

BEFORE THE LAND USE HEARINGS OFFICER  
CLACKAMAS COUNTY, OREGON

Regarding an Application for a Zone Change  
From Farm Forest 10-acre (FF-10) to Rural Area  
Residential 2-acre (RA-2).

Case File No: Z0277-23-Z  
(Cereghino)

**A. SUMMARY**

1. The applicant is Jessey Cereghino, represented by Garrett Stephenson, attorney at law. The owners of the subject properties are Gayleen D. Weiler, Joleeta K. Perkins, and Janice W. Kennedy, Trustee. The subject properties are located at 21418 S Highway 213, a location near the northeast corner of the intersection of Hwy 213 and Mitchell Ln, and the northeast portion of the site abuts the end of Lammer Rd. and is within the Hamlet of Beaver creek.
2. The legal description is T3S, R2E, Section 21, Tax Lot 00200, and T3S, R2E, Section 22, Tax Lot 00200, W.M. The subject properties are an approximately 111 acre site zoned Farm Forest 10-acre (FF-10) with a Comprehensive Plan designation of Rural (together referred to as the "Property"). The applicant's proposal seeks a zone change from the current FF-10 zoning to Rural Area Residential 2-acre (RA-2) to allow for a future subdivision of up to 55 lots for detached single-family home development. No development or subdivision is proposed as part of this application.
3. The County received numerous written comments and petitions from interested neighbors, the local Hamlet of Beaver creek CPO, public agencies, and other interested parties in advance of the hearing. Martha Fritzie, Principal Planner for Clackamas County, submitted a staff report on behalf of the County. The applicant's attorney, Garrett Stephenson, also submitted a written statement in advance of the hearing.
4. On September 28, 2023, the Hearings Officer conducted a public hearing to receive testimony and evidence about the applicant's proposal. County staff recommended approval of the zone change application subject to certain Conditions of Approval that were not contested by the applicant. The Hearings Officer approved the application consistent with the County's recommendation.

**B. HEARING AND RECORD HIGHLIGHTS**

1. The Hearings Officer received testimony and evidence at the September 28, 2023 public hearing about this application. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. The public hearing was conducted virtually over the Zoom platform. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the County's staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.

Agency Comments:

2. Martha Fritzie, County Planner of Record, submitted several additions as Exhibits in this matter, including: (a) County Tax Assessor maps showing the subject properties and vicinity, and Statewide Wetlands Inventory consisting of an aerial photo with overlays showing the approximate location of the subject properties and wetland areas identified by the Oregon Department of State Lands; (b) Board Order 2000-57, consisting of an interpretation of County Comprehensive Plan, Chapter 4, Rural Policy 13; (c) OAR 660-004-0040; (d) LUBA 2006-218 & 2006-219 (*Ocean Shores v. Curry County*); and, (e) Clackamas County HO Decision Z0475-22-Z.
3. Gordon Howard of the Department of Land Conservation and Development (DLCD) submitted comments that do not necessarily express opposition to the proposal, but are focused on Statewide Planning Goal 14, *Urbanization*. The letter explains the reasons why DLCD staff disagrees with the Applicant and County Staff about whether an exception to Goal 14 would be required to change the zoning designation of the subject property. This issue is discussed in detail in the County’s staff report. In their September 11, 2023 letter (Exhibit 4) DLCD staff do not necessarily oppose or support the application itself, but focus on Statewide Planning Goal 14, *Urbanization* and recommend that the subject property retain the existing and effective FF-10 zoning, which requires a minimum of ten acres for new land divisions. The letter notes that the subject property is part of a rural residential exception area designated “Rural” in the County’s Comprehensive Plan, and the applicant is proposing to re-zone the subject property from FF-10 to RA-2, which requires a minimum of two acres for new land divisions.
4. The September 11, 2023 letter explains the reasons why DLCD staff disagree with the applicant and with County staff regarding the proper application of Goal 14, asserting that an exception to Goal 14 is necessary in this case. Specifically, they assert the analysis by the applicant and County staff is incorrect, pointing to DLCD’s interpretation that: “While the effective zoning of FF-10 is consistent with the provisions of OAR 660-004-0040(6) and is deemed compliant with Goal 14, changing the effective zoning to RRFF-5, which would amend the applicable requirements regarding minimum parcel size to allow a greater amount of development, triggers OAR 660-004-0040(7). DLCD staff cite the following referenced sections of OAR 660-004-0040:
  - (6)(a) A rural residential zone in effect on October 4, 2000 shall be deemed to comply with Goal 14 if that zone requires any new lot or parcel to have an area of at least two acres, except as required by section (8) of this rule.<sup>1</sup>
  - (b) A rural residential zone does not comply with Goal 14 if that zone allows the creation of any new lots or parcels smaller than two acres. For such a zone, a local government must either amend the zone’s minimum lot and parcel size provisions to require a minimum of at least two acres or take an exception to Goal 14. Until a local government amends its land use regulations to comply with this subsection, any new lot or parcel created in such a zone must have an area of at least two acres.<sup>2</sup>

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<sup>1</sup> 660-004-0040(6)(a)

<sup>2</sup> 660-004-0040(6)(b)

- (7) After October 4, 2000, a local government's requirements for minimum lot or parcel sizes in rural residential areas shall not be amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14 pursuant to OAR chapter 660, division 14, and applicable requirements of this division.
5. The letter from DLCD staff also discusses references in the applicant's provided materials to the Land Use Board of Appeals (LUBA) decision in *Ocean Shores Coalition v Curry County* from 2007. They makes several points concerning that decision including the following statements:
- The case did not involve re-zoning any specific property. Instead, it was about an amendment to the county's one existing rural residential zoning district.
  - The county's one existing zoning district applies to all of its rural residential areas. Prior to 2007 it offered two minimum parcel size options: 5-acres and 10-acres, that were applied based on criteria included in the county's comprehensive plan.
  - The county comprehensive plan also includes criteria for adjusting the minimum parcel size parcel size applying to a rural residential area from 10 acres to 5 acres while maintaining the single county rural residential zoning district.
  - The challenged decision sought to add a third minimum parcel size option of 2-acres to the county's single rural residential zoning district. The county's proposal included express language that the new 2-acre option could not be available without taking a Goal 14 exception.
6. DLCD staff acknowledge in their submitted comments their agency's "understanding that the petitioners [in *Ocean Shores Coalition v Curry County*] challenged the county's decision adopting the amendment based on a contention that, among other things, the county had erred by not adopting language requiring a Goal 14 exception for the 10-acre option down to the 5-acre option offered by the county's single rural residential zoning district." DLCD staff state that DLCD's interpretation of the *Ocean Shores Coalition v Curry County* decision is that it applies only to a very narrow set of circumstances that is not applicable to this case. They state it is DLCD's understanding of this LUBA decision to:
- Agree with the county that adding the third minimum parcel size option was acceptable because the express text of the added language required a Goal 14 exception before it could be applied.
  - Disagree with the Petitioners that a Goal 14 exception was necessary to apply the 5-acre zoning to existing exception areas that had been subject to the 10-acre option, because the county's program (zoning district and comprehensive plan provisions) were acknowledged to be in compliance with Goal 14. Put another way, this type of activity conducted within the existing acknowledged zoning district and guided by existing and acknowledged comprehensive plan provisions would not result in requirements for minimum lot or parcels sizes in rural residential areas being amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14.
7. The Oregon Department of Transportation (ODOT) submitted a comment letter noting that the applicant's traffic analysis found that, with mitigation, the proposal would be consistent with the Transportation Planning Rule (TPR) and transportation safety standards required for

the zone change. ODOT recommends those mitigation items be conditions of approval. County Engineering staff submitted comments concurring with these conclusions.

8. The Staff from Department of State Lands (DSL) submitted comments that noted the applicant's wetland delineation has been concurred with but requested additional information to make a determination that no further DSL review or permitting is required.

**Public Comments:**

9. The County received eleven written comments (letters and emails) and voicemail from the members of public through the date of the hearing, and all were in opposition to the proposed zone change. Two of these comment letters contained petitions opposing the proposal: one signed by 48 residents in the Forest Creek Park subdivision (immediately north of the subject properties) and one with two petitions signed by over 46 residents of S Lammer Rd and S Carmellia Ct area (immediately east of the subject properties). One of the public comment letters was submitted by Tammy Stevens on behalf of the Hamlet of Beaver Creek CPO.
10. Major issues raised included traffic congestion and safety along S Highway 213; traffic safety on S Lammer Rd and at the intersection of S Lammer and S Beaver Creek Blvd., both in terms of access safety and the ability to evacuate the area in an emergency; potential negative environmental impacts to Beaver Creek, wetlands and wildlife habitat; availability of adequate water supply, and meeting surface water conveyance requirements.
11. Illustrative written public comments received through the date of the hearing include:
  - o Tammy Stevens submitted a written statement on behalf of the Hamlet of Beaver Creek CPO, opposing the proposal and describing concerns with development of rural areas, especially with traffic congestion along Highway 213 and its intersections with Beaver Creek Road and Redland Road. Among other comments: "Testimony was received by a gentleman who drives a school bus. His concerns was the extreme difficulty he has on a daily bases [sic] entering Hwy 213 as a result of congestion." Also: "The transportation study was completed in November 2021 during a pandemic when traffic levels were lower. A study with recent impacts would provide a more accurate analysis and without current and accurate information, a zone change should not be considered." In Ms. Stevens' letter, the CPO points to County Comprehensive Plan goals for rural lands, essentially contending the subject properties should be preserved as larger lots offering timber and agricultural uses and asserting that "This 111-acres has been in agricultural production for decades offering space, wildlife viewing, and a quiet and rural environment for those living near and driving through the area." The CPO also points to concerns with surface water management and flooding, and other potential environmental impacts such as impacts to wildlife, and quality of ground water.
  - o Local resident Dianne Roland submitted a petition signed by 48 Forest Creek Park residents stating: "The **number one concern** [*emphasis in original*] is the developer proposed a new access road to Hwy 213. It is stated a new road and access would be between Mitchell Lane and the border of Forest Creek park. Mitchell Lane would become an emergency only travel road. The Oregon Department of Transportation has not signed off on allowing a new access in order for the developer to build a road. The very general

plan shows a suggestion of this road but it is hard to determine exactly the location. Until ODT [sic] agrees to a Hwy 213 definite access point for this future subdivision, we are respectfully are **opposed** [*emphasis in original*] to the zone change from FF10-10 to RA-2 acre.”

- Local resident Scott Paskill submitted a petition signed by 46 residents of S Lammer Rd and S Camelia Ct. area, opposing the proposal and citing traffic and wildlife impact concerns. Among other things, the petition states: “We the undersigned DO NOT [*emphasis in original*] support lots smaller than 10 acres and ABSOLUTELY DO NOT [*emphasis in original*] support connecting any roads between S. Lammer Road and the property being subdivided at 21418 S Hwy 213 and Mitchell Ln.”
- Local resident Marianne Schecklman submitted written comments opposing the proposal and describing the quality of rural life of her neighborhood, including the statement: “We are very concerned about the loss of the wetland area along Beaver creek as a safe corridor and clean water source for he locate wildlife.”
- Local resident Robert Rubitschun submitted written comments opposing the proposal and describing concerns with local area traffic, including the statements: “Highway 213 is already overcrowded and is frequently backed up for miles. Accidents are common on the stretch of road that would be impacted by this land use change. This section of highway requires major improvements to accommodate the current peak-hour use and will likely get worse once ODOT begins tolling of I-205.” Mr. Rubitschun states that the residents of his neighborhood would not oppose the proposed land use changes if accompanied by adequate road changes that would mitigate their concerns, making several suggestions, including suggestions for traffic lights and a left-hand turn lane for the Highway 213 access to their neighborhood. Mr. Rubitschun submitted additional written comments suggesting the developer block off Mitchell Lane traffic from Highway 213, and extend Mitchell Lane further south to connect to Leland Road making Leland Road the only entrance and exit to the proposed development area.
- Local residents John and Shawna Salisbury submitted written comments opposing the proposal and describing concerns with impacts to their neighborhood, including the statements: “These zoning laws were intended to protect the quality of life in rural areas and to prevent urban sprawl.” They also assert: “Additional houses and traffic would decrease the financial value of our house and neighborhood.”
- Local residents Kevin and Katrina Day submitted written comments opposing the proposal and describing concerns with safety, emergency services (including in the event of natural disasters/evacuation) and infrastructure. Among other things, they contest the adequacy of the traffic study findings submitted in this matter, stating: “Traffic study findings are inconsistent with the actual conditions and incidents that occur along this stretch of highway 213. Study is inadequate as to the actual trips as observed and incurred by residents of Mitchell Lane.” Also, “The report does not adequately reflect the number of accidents that occur each year on this stretch of Highway, nor does the study accurately reflect the amount of activity and usage at HWY 213 & Mitchell Lane.”
- Local residents Heidi and Mike Schmidt submitted written comments opposing the proposal and describing concerns with local traffic congestion and particularly emergency access, stating: “Another major concern to point out is that during the fires a few years ago, this entire Beaver creek area was a parking lot during the evacuation process. It took our family 4 hours during an evacuation to drive a route that usually took 15 minutes.

## ***Discussion of County Staff Report***

12. At the hearing County Principal Planner Martha Fritzie shared a PowerPoint presentation and discussed the County's staff report reviewing this application, discussed several related exhibits, and discussed the County's recommended approval of the application subject to Conditions of Approval.
13. Ms. Fritzie noted that several neighbors submitted written comments in advance of the hearing, as did the applicant's attorney, with the public comments from neighbors largely opposing the proposed zone change and raising issues including congestion and safety along S Highway 213, traffic safety on S Lammer Rd and at the intersection of S Lammer Rd and S Beaver Creek Blvd., and potential negative impacts to Beaver Creek, wetlands, and wildlife habitat.
14. Ms. Fritzie shared a slide showing the site location and zoning for the Property and surrounding area, noting the Property's location along Highway 213 approximately 0.95 miles south of the city of Oregon City and approximately 0.90 miles NW of the unincorporated community of Beaver Creek. Ms. Fritzie pointed to the Property's current FF-10 zoning, and the surrounding zoning of FF-10, RRFF-5, RA-2 within ½ mile, and RA-1 within the unincorporated community of Beaver Creek. Ms. Fritzie also shared a slide showing an aerial view of the Property, with a wetland delineated in the western portion (approx. 0.89 acres), steep sloped (>20%) in the northeastern portion, and Beaver Creek (a regulation fish-bearing stream) in the northeast portion.
15. Ms. Fritzie shared a slide noting relevant polices and criteria, including Statewide Planning (SWP) Goal 12, *Transportation* and Goal 14, *Urbanization*, County Zoning and Development Ordinance (ZDO) Section 1202 (Zone Change), and Section 1307 (Procedures), as well as County Comprehensive Plan Goals & Policies, Chapter 2 (Citizen Involvement), Chapter 3 (Natural Resources & Energy), Chapter 4 (Land Use), Chapter 5 (Transportation), and Chapter 11 (The Planning Process).
16. Ms. Fritzie shared a slide and provided discussion concerning SWP Goal 14, *Urbanization*. Ms. Fritzie pointed out that OAR 660-004-0040 addresses the application of SWP Goal 14 specifically to rural residential lands and provides direction about whether an exception to Goal 14 is needed to change zoning. Ms. Fritzie noted that, even if no exception is warranted under OAR 660-004-0040, Oregon case law requires a determination whether the proposed use is "urban" or "rural" noting further that any "urban" development on "rural" lands needs an exception to Goal 14. Ms. Fritzie noted that OAR 660-004-0040: requires a minimum lot size of at least 2 acres for new rural residential areas; recognizes that some jurisdictions were already acknowledged to comply with Goal 14, and; identifies when an exception to Goal 14 is required for a change in "a local government's requirements for minimum lot sizes in rural residential area."
17. Ms. Fritzie also shared a slide and provided discussion of differing interpretations of goal exception requirements under OAR 660-004-0040, pointing to subsection (7) "*After October*

4, 2000, a local government's requirements for minimum lot or parcel sizes in rural residential areas shall not be amended to allow a smaller minimum for any individual lot of record or parcel without taking an exception to Goal 14 pursuant to OAR Chapter 660, division 14, and applicable requirements of this division." Ms. Fritzie pointed to the LUBA case interpreting this provision (Curry County, 2007), quoting: "While the text of OAR 660-004-0040(6)<sup>3</sup> could be clearer, we believe it refers to the amendment to allow a smaller minimum lot size and does not refer to an existing acknowledge zoning ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size in the RR zone without an exception."

