

IN THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON
 FOR THE COUNTY OF YAMHILL
 SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of Approving on Voluntary Remand to the Board from an Appeal)
 Filed with the Land Use Board of Appeals: A Zone Change from Agriculture/)
 Forestry Large Holding to Agriculture/Forestry Small Holding, a Zone Change)
 from EF-20 Exclusive Farm Use to AF-10 Agriculture Forestry Small Holding,) Ordinance No. 772
 and Taking an Exception to Goal 3 and 4 for a 21.27 Acre Parcel Located on the) (Revising Ordinance 767)
 north side of Chehalem Drive, Yamhill County, Tax Lot No. 3301-100,)
 Applicants Matthew and Renee Powell, Docket PAZ-02-03,)
 and Declaring an Emergency.)

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board), pursuant to the terms of a Stipulated Settlement Agreement (dated June 13, 2005) between the County, the applicants, and Friends of Yamhill County, sat for the transaction of county business on June 29, 2005 in Public Hearing, closed the hearing, and then deliberated to a decision, Commissioners Kathy George, Mary P. Stern and Leslie Lewis being present.

IT APPEARING TO THE BOARD that Matthew and Renee Powell applied for a Zone Change from Agriculture/Forestry Large Holding to Agriculture/Forestry Small Holding, a Zone Change from EF-20 Exclusive Farm Use to AF-10 Agriculture Forestry Small Holding and Taking an Exception to Goal 3 and 4 for a 21.27 Acre Parcel located on the north side of Chehalem Drive, Yamhill County, Tax Lot No. 3301-100, Docket PAZ-02-03.

A public hearing was held before the Board on June 29, 2005. The Board heard testimony and considered evidence at that public hearing, closed the hearing, and then deliberated to a decision, wherein the Board voted unanimously 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, 1) based on the findings of fact and law contained in the applicant's original Burden of Proof, dated July 8, 2003, and revised February 25, 2004, and including only those findings therein which are applicable to Tax Lot No. 3301-100 (the amended subject property); 2) based on those amended findings of fact and law contained in the applicant's amended Burden of Proof entitled "Remand of LUBA Final Opinion and Order No. 2004-089", dated February 22, 2005; and 3) based on those findings of fact and law contained in the applicant's April 6, 2005 letter entitled "Supplemental Burden of Proof", and based on the written and oral evidence and testimony contained in the record of the public hearing. 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 29th day of June, 2005, at McMinnville, Oregon.

ATTEST

YAMHILL COUNTY BOARD OF COMMISSIONERS

JAN COLEMAN
 County Clerk



Mary P. Stern
 Chair MARY P. STERN

By *Anne Britt*
 Deputy Anne Britt

Leslie A. Lewis
 Commissioner LESLIE LEWIS

APPROVED AS TO FORM:
Rick Sanai

Kathy George
 Commissioner KATHY GEORGE

Rick Sanai, Assistant County Counsel

Accepted by Yamhill County Board of Commissioners on
6/29/05 by Board Order
 # 05-534

EXHIBIT A

FINDINGS FOR APPROVAL

DOCKET: PAZ-02-03

REQUEST: Approval of a Comprehensive Plan map amendment from Agriculture Forestry Large Holding to Agriculture Forestry Small Holding; a zone change from EF-20 Exclusive Farm Use to AF-10 Agriculture Forestry Small Holding, on voluntary remand from an appeal to LUBA filed May 17, 2005 (LUBA No. 2005-074), and pursuant to the terms of a Stipulated Settlement Agreement (dated June 13, 2005) between the County, the applicants, and Friends of Yamhill County.

APPLICANT: Matthew and Renee Powell

OWNERS: Robert and Judith Travers

ATTORNEY: John A. Rankin, LLC.

TAX LOT: 3301-100

LOCATION: 17650 NE Chehalem Drive, Newberg, Oregon; Approximately ½ of a mile south of the intersection of Bald Peak Road and Chehalem Drive, on the north side of Chehalem Drive.

CRITERIA: Sections 402, 501, 1204 and 1208.02 of the Yamhill County Zoning Ordinance. Section 904, Limited Use Overlay may also be applied. Comprehensive Plan policies may be applicable. ORS 197.732, Goal Exceptions. OAR 660-04, Exception Process. OAR 660-12-0060 Transportation Planning Rule.

