

MAY 6 3 06 PM '99

KAREN R. LEBRETON  
COUNTY CLERK

IN THE COUNTY COURT OF THE STATE OF OREGON  
IN AND FOR THE COUNTY OF WASCO

IN THE MATTER OF ADOPTING AN )  
EXCEPTION TO STATEWIDE GOAL 3 )  
AGRICULTURAL LANDS FOR SEVEN )  
PROPERTIES TO BE REZONED FROM )  
A-1(160) EXCLUSIVE FARM USE TO F- ) ORDINANCE 99-112  
F(10) FOREST-FARM WITH A LIMITED )  
USE OVERLAY IN THE BADGER )  
CREEK AREA (FILES CPA-98-102- )  
WAA1-LU-P AND ZNC-98-102-WAA1- )  
LU-P). )

1 NOW ON THIS DAY, the above-entitled matter having come on regularly for  
2 consideration, said day being one duly set in term for the transaction of public business and a  
3 majority of the Court being present; and

4  
5 IT APPEARING TO THE COURT: That on August 14, 1998, the application from Frank  
6 Walker & Associates, representing Herbert McCreary et al, Ed & Chris Coburn, Duane and  
7 Barbara May, Mark and Kathi Peterson, Jack and Ann Sheldon, Robert Gustafson et al, and  
8 Jackie Lee Ashley, was determined to be complete. The application is for an amendment to the  
9 Wasco County Comprehensive Plan map and zoning maps to allow an "Irrevocably Committed  
10 Exception" to Statewide Land Use Goal 3, and to change the zoning designation of seven  
11 properties (totaling 237.51 acres) from "A-1(160)" Exclusive Farm Use to "F-F(10)" Forest-  
12 Farm. The subject properties are located along Badger Creek Road and Fairgrounds Road, south  
13 and west of the intersection of those two roads, and further described as Township 4 South,  
14 Range 13 East, Section 5, Tax Lot 500, and Township 4 South, Range 13 East, Section 6, Tax  
15 Lots 100, 200, 300, 500, 600, and 700; and

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IT FURTHER APPEARING TO THE COURT: That the Wasco County Planning Commission held a public meeting on October 6, 1998, heard a summary of the staff report, then continued the hearing to December 1, 1998, at the request of the applicants; and

IT FURTHER APPEARING TO THE COURT: That on December 1, 1998, the Wasco County Planning Commission opened the hearing and received a further summary of the staff report and testimony, then continued the hearing to February 2, 1999, at the request of the applicants; and

IT FURTHER APPEARING TO THE COURT: That on February 2, 1999, the hearing was continued to March 2, 1999 at the applicants request; and

IT FURTHER APPEARING TO THE COURT: That on March 2, 1999, the Wasco County Planning Commission met to conduct the continuation of the quasi-judicial public hearing on the above matter. The Commission reopened the hearing to accept into the record the submission of the request by the applicants to include Limited Use Overlay language, plus the Findings of Fact and map describing the proposed Limited Use Overlay. Following receipt and review of all evidence, the Commission deliberated and recommended approval of the request to the Wasco County Court, with some amendments to the findings and limited use overlay language as follows:

1. The Commission incorporated the suggestions by staff for five amendments to the applicants' Findings and Conclusions, page 7 and 11; and the addition of a new section D(3) to the proposed Limited Use Overlay stating that: *Partitions shall be approved only*

P 990150 (36)

1           *for parcels containing a homesite (either an existing or new dwelling homesite) that is*  
2           *identified on the Limited Use Overlay map.*

3    2.    The Commission directed the applicant to refine the map, with staff's review and  
4           approval, prior to the County Court hearing.

5    3.    The Commission recognizes and adopts the applicants' representative's proposed  
6           findings and conclusions and the proposed Limited Use Overlay with amendments which  
7           were made part of the record at the hearing held on March 2, 1999, and the refined map  
8           which will be reviewed and approved prior to the County Court hearing.

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10       IT FURTHER APPEARING TO THE COURT: The Wasco County Commission  
11       deliberated upon the full record and evidence and testimony presented. On a 5-1 vote, the  
12       Commission approved a recommendation that the Wasco County Court approve the request by  
13       Frank Walker & Associates, subject to the applicants' Findings of Fact as amended, and  
14       providing that a map of the Exception Area be provided prior to the County Court hearing:

- 15    1.    An Irrevocably Committed Exception to Goal 3.  
16    2.    A Zoning Map Amendment from "A-1(160) to F-F(10)."  
17    3.    The Application of a Limited Use Overlay to the Exception Area, indicating 10 existing  
18           dwellings plus 3 new building sites, and limiting land divisions to only those sites as  
19           identified on the Limited Use Overlay map.

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21       IT FURTHER APPEARING TO THE COURT: That on 10:00 a.m. on April 14, 1999,  
22       in the County Courtroom, Room 202, of the Wasco County Courthouse, The Dalles, Oregon, this  
23       Court met to conduct a public hearing on the above matter. The members of the Court were  
24       determined to be qualified to hear the matter; and

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P 990150 (36)

1 IT FURTHER APPEARING TO THE COURT: That the Court reviewed the record of  
2 the Planning Commission, heard the staff summary and received testimony and evidence from  
3 the parties and then closed the hearing for further input. The Court then deliberated, resulting in  
4 a 3 to 0 vote to approve the request by Frank Walker & Associates for (1) Exception to Goal 3  
5 Agricultural Lands; (2) Comprehensive Plan Map Amendment; (3) Zone Change with a Limited  
6 Use Overlay; and (4) a Badger Creek Limited Use Overlay map dated May 1999. Based upon the  
7 full record and evidence and testimony presented, the Court, being fully apprised in the premises,  
8 did hereby make the following findings of fact and conclusions of law:

9 FINDINGS OF FACT

- 10 1. Proper notice was given and the hearing was held in accordance with procedural rules for  
11 legislative hearings and in conformity with said requirements as set forth in the Wasco  
12 County Comprehensive Plan.  
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14 2. Three members of the County Court were present. The members were qualified to sit as  
15 decision-makers after full disclosure was made and the matter of qualifications was discussed  
16 by the Court.  
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18 3. In making its decision, the Court recognizes the procedural and legal requirements of the  
19 Wasco County Comprehensive Plan and the Wasco County Land Use and Development  
20 Ordinance and weighed fully each requirement in arriving at its decision.  
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22 4. The Court acknowledges and accepts the Findings of Fact that were presented by the  
23 applicants, as amended; the Limited Use Overlay as amended, and the Recommendation  
24 made by the Wasco County Planning Commission, dated March 10, 1999.  
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27 CONCLUSIONS OF LAW  
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- 30 1. The Wasco County Court acknowledges and accepts the original findings and conclusions  
31 presented by the applicants and the Planning Commission Recommendation dated March 10,  
32 1999.  
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34 2. The Court concludes that evidence in the record substantially demonstrates that the proposed  
35 Exception, Comprehensive Plan Amendment, and Zone Change from "A-1(160)" Exclusive  
36 Farm Use to "F-F(10)" Forest-Farm meets the criteria in the Wasco County Land Use and  
37 Development Ordinance, Wasco County Comprehensive Plan, and State law.  
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P 990150 (34)

1 3. The Court amends the applicants Page 7, paragraph 4, Findings of Fact to state "Tax Lot 600  
2 is in deferment but is not being put to any farm use."  
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4 4. The Court amends the applicants proposed Limited Use Overlay Zone to:  
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6 (1) Delete Section B.3. (conditional use criteria for permitted uses)/

7 (2) Amend Section C.1. to state "Additional single family dwellings not in conjunction  
8 with farm or forest use **only** on sites identified on the "Development Area" map as  
9 **future residences.**

10 (3) Amend Section D.3. to state "Partitions shall be allowed only for parcels containing a  
11 homesite (either an existing or new dwelling homesite) that is identified on the  
12 Limited Use Overlay Map. **Partitions around any homesite shall not result in the**  
13 **creation of an undevelopable remnant parcel.**  
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16 1. NOW, THEREFORE, IT IS HEREBY ORDERED: That the Wasco County Court grants  
17 the request by Frank Walker & Associates, representing Herbert McCreary et al, Ed & Chris  
18 Coburn, Duane and Barbara May, Mark and Kathi Peterson, Jack and Ann Sheldon, Robert  
19 Gustafson et al, and Jackie Lee Ashley for an amendment to the Wasco County  
20 Comprehensive Plan and zoning maps to allow an "Irrevocably Committed Exception" to  
21 Statewide Land Use Goal 3, and to change the zoning designation of seven properties  
22 (totaling 237.51 acres) from "A-1(160)" Exclusive Farm Use to "F-F(10)" Forest-Farm in the  
23 Wasco County Land Use and Development Ordinance. The subject properties are located  
24 along Badger Creek Road and Fairgrounds Road, south and west of the intersection of those  
25 two roads, and further described as Township 4 South, Range 13 East, Section 5, Tax Lot  
26 500, and Township 4 South, Range 13 East, Section 6, Tax Lots 100, 200, 300, 500, 600, and  
27 700.

