



# Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street, Suite 150

Salem, OR 97301-2540

(503) 373-0050

Fax (503) 378-5518

www.lcd.state.or.us



## NOTICE OF ADOPTED AMENDMENT

12/31/2008

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

**FROM:** Mara Ulloa, Plan Amendment Program Specialist

**SUBJECT:** Douglas County Plan Amendment  
DLCD File Number 002-04R

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:** Monday, January 12, 2009

This amendment was submitted to DLCD for review prior to adoption with less than the required 45-day notice. 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 THAT IT WAS MAILED TO DLCD. AS A RESULT, YOUR APPEAL DEADLINE MAY BE EARLIER THAN THE ABOVE DATE SPECIFIED.

**Cc:** Cheryl Goodhue, Douglas County  
Doug White, DLCD Community Services Specialist  
John Renz, DLCD Regional Representative

<paa> YA/email

**NR0F 2**

**DLCD**

**DEPT OF**

**DEC 24 2008**

**LAND CONSERVATION AND DEVELOPMENT**

# 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**

For DLCD Use Only

Jurisdiction: **Douglas County**

Local file number: **04-100**

Date of Adoption: **12/17/2008**

Date Mailed: **12/22/2008**

Was a Notice of Proposed Amendment (Form 1) mailed to DLCD? **Yes** Date: **5/28/2004**

Comprehensive Plan Text Amendment

Comprehensive Plan Map Amendment

Land Use Regulation Amendment

Zoning Map Amendment

New Land Use Regulation

Other: Non-Resource Determination

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

Great American Properties (GAP), request for a Plan Amendment from (FFT) Farm Forest Transitional to (RR5) Rural Residential-5 Acre and a Zone Change from (FG) Farm Grazing to (5R) Rural Residential-5 Acre, together with a Determination that the property is Non-resource land and not subject to the Agricultural and Forest Land goals on a 160.34 acre parcel to allow for future subdivision.

Does the Adoption differ from proposal? **No**

Plan Map Changed from: **(FFT) Farm Forest Transitional** to: **(RR5) Rural Residential-5 Acre**

Zone Map Changed from: **(FG) Farm Grazing** to: **(5R) Rural Residential-5 Acre**

Location: **Melrose County Road 51B, just south of the Melrose Rural Community boundary.**  
Acres Involved: **160.34**

Specify Density: Previous: **1 DU/160 AC**

New: **1 DU/5 AC**

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 file No.

002-04R(13679) [12678]

LUBA 2005-045



Please list all affected State or Federal Agencies, Local Governments or Special Districts:

ODOT, ODF&W, Douglas County Fire District No. 2, Douglas Forest Protective Agency, Quest, Douglas Electric Cooperative, Avista Utilities, Umpqua Basin Water Association, Roseburg School District No. 4

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Local Contact: **Jonathan M. Wright**

Phone: (541) 440-4289 Extension:

Address: **Room 106, Justice Building**

Fax Number: 541-440-6266

City: **Roseburg**

Zip: 97470-

E-mail Address: [jmwright@co.douglas.or.us](mailto:jmwright@co.douglas.or.us)

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## **ADOPTION SUBMITTAL REQUIREMENTS**

This form **must be mailed** to DLCD **within 5 working days after the final decision**

per ORS 197.610, OAR Chapter 660 - Division 18.

1. **Send this Form and TWO Complete Copies (documents and maps) of the Adopted Amendment to:**

**ATTENTION: PLAN AMENDMENT SPECIALIST  
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
635 CAPITOL STREET NE, SUITE 150  
SALEM, OREGON 97301-2540**

2. **Electronic Submittals:** At least **one** hard copy must be sent by mail or in person, but you may also submit an electronic copy, by either email or FTP. You may connect to this address to FTP proposals and adoptions: [webserver.lcd.state.or.us](http://webserver.lcd.state.or.us). To obtain our Username and password for FTP, call Mara Ulloa at 503-373-0050 extension 238, or by emailing [mara.ulloa@state.or.us](mailto:mara.ulloa@state.or.us).
3. **Please Note:** Adopted materials must be sent to DLCD not later than **FIVE (5) working days** following the date of the final decision on the amendment.
4. Submittal of this Notice of Adoption must include the text of the amendment plus adopted findings and supplementary information.
5. The deadline to appeal will not be extended if you submit this notice of adoption within five working days of the final decision. Appeals to LUBA may be filed within **TWENTY-ONE (21) days** of the date, the Notice of Adoption is sent to DLCD.
6. In addition to sending the Notice of Adoption to DLCD, you must notify persons who participated in the local hearing and requested notice of the final decision.
7. **Need More Copies?** You can now access these forms online at <http://www.lcd.state.or.us/>. Please print on **8-1/2x11 green paper only**. You may also call the DLCD Office at (503) 373-0050; or Fax your request to: (503) 378-5518; or Email your request to [mara.ulloa@state.or.us](mailto:mara.ulloa@state.or.us) - **ATTENTION: PLAN AMENDMENT SPECIALIST.**

BEFORE THE BOARD OF COMMISSIONERS  
OF DOUGLAS COUNTY, OREGON

FILED

DEC 17 2008

AN ORDINANCE ADOPTING AMENDMENTS TO THE )  
DOUGLAS COUNTY COMPREHENSIVE PLAN MAP AND )  
ZONING MAP BASED ON A NONRESOURCE )  
DETERMINATION FOR GOALS 3 AND 4, AND A )  
DEMONSTRATION OF CONSISTENCY WITH THE )  
COUNTY'S 5-ACRE DESIGNATION FOR GREAT )  
AMERICAN PROPERTIES (GAP). PD FILE NO. 04-100. )

