

BEFORE THE LAND USE HEARINGS OFFICER
CLACKAMAS COUNTY, OREGON

Regarding an Application for a Zone Change
From Rural Residential Farm Forest 5-acre
(RRFF-5) to Rural Area Residential 2-acre
(RA-2).

Case File No: Z0331-22-Z
(Bleszinski)

A. SUMMARY

1. The applicants are Robert & Stan Bleszinski. The owners of the subject property are Stanley Bleszinski, Katherine Bleszinski, and Robert Bleszinski.
2. The subject property is located at 17449 S Redland Rd., Oregon City, OR 97045. The legal description is T2S, R2E, Section 36, Tax Lot 0200, W.M. The subject property is an approximately 29.1 acre parcel¹ zoned Rural Residential Farm Forest 5-acre (RRFF-5) located approximately one-quarter mile west of the unincorporated community of Redland.
3. On September 15, 2022, the Hearings Officer conducted a public hearing to receive testimony and evidence about the applicant’s proposal to change the zoning designation for the property from RRFF-5 to Rural Area Residential 2-acre (RA-2), which would increase the development potential of the property from 6 to up to 15 lots for detached single-family homes. Several neighbors residing near the site provided written comments and testimony in opposition to the zone change. The Community Planning Organization (CPO) for the area met to consider this application and voted to recommend its approval.
4. County staff recommended approval of the zone change application subject to certain Conditions of Approval. The Hearings Officer approved the application consistent with the County’s recommendation.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony and evidence at the September 15, 2022 public hearing about this application. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. The public hearing was conducted virtually over the Zoom platform due to the corona virus. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the County’s staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.

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¹ The application also describes the site as approximately 30.6 acres.
Hearings Officer Final Order
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Discussion of County Staff Report

2. At the hearing, County Principal Planner Martha Fritzie shared a PowerPoint presentation and discussed the County's staff report reviewing this application, discussed several related exhibits, and discussed the County's recommended approval of the application subject to a couple of Conditions of Approval. Ms. Fritzie noted that the Redland-Viola-Fischers Mill CPO supports the proposed zone change, while several neighbors oppose it. Ms. Fritzie noted that the application is to change the zoning for the subject property from RRFF-5 to RA-2 and since both of these zones are rural residential the County views the Comprehensive Plan designation for the subject property as not changing. Ms. Fritzie further noted that approval of this zone change would not authorize any development of the subject property, but would increase the development potential from 6 to 15 lots for detached single-family homes.
3. Ms. Fritzie shared a slide showing the zoning and development of the surrounding area, noting the subject property's current RRFF-5 zoning and development with a single-family dwelling and accessory outbuildings. Ms. Fritzie pointed out that the surrounding properties to the east and south are zoned RA-2 and also developed with single-family homes, and the properties to the west are zoned RRFF-5. The slide shows that the two properties immediately adjacent to the west very similar to the subject property, each with a single-family dwelling on a larger parcel of RRFF-5 zoned property. Ms. Fritzie also pointed out that the properties to the north are zoned Timber (TBR) and are wooded as is the most northerly portion of the subject property. Ms. Fritzie reports that there are no known wetlands, steep slopes, or other protected resource areas on the property.
4. Ms. Fritzie shared a slide and provided discussion of relevant State and County policies and criteria, including Statewide Planning (SWP) Goals, Goal 12 *Transportation* and Goal 14, *Urbanization*. Ms. Fritzie reviewed relevant portions of the County's Zoning & Development Ordinance (ZDO) Sections 1202 and 1307, concerning Zone Change, and Procedures, respectively. Ms. Fritzie also reviewed relevant County Comprehensive Plan Goals & Policies, including Chapter 2 (Citizen Involvement), Chapter 4 (Land Use), Chapter 5 (Transportation) and Chapter 11 (The Planning Process).
5. With respect to SWP Goal 14, *Urbanization*, Ms. Fritzie provided discussion related to OAR 660-004-0040, which addresses the application of Goal 14 specifically to rural residential lands and provides direction about whether an exception to Goal 14 is needed to change zoning. Ms. Fritzie points out that even if no exception is warranted under OAR 660-004-0040, case law requires a determination whether the proposed use is "urban" or "rural." Ms. Fritzie notes that OAR 660-004-0040:
 - (a) Requires a minimum lot size of at least 2 acres for new rural residential areas.
 - (b) Recognizes that some jurisdictions were already acknowledged to comply with Goal 14.
 - (c) Identifies when an exception of Goal 14 is required for a change in "a local government's requirements for minimum lot or parcel sizes in rural residential area."
6. Ms. Fritzie also pointed to differing interpretations of goal exception requirements arising from OAR 660-004-0040(7), which states: *After October 4, 2000, a local government's requirements for minimum lot or parcel sizes in rural residential areas shall not be amended*

