

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 a Plan Amendment)
 from Agriculture/Forestry Large Holding to)
 Agriculture/Forestry Small Holding, and a Zone)
 Change from EF-20 Exclusive Farm Use to)
 AF-10 Agriculture Forestry Small Holding for a) ORDINANCE 767
 21.27 Acre Parcel Located on the North Side of)
 Chehalem Drive, Yamhill County, Tax Lot)
 3301-100, Applicants Matthew and Renee Powell,)
 Docket PAZ-02-03, as Remanded by the Land Use)
 Board of Appeals, and Declaring an Emergency)

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business at 10:00 a.m. on April 27, 2005, in Room 32 of the courthouse, Commissioners Mary P. Stern, Leslie Lewis, and Kathy George being present.

THE BOARD MAKES THE FOLLOWING FINDINGS:

A. In 2003, 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 for a 38.71 Acre Parcel located on the north side of Chehalem Drive, Yamhill County, Tax Lots Nos. 3301-100, -101 and -102, Docket PAZ-02-03. This application was approved by Ordinance 737 and timely appealed to the Land Use Board of Appeals, which remanded the decision to the Board for additional proceedings.

B. A public remand hearing was held before the Board on March 23, 2005 to consider testimony and evidence, after which the public hearing was closed and the applicants and opponents were allowed opportunity to submit additional written testimony, to be considered by the Board in its deliberations at the formal session of April 13, 2005; and

C. At its regularly scheduled April 13, 2005, the Board voted unanimously to approve the application and directed that findings in support of the application be prepared for consideration on April 27, 2005; NOW THEREFORE,

IT IS HEREBY ORDAINED BY THE BOARD that the application is approved as detailed in Ordinance 737 and the Findings for Approval, attached as Exhibit "A" and by this reference incorporated herein, based on the findings of fact and law contained in the applicant's burden of proof entitled "Remand of LUBA Final Opinion and Order No. 2004-089" and 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 27th day of April, 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

Not available for signature
Commissioner LESLIE LEWIS

APPROVED AS TO FORM

Rick Sanai
RICK SANAI
Assistant County Counsel

Kathy George
Commissioner KATHY GEORGE

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Exhibit "A"
FINDINGS FOR APPROVAL

FILM **84** PAGE **081**

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 remand from LUBA Final Opinion and Order No. 2004-089.

APPLICANTS: Matthew and Renee Powell

OWNERS: Robert and Judith Travers and the Chehalem Park and Rec. District

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, 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, and OAR 660-04, Exception Process does not apply because the Board found that the property is not agricultural land (*i.e.*, not resource land), and that the taking of an exception is not necessary for non-resource land.

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 cut-over 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 applicants have 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 applicants' 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 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: Page 8 of the applicants' submittal, 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 (File No. P-967-79).") After the LUBA remand, the applicants removed Tax Lot 101 and 102 from the remand request; 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 Ordinance 737 with findings attached thereto as Exhibit A, with are incorporated herein by this reference.

As noted above, on remand the applicants modified the application by reducing the subject property to Tax Lot 100, and the Board's proceedings on remand 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 remand zone change and plan amendment for the modified subject property, unless otherwise amended by these new findings contained in this Exhibit A.

Procedurally, the Board reviewed LUBA's *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. However, 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 the *Final Opinion and Order*, LUBA 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; 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.

The applicants requested at the remand hearing that the Board limit its scope of review to petitioner's third sub-assignment of error, in which the petitioner challenged the Board's original decision finding that the subject property was not resource land.

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 scientific and engineering evidence and expert opinion submitted by the applicants in support of the Board's original decision finding that the subject property (as modified) is not resource land, as well as any relevant contradicting testimony and evidence.

Regarding the criterion YCZO Section 1208.02 (E), an exception to Goal 3 was not required, as addressed in Section C of these findings below.

C. Goal Exception Provisions and Analysis

When the applicants originally contacted the Planning staff, staff informed them they would need to request an exception to Goal 3, but not to Goal 4. The applicants' original burden of proof and supplemental materials provided substantial evidence addressing the Goal 3 exception.

In its original Ordinance 737 decision, the Board found "that the subject property is non-resource land, based on the reasons stated in the applicants' burden of proof..., and based on other substantial evidence in the record..." (page 4).

Opponents, Friends of Yamhill County, filed a LUBA appeal, which resulted in that board's *Final Opinion and Order* noted above and below.

LUBA, in its *Final Opinion and Order* 2004-089, remanding this case back to the Board stated on page 14 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." (Emphasis Added).

