



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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NOTICE OF ADOPTED AMENDMENT

July 24, 2007



TO: Subscribers to Notice of Adopted Plan
or Land Use Regulation Amendments

FROM: Mara Ulloa, Plan Amendment Program Specialist

SUBJECT: Marion County Plan Amendment
DLCD File Number 010-06

The Department of Land Conservation and Development (DLCD) received the attached notice of adoption. A copy of the adopted plan amendment is available for review at the DLCD office in Salem and the local government office.

Appeal Procedures*

DLCD ACKNOWLEDGMENT or DEADLINE TO APPEAL: August 8, 2007

This amendment was submitted to DLCD for review 45 days prior to adoption. Pursuant to ORS 197.830 (2)(b) only persons who participated in the local government proceedings leading to adoption of the amendment are eligible to appeal this decision to the Land Use Board of Appeals (LUBA).

If you wish to appeal, you must file a notice of intent to appeal with the Land Use Board of Appeals (LUBA) no later than 21 days from the date the decision was mailed to you by the local government. If you have questions, check with the local government to determine the appeal deadline. Copies of the notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR Chapter 661, Division 10). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

***NOTE: THE APPEAL DEADLINE IS BASED UPON THE DATE THE DECISION WAS MAILED BY LOCAL GOVERNMENT. A DECISION MAY HAVE BEEN MAILED TO YOU ON A DIFFERENT DATE THAN IT WAS MAILED TO DLCD. AS A RESULT YOUR APPEAL DEADLINE MAY BE EARLIER THAN THE ABOVE DATE SPECIFIED.**

Cc: Doug White, DLCD Community Services Specialist
Ron Eber, DLCD Farm/Forest Specialist
Sterling Anderson, Marion County

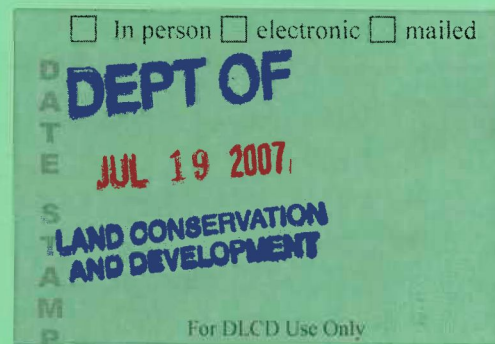
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FORM 2

DLCD

Notice of Adoption

THIS FORM **MUST BE MAILED** TO DLCD
WITHIN 5 WORKING DAYS AFTER THE FINAL DECISION
PER ORS 197.610, OAR CHAPTER 660 - DIVISION 18



Jurisdiction: **MARION COUNTY**

Local file number: **ZC/CP07-09**

Date of Adoption: **7/11/2007**

Date Mailed: **7/17/2007**

Was a Notice of Proposed Amendment (Form 1) mailed to DLCD? **Select one** Date: **9/25/2006**

☐ Comprehensive Plan Text Amendment

☒ Comprehensive Plan Map Amendment

☐ Land Use Regulation Amendment

☒ Zoning Map Amendment

☐ New Land Use Regulation

☐ Other:

Summarize the adopted amendment. Do not use technical terms. Do not write "See Attached".

to change the zone from SA (Special Agriculture) to AR-10 (Acreage Residential-10 acre minimum lot size) and to change the comprehensive plan designation from Special Agriculture to Rural Residential and to take exception to Statewide Goal 3 (Agriculture)

Does the Adoption differ from proposal? No, no explanation is necessary

Plan Map Changed from: **Special Agriculture**

to: **Acreage Residential 10 acre minimum**

Zone Map Changed from: **Special Agriculture**

to: **Rural Residential**

Location: **4300 block Riverside & 4427, 4447, 4448 Fox Ln S**

Acres Involved: **0**

Specify Density: Previous:

New:

Applicable statewide planning goals:

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19
☐ ☐ ☒ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐

Was an Exception Adopted? ☒ YES ☐ NO

Did DLCD receive a Notice of Proposed Amendment...

45-days prior to first evidentiary hearing?

☒ Yes ☐ No

If no, do the statewide planning goals apply?

☐ Yes ☐ No

If no, did Emergency Circumstances require immediate adoption?

☐ Yes ☐ No

DLCD # 010-06 (15586)

**BEFORE THE BOARD OF COMMISSIONERS
FOR MARION COUNTY, OREGON**

In the Matter of the)	Case No. ZC/CP06-09
)	
Application of:)	Clerk's File No. 5528
)	
Royce and Joan Otteson, Kent and Dawn)	ZONE CHANGE/COMPREHEN-
Campbell and Janet Adams)	SIVE PLAN AMENDMENT

AN ADMINISTRATIVE ORDINANCE

ORDINANCE NO. 1350

THE MARION COUNTY BOARD OF COMMISSIONERS HEREBY ORDAINS AS FOLLOWS:

SECTION I. Purpose

This matter comes before the Marion County Board of Commissioners ("Board") on the application of Royce and Joan Otteson, Kent and Dawn Campbell and Janet Adams to change the zone from SA (Special Agricultural) to AR-10 (Acreage Residential-10 acre minimum lot size) and to change the Comprehensive Plan designation from Special Agricultural to Rural Residential and to take an exception to Statewide Planning Goal 3 (Agricultural Lands) on a 0.87 acre parcel, 0.38 acre parcel and a 1.11 acre parcel located in the 4300 block of Riverside Road at 4427 and 4448 Fox Lane South, Salem.

