

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In The Matter Of Approval of a Comprehensive Plan amendment)
from Agriculture/Forestry Large Holding to Agriculture/)
Forestry Small Holding & a zone change from AF-20 Agriculture/)
Forestry to AF-10 Agriculture/Forestry Small Holding,) Ordinance 813
Tax Lots 3226-491 & 493, Docket PAZ-03-07, Applicants Martin)
Castro & Michael & Laurel Heifetz, and Declaring an Emergency.)

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the "Board") sat for the transaction of county business on August 1, 2007, Commissioners Kathy George, Mary P. Stern, and Leslie Lewis being present.

IT APPEARING TO THE BOARD that Martin Castro and Michael & Laurel Heifetz requested approval of a Comprehensive Plan amendment from Agriculture/Forestry Large Holding to Agriculture/Forestry Small Holding, and a zone change from AF-20 Agriculture/Forestry to AF-10 Agriculture/Forestry Small Holding.

IT APPEARING TO THE BOARD that the matter was heard and approved 5 to 3 by the Planning Commission at a duly noticed public hearing on May 3, 2005. A public hearing was held before the Board on July 18, 2007. After hearing testimony from the applicant (there being no opponents) the Board voted 3 to 0 to approve the application. NOW, THEREFORE,

IT IS HEREBY ORDAINED BY THE BOARD, that the application is approved as detailed in the Findings for Approval, attached as Exhibit "A" and by this reference incorporated herein. This ordinance, being necessary for the health, safety, and welfare of the citizens of Yamhill County, and an emergency having been declared to exist, is effective upon passage.

DONE this 1st day of August, 2007, at McMinnville, Oregon.

ATTEST: YAMHILL COUNTY BOARD OF COMMISSIONERS

JAN COLEMAN
County Clerk
By: Anne Britt Deputy Anne Britt
APPROVED AS TO FORM _____
Commissioner
Kathy George
KATHY GEORGE
Mary P. Stern
MARY P. STERN
Leslie A. Lewis
LESLIE LEWIS

Rick Sanai, Assistant County Counsel

B.O.07-721

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REQUEST: Approval of a Comprehensive Plan amendment from Agriculture/Forestry Large Holding to Agriculture/Forestry Small Holding; a zone change from AF-20 Agriculture/Forestry to AF-10 Agriculture/Forestry Small Holding. The applicant is proposing to have the property recognized as nonresource land rather than take an exception to Goals 3 and 4.

APPLICANT: The Benkendorf Associates Corp, representing Martin Castro and Michael and Laurel Heifetz

TAX LOT: 3226-491 and 493

LOCATION: 33133 and 32705 NE Lesley Road, Newberg Oregon

CRITERIA: Sections 403, 501, 904, and 1208.02 of the Yamhill County Zoning Ordinance. Section 904, Limited Use Overlay may also be applied. Comprehensive Plan policies may be applicable. OAR 660-04, Exception Process. OAR 660-12-0060 Transportation Planning Rule.

FINDINGS:

A. Background Facts:

1. *Property size:* Tax Lot 491 is approximately 20.19 acres and Tax Lot 493 is approximately 20.05 acres.
2. *Access:* Lesley Road, a publically dedicated, privately maintained road.
3. *On-site Land Use:* Both parcels currently have one single family residence each.
4. *Surrounding Land Use:* Property to the north, south and east contains parcels of around 5 to 20 acres in size that are predominately forested with single family residences on some of the parcels. Property to the west, across Wilsonville Road, contains much larger lots that appear to be predominantly in farm use.
5. *Surrounding Zoning:* Zoning to the south is AF-10 Agriculture/Forestry Small Holding. Zoning to the north, east and west is AF-20, Agriculture/Forestry. The AF-10 property is a rural residential zone for which an exception to Goals 3 (Agriculture goal) and 4 (Forestry goal) have already been taken. The AF-20 zone is a resource zone that is under the protection of statewide planning Goals 3 and 4.
6. *Water:* The existing dwellings on the subject properties are developed with on-site wells. The new proposed dwellings will likely be served by on-site wells.
7. *Sewage Disposal:* The existing residences are served by an on-site septic system. New dwelling sites will be provided by on-site septic systems.
8. *Fire Protection:* Newberg Rural Fire District