FINDINGS:

A. Background Facts:

1. Property size: Tax Lot 100 is 21.27 acres.
2. Access: N.E. Chehalem Drive, a County public road.
3. On-site Land Use: Tax Lots - 100 is developed with a single family dwelling. Taken as a whole, the property slopes down to the south and contains an older non-stocked cutover small woodlot area on the steeper slopes of the northeast with no commercial value timber and very thick overgrown underbrush. The application indicates that the steeper original pasture/orchard area located on Tax Lot 100 has not been farmed at least since the 1970s or otherwise used for farm uses for a significant number of years.
4. Surrounding Land Use: The applicant has given a detailed description of the surrounding land use on page 7 and 8 of their original application burden of proof as well as in the supplemental submitted materials, including the remand burden of proof and written response to opponents, which documents are incorporated here by this reference.
5. Surrounding Zoning: Zoning to the north is EF-20, Exclusive Farm Use. Zoning to the south, east and west is AF-10 Agriculture/Forestry Small Holding.
6. Water: The existing dwellings on the subject properties have access to spring water that serves the City of Newberg. The new proposed dwelling will likely be served by an on-site well.

7. Sewage Disposal: To be provided by an on-site septic system.
8. Fire Protection: Newberg Rural Fire District
9. Soils: The Yamhill County Soil Survey shows that the subject property parcel is primarily composed of Jory soils that are rated agriculture Classes II, III, IV and VI. A site specific "Detailed Inventory of Soils on Tax Lot 100" prepared for the applicant's remand request by Certified Soil Scientist Joel A. Norgren, dated December 31, 2005, modifies the original Soil Survey and establishes that approximately 60% of the total existing soils possess a soil capability class VI and above; 85.6% of the total existing soils possess a soil capability class of IV, V and VI; that only 2.3% have a soil capability class of II; and that the subject property is predominantly Low Value soils, consists of 66.3% Low Value soils and 33.7% High Value Soils. Therefore, the subject property is land of predominantly soil capability class VI and above; and is land of predominantly Low Value Soils. Of the existing soils, 86% has a soil capability class IV and above, and only 5% has a soil capability class of II.
10. Taxes: Tax Lot 100 has 20.27 acres on farm deferral.
11. Previous Actions: In 1978 partition Docket P-818-78 was approved that created Tax Lots 100 and 101. At the time the estimated acreages of these lots was 22.0 for Tax Lot 100 and 20.2 for lot 101. These were later revised by the Assessor's office as 21.27 for Tax Lot 100 and 17.44 for the combination of Tax Lot 101 and 102. (Note: On page 8 of the applicant's submittal, he stated that: "The subject property, including Tax Lots 100, 101 and 102 has existed in its current configuration since the County partition approval created Tax Lots 101 and 102 from 100 in 1979(Casefile No. P-967-79).") After the LUBA remand, the applicant removed Tax Lot 101 and 102 from the remand request, so that this decision only affects Tax Lot 100.
12. Floodplain: FIRM 410249 0159 C, shows that the property, is not within the 100-year flood hazard area.
13. Fish and Wildlife: The property is not identified as critical fish or wildlife habitat.

B. Remand Zone Change and Plan Amendment Provisions and Analysis

Approval of a request for a zone change must be based on compliance with the standards and criteria in YCZO Section 402, 501, and 1208.02, as well as the applicable Comprehensive Plan policies and the Transportation Planning Rule. These standards and criteria were already addressed in the Board's original Final Order entitled "Ordinance No. 737" with findings attached thereto as Exhibit A, with are incorporated here by this reference.

As noted above, on remand from LUBA's Final Opinion and Order (Case No. 2004-089), the applicant modified the application by reducing the subject property to include only Tax Lot 100, and the Board's present proceedings on this voluntary remand from a second LUBA appeal (Case No. 2005-074), represent a continuation of the original application rather than a new application. Therefore, the Board's record that led to the earlier LUBA appeal is properly part of the record on remand unless specifically excluded by the Board. *Rutigliano v. Jackson County*, 47 Or LUBA 628 (2004). The Board is allowing its earlier findings to stand in addressing this voluntary remand zone change and plan amendment as well as the taking of an exception to Goal 3 and 4 for the modified subject property, unless otherwise amended by these new findings contained in this Exhibit A. The Goal 3 exception portions of the original findings contained in County Ordinance No. 737, are restated below, and amended to include the remand and Goal 4 issues.

Procedurally, the Board reviewed the LUBA Final Opinion and Order and determined that LUBA did not specifically instruct the Board to limit the scope of remand proceedings, and the Board finds that the YCZO is silent as to the procedures required for LUBA remands. But under Section 1400, Administrative Provisions, the Board is entitled to limit the scope of remand proceedings to correcting the deficiencies that were the basis for LUBA's remand. *CCCOG v. Columbia County*, 44 Or LUBA 438 (2003).

On page 5 of LUBA Final Opinion and Order No. 2004-089, LUBA states that "Petitioner [Friends of Yamhill County] raises one assignment of error, entitled "Reasons Exception," with four sub-assignments of error." Three of the four sub-assignments of error address 1) the market analysis and 2) the alternative sites analysis required by the exception criteria and 4) a case law prohibition on granting an exception for uses allowed in the underlying zone.

