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

8/28/2009

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

FROM: Plan Amendment Program Specialist

SUBJECT: Jackson County Plan Amendment
DLCD File Number 003-04

The Department of Land Conservation and Development (DLCD) received the attached notice of adoption. Due to the size of amended material submitted, a complete copy has not been attached. 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: Thursday, September 10, 2009

This amendment was submitted to DLCD for review 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 THAT IT WAS MAILED TO DLCD. AS A RESULT, YOUR APPEAL DEADLINE MAY BE EARLIER THAN THE ABOVE DATE SPECIFIED.

Cc: Mike Mattson, Jackson County
Doug White, DLCD Community Services Specialist
John Renz, DLCD Regional Representative
Katherine Daniels, DLCD Farm/Forest Specialist

<paa> YA/

☐ In person ☐ electronic ☐ mailed

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: **Jackson County**
Local file number: **LRP2004-00005 Remand**
Date of Adoption: **8/19/2009**
Date Mailed: **8/20/2009**
Was a Notice of Proposed Amendment (Form 1) mailed to DLCD? **Yes** Date: 10/4/2004

☐ 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".

LUBA Remand 2007-061. Comprehensive Plan Map and Zoning Map Amendment to change the zoning from Forest Resource (FR) and Woodland Resource (WR) to Rural Residential (RR-10, 10 acre density). Also amends Jackson County's Goal 5 Resources, 1990 Background Document to include mitigation measures to protect Deer Winter Range. Mitigation measures proposed would be in addition to the current mitigation requirements for the West Valley Unit for Deer and Elk Winter Range.

Does the Adoption differ from proposal? Yes, Please explain below:

The amendment also includes an interpretation of the Comprehensive Plan that does not require an exception to rezone land to Rural Residential Land.

Plan Map Changed from: **Forestry/Open Space** to: **Rural Residential**
Zone Map Changed from: **Forest & Woodland Resource** to: **RR-10**
Location: **0.8 mi. NW of Johns Peak Rd. & Old Military Rd.** Acres Involved: **342**
Specify Density: Previous: **1 per 80 acres** New: **1 per 10 acres**
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. 003-04R (13931) [15681]

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

City of Jacksonville, RVCOG, Jackson County Fire Dist. #3, ODF, BLM, DSL, ODFW, Jackson County Roads & Parks, Oregon State Watermaster

Local Contact: **Mike Mattson** Phone: **(541) 774-6937** Extension:

Address: **10 S. Oakdale, Room 100** Fax Number: **541-774-6791**

City: **Medford** Zip: **97501-** E-mail Address: **mattsomw@jacksoncounty.org**

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**. 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**.

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

Adopted: 8/19/09
Effective: 10/18/09

BEFORE THE BOARD OF COMMISSIONERS
STATE OF OREGON, COUNTY OF JACKSON

ORDINANCE NO. 2009-4

AN ORDINANCE APPROVING AN AMENDMENT, FOLLOWING A LUBA REMAND, TO THE COMPREHENSIVE PLAN MAP AND ZONING MAP TO CHANGE THE PLAN MAP DESIGNATION FROM FORESTRY/OPEN SPACE LAND (FOS) TO RURAL RESIDENTIAL LAND AND THE ZONING MAP FROM FOREST RESOURCE (FR) AND WOODLAND RESOURCE (WR) TO RURAL RESIDENTIAL (RR-10) ON 342.98 ACRES DESCRIBED AS TOWNSHIP 37 SOUTH, RANGE 2 WEST, SECTION 18, TAX LOTS 300, 400, 401, & 700 AND TOWNSHIP 37 SOUTH, RANGE 2 WEST, SECTION 19, TAX LOT 200, AND LOCATED APPROXIMATELY 0.75 MILES NORTHWEST OF THE INTERSECTION OF OLD MILITARY ROAD AND JOHNS PEAK ROAD, ON JOHNS PEAK ROAD. FILE LRP2004-00005.

RECITALS:

1. Pursuant to Chapter 197 and 215 of the Oregon Revised Statutes, and in conformance with the Statewide Planning Goals, Jackson County's Comprehensive Plan (JCCP) and implementing ordinances have been acknowledged by the Oregon Land Conservation and Development Commission (LCDC).

2. The standards justifying minor or quasi-judicial amendments to the Jackson County Comprehensive Plan Map and Zoning Map Amendments are contained in the Jackson County Comprehensive Plan and in the Jackson County Land Development Ordinance (JCLDO) Chapter 3.

3. JCLDO Section 3.7.3 states that a minor map amendment must conform to the Statewide Planning Goals, Oregon Administrative Rules, and the Comprehensive Plan as a whole.

4. An application was received by Jackson County from Edward Cox II, agent for the applicants, on March 31, 2004. The original proposal was a Minor Comprehensive Plan Map and Zoning Map

Amendment to change the Comprehensive Plan Map designation from Forestry/Open Space to Rural Use and the zoning district map from Forest Resource (FR) and Woodland Resource (WR) to Rural Use (RU) on 683+ acres. After initial review by staff, the application was deemed incomplete on March 30, 2004. A site visit of the area was scheduled and completed by the Planning Commission on July 8, 2004. On August 11, 2004, a letter was submitted from the agent, Edward L. Cox II, requesting the Planning Department to process the application. The application was deemed complete as of August 11, 2004.

5. The application was scheduled before the Jackson County Planning Commission for a November 18, 2004 first evidentiary hearing. This hearing date was cancelled and a new hearing was not scheduled. The applicants submitted Measure 37 claims to the Board of Commissioners and these claims were affirmed. Following discussion with the agent, Mr. Cox, the application was changed to reduce the number of tax lots involved and to change the Comprehensive Plan Map and Zoning Map to Rural Residential Land and RR-10, respectively. The initial application was to change the comprehensive plan and zoning maps to Rural Use (RU). A new public hearing date was scheduled for June 8, 2006 at 9:15 a.m.

6. On June 8, 2006, the Jackson County Planning Commission held a properly advertised public hearing to consider the evidence and testimony on this application. The public hearing was continued to September 28, 2006. After considering the evidence submitted and testimony, the Planning Commission, by motion and vote, recommended the Board of Commissioners deny the application for a Comprehensive Plan Map and Zoning Map Amendment to change the plan map designation from Forest/Open Space Land (FOS) to Rural Residential Land and the zoning map from Forest Resource (FR) and Woodland Resource (WR) to Rural Residential (RR-10) on 342.98 acres.

7. On January 17, 2007, the Jackson County Board of Commissioners held a properly advertised public hearing to consider the recommendation by the Planning Commission and consider evidence and testimony on this application. The Board of Commissioners approved the application and signed Ordinance 2007-10 on February 21, 2007.

8. The application was appealed to the Land Use Board of Appeals (LUBA) and was remanded to Jackson County on October 4, 2007. The agent for the applicant requested Jackson County proceed with the remanded application on April 8, 2008.

9. The remanded application was scheduled for a public hearing before the Jackson County Board of Commissioners on October 8, 2008. That public hearing was cancelled.

10. On April 8, 2009 held a public hearing before the Board of Commissioners. That hearing was continued to April 22, 2009.

11. On April 22, 2009, the Board of Commissioners held a public hearing on the remanded application. The hearing was continued to June 17, 2009.

12. On June 17, 2009, the Board of Commissioners held a public hearing on the remanded application and voted to approve the application.

2-ORDINANCE; LUBA Remand of File LRP2004-00005
Edward L. Cox II, Agent; Edward L. Cox II, et al, Applicants/Owners

SECTION 1. LUBA REMAND ASSIGNMENTS OF ERROR

1.1 LUBA remanded the application back to Jackson County based upon the following Assignments of Error:

1.1.1 1st Assignment of Error, Subassignment of Error (C), Wildlife Habitat. Many of the properties are within the "Other" Winter Range Habitat for deer and elk, an identified Goal 5 resource. LUBA found there was not substantial evidence within the record to support the County's finding fo minimal impact to deer and elk habitat. LUBA also found an amendment to change the zoning from a resource zone to a residential zone to allow a higher residential density in the "Other" Winter Range Habitat is an amendment to the Goal 5 program that must be evaluated for compliance with Goal 5.

1.1.2 2nd Assignment of Error, Subassignment of Error (A), Rural Residential Lands. LUBA states in the remand "...The Rural Residential map designation provisions mandating an 'exception' and the absence of any language suggesting the contrary convey the strong impression that the county intended the Rural Residential designation to apply exclusively to exception lands, while the Rural Use designation applies exclusively to non-resource lands for which no exception is required."

LUBA, however, did not hold the RR map designation criteria must *necessarily* be interpreted in the above manner. There may be other relevant context or history that points to a different conclusion. There were no findings addressing the issue or adopting the county counsel's interpretation as the county's. LUBA believes it was appropriate to remand the decision to allow the Board of Commissioners to address this interpretative issue.

1.1.3 2nd Assignment of Error, Subassignment of Error (D), Rural Residential Map Designation Criterion 2(D), Conflicting Goal 5 Uses. Criterion 2(D) of the Rural Residential Lands map designation requires "[w]here the proposed area includes or adjoins identified Goal 5 resources, or is otherwise mapped within a Goal 5 impact area, a conflicting use analysis must be provided in accordance with the Goal 5 process to support the proposed Plan designation. LUBA determined the county failed to conduct a "conflicting use" analysis under the Goal 5 process with respect to deer winter range habitat.

Now, Therefore, the Board of County Commissioners of Jackson County hereby make the following findings and conclusions:

SECTION 2. LEGAL FINDINGS

Based upon evidence in the record and testimony at the public hearings, the Board makes the following findings with respect to the sustained Assignments of Error identified by LUBA above.

2.1 **Compliance with Goal 5: Conflicting Use Analysis and Amendment to Jackson**

County's *Goal 5 Resources, Background Document, 1990*, regarding the West Valley Unit of Area of Special Concern (ASC) 90-1, Deer and Elk Habitat. 1st Assignment of Error, Subassignment of Error (C), Wildlife Habitat and 2nd Assignment of Error, Subassignment of Error (D), Rural Residential Map Designation Criterion 2(D), Conflicting Goal 5 Uses. The Board of Commissioners adopts as its own the staff report (Pgs. 87-114 of the record), attached hereto and incorporated as Exhibit "A"; the Supplemental Findings to the Board of Commissioners (Pgs. 378-380 of the record), attached hereto and incorporated as Exhibit "B"; the Supplemental Findings for Section 3.5.4(B) of the LDO (Pg. 386 of the record), attached hereto and incorporated as Exhibit "C"; and the Recommended Conditions for LRP2004-00005 (Pgs. 387-388 of the record), attached hereto and incorporated as Exhibit "D." Where factual conflicts arose, the Board has resolved them consistent with these findings.

2.1.1 The Board of Commissioners finds there is substantial evidence in the record to determine this portion of the West Valley Unit of Deer and Elk Winter Range Habitat is adequately protected by the addition of mitigation measures propose by the applicant, Exhibit "D" and the current requirements of Section 7.1.1(C) of the LDO. The Oregon Department of Fish and Wildlife (ODFW) has submitted a letter of concurrence that mitigation measures provided by the applicant are adequate to protect deer winter range habitat. The applicant also has submitted a proposed plat of a Planned Unit Development (PUD) upon which the mitigation measures are based. The Board also finds the approval of the proposed PUD is feasible through a subsequent Type 4 application to Jackson County, although the Board is not implying that Jackson County will approve the subsequent application for a PUD.

The Board finds that both the deer winter range habitat and the conflicting uses are important compared to each other, and, based upon the ESEE analysis, the conflicting uses, which include residential development, should be allowed using the mitigation measures identified through the ESEE analysis. These mitigation measures are identified in Exhibit "D", Recommended Conditions for LRP2004-00005 as well as current requirements of Section 7.1.1(C) of the LDO. Additionally, since the proposed PUD is the basis for the proposed mitigation measures, any subsequent PUD proposal and application submitted to Jackson County should be substantially compliant with the PUD as outlined by the applicant in this application.

The Board finds that the application is compliant with Statewide Planning Goal 5 and Jackson County's *Goal 5 Resources, Background Document, 1990*, regarding the West Valley Unit of Area of Special Concern (ASC) 90-1, Deer and Elk Habitat, is amended to include mitigation measures found in Exhibit "D", Recommended Conditions for LRP2004-00005, for the specific area associated with this application.

2.2 **Interpretation of the Rural Residential Lands Map Designation Element to determine whether an "exception" is required to rezone property or properties from a resource zone to a residential zone.**

The Board finds in the record two (2) county counsel opinions with respect to whether an "exception" is required to rezone a property or properties from a resource zone to a rural

residential zone. The first is from Jackson County's previous County Counsel, Doug McGeary, a memo dated August 25, 2006 (Pgs.115-117 of the record), attached hereto and incorporated as Exhibit "E." Mr. McGeary's initial interpretation of state law determined that "In short, state law does not require an exception to State Goal 3 (farmland protection) or 4 (forest land protection) if the land is not farm or forest land by definition." Mr. McGeary then turned to the Comprehensive Plan and LDO to ensure there are no local restrictions that go beyond state law.

Mr. McGeary reviewed the Forestry/Open Space Lands section of the Map Designations Element, specifically Section 2 of that element. He found that the criteria in Section 2 of the Forestry/Open Space Lands in the Map Designations Element clarified any ambiguity in favor of the *Bates* rule, which determined that state law does not require an exception to support a plan amendment to a more appropriate designation and zone.

Mr. McGeary then reviewed the Map Designations Element for Rural Residential Land and the criteria to designate property or properties rural residential. He states "Section 2)A) states that Forest/Open Space Lands may not be designate Rural Residential unless an 'applicable' exception to Goal 4 is 'justified.' Once again, an applicable exception is not justified if the evidence clearly proves the land located within a Forestry designation on the Comp Plan Map is not forest land by definition as set out in Oregon Law and local ordinance that define the physical characteristics of forest land. Thus, I believe the County can comfortably interpret its Comp Plan consistent with state law as applied under *Bates*."

Mr. McGeary concluded saying "State law and Jackson County's land use ordinances do not require an exception to State Goal 3 (farmland protection) or 4 (forest land protection) if the land is not farm or forest land by definition."

