



Community Development Department

Planning Division Building Safety Division Environmental Health Division

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STAFF REPORT

FILE NUMBER: 247-15-000472-MC

HEARING DATE: Tuesday, October 20, 2015, 6:30 p.m.
Deschutes Services Center – Barnes & Sawyer Rooms
1300 NW Wall Street
Bend, OR 97701

APPLICANTS/OWNERS: Jeffrey W. Rank & Carol L. Rank and
Kaiser Butte Development, LLC
c/o Lori K. Murphy
Miller Nash Graham & Dunn LLP
1567 S.W. Chandler Ave, Ste. 204
Bend, OR 97702

ATTORNEY: Lori Murphy
Miller, Nash, Graham & Dunn, PC
1567 SW Chandler Ave. Ste 204
Bend, OR 97701

REQUEST: The applicants request a Modification of Conditions of Conditional Use CU-05-14 to clarify and approve ongoing sales of hay, feed, and accessory items as commercial activity in conjunction with farm use.

STAFF REVIEWER: Chris Schmoyer, Associate Planner

I. STANDARDS AND APPLICABLE CRITERIA:

Title 18, the Deschutes County Zoning Ordinance, of the Deschutes County Code.
Chapter 18.04, Title, Purpose and Definitions
Definition – Farm use.
Chapter 18.32, Multiple Use Agricultural Zone (MUA-10)
Chapter 18.80, Airport Safety Combining Zone
Section 18.80.028, Height Limitations
Section 18.80.044, Land Use Compatibility

Chapter 18.84, Landscape Management (LM) Combining Zone
Sections 18.84.080, Design Review Standards

Chapter 18.116, Supplementary Provisions
Section 18.116.030, Off-street parking and loading
Section 18.116.031, Bicycle parking
Section 18.116.035, Bicycle commuter facilities
Section 18.116.040, Accessory Uses

Chapter 18.124, Site Plan Review
Section 18.124.060 Approval Criteria
Section 18.124.070, Required Minimum Standards

Chapter 18.128, Conditional Uses
Section 18.128.015, General Standards Governing Conditional Uses

II. **BASIC FINDINGS:**

- A. LOCATION:** The subject property has an assigned address of 4626 SW Quarry Avenue, Redmond, and is identified on County Assessor's map 16-12-12 as tax lot 100. The subject property is located approximately two (2) miles south of the City Limits boundary of Redmond.
- B. ZONING:** The subject property is zoned Multiple Use Agricultural (MUA-10), and is also within the Landscape Management (LM) and Airport Safety (AS) combining zones. It is designated Rural Residential Exception Area on the Deschutes County Comprehensive Plan Map.
- C. SITE DESCRIPTION:** The subject property is 8.68 acres in size, roughly rectangular in shape and is generally level. There is an existing dwelling, three large hay barns, the current retail operation, a chicken coop, a horse barn, a feed storage building and multiple outbuildings on the property. There also appears to be several types of heavy equipment stored on the property, including semi-trucks, trailers, as well as storage containers. There appears to be an area of pasture in the southern portion of the property. The property is accessed from an existing driveway off of SW Quarry Avenue, which is a paved road that connects to Highway 97 approximately 470 feet east of the subject property.



Source: Google Earth 2015

- D. SURROUNDING USES AND ZONING:** A portion of the subject property abuts Highway 97 on the east and NW Quarry Avenue on the north. Land uses in the area consist primarily of rural residences, small scale farming and two commercial uses. Zoning surrounding the property consists of MUA-10 except to the northeast which is designated EFU-TRB subzone. The EFU-zoned property to the northeast is owned by Diamond B Trailer Sales, a retail business that sells trailers and farm supplies. Many of the MUA-10 zoned properties contain dwellings. However, the abutting property to the east is vacant land owned by the Oregon Department of Parks and Recreation and is also zoned MUA-10. To the south is the Schultz Farm and Garden, a horticultural retail operation, on a 10-acre parcel zoned MUA- 10.
- E. PROPOSAL:** The applicants propose to modify the conditions of approval of Land Use File CU-05-14. The applicant requests a Modification of Conditions of Conditional Use CU-05-14 to clarify and approve ongoing sales of hay, feed, and accessory items as commercial activity in conjunction with farm use. Specifically, the applicants state the purpose of the modification is to: "... *clarify and to ratify the applicant's continuation of selling hay, feed, and accessory items ("incidentals") as a commercial use in conjunction with farm use*".

The applicant has submitted a plot plan, a burden of proof statement and 19 exhibits, which are incorporated herein by reference.

- F. **PUBLIC AGENCY COMMENTS:** The Planning Division sent notice of the land use application to several public agencies and received the following responses:

County Senior Transportation Planner: Peter Russell, County Senior Transportation Planner, provided his comments on the proposal in an email to the applicants' attorney on August 25, 2015. An excerpt of the email is provided below:

I've looked at the burden of proof and it never clearly states how much square footage will be in which use, so for discussion purposes I've taken the size of the barn (5,040 square feet) and utility building (2,400 square feet) for 7,440 square feet of building space for a reasonable worst-case scenario. I then did calculations for trip generation based on various uses from the most recent edition of the Institute of Traffic Engineers (ITE) manual. I talked with George Kolb, County Engineer, and he has agreed with this approach. It appears you'll need to do a Site Traffic Report and analyze the driveway onto Quarry and the intersection of Quarry/97. This is the lowest level of traffic analysis we require. You don't need to do a Traffic Impact Analysis (TIA) which is a more complex traffic study.

The reason I did this is because Deschutes County Code (DCC) 18.116.310(C) requires traffic analysis for any land use that will generate more than 50 weekday trips. (When a land use application is tied to a code enforcement case, we assume the site is a greenfield development or in other words analyze the site as if it were vacant; whether the site is generating now or has generated traffic in the past based on the disputed land use is irrelevant.) If the use will generate more than 50 weekday trips, then traffic analysis is required; the traffic analysis in turn is based on the trip generation for the 4-6 p.m. peak hours.

There are two admitted challenges for this particular land use. One, is finding an ITE category that either matches or is a close analog to the proposed use. The combination of agricultural and related uses did prove difficult as the burden of proof lists a fair amount of potential related uses, but not how much space each use would take. Below are several categories from the ITE, why I chose them, and what the expected trip generation rates came out to be. The second challenge is for some of these land use categories, there are no weekday trip rates; I extrapolated the number of potential weekday trips from the provided p.m. peak hour data. Typically, the weekday rate is higher than p.m. peak hour rate.

I'm not saying this is perfect, but it's the best I could come up with based on the information provided. If I had more detailed information about the square footage being used for each use, that would be helpful.

Warehousing (Land Use 150)

Storage of materials primarily, but may include office space and maintenance areas. The County is using this for determining transportation system development charges (SDCs) for grow operations.

3.56 weekday trips per 1,000 square feet; 0.32 p.m. peak hour trips per 1,000 square feet.

$3.56 \times 7.44 = 26.48$ weekday trips. No traffic analysis needed.

Tractor Supply Store (Land Use 810)

Specializes in sale of agricultural and garden equipment, power tools, vehicle maintenance parts and heavy-duty outdoor machinery. May also offer ancillary items and accessories.

No weekday trip generation rate, p.m. peak hour rate is 1.40 trips per 1,000 square feet.

$1.40 \times 7.44 = 10.41$ p.m. peak hour trips. Based on 10.41 trips per hour over two hours ($10.41 \times 2 = 20.82$ trips) and the business being open for six more hours, the site would only need to average 5 trips per hour for remaining six hours to meet the 50-trip threshold. Traffic study required.

Pet Supply Superstore (Land Use 866)

Specializes in sale of pets and pet supplies, food and accessories.

No weekday trip generation rate, p.m. peak hour is 3.38 trips per 1,000 square feet.

$3.38 \times 7.44 = 25.15$ p.m. peak hour trips. Based on 25.15 trips per hour over two hours, the 50-trip threshold would be met in two hours. Assuming only 25 trips are generated in 4-6 p.m. peak hours, the business being open for six more hours would only have to generate slightly more than 4 trips per hour to meet the 50-weekday trip threshold. Traffic study required.

Again, these are just first-magnitude assessments based on the information supplied. If you have any questions, please let me know. Thanks.

Peter Russell, County Senior Transportation Planner, provided additional comments on the proposal in an email to staff on October 12, 2015. These comments were in response to the applicant's attorney's 10/12/15 email to staff that she had "...confirmed with the owner that he has one employee each day". An excerpt of Mr. Russell's 10/12/15 email is provided below:

With one employee the daily trip total goes to 38 trips, which is still below the 50-trip threshold for traffic analysis set by DCC 18.116.310. No further traffic analysis is needed. We'll still have to determine transportation system development charges (SDCs), which are currently set at \$3,852 per p.m. peak hour trip. Typically, in the absence of specific p.m. peak hour data, we've deferred to the fact site-generated traffic in the p.m. peak is usually 10% of the daily traffic.

In this case, that would mean 3.8 trips, which is 10% of 38. The SDC would then be $\$3,852 \times 3.8 = \$14,638$.

Deschutes County Road Department: George Kolb, PE, County Engineer, provided the following comments in an email submitted 9/18/15 (excerpted):

I have looked over Peter Russell's email dated 8/25/2015 and agree with Peter that a Site Traffic Report will be required for this application. I will defer any comments I have

on possible road improvements until after I have had a chance to review the Site Traffic Report.

