



THIRD SUPPLEMENTAL AGENDA COVER MEMO

Memorandum Date: November 15, 2024
Ordinance First Reading Date: September 24, 2024
Ordinance Second Reading/Public Hearing: October 15, 2024
Ordinance Third Reading Date: December 3, 2024

TO: Board of County Commissioners
DEPARTMENT: Land Management Division, Planning
PRESENTED BY: Shawna Adams, Senior Planner
AGENDA ITEM TITLE: THIRD READING & DELIBERATIONS/ ORDINANCE NO. PA 1387/ In the Matter of Amending the Rural Comprehensive Plan to Redesignate Land From “Agricultural” to “Residential”; Rezoning That Land From “E-25/Exclusive Farm Use” to “RR-10/Rural Residential”; and Taking an “Irrevocably Committed Exception” to Statewide Planning Goal 3; and Adopting a Savings and Severability Clause. (Planning Action File No. 509-PA20-05634; Applicant: Perkins) (PM & NBA 8/1/2023, 10/31/2023, 12/5/2023, 9/24/2024, 10/15/2024)

I. MOTION

December 3, 2024 (1:30 PM): ALTERNATIVE MOTIONS:

A. MOVE TO APPROVE AND ENACT ORDINANCE NO. PA 1387 AS PRESENTED

OR

B. MOVE TO SET A FOURTH READING. DIRECT THE APPLICANT’S AGENT OR STAFF OR BOTH TO MODIFY THE DRAFT FINDINGS IN SUPPORT OF APPROVAL AS DIRECTED BY THE BOARD. DIRECT STAFF TO REVISE ORDINANCE NO. PA 1387 FOR THE BOARD’S CONSIDERATION AND ACTION ON (DATE CERTAIN), 1:30 PM IN HARRIS HALL

OR

C. MOVE TO TENTATIVELY DENY THE PROPOSAL UNDER PLANNING ACTION FILE NO. 509-PA20-05634 AND DIRECT STAFF TO PREPARE AN ORDER WITH APPROPRIATE FINDINGS FOR FINAL ACTION

II. AGENDA ITEM SUMMARY

On October 15, 2024, the Board passed a motion setting a third reading for Ordinance PA1387 and directing staff to revise the Ordinance and findings in support of approval for Board consideration on December 3, 2024, at 1:30 PM. This matter sets the revised Ordinance and findings before the Board according to the Board's directive.

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

This privately initiated plan amendment and zone change proposal was initially brought before the Lane County Planning Commission (LCPC) to hold a public hearing and make a recommendation for Board Action. On February 21, 2023, the LCPC passed a motion to forward a recommendation for denial. Commissioners opposed concluded that the application does not meet the standard for an irrevocably committed land exception, in that the record does not lead to the conclusion that farm use of the subject property is impracticable or that the relationship between the subject property and nearby parcels impedes resource use.

The matter was brought before the Board to conduct a public hearing on August 1, October 31, and December 5, 2023. After closing the hearing on December 5, 2023, the Board tentatively approved the request via a 3-2 vote. The Board's motion directed staff and the applicant to draft an Ordinance with findings of fact in support of the Board's tentative approval and to return to the Board for a first and second reading and subsequent public hearing on the Ordinance, following which the Board would consider whether the findings reflect the basis for the Board's decision and determine whether to adopt the Ordinance or provide staff with other direction. After tentatively approving the proposal, the Board passed a second motion to reopen the record to allow for the applicant to submit draft findings in support of the Ordinance for staff and County Counsel review before scheduling the matter to be brought back before the Board. After receiving the applicant's draft findings in May of 2024 and the on boarding of new County Counsel at the end of June, LMD staff proceeded with scheduling the matter for before the Board for a first reading on September 24, 2024, and a second reading and re-opened public hearing on October 15, 2024.

On October 15, 2024, the Board closed the public hearing and began deliberations on the Ordinance. The Board opted to set a third reading on the Ordinance and directed staff to return with a revised Ordinance and findings for consideration and action by the Board on December 3, 2024. Specifically, Board direction was that staff eliminate the statements from the findings that justify approval based on the conclusion that Mr. Bellew, the adjacent property to the north, would object to farm use of the subject property contrary to the testimony he has provided. The Board also directed staff to omit statements concluding that the growing and harvesting of hay and other activities on adjacent properties do not constitute farm use.

In coordination with the applicant's agent, Staff has modified Ordinance PA1387 and the findings accordingly. See **Attachment 1**.

All materials submitted into the record after staff's October 14, 2024, Distribution Memo and before the close of the hearing record on before the close of the hearing on October 15, 2024, have been attached to this Supplemental Agenda Cover Memo. See **Attachment 2**.

For a more detailed history of this request, please review the Agenda Cover Memorandums included for the Board packets for the August 1, 2023 and October 31, 2023 hearing dates, and the Board Packets prepared for the September 24, 2024 first reading and October 15, 2024, second reading and hearing. Links have been provided at the end of this Supplemental Agenda Cover Memo for convenience.

B. Policy Issues

The Board is asked to review the proposal for compliance with the approval criteria. See Section III.F., Analysis.

C. Board Goals

The Board's action for this matter does not directly relate to any of the Board's strategic planning goals. Approval or denial of the request is determined by compliance with specific approval criteria dictated by the Lane Code and state law, and consistency with relevant RCP policies adopted by the Board and acknowledged by the Land Conservation and Development Commission (LCDC).

D. Financial and/or Resource Considerations

LMD operates on a fee-supported enterprise fund. The applicants' request is a fee-for-service land use application processed by LMD and reviewed by the LCPC and the Board.

E. Health Implications

There are no identified health implications related to the Board's decision whether to approve the application on remand. Approval or denial of the land use application is determined by compliance with land use regulations associated with specific approval criteria. Health implications can only be considered insofar as they are incorporated into the Lane County land use code, building code, or sanitation regulations. Health-related implications, if any, are addressed in the approval criteria and/or addressed by the applicant as conditions of approval.

F. Analysis

The applicable approval criteria, relevant facts and information in the record, and key issues concerning this application were summarized under Section III.F. Analysis in the original Agenda Cover Memo provided in the Board Packet for the August 1, 2023, public hearing and Supplemental Agenda Cover Memos. Links are provided below.

G. Alternatives/Options

Option 1: Approve the application and enact Ordinance No. PA 1387 as presented.

OR

Option 2: Direct applicant's representative or staff or both to modify the revised findings of fact in support of approval as directed by the Board. Direct staff to return with a revised Ordinance for the Board's consideration and action at a fourth reading.

OR

Option 3: Tentatively deny the application and direct staff to prepare an Order with findings for final action, setting forth the Board's reasons for denying the application.

IV. RECOMMENDATION

In consideration of the Board's decision to tentatively approve the proposal and the direction provided following the October 15, 2024, continued hearing, staff recommend Option 1.

V. TIMING/IMPLEMENTATION/FOLLOW UP

This Ordinance does not contain an emergency clause and will go into effect 30 days after Board adoption or upon LCDC acknowledgement, whichever is later.

Notice of Board action will be provided to the Department of Land Conservation and Development (DLCD) and all other parties. In addition, the County's official comprehensive plan and zoning maps will be updated to reflect the adopted changes. Should the Board decide to revise the findings or deny the application, staff will prepare and return to the Board with a revised Ordinance or Order.

VI. ATTACHMENTS

1. ORDINANCE PA 1387

Exhibit A: Existing/Proposed Plan Map

Exhibit B: Existing/Proposed Zone Map

Exhibit C: Findings of Fact & Conclusions of Law

2. Written hearing testimony, submitted by Sean Malone, LWLC, received October 15, 2024

3. Full board packet with the Agenda Cover Memo for the August 1, 2023, hearing, can be found at this link:

https://www.lanecountyor.gov/UserFiles/Servers/Server_3585797/File/Government/BCC/2023/2023_AGENDAS/080123agenda/T.11.B.pdf

4. Full board packet with the Supplemental Agenda Cover Memo for the October 31, 2023, hearing, can be found at this link:

https://cdnsm5-hosted.civicle.com/UserFiles/Servers/Server_3585797/File/Government/BCC/2023/2023_AGENDAS/103123agenda/T.3.A.pdf

5. Full board packet with the Second Supplemental Agenda Cover Memo for the September 24 and October 15 Board meetings, can be found at this link:

https://www.lanecountyor.gov/UserFiles/Servers/Server_3585797/File/Government/BCC/2024/2024_AGENDAS/092424agenda/T.8.A.pdf

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDINANCE NO: PA 1387

In the Matter of Amending the Rural Comprehensive Plan to Redesignate Land From "Agricultural" to "Residential"; Rezoning That Land From "E-25/Exclusive Farm Use" to "RR-10/Rural Residential"; and Taking an "Irrevocably Committed Exception" to Statewide Planning Goal 3; and Adopting a Savings and Severability Clause. (Planning Action File No. 509-PA20-05634; Applicant: Perkins)

WHEREAS, the Board of Commissioners, through enactment of Ordinance No. PA 884 has adopted Land Use Designations and Zoning for lands within the planning jurisdiction of the Lane County Rural Comprehensive Plan; and

WHEREAS, Lane Code 16.400 sets forth procedures to amend the Rural Comprehensive Plan, and Lane Code 16.252 sets forth procedures for rezoning lands within the jurisdiction of the Rural Comprehensive Plan; and

WHEREAS, on October 29, 2020, application no. 509-PA20-05634 was made for a minor amendment to redesignate Tax Lot 2701, Map 19-03-16, from "Agriculture" to "Rural" with a concurrent request to rezone the property from "E-40/Exclusive Farm Use" to "Rural Residential 5," and adopt an "irrevocably committed exception" to Statewide Planning Goal 3 (Agricultural Lands) for the property; and

WHEREAS, the Lane County Planning Commission reviewed the proposal in a public hearing on August 2, 2022, November 1, 2022, and February 21, 2023; and

WHEREAS, the Lane County Planning Commission deliberated on February 21, 2023, and forwarded the matter to the Board with a recommendation for denial of the proposed plan amendment and zone change; and

WHEREAS, the Board of County Commissioners conducted public hearings on August 1 2023, October 31, 2023, December 5, 2023, and October 15, 2024, and deliberated on December 3, 2024, and is now ready to take action; and

WHEREAS, evidence exists within the record indicating that the proposal meets the requirements of Lane Code Chapter 16, and the requirements of applicable state and local law;

NOW, THEREFORE, the Board of County Commissioners of Lane County **ORDAINS** as follows:

1. The Official Lane County Rural Comprehensive Plan is amended to redesignate Tax Lot 2701, Map 19-03-16, from "Agricultural" to "Residential." This is depicted on the Official Lane County Plan maps and further identified as Exhibit "A" attached and incorporated herein.
2. The Official Lane County Zoning Map is amended to change the zone for Tax Lot 2701, Map 19-03-16, from "E-25/Exclusive Farm Use" to "RR-10/Rural Residential 10". This is depicted on the Official Lane County Zone maps and further identified as Exhibit "B" attached and incorporated herein.

3. An “irrevocably committed” lands exception to Statewide Planning Goal 3 is adopted for Tax Lot 2701, Map 19-03-16.

FURTHER, although not a part of this Ordinance, the Board of County Commissioners adopts Findings of Fact and Conclusions of Law as set forth in Exhibit "C" attached, in support of this action.

The prior designation and zone repealed by this Ordinance remain in full force and effect to authorize prosecution of persons in violation thereof prior to the effective date of this Ordinance.