The second county counsel opinion is from Jackson County's current County Counsel, Frank Hammond. His memo is dated April 13, 2009 (Pgs.381-384), attached hereto and incorporated as Exhibit "F." The memo includes an Exhibit A that includes Board findings regarding the availability of RR zoning on Non-resource, non-exception land. The Board of Commissioners adopts the memo and the findings as its own and includes the findings below.

> 2.2.1 The Board adopts the following findings, interpretations, and conclusions pursuant to the Land Use Board of Appeals' (LUBA final order in *Lofgren v. Jackson County*. Or LUBA_(LUBA No. 2007-061, 2007). LUBA mandated that the Board adopt an interpretation of the Jackson County Comprehensive Plan (hereinafter "JCCP") with regard to the Second Assignment of Error. Specifically, the interpretation shall address the JCCP Rural Residential Land Purpose statement, which provides, "Exceptions to statewide planning Goals 3, 4, and 14 (as applicable) are required to establish Rural Residential lands outside adopted Urban Growth Boundaries." Additionally, the interpretation shall address JCCP Rural Residential Land Map Designation Element 2(A), which states that land "currently designated Agricultural or Forest/Open Space Lands may not be designated as Rural Residential unless an exception to the applicable Goal 3 or 4 is justified in accordance with the Goal 2 Exceptions Process, ORS 197.732 and OAR 660, Division 4." The Board interprets the foregoing "as applicable" modifier to mean that exceptions to the statewide planning goals are required if the statewide planning goals are

"applicable" in a particular case. The Board reaches its interpretations and findings for the reasons that follow.

The Forestry/Open Space Land Map Designations Element of the Jackson County Comprehensive Plan states that the four principal forest land environments described in the Forest Lands Element must be designated for Forestry and Open Space unless an exception to Goal 4 is taken. JCCP Forestry/Open Space Map Designations Element 2(A). Because the Board previously found that the subject property is nonresource, the Board finds that an exception is not necessary.

Because of the requirement under the Forestry/Open Space Map Designations Element that land within the principal forest land environments must not be rezoned unless an exception is taken, the Board concludes that the "as applicable" language of the JCCP Rural Residential Land Purpose statement and JCCP Rural Residential Land Map Designation Element 2(A) means that an exception is needed only when an exception is "applicable" to a particular property. In this case, an exception is not applicable, because of the previous findings with regard to the property not being resource land. If the JCCP was intended to require an exception in all cases, there would be no need to include the "as applicable" language. Goal exceptions are only required when they are otherwise mandated by the JCCP.

The Board finds a textual analysis supports this conclusion. If there is more that one possible meaning to the provision, which LUBA implies, the Board could apply legislative history to determine the meaning. *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). Unfortunately, no legislative history relevant to this question appears to exist. Because of that, the Board is forced to apply legislative maxims in order to resolve the meaning of the ordinance. *Id.* One such maxim is that the Board should apply the policy it believes the enacting Board was pursuing. *PGE*, 317 Or at 612 ("[W]here no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue."). *See also Church*, 187 Or App at 526 (looking to policy behind ordinance in evaluating county's interpretation of ordinance).

The policy supporting the applicable provisions is that RR zoning not be applied to lands subject to Goals 3 and 4. The regulations use the word "applicable" to describe the goals. Applicable means the goal must apply. This leaves three possibilities for qualifying for RR zoning: Goal 3 applies but the use is excepted (meaning the goal is not operative); Goal 4 applies but the use is excepted (meaning the goal is not operative); *or* neither goal applies and neither goal is therefore operative. All three possibilities are conceptually equivalent in that in none of the possibilities does the goal operate. Therefore, the Board could thus reasonably conclude that the policy of the regulations would be served by allowing RR zoning on non-resource, non-exception land where no resource goal is operative.

The Board's interpretation that a goal exception is not necessary is in keeping with existing precedent, which states that if land is shown to be nonresource, a goal exception is not necessarily required. *See Wetherell v. Douglas County*, _Or LUBA _ (LUBA No.

2006-122, 2006), *DLCD v. Josephine County*, 18 Or LUBA 798 (1990), *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

Finally, LUBA commented that the Rural Use designation appears to contemplate an application such as this, where the property is not resource and does not require an exception. The Board finds that the fact that Rural Use designation does not require an exception does not mean that the Rural Residential Designation does require an exception. The Board interprets the JCCP to mean that an exception may be required when seeking a Rural Residential Designation. The Board finds that no such exception is required in this case.

The Board finds that the applicant has shown compliance with all other criteria for the Statewide Planning Goals, Oregon Administrative Rules, Jackson County Comprehensive Plan and Jackson County Land Development Ordinance.

SECTION 3. CONCLUSIONS

3.1 The Board of Commissioners concludes that proper public notice was given.

3.2 The Board of Commissioners concludes that an amendment to Jackson County's *Goal 5 Resources, Background Document, 1990*, regarding the West Valley Unit of Area of Special Concern (ASC) 90-1, Deer and Elk Habitat, is justified based upon the ESEE analysis and mitigation measures proposed by the applicant. The amendment is specific to the area specified by the application.

3.3 The Board of Commissioners concludes that the Map Designation Element for Rural Residential Lands does not necessarily require an exception to rezone a property or properties from a resource zone to a rural residential zone. An exception may be required when seeking a Rural Residential Designation. The Board concludes that no such exception is required for this application.

SECTION 4. DECISION

The Board of County Commissioners of Jackson County ordains as follows:

4.1. Based on the record , testimony of the public hearing, the staff report (Pgs. 87-114 of the record), attached hereto and incorporated as Exhibit "A", the Supplemental Findings to the Board of Commissioners (Pgs. 378-380 of the record), attached hereto and incorporated as Exhibit "B", the Supplemental Findings for Section 3.5.4(B) of the LDO (Pg. 386 of the record), attached hereto and incorporated as Exhibit "C", the Recommended Conditions for LRP2004-00005 (Pgs. 387-388 of the record), attached hereto and incorporated as Exhibit "D.", a memo from the previous County Counsel, Doug McGeary, dated August 25, 2006 (Pgs.115-117 of the record), attached hereto and incorporated as Exhibit "E", and a memo from the current County Counsel, Frank Hammond, dated April 13, 2009 (Pgs.381-384), attached hereto and incorporated as Exhibit "F", the Board of Commissioners approves a Comprehensive Plan Map and Zoning Map

Amendment to change the plan map designation from Forest/Open Space Land (FOS) to Rural Residential Land and the zoning map from Forest Resource (FR) and Woodland Resource (WR) to Rural Residential (RR-10) on 342.98 acres described as Township 37 South, Range 2 West, Section 18, Tax Lots 300, 400, 401, & 700 and Township 37 South, Range 2 West, Section 19, Tax Lot 200, and located approximately 0.75 miles northwest of the intersection of Old Military Road and Johns Peak Road, on Johns Peak Road, as illustrated on the zoning map of the Jackson County Planning Commission Recommendation in Exhibit "G".

4.2 Invalidity of a section or part of this ordinance shall not affect the validity of the remaining sections or parts of sections.

APPROVED this 19th day of August, 2009, at Medford, Oregon.

JACKSON COUNTY BOARD OF COMMISSIONERS

Dave Gilmour, Chair

Jack Walker, Commissioner

absent

Dennis C. W. Smith, Commissioner

APPROVED AS TO
LEGAL SUFFICIENCY:

County Counsel

ATTEST:

Donna Bladek

By: Recording Secretary

The Board of County Commissioner's Ordinance is the final decision on this action. This decision may be appealed to the Oregon Land Use Board of Appeals (LUBA). You must appeal this decision within 21 days of the date it is mailed. This decision is being mailed on August 20, 2009, and the LUBA appeal period will expire on September 10, 2009. Please contact LUBA for specific appeal information. They are located at 550 Capitol Street N.E. Suite 235, Salem, Oregon 97301-2552. They can be reached at (503) 373-1265.

EXHIBIT A

JACKSON COUNTY DEVELOPMENT SERVICES

REMAND OF COMPREHENSIVE PLAN MAP AND ZONING MAP AMENDMENT

FILE LRP2004-00005

STAFF REPORT

Ordinance 2007-10 was approved by the Board of Commissioners on February 21, 2007. The ordinance was as follows:

"An Ordinance Approving an Amendment to the Comprehensive Plan Map and Zoning Map to Change the Plan Map Designation from Forestry/open Space Land (FOS) to Rural Residential Land and the Zoning Map from Forest Resource (FR) and Woodland Resource (WR) to Rural Residential (RR-10) on 342.98 Acres Described as Township 37 South, Range 2 West, Section 18, Tax Lots 300, 400, 401, & 700 and Township 37 South, Range 2 West, Section 19, Tax Lot 200, and Located Approximately 0.75 Miles Northwest of the Intersection of Old Military Road and Johns Peak Road, on Johns Peak Road. Edward L. Cox II, Roberta Jane Cole and John O. Sawyer, Jr., William M. and Colleen P. Cox, Norman J. and Kathy W. Salyer, and Joseph L. and Lynn A. Smith, Owners. File LRP2004-00005."

The Post Acknowledgment Plan Amendment (PAPA) approval was appealed to the Land Use Board of Appeals (LUBA). The ordinance and amendment were remanded to the County by LUBA on October 4, 2007. The quasi-judicial public meeting has been scheduled before the Board of Commissioners on April 8, 2009. This staff report identifies the remand issues, evidence submitted by the applicants regarding the remand issues, and staff findings for the Board of Commissioners.

I. REMAND ISSUES

The remand issues to be addressed are described in the following table.

Assignments of Error	Issues	Evidence
1st Assignment of Error Sub-assignment of error (C) Wildlife Habitat	Much of subject property is within the "Other" Winter Range Habitat, A Goal 5 Resource. LUBA found there was not substantial evidence supporting the county's finding of minimal impact on habitat. LUBA also found an amendment to change the zoning from a resource zone to a residential zone to allow higher residential density in the "Other" Winter Range Habitat is an amendment to the Goal 5 program that must be evaluated for compliance with Goal 5.	Applicants have submitted an ESEE conflicting use analysis with mitigation measures. A letter from ODFW has also been submitted indicating their positive recommendation of the plan submitted by the applicant. A PUD for development of the properties was submitted to show the development and mitigation measures are feasible to mitigate impacts and provide adequate protection to Black-tailed deer populations.
2nd Assignment of Error Sub-assignment of error (A) Rural Residential Lands	LUBA states "...the Rural Residential map designation provisions mandating an 'exception' and the absence of any language suggesting the contrary convey the strong impression that the county intended the Rural Residential designation to apply exclusively to exceptions lands, while the Rural Use designation applies exclusively to non-resource lands for which no exception is required." LUBA, however, did not hold the RR map designation criteria must *necessarily* be interpreted in the manner above. There may be other relevant context or history that points to a different conclusion. There were no findings addressing the issue or adopting the county counsel's interpretation as the county's. LUBA believes it was appropriate to remand the decision to allow the Board of Commissioners to address this interpretative issue.	Applicant has submitted suggested findings and conclusions of law for the Board of Commissioners to determine the "as applicable" modifier means that exceptions to the statewide planning Goals are required if the statewide planning goals are "applicable" in a particular case. The applicant believes the Board can find that goal exceptions are not "applicable" in this case.

2nd Assignment of Error Sub-assignment of error (D) Rural Map Designation Criteria 2(D): Conflicting Goal 5 Uses	Criterion 2(D) of the Rural Residential map designation requires that "[where the proposed area includes or adjoins identified Goal 5 resources, or is otherwise mapped within a Goal 5 impact area, a conflicting use analysis must be provided in accordance with the Goal 5 process to support the proposed Plan designation." LUBA determined the county failed to conduct a "conflicting use" analysis under the Goal 5 process with respect to deer winter range habitat. That "conflicting use" analysis is the process set out in OAR Chapter 660, Division 23, the administrative rule that implements Goal 5.	Applicant has submitted an ESEE conflicting use analysis.

A) **Goal 5: Conflicting Use Analysis and Amendment to Jackson County's *GOAL 5 RESOURCES, BACKGROUND DOCUMENT, 1990*, regarding the West Valley Unit of Area of Special Concern (ASC) 90-1, Deer and Elk Habitat.** Compliance with Goal 5.

SUMMARY OF LUBA REMAND FINDINGS, GOAL 5: LUBA found that an amendment to a nonresource, Rural Residential zoning is an amendment to the Goal 5 program that must be evaluated for compliance with Goal 5. LUBA also found there was not substantial evidence to support the county's finding of minimal impact on habitat (1st Assignment of Error, Subsection (C)).

Further in the remand under the 2nd Assignment of Error, Subsection (D), LUBA found the county failed to conduct a "conflicting use" analysis and provide the necessary findings addressing OAR 660, division 23, as required in the Rural Residential map designation criterion 2(D), which states "[where the proposed area includes or adjoins identified Goal 5 resources, or is otherwise mapped within a Goal 5 impact area, a conflicting use analysis must be provided in accordance with the Goal 5 process to support the proposed Plan designation."

1) **CRITERIA FOR GOAL 5, OAR 660-023-0040 &0050:**

a) ***660-023-0040 ESEE DECISION PROCESS***

(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule. Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a

previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:

(a) Identify conflicting uses;

(b) Determine the impact area;

(c) Analyze the ESEE consequences; and

(d) Develop a program to achieve Goal 5.

(2) Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. The following shall also apply in the identification of conflicting uses:

(a) If no uses conflict with a significant resource site, acknowledged policies and land use regulations may be considered sufficient to protect the resource site. The determination that there are no conflicting uses must be based on the applicable zoning rather than ownership of the site. (Therefore, public ownership of a site does not by itself support a conclusion that there are no conflicting uses.)

(b) A local government may determine that one or more significant Goal 5 resource sites are conflicting uses with another significant resource site. The local government shall determine the level of protection for each significant site using the ESEE process and/or the requirements in OAR 660-023-0090 through 660-023-0230 (see OAR 660-023-0020(1)).

(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.

(4) Analyze the ESEE consequences. Local governments shall

analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.

(5) Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:

(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.

(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.

(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.

b) OAR 660-023-0050 Programs to Achieve Goal 5

(1) For each resource site, local governments shall adopt comprehensive plan provisions and land use regulations to implement the decisions made pursuant to OAR 660-023-0040(5). The plan shall describe the degree of protection intended for each significant resource site. The plan and implementing ordinances shall clearly identify those conflicting uses that are allowed and the specific standards or limitation that apply to the allowed uses. A program to achieve Goal 5 may include zoning measures that partially or fully allow conflicting uses (see OAR 660-023-0040(5)(b) and (c)).

