

**BEFORE THE PLANNING DIVISION  
FOR POLK COUNTY, OREGON**

**In the Matter of the Applications of:**

**File No: PA 18-01, ZC 18-02**

**Simmons Family Properties, LLC,  
Christopher and Kimberly Gray,  
Kevin Stone, and Jonathan and  
Tamera Pugmire**

**HEARING RECOMMENDATION**

**I. SUMMARY OF PROCEEDINGS**

**A. BACKGROUND**

This matter arose on the applications of Wallace Lien, attorney on behalf of the Simmons Family Properties, LLC, Christopher and Kimberly Grey, Kevin Stone, and Jonathan and Tamera Pugmire (“Applicants”) to make a Comprehensive Plan amendment and a Zoning Map amendment for seven (7) contiguous parcels comprising an approximately 228 acre area (subject properties). The subject properties are currently designated Agriculture on the Comprehensive Plan Map and Exclusive farm Use (EFU) on the Zoning Map. The Applicants are proposing to change the Comprehensive Plan designation of the subject properties to Rural Lands and the zoning to Agriculture and Forestry-10 Acre (AF-10). The Applicants’ request requires an exception to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The Applicants have requested an exception to these Goals under the “irrevocably committed” goal exception criteria.

The subject property owners previously submitted similar applications in 2014, identified as planning files PA 14-01 and ZC 14-02. After conducting a public hearing, the Polk County Hearings Officer issued a recommendation to the Polk County Board of Commissioners that these applications be denied. This recommendation was primarily based on insufficient evidence to demonstrate that the subject properties are not capable of producing agricultural or forest products, and insufficient evidence to demonstrate how the relationship between adjoining uses and the subject properties has made farm or forest uses thereon impracticable, and that approval of the exceptions would not commit neighboring resource zoned properties to non-resource uses.

As a result of the Hearings Officer’s denial recommendation, the Applicants withdrew their applications in order to further study and address the deficiencies identified by the Hearings Officer. Although these are new applications, the Applicants have requested that the Record for PA 14-01 and ZC 14-02 be incorporated into the record for these current applications. The Applicants contend that because most of the factual material from the previous applications were unchallenged and uncontroversial, it should stand as sufficient evidence to support the certain factual propositions without the need to repeat that evidence in the current case. Because the Applicants are requesting to utilize the Hearings Officer’s previous findings, in part, the Hearings Officer has structured this decision to include, “Hearings Officer’s Previous Findings”, “Applicant’s Additional Findings”, and “Hearings Officer’s Current Findings”.

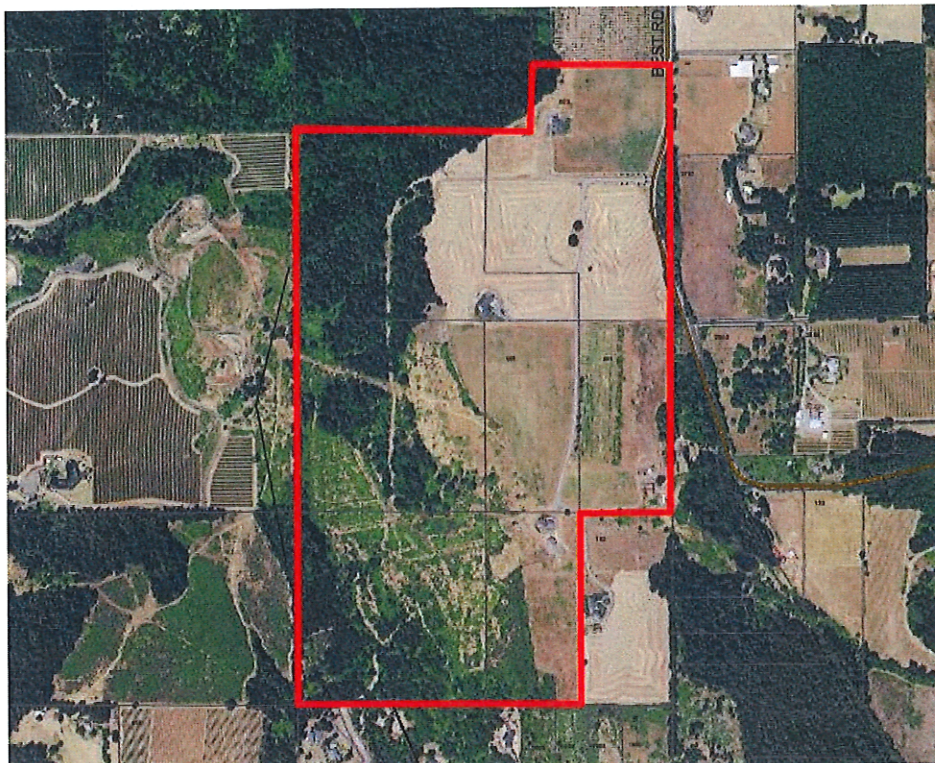
1           1. PROCEDURAL HISTORY

2   The current applications were submitted on December 14, 2018. An incomplete letter was sent by  
 3   Staff on January 11, 2019, requesting additional information to further address certain Goals and  
 4   Policies within the Polk County Comprehensive Plan (PCCP), and to provide an updated  
 5   Transportation Impact Analysis (TIA) for consistency with the Transportation Planning Rule  
 6   (TPR) and the Polk County Design Standards for a Transportation Impact Analysis. On March 19,  
 7   2019, the Applicants provided additional information into the record, at which time Staff deemed  
 8   the applications complete. The Oregon Department of Land Conservation and Development  
 9   (DLCD) notice was sent via email on August 6, 2019.

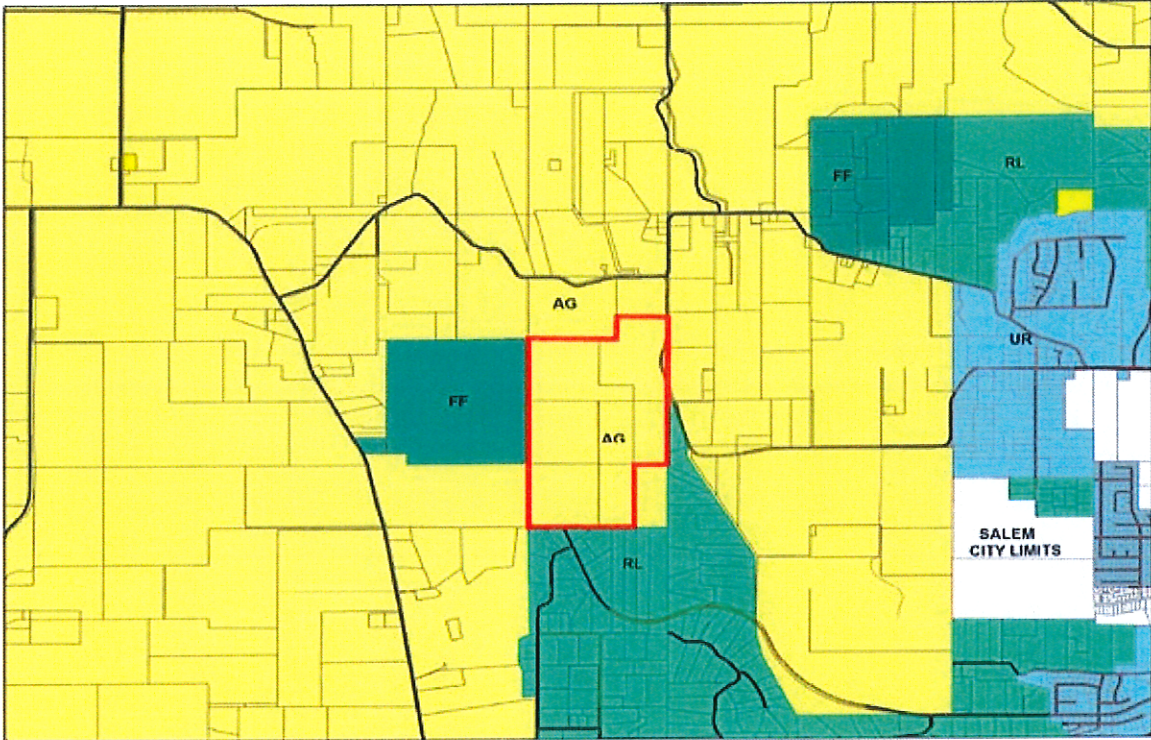
10           2. COMPREHENSIVE PLAN AND ZONING DESIGNATIONS:

Location	Comprehensive Plan Designation	Zoning Designation
Subject Properties	Agriculture	Exclusive farm Use
Property North	Agriculture	Exclusive Farm Use
Property South	Rural Lands	Acreage Residential- Five Acre
Property East	Agriculture and Rural Lands	Exclusive Farm Use and Acreage Residential-Five Acre
Property West	Farm Forest and Agriculture	Farm/Forest and Exclusive Farm Use

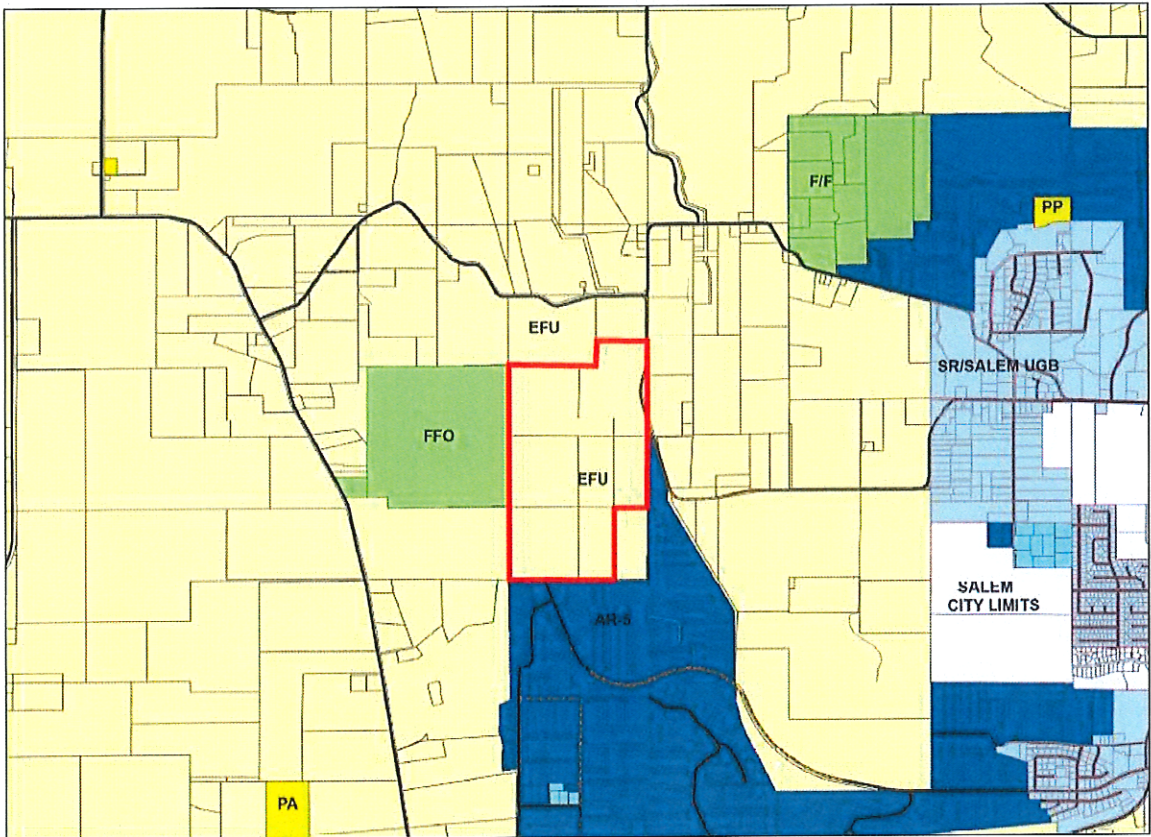
11   **2018 Polk County Aerial Photograph of the subject properties.**



CURRENT COMPREHENSIVE PLAN MAP



CURRENT ZONING MAP



1           3. PARCEL SIZE:

2       Seven (7) contiguous parcels that are approximately 228 acres.

3           4. PROPERTY DESCRIPTION:

4       The subject properties, located one (1) property south of the intersection of Orchard Heights Road  
5       and Best Road, consist of seven (7) legal parcels comprising approximately 228 acres of land in  
6       four (4) separate ownerships as follows: Simmons Family Properties, LLC owns four (4)  
7       contiguous parcels which comprise an approximately 120.0 acre tract (Tax Lots 601, 604 and 605  
8       in T7S, R4W, Section 14, and Tax Lot 100 in T7S, R4W, Section 23); Kevin Stone owns one (1)  
9       parcel containing approximately 20.0 acres (T7S, R4W, Section 23, Tax Lot 101); Christopher &  
10       Kimberly Gray own one (1) parcel containing approximately 45.0 acres (T7S, R4W, Section 14,  
11       Tax Lot 602); and Jonathan & Tamara Pugmire own one (1) parcel containing approximately 43.7  
12       acres (T7S, R4W, Section 14, Tax Lot 603).

13       The subject properties were lawfully created pursuant to Polk County Subdivision and Partition  
14       Ordinance Section 91.950(1)(b), arriving at their current configuration through a series of  
15       partitions identified as LP 05-20, LP 05-22, and LP 05-23, and memorialized in Polk County  
16       Partition Plats 2006-0027 through 2006-0029. Staff notes that Parcel 3 of Partition Plat 2006-0029  
17       (Tax Lot 102 in T7S, R4W, Section 23) has not been included in the applications and is not  
18       considered to be part of the exception area comprising the subject properties.

19       The partition approvals identified as LP 05-20, LP 05-22, and LP 05-23 became effective May 3,  
20       2006. These land partition approvals were made possible by three (3) Oregon Ballot Measure 37  
21       Claims (2004), hereinafter referred to as Measure 37, identified as M 05-09, M 05-13, and M 05-  
22       14, and vesting determinations for the land partitions were made in Polk County Planning Division  
23       file numbers VRD 09-03 with respect to LP 05-23, VRD 09-02 with respect to LP 05-22, and VRD  
24       09-01 with respect to LP 05-20. Following the Measure 37 Claims and corresponding vested rights  
25       determinations, a suite of Oregon Ballot Measure 49 (2007), hereinafter referred to as Measure 49,  
26       claims were submitted to DLCD, which resulted in three (3) Measure 49 Final Order and Home  
27       Site Authorizations (Final Order). Claim H132890 was divided into three (3) claims, recognizing  
28       the separate ownerships of the subject properties at that time. Claim H132890A refers to Tax Lot  
29       600 and claimants Nina Simmons, Wayne Simmons and Allen Simmons; Claim H132890B refers  
30       to a Tax Lot 601 and claimants Wayne Simmons and Allen Simmons; and, Claim H132890C refers  
31       to a Tax Lot 100 and claimants Nina Simmons, Wayne Simmons and Allen Simmons. Final Orders  
32       arising from these three (3) Claims provided for two (2) dwellings (Tax Lots 602 and 603) in  
33       connection with Claim H132890A, for zero (0) dwellings in connection with Claim H132890B,  
34       and for three (3) dwellings in connection with Claim H132890C. The Final Orders referenced  
35       above authorized five (5) dwellings on the parcels vested under Measure 37. Of the five (5)  
36       authorized dwellings under Measure 49, three (3) have been built. These dwellings are on Tax Lots  
37       602 and 603 in T7S, R4W, Section 14 and Tax Lot 101 in T7S, R4W, Section 23. Based on a  
38       review of the Polk County Community Development and Assessor records, the subject properties  
39       currently contain a total of three (3) dwellings.

40       Based on a review of the Polk County Significant Resource Area (SRA) Map, the subject properties  
41       have no inventoried significant resources. Based on the Federal Emergency Management Agency  
42       (FEMA) Flood Insurance Rate Map (FIRM) panel number 41053C0275F, dated December 19, 2006,  
43       the subject properties are located outside of the Special Flood Hazard Area. There are no historic sites  
44       or Greenway areas located on the subject properties. Based on a review of the National Wetland  
45       Inventory (NWI) map, Rickreall quadrangle, the middle fork of the McNary Branch of Mud Slough  
46       abuts the northwest corner of the subject properties, but does not appear to be located on the subject  
47       properties based on Staff's review of LIDAR imagery, accessed through Polk County's Geographic  
48       Information System (GIS).

1 **Table 1: Soil characteristics of the subject properties as identified in the Natural Resources**  
 2 **Conservation Service (NRCS) Soil Survey of Polk County, Oregon utilizing the Polk**  
 3 **County Geographic Information System (GIS) <sup>1</sup>**

Soil Type	Soil Name	Soil Class	High-Value	Forest Productivity	Acres
61C	Ritner Gravely Silty Clay Loam	IVS	No	143	4.0
61D	Ritner Gravely Silty Clay Loam	VIS	No	143	3.8
61E	Ritner Gravely Silty Clay Loam	VIIS	No	143	83.3
36C	Jory Silty Clay Loam	IIE	Yes	172	23.3
36D	Jory Silty Clay Loam	IIIE	Yes	172	21.1
52C	Nekia Silty Clay Loam	IIE	Yes	157	54.2
52D	Nekia Silty Clay Loam	IIIE	Yes	157	20.0
52E	Nekia Silty Clay Loam	IVE	No	157	18.6
<b>TOTAL:</b>					229.3

4  
 5 Based on Polk County’s soil report for the subject properties, the subject properties contain  
 6 approximately 51.7% high-value farmland soils as defined in ORS 215.710. Approximately 61.6%  
 7 of the soils on the properties are Class I-IV. The subject properties contain soils that are also  
 8 considered productive forestry soils. Those soils on the subject properties are cable of annually  
 9 producing an average of approximately 154 cubic feet of wood fiber per acre.

10 During the review for PA 14-01 and ZC 14-02, the Applicants submitted two independent soil  
 11 studies with the applications materials that disagree with the mapped soil units on the NRCS Soil  
 12 Survey shown in the table above. The first soil study was completed by Joel A. Norgren, CPSS in  
 13 April and July of 2011. The Norgren soils report was updated in February, 2014 by Andy  
 14 Gallagher, CPSS. While both soils scientists modified the share of soils in each capability class  
 15 mapped by the NRCS, and mapped new Witzel soils on the subject properties, the Norgren and  
 16 Gallagher soils studies both indicate a predominance of agricultural soils (Class I-IV).

17 **SERVICES:**

18 Access: The subject properties take access from Best Road via an existing driveway and  
 19 easements. Best Road is identified as a Minor Collector in the Polk County  
 20 Transportation Systems Plan, Figure 3.

21 Water/Sewer: The Applicants state that two shares for water hookups have been purchased from  
 22 the Orchard Heights Water District. Water would also be obtained from on-site  
 23 wells. The subject properties would be served by on-site sewage disposal systems  
 24 (septic systems).

25 School: Salem School District 32J

26 Fire: Salem Suburban RFPD

27 Police: Polk County Sheriff

<sup>1</sup> Disclaimer: Information is based on NRCS soil information & Polk County Tax Assessment data. This information is provided for land use planning purposes only. Polk County is not responsible for map errors, omissions, misuse, or misinterpretation. Percent and total calculations are based on Staff measurements using the Polk County GIS.



1                   **III. EVIDENTIARY RULINGS REGARDING WRITTEN TESTIMONY**

2  
3                   **A. Notice of Withdrawal and Motion to Strike**

4                   On November 8, 2019, during the Open Record Period Jonathan Pugmire and Tamara Pugmire  
5                   filed a Notice of Withdrawal of Arguments and Motion to Strike Evidence from the Record.  
6                   Jonathan and Tamara Pugmire requested that their testimony given during the public hearing and  
7                   the letters submitted into the Record be withdrawn and “no credence or weight” be given to their  
8                   evidence and to the extent allowable by law they move to have all testimony and written evidence  
9                   stricken. Given that Jonathan and Tamara Pugmire’s evidence at the hearing and during the open  
10                  record period was properly introduced into the record, the Hearings Officer will not strike nor  
11                  withdraw the comments. However, the Hearings Officer also understands that Jonathan and  
12                  Tamara Pugmire have requested that their previously, properly submitted testimony be given no  
13                  weight. The Hearings Officer will grant that request and will not give the Pugmire testimony or  
14                  evidence any weight or credence as they have so requested.

15                  **B. Objections to Rebuttal Evidence**

16                  Mr. Lien raised objections to evidence submitted by Deumling, Malone, and Mulkey during the  
17                  Rebuttal period. Mr. Lien argued that the testimony and exhibits they sought to introduce were  
18                  inappropriate as he considered it new evidence and not rebuttal evidence. Mr. Lien moved that  
19                  their submissions be rejected and not allowed in the record. He also argued that if admitted, it  
20                  would be a violation of Applicants’ due process rights because they only had one week to provide  
21                  final argument.

22                  The Hearings Officer reviewed the comments submitted by Deumling, Malone, and Mulkey during  
23                  the Rebuttal period and finds that their comments contain both rebuttal evidence as well as new  
24                  evidence that was not previously submitted in the record. It would be challenging for the Hearings  
25                  Officer (as well as on review) to parse out “new” vs. “rebuttal” evidence within the comments  
26                  submitted by Deumling, Malone, and Mulkey on November 26, 2019. For that reason, the  
27                  Hearings Officer will sustain Mr. Lien’s objections to the testimony and evidence submitted by  
28                  Deumling, Malone, and Mulkey on November 26, 2019 during the rebuttal period.

29   **IV. REVIEW & DECISION CRITERIA**

30                  The review and decision criteria for a Polk County Comprehensive Plan (PCCP) Map amendment  
31                  and a Zoning Map amendment are provided under Polk County Zoning Ordinance (PCZO)  
32                  Sections 115.050 and 111.275. Under those provisions, the Hearings Officer conducts a public  
33                  hearing pursuant to PCZO 111.190 and 115.030 and makes a recommendation to the Polk County  
34                  Board of Commissioners. The Polk County Board of Commissioners conducts a public hearing  
35                  pursuant to PCZO 111.200 and 115.030 and makes a final local decision.

36                  The Justification Statement submitted December 10, 2018 by the Applicants, along with the  
37                  applications for this Comprehensive Plan Amendment and Zoning Map Amendment, requested  
38                  that the Record from PA 14-01 and ZC 14-02 be incorporated here. The Applicants have requested  
39                  that the “prior Record should be used only (*sic*) support of these applications where the evidence  
40                  and prior findings were not challenged or disputed. In all other cases, the applications should stand  
41                  on its own based on the additional new information and evidence submitted here.” The Applicants  
42                  contend that because most of the factual material from the previous applications were unchallenged  
43                  and uncontroversial, it should stand as sufficient evidence to support the certain factual  
44                  propositions without the need to repeat that evidence in the current case. Because the Applicants  
45                  have not specifically identified what factual material they believe was unchallenged and  
46                  uncontroversial and should stand as sufficient evidence in these applications, the Hearings Officer  
47                  incorporates the structure of this Recommendation to include, “Hearings Officer’s Previous  
48                  Findings”, “Applicant’s Additional Findings”, and “Hearings Officer’s Findings” to ensure that  
49                  she has incorporated the factual material from PA 14-01 and ZC 14-02 that the Applicants have  
50                  requested.

1 **1. Findings for Comprehensive Plan Map Amendment; File PA 18-01:**

2 **Amendments to the Comprehensive Plan Map must meet one or more of the following**  
3 **criteria: [PCZO 115.050(A)]<sup>2</sup>**

4 **A. The Comprehensive Plan designation is no longer appropriate due to changing**  
5 **conditions in the surrounding area; and [PCZO 115.050(A)(2)]**

6 **Hearings Officer's Previous Findings in PA 14-01 and ZC 14-02:**

7 Applicant states that portions of the proposed rezone area have traditionally been in Forest Use, some  
8 in Farm Use and some in neither farm nor forest uses. The PCCP Designation would be modified  
9 from Agriculture to Rural Lands. The impetus for this amendment arises in part from the decline of  
10 the agricultural enterprise resulting from some specific regulations that affected the commercial  
11 viability of large tract farming operations and from changes in the surrounding farm enterprise in the  
12 area. The Simmons have also been the only bona fide farmers to ever farm portions of this land since  
13 World War I. The Simmons did not lease out their land when they attempted gooseberries,  
14 strawberries, prunes, cherries, fine fescue, Christmas trees and wheat. All of these crops failed for  
15 various reasons as will be discussed later in the text.

16 Applicants state that the resultant effects of Ballot Measures 37 and 49 also have a bearing on the  
17 filing of the applications since significant capital fixity was established on the easternmost 128 acres  
18 subject to the applications. The subject property has a residual system of roads resulting from the  
19 prior applications and approval of Ballot Measure 37 claim. All of the roads that can serve all parts  
20 of the property are at the very least "roughed out". The road construction that resulted from the Ballot  
21 Measure 37/49 claims is 4,100 feet long. The property now has a gated access that originates on Best  
22 Road. These roads can serve as farm to market roads as well as for everyday access for the residents  
23 and their needs. Electric power has been extended into the site to serve the Lathan, Stone, and Gray  
24 residences. There is now additional capacity for electric power to the eastern half of the rezone area.  
25 Extensions from existing underground lines can be made to serve existing and future parcels to the  
26 west. In addition, two shares for water hookups have been purchased from the Orchard Heights  
27 Water District. There is a potential for four more non-farm dwellings to be established on properties  
28 adjacent to the subject rezone area but the conditions on those properties would likely prevent any  
29 houses from being so close as to interfere with farming activities.

30 The applicant states that the owners are applying collectively for this change because they are all  
31 facing the same problem, the land is too diverse to be adapted to large scale farming operations. The  
32 high elevation of the site, with a majority over 900 feet above sea level, poses extreme problems for  
33 establishing agricultural uses. Though the elevation enables spectacular scenery and the Coast Range  
34 and the South Willamette Valley, it also affects rainfall, humidity, temperature as well as frost free  
35 days. [A] factor in crop failure is excessive wind and sun exposure. The Douglas fir Christmas trees  
36 did not develop proper form in areas from the Eola Summit and west due to wind damage and those  
37 east of the summit developed a condition called "sun scald." The higher elevations combined with  
38 the wind reduced the quality of the Christmas trees in almost every growth cycle. [T]he change in  
39 zoning is to allow a transition from large tract monoculture crops such as wheat, grass seed, orchard  
40 crops, Christmas trees and irrigated fruit and berry crops to smaller tract crops aimed at small-scale  
41 farming operations that would appeal to family farms catering to organic cultivated agriculture (non-  
42 irrigated) and specialty livestock and poultry operations. No gross earnings from farming have  
43 accrued to any of the participants in this zoning action since 2004.

44 An irrevocably committed exception is required to determine the relationship of the subject rezone  
45 area to the lands surrounding and adjacent to it. The applicants contend that lands adjacent and  
46 nearby have no positive impact on the farming of the subject property. There is no relationship  
47 historically between the subject rezone areas and the smaller "hobby farms" (the owners have outside

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<sup>2</sup> The Applicants do not contend that PCZO 115.050(A)(1) is applicable here and it is not addressed in this Hearing Decision.



1 jobs such as doctors and surgeons) that border on the east. The farms to the north that are across  
2 Orchard Heights Road are farmed in conjunction with large fields that have superior soils to those  
3 found on the subject property. The ridge line north of Orchard Heights Road opens up into a very  
4 large contiguous block of farm land in which uniform practices are possible. This is due to relatively  
5 level topography, deeper well drained soils and larger field sizes.

6 Applicants say that changing conditions in the surrounding area also affect the types of crops grown.  
7 The Salem Area has had a doubling of the population in the last 50 years with a significant growth  
8 factor in the West Salem portion of Salem and most notably east of the subject property. The demand  
9 for the types of crops grown historically have diminished such as cherries, prunes, Douglas fir  
10 Christmas trees, grass seed and grain as the yield of these crops also dropped. Some of the processing  
11 facilities for these crops have relocated or closed. The prohibition of irrigation on the subject property  
12 has been a limiting factor.

13 According to applicants, the portion of the property adjacent to non-farm uses on the southeast and  
14 south used to be in orchard crops and Christmas trees. The farming activities were compatible with  
15 these uses but in more recent years at least three dwellings were established that are close to active  
16 farming areas. The subject property borders seven such parcels of which three have dwellings. The  
17 overall establishment of non-farm dwellings in the area does not apparently affect the farming of the  
18 land because they have coexisted for many years without conflict despite field burning and orchard  
19 spraying. One nearby neighbor did have a problem with a well failure but there is no evidence that  
20 the farming of the subject property created that situation. The Hearings Officer does note that the  
21 applicant later made it apparent that surrounding residential uses make spraying for agriculture and  
22 forestry difficult.

23 The applicants argue that the fundamental change has been the move away from large acreage field  
24 crops such as grass seed, grain, orchard crops, nut crops, and Christmas trees to specialty crops.  
25 These new generation of specialty crops include high elevation Noble fir Christmas trees, high value  
26 livestock operations, and wine grapes. Large acreages are not a prerequisite for the success of these  
27 crops nor is irrigation essential for these crops. Changing conditions in the surrounding area also  
28 affect the types of crops grown. The Salem Area has had a doubling of the population in the last 50  
29 years with a significant growth factor in the West Salem portion of Salem and most notably east of  
30 the subject property. The demand for the types of crops grown historically have diminished such as  
31 cherries, prunes, Douglas fir Christmas trees, grass seed and grain as the yield of these crops also  
32 dropped. Some of the processing facilities for these crops have relocated or closed. The prohibition  
33 of irrigation on the subject property has been a limiting factor.

34 Staff concluded that the applicant is proposing this PCCP Map amendment under the assertion that  
35 the current designation of Agriculture is no longer appropriate due to changing conditions in the  
36 surrounding area. The applicant emphasizes in the proposal that the property owner would like the  
37 flexibility to establish additional acreage residential uses on the subject properties, which could allow  
38 small scale specialty agriculture even though it would not be profitable due to the limitations in the  
39 land. The current zoning designation of the subject property is EFU, which implements the  
40 Agriculture PCCP land designation. The EFU zone allows dwellings when certain farm income, soil  
41 quality or continuous ownership tests are met, but does not list dwellings as an outright permitted  
42 use in the zone. The applicant's proposal would change the zoning of the subject property to AF-10,  
43 which supports small scale farm and forest uses. The proposed Rural Lands PCCP designation and  
44 AF-10 Zoning designation would also allow the property owners to establish dwellings on the subject  
45 properties outright without having to prove tenure or demonstrate adequate farm income.

46 The PCCP states that designated "Agriculture Lands" are generally large holdings with few non-  
47 farm uses. Diverse terrain around Polk County offers a variety of commodities that can be locally  
48 grown. Farmers can produce grain or livestock in level areas, set up orchards, vineyards and pastures  
49 on the hills; or develop woodlots on the foothills [Page 5 of the PCCP]. The applicant states that the  
50 subject properties were originally part of a larger tract of land owned by the Simmons family since

1 World War I. The Simmons family actively farmed the tract, growing gooseberries, strawberries,  
2 prunes, cherries, fine fescue grass, Christmas trees and wheat, with little success.

3 Statements by the applicant indicate that parcelization of lands in the vicinity of the subject properties  
4 has resulted in an ownership pattern that precludes the management of small farm holdings as larger  
5 farm units and has led to the proliferation of small scale specialty farms. Staff notes that the nearest  
6 large agricultural operations to the subject properties are Christmas tree farms and vineyards. Using  
7 2011 Aerial Photographs and GIS measuring tools, Staff estimated the size of the largest agricultural  
8 operations in the vicinity of the subject properties. Eola Hills Wine Cellars' Legacy Estate Vineyard  
9 has approximately 75 acres of vineyard planted on an approximately 162 acre property immediately  
10 west of the subject properties; Domaine Drouhin Oregon, Inc. has approximately 140 acres of  
11 vineyard planted on four adjacent parcels totaling approximately 278 acres about a mile northeast of  
12 the subject properties; Doubletrees Land & Timber, LLC has approximately 120 acres of Christmas  
13 trees planted on an approximately 170-acre property about one third of a mile southeast of the subject  
14 properties; Schudel Enterprises, LLC owns approximately 198 acres immediately west of the  
15 Domaine Drouhin Oregon, Inc. and grows Christmas trees on approximately 185 of those acres; and,  
16 across Orchard Heights Road from the subject properties Charles and Andrea Hatchette own ten  
17 contiguous tax lots comprising approximately 147 acres with over 100 acres of Christmas trees.  
18 Growing specialty crops at a larger scale generally means lower input costs, and more predictability  
19 at harvest.

20 Land use changes on properties in the vicinity of the subject properties generally could support the  
21 applicant's statements regarding the proliferation of small scale farms in the area. Staff developed a  
22 table [set out on pages 7 and 8 of the Staff report] to characterize the nature of specialty agriculture  
23 in the vicinity of the subject properties. The 2014 Polk County Assessor's Office records were  
24 referenced for the assessed values of land and structures located on EFU lands within 1,000 feet of  
25 the subject properties to help evaluate whether nearby lands are primarily used for agricultural or  
26 residential purposes. There is no evidence demonstrating whether or not surrounding properties are  
27 able to make a profit in money from agriculture. Therefore, to help understand whether or not  
28 surrounding small farm operations rise to the level of a commercial farm where there is the intent to  
29 make a profit in money, one can assume that properties engaged primarily in agriculture generally  
30 have higher assessed values for land relative to structures thereon.

31 Of the 21 properties zoned EFU within 1,000 feet of the subject properties, eight have higher assessed  
32 values for structures than for the underlying land. Two of the properties for which land is assessed  
33 at a higher value than the structures thereon are not receiving farm deferrals, which would inflate the  
34 assessed value of those lands. Whether or not a property qualifies for special assessment for farm  
35 use is not necessarily an indicator as to whether or not the property is capable of making in profit in  
36 money from farm use. Staff observes that three of the 12 nearby EFU properties having higher  
37 assessed values for land than for structures are vacant. Accordingly, it can be argued that, within  
38 1,000 feet of the subject properties, there are nearly as many small scale farm among EFU properties  
39 with residences than there are large commercial farming operations. A majority of the EFU lands to  
40 the north and west of the subject properties are, or could be, large commercial scale farms. The  
41 applicant has characterized the properties to the east as "hobby" farms. A definition of a "hobby"  
42 farm from Internal Revenue Service (IRS) is generally accepted to mean that there is no intention by  
43 the farm operator to make a profit from agricultural activities.<sup>3</sup> Staff observes that EFU zoned  
44 properties near the subject property that have higher assessed values for structures than for the  
45 underlying land and may qualify as hobby farms by this definition. Without economic data for the  
46 surrounding properties, Staff made the assumption that agricultural income would not be sufficient  
47 to support the costs of dwellings and other structural improvements on those lands. Therefore, capital  
48 derived from sources other than farm income from these neighboring properties would be necessary

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<sup>3</sup> FS-2007-18, *Business or Hobby? Answer Has Implications for Deductions*, Internal Revenue Service, (April 2007), <https://www.irs.gov/uac/Business-or-Hobby%3F-Answer-Has-Implications-for-Deductions>, viewed 10/19/15.

1 to construct and maintain the dwellings and structures, leading one to conclude that agricultural  
2 activities thereon are ancillary to the residential uses. This does not in itself allow the conclusion that  
3 surrounding properties are not capable of or are not currently making a profit in money from  
4 agriculture; only that it may not be the primary activity or use of the land.

5 Measure 37 claims were made on two properties adjoining the subject properties. One of the Measure  
6 37 claims was succeeded by Measure 49 Order No. E132401, which recognized two additional  
7 parcels for Tax lot 200 in T7S, R4W, Section 23. A second Measure 37 claim on an approximately  
8 104 acre parcel, identified as Tax Lot 601 in T7S, R4W, Section 23, adjacent to the southwest corner  
9 of the subject properties authorized two additional parcels pursuant to a Measure 37 Claim (M06-  
10 249), and two additional dwellings pursuant to a Measure 49 Final Order (H134231). Pursuit of  
11 potential land entitlements under Measures 37 and 49 are emblematic of a trend towards a growing  
12 number smaller agricultural parcels occurring in the vicinity of the subject properties over the past  
13 several decades. This has resulted in a diversification of farming on a small scale with equine stables,  
14 Christmas tree farms, grass seed growers, wood lots, and vineyards and wineries operating within a  
15 thousand feet of the subject properties. Recent changes on these nearby properties exemplify the  
16 shift to small scale specialty agriculture. Cubanismo Vineyards began with a partition of a 32-acre  
17 parcel into a 20-acre parcel and a 12-acre parcel in 1978 (Polk County Planning File SE 78-18),  
18 followed by a farm dwelling approval in 1989 (Polk County Planning File FD 89-16). A conditional  
19 use permit approved wine sales and marketing as a home occupation in 2004 (Polk County Planning  
20 File CU 04-21), including four events attracting up to 300 visitors. Another commercial winery was  
21 established within the past 10 years adjacent to the subject properties. Eola Hills Winery purchased  
22 a large parcel immediately west of the subject properties which was the subject of Plan Amendment  
23 and Zone Change applications in 2010 (PA 10-05 and ZC 10-06, respectively) to change the plan  
24 designation from Forest to Farm Forest and change the zoning designation from Timber  
25 Conservation (TC) to Farm Forest Overlay (FFO). A subsequent land use application (LUD 13-11)  
26 was approved to establish a winery at what is now known as the Legacy Estate Vineyard. The winery  
27 offers wine tasting, company picnics and wedding ceremonies at their Legacy Estate Vineyard  
28 location.

29 The elevation of the subject properties is between 900 and 1,060 feet with steep slopes to the west  
30 and south originating from a high point at the southern end of the Eola Hills. According to the  
31 applicant, this geography creates more challenging conditions for crop cultivation than properties  
32 that have been successful at establishing commercial vineyards and Christmas tree farms. Wind  
33 exposure is high since this southern promontory of the Eola Hills is in the path of coastal winds  
34 passing through the Van Duzer Gap. Moreover, the subject properties are located on the south side  
35 of a promontory, so they receive more incident solar radiation than other areas of Polk County. The  
36 applicant states that a combination of solar exposure on steep south facing slopes and steady winds  
37 make raising crops on the subject properties impracticable because elevated rates of transpiration  
38 sap available soil moisture, which stunts growth and leads to crop failures. The slope, aspect and  
39 elevation of the subject properties has contributed to crop failures resulting from cool temperatures  
40 that discourage pollinators, heavy rains precipitated from orographic lifting of clouds up the Eola  
41 Hills, and constant wind damaging and stressing plants. Staff evaluated the applicant's statements  
42 and concurs that while the subject properties are predominantly comprised of soils that characterize  
43 agricultural land, consistent with OAR 660-033-0030, site constraints related to slope, aspect,  
44 excessive wind and abundant sun exposure limit the ability of the subject properties to produce  
45 commercial agricultural crops. The Hearings Officer does not entirely disagree, even though the  
46 applicant has not conclusively shown how these factors would not similarly limit agricultural  
47 activities on property zoned Agriculture and Forestry-10. The Hearings Officer also is mindful that  
48 while that zone permits placement of a residence as a matter of right, there is no requirement that  
49 any actual agricultural/forest activity be undertaken.

50 Over the past decade a series of land partitions of the original Simmons holdings, identified as Polk  
51 County Planning authorizations LP 05-20, LP 05-22, and LP 05-23, and memorialized in Partition  
52 Plats 2006-0027 through 2006-0029, have resulted in the current configurations of the subject

1 properties. These recent land partitions were made possible by three Measure 37 Claims (identified  
2 as Polk County Measure 37 authorizations M 05-09, M 05-13, and M 05-14). Subsequent vesting  
3 determinations by Polk County Planning Division, identified as Polk County file numbers VRD 09-  
4 01 through VRD 09-03, upheld these Measure 37 partitions. The Measure 37 partitions of the subject  
5 properties created six parcels to bring the total number of parcels to nine. Following the Measure 37  
6 claims and corresponding vested rights determinations, a suite of Measure 49 claims were submitted,  
7 which resulted in three Measure 49 Final Order and Home Site Authorizations (Final Order)  
8 approved by DLCD. The Final Orders referenced above authorized five dwellings on the parcels  
9 vested under Measure 37. Of the five authorized dwellings under Measure 49, three have been built.  
10 These dwellings are on Tax Lots 602 and 603 in T7S, R4W, Section 14 and Tax Lot 101 in T7S,  
11 R4W, Section 23. Based on a review of the Polk County Assessor records, the subject properties  
12 currently contain a total of three dwellings.

13 Applicant contends that the subject properties are compatible with the properties in the vicinity and  
14 that the subject properties cannot reasonably or feasibly be utilized for farm or forest use by  
15 themselves or in conjunction with adjoining properties. Division of the subject properties following  
16 Measure 37 claims made by various members of the Simmons family, and the construction of three  
17 dwellings on its eastern portion have broken up the ownership of what was once an approximately  
18 267-acre farm unit. The parcelization and establishment of infrastructure to service the three new  
19 dwellings on the subject properties has made achieving economies of scale for agriculture difficult.  
20 Furthermore, the applicant contends that water, power and septic lines that connect the dwellings to  
21 domestic services have been placed underground, rendering the management of the land for  
22 agriculture impractical since the land cannot be tilled without interfering with this buried residential  
23 infrastructure. Roads serving existing dwellings on the subject properties are aligned so that they  
24 interfere with the orderly tilling of soil, and are gravel surfaced for residential use. Farm activities  
25 such as ripping, disking, seeding and spraying require large, uniform fields to be done efficiently.  
26 Gravel driveways crossing the middle of the subject properties, both vertically and horizontally,  
27 conflict with the efficient management of essential soil preparation and crop protection activities.

28 Applicant states that the demand for crops grown historically have diminished, crops such as  
29 cherries, prunes, Douglas fir Christmas trees, grass seed and grain, as the yield of these crops also  
30 dropped. Some of the processing facilities for these crops have relocated or closed. The applicant  
31 also states that prohibition of irrigation on the subject property and physical characteristics of the  
32 site have been a limiting factor in the ability to profitably manage the subject properties for  
33 agriculture. These factors coupled with the development that occurred under Measures 37 and 49 on  
34 the subject properties and former farm unit are changing conditions. Applicant contends that the AF-  
35 10 zone could be compatible with surrounding land uses and also would enable the applicant to  
36 develop larger acreage home sites where the occupant could manage the property for a range of  
37 specialty farm uses as a hobby even though the land is not suitable to make a profit in money from  
38 farm use. Based on the above, Staff concluded the applications could comply with this criterion.  
39 When these facts provided by the proponents are evaluated along with the testimony and evidence  
40 provided during the public hearing process, the Hearings Officer is not convinced.

41 **Applicant's Additional Findings:**

42 This proposed plan map amendment from Agriculture to Rural Lands must meet at least one of the  
43 three criteria stated in PCZO 115.050(A) which are 1) that the plan designation is erroneous and  
44 needs to be corrected; or 2) the plan designation is no longer appropriate due to changing  
45 conditions in the surrounding area; or 3) the purpose of the plan will be better carried out due to  
46 the proposals conformance to the plan and zone.

47 The applications assert that the Agriculture plan designation is no longer appropriate due to  
48 changing conditions in the surrounding areas. In addition, the applications assert that the purpose  
49 of the plan will be better carried out due to the proposals conformance to the plan and zone (this  
50 factor will be addressed separately below).

1 This aspect of the justification corresponds to the irrevocably committed exception that will be  
2 used to justify this plan change, and which is discussed in detail below. The West Salem Hills in  
3 the area surrounding the subject properties has changed significantly over the past 30 years since  
4 the plan designation was applied, and now has an entirely different land use character than it did  
5 when the EFU plan designation was applied. The parcelization, and the influx of homes combined  
6 with the disintegration of farm and forest uses contribute to the dramatic change in the land use  
7 character of this area. The decline of agricultural enterprises resulted, among other things, from  
8 specific regulations that affected the commercial viability of large tract farming operations and  
9 from changes in the surrounding farm enterprise in the area. The applicants are applying  
10 collectively for this change because they are all facing the same problem, the land is too diverse  
11 to be adapted to commercial farming operations. The conditions that surround a property affect  
12 the ability and the will to farm. The types of practices that a farmer can employ are affected by  
13 what surround the subject rezone area.

14 The Land Use Inventory (Exhibit V attached to the Justification Statement) points out that today  
15 71% of the parcels in the surrounding area have single family homes constructed on them. The  
16 average parcel size in the surrounding area is only 12.07 acres, and 77% of the parcels in the area  
17 are less than 10 acres in size. 45% of the parcels in the area are not in farm or forest use and do  
18 not have any tax deferral benefits.

19 This area contains some of the most valuable homes in the Willamette Valley. 21 of the parcels in  
20 this area are valued at over \$1,000,000, nearly 10% of the entire study area. 82 more of the parcels  
21 in the study area are valued at more than \$500,000, which is over \$38% more of the parcels in the  
22 study area. Combined, parcels in the study area that have valuation of over \$500,000 is 103,  
23 meaning over 48% of the parcels in the study area are very high value home sites.

24 In addition, there is a high percentage (48.8%) of parcels in the study area where the assessed value  
25 of the structures on the property exceed the assessed value of the land in the property. As noted  
26 above, the IRS definition of a “hobby farm”, is where the value of the house and outbuilding on a  
27 property exceed the value of the land itself. The assumption is then made that the capital  
28 investment for the parcel is derived from some source other than production of revenue from the  
29 sale of agricultural products. This percentage of hobby farms is much higher than it was 10, 20 or  
30 30 years ago when the plan designation was first applied to the study area.

31 Combine all these current facts, and the change in the plan designation seems clear. The  
32 Agriculture plan designation, while once valid in the early 1980's, is no longer appropriate due to  
33 these identified changing conditions in the surrounding area. In addition, moving forward into the  
34 future planning horizon, this area is better directed to the creation of rural home sites that are over  
35 10 acres in size in order to provide the highest and best use of the land. The Applicants submitted  
36 additional material during the Open Record period to support a finding that the Agricultural Plan  
37 designation is no longer appropriate.

38 The Applicants contend the applications comply with both sections 2 and 3 of the plan amendment  
39 approval criteria, and therefore should be approved.

#### 40 **Hearings Officer Findings:**

41 For the purpose of this decision, the Hearings Officer finds that the evidence to demonstrate  
42 compliance with this criteria should be focused on “...changing conditions in the surrounding area”,  
43 as specified by PCZO 115.050(A)(2). The Hearings Officer’s evaluation of PCZO 115.050(A)(3)  
44 is addressed below.

45 The Applicants assert that the Agriculture Comprehensive Plan designation is no longer appropriate  
46 for the subject properties because of increased parcelization and residential development on  
47 surrounding lands, making it impractical for the subject properties to be managed for farm use  
48 with an intent to make a profit in money. The Applicants argue that “hobby farms” with smaller  
49 scaled specialized crops and livestock are more suitable for the area due to markets moving away  
50 from large acreage field crops.

1 The evidence relied upon for increased “hobby farms” in the area is based on the above referenced  
2 IRS definition and an updated 2,571 acre study area of surrounding properties, which contains  
3 information on zoning designations, parcel size, number of dwellings, and assessed values of the  
4 land verses structures. The provided Land Use Inventory further summarizes the “Impacts of uses  
5 on adjacent property that affect farm/forest practices on subject property” and the “Relationship  
6 between subject rezone area and adjacent property” for all contiguous tax lots to the subject  
7 properties.

8 The Applicants’ designation of a “hobby farm” largely relies upon an evaluation of whether or not  
9 a property has higher assessed value for the land or structures. This assumption implies that  
10 agricultural income would not be sufficient to support the costs of dwellings and other structural  
11 improvements on those lands. Therefore, capital derived from sources other than farm income  
12 would be necessary to construct and maintain the dwellings and structures, leading to the  
13 conclusion that agriculture activities are ancillary and subordinate to the residential uses on  
14 surrounding properties. In the previous proceedings, the Hearings Officer did not agree with these  
15 assumptions and stated, “This does not itself allow the conclusion that surrounding properties are  
16 not capable of or are not currently making a profit in money from agriculture; only that it may not  
17 be the primary activity or use of the land.” The Land Use Board of Appeals (LUBA) has also  
18 agreed with this position in *Lovinger v. Lane County*, 36 Or LUBA 1 (1999), when it was  
19 determined that a Goal 3 committed exception cannot be justified based on a finding that  
20 “commercial farming” is impracticable on the subject property. LUBA also determined that a Goal  
21 3 committed exception cannot be justified simply because the property is not capable of supporting  
22 an economically self-sufficient agricultural operation, or simply because a reasonable farmer could  
23 not make a living entirely from agricultural use of the land. Farm uses that do not meet these  
24 thresholds are still protected by Goal 3.

25 During the review for PA 14-01 and ZC 14-02, findings stated that, “The Simmons have also been  
26 the only bona fide farmers to ever farm portions of this land since World War I” and “No gross  
27 earnings from farming have accrued to any of the participants in this zoning action since 2004”.  
28 These findings may now be invalid, as Staff found conflicting evidence that demonstrates at least  
29 two (2) of the subject properties are currently employed in farm use with an intent to make a profit  
30 in money. Staff reviewed Polk County’s Community Development records and found two (2)  
31 Agriculture Exemption Permits for two (2) of the subject properties (Tax Lots 602 and 603 in T7S,  
32 R4W, Section 14). Polk County’s Agriculture Exemption Permit requires applicant’s to “Be  
33 specific in describing your farm or forest enterprise, size of operation, and annual profit.” One of  
34 the Agriculture Exemption Permits was issued for Tax Lot 602 on March 6, 2017, which indicates  
35 that the farm operation consisted of 20 acres of fescue that was switched to orchard grass in 2016,  
36 with an annual profit of more than \$10,000. Prior to the Public Hearing, written testimony was  
37 submitted into the record that Mr. Julian Lafayette is a grass seed farmer that currently farms a  
38 total of 45 acres of the subject property (the land owned by Pugmires, the Grays, and the Lathens),  
39 and grows Orchard Grass which does well. The other Agriculture Exemption permit was issued  
40 for Tax Lot 603 on July 12, 2018, which indicates that the farm enterprise consists of horse  
41 boarding, lessons, and chicken egg production with an annual profit of \$14,000. The 2018 Polk  
42 County aerial photograph recently became available through Polk County’s GIS. Based on this  
43 photograph, Staff finds that approximately 35 acres of the proposed exception area is currently in  
44 field crop production, which is located partially on Tax Lot 602 and partially on Tax Lot 603.  
45 These photographs are consistent with the statements provided in the Agricultural Exemption  
46 permit that was issued for Tax Lot 602. The Hearings Officer finds that there is substantial  
47 evidence in the record to demonstrate that at least a portion of the subject properties are managed  
48 for farm use and are making a profit in money.

49 The Hearings Officer finds there are other flaws with this “hobby farm” definition and evaluation,  
50 as it applies to these applications. Farming operations often times own many non-contiguous  
51 parcels throughout the county, or even in surrounding counties. The applicable criteria in OAR  
52 660-033-0135 for qualifying for an income-based dwelling in the EFU zone recognizes this

1 common scenario by allowing noncontiguous lots or parcels designated for Exclusive Farm Use  
2 in Polk County or a contiguous county to be used to meet the gross income requirements. Although  
3 the Applicants have provided compelling evidence that the majority of the tax lots in the study  
4 area are under 10 acres in size and contain single-family dwellings, the Hearings Officer finds that  
5 this does not necessarily mean that the EFU zoned properties are not in farm use as that term is  
6 defined in ORS 215, and the evidence does not exclude the possibility that the EFU zoned tax lots  
7 are part of larger farming operations.

8 Assuming that a higher assessed value of structures verses the land also does not necessarily mean  
9 that the farming operation is not intended to make a profit in money because the structures may  
10 have been constructed from income generated from other investments, inheritances, or may have  
11 had lower input costs by property owners constructing the dwellings themselves. There are  
12 numerous possibilities to account for why individual tax lots have a higher assessed value for the  
13 structures than the land.

14 Based on the Land Use Inventory provided by the Applicants, the Applicants determined that 71%  
15 of the parcels within the surrounding area contain a single-family dwelling, the average parcel size  
16 to be 12.07 acres with 77% of the parcels being less than 10 acres in size, and 45% of the parcels  
17 to not be in farm or forest use and to not be receiving any tax deferral benefits. It is important to  
18 point out that the Land Use Inventory includes surrounding Suburban Residential (SR) and  
19 Acreage Residential – Five Acre (AR-5) zoned properties, which are exception areas that have  
20 been planned and zoned for residential development. The SR and AR-5 zones also have a much  
21 smaller minimum parcel size than other surrounding resource zoned properties. OAR 660-004-  
22 0028(6)(c)(A) states, "...Resource and nonresource parcels created and uses approved pursuant to  
23 the applicable goals shall not be used to justify a committed exception..." In *Johnson v. Land*  
24 *County*, 31 Or LUBA 454 (1996), LUBA further determined that a county's reliance in the  
25 existence of adjacent non-resource parcels in justifying a committed exception is impermissible  
26 where the findings do not adequately establish how or when the adjacent parcels were created.  
27 Therefore, surrounding parcels that were lawfully partitioned and developed pursuant to the  
28 applicable goals cannot be used to justify an irrevocably committed Goal Exception for the subject  
29 properties.

30 To address these concerns, the Applicants' submitted additional evidence into the record during  
31 the Open Record period with clarifying information on surrounding lands. The information  
32 included was intended to provide further information about when the parcels (in the Inventory  
33 Study) were created in relationship to the application of land use goals to the parcelization. The  
34 Applicants also stated that they examined assessor records and deed information to identify the  
35 date of parcel creation. The Applicants represented that they believe that within the Study Area  
36 there are currently 51 dwellings (out of 153 dwellings) that were constructed without the  
37 application of any land use regulation. They also noted that there are rights granted under M37/39  
38 for additional 10 dwellings without application of land use regulation.

39 However, the Hearings Officer still finds that the figures provided by the Applicants, included with  
40 the applications and submitted during the Open Record Period, intending to characterize the  
41 surrounding area, cannot be considered to accurately represent changing conditions in the  
42 surrounding area to justify an irrevocably committed exception to Goals 3 and 4. While the  
43 Applicants included their method of research to obtain "date of parcel creation" in their Addendum  
44 to the Land Use Inventory, it should still be noted that it is unclear how all parcel sizes were  
45 determined by the Applicants. Without determining each parcel's lawful size and configuration,  
46 the figures presented in the Land Use Inventory and Addendum can greatly vary, such as average  
47 parcel size and dwelling density. It is not uncommon for one (1) parcel to contain multiple tax lots.  
48 For this reason, it cannot be assumed that separate tax lots equate to separate parcels. For example,  
49 the Applicants' Land Use Inventory identifies the properties owned by "Hatchette", within Section  
50 14, to be 4 parcels (Tax Lots 100, 104, 118 and 202), totaling 42.98 acres plus an easement road.  
51 However, Community Development records indicate that the lawful parcel configuration of Tax  
52 Lot 202 also includes Tax Lot 901 (T7S, R4W, Section 11), and Tax Lot 114 (T7S, R4W, Section

1 14), containing approximately 24 acres, not 3.11 acres as represented by the Land Use Inventory.  
2 The Addendum provided during the open record period did not adequately address these  
3 discrepancies for properties within the study area. This example demonstrates how the Applicants'  
4 representation of "average parcel size" is likely based on calculations from tax lot sizes, not parcel  
5 sizes.

6 In a letter provided by Angela Carnahan, Regional Representative for the Oregon Department of  
7 Land Conservation and Development (DLCD), she states that the applicant relies heavily on the  
8 Land Use Inventory encompassing approximately four (4) square miles surrounding the subject  
9 properties. Utilizing such a large study area obscures the fact that an irrevocably committed  
10 exception is primarily an evaluation of adjacent uses and their relationship to the subject properties.  
11 Ms. Carnahan further states that in *Scott v. Crook County*, 56 Or LUBA 691 (2008), the Land Use  
12 Board of Appeals accepted that an irrevocably committed exception should be focused on  
13 "adjacent lands and uses, not the character of or uses in the larger area within a one-mile radius of  
14 the subject property." Mr. Lien argued that the legislature does not say the study area is  
15 "contiguous" but rather adjacent which should include surrounding areas. Examining the  
16 surrounding area and the exception area should look like a donut, the exception area is the hole  
17 and the surrounding area is the substance of the donut, and what happens in the surrounding area  
18 has a direct impact on what can happen in the exception area. The Hearings Officer understands  
19 the Applicants' arguments; however, the size of the "donut" here is enormous. Utilizing 4 square  
20 miles is approximately 2,571 acres. The subject properties (totaling 228 acres) do not even equate  
21 to 10% percent of the total land of the Applicants' requested Land Use Inventory. In using the  
22 donut analogy, given that the exception area is not even 10% of the donut, it is unlikely it would  
23 be considered a "hole" in the center of a donut. As a result the Study Area is monumentally larger  
24 than the Exception Area and has a strong ability to dilute what is actually happening on the  
25 properties adjacent to the Exception Area.

26 Although the Applicants have put forth a significant amount of information regarding zoning,  
27 ownership patterns, deferral status, etc., as pointed out by Ms. Carnahan, a large study area can  
28 obscure the facts when evaluating adjacent uses and their relationship to the subject properties.  
29 Therefore, the Hearings Officer finds that the majority of the information presented in the Land  
30 Use Inventory and Addendum cannot be relied upon to justify an exception to Goals 3 and 4, and  
31 does not adequately demonstrate that there has been a recent shift in land use management from  
32 farm operations with the intent to make a profit in money, to "hobby farms" with no intent to make  
33 a profit in money, as asserted by the Applicant.

