BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of: Lois M. Pfennig, Trustee of the Henry O. and Lois M. Pfennig Trust	)	Case No. CP/ZC/P 19-005 **COMPREHENSIVE PLAN AMENDMENT/ ZONE CHANGE/PARTITION**

RECOMMENDATION

I. Nature of the Application

This matter came before the Marion County Hearings Officer on the application of Lois M. Pfennig, Trustee of the Henry O. and Lois M. Pfennig Trust, to change the zone from SA (Special Agriculture) to AR-2 (Acreage Residential - 2 Acre Minimum) and the Comprehensive Plan designation from Special Agriculture to Rural Residential, with an exception to statewide Goal 3 (Agricultural Land) and Goal 14 (Urbanization) on a 20.46-acre parcel, and then to partition the property into a 2-acre parcel, a 2-acre parcel, and a 16.46-acre parcel on property located in the 2400 block of 62nd Avenue SE, Salem, Marion County, Oregon (T8S; R2W; Section 04A; tax lot 2800). Applicant's representative clarified at hearing that Applicant is not requesting an exception to Goal 4.

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP), Marion County Code (MCC), Title 17, especially chapters 123 and 128, Statewide Land Use Planning Goals, and Oregon Administrative Rules (OAR), chapter 660, divisions 004 and 014.

III. Hearing

A public hearing was held on the application on July 24, 2019. At hearing, the Planning Division file was made part of the record. The following persons appeared and provided testimony:

1.	Lisa Milliman	Planning Division
2.	John Rasmussen	Marion County Public Works
3.	Wallace W. Lien	Attorney for Applicant
4.	Jean Wolff	Opponent
5.	Kelly Bradley	Opponent
6.	Loyal Kloes	Opponent
7.	Roger Kaye	Friends of Marion County

The following documents were entered into the record as exhibits at hearing:

Ex. 1	Pfennig partition map showing access options
Ex. 2	Aerial map of surrounding area, with some parcels labeled with letters

Ex. 3 Highlighted pages 18-19 of Applicant's statement
Ex. 4 July 24, 2019 statement of Roger Kaye

A request was made at hearing to leave the written record open to submit additional materials. Under ORS 197.763(6)(a), prior to the close of the initial evidentiary hearing, any participant may ask to present additional evidence, argument, or testimony on the application, and the hearings authority shall grant the request by continuing the hearing to a later date, or by keeping the record open to submit the information in writing. The hearings officer granted an open record period. The following documents were submitted by Applicant during the open record period:

Ex. 5 August 7, 2019 letter from Wallace Lien
Ex. 6 Deed for subject property, dated June 4, 1958, recorded at Vol. 550, Page 847
Ex. 7 Partition Plat 2012-08
Ex. 8 Partition Plat 2019-38
Ex. 9 Updated Assessor's Map 8-2W-4A
Ex. 10 Marion County SGO Map
Ex. 11 NCRS Soil excerpt pages
Ex. 12 Assessor's Map 8-2W-03B
Ex. 13 Assessor's Map 8-2W-03C
Ex. 14 Property Profile of TL 4600 – Assessor's Map 8-2W-04A
Ex. 15 Property Profile of TL 5200 – Assessor's Map 8-2W-04A
Ex. 16 Property Profile of TL 0600 – Assessor's Map 8-2W-04D
Ex. 17 Property Profile of TL 3700 – Assessor's Map 8-2W-03B
Ex. 18 Property Profile of TL 4801 – Assessor's Map 8-2W-03B
Ex. 19 Property Profile of TL 5000 – Assessor's Map 8-2W-03B
Ex. 20 Property Profile of TL 5100 – Assessor's Map 8-2W-03B
Ex. 21 Property Profile of TL 1100 – Assessor's Map 8-2W-03C

No objections were raised to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at the hearing. A question was raised whether notice was required to be posted on the subject property. MCC Chapter 17.111 does not require posted notice.

The hearings officer who heard this matter has retired, and the hearings officer who wrote this recommendation is the new hearings officer for Marion County. The hearings officer who wrote this recommendation certifies that she listened to the hearing and reviewed the entire record prior to making her recommendation.

IV. Executive Summary

Applicant requests a zone change from SA to AR-2, a Comprehensive Plan designation change from Special Agriculture to Rural Residential, and exceptions to statewide Goal 3 and Goal 14 on a 20.46-acre parcel, and then to partition the property into a 2-acre parcel, a 2-acre parcel, and a 16.46-acre parcel. The hearings officer finds Applicant has not met the burden of proving that criteria for taking an exception to Goal 3 and Goal 14, for an MCCP amendment, a zone change, or a partition have been met. The hearings officer finds Applicant has not shown that the

relationship between the subject property and adjacent lands has irrevocably committed the subject property to uses not allowed by Goal 3, or that uses allowed by the goal are impracticable. There is also insufficient evidence in the record to find that the subject property is committed to urban development or that any rural use of the property is impracticable. The hearings officer recommends **DENIAL** of the proposal.

V. Findings of Fact

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

1. The subject property is located west of 62nd Avenue SE, south of Macleay Road SE, and north of Culver Drive SE. The property is unimproved and has a small amount of frontage on an undeveloped right-of-way identified as Wickiup Street SE. The parcel is currently being farmed with a cover crop and is specially assessed for agriculture by the Marion County Tax Assessor's Office. Soils on the subject property are composed of Amity (Am), Woodburn (WuA), Concord (Co), and Silverton (SuC) Class II and III silt loam soils that are defined as high value for agriculture. The property is described in its current configuration in deeds as far back as 1958 and is a legal parcel for land use purposes.

2. Surrounding properties to the west and south are zoned SA and composed of small to medium sized lots in agricultural and rural residential use. Properties to the north and east are zoned AR and are developed with rural residential lots.

3. Applicant states that the ultimate goal of the proposal is to create two new 2.0-acre parcels, leaving 16.46 acres in a remainder parcel that would be left vacant "for the time being." Applicant acknowledges the 16.46-acre remainder parcel could be divided in the future in a series of partitions, or a subdivision, that would eventually result in the creation of up to six additional 2.0-acre residential lots (with the remaining acreage used to create an access drive).

4. Marion County Planning Division requested comments on the proposal from various governmental agencies.

   Marion County Public Works (MCPW) Land Development and Engineering Permits (LDEP) commented:

   ENGINEERING CONDITIONS
   Condition A – On the plat, show sufficient right-of-way dedication to serve the future AR-2 lots.

   Condition B – Prior to plat approval, provide a stormwater detention template plan prepared by a licensed civil engineer addressing stormwater detention on each of the proposed lots to be constructed in conjunction with homebuilding.

Condition C – Prior to plat approval, provide a notarized Road Maintenance Agreement (RMA) regarding the proposed shared access easement.

ENGINEERING REQUIREMENTS

D. In accordance with Marion County Code 11.10, driveway "Access Permits" for access to the public right-of-way will be required upon application for building permits for a new dwelling on any of the resulting parcels. Driveways must meet sight distance, design, spacing, and safety standards.

E. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits, per Marion County Ordinances #00-10R and #98-40R, respectively.

F. Individual lot stormwater detention systems, typically exfiltration pipes inside round rock trenches, would need to be constructed and inspected prior to final building inspection. An On-site Stormwater Discharge Permit is required from MCPW Engineering for the template design to serve typical lots, and a Plumbing Permit is required from the Building Department for actual construction inspection.

G. Utility work within the public right-of-way requires permits from MCPW Engineering.

H. The subject property is situated within Marion County's DEQ-defined Stormwater Management Area (SMA). Marion County has been delegated authority by DEQ to operate a NPDES 1200-CN program for ground disturbing activities of 1 to under 5 acres. An Erosion Prevention & Sediment Control (EPSC) Permit will be required to put in the access easement. Individual lot home construction will also require a permit for each lot unless done under an aggregate EPSC Permit.

ENGINEERING ADVISORY

I. There is concern that applying a step-wise approach to developing the entire subject property as AR-2 in combination with the northern neighboring parcels under similar ownership may invoke difficulties with access that meets MCPW as well as fire access standards.

J. The land use application site map has Whispering Way annotated as a 40 feet wide easement. However, it is noted that Partition Plat #2012-08, and subsequently Partition Plat #2019-38, indicates Whispering Way as being a total of 26 feet in width.

K. Construction of improvements on the property should not block historical or naturally occurring runoff from adjacent properties. Furthermore, site grading should not impact surrounding properties, roads, or drainage ways in a negative manner.

