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February 10, 2010

**VIA EMAIL AND REGULAR MAIL**

Washington County Planning Commission  
Department Land Use and Transportation  
155 North First Avenue  
Hillsboro, OR 97124

Re: Evidence in Support of Committed Exception Determination  
Casefile No: 09-360-PA

Dear Chair San Soucie and Commissioners:

Our office represents KCL Inc., the applicant in the above referenced application for property located east of SW Brighton Lane and north of SW Bald Peak Road (Map Number 2S3 2 Tax Lot 100). The contents of this letter and the attached information are provided in response to the January 13, 2010 Staff Report analyzing the application for a committed exception to Goal 3. Staff raised several concerns in its report that are addressed through the additional analysis and evidence contained in this letter.

The requested plan amendment based upon the committed and developed exception to Goal 3 is not often utilized. However, it is certainly not without precedent. In the 1980s several such applications were approved and within the general area of this application. Those applications of the developed and committed exceptions for plan amendments provide precedent and a road map for your Commission to consider. See Exhibit 1. The standards upon which the County has approved similar requests for committed exception lands supports the approval of this request.



## **The Site Topography and History of Farm Use Suggests that the Subject Property is Committed.**

### *Site Characteristics<sup>1</sup>*

The topography of this property is unique. It is steeply sloped with elevations ranging from 460 to 820 feet across the property from east to west.<sup>2</sup> See Exhibit 2. The property drops off substantially along the south and east property lines and in some places these slopes exceed 30%. At the bottom of the slope, the property is bounded to the east by a small stream, an unnamed tributary of the Tualatin River. Considering the minimum economic farm use standard of 80 acres for agricultural parcels, the subject property is significantly smaller measuring a total of 58.2 acres. The sloping character of the property limits the amount of land available to grow various products. Some crops would only be able to utilize the property with extreme terracing or crop layouts but ultimately would not result in a viable farm unit because of the reduction in density of plantings. In addition, modern harvesting and planting techniques cannot be used because the instability of the slopes make maneuvering and access too dangerous for large tractors and other farm equipment. Plowing steep slopes increases the likelihood of erosion and potential for water quality impacts to the nearby stream.

The property does not have a water right allowing for irrigation of agricultural uses. The eastern facing slopes are dry and hot in the summer parching and scorching green seedlings. Although the soils are classified as Types II, III and IV, the relatively high elevation, coupled with the full east and south facing sun exposure make these soils impracticable for agricultural use. The exceptional dryness in the summer is evidenced by the default landscape of low water demand Madrone trees. Although more prevalent in Jackson, Josephine and Douglas counties, Madrone trees need little or no rain, do not tolerate shade, and thrive on very warm sites with shallow, rocky soils. Exhibit 3. The existence of the Madrone trees in an atypical area of Washington County is the result of the subject property comprising an arid microclimate. A microclimate is a highly localized atmospheric zone where the climate differs from the surrounding area. The term may refer to areas as small as a few square feet (for example a garden bed) or as large as many square miles (for example a valley). Here, although the soils are suitable for farming, the elevation, exposure and weather effects, make this area of Bald Peak unique when considering farming activities.

A number of existing property owners note that either because of the elevation or the exposure, the area is prone to sudden high winds from the south or the east. See Exhibit 4. Such

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<sup>1</sup> This description of the property applies to the committed exception determination of the existing characteristics under OAR 660-004-0028(2)(a) described under the Committed Exception heading as a portion of the state regulations governing committed exceptions. Further, the characteristics of the subject property are relevant considerations as to whether resource use of the subject property is impracticable. *DLCD v. Curry County*, 151 Or. App. 7, 11 (1997).

<sup>2</sup> Most of the rest of the east facing slope of Bald Peak at similar elevations is located within exception area #129 and zoned a combination of AF-5 and AF-10.



winds increase the likelihood of overspray from the use of herbicides and pesticides even when accomplished through ground application.

