

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding an application Edward Christensen for)	<u>FINAL ORDER</u>
conditional use approval for a dog boarding kennel and)	<u>ON REMAND</u>
nonconforming use approval of an existing structure)	Z0054-24-C and
on a 5.25-acre parcel at 27320S. Pelican Court in)	Z0055-24-NCU
unincorporated Clackamas County, Oregon)	(Huffman K9)

A. SUMMARY

1. Edward Christensen acting on behalf of the property owners, Eve Godbold and Jensen Huffman (the “applicants”), requests conditional use approval to establish a dog boarding kennel that will accommodate up to 16 dogs. Eight kennels are proposed within an approximately 750 square foot portion of an existing building and eight other kennels will be in a proposed 650 square foot building. Each kennel includes an attached outdoor area.

2. The applicants also request Nonconforming Use approval of an existing structure that does not conform to the minimum setback requirements of the current regulations. The applicants propose to use a portion of the nonconforming structure for one of the sets of eight dog kennels. The remaining kennels will be located in a new building to be constructed on the site. (Exhibit 2 at 54).

3. The nonconforming use application only applies to the existing structures on the site; the CUP is a separate permit proposing a new use that is permitted as a conditional use in the EFU zone. (ZDO Table 401-1).

4. The applicants currently conduct dog training on the site, and will continue to do so. Dog training is a permitted use on the site, subject to the limitations of ZDO 401.05(D)(6). A conditional use permit is not necessary for the frequency and size of dog training classes the applicant conducts.¹

5. The proposed kennel and nonconforming structure are located on a 5.25-acre parcel located at 27320 S. Pelican Court; also known as tax lot 00523, Section 20, Township 4 South, Range 1 East, of the Willamette Meridian, Clackamas County (the “site”). The site and all surrounding properties are zoned EFU (Exclusive Farm Use).

6. Clackamas County Hearings Officer Joe Turner (the “hearings officer”) held an online public hearing about the application on June 27, 2024. County staff recommended that the hearings officer approve the application, subject to conditions. County Staff, the applicants, and area residents testified orally and in writing about the application. The

¹ ZDO 401.05(D)(6) limits dog training facilities to a maximum six classes per day and a maximum ten dogs per class.

hearings officer approved the application by Final Order dated July 15, 2024. (Exhibit 42).

7. Neighboring residents Kevin and Vicki Guay appealed the hearings officer's decision to the Land Use Board of Appeals ("LUBA"). Following a hearing before the Board, an order was entered remanding the July 15, 2024, decision to the hearings officer to make additional findings regarding farm uses and practices on surrounding lands and the impacts of the proposed nonfarm use on each farm practice, including the potential waste water impacts on surrounding farm uses. See the Final Opinion and Order LUBA No. 2024-050 dated December 12, 2024 (the "LUBA Decision", Exhibit 43).

8. The hearings officer held a remand hearing limited to the issue of whether the proposed use complies with ZDO 401.05(A)(1) and ORS 215.296(1). The hearings officer allowed all interested parties to submit additional argument and testimony regarding this issue. County staff, the applicant, the property owners, their attorney, and the Guays testified at the remand hearing.

9. Based on the additional findings in this Final Order on Remand the hearings officer finds that:

a. The applicants identified existing farm operations on lands surrounding the site, the accepted farm practices on each farm, and the potential impacts of the proposed nonfarm use on each farm practice; and

b. The applicants sustained their burden of proof that the proposed dog kennel will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use; specifically that:

i. The kennel use will not create a significant risk of surface water, groundwater, or soil contamination that could impact farm operations on surrounding properties;

ii. The proximity of the kennel to the adjacent Guays property will not significantly impact potential future livestock operations on that property;

iii. The kennel will not increase, and will likely reduce, the amount of dust generated by vehicle traffic on the gravel surfaced Pelican Court;

iv. Alleged impacts to the value of surrounding properties will not significantly impact or increase the cost of farm operations on those lands; and

v. The County has the ability to monitor and enforce compliance with the conditions of approval.

10. Based on the findings provided or incorporated herein, the hearings officer finds that the applicants sustained the burden of proof that the proposed use does or can comply with the relevant approval standards of the Clackamas County Zoning and Development Ordinance (the “ZDO”), provided the applicants comply with conditions of approval recommended by County staff or warranted by the facts and law to ensure the proposed use does comply in fact with those standards. Therefore the hearings officer approves the application subject to the conditions at the end of this Final Order On Remand.

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at the public hearing about this application on June 27, 2024. All exhibits and records of testimony are filed at Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the declaration required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The following is a summary by the hearings officer of selected testimony at the public hearing.

2. County planner Melissa Lord summarized the history of the application and remand. She noted that LUBA remanded the application solely regarding whether the application complies with the farm impact test of ZDO 401.05(A)(1) and ORS 215.296(1). LUBA required that the County identify farming operations on surrounding properties, the farm practices on those farms, and the potential impacts of the proposed use on those practices. The applicants submitted a packet of new evidence addressing that issue, Exhibit 44a – 44l.

