



# POLK COUNTY

POLK COUNTY COURTHOUSE \* DALLAS, OREGON 97338  
(503) 623-9237 \* FAX (503) 623-6009

COMMUNITY DEVELOPMENT

AUSTIN M'GUIGAN  
Director

## Polk County Community Development Planning Division Staff Report and Recommendation

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<b>TYPE OF APPLICATIONS:</b>	<ol style="list-style-type: none"><li>1. <u>Comprehensive Plan Map amendment</u> to change the Comprehensive Plan Map designation from Agriculture to Rural Lands for an area of land containing approximately 228 acres.</li><li>2. <u>Exception to Statewide Planning Goals 3 and 4</u> to justify the change from an Agricultural Comprehensive Plan designation to a Rural Lands Comprehensive Plan designation.</li><li>3. <u>Zoning Map amendment</u> to change the zoning of the subject properties from Exclusive Farm Use (EFU) to Agriculture and Forestry-Ten Acre (AF-10).</li></ol>
<b>APPLICANT:</b>	Wallace W. Lien
<b>OWNERS:</b>	Simmons Family Properties, LLC Christopher and Kimberly Gray Kevin Stone Jonathan and Tamera Pugmire
<b>PROPERTY LOCATIONS:</b>	Seven contiguous parcels adjacent to Best Road NW, Salem, Oregon (Assessment Map T7S, R4W, Section 14, Tax Lots 601, 602, 603, 604 and 605; and T7S, R4W Section 23, Tax Lots 100 and 101).
<b>FILE NUMBERS:</b>	PA 18-01 & ZC 18-02
<b>REVIEW AND DECISION CRITERIA:</b>	<ol style="list-style-type: none"><li>1) Polk County Zoning Ordinance (PCZO) Sections 111.275 and 115.050</li><li>2) Oregon Administrative Rule (OAR) 660-004</li></ol>
<b>POLK COUNTY CONTACT:</b>	Sidney Mulder; Phone: (503) 623-9237, Email: mulder.sidney@co.polk.or.us

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### I. PROJECT AND PROPERTY DESCRIPTION

**PROJECT DESCRIPTION:** The applicant is requesting 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 applicant is 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 applicant's request requires an exception to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The applicant has requested an exception to these Goals under the "irrevocably committed" goal exception criteria.

The subject property owners previously submitted a similar application 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

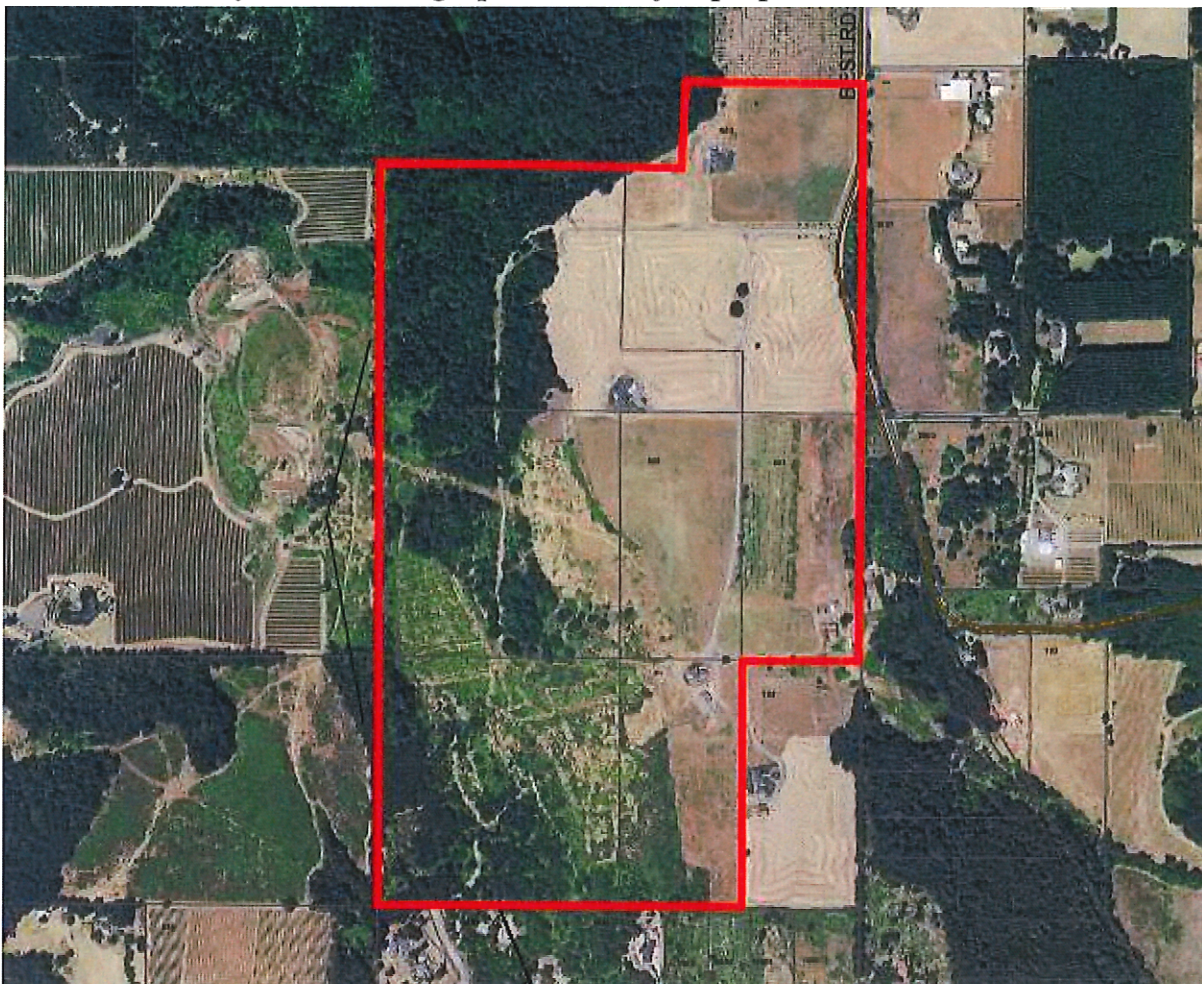


subject properties has made farm or forest uses thereon impracticable, and that approval of the exceptions would not commit neighboring resource zoned properties to non-resource uses.

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 this is a new application, the applicant has requested that the Record for PA 14-01 and ZC 14-02 be incorporated into the record for these current applications. The applicant contends 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 applicant is requesting to utilize the Hearings Officer's previous findings, in part, staff has structured this staff report to include, "Hearings Officer's Previous Findings", "Applicant's Additional Findings", and "Staff Findings".

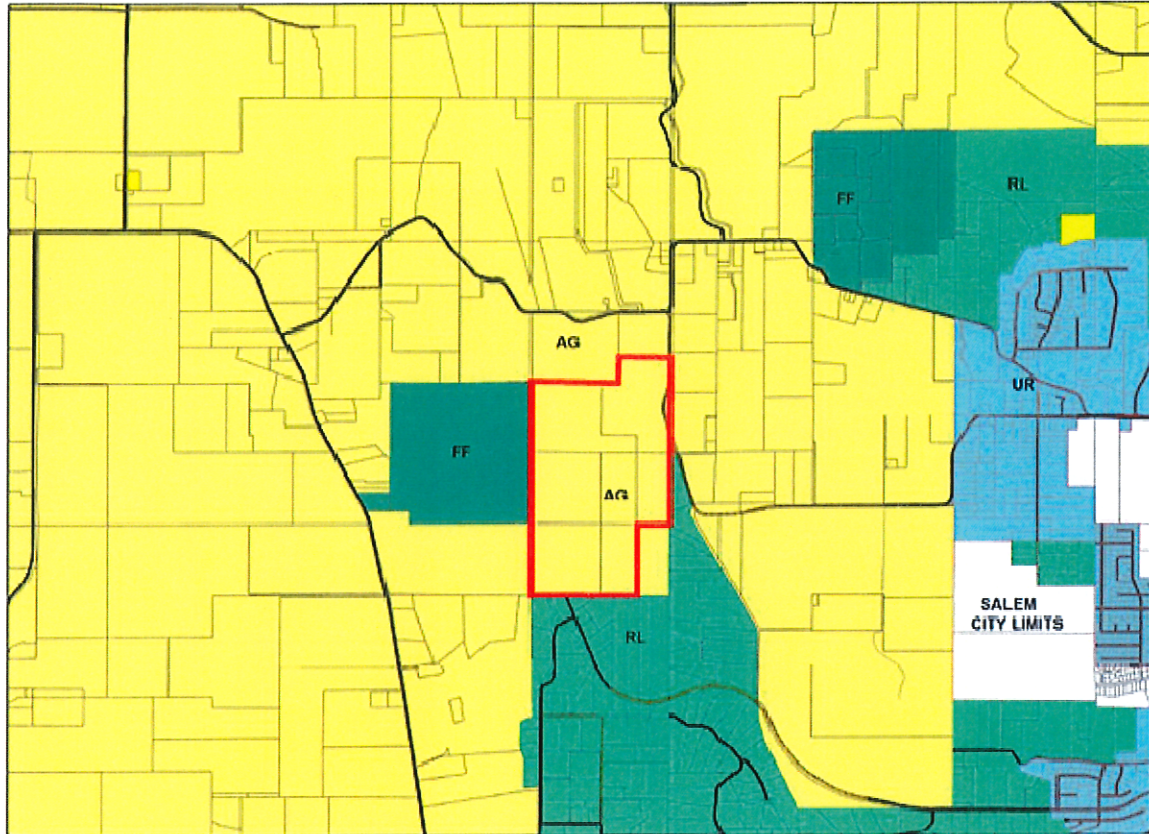
The current applications were submitted on December 14, 2018. An incomplete letter was sent by staff on January 11, 2019 requesting additional information to further address certain Goals and Policies within the Polk County Comprehensive Plan (PCCP), and to provide an updated Transportation Impact Analysis (TIA) for consistency with the Transportation Planning Rule (TPR) and the Polk County Design Standards for a Transportation Impact Analysis. On March 19, 2019, the applicant provided the requested information, at which time staff deemed the applications complete. The Oregon Department of Land Conservation and Development (DLCD) notice was sent via email on August 6, 2019. The Hearings Officer's Public Hearing is scheduled for October 15, 2019 at 6:00 PM, and the Board of Commissioners Hearing is scheduled for December 11, 2019 at 9:00 AM.

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

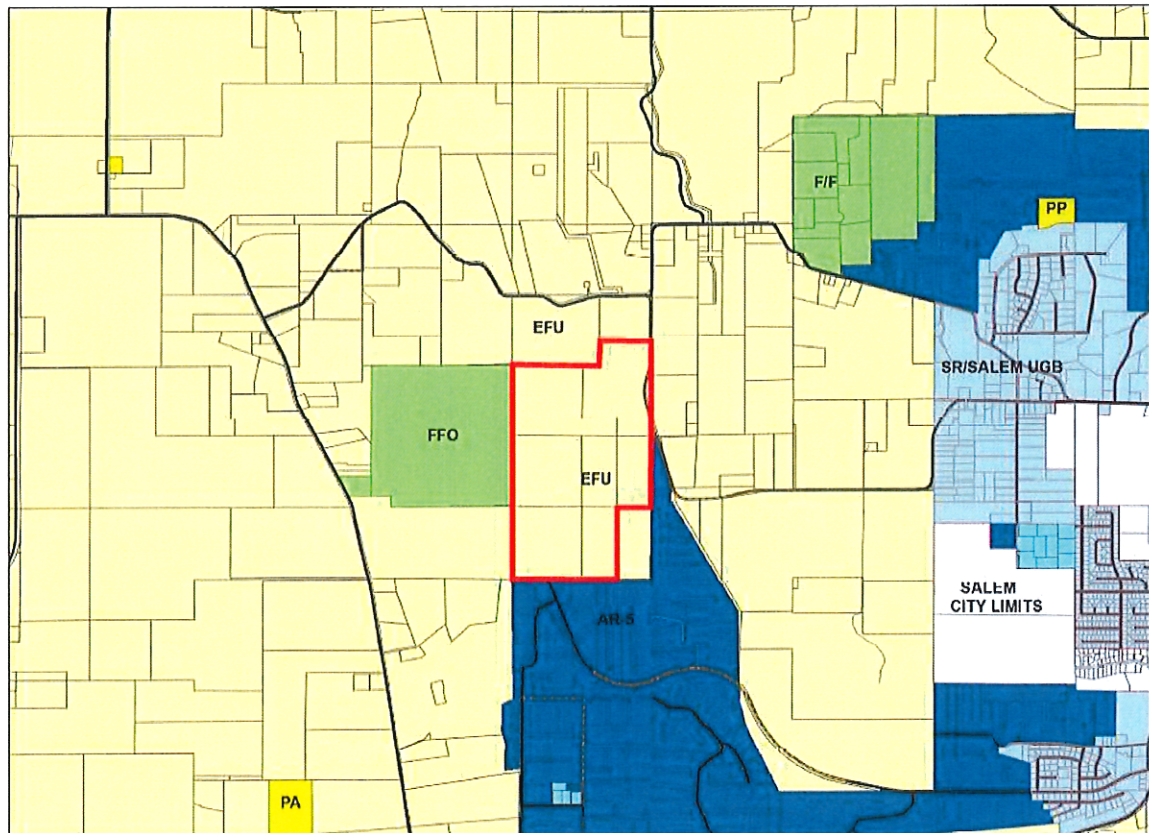




CURRENT COMPREHENSIVE PLAN MAP



CURRENT ZONING MAP





**Table 1. Comprehensive Plan Map and Zoning Map Designations for the Subject Properties and Contiguous Properties**

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

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

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

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



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

**Table 2: Soil characteristics of the subject properties as identified in the Natural Resources Conservation Service (NRCS) Soil Survey of Polk County, Oregon utilizing the Polk 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

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

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

**NOTIFICATION:**

Notice of the October 15, 2019 public hearing before the Polk County Hearings Officer was provided as required by PCZO 111.340-111.370. Notice was mailed to property owners located within 750 feet of the outside perimeter of the subject properties on August 6, 2019. Notice was printed in the local Itemizer-Observer Newspaper on August 14, 2019. Notice was posted on the subject property on or prior to September 25, 2019. Notice of the December 11, 2019 public hearing before the Board of Commissioners has not yet been provided as of the writing of this staff report,

<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.



but will be completed prior to the public hearing as required by PCZO 111.340-111.370.

(Note: The Board of Commissioners public hearing was originally scheduled for November 20, 2019, but was rescheduled for December 11, 2019)

SERVICES:

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

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

School: Salem School District 32J

Fire: Salem Suburban RFPD

Police: Polk County Sheriff

**II. COMMENTS RECEIVED**

David Friemaker,  
Salem-Keizer Public Schools: A letter was submitted identifying projected increased enrollment and the financial impacts on the Salem-Keizer School District as a result of potential development associated with these applications.

Angela Carnahan, DLCD: A letter was submitted recommending denial of these applications because the subject properties are not irrevocably committed. Comments identify relevant Case Law, a description of surrounding properties, right-to-farm protection laws, and statements that there is insufficient evidence to address OAR 660-004-0018.

Raymond and Jean Thorpe: Neighboring property owners submitted comments into the record expressing concerns about how the proposed development could impact their well, and concerns about whether or not their well specifically was tested.

No other comments were received as of the writing of this staff report. Staff has addressed the above comments in the appropriate sections of Section III of this staff report below. Full comments are included as Attachment D of this report.

**III. REVIEW & DECISION CRITERIA**

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

The applicant has requested that the Record for PA 14-01 and ZC 14-02 be incorporated into the record for these current applications. The applicant contends 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 applicant is requesting to utilize the Hearings Officer's previous findings from PA 14-01 and ZC 14-02, in part, staff has structured this staff report to include, "Hearings Officer's Previous Findings", "Applicant's Additional Findings", and "Staff Findings".

Staff findings and analysis are included below, based on evidence in the record.

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

**Amendments to the Comprehensive Plan Map must meet one or more of the following criteria:** [PCZO 115.050(A)]

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

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

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

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

An irrevocably committed exception is required to determine the relationship of the subject rezone area to the lands surrounding and adjacent to it. The applicants contend that lands adjacent and nearby have no positive impact on the farming of the subject property. There is no relationship historically between the subject rezone areas and the smaller "hobby farms" (the owners have outside jobs such as doctors and surgeons) that border on the east. The farms to the north that are across Orchard Heights Road are farmed in conjunction with large fields that have superior soils to those found on the subject property. The ridge line north of Orchard Heights Road opens up into a very large contiguous block of farm land in which uniform practices are possible. This is due to relatively level topography, deeper well drained soils and larger field sizes.



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

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

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

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

The PCCP states that designated "Agriculture Lands" are generally large holdings with few non-farm uses. Diverse terrain around Polk County offers a variety of commodities that can be locally grown. Farmers can produce grain or livestock in level areas, set up orchards, vineyards and pastures on the hills; or develop woodlots on the foothills [Page 5 of the PCCP]. The applicant states that the subject properties were originally part of a larger tract of land owned by the Simmons family since World War I. The Simmons family actively farmed the tract, growing gooseberries, strawberries, prunes, cherries, fine fescue grass, Christmas trees and wheat, with little success.

Statements by the applicant indicate that parcelization of lands in the vicinity of the subject properties has resulted in an ownership pattern that precludes the management of small farm holdings as larger farm units and has led to the proliferation of small scale specialty farms. Staff notes that the nearest large agricultural operations to the subject properties are Christmas tree farms and vineyards. Using 2011 Aerial Photographs and GIS measuring tools, staff estimated the size of the largest agricultural operations in the vicinity of the subject properties. Eola Hills Wine Cellars' Legacy Estate Vineyard has approximately 75 acres of vineyard planted on an approximately 162 acre property immediately

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

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

Of the 21 properties zoned EFU within 1,000 feet of the subject properties, eight have higher assessed values for structures than for the underlying land. Two of the properties for which land is assessed at a higher value than the structures thereon are not receiving farm deferrals, which would inflate the assessed value of the those lands. Whether or not a property qualifies for special assessment for farm use is not necessarily an indicator as to whether or not the property is capable of making in profit in money from farm use. Staff observes that three of the 12 nearby EFU properties having higher assessed values for land than for structures are vacant. Accordingly, it can be argued that, within 1,000 feet of the subject properties, there are nearly as many small scale farm among EFU properties with residences than there are large commercial farming operations. A majority of the EFU lands to the north and west of the subject properties are, or could be, large commercial scale farms. The applicant has characterized the properties to the east as "hobby" farms. A definition of a "hobby" farm from Internal Revenue Service (IRS) is generally accepted to mean that there is no intention by the farm operator to make a profit from agricultural activities.<sup>2</sup> Staff observes that EFU zoned properties near the subject property that have higher assessed values for structures than for the underlying land and may qualify as hobby farms by this definition. Without economic data for the surrounding properties, staff made the assumption that agricultural income would not be sufficient to support the costs of dwellings and other structural improvements on those lands. Therefore, capital derived from sources other than farm income from these neighboring properties would be necessary to construct and maintain the dwellings and structures, leading one to conclude that agricultural activities thereon are ancillary to the residential uses. This does not in itself allow the conclusion that surrounding properties are not capable of or are not currently making a profit in money from agriculture; only that it may not be the primary activity or use of the land.

Measure 37 claims were made on two properties adjoining the subject properties. One of the Measure 37 claims was succeeded by Measure 49 Order No. E132401, which recognized two additional parcels for Tax lot 200 in T7S, R4W, Section 23. A second Measure 37 claim on an approximately 104 acre parcel, identified as Tax Lot 601 in T7S, R4W, Section 23, adjacent to the southwest corner of the subject properties authorized two additional parcels pursuant to a Measure 37 Claim (M06-249), and two additional dwellings pursuant to a Measure 49 Final Order (H134231). Pursuit of potential land entitlements under Measures 37 and 49 are emblematic of a trend towards a growing number smaller agricultural parcels occurring in the vicinity of the subject properties over the past several decades. This has resulted in a diversification of farming on a small scale with equine stables, Christmas tree

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<sup>2</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.



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

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

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

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

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

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

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

This application asserts that the Agriculture plan designation is no longer appropriate due to changing conditions in the surrounding areas. In addition, this application asserts that the purpose of the plan will be better carried out due to the proposals conformance to the plan and zone.

This aspect of the justification corresponds to the irrevocably committed exception that will be used to justify this plan change, and which is discussed in detail below. The West Salem Hills in the area surrounding the subject properties has changed significantly over the past 30 years since the plan designation was applied, and now has an entirely different land use character than it did when the EFU plan designation was applied. The parcelization, and the influx of homes combined with the disintegration of farm and forest uses contribute to the dramatic change in the land use character of this area.

The Land Use Inventory points out that today 71% of the parcels in the surrounding area have single family homes constructed on them. The average parcel size in the surrounding area is only 12.07 acres, and 77% of the parcels in the area are less than 10 acres in size. 45% of the parcels in the area are not in farm or forest use and do not have any tax deferral benefits.

