

# MEMO

**To:** Ann Gasser, Marion County Hearings Officer  
**From:** Mark D. Shipman, on behalf of TLM Holdings, LLC  
**cc:** Lisa Milliman, Associate Planner  
**Date:** May 1, 2019  
**Re:** Zone Change/ Comprehensive Plan/Conditional Use Case 19-002; TLM Holdings, LLC



TLM Holdings, LLC ("**Applicant**") submitted the consolidated application identified as Marion County Case No. ZC/CP/CU 19-002, requesting a Comprehensive Plan Amendment, Zone Change and Conditional Use Permit (the "**Application**") to develop that certain real property located at 22515 Airport Rd NE in Aurora, Oregon and identified as Tax Lots 800 and 900 on Marion County Assessor's Map No. 04-1W-02D (the "**Subject Property**"). Applicant submits this memorandum to address issues raised in the March 27, 2019 public hearing (the "**Hearing**") and during the open record and rebuttal periods.

**I. The evidence in the record satisfies the transportation system related criteria.**

*a. The trip generation calculations are based on substantial evidence and are consistent with the applicable laws.*

During the Hearing, opponents raised issues with respect to the trip generation calculations in Applicant's Transportation Impact Analysis ("**TIA**"). The amount of net new trips is calculated by determining the total traffic for the new zone based on estimates provided in the ITE Trip Generation Manual and reducing them by the number of daily trips that could be a reasonable worst-case scenario on the Subject Property in the current zone. Applicant's TIA originally determined that a reasonable worst-case scenario on the Subject Property would be a 100,000 square foot church use, which amounted to a reduction of 631 daily trips. Concerns were raised that Applicant's trip generations estimates were inaccurate because: (1) the church use has ceased on the Subject Property; and (2) expanding the church to 100,000 square feet would not be allowable under the Marion County Zoning Code ("**MCZC**").

Applicant revised its trip generation calculations using a 5,000 square foot farm stand as a reasonable worst-case scenario. MCZO 17.136.040(A) authorizes a farm stand as a use permitted subject to standards. The revised trip generation reduces Applicant's impact by 341 total trips, 12 in the AM peak hour and 34 in the PM peak hour based on a farm stand use. Applicant has also revised its proportionate share calculations based on the revised trip generation calculations. Applicant anticipates accounting for 3.1% of the traffic at the OR-551/Arndt Road intersection, 1.9% of the traffic at the OR-551/Ehlen Road intersection, 4.1% of

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the traffic at the Airport and Ehlen intersection, and 6.4% of the traffic at the Airport and Arndt Road intersection. Based on the proposed improvements for those facilities identified in the Marion County Rural Transportation System Plan, the Aurora Transportation System Plan, and the Oregon Department of Transportation Statewide Transportation Improvement Program, Applicant has proposed a proportionate share contribution of \$475,409.00 in order to mitigate the impacts of the proposed impact.

Opponent Joseph Schaefer ("**Schaefer**") argues in his April 23, 2019 comment letter that revised traffic generation underestimates the reasonably expected traffic from a farm stand. Schaefer's comments do not explain how any approval criterion is being misinterpreted or misapplied. Rather, he argues that the traffic estimates used in the revised TIA are incorrect. His comments go to the weight of the evidence to pose a substantial challenge. Schaefer provides no evidence to the contrary. Rather, he simply comments that the evidence submitted by Applicant is incorrect. The record contains substantial evidence to support the revised traffic generation estimates used in the TIA such that a reasonable person can rely on them.

Schaefer's primary argument is that the ITE Manual Land Use Code 817 is an inappropriate basis to use for a farm stand or nursery use. He argues the study in the manual includes urban and suburban nurseries, and therefore, the estimates are inapplicable. Schaefer's comments ignore the fact that the trip generation is intended to be only a reasonable estimate of the projected traffic generation. While the data collected for nursery land uses in the ITE Trip Generation Manual was primarily done in urban and suburban areas, the data collected for all land uses, including the proposed land uses (warehouse and office) were similarly done in urban and suburban areas. Therefore, if the manual overstates the trip generation for land uses in rural areas, it would apply to all land uses equally, not just nursery/farm stand uses. Applicant's Traffic Engineer, Dr. Lacy Brown, is an expert in traffic engineering and submitted a stamped TIA evidencing her confidence in the traffic projections and the methodology used. Clackamas County submitted a supplemental comment letter approving the methodology used in the revised TIA and estimating similar traffic from the farm stand as calculated in the revised TIA. Without any contravening evidence to cite, Schaefer's complaints regarding the quality and accuracy of the revised TIA are not a basis to recommend denial of the Application.