18. Ms. Fritzie discussed interpretations of OAR 660-004-0040 by staff, County Counsel, the Hearings Officer, and the Applicant, referencing Exhibits 2, 3, and 16. Ms. Fritzie pointed to these interpretations as supporting a finding that: a Goal 14 exception is not always required for rural residential zone changes and is not required in this case; the County is acknowledge to comply with Goal 14; the process and criteria to change zones/minimum lot sizes within the Rural designation in the County's Comprehensive Plan has not changes, and; it is not functionally or substantively different than Curry County. Ms. Fritzie also shared a slide and provided discussion of the interpretation of OAR 660-004-0040 by DLCD, referencing Exhibit 4 submitted by DLCS staff. Specifically, she notes that DLCD staff assert that a Goal 14 exception is required; they do not believe that the "carve out" for Curry County applies to Clackamas County, and; they point out that Curry County's Plan and rural residential zoning is structured differently.
19. Ms. Fritzie shared a slide and provided discussion concerning factors to consider in determining whether zoning for residential lands may be considered "urban" or "rural" use, pointing out that while 1 acre lots are "urban" and 10 acre lots are "rural" there are no bright lines for lot sizes in between. Ms. Fritzie pointed to factors to consider per LUBA and other case law, including: public facilities and services; potential impacts to nearby UGB; use appropriate for, limited to needs of rural area to be served, and; intensity of use. Ms. Fritzie states that, based on these factors, the County finds that the proposed use is "rural." Ms. Fritzie also presented staff findings with respect to ZDO 1202.03(A) that the proposed zone change is consistent with the applicable goals and policies of the Comprehensive Plan. Specifically, that Chapters 2 & 11 procedural and coordination policies and requirements have been followed for this application, and with respect to Chapter 5 requirements that the zone change comply with the Transportation Planning Rule (TPR), SWP Goal 12, referencing findings that ODOT and Transportation Engineering (TE) staff confirm compliance with TPR.
20. Ms. Fritzie shared a slide and provided discussion concerning staff findings for Comprehensive Plan Chapter 3 for wetland and hazard areas. Ms. Fritzie pointed to Policy 3.F.1...*prevent disturbance of natural wetlands (marshes, swamps, bogs) associated with river and stream corridors*. Ms. Fritzie noted that this wetlands policy was adopted so that the County would review significant developments – including zone changes – to assure consistency with Goal 5 for wetland resources. Ms. Fritzie noted there are 0.89 acres of mapped wetlands on the Property, discussing how the applicant demonstrates how

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<sup>3</sup> The referenced text is now found in OAR 660-004-0040(7).  
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development can occur outside the wetlands, with staff finding that the policy can be met with condition of approval that: “Future land division required to place delineated wetlands in “development restricted” area or tract.” Ms. Fritzie pointed to Policy 3.L.1 *Apply appropriate safeguards to development on organic/compressible soils, high shrink-swell soils and wet soils with high water table (as denied in DOGAMI Bulletin No. 99) to minimize threats to life, private and public structures/facilities.* Ms. Fritzie noted that Bulletin 99 (B99) map identifies wet soils in general wetland area, and the wetland delineation further refines B99 map, again noting that this policy can be met with the development restrictions condition.

21. Ms. Fritzie pointed to staff findings with respect to Chapter 4: policies for the application of an RA-2 zoning district. Ms. Fritzie noted that pursuant to policy 4.MM.11.1, *the RA-2 zoning district shall be applied when all of the following criteria are met:*
  - 4.MM.11.1.a. *Parcels are generally two acres or smaller*
  - 4.MM.11.1.b. *The area is significantly affected by development.*
  - 4.MM.11.1.c. *There are no natural hazards, and the topography and soils are suitable for the location of homes.*
  - 4.MM.11.1.d. *A public or private community water system is available.*
  - 4.MM.11.1.e. *Areas are in proximity or adjacent to an Unincorporated Community or incorporated city.*
  
22. Ms. Fritzie shared a slide and discussed staff findings with respect the application of policy 4.MM.11.1 and the proposed RA-2 zoning for the Property, noting that within ¼ mile of the subject site: a simple majority of parcels are “2 acres or smaller”; 72% of all parcels are <2 acres, and; 81% of those parcels are developed. Ms. Fritzie described staff findings for other development in the area, noting subdivisions with lots ranging from 8,000 to 20,000 square feet, nearby golf course, churches, distillery, and veterinary clinic. Ms. Fritzie also shared a slide with additional staff findings concerning the proposed RA-2 zoning, noting staff found no hazard areas such as floodplain or mapped landslides. She pointed to findings concerning some steep slope on site, but noted this area will not be developed and will be within the future restricted development area. Ms. Fritzie noted there will also be no future development on wet soils (the delineated wetland), with the remaining soils found suitable for development. She noted that public water is available to serve the site, and the site is approximately 1 mile from the city of Oregon City and from the unincorporated community of Beaver creek. Ms. Fritzie stated that, based on these findings, staff found the proposal consistent with the relevant Comprehensive Plan policies.
  
23. Ms. Fritzie shared a slide and provided discussion concerning ZDO findings for Section 1202.03(B), which requires demonstration that any needed public services are available and sufficient for development under the proposed new zoning district. She noted that there is no public sewer system available, but the applicant had submitted preliminary statements of feasibility for surface water management and water service (Clackamas River Water). With respect to staff findings for ZDO Section 1202.03(C): *The transportation system is adequate and will remain adequate with approval of the proposed zone change...* and ZDO Section 1202.03(D): *Safety of the transportation system is adequate to serve the level of development anticipated by the zone change...* Ms. Fritzie pointed to findings by ODOT and County Transportation Engineering confirming the system is adequate for the proposal, and findings



by ODOT and County Transportation Engineering confirming that, within mitigation, safety is adequate. Specifically, the proposed mitigation (as conditioned) includes left turn land on the southbound Highway 213 approach to the site access; storage length of 100 feet for the southbound left turn land on Highway 213, and; right turn deceleration lane on the northbound Highway 213 approach to the site access.

24. Based on staff analysis as discussed, Ms. Fritzie stated it is the County's position that the proposal does not need an exception to Statewide Planning Goal 14 and with conditions, the proposal meets all applicable zone change criteria. Ms. Fritzie stated that County staff recommends approval of Z0277-23-Z subject to recommended Conditions of Approval, including Highway 213 modifications, that future development is prohibited in delineated wetlands, slopes over 20%, and within 100 feet of Beaver Creek.

### ***Applicant Comments***

25. The applicant's attorney, Garrett Stephenson, appeared at the hearing and made a statement reiterating applicant's position that a Goal 14 exception is not required, referencing LUBA's decision in *Oregon Shores Conservation Coalition v. Curry County* (Order, LUBA Nos. 06-218 and 06-219, Mar. 20, 2007). Mr. Stephenson also referenced the factors determining "urban" vs. "rural" uses, pointing to the Oregon Supreme Court's decision in *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986). Mr. Stephenson pointed to the applicant's proposed entrance on page 94 of Exhibit 2 (Exhibit 2, page 4 of 7 on the original application), describing the proposed access as directly across from the emergency access road for the golf course, with emergency access only to S Mitchell Lane. Mr. Stephenson also pointed to the memorandum he submitted as Exhibit 16 with an excerpt from the application showing the areas in which development would be prohibited (areas within 100 feet of Beaver Creek or within the areas of 20% or greater sloped that surround Beaver Creek), while pointing out that the application here is for a zone change, and not for a subdivision.

### ***Public Comments***

26. Mike Patterson is a neighbor, who sought clarification concerning a referencing in the application to closing Mitchell Lane. The applicant, Mr. Cereghino, answered the question directly stating that the reference is an error, that the intention is to provide emergency access to the anticipated subdivision on the Property to Mitchell Lane via a locked access gate.
27. Paul Edgar is an interested citizen residing in Oregon City. Mr. Edgar provides civic service participating on a Community Action Board and Historic Review Board, and points to the lack of affordable housing, particularly smaller housing units, and recommends policy work towards creating access to more affordable housing. Mr. Edgar recommends imposing conditions of approval on new development requiring smaller, affordable housing units.
28. Tammy Stevens is a board member of the Hamlet of Beaver Creek CPO, provided testimony at the hearing, in addition to a written statement she submitted on behalf of the CPO. Ms. Stevens describes traffic congestion on Highway 213, asserting that the local intersections for

Beavercreek and Redland providing access to Highway 213 in the vicinity of the subject property are already failing. Ms. Stevens relates the testimony of a school bus driver who provided input at a CPO meeting discussing this proposal, also describing the difficult challenge of area traffic and the extreme difficulty he has on a daily basis entering Highway 213 because of the congestion. Ms. Stevens contends that the traffic infrastructure is failing, needs improvements, yet none are planned. She reports that the CPO board and attending citizens voted unanimously to recommend this proposal be denied. Ms. Stevens also requested that the record be held open for two weeks to allow submission of additional written statements and evidence for consideration in this matter.

29. Diane Roland is a neighbor residing in the nearby Forest Creek community of homes built in the 1970s. Ms. Roland is opposed to the application, and submitted a petition in advance of this hearing with 46 signatures of area residents also in opposition to this proposed zone change. Ms. Roland points to the access to Highway 213 as her main concern, describing the existing traffic challenges, reporting drivers already have to wait for someone to let them access Highway 213 from her neighborhood's access point. Ms. Roland asserts that the additional 518 daily vehicle trips that can be anticipated from development following approving this zone change proposal will make it worse. Ms. Roland also contends that the proposal fails to provide adequate protection for wildlife along Beaver Creek.
30. Scott Paskill is a neighbor residing nearby on Lammer Road. Mr. Paskill agrees with the comments by Tammy Stevens and the Beavercreek CPO. Mr. Paskill states that he is opposed to this application, along with many other area homeowners. He describes Beaver Creek as a fish-bearing stream, with steep slopes and an old railroad. Mr. Paskill is very concerned with the potential traffic increase, particularly with the Lammer Road access onto Highway 213, describing this intersection as an existing hazard with accidents and damage to the adjacent property owner's fence. He describes the area as largely developed with homes building in the 1970s and earlier, and describes safety hazards already facing older pedestrians walking along these roads. Mr. Paskill expressed concern with not having Lammer Road connected to any new development.
31. Steve and Lori Rheinberger are neighbors residing in the nearby Twin Cedars community. They are opposed to this proposal, and expressed concerns with the safety of the transportation system in the area. Mr. and Ms. Rheinberger agree with the statements submitted by the CPO in opposition to this proposal. They also describe their experience evacuating the area approximately three years ago due to fires in the area, and how the traffic was so heavy they were unable to get from Mitchell Lane onto Highway 213, the only exit from their neighborhood.
32. Laurie Kimmell is a neighbor residing nearby on S. Dales Ave. Ms. Kimmell opposes this application and also submitted a written statement in addition to her testimony at the hearing. Ms. Kimmell is an active member of her community, serving on her HOA board for six years and acting as president. She disputes several statements in the application and staff report, contending that descriptions of the Property as "surrounded by churches" are not accurate, asserting there is actually just one neighborhood church, with others at least 1-2 miles away. Ms. Kimmell disputes the applicant's traffic study, asserting that it was not conducted during

peak traffic hours and the study is skewed. Ms. Kimmell also describes the access intersections onto Highway 213 as “failed” and describes Highway 213 as “a parking lot.” Ms. Kimmell references the wildfires that impacted the area a few years ago, and evacuation issues related to traffic on Highway 213. She describes issues with the access onto Highway 213 from Lammer Road, asserting it has poor sight distance, with speeding issues particularly on Fridays and weekends, and contending the applicant’s crash data for this intersection is incomplete. Ms. Kimmell also asserts that there are flooding issues in the area due to a high water table. Ms. Kimmell points to Goal 3 of the County’s Comprehensive Plan, particularly to preserve farmland, describing the Property as suitable for farmland and grazing.

33. Prior to ending the public hearing and closing the record, the Hearings Officer asked whether any of the parties wanted an opportunity to provide additional evidence, arguments, or testimony. Several individuals requested the opportunity, with Ms. Stevens of the Hamlet of Beaver Creek CPO asking for an additional two weeks to submit new evidence. The Hearings Officer discussed the request with the parties, and determined that it was appropriate to hold the record for all parties and members of the public as follows: until 4:00 pm on Thursday, October 5, 2023 to submit additional written evidence, argument, or testimony, until 4:00 pm on Thursday, October 12, 2023 for any participant or member of the public to respond to new evidence submitted during the prior open record period, and until 4:00 pm on Thursday, October 19, 2023 for the applicant to provide a final “last word” response or rebuttal.