34 Lastly, according to the 2019 Polk County Assessor's records, approximately 225.7 acres of the  
35 subject property's 228 acres are currently receiving special assessment for farm deferral. A  
36 footnote on the Applicants' Land Use Inventory, included as Exhibit V in the record, states:

37 "Polk County is one of the most liberal counties in the State for granting an owner the  
38 right to a deferral program. For example the easement roads and tower and well sites  
39 are all included in a deferral program. Many of the parcels that are under 5 acres in size  
40 with no real opportunity to develop commercial farm uses have farm or forest deferral  
41 programs applied to the parcels. One example is TL900, Map 7.4.13A which is .92 acres  
42 of land that receives a forest deferral. From the study area it is apparent that one cannot  
43 rely on the deferral program for determination of the farm or forest use of a parcel. The  
44 actual use information here came from aerial mapping and site visits."

45 The Hearings Officer disagrees with this conclusion and finds that farm or forest deferral  
46 assessments can be a reliable source of information for determining whether or not a property is  
47 managed for farm or forestry purposes, particularly for surrounding non-EFU zoned properties.  
48 As required by Oregon Revised Statute (ORS) 308A.071, non-EFU zoned properties are required  
49 to demonstrate a specified amount of gross income in order to receive farm deferral. Staff reviewed  
50 the Assessor's records for the above referenced property identified as Tax Lot 900 in 7.4.13A, and  
51 confirmed that this property is not receiving any special assessment and has not received any



1 special assessment since prior to 1997. The Oregon Land Use Board of Appeals (LUBA) has also  
2 previously agreed with this position in *Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000),  
3 when LUBA found that a local government is not required to adopt findings addressing the farm  
4 tax deferral status of property when considering the “irrevocably committed” factors of OAR 660-  
5 004-0028. However, the fact that property is in farm tax deferral is relevant evidence in  
6 determining whether it is impracticable to put the property to farm use. According to the 2019 Polk  
7 County Assessor’s records, the subject properties are all currently receiving farm deferral.

8 Based on evidence in the record, the Hearings Officer finds that the applications do not  
9 demonstrate that the Agriculture Comprehensive Plan designation is no longer appropriate due to  
10 changing conditions in the surrounding area and the applications do not comply with this criteria.

11 **B. The purpose of the Comprehensive Plan will be carried out through approval of**  
12 **the proposed Plan Amendment based on the following: [PCZO 115.050(A)(3)]**

13 **1. Evidence that the proposal conforms to the intent of relevant goals and**  
14 **policies in the Comprehensive Plan and the purpose and intent of the**  
15 **proposed land use designation. [PCZO 115.050(A)(3)(a)]**

16 **a. Polk County will endeavor to conserve for agriculture those areas which**  
17 **exhibit a predominance of agricultural soils, and an absence of nonfarm**  
18 **use interference and conflicts. [PCCP Section 2, Agricultural Lands Policy**  
19 **1.1]**

20 **b. Polk County will place lands designated as agriculture on the**  
21 **Comprehensive Plan Map consistent with Oregon Revised Statutes**  
22 **Chapter 215 and Oregon Administrative Rules Chapter 660, Division 33**  
23 **in an exclusive farm use zoning district. [PCCP Section 2, Agricultural**  
24 **Lands Policy 1.2]**

25 **Hearings Officer’s Previous Findings:**

26 The proponents, comprised of a group of four property owners, are seeking an exception to this  
27 county goal as well as to Statewide Planning Goal 3. The proponents are predicating this exception  
28 on the highly variable and adverse conditions that are posed to commercial agriculture, which  
29 requires...intent to make [a] profit. The largest land owner, the Simmons Family Properties LLC, is  
30 the only one among the four owners that has a long history with the property and the challenges they  
31 have faced for 80 years in establishing profitable farming enterprise.

32 The proponents have strongly held beliefs that an exception is warranted based on a host of complex  
33 factors including but not limited to elevation, wind exposure, sun exposure, shallow soils,  
34 preponderance of rock, cold temperatures related to elevation, inability to irrigate and inability to  
35 burn crop residues. In addition, there are no linkages to the other farm enterprises in the area that are  
36 less affected by the same factors. Also, there are two borders where all the parcels are zoned for non-  
37 resource use and thus offer no complementary farm enterprises.

38 Applicant contends that this property is very vulnerable to climate due to its exposure factor to  
39 coastal wind patterns and its high elevation (those areas over 900 feet above sea level). The  
40 continuous failure of crops on the property can likely be attributed, at least in part, to changes in  
41 climate, which affects sensitive orchard crops and Christmas trees. The fluctuations in weather and  
42 the emergence of destructive synoptic events have wreaked havoc on prunes, cherries and Douglas  
43 Fir Christmas trees. Episodes such as extremely high rainfall in late June and early July have  
44 destroyed entire cherry crops. High diurnal variations in weather have retarded pollination to the  
45 prune orchards that formerly occupied this site. The inability to reach 55 degree temperatures early  
46 enough in the growing season ruined prune crops. Temperatures must be at least 55 degrees for bees  
47 to pollinate, but in an increasing number of years the temperatures fell short for pollination. For  
48 example, cherries used to be grown in the subject rezone area but the higher elevation triggers late  
49 spring/early summer rains that split the cherries and renders the crop 100% destroyed. This happened

1 to Wayne Simmons on four different occasions despite having pruned the trees and applying all  
2 required amendments. They have had failures with strawberries, gooseberries, parsons prunes,  
3 cherries, wheat, barley, and grass seed. The Hearings Officer takes note, however, nothing indicates  
4 that grapes ----grown extensively on nearby lands ---were attempted.

5 Wayne Simmons, one of the applicants, claims to have served on several notable agricultural  
6 commissions for prunes and nuts and Kevin Stone is also currently a farmer raising and managing  
7 Christmas trees throughout the Mid-Willamette Valley. These two individuals are said to know  
8 farming and as a consultant to both parties have visited other sites they have farmed. They say the  
9 subject property bears no resemblance to the properties where they consistently make profits. The  
10 Stone Christmas tree properties (including those they lease) are at high elevations but the soils are  
11 deeper, well drained and have less stone. There are limitations based on high winds which does affect  
12 their Christmas tree production but does not arrest it.

13 The grape lands to the west/southwest are up to 750 lower in elevation than the subject property. The  
14 vineyards are also on deep, well drained soils that have access to stored surface water. Applicants  
15 say grapes will not ever likely be produced on the subject property adjacent to the existing vineyards  
16 for the following reasons.

- 17 • The slopes uphill from the vineyards are not able to be cultivated because of boulders and  
18 rock fragments dominate the entire area.
- 19 • The elevations are higher on the subject property and therefore grapes would have a  
20 reduced growing season.
- 21 • The wind exposure from the Van Duzer Corridor is too strong and would damage grape  
22 plants.
- 23 • There is no surface or ground water available for establishing vineyards since the subject  
24 property is in the Eola Hills groundwater limited area.
- 25 • The slopes have complex aspects and as such there are no large contiguous blocks of land  
26 that have uniform aspect, thus making grape farming very challenging.
- 27 • A significant portion of the subject rezone area is wooded and has a very thick understory  
28 vegetation that would be difficult to control.

29 Applicants contend that if wine grapes could grow on the property, they would already be here.  
30 Grapes are a deep rooted crop that require cultivation and in most instances irrigation water. The  
31 subject property has no water rights and is in a Groundwater Limited Area. Though the easternmost  
32 acres along Best Road appear to have appropriate characteristics for wine grapes, it has too many  
33 boulders and no irrigation water to establish grapes. Appendix 4 of the applications contains a letter  
34 from viticulture expert and wine grape producer Mike McLain, stating that the subject property is  
35 unsuitable for grape production. These lands are now committed to other more suitable agricultural  
36 uses (organic oats and fine fescue) and besides the elevations along Best Road are on the high end  
37 of the threshold (over 900 feet elevation) and there are no south facing slopes there which would be  
38 a prerequisite for this frost prone area.

39 Applicant says the most limiting factor for the production of wine grapes is the absence of irrigation  
40 water. The vineyard to the west of the rezone area has a large surface water reservoir for their grapes.  
41 Water would especially be a prerequisite for this highly exposed windy location with thin soils. The  
42 presence of high stone content in the rooting zone is very limiting for grapes because they deprive  
43 the grapes of moisture that would otherwise be in soil. In addition, the high stone content of most  
44 soils on the property would make "floor treatment" of the vineyard nearly impossible.

45 Last, and very importantly, applicant maintains, the large forested areas as observed by the  
46 professional wildlife biologist still have significant populations of indigenous wildlife such as deer.  
47 Any vineyard on the property would require 6-8 foot fences to arrest deer depredation to vineyard  
48 plants. Fences are very difficult to establish and maintain because of the very shallow depth to  
49 bedrock and hardpans. Some areas on the property have never been fenced for this reason. The

1 Willamette viticulture area is 95% below 600 feet above sea level and only 5% above that figure.  
2 The same long list of factors that resulted in multiple crop failures for the property also apply to  
3 grapes. The grapes are not so hardy that can be planted in rocky soils with no irrigation. The rare  
4 varietal wine grapes (Pinot Noir, Pinot Gris and Rieslings) are also very difficult to grow at  
5 elevations over 750 feet. An observation of the high hill tops on the Eola Hills clearly supports this  
6 premise.

7 Applicant contends that the resource most considered essential for continued stability of agriculture  
8 within Polk County is the preservation of the best soil areas. Historically, the large field plow  
9 agriculture has resulted in degradation to the fragile erosion prone soils comprising the farm fields.  
10 All of the soils on the property; are highly erodible and restoration of soil tithe and structure would  
11 be a prerequisite to preserving the most essential of resources. The soils for the subject property are  
12 described in the Soil Survey for Polk County, Area Oregon. These surveys are excellent "plow layer"  
13 soil surveys but they lack the specificity for fine tuning the property for more intense agriculture and  
14 property improvements such as domestic wells, driveways, roads, utilities and drain fields.

15 Largely under the auspices of the Simmons Family Properties, two top scientists were retained to  
16 study the soils in greater detail. Dr. Joel Norgren, likely the longest practicing soils scientists in the  
17 state (and ARCPACS Certified) conducted an extensive and detailed mapping of both the western  
18 and eastern-halves of the subject property. Due to advanced age and health problems, the project  
19 was turned over by Dr. Norgren to Agronomist and ARCPACS Certified Soil Scientist Andy  
20 Gallagher. Both the Gallagher and Norgren reports are attached to the applications as Appendix 1  
21 (Gallagher) and Appendix 2 (Norgren). As noted above, the Hearings Officer believes there is good  
22 reason to question the relevance of these studies as evidence supporting applicants in this proceeding,  
23 whatever other valid uses can be made of their findings.

24 In summary, applicant argues that the soils were the focus of the studies as they well should be, but  
25 other soil characteristics such as excessive stoniness, shallow depth to bedrock and texture rather  
26 than taxonomic soil classifications yielded a new perspective on this site. The dual soil analysis  
27 coupled with the Agronomists (Gallagher) knowledge of the effects of soil on agriculture reveals a  
28 site with a multitude of limitations that include but are not necessarily limited to: excessive slopes  
29 (over 20 percent that are not traversable by standard farm equipment; excessive wind speeds that  
30 disrupt spraying opportunities and that shape and break orchard crops and Christmas trees; excessive  
31 sun exposure due to elevations over 950 feet and up to and over 960 feet above mean sea level;  
32 excessive stoniness especially on the westernmost 80 acres owned by Simmons; shallow depth to  
33 bedrock that limits moisture retention on an already xeric slope and ridgeline; loose friable soils on  
34 the ridgeline that are prone to excessive dryness and wind erosion).

35 Applicant says the aerial photographs in the record graphically depict very red soils that are heavily  
36 leached of organic materials. The soils areas capable of being cultivated could enroll in the  
37 Conservation Reserve Program which is designed to maintain soils that are highly erodible. The high  
38 degree of variability in the land with respect to soil depth, rock content, soil temperatures, soil  
39 moisture, wind and sun simply makes farming too much of a gamble too often. Despite the consistent  
40 loss of crops, the owners still want to retain some semblance of farming by encouraging small but  
41 intensive farming operations despite the fact that crops cannot be irrigated (Groundwater Limited  
42 Area) nor can grass or grain stubble be burned. Farm equipment cannot tolerate the high stone and  
43 steep slopes so characteristic of many areas. Some of the former larger fields used for grain and grass  
44 are so windswept and the soils so shallow as to preclude a successful crop on a regular basis.

45 The proponents claim they recognize that this proposed action could affect adjacent and nearby farm  
46 operations, but they too have problems that limit their farm uses to low income generating grass hay  
47 and limited grazing on very substandard acreages. The three agricultural properties across Best Road  
48 from the subject property (east) have never been farmed in conjunction with the subject property and  
49 are marginal respect to agricultural production. The PCCP affirms many of the earlier assertions  
50 made in the applications regarding limitations based on slopes, exposure, temperature and terrain  
51 features. It also affirms the conditions in the area concerning parcelization, housing and the absence

1 of farm enterprise to the south, east and northeast. The PCCP also lends support to the self-evident  
2 limitations as observed by two very seasoned farmers that work this proposed rezone area  
3 particularly for Sub-Area V. Appendix 9 of the applications entitled "EXAMINATION OF  
4 CONSEQUENCES FOR INDIVIDUAL SUB-AREAS" stresses the limitations of this site. Some of  
5 the key facts alleged by applicant are: 1.) "The area is considered marginal farm land because only  
6 59 percent of the soils are agricultural, 2.) Slopes range from 12-30 percent on the sides, leveling off  
7 to 3 percent in only a few areas, 3.) Sub- Area V is also located in an area exhibiting a predominance  
8 of nonfarm uses and interference, and 4.) Forest site class data are not available.

9 In summary, applicant states that the PCCP Goals and Policies are very much in favor of what the  
10 proponents are advocating, "continued encouragement of agriculture and/or forestry as the dominant  
11 uses of such lands as long as possible for the production of agricultural and forest products, and to  
12 insure that the conversion of such lands to urban or non-farm rural uses, where necessary and  
13 appropriate, occurs in an orderly and economical manner." The Hearings Officer again recalls,  
14 however, there would be no requirement that new residents on the rezoned property actually do  
15 anything to foster agriculture or forest production.

16 Staff also noted that the soil studies authored by Norgren and Gallagher were not conducted in  
17 accordance with ORS 215.211 and, consequently, cannot be used to determine whether land qualifies  
18 as agricultural land, or to dispute the Soil Survey. While Staff was not able to use the Norgren and  
19 Gallagher soil studies to determine whether the subject properties qualify as agricultural land,  
20 conclusions in the studies regarding site specific limitations for agriculture are referenced herein.  
21 The Soil Survey data shows that the subject properties are composed predominantly of agricultural  
22 soils with 53.5% being soils designated capability class II through IV. Land with a predominance of  
23 soils in capability classes I through IV is considered agricultural land per OAR 660-033-0030. Staff  
24 notes that the Norgren and Gallagher soil studies found units of Witzel soils, where the NRCS Soil  
25 Survey mapped none, and found a smaller share of Ritner soils on the subject properties. Both soil  
26 scientists mapped a predominance of agricultural soils on the subject properties with Gallagher  
27 stating that 55.0% of the subject properties' soils are in capability classes I through IV and Norgren  
28 finding 64.3% of the soils in capability classes I through IV.

29 While the NRCS Soil Survey and the Norgren and Gallagher soil studies for the subject properties  
30 would lead one to conclude it is agricultural land, the applicant states there are limiting factors that  
31 render it incapable of producing reliable crops at a commercial scale. The applicant observes that a  
32 number of factors complicate agricultural uses of the subject properties including but not limited to  
33 elevation, wind exposure, sun exposure, shallow soils, preponderance of rock, cold temperatures  
34 related to elevation, inability to irrigate and inability to burn crop residues. The elevation of the  
35 subject properties is between 900 and 1,060 feet with steep slopes to the west and south. As stated  
36 by the applicant, the subject properties are situated on a high point at the southern end of the Eola  
37 Hills. Wind exposure is high since this southern promontory of the Eola Hills is in the path of coastal  
38 winds passing through the Van Duzer Gap. Moreover, the subject properties' location on the south  
39 side of a promontory means they receive more incident solar radiation than other areas of Polk  
40 County. The applicant indicates that a combination of solar exposure on steep south facing slopes  
41 and steady winds make raising crops on the subject properties impracticable because increased  
42 transpiration of available soil moisture stunts growth and leads to crop failures. The slope, aspect  
43 and elevation of the subject properties has contributed to crop failures resulting from cool  
44 temperatures discouraging pollinators, heavy rains precipitated from orographic lifting of clouds up  
45 the Eola Hills, and constant wind damaging and stressing plants. Staff evaluated the applicant's  
46 statements and concurs that while the subject properties are predominantly comprised of soils that  
47 characterize agricultural land, consistent with OAR 660-033-0030, site constraints related to slope,  
48 aspect, excessive wind and sun exposure could limit the ability of the subject properties to produce  
49 commercial agricultural crops. Applicants appear to be contending that factors such as slope and  
50 microclimates impair the agricultural suitability rating as determined by the NRCS. In its letter dated  
51 November 10, 2015, the Oregon Department of Agriculture stated that factors such as slope and  
52 microclimates already are taken into account when soil is rated by the NRCS and cannot be used to

1 guide local governments in assessing soil capabilities. The Hearings Officer therefore adheres to the  
2 concept that the NRCS Soil Survey is controlling, and already takes into account physical  
3 characteristic such as slope, rockiness, microclimates, etc. The Hearings Officer concludes that the  
4 Soils Survey demonstrates the subject properties are composed of predominantly of agricultural  
5 soils. Land with a predominance of soils in capability classes I through IV is considered agricultural  
6 land per OAR 660-033-0030. With 53.5% being soils designated capability class II through IV,  
7 according to the Soil Survey, the subject property qualifies as agricultural by rule. While the Norgren  
8 and Gallagher soil studies were not used as part of the Hearings Officer's evaluation of the applicant's  
9 proposal, they validate soils maps found in the Soils Survey demonstrating a predominance of  
10 agricultural soils on the subject property. Based on soils data, the Hearing Officer finds that the  
11 subject property is agricultural land, consistent with OAR 660-033-0030.

12 The applicant states that wine grapes are not a suitable crop for the subject properties, citing site  
13 specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a  
14 preponderance of boulders, and a lack of landscape uniformity to establish blocks with the  
15 appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette  
16 viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower  
17 elevations than the subject properties. Cubanismo Vineyards to the east of the subject properties is  
18 located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills Wine  
19 Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject properties  
20 at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the subject properties  
21 is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon, Inc.'s vineyard northeast  
22 of the subject properties at an elevation of approximately 680 feet. While the aforementioned  
23 vineyards are all above 600 feet of elevation, except for the Legacy Estate Vineyard, they are not  
24 located on ridge tops, and are largely sheltered from the constant winds affecting the subject  
25 properties. Vineyard sites in the vicinity of the subject properties reveal the variety of landscapes on  
26 which vineyards are planted, with east facing, west facing and south facing vineyards represented  
27 by the small sample above. However, the subject properties are more exposed to wind and sun than  
28 the vineyard sites surrounding it, lending some credence to the applicant's observations that wine  
29 grape production is impracticable there. At the same time, evidence in the record shows that some  
30 knowledgeable grape growers feel that "the rocky, wind-battered slopes of the Eola-Amity hills have  
31 emerged as one of Oregon's most singular terrains for pinot noir." [Patrick Comiskey, "Wind  
32 Powered Pinot", Wine & Spirits Magazine, April 2013.] Applicant contends above that the Simmons  
33 family "actively farmed the tract, growing gooseberries, strawberries, prunes, cherries, fine fescue  
34 grass, Christmas trees and wheat with little success," attempting by this recitation to demonstrate the  
35 land is not suitable for large-scale commercial agricultural crops. There is no indication that attempts  
36 were made to grow grapes of any variety. A letter dated November 10, 2015 from James Johnson,  
37 Land Use and Water Planning Coordinator with the Oregon Department of Agriculture, states that  
38 vineyard development at elevations exceeding 750 feet and in wind prone areas are more common  
39 these days as climate and weather patterns have changed. He also challenges the applicant's  
40 assertions that grass seed and Christmas trees cannot be grown on the subject properties. R. E. Steele,  
41 President of the Polk County Farm Bureau, states in a letter dated November 18, 2015 that successful  
42 wine grape vineyards and Christmas tree farms operate in the immediate vicinity of the subject  
43 properties, contradicting the applicant's representations. Although the rules governing irrevocably  
44 committed exceptions factor site specific challenges to farm and forest operations, a demonstration  
45 that these activities are "impracticable", per OAR 660-004-0028, is necessary to meet the exception  
46 criteria. The applicant concedes that the subject properties may be suitable for Noble fir Christmas  
47 tree production. Moreover, evidence in the record indicates that wine grapes and grass seed could  
48 also be produced on the subject properties. Consequently, the Hearings Officer finds that the subject  
49 properties could produce viable crops, and would conserve agricultural land exhibiting a  
50 predominance of agricultural soils under the current Plan map designation and zone.

51 The applicant has applied for an irrevocably committed Goal 3 exception as part of the applications.  
52 The exception criteria are evaluated below. The proposed exception area may contain a  
53 predominance of agricultural soils and even continue to have other agricultural characteristics, while

1 still qualifying for an irrevocably committed Goal exception. This criterion requires Polk County to  
2 determine the most appropriate PCCP designation for the exception area, once an exception is  
3 approved. The applicant is proposing a Rural Lands PCCP designation. The applicant states that the  
4 demand for the types of crops grown historically have diminished such as cherries, prunes, Douglas  
5 fir Christmas trees, grass seed and grain as the yield of these crops also dropped. Some of the  
6 processing facilities for these crops have relocated or closed. The applicant also states that  
7 prohibition of irrigation on the subject property and physical characteristics of the site have been a  
8 limiting factor in the ability to profitably manage the subject properties for agriculture. These factors  
9 coupled with the development that occurred under Measures 37 and 49 on the subject properties and  
10 former farm unit are changing conditions. The Agriculture and Forestry-10 Acre zone, which  
11 implements the Rural Lands PCCP designation, could be compatible with surrounding land uses and  
12 also enable the applicant to develop larger acreage home sites where the occupant could manage the  
13 property for a range of specialty farm uses as a hobby even though the land may not be not suitable  
14 to make a profit in money from farm use. As a result, the Rural Lands PCCP designation and  
15 associated policies are evaluated below.

16 **Applicant's Additional Findings:**

17 The Applicants contend the proposed change will gracefully allow a transition from EFU mandated  
18 large tract crops such as wheat, grass seed, orchard crops, Christmas trees and irrigated fruit and  
19 berry crops, to smaller tract crops aimed at hobby farms associated with non-farm dwellings, and  
20 which appeal to families catering to organic cultivated agriculture (non-irrigated) and specialty  
21 livestock and poultry operations. In the Applicants' Justification Statement and attached exhibits  
22 they presented additional evidence regarding the subject properties ability to support vineyards.  
23 The Applicants argued that the issue of the ability of the subject properties to support commercial  
24 vineyards has been studied extensively by several experts in the wine and vineyard fields.

25 Exhibit Y is a letter memorandum from Andy Gallagher, who is a recognized soil scientist, with  
26 a specialty in assisting property owners in the evaluation of property to potentially be used for  
27 vineyards. A key element in the study of the subject properties involved topography and weather  
28 patterns. Included in the Gallagher report is climate information from Dr. Greg Jones, who is a  
29 professor at Southern Oregon University, and who is an international expert on vineyard  
30 climatology.

31 This report notes that the topography and climate of the subject properties is not favorable for  
32 growing wine grapes. This opinion is due to the high elevation, exposure to wind, higher rainfall  
33 and overall cooler microclimate. The science is derived from indices developed at U. C. Davis,  
34 and establishes that for a commercial vineyard there must be from 2000 to 2200 "growing degree  
35 days" (GDD). This index includes complex measures of climatic conditions, and establishes a  
36 scientific measure for the probability of land becoming a productive commercial vineyard. After  
37 a review of the subject properties, and applying this index, it was determined that the predominate  
38 amount of the subject property falls below the minimum 2000 GDD standard, therefore making  
39 it unsuitable and unwise to attempt viticulture on the site.

40 In addition, Mike McLain, Vineyard Properties, a recognized expert on identification of vineyard  
41 property in the Willamette Valley was engaged to review the site and provide his expert opinion.  
42 He classified the subject properties as "higher risk" to a buyer based on its high elevation, its  
43 wrong facing slope and its high exposure to wind. Mr. McLain's letter report is attached hereto  
44 as Exhibit Z.

45 During the Open Record period, the Applicants submitted additional argument in response to  
46 public testimony about the subject property's vineyard capabilities. The Applicants argued there  
47 are no details in the Record about the Bethel Heights Winery and Justice Vineyards and according  
48 to information on the wineries' respective websites, both Bethel and Justice have better soil and  
49 are at a lower elevation.

50 **Public Testimony:**

1 The Record received many comments from the public regarding the subject property’s continued  
2 potential for agricultural uses, including through grape production. Mimi Casteel, representing  
3 Bethel Heights Vineyard, presented testimony that while shallow, rocky soils were historically  
4 perceived as bad for viticulture, the image of that soil is changing. She testified that she farms  
5 without tilling or irrigation, it a regenerative agriculture that she believes will be profitable in the  
6 future.

7 **Hearings Officer Findings:**

8 In 2014, the Hearings Officer previously determined that the NRCS Soil Survey demonstrates that  
9 the subject properties are composed of predominantly agriculture soils, and although there may be  
10 limiting factors on-site such as, wind, elevation, slopes, etc., the subject properties could produce  
11 viable crops, and would conserve agricultural land exhibiting a predominance of agricultural soils  
12 under the current Plan map designation and zone.

13 NRCS soil data has been updated since the evaluation conducted during PA 14-01 and ZC 14-02.  
14 Therefore, to ensure the most up to date information is being evaluated for this review, County Staff  
15 generated a new soils report for the subject properties, which is summarized in Table 2 above and is  
16 based on soils data that was last updated on September 17, 2018. Based on the most recent NRCS  
17 soils data available, Staff determined that the subject properties contain 51.7 percent high-value  
18 farmland soils, and 61.6 percent Class I-IV soils, which are considered agricultural land as defined  
19 in OAR 660-033-0030. Thus, the soil data still supports a finding that the subject property is  
20 appropriately classified as agricultural land as defined by OAR 660-033-0030.

21 Although the record demonstrates that the subject properties have experienced various types of crop  
22 failure in the past, the Hearings Officer previously noted that nothing in the record indicated that  
23 wine grapes have ever been attempted to be grown on-site, which are extensively grown on nearby  
24 properties. In the applications, the Applicants provided additional evidence of the subject properties  
25 wine grape growing capabilities. The Applicants provided a letter written by Mike McClain, whose  
26 opinion is that the subject property is, “...just too high, wrong slope, and too exposed for a  
27 knowledgeable vineyard land buyer to want to buy it.” Mr. McClain’s letter initially discusses  
28 wine grapes in general and then provides only a price for Pinot noir grapes. However, he also  
29 indicates in the years that were not the very best, the harvest may be sellable to a sparkling wine  
30 winery; however, does not give an average price per ton.

31 The Applicants submitted a letter summarizing a site evaluation performed by Andy Gallagher, who  
32 has 20 years of experience evaluating potential vineyard properties in Western Oregon. Mr.  
33 Gallagher’s findings indicate that at the higher elevation (>900 feet), there are less than 2000 GDD  
34 which places approximately 60% of the subject properties into a category of “suitable for hybrid  
35 wine grapes and only the very earliest V. vinifera varieties.” Additional findings indicate that the  
36 site is “too cool for a pinot noir site”. Although there may be limitations for growing certain types  
37 of wine grapes, it remains unclear whether these limitations extend to the entire 228 acres of the  
38 subject property, and whether these limitations are explicitly for pinot noir grapes, or if other  
39 varieties grown in Oregon could prevail. Further, Mr. Gallagher did state that “On average, the site  
40 would be expected to have vintage to vintage variability (1811 to 2111) which could still ripen  
41 fruit, but at the margins in the cooler years.” (Ex. Y.)

42 Also, Polk County’s Community Development records indicate that since the last proceeding, two  
43 (2) Agriculture Exemption Permits were issued for two (2) of the subject properties (Tax Lots 602  
44 and 603 in T7S, R4W, Section 14). Polk County’s Agriculture Exemption Permit requires  
45 applicant’s to “Be specific in describing your farm or forest enterprise, size of operation, and  
46 annual profit.” One of the Agriculture Exemption Permits was issued for Tax Lot 602 on March  
47 6, 2017, which indicates that the farm operation consisted of 20 acres of fescue that was switched  
48 to orchard grass in 2016, with an annual profit of more than \$10,000. The other Agriculture  
49 Exemption permit was issued for Tax Lot 603 on July 12, 2018, which indicates that the farm  
50 enterprise consists of horse boarding, lessons, and chicken egg production with an annual profit of  
51 \$14,000. The 2018 Polk County aerial photograph recently became available through Polk

1 County's GIS. Based on this photograph, Staff finds that approximately 35 acres of the proposed  
2 exception area is currently in field crop production, which is located partially on Tax Lot 602 and  
3 partially on Tax Lot 603. These photographs are consistent with the statements provided in the  
4 Agricultural Exemption permit that was issued for Tax Lot 602.

5 Mr. Julian Lafayette submitted testimony that he is a grass seed farmer that currently farms the  
6 land owned by Pugmires, the Grays, and the Lathens, a total of 45 acres and grows Orchard Grass  
7 which does well. The Applicants have raised issue with the submission by Mr. Lafayette; they  
8 indicate he does not specify how many acres are planted on each tax lot and it was not written by  
9 him but actually by Sarah Deumling; therefore, it has no credibility and it should not be given any  
10 weight. However, the Applicants do not dispute that Mr. Lafayette does plant on at least some  
11 portion of the Pugmire and Gray Properties (Tax Lots 602 and 603). Even if Ms. Deumling was  
12 the scribe of the testimony, the record (from the October 11, 2019 email) demonstrates that Mr.  
13 Lafayette had the opportunity to review and change his comments. Mr. Lafayette's comments were  
14 submitted into the record prior to the hearing and the Hearings Officer finds them credible.  
15 Credibility of a comment and weight given to a comment are two separate matters. The Hearings  
16 Officer provides no greater weight to Mr. Lafayette's comment than the other public comments  
17 and balances this comment with all of the comments and evidence received into the record.

18 Although additional evidence provided by the Applicants indicate that portions of the subject  
19 property may not be suitable for vineyards or forestlands, given all of the evidence in the record  
20 the Hearings Officer finds the subject properties could produce viable crops, and maintaining the  
21 current Agricultural Plan designation and EFU zone would conserve agricultural land exhibiting a  
22 predominance of agricultural soils.

23 The Applicants have applied for an irrevocably committed Goal 3 and Goal 4 exception as part of  
24 the applications. The exception criteria are evaluated below. The proposed exception area may  
25 contain a predominance of agricultural soils and even continue to have other agricultural  
26 characteristics, while still qualifying for an irrevocably committed Goal exception. This criterion  
27 requires Polk County to determine the most appropriate PCCP designation for the exception area,  
28 once an exception is approved. The Applicants are proposing a Rural Lands PCCP designation. The  
29 Applicants state that the demand for the types of crops grown historically have diminished such as  
30 cherries, prunes, Douglas fir Christmas trees, grass seed and grain as the yield of these crops also  
31 dropped. Some of the processing facilities for these crops have relocated or closed. The Applicants  
32 also state that prohibition of irrigation on the subject property and physical characteristics of the site  
33 have been a limiting factor in the ability to profitably manage the subject properties for agriculture.  
34 These factors coupled with the development that occurred under Measures 37 and 49 on the subject  
35 properties and former farm unit are changing conditions. The Agriculture and Forestry-10 Acre zone,  
36 which implements the Rural Lands PCCP designation, could be compatible with surrounding land  
37 uses and also enable the Applicants to develop larger acreage home sites where the occupant could  
38 manage the property for a range of specialty farm uses as a hobby even though the land may not be  
39 not suitable to make a profit in money from farm use. As a result, the Rural Lands PCCP designation  
40 and associated policies are evaluated below, following the evaluation of the applicable Forest Lands  
41 Goals and Policies.

- 42           **c. To conserve and protect, and encourage the management of forest lands**  
43           **for continued timber production, harvesting and related uses.** [PCCP  
44           Section 2, Forest Lands, Goal 1]
- 45           **d. To conserve and protect watersheds, fish and wildlife habitats, riparian**  
46           **areas and other such uses associated with forest lands.** [PCCP Section 2,  
47           Forest Lands, Goal 2]
- 48           **e. Polk County will provide for the protection of productive forest lands.**  
49           **Designated forest lands will be areas defined as one of the following:** [PCCP  
50           Section 2, Forest Land, Policy 1.1]



- i. **Predominately Forest Site Class I, II and III, for Douglas Fir as classified by the U.S. Soil Conservation Service;**
  - ii. **Suitable for commercial forest use;**
  - iii. **In predominately commercial forest use and predominately owned by public agencies and private timber companies;**
  - iv. **Cohesive forest areas with large parcels;**
  - v. **Necessary for watershed protection;**
  - vi. **Potential reforestation areas; and**
  - vii. **Wildlife and fishery habitat areas, potential and existing recreation areas or those having scenic significance.**
- f. **Polk County will promote the efficient management of its timber resources to ensure a sustained yield of forest products, adequate grazing areas for domestic livestock, wildlife habitat, protection of watershed areas and the provision of recreational activities. [PCCP Section 2, Forest Land, Policy 2.1]**
  - g. **Polk County will encourage the reforestation of cut-over timber lands and the forestation of marginal agricultural lands. [PCCP Section 2, Forest Land, Policy 2.5]**
  - h. **Polk County will encourage utilization of programs for small woodlot owners designed to promote efficient timber production. [PCCP Section 2, Forest Land, Policy 2.6]**

**Hearings Officer’s Previous Findings:**

These specific Goals and Policies were not addressed during PA 14-01 and ZC 14-02. Because an exception to Statewide Planning Goal 4 is required for the proposed re-zone area, Staff determined that Polk County’s Forest Lands Goals and Policies are applicable to these applications. Staff requested that these relevant Forest Lands Goals and Policies be addressed by the Applicants in a letter dated January 11, 2019.

**Requirement to Analyze Forest Lands Goals and Policies in PCCP:**

In the Applicant’s Supplemental Justification Statement dated March 19, 2019 and raised again in Final Rebuttal Arguments, the Applicants raise issue with addressing Forest Lands Goals and Policies as stated in the Polk County Comprehensive Plan because they contend that by qualifying for an Exception to Goal 4, that negates the need for further consideration of any and all forest uses. Even though Applicants dispute that their applications must comply with this portion of the PCCP, they still addressed the Forest Lands Goals and Policies as requested by County Staff. For clarity of the Record, the Hearings Officer finds that for the applications, the Forest Lands Goals and Policies in the Polk County Comprehensive Plan do need to be evaluated because the Applicants have applied for an Exception to Goal 4 and the proposed Plan Amendment must still comply with the purpose of the Comprehensive Plan. (See PCZO 115.050(A)(3).)

**Applicant’s Additional Findings:**

**Forest Land Goal 1 - To conserve and protect, and encourage the management of forest lands for continued timber production, harvesting and related uses.** As set forth in the Exception to Goal 4, the subject property is not available for forest uses because the uses on the surrounding properties have made use of the subject property for forest uses impracticable. Therefore, there is no ability to conserve or protect the subject property for timber production, harvesting or related uses.

In order to address forest land issues, the Applicants commissioned Stuntzner Engineering & Forestry to evaluate the subject property. That report is included with the original applications as Exhibit W. The suitability of the site for forest uses assessed the physical site conditions; the impacts

1 from surrounding uses; and the economic feasibility of commercial timber production. It was noted  
2 that the primary focus for forestry uses was on the western slopes of the property where some trees  
3 were intermingled with, and sometimes overtaken by scotch broom, blackberries and other brush  
4 and scrub trees.

5 The report determined there were 24.1 acres in the northwest corner of the site, on the steep west  
6 facing slope that had some Douglas fir and Maple trees, and another 44.8 acres of land that included  
7 predominately Oak trees. The remaining 157.2 acres was predominated by brush, included in the  
8 powerline right of way, or otherwise was not in forest uses. Figure 1. Historic aerial photographs  
9 from 1969 and 1935 confirmed this ratio of land uses.

10 In the 24.1 acre area, it was pointed out that some selective cutting was done in the 1960's and again  
11 in the early 1990's, with some reforestation efforts occurring after the selective cuts. It was noted  
12 that in the reforestation efforts, the survival rate was an estimated 25%. Where the reforestation  
13 efforts failed, brush and scrub trees took their place.

14 In the 44.8 acre area, it was noted that whatever stock of hardwoods are there, developed through  
15 natural afforestation, and not due to man efforts to commercially manage this area for timber  
16 production. The report notes that only about 35% of the 44.8 acres is actually stocked with hardwood  
17 trees, and those are of different sizes and ages. There were no Douglas-fir trees observed in this area  
18 at all.

19 The report includes soil mapping data and analysis, and reports that while the soil on the western  
20 slope is Ritner, Type 61E, which has a suitability rating of 143, the other elements of land that make  
21 it suitable for commercial forest uses (water and sunlight) do not exist sufficiently to allow the site  
22 to be commercially placed in timber production. In this area, the low water storage capability coupled  
23 with the more intense sun exposure inhibits seedling survival.

24 Fire risk and protection were reviewed as was the over-all suitability of the subject property for  
25 commercial forest uses, and the report found that the property was simply not suitable for timber  
26 production.

27 During the Open Record Period, the Applicants submitted a Supplemental Forestry Study that  
28 provided expert analysis as to the upper lands, 100+ acres on the subject properties. This  
29 Supplemental Forestry Study by Cliff Barnhart determined:

- 30 1. The upland area of 105. 8 acres has a total of 14 acres committed to development such  
31 as dwelling and roads, leaving the net acreage for review at 91.8 acres.
- 32 2. The land has been committed to non-forestry uses since at least 1935.
- 33 3. Conversion of this upland area would require some effort and cost in the application of  
34 herbicides.
- 35 4. The land is not financially viable for forestry production based on the same issues raised  
36 in the original report for the western slopes.
- 37 5. Given the climate change, and the proliferation of fires, along the West Coast, and since  
38 2017 in Oregon, the risk of fire to timber, especially in areas with many dwellings, risen  
39 dramatically.
- 40 6. The subject property has a high voltage power line traversing it, and it is located in the  
41 middle of an area that has a large number of dwellings nearby. These are factors that  
42 contribute heavily to the increased fire risk.
- 43 7. Given the dramatic rise in fire risk, the liability insurers have stepped away from this  
44 market making it nearly impossible and financially unfeasible for small lot forest  
45 ownerships to obtain insurance.

46 Based on the findings of the forestry experts, there is no ability to carry out commercial timber  
47 production or management for harvesting or related forest uses. This Goal is complied with.

48 **Forest Land Goal 2 - To conserve and protect watersheds, fish and wildlife habitats, riparian**  
49 **areas and other such uses associated with forest lands.** There are no watersheds, fish or wildlife  
50 habitats or riparian areas identified or mapped on or near the subject property. This Goal is not

1 applicable here, as there are no such uses that need to be conserved or protected involved in the  
2 applications. This Goal is complied with.

3 **Resource Preservation Policy 1.1 - Polk County will provide for the protection of productive**  
4 **forest lands. Designated forest lands will be areas defined as one of the following: a)**  
5 **predominately Forest Site Class I, II and III, for Douglas Fir as classified by the U.S. Soil**  
6 **Conservation Service: b) suitable for commercial forest use: c) in predominately commercial**  
7 **forest use and predominately owned by public agencies and private timber companies: d)**  
8 **cohesive forest areas with large parcels: e) necessary for watershed protection: f) potential**  
9 **reforestation areas: or g) wildlife and fishery habitat areas, potential and existing recreation**  
10 **areas or those having scenic significance.** As identified in the Stuntzner report, the subject property  
11 is not predominately forest land that is in production, or capable of producing commercial timber  
12 that can be harvested for profit. There are no cohesive forest areas in the neighborhood that is  
13 predominated by rural residential parcels, a vineyard and other non-forest uses. Aside from the  
14 powerline easement, there are no public agency ownerships in the area, nor are there any private  
15 timber company ownerships that predominate the area.

16 There are no watersheds on or near the subject property. The potential for reforestation is minimal  
17 as experienced by the owner over the last several decades due to water storage limitation and high  
18 sun exposure that limits the ability of seedlings to mature. There are no identified habitats on or near  
19 the subject property. There are no identified recreation or scenic areas of significance identified on  
20 the site.

21 The subject property is not conducive to commercial timber production, as pointed out in the  
22 Stuntzner report and Supplemental Report, and none of the other elements of these policies are  
23 adversely impacted by this proposal. This Policy is complied with.

24 **Resource Management Policy 2.1 - Polk County will promote the efficient management of its**  
25 **timber resources to ensure a sustained yield of forest products, adequate grazing areas for**  
26 **domestic livestock, wildlife habitat, protection of watershed areas and the provision of**  
27 **recreational activities.** As set forth in the Stuntzner reports, the subject property does not contain  
28 the commercial ability to produce forest products worthy of management for any sustained yield.  
29 There are no watersheds on or near the subject property. There are no recreational areas on or near  
30 the subject property. There is no wildlife habitat on or near the subject property. Effectively, there  
31 are no identified resources that can be efficiently managed to produce or protect the listed activities.

32 There are grazing areas on the subject property for domestic livestock. The purpose of the 10 acre  
33 minimum parcel size here is to protect and enhance those areas. When an acreage homesite is  
34 established it allows the homeowner to maintain cattle, horses or other domestic animals to be  
35 managed as a part of their homesite. This will result in more productive use of the land, as smaller  
36 parcels when cumulated will produce a higher level of grazing activities than currently exist.

37 There is nothing in this proposal that will adversely impact the efficient management of local timber  
38 resources, or providing adequate grazing areas for domestic livestock. Similarly there are no wildlife  
39 habitat, watersheds or recreational activities in the area that would be impacted. This Policy is  
40 complied with.

41 **Resource Management Policy 2.5 - Polk County will encourage the reforestation of cut-over**  
42 **timber lands and the forestation of marginal agricultural lands.** Reforestation on the subject  
43 property has been proven to be ineffective. According to the Stuntzner report, prior attempts at  
44 reforestation result in a seedling survival rate of only 25% due to soil type, lack of water storage and  
45 sun exposure that exist on the western slopes of the subject property. In addition, the subject property  
46 is not "cut-over timber lands." There historically have been some limited and selective cutting of  
47 trees along the western slopes, natural afforestation has created a brushed over mess of scrub trees,  
48 blackberries amongst some natural Oak and Douglas fir.

49 The subject property might be considered "marginal agricultural lands", however the subject  
50 property has two distinct topographical features, the western slopes, and the uplands. The western

1 slopes are too steep, the soil too shallow and rocky to be considered for agriculture uses, and as noted  
2 above it is not feasible or economical to attempt to convert the western slopes to forestland. The  
3 uplands historically are not capable of producing commercial timber as shown by the lack of trees  
4 going back nearly 100 years and has the same issues as those of the western slopes.

5 The highest and best use of the uplands is not attempting to convert it to forest uses, that are not  
6 feasible due to the level and type of uses that go on around the subject property, but to allow rural  
7 residential homesites on 10+ acre parcels that can sustain some limited agricultural activities and  
8 perhaps even a few small stands of Christmas trees. This Policy is complied with.

9 **Resource Management Policy 2.6 - Polk County will encourage utilization of programs for**  
10 **small woodlot owners designed to promote efficient timber production.** This Policy is not  
11 directed to property owners in the midst of a land use application, but is directed to County Staff in  
12 how to deal with small woodlot owners, and encouragement to Staff to provide assistance in  
13 available programs. As such the Policy is not applicable here. In addition, the Applicants here are  
14 not "small woodlot owners" and therefore would not qualify for any programs in any event.

#### 15 Hearings Officer Findings:

16 Based on a review of the Polk County Significant Resource Area (SRA) Map, the subject properties  
17 do not contain any inventoried significant resources. Based on the Federal Emergency Management  
18 Agency (FEMA) Flood Insurance Rate Map (FIRM) panel numbers 41053C0275F, dated December  
19 19, 2006, the subject properties are located outside of the Special Flood Hazard Area. There are no  
20 historic sites or Greenway areas located on the subject properties. The National Wetland Inventory  
21 (NWI) map, Rickreall quadrangle, indicates that the middle fork of the McNary Branch of Mud  
22 Slough may abut the northwest corner of the subject properties. However, based on Staff's review of  
23 LIDAR imagery it does not appear to be located on the subject properties. For these reasons, Staff  
24 concurred with the Applicants' findings regarding the lack of Goal 5 inventoried fish and wildlife  
25 habitats and riparian areas on the subject properties.

26 According to the most recent NRCS soils data, accessed through Polk County's GIS and summarized  
27 in Table 2 above, the subject properties are capable of producing an average of approximately 154  
28 cubic feet of wood fiber per acre, per year. Approximately 52 percent of the subject properties  
29 contain Class II and III soils, which is considered forest lands. Nevertheless, the Applicants  
30 concluded that there is no ability to carry out commercial timber production or management for  
31 harvesting or related forest uses on the subject properties, based on a Forestland Suitability Analysis  
32 conducted by Cliff Barnhart, ACF, with Stuntzner Engineering and Forestry, LLC. Staff reviewed  
33 this analysis, which is included in the record as Exhibit W. This analysis indicates that the primary  
34 focus of the assessment is 1) physical site condition with respect to forest production; 2) the impacts  
35 of surrounding perimeter land uses; and 3) the economic feasibility of commercial forest uses. Maps  
36 included with the assessment indicate that the entire subject property was evaluated, however, the  
37 narrative states that the primary focus of the assessment is the western slopes of the property, some  
38 of which is currently forested, while some of which is currently overtaken by scotch broom,  
39 blackberries, and other forms of brush vegetation.

40 Mr. Barnhart's assessment included an evaluation of different land cover types for the subject  
41 properties based on 1935, 1969, and 2016 aerial photographs. These photographs depict five (5)  
42 different land cover types and how the land cover has changed over time. The five (5) classifications  
43 include: Douglas fir/maple forest, scotch broom/brush, oak forest, non-forest, and powerline right-  
44 of-way.

45 The area identified as "Type 1" includes Douglas fir and maple forests, which comprises  
46 approximately 24.1 acres of the subject property near the northwest corner of the proposed re-zone  
47 area. Aerial photographs indicate that this area has been forested for the 82-year period that aerial  
48 photographs are available. Findings indicate that the northern half of this area was harvested  
49 sometime around 1969, and the southern half was harvested around 1990. The northern area was not  
50 replanted after the 1969 harvest, but natural regeneration included a mix of maples and scattered

1 Douglas fir trees. The southern area was replanted with Douglas fir trees, with an estimated survival  
2 rate of 25% and the remaining 75% currently contains brush and hardwoods.

3 The area identified as “Type 2” is composed of grass, scotch broom, and blackberries with scattered  
4 hardwood trees, which comprises approximately 48.0 acres near the south-central portion of the  
5 subject properties. Mr. Barnhart concluded that there are three scenarios for why this area lacks forest  
6 cover including, 1) fire history, 2) historic clearing for grazing, or 3) the site is not suitable for  
7 growing trees. In addition, farming and application of herbicides within this area could explain the  
8 lack of afforestation. Findings also indicate that it would be difficult to reforest this area with Douglas  
9 fir due to the southwest aspect and shallow soils. Findings indicate that Ponderosa pine is a more  
10 suitable species for these types of conditions, however, it is the opinion of Mr. Barnhart that the  
11 economics of growing pine in this region is not favorable.

12 The area identified as “Type 3” is composed of naturally regenerated hardwood species over the last  
13 35 years, which comprises approximately 44.8 acres. Earlier photographs show the area to be  
14 historically comprised of land cover that is closer to “Type 2” vegetation, with the exception of some  
15 scattered hardwoods. Historic photographs also show that this area was cleared for agricultural  
16 purposes in the 1960’s. Mr. Barnhart notes that Douglas fir was not observed in the understory of  
17 the current oak stand.

18 An Addendum to Forestland Suitability Analysis was entered into the Record during the Open  
19 Record period to address the area identified as “Type 4”, which comprises the eastern half of the  
20 subject properties, an area approximately 105.8 acres in size. Type 4 is generally described as  
21 rolling ridgetop topography. There currently is not any forest vegetation within Type 4 other than  
22 two narrow strips along the eastern fence lines. Of the 105.8 acres included in Type 4, 14.0 acres are  
23 already committed to other uses and 91.8 are potentially available to convert to forest use. The area  
24 potentially available to forest production is currently vegetated with grass fields and primarily  
25 herbaceous vegetation. The Addendum states in part:

26 [C]onversion of Type 4A to forest productivity would require herbicide site preparation and  
27 planting. No clearing or brush piling would be required in this area. Douglas-Fir should be  
28 fairly easy to establish in this area as long as competing vegetation is controlled during the  
29 first five years of establishment in order to conserve moisture available to the trees, and to  
30 prevent outbreaks of field mice which like grass cover. The gentle northerly and easterly  
31 aspects in type 4A should be favorable to seedling survival under normal precipitation years.

32 ....

33 The upland area mapped as Type 4 includes a combination of Jory and Nekia silty clay loam  
34 soils. Both of these soil types have forest productivity ratings classified as being suitable for  
35 commercial forest uses.

36 ...

37 All of Type 4A could be operated on with ground machinery.

38 However, the Addendum also stated, “This addendum does not change the analysis or conclusions  
39 provided in the original report for western slope areas mapped in the report as Type #1, #2, and #3.  
40 The sections in that report discussing obstacles to commercial forest management, conservation  
41 forest use, and comparison to Zena tree farm equally apply to Type #4 as they were applied to the  
42 western slope areas covered in that report.”

43 Historic photographs depict this area to have been managed for various agricultural crops such as  
44 hay. Based on Staff’s review of NRCS soils maps and data, approximately 98 acres of this 105.8  
45 acre area (93.5%) contain Class II and III soils with an average forest productivity of approximately  
46 163 cubic feet of wood fiber per acre annually, which is higher than the average productivity of the  
47 remaining portion of the subject properties.

1 The Forestland Suitability Analysis provides findings indicating that soils only represent one (1) of  
2 the three (3) environmental components of nutrients, water, and sunlight, which effects forest  
3 productivity. However, there are no findings in the Addendum to demonstrate that the "Type 4" area  
4 lacks adequate nutrients, water and sunlight. In fact, the Addendum indicates that Douglas Fir could  
5 easily establish on the uplands and there is no clearing or brush piling that would be required.

6 Findings to address limiting factors such as aspect, low water storage, and shallow soils are specific  
7 to areas identified as "Types 1, 2, and 3", which are primarily composed of Ritner gravelly silty clay  
8 loam soil, and have the lowest forest productivity capability for the subject properties based on  
9 NRCS soils data. The soils identified in Type #4 are suitable for commercial forest uses.

10 The Addendum addresses Type 5, the powerline right-of-way, by including those acres in "Type 4."  
11 The Addendum indicates that Type 5 as 14.0 acres that are already previously committed to  
12 dwellings, roads, and the powerline.

13 Topography and the lack of road access to the lower slopes of the subject properties was identified  
14 as a limiting factor for why ground machinery could not be used for a logging operations. However,  
15 topography and access to roads is not a limiting factor for Type #4. This evaluation is again specific  
16 to the western sloped areas and does not adequately demonstrate that traditional logging methods  
17 could not be employed on the remaining eastern portions of the subject properties.

18 Fire risk and protection was another concern evaluated as part of this analysis. Mr. Barnhart  
19 concluded that the fact the subject property is not within an Oregon Department of Forestry (ODF)  
20 fire protection district coupled with the perceived higher risk of human-caused fire would act as a  
21 deterrent to commercial forest land investors. In the Addendum, Mr. Barnhart renewed his concern  
22 to fire risk and included a new development, that it is harder and more expensive to obtain liability  
23 insurance due the high number of catastrophic fires which have occurred over the past two years.  
24 He also stated two significant conditions associated with the recent wildfire catastrophes in  
25 California exist on the properties subject to this report: (1) high voltage overhead powerlines through  
26 the property; and (2) close vicinity to heavily populated areas. Staff nor the Hearings Officer do not  
27 necessarily disagree with that conclusion, however, Staff was concerned that the result of this  
28 proposed re-zone area would allow for increased rural residential development. Part of the  
29 irrevocably committed Goal exception criteria requires the Applicants to demonstrate that "rural  
30 uses, density and public facilities will not commit adjacent or nearby resource land to uses not  
31 allowed by the applicable goal as described by OAR 660-004-0028." Staff reviewed 2019 Polk  
32 County Assessor's data and determined that approximately 199.5 acres just northwest of the  
33 subject properties are receiving forest deferral. In addition, these areas visually appear to be  
34 managed for forestry purposes based on Staff's review of the 2018 Polk County aerial photograph.  
35 Staff raised concern that if increased rural residential development within the area is a deterrent  
36 factor for commercial forest land investors as the Applicants claim, yet the Applicants' proposal  
37 would result in 17-19 additional dwellings, it seems that new residential development could further  
38 deter investors of neighboring forest properties and therefore, "commit" those lands as well.

39 An evaluation of how the current level of development within the surrounding vicinity impacts  
40 normal commercial forest management practices was also evaluated in the Forestland Suitability  
41 Analysis. Mr. Barnhart's findings indicate that the risk of neighbor lawsuits would prevent  
42 helicopter herbicide applications, therefore, requiring backpack treatments which would increase  
43 costs associated with normal silviculture practices. Statements also indicate that close proximity  
44 to major population centers would also limit the opportunity for slash burning due to a significant  
45 amount of smoke and the risk of neighbor complaints and lawsuit threats from smoke damage,  
46 making the subject property less desirable for timber management. Noise associated with timber  
47 harvest operations is another concern. Again, the Hearings Officer does not necessarily disagree  
48 with these findings, but it is unclear how adding 17-19 additional dwellings on the subject  
49 properties would not "commit" neighboring forest operations for the same reasons.

50 A financial analysis was provided with the Forestland Suitability Analysis to demonstrate the  
51 projected rate of return for forestland investors. This evaluation includes information on 1) the cost

1 of site preparation, 2) planting, 3) silviculture treatments expected, 4) annual holding costs, and 5)  
2 projections of expected future harvest income. After using two discounted cash flow (DCF)  
3 models, findings conclude that it is not financially feasible to manage the subject properties for  
4 timber production without subsidizing or settling for a much lower rate of return on investments  
5 than what is typically demanded in the marketplace (5-6 percent). This evaluation was only  
6 conducted for the areas referenced above as vegetation “Type 1, 2 and 3.” The DCF models in  
7 Exhibit W for Type#1, #2, and #3 estimate timber volume based on soil productivity and Type 1,  
8 2 and 3 contain soil productivity ratings of 143 or 157. The Addendum did not include a specific  
9 financial analysis for Type #4 but stated that it would be similar to Type #1 and #3 in Figure 11 of  
10 the 2017 report. However, Type #4 contains approximately 43 acres of the highest forest  
11 productivity capability (rating of 172) based on the NRCS soil data. Type #4 is the only area on  
12 the subject property that contains this forest productivity capability. The Addendum lacks any  
13 substantive discussion of how the financial analysis for Type #4 is considered similar to that of  
14 Type #1 and Type #3 only the statement that they are.

15 Type #1 and Type #3 in the 2017 report contain lower soil productivity ratings than a portion of  
16 Type #4. Without a more substantive explanation, the Hearings Officer does not find it reasonable  
17 to conclude that the evidence supports a finding that the financial analysis for Type #4 will be  
18 similar to Type #1 and Type #3 given the difference in soil productivity and the large area of higher  
19 productivity capability. Mr. Barnhart did point out that the cost of land or rent costs was not  
20 included in these models. However, the Applicants currently own the land and the DCF models  
21 still have a profitable rate of return assuming the subject property owners invest money on the land  
22 that they currently own.

23 Due to the impacts of fragmentation that has occurred on and around the subject properties, Mr.  
24 Barnhart states, “In my opinion, this property which is located in a fragmented area is better suited  
25 for small parcel hobby tree farms where return on investment is not the primary motivation for  
26 management.” This conclusion implies that the subject properties could be managed for forest  
27 production, however, there could be added risks which have been identified as an inability to use  
28 certain forest management practices, a slightly lower rate of return for the western portion of the  
29 subject property, and potential litigation from neighbors from smoke created during slash burning.  
30 Nevertheless, the Hearings Officer finds that the evidence in the record does not demonstrate that  
31 the entire 228 acre area of land could not reasonably be managed for a commercial forest operation,  
32 specifically those areas identified as “type 4”, and how, if approved, further fragmentation and  
33 residential development would not impact or “commit” surrounding properties that are currently  
34 managed for forestry purposes.

35 In a similar application that required an exception to Goal 4 (*DLCD v. Curry County*, 30 Or LUBA  
36 294, 1996) the Oregon Land Use Board of Appeals (LUBA) determined that a finding that  
37 commercial forestry is impracticable on certain property does not justify an irrevocably committed  
38 Goal 4 exception. It must be demonstrated that the property is impracticable for all Goal 4 uses. In a  
39 similar case, (*DLCD v. Coos County* 29 Or LUBA 415, 1995) LUBA determined that findings that  
40 address only the practicability of commercial forestry uses, rather than all commercial and  
41 noncommercial uses allowed by Goals 3 and 4 on agricultural and forestland, do not justify an  
42 irrevocably committed exception to either Goal 3 or Goal 4. The Forestland Suitability Analysis  
43 focuses primarily on why commercial forestry is impracticable on the subject properties, however,  
44 some findings to address why the property cannot be managed for the conservation of oak savanna  
45 was also submitted. Findings indicate that conservation strategies are focused on tracts that are  
46 greater than 200 acres in size, and a majority of the subject forestlands do not have large “Legacy”  
47 oak trees. Although the Applicants have submitted compelling evidence to demonstrate that  
48 commercial forest operations may not be practicable on the western portion of the subject property,  
49 the evidence in the record does not demonstrate that the entire 228 acre proposed exception area  
50 could not be managed for any commercial and noncommercial uses allowed by Goals 3 and 4.

