

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the ) Case No. CU 18-025  
Application of: )  
JENNIFER E. HOEFLING, TRUSTEE OF THE ) Clerk's File No.  
JENNIFER E. HOEFLING REVOCABLE LIVING )  
TRUST DATED APRIL 18, 2016 ) **Conditional Use**

ORDER

**I. Nature of the Application**

This matter comes before the Marion County Hearings Officer on appeal of the Planning Director's approval of the application of Jennifer E. Hoefling, Trustee of the Jennifer E. Hoefling Revocable Living Trust Dated April 18, 2016 for a conditional use permit to establish a wholesale health supplement business on a 2.85-acre unit of land in a UT-20 (Urban Transition-20 acre minimum) zone at 20567 Highway 99E, Aurora, Marion County, Oregon (T4S, R1W, S14D, tax lot 900).

**II. Relevant Criteria**

The Marion County Comprehensive Plan (MCCP), City of Aurora Comprehensive Plan (CACP) and City of Aurora/Marion County Urban Growth Boundary Coordination Agreement (UGBCA) apply within the City of Aurora Urban Growth Area (UGA). Standards and criteria relevant to this application are found in Marion County Code (MCC), title 16, especially chapters 16.13 and 16.40.

**III. Public Hearing**

A public hearing was held on this matter on June 6, 2018. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the application:

- |    |                 |                                       |
|----|-----------------|---------------------------------------|
| 1. | Brandon Reich   | Marion County Planning Division       |
| 2. | Ian Levin       | For applicant <sup>1</sup>            |
| 3. | Sara Kendrick   | Attorney for appellant City of Aurora |
| 4. | Joseph Schaefer | City of Aurora                        |
| 5. | Renata Wakeley  | City of Aurora                        |

Supplemental information from the City of Aurora was entered into the record as exhibit 1 at hearing. Appellant City of Aurora asked to keep the record open to submit additional written material. Applicant requested a rebuttal period. The record remained open to June 13, 2018 for participants other than applicant, and to June 20, 2018 for applicant. The following documents were submitted during the open record period:

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<sup>1</sup> Neither applicant Jennifer E. Hoefling, Trustee nor her representative designated on the application appeared at hearing. Ira Levin appeared to speak for applicant but had no written authorization from applicant to appear. No participant, including appellant, objected to Mr. Levin's appearance on applicant's behalf. Mr. Levin testified he had been working with applicant and was knowledgeable of the case. Mr. Levin was allowed to appear for applicant.

- Ex. 2 June 12 2018 letter from Joseph Schaefer in individual capacity  
Ex. 3 June 12, 2018 transmittal cover letter with attached June 13, 2018  
City of Aurora narrative and one page CACP excerpt  
Ex. 4 June 20, 2018 submission from Ira Levin

No objections were raised at hearing to notice, jurisdiction, conflict of interest, evidence or testimony. In exhibit 4, Mr. Levin claimed that appellant's open record submission content was outside the scope allowed by the hearings officer. Mr. Levin stated the record was left open only for comments, not testimony or evidence. The hearings officer listened to the hearing recording. The hearings officer initially stated the record would be left open for attendee comment but later clarified that the initial open record period was for attendee "arguments, evidence, information..." Appellant's open record submission is accepted for the record.

#### IV. Findings of Fact

The hearings officer, after careful consideration of testimony and evidence in the record, issues the following findings of fact:

1. The subject property is within the City of Aurora urban growth boundary (UGB). The western 2/3 of the subject property is designated Industrial and the eastern 1/3 is designated Commercial under the CACP. The entire property is zoned UT-20. The purpose of UT-20 zoning under these designations is to retain and protect land for future urban industrial and commercial uses.
2. The subject property is on the west side of Highway 99E, about 1,850 feet south of its intersection with Orchard Avenue NE, and contains a dwelling. Deeds from as far as 1963 describe the subject property in its current configuration. The property is a legal parcel for land use purposes.
3. Properties adjacent to the north, east and south are zoned UT-20. Properties to the west, beyond the railroad right-of-way, are zoned EFU (Exclusive Farm Use) and are in agricultural use.
4. The application form proposes a wholesale health supplement business. At hearing, applicant explained that the intent of the application was to allow the health supplement and other industrial uses of the property. Added potential uses of the property are discussed in Section V below.
5. The Marion County Planning Division requested comments on the application from various government agencies.