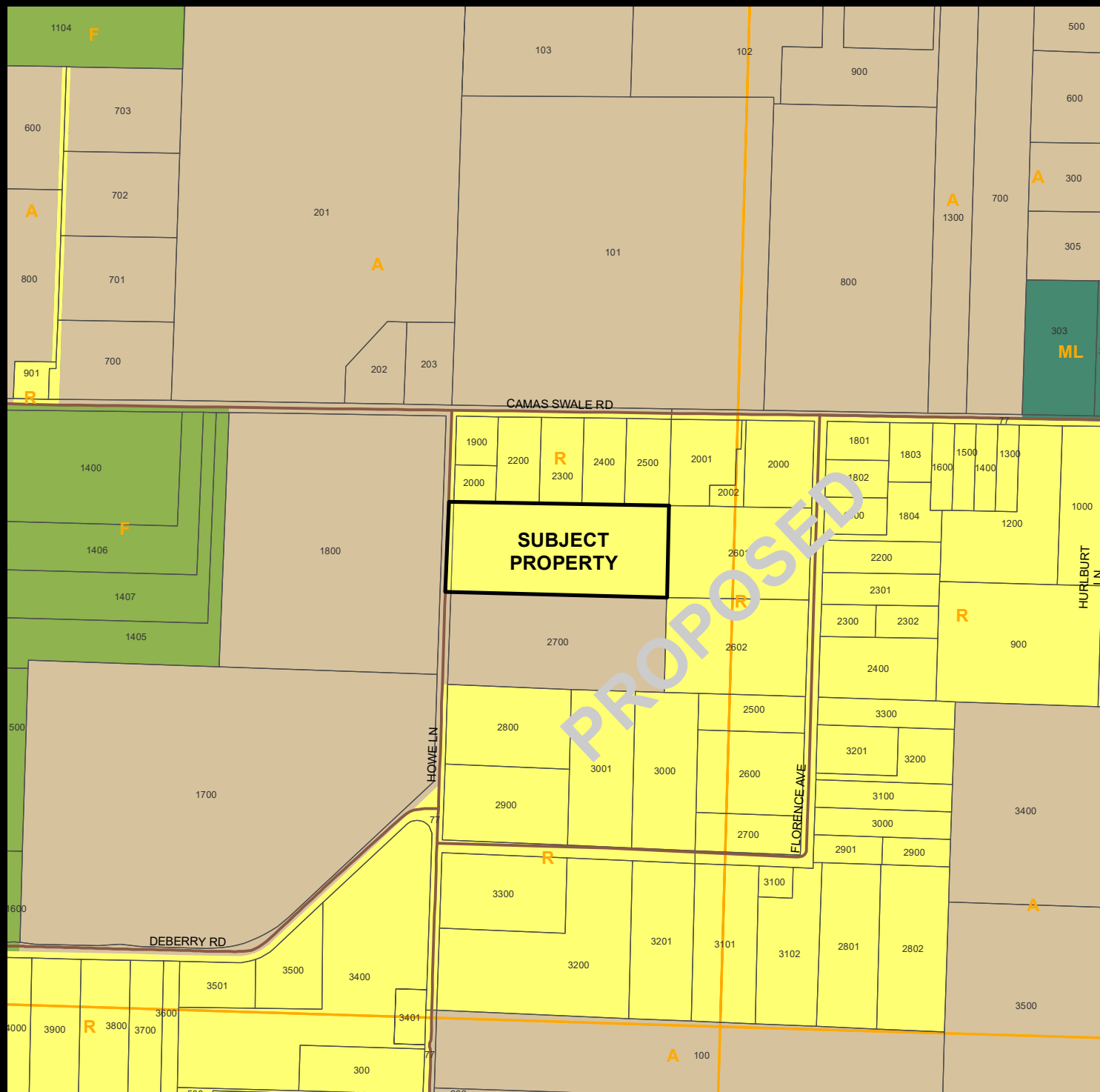
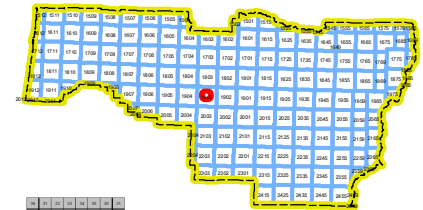
If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity to the remaining portions hereof.

This Ordinance will go into effect 30 days after Board adoption or upon acknowledgement by the Land Conservation and Development Commission, whichever is later.

ENACTED this 3rd day of December, 2024.

Laurie Trieger, Chair
Lane County Board of Commissioners

Recording Secretary for this Meeting of the Board



Ordinance PA 1387 Exhibit A

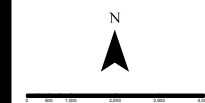
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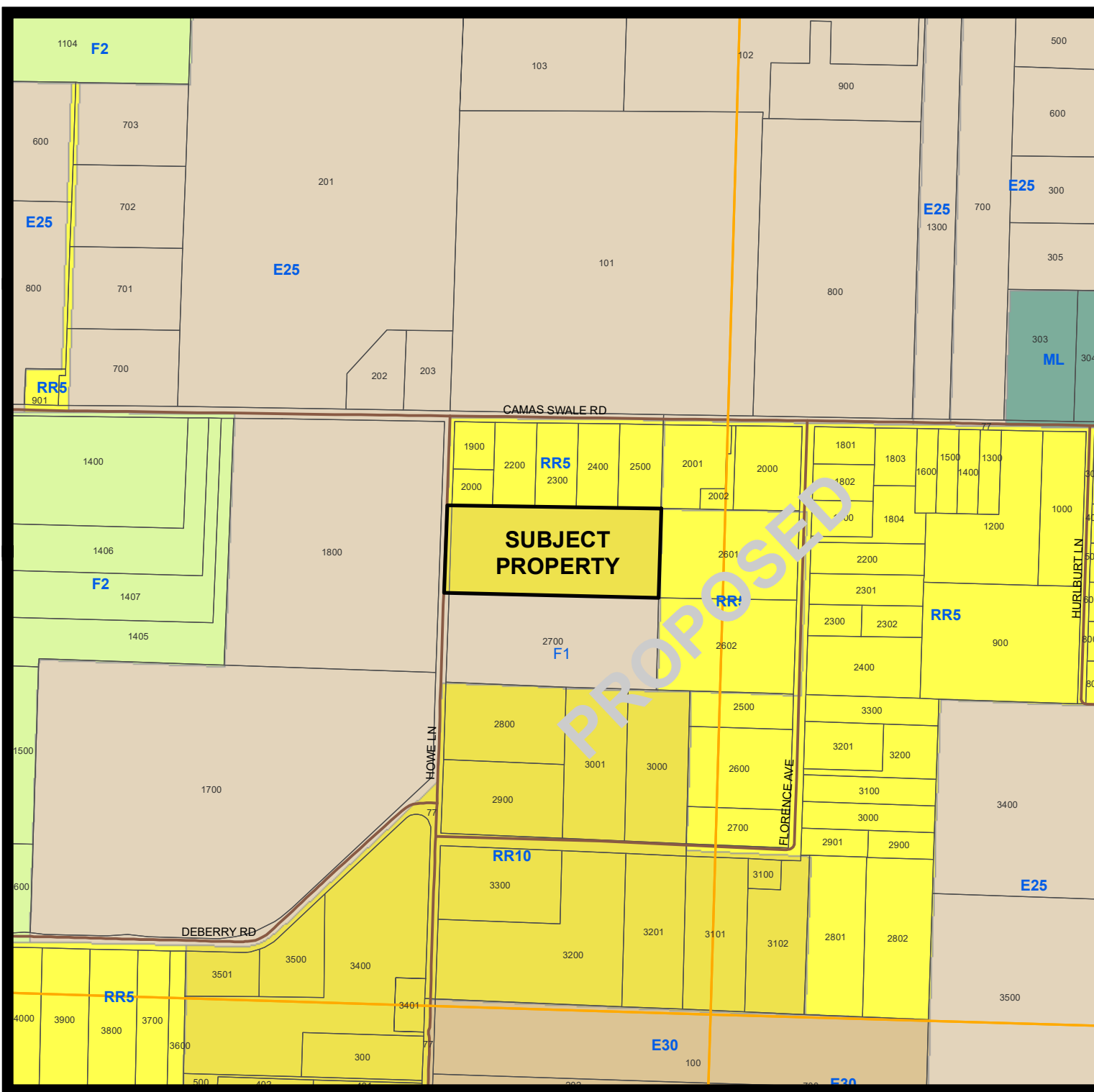
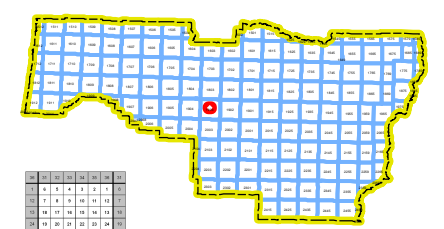
- RCP Plan Designations**
- P - Forest
 - A - Agricultural
 - ML - Marginal
 - C - Commercial
 - I - Industrial
 - R - Residential
 - NRES - Non Resource
 - P - Parks
 - AIR - Airport
 - NR-CA - Natural Resource Conservation Area
 - NR-M - Natural Resource - Mineral
 - NR-W - Natural Resource - Wildlife
 - E - Estuary
 - DR - Destination Resort
 - PF - Public Facility

ORIGINAL ADOPTING ORDINANCE NUMBER:

Revision	Ordinance or Order Number	Date Effective	Planning Action Number	Revision Description
1				
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**Official Lane County
Plan Map**



Ordinance PA 1387
Exhibit B

- Zoning**
- F1 - Non-Impacted Forest
 - F2 - Impacted Forest
 - E25 - Exclusive Farm Use (25 acre minimum)
 - E30 - Exclusive Farm Use (30 acre minimum)
 - E40 - Exclusive Farm Use (40 acre minimum)
 - E60 - Exclusive Farm Use (60 acre minimum)
 - ML - Marginal Lands
 - RC - Rural Commercial
 - RI - Rural Industrial
 - LI - Light Industrial
 - GI - General Industrial
 - RPF - Rural Public Facility
 - RR1 - Rural Residential (1 acre minimum)
 - RR2 - Rural Residential (2 acre minimum)
 - RR3-ARES - Non Resource (2 acre minimum)
 - RR5 - Rural Residential (5 acre minimum)
 - RR5-ARES - Non Resource (5 acre minimum)
 - RR10 - Rural Residential (10 acre minimum)
 - RR10-ARES - Non Resource (10 acre minimum)
 - PR - Park and Recreation
 - RRP - Rural Park and Recreation
 - AO - Airport Operations
 - CLWP - Clear Lake Watershed Protection Area
 - NR - Natural Resource
 - NE - Natural Estuary
 - CR - Destination Resort
 - QM - Quarry and Mining Operations
 - SG - Sand, Gravel and Rock Products
 - SGCP - Sand, Gravel and Rock Products Combining Processing
 - CR - Rural Commercial
 - C2 - Neighborhood Commercial
 - C3 - Commercial
 - M2 - Light Industrial
 - PF - Public Facility

ORIGINAL ADOPTING ORDINANCE NUMBER:

Revision	Ordinance or Order Number	Date Effective	Planning Action Number	Revision Description
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EXHIBIT C
ORDINANCE NO. PA 1387

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The matter before the Lane County Board of Commissioners (Board) is a request to amend the Lane County Rural Comprehensive Plan designation of property identified as tax lot 2701, map 19-03-16 (the "Subject Property" or "Exception Area"), from "Agricultural" to "Residential", with concurrent rezoning of the property from "E-25/Exclusive Farm Use" to "RR-10/Rural Residential 10", and adoption of an "irrevocably committed" land exception to Statewide Planning Goal 3 (Goal 3). The Planning Action file number is 509-PA20-05634. Applicants requesting the action are Charles and Wendy Perkins (Applicant) and are represented by Micheal M. Reeder of the Law Office of Mike Reeder (Mike Reeder). The Exception Area is 9.86 acres in size and is located on the east side of Howe Lane, a Lane County road, approximately 0.8 miles west of the City of Creswell urban growth boundary (UGB).
2. The Board hereby finds that the request satisfies the requirements of Lane Code 16.400(6)(h)(iii)(aa) in that it meets "all applicable requirements of local and state law, including statewide planning goals and Oregon Administrative Rules."
3. The Board's finds that the request meets the approval criteria for Minor Amendments found in Lane Code (LC) 16.400(6)(h)(iii)(aa-dd), LC 16.400(8)(a) and (c)(i-iii), and LC 12.050. The Board finds that the request complies with all applicable Oregon Revised Statutes (ORS), Oregon Administrative Rules (OAR), and the Rural Comprehensive Plan (RCP) and all relevant RCP Working Papers. Specifically, the Board finds that the request complies with OAR 660-004-000, OAR 660-004-0018 and OAR 660-004-0028. The Board finds that the request meets the zone change criteria found at LC 16.252(2) and conforms with LC 16.003 and LC 16.004. An "irrevocably committed" exception is an exception taken in accordance with ORS 197.732(2)(b), Statewide Planning Goal 2, Part II(b), and with the provisions of OAR 660-004-0028. The Board finds that the request meets the exception requirements of ORS 197.732(2)(b), Statewide Planning Goal 2, Part II(b) and the applicable provisions of OAR 660-004-0028.
4. According to Legal Lot Verification with Notice Application, Lane County File Number 509-PA19-05322, the Subject Property is a lawfully established unit of land. No party challenged this conclusion and the Board finds that the Subject Property is a lawfully established unit of land.
5. **Justification for Exception.** The property is irrevocably committed and is impracticable for farm use because of its size, proximity to adjacent nearby dwellings or wells on rural residential land, and unsuitability for farm use. Applicant's written submittals state that the impacts of the relations and interface of the dwellings on adjacent land to the north, east, and south and uses, coupled with the additional proliferation of residential uses in the immediate vicinity, are reasonably like those impacts "legislatively determined" in the *1989 Developed & Committed Lands Working Paper Addendum* (the "Addendum") to create an impracticability for resource use in consideration of the size of the Subject Property. The Applicant further contends that soil capability, soil conditions, presence of jurisdictional wetlands, and lack of slope make the

Exception Area unsuitable and impracticable for farm use. In oral testimony before the Lane County Planning Commission, the Applicant modified the request to better align with the *Addendum* by eliminating reliance on a dwelling located on resource land to the south, because the dwelling to the south is located on a 9.86-acre property designated Agriculture and zoned E-25.¹

6. **Reliance on the *Addendum*.** In 1989, under Board Order 89-10-25-4, the Board adopted the *Addendum* as an interpretation of the effect of dwelling units on neighboring resource lands. This interpretation sets forth guidelines for considering the designation of “committed land” as a function of the size of the Subject Property and the number of dwellings adjoining it. The *Addendum* Introduction and Order adopting the *Addendum* indicate the *Addendum*’s purpose is to provide additional justification under OAR 660-004-0028 for 341 Developed & Committed Exception areas that, in 1988, the Supreme Court determined were insufficiently justified based on methodology contrary to OAR 660-004-0028.