*b. The revised TIA demonstrates that the proposed comprehensive plan map amendment conforms with the TPR rule.*

A written comment letter submitted by the City of Aurora has questioned whether Applicant complies with OAR 660-012-060 (the "**TPR Rule**"). The TPR Rule provides in relevant part:

"(1) if an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would: \* \* \*

(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment. \* \* \*

(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.”

When the transportation facilities at issue are projected to not meet the performance standards, the relevant standard is whether the proposal causes further degradation of the facility. Applicant’s previous TIA found that no significant effect would be realized on the surrounding intersections because the net new trips were not significant enough to degrade operations on the facilities. According to the revised TIA and new trip generation, the proposed project would further degrade operations on three intersections in the short-term (2022): OR-551/Arndt, OR-551/Ehlen, and Airport/Ehlen. In the long-term, the Airport/Arndt, OR-551/Arndt, and OR-551/Ehlen intersections are further degraded with the addition of project trips. No condition of approval has been proposed to expressly limit the traffic generated by the Subject Property, i.e., no trip cap has been proposed. Therefore, the plan amendment will significantly affect the above identified facilities, and the County must put into place one or more of the measures specified in OAR 660-012-0060(2). *Lufkin v. City of Salem*, LUBA No. 2007-259, 2 (2008).

If a land use action significantly affects transportation facilities, a local jurisdiction must put in place measures set out in OAR 660-012-0060(2). That provision states in relevant part:

“If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion. \* \* \*

(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. Local governments shall, as part of the amendment, specify when measures or improvements provided pursuant to this subsection will be provided.”

Applicant's proposed mitigation satisfies OAR 660-012-0060(2)(d). Applicant has agreed to be subject to a condition of approval that requires a funding method in the form of a proportionate share payment which would contribute to funding transportation improvements necessary to ensure the land use is consistent with the identified function, capacity, and performance standards of the facilities, measured at the end of the planning period. *Lufkin*, pg. 5. These measures would be provided to the jurisdiction as a condition of approval, at an appropriate date set out by the jurisdiction, and would completely account for Applicant's effect on the traffic facilities. As a condition of approval, Applicant and the County may enter into a development agreement requiring payment of such proportionate share fees prior to any construction or new uses. The opponent's comments have not explained how any of the proposed mitigation measures will fail to completely mitigate Applicant's proportionate share of the traffic impact and in turn, mitigating Applicant's "significant effect." Here the proposed conditions of approval are all consistent with the relevant improvement goals set out in the Marion County TSP, the City of Aurora TSP, and the ODOT STIP, and no amendments are necessary.

Finally, Applicant has complied with the coordination requirements in OAR 660-012-0060(4). Applicant has conferred with Marion County (the "**County**"), ODOT, the City of Aurora, and Clackamas County about the proposed development, the traffic impacts, and proposed mitigation. Each jurisdiction has received notice of the Application, received an opportunity to comment, and in each case, submitted comments to the County. Applicant has taken specific steps to address the concerns of each jurisdiction. For example, Applicant has added additional improvements to the Airport/Arndt intersection in order to address the suggested improvements in the Aurora TSP. Also, Applicant has had conversations with Aurora officials regarding their concerns regarding the City's desire to bring the airport into the Urban Growth Boundary. Applicant has had conversations with ODOT and obtained a concurrence from Keith Blair, stating ODOT's satisfaction with the revised TIA and mitigation proposals. Applicant has communicated with Clackamas County and they have concurred that Clackamas County is satisfied with the revised TIA and mitigation proposal. Finally, Applicant is in communication with Marion County Public Works in order to obtain approval of Applicant's revised TIA, trip generation, and proposed mitigation.