Redmond Fire and Rescue: Clara Butler, Deputy Fire Marshal, submitted the following comments on September 18, 2015:

Developer must disclose the use for this space to apply codes accurately.

WATER:

• **Fire Safety during Construction – 2014 OFC Chapter 33**

- *Approved fire department access roads, required water supply, fire hydrants, and safety precautions shall be made available as soon as combustible material arrives on site.*

Area without Fire Hydrants:

• **NFPA 1142 Requirements**

- *If the structure is being built in an area without a public water supply system, then the water flow requirements will come from NFPA 1142.*
- **Note:** *The following information will need to be provided in order to determine accurate water flow requirements.*
 - *Building height, length and width*
 - *Use of the building*
 - *Type of construction*
 - *Whether the structure 100 sq ft or larger and within 50 feet of any other structures*

• **Structures with Automatic Sprinkler systems – 2012 NFPA 1142 Chapter 7**

- *The authority having jurisdiction shall be permitted to waive the water supply required by this standard when a structure is protected by an automatic sprinkler system that fully meets the requirements of NFPA 13 or 903.3.1.2 NFPA 13R of the OFC.*

• **Area Separation – Appendix B 104.2**

- *Portions of buildings which are separated by fire walls without openings constructed in accordance with the International Building Code (table 705.4) are allowed to be considered as separate fire flow calculation areas.*

ACCESS:

• **Premises Identification – 2014 OFC 505.1**

- *Approved numbers or addresses shall be placed on all new and existing buildings in such a position as to be plainly visible and legible from the street or road fronting the property. Said numbers shall contrast with their background and visible at night. Number/letter shall be a minimum of 4" high and a 0.5" stroke width.*

• **Fire Apparatus Access Roads – 2014 OFC Section 503 & Appendix D**

- *Fire apparatus access roads shall extend to within 150 ft of all portions of the building as measured by an approved route around the exterior of the building.*
- *Fire apparatus access roads shall have an unobstructed width of **not less than 20 feet** and an unobstructed vertical clearance of not less than 13 feet 6 inches.*

- Fire apparatus roads shall be designed and maintained to support the imposed loads of **70,000 lbs** and shall be surfaced so as to provide **all-weather driving** capabilities.
- The required **turning radius** of a fire apparatus access road shall be 30 feet inside and 50 feet outside.
- The **grade** of the fire apparatus access roads shall be within the limits established by the fire code official (10%).
- **Fire Lanes – 2014 OFC 503.3 & Appendix D**
 - Approved signs or other approved notices shall be provided for fire apparatus access roads to identify such roads or prohibit the obstruction thereof. Such signs or notices shall be kept in legible conditions at all times. The stroke shall be 1 inch with letters 6 inches high and read **“No Parking Fire Lane”**. Spacing for signage shall be every 50 feet.
 - Recommended to also (in addition to Fire lane signs) paint fire lane curbs in bright red paint with white letters.
 - **Appendix D Section 103.6.1 Roads 20-26 Ft. Wide:** Shall have Fire Lane signs posted on both sides of a fire lane.
 - **Appendix D Section 103.6.2 Roads more than 26 Ft. Wide:** Roads 26-32 ft wide shall have a Fire Lane signs posted on one side of the road as a fire lane.
- **Aerial Access Roads – 2014 OFC Appendix D, Section 105**
 - Buildings or portions of buildings or facilities exceeding 30 feet in height above the lowest level of fire department vehicle access shall be provided with approved fire apparatus access roads and capable of accommodating fire department aerial apparatus. Overhead utility and power lines shall not be located within the aerial fire apparatus access roadways. At least one of the required access routes meeting this condition shall be located within a minimum of 15 feet and a maximum of 30 feet from the building, all access roads shall have an unobstructed width of not less than 26 feet and shall be positioned parallel to one entire side of the building.
- **Dead-Ends – 2014 OFC Section 503.2.5**
 - Dead-end fire apparatus access roads in excess of 150 feet in length shall be provided with an approved area for turning around fire apparatus. Contact Redmond Fire & Rescue for requirements.
- **Additional Access – 2014 OFC Section 503.1.2**
 - The fire code official is authorized to require more than one fire apparatus access road based on the potential for impairment of a single road by vehicle congestion, conditions or terrain, climatic conditions or other factors that could limit access.
- **Emergency Access Road Gates – 2014 OFC Appendix D 103.5**
 - Minimum 20 feet wide.
 - Gates shall be swinging or sliding type.
 - Shall be able to be manually operated by one person.
 - Electric gates shall be equipped with a means of opening by emergency personnel & approved by fire official.
 - Locking devices shall be fire department Knox Key Switch purchased from A-1 Lock, Safe Co., Curtis Safe & Lock, on line at www.knoxbox.com, or contact Redmond Fire & Rescue for an order form.
 - Section 503.3: Install a sign on the gate **“No Parking-Fire Lane”**

- **Key Boxes – 2014 OFC Section 506.1**
 - An approved key box shall be installed on all structures equipped with a fire alarm system and /or sprinkler system. Approved key boxes can only be purchased at A-1 Lock Safe Co., Curtis Safe and Lock, on line at www.knoxbox.com, or contact Redmond Fire & Rescue for an order form.
- **Commercial & Industrial Development – 2014 OFC Appendix D 104**
 - Buildings exceeding three stories or 30 feet in height shall have at least 2 means of fire apparatus access for each structure.
 - Where 2 access roads are required, they shall be placed not less than ½ the length of the overall diagonal dimension of the property or area to be served, measured in a straight line between accesses.

If there are questions regarding Fire Code issues, please contact the Redmond Fire and Rescue Deputy Fire Marshal at 541-504-5016 or email at clara.butler@redmondfireandrescue.org.

- G. **PUBLIC COMMENTS:** The Planning Division sent notice of the proposed land use application to all property owners within 250 feet of the subject property. One comment, received via email, was received in response to the notice, which expressed favor to the proposed use. Specifically, on September 30, 2015, an email from Jacob Hueners, was provided to staff by the applicants' attorney. In the email, Mr. Hueners states:

I have no problem whatsoever with the business practices of Quarry Hay and Feed. Which is my direct neighbor to the east.
- H. **REVIEW PERIOD:** This application was submitted on August 28, 2015 and accepted and deemed complete on September 27, 2015. The 150th day on which the County must take final action is February 24, 2016. The applicants also submitted the land use sign affidavit indicating that the required land use sign was posted on the property on September 17, 2015.
- I. **LOT OF RECORD:** The subject property is recognized as a legal lot of record pursuant to being lot 1 in block 1 of Long Butte Tracts subdivision.
- J. **LAND USE HISTORY:** Landscape Management approval (LM-02-217) was granted for this property for a manufactured home with a carport, barn and utility building. In response to a code complaint (C03-233), the applicants submitted a Conditional Use application (CU-05-14). The application was denied by the hearings officer and the Applicants timely filed an appeal on July 5, 2005 (A-05-4). On July 27, 2005 the Deschutes County Board of County Commissioners ("Board ") issued Order # 2005-068 accepting de novo review on the appeal. On October 3, 2005, the Board issued a decision reversing the hearings officer's decision and conditionally approving the commercial hay and livestock feed sales from the subject property. Landscape Management approval (LM-07-44) was granted for this property for three hay sheds and an addition to an existing hay shed on the property. In 2014, code violation complaints were filed with the County (Case File Nos. C-14-14, C-14-15 and C-14-16) alleging the applicants sold items not authorized under the conditional use permit approval. The subject modification application was submitted by the applicant as an effort to clarify and authorize ongoing sales of hay, feed, and associated accessory items as commercial activity in conjunction with farm use.

III. PRELIMINARY FINDINGS:

Title 22 of the Deschutes County Code, the Development Procedures Ordinance

A. Chapter 22.36, LIMITATIONS ON APPROVALS

1. Section 22.36.040. Modification of Approval.

- A. *An applicant may apply to modify an approval at any time after a period of six months has elapsed from the time a land use action approval has become final.***

STAFF RESPONSE: This standard is met because the Board's decision on File CU-05-14 (A-05-04) became final twelve days after it was mailed on October 3, 2005, therefore more than six months have elapsed since the land use action approval became final.

- B. *Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.***

STAFF RESPONSE: In response to this criterion, the applicant's burden of proof statement provides the following:

The County issued a code violation, spurred by the complaint of a competitor, alleging that the applicant was engaging in commercial activities in conjunction with farm use that went beyond the scope of the conditional use permit. Applicant's conditional use permit authorizes the sale of "deliveries, shipping, loading, unloading, storage of hay and livestock feed, and sales of hay and livestock feed to the public". This modification request is being filed to clarify that "hay and livestock feed" includes the sale of agricultural items, which is a permitted use in the MUA-10 zone, and the sale of items related to a commercial use in conjunction with farm use and incidentals.

The Applicant is not requesting any change of use since he began selling agricultural and farm-related products, such as hay, feed, and livestock supplies, in the year 2002. When the original conditional use permit was obtained, he had already been operating, filling a critical need in the county for hay, livestock feed, and livestock supplies. Since that time, the applicant's inventory has remained the same, with occasional changes of inventory due to customer demand, market demand and supply, and other regular changes to inventory.

This modification request presents no change from the current operation or even the operation which began in 2002. This request will clarify what was intended in 2005, that the applicant be authorized to continue selling permitted agricultural items produced on the land, as well as, those agricultural and farm use items produced offsite as part of the commercial use in conjunction with farm use. The customer base will be the same. There will be no increase in traffic.