SECTION II. Procedural History

The Marion County Hearings Officer held a public hearing on this application on December 13, 2006. Mailed notice was provided to all property owners within 750 feet of the subject property at least 20 days before the hearing. On May 16, 2007, the Hearings Officer issued a report recommending that the Board grant the requested changes subject to certain conditions. Official notice was taken of the Planning Division file and the Hearings Officer's recommendation. The Board considered evidence in the record, all arguments of the parties and is otherwise fully advised in the premises.

SECTION III. Adoption of Findings and Conclusion

After careful consideration of all facts and evidence in the record, the Board adopts as its own the Findings of Facts and Additional Findings of Fact and Conclusions of Law contained in Section IV and V of the Hearings Officer's recommendation dated May 16, 2007 contained in Exhibit A, attached hereto, and by this reference incorporated herein.

SECTION IV. Action

The requested Comprehensive Plan Amendment from Special Agriculture to Rural Residential is hereby **GRANTED**.

The requested zone change from SA (Special Agricultural) to AR-10 (Acreage Residential-10 acre minimum) is hereby **GRANTED** subject to the conditions identified in Exhibit B, attached hereto and by this reference incorporated herein.

The property rezoned by this Ordinance is described in Exhibit C, attached hereto and by this reference incorporated herein. The Official Marion County Zoning Map shall be changed pursuant to the Marion County Rural Zoning Ordinance Section 110.660 to reflect the new zoning.

SECTION V. Effective Date

Pursuant to Ordinance 669, this is an Administrative Ordinance and shall take effect 21 days after the adoption and final signatures of the Marion County Board of Commissioners.

SIGNED and FINALIZED this 11th day of July,
2007, at Salem, Oregon.

MARION COUNTY BOARD OF COMMISSIONERS

Janet Carlson
Chair

D. Kern Heckett
Recording Secretary

JUDICIAL NOTICE

Oregon Revised Statutes, Chapter 197.830, provides that land use decisions may be reviewed by the Land Use Board of Appeals by filing a notice of intent to appeal within 21 days from the date this Ordinance becomes final.

EXHIBIT A

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the application of:)	Case No.	ZC/CP 06-9
)		
Royce and Joan Otteson,)	Clerk's File No.	
Kent and Dawn Campbell, Louis and)		
Lillian Owen, and Janet Adams)		
)		

RECOMMENDATION

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Royce and Joan Otteson, Kent and Dawn Campbell, Louis and Lillian Owen, and Janet Adams to change the zone from SA (Special Agricultural) to AR-10 (Acreage Residential-10 acre minimum lot size) and to change the Comprehensive Plan designation from Special Agricultural to Rural Residential and to take an exception to Statewide Planning Goal 3 (Agricultural) on a 0.87 acre parcel, 0.38 acre parcel, 1.11 acre parcel, and a 1.12 acre parcel located in the 4300 block of Riverside Road at 4427, 4448 Fox Lane S., Salem, Marion County, Oregon. (T8S; R4W; Section 36DC; Lots 100, 200, 300, and 400).

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and the Marion County Zoning Ordinance (MCZO) (Rural), especially chapters 123 and 128.

III. Public Hearing

A public hearing was duly held on this application on December 13, 2006. At the hearing, the Planning Division file was made part of the record. Planning Division files AR 05-27 and AR 02-12 were also made a part of the record. The following persons appeared at the hearing:

- | | | |
|----|---------------|-------------------------|
| 1. | David Epling | Planning Division |
| 2. | Royce Otteson | Applicant |
| 3. | Mark Shipman | Attorney for Applicants |
| 4. | Dawn Smith | Opponent |

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

IV. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The property originally proposed for the comprehensive plan amendment and zone change consists of four tax lots containing a total of 3.48 acres designated Special Agriculture in the M CCP and zoned SA under the Marion County Rural Zoning Ordinance (MCRZO). The owner of tax lot 84W36DC 300, Louis Owen (Lillian Owen is deceased), withdrew his request for the comprehensive plan amendment and zone change. The Owen property will not be considered for zoning or designation changes. The remaining properties are the 1.11-acre Otteson property (tax lot 100), the 0.87-acre Campbell property (tax lot 200) and the 0.38-acre Adams property (tax lot 400), for 2.36 acres total.
2. The subject properties are on the south side of Riverside Road at the southeast and southwest corners of Fox Lane and Riverside Road. The Otteson and Campbell properties extend south to an existing railroad right-of-way. The properties are also in the SGO (Sensitive Groundwater Overlay) and Geologically Hazardous Areas Overlay zones.
3. Administrative Review Case 02-12 approved a replacement dwelling on tax lot 400 and Administrative Review Case 05-27 denied a lot-of-record dwelling on tax lot 100.
4. Tax lots 200 and 400 contain dwellings and tax lot 100 is vacant. Surrounding properties to the east, west, and north are zoned SA and consist of a mixture of farmed parcels and parcels devoted to residential use. Property to the south is zoned EFU (EXCLUSIVE FARM USE) and also is a mixture of farm and rural residential use.
5. Applicants ask to change the Comprehensive Plan designation from Special Agriculture to Rural Residential, and to change the zoning from SA to AR-10. Approval of this proposal will allow placement of a dwelling on tax lot 100.
6. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