Pursuant to the terms of a Stipulated Settlement Agreement (dated June 13, 2005) between the County, the applicant, and Friends of Yamhill County, the applicant requested that the Board voluntarily remand for revision and reconsideration its decision on the amended subject application as contained in Ordinance No. 767 (which decision is the subject of the LUBA Appeal No. 2005-074, and that the Board conduct the voluntary remand hearing to readdress the Goal 3 and 4 issues.

At the remand hearing, the Board limited the scope of testimony, and in its subsequent deliberation and decision, the Board limited its scope of review, to considering the additional evidence and expert opinion submitted by the applicant in support of the Board's original decision (as modified) relative to Goal 3 and 4, as well as any relevant contradicting testimony and evidence.

Regarding the criterion YCZO Section 1208.02 (E), and pursuant to the Stipulated Settlement Agreement, the Board has agreed that an exception to Goal 3 is required. And even though the Board does not believe that an exception to Goal 4 should be required for this application, the Board has agreed that the criteria for a Goal 4 exception will be addressed in the findings below, under the terms of that same Agreement.

C. Goal Exception Provisions and Analysis (Restated from Ordinance No. 737 and amended)

1. Oregon Administrative Rule (OAR) 660-04 contains the requirements for taking an exception to the goals. The applicants are applying for a "reasons" exception to Goal 3 and to Goal 4.
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:

(2) The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal 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":

(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;

(B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under the alternative factor the following questions shall be addressed:

(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?

(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?

(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

(C) This alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding.

(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 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." The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. "Compatible" is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.

3. Regarding the first factor of Goal 2, OAR 660-004-0020(2)(a) requires the county to demonstrate that there are reasons why the state policy embodied in the applicable goal should not apply. OAR 660-004-0022

describes the types of reasons that can justify the approval of certain types of uses not otherwise allowed on resource land. OAR 660-004-0022(2) provides the specifically applicable criteria for adopting a reasons exception to allow the proposed rural residential development. The Board finds that OAR 660-04-022 (1) does not apply to this application because (1) applies only to “*uses not specifically provided for in subsequent sections of this rule*”, and that (2), which is applicable specifically to rural residential development and states that for “*rural residential development, the reasons cannot be based on market demand for housing, except as provided for in this section of this rule, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics. A county must show why, based on the economic analysis in the plan, there are reasons for the type and density of housing planned which require this particular location on resource lands. A jurisdiction could justify an exception to allow residential development on resource land outside an urban growth boundary by determining that the rural location of the proposed residential development is necessary to satisfy the market demand for housing generated by existing or planned rural industrial, commercial, or other economic activity in the area.*”

The applicants have submitted significant and substantial documentation and information regarding rural residential growth in Yamhill County which are found in their Burden of Proofs, the application materials and in the additional written and oral testimony presented at the original and subsequent Board Public Hearings, which are all incorporated into these findings in its entirety by this reference.

The Economic Development section of the County’s Comprehensive Plan addresses this fact and states that the attraction of new industries in recent years has helped the local economy significantly, and the County’s Overall Economic Development Plan has served as “a guide to the fulfillment of the county’s economic development goals and policies.”

As noted above, the County’s own Exception Land analysis contained in Appendix D of the Yamhill County Transportation System Plan (TSP) Final Report, dated March 1996 demonstrates the impact of this economic growth on rural residential lands by finding in 1996 that at least 78.5% of all rural residential properties were then currently developed. Within the Newberg area, the percentage of developed rural residential properties in 1996 actually increased to at least 84%. This increased market demand in the Newberg area is supported by and results from the continued commercial and industrial development within the Newberg urban growth boundary and city limits, as well as from the continued demand for all residential land, including rural residential properties, given Newberg’s close proximity to the Portland Metro Area.

The Summary of the Economic Development section of the Yamhill County Comprehensive Plan states “[T]he economy of Yamhill County is largely based upon agricultural and forestry related industries....” and that the “County has traditionally been plagued by high levels of unemployment, but the attraction of new industries in recent years has helped to alleviate this condition.”

Another indicator of rural economic development is the increase traffic counts on rural County roads. The Summary of the Development section of the Yamhill County Comprehensive Plan states that “[D]ue primarily to the increasing traffic load and traffic hazards on all county roads, there is a need to control access points for future development....” and “[I]n view of the rapidly increasing cost and decreasing supply of energy, it is imperative that all transportation decisions take into account the conservation of energy.”

The Board finds that the County should provide sufficient rural residential lands in appropriate ways and locations under the law for as diverse an income level of its citizens as possible, so that such lands are not only available to the wealthy, or to those citizens who either owned the property for a significant period of time or inherited it.

The Board finds that based on the evidence in the record, the application complies with the requirements of OAR 660-04-022 (2) because the applicants have demonstrated that the subject property is not resource land; that even though the County has not established a specific percentage threshold for developed land, the existing County AF-10 zoned land within the Study Area has been developed to at least 89.1%; and that

there is a need for more AF-10 zoned land within the Study Area to satisfy the market demand for housing and park land generated by existing and planned rural and urban industrial, commercial, and other economic activity in the area.