Marion County Public Works (PW) Land Development and Engineering Permits Section (LDEP) provided engineering requirements A through C:

- A. Hwy 99E is controlled by ODOT. Prior to site plan approval and issuance of building permits, evidence of an ODOT access permit or waiver is required.

- B. Prior to application for building permits, submission of a civil site plan to MCPW Engineering is required. As part of that plan, stormwater detention is required for development of 0.5-acres or more. Stormwater discharge to OR99E would require ODOT co-review.
- C. The subject property is within the unincorporated area of Marion County and will be assessed Transportation System Development Charges (SDCs) upon application for building permits, per Marion County Ordinance #00-10R. The land use application states intent to construct a 15,000 square-foot warehouse. Credit for recent habitation of the existing dwelling within 12 months preceding application for building permits for the warehouse may be given.

Marion County Building Inspection Division commented that building permits are required for change in use or occupancy.

Marion County Onsite Wastewater Program commented that authorization is required to connect to an existing septic system.

Oregon Department of Aviation (ODA) commented the site is approximately 1.6 miles south of the Aurora State Airport, but due to distance and controlled airspace, the development will not pose a hazard to air navigation, and no FAA form 7460-1 will need to be filed with the ODA or FAA.

Oregon Department of Transportation (ODOT) commented that the property abuts the Pacific Highway East (OR-99E), and is subject to state laws administered by the ODOT, including laws related to vehicular access. ODOT noted that vehicular access to the property exists from a single connection to OR-99E. ODOT reviewed its access permit records and determined there is no existing permit for the highway access. ODOT notes that approaches constructed prior to January 1, 2014 have a presumption of written permission when there is no access on record. ODOT verified that the current connection meets the criteria to be viewed as permitted. ODOT evaluated the proposal for a change of use, stating, "Based on ODOT's evaluation of the applicant's proposal, the existing connection can continue to be utilized without need to obtain a new access permit." ODOT noted that any work in the state right-of-way requires an ODOT permit.

Oregon Department of Land Conservation and Development (DLCD) stated the property is essential for City of Aurora's future (20-year) industrial needs and the proposal could necessitate premature UGB expansion.

City of Aurora commented on MCC requirements:

MCC 16.13.020(Q): According to Marion County Planning, the most restrictive zone is the Marion County Industrial Commercial (IC) zone. Please specify which use the subject application is proposed to be permitted under.

In the application, the applicant states that the use is permitted in the Aurora Municipal Code (AMC) section 16.14030.F. as a conditional use. However, without a conditional use permit through the City of Aurora, the

use is not permitted. We consider the proposed use and application an "urban" use that would more appropriately be sited on land annexed to a city and provided with city services. The proposed use could be considered a permitted use under both our Commercial, pending a CUP permit, and/or Industrial zones and we encourage Marion County to require annexation and City land use approvals prior to development.

*MCC 16.13.030(A)*: The proposed structure is estimated at 15,000 square feet. According to the Aurora Municipal Code (AMC) criteria for Site Development Review - which the proposed development would be subject to were it located within the city limits- a structure of this size may be subject to a Traffic Impact Analysis (TIA). Without a TIA, we cannot determine if traffic will be increased "beyond the capacity of existing roads." The applicant states their preference is not to hire an architect or civil engineer but this DOES NOT relieve the applicant of demonstrating compliance with this requirement.

Please also confirm ODOT will provide comments on this application, specifically traffic and road capacity and impacts, in advance of a determination by Marion County on this application.

*MCC 16.13.030(B)*: The proposed development, as submitted, will be located on portions of the lot with a Comprehensive Plan/Zone designation of Commercial (western portion) and portions of the lot with a Comprehensive Plan/Zone designation of Industrial under the Aurora Comprehensive Plan map (proposed development has a 70-foot front setback). In addition, we do not believe the proposed development location provides for any significant unused portions of the property to have adequate development options as, were the property annexed into the City of Aurora, greater density and smaller setbacks would be permitted on the property.