The Marion County Department of Public Works Engineering and Permits Section (DPW) originally commented:

Approval of the proposal would change the zone from SA (Special Agriculture) to AR-10 (Acreage Residential – 10 acre minimum lot size) on the subject property. It is our understanding that this would allow construction of a dwelling on one of the subject properties, resulting in approximately 10 additional daily trips on Riverside Road and other roads in the area. Transportation issues have been reviewed based on this level

of development. Changes in development level may result in changes in requirements and/or mitigation measures. The Public Works Department has the following comments, requirements, and recommendations on this case:

STREETS

1. The applicants will be required to establish an access easement to the Otteson property from Fox Lane via one of the other subject properties, or establish an access easement to the Otteson property via some other alternate route that does not involve direct access to Riverside Road.
2. The applicants will be required to sign a nonremonstrance agreement for a project to improve Fox Lane to County standards (which would involve gravel shoulders, slope and drainage work, and may include some paving). Improvements would be required if a new dwelling is constructed.
3. No new accesses to Riverside Road will be permitted.
4. Access permits will be required for any new access, changes to an existing access, or change in use of an existing access. Driveways will also need to meet fire district standards for emergency access.

STORM DRAINAGE

5. Site grading shall not impact surrounding properties, roads, or drainage ways in a negative manner. Construction of improvements on the property shall not block historical or naturally occurring runoff from adjacent properties.
6. At this level of development, storm-water detention will not be required. However, if the amount of impervious area is further increased, storm-water detention may be required to detain the difference between a 10-year storm with developed conditions and a 5-year storm with pre-developed (before development authorized in this case) conditions.

GENERAL

7. The subject property is within the unincorporated area of Marion County. Systems Development Charges will be assessed upon development of the subject property at the time of application for building permits.
8. Any utility work in the public right-of-way will require a utility permit from Public Works.

DPW later modified comments 1, 2 and 3 concerning streets:

- 1) While access via Fox Lane or a shared access would be preferable, due to the difficulty in providing such an access configuration, the subject property will be permitted one access to Riverside Road, which must be at a safe and compliant location.
- 2) (item now deleted)
- 3) (item now deleted)

The Marion County Tax Office provided information on the tax status of the properties.

The Marion County Building Inspection Division commented that a septic site evaluation is required to determine septic feasibility.

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

V. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving all applicable standards and criteria are met.

GOAL EXCEPTION

2. All exceptions and comprehensive plan amendments are subject to DLCD (Department of Land Conservation and Development) review. DLCD was notified as required by state law, but provided no comment on the proposal.
3. There are three types of exceptions to statewide planning goals. The first type of exception is based on the concept that the property itself is too "physically developed" to be available for resource use. The second exception is based on the concept that the land surrounding the subject property is developed to such an extent that the property is "irrevocably committed" to uses other than resource use. The third type of exception requires the county to show other "reasons" why a goal exception is appropriate. Applicants propose a physically developed or irrevocably committed exception to goal 3. Physically developed and irrevocable committed exceptions are often addressed together, but each is a different type of exception. OAR 660-004 governs goal exceptions. OAR 660-004-0025 addresses physically developed exceptions, and OAR 660-004-0028 addresses irrevocably committed exceptions.

Physically developed

4. Under OAR 660-004-0025:

(1) A local government may adopt an exception to a goal when the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal.

(2) Whether land has been physically developed with uses not allowed by an applicable goal will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.

5. The proposed exception area is only about 2.36 acres and is in three tax lots. Two tax lots contain dwellings. The lots are shown on Assessor's map 84W36DC. The Otteson property (tax lot 100) is 1.11-acres, the Campbell property (tax lot 200) is 0.87-acre and the Adams property (tax lot 400) is 0.38-acre.

An aerial photograph in the AR 05-27 file, and a site plan show current development on the subject property. The Adams property contains a house, gravel drive, well and sand filter septic system with drainfield. The Campbell property contains a dwelling, graveled driveway, outbuilding, water system, and septic system. The Otteson parcel is vacant, but is also small at only 1.11-acres.

The Adams and Campbell properties have been in residential use for many years and each parcel is less than one acre. The Adams property is just over 1/3 acre. The Adams and Campbell properties are physically developed to such an extent that farm use cannot practicably be made of the parcels separately. The Adams parcel is bordered by Riverside Road to the north. Beyond the road are parcels with steep slopes that are not in farm use. To the east is Fox Lane and the Campbell and Otteson properties. The Campbell property is closest to the Adams property and is already developed to such an extent it cannot practicably be farmed. To the south is the Owen property that was originally a part of this application. The Burlington Northern Railroad tracks are just south of the Owen property. The Owen parcel is only 1.12-acres and is developed for residential uses. To the west is a .93-acre parcel that also contains residential development. The Campbell parcel borders Riverside Road and then steeply sloping parcels to the north. To the east is the Otteson parcel and more roadway right-of-way. To the south is the railroad right-of-way, and to the west are Fox Lane, and

the Adams, Owen and other residential properties. The Adams and Campbell properties cannot be combined with other surrounding property and put to farm use. OAR 660-004-0025 is satisfied for the Adams and Campbell properties.