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9. *Soils:* The applicant has submitted a soils report on both Tax Lots 491 and 493 by Joel A. Norgren, Ph.D, dated September 4, 2006 and August 18, 2005, respectively, (*see* Appendix A-1 and Exhibit 7) which details what the Yamhill County Soil Survey shows and what he found from his own soils analysis. The entire application and all of applicant's submittals and hereby incorporated into these Findings by this reference.
10. *Taxes:* Tax Lot 491 has 19.19 acres on forestry deferral with one acre at market value. Tax Lot 493 has 19.05 acres on forestry deferral with one acre at market value.
11. *Previous Actions:* In 1979 the area was created by the Ladd Hill Estates subdivision (Docket # S-45-79). In 1983 an application by Dan Smith requesting to place a gate on a public road (Docket # PUD-19-83) was denied due to the determination that reclassification of the road from public to a private road would cause problems regarding road maintenance and access for other potential property owners using the road in the future. In 1997, on Tax Lot 491, Debi Laue received approval on behalf of Dan and Shane Smith for a forest template dwelling (Docket # FT-16-97). A single-family dwelling was approved for Dan and Shane Smith on Tax Lot 493 through a forest template dwelling application (Docket # FT-04-98).
12. *Fish and Wildlife:* The property is not identified as critical fish or wildlife habitat or big game winter range area.
13. *Plan Designation:* The existing property is zoned Agriculture/Forestry AF-20. The Comprehensive Plan designation is Agriculture/Forestry Large Holding. This zone allows both farming and forestry uses. The applicant is seeking an exception to Goals 3 (Agriculture goal) and 4 (Forestry goal). Much of the evidence provided by the applicant supports the view that this property is not resource land. The Board so finds.

B. Resource vs. Nonresource Land

In *Friends of Yamhill County vs. Yamhill County*, LUBA No. 2004-089, it stated on Page 14 of the remand order that:

Where a local government demonstrates that property is not agricultural or forest land; i.e., not resource land, it may plan and zone that property for nonfarm or nonforest use without taking an exception. Niemi v. Clatsop County, 6 Or LUBA 147, 152 (1982). That land is not resource land is generally not a reason to take an exception to resource goals; it is generally a reason that an exception is unnecessary. Therefore, if the county is correct in concluding that the subject property is not resource land, an exception would not be required.

Goal 3 defines "Agricultural Land" - *in western Oregon is land of predominantly Class I, II, III, and IV soils. . . as identified in the Soil Capability Classification system of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event.*

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As submitted by the applicant in Appendix A-1, Joel A. Norgren, PhD, soil scientist did an investigation of soils on the subject properties. The report concluded that the majority of the properties are composed of Class VI soils (491 being 59% Class VI and 493 being 64% Class VI). From these reports, the properties do not satisfy this first test for resource land as the majority of the acreage does not contain Class I-IV soils. However, simply identifying a parcel with Class VI soils does not automatically qualify the property as non-resource land. Other factors like . . . *soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices.* . . . need to be considered.

The discussions related to why the property is not forest land as described by Goal 4 are found on pages 19 and 20 of the application. The applicant states that the property cannot support forestry use and goes on to recite the soils capability classes.

C. Zone Change and Plan Amendment Provisions and Analysis

1. Approval of a request for a zone change must be based on compliance with the standards and criteria in YCZO Section 1208.02. These provisions are:
 - (A) *The proposed change is consistent with the goals, policies, and any other applicable provisions of the Comprehensive Plan.*
 - (B) *There is an existing demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone.*
 - (C) *The proposed change is appropriate considering the surrounding land uses, the density and pattern of development in the area, any changes which may have occurred in the vicinity to support the proposed amendment and the availability of utilities and services likely to be needed by the anticipated uses in the proposed district.*
 - (D) *Other lands in the county already designated for the proposed uses are either unavailable or not as well-suited for the anticipated uses due to location, size, or other factors.*
 - (E) *The amendment is consistent with the current Oregon Administrative Rules for exceptions, if applicable.*
2. Regarding criterion (A) above, Plan goals and policies which may be pertinent are:

Policy I.B.1.c.: All proposed rural area development and facilities: ... (2) Shall not be located in any natural hazard area, such as a floodplain or area of geologic hazard, steep slope, severe drainage problems or soil limitations for building or sub-surface sewage disposal, if relevant;

The property is not within the 100 year floodplain, as shown on FIRM 410249 0195 C. The property does have a significant slope but the area has no formal designation as a natural hazard due to steep slopes or geologic hazard. Since the resulting properties would average ten acres, and the land has soils that are generally good for septic systems, there does not appear to be any significant limitation for sub-surface sewage disposal.

