

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

In the Matter of an Application by)
Robert and Cheryl Krueger and John Macy)
for Approval of a Comprehensive Plan)
Amendment from Agriculture/Forestry)
Large Holding (AFLH) to Agriculture/)
Forestry Small Holding (AFSH), a Zone)
Change from AF-20 to AF-10, and an)
Exception to Goal 3 (Agricultural Lands),)
and Goal 4 (Forest Lands) to Amend Rural)
Residential Exception Code Area 5.11 to)
Include Three Five-Acre Parcels, Tax Lots)
5414-3800, -3900, and -4000, Docket No.)
PAZ-02-01, and Declaring an Emergency)

ORDINANCE 703

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business in formal session on July 26, 2001, Commissioners Leslie Lewis and Robert Johnstone being present.

WHEREAS on June 7, 2001, them Yamhill County Planning Commission approved 6-2 the application identified above, Planning Docket PAZ-02-01, as well as the attendant zoning change and Comprehensive Plan amendment contained in application PAZ-02-01, and;

WHEREAS on July 12, 2001, the Board held a duly noticed public hearing on the application. John Pinkstaff Esq. of McEwan, Gisvold, Rankin, Carter & Streinz LLP, attorney for the applicants, spoke in favor of the application, as did applicant Robert Krueger. No persons offered evidence or spoke in opposition. After receiving evidence and considering testimony, the Board began deliberations, and;

WHEREAS the Board concluded its deliberations and voted 3-0 to affirm the Planning Commission's decision. NOW, THEREFORE:

THE YAMHILL COUNTY BOARD OF COMMISSIONERS ORDAINS AS FOLLOWS:

The Yamhill County Comprehensive Plan Map, as amended, is hereby amended as specified in the attached Exhibit "B" map incorporated into this ordinance by reference; and the Yamhill County Planning Commission's approved zoning change contained in application PAZ-02-01 is affirmed, for the reasons stated in the Findings for Approval attached and incorporated into this Board Order as Exhibit "A." This ordinance being necessary for the health, safety, and welfare of the citizens of Yamhill County, and an emergency having been declared to exist, is effective upon passage.

DONE at McMinnville, Oregon this 26th day of July, 2001.

ATTEST:

YAMHILL COUNTY BOARD OF COMMISSIONERS

CHARLES STERN

County Clerk

By Deputy Kellye Fetters

FORM APPROVED BY:

Rick Sanai
Assistant County Counsel

Not available for signature
Chairman THOMAS E.E. BUNN

Leslie R. Lewis
Commissioner LESLIE LEWIS

Robert Johnstone
Commissioner ROBERT JOHNSTONE

FINDINGS FOR APPROVAL, PAZ-02-01, ORDINANCE No. 703**A. Background Facts.**

This is an application for a comprehensive plan amendment from Agriculture/Forest Large Holding (AFLH) to Agriculture/Forest Small Holding (AFSH) and a zone change from AF-20 to AF-10, and for an exception to Statewide Land Use Goals 3 and 4 on a 15-acre area comprised of three 5-acre parcels located in the Hillcrest Walnut Planting subdivision southeast of McMinnville. Rural residential dwellings are a permitted use in the AF-10 zone but are not in the AF-20 zone.

1. The subject property.

The subject property is located about 8 miles southeast of McMinnville.

1.1 Area Size. 15 acres**1.2 Parcels involved.**

Lots 90, 91 and 92 are part of the Hillcrest Walnut Plantings subdivision. Each of the three lots is 330 x 660 square feet.

1.3 Separate owners. 2

The three lots have two separate ownerships: One lot, Lot 90 (Tax Lot 4000) is owned by Robert and Cheryl Krueger. The other two lots, Lots 91 and 92 (Tax Lots 3800 and 3900), are owned by John P. Macy.

1.4 Parcels developed. 2

Lot 92 is developed with a rural residential nonfarm/forest dwelling, a barn, and is served by a well, a septic system with a drainfield, and a long driveway. Lot 91 is developed with a single story pole building and workshop and a storage building, which have been used in connection with the residence on Lot 92. Lot 90 is not developed with any permanent buildings, but has a parking area and a temporary yurt.

1.5 Parcels developed prior to Statewide Planning Goals. 1

The rural residential dwelling on Lot 92 gained approval in 1973, before the adoption of the Statewide Planning Goals (SPG). The barn on Lot 92 and the three buildings on Lot 91 appear to have been allowed as agricultural buildings after the adoption of the SPGs.

1.6 Subject Area Land Use.

Lots 90, 91 and 92 are in a north facing ravine. On the eastern slope of the ravine, Lot 90 contains some fir and oak. Lot 91 is at the bottom of the ravine and there is a seasonal creek running from down from the south through the middle of Lot 91. Lot 92 slopes back up to the west the bottom the open ravine to the west contains a pasture which was previously used in conjunction with Lot 91 to the west. Lot 91 which contains a 49 x 55 square foot single story pole building and pasture. Lot 92 contains the rural residential dwelling nonfarm/forest use. There is no current farm use activity on Lots 90, 91 and 92.

2. Access.

The subject property has access on Hillview Drive, which is a primary local dedicated public road within the Hillcrest Walnut Plantings subdivision. The road is graveled and runs from the east to west, connecting with Walnut Hill Road which in turn connects with State Highway 233 (Lafayette Hwy).

3. Surrounding Land Use.

The subject properties are part of the western portion of Hillcrest Walnut Plantings Subdivision and are located on south side of Hillview Drive which is the local access road serving the subdivision. To the east is the majority of the subdivision which is included in an exception area known as Code Area 5.11, comprised of 74 lots the majority of which are 5 acre lots with rural residential dwellings and zoned AF-10. See, discussion of Code Area 5.11 in Findings A.10 below. Further to the northeast is another exception area, Woodland Heights Subdivision, Area Code 5.10, which is zoned VLDR-5. The proposed exception area is part of the westerly 82 acre, 12 parcel, six dwelling portion of Hillcrest Walnut Plantings clustered at the western end of Hillview Drive, a main access road through the subdivision, and consisting of ten 5-acre lots and two 15.6-acre lots. This area is not within Code Area 5.11. This area has one 5-acre parcel with a dwelling to the west (Lot 93), six 5-acre lots to the north [consisting of three separated tax lots, 2500, 2501 with a dwelling, and 2502 with a dwelling (Lot 51) and three consolidated tax lots on Lot 54 and two 15-acre lots with two dwellings (Lot 52 and Lot 53). All of these lots are a mixture of forest and pasture and have no farming activity. Two of the 15 acre lots were recently clear-cut. All of these lots exhibit the same characteristics (parcel size, development pattern, topography, soils, ownership pattern, etc.) as the lots included in Code Area 5.11. As a result, it is fair to say that the proposed exception area is surrounded on three sides by 5 acre developed rural residential lots.

To the south and further to the east are parcels of about 20 acres which contain rural residential, forest and small farm uses, which include livestock, Christmas trees, vineyards and orchards.

4. Surrounding Zoning

The surrounding zoning is shown on Exhibit 3. To the east and northeast is the Hillcrest Walnut Planting subdivision which is Area Code 5.11 which is plan designated AFSH and zoned AF-10, and the Woodland Heights subdivision which is Area Code 5.10 which is plan designated VLDR and zoned VLDR-5. To the west, northwest and south the parcels are zoned AFLH and AF-20.

5. Water Information

See data sheet obtained from the County for Township 5 S, Range 4 W, Sections 14 and 15.

6. Floodplain

According to Flood Insurance Rate Map 0485C, none of the parcels are in the 100 year floodplain.

7. Soils¹

According to the soil maps and tables, the proposed exception area is Jory-Yamhill-Nekia association (Well-drained gently sloping to very steep, clay loams over clay and silt loams over silty clay; formed in basaltic colluvium):

Tax Lot 3800 is 100% Class III:	YhD 30% (Class III) (Yamhill silt loam, moderately shallow, 7-20 % slopes)
	SuD 70% (Class III) (Steiwer silty clay loam, basalt substratum; 5-20% slopes)
Tax Lot 3900 is 60% Class II:	YaB 60% (Class IIe-3) (Yamhill silt loam, 2-7% slopes)
40% Class III:	YaC 40% (Class IIIe-2) (Yamhill silt loam, 7-12% slopes)
Tax Lot 4000 is 70 % Class III:	JrE 70% (Class III-2) (Jorey clay loam, 7-12% slopes)
	YaC 30% (Class IIIe-2) (Yamhill silt loam, 7-12% slopes)

¹See, 1974 Yamhill County Soils Survey, as modified by the 1985 Soil Interpretation.

8. Utility Facilities

Utility facilities are available or may be available to the subject parcels. On-site domestic water and subsurface sewage disposal systems can be made available to the property. An approved on-site subsurface sewage disposal system has been approved on Lot 90. Electrical service is available to the property.

9. Habitat

The subject area is not within a Fish Habitat Area or a Critical Wildlife Habitat Area..

10. Area History

10.1 Hillcrest Walnut Plantings Subdivision

The proposed exception area is part (Lots 90, 91 and 92) of the Hillcrest Walnut Plantings Subdivision that was platted in 1909. As such, the three 5-acre lots are considered pre-existing legal lots of record.

10.2 Adjacent Exception Area (Code Area 5.11)

Approval of this application would add 15 acres (the proposed exception area) to an existing exception area known as Code Area 5.11 comprised primarily of Hillcrest Walnut Plantings subdivision. Code Area 5.11 is plan designated Agriculture Forestry Small Holding (AFSH) and zoned AF-10, and contains approximately 600 acres comprised of 74 parcels which were predominantly 5 acre parcels.² The area was found to be committed to rural residential use based on a number of factors, including: the heavily subdivided development pattern which showed 32 dwellings on lots which were predominantly 5-acres in size³, the predominantly class

² Of those parcels, 45 were 0-5.0, 17 were 5.1-10.0 acres, 8 were 1.1-20.0, 2 were 20.1-40.0 acres and 1 was over 40 acres. (See, Exceptions Statement II, Code Area 5.11.)

³The existing subdivisions comprised 95 percent of the area, the development pattern which showed a total of 32 dwellings, with 26 dwellings on parcels 10 acres or less. The intensity of development of the parcels in Area Code 5.11 were 34 parcels occupied by a dwelling out of a total of 74 parcels, and 55 total acres (including transportation uses and dwellings at one acre per dwelling unit) in Rural Residential Use out of a total acreage of 600 acres.

III and IV soils⁴, the steep topography, and the limited growing season which was even shorter due to pocket climates⁵.

Code Area 5.11 was initially adopted by the County in 1979, as part of an Exceptions Statement addressing 55 areas throughout the County which were plan-designated for small-holding as part of the County's general submittal for compliance acknowledgment. In 1979, LCDC required more detailed information to justify a committed exception to Goal 3 and 4⁶ for 22 of the Code Areas, including Code Area 5.11, and approved the rest. In response, the County adopted Exception Statement II in 1980, providing the necessary information to DLCD for the 22 Code Areas, including Code Area 5.11, which it designated as Agriculture/Forestry Small Holding/AF-10. Code Area 5.11 was acknowledged by LCDC.⁷ Code Area 5.11 included nearly

⁴SCS Soil Classification showed: Class II-57 acres; Class III-192 acres; Class IV-313 acres; Class VI-38 acres; with Jory,-Yamhill-Nekia Association.

⁵Topography showed elevations between 200 and 743 feet, steeply rising ridges planted in old cherry and walnut trees, forested in fir and oak, and the growing season, which was limited by early fall and late spring frosts, subject to even shorter pocket climates due to steep ridges and ravines in the western half of the Code Area.

⁶DLCD indicated that although the additional information showed groupings of dwellings on small lots within some Code Areas, it also showed ownership patterns and that many large parcels in common ownership with other parcels in or adjacent to the contested Code Areas and there needed to be more information on existing uses and the farm/forest or nonfarm/forest nature of dwellings and explanation of why parts of certain agricultural and forest lands in common ownership are considered committed to nonfarm/forest uses. See, Exceptions Statement II.