The Regan Bros., a successful, multi-state Christmas tree farming company, owned the property and attempted to use the property for Christmas tree farming from 1984 until 2008, when it was purchased by the applicant. With Regan Bros. 50 years of experience in growing Christmas trees for a profit, they were never able to make a practicable farming use of the property. After 20 years of unsuccessful attempts to make a profitable use of the property as a Christmas tree farm, the Regan Bros. accepted that it was impossible to use the site for a commercial agricultural purpose and proceeded to sell the property. See Exhibit 5. Now, left with the affects of a failed Christmas tree operation and the continued development of surrounding residences, the property is, in effect, committed to non-farm use and such circumstances support a change from the AF-20 exclusive farm use zone to AF-10.

The Regan Bros. did not harvest the Christmas trees remaining on the property upon the sale and the trees have neither been tended to, nor the soils subsequently tilled, nor protected. As such, these Noble, Grand, and Norman firs are not suitable for sale as Christmas trees and are the wrong species for sale in the timber market. See Exhibit 5. The soils have become a nesting ground for rodents as well as growth of soil disease pathogens making farming impracticable.

Also, since the property was designated AF-20, the EPA and other state agencies have enhanced their regulation of the use of pesticides and herbicides. Acknowledging the ease in which chemicals leach through soil as well as through the air, federal law now establishes buffers for the application of pesticides to soils. Generally, these buffers can extend between 75 to 150 feet from existing structures. See Exhibit 6. These buffer requirements were not in place when the land was designated AF-20 and now, due to a court order the EPA and Oregon State Department of Agriculture are instructed to establish additional or enhanced buffers pertaining to the use of pesticides which will be enacted in the near future.<sup>3</sup>

#### *Neighborhood Development<sup>4</sup>*

Since the property was designated AF-20, the surrounding properties have been improved with residential uses. Although staff is correct that most of the surrounding parcels were created before the land was designated AF-20<sup>5</sup>, 18 of the 20 developed parcels located on adjacent lands were improved for residential uses between 1983 and the present. Placing these lands into active

<sup>3</sup> *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9<sup>th</sup> Cir. 2005) resulted in the federal court order requiring additional buffers from pesticide use.

<sup>4</sup> This information applies to the committed exception determination related to the characteristics of adjacent lands and relationship between the subject property and the lands adjacent to it under OAR 660-004-0028(2)(b) and (c) described *infra* under the Committed Exception heading.

<sup>5</sup> The placement of the AF-20 zone on their property was the result of a legislative change impacting multiple properties. It is likely that an AF-20 designation would not have been approved on a site specific quasi-judicial basis.



residential uses over the last 20 years has increased the impacts on the farming activities on this parcel making farming activities much more difficult.

The impacts from this surrounding residential development are exacerbated given the County's small setbacks<sup>6</sup> and the close proximity of the neighboring houses to the applicant's property lines. Three surrounding structures range from only 26 to 38 feet from the applicant's property line. Exhibit 7. Recent federal EPA regulations prohibit the use of agricultural pesticides within 75 to 150 feet of adjacent building. See Exhibit 6. As a result the total land available, based on a 150 foot buffer area from adjacent structures, the remaining area available for farming is greatly reduced to approximately 35 acres. This severe limitation adds to the topographical constraints described above.

As mentioned above, at the base of the slope bounding the eastern property boundary an unnamed creek serving as a tributary to the Tualatin River. This creek is protected within the Tualatin River Subbasin Agricultural Water Quality Management Area Plan and accompanying regulations contained in Or. Admin. Rules 603-095 *et seq.* See Exhibit 8. These rules limit the use of pesticides or fertilizers near streams and require erosion control measures to retain overall water quality.