L. Applicant is advised to coordinate with the local fire marshal for any required fire turnarounds and/or turnouts that may need to be depicted on the plat.

M. Per Partition Plat #2012-08, and subsequent Partition Plat #2019-38, the easement shown on the site plan from Macleay Road (Whispering Way) does not serve the subject property and is therefore not a legal access for the subject property. This easement currently serves two parcels without frontage to public right-of-way.

Marion County Onsite Wastewater Specialist commented that a site evaluation is required for the two new 2.0 acre parcels.

Marion County Fire District No. 1 commented on fire safety, access, and premise identification requirements for development of the property.

Oregon Department of Land Conservation and Development (DLCD) commented that irrevocably committed exceptions must demonstrate compliance with OAR 660-004-0018(2), which addresses planning and zoning for exception areas. Specifically, Applicant must demonstrate that approval of the exception meets the following requirements:

- The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and

- The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses.

Applicant should address whether future residential uses will irrevocably commit adjacent lands zoned Special Agriculture and how it will be compatible with adjacent farm use. It is insufficient to rely on current compatibility with adjacent farm uses since the use of the subject property is proposed to change to residential.

All other contacted agencies either failed to respond or stated no objection to the proposal.

VI. Additional Findings of Fact and Conclusions of Law

1. This is a recommendation to the Marion County Board of Commissioners (BOC). The BOC is the final decision making authority.

2. Applicant has the burden of proving all applicable standards and criteria are met. As 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.

GOAL EXCEPTIONS

3. Applicant asks the BOC to take an exception to Statewide Planning Goal 3, Agricultural Lands, to remove Goal 3 restrictions, and an exception to Statewide Planning Goal 14, Urbanization, to allow urban levels of development on rural lands. A Goal 14 exception is required to change the zoning on the subject property to a minimum parcel size less than AR-10 (Acreage Residential – 10 acre minimum). OAR 660-004-0040(8)(i)(B). Under OAR 660-004-0005(1), an exception to a statewide planning goal is a comprehensive plan provision. The goal exceptions require an MCCP amendment. OAR 660-004-0040(8)(i)(B) also requires the minimum lot size adopted to be consistent with OAR 660-004-0018.

4. OAR 660-004-0005(1) defines an exception as a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:

   (a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

   (b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

   (c) Complies with ORS 197.732(2), the provisions of [OAR 660-004] and, if applicable, the provisions of OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040.

   The proposed exceptions are for a specific situation at this 20.46-acre property and do not establish planning and zoning policy generally. OAR 660-004-0005(1)(a) is met. Applicant proposes residential uses not allowed or conditionally permitted on property designated Special Agriculture and zoned SA. OAR 660-004-0005(1)(b) is met.

5. Under ORS 197.732(2), a local government may adopt an exception to a goal if:

   (a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;

   (b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

   (c) The following standards are met:

(A) Reasons justify why the state policy embodied in the applicable goals should not apply;
(B) Areas that do not require a new exception cannot reasonably accommodate the use;
(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

Applicant does not propose physically developed or reasons exceptions under (a) or (c). Applicant requests irrevocably committed exceptions to Goals 3 and 14. ORS 197.732(2)(b) standards are addressed under OAR 660-004 for the Goal 3 exception, and under OAR 660-014 for the Goal 14 exception. OAR 660-004-0018 is also addressed.

GOAL 3

6. Statewide Planning Goal 3, Agricultural Lands, to preserve and maintain agricultural lands, applies to the subject property. Under OAR 660-004-0028, a local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable. Residential uses are not allowed under Goal 3. OAR 660-004-0028 applies to Goal 3 irrevocably committed exceptions.

OAR 660-004-0028

7. Under 660-004-0028(2), whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:

(a) The characteristics of the exception area;

(b) The characteristics of the adjacent lands;

(c) The relationship between the exception area and the lands adjacent to it; and

(d) The other relevant factors set forth in OAR 660-004-0028(6).

(3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(2)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule, except where other rules apply as described in OAR 660-004-0000(1). Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably

committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible." For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:

(a) Farm use as defined in ORS 215.203;

(b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and

(c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a).

(4) A conclusion that an exception area is irrevocably committed shall be supported by findings of fact that address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area.

(5) Findings of fact and a statement of reasons that land subject to an exception is irrevocably committed need not be prepared for each individual parcel in the exception area. Lands that are found to be irrevocably committed under this rule may include physically developed lands.

(6) Findings of fact for a committed exception shall address the following factors:

(a) Existing adjacent uses;

(b) Existing public facilities and services (water and sewer lines, etc.);

(c) Parcel size and ownership patterns of the exception area and adjacent lands:

(A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the goals were made at the time of partitioning or subdivision. Past land divisions made without application of the goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors makes unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for the subject parcels or land adjoining those parcels.

(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including

parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations;

(d) Neighborhood and regional characteristics;

(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;

(f) Physical development according to OAR 660-004-0025; and

(g) Other relevant factors.

(7) The evidence submitted to support any committed exception shall, at a minimum, include a current map or aerial photograph that shows the exception area and adjoining lands, and any other means needed to convey information about the factors set forth in this rule. For example, a local government may use tables, charts, summaries, or narratives to supplement the maps or photos. The applicable factors set forth in section (6) of this rule shall be shown on the map or aerial photograph.

The factors under OAR 660-004-0028 are addressed in turn below but are reordered and grouped for clarity of findings.

Characteristics, parcel size, and ownership pattern of the exception area. The subject property is a 20.46-acre parcel located in the 2400 block of 62nd Avenue SE, Salem, Marion County, Oregon (T8S; R2W; Section 04A; tax lot 2800). Applicant has owned the subject property since 1958. The property is located west of 62nd Avenue SE, south of Macleay Road SE, and north of Culver Drive SE. It is unimproved and has a small amount of frontage on an undeveloped right-of-way identified as Wickiup Street SE. The parcel is zoned SA, is currently being farmed with a cover crop, and is specially assessed for agriculture by the Marion County Tax Assessor's Office.

Topography on the site is generally flat, with a slight slope to the south. Soils on the subject parcel are composed of Amity (Am), Woodburn (WuA), Concord (Co), and Silverton (SuC) Class II and III silt loam soils that are defined as high value for agriculture. There is an electrical power line that runs along the eastern boundary of the subject property, and a small stand of scrub trees crossing the southern half of the parcel. At 20.46 acres, the subject property is the largest of the farm parcels located between the AR-zoned lands in Goal Exception Area 21.1, discussed below, and North Santiam Highway and the Salem-Keizer Urban Growth Boundary, providing a buffer between residential development and

the smaller farm parcels to the west and south of the subject property. According to tax records, in 2002 the property was being farmed for grass seed, and it has been in agricultural production since that time.

Characteristics, existing uses, and parcel size and ownership patterns of adjacent lands; neighborhood and regional characteristics. There are six parcels immediately adjacent to the east of the subject property, between the property and 62nd Ave SE. All are one acre or less, are zoned AR, and each contains a non-farm dwelling. To the south is one 2.93-acre SA-zoned parcel with a non-farm dwelling. Immediately adjacent to the west are four parcels, all zoned SA, that are .5, 1.25, 3.17, and 4.66 acres in size. All the parcels have non-farm dwellings, and one has a blueberry operation and is in farm deferral. Immediately adjacent to the north are two Applicant-owned parcels that are 9.62 and 2 acres in size. The parcels are zone AR, and Applicant's 9.62 acre parcel contains a dwelling. These parcels, along with the two others Applicant owns north of the subject property, have been owned by Applicant since before acknowledgement of the Marion County Comprehensive Plan in 1987.

Moving beyond immediately adjacent lands, surrounding properties to the west and south of the subject property are zoned SA and composed of small to medium sized lots in agricultural and rural residential use. Properties to the north and east are mostly zoned AR and developed with rural residential lots, though parcels north of the subject property across Macleay Road are zoned SA and are in farm deferral.

Most of the dwellings in the immediate vicinity of the subject property, in both the SA zone and the AR zone, were built in the 1960s and early 1970s. The subject property is adjacent to Goal Exception Area 21.1 – Macleay, identified in Appendix A of the Marion County Comprehensive Plan. This exception area was already developed with small residential lots at the time the Comprehensive Plan was acknowledged in 1987, although many of the larger parcels were partitioned during the 1980s and 1990s into one to two acre residential lots.