In addressing OAR 660-004-0020(2)(a), the Board finds that the following reasons, as modified from the applicants' Burden of Proof, justify the requested Goal 3 and 4 exception:

- 1) The subject property does not meet the definition of "agricultural land" or "forest land" and should have been included in Code Area 1.2 of the County's 1980 exception area decision.
- 2) Approval of the requested exceptions and plan amendment and zone change would be consistent with traditional land use planning policies, including those consistent with similarly situated properties in the same AF-10 zone and utilizing existing tax lot lines on both sides of Chehalem Drive (as was clearly done in the selection of AF-10 lands to the south) should have been used as the 1980 boundary between the subject property and the adjacent resource lands to the north.
- 3) The subject property is bordered on the south and east by AF-10 exception land and is only bordered by smaller sized resource lands to the west and north.
- 4) The subject property has similar topography (i.e. - moderate to steep slopes and elevations changes) to the existing AF-10 exception land to the south and east. Resource lands to the north have predominantly different topography, being significantly more gently sloped and commercially viable.
- 5) The subject property has similar soils (i.e. - the Jory series and related series) to the existing AF-10 exception land to the east and south. The Jory complex is described as moderately to severely erodible and severely restricts the farm and forest uses when found with steep slopes, which restriction is evident in the historic uses of the subject property and the adjacent AF-10 zoned land.
- 6) The subject property historically and currently contains land uses (i.e. - rural residential - hobby farm and small scale farm/forest uses of pastureland and small woodlots) that are significantly more similar to the existing AF-10 exception land to the south and east, than the resource land uses to the north.
- 7) There are no existing commercial farm or forest operations on lands immediately adjacent to the subject property (including resource lands to the north) which would create conflicts by the addition of the one new proposed rural residential parcel. Based on the above described physical characteristics and location, the subject property can not aggregated with larger and more viable farm and forest uses to the more distant west and southwest.
- 8) The subject property has similar natural resources and existing vegetation (i.e. - seasonal drainage ways and cleared pastureland and natural uncultivated areas of Douglas Fir, deciduous trees, poison oak and native grasses) to the existing AF-10 exception land to the west, south and east. In contrast, the resource lands to the north contain significantly more productive and commercially viable land resources, including predominantly managed woodlots and farm uses.
- 9) The subject property, even after approval of the one additional 10.6 acre parcel for the proposed rural residential hobby farm use, has similar parcelization and development (i.e. - average adjacent parcel size of approximately 10 to 12 acres and rural residential single family homes on hobby farms) to the existing AF-10 exception land to the west, south and east. Recent 1990's partitioning and subsequent development of the exception land directly to the south of the subject property as described above, is more consistent with the proposed parcelization than the larger resource land parcels to the north and west and southwest.
- 10) The existence of the City of Newberg's Spring Water System transmission and distribution lines, and utility easements located on the subject property in the same manner as the System is located

on a number of other adjacent 1980 exception lands, further significantly restrict the use of the property for anything other than the proposed low impact rural residential hobby farm/woodlot use.

- 11) The subject property has not been used for "farm use" as defined in ORS 215.203 (2)(a) for a significant period of time, at least from before 1974 as can be seen on the 1974 Soil Survey map (Applicant's Original Exhibit D, Page 2) as well as by comparing that map with the current Yamhill County Scale Map (Applicant's Exhibit A, Page 6), which comparison shows the configuration of the cleared areas of the property remaining substantially the same for years, with the exception of noticeable encroachment of the surrounding native plant species on the latter map.
- 12) The subject property has not been used for "forest use" for a significant period of time.
- 13) County staff confirms that the County Comprehensive Plan and Zoning Codes do not contain any definition of "forest lands" that might need to be addressed.
- 14) Other than the potential for small parcel hobby farm and even smaller hobby woodlot uses which would be allowed to be established and intensified by the approval of this exception and the development of one additional owner occupied dwelling, the subject property can not be developed into a commercial agricultural or forest use in the same way that the existing AF-10 exception land to the west, south and east can not be developed and was designated AF-10, for all of the above applicable reasons.
- 15) Along with the other physical factors described herein, the sizes of the existing parcels that are the subject property and the lack of water rights on the subject property make the subject property suitable only to small hobby farm rural residential use. The addition of the one additional homesite would allow the applicant to transform the now fallow non-resource land currently growing native grasses and native plant species into a viable and managed small acreage hobby farm and woodlot.
- 16) The physical configuration and location of the subject property and its access to Chehalem Drive compliment and complete that portion of the Chehalem Drive rural residential "neighborhood". Driving north on Chehalem Drive to and past the subject property demonstrates that the location and orientation of the existing homes and pasture lands, the location of the access driveways as well as the existing topographical and vegetation separation between the subject property and the resource lands to the north, supports the argument that the subject property should be part of the AF-10 rural residential Chehalem Drive "neighborhood", not the upper Chehalem Drive resource land neighborhood near the intersection of Chehalem Drive and Hillside Drive
- 17) The County has a demonstrated need for additional and appropriate new rural residential lands in the northern Newberg area in order to comply with the requirements of State Goal 10, Housing as implemented and acknowledged in the County's Comprehensive Plan, based on its own exception area growth projections and recent growth patterns, which show that 100% of the exception land has been developed in the north Newberg area and that at least 84% of the rural residential lands within 6,100 feet of the Newberg UGB have been developed, as is documented in the Findings of Fact above.
- 18) Approval of this application would comply with Oregon's Resource Land Dwelling Policy² to provide owners of less productive land the opportunity to create one additional rural residential