3. Attorney Mike Connors, property owner Jensen Huffman, and engineer Edward Christensen appeared in support of the application.

a. Mr. Connors noted that LUBA denied all but one of the Guay’s assignments of error. The remand is limited to whether the application complies with the farm impact test of ZDO 401.05(A)(1) and ORS 215.296(1). The Court of Appeals decision in *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 435 P3d 698 (2019) defines the farm impact test. The applicants must identify farms and farm practices within a defined analysis area around the site and how the proposed use may impact the identified farm practices. Impacts to farming operations must be significant and the County must consider whether conditions can be imposed to limit such impacts.

i. The majority of the Guays objections relate to impacts from the presence of dogs on the site, not the impacts of the kennel operation itself. However, dog training is a permitted use in the EFU zone and Huffman K9 has been operating a dog training facility on the site for the past five years. The proposed kennel is associated with and intended to support the dog training facility by allowing the applicants to board dogs on the site overnight while they are being trained. This will reduce the number vehicle trips generated by the use, as dog owners will not need to bring their dog to the site for

training, pick them up afterwards, and return them for more training the following day. The Guays argue that urine and fecal waste generated by dogs on the site will flow onto their property located east of the site and contaminate their hazelnut crop. However, waste generated by dogs on the site for training has not caused any impacts to the Guays' farm practices or costs during the past five years of operation of a dog training facility on the site.

ii. The applicants submitted a wastewater plan and applied for a Confined Animal Feeding Operations ("CAFO") permit from the Oregon Department of Agriculture ("ODA"). Generally the ODA only requires CAFO permits for operations that generate more than 100 gallons of wastewater per day; the applicant's kennel will generate roughly four gallons per day. However, the applicants worked with the ODA and the ODA agreed to process and issue a CAFO permit for this use. The ODA agreed that the applicant's draft plan meets their requirements, with the exception that the applicants dispose of any wastewater generated by mopping of the kennels in a grassy area on the site, which the applicants agreed to do. The ODA cannot process or issue a CAFO permit until the County approves the CUP for this use and a Land Use Compatibility Statement ("LUCS"). He agreed to a condition of approval requiring the applicants to obtain a CAFO permit for this use, unless the ODA refuses to issue a permit due to the limited volume of waste generated by this use.

(A) Employees of the applicants immediately collect dog and dispose of feces produced on the site. Waste is bagged and placed in trash cans for disposal as solid waste. The applicants have been doing that for the past five years while operating a dog training facility on the site. The applicants use veterinary soap that kills bacteria and viruses to clean the kennels and indoor training area. The applicants collect and properly dispose of the wash water. The sink inside the kennel building is not connected to the septic system. It discharges to a tank or bucket for disposal consistent with ODA requirements.

(B) The Guay's concerns about contamination from dog waste and impacts to livestock are speculative. There is no evidence of any such impacts occurring during the past five years of dog training operations on the site and despite the existence of numerous dogs on other properties in the area. The Guay's unsubstantiated concerns are not substantial evidence.

(C) The CAFO permit will require sampling and testing of soils to ensure contamination does not occur.

(D) The surface pond on the Guays' property is frequented by hundreds of ducks and geese, which presents a much higher risk of water contamination than dogs being housed on the site far away from the Guays' pond.

iii. The applicants submitted a topographic map of the area showing that the site drains to the southwest, away from the Guays' property. (Exhibit

44g). There are a number of existing sources of animal waste on the Guay's property, from the Guay's own dogs and chickens as well as from neighbor's dogs and wildlife, including coyotes, racoons, and geese that frequent the pond on the Guays' property. The Guays' property is not enclosed to limit access from neighbor's dogs and wildlife.

iv. The proposed kennel will not generate additional noise from barking dogs, as there are many dogs living on surrounding properties, including the Guays' property, and dogs are currently being trained on the site. The applicants takes steps to control barking by dogs being trained or boarded on the site. The proposed kennels will be enclosed and insulated to limit noise detectable outside of the buildings. The applicants submitted a noise study demonstrating that the use will not exceed County noise limitations and will not impact farm operations. (Exhibit 31).

v. The proposed kennel use does not pose a risk of dogs escaping from the site and interacting with livestock or other agricultural activities on surrounding properties. The applicants has been operating a dog training facility on the site for the past five years and no dogs have escaped from the site, other than the applicant's own livestock dog, which is not related to the proposed kennel or existing dog training facility. Dogs in training are always controlled by leashes handled by trainers. Dogs are only allowed to be off leash when they are inside the enclosed kennel or training buildings, as the applicants cannot risk allowing customers' dogs to escape. The applicants has installed additional fencing on the site. (Exhibit 44j).

vi. The proposed kennel use will not cause anxiety for livestock on surrounding properties. Dogs are common in the area the applicants has been operating a dog training facility on the site for the past five years without any evidence of livestock impacts.

vii. There is no evidence in the record that the use will have any adverse impact on the value of surrounding properties and property values are not relevant to the CUP criteria, citing *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

viii. Dog training is a permitted use in the EFU zone, which indicates a legislative determination that dogs are not *per se* incompatible with farm uses and operations.