P 990150 (36)

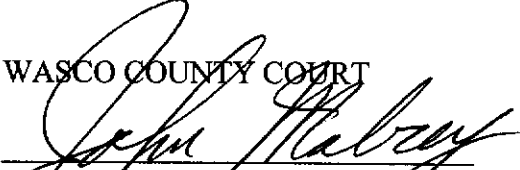
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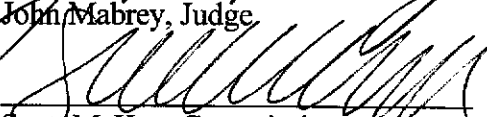
Regularly passed and adopted by the County Court of the County of Wasco, State of Oregon.

SIGNED this 5th day of May, 1999.

Approved as to Form:  
  
Eric Nisley  
Wasco County District Attorney

WASCO COUNTY COURT

  
John Mabrey, Judge

  
Scott McKay, Commissioner

  
Dan Ericksen, Commissioner

P 990150 (36)

# FINDINGS OF FACT – BADGER CREEK EXCEPTION

## INTRODUCTION

Applicant has applied for an Exception to Goal 3 Agricultural Zone, a Zone Change to Forest-Farm (“F-F(10)”), and a Comprehensive Plan Amendment from Exclusive Farm Use (A-1) to Forest-Farm. Following the initial public hearing and in response to concerns raised in testimony and by the Planning Commission, the Applicant and Staff determined that a limited use overlay should also be included. The request and findings below now include the limited use overlay to be applied in conjunction with the Forest-Farm (“F-F(10)”) designation so as to ensure that development in the exception area is limited in accordance with these findings.

The application was submitted by Frank Walker & Associates, and deemed complete June 24, 1998. The applicant attached written authorizations of the property owners as required by Wasco County Land Use Development Ordinance (“WCLUDO”) Section 2.040. To the extent that the 150 day rule applies to this application, the Applicant has waived the rule by written letter to the Planning Department dated January 14, 1999.

The subject properties, also referred to as the “exception area,” are all currently zoned Exclusive Farm Use/A-1 and are subject to the requirements of Goal 3 of the Wasco County Comprehensive Plan and the Statewide Planning Goals. The exception area is located due west of the unincorporated town of Tygh Valley. The predominant use in the exception area is rural residential. The applicant is seeking this exception and zone change so as to make the rural residential uses conforming, and to allow limited additional rural residential uses and land divisions to be made as set forth below.

## DISCUSSION

### I. SUBJECT PROPERTY

The subject properties consist of approximately 237.51 acres located just west of the unincorporated town of Tygh Valley in Wasco County in an area known as Badger Creek Canyon. The owners of the properties, their tax lot designations and parcel sizes are as follows:

Tax Lot No. (4S R13E)	Acreage (Approx.)	Owner
500 (Section 5)	34	Ashley
600 (Section 6)	4.59	McCreary
100 (Section 6)	80.73	Coburn

300 (Section 6)	64.29	May
500 (Section 6)	9.14	Peterson
200 (Section 6)	13	Sheldon
700 (Section 6)	31.76	Gustafson

Fairgrounds Road borders the northern edge of the Ashley property, enters the Coburn property, and then immediately turns northeast, exiting the exception area. Fairgrounds Road thus bisects the Coburn property in two places and the Ashley property once. Fairgrounds Road is a paved road that provides access to the Wasco County Fairgrounds, which are adjacent to the subject properties on the east side.<sup>1</sup>

Where Fairgrounds Road turns northeast, the road continues to the northwest as Badger Creek Road. This is a gravel road that also bisects the Coburn property, creating two additional discrete parcels, and forms the southern boundary of the Sheldon property and part of the northern boundaries of the May and Peterson properties. Badger Creek forms the northern boundary of the McCreary and Gustafson properties, and the southern boundary of the small piece of Coburn property lying below Fairgrounds Road.

The May, Sheldon, Coburn and Ashley properties are all improved for residential use but are not in farm use. The Peterson property is also improved for residential use and although subject to a farm tax deferral, only a few sheep are run on it. The McCreary and Gustafson properties are also improved, subject to a tax deferral, but are not being put to any farm use.

Each of the subject properties has at least one residence on it. The Gustafson property has three residences on it and the Coburn property has two residences on it, although water, electricity, road access and a septic system have been installed at a third possible homesite on the Coburn property. The Gustafson property also contains an outbuilding in which the Gustafsons store equipment and supplies related to their construction contracting business. The Coburn property has the most well-established incidental non-farm or non-forest structure. It contains a 24x48 steel building that functions as an office and warehouse for the Coburns' electrical contracting business, Coburn Electric, Inc., which has been operated from the property for over 35 years. The Coburns store equipment and materials both in the steel building and on the building grounds. Customers come regularly to the Coburn property for parts and equipment, and to contract for services. The Browns, who rent the second residence on the Coburn property, operate a small earthworks contracting business and also use the property they rent for equipment storage.

<sup>1</sup> The information in the table above and a map showing the relative location of the parcels and the roads can be found in the Wasco County Staff Report dated October 6, 1998 (the "Staff Report"), which, by this reference, is incorporated into these Findings.

P 990150 (36)



Physically, the predominant features on the subject properties are their steep rocky slopes and surrounding high cliffs. The cliffs form the walls of the Badger Creek Canyon. Badger Creek is a small creek that runs through the middle of the subject area and generally in an east to west direction, bisecting a number of the parcels. The subject properties are comprised primarily of Class VII soils or worse, although better quality soils can be found on the Badger Creek flood plain at the east end of the subject area on the Gustafson Property. What relatively level ground found in the exception area has mostly been put to the residential and accessory uses described above, however, significant lenses of gravel occur in these areas, further limiting their use for resource uses.

## II. SURROUNDING AREA

Except with respect to the Wasco County Fairgrounds property and use to the east of the exception area, the adjacent and surrounding EFU properties and uses to the north and south are conducted on the plateaus above the cliffs. These surrounding EFU-zoned parcels are primarily large irrigated farm land. To the north, a 340.43 acre and contiguous 184.59 acre and 147.91 acre parcels are under one ownership and are used to graze approximately 200 head of cattle. To the south, there is a 589.52 acre parcel, which is irrigated farmland, and a 25.6 acre timbered parcel, which is not in farm use and contains two residences. To the south and west, there are three adjacent parcels totaling 330 acres in common and contiguous ownership with an additional contiguous 382+/- acres, all of which are used by the McAllisters for irrigated agriculture. Two smaller rural tracts abut the exception area at the northwest corner, neither of which are improved. Finally, the county owns a 41.32 acre parcel at the east end of the exception area and this parcel comprises the Wasco County Fairgrounds, which have existed there since the late 1800s.

Large farm land tracts predominate as one moves out from the exception area and adjacent parcels. Most of these parcels to the south, east and west are registered drycrops with the NRCS and have water rights exceeding 30 acres. A small subdivision is located farther north above the exception area. The White River Game Management Area lies to the northwest, but is separated from the exception area by the two rural tract parcels described above that abut the exception area at its northwest corner. The White River Game Management Area, which is over 9,800 acres, is owned and managed by the State of Oregon.

## III. APPLICABLE STANDARDS AND CRITERIA

The applicable law is found in the Statewide Planning Goals, Oregon Revised Statutes, Oregon Administrative Rules, Wasco County Comprehensive Plan, and the Wasco County Land Use Development Ordinance.

### A. Statewide Planning Goals

Goal 1—Citizen Involvement. The purpose of Goal 1 is to ensure the “opportunity for citizens to be involved in all phases of the planning process.” Wasco County has

incorporated opportunities in its Comprehensive Plan and the WCLUDO. Compliance with Goal 1 is demonstrated by compliance with the applicable Plan and WCLUDO provisions.

Public hearings were held before the Planning Commission on October 6, 1998, December 1, 1998, February 2, 1999, and March 2, 1999. Notice of the hearing was provided as required by WCLUDO Chapter 2.

Goal 2—Land Use Planning. Goal 2 is also satisfied by complying with the applicable provisions of the WCLUDO, which the Planning Commissions finds have been met. In addition, for the reasons set forth in the discussion below, the provisions of Goal 2 relative to exceptions have also been met. Therefore, Goal 2 is met.

Goal 3—Agricultural Lands. Goal 3 provides for the preservation of agricultural lands for farm use. The subject properties have been designated agricultural lands deserving of protection under Goal 3. The subject area is currently being used for rural residential uses not in conjunction with farm uses. Only one of the residences out of nine meets the requirements of Goal 3. In some cases, more than one residence exists on one parcel. The applicant's desire to continue their residential uses and partition off existing residential uses and a small number of additional residential parcels is not allowed under Goal 3. Therefore, an exception must be sought. Approval of the exception will exempt the subject properties from the strict application of Goal 3.