²**215.700 Resource land dwelling policy.** The Legislative Assembly declares that land use regulations limit residential development on some less productive resource land acquired before the owners could reasonably be expected to know of the regulations. In order to assist these owners while protecting the state's more productive resource land from the detrimental effects of uses not related to agriculture and forestry, it is necessary to:

parcel to enhance the hobby farm/forest capability while preserving the County's more productive resource lands to the north and west.

- 19) Approval of this application would allow the applicant and their family the opportunity to establish one additional viable rural residential dwelling and enhance what hobby farm and hooby forest productivity might be able to be established on the subject property to a greater degree than continuing the current use of the property.
- 20) Approval of this application would encourage a proper and appropriate rural residential use of a parcel of County rural land that is least productive and help defer the need for future expansion of the Newberg UGB onto primary resource land, in a manner consistent with Oregon's land use laws which place special emphasis on the preservation and protection of productive farm and forest lands, while encouraging more intensive farm and forest uses on all rural lands.
- 21) The subject property is isolated and unique in that it is the only property in the area that contains the remaining land, including an original homestead which was left after a long history of parcelization, where portions of the original property were sold off. With the result that the remainder of the original homestead property (the subject property), which appears to have less potential than the sold off properties to the south for any viable farm and forest uses (due to steeper slopes and worse soils), was incorrectly designated agricultural land (EF-20) in 1980.
- 22) The factual and expert evidence already submitted into the record, consisting of the Applicants' vineyard consultant's February 25, 2004 letter from Stirling Fox of Oregon Grape Management (LUBA Record 156-7), the January 2, 2004 Yamhill Soil and Water Conservation District letter (LUBA Record 204), as well as the supplemental evidence and testimony taken together to demonstrate that the property can not be farmed commercially, nor can a viable farm use be established on the property.
- 23) The "Detailed Inventory of Soils on Tax Lot 100" prepared for this remand request by Certified Soil Scientist Joel A. Norgren, dated December 31, 2005, attached as Exhibit B to the applicant's remand Burden of Proof, by a site specific analysis establishes that approximately 60% of the total existing soils possess a soil capability class VI and above; 85.6% of the total existing soils possess a soil capability class of IV, V and VI; and only 2.3% have a soil capability class of II; that the subject property consists of 66.3% Low Value soils and 33.7% High Value Soils; and that the subject property is land of predominantly soil capability class VI and above; and is land of predominantly Low Value Soils. Therefore, according to the definitions in Goal 3 and ORS 215.710, the subject property is not predominantly soil capability class I, II, III or VI, and is not predominantly high value soils, as originally believed prior to the site specific field analysis performed by Mr. Norgren.
- 24)
- 25) Goal 4 states in relevant part:
"Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water, and fish and wildlife resources."

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- (1) Provide certain owners of less productive land an opportunity to build a dwelling on their land; and
 - (2) Limit the future division of and the siting of dwellings upon the state's more productive resource land.
- [1993 c.792 §10]

The subject property is not “acknowledged as forest lands...”, therefore the first sentence is not applicable.

The County’s Plan is acknowledged, therefore the first clause of the second sentence is not applicable.

The subject remand application and hearing is a plan amendment, but a determination needs to be made whether or not it is a plan amendment involving forest lands. We look to the remaining portion of the second sentence and finds the definition of forest lands as follows:

“[Including] lands which are suitable for commercial forest uses...”

Please see the detailed analysis contained in the applicant’s supplemental Forestry Potential Report from Soil Scientist Joel Norgren and Forester’s Report from Eric Urstadt, PE/PLS, wherein those experts concluded that the subject property is “impractical for commercial forest uses” (Norgren), and “the economic viability for growing commercial timber on the site is poor” with a “very low” rate of return, all because of the following additional factors which are added to those other applicable factors noted above:

existing homestead, additional site constraints, seasonal creek, power lines, county road, south facing slope - drought issues, limited size of parcel, limited size and low Site Class of potentially viable forest soils, steep slopes, adjacent rural residential homes on smaller parcels, constraints and risks of traditional forest practices - aerial spraying and logging methods, the significant investment in property treatments needed before Douglas Fir can even be planted, and very low project rate of return.