Under AMC 16.14.040.D of the Aurora Commercial zone code, "no building within 100 feet of a residential zone shall exceed 35 feet in height." The subject property is located within 100 feet of residentially zoned property (ODOT ROW is 80 feet and property directly to the east and across Highway 99E has a Comprehensive Plan designation of Residential). The proposed height was not provided in the subject application and we cannot determine whether compliance with the Aurora Municipal Code (AMC) would be met at a future date.

AMC 16.56 Gateway Standards apply to structures and property within 100 feet of the first tier of buildings, whichever is greater, from the ROW of Highway 99E. As such, 16.56.050.A "structures containing commercial uses shall have no minimum front setback and a maximum 10-foot landscaped setback". Upon future annexation, the subject development as proposed would be non-compliant to current property along Highway 99E in the City of Aurora.

*MCC 16.13.030(C)*: The City of Aurora requests that Marion County require annexation of the property to the City of Aurora prior to development in order to ensure structures conform with city zoning regulations.

Conformance with city zoning regulations can only be assured via annexation of the property prior to development AND local land use procedures and approvals such as local conditional use permit approval and site development review.

*MCC 16.13.030(D)*: Require Annexation and ask Marion County to make an interpretation on whether annexation would be prohibited. SDR and CUP permit through City of Aurora.

While we understand the proposed facility is listed as a potentially conditionally permitted use under the UT-20 Marion County zoning, we also wish to provide the following additional comments/concerns for consideration of the application:

- a) Traffic - We believe a Traffic Impact Analysis for impacts, potential mitigation, and proportional share costs to City and ODOT roadways should be required prior to any land use approval on the subject property. In addition, no information on the current drive access and proposed improvements nor parking was provided on the site plan. At a minimum, we would like to see driveway access and parking standards be built to City of Aurora Municipal Code and ODOT standards.
- b) The proposed use/development would require a CUP permit if it were located within the Aurora city limits. CUP review in Aurora requires notification and an opportunity for comments to be received from property owners within 200 feet of the subject proposed (as would be required under city SDR and CUP).

Without an opportunity for local property owners to comment, we don't know if additional conditions of approval should be recommended such as: restrictions to the hours of operation; lighting plans; etc. We request Marion County provide an opportunity for property owners within 200 feet (or more) an opportunity to review and comment on the pending application.

- c) In compliance with AMC 16.42 for Off-Street Parking and Loading Requirements, a 15,000 sq ft facility would require 1 space per employee plus 1 space per 800 sq ft of patron serving area. The applicant did not provide the estimated square footage of the proposed structure dedicated to office but the City estimates 1/4 (or 3,750 sq ft) based on the site plan which would require 5 spaces and an additional 5 spaces for the estimated employees for a total of 10 parking spaces. The applicant's preference to not hire an architect or civil engineer DOES NOT relieve the applicant of demonstrating compliance with this requirement.
- d) Our Urban Growth Boundary Coordination Agreement (UGMA) with Marion County states under Section 1.9., "Conversion of land within the UGA to urban uses shall occur upon annexation and be based on a consideration of applicable annexation policies in the Aurora Comprehensive Plan" and Section 111.3, "The County shall, to the

extent feasible, require City development standards for development within the UGA, including dedication of additional ROW... The County shall, to the extent feasible, require compliance with City development standards, in lieu of County standards, if the development is other than a single-family dwelling."

Demonstration of City development standards for the proposed development is clearly not met and therefore, compliance with the UGMA is not met.

- e) Marion County's Urban Transition Zone 16.13.320.E. requires a favorable site evaluation from the county sanitarian for on-site sewage disposal. NO such evidence has been submitted for review and approval and the applicant's assurance on use of the existing septic system for the new use does not satisfy this requirement.

Further section 16.13.320.E requires this criterion be met "prior to the approval of a use" and therefore, we believe Marion County lacks authority to approve the use absent completion of this item.