(2) When a local government has decided to protect a resource site under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards. For purposes of this division, a standard shall be considered clear and objective if it meets any one of the following criteria:

(a) It is a fixed numerical standard, such as a height limitation of 35 feet or a setback of 50 feet;

(b) It is a nondiscretionary requirement, such as a requirement that grading not occur beneath the dripline of a protected tree; or

(c) It is a performance standard that describes the outcome to be achieved by the design, siting, construction, or operation of the conflicting use, and specifies the objective criteria to be used in evaluating outcome or performance. Different performance standards may be needed for different resource sites. If performance standards are adopted, the local government shall at the same time adopt a process for their application (such as a conditional use, or design review ordinance provision).

(3) In addition to the clear and objective regulations required by section (2) of this rule, except for aggregate resources, local governments may adopt an alternative approval process that includes land use regulation that are not clear and objective (such as a planned unit development ordinance with discretionary performance standards), provided such regulations:

(a) Specify that landowners have the choice of proceeding under either the clear and objective approval process or the alternative regulations; and

(b) Require a level of protection for the resource that meets or exceeds the intended level determined under OAR 660-023-0040(5) and 660-023-0050(1).

FINDINGS: Jackson County's *GOAL 5 RESOURCES, BACKGROUND DOCUMENT, 1990* identifies Black-tailed deer and Roosevelt elk winter range habitats as significant Goal 5 resources mandating protection. Staff finds that the inventory process identified in OAR 660-023-0030 has been completed by Jackson County and the determination of Black-tailed deer and Roosevelt elk winter range habitats has also been completed by Jackson County. The application before the Board of Commissioners will not require the County to determine whether the winter range habitat in question, the West Valley Unit, is a significant Goal 5 resource.

Jackson County's above referenced Goal 5 resources document identified three types of winter range areas: 1) "Especially Sensitive" Winter Ranges; 2) "Sensitive" Winter Ranges; and 3) "Other" Winter Range Units. The subject properties are within the West Valley Unit, an "Other" Winter Range Unit. "Other" Winter Range Units are defined as "*[p]rimarily lower density resident deer populations at the fringes of the lower Rogue River, Bear Creek, Sardine Creek, and Sams Valley. These habitat areas provide lesser quality winter forage cover and slope aspect.*" The West Valley Unit "*[s]upports low densities of resident deer throughout the year, with animal movement fluctuating according to weather severity. Its slope aspect, predominance of conifers and hardwoods, and limited browse species make this extended range relatively poor habitat and of least importance in comparison to other range units in the county.* The West Valley Unit is located "*[s]outh and west of the Interstate-5 corridor on generally north-facing slopes drained by tributaries of the Rogue River and Bear Creek.*" This unit's habitat features are "*[c]haracterized by coniferous timber and hardwood forest lands, with winter range limited to logged areas and agricultural lands at the periphery of the Douglas fir zone.*"

Conflicting uses determined in the Goal 5 background document include: 1) Residential development on winter ranges; 2) Roads; 3) Landfills; 4) Commercial feedlots; 5) Airports; 6) Open concrete canals; 7) Woven-wire fence; 8) Dogs running at large; and 9) Agricultural crops and young conifers damaged by browsing. The applicant has identified conflicting uses for the ESEE analysis. These conflicting uses are: 1) residential development; 2) construction of roads; and 3) the potential of dogs running at large. Staff accepts these conflicting uses for determining impacts that must be addressed through the ESEE analysis.

The impact area is defined as "*[a] geographic area within which conflicting uses could adversely affect a significant Goal 5 Resource.*" (OAR 660-023-0010(3)) The applicant has proposed the impact area be limited to the specific area proposed for the zone change, specifically the 342.98 acres containing the subject parcels identified on the zoning map submitted by staff. Staff agrees that the impact area should be limited to the subject parcels included in this application and remand.

The applicant also identifies an AR (Aggregate Removal) zoned parcel (the Nash aggregate pit) to the south and east of the southern-most parcel of the subject properties. The applicant submits that this aggregate pit must be included in the ESEE conflicting use analysis since it is an identified Goal 5 resource. The applicant identifies the conflicting uses with the aggregate site as residential uses (effects by noise, dust or other discharges from mining) and potential conflicts with roads serving the mining site. Specifically, lots 33, 34 and 103 of the PUD are withing 1,500 feet of the extraction area. The applicant identifies the conflicting uses to be proposed dwellings located on lots 33 and 34 of the

PUD. Staff accepts the applicants findings that the aggregate pit must be included in the ESEE conflicting use analysis and the conflicting uses are dwellings on lots 33 and 34 of the PUD.

Analysis and Findings of ESEE Consequences

OAR 660-023-0040(4) requires an analysis of the economic, social, environmental, and energy consequences that could result from a decision to allow, limit, or prohibit a conflicting use. As part of this analysis, the applicant has submitted a proposed Planned Unit Development (PUD) in order for Jackson County to determine the feasibility of the development and the proposed mitigation measures that would ensure protection of this winter range habitat. The PUD is not before Jackson County as an application that requires a final decision on the proposed development. The feasibility of the proposed PUD to meet requirements of the LDO will be discussed in another section.

The applicant states that the original application approved by the Board of Commissioners was for a zoning designation where parcel sizes were less than 20 acres and the applicant and Jackson County felt the application met the "impacted" definition outlined by ODFW in Jackson County's Goal 5 Resources Background Document (Pages 31 and 32). Ordinance 2007-10 Section 2.1.6 stated that the proposed development impacts to deer winter range habitat will be minimal and the development standards of ASC90-1 were sufficient to assure protection of the West Valley Unit of winter range habitat. Jackson County did not determine the area to be "impacted" as stated by the applicant.

The applicant's proposed PUD development plan provides for large blocks of open space and habitat area as common area and retains a 10 acre overall density. The applicant also indicates the development plan clusters lots and parcels along ridge lines and existing roadway areas to minimize road construction and expand habitat values and migration paths within the tract. Approximately 43% of the site is delineated as open space/habitat areas and provide for habitat "corridors" to enhance movement of resident deer herds with minimal conflict with proposed development. A letter dated February 20, 2008 from ODFW states "*Your proposed plan to develop 35 new tax lots with an overall density of 5.58 acres per homesite (excluding the proposed conservation easement) will introduce increased levels of disturbance, physically remove habitat through homesite and road construction, potentially introduce weedy non-palatable species through the introduction of fill material, and increase the likelihood of deer-vehicle collisions. However, these impacts will occur in an area designated as Other Winter Range, which is a less sensitive habitat and receives the least protection from Jackson County's wildlife protection standards.*" ODFW goes further to state "*In previous meeting and correspondence we have agreed to a number of actions that could mitigate for these expected impacts to wildlife. I have included a summary of these items to this letter (see attachment 2). ODFW recommends Jackson County approve your application, but use these items as conditions of approval. Specifically, we recommend the following conditions are satisfied after your application is approved but before building permits are issued:*

1. *A conservation easement for lots 101, 103, 104, 105, and 106 is signed with a reputable easement holder,*
2. *A wildlife friendly restrictive covenant within the PUD is established,*
3. *A fund for habitat improvement projects to be paid for by the developer is established, and*

4. *Motorcycle trails on lots 101, 103, 104, 105, and 106 are obliterated."*

The applicant has proposed conditions which include:

CONSERVATION EASEMENT FOR LOTS 101, 103, 104, 105, AND 106

1. No buildings or structures.
2. No mining.
3. No ATV use.
4. No new permanent roads to be established on Lots 101, 104, 105 and 106. Temporary (one year maximum) dirt roads may be built in order to manage the property for wildlife habitat enhancement and/or timber production and/or removal.
5. Only one new permanent road is permitted through Lot 103 to provide access for lots 33, 34, and 35.
6. The existing ROW granted to the Motorcycle Rider's Association which allows an ATV trail for access only across Lot 101 will be limited to the existing rights and liabilities as outlined in the deed recorded in the Jackson County Records as Document 2005-055186. No further rights will be extended to the MRA and in no way will the use granted in the above mentioned deed be expanded in any way, shape or form in the future.
7. Non-motorized public access for the purpose of legal hunting during authorized seasons shall be permitted.
8. Logging is to be allowed.

RESTRICTIVE COVENANT TO BE RECORDED AS PART OF CC&R'S FOR A PLANNED UNIT DEVELOPMENT

1. Dogs will not be allowed to roam at large, or run unsupervised.
2. Picket-style fencing will not be allowed.
3. All non-exclusion fences will be built to specifications that allow wildlife to pass through; i.e., top wire 12" above second wire, and bottom wire 16 inches above the ground to allow wildlife to pass under.
4. Exclusion fences will only be used within 300 feet of the building site to protect gardens or high-value landscaping.
5. Game mammal and game bird feeding, especially for deer and turkey, is prohibited. The intent of this condition is to prevent disease and parasite transfer among black-tailed deer, which often occurs at point-source feeding stations, and to limit future animal damage and conflict among neighbors caused by human habituation of wildlife. This prohibition would not effect the development of food plots or improvement projects, which ODFW would encourage.
6. ODFW will conduct wildlife surveys on the properties, and will be contacting the landowners prior to these annual studies.
7. A $2000.00 one-time payment is to be made to the Conservation Easement Holder by the Developer upon the sale of each lot within the PUD. Said monies are due upon closing of the sale. Said payments are to be placed into an account by the Easement Holder. The interest accrued from this account shall be used by the Habitat Easement Holder to develop a habitat improvement implementation plan, which shall be reviewed and approved by ODFW prior to implementing any habitat improvement projects. The

Holder will be responsible for implementing the plan which shall occur no less frequently than every 15 years. The Holder shall be allowed to pay itself for the reasonable costs incurred in administrating the Conservation Easement, developing the plan and implementation of the habitat improvements. Should the interest from this account accrue more funds than could reasonably be expended within the Conservation Easement, the excess funds could be utilized for other Wildlife Habitat Improvement projects within a thirty (30) mile radius of the PUD. These funds may be disbursed by the Habitat Easement Holder.

The applicant also stipulates to eliminate, obliterate or render unuseable all existing roads and motorcycle trails that currently exist on Lots 101, 103, 104, 105 and 106.

In a letter from Thiebes Wildlife Consultant, submitted by the applicant and dated February 11, 2008, Mr. Thiebes concludes "*The winter range is of poor quality based upon soil conditions and is in the lowest valued winter range classification. The reduction of vehicle and ATV use will improve winter range habitat. The CE [Conservation Easement] and plan for regular (as per ODFW agreement) habitat enhancement work is unprecedented and will effect an initial increase in winter range carrying capacity and should maintain this higher level of carrying capacity over time. Therefore, it is recommended that the John's Peak PUD be permitted under these recommendations.*" The recommendations from Mr. Thiebes are nearly identical to the conditions described above for the Conservation Easement and the Restrictive Covenant for the proposed PUD. Any differences are minor.

Should the Board approve the zone change, staff recommends the above conditions of approval be required for the future development of the properties through a Planned Unit Development that must be approved by Jackson County subsequent to the zone change. Staff agrees with ODFW that the proposed conditions of approval for any proposed development will help to mitigate impacts on black-tailed deer winter range habitat and any impacts will be minimal.

The applicant has indicated throughout the application that there will be a total of 35 lots. The total acreage of the properties is 342.98 acres. An overall density of 10 acres per dwelling would allow a total of only 34 lots within the PUD. 34 lots are the maximum amount of lots that can be subdivided through a subdivision or PUD.

ECONOMIC CONSEQUENCES

FINDINGS:

Jackson County's Goal 5 resources document identifies economic impacts as "*Residential development on winter ranges: ODFW estimates a 25-50 percent reduction in winter range carrying capacity when residential development density is one dwelling per 40 acres on black-tailed deer range, and one dwelling per 160 acres on Roosevelt elk range. The resulting loss of deer and elk population could impact the desirability of hunting in Jackson County and reduce the hunter dollars spent on these species (est. $4,100,000 in 1988).* The applicant states this determination does not specifically relate the consequences of a dwelling to the various types of habitat areas, specifically "Sensitive" or "Extremely Sensitive" habitat areas which would appear to be more detrimental.

Another consequence in the Goal 5 document states "*The timber industry currently loses an undetermined amount of resources to deer and elk browsing.*" The applicant states that in December, 2008 an elk herd was moved to reduce impacts of that herd on farm and forest uses in an area east of Medford. The applicant goes on to say that local deer herds are being affected by overpopulation and "hand-feeding."

Other conflicting uses noted in the Goal 5 document (roads, landfills, airports, etc.) indicate these uses should be identified on a case-by-case basis for impact on the habitat.

The applicant included a table within the application of uses and values assigned with those uses and staff has recreated that table below.

USES	VALUE ASSIGNED
34 Rural Residential Lots	$100,000 per Lot added value*
34 Rural Residential Structures	$250,000 per structure added value*
Loss of Current Habitat	Site is marginal habitat; less impact
Enhanced Open Space	Aesthetic value; useful for mitigation
Maintenance of current open space	Aesthetic value; manage trespassing?
Reduction of hunter dollars to development	N/A: Area is closed to hunting by public
Roadway development and maintenance	N/A: enhanced access; no value assigned
Existing AR site (est of Lots 33 and 34)	Significant Site: established by law
Impacts of two dwellings on AR site	Limited if mitigations are applied
Impact of two dwellings on roads used for AR	None: PUD access via John's Peak
Impact on Airport Safety	None: No airport in the vicinity

(Minimum values as established by review of local real estate values, November, 2008)*

The applicant maintains that deer habitat values are significantly low in this vicinity and the area has been impacted by the proximity of other rural residential zoned property on the periphery of the habitat unit, the existing road network within the subject tract, and the activities recreational users utilizing property to the west of the subject tract.

Allowing the Conflicting Uses

The applicant states positive economic impacts from allowing development outright being a substantial addition in property and structural value to Jackson County, with potential tax benefits to the county of approximately $138,000. Other potential economic impacts that the applicant has determined to be difficult to quantify are loss of current habitat (resident deer herd) and maintenance of current woodland/open space (difficult to manage trespassing).