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Policy I.B.1.d.: No proposed rural area development shall require or substantially influence the extension of costly services and facilities normally associated with urban centers, such as municipal water supply and sanitary sewerage or power, gas and telephone services, nor shall it impose inordinate additional net costs on mobile, centralized public services, such as police and fire protection, school busing or refuse collection.

The proposed zone change would not require the extension of utilities or services to the area. Water and sewer would need to be provided by on-site systems. Other services such as electricity, telephone, sheriff and fire protection already serve the existing residents in the area.

Policy II.A.1.h.: No proposed rural area development shall substantially impair or conflict with the use of farm or forest land, or be justified solely or even primarily on the argument that the land is unsuitable for farming or forestry or, due to ownership, is not currently part of an economic farming or forestry enterprise.

The applicant addressed why the zone change would not substantially impair or conflict with the use of farm or forest land, and the Board so finds.

Policy II.A.1.a: Yamhill County will continue to preserve those areas for farm use which exhibit Class I through IV soils as identified in the Capability Classification System of the U.S. Soil Conservation Service.

Since the soils report shows the majority of the property is Class VI soils, approval of the request does not appear to conflict with this policy.

3. Criterion (B) and (D) are similar so they will be considered together. With Criterion (B), the applicant has shown there is an existing demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone, as required by YCZO 1208.02(B). Similar to that is 1208.02(D), which requires showing that those other parcels, already zoned for the proposed use, are either unavailable or not as well suited to the proposed use due to location, size or other factors.

The information submitted shows that 18 other lots zoned AF-10 are available for development. The applicant has submitted arguments that only lots of greater than 10-acres should be considered in the evaluation since they would be creating 10-acre parcels. This argument was also submitted on previous rezoning requests located south of the subject lot. The result of those zoning requests was the creation of two partitions that created two five and two 15-acre parcels. These parcel sizes are allowed in the AF-10 zone by parcel size averaging. The applicant was informed during the preapplication conference that since the AF-10 zone allows lots of 5-acres, and since the recent partitions that resulted from the consultant's rezoning to AF-10 were lots between 5 to 15 acres, the range of comparable properties should also be 5 to 15 acres. Therefore, 18 other lots within the study area are "available" for rural residential use.

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Related to the question of market demand, the applicant submitted a market study, dated November 21, 2005, which showed there is a high demand for rural residential lots.¹ The Board so finds.

4. Regarding criterion (C), the proposed change needs to be shown to be appropriate considering the surrounding land uses, the density and pattern of development in the area, any changes which may have occurred in the vicinity to support the proposed amendment and the availability of utilities and services likely to be needed by the anticipated uses in the proposed district. The only statement in response to criterion is: "The area in which the subject site is located is partially developed with large single-family residences on parcels of 5 - 20 acres." Based on this and other substantial evidence in the record, the applicant has shown that the change is appropriate considering the surrounding land uses. The Board so finds.

Regarding the availability of utilities and services in the area, the lots in the surrounding area have on-site systems for sewer and water hook-ups. Other services such as electricity, telephone, sheriff and fire protection already serve the existing residents in the area. No urban extension of water or sewer service is being relied upon for this request.

5. Regarding criterion (E), the applicant has supplied arguments for a "reasons" exception to Goals 3 and 4 which is discussed in the following section. As noted in Finding A.16, since the property is zoned for Agricultural/Forestry use, an exception to Goals 3 and 4 is also typically taken. However, as noted in Section B of this report, the Board finds the property is nonresource land so neither exception is necessary.