The City of Aurora does not believe the subject application addresses compliance with the applicable criteria. We also believe this proposal violates Marion County's Comprehensive Plan chapter on Urbanization and Policies opposing sprawl and ensuring the orderly transition of land uses from rural to urban land uses. We do not believe the application is consistent with Section 9 of the Urban Growth Management Agreement between Marion County and the City of Aurora because the proposed use/application is for an urban use.

Other contacted agencies did not respond or stated no objection to the proposal.

#### **V. Additional Findings of Fact-Applicable Law-Conclusions of Law**

1. Applicant has the burden of proving, by a preponderance of the evidence in the record, that all applicable criteria relating to this application are met. The preponderance of the evidence standard is explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its

burden and the application must be denied. If the evidence for every criterion is in applicant's favor, then the burden of proof is met and the application must be approved.

2. Under MCC 16.37.000, the Zoning Administrator (Planning Director) has the power to make an initial conditional use decision. The Planning Director approved and mailed this application on April 27, 2018. Under MCC 16.37.080, a decision may be appealed within 15 days of the date the decision is mailed. The 15<sup>th</sup> day was Saturday May 12, 2018, extending the appeal period to Monday May 14, 2018. The decision was timely appealed on May 11, 2018. Under MCC 16.37.100, after receiving a timely appeal, a hearing shall be set before the hearings officer. The hearings officer may hear and decide this matter.
3. On September 10, 2010, the City of Aurora and Marion County entered into the UGBCA. In UGBCA Coordination Policies and Procedures section I.1, the county retains responsibility for regulating land use on lands in the UGA between the city limits and the UGB until the lands are annexed into the city. Under I.4, all land use actions within the UGA shall be consistent with the CACP and with county land use regulations. The UGBCA preamble states the intent of the parties that the boundary and coordination policies and procedures expressed in the agreement shall be consistent with Oregon State Laws, the MCCP and the CACP. UGBCA section IV states the coordination agreement must be consistent with the MCCP Urban Growth Management Framework. The MCCP growth management framework provides overall management concepts and requires individual city-county agreements, such as the City of Aurora/Marion County UGBCA. The hearings officer reviewed the MCCP urbanization section but found no mandatory criteria directly applicable to this proposal. The hearings officer also reviewed the CACP and found no mandatory criteria directly applicable to this proposal.
4. Under MCC 16.01.030, zone classifications implement comprehensive plan designations. MCC title 16 implements several city comprehensive plans and not all plan designations are identical for all cities. Salem/Keizer Comprehensive Plan designations are used below. For cities other than Salem, the zoning administrator shall decide which of the following zones implement the applicable plan designation on the basis of the intent in the applicable comprehensive plan. The zone classifications below are listed in order of most restrictive to least restrictive under the appropriate plan designation. Following are the zones allowed in the Salem Area Comprehensive Plan designations:

<u>Comprehensive Plan Designation</u>	<u>Zone Classification</u>
Developing Residential	RS, UT, UD, RL, RM
Single-Family Residential	RS, UT, UD
Multifamily Residential	RL, RM, UT, UD
Commercial	CO, CR, CG, HC, UT, UD
Industrial	IC, IP, IG, IH, UT, UD

The CACP has commercial and industrial designations. The zones listed above also logically apply in the commercial and industrial CACP designations. UT zoning applies in both CACP designations.

Appellant believes the UT-20 zone must be treated as a resource (farm) zone in accordance with state statutes and administrative rules. Appellant believes the proposed use is not allowed or conditionally permitted in an EFU zone and cannot be approved here. Appellant points to MCC 16.13.000:

The [UT] zone is..intended to encourage the continued practice of commercial agriculture in areas planned for future urban development. The UT zone is intended to be a farm zone consistent with ORS 215.203.

ORS 215.203(1) states:

Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan.

ORS 215.203(2) defines farm use.

Marion County enacted two farm designations under the MCCP and two farm zones in MCC Title 17. The MCCP Special Agriculture and Primary Agriculture designations are implemented by the MCC SA (Special Agriculture) and EFU zones. The subject property is not zoned SA or EFU.