⁷In the acknowledged Exceptions Statement II, the County made findings which provide context for the subject request. The findings describe the "Rural Residential Need" based upon a rural residential needs survey and found that an "overall rural residential need exists" and that "retention in small-holding plan designations found committed to rural residential uses (i.e., nonfarm/forest uses) will help meet this demand" and "will also satisfy Comprehensive plan policies concerning areas where small holdings are appropriate."

The Exceptions II findings also note that "to deny an exception for Code Areas overwhelmingly in individual ownership of existing parcels less than 20 acres in size would be to saddle owners with unnecessary paperwork and hardship and to skew market place options."

The findings address "Code Area Infill" including a spot analysis to determine ultimate nonfarm/forest potential (or rural residential use), as well as "Soil Productivity", noting that:

There are two other factors which must also be considered in evaluating productivity of small parcels. Firstly, the basic assumption underlying the system . . . is that any patch of soil, no matter how small, can produce something. This assumes a high level of individual management. There are certain soils which require a very high level of management in order to realize an appreciable return. In areas containing such soils, as parcel size decreases, the ratio of return to outlay of cash and labor also decreases drastically.

Secondly, there are relatively few crops or types of livestock which are practicably marketable in the County's agricultural stream of commerce at small volumes produced upon small parcels. For these two reasons, productivity of small parcels in area of such soils must be reevaluated. ***

all of the Hillcrest Walnut Plantings subdivision, but, for reasons which are not entirely clear, Code Area 5.11 excluded 10 lots located within the western part of the subdivision, which were all clustered at the western end of Hillcrest Drive, a main access road through the subdivision. These 10 lots, which were left out of Code Area 5.11, consisted of 10 5-acre lots and two 15-acre lots, containing six nonfarm/forest dwellings, including the proposed exception area, consisting of three 5-acre lots with one nonfarm/forest dwelling. It appears that these ten excluded lots exhibited the same characteristics (parcel size, development pattern, topography, soils, ownership pattern, etc.) as the lots included in Code Area 5.11.⁸

10.3 The proposed exception area

This application proposes the enlargement of Code Area 5.11 to include these three parcels based in part on the fact that these parcels have the same basic characteristics as parcels within Code Area 5.11. The same pattern of development which is present within the exception area Code Area 5.11 is reflected in the proposed 15 acre exception area.

At the same time, the characteristics of the proposed exception area are markedly different than the AF-20 parcels to the north, south and east of the Hillcrest Walnut Plantings subdivision consist larger parcels, consisting of 15-40 acre parcels which are in a mixture of forest and small farm use for pasture and livestock, and parcels larger than 40 acres used for field crops including grain and hay.

The three 5-acre parcels which are the subject of this application exhibited the same basic characteristics as the lots within the Code Area 5.11 exception area. This 15-acre area was located within the western part of the same Hillcrest Walnut Planting subdivision abutting the western boundary of the Code Area 5.11; had the same parcelization and development pattern⁹ of 5-acre lot sizes with one out of the three lots having a dwelling (established before the adoption of the statewide goals); was connected to the exception area by an abutting improved local access road (Hillcrest Drive) which was one of two local subdivision roads serving the Hillcrest Planting subdivision; and, possessed the same soil types, topographic and growing season limitations which were found on the other subdivision lots in Code Area 5.11.

Soil associates rated god-to-fair and more dependent upon high management levels are . . . Jory-Yamhill-Nekia * * *

It may not be reasonably be expected that owners of small parcels in these areas will undertake such management for an uncertain return."

⁸ The reasons why this area may have been excluded from Code Area 5.11 and the changes which have occurred since the early 1980's which now justify taking a committed exception for these three lots with a nonfarm/forest dwelling, are discussed in Findings A.10.4 and B.2 below.

⁹The intensity of development of the parcels in the subject area are 1 out of 3 parcels occupied by a dwelling, and about 2 total acres (including transportation uses and dwellings at one acre per dwelling unit) in Rural Residential Use out of a total acreage of 15 acres.

10.4 Changes inside and outside existing exception area and since 1980

10.4.1 The subject property is at the west end of a cul-de-sac, Hillview Drive, which is a public dedicated and privately maintained road, which was created as part of the Hillcrest Walnut Plantings subdivision in 1909. Hillview Drive serves as a rural residential cul-de-sac for a total of 29 five-acre subdivision lots connecting with Walnut Hill Rd, the county road to the east.

10.4.2 In 1980, the County designated as an exception area the subdivision lots along Hillview Drive east of the subject property. Since 1980, the number of rural residential dwellings in the exception area with access on Hillview Drive has increased from 7 to 25 dwellings, leaving only four remaining vacant lots.

10.4.3 Since 1980, the resulting increase in such dwellings inside the exception area has generated an increase in traffic on Hillview Drive from 66 trips per day to 248 trips per day.

10.4.4 There are six dwellings clustered at the western end of the Hillview Drive cul-de-sac and outside the 1980 exception area, which generate an additional 57 trips per day, bringing the total current traffic to 305 trips per day from all dwellings on Hillview Drive.

10.4.5 In 1980, Hillview Drive was a one lane road resembling a "cowpath" with blind corners and vertical curves. Since 1980, Hillview Drive has been improved to a 1.5 lane gravel road, and three or four years ago the neighbors formed the "Hillview Road Maintenance Assn.", through which members contribute monthly to pay for repairs and maintenance of the road, which is now passable in most any weather.

10.4.6 Since 1980, the parcel size and ownership pattern have changed outside the Code Area on Hillview Drive insofar as there are now two owners of Lots 90 (Krueger), 91 and 92 (Macy) rather than a single owner (Sytsma). Regarding development pattern, since 1980, along Hillview Drive the number of nonfarm/forest dwellings outside Code Area 5.11 remains at five, and although there was at most only one new dwelling in this area, there were a number of improvements added to this area. Lot 93 added shed pole 1988. Lot 92 addition to barn in 1987, workshop in 1985 which was expanded in 1990, and a pole barn in 1992. Tax lot 2501 replaced an old house with a new double wide mobile home in 1989 and added a woodworking shop in 1992. Lot 53 built an addition to mobile home for carport in 1983. Lot 52 added a pole barn in 1998. Each new improvement added driveways and walkways to the already existing areas removed from resource use for dwellings, and drainfield areas, wells, and driveways to serve the nonfarm/forest dwellings.

B. Overview of Request

- 1. A "developed exception" may be taken for the developed Lot 92.**

Lot 92 (tax lot 3800) is a 5-acre parcel which contains a rural residential dwelling together with a septic drainfield, replacement drainfield, water well, pole building and shop, extended driveway, and has been in nonfarm/forest use since it was constructed in the late 1970's. The County finds that Lot 92 is physically developed to the extent that it is no longer available for uses allowed by the applicable goal.

2. A "committed exception" may be taken for Lots 90, 91 and 92

The County finds that Lots 90, 91 and 92 (tax lots 3800, 3900 and 4000) are irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable, based on the totality of the circumstances, as follows:

- (1) The impact of the higher level of development in the adjacent exception area (Code Area 5.11) on Hillview Drive, resulting in a three-fold increase in population and traffic since 1980, has made it impractical to use the subject property at the western end of the cul-de-sac for a variety of accepted farm practices and forest operations.

The subject property is at the west end of a cul-de-sac, Hillview Drive, which, since 1909, has been a privately maintained dedicated public road serving as a rural residential cul-de-sac for a total of 29 five-acre subdivision lots in the Hillcrest Walnut Plantings subdivision, and providing access to Walnut Hill Rd, a county road to the east.¹⁰ Since 1980, the number of rural residential dwellings in the exception area with access on Hillview Drive has increased from 7 to 26 dwellings. The resulting increase in such dwellings in the exception area has generated an increase in traffic on Hillview Drive from an estimated 66 trips per day to about 248 trips per day. Including the six dwellings clustered at the western end of the Hillview Drive cul-de-sac and outside the 1980 exception area, which generate an estimated additional 57 trips per day, the total current traffic from all dwellings on Hillview Drive is approximately 305 trips per day. In 1980, Hillview Drive was a one lane road resembling a "cowpath" with blind corners and vertical curves. Since 1980, Hillview Drive has been improved to a 1.5 lane gravel road by the owners of the lots and more recently, the Hillview Drive Road Association, which was created four years ago for the purpose of providing for the improvement, maintenance, and repair of the road.

¹⁰For purposes of a committed exception analysis, the county may consider the lots in the adjacent exception area because those lots were created as part of the original Hillcrest Walnut Plantings subdivision in 1909, and were not created pursuant to the SPGs. See, *DLCD v. Yamhill County*, 31Or LUBA 488, 500 (1996) ("If findings were made that the adjacent exception areas were not created pursuant to the goals, development in those areas could be considered, under OAR 660-04-028(6)(c)(A), in determining if a committed exception were justified on the subject property." *Id.* at n.15.) Likewise, the county may also consider the lots in the area outside or excluded from the exception area because they were created as part of the original Hillcrest Walnut Plantings lots (Lots 93, 51, 52, 53 and 54) or before the adoption of the SPGs.

The increase in population and traffic since 1980 has made it impractical to use the subject property at the western end of this cul-de-sac for accepted farming practices and forest operations due to potential conflicts with residential users. A variety of farming, such as dairy farms, mushroom farms, Christmas tree farms, and grain and livestock operations will generate smoke, dust, odors, use aerial spraying viewed as noxious and hazardous, require use of the road to bring in large equipment, and operate at night. The increase in development means that complaints are more likely to be made against various forest practices required for reforestation, road construction and maintenance, harvesting, application of chemicals, and disposal of slash, resulting in noise, aerial spraying, slash burning, and use of large equipment to clear, cut and buck, and haul harvested timber. The potential resident complaints against such farm and forest practices is even greater due to a deed restriction prohibiting certain agricultural activities on lots within the subdivision. In 1980, when there were only seven dwellings on Hillview Drive west of the subject property, there was considerably less likelihood of such conflicts between farm/forest uses and residential uses. But now, after 20 years, the population and traffic has increased more than tripled, making the potential conflict between farm and forest uses and the residential uses, as a practical matter, make the use the subject property for farm or forest use impractical. The increase in population and traffic is also likely to be a disincentive to anyone who would otherwise consider engaging in such farm and forest practices on the subject property and for whom access is a fundamental consideration.

(2) As a practical matter, there are no other economic farm use which could be employed on the property to avoid the impact upon and conflicts with the higher level of development on adjacent lands.

Besides livestock, grain and timber, which have such substantial conflicts with the more highly developed rural residential lots to the east, the other possible agricultural uses for which the soils on the property are suitable include orchards and berries, which may result in lower impact and fewer conflicts with and complaints from residents of the subdivision. However, as a practical matter, use of the property for orchards and berries is not viable due to certain factors.

First, there are several general limiting factors, including, topography which is highly erodible soil due to slopes, lack of water rights for commercial agricultural irrigation, the small tract size, the high level of management required for resource use, and the limited growing season due to early fall and late spring frosts, and even shorter pocket climates due to steep ridges and ravines.

Second, there are more specific factors. Apples, prunes, cherries, chestnuts and berries require irrigation, but since this property has no water rights for irrigation and the soils are marginal suitability for irrigation anyway, dryland farming is the most appropriate alternative. The slopes (north facing) are unsuitable for grapes. Hazelnuts require at least 100 acres due to specialized machinery for harvesting, mowing and spraying requirements. The remaining possible dryland uses include cherries, walnuts and peaches. However, there is no market for walnuts and cherries. There are no processors for peaches, and, to the extent that there may exist a small specialty market for peaches, it would be difficult to access, and even if possible, as a

practical matter peaches would not be feasible from an economic standpoint because of the time and expense of establishing an intensively managed producing peach orchard on such a small acreage, the substantial likelihood of a poor return on investment, and the uncertainties of a specialized agricultural commodities market. Therefore, there are no crops which might be grown on the subject property at small volumes which can be practicably marketable in the County's agricultural stream of commerce.