The applicant has indicated that a reduction in hunter dollars due to development is not applicable due the area being closed to hunting by the public. It should be noted that the Conservation Easement for the approximately 147 acres in the easement allows for non-motorized public access for hunting in authorized seasons is permitted. This allows for public access for hunting in an area that is presently closed to the public.

Staff finds that although the economic benefits to allowing development outright could add significant structural and property value to the tax base of Jackson County, impacts to winter range habitat will occur (per ODFW) should the proposed development be allowed without mitigation or restrictions.

Limiting the Conflicting Uses
The applicant is proposing limiting the conflicting uses. Economic values associated with limiting development again include the positive economic benefits of additional property and structural value to Jackson County with potential tax benefits. The proposed development will utilize existing roads as the basis for the private roads to access the development, which will limit increased impacts to the winter range habitat. Loss of hunter dollars is difficult to ascertain because the area is closed to hunting by the public and with the conservation and maintenance of over 146 acres as open space for wildlife habitat, the resident deer herds in the area will continue to have the opportunity to traverse this area with minimal impacts. The applicant has also indicated the West Valley Unit is a low quality habitat and of limited importance in terms of deer habitat as noted in the Comprehensive Plan due to existing levels of development and existing impacts. The applicants consulting wildlife biologist has proposed conditions for mitigation of impacts to the wildlife habitat and ODFW has concurred that these conditions could mitigate and improve habitat values over time, thus reducing any quantifiable economic impacts due to limited development of identified conflicting uses. The limited development of identified conflicting uses is consistent with a determination that the identified Goal 5 resource and conflicting uses are important compared to each other and the proposed conditions allow the continued protection of Goal 5 resource, black-tailed deer winter range habitat.

Staff agrees with the applicant that the conditions proposed will allow protection of the winter range habitat. Staff also suggests that any subsequent PUD submitted to Jackson County is substantially compliant with the PUD as outlined by the applicant in their proposal. It is also imperative that ODFW concur that any subsequent PUD submitted to the county is adequate to protect wildlife habitat. ODFW shall submit a written recommendation regarding the subsequent PUD.

Prohibit the Conflicting Uses
The applicant states that maintaining the properties in their current condition results in a loss of value for the property owners due to taxes and costs of ownership, such as controlling trespass. The applicant has stated that the existing roadways are used by the public, who mistakenly believe the properties are public land managed by either BLM or the Forest Service. Since the properties are not determined to be forest lands, the applicant believes economic value from forest activities is insignificant from an economic perspective.

Staff finds that there would be very little development available to these properties other than what already exists. There may be a loss of potential value for property owners and for Jackson County due to a loss of value by tax revenues, costs of ownership and controlling

trespass. The application approved by the Board previously determined that the properties were not forest lands and this issue is not in question for the remand. Currently there is nothing being done to enhance the winter range habitat nor is anything required by the property owners, except requirements currently in the LDO regarding the siting of a dwelling. The economic consequences from prohibiting conflicting uses could include the loss of future tax revenues. The loss of value because of costs of ownership, such as controlling trespass, would not be significantly different than the current situation.

Goal 5 Conflicting Uses
The applicant has identified the residential development as a conflicting use to the AR zoned property and extraction site for the Nash Pit. The applicant believes the use of design features such as siting dwellings on the western portions of lots 33 and 34 to limit impacts of the dwellings on the aggregate resource. The applicant also believes other mitigation measures would help to reduce any economic impacts on aggregate activities occurring in the Nash Pit. These measures include berms and landscaping, building dwellings with topography, enhanced barriers and insulation to buffer the noise, dust and traffic impacts, and require new owners of lots 33 and 34 to sign the standard restrictive covenant (deed declaration) for properties located within 500 feet of an AR zoning district (LDO Section 8.5.3(F)) which prohibits "*[t]he landowner and their successors in interest from pursuing a claim for relief or cause of action alleging injury from mining activities.*"

Staff agrees with the applicant that the mitigation measures suggested by the applicant will minimize conflicts with the aggregate operation at the Nash Pit. Should the Board of Commissioners approve the application, staff suggests the following conditions:

1. Dwellings shall be sited on the western portions of lots 33 and 34.
2. Berms and landscaping will be used to buffer impacts from noise, dust and traffic associated with the aggregate operations at the Nash Pit.
3. Dwellings on the proposed lots 33 and 34 will be built using enhanced barriers and insulation to buffer noise, dust and traffic impacts.
4. A Deed Declaration will be signed and submitted to Jackson County for the proposed lots 33 and 34. The Deed Declaration will be the standard required for uses within 500 feet of an AR zoning district.

SOCIAL CONSEQUENCES

FINDINGS:

Allowing the Conflicting Uses
The applicant has stated that the social impacts of this application are "*[e]ssentially comparing the need for additional housing (a Goal 10 value) versus the maintenance of a somewhat marginal wildlife habitat area (a Goal 5 value).*" The applicant also states there is a significant demand for upscale, rural residential parcels in Jackson County and providing housing for 34 families would be significant in Jackson County, with new home construction averaging about 200 units per year. Finally, the applicant indicates "*The social impacts, then, of this application, are comparing the need for additional housing (a Goal 8 value) versus the maintenance of a somewhat marginal wildlife habitat area and an existing aggregate site (Goal 5 values). Since the planning process requires this comparison, it appears clear from the values assigned to the habitat protection versus the values assigned*

for housing, and then reviewing the mitigation measures proposed, the social impact of protecting the habitat to the exclusion of the proposed development is not a viable exercise."

The single social consequence identified in the *Goal 5 Resources, Background Document, 1990* are *"Lost winter range carrying capacity would result in reduced recreational opportunity for 21,842 hunters (1988 figure), as well as reduce the opportunity for all to view and study these animals."* (Section 2.4(A)(2), Goal 5 Document) The applicant states the lack of hunting is due to several factors. These factors include the prohibition of hunting on the private lands for a least 10 years, the marginal character of the habitat and that there is not a primary deer population, only migratory animals impacted by the residential development to the east, the aggregate pit to the southeast, and the motorcycle rider's property to the west and southwest. Staff agrees with the applicant that the factors listed above do limit the hunting available on the subject parcel.

Staff believes the applicant is proposing limiting conflicting uses based upon the mitigation measures proposed by ODFW and the applicant. Staff does not agree with the applicant that the demand for rural residential parcels in Jackson County is substantial because there is no evidence to support such a statement. It is clear in the Comprehensive Plan that growth shall be centered within urban growth boundaries and urban containment boundaries.

Staff finds allowing conflicting uses fully would have adverse impacts to the winter range habitat. In a letter dated February 20, 2008, ODFW states *"Your proposed plan to develop 35 new taxlots with an overall density of 5.58 acres per homesite (excluding the proposed conservation easement) will introduce increased levels of disturbance, physically remove habitat through homesite and road construction, potentially introduce weedy non-palatable species through the introduction of fill material, and increase the likelihood of deer-vehicle collisions. However, these impacts will occur in an area designated Other Winter Range, which is less sensitive and receives the least protection from Jackson County's wildlife protection standards."* ODFW goes on to say that the mitigation measures proposed by ODFW and the applicant could mitigate for the expected impacts to wildlife. Based upon the information from ODFW, it appears that there would be increased impacts to the winter range habitat if conflicting uses are allowed fully and staff does not recommend allowing conflicting uses fully.

Limiting Conflicting Uses

The applicant, as stated above, has determined that the social consequences are comparing the need for additional housing versus the maintenance of the identified Goal 5 resource, deer winter range habitat. The applicant also states *"Open space values are difficult to quantify from a social perspective, but it has been the norm in the western states that if open space uses are to be protected and maintained for the overall public good, then local, state and federal governments have significant responsibility to provide for the long term ownership and maintenance of these 'open space' areas. If keeping this tract in an open space configuration is an issue of prime public importance, the County or some other unit of government, or a private, non-profit group such as the Nature Conservancy should either buy the land for public use, or provide for development right purchases or transfers so that the open space value is protected for the public, but the actual value of the property is not taken from the owners."*

Staff finds again that there is not substantial evidence in the record to support the need and

demand for rural residential parcels outside of an urban growth boundary or unincorporated community boundary. With respect to Open Space values and the applicants statement that a local government should purchase land or provide development right transfers if open space is of prime public importance, staff finds that the language of Goal 5 mandates a local government to protect natural resources, scenic and historic areas, and open spaces. Deer and elk winter range is an identified Goal 5 resource which has been designated for protection through the Goal 5 process by Jackson County. Following the purpose statement for Goal 5, it states "*Local governments shall adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations.*" Jackson County has requirements in the LDO that provide for some protection of winter range habitat. Further in *Guidelines for Goal 5*, one of the implementation strategies states "*Local, regional and state governments should be encouraged to investigate and utilize fee acquisition, easements, cluster developments, preferential assessment, development rights acquisition and similar techniques to implement this goal.*" The applicant has proposed easement and development techniques would help to achieve protection of winter range habitat. Jackson County has not, at this time, decided to use the implementation strategies the applicant identifies to achieve protection of a Goal 5 resource. With regard to the social consequences identified in Jackson County's Goal 5 document, the loss of winter range carrying capacity would appear to be greatly diminished by the proposed mitigation measures and habitat enhancement as proposed by the applicant and ODFW's positive recommendation of the proposed development plan and adoption of the mitigation measures. Staff believes that limiting the conflicting uses based upon the Conservation Easement and Restrictive Covenant, eliminating roads on open space lots, and current LDO standards for siting of a dwelling would provide adequate protection of the Goal 5 resource, winter range habitat, and allow the identified conflicting uses.

Prohibiting Conflicting Uses

The applicant, as discussed above, indicates that maintaining the current situation of these properties limits the social consequences to a concept of "Open Space values" versus "Rural Residential housing." The applicant goes on to state that open space values are difficulty to quantify from a social perspective. Further, the applicant also says "*If keeping this tract in an open space configuration is factually an issue of prime public importance, government should either buy the land, or provide for development right transfers so that the value of the property is maintained for the owners.*" The applicant indicates that the social impacts are essentially comparing the need for additional housing versus the maintenance of marginal wildlife habitat (a Goal 10 value vs. a Goal 5 value). As a final statement regarding this, the applicant states "*Since the planning process requires this comparison, it appears clear from the values assigned to the habitat protection versus the values assigned for needed housing, and then reviewing the mitigation measures proposed, the social impact of protecting habitat to the exclusion of the proposed development is not a viable exercise.*"

Staff has asserted before that there is no evidence in the record regarding the need for rural residential housing outside of an urban growth boundary or unincorporated community boundary in Jackson County. With respect to Open Space values and the applicants statement that a local government should purchase land or provide development right transfers if open space is of prime public importance, staff again finds that the language of Goal 5 mandates a local government to protect natural resources, scenic and historic areas, and open spaces. Deer and elk winter range is an identified Goal 5 resource which has been designated for protection through the Goal 5 process by Jackson County. Following

the purposed statement for Goal 5, it states "*Local governments shall adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations.*" Jackson County has requirements in the LDO that provide for some protection of winter range habitat. Further in *Guidelines for Goal 5*, one of the implementation strategies states "*Local, regional and state governments should be encouraged to investigate and utilize fee acquisition, easements, cluster developments, preferential assessment, development rights acquisition and similar techniques to implement this goal.*" The applicant has proposed easement and development techniques that would help to achieve protection of winter range habitat. Jackson County has not, at this time, decided to use the implementation strategies the applicant identifies to achieve protection of a Goal 5 resource.

Staff also finds prohibiting conflicting uses would not affect the carrying capacity for this area of winter range habitat. Reduced recreational opportunity for hunters and the opportunity to view and study deer in this area does not change whether development occurs or not. This area is privately owned. It should be noted that the proposed conservation easement provides that non-motorized public access for the purposed of legal hunting during authorized seasons shall be permitted. In the restrictive covenant for the proposed PUD it states ODFW will be conducting wildlife surveys on the properties and will contact landowners prior to their annual studies.

Goal 5 Conflicting Uses
The applicant states that the two dwellings within the impact area of the Nash Pit can be mitigated by means of design features that buffer the dwellings as well as restrictive covenants for development within the impact area, as discussed above. Staff agrees that conditions suggest above regarding mitigation are appropriate to limit impacts to development within the impact area of the Nash Pit. Should the Board of Commissioners approve the application, staff suggests the following conditions:

1. Dwellings shall be sited on the western portions of lots 33 and 34.
2. Berms and landscaping will be used to buffer impacts from noise, dust and traffic associated with the aggregate operations at the Nash Pit.
3. Dwellings on the proposed lots 33 and 34 will be built using enhanced barriers and insulation to buffer noise, dust and traffic impacts.
4. A Deed Declaration will be signed and submitted to Jackson County for the proposed lots 33 and 34. The Deed Declaration will be the standard required for uses within 500 feet of an AR zoning district.

ENVIRONMENTAL CONSEQUENCES

FINDINGS:

Allowing the Conflicting Uses
The applicant's identified environmental consequences of the proposed development includes: the impacts of providing and maintaining new roadways and the concurrent issues of drainage; septic systems; and water resource use that accrues with development. The applicant states that the proposed PUD will eliminate many of the existing roadways and trails on the properties which will result in better management of the properties. That applicant also indicates that the owners are currently faced with issues of trespass and

vandalism arising from public use of the roadways and trails, despite attempts to limit these unauthorized uses. The applicant states that since the roadway alignments already exist, in most cases, there should be limited impacts from this development based upon the mitigation measures that are required as part of the LDO, which contain the development standards for the proposed PUD. The applicant states that there will be significant improvements that will be required including additional ROW provision, new drainage ditches and paving. Additionally, the PUD requires clustering of units on smaller lots and provides for over 140 acres for open space and environmental values. Possible required development conditions significantly mitigate these impacts by establishing drainage retention areas, requiring sand filter or other alternatives to standard a septic system. Water resources are governed by the Water Resources Division of the state.

The environmental consequences determined in Jackson County's Goal 5 document, Section 2.4(A)(3) states "*Residential development on winter range reduces carrying capacity, resulting in long-term reduction of deer and elk populations.*" The applicant did not address this environmental consequence from the County's Goal 5 document.