Further, the proposal will clarify what was intended in 2005. There will be no adverse impact on neighboring properties. The surrounding properties include the Diamond B Trailers, Inc. operation to the north and the Schultz Farm and Garden operation to the south, both users which also operate with permits issued by the county.

The recent decisions from LUBA are evidence of a change of circumstances. Those decisions clarify the scope of uses allowed in conjunction in farm uses and the leniency in which the statutes are applied to resource lands in order to allow the sale of items considered incidental and subordinate to the primary use, such as wineries being able to sell t-shirts, drinking goblets, souvenirs, books and artwork. These LUBA decisions are referenced, in part, in this application.

A second change in circumstance is the local approval of the Schultz Farm & Garden operation, where the user sells items that are neither agricultural nor grown on-site. This user's operation does not enhance the agricultural operation in the county as the plants are sold for landscaping, not agricultural use. This user constructed a freestanding retail store as well with unimproved parking adjacent. This approval supports a determination that non-resource land need not be used solely for resource- land purposes and uses.

For the subject request, the initial retail component was located in a building on the east side of the property, backing up to and is parallel to US Highway 97. Later, the retail component was moved to a barn on the west side of the property. As part of this application, the applicant intends to return the retail component back to the original location in the building adjacent to US Highway 97 or to a center building on the property. Either location will involve minor changes to the structure, to conform to building codes. This change will have no adverse impact on surrounding properties.

The Applicant will continue to sell hay, livestock feed, and livestock supplies such as bedding and grooming supplies. The continuation of the hay and feed operation will have no greater adverse impact on the surrounding neighborhood, since no additional items are proposed than have been sold over the past decade. No additional noise, dust, odor, or traffic will be generated from this request.

*This use is compatible with the Diamond B Trailers, Inc. use to the north, the Schultz Farm and Garden use to the south, and to neighboring properties to the west, which also carry the MUA-10 zoning. See **Exhibits 16** and **17**, photos of Diamond B Trailers, Inc., north across Quarry Road. See also **Exhibits 18** and **19**, photos of Schultz Farm & Garden, looking north along Highway 97. These nearby users have similar business enterprises and operate in substantially similar manner to the applicant's operation. U.S. Highway 97 is located to the east and has been addressed as part of an earlier Landscape Management approval.*

The Board's decision for File CU-05-14 granted approval of a commercial activity in conjunction with farm use that included the storage and sale of hay and livestock feed from the premises. Also in the Board's decision it was stated that: "...the farm use occurring on the property consists of the feeding, breeding, management and sale of goats, and the raising, harvesting and selling of hay." It goes on to state that the hay proposed to be sold from the premises is from hay crops grown in Deschutes and adjoining counties on parcels owned by the applicant or sharecropped by applicant. Condition 2 of the Board's decision for CU-05-14 states, in part: "Operations, approved under this land use permit shall be limited to deliveries, shipping,

loading, unloading, storage of hay livestock feed and sales of hay and livestock feed to the public.”

The applicant's stated purpose of the modification is due to a need for a determination by the hearings officer as to 1) whether incidental and subordinate sales may be allowed as a part of this, 2) whether the variety of items being sold from the premises are incidental and subordinate to the approved use, and 3) to define specifically what those incidental and subordinate sales can include and in what quantities. Specifically, the applicant states: *“This request will clarify what was intended in 2005, that the applicant be authorized to continue selling permitted agricultural items produced on the land, as well as, those agricultural and farm use items produced offsite as part of the commercial use in conjunction with farm use.”*

This type of determination is typically handled through a Declaratory Ruling application, however, Staff understands that the submitted request for a Modification of Conditions application may provide some flexibility to the review if the Hearings Officer determines that the Board's approval under CU-05-14 did not include the current retail sales of incidental items and finds that it is permissible to allow such sales. The applicant contends that there will be no adverse impact on neighboring properties and no increase in traffic. It appears that the proposed modifications are in response to changes in circumstances (e.g. the need for clarification due to reported code violations) and address specific issues that have surfaced following the original approval. As provided above, the applicant also points to a second change of circumstance in the approval of a conditional use/site plan for a retail nursery as a commercial activity in conjunction with farm use (Schultz Farm & Garden). The file number for the retail nursery is CU-09-70/SP-09-31 and is included as Exhibit 6 in the applicants' burden of proof statement.

Under the approval for CU-05-14, the use was located in a building on the east side of the property. Applicant indicates that the retail component of the operation was relocated to a barn on the west side of the site. Through this review, the applicant intends to either relocate the retail store to the original location on the west side of the parcel or to an existing building in the center of the property. The approval for CU-05-14 did not include any review of site plan criteria and standards under 18.124 and 18.116 although staff believes that pertinent sections of these chapters are applicable and should have been applied. Any on-site alterations to the lay out or structures associated with the use should be subject to the site plan review criteria and standards of 18.114 and 18.116.

Staff is uncertain if the Applicants' request constitutes a new proposal. In CU-05-14, the Board limited the commercial activity to:

Operations approved under this land use permit shall be limited to deliveries, shipping, loading, unloading, storage of hay and livestock feed, and sales of hay and livestock feed to the public. From December 21 to March 21 operations authorized by this decision may commence no earlier than 7:00 AM and shall not continue past 5:00 PM. For the balance of the year, operations are limited to 7:00 AM to sunset.

If the Hearings Officer finds that sales of items beyond livestock feed and hay were not permitted by the original approval, but could be permitted as incidental and subordinate uses under this application, the Hearings Officer will also need to conclude that the additional sales do not constitute a substantially new proposal or one that would have significant additional impacts on surrounding properties.

- C. **An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.**

STAFF RESPONSE: In response to this criterion, the applicants' burden of proof statement provides the following:

The Applicant conducts permitted uses on the property and seeks to clarify and ratify the existing use in conjunction with farm use as well as those incidental and subordinate items offered for sale. The Applicant sells items related to agricultural use directly, those related to farm use, or those incidentals to farm use. Specifically, the items include bagged feed¹, supplements to be ingested by farm livestock, livestock care products such as livestock grooming items, livestock shampoo and conditioners, bagged vitamins to be ingested by livestock, salt blocks to be ingested by livestock, livestock bedding materials (shavings and wood chips), and livestock bug and fly traps and sprays, feed containers such as chick feed containers, buckets, water troughs, and bird seed. The latter is commonly used by poultry raisers as the poultry prefer unprocessed seed to the highly-processed poultry feed offered. The idea of selling dog and cat food is addressed later in this burden of proof. The Applicant requests clarification that he may continue to sell those agricultural items listed above as all of the items are either permitted as an outright agricultural use per county code or as a conditional use per the commercial use in conjunction with farm use authorization, including accessory items (incidentals).

Applicant proposes the following modification to the decision, as indicated by the editing marks in underline and strikethrough:

"IV. DECISION:

*Based on the foregoing Findings of Fact and Conclusions of Law, the Board finds that applicant has met all applicable criteria to allow commercial hay, ~~and~~ livestock feed, and accessory items ("incidentals") sales from the subject property **REVERSES** the decision of the Deschutes County Hearings Officer and hereby APPROVES the applicant's proposed conditional use for commercial sales of hay and livestock feed, including accessory items ("incidentals") with the following conditions of approval:*

- 1. Approval is based on the submitted application and the existing improvements on the subject premises. Any substantial change to the proposed operating characteristics, access, dimensions, and yard sizes shall require a new land use application.*
- 2. Operations approved under this land use permit shall be limited to deliveries, shipping, loading, unloading, storage of hay and livestock feed, and sales of hay, ~~and~~ livestock feed, livestock supplies, and accessory items ("incidentals") to the*

¹ See **Exhibit 12** of the applicant's burden of proof for a photo of some of the bagged feed.

public. From December 21 to March 21 operations authorized by this decision may commence no earlier than 7:00 AM and shall not continue past 5:00 PM. For the balance of the year, operations are limited to 7:00 AM to sunset.

3. Hay sold from the premises may be delivered from off-site locations and stored on site until sold. Offsite sources of hay are limited to applicant's other Deschutes, Crook, Jefferson, ~~or~~ and Harney County properties or Deschutes, Crook, Jefferson, and Harney County properties applicant sharecrops. Livestock feed sold from the premises must be produced in Deschutes County, or an adjoining County.
4. Signage advertising Applicant's ~~hay and livestock feed~~ operation shall comply with Deschutes County Sign Ordinance.

Duration of Approval: This approval is void if the use permitted is not commenced within two (2) years of the date of approval." (Editing marks added).

The proposed modification appears to comply with this criterion as it is directed to one or more discrete aspects of the approval. It does not appear to Staff that the modification would amount to approval of a substantially new proposal. However, Staff requests that the Hearings Officer determine whether the proposal is one that would have significant additional impacts on surrounding properties. The proposed modification, as defined in DCC 22.36.040, is being reviewed only under the criteria applicable to that particular aspect of the proposal.

According to the applicant's burden of proof statement, the applicant sells items related to agricultural use directly, those related to farm use, or those incidentals to farm use.

Per the applicant, such incidental items include:

- *bagged feed*
- *supplements to be ingested by farm livestock*
- *livestock care products such as livestock grooming items, livestock shampoo and conditioners, bagged vitamins to be ingested by livestock, salt blocks to be ingested by livestock, livestock bedding materials (shavings and wood chips), and livestock bug and fly traps and sprays*
- *feed containers such as chick feed containers*
- *buckets*
- *water troughs*
- *bird seed. The latter is commonly used by poultry raisers as the poultry prefer unprocessed seed to the highly-processed poultry feed offered.*
- *dog and cat food*

The applicant requests that the County Hearings Officer confirm whether these items are incidental to the use approved under File CU-05-14. If the Hearings Officer can approve the applicants' proposal, a determination should be made as to whether the applicants' proposed conditions are appropriate for inclusion as conditions of the approval.

D. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.

STAFF RESPONSE: In response to this criterion, the applicants' burden of proof statement provides the following:

The Applicant requests modification of the prior conditional use permit to ratify and clarify that the conditional use authorizes the applicant to market those items that have been sold for well over a decade, namely supplements to be ingested by farm livestock, livestock care products such as livestock grooming items, livestock shampoo and conditioners, bagged vitamins to be ingested by livestock, salt blocks to be ingested by livestock, livestock bedding materials (shavings and wood chips), livestock bug and fly traps and sprays, feed containers such as chick feed containers, buckets, water troughs, and bird seed.

When the applicant obtained the conditional use permit to sell "hay and livestock feed", the phrase was intended to broadly capture those items he was selling prior to the initial conditional use, which were those items used by livestock, such as hay and straw, and all feed-related items and livestock supplies. Anything beyond those items would be considered "incidental" items, which are authorized as an accessory use.

As background, the applicant's commercial use in conjunction with farm use includes selling, in a small retail store, the hay and farm products produced at the property and those produced offsite as an authorized commercial use. There is a serious need for a commercial hay distributor in Deschutes County. The Applicant has conducted this activity for approximately thirteen years and believed that his activity constituted agricultural and farm use, consistent with the permitted uses identified in the MUA-10 zone. About ten years ago, as part of resolving a code violation, he sought approval of a conditional use permit to ratify his operation.

The initial conditional use permit authorized the selling of "hay and livestock feed" but failed to specifically mention the inherent need for a small retail, sheltered space in which to market² that hay and feed, nor did it expressly list what constitutes livestock feed to include those items ingested or used by livestock, such as livestock supplements and vitamins. This request is to confirm that the conditional use permit allows the selling of hay, feed and those farm-related items for livestock and to expressly include the approval of the sheltered, retail space needed in order to sell the farm-related and incidental items.

If the Hearings Officer concurs with the applicant that the uses occurring on the property, described above, and throughout the applicant's burden of proof statement, were permitted through the Board's Decision for CU-05-14, the modification will not amount to a substantially new proposal and this criterion can be met. If the Hearings Officer determines that the uses occurring on site as described by the applicant are outside of the scope of the Board's Decision for CU-05-14, a determination will need to be made as to whether these uses have significant additional impacts on surrounding properties in order for this criterion to be met.

If the Hearings Officer determines that the requested modifications would not modify the approval in a scope greater than allowable as a modification, then the proposed modification would not be treated as a new proposal and this criterion can be met.

² The marketing of agricultural products is a permitted activity per the definition of "agricultural use" in the DCC.

B. Chapter 18.32, Multiple Use Agricultural (MUA-10) zone

1. Section 18.32.030, Conditional uses permitted.

The following uses may be allowed subject to DCC 18.128:

- C. Commercial activities in conjunction with farm use. The commercial activity shall be associated with a farm use occurring on the parcel where the commercial use is proposed. The commercial activity may use, process, store or market farm products produced in Deschutes County or an adjoining County.***

STAFF RESPONSE: The commercial activity in conjunction with farm use (hay and livestock feed sales) associated with farm use on the property has already been permitted through the Board's decision for File CU-05-14. The question at hand is whether the inclusion of incidental and subordinate items, as described in the applicant's burden of proof statement and quoted above, are permitted as part of the use. In response to 18.128 (C) above, the applicants' burden of proof statement provides the following:

The county's code expressly authorizes commercial activity in conjunction with farm use. However, the phrase "farm use" inherently is tied to and references resource lands in Oregon. Perhaps this code should read, instead, "commercial activities in conjunction with "agricultural use" rather than "farm use." The phrase "agricultural use" does not presuppose a particular type of high-soil capability.

STAFF COMMENT: Unless the code is formally changed through a text amendment, it must be read as written. Applicants' burden of proof statement continued below:

In the Deschutes County MUA zone, the lands are not resource lands. Thus, using the term agricultural use would make more sense. This would allow the county to acknowledge that the underlying lands (soil classifications) in MUA zone are non-resource lands and were previously acknowledged as non-resource lands.

The conditional use permit uses are primarily all non-agriculturally related as the list includes intense uses such as, but not limited to, churches, destination resorts, gold courses, planned development, landfills, private and public schools, and hydroelectric facilities. None of these uses have anything to do with agriculture or preserving resource lands. The Applicant's proposal to sell agricultural and farm related products is much, much less intense than any of the other authorized conditional uses.

Case Law Explains Commercial Use in Conjunction with Farm Use

All of the case law addressing "commercial use in conjunction with farm use" relates particularly to farm use on resource land. Thus, none of the case law is directly on point. Nonetheless, a review of case law at least establishes a floor, or a basis, of what the bare minimum would be authorized on resource land. The county should be more permissive when applied to a non-resource land zone.

It is logical to conclude that the ordinance authorizing "commercial uses in conjunction with farm use" would mean more than simply authorizing more farm use. LUBA determined that a farm use "does not require that all agricultural products involved in such an operation be produced on the land where the preparation and storage takes

place...." but required that at least one of the products be produced on the land where the preparation or storage takes place in order to constitute farm use. *J and D Fertilizers, Ltd. v. Clackamas County*, 20 Or LUBA 44, LUBA No. 90-073 at 8-9 (1990).

"...since 'commercial activities that are in conjunction with farm use' is designated by the ordinance and the statute as 'nonfarm use,' then it must allow something more than what would be allowed as a 'farm use.' It is reasonable, therefore, to construe the term as including a warehouse for the commercial storage of agricultural products of lands other than that on which the warehouse is located...." *Id.* at 7 (1990), citing *Earle v. McCarthy*, 28 Or App at 542.

Similarly, although Applicant currently grows dry hay, historically raised goats, and raises horses, chickens and sells eggs, which are all farm uses, he is authorized to make use of "nonfarm uses" when seeking approval of a conditional use permit for commercial activity in conjunction with farm use. Those uses would include hay storage, feed storage, the retail operation associated with farm uses, and livestock feed, grooming items, and supporting agri-business items. Further, he would be authorized to sell incidental items as an accessory use of the property.

Farm Use Explained

Additional case law provides that "[c]ommercial activity in conjunction with farm use" on resource land must "enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates." *Friends of Yamhill County v. Yamhill County*, 255 Or. App. 636 at 65 (2013) citing *Craven I*, 308 Or. at 289. The court noted that a commercial use may very well assist other farmers with their agricultural operation and that use would be a valid use. *Id.* The court went on to note that a "farm-use-related commercial activity is a conditional use, determined by the county on a case-by-case, fact-specific basis...." *Id.* at 594. Conditions could then be imposed to ensure that any other non-farm use would be incidental and secondary to the farm use.

Since the code relates to commercial activities in relation to "farm use" rather than "agricultural use", it is relevant to review the county's definition of "farm use." A key difference between outright agricultural use and farm use, per the county, is that the latter requires the "current employment of land for the primary purpose of obtaining a profit".

The local code defines "farm use" to exactly mirror the state's definition of farm use:

"'Farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use...." DCC 18.04.030 Definitions.

The state defines the "current employment of land for farm use". ORS 215.203 (2)(b). The state says that a farmer is currently employing the land for farm use even when he

allows it to lay fallow for a year as a normal requirement of good agricultural husbandry³ or he maintains buildings supporting accepted farm practices⁴. That definition can be a guide as to what counts as using land for farm use, but it is not directly on point. This definition is more restrictive than that required by Deschutes County because the definition specifically relates to those farm uses on agricultural land, meaning those lands zoned exclusive farm use and those lands with resource status. The state's definition inherently removes all hobby farms as being a viable farm use.

The county defines the "current employment of land for farm use" to closely mirror the state's definition, and to include, but not limited to, farm land and even land used for kenneling or training greyhounds. DCC 18.04 Definitions.⁵

It is helpful to look to state law as examples of the more stringent use of land as "farm use" or even "nonfarm use". All of the decisions relate to the state's review of farm or nonfarm uses proposed on resource land zoned exclusive farm use. So, although not directly on point, they illustrate or define uses allowed on EFU land. Thus, similar and broader uses should be authorized in MUA zones; the county should be less restrictive.

Allowed Nonfarm Uses – Commercial Activities in Conjunction with Farm Use

The state's exclusive farm use statutes, including ORS 215.283, expressly authorize "nonfarm uses" on resource land so long as the local governing body approves the use. Counties are free to adopt supplementary local land use regulation standards for nonfarm uses. ORS 215.296(10). One of those "nonfarm uses" includes "commercial activities that are in conjunction with farm use". ORS 215.283(2)(a).

Additional nonfarm uses authorized by the MUA zone specifically include, but are not limited to: dude ranch, kennel, vet clinic, personal airplane landing strip, golf courses, processing facility, destination resorts, planned developments, landfills, hydroelectric facilities, aggregate facilities, and even surface mining. DCC 18.32.030.

Incidental and Subordinate Items Explained

In addition to those approved commercial uses in conjunction with farm use, counties are authorized to allow "incidental and subordinate" items to be sold. Again, case law is illustrative of what items are deemed incidental and subordinate to the approved commercial use in conjunction with farm use. Here, the examples are all farm-related uses approved on exclusive farm use land. Thus, the county should be less restrictive than the examples of allowed items that are identified here.