#### ***Post-Hearing Submissions and Comments Submitted During Open-Record Period***

34. During the initial open-record period (until 4:00 pm on Thursday, October 5, 2023) the County received twenty-one written comments (letters and emails, and a video) from members of the public opposing the application, one written comment from members of the public in support of the application, and a written comment submitted by the applicant’s attorney, Garrett Stephenson.
35. Hailey Jeanne Linnemann provided a written comment stating that : “I am in full support of the rezoning application Z0277-23-Z.” Ms. Linnemann asserts that too many “tight developments” are being built next to FF-10 properties, that “people are already here, community is growing. Let’s make room, 2 acre lots are easy. That’s not a housing development or a subdivision. It’s small farm opportunities for people wishing to get out of the city.”
36. Major issues raised in opposition to the application included traffic congestion and safety along S Highway 213; traffic safety on S Lammer Rd and at the intersection of S Lammer and S Beaver Creek Blvd., both in terms of access safety and the ability to evacuate the area in an emergency; potential negative environmental impacts to Beaver Creek, wetlands and wildlife habitat; availability of adequate water supply, and meeting surface water conveyance requirements.
37. Illustrative written public comments opposed to this proposal that were received during the initial open-record period ending 4:00 pm on Thursday, October 5, 2023 include:

- Amy Archer-Masters is a neighbor of the subject property, residing on S Mitchell Ln. who submitted comments disputing the description of surrounding properties as generally two acres or smaller, contending properties should be described as a percentage and not counted as individual tax lots, also describing properties immediately adjacent to the subject property as 5-10 acre lots. She contends that the proposal does not meet the requirements for a zone change and conflicts with Oregon Statewide Planning Goals, as well as the stated goals in the County’s Comprehensive Plan, and inconsistent with the surrounding properties and the character of the neighborhood. Ms. Archer-Masters points to impacts on her rural community quality of life from the additional traffic, existing difficulty accessing Highway 213 amid congestion. She also states a hill in the roadway near the subject property causes sight line issues at this location resulting in many accidents and “close calls.” She also points to environmental issues pointed to by other concerned citizens, including impacts to wildlife (loss of habitat, etc.), quality of groundwater, and stormwater issues.
  - Jennifer Costanzo submitted written comments opposed to this application, contending “There is simply not infrastructure in place to accommodate more housing, more traffic, more children.” She asserts the city of Oregon City, and County, cannot afford to continue growing, pointing particularly to crowded roads and schools.
  - Camille Eagles submitted written comments opposed to this application, also citing traffic, lack of infrastructure, including both roads and schools, and preservation of open fields in rural areas.
  - Heidi and Mike Schmidt submitted written comments opposed to this application, also pointing to traffic congestion “especially during the morning hours from 7am to 10am and 2:30 pm to 6 pm.” The Schmidts also asserted that egrets occupying the area would be displaced, and referenced the fire evacuation that took place asserting that: “this entire Beavercreek area was a parking lot during the evacuation process. It took our family 4 hours during an evacuation to drive a route that usually took 15 minutes.”
  - Elizabeth Graser-Lindsey submitted written comments opposed to this application. Ms. Graser-Lindsey contends that the properties should not be re-zoned to smaller lots, pointing out to these properties as farmland surrounded by properties being used in farming and forestry. Ms. Graser-Lindsey asserts that 2-acre properties are too small to make a farm income and would draw urban commuters, stating: “Urban commuters don’t belong in a rural area.” She points to negative impacts such as traffic, traffic safety, and fire dangers, but also points to impacts to farm operations with slow-moving tractors and equipment and impacts to the area economy from continued loss of farmland.
  - Jane Varley and Mike Mueller submitted written comments opposed to this application, expressing concerns about the safety of Highway 213 at this location, reporting a dip in the road creates an additional hazard, and stating: “I have great concerns about a new development adding 50 plus lots without changes to the main road to handle all the new traffic by the golf course and at Beavercreek Rd and Redland Rd.
  - Several other written comments were received that agreed with the Beavercreek Hamlet CPO, and particularly the need for improved roadway infrastructure, opposing this application.
38. Laurie Kimmell submitted several a letter and also additional separate comments in opposition to this application, including the following:

- Her own first-hand account of the difficulty of evacuating the area in September 2020 during a level 3 fire evaluation, due to the heavy traffic and lack of adequate egress.
  - Ms. Kimmell disputes a number of surrounding area descriptions. For example, Ms. Kimmell points to the applicant’s statement that Clackamas Community College is approximately 1.5 miles from the site, reporting that traveling on Beaver Creek Rd. the trip was 4.9 miles, and traveling on Hwy. 213 from Mitchell Lane the trip was 3.2 miles. Ms. Kimmell also reports that “Oregon City proper is approximately 2.5 miles N. of the properties.”
  - Ms. Kimmell contests applicant statements and staff findings that there are no known hazards, pointing to the DOGAMI map indicating areas of landslide hazards in the northeast corner of the smaller tax lot along Beaver Creek and asserting these hazards were not addressed in the staff report of the applicant’s engineering report.
  - Ms. Kimmell asserts wetland delineation provided by the applicant did not include the smaller tax lot along Beaver Creek. Ms. Kimmell also contends that an environmental impact study was not completed, nor Oregon Fish & Wildlife Study of Beaver Creek, nor flood zone studies, storm water facilities studies, infiltration rate studies, including impacts on surrounding homes.
  - Ms. Kimmell points to testimony concerning wildlife on the subject properties, describing the Property as a resource site with wildlife habitat requiring additional review and protection.
  - Ms. Kimmell points to DLCD staff’s letter, and asserts that Goal 14 does apply. Further, in the alternative that Goal 14 does not apply under OAR 660-004-0040 because an exception has not been taken, Ms. Kimmell points out that “a Goal 14 exception may nevertheless be required to designate rural land for residential use per the factors discussed in the *1000 Friends of Oregon v. LCDC (1986 Curry County)*, 301 Or 447 LUBA case.
  - Ms. Kimmell points out that there no public sewer is available and septic systems will be required. She points to the applicant’s engineering report from Geopacific and asserts “Nothing was addressed regarding prior concerns of ground water (see applicants exhibit 3) in Beaver Creek estuary, storm drains, high water table, or environmental impact on species/stream.”
  - Ms. Kimmell points out that no studies were done regarding possible reductions of water flow, or the need for pumps to increase water flow for fire suppression with an additional 55 homes.
  - Ms. Kimmell contends that the applicant’s traffic study is flawed, asserting discrepancies in the number of potential homes (stated as 49 in the traffic study, 55 in the applicant’s proposed plat), asserting inadequate methodology in the study times and days and intersections, inadequate studies of actual road conditions and use (such as travel speeds), needed improvements, such as line of sight conditions and shoulders.
  - Ms. Kimmell points to potential impacts to air quality, increases in noise, and light pollution, asserting these should be assessed, as well as impacts to area farming, neighbors’ horses, and to pedestrians and bicyclists in the area. Further, Ms. Kimmell asserts a “Probable reduction in home values of the neighborhood.”
39. On October 5, 2023, (the end of the initial open-record period) Mr. Stephenson, attorney for applicant, submitted an additional written comment/memorandum from Mike Ard, P.E., responding to transportation-related comments submitted in this matter, to “provide some

responses to several transportation-related concerns raised by the public during the hearing on September 28, 2023.” (Exhibit 40) Mr. Ard’s memorandum responds to several specific public comments, as follows:

- *“The intersections of Highway 213/Beavercreek and Highway 213/Redland Road are failing.”* Mr. Ard responds stating that the “traffic impact study prepared for the project includes projections of future traffic levels at the planning horizon with and without the proposed zone change. When considering the impacts of the project, the changes in traffic volume resulting from the zone change is what must be studied.” Mr. Ard points to specific figures depicting the “reasonable worst case” development scenarios for the FF10 and RA-2 zoning, concluding the change would result in a maximum increase of 17 morning peak hour trips and 22 evening peak hour trips along Highway 213 north of the Property, an approximately 1% increase. Mr. Ard discusses diffusion of traffic along other roads providing access to the high school, shopping, jobs, and the city of Oregon City, and other locations. Mr. Ard concludes his response here stating: “Based on the characteristics of the proposed zone change and the surrounding transportation, the requested change would not be projected to materially impact operation of existing intersections along Highway 213 north of the project site. Traffic impacts on the two intersections raised as concerns will be de minimus. Consequently (and appropriately) neither ODOT nor Clackamas County staff requested detailed analysis of additional intersections.”
- *“The traffic study was done in 2021 (a covid year), and should be updated.”* Mr. Ard responds stating that the traffic study submitted for this project was dated July 5, 2023 and the county data was collected on June 22, 2023. Mr. Ards asserts that neither the study nor the traffic counts used in the analysis were from 2021 and no updates are necessary.
- *“Sight distance is inadequate for Mitchell Lane, and ODOT has not approved a new access.”* Mr. Ard notes that sight distance for the intersection of Highway 213 and at Mitchell Lane was not analysis as part of the 2023 Traffic Impact study because the proposal would not use Mitchell Lane for access. Mr. Ard refers to a prior 2021 traffic impact study prepared for this proposed zone change that “demonstrated that adequate sight distance was available for the existing intersection.” Mr. Ard provided a copy of the relevant section from that report. Mr. Ard further discussed the proposed new access to the site that was discussed at the hearing, stating: “Based on these designs, ODOT and Clackamas County staff agreed that the new access is feasible and would be capable of serving traffic from future development under the proposed zoning.” Mr. Ard points to detailed intersection sight distance analysis on page 21 of the June 22, 2023 Traffic Impact Study, asserting it addresses “sight distance at all locations which would accommodate arriving and departing traffic from future development on the subject property.”

40. During the second open-record period (until 4:00 pm on Thursday, October 12, 2023) the County received an additional written comment via email from a member of the public opposing the application, but not specifically responding to any written evidence, argument, or testimony submitted during the initial open record period.
41. During the third open-record period (until 4:00 pm on Thursday, October 19, 2023) the County received a final written comment submitted by the applicant’s attorney, Garrett Stephenson, providing a final “last word” legal argument response or rebuttal to evidence,

argument, or testimony submitted during the initial open record periods. Mr. Stephenson noted that the comments submitted during the open record period repeated the oral testimony offered at the public hearing in this matter. Mr. Stephenson also noted that areas of concern included development generally, traffic on Highway 213, concerns about emergency access, and local residents' desire to preserve the rural character of the area. Mr. Stephenson contends that the majority of these comments did not address any of the applicable approval criteria for the proposed zone change, and concern future development of the Property with a subdivision. Mr. Stephenson points out that the proposal here is for a zone change, that a subdivision application is not part of this application and not being considered here, and such concerns will be addressed in any subsequent subdivision application. Mr. Stephenson provided the following specific responses and arguments:

- Traffic Impacts: Mr. Stephenson points out that the applicant provided a complete Traffic Impact Study, with “proposed operational mitigation for Highway 213 that includes a completely new access, a left-turn lane on the southbound Highway 213 approach, and a north-bound deceleration lane.” Mr. Stephenson points out that both County transportation engineering staff and ODOT determined the proposed mitigation is adequate.
- Trip Generation: Mr. Stephenson addresses comments arguing the trip generation estimates were flawed, pointing to the Traffic Impact Study’s inclusion of traffic counts from 2023 and the study itself (Exhibit 10 of the application) at page 5 statement that: “[t]raffic counts were conducted at the intersection of Oregon Highway 213 and S Mitchell Lane on Thursday, June 22, 2023 from 7:00 to 9:00 AM and from 4:00 to 6:00 PM. Data was used from the highest-volume hour during each analysis period.” Mr. Stephenson addressed comments made by Ms. Kimmell that the study estimates concern potential construction of only 49 homes, and not 55, pointing to the study’s summary table on page 10 comparing “Proposed RA-2 Zoning (55 homes)” with “Existing FF-10 Zoning (11 Homes)” and providing net site trip increase estimates. Mr. Stephenson also points out that some lots on the site would have access to S Beavercreek via S Lammer Rd., and thus these lots would not generate trips to Highway 213 and were not considered as part of the proposed mitigation measures. Further, Mr. Stephenson points to consideration of “background” traffic growth rates. Finally, Mr. Stephenson points to concerns raised about projected trip generation citing the roughly 400 new daily trips on the roadway, noting these are daily trips, not “peak hour traffic” or rush hour trips, with peak hour rush hour trips projected at 39 new trips during the morning rush hour, and 52 new trips in the evening rush hour.
- Traffic on Highway 213: Mr. Stephenson addressed comments by a number of individuals that traffic is already too heavy on Highway 213 to allow any significant new land development. Mr. Stephenson asserts these are impressions and assertions not supported by evidence. Mr. Stephenson contends “[s]uch evidence is simply not sufficient to outweigh the substantial expert evidence provide by the Application (the TIS) and the County’s and ODOT’s concurrence with the TIS.” Mr. Stephenson asserts that, with respect to assertions that the intersection at Highway 213-Beavercreek Rd. and Highway 213 – Redland Rd. are “failing” that no substantial evidence was submitted to support these assertions. Further, Mr. Stephenson asserts that even if evidence were submitted, the TIS submitted by the applicant relied on ODOT and County-accepted methodologies for establishing its scope, with the

applicant's transportation engineer (Mr. Ard, registered PE) concluding that "the requested zone change would not be projected to materially impact operation of existing intersections along Highway 213 north of the project site. Traffic impacts on the two intersections raised as concerns will be *de minimi*. Consequently (and appropriately) neither ODOT nor Clackamas County staff requested detailed analysis of additional intersections."

- **Crash Data:** Mr. Stephenson points to Ms. Kimmell's arguments that the "crash data is incomplete" and similar arguments by other individuals asserting that traffic accidents were more frequent on Highway 213 than the ODOT crash data reflected. Mr. Stephenson cites the Mr. Ard's (the applicant's traffic engineer) statement in the submitted traffic study that:

"Oregon law requires that any crash resulting in injury, death, or damage in excess of \$2,500 must be reported to the DMV. These reports are used by the ODOT Crash Analysis and Reporting Unit to create a data set of crashes in Oregon. Although minor collisions resulting in very little damage may occur which would not show up in ODOT crash data, all severe crashes should appear in the data. Further, engineering analysis of intersection crash risks is consistently based on the ODOT crash reporting unit's data set, meaning that any meaningful analysis or comparison to statewide trends must use this data set to be valid."

"In contrast, listening for sirens is not a reliable [way] of assessing crash risk or history since emergency vehicles respond to numerous non-crash events and since emergency vehicles may activate sirens for a variety of reasons."

Mr. Stephenson asserts that for the reasons provided by Mr. Ard, "arguments that ODOT's crash data does not provide a reliable metric for determining safety are without merit." With respect to ZDO 1202.03(D) criteria, Mr. Stephenson cites the following conclusions from the traffic study at page 3:

"An examination of crash data for the most recent five years shows no significant crash trends that may be indicative of design deficiencies. The intersection crash rate was determined to be well below the 90<sup>th</sup> percentile crash rate for similar intersections in Oregon, and the severity of the reported crashes was relatively low. No specific crash mitigations are recommended."

Mr. Stephenson also cites ODOT's review of the applicant's traffic study and ODOT's conclusion that the proposed mitigation measures would improve the safety of Highway 213 over its current condition:

"The proposed left turn lanes would improve the safety of the highway by separating out slower moving left turning vehicles from the vehicles traveling through this section of highway. [...] To further improve safety, county engineering staff have also proposed requiring acceleration and deceleration lanes at either Mitchell Ln or at the proposed private access. [...] ODOT has determined that with the mitigations above that there would not be a significant effect on the State highway facility. The mitigations address ODOT mobility standards and safety concerns."

Mr. Stephenson asserts that this criteria is met as there are no identified safety concerns as noted by the traffic study, and ODOT has found the proposed mitigation measures will enhance safety over current conditions.