Irrevocably Committed

6. Under 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:
 - (a) A "committed exception" is an exception taken in accordance with ORS 197.732(1)(b), Goal 2, Part II(b), and with the provisions of this rule;
 - (b) For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken;
 - (c) An "applicable goal," as used in this section, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken.
- (2) Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:
 - (a) The characteristics of the exception area;
 - (b) The characteristics of the adjacent lands;
 - (c) The relationship between the exception area and the lands adjacent to it; and
 - (d) The other relevant factors set forth in OAR 660-004-0028(6).
- (3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(1)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule. Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad

resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible." For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:

- (a) Farm use as defined in ORS 215.203;
 - (b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and
 - (c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a).
- (4) A conclusion that an exception area is irrevocably committed shall be supported by findings of fact which address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area.
- (5) Findings of fact and a statement of reasons that land subject to an exception is irrevocably committed need not be prepared for each individual parcel in the exception area. Lands which are found to be irrevocably committed under this rule may include physically developed lands.
- (6) Findings of fact for a committed exception shall address the following factors:
- (a) Existing adjacent uses;
 - (b) Existing public facilities and services (water and sewer lines, etc.);
 - (c) Parcel size and ownership patterns of the exception area and adjacent lands:
 - (A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the Goals were made at the time of partitioning or subdivision. Past land divisions made without application of the Goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors make 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 pursuant to the applicable goals shall not be used to justify a committed

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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 land adjoining those parcels;

- (B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations.
 - (d) Neighborhood and regional characteristics;
 - (e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include 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;
 - (f) Physical development according to OAR 660-004-0025; and
 - (g) Other relevant factors.
- (7) The evidence submitted to support any committed exception shall, at a minimum, include a current map, or aerial photograph which shows the exception area and adjoining lands, and any other means needed to convey information about the factors set forth in this rule. For example, a local government may use tables, charts, summaries, or narratives to supplement the maps or photos. The applicable factors set forth in section (6) of this rule shall be shown on the map or aerial photograph.
- (8) The requirement for a map or aerial photograph in section (7) of this rule only applies to the following committed exceptions:
- (a) Those adopted or amended as required by a Continuance Order dated after the effective date of section (7) of this rule; and

- (b) Those adopted or amended after the effective date of section (7) of this rule by a jurisdiction with an acknowledged comprehensive plan and land use regulations.

7. Under OAR 660-004-0028(1), the first issue that must be addressed is whether the proposed use is allowed by the applicable goal. Statewide Planning Goal 3 allows various uses, including some residential uses. The uses here are residential, and the Oregon Court of Appeals decision in *DLCD v. Yamhill County*, 183 Or App 556, *petition for review dismissed as improvidently allowed*, 336 Or 126 (2003) must be addressed. In the *Yamhill County* case, the Yamhill County Board of Commissioners approved a comprehensive plan amendment, zone change and exception to Statewide Planning Goal 3, to redesignate and rezone a parcel from resource use to residential use. The result allowed a single family dwelling on a newly rezoned ten-acre parcel. DLCD appealed the county's decision to the Land Use Board of Appeals (LUBA).

In the LUBA case (42 LUBA 126 (2002)), DLCD argued that a single family non-farm dwelling is a use allowed by Goal 3, and a goal exception could not be taken for a use allowed in the zone. LUBA disagreed with DLCD, saying that approval of a non-farm dwelling was too speculative, and that applicant was not required to exhaust all local applications before asking for a goal exception. LUBA's decision was appealed to the Oregon Court of Appeals.

The court of appeals reversed and remanded LUBA's decision, saying:

LUBA, for its part, framed the issue, in essence, as whether there should be some sort of exhaustion requirement--that is, that an applicant must first fail to qualify for a non-farm dwelling under Goal 3 and the various statutory provisions pertaining to non-farm dwellings before being able to utilize the exceptions process to rezone the property and build the dwelling. That approach misperceives the proper function of the exception process. The operative principle is not "exhaustion"--*i.e.*, whether an application for a particular use has been approved or denied--but whether the *type of use* is allowed under the pertinent goal. Here, the property at issue is subject to Goal 3. Goal 3 allows non-farm dwellings to be built under certain circumstances specified in ORS chapter 215. If an applicant wishes to build a non-farm dwelling on property subject to Goal 3, then the applicant must satisfy the criteria set forth in one of the relevant provisions of ORS chapter 215. The applicant does not have the option of building that dwelling on that property through the exceptions process and rezoning if the applicant fails to satisfy the criteria of ORS chapter 215. That is so because the *type of use* in question--the use of the property for a non-farm dwelling in this case--*is* permitted under the relevant goal. (Emphasis in the original.)