Staff finds that allowing the conflicting uses fully would negatively impact the winter range habitat. Staff agrees with the applicant that roadways and trails eliminated as required by ODFW within the lots associated with the conservation easement and the development standards of the LDO will help to mitigate environmental consequences associated with the proposed development. Staff finds that allowing conflicting uses fully will not protect the winter range habitat and mitigation measures are needed.

Limiting Conflicting Uses
Staff finds that the mitigation measures proposed by the applicant and ODFW, and development standards of the LDO will limit impacts to the winter range habitat. The recommendation by ODFW for approval of the application by using the mitigation measures proposed by the applicant is adequate testimony by experts regarding the application and the environmental consequences identified by the applicant and Jackson County's Goal 5 document.

Prohibiting Conflicting Uses
The applicant indicates that the property owners are currently faced with issue of trespass and vandalism from public use of the roadways and trails on the properties. Prohibiting identified conflicting uses would continue the problems of trespass and vandalism and possibly damage the area because of extensive use of ATV's and motorcycles on the roads and trails of the private properties. This could increase drainage and erosion problems for the area. Staff finds that prohibiting conflicting uses could have a negative environmental effect on the area if owners are unable to limit unauthorized use.

Goal 5 Conflicting Uses
The applicant did not address the environmental consequences of the proposed development on the aggregate resources in the Nash Pit.

ENERGY CONSEQUENCES

FINDINGS:

Allowing Conflicting Uses
No energy consequences were identified in Jackson County's Goal 5 document, Section 2.4(A)(4). The applicant states that any energy consequences would be related to the cost of extending public facilities to the vicinity. The applicant also indicates there would be some energy consequences from vehicle travel to and from population centers. The applicant states that the developer is required to provide for infrastructure for the development and home location aspects are assessed by the value of the location versus the commuting costs. With that in mind, the applicant believes the energy consequences are limited.

Staff finds the Goal 5 document does not identify any energy consequences regarding residential development within the winter range habitat. Energy costs to bring utilities to the proposed development will be the developers responsibility. The majority of the roads for the proposed PUD are already in place and any new roads must meet the road standards of the LDO. The effect that any new roads will have on the winter range habitat will be minimal, based upon the configuration of the proposed PUD and requirements by ODFW and the LDO for new roads in a winter range habitat. These requirements will help to mitigate impacts to the winter range habitat and staff believes allowing conflicting uses fully without the LDO and ODFW requirement would not achieve Goal 5 compliance.

Limiting Conflicting Uses
Staff finds that the energy consequences identified by the applicant will be limited because of the mitigation measures proposed by the applicant, ODFW, and requirements of the LDO. It is difficult to determine the consequences of travel to and from population centers, but ODFW has stated that development in this area will increase the likelihood of deer-vehicle collisions. They go on to say that these impacts will occur in an area designated as Other Winter Range, a less sensitive habitat type. ODFW indicates the expected impacts to wildlife could be mitigated by applying the conditions of their letter to the applicant dated February 20, 2008. Should the Board approve this application, these conditions should be part of the approval.

Prohibiting Conflicting Uses
The applicant did not address the energy consequences of prohibiting the conflicting uses.

Goal 5 Conflicting Uses
The applicant did not address the energy consequences of conflicting uses on the aggregate resources in the Nash Pit.

ESEE ANALYSIS CONCLUSION

The applicant states that Jackson County can find "*The 'Goal 5 Resource Site(s) (wildlife habitat and an aggregate pit)and the proposed development are important, as compared to each other, and based upon the ESEE analysis, the conflicting use should be allowed in such a way as to protect the resource sites to the extent possible, based upon the information provided herein.*" The applicant has provided mitigation measures through a Conservation Easement, Restrictive Covenant as part of the CC&R's for the PUD, as well as other conditions to protect the Goal 5 resources and comply with Goal 5. The mitigation measures are described below.

CONSERVATION EASEMENT FOR LOTS 101, 103, 104, 105, AND 106

1. No buildings or structures.
2. No mining.
3. No ATV use.
4. No new permanent roads to be established on Lots 101, 104, 105 and 106. Temporary (one year maximum) dirt roads may be built in order to manage the property for wildlife habitat enhancement and/or timber production and/or removal.
5. Only one new permanent road is permitted through Lot 103 to provide access for lots 33, 34, and 35.
6. The existing ROW granted to the Motorcycle Rider's Association which allows an ATV trail for access only across Lot 101 will be limited to the existing rights and liabilities as outlined in the deed recorded in the Jackson County Records as Document 2005-055186. No further rights will be extended to the MRA and in no way will the use granted in the above mentioned deed be expanded in any way, shape or form in the future.
7. Non-motorized public access for the purpose of legal hunting during authorized seasons shall be permitted.
8. Logging is to be allowed.

RESTRICTIVE COVENANT TO BE RECORDED AS PART OF CC&R'S FOR A PLANNED UNIT DEVELOPMENT

1. Dogs will not be allowed to roam at large, or run unsupervised.
2. Picket-style fencing will not be allowed.
3. All non-exclusion fences will be built to specifications that allow wildlife to pass through; i.e., top wire 12" above second wire, and bottom wire 16 inches above the ground to allow wildlife to pass under.
4. Exclusion fences will only be used within 300 feet of the building site to protect gardens or high-value landscaping.
5. Game mammal and game bird feeding, especially for deer and turkey, is prohibited. The intent of this condition is to prevent disease and parasite transfer among black-tailed deer, which often occurs at point-source feeding stations, and to limit future animal damage and conflict among neighbors caused by human habituation of wildlife. This prohibition would not effect the development of food plots or improvement projects, which ODFW would encourage.
6. ODFW will conduct wildlife surveys on the properties, and will be contacting the landowners prior to these annual studies.
7. A $2000.00 one-time payment is to be made to the Conservation Easement Holder by the Developer upon the sale of each lot within the PUD. Said monies are due upon closing of the sale. Said payments are to be placed into an account by the Easement Holder. The interest accrued from this account shall be used by the Habitat Easement Holder to develop a habitat improvement implementation plan, which shall be reviewed and approved by ODFW prior to implementing any habitat improvement projects. The Holder will be responsible for implementing the plan which shall occur no less frequently than every 15 years. The Holder shall be allowed to pay itself for the reasonable costs incurred in administrating the Conservation Easement, developing the plan and implementation of the habitat improvements. Should the interest from this account accrue more funds than could reasonably be

expended within the Conservation Easement, the excess funds could be utilized for other Wildlife Habitat Improvement projects within a thirty (30) mile radius of the PUD. These funds may be disbursed by the Habitat Easement Holder.

The applicant will eliminate, obliterate, or render unuseable all existing roads and motorcycle trails currently existing on lots 101, 103, 104, 105 and 106 (open space/habitat areas).

PROTECTING AGGREGATE RESOURCE LANDS

1. Dwellings shall be sited on the western portions of lots 33 and 34.
2. Berms and landscaping will be used to buffer impacts from noise, dust and traffic associated with the aggregate operations at the Nash Pit.
3. Dwellings on the proposed lots 33 and 34 will be built using enhanced barriers and insulation to buffer noise, dust and traffic impacts.
4. A Deed Declaration will be signed and submitted to Jackson County for the proposed lots 33 and 34. The Deed Declaration will be the standard required for uses within 500 feet of an AR zoning district.

The applicant also states that limiting the development to the plan submitted as a PUD is consistent with protection of the Goal 5 resources. The applicant also states "*Since the quality of the habitat is limited, and the landowner has provided a plan that provides for significant mitigation to the impacts of rural residential development, the applicant submits that application of the 'clear and objective' standards from the JCLD is also consistent with OAR 660-023-0050(2)(a) in that: (1) a fixed amount of land is delineated for wildlife habitat as part of the project; (2) the open space is designed to provide adequate migration through the site; (3) the topography of the habitat areas are such that maintenance and enhancement of those areas by limiting access, improving browse, etc. is effective. Additionally, the applicant believes that the application of a restrictive covenant and other factors such as design features, landscaping, siting, and related mitigation will eliminate any impact of two of the homes within the PUD on the aggregate resource uses.*"

Staff finds that the above conditions, along with the development requirements of ASC 90-1, would be the minimum necessary to protect the winter range habitat and aggregate resource of the Nash Pit for the proposed development. The Board will need to determine whether the ESEE conflicting use analysis shows that the Goal 5 resources and the proposed development are important compared to each other, and, based upon the ESEE analysis, should be allowed in a limited way that protects the Goal 5 resources. The Board will also need to determine whether the proposed mitigation measures above are adequate to protect the Goal 5 resources.

B) **FEASIBILITY OF A PLANNED UNIT DEVELOPMENT SUBDIVISION**

The applicant is submitting information to demonstrate the feasibility of a Planned Unit Development, should the Board of Commissioners rezone the subject parcels to RR-10, 10 acre minimum density. The reasons for approving the PUD rather than

dividing the property into 10 acre residential tracts are as follows: (a) the topography of the tract; (b) the size and shape of the parcels; and (c) wildlife habitat issues.

The applicant states "*The PUD design is specifically oriented to allow development of new single family residential view lots, yet provide for on-site common facilities (private streets) as well as maintaining 146.74 acres of the site for wildlife habitat via a Conservation Easement that will be applied as part of the development proposal. In general, the proposed new lot sizes will be as small as 3.9 acres, and no larger that 12.669 acres, with the lots configured along the existing road network, which will be upgraded to County standards for private roads and to provide connectivity and emergency access.*" The applicant is proposing a total of 35 residential lots. To meet the average density of 1 lot per 10 acres there can only be 34 residential lots because the total acreage of the subject properties is 342.98.

The applicable criteria to review the PUD for feasibility are:

1. Section 3.3.3: Land Division Criteria
2. Section 3.5.4: Planned Unit Development Criteria

1) Section 3.3.3 Approval Criteria

The County may approve applications for division of land only upon finding that the proposed division will comply with all applicable standards of the zoning district and development standards contained in Chapters 7 through 10. (See Section 10.3)

FINDINGS: The applicant mistakenly identifies the land division criteria as Section 3.3.*2* instead of 3.3.3. The applicant states the application contains a Tentative Plat and that the proposed development must comply with the development standards contain in Chapters 7 through 10. The proposed RR-10 zoning district allows single family rural residential uses within the Rural Residential zones as identified in Section 5.3, Chapters 6 and 10. The applicant states the application will provide a development that is superior in orientation, scope and development, reduces impacts on nearby resource lands, and protects open space values including the wildlife habitat issues, in perpetuity.

The applicant indicates the Tentative Plat has been prepared consistent with the provisions of Section 3.3.2 and Chapters 9 and 10 of the JCLDO. The applicant also states the Tentative Plat is consistent with Chapter 10.3.2. This section is for tentative plans within urban growth boundaries and unincorporated community boundaries. The correct section is Section 10.3.1. Staff finds the Tentative Plat and text details for the plat meet the requirements of Section 10.3.1.

Staff finds Section 7.1.1(C), ASC 90-1, would conceivably apply to this proposed PUD. However, the ESEE conflicting use analysis and amendment to the winter range habitat for the West Valley Unit in this area have addressed the criteria for development within the winter range habitat. Section 7.1.1(C) will still apply when owners submit for planning approval to obtain building permits. The PUD can feasibly meet the development criteria of Section 7.1.1(C).

2) Section 3.5.4 Planned Unit Development Approval Criteria

The objectives of Section 3.5.1 must demonstrably be met by the proposed PUD or cluster development plan. In addition, a PUD or cluster development may be approved only if it complies with all of the following criteria:

a) *There will be no significant adverse effects on the project site or surrounding areas, in terms of water quality, public facilities, public safety, natural hazards, or scenic quality labeled as such within an Area of Special Concern;*

FINDINGS: The applicant states that on-site uses will be single family dwellings on single lots of 3 to 12 acres, served with private wells and on-site Class D systems (standard systems, cap-and-fill or sand filters) for sanitation. Public facilities are essentially limited to John's Peak Road as on-site roads will be developed as private roads, but built to county standards. Public safety (police and fire) are currently provided by the Sheriff's office and annexation to Fire District #3 has been completed. The applicant also indicates that with over 47% of the site maintained in open space and wildlife habitat, the County can find the application is consistent with this criterion, in that there will be no significant adverse impacts from the development of this property due to the design and orientation of the PUD.

Staff finds that while there will be impacts from the proposed development, significant adverse effects can be mitigated by measures identified in the ESEE analysis and standards in the LDO. Staff finds this criterion can feasibly be met.

b) *Adequate circulation facilities are provided in and around the project so that existing and planned development is not impeded, and no areas of undue congestion are created;*

FINDINGS: The applicant states "*The applicants have designed the PUD in such a way that existing roads and trails on the ridge lines will provide the access to the proposed structures, with connection between the roads to insure connectivity and emergency access. The development will produce approximately 335 Average Daily Trips, with a peak hour of approximately 33 trips onto the nearest County Road (Old Stage Road). This amount of traffic should not create any adverse impact on a roadway that has a capacity of over 4000 ADT, and currently has less than 1700 trips noted in the most recent traffic counts (see attached); a TIS has been performed and accepted by the County. With the above information in mind, the application can be found to be consistent with Section 4.3.1(B)(c) and Section 3.5.4.*"

Staff finds the applicant did not submit a TIS to Development Services to review for consistency with the applicant's findings and has no evidence that the Planning Director and County Engineer have reviewed and approved the TIS. Without that information, staff cannot determine the feasibility of meeting this criterion.

c) *The development will not require publicly maintained roads, streets, or County services beyond those that would otherwise be required by this Ordinance;*

FINDINGS: The applicant states that the PUD will be developed with new private streets built to county standards, insuring the public will not be forced to develop or maintain the roadways. The applicant also indicates the size and scope of the project will be sufficient to generate adequate income through the Homeowner's Association to properly maintain the road system.