Goal 4—Forest Lands. Goal 4 is not applicable because the subject property does not contain lands designated as Goal 4 forest lands. In addition, although the subject properties do contain some forest cover, the soils are not rated for forest productivity. Goal 4 is met.

Goal 5—Open Spaces, Scenic and Historic Areas, and Natural Resources. None of the subject property has been identified or inventoried in the Comprehensive Plan as a Goal 5 resource. Goal 5 is met.

Goal 6—Air, Water, and Land Resources Quality. The proposal is consistent with Goal 6. The exception area is not located in or near a federal attainment area. The only change in use will be the possible addition of 2-3 residences in an area already committed to rural residential use. With the conditions of the "F-F(10)" zone Badger Creek Overlay Zone, no Goal 6 resources will be adversely affected. Goal 6 is met.

Goal 7—Areas Subject to Natural Disasters and Hazards. The exception area is not identified as a natural disaster or hazard area. To the extent that the Badger Creek floodplain is a hazard area, the Overlay Zone addresses development on the floodplain and this Goal is satisfied.

Goal 8—Recreational Needs. This Goal assists in siting of recreational facilities. No recreational facilities are proposed to be sited. To the extent that the White River Game Management Area is a recreational area, the proposal will not affect it.

Goal 9—Economic Development. This Goal addresses economic activities. The exception and rezone will not affect this Goal. To the extent it is implicated, the agricultural activities in the surrounding area are not impacted.

Goal 10—Housing. The exception area will provide additional housing opportunities consistent with this Goal.

Goal 11—Public Facilities and Services. Goal 11 requires the orderly and efficient arrangement of public facilities. The existing services and facilities are adequate for the proposal. Adequate public roads access the area—Fairgrounds and Badger Creek. Local fire and police services are provided by the rural fire protection district and the sheriff's office. Neither water nor sewer services are provided to the area, but are available on the subject properties. Only 3 additional residences will be allowed, making little if no impact on the local school system. All relevant public officials were contacted. In most cases, no response was received. With respect to fire protection, a concern was raised. The Planning Commission finds that that concern is addressed by the fact that the residential uses are already existing and that very limited additional development will be allowed. Goal 11 is met.

Goal 12—Transportation. The proposal will have little if any impact on the transportation system serving the exception area because there will be minimal increase in traffic generated by development that might occur as a result of the zone change. In connection with Goal 12, the county is required to apply the Transportation Planning Rule located at Chapter 660, Division 12 of the Oregon Administrative Rules. OAR 660-12-060 requires amendments to comprehensive plans that "significantly affect a transportation facility . . . assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility."

In this case, the facilities in question are Fairgrounds Road and Badger Creek Road. The proposed zoning and overlay will not significantly affect either of these facilities because at most 3 additional residences could be introduced to the exception area. The number of trips typically generated by a residential use is minimal and will not significantly impact these roads. Based on the foregoing, Goal 12 is met.

Goal 13—Energy Conservation. This Goal is met by application of development standards contained in the WCLUDO and the Overlay Zone.

Goal 14—Urbanization. The level of existing development and possible development does not constitute urban development. Goal 14 does not apply.

B. State Statutes and Administrative Rules

The applicable standard for evaluating a committed exception is found in Goal 2, Part II(b), ORS 197.732(1)(b) and OAR 660-04-028, which state the same test:

**"A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the**

**applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable.”**

The “uses not allowed by the applicable goal” are those uses enumerated in OAR 660-04-028. Cases prior to the 1996 amendments required that the applicant show that “all” uses allowed by the applicable goal are impracticable. This requirement was based on the language of the former rule. See, e.g., Johnson v. Lane County, 31 Or LUBA 454, 465 (1996); c.f. Brown v. Jefferson County, 33 Or LUBA \_\_\_, 517-18 (1997); see also, DLCD v. Yamhill County, 31 Or LUBA 488, 499 (1996). The focus is “generally, but not exclusively, on uses on adjacent lands.” 1000 Friends of Oregon v. Yamhill County, 27 Or LUBA 508, 515 (1994). Nevertheless, a committed exception “must be based on facts illustrating how past development has cast a mold for future uses.” Brown, supra, at 519 (citations omitted).

**OAR 660-004-0028(2) Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:**

- (a) The characteristics of the exception area;**
- (b) The characteristics of the adjacent lands;**
- (c) The relationship between the exception area and the lands adjacent to it; and**
- (d) The other relevant factors set forth in OAR 660-004-028(6).**

Characteristics of the Exception Area. The exception area includes some of the more prominent topographic features in the vicinity. On the north side, the exception area is dominated by Happy Ridge which separates the Coburn and Sheldon properties from the Justesen properties. The ridge is steep and rocky and comprised of volcanic rock. Even more steep is the ridge on the opposite side of the exception area which separates the south side of the exception area from the McAllister and Dodge properties. Both of these ridges are characterized by the presence of talus slopes scattered below the ridges. Talus slopes are also scattered throughout the exception area in association with the generally steep terrain. 89% of the soils in the area are Class VII or worse, and where soils are found, they are very shallow and rocky, and on steep terrain. Overall, the topography is quite steep, becoming moderately sloping towards the east as Badger Creek exits the canyon. There are a few isolated small level enclaves. Except with respect to a very small percentage of these level areas that are currently vacant, all remaining level areas are developed for the current residential and incidental activities.

Vegetation consists of indigenous species, with relatively sparse forestation by Ponderosa Pine and Scrub Oak. None of the soils in the exception area have a forest site index or woodland capability group delineated in the Wasco County Soil Survey.

Except for the sheep pastured by the Petersons, the area has no history of pasture usage or livestock grazing. Similarly, the area has no history of crop use because of the limited

tillable terrain even where there are Class III soils. Except for the sheep being pastured, no other agricultural activity exists in the exception area. Even the Class VII soils do not have any rating for agricultural use, except for the Tygh Series, but it is located where severe climactic conditions make its use for farm or forest purposes impracticable.

The use to which the exception area properties are committed is primarily residential, a use not allowed outright under Goal 3. Three of the parcels are in agricultural deferment, however: Tax Lots 700, 600 and 500. Tax Lot 700 is in deferment because the owners, the Gustafsons, were attempting for several years to run a hog operation and ran a few sheep on the property. The hog operation was located on the 3 acres comprising the Class III soils on their property. The hog operation ultimately failed financially because of the limited space that limited the size of the operation. The property is no longer being put to any farm use.

Tax Lot 500 is in tax deferment because the owners, the Petersons, pasture a few sheep on their property. However, it is not practicable for the Petersons to use their land for the primary purpose of making a profit from pasturing sheep given the terrain and limited space, and they have never done so.

Tax Lot 600 is in deferment but is not being put to any farm use.

Just because a parcel qualifies for tax deferment does not mean that farm and forest uses are practicable. Qualification for tax deferment is not based on the practicability of farm or forest use. Tax deferment status is irrelevant to farm or forest practicability and it should not be taken into account in determining practicability.

As stated above, the primary use of the exception area is residential and has historically been residential. Three of the dwellings are known to have preceded adoption of the Statewide Planning Goals (1973-74) and two are known to have preceded acknowledgement of Wasco County's Comprehensive Plan (1983). Only two are known to have been approved after adoption and acknowledgement of the County's Comprehensive Plan. The County's records indicate that the other one dwelling was constructed without application of the goals because the County has no record of them. The parcelization pattern is similar. Only one of the seven parcels was created after acknowledgement of the County's Comprehensive Plan, although no Goal 3 findings were made with respect to this parcel. Therefore, only one of the parcels in the exception area was created pursuant to Goal 3 findings.

The primary incidental uses to the residential use in the exception area have not been farm or forest uses. These incidental uses have also existed since prior to the application of the Goals. The most notable non-farm or forest use has taken place on the Coburn property where Coburn Electric, Inc., has been based since the early 1960s. The Coburns have historically provided an important and essential service to the surrounding agricultural wood products community. The local presence of Coburn Electric, Inc., has meant fast and convenient electrical service to farming operations in their time of need.

Two other properties contain outbuildings used for businesses owned or operated by the property owners, for storage of contracting equipment and supplies.

Finally, as shown on the table on page 1, the parcel sizes in the exception area range from 4.6 acres to 80.7 acres. The average parcel size is 33 acres, although only two of the parcels exceed 60 acres and only two others exceed 30 acres. The remaining three are under 15 acres. Given the predominant residential use and relatively small parcelization of the exception area, it is characteristic of a rural development pattern.

Characteristics of the Adjacent Lands. In sharp contrast to the exception area, the adjacent lands are primarily large tracts of irrigated farm land and grazing operations, each consisting of over 500 acres. The adjacent lands are level, have deep, well-drained soils, and are currently employed for farm use. Their historical use is also farm use.

