BEFORE THE MARION COUNTY HEARINGS OFFICER

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

RECOMMENDATION

I. Nature of the Application

This matter is before the Marion County Hearings Officer on the Application of Lois M. Pfenning, Trustee of the Henry O. and Lois M. Pfenning Trust to change the comprehensive plan designation from Special Agriculture to Rural Residential and to change the zone from SA (Special Agriculture) to AR-10 (Acreage Residential), on a 20.46 -acre parcel, then partition that parcel into two lots of 10 and 10.46 acres, located in the 2400 block of 62nd Avenue SE, Salem (T8S; R2W; Section 4A; tax lot 2800).

II. Relevant Criteria

The standards and criteria relevant to this Application are found in the Marion County Comprehensive Plan (Rural Development Policies), and the Marion County Code (MCC) Title 17, especially MCC 17.123, MCC 17.128, and MCC 17.172. Policies relevant to this Application are also found in the State of Oregon Statewide Planning Goals, and Oregon Administrative Rules (OAR 660–004–018 and OAR 660–004–028).

III. Public Hearing

A public hearing was held on this matter on September 8, 2022. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the Application:

1.	Austin Barnes	Marion County Planning Division
2.	Wallace Lien	Attorney for Applicant
3.	Larry Pfennig	In Support of Application
4.	Roger Kaye	Friends of Marion County

No documents were presented, marked, or entered into the record as exhibits. No objections were raised as to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at the hearing.

A request was made at the hearing to leave the written record open to submit additional materials. Pursuant to ORS 197.763(6)(a), prior to the close of the evidential hearing, any participant may ask to present additional evidence, argument, or testimony on the applications, and the hearings officer shall grant the request by continuing the hearing to a later date, or by keeping the record open to submit the information in writing. The hearings officer granted an open record period.

The following submissions were received during the open record period:

1. Submission by Friends of Marion County Received September 20, 2022 with attached Exhibit Map

2. Applicant's Open Record Submittal

IV. Executive Summary and Background

Applicant applied for an irrevocably committed exception to Goal 3 and Goal 14 in the original application in 2019. Planning staff and the hearings officer denied the application. The Board of Commissioners approved the application on March 24, 2021, Ordinance No. 1429. Friends of Marion County appealed the decision to the Land Use Board of Appeals (LUBA). LUBA concluded that the County's decision relied on findings that did not comply with applicable rules and that were not supported by substantial evidence. LUBA determined that the standards for an irrevocably committed exception had not been met.

Applicant submitted a supplemental justification to resolve the concerns raised by LUBA in its remand of the Board's prior approval. As part of the revised application, Applicant modified the request for the AR-2 zone to the AR-10 zone. Because 10 acres are not considered urban in nature, the requirement for a Goal 14 Exception is eliminated.

Applicant submitted additional materials to address the evidence to support the determination and has established compliance with all applicable criteria. The testimony and affidavit of Larry Pfennig are compelling because Mr. Pfennig is the farmer who has attempted to keep the subject property in farm use, but based on several issues has determined that farming is simply impractical on the subject property. The additional findings, along with the modified application, are sufficient to overcome the standards required to take this property out of exclusive farm use. Applicant has shown that the relationship between the subject property and the adjacent lands has irrevocably committed the subject property to uses allowed by Goal 3, and that the uses allowed by the goal are impracticable. The Hearings Officer recommends **APPROVAL** of the Application with conditions of approval stated herein and robust findings of fact to support a determination that farm use cannot coexist with surrounding uses.

This case presents a difficult analysis of conflicting issues for farming viability and protection of farmlands. Larry Pfennig's Affidavit addresses the subject property's relationship with surrounding parcels and presents sufficient findings that farming is impracticable on the subject property. Mr. Pfennig's statements are based on his experience as a life-long farmer, and present sufficient support to approve the application. Robust findings of fact must be included in an Order to withstand scrutiny from the Land Use Board of Appeals. It is recommended that Applicant provide additional evidence at the BOC hearing to support Applicant's decision to stop farming the property, and additional evidence to establish that the issues suffered on the property are not an inevitable consequence of Applicant's decision not to farm, other than cover crops.

Planning suggests a 300-foot special setback if approval is recommended. Applicant objects. Further factual support is needed to justify a special setback of over 100 feet.

V. Findings of Fact

The Hearings Officer, after careful consideration of the testimony and evidence in the record, issues the following finding of fact:

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

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

3. Applicant seeks to create a revised partition of the 20.46 acre property into two parcels of 10.46 acres and 10 acres.

4. Marion County Planning Division requested comments from various governmental agencies. The following comments were received in response to the Applicant's first application requesting AR-2 zoning. No further request for comments was made for Applicant's modified application, and therefore, the comments received reference the original application:

   Marion County Public Works Land Development and Engineering Permits (LDEP) requested that the following conditions be included in the land use case:

   ENGINEERING CONDITIONS

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

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

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

   ENGINEERING REQUIREMENTS

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

   E. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon

application for building permits, per Marion County Ordinances #00-JOR and #98-40R, respectively.

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

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

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

ENGINEERING ADVISORY

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

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

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

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

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

Marion County Onsite Wastewater Specialist commented: Site evaluation required for two new 2.0 acre parcels.

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

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

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

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

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

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

5. On November 22, 2021, the Land Use Board of Appeals issued its Final Opinion and Order. LUBA determined that the County's decision relied on findings that do not comply with applicable rules and are not supported by substantial evidence. LUBA stated that the standards for an irrevocably committed exception were not met because resource use of the subject property has not been shown to be impracticable. However, LUBA determined that it could not conclude that an irrevocably committed exception for the subject property is prohibited as a matter of law, and remanded the matter.