Staff finds that in the original application for a zone change on the subject properties the applicant was willing to upgrade Johns Peak Road to a County Standard "D" road, as described in the Codified Ordinances of Jackson County, Oregon. The new Rural County Roadway Standard for a local road with between 200-800 ADT is a Local Road "B". Staff finds this criterion can feasibly be met.

d) *There are adequate provisions for ongoing maintenance of open space and common areas, and if development is to occur in phases, early phases will have the same or higher ratio of amenities as proposed in later phases of the development; and*

FINDINGS: The proposed PUD provides for approximately 147 acres of open space and common area for wildlife habitat. The applicant states "*The project is designed as a PUD, rather than a cookie-cutter subdivision, due to topography, shape of the parcel, and the deer habitat overlay, which places significant constraints on the applicant in terms of the overall use of the site. The applicants have worked diligently with the ODFW to insure that this development will enhance deer habitat or migration paths, and to protect those habitat areas. This protection is outlined in the CC&Rs, but include the following:*

- *No buildings in the habitat areas;*
- *No mining;*
- *No ATV use;*
- *No new permanent roads on lots 101, 102, 103, 104, 105 and 106 as shown on the PUD Plan. Temporary Roads may be established for fuel break and wild life management purposes;*
- *Dogs will not be allowed to run unsupervised;*
- *Picket-style fences will not be allowed;*
- *All non-exclusion fencing will be built to allow wildlife to pass;*
- *Exclusion fences will only by utilized within 300 feet fo the building site to protect gardens or high value landscaping;*
- *Game mammal and bird feeding prohibited (per ODFW)*
- *$2000 one-time payment to the Conservation Easement Holder by the developer upon the sale of each lot within the PUD. Interest from this money, which is to be paid into an account, is to be used to develop a habitat improvement implementation plan;*
- *Eliminate or render unuseable all existing motorcycle trails and roads in Lots 101, 102, 103, 104, 105 and 106.*
- *The attached CC&Rs and Declaration provide for adequate maintenance and operation of other common areas (roads, drainage, etc.)*

Staff finds there is evidence in the record to determine the proposed PUD offers adequate provisions for maintenance of open areas and common space.

e) *In rural residential areas outside urban growth or urban unincorporated community boundaries, the proposed development complies with the standards of Section 6.3.2(D)(2) and OAR 660-004-0040(7)(e)(A) through (H).*

FINDINGS: OAR 660-004-0040(1) states "*The purpose of this rule is to specify how Statewide Planning Goal 14, applies to rural lands in acknowledged exception areas planned for residential uses.*" OAR 660-004-0002(a) further states "*This rule applies to lands that are not within an urban growth boundary, that are planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands, or both has been taken. Such lands are referred to in the rule as rural residential areas.*" OAR 004-0040(2)(c)(F) indicates the rule does not apply to nonresource land. The Board has determined that the subject parcels are nonresource lands and a goal exception is not required to rezone the parcels to Rural Residential (RR-10). Based upon that determination, OAR 660-004-0040(7)(e)(A) through (H) and Section 6.3.2(D)(2) do not apply in this case.

Section 3.5.1 - Purpose and General Concept

Traditional zoning establishes zone boundaries, permitting specific uses of land within the various zones, and setting general conditions for those uses. Sometimes, however, land may be more effectively developed in planned unit developments (PUDs) or cluster developments that allow imaginative site design techniques through limited modification of the general standards of this Ordinance. This Section sets forth a procedure for developing PUDs and cluster developments, in order to achieve the following objectives:

a) *To ensure the creation of attractive, healthful, and efficient environments for housing, commerce, and industry;*
b) *To permit flexibility in the application of this Ordinance in order to achieve more efficient and aesthetic development that harmonizes with adjoining uses;*
c) *To encourage variety in site design through creative location of buildings, open spaces, off-street parking areas, and street alignment;*
d) *To promote shared community facilities, open space, commonly shared amenities (beyond standard required public improvements such as lighting, streets, sanitary and storm sewer, water, and sidewalks) and sustainable development;*
e) *To capitalize on the potential of special site features such as geography, topography, size, or shape; and*
f) *To preserve open space for aesthetic, environmental and resource management purposes.*

FINDINGS: The Purpose and General Concept statement of Section 3.5.1 are not specific criteria that can be met with specific findings for a) through f). The overall

PUD must demonstrate these general concepts can be met. The proposed PUD has a variety of site designs because of the geography, topography, size or shape of the parcels. The proposed PUD promotes shared open space through a Conservation Easement to protect wildlife habitat. The proposed PUD is designed to capitalize on the site features such as locating dwellings along ridge lines, using existing roads to the greatest extent possible, eliminating roads and trails within the development on the lots with a Conservation Easement to encourage and promote movement of deer through the area, and prohibiting activities which damage winter range habitat. The Conservation Easement helps to preserve the open space (approximately 147 acres) for not only deer winter range habitat (resource management), but aesthetic and environmental purposes as well. Staff finds Section 3.5.1 can feasibly be met by the evidence in the record for the proposed PUD.

C) **INTERPRETATION REGARDING WHETHER AN EXCEPTION IS REQUIRED TO CHANGE THE COMPREHENSIVE PLAN MAP DESIGNATION TO RURAL RESIDENTIAL LANDS AND THE ZONING MAP TO RURAL RESIDENTIAL (RR-10)**

In the second sub-assignment of error (A) of the remand (Pg. 18), LUBA states "*The purpose statement of the Rural Residential designation states in relevant part that "[e)xceptions to statewide planning Goals 3, 4 and 14 (as applicable) are required to establish Rural Residential lands outside adopted Urban Growth Boundaries. Similarly, map designation criterion 2(A) provides that:*

> *'Currently designated Agricultural or Forest/Open Space Lands may not be designated as Rural Residential unless an exception to the applicable Goal 3 or 4 is justified in accordance with the Goal 2 Exceptions Process, ORS 197.732, and OAR 660, Division 4.'*"

LUBA further states "*As explained above, count staff requested an opinion from the county counsel as to whether the JCCP Rural Residential map designation criteria required an exception to the resource goals notwithstanding that the finds that the subject property is not resource land subject to those goals. Citing Bates v. Josephine County, 28 Or LUBA 21 (1994), the county counsel opined that state law does not require an exception in that circumstance. The county counsel reached a similar conclusion under the Rural Residential map designation criteria. Apparently based on that conclusion and our decision in Bates, the staff report to the planning commission state that 'the Planning Commission must determine [that] the subject properties are not farm or forest land subject to Goals 3 and 4 in order to remove the [Rural Residential] Map designations Element requirement for an exception to Goals 3 or 4.' Record 28. The board of commissioners' decision does not specifically address the issue with respect to the Rural Residential map designation criteria, but does adopt a finding with respect to the Forestry/Open Space map designation criteria that an exception to Goals 3 and 4 is not required because the property is nonresource land. Record 3.*"

LUBA goes on to state (Pgs. 20 & 21) "*The relevant portion of the county counsel's letter quoted at n 10 considered only the language of Rural Residential map designation criterion 2(A), which provides that '[c]urrently designated Agricultural or Forest/Open Space Lands may not be designated as Rural Residential unless an*

exception to the applicable Goal 3 or 4 is justified in accordance with the Goal 2 Exceptions Process, ORS 197.732, and OAR 660, Division 4.' That language, in isolation, is somewhat ambiguous, and can be read as county counsel apparently understood it to mean that an exception to Goals 3 or 4 is necessary only if one or more of those goals happen to be 'applicable,' and need not be understood to mean that whether Goal 3 or 4 is 'applicable' depends on whether the land is 'currently designated' as agricultural land or forest land. However, as petitioner note, the purpose language to the Rural Residential map designation element includes similar language and, in our view, that language tends to support the latter interpretation more than the former.

"*As noted above, the purpose language states that '[e]xceptions to statewide planning Goals 3, 4 and 14 (as applicable) are required to establish rural Residential lands * * *.' This use of the term 'applicable' in the purpose statement seems to suggest that some but not necessarily all of the listed goals will apply in taking the required exception, which in turn suggest that the county intended a similar meaning to the use of the word 'applicable' in criterion 2(A). While neither the purpose statement nor criterion 2(A) explicitly exclude the possibility that no goals at all may apply, at the same time there is no particular language contemplating that possibility, either, and certainly no express language indicating that the county need not ta an exception if 'currently designated' resource lands are in fact found not be protected by the resource goals. To the contrary, the rural residential map designation provisions uniformly speak of exception as 'required' or in similar mandatory terms.*

"*The ambiguity on this point is clarified somewhat by the Rural Use map designation criteria, which is relevant context. The Rural Use plan map designation is clearly intended to be applied in circumstances, such as the present one, where the landowner demonstrates that the resource goals do not apply, and in fact can only be applied in that circumstance. Read in that context, the Rural Residential map designation provisions mandating an 'exception' and the absence of any language suggesting the contrary convey the strong impression that the county intended the Rural Residential designation to apply exclusively to exceptions lands, while the Rural Use designation applies exclusively to non-resource lands for which no exception is required. Petitioners assert, and neither the county nor intervenor disputes, that the plan map distinction between rural residential lands and rural non-resource lands is intended to reflect similar distinctions made in the administrative rules governing designation of rural residential lands.*

"*However, we do not hold that the Rural Residential map designation criteria must necessarily be interpreted in the foregoing manner, and do not intend to foreclose a contrary interpretation. The county counsel did not consider the context provided by the Rural Use map designation criteria, and there may be other relevant context or legislative history that points in a different direction. Further, while it can be surmised that staff and the county commissioners agreed with the county counsel's interpretation or at least the ultimate conclusion, there are no findings addressing the issue or adopting the county counsel's interpretation as the county's. Because remand is necessary in any event to address arguments sustained under the first assignment of error, we believe that it is appropriate to remand the decision under this sub-assignment of error to allow the board of commissioners to address this*

interpretive issue in the first instance."

This interpretive issue is now before the Board for consideration.

FINDINGS: The applicant has submitted findings regarding the modifier "as applicable" in the JCCP Rural Residential Land Purpose statement as well as the term "applicable" in the JCCP rural Residential Land Map Designation element 2(A). Each of these statements have been reproduced above. The applicant states the Board may interpret the "*[a]s applicable' modifier to mean that exceptions to the statewide planning goals are required if the statewide planning goals are 'applicable' in a particular case.*" The Board may find that "*[g]oal exceptions are not applicable in this case.*" The applicant goes on to state "*The Forestry/Open Space Land Map Designations Element of the Jackson County comprehensive Plan states that four principal forest land environments described in the Forest Lands Element must be designated for Forestry and Open Space unless an exception is taken. JCCP Forestry/Open Space Map Designation Element 2(A). Because the Board previously found that the subject property is nonresource, the Board finds that an exception [is] not necessary.*

"*Because of the requirement under the Forestry/Open Space Map Designations Element that land within the principal forest land environments must not be rezoned unless an exception is taken, the Board concludes that the 'as applicable' language of the JCCP Rural Residential Land Purpose statement and the JCCP Rural Residential Land Map Designation Element 2(A) means that an exception is needed only when and exception is 'applicable' to a particular property. In this case, an exception is not applicable, because of the previous findings with regard to the property <u>not</u> being resource land. If the JCCP was intended to require and exception in all cases, there would be no need to include the 'as applicable' language. Goal exceptions are only required when they are otherwise mandated by the JCCP.*

"*The Board's interpretation that a goal exception is not necessary is in keeping with existing precedent, which states that if land is shown to be nonresource, a goal exception is not necessarily required. See Wetherell v. Douglas County, __Or LUBA __ (LUBA No. 2006-122, 2006), DLCD v. Josephine County, 18 Or LUBA 798 (1990), Bates v. Josephine County, 28 Or LUBA 21 (1994).*

"*Finally, LUBA commented that the Rural Use designation appears to contemplate an application such as this, where the property is not resource and does not require an exception. The Board finds that the fact that [the] Rural Use designation does not require an exception does not mean that the Rural Residential Designation does require an exception. The Board interprets the JCCP to mean that an exception <u>may</u> be required when seeking a Rural Residential Designation. The Board finds that no such exception is required in this case.*"

Staff has requested an opinion from County Counsel regarding the previous counsel's opinion and this interpretive issue. As of the date of the staff report, no response has been received from County Counsel. Staff expects to have a response by the date of the public hearing on April 8, 2009.

II. CONCLUSIONS

Should the Board of Commissioners find the ESEE conflicting use analysis and mitigation measures suggested by the applicant and ODFW are adequate to protect deer winter range habitat in this area of the West Valley Unit, coupled with a determination that the proposed PUD is feasible to be subsequently approved and an interpretation that an exception is not required to change the Comprehensive Plan Map Designation and Zoning Map designation to Rural Residential Land (RR-10 Zoning District), then the Board should direct staff to prepare an ordinance for review and signature by the Board. Should the Board determine ESEE conflicting use analysis does not show the conflicting uses should be allowed but limited by clear and objective mitigation measures or mitigation measures are not sufficient to protect deer winter range habitat in the West Valley Unit or that the PUD is not feasible or that an exception is required for the proposed rezoning, then an order denying the application will be prepared by staff for the review and signature by the Board.

JACKSON COUNTY DEVELOPMENT SERVICES

By: Michael W. Mattson, Planner II

Date: 3-27-09

SUPPLEMENTAL FINDINGS TO THE BOARD OF COMMISSIONERS
FILE LRP2004-00005
LUBA REMAND

I. ECONOMIC AND SOCIAL CONSEQUENCES

FINDINGS: The applicant has submitted supplemental information and findings regarding staff findings under Social Consequences and Economic Consequences, on the statement by the applicant that there is a need for rural housing in Jackson County. Staff states on Pg. 14 of the staff report "*Staff does not agree with the applicant that the demand for rural residential parcels in Jackson County is substantial because there is no evidence to support such a statement. It is clear in the Comprehensive Plan that growth shall be centered within urban growth boundaries and urban containment boundaries.*" The applicant states that this concept is not factual in terms of the County. He applicant states on Pgs. 355 and 356 of the record "*It is clear from a reading of the Comprehensive Plan that there is a clear demand, as well as 'public need', for rural residential lands The Goal of the Housing Element within the Comprehensive Plan notes as follows: 'Recognizing variety of social needs, attitudes, preferred lifestyles and financial capabilities of households in Jackson County, Goal of the Housing Element is to 'Assure the provision for a range of housing opportunities for all households of the county by location, type and size commensurate with the financial capabilities of local households and consistent with the environmental capabilities of the State and County.'*" The applicant goes on to say the Housing Element further states "*...[J]ackson County is only directly responsible for assuring the provision of the number of housing units needed to accommodate the estimated increased population in unincorporated areas (Emphasis Added).*"

The applicant indicates that Policy 5 of the Housing Element states the County "shall" provide for equal opportunities for all citizens to obtain housing, which includes rural housing as well. The applicant submitted two (2) letters from local realtors, Pgs. 376 and 377 of the record. The applicant references the letter from Mr. Grissom, Pg. 376 of the record, and states "*His letter clearly notes that there is, in fact, a demonstrable need for rural housing opportunities, since Jackson County has not provided for any significant additional rural residential lands since the Plan was adopted in 1982.*"

Staff agrees with the applicant that Jackson County is responsible for provision of housing within the unincorporated areas and at the time the Housing Element was adopted and acknowledged, 1983, there was a finding regarding the future increases in population for the unincorporated areas of Jackson County. Staff accepts the letters by the realtors demonstrating that they believe there is a need for rural residential housing within Jackson County. However, staff would like to note that in the 1990's there was a countywide effort to rezone many properties to Rural Residential Land and that effort was successful in rezoning properties to Rural Residential Land, although it failed to include the northern areas of the County. Staff further notes that the Population Element adopted and acknowledged in 2007 shows a slight decrease in population between 2005 and 2040. As stated in the Economic and Social Consequences analysis, staff believes that limiting the conflicting uses based upon the Conservation Easement and Restrictive Covenant, eliminating roads on open space lots, and current LDO standards for siting of

a dwelling would provide adequate protection of the Goal 5 resource, winter range habitat, and allow the identified conflicting uses.