Northwest of the subject property is Oak Meadows Subdivision, which was platted in 1957 as a suburban residential subdivision of one-half acre lots. The subject property is a part of Oak Dell Farm Subdivision, located at the western edge. Oak Dell Farm Subdivision was platted in 1914 and composed of ten 16 to 20 acre hobby farm parcels. The other parcels in Oak Dell Farm were later further divided to create the one to eight acre rural residential lots located adjacent to 59th Avenue SE and east, between Macleay Road SE and Culver Drive SE/Ganon Street SE.

Applicant completed an evaluation of all parcels within one mile of the subject property. This area encompassed six assessor's maps, for a total of 676.23 acres. The study area included a total of 196 tax lots, plus four parcels that were non-buildable, due to government ownership or size/shape. Applicant states that records from the assessor for the 196 parcels show that the vast majority of the ownerships are of only one parcel, yet Applicant failed to

include specific ownership information as evidence of its assertion.[1] Applicant states there are twelve ownerships in the study area where the owners own two adjoining parcels, but the parcels are not identified.

Applicant provides that 176 of the parcels in the study area are in residential use, and 20 are in commercial or industrial use. There are 160 single family dwellings in the study area. Across the entire study area, the average lot size is 3.45 acres, with the median lot size being just over 2 acres. 131 parcels are less than 2 acres in size, and 51 of those are one acre or less. According to Applicant, 74% of the parcels in the study area are at or under 2 acres in size.

Of the seven properties west of the subject property on assessor's map 8-2W-04A, two are in farm deferral, including the blueberry operation directly adjacent to the subject property on TL 3000. Five of the seven are zoned SA, with the other two zoned AR. Moving farther west in Applicant's study area to assessor's map 08-2W-04B, the tax lot immediately west of the blueberry operation, TL 200, is also in farm deferral. Three other tax lots on this map are in farm deferral, and one is in partial deferral. The majority of the properties on this map are zoned SA, with the exception of property across Culver Road, which is inside the Salem-Keizer UGB and is zoned IBC (Industrial Business Campus) (TL 700 is zoned SA/AR, and Applicant lists "no information available" for TL 500).

Northerly of the subject property, across Macleay Road on assessor's map 7-2W-33, all three tax lots are in farm deferral and range in size from 19.94 to 94.95 acres. All are zoned SA. Heading south in Applicant's study area across the intersection of Culver Road and Deer Park Drive, onto assessor's map 8-2W-04D, 11 of the 19 properties on this map located south of this intersection are in farm deferral, and all are zoned SA. TL 2300 (11.60 acres) on assessor's map 8-2W-04C also lies south of this intersection, is included in Applicant's study area, and is in farm deferral. While the area east of the subject property, between the property and 62nd Ave SE, consists of parcels smaller than one acre containing non-farm dwellings, the areas to the west and south, and to some extent north, provide a different picture, one of a mixture of residential and small farm use.

Applicant does not provide further neighborhood or regional characteristics beyond its examination of the study area. The study area encompasses 676.23 acres, or 1.06 square miles, surrounding the subject property, which the hearings officer finds is sufficient to address this criterion.

Applicant claims that the study area has no history of any agriculture use during any of the time period that it has been zoned SA. However, Applicant admitted there are some farming operations in the area, including a blueberry operation adjacent to the subject property. In its written rebuttal, Applicant also identified TL 200 on assessor's map 8-2W-33 as a commercially farmed parcel and noted that the arable portions of TL 100 and 300 on

[1] In the open record period, Applicant submitted ownership information for the following parcels, for reasons unrelated to demonstrating ownership: TL 4600 and TL 5200 on map 8-2W-04A; TL 0600 on map 8-2W-04D; TL 3700, TL 4801, TL 5000, and TL 5100 on map 8-2W-03B; and TL 1100 on map 8-2W-03C.

the same map are also farmed in conjunction with this parcel. These parcels are all in Applicant's study area.

Applicant originally stated that the subject property is not currently employed in any farm use, and has not been farmed for decades. In its written rebuttal, Applicant clarified that rather than a commercial crop, the subject property has had a cover crop for the past 20 years, maintained to retain the property's farm tax deferral status.

Applicant refers often to the impracticability of commercial farm use on the subject property. OAR 660-004-0028(3)(a) requires local governments to demonstrate that certain uses or activities are impracticable, including farm use as defined in ORS 215.203. *See* ORS 215.203(2)(a). As used in that section, "farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. * * * Applicant states: "[t]he fact that the property has not been in commercial farming for decades is a strong indicator that farm use, for the purpose of making a profit in money, is not practicable." However, there could be a number of reasons a property has not been in commercial farm use, and the fact that it has not been does not necessarily lead to such use being impracticable. In addition, OAR 660-004-0028(2) provides that it is the relationship with adjacent properties that is most relevant. While the characteristics of the proposed exception area must be considered, the focus of the irrevocably committed test is on the relationship between the exception area and adjoining uses, and why that relationship commits the subject property to uses not allowed by the applicable goals. *See Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489, 504-05 (2000).

Applicant continually distinguishes between incidental or "hobby" levels of farm use and commercial farm use, but such a distinction is not supported by the administrative rule or the statutory definition of farm use. *See Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007). The subject property need not be able to support a multi-million dollar commercial farm operation in order to be suitable for farm use. That farm use is not capable of supporting a self-sufficient or "commercial-scale" agricultural operation is not a basis to conclude that farm use of the property is impracticable. *Lovinger v. Lane County*, 36 Or LUBA 1, 17-18, *aff'd* 161 Or App 198, 984 P2d 958 (1999). The Land Use Board of Appeals (LUBA) has held that the term "profit in money" as used in ORS 215.203(2)(a) means "gross income" rather than "profit" in its ordinary sense of net profit. *Brown v. Jefferson County*, 33 Or LUBA 418, 433 (1997), *quoting 1000 Friends v. Benton County*, 32 Or App at 426. In *Brown*, LUBA noted that the appropriate standard for applying the definition of "farm uses" in the context of OAR 660-004-0028 is whether the subject property is "capable, now or in the future, of being 'currently employed' for agricultural production 'for the purpose of obtaining a profit in money.'" *Id.* at 433, *quoting 1000 Friends v. Benton County*, 32 Or App at 426.

Looking at absolute numbers and percentages may lead to a conclusion that the study area is irrevocably committed to urban uses. However, evaluating the study area from a bird's

eye view yields a different picture. Applicant describes the subject property as part of a donut, with its property being the "hole" that is getting closed in by surrounding residential uses. However, the donut appears to encircle the subject property on only two sides and might more appropriately be described as a banana. While the areas east and to some extent north of the subject property could readily be classified as urban, the subject property lies on a border between that urban area and a more rural one to the west and south. Many of these properties are in farm deferral and/or are zoned SA, the latter which by definition is resource land.[2] Though Applicant claims there is little farming done in the area, the evidence when taken as a whole leads to a different conclusion. Furthermore, the rule requires not that farming be predominant in the area, but rather that existing adjacent uses make farm use on the subject property impracticable. Applicant admits that hobby agricultural uses in the area have been compatible in all respects with the surrounding area, and there have been no significant changes in the area in many years. As a whole, an examination of adjacent lands shows a mixture of rural residential and farm uses that have coexisted harmoniously for decades.

Relationship between the exception area and the lands adjacent to it: Applicant characterizes lands adjacent to it as irrevocably committed to non-resource uses. Applicant claims, "the hobby agricultural uses that do exist [in the area] are minor and have been compatible in all respects with the surrounding area," and again states "in all respects, the existing uses in the area have a long history of compatibility." Applicant also maintains that the subject property is compatible with the adjacent blueberry field, and that compatibility is shown by the fact that the two properties have been contiguous without any issues for nearly a decade since the blueberry field was planted. It is unclear why residential uses in the surrounding area render farm use impracticable on the subject property, when by Applicant's own admission they have been compatible with other farm uses in the area.