6. In response to the LUBA order, Applicant provided Supplemental Justification with additional facts in support of the Application. Most notably, Applicant modified the request to seek an AR-10 zone instead of the AR-2 zone originally sought. The modified application requires an exception to Goal 3 together with a change in the zone designation from Special Agriculture (SA) to Acreage Residential Ten Acre Minimum (AR-10), with a partition of the 20.46 acre subject property into two parcels of 10.46 acres and 10 acres.

7. The scope of the remand hearing should be limited to the issues upon which the case was remanded. The basic underpinnings of the LUBA decision include the alleged misconstruction of the law, adequacy of the findings, and the parcels to be allowed. Applicant submitted a supplemental justification including affidavits of Larry Pfennig and Wallace Lien.

8. Larry Pfennig is a lifelong farmer in Marion County, and is the owner of Pfennig Farms, Inc. Mr. Pfennig has been associated with the subject parcel for almost his entire life. Mr. Pfennig states that the subject property does not have a farm well and there are no current water rights associated with the property, which Mr. Pfennig argues limits the parcel's productivity for farm uses. Mr. Pfennig is concerned about the impact of farm uses on the aquifer; that is, that use of water will have an impact on surrounding properties. On the other hand, because of the proximity of small, landscaped lots, the subject property has experienced overspray of landscape irrigation. Mr. Pfennig indicates that overspray from landscaping can result in damage to crops and impact his ability to readily farm the parcel and that he has lost one acre of crop from the overspray. Mr. Pfenning argues that Mr. Pfennig, in declaration and in testimony, provided evidence of conflict between water availability and overspray. Mr. Pfennig testified about an incident in which he lost one acre of crop from overspray from a now non-existing blueberry patch on adjacent property. Mr. Pfennig has not actively farmed the property since 2005 because it was not practical to do so. Mr. Pfennig testified that based on the size of the parcel, the lack of water rights, and conflicts from neighboring properties, farming the property was not productive or cost effective. Mr. Pfenning presented evidence that the impacts from residential neighbors in non-farm uses has generated impacts that conflict with farming. Mr. Pfenning noted trespass, fire damage, overspray, and use of property (horseback riding, walking dogs, motorcycle riding) that results in his property being incompatible with farming. Mr. Pfennig notes the possible introduction of hazards to farming from animals entering the property. Mr. Pfennig recognizes Oregon's Right to Farm protections, but notes that despite his right to farm, doing so on this property does not shield him from conflicts with the nearby residential uses. Mr. Pfenning argues that the limitations of the property itself (water rights, lack of well, size, surrounding residential uses) make farming impractical for the purpose of obtaining a profit. Mr. Pfennig states that as a life long farmer in this area, no farm uses, no matter how the term is defined can practicably be carried on the subject property with houses lining nearly all sides, and some as close as 20 feet from the property line.

9. Larry Pfennig states that on this subject property, he has seen overspray of chemicals that has taken large swaths of property out of production. Mr. Pfennig stated that overspray from adjoining non-farm parcels on the subject property has impacted his ability to have a farming operation on the subject parcel.

10. Wallace Lien, Attorney for Applicant, addressed the affidavits of Larry Pfennig submitted into the record. Mr. Lien addressed the importance of the size of the study area for this application and stated that a smaller study area is important for a neighborhood view of the existing property. Mr. Lien addressed the adjacent properties and indicated that the surrounding areas have a 2.3-acre average, and 12 of out the 13 nearby parcels have a dwelling, and seven of the 13 parcels are one acre or less. Mr. Lien stated that of the thirteen parcels, none are over ten acres in size. The proposed parcels would be significantly larger than surrounding properties. Mr. Lien addressed the difficulties associated with the subject parcel in that it has no irrigation rights and has suffered impacts from neighbors that is not conducive to agricultural use.

Mr. Lien noted that the information provided (trespass, fires, overspray) suggests an impracticability to farm. Mr. Lien argues that the size of the parcel and the close proximity of residential uses make contiguous farm uses impractical.

11. Larry Pfennig testified at the hearing. Mr. Pfennig testified that the water from a neighboring operation came forty feet into the property, and ruined approximately one acre of property. Five acres of the subject property were burned by fire. The damage from fire, in addition to ongoing trespass issues, were factors for Mr. Pfennig to determine replanting was not justified after the fire. Mr. Pfennig attempted to farm with a cover crop year after year, and in 2005, quit because there was no profit in it and the neighbors were unhappy with his farming operations. Of the twenty acres, Mr. Pfennig indicated that at best 14-15 acres were farmable. While it is common for property to include non-tillable land, with the lack of irrigation and water rights, the capability of the parcel to be productively farmed is limited. While a specific threshold of profitability is not presented, Mr. Pfennig's experience as a farmer who did farm the property but quit for practicality and profitability, is accepted as reasonable support for his position.

    Mr. Pfennig testified that the land has been used for motorcycle riding, and horseback riding, and that the property is regularly trespassed upon by neighbors with dogs. The property supported a cover crop, but Mr. Pfennig states it is not practical or cost effective to farm the property. Mr. Pfenning also indicated the concern of introduction of parasites or contaminants to the land caused by the trespass by humans and animals.

12. There is a dispute among the parties whether there is an active blueberry farm adjacent to the subject property. Applicant states that the active blueberry farm, Thank You Berry Much Farms is not on adjacent property. Friends of Marion County states that there is an adjacent parcel in active blueberry operation.

13. Roger Kaye, Friends of Marion County, testified at the hearing. Mr. Kaye addressed the submissions by Friends of Marion County, and stated that adjacent property is in active blueberry production, and could accommodate additional blueberry crops. Mr. Kaye addressed the replacement of manufactured home on adjacent property, and stated that with the new septic drain field, additional blueberry production could be supported on adjacent property. Mr. Kaye states that there are an additional 1.25 acres of blueberry production associated with the Thank You Berry Much. Mr. Kaye addressed the study area, and introduced additional submissions that were included in the record.