II. ENVIRONMENTAL CONSEQUENCES

Goal 5 Conflicting Uses

FINDINGS: The supplemental findings by the applicant state that a restrictive covenant placed on the two proposed dwelling lots would mitigate any potential negative impact on the aggregate resource site. Staff agrees with these findings with regard to the restrictive covenant on Pgs. 360 and 361 of the record. Staff suggests the following conditions of approval for the proposed two lots within the impact area of the Nash Pit:

1. Dwellings shall be sited on the western portions of lots 33 and 34.
2. Berms and landscaping will be used to buffer impacts from noise, dust and traffic associated with the aggregate operations at the Nash Pit.
3. Dwellings on the proposed lots 33 and 34 will be built using enhanced barriers and insulation to buffer noise, dust and traffic impacts.
4. A Deed Declaration will be signed and submitted to Jackson County for the proposed lots 33 and 34. The Deed Declaration will be the standard required for uses within 500 feet of an AR zoning district.

III. ENERGY CONSEQUENCES

Prohibiting Conflicting Uses

FINDINGS: The applicant states the prohibiting conflicting uses would "*[r]esult in the 'status quo', in that there will be no energy consequences, but no savings in energy issues, either; ultimately, the energy impact from these 34 homes will be transferred elsewhere in the county to other housing developments.*" The applicant goes on to state "*The Energy Element (as well as the Statewide Energy Goal) discusses land uses should be managed to maximize the conservation of all forms of energy, and the Statewide Goal discusses combining increasing density along high capacity transportation corridors to achieve greater energy efficiency, and renewable energy sources are "encouraged". Further, the applicant has designed the PUD to follow the guidelines and implementation strategies for energy conservation, and thus is demonstrating compliance with the Energy Goal.*"

Staff finds that prohibiting the conflicting uses would not result in increased energy consequences. Staff further finds that the Jackson County Goal 5 document does not identify any energy consequences regarding residential development within the winter range habitat. The impacts to deer winter range habitat by prohibiting conflicting uses would not increase. It should be noted that ODFW indicated the proposed development "*[w]ill introduce increased levels of disturbance, physically remove habitat through homesite and road construction, potentially introduce weedy non-palatable species through the introduction of fill material, and increase the likelihood of deer-vehicle collisions. However, these impacts will occur in an area designated as Other Winter Range, which is a less sensitive habitat type and receives the least protection from Jackson County's wildlife protection standards.*" ODFW also stated the recommended approval of the application but items referred to in the initial staff report and applicants stipulated conditions of approval should be required to mitigate conflicts. Staff believes

energy consequences to deer winter range habitat as noted by ODFW can be mitigated through conditions of approval indicated in the initial staff report and will not create adverse impacts to the deer winter range habitat.

Goal 5 Conflicting Uses

FINDINGS: The applicants states "*Interestingly, in reviewing the application against the existing Aggregate Resource site (Nash Pit), there seems to be little or no impacts either way. The extraction and processing of aggregate is, essentially, self-contained, and rarely relies on public power sources; the conflicting uses (rural housing) will of course use public power as noted above. The provision, or not, of these homes simply has not relationship to the aggregate use in terms of energy issues.*"

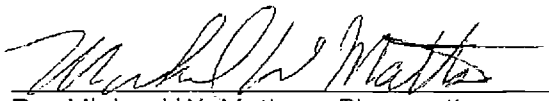
Staff agrees with the applicant's findings.

IV. BOARD INTERPRETATION OF RURAL RESIDENTIAL LAND LANGUAGE REGARDING WHETHER AN EXCEPTION TO GOALS 3 OR 4 IS REQUIRED TO REZONE PROPERTY TO RURAL RESIDENTIAL LAND

FINDINGS: LUBA stated "*...[t]he Rural Residential map designation provisions mandating an 'exception' and the absence of any language suggesting the contrary convey the strong impression that the county intended the Rural Residential designation to apply exclusively to exceptions lands, while the Rural Use designation applies exclusively to non-resource lands for which no exception is required.*" LUBA, however, did not hold the RR map designation criteria must *necessarily* be interpreted in the manner above. There may be other relevant context or history that points to a different conclusion. There were no findings addressing the issue or adopting the county counsel's interpretation as the county's. LUBA believes it was appropriate to remand the decision to allow the Board of Commissioners to address this interpretative issue.

No legislative history or context was found to clearly demonstrate that an exception to Statewide Planning Goals 3 and/or 4 is required to change the comprehensive map designation to Rural Residential Land and the Zoning District to Rural Residential.

JACKSON COUNTY DEVELOPMENT SERVICES



By: Michael W. Mattson, Planner II

Date: 4-13-09

EXHIBIT C

SUPPLEMENTAL FINDINGS FOR SECTION 3.5.4(B) OF THE LDO
BOARD OF COMMISSIONERS HEARING 4-22-09
FILE LRP2004-00005

Section 3.5.4(B): *Adequate circulation facilities are provided in and around the project so that existing and planned development is not impeded, and no areas of undue congestion are created.*

FINDINGS: The applicant states "*The applicants have designed the PUD in such a way that existing roads and trails on the ridge lines will provide the access to the proposed structures, with connection between the roads to insure connectivity and emergency access. The development will produce approximately 335 Average Daily Trips, with a peak hour of approximately 33 trips onto the nearest County Road (Old Stage Road). This amount of traffic should not create any adverse impact on a roadway that has a capacity of over 4000 ADT, and currently has less than 1700 trips noted in the most recent traffic counts (see attached); a TIS has been performed and accepted by the County. With the above information in mind, the application can be found to be consistent with Section 4.3.1(B)(c) and Section 3.5.4.*"

The applicant has submitted a letter from RDK Engineering dated August 21, 2003, Pg. 385 of the record. The Transportation Engineer, Robert D. Kortt, indicated that he had visited the area and talked with Eric Niemeyher, Jackson County Traffic Engineer, to determine the scope of a traffic study for the proposed development of 760 acres to a 10 acre minimum parcel size. Mr. Kortt states in the letter "*Mr. Niemeyer and I drove the area to determine what street improvements, if any, should be considered to support the proposed development. The development will generate 760 average weekday vehicle trips, 76 of the trips will be during the PM peak hour. The majority of the trips will be to and from the Medford area. Mr. Niemeyer concluded that a traffic study was not warranted based on the lower traffic volumes that are present in this area. In other words, the additional trips from the proposed development can be absorbed by the existing street pattern.*" Mr. Kortt concludes "*His concern was focused on the intersection of Johns Peak Rd. and Old Military Rd. He indicated that some street work may be required to improve sight distance for Johns Peak Rd. motorists.*"

Staff finds that while Jackson County Roads did not require a Traffic Impact Study (TIS) for the proposed development of 760 acres as well as the current proposal to develop 342.98 acres. The subsequent application for the PUD, a Type 4 review, would require review from Jackson County Roads. Staff agrees with the applicant that Old Military Road has the capacity to handle the traffic volumes for the proposed development. If Jackson County Roads has issues with the intersection of Johns Peak Road and Old Military Road, the County will have ample opportunity to comment on the PUD proposal for any mitigation measures which may be required. Staff finds the criteria for providing adequate circulation facilities and no areas of undue congestion are created can feasibly be met through review and any required mitigation measures from Jackson County Roads when the subsequent PUD application is presented to Jackson County Development Services.

EXHIBIT D

RECOMMENDED CONDITIONS FOR LRP2004-00005

1. CONSERVATION EASEMENT FOR LOTS 101, 103, 104, 105, AND 106
   - A. No buildings or structures.
   - B. No mining.
   - C. No ATV use.
   - D. No new permanent roads to be established on Lots 101, 104, 105 and 106. Temporary (one year maximum) dirt roads may be built in order to manage the property for wildlife habitat enhancement and/or timber production and/or removal.
   - E. Only one new permanent road is permitted through Lot 103 to provide access for lots 33, 34, and 35.
   - F. The existing ROW granted to the Motorcycle Rider's Association which allows an ATV trail for access only across Lot 101 will be limited to the existing rights and liabilities as outlined in the deed recorded in the Jackson County Records as Document 2005-055186. No further rights will be extended to the MRA and in no way will the use granted in the above mentioned deed be expanded in any way, shape or form in the future.
   - G. Non-motorized public access for the purpose of legal hunting during authorized seasons shall be permitted.
   - H. Logging is to be allowed.

2. RESTRICTIVE COVENANT TO BE RECORDED AS PART OF CC&R'S FOR A PLANNED UNIT DEVELOPMENT
   - A. Dogs will not be allowed to roam at large, or run unsupervised.
   - B. Picket-style fencing will not be allowed.
   - C. All non-exclusion fences will be built to specifications that allow wildlife to pass through; i.e., top wire 12" above second wire, and bottom wire 16 inches above the ground to allow wildlife to pass under.
   - D. Exclusion fences will only be used within 300 feet of the building site to protect gardens or high-value landscaping.
   - E. Game mammal and game bird feeding, especially for deer and turkey, is prohibited. The intent of this condition is to prevent disease and parasite transfer among black-tailed deer, which often occurs at point-source feeding stations, and to limit future animal damage and conflict among neighbors caused by human habituation of wildlife. This prohibition would not affect the development of food plots or improvement projects, which ODFW would encourage.
   - F. ODFW will conduct wildlife surveys on the properties, and will be contacting the landowners prior to these annual studies.
   - G. A $2000.00 one-time payment is to be made to the Conservation Easement Holder by the Developer upon the sale of each lot within the PUD. Said monies are due upon closing of the sale. Said payments are to be placed into an account by the Easement Holder. The interest accrued from this account shall be used by the Habitat Easement Holder to develop a habitat improvement implementation plan, which shall be reviewed and approved by ODFW prior to implementing any habitat improvement projects. The Holder will be responsible for implementing the plan which shall occur no less frequently than every 15 years. The Holder shall be allowed to pay itself for the reasonable costs incurred

in administrating the Conservation Easement, developing the plan and implementation of the habitat improvements. Should the interest from this account accrue more funds than could reasonably be expended within the Conservation Easement, the excess funds could be utilized for other Wildlife Habitat Improvement projects within a thirty (30) mile radius of the PUD. These funds may be disbursed by the Habitat Easement Holder.

3. The applicant also stipulates to eliminate, obliterate or render unusable all existing roads and motorcycle trails that currently exist on Lots 101, 103, 104, 105 and 106.

4. Any subsequent PUD submitted to Jackson County is substantially compliant with the PUD as outlined by the applicant in this proposal.

5. ODFW shall submit a written recommendation regarding any subsequent PUD application submitted to Jackson County for the subject properties.

6. To minimize conflicts with the aggregate operation at the Nash Pit the following conditions will apply to any subsequent PUD application submitted to Jackson County:

   A. Dwellings shall be sited on the western portions of lots 33 and 34.
   B. Berms and landscaping will be used to buffer impacts from noise, dust and traffic associated with the aggregate operations at the Nash Pit.
   C. Dwellings on the proposed lots 33 and 34 will be built using enhanced barriers and insulation to buffer noise, dust and traffic impacts.
   D. A Deed Declaration will be signed and submitted to Jackson County for the proposed lots 33 and 34. The Deed Declaration will be the standard required for uses within 500 feet of an AR zoning district.
   E. No dwelling will be constructed within 500 feet of the AR zoning district.

EXHIBIT E

JACKSON COUNTY
Oregon

MEMO
INTER-OFFICE

COUNTY COUNSEL
DOUGLAS M. McGEARY
Assistant County Counsel
10 S OAKDALE, RM 118A
MEDFORD, OR 97501
Phone: 774-6160
Fax: 774-6722

TO: Cox File # LRP2004-00005

FROM: Douglas M. McGeary, Assistant County Counsel

DATE: August 25, 2006

SUBJECT: Necessity of Goal exceptions

QUESTION: Does Jackson County's Rural Residential zoning requirements under its comprehensive plan require a goal exception to Goal 3 or 4?

ANSWER: No: Given the circumstances presented by claimants in this matter.

DISCUSSION:

I will present the issues as it was presented to me in the following e-mail exchange:

From: Michael Mattson
To: Doug McGeary
Date: 08/08/2006 9:29:38 AM
Subject: Cox Application
Doug,
Below is Reeve's original email to me. I have a folder with copies of the specific LUBA cases, except the DLCD vs. Josephine County case. I will deliver them to you. The Planning Commission is requesting a legal opinion as to whether they are required to address an exception to the applicable Goal 3/4 (see Map Designations Element, Rural Residential Land) or if they can determine that an exception is not required because the land is not farm or forest land (nonresource land, OAR 660-004-0005(3)). Also look at our Map Designations Element, Rural Use Land section.