Even though the language of Goal 4 goes on to describe other forest lands as discussed below, according to at least one case on point, it is “appropriate to focus exclusively or preponderantly on the poor quality of soils for farm and forest use in deciding whether a particular tract qualifies as agricultural lands or forest lands...” unless the an exception is being taken for Goal 3 or 4, which is the case here. Quoted from LUBA headnotes in the case of Friends of Linn County v. Linn County, 42 Or LUBA 235.

Reviewing the second sentence (restated below) in the express definition of forest land contained in Goal 4, the County finds that because there is no comma between “uses” and “including” in the second line, the sentence should be read to mean that the existence of commercial forest uses on one property automatically links together and includes “adjacent and nearby lands which are necessary” for those commercial uses to exist, and links together those commercial uses with “other forested lands” that maintain resources which have resources which are necessary for or compliment the commercial forest uses.

“Forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water, and fish and wildlife resources.”

The applicant’s soil and forestry experts have proven that there are no existing commercial forest uses on the property and that commercial forest uses are not practical or economically viable on the property. Furthermore, as established in the original approval by the County, there are not commercial forest uses on adjacent or nearby lands that could be linked to the subject property and the property does not contain resources which support and can be linked to other commercial forest uses.

4. Regarding the second factor, (OAR) 660-004-0020(b) and subsection (A) specifically, the Board finds that at the March 18, 2004 hearing, the applicant has appropriately indicated on a map of the county exception lands in the Newberg Dundee areas, and otherwise described, the location of possible alternative areas considered for the proposed use, which alternative sites are predominantly AF-10 exception lands and adjacent UGB and resource lands which do not require a new exception. The Board also accepts the applicants' Study Area, and finds that the area for which the exception is taken has been adequately identified.

5. One of the questions listed in OAR-660-004-0020(2)(b)(B) is whether the proposed use could reasonably be accommodated in other areas that do not require an exception. Economic factors can be considered along with other relevant factors. One of the items to consider is whether a dwelling location could be established on property within the Urban Growth Boundary, on committed resource land or on nonresource property. The applicants submitted general information in their original Burden of Proof stating that rural residential lands within the UGB were eliminated due to lack of availability and that such lands are significantly less affordable. Significant additional written and oral testimony was present by the applicants at the March 18, 2004 Board hearing which is addressed in more detail below. In addition, resource lands that are irrevocably committed to nonresource uses and available were eliminated due to the following four reasons:
 - a. There is a lack of availability of resource land that could accommodate the proposed use based on the applicants' search for all available land of a size and price that would be reasonable to purchase and develop.
 - b. That resource lands to the north and west of the study area and surrounding area were larger and thus much less affordable than the incorrectly designated resource lands that is the subject property.
 - c. That resource lands are usually even more difficult to partition and develop into a rural residential homesite given the current income and capability tests under state and county law.
 - d. That the applicants chose the Study Area to raise their family in a rural residential neighborhood in closer proximity and relationship to the City of Newberg given their unique circumstances.

The Board finds that the criteria of subsection (B) is very similar to the County's availability criteria contained in YCZO 1208.02(D), which requires a 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, and which is discussed in the YCZO findings above.

The Board finds that the applicants submitted a substantial packet of maps and documents at the March 18th hearing and discussed at length their detailed analysis that concluded why other areas, including resource and non-resource areas which do not require a new exception, cannot reasonably accommodate the proposed use. The Board finds that the applicants' analysis of availability and suitability for rural residential development summarized in Section (B) (3) above is reasonable to use to find that the proposed use cannot reasonably be accommodated on such other areas. The Board accepts the applicants' numbers and analysis regarding availability with the adjustments discussed verbally in the record as summarized on Table 5 above.

The applicants could not find any resource land within the Study Area that was irrevocably committed to nonresource uses and no evidence to the contrary was submitted by the opponents to this application. The Board can therefore conclude that the proposed use can not be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses.

As noted above, the Board finds that the subject property is not resource land and should not have been included in the 1980 exception land approvals. The Board finds that there is a demonstrable need for

additional AF-10 zoned land within the applicant's study area. Regarding the question of whether the proposed use could reasonably be accommodated within an UGB, the Board finds that, where appropriate, it is better for the County to provide additional land for rural residential hobby farm/forest uses on non-resource lands such as the subject property, than to not provide such additional rural residential land, which would artificially limit housing options for its citizens and could result in more citizens being forced to live within the County's existing urban growth boundaries, and thereby requiring earlier expansions of those urban growth boundaries onto primary valley floor resource farm land which currently surrounds the City of Newberg and the majority of the cities in the County. The Board finds that the placement of a rural residential use on land within an UGB would not be an efficient and appropriate use of such urban or urbanizable land.