V. Additional Findings of Fact and Conclusion of Law

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

2. Applicant has the burden of proving compliance with all applicable criteria as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(1987).

"Preponderance of the evidence" means the greater weight of evidence. It is such evidence that when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted).

Applicants must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equal or less, Applicants have not met their burden and the application must be denied. If the evidence for every criterion is even slightly in Applicants' favor, the burden of proof is met and the application is approved.

GOAL EXCEPTION PROCESS

3. Applicant seeks an exception to Statewide Planning Goal 3, Agricultural Lands, to remove Goal 3 restrictions. Under OAR 660-004-0005(1), an exception to a statewide planning goal is a comprehensive plan provision. The goal exceptions require an MCCP amendment.

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

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

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

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

   The proposed exceptions are for a specific situation at this 20.46-acre property and do not establish planning and zoning policy generally. OAR 660-004-0005(1)(a) is met.

   Applicant proposes residential uses not allowed or conditionally permitted on property designated Special Agriculture and zoned SA. OAR 660-004-0005(1)(b) is met.

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

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

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

c. *The following standards are met:*

A. *Reasons justify why the state policy embodied in the applicable goals should not apply;*

B. *Areas that do not require a new exception cannot reasonably accommodate the use;*

C. *The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and* i

D. *The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.*

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

GOAL 3 EXCEPTION

6. Statewide Planning Goal 3, Agricultural Lands, which seeks to preserve and maintain agricultural lands, applies to the subject property. Applicant seeks an exception to Statewide Planning Goal 3, to remove Goal 3 restrictions. The Goal Exception process requires specific findings justifying why such lands are not available for resource use. There are three types of exceptions to Statewide Goals that may be granted. The first two are based on the concept that the subject property is "physically developed" or "irrevocably committed" to a certain use.

   The third is a "reasons" exception where there is a demonstrated need for the proposed use or activity. Applicant posits that the proposal qualifies for an irrevocably committed exception. Residential uses are not allowed under Goal 3.

7. Goal exceptions are governed by Statewide Planning Goal 2. Goal 2 is implemented through Oregon Administrative Rule (OAR) 660-004. The rules applicable to irrevocably committed exceptions are set out in OAR 660-004-0028. Under OAR 660-004-0028(1), a local government may adopt an exception to a goal when the land 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 impractical. Pursuant to OAR 660-004-0028(2), whether land is irrevocably committed depends on the relationship between the proposed exception area and the lands adjacent to it.

OAR 660-004-0028 (Overview)

8. OAR 660-004-0028 provides exception requirements for land irrevocably committed to other uses:

(1) 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/actors make uses allowed by the applicable goal impracticable:

(a) A "committed exception" is an exception taken in accordance with ORS 197.732(2)(h), Goal 2, Part 1/(b), and with the provisions of this rule, except where other rules apply as described in OAR 660-004-0000(1).

(b) For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.

(c) An "applicable goal," as used in this rule, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken.

(2) Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception must therefore address the following:

(a) The characteristics of the exception area;

(b) The characteristics of the adjacent lands;

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

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

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

(a) Farm use as defined in ORS 215.203;

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

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

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

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

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

(a) Existing adjacent uses;

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

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

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

(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations;

(d) Neighborhood and regional characteristics;

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

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

(g) Other relevant factors.

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

OAR 660-004-0028(2)(a) and (b) (Characteristics)

9. The subject property is a 20.46-acre parcel located in the 2400 block of 62nd Avenue SE, Salem, Marion County, Oregon (TBS; R2.W; Section 04A; tax lot 2800). Applicant (Applicant's family) has owned the subject property since 1958. The property is located west of 62nd Avenue SE, south of Macleay Road SE, and north of Culver Drive SE. It is unimproved and has a small amount of frontage on an undeveloped right-of-way identified as Wickiup Street SE. The parcel is zoned SA, is currently being farmed with a cover crop, and is specially assessed for agriculture by the Marion County Tax Assessor's Office.

The site topography is generally flat, with a slight slope to the south. Soils on the subject parcel are composed of Amity (Am), Woodburn (WuA), Concord (Co), and Silverton (SuC) Class II and III silt loam soils that are defined as high value for agriculture. There is an electrical power line that runs along the eastern boundary of the subject property, and a small stand of scrub trees crossing the southern half of the parcel.

10. The subject property does not have water rights or a well for farm use. The subject property has a cover crop, but has not been actively farmed since 2005 because Applicant (and family) determined that it was not practical to farm the property. This determination was based upon conflicting uses with adjacent rural residential parcels, including trespass and damage to property from fires, size of the parcel, actual tillable acreage, and the presence of high voltage electrical power lines.

The lack of irrigation and unique location of the property amount neighboring residences, along with the testimony of Mr. Pfennig support the position that it is too onerous for Mr. Pfennig to continue the agricultural use of the land due to nearby nonfarm uses.

11. The subject property is surrounded by residential uses. The neighboring properties are primarily residential. There is a blueberry farm, Thank You Berry Much Farm at Tax

Lot 200 on Map 8.2W.04B. The parcel is not contiguous to the subject property. There is, however, a parcel that is adjacent to the property that Friends of Marion County argue is managed by Thank You Berry Much Farm. Applicant states that this adjacent lot, Tax Lot 3000, was sold to someone who immediately tore out over an acre of blueberries to site a new home. Applicant states that there has been no harvesting of blueberries from the adjacent land in 2020, 2021, or 2022. It is recommended that Applicant present current evidence about farming of blueberries in the immediate area, as well as any evidence tending to indicate that farming in the immediate area is decreasing as a result of the difficulties of farming in a residential area.