BARBARA E. NIELSEN, COUNTY CLERK  
ORDINANCE NO. 2008 - 12 - 03

RECITALS

- A. Great American Properties (GAP), request for a Comprehensive Plan Amendment from (FFT) Farm/Forest Transitional to (RR5) Rural Residential - 5 Acre, and a Zone Change from (FG) Exclusive Farm Use-Grazing to (5R) Rural Residential - 5 Acre, based on a Determination that the property is non-resource land and is not subject to the Agricultural and Forest Land Goals, and a demonstration of consistency with the County's 5-Acre Designation, on a 160.34 acre parcel to allow development at the 5R density. The property is located on Melrose County Road No. 51B, just south of the Melrose Rural Community and is described as Tax Lot 3500 in Section 1C and Tax Lot 1000 in Section 12 of T27S, R7W, W.M., Property I.D. Nos. R22241, R119882, R22265 & R22233. Planning Department File No. 04-100.
- B. The Douglas County Planning Commission held a hearing to consider the matter on remand from the Land Use Board of Appeals on August 28, 2008, deliberated to a decision on October 16, 2008 and subsequently recommended approval of the request in a Findings and Decision document dated November 20, 2008.
- C. The Board of Commissioners considered the matter on December 17, 2008, at a hearing held pursuant to Section 6.900.2 of the Douglas County Land Use & Development Ordinance. We affirmed the Planning Commission decision and ordered that the request be granted.

**THE DOUGLAS COUNTY BOARD OF COMMISSIONERS ORDAIN AS FOLLOWS:**

SECTION ONE: The requested Comprehensive Plan Map Amendment, Zone Map Amendment and Nonresource Determination are GRANTED.

SECTION TWO: The "Findings of Fact and Order" of the Board (attached, dated December 17, 2008) and the "Findings of Fact and Decision" of the Douglas County Planning Commission (attached, dated November 20, 2008), are ADOPTED and by reference made part of this Ordinance.

DATED this 17<sup>th</sup> day of December, 2008.

**BOARD OF COUNTY COMMISSIONERS  
OF DOUGLAS COUNTY, OREGON**

Chair Joseph Lauran

ABSENT

Commissioner

Deane Roberts  
Commissioner



**BEFORE THE BOARD OF COMMISSIONERS  
OF DOUGLAS COUNTY, OREGON**

Great American Properties (GAP), request for a )  
Comprehensive Plan Amendment from (FFT) )  
Farm/Forest Transitional to (RR5) Rural Residential - )  
5 - Acre and a Zone Change from (FF) Farm Forest )  
to (5R) Rural Residential - 5 Acre, based on a )  
Determination that the property is non-resource land )  
and is not subject to the Agricultural and Forest Land )  
Goals, and on a demonstration of consistency with )  
the County's 5-Acre Designation, to allow development )  
at the 5R density on a 160.34 acre parcel located on )  
Melrose County Road No. 51B, just south of the )  
Melrose Rural Community. The property is described )  
as Tax Lot 3500 in Section 1C and Tax Lot 1000 in )  
Section 12 of T27S, R7W, W.M., Property I.D. Nos. )  
R22241, R119882, R22265 & R22233. )  
Planning Dept. File No. 04-100. )

**FINDINGS OF FACT  
AND ORDER**

**INTRODUCTION & PROCEDURAL FINDINGS**

1. This matter came before the Board of County Commissioners ("the Board") at a public hearing on December 17, 2008, in Room 216 of the Douglas County Courthouse, Roseburg, Oregon, pursuant to Section 6.900.2 of the Douglas County Land Use and Development Ordinance.
2. The matter came before the Douglas County Planning Commission on remand from the Land Use Board of Appeals on August 28, 2008. The Planning Commission deliberated to a decision on October 16, 2008.
3. The Planning Commission memorialized its decision in a Findings and Decision document dated November 20, 2008; no appeals of that Decision were filed.
4. At the Board meeting on December 17, 2008, the public hearing on this matter was opened and parties were given an opportunity to speak on the Record. The Board deliberated to affirm the Planning Commission Decision at the December 17, 2008 public hearing.

**FINDINGS**

1. Upon considering evidence and exhibits entered as part of the Planning Commission Record, including the written submittals from the applicant and parties, the written Staff Report and the Findings and Decision approved by the Planning Commission on November 20, 2008, and in consideration of evidence considered at the December 17, 2008 Board hearing, the Board finds that the applicable decision criteria, as established in the Staff Report dated August 21, 2008, have been adequately addressed by the applicant.

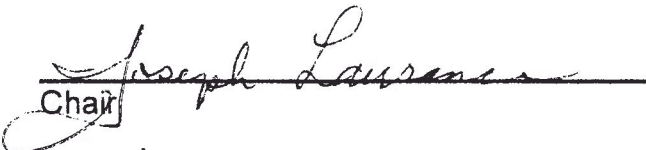
2. The Board finds that the relevant facts raised in this matter support the conclusions and decision reached by the Planning Commission in their Findings and Decision, dated November 20, 2008.
3. The Board adopts the Planning Commission Findings and Decision as its own.

**ORDER**

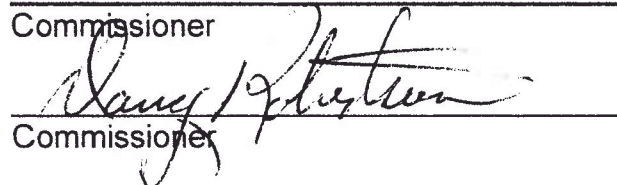
Based on the foregoing, it is hereby ordered by the Board of Commissioners that the Planning Commission Decision is affirmed and the application is GRANTED.

DATED this 17<sup>th</sup> day of December, 2008.

BOARD OF COUNTY COMMISSIONERS  
OF DOUGLAS COUNTY, OREGON

  
Chair

ABSENT  
Commissioner

  
Commissioner



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BEFORE THE PLANNING COMMISSION OF  
DOUGLAS COUNTY, OREGON

3 Re: GREAT AMERICAN PROPERTIES, request for a Comprehensive Plan Amendment  
4 from (FFT) Farm Forest Transitional to (RR5) Rural Residential - 5 Acre and a concurrent Zone  
5 Change from (FG) Exclusive Farm Use - Grazing to (5R) Rural Residential - 5 Acre, together with  
6 a Determination that the property is non-resource land and is not subject to Agricultural & Forest  
7 Lands Goals, on a 160.34 acre parcel to allow future subdivision of the property. The property is  
8 located on the east side of Melrose Road, County Road No. 51B, just south of the Melrose Rural  
9 Community boundary and is described as Tax Lot 3500 in Section 1C and Tax Lot 1000 in Section  
10 12 of T27S, R7W, W.M., Property I.D. Nos. R22241, R119882, R22265 & R22233. The  
11 Riparian Vegetation Corridor Overlay has been applied. Planning Department File No. 04-100.  
12 Callahan Planning Advisory Committee (PAC).