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

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

Combine all these current facts, and the change in the plan designation seems clear. The Agriculture plan designation, while once valid in the early 1980's, is no longer appropriate due to these identified changing conditions in the surrounding area. In addition, moving forward into the future planning horizon, this area is better directed to the creation of rural home sites that are over 10 acres in size in order to provide the highest and best use of the land.

This application complies with both sections 2 and 3 of the plan amendment approval criteria, and therefore should be approved.

Staff Findings: For the purpose of this evaluation, staff finds that the evidence to demonstrate compliance with this criteria should be focused on "...changing conditions in the surrounding area", as specified by PCZO 115.050(A)(2). Staff's evaluation of PCZO 115.050(A)(3) is addressed below.

The applicant asserts that the Agriculture Comprehensive Plan designation is no longer appropriate for the subject properties because of increased parcelization and residential development on surrounding lands, making it impractical for the subject properties to be managed for farm use with an intent to make a profit in money, also known as "hobby farming". The applicant argues that "hobby farms" with smaller scaled specialized crops and livestock are more suitable for the area due to markets moving away from large acreage field crops.

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

Without more specific economic data, the applicant's designation of a "hobby farm" largely relies upon an evaluation of whether or not a property has higher assessed value for the land or structures. This assumption implies that agricultural income would not be sufficient to support the costs of dwellings and other structural improvements on those lands. Therefore, capital derived from sources other than farm income would be necessary to construct and maintain the dwellings and structures, leading to the conclusion that agriculture activities are ancillary and subordinate to the residential uses on surrounding properties. In the previous proceedings, the Hearings Officer did not agree with these assumptions and stated, "This does not itself allow the conclusion that surrounding properties are not capable of or are not currently making a profit in money from agriculture; only that it may not be the primary activity or use of the land." The Land Use Board of Appeals (LUBA) has also agreed with this position in *Lovinger v. Lane County*, 36 Or LUBA 1 (1999), when it was determined that a Goal 3 committed exception cannot be justified based on a finding that "commercial farming" is impracticable on the subject property. LUBA also determined that a Goal 3 committed exception cannot be justified simply because the property is not capable of supporting an economically self-sufficient agricultural operation, or simply because a reasonable farmer could not make a living entirely from agricultural use of the land. Farm uses that do not meet these thresholds are still protected by Goal 3.

During the review for PA 14-01 and ZC 14-02, findings stated that, "The Simmons have also been the only bona fide farmers to ever farm portions of this land since World War I" and "No gross earnings from farming have accrued to any of the participants in this zoning action since 2004". These findings may now be invalid, as staff found conflicting evidence that demonstrates at least two (2) of the subject properties are currently employed in farm use with an intent to make a profit in money. Staff reviewed Polk County's Community Development records and found two (2) Agriculture Exemption Permits for two (2) of the subject properties (Tax Lots 602 and 603 in T7S, R4W, Section 14). Polk County's Agriculture Exemption Permit requires applicant's to "Be specific in describing your farm or forest enterprise, size of operation, and annual profit." One of the Agriculture Exemption Permits was issued for Tax Lot 602 on March 6, 2017, which indicates that the farm operation consisted of 20 acres of fescue that was switched to orchard grass in 2016, with an annual profit of more than \$10,000. The other Agriculture Exemption permit was issued for Tax Lot 603 on July 12, 2018, which indicates that the farm enterprise consists of horse boarding,



lessons, and chicken egg production with an annual profit of \$14,000. The 2018 Polk County aerial photograph recently became available through Polk County's GIS. Based on this photograph, staff finds that approximately 35 acres of the proposed exception area is currently in field crop production, which is located partially on Tax Lot 602 and partially on Tax Lot 603. These photographs are consistent with the statements provided in the Agricultural Exemption permit that was issued for Tax Lot 602. Staff finds that there is substantial evidence in the record to demonstrate that at least a portion of the subject properties are managed for farm use and are making a profit in money.

Staff finds that there are other flaws with this "hobby farm" definition and evaluation, as it applies to these applications. Farming operations often times own many non-contiguous parcels throughout the county, or even in surrounding counties. The applicable criteria in OAR 660-33 for qualifying for an income-based dwelling in the EFU zone recognizes this common scenario by allowing noncontiguous lots or parcels designated for Exclusive Farm Use in Polk County or a contiguous county to be used to meet the gross income requirements. Although the applicant has provided compelling evidence that the majority of the tax lots in the study area are under 10 acres in size and contain single-family dwellings, staff finds that this does not necessarily mean that the EFU zoned properties are not in farm use as that term is defined in ORS 215, and that the evidence does not exclude the possibility that the EFU zoned tax lots are part of larger farming operations.

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

Based on the Land Use Inventory provided by the applicant, the applicant determined that 71% of the parcels within the surrounding area contain a single-family dwelling, the average parcel size to be 12.07 acres with 77% of the parcels being less than 10 acres in size, and 45% of the parcels to not be in farm or forest use and to not be receiving any tax deferral benefits. It is important to point out that the Land Use Inventory includes surrounding Suburban Residential (SR) and Acreage Residential – Five Acre (AR-5) zoned properties, which are exception areas that have been planned and zoned for residential development. The SR and AR-5 zones also have a much smaller minimum parcel size than other surrounding resource zoned properties. OAR 660-004-0028(6)(c)(A) states, "...Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception..." In *Johnson v. Land County*, 31 Or LUBA 454 (1996), LUBA further determined that a county's reliance in the existence of adjacent non-resource parcels in justifying a committed exception is impermissible where the findings do not adequately establish how or when the adjacent parcels were created. Therefore, surrounding parcels that were lawfully partitioned and developed pursuant to the applicable goals cannot be used to justify an irrevocably committed Goal Exception for the subject properties. Although the applicant's Land Use Inventory contains notes about how some of the AR-5 zoned properties were created, there are inadequate findings to demonstrate how or when all adjacent parcels were created. For these reasons, staff finds that the figures provided by the applicant, intending to characterize the surrounding area, cannot be considered to accurately represent recent changes on surrounding farm and forest zoned properties to justify an irrevocably committed exception to Goals 3 and 4.

It should also be noted that it is unclear how all parcel sizes were determined by the applicant. Without determining each parcel's lawful size and configuration, the figures presented in the Land Use Inventory can greatly vary, such as average parcel size and dwelling density. It is not uncommon for one (1) parcel to contain multiple tax lots. For this reason, it cannot be assumed that separate tax lots equate to separate parcels. Although the Land Use Inventory does contain some "Comments" detailing how some parcels were created, it does not appear that the applicant determined when and how each of the surrounding parcels were created. For example, the applicant identifies the properties owned by "Hatchette", within Section 14, to be 4 parcels (Tax Lots 100, 104, 118 and 202), totaling 42.98 acres plus an easement road. However, Community Development records indicate that the lawful parcel configuration of Tax Lot 202 also includes Tax Lot 901 (T7S, R4W, Section 11), and Tax Lot 114 (T7S, R4W, Section 14), containing approximately 24 acres,

not 3.11 acres as represented by the Land Use Inventory. This example demonstrates how the applicant's representation of "average parcel size" is likely based on calculations from tax lot sizes, not parcel sizes.

In a letter provided by Angela Carnahan, Regional Representative for the Oregon Department of Land Conservation and Development (DLCD), she states that the applicant relies heavily on the Land Use Inventory encompassing approximately four (4) square miles surrounding the subject properties. Utilizing such a large study area obscures the fact that an irrevocably committed exception is primarily an evaluation of adjacent uses and their relationship to the subject properties. Ms. Carnahan further states that in *Scott v. Crook County*, 56 Or LUBA 691 (2008), the Land Use Board of Appeals accepted that an irrevocably committed exception should be focused on "adjacent lands and uses, not the character of or uses in the larger area within a one-mile radius of the subject property." Although the applicant has put forth a significant amount of information regarding zoning, ownership patterns, deferral status, etc., as pointed out by Ms. Carnahan, a large study area can obscure the facts when evaluating adjacent uses and their relationship to the subject properties. Therefore, staff finds that majority of the information presented in the Land Use Inventory cannot be relied upon to justify an exception to Goals 3 and 4, and does not adequately demonstrate that there has been a recent shift in land use management from farm operations with the intent to make a profit in money, to "hobby farms" with no intent to make a profit in money.

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

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

Staff disagrees with this conclusion and finds that farm or forest deferral assessments can be a reliable source of information for determining whether or not a property is managed for farm or forestry purposes, particularly for surrounding non-EFU zoned properties. As required by Oregon Revised Statute (ORS) 308A.071, non-EFU zoned properties are required to demonstrate a specified amount of gross income in order to receive farm deferral. Staff reviewed the Assessor's records for the above referenced property identified as Tax Lot 900 in 7.4.13A, and confirmed that this property is not receiving any special assessment and has not received any special assessment since prior to 1997. The Oregon Land Use Board of Appeals (LUBA) has also previously agreed with this position in *Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000), when LUBA found that a local government is not required to adopt findings addressing the farm tax deferral status of property when considering the "irrevocably committed" factors of OAR 660-004-0028. However, the fact that property is in farm tax deferral is relevant evidence in determining whether it is impracticable to put the property to farm use. According to the 2019 Polk County Assessor's records, the subject properties are all currently receiving farm deferral.

Based on evidence in the record, staff finds that there remains insufficient evidence in the record to demonstrate that the Agriculture Comprehensive Plan designation is no longer appropriate due to changing conditions in the surrounding area.

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

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

**a. Polk County will endeavor to conserve for agriculture those areas which**

**exhibit a predominance of agricultural soils, and an absence of nonfarm use interference and conflicts.** [PCCP Section 2, Agricultural Lands Policy 1.1]

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

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

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

Applicant contends that this property is very vulnerable to climate due to its exposure factor to coastal wind patterns and its high elevation (those areas over 900 feet above sea level). The continuous failure of crops on the property can likely be attributed, at least in part, to changes in climate, which affects sensitive orchard crops and Christmas trees. The fluctuations in weather and the emergence of destructive synoptic events have wreaked havoc on prunes, cherries and Douglas Fir Christmas trees. Episodes such as extremely high rainfall in late June and early July have destroyed entire cherry crops. High diurnal variations in weather have retarded pollination to the prune orchards that formerly occupied this site. The inability to reach 55 degree temperatures early enough in the growing season ruined prune crops. Temperatures must be at least 55 degrees for bees to pollinate, but in an increasing number of years the temperatures fell short for pollination. For example, cherries used to be grown in the subject rezone area but the higher elevation triggers late spring/early summer rains that split the cherries and renders the crop 100% destroyed. This happened to Wayne Simmons on four different occasions despite having pruned the trees and applying all required amendments. They have had failures with strawberries, gooseberries, parsons prunes, cherries, wheat, barley, and grass seed. The Hearings Officer takes note, however, nothing indicates that grapes ----grown extensively on nearby lands ---were attempted.

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

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

- The slopes uphill from the vineyards are not able to be cultivated because of boulders and rock fragments dominate the entire area.
- The elevations are higher on the subject property and therefore grapes would have a reduced growing season.



- The wind exposure from the Van Duzer Corridor is too strong and would damage grape plants.
- There is no surface or ground water available for establishing vineyards since the subject property is in the Eola Hills groundwater limited area.
- The slopes have complex aspects and as such there are no large contiguous blocks of land that have uniform aspect, thus making grape farming very challenging.
- A significant portion of the subject rezone area is wooded and has a very thick understory vegetation that would be difficult to control.

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

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

Last, and very importantly, applicant maintains, the large forested areas as observed by the professional wildlife biologist still have significant populations of indigenous wildlife such as deer. Any vineyard on the property would require 6-8 foot fences to arrest deer depredation to vineyard plants. Fences are very difficult to establish and maintain because of the very shallow depth to bedrock and hardpans. Some areas on the property have never been fenced for this reason. The Willamette viticulture area is 95% below 600 feet above sea level and only 5% above that figure. The same long list of factors that resulted in multiple crop failures for the property also apply to grapes. The grapes are not so hardy that can be planted in rocky soils with no irrigation. The rare varietal wine grapes (Pinot Noir, Pinot Gris and Rieslings) are also very difficult to grow at elevations over 750 feet. An observation of the high hill tops on the Eola Hills clearly supports this premise.

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

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

In summary, applicant argues that the soils were the focus of the studies as they well should be, but other soil characteristics such as excessive stoniness, shallow depth to bedrock and texture rather than

taxonomic soil classifications yielded a new perspective on this site. The dual soil analysis coupled with the Agronomists (Gallagher) knowledge of the effects of soil on agriculture reveals a site with a multitude of limitations that include but are not necessarily limited to: excessive slopes (over 20 percent that are not traversable by standard farm equipment; excessive wind speeds that disrupt spraying opportunities and that shape and break orchard crops and Christmas trees; excessive sun exposure due to elevations over 950 feet and up to and over 960 feet above mean sea level; excessive stoniness especially on the westernmost 80 acres owned by Simmons; shallow depth to bedrock that limits moisture retention on an already xeric slope and ridgeline; loose friable soils on the ridgeline that are prone to excessive dryness and wind erosion).

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

The proponents claim they recognize that this proposed action could affect adjacent and nearby farm operations but they too have problems that limit their farm uses to low income generating grass hay and limited grazing on very substandard acreages. The three agricultural properties across Best Road from the subject property (east) have never been farmed in conjunction with the subject property and are marginal respect to agricultural production. The PCCP affirms many of the earlier assertions made in the application regarding limitations based on slopes, exposure, temperature and terrain features. It also affirms the conditions in the area concerning parcelization, housing and the absence of farm enterprise to the south, east and northeast. The PCCP also lends support to the self-evident limitations as observed by two very seasoned farmers that work this proposed rezone area particularly for Sub-Area V. Appendix 9 of the application entitled "EXAMINATION OF CONSEQUENCES FOR INDIVIDUAL SUB-AREAS" stresses the limitations of this site. Some of the key facts alleged by applicant are: 1.) "The area is considered marginal farm land because only 59 percent of the soils are agricultural, 2.) Slopes range from 12-30 percent on the sides, leveling off to 3 percent in only a few areas, 3.) Sub- Area V is also located in an area exhibiting a predominance of nonfarm uses and interference, and 4.) Forest site class data are not available.

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

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

While the NRCS Soil Survey and the Norgren and Gallagher soil studies for the subject properties would lead one to conclude it is agricultural land, the applicant states there are limiting factors that render it incapable of producing reliable crops at a commercial scale. The applicant observes that a number of factors complicate agricultural uses of the subject properties including but not limited to elevation, wind exposure, sun exposure, shallow soils, preponderance of rock, cold temperatures related to elevation, inability to irrigate and inability to burn crop residues. The elevation of the subject properties is between 900 and 1,060 feet with steep slopes to the west and south. As stated by the applicant, the subject properties are situated on a high point at the southern end of the Eola Hills. Wind exposure is high since this southern promontory of the Eola Hills is in the path of coastal winds passing through the Van Duzer Gap. Moreover, the subject properties' location on the south side of a promontory means they receive more incident solar radiation than other areas of Polk County. The applicant indicates that a combination of solar exposure on steep south facing slopes and steady winds make raising crops on the subject properties impracticable because increased transpiration of available soil moisture stunts growth and leads to crop failures. The slope, aspect and elevation of the subject properties has contributed to crop failures resulting from cool temperatures discouraging pollinators, heavy rains precipitated from orographic lifting of clouds up the Eola Hills, and constant wind damaging and stressing plants. Staff evaluated the applicant's statements and concurs that while the subject properties are predominantly comprised of soils that characterize agricultural land, consistent with OAR 660-033-0030, site constraints related to slope, aspect, excessive wind and sun exposure could limit the ability of the subject properties to produce commercial agricultural crops. Applicants appear to be contending that factors such as slope and microclimates impair the agricultural suitability rating as determined by the NRCS. In its letter dated November 10, 2015, the Oregon Department of Agriculture stated that factors such as slope and microclimates already are taken into account when soil is rated by the NRCS and cannot be used to guide local governments in assessing soil capabilities. The Hearings Officer therefore adheres to the concept that the NRCS Soil Survey is controlling, and already takes into account physical characteristic such as slope, rockiness, microclimates, etc. The Hearings Officer concludes that the Soils Survey demonstrates the subject properties are composed of predominantly of agricultural soils. Land with a predominance of soils in capability classes I through IV is considered agricultural land per OAR 660-033-0030. With 53.5% being soils designated capability class II through IV, according to the Soil Survey, the subject property qualifies as agricultural by rule. While the Norgren and Gallagher soil studies were not used as part of the Hearings Officer's evaluation of the applicant's proposal, they validate soils maps found in the Soils Survey demonstrating a predominance of agricultural soils on the subject property. Based on soils data, the Hearing Officer finds that the subject property is agricultural land, consistent with OAR 660-033-0030.

The applicant states that wine grapes are not a suitable crop for the subject properties, citing site specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a preponderance of boulders, and a lack of landscape uniformity to establish blocks with the appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower elevations than the subject properties. Cubanismo Vineyards to the east of the subject properties is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon, Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the variety of landscapes on which vineyards are planted, with east facing, west facing and south facing vineyards represented by the small sample above. However, the subject properties are more exposed to wind and sun than the vineyard sites surrounding it, lending some credence to the applicant's observations that wine grape production is impracticable there. At the same time, evidence in the record shows that some knowledgeable grape growers feel that "the rocky, wind-battered slopes of the Eola-Amity hills have emerged as one of Oregon's most singular terrains for pinot noir." [Patrick Comiskey, "Wind Powered Pinot", Wine & Spirits Magazine, April 2013.] Applicant contends above that the Simmons family "actively farmed the tract, growing gooseberries,

strawberries, prunes, cherries, fine fescue grass, Christmas trees and wheat with little success," attempting by this recitation to demonstrate the land is not suitable for large-scale commercial agricultural crops. There is no indication that attempts were made to grow grapes of any variety. A letter dated November 10, 2015 from James Johnson, Land Use and Water Planning Coordinator with the Oregon Department of Agriculture, states that vineyard development at elevations exceeding 750 feet and in wind prone areas are more common these days as climate and weather patterns have changed. He also challenges the applicant's assertions that grass seed and Christmas trees cannot be grown on the subject properties. R. E. Steele, President of the Polk County Farm Bureau, states in a letter dated November 18, 2015 that successful wine grape vineyards and Christmas tree farms operate in the immediate vicinity of the subject properties, contradicting the applicant's representations. Although the rules governing irrevocably committed exceptions factor site specific challenges to farm and forest operations, a demonstration that these activities are "impracticable", per OAR 660-004-0028, is necessary to meet the exception criteria. The applicant concedes that the subject properties may be suitable for Noble fir Christmas tree production. Moreover, evidence in the record indicates that wine grapes and grass seed could also be produced on the subject properties. Consequently, the Hearings Officer finds that the subject properties could produce viable crops, and would conserve agricultural land exhibiting a predominance of agricultural soils under the current Plan map designation and zone.

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

Applicant's Additional Findings: The issue of the ability of the subject properties to support commercial vineyards has been studied extensively by several experts in the wine and vineyard fields.

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

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

In addition, Mike McLain, Vineyard Properties, a recognized expert on identification of vineyard



property in the Willamette Valley was engaged to review the site and provide his expert opinion. He classified the subject properties as “higher risk” to a buyer based on its high elevation, its wrong facing slope and its high exposure to wind. Mr. McLain’s letter report is attached hereto as Exhibit Z.

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

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

Although the record demonstrates that the subject properties have experienced various types of crop failure in the past, the Hearings Officer noted that nothing in the record indicated that wine grapes have ever been attempted to be grown on-site, which are extensively grown on nearby properties. In response to these findings, the applicant provided a letter summarizing a site evaluation performed by Andy Gallagher, who has 20 years of experience evaluating potential vineyard properties in Western Oregon. Mr. Gallagher’s findings indicate that at the higher elevation (>900 feet), there are less than 2000 GDD which places approximately 60% of the subject properties into a category of “suitable for hybrid wine grapes and only the very earliest V. vinifera varieties.” Additional findings indicate that the site is “too cool for a pinot noir site”. Although there may be limitations for growing certain types of wine grapes, it remains unclear whether these limitations extend to the entire 228 acres of the subject property, and whether these limitations are explicitly for pinot noir grapes, or if other varieties grown in Oregon would prevail. The applicant also provided a letter written by Mke McLain, whose opinion is that the subject property is, “...just too high, wrong slope, and too exposed for a knowledgeable vineyard land buyer to want to buy it.”

As discussed above, Polk County’s Community Development records indicate that since the last proceeding, two (2) Agriculture Exemption Permits were issued for two (2) of the subject properties (Tax Lots 602 and 603 in T7S, R4W, Section 14). Polk County’s Agriculture Exemption Permit requires applicant’s to “Be specific in describing your farm or forest enterprise, size of operation, and annual profit.” One of the Agriculture Exemption Permits was issued for Tax Lot 602 on March 6, 2017, which indicates that the farm operation consisted of 20 acres of fescue that was switched to orchard grass in 2016, with an annual profit of more than \$10,000. The other Agriculture Exemption permit was issued for Tax Lot 603 on July 12, 2018, which indicates that the farm enterprise consists of horse boarding, lessons, and chicken egg production with an annual profit of \$14,000. The 2018 Polk County aerial photograph recently became available through Polk County’s GIS. Based on this photograph, staff finds that approximately 35 acres of the proposed exception area is currently in field crop production, which is located partially on Tax Lot 602 and partially on Tax Lot 603. These photographs are consistent with the statements provided in the Agricultural Exemption permit that was issued for Tax Lot 602. Although additional evidence provided by the applicant indicates that portion of the subject property may not be suitable for vineyards, Community Development records indicate that two (2) of the subject properties are currently being managed for profitable agriculture crops. For this reason, staff concurs with the Hearings Officer’s previous findings that the subject properties could produce viable crops, and maintaining the current Agricultural Plan designation and EFU zone would conserve agricultural land exhibiting a predominance of agricultural soils.