51 Based on the evidence in the record, the Hearings Officer finds the applications do not comply with  
52 this criterion and do not demonstrate that the entire area proposed to be designated Rural Residential

1 could not practicably be managed for commercial timber production or other non-commercial uses  
2 allowed by Goals 3 and 4.

3 **c. The Rural Lands Plan designation applies to lands in the County which for the most  
4 part lie between the relatively flat agricultural areas and the foothills of the Coast  
5 Range. These lands are generally hilly, heavily vegetated, and have low densities of  
6 residential development.**

7 **d. It is the intent of the Rural Lands Plan designation to provide an opportunity for a  
8 segment of the population to obtain acreage home sites in a rural area, while at the  
9 same time encouraging and protecting agriculture and forestry.**

10 **e. In those areas that receive an exception from the Oregon Statewide Planning  
11 Agricultural and Forest Land Goals #3 and #4, but are not given an exception to  
12 Oregon Statewide Planning Urbanization Goal #14, implementation will be  
13 accomplished with the Acreage Residential 10-Acre (AR-10) Zone and Agriculture  
14 and Forestry 10-Acre (AF-10) Zone. In those areas that receive an exception from  
15 the Oregon Statewide Planning Agricultural and Forest Land Goals #3 and #4 and  
16 Urbanization Goal #14, implementation will be accomplished with the Acreage  
17 Residential (AR-5) or Suburban Residential (SR) Zones. [PCCP Section 4]**

18 **Hearings Officer's Previous Findings:**

19 The property owners comprising the rezone area know that they lack the equipment and financial  
20 resources to easily establish farm uses where farm uses are a proven failure. The objective of this  
21 land use action is to create a circumstance where more specialty farms can come into this area.  
22 The rezoning of the property to AF-10 provides an opportunity to re-establish farming without a  
23 substantial capital outlay by creating farm use on smaller field sizes.

24 Applicants say concept of smaller farm units is resurging from a similar resurgence in the late  
25 1970's. A publication entitled "Small-Scale Farming" a portrait from Polk County, Oregon,  
26 articulates issues regarding the establishment of smaller scale farming enterprises. There is a  
27 current resurgence of this concept as more consumers want to know where their food is coming  
28 from, "farm to fork." The subject rezone area, being close to Salem-Keizer,  
29 Monmouth-Independence and Dallas could be an ideal place to establish such a small farm  
30 enterprise area. The AF-10 Zone is ideally suited to the extreme variations that exist on this site  
31 with respect to elevation, slope, wind exposure, aspect, soil mapping units, soil depth, soil  
32 fertility, vegetative cover, degree heating days, frost free days as well as historical use of the  
33 land. The purpose and intention of this zone is to create an environment in which small scale  
34 agriculture and forestry can be conducted through residency management. The concept of small  
35 scale farming and "starter farms" can make substantial contributions to the local farm economy  
36 of the area.

37 According to the Western Rural Development Center Paper from Oregon State University:

38 *With the growing awareness of the fact that small-scale farmers are an*  
39 *important embodiment of Traditional American values, new interest has*  
40 *been generated in ensuring their ultimate survival. Small-scale farmers,*  
41 *however, are significant not only for the social values they represent, but*  
42 *also for their sheer numbers. They make an important contribution to*  
43 *strengthening the economic base and enhancing the social environment of*  
44 *the rural community. Although farmers with gross product sales of less*  
45 *than \$40,000.00 account for only 15 percent of the Oregon's farm product*  
46 *sales, they constitute 80 percent or 21,466 of the 26,753 farmers in the*  
47 *state.*

48 The proliferation of the wine industry in the mid-Willamette Valley and the regular scheduling of  
49 farmers markets (now on various days of the week) has created opportunity for small farmers to  
50 generate cash crops and make a contribution to the local and state economy.



1 An Oregon State University Publication entitled Small-Scale Farming, a portrait of Polk County,  
2 Oregon was published in 1979 and much of what this document promotes has come to fruition  
3 throughout Oregon including Polk County. This 45-page document, though dating from 1979, has  
4 to some extent been realized with the proliferation of small farms, most notably vineyards, farms,  
5 specialty livestock and non-traditional dairies. Other exotic crops being conducted on small acreage  
6 include fowl (ostrich and emu), fur producing animals (mink, alpaca, and llamas) and flower  
7 nurseries. Two produce stands are located within a mile of each other on the Kings Valley Highway  
8 near the Little Luckiamute River Bridge. A fresh vegetable produce stand is located east of Dallas  
9 where the Rickreall Cutoff intersects with Highway 22 across from the Oak Grove Golf Course.  
10 Applicant states that the operators of the Rickreall facility earn most of their year income from the  
11 sale of farm grown produce. Other fresh produce is featured on Wednesdays and Saturdays in Salem  
12 and in Independence on Saturdays. In addition, there is greater emphasis from organic grocery stores  
13 to market local products including fresh produce, free range poultry and beef, honey, and wine. These  
14 products are becoming more common place through Salem's Wednesday and Saturday markets. Life  
15 Source Grocery in Salem, Oregon also carries locally produced farm products from small farms,  
16 some of which are certified organic.

17 Applicants say the subject rezone area has a long history of diverse agriculture, but it also has a long  
18 history of crop and livestock failures. The property has been used for sheep pasture, orchards, berry  
19 crops, wheat, grass seed and Christmas trees and every one of these crops has failed on multiple  
20 occasions for reasons previously outlined. Applicant offers these failures as evidence nothing can be  
21 grown commercially on the property.

22 With all due respect to the Simmons family, the Hearings Officer does not feel confident about  
23 accepting an applicant's testimony about his or her own failure to raise a profitable commercial crop  
24 on a tract of land, as solid evidence that nobody else can succeed with any crop. The Hearings Officer  
25 is not challenging applicants' good faith. However, as a general rule it is not wise to establish a  
26 precedent of accepting, the circumstances of a party's own failure to succeed at a task, as evidence  
27 that nobody else can succeed at the task.

28 Applicants' new plan for the land includes small acreages of organic oats for human consumption,  
29 fine fescue which does not require field burning, the boarding and training of horses and on one  
30 adjoining property not in the rezone area, Noble fir Christmas trees. Noble Mountain Christmas trees,  
31 the largest producers of Noble fir in the world, has plantations nearby at high elevations and they  
32 prefer this area because the trees are genetically adapted to higher elevations. The successful Noble  
33 Mountain plantation nearby are in deeper soil areas without direct wind exposure from the west.  
34 There may be a few select protected areas on the property where Noble fir might endure a growth  
35 cycle. All the owners are seeking to diversify agriculture while concurrently seeking a zone category  
36 that will allow residency management for smaller specialized farming and forest uses.

37 Staff notes that the applicant is proposing to change the PCCP designations and zoning of the subject  
38 properties to Rural Lands and AF-10, respectively. The applicant must provide justification for  
39 designation of the subject properties as Rural Lands. The elevation of the subject properties is  
40 between 900 and 1,060 feet with steep slopes to the west and south at a high point at the southern  
41 end of the Eola Hills. The applicant contends that the subject properties are compatible with the  
42 properties in the vicinity and that the subject properties cannot reasonably or feasibly be utilized for  
43 farm or forest use by themselves or in conjunction with adjoining properties. Division of the subject  
44 properties following Measure 37 claims made by various members of the Simmons family, and the  
45 construction of three dwellings on its eastern portion have broken up the ownership of what was  
46 once an approximately 267-acre farm unit. The applicant has described the properties in the vicinity  
47 and Staff confirmed that of the 21 EFU zoned properties within 1,000 feet of the subject properties,  
48 13 are 20 acres or less in size and include varying levels of small scale agriculture.

49 Statements in the record indicate that the demand for the types of crops grown on the subject  
50 properties historically have diminished, such as cherries, prunes, Douglas fir Christmas trees, grass  
51 seed and grain, as the yield of these crops also dropped. Some of the processing facilities for these

1 crops have relocated or closed. The applicant also states that prohibition of irrigation on the subject  
2 properties and physical characteristics of the site have been a limiting factor in the ability to  
3 profitably manage it for agriculture. The applicant describes a new plan for farm uses that they have  
4 either established or intend to establish on the subject properties. The applicant provided a map  
5 indicating where crops or agricultural activities are either established or could be established but did  
6 not provide a written plan or pro forma. Nevertheless, Staff understands the applicants representation  
7 of those new agricultural uses and plan to be small scale and not profitable and the applicant's  
8 argument to be that if a dwelling is permitted, the likelihood of the establishment of an agricultural  
9 activity, regardless of the fact that it would not be profitable, would be greater and better suited to  
10 small acreage parcels.

11 The applicant is not proposing an exception to Oregon Statewide Planning Goal 14 as they are  
12 proposing AF-10 zoning with a minimum parcel size of 10 acres. The purpose statement for the AF-  
13 10 zone indicates that the function of the zone is to allow the designation of Rural Lands, consistent  
14 with OAR 660-004-0040(7)(i)(A), without requiring a Goal 14 exception.

15 Staff found based on the applicants original submittal that the Rural Lands Plan designation would  
16 be compatible with surrounding land uses and also enable the applicant to develop larger acreage  
17 home sites where the occupant could manage the property for a range of specialty farm uses as a  
18 hobby even though the land is not suitable to make a profit in money from farm use. Based on the  
19 foregoing, Staff concluded that small-scale, specialty agriculture managed by occupants with no  
20 intent to make a profit from agriculture would be consistent with the Rural Lands Plan designation,  
21 as implemented by the AF-10 zone. However, the applicant has provided evidence demonstrating  
22 that there is a local market for diversified farm crops. The Hearings Officer does not disagree, but  
23 notes that the question remains as to whether the subject properties otherwise qualify for re-  
24 designation and re-zoning.

#### 25 **Applicants' Additional Findings:**

26 The property owners in the exception area lack the equipment and financial resources to easily  
27 establish farm uses where farm uses have been a proven failure. The objective of the applications is  
28 to create a circumstance where more specialty farms can come into this area. The rezoning of the  
29 property to AF-10 provides an opportunity to re-establish farming on a small scale where the  
30 property owner can work and manage specialty crops without substantial capital outlay and with  
31 more assurance of some success, even if limited to home use of the products, or limited sales in the  
32 marketplace at farmers markets.

33 The concept of smaller farm units is re-surgng from a similar resurgence in the late 1970's. A  
34 publication entitled "Small-Scale Farming" a portrait from Polk County, Oregon, articulates issues  
35 regarding the establishment of smaller scale farming enterprises. (This publication is part of the  
36 Record that is being incorporated herein.) More consumers want to know where their food is coming  
37 from, the concept of "farm to fork." The exception area, with easy access to Salem, Monmouth,  
38 Independence and Dallas is an ideal place to establish such a small specialty farms, where larger  
39 farms with crop types that are disappearing in popularity and ability to process once were attempted.

40 The AF-10 Zone is ideally suited to the extreme variations that exist in the exception area with  
41 respect to elevation, slope, wind exposure, aspect, soil mapping units, soil depth, soil fertility,  
42 vegetative cover, degree heating days, frost free days as well as the historical use of the land. The  
43 purpose and intention of the proposed AF-10 zone is to create an environment in which small scale  
44 agriculture and forestry can be conducted through residency management. The concept of small scale  
45 farming and "starter farms" have been shown to make substantial contributions to the local farm  
46 economy of the area.

47 According to the Western Rural Development Center Paper from Oregon State University: With the  
48 growing awareness of the fact that small-scale farmers are an important embodiment of traditional  
49 American values, new interest has been generated in ensuring their ultimate survival. Small-scale  
50 farmers, however, are significant not only for the social values they represent, but also for their sheer

1 numbers. They make an important contribution to strengthening the economic base and enhancing  
2 the social environment of the rural community, in addition to employing the land to its maximum  
3 benefit. Although farmers with gross product sales of less than \$40,000.00 account for only 15  
4 percent of the Oregon's farm product sales, they constitute 80 percent or 21,466 of the 26,753 farmers  
5 in the state.

6 The proliferation of the wine industry in the mid-Willamette Valley and the regular scheduling of  
7 farmers markets (now on various days of the week, including ones in Independence and West Salem)  
8 has created opportunity for small farmers to generate cash crops and make a contribution to the local  
9 and state economy.

10 In addition, there is a greater emphasis on growing organic crops, and grocery stores now cater that  
11 market and seek out local products including fresh produce, free range poultry and beef, honey, and  
12 wine. These products are becoming more common place through Salem's Wednesday and Saturday  
13 markets. Life Source Grocery in Salem, Oregon also carries locally produced farm products from  
14 small farms, some of which are certified organic.

15 The new plan for the land includes small acreage of organic oats for human consumption, the  
16 boarding and training of horses, and small lot Christmas trees. Noble Mountain Christmas trees, the  
17 largest producers of Noble fir in the world, has plantations nearby in deeper soil areas without direct  
18 wind exposure from the west. There may be a few select small protected areas in the exception area  
19 where an owner might be able to manage a successful crop of Noble fir for personal marketing.

20 The elevation of the subject properties is between 900 and 1,065 feet with steep slopes to the west  
21 and south at a high point at the southern end of the Eola Hills. Smaller parcelization has been shown  
22 to predominate the area surrounding the exception area. The exception area has been demonstrated  
23 not to be able to be farmed in larger tracts, but has the potential for productive farm and forest  
24 activities on smaller tracts that are owner managed.

25 Division of the subject properties following Ballot Measure 37/49 claims made by various members  
26 of the Simmons family, and the construction of four dwellings on its eastern portion have broken up  
27 the ownership of what was once an approximately 267-acre farm unit. The land use inventory details  
28 the trend toward smaller parcels and owner managed small specialty resource activities.

29 Demand for the types of crops previously attempted in the exception area historically have  
30 diminished, such as cherries, prunes, Douglas fir Christmas trees, grass seed and grain, as the yield  
31 of these crops also dropped. Some of the processing facilities for these crops have relocated or closed.  
32 The lack of ability to irrigate and physical characteristics of the exception area have been a limiting  
33 factor in the ability to profitably manage it for agriculture or forestry.

34 The Applicants are not proposing an exception to Oregon Statewide Planning Goal 14 as they are  
35 proposing AF-10 zoning with a minimum parcel size of 10 acres. The purpose statement for the  
36 AF-10 zone indicates that the function of the zone is to allow the designation of Rural Lands to  
37 accommodate lands which qualify for exceptions and employ a parcel minimum lot size of 10 acres.

38 This proposal fits all the definitions and qualifications for conversion of this exception area to smaller  
39 parcels that can provide rural living opportunities for the Polk County citizenry, and in some places  
40 add agricultural and forestry activities on a small specialty scale to enhance the local resource  
41 economy. This Policy is complied with.

#### 42 **Hearings Officer Findings:**

43 The Polk County Hearings Officer previously determined that failed attempts at farming the subject  
44 properties is not solid evidence that no one else could succeed with any crops. The Applicants have  
45 argued that the demand for crops previously attempted and failed has diminished. The Applicants  
46 have identified a new plan for the land including small acreage of organic oats for human  
47 consumption, the boarding and training of horses, and small lot Christmas trees. The Applicants have  
48 identified local markets for smaller scaled diversified farm crops, which seems contradictory to the  
49 Applicants' position that the properties would be managed as "hobby farms", with no intent to make

1 a profit in money. The Hearings Officer is also skeptical of the Applicants' plan for small acreage  
2 homes to include the boarding and training of horses because introduced into the record was a  
3 Declaration of Covenants, Conditions, and Restrictions for the subject properties and it specifically  
4 states in:<sup>4</sup>

5 **5.7 No Animals**

6 No animals of any kind shall be raised, bred or kept in the Development without DCC  
7 approval, except horses, dogs, cats or other household pets may be kept so long as they are  
8 not bred, maintained or kept for commercial purposes.

9 Thus, the DCC board will be able to control this permitted use on the subject properties and there is  
10 no guarantee that this approval will be given by the DCC board.

11 While the Applicants have put forth a convincing argument about the highest and best use of the  
12 land, the applicable criteria does not allow for an exception to Goal 3 or Goal 4 when the property  
13 could practicably be managed for farm use, even if it does not rise to the level of "commercial" farm  
14 use.

15 As discussed above, LUBA has previously determined that a Goal 3 committed exception cannot be  
16 justified based on findings that "commercial farming" is impracticable on the subject property.  
17 LUBA also found that a Goal 3 committed exception cannot be justified simply because the  
18 property is not capable of supporting an economically self-supporting agricultural operation, or  
19 because a reasonable farmer could not make a living entirely from agricultural use of the land.  
20 Farm use that does not meet these thresholds are still protected by Goal 3 (*Lovinger v. Lane*  
21 *County*, 36 Or LUBA 1, 1999).

22 The Applicants contend that their submittal for the Rural Lands Plan designation would be  
23 compatible with surrounding land uses and also enable the Applicants to develop larger acreage  
24 home sites where the occupant could manage the property for a range of specialty farm uses as a  
25 hobby even though the land is not suitable to make a profit in money from farm use. Based on the  
26 foregoing, small-scale, specialty agriculture managed by occupants with no intent to make a profit  
27 from agriculture would be consistent with the Rural Lands Plan designation, as implemented by the  
28 AF-10 zone. However, as discussed above, the 2018 Polk County aerial photograph demonstrates  
29 that approximately 35 acres of the proposed exception area is currently in field crop production,  
30 and two Agricultural Exemption permits identify an annual profit of \$10,000 from orchard grass  
31 (Tax Lot 602) and \$14,000 from horse boarding, lessons, and chicken egg production (Tax Lot  
32 603). Field crop production was also confirmed by a letter introduced into the record as discussed  
33 above. The Hearings Officer finds that there is evidence in the record to demonstrate that two (2)  
34 of the subject properties are currently managed for farm use and are making a profit in money. The  
35 Hearings Officer also finds that the remaining portion of the proposed exception area could be  
36 managed for farm use with an intent to make a profit in money, although maybe not  
37 "commercially" as a self-supported farm operation, which LUBA has determined to still be  
38 protected by Goal 3. For these reasons, the Hearings Officer finds that the existing Agricultural  
39 Plan Designation and Exclusive Farm Use Zoning Designation are the appropriate designations  
40 for the subject properties.

41 **f. Polk County will permit rural residential development in those designated**  
42 **areas when and where it can be demonstrated that:**

43 **i. Water is available which meets the standards of the State Department**  
44 **of Health; [PCCP Section 2, L, Policy 1.5(a)]**

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<sup>4</sup> The Declaration of Covenants, Conditions, and Restrictions was not taken from the Pugmire testimony, but was previously introduced into the record. The Declaration of Covenants, Conditions, and Restrictions are recorded in the Polk County Clerk Documents and Staff included it in the record prior Staff's recommendation and the hearing.

1 **Hearings Officer's Previous Findings:**

2 According to materials submitted by the applicant, Coffee Geosciences conducted a hydrologic  
3 study of the subject properties to determine the relationships between its springs, wells and  
4 groundwater aquifers. Results of the hydrologic study indicate that the proposal could be served  
5 with groundwater without any effect on nearby wells. The hydrologic report indicates that  
6 groundwater withdrawals of 10 gallons per minute would cause a one inch drawdown of the  
7 aquifer within a radius of 240 feet. The Coffee Geosciences report indicates that a test well  
8 pumping 28.5 gallons per minute for 24 hours recovered 90% of the aquifer drawdown in 30  
9 minutes.

10 The applicant states that the subject properties are in the Eola Hills Groundwater Limited Area  
11 (EHGLA). The Oregon Department of Water Resources (WRD) has defined the EHGLA as being  
12 bounded by Township 5 South in Yamhill County, the Willamette River, Highway 22 and  
13 Highway 99W. Extracting groundwater from aquifers in Columbia River Basalt formations in  
14 the EHGLA is regulated by WRD. Accordingly, the property owners would be required to submit  
15 a well report with WRD to withdraw up to 15,000 gallons of groundwater per day for any  
16 domestic use on the subject properties. The applicant states that the number of wells that would  
17 serve the proposal could be minimized by leveraging wells that produce 15-30 gallons per minute  
18 to serve three potential dwellings instead of just one. The Public Health Division of the Oregon  
19 Health Authority regulates Public Water Systems with four or more service connections,  
20 consistent with OAR 333-061-0020. If a single well was used to serve three potential dwellings  
21 on the subject properties, a Public Water System would not be required; however, withdrawals  
22 of groundwater from the well would be limited to 15,000 gallons per day absent a permit from  
23 WRD.

24 Absent a Public Water System certification, drinking water safety for groundwater sources is  
25 incumbent on individual users. Well constructors are aware of threats to public safety from  
26 domestic water wells that are too shallow, or that are located within 100 feet of a septic system's  
27 leach field. Also, any dwellings that may be constructed following this land use action would  
28 require septic, building, plumbing and electrical permits from Polk County. A site plan review  
29 confirming that relevant development setbacks are met would be part of the building permit  
30 process. Part of the site plan review evaluates whether the location of a domestic water source (a  
31 well) is at least 100 feet from a septic system leach field, thereby protecting property owners'  
32 public health by mitigating e. coli vectors.

33 Based on the evidence provided by the applicant, Staff concluded that adequate water would be  
34 available to serve the proposal. On the other hand, an independent expert on geological matters  
35 and water rights, Dr. E. Timothy Wallin, in written testimony submitted on November 10, 2015,  
36 said the aquifer at issue cannot be relied on to provide a stable supply of water to the proposed  
37 concentration of users under the proposal. He says there is a risk that new wells and existing  
38 wells would find their supplies depleted. The Hearings Officer is not a geologist or hydrologist,  
39 but with additional testimony and evidence in the record and the warnings of Dr. Wallin, it is  
40 such that the Hearings Officer finds that there is not adequate water available to serve the  
41 proposal.

42 **Applicants' Additional Findings:**

43 Water will be provided from a combination of Orchard Heights Water District and on-site wells.

44 One of the debated issues in the prior case was the ability of the subject properties to be served  
45 domestic water from wells developed on-site to serve the parcels that could be created in the AF-  
46 10 zone if the applications were approved. Although there was significant evidence of the  
47 availability of water in the prior Record, because of the doubt raised during the prior process, the  
48 applicants engaged another Hydrologist to study the area and confirm that there is sufficient  
49 aquifer available to supply maximum build out without any adverse impact on any surrounding  
50 properties.

1 Exhibit X is the detailed hydrology study prepared by Mr. John Rehm, a registered professional  
2 geologist who is an expert on hydrology, having performed many studies of local aquifers.  
3 Specifically, Mr. Rehm has modeled and studied properties for Marion County's sensitive  
4 groundwater areas to determine the availability of water and its impacts on surrounding properties  
5 and wells.

6 The target of the water study was the Columbia River Basalt, which has geologically been shown  
7 to contain strings of high hills that contain rechargeable groundwater that is suitable for  
8 residential uses. Mr. Rehm determined in the study area there are two main aquifers, a shallow  
9 one and a deeper one. He states that he had sufficient well and geology information available to  
10 him to get a clear picture of the hydrological setting of the study area.

11 Mr. Rehm's professional expert opinion is there is sufficient annual recharge to the aquifers to  
12 justify partitions on the subject properties of 16 additional parcels and homesites.

### 13 **Hearings Officer Findings:**

14 Neighboring property owners have expressed concerns about the potential impacts that the proposed  
15 development could have on their existing well. Based on written testimony submitted by Dr. E.  
16 Timothy Wallin, the Hearings Officer previously determined that there is inadequate water available  
17 to serve the applicant's proposal. For this reason, the Applicants provided an additional hydrology  
18 study performed by John m. Rehm, Jr., who is a Registered Geologist with the State of Oregon.

19 Mr. Rehm's hydrology study focused on seven key points including; 1) basalt is a good aquifer for  
20 drawing water for a rural residential water well; 2) the Columbia River Basalt extends equally into  
21 the Salem Hills and Eola Hills; 3) Basalt rock layering is the same in the Salem Hills and Eola Hills;  
22 4) groundwater recharge is the same in the Salem and Eola Hills; 5) the structural geology in the  
23 Salem Hills and Eola Hills is the same; 6) hydrology in the Salem Hills and the Eola Hills is the  
24 same; and 7) there has been recent site work in the Orchard Heights Area. The submitted hydrology  
25 study also includes an evaluation of "The Water Budget", which demonstrates that even with up to  
26 19 new home sites, the remaining recharge would be 79.9%. Mr. Rehm indicates that value of the  
27 recharge is very high because the Orchard Heights area is a very spread out rural area; new residences  
28 on the subject property would be on large lots (10 acres); and domestic water use would follow water  
29 use practices of 525 gallons per day, per household.

30 While Dr. Wallis's concerns as well as the neighboring property owners regarding the potential well  
31 impacts are valid, the submitted hydrology report was stamped with Mr. Rehm's Oregon Registered  
32 Professional Geologist stamp and the Hearings Officer finds Mr. Rehm to be a credible professional  
33 who has determined that there is available water to serve future residential development on the  
34 subject properties. Full details of this hydrology report are included as Exhibit X in the record. For  
35 this reason, the Hearings Officer finds that the Applicants have demonstrated that there is adequate  
36 water which meets the standards of the State Department of Health.

- 37 **ii. Each housing unit will have either an approved site for sewage**  
38 **disposal system which meets the standards of the County and the**  
39 **Department of Environmental Quality or ready access to a**  
40 **community system; [PCCP Section 2, L, Policy 1.5(b)]**

### 41 **Hearings Officer's Previous Findings:**

42 The applicant states that the subject properties have been evaluated for septic system approvals.  
43 The subject properties have extensive units of Jory and Nekia silty clay loam soils that generally  
44 accommodate on-site septic systems. Moreover, the applicant's proposal contemplates a land use  
45 action that results in parcels zoned AF-10. The AF-10 zone has a minimum parcel size of 10  
46 acres, which would be considered generally large enough to meet siting standards for septic  
47 systems. Staff consulted with the Polk County Sanitarian, Jim Solvedt, concerning the feasibility  
48 of on-site septic systems on 10-acre parcels, should this proposal be approved. He indicated that  
49 shallow soil depth and steep slopes are limiting factors when installing a standard septic system.  
50 A minimum of 30 inches of effective soil depth is necessary to treat waste water in a standard

1 septic system on gently sloping ground, and a minimum of 60 inches of effective soil depth is  
2 necessary for a standard septic system on slopes exceeding 30 percent. Engineered alternative  
3 treatment or capping fill septic systems may be used where a standard system is impractical due  
4 to site constraints. A site evaluation for an on-site septic system for each new parcel would be  
5 required as part of the building permit process, should this proposal be approved.

6 Staff reviewed materials in the record described above, and found it reasonable to conclude that,  
7 given the 10-acre minimum parcel size of the AF-10 zone, adequate space would be available on  
8 the subject properties to site standard or alternative treatment septic systems. The Hearings  
9 Officer concurs with Staff's conclusion.

10 **Applicants' Additional Findings:**

11 There is no public sewer system available to the exception area, so the area is served by individual  
12 septic systems.

13 **Hearings Officer Findings:**

14 The Hearings Officer concurs with the previous determination made by Staff and finds that parcels  
15 containing at least 10 acres are generally adequate to support an on-site wastewater treatment facility  
16 (septic).

17 **iii. The setback requirements for the development of wells and septic**  
18 **systems on adjacent parcels have been observed; [PCCP Section 2, L,**  
19 **Policy 1.5(c)]**

20 **Hearings Officer's Previous Findings:**

21 The applicant states that a single domestic water well could serve up to three of the proposed  
22 dwellings contemplated by the proposal. This water distribution strategy would minimize the  
23 number of domestic wells needed to serve the proposal. The applicant's proposal, if approved,  
24 would result in parcels zoned AF-10. The AF-10 zone has a minimum parcel size of 10 acres,  
25 which would be considered generally large enough to meet the 100-foot setback standard  
26 separating domestic wells from septic system leach fields. Leveraging domestic water wells to  
27 serve up to three residential connections would enhance the applicant's ability to meet the  
28 distance standard between domestic wells and septic system leach fields. Staff concluded that the  
29 proposed AF-10 zone would provide adequate area to locate domestic wells and septic systems  
30 and associated repair areas on the subject properties in a manner that would meet the required  
31 100-foot separation between them. The Hearings Officer concurs as to disposal but believes  
32 further study is necessary to resolve Dr. Wallin's concern about supply.

33 **Applicant's Additional Findings:** (Addressed in PCCP Section 2, L, Policy 1.5(a) above)

34 **Hearings Officer Findings:**

35 As discussed above, the Applicants provided an additional hydrology study performed by John M.  
36 Rehm, Jr., who is a Registered Geologist with the State of Oregon. Based on this study, it is of Mr.  
37 Rehm's opinion that there is available water to serve future residential development on the subject  
38 properties. This hydrology study was stamped with Mr. Rehm's Oregon Registered Professional  
39 Geologist stamp. Even with the establishment of additional wells on the subject property, Staff finds  
40 that parcels 10 acres in size and larger are generally large enough to establish a dwelling, a domestic  
41 well, and an on-site septic system that is at least 100 feet from any wells. The Hearings Officer finds  
42 based on the evidence in the record that the applications comply with this criterion.

43 **iv. Sufficient public facilities and services, including police and fire**  
44 **protection, health services, schools and transportation facilities, exist**  
45 **or will be provided to accommodate the additional population resulting**  
46 **from the development; and [PCCP Section 2, L, Policy 1.5(d)]**

47 **Hearings Officer's Previous Findings:**

1 The applicant has listed various public facilities and services that would be available for the  
2 subject area, either on site or accessible. These include public education, fire protection, roads,  
3 storm drainage, sewage disposal, sanitation, telephone and internet. The list is set out on page 19  
4 of the Staff report, and --- except for water supply, discussed above --- has not been contested.

5 On October 22, 2013 a transportation analysis was conducted at the request of Wayne Simmons  
6 to study the transportation impacts. The conclusion on Page 8 of the analysis reads as follows:  
7 Seven tax lots in Polk County are proposed for a zone change from EFU to AF-10. The proposed  
8 zone change could generate an additional 17 trips during the morning peak hour, and 22  
9 additional trips during the evening peak hour. The existing infrastructure, including the  
10 intersection of Orchard Heights Road and Best Road adjacent to the property, is adequate to  
11 support this potential additional traffic through the planning horizon. The proposed zone change  
12 is therefore in compliance with the State of Oregon's Transportation Planning Rule.

13 Staff concluded that the applicant has provided information in the record concerning the  
14 provision of public facilities and services that would be available to serve the proposed residential  
15 use of the subject properties, including police and fire protection, health services, schools and  
16 transportation facilities. The applicant indicates that the subject properties are served by Salem  
17 School District 32J, Salem Suburban Rural Fire Protection District, Polk County Sheriff's  
18 Department, Valley Solid Waste Management, Salem Health, and Polk County Public Works  
19 Department. The applicant has demonstrated the subject properties are served by existing public  
20 services.

21 The applicant estimates that 19 additional single family dwellings could be constructed if this  
22 proposal is approved. According to the 2010 US Census demographic profile for Oregon, the  
23 average household size is 2.47 people. As a result, the proposed PCCP change could result in an  
24 additional population of 46 people. Staff found no evidence to suggest that service providers lack  
25 capacity to serve an additional 19 single family dwellings with an estimated population increase  
26 of 46 people.

27 The subject properties abut Best Road, a Minor Collector in Figure 3 of the Polk County  
28 Transportation Systems Plan. The applicant submitted a transportation analysis for the proposal  
29 authored by Lancaster Engineering dated October 22, 2013, supplemented on October 9, 2015,  
30 which indicates that the proposed AF-10 zone would generate 17 morning peak hour trips and  
31 23 evening peak hour trips, as compared with 4 and 5 trips, respectively, for the current EFU  
32 zone. Weekday total trip generation from the proposal would be 218 trips for the proposed AF-  
33 10 zoning and 48 for the current EFU zoning. The Lancaster Engineering traffic analysis included  
34 a discussion of potential traffic impacts the proposal may have on the State Highway System,  
35 and the proposal's consistency with the Transportation Planning Rule (TPR). The relevant section  
36 of the TPR, OAR 660-012-0060, ensures that the function and capacity of State highways will  
37 not be adversely affected by traffic increases resulting from changes to adopted land use plans  
38 and regulations. Lancaster Engineering's TPR discussion focused on the intersection of Highway  
39 22 and 55 Avenue NW, which is also where Highway 51 intersects Highway 22. A letter from  
40 Daniel Fricke, Senior Transportation Planner with the Oregon Department of Transportation  
41 (ODOT), dated June 8, 2015 supports the conclusions in the Lancaster Engineering traffic  
42 analysis addressing the TPR - that the applicant's proposal would not have a significant impact  
43 on a State highway.

44 An operational traffic analysis dated October 22, 2013 was conducted by Lancaster Engineering  
45 for the intersection of Orchard Heights Road and Best Road. The applicant provided additional  
46 analysis of two intersections on Orchard Heights Road in a supplemental report by Lancaster  
47 Engineering dated October 15, 2015. Lancaster Engineering's additional traffic analysis of  
48 impacts on the county road system from potential trip generation by the proposal, particularly the  
49 intersections of Orchard Heights Road and Best Road and Orchard Heights Road and Orchard  
50 Heights Place, was reviewed by the Polk County Engineer, Todd Whitaker, P.E, who determined  
51 the impact of the proposal on the county road system would not be significant. After reviewing



1 the applicant's statements, and comments from Todd Whitaker, P.E, Staff concluded that  
2 sufficient transportation facilities would be available to serve the applicant's proposal.

3 Based on the evidence in the record, Staff concluded there would be sufficient public facilities  
4 and services, including transportation, to accommodate the additional population from the  
5 proposed development. The Hearings Officer agrees.

6 **Applicants' Additional Findings:**

7 The exception area is accessed from Best Road. The area is a gated community with an extensive  
8 internal road system serving the entire exception area. Best Road is a Minor Collector. The  
9 transportation system for parcelization of the exception to 10 acres or more (a maximum of 17  
10 additional homesites) has been studied and found to present no significant impacts on the local  
11 transportation facilities. The transportation reports were confirmed by ODOT.

12 With the exception of two hook-ups available from the Orchard Heights Water District, the  
13 remainder of the exception area will be provided with domestic water from a well. There is no  
14 public sewer system available to the exception area, so the area is served by individual septic  
15 systems.

16 The exception area is provided educational services by the Salem-Keizer School District. Fire  
17 protection is provided by the Salem Suburban Rural Fire Protection District (RFPD). Law  
18 enforcement is provided by the Polk County Sheriff's Office. There is no ODF timber fire  
19 protection provided for the subject properties.

20 (Staff requested additional information regarding transportation in a letter dated January 11, 2019.  
21 The Applicants' supplemental response follows.)

22 To begin with, transportation issues have long been settled and have never been contested. There  
23 have been few changes in the area that impact transportation, and little in the way of new  
24 development since the update was done for this project on October 9, 2015.

25 As requested by Staff, the Applicants engaged Lancaster Engineering to again take another look  
26 at the project and see if there have been any changes in the area that might significantly impact the  
27 transportation facilities in the area. The updated TIA from March 19, 2019 concludes that there  
28 have been no significant changes, and that the local roads will not be significantly affected by the  
29 little increase in traffic to be generated by this proposal. The update is attached to this Memo as  
30 Exhibit AB-1.

31 In addition, Lancaster pointed out that changes in the Transportation Planning Rule, as well as the  
32 Oregon Highway Plan in 2012, have created a "safe harbor" for new developments that will  
33 generate less than 400 average daily trips (ADT). In Action IF.5 of the new Oregon Highway Plan,  
34 "small increases" in traffic (less than 400 ADT) are considered to have no effect on the  
35 transportation facilities, require no mitigation, and are deemed to comply automatically with OAR  
36 660-012-0060(1).

37 Therefore, based on the current law relating to compliance with the TPR, the only relevant question  
38 is the number of ADT generated by a project. Where a project generates less than 400 ADT, it  
39 qualifies as compliant with the TPR. There has been no change in the ADT to be generated by this  
40 project since 2015, therefore there is no need for additional transportation analysis in order to  
41 consider compliance with the TPR.

42 The proposed change in zone here will allow for new parcels not less than 10 acres in size, meaning  
43 a total of 18 new homes. Using the standard calculation of a little less than 10 ADT per new home,  
44 the maximum traffic impacts from this proposal is 170 ADT, thereby qualifying for "safe harbor"  
45 treatment under the OHP, which means that the project is automatically considered to have no  
46 significant impact on transportation facilities in the area.

1 This update confirms the qualification of the project for safe harbor status, and that there have been  
2 no changes in the area sufficient to substantially impact any local transportation facility. The TPR  
3 is fully complied with.

4 **Hearings Officer Findings:**

5 The Hearings Officer previously determined that there would be sufficient public facilities and  
6 services, including transportation, to accommodate the additional population from the additional  
7 development that could result from the applicant's proposal. To ensure that the transportation facts  
8 previously evaluated have not become outdated, Staff requested that the Applicants provide  
9 additional evidence to demonstrate compliance with Statewide Planning Goal 12 (Transportation)  
10 in a letter dated January 11, 2019. As a result, the Applicants provided a supplemental  
11 memorandum from Brian Davis with Lancaster Engineering, concluding that the proposed zone  
12 change from EFU to AF-10, affecting seven (7) parcels, could generate up to 13 additional vehicle  
13 trips during the morning peak hour and 18 additional vehicle trips during the evening peak hour.  
14 Based on the Hearings Officer's previous findings, and supplemented by a memorandum from  
15 Brian Davis with Lancaster Engineering, Staff determined that the increase vehicle trips would not  
16 be a significant change and the existing transportation facilities could support the proposed  
17 increased residential development.

18 David Fridenmaker, from Salem-Keizer Public Schools, provided a letter in the record that contains  
19 projected impacts on Brush College Elementary School, Straub Middle School, and West Salem  
20 High School as a result of the proposed amendments. Mr. Fridenmaker's letter did not expressly  
21 oppose the Applicants' proposal, rather he provided some estimated figures on potential increased  
22 enrollment at each school, and the estimated financial impacts to construct new school facilities to  
23 serve increased enrollment.

24 The greatest potential impact from increased enrollment would be at West Salem High School, which  
25 is already at 97 percent capacity. The school is designed for 1,797 students and the current enrollment  
26 is at 1,746. In 2014, the School District commissioned a study that was performed by the Mid-  
27 Willamette Valley Council of Governments in order to determine an estimation of students per  
28 residence. Based on this study, it was determined that for calculation purposes, there are 0.143 high  
29 school students per single-family dwelling. Mr. Fridenmaker estimates an additional enrollment of  
30 three (3) additional high school students that could result from the Applicants' proposal. Staff found  
31 and the Hearings Officer concurs that although these studies are relevant, this figure is slightly  
32 inflated because the calculation was based on 22 additional single-family dwellings, not 17-19  
33 additional dwelling as proposed in these applications. Nevertheless, the Hearings Officer finds that  
34 Mr. Fridenmaker's letter demonstrates that the existing schools do have capacity for the additional  
35 development, but the additional development could accelerate the rate at which the maximum student  
36 capacity is reached.

37 Other figures provided by Mr. Fridenmaker estimate the facility construction costs per student. Based  
38 on the Rider Levett Bucknall North America Quarterly Construction Cost Report, \$54,925 per  
39 student is estimated for elementary schools, \$64,045 per student is estimated for middle schools, and  
40 \$73,164 per student is estimated for high schools. Based on these figures, Mr. Fridenmaker estimates  
41 the total of facility construction costs as a result of the applicant's proposal to be \$567,282. Again,  
42 Staff acknowledged that these figures are inflated based on 22 new single family dwellings, not 17-  
43 19 as proposed. Nevertheless, the Hearings Officer finds that these figures do not necessarily  
44 demonstrate that there are not sufficient school facilities, just that increased enrollment inevitably  
45 requires more funding.

46 After considering evidence in the record, the Hearings Officer finds there would be sufficient public  
47 facilities and services, including transportation and schools, to accommodate the additional  
48 population from the proposed development.

49 **v. Development of residential units will not result in the loss of lands**  
50 **suitable for agriculture or forestry and will not interfere with**

1 surrounding agriculture forestry activities [PCCP Section 2, L, Policy  
2 1.5(e)]

3 **Hearings Officer's Previous Findings:**

4 Applicants contend that the subject property cannot reasonably or feasibly be utilized for farm or  
5 forest use by itself or in conjunction with adjoining properties. The proponents also recognize  
6 that this proposed action could affect adjacent and nearby farm operations but believe that those  
7 properties, too, have problems that limit their farm uses to low income generating grass hay and  
8 limited grazing agricultural lands on very substandard acreages. Staff notes that the applicant has  
9 applied for an irrevocably committed Goal exception as part of the applications. The proposed  
10 exception area may contain a predominance of agricultural soils and even continue to have other  
11 agricultural characteristics, while still qualifying for an irrevocably committed Goal exception.  
12 The applicant states that the demand for the types of crops grown historically, such as cherries,  
13 prunes, Douglas fir Christmas trees, grass seed and grain, have diminished as the yield of these  
14 crops also dropped. Some of the processing facilities for these crops have relocated or closed.  
15 The applicant also states that prohibition of irrigation and physical characteristics of the site have  
16 been a limiting factor in the ability to profitably manage the subject properties for agriculture.  
17 These changing conditions, applicant believes, have irrevocably committed the subject properties  
18 to residential use. The Agriculture and Forestry-10 Acre zone, which implements the Rural Lands  
19 Comprehensive Plan designation, would be compatible with surrounding land uses and also  
20 enable the applicant to develop larger acreage home sites where an occupant could manage the  
21 property for a range of specialty farm uses as a hobby, even though the land is not suitable to  
22 make a profit in money from farm use. Based on materials and statements in the record, Staff  
23 generally supported the applicant's conclusion that the proposal would not result in the loss of  
24 lands suitable for agriculture or forestry and would not interfere with surrounding agriculture and  
25 forestry activities because small scale agriculture, which is supported by the proposed AF-10  
26 zone, has been conducted in the vicinity of the subject properties for decades without conflicting  
27 with the larger agricultural operations in the area.

28 The subject properties arrived at their current configurations through a series of land use actions  
29 including three Measure 37 Claims, three partitions allowed under Measure 37, Vested Rights  
30 determinations related to property improvements made pursuant to Measure 37 Claims, and three  
31 Measure 49 authorizations that permitted five dwellings on the subject properties. Staff notes that  
32 the applications address recent residential development on the subject properties arising from  
33 these Ballot Measure 37 applications, Ballot Measure 49 authorizations, and Vested Rights  
34 determinations. The vested rights arguments were submitted by the applicant as part of this record  
35 to demonstrate that the subject properties are built and committed with streets, electric power,  
36 septic systems, communication systems and domestic wells. The applicant states that the amount  
37 expended for the infrastructure improvements listed in the preceding paragraph is \$1,016,489.30.  
38 According to the applicant, this figure does not include the more recent studies for hydrology,  
39 transportation, wildlife, soils, agronomy and planning services. The eastern half of the properties  
40 have been the beneficiary of most of the expenditures for improved roads, wells, electric power,  
41 land clearing, surveying, sanitation testing and engineering. The westernmost 120 acres only has  
42 some roughed out roads and no utilities.

43 While the characteristics of the proposed exception area are considered relevant factors when  
44 taking an irrevocably committed Goal exception, the emphasis of the exception is on the  
45 relationship between the proposed exception area and adjoining uses, and why that relationship  
46 commits the subject properties to uses not allowed by the Goals. In this instance, the applicant  
47 contends that the lawful physical development that occurred under Measures 37 and 49 on the  
48 subject properties, while they were not subject to Goals 3 or 4, are changing conditions that,  
49 while may not have vested a Measure 37 use, rise to the level to have irrevocably committed the  
50 subject properties to uses not allowed by Goal 3. Neither this argument nor supporting evidence  
51 was extended to Goal 4 uses at the time of the Staff report. The applicant has since provided  
52 additional evidence in the record demonstrating that residential development around the subject

1 property makes agriculture and forestry difficult by limiting the ability to spray due to the impact  
2 of drift on surrounding residential uses. The applicant has thoroughly documented the  
3 topographical, climate and cultivation challenges of the subject properties, while offering cursory  
4 review of how recent changes on adjoining lands has committed them to uses not allowed by the  
5 goals and whether allowing the proposed amendments would, in turn, commit adjacent or nearby  
6 lands to uses not allowed by the applicable Goal. The seven properties comprising the proposed  
7 exception area are between 20 acres and 45 acres in size. The applicant's proposal contemplates  
8 10 acre properties intended primarily for acreage residential uses and perhaps hobby farming. A  
9 proposal increasing the number of parcels in the proposed exception area would amplify internal  
10 conflicts with agricultural operations by creating smaller farm units. The Hearings Officer cannot  
11 ignore the inevitable loss of some resource land to the siting of proposed residences: streets,  
12 sidewalks, driveways, storage sheds and septic systems, not to mention the footprint of homes  
13 and outbuildings. While this factor alone may not be decisive, it does negatively qualify  
14 applicant's statement that no resource lands would be lost to agricultural and forestry uses.

15 Provisions found in OAR 660-004-0018(2)(b)(B) require that "rural uses, density and public  
16 facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable  
17 Goal as described by OAR 660-004-0028." The applicant's proposal involves an "irrevocably  
18 committed" Goal exception pursuant to OAR 660-004-0028, which necessitates an analysis of  
19 whether the proposal could commit adjacent or nearby resource land to uses not allowed by the  
20 applicable Goal. Increasing the residential density of the subject properties would invariably  
21 create conflicts with nearby large agricultural operations due to spray drift, dust and the  
22 movement of farm machinery. While Oregon has "right to farm" laws that protect farmers from  
23 allegations of trespass, inherent conflicts between residential and agricultural uses increase the  
24 probability of nuisance lawsuits against farmers engaging in accepted agricultural practices such  
25 as tilling fields and spraying crops. The applicant submitted material into the record on November  
26 24, 2015 addressing the issue of drift from agricultural spray activities. The applicant contends  
27 that spray applications in connection with agricultural and forestry operations on the subject  
28 properties could drift to adjacent properties, causing damage to nearby crops and creating a  
29 nuisance for nearby residences. The applicant's argument is a double-edged sword, however,  
30 since the same reasoning could be employed by nearby wine grape and Christmas tree growers  
31 if the subject properties' primary use were residential.

32 A large area of committed lands, substantially isolated from the exception area by steep slopes,  
33 resides to the south of the subject properties. This committed lands area, comprising  
34 approximately 1,100 acres of AR-5 zoned land, extends south to Highway 22 and west to the  
35 Salem city limits. Ten of the fourteen AR-5 parcels nearest the subject properties are owned by  
36 William Curtright and are vacant (T7S, R4W, Section 24 Tax Lots 303 -308 and T7S, R4W,  
37 Section 23 Tax Lots 1000 & 1003 -1005). Each of these vacant AR-5 parcels could be developed  
38 with dwellings, although they have been in their current ownership for over 20 years and are still  
39 vacant. Should the applications be approved, one 20-acre parcel zoned EFU (located at 1785 Best  
40 Road) would be surrounded by properties with Rural Lands PCCP designations. This property,  
41 created pursuant to a Measure 37 Claim as Parcel 3 in Partition Plat 2006-0029, with a nonfarm  
42 dwelling being subsequently approved pursuant to Measure 49 Order number H132890C. Since  
43 the 20-acre parcel and the dwelling thereon were approved absent review relative to the Statewide  
44 Planning Goals, Staff anticipated that the proposed goal exception would not commit this  
45 Measure 37/49 home site to uses other than those allowed by Goal 3 since it has already been  
46 developed to a nonfarm use.

47 Based on the foregoing, Staff concluded that applying the proposed Rural Lands PCCP  
48 designation to the subject properties would be consistent with the goals and policies of the PCCP.  
49 This analysis assumes that the AF-10 zone would implement the Rural Lands PCCP designation.  
50 The applicant has concurrently applied for a zone change on the subject property from EFU to  
51 AF-10 in application ZC 14-02. Staff recommended that a condition of approval require that if  
52 applications PA 14-01 and ZC 14-02 are approved, approval of each application shall be

1 dependent upon approval of the other. The Hearings Officer concurs, but does not want to be  
2 understood as saying this constitutes approval of either application since the applicant has not  
3 met the burden of proof to justify a Goal exception with respect to the subject properties'  
4 suitability for agriculture or forestry, or whether the proposal would commit nearby lands to uses  
5 not allowed by Goal 3.

6 **Applicants' Additional Findings:**

7 The Applicants did not provide additional findings specifically addressing this applicable policy.  
8 However, Staff understood the Applicants' supplemental Forestland Suitability Analysis (Exhibit W  
9 in the record), a memorandum from Andy Gallagher, who is a recognized soil scientist (Exhibit Y  
10 in the record), and a letter from Mike McLain, who is a viticulture expert and wine grape producer,  
11 to demonstrate that the subject properties are not suitable for agriculture and forestry uses.  
12 Therefore, the Applicants assert that development of residential units would not result in the loss  
13 of lands suitable for agriculture or forestry.

14 Applicants also argued in their Final Argument that this development would not interfere with  
15 surrounding agriculture activities because there is only one resource parcel in the neighboring area,  
16 Legacy Hill Vineyard. Applicants argued that vineyard is to the west at the bottom of the hill, with  
17 the vineyard being some distance to the west of the common property line with the Subject  
18 Property, which is along the toe of the steep slope where there is only scrub brush and trees on the  
19 Subject Property. The Applicants argue that given the slope, the homesite on this parcel would  
20 likely be located as far up the slope as possible, and a long distance from the property line. The  
21 Applicants believe there is no way that creating 10 acre parcels along that slope would have any  
22 impact whatsoever on the vineyard land below.

23 **Hearings Officer Findings:**

24 As discussed above, the Hearings Officer finds the evidence in the record demonstrates that the  
25 properties could reasonably be managed for agricultural and/or forestry purposes. Therefore, the  
26 Hearings Officer finds that increased residential development would have an inevitable loss of some  
27 resource land due to the development of streets, driveways, outbuildings, septic systems, the  
28 footprint of the dwelling, etc.

29 Provisions found in OAR 660-004-0018(2)(b)(B) require that "rural uses, density and public  
30 facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable  
31 Goal as described by OAR 660-004-0028." This criterion is substantially similar to the intent of  
32 Policy 1.5(e) from the Polk County Comprehensive Plan, Section 2, listed above. Angela  
33 Carnahan, Regional Representative with DLCD, provided comments indicating that the Applicants  
34 did not adequately address OAR 660-004-0018(2)(b)(B). The Applicants have stated (during the  
35 previous and current proceedings) that spraying and aerial harvesting cannot be utilized on the  
36 subject properties due to increased rural residential dwellings and hobby farms on surrounding  
37 properties because these practices could cause damage to nearby crops and could create a nuisance  
38 for nearby residences. The Hearings Officer finds this argument is a "double-edged sword"  
39 because nearby vineyards and Christmas tree growers could employ the same argument if the  
40 subject properties were developed with a residence and managed for hobby farms. The Hearings  
41 Officer is also not persuaded that there is only one resource parcel contiguous to the subject  
42 property as discussed in more detail in this decision.

43 Further, as discussed above, when evaluating whether the subject properties could be managed for  
44 forestry purposes, the Applicants provided a Forestland Suitability Analysis. This analysis  
45 determined that surrounding parcelization and residential development makes the property less  
46 desirable for timber management because there is a greater risk of lawsuit threats from slash burning,  
47 it would be more difficult to use common forestry practices, and there is a perceived lower financial  
48 rate of return that could be a deterrent for investors. The Hearings Officer is concerned that if  
49 increased rural residential development on surrounding lands is the factor that makes the subject  
50 property not suitable for commercial forestry operations, as purported by the Applicants, it is then

1 unclear how developing 17-19 additional dwelling on 10 acre parcels as proposed by the Applicant  
2 would not further “commit” surrounding properties (approximately 199.5 acres) that are currently  
3 receiving farm deferral and visually appear to be managed for forestry purposes based on the 2016  
4 Polk County aerial photograph.

5 The Applicants did not provide any additional evidence to demonstrate how 17-19 additional  
6 dwellings on 10-acre parcels, that may or may not be managed for hobby farms, would not impact  
7 surrounding properties that are currently managed for agricultural and forestry purposes. Based on  
8 the evidence in the record, the Hearings Officer finds that the applications do not comply with this  
9 criterion.

10 **2. Compliance with Oregon Revised Statutes, statewide planning goals and**  
11 **related administrative rules which applies to the particular property(s) or**  
12 **situations. If an exception to one or more of the goals is necessary, the**  
13 **exception criteria in Oregon Administrative Rules, Chapter 660, Division 4**  
14 **shall apply; and [PCZO 115.050(A)(3)(b)]**

15 **Hearings Officer’s Previous Findings:**

16 Applicants put forward numerous proposed findings regarding all 14 Statewide Planning Goals  
17 and guidelines in their applications and supporting materials. Given that applicants chose not to  
18 number the pages or paragraphs in virtually all of such materials, more precise citation is not  
19 practical. These proposed findings are described on pages 22 to 25 of the Staff report.

20 With respect to all of the goals and guidelines except Goals 3 and 4, Staff and the Hearings  
21 Officer generally accept applicants' proposed findings.

22 A request to amend the PCCP designation from Agriculture to Rural Lands requires an exception  
23 to Goal 3, Agriculture, because the applicant is also seeking a corresponding Zone Map  
24 amendment from Exclusive Farm Use (EFU) to Agriculture and Forestry - 10 Acre (AF-10) zone.  
25 The AF-10 zone permits dwellings outright, whereas the current EFU zone allows dwellings  
26 when administrative and conditional use review criteria are met. The applications must also be  
27 found in compliance with the Statewide Planning Goals and related Oregon Administrative  
28 Rules. For a PCCP amendment with a Goal Exception, the criteria for an "Irrevocably  
29 Committed" exception to Goal 3 found in OAR 660-004-0028 must be considered, along with  
30 the criteria found in the Transportation Planning Rule (TPR) OAR-660-012-0060 as part of Goal  
31 12-Transportation. While the applicant has addressed Statewide Planning Goals 1 -14, above,  
32 Staff has addressed only the Goals relevant to this proposal, as follows:

33 **Goal 3, Agricultural Lands:**

34 The applicant is seeking an "irrevocably committed" exception to amend the PCCP designation  
35 from Agriculture to Rural Lands and zoning from EFU to AF-10 to allow for residential  
36 development on the subject properties. An exception to Goal 3 must be taken since the proposed  
37 Agriculture and Forest 10 Acre (AF-10) zone is not a qualified Exclusive Farm Use zone. In  
38 order to demonstrate that the subject properties are irrevocably committed to uses not allowed by  
39 Goal 3, the applicant must show that recent changes in the exception area, or on adjacent lands,  
40 render farm or forest uses thereon impracticable, not impossible. The exception criteria are  
41 addressed below.

42 **Goal 4, Forest Lands:**

43 The applicant is seeking an "irrevocably committed" exception to amend the PCCP designation  
44 from Agriculture to Rural Lands and zoning from EFU to AF-10 to allow for residential  
45 development on the subject properties. An exception to Goal 4 must be taken since the proposed  
46 Agriculture and Forest 10 Acre (AF-10) zone is not a qualified Exclusive Farm Use zone. In  
47 order to demonstrate that the subject properties are irrevocably committed to uses not allowed by  
48 Goal 4, the applicant must show that recent changes in the exception area, or on adjacent lands,  
49 render farm or forest uses thereon impracticable, not impossible, including the propagation and  
50 harvesting of forest products. The exception criteria are addressed below.

1 **Goal 12, Transportation:**

2 The subject properties abut Best Road, a Minor Collector in Figure 3 of the Polk County  
3 Transportation Systems Plan (TSP). The applicant submitted a transportation analysis for the  
4 proposal authored by Lancaster Engineering dated October 22, 2013, supplemented on October  
5 9, 2015, which indicates that the proposed AF-10 zone would generate 17 morning peak hour  
6 trips and 23 evening peak hour trips, as compared with 4 and 5 trips, respectively, for the current  
7 EFU zone. Weekday total trip generation from the proposal would be 218 trips for the proposed  
8 AF-10 zoning and 48 for the current EFU zoning. The Lancaster Engineering traffic analysis  
9 included a discussion of potential traffic impacts the proposal may have on the State Highway  
10 System, and the proposal's consistency with the Transportation Planning Rule (TPR). In applying  
11 the TPR, OAR 660-012-0060, the County is required to determine whether the applications  
12 significantly affects transportation facilities as measured at the end of the planning period  
13 identified in the TSP, which is 2030.

14 The relevant section of the TPR, OAR 660-012-0060, states that a plan amendment significantly  
15 affects a transportation facility if it would:

- 16 1) Change the functional classification of an existing or planned transportation facility;
- 17 2) Change standards implementing a functional classification system; or
- 18 3) Result in any of the following effects based on projected conditions measured at the  
19 end of the planning period identified in the adopted TSP:
  - 20 a) Types or levels of travel or access that are inconsistent with the functional  
21 classification of an existing or planned transportation facility;
  - 22 b) Degrade the performance of an existing or planned transportation facility such  
23 that it would not meet the performance standards identified in the TSP or  
24 comprehensive plan; or
  - 25 c) Degrade the performance of an existing or planned transportation facility that is  
26 otherwise projected to not meet the performance standards identified in the TSP  
27 or comprehensive plan.