to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14 pursuant to OAR chapter 660, division 14, and applicable requirements of this division. Ms. Fritzie points to case law interpreting this provision in a 2007 LUBA decision² (following an Oregon Supreme decision interpreting these same provisions³) stating: “While the text of OAR 660-004-0040(6) could be clearer, we believe it refers to the *amendment* to allow a smaller minimum lot size and does not refer to an existing acknowledged zoning ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size in the RR zone without an exception.”⁴

7. Ms. Fritzie shared a slide and provided discussion concerning the application of OAR 660-004-0040 as interpreted by County staff and County Counsel. Specifically, County staff and County Counsel assert that OAR 660-004-0040 applies to the present matter as follows:
 - (a) Goal 14 exception is not always required for rural residential zone change and is not required in this case.
 - (b) County acknowledged to comply with Goal 14.
 - (c) Process and criteria to change zones/minimum lot sizes within Rural designation in Comp Plan not changed.
 - (d) Not functionally or substantively different from [the Curry County decision].
8. Ms. Fritzie also provided discussion and a slide concerning the interpretation of OAR 660-004-0040 by DLCDC and its application to this matter, specifically:
 - (a) Goal 14 exception is required.
 - (b) Do not believe the “carve out” for Curry County applies to Clackamas County.
 - (c) Curry County’s Plan and rural residential zoning structured differently.
9. Ms. Fritzie provided discussion and a slide concerning the meaning of the terms “Urban” and “Rural” and how these concepts apply to this matter. Ms. Fritzie noted that while 1 acre lots are “urban” and 10 acre lots are “rural” there is no bright line for lot sizes in between. Rather, Ms. Fritzie points to a number of factors to consider, derived from LUBA and other case law, and how staff considered these factors in determining the proposed use is “rural” as follows:
 - (a) Public facilities and services
 - (b) Potential impacts to nearby UGB
 - (c) Use appropriate for, limited to needs of rural area to be served
 - (d) Intensity of use
10. Ms. Fritzie discussed the analysis staff conducted in making proposed findings that the application meets each of the ZDO 1202.03(A) requirements that the proposed zone change is

² See *Oregon Shores Coalition v. Curry County*, 53 Or LUBA 503 (2007), interpreting the text of former OAR 660-004-0040(6), now contained in OAR 660-004-0040(7).

³ See *1000 Friends of Oregon v. LCDC (Curry Co.)*, 724 P.2d 268 (1986), 301 Or. 447.

⁴ *Oregon Shores Coalition v. Curry County*, 53 Or LUBA 503 (2007), further states: “Relevant context supports the more narrow reading as well. As we noted earlier, when LCDC adopted OAR 660-004-0040 in 2000, it expressly provided that local governments like Curry County with comprehensive plans and land use regulations that had been acknowledged for compliance with Goal 14 after the Supreme Court’s 1986 Curry County decision were not required to amend their comprehensive plans and land use regulations to comply with OAR 660-004-0040. However, that express exemption from OAR 660-004-0040 did not extend to amendments to those previously acknowledged comprehensive plans and land use regulations that post-date OAR 660-004-0040.”

consistent with the applicable goals and policies of the Comprehensive Plan. She pointed to procedural and coordination policies and requirements in Chapters 2 and 11, asserting that these policies and requirements have been followed for this application. Ms. Fritzie also provided discussion of Chapter 5 requirements that the proposed zone change comply with the Transportation Planning Rule (TPR), SWP Goal 12, pointing to the traffic study submitted by the applicant as demonstrating compliance with the TPR. With respect to Chapter 4 policies for the application of an RA-2 zoning district, Ms. Fritzie pointed to 4.MM.11.1 standards that the RA-2 zoning district shall be applied when all the following criteria are met:

- (a) 4.MM.11.1.a. Parcels are generally two acres or smaller.
- (b) 4.MM.11.1.b. The area is significantly affected by development.
- (c) 4.MM.11.1.c. There are no natural hazards, and the topography and soil conditions are well suited for the location of homes.
- (d) 4.MM.11.1.d. A public or private community water system is available.
- (e) 4.MM.11.1.e. Areas are in proximity or adjacent to an Unincorporated Community or incorporated city.
- (f) 4.MM.11.1.f. In areas adjacent to urban growth boundaries, RA-2 zoning shall be limited to those areas in which virtually all existing lots are two acres or less.