Except for the Wasco County Fairgrounds property, the adjacent lands are geographically separated from the exception area by the topographical features of the exception area—namely the high ridges forming the Badger Creek canyon walls. The Fairgrounds property is located on the Badger Creek flood plain after it exits the canyon.

On the total 7,050 acres comprising the surrounding area, there are only 7 dwellings on 66 parcels. In contrast to the exception area, there is no sign of a rural development pattern on these lands. Rather, these lands appear to be well committed to agricultural use. This is further evidenced by the quantity of acreage in the NRCS dry crop rotation (Map E to October 6, 1998, Staff Report).

The existing adjacent uses are primarily large irrigated farm lands and grazing lands. The operations are conducted on parcels and holdings considerably larger than those in the exception area on farm units of 714 acres (McAllister), 590 acres (Dodge) and 673 acres (Justesen). These farmers have the land base to conduct their operations. These properties also have substantial areas of Class VI soils or better, and all of them have large areas that they can irrigate through perfected water rights.

One of the smaller adjacent parcels, the Davis property, used to contain an old mill. There is a photograph in the record of this mill, but it has not been used as such for over 50 years. Although not in the exception area, the mill was located on the exception area side of Badger Ridge. It likely ceased operation due to its inconvenient location relative to the large grain operations above it. Today, the Davis property is not in farm use and contains two residences.

The other two smaller adjacent parcels are located at the northwest corner of the May property and are actually owned by the Mays. The Mays chose not to include these properties in the exception area given their proximity to the adjacent resource uses and the buffer they provide between the exception area and the Game Management Area. Neither of these properties are improved, nor do they have any road access other than via the May property itself.

The Relationship Between the Exception Area and the Lands Adjacent to it. It is not necessary for the relationship between the exception area and the adjacent lands to be one

of conflict. See Wodarczak v. Yamhill County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 97-236, May 19, 1998) slip op. 10. Rather, the relationship between the adjacent lands and the exception area must render the enumerated farm and forest uses in the proposed exception area impracticable. See id.

As described above, most of the exception area is physically separated by prominent natural features from the adjacent lands. In fact, it is only on a map that these farm lands appear to be physically adjacent. In reality, the adjacent farmlands are at an elevation that is 500 to 800 feet higher than the exception area, separated from the exception area by the steep rocky cliffs and rimrock ridgelines. At the east end of the exception area, the Fairgrounds lands are separated from the exception area by Fairgrounds Road.

Because of this physical separation, there is no dependent or mutually beneficial relationship between the exception area and the adjacent lands. Similarly, because of the difference in terrain, soils, water rights, and lack of acreage commonly associated with large crops and pasture usage, there has been no joint use of the exception area and the adjacent lands. None of the owners and operators of the adjacent agricultural operations have chosen to reside in the exception area, likely because of this physical separateness.

Further, no agricultural activity occurs in the exception area that is incidental to, related to, or supportive of the surrounding agricultural uses. Only the electrical contracting services based on the Coburn property have historically supported the adjacent agricultural uses, and, conversely, the adjacent agricultural uses have supported Coburn Electric, Inc.

This absence of any physical or functional relationship between the exception area and the adjacent lands renders the uses enumerated in OAR 660-04-028(3) impracticable. As discussed below, the practicability of farm and forest use in the exception area is constrained by the steep topography, small parcel sizes, and generally (89%) adverse soils.

Absent the ability to operate agricultural uses in the exception area in conjunction with or part of such uses on the adjacent lands, it is impracticable to undertake those uses in the exception area. Farm uses in the area command large tracts of land that can be easily maintained and operated on an economy of scale. The inability of these adjacent large farm lands to be operated in conjunction with similar uses in the exception area renders farm uses impracticable.

With respect to forest uses, there are no adjacent forest lands that could be used in conjunction with the forested parts of the exception area to make any forest use of the exception area practicable. Otherwise, the same constraints on and characteristics of the relationship between the adjacent uses and the exception area render forest uses impracticable.

**OAR 660-04-028(6): Findings of fact for a committed exception shall address the following factors:**

(a) Existing adjacent uses;

- (b) Existing public facilities and services (water and sewer lines, etc.);
- (c) Parcel size and ownership patterns of the exception area and adjacent lands;

\* \* \*

- (d) Neighborhood and regional characteristics;
- (e) Natural or man-made features or other impediments separating the exception area from resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;
- (f) Physical development according to OAR 660-04-025; and
- (g) Other relevant factors.

Existing Adjacent Uses. OAR 660-04-028(6)(c) requires that the analysis of adjacent uses and parcel size and ownership patterns address the following:

“(A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the Goals were made at the time of partitioning or subdivision. Past land divisions made without application of the Goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors make unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. Resource and nonresource parcels created pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for land adjoining those parcels.

(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land’s actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operations. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocable committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownership are not likely to be irrevocably committed if they stand



alone amidst larger farm or forest operations, or are buffered from such operations.”

In summary, subsection (A) of this subsection of the rule states that only uses that were *not* created pursuant to the statewide planning goals can be considered in evaluating whether resource uses are impracticable on the subject properties, thereby irrevocably committing them to nonresource use.

Prior to the adoption of the goals in 1973, the surrounding area of 7,050 acres described in the October 6, 1998, Staff Report consisted of 50 parcels and five dwellings (excluding the approximately 9,800 acres owned by the State of Oregon and comprising the Game Management Area). Today, there are 60 parcels and 7 dwellings on the 7,050 acre area. These figures also do not take into account the two rural tracts abutting the northwest corner of the exception area, neither of which are improved.

The adjacent large farm uses on the Justesen, McAllister, and Dodge holdings pre-existed the adoption of the Goals in 1973. Therefore, they can be considered in evaluating the impracticability of resource use on the subject properties. The adjacent uses are large tract irrigated field and grazing operations. They are conducted on the relatively flat upland area surrounding the exception area. They are separated physically from the exception area by the steep cliff walls of Badger Canyon, and, as a consequence, lie 500 to 800 feet higher above sea level than the exception area. The only access between the exception area and these adjacent uses, except the Fairgrounds, is Badger Creek Road to Fairgrounds Road.

In addition to the adjacent large tract agricultural uses, there are three smaller parcels. One of them contains two residences and the other two are unimproved. None are in farm use.

The adjacent Fairgrounds was established in the late 1800s. This use obviously well precedes application of the Goals. The Fairgrounds sees approximately 20,000 to 30,000 visitors per year. Close to 5,000 of these visitors come for the annual County Fair. The remaining visitors come to use the camping and activity oriented facilities on the Fairgrounds. There is a fully equipped RV Park on the Fairgrounds. The Fairgrounds earned approximately \$28,500 in revenues during 1998 from its camping facilities. There are kitchen and bathroom facilities, and meeting rooms. These facilities are popular with the recreational users of the White River Game Management Area, which they access through the exception area. Hunters (bow and traditional rifle) appear to be the predominant users of Fairgrounds for activities in the Game Management Area.

Existing Public Facilities and Services. There are no public facilities for water and sewer, although each of the residential uses in the exception area has its own well and septic system. The exception area is served by the following public services: Wasco County Electric Cooperative, School District #1 for Maupin, Oregon, and the Tygh Valley Fire Protection District, which is a volunteer district.

Three public roads serve the exception area: Shady Brook Road, Fairgrounds Road, and Badger Creek Road. Badger Creek and Fairgrounds Road runs through this area from east to west. Their presence contributes to the commitment of the area to nonresource use because in many cases they define the ownership lines. Fairgrounds Road is located on rare level ground. Badger Creek Road is a steep and rough gravel road cut into the north canyon wall. Generally, the road system in the exception and surrounding area is limited, due to the topography of the area and development pattern of large tract farm uses. In fact, the road system in the exception area was developed primarily to access the forestlands farther to the West, closer to the Mt. Hood forests.

Parcel Size and Ownership Patterns. The parcel sizes and ownership pattern in the exception area were established prior to the requirement that the Goals be applied to land divisions. As shown in Exhibit H1 of the Staff Report, only one land division was made pursuant to the Goals in the exception area. This land division resulted in the separation of the Sheldon property from the May property along Badger Creek Road, when divisions were allowed based on separation by a road. A similar pattern is found in the adjacent area, but the difference in the parcel size patterns between the two areas shows that the pattern in the exception area supports a commitment to nonresource use.

The sizes of the parcels in the exception area range from 4 acres to 80.73 acres. Based on the County's records, it appears that only one parcel in the exception area ever exceeded 100 acres in size, but it was divided prior to application of the Goals. Under the current EFU/A-1 zoning, the minimum parcel size is 160 acres. These are, therefore, small parcels. In the adjacent area, the average parcel size exceeds 100 acres, and a number of parcels range from 300 to over 500 acres. The average parcel size and holding in the exception area is just 33.93 acres, a parcel size that does not qualify on its own in the EFU zone. This average size is in marked contrast to the adjacent holdings of over 500 contiguous acres by Justesen, McAllister, and Dodge. In addition, none of these figures take into account the White River Game Management Area that exceeds 15 square miles in size. The smaller adjacent parcels (Davis and May) are not in farm use.