28 The Oregon Highway Plan (OHP) Highway Mobility Policy 1F, Action 1F.5, states that a Plan  
29 Amendment subject to TPR Section 0060 that increases the volume to capacity ratio further, or  
30 degrades the performance of a facility so that it does not meet an adopted mobility target at the  
31 planning horizon, will significantly affect the facility unless it falls within the thresholds listed in  
32 Policy 1F for a small increase in traffic between the existing plan and the proposed amendment. The  
33 policy sets the minimum threshold as any proposed amendment that does not increase the average  
34 daily trips (ADT) by more than 400. When evaluated together, the new TPR and OHP exempt plan  
35 amendments that would generate less than 400 ADT from further TPR review as they are classified  
36 as a small increase that does not further degrade the transportation facility.

37 Lancaster Engineering's TPR discussion focused on the intersection of Highway 22 and 55th Avenue  
38 NW, which is also where Highway 51 intersects Highway 22. There is no evidence to suggest that  
39 the proposed PCCP amendment would generate more than 400 vehicle trips. A letter from Daniel  
40 Fricke, Senior Transportation Planner with ODOT, dated June 8, 2015 supports the conclusions in  
41 the Lancaster Engineering traffic analysis addressing the TPR stating that the applicant's proposal  
42 would not have a significant impact on a State highway. Based on the evidence in the record and the  
43 comments from ODOT, it can reasonably be concluded that the proposed Plan Amendment would  
44 not cause a significant effect on State transportation facilities.

45 An operational traffic analysis dated October 22, 2013 was conducted by Lancaster Engineering for  
46 the intersection of Orchard Heights Road and Best Road. The applicant provided additional analysis  
47 of two intersections on Orchard Heights Road in a supplemental report by Lancaster Engineering  
48 dated October 15, 2015. Lancaster Engineering's additional traffic analysis of impacts on the county  
49 road system from potential trip generation by the proposal, particularly the intersections of Orchard  
50 Heights Road and Best Road and Orchard Heights Road and Orchard Heights Place, was reviewed

1 adequate by the Polk County Engineer, Todd Whitaker, P.E, who determined the impact of the  
2 proposal on the county road system would not be significant. After reviewing the applicant's  
3 statements, and comments from Todd Whitaker, P.E, Staff concluded that sufficient transportation  
4 facilities would be available to serve the applicant's proposal, and the Hearings Officer concurs.

5 **Applicant's Additional Findings:**

6 What follows is an analysis of compliance with each of the relevant Statewide Goals.

7 Goal 1 - Citizen Involvement - Citizen involvement is advanced by providing appropriate notice  
8 and an opportunity to comment on the applications. Notice for comments and of any and all public  
9 hearings will be mailed appropriately and timely by Staff pursuant to the mandates of the Polk  
10 County Zone Code. This Goal will be complied with throughout this process.

11 Goal 2 - Land Use Planning - This Goal provides the flexibility in land use planning by allowing  
12 for exceptions to Goals under certain circumstances. The applicants are seeking an "irrevocably  
13 committed" exception to Goals 3 and 4. When the exception is granted and approved, this Goal is  
14 complied with.

15 Goal 3 - Agricultural Lands - An exception is taken to this Goal as set forth in the applications.

16 Goal 4 - Forest Lands - An exception is taken to this Goal as set forth in the applications.

17 Goal 5 - Natural Resources, Scenic and Historic Areas, and Open Spaces - There are no identified  
18 natural resources, historic or declared open spaces in the exception area. As can be seen in  
19 photographs in Exhibit AA, the ridge line that traverses the exception area provides some of the  
20 best and most dramatic territorial views in all of Polk County. This Goal is complied with.

21 Goal 6 - Air, Water and Land Resources Quality - The exception area is intended to provide for  
22 17 new parcels each with a rural residential homesite. The addition of these new homes will have  
23 no adverse impact on the air or land resources. As noted in the hydrogeology report presented by  
24 Mr. Rehm, Exhibit X, the addition of these homes will have no adverse impact on the water in the  
25 area, and there will be sufficient water to serve the new homes. There are no inventoried air or  
26 water or land resources of significance identified in the exception area. This Goal is complied with.

27 Goal 7 - Areas Subject to Natural Hazards - The exception area is not located within an identified  
28 natural hazard area. This Goal is complied with.

29 Goal 8 - Recreational Needs - The exception area is not within any identified or inventoried  
30 recreational area. There are no parks or other recreational designations involved with the exception  
31 area. This Goal is complied with.

32 Goal 9 - Economic Development - This proposal is seeking to take land that cannot be  
33 commercially farmed in large tracts, and turn the land into smaller parcels with homesites where  
34 the owner can establish and maintain small specialty crops, animals or Christmas trees. Taking  
35 unproductive land and turning it into homesite that also can produce some hobby crops is an  
36 economic win for Polk County. One only needs to look at the three parcels in the exception area  
37 that have been developed. The homes on those lots are some of the most expensive homes in Polk  
38 County, and while those parcels remain too large to manage by the owner for any sort of crop  
39 production, some small hobby activities are being attempted. Taking land that is now producing  
40 no economic value to the community and almost no tax dollars for the County, and turning that  
41 land into high value homesites that pay huge sums in taxes is a boom to economic development in  
42 Polk County. This Goal is complied with.

43 Goal 10 - Housing - This proposal will add up to 17 new homes in the West Salem Hills. Homes  
44 that are near the Salem UGB, with easy access to a good highway system and the shopping  
45 opportunities that lie in West Salem and in Salem proper. The addition of rural homesites fills a  
46 need that has existed for a decade or more. The popularity of Ballot Measures 37/49 demonstrated  
47 the desire and need for rural residential housing, and the failure of those measures to actually  
48 produce much in the way of housing indicates the desire and need still remain. In any event, this



1 Goal seeks to supply an array of different housing types in the County, and rural residential homes  
2 on acreage is one of those types the applications will fulfill. This Goal is complied with.

3 Goal 11 - Public Facilities and Services - The street system is in place, and is adequate to serve the  
4 additional dwellings that will be created upon approval of the applications. There is nothing in this  
5 planning change that will create the need for more roads or intersections. Site development will be  
6 by well (except for the two hook-ups for Orchard Heights Water) and septic system, thereby  
7 creating no demand or need for extension of any water or sewer systems to the exception area.  
8 Other public services will not be adversely impacted as there is sufficient capacity at present to  
9 serve the exception area at full build out. This Goal is complied with.

10 Goal 12 - Transportation - The exception area is accessed from Best Road, a Minor Collector. The  
11 submitted transportation analysis for the proposal authored by Lancaster Engineering dated  
12 October 22, 2013, supplemented on October 9, 2015, indicates that the proposed AF-10 zone  
13 would generate 17 morning peak hour trips and 23 evening peak hour trips, as compared with 4  
14 and 5 trips, respectively, for the current EFU zone. Weekday total trip generation from the proposal  
15 would be 218 trips for the proposed AF-10 zoning and 48 for the current EFU zoning. The  
16 Lancaster Engineering traffic analysis included a discussion of potential traffic impacts the  
17 proposal may have on the State Highway System, and the proposal's consistency with the  
18 Transportation Planning Rule (TPR). In applying the TPR, OAR 660-012-0060, the County is  
19 required to determine whether these applications significantly affects transportation facilities as  
20 measured at the end of the planning period identified in the TSP, which is 2030. ODOT reviewed  
21 the Lancaster material and determined there would be no significant effects on any transportation  
22 facility. This information alone makes the applications comply with this Goal. This finding is  
23 verified by the 2012 changes made to the Oregon Highway Plan (OHP), and with the  
24 Transportation Planning Rule. Those changes provide a "safe harbor" for automatic compliance  
25 with Goal 12 where the proposal does not increase the average daily trips (ADT) by more than  
26 400. When evaluated together, the new TPR and OHP exempt plan amendments that would  
27 generate less than 400 ADT from further TPR review as they are classified as a small increase that  
28 does not further degrade the transportation facility. It is typically understood that a single family  
29 dwelling will generate 10 ADT. This proposal will generate at most an additional 17 dwellings,  
30 for a total traffic generation of 170, far below the "safe harbor" figure of 400. This Goal is  
31 complied with.

32 Goal 13 - Energy - The exception area is an excellent site for passive solar heating due to its higher  
33 elevation and sun exposure. The spacing of the dwellings on at least 10-acre parcels will assure  
34 that solar access is not blocked. Energy savings will also be realized from the relatively compact  
35 road system that will be serving all of the existing and potential home sites. Not extending the road  
36 to the west and southwest will minimize the outlay for gravel road bases and paving. The internal  
37 road system also allows maximum accessibility to the only collector road serving the site (Best  
38 Road). All potential dwellings sites will have access to a road system that provides equal access  
39 regardless of location, thus saving energy and wear and tear on vehicles. The road system is  
40 designed so that there are no dead ends and the number of potential new dwellings at 17 does not  
41 trigger any need for a second access. This Goal is complied with.

42 Goal 14 - Urbanization - The Applicants are proposing the AF-10 zoning to implement their  
43 proposed Comprehensive Plan designation of Rural Lands. The purpose statement for the AF-10  
44 zone indicates that the function of the zone is to permit the designation of Rural Lands consistent  
45 with OAR 660-0040040(7)(i)(A), which allows, without an exception to Goal 14, new rural  
46 residential areas designated after October 4, 2000, and requires any new lot or parcel to have an  
47 area of at least ten acres. Once approved with the AF-10 acre zone, this Goal is complied with as  
48 the lands are considered rural lands and not urbanizable lands.

49 Goals 15 - 18 Relate to the Willamette River and Ocean Areas - These Goals are not applicable to  
50 the applications as the exception area is not near or impacted by the Willamette River or any of  
51 the Ocean Goals.

1 **Hearings Officer Findings:**

2 The Applicants have submitted an exception to Statewide Planning Goal 3 (Agricultural Lands) and  
3 Goal 4 (Forest Lands), under the “irrevocably committed” goal exception criteria. The applicable  
4 criteria for an irrevocably committed goal exception(s) is addressed below.

5 As discussed above, Staff has determined that there are adequate transportation facilities to support  
6 additional residential development that could result from the Applicants’ proposal. Staff’s findings  
7 are based on the Hearings Officer’s previous findings, as well as a supplemental memorandum from  
8 Brian Davis with Lancaster Engineering, which was requested by Staff and provided by the  
9 Applicants. Staff finds that the Applicants’ proposal would be in compliance with Statewide  
10 Planning Goal 12 (Transportation).

11 Public Comment raised the issue of whether the Applicants and Polk County had complied with a  
12 Goal 5 Exception because the subject properties are within a designated significant groundwater  
13 resource. The Hearings Officer will address this below.

14 The Hearings Officers finds that, other than what is mentioned above, the Applicants’ proposal is  
15 consistent with all other Statewide Planning Goals, based on the Applicant’s statements and the  
16 extensive uncontested findings during the previous proceeding.

17 **3. Compliance with the provisions of any applicable intergovernmental**  
18 **agreement pertaining to urban growth boundaries and urbanizable land.**  
19 **[PCZO 115.050(A)(3)(c)]**

20 **Hearings Officer’s Previous Findings:**

21 The subject properties are not located within an urban growth boundary or within an  
22 incorporated city. As a result, no intergovernmental agreements are applicable to the  
23 applications. This criterion is not applicable to the proposed amendment.

24 **Applicant’s Additional Findings:**

25 There are no intergovernmental agreements that are applicable to the exception area.

26 **Hearings Officer Findings:**

27 Staff confirmed that the subject properties are not located within an urban growth boundary or  
28 within an incorporated city. As a result, no intergovernmental agreements are applicable to the  
29 applications. This criterion is not applicable to the proposed amendment.

30 **2. Findings for an Exception to Statewide Planning Goals 3 and 4 File PA 18-01:**

- 31 **A. A local government may adopt an exception to a goal when the land subject to the**  
32 **exception is irrevocably committed to uses not allowed by the applicable goal**  
33 **because existing adjacent uses and other relevant factors make uses allowed by**  
34 **the applicable goal impracticable; [OAR 660-004-0028(1)]**

35 **Hearings Officer’s Previous Findings:**

36 Applicants state that a local government may adopt an exception to a goal when the land subject  
37 to the exception is irrevocably committed to uses not allowed by the applicable goal because  
38 existing and adjacent uses and other relevant factors makes uses allowed by the applicable goal  
39 impracticable. At length, applicants argue this point as summarized on pages 24 and 25 of the Staff  
40 report, including discussion of the definitions of "practical" and "practicable."

41 Applicants contend every area on the property proposed in this rezone has multiple challenges  
42 depending on location. No area on the site is ideally suited for farming but some areas can be  
43 farmed for select crops with appropriate management practices. The standards in the goals and the  
44 enabling EFU zone explicitly are driven by the enabling legislation in ORS 215.203 for farming  
45 to be conducted with "an intent to make a profit in money." Large fields with monoculture crops

1 have proven to be a failure on this farm that, applicants says, was abandoned after World War I  
2 and purchased from the county for the taxes in the 1930's.

3 Staff understands that the applicants are proposing this PCCP amendment under the assertion that  
4 the current designation of Agriculture, and subsequently Oregon Statewide Planning Goal 3, are  
5 no longer appropriate due to changing conditions on the subject properties and in the surrounding  
6 area. The applicants emphasize in their proposal that the property is better suited for acreage home  
7 sites. The current zoning designation of the subject property is EFU, which implements the  
8 Agriculture PCCP designation and has a minimum parcel size of 80 acres. The EFU zone allows  
9 dwellings when certain farm income, soil quality or continuous ownership tests are met, but does  
10 not list dwellings as an outright permitted use in the zone. The applicant's proposal would change  
11 the zoning of the subject property to AF-10, which has a 10-acre minimum parcel size and permits  
12 a single family dwelling as an outright permitted use. The applicants are proposing an Irrevocably  
13 Committed Goal exception to Statewide Planning Goal 3, Agricultural Lands.

14 It must be noted, even if not explicitly stated, that land use laws and ordinances in Oregon do not  
15 encourage easy conversion of resource lands into non-resource lands. However, an exception to a  
16 goal may be adopted when an application demonstrates that the land subject to the exception is  
17 irrevocably committed to uses not allowed by Goal 3. An Irrevocably Committed exception may  
18 be justified when a local government demonstrates that existing adjacent uses and other relevant  
19 factors make uses allowed by Goal 3 impracticable. Demonstrating that all allowed uses under  
20 Goal 3 are impossible is not required to take an exception, only that the uses are impracticable. A  
21 demonstration that recent or imminent changes affecting an exception area by themselves, or in  
22 combination with other factors, render continued farm use impracticable is required to justify a  
23 goal exception. The applicant asserts that prohibition of irrigation on the subject properties and  
24 physical characteristics of the site have been a limiting factor in the ability to profitably manage  
25 the subject properties for agriculture. The applicant contends that these factors coupled with the  
26 development that occurred under Measures 37 and 49 on the subject properties are changing  
27 conditions that have irrevocably committed the subject properties to uses not allowed by Goal 3.  
28 Staff concluded that an exception to Goal 3, Agricultural Lands, is therefore necessary to reconcile  
29 ownership patterns with the land capability of the subject properties. The Hearings Officer concurs  
30 as to the necessity, though whether this property qualifies for such an exception in fact remains  
31 open.

### 32 **Applicants' Additional Findings:**

33 In addition to complying with the Polk County Plan and Zone amendment process stated above, the  
34 applications require an exception be taken for Goal 3 (Agriculture) and Goal 4 (Forestry). No  
35 exception is necessary for Goal 14, because the proposed AF-10 zoning does not constitute  
36 urbanization as a matter of law. No exception is necessary for any other Goal. The exception  
37 process, and compliance therewith is discussed below.

38 The statewide goals and guidelines are not fixed in stone, and like variances to development  
39 standards in a zone code, there is a process where the normal goal provisions can be found to not  
40 apply to certain lands. This is the Exception process, found in Goal 2, Part II and OAR 660-015-  
41 0000(2).

42 According to this exception process, Polk County may adopt an exception to a goal for one of three  
43 reasons. The first is that the land subject to the exception is physically developed to the extent that  
44 it is no longer available for uses allowed by the applicable goal. The second is that the land subject  
45 to the exception is irrevocably committed to uses not allowed by the applicable goal because existing  
46 adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable.  
47 The third and final is that there are reasons that justify why the state policy embodied in the  
48 applicable goals should not apply.

49 In the applications it is the second of the three exception criteria which is applicable here, and upon  
50 which the applicants rely and will justify compliance with. In this case the 228 acres, in the seven

1 contiguous parcels, are irrevocably committed to non-resource uses (farm or forestry) because of the  
2 type and density of uses that has developed on adjacent and surrounding lands.

3 The requirements to qualify land for an irrevocably committed exception are specified in OAR  
4 660-004-0028. The irrevocably committed exception is authorized specifically in ORS  
5 197.732(2)(b) where the land subject to the exception is irrevocably committed to uses not allowed  
6 by the applicable goal because existing adjacent uses, and other relevant factors, make uses allowed  
7 by the applicable goal impracticable.

8 Under OAR 660-004-0028(2) whether land is irrevocably committed depends on the relationship  
9 between the exception area and the lands adjacent to it. To justify this exception type, evidence must  
10 be submitted that address the following issues:

- 11 (a) The characteristics of the exception area;
- 12 (b) The characteristics of the adjacent lands;
- 13 (c) The relationship between the exception area and the lands adjacent to it; and
- 14 (d) The other relevant factors set forth in OAR 660-004-0028(6) which include:
  - 15 1. Existing adjacent uses;
  - 16 2. Existing public facilities and services (water and sewer lines, etc.);
  - 17 3. Parcel size and ownership patterns of the exception area and adjacent lands:
    - 18 A. Consideration of parcel size and ownership patterns shall include an analysis of how  
19 the existing development pattern came about and whether findings against the goals  
20 were made at the time of partitioning or subdivision. Past land divisions made without  
21 application of the goals do not in themselves demonstrate irrevocable commitment  
22 of the exception area. Only if development (e.g., physical improvements such as  
23 roads and underground facilities) on the resulting parcels or other factors makes  
24 unsuitable their resource use or the resource use of nearby lands can the parcels be  
25 considered to be irrevocably committed. Resource and non-resource parcels created  
26 and uses approved pursuant to the applicable goals shall not be used to justify a  
27 committed exception.
    - 28 B. Existing parcel sizes and contiguous ownerships shall be considered together in  
29 relation to the land's actual use. For example, several contiguous undeveloped parcels  
30 (including parcels separated only by a road or highway) under one ownership shall  
31 be considered as one farm or forest operation. The mere fact that small parcels exist  
32 does not in itself constitute irrevocable commitment. Small parcels in separate  
33 ownerships are more likely to be irrevocably committed if the parcels are developed,  
34 clustered in a large group or clustered around a road designed to serve these parcels.  
35 Small parcels in separate ownerships are not likely to be irrevocably committed if  
36 they stand alone amidst larger farm or forest operations, or are buffered from such  
37 operations;
  - 38 4. Neighborhood and regional characteristics;
  - 39 5. Natural or man-made features or other impediments separating the exception area from  
40 adjacent resource land. Such features or impediments include but are not limited to roads,  
41 watercourses, utility lines, easements, or rights-of-way that effectively impede  
42 practicable resource use of all or part of the exception area;
  - 43 6. Physical development according to OAR 660-004-0025; and
  - 44 7. Other relevant factors.

45 Whether uses or activities allowed by an applicable goal are impracticable as that term is used here  
46 is determined through consideration of the above factors.

1 For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following  
2 uses or activities are impracticable:

- 3 (a) Farm use as defined in ORS 215.203;
- 4 (b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and
- 5 (c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a).

6 The purpose of this exception process is to permit irrevocably committed exceptions were justified  
7 so as to provide flexibility in the application of broad resource protection goals. It is not required  
8 that an applicant demonstrate that every use allowed by the applicable goal is "impossible."

9 There are only two goals that are applicable for this exception: Goal 3, Agriculture and Goal 4  
10 Forestry. What follows is the justification for the irrevocably committed exception to these two  
11 Goals.

### 12 Hearings Officer Findings:

13 Public comment raised issue that the applications also need to have findings relating to an Exception  
14 to Statewide Planning Goal 5 because the subject properties are located in a groundwater limited  
15 area. The Oregon Department of Water Resources (WRD) has defined the Eola Hills Groundwater  
16 Limited Area (EHGLA) as being bounded by Township 5 South in Yamhill County, the  
17 Willamette River, Highway 22 and Highway 99W. The Applicants have stated that the subject  
18 properties are within the EHGLA. Polk County's Goal 5 inventory is acknowledged by DLC. If  
19 Polk County updated their inventory through periodic review, the inventory may need to include  
20 ground water limited resources. Currently, based on a review of the Polk County Significant Resource  
21 Area (SRA) Map, the subject properties have no inventoried significant resources.

22 Based on the evidence in the record, the Hearings Officer finds the subject properties do not have  
23 an inventoried significant resource and an Exception to Goal 5 is not required for the applications.

24 The Applicants' proposal requires an exception to Statewide Planning Goals 3 and 4. The applicable  
25 criteria for an irrevocable committed goal exception(s) is addressed below.

26 **B. Whether land is irrevocably committed depends on the relationship between the**  
27 **exception area and the lands adjacent to it. The findings for a committed**  
28 **exception therefore must address the following: [OAR 660-004-0028(2)]**

- 29 **1. The characteristics of the exception area;**
- 30 **2. The characteristics of the adjacent lands;**
- 31 **3. The relationship between the exception area and the lands adjacent to it; and**
- 32 **4. The other relevant factors set forth in OAR 660-004-0028(6);**

### 33 Hearings Officer's Previous Findings:

34 Applicants argue that the subject property cannot reasonably or feasibly be utilized for farm or  
35 forest use by itself or in conjunction with adjoining properties, especially to the east and south  
36 where rural residences have proliferated. It cannot be reasonably farmed with most of the area to  
37 the north due to topographic constraints, nor can it be with properties to the east that are across  
38 Best Road that are in small farm use parcels with dwellings. The subject of these applications is  
39 a 228-acre area comprised of four ownerships and seven legal lots of record. Each ownership is  
40 described in detail in the applications, as summarized on pages 30 to 32 of the Staff report.

41 Staff maintains that whether land is irrevocably committed depends on the relationship between  
42 the exception area and the lands adjacent to it. The applicant states that the subject properties were  
43 originally part of a larger tract of land owned by the Simmons family since World War II.  
44 Applicant states that the Simmons family actively farmed the tract, growing gooseberries,  
45 strawberries, prunes, cherries, fine fescue grass, Christmas trees and wheat, with little success.

1 The subject properties are located one property south the intersection of Orchard Heights Road  
2 and Best Road and are commonly known as 1789, 1795 and 1797 Best Road, Salem, OR  
3 (Assessment Map T7S, R4W, Section 14, Tax Lots 601,602,603,604 and 605 and T7S, R4W,  
4 Section 23, Tax Lots 100 and 101). The subject properties arrived at their current configurations  
5 through a series of land use actions including three Measure 37 Claims, three partitions allowed  
6 under Measure 37, Vested Rights determinations related to property improvements made pursuant  
7 to Measure 37 Claims, and three Measure 49 authorizations that permitted five dwellings on the  
8 subject properties.

9 Staff notes that these applications addresses recent residential development on the subject  
10 properties arising from these Ballot Measure 37 applications, Ballot Measure 49 authorizations,  
11 and vested rights determinations. The vested rights arguments were submitted by the applicant as  
12 part of this record to demonstrate that the subject properties are built and committed with streets,  
13 electric power, septic systems, communication systems and domestic wells. The applicant states  
14 that the amount expended for the infrastructure improvements listed in the preceding paragraph is  
15 \$1,016,489.30. According to the applicant, this figure does not include the more recent studies for  
16 hydrology, transportation, wildlife, soils, agronomy and planning services. The eastern half of the  
17 properties have been the beneficiary of most of the expenditures for improved roads, wells, electric  
18 power, land clearing, surveying, sanitation testing and engineering. The westernmost 120 acres  
19 only has some roughed out roads and no utilities.

20 The elevation of the subject properties is between 900 and 1,060 feet with steep slopes to the west  
21 and south at a high point at the southern end of the Eola Hills. According to the applicant, this  
22 creates more challenging conditions for crop cultivation than properties that have been successful  
23 at establishing commercial vineyards and Christmas tree farms. Wind exposure is high since this  
24 southern promontory of the Eola Hills is in the path of coastal winds passing through the Van  
25 Duzer Gap. Moreover, the subject properties location on the south side of a promontory means  
26 they receive more incident solar radiation than other areas of Polk County. The applicant indicates  
27 that a combination of solar exposure on steep south facing slopes and steady winds make raising  
28 crops on the subject properties impracticable because elevated rates of transpiration sap available  
29 soil moisture, which stunts growth and leads to crop failures. The slope, aspect and elevation of  
30 the subject properties have contributed to crop failures resulting from cool temperatures that  
31 discourage pollinators, heavy rains precipitated from orographic lifting of clouds up the Eola Hills,  
32 and constant wind damaging and stressing plants. Staff evaluated the applicant's statements and  
33 concurs that while the subject properties are predominantly comprised of soils that characterize  
34 agricultural land, consistent with OAR 660-033-0030, site constraints related to slope, aspect,  
35 excessive wind and abundant sun exposure limit their ability to produce commercial agricultural  
36 crops.

37 The applicant states that wine grapes are not a suitable crop for the subject properties, citing site  
38 specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a  
39 preponderance of boulders, and a lack of landscape uniformity to establish blocks with the  
40 appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette  
41 viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower  
42 elevations than the subject properties. Cubanisimo Vineyards to the east of the subject properties  
43 is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills  
44 Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject  
45 properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the  
46 subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon,  
47 Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While  
48 the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate  
49 Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds  
50 affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the  
51 variety of landscapes on which vineyards are planted, with east facing, west facing and south  
52 facing vineyards represented by the small sample above. However, the subject properties are more

1 exposed to wind and sun than the vineyard sites surrounding it, lending some credence to the  
2 applicant's observations that wine grape production is impracticable there. At the same time,  
3 evidence in the record shows that some knowledgeable grape growers feel that "the rocky,  
4 windbattered slopes of the Eola-Amity hills have emerged as one of Oregon's most singular  
5 terrains for pinot noir." [Patrick Comiskey, "Wind Powered Pinot", *Wine & Spirits Magazine*,  
6 April 2013.] Applicant contends above that the Simmons family "actively farmed the tract,  
7 growing gooseberries, strawberries, prunes, cherries, fine fescue grass, Christmas trees and wheat  
8 with little success," attempting by this recitation to demonstrate the land is not suitable for large-  
9 scale commercial agricultural crops. There is no indication that attempts were made to grow grapes  
10 of any variety.

11 Statements by the applicant indicate that parcelization of lands in the vicinity of the subject  
12 properties has resulted in an ownership pattern that precludes the management of small farm  
13 holdings as larger farm units and has led to the proliferation of small scale specialty farms. Staff  
14 notes that the nearest large agricultural operations to the subject properties are Christmas tree farms  
15 and vineyards. Using 2011 Aerial Photographs and GIS measuring tools, Staff estimated the size  
16 of the largest agricultural operations in the vicinity of the subject properties. Eola Hills Wine  
17 Cellars' Legacy Estate Vineyard has approximately 75 acres of vineyard planted on an  
18 approximately 162 acre parcel immediately west of the subject properties; Domaine Drouhin  
19 Oregon, Inc. has approximately 140 acres of vineyard planted on four adjacent parcels totaling  
20 approximately 278 acres about a mile northeast of the subject properties; Doubletrees Land &  
21 Timber, LLC has approximately 120 acres of Christmas trees planted on an approximately 170  
22 acre property about one third of a mile southeast of the subject properties; Schudel Enterprises,  
23 LLC owns approximately 198 acres immediately west of the Domaine Drouhin Oregon, Inc. and  
24 grows Christmas trees on approximately 185 of those acres; and, across Orchard Heights Road  
25 from the subject properties, Charles and Andrea Hatchette own ten contiguous tax lots comprising  
26 approximately 147 acres planted with over 100 acres of Christmas trees. Growing specialty crops  
27 at a larger scale generally means lower input costs, and more predictability at harvest.

28 Land use changes on properties in the vicinity of the subject properties generally support the  
29 applicant's statements regarding the proliferation of small scale farms in the area. Staff developed  
30 a table to characterize the nature of specialty agriculture in the vicinity of the subject properties.  
31 The 2014 Polk County Assessor's Office records were referenced for the assessed values of land  
32 and structures located on EFU lands within 1,000 feet of the subject properties to help evaluate  
33 whether nearby lands are primarily used for agricultural or residential purposes. There is no  
34 evidence demonstrating whether or not surrounding properties are able to make a profit in money  
35 from agriculture. Therefore, to help understand whether or not surrounding small farm operations  
36 rise to the level of a commercial farm where there is the intent to make a profit in money, one can  
37 assume that properties engaged primarily in agriculture generally have higher assessed values for  
38 land relative to structures thereon. The table compares assessed values for land and structures on  
39 EFU properties within 1,000 feet of the subject properties. The table is set out in full on pages 33  
40 and 34 of the Staff report.

41 Of the 21 properties zoned EFU within 1,000 feet of the subject properties, eight have higher  
42 assessed values for structures than for the underlying land. Two of the properties for which land is  
43 assessed at a higher value than the structures thereon are not receiving farm deferrals, which would  
44 inflate the assessed value of the those lands. Whether or not a property qualifies for special  
45 assessment for farm use is not necessarily an indicator as to whether or not the property is capable  
46 of making in profit in money from farm use. Staff observed that three of the 12 nearby EFU  
47 properties having higher assessed values for land than for structures are vacant. Accordingly, it  
48 can be argued that, within 1,000 feet of the subject properties, there are nearly as many small scale  
49 farms among EFU properties with residences than there are large commercial farming operations.  
50 A majority of the EFU lands to the north and west of the subject properties are, or could be, large  
51 commercial scale farms. The applicant has characterized the properties to the east as "hobby"  
52 farms. A definition of a "hobby" farm from Internal Revenue Service (IRS) is generally accepted

1 to mean that there is no intention by the farm operator to make a profit from agricultural activities.  
2 Staff observes that EFU zoned properties near the subject property that have higher assessed values  
3 for structures than for the underlying land and may qualify as hobby farms by this definition.  
4 Without economic data for the surrounding properties, Staff is making the assumption that  
5 agricultural income would not be sufficient to support the costs of dwellings and other structural  
6 improvements on those lands. Therefore, capital derived from sources other than farm income  
7 from these neighboring properties would be necessary to construct and maintain the dwellings and  
8 structures, leading one to conclude that agricultural activities thereon are ancillary to the residential  
9 uses. This does not in itself allow the conclusion that surrounding properties are not capable of or  
10 are not currently making a profit in money from agriculture; only that it may not be the primary  
11 activity or use of the land.

12 Measure 37 claims were made on two properties adjoining the subject properties. One of the  
13 Measure 37 claims was substantiated by Measure 49 Order No. E132401, which permitted two  
14 additional parcels (allowing each existing dwelling to be on its own parcel) for Tax Lot 200 in  
15 T7S, R4W, Section 23. A second Measure 37 claim on an approximately 104 acre parcel, identified  
16 as Tax Lot 601 in T7S, R4W, Section 23, adjacent to the southwest corner of the subject properties  
17 authorized two additional parcels pursuant to a Measure 37 Claim (M06-249), and two additional  
18 dwellings pursuant to a Measure 49 Final Order (HI 34231). Pursuit of potential land entitlements  
19 under Measures 37 and 49 are emblematic of trend towards a growing number smaller agricultural  
20 parcels occurring in the vicinity of the subject properties over the past several decades. This has  
21 resulted in a diversification of farming on a small scale with equine stables, Christmas tree farms,  
22 grass seed growers, wood lots, and vineyards and wineries operating within a thousand feet of the  
23 subject properties. Recent changes on these nearby properties exemplify the shift to small scale  
24 specialty agriculture. Cubanisimo Vineyards began with a partition of a 32 acre parcel into 12 acre  
25 and 20 acre parcels in 1978 (Polk County Planning File SE 78-18), followed by a farm dwelling  
26 approval in 1989 (Polk County Planning File FD 89-16). A conditional use permit approved wine  
27 sales and marketing as a home occupation in 2004 (Polk County Planning File CU 04-21),  
28 including four (4) events attracting up to 300 visitors. Another commercial winery was established  
29 within the past ten years adjacent to the subject properties. Eola Hills Winery purchased a large  
30 parcel immediately west of the subject properties which was the subject of Plan Amendment and  
31 Zone Change applications in 2010 (PA 10-05 and ZC 10-06, respectively) to change the plan  
32 designation from Forest to Farm Forest and change the zoning designation from Timber  
33 Conservation (TC) to Farm Forest Overlay (FFO). A subsequent land use application (LUD 13-  
34 11) was approved to establish a winery at what is now known as the Legacy Estate Vineyard. The  
35 winery offers wine tasting, company picnics and wedding ceremonies at their Legacy Estate  
36 Vineyard location.

37 Over the past decade a series of partitions of the original Simmons holdings, identified as LP 05-  
38 20, LP 05-22, and LP 05-23, and memorialized in Partition Plats 2006-0027 through 2006-0029,  
39 have resulted in the current configurations of the subject properties. These recent land partitions  
40 were made possible by three Measure 37 Claims (identified as M 05-09, M 05-13, and M 05-14).  
41 Subsequent vesting determinations by Polk County Planning Division, identified as file numbers  
42 VRD 09-01 through VRD 09-03, upheld these Measure 37 partitions. The Measure 37 partitions  
43 of the subject properties created six parcels to bring the total number of parcels to nine. Following  
44 the Measure 37 Claims (Claims) and corresponding vested rights determinations, a suite of  
45 Measure 49 claims were submitted, which resulted in three Measure 49 Final Order and Home Site  
46 Authorizations (Final Order) approved by DLCD. The Final Orders referenced above authorized  
47 five dwellings on the parcels vested under Measure 37. Of the five authorized dwellings under  
48 Measure 49, three have been built. These dwellings are on Tax Lots 602 and 603 in T7S, R4W,  
49 Section 14 and Tax Lot 101 in T7S, R4W, Section 23. Based on a review of the Polk County  
50 Assessor records, the subject properties currently contain a total of three dwellings.

51 The applicant contends that the subject properties are compatible with the properties in the vicinity  
52 and that the subject properties cannot reasonably or feasibly be utilized for farm or forest use by



1 themselves or in conjunction with adjoining properties. Division of the subject properties  
 2 following Measure 37 claims made by various members of the Simmons family, and the  
 3 construction of three dwellings on its eastern portion have broken up the ownership of what was  
 4 once an approximately 267-acre farm unit. The resulting parcelization and establishment of  
 5 infrastructure to service the three new dwellings on the subject properties has made achieving  
 6 economies of scale for agriculture difficult. Furthermore, water, power and septic lines that  
 7 connect the dwellings to domestic services have been placed underground, rendering the  
 8 management of the land for agriculture impractical since the land cannot be plowed without  
 9 interfering with this buried residential infrastructure. Roads serving existing dwellings on the  
 10 subject properties are aligned so that they interfere with the orderly tilling of soil, and are gravel  
 11 surfaced for residential use. Farm activities such as ripping, discing, seeding and spraying require  
 12 large, uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
 13 properties both vertically and horizontally conflict with the efficient management of soil  
 14 preparation and crop protection activities, making commercial agriculture impracticable.

15 The applicant states that the demand for the types of crops grown historically have diminished  
 16 such as cherries, prunes, Douglas fir Christmas trees, grass seed and grain as the yield of these  
 17 crops also dropped. Some of the processing facilities for these crops have relocated or closed. The  
 18 applicant also states that prohibition of irrigation on the subject properties and physical  
 19 characteristics of the site have been a limiting factor in the ability to profitably manage them for  
 20 agriculture. These factors coupled with the development that occurred under Measures 37 and 49  
 21 on the subject properties and former farm unit are changing conditions that the applicant contends  
 22 have committed the subject properties to uses other than agricultural use. Staff evaluated materials  
 23 submitted by the applicant regarding development of the subject properties pursuant to Measure  
 24 37 Claims and Measure 49 Final Orders, an increase in the number of small farms in the vicinity  
 25 of the subject properties, and the low productivity of farmland at higher elevations in the Eola  
 26 Hills, and agree these facts support the applicant's conclusion that the Agriculture and Forestry-10  
 27 Acre zone would be compatible with surrounding land uses; it would also enable the applicant to  
 28 develop larger acreage home sites where the occupant could manage the property for a range of  
 29 specialty farm uses as a hobby even though the land is not suitable to make a profit in money from  
 30 farm use. Based on statements by the applicant and evidence in the record, Staff concluded that  
 31 small scale specialty farms with single family dwellings have coexisted with larger farm operations  
 32 in their vicinity with little evidence of conflict. The applicant submitted material into the record  
 33 on November 24, 2015 addressing the issue of drift from agricultural and forestry spray activities.  
 34 The applicant contends that spray applications in connection with agricultural and forestry  
 35 operations on the subject properties could drift to adjacent properties, causing damage to nearby  
 36 crops and creating a nuisance for nearby residences. The applicant's argument is a double-edged  
 37 sword, however, since the same reasoning could be employed by nearby wine grape and Christmas  
 38 tree growers if the subject properties' primary use were residential.

39 **Applicants' Additional Findings:**

40 **The characteristics of the exception area** - The exception area is adjacent to Best Road NW, Salem,  
 41 and consists of seven parcels, identified as Tax Lots 601, 602, 603, 604 and 605 on Map 7.4.14, and  
 42 Tax Lots 100 and 101 on Map 7.4.23. The location and relationships of the exception area is shown  
 43 on the Assessor Maps, Exhibits M and N, and on the aerial photograph at Exhibit Q. The exception  
 44 area is approximately 228 acres in size. While the exception area is predominated by agricultural  
 45 and forestry type soils, there have been no productive commercial farming or forestry operations on  
 46 these lands for generations. Summary information on the exception area follows:

47

Tax Lot No.			
100	40 acres	Simmons	idle

101	20 acres	Stone	Residential
601	20 acres	Simmons	idle
602	45 acres	Gray	Residential
603	43.66	Pugmire	Residential
604	40	Simmons	idle
605	20	Simmons	idle

1 The properties in the exception area were lawfully created pursuant to Polk County Subdivision and  
2 Partition Ordinance Section 91.950(1)(b), arriving at their current configuration through a series of  
3 partitions identified as LP 05-20, LP 05-22, and LP 05-23, and memorialized in Polk County  
4 Partition Plats 2006-0027 through 2006-0029.

5 The partition approvals identified as LP 05-20, LP 05-22, and LP 05-23 became effective May 3,  
6 2006. These land partition approvals were made possible by three Oregon Ballot Measure 37 Claims  
7 (BM 37), identified as M 05-09, M 05-13, and M 0514, and vesting determinations for the land  
8 partitions were made in Polk County Planning Division file numbers VRD 09-03 with respect to LP  
9 05-23, VRD 09-02 with respect to LP 05-22, and VRD 09-01 with respect to LP 05-20. Following  
10 the Measure 37 Claims and corresponding vested rights determinations, Oregon Ballot Measure 49  
11 (BM 49) required refileing of claims with DLCD, which resulted in three BM 49 Home Site  
12 Authorizations. Claim H132890 was divided into three claims, recognizing the separate ownerships  
13 of the subject properties at that time. Claim H132890A refers to Tax Lot 600 and claimants Nina  
14 Simmons, Wayne Simmons and Allen Simmons; Claim H132890B refers to a Tax Lot 601 and  
15 claimants Wayne Simmons and Allen Simmons; and, Claim H132890C refers to a Tax Lot 100 and  
16 claimants Nina Simmons, Wayne Simmons and Allen Simmons. These decisions approved two  
17 dwellings (Tax Lots 602 and 603) in connection with Claim H132890A, for zero dwellings in  
18 connection with Claim H132890B, and for three dwellings in connection with Claim H132890C.  
19 The Final Orders referenced above authorized five dwellings on the parcels vested under BM 37. Of  
20 the five authorized dwellings under BM 49, four have been built. These dwellings are on Tax Lots  
21 602 and 603 in T7S, R4W, Section 14 and Tax Lot 101 and 102 in T7S, R4W, Section 23.

22 The exception area has no inventoried significant resources and is outside any regulated floodplain.

23 The exception area takes access from Best Road, and has an extensive internal roadway system,  
24 consisting of 4100 linear feet of developed roads, to serve the individual parcels. The entrance is  
25 gated. Exhibit AA(23). Best Road is identified as a Minor Collector. Transportation analysis  
26 performed for the exception area and reviewed by ODOT indicates the creation of additional  
27 homesites on parcels that are at least 10 acres in size will not have a significant impact on local  
28 transportation facilities. Exhibit U.

29 The exception area has use of two water hookups provided by the Orchard Heights Water District.  
30 The remaining area will be served by domestic water wells, some of which are already in existence  
31 in addition to the three already drilled and serving the existing homes. The exception area will be  
32 served by on-site sewage disposal systems. The area is well suited to on-site sewage given the large  
33 parcel sizes proposed, as witnessed by the approval of the three systems already in place.

34 The area is provided educational services by the Salem Keizer School District. Fire protection is  
35 provided by the Salem Suburban RFPD. Law enforcement is provided by the Polk County Sheriff's  
36 Office. There is no ODF timber fire protection provided for the subject properties.

37 Electric power has been extended throughout the exception area to serve the new and prospective  
38 parcels.

1 Aside from the residential uses on three of the parcels in the exception area, the land in the exception  
2 area is idle. In the past, the prior owner of the entire exception area (Simmons) has attempted farming  
3 and forestry uses unsuccessfully, despite being an excellent and long time family farmer in West  
4 Salem. The decline of agricultural enterprises resulted, among other things, from specific regulations  
5 that affected the commercial viability of large tract farming operations and from changes in the  
6 surrounding farm enterprise in the area. The Simmons have been the only bona fide farmers to ever  
7 farm portions of this land since World War I. The Simmons have attempted gooseberries,  
8 strawberries, prunes, cherries, fine fescue, Christmas trees and wheat on their properties. All of these  
9 crops failed for various reasons.

10 The land in the exception area is topographically diverse with a ridge line running through the area,  
11 a knoll and steep slopes to the west. A majority of the exception area is over 900 feet above sea  
12 level, which poses extreme problems with rainfall, humidity, and temperature as well as the number  
13 of frost free days. Exhibit P.

14 The exception area is subject to excessive wind and sun exposure. The Douglas fir Christmas trees  
15 previously attempted did not develop proper form in areas from the Eola Summit and west due to  
16 wind damage, and those east of the summit developed a condition called "sun scald." The higher  
17 elevations combined with the wind in the exception area makes forestry uses impracticable. No  
18 gross earnings from farming have accrued to any of the participants in this zoning action since 2008.

19 **The characteristics of the adjacent lands** - The land use inventory, Exhibit V, details all the  
20 characteristics of the adjacent and surrounding lands. The inventory study included an analysis of  
21 every property on a total of four sections that surround the exception area. The study area Map  
22 includes all 8 Assessor maps in Sections 13, 14, 23 and 24, in Township 7S, Range 4W. The total  
23 study area is approximately 4 miles square, encompassing approximately 2,571 acres.

24 Topography plays a significant role in the uses that take place in the study area. The ridge line of  
25 the Eola Hills runs through the middle of the study area. The highest point along this ridge line is  
26 actually located in the exception area, being 1,065 feet in elevation. The ridge line dives steeply to  
27 the west with properties at the western edge of the study area being less than 300 feet in elevation.  
28 The ridge line height also accounts for the presence of water and communication towers in the study  
29 area.

30 From the facts obtained and analyzed regarding the study area surrounding the exception area, it is  
31 revealed that there are 215 useable Tax Lots, plus three easement roads, two tower sites and two well  
32 sites, for an effective total of 222 Tax Lots.

33 There are 153 houses on the 215 parcels, equating to 71% of the parcels in the study area have single  
34 family dwellings. Almost all the parcels that are identified in actual farm use do not have a dwelling  
35 located on-site.

36 The average parcel size in the study area is 12.07 acres. 165 of the 215 parcels are under 10 acres in  
37 size, meaning 77% of the parcels in the study area are under 10 acres in size.

38 118 of the 215 Tax Lots are in farm or forest deferral programs, and 97 are not, meaning only 55%  
39 of the parcels are in a deferral program. Even this figure is deceptive since 104 of the 215 parcels  
40 have structure values that exceed the land value, making these by IRS definition "hobby farms".  
41 This means that 48.8% of the parcels in the study area can be classified as "hobby farms". Parcels  
42 which are granted deferral status, despite the fact that the owners derive their income from sources  
43 other than employment of agricultural or forestry practices on their land. These owners generally  
44 work a full time job off-site which supports the capital investment in the parcel.

45 There is one large commercial vineyard (Eola Hills) in the study area that is a total of 232.1 acres in  
46 size, and encompasses three tax lots. There is one large Filbert Orchard (Walker) in the study area  
47 that is 242.02 acres in size, and is encompassed in two tax lots. There is one large tree farm  
48 (Doubletrees Land and Timber) in the study area that is 169.63 acres in size. There is one large  
49 ownership (Waldensee LLC) that is 99.18 acres in size which is idle at this time. There is one large

1 ownership (Pratt) that is 91.38 acres in size which appears to be idle at this time as well. Aside from  
2 these large ownerships, no other parcel in the study area is over 50 acres in size. It should be noted  
3 that these large parcels are all on the flatter land to the west, with considerably different land  
4 characteristics that exist in the higher elevations of the exception area.

5 There are several parcels in the study area that are owned in combination with other parcels by one  
6 owner. Glenecreek Springs owns 3 parcels totaling 42.95 acres. Hanke owns 7 parcels totaling 6.98  
7 acres. Hatchette owns 4 parcels totaling 42.98 acres plus an easement road. Curtright owns 4 parcels  
8 totaling 51.59 acres. Ogdahl owns 3 parcels totaling 8.59 acres

9 The study area contains some of the most valuable homes in the Willamette Valley. 21 of the parcels  
10 here are valued at over \$1,000,000, nearly 10% of the entire study area. 82 more of the parcels in  
11 the study area are valued at more than \$500,000, which is over 38% more of the parcels in the study  
12 area. Combined, parcels in the study area that have valuation of over \$500,000 is 103, meaning over  
13 48% of the parcels in the study area are very high value non-resource related homesites.

14 110 of the parcels are zoned EFU. 4 of the parcels are zoned FF. 1 of the parcels is zoned TC. 99  
15 of the parcels are zoned AR-5, which figure may actually be 100, as one of the parcels is identified  
16 by the county as being zoned AR, however it is most likely that parcel is also zoned AR-5. 4 of the  
17 parcels are zoned SR.

18 **The relationship between the exception area and the lands adjacent to it** - The West Salem Hills  
19 is a fairly distinctive area, including the exception area, the study area, and the remaining area west  
20 of the Salem UGB and ending at the flat lands along Oak Grove Road. The West Salem Hills area  
21 extending from the UGB to Oak Grove Road comprise two separate distinct land use patterns. The  
22 area from the UGB west to the exception area is rolling hills rising to the peak in the exception area,  
23 then diving sharply downward to the flat land, low elevation farm land to the west. While these  
24 areas may share the same soil, the difference in elevation and weather profiles make the two regions  
25 considerably different for commercial crop and timber production. It is not a coincidence that the  
26 larger active farm and forest parcels are predominately on the flat farm land to the west (Legacy  
27 Vineyard) where commercial agricultural uses can be made viable with good husbandry of the land.

28 The exception area lies in the middle of the study area and several of the parcels in the study area  
29 border the lands in the exception area. As noted, the study area is characterized by parcels that  
30 average just over 12 acres in size, typically have a non-resource dwelling. Where there are resource  
31 activities, a high percentage of those parcels are classified as "hobby farms", meaning that the  
32 activities on the land are for some other purpose than making a profit. Typically these uses are  
33 carried out in order to obtain and maintain a tax deferral, and/or for supplemental income, or for  
34 home use of the products generated from the resource activities. The primary purpose of these  
35 parcels is rural residential living, not commercial farming or forestry.

36 The conditions on the lands that surround the exception area affect the ability and the will to farm or  
37 grow timber. The types of practices that a farmer or forester can employ are affected by what  
38 surrounds the exception area. The types and varieties of crops available are also heavily influenced  
39 by what adjacent and nearby farmers grow because they can share knowledge, equipment and  
40 farming practices.

41 With respect to the relationship of the exception area with adjoining and surrounding study area, the  
42 lands adjacent and nearby have no positive impact on the farming in the exception area. There is no  
43 relationship historically between the exception area and the smaller "hobby farms" (the owners have  
44 outside jobs), and rural residential parcels that border on the east. The farms to the north across  
45 Orchard Heights Road are farmed in conjunction with large fields that have superior soils and  
46 growing conditions to those found in the exception area. The ridge line north of Orchard Heights  
47 Road opens up into a very large contiguous block of farm land in which uniform practices are  
48 possible. This is due to relatively level topography, deeper well drained soils and larger field sizes,  
49 land characteristics that are not present in the exception area.

1 Changing conditions in the surrounding area also affect the types of crops available to be grown.  
2 Over the years, the demand for the types of crops grown historically in the West Salem Hills have  
3 diminished such as cherries, prunes, Christmas trees, grass seed and grain as the yield of these crops  
4 also dropped. Some of the processing facilities for these crops have relocated or closed. The lack of  
5 irrigation in the exception area has also been a limiting factor.

6 With the proliferation of smaller parcels and the addition of rural residential dwellings and hobby  
7 farms, intensive farm practices, such as spraying and aerial harvesting cannot be undertaken in the  
8 exception area. That is even if those practices would be warranted given the land characteristics and  
9 weather patterns in the exception area.

10 This exception is warranted based on a host of complex factors including but not limited to elevation,  
11 wind exposure, sun exposure, shallow soils, preponderance of rock, cold temperatures related to  
12 elevation, and inability to irrigate. There are also no linkages to the other farm enterprises in the area  
13 that are less affected by the same factors. In addition, the small parcels and rural residential uses  
14 make commercial farming practices such that impacts from those surrounding uses drastically reduce  
15 the farming practices that would be needed to even marginally produce commercially farm or forest  
16 crops in the exception area, as exemplified by the many attempts made by the Simmons family prior  
17 to modifying the exception area to follow the parcelization pattern that has developed in the  
18 surrounding lands.

19 The exception area, which was entirely owned by the Simmons family for generations, and until  
20 recently, has been attempted to be farmed since before World War I. The Simmons family has  
21 attempted growing gooseberries, strawberries, prunes, cherries, fine fescue grass, Christmas trees  
22 and wheat, with little to no success.

23 The current proposal is a continuation of the family's attempt to employ the highest and best use of  
24 the land, which is in rural residential use. This conversion from poor farm and forest land to rural  
25 residential use began with the passage of Measure 37, allowing the creation of the parcels in the  
26 exception area. By sale of some of those parcels, and the uses employed thereon by the new owners,  
27 it became clear that the trend in the area toward smaller rural residential parcels was highly effective  
28 and popular with the general public. One only need to look at the huge and expensive homes built  
29 in the exception area to see how smaller parcels provide the highest and best use of the land. Even  
30 the 20 and 40 acre tracts that now exist present too large a land mass to be productive, making the  
31 best size in the 10-15 acre range, which matches up perfectly with the 12 acre average parcel size in  
32 the study area.

33 The exception area now sports an extensive layout of roads, as well as the extension of electricity  
34 and the development of several domestic wells. The amount expended for development in the  
35 exception area exceeds \$1 Million dollars, not including the costs of the three new homes built in  
36 the exception area.

37 The elevation of the subject properties is between 900 and 1,065 feet with steep slopes to the west  
38 and south at a high point at the southern end of the Eola Hills. This topography creates more  
39 challenging conditions for crop cultivation than properties that have been successful at establishing  
40 commercial vineyards and Christmas tree farms in the study area. Wind exposure is high since this  
41 southern promontory of the Eola Hills is in the path of coastal winds passing through the Van Duzer  
42 Gap. Moreover, the exception area location on the south side of a promontory means they receive  
43 more incidental solar radiation than most other areas of Polk County. The combination of solar  
44 exposure on steep south facing slopes and steady winds make raising crops on the subject properties  
45 impracticable because of elevated rates of transpiration sap, and available soil moisture which stunts  
46 growth and leads to crop failures. The slope, aspect and elevation in the exception area have  
47 contributed to crop failures because of cool temperatures that discourage pollinators, heavy rains,  
48 and constant wind damaging and stressing plants. While the exception area is predominantly  
49 comprised of soils that characterize agricultural and forest land, site constraints related to slope,  
50 aspect, excessive wind and abundant sun exposure prevent their ability to produce commercial  
51 agricultural and timber crops.

1 In the past several decades, vineyards have begun appearing in the West Salem Hills and the lands  
2 to the west of the exception area. However, wine grapes are not a suitable crop for the exception  
3 area due to growing limitations related to elevation, a lack of irrigation, crop damage from pests, a  
4 preponderance of boulders, and a lack of landscape uniformity to establish blocks with the  
5 appropriate aspect needed for commercial vineyards. The vast majority of vineyards in the area are  
6 below 600 feet in elevation. Nearby vineyards are at lower elevations than exist in the exception  
7 area. Cubanísimo Vineyards to the east of the subject properties is located on the leeward side of  
8 Glenn Hill at an elevation of approximately 950 feet. Nearby Legacy Estate Vineyard is located at  
9 the toe of the escarpment west of the exception area at an elevation of approximately 500 feet.  
10 Kathken Winery, to the northwest of the exception area is at an elevation of approximately 830 feet.  
11 Domaine Drouhin Oregon, Inc.'s vineyard northeast of the exception area is at an elevation of  
12 approximately 680 feet. While the aforementioned vineyards are all above 600 feet of elevation,  
13 except for the Legacy Estate Vineyard, they are not located on ridge tops, and are largely sheltered  
14 from the constant winds affecting the subject properties.

15 Expert testimony from Red Hills Soil, Professor Jones and Mike McLain all indicate the  
16 aforementioned factors effectively make the establishment of vineyards in the exception area  
17 impracticable.

18 Parcelization of lands in the study area surrounding the exception area has resulted in an ownership  
19 pattern that precludes the management of small holdings as larger farm units and has led to the  
20 proliferation of small scale specialty hobby farms. The only viable commercial agricultural  
21 operations exist on lands with different site characteristics and are much larger than the parcels in  
22 the exception area. According to the Inventory Study, the Legacy Vineyard site is 232 acres, of  
23 which less than half is actually planted. The Walker filbert orchard, in the flat lands to the west is  
24 242 acres. The Doubletrees forest parcel is nearly 100 acres planted in Christmas trees. The only  
25 other large parcels (Waldensee and Pratt) are both idle. Specialty crops such as grapes, filberts and  
26 Christmas trees profit greatly from their larger scale parcels which allows for lower production  
27 expenses, and more predictability in the harvest.

28 55% of the parcels in the study area are on a tax deferral program, however many of those parcels  
29 have structure values that exceed the assessed value of the land, meaning those parcels are “hobby  
30 farms” and are not commercial farming units. For these “hobby farm” parcels, agricultural income  
31 is simply not sufficient to support the costs of dwellings and other structural improvements on those  
32 lands. Therefore, money must be derived from sources other than farm income in order to construct  
33 and maintain the dwellings and structures. The only conclusion to be reached from this circumstance  
34 is that whatever agricultural activities are undertaken on those parcels are ancillary to the residential  
35 uses. The primary motivation of those owners is rural residential living and not farming. Any  
36 farming activities supplies only leisure activity for the owner, supplement income, or products for  
37 home consumption. In addition, those activities can maintain the economic advantages of a tax  
38 deferral program.

39 The small parcelization in the study area, driven in some part by rights granted under BM 37/49 also  
40 demonstrate the trend toward smaller more manageable land units. This smaller parcelization has  
41 resulted in a diversification of farming activities that is not dependent on processors that no longer  
42 exist, and on consumer demands that change periodically. Smaller tracts are conducive to specialty  
43 crops that can be grown in a hobby farm style rural residential parcel include horses and stables,  
44 Christmas trees and small wood lots for firewood.

45 Examples previously discussed include Cubanísimo Vineyards that began with a partition of a 32  
46 acre parcel into 12 acre and 20 acre parcels in 1978 (Polk County Planning File SE 78-18), followed  
47 by a farm dwelling approval in 1989 (Polk County Planning File FD 89-16). A conditional use permit  
48 approved wine sales and marketing as a home occupation in 2004 (Polk County Planning File CU  
49 04-21), including four (4) events attracting up to 300 visitors. While the site characteristics at  
50 Cubanísimo are much better for vineyard operations than on any parcel in the exception area, this  
51 growth pattern shows how much time and effort it takes for small vineyard to become productive.

1 Even with this scenario, the owner of Cubanissimo has had to supplement the cost of the vineyard  
2 and winery over much of this period with outside income from full time employment off-site.

3 The Legacy Vineyard, owned by Eola Hills Winery obtained a Plan Amendment and Zone Change  
4 in 2010 (PA 10-05 and ZC 10-06, respectively) to change the plan designation from Forest to Farm  
5 Forest and change the zoning designation from Timber Conservation (TC) to Farm Forest Overlay  
6 (FFO). A subsequent land use application (LUD 13-11) was approved to establish a winery.

7 As previously noted, the parcelization pattern in the West Salem Hills included the partition and  
8 dwelling approvals obtained by the Simmons family in the exception area.

9 These factors support the conclusion that the AF-10 zone would be compatible with surrounding  
10 land uses. This land use designation would also enable the Applicants to develop acreage home sites  
11 where the occupant could manage the smaller property for a range of specialty farm uses as a hobby  
12 even though the land is not suitable to make a profit in money from farm use. Large scale commercial  
13 agriculture on the subject properties is impracticable. Small scale specialty farms with single family  
14 dwellings have coexisted over the years with larger farm operations in their vicinity with little  
15 evidence of conflict.