In Craven v. Jackson County, the court concluded that "[a] commercial use which assists farmers in processing and marketing crops can be as supportive of agricultural operations as one which aids them in producing crops." 94. Or. App 49, p, 54 (1988). Further, the court concluded that: "[I]t is consistent with the statute for the county to determine that incidental activities of those kinds [selling glasses and t-shirts] can be

³ ORS 215.203(2)(b)(B).

⁴ ORS 215.203(2)(b)(F).

⁵ Because veterinary services and kenneling of pets are allowed in both EFU and MUA-10 zones, it makes sense to allow a user to sell food for those uses.

permitted to the extent they are secondary to and support the wine processing and selling activities of the winery." *Id.* The Supreme Court affirmed the Court of Appeals determination. *Craven v. Jackson County*, 308 Or. 281 (1989).

In *Friends of Yamhill County v. Yamhill County*, the court reviewed the application of what constitutes "commercial activities that are in conjunction with farm use" as permitted under ORS 215.283(2)(a). 255 Or. App. 636 (2013). The court reviewed the history of state policy for agricultural land and the meaning of "commercial use in conjunction with farm use". Further, it recited legislative history from 2010 when the legislature amended the statute governing wineries to expressly allow wineries to sell incidental items. *Id.* at 592. The court reviewed the type of activities presented in the case, such as events and food service, and expressed concern that those incidental activities may overtake the primary activity of processing and selling wine. *Id.* at 651. The court upheld LUBA's determination that the county did not err when it approved the non-wine related activity and limited that activity to no more than "25 percent of the gross income from onsite retail sales of wine..." *Id.*

In *Greenfield v. Multnomah County* (Or. LUBA) (Remanded June 19, 2013), LUBA reviewed the state's farm stand criteria for a farm stand on exclusive farm use zoned land. The farm stand administrative rule, set out in OAR 660-033-0130(23), provides that farm stands may "include the sale of retail incidental items...to promote the sale of farm crops or livestock..." and that annual sales of that incidental activity "must not make up more than 25 percent of the total annual sales of the farm stand." *Id.* at 4-5. The court recognized the limitation on incidental sales as a method to ensure that the legislative intent of ensuring that farm use is the driving use of the property. *Id.* at 27. *Greenfield v. Multnomah County* was reviewed by the Court of Appeals, which held that LUBA did not err on this point. 259 Or. App. 687, 705 (2013).

Local Decisions Influence Review

The Applicant is aware of at least one decision impacting a commercial use in conjunction with farm use and that is the Shultz Farm and Garden permit, which is the user directly south of Applicant's property. The county did not provide the applicant with any other decisions related to commercial uses in conjunction with farm use on MUA-10 zoned land. The applicant requested through counsel, that the county provide a list of those commercial uses in conjunction with farm use that have an approved mercantile or shop building and none were provided.

The county has provided the applicant with copies of other decisions, all of which relate to exclusive farm use zones, where the primary purpose is to preserve the resource land. Locally, the hearings officer has determined what uses are deemed incidental to a commercial use in conjunction with farm use on exclusive farm use zones.

These decisions serve as merely a guide and are not binding since they all relate to protecting resource land. The decisions should be read as if they establish a baseline of what can occur as a commercial use in conjunction with farm use on non-resource land, such as that in the MUA zone. Nonetheless, we turn to those decisions to borrow a similar analysis.

The Newell case included a request for a conditional use permit for a commercial use in conjunction with farm use. The hearings officer reviewed an exclusive farm use parcel

and determined what constitutes farm use and those commercial uses in conjunction with farm use. *Newell (Allied Show Services), CU-13-31, SP 13-18, April 18, 2014. In this case, the farm use is pasture for livestock raising and grass hay. The Applicant requested to conduct up to three horse shows a year. The hearings officer applied four elements to determine whether the horse shows could be conducted:*

"(1) the commercial activity must be related to the farm use occurring on the property; (2) the commercial activity must be incidental and subordinate to the farm use; (3) the commercial use must enhance the quality of the agricultural enterprise; and (4) the commercial use must promote the policy of preserving farm land for farm use."

In Newell, the hearings officer determined that although the horse events were only marginally related to the actual farm use, the events would be incidental to the farm use and they were approved.

*In Crescent Moon Ranch, which was a request for a conditional use permit for a commercial use in conjunction with farm use on resource land with irrigation, the hearings officer had an opportunity to review "incidental and subordinate" uses as applied to an alpaca farm and retail operation. Crescent Moon Ranch, CU-14-7, LM-14-28 (Reconsideration Oct. 20, 2014). Initially, the hearings officer determined that the amount of incidental sales could not exceed the "farm stand" cap of 25%. The applicant distinguished the request for a commercial use in conjunction with farm use from a request for a farm stand request. The hearings officer noted an earlier decision wherein "incidental and subordinate" would mean that "economically the proposed commercial activity is incidental and subordinate to the farm use of the property." In that case, the hearings officer reviewed the temporal, spatial and financial impacts of the proposed commercial use and determined that the gross sales from the commercial use should not exceed 40% of the farm use. *Id.* at 8-9. The hearings officer clarified that the retail sales and any income cap is "to be calculated based on all farm product sales". *Id.* at 10. The hearings officer arrived at that percentage by referencing the percentage amount used in a different case heard by the Board, which related to a hay operator who intended to host wedding or commercial events at the property. *Id.* at 7. The relevant percentage was very specific as to that particular operation and the amount of farm use income generated as related to the amount charged for a wedding event. The percentage has nothing to do with state statute.*

Applying the Newell Analysis to Proposal

Applying the criteria laid out in Newell, the applicant's proposal meets the strict standards of commercial activity on resource land despite his land being non-resource land:

(1) the commercial activity must be related to the farm use occurring on the property;

Here, the farm use is growing hay on a non-irrigated, non-resource, irregular shaped parcel, both onsite and offsite, and raising livestock, currently chickens and eggs and formerly goats. The proposed commercial activity directly relates to providing a demand for Applicant's farm uses by offering hay, chickens and eggs for sale and by providing other feed to support livestock and poultry operations. Selling feed and accessory/incidental items further creates a demand for Applicant's farm uses. By

providing a retail operation to sell those farm products and those items related to farm use, the proposed commercial activity is related to a farm use occurring on the property.

(2) the commercial activity must be incidental and subordinate to the farm use;

The primary farm use is the growing and selling of hay and the growing and selling of chickens and eggs and formerly goats and pasturing horses. The selling of feed and related farm items must be incidental and subordinate to the growing and selling of hay, horses, chickens and eggs. As stated above, however, the applicant should not be limited to the current agricultural uses as certain conditions may require the applicant to change the agricultural use of the property.

The selling of related items such as livestock feed, livestock snacks, poultry feed, feed containers and livestock grooming supplies is offered merely for the convenience of the farmer who requires hay and feed for their own agricultural operation. One method of ensuring incidental and subordinate is to apply an economic test, although we believe it is unnecessary here. Additionally, the small retail space is proportionally a small percentage of the overall parcel, ensuring that the retail store does not overtake the original farm operation.

(3) the commercial use must enhance the quality of the agricultural enterprise; and

The proposed commercial use of operating the retail space in conjunction with farm use serves to enhance the quality of the agricultural enterprise. The Applicant is providing a service for other farmers in selling farm products (hay, straw, chicken, eggs) that are critical to larger farm operations such as livestock operations and even small hobby farms that are too small to grow sufficient feed for their livestock. The incidentals are also necessary for agribusiness and his operation reduces transportation trips otherwise required to purchase the same products at multiple other locations.

(4) the commercial use must promote the policy of preserving farm land for farm use.

The proposed use has no detrimental impact on farm use or farm land and in fact is not even located on farm land. All in all, as a conditional use, the applicant may conduct commercial activity in conjunction with farm use and maintain buildings supporting those farm practices. The subject property is not irrigated, is covered by a driveway, buildings, barns, parking, and a residence. The subject property is not resource land and will not adversely affect uses off site.

The continuation of the applicant's business will not put any other farmer out of business. The selling of the hay and feed and related items does not adversely impact surrounding properties nor does it impact farmers in the area. Instead, this use directly supports other farmers' uses and productivity. The applicant's operation provides essential products.

Despite not needing to comply with the more stringent application of the farm use standards established at the state level, for application to resource lands, the applicant is amazingly performing farm operations on land that is not resource land. This should be

complimented as it allows more intense farm operations to occur on higher quality agricultural lands elsewhere within the county. The request promotes the preservation of farm land for farm use.

The county is authorized to regulate nonfarm uses of land in exclusive farm use zones more stringently than state statute. Brentmar v. Jackson County LUBA No. 93-208 (Oct. 5, 1994).

The county has the ability to interpret its own land use regulation unless the interpretation is inconsistent with the underlying policy that provides the basis for the land use regulation or is contrary to state statute or land use goal. ORS 197.829(1). Here, it is questionable whether the county has properly applied a state statute governing "farm use" and "commercial use in conjunction with farm use" to non-resource farm use land. There is no state statute, rule, or policy to apply the restrictive definition of farm use to non-resource land. This is important as it means the county has greater leeway in interpreting the application of its own code. The county should liberally interpret "farm use" and "commercial use in conjunction with farm use" as applied to the non-resource land identified in the subject application.