And that:

"In order to show that land is not resource land, an applicant must demonstrate that it does not qualify as agricultural land or forest lands. See *Friends of Linn County v. Linn County*, 42 Or LUBA 235, 239-40 (2002). "Agricultural Land" is defined in Goal 3 as follows:

'Agricultural Land * * * 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.'

“Under that definition, ‘agricultural land’ includes lands composed predominantly of Class I through IV soils.” (Emphasis Added).

The Board finds that 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, (Exhibit B to the applicants’ 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.

The Board finds that based on Mr. Norgren’s site specific field analysis, as well as supplemental evidence and expert opinion submitted by the applicants, and based the following additional findings of fact, the applicants have demonstrated that the subject property is not “agricultural land” (i.e., is not resource land), and that a Goal 3 exception is not required for approval of the plan amendment and zone change:

- 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.
- The subject property is bordered on the south and east by AF-10 exception land and is bordered by resource lands to the north and west.
- The subject property has similar topography (i.e., moderate to steep slopes and elevations changes) to the existing AF-10 exception land to the west and east. Resource lands to the north have predominantly different topography, being significantly more gently sloped and commercially viable.
- The subject property has similar soils (i.e., the Jory series and related series) to the existing AF-10 exception land to the west, 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.

- The subject property historically and currently contains land uses (i.e. - rural residential and small scale fallow pastureland and small unmanaged and unstocked overgrown woodlot area) that are significantly more similar to the existing AF-10 exception land to the west, south and east, than the resource land uses to the north.
- 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 cannot be aggregated with larger and more viable farm and forest uses to the more distant west and southwest.
- The subject property has similar natural resources and existing vegetation (i.e., seasonal drainage-ways and fallow pastureland and natural uncultivated overgrown areas of deciduous trees, underbrush, 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.
- The subject property, even after approval of only one additional 10.6 acre parcel for the proposed rural residential use, has similar parcelization and development to the existing AF-10 exception land to the west, south and east (i.e., average adjacent parcel size of approximately 10 to 12 acres and rural residential single family homes). 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.
- The existence of the City of Newberg's Spring Water System transmission and distribution lines, and other utility easements located on the subject property further significantly restrict the use of the property for anything other than the proposed low impact rural residential use.
- The subject property has not been used for "farm use" as defined in ORS 215.203 (2)(a) for a significant period of time, if ever, but certainly for a long period of time before 1974 as can be seen on the 1974 Soil Survey map (Exhibit D, Page 2 of the original burden of proof) as well as by comparing that map with the current Yamhill County Scale Map (Exhibit A, Page 6, of the original burden of proof), 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 and non-native plant species on the latter map.

- The subject property cannot 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 cannot be developed and was designated AF-10, for all of the above applicable reasons.
- As well as the other physical factors described herein, the size of the subject property and lack of water rights on the subject property make it suitable only to rural residential use.
- 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”. Traveling along Chehalem Drive from Tax Lot 600 north 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, support 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.
- 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.
- Approval of this application complies with Oregon’s Resource Land Dwelling Policy to provide owners of less productive non-resource land the opportunity to create one additional rural residential parcel while preserving the County’s more productive resource lands to the north and west.
- Approval of this application would encourage a proper and appropriate rural residential use of a parcel of County rural land that is not 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.
- The subject property is isolated and unique in that it is the only property in the area that is the remaining land, including an original homestead, left after a long history of parcelization, where the properties that were sold were designated AF-10 in 1980. The original homestead property (the subject property) which appears to have less potential than the sold properties to the south for any viable farm and forest uses (due to steeper slopes and worse soils), was designated resource land (EF-20) in 1980.

Therefore, consistent with LUBA's remand order and other case law, including LUBA's decision in *Friends of Linn County v. Linn County*, 42 Or LUBA 235, 239-40 (2002), the applicants have demonstrated that the subject property does not qualify as agricultural land, the Board is required to conclude that the subject property is not resource land, and a Goal 3 exception is not required for approval of the subject application as modified.

The opponents raised concerns during the remand hearing and in subsequent written testimony that the applicants should also be required to take a Goal 4 exception. However, the Board finds that the record shows that adequate opportunity was given to the opponents to raise the Goal 4 exception issue at the original hearing on March 18, 2004 and as continued; that they failed to adequately raise that issue either at that hearing or on appeal to LUBA. The Board has followed the clear and express procedural and substantive requirements of the LUBA remand opinion and its own regulations discussed above and below, and the opponents cannot now or in a subsequent LUBA appeal raise the Goal 4 exception issue, assuming that it is even applicable to the subject application, which the Board finds it is not. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

The Board notes that the applicants in their original burden of proof addressed forest issues a number of times: for instance, by stating that the commercial forest uses on properties on "a small number of larger properties located a greater distance than one-quarter to one-half mile to the north of the subject property...", the difficulties with establishing farm and forest uses on the steep and highly erodible Jory soils located on the subject property, as well as the farm and forest productivity of the subject property. The applicants also addressed the Goal 4 issues with scientific evidence and expert opinion in their written response testimony following the close of the remand hearing.