The *Yamhill County* case involved a reasons exception to Goal 3, but refers to provisions generally applicable to all goal exceptions, including irrevocably committed exceptions. The case seems to preclude taking an exception for rural residential use, but the case cannot be read that broadly. OAR 660-004-0022(2) specifically anticipates reasons exceptions for "rural residential development", and, OAR 660-004-0040 "applies to lands . . . that are planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3 . . . has been taken." OAR 660-004-0022(2) and OAR 660-004-0040 would be meaningless if exceptions could not be taken for rural residential uses.

Friends of Yamhill County v. Yamhill County, 47 Or LUBA 508 (2004) is another case where an exception to Goal 3 was requested, but this time rather than allowing one dwelling on one ten-acre parcel, the applicant wanted to divide a 20-acre parcel into two ten-acre parcels, keeping an existing dwelling on one parcel and allowing a new residential use on the other parcel. LUBA considered the court of appeals decision in the former *Yamhill County* case, noting that it could not be read to exclude an exception for all residential development in an EFU zone, noting that there are numerous instances where exceptions have been taken to allow acreage residential designations and zoning for formerly EFU zoned lands. LUBA explained:

[The] threshold inquiry is whether the proposed use is a "type of use" that is allowed by the applicable statewide planning goals. If the proposed use is the "type of use" that the goals allow, or conditionally allow subject to approval standards, an exception cannot be approved to authorize the proposed use.

* * *

The nature and scope of the "type of use" inquiry is the critical question.

LUBA decided the type of use proposed was a residential partition, a use not allowed by the goal. The one-lot zone change proposed in the former *Yamhill County* case allowed one new non-farm dwelling on one parcel. Goal 3 allows one non-farm dwelling on one parcel in some circumstances. Goal 3 does not allow subdivisions or partitions for residential development. Though no partition is requested here, the former *Yamhill County* case can be read as forbidding an exception that results in development of one dwelling on one parcel, while allowing an exception for larger residential development. The level of residential use proposed is not allowed by Goal 3.

One way to reconcile *Yamhill County* with OARs 660-004-0022(2) and 660-004-0040 is to construe the court's decision as narrowly applying to the facts of that case. The one-lot zone change in the *Yamhill County* case allowed one non-farm dwelling on one parcel, with no prospect of being able to further divide the parcel or to allow any additional dwellings. Goal 3 allows one non-farm dwelling on one parcel in some

circumstances but does not allow larger scale residential development, or subdivision for residential development. *Yamhill County* can be read as prohibiting an exception that results in development of one dwelling on one parcel, while allowing an exception that may result in residential development on more than one parcel. Although this area is confusing, an exception determination may be made in this case.

8. The characteristics of the exception area were addressed above in the physically developed section of this recommendation. The immediately surrounding lands were also addressed and it was noted that these properties could not be consolidated with other properties to make an effective farm unit. The proposed exception area is bordered to the north by a roadway and steeply sloping property, to the south by railroad tracks, small homesites and the Willamette River, to the east by rights-of-way, and to the west by smaller residential parcels. The property to the north is in the most extreme geological hazard classifications, and has not even been logged in the past due to its extreme slope.

Very little farm or forest use surrounds the subject property, and small residential parcels predominate much of the area. The Willamette River, roadways and railroad cut much of the area to the south and east into fairly narrow strips that are not conducive to farm use and have encouraged small acreage residential development. The subject property is isolated from lands in farm and forest use by distance, small residential properties and the physical barriers of slope, roadways and railroad tracks.

As noted above, the proposed exception area is small - less than three acres, heavily developed on two parcels and isolated from property in farm use by physical and natural barriers. The property is impractical for farm or forest use by itself or in combination with any adjacent properties due to existing residential development, steep slopes and human-made barriers.

The subject property and other properties in the area were already in existence when the county was initially seeking acknowledgement of its first comprehensive plan in compliance with statewide planning goals (see MCCP, Appendix A), so findings against the goals were not made at the time of partitioning or subdivision.

The subject parcels are all in separate ownership and the surrounding small parcels are also generally in separate ownerships (see notification map). As noted by the rule, small parcels 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. That is an accurate description of the proposed exception area and the surrounding area.

As noted above, the record includes an aerial photograph (AR 05-27 file) and a site plan of the subject properties. A larger, annotated map shows the larger area and the dwelling development pattern of the area. Very little farm or forest use surrounds the

proposed exception site, and small residential parcels predominate much of the area. The Willamette River, roadways and railroad cut much of the area to the south and east into fairly narrow strips that are not conducive to farm use and have encouraged small acreage residential development. Some annual grains are grown on the larger flat lands along the river. Some of the less steep northerly slopes have been logged but are not actively being managed for timber. The most severely sloped areas have not been logged. Much of the area north and west of the railroad right-of-way is within a geological slide hazard area.

Given the current development on the proposed exception site, its small size, the parcelization pattern in the area, physical and topographic constraints and its isolation from farm and forest uses, the proposed exception area is irrevocably committed to nonresource use.