Dog Food Revisited

The applicant began selling dog food as an accessory item after farmer and rancher customers requested it for their working animals. The dog food sales were always a minor part of the applicant's business. At the same time, it provided a service to the customers by allowing the customer to be efficient in time and resources by avoiding two separate trips to purchase hay/feed at one place and dog food at another.

As part of the applicant's business review by the county, this counsel encouraged the applicant to cease selling dog food since county staff believed that dog food did not relate to agricultural use. Upon review of the ordinance, statutes, and case law, this counsel's opinion has been changed. The applicant should be allowed to sell dog food as a commercial use in conjunction with farm use.

A review of the ordinance provides that kennels and veterinary clinics are authorized conditional uses in the MUA-10 zone. DCC 18.32.030(E). The county defines the "current employment of land for farm use" to closely mirror the state's definition, and to include, but not limited to, farm land and even land used for kenneling or training greyhounds. DCC 18.04 Definitions.⁶ Dog-related uses and facilities are allowed on designated, resource farmland. Dog training classes are a special use allowed in EFU zones. DCC 18.16.025(K). Commercial dog boarding kennels and dog training classes are authorized conditional uses on both high-value and non-high value farmland. DCC 18.16.030(EE). It follows that if dog-related activities are expressly authorized on lands most protected and preserved, then dog-related support items may be sold to support those activities on non-resource and non-protected land.

Furthermore, there is no restriction on the raising of dogs to any particular zone. Dogs are regularly accepted in all zones. The difference here is that farmers and ranchers,

⁶ Because veterinary services and kenneling of pets are allowed in both EFU and MUA-10 zones, it makes sense to allow a user to sell food for those uses.

who comprise the customer base of the applicant's operation, engage the assistance of working ranch dogs. Ranch dogs are required for herding capability and livestock protection. The working dogs are required to protect field crops from rodents, which could otherwise devastate a crop. Dogs patrol the property to prevent damage from deer. It is customary in the ranching and farming industry to maintain more than one dog on a farm.

The county reviewed the necessity of working dogs in a decision in June 2012. The county acknowledged the role of the small working farm animals. "These animals are often used on ranches that are engaged in horse breeding and raising livestock. These animals could include dogs used as guard dogs or herding dogs and cats used as 'mousers.'" **Exhibit 7** at 5. In Bend Equine Medical's request to provide veterinary care and surgical care for working farm animals, the county made note of working dogs and cats as "essential to the practice of agriculture." *Id.* at 7. The county staff noted:

Small animals that work on farms are an important and integral part of area farms that produce hay and raise, breed, and keep horses. These animals, therefore, are associated with the farm use occurring on the Bend Equine property. The care of farm animals is necessary so the animals can work on farms. These services are beneficial to many farm uses, including equine ranches. The applicant's proposal to limit small animal veterinary services to farmers who use Bend Equine for veterinary or breeding services for equines and other livestock will also assure an association between the service offered and the farm use occurring on the Bend Equine property. *Id.* at 8-9.

Similarly, the applicant's hay and livestock feed operation should be able to include the sale of feed for small working animals as the work these animals contribute to the farm and ranching community is associated with farm use occurring on the applicant's property. Here, upon review of case law, the applicant proposes to limit feed for small working farm animals to cat and dog food. These are directly related to the activities conducted on the subject property: dogs to patrol and guard the chickens and horses, and cats to serve as barn cats to keep mice from the hay and to "mouse" the dry hay crops as a means of natural pest control.

If the county determines the sale of feed for small working farm animals falls outside the scope of a commercial use in conjunction with farm use, then it may be sold still as an incidental item. Past performance indicates that the sale of dog food generated approximately 1 to 2 percent of the applicant's gross sales.

Applicant's Business Reviewed

With regard to the income relationship between farm use and the commercial retail operation, the applicant's hay operation for the hay he personally farms, hauls and markets generates approximately 1,518 tons/year which grosses approximately \$395,000. In addition to the hay that the applicant personally farms, he also acquires hay wholesale from other farmers and either hauls it himself or receives it onsite to be stored and marketed. This portion of the business is about half of the hay operation in its entirety. Additionally, the raising of chickens and sale of eggs generates approximately \$9,000/year.

The applicant requests a modification of conditionals to expressly authorize the sale of bagged feed, supplements to be ingested by farm livestock, livestock care products such

as livestock grooming items, livestock shampoo and conditioners, bagged vitamins to be ingested by livestock, salt blocks to be ingested by livestock, livestock bedding materials (shavings and wood chips), and livestock bug and fly traps and sprays, feed containers such as chick feed containers, buckets, water troughs, and bird seed. As mentioned above, bird seed is commonly used by poultry raisers; many poultry prefer unprocessed seed to the highly-processed seed. All of these items are considered "farm use" items.

Case law has established a 25% cap on incidental items sold that are subordinate to the main use of the property. Local decisions have established a 25% or 40% cap on incidental uses marketed beyond the farm use occurring on the property. Neither of these standards applies directly to the applicant's proposal because none relate to a use of non-resource land.

MUA-10 zoning is less restrictive than EFU because there are no resource lands that require protection or preservation. The Applicant's agricultural use is a permitted activity and the commercial use in conjunction with farm use is a conditional activity. The ordinance does not require that the commercial use must be limited by percentage or even related to a permitted use.

Here, the applicant conducts permitted agricultural activity by growing and marketing of dry hay and raising chickens and marketing hay, chickens, and eggs. The original conditional use permit was to permit the marketing of hay and livestock feed to the public. The use fits in well with surrounding properties and does not present an adverse impact to resource lands. Uses in MUA-10 zones include non-agricultural uses as well.

Recall that the subject property is non-resource land as opposed to those sites reviewed by the state and the local hearings officers which are all located on exclusive farm use, resource land zones. Any uses to be limited at the applicant's operation should be viewed less restrictively than those uses on EFU lands.

If the county determines that an income cap must be applied to the subject property, then the income cap should apply to those items incidental and subordinate to the agricultural and farm use items. It is hard to determine what that would be at this point. The Applicant does maintain a tiny inventory of greeting cards and previously sold dog food and dog collars. These items would be considered incidental and subordinate to the farm items. If the applicant sells these items, they would certainly come nowhere close to the 25% cap established in case law or the 25% or 40% cap established in local decisions. Prior records indicate these items comprised less than one to two percent of the applicant's gross proceeds. These items comprise such a tiny percentage of the applicant's agri-business that it seems a waste of resources for the applicant or the county to annually review those figures to ensure compliance.

During communication with the county prior to this application, the county questioned whether any income cap would be applied not just to the incidental and subordinate items but the entire retail operation. There is nothing in state law or case law to suggest this is appropriate. If the county makes a leap to require that an income cap is appropriate for the subject request, then the applicant would assure gross sales from the retail store do not exceed 25% or 40% of the gross income from the harvesting and sale of hay, the growing of chickens and sale of eggs or other farm use, it being acknowledged that farmers typically grow different crops or raise different livestock

depending on a multitude of factors such as market demand, health concerns, and profitability. For example, the applicant previously raised goats and now finds raising chickens to be more suitable. It is important to note that the underlying farm use may change over time due to the cost of equipment, weather, availability of water, availability of fuel and power, and the cost of fuel and power. This interpretation would put the applicant and most agricultural operations out of business and is not supported by any statute, case law or LUBA decision.

Entire Farm Operation

If an income test is applied, the county has raised the question of whether the income used to establish the income test, addressed above, is the income generated from the agricultural use of the subject property or the farm operation in its entirety. In other words, does the farm use require a review of only the on-site productivity or does it consider the applicant's entire farm operation, which includes multiple other parcels.

First, federally, one case recognizes the concept of the entire farm operation. When reviewed by the taxing authorities, the Supreme Court has recognized that farm use includes the storage of farm products raised on land off-site and as part of an overall farm operation. Reter v. State Tax Commission, 256 Or 294 (1970).

Second, at the state level, statutes provide that farm use means the "current employment of land". The state law does not require the "current employment of a parcel" or the "current employment of a particular lot" or the "current employment of a subject tract". Further, state law contemplates that farms extend beyond a particular parcel. The definition of farm use limits a particular subset of use of land to "on-site" use: "...farm use includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection....". This suggests that offsite operations are considered but that construction and maintenance of equipment must occur only on-site, likely in order to allow local government the ability to regulate and permit construction activities on a parcel by parcel basis. This distinction allows the locality to review each parcel or tax lot with unique eye toward the zoning designation and the proposed use. A zone and a use are the not the same.

The state definition of farm use intends to capture generic use of land for farm use, whether it is the use of one parcel, adjacent parcels, or non-contiguous parcels as a farm operation constituting farm use. It is well known that many farm products are brought from off site, such as crops like hay being grown on one location and then sold from another location.

Third, a review of case law supports a determination that farms should be viewed in their entirety. In a Goal 3 exception case, LUBA rejected an argument that grazing livestock on a property, in conjunction with a larger livestock operation off-site, does not constitute farm use. Pekarek v. Wallowa County, 36 Or LUBA 494 (LUBA No. 98-094 at 19) (1999). Although the question presented was whether the property was irrevocably committed to non-farm use, LUBA acknowledged that the property was being put to farm use because it was "part of a larger farming operation" and that raised the question of whether the county determined that farm use was impractical. Id. at 20. The decision was remanded to the county to address that question.