Oregon's Statewide Planning Goals and Guidelines (*see also* OAR 660-015) are published by DLCD. Urban land is defined in the Statewide Planning Goals and Guidelines glossary as land inside an urban growth boundary. City of Aurora does not find this definition limiting because it does not specify that agricultural land may not lie within the UGB. The Goal 3, Agricultural Lands, definition of agricultural land specifically states it does not include land within acknowledged urban growth boundaries. (*See also* OAR 660-033-0020(1)(c).) The subject property is within the City of Aurora UGB, but is not agricultural land, and is not limited to ORS chapter 215 uses. The hearings officer interprets the MCC 16.13.000 reference to ORS 215.203 to not restrict UT zone uses to ORS 215.283 under ORS 215.203(1), but to allow farm uses defined in ORS 215.203(2). The UT-20 zone is a unique urban zone that allows for farm deferral within a UGB.

5. Under MCC 16.40.070, a conditional use application shall include:
  - A. Signatures of all owners of the subject property; or
  - B. The signatures of the purchasers of the property under a duly executed, recorded, written contract of sale; or



- C. The signatures of lessee in possession of the property with the written consent of all the owners; or
- D. The signatures of the agent of those identified in subsection (A), (B) or (C) of this section when authorized in writing by those with the interests described in subsection (B) or (C) of this section, and all the owners of the property; or
- E. The signature of an authorized agent of a public agency or utility holding an easement or other right that entitles the applicant to conduct the proposed use on the subject property without the approval of the property owners; and
- F. The signature of the applicant and the applicant's address and phone number.

The record contains a warranty deed recorded at reel 3822, page 152, showing the subject property was conveyed to Jennifer E. Hoefling, Trustee of the Jennifer E. Hoefling Revocable Living Trust Dated April 18, 2016. The application is signed but the signature is fairly illegible and there is no signature block identifying the signatory as Ms. Hoefling, or the signing capacity (i.e., trustee). Mr. Levin testified that he was present when Ms. Hoefling signed the application and that she signed in her capacity as trustee. MCC 16.40.070 is satisfied.

- 6. The submitted application form states this is a request to, "Establish a Wholesale Health Supplement Business.." Applicant's accompanying narrative statement explains that wholesale products, such as Muscle Milk, Cliff Bars and protein powders will be delivered to the property by van, UPS or FedEx, orders will be made up and shipped to retail customers, no mixing of raw materials will take place on site, and that use may overlap the commercial and industrial designations on the property. The narrative states the use will be housed in a new 15,000 square foot building, with an office in the on-site dwelling or in an office incorporated into the new building.

After the City of Aurora's initial comments on the application, applicant responded that the business will employ three to five people; water will come from the existing well and will be only for employee restrooms; the existing septic system will be used, but if needed, the parcel is big enough to accommodate a new septic system; and the existing driveway will be used for access. A rough site plan shows a new building along the southern property line and set back 70' from Highway 99E.

Mr. Levin explained at hearing that the application intended the health supplement business to occupy only about a third of the proposed 15,000 square-foot building and other tenants would occupy the rest. The other uses are not yet determined, essentially leaving applicant's request as a proposal for any conditionally permitted UT zone commercial or industrial use in the proposed building. Applicant also objected to Planning Director conditions 2 and 6 and asked to delete the future annexation non-remonstrance agreement requirement and the five-person employee cap.

MCC 16.40.020

7. MCC 16.40.020 contains the following conditional use criteria:
- A. The use is listed as a conditional use in the zone, or is otherwise identified as a conditional use and is consistent with the intent and purpose of the zone and the provisions that authorized consideration as a conditional use.
  - B. The parcel is suitable for the proposed use considering such factors as size, shape, location, topography, soils, slope stability, drainage and natural features.
  - C. The proposed use, as conditioned, will not substantially limit, impair, or preclude the use of surrounding properties for the uses permitted in the applicable zone.
  - D. The proposed use, as conditioned, will not have a significant adverse effect on air or water quality.
  - E. Adequate public and utility facilities and services to serve the use are available or will be made available prior to establishment of the use.

8. MCC 16.13.020 contains uses allowed with a conditional uses permit and compliance with MCC 16.13.300. The Planning Director evaluated the proposed health supplement use under MCC 16.13.020(Q):

Uses allowed outright or conditionally in the most restrictive zone...consistent with the land use designation.