- c. **To conserve and protect, and encourage the management of forest lands for continued timber production, harvesting and related uses.** [PCCP Section 2, Forest Lands, Goal 1]
- d. **To conserve and protect watersheds, fish and wildlife habitats, riparian areas and other such uses associated with forest lands.** [PCCP Section 2,

Forest Lands, Goal 2]

- e. **Polk County will provide for the protection of productive forest lands. Designated forest lands will be areas defined as one of the following:** [PCCP 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 applicant in a letter dated January 11, 2019.)

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 application as Exhibit W. The suitability of the site for forest uses assessed the physical site conditions; the impacts from surrounding uses; and the economic feasibility of commercial timber production. It was noted that the primary focus for forestry uses was on the western slopes of the property where some trees were intermingled with, and sometimes overtaken by scotch broom, blackberries and other brush and scrub trees.

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

In the 24.1 acre area, it was pointed out that some selective cutting was done in the 1960's and again in the early 1990's, with some reforestation efforts occurring after the selective cuts. It was noted that in

the reforestation efforts, the survival rate was an estimated 25%. Where the reforestation efforts failed, brush and scrub trees took their place.

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

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

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

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

**Forest Land Goal 2 - To conserve and protect watersheds, fish and wildlife habitats, riparian areas and other such uses associated with forest lands.** There are no watersheds, fish or wildlife habitats or riparian areas identified or mapped on or near the subject property. This Goal is not applicable here, as there are no such uses that need to be conserved or protected involved in this application. This Goal is complied with.

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

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

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

**Resource Management Policy 2.1 - 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.** As set forth in the Stuntzner report, the subject property does not contain the commercial ability to produce forest products worthy of management for any sustained yield. There are no watersheds on or near the subject property. There are no recreational areas on or near the subject property. There is no wildlife habitat on or near the subject property. Effectively, there are no identified resources that can be efficiently managed to produce or protect the listed activities.

There are grazing areas on the subject property for domestic livestock. The purpose of the 10 acre minimum parcel size here is to protect and enhance those areas. When an acreage homesite is

established it allows the homeowner to maintain cattle, horses or other domestic animals to be managed as a part of their homesite. This will result in more productive use of the land, as smaller parcels when cumulated will produce a higher level of grazing activities than currently exist.

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

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

The subject property might be considered "marginal agricultural lands", however the subject property has two distinct topographical features, the western slopes, and the uplands. The western slopes are too steep, the soil too shallow and rocky to be considered for agriculture uses, and as noted above it is not feasible or economical to attempt to convert the western slopes to forestland. The uplands historically is not capable of producing commercial timber as shown by the lack of trees going back nearly 100 years.

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

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

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

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



forested, while some of which is currently overtaken by scotch broom, blackberries, and other forms of brush vegetation.

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

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

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

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

There were no findings to address the area identified as "Type 4", which comprises the eastern half of the subject properties, an area approximately 105.8 acres in size. Historic photographs depict this area to have been managed for various agricultural crops such as hay. Based on staff's review of NRCS soils maps and data, approximately 98 acres of this 105.8 acre area (93.5%) contain Class II and III soils with an average forest productivity of approximately 163 cubic feet of wood fiber per acre annually, which is higher than the average productivity of the remaining portion of the subject properties.

The Forestland Suitability Analysis provides findings indicating that soils only represent one (1) of the three (3) environmental components of nutrients, water, and sunlight, which effects forest productivity. However, there are no findings to demonstrate that the "Type 4" area lacks adequate nutrients, water and sunlight because the Forestland Suitability Analysis focuses on the western slopes of the subject property. Findings to address limiting factors such as aspect, low water storage, and shallow soils are specific to areas identified as "Types 1, 2, and 3", which are primarily composed of Ritner gravelly silty clay loam soil, and have the lowest forest productivity capability for the subject properties based on NRCS soils data. For these reasons, staff finds that there is insufficient evidence in the record to demonstrate that the entire area proposed to be designated Rural Residential could not practicably be managed for commercial timber production.

There also were no findings to address the area identified as "Type 5", which includes a powerline right-of-way that comprises approximately 3.3 acres of the subject properties. Staff finds that this area is not a significant portion of the subject property and, therefore, does not warrant an individual evaluation of this area.

Topography and the lack of road access to the lower slopes of the subject properties was identified as a

limiting factor for why ground machinery could not be used for a logging operations. This evaluation is again specific to the western sloped areas and does not adequately demonstrate that traditional logging methods could not be employed on the remaining eastern portions of the subject properties.

Fire risk and protection was another concern evaluated as part of this analysis. Mr. Barnhart concluded that the fact the subject property is not within an Oregon Department of Forestry (ODF) fire protection district coupled with the perceived higher risk of human-caused fire would act as a deterrent to commercial forest land investors. Staff does not necessarily disagree with this conclusion, however, staff is concerned that the result of this proposed re-zone area would allow for increased rural residential development. Part of the irrevocably committed Goal exception criteria requires the applicant to demonstrate that "rural uses, density and public facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described by OAR 660-004-0028." Staff reviewed 2019 Polk County Assessor's data and finds that approximately 199.5 acres just northwest of the subject properties are receiving forest deferral. In addition, these areas visually appear to be managed for forestry purposes based on staff's review of the 2018 Polk County aerial photograph. Staff is concerned that if increased rural residential development within the area is a deterrent factor for commercial forest land investors as the applicant claims, yet the applicant's proposal would result in 17-19 additional dwellings, it seems that new residential development could further deter investors of neighboring forest properties and therefore, "commit" those lands as well.

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

A financial analysis was provided with the Forestland Suitability Analysis to demonstrate the projected rate of return for forestland investors. This evaluation includes information on 1) the cost of site preparation, 2) planting, 3) silviculture treatments expected, 4) annual holding costs, and 5) projections of expected future harvest income. After using two discounted cash flow (DCF) models, findings conclude that it is not financially feasible to manage the subject properties for timber production without subsidizing or settling for a much lower rate of return on investments than what is typically demanded in the marketplace (5-6 percent). This evaluation was only conducted for the areas referenced above as vegetation "Type 1, 2 and 3", and does not evaluate the financial feasibility of the portion of the subject property that contains the highest forest productivity capability based on NRCS soil data. A financial analysis was not performed for approximately 105.8 acres of the subject properties, identified in the analysis as "Type 4". Figures 10 and 11 in the Forestland Suitability Analysis projects a 4.1 percent rate of return for vegetation "Type 2", and a 4.7 percent rate of return for vegetation "Types 1 and 3". Mr. Barnhart points out that the cost of land or rent costs was not included in these models. Staff finds that although the projected rate of return is lower than what is typically required by investors, staff finds that these figures demonstrate that the property is projected to still have a profitable rate of return assuming the subject property owners invest money on the land that they currently own. Staff also finds that if vegetation "Type 4" were included, the projected rate of return could be within the 5-6 percent rate of return typically sought after by investors.

Due to the impacts of fragmentation that has occurred on and around the subject properties, Mr. Barnhart states, "In my opinion, this property which is located in a fragmented area is better suited for small parcel hobby tree farms where return on investment is not the primary motivation for management." This conclusion implies that the subject properties could be managed for forest production, however, there could be added risks which have been identified as an inability to use

certain forest management practices, a slightly lower rate of return for the western portion of the subject property, and potential litigation from neighbors from smoke created during slash burning. Nevertheless, staff finds that there is still insufficient evidence in the record to demonstrate that the entire 228 acre area of land could not reasonably be managed for a commercial forest operation, specifically those areas identified as “type 4”, and how, if approved, further fragmentation and residential development would not impact or “commit” surrounding properties that are currently managed for forestry purposes.

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

- c. **The Rural Lands Plan designation applies to lands in the County which for the most part lie between the relatively flat agricultural areas and the foothills of the Coast Range. These lands are generally hilly, heavily vegetated, and have low densities of residential development.**
- d. **It is the intent of the Rural Lands Plan designation to provide an opportunity for a segment of the population to obtain acreage home sites in a rural area, while at the same time encouraging and protecting agriculture and forestry.**
- e. **In those areas that receive an exception from the Oregon Statewide Planning Agricultural and Forest Land Goals #3 and #4, but are not given an exception to Oregon Statewide Planning Urbanization Goal #14, implementation will be accomplished with the Acreage Residential 10-Acre (AR-10) Zone and Agriculture and Forestry 10-Acre (AF-10) Zone. In those areas that receive an exception from the Oregon Statewide Planning Agricultural and Forest Land Goals #3 and #4 and Urbanization Goal #14, implementation will be accomplished with the Acreage Residential (AR-5) or Suburban Residential (SR) Zones. [PCCP Section 4]**

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

Applicants say concept of smaller farm units is resurging from a similar resurgence in the late 1970's. A publication entitled "Small-Scale Farming" a portrait from Polk County, Oregon, articulates issues regarding the establishment of smaller scale farming enterprises. There is a current resurgence of this concept as more consumers want to know where their food is coming from, "farm to fork." The subject rezone area, being close to Salem-Keizer, Monmouth-Independence and Dallas could be an ideal place to establish such a small farm enterprise area. The AF-10 Zone is ideally suited to the extreme variations that exist on this site with respect to elevation, slope, wind exposure, aspect, soil mapping units, soil depth, soil fertility,

vegetative cover, degree heating days, frost free days as well as historical use of the land. The purpose and intention of this zone is to create an environment in which small scale agriculture and forestry can be conducted through residency management. The concept of small scale farming and "starter farms" can make substantial contributions to the local farm economy of the area.

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

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

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

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

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

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

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



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

Statements in the record indicate that the demand for the types of crops grown on the subject properties historically have diminished, such as cherries, prunes, Douglas fir Christmas trees, grass seed and grain, as the yield of these crops also dropped. Some of the processing facilities for these crops have relocated or closed. The applicant also states that prohibition of irrigation on the subject properties and physical characteristics of the site have been a limiting factor in the ability to profitably manage it for agriculture. The applicant describes a new plan for farm uses that they have either established or intend to establish on the subject properties. The applicant provided a map indicating where crops or agricultural activities are either established or could be established but did not provide a written plan or pro forma. Nevertheless, staff understands the applicants representation of those new agricultural uses and plan to be small scale and not profitable and the applicant's argument to be that if a dwelling is permitted, the likelihood of the establishment of an agricultural activity, regardless of the fact that it would not be profitable, would be greater and better suited to small acreage parcels.

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

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

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

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

The AF-10 Zone is ideally suited to the extreme variations that exist in the exception area with respect to elevation, slope, wind exposure, aspect, soil mapping units, soil depth, soil fertility, vegetative cover, degree heating days, frost free days as well as the historical use of the land. The purpose and

intention of the proposed AF-10 zone is to create an environment in which small scale agriculture and forestry can be conducted through residency management. The concept of small scale farming and "starter farms" have been shown to make substantial contributions to the local farm economy of the area.

According to the Western Rural Development Center Paper from Oregon State University: With the growing awareness of the fact that small-scale farmers are an important embodiment of traditional American values, new interest has been generated in ensuring their ultimate survival. Small-scale farmers, however, are significant not only for the social values they represent, but also for their sheer numbers. They make an important contribution to strengthening the economic base and enhancing the social environment of the rural community, in addition to employing the land to its maximum benefit. Although farmers with gross product sales of less than \$40,000.00 account for only 15 percent of the Oregon's farm product sales, they constitute 80 percent or 21,466 of the 26,753 farmers in the state.

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

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

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

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

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

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

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

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

Staff Findings: The Polk County Hearings Officer previously determined that failed attempts at farming the subject properties is not solid evidence that no one else could succeed with any crops. The applicant has identified local markets for smaller scaled diversified farm crops, which seems

contradictory to the applicant's position that the properties would be managed as "hobby farms", with no intent to make a profit in money. Although the applicant has put forth a convincing argument about the highest and best use of the land, the applicable criteria does not allow for an exception to Goal 3 or Goal 4 when the property could practicably be managed for farm use, even if it does not rise to the level of "commercial" farm use.

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

As discussed above, the 2018 Polk County aerial photograph demonstrates that approximately 35 acres of the proposed exception area is currently in field crop production, and two Agricultural Exemption permits identify an annual profit of \$10,000 from orchard grass (Tax Lot 602) and \$14,000 from horse boarding, lessons, and chicken egg production (Tax Lot 603). Staff finds that there is substantial evidence in the record to demonstrate that two (2) of the subject properties are currently managed for farm use and are making a profit in money. Staff also finds that the remaining portion of the proposed exception area could be managed for farm use with an intent to make a profit in money, although maybe not "commercially" as a self-supported farm operation, which LUBA has determined to still be protected by Goal 3. For these reasons, staff finds that the existing Agricultural Plan Designation and Exclusive Farm Use Zoning Designation are the appropriate designations for the subject properties.

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

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

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

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

Absent a Public Water System certification, drinking water safety for groundwater sources is incumbent on individual users. Well constructors are aware of threats to public safety from domestic water wells that are too shallow, or that are located within 100 feet of a septic system's leach field. Also, any dwellings that may be constructed following this land use action would require septic, building, plumbing and electrical permits from Polk County. A site plan review confirming that relevant development setbacks are met would be part of the building permit

process. Part of the site plan review evaluates whether the location of a domestic water source (a well) is at least 100 feet from a septic system leach field, thereby protecting property owners' public health by mitigating e. coli vectors.

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

Applicant's Additional Findings: Water will be provided from a combination of Orchard Heights Water District and on-site wells.

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

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

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

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

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

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

The submitted hydrology report was stamped with Mr. Rehm's Oregon Registered Professional Geologist stamp. Staff has determined Mr. Rehm to be a credible professional who has determined that there is available water to serve future residential development on the subject properties. For this



reason, staff finds that the applicant has demonstrated that there is adequate water which meets the standards of the State Department of Health. Full details of this hydrology report are included as Exhibit X in the record.

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

Hearings Officer's Previous Findings: The applicant states that the subject properties have been evaluated for septic system approvals. The subject properties have extensive units of Jory and Nekia silty clay loam soils that generally accommodate on-site septic systems. Moreover, the applicant's proposal contemplates a land use action that results in parcels zoned AF-10. The AF-10 zone has a minimum parcel size of 10 acres, which would be considered generally large enough to meet siting standards for septic systems. Staff consulted with the Polk County Sanitarian, Jim Solvedt, concerning the feasibility of on-site septic systems on 10-acre parcels, should this proposal be approved. He indicated that shallow soil depth and steep slopes are limiting factors when installing a standard septic system. A minimum of 30 inches of effective soil depth is necessary to treat waste water in a standard septic system on gently sloping ground, and a minimum of 60 inches of effective soil depth is necessary for a standard septic system on slopes exceeding 30 percent. Engineered alternative treatment or capping fill septic systems may be used where a standard system is impractical due to site constraints. A site evaluation for an on-site septic system for each new parcel would be required as part of the building permit process, should this proposal be approved.

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

Applicant's Additional Findings: There is no public sewer system available to the exception area, so the area is served by individual septic systems.

Staff Findings: Staff concurs with the Hearings Officer's previous determination that parcels containing at least 10 acres are generally adequate to suppose an on-site wastewater treatment facility (septic).

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

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

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

Staff Findings: As discussed above, the applicant provide an additional hydrology study performed by John M. Rehm, Jr., who is a Registered Geologist with the State of Oregon. Based on this study, it is of Mr. Rehm's opinion that there is available water to serve future residential development on the subject properties. This hydrology study was stamped with Mr. Rehm's Oregon Registered Professional Geologist stamp. Even with the establishment of additional wells on the subject property,

staff finds that parcels 10 acres in size and larger are generally large enough to establish a dwelling, a domestic well, and an on-site septic system that is at least 100 feet from any wells.

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

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

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

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

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

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

An operational traffic analysis dated October 22, 2013 was conducted by Lancaster Engineering for the intersection of Orchard Heights Road and Best Road. The applicant provided additional analysis of two intersections on Orchard Heights Road in a supplemental report by Lancaster Engineering dated October 15, 2015. Lancaster Engineering's additional traffic analysis of impacts

on the county road system from potential trip generation by the proposal, particularly the intersections of Orchard Heights Road and Best Road and Orchard Heights Road and Orchard Heights Place, was reviewed by the Polk County Engineer, Todd Whitaker, P.E, who determined the impact of the proposal on the county road system would not be significant. After reviewing the applicant's statements, and comments from Todd Whitaker, P.E, staff concluded that sufficient transportation facilities would be available to serve the applicant's proposal.

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

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

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

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

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

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

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

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

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

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

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

fully complied with.

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

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

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

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

After considering evidence in the record, staff concurs with the Hearings Officer's previous findings that there would be sufficient public facilities and services, including transportation and schools, to accommodate the additional population from the proposed development.

**v. Development of residential units will not result in the loss of lands suitable for agriculture or forestry and will not interfere with surrounding agriculture forestry activities [PCCP Section 2, L, Policy 1.5(e)]**

Hearings Officer's Previous Findings: Applicants contend that the subject property cannot reasonably or feasibly be utilized for farm or forest use by itself or in conjunction with adjoining properties. The proponents also recognize that this proposed action could affect adjacent and nearby farm operations but believe that those properties, too, have problems that limit their farm uses to low income generating grass hay and limited grazing agricultural lands on very substandard acreages. Staff notes that the applicant has applied for an irrevocably committed Goal exception as part of this application. The proposed exception area may contain a predominance of agricultural soils and even continue to have other agricultural characteristics, while still qualifying for an

irrevocably committed Goal exception. The applicant states that the demand for the types of crops grown historically, such as cherries, prunes, Douglas fir Christmas trees, grass seed and grain, have diminished as the yield of these crops also dropped. Some of the processing facilities for these crops have relocated or closed. The applicant also states that prohibition of irrigation and physical characteristics of the site have been a limiting factor in the ability to profitably manage the subject properties for agriculture. These changing conditions, applicant believes, have irrevocably committed the subject properties to residential use. The Agriculture and Forestry-10 Acre zone, which implements the Rural Lands Comprehensive Plan designation, would be compatible with surrounding land uses and also enable the applicant to develop larger acreage home sites where an occupant could manage the property for a range of specialty farm uses as a hobby, even though the land is not suitable to make a profit in money from farm use. Based on materials and statements in the record, staff generally supported the applicant's conclusion that the proposal would not result in the loss of lands suitable for agriculture or forestry and would not interfere with surrounding agriculture and forestry activities because small scale agriculture, which is supported by the proposed AF-10 zone, has been conducted in the vicinity of the subject properties for decades without conflicting with the larger agricultural operations in the area.

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

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



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

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

Based on the foregoing, staff concluded that applying the proposed Rural Lands PCCP designation to the subject properties would be consistent with the goals and policies of the PCCP. This analysis assumes that the AF-10 zone would implement the Rural Lands PCCP designation. The applicant has concurrently applied for a zone change on the subject property from EFU to AF-10 in application ZC 14-02. Staff recommended that a condition of approval require that if applications PA 14-01 and ZC 14-02 are approved, approval of each application shall be dependent upon approval of the other. The Hearings Officer concurs, but does not want to be understood as saying this constitutes approval of either application since the applicant has not met the burden of proof to justify a Goal exception with respect to the subject properties' suitability for agriculture or forestry, or whether the proposal would commit nearby lands to uses not allowed by Goal 3.

Applicant's Additional Findings: The applicant did not provide additional findings specifically addressing this applicable policy. However, staff understands the applicant's supplemental Forestland Suitability Analysis (Exhibit W in the record), a memorandum from Andy Gallagher, who is a recognized soil scientist (Exhibit Y in the record), and a letter from Mike McLain, who is a viticulture expert and wine grape producer, to demonstrate that the subject properties are not suitable for agriculture and forestry uses. Therefore, the applicant asserts that development of residential units would not result in the loss of lands suitable for agriculture or forestry.

Staff Findings: As discussed above, staff finds that there remains insufficient evidence in the record to demonstrate that the entire 228 acres of the subject properties could not reasonably be managed for agricultural or forestry purposes. Therefore, staff concurs with the Hearings Officer's previous findings that increased residential development would have an inevitable loss of some resource land due to the

development of streets, driveways, outbuildings, septic systems, the footprint of the dwelling, etc.