In its written rebuttal, Applicant points to externalities likely to result from agricultural use that may bring about complaints from neighbors – things such as dust, odors, and noise. However, externalities from farm or forest operations such as dust, spray, smoke and noise are inherent aspects of rural life in agricultural or forest zones, and absent evidence that such externalities have or are likely to cause actual conflicts with resource operations, evidence of the possibility of such conflicts with rural residential uses is insufficient to demonstrate that resource uses are impracticable. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

Applicant does not address its relationship to adjacent lands that are residentially developed, except to say that the area has been a haven for small parcel rural residential living for decades, and as divided the property will match similarly sized residential properties in the area. Applicant admits limited farm use on the subject property in recent years, restricted to a cover crop, but it does not point to any instances where such use has been incompatible with adjacent residential uses. It appears farm use on the subject

[2] Under OAR 660-004-0005(2), "Resource Land" is land subject to one or more of the statewide Goals listed in OAR 660-004-0010(1)(a) through (g) except subsections (c) and (d).

property, albeit limited, has had a congruous relationship with both residential and farm uses on adjacent lands.

Existing public facilities and services. There are no urban services in the area. Water is provided by domestic water wells, and sanitation is provided by septic systems.

Natural or man-made features. There is an electrical power line that runs along the eastern boundary of the subject property, and a small stand of scrub trees crossing the southern half of the parcel. The subject property is separated by the farm properties to the north by Macleay Road (and by Applicant's other parcels). It is separated from other SA-zone properties to the south by the intersection of Culver Road and Deer Park Drive. There are no other noteworthy natural or man-made features, and these roads do not significantly separate the subject property from adjacent resource land.

Physical development according to OAR 660-004-0025. Applicant is not claiming a physically developed exception, and the subject property is currently undeveloped. OAR 660-004-0025 does not apply.

Other relevant factors. Applicant provides other factors it believes are relevant to the impracticability of farm use, including the small and irregular shape of the parcel and the level of improvements (the latter of which is not elaborated upon, as the site is undeveloped), the wooded area, the presence of electrical transmissions lines, the adjoining non-farm dwellings that surround the subject property, and the lack of water rights. These perceived difficulties are not discussed in any detail. And while they may create challenges to certain types of farm uses, or may even make the property particularly prone to specific types of farm uses, they do not show a blanket impracticability of farm use on the subject property.

OAR 660-004-0028 is not satisfied.

OAR 660-004-0018

8. OAR 660-004-0018 covers planning and zoning in exception areas. OAR 660-004-0018(2) applies when local governments take irrevocably committed exceptions under ORS 197.732(2)(b) and OAR 660-004-0028 and OAR 660-014-0030.

Under OAR 660-004-0018(2)(b), plan and zone designations shall limit uses, density, and public facilities and services to those that meet the following requirements:

(A) The rural uses, density, and public facilities and services will maintain the land as "Rural Land" as defined by the goals, and are consistent with all other applicable goal requirements;

(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and

(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses[.]

9. Applicant states in its initial application that OAR 660-004-0018 is intended to ensure that rural land does not require urban levels of services. Applicant addresses why its proposal will not generate any need to expand public systems, particularly the need for a public water or sewer system. However, as explained by LUBA, the purpose of OAR 660-004-0018(2) is to ensure that physically developed and irrevocably committed exceptions do not have a cascading effect of committing further resource lands in the area to nonresource use. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007). The rule goes beyond addressing only public facilities and services and requires that rural uses and density also will not commit adjacent or nearby resource land to uses not allowed by the applicable goal.

Applicant somewhat addresses this requirement in its written rebuttal, when it lists the parcels Applicant ostensibly believes should be addressed as being at risk of being committed to non-resource use, providing their map/tax lot information, size, use, and presence or absence of a dwelling. Applicant states: "in the study area, there is only one true farm, several hobby farms, and a bunch of acreage homesite[s] without any farming activity. . . There is nothing about placing a few more homes on [the subject property] that will have any long term future impact on that one farm." Applicant is presumably identifying the commercial farming operation on TL 200 on assessor's map 8-2W-33 and its neighboring parcels as the "true" farm. It states that "[s]imilarly there is nothing a few more homes will do to the blueberry field to the west..." In its discussion of the exception to Goal 3, Applicant primarily focuses on how the level of rural residential development irrevocably commits the subject property to residential use. What Applicant fails to adequately address is if, as Applicant contends, non-resource uses on adjacent properties have committed the subject property to non-resource uses, why would the conversion of the subject property to non-resource use not also commit other adjacent and area lands currently in resource use to non-resource use as well?

Applicant's primary justifications for why the subject property is irrevocably committed to non-resource use are summarized by Applicant as: 1) parcel size that closely matches the 2 acre minimum lot size in the AR zone; 2) domestic wells and private septic systems on every parcel in the surrounding area; 3) an absence of any commercial farm activities; and 4) a predominance of non-farm residential dwellings. If approved, these very justifications could be used by owners of other resource properties to rationalize why they are irrevocably committed to non-resource use, and adding the subject property to the non-resource lands in the area would seemingly provide additional momentum for the "cascade." Applicant's proposal would: 1) generate more small parcels in the area; 2) create additional private wells and septic systems; 3) further remove land from possibly being used for commercial farming activities; and 4) result in even more non-farm residential dwellings. If such justifications can be used by Applicant to show why surrounding uses have made farm use impracticable on the subject property, it seems others could follow suit. Applicant's simple response about the de minimus impact of a few additional homes does not sufficiently address OAR 660-004-0018(2).

Applicant did not address individual OAR 660-004-0018 criteria or adequately evaluate them in relation to land uses and density, but only to public facilities and services. OAR 660-004-0018 requires more. For example, one way of avoiding a Goal 14 reasons exception under OAR 660-004-0018 is to show that uses, density, and public facilities and services are limited to those that are the same as current uses, density, and public facilities and services existing on the exception site. Increasing the density on the exception area from zero dwellings to two (or more) does not continue the same density. Applicant must address OAR 660-004-0018(2)(b)(A) through (C) to help determine whether the proposal can be approved under an irrevocably committed exception. **OAR 660-004-0018 is not satisfied.**

10. Given the high-value soils on the property, the historical and current use of the subject property for farm use, albeit not commercial farm use, and the lack of identified conflicts between adjacent uses and farm use on the subject property (or other farm uses in the study area), Applicant has not shown that the relationship between the subject property and adjacent lands has irrevocably committed the subject property to uses not allowed by Goal 3, or that uses allowed by the goal are impracticable. **Taking a Goal 3 exception is not recommended.**

GOAL 14

11. OAR 660-004-00040 specifies how Goal 14 applies to rural lands in acknowledged exception areas planned for residential uses. The rule applies to "rural residential areas," which under the rule means lands that are not within an urban growth boundary, that are planned and zoned primarily for residential uses, and for which an exception to Goal 3, Goal 4, or both has been taken. The subject property is not within an urban growth boundary. Applicant has applied for a comprehensive plan change from Special Agriculture to Rural Residential, a zone change from SA to AR-2, and an exception to Goal 3. OAR 660-004-00040 applies. Under OAR 660-004-00040(8)(i)(B), the county must take an exception to Goal 14 when establishing a minimum two acre lot size.

Applicant states that OAR 660-014-0030 does not apply, because what is proposed is not an urban level of development, as the AR zone requires a minimum lot size of 2 acres. Applicant is mistaken. OAR 660-014-0030 governs all committed exceptions to Goal 14, as this rule is more specifically tailored to the taking of exceptions to Goal 14 than is the general committed exceptions rule in OAR 660-004-0028. The former describes factors considered and findings required to determine that land is "committed to urban development," while the latter speaks only generally of "commit[ment] to uses not allowed by the applicable goal," or factors which prevent the "resource use" of lands. *1000 Friends of Oregon v. LCDC*, 301 Or 447, 482 (1986).

Applicant asks the county to take an irrevocably committed Goal 14 exception to allow AR-2 zoning on the subject property. Under OAR 660-004-0010(1)(d)(D), an exception to Goal 14 must follow the requirements of OAR 660-014-0030 (irrevocably committed exception) or OAR 660-014-0040 (reasons exception). Because Applicant requests an

irrevocably committed exception to Goal 14 to allow urban levels of development on rural land, OAR 660-014-0030 applies. And, although OAR 660-14-0030 does not itself require a demonstration of impracticability, "ORS 197.732(1)(b) [now ORS 197.732(2)(b)] and *Curry County* impose the requirement that a local government support an exception to Goal 14 by demonstrating that it is '*impracticable to allow any rural uses* in the exception area.'" *Id*, citing to *1000 Friends of Oregon v. LCDC*, 301 Or 447 (1986) *(Curry County)* (emphasis in the original).