Finally, it may be suggested that in order to show that a farm use is impracticable one must show that a person cannot engage in any use, even one which is not an economic farm use, or in the words of the ORS 215.203 definition of "farm use", one "for the primary purpose of obtaining a profit in money." However, such an interpretation would be incorrect, because the practical effect would mean that the owner of the property could be forced to choose between engaging in economic farm use and foregoing the economic farm use and instead letting the land lay idle or using the land merely for a few horses, or other uses which are not an economic farm use, so as to reduce the impacts upon and therefore the conflicts with the rural residential uses in the surrounding area. This would be inconsistent with the statutory definition of "farm use" which requires there to be a "primary purpose of obtaining a profit in money." It is more consistent with the statutory scheme and purpose of preservation of agricultural lands for farm uses which make a substantial contribution to the agricultural economy, to presuppose that the kind of resource use found to be "impracticable" to qualify for a "committed" exception, must be "an economic farm use". Therefore, it would be incorrect to deny a committed exception merely because the owner could let their land lie fallow so as to avoid the generating the kind of impacts on and which an economic farm use will have on surrounding residential uses.

In conclusion, there are no crops which might be grown on the subject property at small volumes which can be practicably marketable in the County's agricultural stream of commerce.

(3) The characteristics of the surrounding area and uses and their relationship with the proposed exception area renders the farm/forest uses on the proposed exception area impracticable.

The characteristics of the surrounding area consist of similar five-acre lots along the road inside the exception area to the east (Code Area 5.11), the nine other 5-15 acre lots to the north and west clustered at the end of the cul-de-sac outside the exception area (Study Area 65), and the larger 20-40 parcels to the south and further west. Study Area 65 was one of several areas which the County considered for additional exception lands in 1992. Characteristics which the proposed exception area shares in common with both Code Area 5.11 and Study Area 65 include the following: (1) All are part of the same subdivision; (2) Both use the same road, cul-de-sac, which serves as a common transportation corridor. Both, through the road association, comprised of owners inside both areas, have a common interest in the condition and use of the road. (3) Both have the same steep slopes and similar topography. (4) Both have the same parcel sizes and ownership pattern, in terms of having nearly all 5-acre lots. Code Area 5.11 has one 15-acre lot and Study Area 65 has two 15-acre lots. (6) Both have the same type and level of use,

i.e., residential use with some small woodlots, a few small animals and nothing which would qualify as commercial timber or commercial agriculture.

Therefore, the characteristics which the proposed exception area has in common with Code Area suggest that both should have the same zoning. So why is Study Area 65 not part of Code Area 5.11? Was it a mistake? The reason is not clear, since the ownership pattern does not appear to be different. For example, in Study Area 65, there were four owners for the four 15-acre parcels; whereas in Code Area 5.11, there were three owners for the five 15-acre parcels. The County could just as easily included Study Area 65 in Code Area 5.11, but, without explanation, it did not do so. By failing to include the proposed exception area, the situation involving imminent conflicts was allowed to occur. Therefore, it is reasonable to conclude that omission of the proposed area from Code Area 5.11 could have been a mistake. If County would have foreseen this problem, it would have been better to have included property in Code Area 5.11. In fact, that is the reason that County staff suggested in 1992 that Study Area 65 be considered for a committed exception. Study Area 65 was not ultimately adopted. It is interesting to note that staff recommended against adoption because the study area only contained two dwellings which pre-existed the SPGs. One of those was Lot 92, part of the subject exception area in this case, so a strong argument can be made that this application, by containing one dwelling which pre-existed the SPG's on just three lots, should succeed where Study Area 62 failed. Also, there was a lack of owner support for the larger Study Area 62, which is no longer the situation in this case. Moreover, the logic for an exception, at least to this property, still exists, and indeed is even stronger today because of the continued growth in Code Area 5.11. Since 1990, there have been seven more dwellings built along Hillview Drive. So whether it was a mistake, or merely an oversight, there are imminent unintended consequences, and the County can now take action to address and correct the problem.

Doing nothing exposes owners to imminent conflicts with commercial agricultural or commercial timber. The close relationship between the exception area sharing the same road will continue, and failure to address the problems will exacerbate the conflicts. On the other hand, correcting the problem will prevent future conflicts. To prevent the subject property from creating the same type of conflicts with the surrounding AF-20 lands, the conditions of approval could include a voluntary agreement to a condition that there be a deed restriction to assure no nuisance complaints, protecting future agricultural and forestry practices in Study Area 65 and the larger parcels to the south and further to the west. At the same time, approval of the exception will encourage the owners to engage in the type of small resource use on 5-acre lots which is more compatible with Code Area 5.11 to the east and with Study Area 65 to the west and north, rather than the type of accepted farm practices resulting from economic farm uses which generate complaints by surrounding residential dwelling owners.

The minimum change necessary is Lots 90, 91, and 92. Other lots in Study Area 65 could be considered for future inclusion, but there are factors which make the exception for Lots 90, 91, and 92 more appropriate than the other lots at this point in time. First, these lots are closest to Code Area 5.11 and therefore have a greater likelihood of conflicts than lots further away from Code Area 5.11. Second, these lots do not contain current farm use or fully stocked wood lot, so

conversion will not remove land from or interfere with any ongoing agricultural or forest operation. Third, as a matter of logistics, these applicants do not control the other lots, and some of those other lot owners may wish to continue to remain in AF-20 zone. Fourth, each lot usually has certain unique features, and without a detailed factual analysis of each of the other lots, one cannot determine whether such other lots in Study Area 65 should also be considered for an exception area.

By comparison, there is nothing which suggests a close relationship between the proposed exception area and the larger parcels to the south and further to the west. If anything, inclusion of this property with the larger parcels in the AF-20 zone is an anomaly, since the smaller parcel size and ownership pattern makes it unlikely that such small parcels could ever be employed in commercial agriculture or timber operations.

Therefore, the application satisfies the requirements for a "irrevocably committed" exception.

(4) Other Requirements

The County finds that the applicant has satisfied the other requirements for this comprehensive plan amendment/zone change.

The application demonstrates compliance with the Transportation Planning Rule because two additional dwellings will not significantly affect a transportation facility, as required by OAR 660-012-0060.

The application, which requests a zone change to AF-10 to conform to the plan designation of AFSH (Agriculture Forestry Small Holding), satisfies the requirements under the zoning ordinance for a zone change. See, YCZO 1202.08. More specifically, the County finds that: (a) the proposed change is consistent with the comprehensive plan policies, (b) there is a demonstrable need for the use; (c) the proposed change is compatible with surrounding uses, density and pattern of development, and changes which have occurred; (d) there are no other lands as well suited for the use due to location. Use of the property for small resource use as provided in the AF-10 zone will be very well suited to the type of use which applicant Kruegers wish to make of the property, which is a homestead for their family which will fulfill their vision which is to design and implement an ecologically sound, cooperative, self-reliant and sustainable homestead that will be used as a practicum for future consultation with other small parcel owners in our community.

C. Applicable Criteria

To allow development for rural residential, the applicant is requesting a plan amendment and zone change for the three lots from AFLH/AF-20 to AFSH/AF-10. The plan amendment and zone change will require an exception to be taken to Statewide Goal 3 and 4 Applicant proposes

a "developed or committed" exception to Statewide Goal 3 and 4. This will require compliance with the following approval criteria:

1. State Statutes and Administrative Rules

1.1 ORS 197.732 (Exceptions)

The proposed use seeks to add a 15 acre area to a "developed" or "irrevocably committed" exception area. A committed exception to Goals 3 and 4 is proposed under ORS 197.732, which provides in part:

"(1) A local government may adopt an exception to a goal if:

"(a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;

"(b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable;

1.2 OAR 660-004-0018 (Planning and Zoning for Exception Areas)

OAR 660-004-0018 explains the requirements for adoption of plan and zone designations for exceptions. "Physically developed" or "irrevocably committed" exceptions under OAR 660-004-0025 and 660-004-0028 are intended to recognize and allow continuation of existing types of development in the exception area. OAR 660-004-0018 provides as follows:

(2) For "physically developed" and "irrevocably committed" exceptions to goals, plan, and zone designations shall authorize a single numeric minimum lot size and shall limit uses, density, and public facilities and services to those:

(a) Which are the same as the existing land uses on the exception site; or

(b) Which meet the following requirements:

(A) The rural uses, density, and public facilities and services will maintain the land as "Rural Land" as defined by the goals and are consistent with all other applicable Goal requirements; and

(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and

(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses.

(3) Uses, density, and public facilities and services not meeting section (2) of this rule may be approved only under provisions for a reasons exception as outlined in section (4) of the rule and OAR 660-004-0020 through 660-004-0022.

1.3 OAR 660-004-0025

OAR 660-004-0025, which explains the exception requirements for land "physically developed" to other uses, provides as follows:

- (1) A local government may adopt an exception to a goal when the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal.*
- (2) Whether land has been physically developed with uses not allowed by an applicable Goal, will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.*

1.4 OAR 660-004-0028 (Exception for Land Irrevocably Committed to Other Uses)

The framework for irrevocably committed exceptions set forth in OAR 660-004-0028. OAR 660-004-0028(1) allows a local government to adopt an exception to a statewide planning goal "when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]" OAR 660-004-0028(2) requires that a committed exception determination must address certain factors, particularly the characteristics of the exception area, i.e. the subject property, characteristics of the adjacent lands, and the relationship between the exception area and adjacent lands.¹¹ OAR 660-004-0028(3) requires that for an exception to Goal 3 (Agricultural Lands), the local government must demonstrate that "farm uses" as defined in ORS 215.203 are impracticable in the exception area. OAR 660-004-0028(4) requires that a committed exception must be supported by findings of fact addressing all applicable factors of

¹¹ OAR 660-004-0028(2) provides:

"Whether land is irrevocably committed depends on the relationship between the exception area [i.e. the subject property] and the lands adjacent to it. The findings for a committed exception therefore must address the following:

- "(a) The characteristics of the exception area;
- "(b) The characteristics of the adjacent lands;
- "(c) The relationship between the exception area and the lands adjacent to it; and
- "(d) The other relevant factors set forth in OAR 660-04-028(6)."

OAR 660-004-0028(6) and explain why those facts support the conclusion that the uses allowed by the applicable goal are impracticable in the exception area.¹²

D. Analysis.

This request for a plan amendment and zone change under Yamhill County Zoning Ordinance (YCZO), for a "developed and committed" exception under ORS 197.732(1)(c) and the implementing administrative rules, satisfies the applicable approval criteria for the reasons set forth below:

In addition to a plan amendment/ zone change , this application requests an Exception to Statewide Land Use Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands).

1. OAR 660-004-0025 (Exception Requirements for Land Physically Developed to Other Uses)

The County finds that Lot 92 (tax lot 3800) is physically developed to the extent that it is no longer available for uses allowed by the applicable goal as required by 660-004-0025. The exact nature and extent of the area found to be physically developed, including the structures, roads, sewer and water facilities, and utility facilities is as follows:

¹² OAR 660-004-0028(6) provides, in relevant part:

"Findings of fact for a committed exception shall address the following factors:

"(a) Existing adjacent uses;

"(b) Existing public facilities and services (water and sewer lines, etc.);

"(c) Parcel size and ownership patterns of the exception area and adjacent lands:

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

"(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. * * *;

"(d) Neighborhood and regional characteristics;

"(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. * * *;

"(f) Physical development according to OAR 660-04-025; and

"(g) Other relevant factors."

1.1 Physically Developed: Existing Features

Structures inside the proposed exception include a residence and barn on tax lot 3800, a pole building and a workshop on tax lot 3900. Tax lot 4000 contains no structures.