In this case, parcel size alone is indicative of irrevocable commitment of the exception area to non-resource use. These are small parcels in separate ownership, in marked contrast to the parcel sizes and contiguous ownership pattern of the adjacent lands and surrounding areas. Moreover, each of these parcels is developed for residential use. In addition, the parcels are clustered in a large group. Although these roads were not designed specifically to serve residential uses in the exception area, neither were they designed to serve the agricultural lands above. Today, these roads are maintained County roads on which the residents of the exception area and visitors to the Game Management Area rely. They do not provide any connectivity between the exception area and the adjacent farm uses. These factors contribute to the irrevocable commitment of the exception area.

Finally, parcelization has not occurred in any way related to maximizing resource terrain. For example, the small flood plain at the west end of Badger Creek covers three separate distinct ownerships. There are no contiguous ownerships in the exception area. The historical lack of farm or forest use in the exception area bears out the impracticability of

putting these small parcels with limited quality soils and level terrain to any farm or forest use.

Neighborhood and Regional Characteristics. The exception area can be characterized as a rural residential neighborhood, which considers itself part of the town of Tygh Valley, which is only 1 ½ miles to the southeast. As described above, there are no farm or forest use activities within this neighborhood and there is no evidence of such uses historically. The Coburn parcel contains shop facilities for a company that provides electrical and communications services to the entire region. The adjacent farm and ranch uses rely heavily on the existence of this business to keep themselves up and running in the event of electrical problems. The Coburns are well acquainted with these adjacent farm and ranch operations and their company is often called in to assist with electrical repairs.

The region is more accurately characterized as agricultural, containing large tracts of farm and ranch lands, with small pockets of rural use. Residences are scattered far and wide, as indicated by the presence of only seven dwellings in the area adjacent to the exception area. As a result, there are no neighborhoods per se, until you reach the intermittent rural centers, towns such as Tygh Valley, Pine Hollow or Wamic, or other small pockets of non-agricultural development. The region relies on these rural centers and pockets for the incidental non-farm and non-forest uses and services they provide, as well as the additional housing, even though the lands are not inventoried as Goal 10 lands.

Natural Features or Man-Made Features Separating and Impeding Resource Use. The most significant natural features are the high cliffs surrounding the exception area that separate the exception area from the adjacent resource lands on two sides. These features effectively impede the practicable resource use of all or part of the exception area because they prevent any use of the exception area in conjunction with the adjacent resource uses. (As discussed below, the exception area is incapable of supporting resource uses on its own). In addition, these features impede resource use because they do not contain the quality and depth of soils or more level terrain needed for resource use.

The other prominent natural features of the exception area that impede resource use are the predominant steep and rocky slopes and lack of level fertile ground in the remainder of the exception area. What level ground exists has mostly been developed for residential use and is, therefore, committed to that use.

The road system also effectively impedes practicable resource use of the exception area because only one road, Badger Creek Road, provides access to the area from the adjacent farm lands. The route to Badger Creek Road from the adjacent farm lands is not direct, with the exception of the route from the Fairgrounds parcel which is not physically separated by any geographical features from the exception area. Thus, both the geographical features and the limited road system, alone or together, effectively impede resource use of the exception area because they do not allow the exception area to be used in conjunction with the adjacent resource uses.

Finally, Badger Creek itself impedes resource. One reason is because of the flash flood hazard it poses. As previously noted, most level ground is associated with the creek's flood plain. Consequently, it is the most desirable ground for crops, grazing or related facilities, but those activities and structures would be subject to the annual threat of flood damage. Another reason is because the Forest Practices Rules limit forest use activities near waterways such as Badger Creek.

Physical Development According to OAR 660-04-025. Physical development according to OAR 660-04-025 addresses whether the land is no longer available for the uses described in OAR 660-04-028(3). Existing physical development includes structures (residential and outbuildings), roads, sewer and water facilities, and utility facilities. Uses allowed by Goal 3 cannot be used to justify physical development.

The exception area is almost completely physically developed for residential use. None of the residential uses are permitted under Goal 3. Nine residences exist on 7 parcels, and each residence has associated access to Badger Creek or Fairgrounds Road, a septic system and well water system, and is connected to electricity. A tenth homesite has been prepared by the installation of water, electricity and a septic system, and is also not permitted by Goal 3. These homesites with their associated outbuildings cover most of the developable land in the exception area. As shown on the map attached to the proposed Badger Creek Overlay Zone, there is only enough remaining developable land for 3 additional homesites.

The Class III soils in the exception area tend to be found mostly under these existing residences and outbuildings.

Of the remaining land available for residential use and of the remaining undeveloped land, none of it can practicably be put to any resource use because it is too small, or otherwise physically constrained by the topography or poor quality soils.

Given that less than 11% of the exception area contains soils available for resource use, the existence of nine residential developments in the exception area contributes to the unavailability of land for resource use. Almost all of the residences and outbuildings are located on what limited level ground there is.

#### Other Relevant Factors.

The "other relevant factors" must "necessarily relate to why property otherwise suitable for resource uses is, for some intervening reason, rendered impracticable" for resource uses. Brown, supra, at 519. The factors enumerated below are discussed in more detail in the following section, but are set out here in brief.

Despite the presence of farmable soils, the preponderance of rocky, steep and erosion prone terrain makes farm and forest use of the exception area impracticable. Farm uses in this area require shallower slopes and the deeper soils associated with the shallower slopes and level lands in the adjacent areas, such as Juniper Flats to the south. The majority of the trees are located on the steep slopes, which are inaccessible to most types

of logging equipment, or adjacent to Badger Creek, a water source protected by the Oregon Forest Practices Rules.

Bringing in technology, energy and irrigation capital and improvements to make resource use of the subject property would come at considerable expense. This need for high capital and energy inputs to put the limited available terrain to resource use makes resource use of the exception area impracticable.

The lack of an historical connection with or assimilation into the adjacent resource uses has rendered resource use of the exception area impracticable. This is because in order for resource uses of the exception area to be practicable, much larger and better suited tracts were needed to make resource use practicable, let alone economically viable. Without the commitment or cooperation of the adjacent resource lands to making resource use work in the exception area, resource uses were simply not practicable. In addition, because of this lack of connection and assimilation, the exception area became committed to rural residential uses instead of resource uses.

The lack of historical farm or forest use of the exception area is another relevant factor that renders resource use of the exception area impracticable because it allowed nonresource uses to become established in the exception area leading to the predominantly residential pattern seen today in the exception area.

**OAR 660-004-0028(3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(1)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule. Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible". For exceptions to Goal 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable".**

- (a) Farm use as defined in ORS 215.203;
- (b) Propagation or harvesting of forest products as specified by OAR 660-33-120; and<sup>2</sup>
- (c) Forest operations or forest practices as specified in OAR 660-060-025(2)(a).

The rule does not require that these resource uses be impossible in the exception area, rather it requires that they be impracticable. Impracticable means "not capable of being carried out in practice." Webster's New World Dictionary, 2<sup>nd</sup> College Edition, 1980.

<sup>2</sup> The actual citation in the administrative rule is to OAR 660-331-0020, which does not exist. The Applicant's attorney contacted LCDC who advised her that the correct citation should be to OAR 660-33-120.

Capable means "having ability" or "able to do things well." Id. Ability means "being able" or "skill, expertness or talent." Id. Finally, "in practice" means by the usual method, custom or convention. Id.

Based on the foregoing, the county must evaluate to what extent the adjacent uses and other factors affect the ability of carrying out resource uses in practice in the exception area. The rule only requires evaluating whether the resource use can be carried out by the usual methods or customs. Consequently, just because a farming or forest use can be attained by methods that are not usual or customary does not mean that the farm or forest use is practicable.

Farm Use. ORS 215.203(2)(a) defines "farm use" as:

"the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof.

'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for humans or animal use.

'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows.

'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission.

'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.

'Farm use' does not include the use of land subject to the provisions of ORS chapter 321 [Timber and Forestland Taxation], except land used exclusively for growing cultured Christmas trees . . . ."

The first part of the definition of "farm use" uses the phrase "the *current* employment of land for the *primary purpose* of obtaining a *profit in money*." ORS 215.203(2)(a) (italics added). This statutory provision was originally enacted in 1967 together with provisions in Chapter 308 of the Oregon Revised Statutes as a legislative program to provide property tax relief for certain farm lands. 1000 Friends v. Benton County, 32 Or App 413, 425 (1978). Based on this legislative history, LUBA has rejected a county's use of a "commercial agricultural enterprise" standard to evaluate whether this rule is met and has pointed out that no profit need be obtained, rather the primary purpose must simply be for earning "money receipts." Brown, supra, at 521.