ix. The proposed kennel use is not nonconforming; only the buildings are nonconforming with regard to current setback requirements. The County confirmed that the buildings were legally established and continued without interruption, so that issue is not relevant to this remand proceeding.

b. Mr. Huffman testified that they make an effort to ensure that their use does not impact neighboring properties or residents.

c. Mr. Christensen testified that he is a licensed civil engineer. He surveyed the entire site and determined that runoff from the site drains to the ditch on Pelican Court, which then flows south, crosses Pelican Court in a culvert that discharges to a drainage easement on the Canby Needy plat. Runoff from the site eventually flows into the Pudding River via Bear Creek and Rock Creek. The Guays' property drains southeast to Gribble Creek. There is a roughly one-foot vertical separation between the site and the Guays' property.

i. The dead trees on the Guay property are likely due to ponded water in that area.

ii. The kennel building is located 12.44 feet from the east boundary of the site, exceeding the minimum ten-foot setback required by the current code. The training building is nonconforming with regard to setbacks but it is allowed to remain, as it predates setback requirements.

4. Kevin Guay summarized his written testimony. (Exhibit 45). He testified that he and his wife grow hazelnuts and raise livestock on their 34-acre property east of the site. They purchased their property in 2002. The proposed dog kennel will force a significant change in, and significantly increase the cost, of their farm practices.

a. The existing training operation and the proposed boarding kennel are interconnected and should be subject to the same review.

b. Waste from dogs housed and trained on the site may flow onto their property and contaminate their hazelnut crop, soil, and surface and groundwater on their property. The applicants dump mop water from the kennel near their property. Not all dog waste is picked up from the site. Hazelnuts fall to the ground when they are ready and remain on the ground for up to several months, sometimes sitting in standing water prior to harvest. Harvested nuts are mixed with nuts from other farms to be cleaned, dried, and stored prior to sale for human consumption. Stormwater may carry dog waste from the site onto their property and contaminate their nuts. Dog waste may contain toxic pathogens, viruses, and bacteria and may remain in the environment for up to a year, according to the EPA. Hazelnuts contaminated by dog waste would be unsafe for human consumption.

i. Willamette Hazelnut CEO Michael Severeid expressed concern with the proximity of the kennel building to their hazelnut orchard and believes that there is a real possibility that runoff may carry dog feces onto their property and contaminate their crop. There is a possibility that Willamette Hazelnut would not purchase their nuts, rendering their nuts unmarketable. (Exhibit 45c at 106).

ii. The USDA has the right to enter their property and conduct an inspection if they have any suspicion of potential crop contamination and they have the authority to shut down their hazelnut operation if contamination is discovered.

iii. Mr. Severeid also noted dead and dying trees near the applicant's kennel and opined that there is a possibility that nitrates from dog feces could be killing the trees. (Exhibit 45c at 106).

iv. In the *Stop the Dump* case, the court noted that odors and visual impacts of the dump on sales of adjacent farm crops was a real concern and the same reasoning applies here.

v. Testing of nuts and soil for contamination is costly and difficult, due to the need for expert consultants, making testing impractical and economically unfeasible.

vi. Jeff Rumpca, the operator of their hazelnut orchard, also expressed concern with potential soil and crop contamination given the close proximity of the kennel to their property and liability associated with such contamination. He opined that "it is not worth the risk" and he may terminate his contract with them. (Exhibit 45c at 103).

c. The proposed kennel facility will impact their livestock. Barking dogs can stress livestock. Cows may push against fences in an effort to escape from the sound of barking. They have had lambs born prematurely, possibly due to stress. When he hears barking from the site his cows are bunched up in the southeast corner of his property, away from the site, pushing against the fence and not grazing. His current pasture is located approximately 100 feet from the kennel and training facility. The proximity of the kennel building housing eight to sixteen dogs directly adjacent to his property will prevent him from using this portion of his property for livestock when the current hazelnut trees are no longer productive. Fencing the site will not eliminate stress to their animals. Dogs may escape from the site and chase, injure, and kill livestock. There are dogs on other properties in the area, but they are not confined to kennels next to his property. In addition, livestock can become accustomed to resident dogs. However, the applicants will house different dogs all the time, preventing his livestock from acclimating to the dogs.

d. The kennel buildings directly abut their property and do not comply with current setback requirements. They can hear barking and smell odors from dogs housed inside the kennel.

e. The applicants have been operating their training facility in violation of the Code; a former employee "turned them in" to the County.

f. Responding to this application and pursuing their LUBA appeal has cost them significant time and money and diverted them from their farm operations.

g. The applicants propose to dispose of kennel wash water by dumping it on the ground, which could result in groundwater contamination. Groundwater levels in this area are very shallow, within 18 feet of the surface, and perched groundwater is located within 18 inches. Surface water often ponds on Pelican Court before flowing towards their pond and well. Other dog kennels are equipped with catchment systems to collect urine and feces for offsite disposal.

h. The boarding kennels should be located in the middle of the site, away from adjacent farm operations.