As discussed above, when evaluating whether or not the subject properties could be managed for forestry purposes, the applicant provided a Forestland Suitability Analysis. This analysis determined that surrounding parcelization and residential development makes the property less desirable for timber management because there is a greater risk of lawsuit threats from slash burning, it would be more difficult to use common forestry practices, and there is a perceived lower financial rate of return that could be a deterrent for investors. Staff is concerned that if increased rural residential development on surrounding lands is the factor that makes the subject property not suitable for commercial forestry operations, as purported by the applicant, it is then unclear how developing 17-19 additional dwelling on 10 acre parcels as proposed by the applicant would not further "commit" surrounding properties (approximately 199.5 acres) that are currently receiving farm deferral and visually appear to be managed for forestry purposes based on the 2016 Polk County aerial photograph.

Provisions found in OAR 660-004-0018(2)(b)(B) require that "rural uses, density and public facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable Goal as described by OAR 660-004-0028." This criteria is substantially similar to the intent of Policy 1.5(e) from the Polk County Comprehensive Plan, Section 2, listed above. Angela Carnahan, Regional Representative with DLCD, provided comments indicating that the applicant did not adequately address OAR 660-004-0018(2)(b)(B). The applicant has stated (during the previous and current proceedings) that spraying and aerial harvesting cannot be utilized on the subject properties due to increased rural residential dwellings and hobby farms on surrounding properties because these practices could cause damage to nearby crops and could create a nuisance for nearby residences. The Hearings Officer previously determined that this argument is a "double-edged sword" because nearby vineyards and Christmas tree growers could employ the same argument if the subject properties were developed with a residence and managed for hobby farms. The applicant did not provide any additional evidence to demonstrate how 17-19 additional dwellings on 10-acre parcels, that may or may not be managed for hobby farms, would not impact surrounding properties that are currently managed for agricultural and forestry purposes. For these reasons, staff finds that there remains insufficient evidence to demonstrate that increased rural residential development on the subject properties would not impact adjacent farm and forestry operations.

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

Hearings Officer's Previous Findings: Applicants put forward numerous proposed findings regarding all 14 Statewide Planning Goals and guidelines in their application and supporting materials. Given that applicants chose not to number the pages or paragraphs in virtually all of such materials, more precise citation is not practical. These proposed findings are described on pages 22 to 25 of the staff report.

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

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

**Goal 3, Agricultural Lands:**

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

#### **Goal 4, Forest Lands:**

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

#### **Goal 12, Transportation:**

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

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

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

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

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

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

Applicant's Additional Findings: What follows is an analysis of compliance with each of the relevant Statewide Goals.

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

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

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

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

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

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

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

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

Goal 9 - Economic Development - This proposal is seeking to take land that cannot be commercially farmed in large tracts, and turn the land into smaller parcels with homesites where the owner can establish and maintain small specialty crops, animals or Christmas trees. Taking unproductive land and turning it into homesite that also can produce some hobby crops is an economic win for Polk County. One only needs to look at the three parcels in the exception area that have been developed. The homes on those lots are some of the most expensive homes in Polk County, and while those

parcels remain too large to manage by the owner for any sort of crop production, some small hobby activities are being attempted. Taking land that is now producing no economic value to the community and almost no tax dollars for the County, and turning that land into high value homesites that pay huge sums in taxes is a boom to economic development in Polk County. This Goal is complied with.

Goal 10 - Housing - This proposal will add up to 17 new homes in the West Salem Hills. Homes that are near the Salem UGB, with easy access to a good highway system and the shopping opportunities that lie in West Salem and in Salem proper. The addition of rural homesites fills a need that has existed for a decade or more. The popularity of Ballot Measures 37/49 demonstrated the desire and need for rural residential housing, and the failure of those measures to actually produce much in the way of housing indicates the desire and need still remain. In any event, this Goal seeks to supply an array of different housing types in the County, and rural residential homes on acreage is one of those types this application will fulfill. This Goal is complied with.

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

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

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

Goal 14 - Urbanization - The applicants are proposing the AF-10 zoning to implement their proposed Comprehensive Plan designation of Rural Lands. The purpose statement for the AF-10 zone indicates that the function of the zone is to permit the designation of Rural Lands consistent



with OAR 660-0040040(7)(i)(A), which allows, without an exception to Goal 14, new rural residential areas designated after October 4, 2000, and requires any new lot or parcel to have an area of at least ten acres. Once approved with the AF-10 acre zone, this Goal is complied with as the lands are considered rural lands and not urbanizable lands.

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

Staff Findings: The applicant has submitted an exception to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), under the "irrevocably committed" goal exception criteria. The applicable criteria for an irrevocably committed goal exception(s) is addressed below.

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

Staff finds that the applicant's proposal is consistent with all other Statewide Planning Goals, based on the applicant's statements and the extensive uncontested findings during the previous proceeding.

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

Hearings Officer's Previous Findings: The subject properties are not located within an urban growth boundary or within an incorporated city. As a result, no intergovernmental agreements are applicable to this application. This criterion is not applicable to the proposed amendment.

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

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

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

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

Hearings Officer's Previous Findings: Applicants state that a local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing and adjacent uses and other relevant factors makes uses allowed by the applicable goal impracticable. At length, applicants argue this point as summarized on pages 24 and 25 of the staff report, including discussion of the definitions of "practical" and "practicable."

Applicants contend every area on the property proposed in this rezone has multiple challenges depending on location. No area on the site is ideally suited for farming but some areas can be farmed for select crops with appropriate management practices. The standards in the goals and the enabling EFU zone explicitly are driven by the enabling legislation in ORS 215.203 for farming to be conducted with "an intent to make a profit in money." Large fields with monoculture crops have proven to be a failure on this farm that, applicants says, was abandoned after World War I and purchased from the county for the taxes in the 1930's.

Staff understands that the applicants are proposing this PCCP amendment under the assertion that the current designation of Agriculture, and subsequently Oregon Statewide Planning Goal 3, are no

longer appropriate due to changing conditions on the subject properties and in the surrounding area. The applicants emphasize in their proposal that the property is better suited for acreage home sites. The current zoning designation of the subject property is EFU, which implements the Agriculture PCCP designation and has a minimum parcel size of 80 acres. The EFU zone allows dwellings when certain farm income, soil quality or continuous ownership tests are met, but does not list dwellings as an outright permitted use in the zone. The applicant's proposal would change the zoning of the subject property to AF-10, which has a 10-acre minimum parcel size and permits a single family dwelling as an outright permitted use. The applicants are proposing an Irrevocably Committed Goal exception to Statewide Planning Goal 3, Agricultural Lands.

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

Applicant's Additional Findings: In addition to complying with the Polk County Plan and Zone amendment process stated above, this application requires an exception be taken for Goal 3 (Agriculture) and Goal 4 (Forestry). No exception is necessary for Goal 14, because the proposed AF-10 zoning does not constitute urbanization as a matter of law. No exception is necessary for any other Goal. The exception process, and compliance therewith is discussed below.

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

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

In this application it is the second of the three exception criteria which is applicable here, and upon which the applicants rely and will justify compliance with. In this case the 228 acres, in the seven contiguous parcels, are irrevocably committed to non-resource uses (farm or forestry) because of the type and density of uses that has developed on adjacent and surrounding lands.

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

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

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

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

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

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

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

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

Staff Findings: The applicant's proposal requires an exception to Statewide Planning Goals 3 and 4. The applicable criteria for an irrevocable committed goal exception(s) is addressed below.

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

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

Hearings Officer's Previous Findings: Applicants argue that the subject property cannot reasonably or feasibly be utilized for farm or forest use by itself or in conjunction with adjoining properties, especially to the east and south where rural residences have proliferated. It cannot be reasonably farmed with most of the area to the north due to topographic constraints, nor can it be with properties to the east that are across Best Road that are in small farm use parcels with dwellings. The subject of this application is a 228-acre area comprised of four ownerships and seven legal lots of record. Each ownership is described in detail in the application, as summarized on pages 30 to 32 of the staff report.

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

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

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

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

constraints related to slope, aspect, excessive wind and abundant sun exposure limit their ability to produce commercial agricultural crops.

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

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

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



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

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

Over the past decade a series of partitions of the original Simmons holdings, identified as LP 05-20, LP 05-22, and LP 05-23, and memorialized in Partition Plats 2006-0027 through 2006-0029, have resulted in the current configurations of the subject properties. These recent land partitions were made possible by three Measure 37 Claims (identified as M 05-09, M 05-13, and M 05-14). Subsequent vesting determinations by Polk County Planning Division, identified as file numbers VRD 09-01 through VRD 09-03, upheld these Measure 37 partitions. The Measure 37 partitions of the subject properties created six parcels to bring the total number of parcels to nine. Following the Measure 37 Claims (Claims) and corresponding vested rights determinations, a suite of Measure 49 claims were submitted, which resulted in three Measure 49 Final Order and Home Site Authorizations (Final Order) approved by DLCD. The Final Orders referenced above authorized five dwellings on the parcels vested under

Measure 37. Of the five authorized dwellings under Measure 49, three have been built. These dwellings are on Tax Lots 602 and 603 in T7S, R4W, Section 14 and Tax Lot 101 in T7S, R4W, Section 23. Based on a review of the Polk County Assessor records, the subject properties currently contain a total of three dwellings.

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

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

#### Applicant's Additional Findings:

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

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

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

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

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

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

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

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

Electric power has been extended throughout the exception area to serve the new and prospective

parcels.

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

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

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

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

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

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

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

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

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

There is one large commercial vineyard (Eola Hills) in the study area that is a total of 232.1 acres in size, and encompasses three tax lots. There is one large Filbert Orchard (Walker) in the study area that is 242.02 acres in size, and is encompassed in two tax lots. There is one large tree farm (Doubletrees Land and Timber) in the study area that is 169.63 acres in size. There is one large ownership (Waldensee LLC) that is 99.18 acres in size which is idle at this time. There is one large ownership (Pratt) that is 91.38 acres in size which appears to be idle at this time as well. Aside from these large ownerships, no other parcel in the study area is over 50 acres in size. It should be noted that these

large parcels are all on the flatter land to the west, with considerably different land characteristics that exist in the higher elevations of the exception area.

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

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

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

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

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

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

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

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



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

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

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

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

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

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

In the past several decades, vineyards have begun appearing in the West Salem Hills and the lands to the west of the exception area. However, wine grapes are not a suitable crop for the exception area due to growing limitations related to elevation, a lack of irrigation, crop damage from pests, a preponderance of boulders, and a lack of landscape uniformity to establish blocks with the appropriate aspect needed for commercial vineyards. The vast majority of vineyards in the area are below 600 feet in elevation. Nearby vineyards are at lower elevations than exist in the exception area. Cubanisimo Vineyards to the east of the subject properties is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet. Nearby Legacy Estate Vineyard is located at the toe of the escarpment west of the exception area at an elevation of approximately 500 feet. Kathken Winery, to

the northwest of the exception area is at an elevation of approximately 830 feet. Domaine Drouhin Oregon, Inc.'s vineyard northeast of the exception area is at an elevation of approximately 680 feet. While the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds affecting the subject properties.

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

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

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

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

Examples previously discussed include Cubanissimo Vineyards that began with a partition of a 32 acre parcel into 12 acre and 20 acre parcels in 1978 (Polk County Planning File SE 78-18), followed by a farm dwelling approval in 1989 (Polk County Planning File FD 89-16). A conditional use permit approved wine sales and marketing as a home occupation in 2004 (Polk County Planning File CU 04-21), including four (4) events attracting up to 300 visitors. While the site characteristics at Cubanissimo are much better for vineyard operations than on any parcel in the exception area, this growth pattern shows how much time and effort it takes for small vineyard to become productive. Even with this scenario, the owner of Cubanissimo has had to supplement the cost of the vineyard and winery over much of this period with outside income from full time employment off-site.

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

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

These factors support the conclusion that the AF-10 zone would be compatible with surrounding land uses. This land use designation would also enable the applicants to develop acreage home sites where

the occupant could manage the smaller property for a range of specialty farm uses as a hobby even though the land is not suitable to make a profit in money from farm use.

Large scale commercial agriculture on the subject properties is impracticable. Small scale specialty farms with single family dwellings have coexisted over the years with larger farm operations in their vicinity with little evidence of conflict.

In essence the relationship of the surrounding area to the exception area is much like a donut, where the surrounding area, as depicted in the Inventory Study, is the substance of the donut and the exception area is the hole. What happens in the surrounding area has a direct impact on what can happen in the exception area. From the facts presented, it seems clear the parcelization and rural residential trend in the surrounding area, together with the unfriendly growing conditions in the exception area, encourage the continued transformation of this area to rural residential parcels that are no smaller than 10 acres in size.

Staff Findings: In order to characterize lands that are adjacent to the proposed exception area, the applicant provided a Land Use Inventory that comprises approximately 2,571 acres of surrounding land. Based on this inventory, the applicant determined that 71% of the parcels within the surrounding area contain a single-family dwelling, the average parcel size to be 12.07 acres with 77% of the parcels being less than 10 acres in size, and 45% of the parcels to not be in farm or forest use or receiving any tax deferral benefits. It is important to point out that the Land Use Inventory includes surrounding Suburban Residential (SR) and Acreage Residential – Five Acre (AR-5) zoned properties, which are exception areas that have been planned and zoned for residential development. The SR and AR-5 zones also have a much smaller minimum parcel size than other surrounding resource zoned properties. OAR 660-004-0028(6)(c)(A) states, "...Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception..." Therefore, staff finds that the only known relevant data associated with the provided Land Use Inventory is surrounding properties that were partitioned and/or developed through a Ballot Measure 37 or 49 State Waiver, which allowed partitioning and development that was not subject to any Statewide Planning Goals. All other resource and nonresource parcels created, and uses approved on surrounding lands can be assumed to have been approved pursuant to the applicable Goals.

In *Johnson v. Land County*, 31 Or LUBA 454 (1996), LUBA determined that a county's reliance on the existence of adjacent non-resource parcels in justifying a committed exception is impermissible where the findings do not adequately establish how or when the adjacent parcels were created. Therefore, surrounding parcels that were lawfully partitioned and developed pursuant to the applicable goals cannot be used to justify an irrevocably committed Goal Exception for the subject properties. Although the applicant's Land Use Inventory contains notes about how some of the AR-5 zoned properties were created, there are inadequate findings to demonstrate how or when all adjacent parcels were created. For these reasons, staff finds that the figures provided by the applicant, intending to characterize the surrounding area, cannot be considered to accurately represent recent changes on surrounding farm and forest zoned properties when justifying an irrevocably committed exception to Goals 3 and 4.

Much of the applicant's argument focuses on evidence to demonstrate that the subject properties cannot be put to commercial farm use, but agriculture and even "hobby farms" could be managed on 10 acre parcels that contain a dwelling as the applicant suggests. In *Lovenger v. Lane County*, 36 Or LUBA (1999), LUBA determined that a Goal 3 committed exception cannot be justified based on a finding that "commercial farming" is impracticable on the subject property. LUBA also found that a Goal 3 committed exception cannot be justified based on a finding that the property is not capable of supporting an economically self-sufficient agricultural operation, or property on which a reasonable farmer could make a living entirely from agricultural use of the land. Farm uses that do not meet the "commercial farm use" threshold are still protected by Goal 3. As a result, Staff finds that that applicant has not provided sufficient evidence demonstrating compliance with this criteria.

- C. Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(2)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule, except where**

**other rules apply as described in OAR 660-004-0000(1). Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible." For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:**

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

Hearings Officer's Previous Findings: Applicant notes that a local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing and adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable. This criterion allows a local government to give permission for an exception. In this case, there are so many factors individually and collectively that limit use that one can only conclude, in the judgment of the applicant, that the property as a whole is impractical to farm with an intent to make a profit. It is not any one factor on or off the site that makes this property difficult, applicant argues, it can be any one factor at a given location or all of them.

The applicants have put forward an argument, summarized on pages 36 to 40 of the staff report, that the subject property can be divided into several sub-areas of diverse characteristics for analysis purposes, which make it impractical (or impracticable) to cultivate as a unit. Applicant states that every area on the property proposed in this rezone has multiple challenges depending on location. It may be pointed out that the applicant argues the tract as a whole is not suitable for agriculture, but some parcels are. Applicants concede that no area on the site is ideally suited for farming but some areas can be farmed for select crops with appropriate management practices. Applicants claim the forested portions of the subject property contain timber that has many defects from the excessive wind and snow loads that occur at this site. The common defects are blown out tops, excessive limbs, excessive tapering, and butt swell. The timbered portions of the property are not easily accessible either. The Simmons family did one very limited harvest but the logging operators were limited by having to bring all logs uphill. The loggers were discouraged from taking out any more timber than they did due to steep terrain and rocks. Again, however, applicant cites his own failure as evidence that commercial harvesting efforts are futile on the subject property. Evidence in the record demonstrates that the subject properties are suitable for forest production. Although growing marketable timber on the subject properties has proved challenging according to the applicant's statements, analysis of Natural Resource Conservation Service (NRCS) soils maps accessed using Polk County GIS analysis tools indicates the subject properties' soils are productive forest soils. Soils on the subject properties have an average forest capability of approximately 154 cubic feet per acre annually. A forest soil capability index of 69 cubic feet per acre annually is average for the Pacific Northwest.<sup>3</sup> The subject properties' soils are capable of producing over twice as much wood fiber as the average local site managed for forest uses. The applicant points to "many defects from the excessive wind and snow loads that occur at this site", with "blown out tops, excessive limbs, excessive tapering, and butt swell" cited as common defects in timber grown in the past on the subject properties. Steep slopes on the western portion of the subject properties also present challenges with logging operations according to the applicant, although it is a general practice in this region to conduct timber harvests on steep slopes.

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<sup>3</sup> Conner, Roger & Thompson, Michael, *Timber Growth, Management, and Change*, USDA Forest Service, 2007

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

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

The applicant states that the subject properties cannot reasonably or feasibly be utilized for farm or forest use by itself or in conjunction with adjoining properties. Division of the subject properties following Measure 37 claims made by various members of the Simmons family, and the construction of three dwellings on its eastern portion have broken up the ownership of what was once an approximately 267-acre farm unit. The resulting parcelization and establishment of infrastructure to service the three new dwellings on the subject properties has made achieving economies of scale for agriculture difficult. Furthermore, according to the applicant, water, power and septic lines that connect the dwellings to domestic services have been placed underground, which make the management of the land for agriculture impracticable since the land cannot be

plowed without interfering with this buried residential infrastructure. Roads serving existing dwellings on the subject properties are aligned so that they interfere with the orderly tilling of soil, and are gravel surfaced for residential use. Farm activities such as ripping, discing, seeding and spraying require large, uniform fields to be done efficiently. Gravel residential driveways crossing the middle of the subject properties both vertically and horizontally conflict with the efficient management of essential soil preparation and crop protection activities.

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

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

Provisions found in OAR 660-004-0018(2)(b)(B) require that "rural uses, density and public facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described by OAR 660-004-0028." The applicant's proposal involves an "irrevocably committed" goal exception pursuant to OAR 660-004-0028, which necessitates an analysis of whether the proposal could commit adjacent or nearby resource land to uses not allowed by the applicable goal. Increasing the residential density of the subject properties would invariably create conflicts with nearby large agricultural operations due to spray drift, dust and the movement of farm machinery. While Oregon has "right to farm" laws that protect farmers from allegations of trespass, inherent conflicts between residential and agricultural uses increase the probability of nuisance lawsuits



against farmers engaging in accepted agricultural practices such as tilling fields and spraying crops. The applicant submitted material into the record on November 24, 2015 addressing the issue of drift from agricultural and forestry spray activities. The applicant contends that spray applications in connection with agricultural and forestry operations on the subject properties could drift to adjacent properties, causing damage to nearby crops and creating a nuisance for nearby residences. The applicant's argument is a double-edged sword, however, since the same reasoning could be employed by nearby wine grape and Christmas tree growers if the subject properties' primary use were residential.

The applicant states that two soil scientists evaluated the soils on the subject properties for their agricultural capability. Soil Scientists Joel Norgren and Andy Gallagher conducted a detailed soil study of the subject properties that supplements NRCS Soil Survey of Polk County (Soil Survey) data found above. The soil studies authored by Norgren and Gallagher were not conducted in accordance with ORS 215.211 and, consequently, cannot be used to determine whether land qualifies as agricultural land, or to dispute the Soil Survey. The Soil Survey data shows that the subject properties are composed predominantly of agricultural soils with 53.5% being soils designated capability class II through IV. Land with a predominance of soils in capability classes I through IV is considered agricultural land per OAR 660-033-0030. Staff noted that the Norgren and Gallagher soil studies found units of Witzel soils, where the Soil Survey mapped none, and found a smaller share of Ritner soils on the subject properties. Both soil scientists mapped a predominance of agricultural soils on the subject properties with Gallagher stating that 55% of the subject properties' soils are in capability classes I through IV and Norgren finding 64.3% of the soils in capability classes I through IV.

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

The applicant states that wine grapes are not a suitable crop for the subject properties, citing site specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a preponderance of boulders, and a lack of landscape uniformity to establish blocks with the appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower elevations than the subject properties. Cubanisimo Vineyards to the east of the subject properties is

located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon, Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate

Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the variety of landscapes on which vineyards are planted, with east facing, west facing and south facing vineyards represented by the small sample above. However, the subject properties are more exposed to wind and sun than the vineyard sites surrounding it, lending credence to the applicant's observations that wine grape production is impracticable there. As noted above, however, some wine experts maintain that certain varieties of grapes flourish in that area despite prevailing winds.