Finally, the Board has historically made land use decisions consistent with its Finding (B)(5) in Exhibit A of Ordinance No. 737 that "[S]ince the property is zoned for Exclusive Farm use and not for Agricultural/Forestry use, an exception to Goal 4 is not required.

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, remand burden of proof, and written response testimony after the close of the remand hearing, and in the above findings.

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

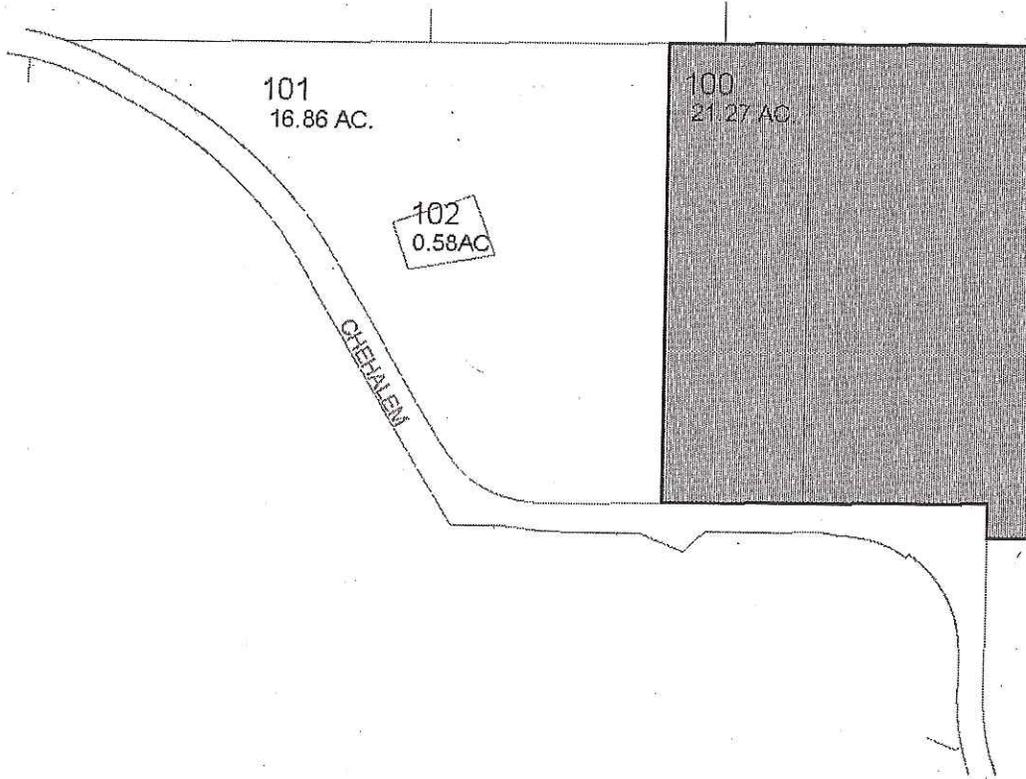
1. The request is for a Comprehensive Plan amendment and zone change from Exclusive Farm Use, EF-20 to AF-10.

2. The proposed Comprehensive Plan amendment and zone change is consistent with Comprehensive Plan goals and policies.
3. An exception to Goal 3 is not required because the property is not agricultural land, is unsuitable for farming due to soils and slope as well as other factors.
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.

EXHIBIT "B" MAP FOR ORDINANCE NO. 767
PLAN AMENDMENT AND ZONE CHANGE
ADOPTED BY THE YAMHILL COUNTY BOARD OF COMMISSIONERS
APRIL 27, 2005

FOR A COMPREHENSIVE PLAN AMENDMENT FROM
AGRICULTURE/FORESTRY LARGE HOLDING TO AGRICULTURE/FORESTRY
SMALL HOLDING AND
TO CHANGE OFFICIAL ZONING MAP FROM
EF-20 EXCLUSIVE FARM USE
TO
AF-10 AGRICULTURE/FORESTRY SMALL HOLDING



CHANGE APPLIES TO TAX LOT 3301-100 DESCRIBED ABOVE

APPROXIMATE SCALE - 1 INCH = 400 FEET

B.o.05-298