There are six parcels immediately adjacent to the east of the subject property between the property and 62nd Avenue SE. These parcels are all one acre or less, are zoned AR, and each contain a non-farm dwelling. To the south is a 2.93 acre parcel that is zone SA with a non-farm dwelling. Immediately adjacent to the west are four parcels that are all zoned SA that range from one-half acre to four acres in size. All of these parcels have non-farm dwellings. One of these parcels includes a blueberry operation, the size and scope of which is disputed. To the north of the property are two parcels owned by the Applicant that are 9.62 and 2 acres in size. These parcels are also zoned AR, and the 9.62 acre parcel includes a dwelling. These parcels were owned by Applicant prior to the acknowledgment of the Marion County Comprehensive Plan in 1987.

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

Most of the dwellings in the immediate vicinity of the subject property, in both the SA and AR zones, were built prior to the Marion County Comprehensive Plan, and are adjacent to a goal exception area. However, many of the larger parcels were partitioned into one to two acre residential lots after the acknowledgement of the MCCP.

The Oak Meadows Subdivision, which was platted in 1957, is a suburban residential subdivision of one-half acre lots, lies northwest of the subject property. The subject property is part of the Oak Dell Farm Subdivision which was platted in 1914 and includes hobby farms of less than twenty acres. Other parcels in the Oak Dell Farm were further divided to create the one-to-eight-acre rural residential lots located adjacent to 59th Avenue SE, between Macleay Road SE and Culver Drive SE.

12. In the original application, Applicant selected a study area on the basis of all the areas surrounding the subject property on the Assessor Maps. The study area included all property that encompassed 6.23 acres of agricultural, rural residential, and some commercial properties. Applicant notes that LUBA referred to the study area as being "large" but did not indicate how large a study area should be. In order to downsize the study area, Applicant considers only properties that are contiguous to the subject property. Applicant urges that the Department of Land Conservation and Development (DLCD), based on its interpretation of in the prior proceeding, *Scott v. Crook County*, 56

LUBA 691 (2008), that only contiguous properties be subject to the analysis. Applicant encourages that good land use planning requires a wider analysis that adjacent properties, Applicant defers to DLCD given the language of the LUBA remand. Applicant further states that OAR 660-004-0028 makes references to "adjacent uses." Applicant states that according to www.Merriam-Webster.com, "adjacent" means having a common border and includes "contiguous" as a synonym.

13. The focus of an irrevocably committed exception must be preponderantly on the adjacent properties, rather than any limitations inherent in the subject property itself. *Friends of Linn County v. Linn County*, LUBA (2002-176). Applicant submits an evaluation of existing adjacent uses. The study area includes 13 parcels that total 29.91 acres, for an average parcel size of 2.3 acres. Eleven of the thirteen parcels have houses, and one of those vacant parcels is owned by Applicant. Fourt of the parcels have the SA zoning and seven have the AR zoning. Only one parcel has farm tax deferral status. Applicant submits a chart (Applicant's Supplemental Justification on Remand) illustrating the status and use of adjacent properties. Applicant's chart shows that there is only one adjacent parcel in farm use. All but two of the adjacent parcels have existing dwellings and each of the dwellings were built prior to the application of comprehensive land use planning. Nine of the parcels have been zoned for Acreage Residential and four for Special Agriculture use. Only TL3000, with the small blueberry field qualified for farm tax deferral.

Applicant argues that the concern about the study area is resolved by use of the review of adjacent lands, but notes that the original study area stands for neighborhood and regional characteristics.

The selected study area is sufficient for the analysis required by OAR 660-004-0028(2). For purposes of the remand as it relates to OAR 660-004-0028, Applicant focuses on an evaluation of existing adjacent uses. This approach is reasonable given Applicant's description of the subject property as the "hole" of a doughnut – Applicant looks to the properties that create the "doughnut" around the subject property, the "hole." The physical features of the property and its uses, and the development pattern of the lands bordering the subject property support a determination that the study area is adequate to consider the property's relationship with adjacent lands.

14. The uses on adjacent properties irrevocably commit the subject property to nonresource use as supported by the statements submitted by Larry Pfennig. Larry Pfennig detailed both in his Affidavit and his testimony conflicts with surrounding uses that are not speculative: overspray, fire, trespass, and aquifer fragility caused by neighboring residential landscaping.

Further, Larry Pfennig does not and cannot rely on the subject parcel to support a commercial agricultural crop. Mr. Pfennig details that he lost an acre of property from irrigation overspray, he lost five acres of property from an actual fire caused trespass and use by surrounding neighbors, Mr. Pfennig details that neighbors have used the subject property to ride motorcycles. Because of the relationship with surrounding uses, not only can the subject property not support commercial agriculture, according to Mr. Pfennig, only a cover crop can be supported on the subject property with no expectation of any financial remuneration.

The size and location of the revised study area presented by Applicant complies with the mandates of OAR 660-004-0028 because it includes a thorough evaluation of adjacent and surrounding lands within a suitable geographic range. The testimony and declaration of Larry Pfennig addresses characteristics of the neighborhood, which in addition to the detailed examination of the study area shown in the analysis submitted in Applicant's Supplemental Justification on Remand, is sufficient to address the criterion.

Specifically, Mr. Pfennig details characteristics of the property that commit the subject property to nonresource use, including small size, lack of water rights for irrigation, access limitations, the presence of high voltage electrical power lines. However, the focus of the exception is with respect to the conflicts with the surrounding properties: irrigation and chemical overspray, trespass by neighbors and their animals, including motorcycles, and risk of fires.

Mr. Pfenning has planted cover crops on the subject property but has not obtained a financial benefit from doing so. Cover crops can be considered a sustainable agricultural practice that can benefit soil structure, pest and weed management. Mr. Pfennig's testimony that it is not cost effective to farm the property, and Mr. Pfennig stopped actively farming years ago. The presence of residential neighbors created economic challenges for Mr. Pfennig including increased costs of farming and increased risk of productivity. While Oregon has a Right to Farm law to protect farmers, Mr. Pfennig could face challenges and legal costs from impacts to residential neighbors.

