FRIENDS of MARION COUNTY

August 11, 2025

Marion County Planning Division
5155 Silverton Rd., NE
Salem, OR 97305

RE: ZC/CP/P 19-005(Pfennig)- Request for Denial

To Marion County Planning Division:

Friends of Marion County is an independent 501(c)(3) farmland protection organization founded in 1998. Our mission is to protect farm and forestland, parks, and open space in Marion County.

Friends of Marion County (FoMC) opposes and requests denial 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).

For the above referenced application, please accept the following as written comments on behalf of Friends of Marion County (FoMC).

Agriculture is a critically important component of Marion County's economy. Each year, Marion County's more than 2,400 farms produce more than $874 million worth of agricultural products. (2022 Census of Agriculture, USDA National Agricultural Statistics Service.) These farms employ more than 10,000 people, harvesting the wide-variety of fresh food, fibers, and seeds that nourish and supply our county, our state and the nation. (*Id.*)

Protecting agricultural land in Marion County is crucial to preserving these benefits and this vital industry. Because of the concerns we outline below, FoMC urges the Board of Commissioners to reject the recommendation of the Hearing Officer and to instead deny the Comprehensive Plan Amendment, Zone Change, and Partition Request (Application) submitted by Larry Pfennig (Applicant).

This application is before the Board following a remand from the Land Use Board of Appeals (LUBA). FoMC asked LUBA to review Marion County's prior approval of this application because the County's decision had both misconstrued the applicable law and made findings that were not supported by substantial evidence. LUBA agreed with FoMC on all counts. Of particular note is LUBA's

finding on page 29 of its decision: "The evidence in the record is that *the allegedly conflicting rural residential uses have been long present in the area*, *the subject property is currently farmed* and adjacent to property currently being farmed, *other farm use occurs in the study area*, and *no relevant, imminent land use change in the area has been identified*." (emphasis added) Furthermore, LUBA found the County had not supported its conclusion that an exception on the subject property would not commit other resource land to nonresource use.

The Applicant's additional information submitted on remand does not alter the conclusions LUBA expressed above. If the County follows a correct application of the law, an irrevocably committed exception cannot legally be approved on the subject property.

The Application should be DENIED by the Board because the Application does not comply with OAR 660-004-0028. The Applicant has still failed to provide the evidence or analysis required by OAR 660-004-0028(2). *See Friends of Marion County v. Marion County* (Pfennig), (LUBA No 2021-043, Opinion, Nov 22, 2021) (slip op 10) (citing cases and explaining required analysis) (*"Pfennig I"*).

a. Study Area

In order to secure an irrevocably committed exception to Goal 3, the Applicant must demonstrate that existing adjacent uses and other relevant factors make farm use impracticable. ORS 197.732(2)(b). As such, the Applicant and the County must determine what the existing adjacent uses are. In the original Application, the Applicant selected a "study area" to examine the uses in the study area, relying on average parcel size and other characteristics. But the Applicant did not explain *why* the selected study area was sufficient for purposes of the analysis required by OAR 660-004-0028(2) or (6). As such,LUBA found that the County had failed to find that the selected study area appropriately informed the required evaluation of the relationship between adjacent lands and the subject property, and other relevant considerations such as neighborhood and regional characteristics. *Pfennig I* at 12. The Applicant also "fail[ed] to analyze the relationship between the adjacent lands, the study area, and the subject property." *Id.* LUBA explained that the prior decision failed to comply with OAR 660-004-0028(2)(c) and (d) as well as OAR 660-004-0028(6)(d). *Pfennig I* at 13-14.

LUBA noted that the decision "fails to explain the study area's relationship, other than geographic, to the proposed exception area—that is, why it is an appropriate neighborhood or region for study." *Id.* at 14; *see id.* n4. The Applicant's submission on remand does not correct those errors. The Hearing Officer's Recommended Finding 14 claims that the declaration from the Applicant includes a thorough evaluation of adjacent and surrounding lands within a suitable geographic area. But the Hearing Officer goes on to state that there remains dispute about whether there are adjacent lands currently in farm use. As such, the purported "thorough examination" appears to be incomplete.

Furthermore, the Hearing Officer's Recommended Finding 13 appears to be an attempt to address LUBA's finding that the County and Applicant failed to address why the selected study area was sufficient. The Applicant now claims the subject property is the "hole" of a doughnut, so the study area appropriately comprises the properties creating the "doughnut" around the "hole." But this bakery metaphor does nothing to remedy the insufficiency identified by LUBA. The doughnut-hole analysis is simply geography again, which LUBA has already found insufficient. The Applicant has failed to actually explain the relationship of the study area to the subject property. Instead, the Applicant argues that only "contiguous" properties must be considered, which misstates the law and has already been rejected by LUBA. The Applicant and the Hearings Officer have erroneously excluded nearby properties engaged in farm use, which when properly included, indicate that farm use remains viable in the area, and that approving an exception on the subject property could threaten the continuation of farm practices on those properties.