5. Vicki Guay argued that dog feces may contaminate their property and the applicants has not established a proper waste management plan. The floor of the outdoor portion of the kennels will be surfaced with rubber mats on top of gravel, which will allow urine and feces to seep into the ground. The indoor portions will be surfaced with concrete, but the kennels are not water tight and there is no catchment system to collect and contain runoff from the floors. There is no evidence that the existing septic system on the site will provide adequate treatment of dog waste. The kennels are located in very close proximity to their property. The aerial photos in the record show dead trees near the kennels, which may be caused by nitrates contained in dog waste from the site. (Exhibits 44c and 44l).

a. The hydric soils on the site are not suitable for proper waste management. Hydric soils are often associated with wetlands, standing and ponding water, and high groundwater. Runoff from the site may carry bacteria from dog urine and feces on this site onto their property, contaminating their stock pond, groundwater and irrigation wells, and their hazelnut crop.

b. The proximity of the kennels to their property limits potential farm operations on their property, due to potentially contaminated runoff and impacts to livestock in the portion of their property near the kennels.

c. Traffic on Pelican Court will generate dust that could contaminate their property. Road dust is different than field dust, as it may contain oil and other contaminants from vehicles and dust suppression chemicals.

6. At the end of the public hearing, the hearings officer held the record open for three weeks, subject to the following schedule:

a. For one week, until May 1, 2025, to allow all parties the opportunity to submit new testimony and evidence;

b. For a second week, until May 8, 2025, to allow all parties the opportunity to respond to testimony and evidence submitted during the first week; and

c. For a final week, until May 18, 2025, to allow the applicants to submit a final written argument.

7. The record in this case closed at 4:00 p.m. on May 18, 2025. Exhibits 45 through 49 were submitted during the open record period.

C. FINDINGS

1. LUBA remanded this CUP decision for the sole issue of determining whether the proposed use complies with the farm impacts test set out in ZDO 401.05(A)(1) and ORS 215.296(1), to determine whether the use “a. Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and b. Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.” Concerns related to compliance with the conditional use criteria in ZDO 1203.03 and wastewater treatment provisions of ZDO 1006.05 were addressed in the prior decision and affirmed by LUBA or waived the Guays. The hearings officer has no authority to reconsider those issues in this proceeding.

2. In addition, impacts from the applicant’s existing dog training operations are not relevant to this application. Dog training is a permitted use in the EFU zone, subject to the criteria in 401.05(D)(6). (ZDO Table 401-1). Only the proposed boarding kennel is subject to conditional use review and the farm impact test criteria in ZDO 401.05(A)(1). (*Id.*) However, the fact that the applicants has been operating a dog training facility on the site for more than five years without causing impacts to farm operations and activities is evidence relevant to whether the kennel use will result in such impacts.

3. The applicants identified existing farm operations on lands surrounding the site, the accepted farm practices on each farm, and the potential impacts of the proposed nonfarm use on each farm practice.

a. Existing farm uses include the production of hay, Christmas trees, hazelnuts, grass seed, apples, and “commercial trees” (nursery stock); grazing of cattle, horses, and mules; raising chickens for egg production, and horse boarding. (Exhibits 44c and 46b). The applicants raise sheep and goats on their property. (Exhibits 2 at 24, 2a at 15, Exhibit 30 at 3). The Guays provided additional evidence regarding current and potential future farm operations and practices on their property abutting the east boundary of the site. They currently raise hazelnuts and graze livestock on their property. (Exhibits 45a). They will remove the current hazelnut trees in the future, when they cease to be productive. At that point they will either replant new hazelnuts or expand their current livestock operation by converting some or all of the current hazelnut orchard to livestock.² (Exhibit 45b at 7, 45f at 1, and 45h at 1).

² The applicants states that the Guays proposed to raise sheep. (Exhibit 49). However, the hearings officer did not see any reference to sheep in the Guays’ plans. They only refer to expansion of their current “livestock” operation. (Exhibit 45b at 7, 45f at 1, and 45h at 1).

b. Accepted farm practices on properties in the area include:

i. Growing, cutting, drying, baling, and collection of hay, application of fertilizer and weed control, and periodic tilling and reseeded of grass for continued hay production;

ii. Grazing of cows in fenced pastures and slaughter by mobile butcher or by transport to a slaughter and processing facility;

iii. Housing and feeding of horses in stalls with daily “muck out” or on fenced pastures with access to shelter;

iv. Chickens are allowed to free range during the day and confined to coops at night;

v. Christmas trees are planted, pruned and shaped as needed, and harvested when mature, either for bulk sale or for public U-Cut. The ground around the trees is sprayed periodically to control weeds.

vi. Hazelnut trees are pruned in the winter and spring, fertilized in the spring and fall, and sprayed with pesticides periodically throughout the year to control pests and diseases. The ground around the trees is sprayed and/or mowed to control weeds and facilitate the harvest of nuts from the ground. Fallen nuts are collected and sent to a processor where they are combined with nuts from other growers for cleaning, drying, processing, and sale for human consumption.

vii. Grazing of mules as pets or for recreation;

viii. Apples are grown for public U-pick;

ix. Various types of “commercial trees” (nursery stock) are planted in the winter, sprayed throughout the year, harvested when mature, and sold for resale at garden centers and home stores.

x. The Guays’ potential future livestock operation may include purchase of livestock from other farms, breeding livestock, creating feeding and watering stations and multiple pastures for rotational grazing, providing shelter and birthing pens, and buildings or other facilities for storage of hay and grain.