- 11. Ms. Fritzie pointed to staff findings with respect to ZDO 1202.03(A), that within $\frac{1}{4}$ mile of the subject site a simple majority of properties are “no more than 2 acres” with 50.8% of these area parcels less than or equal to 2 acres. She pointed to findings that 97% of these parcels are developed, with 52.5% of these parcels 2 acres or less. Further, Ms. Fritzie pointed to other development in Redland, including school, commercial, church, and small lot residential uses. She reported that there are no known wetlands or natural hazards on the subject property, and that a public water system fed by Clackamas River Water is available to the site. Ms. Fritzie also reported that the site is within $\frac{1}{4}$ -mile of the unincorporated community of Redland and is not adjacent to an UGB. Based on these findings, Ms. Fritzie asserts that the proposal is consistent with Chapter 4 policies.
- 12. With respect to ZDO findings for Section 1202.03(B), Ms. Fritzie stated that this section requires demonstration that any needed public services are available and sufficient for development under the new zoning designation. She noted that there are no public serves available other than the existing public water service, and pointed to a preliminary statement of feasibility stating that adequate Clackamas River Water services are available to serve the proposal.
- 13. Ms. Fritzie pointed to staff findings with respect to ZDO 1202.03 (C) and (D) in considering the traffic study submitted by the applicant and in proposing findings that the transportation system is adequate and will remain adequate with approval of the proposed zone change, and that the safety of the transportation system is adequate to serve the level of development anticipated by the proposed zone change. Ms. Fritzie specifically referenced that the County’s Transportation Engineering staff concurred with these conclusions of the Traffic Impact Analysis submitted by the applicant that the proposed zone change:
 - (a) Is not expected to generate a significant volume of traffic, only a small increase
 - (b) Will not have a significant effect on the transportation system

- (c) Will have minimal impact of the operability and safety of the surrounding transportation system.
14. Christian Snuffin, PE, PTOE, Senior Traffic Engineer for the County's Department of Transportation and Development, and Transportation Safety, submitted an August 15, 2022 email concerning the application, stating that he reviewed the application and traffic study for Z0331-22-Z and has no concerns.
15. Based on staff analysis as discussed, Ms. Fritzie stated it is the County's position that the proposal does not need an exception to Statewide Planning Goal 14 and meets all applicable zone change criteria. Ms. Fritzie stated that County staff recommends approval of Z0331-22-Z subject to recommended Conditions of Approval.

Applicant Comments

16. Danelle Isenhardt, of Isenhardt Consulting, provided testimony and advocacy on behalf of applicants in support of the application. She noted that approving the proposed zone change would probably result in about 12 lots on the subject property, consistent with the conceptual site plan submitted with the application, stating also that the applicant wanted to preserve the trees along the back of the site. Ms. Isenhardt stated that the applicants agree with the County's recommended approval of the application and do not dispute the related Conditions of Approval recommended by the County.

Public Comments

17. Greg Davis is a resident within the Fieldstone HOA community, a small rural residential development zoned RA-2 that is adjacent to the subject property and is part of the larger area Redland Community. Mr. Davis appeared for the hearing and provided testimony opposing this application proposing to change the zoning for the site from RRFF-5 to RA-2, describing concerns with traffic and storm drainage. He describes the Fieldstone HOA community as currently having 26 homes sharing access to Redland Rd. via Fieldstone Ln., stating that the Fieldstone HOA Board is opposed to this application. Mr. Davis points out that approving this application has the potential to 50% to the existing the traffic on Fieldstone Ln., a significant increase.
18. Daniel Goetz is also a resident of the Redland Community, residing on Joanne Lane near the proposal site. Mr. Goetz testified that he has no concerns with the proposed zone change.
19. Cristy Murray is a resident of the Redland Community, residing on S. Redland Road near the proposal site. On August 20, 2022, Ms. Murray submitted an email to the County stating: "I am vehemently opposed to permitting 15 more homes going in virtually right across the street from me. We already have way too much traffic on Redland Rd. The entire area has grown too much for those of use who have lived here for a long time." Ms. Murray points to the Park Place project bringing development to the area, stating local residents do not want any more houses. Ms. Murray closes here comment stating: "This is supposed to be a rural area and it's turning into an overcrowded area instead."