13  
14

**FINDINGS OF FACT and DECISION**

14 We adopt the following findings of fact and decision.

15  
16

**INTRODUCTION**

16  
17

**Application**

17 Great American Properties, the applicant, owns a 160.34-acre parcel of land located  
18 northeast of the intersection of Melrose Road and Colonial Road, and south of the Melrose Rural  
19 Community boundary<sup>1</sup>. The subject property is designated (FFT) Farm Forest Transitional in the  
20 comprehensive plan and is zoned (FG) Exclusive Farm Use - Grazing.

21 The FFT designation is applied to lands which have some characteristics of both  
22 agricultural lands and timberlands and are therefore protected under Statewide Planning Goals 3  
23 (Agricultural Lands) and 4 (Forest Lands). The extensive studies provided by the applicant  
24 demonstrate that the subject property is neither agricultural land nor forest land as defined and  
25 protected under Goals 3 and 4.

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<sup>1</sup> In the analysis of the potential of the property for agricultural and forestry use, the area is generally given as 162.8 acres, which reflects round-off of the individual polygons in the soil study by Gary Kitzrow.

1           The applicant requests a comprehensive plan amendment to change the plan designation of  
2 the subject property to (RR5) Rural Residential - 5 Acre and a zone change to (5R) Rural  
3 Residential - 5 Acre, based on a determination that the property is nonresource land and thus not  
4 protected by Goals 3 and 4.

5           **Physical Setting and History of the Subject Property**

6           The physical setting and history of the subject property are described in our findings of  
7 December 9, 2004. The chief points are as follows.

8           The subject property is bordered on three sides by county roads. A north-south ridge line  
9 provides the principal topographic definition. The ridge line marks the watershed boundary  
10 between the main stem of Champagne Creek to the east and Elgarose Creek, a tributary of  
11 Champagne Creek, to the west. Champagne Creek cuts across the east end of the subject  
12 property; the slope down from the ridge line to the east is very steep. Elgarose Creek lies west of  
13 Melrose Road and the subject property; most of the property drains into Elgarose Creek. The  
14 slope down from the ridge line to the west is rocky and steep, becoming moderately sloping as  
15 Melrose Road is approached.

16           The subject property is comprised mainly of unimproved abandoned pasture, with areas of  
17 exposed rock, hardwoods, native brush, and scattered conifers. A small stand of conifers is  
18 located on the south end of the property along Colonial Road. The property is undeveloped,  
19 except for a small shed and a 500,000-gallon water storage tank operated by Umpqua Basin Water  
20 Association. The opponents note that a barn is on the tax assessor's role; however, the barn was  
21 dismantled in 2004 due to its dilapidated condition. It is not physically present on the property.

22           The soils of the property are generally very infertile, thin, and droughty. The primary



1 reasons for the soil properties are the sandstone and siltstone bedrock, the history of erosion and  
2 burning, and the steep west facing slopes. The soil environment severely limits resource use of  
3 the subject property. No irrigation water is available.

4 Historically, the subject property was farmed from 1930 to 2000 as part of a 387-acre ranch  
5 owned by the family of John B. Richards. The subject property formed most of the east half of the  
6 ranch; good level agricultural soils west of Melrose Road formed the west half of the ranch.

7 From 1930 to 1982, Richards hayed the west half and ran stock alternately on the east and  
8 west halves. At its best, the 387-acre ranch produced 8000 bales of hay annually, mostly on the  
9 west half, and all the hay was fed to stock. The ranch was a marginal farm unit, requiring large  
10 investments of time and fertilizer, and generated a poor cash flow. By 1982 Richards stopped  
11 operating the ranch because of the amount of effort and money needed to make it run. The rising  
12 cost of vehicles, feeder animals, farm machinery, family living, farm labor, and fuel over the  
13 1930-82 period had outstripped the profitability of the farm.

14 From 1982 to 2000, Richards rented the ranch to various tenants. The ranch's farm  
15 quality deteriorated substantially during this period.

16 In 2000, Richards partitioned the ranch and sold the productive west half to Napier. In  
17 2002, Richards sold the subject property to DeCoite, and the applicant acquired it in 2003.

### 18 **Procedural History**

19 The application in this matter was filed May 3, 2004. After a series of hearings which  
20 included a site visit, the commission approved the application on December 9, 2004, pursuant to  
21 LUDO § 2.060(3)(a) and (b). Shelley Wetherell, Janell Stradtner, and the Friends of Douglas  
22 County (referred to as "Wetherell", collectively or individually as the context requires) appealed

1 the decision to the Douglas County Board of Commissioners, who approved the application and  
2 denied Wetherell's appeal on February 23, 2005.

3 Wetherell appealed the county's approval to the Land Use Board of Appeals. LUBA  
4 remanded the county's decision on September 8, 2005, to further address Goals 3 and 4. As to  
5 Goal 3, LUBA found the county's decision was inconsistent with DLCD rule OAR  
6 660-033-0030(5), which prohibited considering profitability or gross farm income in determining  
7 whether land is agricultural land or whether Goal 3 is applicable.

8 The applicant appealed LUBA's decision to the Court of Appeals. The Court of Appeals  
9 reversed LUBA in part, holding that the DLCD rule was invalid in part, *Wetherell v. Douglas*  
10 *County*, 204 Or App 732 (2006). The applicant appealed to the Oregon Supreme Court. On May  
11 24, 2007, the Supreme Court ruled that DLCD rule OAR 660-033-0030(5) was completely invalid,  
12 and that the county could properly consider profitability in determining whether the property was  
13 subject to Goal 3's protection, *Wetherell v. Douglas County*, 342 Or 666 (2007).