LUBA reviewed whether a feedlot operation was a commercial activity in conjunction with farm use on EFU, resource land in *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107, LUBA No. 2004-063 (2004). In this case, LUBA distinguished between the storage of compost on EFU-land not qualifying as the current employment of land for farm use, but bringing livestock on to the parcel from other parcels and then transferring those livestock to yet other parcels in the entire livestock operation does constitute farm use. *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107, LUBA No. 2004-063 at 8 (2004). LUBA determined that a livestock operation did not need to include each of the "feeding, breeding, management and sale of livestock" elements in order to qualify as farm use; "Rather a livestock operation that does not include all of the four of the listed activities may still qualify as a farm use [] provided the operation nevertheless constitutes 'the produce of...livestock.'" *Id.* at 12. In other words, LUBA considered land as being used for farm use when part of the overall farm operation was being conducted offsite.

Lastly, locally, the county code expressly contemplates that for commercial uses in conjunction with farm uses that products may come from adjoining counties. This inherently acknowledges that farm operations often require additional properties. In at least one other application, the county has acknowledged a hay operation to include more than the particular parcel at issue.⁷

In the applicant's own case, heard by the Board, the applicant testified as to the amount of hay produced on the subject property and the amount he raised and cultivated on other property he owns and sharecrops. CU-05-14, at 5-6. "The Board finds that the combination of dryland hay cultivation and irrigated hay cultivation on the subject premises is a farm use." *Id.* at 6.

In conclusion, the applicant's operation should be viewed in its entirety to include all farm income generated on all lands he personally farms and sharecrops despite those lands not being contiguous to the subject parcel.

Income Test Applied to this Request

As applied to the application, the applicant's hay and feed operation includes multiple tracts of land, which altogether form the hay and feed operation. The subject property is used for dry hay production as well as the storage and retail sales of both hay and feed. Others parcels used for the production of hay include, but are not limited to:

60646 Anderson Valley Road, Princeton, Oregon – 60 acres
65341 Crane Buchanan Road, Burns, Oregon – 85 acres
4790 SW Elkhorn, Redmond, Oregon & 5451 SW Canal Blvd., Redmond, Oregon – 34 acres
4215 SW 58th, Redmond, Oregon – 24 acres
6240 SW 43rd, Redmond, Oregon – 40 (Applicant's own)
6705 SW 46th, Redmond, Oregon – 10 (Applicant's own)

All generate about six tons of hay per acre per year. A total of 253 acres generates approximately 1518 tons of hay, at the current retail price, which results in a gross profit

⁷ Tony Aceti's hay operation south of the subject property and south of Tumalo Road and west of Highway 97.

of approximately \$394,680. In addition, the applicant acquires hay from multiple other farmers and the applicant haul's all of that hay, meaning he goes out and picks it up and stores it on his site and some others bring it to him. The sale of the applicant's own hay and those permitted by the Board decision are not in question.

Again, it is relevant to note that the statutes governing farm use apply to resource lands zoned exclusive farm use. Here, the county has expressly allowed agricultural use as a permitted activity and has conditionally allowed commercial use in conjunction with farm use on non-resource land as well as a long list of non-agricultural uses. There is no statutory or local county requirement that farm use must be limited to income-generating activity on the subject property.

It is well known that farming often requires leasing land in order to have sufficient scale to make the investment in required equipment possible and feasible to sell crops. Multiple parcels are required to sustain an agricultural operation. Further, there is evidence of farm operations, like the applicant's, conducted across multiple tracts, parcels, and properties that are neither contiguous or even nearby the subject property and one would be hard pressed to tell a farmer that he is not a farmer because his operation does not involve a contiguous parcel of land. Thus, a determination that farm use includes the entire farm operation is not inconsistent with the county code or state law.

As applied to the subject property, the applicant's incidental and subordinate sales would be those items that are not either directly agricultural or farm products as would be allowed by code. Currently, the applicant's inventory includes the following: hay, bagged feed (grain/oats), livestock snacks (horse snacks), bagged supplements and vitamins for livestock ingestion, livestock grooming supplies (shampoo, conditioner, brushes), livestock bedding supplies such as shavings and wood chips, livestock salt blocks, feed containers such as water troughs, water buckets and the de-icers for those, and livestock feeding bottles.

It is hard to determine what items the applicant would sell that are not agricultural or farm based. Items which may fall outside of the agricultural or farm use definition could include: bagged bird seed (poultry often prefer the raw bird seed to processed poultry seed), bug sprays, fly masks, fly sprays, and greeting cards. All of these latter items are merely incidental and subordinate to the main hay and feed operation. They should be approved because they are necessary for other farmers' profitable agricultural operations and the state has long recognized that it is important to have up to 25% of incidentals to be sold on EFU, resource lands. The intent is to keep agribusiness afloat.

As previously stated, LUBA set a limit of 25% for incidental items. The county hearings officer established a 40% rule for commercial uses in conjunction with farm use and although the hearings officer cannot write code, it gives us an idea of the percentage that may be used for activities on resource land. No precedent addresses any limitation of selling incidentals on non-resource land.

For the latter, if the county determines it is appropriate to cap the sale of incidental and subordinate items on non-resource land, then those items should be capped at 25% of the total gross sales of hay, feed, and livestock-related items.

STAFF RESPONSE: Because the subject property is zoned MUA-10 and designated as Rural Residential Exception Area, not EFU-zoned property designated Agriculture and protected by Statewide Planning Goal 3, Agricultural Lands, Staff does not believe the property is subject to standards and developed case law that would apply to a commercial activity in conjunction with farm use in the EFU zone.

In CU-05-14, the Board set forth a four-prong test for compliance with this criterion:

1. There must be a farm use on the subject property;
2. The proposed commercial activity must be “associated with” that farm use;
3. The proposed commercial activity must consist of one or more of the following: using, processing, storing or marketing farm products; and
4. The farm products must be produced in Deschutes County or an adjoining county.

The proposal’s compliance with each of these components is discussed below.

1. Farm Use occurring on the subject property

Section 18.04.030 of the Deschutes County Code defines “farm use” as follows:

“Farm use” means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. “Farm use” includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. “Farm Use” also includes the current employment of the land for the primary purpose of obtaining a profit in money by stabling or training equines, including but not limited to, providing riding lessons, training clinics and schooling shows. “Farm use” also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. “Farm use” includes the on-site construction and maintenance of equipment and facilities used for the activities described above. “Farm use” does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3). Current employment of the land for farm use also includes those uses listed under ORS 215.203(2)(b).

In CU-05-14, the Board concluded that:

The Board finds that applicant's use of the subject property for hay cultivation, harvesting, and sales as well as livestock feeding, breeding and sales is primarily for the purpose of obtaining a profit in money. Applicant's hay cultivation on the subject premises is in conjunction with hay cultivation on 934 non-contiguous acres. Although applicant's profit from this parcel is relatively small, the profit is proportional to the parcel size, which is also relatively small. Applicant's hay growing operation on the subject parcel is part of a larger hay growing operation encompassing an additional 934 acres. Applicant's evidence establishes that applicant's purpose is to obtain a profit in money

from hay grown and harvested on the subject property and from goats bred, fed and raised on the subject property.

This was based on detailed financial evidence provided by the applicant that “farm use”, for the primary purpose of obtaining a profit in money, was occurring on the subject property. The burden of proof indicates that “...*Applicant currently grows dry hay, historically raised goats, and raises horses, chickens and sells eggs...*”. Staff is uncertain if the applicant should be required as part of this application to produce receipts in money for these on-site farm activities to demonstrate that they are undertaken for the primary purpose of obtaining a profit in money. Staff requests the Hearings Officer to make specific findings on this topic and clearly identify the “farm use” that provides the basis of any approval.

2. Commercial activity associated with that farm use

In CU-05-14, the Board concluded that:

As discussed above, the proposed commercial use is the sale of hay and livestock feed from the subject premises. Applicant must establish a reasonable relationship between the proposed commercial activity and the existing farm use. The ordinance requiring this association between the farm use and the proposed commercial use includes no objective standards, quantifications, or qualifications. The association applicant must demonstrate is a reasonable relationship between the proposed commercial activity and the farm use on the subject parcel. The sale of hay is reasonably associated with applicant's farm use. Hay cultivated on the subject parcel must either be consumed on site or consumed elsewhere. Sales are a reasonable way to distribute harvested hay to third parties. Without sales, there is no point to cultivating the crop. Sales of crops is a permitted use on the subject property. The Board concludes that storage of hay and commercial sales of hay are commercial activities associated with the farm use taking place on the subject parcel.

The feeding, breeding, management and sale of livestock is also a permitted agricultural use in the MUA zone. Applicant raises goats on the subject parcel. Applicant's raising and breeding of goats requires the feeding of the goats. Goats eat many things, including livestock feed. Livestock feed sales are reasonably related to the agricultural practice of feeding of goats on the subject parcel.

The Hearings Officer will need to determine what commercial activities, specifically what sales items, are associated with the farm use and which sales items are not associated with the current on-site farm use. Staff notes that “associated” sales items will also need to meet prongs 3 and 4 of this criterion, as discussed below.

In addition, staff is concerned that farm use of the property may be altered, curtailed, or ceased at some point in the future without a cessation of the commercial activity. If the Hearings Officer finds that an approval is contingent on the continuing farm use of the property, staff recommends the Hearings Officer impose a condition of approval specifying what types and intensity of farm use of the property is required to continue the commercial use.

3. Commercial activity consists of using, processing, storing or marketing farm products

In CU-05-14, the Board concluded that:

As discussed above, the commercial activity proposed by the applicant is marketing and sales of hay and livestock feed from the premises. Both hay and livestock feed are farm products. Applicant's proposed use constitutes marketing farm products.