*c. Comments regarding whether the revised TIA complies with the County's TIA completeness requirements is not a basis for denial of the Application.*

A comment letter submitted by Joseph Schaefer during the response period argued that Applicant's TIA does not comply with the County's TIA requirements because the TIA does not separately break out estimates for anticipated truck trips. The County's TIA requirements are not mandatory approval criteria, but rather they are application completeness criteria. Comments regarding noncompliance with such forms or requirements do not provide a basis for denial of an application. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369, 378 22 (2009). Nonetheless, Applicant's revised TIA conforms to the County's requirements. Separate traffic figures for trucks are required for developments that are expected to generate a significant amount of truck traffic (thirty trucks per day). There is no evidence in the record supporting the position that the proposed Application will result in uses creating anywhere near thirty semi-trucks per day. Applicant anticipates approximately one or two semis per day on the Subject Property.

The letter highlights two scenarios where trucks might be utilized on the Subject Property. First, the letter assumes the site will be used as a fixed-base operator (“**FBO**”) and, as such, will require fuel delivery trucks. While Applicant hasn’t committed to locating an FBO on the Subject Property, if fuel was needed to be stored on-site, there is no evidence supporting that the argument that fuel would be delivered on a daily basis, which is not customary. Similarly, Applicant’s engineers have rebutted the assertion that daily truck trips are needed to serve the site’s wastewater needs. Applicant has demonstrated that there are multiple feasible options to treat wastewater. Moreover, should sewage be stored in storage tanks and trucked off-site for processing, pumping of those materials into a truck would likely occur twice a month. Opponent’s comments do not contradict the traffic assumptions included in Applicant’s revised TIA, which includes truck traffic needed for the site’s operations.

**II. The evidence in the record satisfies the conditional use criteria.**

*a. Airport-related uses and emergency service stations are allowed conditional uses.*

During the Hearing, the Hearings Officer raised questions about what conditional uses are being requested in the Application and how those uses should be evaluated. MCZC 17.171.030 provides the allowed conditional uses enumerated within twelve subsections. Subsection A authorizes “[a]irport and airport-related commercial and industrial uses,” and Subsection L authorizes “[f]ire and emergency services stations and police substations; training facilities, administrative offices and living quarters for fire, emergency, and police services exceeding 20 full-time persons and 200 day-use visitors.” Applicant’s requested conditional uses are for airport-related commercial and industrial uses and fire and emergency service stations. Additional specificity as to the subtype of airport-related uses or emergency service stations is not needed under the code, and Applicant’s request for the proposed conditional uses is consistent with the plain text of the code.

MCZC 17.119.070 sets out the review criteria for granting a conditional use. The review criteria are:

*“(A) That [the director, planning commission, or hearings officer] has the power to grant the conditional use;*

*(B) That such conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;*

*(C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.”*

*b. The Board of Commissioners has authority to issue a consolidated approval of the Application.*

Marion County Rural Zoning Ordinance gives the Planning Director the authority to grant the conditional use in this case. However, Applicant agrees with staff’s analysis that the conditional use is dependent on the comprehensive plan map amendment, which is subject to the exclusive jurisdiction of the Board. Therefore, under a consolidated application, the Board

has the authority to issue the conditional use application concurrent with the proposed Application upon a finding that the evidence satisfies the criteria for the comprehensive plan map amendment and zone change.

*c. Airport-related uses are in harmony with the Public zone.*

Applicant has submitted a list of potential specific uses for the airport and airport-related commercial and industrial uses relating to the conditional use permit application. When examining all the evidence in the record, it is clear that locating airport-related commercial and industrial uses on the Subject Property is in harmony with the purpose and the intent of the Public zone. Many of the identified uses are taking place on other properties located within the Public zone at the Aurora Airport. Each use is specifically tailored to support the airport, or other airport-related businesses. Many of the uses are related to manufacturing, sales, and service of airplanes and airplane-related accessories. For example, Van's Aircraft, located to the south of the Subject Property, sells RV aircraft kits, which allows customers to purchase and assemble their own RV aircraft. Van's also sells fully assembled RV aircraft as well. Also located at the Aurora Airport, Aurora Aviation offers private aircraft sales, maintenance, and private charter services. Additionally, Metal Innovations is located at the Aurora Airport, southwest of the Subject Property. Metal Innovations serves as an FAA repair station and also designs and manufactures custom helicopter blades used by several helicopter users at the Aurora Airport. To the north of the Subject Property, Pacific Coast Avionics markets, sells, installs, and repairs avionic equipment for private aircraft including emergency locator transponders. On the north portion of the airport, Willamette Aviation Services serves as an FBO for the General Aviation Community. Willamette Aviation includes aircraft rental, discovery flights, flight training programs, flight simulations, an aviation fuel service station, aircraft maintenance, FAA medical exams, airport hangars, and a pilot supply shop. The Aurora Airport is home to two heavy-lift helicopter companies, Columbia Helicopters and Helicopter Transport Services. Several companies, such as Winco, Inc., operate hangars related to larger businesses. Life Flight Network currently occupies hangar and office space in the Aurora Airport to coordinate and operate critical care transport and emergency air ambulance services throughout the northwest. The record demonstrates that authorizing airport-related commercial and industrial uses on the Subject Property will be in harmony with the Public zone at the Aurora Airport because the preexisting development pattern demonstrates such uses serve the public and semi-public use of the airport.