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

Statements in the record indicate that the demand for the types of crops grown on the subject properties historically have diminished, such as cherries, prunes, Douglas fir Christmas trees, grass seed and grain, as the yield of these crops also dropped. Some of the processing facilities for these crops have relocated or closed. According to statements by the applicant, crops of prunes, cherries, gooseberries, wheat, grass seed and Christmas trees planted on the subject properties have failed in the past. The applicant relies on this history to demonstrate that the subject properties are generally unsuitable for commercial farming, which implies a profit. While farming on the subject properties may produce specialty crops, no profit in money has accrued from those activities for over a decade according to the applicant. The applicant also states that prohibition of irrigation on the subject properties and physical characteristics of the site have been a limiting factor in the ability to profitably manage it for agriculture. The applicant describes a new plan for farm uses that they have either established or intend to establish on the subject properties. The applicant provided a map indicating where crops or agricultural activities are either established or could be established but did not provide a written plan or profit and loss proforma. Nevertheless, staff understands the applicant to mean that the new agricultural uses and plan are small scale and not profitable and the applicants argument to be that if a dwelling is permitted, the likelihood of the establishment of an agricultural activity, regardless of the fact that it would not be profitable, would be greater and better suited to small acreage parcels primarily used for residential purposes. Staff agreed with the applicant, that the parcelization and nonfarm development that occurred on the subject property while the property was not subject to Goal 3 has reasonably caused additional difficulty to commercially farm this particular area; especially as a larger farm unit. Based on the testimony and evidence provided by the applicant, staff concluded that the subject properties are not suitable for farm use with the primary purpose of obtaining a profit in money. Based on the evidence in the record, the Hearings

Officer does not come to this conclusion. The NRCS soil survey shows the tract as having very good agricultural capabilities, even taking into account various physical limitations such as slope and microclimate. The Hearings Officer presumes this indicates commercial capability, and applicants have not overcome this presumption by contrary evidence.

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

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

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

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<sup>4</sup> Conner, Roger & Thompson, Michael, *Timber Growth, Management, and Change*, USDA Forest Service, 2007

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

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

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

As noted above, applicant submitted additional written materials immediately prior to the public hearing on October 27, 2015, entitled *Additional Findings Demonstrating Compliance with Statewide Planning Goal 4* (self authored) and *Custom Soil Resource Report* (dated October 16, 2015) by the Natural Resources Conservation Service of USDA. The document dated October 26, 2015, featured "empirical observations" concerning timber products by Frank Walker and Associates (FWA), as well as applicant Simmons. The document dated October 27, 2015, in considerable detail described the various soils in the subject tract. Applicant concludes that "The evidence clearly shows that no trees, including cherries, can survive long term in this mapping unit." Applicant states that the conclusion is based primarily on data in the custom report, and it appears generally to support applicant's contention that the tract is unsuitable as a forestry resource. At the same time, the Hearings Officer finds nothing to show that the report has been submitted to DLCDC for review, as required by state legislative action. This rule, which applies to rezoning of resource lands to non-resource uses, says only soil reports so reviewed can be considered by local governments in land use proceedings. DLCDC has raised an objection to this proceeding based on this requirement, as expressed in its letter received by staff on October 27, 2015. While the

materials described in this paragraph have become a part of the record, the Hearings Officer cannot see how he can give weight as evidence to the data therein.

Applicant's Additional Findings:

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

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

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

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

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

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

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

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

Additional obstacles to development of the subject properties for forestry use include the inability to apply herbicides by helicopter due to the significant level of development on surrounding lands.

Use of manual labor for spraying is cost prohibitive. There is also the inability to burn slash generated as a routine part of forestry management after harvest because of governmental restrictions, and smoke complaints. Noise from equipment operations, relay horn signals, back up beepers are also significantly restricted in a highly residential area such as is present on

surrounding lands.

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

Staff Findings: The Hearings Officer previously concluded that based on NRCS soils data, the subject properties have very good agricultural capabilities, even after taking into account various physical limitations such as slope and microclimate.

To address the Hearings Officer's findings, the applicant provided additional expert testimony from Andy Gallagher, who is a recognized soil scientist, and Mike McLain, who is an expert in identifying vineyard properties within the Willamette Valley. During the review for PA 14-01 and ZC 14-02, findings stated that, "The Simmons have also been the only bona fide farmers to ever farm portions of this land since World War I" and "No gross earnings from farming have accrued to any of the participants in this zoning action since 2004". These findings may now be invalid, as staff found conflicting evidence that demonstrates at least two (2) of the subject properties are currently employed in farm use with an intent to make a profit in money. Staff reviewed Polk County's Community Development records and found two (2) Agriculture Exemption Permits for two (2) of the subject properties (Tax Lots 602 and 603 in T7S, R4W, Section 14). Polk County's Agriculture Exemption Permit requires applicant's to "Be specific in describing your farm or forest enterprise, size of operation, and annual profit." One of the Agriculture Exemption Permits was issued for Tax Lot 602 on March 6, 2017, which indicates that the farm operation consisted of 20 acres of fescue that was switched to orchard grass in 2016, with an annual profit of more than \$10,000. The other Agriculture Exemption permit was issued for Tax Lot 603 on July 12, 2018, which indicates that the farm enterprise consists of horse boarding, lessons, and chicken egg production with an annual profit of \$14,000. The 2018 Polk County aerial photograph recently became available through Polk County's GIS. Based on this recent 2018 photograph, staff finds that approximately 35 acres of the subject properties are currently in field crop production, which is located partially on Tax Lot 602 and partially on Tax Lot 603. These photographs are consistent with the statements provided in the Agricultural Exemption permit that was issued for Tax Lot 602. Staff finds that there is substantial evidence in the record to demonstrate that at least a portion of the subject properties are managed for farm use and are making a profit in money.

Based on evidence in the record, staff concurs with the Hearings Officer's previous findings that the subject properties have very good agricultural capabilities. Evidence in the record further demonstrates that at least a portion of the subject property is currently being managed for farm use with an intent to make a profit in money.

The Hearings Officer previously concluded, "Considering that the proposed exception area has an average forest capability value of 154 cubic feet per acre annually, it has never been actively managed for forest production and there is a commercial hard wood forest operator in its immediate vicinity, the Hearings Officer concludes that the propagation and harvesting of forest products is practicable." As discussed above, in order to ensure that the most up to date information is being evaluated for this review, staff generated a new soils report for the subject properties, which is summarized in Table 2 above, and is based on soils data that was last updated on September 17, 2018. Based on the most recent NRCS soils data available, staff finds that the subject properties are capable of producing an average of approximately 154 cubic feet of wood fiber per acre, per year. Approximately 52 percent of the subject properties contain Class II and III soils, which is considered forest lands.

To address the Hearings Officer's previous findings regarding forest capability, the applicant provided a Forestland Suitability Analysis performed by Cliff Barnhart. As discussed above, staff has determined that because the Forestland Suitability Analysis only focuses on the western portion of the subject property, and does not evaluate that eastern approximately 105.8 acres of the subject property, there remains insufficient evidence in the record to demonstrate that the entire 228 acre



proposed exception area could not be managed for the propagation or harvesting of a forest product. Staff findings fully evaluating the Forestland Suitability Analysis is included on pages 23-26 of this report.

- D. A conclusion that an exception area is irrevocably committed shall be supported by findings of fact that address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area.;** [OAR 660-004-0028(4)]
- E. Findings of fact and a statement of reasons that land subject to an exception is irrevocably committed need not be prepared for each individual parcel in the exception area. Lands that are found to be irrevocably committed under this rule may include physically developed lands.** [OAR 660-004-0028(5)]
- F. Findings of fact for a committed exception shall address the following factors:** [OAR 660-004-0028(6)]

Hearings Officer's Previous Findings: This application relies on the factors addressed in this section to demonstrate that farm uses on the subject properties are rendered impracticable by climatic and geographic conditions, and by parcelization and development that occurred internally as a result of Measure 37 and Measure 49 while the subject properties were not subject to Goal 3. The applicant pays particular attention to a history of crop failures on the subject properties attributable to excessive wind and sun exposure, high transpiration rates, thin soils, steep slopes, and excessive snow loads. The applicant also addresses how recent changes have irrevocably committed the subject properties to uses not allowed by Goal 3 resulting from infrastructure investments made to serve parcels and nonfarm dwellings approved pursuant to Measures 37 and 49. The applicant also explains the similarities between the subject properties and small scale farms on adjacent properties across Best Road as an example of compatibility between uses allowed by the proposed Rural Lands designation and existing uses on adjacent lands. The applicant argues that the prevalence of small scale agriculture with single family dwellings, in the vicinity of the subject properties, and the general absence of conflict between them and nearby large scale agricultural operations supports the applicant's contention that the proposed Rural Lands PCCP designation and corresponding AF-10 zone would be harmonious with surrounding land uses.

Staff Findings: During this review, the applicant relied substantially on the same evidence that was previously evaluated. However, supplemental evidence was also provided including: a Land Use Inventory of surrounding properties, a Forestland Suitability Analysis; a hydrology review report; and two vineyard capability reports.

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

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

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

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

Staff notes that statements by the applicant indicate that lands in the vicinity of the subject property exhibit an ownership pattern that hinders the management of small farm holdings as larger farm units, which has contributed to a proliferation of small scale, specialty agriculture in the area. Staff notes that the nearest large agricultural operations to the subject properties are Christmas tree farms and vineyards. A rural residential exception area is also adjacent to the southern parcels of the exception area. Due to an escarpment on the west side, applicants believe the subject properties are

more closely associated geographically with adjacent properties along Best Road than those to the west taking access from Oak Grove Road, which is 600 feet lower in elevation.

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

Using 2011 Aerial Photographs and GIS measuring tools, staff estimated the size of the largest agricultural operations in the vicinity of the subject properties. Eola Hills Wine Cellars' Legacy Estate Vineyard has approximately 75 acres of vineyard planted on a 160 acre parcel immediately west of the subject properties; Domaine Drouhin Oregon, Inc. has approximately 140 acres of vineyard planted on four adjacent parcels totaling approximately 278 acres about a mile northeast of the subject properties; Doubletrees Land & Timber, LLC has approximately 120 acres of Christmas trees planted on an approximately 170 acre property about one third of a mile southeast of the subject properties; Schudel Enterprises, LLC owns approximately 198 acres immediately west of the Domaine Drouhin Oregon, Inc. and grows Christmas trees on approximately 185 of those acres; and, across Orchard Heights Road from the subject properties, Charles and Andrea Hatchette own ten contiguous tax lots comprising approximately 147 acres planted with over 100 acres of Christmas trees. Growing specialty crops at a larger scale generally means lower input costs, and more predictability at harvest.

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

Of the 21 properties zoned EFU within 1,000 feet of the subject properties, eight have higher assessed values for structures than for the underlying land. Two of the properties for which land is assessed at a higher value than the structures thereon are not receiving farm deferrals, which would inflate the assessed value of the those lands. Staff observes that three of the 12 nearby EFU properties having higher assessed values for land than for structures are vacant. Accordingly, it can be argued that, within 1,000 feet of the subject properties, there are nearly as many small scale farms among EFU properties with residences than there are large commercial farming operations. A majority of the EFU lands to the north and west of the subject properties are, or could be, large commercial scale farms. The applicant has characterized the properties to the east as "hobby" farms. A definition of a "hobby" farm from Internal Revenue Service (IRS) is generally accepted to mean

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

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

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

A large area of committed lands, substantially isolated from the exception area by steep slopes, resides to the south of the subject properties. This committed lands area, comprising approximately 1,100 acres of AR-5 zoned land, extends south to Highway 22 and west to the Salem city limits. Ten

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<sup>5</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.

of the fourteen AR-5 parcels nearest the subject properties are owned by William Curtright and are vacant (T7S, R4W, Section 24 Tax Lots 303 - 308 and T7S, R4W, Section 23 Tax Lots 1000 & 1003 - 1005). Each of these vacant AR-5 parcels could be developed with dwellings, although they have been in their current ownership for over 20 years and are still vacant. Should this application be approved, one 20 acre parcel zoned EFU (located at 1785 Best Road) would be surrounded by properties with Rural Lands Plan designations. This property was created and authorized by a Measure 37 Claim, Parcel 3 in Partition Plat 2006-0029, and the dwelling was subsequently approved by Measure 49 Order number H132890C. Since the 20 acre parcel and the dwelling thereon were approved absent review relative to the Statewide Planning Goals, staff anticipates that the proposed goal exception would not commit the home site to uses other than those allowed by Goal 3 since it has already been created and developed for nonfarm use.

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

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

Provisions found in OAR 660-004-0018(2)(b)(B) require that "rural uses, density and public facilities will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described by OAR 660-004-0028." The applicant's proposal involves an "irrevocably committed" goal exception pursuant to OAR 660-004-0028, which necessitates an analysis of whether the

proposal could commit adjacent or nearby resource land to uses not allowed by the applicable goal. Increasing the residential density of the subject properties would invariably create conflicts with nearby large agricultural operations due to spray drift, dust and the movement of farm machinery. While Oregon has "right to farm" laws that protect farmers from allegations of trespass, inherent conflicts between residential and agricultural uses increase the probability of nuisance lawsuits against farmers engaging in accepted agricultural practices such as tilling fields and spraying crops. The applicant submitted material into the record on November 24, 2015 addressing the issue of drift from agricultural and forestry spray activities. The applicant contends that spray applications in connection with agricultural and forestry operations on the subject properties could drift to adjacent properties, causing damage to nearby crops and creating a nuisance for nearby residences. The applicant's argument is a double-edged sword, however, since the same reasoning could be employed by nearby wine grape and Christmas tree growers if the subject properties' primary use were residential.

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

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

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

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

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

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

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

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

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

Staff Findings: In order to characterize surrounding land use patterns, the applicant continued to rely substantially on the IRS “hobby farm” definition to demonstrate that surrounding properties are not managed for farm use with an intent to make a profit in money. However, the Hearings Officer previously determined, “Without economic data for the surrounding properties, staff is making the assumption that agricultural income would not be sufficient to support the costs of dwellings and other structural improvements on those lands. Therefore, capital derived from sources other than farm income from these neighboring properties would be necessary to construct and maintain the dwellings and structures, leading one to conclude that agricultural activities thereon are ancillary to the residential uses. This does not in itself allow the conclusion that surrounding properties are not capable of or are not currently making a profit in money from agriculture; only that it may not be the primary activity or use of the land.”

Much of the applicant’s argument focuses on evidence to demonstrate that the subject properties cannot be put to commercial farm use, but agriculture and even “hobby farms” could be managed on 10 acre parcels that contain a dwelling as purported by the applicant. In *Lovenger v. Lane County*, 36 Or LUBA (1999), LUBA determined that a Goal 3 committed exception cannot be justified based on a finding that “commercial farming” is impracticable on the subject property. LUBA also found that a Goal 3 committed exception cannot be justified based on a finding that the property is not capable of supporting an economically self-sufficient agricultural operation, or property on which a reasonable farmer could make a living entirely from agricultural use of the land. Farm uses that do not meet the “commercial farm use” threshold are still protected by Goal 3.

In order to characterize lands that are adjacent to the proposed exception area, the applicant provided a Land Use Inventory that comprises approximately 2,571 acres of surrounding land. Based on this inventory, the applicant determined that 71% of the parcels within the surrounding area contain a single-family dwelling, the average parcel size to be 12.07 acres with 77% of the parcels less than 10 acres in size, and 45% of the parcels are not in farm or forest use and are not receiving any tax deferral benefits. It is important to point out that the Land Use Inventory includes surrounding Suburban Residential (SR) and Acreage Residential – Five Acre (AR-5) zoned properties, which are exception areas that have been planned and zoned for residential development. The SR and AR-5 zones also have a much smaller minimum parcel size than other surrounding resource zoned properties. OAR 660-004-0028(6)(c)(A) states, “...Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception...” Therefore, staff finds that the only known relevant data associated with the provided Land Use Inventory is surrounding properties that were partitioned and/or developed through a Ballot Measure 37 or 49 State Waiver, which was not subject to any Statewide Planning Goals. All other resource and nonresource parcels created, and uses approved on surrounding lands can be assumed to have been approved pursuant to the applicable goals.

In *Johnson v. Land County*, 31 Or LUBA 454 (1996), LUBA determined that a county’s reliance on the existence of adjacent non-resource parcels in justifying a committed exception is impermissible where the findings do not adequately establish how or when the adjacent parcels were created. Therefore, surrounding parcels that were lawfully partitioned and developed pursuant to the applicable goals cannot be used to justify an irrevocably committed Goal Exception for the subject properties. Although the applicant’s Land Use Inventory contains notes about how some of the AR-5 zoned properties were created, there are inadequate findings to demonstrate how or when all adjacent parcels were created. For these reasons, staff finds that the figures provided by the applicant, intending to characterize the surrounding area, cannot be considered to accurately represent recent changes on surrounding farm and forest zoned properties when justifying an irrevocably committed exception to Goals 3 and 4.

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



Hearings Officer's Previous Findings: Applicant says this application is partly predicated on this premise due to the fact that the subject property was the subject of a Ballot Measure 37 application, a Ballot Measure 49 Authorization and a Vested Rights Argument. The various public facilities and services are identified in more detail on pages 48 to 51 of the staff report.

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

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

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

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

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

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

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

Staff Findings: Any future residential development would be served by an individual on-site septic

system. Staff finds that parcels 10 acres in size are generally large enough to support a single-family dwelling served by an on-site septic system.

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

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

The submitted hydrology report was stamped with Mr. Rehm's Oregon Registered Professional Geologist stamp. Staff has determined Mr. Rehm to be a credible professional who has determined that there is available water to serve future residential development on the subject properties. For this reason, staff finds that the applicant has demonstrated that there is adequate water which meets the standards of the State Department of Health. Full details of this hydrology report are included as Exhibit X in the record.

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

- a. **Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the goals were made at the time of partitioning or subdivision. Past land divisions made without application of the goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors makes unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for the subject parcels or land adjoining those parcels.**
- b. **Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations; [OAR 660-004-0028(6)(c)(A) and (B)]**

Hearings Officer's Previous Findings: Applicant says the area surrounding the property has gradually developed over the last 80 years to contain a large number of dwelling units in the AR-5 zoned areas to the south and east and to smaller high value farm units to the northeast. According to the applicant, the practice of farming properties across boundaries (complementary) was and is absent from this area. The subject property is an isolated piece of land which is evident when visiting it. The subject rezone area does not directly border any other farm field (not to be confused with properties that have farm use). The area surrounding the property has three different zoning categories which speaks to the variability of the land. The entire southern boundary abuts an AR-5 zoned as does half of the eastern boundary. The very dark blue pattern in the upper right hand corner of the map is within the Salem Urban Growth Boundary (Urban Reserve). The remainder of the eastern boundary is bordered by EFU zoned parcels that are 11, 14.6, 15.0, 18.29 and 19.71 acres respectively. Most of these parcels are leased out to larger farming operations except for the 19.71 acre parcel which is the Cubanismo Vineyard.

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

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

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

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

Using 2011 Aerial Photographs and GIS measuring tools, staff estimated the size of the largest agricultural operations in the vicinity of the subject properties. Eola Hills Wine Cellars' Legacy Estate Vineyard has approximately 75 acres of vineyard planted on a 160 acre parcel immediately west of the subject properties; Domaine Drouhin Oregon, Inc. has approximately 140 acres of vineyard planted on four adjacent parcels totaling approximately 278 acres about a mile northeast of the subject properties; Doubletrees Land & Timber, LLC has approximately 120 acres of Christmas trees planted on an approximately 170 acre property about one third (~) of a mile southeast of the subject properties; Schudel Enterprises, LLC owns approximately 198 acres immediately west of the Domaine Drouhin Oregon, Inc. and grows Christmas trees on approximately 185 of those acres; and, across Orchard Heights Road from the subject properties Charles and Andrea Hatchette own

ten contiguous tax lots comprising approximately 147 acres of Christmas tree land, of which over 100 acres is planted. Growing specialty crops on a large scale lowers input costs and provides more predictability at harvest.