Regarding the criteria of subsection (C), the Board finds that the applicants provided a broad review of similar types of areas in their Burden of Proof as well as a review of specific alternative sites in their written and oral testimony on March 18th. And even though subsection (B) allows the County to adopt an exception by assessing only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use, the Board did review and adjust the available and suitable site specific comparisons presented by the applicants. The Board did review the applicants' detailed evaluation of specific alternative sites, even though the opponents at the hearing did not specifically describe with facts or make any specific assertion that any of the alternative sites within the study area or the rest of the County could more reasonably accommodate the proposed use than the subject property.

6. Regarding the third factor, OAR-660-004-0020(2)(c), the environmental, economic, social and energy (ESEE) analysis, the applicants have addressed this requirement on pages 24-29 of their original Burden of Proof with additional supplemental written and oral evidence and documentation provided at the March 18th hearing. As noted above, the applicants have submitted detailed information regarding an ESEE analysis of the subject property and to a lesser degree alternative resource and non-resource sites within their Study Area. The Board finds that a detailed evaluation of specific alternative resource sites inside or outside the Study Area is not required because enough information has been placed in the record to confirm that such alternative resource sites are specifically described with sufficient facts to support the assertion that such sites do not have significantly fewer adverse impacts than the subject site.

The Board reasserts the findings stated above regarding the applicants' ESEE analysis on the subject property and the applicants' comparison of the characteristics and impacts of allowing an exception for the proposed use on the subject property generally compared with resource lands in the Study Area. Again, as noted above, the Board finds that the subject property is not resource land and should not have been included in the 1980 exception land approvals, for the reasons stated by the applicants as modified above by the Board. The Board also finds that there exist no significant resource uses adjacent to the proposed use; that the long-term economic impact on the general area caused by irreversible removal of the subject property from the resource base is negligible to non-existent, that the benefits of allowing the proposed use on non-productive land outweighs the adverse impacts of allowing such a use on actual resource lands, that the effects of the proposed use of one additional rural dwelling on the existing water table will be significantly less than allowing the same use on actual resource land, and that there will be no additional costs of improving roads.

For the reasons stated above, the Board concludes that the long-term environmental, economic, social and energy consequences resulting from the use at the proposed site do not require measures designed to reduce adverse impacts and that the proposed use is not significantly more adverse than would typically result from the same proposed use being located in other areas requiring a Goal exception.

7. Regarding factor OAR-660-004-0020(2)(d) the proposed uses need to be compatible with other adjacent uses or be so rendered through measures designed to reduce adverse impacts. The applicant has submitted reasons on pages 29-31 explaining why the proposed dwelling would be compatible with other adjacent rural residential uses.

The Board reasserts the findings stated by the applicants as modified by the Board above. The Board finds that a significant reason why it approved this proposed application and use at its March 18th hearing was because the characteristics and impacts of the subject property conforms more exactly to and are more compatible with the other adjacent rural residential uses located on adjoining non-resource lands, that there will be no significant adverse impacts and the proposed use will be an appropriate addition to the existing rural residential neighborhood. The applicant has demonstrated that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices, because there is no significant commercial or natural resource uses in the immediate area of the subject property.

8. The Board finds that based on the applicant's site specific field analysis and supplemental evidence and expert opinion, and based the original and the above additional findings of fact, the applicant has demonstrated that the criteria for taking an exception for Goal 3 and Goal 4 has been satisfied.

D. Summary.

Based on the above findings, the Board concludes that the subject application as modified does satisfy all of the applicable criteria, as contained in the applicants' original Burden of Proof, their remand and supplemental Burden of Proof and written and oral testimony, and in the above findings.

CONCLUSIONS: Based on all of the evidence in the record, the Board finds that:

1. The request is for a Comprehensive Plan amendment and zone change from Exclusive Farm Use, EF-20 to AF-10, including an exception to Goal 3 and Goal 4.
2. The proposed Comprehensive Plan amendment and zone change is consistent with Comprehensive Plan goals and policies.
3. An exception to Goal 3 and Goal 4 is justified because the property is unsuitable for farming or forest uses due to soils and slope as well as other factors, and other existing or potential resource and non-resource areas which do not require an exception can not reasonably accommodate the one additional proposed rural residential use.
4. The proposed change is consistent with the zone change criteria of Section 1208.02.
5. The proposed change complies with the Transportation Planning Rule.

The application is hereby approved.