- Congestion on Mitchell Lane: Mr. Stephenson addressed comments expressing concern about potential increased traffic on Mitchell Lane by pointing to the change in the applicant’s proposal resulting in no access between potential new homes and Mitchell Lane, other than the emergency use only access. Mr. Stephenson points out that this emergency access “would presumably be a benefit to those living on Mitchell Lane, who could use the internal roadways serving the Property as an additional access point to Highway 213 in an emergency.”
- Payment for Traffic Impact Mitigation: Mr. Stephenson addressed comments raising concerns about who would pay for the proposed mitigation measures, stating that “these would be paid for by a future developer as mitigation for a proposed development on the Property, and not by the Public.” Further, Mr. Stephenson points out that the proposed mitigation measures can be constructed on private property controlled by the applicant and no off-site property purchase is required.
- Conclusion Regarding Traffic Issues: Mr. Stephenson points to the Transportation Planning Rule (*see* County ZDO Sections 1202.03(C) and (D); OAR 660-012-0060) and its requirement that applicants for zone changes evaluate the potential increase in traffic under a “reasonable worst-case” development scenario to determine whether the change will significantly affect “an existing or planned transportation facility” and, if such affects are identified, propose mitigation measures. Mr. Stephenson contends that assertions that the applicant’s traffic study is flawed are not supported by evidence and the Hearings Officer should reject those assertions and find that the Traffic Impact Study and the proposed mitigation measures are sufficient to satisfy the TPR and County ZDO Sections 1202.03(C) and (D).
- Natural Disasters: Mr. Stephenson addressed comments raising concerns about future emergency evacuations, such as caused by the recent wildfire event. First, Mr. Stephenson points out that the submitted application is subject to certain discrete criteria, and these criteria do not directly or indirectly address the potential impact of residential growth on congestion during an evacuation event. Mr. Stephenson points to the applicant’s TPR analysis stating that “the project’s impacts on Highway 213 can be adequately mitigated and the only substantial evidence in the record with regard to safety – the TIS and ODOT’s testimony – indicate that the existing road system can safely serve the potential new traffic generated under an RA-2 zone with the proposed mitigation measures.” Mr. Stephenson points out that the only closely applicable standard addressing “natural hazards” is contained in the County Comprehensive Plan (4.MM.11.1.c), and concerns natural hazards on the Property and the Property’s topography, pointing to staff findings concerning “natural hazards” and interpreting the provision to mean those listed in the “Major Hazards Open Space overlay.” Mr. Stephenson points to support for this interpretation contained in Policy 4.GG.2.2. of the County’s Comprehensive Plan, which states: “the purpose of the Major Hazards Open Space is to protect the public from natural hazards.” Further, Major Hazards Open Space is land in these categories: The floodway of 100-year floodplains; areas of known landslide hazard; and areas of severe erosion, unstable soil, or earth movement. (Also referencing County Comprehensive Plan Policy 4.GG.2.2.). Mr. Stephenson points out that, as stated in the applicant and by County staff, the subject properties are not designated as a Major Hazard Open Space and thus do not include any “natural

hazards.” Mr. Stephenson further points out findings contained in the staff report concerning this interpretation, that:

“Staff concurs and finds this interpretation consistent with the areas identified in Statewide Planning Goal 7, Areas Subject to Natural Hazards. In Goal 7, the state identifies floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires. As noted, there are no mapped landslide areas (per Bulletin 99) and no mapped flood hazard areas (floodplain or floodway). It is not possible for there to be no risk for earthquakes or wildfire, but there is no evidence that would indicate these lots would have any higher risk than any other nearby lots.”

Secondly, Mr. Stephenson points out that these serious and recent wildfire events may prompt additional emergency planning, but no applicable legislation has been enacted that would limit new development to reduce congestion during evacuations. Further, Mr. Stephenson essentially contends that denial of the application for this reason would not be based on the standards and criteria that were applicable at the time the application was submitted, in violation of ORS 215.427(3)(a). Thirdly, Mr. Stephenson points to ODOT findings that the mitigation improvements required for this project will increase the safety and flow of Highway 213 adjacent to the subject property. Mr. Stephenson further points out here, as he did earlier, that the proposed new access point could provide those living on Mitchell Lane with an additional emergency egress.

- Wetland Delineation and Resource Impacts: Mr. Stephenson addressed comments raising concerns about the applicant’s wetland delineation, pointing out that this delineation has been accepted by the Oregon Department of State Lands (DSL) and the applicant’s proposal will limit development to areas outside those wetlands. Mr. Stephenson points out that a separate delineation of the northeast parcel was not conducted as this portion of the Beaver Creek corridor is already identified as such by the County. Mr. Stephenson points out that Beaver Creek likely has protected fish habitat and is proposed to be protected, but otherwise the County has not designated any other habitat areas on the property.
- Rural Character and Urbanization Concerns: Finally, Mr. Stephenson addresses what he describes as: “The crux of the opposition of many homeowners related to perceived loss in rural character that they believe would be inherent in development of this property with two-acre lots.” Mr. Stephenson points to findings in the record that 72% of the lots within ¼ mile of the Property are actually smaller than two acres. He asserts that comments by residents of surrounding properties implying that their subdivisions should be “grandfathered” and no further development of the areas should be allowed is not consistent with applicable land use regulations. Mr. Stephenson points to the applicable approval criteria that determine if the RA-2 zoning should be applied noting “the wording of the policy makes clear that if the criteria are met, the RA-2 zoning “shall” be applied.” Mr. Stephenson asserts that, “once a demonstration has been made that the criteria are met, the Hearings Officer does not have the discretion to deny an RA-2 zoning district.” Mr. Stephenson also points to staff analysis in the County’s Staff Report’s findings on these criteria, supporting the County’s recommendation of approval.

## C. BACKGROUND FACTS

### Subject properties and surrounding area:

- a. The subject properties are located in a predominantly rural area, with an established rural residential character and pattern of development. The subject site is approximately 111 acres and is made up of two separate legal lots of record (tax lot 32E21 00200 and 32E22 00200). The site is located approximately 0.95 miles south of Oregon City and 0.90 miles northwest of the unincorporated community of Beavercreek. The primary access to the site is via Hwy 213, which traverses the western boundary of the site, but the easternmost portion of the site abuts the end of S Lammer Rd.
- b. The Stone Creek Golf Course is located across Highway 213 from the subject properties. In the general area of the subject properties, there are numerous platted subdivisions that have smaller lot sizes under 2 acres; however, they were all created in the late 1960s and early 1970s when the zoning of the area was R-20. Most of those subdivisions are currently zoned Rural Residential Farm Forest, 5 acre (RRFF-5). The current FF-10 zoning on the subject properties took effect in 1980 after the Rural Plan Amendment for this area was adopted.



Source: County GIS, PlanMap (2022 aerial photo)

### Site Characteristics:

- c. The larger tax lot **32E21 00200** (approximately 82.7 acres) has gently sloping topography, with the highest elevations in the southwestern portions of the property. The property has been managed primarily as agricultural grass seed/hay production and livestock. Historical photos

from 1952 to 2020 show very little change on site. A single family home, a barn, and several outbuildings are located in the west-central portion of the study area.

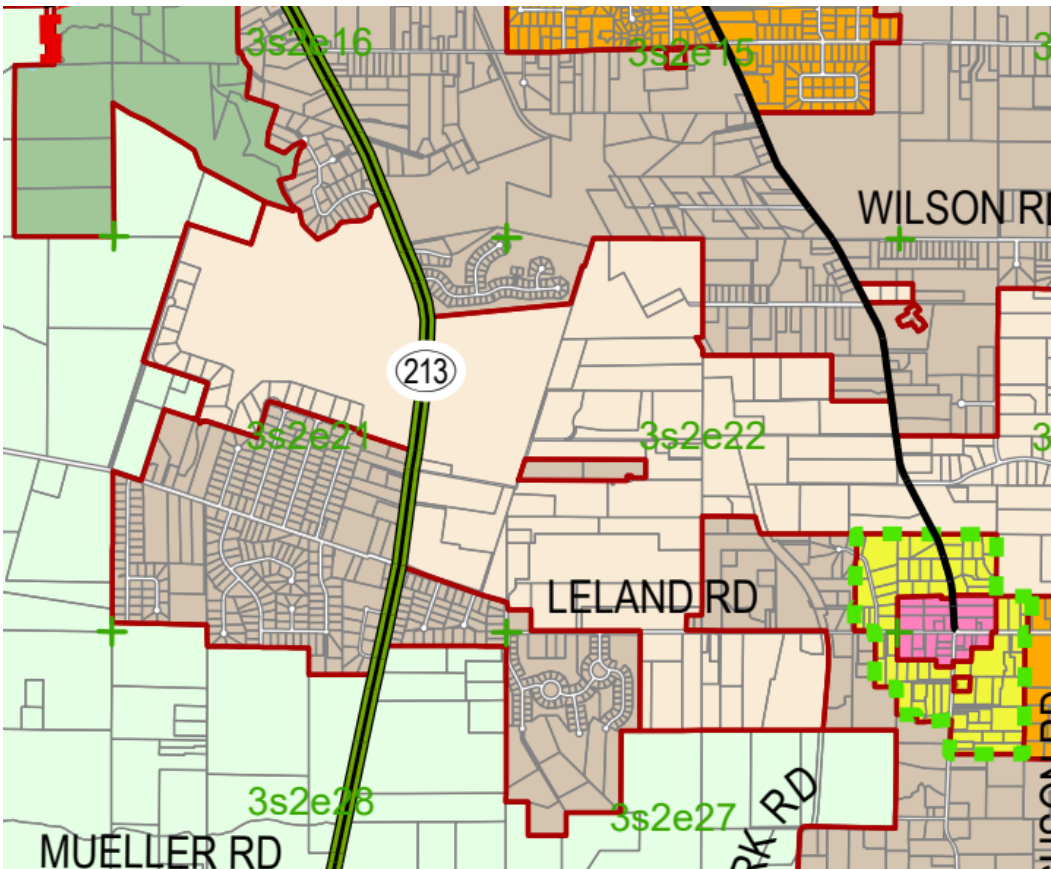
- d. The smaller tax lot **32E22 00200** (approximately 29.3 acres) is undeveloped and appears to be primarily forested. This taxlot is divided by a canyon, through which Beaver Creek runs. Slopes in excess of 20% are present on this property, generally along Beaver Creek.

**Streams, wetlands, and other habitat areas:**

- e. A linear riverine wetland (per the Department of State Lands classification) runs north through the central portion of the larger tax lot (32E21 00200). The U.S. Fish and Wildlife Service designates this wetland as a seasonally flooded intermittent riverine wetland (R4SBC) that is an open channel which periodically or continuously contains moving water, or which forms a connecting link between two bodies of standing water. The applicant's submitted wetland delineation determined that there were additional wetlands associated with this mapped riverine wetland, including marshy areas at least 30 percent vegetated with emergent, herbaceous vegetation and surface water present for extended periods especially early in the growing season. The total acreage of wetlands on tax lot 32E21 00200, per the wetland delineation report, is .89 acres. The main riverine wetland channel on this property continues offsite to the north.
- f. As noted, the smaller taxlot (32E22 0200) is divided by Beaver Creek. Beaver Creek is classified by the state and the U.S Fish and Wildlife Service as freshwater forested shrub wetland. A wetland delineation was not prepared for this lot however, this segment of Beaver Creek is a regulated River and Stream Conservation Area per the County maps. The greater Oregon City Watershed Council's May 2010 Watershed Assessment indicates that the section of Beaver Creek going through this property is a fish-bearing stream.
- g. There are no other known wetlands, streams or other protected resource or habitat areas on the properties. There are no regulated hazard areas (floodplain, mass movement areas, etc.) on the properties.

**Zoning and history:**

- h. The subject site's current FF-10 zoning took effect in 1980 after being adopted through the Rural Plan Amendment or RUPA process, which included a number of different Comprehensive Plan amendment packages for different rural areas of the County. The subject properties are part of Rural Plan Amendment Area R-14 of the Rural Plan Amendment (RUPA) II legislative zoning rural exception areas. The rural residential FF-10 zoning in the RUPA II area R-14 has remained predominately the same since Comprehensive Plan acknowledgement. Prior to that, the zoning was R-20. The subject properties are surrounded by FF-10 and RRFF-5 zoning, with the closest denser zone of RA-2 located about 1/2 mile to the north.



Source: Clackamas County, *Non-Urban Area Zoning* map (April 20, 2023)

**Proposal**

- i. The Applicant’s proposal is to change the zoning designation of the property from Farm Forest, 10 acre (FF-10) to Rural Area Residential, 2-acre (RA-2) in order to divide the property into up to 55 lots for single-family home development. **No new construction or land uses are proposed in this application; no subdivision is proposed in this application.** Rather, the Applicant is effectively seeking to change the number of lots and dwellings potentially allowable on the property from 11 (under the current FF-10 zoning) to 55 (under the RA-2 zoning); a net increase of up to 44 rural residential lot.
  
- j. In May 2021, the same applicant applied for a zone change for the subject properties (Z0232-21-ZAP), but withdrew that application before the public hearing was held in order to work to resolve specific issues identified through the review of that proposal, including:
  - Providing additional evidence to demonstrate consistency with Comprehensive Plan policies related to the identified streams and wetlands; and
  - Working with ODOT to find a solution to Transportation Planning Rule (“TPR”) requirements that were not adequately addressed.
  
- k. Service providers:
  - (a) Sewer: The subject property is not located within a public or private sewer district. Septic systems would be required for any future development.
  - (b) Water: The subject properties are located within Clackamas River Water service district.
  - (c) Fire Protection: Clackamas RFPD #1



1. **Noticing:** This application has been processed consistent with the legal noticing requirements in Section 1307 of the County’s Zoning and Development Ordinance (ZDO) and with state noticing requirements. Specifically, the County has provided notice to interested agencies, local governments and property owners within 1/2-mile of the subject property consistent with State law and Section 1307 of the ZDO. The notification to property owners, public notices and hearings ensures an opportunity for citizens to participate in the land use process.

#### **D. DISCUSSION**

This application is subject to the standards and criteria of Clackamas County Zoning and Development Ordinance (ZDO) Section 1202, Zone Changes, and the Comprehensive Plan. Oregon Administrative Rules and Statewide planning Goals 11, 12, and 14 are also applicable when determining whether a Goal Exception is required for the zone change. This application is being processed as a Type III Permit, pursuant to Section 1307. A Type III Permit is quasi-judicial in nature, and involves land use actions governed by standards and approval criteria that require the use of discretion and judgment. The issues associated with the land use action may be complex and the impacts significant, and conditions of approval may be imposed to mitigate the impacts and ensure compliance with this Ordinance and the Comprehensive Plan. The Type III procedure is a quasi-judicial review process where the review authority receives testimony, reviews the application for conformance with the applicable standards and approval criteria, and issues a decision.

The Hearings Officer has jurisdiction to hear and decide applications for zoning changes pursuant to Section 1307 as shown by Table 1307-1. The Hearings Officer has reviewed the entire record of this proceeding, finding the evidence presented is reliable, probative and substantial evidence upon which to base a determination in these matters. A number of comments were submitted and assertions made that are outside the approval criteria for this application, such as assertions that approval of this application will negatively impact property values. The discussion here addresses relevant approval criteria.

#### **PART 1. SUBMITTAL REQUIREMENTS**

Subsection 1202.02 of the County ZDO lists the information that must be included in a complete application for a Zone Change. This application includes a completed land use application form, additional narrative and supplemental application statements addressing the criteria in Section 1202 of the ZDO, a vicinity map showing the relationship of the subject property to the surrounding area, a site plan of the subject property, application fee, transportation. The application also includes a description of the proposed use, a Transportation Impact Study, Wetland Delineation, Soil Survey Map, a preliminary statement of feasibility concerning adequacy of water service with the exception of fire flows, and a preliminary statement of feasibility stated adequate surface water management, treatment, and conveyance is available or can be made available. All the submittal requirements under Subsection 1202.02 are included in the application. The application was submitted on July 6, 2023. The application was deemed complete for the purposes of Oregon Revised Statutes (ORS) 215.427 on August 7, 2023. Notice was issued on August 24, 2023 for the September 28, 2023 hearing. The subject property is not located inside an urban growth boundary. The 150-day deadline established by state law for processing this application is January 4, 2024.