(Exhibits 45b at 5 and 7, 46b, and 46c).

4. The hearings officer finds that the 16 dog kennels proposed in this application will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use.

Sanitation and pollution.

5. The hearings officer finds that the proposed kennel use will not create a risk of surface water, groundwater, or soil contamination that could significantly impact farm operations on surrounding properties. There is no dispute that contamination of the Guays' hazelnut crop would result in significant impacts to, and significantly increase the cost of, their farm operations. (Exhibits 45c at 15-33, 46-54, 103-106, & 141-150). However, the evidence in the record demonstrates that the applicant's dog training use has not caused, and the proposed kennel will not cause, contamination of the Guays' crop.

a. As noted above, the existing dog training use is permitted and the hearings officer has no authority to impose conditions on that use. This review is limited to the proposed kennel facility. The fact that the kennel facility is related to the training use, allowing the applicants to keep dogs on the site overnight for training on subsequent days, does not make the training operation subject to conditional use review.

b. Dogs in the kennel will be confined inside of a building or roofed and walled runs, where feces and urine are not exposed to rain and runoff. (Exhibit 2 at 20, 44b at 2, 44j at 1, and 44i). The interior portion of the kennels are surfaced in concrete. (Exhibit 2 at 20). The outdoor runs attached to the kennels are surfaced with gravel covered by rubber mats. (Ms. Guay testimony and Exhibit 45a at 2). As discussed on the applicant's waste management plan (Exhibit 2 at 20-21), the applicants staff pick up feces by hand and store it in waste containers which the local solid waste provider collects and disposes on a weekly basis. Dog feces are not disposed of in the septic system serving the site. (Exhibit 46a at 2). The applicants' staff clean the kennels with veterinary cleaners and use mops, rather than hoses that could generate runoff. (Applicants' testimony and Exhibit 46a). The applicants collect and dispose of kennel wash water in a sink that is connected to a bucket or tank, which will then be disposed of in a grassy area on the site roughly 180 feet from the Guays' property, as recommended by the ODA. Kennel cleaning will generate roughly four gallons of wash water per day; 1,465 gallons per year. (Exhibits 44b, 44e, 44f, and 47a at 10). There are no barriers, gutters, or catchment system around the edges of the kennel floor; therefore, limited amounts of wash water may flow off of the floors onto the ground where it can infiltrate into the soil. (Exhibit 45b at 8). The kennel building is located more than 12 feet from the nearest property line. (Exhibit 47a at 3). The area between the kennel building and the property line is vegetated with trees. (Exhibits 2a at 33, 44h, 44i, 44j, and 44l).

i. The dog training building is located much closer to the property line than the kennel building. (Exhibits 47a at 3 and 8-10). However, the training building is not relevant to this CUP application for a dog kennel as dog training is a permitted use on the site. However, the applicants have been washing the floor of the training building and disposing of the resulting wash water on the site without impacting adjacent properties. (Applicant testimony).

c. The applicants submitted a draft CAFO permit application to the ODA, which the ODA agreed to process even though the use produces significantly less than the 100 gallons of waste per day limit where a CAFO permit is normally required. ODA staff visited the site on two different dates in March to determine the feasibility of on-site waste disposal. (Exhibits 44b, 44d, 44e, 44f, 47a, and 47f). The soils on the site can accommodate infiltration of waste water (Exhibit 47a 5-7). The CAFO program is intended to implement state and federal laws addressing surface and groundwater contamination. (Exhibit 47f). The ODA will not process or issue a CAFO permit until the applicants obtain a Land Use Compatibility Statement (LUCS) from the County, which cannot occur without approval of this CUP application. (Exhibits 44b and 49).

d. This rural area is frequented by a variety of wildlife including coyotes, racoons, possums, deer, and other animals. Geese frequent the pond on the Guays' property. The Guays' property is not fenced to exclude these animals. Any wildlife that access the Guays' property are likely to generate urine and feces directly onto the property, including the Guays' hazelnut orchard and surface pond. (Applicants' testimony and Exhibit 49). In addition, dogs reside and generate waste on many surrounding properties. (44l).