Based on the definition of impracticability and the language immediately above, the county's focus must be, therefore, on whether the current employment of the lands in the exception area for the primary purpose of generating any money is capable of being carried out in accordance with customary practices.

Raising, harvesting and selling crops. This is one of the predominant uses in the region, but one that is markedly absent from the exception area. Raising grass hay, alfalfa and sugar beets, common in the surrounding area, have no history in the exception area.

As pointed out by the property owners' expert, Frank Walker of Frank Walker & Associates, there are simply not enough soils of the quality needed to raise and harvest crops in the exception area. There are small pockets of thick soils that could support crops, but these pockets are isolated, in separate ownership, found in pockets of less than two acres, and often already developed for residential use. In addition, the terrain is mostly characterized by steep and rock slopes and what level terrain exists has been developed and historically committed to nonresource uses.

As pointed out above, none of the tillable soils in the exception area are contiguous to adjacent lands and available for use in conjunction with resource use on those lands. The adjacent lands have clearly established that the raising, harvesting and selling of crops is practicable in this region only on very large tracts with over 15 acres, and in most cases over 30 acres, of water rights. The adjacent uses do not rely upon or in any other way use the lands in the exception area in conjunction with resource use. The road system has never been developed to support such an arrangement and the topography of the area has hampered the viability of doing so. As a result, the adjacent uses as well as the other relevant factors have rendered this type of resource use in the exception area impracticable.

Feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees; dairying and dairy products. Cattle ranching is another predominant use in the region, but absent in the exception area. The only history of these types of farm uses in the exception area is the Gustafsons' failed hog operation. For several years they attempted to run a hog operation incidental to the primary residential use of their property. It was located on the only terrain not committed to residential use on their property—a relatively level area of approximately 3 acres along Badger Creek. They had outside partners who contributed financially to the operation. However, despite having earned money receipts from the operation, the Gustafsons finally had to sell off the livestock and close down the operation. The Gustafsons found that the available land was simply not large enough to make such a use worthwhile. In addition, the Gustafsons had to continue to hold full time jobs elsewhere to earn sufficient income to support the operation and their family, thus precluding making the hog operation the primary use of their property.

Where there are lands that could be used for pasturing, the grasses are insufficient because of the poor basal coverage resulting from the thin and rocky soils and arid conditions. Consequently, in order to put the exception area lands to use for the primary purpose of a use such as cattle ranching or chicken farming, considerable additional

capital and energy inputs would be required. Given the extent of additional inputs required relative to the usual manner in which feeding, breeding, management and sale of such operations are conducted, such a use in the exception area is impracticable.

The adjacent large tract resource uses further make breeding and management operations impracticable because they are physically separated from the exception area, thereby precluding any pooling of land and resources, and because they are committed to resource uses that are operated on an economy of scale precluding the incorporation or support of resource use of the small tracts in the exception area.

Any other agricultural or horticultural use or animal husbandry or any combination thereof, and the remaining "farm uses" described in ORS 215.203(2)(a). There is no evidence in the record that lands in the exception area have ever been used primarily for any of the farm uses enumerated in ORS 215.203.

Consideration has been given to the primary use of stabling and training horses for a profit. There is evidence in the record that an operation of this type requires a minimum of five acres of relatively flat ground. A significant portion would need to be flat for stables and riding rings. None of the properties in the exception area contain the requisite available ground and, therefore, none could support such an operation as a primary purpose. Similarly, there are insufficient lands available for raising fish, bird and other animal species as set out in ORS 215.203(2)(a). The extent of residential development would be incompatible with this type of use.

Almost any rural tract of land could be put to any of these farm uses, but the issue here is whether putting the land to farm use as its primary purpose is practicable. The evidence shows that it is not. There are inadequate quantities and availability of suitable soils. There is inadequate land available on which to grow or pasture crops or animals and inadequate land available to construct necessary facilities. The additional capital expenditures and inputs required are beyond the norm for the "practice" in the surrounding area and, even if not, render the use as the primary use for the land impracticable economically.

Part of the definition of "farm use" speaks to uses undertaken in conjunction with the uses enumerated in the other parts of the definition. As shown above, those uses are impracticable in the exception area. Consequently, there would be no reason to undertake any supporting uses. Even if the supporting uses were to be undertaken in conjunction with a farm use on adjacent lands, it would be impracticable to do so in the exception area because of the lack of physical connectivity between the two areas. Only the flat areas adjacent to the Fairground land could be used in conjunction with Fairground, uses, but those flat areas are already developed and committed to nonresource uses.

The adjacent uses render farm uses impracticable as the primary use of the land because the adjacent uses operate on a considerably larger scale that is not conducive to assimilating the small parcels with relatively minimal useable acreage into their operations. In addition, the adjacent uses are separated from the exception area



physically, further limiting the practicability of conducting farm uses customary to the area in the exception area. The adjacent uses make farm uses in the exception area impracticable because they are incapable of contributing to or supporting in any way farm uses in the exception area. This is primarily because of the physical features separating the two areas. This is also because the economics of using the exception area in conjunction with a farm use in the adjacent area are not there. The lack of fertile soils and flat terrain are markedly different and do not support the same types of uses to which the adjacent area is being put. The type of crops and livestock produced, equipment used, and farm practices employed in the adjacent area would be entirely different for less fertile soils, uneven terrain, small parcel sizes, and limited water availability. Supporting facilities located in the exception area would be difficult to reach and not near enough to farm operations. The only farm use that the exception area could support is a farm use on the Fairgrounds; however, as with the adjacent agricultural operations, the exception area could not provide additional pasture or cultivatable land. At most, it could provide land for support facilities, but that land is already developed and committed to other uses. In any case, the Fairgrounds is committed to many non-resource uses. Joint management of adjacent lands with the exception area is not an option.

The "current employment" of land for a farm use includes (a) land that has been planted in orchards, cultured Christmas trees or vineyards for at least the last three years; (b) land that is not useable as farm use land but which is adjacent to and in common ownership with farm use land; and (c) land constituting a woodlot that is less than 20 acres and is adjacent to and in common ownership with specially valued farm use land. ORS 215.203(2)(b).<sup>3</sup> None of the subject properties meet any of these definitions as none are or have been in orchards, cultured Christmas trees or vineyards for any period of time, including in the last three years, none are adjacent to and in common ownership with farm use land, and none are lands constituting woodlots adjacent to and in common ownership with specially valued farm land.

Propagation or Harvesting of Forest Products as Specified in OAR 660-33-120. The correct citation in this subsection is to OAR 660-33-120, not 660-331-0020.<sup>4</sup> OAR 660-33-120 states that propagation and harvesting of forest products may be an allowed use in an exclusive farm use zone, subject to any notice and hearing requirements of ORS Chapter 197 and subject to any additional limitation and requirements of the local jurisdiction.

A definition of "forest products" can be found in ORS 532.010(4), which states that forest products are "any form, including but not limited to logs, poles and piles, into which a fallen tree may be cut before it undergoes manufacturing, but not including peeler cores."

Many of the same reasons that make farm use impracticable in the exception area make the propagation and harvesting of forest products impracticable. As evidenced by the

<sup>3</sup> The other definitions of "current employment" of land for farm use in ORS 215.203(2)(b) are not relevant here.

<sup>4</sup> The Applicant's attorney stated that she had contacted DLCD for clarification and received this information directly from Mike Rupp at DLCD.

sparse forest cover and as explained by the Applicant's expert, Andrew Bryant of Environmental Service LTD, the soils and topography are not very friendly to forest species growth. None of the soils in the exception area have a forest site index or woodland capability group delineated in the Soil Survey of Wasco County, Oregon (Northern Part) USDA-SCS pub. 1982. In addition, the soils have a low water supply carrying capacity, classifying them as range land soils rather than forestland soils. Topographically, the steep slopes associated with the side walls of Badger Canyon and prevalent rocky terrain have little or no top soil to hold water and support root development.

The Applicant's expert also testified that the presence of trees in the exception area has primarily occurred since the 1880's, when the area was settled. Prior to that, trees were absent in the area because it was exposed to frequent broadcast burns set by local native tribes. The trees existing today do so because they are drought resistant and surviving in small pockets where the soil is deeper and better able to retain moisture. There are no old growth stumps in the area indicative of historical forest activities.

"Propagation or harvesting" of forest products contemplates the existence of tree species from which forest products can be derived. While some of the pine and oak trees could be harvested for forest products, it would be extremely impracticable to do so. First, many of the useable trees are found on the steep slopes or at the bottom of Badger Creek Canyon. They are harvestable only by helicopter. Given the small number of trees in the area, the economic and energy inputs would overwhelm anyone seeking to propagate and harvest forest products in the area. In addition, these types of operations cannot be undertaken with adjacent lands because none of the adjacent lands are forested.