*d. The fire and emergency service station are in harmony with the Public zone.*

In its updated site plan, Applicant has also identified a portion of the Subject Property for a fire station and emergency operations center. Similar to the airport-related uses, the fire station and emergency operations center support the public and semi-public uses allowed in the Public zone at the Aurora Airport. It is common for airports to have a dedicated emergency response unit primarily dedicated with serving the airport and surrounding area. This allows for a quick response should emergency service be needed on the runway or other airport facilities. Moreover, a fire station and emergency response center are themselves public uses. Therefore, the evidence in the record demonstrates that the fire and emergency service station use is in harmony with the purpose and intent of the zone.

- e. *Failure to comply with development standards is not a basis for denial of the conditional use application.*

A comment letter submitted by Schaefer incorrectly stated that in order for the proposed conditional use to be approved, the application must satisfy MCZC 17.171.060(J). As stated above, the review criteria for approval of a conditional use is set out in MCZC 17.119.070. The provision Schaefer refers to, MCZC 17.171.060(J) is a property development standard that is required to be satisfied prior to the issuance of a building permit. Failure to demonstrate compliance with development standards not a basis to deny the issuance of a conditional use permit.

- f. *The record demonstrates that compliance with the development standards is feasible.*

Assuming for the purpose of argument that the development standards are relevant to the Application and without waving any argument to the contrary, the appropriate standard of review is whether compliance with such standards as a condition of approval is feasible. As the staff report concludes, compliance the development standards in MCZO 17.171.060 will be applied during the permitting process and can be ensured through conditions of approval. The record demonstrates that compliance with these standards is feasible.

The Subject Property is of adequate size that conformance with height, setback, and lot coverage standards is feasible. The proposed site plan, which demonstrates a possible development pattern, complies with these standards. Thus, Applicant has demonstrated that compliance with MCZO 17.171.060(A)-(G) is feasible. Applicant satisfies this criterion by submitting a TIA and is working with Marion County Public Works to obtain approval of the TIA.

Applicant's engineers have submitted comment letters explaining how the Subject Property can accommodate DEQ's stormwater and wastewater requirements. There is no contradictory evidence in the record. Therefore, Applicant has demonstrated that compliance with MCZO 17.171.060(H) and (I) are feasible.

MCZC 17.171.060(J) requires Applicant to "[d]emonstrate that the development will be consistent with the identified function, capacity, and level of service of transportation facilities serving the site. A transportation impact analysis, approved by the Marion County department of public works, may be required prior to building permit approval." In this case, Applicant has completed and submitted a revised TIA to ensure that the project's effect on the surrounding facilities will be mitigated. Applicant will mitigate the impact on the surrounding facilities through conditions of approval, including a development agreement ensuring the proportionate share contribution is satisfied. Applicant has demonstrated this criterion, as conditioned, can be satisfied and such mitigation actions are feasible.

**III. The Urban Growth Boundary Coordination Agreement between the City of Aurora and Marion County does not relate to any specific review criteria and is not a basis for approval or denial of the Application. Nonetheless, the County has appeared to comply with the agreement with respect to the proposal.**

- a. *The Urban Growth Boundary Coordination Agreement does not relate to any specific review criteria or provide a bases for approval or denial.*

At the Hearing, a question was raised about the whether the Subject Property is located within an Area of Mutual Concern as identified in that certain City of Aurora/Marion County Urban Growth Boundary Coordination Agreement dated September 10, 2010 (the "**Coordination Agreement**") and how that would affect the Application. The Coordination Agreement provides the City with opportunity to respond to and make recommendations about land use proposals in the Urban Growth Area (the "**UGA**") and Area of Mutual Concern (the "**AMC**"). The Coordination Agreement does not relate to any specific approval criteria and does not provide a basis for approval or denial of the Application. The Coordination Agreement has not been adopted or incorporated into the Marion County Comprehensive Plan. Further, no one has raised any objection to the Application based on the Coordination Agreement, argued that the Coordination Agreement has been breached, or argued that the Coordination Agreement provides a basis to deny the Application.