16 The Applicants spent considerable time researching deed and building records to offer additional  
17 information during the Open Record Period. Through their research the Applicants re-examined  
18 the original Study Area identified as Exhibit V and identified parcels that were created and built  
19 on prior to 1970. The Applicants identified January 1, 1970, as an arbitrary start line for partial  
20 creation because it was before Statewide Goals or Guidelines apply and there was no Polk County  
21 Comprehensive Plan. Their research demonstrated that within the Study Area 51 houses were  
22 constructed without the application of land use regulation, or in the alternative that M37/49  
23 prohibited the application of land use regulations. In addition, the rights granted under M37/49,  
24 provide for the siting of an additional 10 dwellings for a total dwelling development done without  
25 any application of land use regulations of 61. These dwellings account for 40% of the total 153  
26 houses in the entire Study Area. There are 46 parcels that were created, and have not changed  
27 boundaries to this date, that were created before the application of land use regulations. An  
28 additional 10 parcels are authorized under M37/49, which means they are partitioned without  
29 application of land use regulations. Mr. Simmons was not able to determine when one parcel was  
30 created and it was not counted, so there is a total of 56 parcels within the Study Area that were  
31 created without the application land use regulations. This represents 26% of the 215 parcels in the  
32 Study Area. Therefore using only the parcels that have not had the application of the Statewide  
33 Goals and Guidelines or its implementing laws and ordinances, 40% of the dwellings in the Study  
34 Area and 26% of the parcels, this rises to a sufficient level of commitment to qualify the subject  
35 property for an irrevocably committed exception.

36 The Applicants also re-examined the 14 contiguous parcels given they are entitled to a higher level  
37 of scrutiny and determined that there are 10 existing dwellings on 14 existing parcels. The Applicants  
38 also acknowledged that additional parcels and dwellings were possible under M37/49 rights already  
39 granted.

40 In essence the relationship of the surrounding area to the exception area is much like a donut, where  
41 the surrounding area, as depicted in the Inventory Study, is the substance of the donut and the  
42 exception area is the hole. What happens in the surrounding area has a direct impact on what can  
43 happen in the exception area. From the facts presented, it seems clear the parcelization and rural  
44 residential trend in the surrounding area, together with the unfriendly growing conditions in the  
45 exception area, encourage the continued transformation of this area to rural residential parcels that  
46 are no smaller than 10 acres in size. The Applicants contend that the true standard of review under  
47 the irrevocably committed exception is wider than contiguous parcels but if reviewed under  
48 contiguous or adjacent, the subject properties are irrevocably committed.

1 **Hearings Officer Findings:**

2 In determining whether the land is irrevocably committed, the characteristics of the Exception Area,  
3 the adjacent land, and the relationship between the Exception area and the lands adjacent to it must  
4 be examined. The Applicants state that three of the 7 tax lots in the Exception area contain residential  
5 homes and the other 4 tax lots sit idle. In order to characterize lands that are adjacent to the proposed  
6 exception area, the Applicants have provided a Land Use Inventory that comprises approximately  
7 2,571 acres of surrounding land totaling the study area to 4 miles. Based on the original inventory  
8 and its update, the Applicants determined that 71% of the parcels within the surrounding area  
9 contain a single-family dwelling, the average parcel size to be 12.07 acres with 77% of the parcels  
10 being less than 10 acres in size, and 45% of the parcels to not be in farm or forest use or receiving  
11 any tax deferral benefits. The Applicants argued at hearing that the size of this study area was  
12 important and that when examining the Exception area it should be looked at as if it were a donut,  
13 the exception area is the hole in the middle of the donut and study area was the outer part because  
14 what happens in the surrounding area has a direct impact on what can happen in the exception area.  
15 During the Open Record period, the Applicants introduced additional evidence into the record  
16 regarding when the tax lots identified in Exhibit V were created in relationship to land use goals.

17 In *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757, 770 (2004) LUBA stated “the  
18 focus of the rule is the relationship between the subject property and adjacent uses, rather than uses  
19 approximately one-half mile from the subject property.” In *Scott v. Crook County*, 56 Or LUBA  
20 691 (2008), the county’s findings did not demonstrate error when they evaluated land within a  
21 one-mile radius of the subject property. In *Gordon v. Polk County*, 54 Or LUBA 351 (2007)  
22 LUBA stated that findings that analyze parcel sizes within a 2000-foot radius of the property and  
23 beyond, but do not discuss adjacent uses and ownership patterns, are inadequate. Thus, LUBA has  
24 not provided a specific distance requirement for a study area but rather has made case by case  
25 decisions while at the same time emphasizing the importance of analysis of adjacent uses and  
26 ownership patterns. Similarly OAR 660-004-0028(6) requires the county’s findings to focus on  
27 existing adjacent uses and parcel size and ownership patterns on adjacent lands. In evaluating  
28 these previous decisions and current rules, the Hearings Officer believes the appropriate size of  
29 the study area varies on a case by case basis and it is critically important to have thorough analysis  
30 of the uses on adjacent properties and their ownership patterns.

31 While it is clear that the Applicants have spent a significant amount of time and resources  
32 researching the large study area, the Hearings Officer finds the Study Area requested by the  
33 Applicants in these applications is too large of a study area given the language in the rules. The  
34 Hearings Officer finds that a Study Area of four (4) square miles (2,571 acres) around the subject  
35 properties is too expansive and has the ability to dilute the relevant information that is required to  
36 be analyzed by the administrative rules. Given that the information provided by the Applicants is  
37 divided either between all properties within four square miles or the 14 adjacent properties, the  
38 Hearings Officer will focus on the 14 adjacent properties to the Exception Area as the Study Area.

39 Of the 14 adjacent tax lots: 5 are zoned EFU, 2 are zoned Farm/Forest, and 7 are AR-5. Of these  
40 contiguous tax lots, there are 10 existing dwellings on 14 existing tax lots. The Applicants believe  
41 that because of M37/49, the contiguous properties have the ability to have 15 dwellings and 18 tax  
42 lots. OAR 660-004-0028(6)(c)(A) states, “...Resource and nonresource parcels created and uses  
43 approved pursuant to the applicable goals shall not be used to justify a committed exception...”  
44 The Land Use Inventory (Exhibit V) included surrounding Suburban Residential (SR) and Acreage  
45 Residential – Five Acre (AR-5) zoned properties, which are areas that have been planned and  
46 zoned for residential development. The Applicants provided an update to the Study Area in Exhibit  
47 V during the Open Record regarding the construction of houses without land use application. The  
48 Applicants reasoned that currently 51 houses out of 153 were constructed without land use  
49 regulation and that 10 more could be constructed under M37/49; therefore 40% of the total houses  
50 were created without application. They also argued that 46 tax lots were created prior to 1970 and  
51 have not changed boundaries and thus were created before the application of land use regulations  
52 and that there are an additional 10 tax lots that are authorized under M37/49, so a total of 26% of



1 the 215 tax lots in the Study Area were created without the application of any land use regulation.  
2 As discussed above, the Applicant's Land Use Inventory identifies the properties owned by  
3 "Hatchette", within Section 14, to be 4 parcels (Tax Lots 100, 104, 118 and 202), totaling 42.98  
4 acres plus an easement road. However, Community Development records indicate that the lawful  
5 parcel configuration of Tax Lot 202 also includes Tax Lot 901 (T7S, R4W, Section 11), and Tax  
6 Lot 114 (T7S, R4W, Section 14), containing approximately 24 acres, not 3.11 acres as represented  
7 by the Land Use Inventory. The Addendum provided during the open record period did not  
8 adequately address these discrepancies for properties within the study area. This example  
9 demonstrates how the Applicants' representation of "average parcel size" is likely based on  
10 calculations from tax lot sizes, not parcel sizes.

11 Again, the Hearings Officer finds this expansive Study Area has the effect of diluting the  
12 relationship between the Exception Area and the adjacent lands. Of the 14 contiguous properties  
13 to the exception area, the Applicants have identified three tax lots, Tax Lot 600 on Map 7.4.14,  
14 Tax Lot 200 on Map 7.4.23, and Tax Lot 500 on Map 7.4.23 that are created without land use  
15 regulation. However, of these 3 tax lots; 2 are the product of M37/49 and have yet to be exercised;  
16 thus, only one tax lot – Map 7.4.23 Tax Lot 500 was established prior to 1970. If only the adjacent  
17 properties are examined and only dwellings and tax lots that are in existence today, there is 1  
18 dwelling out of 10 dwellings (roughly 10%) and 1 tax lot out of 14 tax lots (roughly 7%) that were  
19 created without the application of land use regulation. All other resource and nonresource parcels  
20 created and uses approved on surrounding lands can be assumed to have been approved pursuant  
21 to the applicable Goals. In *Johnson v. Land County*, 31 Or LUBA 454 (1996), LUBA determined  
22 that a county's reliance on the existence of adjacent non-resource parcels in justifying a committed  
23 exception is impermissible where the findings do not adequately establish how or when the  
24 adjacent parcels were created. Therefore, surrounding parcels that were lawfully partitioned and  
25 developed pursuant to the applicable goals cannot be used to justify an irrevocably committed Goal  
26 Exception for the subject properties.

27 For these reasons, based on the evidence in the record, the Hearing Officer is not convinced that  
28 the relationship between the subject properties and the surrounding lands have committed the  
29 subject properties to uses not otherwise permitted by Goals 3 and 4.

30 **C. Whether uses or activities allowed by an applicable goal are impracticable as**  
31 **that term is used in ORS 197.732(2)(b), in Goal 2, Part II(b), and in this rule**  
32 **shall be determined through consideration of factors set forth in this rule, except**  
33 **where other rules apply as described in OAR 660-004-0000(1). Compliance with**  
34 **this rule shall constitute compliance with the requirements of Goal 2, Part II. It**  
35 **is the purpose of this rule to permit irrevocably committed exceptions where**  
36 **justified so as to provide flexibility in the application of broad resource**  
37 **protection goals. It shall not be required that local governments demonstrate**  
38 **that every use allowed by the applicable goal is "impossible." For exceptions to**  
39 **Goals 3 or 4, local governments are required to demonstrate that only the**  
40 **following uses or activities are impracticable:**

- 41 1. Farm use as defined in ORS 215.203;
- 42 2. Propagation or harvesting of a forest product as specified in OAR 660-  
43 033-0120; and
- 44 3. Forest operations or forest practices as specified in OAR 660-006-  
45 0025(2)(a) [OAR 660-004-0028(3)]

#### 46 Hearings Officer's Previous Findings:

47 Applicant notes that a local government may adopt an exception to a goal when the land subject  
48 to the exception is irrevocably committed to uses not allowed by the applicable goal because  
49 existing and adjacent uses and other relevant factors make uses allowed by the applicable goal  
50 impracticable. This criterion allows a local government to give permission for an exception. In this

1 case, there are so many factors individually and collectively that limit use that one can only  
2 conclude, in the judgment of the applicant, that the property as a whole is impractical to farm with  
3 an intent to make a profit. It is not any one factor on or off the site that makes this property difficult,  
4 applicant argues, it can be any one factor at a given location or all of them.

5 The applicants have put forward an argument, summarized on pages 36 to 40 of the Staff report,  
6 that the subject property can be divided into several sub-areas of diverse characteristics for analysis  
7 purposes, which make it impractical (or impracticable) to cultivate as a unit. Applicant states that  
8 every area on the property proposed in this rezone has multiple challenges depending on location.  
9 It may be pointed out that the applicant argues the tract as a whole is not suitable for agriculture,  
10 but some parcels are. Applicants concede that no area on the site is ideally suited for farming but  
11 some areas can be farmed for select crops with appropriate management practices. Applicants  
12 claim the forested portions of the subject property contain timber that has many defects from the  
13 excessive wind and snow loads that occur at this site. The common defects are blown out tops,  
14 excessive limbs, excessive tapering, and butt swell. The timbered portions of the property are not  
15 easily accessible either. The Simmons family did one very limited harvest but the logging operators  
16 were limited by having to bring all logs uphill. The loggers were discouraged from taking out any  
17 more timber than they did due to steep terrain and rocks. Again, however, applicant cites his own  
18 failure as evidence that commercial harvesting efforts are futile on the subject property. Evidence  
19 in the record demonstrates that the subject properties are suitable for forest production. Although  
20 growing marketable timber on the subject properties has proved challenging according to the  
21 applicant's statements, analysis of Natural Resource Conservation Service (NRCS) soils maps  
22 accessed using Polk County GIS analysis tools indicates the subject properties' soils are productive  
23 forest soils. Soils on the subject properties have an average forest capability of approximately 154  
24 cubic feet per acre annually. A forest soil capability index of 69 cubic feet per acre annually is  
25 average for the Pacific Northwest.<sup>5</sup> The subject properties' soils are capable of producing over  
26 twice as much wood fiber as the average local site managed for forest uses. The applicant points  
27 to "many defects from the excessive wind and snow loads that occur at this site", with "blown out  
28 tops, excessive limbs, excessive tapering, and butt swell" cited as common defects in timber grown  
29 in the past on the subject properties. Steep slopes on the western portion of the subject properties  
30 also present challenges with logging operations according to the applicant, although it is a general  
31 practice in this region to conduct timber harvests on steep slopes.

32 The applicant submitted additional evidence into the record on October 26, 2015, October 27,  
33 2015, November 10, 2015 and November 24, 2015 regarding the forest capability of the subject  
34 properties. The applicant's arguments concerning the timber capability of the subject properties  
35 focused on site specific issues related to topography, climate and challenges encountered during a  
36 single timber harvest. The record does not indicate that the subject properties have ever been  
37 actively managed for timber, even though its site index for forest propagation is double the average  
38 for the Pacific Northwest. Evidence submitted by the applicant addresses the suitability of the  
39 proposed exception area for soft wood timber production, notably Douglas fir. The prevailing  
40 aspect of the subject properties, composed mostly of steep south and west facing slopes, are not  
41 conducive to Douglas fir production because of high transpiration rates. Notwithstanding the vigor  
42 of the subject properties' soils for forest propagation, evidence in the record submitted by Sarah  
43 Deumling, owner of Zena Forest Products, and by Steve Vaught, a professional forester who is  
44 familiar with timber management in the Eola Hills, indicates the area is viable for timber  
45 management. In serial correspondence, Sarah Deumling details the timber operations of Zena  
46 Forest Products, a company that specializes in hard wood forest products. Zena Forest Products  
47 sustainably produces flooring and cabinet making materials, primarily from Oregon White Oak  
48 and Oregon Big Leaf Maple trees, on lands with similar site characteristics just north of the subject  
49 properties. Ms. Deumling has proposed to purchase the subject properties to manage them for hard

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<sup>5</sup> Conner, Roger & Thompson, Michael, *Timber Growth, Management, and Change*, USDA Forest Service, 2007

1 woods and has offered pro-bono consulting services to profitably produce hard wood forest  
2 products on the subject properties. Both Steve Vaught and Sarah Deumling attest to the legitimacy  
3 of hard wood forests for timber production, habitat values and soil and water conservation benefits.  
4 Considering that the proposed exception area has an average forest capability value of 154 cubic  
5 feet per acre annually, it has never been actively managed for forest production and there is a  
6 commercial hard wood forest operator in its immediate vicinity, the Hearings Officer concludes  
7 that the propagation and harvesting of forest products is practicable.

8 Staff concluded that the criteria require the applicant to demonstrate that farm and forest uses are  
9 impracticable on the subject properties, not that every use allowed under Goal 3 is impossible. The  
10 applicant cites geographic and climatic challenges on the subject properties that have contributed  
11 to a history of crop failures and infrastructure investments on the subject properties related to  
12 Measure 37 claims and Measure 49 authorizations as justification for the irrevocably committed  
13 Goal exception. The applicant acknowledges that specialty agriculture is currently practiced on the  
14 subject property, and stresses that no earnings from farming have been made since 2004.  
15 According to statements by the applicant, crops of prunes, cherries, gooseberries, wheat, grass seed  
16 and Christmas trees planted on the subject properties have failed in the past. The applicant relies  
17 on this history to demonstrate that the subject properties are generally unsuitable for commercial  
18 farming, which implies a profit in money. While farming on the subject properties may produce  
19 specialty crops, no profit in money has accrued from those activities for over a decade according  
20 to the applicant. The definition of "Farm Use" in ORS 215.203(2) means "the current employment  
21 of the land for the primary purpose of obtaining a profit in money." Absent a profit from  
22 agricultural activities, the subject properties could not be engaged in a farm use, per this definition.  
23 Staff understands the applicants argument to be that the development that occurred both on the  
24 subject properties, and parcels that were formally part of the farm unit, as a result of Measures 37  
25 and 49 (while the property was not subject to Goal 3) were essentially the tipping point that  
26 committed the properties. The applicant calls agriculture with no intent to make a profit "hobby"  
27 farming. Farming of this type is supported by the proposed Rural Lands plan designation and the  
28 corresponding AF-10 zone.

29 The applicant states that the subject properties cannot reasonably or feasibly be utilized for farm  
30 or forest use by itself or in conjunction with adjoining properties. Division of the subject properties  
31 following Measure 37 claims made by various members of the Simmons family, and the  
32 construction of three dwellings on its eastern portion have broken up the ownership of what was  
33 once an approximately 267-acre farm unit. The resulting parcelization and establishment of  
34 infrastructure to service the three new dwellings on the subject properties has made achieving  
35 economies of scale for agriculture difficult. Furthermore, according to the applicant, water, power  
36 and septic lines that connect the dwellings to domestic services have been placed underground,  
37 which make the management of the land for agriculture impracticable since the land cannot be  
38 plowed without interfering with this buried residential infrastructure. Roads serving existing  
39 dwellings on the subject properties are aligned so that they interfere with the orderly tilling of soil,  
40 and are gravel surfaced for residential use. Farm activities such as ripping, discing, seeding and  
41 spraying require large, uniform fields to be done efficiently. Gravel residential driveways crossing  
42 the middle of the subject properties both vertically and horizontally conflict with the efficient  
43 management of essential soil preparation and crop protection activities.

44 The subject properties arrived at their current configurations through a series of land use actions  
45 including three Measure 37 Claims, three partitions allowed under Measure 37, Vested Rights  
46 determinations related to property improvements made pursuant to Measure 37 Claims, and three  
47 Measure 49 authorizations that permitted five dwellings on the subject properties. Staff notes that  
48 the applications address recent residential development on the subject properties arising from these  
49 Ballot Measure 37 applications, Ballot Measure 49 authorizations, and vested rights  
50 determinations. The vested rights arguments were submitted by the applicant as part of this record  
51 to demonstrate that the subject properties are built and committed with streets, electric power,  
52 septic systems, communication systems and domestic wells. The applicant states that the amount

1 expended for the infrastructure improvements listed in the preceding paragraph is \$1,016,489.30.  
2 According to the applicant, this figure does not include the more recent studies for hydrology,  
3 transportation, wildlife, soils, agronomy and planning services. The eastern half of the properties  
4 have been the beneficiary of most of the expenditures for improved roads, wells, electric power,  
5 land clearing, surveying, sanitation testing and engineering. The westernmost 120 acres only has  
6 some roughed out roads and no utilities.

7 While the characteristics of the proposed exception area are considered relevant factors when  
8 taking an irrevocably committed goal exception, the emphasis of the exception is on the  
9 relationship between the proposed exception area and adjoining uses, and why that relationship  
10 commits the subject properties to uses not allowed by the goals. In this instance, the applicant  
11 contends that the lawful physical development that occurred under Measures 37 and 49 on the  
12 subject properties, while they were not subject to Goals 3 or 4, are changing conditions that, while  
13 may not have vested a Measure 37 use, rise to the level to have irrevocably committed the subject  
14 properties to uses not allowed by Goal 3. Neither this argument nor supporting evidence was  
15 extended to Goal 4 uses at the time of the Staff report. The applicant has since provided additional  
16 evidence in the record demonstrating that residential development around the subject property  
17 makes agriculture and forestry difficult by limiting the ability to spray due to the impact of drift  
18 on surrounding residential uses. The applicant has thoroughly documented the topographical,  
19 climate and cultivation challenges of the subject properties, while offering cursory review of how  
20 recent changes on adjoining lands has committed them to uses not allowed by the goals and  
21 whether allowing the proposed amendments would, in tum, commit adjacent or nearby lands to  
22 uses not allowed by the applicable goal. The applicant fails to adequately demonstrate how recent  
23 changes on adjacent lands make timber production on the subject properties impracticable. The  
24 seven properties comprising the proposed exception area are between 20 acres and 45 acres in size.  
25 The applicant's proposal contemplates 10 acre properties intended primarily for acreage residential  
26 uses and perhaps hobby farming. A proposal increasing the number a parcels in the proposed  
27 exception area would amplify internal conflicts with agricultural operations by creating smaller  
28 farm units. The Hearings Officer cannot ignore the inevitable loss of some resource land to the  
29 siting of proposed residences: Streets, sidewalks, driveways, storage sheds and septic systems, to  
30 mention the footprint of homes and outbuildings. While this factor alone may not be decisive, it  
31 does negatively qualify applicant's statement that no resource lands would be lost to agricultural  
32 and forestry uses.

33 Provisions found in OAR 660-004-0018(2)(b )(B) require that "rural uses, density and public  
34 facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable  
35 goal as described by OAR 660-004-0028." The applicant's proposal involves an "irrevocably  
36 committed" goal exception pursuant to OAR 660-004-0028, which necessitates an analysis of  
37 whether the proposal could commit adjacent or nearby resource land to uses not allowed by the  
38 applicable goal. Increasing the residential density of the subject properties would invariably create  
39 conflicts with nearby large agricultural operations due to spray drift, dust and the movement of  
40 farm machinery. While Oregon has "right to farm" laws that protect farmers from allegations of  
41 trespass, inherent conflicts between residential and agricultural uses increase the probability of  
42 nuisance lawsuits against farmers engaging in accepted agricultural practices such as tilling fields  
43 and spraying crops. The applicant submitted material into the record on November 24, 2015  
44 addressing the issue of drift from agricultural and forestry spray activities. The applicant contends  
45 that spray applications in connection with agricultural and forestry operations on the subject  
46 properties could drift to adjacent properties, causing damage to nearby crops and creating a  
47 nuisance for nearby residences. The applicant's argument is a double-edged sword, however, since  
48 the same reasoning could be employed by nearby wine grape and Christmas tree growers if the  
49 subject properties' primary use were residential.

50 The applicant states that two soil scientists evaluated the soils on the subject properties for their  
51 agricultural capability. Soil Scientists Joel Norgren and Andy Gallagher conducted a detailed soil  
52 study of the subject properties that supplements NRCS Soil Survey of Polk County (Soil Survey)

1 data found above. The soil studies authored by Norgren and Gallagher were not conducted in  
2 accordance with ORS 215.211 and, consequently, cannot be used to determine whether land  
3 qualifies as agricultural land, or to dispute the Soil Survey. The Soil Survey data shows that the  
4 subject properties are composed predominantly of agricultural soils with 53.5% being soils  
5 designated capability class II through IV. Land with a predominance of soils in capability classes  
6 I through IV is considered agricultural land per OAR 660-033-0030. Staff noted that the Norgren  
7 and Gallagher soil studies found units of Witzel soils, where the Soil Survey mapped none, and  
8 found a smaller share of Ritner soils on the subject properties. Both soil scientists mapped a  
9 predominance of agricultural soils on the subject properties with Gallagher stating that 55% of the  
10 subject properties' soils are in capability classes I through IV and Norgren finding 64.3% of the  
11 soils in capability classes I through IV.

12 While the NRCS Soil Survey and the Norgren and Gallagher soil studies for the subject properties  
13 would lead one to conclude it is agricultural land, the applicant states there are limiting factors that  
14 render it incapable of producing reliable crops at a commercial scale. The applicant observes that  
15 a number of factors complicate agricultural uses of the subject properties including but not limited  
16 to elevation, wind exposure, sun exposure, shallow soils, preponderance of rock, cold temperatures  
17 related to elevation, inability to irrigate and inability to burn crop residues. The elevation of the  
18 subject properties is between 900 and 1,060 feet with steep slopes to the west and south. As stated  
19 by the applicant, the subject properties are situated on a high point at the southern end of the Eola  
20 Hills. Wind exposure is high since this southern promontory of the Eola Hills is in the path of  
21 coastal winds passing through the Van Duzer Gap. Moreover, the subject properties' location on  
22 the south side of a promontory means they receive more incident solar radiation than other areas  
23 of Polk County. The applicant indicates that a combination of solar exposure on steep south facing  
24 slopes and steady winds make raising crops on the subject properties impracticable because  
25 elevated rates of transpiration sap available soil moisture, which stunts growth and leads to crop  
26 failures. The slope, aspect and elevation of the subject properties has contributed to crop failures  
27 resulting from cool temperatures that discourage pollinators, heavy rains precipitated from  
28 orographic lifting of clouds up the Eola Hills, and constant wind damaging and stressing plants.  
29 Applicant argues that while the subject properties are predominantly comprised of soils that  
30 characterize agricultural land, consistent with OAR 660-033-0030, site constraints related to slope,  
31 aspect, excessive wind and abundant sun exposure limit the ability of the subject properties to  
32 produce commercial agricultural crops. However, the Hearings Officer recalls that in a letter dated  
33 November 10, 2015, received the same date into the Record, the Land Use and Water Planning  
34 Coordinator for the Oregon Department of Agriculture explained that various physical factors such  
35 as slope and microclimates already are taken into account when a soil's agricultural capability  
36 rating is determined by the NRCS and referenced on corresponding soils maps. Applicant appears  
37 to count such difficulties twice in his arguments, given that physical constraints to agriculture are  
38 already factored into the NRCS soil's capability rating.

39 The applicant states that wine grapes are not a suitable crop for the subject properties, citing site  
40 specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a  
41 preponderance of boulders, and a lack of landscape uniformity to establish blocks with the  
42 appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette  
43 viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower  
44 elevations than the subject properties. Cubanisimo Vineyards to the east of the subject properties  
45 is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills  
46 Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject  
47 properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the  
48 subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon,  
49 Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While  
50 the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate

51 Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds  
52 affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the

1 variety of landscapes on which vineyards are planted, with east facing, west facing and south  
2 facing vineyards represented by the small sample above. However, the subject properties are more  
3 exposed to wind and sun than the vineyard sites surrounding it, lending credence to the applicant's  
4 observations that wine grape production is impracticable there. As noted above, however, some  
5 wine experts maintain that certain varieties of grapes flourish in that area despite prevailing winds.

6 Statements by the applicant indicate that lands in the vicinity of the subject properties exhibit an  
7 ownership pattern that hinders the management of small farm holdings as larger farm units, which  
8 has contributed to a proliferation of small scale specialty farms. According to 2011 Aerial  
9 Photographs and GIS measuring tools, small scale, specialty farms make up the adjacent uses  
10 immediately north of the subject properties, and to the east across Best Road. An 18.1-acre  
11 property north of the subject properties, commonly known as 1895 Best Road, contains an old  
12 orchard. A 15 acre property, commonly known as 1890 Best Road, is planted with Christmas trees.  
13 The next property to the south, 1860 Best Road, is a 14.6 acre property is planted for grass seed.  
14 Further south, a 19.7 acre property at 1800 Best Road appears to be used as pasture. The southerly  
15 adjacent property, 1679 Best Road, is a fallow 11.4 acre tax lot under common ownership with an  
16 Acreage Residential-Five Acre (AR-5) zoned tax lot separated by Best Road. A number of  
17 contiguous properties zoned AR-5 exist to the south of the subject properties that were included in  
18 the initial committed lands inventory leading up to acknowledgement of the Polk County  
19 Comprehensive Plan. The five remaining adjacent properties north and east of the subject  
20 properties, with the exception of the Eola Hills Wine Cellars' Legacy Estate Vineyard property  
21 discussed below, are between 48 acres and 101 acres in size and managed primarily as woodlots.  
22 Due to a steep escarpment on its west side, the subject properties are more closely associated  
23 geographically with adjacent properties along Best Road than those to the west taking access from  
24 Oak Grove Road, which is 600 feet in elevation lower.

25 Statements in the record indicate that the demand for the types of crops grown on the subject  
26 properties historically have diminished, such as cherries, prunes, Douglas fir Christmas trees, grass  
27 seed and grain, as the yield of these crops also dropped. Some of the processing facilities for these  
28 crops have relocated or closed. According to statements by the applicant, crops of prunes, cherries,  
29 gooseberries, wheat, grass seed and Christmas trees planted on the subject properties have failed  
30 in the past. The applicant relies on this history to demonstrate that the subject properties are  
31 generally unsuitable for commercial farming, which implies a profit. While farming on the subject  
32 properties may produce specialty crops, no profit in money has accrued from those activities for  
33 over a decade according to the applicant. The applicant also states that prohibition of irrigation on  
34 the subject properties and physical characteristics of the site have been a limiting factor in the  
35 ability to profitably manage it for agriculture. The applicant describes a new plan for farm uses  
36 that they have either established or intend to establish on the subject properties. The applicant  
37 provided a map indicating where crops or agricultural activities are either established or could be  
38 established but did not provide a written plan or profit and loss proforma. Nevertheless, Staff  
39 understands the applicant to mean that the new agricultural uses and plan are small scale and not  
40 profitable and the applicants argument to be that if a dwelling is permitted, the likelihood of the  
41 establishment of an agricultural activity, regardless of the fact that it would not be profitable, would  
42 be greater and better suited to small acreage parcels primarily used for residential purposes. Staff  
43 agreed with the applicant, that the parcelization and nonfarm development that occurred on the  
44 subject property while the property was not subject to Goal 3 has reasonably caused additional  
45 difficulty to commercially farm this particular area; especially as a larger farm unit. Based on the  
46 testimony and evidence provided by the applicant, Staff concluded that the subject properties are  
47 not suitable for farm use with the primary purpose of obtaining a profit in money. Based on the  
48 evidence in the record, the Hearings Officer does not come to this conclusion. The NRCS soil  
49 survey shows the tract as having very good agricultural capabilities, even taking into account  
50 various physical limitations such as slope and microclimate. The Hearings Officer presumes this  
51 indicates commercial capability, and applicants have not overcome this presumption by contrary  
52 evidence.

1 Materials submitted by the applicant indicate that the subject properties contain "timber that has  
2 many defects from the excessive wind and snow loads that occur at this site." Although growing  
3 marketable timber on the subject properties has proved challenging according to the applicant's  
4 statements, analysis of Natural Resource Conservation Service (NRCS) soils maps accessed using  
5 Polk County GIS analysis tools indicates the subject properties' soils are productive forest soils.  
6 Soils on the subject properties have an average forest capability of approximately 154 cubic feet  
7 per acre annually. A forest soil capability index of 69 cubic feet per acre annually is average for  
8 the Pacific Northwest.<sup>6</sup> The subject properties' soils are capable of producing over twice as much  
9 wood fiber as the average local site managed for forest uses. The applicant points to "many defects  
10 from the excessive wind and snow loads that occur at this site", with "blown out tops, excessive  
11 limbs, excessive tapering, and butt swell" cited as common defects in timber grown in the past on  
12 the subject properties. Steep slopes on the western portion of the subject properties also present  
13 challenges with logging operations according to the applicant, although it is common knowledge  
14 that logging in this region often must deal with steep slopes.

15 The applicant submitted additional evidence into the record on October 26, 2015, October 27,  
16 2015, November 10, 2015 and November 24, 2015 regarding the forest capability of the subject  
17 properties. The applicant's arguments concerning the timber capability of the subject properties  
18 focused on site specific issues related to topography, climate and challenges encountered during a  
19 single timber harvest. The record does not indicate that the subject properties have ever been  
20 actively managed for timber, even though its site index for forest propagation is double the average  
21 for the Pacific Northwest. Evidence submitted by the applicant addresses the suitability of the  
22 proposed exception area for soft wood timber production, notably Douglas fir. The prevailing  
23 aspect of the subject properties, composed mostly of steep south and west facing slopes are not  
24 conducive to Douglas fir production because of high transpiration rates. Notwithstanding the vigor  
25 of the subject properties' soils for forest propagation, evidence in the record submitted by Sarah  
26 Deumling, owner of Zena Forest Products, and by Steve Vaught, a professional forester who is  
27 familiar with timber management in the Eola Hills. In serial correspondence, Sarah Deumling  
28 details the timber operations of Zena Forest Products, a company that specializes in hard wood  
29 forest products. Zena Forest Products sustainably produces flooring and cabinet making materials,  
30 primarily from Oregon White Oak and Oregon Big Leaf Maple trees, on lands with similar site  
31 characteristics just north of the subject properties. Ms. Deumling has proposed to purchase the  
32 subject properties to manage them for hard woods and has offered pro-bono consulting services to  
33 profitably produce hard wood forest products on the subject properties. Both Steve Vaught and  
34 Sarah Deumling attest to the legitimacy of hard wood forests for timber production, habitat values  
35 and soil and water conservation benefits. Considering that the proposed exception area has an  
36 average forest capability value of 154 cubic feet per acre annually, it has never been actively  
37 managed for forest production and there is a commercial hard wood forest operator in its  
38 immediate vicinity, the Hearings Officer concludes that the propagation and harvesting of forest  
39 products is practicable.

40 Most of the land in the vicinity of the subject properties is zoned EFU. Per ORS 215.213(1)(b),  
41 implemented locally by PCZO 136.030(B), the propagation and harvesting of forest products is  
42 permitted in the EFU zone. As such, Goal 4, Forest Lands, must be addressed when amending the  
43 land use designation of lands considered suitable for forest uses. Some of the property surrounding  
44 the subject properties is either currently engaged in forestry, or was recently managed for forest  
45 purposes. Property to the northwest of the subject properties is managed for commercial timber,  
46 evident in 2011 Polk County Aerial Photography images. The approximately 48.4-acre EFU zoned  
47 property owned by Frank Tullius, identified as Tax Lot 700 in T7S, R4W, Section 14 contains  
48 37.2 acres of designated forest land according to information maintained by the Polk County  
49 Assessor's Office. Similarly, the property immediately west of the Frank Tullius land contains

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<sup>6</sup> Conner, Roger & Thompson, Michael, *Timber Growth, Management, and Change*, USDA Forest Service, 2007

1 approximately 42.7 acres of designated forest land on a 49.5-acre parcel. The adjacent property to  
2 the west, a 158 acre parcel zoned Farm/Forest, was the subject of a PCCP Map amendment and  
3 Zone Change in 2011. The amendment to Farm/Forest (FF) from Timber Conservation (TC)  
4 zoning was processed to allow a new property owner, Eola Hills Wine Cellars Inc., to establish a  
5 winery at what has become the Legacy Estate Vineyard. Prior to acquisition by Eola Hills Wine  
6 Cellars Inc., the 158-acre parcel was managed for commercial timber by various companies,  
7 including Zena Timber Company.

8 The applicant submitted additional evidence into the record on October 12, 2015, addressing forest  
9 practices on the subject properties. The applicant cites geographic and climatic factors related to  
10 elevation, wind, sun scald, cold temperatures, steep slopes a preponderance of boulders, and power  
11 line easements that make managing the subject properties for commercial forestry impracticable.  
12 An inventory of standing timber on the subject properties is presented by the applicant  
13 demonstrating that existing stands are a mix of merchantable timber, like Douglas fir and oak, and  
14 non-merchantable timber like maple. According to the applicant, existing trees on the subject  
15 property serve as a buffer benefitting adjoining properties. Although the applicant has submitted  
16 evidence in the record demonstrating that a mix of tree species and ages is present on the subject  
17 properties, there is little discussion of the subject properties' forest potential, as required by this  
18 rule. Evidence in the record submitted by Sarah Deumling, owner of Zena Forest Products, and by  
19 Steve Vaught, a professional forester who is familiar with timber management in the Eola Hills.  
20 In serial correspondence attests to the forest capability of the subject properties, Sarah Deumling  
21 details the timber operations of Zena Forest Products, a company that specializes in hard wood  
22 forest products. Zena Forest Products sustainably produces flooring and cabinet making materials,  
23 primarily from Oregon White Oak and Oregon Big Leaf Maple trees, on lands with similar site  
24 characteristics just north of the subject properties.'

25 Given the elevated capability of soils for growing timber on the subject properties, and current and  
26 historic timber operations on nearby lands, more information from the applicant concerning the  
27 potential ability of the subject properties to be managed for commercial timber operations is  
28 necessary to determine the proposal's consistency with Goal 4. The applicant provided information  
29 on October 12, 2015 regarding existing timber on the subject properties and describing climatic  
30 and geographic challenges thereon that limit the production of timber. However, information  
31 concerning the potential of the subject properties to grow merchantable timber is still lacking in  
32 the record. While the applicant's description of site specific limitations on the subject properties  
33 inhibiting commercial timber production has merit, it lacks information concerning the capability  
34 and economic viability of propagating and harvesting forest products across the entire proposed  
35 exception area. Based on the above, Staff concluded that applying the proposed Rural Lands PCCP  
36 designation to the subject property could be consistent with the provisions of OAR 660-004-  
37 0028(3), provided additional evidence demonstrating how commercially producing forest products  
38 is not economically viable within the exception area is provided by the applicant prior to or during  
39 the October 27, 2015 public hearing on this matter. With his additional evidence, a conclusion  
40 could be made that the applicant's proposal is inconsistent with Goal 4, Forest Lands.

41 As noted above, applicant submitted additional written materials immediately prior to the public  
42 hearing on October 27, 2015, entitled *Additional Findings Demonstrating Compliance with*  
43 *Statewide Planning Goal 4* (self authored) and *Custom Soil Resource Report* (dated October 16,  
44 2015) by the Natural Resources Conservation Service of USDA. The document dated October 26,  
45 2015, featured "empirical observations" concerning timber products by Frank Walker and  
46 Associates (FWA), as well as applicant Simmons. The document dated October 27, 2015, in  
47 considerable detail described the various soils in the subject tract. Applicant concludes that "The  
48 evidence clearly shows that no trees, including cherries, can survive long term in this mapping  
49 unit." Applicant states that the conclusion is based primarily on data in the custom report, and it  
50 appears generally to support applicant's contention that the tract is unsuitable as a forestry resource.  
51 At the same time, the Hearings Officer finds nothing to show that the report has been submitted to  
52 DLCD for review, as required by state legislative action. This rule, which applies to rezoning of



1 resource lands to non-resource uses, says only soil reports so reviewed can be considered by local  
2 governments in land use proceedings. DLCDC has raised an objection to this proceeding based on  
3 this requirement, as expressed in its letter received by Staff on October 27, 2015. While the  
4 materials described in this paragraph have become a part of the record, the Hearings Officer cannot  
5 see how he can give weight as evidence to the data therein.

6 **Applicant's Additional Findings:**

7 The Properties Are Not Suitable for Vineyards - The issue of the ability of the subject properties  
8 to support commercial vineyards has been studied extensively by several experts in the wine and  
9 vineyard fields.

10 Exhibit Y is a letter memorandum from Andy Gallagher, who is a recognized soil scientist, with  
11 a particular specialty in assisting property owners in the evaluation of property to potentially be  
12 used for vineyards. A key element in the study of the subject properties involved topography and  
13 weather patterns. Included in the Gallagher report is climate information from Dr. Greg Jones,  
14 who is a professor at Southern Oregon University, and who is an international expert on vineyard  
15 climatology.

16 This report notes that the topography and climate of the subject properties is not favorable for  
17 growing wine grapes. This opinion is due to the high elevation, exposure to wind, higher rainfall  
18 and overall cooler microclimate. The science is derived from indices developed at U. C. Davis,  
19 and establishes that for a commercial vineyard there must be from 2000 to 2200 "growing degree  
20 days" (GDD). This index includes complex measures of climatic conditions, and establishes a  
21 scientific measure for the probability of land becoming a productive commercial vineyard. After  
22 a review of the subject properties, and applying this index, it was determined that the predominate  
23 amount of the subject property falls below the minimum 2000 GDD standard, therefore making  
24 it unsuitable and unwise to attempt viticulture on the site.

25 In addition, Mike McLain, Vineyard Properties, a recognized expert on identification of vineyard  
26 property in the Willamette Valley was engaged to review the site and provide his expert opinion.  
27 He classified the subject properties as "higher risk" to a buyer based on its high elevation, its wrong  
28 facing slope and its high exposure to wind. Mr. McLain's letter report is attached hereto as Exhibit  
29 Z.

30 Property is Not Suitable for Forest Uses - A Forestland Suitability Analysis was performed on  
31 the subject properties by Cliff Barnhart, ACE, Stuntzner Engineering & Forestry, LLC, a well  
32 recognized expert on the development of forest lands in Oregon. His study is attached hereto as  
33 Exhibit W.

34 This study recognizes that a good share of the subject property is overtaken by scotch broom,  
35 blackberries and other brush. The focus of this study is on the large area of the subject property  
36 that is the western slope where there are trees intermixed with the brush. Of the 226.1 acres  
37 studied, 157.1 acres were found to historically be in scotch broom and other brush, or power line  
38 right of way or in non-forestry types of uses. Only 24.1 acres were found to contain some  
39 Douglas fir and Maple, and only 44.8 acres with Oak trees.

40 Using historical aerial photographs, the study demonstrates how the western slopes of the subject  
41 property have never been commercially used for timber or any type of forest uses. The trees that  
42 have grown up on these slopes are native volunteers that even with commercial management  
43 would not amount to a productive forest use. There appears to have been some tree cutting in the  
44 late 1960's, with some limited replanting of Douglas fir done in 1969.

45 Contributing factors determined in this study to the lack of suitability for forest use of the subject  
46 properties include the steep slopes of the western face; poorer soil types; the wind and rain effect  
47 on the west facing slopes; and fire risk since the subject properties are not within an ODF fire  
48 protection district.

1 Additional obstacles to development of the subject properties for forestry use include the inability  
2 to apply herbicides by helicopter due to the significant level of development on surrounding lands.  
3 Use of manual labor for spraying is cost prohibitive. There is also the inability to burn slash  
4 generated as a routine part of forestry management after harvest because of governmental  
5 restrictions, and smoke complaints. Noise from equipment operations, relay horn signals, back up  
6 beepers are also significantly restricted in a highly residential area such as is present on  
7 surrounding lands.

8 The Applicant submitted additional evidence during the Open Record period with an Addendum  
9 to the Forestland Suitability Analysis. This Addendum provided expert analysis as to the upper  
10 lands, 100+ acres on the subject properties. This Supplemental Forestry Study by Cliff Barnhart  
11 determined:

- 12 1. The upland area of 105.8 acres has a total of 14 acres committed to development such  
13 as dwelling and roads, leaving the net acreage for review at 91.8 acres.
- 14 2. The land has been committed to non-forestry uses since at least 1935.
- 15 3. Conversion of this upland area would require some effort and cost in the application of  
16 herbicides.
- 17 4. The land is not financially viable for forestry production based on the same issues raised  
18 in the original report for the western slopes.
- 19 5. Given the climate change, and the proliferation of fires, along the West Coast, and since  
20 2017 in Oregon, the risk of fire to timber, especially in areas with many dwellings, risen  
21 dramatically.
- 22 6. The subject property has a high voltage power line traversing it, and it is located in the  
23 middle of an area that has a large number of dwellings nearby. These are factors that  
24 contribute heavily to the increased fire risk.
- 25 7. Given the dramatic rise in fire risk, the liability insurers have stepped away from this  
26 market making it nearly impossible and financially unfeasible for small lot forest  
27 ownerships to obtain insurance.

28 Also, included with the study is a Financial Analysis that details the monetary elements involved  
29 in commercial forestry. Using the two generally accepted accounting measures for financial  
30 feasibility for forestry uses, the study determined that the net present value for an investment in  
31 this land for forestry uses would be between minus \$105 per acre upwards to minus \$391 per acre.  
32 Obviously the financial analysis of this property clearly shows that no commercial forestry uses  
33 can legitimately be implemented.

34 The Applicants also argue on the Rebuttal that there is no conflicting evidence with regard to the  
35 practicability of forestry uses on the Subject Property as they have the only expert evidence  
36 submitted. The Applicants argue the subject properties are not suitable for forestry uses, and the  
37 inability to institute forestry uses is shown in over 80 years of activity on the Subject Property by  
38 the Simmons family without ever even considering forestry uses due to the thin and rocky soil, the  
39 slopes and wind affect from the Van Duzer corridor.

#### 40 **Hearings Officer Findings:**

##### 41 *1. Farm Use as defined in ORS 215.203*

42 The Hearings Officer previously concluded that based on NRCS soils data, the subject properties  
43 have very good agricultural capabilities, even after taking into account various physical limitations  
44 such as slope and microclimate. Here, the Hearings Officer finds that the NRCS soils data  
45 demonstrates the subject properties have very good agricultural capabilities, even after taking into  
46 account various physical limitations such as slope and microclimate.

47 To address the Hearings Officer's previous findings, with these applications the Applicants provided  
48 additional expert testimony from Andy Gallagher, who is a recognized soil scientist, and Mike  
49 McLain, who is an expert in identifying vineyard properties within the Willamette Valley to address  
50 the subject properties vineyard capabilities. Both Mr. Gallagher and Mr. McClain's concerns for the

1 site seem to be for only pinot noir production. The Hearings Officer believes that there are other  
2 grapes, besides pinot noir, produced in the Willamette Valley for wine. The record is unclear if Mr.  
3 McClain and Mr. Gallagher evaluated the site for other types of grapes, or only Pinot Noir, However,  
4 Mr. McClain made a statement that “What would happen in all but the very best years (i.e. very early  
5 and warm until harvest) is that the fruit would only be sellable to a sparkling wine winery (they don’t  
6 want ripe flavors) or that the fruit would be rejected by the contracted winery because it doesn’t meet  
7 the minimum degree brix requirements of the contract. This implies to the Hearings Officer that the  
8 grapes will be sellable almost every year for sparkling wine thereby having the potential to generate  
9 gross income.

10 The Applicants also argue that slope and elevation are challenges too big to overcome for viable  
11 vineyard production on the subject properties. The Applicants rely on the reports authored by Mr.  
12 McLain and Mr. Gallagher to support their argument as to these challenges. However, Mr.  
13 Gallagher’s concerns regarding the site are related to pinot noir grapes as mentioned above. In  
14 evaluating the elevation, Mr. Gallagher concluded that with the elevation, the majority (60%) of  
15 the property puts it into the Winkler Index category 1a, suitable for hybrid wine grapes and only  
16 the earliest V. vinifera varieties. Mr. Gallagher analyzed data and determined that due to the  
17 elevation, the site is cooler than the median values for the much of the planted area in the Eola-  
18 Amity AVA; however, the growing degree-day and average growing season temperature values do  
19 still fall within cool climate suitability on average. Thus, Mr. Gallagher concluded:

20 On average the site would be expected to have vintage to vintage variability (1811 to 2111)  
21 which could still ripen fruit, but at the margins in the cooler years. For the extremes, the  
22 analogy here is that the warmest of years in a 30-year period, similar to 2015, would  
23 produce conditions that would be very conducive to ripening fruit at this elevation. On the  
24 other hand, the coolest of years in a 30-year period, similar to 2010, would produce  
25 conditions that would be very difficult to ripen fruit at this elevation. (Applications, Exhibit  
26 Y)

27 The Hearings Officer believes the evidence supports a finding that on average the subject property  
28 could have successful vineyard production. While extreme cold weather years may be hard, that is  
29 true for many agricultural products and certainly is not sufficient evidence to support a finding that  
30 farm use is impracticable.

31 During the review for PA 14-01 and ZC 14-02, findings stated that, “The Simmons have also been  
32 the only bona fide farmers to ever farm portions of this land since World War I” and “No gross  
33 earnings from farming have accrued to any of the participants in this zoning action since 2004”.  
34 These findings may now be invalid, as Staff found conflicting evidence that demonstrates at least  
35 two (2) of the subject properties are currently employed in farm use with an intent to make a profit  
36 in money. Staff reviewed Polk County’s Community Development records and found two (2)  
37 Agriculture Exemption Permits for two (2) of the subject properties (Tax Lots 602 and 603 in T7S,  
38 R4W, Section 14). Polk County’s Agriculture Exemption Permit requires applicant’s to “Be  
39 specific in describing your farm or forest enterprise, size of operation, and annual profit.” One of  
40 the Agriculture Exemption Permits was issued for Tax Lot 602 on March 6, 2017, which indicates  
41 that the farm operation consisted of 20 acres of fescue that was switched to orchard grass in 2016,  
42 with an annual profit of more than \$10,000. The other Agriculture Exemption permit was issued  
43 for Tax Lot 603 on July 12, 2018, which indicates that the farm enterprise consists of horse  
44 boarding, lessons, and chicken egg production with an annual profit of \$14,000. At the public  
45 hearing, the Applicant’s attorney, Mr. Lien, argued that this was potential profit not actual annual  
46 profit. Whether it is actual or anticipated profit, the agricultural permits demonstrate to the  
47 Hearings Officers that the subject properties have agricultural capabilities. The 2018 Polk County  
48 aerial photograph recently became available through Polk County’s GIS. Based on this recent 2018  
49 photograph, Staff determined that approximately 35 acres of the subject properties are currently in  
50 field crop production, which is located partially on Tax Lot 602 and partially on Tax Lot 603.  
51 These photographs are consistent with the statements provided in the Agricultural Exemption  
52 permit that was issued for Tax Lot 602 and with the statement made by Mr. Lafayette. Based on

1 the evidence in the record, the Hearings Officer finds that there is substantial evidence in the record  
2 to demonstrate that at least a portion of the subject properties are managed for farm use and are  
3 making a profit in money.

4 Based on evidence in the record, the Hearings Officer finds that the subject properties have  
5 agricultural capabilities. Evidence in the record further demonstrates that at least a portion of the  
6 subject property is currently being managed for farm use with an intent to make a profit in money.

7 *2. Forestry Practices - Propagation or harvesting of a forest product as specified in OAR*  
8 *660-033-0120 and Forest operations or forest practices as specified in OAR 660-006-*  
9 *0025(2)(a)*

10 The Hearings Officer previously concluded, “Considering that the proposed exception area has an  
11 average forest capability value of 154 cubic feet per acre annually, it has never been actively  
12 managed for forest production and there is a commercial hard wood forest operator in its  
13 immediate vicinity, the Hearings Officer concludes that the propagation and harvesting of forest  
14 products is practicable.” As discussed above, in order to ensure that the most up to date information  
15 is being evaluated for this review, Staff generated a new soils report for the subject properties, which  
16 is summarized in Table 2 above, and is based on soils data that was last updated on September 17,  
17 2018. Based on the most recent NRCS soils data available, Staff determined that the subject  
18 properties are cable of producing an average of approximately 154 cubic feet of wood fiber per  
19 acre, per year. Approximately 52 percent of the subject properties contain Class II and III soils,  
20 which is considered forest lands. The Hearings Officer finds the soil data is relevant and credible  
21 factor in examining all the evidence to determine if an Exception to Goal 4 exists.

22 The Applicants concluded that there is no ability to carry out commercial timber production or  
23 management for harvesting or related forest uses on the subject properties, based on a Forestland  
24 Suitability Analysis conducted by Cliff Barnhart, ACF, with Stuntzner Engineering and Forestry,  
25 LLC. (Exhibit W) This analysis indicates that the primary focus of the assessment is 1) physical site  
26 condition with respect to forest production; 2) the impacts of surrounding perimeter land uses; and  
27 3) the economic feasibility of commercial forest uses. Maps included with the assessment indicate  
28 that the entire subject property was evaluated, however, the narrative states that the primary focus of  
29 the assessment is the western slopes of the property, some of which is currently forested, while some  
30 of which is currently overtaken by scotch broom, blackberries, and other forms of brush vegetation.

31 Mr. Barnhart’s assessment included an evaluation of different land cover types for the subject  
32 properties based on 1935, 1969, and 2016 aerial photographs. These photographs depict five (5)  
33 different land cover types and how the land cover has changed over time. The five (5) classifications  
34 include: Douglas fir/maple forest, scotch broom/brush, oak forest, non-forest, and powerline right-  
35 of-way.

36 The area identified as “Type 1” includes Douglas fir and maple forests, which comprises  
37 approximately 24.1 acres of the subject property near the northwest corner of the proposed re-zone  
38 area. Aerial photographs indicate that this area has been forested for the 82-year period that aerial  
39 photographs are available. Findings indicate that the northern half of this area was harvested  
40 sometime around 1969, and the southern half was harvested around 1990. The northern area was not  
41 replanted after the 1969 harvest, but natural regeneration included a mix of maples and scattered  
42 Douglas fir trees. The southern area was replanted with Douglas fir trees, with an estimated survival  
43 rate of 25% and the remaining 75% currently contains brush and hardwoods.

44 The area identified as “Type 2” is composed of grass, scotch broom, and blackberries with scattered  
45 hardwood trees, which comprises approximately 48.0 acres near the south-central portion of the  
46 subject properties. Mr. Barnhart concluded that there are three scenarios for why this area lacks forest  
47 cover including, 1) fire history, 2) historic clearing for grazing, or 3) the site is not suitable for  
48 growing trees. In addition, farming and application of herbicides within this area could explain the  
49 lack of afforestation. Findings also indicate that it would be difficult to reforest this area with Douglas  
50 fir due to the southwest aspect and shallow soils. Findings indicate that Ponderosa pine is a more

1 suitable species for these types of conditions, however, it is the opinion of Mr. Barnhart that the  
2 economics of growing pine in this region is not favorable.

3 The area identified as “Type 3” is composed of naturally regenerated hardwood species over the last  
4 35 years, which comprises approximately 44.8 acres. Earlier photographs show the area to be  
5 historically comprised of land cover that is closer to “Type 2” vegetation, with the exception of some  
6 scattered hardwoods. Historic photographs also show that this area was cleared for agricultural  
7 purposes in the 1960’s. Mr. Barnhart notes that Douglas fir was not observed in the understory of  
8 the current oak stand.

9 An Addendum to Forestland Suitability Analysis was entered into the Record during the Open  
10 Record period to address the area identified as “Type 4”, which comprises the eastern half of the  
11 subject properties, an area approximately 105.8 acres in size. Type 4 is generally described as rolling  
12 ridgetop topography. There currently is not any forest vegetation within Type 4 other than two  
13 narrow strips along the eastern fence lines. Of the 105.8 acres included in Type 4, 14.0 acres are  
14 already committed to other uses and 91.8 are potentially available to convert to forest use. The area  
15 potentially available to forest production is currently vegetated with grass fields and primarily  
16 herbaceous vegetation. The Addendum states in part:

17 [C]onversion of Type 4A to forest productivity would require herbicide site preparation  
18 and planting. No clearing or brush piling would be required in this area. Douglas-Fir  
19 should be fairly easy to establish in this area as long as competing vegetation is controlled  
20 during the first five years of establishment in order to conserve moisture available to the  
21 trees, and to prevent outbreaks of field mice which like grass cover. The gentle northerly  
22 and easterly aspects in type 4A should be favorable to seedling survival under normal  
23 precipitation years.

24 ....

25 The upland area mapped as Type 4 includes a combination of Jory and Nekia silty clay  
26 loam soils. Both of these soil types have forest productivity ratings classified as being  
27 suitable for commercial forest uses.

28 ...

29 All of Type 4A could be operated on with ground machinery.

30 The Hearings Officer interprets the Addendum as describing Type 4 as possessing positive qualities  
31 for forest productivity; (1) no clearing or brush piling would be required; (2) gentle northerly and  
32 easterly aspects in type 4A should be favorable to seedling survival under normal precipitation years;  
33 (3) Douglas Fir could easily establish; soil is classified as being suitable for commercial forest uses;  
34 (4) all of the Type 4A could be operated with ground machinery.

35 While there would need to be some herbicide preparation, when evaluating all of the other factors,  
36 that factor alone can establish the forest use as impracticable. Further, considering the topographical,  
37 vegetative, and soil differences between Type 4 and Type 1 and Type 3, the Hearings Officer is not  
38 persuaded that the financial suitability analysis prepared for Type 1 and Type 3 is accurate for Type  
39 4. The DCF model for Type 1 and 3 relied on the soil productivity reported by the NRCS soil survey.  
40 The soil productivity is higher for Type 4. It is logical to assume that with a higher soil productivity  
41 that potential for productivity (i.e. timber volume) would be higher. It is also logical to conclude that  
42 minimum site preparation, the ability to use ground machinery, and a high survival rate for seeding  
43 would all result in lower input costs, which would result in higher profit margins.

44 While the Simmons family has never tried commercial forest productivity, that does not mean it  
45 is impracticable. Given all of the evidence in the record, the Hearings Officer finds the applications  
46 do not demonstrate that forestry operations or practices are impractical.

47 **D. A conclusion that an exception area is irrevocably committed shall be supported**  
48 **by findings of fact that address all applicable factors of section (6) of this rule and**

1 by a statement of reasons explaining why the facts support the conclusion that  
2 uses allowed by the applicable goal are impracticable in the exception area.; [OAR  
3 660-004-0028(4)]

4 E. Findings of fact and a statement of reasons that land subject to an exception is  
5 irrevocably committed need not be prepared for each individual parcel in the  
6 exception area. Lands that are found to be irrevocably committed under this rule  
7 may include physically developed lands. [OAR 660-004-0028(5)]

8 F. Findings of fact for a committed exception shall address the following factors:  
9 [OAR 660-004-0028(6)]

10 1. Existing adjacent uses; [OAR 660-004-0028(6)(a)]

11 Hearings Officer's Previous Findings: The applicants say adjacent land uses are unusually  
12 varied, including a discussion of the elevation of Willamette vineyards, on pages 45 and 46 of the  
13 Staff report.

14 Applicant says if wine grapes could grow on the property, they would already be here.

15 The proponents have strongly held beliefs that an exception is warranted based on a host of  
16 complex factors including but not limited to elevation, wind exposure, sun exposure, shallow soils,  
17 preponderance of rock, cold temperatures related to elevation, inability to irrigate and inability to  
18 burn crop residues. In addition, there are no linkages to the other farm enterprises in the area that  
19 are less affected by the same factors. Also, there are two borders where all the parcels are zoned  
20 for non-resource use and thus no complementary farm enterprises.