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

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

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

The applicant states that the smaller resource properties in the area are clustered along Best Road, immediately east of the subject properties. According to 2011 Aerial Photographs and GIS measuring tools, small scale, specialty farms make up the adjacent uses immediately north of the subject properties, and to the east across Best Road. An 18.1-acre property north of the subject properties, located at 1895 Best Road, contains an old orchard. A 15-acre property at 1890 Best Road, is planted with Christmas trees. The next property to the south, 1860 Best Road, is a 14.6-

acre property planted for grass seed. Further south, a 19.7-acre property at 1800 Best Road appears to be used as pasture. The southerly adjacent property, 1679 Best Road, is a fallow 11.4-acre tax lot under common ownership with an Acreage Residential-Five Acre (AR-5) zoned tax lot. A number of contiguous properties zoned AR-5 exist to the south of the subject properties that were included in the initial committed lands inventory leading up to acknowledgement of the PCCP. This large area of committed lands, substantially isolated from the exception area by steep slopes, resides to the south of the subject properties. This committed lands area, comprising approximately 1,100 acres of AR-5 zoned land, extends south to Highway 22 and west to the Salem city limits. Ten of the fourteen AR-5 parcels nearest the subject properties are under one ownership and are vacant (T7S, R4W, Section 24 Tax Lots 303 -308 and T7S, R4W, Section 23 Tax Lots 1000 & 1003 - 1005). Each of these vacant AR-5 parcels could be developed with dwellings, although they have been in their current ownership for over 20 years and are still vacant. Should this application be approved, one 20-acre parcel zoned EFU (located at 1785 Best Road) would be surrounded by properties with Rural Lands Plan designations. This property was created and authorized by a Measure 37 Claim, Parcel 3 in Partition Plat 2006-0029, and the dwelling was subsequently approved by Measure 49 Order number H132890C. Since the 20-acre parcel and the dwelling thereon were approved absent review relative to the Statewide Planning Goals, staff anticipates that the proposed goal exception would not commit the home site to uses other than those allowed by Goal 3 since it has already been created and developed for nonfarm use.

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

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

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

The applicant contends that these facts, coupled with the physical characteristics of the site, have led to the inability to manage the subject properties for resource use, either together or individually, and return a profit. The applicant provided a map indicating where crops or agricultural activities are

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

The Hearings Officer rejects applicant's attempts in effect to discredit the NRCS soil survey data by repeatedly calling attention to factors such as slope, which already are taken into account when the soil was evaluated, and by referring to other soil surveys not certified by DLCD. The Hearings Officer, without challenging applicant's veracity, finds it difficult to establish a precedent of allowing applicants to testify of their own failures to farm specific tracts profitably, when it is to their own advantage that the land be deemed unsuitable for large-scale agriculture. Indeed, evidence has been included in the record contradicting the applicant's statements regarding the viability of the proposed exception area for farm and forest uses. The applicant states that wine grapes are not a suitable crop for the subject properties, citing site specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a preponderance of boulders, and a lack of landscape uniformity to establish blocks with the appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower elevations than the subject properties. Cubanissimo Vineyards to the east of the subject properties is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon, Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the variety of landscapes on which vineyards are planted, with east facing, west facing and south facing vineyards represented by the small sample above. However, the subject properties are more exposed to wind and sun than the vineyard sites surrounding it, lending some credence to the applicant's observations that wine grape production is impracticable there. At the same time, evidence in the record shows that some knowledgeable grape growers feel that "the rocky, wind-battered slopes of the Eola-Amity hills have emerged as one of Oregon's most singular terrains for pinot noir." [Patrick Comiskey, "Wind Powered Pinot", Wine & Spirits Magazine, April 2013.] Applicant contends above that the Simmons family "actively farmed the tract, growing gooseberries, strawberries, prunes, cherries, fine fescue grass, Christmas trees and wheat with little success," attempting by this recitation to demonstrate the land is not suitable for large-scale commercial agricultural crops. There is no indication that attempts were made to grow grapes of any variety.



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

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

Applicant's Additional Findings: There are seven parcels in the exception area, totally 228 acres. The size and ownership pattern is detailed above. The parcel sizes and ownership pattern in the surrounding study area are also detailed above.

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

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

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

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

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

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

1. In the study area there are 215 useable Tax Lots, plus three easement roads, two tower sites and two well sites, for an effective total of 222 Tax Lots.
2. There are 153 houses on the 215 parcels, equating to 71% of the parcels in the study area have single family dwellings.
3. Total acreage in this study area is 2,571.2, with an average parcel size of 12.07 acres.
4. 165 of the 215 parcels are under 10 acres in size, meaning 77% of the parcels in the study area are under 10 acres in size.
5. 118 of the 215 Tax Lots are in farm or forest deferral programs, and 97 are not, meaning only 55% of the parcels are in a deferral program.
6. There is one large commercial vineyard (Eola Hills) in the study area that is a total of 232.1 acres in size, and encompasses three tax lots.
7. There is one large Filbert Orchard (Walker) in the study area that is 242.02 acres in size, and is encompassed in two tax lots.
8. There is one large tree farm (Doubletrees Land and Timber) in the study area that is 169.63 acres in size.
9. There is one large ownership (Waldensee LLC) that is 99.18 acres in size which is idle at this time.
10. There is one large ownership (Pratt) that is 91.38 acres in size which appears to be idle at this time as well.
11. Aside from these large ownerships, no other parcel in the study area is over 50 acres in size.
12. The following are people/entities that own multiple parcels in the Study Area:
  - 12.1. Glencreek Springs owns 3 parcels totaling 42.95 acres.
  - 12.2. Hanke owns 7 parcels totaling 6.98 acres.
  - 12.3. Hatchette owns 4 parcels totaling 42.98 acres plus an easement road.
  - 12.4. Curtright owns 4 parcels totaling 51.59 acres.
  - 12.5. Ogdahl owns 3 parcels totaling 8.59 acres
13. The study area contains some of the most valuable homes in the Willamette Valley. 21 of the parcels here are valued at over \$1,000,000, nearly 10% of the entire study area. 82 more of the parcels in the study area are valued at more than \$500,000, which is over 38% more of the parcels in the study area. Combined, parcels in the study area that have valuation of over \$500,000 is 103, meaning over 48% of the parcels in the study area are very high value homesites.
14. 110 of the parcels are zoned EFU.
15. 4 of the parcels are zoned FF.
16. 1 of the parcels is zoned TC.
17. 99 of the parcels are zoned AR-5.

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

19. 4 of the parcels are zoned SR.

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

Staff Findings: Although the applicant has clearly put forth a significant amount of time and effort compiling information in the above mentioned Land Use Inventory, staff is concerned that the applicant's conclusions are lacking details about whether surrounding properties were created and developed pursuant to the applicable Statewide Planning Goals. For example, it is safe to assume that all residential development (with the exception of Measure 37 and Measure 49 residential development) on surrounding properties, where a planning authorization and/or building permit was acquired, can be presumed to have been approved pursuant to the applicable Goals. Similarly, all parcels created pursuant to a land partition (with the exception of Measure 37 and Measure 49 partitions) can also be presumed to have been approved pursuant to the applicable Goals. This criteria state, "Resource and nonresource parcels created and uses approved pursuant to the applicable Goals shall not be used to justify a committed exception."

In addition, staff is concerned that the details in the Land Use Inventory may be inaccurate. It is not uncommon for one (1) parcel to contain multiple tax lots. For this reason, it cannot be assumed that separate tax lots equate to separate parcels. Although the Land Use Inventory does contain some "comments" detailing how some parcels were created, it is unclear how the applicant determined the lawful configuration of each surrounding parcel. For example, the applicant identifies the properties within Section 14 that are owned by "Hatchette", to be 4 parcels (Tax Lots 100, 104, 118 and 202), totaling 42.98 acres plus an easement road. However, Community Development records indicate that the lawful parcel configuration of Tax Lot 202 also includes Tax Lot 901 (T7S, R4W, Section 11), and Tax Lot 114 (T7S, R4W, Section 14), containing approximately 24 acres, not 3.11 acres as represented by the Land Use Inventory. This example demonstrates how the applicant's representation of "average parcel size" is likely based on calculations of tax lot sizes, not legal parcel sizes. Therefore, staff finds that the information presented in the Land Use Inventory does not accurately represent the characteristics of surrounding properties and cannot be relied upon to justify an exception to Goals 3 and 4.

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

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

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

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

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

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

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

Staff Findings: As discussed above, the information presented in the Land Use Inventory cannot be relied upon to justify an exception to Goals 3 and 4 because there is insufficient evidence to demonstrate whether or not surrounding parcelization and residential development was approved pursuant to the applicable Statewide Planning Goals. For these reasons, staff finds that information provided does not accurately depict the neighborhood and regional characteristics.

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

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

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

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

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

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

Applicant's Additional Findings: Best Road border a portion of the exception area to the east. The topographical change in elevation separates the exception area from the flat land below to the west. These features, and how they impede the ability of the exception area to be used for productive resource use are discussed above.

Staff Findings: The record demonstrates that at least a portion of the subject properties are currently in farm use with an intent to make a profit in money, as evidenced by two (2) Agricultural Exemption permits that were issued to two different property owners of the proposed exception area. In addition, the submitted Forestland Capability Analysis only evaluated the western portion of the subject property and did not demonstrate that the eastern portion, which contains the most productive forestland soils, could not be managed for timber production. Although the applicant has described the physical characteristics of the subject property, staff finds that there remains insufficient evidence to demonstrate how natural or man-made features or other impediments preclude the entire 228 acre exception area from being managed for farm and forestry purposes.

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

Hearings Officer's Previous Findings: Applicant says this application is partly predicated on this premise due to the fact that the subject property was the subject of a Ballot Measure 37 application, a Ballot Measure 49 Authorization and a Vested Rights Argument. The vested rights arguments are submitted as part of this record to demonstrate that the property is built and committed with streets, electric power, septic systems, communication systems and domestic wells. The amount of expended for the infrastructure improvements listed in the preceding paragraph is \$1,016,489.30. This figure does not include the more recent studies for hydrology, transportation, wildlife, soils, agronomy and planning services. The eastern half of the property has been the beneficiary of most of the improvement expenditures such as improved roads, wells, electric power, land clearing, surveying,

sanitation testing and engineering. The westernmost 120 acres only has some roughed out roads and no utilities.

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

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

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

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

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

The Simmons family has expended in excess of \$1,000,000 in the development of the exception area. The three new homes constructed in the exception area have added over \$2,500,000 more in expenses



in constructing those homes. The total amount of money expended to develop the exception area is then over \$3,500,000.

Staff Findings: The Hearings Officer previously determined that there was insufficient evidence in the record to demonstrate that the developed infrastructure within the exception area precludes the subject properties from being managed for forestry purposes. As discussed above, the applicant provided a Forestland Suitability Analysis, which includes information about site characteristics, a financial analysis, and perceived risks associated with managing the land for forestry operations. This analysis only extended to the western portion of the subject property and did not evaluate the eastern approximately 105.8 acres, of which contains the highest forestland capability according to NRCS soil data. For these reasons, staff finds that there is insufficient evidence to demonstrate that the entire proposed exception area could not be managed for forestry purposes, and it is not clear how developing 17-19 additional 10-acre homesites would not extend the same perceived risks to neighboring forestry operations and “commit” those properties.

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

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

Applicant contends there are so many factors individually and collectively that limit use that one can only conclude that the property as a whole is impractical to farm with intent to make a profit. Applicant lists some of these factors, as summarized in pages 60 and 61 of the staff report. The topography of the site, applicant states, can only be described as varied and complex. The westernmost 120 acres has slope orientations south to north that are: southeast, due west, and northwest. Slopes are alternating convex and concave (drainages). None of the area in the westernmost 120 acres has ever had any agricultural activity except for a brief period when sheep were grazed there. Applicant maintains that the sheep were decimated by coyotes and no cultivated agriculture has ever taken place here. The Hearings Officer himself once ran some sheep and is aware of the risk of predation. However, the Record does not show that the risk is greater in the Eola Hills than elsewhere in Polk County.

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

Staff responded that the applicant observes that a number of factors complicate agricultural uses of the subject properties including but not limited to elevation, wind and sun exposure, shallow soils, preponderance of rock, cold temperatures related to elevation, inability to irrigate and inability to burn crop residues. The elevation of the subject properties is between 900 and 1,060 feet with steep slopes to the west and south. As stated by the applicant, the subject properties are situated on a high point at the southern end of the Eola Hills. Wind exposure is high since this

southern promontory of the Eola Hills is in the path of coastal winds passing through the Van Duzer Gap. Moreover, the subject properties' location on the south side of a promontory means they receive more incident solar radiation than other areas of Polk County. The applicant indicates that a combination of solar exposure on steep south facing slopes and steady winds make raising crops on the subject properties impractical because increased transpiration of available soil moisture stunts growth and leads to crop failures. The slope, aspect and elevation of the subject properties has contributed to crop failures resulting from cool temperatures that discourage pollinators, heavy rains precipitated from orographic lifting of clouds up the Eola Hills, and constant wind stressing and damaging plants. Based on materials and statements in the record, staff generally supports the applicant's conclusion that geographic and climatic factors have contributed to repeated crop failures on the subject properties, indicating the site is unsuitable for commercial agriculture.

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

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

Applicant's Additional Findings: See the totality of factors discussed above.

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

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

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

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

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

Staff Findings: Although the applicant has put forth a compelling argument regarding the highest and best use of the proposed exception area, staff disagrees with the applicant's assertion that Oregon's planning program "...is ultimately to put land to its highest and best use and then to protect that use from other uses that come along that interfere with its highest and best use." Statewide Planning Goals 3 and 4 are designed to protect agricultural and forestlands, which includes the subject properties by definition. Staff's findings are supported by Oregon Case Law, which demonstrates that Goal 3 protection does not mean the agricultural land must be put to commercial use. LUBA has previously determined that a Goal 3 committed exception cannot be justified based on a finding that "commercial farming" is impracticable on the subject property. LUBA also found that a Goal 3 committed exception cannot be justified simply because the property is not capable of supporting an economically self-supporting agricultural operation, or property on which a reasonable farmer could make a living entirely from agricultural use of the land. Farm uses that do not meet that threshold are protected by Goal 3 (*Lovinger v. Lane County*, 36 Or LUBA 1, 1999). Staff does not question that there may be challenges associated with farming the subject properties commercially. However, LUBA has determined that "commercial farming" is not the threshold for whether or not a Goal exception is warranted.

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

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

Staff Findings: Planning Division staff reviews the proposed zone change, and prepares a staff report and recommendation for the Hearings Officer. The Hearings Officer makes a recommendation to the Board of Commissioners for a final local decision. Authorization for a zone change is provided under PCZO 111.275. A zone change is subject to recommendation by the Hearings Officer after holding a public hearing pursuant to PCZO 111.190 and 115.030 and decision by the Polk County Board of Commissioners after holding a public hearing pursuant to PCZO 111.200 and 115.030. This application has been processed in accordance with these procedural requirements of the PCZO.

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

- 1. The proposed zone is appropriate for the comprehensive plan land use**

**designation on the property and is consistent with the purpose and policies for the applicable comprehensive plan land use classification; [PCZO 111.275(A)]**

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

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

Hearings Officer's Previous Findings: Applicant says the proposed Agriculture/Forestry-10 Zone implements the intent statements of the Rural Lands designation and the Agricultural designation. Both intent statements seek to preserve and protect agricultural lands. Both designations encourage the agricultural use of land over home site development and the Rural Lands broaden the scope to protect forestry as well.

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

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

Applicant's Additional Findings: The AF-10 zone is identified as one of the zones that appropriately implements the Rural Lands plan designation. This section is complied with.

Staff Findings: The applicant has concurrently applied for a zone change to amend the subject properties zoning designation from EFU to AF-10, and a Comprehensive Plan Amendment with an exception to Statewide Planning Goals 3 and 4, to change the designation from Agriculture to Rural Lands. Staff concurs with applicant that Rural Lands is the appropriate Comprehensive Plan designation for the AF-10 Zoning District. However, staff finds that the Zone Change application should not be approved unless concurrent approval is obtained for a Comprehensive Plan amendment with an exception to Goals 3 and 4. An exception to Goal 14 is not required because the AF-10 zone has a 10.0 acre minimum parcel size.

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

- a. **It is the purpose and function of the Agriculture and Forestry – 10-acre minimum (AF-10) zone to:**

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

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

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

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

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

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

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

Staff notes that the applicant has proposed a zone change from EFU to AF-10. The proposed AF-10 zone allows "farm use" and "the propagation and harvesting of a forest product" and a single family dwelling as permitted uses. Based on the application materials and statements by the applicant, the AF-10 zone would be compatible with surrounding land uses and also enable the applicant to develop larger acreage home sites where the occupants could manage the property for a range of

specialty farm uses as a hobby even though the land is not suitable to make a profit in money from farm use. The purpose statement of the AF-10 zone indicates that the function of the zone is to allow the designation of Rural Lands, consistent with OAR 660-004-0040(7)(i)(A), without requiring a Goal 14 exception. Staff concluded that designation of the subject properties as the proposed the AF-10 zone, with its 10-acre minimum parcel size, does not require a Goal 14 exception.

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

Staff Findings: As a result of the proposed zone change, the subject properties could be further divided to create parcels that are a minimum of 10.0 acres in size. A single-family dwelling is a permitted use within the AF-10 zone. Because the AF-10 zone has a 10.0 acre minimum parcel size, an exception to Goal 14 is not required.

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

Hearings Officer's Previous Findings: Applicant states there is no supply of this type of land found in a cohesive area anywhere in Polk County. The properties comprising this request are already tracking in this direction and the objective is to continue this trend. Fine Fescue and organic oats have already been planted and a horse boarding and training facility is also being established as this application is being processed.

Staff states that the applicant has applied for an irrevocably committed Goal exception as part of this application. The exception criteria are evaluated above. The proposed exception area may contain a predominance of agricultural soils and even continue to have other agricultural characteristics, while still qualifying for an irrevocably committed Goal exception. This criterion requires Polk County to determine the most appropriate PCCP designation for the exception area, once an exception is approved. The applicant is proposing a Rural Lands PCCP designation. The applicant states that the demand for the types of crops grown historically have diminished such as cherries, prunes, Douglas fir Christmas trees, grass seed and grain as the yield of these crops also dropped. Some of the processing facilities for these crops have relocated or closed. The applicant also states that prohibition of irrigation on the subject properties and physical characteristics of the site have been limiting factors inhibiting the ability to profitably manage the subject properties for agriculture. Further, applicant contends the AF-10 zone would be compatible with surrounding land uses and, also enable the applicant to develop larger acreage home sites where the occupants could manage the subject properties for a range of specialty farm uses as a hobby even though the land is not suitable to make a profit in money from farm use. The Hearings Officer does note that the applicant later made it apparent that surrounding residential uses make spraying for agriculture and forestry difficult.

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

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

- iii. Provide for the establishment of uses consistent with the location, inherent limitations and the functional needs of the area; [PCZO**



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

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

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

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

Evidence submitted by Sarah Deumling, owner of Zena Forest Products, and by Steve Vaught, a professional forester who is familiar with timber management in the Eola Hills indicates the area could be managed profitably as a hard wood forest. In serial correspondence, Sarah Deumling details the timber operations of Zena Forest Products, a company that specializes in hard wood forest products. Zena Forest Products sustainably produces flooring and cabinet making materials,

primarily from Oregon White Oak and Oregon Big Leaf Maple trees, on lands with similar site characteristics just north of the subject properties. Ms. Deumling has proposed to purchase the subject properties to manage them for hard woods and has offered pro-bono consulting services to profitably produce hard wood forest products on the subject properties. Both Steve Vaught and Sarah Deumling attest to the legitimacy of hard wood forests for timber production, habitat values and soil and water conservation benefits.

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

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

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

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

Staff Findings: Based on soils data, the Hearing Officer previously determined that the subject property is agricultural land (consistent with OAR 660-033- 0030) and was not convinced that future property owners would actually manage the property for "hobby" farms. Staff does not doubt that there is a legitimate market for small-scaled intensive agricultural operations that produce crops that can be sold at local farmers markets. However, as pointed out by the Hearings Officer, there is no assurance that the land would actually be managed this way, especially with all of the site characteristics that the applicant has identified to be challenging for agricultural management (slope, wind, temperature, etc.). One of the subject properties is already 20 acres in size and contains a dwelling. It is unclear how a 10 acre parcel that contains a dwelling would not face the same challenges that a 20 acre parcel with a dwelling currently faces, as described by the applicant. For these reasons, staff concurs with the Hearings Officer's previous findings that there is no assurance that the proposed zone change would provide for the establishment of uses consistent with the location, inherent limitations and the functional needs of the area.

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

Hearings Officer's Previous Findings: Applicant states that the subject properties have been involved in prior land use actions that would have resulted in a denser development. This proposal maintains at least a 10-acre parcel size. Two recent sales have been for parcels that are 43 and 45

acres respectively. Earlier, an 18.14-acre parcel was created. Two of these parcels now have agriculture uses being established, thus affirming the trend for this area. The 45 and 43 acre parcels were created through a Ballot Measure 49 Claim.

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

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

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

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

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

An operational traffic analysis dated October 22, 2013, was conducted by Lancaster Engineering for the intersection of Orchard Heights Road and Best Road. The applicant provided additional analysis of two intersections on Orchard Heights Road in a supplemental report by Lancaster Engineering dated October 15, 2015. Lancaster Engineering's additional traffic analysis of impacts on the county road system from potential trip generation by the proposal, particularly the intersections of Orchard Heights Road and Best Road and Orchard Heights Road and Orchard Heights Place, was reviewed by the Polk County Engineer Todd Whitaker, P.E, who determined the impact of the proposal on the county road system would not be significant. After reviewing the applicant's statements, and comments from Whitaker, the Polk County Engineer staff concludes that sufficient transportation facilities would be available to serve the applicant's proposal. However, at the time the applicant submits applications to develop the exception area, should this proposal be approved, they may be responsible for transportation improvements.