*b. Marion County has complied with its obligations in the Coordination Agreement with respect to the Application.*

The Coordination Agreement was previously submitted into the record by the City of Aurora on or about April 9, 2019. There are two land areas addressed in the Coordination Agreement, the UGA and the AMC. The UGA is defined as the area between the city limits of Aurora and the urban growth boundary. The Subject Property is located outside of the Aurora city limits and the urban growth boundary, so the provisions of the Coordination Agreement involving the UGA do not apply to this Application. The AMC is identified in Exhibit A of the Coordination Agreement and does appear to include the Subject Property.

Section V of the Coordination Agreement provides that Marion County and the City of Aurora have agreed to coordinate land use decisions within the AMC in the following ways:

"1. The County shall retain responsibility for land use decisions and actions concerning and affecting lands within the AMC.

2. The County shall provide notice and request for comments of pending land use actions within the AMC to the City at least 20 days before the initial evidentiary hearing or land use decision when no public hearing is held. Where the first scheduled action on a proposal is a public hearing and the City responds in writing within 10 days requesting additional time in which to review the proposal, the City's time for submitting comments may be extended until the next regularly scheduled hearing before that body. If no additional hearing is involved, the City shall be allowed an additional 10 days to submit comments.

3. The County shall discourage development and zone changes that would preclude future redevelopment and urbanization of the area. the County shall encourage applicants for land divisions to submit plans for the efficient future re-division of the land to urban densities.

4. The County shall send notice of land use decisions within the AMC to the City when requested by the City, when such decisions are issued. Applicable appeal periods set by County ordinance or State statute shall apply to such decisions.



5. The County shall send notice of public hearings to the City within the times prescribed by County ordinance or State law prior to hearings on appeals of such decisions, when requested by the City.

6. The City may at its discretion develop studies as to the suitability, feasibility, and effectiveness of extending urban facilities such as water and sewer service to land within the AMC. Such studies shall not be construed by Marion County or others as being a violation of the City's or County's Comprehensive Plans. The City will not, however, extend such facilities into this area without first obtaining appropriate amendments to the City and County's Comprehensive Plans. This provision is intended to recognize that certain facility planning requires consideration of timetables that extend beyond the 20-year planning period recognized in the City Plan and it is therefore appropriate for specialized facility planning to be undertaken for the area."

All of these requirements appear to have been satisfied. Marion County retains responsibility and jurisdiction for the land use decision that is the subject of the Application. The County provided notice and request for comment to the City of Aurora on or about February 19, 2019, more than 20 days before the Hearing. The proposed development of the Subject Property is for the purpose of urbanization of a piece of property that has been unfarmable for decades and hasn't been utilized for at least a year. Approving the Application would encourage development and urbanization of the area, consistent with the spirit of Section V, 3 of the Coordination Agreement. The County will presumably send notice of the land use decision within the AMC to the City of Aurora if requested and will send notice of public hearings to the City of Aurora within the times prescribed by County ordinance and state law, if requested. Finally, Section V, 6 of the Coordination Agreement states that the City of Aurora "may at its discretion develop studies as to the suitability, feasibility, and effectiveness of extending urban facilities such as water and sewer service to land within the AMC. . . . The City will not, however, extend such facilities into this area without first obtaining appropriate amendments to the City and County's Comprehensive Plans." The City has not, to Applicant's knowledge, yet undertaken the feasibility study regarding further extending the Urban Growth Boundary.

The Coordination Agreement has been fully complied with respect to the Application, and the City of Aurora has received proper notice and opportunity to comment on the Application for the Subject Property, which is contained in the AMC.

#### **IV. Conclusion**

Applicant appreciates the opportunity to respond to comments and provide additional argument on these issues. Applicant and its project team believe Applicant has satisfied all mandatory approval criteria for the Application and requests a recommended approval of the Application consistent with the recommendation in the staff report.