#### 14 **Goal 3 Issues (Agriculture)**

15 On August 1, 2007, LUBA remanded the decision back to the county on the following  
16 points concerning Goal 3.

17 "OAR 660-033-0020(1)(a)(B) defines "agricultural land" in relevant part to include:

18 "Land in other soil classes that is suitable for farm use as defined in ORS  
19 215.203(2)(a), taking into consideration soil fertility; suitability for grazing;  
20 climatic conditions; existing and future availability of water for farm  
21 irrigation purposes; existing land use patterns; technological and energy  
22 inputs required; and accepted farming practices'.

23 "As framed by the parties, whether the subject property is 'suitable for farm use'  
24 and hence agricultural land under OAR 660-033-0020(1)(a)(B) turns on whether it  
25 is suitable for grazing or for a commercial vineyard. The opponents argued that  
26 the property has a 70-year history of seasonal grazing at various levels of intensity,



1 and there is no reason why the property cannot continue to be used for seasonal  
2 grazing, either alone or in conjunction with nearby grazing operations. With  
3 respect to a commercial vineyard, the opponents noted evidence that 12 percent or  
4 approximately 19 acres of the property has soils, aspects and other features suitable  
5 for a commercial vineyard, and cited to the existence of a nearby, similarly-sized  
6 commercial vineyard on a 160-acre parcel with the same soils.

7 \* \* \*

8 "In our view, remand [of the county's decision after the Supreme Court's decision]  
9 is still necessary under the first assignment of error for the following reasons.

10 "First, we held that the county's conclusion that the property is not  
11 agricultural land was based on an approach that 'would be error even if OAR  
12 660-033-0030(5) did not apply.' Specifically, we found that the county had  
13 erroneously applied a 'commercial-scale' approach that considered the property  
14 suitable for farm use only if it could support grazing or other farm uses at a  
15 relatively large scale or intensity. Neither the Court of Appeals' nor the Supreme  
16 Court's opinions disturb that portion of our decision. We continue to believe that  
17 the county erred in that regard. If 50-60 cattle can be seasonally grazed on the  
18 subject property (consistent with historic use of the property) or a small vineyard  
19 established with a reasonable expectation of yielding a profit in money, the fact that  
20 the cattle operation or vineyard and any resulting profit may be relatively small in  
21 size is not a sufficient basis to conclude that the subject property is not suitable for  
22 farm use under the Goal 3 rule. Because the county's findings repeatedly dismiss  
23 small-scale farm uses as "lifestyle" farm uses, without appearing to recognize that  
24 such small-scale uses may in fact constitute "farm use" as defined in ORS  
25 215.203(2)(a), remand is necessary to adopt findings free of that error.

26 "Second, we held in *Wetherell I* that the county's findings failed to  
27 adequately address OAR 660-033-0030(3), which provides that "Goal 3 attaches  
28 no significance to ownership of a lot or parcel when determining whether it is  
29 agricultural land," and that "[n]earby or adjacent land, regardless of ownership,  
30 shall be examined" in determining whether land is suitable for farm use under OAR  
31 660-033-0020(1)(a)(B). Specifically, we concluded that the county erred in  
32 summarily dismissing use of the property in conjunction with the adjacent Napier  
33 property, the other half of the ranch that the subject property was part of until 2000.  
34 Further, the county failed to address conjoined use with the Mellors' property,  
35 nearby ranchers who formerly leased the subject property and who expressed  
36 interest in leasing it again for use in conjunction with their ranch operation. Again,  
37 neither the Court of Appeals' nor Supreme Court's opinions disturbed that aspect  
38 of *Wetherell I*, and we continue to believe that error among others identified in the  
39 first assignment of error warrants remand." *Wetherell v. Douglas County*, LUBA  
40 No. 2005-045 (Aug. 1, 2007), slip opinion pages 4-7.

1 On remand, the issues for the county are the following.

2 1. Is the property suitable for farm use as grazing? LUBA directed the analysis to  
3 consider whether a small-scale grazing operation would be profitable.

4 2. Is the property suitable for farm use as a small vineyard?

5 3. The standard is whether a grazing or vineyard operation can be established with a  
6 reasonable expectation of yielding a profit in money, not necessarily at a relatively large scale or  
7 intensity.

8 4. Is the property suitable for farm use (profit in money), in conjunction with (1) the  
9 adjacent Napier property, or (2) the Mellor operation?

10 The following substantial issues have been previously settled in this proceeding. (There  
11 are also many minor issues that have been settled, and all issues beyond Goals 3 and 4.)

12 1. That the property is not predominately USDA Class I, II, III, or IV soils. (It is  
13 predominately Class VI and worse soils.)

14 2. That the property is not necessary to permit farm practices to be undertaken on  
15 adjacent or nearby agricultural lands.

16 3. That the property is not part of a larger farm unit (it is not part of the Napier or Trent  
17 farms, for example).

18 4. That the property is not suitable for farming, other than the possibility of grazing or  
19 a vineyard.

20 It is the county's intent in this decision to leave all settled issues settled, not to reopen any  
21 issue that has already been decided or waived, and not to open any new issue except as legally  
22 required. No evidence or argument is considered or intended to be considered in this decision



1 with respect to the settled issues.

2 **Goal 4 Issues (Forestry)**

3 LUBA remanded the county's decision on Goal 4 issues in 2005. The Goal 4 part of  
4 LUBA's 2005 decision was not disturbed by the Supreme Court case.

5 LUBA's guidance concerning Goal 4 was as follows.

6 First, LUBA clarified its two earlier cases that had discussed the 80 cubic feet/acre/year  
7 language in the county comprehensive plan as a standard for commercial forest lands protected by  
8 Goal 4.

9 "At best our references to the 80 cf/ac/yr comprehensive plan language [in two  
10 earlier LUBA cases involving Douglas County's forest element] was *dicta*.