The application originally cited to City of Aurora zoning but Marion County zoning applies within the UGA. MCC 16.01.030 lists zone classifications in order of most restrictive to least restrictive under the appropriate plan designation:

Commercial	CO, CR, CG, HC, UT, UD
Industrial	IC, IP, IG, IH, UT, UD

CO (Commercial Office) is the most restrictive zone in the Commercial designation. No industrial uses are allowed or conditionally permitted in the CO zone. IC (Industrial Commercial) zone is the most restrictive Industrial designation. City of Aurora disagrees that the CO and IC zones are the least restrictive commercial and Industrial zones, and argues that the UT zone is the most restrictive zone. MCC 16.01.030 allows the zoning administrator to designate which zones apply under city comprehensive plan designations, but not to alter the most to least restrictive order. The CO and CI zones are the most restrictive zones in the Commercial and Industrial CACP designations.

MCC 16.09.010(A) (33) lists wholesale trade, SIC 50 and 51, except scrap and waste material (SIC 5093) as a use in the IC zone. SIC refers to the Standard Industrial Classification manual published by the US Department of Labor. The manual lists industry classifications by code number. SIC code 51 is listed as wholesale trade-non-durable goods. Sub-code 5149, groceries and related products not elsewhere classified, lists health food wholesale as a use. Vitamins are listed under code 5132. The health supplement use qualifies as an allowed use in the IC zone and a use in the UT zone, but applicant made clear at hearing that the health supplement business is not its only intended use. The hearings officer interprets applicant's statements as a request for additional unnamed and undetermined uses, but conditional uses are specific and must be individually evaluated to determine if they can be allowed in the zone and on specific properties. Un-quantified, blanket industrial uses are not conditionally permitted in the UT zone. The application, as presented, cannot be approved. **MCC 16.40.020(A) is not satisfied.**

9. Applicant provides only one identified proposed use but seeks other unnamed uses. Applicant provided no MCC 16.40.020 criteria evaluation and little documentation in support of even the one named use, but some findings can be made on the record at hand. The parcel is not in a geologically hazardous, sensitive groundwater or floodplain overlay zone. The parcel is roughly parallelogram-shaped and, by the Planning Director's findings, it is fairly flat and large enough to hold a 15,000 square-foot building. The preliminary site plan shows the proposed building extending into the commercially designated portion of the subject property, but the MCC does not allow industrial uses in the Commercial designation. The building must be wholly located on the industrially designated portion of the property, which might change evaluations under this criterion. Soil types on the property were not identified and cannot be evaluated. Drainage patterns are not identified and cannot be evaluated. Applicant has not provided specific uses or sufficient evidence to allow full evaluation of this criterion. **MCC 16.40.020(B) is not satisfied.**
10. All intended uses are not specified. Without specificity, there is insufficient evidence in the record to determine whether surrounding property uses will be limited, impaired or precluded by unidentified individual or aggregate uses, or to determine possible mitigating conditions of approval. **MCC 16.40.020(C) is not satisfied.**
11. All intended uses are not specified. Without specificity, it cannot be determined whether uses will have potential adverse effects on air or water quality. **MCC 16.40.020(D) is not satisfied.**
12. All intended uses are not specified. Applicant objects to an employee cap that might obviate the need for public water, sewer and additional transportation services. Without specific uses and additional evidence, it is not clear that adequate public facilities and services are or will be available prior to establishing uses on the property. **MCC 16.40.020(E) is not satisfied.**

13. Under MCC 16.13.030, to grant approval for a conditional use listed in MCC 16.13.020 the criteria in this section must be found to be satisfied in addition to the criteria in MCC 16.40.020:

- A. The use will not increase traffic beyond the capacity of existing roads.
- B. If the use will remain after the area is urbanized it will be located in such a manner that any significant unused portion of the property has adequate development options.
- C. The use and related structures and improvements meet the development standards of the most restrictive zone consistent with the applicable Comprehensive Plan designation; or the city concurs and, if the city requests, conditions are imposed that require the structures and improvements to be brought into conformance with city zoning regulations upon annexation.
- D. The most restrictive zone used in the applicable Comprehensive Plan designation lists the proposed use as a permitted or conditional use; or the city concurs and, if the city requests, conditions are imposed which require that the use be brought into conformance with city zoning regulations upon annexation.
- E. In order to qualify as a commercial activity in conjunction with farm or forest use..