OAR 660-014-0030

12. Under OAR 660-014-0030:

(1) A conclusion, supported by reasons and facts, that rural land is irrevocably committed to urban levels of development can satisfy the Goal 2 exceptions standard (e.g., that it is not appropriate to apply Goal 14's requirement prohibiting the establishment of urban uses on rural lands). If a conclusion that land is irrevocably committed to urban levels of development is supported, the four factors in Goal 2 and OAR 660-004-0020(2) need not be addressed.

(2) A decision that land has been built upon at urban densities or irrevocably committed to an urban level of development depends on the situation at the specific site. The exact nature and extent of the areas found to be irrevocably committed to urban levels of development shall be clearly set forth in the justification for the exception. The area proposed as land that is built upon at urban densities or irrevocably committed to an urban level of development must be shown on a map or otherwise described and keyed to the appropriate findings of fact.

(3) A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following:

(a) Size and extent of commercial and industrial uses;
(b) Location, number and density of residential dwellings;
(c) Location of urban levels of facilities and services; including at least public water and sewer facilities; and
(d) Parcel sizes and ownership patterns.

(4) A conclusion that rural land is irrevocably committed to urban development shall be based on all of the factors listed in section (3) of this rule. The conclusion shall be supported by a statement of reasons explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development.

(5) More detailed findings and reasons must be provided to demonstrate that land is committed to urban development than would be required if the land is currently built upon at urban densities.

13. The four factors in Goal 2 and OAR 660-004-0020(2) referred to in OAR 660-014-0030(1) apply to reasons exceptions. Applicant does not ask for, nor address a reasons exception, so the four factors in Goal 2 and OAR 660-004-0020(2) do not apply to this application. Should the BOC find the subject property is not irrevocably committed to an urban level of development, Applicant could reapply for a reasons exception and the four factors, along with any other relevant criteria, would be considered.

As stated, Applicant does not specifically address OAR 660-014-0030, as it does not believe it applies. The criteria under this rule are generally addressed in Applicant's narrative, as discussed below.

Commercial/industrial uses. No commercial or industrial areas are on the subject property. Applicant identifies 20 parcels in commercial or industrial use in the study area. No other specific information is included in the record.

Location, number, and density of residential dwellings. Location, number and density of residential dwellings in the study area were discussed above, and those findings are incorporated here. As stated, Applicant completed an evaluation of all parcels within one mile of the subject property, for a total of 676.23 acres. The study area included a total of 196 tax lots, plus four parcels that were non-buildable. There are 160 single family dwellings in the study area. The highest concentration of residential dwellings is east of the subject property, though dwellings exist throughout the study area. Areas east and to some extent north of the subject property could readily be classified as urban, but the subject property lies on a border between that urban area and a more rural one to the west and south.

Urban service levels. No public water or sewer facilities are available to the subject property. Applicant states there is sufficient water to serve the subject property, but provides no specific evidence. There was some testimony at the hearing by neighbors in the area who stated their water supply had declined in recent years and that they have had to re-drill wells, though Applicant claims testimony came from owners in Oak Meadows subdivision, some distance away (though within the study area). In its rebuttal, Applicant points to the well on Applicant's home place (TL 2700) as evidence of the availability of water. The well was dug in the late 1950s and has been producing a good quantity of water ever since.

There was also testimony from neighbors who had conducted percolation tests on their properties to find out the water absorption rate of the soil, in order to determine if septic systems could be installed. According to their testimony, the tests failed. In its written rebuttal, Applicant concedes that the area is characterized by a combination of soils that are classified with low permeability, meaning that siting a normal septic system may be difficult. Applicant states that a sand filter system may be approved as an alternative, if necessary.

Access to the subject property is not clearly shown. Applicant states that the property has primary access from Macleay Road via Whispering Way SE, a private easement. However, MCPW LDEP notes that per Partition Plat #2012-08, and subsequent Partition Plat #2019-

38, Whispering Way does not serve the subject property and therefore does not provide legal access. The property has access via Wickiup Street, but this street is currently unimproved. Applicant provided several alternatives for providing sufficient access for its proposal, and for future partitions or subdivisions, but these alternatives are not clearly feasible.

Other typical urban/rural services such as electrical and telephone services are available to the property.

There are conflicting claims about adequacy of water in the area, and Applicant has not provided evidence to substantiate its claims. Applicant suggests a reasonable alternative that could be used if a traditional septic system cannot be utilized, but Applicant has not shown whether such alternative is a viable option. Residential use is an urban use, requiring water and sewer. A property irrevocably committed to urban use must have access to those services required for an urban use. Without more evidence, it is difficult to reach a conclusion that the property is committed to urban levels of development when urban services are not available and the availability of traditionally rural residential services is not shown. **Applicant should provide additional evidence to show that services can be made available to the subject property.**

Parcel sizes/ownership patterns. Parcel size and ownership patterns are addressed above, and those findings are incorporated here. As previously noted, information on ownership patterns is not fully provided by Applicant. Applicant needs to more specifically identify common adjacent ownerships within and without the study area boundary to make the area sufficient to encompass resource and non-resource uses in the vicinity of the subject property.

The study area appears stable, and the subject property provides a transition from highly parcelized AR-2 land to SA-zoned land. Applicant claims, "[w]hat is proposed here matches what is happening in the surrounding neighborhood," seeming to imply a recent change in the area. Earlier in its written statement, Applicant stated that nearly the entire area has been devoted to rural residential uses for over 30 years. Applicant identified no recent changes in the area. Much of the small parcelization occurred prior to implementation of Statewide Land Use Planning and SA zoning, and the remainder took advantage of exception areas for implementation of AR zoning in the early 1980s when the comprehensive plan was acknowledged by DLCD. Absent recent or imminent changes in adjacent rural residential uses, where a neighboring subdivision has been developed for many years and the subject property has been in resource use during much of that time, the existence of those adjacent rural residential uses is insufficient to demonstrate that the subject property is irrevocably committed to nonresource use. *See DLCD v. Lane County*, 39 Or LUBA 445 (2001).

There is insufficient evidence in the record to find that the subject property is committed to urban development or that any rural use of the property is impracticable. **Taking a Goal 14 exception is not recommended.**

STATEWIDE PLANNING GOALS

14. Under OAR 660-004-0010(3) and OAR 660-004-0018(1), exceptions to one goal or portion of one goal does not assure compliance with, or relieve a jurisdiction from the remaining goal requirements. Each statewide planning goal is examined for compliance.

15. Goal 1: Citizen Involvement: To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

Notice and the hearings process before the hearings officer and BOC provide an opportunity for citizen involvement. Goal 1 is satisfied.

Goal 2: Land Use Planning: To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual basis for such decisions and actions.

Applicant's proposal is examined under Goal 2 plan amendment requirements. As part of the goal, each plan and related implementation measure is coordinated with the plans of affected governmental units. Affected governmental units are those local governments, state and federal agencies and special districts that have programs, land ownerships, or responsibilities within the area included in the plan. The Planning Division notified Marion County Fire District No. 1, Salem-Keizer School District, Marion County departments, and DLCD of the proposed comprehensive plan amendment. The fire district commented on fire safety, access, and premise identification requirements for development of the property. MCPW requested conditions of approval, including showing sufficient right-of-way dedication. The county tax office submitted tax information on the property. The county wastewater specialist commented that site evaluation is required for two new 2 acre parcels. The BOC will evaluate Goal 2 exception criteria and consider agency comments in evaluating this application. Goal 2 will be satisfied.

Goal 3: Agricultural Lands. To preserve and maintain agricultural lands.

Applicant requests an exception to Goal 3 to allow an urban level of development on the subject property. The result of the exception request will determine whether Goal 3 will be applicable.

Goal 4: Forest Lands. To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

The subject and surrounding properties are not MCCP-identified forest lands. Goal 4 is not applicable.

Goal 5: Open Spaces, Scenic and Historic Areas, and Natural Resources. To protect natural resources and conserve scenic and historic areas and open spaces.

No MCCP-identified Goal 5 resources are on or near the subject property. Goal 5 is not applicable.

Goal 6: Air, Water and Land Resources Quality. To maintain and improve the quality of the air, water and land resources of the state.

No significant particulate discharges are anticipated. Septic permitting has yet to be proven feasible. With a showing of feasibility and a condition requiring septic permitting, Goal 6 could be met.

Goal 7: Areas Subject to Natural Disasters and Hazards. To protect people and property from natural hazards.

The subject property is not in an MCCP-identified floodplain or geologically hazardous area overlay zone area. Goal 7 is not applicable.