11 "We ... disagree ... that the county has in fact defined 80 cf/ac/yr as the  
12 threshold for Goal 4 protection.

13 \* \* \*

14 [T]he cited comprehensive plan language does not adopt a 80 cf/ac/yr threshold for  
15 Goal 4 protection, and the county's interpretation to that effect cannot be affirmed."  
16 *Wetherell v. Douglas County*, LUBA No. 2005-045 (Sept. 8, 2005), slip opinion  
17 pages 27-28.

18 Then LUBA added the following.

19 "Neither Goal 4 nor the Goal 4 rule set forth a precise methodology for  
20 determining whether land is 'suitable for commercial forestry.'

21 \* \* \*

22 "...Goal 4 requires some measurement of productivity for unrated soils  
23 when determining whether land is forest land, and the goal does not permit counties  
24 to simply assume that unrated soils have zero or near zero productivity.

25 "...OAR 660-006-0010 ... requires that local governments inventory  
26 'forest lands' and include a 'mapping of forest site class.' Significantly, '[i]f site  
27 information is not available then an equivalent method of determining forest land  
28 suitability must be used.' Thus, in inventorying forest lands, local governments  
29 must map 'forest land suitability' using a 'forest site class' method. The absence

1 of data requires use of an 'equivalent method.' While OAR 660-006-0010  
2 pertains to the inventory of forest lands, it again shows that LCDC is concerned that  
3 determinations of 'forest land suitability' be made based on empirical methods, and  
4 that counties cannot simply assume from the fact that no NRCS productivity ratings  
5 exist for certain soils that such soils are nonresource soils." *Wetherell v. Douglas*  
6 *County*, LUBA No. 2005-045 (Sept. 8, 2005), slip opinion pages 28-34.

7 In rejecting the applicant's quantitative analyses of timber productivity capability, LUBA wrote:

8 "[The quantitative] analyses are based on the erroneous premise that 80 cf/ac/yr is  
9 the county's acknowledged threshold for Goal 4 lands. Remand is necessary for  
10 the county to reconsider whether the subject property is 'suitable for commercial  
11 forestry' without that premise. ...

12 "First, [Wetherell et al.] offer no focused challenge to the county's  
13 conclusion that the 56.1 acres of Dickerson and Nonpareil soils that currently  
14 support trees cannot support full stocking levels. Second, [Wetherell et al.] offer  
15 no focused challenge to the county's conclusion that the 71.5 acres of Dickerson  
16 and Nonpareil soils that have not supported trees for at least the past 50 years  
17 cannot in fact produce any trees. As far as [Wetherell et al.] have shown, both of  
18 those conclusions are supported by the record.

19 "Second, although [Wetherell et al.] do not assign error to this aspect of the  
20 analyses, we note that under the third and fourth analyses the forestry consultant  
21 *averaged* the cf/ac/yr data across the entire parcel. Because slightly less than half  
22 of the 162-acre subject property, 71.5 acres of Dickerson and Nonpareil soils, have  
23 essentially zero productivity, the overall average productivity per acre is relatively  
24 low, as low as 48.5 cf/ac/yr. Goal 4 does not specify how such calculations are  
25 made. However, as explained above, the comprehensive plan element  
26 implementing Goal 4 describes what kinds of lands may be included in two types of  
27 Goal 4 plan designations. As relevant here, both plan designations include lands  
28 that 'predominantly' consist of specified cubic foot site classes. On remand, the  
29 county may wish to consider whether, in light of the standards for placing lands  
30 within these two Goal 4 plan designations, the approach taken by the consultant in  
31 calculating the *average* productivity of the parcel is the correct approach, or  
32 whether calculating the productivity or cubic foot site class of the *predominant*  
33 portion of the subject property is more consistent with the comprehensive plan  
34 Goal 4 element." *Wetherell v. Douglas County*, LUBA No. 2005-045 (Sept. 8,  
35 2005), slip opinion pages 34-35 (emphasis original).

36 On remand, the issues for the county are the following.

- 37 1. Is the property suitable for commercial forest uses?



1           2.     Does the county have a standard for determining whether land is suitable for  
2 commercial forest use as protected by Goal 4?

3           3.     Does Goal 4 require or allow the county to use either or both the average  
4 productivity or the predominant productivity in determining whether the property is protected by  
5 Goal 4?

6           4.     Is the determination of whether the property is suitable for commercial forestry use  
7 based on a quantitative analysis which complies with methodology prescribed by the Oregon  
8 Department of Forestry?

9           The following substantial issues have been previously settled in this proceeding, and are  
10 intended to be left settled.

11           1.     That the property is not protected by Goal 4 as “adjacent or nearby lands which are  
12 necessary to permit forest operations or practices and other forested lands that maintain soil, air,  
13 water, and fish and wildlife resources.”

14           2.     That the 56.1 acres of Dickerson and Nonpareil soils that currently support trees  
15 cannot support full stocking levels.

16           3.     That the 71.5 acres of Dickerson and Nonpareil soils that have not supported trees  
17 for the past 50 years cannot in fact produce any trees for commercial forestry purposes.

18           4.     That the methodology of averaging tree productivity across the property on an area  
19 basis complies with Goal 4.

20           **Applicable Standards and Criteria**

21           At this point in the proceeding, the applicable criteria under Goal 3 are whether the  
22 property is suitable for farm use, and under Goal 4 are whether the property is suitable for

1 commercial forest uses.

2 **OFFICIAL NOTICE**

3 The commission takes official notice of the constitutions of the United States and the State  
4 of Oregon, the Douglas County Comprehensive Plan (the comprehensive plan), the Douglas  
5 County Land Use and Development Ordinance (LUDO), and the applicable maps and supporting  
6 documents pertaining to the foregoing. We also take official notice of the software commonly  
7 used to read computer files, such as Adobe Acrobat, Microsoft Office 2007 Word, and Excel.

8 In addition, the commission takes notice of the decisions and the record of LUBA, the  
9 Court of Appeals, and the Supreme Court of Oregon in this matter.