It is recommended that Applicant provide additional evidence on the impact of the lack of irrigation and trespass by neighbors in his decision to stop farming, and proof that the neighbor's trespass is not the result of his not farming the subject property.

OAR 660-004-0028(2)(c) and (d) (Relationship to exception area and adjacent lands)

15. The LUBA Final Opinion and Order determined that the County misconstrued the law when it "declared the exception area irrevocably committed without undertaking the required analysis of adjacent lands." LUBA stated that the County explained that it determines whether the surrounding area irrevocably commits the subject property to nonresource use before it determines whether the relationship between the surrounding property make the resource use impracticable. LUBA directs that the 660-004-0028 factors must be analyzed before it is possible to conclude that the surrounding property commits the subject property to nonresource use.

OAR 660-004-0028(2)(c) and (d) require an analysis of the relationship between the exception area and the lands adjacent to it, and other relevant factors.

16. OAR 660-004-0028(3) states that local governments are not required to demonstrate that every use allowed by the applicable goal is "impossible." For exceptions to Goal 3, local governments are required to demonstrate that under OAR 660-004-0028(3)(a) that farm use as defined in ORS 215.203 is impracticable.

As used in that section, "farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. ORS 215.203(2)(a).

While there are other lands in farm use near the subject parcel, the "Thank You Berry Much Farm," there remains dispute whether there are adjacent lands currently in farm use.

Applicant originally stated that the subject property is not currently employed in any farm use, and has not been farmed for decades. In its written rebuttal, Applicant clarified that rather than a commercial crop, the subject property has had a cover crop for the past 20 years, maintained to retain the property's farm tax deferral status. However, there is no evidence that there has been any profitability from harvesting the property.

LUBA determined that to the extent that the County concluded that farming must be at a commercial scale in order to be protected, OAR 660-004-0028(2) and (6) do not include such a requirement. Again, OAR 660-004-0028(2) provides that it is the relationship with adjacent properties that is most relevant. While the characteristics of the proposed exception area must be examined, the focus of the irrevocably committed test is on the relationship between the exception area and adjoining uses, and why that relationship commits the subject property to uses not allowed by the applicable goals. *See Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489, 504-05 (2000).

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

Applicant submitted the Affidavit of Larry Pfennig, and Mr. Pfennig's testimony that indicates that the property has not been in commercial farm use since 2005, and that the reason for that is that farming for profit is not practicable based upon the trespass, overspray, irrigation issues, and the loss of acreage in the subject parcel as a result of these issues combined with the subject parcel's characteristics (size, tillable acres, lack of water rights and satisfactory irrigation).

To the extent that the Thank You Berry Much Farm is in current farm use, there is not sufficient evidence in the record to support a conclusive determination that the Thank You Berry Much Farm is actually adjacent to the subject property. Thank You Berry Much Farms is located at 5975 Culver Drive SE, Salem, Oregon. The actual, adjacent parcel at is located at 5989 Culver Drive. Applicant states that this is the adjacent property upon which over an acre of blueberries were removed and no harvest occurred in 2020, 2021, and 2022, which was supported by photographs submitted in Applicant's Open Record Submittal. Friends of Marion County (September 22, 2022 submission) states: "Our research shows that the expanded area could be used to grow another farm crop" and "no evidence that the property is irreparably damaged by the construction of the new dwelling and septic drain field." Friends of Marion County posit that there are other crops that would retain a high return on investment, including hazelnuts. While these suggestions are possible, what could be done on an adjacent (contiguous) property upon which there does not appear to be actual current farm use, is not the focus of the inquiry. The evidence submitted by Applicant supports a determination that contiguous properties are not in farm use.

OAR 660-004-0018(2)(b)(B)

17. OAR 660-004-0018(2)(b)(B) requires that the proposed exception will not commit adjacent or nearby resource land to uses not allowed by Goal 3.

The property is 20.46 acres in size and is the largest parcel among the SA zoned properties located between Macleay Road SE and Culver Road. According to Tax records, in 2002 the property was being farmed for grass seed. Since 2005, the parcel has been planted in cover crop, but has not been actively farmed since that time. Nearly all of these farm-zoned properties in the adjacent area are currently specially assessed as farmland by the Assessor and are in various types of agricultural production.

Most of the dwellings in the immediate vicinity of the subject parcel, in both the SA zone and the AR zone, were built in the 1960s and early 1970s and review of historical air photos show that use of the farmland has not changed since the area was first developed. The subject parcel is adjacent to Goal Exception Area 21.1 - Macleay, identified in Appendix A of the Marion County Comprehensive Plan. This exception area was already developed with small residential lots at the time the Comprehensive Plan was acknowledged in 1987, although many of the larger parcels were partitioned during the 1980s and 1990s into one-to-two-acre residential lots. Oak Meadows Subdivision, composed of 59th Avenue SE, Tumalo Drive SE and Wickiup Street SE, was platted in 1957 as a suburban residential subdivision of one half acre lots. Oak Dell Farm Subdivision was platted in 1914 and composed of ten 16 to 20 acre hobby farm parcels. The subject parcel is a part of Oak Dell Farm, located at the western edge. The other parcels in Oak Dell Farm were later further divided to create the one-to-eight-acre rural residential lots located adjacent to 59th Avenue SE and east, between Macleay Road SE and Culver Drive SE/ Ganon Street SE, as can be seen on the Exception Area map. The parcel directly north of the subject parcel was originally a portion of Lot 1 of Oak Dell

Farm and later included in the exception area because it was located in between the residentially developed areas of Oak Meadows and Oak Dell Farm, located on the south side of Macleay Road SE. This property has been owned by Applicant since acknowledgement of the Marion County Comprehensive Plan in 1987, and was partitioned in 2007 and again in 2015.

The original study area is considered with respect to whether the exception and implementing zone change would broaden the extent of acreage residential properties.