Goal 8: Recreational Needs. To satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts.

No Goal 8 resources are identified on the subject property or implicated by this application. This goal is not applicable.

Goal 9: Economic Development. To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.

OAR chapter 660, Division 009 does not require or restrict planning for industrial and other employment uses outside an urban growth boundary (UGB), but counties must comply with the division requirements within UGBs. The subject property is not within a UGB. Goal 9 is not applicable.

Goal 10: Housing. To provide for the housing needs of citizens of this state.

OAR 660-008 defines standards for compliance with Goal 10 regarding adequate numbers of needed housing units and efficient use of buildable land within UGBs. The subject property is not within a UGB. Goal 10 does not apply.

Goal 11: Public Facilities and Services. To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

Applicant stated that domestic water on the subject property will be provided by a well, but Applicant has not shown attaining on-site water service is feasible. With a showing of feasibility, no urban water service would be necessary. Wastewater service feasibility is also not yet shown, but with a showing of feasibility, and a condition requiring septic permitting, there would be no need for urban wastewater services. **Goal 11 could be met with additional information provided by Applicant.**

Goal 12: Transportation. To provide and encourage a safe, convenient and economic transportation system.

OAR 660-012-0060 implements Goal 12. Under OAR 660-012-0060(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:

(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);

(b) Change standards implementing a functional classification system; or

(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 [transportation system plan]. 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.

(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

(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.

With an easement to use Whispering Way, the proposed parcels would be served by a single driveway onto Macleay Road. Applicant has also provided alternative access points. Regardless of where the parcels access public roads, traffic use generated would be fairly minimal. Applicant does not propose changing the functional classification of any road or standards implementing them. LDEP requested conditions of approval, including showing

sufficient right-of-way dedication on the plat to serve the future AR-2 lots and providing a Road Maintenance Agreement regarding the proposed shared access easement, but did not express concern that the plan and zone amendment would significantly affect the existing transportation facility. Goal 12 is met.

Goal 13: Energy Conservation. To conserve energy.

Normal residential use will not significantly impact energy consumption. Goal 13 is satisfied.

Goal 14: Urbanization. To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.

Applicant requests an exception to Goal 14 to allow an urban level of development on the subject property. The result of the exception request will determine whether Goal 14 will be applicable.

Goals 15-19, Willamette River Greenway, Estuarine Resources, Coastal Shorelands, Beaches and Dunes, and Ocean Resources. The subject property is not within the Willamette River Greenway, or near any ocean or coastal-related resources. These goals do not apply.

MCCP POLICIES

16. Under MCCP Plan Amendment Policy 2, plan changes directly involving five or fewer properties are considered a quasi-judicial amendment. Quasi-judicial amendments may be initiated by the subject property owners with an application form supplied by the Marion County Planning Division. The amendment will be reviewed by the zone change procedure established in MCC Title 17. A plan amendment application of this type may be processed simultaneously with a zone change request.

    The subject property is one parcel. The proposal is considered a quasi-judicial amendment request reviewed under applicable MCC title 17 procedures.

17. The proposal must be consistent with applicable MCCP rural development policies:

    Rural General Development Policy 1: All land divisions should be reviewed by Marion County for their compatibility with county goals and policies.

    As detailed below, the hearings officer finds not all partitioning related policies are met on this record. **Rural General Development Policy 1 is not met.**

    Rural General Development Policy 2: "Strip-type" commercial or residential development along roads in rural areas shall be discouraged.

With an easement, the subject property can access Macleay Road from an existing driveway, and neither this nor Applicant's other potential access points cause the proposal to increase roadway frontage devoted to residential use. This policy is met.

Rural General Development Policy 3 concerns rural industrial, commercial and public development and is not applicable.

Rural Residential Policies 1-4 are directed at county coordination with other governmental agencies, rural development costs, and reducing public cost for providing utility services for rural housing. These policies are not applicable.

Rural Residential Policy 5: Marion County considers rural residential living a distinct type of residential experience. The rural lifestyle involves a sacrifice of many of the conveniences associated with urban residences and the acceptance of lower levels of governmental services, narrow roads and the noises, smells and hazards associated with rural living and accepted farm and forest management practices. Marion County finds that it is financially difficult, not cost effective and inconsistent with maintaining a rural lifestyle for government to reduce or eliminate the inconveniences caused by lower levels of public services or farming and forest management practices. When residences are allowed in or near farm or forest lands, the owners shall be required to agree to filing of a declaratory statement in the chain of title that explains the County's policy giving preference to farm and forest uses in designated resource lands.

Applicant would be required to sign a declaratory statement as a condition of any approval. With this condition, this policy is met.

Rural Residential Policy 6: Where designated rural residential lands are adjacent to lands protected for resource use, a reasonable dwelling setback from the resource land shall be required, and any other means used, to minimize the potential for conflicts between accepted resource management practices and rural residents.

Planning staff recommended a condition requiring a 100 foot setback from land in farm use to the west and southwest of the subject property. MCC 17.128.050 provides a special setback of 100 feet for AR-zoned properties from adjacent farm uses, but also provides alternate criteria to reduce the setbacks. Applicant's representative objected to the condition at hearing, stating Applicant did not believe the setback was necessary. Applicant can request an exception to the setback when it applies for building permits, and if not granted, Applicant must comply with the setback standards. This policy can be met.

Rural Residential Policy 7: Lands available for rural residential use shall be those areas developed or committed to residential use or significant areas unsuitable for resource use located in reasonable proximity to a major employment center.

As discussed above, the subject property is not committed to residential use or unsuitable for resource use. **Rural Residential Policy 7 is not satisfied.**

Rural Residential Policy 8: Since there is a limited amount of area designated Rural Residential, efficient use of these areas shall be encouraged. The minimum lot size in Rural Residential areas existing on October 4, 2000, shall not be less than two acres allowing for a range of parcel sizes from two to 10 acres in size unless environmental limitations require a larger parcel. Areas rezoned to an Acreage Residential zone after October 4, 2000, shall have a 10-acre minimum lot size unless an exception to Goal 14 (Urbanization) is granted.

The subject parcel is currently zoned SA. Applicant requests AR-2 zoning, which requires the county to take a Goal 14 exception to allow that level of density. As noted above, the hearings officer finds Applicant has not adequately addressed the Goal 14 exception at this time, and an exception to Goal 14 is not recommended. **Rural Residential Policy 8 is not satisfied.**

Rural Residential Policy 9: When approving rural subdivisions and partitionings each parcel shall be approved as a dwelling site only if it is determined that the site: 1) has the capacity to dispose of wastewater; 2) is free from natural hazards or the hazard can be adequately corrected; 3) there is no significant evidence of inability to obtain a suitable domestic water supply; and 4) there is adequate access to the parcel.

The subject property is not within a floodplain, geologically hazardous area, or SGO zone. Applicant has not demonstrated sufficient groundwater availability after development, but there is no significant evidence of *inability* to obtain a suitable domestic water supply. Applicant has addressed access for the initial two 2-acre parcels that are proposed, and Applicant offers several alternatives for access should the remaining 16.46 acre-parcel be developed in the future. Policy 9 subsections (2)-(4) are met.

Applicant states other properties in the area are served by on-site wastewater facilities on comparably sized parcels. Applicant provided no individualized wastewater feasibility information specifically on septic adequacy for the newly proposed parcels. **Policy 9 subsection (1) is not met, but could be met with more information.**

Rural Residential Policy 10: All residential uses in rural areas shall have water supply and distribution systems and sewage disposal systems which meet prescribed standards for health and sanitation.

Applicant has not proven likely suitable water supply and has not proven feasibility for acceptable on-site septic service. **Policy 10 is not met, but could be met with more information.**

Rural Residential Policy 11 deals with rural residential subdivisions and is not applicable.

Rural Residential Policy 12 deals with public or community service districts. No service districts are in the area and none are requested in this proposal. This policy is not applicable.

Rural Residential Policy 13 deals with community water supply systems. None are proposed. This policy is not applicable.

Rural Residential Policy 14: In rural residential areas within one mile of an urban growth boundary, a redevelopment plan may be required as a condition of land division. The plan shall demonstrate that reasonable urban density development is possible should the urban growth boundary need to be expanded in the future.

The subject property is within one mile of an urban growth boundary. A redevelopment plan does not appear necessary with this application. This policy is met.