10 **FINDINGS OF FACT**

11 The headings in this document are provided for the convenience of the reader and do not  
12 limit the contents. It is intended that the document stand as a whole to support the decision, and  
13 the location of particular text under a specific heading does not limit the findings to that heading.  
14 A particular passage may be applicable in support of the decision as to a topic covered under a  
15 different heading. In some areas the findings are set forth as alternative lines justifying the same  
16 conclusion. We incorporate our findings of December 9, 2004, by reference, except where the  
17 context here indicates they are superseded by these findings. As noted earlier, it is our intent that  
18 settled issues remain so.

19 **Goal 3 (Agricultural Lands)**

20 At this point in the proceeding, the issue is whether the property is "agricultural land"  
21 under the following criterion:

22 "Land in other soil classes [other than NRCS Class I-IV in western Oregon]  
23 that is suitable for farm use as defined in ORS 215.203(2)(a), taking into

1 consideration soil fertility, suitability for grazing, climatic conditions, existing and  
2 future availability of water for farm irrigation purposes, existing land use patterns,  
3 technological and energy inputs required, and accepted farming practices". OAR  
4 660-033-0020(1)(a)(B).

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

11 The potential use of the property for grazing was intensively studied by Paul E. Day, M.S.,  
12 an agricultural consultant and retired associate professor of agriculture of Oregon State  
13 University.<sup>2</sup> The potential use of the property to operate a small vineyard was intensively studied  
14 by Bruce Biehl, a vineyard consultant with 24 years of professional experience, vineyard owner  
15 and manager, and president of Agricultural & Resource Economic Associates Inc.<sup>3</sup> The studies  
16 were critiqued by Wetherell. Day and Biehl responded to the points Wetherell raised.

17 The studies by Day and Biehl, including their rebuttals, appendices, and exhibits, are  
18 credible and are adopted as findings (to the extent their later statements may be inconsistent with  
19 their earlier statements, owing to new data and analysis, we rely on the later statements). The  
20 Day and Biehl studies confirm that the property is not suitable for current employment for the  
21 primary purpose of obtaining a profit in money by farming.

22 The low soil fertility of the property is well documented. About 78% of the property soils

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<sup>2</sup> P.E. Day, "Great American Melrose Property Agricultural Profitability Estimates" (May 28, 2008); P.E. Day, "Appendix to Great American Melrose Property Agricultural Profitability Estimates / Livestock Enterprise Budget Calculator for Western Oregon" (May 28, 2008); P.E. Day and S. Mountainspring, "Great American Melrose Property Agricultural Profitability Estimates / Rebuttal Memorandum" (Oct. 3, 2008).

<sup>3</sup> B. Biehl, "Potential Wine Grape Productivity from Melrose Property in Douglas County, Oregon / Assessor's Map T27S R7W Sec 12 TL 1000 / T27S R 7W Sec 1 TL 3500" (May 30, 2008); B. Biehl, "Potential Wine Grape Productivity from Melrose Property in Douglas County, Oregon / Assessor's Map T27S R7W Sec 12 TL 1000 / T27S R 7W Sec 1 TL 3500 / Rebuttal Memorandum" (Oct. 6, 2008).



1 are USDA Class VI, VII, and VIII (Dickerson and Nonpareil soil series). The remaining 21% are  
2 Class III and IV soils (Speaker and Josephine soil series).

3 The soils are generally thin, droughty, and infertile. The property has a predominately  
4 southwest aspect, lack of irrigation water, infertile sandstone bedrock, lack of saprolite, and lack of  
5 deep alluvial soils. The predominant soils have no true topsoil and lack argyllic (clay) horizons  
6 that hold water.

7 Although grazing can occur on the property, it would not result in a profit in money. The  
8 Day reports studied grazing. The reports considered a 20-head cow-calf operation; a 100-steer  
9 seasonal operation; and combining the property with other operations by Napier, Mellor, and  
10 Trent.

11 The Day reports show that the costs of fertilizer, labor, equipment, and feed at the  
12 operating level, and capital recovery, taxes, and insurance at the ownership level make it highly  
13 unlikely that the property can turn a profit in grazing. Although Day focused on cattle, his  
14 analysis also considered sheep, meat goats, horses, and alpacas, and arrived at similar conclusions.  
15 The conclusions of the Day reports are strongly corroborated by standard budgets from the  
16 University of California which show that cattle grazing operations similar to prospective ones on  
17 the subject property are predicted to lose money.

18 The productivity estimates of the farm soils by the USDA are based on an assumption of a  
19 high level of management. A high level of management is especially necessary on poorer soils to  
20 yield the expected productivity. The Day reports note the cost requirements of implementing the  
21 high level of management. The property's low fertility and poor quality of improvement ( fences,  
22 outbuildings, etc.) strongly weighed against profitable grazing.

1           Since the record includes a "live" copy of the spreadsheets which Day used in his reports,  
2 the effect of changes to the input values may be observed. To the extent that any changes in the  
3 input values are justified by the findings or the record as a whole, in the way of minor revisions to  
4 the spreadsheets, we interpret results of such revisions which show that the prospective operations  
5 would yield negative net profit to be consistent with and support the general conclusion that the  
6 subject property is unsuitable for grazing with the intent to make a profit in money.

7           Combining a grazing operation on the subject property with operations on other nearby  
8 properties is considered in the Day reports. The grazing operation budgets in the Day reports  
9 have built in to them the premise that the subject property has already been combined with other  
10 similar nearby operations for maximum efficiency. The budget analyses in the Day reports show  
11 that the subject property would be a component that would lose money for the operator of a  
12 combined operation. Any reasonable farmer would not include the subject property in his  
13 operation. This is based on the critical assumption that accepted farming practices are used. As  
14 the Day reports note, profit might be possible by mismanaging the operation and deviating from  
15 the USDA standard of a high level of management of the property. However, any such profit  
16 would be short-term and at the cost of the overall productivity of the subject property (e.g.,  
17 neglecting fertilization; failing to maintain fences). Long-term damage to the property from  
18 mismanagement is especially likely because the thin droughty soils are unforgiving of  
19 management error; this likely occurred in the past on the subject property. The credibility of  
20 neighbors who claim they would make a profit grazing the subject property is seriously undercut  
21 by their failure to produce even a single budget, tax return, or financial statement showing that  
22 profit has occurred, is likely, or is possible.