*The Hearings Officer finds that the submittal requirements of Subsection 1202.02 are met.*

## **PART 2. ZONING CHANGE**

This application is subject to Clackamas County Zoning and Development Ordinance (ZDO) Section 1202, *Zone Changes* and the Clackamas County Comprehensive Plan. Because the subject properties are rural exception lands with a “Rural” Comprehensive Plan designation, they are also subject to the rules in OAR 660-004-0040 that require, in some cases, a new exception Statewide Planning Goal 14, *Urbanization*, when changing the zoning designation. Compliance with the applicable regulations is discussed below. ***The Hearings Officer reviewed, adopted and/or modified these staff findings as denoted by boldface type in italics.***

### **A. Section OAR 660-004-0040 -- Application of Statewide Planning Goal 14 to Rural Residential Areas**

OAR 660-004-0040 implements Statewide Planning Goal 14 and sets standards for lot sizes in rural residential zones. It partially codifies a court ruling that determined development on lots smaller than two acres was “urban development” and not allowed outside urban growth boundaries or an acknowledged unincorporated communities without taking an exception to Goal 14. OAR 660-004-0040 (see Exhibit 3c) also identifies considerations and requirements for zone changes within rural residential areas (Rural Exception Lands). In some cases, a zone change in Rural Exceptions Lands will require a new exception to Statewide Planning Goal 14. The determination about whether a Goals 14 Exception is needed for the subject application is discussed in the findings below.

**Background:** Comprehensive planning following adoption of the Statewide Planning Goals and the creation of the Department of Land Conservation and Development (DLCD) involved determining which rural lands could accommodate residential development and be acknowledged as Rural Exception Lands, pursuant to an exception to statewide Planning Goals 3 and 4. However, when the state’s Land Conservation and Development Commission (LCDC) became concerned that certain counties were allowing urban uses on rural land, the application of Goal 14, *Urbanization*, became an integral part of the comprehensive planning process.<sup>4</sup> Specifically, for Clackamas County, the adoption of Rural Exception Lands was authorized through the Rural Plan Amendment or RUPA process, which included a number of different Comprehensive Plan amendment packages for different rural areas of the County. As part of the RUPA process, LCDC and Metro required the County to make Goal 14 compliance findings for the rural exception lands to allow for a rural land use designation with 10-acre, 5-acre, and 2-acre minimum lot sizes; the County’s rural Comprehensive Plan land use designation and minimum parcel sizes (10-acre, 5-acre, and 2-acre) were determined by the State to comply with Goal 14.

Subsequently, as part of the 1986 DLCD Periodic Review process the County was required to “submit information on existing potential development patterns, Goal 14 exceptions for certain areas, analyses of rural areas and revised plan policies and ordinances consistent with Goal 14/Curry County decision” (Reference DLCD Order No. 00073). DLCD Order 00631 (7/2/96) modified this

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<sup>4</sup> 1000 Friends of Oregon v. LCDC (1986 Curry County), 301 Or 447.  
*Hearings Officer Final Order*  
*Z0277-23-Z*  
*Cereghino Zone Change*

work task and created new Task 13, 14 and 15 to address Curry County issues. The new Task 13 description was “Resolve the Goal 14 issues raised in the Curry County Supreme Court decision for the areas Zoned RRF5, RA-2, RR, RC, HL, and RI located outside of unincorporated communities”. From what County staff can determine in our records, the original component of Task 13 that included “inventory information on exception areas, Goal 14 exceptions for certain areas, analysis of rural areas, and revised plan policies and ordinances, as necessary to be consistent with Goal 14 and the Curry County decision” (No. 5 of original Periodic Review Task 8, periodic review work program approval DLCD Order No. 00073), was completed and acknowledged by DLCD prior to the second Task 13 modification in 1997 (DLCD No. 00804). Regardless of what components of Task #13 were satisfied during what time period, DLCD approved the full Periodic Review Task #13 in 2002 (Order No. 001365), without requiring the County to take Goal 14 exceptions for existing rural residential zoning. Staff assumes the documentation and Goal 14 consistency findings submitted as part of the Periodic Review Task 13 (previously task #8) was sufficient for DLCD to determine that the County’s existing exception areas were consistent with Goal 14 and did not need a post-Curry County Goal 14 exception. As such, Staff finds that the County acknowledged post-1986 Curry County, Goal 14 consistency findings for rural minimum lot sizes of 2 acres, 5 acres, and 10 acres. Since Comprehensive Plan adoption, zone changes on rural residential lands have been subject to the same set of Zoning and Development Ordinance approval criteria in Section 1202 and Rural Land Use policies in the Comprehensive Plan.

In 2000, LCDC adopted administrative rules in OAR 660-004-0040 to respond to the Oregon Supreme Court’s Curry County 1986 Decision. For rural residential areas designated after the effective date of OAR 660-004-0040, OAR 660-004-0040(7)(i) requires a minimum lot or parcel size of two acres and any lot sizes between 10 acres and 2 acres must be justified by an exception to Goal 14. LCDC recognized that some local government like Curry County, had already adopted comprehensive plan and land use regulation amendments incorporating Goal 14 consistency findings as addressed in the Supreme Court’s 1986 Curry County decision, and that those amendments had already been acknowledged by LCDC<sup>5</sup>.

However, there were varying interpretations of this OAR section following adoption and how it applied to zone changes on individual properties within rural residential zoning districts.

**Application of OAR 660-004-0040(6) and Goal 14 Exceptions:** In 2007, LUBA dealt directly with the question of how OAR 660-004-0040 applies to changes in minimum lots sizes in rural residential areas (see *Oregon Shores Coalition v. Curry County*, 53 Or LUBA 503(2007), Exhibit 3d). While there were two main issues raised by this case, and discussed in a 9/11/23 letter from DLCD Staff (see Exhibit 4), the issue relevant to this particular proposal is whether a zone change that does not change the Plan designation but simply allows for a five-acre lot size for land divisions, rather than a 10-acre lot size, would require an exception to Goal 14. Regarding this particular issue, LUBA concluded the following:

*We set out the text of OAR 660-004-0040(6) again below: “After the effective date of this rule, a local government’s requirements for minimum lot or parcel sizes in rural residential areas shall not*

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<sup>5</sup> Oar 660-004-0040(3)(b)  
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be amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14 pursuant to OAR 660, Division 014.” (Emphasis added.)

*While the text of OAR 660-004-0040(6) could be clearer, we believe it refers to the amendment to allow a smaller minimum lot size and does not refer to an existing acknowledged zoning ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size in the RR zone without an exception. Relevant context supports the more narrow reading as well. As we noted earlier, when LCDC adopted OAR 660-004-0040 in 2000, it expressly provided that local governments like Curry County with Comprehensive Plans and land use regulations that had been acknowledged for compliance with Goal 14 after the supreme Court’s Curry County decision were not required to amend their comprehensive plans and land use regulations to comply with OAR 660-004-0040.*

Per County Planning staff’s and County Counsel’s reading of Oregon Shores Coalition v. Curry County, OAR 660-004-0040 would not explicitly require a Goal 14 exception for a proposed zone change from FF-10 to RA-2 due to the following:

- (1) Rural exception lands in Clackamas County were already acknowledged as such on 10/4/00 (the effective date of the afore-mentioned Rule amendments) and the County has not amended the provisions of the Comprehensive Plan to allow a smaller minimum lot size in its Rural Exception Lands than was previously allowed. Nor has the County changed the process or criteria of approval for such a zone change, as regulated by ZDO Section 1202 and the Comprehensive Plan.
- (2) The County’s Comprehensive Plan was reviewed and acknowledged by LCDC for compliance with Statewide Planning Goal 14 during initial acknowledgement and during Periodic Review from 1986-2002. The rural land exception documents (RUPA I, II, III, and IV) included Statewide Goal 14 findings for rural residential exception lands. LCDC determined that the County did not allow any ‘urban uses’ on rural lands and, as such, the County was determined to be compliant with Goal 14.
- (3) Furthermore, as discussed above, the County has acknowledged, post-1986 Curry County Goal 14 consistency findings for minimum lot sizes of 2 acres, 5 acres, and 10 acres. The County has one Rural land use designation identified in the Comprehensive Plan, which includes three minimum lot sizes (2 acre, 5 acre and 10 acre) with thresholds for changing from one minimum lot size to another. This is very similar to how Curry County’s Rural plan designation is set up, except that they did not have a 2-acre minimum lot size acknowledged for consistency with post-1986 Curry County Goal 14 requirements. As such, County staff asserts the carve out situation LUBA created in LUBA 503, 2007 is applicable to Clackamas County and that, in this particular case, a Goal 14 exception is not explicitly required to rezone from FF-10 to RRF-5.

In their testimony dated 9/11/23 (Exhibit 4), DLCD Staff notes that they disagree with the county’s assessment of the applicability of Goal 14 to the proposed (and other similar) rural residential zone changes. In their testimony, DLCD Staff seems to be distinguishing Clackamas County’s situation from the 2007 Curry County case because Curry County had a single rural zone with two minimum

lot sizes so, in effect, there was no zone change, even though they were applying Comprehensive Plan criteria to decide whether to apply the 10-acre or the 5-acre minimum lot size standard. Clackamas County, on the other hand has one Comprehensive Plan designation (Rural), under which there may be several options for specific designations with 10, 5, or 2-acre minimum lot sizes that are determined based on applying certain Comprehensive Plan criteria. County staff feels there is no functional or substantive difference in the structure of the Curry and Clackamas County's processes in this instance: both are applying Comprehensive Plan criteria to choose between different, acknowledged minimum lot sizes, through a process that was previously acknowledged to comply with Goal 14. And in both scenarios, the outcome is the same – rural residential development may happen at a higher density (with a smaller minimum lot size) than would have been allowed prior to the change.

Further, in its 2007 decision, LUBA does not explicitly refer to “zone changes”; rather it explicitly states that the cited OAR does not apply to an *ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size*. In the case of this proposal, the proposed reduction is also from a ten-acre to a five-acre minimum lot size and under the same set of circumstance as in Curry County (i.e. an ordinance that already allowed for such a reduction).

The county's Hearing's Officer has concurred twice with county Staff's assessment of the applicability of Goal 14 to the rural residential zone change proposed, most recently under file Z0475-22-Z, finding that no Goal 14 exception was required (see Exhibit 3e). Although the two prior proposals were not identical to the current proposal – one included a zone change from RRFF-5 (Rural Residential Farm Forest, 5-acre) to RA-2 and the other included a zone change from FF-10 to RRFF-5 – Staff finds no real distinction in the subject proposal and the two noted proposals as they relate specifically to the applicability of Goal 14 under OAR 660-004-0040(6).

The Applicant also asserts that a Goal 14 exception is not required, citing agreement with the assessment in the “Curry” case as well as noting that under OAR 660-004-0040, the minimum allowable lot size within a rural residential area is two acres and that an exception is required for lots smaller than that size. As such, Staff has determined that a Goal 14 exception under OAR 660-004-0040(6) is not required for the proposed zone change.

**Rural versus Urban Uses:** When making a determination that a Goal 14 exception is not required, *DLCD v. Klamath County, 38 Or LUBA 769 (2000)* makes it clear that findings also need to be included in a local government's action to explain why the proposed use on rural exception lands is “rural” and not “urban”. *OAR 660-014-0040 Establishment of New Urban Development on Undeveloped Rural Lands and 660-004-0010 Application of the Goal 2 Exception Process to Certain Goals*, provide the required process for a Goal 14 exception. However, these OARs are only applicable to new urban development on rural lands and, as such, the Applicant and Planning Staff have also included findings to address why the proposed zone change would still be a “rural” use and would not require a Goal 14 exception.

What is “urban” and what is “rural” is not explicitly clear in the context of Goal 14 since Statewide Planning Goals contain no definition of urban or rural uses. Additionally, while it is clear that OAR 660-004-040 applies to urban development on rural land, “urban development” is not defined in the

OARs. That said, the Statewide Planning Goals do contain the following definitions of rural and urban land:

*RURAL LAND. Rural lands are those which are outside the urban growth boundary and are:*  
*(a) Non-urban agricultural, forest or open space lands or,*  
*(b) Other lands suitable for sparse settlement, small farms or acreage homesites with no or hardly any public services, and which are not suitable, necessary or intended for urban use,*

*URBAN LAND. Land inside an urban growth boundary.*

The meaning of these terms in the context of individual applications has been contemplated in many different case law discussions over the years. See, *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37, 48 (2000). The key case, *1000 Friends v. LCDC (Curry Co.)*, 301 Or. at 505 and those cases since Curry Co. make it clear that residential parcel sizes at either extreme are either clearly urban (one acre lots are urban) or clearly rural (10 acre lots are rural) but contain no bright line for anything in between. According to the Courts, these decisions must be made on a case-by-case basis since state law does not draw a line between urban and rural use based on parcel size alone. Additional considerations in an analysis of what constitutes urban development on rural land include the necessity for the extension of public services such as sewer and water. In general, relevant case law suggests that three main areas of consideration must be addressed to make a determination that a use is rural:

1. *That public facilities and services providing for water and sewage disposal will be limited to the types and levels of service available and appropriate for rural lands. Or in other words, that the proposed uses on rural lands will not require urban levels of service.*

The proposed zone change, and the potential 55 lots the RA-2 zone would allow for, involves only public water service from Clackamas River Water. Most of the properties within this FF-10 zoned area are served by Clackamas River Water, but are on septic systems. In fact, public sewer service is explicitly prohibited outside of a UGB (except in specific circumstances), making it a good proxy for “urban levels of service.”

Further, the Applicant notes that the “*Application will not require new urban levels of service. Public water lines are already in place in the area, including a 12-inch main line in Highway 213 and a 6-inch water line in S Lammer Road. Each two-acre lot can be served with a separate septic system.*”

As such, planning staff finds that the proposed services to a new parcel in this area would still be a rural level of service. ***The Hearings Officer concurs with this analysis and in these staff findings.***

2. *The potential impact on a nearby Urban Growth Boundary. Specifically, consideration of whether the density and number of residential units allowed under the proposed zoning would impermissibly affect the ability of nearby UGBs to perform their urbanization function.*

The addition of up to 55 lots the proposed zone change would authorize would not impact the ability of nearby UGBs to perform their urbanization function. The proposed RA-2 zoning is an

acknowledged rural zoning district, and it is surrounded by a majority of lots that are two acres or smaller which would be consistent with the pattern of development in the Beaver Creek area. The subject property is located approximately 0.95 miles from the Oregon City Urban Growth Boundary, so it is not directly adjacent to City limits or located adjacent to any urban uses. ***The Hearings Officer concurs with this analysis and in these staff findings.***

In addition,

3. *Whether the size of the proposed lots in a partition or subdivision that will accompany the zone change can be considered a rural use.*

Case law has made the determination of a rural vs. urban use on parcel size alone on a case by case basis. However, as long as the minimum lot size of the proposed new zoning district does not allow for the creation of parcels under 2 acres, the proposed zone change would stay consistent with the County's Goal 14 consistency findings for Rural Exception Lands. This is because the proposed RA-2 zoning would still be considered a rural use, as determined by LCDC during the original Comprehensive Plan acknowledgement RUPA process and during the subsequent post 1986 Periodic Review acknowledgement that included Goal 14 findings for the RA-2 zone.