The Oregon Forest Practices Rules, in particular the water protection rules at OAR 629-635, further limit the practicability of harvest activities. As noted above, most trees could be expected to grow around the moister and deeper soils associated with Badger Creek. However, the Forest Practices Rules prohibit and limit certain practices within the riparian management zone around the creek.

Existing development in the exception area renders the primary use of the exception area for forest propagation and harvesting activities impracticable because it limits the available area for tree propagation. It was noted that a small number of large older trees exist, but these are located immediately adjacent to the residential uses and have thrived because of the residential yard irrigation undertaken by the property owners.

The adjacent farm lands and uses render propagation or harvesting of forest products impracticable because they are committed to grazing and large crops. These adjacent lands are not only not in any type of forest use, they would not be available to support a harvesting operation because of the conflict that would create on the farmlands. As shown with respect to farm uses, propagation and harvesting of forest products in the exception area can be practicable only if the adjacent lands were available to support the use, and they are not.

Finally, the adjacent agricultural practices conflict with tree growth and forest resource improvements because of run off from irrigation that contributes to slope instability at the southern end of the exception area. In addition, spray drift and volatilization, although an accepted practice on farm land, will retard tree growth and would, therefore, additionally stress reforestation efforts.

Forest Operations or Forest Practices. The correct citation in this subsection should be to OAR 660-006-0025(2)(a), which states that forest operations or forest practices, including reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash, are allowed uses pursuant to the Forest Practices Act and Goal 4.

“Forest operation” is defined by OAR 660-006-000(6) to mean any commercial activity relating to the growing or harvesting of any forest tree species as defined in ORS 527.620([10]). “Forest tree species” do not include Christmas trees and hardwood timber. ORS 527.620(10). Forest practices are reforestation of forest land, road construction and maintenance, harvesting of forest tree species, applications of chemicals and disposal of slash. ORS 527.620(9). Forest lands 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 soils, air, water and fish and wildlife resources.” OAR 660-006-000.

Unlike with respect to the analysis of farm use in the exception area, the analysis of forest operations and practices do directly relate to the practicability of conducting commercial forest activities in the exception area. This interpretation can be made because the definition of “forest operation” in the administrative rule specifically contemplates any commercial activity relating to the growing or harvesting of tree species and forest lands are specifically defined by suitability to commercial forest uses.

Forest practices include reforestation on “forest land.” Forest lands are defined as “lands which are suitable for commercial forest uses.” OAR 660-006-000. Reforestation implies that trees have been removed or will be removed. As shown by the Applicant’s expert, it is impracticable to consider reforestation in the exception area. This is due not only to the limitations of the exception area itself, such as the limited available soils and terrain, but also because of the adjacent uses which are unavailable to support such efforts and which undertake certain practices that retard tree growth.

In addition, reforestation is impracticable because there is no forest operation that can be practicably carried out in the exception area. The Applicant’s expert provided substantial evidence explaining why forest operations (“commercial activities” as defined by administrative rule) are impracticable in the exception area. Forest practices and operations are impracticable for many of the same reasons that propagation and harvesting of tree species is impracticable in the exception area. There are no soils rated for forest use, predominantly steep slopes and insufficient water. As with farm uses, increased capital inputs might allow forest practices to be undertaken, but doing so would still require over 125 years or longer to make the practice commercially viable. In addition, given the fact that most of the level ground needed for these activities is located

adjacent to Badger Creek, the Forest Practices Rules strictly limit the type and extent of operations and practices that could be undertaken.

The adjacent uses make forest uses of the exception area impracticable because they provide no support for forest uses. The adjacent uses are large agricultural operations. They do not have the machinery or capital to undertake or support a marginal forest operation. In addition, as discussed above, certain agricultural practices may actually retard forest growth in the exception area.

Finally, although the White River Game Management area is not adjacent to the exception area, its proximity also contributes to the impracticability of forest propagation, harvesting, practices and operations. The state manages the wildlife management area for wildlife, not forest uses or forest resources. The Applicant's expert testified that excessive tree stocking levels, non harvest or minimal harvest of bug kill trees and the resulting fuel loads associated with down and dying timber would pose a risk to such forest uses in the exception area.

C. Wasco County Comprehensive Plan.

**Goals.**

Goal 1-- Citizen Involvement.

This Goal is met by compliance with the requirement that at least two public hearings be held concerning the applicant's proposal. The Planning Commission has held two hearings and the County Court will be holding at least one hearing. This Goal is met.

Goal 2 -- Land Use Planning.

Two Policies under this Goal are relevant. The first requires consistency with the Statewide Planning Goals. These are discussed above and the Planning Commission finds consistency. The second Policy, Policy 3, requires implementation through the revision process set out in the Comprehensive Plan. This process has been complied with as set forth below.

Goal 3 -- Agricultural Lands.

Policy 2, Implementation Measure B provides that "[n]on-farm uses permitted within the farm use zones adopted pursuant to ORS 215.213 should be minimized to allow for maximum agricultural productivity." This rezone does not affect agricultural productivity as discussed below relative to OAR 660-04-018(2). Policy 4 that requires the orderly and efficient conversion of agricultural land to urban land does not apply to this rezone because it is not converting the exception area to urban land as defined by Goal 14. In any case, the protection of the surrounding agricultural uses is assured by compliance with OAR 660-04-018(2).

Goal 4 -- Forest Lands.

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None of the exception area lands are designated as Goal 4 lands.

Goal 5 -- Open Spaces, Scenic and Historic Areas and Natural Resources.

There are no Goal 5 resources in the exception area. To the extent the rezone affects the nearby Game Management Area, compliance with OAR 660-04-108(2) and the Badger Creek Overlay Zone protect that use.

Goal 6 -- Air, Land and Water Quality.

No Goal 6 resources are adversely affected by this amendment and rezone. Compliance with the Badger Creek Overlay Zone and the applicable provisions of the WCLUDO will ensure that the Policies and Implementation Measures under this Goal are met.

Goal 7 -- Areas Subject Natural Disasters and Hazards. None of the exception area is located in an area identified as subject to this Goal. To the extent that the steep and rocky slopes and Badger Creek flood plan are areas subject to natural disasters and hazards, compliance with the Badger Creek Overlay Zone will ensure compliance with this Goal.

Goal 8 -- Recreational Needs.

There is testimony in the record that Badger Creek Road is used for recreational purposes for access to the White River Game Management Area. The rezone and plan amendment will not adversely affect this access. This Goal is met.

Goal 9 -- Economy of State.

The proposed rezone and comprehensive plan amendment will not adversely affect this Goal. The exception area is already committed to nonresource use. Compliance with the Badger Creek Overlay Zone will ensure protection and continued viability of the surrounding agricultural uses.

Goal 10 -- Housing.

The exception area is not part of the County's housing inventory. To the extent that the area does help the County meet its housing needs, the rezone and plan amendment will further this Goal by allowing the residential uses to remain as permitted uses and adding 3 new dwellings to the area.

Goal 11 -- Public Facilities and Services.

As discussed above, there are adequate public facilities and services already serving the exception area. The addition of 3 new residences in the area will not adversely affect these services.

Goal 12 -- Transportation.

As discussed above, the proposed rezone and plan amendment will not significantly impact the existing road system. Only 3 new residences are possible in the exception area which would not significantly affect the functional classification of the roads serving the area or increase traffic levels in or to the area.

Goal 13 -- Energy Conservation.

This Goal is met by application of the development standards contained in the WCLUDO and Badger Creek Overlay Zone.

Goal 14 -- Urbanization.

The level of existing development and possible development provided in the Badger Creek Overlay Zone does not constitute urban development or create urbanizable lands. Therefore, Goal 14 does not apply.

**Section XI(VIII).**

Section XI(VIII) of the County's Comprehensive Plan identifies the general criteria that must be considered for approval of a plan amendment. As set forth by the County Court in Exhibit B of the Big Muddy Ranch—Young Life Youth and Family Camp Exception (September 1997), these criteria are factors for consideration and not standards that must each be strictly met. Thus, the Planning Commission and County Court need only consider these criteria and determine whether they are generally satisfied. Further, as previously determined by the County Court, factors VIII(3) and VIII(5) relative to mistake and inventory change are generally more appropriate in a legislative plan amendment which often includes policy deliberations of a broader scale. For a quasi-judicial plan amendment of limited scope, such as this one, the other factors are more applicable.

**VIII.**

1. **The proposed amendment complies with the State of Oregon Statewide Planning Goals. Each Goal must be addressed or if not applicable, explained why.**

The Statewide Planning Goals and the Comprehensive Plan Goals are discussed above.