1           The budget analysis by Day and Biehl uses an appropriate scale for the operation. It is a  
2 small scale operation as would be typical in central Douglas County. The Day report considers  
3 20-head year-round and 100-head seasonal operations for cattle, and 100-head sheep and 140-head  
4 goat operations. The Biehl report uses a 20-acre vineyard, which is an average size for the area,  
5 and which is the largest possible on the subject property. These are the scales of operations that  
6 are likely, if any are, to yield a profit on the property.

7           The climatic conditions of the property are similar to other areas in central Douglas  
8 County, The property's southwest aspect exacerbates soil infertility by increasing the effect of  
9 drought due to the lack of irrigation and the soil's inability to hold water; these factors significantly  
10 reduce the effective growing season for forage.

11           Water is not available now or in the future for farm irrigation. This decreases the  
12 property's potential productivity. Although two small ponds are present on the property; one is  
13 seasonal and the other is completely inadequate to provide the amount of water needed for  
14 irrigation. The property does not have a suitable site for constructing a reservoir of the size  
15 needed to store irrigation water. The shallow depth top bedrock and droughty soils indicate lack  
16 of a groundwater aquifer; the steep topography, shallow soils, and soil limitations noted in the  
17 NRCS data preclude constructing a reservoir of any significant size; the stream crossing the  
18 property is closed to surface appropriation during the irrigation season to protect fishery resources.

19           Application of fertilizer is not cost effective, as the Day reports show. A large amount of  
20 fertilizer is needed relative to the amount of productivity resulting, making fertilization very  
21 uneconomical. The subject property's steep, bouldery slopes and rock outcrops make application  
22 time-consuming and expensive. Fertilizer application is made more difficult by the presence of a



1 fish-bearing stream which requires a buffer, scattered openings where fertilizer is needed, and  
2 adjacent rural residences which have to be avoided and are sources of complaints due to drift.  
3 The inherently infertile nature of the soils on the subject property cannot practicably be corrected  
4 by fertilization, with an intent to make a profit in money, due to these factors.

5 The existing land use pattern in the area is a mix of properties in rural residential use, small  
6 scale farm use, and larger parcels. Farming occurs to the west on good agricultural soils on flat  
7 land; on the poor soils on hilly ground in the vicinity of the subject property, the primary use of the  
8 land is rural residential.

9 Inordinately expensive inputs of technology and energy are required to make the subject  
10 property suitable for farming. The site's steep topography, lack of maintenance of fences and  
11 buildings, overgrown brush, and weed invasion are additional barriers to the property's suitability  
12 for farming. Reasonable inputs of technology and energy would not overcome the limiting  
13 characteristics inherent in the subject property, such as lack of irrigation, steepness, shallow soil,  
14 low water-holding capacity of soils, and lack of saprolite, to make it a viable agricultural unit.

15 Accepted farming practices are thoroughly discussed in the Day and Biehl reports. No  
16 reasonable farmer would undertake to rehabilitate the subject property to a working farm, with the  
17 primary purpose of obtaining a profit in money, due to the property's infertile droughty soils, lack  
18 of irrigation water, difficult topography, and deferred maintenance needs of pasture and  
19 improvements. The discipline of the budget analysis shows that grazing, reservoir development,  
20 fertilizer application, and other technology and energy inputs would not be accepted farming  
21 practices on the property because no profit would be anticipated due to the fact that the expenses  
22 involved would far exceed the expected return. In addition, reliance on the level of volunteerism

1 which Wetherell suggests is available is not an accepted farming practice, noble and laudable  
2 though such altruism may be when it appears on rare occasion.

3 Wetherell claims that the Delfino, Green Butte, and Hillcrest vineyards are comparable to  
4 the subject property. The Biehl report shows that soils and other attributes of these three  
5 vineyards differ significantly from the subject property. We find it very significant that Biehl has  
6 firsthand experience on the Delfino site, and does not perceive the Delfino soils to be comparable  
7 to those on the subject property because the Delfino soils are significantly deeper and richer in  
8 saprolite. The Delfino property has a large pond which provides irrigation water; the subject  
9 property lacks such a comparable feature and lacks a suitable site to construct one. The Delfino  
10 property has a bed and breakfast operation as part of the vineyard, which provides significant  
11 nonfarm income. No financial data is provided to allow a comparison.

12 We find it highly significant that independent enterprise budgets by university extension  
13 services for cattle grazing and wine grape vineyard operations directly comparable to prospective  
14 operations on the subject property found that operations such as those proposed on the subject  
15 property would generally be expected to yield operating losses and not profit.

16 We have considered the seven factors of OAR 660-033-0020(1)(a)(B), appropriate scales  
17 of farming, and combinations of the subject property with other operations. Because of the severe  
18 limitations of the property due to low soil fertility, lack of irrigation water, southwest aspect, the  
19 technology and energy inputs required, and limitations on accepted farming practices, no  
20 reasonable farmer would consider using the property for a farm operation, whether it be a small  
21 local scale, a large commercial scale, or some other arrangement, alone or in combination with  
22 other properties. In conclusion, the subject property is not suitable for farm use.

1           The subject property is not agricultural land protected by Goal 3. The decision complies  
2 with Goal 3.

3 **Goal 4 (Forest Lands)**

4           At this point in the proceeding, the issue is whether the subject property is “forest land,”  
5 under the criterion of “lands which are suitable for commercial forest uses.”

6           The potential timber productivity of the property was intensively studied by Marc E.  
7 Setchko, M.F., a consulting forester with 32 years of professional forestry experience.<sup>4</sup> The  
8 Oregon Department of Forestry reviewed the Setchko study and found that the methodology and  
9 reasoning are consistent with current standards of practice of professional forestry.