The *Addendum* includes a vast amount of technical and expert experience that produced by Lane County experts tasked by the Board to produce an *Addendum* that could be relied upon by future applicants. On page 7 of Applicant’s written statement (“Exhibit A” to the Application), the Applicant specifically incorporated Board Order No. 89-10-25-4 and the *Addendum* as “Exhibit V”.

The Applicant states on pages 7-8:

“The impacts of the relationship and interface of those dwellings and uses, coupled with the additional proliferation of residential use in the immediate vicinity, are reasonably similar to those impacts legislatively determined in the Addendum to create an impracticability for resource use, and, therefore, support the finding that the Subject Property is committed to non-resource use.”

The *Addendum*’s sole purpose was to provide Lane County with the justification of how to satisfy the LCDC directive of compliance with Goal 2, ORS 197.732, and OAR 660-004-028, including the factors cited in OAR 660-004-0028(6). Specifically, the *Addendum* explains that the *Addendum* is meant to explain the “why” that justifies the conclusion that a property is “irrevocably committed” to uses other than those uses allowed by Goals 3 and 4.² LUBA has determined that findings justifying an irrevocably committed exception may be proper for judicial review when a reasonable person reading the decision would realize that another document is incorporated into the findings. *Johnson v. Lane County*, 31 Or LUBA 454 (1996) (where LUBA held that an exception application was not supported by adequate findings when such findings did not “provide a sufficient reference to the specific documents relied upon by the county to satisfy the criteria.”)³

¹ In Board Order 96-11-12-1, the Board clarified these guidelines refer to dwellings located on land designated for nonresource purposes (e.g., land zoned “Rural Residential”) and are not meant to include dwellings located on resource land (e.g., land zoned “Exclusive Farm Use”). The Board further finds that these guidelines are not meant to include dwellings approved under statewide planning goals (e.g., dwellings and parcels that postdate Statewide Planning Goals in exception areas approved under the goals).

² See *Addendum*, pages 2-3 and 5.

³ *Johnson, supra* cited to *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992) to support this proposition.

Johnson, supra therefore stands for the proposition that the Applicant may rely on the findings in the Addendum to justify the criteria found at ORS 197.732(1)(b), Goal 2, Part II(b) and OAR 660-004-0028 for the approval of an irrevocably committed exception to Goal 3 (and Goal 4).

The *Addendum* guidelines provide that a property with rural residential development on one side must be five acres or smaller to qualify as committed land. Applicant's August 1, 2023 proposed supplemental findings indicate that the *Addendum*, as applied to the interface of uses found existing on the Subject Property and adjacent properties, still lends support for the proposed irrevocably committed in consideration of select advisory committee members statements quoted in the *Addendum* and that "the western 4 acres of the Subject Property is the only part of the property that could be utilized for hay production because of the poor soil." The entire 10-acre property is comprised of Class III and IV soils qualifying the property for protection under Goal 3. The Board finds that six acres or more of the property is impracticable for farm use, primarily due to Rural Residential development located on exception lands that predate the statewide planning goals. The *Addendum* guidelines provide that "Parcels with a dwelling on one adjoining side are impracticable for farm management if 5 acres or less and impracticable for forest management if 15 acres are less." However, the *Addendum* specifically provides flexibility in the application of the guidelines when it states: "It is important to remember that the thresholds set forth in Section IV are guidelines only. Facts derived from individual exception areas may dictate conclusions different than the thresholds suggest. The guideline thresholds are interpreted to allow the Board to consider the impact of multiple exceptions dwellings on each side in the count of dwellings to consider if the subject property is irrevocably committed. While the less than 10 acres, but more than 5 acres in size the subject property has multiple rural residential dwellings on the north side that predate the Goals. The thresholds established on page 7 of the *Addendum* are not fixed, but, as circumstances justify, may be interpreted as follows: If there are multiple Rural Residential dwellings established prior to the Statewide Planning Goals, those dwellings may be used to justify an irrevocably committed exception even though the thresholds could be interpreted to establish justification if there is only one dwelling on each relevant side of the property in question. A more stringent interpretation would be impermissibly rigid and would contradict the purpose of the *Addendum* and would be inconsistent with the criteria found at ORS 197.732(1)(b), Goal 2, Part II(b) and OAR 660-004-0028 for the approval of an irrevocably committed exception to Goal 3.

7. Irrevocably Committed Exception Criteria

ORS 197.732(2)(b) – "(2) A local government may adopt an exception to a goal if:...(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..."

The Board finds that the request meets the requirements of ORS 197.732(2)(b) because, as will be demonstrated below, the Subject Property is irrevocably committed as described by the Land Conservation and Development (LCDC) rules because existing adjacent uses and other relevant factors make uses allowed by Goals 3 and 4 impracticable. Specifically, the evidence in the record clearly demonstrates that farming and forestry are not practicable on the Subject Property and therefore the Subject Property is irrevocably committed to uses not allowed by Goals 3 and 4.

8. OAR 660-004-0028: Exception to Requirements for Land Irrevocably Committed to Other Uses

OAR 660-004-0028(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 factors make uses allowed by the applicable goal impracticable.”

The Board finds that the request meets the requirements of OAR 660-004-0028(1) because, as will be demonstrated below, the Subject Property is irrevocably committed as described by the Land Conservation and Development (LCDC) rules because existing adjacent uses and other relevant factors make uses allowed by Goals 3 and 4 “impracticable” as defined by OAR 660-004-0028(3) and interpreted by relevant caselaw. Specifically, the evidence in the record clearly demonstrates that after consideration of the factors articulated in OAR 660-004-0028 farming and forestry are not practicable on the Subject Property and therefore the Subject Property is irrevocably committed to uses not allowed by Goals 3 and 4.

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

(a) The characteristics of the exception area;

The Exception Area (identified as Map 19-03-16, Tax Lot 2701), is relatively flat, vacant, and fallow. It is not farmed in any manner. It is subject to normal taxation and is not in farm tax deferral. As will be discussed below, there have been very few attempts to farm the Subject Property since the 1950s, but the few times farming has been tried it has ended in failure. On page 6 of the staff Agenda Cover Memo, dated July 14, 2023 (the “Staff ACM”), staff states: “The applicants’ justification has been contested. The resident of the closest rural residential dwelling to the north disagrees that the subject property is irrevocably committed, and indicates it has been farmed and should be preserved for farm use.” However, the testimony of this rural residential neighbor that “indicates” that the Subject Property has been “farmed” does not provide any evidence of farming, nor does this objector provide any evidence that it could be productively farmed primarily for a profit in money. In any case, this the Board concludes that the objector’s testimony is directly contradicted by multiple local residents and farmers in the area. The Board finds that the testimony of the local farmers who have first-hand knowledge of the efforts to farm and the failure to farm the Exception Area is more probative than the testimony of the objector.

In 2019, Chuck Perkins applied for, and received approval of, a Type II legal lot verification application with the Planning Director for the Subject Property. The PD LLV Decision was appealed by LandWatch to the Hearings Official, PA 19-05322.⁴ The HO affirmed the PD Decision and approved the LLV application. The HO approval (the “HO LLV Decision”), and hence the HO LLV Decision findings, were not further appealed.⁵

⁴ *Application of Chuck Perkins Legal Lot Verification with Notice*, Lane County Hearings Official decision at PA 19-05322 (10/21/2019).

⁵ The *Perkins* HO LLV Decision is found at BCC Staff AMC 8-1-23, Attachment 11.69 in the record of the subject application.

The HO LLV Decision is a final, unappealable land use decision. The HO LLV Decision findings are relevant to the current Application because they establish the facts that lead to the conclusion that the Subject Property is not a farm use property, is irrevocably committed to uses other than farm use, and should therefore be changed from Agriculture to Residential and from EFU-25 to Rural Residential 10. The Board finds that the Subject Property should have been designated as Residential and that the correct zoning should have been RR-5. The relevant findings that support this conclusion are recited below.

Finding 2 of the HO LLV Decision states:

"There is no evidence that the subject property has been used for serious agricultural usage. Limited use for agricultural use, such as raising a single cow, was found not to be productive and the property has remained fallow since its creation in 1950. It is occupied by some apple trees but these trees have not been commercially managed as an orchard." Page 2 of 6.

The HO LLV Decision continues:

"Testimony was given that explained that attempted agricultural pursuits on the property, while admittedly minor, have failed and the property has remained largely fallow since its creation."

"A reasonable person would conclude that given the layout and number of tracts created by the Hurlburt unrecorded subdivision, the intent of the subdivider was largely to create properties to be sold for development."

"Given the survey establishing the parent parcel, it is unrealistic to conclude that the intent was not to create lots (tracts) for sale and subsequent development. Absent any evidence that the larger lots were actually used for agricultural purposes, it is more likely that they represented opportunities for future division or the potential sale to a buyer looking for privacy or the ability to hobby farm. In any event, given the circumstances surrounding the subdivision, I do not believe that a preponderance of the evidence supports a conclusion that the intent of the creator of the subject property was to create it for agricultural purposes." Page 5 of 6.

In addition to the HO LLV Decision findings of fact and conclusions of law discussed above, testimony in the record affirms that the Subject Property is not agricultural land that can be used for farming to make a profit in money as defined by ORS 215.203(2)(a). This statute defines "farm use" as follows, in relevant part:

"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, of 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."

Below is a summary of the testimony attesting to the fact that the Subject Property is not suitable for “farm use” as defined by ORS 215.203(2)(a) as follows:

Testimony of Fred Stauffer

Mr. Stauffer’s comments provided to the applicant and then relayed to the Board regarding farming of the subject property state:

“Well[,] as far as farming activity goes on the Coop now Perkins Property[,] I lived on Florence [A]ve on and off from 1981 on. I was also good friends with Andy Coop. There has never been a farm o[r] farming during the period I was in the area...In the state of Oregon if you want to put an outbuilding you’re charged major taxes like it’s living quarters and the permit process is expensive as well. Maintaining 7 acres is very difficult and requires equipment. Not only for the safety of your home but for the safety of other homes on the street. I’m talking about fire safety, if you don’t maintain the property you can be fined. I had hoped to sell hay from my field for horses. But after further investigation I found no one wanted it [because it] had low value. I had applied for the farm operation permit in hopes I could cut my own hay yearly put it into the pole barn and sell it. Turns out I would be lucky to get two dollars a bail. I also did testing on the soil and investigation with Oregon information on the types of soil. Turns out the soil is garbage, nearly all clay. You can’t grow anything [i]n the dirt, its useless[;] there’s nothing that wants to grow there. My experience living on that street, it was difficult to get a tree to grow. So all the equipment was sold, the pole barn was never constructed. And I never to advantage of the exemption on my taxes. The property in that area is good for one thing, growing families not farming.” Email from Fred Stauffer to Mike Reeder dated August 2, 2022.

Testimony of Ron Bowers 7/27/2023

In a letter dated July 27th, Ron Bowers, a local farmer, who lives at 83028 N. Bradford Rd, east of Creswell, wrote:

“I have lived in the Creswell area my whole life, I am now 75 years old, the piece of property in question has had a couple of attempts to farm in the past. Neither attempt worked out. The ground is not suitable farming because to[o] much of it stay[s] to[o] wet from equipment on.”

Testimony of Bill Spencer 7/17/2023

In a letter dated July 17th, local farmer and neighbor who lives at 32718 DeBerry Road wrote:

“I have resided nearby for over 40 years and can recall only 2 or 3 years when someone tried to hay this property. I see very little agricultural value. Its best use, in my opinion, is to have a residence on it.”

Testimony of Bill Spencer 7/31/2023

In an email to Mike Reeder, dated 7/31/2023, in response to certain questions regarding the suitability of the Subject Property for farming for a profit in money, Bill Spencer, a neighbor, long time area farmer and at-large nonresident member of the City of Creswell Planning Commission testified as follows:

"The property was mowed to keep down fire danger for years. I do not remember any animals on it. Teresa Bichel, a neighbor to the south on Howe Lane, tried to make hay for 2 or 3 years approx 10 years ago. It was a waste of time. The quality and quantity were not adequate. It is not property that I would ever try to hay. My family has owned and farmed approximately 48 acres of mixed woodlot and pasture land since 1995 that borders Howe Lane and DeBerry Road. We keep 5 brood cows and have had averaged 3 horses as we had a brood mare and her foals. The soil on our farm is in need of heavy fertilizer and lime if we want a good stand of grass. It needs constant renewing as it is very thin and poor top soil. Clay is incredibly dense and cuts off drainage except by surface run off. Because we have a substantial number of acres, we can raise a few animals, but we have to buy hay as it does not produce well enough to be worth haying. I would have never and would never consider leasing the Perkins property. It is not worth using for hay or animals because it would be a waste of time and money. I do not know of any crop that would do well there. For instance, fir trees do not grow to maturity because of the clay. The Perkins property includes a substantial amount of land that does not have good drainage due to the lack of enough slope to the nearest drainage and the clay so near the surface."