1.2 Roads

The proposed exception is bordered on the north side by Hillview Drive. This is one of the main roads providing access to the Hillcrest Walnut Plantings subdivision. Hillview Drive is a primary local dedicated public road which is maintained by a private Road Maintenance Association comprised of owners of lots bordering Hillview Drive within the Hillcrest Walnut Plantings subdivision. Hillcrest Drive is graveled and runs from the east to west, connecting with Walnut Hill Road which in turn connects with State Highway 233 (Lafayette Hwy). Hillcrest Drive serves both subdivision lots within and without the existing exception area, Code Area 5.11. In addition to 29 lots inside Code Area 5.11, Hillcrest Drive provides direct access for a total of 10 lots (including the proposed exception area) in eight ownerships which have six (6) rural residential dwellings outside the western boundary of Code Area 5.11.

1.3 Sewer, Water and Utility Facilities:

Sewer service to the subject lots is provided by septic systems. Water is supplied by groundwater sources. Electricity and phone service are available in the area.

1.4 Area Physically Developed:

The surrounding area is physically developed. To the east of the proposed exception area, inside Code Area 5.11, there are 26 out of the 29 five-acre lots along Hillview Drive which have rural residential dwellings. To the north and west of the proposed exception are, outside Code Area 5.11, there are seven (7) lots in six (6) ownerships which have five (5) rural residential dwellings, all of which were placed before the adoption of Code Area 5.11 in 1980. Four of the lots are 5 acres in size, and three of the lots are 15 acres in size. All of these dwellings were placed prior to the 1980 adoption of Code Area 5.11, and none of the lots are used for any farm operations. The question of how much area is "developed" by a dwelling needs to be addressed. The assessor's office removes one acre around each dwelling from deferral. Certainly this is the minimum amount that should be considered to be "developed" by the presence of a dwelling. The next question is how much of a five, ten or fifteen acre parcel is "developed" with the presence of a dwelling, and will depend on many factors which include dwelling size, dwelling placement, driveway length, accessory uses and other improvements necessary for placement of a dwelling. As noted above the dwellings are not the only things present that can "develop" a parcel to a nonresource use. Roads and other improvements made to service a subdivision or group of parcels will also "develop" an area to a nonresource use. In this case, Hillview Drive provides access to the existing dwelling in the proposed exception area as well as the other five dwellings to the east and north, all of which dwellings were placed prior to the 1980 adoption of

Code Area 5.11. Each of the six dwellings have parking and driveways to the dwellings and between accessory buildings, shop buildings, as well as areas occupied by septic system drainfields, drainfield replacement areas, and individual wells.

Hillview Drive is about one mile in length running west from Walnut Hill Road. In 1978, there were about eight dwellings along Hillview Drive and the road was a one lane heavily rutted "cow path." As more homes were built, there have been improvements made to Hillview Drive to make it acceptable for residential use, particularly in the section of Hillview Drive abutting the proposed exception area and the other seven lots with five dwellings to the east and north. Three to four years ago the Hillview Road Maintenance Association was formed, through which each property owner contributes (currently \$150 per year) for monthly maintenance to the road. (Prior to the filing of this application, the Kruegers attended a meeting of the association and those present had no objection to the proposed zone change.) Therefore, since 1980, Hillview Drive has been significantly improved to make it acceptable for residential use.

As a result, the improvement of, and the surrounding rural residential development clustered along, Hillview Drive abutting the proposed exception area and the surrounding area, renders the proposed exception area developed because they effectively discourage or block recombination of the parcels in the proposed exception area with larger farm parcels outside of the proposed exception area.

To the south and above the proposed exception area is tax lot 700 and 702. The creek which runs through the exception area comes down from the south down from tax lot 700. Above the creek are Christmas trees, and above that a dwelling and steep forested acreage. There is no access from Hillview Drive to tax lots 700 and 702; instead those lots have access to Walnut Hill Road by way of Three Trees Lane. The existence of a dwelling on Lot 92 make the property too expensive to acquire and make use of the proposed exception area in combination with tax lots 700 and 702 impracticable.

2. Irrevocably Committed. [OAR 660-004-0028 (Exception Requirements for Land Irrevocably Committed to Other Uses)]

The County finds that the application for a "irrevocably committed" exception on Lots 90, 91, and 92 (tax lots 3800, 3900 and 4000) based on those lots being irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable, and therefore satisfies the requirements of OAR 660-004-0028 as more fully explained below.

2.1 Characteristics of the Proposed Exception Area:

The proposed 15-acre exception area is a ravine the length of which slopes down from about 600 feet at its northwestern boundary to about 500 feet at Hillview Drive on its southeastern boundary. The sides of the ravine descend steeply down the western and eastern boundaries to a seasonal creek at the bottom of the ravine running from north to south. At the

top of the ravine on the western boundary of the area is a rural residence which is served by a well and a septic drainfield and a barn (Lot 92 owned and occupied by John P. Macy) with pasture which slopes down to a seasonal creek which runs north down through the middle of Lot 91. The seasonal creek contains willows and is wet all year. Lot 91 contains a pole building and pasture. On the eastern boundary of the area is Lot 90 (Krueger) with relatively steep ridges on its eastern slope which are forested in fir and oak, and an open area which slopes down to the seasonal creek cutting through Lot 91.

2.2 Characteristics of Adjacent Lands

West of the proposed exception area the adjoining land slopes fairly steeply up to about 860 feet and is forested with a mixture of fir and oak. North of the proposed exception area the adjoining land slopes fairly steeply down to about 200 feet and is forested with a mixture of fir and oak. The physically developed rural residential area bordering the subject area to the west and north, which contains 7 lots, 6 ownerships, 5 dwellings, together with the difference in topography of the proposed exception area and the areas to the north and west, make it extremely unlikely that adjoining owners would be interested in purchasing land in the proposed exception area to increase their holdings. East of the proposed exception area is the 600 acre subdivision, Code Area 5.11, comprised of primarily 5-acre lots, and served by the same subdivision access road, Hillview Drive, along which 25 out of 29 lots have rural residences.

2.3 Relationship between Exception Area and Adjacent Land:

2.3.1 To the east is the 600 acre exception area known Code Area 5.11, which is comprised of the Hillcrest Walnut Plantings subdivision and zoned AF-10 Agriculture Forestry Small Holding, which allows small-scale or more intensive farm and forestry activities. The proposed exception area consists of three lots (90, 91 and 92) in the subdivision, which are directly served by Hillview Drive, one of the main subdivision access roads leading to Walnut Hill Road to the east. The proposed exception area is almost identical to uses and development on the lots in Code Area 5.11, which is comprised of rural residential development, with dwellings on 5-15 acre tracts, served by a improved subdivision roads, individual on-site wells and septic tanks, an not suitable for farming for profit given the soils, slopes, and parcel sizes. These include lots which have mostly owners who work away from home, rural residences with driveways, lawns, outbuildings, small gardens, a few dogs, one with 2 or 3 horses, one with a small cherry orchard, one with some Christmas trees, and one with a 100'x100' plot planted in grapes, one with a few chickens and ducks, and forested areas.

2.3.2 Land to the north and to the immediate east are part of the same subdivision as the subject lots, and also served by Hillview Drive. Land further to the east and south is in more extensive forest use which includes woodlots and Christmas trees. Considered as a single tract or as three separate lots, it is unlikely that the proposed exception area would be combined with the property to the south or west. This is due to the small 5-15 acre size, the existence a dwelling on Lot 92 , which make it too expensive for a farmer or forester to justify buying to combine with

their property, and is also limited by the need for setbacks from the creek through Lot 91 and the steeply sloping eastern side of Lot 90.

2.3.3 The characteristics of the surrounding area and uses and their relationship with the proposed exception area renders the farm/forest uses on the proposed exception area impracticable.

The characteristics which the proposed exception area shares in common with both Code Area 5.11 and Study Area 65 include the following: (1) All are part of the same subdivision; (2) Both use the same road, cul-de-sac, which serves as a common transportation corridor. Both, through the road association, comprised of owners inside both areas, have a common interest in the condition and use of the road. (3) Both have the same steep slopes and other topography. (4) Both have the same parcel sizes and ownership pattern, in terms of having nearly all 5-acre lots. Code Area 5.11 has one 15-acre lot and Study Area 65 has two 15-acre lots. (6) Both have the same type and level of use, i.e., residential use with some small woodlots, a few small animals and nothing which would qualify as commercial timber or commercial agriculture.

Therefore, the characteristics which the proposed exception area has in common with Code Area suggest that both should have the same zoning. So one may ask, why is Study Area 65 not part of Code Area 5.11? Was it a mistake? Applicants have researched this and found that the reason is not clear, since the ownership pattern does not appear to be different. For example, in Study Area 65, there were four owners for the four 15 acre parcels; whereas in Code Area 5.11, there were three owners for the five 15 acre parcels. The County could just as easily included Study Area 65 in Code Area 5.11, but, without explanation, it did not do so. By failing to include the proposed exception area, the situation involving imminent conflicts was allowed to occur. Therefore, it is reasonable to conclude that omission of the proposed area from Code Area 5.11 could have been a mistake.

If County would have foreseen this problem, it would have been better to have included property in Code Area 5.11. In fact, that is the reason that County staff suggested in 1992 that Study Area 65 be considered for a committed exception. Although Study Area 65 was not ultimately adopted, the logic for an exception, at least to this property, still exists, and indeed is even stronger today because of the continued growth in Code Area 5.11. Since 1990, there have been seven more dwellings built along Hillview Drive. So whether it was a mistake, or merely an oversight, there are imminent unintended consequences, and the County can now take action to address and correct the problem.

Doing nothing exposes owners to imminent conflicts with commercial agricultural or commercial timber. The close relationship between the exception area sharing the same road will continue, and failure to address the problems will exacerbate the conflicts. On the other hand, correcting the problem will prevent future conflicts. To prevent the subject property from creating the same type of conflicts with the surrounding AF-20 lands, the conditions of approval could include a voluntary agreement to a condition that there be a deed restriction to assure no nuisance complaints, protecting future agricultural and forestry practices in Study Area 65 and

the larger parcels to the south and further to the west. At the same time, approval of the exception will encourage the owners to engage in the type of small resource use on 5-acre lots which is more compatible with Code Area 5.11 to the east and with Study Area 65 to the west and north, rather than the type of accepted farm practices resulting from economic farm uses which generate complaints by surrounding residential dwelling owners.

The minimum change necessary is Lots 90, 91, and 92. Other lots in Study Area 65 could be considered for future inclusion, but there are factors which make the exception for Lots 90, 91, 92 more appropriate than the other lots at this point in time. First, these lots are closest to Code Area 5.11 and therefore have a greater likelihood of conflicts than lots further away from Code Area 5.11. Second, these lots do not contain current farm use or fully stocked wood lot, so conversion will not remove land from or interfere with any ongoing agricultural or forest operation. Third, as a matter of logistics, these applicants do not control the other lots, and some of those other lot owners may wish to continue to remain in AF-20 zone. Fourth, each lot usually has certain unique features, and without a detailed factual analysis of each of the other lots, one cannot determine whether such other lots in Study Area 65 should also be considered for an exception area.

By comparison, there is nothing which suggests a close relationship between the proposed exception area and the larger parcels to the south and further to the west. If anything, inclusion of this property with the larger parcels in the AF-20 zone is an anomaly, since the smaller parcel size and ownership pattern makes it unlikely that such small parcels could ever be employed in commercial agriculture or timber operations.

2.4 Existing Adjacent Uses: See Finding A.3.

2.4.1 Existing Adjacent Uses in 1980

In 1980, the existing adjacent uses were as follows:

Parcel size and Ownership Pattern:

Inside Code Area 5.11: There were 28 5-acre lots and one 15 acre lot inside Code Area on Hillview Drive.