D. Goal Exception Provisions and Analysis

1. Oregon Administrative Rule (OAR) 660-04 contains the requirements for taking an exception to the goals. Pages 20-24 contains the exception criteria and responses.
2. Oregon Administrative Rule (OAR) 660-04 contains the requirements for taking goal exceptions. OAR 660-04-020 contains four factors that must be addressed when taking an exception to a goal. They are:
 - (a) *Reasons justify why the state policy embodied in the applicable goals should not apply. The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;*
 - (b) *Areas which do not require a new exception cannot reasonably accommodate the use.*
 - (c) *The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being*

¹The market study noted on page 13 that on October 14, 2005 a Marion County Circuit court judge rendered a judgement that Measure 37 was unconstitutional. That judgement was overturned in early 2006 and Measure 37 claims and land use applications have continued to be processed.

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located in other areas requiring a Goal exception. The exception shall describe the characteristics of each alternative areas considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts

- (d) *The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.*
3. Regarding factor OAR 660-04-020(a), the state policy embodied in the applicable goals is the protection of farm and forest land. The applicant's response to this factor is on pages 21 and 22 of the request. The response describes how the applicant believes the site is not resource use, and the Board so finds.
 4. Regarding factor OAR 660-04-020(c), the environmental, economic, social and energy (ESEE) analysis needs to be done regarding this request. The applicant stated that the economic, social and energy consequences resulting from the use at the proposed site are not expected to be more adverse than would typically result from the same proposed use being located in other areas requiring a Goal exception. The Board agrees, and so finds.
 5. Regarding factor OAR 660-04-020(d) the proposed uses need to be compatible with other adjacent uses or be so rendered through measures designed to reduce adverse impacts. The response to this is found on the bottom of page 24. The response discusses the development on surrounding land. As for the issue of compatibility, the applicant stated the site is compatible because it would result in parcel sizes similar to the surrounding area.
 6. OAR 660-004-0025 contains the rules for "Exception Requirements for Lands Physically Developed to Other Uses." In OAR 660-004-0025(2) it states in part that, "Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception." The homes and accessory uses on-site and on the neighboring parcels were approved after the adoption of the statewide planning goals and can not be used to justify an exception.

E. Goal 12 (Transportation Rule) Provisions and Analysis

1. The provisions of the Transportation Planning Rule, implementing Goal 12, must be addressed. OAR 660-12-060 contains the provisions that must be met:
 - (1) *Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility. This shall be accomplished by either:*
 - (a) *Limiting allowed land uses to be consistent with the planned function, capacity and level of service of the transportation facility;*
 - (b) *Amending the TSP [Transportation System Plan] to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division; or,*
 - (c) *Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.*
 - (2) *A plan or land use regulation amendment significantly affects a transportation facility if it:*
 - (a) *Changes the functional classification of an existing or planned transportation facility;*
 - (b) *Changes standards implementing a functional classification system;*
 - (c) *Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or*
 - (d) *Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP.*
2. Regarding (1) and (2), two additional homes would not significantly affect the existing transportation facility. Therefore the proposed residential use is consistent with the identified function, capacity, and level of service of the local roads.

NONRESOURCE

The applicant explained in the request why the property is not suitable for farm or forest use. The applicant explained how the properties soils prohibits farm uses and how past attempts at forestry use have failed. The Board finds the property is nonresource land. A condition of approval shall be applied which prohibits the subject parcel, or resulting lots, from being placed on farm or forest deferral in the future. This is similar to the requirement for a nonfarm dwelling when the dwelling is allowed loss of deferral is required.

CONCLUSIONS:

1. The request is for a Comprehensive Plan amendment and zone change from Agriculture/Forestry AF-20 to AF-10.
2. The proposed zone change is consistent with Comprehensive Plan goals and policies.
3. The property is justified as not being resource land due to the soils, the slope and the failed past attempts at farm and forestry use. Because of this an exception to Goals 3 and 4 is not required.

5. The proposed change is consistent with the zone change criteria of Section 1208.02.
6. The proposed change complies with the Transportation Planning Rule.

APPROVAL:

The request is approved with the following condition of approval: the subject parcel, or resulting lots, are prohibited from being placed on farm or forest deferral in the future.

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