9. Planning and zoning for exception areas is governed by OAR 660-004-0018:
 - (1) Purpose. This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.
 - (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:
 - (a) That are the same as the existing land uses on the exception site;
 - (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; and
 - (B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and

- (C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;
 - (c) For which the uses, density, and public facilities and services are consistent with OAR 660-022-0030, "Planning and Zoning of Unincorporated Communities", if applicable, or
 - (d) That are industrial development uses, and accessory uses subordinate to the industrial development, in buildings of any size and type, provided the exception area was planned and zoned for industrial use on January 1, 2004, subject to the territorial limits and other requirements of ORS 197.713 and 197.714
- (3) Uses, density, and public facilities and services not meeting section (2) of this rule may be approved only under provisions for a reasons exception as outlined in section (4) of the rule and OAR 660-004-0020 through 660-004-0022.
 - (4) "Reasons" Exceptions. (No reasons exception is requested. Subsection 4 does not apply.)

All statewide planning goals are examined below to ensure that the exception to Goal 3 does not run afoul of the remaining goal requirements. Taking an exception to Statewide Planning Goal 3 will not allow additional parcelization, so no uses, densities, public facilities or services, or activities other than those recognized or justified by the exception will be allowed. The subject physically developed and irrevocably committed exceptions allowed under OAR 660-004-0025 and 660-004-0028 will impose a rural residential designation and AR-10 zoning. No additional land divisions are possible under this designation and zoning, so densities and the existing type of development will not change within the exception area. Because no plan and zoning provisions will be adopted that will allow changes in existing types of uses, densities, or services, the standards outlined in this rule are not applied.

STATEWIDE PLANNING GOALS

- 10. As noted above, exceptions to one goal or a portion of one goal do not relieve a jurisdiction from the remaining goal requirements. Each statewide planning goal is examined for compliance.
- 11. Goal 1: Citizen Involvement. The notice and hearings process provides an opportunity for citizen involvement.

Goal 2: Land Use Planning. The subject application for goal exception is examined under the implementing regulations for this goal.

Goal 3: Agricultural Lands. Goal 3 applies to the subject site. Applicants are requesting an exception to this goal.

Goal 4: Forest Lands. The subject site is not in a forest zone. This goal is not applicable.

Goal 5: Open Spaces, Scenic and Historic Areas, and Natural Resources. No MCCP identified wetlands, riparian ways, aggregate sites, big game habitat, sensitive waterways or cultural sites are identified on or immediately adjacent to this site. This goal is not applicable.

Goal 6: Air, Water and Land Resources Quality. The subject site is not within an identified air or watershed area. State law, administered through the county, governs septic disposal systems. State and county regulations are consistent with this goal. Single family residential use of the property will not result in significant particulate discharge into the air. However, the area is identified as a sensitive groundwater area.

*The subject site is in an SGO-5 zone, an area identified as having potential groundwater limitations. MCZO chapter 181 sets out the criteria for development permit applications for new land uses that rely on water from exempt use wells in the SGO zone. Domestic use wells are exempt use wells under Oregon Department of Water Resources regulations.

Under MCZO 181.060, applicants for a development permit where the new land use will rely on groundwater in the sensitive groundwater overlay zone are subject to the following requirements:

- (A) Any wells on the tract subject to temporary or permanent abandonment under ORS 537.775 shall be abandoned prior to final development permit approval.
- (B) The well shall be made available to the county for monitoring purposes, pursuant to the county well monitoring program ordinance.
- (C) Evidence that any required permits from the Oregon Health Division for use of the water have been obtained shall be submitted to the county prior to development permit approval, or final plat approval in the case of partitions, subdivisions, and planned unit developments.

These items can be made conditions of approval.

Under MCZO 181.070(B), when the application is for a development permit for a new dwelling that is reliant upon an exempt-use well on a lot existing on the effective date of the SGO ordinance, the following requirements apply:

- (1) Prior to approval of the building or manufactured dwelling placement permit, the owner shall be required to sign and allow the entering of the following declaratory statement into the chain of title for the subject parcel:

The property herein described is situated in a "Sensitive Groundwater Overlay" zone. The availability of groundwater may be limited, and if a long-term decline in water supply occurs the property owner may need to find an alternate source. Marion County is not responsible for deepening or replacing wells that fail to produce an adequate supply of groundwater.

- (2) - (3) (SGO-A zone requirements. Not applicable.)

The MCZO 181.070(B)(1) requirement can be made a condition of approval. As conditioned, both water supply requirements and Goal 6 will be met.

Goal 7: Areas Subject to Natural Disasters and Hazards. The subject site is not within an identified floodplain but is within a geologic slide hazard area. In case number AR05-27, the applicants provided a Report of Geological Assessment Proposed Residential Site Tax Lot 100, Riverside Road Marion County, Oregon. The report was prepared by Curtis C. Ehlers, R.G., C. E. G., Senior Engineering Geologist of Carlson Geotechnical. The report determined that the proposed site was geologically suitable for the proposed development. When applicants apply for their building permits, they will be required to comply with the requirements of MCRZO chapter 182. As conditioned, this goal is met.

Goal 8: Recreational Needs. No recreational uses of the property are proposed or implicated by this application. This goal is not applicable.