In addition, Staff agrees with the Applicant's assertion that *the proposed two-acre lots are substantially larger than the vast majority of existing lots and parcels in the area, which will allow the lots to retain a comparatively rural character.* As described by the Applicant,

*"At full development [under the proposed RA-2 zoning], the Property can support approximately 55 new dwellings in a total parcel area of 111 acres, or approximately 0.5 dwellings/acre. On the other hand, the County's lowest-density urban residential zone allows a maximum of 1.45 dwellings/acre, nearly three times more than the Application's proposed density level. As such, these Properties will remain rural in character and function and will not diminish the UGB's distinction between urban and rural areas. And, even if each home is occupied by a family, this level of density will not be enough on its own to create a demand for new supportive urban development (such as new schools and stores), especially since those services are already available in nearby Oregon City and Beaver Creek."*

As such, Planning Staff finds that the proposed zone change to RA-2 would constitute a rural, not an urban, use. **A Goal 14 exception is not required for this proposal. *The Hearings Officer concurs with this analysis and in these staff findings, adding the following additional comments in support of this analysis:***

***In the September 11, 2023 written comments submitted by Mr. Gordon Howard on behalf of DLCD asserting that a Goal 14 exception pursuant to the provisions of OAR 660-014-0030 is required for the proposed zoning change, the agency points to DLCD's interpretation that: "While the effective zoning of FF-10 is consistent with the provisions of OAR 660-004-0040(6) and is deemed compliant with Goal 14, changing the effective zoning to RA-2, which would amend the applicable requirements regarding minimum parcel size to allow a greater amount of development, triggers OAR 660-004-0040(7)."***

*The letter further states: “It is our position that a Goal 14 exception is necessary in this case. While the effective zoning of FF-10 is consistent with the provisions of OAR 660-004-0040(6) and is deemed compliant with Goal 14, changing the effective zoning to RA-2, which would amend the applicable requirements regarding minimum parcel size to allow a greater amount of development, triggers OAR 660-004-0040(7).” This position implies that the creation of any new lot or parcel in a rural residential neighborhood triggers OAR 660-004-0040(7)’s requirement to take an exception to Goal 14, regardless whether the lot is larger or smaller than two, five or even ten acres. This position would require an exception to Goal 14 before the owner of a 10-acre property of RRFF-5 property could divide that property into two 5-acre lots. There is no substantive difference in this proposal. This is the same issue addressed in Oregon Shores Coalition v. Curry County, 53 Or LUBA 503(2007), with the relevant portion of the text discussed above set out again below for reference:*

*While the text of OAR 660-004-0040(6) could be clearer, we believe it refers to the amendment to allow a smaller minimum lot size and does not refer to an existing acknowledged zoning ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size in the RR zone without an exception. Relevant context supports the more narrow reading as well. As we noted earlier, when LCDC adopted OAR 660-004-0040 in 2000, it expressly provided that local governments like Curry County with Comprehensive Plans and land use regulations that had been acknowledged for compliance with Goal 14 after the Supreme Court’s Curry County decision were not required to amend their comprehensive plans and land use regulations to comply with OAR 660-004-0040.*

*Consistent with the above discussion, OAR 660-004-0040(8)(a) provides that: “The creation of any new lot or parcel smaller than two acres in a rural residential area shall be construed an urban use.” Thus, a Goal 14 exception would be required if creation of any new lot or parcel smaller than two acres were proposed. However, none is proposed here. Of note, the specific phrasing implies that creation of new lots or parcels of two acres or more in a rural residential area are not necessarily construed an urban use or would require a Goal 14 exception. Rather, as discussed below, further analysis is required to make this determination.*

*OAR 660-004-0040(8)(a) further provides that: “This subsection shall not be construed to imply that creation of new lots or parcels two acres or larger always complies with Goal 14.” This specific phrasing should, however, be construed to imply that creation of new lots or parcels two acres or larger may comply with Goal 14. Consistent with this analysis, OAR 660-004-0040(8)(a) continues: “The question of whether the creation of such lots or parcels complies with Goal 14 depends upon compliance with all provisions of this rule.” Thus, OAR 660-004-0040(8)(a) makes clear the creation of new lots or parcels two acres or larger may comply with Goal 14, requiring analysis addressing whether the proposed zone change would result in “rural” use as opposed to “urban” use to determine whether the proposed zone change requires a Goal 14 exception.*

*Here, Clackamas County has specified a minimum lot size of 2-acres or larger for each rural residential area. This proposal is merely to change this parcel’s zoning from the County’s FF-10 zone to the RA-2 zone, still requiring a minimum lot size of 2-acres or larger within an acknowledged exception area planned for rural residential uses. The proposed zone will permit a rural residential use with no available public sewer facilities (a rural level of service). In particular, development on the subject site is and will continue to be served by private on-site*

*septic systems and does not need to connect to public sewer. The record shows no potential impact to the ability of nearby UGBs to perform their urbanization function. Rather, approval of the proposed zone will result in the subject property being developed consistent with the pattern of development in the local area: primarily sparse settlement on acreage lots, the majority of which are residential lots that are no larger than those proposed here. Thus, the subject property's proposed RA-2 zone remains a rural residential use in an existing rural residential area and no Goal 14 exception is required.*

## **B. Zoning and Development Ordinance (ZDO) Findings**

The Clackamas County Planning and Zoning Staff have reviewed the relevant Sections of the ZDO and Comprehension Plan in conjunction with this proposal and make the following findings and conclusions:

### **1. Submittal requirements**

Subsection 1202.02 of the ZDO lists the information that must be included in a complete application for a Zone Change.

The application was submitted on July 6, 2023. The application was deemed incomplete and a notice sent to the Applicant on July 27, 2023. The Applicant provided additional information to address the incomplete notice and the application was deemed complete on August 7, 2022. As such, the 150-day deadline established by state law for processing this application is January 4, 2023. *The Hearings Officer concurs in these staff findings.*

### **2. Zone change approval criteria of Zoning and Development Ordinance Section 1202.03**

The zone change criteria are listed in Section 1202.03 of the ZDO. Section 1202.03 states that a zone change may be approved after a hearing conducted pursuant to Section 1307, if the Applicant(s) provide evidence substantiating the following criteria:

#### **A. Section 1202.03(A)**

*The proposed zone change is consistent with the applicable goals and policies of the Comprehensive Plan*

The County's Comprehensive Plan includes goals and policies that must be considered when evaluating a proposed zoning district change. The Applicant provided findings addressing ZDO Section 1202.03(A) approval criteria and Staff did an independent review of which Comprehensive Plan policies are applicable. All Comprehensive Plan chapters were reviewed, but the findings below are limited to only those goals and policies that Staff found applicable to this specific proposal.

- i. Chapter 2; Citizen Involvement:** The purpose of this Chapter is to promote citizen involvement in the governmental process and in all phases of the planning process.

There is one policy in this Chapter applicable to this application:

*Policy 2.A.1 Require provisions for opportunities for citizen participation in preparing and revising local land use plans and ordinances. Insure opportunities for broad*

*representation, not only of property owners and County wide special interests, but also of those within the neighborhood or areas in question.*

The Clackamas County Comprehensive Plan and ZDO have adopted and acknowledged procedures for citizen involvement. This application has been processed consistent with those procedures. Specifically, the County has provided notice to interested agencies, local governments and property owners within ½ mile of the subject property consistent with State law and Section 1307 of the ZDO. The notification to property owners, public notices and hearings ensures an opportunity for the public to participate in the land use process.

**This application is consistent with Chapter 2. *The Hearings Officer concurs in these staff findings.***

- ii. **Chapter 3 Natural Resources and Energy:** The purpose of this Chapter is to provide for the planning, protection and appropriate use of the County's natural resources and energy.

This Chapter contains eight (8) Sections addressing; 1) Water Resources; 2) Agriculture; 3) Forests; 4) Mineral and Aggregate Resources; 5) Wildlife Habitats and Distinctive Resource Areas; 6) Natural Hazards; 7) Energy Sources and Conservation and; 8) Noise and Air Quality.

As discussed previously, the subject properties do contains wetlands identified in the Department of State Lands (DSL) Wetland Inventory and contains a regulated stream, Beaver Creek, and therefore four policies found in Chapter 3 are applicable to the subject proposal.

*Policy 3.A.1 Maintain rivers and streams in their natural state to the maximum practicable extent through sound water and land management practices. Consideration shall be given to natural, scenic, historic, economic, cultural, and recreational qualities of the rivers and adjacent lands*

*Policy 3.A.2 Apply erosion and sediment reduction practices in all river basins to assist in maintaining water quality. Existing riparian vegetation along streams and river banks should be retained to provide fisheries and wildlife habitat, minimize erosion and scouring, retard water velocities, and suppress water temperatures.*

**3.A.1:** The smaller tax lot (32E22 00200) is undeveloped and contains a steeply forested canyon divided by Beaver Creek, classified by the state and the U.S Fish and Wildlife Service and the Department of State Lands as a Riverine wetland. The section of Beaver Creek on this tax lot is a mapped River and Stream Conservation area that would be regulated by Policy 3.A.1 and 3.A.2. Many of the submitted comment letters describe the natural and scenic natural quality of Beaver Creek on this property and evidence on the record demonstrates that this is a stream corridor in its natural state with scenic qualities. Policy 3.A.1 requires the County to maintain streams in their natural state to the maximum extent with consideration of these natural and scenic qualities.

The portion of Beaver Creek that traverses part of the subject property is classified as a “medium” stream, regulated under the county’s River and Stream Conservation Area rules. As such, development is prohibited within 70 feet of the mean high water line of the stream and removal of vegetation within that buffer is allowed only on a very limited basis.

The Applicant has stated that future development could meet the required setback of the river and stream conservation area and has, in fact, proposed to maintain an even greater setback from Beaver Creek – 100 feet. In addition, the Applicant also proposed to develop only in areas with slopes of less than 20% (even though the county’s Zoning & Development Ordinance would allow for development on such slopes if there were outside the required stream buffer). The Applicant is also not proposing any roads or driveways through the stream corridor. The 3-4 homes that would locate on the east side of Beaver Creek would access the site from the east (S Lammer Ln), while the remainder of the homes on the west side of Beaver Creek would access the site from the west (S Hwy 213).

To ensure this riparian corridor is maintained, the applicant has proposed the following condition:

*There shall be no development or development-related disturbance, nor removal of riparian vegetation or non-dangerous trees, within 100 feet of the high water mark of Beaver Creek or upon slopes 20% or greater.*

Staff acknowledges concerns raised about this stream corridor and forested area and agrees that development on this site would lead to removal of some the mature forest canopy and associated vegetation at the top of the slope above Beaver Creek. However, Staff finds it notable that the areas that would be developed on this taxlot (outside of the stream buffer and steep slopes) are afforded no protection from tree removal - all those trees could be removed without a permit. The additional stream buffer and development prohibition on slopes >20% proposed by the Applicant would provide a larger vegetated buffer that is currently required.

Further, this policy requires the natural state of rivers and streams to be protected *to the maximum extent practicable*. To that end, the Applicant has proposed to comply with a condition that would retain more vegetation that is currently required and has shown through a conceptual lot and homesite layout that as many as 12 homes may be able to be developed on the smaller taxlot (32E22 00200) while maintaining these vegetated buffers.

3.A.2: The applicant submitted findings that Policy 3.A.2 including the following:

- *The existing riparian vegetation along Beaver Creek will be preserved because no development (and by extension, no tree removal) is proposed within 100 feet of the high-water mark of Beaver Creek. This is consistent with the maximum riparian buffer required under ZDO 704.3. In practice, preservation of all vegetation on slopes 20% or greater will provide in many cases protection of*



*riparian vegetation in excess of 200 feet. Soil erosion will be prevented during development of the West Parcel through the use of soil management best management practices (“BMPs”) as recommended in the Clackamas County Erosion Prevention Planning and Design Manual. However, it is worth noting that the need for such BMPs may be minimal, as slopes of 20% or greater are not proposed to be developed.*

- *The Applicant’s civil engineer prepared a report that demonstrates each 2-acre lot can infiltrate runoff from new impervious surfaces, either naturally or via swales/French drains, to prevent any surface water flow to these streams*

Indeed, the Applicant submitted the conceptual subdivision plans and an infiltration analysis to demonstrate that development under the proposed RA-2 zoning could occur in such a way as to not disturb riparian vegetation, either by development, soil erosion, or infiltration.

Staff finds that the evidence in the record is sufficient to conclude that the subject properties could be developed under the RA-2 zoning in such a way that retains the vegetated buffer of Beaver Creek, maintains the natural state of the stream as much as is practicable through sound water and land management practices, if conditions are imposed that prohibit development within 100 feet of the mean high water line of Beaver Creek or on slopes greater than 20% on the subject site.

**With conditions, the proposed zone change is consistent with Comprehensive Plan Policies 3.A.1 and 3.A.2. *The Hearings Officer concurs in the above discussion and in these staff findings.***

*Policy 3.F.1 For areas that are outside both the Metropolitan Service District Boundary and the Portland Metropolitan Urban Growth Boundary, prevent disturbance of natural wetlands (marshes, swamps, bogs) associated with river and stream corridors. Adjacent development shall not substantially alter normal levels or rates of runoff into and from wetlands. Site analysis and review procedures specified in the Open Space and Floodplains section of the Land Use chapter shall apply.*

The Applicant first provides findings that interpret this policy to mean essentially that impacts are not prohibited to wetlands outside of the Portland Metropolitan area by citing the fact that policies in 3.F.1.1 and 3.F.1.3 reference areas governed through the Open Space, Floodplain and Development Standards chapters in the Plan.

Staff disagrees. Wetlands are not regulated through those chapters (unless they happen to coincide with designated open space or floodplain areas). If the above policy meant that wetlands had no protection from disturbance, except if within a regulated in open space and flood plain areas, most wetlands in the rural areas of the county would have no county-level protections at all and the county would be in violation of Goal 5.

Policy 3.F.1 was specifically included in the acknowledged Comprehensive Plan in order to comply with Statewide Planning Goal 5, for wetland resources. Outside of the Urban Growth Boundary (except in parts of the Mt. Hood area) the federal wetland inventory is so general (just based on aerial fly overs) that it has not been possible to determine the exact location, quality, or quantity of wetlands. The County has not had the resources in order to develop more in depth or County specific wetland mapping. As such, policy 3.F.1 was adopted so that the County would review significant developments- including zone changes- to assure consistency with Goal 5 for wetland resources. The use of the phase “prevent disturbance” was intentional and until the county has an inventory of rural wetland compliant with Goal 5, the only county-level protection afforded many of the wetlands in the rural areas is this “prevent disturbance” standard.

The subject policy applies to the wetland complex on the larger parcel (32E21 00200) since it is outside of the UGB and is not a River and Stream Conservation area regulated by Policy 3.A.1 and 3.A.2 above. It would also not be regulated by any policies in the ZDO and, as such, the Comprehensive plan specifically states that any Zone Change application needs to be reviewed to assure consistency with Chapter 3 policies of the Plan.