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

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

Based on a memorandum written by Brian Davis with Lancaster Engineering, staff determined that the proposed zone change would not result in a significant increase in traffic. Staff concurs with the previous findings that up to 19 additional dwellings could be supported by existing public services and facilities.

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

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

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

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

generally supports the applicant's conclusion that the proposed exception area has benefitted from infrastructure investments that interfere its management as a farm unit.

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

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

Staff Findings: As discussed above, the applicant provided a memorandum written by Brian Davis with Lancaster Engineering, who determined the proposed zone change from EFU to AF-10 could generate up to 13 additional vehicle trips during the morning peak hour and 18 additional vehicle trips during the evening peak hour. Staff provided notice of the applicant's proposal to the Polk County Public Works Department and to the Oregon Department of Transportation (ODOT). As of the writing of this staff report, no comments from either of these departments were received. Therefore, staff finds that the previous comments submitted by Todd Whitaker, P.E, are sufficient for this review. After reviewing the traffic analysis authored by Brian Davis, and comments previously submitted from Mr. Whitaker, staff concluded that sufficient transportation facilities would be available to serve the applicant's proposal. However, at the time the applicant submits applications to develop the exception area, they may be responsible for transportation improvements.

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

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

Staff indicates that, based on a review of the Polk County Significant Resource Areas Map, the subject properties have no inventoried significant resources. Based on a review of the National Wetland Inventory map, Rickreall quadrangle, the middle fork of the McNary Branch of Mud Slough abuts the northwest corner of the subject properties, and is identified as a linear wetland. This request does not include a review of any specific new development. However, development within a riparian setback area may be prohibited or require County, State, and/or Federal permits. As described in PCZO 182.050(B)(2), the size of the wetland/riparian setback ranges between 25 and 100 feet based on the type and size of the wetland. Any future non-structural development activity that is identified as a conflicting use in PCZO 182.070 within a riparian setback area would require a management plan filed with the Polk County Planning Division. Such development would also require State or Federal permits. If a management plan is required, the applicant shall coordinate the plan with Oregon Department of State Lands (DSL) and other appropriate State and Federal

agencies. Structural development would be prohibited within the riparian setback area. Within the riparian setback area, all trees and at least 50 percent of the understory would be retained, excluding the exceptions authorized pursuant to PCZO 182.050(B)(1)(a-e). The property owner is responsible for obtaining any necessary County, State and Federal permits prior to commencing development.

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

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

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

Hearings Officer's Previous Findings: Applicant contends that the area surrounding the property has three different zoning categories which speaks to the variability of the land. The entire southern boundary abuts an AR-5 zoned as does half of the eastern boundary. The very dark blue pattern in the upper right hand corner of the map is within the Salem Urban Growth Boundary (Urban Reserve). The remainder of the eastern boundary is bordered by EFU zoned parcels that are 1 i 14.6, 15.0, 18.29 and 19.71 acres respectively. Most of these parcels are leased out to larger farming operations except for the 19.71-acre parcel which is the Cubanismo Vineyard.

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

Two-thirds of the western boundary is bordered by Farm Forest Zoning, and it is within this property (Tax lot 500 in 7 4 14) that Legacy Vineyard is located. The property is dominantly in farm use but there are still large forested areas in the northern one-half of the property and along the eastern boundary next to the proposed rezone area. The remaining one-third of the western boundary is bordered by a 92-acre parcel that is basically devoid of any farm use and is principally in timber use and dormant land that appears to be in Scotch Broom. This parcel is not lacking in farming potential except for areas with large boulders. The property does not appear to be actively farmed at the present time. A 101. 78-acre parcel touches on a point in the southwest corner. It is heavily wooded, very steep and devoid of agriculture near the common boundary.

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

The proponents have strongly held beliefs that the an exception is warranted based on a host of complex factors including but not limited to elevation, wind exposure, sun exposure, shallow soils, preponderance of rock, cold temperatures related to elevation, inability to irrigate and inability to burn crop residues. In addition, there are no linkages to the other farm enterprises in the area that are less affected by the same factors. Also, there are two boundaries in the proposed exception area



where all the parcels are zoned for non-resource use and thus no complementary farm enterprises exist.

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

If this application is approved, the primary changes to the uses permitted on the subject properties would be that the AF-10 zone allows dwellings as an outright permitted use and a 10-acre minimum parcel size. Dwellings may be permitted in the EFU zone, subject to certain acreage, income and land tenure standards. Outright permitted uses on AF-10 zoned land include single-family dwellings, public parks, churches and a host of accessory uses and structures (including home occupations, schools, public facilities, among other uses). Based on the evidence submitted by the applicant, the AF-10 zone, would be compatible with surrounding land uses and also would enable the applicant to develop larger acreage home sites where the occupants could manage the property for a range of specialty farm uses as a hobby even though the land is not suitable to make a profit in money from farm use. Despite considerable verbiage about hobby farming, however, there would be no explicit requirement that agricultural activity be carried on at any portion of the land so zoned.

Uses allowed in the AF-10 zone are already allowed on the neighboring properties that are zoned AR-5. It is commonly accepted that properties that have the same permitted uses are generally compatible with one another.

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

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

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

Applicant recites how the subject property was the subject of a Ballot Measure 37 application, a Ballot Measure 49 Authorization and a Vested Rights Argument. The vested rights arguments are submitted as part of this record to demonstrate that the property is built and committed with streets, electric power, septic systems, communication systems and domestic wells.

Available public facilities and services already have been enumerated above.

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

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

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

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

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

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

The applicant states that the subject properties are in the Eola Hills Groundwater Limited Area (EHGLA). The Oregon Department of Water Resources (WRD) has defined the EHGLA as being bounded by Township 5 South in Yamhill County, the Willamette River, Highway 22 and Highway 99W. Extracting groundwater from aquifers in Columbia River Basalt formations in the EHGLA is regulated by WRD. Accordingly, the property owners would be required to submit a well report with WRD to withdraw up to 15,000 gallons of groundwater per day for any domestic use on the subject properties. The applicant states that the number of wells that would serve the proposal could be minimized by leveraging wells that produce 15-30 gallons per minute to serve three potential dwellings instead of just one. The Oregon Public Health Division of the Oregon Health Authority regulates Public Water Systems with four or more service connections, consistent with OAR 333-

061-0020. If a single well was used to serve three potential dwellings on the subject properties, a Public Water System would not be required; however, withdrawals of groundwater from the well would be limited to 15,000 gallons per day absent a permit from WRD.

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

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

Applicant's Additional Findings:

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

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

Staff Findings: As discussed above, when evaluating whether or not the subject properties could be managed for forestry purposes, the applicant provided a Forestland Suitability Analysis. This analysis determined that surrounding parcelization and residential development makes the property less desirable for timber management because there is a greater risk of lawsuit threats from slash burning, it would be more difficult to use common forestry practices, and there is a perceived lower financial rate of return that could be a deterrent for investors. Staff is concerned that if increased rural residential development on surrounding lands is the factor that makes the subject property not suitable for commercial forestry operations as purported by the applicant, it is then unclear how developing 17-19 additional dwelling on 10 acre parcels as proposed by the applicant would not adversely impact allowed uses on surrounding properties (approximately 199.5 acres) that are currently receiving farm deferral and visually appear to be managed for forestry purposes based on the 2016 Polk County aerial photograph. Staff finds that there remains insufficient evidence to demonstrate that increased rural residential development on the subject properties would not significantly adversely affect adjacent farm and forestry operations.

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

- 5. The proposed change is appropriate taking into consideration the following:**
  - a. Surrounding land uses,**
  - b. The density and pattern of development in the area,**
  - c. Any changes which may have occurred in the vicinity to support the proposed amendment. [PCZO 111.275(E)]**

Hearings Officer's Previous Findings: Applicant argues that the area surrounding the property has

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

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

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

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

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

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

The proposed exception area is comprised of seven parcels ranging in size from 45 acres to 20 acres.

Simmons Family Properties, LLC owns four contiguous parcels in a 120 acre tract (Tax Lots 601, 604 and 605 in T7S, R4W, Section 14, and Tax Lot 100 in T7S, R4W, Section 23). A 20 acre parcel south of the Simmons Family Properties, LLC, is owned by Kevin Stone (T7S, R4W, Section 23, Tax Lot 101). Two parcels to the north of the Simmons Family Properties, LLC tract are owned by Christopher & Kimberly Gray (at T7S, R4W, Section 14, Tax Lot 602) and Jonathan & Tamara Pugmire (at T7S, R4W, Section 14, Tax Lot 603), and are 45 acres and 43.7 acres, respectively.

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

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

The applicant states that the smaller resource properties in the area are clustered along Best Road, immediately east of the subject properties. A number of contiguous properties zoned AR-5 exist to the south of the subject properties that were included in the initial committed lands inventory leading up to acknowledgement of the PCCP. The area to the south is substantially isolated from the exception area by steep slopes. This committed lands area, comprising approximately 1,100 acres of AR-5 zoned land, extends south to Highway 22 and west to the Salem city limits. Ten of the fourteen AR-5 parcels nearest the subject properties are owned by William Curtright and are vacant (T7S, R4W, Section 24 Tax Lots 303 - 308 and T7S, R4W, Section 23 Tax Lots 1000 & 1003 - 1005). Each of these vacant AR-5 parcels could be developed with dwellings, although they have been in their current ownership for over 20 years and are still vacant. Should this application be approved, one 20 acre parcel zoned EFU (located at 1785 Best Road) would be surrounded by

properties with Rural Lands Plan designations. This property was created and authorized by a Measure 37 Claim, was created as Parcel 3 in Partition Plat 2006-0029, and the dwelling was subsequently approved by Measure 49 Order number H132890C. Since the 20 acre parcel and the dwelling thereon were approved absent review relative to the Statewide Planning Goals, staff anticipates that the proposed goal exception would not commit the home site to uses other than those allowed by Goal 3 since it has already been created and developed for nonfarm use.

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

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

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

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

#### Applicant's Additional Findings:

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

The proposed change is appropriate considering the development in the area - This section is also



addressed in detail under the exception statement, and is supported by the inventory study that is Exhibit V. This section is complied with.

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

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

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

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

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

Staff Findings: Staff confirmed that the subject properties are not located within Urban Growth Boundary. This criterion is therefore not applicable to this request.

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

Hearings Officer's Previous Findings: Findings and conclusions related to conformance with Oregon Revised Statutes, as implemented by the Oregon Administrative Rules, including the exception criteria in Oregon Administrative Rules, Chapter 660, Division 4, are addressed above in findings and conclusions of consistency with the PCCP.

Applicant's Additional Findings: Once compliance is found for the exception and the statewide Goals (see below), compliance with all state laws is certain. This section is complied with.

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

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

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

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

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

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

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

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

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

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

Goal 10 - Housing - This proposal will add up to 17 new homes in the West Salem Hills. Homes that are near the Salem UGB, with easy access to a good highway system and the shopping opportunities that lie in West Salem and in Salem proper. The addition of rural homesites fills a need that has existed for a decade or more. The popularity of BM37/49 demonstrated the desire and need for rural residential housing, and the failure of those measures to actually produce much in the way of housing indicates the desire and need still remain. In any event, this Goal seeks to supply an array of different housing types in the County, and rural residential homes on acreage is one of those types this application will fulfill. This Goal is complied with.

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

Goal 12 - Transportation - The exception area is accessed from Best Road, a Minor Collector. The submitted transportation analysis for the proposal authored by Lancaster Engineering dated October 22, 2013, supplemented on October 9, 2015, indicates that the proposed AF-10 zone would generate 17 morning peak hour trips and 23 evening peak hour trips, as compared with 4 and 5 trips, respectively, for the current EFU zone. Weekday total trip generation from the proposal would be 218 trips for the proposed AF-10 zoning and 48 for the current EFU zoning. The Lancaster Engineering traffic analysis included a discussion of potential traffic impacts the proposal may have on the State Highway System, and the proposal's consistency with the Transportation Planning Rule (TPR). In applying the TPR, OAR 660-012-0060, the County is required to determine whether this application significantly affects transportation facilities as measured at the end of the planning

period identified in the TSP, which is 2030. ODOT reviewed the Lancaster material and determined there would be no significant effects on any transportation facility. This information alone makes this application comply with this Goal. This finding is verified by the 2012 changes made to the Oregon Highway Plan (OHP), and with the Transportation Planning Rule. Those changes provide a “safe harbor” for automatic compliance with Goal 12 where the proposal does not increase the average daily trips (ADT) by more than 400. When evaluated together, the new TPR and OHP exempt plan amendments that would generate less than 400 ADT from further TPR review as they are classified as a small increase that does not further degrade the transportation facility. It is typically understood that a single family dwelling will generate 10 ADT. This proposal will generate at most an additional 17 dwellings, for a total traffic generation of 170, far below the “safe harbor” figure of 400. This Goal is complied with.

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

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

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

Staff Findings: Findings and conclusions related to conformance with Oregon Revised Statutes, as implemented by the Oregon Administrative Rules, including the exception criteria in Oregon Administrative Rules, Chapter 660, Division 4, are addressed above in findings and conclusions of consistency with the PCCP. The only Goal Exceptions applicable to these applications are Goals 3 and 4.

- 8. The road function, classification, capacity and existing and projected traffic volumes have been considered. To allow comprehensive plan map and zone map amendments that may generate trips up to the planned capacity of the transportation system, Polk County will consider road function, classification, road capacity and existing and projected traffic volumes, as criteria for comprehensive plan map and zone map amendments. [PCZO 111.275(H)]**

Hearings Officer’s Previous Findings: Applicant notes that on October 22, 2013 a transportation analysis was conducted at the request of Wayne Simmons to study the transportation impacts. The conclusion on Page 8 of the analysis reads as follows: Seven tax lots in Polk County are proposed for a zone change from EFU to AF-I 0. The proposed zone change could generate an addition 17 trips during the morning peak hour, and 22 additional trips during the evening peak hour. The existing infrastructure, including the intersection of Orchard Heights Road and Best Road adjacent to the property, is adequate to support this potential additional traffic through the planning horizon. The proposed zone change is therefore in compliance with the State of Oregon’s Transportation Planning Rule.

Staff notes that the subject properties abut Best Road, a Minor Collector in Figure 3 of the Polk County Transportation Systems Plan. The applicant submitted a transportation analysis for the

proposal authored by Lancaster Engineering dated October 22, 2013, supplemented on October 9, 2015, which indicates that the proposed AF-10 zone would generate 17 morning peak hour trips and 23 evening peak hour trips, as compared with 4 and 5 trips, respectively, for the current EFU zone. Weekday total trip generation from the proposal would be 218 trips for the proposed AF-10 zoning and 48 for the current EFU zoning. The Lancaster Engineering traffic analysis included a discussion of potential traffic impacts the proposal may have on the State Highway System, and the proposal's consistency with the Transportation Planning Rule (TPR). The relevant section of the TPR, OAR 660-012-0060, ensures that the function and capacity of State highways will not be adversely affected by traffic increases resulting from changes to adopted land use plans and relations. Lancaster Engineering's TPR discussion focused on the intersection of Highway 22 and 55 Avenue NW, which is also where Highway 51 intersects Highway 22. A letter from Daniel Fricke, Senior Transportation Planner with ODOT, dated June 8, 2015 supports the conclusions in the Lancaster Engineering traffic analysis addressing the TPR - that the applicant's proposal would not have a significant impact on a State highway.

Applicant says an operational traffic analysis was conducted by Lancaster Engineering for the intersection of Orchard Heights Road and Best Road. However, an incomplete application letter from Austin McGuigan, Polk County Community Development Director, dated October 15, 2014 informed the applicant that Polk County Engineer, Todd Whitaker, P.E., determined the Lancaster Engineering traffic analysis did not meet the requirements of the Polk County Public Works Design Standards for a Traffic Impact Analysis. Deficiencies in the Lancaster Engineering traffic analysis noted by the Polk County Engineer were the lack of analysis of the intersections Dahlia Way and Orchard Heights Road, 55th Avenue NW and Eola Drive, and missing information requested in the Transportation Impact Analysis Checklist found in Appendix 3 of the Polk County Public Works Design Standards. Following a letter from Mark Bernard, Polk County Senior Planner, dated August 4, 2015 requesting information to supplement the record, including the additional traffic analysis described above, the applicant provided additional analysis of two intersections on Orchard Heights Road in a supplemental report by Lancaster Engineering dated October 15, 2015. Lancaster Engineering's additional traffic analysis of impacts on the county road system from potential trip generation by the proposal, particularly the intersections of Orchard Heights Road and Best Road and Orchard Heights Road and Orchard Heights Place, was reviewed by the Polk County Engineer, Todd Whitaker, P.E, who determined the impact of the proposal on the county road system would not be significant. After reviewing the applicant's statements, and comments from Todd Whitaker, P.E, staff concluded that the proposal is consistent with the function, classification and capacity of local transportation facilities.

Applicant's Additional Findings: The road function, classification, capacity and existing and projected traffic volumes have been considered by Lancaster Engineering and reviewed and approved by ODOT. This section is complied with.

Staff Findings: As discussed above, the proposed zone change from EFU to AF-10 is anticipated to generate up to 13 additional vehicle trips during the morning peak hour and 18 additional vehicle trips during the evening peak hour. Based on the Hearings Officer's previous findings, supplemented by a memorandum from Brian Davis with Lancaster Engineering, and comments previously submitted from ODOT and Polk County's Public Works Department, staff finds that the increase vehicle trips would not be a significant change and the existing transportation facilities could support the proposed increased residential development.

#### **IV. CONCLUSION & RECOMMENDATIONS**

Hearings Officer's Previous Conclusion and Recommendation: The present case is one where the Hearings Officer does not necessarily believe there is anything intrinsically wrong with the proposal under consideration, but has to recognize that applicable laws, regulations and ordinances are structured so that it is extremely difficult to rezone a tract of land from resource use to non-resource use. In this case the evidence put forward by the applicants is impressively voluminous, but not always solid. For example, the applicant at considerable length appears to be seeking to discredit the Natural Resources Conservation Service (NRCS) soil survey of Polk County, used in conjunction with the Polk County Geographic Information System, by introducing evidence of other soil surveys. However, the rules governing land use proceedings simply do not allow a local government

to consider evidence of soil studies conducted by experts lacking credentials granted by LCDC. That may or may not be fair, but the Hearings Officer does not have authority to change the rules.

A table on page 3 of the staff report displays the characteristics of the subject tract according to the NRCS. In summary, the subject tract of 227.09 acres contains about 51.8 percent of high-value soils. Of the subject tract, 53.5 percent are Class I-IV. The tract contains productive forest soils, capable of annually producing an average of approximately 154 cubic feet of wood fiber per acre. Applicants submitted other studies, presumably more supportive of their proposal, but these other studies have not been certified by DLCD and, under OAR 600-033-0030 and 0045, cannot be taken into account by a local government in land use proceedings. The Oregon Department of Agriculture also pointed out that any soil analysis other than the NRCS, pursuant to DLCD rules, cannot be used in this case.

The applicants further argue that even if soil is rated as highly productive for agriculture or forestry purposes, it may be accepted from the designation it ordinarily would have based on physical characteristics such as its slope, rockiness, and microclimatic phenomena. According to DLCD and the Oregon Department of Agriculture, the NRCS soil capability ratings already take into account physical limitations of specific soils, including but not limited to slope and microclimates. Applicants cannot cause such physical limitations to be factored in twice when determining soil capabilities.

Applicants stress at length that one of them tried for years to farm the acreage, and could not make a profit even on Christmas trees. This assertion raises a point that must be dealt with carefully to avoid misunderstanding. One opponent, Sarah Deumling, who spoke for Zena Forest, LLC, said she owns and manages "as close to an identical piece of property as it gets", also located along the crest of Eola Hills. She manages the property for timber production and maintains a small sawmill processing lumber for flooring and furniture, employing three permanent employees and as many contract workers. She testified that the soils on the subject tracts "are even better than ours for commercial timber production." In the opinion of the Hearings Officer, this testimony carries more weight than that of an owner who claims to have failed to use his tract successfully for resource purposes, and offers his experience as proof that the land cannot be productively used by anybody else.

The Hearings Officer relied on specific evidence related to agricultural soils classification, potential for wine grape production and viability of timber management when making a recommendation on this application. The Soils Survey demonstrates the subject properties are composed of predominantly of agricultural soils. Land with a predominance of soils in capability classes I through IV is considered agricultural land per OAR 660-033-0030. With 53.5% being soils designated capability class II through IV, according to the Soil Survey, the subject property qualifies as agricultural by rule. While the Norgren and Gallagher soil studies were not used as part of the Hearings Officer's evaluation of the applicant's proposal, they validate soils maps found in the Soils Survey demonstrating a predominance of agricultural soils on the subject property. Based on soils data, the Hearing Officer finds that the subject property is agricultural land, consistent with OAR 660-033-0030.