(No commercial activity in conjunction with farm or forest use is requested. This subsection is not applicable.)

- F. Farm stand subject to the following standards..

(No farm stand is requested. This section is not applicable.)

14. The Planning Director placed a five person employee cap on the permit to help lessen traffic impacts but applicant asked to remove the cap. Without defined uses or a capping method, no trip estimate can be made and there is no basis on which to evaluate traffic impacts. **MCC 16.13.030 (A) is not met.**

15. A building illustrated in the site plan straddles the Commercial and Industrial designated portions of the subject property. No industrial uses are allowed or conditionally permitted under the CO zone. Any industrial-use building must be on the industrially designated portion of the property. The hearings officer will not assume, without further detail, that any use remaining after urbanization will be located in a manner that allows adequate development options on significant unused portions of the property. **MCC 16.13.030 (B) is not met.**

16. IC zone development standards are found in MCC 16.09 and, by reference, in MCC 16.24 and 16.26 through 16.34. Many standards contained in the UT zone and ten other applicable chapters may inconsistent with city standards. Applicant has not addressed these standards. City of Aurora objects to this proposal altogether but would prefer development under city rather than county standards. Under the UGBCA the application could be conditioned to meet city development standards to the extent feasible but the record does not contain sufficient evidence to evaluate the feasibility of meeting city standards. **Applicant has not proven that MCC 16.13.030(C) is met.**
17. The CO zone does not allow or conditionally permit industrial uses zone. The IC zone, MCC 16.09.010(A)(33), lists wholesale trade, SIC 50 and 51, except scrap and waste material (SIC 5093) as an allowed use. The SIC manual identifies code 51 as wholesale trade-non-durable goods. The manual lists health food wholesale under sub-code 5149, groceries and related products not elsewhere classified. Vitamins are listed under code 5132. The health supplement use would be allowed in the IC zone but unnamed uses cannot be evaluated. Applicant has not proven that all uses are allowed or conditionally permitted in the IC zone. And, the City of Aurora objects to the proposal altogether, but if it is approved, the city requests a condition requiring applicant to begin the annexation process prior to implementing any use. The one specifically proposed use is listed in the IC zone as a permitted use. Other uses are not identified, and without more detail, **MCC 16.13.030(D) cannot be fully evaluated and is not met.**

MCC 16.13.300

18. Under MCC 16.13.300, comprehensive plan policies applicable to lands in the UT zone anticipate future city annexation and extension of public facilities and services to lands intended for residential, commercial or industrial use. To facilitate an orderly transition to efficient urban development, regulation of land divisions and development proposed prior to urban development is necessary. Development regulations and standards in MCC 16.13.310 and 16.13.320 shall apply to land in the UT zone.

Except as provided below, when land is added to an urban growth boundary, the county shall zone it as follows:

- A. Residential exception areas shall be placed in a UT-5 zone.
- B. Resource land shall be placed in a UT-20 zone.

The county may consider applying a different zone for specific properties upon request of the property owner or city. The purpose and intent of the proposed zone must be consistent with the applicable comprehensive plan designation.

The subject property is within the UGB and is zoned UT-20. No alternate zoning is requested. MCC 16.13.310 and .320 deal with residential development and are not applicable. MCC 16.13.300 does not apply.

AIRPORT OVERLAY ZONE

19. The subject property is within the Aurora State Airport overlay zone. Under MCC 16.21.030, to carry out the provisions of the airport overlay zone, three airport development districts are provided within the airport overlay zone. The outside boundary of these districts is shown on the official zoning map. The airport master plan is used to identify height limits applicable in each district and boundaries between the districts.

According to the state-published 2013 Aurora State Airport Master Plan, chapter 6, Airport Layout Plan drawings, Airport Airspace (sheet 2), Imaginary Surfaces, the subject property is within the airport's 150' horizontal surface. MCC 16.21.030(B), Horizontal Surface District, applies. This district consists of the land, water and airspace above or below the horizontal surface.