Rural Residential Policy 15: Where parcels of 20 acres or larger are suitable for rural residential development and previous nearby development does not create a precedent for conventional subdivision development, the developer shall be encouraged to cluster the residences through the planned development process to retain any resource use potential, preserve significant blocks of open space and wildlife habitat and to provide buffers between the residences and nearby resource uses and public roadways.

This policy is related to planned developments and does not apply.

Rural Residential Policy 16: The Acreage Residential (AR) zone will be the predominant zone applied to the lands designated Rural Residential. A numerical suffix may be used to indicate the minimum lot size allowed in the zone.

Applicant asks for AR-2 zoning and a Rural Residential plan designation. If the proposal is approved, the property will be AR zoned and will have a parcel size suffix. If it is not approved, designation will remain Special Agriculture. This policy will be met.

Rural Residential Policy 17: In rural areas mobile homes and manufactured dwellings will be allowed on the same basis as conventional site-built single-family housing.

No mobile home restrictions will be applied by the county. This policy is met.

18. **Applicant has proven some but not all applicable MCCP policies are or can be met.**

ZONE CHANGE

19. Under MCC 17.123.020(C), a quasi-judicial zone change may be initiated by property owners consistent with MCC 17.119.020 and 17.119.025 application requirements. MCC 17.119.020 and 17.119.025 contain filing and signature requirements. Property owners may file and sign applications. The deed Applicant submitted with its application, a statutory warranty deed dated February 2, 1995 and recorded in the Marion County deed records at reel 1220, page 291, does not describe the subject property. Applicant's Exhibit 1 to its rebuttal materials, a statutory warranty deed dated June 4, 1958 and recorded in the Marion County deed records at vol. 550, page 847, shows the subject property was conveyed to Henry O. Pfennig and Lois M. Pfennig, husband and wife. Lois M. Pfennig

signed and filed the applications as Trustee of the Henry O. and Lois M. Pfennig Trust.[3] Applicant has not shown that the subject property is currently owned by the Henry O. and Lois M. Pfennig Trust. However, under MCC 17.119.025(B), when a person signs as the owner of property, the hearings officer and the board may accept these statements to be true, unless the contrary be proved, and except where otherwise in this title more definite and complete proof is required. **MCC 17.119.020, 17.119.025, and MCC 17.123.020(C) are met, but the hearings officer recommends that Applicant submit the current deed for the subject property.**

20. Under MCC 17.123.060, approval of a zone change application or initiated zone change shall include findings that the change meets the following criteria:

A. The proposed zone is appropriate for the Comprehensive Plan land use designation on the property and is consistent with the goals and policies of the Comprehensive Plan and the description and policies for the applicable land use classification in the Comprehensive Plan; and

B. The proposed change is appropriate considering the surrounding land uses and the density and pattern of development in the area; and

C. Adequate public facilities, services, and transportation networks are in place, or are planned to be provided concurrently with the development of the property; and

D. The other lands in the county already designated for the proposed use are either unavailable or not as well suited for the anticipated uses due to location, size or other factors; and

E. If the proposed zone allows uses more intensive than uses in other zones appropriate for the land use designation, the new zone will not allow uses that would significantly adversely affect allowed uses on adjacent properties zoned for less intensive uses.

21. The proposed zone is appropriate for the Rural Residential MCCP designation proposed by Applicant. As found above and incorporated here, Applicant has not proven the proposal is consistent with all applicable MCCP goals and policies. **MCC 17.123.060(A) is not met.**

22. Applicant's study of surrounding land uses, density, and pattern of development in the area is discussed above, and the findings are incorporated here. The hearings officer finds the proposed zone change is not appropriate considering the surrounding land uses and the density and pattern of development in the area. **MCC 17.123.060(B) is not met.**

23. As discussed above and incorporated here, Applicant has not proven that public facilities at a rural level of development are in place. **MCC 17.123.060(C) is not met.**

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[3] Applicant's representative confirmed at hearing that Henry Pfennig is deceased and directed the hearings officer to the death certificate recording information.

24. Applicant provides that there are very few parcels or areas zoned AR in the county that are not already fully parcelized and developed with residential homes. However, there are seven parcels to the east of the subject property, between 62nd Avenue SE and 70th Avenue SE, which are already zoned AR and are large enough to be partitioned to create a total of 12 new parcels, which is two more than the maximum that could be created under Applicant's proposal. In its written rebuttal, Applicant addresses the characteristics of certain parcels proposed by an opponent at hearing as being as well suited for the anticipated uses, coming to the conclusion that each parcel is not *better* suited, which is not the standard. Applicant does not go far beyond the study area to address other lands in the county. Applicant does not adequately address why other land in the county is unavailable or not well suited for rural residential use. **MCC 17.123.060(D) is not met.**

25. The six parcels immediately adjacent to the east of the subject property are one acre or less and are zoned AR. To the south is one 2.93-acre SA-zoned parcel, and immediately adjacent to the west are four parcels, all zoned SA, ranging from .5 to 4.66 acres in size. The largest contains a blueberry operation. Immediately adjacent to the north are two Applicant-owned parcels that are 9.62 and 2 acres in size, both zoned AR. Moving beyond immediately adjacent lands, surrounding properties to the west and south of the subject property are zoned SA and composed of small to medium sized lots in agricultural and rural residential use. Properties to the north and east are mostly zoned AR and are developed with rural residential lots, though parcels north of the subject property across Macleay Road are zoned SA and are in farm deferral.

    The proposed AR-2 zoning would increase the density permitted on the subject property, allowing for two additional dwellings. The proposed zone, with special setbacks and a declaratory statement, may be compatible with adjacent properties zoned for less intensive uses. Adjacent SA-zoned properties would not likely be impacted by the proposed rezoning. With current code requirements, such as special setbacks and declaratory statements in place, it appears the proposed zone will not allow uses that would significantly adversely affect allowed uses on adjacent properties zoned for less intensive uses. MCC 17.123.060(E) is met.

26. **Not all MCC 17.123.060 requirements are proven met on this record. Zone change approval is not recommended.**

PARTITION

MCC chapter 17.172

27. MCC chapter 17.172 governs subdivisions, partitions, and property line adjustments in Marion County. MCC 17.172.040 states that when considering a partitioning, the BOC shall determine whether the proposed partition plan is in accordance with adopted ordinances, comprehensive plans, and land development policies of Marion County. The BOC may prescribe conditions or make changes or modifications to the partitioning to bring it in compliance with applicable ordinances and regulations. MCC 17.172, Article II (Roads,

Street and Easements), IV (Sewage, Water, Utilities and Stormwater Management) and V (Partitioning) apply to partitions in Marion County.

28. Under MCC 17.172.160, no person shall dedicate for public use, or deed to Marion County, a parcel of land which is used or proposed to be used as a roadway without first obtaining approval of the board and delivering the deed to the board for its endorsement. No dedication is effective unless the property is accepted by the board and recorded with the Marion County clerk's office.

29. Under MCC 17.172.180, when it appears necessary to continue streets to an adjacent acreage, the streets shall be platted to the boundary or property line of the proposed subdivision and shall have a turnaround with a configuration approved by the Marion County department of public works engineering.

No street will be platted through the subject property. MCC 17.172.180 is not applicable.

30. Under MCC 17.172.200, the property line radius at street intersections shall be to Marion County Public Works department standards.

The subject property does not border an intersection. MCC 17.172.200 is not applicable.

31. Under MCC 17.172.220, no street grade shall be in excess of 12 percent unless the commission or hearings officer finds that, because of topographic conditions, a steeper grade is necessary. The commission or hearings officer shall require a written statement from the Director of Public Works indicating approval of any street grade that exceeds 12 percent.

The subject property is generally flat. No grade steeper than 12 percent is implicated. MCC 17.172.220 is met.

32. Under MCC 17.172.240, if land to be partitioned will cause the termination of a roadway or borders a roadway right-of-way of less than standard width, the applicant shall dedicate sufficient land to provide for a cul-de-sac or to increase the half (or halves) of right-of-way bordering the subject parcel to one-half of the standard width. Unless otherwise specified for an individual street in the zoning ordinance, standard right-of-way widths are subject to Marion County Department of Public Works standards.

MCPW recommends a condition requiring Applicant to show sufficient right-of-way dedication to serve the future AR-2 lots on the plat. With this condition, MCC 17.172.240 will be met.