Outside Code Area 5.11. There were three contiguous ownerships. The first is Lots 92, 91 and 90 a 15 acre ownership (the proposed exception area). The second is on Lot 51, a 10 acre ownership which had been partitioned into tax lots 5414-2501 and 2502. The third is Lot 54, a 15 acre ownership which had been partitioned into three lots. Thus there were ten 5-acre lots and two 15 acre lots for a total of 12 lots outside the Code Area on Hillview Drive.

Development Pattern:

Inside Code Area 5.11: Along Hillview Drive there were 7 nonfarm/forest dwellings inside Code Area 5.11 (Lots 61, 64, 65, 76, 77, 79, 80).

Outside Code Area 5.11: Along Hillview Drive there were 5 nonfarm/forest dwellings outside Code Area 5.11. (Lots 52¹³, 53, 92 and 93 and tax lots 5414-2501 and 2502). Each developed lot includes areas removed from resource use for garages, shop buildings, septic systems and drainfields, replacement drainfields, wells, and driveways, some of which are rather lengthy, to serve the dwellings.¹⁴

Road: Hillview Drive was a one lane heavily rutted road running through Code Area 5.11 and serving the original subdivision lots west of Code Area. During winter months, the western half of the road became nearly impassable due to its steepness and poor condition.

Use of property:

Inside Code Area 5.11: Along Hillview Drive. The Exceptions Statement II describes the code area in general as having 76 parcels, occupied by 32 dwellings, 26 of which dwellings were on 10 acres or less, of and area as a "steeply rising ridge planted in old cherry and walnut trees . . . growing season is limited by early fall and late spring frost [and] even shorter pocket climates occur due to steep ridges and ravines in the western half of the Code Area," noted its poor suitability for irrigation, and concluded that this area was committed to rural residential use "due to an evenly-distributed small parcelization pattern of individual ownerships on soils with marginal productivity potential due to soil quality and topographical constraints." These small resource parcels were forested and were used for woodlots, pasture for a small number of horses or sheep, fruits trees, landscaping and household gardens.

Outside Code Area 5.11. Uses outside Code Area 5.11 at the western end of Hillview Drive were nonfarm/forest uses. The owner of Lots 92, 91, and 90 lived in the dwelling on Lot 92 and grazed a few horses and sheep on Lots 90 and

¹³Although planning records for Lot 52 were incomplete, it appears from the planning departments address maps that the dwelling on Lot 52 was in existence in 1985. For purposes of this analysis it is assumed that the dwelling on Lot 52 was established prior to 1980, although it does not make a significant difference for purposes of satisfying the approval criteria for this application. .

¹⁴The area occupied by these improvements appear to exceed the one acre which the assessor's office removes around each dwelling from farm deferral for property tax purposes, which would be the minimum amount that should be considered "developed" by each dwelling.

91. The primary use of the other lots north of Hillview Drive was in woodlots of fir and other tree species, and a few chickens and ducks.

Markets: According to OSU Horticulturist, Jeff Olsen, markets to some extent existed for prunes, walnuts, cherries, and peaches in the 1980's. The "glory years" for prunes were the 1940's through the 1980's. The market for walnuts, which had their heyday in the 1950's and 1960's, were dwindling. Cherries still had some processors in the valley.

2.4.2 Existing Adjacent Uses Since 1980

Since 1980, the following changes in the existing adjacent uses have occurred:

Parcel size and Ownership Pattern:

Inside Code Area 5.11: Since 1980, the parcel size and ownership pattern appear to be the same inside the Code Area on Hillview Drive.

Outside Code Area 5.11. Since 1980, the parcel size and ownership pattern have changed outside the Code Area on Hillview Drive insofar as there are now two owners of Lots 90 (Krueger), 91 and 92 (Macy) rather than a single owner (Sytsma).

Development Pattern:

Inside Code Area 5.11: Since 1980, out of the 29 Lots along Hillview Drive inside the Code Area, the number of nonfarm/forest dwellings has increased from seven to 25. In addition to Lots 61, 64, 65, 76, 77, 79, 80 have been added Lots 55, 57, 58, 60, 62, 63, 64, 66, 67, 68, 69, 78, 82, 83, 84, 85, 86, 87, and 89. Only four vacant lots remain (Lots 56, 59, 81, and 88).

Outside Code Area 5.11: Since 1980, along Hillview Drive the number of nonfarm/forest dwellings outside Code Area 5.11 remains at five (Lots 52, 53, 92 and 93 and tax lots 5414-2501 and 2502). Although there was at most only one new dwelling in this area, there were a number of improvements added to this area. Lot 93 added shed pole 1988. Lot 92 addition to barn in 1987, workshop in 1985 which was expanded in 1990, and a pole barn in 1992. Tax lot 2501 replaced an old house with a new double wide mobile home in 1989 and added a woodworking shop in 1992. Lot 53 built an addition to mobile home for carport in 1983. Lot 52 added a pole barn in 1998. Each new improvement added driveways and walkways to the already existing areas removed from resource use for dwellings, and drainfield areas, wells, and driveways to serve the nonfarm/forest dwellings.

Road: Since 1980, Hillview Drive has been substantially improved. Three or four years ago the neighbors formed the "Hillview Road Maintenance Assn.", through which members contribute monthly to maintenance of the road, and now the road is passable in most any weather.

Markets: According to OSU Horticulturist, Jeff Olsen, there are no longer any markets for prunes, walnuts, and cherries from small acreage, and the markets for peaches are limited to specialty markets.

2.5. Existing Public Facilities and Services: See Findings A.8.

2.6 Parcel Size and Ownership Pattern, Proposed Exception Area/Adjacent Land: See Findings A.1, A.3, and A.10.

Like the parcels in the proposed exception area, parcels to the north, the west, and to the east are all part of the Hillcrest Walnut Plantings subdivision, and are from 5 to 15 acres. The majority of parcels are 5 acres. In the proposed exception area there is one contiguous ownership, lots 91 and 92. The adjacent area has a similar ownership pattern. Land to the south and west of the subdivision contains larger parcels, nearly all 20 acres in size.

2.7 Neighborhood and Regional Characteristics: See Findings A.10.

2.8 Natural and Man-Made Features/Impediments: See Findings A.10.

2.9 Physical Development: See Findings A.1 and A.10.

2.10 Other Relevant Factors:

The proposed exception area contains 3 lots in two separate ownerships. OAR 660-04-028(6)(c)(B) states that small parcels do not themselves constitute irrevocable commitment. However, small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or around a road designed to serve the parcels. The latter description fits the study area. The existence of this parcelization pattern severely limits the potential for resource uses. The greater the number of separate owners, especially if those ownerships are developed with dwellings, the lower chance that these parcels could be aggregated into a farm or forestry holding that could be used for resource use.

The lots in the subdivision, including the three 5-acre lots in the proposed exception area, contain a deed restriction which states:

"Said lots or tracts shall not be used for the purpose of raising, breeding, pasturing, boarding, buying or selling of dogs, cats, mink, nutria, rodents, hogs, pigs, or piglets."

This restriction applies to Lots 90 and 92, as well as to 36 other lots in the Hillcrest Walnut Plantings subdivision. These restrictions limit the possibility of establishing a farm use, and could discourage adjoining farmers from purchasing these lots to combine with their farms.

2.11 Resource Uses:

To determine the resource uses that could be established on the property the soils must be evaluated. The three main soil types in the proposed exception area are Yamhill, Jorey and Steiwer. These soil types have an agricultural rating of Class II and III. The Yamhill county Soil Survey lists the following agricultural uses for these soils:

Yamhill: orchards, small grain, hay, and pasture

Jorey: Orchards, berries, grain, hay, pasture, and timber

Steiwer: Grain, hay and pasture,

As explained in Exception Statement II, the economics of farming and forestry on small parcels of 5-15 acres require high levels of management which it may not be reasonable to expect owners to undertake.¹⁵

¹⁵ As noted in Exceptions Statement II:

"to deny an exception for Code Areas overwhelmingly in individual ownership of existing parcels less than 20 acres in size would be to saddle owners with unnecessary paperwork and hardship and to skew market place options."

There are two other factors which must also be considered in evaluating productivity of small parcels. Firstly, the basic assumption underlying the system . . . is that any patch of soil, no matter how small, can produce something. This assumes a high level of individual management. There are certain soils which require a very high level of management in order to realize an appreciable return. In areas containing such soils, as parcel size decreases, the ratio of return to outlay of cash and labor also decreases drastically.

Secondly, there are relatively few crops or types of livestock which are practicably marketable in the County's agricultural stream of commerce at small volumes produced upon small parcels. For these two reasons, productivity of small parcels in area of such soils must be reevaluated. ****

Soil associates rated good-to-fair and more dependent upon high management levels are . . . Jory-Yamhill-Nekia * * *

It may not be reasonably be expected that owners of small parcels in these areas will undertake such management for an uncertain return."

2.11.1 Agricultural Uses

These soils depend upon a high management level. The type of farm products which can be grown is further limited by whether the land is irrigated or non-irrigated. The proposed exception area must be considered non-irrigated because there are no water rights for irrigation from the Department of Water Resources. Applicants reviewed the Yamhill County Soils Survey, obtained soils map and topographical maps and consulted with Oregon State University Extension Service in McMinnville regarding the types of agricultural products which are suitable with limited water availability. The principal dryland crops for these soils include winter wheat, grass hay, grapes, and Christmas trees. The principal dryland tree fruits and nuts for these soils are cherries, hazelnuts, walnuts and peaches.

Christmas tree farming is a possibility. There are Christmas trees on a larger parcel to the south of the subject property. Christmas trees require intensive management, including spraying. Other types of farming, such as dairy farms, mushroom farms, and grain and livestock operations are possibilities. However, conflicts with the surrounding residential uses is imminent due to the smoke, dust, odors, use of aerial spraying viewed as noxious and hazardous, use of the road to bring in large equipment, and operations at night.

The potential resident complaints against such farm and forest practices is even greater due to the deed restriction discussed above, prohibiting certain agricultural activities on lots within the subdivision.

In 1980, when there were only seven dwellings on Hillview Drive west of the subject property, there was considerably less likelihood of such conflicts between farm/ forest uses and residential uses. But now, after 20 years, the population and traffic has increased more than tripled, making the potential conflict between farm and forest uses and the residential uses, as a practical matter, make the use the subject property for farm or forest use impractical. The increase in population and traffic is also likely to be a disincentive to anyone who would otherwise consider engaging in such farm and forest practices on the subject property and for whom access is a fundamental consideration.

Besides livestock, grain and timber, which have such substantial conflicts with the more highly developed rural residential lots to the east, the other possible agricultural uses for which the soils on the property are suitable include orchards and berries, which may result in lower impact and fewer conflicts with and complaints from residents of the subdivision. However, as a practical matter, use of the property for orchards and berries is not viable due to certain factors.

First, there are several general limiting factors, including, topography which is highly erodible soil due to slopes, lack of water rights for commercial agricultural irrigation, the small tract size, the high level of management required for resource use, and the limited growing season due to early fall and late spring frosts, and even shorter pocket climates due to steep ridges and ravines.

Second, there are more specific factors. Applicant conferred with OSU Extension Service regarding the possibilities of commercial farm use on the property.¹⁶ Apples, prunes, cherries, chestnuts and berries require irrigation, but since this property has no water rights for irrigation and the soils are marginal suitability for irrigation anyway, dryland farming is the most appropriate alternative. The slopes (north facing) are unsuitable for grapes. Hazelnuts require at least 100 acres due to specialized machinery for harvesting, mowing and spraying requirements. The remaining possible dryland uses include cherries, walnuts and peaches. However, there is no market for walnuts and cherries. There are no processors for peaches, and, to the extent that there may exist a small specialty market for peaches, it would be difficult to access, and even if possible, as a practical matter peaches would not be feasible from an economic standpoint because of the time and expense of establishing an intensively managed producing peach orchard on such a small acreage, the substantial likelihood of a poor return on investment, and the uncertainties of a specialized agricultural commodities market. Therefore, there are no crops which might be grown on the subject property at small volumes which can be practicably marketable in the County's agricultural stream of commerce.