STIPULATED SETTLEMENT AGREEMENT

DATED: June 13, 2005

AMONG: MATTHEW and RENEE POWELL,
represented by
JOHN A. RANKIN, LLC
ATTORNEY AT LAW
26715 S.W. Baker Road
Sherwood, OR 97140

(“Powells”)

FRIENDS OF YAMHILL COUNTY
Attn: Merilyn Reeves
P.O. Box 1083
McMinnville, OR 97128

(“FYC”)

YAMHILL COUNTY, OREGON
Yamhill County Courthouse
535 NE 5th Street
McMinnville, OR 97128-4523

(“County”)

RECITALS

A. The Powells are the applicant under Docket PAZ-02-03, Yamhill County Ordinance No. 767, approving a plan amendment and zone change for Tax Lot 3301-100, which became final on April 27, 2005.

B. On May 17, 2005, FYC filed an appeal of Yamhill County Ordinance No. 767 to the Land Use Board of Appeals (“LUBA”) under LUBA No. 2005-074. On June 7, 2005, the parties stipulated to a Motion filed with LUBA asking for the record filing date to be reset to June 15, 2005.

C. On June 3, 2005, representatives of FYC and the Powells agreed to initiate settlement discussions. Based on those settlement discussions, the parties have agreed to execute this Stipulated Settlement Agreement (the “Settlement Agreement”).

D. The Powells hereby agree to request that Yamhill County revise their Decision under Ordinance 767 ("Revised Decision") through a public land use decision making process to incorporate the terms of this Settlement Agreement.

E. The parties desire to settle their dispute under LUBA 2005-074, and by this document specifically establish the terms of settlement.

NOW, THEREFORE, in consideration of the mutual promises of the parties set forth in this Agreement, the parties agree as follows:

1. Mutual Obligations of the Parties

The parties agree to file this Settlement Agreement with the County resolving all issues between the parties.

2. Obligations of the Powells

The Powells shall continue the process of voluntary remand/reconsideration with the purpose of removing designation of the 21 acres of Tax Lot 3301-100 as non-resource land and instead seek a rezoning to AF10 for a second dwelling on the property based on an exception to the Goals 3 and 4.

3. Obligations of the County

Upon receiving a revised application consistent with the terms of this Settlement Agreement, the County shall issue a Revised Decision under Ordinance 767 and hold a public hearing before the Yamhill County Board of Commissioners.

The Revised Decision issued in compliance with the terms of this Settlement Agreement shall supersede Ordinance No. 767, which as a result of the Revised Decision, will have no further force or effect.

If the Revised Decision incorporates each of these conditions of settlement without alteration or amendment, FYC waives their right to appeal the Revised Decision. However, if any of the conditions of approval of the Revised Decision vary from the terms of this Settlement Agreement, FYC shall maintain their right to appeal the Revised Decision.

4. Obligations of FYC

FYC will not support nor oppose the voluntary remand/reconsideration when a public hearing is held. FYC shall agree not to pursue in any manner their appeal of the County Decision, pending the submission of a revised application by the Powells and the issuance of a Revised Decision by the County. The appeal shall be withdrawn within three days of the date of the issuance by the County of a Revised Decision.

FYC shall not file any further appeals of or object to the Revised Decision by the County concerning Tax Lot 3301-100, provided the terms of the Revised Decision referenced under this paragraph are consistent with the provisions of this Settlement Agreement.

FYC shall not oppose or assist any other group or individual in opposing a Revised Decision of the County that is consistent with the terms of this Settlement Agreement.

5. General Provisions

Enforcement. The obligations of the parties pursuant to this Settlement Agreement may be enforced by an action for damages, specific performance or injunctive relief.

Attorneys' Fees. If a suit, action, or other proceeding of any nature whatsoever is instituted in connection with any controversy arising out of this Settlement Agreement or to interpret or enforce any rights hereunder between FYC and Powells only, specifically excluding the County, the prevailing party shall be entitled to recover its attorneys', paralegals' and experts' fees and expenses and all other fees and expenses actually incurred and reasonably

necessary in connection therewith, as determined by the court at trial or on any appeal or review, in addition to all other amounts provided by law.

Costs. Except for the filing fee and deposit for costs filed by FYC, the Powells and FYC hereby waive any and all claims or actions for costs, direct or indirect, arising out of or connected with Case File PAZ-02-03. The foregoing shall not apply to any alleged breach of this Agreement.

Execution. This Settlement Agreement may be executed in counterparts, and shall be effective upon full execution and delivery by the parties. This Settlement Agreement may be delivered by facsimile transmission.

Notices. Any notices required under this Settlement Agreement are deemed delivered when placed in first class mail or submitted by a complete facsimile.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date and year first written above.

POWELLS:

MATTHEW and RENEE POWELL

By: Matthew L Powell

By: Renee Powell

FYC:

FRIENDS OF YAMHILL COUNTY

By: Marilyn B Reeves

Its: President, Friends of Yamhill County

COUNTY:

YAMHILL COUNTY, OREGON

By: Mark P. Steen 6/29/05
Its: Chair, Bd. of Comm'rs