Testimony of Scott Carmichael 7/28/2023

In a letter dated July 28th a local farmer wrote:

"This property the window to farm is to[o] short. That small of a land is not worth the time & money to try to farm. Dirt, clay is no good to farm. Plus to[o] wet. It's only good for a house w[/] yard just like rest of the propert[ies] next to it. It's total[l]y surrounded by houses[;] what a mess to try to farm."

The applicant provides the following: if the Subject Property is not used for any use whatsoever, then there would be no impact (other than perhaps continuing to attract trespassers and the potential fire danger that such behavior engenders), but to expect that one may not use their property for any reason is not reasonable or fair. If the Subject Property can be used for farming (which all evidence shows that it cannot) the farm use would need to use considerably more water than a single-family home.

The Subject Property was created as a separate parcel in 1946, prior to the adoption of LCDC Goals, including Goal 3. It is not in common ownership with any adjacent parcels. The Subject Property is a rectangular, 9.86 acres in size, of which the west 4.7 acres is open field. Howe Lane, a Lane County road, borders the Subject Property on the west side, providing access. The Subject Property is identified with a wetland stream in the eastern part of the property which isolates the Subject Property from the parcel to the east (Tax Lot 2601).

The Subject Property is developed with a 110-foot deep well (LANE 55153) which was drilled in 1998 and produced 8.5 gallons per minute at that time. No water rights are associated with the Subject Property. The Subject Property is not within a water quantity limited area as those areas are determined by Lane Manual 13.010.005.

The soils on the Subject Property are identified as #105A Pengra silt loam (88% of parcel) and #85 Natroy silty clay loam (12% of the parcel). The Pengra soils are deep and poorly drained. These Class III soils can be classified as a “high value” soils if drained. These soils are commonly used mainly for small grain, grass seed, hay, and pasture when well drained. The Subject Property is not drained. The main limitation for hay and pasture use is wetness. Grazing when the soil is wet results in compaction of the surface layer, poor tilth, and excessive runoff. Only those hay and pasture plants that tolerate a seasonal high-water table are suitable for use in undrained areas. The water table is at a depth of 1.5 to 2.5 feet from November to May. The Board finds that the Subject Property is poorly drained. Therefore, the Exception Area’s soils are not considered “high value.”

The Natroy soils are a deep, poorly drained, Class IV soil classified as a “high value” soil. These soils are used mainly for grass seed, hay, and pasture. The main limitation for hay and pasture use is clay content, wetness, and very slow permeability. Restricted grazing during wet periods is necessary to protect the soil from compaction. The water table is 1 foot above the surface to 1 foot below the surface from November to May. This soils information is taken from the Soil Survey of Lane County Area September 1987.

According to the Lane County Big Game Habitat Map, the Subject Property is designated by the Oregon Department of Fish and Wildlife as "Impacted Big Game Range" due to impacts from prior parcelization and rural development. No identified sensitive bird habitat exists on the Subject Property. The Subject Property is not known to harbor federally listed endangered plant or animal species.

(b) The characteristics of the adjacent lands;

The Subject Property is located adjacent to two other exception areas to the north and east, and bordered by a 9.87-acre E-25 property to the south. It is bordered by a County road on the west – Howe Lane. The property on the west side of the Howe Lane appears to be farmed commercially. The Subject Property shares a border with 8 properties: 5 to the north and 1 each to the east, south and west.

North

Each of the 5 properties to the north of the Subject Property are zoned Rural Residential (RR-5) located within Developed and Committed Exception Area #385-4. The area is generally level and is comprised entirely of #105A Pengra soils. Each property shares a 200-foot-long boundary with the Subject Property. Each of these adjacent properties was created prior to the LCDC Goals. Two properties are in common ownership. Three of the four dwellings were developed prior to the adoption of the LCDC Goals. This Exception Area (385-4) is not listed as a Water Quantity Limited Area in Lane Manual 13.010.005.

Map 19-03-16, Tax Lot 2000: The .8-acre property was created in 1950 and is developed with a residence at 83031 Howe Lane since 1950. The dwelling is located 80 feet from the Subject Property. TL 2000 is not in farm or forest deferral. No farm use is evident on TL 2000. The owner of TL 2000 (Cliff Bellew) stated in his oppositional letter to the Lane County Planning Commission on July 18, 2022 that his well produces 3.5 gpm and goes down to 1.75 gpm in the summer. The well is 75 feet north of the shared property line with the Subject Property. The soils type of the

Subject Property indicates the need for fertilizer to grow crops normally associated with 105A-Pengra silt loam and 85-Natroy silty clay loam soils.

Map 19-03-16, Tax Lot 2200: The 1.6-acre property was created in 1953 and is developed with a residence at 32818 Camas Swale Road since 1948. TL 2200 is bordered on the north by Camas Swale Road, a County Road. The dwelling is located 235 feet from the Subject Property. TL 2200 is not in farm or forest deferral. The Board finds that there is no evidence of farm use on TL 2200.

Map 19-03-16, Tax Lot 2300: The 1.86-acre property was created in 1955 and is developed with a residence at 32826 Camas Swale Road since 1955. TL 2300 is bordered on the north by Camas Swale Road, a County Road. The dwelling is located 295 feet from the Subject Property. TL 2300 is not in farm or forest deferral. The Board finds that there is no evidence of farm use on TL 2300. It is currently in common ownership with Tax Lot 2400 to the east.

Map 19-03-16, Tax Lot 2400: The 1.86-acre property was created in 1955 and is undeveloped. TL 2400 is bordered on the north by Camas Swale Road, a County Road. TL 2400 is not in farm or forest deferral. The Board finds that there is no evidence of farm use on TL 2400. It is in common ownership with Tax Lot 2300 to the west.

Map 19-03-16, Tax Lot 2500: The 1.89-acre property was created in 1959 and is developed with a residence at 32874 Camas Swale Road. TL 2500 is bordered on the north by Camas Swale Road, a County Road. The dwelling was established in 1998 after the adoption of the LCDG Goals. The dwelling is located 135 feet from the Subject Property. TL 2500 is not in farm or forest deferral. The Board finds that there is no evidence of farm use on TL 2500. It is immediately adjacent on the east to parcels within the D&C Exception Area 400-1.

East

Map 19-03-16, Tax Lot 2601: TL 2601 was the subject of a Developed and Committed Exception in 2001 (Ordinance No. PA 1148) which changed the zoning of the parent 13.39-acre parcel from E-25 to RR-5 and added the property to D&C Area #400-1. That D&C Exception Area 400-1 is within a Water Quantity Limited Area as determined in Lane Manual 13.010.005. TL 2601 is the northern 6.54-acre portion of the parent property that was separated out in 2002 on Partition Plat 2002-P1575 and is developed with a residence at 83000 Florence Avenue since 2002. The other parcel, 6.74 acres in size, divided pursuant to Ordinance No. PA 1148, TL 2602, is also developed with a dwelling. While TL 2601 may not be adjacent to the Subject Property, its northwest corner “kisses” the southwest corner of the Subject Property. The dwelling is located 480 feet to the east of the Subject Property. TL 2601 is not in farm or forest deferral. The Board finds that there is no evidence of farm use on TL 2601. The owner has stated that he requested an agricultural building from Lane County but did not follow through with it. The purpose of the building was intended to store equipment for property maintenance/fire suppression not for farming. The referenced harvested and baled hay was sold at a very low cost due to the poor quality of the hay caused by soil conditions. The Board finds that TL 2601 is isolated from, and inaccessible to, activities on the Subject Property by the presence of a wooded wetlands existing on both properties along the common border. The western part of TL 2601 contains #85 Natroy soils and the east part contains #105A Pengra soils. No adjacent property is in the same ownership.

South

Map 19-03-16, Tax Lot 2700: The 9.87-acre property was created in 1953 and is developed with a residence at 32818 Camas Swale Road since 1948. It is also developed with a temporary hardship manufactured home placed in 1990. TL 2700 is bordered on the west by Howe Lane. Both the parcel and the dwelling were developed prior to the adoption of the LCDC Goals in 1974. The dwelling is located 250 feet to the south of the Subject Property. TL 2700 is not in farm or forest deferral. The Board finds that there is no evidence of farm use on the property. The south-central portion of TL 2700 is occupied by various abandoned vehicles and machinery that may have been associated with a logging enterprise. The parcel was in common ownership with the Subject Property until 2019. It appears that there was an attempt to utilize the northwestern 2 acres with 4 acres of the Subject Property for hay production in the past. However, this attempt at farm use was unsuccessful and abandoned many years ago. TL 2700 also has the same soil units, Natroy and Pengra, as the Subject Property with an area of #120B Salkum around the homesite area. TL 2700 also has a wetlands drainage on the east side of the parcel that drains northward into the Subject Property. Only 2 acres of the parcel appear to be available for production of a hay crop if the Pengra soils in that area enabled the activity to occur in a productive manner. Properties to the south of TL 2700 are within the D&C Exception Area 385-2. TL 2700 does not need a D&C exception to Goal 3 because it already has the benefit of a lawfully established dwelling.

West

Lane County Road 292/Howe Lane: This property is developed with a Lane County Road, named Howe Lane. This Lane County transportation facility is 50 feet in width and separates the Subject Property from the property located to the west, Map 19-03-16, Tax Lot 1800.

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

The Subject Property is less than 10-acres. The adjacent lands to the north are within a Developed and Committed Area #385-4 where 5 parcels were created prior to the LCDC Goals with 3 of the parcels developed with a residence prior to the goals. There is a dwelling on each of the 3 adjacent parcels on three sides situated to the east, south and west. Two of the dwellings and parcels are in the E25 Zone and predate the goals. The dwelling to the east was developed on a recently created parcel after the goals were adopted as part of the Developed and Committed application approved pursuant to Ordinance No. PA 1148.

The parcel to the east, TL 2601, is isolated from the Subject Property by a wooded area that occupies a wetland drainage. The adoption of a Developed and Committed Exception for the parent property (formerly TL 2600) documented the impracticability of utilizing TL 2601 for farming activity in conjunction with the Subject Property.

The adjacent parcel to the south, TL 2700, is not utilized for farm use and is also developed with a dwelling. The east part of TL 2700 drains to the wetland area on the east portion of the Subject Property. It appears only 2 acres in the northwest part of TL 2700 has ever been utilized for hay or maintained to limit fire hazard in conjunction with the Subject Property. The Board finds that this site has not been part of an agricultural operation.

The property to the west, TL 1800, is separated from the Subject Property from the County Road, Howe Lane. The Subject Property is isolated from TL 1800. As noted above, TL 1800 has no access developed to Howe Lane.

The properties to the north are within D&C Exception Area 385-4. Each parcel is less than 2 acres in size and has a 200' common boundary with the Subject Property. This level of development is considered an "urban" level of development under Goal 14:

"OAR 660-004-0040(6)(a) A rural residential zone in effect on October 4, 2000 shall be deemed to comply with Goal 14 if that zone requires any new lot or parcel to have an area of at least two acres, except as required by section (8) of this rule. (b) A rural residential zone does not comply with Goal 14 if that zone allows the creation of any new lots or parcels smaller than two acres. For such a zone, a local government must either amend the zone's minimum lot and parcel size provisions to require a minimum of at least two acres or take an exception to Goal 14. Until a local government amends its land use regulations to comply with this subsection, any new lot or parcel created in such a zone must have an area of at least two acres."

Apparently, the development of the parcels to the north resulted in an impact on the drainage pattern of the Subject Property. The drainage of the area naturally flows to the north but the development of the parcels and dwellings in D&C #385-4 resulted in blockages that slowed the drainage northward and directed it eastward to the get under Camas Swale Road. This has contributed to the wetness of the soils on the Subject Property affecting the ability to produce hay.

One dwelling is particularly close to the Subject Property. The dwelling on Tax Lot 2000 is only 80 feet from the common boundary. The owner of TL 2000 has submitted information into the record asserting that there may be potential impacts to his water supply if this application is approved. His well is approximately 75 feet from the subject exception area.

Board Order No. 89-10-25-4 and the *Addendum to the Developed and Committed Lands Working Paper* (the "*Addendum*"), are relevant to this application and have direct bearing on determining whether the Subject Property is irrevocably committed. The *Addendum* analyzes the impacts commonly prevalent in the relationship and interface between small resource parcels and surrounding residential uses. Board Order 96-11-12-1 clarified that the guidelines are not intended to include dwellings located on resource land.