Although the property lacks water for irrigation, approval of applicant's request for a change from AF-20 to AF-10, enabling the construction of five dwellings, will not adversely affect groundwater or existing wells. Based on information from the Assistant Water Master, Cole Deamon, and vineyard irrigation specialist, Bud Beck, five additional houses would not impact existing wells because the limited use of water for residential purposes is far below the demand for irrigation.<sup>7</sup> See Exhibit 9. Therefore, the applicant's project will not reduce water availability to surrounding areas.

The property is accessible via two private roads that currently serve as the sole access for other residential uses. Larkins Mill Road provides access for 11 homes and Brighton Lane provides access for 13 homes. These private roads are approximately 30 feet wide and tightly curved as they approach Bald Peak Road. Although these roads are adequate to serve the existing and future residential uses, they are wholly inadequate to support agricultural uses such as log trucks or farm equipment and the existence of routine residential traffic on this road, only exacerbates the conflict.

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<sup>6</sup> Under County Development Code Section 3449.2, the applicable setbacks are: thirty (30) foot front yard; ten (10) foot side yard; twenty (20) foot rear yard; and thirty (30) foot street side yard.

<sup>7</sup> Per Washington County Comprehensive Plan Policy 6, water quality and quantity will not be adversely affected by applicant's District change from AF-20 to AF-10. In fact, approval of applicant's request will help maintain water quantity and prevent water quality impacts by reducing heavy use of pesticides and herbicides. According to the Assistant Water Master, Cole Deamon the domestic use of water for a family of four is estimated at 400 gallons per day, or approximately 2,000 gallons per day for five more homes. In comparison, planting only one acre of grapes on the property would use more water in one watering at an amount of 2,490 gallons per day/acre, than all five homes.

**The Committed Exception Factors of Goal 2, Or. Admin. Rule 660-004-0028, are satisfied.**

A committed exception is generally available when the ability to farm the applicant's property has been made impracticable by changes in the surrounding uses.<sup>8</sup> The committed exception process is governed by a highly detailed administrative rule, OAR 660-004-0028, identifying the factors the County can take into consideration. As a result of the characteristics of this site, in terms of the topography, the earlier but failed use of the property as a Christmas tree farm, lack of water, and the recent developments in the surrounding area, the applicant's property is uniquely situated to meet the requirements for a committed exception.

*How are the Surrounding Uses Defined?*

The review process for a committed exception includes the relationship of the applicant's property and what uses might be employed as it relates to existing adjacent uses.<sup>9</sup> In order to make this determination, an identification of surrounding uses is required. Staff has suggested that the surrounding lands inquiry is limited to those lands that are contiguous and cannot include three pre-existing exception areas #129, #130, and #131. The Oregon Administrative Rules defines the term "contiguous" to mean, "connected in such a manner as to form a single block of land," in other words adjoining.<sup>10</sup> Since the committed exception regulations do not use the term contiguous but instead use the term adjacent, the context for review of an application for committed exception is necessarily broader than contiguous, adjoining land.<sup>11</sup> As a result of this broader definition, staff and the Planning Commission should take a more expansive view of the changing character of adjacent land to include the extensive non-farm development pattern within the existing exception areas.

*Relationship Between Exception Area and Surrounding Lands*

Of the 20 parcels adjacent to the applicant's property all but two have constructed homes since 1975, mostly in the 1980s and 1990s. See Exhibit 10. All of these parcels are within one mile of the subject property and homes have been constructed practically up to the applicant's property line. Notably, the development of homes in the last 20 years on neighboring properties shows that changing the District designation for the applicant's property will not perpetuate a domino effect because so few vacant properties remain in the vicinity. Most of the AF-20 District property already contains non-farm dwellings permitted through the Marginal Lands

<sup>8</sup> ORS 197.732(2)(b) and OAR 660-004-0028(1) explain that, "A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable."

<sup>9</sup> OAR 660-004-0028(2)(b).

<sup>10</sup> See OAR 660-033-0020(3).

<sup>11</sup> See *PGE v. BOLI*, 317 Or 606, 611 (a decision maker cannot omit what the legislature has inserted in a statute).