**If it appears that it is not possible to apply an appropriate goal to specific properties or situations then the applicant shall set forth the proposed exception to such goal as provided in Statewide Planning Goal #2, Part II. Compelling reasons and facts shall be given why an exception should be adopted including:**

- a. **Why the proposed use should be provided for; and**

The Applicant is seeking a zone change to the exception area that would reduce the minimum parcel size to 10 acres and that would allow residential uses that do not conflict

with resource operations. The Applicant has requested the Forest-Farm ("F-F(10)") designation with a minimum parcel size of 10 acres subject to an overlay entitled the Badger Creek Overlay Zone. The proposed uses should be provided for because the uses already exist and the exception area is committed to that use. Nonconforming uses are disfavored and the proposed exception and zone change would make the uses conforming. The proposed uses would be consistent with the existing residential uses and the development pattern in the subject area. No conflict between the uses in the subject area and the adjacent resource uses has been shown or exists. Minimization of conflict is adequately addressed in the Badger Creek Overlay Zone and application of the WCLUDO.

**b. What alternative locations within the area could be used for the proposed use; and**

There are no alternative locations for the proposed use within the exception area and none have been proposed. Most of the uses are pre-existing, and only 3 new homesites are proposed in the exception area. The adjacent parcels are in farm use and residential use of those parcels is not allowed under the current zoning.

**c. What are the long-term environmental, economic, social and energy consequences to the locality, the region or the State of Oregon from not applying the Goal or permitting the proposed use; and**

There are no quantifiable long-term environmental, economic, social and energy consequences of not continuing to apply Goal 3 to the exception area. The exception area is already committed to residential use. The Badger Creek Overlay Zone and application of other relevant WCLUDO criteria at the time of development will mitigate against any such adverse effects.

**d. How the proposed use would be compatible with other adjacent uses.**

The proposed use is pre-existing in the exception area. No evidence has been presented that the rural residential use of the exception area is incompatible with the adjacent resource uses. Compatibility will be ensured by application of the Badger Creek Overlay Zone.

The Water Resources Department and the Department of Fish and Wildlife have suggested in letters to the Planning Department concerning this application that a zone change to "F-F(10)" would "inflict additional pressure" on the winter range for deer and elk and on the Badger Creek flood plain and water resources. The Planning Commission finds that these opinions are based on unfounded speculation that numerous additional residences and recreation users would result from the zone change. First, the zone change in and of itself will not have any effects. Second, it is not physically possible to add more than 2 or 3 dwellings to the area given the topography, and the number is limited to 3 by the Badger Creek Overlay Zone. There is no evidence that the addition of

3 new residences will result in increased off road driving or other recreation users to the extent described in the letters. Finally, the White River Game Management Area is not adjacent to the exception area.

2. **There is substantial proof that the proposed change will not be detrimental to the spirit and intent of such goals.**

Based on the findings of compliance set forth above relative to the goals, the Planning Commission finds that the proposed change will not be detrimental to the spirit and intent of the goals.

3. **A mistake in the original Comprehensive Plan occurred or changes in the character of the neighborhood has occurred which warrant the proposed change.**

As found above, this factor is not applicable to a quasi-judicial zone change.

4. **There are factors which relate to the public need for healthful, safe and aesthetic surroundings and conditions.**

This factor requires consideration of factors that relate to the public need for healthful, safe and aesthetic surroundings. Application of WCLUDO development criteria and the Badger Creek Overlay Zone will ensure these factors are met by requiring septic system and well approval by the county, and by ensuring that subsequent development occurs in compliance with WCLUDO criteria that promote safety and aesthetic surroundings.

5. **There is proof of change in the inventories originally developed.**

As found above, this factor is not applicable to this quasi-judicial zone change.

6. **Revisions shall be based on special studies or other information which will serve as the factual basis to support the change. The public need and justification for the particular change must be established.**

The Planning Commission finds that the public need and justification has been established in the application and supporting documentation and that an adequate factual basis exists to support the plan amendment. The public need for the change is evidenced by the inconsistency between the existing uses and characteristics of the exception area on the one hand, and the resource designation on the other. Nonconforming uses are disfavored. The public need is further met by making these uses conforming.

- D. WCLUDO Criteria—Chapter 9—Zone Change and Ordinance Amendment

Section 9.020 of the WCLUDO allows zone changes to be granted “only if the following circumstances are found to exist:

- A. **The original zoning was the product of a mistake; or**



**B. It is established that:**

- 1. The rezoning will conform with the Comprehensive Plan; and,**
- 2. The site is suitable to the proposed zone;**
- 3. There has been a conscious consideration of the public, health, safety and welfare in applying the specific zoning regulations.”**

The Planning Commission finds that the criteria in WCLUDO Section 9.020(B) are met. As discussed above, the proposal conforms with the Comprehensive Plan. The site is suitable for the proposed use as evidenced by the existence of the proposed use and the lack of any conflicts with the adjacent uses. Finally, the public health, safety and welfare have been consciously considered in the zone change as evidenced by the provisions of the Badger Creek Overlay Zone and the Planning Commission’s consideration of the applicable statutes, administrative rules, and goals.

**E. Planning and Zoning Rule for Exception Areas.**

OAR 660-004-018(2) contains the applicable rule for planning and zoning in an irrevocably committed exception area. Uses must be limited to the following:

- “a. Uses which are the same as the existing types of land use on the exception site; or**
- b. Rural uses which meet the following requirements:**
  - (A) The rural uses are consistent with all other applicable Goal requirements; and**
  - (B) The rural uses will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and**
  - (C) The rural uses are compatible with adjacent or nearby resource uses.”**

Subsection (a) or (b) must be met in order for this criteria to be satisfied. The Planning Commission addresses subsection (b) because uses allowed under the “F-F(10)” zone and the Badger Creek Overlay Zone do not all meet the requirements of subsection (a).

Based on the findings set forth above concerning the applicable goals, the Planning Commission finds that the proposed zone designation together with the Badger Creek Overlay provides for uses that are consistent with the applicable goals.

The rural uses proposed in the exception already exist, and even though they preceded acknowledgement of the Comprehensive Plan and application of the resource protection goals, there is no evidence that these uses are causing the adjacent or nearby resource uses to become committed to nonresource use. The Planning Commission finds that the

strict limits on additional development and limited available development (3 new residences are possible) in the exception area will ensure that the exception area does not have this undesirable effect. The Planning Commission also finds that the physical characteristics and geographically restricted location of the exception area limit development and will prevent commitment of nearby and adjacent resource land.

Finally, the Planning Commission finds that the proposed and existing uses are compatible with adjacent and nearby resource uses. Except with respect to speculative concerns about the compatibility of the proposed uses with the Game Mangement Area, which the Planning Commission found to be unsupported, there is no evidence of incompatibility. Seven out of the nine homesites preceded application of the resource protection goals. Despite the fact that this development occurred without consideration of compatibility, these rural residential uses have existed alongside the adjacent and nearby resource uses. Testimony from adjacent property owners stated that the uses are compatible. Further, there is evidence in the record showing that the adjacent agricultural uses rely on the existence of the Coburns' electrical business to support their agricultural operations.

#### CONCLUSION

Based upon all of the findings of fact and conclusions of law set forth above, the Planning Commission recommends approval of the exception and zone change and recommends that the exception area be rezoned to "F-F(10)" together with the Badger Creek Overlay Zone and that the corresponding Plan, map and ordinance amendments be made.

Approved by the County Court this \_\_\_\_ day of \_\_\_\_\_, 1999.

\_\_\_\_\_  
JOHN C. MABREY, Judge

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Section DIVISION --BADGER CREEK LIMITED USE OVERLAY

A. Purpose

The purpose of the Badger Creek Limited Use Overlay is (a) to assure that the development and use of the Badger Creek exception area (adopted as part of the Wasco County Comprehensive Plan by Ordinance No. 99-112) occurs in a manner that is consistent with the purpose and intent of the Badger Creek Exception ("Exception") and (b) to limit uses and activities in accordance with the Exception.

B. Permitted Uses

1. Residential uses existing as of the effective date of this Ordinance shall be allowed to remain.
2. Existing residential dwellings may be replaced, altered or restored. Replacement may be to another place on the lot or parcel within the "Development Area" as shown on the Badger Creek Limited Use Overlay Map. The replacement dwelling shall be subject to the Property Development Standards of the "F-F(10)" Zone.

C. Conditional Uses

1. Additional single-family dwellings not in conjunction with farm or forest use only on sites identified as future residences on the "Development Area" as shown on the Badger Creek Limited Use Overlay Map.
2. Conditional uses shall be subject to the provisions of Chapter 5, Conditional Use Review of this code.
3. Home occupations which shall also be subject to Chapter 20, Site Plan Review.

D. Limitations

1. No partitioning or subdividing shall occur if any of the resulting parcels or lots are less than ten (10) acres in size.
2. All new structures not provided in conjunction with a forest or farm use shall be located within the "Development Area" as shown on the Badger Creek Limited Use Overlay Map.
3. Partitions shall be allowed only for parcels containing a homesite (either an existing or new dwelling homesite) that is identified on the Badger Creek Limited Use Overlay Map. Partitions around any homesite shall not result in the creation of an undevelopable remnant parcel.