1. Use Limitations. Any use, accessory use, building or structure allowed in the underlying zone shall be permitted provided the following requirements are satisfied:
  - a. Except as provided in subsection (D) of this section, no obstruction or object shall penetrate the horizontal surface as defined in MCC 16.21.020.
  - b. Sanitary landfills, sewage lagoons or sewage sludge disposal shall not be permitted closer than 10,000 feet to the airport runway.

Applicant proposes no structures that would penetrate the 150' horizontal surface. No sanitary landfill is proposed or allowed under this application. ODA reviewed the proposal and found that, due to the distance and controlled airspace the development will not pose a hazard to air navigation, and applicant will not be required to submit an FAA form 7460-1 with the ODA or FAA. MCC 16.21.030(B) is satisfied.

OTHER

20. The original health supplement application submitted for director review and agency comment is significantly different than the application presented at hearing. Because of this, the request for agency comments as sent out was inadequate to alert agencies of the range of conditionally permitted uses that might be allowed under the application as presented at hearing. On any appeal, the full range of uses must be specified and supporting evidence must be provided to allow agencies and others an opportunity to comment on the modified application.
21. As presented at hearing, this application intends additional, unnamed uses. The application, as submitted, only alerted the Planning Director to the proposed health supplement business. The notice of this public hearing only alerted surrounding property owners to the proposed health supplement business. Hearing notice was ineffective given the range of conditional

uses that might be allowed under the application as explained at hearing. On any appeal, applicant must include all requested uses with substantial supporting evidence addressing all applicable criteria to allow proper proposal evaluation and proper notice to surrounding property owners.

#### VI. Order

It is hereby found that applicant has not met the burden of proving applicable standards and criteria for approval of a conditional use application to establish a wholesale health supplement business and other unspecified uses in the UT zone have been met. The conditional use application is **DENIED**.

#### VII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 10<sup>th</sup> day of August 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 26<sup>th</sup> day of July 2018.



Ann M. Gasser  
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Jennifer Hoefling, RLT  
2744 Arroyo Ridge Dr. NW  
Salem, OR 97304

Norm Bickell  
2232 42<sup>nd</sup> Ave. SE #771  
Salem, OR 97317

Renata Wakeley  
City Planner  
City of Aurora  
21420 Main St.  
Aurora, OR 97002

Teresa Zimmerlee  
20517 Hwy 99E  
Aurora, OR 97002

Sara Kendrick  
317 Court St. NE  
Suite 203  
Salem, OR 97301

Donald Nerenberg  
P.O. Box 13  
Canby, OR 97013

Joseph Schaefer  
21420 Main St.  
Aurora, OR 97002

Agencies Notified

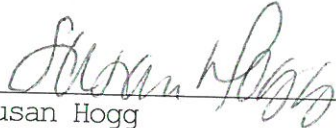
Planning Division (via email: gfennimore@co.marion.or.us)  
(via email: breich@co.marion.or.us)  
(via email: lmilliman@co.marion.or.us)  
Code Enforcement (via email: bdickson@co.marion.or.us)  
Building Inspection (via email: twheeler@co.marion.or.us)  
Assessor (via email: assessor@co.marion.or.us)  
PW Engineering (via email: jrassmussen@co.marion.or.us)  
OR DLCD (via email: angela.carnahan@state.or.us)  
ODOT (via email: odotr2planmgr@odot.state.or.us)  
ODA (via email: jeff.caines@aviation.state.or.us)  
1000 Friends of Oregon (via email: Muriel@friends.org)  
AAC Member No. 6-1 (no members)

Ian Levin  
695 Commercial St. SE #006  
Salem, OR 97301

Bill Graupp  
14629 Ehlen Road NE  
Aurora, OR 97002

Tom Heitmanek  
21354 Liberty St. NE  
Aurora, OR 97002

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 26<sup>th</sup> day of July 2018, and that the postage thereon was prepaid.

  
\_\_\_\_\_  
Susan Hogg  
Secretary to Hearings Officer