Finally, it may be suggested that in order to show that a farm use is impracticable one must show that a person cannot engage in any use, even one which is not an economic farm use, or in the words of the ORS 215.203 definition of "farm use", one "for the primary purpose of obtaining a profit in money."¹⁷ However, such an interpretation would be incorrect, because the practical effect would mean that the owner of the property could be forced to choose between engaging in economic farm use and foregoing the economic farm use and instead letting the land lay idle or using the land merely for a few horses, or other uses which are not an economic farm use, so as to reduce the impacts upon and therefore the conflicts with the rural residential uses in the surrounding area. This would be inconsistent with the statutory definition of "farm use"

¹⁶ Rob Krueger has researched through the OSU Extension Service the potential uses of the property which is the subject of the proposed exception, and determined that commercial resource use of the property is impracticable due to a number of factors, including but not limited to the small tract size, existence of a dwelling, topography which is highly erodible soil due to slopes, lack of water rights for commercial agricultural irrigation, the need to protect the creek, the high level of management required for resource use, the limited growing season due to early fall and late spring frosts, and even shorter pocket climates due to steep ridges and ravines. There is insufficient acreage available for commercial field crops (such as winter wheat and grass hay) and hazelnuts, and the other possible agricultural products typically grown on these soil types (apples, prunes, cherries, chestnuts, would require irrigation, making dryland farming the only alternative. The slopes (north facing) are unsuitable for grapes. The highly erodible soil and the dwelling and the creek running through the middle of the property make the land unsuitable for Christmas trees and livestock pasture. The remaining possible dryland uses include cherries, walnuts and peaches. However, there is no market for walnuts and cherries, and although there is a possible specialty market for peaches, accessing the market is speculative, and even if possible, the time and expense of establishing an intensively managed producing peach orchard on the small amount of acreage available for orchard, with the uncertainties of a specialized agricultural commodities market for peaches, one make a poor return on the investment and would not make a substantial contribution to the agricultural economy in the area.

¹⁷The statutory scheme suggests that there is a requirement that it be for the primary purpose of obtaining a profit. See definitions in ORS 215.203(2)(a) ("current employment"), (b) "accepted farming practice") both of which consider making a profit in money and economic farm use.

which requires there to be a "primary purpose of obtaining a profit in money". It is more consistent with the statutory scheme and purpose of preservation of agricultural lands for farm uses which make a substantial contribution to the agricultural economy, to presuppose that the kind of resource use found to be "impracticable" to qualify for a "committed" exception, must be "an economic farm use". Therefore, it would be incorrect to deny a committed exception merely because the owner could let their land lie fallow so as to avoid the generating the kind of impacts on and which an economic farm use will have on surrounding residential uses.

2.11.2 Timber.

According to Rob Tracey at the US Department of Agriculture and Soil and Water Conservation District, the most appropriate resource use of the property is forest.¹⁸ The soils¹⁹ are suitable for growing douglas fir, as well as certain hardwoods. There is at most about five acres of suitable area on Lots 90 and 92 available for establishment of a woodlot. Most of the available acreage is on Lot 90. Lot 93 has no available area due to the areas occupied by the rural residential dwelling, barn, driveways, drainfield, and the need for firebreak setbacks from those structures. Likewise, Lot 92 has a very limited amount of available acreage due to the need for setbacks from the three structures and the area of the creek. Applicants representative conferred with James Letournea, a professional forester in Yamhill County, regarding the amount of income which might generally be expected to be generated on a typical five-acre tract with these type of soils. It is estimated that the 5 acre tract would net about \$57,250 after 50 years, based on the following calculations. Such information, such soils typically produce about 40,000 board feet per acre. So five acres would produce about 200,000 board feet, and at \$250 per 1000 B.F., the owner would net \$50,000 at the end of 50 years when the trees would be mature (200,000 B.F x \$250/B.F = \$50,000). In addition to the \$50,000 net after 50 years, the owner would also receive some "thinning returns" at 20-25 years, which would net another \$5,000, and again about 10 years later would receive more thinning returns for another \$5,000, so the total would be about \$60,000 after 50 years. The cost of planting five acres would be about \$2,500 (at \$1+/tree x 400 trees per acre x 5 acres = \$2,500) which assumes planting upon sodded area so no land clearing is required before planting and spraying). \$60,000 less \$2,500 = \$57,250 after 50 years. After that there would be additional capital outlay for reforestation.

The long term net profit of \$57,250 from growing trees on a five acre tract over 50 years (computes out to be about \$1,000 per year) cannot, as a practical matter, be considered a level of resource use which requires the protection of an AF-20 zoning or disqualifies it from being zoned

¹⁸ Although the lots are most suitable for forest use, the lots cannot qualify for a forest template dwelling because they were not predominantly devoted to forest use on January 1, 1993, and were part of a tract which included a dwelling on November 4, 1993. See, YCZO 402.03(O).

¹⁹ Yamhill and Jory soils on the proposed exception area are suitable for growing timber. Lot 90 is predominantly Jory soils and the rest of Lot 90 and all of Lot 91 are Yamhill soils. Yamhill soils are capable of producing 125 cubic feet per acre per year of wood fiber from commercial tree species, and Jory soils 155 cubic feet per acre per year.

AF-10. Indeed, such a level of resource use is, much like raising a small number of livestock, indicative of the type of small resource use which is more appropriate in the AF-10 small resource use zone. Although this level of long term investment in a five acre forest can provide supplemental income, it cannot provide a sufficient level of annual income for the tract to be considered more than a small-scale resource use. Stated another way, it must take more than the potential of growing timber on a 5-acre tract of timber to require as a matter of law protection under an Agriculture Forestry Large Holding plan designation. Otherwise, DLCDC could not have acknowledged any of the forested five acre lots in Code Area 5.11 since the soils information indicates that the soils in Code Area 5.11 are suitable for timber, and the lots in the exception area are currently in forest use.

Although there is no specific size above which a tract will be considered too large to be considered ineligible for an exception for a rural residential dwelling, the state statutes adopted in 1993, governing lot of record and forest template dwellings, does provide some guidance. In ORS 215.720(1)(a) the legislature changed the law to allow lot of record dwellings to be established on land zoned for forest use. One of the methods allows placement of a dwelling if the parcel is not capable of producing 5,000 cubic feet per year of commercial tree species wood fiber. It appears that the legislature did not believe that parcels that produce less than 5,000 cubic feet of timber yearly would be considered to substantially contribute to the timber industry. Because the most the proposed exception can produce is well below the 5,000 cubic feet of timber yearly²⁰ which is considered to substantially contribute to the timber industry, the County finds that the parcels in the area would not substantially contribute to the timber industry in the area.

Finally, as explained above, additional dwellings can generate complaints against the sight and sounds generated by accepted forest practices, and lead to nuisance complaints against such activities as clear cutting and log hauling from neighboring properties. Although the most appropriate use of the property is for growing commercial tree species, for managed timber operations, the increase in development means that complaints are more likely to be made against various forest practices, such as reforestation, road construction and maintenance, harvesting, application of chemicals, and disposal of slash, resulting in noise, aerial spraying, slash burning, and use of large equipment to clear, cut and buck, and haul harvested timber. Applicant's representative discussed the effect of houses on forest operations with Jim Letournea, a professional forester in Yamhill County. Forest operations are experiencing frequent complaints from neighbors against the noises and impacts of accepted forest practices, such as clear-cutting.

Applicants believe that accepted forest practices should not be hampered by such complaints, and in order to provide assurance that no nuisance claims will be made by the owner or occupant of the subject lots, will agree, as a condition to the approval of an exception, to

²⁰At most, five acres would produce about 750 cubic feet per year of commercial wood species (5 acres x 150 cubic feet/acre/year = 750 cubic feet/ year).

voluntarily sign an affidavit²¹ under which the owner and occupants would recognize the right of surrounding properties to engage in accepted forest practices under acknowledging a declaratory statement to be recorded in the deed and mortgage records recognizing that accepted forest practices may create inconveniences and that it is not the timber operator's responsibility to modify such practices to accommodate the owner of occupant of the property with the exception of operator's violation of state law, including the state Forest Practices Act.

2.12 Rural vs. Urban Lot Sizes:

The proposed exception area is part of the Hillcrest Walnut Plantings subdivision platted in 1909, which created parcels of 5-15 acres, with the majority 5 acres in size. If this application is approved, it would allow one dwelling on each of the two vacant five acre lots (Lots 3900 and 4000). This pattern is similar to that allowed immediately to the west and northwest, which is Code Area 5.11 exception land where the remainder of the Hillcrest Walnut Plantings subdivision is located. In the AF-10 district, YCZO 501.06 authorizes establishment of a principal dwelling as a permitted use on a pre-existing lot of record, so each of the vacant 5-acre lots would qualify for a rural residential dwelling.²² The AF-10 zoning that allows this parcel size has been adopted for Code Area 5.11 which contains mostly five acre parcels and is located immediately to the east of the proposed exception area and has been acknowledged by the Land Conservation and Development Commission as being rural rather than urban. Therefore, the County finds that allowing one dwelling per five acres is a rural, not an urban, scale of use.

2.13. Conclusions.

During the hearing before the Planning Commission, there was the suggestion that the County should not allow the exception because the boundary line of existing exception area Code Area 5.11 should not be altered because "one must draw a line somewhere" and that line was drawn in 1980 and must not be changed. The Board finds that to the extent that Code Area 5.11 boundary line immediately to the east of the subject property would be changed to include the three parcels which are the subject of this application, such a change is appropriate because it satisfies the requirements for a developed and committed exception for the reasons set forth in Findings B., D.1. and D.2.

²¹ The affidavit would be similar to the form affidavit required under YCZO 403.08(E), acknowledging a declaratory statement to be recorded in the deed and mortgage records to recognize that accepted agricultural operations may create inconveniences and that it is not the agricultural operator's responsibility to modify such practices to accommodate the owner of occupant of the property with the exception of operator's violation of state law.

²² The AF-10 zone allows creation of new lots at least 10 acres in size. The lots in this case are not new lots because they were created in 1909 and are recognized as pre-existing legal lots of record. See, YCZO 501.06 B.1 and B.2.

More specifically, the Board is persuaded that the exception to allow the zoning to be changed to AF-10 is appropriate in light of the striking similarities between these parcels and the adjacent exception area along Hillview Drive which runs through the heart of the old 1909, 600+ acre Hillcrest Walnut Planting subdivision which comprises Code Area 5.11, consisting of rows of 5 acre parcels with rural residential dwellings, and which terminates at the 3 subject parcels, two vacant and one with a residence. Given the same characteristics in terms of location, parcel size, development pattern, topography, mixture of trees and open space with no farming activity, the two vacant parcels, tax lots 4000 and 3900, are "sandwiched" between the house on tax lot 3800 and the adjacent houses in the exception area, on the south side of the Hillview Drive. Hillview Drive is the main, indeed the only access road through this part of the subdivision cul-de-sac, with houses all clustered along the road inside the exception area, and clustered around Hillview Drive outside the exception area are five more rural residential dwellings, 3 on 5 acre parcels and 2 on 15 acre parcels, which were all part of the old 1909 subdivision and which are all served by the same subdivision road cul-de-sac.

The Board finds that it is time to recognize that it is impractical to put these 3-5 acre parcels to resource use and change zoning from AF-20 to Rural Residential AF-10 because, either it was an oversight in 1980 to exclude these parcels from Code Area 5.11, or changes have occurred since 1980 which justify bringing them into the exception area now. In other words, as explained in the previous findings, either the parcels should have been included in the adjacent 600 acre AF-10 exception area in 1980 or, in the alternative, the amount of development on the adjacent AF-10 land and the changes in agricultural economics which have occurred since 1980 have made it impractical to make any economic farm or forest uses on the parcels without the farm and forest practices generating conflicts with the adjacent rural residential area.