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

Of the seven properties west of the subject property on assessor's map 8-2W-04A, two are in farm deferral. Five of the seven are zoned SA, with the other two zoned AR. Moving farther west in Applicant's study area to assessor's map 08-2W-04B, the tax lot immediately west of the blueberry operation, TL 200, is also in farm deferral. Three other tax lots on this map are in farm deferral, and one is in partial deferral. There is insufficient evidence of why the lots are in farm deferral without being actively farmed. However, A property may be in farm deferral because of its zoning and meeting income requirements, even if the lots are idle. The majority of the properties on this map are zoned SA, with the exception of property across Culver Road, which is inside the Salem- Keizer UGB and is zoned IBC (Industrial Business Campus) (TL 700 is zoned SNAR, and Applicant lists "no information available" for TL 500).

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

The land outside the Macleay Exception Arca in all directions was being farmed in the 1980s, when the Comprehensive Plan was acknowledged, and continues to be farmed. Applicant states that the rural residential properties in the adjacent Exception Area irrevocably commit the subject property to non-resource use. Again, Applicant argues that the property is akin to the hole of a doughnut, and based upon the location and lack of irrigation, it is reasonable to consider that this property is committed to nonresource use. The dwellings adjacent to the subject property were built in the early 1970s and the subject parcel has not been actively farmed for decades. Public water and sewer service is not available on the subject property nor could it be provided to the property.

It is essential to this inquiry that Applicant seeks the exception and implementing zone change to allow two parcels of over ten acres; significantly larger than any of the adjacent properties.

The size of the proposed parcels will retain the rural character of the lands and surrounding areas.

Numerous properties in the area are small lots on less than two acres of property. These properties are privately owned, and not available for or in agricultural production. In the study area, there are no true farms adjacent to the subject property. There is conflicting evidence of a blueberry farm operation and whether the blueberry farm is operating on adjacent property. Allowance of the two ten-acre parcels, again significantly larger than all adjacent properties, will not cause a change on the resource land in the area or change the rural character of the surrounding area.

If the subject parcel is approved for a zone change to Acreage Residential, the remaining farm parcels to the west and south will not be at any greater risk of impact from increasing rural residential densities. Opponents argue that removal of the largest farm parcel in that area will reduce the potential for the adjacent farmland to be farmed as a conglomerate. At 20.46 acres, the subject parcel is the largest of the farm parcels located between the Acreage Residential-zoned lands in Exception Area 21.1 and North Santiam Highway and the Salem-Keizer Urban Growth Boundary, providing a buffer between the residential development and the smaller farm parcels to the west and south of the subject parcel. If the subject parcel were to be converted to two ten-acre rural residential lots, the Special Agriculture-zoned farmlands to the west and south would not be at any greater risk of being irrevocably committed to residential use. Larger properties being farmed are too far away to be committed to non-farm use by the proposal.

The proposal meets the criteria for an irrevocably committed exception in OAR 660-004-00028.

STATEWIDE PLANNING GOALS

18. The proposal to amend the Comprehensive Plan must be consistent with the Statewide Planning Goals or seek exemptions to them. The relevance of each goal in this proposal is addressed below.

Goal 1: Citizen Involvement. The notice and hearings process provides an opportunity for citizen involvement. The goal is satisfied.

Goal 2: Land use Planning. The subject application would change the zoning. The Hearings Officer makes a recommendation to the Marion County Board of Commissioners who will make the decision on behalf of the County. Marion County Planning division requested comments from various governmental agencies, and their comments are included. The goal is satisfied.

Goal 3: Agricultural Lands. Applicant seeks an exception, which is addressed in detail herein.

Goal 4: Forest Lands. Since the property is within an incorporated community and are not in MCCP identified forest lands, this goal no longer applies.

Goal 5: Open Spaces, Scenic and Historic Areas and Natural Resources. The Marion County Comprehensive Plan does not identify any significant open spaces, scenic and historic areas and natural resources on the subject property. The goal does not apply.

Goal 6: Air, Water and Land Resources Quality. The subject property is not within an identified air quality area. There is no indication that the property isin the sensitive groundwater overlay zone. The goal does not apply.

Goal 7: Areas Subject to Natural Disasters and Hazards. The subject property is not within an identified floodplain or geologic hazards area. This goal does not apply.

Goal 8: Recreation Needs. No recreational uses of the property are proposed in conjunction with this application. The goal does not apply.

Goal 9: Economic Development. Because this goal focuses on commercial and industrial development, primarily within an urban growth boundary, it does not apply to this proposal.

Goal 10: Housing. This goal applies to housing within an urban growth boundary and, therefore, does not apply to this proposal.

Goal 11: Public Facilities and Services. The subject parcel can be served by a well, and with a showing of feasibility, no urban water service would be necessary. A condition requiring septic permitting would eliminate the need for urban wastewater services. Goal 11 could be satisfied.

Goal 12: Transportation. Goal 12 is implemented through OAR 660.01200060. With an easement to use Whispering Way, the proposed parcels would be served by a single driveway onto Macleay Road. Applicant has also provided alternative access points. This goal can be satisfied with conditions of approval.

Goal 13: Energy Conservation. The energy use of the property will be minimal with the proposed use. This goal is satisfied.

Goal 14: Urbanization. This goal is to provide for an orderly and efficient transition from rual to urban land use and to accommodate an urban population. Applicant modified the request for the AR-2 zone to the AR-10 zone. Because 10 acres are not considered urban in nature, the requirement for a Goal 14 Exception is eliminated, and Goal 14 is satisfied.

Goals 15-19 are not applicable because the subject property is not within the Willamette River Greenway, or near any ocean or coastal-related resources.

19. OAR 660-004-0040(8)(i)(B) permits zoning with as low as a two acre minimum parcel size to be applied to property designated as rural residential after October 4,

2000, if an exception to Goal 14 is taken. The minimum lot size adopted by the county must also be consistent with OAR 660-004-0018.