e. The applicants have been operating a dog training facility on the site for more than five years. Dogs in training are relieving themselves on the site, producing urine and feces in the field and within the training building without impacting farm operations on surrounding properties. (Exhibits 2, 2a, 47a, and 49). The Guays argue that nitrates and other contaminants in dog waste generated on the site impacted the health of trees near the kennel building. (Guays' testimony and Exhibits 45f at 2 and 8, 48 at 2, citing Exhibits 44c and 44l). However, older aerial photos show the trees in this area were declining before the applicants purchased the site and began their dog training operation. (Exhibit 47e). In addition, the trees and other vegetation on the site, between the kennel and the Guays' property appear to be thriving and unaffected by any runoff from the kennel. (Exhibits 46d, 46e, and 47e). Hazelnut trees will not thrive in areas with high groundwater, standing water, and wet soils. (Exhibits 45c at 44-45, 47a at 9, 47c, and 47d). The portions of the Guays' orchard where trees are dying aligns with the mapped finger of Dayton silt loam soils, which have a much lower rate of infiltration compared to the Amity silt loam soils in the area. (Exhibits 45c at 63-73 and 47a at 5-7). There are large amounts of surface water ponded around the hazelnut trees in the portion of the Guay's property where the trees are dying. (Exhibits 44i and 45c at 11-14 & 74). No elevated nutrient levels were detected in the applicants' test of the soils on the site. (Exhibit 47b).

f. The majority of the site drains to the west, away from the Guay's property, following a finger of Dayton silt loam on the site. Based on the applicant's on-site survey, the elevation of the site drops 2.05 feet from the northeast to the southwest. (Exhibits 44g, 44h, and 47a at 6 & 9). However, the easternmost portion of the site drains to the west. (Exhibit 45c at 84 and 47a at 15). The site contains hydric soils (Exhibits 6, at 3, 45c at 63-73 and 47a at 5-7), but there are no wetlands in the area of proposed

development as [“it appears that existing development has cut off the hydrology in the northeastern corner of the property.” (Exhibit 18). The Guays’ argument that the entire site drains east towards their property is based on broad scale USGS mapping and statements from County Transportation Operations Supervisor Paul Runyan regarding the location of ditches and culverts on Pelican Court and Mark Road some distance north of the site. (Exhibit 45c at 75-83). That evidence conflicts with other evidence in the record; the Guays’ “ground surface cross-section profile” (Exhibit 45c at 84) and the applicant’s photos demonstrating that there are no culverts at the intersection of Pelican Court and Mark Road as asserted by the Guays. (Exhibit 47a at 11-12). The applicants proposed to dispose of kennel wash water in an area of the site that drains to the west. (Exhibit 47a at 10 and 15).

g. Given the above, the hearings officer finds that the proposed kennel use will not result in soil or water contamination on surrounding properties that could significantly impact farm operations or costs.

i. The applicants have been operating a dog training facility with dogs producing waste and wash water on this site for more than five years without causing contamination of the Guays property, water, or nut crop, or the soils on the site. The applicant’s dogs have not impacted the health of the Guays’ hazelnut trees located near the kennel building; the health of these trees was declining before the applicants purchased the site and began operating their dog training facility. Approval of this application will not increase the number of dogs on the site, as the kennel use is proposed to only serve dogs that are participating in the applicant’s existing training program. The kennel will concentrate dogs in a limited area of the site while they are confined to the kennels. However, the kennels and runs are covered and enclosed to prevent or limit rainfall that could transport waste. The kennels and runs are cleaned daily to remove the majority of the waste and the resulting wash water will be disposed of pursuant to the proposed CAFO permit.

ii. Compliance with the CAFO permit requirements will adequately protect surface and groundwater and prevent contamination of surrounding properties, as the CAFO program is intended to implement state and federal laws addressing such contamination issues. The Guays dispute the feasibility of on-site disposal of wash water due to the presence of hydric soils, ponded surface water, high groundwater, and other conditions on the site that were not apparent at the time of the ODA site visit. However, the hearings officer finds that ODA staff have sufficient experience and expertise and access to soil maps and other data to allow them to consider these issues and determine the feasibility of on-site disposal of kennel wash water. As noted in the CAFO narrative, the applicants will not dispose of wash water on saturated soil. When soils are saturated they will collect and store wash water for disposal when soil conditions allow. (Exhibit 44e). A condition of approval is warranted to require the applicants obtain a CAFO permit for the kennel use, unless the ODA refuses to process due to limited volume of effluent generated on the site.

iii. The small amount of dog waste that may flow onto the site from the kennels will be diluted by the wash water. Although runoff from this portion of the site appears to flow to the east (Exhibit 45c at 84), the kennel building is located more than 12 feet from the nearest property line. Therefore, any such runoff will be further diluted as it flows through the intervening vegetation and soil between the kennel and the Guays' property. The fact that the training building is located much closer to the property line is irrelevant, as the dog training business is a permitted use.

iv. Wildlife and waterfowl that have access to the Guays' and other hazelnut orchards that sell nuts to Willamette Hazelnut also produce waste, yet that waste has not resulted in contamination of the nut crop.

h. Dog waste may generate odors, however, given that waste is contained in plastic bags which are then placed in trash containers, combined with the size of the site, any odors are unlikely to be detectable offsite. In addition, such odors are not inconsistent with the character of the EFU zone, where a wide variety of potentially odor generating agricultural activities are allowed.