b. Conflicts with Properties in the Study Area

The Hearing Officer's Recommended Finding 14 states that the uses on adjacent properties irrevocably commit the subject property to nonresource use. That Finding is unsupported and should not be adopted by the Board. On review of the prior approval, LUBA determined that potential, hypothetical, or speculative conflicts are not sufficient. *Pfennig I* at 14-15. That is all the Applicant has put forward here. Many of the nearby properties are currently in farm tax deferral, contain farm uses, or are capable of supporting a farm use. FoMC previously submitted ample evidence of examples of farms on small lots. Moreover, the Applicant does not identify any "recent or imminent changes affecting the subject property" that would change that historic relationship. *Id.* at 23.

The Applicant and the Hearings Officer rely on speculation and possibility of potential conflicts. The Hearing Officer's Recommended Finding 14 concludes the following conflicts are supported by the Applicant's testimony and are not speculative: overspray, fire, trespass, and aquifer fragility.

But the Applicant's testimony does not describe any actual conflicts that occur between the subject property and nearby residential uses. There is no doubt that conflicts between residential use and farm use can and do occur in Oregon. However, the Applicant's material still fails to identify any conflicts that actually occur between the nearby properties and the subject property. The Applicant also does not explain that there are any actual conflicts, how or why those came about, or why they make farm use impracticable on the subject property. Again, the subject property and many nearby properties are currently being farmed.

The Applicant fails to explain what characteristics of the nearby properties make farming the subject property impracticable. The Applicant and the Hearings Officer misinterpret OAR 660-004-0028(2) and (6). The term "adjacent lands" can include more than just "adjacent parcels." The Applicant cannot ignore the characteristics of nearby parcels that support farm use or the overall zoning and development pattern of the immediate area. There is a banana shaped pattern of AR zoned land to the east of the subject property and then a grouping of properties zoned for agricultural use to the west. Nearby properties to the west currently receive farm tax deferrals and are capable of supporting farm uses. OAR 660-004-0028(2) and (6) does not permit the Applicant and the County to ignore the characteristics of non-adjacent parcels. There is no direction from LUBA to the contrary.

Among other factors, the Applicant and the County must evaluate and explain parcel size and ownership patterns of the exception area and adjacent lands. OAR 660-004-0028(6)(c).Specifically, "[o]nly if development... 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." *Id.* (6)(c)(A). The parcel size and ownership patterns "shall be considered together in relation to the land's actual use." *Id.* (6)(c)(B). For example, "[t]he mere fact that small parcels exist does not in itself constitute irrevocable commitment." *Id.* In this case, the pattern of development and grouping of adjacent residential development on 62nd Ave does not support an irrevocably committed exception.

The mere presence of residential uses on properties adjacent to the subject property does not demonstrate that the proposed exception area is irrevocably committed to non-farm uses. *Wodarczak v. Yamhill County*, 34 Or LUBA 453 (1998). Although adjacent to the AR zoned properties, the subject property is separate from those properties in that it does not share a common roadway or access with the smallest of those parcels. In other words, the existence of the local roadways, and the pattern of zoning and development along those roadways does not irrevocably commit the subject property to non-farm use. The existing development pattern is stable and separate from the subject property because of the location of SE 62nd Ave. Absent this exception and expansion of roadways required to access the new lots, the existing residential development adjacent to and near the subject property is not capable of expanding further in a manner that would make farming the subject property impracticable.

The Applicant's rationale in the remand submission and the statements in the affidavit and declaration are inadequate to support a finding that the property is irrevocably committed to non-farm use. The applicant has not identified any actual issues or conflicts that make the property "not good ground" for farming. The property is currently being farmed and has been for many years in the past. The ground is good enough to support an ongoing farm use, the cover crop, despite the potential for the conflicts mentioned by the Applicant. The property is being farmed despite the presence of a high voltage transmission line and is being farmed beneath the power line itself.

The Applicant's materials explain that Larry Pfennig "has been a life long farmer in and around the area." However, the testimony provided by Mr. Pfennig and Mr. Lien, the applicant's attorney, is not specific to the subject property or nearby properties. The water conflicts are all potential or hypothetical conflicts. Neither Mr. Pfennig nor Mr. Lien's testimony establishes that actual conflicts between residential well use and agricultural use of the property have occurred or are likely to occur in the future. Neither Mr. Pfennig nor Mr. Lien are hydrologists or purport to have any knowledge of water availability in the surrounding area.