The *Addendum*, as applied to the interface of uses found existing on the Subject Property and adjacent properties, still lends support to a finding that the Subject Property is "irrevocably committed" even when not accounting for dwellings located on resource land or the dwellings located on the D & C parcels created by Ordinance No. PA 1148 in 2001 (i.e. after the adoption of the Goals in 1974).

The Subject Property is bordered on one side (the north side) by three dwellings on lands designated as residential and developed and committed that were developed prior to the adoption of the Goals in 1974. The impacts of the relationship and interface of those dwellings and uses, are reasonably similar to those impacts legislatively determined in the *Addendum* to

create an impracticability for resource use and, therefore, support the finding that the Subject Property is committed to non-resource use. Under the section IV of the *Addendum* entitled “Thresholds for Land Irrevocably Committed to Non-resource Use,” it is stated “c) Parcels with a dwelling on one adjoining side are impracticable for farm management if 5 acres or less and impracticable for forest management if 15 acres or less.”

The LESA Technical Committee members from agriculture were posed the question:

“If the parcel is not adjacent to any other property you own or lease for farm or forest management purposes and if it does not have a residence on it, what would be the minimum parcel size you would need for practicable farm or forest management?”

The Committee, consisting of farmers, ranchers, OSU Extension agents, Forest Service personnel, and a USDA District Conservationist, responded with answers from 5 to 50 acres because of the diversity of agricultural endeavors. Parcels as small as 5 acres were considered practicable only in respect to organic farms because they do not use chemicals, utilize very little fertilizer and only if the property has good rich soil. This finding came from John A. Hentze, a farmer with a B.S. from Oregon State University in 1953. He had 35 years of experience in farming.

The LESA Technical Committee members from agriculture were also posed the question:

“If the parcel is adjacent to other property you own or lease for farm or forest management and does not have a residence on it, what would be the minimum parcel size you would need for practicable farm or forest management?”

Four of the Committee members responded that 10 acres would be necessary, but two of the Committee members responded that a minimum of 5 acres would be necessary as long as it requires no major change in current management practices and the price was right. These members were John A. Hentze identified above, and Ross Penhallegon, with ten years of experience as the OSU Extension agent.

The Board finds that in the present instance, the western 4 acres of the Subject Property is the only part of the exception area that could possibly be utilized for hay production because of the poor soil. This amount of land is less than the minimum amount of acreage identified by the Committee as necessary for practicable farm management regardless of the number of dwellings adjacent to it. This would apply to any stand-alone farmland or other farm land located adjacent to existing ownership or leased lands.

The Board finds that the 4 acres of land on the Subject Property is not large enough to be considered practicable for farm use by members of the Technical Committee regardless of the number of dwellings adjacent to it.

The Board finds that a property with 4 acres of land with very poor soils and three dwellings on one side is also not practicable for farm use because of the impacts identified in the *Addendum* such as: difficulty in obtaining insurance for chemical applications, increased possibility of litigation, problems with spraying herbicides and pesticides, subject to trespass and vandalism liability, and hostility of neighborhood.

(d) The Other Relevant Factors Set Forth in OAR 660-004-0028(6).

OAR 660-004-0028(6) is cited in ***bold italics*** with the Board findings and conclusions below:

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

(a) Existing adjacent uses;

The Board finds that, based on the evidence in the whole record, that the existing uses adjacent to the Subject Property, are not used for “commercial farm activities” or even “small scale farming” activity. The properties to the adjacent north are not farmed in any manner but are used for residential purposes. The property to the adjacent west is a County road, Howe Lane (i.e. a transportation facility) and not used for farming. (The property to the west of Howe Lane appears to be a farming operation, or at least part of a farming operation). The property adjacent to the south is designated Agriculture and zoned E-25, but is not farmed and is used for residential purposes. The two properties adjacent to the east are part of an exception area (pursuant to Ordinance PA 1148) and developed with a dwelling on each parcel consistent with their Rural Residential designation and RR-5 zoning. There is no farming on either of these two exception parcels.

The record shows that Fred Stauffer, the former owner of the exception properties to the east, testified that he could not successfully farm or forest the property due to the poor-quality soils. The Stauffer application that was approved in the early 2000s included a letter, dated March 21, 1994, from Mike Cloughesy, Extension Agent for Oregon State University Extension Service Lane County Office stating that due to the poor-quality soils and poor drainage, the exception property could not economically grow Christmas trees.

There is no evidence in the record that the adjacent properties are being farmed, either commercially, or in any manner for profit. The Board finds that cutting grass/hay is a way to maintain the property and control fire hazards.

ORS 215.203(2) defines “farm use” as follows: “the current employment of land for the primary purpose of obtaining a profit in money...” While “farm use” is more inclusive than “large” “commercial agricultural enterprises” it still requires that the activity be more than hobby farming or gardening. *Wetherell v. Douglas County*, 54 Or LUBA 604, 611-13 (2005). The definition requires that the “primary purpose” be for obtaining a profit in money, whether or not profit is actually made. *See 1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 517-18 (1994)(where LUBA rejected the county’s suggestion that the county may establish the level of profitability necessary to qualify as a “farm use” as defined by ORS 215.203 at the same level that would qualify a farm use as a commercial agricultural enterprise.) The Oregon Supreme Court has ruled that profitability can be taken into consideration in determining whether the subject property is “suitable for farm use.” *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005), *aff’d in part, rem’d in part*, 204 Or App 778 (2006), *aff’d in part, rev’d in part*, 342 Or 666 (2007). Citing *Landwatch Lane County v. Lane County*, 77 Or LUBA 368, 373, *aff’d without opinion*, 292 Or App 415, 421 (2018), in *Cattoche v. Lane County*, 79 Or LUBA 466, 486 (2019) LUBA stated:

“In determining whether a land use is a ‘farm practice,’ a local government may consider whether a reasonable farmer would be motivated to put the land to agricultural use ‘for the primary purpose of obtaining a profit in money.’”

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

There are no existing public water or sewer lines available to the Subject Property or in the nearby vicinity as the Subject Property and the surrounding properties are well outside any urban growth boundary or unincorporated community boundary where such facilities may be present. The Board finds that the Subject Property can provide its own potable water (well) and wastewater (on-site septic system). The Board concludes that one additional dwelling in this area will not create the need for facility or personnel expansion by service providers.

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

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

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

The Subject Property is small – less than 10 acres with only 4 of those acres marginally usable for hay production. The Applicant does not own any other adjacent or nearby property. Except for Tax Lots 2300 and 2400 to the north (which are in common ownership) the adjacent properties are in multiple ownerships. All the adjacent parcels to the north, south, and west were created prior to the implementation of the LCDC Goals in 1974. The parcel to the east was reduced in size through partitioning in 2002. All the houses on adjacent lands were developed prior to the goals except for the dwelling to the east (Tax Lot 2601) and one dwelling to the north (Tax Lot 2500). The Board finds that the

surrounding properties, as discussed previously, are exception properties and are unsuitable for resource use.

(d) Neighborhood and regional characteristics:

The neighborhood characteristics are comprised of Developed and Committed (D&C) Rural Residential Lands and Exclusive Farm Use lands. The residential lands are comprised of three D&C areas: #385-4 to the north; 385-2 to the south; and 400-1 to the east. These Exception areas occupy a swath of properties extending along Camas Swale Road from the City Limits of Creswell for approximately 1 mile and border the Subject Property on two sides. Property to the west across Howe Lane and north across Camas Swale Road are larger parcels used for hay production.

The north side of the Subject Property is adjacent to acknowledged Exception Area 4 of Plot 385 that contains 9.6 acres with 6 parcels, 4 dwellings and an average parcel size of 1.65 acres. The plot plan in original application submittal shows the locations of the dwellings in this exception area with the nearest dwelling being on Tax Lot 2000 being less than 75 feet from the Subject Property.

The east side of the Subject Property is adjacent to acknowledged Exception Area 1 of Plot 400 that contains 161.49 acres, 44 parcels with 43 dwellings and an average parcel size of 3.67 acres. This exception area extends about 1 mile east to the boundary of the City of Creswell. This exception area also includes the 13.39 acres that was added to it with the 2001 approval of Ordinances No. PA 1148. This 13.39 acres was subsequently divided into two parcels, Tax Lots 2601 and 2602, and a dwelling was established on each parcel. Tax Lot 2601 is adjacent to the east boundary of the Subject Property.

The south side of the Subject Property is adjacent to Tax Lot 2700 which is similar in size and physical characteristics to the Subject Property, has a dwelling on it and is not being farmed. This parcel is adjacent to acknowledged Exception Area 2 of Plot 385 that contains 197.8 acres with 30 parcels, 33 dwellings and an average parcel size of 6.6 acres.

The property to the west of Howe Lane, Map 19-03-16, Tax Lot 1800 is 28.51-acres and was created prior to 1949. It has been developed with a residence at 32724 Camas Swale Road since 1930. The majority of soils on TL 1800 are identified as #102A Pengra with a section of #120B Salkum around the homesite. A barn exists on TL 1800 near the existing dwelling. TL 1800 is not in farm or forest deferral but appears to be utilized for hay production. Access to TL 1800 is from Camas Swale Road which borders the property on the north. No access exists onto Howe Lane on the east side adjacent to the Subject Property.

The *Addendum*, as applied to the interface of uses found existing on the Subject Property, adjacent properties and properties in the vicinity of the Subject Property, supports the finding that the Subject Property is "irrevocably committed."

The Subject Property is surrounded by 6 dwellings, of which 5 are on lands designated and zoned as residential and are developed and committed lands. The other dwelling is on an E25 zoned parcel that is not being farmed. The impacts of the relationship and

interface of those dwellings and uses, coupled with the additional proliferation of residential use in the immediate vicinity, are reasonably similar to those impacts legislatively determined in the *Addendum* to create an impracticability for resource use and, therefore, support the finding that the Subject Property is committed to non-resource use. Even discounting the “Stauffer” exception dwellings, the Board finds that the Subject Property is irrevocably committed.

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

Howe Lane is a County Road with a 50-foot wide right-of-way with ditches that borders the Subject Property on the west and acts as an impediment to utilization of the Subject Property with the farm parcel to the west. There are identified wetland drainages along the eastern part of the Subject Property and the property to the south that effectively isolate the Subject Property from the pre-goal parent resource property to the east.

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

This Application is for an irrevocably committed exception and not a developed exception. There is no physical development on the Subject Property as defined according to OAR 660-004-0025. However, lands surrounding the Subject Property on all four sides are physically developed with dwellings on the north, south, and east, and a Lane County road on the west.

The Subject Property is developed with a well in the northwest part of the Subject Property and a gravel drive on the southwest portion of the Subject Property.

(g) Other relevant factors.

The Board finds that the Subject Property has not been successfully farmed and has essentially remained fallow since 1950. The Board further finds that the eastern part of the Subject Property is a woodland and wetland area that has not been farmed and regardless of soil quality is not practicable to farm. Although the Subject Property is a 9.86-acre parcel, only 4.1 acres produces vegetation necessary to mow for fire prevention purposes. The rest of the Subject Property (5.76 acres) could not be attempted for farming. It is further found that the presence and proliferation of residential use adjacent to and nearby the Subject Property have led owners and prospective owners/lessees to consider the property impracticable for resource use. The same conclusions regarding the reasons for impracticability of resource use found in the *Addendum* can be reasonably applied to the Subject Property.

The *Addendum* represents an extensive evaluation conducted over a two-year, public meeting period that included a research committee of professional and agricultural interest representatives. This committee promulgated recommendations which were incorporated into the *Addendum* and adopted as Board Order 89-10-25-4.

Furthermore, Appendix A of the Addendum provides support and foundation for the Board's decision in the section termed "Neighborhood Characteristics: (3a)":

"Both the agriculture and forest experts agreed that the presence of dwellings on neighboring land and the attitudes the inhabitants hold towards standard management practices would have a definite bearing on a decision to buy or lease resource land; the more houses the more likely the potential for conflicts. Residences adjacent on two or more sides are not acceptable. Recreational uses are just as much of a problem to resource managers, however commercial, industrial, and institutional uses are compatible because they have greater tolerance towards resource management practices."

The criteria provided within the Addendum and codified through Board Order 89-10-25-4, along with the other considerations stated herein, support the finding that the Subject Property does not represent practicable agricultural resource land and is therefore developed and committed to non-resource use. The development surrounding the Subject Property is within the considerations and criteria provided by the working paper to assess the practicability of resource use and the developed and committed nature of the Subject Property. The impacts and results of neighboring development that the working paper details are found to be reasonably associated with the Subject Property and should be applied to the Subject Property in the analysis of practicability of resource use.