Proximity of the kennel to livestock

6. The hearings officer finds that the proposed kennel use will not significantly impact the Guays' potential future livestock operation. There is no dispute that dogs can cause stress to livestock, especially if dogs are allowed to chase livestock or run fence lines while barking. (Exhibit 45c at 101 and 155-162) and such stress can impact livestock growth and reproduction (Exhibit 45c at 163-180). However, dogs associated with the proposed kennel will be confined to fully enclosed kennels where the dogs cannot chase, harass, or even see livestock on adjacent properties and livestock cannot see the dogs. Dogs are common in the rural area and there are many existing dogs residing on neighboring properties without impacting livestock on those or surrounding properties. Dog training facilities, where dogs are not confined to enclosed kennels, are an outright permitted use in the EFU zones. (ZDO Table 401-1). The applicants submitted evidence that a Siberian Husky kennel, where the dogs frequently bark and howl, had no impact on the author's sheep. (Exhibit 47h). Dogs on this site are not allowed to bark; the applicant's trainers correct dogs that bark and will use bark collars and other equipment inside the kennel to limit barking. The Guays argue that the proposed barking correction methods will not work. However, the article they provided states that such methods can be effective to limit barking if used correctly, consistently, and with adequate training. (Exhibit 45c at 181-190). The applicants, professional dog trainers, have the ability to properly use bark collars and other controls and train dogs to limit barking.

a. The condition of the fencing between the site and the Guays' property is irrelevant, as dogs related to this use will be confined in fully enclosed kennel with no access to the boundary fence. Dogs will be leashed when taken out of kennels for training or transport to and from their owners' vehicles.

b. Noise from the proposed kennel may be audible on surrounding properties, but it will comply with County noise standards set out in Section 6.05.050 of the Clackamas County Code and not inconsistent with other agricultural activities that are permitted in the EFU zone. (Exhibit 2a at 33-45).

Road dust

7. Dust can impact farm operations and costs. (Exhibit 45c at 193-196). However, the hearings officer finds that the proposed kennel will not increase the amount of dust generated by traffic on the gravel surfaced Pelican Court, as the proposed kennel will not increase, and will likely reduce, the amount of traffic this road. As noted above, the applicants currently operate a dog training facility on the site, which is a permitted use in the EFU zone. Training courses often continue for several days. That use generates additional traffic to and from the site as dog owners travel to the site, drop off their dogs for training, and return home, repeating the same process in the evening after training is completed and returning the next day for additional training. The proposed kennel will allow dogs that are undergoing training to remain on the site, reducing the need for owners to travel back and forth to the site for subsequent days of training.

Property Values

8. Alleged property value impacts of the facility are not relevant to the applicable approval criteria. A decrease in the value of land will not significantly impact or increase the cost of farm operations on the land. The Land Use Board of Appeals (“LUBA”) held that “[p]otential loss of property value does not affect the use of surrounding properties for residential and other primary uses within the meaning of ZDO 1203.01(D). . .” *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

Enforcement

9. The proposed use is approved subject to conditions that are “reasonably calculated to fulfill public needs emanating from the proposed land uses as set forth in the application [including] protection of the public from the potentially deleterious effects of the proposed use.” ZDO 1307.15. ZDO 1307.17(L) authorizes the planning director to initiate revocation of this approval if the applicants fail to comply with the conditions of approval. Suggestions that conditions attached to a land use decision may be violated are speculative, and are not grounds for denial of the application.

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby approves Z0054-24-C and Z0055-24-NCU (Huffman K9) subject to the following conditions:

Conditions of Approval:

1. Approval of this land use permit is based on the submitted written narrative and plan(s) filed with the County on February 20, 2024, and additional materials received April 11 and April 14, 2024 as well as materials submitted during the remand proceeding. No work shall occur under this permit other than which is specified within these documents, unless otherwise required or specified in the conditions below. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of any approval resulting from the decision described herein.
2. The conditional use approval is valid for four (4) years from the date of the final written decision (ZDO 1203.05). If the County's final decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four year period, the approval shall be implemented, or the approval will become void. "Implemented" means all major development permits shall be obtained and maintained for the approved conditional use, or if no major development permits are required to complete the development contemplated by the approved conditional use, "implemented" means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained. A "major development permit" is:
 - a. A building permit for a new primary structure that was part of the conditional use approval, or
 - b. A permit issued by the County Engineering Division for parking lot or road improvements required by the conditional use approval.