The Board is persuaded that the similarities between the three parcels and the existing exception area outweigh any differences in characteristics. As explained in the Area History (see findings 10.2, which explains what code area 5.11 is, how it was created, and why it was approved), the 600 acre exception area had 74 parcels, predominantly 5 acres in size, with 32 dwellings. The boundary lines of Code Area 5.11 were not based on a parcel by parcel analysis but instead reflected areas which exhibited similar soils, steep slopes with 200-700 ft. elevation, limited growing season in pocket climates. The three parcels have all of these same characteristics. The adoption of Code Area 5.11 recognized that an overall need exists for rural residential dwelling opportunities, that parcels under 20 acres in these situations which are not allowed to be used for a dwelling present a hardship for their owners because of the limited options in the market place based on lack of: (1) productivity given high level of management for return as parcel size decreases and in terms of ratio of return to outlay cash/labor; and (2) practical marketability with uncertain returns. The Board finds that had owners of these parcels so requested to be included in the Code Area 5.11 in 1980, there would have been sufficient basis for allowing their inclusion in the Code Area 5.11 in 1980.

In the alternative, even if one finds that there was insufficient evidence in 1980 to include these parcels in the exception area, the Board finds that since 1980, changes occurring inside

existing exception area have resulted in a situation in which an exception and zone change is justified. (see findings 10.4) The Board is mindful that in 1992 these parcels were part of Study Area 65, which was a proposed by the planning staff to be an exception area consisting of 10 parcels immediately west of Code Area 5.11, and which was ultimately not approved by the Board as an exception area in 1992. The history of Study Area 5.11 suggests that it was not included as an exception area because of a lack of support from the owners of the property, which was at least in part due to the fact that the majority of the parcels already had dwellings and that the owners were concerned that rezoning of their property would cause them to lose their forest or farm tax deferral.

The Board is further persuaded that conflicts with economic farm uses make farm use impracticable. Thus, even if it was not an oversight to have excluded these parcels from the exception area back in 1980, the level of development in code area 5.11 since 1980 provides compelling reason to add these three parcels now. This includes the threefold increases in population and traffic which generate actual and imminent conflicts with economic farm and forest uses make farm use impracticable. The impact of the higher level of development in the adjacent exception area (Code Area 5.11) on Hillview Drive, resulting in a three-fold increase in population and traffic since 1980, has made it impractical to use the subject property at the western end of the cul-de-sac for a variety of accepted farm practices and forest operations. Applicants have conducted an exhaustive due diligence study of the possible resource uses and the impact of accepted farm and forest operations. The Board is persuaded that the few economic farm or forest uses are impractical. Christmas tree farming, which will produce marginal economic returns, requires aerial spraying, harvesting, hauling, and that traffic and noise from a Christmas tree farm immediately to the south has generated complaints from neighbors, making the potential conflicts from Christmas tree farming imminent and render the use impractical. The Board observes that other farm uses (e.g. dairy farms, mushroom farms, and grain and livestock operations) generate smoke, dust, odors, use aerial spraying viewed as noxious and hazardous, require use of the road to bring in large equipment, and operate at night, all accepted agricultural practices which also will result in potential and imminent conflicts which would render those uses impractical. Likewise, the use of the property for woodlot, using typical timber management practices, is impractical. About three to five acres of the property is suitable for commercial timber species timber, which would produce a modest but very long term payoff of about \$57,000 over 50 years. A neighboring woodlot owner, John Atree would be interested in combining his forest tracts, but not with these parcels because they are too wet. However, even if these parcels were used for small tract woodlot, the increase in development within the adjacent Code Area 5.11 means that complaints are more likely to be made against the forest practices associated with such use, including reforestation, road construction and maintenance, harvesting, application of chemicals, and disposal of slash, resulting in noise, aerial spraying, slash burning, and use of large equipment to clear, cut and buck, and haul harvested timber. The Board is persuaded that such complaints would be imminent because the neighbor, John Atree, reported that there were numerous complaints from residents along Hillview Drive when two small tract woodlots adjacent to his property were clear cut in recent years.

The Board finds that, as a practical matter, there are no other economic farm use which could be employed on the property to avoid the impact upon and conflicts with the higher level of development on adjacent lands. The applicant's due diligence study of resource uses showed that orchards and berries are not economically viable because it is unrealistic to expect to make much if any profit on such crops. The economic feasibility of one specialty crop, peaches, was researched by the applicant, Rob Krueger, and found not to be feasible due to risk in markets and uncertain returns. Mr. Krueger approached three banks which typically make farm loans, and none of them would extend credit to him for any farm use, including peaches because of the low value of the security (small parcels), and uncertain returns.

The Board finds that the characteristics of the surrounding area and uses and their relationship with the proposed exception area renders the farm/forest uses on the proposed exception area impracticable. Hillview Drive has been converted from a "cowpath" to a well maintained graveled 1.5 lane road, maintained by the local road association. farm and forest activities will conflict more with the three- fold increase in vehicles on road.

The Board is also mindful that the subject parcels have never received farm or forest tax deferral treatment, there have been no objections from any neighbor, and indeed, the road association favors approval of the application, and both John Altree and Sam Hawkins, President of the association, who favored approval of the application, stated that no other property of this size along Hillview Drive is making any income from farming.

The Board finds that inclusion of the three parcels will not set a bad precedent or domino effect. The requested change is the minimum change necessary, and approval will not be a basis for bringing any other property into the exception area. The reasons for approving the exception on these parcels are fact specific to these parcels. Any other parcels which may apply for inclusion in the future would be required to be justified on its own merits, based on the specific circumstances relative to such parcels.

Finally, the Board finds that the application is based on historical fact and not any notions of equity or expectations of the applicants. Applicants did not make any equity argument in this case. The characteristics and changes in the area and the imminent conflicts all exist regardless of who owns the parcels or when they were purchased. The lots are freely transferrable.

3. Response to DLCD Comments

DLCD has written a letter commenting on the original application filed in this matter. DLCD expressed concerns that there was no explanation of changes which had occurred since 1080 when the existing exception area was adopted. This revised application discusses such changes at Findings A.10. and C.2, which have resulted in a three fold increase in dwellings and traffic on Hillview Drive, which is a cul-de-sac around which all of the affected dwellings are clustered.

In its comment, DLCD also expressed the view that the adoption of the Code Area 5.11

in 1980 was a decision that the lots were not irrevocably committed. However, for the reasons discussed in A.10., and D.2.3 and D.2.4, our research reveals that it is not entirely clear why the subject property was excluded, and, indeed, it is more likely that it was a mistake or oversight²³, the unintended consequences of which have now created a situation in which conflicts with residential uses within the exception area due to impacts from farm and forest practices on the subject property are imminent.

Although the May 7, 2001 letter from Michael Rupp of DLCD found shortcomings in initial application, and Applicant revised the application to address all of the points raised in the DLCD letter, DLCD did not submit additional written comments following applicant's submittal of its May 21, 2001 Revised Application. Applicant's attorney testified that he called Michael Rupp of DLCD who acknowledged there was more information to support the application and said DLCD would probably not submit another letter, but would probably leave this decision up to local decision makers.

²³It is very possible that a mistake or oversight was due to the fact that none of the Code Areas involved a parcel by parcel analysis, but rather the analysis was based on a broad overview of parcelization and development patterns in large blocks of land. In other words, the adoption of the original code area was far from an exact science, and too much should not be attributed to the precise location of a parcel or lot on one side of a line or the other. Moreover, given the similarities with the other parcels in Code Area 5.11, it is self evident that the subject property could have been included in the exception area if the County had been requested to do so. Nevertheless, even if a mistake were not made in 1980, the occurrence of changes since 1980 provide adequate basis for taking a committed and exception over 20 years later.

Based on these fundamental similarities in relevant characteristics, it would have been more logical to have included these three 5-acre parcels within the Code Area 5.11 exception area than to have grouped them with the larger AF-20 zoned parcels. However, in creation of the Code Area 5.11, which included about 600 total acres, the County must have necessarily drawn the Code Area 5.11 boundary lines between the exception area (AF-10) zone and Exclusive Farm Use (AF-20) areas with a broad brush, and as such, the exception area boundary lines are only a general approximation of a large number or blocks of parcels with common characteristics, i.e., instead of considering each individual parcel, and the boundary lines are generally straight lines which reflect only a general differentiation between large blocks of exception lands and exclusive farm use lands. Seen in this light, it would appear that the western boundary of Code Area 5.11 was drawn so that the majority of the boundary line would border the larger parcels of 15 or more acres in size, and this resulted in the exclusion of a handful of smaller 5-acre lots at the western fringe of the subdivision, such as Lots 90, 91 and 92, from Code Area 5.11. Thus, rather than being designated AFSH and AF-10, these three 5-acre parcels were lumped in with a group of the larger parcels to be designated AFLH and AF-20 designation. Viewed on a macro level, this is not to suggest that there was anything wrong with the general AFLH and AF-20 designation as far as it went, where there was no specific evidence that Lots 90, 91, and 92 should be more appropriately included in Area Code 5.11, rather than being included with a group of larger parcels primarily 15-20 acres in size. But viewed today on a micro level, the inclusion of these three 5-acre lots within the AFLH and AF-20 designation appears to be incongruous with the more detailed evidence demonstrating that these three lots more appropriately belong with the group of 5-acre parcels within Code Area 5.11 which they most resemble. The subject parcels are an integral part of Code Area 5.11 and are also committed to nonresource rural residential use for the same reasons that Code Area 5.11 was acknowledged to be so committed.

Finally, DLCD's comment points to the applicants' acquisition of the property in spite of the zoning restrictions. However, under ORS 92.017, these legal lots of record created in 1909 are lawfully created lots which remain discrete lots and, as such, are freely transferable, and applicants acquired them believing the lots would be better suited for rural residential and small scale resource use, than for agriculture/forest large holding,. As purchasers, applicants are proper parties to file this application. Moreover, facts are facts, and the facts which justify an exception to be taken exist regardless of who files an application.

4. OAR 660-0012-0060 (Transportation Planning Rule)

OAR 660-0012-0060(1) provides that *amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility.*

The impact of two new residential dwellings upon the roads is addressed in a memorandum from William Gille, Yamhill County Director of Public Works, dated May 14, 2001, in which he indicates that two additional homes might generate about 19 additional trips per day, and that will not cause capacity or level of service related problems on Walnut Hill and Starr Quarry Roads, or Hillview Drive. The County finds that the proposed use will be consistent with current traffic levels and will not significantly affect a transportation facility, and therefore satisfies OAR 660-0012-0060(1).

5. Ordinance Provisions and Analysis

5.1. YCZO section 1204 (Exceptions to Statewide Goals)

YCZO Section states that exceptions to statewide goals are subject only to the requirements of the Oregon Administrative Rules discussed above. Therefore, the Plan Amendment portion of this request is not subject to local review criteria.

5.2. YCZO section 1208.02 (Quasi-Judicial Zone Changes)

The proposed plan amendment and zone change is intended to add 15 acres to an existing exception area, Code Area 5.11, which is 600 acres in size. The reasons for the plan amendment and zone change are explained in the justification for a developed and committed exception. See Findings A.10, B and D.

The need to add this property to the exception area was the result of a mistake or an oversight in 1980 when the existing exception area was adopted. The three lots could have been included in the original boundaries of Code Area 5.11 if the County had chosen to consider the properties on the western boundary on a parcel by parcel basis. Although a parcel by parcel consideration is not required under OAR 660-04-028(5), nothing prevents such a parcel by parcel analysis being used to fine tune the boundaries of an existing exception area. The original

exception area and its AFSH/AF-10 planning and zoning has been acknowledged to be in compliance with the goals and there is no requirement that the County reevaluate the need for the AF-10 zoning which is fulfilled by Area Code 5.11. The County finds that a minor amendment to Area Code 5.11 satisfies the same need that Area Code 5.11 fulfills because the addition of three 5-acre lots to the 600 acre exception area constitutes a will only expand the exception area by 2.5 %. Therefore, as a general matter, this limited addition to the exception area constitutes a minor amendment which is consistent with the justification for larger exception area and therefore satisfies the zone change requirements for the same reasons that adoption of the Code Area 5.11 satisfied those requirements.