(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;

ORS 215.203(2) defines "farm use" as follows: "the current employment of land for the primary purpose of obtaining a profit in money..." While "farm use" is more inclusive than "large" "commercial agricultural enterprises" it still required that the activity be more than hobby farming or gardening. *Wetherell, supra* 54 Or LUBA at 611-13. The definition requires that the "primary purpose" be for obtaining a profit, whether or not profit is actually made. See *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 517-18 (1994)(where LUBA rejected the county's suggestion that the county may establish the level of profitability necessary to qualify as a "farm use" as defined by ORS 215.203 at the same level that would qualify a farm use as a commercial agricultural enterprise.) The Oregon Supreme Court has ruled that profitability can be taken into consideration in determining whether the subject property is "suitable for farm use." *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005), *aff'd in part, rem'd in part*, 204 Or App 778 (2006), *aff'd in part, rev'd in part*, 342 Or 666 (2007).

The soils on the Subject Property are identified as #105A Pengra silt loam (88% of parcel) and #85 Natroy silty clay loam (12% of the parcel). The Pengra soils are deep, somewhat poorly drained, Class III soils classified as a “high value” soil if drained. The Subject Property is not drained. These soils are used mainly for small grain, grass seed, hay, and pasture. The main limitation for hay and pasture use is wetness. Grazing when the soil is wet results in compaction of the surface layer, poor tilth, and excessive runoff. Only those hay and pasture plants that tolerate a seasonal high-water table are suitable for use in undrained areas. The water table is at a depth of 1.5 to 2.5 feet from November to May. The Natroy soils are a deep, poorly drained, Class IV soil classified as a “high value” soil. These soils are used mainly for grass seed, hay, and pasture.⁶ The main limitation for hay and pasture use is clay content, wetness, and very slow permeability. Restricted grazing during wet periods is necessary to protect the soil from compaction. The water table is 1 foot above the surface to 1 foot below the surface from November to May. This soils information is taken from the Soil Survey of Lane County Area Sept. 1987.

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

Lane County Soil Ratings for Forest and Agriculture (2011) contains estimates based on Oregon Department of Forestry (ODF) data. The ODF data indicate Natroy silty clay loam soils (soil map unit #85) have an estimated wood fiber productivity of 60 cubic feet per acre per year and Pengra soils have an estimated productivity of 45 cubic feet per acre per year. Based on the soil percentages indicated in the RLID report for the Subject Property, the estimates indicate the Subject Property is capable of producing approximately 47 cubic feet per acre per year. This is under the 50 cubic foot threshold that Lane County has established for commercial forestry. Therefore, the Board finds that the uses and activities allowed by Goals 3 and 4 are impracticable.

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

OAR 660-006-0025(2): The following uses pursuant to the Forest Practices Act (ORS chapter 527) and Goal 4 shall be allowed in forest zones:

(a) Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash;

The size of the Subject Property, the wet soils with poor forest productivity, the lack of merchantable timber on the parcel, and the adjacent urban level of development to the north, all combine to render the Exception Area impracticable for forest operations. There are no designated, zoned or managed forest lands located in the vicinity of the Subject Property.

(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.

⁶ LUBA has recently held that “a county is not required ‘to consider whether property is suitable for farm use based on the cultivation of marijuana (or any other crop) in ways that are entirely removed from agricultural qualities of land.’” *Landwatch Lane County v. Lane County*, 77 Or LUBA 368, 373, *aff’d*, 294 Or App; 415, 421 (2018).

For all the reasons stated above and below responding to all of the relevant factors of section (6) support the conclusion that the uses allowed by Goal 3 and Goal 4 are impracticable for the Subject Property. The Subject Property is not suitable for farming or forest operations.

9. OAR 660-004-0018(2)(b)(B) & (C)

OAR 660-004-0018(2) For “physically developed” and “irrevocably committed” exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those that satisfy (a) or (b) or (c) and, if applicable, (d):

(b) That meet the following requirements:

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

The rural residential uses, densities and public facilities and services for adjacent or nearby exception areas are described elsewhere in the record and these findings and are like those for the Subject Property. The proposed plan amendment and zone change will therefore maintain the Subject Property as “Rural Land.”

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

The Board finds that the uses allowed by the approval of the Application will not commit adjacent or nearby resource land to uses not allowed by Goal 3 and Goal 4. The north and east sides of the Subject Property are contiguous with developed and committed lands that are zoned RR5, are smaller in size, and all but one parcel has a dwelling on it. The adjacent property to the south is a 9.86-acre parcel with a dwelling on it that is zoned E-25, has physical characteristics very similar to the Subject Property and is not suitable for, and is not being used for, farming and has a dwelling on it. One property on the west side of Howe Lane is a 47.79-acre unit of land in Tax Lot 1700 that has a dwelling, a barn for storing hay and cows, and land used for hay or pasture. Another property is the 28.51 -acre unit of land in Tax Lot 1800 that has a dwelling on it, a guest house and a large building possibly used for agriculture. The land is apparently used for hay and pasture. These farm uses are generally low intensity in nature and are significantly setback from the Subject Property on the opposite side of Howe Lane. A dwelling on the Subject Property would be in the middle of the Subject Property and would not be closer to the farmed parcels on the opposite side of Howe Lane than the existing dwellings on the developed and committed area on the north side of the Subject Property. Approval of the Application will therefore not commit or promote justification for changing the adjacent or nearby agricultural lands on the opposite side of Howe Lane to nonresource use. There are no designated, zoned or managed forest lands located in the vicinity of the Subject Property.

The type and level of agricultural activities associated with hay, livestock pasture and raising livestock on nearby lands to the west will not conflict with the use of the Subject Property for a dwelling because, the Applicant’s dwelling will be located more than 200 feet the closest agricultural parcel and on the opposite side of Howe Lane. However, even if a dwelling was located

elsewhere on the Subject Property, the dwelling would not commit adjacent and nearby resource lands to any other use.

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

Approval of the Application would result in the addition of one dwelling on the Subject Property. The Board finds that one dwelling will be compatible with the residential uses and densities of adjacent developed and committed lands to the north and east, and with the dwelling on the 9.87-acre parcel to the south. Approval of the Application will not adversely affect the agricultural uses of the nearby lands zoned for exclusive farm use on the opposite side of Howe Lane.

10. Findings and Conclusions Related to Compliance with Lane Code 16.400 – Plan Amendment Criteria

LC 16.400(6)(h)(iii) states as follows:

“(iii) The Board may amend or supplement the Rural Comprehensive Plan upon making the following findings:

(aa) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.”

This plan amendment meets all legal requirements in that it is being processed pursuant to the requirements of Lane Code and the acknowledged Lane County Rural Comprehensive Plan. An irrevocably committed exception to Goal 3 and Goal 4 has been taken in compliance with Statewide Planning Goals and OAR 660-004-0000 requirements. Compliance with the applicable Statewide Planning Goals and Oregon Administrative Rules has been addressed above.

“(bb) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is:

(i-i) necessary to correct an identified error in the application of the Plan; or

(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; or

(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; or

(iv-iv) necessary to provide for the implementation of adopted Plan policy or elements; or

This RCP amendment implements RCP Goal 3, Policies 7 and 8, as specified in the following finding. The change in plan designation is provided for in RCP Goal 2, Policy 12. Changes to Plan designations for developed and committed areas outside of a Community designation, shall be

accomplished through the County's Plan Amendment procedure, and will be fulfilled by the proposed amendment. RCP Goal 3, Policy 7 provides that some agricultural lands are not suitable or available for agricultural use by the nature of being built upon, committed to or needed for nonagricultural uses. The Subject Property's 9.86 acres is committed to nonagricultural uses. RCP Goal 3, Policy 8 states, "Maximum protection to agricultural activities should be provided to minimize activities, particularly residential, that conflict with line such use." Dwellings allowed on the E-25 zoned properties, that are not in a Major wildlife habitat area, are required by Lane Code 16.212(15)(a)(ii) to have a minimum 100-foot setback from any adjoining lines of property zoned EFU and to be on the least suitable part of the property for farming. A dwelling can be established in the center of the Subject Property, at the tree line, where it will be setback substantially more than 100 feet from the nearest agricultural activities on properties located west side of Howe Lane. This setback would provide significant protection for nearby farm use activities. However, no specific setback has been conditioned.

(v-v) otherwise deemed by the Board, for reasons briefly set forth in its decision, to be desirable, appropriate or proper.

To the extent applicable and relevant, given that the proposed plan amendment is necessary for implementation of above-referenced plan policies under subsection (iv)-(iv) above, for the reasons discussed herein, approval of this plan amendment application for Rural Residential and RR10/RCP zoning is desirable, appropriate and proper. Approval of this Application will result in the Subject Property being eligible for one (1) single-family dwelling, which will increase the supply of housing in the County. The Board finds that the state of Oregon, and Lane County specifically, is experiencing a housing crisis. Oregon Governor Tina Kotek has set a goal of producing 36,000 homes per year and has taken executive action to spur achievement of that goal. Permitting additional housing will mitigate the impacts of this crisis. The health, safety and general welfare of the County will be improved with the approval of the Application.

11. Findings and Conclusions Related to Compliance with the Statewide Planning Goals and Lane County Rural Comprehensive Plan Policies

"(cc) For Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component does not conflict with adopted Policies of the Rural Comprehensive Plan, and if possible, achieves policy support."

Based on the findings and conclusions for compliance with the Statewide Planning Goals and Rules below, the proposed plan amendment and zone change complies with the applicable RCP Policies for:

- Goal 1 citizen participation,
- Goal 2 for a developed and committed exception to Goal 3,
- Goal 3 for agricultural lands that recognizes a developed and committed lands exception may be appropriate,
- Goal 5 for designated wetlands,
- Goal 6 for protection of land and groundwater resources,
- Goal 10 for housing,
- Goal 11 for adequate levels of rural public facilities and services, and

- Goal 12 for transportation; and
- Goal 14 for urbanization.

The following RCP Policies are not applicable to this application:

- Goal 4 forest lands
- Goal 5 for all Goal 5 resources except wetlands,
- Goal 7 for areas subject to natural disasters and hazards
- Goal 8 for recreational resources,
- Goal 9 for economic development,
- Goal 13 for energy conservation,
- Goal 15 for the Willamette River Greenway,
- Goal 16 for estuarine resources,
- Goal 17 for coastal shorelands,
- Goal 18 for beaches and dunes, and
- Goal 19 for ocean resources.

“(dd) For Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is compatible with the existing structure of the Rural Comprehensive Plan, and is consistent with the unamended portions or elements of the Plan.”

The proposed plan amendment and zone change are compatible with the existing structure of the RCP and is consistent with the unamended portions or elements of the plan for RCP Policies:

- Goal 1 citizen participation,
- Goal 2 for a developed and committed exception to Goal 3,
- Goal 3 for agricultural lands that recognizes a developed and committed lands exception may be appropriate,
- Goal 5 for designated wetlands,
- Goal 6 for protection of land and groundwater resources
- Goal 10 for housing,
- Goal 11 for adequate levels of rural public facilities and services,
- Goal 12 for transportation; and
- Goal 14 for urbanization.

Findings and Conclusions for Compliance with the Statewide Planning Goals

Goal 1: Citizen Involvement

“To develop a citizen involvement program that ensures the opportunity for citizens to be involved in all phases of the planning process.”

Goal 1 is a “process” goal. This proposal complies with Goal 1 because the processing of the Application is as a quasi-judicial application through the County’s acknowledged public process for individual plan and zone changes. This process includes public hearings and opportunities for citizen involvement before the Planning Commission and the County Board of Commissioners.

Goal 2: Land Use Planning

Part I of Goal 2 requires local governments to establish processes and policies for land use decisions.

“To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.”

Part II(b) of Goal 2 authorizes an "exception" to Statewide Planning Goals 3 or 4 when,

“The land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable.”

The Application’s compliance with Part II(b) of Goal 2 has been discussed in these findings above and need not be repeated. The findings are incorporated herein.

“(2) For "physically developed" and "irrevocably committed" exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those that satisfy (a) or (b) or (c) and, if applicable, (d):

(a) That are the same as the existing land uses on the exception site;”

The Application is for RR10 zoning that would allow one dwelling on the Subject Property and would not allow the division of the Subject Property. This level of allowed development would be the same as allowed by the RR5 zoning of nearby lands that allows one dwelling unit per parcel.

(b) That meet the following requirements:

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

The rural residential uses, densities and public facilities and services for adjacent or nearby exception areas are described elsewhere in these findings and are similar to those for the Subject Property. The proposed plan amendment and zone change will therefore maintain the Subject Property as “Rural Land”.