As noted, the DSL Statewide Wetland Inventory identified an intermittent, riverine wetland on site. The linear riverine wetland (per the Department of State Lands classification) runs north through the central portion of this larger tax lot (see exhibit 8). The U.S Fish and Wildlife Service designates this wetland as a seasonally flooded intermittent riverine wetland (R4SBC) that is an open channel which periodically or continuously contains moving water, or which forms a connecting link between two bodies of standing water. The applicant’s submitted wetland delineation determined that there were additional wetlands associated with this mapped riverine wetland. The total acreage of wetlands on tax lot 32E21 00200 per the wetland delineation report is .89 acres.

The Applicant did also provide findings addressing the “prevent disturbance” standard and included conceptual lot and home layout designs that demonstrate the subject properties can be developed with 2-acre lots and no development would need to occur within the wetlands. The conceptual designs also include bridges that would be built to span over the wetland, so that roads would not be developed within wetlands.

The Applicant also provided information from Sisul Engineering about infiltration rates of the soils on the site and feasibility of on-site stormwater management if it were to be developed with 2-acre lots (see Exhibit 2, *Application*, pages 95 - 104). This analysis concluded that:

*Water quality will be met through infiltration that will keep the runoff from surface waters and with the use of vegetated ditches and detention ponds, where the vegetation will trap sediment and cleanse the runoff. These measures are common elements to rural developments where the acreage of the sites allows less structured facilities than would typically be used in an urban development.*

To ensure disturbance of and runoff into wetlands are prevented, the Applicant proposed the following conditions of approval:

- *“Wetlands identified in the Applicant’s wetland delineation (prepared by Pacific Habitat Services, dated June 15, 2021) shall be protected from any disturbance by a nondisturbance/conservation easement held by a homeowners association, Clackamas River Water, or a third-party conservation entity. Such easement shall be established prior to approval of any final plat on the property.”*
- *“Wetlands identified in the Applicant’s wetland delineation (prepared by Pacific Habitat Services, dated June 15, 2021) which must be crossed by internal roadways shall be protected by the use of bridge structures, the support for which must be constructed outside of the delineated wetlands.”*

DSL was notified and provided comments on this proposal. DSL staff concurred, or agreed with, with the Applicant’s wetland delineation for the larger lot (32E21 00200), but noted that no wetland delineation was provided for the smaller lot (32E22 00200). Indeed, the State Wetland Inventory does identify a wetland on that parcel, it is directly associated with and appears to be mostly contained within a portion of Beaver Creek and, as such, would be well within the vegetated stream buffer that is required to remain intact.

DSL staff further states that *“it appears that the project will impact wetlands and require a State Permit”*, but goes further to identify the additional information needed for DSL to be able to make the finding that no further review or permitting is required. These additional pieces of information seem to be the basis for the statement that there appear to be impacts, rather than an identification of actual impacts that are made to wetlands by the proposal. The three additional items include:

- *a wetland delineation for Sec 22, TL200*
- *a plan set that overlays wetlands on actual proposed construction elements*
- *a plan set that visually documents avoidance of wetland so that verification of design comments such that bridges are used to avoid wetlands...can be verified.*

Staff understands that those elements are necessary for DSL to determine that no permit is required at the time of development, but for the purposes of the zone change and to address the “prevent disturbance” standard, the Applicant only needs to show that it is possible to develop the site in such a way as to avoid the wetlands. Staff finds that the Applicant has done this with the following:

- A conceptual plan that identifies lots, homesites, septic areas outside of identified wetlands and all identified wetlands placed in a restricted development area (see Exhibit 2, *Application*, pages 91 - 97).
- An elevation showing the type of bridge that could be utilized to span the wetland, without any development within the wetland area. Staff finds this sufficient to conclude that it can be done – specific engineering of these bridges will occur at the time development is proposed

- Providing a report completed by a civil engineer that found each 2-acre lot can infiltrate runoff from new impervious surfaces, either naturally or via swales/French drains, to prevent any surface water flow to wetlands or streams.
- Agreeing that to protect wetlands from disturbance, it is necessary to include conditions that would require all identified wetlands on the subject properties be placed in development restricted areas or open space tracts. This condition would be implemented at the time the land is divided and would be used to ensure all wetlands are identified and no development – including homes, septic systems, or roads – occurs with the wetlands.

As such, Staff finds it reasonable to conclude that, with a condition that prohibits development within mapped wetland areas, **the proposed zone change can be consistent with the Policy 3.F.1 of the Comprehensive Plan.** *The Hearings Officer concurs in the above discussion and in these staff findings. I considered concerns raised by interested citizens regarding these wetlands, issues with drainage, and the effects of development of these properties as 2-acre rural residential lots. I also considered the applicant's engineering reports (Sisul engineering) and staff review of this issue and am persuaded that, with proposed conditions of approval, the proposal can be made consistent with this policy.*

Policy 3.L.3 *Apply appropriate safeguards to development on organic/compressible soils, high shrink-swell soils and wet soils with high water table (as defined in DOGAMI Bulletin No. 99) to minimize threats to life, private and public structures/facilities.*

The DOGAMI Bulletin 99 maps indicate presence of wet soils throughout central part of the larger tax lot 32E21 00200. Bulletin 99 defines “wet soils” as “*areas in which the water table rises to within 1.5 ft. of the ground surface. High water table causes water to stand at the surface or in shallow excavations. Pumping of water from excavations may cause sides to cave unless properly shored. High water table can cause basement floors and walls to crack, force empty storage tanks to rise to the ground surface, and prevent subsurface disposal of septic tank effluent.*”

The area on the Bulletin 99 map generally identifies the wetlands on taxlot 32E21 00200, and, as the applicant notes, the Bulletin 99 maps are imprecise when it comes to the delineation of wet soils. In fact, the Bulletin 99 document specifically notes with regard to soils, “*the maps should be used as a guide for planners and developers so that obvious hazards are not overlooked. The maps are not a substitute for on-site geologic or soil investigations.*”

The applicant’s submitted wetland delineation report states that the wetlands on site were delineated using several factors including:

- topographic changes;
- changes from observed hydric soils to soils where no hydric indicators were observed; and

- areas that exhibited a high water table and/or saturation within the upper 12 inches of the soil profile.

This delineation further refines the mapped area on the Bulletin 99 maps and ensures that all the identified “wet soils” are included within the delineated wetlands, in which development would be prohibited under this proposal.

The Applicant has demonstrated that the subject properties would be developed under the RA-2 zoning in such a way as to prevent Staff finds that prohibiting all development within the mapped wetlands, and by default, the areas of wet soils, provides and “appropriate safeguard” *to minimize threats to life, private and public structures/facilities.*

**This application is consistent with Chapter 3. *The Hearings Officer concurs in the above discussion and in these staff findings. I considered the written statements and testimony submitted by interested citizens opposed to this application. I note, however, that a significant majority of the parcels within the area under consideration (within ¼ mile of the site) are identified as two acres or smaller in size, characterized by rural residential development with a rural level of services. In other words, the immediate vicinity is already impacted by rural residential development. Beaver Creek runs through a portion of the site, but there appears to be suitable area for any future development of the site, leaving room for the applicant to expand the required 70-foot buffer along Beaver Creek to a 100-foot buffer. I am persuaded that any development resulting from the proposed zoned could be so situated as to have minimal additional impact on the surrounding area, including wildlife habitat.***

- iii. **Chapter 4 Land Use:** *This Section of the Comprehensive Plan includes the definitions for urban and rural land use categories, and outlines policies for determining the appropriate Comprehensive Plan land use designation for all lands within the County.*

This Chapter contains three Sections addressing; 1) Urbanization; 2) Urban Growth Concepts; and 3) Land Use Policies for the each Land Use Plan designation. Only the Land Use Policies for the each Land Use Plan designation would be applicable to the proposed zone change and those are addressed below:

The subject property is designated Rural on the Comprehensive Plan Map. The proposed change is to a rural residential zoning designation with a different minimum lot size. There is no change proposed to the existing Rural designation on the Comprehensive Plan Map. Each of the applicable Policies in the Rural Section of Ch. 4 (Land Use) Chapter of the Comprehensive Plan are addressed as follows:

Policy 4.MM.5 *Existing large lots should be reduced to meet future rural housing needs prior to expanding the areas designated as Rural.*

This proposal involves a large, approximately 111-acre lot that would be reduced to accommodate more rural residential housing.

**This policy is met. *The Hearings Officer concurs with this analysis and in these staff findings. I agree with the concerns expressed by Mr. Edgar regarding the need for smaller, affordable housing units. This application, however, proposes to re-zone these two FF-10 zone properties to RA-2 zone, the smallest of the County’s rural zoning designations. I understand Mr. Edgar’s contention that none of these lots are likely to provide for the type of “affordable housing” he is encouraging. However, I suggest the type of affordable housing Mr. Edgar is discussing requires urban-sized lots and urban levels of services, including public water and sewer, and public transportation services.***

Policy 4.MM.11.1 *The RA-2 zoning district shall be applied when all the following criteria are met:*

*a. Parcels are generally two acres or smaller.*

In 2000, the Board of County Commissioners (Board) provided an interpretation of this criteria through Board Order (BO) 2000-57 (see Exhibit 3b). Although in 2000, these policies were numbered differently, the text of the policies has remained the same and this interpretation is still used to assess whether a zone change proposal to the RA-2 zoning district will comply with this standard.

Under BO 2000-57, the Board interpreted the use of “generally two acres or smaller” to mean parcels that are “no more than 2 acres”. The term “generally” is interpreted to mean a “simple majority of the parcels within the area under consideration”. Additionally, the BCC has interpreted “area” as meaning a majority of the parcels within a Rural land use designation that are at least partially located within ¼ mile of the boundaries of the property being considered for a zone change, including the parcels being considered for the zone change.

The application materials included a map and analysis of all properties that are wholly or partially within ¼ mile (1,320 feet) of the boundaries of the subject property. Specifically, the applicant’s submitted analysis concluded that there were 202 total properties wholly, or partially, within ¼ mile of the subject property. Of those 202 properties, 144 were no more than 2 acres and 58 are over 2 acres in size. As such, well over 50%, or a majority, were 2 acres or less.

This alone meets the “generally two acres” standard. However, the Applicant provides additional analysis that finds that within ½ mile of the subject properties, 80% of the lots are smaller than two acres and within a mile, 85% of lots are smaller than two acres.

**Policy 4.MM.11.1(a) has been met. *The Hearings Officer concurs with this analysis and in these staff findings. Ms. Kimmell and other commentators challenge the methodology used by the applicant and staff in making this determination, pointing out that as a percentage of land use as a whole, the majority of use by acreage is not residential on lots less than two acres. However, the applicant and staff used the correct methodology for this criteria as interpreted by the County’s Board.***

b. The area is significantly affected by development

The applicant provided findings stating that the project is located within a highly developed area between Oregon City to the north, Mulino to the south, and Beavercreek to the east. Existing single family subdivisions are located to the north, south, west, and southwest and have typical lot sizes of 8,000 to 20,000 sq. ft. There is a smaller subdivision directly east located on south Lammer Rd., comprising ½ acre lots. The area also includes churches, the Stone Creek Golf Course, a distillery, and a veterinary clinic and it is located within a mile of Oregon City.

“Significantly affected” is not internally defined by the ZDO. Its meaning can be determined by the hierarchical structure of the policies of 4.MM.11 of the Plan. Based on the approval criteria in Chapter 4 of the Land Use policies for FF10, RRF5 and RA2 “Significantly affected” is the term used to describe properties that are which are generally 2 acres or smaller. “Affected” is the term used to describe properties that are generally 5 acres or 10 acres. The surrounding area (1/4 mile radius) and subject properties are significantly affected by development. Of the 202 properties partially, or wholly, within ¼ mile of the subject property, 140, or 81%, are developed.

Staff considers this area to be significantly affected by development. **Policy 4.MM.11.1.b is met. *The Hearings Officer concurs with this analysis and in these staff findings. Ms. Kimmell and other commentators challenge this staff finding, again pointing out that as a percentage of land use as a whole the majority of use by acreage is not residential on lots less than two acres. However, as discussed above, the applicant and staff used the correct methodology for this criteria as interpreted by the County’s Board.***

c. There are no natural hazards, and the topography and soils are suitable for the location of homes.

Natural hazards:

Similar to the policy discussed above, there is no definition or necessarily precedent for “no natural hazards.” The Applicant proposes to interpret “natural hazards” to mean those listed in the “Major Hazards Open Space overlay.” Policy 4.GG.2.2 of the Comprehensive Plan states that “the purpose of the Major Hazards Open Space is to protect the public from natural hazards.” Major Hazards Open Space is land in any of the following categories:

- *The floodway of 100-year floodplains;*
- *Areas of known landslide hazard; and*
- *Areas of severe erosion, unstable soil, or earth movement. See Comprehensive Plan, Policy 4.GG.2.2.*

The Applicant further concludes that *notably, the Property is not designated as a Major Hazard Open Space and thus does not include any “natural hazards” as previously determined by the County.*

Staff concurs and finds this interpretation consistent with the areas identified in Statewide Planning Goal 7, *Areas Subject to Natural Hazards*. In Goal 7, the state identifies *floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires*. As noted, there are no mapped landslide hazard areas (per Bulletin 99) and no mapped flood hazard areas (floodplain or floodway). It is not possible for there to be no risk for earthquakes or wildfire, but there is no evidence that would indicate these lots would have any higher risk than of those hazards than any other nearby lots.

Topography and soils suitable for the location of homes:

The smaller tax lot included in the subject application (32E22 00200) contains an area of steep slopes (>20%) in the forested canyon with Beaver Creek. A condition that prevents any development for occurring within the steeply sloped areas will ensure homes are not built on areas with steep topography.

As noted, the area of “wet soils” on the larger taxlot was refined by the wetland delineation for the site. Per this report, the wetlands were *delineated based on topographic changes and changes from observed hydric soils to soils where no hydric indicators were observed*. A condition that prevents any development for occurring within the identified wetlands will ensure homes are not built on these less suitable soils. Outside the wetland and stream areas, soils present on the property include Jory stony silt loam and Jory silty clay loam. Based on the soils report provided by the Applicant (see Exhibit 2, Application, pages 169 - 188), these soils are described as “well drained” and are not rated as hydric soils. The topography of these area includes only moderate slopes, making the areas outside the wetlands and the stream corridor more suitable areas on the site for development.

The Applicant provided information from Sisul Engineering about infiltration rates of the soils on the site and feasibility of on-site stormwater management if it were to be developed with 2-acre lots (see Exhibit 2, Application, pages 95 - 104). This study noted the following:

*The applicant recently had GeoPacific Engineering perform infiltration testing on the site. That infiltration testing, included as an appendix to this report, found infiltration rates ranging from 10.3 inches per hour to zero inches per hour. These are raw infiltration rates and the actual infiltration rates used for design would include a factor of safety. In areas where at least a 0.5 inch/hour design infiltration rate can be utilized, a substantial portion of the site runoff from new impervious surfaces could be infiltrated, with larger events utilizing an overflow bypass system to an established drainageway. Where infiltration rates are below 0.5 inches per hour, then it is more*



*likely that stormwater facilities would be more detention in nature, rather than retention.*

The report goes on to indicate what types of infiltration facilities would be used for development under the proposed RA-2 zoning.