20. OAR 660-014-0030: The applicants calculate the average parcel size in the adjacent Acreage Residential area to be 3.45 acres and the median parcel size to be 2 acres. In 2000, DLCD determined that parcels two acres and greater on rural residential land existing at that time was considered rural. Parcels smaller than two acres were determined to be urban. Since the average parcel size of the adjacent Acreage Residential land is greater than 2 acres, it appears to still be rural in nature. Since adjacent lands are still considered to be rural based on DLCD's rules, that land cannot commit the subject property to urban development. This exception would appear to apply in other circumstances, such as rural residential development in subdivisions with existing smaller than two acres parcel sizes which DLCD determined to be urban in nature. This circumstance may commit a nearby property to an urban level of development and permit a lot size of less than ten acres to be applied. This proposal retains the rural residential character as the two ten-acre parcels are significantly larger than all adjacent properties.

COMPREHENSIVE PLAN AMENDMENT

21. All Comprehensive Plan changes are subject to review by the State Department of Land Conservation and Development (DLCD). DLCD was notified as required by State Law and Irrevocably committed exception must demonstrate compliance with OAR 660-004-0018(2), which addresses planning and zoning for exception areas. Specifically, the applicant must demonstrate that approval of the exception meets the following requirements: The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and the rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses; and the applicant should address whether future residential uses will irrevocably commit adjacent lands zoned Special Agriculture and how it will be compatible with adjacent farm use. It is insufficient to rely on current compatibility with adjacent farm uses since the use of the subject property is proposed to change to residential.

The Marion County Comprehensive Plan (MCCP) establishes procedures to be used when considering plan amendments. Plan changes directly involving 5 or fewer properties will be considered a quasi-judicial amendment. The amendment will be reviewed by the zone change procedures established in MCC 17.123. A plan amendment of this type may be processed simultaneously with a zone change request with the zone change procedure outlined in Chapter 123 of the MCRZO. The subject property is comprised of one parcel of land and the proposal can therefore be considered under the quasi-judicial amendment process.

The proposal must be consistent with applicable polices for Rural Residential developed contained in the comprehensive plan. These policies include:

a. *Since there is a limited amount of area designated Rural Residential efficient use of these areas shall be encouraged. The minimum lot size in Rural*

Residential areas existing on October 4, 2000, shall not be less than 2 acres allowing for a range of parcel sizes from 2 to 10 acres in size unless environmental limitations require a larger parcel. Areas rezoned to an Acreage Residential zone after October 4, 2000, shall have a 10 acre minimum lot size unless an exception to Goal 14 (Urbanization) is granted.

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

c. *All residential uses in rural areas shall have water supply and distribution systems and sewage disposal systems which meet prescribed standards for health and sanitation.*

The applicant is proposing to rezone the subject parcel to an Acreage Residential zone with a minimum lot size of less than 10 acres. A Goal 14 exception is not required.

The proposal appears to be consistent with the Rural Residential policies in the Marion County Comprehensive Plan.

ZONE CHANGE CRITERIA

22. Applicant seeks a zone change from SA (Special Agriculture) to AR (Acreage Residential). The criteria for a zone change are found in the Marion County Code Chapter 17.123.060:

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

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

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

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

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

zoned for less intensive uses.

23. The proposed zone is appropriate for the Rural Residential Comprehensive Plan designation proposed by Applicant. Applicant has provided sufficient evidence to support a determination that the proposal is consistent with all applicable MCCP goals and policies. MCC 12.123.020(A) is met.

Applicant's study of surrounding land uses, density, and pattern of development in the area is discussed above, and the findings are incorporated here. The zone change is appropriate considering the surrounding land uses and the density and pattern of development in the area. MCC 12.123.020(B) is met.

LDEP included permitting requirements. Applicant has proven that public facilities at a rural level of development are either in place or can be obtained through the permitting process as commented by LDEP. MCC 12.123.020(C) is met.

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

MCC 12.123.020(D) can be met with an analysis of other lands that are unavailable or not well suited.

The six parcels immediately adjacent to the east of the subject property are one acre or less and are zoned AR. Applicant owns two parcels to the north that are 9.62 and 2 acres in size and are both zoned AR. Properties to the north and east are mostly zoned AR and are developed with rural residential lots. The proposed AR-10 zoning would be compatible with adjacent properties. Any adjacent SA-zoned properties would not likely be impacted by the proposed rezoning. With current code requirements, such as special setbacs, the proposed zone would not allow uses that would significantly adversely affect allowed uses on adjacent properties zoned for less intensive uses. MCC 12.123.020(E) is met.

The applicants address the zone change criteria and the proposal appears consistent with the density and pattern of development on nearby land zoned Acreage Residential. A zone change approval is recommended.

PARTITION

24. There are no specific approval criteria for partitions in the AR zone. MCC 17.128.070 requires a minimum lot size of two acres.

The two proposed new parcels will each be at least ten acres each and are consistent with this standard. In addition, the resulting undeveloped parcels, if they can obtain septic approval, appear to be of sufficient size and shape to meet the development standards in the AR zone. The access proposed for the initial two-acre lots would be via Whispering Way SE, a private easement serving two lots to the north of the subject parcel.

25. MCC 17.128.050 establishes special siting standards for dwellings near resource

zones:

(a) *Any new dwelling in an AR zone shall be required to maintain a special setback from any parcel in the EFU, SA, FT, or TC zones when necessary lo minimize potential conflicts with farm or forest uses. A 100-foot setback is the standard adjacent for farm use and 200 feet is the standard adjacent to forest uses.*

(b)

(c) *The owner of a proposed dwelling to be located within 500 feet of the EFU, SA, FT, TC zones shall be required to concur in the filing of the Declaratory Statement prescribed in the respective resource zone.*

Planning requests a special setback of 300 feet. A special setback can be applied to any approval. Planning does not provide justification for why such a large setback is requested. Applicant opposes the imposition of a 300 feet setback based upon the size of the parcel. Applicant objects to a 300-foot setback because it greatly reduces the building envelope for any new dwelling. There is a 125-foot-wide power easement that runs along the eastern boundary and necessarily limits any construction in that area. Setbacks are determined from property lines, not easements, but the 125 foot easement ensures a sufficient setback from the eastern boundary. Applicant states that the property is just over 500 feet in total width.