21 Staff notes that statements by the applicant indicate that lands in the vicinity of the subject property  
22 exhibit an ownership pattern that hinders the management of small farm holdings as larger farm  
23 units, which has contributed to a proliferation of small scale, specialty agriculture in the area. Staff  
24 notes that the nearest large agricultural operations to the subject properties are Christmas tree farms  
25 and vineyards. A rural residential exception area is also adjacent to the southern parcels of the  
26 exception area. Due to an escarpment on the west side, applicants believe the subject properties  
27 are more closely associated geographically with adjacent properties along Best Road than those to  
28 the west taking access from Oak Grove Road, which is 600 feet lower in elevation.

29 The applicant states that wine grapes are not a suitable crop for the subject properties, citing site  
30 specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a  
31 preponderance of boulders, and a lack of landscape uniformity to establish blocks with the  
32 appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette  
33 viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower  
34 elevations than the subject properties. Cubanisimo Vineyards to the east of the subject properties  
35 is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills  
36 Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject  
37 properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the  
38 subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon,  
39 Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While  
40 the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate  
41 Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds  
42 affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the  
43 variety of landscapes on which vineyards are planted, with east facing, west facing and south  
44 facing vineyards represented by the small sample above. However, the subject properties are more  
45 exposed to wind and sun than the vineyard sites surrounding it, lending some --- though not  
46 conclusive --- credence to the applicant's observations that wine grape production is impracticable  
47 there.

48 Using 2011 Aerial Photographs and GIS measuring tools, Staff estimated the size of the largest  
49 agricultural operations in the vicinity of the subject properties. Eola Hills Wine Cellars' Legacy

1 Estate Vineyard has approximately 75 acres of vineyard planted on a 160 acre parcel immediately  
2 west of the subject properties; Domaine Drouhin Oregon, Inc. has approximately 140 acres of  
3 vineyard planted on four adjacent parcels totaling approximately 278 acres about a mile northeast  
4 of the subject properties; Doubletrees Land & Timber, LLC has approximately 120 acres of  
5 Christmas trees planted on an approximately 170 acre property about one third of a mile southeast  
6 of the subject properties; Schudel Enterprises, LLC owns approximately 198 acres immediately  
7 west of the Domaine Drouhin Oregon, Inc. and grows Christmas trees on approximately 185 of  
8 those acres; and, across Orchard Heights Road from the subject properties, Charles and Andrea  
9 Hatchette own ten contiguous tax lots comprising approximately 147 acres planted with over 100  
10 acres of Christmas trees. Growing specialty crops at a larger scale generally means lower input  
11 costs, and more predictability at harvest.

12 Land use changes on properties in the vicinity of the subject properties generally support the  
13 applicant's statements regarding the proliferation of small scale farms in the area. Staff developed  
14 Table 3 on page 33 of this report to characterize the nature of specialty agriculture in the vicinity  
15 of the subject properties. The 2014 Polk County Assessor's Office records were referenced for the  
16 assessed values of land and structures located on EFU lands within 1,000 feet of the subject  
17 properties to help evaluate whether nearby lands are primarily used for agricultural or residential  
18 purposes. There is no evidence demonstrating whether or not surrounding properties are able to  
19 make a profit in money from agriculture. Therefore, to help understand whether or not surrounding  
20 small farm operations rise to the level of a commercial farm where there is the intent to make a  
21 profit in money we can assume that properties engaged primarily in agriculture generally have  
22 higher assessed values for land relative to structures thereon.

23 Of the 21 properties zoned EFU within 1,000 feet of the subject properties, eight have higher  
24 assessed values for structures than for the underlying land. Two of the properties for which land is  
25 assessed at a higher value than the structures thereon are not receiving farm deferrals, which would  
26 inflate the assessed value of the those lands. Staff observes that three of the 12 nearby EFU  
27 properties having higher assessed values for land than for structures are vacant. Accordingly, it  
28 can be argued that, within 1,000 feet of the subject properties, there are nearly as many small scale  
29 farms among EFU properties with residences than there are large commercial farming operations.  
30 A majority of the EFU lands to the north and west of the subject properties are, or could be, large  
31 commercial scale farms. The applicant has characterized the properties to the east as "hobby"  
32 farms. A definition of a "hobby" farm from Internal Revenue Service (IRS) is generally accepted  
33 to mean that there is no intention by the farm operator to make a profit from agricultural activities.<sup>7</sup>  
34 Staff observed that EFU zoned properties near the subject property that have higher assessed  
35 values for structures than for the underlying land and may qualify as hobby farms by this definition.  
36 Without economic data for the surrounding properties, Staff is making the assumption that  
37 agricultural income would not be sufficient to support the costs of dwellings and other structural  
38 improvements on those lands. Therefore, capital derived from sources other than farm income  
39 from these neighboring properties would be necessary to construct and maintain the dwellings and  
40 structures, leading one to conclude that agricultural activities thereon are ancillary to the residential  
41 uses. This does not in itself allow the conclusion that surrounding properties are not capable of or  
42 are not currently making a profit in money from agriculture; only that it may not be the primary  
43 activity or use of the land.

44 Measure 37 claims were made on two properties adjoining the subject properties. One of the  
45 Measure 37 claims was succeeded by Measure 49 Order No. E132401, which permits the  
46 establishment of two additional parcels for a total of three home sites on Tax Lot 200 in T7S, R4W,  
47 Section 23. Pursuit of potential land entitlements under Measures 37 and 49 are emblematic of  
48 trend towards a growing number smaller agricultural parcels occurring in the vicinity of the subject

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<sup>7</sup> FS-2007-18, *Business or Hobby? Answer Has Implications for Deductions*, Internal Revenue Service, (April 2007), <https://www.irs.gov/uac/Business-or-Hobby%3F-Answer-Has-Implications-for-Deductions>, viewed 10/19/15.

1 properties over the past several decades. This has resulted in a diversification of farming on a small  
2 scale with equine stables, Christmas tree farms, grass seed growers, wood lots, and vineyards and  
3 wineries operating within a thousand feet of the subject properties. Recent changes on these nearby  
4 properties exemplify the shift to small scale specialty agriculture. Cubanisimo Vineyards began  
5 with a partition of a 32-acre parcel into 12-acre and 20-acre parcels in 1978 (Polk County Planning  
6 File SE 78-18), followed by a farm dwelling approval in 1989 (Polk County Planning File FD 89-  
7 16). A conditional use permit approved wine sales and marketing as a home occupation in 2004  
8 (Polk County Planning File CU 04-21), including four (4) events attracting up to 300 visitors.  
9 Another commercial winery was established within the past ten years adjacent to the subject  
10 properties. Eola Hills Winery purchased a large parcel immediately west of the subject properties  
11 which was the subject of Plan Amendment and Zone Change applications in 2010 (PA 10-05 and  
12 ZC 10-06, respectively) to change the PCCP designation from Forest to Farm Forest and change  
13 the Zoning designation from Timber Conservation (TC) to Farm Forest Overlay (FFO). A  
14 subsequent land use application (LUD 13-11) was approved to establish a winery at what is now  
15 known as the Legacy Estate Vineyard. The winery offers wine tasting, company picnics and  
16 wedding ceremonies at their Legacy Estate Vineyard location.

17 Over the past decade a series of partitions of the original Simmons holdings, identified as LP 05-  
18 20, LP 05-22, and LP 05-23, and memorialized in Partition Plats 2006-0027 through 2006-0029,  
19 have resulted in the current configurations of the subject properties. These recent land partitions  
20 were made possible by three (3) Measure 37 Claims (identified as M 05-09, M 05-13, and M 05-  
21 14). Subsequent vesting determinations by Polk County Planning Division, identified as file  
22 numbers VRD 09-01 through VRD 09-03, upheld these Measure 37 partitions. The Measure 37  
23 partitions of the subject properties created six parcels to bring the total number of parcels to nine  
24 (9). Following the Measure 37 Claims (Claims) and corresponding vested rights determinations, a  
25 suite of Measure 49 claims were submitted, which resulted in three Measure 49 Final Order and  
26 Home Site Authorizations (Final Order) approved by DLCD. Final Orders arising from these three  
27 Claims provided for five dwelling entitlements for the subject properties. The Final Orders  
28 referenced above authorized five dwellings on the parcels vested under Measure 37. Of the five  
29 authorized dwellings under Measure 49, three have been built. These dwellings are on Tax Lots  
30 602 and 603 in T7S, R4W, Section 14 and Tax Lot 101 in T7S, R4W, Section 23. Based on a  
31 review of the Polk County Assessor records, the subject properties currently contain a total of three  
32 dwellings.

33 A large area of committed lands, substantially isolated from the exception area by steep slopes,  
34 resides to the south of the subject properties. This committed lands area, comprising approximately  
35 1,100 acres of AR-5 zoned land, extends south to Highway 22 and west to the Salem city limits.  
36 Ten of the fourteen AR-5 parcels nearest the subject properties are owned by William Curtright  
37 and are vacant (T7S, R4W, Section 24 Tax Lots 303 - 308 and T7S, R4W, Section 23 Tax Lots  
38 1000 & 1003 - 1005). Each of these vacant AR-5 parcels could be developed with dwellings,  
39 although they have been in their current ownership for over 20 years and are still vacant. Should  
40 the applications be approved, one 20 acre parcel zoned EFU (located at 1785 Best Road) would be  
41 surrounded by properties with Rural Lands Plan designations. This property was created and  
42 authorized by a Measure 37 Claim, Parcel 3 in Partition Plat 2006-0029, and the dwelling was  
43 subsequently approved by Measure 49 Order number H132890C. Since the 20 acre parcel and the  
44 dwelling thereon were approved absent review relative to the Statewide Planning Goals, Staff  
45 anticipates that the proposed goal exception would not commit the home site to uses other than  
46 those allowed by Goal 3 since it has already been created and developed for nonfarm use.

47 The applicant contends that the subject properties are compatible with the properties in the vicinity  
48 and that the subject properties cannot reasonably or feasibly be utilized for farm or forest use by  
49 themselves or in conjunction with adjoining properties. Division of the subject properties  
50 following Measure 37 claims made by various members of the Simmons family, and the  
51 construction of three dwellings on its eastern portion have broken up the ownership of what was  
52 once an approximately 267-acre farm unit. The resulting parcelization and establishment of



1 infrastructure to service the three new dwellings on the subject properties has made achieving  
2 economies of scale for agriculture difficult. Furthermore, water, power and septic lines that  
3 connect the dwellings to domestic services have been placed underground, rendering the  
4 management of the land for agriculture impractical, since the land cannot be plowed without  
5 interfering with this buried residential infrastructure. Roads serving existing dwellings on the  
6 subject properties are aligned so that they interfere with the orderly tilling of soil, and are gravel  
7 surfaced for residential use. Farm activities such as ripping, discing, seeding and spraying require  
8 large, uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
9 properties both vertically and horizontally conflict with the efficient management of soil  
10 preparation and crop protection activities.

11 While the characteristics of the proposed exception area are considered relevant factors when  
12 taking an irrevocably committed goal exception, the emphasis of the exception is on the  
13 relationship between the proposed exception area and adjoining uses, and why that relationship  
14 commits the subject properties to uses not allowed by the goals. In this instance, the applicant  
15 contends that the lawful physical development that occurred under Measures 37 and 49 on the  
16 subject properties, while they were not subject to Goals 3 or 4, are changing conditions that, while  
17 may not have vested a Measure 37 use, rise to the level to have irrevocably committed the subject  
18 properties to uses not allowed by Goal 3. Neither this argument nor supporting evidence was  
19 extended to Goal 4 uses at the time of the Staff report. The applicant has since provided additional  
20 evidence in the record demonstrating that residential development around the subject property  
21 makes agriculture and forestry difficult by limiting the ability to spray due to the impact of drift  
22 on surrounding residential uses. The applicant has thoroughly documented the topographical,  
23 climate and cultivation challenges of the subject properties, while offering cursory review of how  
24 recent changes on adjoining lands has committed them to uses not allowed by the goals and  
25 whether allowing the proposed amendments would, in turn, commit adjacent or nearby lands to  
26 uses not allowed by the applicable goal. The applicant fails to adequately demonstrate how recent  
27 changes on adjacent lands make timber production on the subject properties impracticable. The  
28 seven properties comprising the proposed exception area are between 20 acres and 45 acres in size.  
29 The applicant's proposal contemplates 10 acre properties intended primarily for acreage residential  
30 uses and perhaps hobby farming. A proposal increasing the number of parcels in the proposed  
31 exception area would amplify internal conflicts with agricultural operations by creating smaller  
32 farm units. The Hearings Officer cannot ignore the inevitable loss of some resource land to the  
33 siting of proposed residences: Streets, sidewalks, driveways, storage sheds and septic systems, to  
34 mention the footprint of homes and outbuildings. While this factor alone may not be decisive, it  
35 does negatively qualify applicant's statement that no resource lands would be lost to agricultural  
36 and forestry uses.

37 Provisions found in OAR 660-004-0018(2)(b )(B) require that "rural uses, density and public  
38 facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable  
39 goal as described by OAR 660-004-0028." The applicant's proposal involves an "irrevocably  
40 committed" goal exception pursuant to OAR 660-004-0028, which necessitates an analysis of  
41 whether the proposal could commit adjacent or nearby resource land to uses not allowed by the  
42 applicable goal. Increasing the residential density of the subject properties would invariably create  
43 conflicts with nearby large agricultural operations due to spray drift, dust and the movement of  
44 farm machinery. While Oregon has "right to farm" laws that protect farmers from allegations of  
45 trespass, inherent conflicts between residential and agricultural uses increase the probability of  
46 nuisance lawsuits against farmers engaging in accepted agricultural practices such as tilling fields  
47 and spraying crops. The applicant submitted material into the record on November 24, 2015  
48 addressing the issue of drift from agricultural and forestry spray activities. The applicant contends  
49 that spray applications in connection with agricultural and forestry operations on the subject  
50 properties could drift to adjacent properties, causing damage to nearby crops and creating a  
51 nuisance for nearby residences. The applicant's argument is a double-edged sword, however, since  
52 the same reasoning could be employed by nearby wine grape and Christmas tree growers if the  
53 subject properties' primary use were residential.

1 Based on materials and statements in the record, Staff generally supported the applicant's  
2 conclusion that the proposal is consistent with land use patterns and uses in the vicinity of the  
3 subject properties. The applicant subsequently submitted evidence to the contrary. Nevertheless,  
4 the Hearings Officer finds that evidence is lacking that would demonstrate the relationship with  
5 existing adjacent uses has made either farm or forest use of the subject properties impracticable.

#### 6 **Applicant's Additional Findings:**

7 The land use inventory, Exhibit V, details all the characteristics of the adjacent and surrounding  
8 lands. The inventory study included an analysis of every property on a total of four sections that  
9 surround the exception area. The study area Map includes all 8 Assessor maps in Sections 13, 14,  
10 23 and 24, in Township 7S, Range 4W. The total study area is approximately 4 miles square,  
11 encompassing approximately 2,571 acres.

12 There are 215 useable Tax Lots, plus three easement roads, two tower sites and two well sites, for  
13 an effective total of 222 Tax Lots. There are 153 houses on the 215 parcels, equating to 71% of the  
14 parcels in the study area have single family dwellings. Almost all the parcels that are identified in  
15 actual farm use do not have a dwelling located on-site.

16 The average parcel size in the study area is 12.07 acres. 165 of the 215 parcels are under 10 acres in  
17 size, meaning 77% of the parcels in the study area are under 10 acres in size.

18 118 of the 215 Tax Lots are in farm or forest deferral programs, and 97 are not, meaning only 55%  
19 of the parcels are in a deferral program. Even this figure is deceptive since 104 of the 215 parcels  
20 have structure values that exceed the land value, making these by IRS definition "hobby farms".  
21 This means that 48.8% of the parcels in the study area can be classified as "hobby farms". Parcels  
22 which are granted deferral status, despite the fact that the owners derive their income from sources  
23 other than employment of agricultural or forestry practices on their land. These owners generally  
24 work a full time job off-site which supports the capital investment in the parcel.

25 There is one large commercial vineyard (Eola Hills) in the study area that is a total of 232.1 acres in  
26 size, and encompasses three tax lots. There is one large Filbert Orchard (Walker) in the study area  
27 that is 242.02 acres in size, and is encompassed in two tax lots. There is one large tree farm  
28 (Doubletrees Land and Timber) in the study area that is 169.63 acres in size. There is one large  
29 ownership (Waldensee LLC) that is 99.18 acres in size which is idle at this time. There is one large  
30 ownership (Pratt) that is 91.38 acres in size which appears to be idle at this time as well. Aside from  
31 these large ownerships, no other parcel in the study area is over 50 acres in size. It should be noted  
32 that these large parcels are all on the flatter land to the west, with considerably different land  
33 characteristics that exist in the higher elevations of the exception area.

34 There are several parcels in the study area that are owned in combination with other parcels by one  
35 owner, and those are detailed above.

36 The study area contains some of the most valuable homes in the Willamette Valley. 21 of the parcels  
37 here are valued at over \$1,000,000, nearly 10% of the entire study area. 82 more of the parcels in  
38 the study area are valued at more than \$500,000, which is over 38% more of the parcels in the study  
39 area. Combined, parcels in the study area that have valuation of over \$500,000 is 103, meaning over  
40 48% of the parcels in the study area are very high value non-resource related homesites.

41 110 of the parcels are zoned EFU. 4 of the parcels are zoned FF. 1 of the parcels is zoned TC. 99  
42 of the parcels are zoned AR-5, which figure may actually be 100, as one of the parcels is identified  
43 by the county as being zoned AR, however it is most likely that parcel is also zoned AR-5. 4 of the  
44 parcels are zoned SR.

#### 45 **Hearings Officer Findings:**

46 Prior to the hearing, Angela Carnahan from DLCD submitted comments into the record that the Land  
47 Use Inventory submitted by the Applicants encompassed too large of an area. Open Record period  
48 comment also raised argument that the size of the Study Area diluted what was actual occurring in  
49 the adjacent lands. The Applicants argued the exception area should be looked at as if it were a

1 donut, and the exception area is in the inside hole and examination of a larger area (the meat of the  
 2 donut), adjacent to the Exception area should be examined. The Hearings Officer finds that utilizing  
 3 4 square miles (approximately 2,571 acres) as "adjacent" lands to the subject properties (totaling  
 4 228 acres) means the size of the Exception area is not even 10% percent of the total area of land  
 5 in the Applicants' Land Use Inventory and this Inventory is too large to examine the existing  
 6 adjacent uses. The Hearings Officer will focus on the contiguous tax lots to the exception area in  
 7 order to determine if the existing adjacent uses irrevocably commit the exception area. There are 14  
 8 contiguous tax lots and the Applicants included information about each tax lot in their applications  
 9 as well as during the Open Record period. The Hearings Officer summarizes the information below:

Map	Tax Lot and Size	Zoning	Additional Information
7.4.13B	Tax Lot 2400 – 14.64 Acres	EFU	This property is located across Best Road. It does have Christmas trees planted on it.
7.4.13	Tax Lot 1701 – 19.71 Acres	EFU	This property is located across Best Road. The Applicants believe no active farming is occurring on this property however they also observed in 2017 there was a fenced grass field.
7.4.24	Tax Lot 300 – 5.19 Acres	AR-5	Adjacent to Tax Lot 601. This property contains Dense Timber. The Applicants believe close dwelling compound to property line inhibits agricultural and forest uses on Simmons property.
7.4.24	Tax Lot 303 – 4.02 Acres	AR-5	Applicants contend this property is solely for residential use due to size. This impacts farm use practices for Simmons (livestock) and Lathen (grass seed and Christmas Trees). No way for farm use on Simmons and Lathen properties to be buffered or screened from the permitted residential use.
7.4.23	Tax Lot 102 – 20 Acres	EFU	This property has been used as cherry orchard and it currently has a portion being farmed for grass seed planted. The Applicants have raised concern that Tax Lot 101 cannot plant Christmas trees because of high chemical impact and proximity to this property where children live. Applicant Simmons again raises concern over home proximity to potential swine operation. This property was previously owned and farmed by Applicant Simmons.
7.4.23	Tax Lot 1004 – 11.42 Acres – Same Owner as Tax Lot 1003	AR-5	This property is currently vacant. The Applicants discuss how this property could be developed and potential impacts.
7.4.23	Tax Lot 1003 – 11.42 Acres – Same Owner as Tax Lot 1004	AR-5	This property is currently vacant. The Applicants discuss how this property could be developed and have potential impacts.
7.4.23	Tax Lot 1020 – 5.7 Acres	AR-5	This property is used for residential use. Applicants argue this property could affect

			customary forest practices, including helicopter spraying and harvesting.
7.4.23	Tax Lot 1010 – 4.92 Acres	AR-5	This property is used for residential use. Applicants argue establishment of another dwelling impacts fire concern. More dwellings affect forest management practices.
7.4.23	Tax Lot 1015 – 5.02 Acres	AR - 5	This property is used for residential use. The owners did create large fire buffers. Applicants argue presence of luxury home impacts normal and necessary forest practices.
7.4.23	Tax Lot 200 – 91.38 Acres	EFU	The Applicants have observed no farming activity but have observed two mature stands of timber. This property also has variable topography.
7.4.23	Tax Lot 500 – 157.7 Acres	F/F	Nearly 100% of land is in resource use. This property contains a large vineyard.
7.4.14	Tax Lot 700 – 48.44 Acres	F/F	This property is being used for timber. This Property borders Applicants Gray and Pugmire. These properties coexist.
7.4.14	Tax Lot 600 – 18.14 Acres	EFU	This parcel has a cherry orchard and Christmas trees on it. The Applicants have argued the cherry orchard is non-productive and it is low-value timber.

1  
2 From the above table it is clear that most of the parcels that are adjacent to the exception zone are  
3 currently in some type of agricultural or forestry practice. There are also contiguous parcels that are  
4 used for primarily residential purposes. However, contiguous AR-5 zoned parcels were planned and  
5 zoned for residential use. OAR 660-004-0028(6)(c)(A) states, "...Resource and nonresource  
6 parcels created and uses approved pursuant to the applicable goals shall not be used to justify a  
7 committed exception..." Applicants have also argued that due to the proximity of several  
8 surrounding homes, including homes that have a high dollar value, will detrimentally affect  
9 farming practices on the subject properties, including the ability for swine production; thus,  
10 committing the exception zone. However, even assuming that some farm uses or practices on the  
11 subject properties might be "objectionable to non-farm residents," as the Applicants claim, it is  
12 well settled that "people who build houses in an agricultural area must expect some discomforts to  
13 accompany the perceived advantages of a rural location." *Prentice v. LCDC*, 71 Or App 394, 403,  
14 692 P2d 642 (1984), quoting *1000 Friends of Oregon v. LCDC*, 69 Or App 717, 728, 688 P2d 103  
15 (1984).

16 The Applicants also argue that forestry practice is impracticable within the Exception area due to  
17 residential development on adjacent properties. The Applicants contend that current proximity of  
18 several of the homes on contiguous parcels create additional fire risk and increased cost to potential  
19 forest production. However, again the contiguous properties, particularly, to the south of the  
20 exception zone were created and approved pursuant to applicable goals. Further, the subject  
21 properties have contiguous properties that are currently in use for forestry purposes, as evidenced  
22 by Polk County's aerial photographs.

1 In *Johnson v. Land County*, 31 Or LUBA 454 (1996), LUBA determined that a county's reliance  
2 on the existence of adjacent non-resource parcels in justifying a committed exception is  
3 impermissible where the findings do not adequately establish how or when the adjacent parcels  
4 were created. Therefore, surrounding parcels that were lawfully partitioned and developed  
5 pursuant to the applicable goals cannot be used to justify an irrevocably committed Goal Exception  
6 for the subject properties. The Applicants Land Use Inventory and additional evidence submitted  
7 during the Open Record Period does not demonstrate sufficient evidence that the AR-5 zoned  
8 properties contiguous to the exception zone were created and approved without application of the  
9 applicable goals. The Polk County Subdivision and Partition Ordinance was first adopted on May  
10 15, 1974. Therefore, even if the parcels were created without the application of applicable goals,  
11 they would have likely been created prior to May 15, 1974. Evidence in the record does not  
12 demonstrate a nexus for how adjacent parcels created prior to 1974 would commit the subject  
13 properties to non-resource uses. Thus, the Hearings Officer will not consider the AR-5 zoned  
14 contiguous parcels as justification for an irrevocably committed exception to Goals 3 and 4.  
15 Further, there are several adjacent properties that have residential uses and are managed for  
16 resource purposes.

17 Based on the evidence in the record, the Hearings Officer finds the applications do not meet the  
18 criterion that the existing adjacent uses justify an irrevocably committed exception to Goals 3 and  
19 4.

20 **2. Existing public facilities and services (water and sewer lines, etc.); [OAR 660-**  
21 **004-0028(6)(b)]**

22 **Hearings Officer's Previous Findings:**

23 Applicant says the applications are partly predicated on this premise due to the fact that the subject  
24 property was the subject of a Ballot Measure 37 application, a Ballot Measure 49 Authorization  
25 and a Vested Rights Argument. The various public facilities and services are identified in more  
26 detail on pages 48 to 51 of the Staff report.

27 According to materials submitted by the applicant, Coffee Geosciences conducted a hydrologic  
28 study of the subject properties to determine the relationships between its springs, wells and  
29 groundwater aquifers. Results of the hydrologic study indicate that the proposal could be served  
30 with groundwater without any effect on nearby wells. The hydrologic report indicates that  
31 groundwater withdrawals of 10 gallons per minute would cause a one-inch drawdown of the  
32 aquifer within a radius of 240 feet. The Coffee Geosciences report indicates that a test well  
33 pumping 28.5 gallons per minute for 24 hours recovered 90% of the aquifer drawdown in 30  
34 minutes.

35 The applicant states that the subject properties are in the Eola Hills Groundwater Limited Area  
36 (EHGLA). The Oregon Department of Water Resources (WRD) has defined the EHGLA as being  
37 bounded by Township 5 South in Yamhill County, the Willamette River, Highway 22 and  
38 Highway 99W. Extracting groundwater from aquifers in Columbia River Basalt formations in the  
39 EHGLA is regulated by WRD. Accordingly, the property owners would be required to submit a  
40 well report with WRD to withdraw up to 15,000 gallons of groundwater per day for any domestic  
41 use on the subject properties. The applicant states that the number of wells that would serve the  
42 proposal could be minimized by leveraging wells that produce 15-30 gallons per minute to serve  
43 three potential dwellings instead of just one. The Oregon Public Health Division of the Oregon  
44 Health Authority regulates Public Water Systems with four or more service connections, consistent  
45 with OAR 333-061-0020. If a single well was used to serve three potential dwellings on the subject  
46 properties, a Public Water System would not be required; however, withdrawals of groundwater  
47 from the well would be limited to 15,000 gallons per day absent a permit from WRD.

48 Absent a Public Water System certification, drinking water safety for groundwater sources is  
49 incumbent on individual users. Well contractors are aware of threats to public safety from domestic  
50 water wells that are too shallow, or that are located within 100 feet of a septic system's leach field.

1 Also, any dwellings that may be constructed following this land use action would require septic,  
2 building, plumbing and electrical permits from Polk County. A site plan review confirming that  
3 relevant development setbacks are met would be part of the building permit process. Part of the  
4 site plan review evaluates whether the location of a domestic water source (a well) is at least 100  
5 feet from a septic system leach field, thereby protecting property owners' public health by  
6 mitigating *e coli* vectors.

7 Based on the evidence provided by the applicant, Staff concluded that adequate water would be  
8 available to serve the proposal. On the other hand an independent expert on geological matters and  
9 water rights, Dr. E. Timothy Wallin, in written testimony submitted on November 10, 2015, said  
10 the aquifer at issue cannot be relied on to provide a stable supply of water to the proposed  
11 concentration of users under the proposal. He says there is a risk that new wells and existing wells  
12 would find their supplies depleted. The Hearings Officer is not a geologist or hydrologist, but with  
13 additional testimony and evidence in the record and the warnings of Dr. Wallin, it is such that the  
14 Hearings Officer finds that there is not adequate water available to serve the proposal.

### 15 **Applicant's Additional Findings:**

16 The exception area is accessed from Best Road. The area is a gated community with an extensive  
17 internal road system serving the entire exception area. Best Road is a Minor Collector. The  
18 transportation system for parcelization of the exception to 10 acres or more (a maximum of 17  
19 additional homesites) has been studied and found to present no significant impacts on the local  
20 transportation facilities. The transportation reports were confirmed by ODOT.

21 With the exception of two hook-ups available from the Orchard Heights Water District, the  
22 remainder of the exception area will be provided with domestic water from a well. There is no public  
23 sewer system available to the exception area, so the area is served by individual septic systems.

24 The exception area is provided educational services by the Salem Keizer School District. Fire  
25 protection is provided by the Salem Suburban RFPD. Law enforcement is provided by the Polk  
26 County Sheriff's Office. There is no ODF timber fire protection provided for the subject properties.

### 27 **Hearings Officer Findings:**

28 Any future residential development would be served by an individual on-site septic system. Staff  
29 finds that parcels 10 acres in size are generally large enough to support a single-family dwelling  
30 served by an on-site septic system.

31 Based on written testimony submitted by Dr. E. Timothy Wallin, the Hearings Officer previously  
32 determined that there is inadequate water available to serve the Applicants' proposal. For this reason,  
33 the Applicants provided an additional hydrology study performed by John M. Rehm, Jr., who is a  
34 Registered Geologist with the State of Oregon.

35 Mr. Rehm's hydrology study focused on seven key points including; 1) Basalt is a good aquifer for  
36 drawing water for a rural residential water well; 2) The Columbia River Basalt extends equally into  
37 the Salem Hills and Eola Hills; 3) Basalt rock layering is the same in the Salem Hills and Eola Hills;  
38 4) Groundwater recharge is the same in the Salem and Eola Hills; 5) The structural geology in the  
39 Salem Hills and Eola Hills is the same; 6) Hydrology in the Salem Hills and the Eola Hills is the  
40 same; and 7) There has been recent site work in the Orchard Heights Area. The submitted hydrology  
41 study also includes an evaluation of "The Water Budget", which demonstrates that even with up to  
42 19 new home sites, the remaining recharge would be 79.9%. Mr. Rehm indicates that value of the  
43 recharge is very high because the Orchard Heights area is a very spread out rural area; new residences  
44 on the subject property would be on large lots (10 acres); and domestic water use would follow water  
45 use practices of 525 gallons per day, per household.

46 Public comments were received that raised concerns over adequate water supply and argued the  
47 applications need to also have findings regarding an Exception to Goal 5 of the Polk County  
48 Comprehensive Plan. As discussed above, the Oregon Department of Water Resources (WRD) has  
49 defined the Eola Hills Groundwater Limited Area (EHGLA) as being bounded by Township 5

1 South in Yamhill County, the Willamette River, Highway 22 and Highway 99W. The Applicants  
2 have acknowledged the subject properties are within the EHGLA. But based on a review of the  
3 Polk County Significant Resource Area (SRA) Map, the subject properties have no inventoried  
4 significant resources.

5 The submitted hydrology report was stamped with Mr. Rehm's Oregon Registered Professional  
6 Geologist stamp. The Hearings Officer finds that Mr. Rehm is a credible professional who has  
7 determined there is available water to serve future residential development on the subject  
8 properties. Based on the evidence in the record, the Hearing Officer finds the Applicants have  
9 demonstrated there is adequate water which meets the standards of the State Department of Health.  
10 Full details of this hydrology report are included as Exhibit X in the record.

11 **3. Parcel size and ownership patterns of the exception area and adjacent lands:**

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

29 b. **Existing parcel sizes and contiguous ownerships shall be considered**  
30 **together in relation to the land's actual use. For example, several**  
31 **contiguous undeveloped parcels (including parcels separated only by**  
32 **a road or highway) under one ownership shall be considered as one**  
33 **farm or forest operation. The mere fact that small parcels exist does**  
34 **not in itself constitute irrevocable commitment. Small parcels in**  
35 **separate ownerships are more likely to be irrevocably committed if**  
36 **the parcels are developed, clustered in a large group or clustered**  
37 **around a road designed to serve these parcels. Small parcels in**  
38 **separate ownerships are not likely to be irrevocably committed if they**  
39 **stand alone amidst larger farm or forest operations, or are buffered**  
40 **from such operations; [OAR 660-004-0028(6)(c)(A) and (B)]**

41 **Hearings Officer's Previous Findings:**

42 Applicant says the area surrounding the property has gradually developed over the last 80 years to  
43 contain a large number of dwelling units in the AR-5 zoned areas to the south and east and to  
44 smaller high value farm units to the northeast. According to the applicant, the practice of farming  
45 properties across boundaries (complementary) was and is absent from this area. The subject  
46 property is an isolated piece of land which is evident when visiting it. The subject rezone area does  
47 not directly border any other farm field (not to be confused with properties that have farm use).  
48 The area surrounding the property has three different zoning categories which speaks to the  
49 variability of the land. The entire southern boundary abuts an AR-5 zoned as does half of the  
50 eastern boundary. The very dark blue pattern in the upper right hand corner of the map is within  
51 the Salem Urban Growth Boundary (Urban Reserve). The remainder of the eastern boundary is

1 bordered by EFU zoned parcels that are 11, 14.6, 15.0, 18.29 and 19.71 acres respectively. Most of  
2 these parcels are leased out to larger farming operations except for the 19.71 acre parcel which is  
3 the Cubanismo Vineyard.

4 Applicant contends that, with respect to the relationship of the property with adjoining and nearby  
5 agricultural lands, the lands adjacent and nearby have no positive impact on the farming of the  
6 subject property. There is no relationship historically between the subject rezone areas and the  
7 smaller "hobby farms" (the owners have outside jobs such as doctors and lawyers) that border on  
8 the east. The farms to the north that are across Orchard Heights Road are farmed in conjunction  
9 with large fields that have superior soils to those found on the subject property. The ridge line  
10 north of Orchard Heights Road opens up into a very large contiguous block of farm land in which  
11 uniform practices are possible. This is due to relatively level topography, deeper well drained soils  
12 and larger field sizes

13 Changing conditions in the surrounding area also affect the types of crops grown. The Salem Area  
14 has had a doubling of the population in the last 50 years with a significant growth factor in the  
15 West Salem portion of Salem and most notably east of the subject property. The demand for the  
16 types of crops grown historically have diminished such as cherries, prunes, Douglas fir Christmas  
17 trees, grass seed and grain as the yield of these crops also dropped. Some of the processing facilities  
18 for these crops have relocated or closed.

19 The portion of the property adjacent to non-farm uses on the southeast and south used to be in  
20 orchard crops and Christmas trees. The farming activities were compatible with these uses but in  
21 more recent years at least three dwellings were established that are close to active farming areas.  
22 The subject property borders seven such parcels of which three have dwellings. The overall  
23 establishment of non- farm dwellings in the area does not apparently affect the farming of the land  
24 because they have coexisted for many years without conflict despite field burning and orchard  
25 spraying. One nearby neighbor did have a problem with a well failure but there is no evidence that  
26 the farming of the subject property created that situation.

27 Staff notes that statements by the applicant indicate that parcelization of lands in the vicinity of  
28 the subject properties has resulted in an ownership pattern that precludes the management of small  
29 farm holdings as larger farm units, which has led to the proliferation of small scale specialty farms.  
30 Staff notes that the nearest large agricultural operations to the subject properties are Christmas  
31 trees and vineyards. A rural residential exception area is also adjacent to the southern parcels of  
32 the exception area. Due to a steep escarpment on the west side, the subject properties are more  
33 closely associated geographically with adjacent properties along Best Road than those to the west  
34 taking access from Oak Grove Road, which is 600 feet lower in elevation.

35 Using 2011 Aerial Photographs and GIS measuring tools, Staff estimated the size of the largest  
36 agricultural operations in the vicinity of the subject properties. Eola Hills Wine Cellars' Legacy  
37 Estate Vineyard has approximately 75 acres of vineyard planted on a 160 acre parcel immediately  
38 west of the subject properties; Domaine Drouhin Oregon, Inc. has approximately 140 acres of  
39 vineyard planted on four adjacent parcels totaling approximately 278 acres about a mile northeast  
40 of the subject properties; Doubletrees Land & Timber, LLC has approximately 120 acres of  
41 Christmas trees planted on an approximately 170 acre property about one third (~) of a mile  
42 southeast of the subject properties; Schudel Enterprises, LLC owns approximately 198 acres  
43 immediately west of the Domaine Drouhin Oregon, Inc. and grows Christmas trees on  
44 approximately 185 of those acres; and, across Orchard Heights Road from the subject properties  
45 Charles and Andrea Hachette own ten contiguous tax lots comprising approximately 147 acres of  
46 Christmas tree land, of which over 100 acres is planted. Growing specialty crops on a large scale  
47 lowers input costs and provides more predictability at harvest.

48 The proposed exception area is comprised of seven parcels ranging in size from 45 acres to 20  
49 acres. Simmons Family Properties, LLC owns four contiguous parcels in a 120-acre tract (Tax  
50 Lots 601,604 and 605 in T7S, R4W, Section 14, and Tax Lot 100 in T7S, R4W, Section 23). A  
51 20-acre parcel south of the Simmons Family Properties, LLC, is owned by Kevin Stone (T7S,



1 R4W, Section 23. Tax Lot 101). Two parcels to the north of the Simmons Family Properties, LLC  
2 tract are owned by Christopher & Kimberly Gray (at T7S, R4W, Section 14, Tax Lot 602) and  
3 Jonathan & Tamara Pugmire (at T7S, R4W, Section 14, Tax Lot 603), and are 45 acres and 43.7  
4 acres, respectively.

5 Over the past decade a series of partitions of the original Simmons holdings, identified as LP 05-  
6 20, LP 05-22, and LP 05-23, memorialized in Partition Plats 2006-0027 through 2006-0029, have  
7 resulted in the current configurations of the subject properties. These recent land partitions were  
8 made possible by three Measure 37 Claims (identified as M 05-09, M 05-13, and M 05-14).  
9 Subsequent vesting determinations by the Polk County Community Development department,  
10 identified as file numbers VRD 09-01 through VRD 09-03, upheld these Measure 37 partitions.  
11 The Measure 37 partitions of the subject properties created six parcels to bring the total number of  
12 parcels to nine. Following the Measure 37 Claims (Claims) and corresponding vested rights  
13 determinations, a suite of Measure 49 claims were submitted, which resulted in three Measure 49  
14 Final Order and Home Site Authorizations (Final Order) approved by DLCDD. The Final Orders  
15 referenced above authorized five dwellings on the parcels vested under Measure 37. Of the five  
16 authorized dwellings under Measure 49, three have been built. These dwellings are on Tax Lots  
17 602 and 603 in T7S, R4W, Section 14 and Tax Lot 101 in T7S, R4W, Section 23. Based on a  
18 review of the Polk County Assessor records, the subject properties currently contain a total of three  
19 dwellings.

20 Measure 37 claims were made on two properties adjoining the subject properties. One of the  
21 Measure 37 claims was succeeded by Measure 49 Order No. E132401, which permits the  
22 establishment of two additional parcels for a total of three home sites on Tax Lot 200 in T7S, R4W,  
23 Section 23. A second Measure 37 claim on an approximately 104-acre parcel, identified as Tax  
24 Lot 601 in T7S, R4W, Section 23, adjacent to the southwest corner of the subject properties  
25 authorized two additional parcels pursuant to a Measure 37 Claim (M06-249), and two additional  
26 dwellings pursuant to a Measure 49 Final Order (HI 34231). Pursuit of potential land entitlements  
27 under Measures 37 and 49 are emblematic of trend towards a growing number smaller agricultural  
28 parcels occurring in the vicinity of the subject properties over the past several decades. This has  
29 resulted in a diversification of farming on a small scale with equine stables, Christmas tree farms,  
30 wood lots, and vineyards and wineries operating within a thousand feet of the subject properties.  
31 Recent changes on nearby properties exemplify the shift to small scale specialty agriculture.  
32 Cubanismo Vineyards began with a partition of a 32-acre parcel into a 12-acre parcel and a 20  
33 acre parcel in 1978 (Polk County Planning File SE 78-18), followed by a farm dwelling approval  
34 in 1989 (Polk County Planning File FD 89-16) A conditional use permit approved wine sales and  
35 marketing as a home occupation in 2004 (Polk County Planning File CU 04-21), including four  
36 events attracting up to 300 visitors. Another commercial winery was established within the past  
37 ten years adjacent to the subject properties. Eola Hills Winery purchased a large parcel  
38 immediately west of the subject properties which was the subject of Plan Amendment and Zone  
39 Change applications in 2010 (PA 10-05 and ZC 10-06, respectively) to change the plan designation  
40 from Forest to Farm Forest and change the zoning designation from Timber Conservation (TC) to  
41 Farm Forest Overlay (FFO). A subsequent land use application (LUD 13-11) was approved to  
42 establish a winery at what is now known as the Legacy Estate Vineyard. The winery offers wine  
43 tasting, company picnics and wedding ceremonies at the Legacy Estate Vineyard location.

44 The applicant states that the smaller resource properties in the area are clustered along Best Road,  
45 immediately east of the subject properties. According to 2011 Aerial Photographs and GIS  
46 measuring tools, small scale, specialty farms make up the adjacent uses immediately north of the  
47 subject properties, and to the east across Best Road. An 18.1-acre property north of the subject  
48 properties, located at 1895 Best Road, contains an old orchard. A 15-acre property at 1890 Best  
49 Road, is planted with Christmas trees. The next property to the south, 1860 Best Road, is a 14.6-  
50 acre property planted for grass seed. Further south, a 19.7-acre property at 1800 Best Road appears  
51 to be used as pasture. The southerly adjacent property, 1679 Best Road, is a fallow 11.4-acre tax  
52 lot under common ownership with an Acreage Residential-Five Acre (AR-5) zoned tax lot. A

1 number of contiguous properties zoned AR-5 exist to the south of the subject properties that were  
2 included in the initial committed lands inventory leading up to acknowledgement of the PCCP.  
3 This large area of committed lands, substantially isolated from the exception area by steep slopes,  
4 resides to the south of the subject properties. This committed lands area, comprising approximately  
5 1,100 acres of AR-5 zoned land, extends south to Highway 22 and west to the Salem city limits.  
6 Ten of the fourteen AR-5 parcels nearest the subject properties are under one ownership and are  
7 vacant (T7S, R4W, Section 24 Tax Lots 303 -308 and T7S, R4W, Section 23 Tax Lots 1000 &  
8 1003 -1005). Each of these vacant AR-5 parcels could be developed with dwellings, although they  
9 have been in their current ownership for over 20 years and are still vacant. Should these  
10 applications be approved, one 20-acre parcel zoned EFU (located at 1785 Best Road) would be  
11 surrounded by properties with Rural Lands Plan designations. This property was created and  
12 authorized by a Measure 37 Claim, Parcel 3 in Partition Plat 2006-0029, and the dwelling was  
13 subsequently approved by Measure 49 Order number H132890C. Since the 20-acre parcel and the  
14 dwelling thereon were approved absent review relative to the Statewide Planning Goals, Staff  
15 anticipates that the proposed goal exception would not commit the home site to uses other than  
16 those allowed by Goal 3 since it has already been created and developed for nonfarm use.

17 In this case, the applicant is making the argument that while the subject properties were exempt  
18 from Oregon Statewide Planning Goals, the property owner made a substantial investment in  
19 developing the subject properties for nonfarm uses. Staff understands the applicant's argument to  
20 be that the legal development and land use pattern of the subject properties that occurred under  
21 Measures 37 and 49 were the tipping point for commitment of the subject properties to non-  
22 resource uses. It was not necessarily recent changes in the land use pattern or development on  
23 surrounding properties that in and of themselves commit the subject properties. The applicant  
24 contends that the subject properties are compatible with the properties in the vicinity but that the  
25 subject properties cannot reasonably or feasibly be utilized for farm or forest use by themselves or  
26 in conjunction with adjoining properties.

27 In VRD 09-01, Polk County concluded that the Estate of Nina Simmons and the Ervin Simmons  
28 Testamentary Trust had vested, on December 6, 2007, three separate parcels consisting of 45, 45  
29 and 19.77 acres each, depicted on Polk County Partition Plat 2006-0027, and a single-family  
30 dwelling residential use on Parcel 3 of said partition plat. In VRD 09-02, Polk County concluded  
31 that the Estate of Nina Simmons had vested, on December 6, 2007, three separate parcels  
32 consisting of 40, 20 and 20 acres each. In VRD 09-03, Polk County concluded that the Ervin  
33 Simmons Testamentary Trust had vested, on December 6, 2007, three separate parcels consisting  
34 of 40, 20 and 20 acres each.

35 Division of the subject properties following Measure 37 claims made by various members of the  
36 Simmons family, the vesting of which is described above, and the construction of three dwellings  
37 on its eastern portion have broken up the ownership of what was once an approximately 267-acre  
38 farm unit and has made achieving economies of scale for agriculture difficult. The applicant does  
39 not rely solely on the recent parcelization pattern of the subject properties to demonstrate how the  
40 properties were committed. The applicant states that the actual development of the land including  
41 water, power and septic lines that connect the dwellings to domestic services have rendered the  
42 management of the land for agriculture impractical since the land cannot be plowed without  
43 interfering with buried residential infrastructure. Roads serving existing dwellings on the subject  
44 properties are aligned so that they interfere with the orderly tilling of soil, and are gravel surfaced  
45 for residential use. Farm activities such as ripping, discing, seeding and spraying require large,  
46 uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
47 properties both vertically and horizontally conflict with the efficient management of essential soil  
48 preparation and crop protection activities.

49 The applicant contends that these facts, coupled with the physical characteristics of the site, have  
50 led to the inability to manage the subject properties for resource use, either together or individually,  
51 and return a profit. The applicant provided a map indicating where crops or agricultural activities  
52 are either established or could be established but did not provide a written plan or profit and loss

1 proforma. Nevertheless, Staff understands the applicant to mean that the new agricultural uses and  
2 plan are small scale and not profitable and the applicants argument to be that if a dwelling is  
3 permitted, the likelihood of the establishment of an agricultural activity, regardless of the fact that  
4 it would not be profitable, would be greater and better suited to small acreage parcels primarily  
5 used for residential purposes. Staff agrees with the applicant, that the parcelization and nonfarm  
6 development that occurred while the property was not subject to Goal 3 has reasonably caused  
7 additional difficulty to commercially farm this particular area; especially as a larger farm unit.  
8 Based on the testimony and evidence provided by the applicant, Staff concluded that the subject  
9 properties are not suitable for farm use with the primary purpose of obtaining a profit in money.  
10 The applicant has since provided additional evidence in the record demonstrating that residential  
11 development around the subject property makes agriculture and forestry difficult by limiting the  
12 ability to spray due to the impact of drift on surrounding residential uses. The applicant has  
13 thoroughly documented the topographical, climate and cultivation challenges of the subject  
14 properties, while offering cursory review of how recent changes on adjoining lands has committed  
15 them to uses not allowed by the goals and whether allowing the proposed amendments would, in  
16 tum, commit adjacent or nearby lands to uses not allowed by the applicable goal. The applicant  
17 fails to adequately demonstrate how recent changes on adjacent lands make timber production on  
18 the subject properties impracticable. The seven properties comprising the proposed exception area  
19 are between 20 acres and 45 acres in size. The applicant's proposal contemplates 10 acre properties  
20 intended primarily for acreage residential uses and perhaps hobby farming. A proposal increasing  
21 the number a parcels in the proposed exception area would amplify internal conflicts with  
22 agricultural operations by creating smaller farm units.

23 The Hearings Officer rejects applicant's attempts in effect to discredit the NRCS soil survey data  
24 by repeatedly calling attention to factors such as slope, which already are taken into account when  
25 the soil was evaluated, and by referring to other soil surveys not certified by DLCD. The Hearings  
26 Officer, without challenging applicant's veracity, finds it difficult to establish a precedent of  
27 allowing applicants to testify of their own failures to farm specific tracts profitably, when it is to  
28 their own advantage that the land be deemed unsuitable for large-scale agriculture. Indeed,  
29 evidence has been included in the record contradicting the applicant's statements regarding the  
30 viability of the proposed exception area for farm and forest uses. The applicant states that wine  
31 grapes are not a suitable crop for the subject properties, citing site specific limitations related to  
32 elevation, a lack of irrigation water, crop damage from pests, a preponderance of boulders, and a  
33 lack of landscape uniformity to establish blocks with the appropriate aspect. The applicant states  
34 that the vast majority of vineyards in the Willamette viticulture area are below 600 feet in  
35 elevation. Indeed, existing nearby vineyards are at lower elevations than the subject properties.  
36 Cubanismo Vineyards to the east of the subject properties is located on the leeward side of Glenn  
37 Hill at an elevation of approximately 950 feet, Eola Hills Wine Cellars' Legacy Estate Vineyard is  
38 located at the toe of the escarpment west of the subject properties at an elevation of approximately  
39 500 feet, Kathken Winery, to the northwest of the subject properties is at an elevation of  
40 approximately 830 feet, and Domaine Drouhin Oregon, Inc.'s vineyard northeast of the subject  
41 properties at an elevation of approximately 680 feet. While the aforementioned vineyards are all  
42 above 600 feet of elevation, except for the Legacy Estate Vineyard, they are not located on ridge  
43 tops, and are largely sheltered from the constant winds affecting the subject properties. Vineyard  
44 sites in the vicinity of the subject properties reveal the variety of landscapes on which vineyards  
45 are planted, with east facing, west facing and south facing vineyards represented by the small  
46 sample above. However, the subject properties are more exposed to wind and sun than the vineyard  
47 sites surrounding it, lending some credence to the applicant's observations that wine grape  
48 production is impracticable there. At the same time, evidence in the record shows that some  
49 knowledgeable grape growers feel that "the rocky, wind-battered slopes of the Eola-Amity hills  
50 have emerged as one of Oregon's most singular terrains for pinot noir." [Patrick Comiskey, "Wind  
51 Powered Pinot", Wine & Spirits Magazine, April 2013.] Applicant contends above that the  
52 Simmons family "actively farmed the tract, growing gooseberries, strawberries, prunes, cherries,  
53 fine fescue grass, Christmas trees and wheat with little success," attempting by this recitation to

1 demonstrate the land is not suitable for large-scale commercial agricultural crops. There is no  
2 indication that attempts were made to grow grapes of any variety.

3 With respect to Goal 4, information concerning the potential of the subject properties to grow  
4 merchantable timber was lacking in the applications. While the applicant's description of site  
5 specific limitations on the subject properties inhibiting commercial timber production may have  
6 some merit, it lacked information concerning the capability and economic viability of propagating  
7 and harvesting forest products across the entire exception area. Staff concluded that if sufficient  
8 valid additional evidence demonstrating how the exception areas lack of ability to commercially  
9 produce forest products is provided by the applicant prior to a final local decision on the  
10 applications, the applicant's proposal would be consistent with this criteria. Applicant submitted a  
11 substantial volume of material looking toward this end, both before and after the public hearing,  
12 citing site specific challenges related to climate, topography and a failed timber harvest.

13 Evidence submitted by Sarah Deumling, owner of Zena Forest Products, and by Steve Vaught, a  
14 professional forester who is familiar with timber management in the Eola Hills indicates the area  
15 could be managed profitably as a hard wood forest. In serial correspondence, Sarah Deumling  
16 details the timber operations of Zena Forest Products, a company that specializes in hard wood  
17 forest products. Zena Forest Products sustainably produces flooring and cabinet making materials,  
18 primarily from Oregon White Oak and Oregon Big Leaf Maple trees, on lands with similar site  
19 characteristics just north of the subject properties. Ms. Deumling has proposed to purchase the  
20 subject properties to manage them for hard woods and has offered pro-bono consulting services to  
21 profitably produce hard wood forest products on the subject properties. Both Steve Vaught and  
22 Sarah Deumling attest to the legitimacy of hard wood forests for timber production, habitat values  
23 and soil and water conservation benefits. Considering that the proposed exception area has an  
24 average forest capability value of 154 cubic feet per acre annually, it has never been actively  
25 managed for forest production and there is a commercial hard wood forest operator in its  
26 immediate vicinity, the Hearings Officer concludes that the propagation and harvesting of forest  
27 products is practicable.

### 28 **Applicants' Additional Findings:**

29 There are seven parcels in the exception area, totally 228 acres. The size and ownership pattern is  
30 detailed above. The parcel sizes and ownership pattern in the surrounding study area are also  
31 detailed above.

32 The inventory study included an analysis of every parcel on a total of four sections that surround  
33 the target properties. The study area Map includes all 8 Assessor maps in Sections 13, 14, 23 and  
34 24, in Township 7S, Range 4W. The total study area is approximately 4 miles square,  
35 encompassing approximately 2,571 acres. In the study area 7 parcels have been approved for  
36 second dwellings. There is at least one approved non-farm dwelling. 31 of the parcels were created  
37 by partition, either a regular partition, or one approved under BM37/49 regulations. Contiguous  
38 parcels under one ownership constitute 22 separate parcels (11 ownerships). Five owners in the  
39 study area own multiple parcels, some are contiguous and some are not.

40 Land Use Inventory of the Property and Surrounding Area - The key element in any irrevocably  
41 committed exception is a complete and detailed study of the property and the lands that surround  
42 it. Exhibit V hereto is an exhaustive inventory study of West Salem Hills properties, including  
43 the 228 acres of applicant's property. The properties are adjacent to Best Road NW, and consist  
44 of seven Tax Lots, identified as Tax Lots 601, 602, 603, 604 and 605 on Map 7.4.14, and Tax  
45 Lots 100 and 101 on Map 7.4.23.

46 The inventory study included an analysis of every property on a total of four sections that  
47 surround the target properties. The study area Map includes all 8 Assessor maps in Sections 13,  
48 14, 23 and 24, in Township 7S, Range 4W. The total study area is approximately 4 miles square,  
49 encompassing approximately 2,571 acres.

1 It must be recognized that topography plays a significant role in the uses that take place in this  
2 area. The ridge line of the Eola Hills runs through the middle of the study area. The highest  
3 point along this ridge line is actually located on one of the target properties, being 1,065 feet in  
4 elevation. The ridge line dives steeply to the west with properties at the western edge of the study  
5 area being less than 300 feet in elevation. The ridge line height also accounts for the presence of  
6 water and communication towers in the study area.

7 Each and every Tax Lot identified within the study area was reviewed in detail. Assessment data  
8 and maps were considered, as well as aerial photographs and drive by site visits in order to  
9 provide as much information about the surrounding area as was possible. From the information  
10 contained in this Study, one has the ability to determine all aspects of each and every parcel  
11 within the study area. The relevant information found here includes: ownership; valuation;  
12 location, deferral status, current use; size; if there is a dwelling; if there are accessory structures;  
13 how the parcel was created; and what the zoning is.

14 From the information obtained and analyzed, the following is a summary of the findings made  
15 from the base data reviewed:

- 16 1. In the study area there are 215 useable Tax Lots, plus three easement roads, two tower sites  
17 and two well sites, for an effective total of 222 Tax Lots.
- 18 2. There are 153 houses on the 215 parcels, equating to 71% of the parcels in the study area have  
19 single family dwellings.
- 20 3. Total acreage in this study area is 2,571.2, with an average parcel size of 12.07 acres.
- 21 4. 165 of the 215 parcels are under 10 acres in size, meaning 77% of the parcels in the study area  
22 are under 10 acres in size.
- 23 5. 118 of the 215 Tax Lots are in farm or forest deferral programs, and 97 are not, meaning only  
24 55% of the parcels are in a deferral program.
- 25 6. There is one large commercial vineyard (Eola Hills) in the study area that is a total of 232.1  
26 acres in size, and encompasses three tax lots.
- 27 7. There is one large Filbert Orchard (Walker) in the study area that is 242.02 acres in size, and  
28 is encompassed in two tax lots.
- 29 8. There is one large tree farm (Doubletrees Land and Timber) in the study area that is 169.63  
30 acres in size.
- 31 9. There is one large ownership (Waldensee LLC) that is 99.18 acres in size which is idle at this  
32 time.
- 33 10. There is one large ownership (Pratt) that is 91.38 acres in size which appears to be idle at this  
34 time as well.
- 35 11. Aside from these large ownerships, no other parcel in the study area is over 50 acres in size.
- 36 12. The following are people/entities that own multiple parcels in the Study Area:
  - 37 12.1. Glencreek Springs owns 3 parcels totaling 42.95 acres.
  - 38 12.2. Hanke owns 7 parcels totaling 6.98 acres.
  - 39 12.3. Hatchette owns 4 parcels totaling 42.98 acres plus an easement road.
  - 40 12.4. Curtright owns 4 parcels totaling 51.59 acres.
  - 41 12.5. Ogdahl owns 3 parcels totaling 8.59 acres
- 42 13. The study area contains some of the most valuable homes in the Willamette Valley. 21 of the  
43 parcels here are valued at over \$1,000,000, nearly 10% of the entire study area. 82 more of  
44 the parcels in the study area are valued at more than \$500,000, which is over 38% more of

1 the parcels in the study area. Combined, parcels in the study area that have valuation of over  
2 \$500,000 is 103, meaning over 48% of the parcels in the study area are very high value  
3 homesites.

4 14. 110 of the parcels are zoned EFU.

5 15. 4 of the parcels are zoned FF.

6 16. 1 of the parcels is zoned TC.

7 17. 99 of the parcels are zoned AR-5.

8 18. 1 of the parcels is identified as being zoned AR, however it is possible the actual zoning is AR-  
9 5.

10 19. 4 of the parcels are zoned SR.