The applicant states that wine grapes are not a suitable crop for the subject properties, citing site specific limitations related to elevation, a lack of irrigation water, crop damage from pests, a preponderance of boulders, and a lack of landscape uniformity to establish blocks with the appropriate aspect. The applicant states that the vast majority of vineyards in the Willamette viticulture area are below 600 feet in elevation. Indeed, existing nearby vineyards are at lower elevations than the subject properties. Cubanísimo Vineyards to the east of the subject properties is located on the leeward side of Glenn Hill at an elevation of approximately 950 feet, Eola Hills Wine Cellars' Legacy Estate Vineyard is located at the toe of the escarpment west of the subject properties at an elevation of approximately 500 feet, Kathken Winery, to the northwest of the subject properties is at an elevation of approximately 830 feet, and Domaine Drouhin Oregon, Inc.'s vineyard northeast of the subject properties at an elevation of approximately 680 feet. While the aforementioned vineyards are all above 600 feet of elevation, except for the Legacy Estate Vineyard, they are not located on ridge tops, and are largely sheltered from the constant winds affecting the subject properties. Vineyard sites in the vicinity of the subject properties reveal the variety of

landscapes on which vineyards are planted, with east facing, west facing and south facing vineyards represented by the small sample above. However, the subject properties are more exposed to wind and sun than the vineyard sites surrounding it, lending some credence to the applicant's observations that wine grape production is impracticable there. At the same time, evidence in the record shows that some knowledgeable grape growers feel that "the rocky, wind-battered slopes of the Eola-Amity hills have emerged as one of Oregon's most singular terrains for pinot noir." [Patrick Comiskey, "Wind Powered Pinot", Wine & Spirits Magazine, April 2013.] Applicant contends above that the Simmons family "actively farmed the tract, growing gooseberries, strawberries, prunes, cherries, fine fescue grass, Christmas trees and wheat with little success," attempting by this recitation to demonstrate the land is not suitable for large-scale commercial agricultural crops. There is no indication that attempts were made to grow grapes of any variety.

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

Based on the testimony and evidence provided by applicants and submitted into the Record, and the findings set out above, staff recommended that the Board of Commissioners approve the applications, provided additional evidence demonstrating how commercially producing forest products are not economically viable within the exception area is provided by the applicant prior to or during the public hearing. Applicant did produce additional information concerning the forest capability of the subject properties, reviewed by the Hearings Officer. Nevertheless, for reasons detailed above in this order, the Hearings Officer could not find that the applicant has demonstrated that the subject tract was not capable of producing agricultural or forest products. The applicant has also failed to establish that the relationship between adjoining uses and the subject properties has made farm or forest uses thereon impracticable and that approval of the exception would not commit neighboring resource zoned properties to non-resource use. Consequently, it is RECOMMENDED that the Board deny the applications. If the Board following its consideration approves one application, it is urged that this does not automatically entail approval of the other. If the applications are approved, it is RECOMMENDED that future development of the property is subject to the use and development standards in the PCZO. These include, but are not limited to, standards for the AF-10 zone listed in PCZO 128.800.

Applicant's Conclusion and Recommendation: The time has come for Polk County to recognize that parcelization and small scale specialty farming and forestry can better replace large scale resource activities in areas with unique site characteristics and unfortunate patterns of diminished consumer demand and loss of processing facilities.

There is no better example in Polk County where this recognition is important than in the West Salem Hills. The exception area has a long proven history of attempted farming and forestry practices, all of which have failed. Some failures are due to poor site conditions, others from crops such as prunes retreating from consumer demand. Other crops have lost their processing facilities, and thereby the canneries financing, and the inability to get crops sold, such as cherries.

By recognizing the necessity for conversion of larger unproductive tracts to smaller tracts to meet rural residential living demands, it opens the land up to a more intense and owner managed specialty crops that could not be undertaken by one farmer on a large tract.

In this case the surrounding area has developed into a plethora of small parcels, most just for residential living, but some in owner managed resource production. The average parcel size of just over 12 acres, and the pressure on the area from the presence of so many non-farm or forest parcels



and uses, make conversion of this exception area meaningful for Polk County.

It must be remembered that an exception area may contain a predominance of agricultural and forest soils, and still qualify for an irrevocably committed Goal exception. The site characteristics together with the pressure from the uses on surrounding lands that negatively impact resource activity in the exception area all justify the exception, approval of the comprehensive plan amendment and rezoning the exception area for 10 acre tracts.

Approval of the planning change would not result in the loss of lands suitable for agriculture or forestry, and would not interfere with surrounding agriculture and forestry activities because small scale agriculture, which is supported by the proposed AF-10 zone, has been conducted in the vicinity of the subject properties for decades without conflicting with the larger agricultural operations in the area. The proposed exception area is also substantially isolated from the actual farming areas by steep slopes.

This application complies with all of the approval criteria for the amendment of the Polk County Comprehensive Plan from Agriculture to Rural Residential. In addition, the proposed exception area satisfies all of the approval criteria for an exception based on the fact that the exception area is irrevocably committed to non-resource use based on the trend in the surrounding area to smaller parcels in non-farm use which makes resource use in the exception area impracticable.

The application further complies with all the zone change criteria applicable, and satisfies the Comprehensive Plan Policies related to Rural Residential development. The applicants have spent years studying the area, and what can and cannot be done productively and from a land use standpoint. Experts have been employed, and hundreds of pages of information to justify this application have been produced and are introduced here.

This application satisfies all the applicable approval criteria for the plan amendment and the zone change, and should be approved.

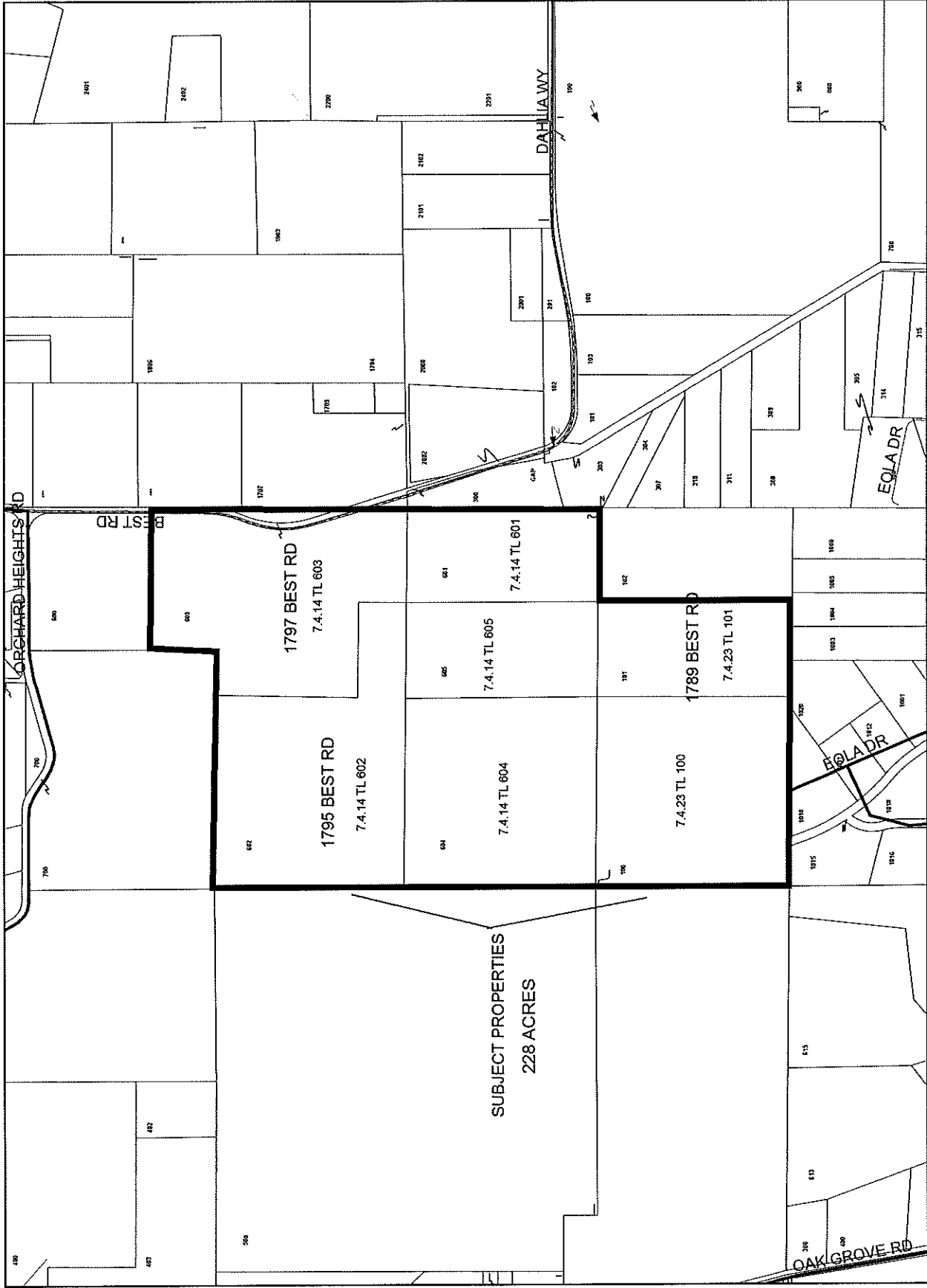
Staff's Conclusion and Recommendation: Based on the written testimony and evidence provided by the applicant and submitted into the Record, and the findings set out above, staff finds that there remains insufficient evidence to demonstrate compliance with all the applicable review and decision criteria for a Zone Change and a Comprehensive Plan Amendment with an exception to Oregon Statewide Planning Goals 3 and 4. Consequently, it is RECOMMENDED that the Hearings Officer recommend DENYING the applications to the Board of Commissioners.

## V. ATTACHMENTS

Attachment A: Map of the subject properties

Attachment B: Comments

SUBJECT PROPERTY MAP (PA 18-01 & ZC 18-02)



Date: 8/21/2019  
 This map was produced from the Polk County geographic database to support its governmental activities. This product is for information purposes and may not have been prepared for, or be suitable for, engineering, or surveying purposes. The county is not responsible for any map errors, possible misuse, or misinterpretation.



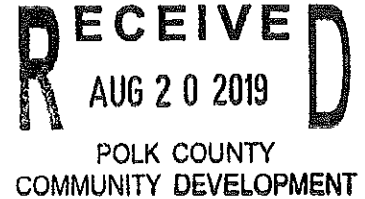


DAVID FRIDENMAKER, Manager  
Facility Rental, Planning, Property Services  
3630 State Street, Bldg. C • Salem, Oregon 97301-5316  
503-399-3335 • FAX: 503-375-7847

Christy Perry, Superintendent

August 20, 2019

Sidney Mulder, Planner  
Polk County Community Development  
Polk County Courthouse  
850 Main Street  
Dallas OR 97338



RE: Land Use Activity Case No. PA18-01, ZC18-02, Best Rd. NW

Polk County issued a Request for Comments for a Land Use Case as referenced above. Please find below comments on the impact of the proposed land use change on the Salem-Keizer School District.

#### IDENTIFICATION OF SCHOOLS SERVING THE SUBJECT PROPERTY

The School District has established geographical school attendance areas for each school known as school boundaries. Students residing in any residence within that boundary are assigned to the school identified to serve that area. There are three school levels, elementary school serving kindergarten thru fifth grade, middle school serving sixth thru eighth grade, and high school serving ninth thru twelfth grade. . The schools identified to serve the subject property are:

School Name	School Type	Grades Served
Brush College	Elementary	K thru 5
Straub	Middle	6 thru 8
West Salem	High	9 thru 12

Table 1

#### SCHOOL CAPACITY & CURRENT ENROLLMENT

The School District has established school capacities which are the number of students that a particular school is designed to serve. Capacities can change based on class size. School capacities are established by taking into account core infrastructure (gymnasium, cafeteria, library, etc.) counting the number of classrooms and multiplying by the number of students that each classroom will serve. A more detailed explanation of school capacity can be found in the School District's adopted Facility Plan.

School Name	School Type	School Enrollment	School Design Capacity	Enroll./Capacity Ratio
Brush College	Elementary	273	453	60%
Straub	Middle	661	956	69%
West Salem	High	1,746	1,797	97%

Table 2

**POTENTIAL ADDITIONAL STUDENTS IN BOUNDARY AREA RESULTING FROM APPROVAL OF LAND USE CASE**

The School District anticipates the number of students that may reside at the proposed development based on the housing type, single family (SF), duplex/triplex/four-plex (DU), multi-family (MF) and mobile home park (MHP). The School District commissioned a study by the Mid-Willamette Valley Council of Governments in 2014 to determine an estimate of students per residence, for the Salem-Keizer area, in each of the four housing types. Since the results are averages, the actual number of students in any given housing type will vary. The table below represents the resulting estimates for the subject property:

School Type	Qty. of New Residences	Housing Type	Average Qty. of Students per Residence	Total New Students
Elementary	22	SF	0.194	4
Middle	22	SF	0.101	2
High	22	SF	0.143	3

Table 3

**POTENTIAL EFFECT OF THIS DEVELOPMENT ON SCHOOL ENROLLMENT**

To determine the impact of the new residential development on school enrollment, the School District compares the school capacity to the current enrollment plus estimates of potential additional students resulting from land use cases over the previous two calendar years. A ratio of the existing and new students is then compared with the school design capacity and expressed as a percentage to show how much of the school capacity may be used.

School Name	School Type	School Enrollment	New Students During Past 2 yrs	New Student from this Case	Total New Students	School Design Cap.	Enroll./Cap. Ratio
Brush College	Elem.	273	0	4	4	453	61%
Straub	Mid.	661	0	2	2	956	69%
West Salem	High	1,746	18	3	21	1,797	98%

Table 4

**ESTIMATE OF THE EFFECT ON INFRASTRUCTURE – IDENTIFICATION OF WALK ZONES AND SCHOOL TRANSPORTATION SERVICE**

Civic infrastructure needed to provide connectivity between the new residential development and the schools serving the new development will generally require roads, sidewalks and bicycle lanes. When developing within one mile of school(s), adequate pathways to the school should be provided that would have raised sidewalks. If there are a large number of students walking, the sidewalks should be wider to accommodate the number of students that would be traveling the

path at the same time. Bike lanes should be included, crosswalks with flashing lights and signs where appropriate, traffic signals to allow for safe crossings at busy intersections, and any easements that would allow students to travel through neighborhoods. If the development is farther than one mile away from any school, provide bus pullouts and a covered shelter (like those provided by the transit district). Locate in collaboration with the District at a reasonable distance away from an intersection for buses if the distance is greater than ½ mile from the main road. If the distance is less than a ½ mile then raised sidewalks should be provided with stop signs where students would cross intersections within the development as access to the bus stop on the main road. Following is an identification, for the new development location, that the development is either located in a school walk zone or is eligible for school transportation services.

School Name	School Type	Walk Zone or Eligible for School Transportation
Brush College	Elementary	Eligible for School Transportation
Straub	Middle	Eligible for School Transportation
West Salem	High	Eligible for School Transportation

Table 5

### ESTIMATE OF NEW SCHOOL CONSTRUCTION NEEDED TO SERVE DEVELOPMENT

The School District estimates the cost of constructing new school facilities to serve our community. The costs of new school construction is estimated using the Rider Levett Bucknall (RLB) North America Quarterly Construction Cost Report and building area per student from Cornerstone Management Group, Inc. estimates. The costs to construct school facilities to serve the proposed development are in the following table.

School Type	Number of Students	Estimate of Facility Cost Per Student*	Total Cost of Facilities for Proposed Development*
Elementary	4	\$54,925	\$219,700
Middle	2	\$64,045	\$128,090
High	3	\$73,164	\$219,492
TOTAL			\$567,282

Table 6

\*Cornerstone Management Group, Inc. estimates based on RLB cost index average, 2019 First Quarter.

Sincerely,



David Fridenmaker, Manager  
Planning and Property Services

c: Mike Wolfe, Chief Operations Officer, David Hughes, Manager – Custodial, Property and Auxiliary Services, Michael Shields, Director of Transportation



# Oregon

Kate Brown, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: 503-373-0050

Fax: 503-378-5518

[www.oregon.gov/LCD](http://www.oregon.gov/LCD)

September 30, 2019

Sidney Mulder, Planning Supervisor  
Polk County Community Development  
850 Main Street  
Dallas, OR 97338

**RECEIVED**  
SEP 30 2019  
POLK COUNTY  
COMMUNITY DEVELOPMENT



RE: **Simmons zone change**  
County # PA 18-01 and ZC 18-02, DLCD # 001-19

Dear Sidney:

Thank you for the opportunity to review the application. The proposal involves comprehensive plan and zoning map amendments to rezone 228 acres in the Eola Hills from Exclusive Farm Use (EFU) to Agriculture and Forestry Ten Acre (AF-10) based on an irrevocably committed exception. The Department of Land Conservation and Development (DLCD) has the following comments.

#### Irrevocably Committed Exception

An irrevocably committed exception can be justified if existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable. For exceptions from Statewide Planning Goal 3, OAR 660-004-0028(3) specifies that it is necessary to prove that the following activities are impracticable:

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

In *Scott v. Crook County*, 56 Or LUBA 691 (2008), the Land Use Board of Appeals accepted that an irrevocably committed exception should be focused on “adjacent lands and uses, not the character of or uses in the larger area within a one-mile radius of the subject property.” The application in this case relies heavily on a land use inventory encompassing approximately four square miles. While this information may be useful in addressing regional characteristics (see OAR 660-004-0028(6)(d)), the applicant’s emphasis on such a large study area obscures the fact that an irrevocably committed exception is primarily an evaluation of adjacent uses and their relationship to the subject properties.

The adjacent uses are predominantly agriculture, including vineyards, and forestry. Approximately 77% of the subject property borders on these resource uses while only 23% borders on rural-residential uses. Two adjacent properties zoned EFU received Measure 49 approvals. One, tax lot 102, was approved for one dwelling which has been built and the 20-acre



property is in agricultural use. The second, tax lot 200, consists of 91 acres and has three existing farm dwellings to the west, on North Oak Grove Road NW. The Measure 49 approval allows two of the existing dwellings to be placed within their own parcels which must not exceed two acres, as the entire region is in a groundwater restricted area.

There is limited land in primarily residential use to the south of subject properties and there are two small parcels to the east along Best Road. The applicant attempts to discredit the adjacent farm operations by calling them “hobby farms” but the land remains primarily in agricultural use. Given Oregon’s Right-to-Farm protections, we fail to see how such a limited number of adjacent dwellings could possibly irrevocably commit the subject 228 acres. Farm use and forest product propagation are not impracticable based on the adjacent land uses.

The subject properties contain three existing dwellings approved under Ballot Measures 37 and 49, with the ability to establish one additional dwelling. This equates to one dwelling per 57 acres in the 228 acre application area. Such a residential density is consistent with farm use as evidenced by the applicant’s submission, which demonstrates that a limited number of dwellings can exist within a thriving agricultural area.

The application does not appear to address OAR 660-004-0018, which requires that irrevocably committed exception applications demonstrate:

“The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028;” - OAR 660-004-0018(2)(b)(B)

The application is incomplete until this requirement is addressed. The applicant should explain how the proposed sixteen residential parcels will not irrevocably commit adjacent lands.

#### Conclusion

Thank you again for the opportunity to comment. For the reasons stated above, the department concludes that the subject properties are not irrevocably committed and thus do not qualify for the proposed comprehensive plan and zoning map amendments. We recommend that the application be denied.

Please enter this letter into the record of these proceedings and provide a copy of the final decision when it becomes available. If additional information is provided at the hearing, the department requests that the hearing be continued, pursuant to ORS 197.763(4)(b), to allow us time to review the new information and respond if necessary.

Best,

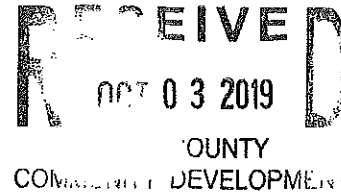
*Angela Carnahan*

Angela Carnahan, DLCD Regional Representative

Cc: Austin McGuigan, Polk Co Community Development Director

September 30, 2019

Polk County Community Development  
Polk County Courthouse  
850 Main St.  
Dallas, OR 97338



Attn: Sidney Mulder

Re: PA 18-01 and ZC 18-02

We are unable to attend the hearing on October 15, 2019 concerning this application, but we would like to enter our concerns about the changes being proposed.

Our property is located at 1890 Best Road NW, on the east side of Best Road across from the affected properties. When the application was last submitted in 2015, we submitted comments about it. Our primary concern at that time related to how these changes might negatively affect our water supply. Prior to that hearing, we had received information from a set of FAQs prepared by the applicants that noted that the changes being proposed could eventually result in the addition of a total of 21 dwellings to the sites. Although the FAQs stated that the hydrologist/geologist team "conducted exhaustive testing of all the existing wells to measure drawdown during high demand pumping", we were not aware that any such testing occurred on our well, unless it was done without our permission.

The availability of water is critical to our ability to live in our home. We have not received any information since that time that allays those concerns.

We ask that the county take this into consideration when making decisions on this application.

Sincerely,

A handwritten signature in black ink that reads "Raymond Thorne". The signature is written in a cursive, flowing style.

Raymond Thorne

A handwritten signature in black ink that reads "Jean Thorne". The signature is written in a cursive, flowing style.

Jean Thorne