Goal 9: Economic Development. This goal focuses on commercial and industrial development, mostly within urban growth boundaries (UGBs). OAR chapter 660, division 9, the Goal 9 implementing regulation, applies only to comprehensive plans for areas within UGBs. The subject site is not within a UGB. This goal is not applicable.

Goal 10: Housing. This goal applies to buildable lands. Buildable lands, as defined in Goal 10, occur in urban and urbanizable areas. Urbanizable lands are, by Statewide Planning Goal definition, within urban growth boundaries. The subject property is not

considered urbanizable under this goal. Although one new homesite will be allowed, the housing goal is not applicable.

Goal 11: Public Facilities and Services. The proposed exception area contains mostly preexisting development and is adequately served by public roadways and private facilities and services. This goal is met.

Goal 12: Transportation. Under OAR 660-012-0060(1), where an amendment to an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:

- (a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
- (b) Change standards implementing a functional classification system; or
- (c) As measured at the end of the planning period identified in the adopted transportation system plan:
 - (A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
 - (B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
 - (C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan.

The subject property is off of Riverside Road S., a county road. Two of the three parcels have been in residential use for years. The proposed exception will not allow additional division or more intensive use of the property, only one additional dwelling site. The application was coordinated with Marion County DPW, the roadway authority for Marion County. DPW stated no concerns for roadway capacity or safety issues with the proposal. The proposed exception will not change the functional classification of the roadway, change standards implementing the functional classification system, allow types or levels of land uses that result in levels of travel or access inconsistent

with a local street, or reduce the performance standards of the roadway. The proposal will not significantly affect a transportation facility. This goal is satisfied.

Goal 13: Energy Conservation. Normal residential use of the property will not significantly impact energy consumption.

Goals 14: Urbanization. For a new rural residential area, an exception to statewide planning goal 14 is required if less than a ten acre minimum parcel size is proposed. Here, an AR-10 zone is requested, so no goal 14 exception is required.

Goals 15-19: Goals 15 (Willamette River Greenway), 16 (Estuarine Resources), 17 (Coastal Shore Lands), 18 (Beaches and Dunes), and 19 (Ocean Resources), are not applicable because the subject site is not within the Willamette River Greenway or near any ocean or coastal related resources.

COMPREHENSIVE PLAN AMENDMENT

12. Under the MCCP amendment procedures, plan changes directly involving five or fewer properties are quasi-judicial amendments. Quasi-judicial amendments may be initiated by the subject property owners with an application form supplied by the Marion County Planning Division. The amendment will be reviewed by the zone change procedure established in the Marion County Zoning Ordinance. A plan amendment application of this type may be processed simultaneously with a zone change request.

This application involves three parcels and is a quasi-judicial plan amendment. Applicable MCCP policies are reviewed.

13. The following MCCP policies are considered:

Rural Residential Policy 7: Lands available for rural residential use shall be those areas committed to residential use or significant areas unsuitable for resource use located in reasonable proximity to a major employment center.

If the proposed exception to Statewide Planning Goal 3 is approved, the proposed residentially designated area will be in an exception area. Additionally, the subject property is reasonably proximate to Salem, the major employment center in Marion County. This policy is met.

Rural Residential Policy 8: Since there is a limited amount of area designated Rural Residential, efficient use of these areas shall be encouraged. The minimum lot size in Rural Residential areas existing on October 4, 2000, shall not be less than 2 acres allowing for a range of parcel sizes from 2 to 10 acres in size unless environmental limitations require a larger parcel. Areas rezoned to an Acreage Residential zone after

October 4, 2000, shall have a 10-acre minimum lot size unless an exception to Goal 14 (Urbanization) is granted.

A ten-acre minimum lot size will be applied to the subject property. This policy is met.

Rural Residential Policy 10: All residential uses in rural areas shall have water supply and distribution systems and sewage disposal systems which meet prescribed standards for health and sanitation.

The water and septic systems serving two of the parcels at the subject site are preexisting. There are no known well or septic problems in the area. At the building permit stage, septic permitting will be required. This policy is met.

Rural Residential Policy 16: The Acreage Residential (AR) zone will be the predominant zone applied to the lands designated Rural Residential. A numerical suffix may be used to indicate the minimum lot size allowed in the zone.

An AR-10 lot size limitation is required for the subject property. Although all lots are well below the lot size standard, most are already developed. This policy is satisfied.

ZONE CHANGE

14. MCZO 123.060 contains the following zone change criteria:

- (a) The proposed zone is appropriate for the Comprehensive Plan land use designation on the property and is consistent with the goals and policies of the Comprehensive Plan and the description and policies for the applicable land use classification in the Comprehensive Plan; and
- (b) The proposed change is appropriate considering the surrounding land uses and the density and pattern of development in the area; and
- (c) Adequate public facilities, services, and transportation networks are in place, or are planned to be provided concurrently with the development of the property; and
- (d) The other lands in the County already designated for the proposed use are either unavailable or not as well suited for the anticipated uses due to location, size or other factors; and
- (e) If the proposed zone allows uses more intensive than uses in other zones appropriate for the land use designation, the new zone will not allow uses that would significantly adversely affect allowed uses on adjacent properties zoned for less intensive uses.