In the alternative, changes have occurred in the surrounding area since 1980 which have rendered farm and forest use of the property impracticable, and, for the same reasons which justify a committed exception, the County finds that YCZO 1208.02 is satisfied. See Findings B and D.

5.2.1. YCZO section 1208.02(A)

The County finds that the proposed change is consistent with the goals, policies and any other applicable provisions of the Comprehensive Plan as required by YCZO 1208.02(A) for the following reasons.

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

The property is not within the 100 year floodplain, as shown on FIRM 410249 0320 C. There are some slopes but there appears to be adequate area for construction of residences on each existing parcel. The sanitarian stated that no applications for septic systems have been made but also mentioned that the soils are generally good for septic systems.

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

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

Policy I.B.2.a.: Yamhill County will continue to recognize that the appropriate location of very low density residential development is in designated large areas where

commitments to such uses have already been made through existing subdivision, partitioning, or development and by virtue of close proximity to existing urban centers; or in small, limited areas having unique scenic, locational and other suitable site qualities where the anticipated magnitude or density of development is not such as to require more than a very basic level of services, such as single local-road access, individual domestic wells and sewage-disposal systems, and possible rural fire protection.

The Hillcrest Walnut Plantings subdivision was platted December 6, 1909 and covers more than one half square mile. The subdivision itself does not commit the area to residential use. However, nearly all of this subdivision was excepted from Goal 3 in Exceptions Statement II (ESII) which was adopted by the Board of Commissioners April 23, 1980. The subject property is part of the subdivision but was excluded from this rezoning, along with approximately 65 acres bordering to the north and west. The reasons for this exclusion are not entirely clear. At first glance it appears that the decision makers excluded all the 15 acre lots at the western end of this subdivision but that is not true since one 15 acre lot was included (Lot 55) in ESII. The property is not near any urban centers. It is adjacent to a large area to the east which is committed to rural residential development. If approved, the magnitude of development would be two additional home sites. These, along with the existing residents in the area would not require more than a very basic level of services such as single local access roads and individual septic/water systems.

The Comprehensive Plan contains the following relevant policies:

*SECTION II. THE LAND AND WATER
A. AGRICULTURAL LANDS
POLICIES*

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

*II. FOREST LANDS
GOAL STATEMENT*

*1. To conserve and to manage efficiently the county's forest and range resources, thereby ensuring a sustained yield of forest products, adequate grazing areas for domestic livestock, habitat for fish and wildlife, protection of forest soils and watershed, and preservation of recreational opportunities. (98)
POLICIES*

e. Yamhill County recognizes that areas of the county are characterized by such a mixture of farm and forest use that the agricultural lands and forest lands goals of this Plan are both applicable. Farm and forest resources within these areas shall be protected through mixed-use zoning that recognizes both types of use. Any proposal to

change the zoning designation of a parcel from a farm or forest classification to a mixed-use zone shall include a demonstration that the use of the parcel is such a mixture that neither the farm nor forest land goals can be exclusively applied. (565)

The county finds that the foregoing policies are not independent approval standards, but rather aspirational and are satisfied through approval of a reasons exception and a limited use overlay zone. That these are not independent approval criteria is evident from the County's comprehensive plan which states:

** * * Goals are general directives or achievements toward which the County wishes to go in the future. Policies are more specific statements of action to move the County toward attainment of the goals. These policies are used in daily decision-making or in the development of ordinances by the County.*

Implementation of the County goals and policies can occur several ways. Many are implemented through county ordinance. Other goals and policies will apply to individual issues or proposals put forth by both private and public sectors. Still others will require action dependent upon the County's fiscal resources through time.

Where certain goals and policies conflict with others, the final decision will require a weighing of the merits in order to achieve a balanced decision. Through time, the goals and policies are guides for consistent, reasonable and balanced land use decisions. (See, Revised Comprehensive Plan, page 2.)

Second, the County finds that these YCCP provisions are implemented through the zoning ordinance, viz. YCZO 1208.02(E) which requires application of the OAR's where applicable, and that the OAR's (Goal 3 and 4 rules) address the same policy of preserving agriculture, and therefore, the YCCP provisions are not approval criteria but are implemented through the zoning ordinance and the OAR's.

Third, the County can also find that even if any of its Agricultural and Forest Comprehensive Plan Goals and Policies were to be considered an independent approval standard, and even if these policies were not shown to be implemented through the zoning ordinance, it would nevertheless not apply in this case because Goal 3 and 4 exceptions are taken. YCZO Section 1204 provides that exceptions are subject only to the OARs and not subject to local review criteria and may be taken using the Type C procedure under YCZO section 1301. Policy II.A.2.a. is intended to carry out goal 3 and 4. The taking of a goal 3 and 4 exception demonstrates compliance with the goals and therefore compliance with such a plan policy intended to carry out Goal 3 and 4. This interpretation is consistent with past practices insofar as the county has other areas of Class I through IV soils and mixed farm and forest lands for which exceptions have been taken and acknowledged by LCDC to be in compliance with the goals. Therefore, the County finds that it is reasonable to interpret this policy to authorize use of such lands where an exception is taken.

5.2.2 YCZO section 1208.02(B)

The County finds that there is an existing, demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone, as required by YCZO 1208.02(B), for the following reasons.

First, the demonstrable need requirement is satisfied by a finding that the subject area is "developed" and "irrevocably committed" to rural residential use. See, Findings B and D.

Second, the subject parcels fulfill a need for rural residential uses which have adequate fire protection, will not generate inordinate service demands have single local road access, individual domestic wells and sewage disposal systems. The area has agricultural limitations due to topography and climate, and as part of an existing subdivision which is already within an exception area, and will fit well with the existing development pattern in the exception area. In this case, the subject area has a high amenity value for rural residential use, and is an area where such needs can be accomplished without compromising basic County goals of urban containment and orderly urban development.

5.2.3 YCZO section 1208.02(C)

The County finds that the requirements of YCZO 1208.02(C) are satisfied. The proposed change is appropriate considering the surrounding land uses, the density and pattern of development in the area, any changes which may have occurred in the vicinity to support the proposed amendment and the availability of utilities and services likely to be needed by the anticipated uses in the proposed district. The surrounding uses include the exception area to the west and the larger parcels in the AF-20 zone to the east. The fact that the parcels more closely resemble the exception lands than the AF-20 lands is discussed in Findings D.2. The use of this 15 acre area for one existing and two additional 5-acre rural residential home sites is consistent with the changes which have occurred in the surrounding area. A.10, B.2.

The principal reason Kruegers purchased Lot 90 (Tax Lot 4000) in 2000 was to establish a homestead for their family which will fulfill their vision which is to design and implement an ecologically sound, cooperative, self-reliant and sustainable homestead that will be used as a practicum for future consultation with other small parcel owners in our community. The Kruegers plan to undertake a two to three-year process of design and implementation which is required to get their system going. Initially this would involve a detailed design of the property, followed by natural house construction, alternative energy system design and implementation, intensive garden design and implementation, water system design and implementation, forest species plantings, and design of wildlife areas. Once the system has been initiated, in approximately three years, they plan to start a non-profit organization focused on design consultation targeting people owning small properties in our community. Thus, making the best use of the property for activities which are compatible with the surrounding uses will avoid the

type of conflicts which have rendered the intense types of agricultural and forestry practices impractical.

No sewer or water services will be required because there is an on-site well and there will be a subsurface sewage disposal system installed. The property is currently served with electrical power by PGE, and within the Amity Fire District. Adequate roads are available to the property. See, Findings D.4. Adequate bus service is available to the property. Regarding criterion (C), the proposed change needs to be shown to be appropriate considering the surrounding land uses, the density and pattern of development in the area, any changes which may have occurred in the vicinity to support the proposed amendment and the availability of utilities and services likely to be needed by the anticipated uses in the proposed district. Surrounding land uses to the east are small residential lots. Somewhat larger residential lots exist to the north and west. Property to the south has some Christmas trees as farm use. The applicant points out that the property to the east was part of code area 5.11 in Exceptions Statement II. The application explains in detail why the subject parcel and use is very similar to that found in this exception area. Why the subject parcel and possibly some of the neighboring area to the north was not included in Exceptions Statement II is not clear. Staff agrees that the subject property and use is substantially the same as the neighboring rural residential property. In 1992 this area was again evaluated as part of study area 65. The purpose of that study was to determine if there was enough development prior to the Statewide Planning Goals (SPG) to justify certain areas as being built and committed to rural residential use. In the case of area 65 there were only a few lots developed prior to SPG and the response from residents of the area was not favorable to rezoning. Therefore, staff recommended against the entire area 65 being rezoned. Rezoning a portion of area 65 (which is essentially the applicant's request) was not evaluated.

The main change which has occurred in the area is the development of the subdivision to the east. While this does not absolutely prevent the use of the subject property for some type of farm use it does make it more difficult. The location of the property is near the end of an approximately ½ mile dead end gravel road. While this road has served the adjacent rural residents for a number of years, it appears to be less suited to serve commercial farm and forestry operations.

Regarding the availability of utilities and services in the area, the lots in the surrounding area have on-site systems for sewer and water hook-ups. Other services such as electricity, telephone, sheriff and fire protection already serve the existing residents in the area.

5.2.4 YCZO section 1208.02(D)

The County finds that other lands in the County already designated for the proposed uses are either unavailable or not as well-suited for the anticipated uses due to location, size or other factors as required by YCZO 1208.02(D).

As explained above, the original exception area and its AFSH/AF-10 planning and zoning has been acknowledged to be in compliance with the goals and there is no requirement that the County reevaluate the need for the AF-10 zoning which is fulfilled by Area Code 5.11. Moreover, the original Code Area 5.11 could have included these parcels if there had been a parcel by parcel analysis. The County finds that a minor amendment to Area Code 5.11 is consistent with the justification for the original larger exception area and therefore addition of three 5-acre lots satisfies this zone change requirement for the same reasons that adoption of the Code Area 5.11 satisfied the requirements. The applicant has shown that other lands in the county already designated for the proposed uses are either unavailable or not as well-suited for the anticipated uses due to location, size, or other factors, as required by YCZO 1202.08(D). The applicant states there are only four other vacant parcels in the AF-10 zone along Hillview Drive. It is not known whether these lots are presently in the works for being developed or if they are still available. Additionally, as indicated in the study from June of 1999, 36 parcels were available and 28 could potentially be created.

5.2.5 YCZO section 1208.02(E)

The County finds that the application satisfies YCZO section 1208.02(E) requirement that the amendment is consistent with the OAR's for exceptions, if applicable. The OAR requirements are addressed above.

Goal 14 is not applicable and no Goal 14 exception is required because the proposed use will not require extension of urban services (sewer or water), and extension of such services will be prohibited under the LUO conditions unless a Goal 14 exception is taken. Furthermore, the 5 acre minimum lot size will be considered a rural, not an urban, use under the Goal 14 rules.

E. Conclusion.

For the foregoing reasons, the County approves the application by Robert and Cheryl Krueger and John P. Macy, for a plan amendment and zone change from AFLH/AF-20 to AFSH/AF-10 and an exception to Statewide Land Use Planning Goals 3 and 4 for Tax Lots 5414-3800, 3900 and 4000.

DOCKET NO: PAZ-02-01

FILM 71 PAGE 2300

APPLICANT: Robert and Cheryl Krueger

TAX LOT NO: 5414-3800, 3900 and 4000

Exhibit "B"