Given the limitations of the subject property, and insufficient factual support for an setback of 200 feet over the standard setback, the standard 100 feet setback is appropriate.

26. MCC 17.128.050 requires that a Declaratory Statement be recorded with the property deed because the subject property is near a resource zone. This serves to notify the applicant and subsequent owners that there are farm or timber operations in the area. Any approval can be conditioned to meet this criterion.

27. Both parcels would appear to have access to an existing private easement; therefore, no new easement should be required.

VII. Recommendation

It is hereby found that Applicant has met the burden of proving the applicable standards and criteria for approval to change the comprehensive plan designation from Special Agriculture to Rural Residential and to change the zone from SA (Special Agriculture) to AR-10 (Acreage Residential), on a 20.46 -acre parcel, then partition that parcel into two lots of 10 and 10.46 acres, located in the 2400 block of 62nd Avenue SE, Salem (T8S; R2W; Section 4A; tax lot 2800).

Therefore, the Hearing Officer recommends that the Marion County Board of Commissioners **GRANT** the Application subject to the following conditions that are necessary for the public health, safety, and welfare:

A. The applicant shall submit a final partition plat to the County Surveyor's

Office (5155 Silverton Road NE; (503) 588-5036) and shall contain the notation that the survey is the result of Partition Case 19-001. Following plat approval it shall be recorded with the Marion County Clerk.

B. Prior to submitting the final partition plat, the applicant shall obtain an approved septic site evaluation from the Marion County Building Inspection Division on all undeveloped parcels. The applicant is strongly encouraged to contact Building Inspection, (503) 588-5147, regarding septic sites before having the property surveyed. Septic site requirements may affect the proposed property line or lot locations.

C. The applicant is advised that a Partition Plant Service Report from a title company will be required upon submission of the final mylar to the County Surveyor.

D. Prior to recording the plat all taxes due must be paid to the Marion County Tax Department (contact the Marion County Tax Department at 503-588-5215 for verification of payments).

E. On the plat, show sufficient right-of-way dedication to serve the future AR-10 lots.

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

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

Prior to issuance of building permits on the resulting parcels:

H. The partition plat shall be recorded.

I. The applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. This statement shall be recorded by the applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director.

J. Any dwelling shall maintain 100-foot setback from land in farm use to the west and southwest.

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

L. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits, per Marion County Ordinances #00-1 OR and #98-40R, respectively.

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

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

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

P. The resulting parcels shall significantly conform to the site plan submitted with the proposal. Minor variations are permitted upon review and approval by the Planning Director. All parcels shall be a minimum ten acres in size, prior to any right-of-way dedication.

Q. It is recognized that the final partitioning may vary from the proposed plan due to topography or surveying. Minor variations are permitted; however, each resulting parcel shall be a minimum 10.0 acres prior to any required right-of-way dedication.

R. After the final Partition plat has been recorded no alteration of property lines shall be permitted without first obtaining approval from the Planning Director.

S. The applicant should contact Marion County Fire District to obtain a copy of the District's Recommended Building Access and Premise Identification regulations and the Marion County Fire Code Applications Guide. Fire District access standards may be more restrictive than County standards.

T. The applicants should contact Marion County Land Development and Engineering (503-584-7714) for additional Engineering Requirements and Advisories that may be required.

VIII. Referral

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

DATED at Salem, Oregon, this 2nd day of June, 2025.

Jill F. Foster

Jill F. Foster
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Larry Pfenning
4764 Bradford Loop SE
Salem, OR 97302

Roger Kaye
Friends of Marion County
PO Box 3274
Salem, OR 97302

Wallace W Lien
1004 Crescent Dr. NW
Salem, OR 97304

City: Salem *(via email)*
apanko@cityofsalem.net

Area Advisory Committees *(via email)*
laulehines@gmail.com

Roger Kaye *(via email)*
rkaye2@gmail.com

Friends of Marion County
P.O. Box 3274
Salem, OR 97302

1000 Friends of Oregon
133 SW 2nd Ave
Portland, OR 97204-2597

Pudding River Watershed Council *(via email)*
anna@puddingriverwatershed.org
cleanpuddingriver@gmail.com

County Agencies Notified:
Assessor's Office *(via email)*
assessor@co.marion.or.us

Tax Collector *(via email)*
NMcVey@co.marion.or.us
ADhillon@co.marion.or.us

Surveyor's Office *(via email)*
KInman@co.marion.or.us

Fire District: *(via email)*
salemfire@cityofsalem.net

Planning Division *(via email)*
breich@co.marion.or.us
abarnes@co.marion.or.us
jspeckman@co.marion.or.us
ediaz@co.marion.or.us

Building Inspection *(via email)*
pwolterman@co.marion.or.us
Kaldrich@co.marion.or.us
CTate@co.marion.or.us

Public Works LDEP Section *(via email)*
jrasmussen@co.marion.or.us
mcldep@co.marion.or.us
JShanahan@co.marion.or.us

School District: *(via email)*
Fridenmaker_david@salkeiz.k12.or.us

Code Enforcement *(via email)*
CGoffin@co.marion.or.us

State Agencies Notified: *(via email)*
hilary.foote@state.or.us
sarah.marvin@state.or.us
angela.carnahan@state.or.us
pwingard@dled.satet.or.us

By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 2nd day of June, 2025 and that the postage thereon was prepaid.

Administrative Assistant to the
Hearings Officer