15. If the M CCP designation is changed to Rural Residential then the proposed AR-10 zone would be consistent with the designation. Appropriate M CCP policies have been addressed and are met. MCZO 123.060(a) is met.
16. The parcels within the proposed exception area have existed for years and none can be divided as a result of this application. This zone change will not alter the density allowed on the subject property. The proposed change is appropriate and will not alter the pattern of development in the area. MCZO 123.060(b) is met.
17. Two of the parcels are already developed and all are or can be served by appropriate utilities, and private and public services. Adequate public facilities, services, and transportation networks are in place. MCZO 123.060(c) is met.
18. Use of the site will not be altered by the proposed zone change. Residential use of two of the parcels already exists. The zone change is site specific. Other lands in the county already designated for the proposed use cannot serve the use due to their location. MCZO 123.060(d) is met.
19. The AR zone is the only MCZO zone appropriate to the Rural Residential designation. MCZO 123.060(e) is met.

VI. Recommendation

It is hereby found that applicants have met the burden of proving the applicable standards and criteria for approval of an exception to Statewide Planning Goal 3, a comprehensive plan amendment from Special Agriculture to Rural Residential and a zone change from SA to AR have been met. Therefore, the hearings officer recommends that the applicant be **GRANTED**, subject to the conditions set forth below. The conditions are necessary for the public health, safety and welfare.

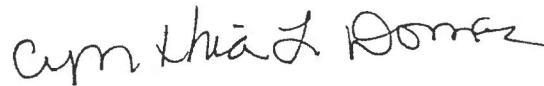
1. The applicants will be allowed one access to Riverside Road. In accordance with Marion County Driveway Ordinance #651, driveway permits will be required for any new access or change in existing access to the public right-of-way.
2. Applicant shall obtain all permits required by the Marion County Building Inspection Division, including all building permits. System development charges will be assessed upon development of the subject property at the time of application for building permits. Applicant shall also submit a site drainage plan in accordance with the Marion County Department of Public Works standards, with existing contours and natural drainage courses indicated by arrows pointed in the direction of flow, and showing how applicant proposes discharging roof runoff from the site.

3. Any utility work in the public right-of-way will require a utility permit from Public Works. Any additional public utility easements must be approved by the Marion County Department of Public Works. The applicant shall provide utility easements as required by DPW.
4. At the time of application for building permits, applicants will be required to show compliance with MCZO 181 and 182.
5. Construction of improvements shall not block historical or naturally occurring runoff from the adjacent properties.

VII. Referral

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

DATED at Salem, Oregon, this 11th day of May 2007.



Cynthia L. Domas
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Royce and Joan Otteson
538 Clarmont Ct. NW
Salem, Oregon 97304

Kent and Dawn Campbell
4448 Fox Lane South
Salem, OR 97306

Louis Owen
4447 Fox Lane South
Salem, OR 97306

Janet Adams
4427 Fox Lane South
Salem, OR 97306

Janet Busby
P. O. Box 226
Aumsville, OR 97325

Agencies Notified
Planning Division
Building Inspection
AAC Member No. 1

Aileen Kaye
10095 Parrish Gap Rd SE
Turner OR 97392

Laurel Hines
10371 Lake Dr SE
Salem OR 97306

Allen Hai
4558 Fox Lane
Salem, OR 97306

by mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 11th day of May 2007, and that the postage thereon was prepaid.

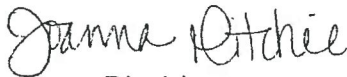

Joanna Ritchie
Secretary to Hearings Officer

EXHIBIT B

The Marion County Board of Commissioners adopts the following conditions in ZC/CP 06-09/Otteson, Campbell and Adams

CONDITIONS OF APPROVAL:

Pursuant to the Marion County Rural Zoning Ordinance Chapter 123.070, the following conditions apply to the AR-10 (Acreage Residential-10 acre minimum) zoning granted in this action. These conditions are reasonably related to the specific development proposed, will serve the public interest of reducing land use conflicts, and are based upon standards adopted by the County. The AR-10 zoning significantly intensified the use of the land. The conditions are necessary for the public health, safety and welfare.

1. The applicants will be allowed one access to Riverside Road. In accordance with Marion County Driveway Ordinance #651, driveway permits will be required for any new access or change in existing access to the public right-of-way.
 2. Applicant shall obtain all permits required by the Marion County Building Inspection Division, including all building permits. System development charges will be assessed upon development of the subject property at the time of application for building permits. Applicant shall also submit a site drainage plan in accordance with the Marion County Department of Public Works standards, with existing contours and natural drainage courses indicated by arrows pointed in the direction of flow, and showing how applicant proposes discharging roof runoff from the site.
 3. Any utility work in the public right-of-way will require a utility permit from Public Works. Any additional public utility easements must be approved by the Marion County Department of Public Works. The applicant shall provide utility easements as required by DPW.
 4. At the time of application for building permits, applicants will be required to show compliance with MCZO 181 and 182.
 5. Construction of improvements shall not block historical or naturally occurring runoff from the adjacent properties.
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EXHIBIT C

The following described properties are rezoned from SA (Special Agriculture) to AR-10 (Acreage Residential-10 acre minimum) zone.