Applicant has demonstrated that the site could be developed at the RA-2 zoning density while maintaining all development on the topography and soils that are suitable for housing. The majority of the property contains such soils and topography – the mapped wetland on lot 32E22 00200 only encompasses 0.89 or the total 82.7 acres. The steep slopes around Beaver Creek are largely within the stream buffer where development is prohibited and the applicant has demonstrated through the provided conceptual layouts that there is sufficient upland on the smaller lot 32E22 0020 to accommodate homes and septic systems.

**Policy 4.MM.11.2.c is met. *The Hearings Officer concurs with this analysis and in these staff findings. As pointed out by Mr. Stephenson and as stated in the applicant and by County staff, the subject properties are not designated as a Major Hazard Open Space and thus do not include any “natural hazards.”***

d. A public or private community water system is available.

Clackamas River Water has submitted a signed statement of feasibility for the proposed subdivision showing that they have capacity to serve a maximum of 55 lots allowable in the RA2 zoning district. As such, **Policy 4.MM.11.2.d is met. *The Hearings Officer concurs with this analysis and in these staff findings. I considered concerns raised by neighbors regarding potential impacts to their water supply from additional development. However, I note that Clackamas River Water provided a signed statement of feasibility for the water capacity and find no substantial evidence or analysis to support finding that the zone change should be denied for this reason.***

e. Areas are in proximity or adjacent to an Unincorporated Community or incorporated city.

The subject property is approximately 0.95 miles from the incorporated City of Oregon City and less than a mile from the unincorporated community of Beavercreek. Many easily accessible main roads, such as Beavercreek Rd., Highway 213, and S. Leland Rd. link together the subject property with Beavercreek and Oregon City. As such, this is considered an area that has easy access to an incorporated City and unincorporated community. As such, **policy 4.MM.11.1.e is met. *The Hearings Officer concurs with this analysis and in these staff findings. Ms. Kimmell points out that driving distances to these communities are not the same as linear distances on a map. However, this does not change the analysis here, or change the fact that the site is in proximity or adjacent to an unincorporated community or incorporated city within the meaning of this criteria.***

*f. In areas adjacent to urban growth boundaries, RA-2 zoning shall be limited to those areas in which virtually all existing lots are two acres or less.*

This policy is not applicable because the properties are not adjacent to the Urban Growth Boundary. **This application is consistent with 4.MM.11.1.f. The Hearings Officer concurs with this analysis and in these staff findings.**

Based on the above analysis and findings, **this application is consistent with Chapter 4. The Hearings Officer concurs with this analysis and in these staff findings.**

**iv. Chapter 5 Transportation:** *This Chapter outlines policies addressing all modes of transportation.*

This Chapter contains eight Sections including 1) Foundation and Framework; 2) Land Use and Transportation; 3) Active Transportation; 4) Roadways; 5) Transit; 6) Freight, Rail, Air, Pipelines and Water Transportation; 7) Finance and Funding; and 8) Transportation Projects and Plans.

The only policy found in this chapter that is relevant to this application is found in the Roadways section.

*Policy 5.F.6 Require changes in land use plan designation and zoning designation to comply with the Transportation Planning Rule [Oregon Administrative Rules (OAR) 660-012-0060]*

The applicant was required to submit a traffic study or similar evidence to demonstrate compliance with requirements of the Transportation Planning Rule (TPR), found in Oregon Administrative Rules 660-012- 0060, as well as the requirements of ZDO Section 1202.03 and Chapter 5 of the Comprehensive Plan.

The Applicant provided a Traffic Impact Study (TIA) with the application materials (see Exhibit 2, *Application*, pages 192-267). This study, dated July 5, 2023 was completed by a licensed traffic engineer (Ard Engineering) and found that

*Based on the zone change analysis, the proposed change to RA-2 zoning could result in a net increase of up to 31 trips during the morning peak hour, 42 trips during the evening peak hour, and 414 additional daily trips as compared to the existing FF-10 zoning.*

*The study intersections are projected to operate acceptably per ODOT and Clackamas County standards through 2038 either with or without the addition of site trips from the proposed development and with or without the addition of site trips from development under the “reasonable worst case development scenario” for the proposed zoning. No operational mitigations are necessary or recommended in conjunction with the proposed development.*

*An examination of crash data for the most recent five years shows no significant crash trends that may be indicative of design deficiencies. The intersection crash*

*rates were determined to be well below the 90th percentile crash rate for similar intersections in Oregon. No specific crash mitigations are recommended.*

*A left-turn lane is projected to be warranted and is recommended for installation on the southbound Highway 213 approach to the site access in conjunction with the proposed development. Based on the queuing analysis, it is recommended that a storage length of 100 feet be provided for the future southbound left-turn lane on Highway 213. A northbound right-turn deceleration lane is also warranted on the northbound Highway 213 approach to the site access on Highway 213. No new turn lanes are recommended for the intersection of S Beaver Creek Road at S Lammer Road in conjunction with the proposed development and zone change.*

Both ODOT and County Transportation Engineering (TE) reviewed the proposal concur with the analysis and conclusions of the TIA. Specifically, ODOT (see Exhibit 13) notes that:

*For zone changes and comprehensive plan amendments, local governments must make a finding that the proposed amendment complies with the Transportation Planning Rule (TPR), OAR 660-012-0060. There must be substantial evidence in the record to either make a finding of “no significant effect” on the transportation system, or if there is a significant effect, require assurance that the land uses to be allowed are consistent with the identified function, capacity, and performance standard of the transportation facility. In addition, the Clackamas County Development Code requires safety to be addressed as part of a Zone Change request.*

*The safety of the transportation system is a high priority for Clackamas County and ODOT and the two agencies often work together to address safety concerns across the transportation system. With a posted speed of 55mph, OR 213 is considered a high speed facility.*

*The Traffic Impact Study (TIS) prepared by the applicant’s traffic engineer, has identified that the proposed highway access intersection would not meet the Oregon Highway Plan mobility standard for this facility without mitigation.*

County TE staff confirmed that *the traffic operations analysis does show that the site access is expected to meet ODOT and County operational standards under future background plus site trips. The recommended southbound left-turn lane is not needed from a strictly operational standpoint, but it is a necessary safety mitigation given the high traffic speeds and volumes on OR 213. (See Exhibit 9)*

As such, the proposal is consistent with the requirements of the TPR. **This application is consistent with Chapter 5. The Hearings Officer concurs with this analysis and in these staff findings. The traffic and safety concerns raised by several residents of the local area are genuine: additional use of local access roads in particular will always have some impact, and I noted the impact the recent wildfire evacuations have had residents’ view of the capacity of the transportation system. However, I also noted the Traffic Impact Study and related analysis conducted by Mr. Ard, a licensed professional engineer, and the concurrence in his assessment and recommended mitigation by both County staff and**

***ODOT staff. I was persuaded that approval of this zone change will not significantly affect the operational or safety adequacy of the transportation system.***

- v. **Chapter 11 The Planning Process:** *The purpose of this Chapter is to establish a framework for land use decisions that will meet the needs of Clackamas County residents, recognize the County's interrelationships with its cities, surrounding counties, the region, and the state, and insure that changing priorities and circumstances can be met.*

In the City, Special District and Agency Coordination Section of this Chapter, one policy is applicable:

Policy 11.A.1 *Participate in interagency coordination efforts with federal, state, Metro, special purpose districts and cities. The County will maintain an updated list of federal, state and regional agencies, cities and special districts and will invite their participation in plan revisions, ordinance adoptions, and land use actions which affect their jurisdiction or policies.*

Notice of this application has been provided to all appropriate agencies and parties, DLCD and the Hamlet of Beavercreek CPO, and an advertised public hearing before the Hearing's Officer provides an adequate opportunity for interagency coordination of this proposed zone change and demonstrates compliance with this policy. **This policy is met; this application is consistent with Chapter 11. The Hearings Officer concurs with this analysis and in these staff findings.**

Based on the above findings and those provided by the applicant, staff finds that **the proposed zone change can be found compliant with ZDO Subsection 1202.03(A). The Hearings Officer concurs with this analysis and in these staff findings.**

***B. Section 1202.03(B):***

*If development under the proposed zoning district designation has a need for any of the following public services, the need can be accommodated with the implementation of the applicable service provider's existing capital improvement plan: sanitary sewer, surface water management, and water. The cumulative impact of the proposed zone change and development of other properties under existing zoning designations shall be considered.*

Development that could occur under the proposed RA-2 zoning district would not have access to or need public sewer. The subject property is not located in a public sanitary sewer district and onsite septic systems would be required for each lot allowed under the RA-2 zoning district. The development would have access to public water, provided through Clackamas River Water (CRW) district. A *Preliminary Statement of Feasibility* signed by was submitted with the application, indicating that site could be adequately served with water under the proposal. A signed *Preliminary Statement of Feasibility* was also submitted with the application, indicating that surface water could be adequately managed on the subject site.

**The proposed zone change is consistent with 1202.03(B). The Hearings Officer concurs with this analysis and in these staff findings.**

### **C. Section 1202.03(C)**

*The transportation system is adequate and will remain adequate with approval of the proposed zone change. For the purpose of this criterion:*

- 1. Adequate means a maximum volume-to-capacity ratio (v/c), or a minimum level of service (LOS), as established by Comprehensive Plan Tables 5-2a, Motor Vehicle Capacity Evaluation Standards for the Urban Area, and 5-2b, Motor Vehicle Capacity Evaluation Standards for the Rural Area.*
- 2. The evaluation of transportation system adequacy shall be conducted pursuant to the Transportation Planning Rule (Oregon Administrative Rules 660-012- 0060).*
- 3. It shall be assumed that the subject property is developed with the primary use, allowed in the proposed zoning district, with the highest motor vehicle trip generation rate.*
- 4. The methods of calculating v/c and LOS are established by the Clackamas County Roadway Standards.*
- 5. The adequacy standards shall apply to all roadways and intersections within the impact area of the proposed zone change. The impact area shall be identified pursuant to the Clackamas County Roadway Standards.*
- 6. A determination regarding whether submittal of a transportation impact study is required shall be made based on the Clackamas County Roadway Standards, which also establish the minimum standards to which a transportation impact study shall adhere.*
- 7. Notwithstanding Subsections 1202.03(C)(4) through (6), motor vehicle capacity calculation methodology, impact area identification, and transportation impact study requirements are established by the ODOT Transportation Analysis Procedures Manual for roadways and intersections under the jurisdiction of the State of Oregon.*

ZDO Subsections 1202.03(C)(1)-(7) define what is meant by an “adequate” transportation system. The Applicant’s submitted evidence, as verified by ODOT and the county’s Transportation Engineering (TE) Division, which indicate that the existing and planned transportation system is adequate to serve the proposed zone change and no mitigation measures are recommended to meet the TPR requirements; however mitigation measures that are necessary to meet safety standards.

Specifically, the Traffic Impact Study (TIA) concluded that: *The study intersections are projected to operate acceptably per ODOT and Clackamas County standards through 2038 either with or without the addition of site trips from the proposed development and with or without the addition of site trips from development under the “reasonable worst case development scenario” for the proposed zoning. No operational mitigations are necessary or recommended in conjunction with the proposed development.*

***This application is consistent with 1202.03(C). The Hearings Officer concurs with this analysis and in these staff findings. As discussed above, I was persuaded by the Traffic Impact Study and related analysis conducted by Mr. Ard, a licensed professional engineer, and the concurrence in his assessment and recommended mitigation by both County staff and ODOT staff, that the transportation system is adequate and will remain adequate with approval of the proposed zone change.***

**D. Section 1202.03(D)**

*Safety of the transportation system is adequate to serve the level of development anticipated by the proposed zone change.*

The TIA also addressed the safety of the transportation system under the proposal and concluded the following:

*An examination of crash data for the most recent five years shows no significant crash trends that may be indicative of design deficiencies. The intersection crash rates were determined to be well below the 90th percentile crash rate for similar intersections in Oregon. No specific crash mitigations are recommended.*

*A left-turn lane is projected to be warranted and is recommended for installation on the southbound Highway 213 approach to the site access in conjunction with the proposed development. Based on the queueing analysis, it is recommended that a storage length of 100 feet be provided for the future southbound left-turn lane on Highway 213. A northbound right-turn deceleration lane is also warranted on the northbound Highway 213 approach to the site access on Highway 213. No new turn lanes are recommended for the intersection of S Beaver Creek Road at S Lammer Road in conjunction with the proposed development and zone change.*

Both ODOT and County TE staff have reviewed the Applicant's TIA and concur with its findings. ODOT has recommended the following conditions of approval for the proposal:

- A left turn lane is projected to be warranted and shall be installed on the southbound Highway 213 approach to the site access in conjunction with the proposed development.
- A storage length of 100 feet shall be provided for the future southbound left turn lane on Hwy 213.
- A northbound right turn deceleration lane is also warranted on the northbound Hwy 213 approach to the site access on Hwy 213 and shall be installed

As such, staff finds that the traffic improvements necessary needed to demonstrate that the safety of the transportation system are adequate to serve the level of development anticipated by the proposed zone change. **With conditions, this application can be consistent with 1202.03(D). The Hearings Officer concurs with this analysis and in these staff findings.**

**PART 3. CONDITIONS OF APPROVAL**

Staff recommends **APPROVAL** of the zone change (File No. Z00277-23-Z) from the Farm Forest, 10-Acre (FF-10) zone to the Rural Area Residential, 2-acre (RA-2) zone, subject to the following conditions of approval, ***reviewed, adopted and/or modified by the Hearings Officer:***

1. The Clackamas County *Non-Urban Area Zoning Map* shall be amended to identify the subject properties as being in the Rural Area Residential, 2-Acre (RA-2) zoning district.

2. Any future land division shall prohibit development within all delineated wetland areas, as identified in the most current and valid delineation approved by the Dept. of State Lands, by designating the area(s) as restricted development area(s) within individual lots or by placing the area(s) in tract(s) in which development is prohibited.
3. Any future land division shall prohibit development within 100 feet of the mean high water line of Beaver Creek and on any area with a slope of greater than 20 percent by designating the area(s) as restricted development area(s) within individual lots or by placing the area(s) in tract(s) in which development is prohibited.
4. In conjunction with the development of a subdivision on the site, the following improvements shall be made to S Hwy 213:
  - A left turn lane shall be installed on the southbound Highway 213 approach to the site access;
  - A storage length of 100 feet shall be provided for the southbound left turn lane on Hwy 213; and
  - A right turn deceleration lane shall be installed on the northbound Hwy 213 approach to the site access.
5. The approval of the application granted by this decision concerns only the applicable criteria for this decision. The decision does not include any conclusions by the county concerning whether the activities allowed will or will not come in conflict with the provisions of the federal Endangered Species Act (ESA). This decision should not be construed to or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination if necessary with the federal agencies responsibility for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated and maintained in a manner that complies with the ESA.

This recommendation is based on the findings detailed in Section III of this Staff Report.

#### **E. DECISION**

Based on the findings, discussion, conclusions, and record in this matter, the Hearings Officer finds that the application satisfies all the criteria in Section 1202 of the ZDO and is consistent with the Comprehensive Plan criteria for the Rural Area Residential 2-acre (RA-2) zoning designation, as well as all other applicable Comprehensive Plan policies, and APPROVES Zone Change Application Z0277-23-Z.

Dated: November 2, 2023



Carl D. Cox

Clackamas County Hearings Officer

## APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision is "final" for purposes of a LUBA appeal as of the date of the decision appearing by my signature.