33. Under MCC 17.172.260, where topographical requirements necessitate either cuts or fills for the proper grading of streets, additional right-of-way may be required to be dedicated to allow all cut and fill slopes to be within the right-of-way.

The subject property is fairly flat. No additional right-of-way dedication is requested or required to address topographical conditions. MCC 17.172.260 is not applicable.

34. Under MCC 17.172.320, all street or road improvements including pavement, curbs, sidewalks, signage, and surface drainage shall be in accordance with the specifications and standards prescribed by the director of public works. Subdivision plats shall not have final approval until such time as the director of public works, or his/her designee, is satisfied that the street improvements will be completed in accordance with the specifications and standards set forth by the Marion County Department of Public Works.

No building permits within a subdivision or partition shall be issued until the director of public works, or his/her designee, approves that the improvements have been completed or sufficient improvement agreements and financial guarantees have been recorded.

The portion of this provision relating solely to subdivision plats is not applicable. The Planning Director is not requesting roadway frontage improvements. MCC 17.172.320 is met.

35. Under MCC 17.172.400, all lots or parcels shall be served by an authorized sewage disposal system. Subsurface sewage disposal for individual parcels shall meet DEQ and Marion County Building Inspection Division requirements. Those subsurface sewage systems used by a community, sanitary district, industry, or incorporated area must be authorized by DEQ via the Marion County Building Inspection Division. Installation and maintenance shall be in accordance with DEQ regulations and requirements. The hearings officer may require connection to an existing sewage collection and treatment system regardless of lot suitability for subsurface disposal if the hearings officer deems it necessary and provided the connection is available.

The proposed parcels have no access to community sewer systems and will rely on subsurface sewage disposal. DEQ sewage disposal requirements are overseen by Marion County Public Works. Applicant has not proven it is feasible to accommodate subsurface sewage disposal on the subject property. Once Applicant makes a showing of feasibility, Public Works subsurface sewage disposal reviews and permits would be made conditions of any approval and MCC 17.172.400 would be met. **Without a showing of feasibility, the conditions cannot apply and MCC 17.172.400 is not met.**

36. Under MCC 17.172.420, all lots or parcels shall be served by an authorized public or private water supply system or by individual private wells.

(a) Public or Private Systems: Public or private systems shall meet the requirements of the Oregon State Health Division with reference to chemical and bacteriological quality. In addition, such systems must meet the quantity, storage, and distribution system requirements of the State Health Division and the Marion County Department of Public Works.

(b) Individual Private Wells: Individual private wells must meet the construction requirements of the Oregon State Water Resources Department [OWRD] and be located in accordance with requirements of the State Health Division in relation to public or private sewage disposal systems. The bacteriological quality of this water may be determined through the Marion County health department. Upon receiving the recommendations from the State Health Division or Marion County health department, the hearings officer or commission may require the use of an engineered public or private water system in any proposed subdivision. Other criteria to be considered in making this determination are the recommendations contained in the Marion County Water Quality Management Plan, Marion County Comprehensive Plan, and Chapter 181 of the Marion County Rural Zoning Ordinance.

The subject property would be served by a private well that must meet OWRD and sanitation requirements. Applicant has not shown that the subject property can feasibly support a private well without disruption in groundwater supplies. **Without a showing of feasibility, MCC 17.172.420 is not met.**

37. Under MCC 17.172.430, the impact of proposed subdivisions and partitions on stormwater runoff shall be evaluated and potential adverse impacts shall be mitigated. Where evidence indicates stormwater runoff will have an adverse impact on a drainage system or natural drainage network, the developer shall demonstrate that proposed stormwater management on the subject property will compensate for the proposed change per county standards. Compliance with this requirement shall be demonstrated by compliance with Department of Public Works engineering standards.

MCPW LDEP advised Applicant that construction of improvements on the property should not block historical or naturally occurring runoff from adjacent properties, and that site grading should not impact surrounding properties, roads, or drainage ways in a negative manner. The parcel is relatively flat, and with requirements, administered by MCPW, stormwater issues will be addressed during the county permitting process. MCC 17.172.430 can be satisfied.

38. Under MCC 17.172.540, unless a variance is granted, partitions shall conform to applicable regulations in MCC 17.172.460 through 17.172.660. The director shall determine if annexation to a fire, sewer or water district is required. If the director determines that annexation is required, annexation or a non-remonstrance agreement must be filed with the appropriate agency.

No variance to MCC chapter 17.172 requirements is requested. MCC 17.172.460 through 17.172.660 and other provisions of 17.172 specifically referring to partitioning requirements are examined in this recommendation.

39. MCC 17.172.460 deals with pre-application conferences and contains no substantive criteria.

40. MCC 17.172.480 deals with partitioning procedure and requires a partitioning application. An application was filed. MCC 17.172.480 is met.

41. MCC 17.172.500 deals with application form requirements and contains no substantive criteria.

42. MCC 17.172.510 and 17.172.520 contain filing and signature requirements addressed above under the zone change section. Property owners may file and sign partitioning applications. As discussed above, Applicant has not shown that the subject property is currently owned by the Henry O. and Lois M. Pfennig Trust. Under MCC 17.119.025 (B), when a person signs as the owner of property, the hearings officer and the board may accept these statements to be true, unless the contrary be proved, and except where otherwise in this title more definite and complete proof is required. **MCC 17.172.510 and 17.172.520 are met, but the hearings officer recommends that Applicant submit the current deed for the subject property.**

43. MCC 17.172.530 deals with governmental agency coordination. Requests for comment were sent to affected governmental agencies. MCC 172.520 procedures were followed.

44. MCC 17.172.540 deals with regulation conformance. This application is being examined against applicable regulations.

45. Under MCC 17.172.560, all lots must have a minimum of 20 feet of frontage on a public right-of-way, or, when an access easement is proposed to serve one or more lots in any partitioning, the location and improvement of the roadway access shall conform to the following standards which are necessary for adequate access for emergency vehicles. Evidence that the access has been improved to these standards shall be provided prior to the issuance of building permits on the parcels served by the access easement.

    A. Have a minimum easement width of 20 feet;

    B. Have a maximum grade of 12%;

    C. Be improved with an all-weather surface with a minimum width of 12 feet;

    D. Provide adequate sight-distance at intersections with public roadways;

    E. Be provided with a road name sign at the public road as identification for emergency vehicles in accordance with the Marion County Address and Street Name Ordinance.

    None of the proposed parcels contain a grade greater than 12%. An access easement, Whispering Way, is proposed to serve the created lots. Whispering Way has a 26 foot easement, and Applicant has indicated its intent to increase that width to 60 feet. However, per Partition Plat #2012-08, and subsequent Partition Plat #2019-38, the easement does not serve the subject property and is therefore not legal access for the subject property. An

access easement serving the proposed parcels, surface improvements, and private drive standards can be made conditions of approval. MCC 17.172.560 can be met.

46. MCC 17.172.580 through 17.172.640 deal with notification, appeal of Planning Director and hearings officer decisions and hearing requirements, and contain no substantive criteria.

47. Applicant is advised that under MCC 17.172.660, within two years of approval of the partitioning application, Applicant shall submit for approval by the Director, a partitioning plat in the appropriate form that shall reflect the final decision. When approved, the plat shall be recorded with the Marion County Clerk. Until the plat is approved and recorded, no building permits for any of the divided parcels shall be issued. If Applicant does not record a partitioning plat within two years, approval will be deemed null and void. One extension may be approved by the Planning Director on submission of written justification prior to the expiration of the two-year time limit.

48. **Applicant has proven some but not all applicable criteria are or can be met. A partition is not recommended.**

VII. Recommendation

It is hereby found that Applicant has NOT met the burden of proving that criteria for taking an exception to Goal 3 and Goal 14, for an MCCP amendment, a zone change from SA to AR-2, or a partition have been met. The hearings officer recommends **DENIAL** of the proposal.

VIII. Referral

This document is a recommendation to the Marion County Board of Commissioners. The Board will make the final determination on this application after holding a public hearing. The planning division will notify all parties of the hearing date.

DATED at Salem, Oregon, this 10th day of December, 2019.

Stephanie L. Schuyler
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

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Marion County Fire District No. 1
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AAC Member No. 3 (no members)

Roger Kaye
Friends of Marion County
P.O. Box 3274
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East Salem Suburban Neighborhood Association
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Salem, OR 97309

By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 10th day of December, 2019, and that the postage thereon was prepaid.

Susan Hogg
Secretary to the Hearings Officer