11 20. 104 of the 213 parcels have structure values that exceed the land value, making these by IRS  
12 definition "hobby farms". This means that 48.8% of the parcels in the study area can be  
13 classified as "hobby farms".

14 During the Open Record Period the Applicants submitted additional information regarding their  
15 Inventory Study as thoroughly discussed above. The Applicants also argue that even focusing on  
16 just the fourteen adjacent parcels, there is sufficient evidence to justify the irrevocably committed  
17 exception. The Applicants contend there are 10 existing dwellings on 14 existing parcels. There is  
18 also the ability for more dwellings under Measure 37/49 or two parcels are currently larger in size  
19 then required and could divide. Specifically, in regard to the contiguous parcels, the Applicants  
20 argue:

21 There is one actively managed resource use in this mix, Legacy Vineyards, all the other parcels  
22 are not managed for farm or forest uses. Three of these parcels are under 5 acres in size. Two  
23 are over 5 acres but under 10 acres in size. Six of the parcels are over 10 but are 20 acres or  
24 under. Only three of the parcels are over 20 acres in size.

#### 25 **Hearings Officer Findings:**

26 During the Open Record period, the Applicant submitted an updated Land Use Inventory to  
27 supplement the Land Use Inventory submitted with the applications. In the update to the Land Use  
28 Inventory the Applicants researched the Study area to determine date of parcel creation and date of  
29 residential development. The Applicants created a table to demonstrate the tax lots created prior to  
30 1970 since that would encompass the tax lots created without land use regulation. In regards to  
31 the entire the Land Use Inventory, the Hearings Officer is concerned information may be  
32 inaccurate. It is not uncommon for one (1) parcel to contain multiple tax lots. For this reason, it  
33 cannot be assumed that separate tax lots equate to separate parcels. Although the Land Use  
34 Inventory does contain some "comments" detailing how some parcels were created, it is unclear  
35 how the Applicants determined the lawful configuration of each surrounding parcel. For example,  
36 the Applicants identify the properties within Section 14 that are owned by "Hatchette", to be 4  
37 parcels (Tax Lots 100, 104, 118 and 202), totaling 42.98 acres plus an easement road. However,  
38 Community Development records indicate that the lawful parcel configuration of Tax Lot 202 also  
39 includes Tax Lot 901 (T7S, R4W, Section 11), and Tax Lot 114 (T7S, R4W, Section 14),  
40 containing approximately 24 acres, not 3.11 acres as represented by the Land Use Inventory. This  
41 example demonstrates how the Applicants' representation of "average parcel size" is likely based  
42 on calculations of tax lot sizes, not legal parcel sizes. Therefore, the Hearings Officer believes the  
43 information presented in the Land Use Inventory does not accurately represent the characteristics  
44 of surrounding properties and cannot be relied upon to justify an exception to Goals 3 and 4.

45 The Hearings Officer recognizes the Applicants put forth a significant amount of time and effort into  
46 compiling information in the Land Use Inventory and its update. However, as discussed above, the  
47 Hearings Officer finds the Land Use Inventory too expansive and is focusing on the fourteen adjacent  
48 properties to the Exception area. The Hearings Officer is concerned that the Applicants' conclusions

1 are still lacking details about when these surrounding properties were created and developed pursuant  
2 to the applicable Statewide Planning Goals. For example, it is safe to assume that all residential  
3 development (with the exception of Measure 37 and Measure 49 residential development) on  
4 surrounding properties, where a planning authorization and/or building permit was acquired, can be  
5 presumed to have been approved pursuant to the applicable Goals. Similarly, all parcels created  
6 pursuant to a land partition (with the exception of Measure 37 and Measure 49 partitions) can also  
7 be presumed to have been approved pursuant to the applicable Goals. This criterion states, “Resource  
8 and nonresource parcels created and uses approved pursuant to the applicable Goals shall not be  
9 used to justify a committed exception.” The additional information provided during the Open  
10 Record period identified adjacent properties that contain dwellings that were built prior to 1970.  
11 The Applicants identified January 1, 1970, as an arbitrary start date for when Statewide Goals or  
12 Guidelines became applicable. Even when considering this additional evidence, it is unclear how  
13 dwellings that were established prior to 1970 would commit the subject property, as this  
14 development would not be a recent change in characteristics in the surrounding vicinity.

15 The Hearings Officer finds the record still does not contain information regarding how and when  
16 the AR-5 zone properties adjacent to the Exception area were created. The Hearings Officer is also  
17 not clear on how the Applicants are determining when a property is “actively managed resource  
18 use” and the record reflects that more than one parcel is being managed for resource use. The  
19 Applicants have argued that only Tax Lot 500 -Legacy Vineyard is being managed for resource  
20 use; however, Tax Lot 700 is also being managed almost entirely for forestry use-timber. Further,  
21 other contiguous properties have a portion of their property being managed for resource use. The  
22 Hearings Officer also finds the record reflects that only two contiguous parcels are smaller than  
23 five acres, Tax Lot 303 and 1010 and the contiguous ownership of Tax 1004 and Tax Lot 1003 do  
24 not appear to have been considered in parcel size of contiguous properties.

25 Based on the evidence in the record, the Hearings Officer has concerns regarding the accuracy of  
26 the Land Use Inventory and finds the record cannot support a finding that the parcel size and  
27 ownership patterns of the exception area and adjacent lands justify an irrevocably committed  
28 exception to Goals 3 and 4.

#### 29 **4. Neighborhood and regional characteristics; [OAR 660-004-0028(6)(d)]**

##### 30 **Hearings Officer’s Previous Findings:**

31 Applicant described in considerable detail the adjacent and neighboring properties, summarized  
32 in pages 55 to 57 of the Staff report. Statements by the applicant indicate that lands in the vicinity  
33 of the subject property exhibit an ownership pattern that hinders the management of small farm  
34 holdings as larger farm units. According to 2011 Aerial Photographs and GIS measuring tools,  
35 small scale, specialty farms make up the adjacent uses immediately north of the subject  
36 properties, and to the east across Best Road. A number of contiguous properties zoned AR-5  
37 exist to the south of the subject properties that were included in the initial committed lands  
38 inventory leading up to acknowledgement of the PCCP. The five remaining adjacent properties  
39 north and east of the subject properties, with the exception of the Eola Hills Wine Cellars' Legacy  
40 Estate Vineyard, are between 48 acres and 101 acres in size and managed primarily as woodlots.  
41 Due to a steep escarpment on the west side, the subject properties are more closely associated  
42 geographically with adjacent properties along Best Road than those to the west taking access  
43 from Oak Grove Road, which is 600 feet lower in elevation.

44 The applicant states that wine grapes are not a suitable crop for the subject properties, citing site  
45 specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a  
46 preponderance of boulders, and a lack of landscape uniformity to establish blocks with the  
47 appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette  
48 viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower  
49 elevations than the subject properties. Cubanisimo Vineyards to the east of the subject properties  
50 is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills  
51 Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject

1 properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the  
2 subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon,  
3 Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet.  
4 While the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy  
5 Estate Vineyard, they are not located on ridge tops, and are largely sheltered from the constant  
6 winds affecting the subject properties. Vineyard sites in the vicinity of the subject properties  
7 reveal the variety of landscapes on which vineyards are planted, with east facing, west facing  
8 and south facing vineyards represented by the small sample above.

9 The applicant states that the demand for the types of crops grown on the subject properties  
10 historically have diminished such as cherries, prunes, Douglas fir Christmas trees, grass seed and  
11 grain as the yield of these crops also dropped. Some of the processing facilities for these crops  
12 have relocated or closed. The applicant also states that prohibition of irrigation on the subject  
13 property and physical characteristics of the site have been a limiting factor in the ability to  
14 profitably manage the subject properties for agriculture.

15 Staff concluded that these factors described by the applicant coupled with the development that  
16 occurred under Measures 37 and 49 on the subject properties and former farm unit are changing  
17 neighborhood and regional characteristics.

#### 18 **Applicant's Additional Findings:**

19 These characteristics are detailed above. The exception area is unique in that it includes the highest  
20 ridge line in West Salem, and also the steep slopes down the flat farm land to the west. The study  
21 area surrounding the exception area is predominately parcels averaging 12 acres in size with a non-  
22 resource related dwelling. There are some larger resource parcels, generally to the west, which do  
23 not have dwelling associated with them. The area in the West Salem Hills is mostly rural residential  
24 parcels and homesites. The Salem UGB is nearby to the East. Because of the elevation, the area has  
25 several electronic towers and water tanks. The major east west BPA major power lines bisect the  
26 area and traverse across the middle of the exception area.

#### 27 **Hearings Officer Findings:**

28 As discussed above, the information presented in the Land Use Inventory and supplemental  
29 information submitted during the Open Record period cannot be relied upon to justify an exception  
30 to Goals 3 and 4 because the Land Use Inventory does not appear to accurately depict tax lot and  
31 parcel categories, the record does not demonstrate whether or not surrounding parcelization and  
32 residential development was approved pursuant to the applicable Statewide Planning Goals, and  
33 even if they were created and developed prior to zoning regulations, how that parcelization and  
34 development has committed the subject properties to non-resource uses. Further, there are several  
35 contiguous parcels as well as regional parcels being managed for resource use. For these reasons,  
36 the Hearings Officer finds that information provided by the Applicants does not accurately depict  
37 the neighborhood and regional characteristics and cannot be used as justification for an irrevocably  
38 committed exception to Goals 3 and 4.

- 39 **5. Natural or man-made features or other impediments separating the**  
40 **exception area from adjacent resource land. Such features or impediments**  
41 **include but are not limited to roads, watercourses, utility lines, easements,**  
42 **or rights-of-way that effectively impede practicable resource use of all or**  
43 **part of the exception area; [OAR 660-004-0028(6)(e)]**

#### 44 **Hearings Officer's Previous Findings:**

45 Applicant contends that the subject property has extensive forests, steep rocky hillsides and  
46 windswept hilltops with relatively thin and infertile soils. There are also areas that are more  
47 protected from the weather elements with deeper and well drained soils. The objective of this land  
48 use action is to create a circumstance where more specialty farms can come into this area such as  
49 organic oats, grass seed that requires no burning, and Noble fir Christmas trees.



1 The applicant's narrative states that approximately two-thirds of the northern boundary is in a  
2 heavily wooded buffer that separates the subject property from Orchard Heights Road. There is a  
3 very deep ravine that is the headwater area for a creek that barely touches the northwest corner of  
4 the property. This area has never been farmed and it has never been settled very likely due to steep  
5 and irregular topography, the presence of very large oak and fir trees, and wet pockets. There is  
6 also no good road access to this area. According to the Applicant a significant element of wasteland  
7 is present on this site. The westernmost 80 acres owned by the Simmons family applicant argues,  
8 is for all intents and purposes "wasteland" because it either has never been farmed or is fully in a  
9 woodlot. Other areas on the property also are too steep to farm, Applicants claim. The ridge line  
10 now has roads and dwellings that have had the effect of breaking up larger agricultural fields in  
11 response to Ballot Measures 37 and 49. There is some interest in possibly setting aside some of  
12 the forested areas on the steep west facing slopes for conservation easements and buffers. The  
13 lands near the western border are not only inaccessible by road but are difficult to traverse due to  
14 heavy thickets and boulders.

15 The proponents have strongly held beliefs that the an exception is warranted based on a host of  
16 complex factors including but not limited to elevation, wind exposure, sun exposure, shallow soils,  
17 preponderance of rock, cold temperatures related to elevation, inability to irrigate and inability to  
18 burn crop residues. In addition, there are no linkages to the other farm enterprises in the area that  
19 are less affected by the same factors. Also, there are two property lines where all the parcels are  
20 zoned for non-resource use and thus no complementary farm enterprises could be pursued.

21 Staff concluded that, as stated by the applicant, the subject properties are situated on a high point  
22 at the southern end of the Eola Hills. This geographic juxtaposition isolates the subject properties  
23 due to steep slopes on the north, west and south flanks of Glenn Hill, its highest elevation, while  
24 Best Road separates the subject properties from other EFU zoned lands to the east. The applicant  
25 contends that the subject properties are compatible with the properties in the vicinity, but that the  
26 subject properties cannot reasonably or feasibly be utilized for farm or forest use by themselves or  
27 in conjunction with adjoining properties.

28 The subject properties have a residual system of roads resulting from the prior applications and  
29 approval of Measure 37 Claims and Measure 49 Final Orders. The road construction that resulted  
30 from these land use actions is 4,100 feet long. The properties now have a gated access fronting  
31 Best Road. Land partitions pursuant to Ballot Measure 37 Claims, and building infrastructure to  
32 service the three new dwellings built pursuant to Measure 49 Final Orders on the subject properties,  
33 have made achieving economies of scale for agriculture difficult. Furthermore, water, power and  
34 septic lines that connect the dwellings to domestic services have been placed underground, which  
35 make management of the land for agriculture impractical since it cannot be plowed without  
36 interfering with this buried residential infrastructure. Roads serving existing dwellings on the  
37 subject properties are aligned so that they interfere with the orderly tilling of soil, and are gravel  
38 surfaced for residential use. Farm activities such as ripping, discing, seeding and spraying require  
39 large, uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
40 properties both vertically and horizontally conflict with efficient management of soil preparation  
41 and crop protection activities. Based on materials and statements in the record, Staff generally  
42 supports the applicant's conclusion that the proposed exception area is isolated from adjacent  
43 resource land by steep slopes, residential infrastructure and a county road. The Hearings Officer  
44 concurs, though noting this conclusion is not decisive as to the applications.

45 **Applicants' Additional Findings:**

46 Best Road borders a portion of the exception area to the east. The topographical change in elevation  
47 separates the exception area from the flat land below to the west. These features, and how they  
48 impede the ability of the exception area to be used for productive resource use are discussed above.

49 **Hearings Officer Findings:**

1 The record demonstrates that at least a portion of the subject properties are currently in farm use with  
2 an intent to make a profit in money, as evidenced by two (2) Agricultural Exemption permits that  
3 were issued to two different property owners of the proposed exception area. In addition, the  
4 submitted Forestland Capability Analysis and Addendum demonstrated that the eastern portion,  
5 which contains the most productive forestland soils, could be managed for timber production.  
6 Although the Applicants have described the physical characteristics of the subject property, the  
7 Hearings Officer finds that the record does not demonstrate how natural or man-made features or  
8 other impediments preclude the entire 228-acre exception area from being managed for farm and  
9 forestry purposes.

10 **6. Physical development according to OAR 660-004-0025; and [OAR 660-**  
11 **004-0028(6)(f)]**

12 **Hearings Officer's Previous Findings:**

13 Applicant says the applications are partly predicated on this premise due to the fact that the subject  
14 property was the subject of a Ballot Measure 37 application, a Ballot Measure 49 Authorization  
15 and a Vested Rights Argument. The vested rights arguments are submitted as part of this record to  
16 demonstrate that the property is built and committed with streets, electric power, septic systems,  
17 communication systems and domestic wells. The amount of expended for the infrastructure  
18 improvements listed in the preceding paragraph is \$1,016,489.30. This figure does not include the  
19 more recent studies for hydrology, transportation, wildlife, soils, agronomy and planning services.  
20 The eastern half of the property has been the beneficiary of most of the improvement expenditures  
21 such as improved roads, wells, electric power, land clearing, surveying, sanitation testing and  
22 engineering. The westernmost 120 acres only has some roughed out roads and no utilities.

23 Applicant says the resultant effects of Ballot Measures 37 and 49 also have a bearing on the  
24 filing of these applications since significant capital fixity was established on the easternmost  
25 128 acres. The subject property has a residual system of roads resulting from the prior  
26 applications and approval of Ballot Measure 37 claim. All of the roads that can serve all parts  
27 of the property are at the very least "roughed out". The road construction that resulted from  
28 the Ballot Measure 37/49 claims is 4,100 feet long. The property now has a gated access that  
29 originates on Best Road. These roads can serve as farm to market roads as well as for everyday  
30 access for the residents and their needs. Electric power has been extended into the site to serve  
31 the Lathan, Stone, and Gray residences. There is now additional capacity for electric power  
32 to the eastern half of the rezone area. Extensions from existing underground lines can be made  
33 to serve existing and future parcels to the west. In addition, two shares for water hookups have  
34 been purchased from the Orchard Heights Water District. There is a potential for four more  
35 non-farm dwellings to be established on properties adjacent to the subject rezone area but the  
36 conditions on those properties would likely prevent any houses from being so close as to  
37 interfere with farming activities.

38 Staff notes the applicant identifies physical development from parcelization and residential  
39 development on the subject properties arising from Measure 37 Claims, Measure 49 Final  
40 Orders, and Vested Rights Determinations. The vested rights arguments are submitted as part  
41 of this record to demonstrate that the property is built and committed with streets, electric  
42 power, septic systems, communication systems and domestic wells. According to the  
43 applicant, the amount expended for the infrastructure improvements is \$1,016,489.30. The  
44 eastern half of the property has been the beneficiary of most of the improvement expenditures  
45 such as improved roads, wells, electric power, land clearing, surveying, sanitation testing and  
46 engineering. The westernmost 120 acres only has some roughed out roads and no utilities.

47 The subject properties have a residual system of roads resulting from the prior applications  
48 and approval of Measure 37 Claims and Measure 49 Final Orders. The road construction that  
49 resulted from these land use actions is 4,100 feet long. The properties now have a gated access  
50 fronting Best Road. Land partitions pursuant to Ballot Measure 37 Claims, and building  
51 infrastructure to service the three new dwellings built pursuant to Measure 49 Final Orders on

1 the subject properties, has made achieving economies of scale for agriculture difficult.  
2 Furthermore, the applicant states that water, power and septic lines that connect the dwellings  
3 to domestic services have been placed underground, which make management of the land for  
4 agriculture impractical since it cannot be plowed without interfering with this buried  
5 residential infrastructure. Roads serving existing dwellings on the subject properties are  
6 aligned so that they interfere with the orderly tilling of soil, and are gravel surfaced for  
7 residential use. Farm activities such as ripping, discing, seeding and spraying require large,  
8 uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
9 properties both vertically and horizontally conflict with efficient management of soil  
10 preparation and crop protection activities.

11 Based on materials and statements in the record, Staff generally supports the applicant's  
12 conclusion that the proposed exception area has benefitted from infrastructure investments  
13 that interfere with its management as a farm unit. However, substantial evidence  
14 demonstrating that the same infrastructure interferes with the exception areas ability to be  
15 used for forestry is lacking.

16 **Applicants' Additional Findings:**

17 The exception area is developed with three large and expensive homes and several outbuildings,  
18 including one large stable. There are 4,100 linear feet of road constructed in the exception area.  
19 Electrical power has been extended to the site, and buried vaults and cables are extended throughout  
20 the top land. There is sufficient capacity constructed in the exception area to serve the proposed  
21 increase in density. There are many wells drilled in the exception area, three of which are currently  
22 being used by the three homes that are currently built. There are three on-site septic systems in place  
23 in the exception area.

24 The Simmons family has expended in excess of \$1,000,000 in the development of the exception  
25 area. The three new homes constructed in the exception area have added over \$2,500,000 more in  
26 expenses in constructing those homes. The total amount of money expended to develop the  
27 exception area is then over \$3,500,000.

28 **Hearings Officer Findings:**

29 The Hearings Officer believes the Applicants have expended significant finances for infrastructure  
30 improvements. However, in carefully reviewing the Forestland Suitability Analysis and Addendum,  
31 the NRCS soil data, and the current agricultural exemption permits for structures; the Hearings  
32 Officer finds the evidence in the record does not demonstrate that "physical development" within  
33 the exception zone "commits" these properties from engaging in agricultural or forestry practices.

34 **7. Other relevant factors. [OAR 660-004-0028(6)(g)]**

35 **Hearings Officer's Previous Findings:**

36 Applicant states that the subject property has extensive forests, steep rocky hillsides and  
37 windswept hilltops with relative thin and infertile soils. There are also areas that are more protected  
38 from the weather elements with deeper and well drained soils. The objective of this land use action  
39 is to create a circumstance where more specialty farms can come into this area such as organic  
40 oats, grass seed that requires no burning, and Noble fir Christmas trees. The property owners want  
41 to facilitate this trend while having minimal impacts on public facilities and services, groundwater  
42 resources, and aesthetics. None of the uses so far require irrigation water, nor will they since this  
43 is a groundwater restricted area.

44 Applicant contends there are so many factors individually and collectively that limit use that  
45 one can only conclude that the property as a whole is impractical to farm with intent to make  
46 a profit. Applicant lists some of these factors, as summarized in pages 60 and 61 of the Staff  
47 report. The topography of the site, applicant states, can only be described as varied and  
48 complex. The westernmost 120 acres has slope orientations south to north that are: southeast,  
49 due west, and northwest. Slopes are alternating convex and concave (drainages). None of the

1 area in the westernmost 120 acres has ever had any agricultural activity except for a brief  
2 period when sheep were grazed there. Applicant maintains that the sheep were decimated by  
3 coyotes and no cultivated agriculture has ever taken place here. The Hearings Officer himself  
4 once ran some sheep and is aware of the risk of predation. However, the Record does not show  
5 that the risk is greater in the Eola Hills than elsewhere in Polk County.

6 Applicant argues that the resultant effects of Ballot Measures 37 and 49 also have a bearing  
7 on the filing of these applications since significant capital fixity was established on the  
8 easternmost 128 acres. The subject property has a residual system of roads resulting from the  
9 prior applications and approval of Ballot Measure 37 claim. All of the roads that can serve all  
10 parts of the property are at the very least 'roughed out". The road construction that resulted  
11 from the Ballot Measure 37/49 claims is 4,100 feet long. The property now has a gated access  
12 that originates on Best Road. These roads can serve as farm to market roads as well as for  
13 everyday access for the residents and their needs. Electric power has been extended into the  
14 site to serve the Lathan, Stone, and Gray residences. There is now additional capacity for  
15 electric power to the eastern half of the rezone area. Extensions from existing underground  
16 lines can be made to serve existing and future parcels to the west. In addition, two shares for  
17 water hookups have been purchased from the Orchard Heights Water District. There is a  
18 potential for four more non-farm dwellings to be established on properties adjacent to the  
19 subject rezone area but the conditions on those properties would likely prevent any houses  
20 from being so close as to interfere with farming activities.

21 Staff responded that the applicant observes that a number of factors complicate agricultural  
22 uses of the subject properties including but not limited to elevation, wind and sun exposure,  
23 shallow soils, preponderance of rock, cold temperatures related to elevation, inability to  
24 irrigate and inability to burn crop residues. The elevation of the subject properties is between  
25 900 and 1,060 feet with steep slopes to the west and south. As stated by the applicant, the  
26 subject properties are situated on a high point at the southern end of the Eola Hills. Wind  
27 exposure is high since this southern promontory of the Eola Hills is in the path of coastal  
28 winds passing through the Van Duzer Gap. Moreover, the subject properties' location on the  
29 south side of a promontory means they receive more incident solar radiation than other areas  
30 of Polk County. The applicant indicates that a combination of solar exposure on steep south  
31 facing slopes and steady winds make raising crops on the subject properties impractical  
32 because increased transpiration of available soil moisture stunts growth and leads to crop  
33 failures. The slope, aspect and elevation of the subject properties has contributed to crop  
34 failures resulting from cool temperatures that discourage pollinators, heavy rains precipitated  
35 from orographic lifting of clouds up the Eola Hills, and constant wind stressing and damaging  
36 plants. Based on materials and statements in the record, Staff generally supports the  
37 applicant's conclusion that geographic and climatic factors have contributed to repeated crop  
38 failures on the subject properties, indicating the site is unsuitable for commercial agriculture.

39 The subject properties have a residual system of roads resulting from the prior applications  
40 and approval of Measure 37 Claims and Measure 49 Final Orders. The road construction that  
41 resulted from these land use actions is 4,100 feet long. The properties now have a gated access  
42 fronting Best Road. Land partitions pursuant to Ballot Measure 37 Claims, and building  
43 infrastructure to service the three new dwellings built pursuant to Measure 49 Final Orders on  
44 the subject properties, has made achieving economies of scale for agriculture difficult.  
45 Furthermore, the applicant states that water, power and septic lines that connect the dwellings  
46 to domestic services have been placed underground, which make management of the land for  
47 agriculture impractical since it cannot be plowed without interfering with this buried  
48 residential infrastructure. Roads serving existing dwellings on the subject properties are  
49 aligned so that they interfere with the orderly tilling of soil, and are gravel surfaced for  
50 residential use. Farm activities such as ripping, discing, seeding and spraying require large,  
51 uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
52 properties both vertically and horizontally conflict with efficient management of soil

1 preparation and crop protection activities. Based on materials and statements in the record,  
2 Staff generally supports the applicant's conclusion that the proposed exception area has  
3 benefitted from infrastructure investments that interfere its management as a farm unit.

4 Staff evaluated statements by the applicant and evidence in the record as demonstrating that  
5 other relevant factors, including climatic and geographic limitations and substantial  
6 infrastructure improvements made to vest Measure 37 Claims and built to serve three Measure  
7 49 dwellings contribute to irrevocably committing the subject properties to uses not allowed  
8 by Goal 3. The Hearings Officer does not attach great weight to statements by any of the  
9 applicants about his/her own personal efforts to farm or grow timber commercially with  
10 success on the subject property, but otherwise does not disagree with Staff's conclusions.

11 **Applicants' Additional Findings:**

12 See the totality of factors discussed above.

13 For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the statutorily  
14 defined farm uses or activities, and the Administrative Rule defined propagation and operation and  
15 practices employed in forest uses are impracticable.

16 It is understood that in certain places in the exception area plants and trees can be grown and  
17 harvested. The point here is that those activities cannot be done commercially for a profit due to  
18 impacts from the surrounding uses - the trend of which is to place rural residential neighbors, with  
19 more urban expectations, all around and adjacent to the exception area.

20 The concept being put forward here is that the intent of the planning program is ultimately to put  
21 land to its highest and best use and then to protect that use from other uses that come along that  
22 interfere with the highest and best use. In this case, the elevation and climate, and the proliferation  
23 of rural residential parcels and uses on the surrounding lands, among other factors make commercial  
24 farming and forestry impracticable. The economy of the region over the last two decades or more  
25 trend development in two ways: large farm parcels with good soil and proper elevation on large  
26 parcels for commercial farming and forestry; and smaller rural residential parcels some used only  
27 for living, and other for living combined with some resource activity for home supplement or use,  
28 and not for commercial sale.

29 This combination provides that all the land is put to its highest and best use. Junk lands such as that  
30 in the exception area cannot be commercially farmed. The Simmons family has tried that for decades  
31 and failed. These lands can be productive however in smaller parcels, where the owner is allowed  
32 to live on the land and employ specialty practices that can be done part time with little out of pocket  
33 expense, and which supplement the family's outside income. The trade off is clearly preferred in  
34 Oregon's land use system which encourages the highest and best use of the land. What is better 228  
35 acres of idle land with three homes, or 17-19 smaller parcels with homes and perhaps some small  
36 specialty farm or forest practices that generate commodities for the public?

37 It must be remembered that the land use program in Oregon is designed to be flexible and change  
38 with the times and the needs of community. It is not required that the exception area demonstrate  
39 that all farm or forest practices are impossible, only that certain identified and defined practices are  
40 impracticable. The applications meet the exception standard and should be approved.

41 **Hearings Officer Findings:**

42 Although the Applicants have put forth a compelling argument regarding the highest and best use of  
43 the proposed exception area, the Hearings Officer disagrees with the Applicant's assertion that  
44 Oregon's planning program "...is ultimately to put land to its highest and best use and then to protect  
45 that use from other uses that come along that interfere with its highest and best use." Statewide  
46 Planning Goals 3 and 4 are designed to protect agricultural and forestlands, which includes the  
47 subject properties by definition. Oregon Case Law demonstrates that Goal 3 protection does not  
48 mean the agricultural land must be put to commercial use. LUBA has previously determined that a

1 Goal 3 committed exception cannot be justified based on a finding that “commercial farming” is  
2 impracticable on the subject property. LUBA also found that a Goal 3 committed exception cannot  
3 be justified simply because the property is not capable of supporting an economically self-  
4 supporting agricultural operation, or property on which a reasonable farmer could make a living  
5 entirely from agricultural use of the land. Farm uses that do not meet that threshold are protected  
6 by Goal 3 (*Lovinger v. Lane County*, 36 Or LUBA 1, 1999). The test under Lovinger is not whether  
7 the property is capable of supporting “commercial” levels of agriculture. *See Gordon v. Polk*  
8 *County*, 54 Or. LUBA 351 (2007)(citing *Lovinger v. Lane County*, 36 Or. LUBA 1, 18 (1999)).

9 The Hearings Officer believes that the Applicants have previously faced challenges with  
10 commercial farming; however, the Hearings Officer finds “commercial farming” as argued by the  
11 Applicants is not the threshold as set forth by LUBA for whether or not a Goal exception is  
12 warranted. The Hearings Officer also finds that evidence does not support a finding that the forest  
13 product propagation or harvesting nor that forestry practices are impracticable; thus, the  
14 Applicants have also not sufficiently demonstrated an Exception to Goal 4 is warranted. The  
15 adjacent properties surrounding the subject properties have almost entirely been planned pursuant  
16 to Statewide Planning Goals. The adjacent properties also contain planned residential use and  
17 resource use. The Statewide planned use of the adjacent properties do not commit the proposed  
18 exception area to nonresource uses.

19 Based on the evidence in the record, the Hearings Officer finds the applications do not comply  
20 with this criterion.

## 21 **2. Findings for Zone Change, File ZC 18-02:**

22 **A. AMENDING OFFICIAL ZONING MAP. A zone change is a reclassification of**  
23 **any area on the Official Zoning Map from one zoning designation to another, after**  
24 **the proposed change has been reviewed and a recommendation made by the**  
25 **Hearings Officer or the Planning Commission. Such change shall be an ordinance**  
26 **enacted by the Board of Commissioners after proceedings have been**  
27 **accomplished in accordance with the provisions of this chapter. Annexation of**  
28 **territory to a city shall result in automatic amendment of the Official Zoning Map**  
29 **as of the effective date of annexation. When the Official Zoning Map is amended**  
30 **by ordinance or annexation to a city, the Planning Director shall cause the changes**  
31 **to be made to the Official Zoning Map. [PCZO 111.110]**

32 Planning Division Staff reviews the proposed zone change, and prepares a Staff report and  
33 recommendation for the Hearings Officer. The Hearings Officer makes a recommendation to the  
34 Board of Commissioners for a final local decision. Authorization for a zone change is provided  
35 under PCZO 111.275. A zone change is subject to recommendation by the Hearings Officer after  
36 holding a public hearing pursuant to PCZO 111.190 and 115.030 and decision by the Polk County  
37 Board of Commissioners after holding a public hearing pursuant to PCZO 111.200 and 115.030.  
38 The Hearings Officer finds the applications have been processed in accordance with these  
39 procedural requirements of the PCZO.

40 **B. ZONE CHANGE CRITERIA. Pursuant to Section 111.160, a zone change may be**  
41 **approved, provided that the request satisfies all applicable requirements of this**  
42 **ordinance, and provided that with written findings, the applicant(s) clearly**  
43 **demonstrate compliance with the following criteria:**

44 **1. The proposed zone is appropriate for the comprehensive plan land use**  
45 **designation on the property and is consistent with the purpose and policies for**  
46 **the applicable comprehensive plan land use classification; [PCZO 111.275(A)]**

47 **a. It is the intent of the Rural Lands Plan designation to provide an**  
48 **opportunity for a segment of the population to obtain acreage home sites**

1 in a rural area, while at the same time encouraging and protecting  
2 agriculture and forestry.

3 In those areas that receive an exception from the Oregon Statewide  
4 Planning Agricultural and Forest Land Goals #3 and #4, but are not given  
5 an exception to Oregon Statewide Planning Urbanization Goal #14,  
6 implementation will be accomplished with the Acreage Residential 10-  
7 Acre (AR-10) Zone and Agriculture and Forestry 10-Acre (AF-10) Zone.  
8 In those areas that receive an exception from the Oregon Statewide  
9 Planning Agricultural and Forest Land Goals #3 and #4 and Urbanization  
10 Goal #14, implementation will be accomplished with the Acreage  
11 Residential (AR-5) or Suburban Residential (SR) Zones. [PCCP Section 4]

12 **Hearings Officer's Previous Findings:**

13 Applicant says the proposed Agriculture/Forestry-10 Zone implements the intent statements of the  
14 Rural Lands designation and the Agricultural designation. Both intent statements seek to preserve  
15 and protect agricultural lands. Both designations encourage the agricultural use of land over home  
16 site development and the Rural Lands broaden the scope to protect forestry as well.

17 The Rural Lands designation promotes opportunity for a segment of the population to undertake  
18 resource use of land without having to start with a large acreage. The Rural Lands designation is  
19 a good fit for the subject applications because none of the existing parcels conform to the 80-acre  
20 minimum lot size for the EFU zone. The parcel sizes involved in this zone change are: 45, 43, 40,  
21 40, 20, 20, and 20. The proposed AF-10 zoning is a good fit for this area given the highly variable  
22 topography, soils, wind exposure, vegetative cover and elevation.

23 Staff notes that, as described in Section 4 of the PCCP, the Rural Lands Plan designation is  
24 implemented by the AR-5, AR-10 and AF-10 zones. The main difference between the AF-10 zone  
25 and the AR-5 and AR-10 zones is that a purpose of the AF-10 zone is to provide larger acreage  
26 home sites while maximizing opportunities for farm uses, and the purpose of the AR-5 and AR-10  
27 zones is to act as a buffer between farm zones and higher density urban areas. The subject parcel  
28 is currently zoned EFU, which has an 80-acre minimum parcel size. The EFU zone and AF-10  
29 zone have different minimum parcel sizes and dwellings are outright permitted in the AF-10 zone,  
30 so zoning the subject property AF-10 would allow for additional residential density beyond what  
31 is currently permitted. The uses in the AF-10 zone have already been determined to be consistent  
32 with the Rural Lands PCCP designation, and the management of the subject properties for small  
33 scale agricultural purposes and the establishment of single family dwellings, all uses permitted in  
34 the AF-10 zone. Therefore, Staff concluded, the applications complied with this criterion.

35 **Applicants' Additional Findings:**

36 The AF-10 zone is identified as one of the zones that appropriately implements the Rural Lands  
37 plan designation. This section is complied with.

38 **Hearings Officer Findings:**

39 The Applicants have concurrently applied for a zone change to amend the subject properties zoning  
40 designation from EFU to AF-10, and a Comprehensive Plan Amendment with an exception to  
41 Statewide Planning Goals 3 and 4, to change the designation from Agriculture to Rural Lands. Rural  
42 Lands is the appropriate Comprehensive Plan designation for the AF-10 Zoning District. The Zone  
43 Change application should not be approved unless concurrent approval is obtained for a  
44 Comprehensive Plan amendment with an exception to Goals 3 and 4. An exception to Goal 14 is not  
45 required because the AF-10 zone has a 10.0 acre minimum parcel size.

46 **2. The proposal conforms with the purpose statement of the proposed zone;**  
47 **[PCZO 111.275(B)]**

48 **a. It is the purpose and function of the Agriculture and Forestry – 10-acre**

1                    **minimum (AF-10) zone to:**

- 2                    **i. Allow the designation of new Rural Lands consistent with Oregon**  
3                    **Administrative Rule (OAR) 660-004-0040, without requiring an**  
4                    **exception to Oregon Statewide Planning Goal 14; [ PCZO 128.810 (A)]**

5                    **Hearings Officer's Previous Findings:**

6                    Applicant claims that the AF-10 Zone is ideally suited to the extreme variations that exist on this  
7                    site with respect to elevation, slope, wind exposure, aspect, soil mapping units, soil depth, soil  
8                    fertility, vegetative cover, degree heating days, frost free days as well as historical use of the land.  
9                    The purpose and intent of this zone is to create an environment in which small scale agriculture  
10                   and forestry can be conducted through residency management. The concept of small scale farming  
11                   and "starter farms" can make substantial contributions to the local farm economy of the area.

12                   According to the Western Rural Development Center Paper from Oregon State University:

13                   With the growing awareness of the fact that small-scale farmers are an important  
14                   embodiment of Traditional American values, new interest has been generated in  
15                   ensuring their ultimate survival. Small-scale farmers, however, are significant  
16                   not only for the social values they represent, but also for their sheer numbers.  
17                   They make an important contribution to strengthening the economic base and  
18                   enhancing the social environment of the rural community. Although farmers  
19                   with gross product sales of less than \$40,000.00 account for only 15 percent of  
20                   the Oregon's farm product sales, they constitute 80 percent or 21,466 of the  
21                   26,753 farmers in the state.

22                   An Oregon State University Publication entitled Small-Scale Farming, a portrait of Polk County,  
23                   Oregon was published in 1979 and much of what this document promotes has come to fruition  
24                   throughout Oregon including Polk County. This 45-page document, though dating from 1979, has  
25                   to some extent been realized with the proliferation of small farms, most notably vineyards, farms,  
26                   specialty livestock and non-traditional dairies. Other exotic crops being conducted on small  
27                   acreage include fowl (ostrich and emu), fur producing animals (mink, alpaca, and llamas) and  
28                   flower nurseries. Two produce stands are located within a mile of each other on the Kings Valley  
29                   Highway near the Little Luckiamute River Bridge. A fresh vegetable produce stand is located east  
30                   of Dallas where the Rickreall Cutoff intersects with Highway 22 across from the Oak Grove Golf  
31                   Course. The operators of the Rickreall facility earn most of their yearly income from the sale of  
32                   farm grown produce. Other fresh produce is featured on Wednesdays and Saturdays in Salem and  
33                   in Independence on Saturdays.

34                   The only other AF-10 zoned property in Polk County is located near the intersection of Harmony  
35                   Road and Highway 22 and nearly next door to the location of the Buell Store. This 40-acre parcel  
36                   has been adaptively reclaimed from a former quarry site into an intensive forest management  
37                   operation. The subject property, similar to the Buell property, has areas that are ideally suited for  
38                   small woodland management, horse operations, specialty grain and grass seed and possible orchard  
39                   crops. A horse operation is already taking hold. Polk County has no other AF-10 zoned areas  
40                   except at Buell.

41                   This purpose statement is not an approval criterion but it provides an opportunity to establish where  
42                   limitations currently exist. The subject property defies any attempt to manage it on a large field  
43                   size basis and with uniform crops, according to applicant's statements. The Simmons family has  
44                   had crop failures for prunes, cherries, gooseberries, wheat, grass seed, Christmas trees, and other  
45                   specialty crops. The adaptive use of this site for smaller and more intensive farm and forest  
46                   operations, applicant concludes, is a hand-in-glove fit for this highly variable location. The  
47                   Hearings Officer cannot disagree with the applicant's zeal to foster small-scale agriculture, but  
48                   must remind himself that nothing in the re-designation or re-zone gives assurance that agricultural  
49                   activity in fact will be practiced on any of the small tracts newly established.



1 Staff notes that the applicant has proposed a zone change from EFU to AF-10. The proposed AF-  
2 10 zone allows "farm use" and "the propagation and harvesting of a forest product" and a single  
3 family dwelling as permitted uses. Based on the application materials and statements by the  
4 applicant, the AF-10 zone would be compatible with surrounding land uses and also enable the  
5 applicant to develop larger acreage home sites where the occupants could manage the property for  
6 a range of specialty farm uses as a hobby even though the land is not suitable to make a profit in  
7 money from farm use. The purpose statement of the AF-10 zone indicates that the function of the  
8 zone is to allow the designation of Rural Lands, consistent with OAR 660-004-0040(7)(i)(A),  
9 without requiring a Goal 14 exception. Staff concluded that designation of the subject properties  
10 as the proposed the AF-10 zone, with its 10-acre minimum parcel size, does not require a Goal 14  
11 exception.

12 **Applicants' Additional Findings:**

13 According to PCZO 128.810, there are many purposes for the AF-10 zone. It is first and foremost  
14 a zone to accommodate exceptions to Goal 14, while providing larger acreage homesite that will  
15 allow small time specialty hobby farms that the owner can manage while working off-site and still  
16 make some production from the land that would not be the case otherwise. The AF-10 zone intends  
17 to provide for orderly growth; promote the planning of future roads and protect identified natural  
18 resources. These are the exact reasons for this proposal. This section is complied with.

19 **Hearings Officer Findings:**

20 If these applications were approved, the subject properties could be further divided to create parcels  
21 that are a minimum of 10.0 acres in size. A single-family dwelling is a permitted use within the AF-  
22 10 zone. Because the AF-10 zone has a 10.0 acre minimum parcel size, an exception to Goal 14 is  
23 not required. The Hearings Officer is concerned that even if the AF-10 zone was applied, all of the  
24 permitted uses within the AF-10 zone may still not be allowed on the subject properties pursuant to  
25 the Declaration of Covenants, Conditions and Restrictions for the Glenn Hill Estates. However, the  
26 Applicants have presented testimony and evidence into the record that their intent is to allow the  
27 establishment of "hobby farming" which agricultural and forestry is still a permitted use in AF-10.  
28 Polk County administers the Polk County Zoning Ordinance, not private agreements that further  
29 limit uses allowed on the subject properties. However, the Hearings Officer acknowledges the  
30 contradicting evidence in the record regarding the intended uses for the proposed 17-19 additional  
31 parcels.

- 32 **ii. Provide larger acreage home sites while at the same time providing**  
33 **the maximum opportunity for agriculture and forestry related**  
34 **operations that could result in rural employment for the residents of**  
35 **Polk County; [PCZO 128.810(B)]**

36 **Hearings Officer's Previous Findings:**

37 Applicant states there is no supply of this type of land found in a cohesive area anywhere in Polk  
38 County. The properties comprising this request are already tracking in this direction and the  
39 objective is to continue this trend. Fine Fescue and organic oats have already been planted and a  
40 horse boarding and training facility is also being established as the applications are being  
41 processed.

42 Staff states that the applicant has applied for an irrevocably committed Goal exception as part of  
43 the applications. The exception criteria are evaluated above. The proposed exception area may  
44 contain a predominance of agricultural soils and even continue to have other agricultural  
45 characteristics, while still qualifying for an irrevocably committed Goal exception. This criterion  
46 requires Polk County to determine the most appropriate PCCP designation for the exception area,  
47 once an exception is approved. The applicant is proposing a Rural Lands PCCP designation. The  
48 applicant states that the demand for the types of crops grown historically have diminished such  
49 as cherries, prunes, Douglas fir Christmas trees, grass seed and grain as the yield of these crops  
50 also dropped. Some of the processing facilities for these crops have relocated or closed. The

1 applicant also states that prohibition of irrigation on the subject properties and physical  
2 characteristics of the site have been limiting factors inhibiting the ability to profitably manage  
3 the subject properties for agriculture. Further, applicant contends the AF-10 zone would be  
4 compatible with surrounding land uses and, also enable the applicant to develop larger acreage  
5 home sites where the occupants could manage the subject properties for a range of specialty farm  
6 uses as a hobby even though the land is not suitable to make a profit in money from farm use.  
7 The Hearings Officer does note that the applicant later made it apparent that surrounding  
8 residential uses make spraying for agriculture and forestry difficult.

9 **Applicant's Additional Findings:**

10 (Addressed in PCZO 128.810 (A) above.)

11 **Hearings Officer Findings:**

12 As a result of the proposed zone change, the subject properties could be further divided to create  
13 parcels that are a minimum of 10.0 acres in size. Therefore, based on the size of the proposed rezone  
14 area, the Applicants' proposal could result in 17-19 additional single-family dwellings on the subject  
15 properties. The Applicants' proposal of "small hobby farms" that contain a single-family dwelling  
16 would be consistent with the purpose and intent of the AF-10 zone; however, as previously pointed  
17 out by the Hearings Officer and reiterated here, there is no assurance that any agricultural or forestry  
18 practices would actually be practiced as a result of approving these applications.

19 **iii. Provide for the establishment of uses consistent with the location,**  
20 **inherent limitations and the functional needs of the area; [PCZO**  
21 **128.810(C)]**

22 **Hearings Officer's Previous Findings:**

23 Applicant contends that the subject property has extensive forests, steep rocky hillsides and  
24 windswept hilltops with relative thin and infertile soils. There are also areas that are more protected  
25 from the weather elements with deeper and well drained soils. The objective of this land use action  
26 is to create a circumstance where more specialty farms can come into this area such as organic  
27 oats, grass seed that requires no burning, and Noble fir Christmas trees. The property owners want  
28 to facilitate this trend while having minimal impacts on public facilities and services, groundwater  
29 resources, and aesthetics. None of the uses so far require irrigation water, nor will they since this  
30 is a groundwater restricted area.

31 Staff concluded that the applicant has submitted materials in the record demonstrating that inherent  
32 limitations of the proposed exception area preclude its management as a farm unit. The applicant  
33 observes that a number of factors complicate agricultural uses of the subject properties including  
34 elevation, wind exposure, sun exposure, shallow soils, preponderance of rock, cold temperatures  
35 related to elevation, inability to irrigate and inability to burn residues. Based on all the  
36 evidence in the record, the Hearings Officer, however, cannot reach the same conclusion as Staff.

37 The Hearings Officer relied on specific evidence to arrive at a different conclusion than Staff. First,  
38 the Soils Survey demonstrates the subject properties are composed of predominantly of  
39 agricultural soils. Land with a predominance of soils in capability classes I through IV is  
40 considered agricultural land per OAR 660-033-0030. With 53.5% being soils designated capability  
41 class II through IV, according to the Soil Survey, the subject property qualifies as agricultural by  
42 rule. While the Norgren and Gallagher soil studies were not used as part of the Hearings Officer's  
43 evaluation of the applicant's proposal, they validate soils maps found in the Soils Survey  
44 demonstrating a predominance of agricultural soils on the subject property. Based on soils data,  
45 the Hearing Officer finds that the subject property is agricultural land, consistent with OAR 660-  
46 033- 0030.

47 The applicant states that wine grapes are not a suitable crop for the subject properties, citing site  
48 specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a  
49 preponderance of boulders, and a lack of landscape uniformity to establish blocks with the

1 appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette  
2 viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower  
3 elevations than the subject properties. Cubanissimo Vineyards to the east of the subject properties  
4 is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills  
5 Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject  
6 properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the  
7 subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon,  
8 Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While  
9 the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate  
10 Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds  
11 affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the  
12 variety of landscapes on which vineyards are planted, with east facing, west facing and south  
13 facing vineyards represented by the small sample above. However, the subject properties are more  
14 exposed to wind and sun than the vineyard sites surrounding it, lending some credence to the  
15 applicant's observations that wine grape production is impracticable there. At the same time,  
16 evidence in the record shows that some knowledgeable grape growers feel that "the rocky,  
17 wind-battered slopes of the Eola-Amity hills have emerged as one of Oregon's most singular  
18 terrains for pinot noir." [Patrick Comiskey, "Wind Powered Pinot", Wine & Spirits Magazine,  
19 April 2013.] Applicant contends above that the Simmons family "actively farmed the tract,  
20 growing gooseberries, strawberries, prunes, cherries, fine fescue grass, Christmas trees and wheat  
21 with little success," attempting by this recitation to demonstrate the land is not suitable for large-  
22 scale commercial agricultural crops. There is no indication that attempts were made to grow grapes  
23 of any variety.

24 Evidence submitted by Sarah Deumling, owner of Zena Forest Products, and by Steve Vaught, a  
25 professional forester who is familiar with timber management in the Eola Hills indicates the area  
26 could be managed profitably as a hard wood forest. In serial correspondence, Sarah Deumling  
27 details the timber operations of Zena Forest Products, a company that specializes in hard wood  
28 forest products. Zena Forest Products sustainably produces flooring and cabinet making materials,  
29 primarily from Oregon White Oak and Oregon Big Leaf Maple trees, on lands with similar site  
30 characteristics just north of the subject properties. Ms. Deumling has proposed to purchase the  
31 subject properties to manage them for hard woods and has offered pro-bono consulting services to  
32 profitably produce hard wood forest products on the subject properties. Both Steve Vaught and  
33 Sarah Deumling attest to the legitimacy of hard wood forests for timber production, habitat values  
34 and soil and water conservation benefits.

35 Applicant argues that the elevation of the subject properties is between 900 and 1,060 feet with  
36 steep slopes to the west and south. As stated by the applicant, the subject properties are situated  
37 on a high point at the southern end of the Eola Hills. Wind exposure is high since this southern  
38 promontory of the Eola Hills is in the path of coastal winds passing through the Van Duzer Gap.  
39 Moreover, the subject properties' location on the south side of a promontory means they receive  
40 more incident solar radiation than other areas of Polk County. The applicant indicates that a  
41 combination of shallow soils, solar exposure on steep south facing slopes and steady winds make  
42 raising crops on the subject properties impractical because increased transpiration of available soil  
43 moisture stunts growth and leads to crop failures. The slope, aspect and elevation of the subject  
44 properties has contributed to crop failures resulting from cool temperatures discouraged  
45 pollinators, heavy rains precipitated from orographic lifting of clouds up the Eola Hills, and  
46 constant wind stressing and damaging plants.

47 Staff understands the applicant's argument to be that if a dwelling is permitted, the likelihood of  
48 the establishment of an agricultural activity increases because the occupant could manage the  
49 property for a range of specialty farm uses as a hobby even though the land is not suitable to make  
50 a profit in money from farm use. Staff agrees the proposed AF-10 zone would then be appropriate  
51 for the subject properties due to inherent limitations on agriculture brought about by the unique  
52 climatic and geographic factors described above.

1 As suggested above, the Hearings Officer has some skepticism about the number of potential  
2 residents who might be seriously interested in long-term hobby farming, and finds nothing in the  
3 record showing how many new residents will take advantage of the opportunity. It is clear that  
4 such a person or family may build a residence as a matter of right, but will incur no penalty for  
5 ignoring farming or forestry activities. Therefore, the Hearings Officer finds that the proposal  
6 would not provide for the establishment of uses consistent with the location, inherent limitations  
7 and functional needs of the area.

8 **Applicant’s Additional Findings:**

9 (Addressed in PCZO 128.810 (A) above.)

10 **Hearings Officer Findings:**

11 Based on soils data, the Hearing Officer previously determined that the subject property is  
12 agricultural land (consistent with OAR 660-033- 0030) and was not convinced that future property  
13 owners would actually manage the property for “hobby farms”. The Hearings Officer and Staff do  
14 not doubt that there is a legitimate market for small-scaled intensive agricultural operations that  
15 produce crops that can be sold at local farmers markets. However, as pointed out previously, there  
16 is no assurance that the land would actually be managed this way, especially with all of the site  
17 characteristics that the Applicants have identified to be challenging for agricultural management  
18 (slope, wind, temperature, etc.). One of the subject properties is already 20 acres in size and  
19 contains a dwelling. It is unclear how a 10 acre parcel that contains a dwelling would not face the  
20 same challenges that a 20 acre parcel with a dwelling currently faces, as described by the  
21 Applicants. The Applicants have made extensive arguments above how the proximity of the  
22 subject properties to residential lands presents challenges to agricultural and forestry practices, it  
23 is unclear how adding more houses changes or make those hardships easier. For these reasons, the  
24 Hearings Officer finds that there is no assurance that the proposed zone change would provide for  
25 the establishment of uses consistent with the location, inherent limitations and the functional needs  
26 of the area.

- 27 **iv. Provide for the orderly growth of the rural areas so that as**  
28 **development occurs, the supporting community will be able to afford**  
29 **the increased capital investments required for services to and within**  
30 **the new rural area and the costs of maintenance of utility facilities,**  
31 **roads, protective services, and desired social service; [PCZO**  
32 **128.810(D)]**

33 **Hearings Officer’s Previous Findings:**

34 Applicant states that the subject properties have been involved in prior land use actions that would  
35 have resulted in a denser development. This proposal maintains at least a 10-acre parcel size. Two  
36 recent sales have been for parcels that are 43 and 45 acres respectively. Earlier, an 18.14-acre  
37 parcel was created. Two of these parcels now have agriculture uses being established, thus  
38 affirming the trend for this area. The 45 and 43 acre parcels were created through a Ballot Measure  
39 49 Claim.

40 Staff states that the applicant addresses current residential development on the subject properties  
41 arising from Ballot Measure 37 Claims, a Ballot Measure 49 Final Orders, and Vested Rights  
42 Arguments. The Vested Rights Arguments are included as part of the record to demonstrate that  
43 the subject properties are built and committed with streets, electric power, septic systems,  
44 communication lines and domestic wells. The amount of expended for these infrastructure  
45 improvements, applicant states, was \$1,016,489.30. The eastern half of the property has been the  
46 beneficiary of most of the expenditures for improved roads, wells, electric power, land clearing,  
47 surveying, septic system testing and engineering. The westernmost 120 acres only has some  
48 roughed out roads and no utilities.

1 The subject properties have a residual system of roads resulting from the prior applications and  
2 approval of Measure 37 Claims and Measure 49 Final Orders. The road construction that resulted  
3 from these land use actions is 4,100 feet long. The properties now have a gated access fronting  
4 Best Road. Land partitions pursuant to Ballot Measure 37 Claims, and building infrastructure to  
5 service the three new dwellings built pursuant to Measure 49 Final Orders on the subject properties,  
6 has made achieving economies of scale for agriculture difficult. Furthermore, water, power and  
7 septic lines that connect the dwellings to domestic services have been placed underground, which  
8 make management of the land for agriculture impractical since it cannot be plowed without  
9 interfering with this buried residential infrastructure. Roads serving existing dwellings on the  
10 subject properties are aligned so that they interfere with the orderly tilling of soil, and are gravel  
11 surfaced for residential use. Farm activities such as ripping, discing, seeding and spraying require  
12 large, uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
13 properties both vertically and horizontally conflict with efficient management of soil preparation  
14 and crop protection activities. Staff has evaluated statements by the applicant and evidence in the  
15 record demonstrating that infrastructure improvements made to vest Measure 37 claims and built  
16 to serve three Measure 49 dwellings would likely reduce the share of capital investment needed  
17 from the local community to serve future development.

18 The applicant has provided information in the Record concerning the provision of public facilities  
19 and services that would be available to serve the proposed residential use of the subject properties.  
20 The applicant has demonstrated the subject properties are served by existing public services.

21 The applicant estimates that 19 additional single family dwellings could be constructed if this  
22 proposal is approved. According to the 2010 US Census demographic profile for Oregon, the  
23 average household size is 2.47 people. As a result, the proposed PCCP change could result in an  
24 additional population of 46 people. Staff found no evidence to suggest that these service providers  
25 lack capacity to serve an additional 19 single family dwellings with an estimated population  
26 increase of 46 people.

27 The subject properties abut Best Road, a Minor Collector in Figure 3 of the Polk County  
28 Transportation Systems Plan. The applicant submitted a transportation analysis for the proposal  
29 authored by Lancaster Engineering dated October 22, 2013, supplemented on October 9, 2015,  
30 which indicates that the proposed AF-10 zone would generate 17 morning peak hour trips and 23  
31 evening peak hour trips, as compared with 4 and 5 trips, respectively, for the current EFU zone.  
32 Weekday total trip generation from the proposal would be 218 trips for the proposed AF-10 zoning  
33 and 48 for the current EFU zoning. The Lancaster Engineering traffic analysis included a  
34 discussion of potential traffic impacts the proposal may have on the State Highway System, and  
35 the proposal's consistency with the Transportation Planning Rule (TPR). The relevant section of  
36 the TPR, OAR 660-012-0060, ensures that the function and capacity of State highways will not be  
37 adversely affected by traffic increases resulting from changes to adopted land use plans and  
38 regulations. Lancaster Engineering's TPR discussion focused on the intersection of Highway 22  
39 and 55 Avenue NW, which is also where Highway 51 intersects Highway 22. A letter from Daniel  
40 Fricke, Senior Transportation Planner with ODOT, dated June 8, 2015 supports the conclusions in  
41 the Lancaster Engineering traffic analysis addressing the TPR - that the applicant's proposal would  
42 not have a significant impact on a State highway.

43 An operational traffic analysis dated October 22, 2013, was conducted by Lancaster Engineering  
44 for the intersection of Orchard Heights Road and Best Road. The applicant provided additional  
45 analysis of two intersections on Orchard Heights Road in a supplemental report by Lancaster  
46 Engineering dated October 15, 2015. Lancaster Engineering's additional traffic analysis of impacts  
47 on the county road system from potential trip generation by the proposal, particularly the  
48 intersections of Orchard Heights Road and Best Road and Orchard Heights Road and Orchard  
49 Heights Place, was reviewed by the Polk County Engineer Todd Whitaker, P.E, who determined  
50 the impact of the proposal on the county road system would not be significant. After reviewing the  
51 applicant's statements, and comments from Whitaker, the Polk County Engineer Staff concludes  
52 that sufficient transportation facilities would be available to serve the applicant's proposal.

1 However, at the time the applicant submits applications to develop the exception area, should this  
2 proposal be approved, they may be responsible for transportation improvements.

3 **Applicant's Additional Findings:** (Addressed in PCZO 128.810 (A) above.)

4 **Hearings Officer Findings:**

5 As discussed above, the record received comments from the Salem-Keizer School District which  
6 contains estimated facility costs associated with additional Elementary, Middle, and High School  
7 enrollment that could result from approving these applications. Staff determined that nothing in the  
8 record demonstrates that there are currently insufficient school facilities; however, increased  
9 enrollment inevitably requires more funding.

10 Based on a memorandum written by Brian Davis with Lancaster Engineering, Staff determined that  
11 the proposed zone change would not result in a significant increase in traffic. Thus, the Hearings  
12 Officer finds that up to 19 additional dwellings could be supported by existing public services and  
13 facilities.