Staff believes that any commercial activity that does not consist of using, processing, storing or marketing farm products (produced in Deschutes County or an adjoining County) is not part of the "commercial activity" and could only be permitted as incidental and subordinate sales to the commercial activity, as discussed below.

4. Farm products are produced in Deschutes County or an adjoining County.

In CU-05-14, the Board concluded that:

The record indicates the hay sold on the subject property is grown on subject property or on other property owned by the applicant and his family in Deschutes, Crook and Harney Counties. As a condition of approval, applicant is restricted to sales of hay from Deschutes, Crook and Harney Counties.

Again, Staff believes that any commercial activity that does not consist of using, processing, storing or marketing farm products (produced in Deschutes County or an adjoining County) is not part of the "commercial activity" and could only be permitted as incidental and subordinate sales to the commercial activity, as discussed below.

As discussed by the applicant, the case law on commercial activity in conjunction with farm use in Exclusive Farm Use zones does not appear to be binding on a use with the same name in an MUA-10 (property within a Rural Residential Exception Area). Staff is uncertain if the reasoning in those farm zone cases might be helpfully applied to the current proposal. Staff is also uncertain if incidental sales are 1) not allowed as part of the proposed use under the code, 2) allowed as an 18.116.040 "accessory use", as described in detail below, or 3) somehow implicitly allowed as part of the commercial activity in conjunction with farm use. Staff requests the Hearings Officer make specific findings on this issue and clearly delineate what limitations, if any, should apply to these incidental sales.

2. Sections 18.32.040, Dimension standards, and 18.32.050, Yards.

STAFF RESPONSE: At the time of completion of the staff report, the applicant was not proposing any new structures, or additions to existing structures, for the site as part of this application. These two sections are not applicable to the current proposal.

C. Chapter 18.80, Airport Safety Combining Zone

1. Section 18.80.028, Height Limitations
2. Section 18.80.044, Land Use Compatibility

STAFF RESPONSE: The property is within Airport Safety Combining Zone associated with the Redmond Airport. New structures and additions to existing structures need to comply with the requirements of this chapter. No such structures are proposed.

D. Chapter 18.84, Landscape Management (LM) Combining Zone

1. Section 18.84.050, Use Limitations.
2. Section 18.84.080, Design Review Standards

STAFF RESPONSE: 18.84.050(A) states:

Any new structure or substantial alteration of a structure requiring a building permit, or an agricultural structure, within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.

The property falls within the boundaries of the Landscape Management Combining Zone associated with Highway 97. In the event that proposed modifications involve a new structure or substantial alteration of a structure requiring a building permit, or an agricultural structure, Landscape Management Site Plan Review would be required. Substantial alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure. If the Hearings Officer approved the application, Landscape Management Site Plan Review could be made a condition of approval.

E. Chapter 18.124, Site Plan Review

1. Section 18.124.030. Approval Required.
 - A. ***No building, grading, parking, land use, sign or other required permit shall be issued for a use subject to DCC 18.124.030, nor shall such a use be commenced, enlarged, altered or changed until a final site plan is approved according to DCC Title 22, the Uniform Development Procedures Ordinance.***
 - B. ***The provisions of DCC 18.124.030 shall apply to the following:***
 1. ***All conditional use permits where a site plan is a condition of approval;***
 2. ***Multiple family dwellings with more than three units;***
 3. ***All commercial uses that require parking facilities;***
 4. ***All industrial uses;***
 5. ***All other uses that serve the general public or that otherwise require parking facilities, including, but not limited to, landfills, schools, utility facilities, churches, community buildings, cemeteries, mausoleums, crematories, airports, parks and recreation facilities and livestock sales yards; and***
 6. ***As specified for Flood Plain Zones (FP) and Surface Mining Impact Area Combining Zones (SMIA).***

STAFF RESPONSE: The commercial use of the property, as originally approved, and under this proposed modification falls plainly within “commercial uses that require parking facilities”. Staff is uncertain why Site Plan Review was not required at the time of CU-05-14. Staff is uncertain if either the failure to receive Site Plan approval at the time of CU-05-14 or anything in the current proposal, including the change in the building housing the commercial activity, necessitates site plan review at this point. Staff requests the Hearings Officer make specific findings on this issue.

F. Chapter 18.116, Supplementary Provisions

1. Section 18.116.030, Off-street parking and loading.
2. Section 18.116.031, Bicycle parking.
3. Section 18.116.035, Bicycle commuter facilities.

STAFF RESPONSE: If the Hearings Officer believes that Site Plan Review is triggered then applicable requirements under 18.116 may apply as well.

4. Section 18.116.040, Accessory Uses.

An accessory use shall comply with all requirements for a principal use, except as DCC Title 18 specifically allows to the contrary, and shall comply with the following limitations:

STAFF RESPONSE: Staff is uncertain if sales of incidental items, as proposed by the applicant constitute an “accessory use⁸” of the commercial activity in conjunction with farm use. To the extent the Hearings Officer finds that such sales constitute an accessory use, that use must be incidental and subordinate commercial activity in conjunction with farm use. In 247-15-000001-LUP, the Hearings Officer found:

As discussed in Hearings Officer Green’s recent decision in Brown, discussed above, the phrase “incidental and subordinate to” is not defined in Title 18 or SB 960, or elsewhere in state law or Land Use Board of Appeals (LUBA) decisions.

Merriam-Webster⁹ defines:

Incidental:

- 1 a: being likely to ensue as a chance or minor consequence <social obligations incidental to the job>
b: minor
- 2: occurring merely by chance or without intention or calculation

Subordinate:

- 1 placed in or occupying a lower class, rank, or position: inferior <a subordinate officer>

To the extent the Hearings Officer finds that the sale of incidental items is an accessory use on the subject property, those sales would need to be likely to ensue as a chance or minor consequence in connection the commercial activity sales and be secondary or minor/lower in relation to those sales. Staff recommends the Hearings Officer identify what incidental sales items might “ensue as a chance or minor consequence” from the commercial activity sales. Staff also suggests the Hearings Officer to consider a condition of any approval of incidental sales as an accessory use that requires annual sales reporting for the commercial use and incidental sales and that incidental sales do not exceed a fixed percentage of the commercial activity sales.

⁸ "Accessory use or accessory structure" means a use or structure incidental and subordinate to the main use of the property, and located on the same lot as the main use. Accessory uses include drilling for, and utilization of, low temperature geothermal fluid in conjunction with the main use of the property.

⁹ <http://www.merriam-webster.com/>

G. Chapter 18.128, Conditional Uses

1. Section 18.128.015, General Standards Governing Conditional Uses

Except for those conditional uses permitting individual single-family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:

- A. *The site under consideration shall be determined to be suitable for the proposed use based on the following factors:***
 - 1. *Site, design and operating characteristics of the use;***
 - 2. *Adequacy of transportation access to the site; and***
 - 3. *The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.***
- B. *The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).***

STAFF RESPONSE: The Board's decision for CU-05-14 found compliance with these criteria. The applicant did not address conditional use permit criteria of DCC 18.128.015 in the submitted burden of proof statement for the modification and Staff is uncertain if the proposal triggers review of the conditional use criteria in DCC 18.128.015 above.

In the event that the Hearings Officer determines that the applicants proposed modifications to the site increase impacts on surrounding properties, such as transportation impacts and compatibility with existing and projected uses on surrounding properties, review of these standards and criteria would be required.

IV. SUMMARY AND CONCLUSION

Staff was unable to conclude compliance with DCC Sections 22.36.040 (B), (C) and (D), thus, points to the hearings officer for a determination of compliance with these criteria, provided below:

- B. *Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.***
- C. *An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.***

- D. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.*

Below are observations Staff offers to the Hearings Officer's for consideration in regards to this proposal:

- 1) The Hearings Officer will need to clearly identify the "farm use" that provides the basis of any approval and determine what commercial activities, specifically what sales items, are associated with the farm use and which sales items are not associated with the current on-site farm use.
- 2) Staff is concerned that farm use of the property may be altered, curtailed, or ceased at some point in the future without a cessation of the commercial activity. If the Hearings Officer finds that an approval is contingent on the continuing farm use of the property, staff recommends the Hearings Officer impose a condition of approval specifying what types and intensity of farm use of the property is required to continue the commercial use.
- 3) As discussed by the applicant, the case law on commercial activity in conjunction with farm use in Exclusive Farm Use zones does not appear to be binding on a use with the same name in an MUA-10 zone (property within a Rural Residential Exception Area). Staff is uncertain if the reasoning in those farm zone cases might be helpfully applied to the current proposal. Staff is also uncertain if incidental sales are:
 - a) not allowed as part of the proposed use under the code;
 - b) allowed as an 18.116.040 "accessory use", or;
 - c) somehow implicitly allowed as part of the commercial activity in conjunction with farm use.
- 4) Staff requests the Hearings Officer make specific findings and clearly delineate what limitations, if any, should apply to incidental sales. Staff recommends the Hearings Officer identify what incidental sales items might "ensue as a chance or minor consequence" from the commercial activity sales. Staff also suggests the Hearings Officer to consider a condition of any approval of incidental sales as an accessory use that requires annual sales reporting for the commercial use and incidental sales and that incidental sales do not exceed a fixed percentage of the commercial activity sales.
- 5) If the hearings officer is able to approve the applicants' proposal, Staff would like to be provided the opportunity to suggest conditions of approval.

Dated this 13th day of October, 2015

Mailed this 13th day of October, 2015