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

The Board finds that based on the evidence in the record the uses allowed by the approval of the Application will not commit adjacent or nearby resource land to uses not allowed by Goal 3 or Goal 4. The north and east sides of the Subject Property are contiguous with developed and committed lands that are zoned RR5, are smaller in size and all but one parcel has a dwelling on

it. The adjacent property to the south is a 9.86 acre parcel with a dwelling on it that is zoned E-25, has physical characteristics very similar to the Subject Property and is not being used for farming and has a dwelling on it. One property on the west side of Howe Lane is a 47.79 acre unit of land in tax lot 1700 that has a dwelling, a barn for storing hay and cows, and land used for hay or pasture. Another property is the 28.51 acre unit of land in tax lot 1800 that has a dwelling on it, a guest house and a large building possibly used for agriculture. The land is apparently used for hay and pasture. These farm uses are generally low intensity in nature and are significantly setback from the Subject Property on the opposite side of Howe Lane, a dwelling on the Subject Property would be located in the middle of the Subject Property and would not be closer to the farmed parcels on the opposite side of Howe Lane than the existing dwellings on the developed and committed area on the north side of the Subject Property. Approval of the Application will therefore not commit or promote justification for changing the adjacent or nearby agricultural lands on the opposite side of Howe Lane to nonresource use.

There are no designated, zoned or managed forest lands located in the vicinity of the Subject Property.

The type and level of agricultural activities associated with hay, livestock pasture and raising livestock on nearby lands to the west will not conflict with the use of the Subject Property.

“(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;”

Approval of the Application would result in the addition of one dwelling on the Subject Property and, this will be compatible with the residential uses and densities of adjacent developed and committed lands to the north and east, and with the dwelling on the 9.87 acre parcel to the south. Approval of the Application will not adversely affect the agricultural uses of the nearby lands zoned for exclusive farm use on the opposite side of Howe Lane.

Goal 3 and Goal 4: The Relationship Between Goals 3 and 4.

OAR 660-006-0015(2) states,

“When lands satisfy the definition requirements of both agricultural land and forest land, an exception is not required to show why one resource designation is chosen over another. The plan need only document the factors that were used to select an agricultural, forest, agricultural/forest, or other appropriate designation.”

Because the Subject Property is designated as “Agriculture” by the Lane County Rural Comprehensive Plan, an exception to Goal 4 is not required. However, out of an abundance of caution, the Board hereby finds, that based on the evidence in the record, the Application meets the irrevocable exception criteria for Goal 4, Forest Lands.

Goal 3: Agricultural Lands

“To preserve and maintain agricultural lands. Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the State's agricultural land

use policy expressed in ORS 215.243 and 215.700.”

Goal 3 requires that SCS soils data be used to classify the soils, unless refined with more detailed onsite investigation. OAR 660-033-0030(6). According to the Lane County soils map that is based on the SCS soils data, the predominant soil type of the Subject Property is 105A Pengra silt loam. This soil type has 1 to 4% slopes, is agricultural capability class II land and would be classified as high value farmland if well drained. However, the Subject Property is poorly drained so this soil type would not qualify as high value farmland. According to the Lane County contours map in Exhibit Q, the Subject Property slopes very gently downward to the east. The relatively level nature of the Subject Property contributes to its poor drainage. According to the Lane County soils map in Exhibit O, a small area in the southeast corner of the Subject Property is composed of 120B Salkum silt loam soils with 2 to % slopes and is an agricultural class 2, high value soil. This soil type corresponds to the poorly drained wetland area on the Subject Property.

Goal 4: Forest Lands

“To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture. Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.”

Goal 4 is relevant in determining the potential impacts that approval of the Application and subsequent development of a dwelling on the Subject Property might have on any nearby “Forest Lands.” Because there are no nearby designated forest lands, Goal 4 is not applicable.

Goal 5: Open spaces, scenic and historic areas, and natural resources.

Except for a wetland drainage in the southeast corner of the Subject Property, there are no designated or identified Goal 5 resources on the Subject Property. There is a designated wetland drainage in the southeastern corner of the Subject Property, as shown in Exhibits P and D. Development of one dwelling on the Subject Property can occur at least 200 feet away from this wetland and without interference with or alteration of this wetland.

Goal 6: Air, Water and Land Resources Quality

“To maintain and improve the quality of the air, water and land resources of the State. All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges

shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources.”

Goal 6 protects the quality of land, air, and water resources.

One focus is on the means of onsite sewage disposal. The Board finds that the Subject Property can be developed for one dwelling using an onsite sewage disposal system. A precondition to any residential use, however, will be the development of individual septic systems meeting state standards. The soils on the Subject Property are the same as those on rural residential subdivisions in the immediate area that have developed such systems. The availability of the state standards as a precondition to residential development ensures that the future use will comply with Goal 6.

Another focus is on groundwater. Lane Manual Chapter 13.010(2)(b)(i) designates adjacent and nearby committed land areas 385 1 and 2, and 400 1-3 as ground water quantity and quality limited areas.

In 2001, Lane County approved Ordinance No. PA 1148 for a plan amendment and zone change to RR5 for the adjacent properties in Map 19-03-15 Tax Lots 2601 and 2602, then Tax Lot 2600. To address the groundwater limited area concerns, this ordinance included a well log examination by the environmental planning firm of EGR & Associates, Inc. for 65 area wells and groundwater supply for the properties near Tax Lots 600 and 601. This report concluded that appropriately constructed wells to support the proposed two dwellings would provide an adequate supply of 500 gallons per day, respectively, without causing adverse effects upon adjacent wells or exceeding the carrying capacity of the aquifer.

In 2001, a well was drilled on the adjacent property in Map 19-03-15 Tax Lots 2601 and 2602, then Tax Lot 2600. At a depth of 33 to 58 feet, this well yielded 15 gallons of water per minute for a duration of one hour.

In 1998, a well was drilled on the Subject Property. At a depth of 110 feet, this well yielded 8.5 gallons of water per minute for a duration of one hour.

Based on the groundwater information the record, the Board finds that the use of the existing well on the Subject Property, for domestic household purposes will not create the need for a public water facility, will not create the need for service providers to supply water to the Subject Property, and will not negatively affect groundwater supply for nearby properties, and will not exceed the carrying capacity of the groundwater in the area.

The Board finds that the Subject Property is not listed as a water quantity limited area within Lane Manual 13.010. The Subject Property is not within the Spencer Creek Watershed and it is not within one of the listed Developed and Committed Lands Exception Areas. The Subject Property is not in a protected Goal 5 area. In addition, the immediate exception area, D&C Area #385-4, is also not listed as a water quantity limited area.

The Board finds that the methodology for determining the adequacy of water supply is identified in the Lane County Rural Comprehensive Plan Goal 5 Water Resources Policy #4:

“The primary means of evaluating groundwater resources for land use planning purposes shall be through the land division review process. The Little Butte Volcanics, Eugene Formation, Fisher Formation, Spencer Formation, Flourney Formation, Alluvium and Older Dunes geological units shall be designated as quality and/or quantity limited aquifers. As such the provisions of Chapter 13, Lane Code (Land Divisions) regarding areas so designated will apply.”

Lane County *RCP* Policy #4 directs the use of the requirements found in the land division requirements of Lane Code 13:

Lane Code Chapter 13 – Land Divisions and Property Line Adjustments

Lane Code 13.060(h) (ii) Prior to final plat approval, areas designated by the Board as having problems in the quantity or quality of available water as adopted into Lane Manual Chapter 13.010 must also comply with the following requirements for all vacant proposed parcels that are less than 20 acres in size:

(aa) If the subject property is designated as quantity limited, as listed in Lane Manual 13.010(2), prior to final plat approval, the applicant must submit proof demonstrating it can sustain the proposed development with sufficient water. The Director can require an aquifer study prepared by an Oregon registered geologist.

For the purpose of this application: Board finds that this Lane Code provision above contains extra provisions for areas that have been designated as quantity limited areas in the adopted Lane Manual Chapter 13.010. The Subject Property is not listed as a water quantity limited area within Lane Manual 13.010. The Subject Property is not within the Spencer Creek Watershed and it is not within one of the listed Developed and Committed Lands Exception Areas. The immediate exception area, D&C Area #385-4, is also not listed as a water quantity limited area.

Because the Subject Property is not listed as water quantity limited, demonstration of water availability can be demonstrated in accordance with Lane Code 13.060(h)(iii):

Lane Code 13.060(h) (iii) Water Availability

(bb) Individual Water Systems. When parcels are to be served by individual or shared water systems, they must comply with either (A) or (B) below.

(A) When parcels will be served by individual or shared water systems, sufficient evidence may be submitted to demonstrate that each parcel will have an adequate supply of water prior to final plat approval. Adequate supply of water for parcels created by a land division must comply with the following standards:

(i-i) For an individual well, the well must produce on average five gallons per minute during a five-hour pump test;

The Subject Property is developed with a 110’ deep well (LANE 55153) which was drilled in 1998 and produced 8.5 gallons per minute at that time. In addition to the 1998 well test, the Applicant provided a new well test for the same well, report dated November 14, 2023, showing that the well on the Subject Property produced between 9.1 and 11.2 gallons per minute for a 5 hour test. These two well production reports, one from 1998 and one from 2023, show that the Subject Property conforms to the requirements of Lane Code for determination that there is an adequate supply of water for the Subject Property. This un rebutted evidence shows that the aquifer is

actually producing more water over the years. The Board finds that the testimony of the neighboring property owner about purported decline in his well performance is not relevant to the criteria. It should be noted that wells may “decline” for a variety of reasons, some which have nothing to do with overall groundwater resources.

Goal 7: Areas Subject to Natural Disasters and Hazards.

“To protect life and property from natural disasters and hazards.”

The phrase “areas of natural disasters and hazards” means “areas that are subject to natural events that are known to result in death or endanger the works of man, such as stream flooding, ocean flooding, ground water, erosion and deposition, landslides, earthquakes, weak foundation soils and other hazards unique to local or regional areas.”

There are no such areas known on the Subject Property. The Lane County contours map in the record indicates that the Subject Property has a very slight slope, validating that there are no landslide hazards on the Subject Property. The Lane County floodplain map indicates that the Subject Property is not in a floodplain area.

Goal 8: Recreational Needs

“To satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts.”

The overriding purpose of Goal 8 is to address all recreational needs, but its primary focus is on siting and developing destination resorts, defined in Goal 8 as "self-contained development[s] providing visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities." Goal 8 is not directly applicable to the Application. No destination resort is proposed. Furthermore, the Subject Property is not used for public recreational purposes and is not designated on any county plan as intended for that purpose in the future.

Goal 9: Economic Development

“To provide adequate opportunities throughout the State for a variety of economic activities vital to the health, welfare, and prosperity of Oregon’s citizens.”

Goal 9 is focused on commercial and industrial development. This goal is not directly applicable to the rural residential use of a rural residential designation.

Goal 10: Housing

“To provide for the housing needs of citizens of the State.

Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.”

Goal 10, like its implementing rule, is geared primarily to housing issues inside urban growth boundaries. The goal's definition of "buildable lands," for example, is limited to lands in urban and urbanizable areas. This site is outside any UGB. To the extent Goal 10 may have some relevance to rural areas, this proposal will comply with the goal because, it will result in one additional dwelling unit. In addition, the Buildable land inventories of each city in Lane County assume some level of new housing to be provided in the rural area of the County.

Goal 11: Public Facilities and Services

"To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development. Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served. A provision for key facilities shall be included in each plan. Cities or counties shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons. To meet current and long-range needs, a provision for solid waste disposal sites, including sites for inert waste, shall be included in each plan."

Goal 11 addresses facilities and services in urban and rural areas. The Subject Property is "rural land" and will remain rural after this approval, as discussed in connection with Goal 14. "Public facilities and services" is defined in the Statewide Planning Goals to include: "projects, activities and facilities which the planning agency determines to be necessary for the public health, safety and welfare." The Goal 11 Rule defines a "public facility": "A public facility includes water, sewer, and transportation facilities, but does not include buildings, structures or equipment incidental to the direct operation of those facilities." OAR 660-11- 005(5).

The *Rural Plan Policies* (Goal 11, Policies 6.e. and k.) describe the minimum level of services for Nonresource areas in rural Lane County. The services are: schools, on-site sewage disposal, individual water supply system, electrical service, telephone service, rural level fire and police protection, and reasonable access to solid waste disposal. The services available to the Subject Property, or proposed to be developed, include:

- Fire South - Lane Co Fire & Rescue
- Police - Lane County Sheriff and State Police
- Schools - Creswell School District
- Access - Howe Lane
- Electric - Emerald People's Utility District
- Telephone (including internet) - Century Link, Charter or Spectrum
- Solid Waste - Sanipac garbage services (Creswell Dump) 34293 Cloverdale Road
- Sewer - Individual Septic Systems (Proposed)
- Water - an existing well

Based on this information, the Board finds that the services available to the Subject Property comply with this Goal and RCP Goal 11 Policies 6.e. and k.

Goal 12: Transportation

“To provide and encourage a safe, convenient and economic transportation system.

A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services, (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.”

Goal 12 is implemented through the Goal 12 Rule (OAR 660-012). The Rule has a section that specifically addresses proposals such as this – amendments to acknowledged comprehensive plans and implementing regulations. OAR 660-12-060(1) provides that any such amendments that “significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility.” The threshold question, therefore, is whether the proposed one dwelling unit allowed by the Application would significantly affect a transportation facility.