14 v. **To promote the planning of future roads in the area; and [PCZO**  
15 **128.810(E)]**

16 **Hearings Officer's Previous Findings:**

17 Applicant states that the subject property has a residual system of roads resulting from the prior  
18 applications and approval of Ballot Measure 37 claim. All of the roads that can serve all parts  
19 of the property are at the very least "roughed out". The road construction that resulted from the  
20 Ballot Measure 37/49 claims is 4,100 feet long. The property now has a gated access that  
21 originates on Best Road. These roads can serve as farm to market roads as well as for everyday  
22 access for the residents and their needs.

23 The applicant addressed current residential development on the subject properties arising from  
24 Measure 37 Claims, Measure 49 Final Orders, and Vested Rights Determinations. The  
25 applicant included evidence from the Vested Rights Determinations as part of the record to  
26 demonstrate that the subject properties are built and committed with streets, electric power,  
27 septic systems, communication networks and domestic wells. The amount of expended for the  
28 infrastructure improvements was \$1,016,489.30. The eastern half of the property has been the  
29 beneficiary of most of the expenditures for improved roads, wells, electric power, land  
30 clearing, surveying, sanitation testing and engineering. The western most 120 acres only has  
31 some roughed out roads and no utilities.

32 The subject properties have a residual system of roads resulting from the prior applications  
33 and approval of Measure 37 Claims and Measure 49 Final Orders. The road construction that  
34 resulted from these land use actions is 4,100 feet long. The properties now have a gated access  
35 fronting Best Road. Land partitions pursuant to Ballot Measure 37 Claims and building  
36 infrastructure to service the three new dwellings built pursuant to Measure 49 Final Orders on  
37 the subject properties, have made achieving economies of scale for agriculture difficult.  
38 Furthermore, water, power and septic lines that connect the dwellings to domestic services  
39 have been placed underground, which make management of the land for agriculture  
40 impractical since it cannot be plowed without interfering with this buried residential  
41 infrastructure. Roads serving existing dwellings on the subject properties are aligned so that  
42 they interfere with the orderly tilling of soil, and are gravel surfaced for residential use. Farm  
43 activities such as ripping, discing, seeding and spraying require large, uniform fields to be done  
44 efficiently. Gravel driveways crossing the middle of the subject properties both vertically and  
45 horizontally conflict with efficient management of soil preparation and crop protection  
46 activities. Based on materials and statements in the record, Staff generally supports the  
47 applicant's conclusion that the proposed exception area has benefitted from infrastructure  
48 investments that interfere its management as a farm unit.

1 Comments from the Polk County Engineer set forth in a letter from Austin McGuigan, Polk  
2 County Community Development Director, dated October 15, 2014 indicate that the  
3 anticipated 300 trips a day would trigger a warrant to pave Best Road. Best Road provides the  
4 primary access to the subject properties and is currently surfaced with gravel. An operational  
5 traffic analysis dated October 22, 2013 was conducted by Lancaster Engineering for the  
6 intersection of Orchard Heights Road and Best Road. The applicant provided additional  
7 analysis of two intersections on Orchard Heights Road in a supplemental report by Lancaster  
8 Engineering dated October 15, 2015. Lancaster Engineering's additional traffic analysis of  
9 impacts on the county road system from the 218 potential trips generated by the proposal,  
10 particularly the intersections of Orchard Heights Road and Best Road and Orchard Heights  
11 Road and Orchard Heights Place, was reviewed by the Polk County Engineer, Todd Whitaker,  
12 P.E, who determined the impact of the proposal on the county road system would not be  
13 significant. After reviewing the applicant's statements, and comments from Whitaker, Staff  
14 concluded that sufficient transportation facilities would be available to serve the applicant's  
15 proposal. However, at the time the applicant submits applications to develop the exception  
16 area, they may be responsible for transportation improvements.

17 **Applicant's Additional Findings:** (Addressed in PCZO 128.810 (A) above.)

18 **Hearings Officer Findings:**

19 As discussed above, the Applicants provided a memorandum written by Brian Davis with Lancaster  
20 Engineering, who determined the proposed zone change from EFU to AF-10 could generate up to  
21 13 additional vehicle trips during the morning peak hour and 18 additional vehicle trips during the  
22 evening peak hour. Staff provided notice of the Applicants' proposal to the Polk County Public  
23 Works Department and to the Oregon Department of Transportation (ODOT). No comments from  
24 either of these departments were received. Therefore, the previous comments submitted by Todd  
25 Whitaker, P.E, are sufficient for this review. After reviewing the traffic analysis authored by Brian  
26 Davis, and comments previously submitted from Mr. Whitaker, the Hearings Officer concludes that  
27 sufficient transportation facilities would be available to serve the Applicants' proposal. However, if  
28 these applications were to be approved, additional transportation improvements may be required.

29 **vi. To provide for the above, yet not adversely affect fish and wildlife**  
30 **resources and habitat areas, natural areas, and scenic areas. [PCZO**  
31 **128.810(F)]**

32 **Hearings Officer's Previous Findings:**

33 Applicant claims the subject property has been examined for fish and wildlife resources by a  
34 licensed biologist and the potential impacts to those resources. The property is basically a ridge  
35 line with large flanking slopes to the east and west. There are permanent streams and there is an  
36 intermittent drainage in the very extreme northwest corner of the property above Legacy  
37 Vineyard. The wildlife biologist did discover some significant old growth Oregon White Oak.  
38 These trees are in relatively inaccessible locations but could be preserved through restrictive  
39 covenants. The portion of the property owned by the Simmons family is being considered for a  
40 Conservation Easement, particularly close to the Legacy Vineyard to minimize conflicts between  
41 use areas and to maintain a tree canopy cover to preserve a wet weather draw.

42 Staff indicates that, based on a review of the Polk County Significant Resource Areas Map, the  
43 subject properties have no inventoried significant resources. Based on a review of the National  
44 Wetland Inventory map, Rickreall quadrangle, the middle fork of the McNary Branch of Mud  
45 Slough abuts the northwest corner of the subject properties, and is identified as a linear wetland.  
46 This request does not include a review of any specific new development. However, development  
47 within a riparian setback area may be prohibited or require County, State, and/or Federal permits.  
48 As described in PCZO 182.050(B)(2), the size of the wetland/riparian setback ranges between  
49 25 and 100 feet based on the type and size of the wetland. Any future non-structural development  
50 activity that is identified as a conflicting use in PCZO 182.070 within a riparian setback area

1 would require a management plan filed with the Polk County Planning Division. Such  
2 development would also require State or Federal permits. If a management plan is required, the  
3 applicant shall coordinate the plan with Oregon Department of State Lands (DSL) and other  
4 appropriate State and Federal agencies. Structural development would be prohibited within the  
5 riparian setback area. Within the riparian setback area, all trees and at least 50 percent of the  
6 understory would be retained, excluding the exceptions authorized pursuant to PCZO  
7 182.050(B)(1)(a-e). The property owner is responsible for obtaining any necessary County, State  
8 and Federal permits prior to commencing development.

9 **Applicant's Additional Findings:** (Addressed in PCZO 128.810 (A) above.)

10 **Hearings Officer Findings:**

11 Based on a review of the Polk County Significant Resource Area (SRA) Map, the subject properties  
12 do not contain any inventoried significant resources. Based on the Federal Emergency Management  
13 Agency (FEMA) Flood Insurance Rate Map (FIRM) panel numbers 41053C0275F, dated December  
14 19, 2006, the subject properties are located outside of the Special Flood Hazard Area. There are no  
15 historic sites or Greenway areas located on the subject properties. The National Wetland Inventory  
16 (NWI) map, Rickreall quadrangle, indicates that the middle fork of the McNary Branch of Mud  
17 Slough may abut the northwest corner of the subject properties. However, based on Staff's review of  
18 LIDAR imagery it does not appear to be located on the subject properties. The Hearings Officer finds  
19 the evidence in the record does not suggest that the Applicants' proposal would adversely affect fish  
20 and wildlife resources, habitat areas, natural areas, or scenic areas.

- 21           **3. The uses allowed in the proposed designation will not significantly adversely**  
22           **affect allowed uses on adjacent lands; [PCZO 111.275(C)]**  
23           **4. Adequate public facilities, services, and transportation networks are in place,**  
24           **or are planned to be provided concurrently with the development of the**  
25           **property; [PCZO 111.275(D)]**

26 **Hearings Officer's Previous Findings:**

27 Applicant contends that the area surrounding the property has three different zoning categories  
28 which speaks to the variability of the land. The entire southern boundary abuts an AR-5 zone as  
29 does half of the eastern boundary. The very dark blue pattern in the upper right hand corner of the  
30 map is within the Salem Urban Growth Boundary (Urban Reserve). The remainder of the eastern  
31 boundary is bordered by EFU zoned parcels that are 14.6, 15.0, 18.29 and 19.71 acres respectively.  
32 Most of these parcels are leased out to larger farming operations except for the 19.71-acre parcel  
33 which is the Cubanismo Vineyard.

34 The subject property is bordered on the north by Tax Lot 700 which is 48.44 and a point on the  
35 northwest by Tax Lot 201 which is 49.44 acres. One could argue that both Tax Lots 700 and 201  
36 should be zoned TC or FF because they are heavily timbered, very steep and have never been  
37 farmed in documented history

38 Two-thirds of the western boundary is bordered by Farm Forest Zoning, and it is within this  
39 property (Tax lot 500 in 7 4 14) that Legacy Vineyard is located. The property is dominantly in  
40 farm use but there are still large forested areas in the northern one-half of the property and along  
41 the eastern boundary next to the proposed rezone area. The remaining one-third of the western  
42 boundary is bordered by a 92-acre parcel that is basically devoid of any farm use and is principally  
43 in timber use and dormant land that appears to be in Scotch Broom. This parcel is not lacking in  
44 farming potential except for areas with large boulders. The property does not appear to be actively  
45 farmed at the present time. A 78-acre parcel touches on a point in the southwest corner. It is heavily  
46 wooded, very steep and devoid of agriculture near the common boundary.

47 Applicant states it is noteworthy that there is a very large contiguous block of AR-5 zoned lands  
48 that starts at the southern boundary of the property extends south to State Highway 22 and also  
49 extends to the east for two miles to the Salem Urban Growth Boundary (See Figure 4, PCCP Plan



1 Map). This block of AR-zoned land is the third largest in Polk County and the largest near Salem.  
2 It should also be noted for the record that there are three other nodes of AR zoned lands north and  
3 west of Salem and two of them are contiguous to the Salem Urban Reserve. The block of AR zoned  
4 land bordering the subject property does border the Salem Urban Reserve farther to the east.

5 The proponents have strongly held beliefs that the exception is warranted based on a host of  
6 complex factors including but not limited to elevation, wind exposure, sun exposure, shallow soils,  
7 preponderance of rock, cold temperatures related to elevation, inability to irrigate and inability to  
8 burn crop residues. In addition, there are no linkages to the other farm enterprises in the area that  
9 are less affected by the same factors. Also, there are two boundaries in the proposed exception area  
10 where all the parcels are zoned for non-resource use and thus no complementary farm enterprises  
11 exist.

12 Staff notes that the applicant is proposing a zone change of the subject property from EFU to AF-  
13 10. With few exceptions, the AF-10 zone permits those uses that are allowed in the EFU zone.  
14 Based on a review of the Polk County Zoning Map, neighboring properties are zoned AR-5, EFU  
15 and FF. A review of the 2011 Polk County aerial photograph shows that contiguous properties are  
16 primarily used for agricultural and forestry purposes. Adjacent properties to the north and east  
17 contain dwellings.

18 If the applications are approved, the primary changes to the uses permitted on the subject properties  
19 would be that the AF-10 zone allows dwellings as an outright permitted use and a 10-acre  
20 minimum parcel size. Dwellings may be permitted in the EFU zone, subject to certain acreage,  
21 income and land tenure standards. Outright permitted uses on AF-10 zoned land include single-  
22 family dwellings, public parks, churches and a host of accessory uses and structures (including  
23 home occupations, schools, public facilities, among other uses). Based on the evidence submitted  
24 by the applicant, the AF-10 zone, would be compatible with surrounding land uses and also would  
25 enable the applicant to develop larger acreage home sites where the occupants could manage the  
26 property for a range of specialty farm uses as a hobby even though the land is not suitable to make  
27 a profit in money from farm use. Despite considerable verbiage about hobby farming, however,  
28 there would be no explicit requirement that agricultural activity be carried on at any portion of the  
29 land so zoned. Uses allowed in the AF-10 zone are already allowed on the neighboring properties  
30 that are zoned AR-5. It is commonly accepted that properties that have the same permitted uses  
31 are generally compatible with one another.

32 The uses that would be allowed under the AF-10 zone, that are not permitted in the EFU zone,  
33 include dwellings, churches and schools as a permitted use and certain conditional uses which may  
34 have offsite impacts. Such conditional uses include home occupations, kennels, and outdoor motor  
35 race tracks. The applicant has not indicated that any of those uses would be established on the  
36 subject properties, but it would remain a possibility. Any conditional uses in the AF-10 zone would  
37 require an application with Polk County, and the applicant would need to demonstrate how their  
38 specific proposal would comply with all conditional use standards. The analysis and opportunity  
39 for public involvement afforded through the conditional use permitting process would ensure that  
40 conditional uses would not significantly adversely affect allowed uses on adjacent lands.

41 The AF-10 zone also permits the uses allowed in the EFU zone, which is the subject property's  
42 current zoning designation. Neighboring properties are either zoned AR-5, EFU or FF, so  
43 agriculture and forestry uses in the AF-10 zone would be substantially similar to, and therefore  
44 consistent with, uses allowed on neighboring properties.

45 In consideration of the above factors, Staff concluded that the uses permitted in the AF-10 zone  
46 would not significantly adversely affect allowed uses on adjacent lands. Adequate public facilities,  
47 services, and transportation networks are in place, or are planned to be provided concurrently with  
48 the development of the property. [PCZO 111.275(D)]

49 Applicant recites how the subject property was the subject of a Ballot Measure 37 application, a  
50 Ballot Measure 49 Authorization and a Vested Rights Argument. The vested rights arguments are

1 submitted as part of this record to demonstrate that the property is built and committed with streets,  
2 electric power, septic systems, communication systems and domestic wells.

3 Available public facilities and services already have been enumerated above.

4 On October 22, 2013 a transportation analysis was conducted at the request of Wayne Simmons  
5 to study the transportation impacts. The conclusion on Page 8 of the analysis reads as follows:  
6 Seven tax lots in Polk County are proposed for a zone change from EFU to AF-10. The proposed  
7 zone change could generate an additional 17 trips during the morning peak hour, and 22 additional  
8 trips during the evening peak hour. The existing infrastructure, including the intersection of  
9 Orchard Heights Road and Best Road adjacent to the property, is adequate to support this potential  
10 additional traffic through the planning horizon. The proposed zone change is therefore in  
11 compliance with the State of Oregon's Transportation Planning Rule.

12 Staff indicates that the applicant has provided information in the record regarding the public  
13 facilities and services that would be available to serve proposed residential uses on the subject  
14 properties. The applicant has demonstrated the subject properties could be adequately served by  
15 existing public services.

16 The applicant estimates that 19 additional single family dwellings could be constructed if this  
17 proposal is approved. According to the 2010 US Census demographic profile for Oregon, the  
18 average household size is 2.47 people. As a result, the proposed PCCP change could result in an  
19 additional population of 46 people. Staff found no evidence to suggest that these service providers  
20 lack capacity to serve an additional 19 single family dwellings with an estimated population  
21 increase of 46 people.

22 The subject properties abut Best Road, a Minor Collector in Figure 3 of the Polk County  
23 Transportation Systems Plan. The applicant submitted a transportation analysis for the proposal  
24 authored by Lancaster Engineering dated October 22, 2013, supplemented on October 9, 2015 with  
25 additional analysis of several intersections on Orchard Heights Road, which indicates that the  
26 proposed AF-10 zone would generate 17 morning peak hour trips and 23 evening peak hour trips,  
27 as compared with 4 and 5 trips, respectively, for the current EFU zone. Weekday total trip  
28 generation from the proposal would be 218 trips for the proposed AF-10 zoning and 48 for the  
29 current EFU zoning. The Lancaster Engineering traffic analysis included a discussion of potential  
30 traffic impacts the proposal may have on the State Highway System, and the proposal's consistency  
31 with the Transportation Planning Rule (TPR). The relevant section of the TPR, OAR 660-012-  
32 0060, ensures that the function and capacity of State highways will not be adversely affected by  
33 traffic increases resulting from changes to adopted land use plans and regulations. Lancaster  
34 Engineering's TPR discussion focused on the intersection of Highway 22 and 55th Avenue NW,  
35 which is also where Highway 51 intersects Highway 22. A letter from Daniel Fricke, Senior  
36 Transportation Planner with ODOT, dated June 8, 2015 supports the conclusions in the Lancaster  
37 Engineering traffic analysis addressing the TPR - that the applicant's proposal would not have a  
38 significant impact on a State highway.

39 An operational traffic analysis dated October 22, 2013 was conducted by Lancaster Engineering  
40 for the intersection of Orchard Heights Road and Best Road. The applicant provided additional  
41 analysis of two intersections on Orchard Heights Road in a supplemental report by Lancaster  
42 Engineering dated October 15, 2015. Lancaster Engineering's additional traffic analysis of impacts  
43 on the county road system from potential trip generation by the proposal, particularly the  
44 intersections of Orchard Heights Road and Best Road and Orchard Heights Road and Orchard  
45 Heights Place, was reviewed by the Polk County Engineer, Todd Whitaker, P.E, who determined  
46 the impact of the proposal on the county road system would not be significant. After reviewing the  
47 applicant's statements, and comments from Whitaker, Staff concluded that sufficient transportation  
48 facilities would be available to serve the applicant's proposal.

49 According to materials submitted by the applicant, Coffee Geosciences conducted a hydrologic  
50 study of the subject properties to determine the relationships between its springs, wells and

1 groundwater aquifers. Results of the hydrologic study indicate that the proposal could be served  
2 with groundwater without any effect on nearby wells. The hydrologic report indicates that  
3 groundwater withdrawals of 10 gallons per minute would cause a one -inch drawdown of the  
4 aquifer within a radius of 240 feet. The Coffee Geosciences report indicates that a test well  
5 pumping 28.5 gallons per minute for 24 hours recovered 90% of the aquifer drawdown in 30  
6 minutes.

7 The applicant states that the subject properties are in the Eola Hills Groundwater Limited Area  
8 (EHGLA). The Oregon Department of Water Resources (WRD) has defined the EHGLA as being  
9 bounded by Township 5 South in Yamhill County, the Willamette River, Highway 22 and  
10 Highway 99W. Extracting groundwater from aquifers in Columbia River Basalt formations in the  
11 EHGLA is regulated by WRD. Accordingly, the property owners would be required to submit a  
12 well report with WRD to withdraw up to 15,000 gallons of groundwater per day for any domestic  
13 use on the subject properties. The applicant states that the number of wells that would serve the  
14 proposal could be minimized by leveraging wells that produce 15-30 gallons per minute to serve  
15 three potential dwellings instead of just one. The Oregon Public Health Division of the Oregon  
16 Health Authority regulates Public Water Systems with four or more service connections, consistent  
17 with OAR 333-061-0020. If a single well was used to serve three potential dwellings on the subject  
18 properties, a Public Water System would not be required; however, withdrawals of groundwater  
19 from the well would be limited to 15,000 gallons per day absent a permit from WRD.

20 Absent a Public Water System certification, drinking water safety for groundwater sources is  
21 incumbent on individual users. Well constructors are aware of threats to public safety from  
22 domestic water wells that are too shallow, or that are located within 100 feet of a septic system's  
23 leach field. Also, any dwellings that may be constructed following this land use action would  
24 require septic, building, plumbing and electrical permits from Polk County. A site plan review  
25 confirming that relevant development setbacks are met would be part of the building permit  
26 process. Part of the site plan review evaluates whether the location of a domestic water source (a  
27 well) is at least 100 feet from a septic system leach field, thereby protecting property owners'  
28 public health by mitigating e-coli vectors.

29 Based on the evidence provided by the applicant, Staff concluded that adequate water would be  
30 available to serve the proposal. On the other hand an independent expert on geological matters and  
31 water rights, Dr. E. Timothy Wallin, in written testimony submitted on November 10, 2015, said  
32 the aquifer at issue cannot be relied on to provide a stable supply of water to the proposed  
33 concentration of users under the proposal. He says there is a risk that new wells and existing wells  
34 would find their supplies depleted. The Hearings Officer is not a geologist or hydrologist, but with  
35 additional testimony and evidence in the record and the warnings of Dr. Wallin, it is such that the  
36 Hearings Officer finds that there is not adequate water available to serve the proposal.

37 **Applicants' Additional Findings:**

38 The AF-10 uses will not significantly adversely affect allowed uses on adjacent lands - This section  
39 is addressed in detail under the exception statement, and is supported by the inventory study that  
40 is Exhibit V. This section is complied with.

41 Adequate public facilities are in place - As noted herein, the existing street system is adequate;  
42 water and sewer will be provided on-site; and electrical service is already established on site to  
43 accommodate the projected growth if these applications are approved. This section is complied  
44 with.

45 **Hearings Officer Findings:**

46 Findings to evaluate adequate public facilities, services, and transportation networks have been  
47 fully evaluated above. As discussed above, the Hearings Officer has determined that existing  
48 public service and facilities, including transportation could support the creation of additional  
49 parcels 10 acres in size and up 19 additional single-family dwellings.

1 As discussed above, when evaluating whether the subject properties could be managed for forestry  
2 purposes, the Applicants provided a Forestland Suitability Analysis. This analysis determined that  
3 surrounding parcelization and residential development makes the property less desirable for timber  
4 management because there is a greater risk of lawsuit threats from slash burning, it would be more  
5 difficult to use common forestry practices, and there is a perceived lower financial rate of return  
6 that could be a deterrent for investors. The Forestland Suitability Analysis Addendum also raised  
7 concerns about the inability for small to medium sized timber owners to obtain liability insurance  
8 due to wildfire concerns. The Addendum stated that two significant conditions associated with the  
9 recent wildfire catastrophes in California exists on the subject properties; (1) high voltage overhead  
10 powerlines throughout the property, and (2) the close vicinity to heavily populated areas. This  
11 evidence raises concerns for the Hearings Officer that if increased rural residential development  
12 on surrounding lands is the factor that makes the subject property not suitable for commercial  
13 forestry operations as purported by the Applicants, it is then unclear how developing 17-19  
14 additional dwelling on 10 acre parcels as proposed by the Applicants would not adversely impact  
15 allowed uses on surrounding properties (approximately 199.5 acres) that are currently receiving  
16 farm deferral and visually appear to be managed for forestry purposes based on the 2018 Polk  
17 County aerial photograph. The subject properties are bordered on two sides by high value timber.

18 Based on the evidence in the record, the Hearings Officer finds these applications do not comply  
19 with this criterion because the evidence does not support a finding that uses allowed in the  
20 proposed designation will not significantly adversely affect allowed uses on adjacent lands

21 **5. The proposed change is appropriate taking into consideration the following:**

22 **a. Surrounding land uses,**

23 **b. The density and pattern of development in the area,**

24 **c. Any changes which may have occurred in the vicinity to support the**  
25 **proposed amendment. [PCZO 111.275(E)]**

26 **Hearings Officer's Previous Findings:**

27 Applicant argues that the area surrounding the property has three different zoning categories which  
28 speaks to the variability of the land. The entire southern boundary abuts an AR-5 zoned as does  
29 half of the eastern boundary. The very dark blue pattern in the upper right hand corner of the map  
30 is within the Salem Urban Growth Boundary (Urban Reserve). The remainder of the eastern  
31 boundary is bordered by EFU zoned parcels that are 11, 14.6, 15.0, 18.29 and 19.71 acres  
32 respectively. Most of these parcels are leased out to larger farming operations except for the 19.71-  
33 acre parcel which is the Cubanismo Vineyard.

34 Two-thirds of the western boundary is bordered by Farm Forest Zoning, and it is within this  
35 property (Tax lot 500 in 7.4.14) that Legacy Vineyard is located. The property is dominantly in  
36 farm use but there are still large forested areas in the northern one-half of the property and along  
37 the eastern boundary next to the proposed rezone area. The remaining one-third of the western  
38 boundary is bordered by a 92-acre parcel that is basically devoid of any farm use and is principally  
39 in timber use and dormant land that appears to be in Scotch Broom. This parcel is not lacking in  
40 farming potential except for areas with large boulders. The property does not appear to be actively  
41 farmed at the present time. A 101.78-acre parcel touches on a point in the southwest corner. It is  
42 heavily wooded, very steep and devoid of agriculture near the common boundary.

43 It is noteworthy that are very large contiguous block of AR-5 zoned lands that starts at the southern  
44 boundary of the property extends south to State Highway 22 and also extends to the east for two  
45 miles to the Salem Urban Growth Boundary (See Figure 4, PCCP Plan Map). This block of AR  
46 zoned land is the third largest in Polk County and the largest near Salem. It should also be noted  
47 for the record that there are three other nodes of AR zoned lands north and west of Salem and two  
48 of them are contiguous to the Salem Urban Reserve. The block of AR zoned land bordering the  
49 subject property does border the Salem Urban Reserve farther to the east.

1 The area surrounding the property has gradually developed over the last 80 years to contain a large  
2 number of dwelling units in the AR-5 zoned areas to the south and east and to smaller high value  
3 farm units to the northeast. The concept of farming properties across boundaries (complementary)  
4 was and is absent from this area. The subject property is an isolated piece of land which is evident  
5 when visiting it. The subject rezone area does not directly border any other farm field (not to be  
6 confused with properties that have farm use).

7 The resultant effects of Ballot Measures 37 and 49 also have a bearing on the filing of these  
8 applications since significant capital fixity was established on the easternmost 128 acres. The  
9 subject properties have a residual system of roads resulting from the prior applications and  
10 approval of Ballot Measure 37 claim. All of the roads that can serve all parts of the property are at  
11 the very least "roughed out". The road construction that resulted from the Ballot Measure 37/49  
12 claims is 4,100 feet long. The property now has a gated access that originates on Best Road. There  
13 is a potential for four more non-farm dwellings to be established on properties adjacent to the  
14 subject rezone area but the conditions on those properties would likely prevent any houses from  
15 being so close as to interfere with farming activities.

16 The proponents also recognize that this proposed action could affect adjacent and nearby farm  
17 operations but they too have problems that limit their farm uses to low income generating grass  
18 hay and limited grazing agricultural lands on very substandard acreages. The three agricultural  
19 properties across Best Road from the subject property (east) have never been farmed in conjunction  
20 with the subject property and are marginal respect to agricultural production. Hay and livestock  
21 are the principal items raised on these parcels that range from 14 to 19 acres. These parcels are  
22 only 17% and 24% as large as the minimum lot size of the EFU Zone. Staff says statements by the  
23 applicant indicate that parcelization of lands in the vicinity of the subject properties has resulted  
24 in an ownership pattern that precludes the management of small farm holdings as larger farm units,  
25 which has led to the proliferation of small scale specialty farms. Staff notes that the nearest large  
26 agricultural operations to the subject properties are Christmas trees and vineyards. A rural  
27 residential exception area is also adjacent to the southern parcels of the exception area. Due to a  
28 steep escarpment on the west side, the subject properties are more closely associated  
29 geographically with adjacent properties along Best Road than those to the west taking access from  
30 Oak Grove Road, which is 600 feet lower in elevation.

31 The proposed exception area is comprised of seven parcels ranging in size from 45 acres to 20  
32 acres. Simmons Family Properties, LLC owns four contiguous parcels in a 120 acre tract (Tax Lots  
33 601, 604 and 605 in T7S, R4W, Section 14, and Tax Lot 100 in T7S, R4W, Section 23). A 20 acre  
34 parcel south of the Simmons Family Properties, LLC, is owned by Kevin Stone (T7S, R4W,  
35 Section 23, Tax Lot 101). Two parcels to the north of the Simmons Family Properties, LLC tract  
36 are owned by Christopher & Kimberly Gray (at T7S, R4W, Section 14, Tax Lot 602) and Jonathan  
37 & Tamara Pugmire (at T7S, R4W, Section 14, Tax Lot 603), and are 45 acres and 43.7 acres,  
38 respectively.

39 Over the past decade a series of partitions of the original Simmons holdings, identified as LP 05-  
40 20, LP 05-22, and LP 05-23, memorialized in Partition Plats 2006-0027 through 2006-0029, have  
41 resulted in the current configurations of the subject properties. These recent land partitions were  
42 made possible by three Measure 37 Claims (identified as M 05-09, M 05-13, and M 05-14).  
43 Subsequent vesting determinations by the Polk County Community Development, identified as  
44 file numbers VRD 09-01 through VRD 09-03, upheld these Measure 37 partitions. The Measure  
45 37 partitions of the subject properties created six parcels to bring the total number of parcels to  
46 nine. Following the Measure 37 Claims (Claims) and corresponding vested rights determinations,  
47 a suite of Measure 49 claims were submitted, which resulted in three Measure 49 Final Order and  
48 Home Site Authorizations (Final Order) approved by DLCDD. The Final Orders referenced above  
49 authorized five (5) dwellings on the parcels vested under Measure 37. Of the five (5) authorized  
50 dwellings under Measure 49, three (3) have been built. These dwellings are on Tax Lots 602 and  
51 603 in T7S, R4W, Section 14 and Tax Lot 101 in T7S, R4W, Section 23. Based on a review of the  
52 Polk County Assessor records, the subject properties currently contain a total of three (3)

1 dwellings.

2 Measure 37 claims were made on two properties adjoining the subject properties. One of the  
3 Measure 37 claims was succeeded by Measure 49 Order No. E132401, which permits the  
4 establishment of two additional parcels for a total of three home sites on Tax Lot 200 in T7S, R4W,  
5 Section 23. A second Measure 37 claim on an approximately 104-acre parcel, identified as Tax  
6 Lot 601 in T7S, R4W, Section 23, adjacent to the southwest corner of the subject properties  
7 authorized two additional parcels pursuant to a Measure 37 Claim (M06-249), and two additional  
8 dwellings pursuant to a Measure 49 Final Order (H134231). Pursuit of potential land entitlements  
9 under Measures 37 and 49 are emblematic of trend towards a growing number of smaller  
10 agricultural parcels occurring in the vicinity of the subject properties over the past several decades.  
11 This has resulted in a diversification of farming on a small scale with equine stables, Christmas  
12 tree farms, wood lots, and vineyards and wineries operating within a thousand feet of the subject  
13 properties. Recent changes on nearby properties exemplify the shift to small scale specialty  
14 agriculture. Cubanisimo Vineyards began with a partition of a 32-acre parcel into 12-acre parcels  
15 in 1978 (Polk County Planning File SE 78-18), followed by a farm dwelling approval in 1989  
16 (Polk County Planning File FD 89-16) A conditional use permit approved wine sales and  
17 marketing as a home occupation in 2004 (Polk County Planning File CU 04-21), including four  
18 events attracting up to 300 visitors. Another commercial winery was established within the past  
19 ten years adjacent to the subject properties. Eola Hills Winery purchased a large parcel  
20 immediately west of the subject properties which was the subject of Plan Amendment and Zone  
21 Change applications in 2010 (PA 10-05 and ZC 10-06, respectively) to change the plan designation  
22 from Forest to Farm Forest and change the zoning designation from Timber Conservation (TC) to  
23 Farm Forest Overlay (FFO). A subsequent land use application (LUD 13-11) was approved to  
24 establish a winery at what is now known as the Legacy Estate Vineyard. The winery offers wine  
25 tasting, company picnics and wedding ceremonies at the Legacy Estate Vineyard location.

26 The applicant states that the smaller resource properties in the area are clustered along Best Road,  
27 immediately east of the subject properties. A number of contiguous properties zoned AR-5 exist  
28 to the south of the subject properties that were included in the initial committed lands inventory  
29 leading up to acknowledgement of the PCCP. The area to the south is substantially isolated from  
30 the exception area by steep slopes. This committed lands area, comprising approximately 1,100  
31 acres of AR-5 zoned land, extends south to Highway 22 and west to the Salem city limits. Ten of  
32 the fourteen AR-5 parcels nearest the subject properties are owned by William Curtright and are  
33 vacant (T7S, R4W, Section 24 Tax Lots 303 - 308 and T7S, R4W, Section 23 Tax Lots 1000 &  
34 1003 -1005). Each of these vacant AR-5 parcels could be developed with dwellings, although they  
35 have been in their current ownership for over 20 years and are still vacant. Should these  
36 applications be approved, one 20 acre parcel zoned EFU (located at 1785 Best Road) would be  
37 surrounded by properties with Rural Lands Plan designations. This property was created and  
38 authorized by a Measure 37 Claim, was created as Parcel 3 in Partition Plat 2006-0029, and the  
39 dwelling was subsequently approved by Measure 49 Order number H132890C. Since the 20 acre  
40 parcel and the dwelling thereon were approved absent review relative to the Statewide Planning  
41 Goals, Staff anticipates that the proposed goal exception would not commit the home site to uses  
42 other than those allowed by Goal 3 since it has already been created and developed for nonfarm  
43 use.

44 In this case, the applicant is making the argument that while the subject properties were exempt  
45 from Oregon Statewide Planning Goals the property owner made a substantial investment in  
46 developing the subject properties for nonfarm uses. Staff understands the applicant argument to  
47 be that the legal development and land use pattern of the subject properties that occurred under  
48 Measures 37 and 49 were the tipping point for commitment of the subject properties to non-  
49 resource uses. It was not necessarily recent changes in the land use pattern or development on  
50 surrounding properties that in and of themselves commit the subject properties.

51 In VRD 09-01, Polk County concluded that the Estate of Nina Simmons and the Ervin Simmons  
52 Testamentary Trust had vested, on December 6, 2007, three separate parcels consisting of 45, 45

1 and 19.77 acres each, depicted on Polk County Partition Plat 2006-0027, and a single-family  
2 dwelling residential use on Parcel 3 of said partition plat. In VRD 09-02, Polk County concluded  
3 that the Estate of Nina Simmons had vested, on December 6, 2007, three separate parcels  
4 consisting of 40, 20 and 20 acres each. In VRD 09-03, Polk County concluded that the Ervin  
5 Simmons Testamentary Trust had vested, on December 6, 2007, three separate parcels consisting  
6 of 40, 20 and 20 acres each.

7 Division of the subject properties following Measure 37 claims made by various members of the  
8 Simmons family, the vesting of which is described above, and the construction of three dwellings  
9 on its eastern portion have broken up the ownership of what was once an approximately 267 acre  
10 farm unit and has made achieving economies of scale for agriculture difficult. The applicant does  
11 not rely solely on the recent parcelization pattern of the subject properties to demonstrate how the  
12 properties were committed. The applicant states that the actual development of the land including  
13 water, power and septic lines that connect the dwellings to domestic services have rendered the  
14 management of the land for agriculture impractical since the land cannot be plowed without  
15 interfering with buried residential infrastructure. Roads serving existing dwellings on the subject  
16 properties are aligned so that they interfere with the orderly tilling of soil, and are gravel surfaced  
17 for residential use. Farm activities such as ripping, discing, seeding and spraying require large,  
18 uniform fields to be done efficiently. Gravel driveways crossing the middle of the subject  
19 properties both vertically and horizontally conflict with the efficient management of essential soil  
20 preparation and crop protection activities.

21 The applicant states that the demand for the types of crops grown historically have diminished  
22 such as cherries, prunes, Douglas fir Christmas trees, grass seed and grain as the yield of these  
23 crops also dropped. Some of the processing facilities for these crops have relocated or closed. The  
24 applicant also states that prohibition of irrigation on the subject property and physical  
25 characteristics of the site have been a limiting factor in the ability to profitably manage the subject  
26 properties for agriculture. These factors coupled with the development that occurred under  
27 Measures 37 and 49 on the subject properties and former farm unit are changing conditions. Based  
28 on statements by the applicant and evidence in the record, Staff concluded the AF-10 zone, which  
29 implements the Rural Lands PCCP designation, would be compatible with surrounding land uses  
30 and also enable the applicant to develop larger acreage home sites where the occupants could  
31 manage the property for a range of specialty farm uses as a hobby even though the land is not  
32 suitable to make a profit in money from farm use. The Hearings Officer does note that the applicant  
33 later made it apparent that surrounding residential uses make spraying for agriculture and forestry  
34 difficult.

#### 35 **Applicant's Additional Findings:**

36 The proposed change is appropriate considering the surrounding lands - This section is addressed  
37 in detail under the exception statement, and is supported by the inventory study that is Exhibit V.  
38 This section is complied with.

39 The proposed change is appropriate considering the development in the area - This section is also  
40 addressed in detail under the exception statement, and is supported by the inventory study that is  
41 Exhibit V. This section is complied with.

42 The proposed change is appropriate considering how the area has developed - This section is also  
43 addressed in detail under the exception statement, and is supported by the inventory study that is  
44 Exhibit V. This section is complied with.

#### 45 **Hearings Officer Findings:**

46 As discussed above, the Applicants have clearly put forth a significant amount of time and effort  
47 compiling information in the above mentioned Exhibit V-Land Use Inventory and the supplemental  
48 information submitted during the Open Record period; however, the Hearings Officer is still  
49 concerned that the Applicants' conclusions are lacking details about whether surrounding properties  
50 were created and developed pursuant to the applicable Statewide Planning Goals. The Applicants

1 submitted a Land Use Inventory that contains a study area of approximately 2,571 surrounding acres.  
2 Staff has determined that this land use inventory does not accurately represent surrounding land use  
3 patterns because it appears that the Applicants used tax lot sizes and configurations rather than legal  
4 parcel sizes and configurations, which can alter figures related to average parcel size, dwelling  
5 density, etc. In addition, Staff finds that surrounding development that is permitted within the zone  
6 and was established pursuant to the applicable Goals cannot be used to justify changes on  
7 surrounding lands. For example, land partitions and residential development on surrounding AR-5  
8 and SR zoned properties does not constitute a recent change on surrounding properties because these  
9 properties have been planned and zoned for residential development. In addition, the Applicants  
10 claim that increased parcelization and residential development precludes the Applicants from  
11 utilizing common farm and forestry practices. If so, it is unclear how the Applicants' proposal would  
12 not impact surrounding farm and forest lands that are currently being managed for vineyards,  
13 Christmas tree production, and timber production. For these reasons, the Hearings Officer finds that  
14 the proposed AF-10 zone is not appropriate after taking into consideration surrounding land uses,  
15 density and development patterns of the area, and changes that have occurred in the vicinity to  
16 support the proposed amendment.

17 **6. The proposal complies with any applicable intergovernmental agreement**  
18 **pertaining to urban growth boundaries and urbanizable land; and [PCZO**  
19 **111.275(F)]**

20 **Hearings Officer's Previous Findings:** The subject property is not located within an Urban  
21 Growth Boundary. This criterion is therefore not applicable to this request.

22 **Applicant's Additional Findings:** There are no intergovernmental agreements that are applicable  
23 to the exception area.

24 **Hearings Officer Findings:** Staff confirmed that the subject properties are not located within Urban  
25 Growth Boundary. The Hearings Officer finds this criterion is not applicable to this request.

26 **7. The proposal complies with Oregon Revised Statutes, all applicable statewide**  
27 **planning goals and associated administrative rules. If an exception to one or**  
28 **more of the goals is necessary, the exception criteria in Oregon Administrative**  
29 **Rules, Chapter 660, Division 4 shall apply. [PCZO 111.275(G)]**

30 **Hearings Officer's Previous Findings:**

31 Findings and conclusions related to conformance with Oregon Revised Statutes, as implemented  
32 by the Oregon Administrative Rules, including the exception criteria in Oregon Administrative  
33 Rules, Chapter 660, Division 4, are addressed above in findings and conclusions of consistency  
34 with the PCCP.

35 **Applicants' Additional Findings:**

36 Once compliance is found for the exception and the statewide Goals (see below), compliance with  
37 all state laws is certain. This section is complied with.

38 What follows is an analysis of compliance with each of the relevant Statewide Goals.

39 **Goal 1 - Citizen Involvement** - Citizen involvement is advanced by providing appropriate notice  
40 and an opportunity to comment on the applications. Notice for comments and of any and all public  
41 hearings will be mailed appropriately and timely by Staff pursuant to the mandates of the Polk  
42 County Zone Code. This Goal will be complied with throughout this process.

43 **Goal 2 - Land Use Planning** - This Goal provides the flexibility in land use planning by allowing  
44 for exceptions to Goals under certain circumstances. The Applicants are seeking an "irrevocably  
45 committed" exception to Goals 3 and 4. When the exception is granted and approved, this Goal is  
46 complied with.

47 **Goal 3 - Agricultural Lands** - An exception is taken to this Goal as set forth in the applications.



- 1 Goal 4 - Forest Lands - An exception is taken to this Goal as set forth in the applications.
- 2 Goal 5 - Natural Resources, Scenic and Historic Areas, and Open Spaces - There are no identified  
3 natural resources, historic or declared open spaces in the exception area. As can be seen in  
4 photographs in Exhibit AA, the ridge line that traverses the exception area provides some of the  
5 best and most dramatic territorial views in all of Polk County. This Goal is complied with.
- 6 Goal 6 - Air, Water and Land Resources Quality - The exception area is intended to provide for  
7 17 new parcels each with a rural residential homesite. The addition of these new homes will have  
8 no adverse impact on the air or land resources. As noted in the hydrogeology report presented by  
9 Mr. Rehm, Exhibit X, the addition of these homes will have no adverse impact on the water in the  
10 area, and there will be sufficient water to serve the new homes. There are no inventoried air or  
11 water or land resources of significance identified in the exception area. This Goal is complied  
12 with.
- 13 Goal 7 - Areas Subject to Natural Hazards - The exception area is not located within an identified  
14 natural hazard area. This Goal is complied with.
- 15 Goal 8 - Recreational Needs - The exception area is not within any identified or inventoried  
16 recreational area. There are no parks or other recreational designations involved with the exception  
17 area. This Goal is complied with.
- 18 Goal 9 - Economic Development - This proposal is seeking to take land that cannot be  
19 commercially farmed in large tracts, and turn the land into smaller parcels with homesites where  
20 the owner can establish and maintain small specialty crops, animals or Christmas trees. Taking  
21 unproductive land and turning it into homesite that also can produce some hobby crops is an  
22 economic win for Polk County. One only needs to look at the three parcels in the exception area  
23 that have been developed. The homes on those lots are some of the most expensive homes in Polk  
24 County, and while those parcels remain too large to manage by the owner for any sort of crop  
25 production, some small hobby activities are being attempted. Taking land that is now producing  
26 no economic value to the community and almost no tax dollars for the County, and turning that  
27 land into high value homesites that pay huge sums in taxes is a boom to economic development in  
28 Polk County. This Goal is complied with.
- 29 Goal 10 - Housing - This proposal will add up to 17 new homes in the West Salem Hills. Homes  
30 that are near the Salem UGB, with easy access to a good highway system and the shopping  
31 opportunities that lie in West Salem and in Salem proper. The addition of rural homesites fills a  
32 need that has existed for a decade or more. The popularity of BM37/49 demonstrated the desire  
33 and need for rural residential housing, and the failure of those measures to actually produce much  
34 in the way of housing indicates the desire and need still remain. In any event, this Goal seeks to  
35 supply an array of different housing types in the County, and rural residential homes on acreage is  
36 one of those types these applications will fulfill. This Goal is complied with.
- 37 Goal 11 - Public Facilities and Services - The street system is in place, and is adequate to serve the  
38 additional dwellings that will be created upon approval of the applications. There is nothing in  
39 this planning change that will create the need for more roads or intersections. Site development  
40 will be by well (except for the two hook-ups for Orchard Heights Water) and septic system, thereby  
41 creating no demand or need for extension of any water or sewer systems to the exception area.  
42 Other public services will not be adversely impacted as there is sufficient capacity at present to  
43 serve the exception area at full build out. This Goal is complied with.
- 44 Goal 12 - Transportation - The exception area is accessed from Best Road, a Minor Collector. The  
45 submitted transportation analysis for the proposal authored by Lancaster Engineering dated  
46 October 22, 2013, supplemented on October 9, 2015, indicates that the proposed AF-10 zone  
47 would generate 17 morning peak hour trips and 23 evening peak hour trips, as compared with 4  
48 and 5 trips, respectively, for the current EFU zone. Weekday total trip generation from the proposal  
49 would be 218 trips for the proposed AF-10 zoning and 48 for the current EFU zoning. The  
50 Lancaster Engineering traffic analysis included a discussion of potential traffic impacts the

1 proposal may have on the State Highway System, and the proposal's consistency with the  
2 Transportation Planning Rule (TPR). In applying the TPR, OAR 660-012-0060, the County is  
3 required to determine whether the applications significantly affects transportation facilities as  
4 measured at the end of the planning period identified in the TSP, which is 2030. ODOT reviewed  
5 the Lancaster material and determined there would be no significant effects on any transportation  
6 facility. This information alone makes the applications comply with this Goal. This finding is  
7 verified by the 2012 changes made to the Oregon Highway Plan (OHP), and with the  
8 Transportation Planning Rule. Those changes provide a "safe harbor" for automatic compliance  
9 with Goal 12 where the proposal does not increase the average daily trips (ADT) by more than  
10 400. When evaluated together, the new TPR and OHP exempt plan amendments that would  
11 generate less than 400 ADT from further TPR review as they are classified as a small increase that  
12 does not further degrade the transportation facility. It is typically understood that a single family  
13 dwelling will generate 10 ADT. This proposal will generate at most an additional 17 dwellings,  
14 for a total traffic generation of 170, far below the "safe harbor" figure of 400. This Goal is  
15 complied with.

16 Goal 13 - Energy - The exception area is an excellent site for passive solar heating due to its higher  
17 elevation and sun exposure. The spacing of the dwellings on at least 10-acre parcels will assure  
18 that solar access is not blocked. Energy savings will also be realized from the relatively compact  
19 road system that will be serving all of the existing and potential home sites. Not extending the road  
20 to the west and southwest will minimize the outlay for gravel road bases and paving. The internal  
21 road system also allows maximum accessibility to the only collector road serving the site (Best  
22 Road). All potential dwellings sites will have access to a road system that provides equal access  
23 regardless of location, thus saving energy and wear and tear on vehicles. The road system is  
24 designed so that there are no dead ends and the number of potential new dwellings at 17 does not  
25 trigger any need for a second access. This Goal is complied with.

26 Goal 14 - Urbanization - The Applicants are proposing the AF-10 zoning to implement their  
27 proposed Comprehensive Plan designation of Rural Lands. The purpose statement for the AF-10  
28 zone indicates that the function of the zone is to permit the designation of Rural Lands consistent  
29 with OAR 660-0040040(7)(i)(A), which allows, without an exception to Goal 14, new rural  
30 residential areas designated after October 4, 2000, and requires any new lot or parcel to have an  
31 area of at least ten acres. Once approved with the AF-10 acre zone, this Goal is complied with as  
32 the lands are considered rural lands and not urbanizable lands.

33 Goals 15 - 18 Relate to the Willamette River and Ocean Areas - These Goals are not applicable  
34 to the applications as the exception area is not near or impacted by the Willamette River or any  
35 of the Ocean Goals.

#### 36 Hearings Officer Findings:

37 Findings and conclusions related to conformance with Oregon Revised Statutes, as implemented  
38 by the Oregon Administrative Rules, including the exception criteria in Oregon Administrative  
39 Rules, Chapter 660, Division 4, are addressed above in findings and conclusions of consistency  
40 with the PCCP. The only Goal Exceptions applicable to these applications are Goals 3 and 4.

- 41 **8. The road function, classification, capacity and existing and projected traffic**  
42 **volumes have been considered. To allow comprehensive plan map and zone**  
43 **map amendments that may generate trips up to the planned capacity of the**  
44 **transportation system, Polk County will consider road function, classification,**  
45 **road capacity and existing and projected traffic volumes, as criteria for**  
46 **comprehensive plan map and zone map amendments. [PCZO 111.275(H)]**

#### 47 Hearings Officer's Previous Findings:

48 Applicant notes that on October 22, 2013 a transportation analysis was conducted at the request of  
49 Wayne Simmons to study the transportation impacts. The conclusion on Page 8 of the analysis  
50 reads as follows: Seven tax lots in Polk County are proposed for a zone change from EFU to AF-

1 I 0. The proposed zone change could generate an addition 17 trips during the morning peak hour,  
2 and 22 additional trips during the evening peak hour. The existing infrastructure, including the  
3 intersection of Orchard Heights Road and Best Road adjacent to the property, is adequate to  
4 support this potential additional traffic through the planning horizon. The proposed zone change  
5 is therefore in compliance with the State of Oregon's Transportation Planning Rule.

6 Staff notes that the subject properties abut Best Road, a Minor Collector in Figure 3 of the Polk  
7 County Transportation Systems Plan. The applicant submitted a transportation analysis for the  
8 proposal authored by Lancaster Engineering dated October 22, 2013, supplemented on October 9,  
9 2015, which indicates that the proposed AF-10 zone would generate 17 morning peak hour trips  
10 and 23 evening peak hour trips, as compared with 4 and 5 trips, respectively, for the current EFU  
11 zone. Weekday total trip generation from the proposal would be 218 trips for the proposed AF-10  
12 zoning and 48 for the current EFU zoning. The Lancaster Engineering traffic analysis included a  
13 discussion of potential traffic impacts the proposal may have on the State Highway System, and  
14 the proposal's consistency with the Transportation Planning Rule (TPR). The relevant section of  
15 the TPR, OAR 660-012-0060, ensures that the function and capacity of State highways will not be  
16 adversely affected by traffic increases resulting from changes to adopted land use plans and  
17 relations. Lancaster Engineering's TPR discussion focused on the intersection of Highway 22 and  
18 55 Avenue NW, which is also where Highway 51 intersects Highway 22. A letter from Daniel  
19 Fricke, Senior Transportation Planner with ODOT, dated June 8, 2015 supports the conclusions in  
20 the Lancaster Engineering traffic analysis addressing the TPR - that the applicant's proposal would  
21 not have a significant impact on a State highway.

22 Applicant says an operational traffic analysis was conducted by Lancaster Engineering for the  
23 intersection of Orchard Heights Road and Best Road. However, an incomplete application letter  
24 from Austin McGuigan, Polk County Community Development Director, dated October 15, 2014  
25 informed the applicant that Polk County Engineer, Todd Whitaker, P.E., determined the Lancaster  
26 Engineering traffic analysis did not meet the requirements of the Polk County Public Works  
27 Design Standards for a Traffic Impact Analysis. Deficiencies in the Lancaster Engineering traffic  
28 analysis noted by the Polk County Engineer were the lack of analysis of the intersections Dahlia  
29 Way and Orchard Heights Road, 55th Avenue NW and Eola Drive, and missing information  
30 requested in the Transportation Impact Analysis Checklist found in Appendix 3 of the Polk County  
31 Public Works Design Standards. Following a letter from Mark Bernard, Polk County Senior  
32 Planner, dated August 4, 2015 requesting information to supplement the record, including the  
33 additional traffic analysis described above, the applicant provided additional analysis of two  
34 intersections on Orchard Heights Road in a supplemental report by Lancaster Engineering dated  
35 October 15, 2015. Lancaster Engineering's additional traffic analysis of impacts on the county road  
36 system from potential trip generation by the proposal, particularly the intersections of Orchard  
37 Heights Road and Best Road and Orchard Heights Road and Orchard Heights Place, was reviewed  
38 by the Polk County Engineer, Todd Whitaker, P.E, who determined the impact of the proposal on  
39 the county road system would not be significant. After reviewing the applicant's statements, and  
40 comments from Todd Whitaker, P.E, Staff concluded that the proposal is consistent with the  
41 function, classification and capacity of local transportation facilities.

#### 42 **Applicants' Additional Findings:**

43 The road function, classification, capacity and existing and projected traffic volumes have been  
44 considered by Lancaster Engineering and reviewed and approved by ODOT. This section is  
45 complied with.

#### 46 **Hearings Officer Findings:**

47 As discussed above, the proposed zone change from EFU to AF-10 is anticipated to generate up to  
48 13 additional vehicle trips during the morning peak hour and 18 additional vehicle trips during the  
49 evening peak hour. Based on the Hearings Officer's previous findings, supplemented by a  
50 memorandum from Brian Davis with Lancaster Engineering, and comments previously submitted  
51 from ODOT and Polk County's Public Works Department, Staff determined that the increase

1 vehicle trips would not be a significant change and the existing transportation facilities could  
2 support the proposed increased residential development.

3 The Hearings Officer concurs with Staff and finds the applications complies with this criterion.

#### 4 **IV. CONCLUSION & RECOMMENDATIONS**

5 The Hearings Officer concurs with the previous Hearings Officer's initial thoughts "The present  
6 case is one where the Hearings Officer does not necessarily believe there is anything intrinsically  
7 wrong with the proposal under consideration, but has to recognize that applicable laws, regulations  
8 and ordinances are structured so that it is extremely difficult to rezone a tract of land from resource  
9 use to non-resource use."

10 In support of the applications, the Applicants have submitted additional evidence and engaged in  
11 time consuming work in gathering information for 2,571 acres of land in Polk County. However,  
12 based on evidence in the Record, including written and oral testimony and the detailed findings  
13 set out above, the Hearings Officer finds that the applications do not demonstrate compliance with  
14 all the applicable review and decision criteria for a Zone Change and a Comprehensive Plan  
15 Amendment with an exception to Oregon Statewide Planning Goals 3 and 4. Consequently, the  
16 Hearings Officer recommends that the Board of Commissioners DENY these applications.

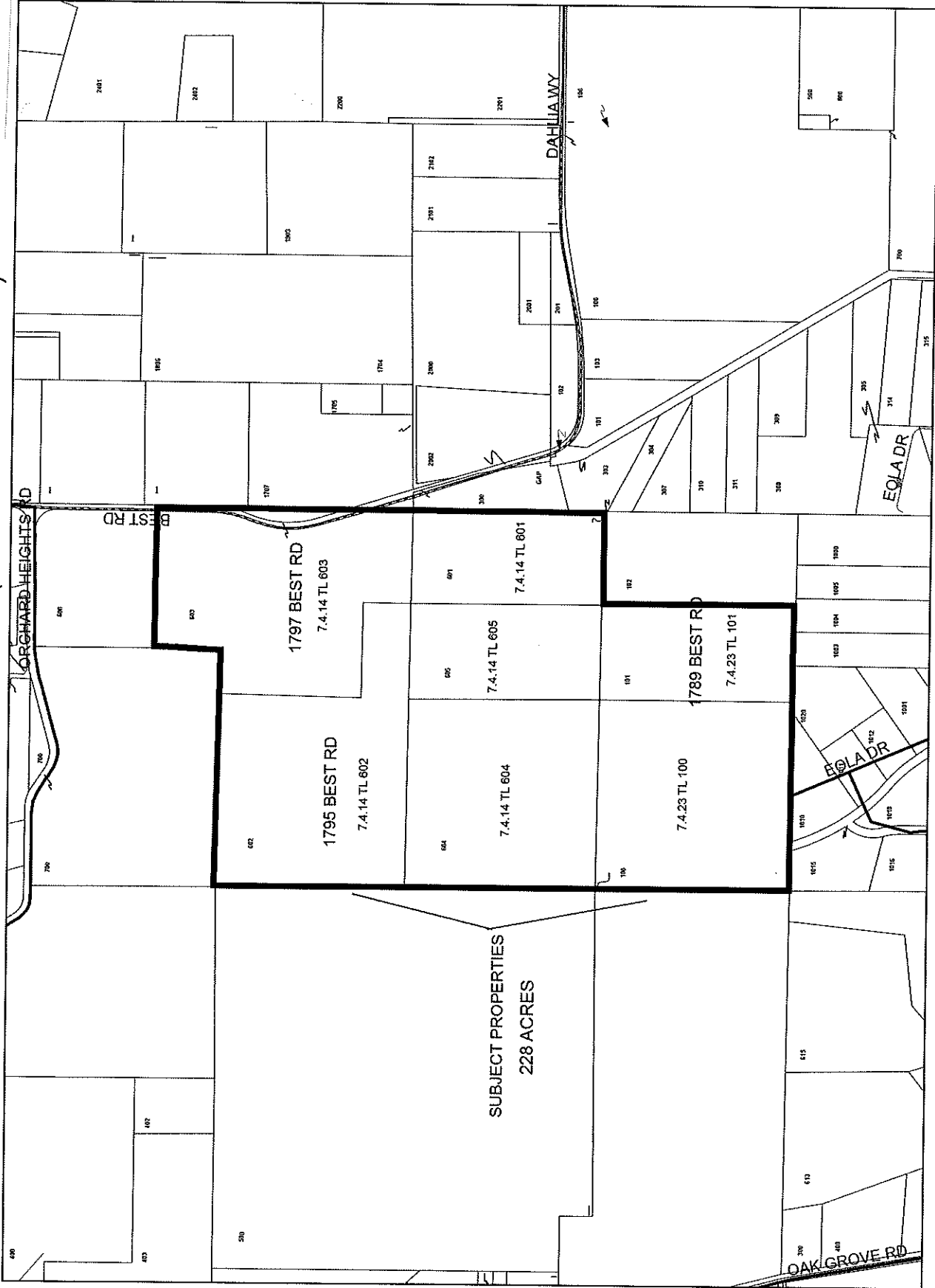
#### 17 **V. ATTACHMENTS**

18 Attachment A: Map of the subject properties

19  
20  
21  
22 June 1, 2020.

23  
24 *Leslie Howell*

25  
26 Leslie Howell  
27 Polk County Hearings Officer  
28 Dallas, Oregon,



Date: 8/21/2019  
This map was produced from the Polk County geographic databases to support its governmental activities. This product is for informational purposes and may not have been prepared for, or be suitable for, legal engineering, or surveying purposes. The county is not responsible for any map errors, possible misuse, or misinterpretation.