...
Mike,
In reading the Cox Application, it led me to Bates v. Josephine Co., LUBA 94-048, which in turn referred to DLCD v. Josephine County, 18 Or LUBA 798, 802 (1990). I tried without success to find that one on the Internet. Do you have access to it or can you tell me where I can look it up?
My concern is Cox's contention, which seems to be borne out by Bates, that he does not need an exception to Goals 3 and 4 to rezone to RR if the property is found to be non-resource land. I'm confused -- I thought the whole point of our Rural Use map designation/zone was to allow such property to be rezoned without an exception. It appears from this that if an applicant can show that his resource-zoned property doesn't qualify as resource, he can seek a change to any other zone without taking an exception. So why do we have Rural Use zoning at all? Thanks.
Reeve

In review of cases *Bates* and *DLCD*, the law seems clear: Once the county determines that the

subject parcel does not fall within criteria defining the protected goal resource, then state law does not require an exception be made to the relative goal in order to support a plan amendment to a more appropriate designation and zone. In short, state law does not require an exception to State Goal 3 (farmland protection) or 4 (forest land protection) if the land is not farm or forest land by definition.

If state law does not require it, then we turn to Jackson County's comprehensive land use plan (Comp Plan) and Land Development Ordinance (LDO) to ensure there are no other particular local restrictions that go beyond state law.

COMPREHENSIVE PLAN ANALYSIS

A. FORESTRY/OPEN SPACE LAND

I have first reviewed the Comp Plan map designation element under Forestry/Open Space Land. The criteria for designating land as forest land appears under section 2. However relating the various provisions results in some ambiguity. Section A seems to indicate that if land falls within a specific and predetermined geographic area (*ie.* "forest land environments"), then it must be designated forest, unless already designated agriculture or aggregate lands. The section is worded further to require performing an exception to Goal 4 to designate land as anything other than forest. Thus, it appears that unless specifically designated something else, land within forest land is presumed forest land and the sole process to overcome that presumption is to successfully prove otherwise by exception.

Conversations with Mike Mattson indicate that the above proposition does not necessarily occur in practice. In fact, under section 2)D) of the Comp Plan, the rules allows for map amendments to be accomplished if site specific evidence clearly indicates that the subject property is not forest land. This certainly is in concert with allowances under state law as discussed above. Moreover, under 2)E) it states "Except where another resource land designation is requested, or where justified through the Goal Exception process, Goal 4 is deemed to apply..." (Emphasis Added) Clearly, *Bates*, and related cases hold that the "Goal Exception" process is not justified when site specific evidence indicates the land is not forest land. This same analysis would apply to the Section 2)E) map designation criteria which also uses the "where justified through Goal Exception process" language.

Reviewing the remaining map designation criteria also seems to clarify the ambiguity in favor of the *Bates* rule. Section 2)C) seems to provide for the prospects of rural designation when the land is not suited for forestry. Finally, map designation section 2)F) appears to clear any final ambiguity to this question, allowing rural land designation within Forestry/Open Space

Land when findings are made that the subject property "does not merit Goal 4 protection..."

B. RURAL RESIDENTIAL LAND

Moving next to the Rural Residential Land section of the Comp Plan, the Map Designation Criteria section appears dispositive. Section 2)A) states that Forest/Open Space Lands may not be designated Rural Residential unless an "applicable" exception to Goal 4 is "justified." Once again, an applicable exception is not justified if the evidence clearly proves the land located within a Forestry designation on the Comp Plan Map is not forest land by definition as set out in Oregon law and local ordinance that define the physical characteristics of forest land. Thus, I believe the County can comfortably interpret its Comp Plan consistent with state law as applied under *Bates*.

LAND DEVELOPMENT ORDINANCE ANALYSIS

To analyze relevant Land Development Ordinance provisions, the reader is referred to LDO 5.3 Rural Residential Zoning Districts which includes Rural Use and Rural Residential districts. The LDO describes the Rural Use district as those lands that are not urban and do not meet state definitions of forest land "or qualify for exception to Statewide Planning...Goal 4." Once again, even the LDO clearly allows for the distinction between land that does not meet definitions of forest land and land that may but an exception is required to otherwise designate it Rural Residential Land. Thus, the LDO clearly plans for such designation and again, appears consistent with the proposition in *Bates* decision that Forestry/Open Space Land that is not defined as forest land does not require an exception process to be re-designated as Rural Residential Land.

CONCLUSION

State law and Jackson County's land use ordinances do not require an exception to State Goal 3 (farmland protection) or 4 (forest land protection) if the land is not farm or forest land by definition. On the other hand, this does not mean that by avoiding the exception, land can be designated as anything anyone desires. Neither the Comp Plan nor the LDO seem to contemplate re-designation of land to any type of map designation contained within the Comp Plan. Rather, it can be re-designated only to a designation within which the subject land most appropriately fits the definitions under that designation.

EXHIBIT F

JACKSON COUNTY
Oregon

MEMO
INTER-OFFICE

County Counsel

Frank Hammond
County Counsel

10 S. Oakdale Avenue
Medford, OR 97501
Phone: (541) 774-6160
Fax: (541) 774-6722
hammonfg@jacksoncounty.org

To: Cox Remand File
From: Frank Hammond
Subject: Availability of RR Zoning on Non-Resource, Non-Exception Land
Date: April 13, 2009

Introduction and Issue

Applicant is attempting to re-zone the subject property to Rural Residential (RR). The subject property does not require an exception because it is not resource land. *See Bates v. Josephine County*, 28 Or LUBA 21 (1994); *DLCD v. Josephine County*, 18 Or LUBA 798 (1990) and Memo re Necessity of Goal Exceptions by Douglas M. McGeary dated August 25, 2006. The question is whether RR zoning can be applied to land for which an exception is not necessary where the relevant land use regulations state that RR cannot be placed on property "unless an exception to the ***applicable*** Goal 3 or 4 is justified." (Emphasis added.) As LUBA noted in its opening opinion in this matter, two readings of this requirement are possible. Either (1) RR only applies to exception land; or (2) RR can apply when an exception is not necessary because neither goal is "applicable."

Board Interpretation and Discretion

The Board of Commissioners must interpret the relevant terms of its ordinance. In doing so, the Board retains substantial interpretative discretion. LUBA must affirm a board interpretation of its own ordinance "'unless LUBA determines that the county's interpretation is inconsistent with express language of the ordinance or its apparent purpose or policy.'" *Church v. Grant County*, 187 Or App 518, 524 (2003)(quoting *Clark v. Jackson County*, 313 Or 508, 513 (1992); *see generally* ORS 197.829 (setting out standard).

Interpretation

As noted, a textual analysis of the relevant provisions leaves two possible interpretations open to the Board. Under that circumstance, the Board could apply legislative history to determine the meaning. *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). Unfortunately, no legislative history relevant to this question appears to exist. Because of that, the Board is forced to apply legislative maxims in order to resolve the meaning of the ordinance. *Id.* One such maxim is that the Board should apply the policy it believes the enacting Board was pursuing. *PGE*, 317 Or at 612 ('[W[here no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue.") *See also Church*, 187 Or App at 526 (looking to policy behind ordinance in evaluating county's interpretation of ordinance).

The policy supporting the regulation is for the Board to decide, but the policy appears to be that RR zoning not be applied to lands subject to Goals 3 and 4. The regulations use the word "applicable" to describe the goals. Applicable means the goal must apply. This leaves three possibilities for qualifying for RR zoning: Goal 3 applies but the use is excepted (meaning the goal is not operative); Goal 4 applies but the use is excepted (meaning the goal is not operative); or neither goal applies and neither goal is therefore operative. All three possibilities are conceptually equivalent in that in none of the possibilities does the goal operate. Therefore, the Board could thus reasonably conclude that the policy of the regulations would be served by allowing RR zoning on non-resource, non-exception land where no resource goal is operative.

A finding based on this interpretation is attached to this Memorandum as Exhibit A.

EXHIBIT A TO MEMEMORANDUM RE
AVAILABILITY OF RR ZONING ON NON-RESOURCE,
NON-EXCEPTION LAND

April 13, 2009

The Board adopts the following findings, interpretations, and conclusions pursuant to the Land Use Board of Appeals' (LUBA) final order in *Lofgren v. Jackson County*. Or LUBA _ (LUBA No. 2007-061, 2007). LUBA mandated that the Board adopt an interpretation of the Jackson County Comprehensive Plan (hereinafter "JCCP") with regard to the Second Assignment of Error. Specifically, the interpretation shall address the JCCP Rural Residential Land Purpose statement, which provides, "Exceptions to statewide planning Goals 3, 4. and 14 (as applicable) are required to establish Rural Residential lands outside adopted Urban Growth Boundaries." Additionally, the interpretation shall address JCCP Rural Residential Land Map Designation Element 2(A), which states that land "currently designated Agricultural or Forest/Open Space Lands may not be designated as Rural Residential unless an exception to the applicable Goal 3 or 4 is justified in accordance with the Goal 2 Exceptions Process, ORS 197.732 and OAR 660, Division 4." The Board interprets the foregoing "as applicable" modifier to mean that exceptions to the statewide planning goals are required if the statewide planning goals are "applicable" in a particular case. The Board also finds that goal exceptions are not "applicable" in this case. The Board reaches its interpretations and findings for the reasons that follow.

The Forestry/Open Space Land Map Designations Element of the Jackson County Comprehensive Plan states that the four principal forest land environments described in the Forest Lands Element must be designated for Forestry and Open Space unless an exception to Goal 4 is taken. JCCP Forestry/Open Space Map Designations Element 2(A). Because the Board previously found that the subject property is nonresource, the Board finds that an exception is not necessary.

Because of the requirement under the Forestry/Open Space Map Designations Element that land within the principal forest land environments must not be rezoned unless an exception is taken, the Board concludes that the "as applicable" language of the JCCP Rural Residential Land Purpose statement and JCCP Rural Residential Land Map Designation Element 2(A) means that an exception is needed only when an exception is "applicable" to a particular property. In this case, an exception is not applicable, because of the previous findings with regard to the property not being resource land. If the JCCP was intended to require an exception in all cases, there would be no need to include the "as applicable" language. Goal exceptions are only required when they are otherwise mandated by the JCCP.

The Board finds that a textual analysis supports this conclusion. If there is more than one possible meaning to the provision, which LUBA implies, the Board could apply legislative history to determine the meaning. *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). Unfortunately, no legislative history relevant to this question appears to exist. Because of that, the Board is forced to apply legislative maxims in order to resolve the meaning of the ordinance. *Id.* One such maxim is that the Board should apply the policy it believes the enacting Board was

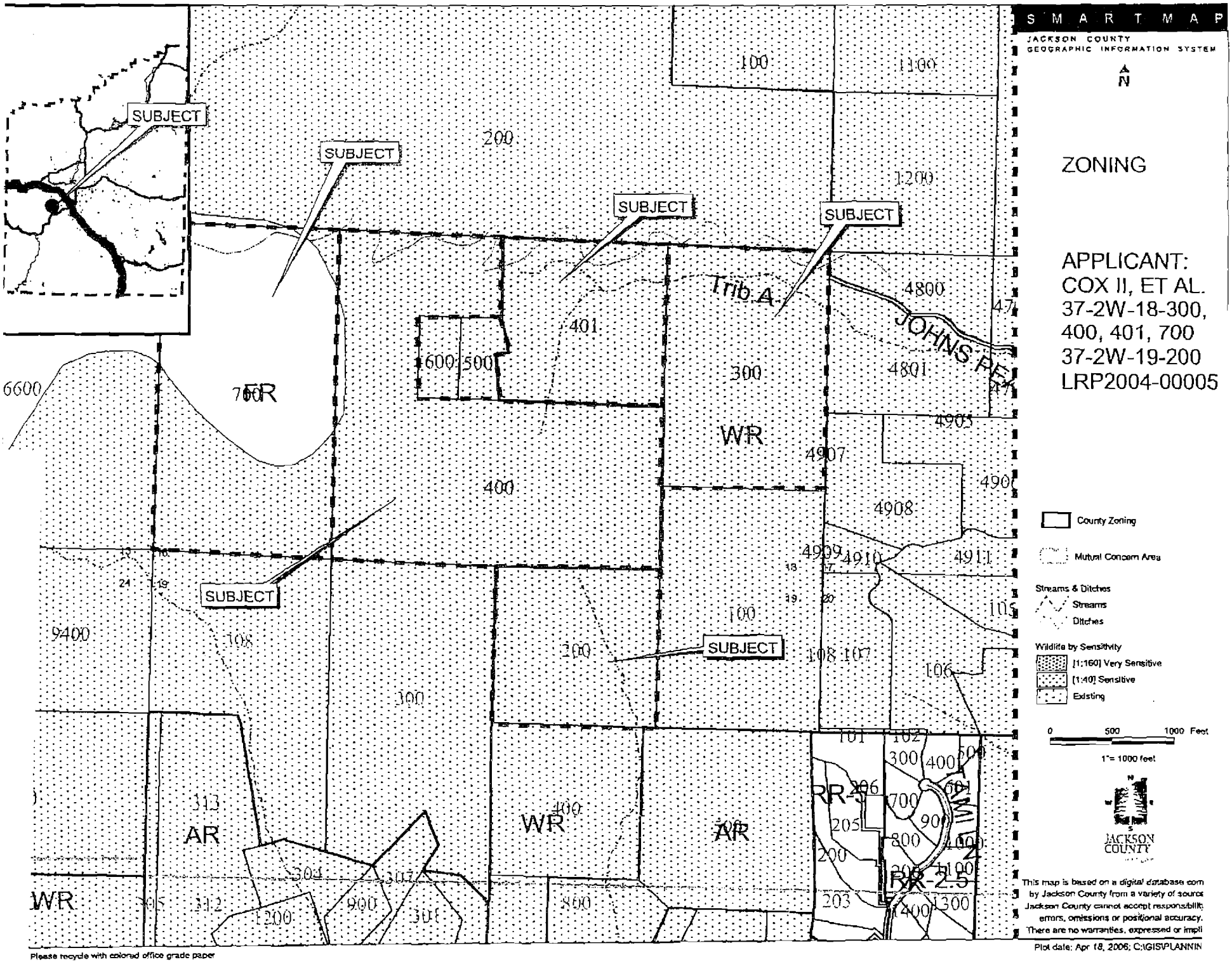


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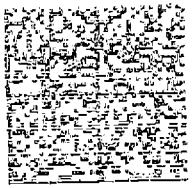
EXHIBIT G

JACKSON COUNTY Oregon
Development Services
10 S Oakdale Ave. Room 100
Medford, OR 97501



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