The proposed development of one dwelling on the Subject Property will not trigger this section of the rule. The ITE Manual 10th Edition estimates that the number of daily trips for one unit of single family detached house is 9.44 trips per day. Lane Code Chapter 15 does not require a traffic impact study for this number of trips. The *Lane County Rural Transportation System Plan* designates Howe Lane as a Major Rural Collector and indicated Howe Lane has 600 daily trips. The traffic from one additional dwelling on the Subject Property would only increase the traffic on Howe Lane by 1.5%, would not significantly affect Howe Lane, and would not trigger the requirement in LC 15 for a transportation impact study. In any case, even under the current plan designation and zoning, the Subject Property would be expected to produce some vehicular trips that must be accounted for in this Application. The Board finds that the Application is consistent with Goal 12 and the Goal 12 Transportation Planning Rule.

Goal 13: Energy Conservation

“To conserve energy. Land and uses developed on the land shall be managed and controlled so as to maximize the conservation of all forms of energy, based on sound economic principles.”

This goal is not directly applicable to individual land use decisions. Rather, its focus is on the adoption and the amendment of land use regulations.

Goal 14: Urbanization

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

A specific residential development proposal that is allowed to be established on an irrevocably committed exception area must also be found to be a “rural” level of development under Goal 14. Goal 14 prohibits urban uses on rural land. By definition, all land outside an acknowledged urban growth boundary and not subject to a Goal 14 exception is rural land. When a county amends its plan for rural land, it must demonstrate that the new plan and zone designations comply with Goal 14 or adopt an exception to Goal 14.

A density of one unit per ten acres is not an urban density. The proposed density of one unit per ten acres is the lowest possible Rural Residential density allowed under the Lane County Rural Comprehensive Plan and Lane Code.

Goals 15-19:

Goal 15: Willamette River Greenway

Goal 16: Estuarine Resources

Goal 17: Coastal Shorelands

Goal 18: Beaches and Dunes

Goal 19: Ocean Resources

These five goals are not applicable as they deal with resources that are not present on the Subject Property.

12. Findings and Conclusions Related to Compliance with the Lane Code 16.252 Rezoning Criteria

“16.252 Procedures for Zoning, Rezoning and Amendments to Requirements.”

“(1) Purpose. As the Rural Comprehensive Plan for Lane County is implemented, changes in zone and other requirements of this chapter will be required. Such Amendments shall be made in accordance with the procedures of this section.

(2) Criteria. Zonings, rezonings and changes in the requirements of this chapter shall be enacted to achieve the general purpose of this chapter and shall not be contrary to the public interest. In addition, zonings and rezonings shall be consistent with the specific purposes of the zone classification proposed, applicable Rural Comprehensive Plan elements and components, and Statewide Planning Goals for any portion of Lane County which has not been acknowledged for compliance with the Statewide Planning Goals by the Land Conservation and Development Commission. Any zoning or rezoning may be effected by Ordinance or Order of the Board of County Commissioners or the Hearings Official in accordance with the procedures in this section.”

Consistency with the General Purposes of Chapter 16:

LC 16.003 sets forth 14 broadly-worded purpose statements that include a provision to ensure that development is commensurate with the character and physical limitations of the land. Rezoning from E25 to RR-10 implements the proposed plan amendment to Rural Residential with a developed and committed exception. The public interest is served by recognizing that the land is impacted by nearby development.

Consistency with the Purpose of the Rural Residential Zone:

The Rural Residential zone is intended to provide opportunities for people to live in a rural area, allow primary and accessory residential uses that are compatible with primary residential uses, and implement the *Rural Plan Policies* related to developed and committed lands. The proposed RR10 zoning will allow one dwelling on the Subject Property, that is the same 1 dwelling density the RR5 zoning allows on adjacent developed and committed areas. The RR10 zone will therefore be compatible with residential uses.

Consistency with the Rural Plan Policies:

The *Rural Plan Policies* provide the policy basis for comprehensive plan and implementing regulations and provide direction for land use decisions. The findings in Exhibit demonstrate that the proposed amendment is consistent with the *Rural Plan Policies*.

Consistency with the Statewide Planning Goals:

Findings 12 above demonstrate consistency with the Statewide Planning Goals.

From: [Sean Malone](#)
To: [ADAMS Shawna L](#); [ADAMS Shawna L](#); [BELL Amber R](#); [Hope S](#)
Subject: LandWatch Testimony re Perkins - PA20-05634
Date: Tuesday, October 15, 2024 9:30:40 AM
Attachments: [Malone to Lane County re Perkins 10.15.24.pdf](#)

[EXTERNAL]

Shawna,

Please find attached testimony for the Perkins zone change and exception application before the Board today. Please add to the record.

Thank you,

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October 15, 2024

Via Email

Lane County Board of Commissioners
c/o Shawna Adams, Senior Planner
Land Management Division
3050 North Delta Highway
Eugene OR 97408
shawna.adams@lanecountyor.gov

Re: LandWatch Lane County Comments for File No. 509-PA20-05634 (Perkins),
Request for Comprehensive Plan Amendment, Rezone, and Irrevocably
Committed Exception to Statewide Planning Goal 3.

On behalf of LandWatch Lane County, please accept this comment letter for application 509-PA20-05634 (Perkins). LandWatch incorporates by reference its prior comment letters dated February 21, 2023, before the Planning Commission and August 1, 2023, October 31, 2023, and December 5, 2023, before the Board of Commissioners. LandWatch also incorporates by reference the issues raised in the staff reports. As has been stated previously, numerous issues have been raised by staff, DLCD, and the Oregon Department of Agriculture. These issues have not yet been resolved, and, therefore, LandWatch respectfully requests that the Board deny the application.

As has already been identified by DLCD and LandWatch, reliance on the 1989 Developed and Committed Lands Working Paper Addendum is mistaken. The findings also point to the decision in *Johnson v. Lane County*, 24 Or LUBA 251, 259 (1992) to support using the Addendum, but that case does not indicate that the Addendum is either a standard or a criterion for irrevocably committed exceptions. This makes sense because the Addendum was never acknowledged by DLCD, as would be the case with an amendment to land use regulations or a comprehensive plan. Second, the exception process is a matter of state law, and the County gets no deference in its reliance on the

Addendum. In *Johnson*, LUBA largely disregarded the Addendum and did not appear to give it any authority, and once Intervenor and the Count conceded that they “did not exclusively rely on the working paper guidelines” and relied on an expert opinion of an agricultural consultant. LUBA reviewed the expert report and sustained the assignment of error because the expert report did not contain the analysis alleged. As such, LUBA did not give the Addendum any credence. LUBA next addressed the Addendum in the seventh assignment of error where LUBA found that the “county’s conclusory application of the working paper guidelines does not substitute for the actual analysis required under for the actual analysis required under OAR 660-04-018(2)(b)(B).” In other words, the findings related to the Addendum do not substitute for findings under the relevant administrative rules. The findings, here, do not appreciate that basic conclusion.

As DLCD noted, the mere existence of dwellings nearby does not mean that the subject property satisfies the developed and committed exception criteria. Indeed, if the existence of dwellings meant that an adjacent parcel satisfied the exception criteria, then there would be a never-ending cascade of exceptions based on every new dwelling. That is not the intent of the administrative rules.

The findings also allege that an adjacent neighbor’s allegations that the subject property was farmed is not supported by evidence. The findings are mistaken because the testimony of that neighbor *is* evidence. The findings must address that testimony. It is not enough to simply ignore it. For example, the findings rely on the testimony of local farmers, but ignore the testimony of others as “not evidence.” That is contradictory.

The findings rely on various statements from the prior LLV approval, but that approval did not contain the same testimony in opposition here. The testimony that alleged the farmland had been farmed was not submitted for the LLV application. In fact, the LLV decision noted that there was no serious attempt at farming: “Testimony was given that explained that attempted agricultural pursuits on the property, while admittedly minor, have failed and the property has remained largely fallow since its creation.” If there has been no serious attempt to farm the property, then any findings about its unsuitability must account for that shortcoming. The findings also point to the following conclusion in the LLV application: “Absent any evidence that the larger lots were actually used for agricultural purposes, it is more likely that they represented opportunities for future division or the potential sale to a buyer looking for privacy or the ability to hobby farm.” Again, here, there is evidence, and the prior quotation begins with “[a]bsent any evidence” Here, there is evidence that the subject parcel was farmed.

The findings are contradictory. On one hand, they allege that “based on the evidence in the whole record, that the existing uses adjacent to the Subject Property, are not used for ‘commercial farm activities’ or even ‘small scale farming’ activity.” Then, on the other hand, the findings allege that the properties to the west “appears to be a farming operation, or at least part of a farming operation.” The findings are mistaken, first, to assume that the road is the adjacent property and, second, that the adjacent properties to the west can be ignored. It is clearly legal error to ignore the adjacent farmed properties to the west. The findings are also contradictory because they allege that there is no development on the property and that there is development on the property in the form of a well and septic drain field.

The proposed findings allege: “Howe Lane is a County Road with a 50-foot wide right-of-way with ditches that borders the Subject Property on the west and acts as an impediment to utilization of the Subject Property with the farm parcel to the west.” There is no support in the record that because a farmed parcel is across the street, it cannot be used in conjunction with the subject property. It appears the findings confuse the terms “adjacent” and “contiguous.” Regardless, the failure to address the properties to the west, as well as the farmed properties to the north is legal error.

The findings also allege that “[t]he rest of the Subject Property (5.76 acres) could not be attempted for farming.” Not only does this not make sense, but LandWatch submits that there has been no serious attempt at farming the property. The Spencer testimony also indicates that they can farm their land adjacent to Howe Lane and raise animals on it.

LandWatch also submits that the Stauffer testimony is irrelevant, alleging things about “major taxes,” and it appears that Stauffer is referring to his own property. The testimony of Bill Spencer also concedes that there have been only a “couple of” attempts at farming. Again, it is apparent that the only reason there is no farming is because there has been no serious attempt at doing so. Spencer also alleges that the “property was mowed to keep down fire danger for years,” but Spencer does not indicate how he gained this information. Allegations about the inadequate size of the property from other testimony do not respond to the issue of whether the property could be farmed in conjunction with other parcels as a farm unit.

OAR 660-004-0028(2)(b) requires an analysis of the characteristics of adjacent lands. The findings purport to put words in the mouth of Mr. Bellew, stating that “[h]aving a residential well used for potable water 75 feet from a farm operation that would necessarily use fertilizer, herbicides and pesticides that could contaminate the

neighbor's residential groundwater is a conflict that justifies an irrevocable exception to Goal 3." This allegation is without any factual basis and is purely speculation. Next, the findings fail to account for the large property in farm use to the west because the findings allege that the only property to the west is "Lane County Road 292/Howe Lane." This is plainly inconsistent with the language and intent of the administrative rule. Again, the subject property could be farmed in conjunction with the subject property. Under OAR 660-004-0028(2)(c), the findings are supposed to analyze the relationship between the exception area and the lands adjacent. Again, the findings appear to take the position that the adjacent farmland to the west is impossible to access because there is no access off of Howe Lane.

The findings allege property is not suitable because "of the impacts identified in the *Addendum* such as: difficulty in obtaining insurance for chemical applications, increased possibility of litigation, problems with spraying herbicides and pesticides, subject to trespass and vandalism liability, and hostility of neighborhood." None of these are factual findings for this property, and the findings are just repeating those issues that have not been found to have occurred here. Moreover, those findings are purely speculative. Then the findings go on to allege a conflict related to a neighbor that does not allege a conflict. Again, the findings are putting words in the neighbor's mouth, and there is simply no excuse for doing so.

The findings allege that "[t]here is no evidence in the record that the adjacent properties are being farmed, either commercially, or in any manner for profit." Again, the findings just ignore the most relevant property to the west. In fact, every large parcel that exists in the vicinity of the property is ignored, including 1700 and 1800 to the west, as well as the large-acre agricultural lands to the north. The lands to the north are also not analyzed under the rules, and that appears to be legal error.

The memo submitted on October 14, 2024, that includes an attachment with email communications between the applicant's attorney and Commissioner Farr raises more questions than it answers as it relates to *ex parte* contacts. It is not clear how commonplace these types of communications are in Lane County, but, regardless, the emails are *ex parte* contacts that have finally been disclosed, although nothing was said of the *ex parte* contacts from prior hearings. However, the emails indicate that both Commissioner Farr and Mike Reeder, the applicant's legal counsel, asked to communicate further by phone. If those further communications occurred, then Commissioner Farr must disclose their existence and disclose their substance. Until that has occurred, serious questions remain about the existence of further *ex parte* contacts.

For the reasons above and those set forth in the DLCD letter, the Bellew letter, the staff reports, all of which are incorporated herein, LandWatch respectfully requests that the application be denied.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sean Malone". The signature is fluid and cursive, with a large initial "S" and "M".

Sean T. Malone
Attorney for LandWatch Lane County

Cc:
Client