10           The Setchko study, including the rebuttal, appendices, and exhibits is credible and is  
11 adopted as findings (to the extent that the later statements may be inconsistent with earlier  
12 statements, owing to new data and analysis, we rely on the later statements).

13           LUBA has required a quantitative analysis of the potential timber productivity of the  
14 subject property in order to determine whether it is suitable for commercial forest use. Despite  
15 that direction, LUBA acknowledges that state law provides no quantitative criterion to apply to the  
16 results of that analysis. We consider a series of reasonable standards and conclude the subject  
17 property fails under every one of them to be suitable for commercial forest use.

18           To summarize the Setchko report, the analysis began with an estimate of the stocking  
19 capacity of the property, building on the premise that those portions of the property in Dickerson  
20 and Nonpareil soils which had not supported timber for the past 59 years are unsuitable for timber

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<sup>4</sup> Setchko, M.E., with technical assistance by S. Mountainspring, “Potential Timber Productivity of the Great American Properties Parcel” (Feb. 2008) and Setchko, M.E., with technical assistance by S. Mountainspring, “Potential Timber Productivity of the Great American Properties Parcel / Rebuttal Memorandum” (Oct. 6., 2008).



1 production, and that areas of Dickerson and Nonpareil soils with widely scattered trees are unable  
2 to support fully stocked stands.

3 The Setchko report conducts an aerial photographic analysis to estimate the stocking  
4 capacity of the areas with widely scattered trees. The analysis calculates that the areas with  
5 widely scattered trees have stocking capacity of 9.4% of a normal fully-stocked stand. The 9.4%  
6 stocking capacity value is confirmed by independent parallel analysis based on U.S. Forest  
7 Service regression equations and categorical groupings of indicator species.

8 The Setchko report applies the 9.4% stocking capacity estimate to the aerial analysis to  
9 estimate the total stocking capacity of the Dickerson and Nonpareil soil polygons. He calculates  
10 the mean annual increment of growth (in cubic feet/acre/year, cf/ac/yr) for each polygon based on  
11 standard tables and tree core samples on site. Finally, Setchko provides an economic analysis  
12 which shows the net present value and the internal rate of return for using the property as a  
13 commercial forestry operation.

14 The Dickerson and Nonpareil soils which constitute 78% of the property have potential  
15 timber productivity of 15 cf/ac/yr (productivity class 7) (this is termed the "predominant  
16 productivity"). Averaged by areally weighted polygon values, the entire parcel has overall  
17 average potential productivity of 38 cf/ac/yr (productivity class 6) (this is termed the "average  
18 productivity").

19 The net present value for the property managed as for commercial forestry shows the  
20 property loses money in timber production, regardless of the species planted or the rotation cycle  
21 selected; the average net present value is *negative* \$133,900. This indicates the property is not  
22 suitable for commercial forest uses. The internal rate of return is less than 3% for timber

1 production of the property, which is below the generally accepted values of 4% and greater for  
2 property deemed suitable for timber production in a commercial enterprise.

3 The Douglas County Comprehensive Plan defines commercial forest land as "forest land  
4 that is capable of producing crops of industrial wood, generally in excess of 50 cf/ac/yr"  
5 (productivity classes 1-5). Douglas County Comprehensive Plan A-3. Neither the predominant  
6 nor the average productivity of the subject property meets that standard. We note that it appears  
7 Jackson County has also adopted 50 cf/ac/yr as its standard for commercial forest land.

8 The predominant productivity of the subject property does not meet the standard for  
9 commercial forest land which Wetherell claims applies, 20 cf/ac/yr. This standard is based on the  
10 Oregon Department of Forestry requirement for reforestation after logging occurs, i.e.,  
11 reforestation is required on lands capable of producing 20 cf/ac/yr. The portions of the subject  
12 property at issue (the Dickerson and Nonpareil soil areas) have not been logged in the past 59  
13 years, nor grown trees during that period. The ODF reforestation standard is not applicable to the  
14 property, and is not the standard for determining whether land is protected by Goal 4 as suitable for  
15 commercial forestry use in Douglas County. The 20cf/ac/yr standard may be appropriate for  
16 eastern Oregon, but it is not the conventional commercial standard in western Oregon, where 50  
17 cf/ac/yr and higher values are typically used by commercial operators to determine whether  
18 property is suitable for commercial forestry use. To the extent that it is determined on review that  
19 20 cf/ac/yr is the appropriate standard, we exercise our discretion in this case to adopt the  
20 predominant productivity of the property as the determinant of whether the property is suitable for  
21 commercial forestry use.

22 The economic analysis of net present value and internal rate of return are used in

1 determining whether land is suitable for commercial forestry use in the Josephine County  
2 comprehensive plan. The economic analysis of the subject property in the Setchko report  
3 supports and confirms the conclusion that the property is not suitable for commercial forestry use  
4 (a commercial forestry operation would lose money and does have an economically viable internal  
5 rate of return), independently of the numeric standard (cf/ac/yr) used to define commercial forest  
6 lands.

7 The subject property is not forest lands protected by Goal 4. The decision complies with  
8 Goal 4.

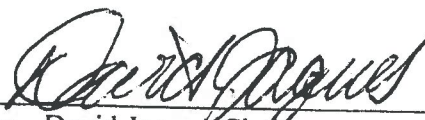
9 **Agriforestry**

10 Mixed use of the subject property for agriculture and forestry appears to be separately  
11 covered under Goals 3 and 4. The Day and Setchko reports address agriforestry and show that the  
12 subject property is not suitable for such mixed use. By mentioning the agriforestry issue in  
13 passing, we do not intend to open a new or settled issue.

14 **DECISION**

15 The proposed plan amendment and zone change are approved as requested.

16 Date: November 20, 2008 DOUGLAS COUNTY PLANNING COMMISSION

17   
18 \_\_\_\_\_  
By: David Jaques, Chair



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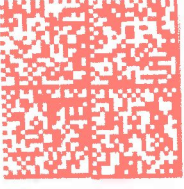
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