Mr. Pfennig farms for himself on an unnamed number of properties and also has "contracted out [his] equipment and services to other land owners for farming services." Mr. Pfennig fails to explain what conflict he mentions have actually occurred on the subject property or how those conflicts rise to the level of making the subject property impracticable for farming. It is not clear the extent to which things like sprinklers or residential chemical spray or BBQs actually affects the farm operation, its potential profitability, or productivity. Mr. Pfennig's testimony is general in nature and does not mention specific events or specific neighboring properties. Neither does Mr. Lien's testimony. For example, Mr. Lien asserts that residential chemical spray "can pollute farm crops as far as 20 or 30 feet away," but this is all speculation. Neither Mr. Lien nor Mr. Pfennig point to any evidence that such an event has actually occurred or its effect on the farming operation on the subject property. The property has been actively farmed, and as Mr. Lien states, any conflicts "have not been discovered." Even if non-speculative conflicts had been identified, the fact that existing developments may make farm practices challenging on a given property does not show that the adjacent development has made farm operations impracticable.*Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000). The Applicant has failed to meet the burden of demonstrating that farm use is impracticable, and as such, the record does not contain substantial evidence to support a finding that the relationship between the subject property and adjacent uses irrevocably commit the subject property to nonresource use.

c. Capability of Farm Use

LUBA also found that the Applicant and the County misconstrued OAR 660-004-0028, ORS 215.203(2)(a) and the requirement to determine whether the property is capable of farm use. *Pfennig I* at 16-18. Again, the Applicant's submission on remand does not correct those errors. FoMC disagrees with the Applicant that LUBA failed to address "substantive compliance" with the applicable criteria. LUBA did address the substance of the County's findings and the Applicant's evidence and found that it was lacking. The subject property currently supports a farm use and has done so for many years without conflict. *Pfennig I* at 19 ("The current farm use of the property as well as the adjacent blueberry farm suggest that farm use of the subject property is not impracticable."). The Applicant did not challenge the findings that established the historic lack of conflict between the subject property and nearby lands zoned for

residential use. *See e.g. Pfennig I* at 22-23. Subject to law of the case, those findings are not subject to review or challenge on remand.

Even if the Applicant was permitted to challenge this finding, the Applicant admits that the subject property is planted with a cover crop, which is a farm use. There have been no reports of the field burning or crops being lost because of any of the activities mentioned by the Applicant and repeated by the Hearings Officer. Mr. Pfennig states that these things have occurred, but he also makes clear that a different farmer farms the subject property. Mr. Pfennig states that he is not present on the property to actually witness these potential impacts. Moreover, the farm use has continued despite these potential conflicts. Mr. Pfennig's testimony is self-serving as he stands to gain a significant financial benefit from developing the property. Moreover, his testimony and opinion conflicts with the fact that the property has been and continues to be farmed. The farmer who plants and harvests the property continues to do so, which shows that farming the property continues to be a practicable and worthwhile endeavor. The conflicts presented by the Applicant and his attorney simply do not rise to the level of irrevocably committing the property to non-farm use.

d. Effect of Zone Change on Neighboring Properties

Finally, the Applicant does not adequately address how the change in proposed zone to AR-10 complies with OAR 660-004-0018(2)(b) or is consistent with the Applicant's conclusions related to OAR 660-004-0028(2).

The Hearing Officer's Recommended Finding 17 purports to address this requirement of the OAR. The Hearings Officer finds that because the two resulting parcels from the Application are larger than all the adjacent properties, the zone change would not cause a change on the resource land in the area or change the rural character of the surrounding area. But this recommendation entirely misses the point of OAR 660-004-0018(2)(b)(B).

The Applicant is here before the Board claiming that the fact that the subject property is near residential uses makes the subject property impracticable to farm. But if the Application is approved, the subject property will now be one of the "residential uses" making it impracticable for the farms near the subject property to continue. The Applicant and the Hearings Officer nowhere explain how the supposed impacts of residential use will not cascade to nearby properties if the County allows the exception. *See Pfennig I* at 27-28 (citing and explaining OAR 660-004-0018(2)(b)(B).

The Applicant proposes, and the Hearings Officer apparently accepted, that the AR-10 zone would provide a better buffer. However, the Applicant fails to explain why any buffer is needed. What the applicant still fails to explain is how the residential uses to the east of the subject property somehow commit the property to non-farm use, but why residential use of the exception area will not commit the properties to the west to non-farm use. How would additional residential use not replicate the potential conflicts

claimed by the Applicant on the properties west of the subject property? The impacts associated with residential use would be replicated and reproduced.The Applicant cannot have it both ways. Either neighboring residential use commits a property to non-farm use, in which case, this Application violates OAR 660-004-0018(2)(b)(B), or it doesn't, in which case, these is no basis for an exception on the subject property. Either way, the Application should be denied.

e. Conclusion

Finally, the Hearing Officer's Recommendation includes numerous instances of recommending that the Applicant provide additional information to support the Application. Should the Applicant provide additional information at or shortly before the Board Hearing, FoMC requests that the record be left open in order to provide FoMC with an opportunity to respond to any additional information submitted by the Applicant prior to the Board's final decision.

Thank you for the opportunity to comment on this application.

Roger Kaye, President
rkaye2@gmail.com
503-743-4567