If the approval of a conditional use is not implemented within the initial approval period established by Subsection 1203.05(A), a two-year time extension may be approved pursuant to Section 1310, Time Extension. [Subsection 1203.05(B)]

3. If a conditional use is implemented pursuant to Subsection 1203.05 and later discontinued for a period of more than five consecutive years, the conditional use shall become void. [Subsection 1203.06)]
4. The approval of an alteration of a nonconforming use, pursuant to Subsection 1206.07(B) or (C), is valid for a period of two years from the date of the final decision. If the County's final decision is appealed, the approval period shall commence on the date of the final appellate decision. During this two-year period, the approval shall be implemented, or the approval will become void. "Implemented" means all major development permits shall be obtained and maintained for the approved conditional use, or if no major development permits are required to complete the development contemplated by the approved conditional use, "implemented" means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained, as described in Condition #2. [Subsection 1206.08]

5. Notwithstanding Subsection 1206.04(A), the allowed discontinuance period for a nonconforming use approved for an alteration pursuant to Subsection 1206.07(B) is extended to 24 consecutive months from the date of implementation of the alteration pursuant to Subsection 1206.08(A)(1). In no event shall the total period of discontinuance exceed 48 consecutive months (i.e., any discontinuance period preceding the filing of an application for an alteration, plus the period during which the alteration application is under review, plus the approval period allowed by Subsection 1206.08(A), plus the 24 consecutive months from the date of implementation. [Subsection 1206.08]
6. If the approval of an alteration of a nonconforming use is not implemented within the initial approval period established by Subsection 1206.08(A), a two-year time extension may be approved pursuant to Section 1310, Time Extension. [Subsection 1206.08]
7. Dog training classes, may be conducted outdoors or in preexisting farm buildings that existed on January 1, 2013, provided the number of dogs participating in training does not exceed ten dogs per training class; and, the number of training classes to be held on-site does not exceed six per day. If the dog training classes will exceed these limitations, then a Conditional Use permit must be obtained. [401.05(D)(6)]
8. Building materials for the façade of the proposed kennel building where the primary entrance is located shall be surfaced with brick, tile, masonry, stucco, stone or synthetic equivalent, pre-cast masonry, gypsum reinforced fiber concrete, wood lap siding, architecturally treated concrete, glass, wood, metal, or a combination of these materials. [1005.03(E)]
9. The applicants shall **insulate the kennel buildings to limit sound transmission outside the buildings.**
10. The applicants shall **confine all boarded dogs inside the kennel at night and use bark collars as necessary to control barking.**
11. **The kennels shall only be used to house dogs involved in the applicants' training program.**
12. **Prior to operating the kennels the applicant shall obtain approval of a CAFO permit from the ODA, unless the ODA refuses to issue a CAFO solely due to the limited volume of animal waste generated by this use.**
13. **All frontage and onsite improvements shall comply with the *Clackamas County Roadway Standards*.**
14. The applicants shall obtain a Development Permit from Clackamas County Department of Transportation and Development prior to the initiation of any construction activities associated with the project.
15. The driveway approach onto S. Pelican Court is required to meet the standards of a gravel driveway, per Roadway Standards Drawing D400 "Standard Driveway Entry onto Unpaved County Roads".

16. The applicants shall improve the existing driveway to provide a minimum 12-foot wide, gravel access road from the approach onto S Pelican Court to the parking area serving the kennel facility. The access road shall be consistent with Roadway Standards Drawing R100. Turnouts shall be constructed every 400 feet, per Standard Drawing C350.
17. An emergency vehicle turnaround shall be provided on-site, per Standard Drawing C350, as approved by the fire marshal.
18. The applicants shall provide adequate on site circulation areas for the parking and maneuvering of all vehicles anticipated to use the kennel facility. Parking spaces for the solar kennel shall meet *ZDO* section 1015 dimensional requirements, and Roadway Standards, Drawing P100/P200.
19. Prior to the issuance of a building permit or the initiation of any construction activities associated with the kennel facility, the applicants shall submit to Clackamas County Development Engineering:
 - a. Written approval from the local Fire District for the planned access, circulation, fire lanes. The approval shall be in the form of site stamped and signed by the Fire Marshal.
 - b. A set of street and site improvement construction plans, in conformance with *Clackamas County Roadway Standards* Section 140, to Clackamas County's Engineering Office and obtain written approval, in the form of a Development Permit.
 - i. The permit will be for driveway, drainage, parking and maneuvering areas, and other site improvements.
 - ii. The minimum fee deposit is required upon submission of plans for the Development Permit. The fee will be calculated based on 8.83% of the public improvements and 5% of the onsite transportation improvements, according to the current fee schedule.
 - iii. The applicants shall have an Engineer, registered in the state of Oregon, design and stamp construction plans for all required improvements, or provide alternative plans acceptable to the Engineering Division.
20. **Prior to the operation of the dog kennel use**, the applicants shall work with the Clackamas County Building Codes division to obtain necessary permits for the building addition that occurred between 2005 and 2010, as described in this Final Order.
21. **Prior to the issuance of a building permit and/or site development**, the applicants shall submit to Clackamas County Engineering Office:
 - a. Written approval from the Fire District for the planned access, circulation, fire lanes and water source supply. The approval shall be in the form of site and utility plans stamped and signed by the Fire Marshal.

- b. Written approval from the Clackamas County Engineering for surface water management facilities and erosion control measures.
- c. A set of street and site improvement construction plans, in conformance with Clackamas County Roadway Standards Section 140, to Clackamas County's Engineering Office and obtain written approval, in the form of a Development Permit.

DATED this 3rd day of June 2025.



Joe Turner, Esq., AICP
Clackamas County Land Use Hearings Officer

APPEAL RIGHTS

ZDO 1307.14(D)(6) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).