20. Nancy Read is a resident of the Redland Community, residing on S. Sprague Road within a short distance of the proposal site. Ms. Read submitted a September 1, 2022 email to the County in opposition to the proposed zone change, stating: “Just because there are other developments in the area zoned RA-2 should not mean these 30 acres should be rezoned.” She further asserts that the submitted documentation does not address the loss of farm and forest land, or meet the need to control growth while preserving farm and forest lands.
21. The Redland-Viola-Fischers Mill CPO conducted a special meeting on August 31, 2022 to consider the application, asking several questions of the applicants and Ms. Isenhart at a special meeting held via Zoom in order to consider the application. The CPO issued notice of the special meeting to the community and published notice with Clackamas County. The CPO reports that, after extensive discussion, questions, and answers provided by the applicants, the CPO voted in favor of approving the application.
22. Kelly Reid of the Oregon Department of Land Conservation and Development (DLCD) submitted written comments in a September 1, 2022 email asserting that a Goal 14 exception pursuant to the provisions of OAR 660-014-0030 is required for the proposed zoning change. In her email, Ms. Reid states: “It is our position that a Goal 14 exception is necessary in this case. While the effective zoning of RRFF-5 is consistent with the provisions of OAR 660-004-0040(6) and is deemed compliant with Goal 14, changing the effective zoning to RA-2, which would amend the applicable requirements regarding minimum parcel size to allow a greater amount of development, triggers OAR 660-004-0040(7).” Ms. Reid cites the following referenced sections of OAR 660-004-0040:
- (a) A rural residential zone in effect on October 4, 2000 shall be deemed to comply with Goal 14 if that zone requires any new lot or parcel to have an area of at least two acres, except as required by section (8) of this rule.⁵
 - (b) A rural residential zone does not comply with Goal 14 if that zone allows the creation of any new lots or parcels smaller than two acres. For such a zone, a local government must either amend the zone’s minimum lot and parcel size provisions to require a minimum of at least two acres or take an exception to Goal 14. Until a local government amends its land use regulations to comply with this subsection, any new lot or parcel created in such a zone must have an area of at least two acres.⁶
 - (c) After October 4, 2000, a local government’s requirements for minimum lot or parcel sizes in rural residential areas shall not be amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14 pursuant to OAR chapter 660, division 14, and applicable requirements of this division.
23. In her September 1, 2022 email, Ms. Reid of DLCD distinguished the LUBA decision in *Ocean Shores Coalition v. Curry County* from 2007, contending that the *Curry County* case did not involve re-zoning any specific property, but was about an amendment to the county’s one existing rural residential zoning district. Ms. Reid asserts that the challenged decision concerned adding a third minimum parcel size of 2-acres to the county’s single rural

⁵ 660-004-0040(6)(a)

⁶ 660-004-0040(6)(b)

residential zoning district, and further asserts that the county's proposal included express language that the new 2-acre option required taking a Goal 14 exception. Ms. Reid states it is DLCD's position that the referenced LUBA decision:

- (a) Agrees with the county that adding the third minimum parcel size option was acceptable because the express language required taking a Goal 14 exception; and
- (b) Disagrees with the petitioners in that matter that a Goal 14 exception was necessary to apply the 5-acre option to existing exception areas that had been subject to the 10-acre option, because the county's zoning district and comprehensive plan provisions were acknowledged to be in compliance with Goal 14. Ms. Reid states here: "Put another way, this type of activity conducted within the existing acknowledged zoning district and guided by existing acknowledged comprehensive plan provisions would not result in requirements for minimum lot or parcel sizes in rural residential areas being amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14."

24. In her September 1, 2022 email, Ms. Reid of DLCD closes by stating it is her agency's position that the referenced LUBA decision applies to a very narrow set of circumstances not applicable to this case. She recommends that the subject property retain the existing RRFF-5 zoning, and the applicants explore the possibilities of a Goal 14 exception pursuant to the provisions of OAR 660-014-0030, offering to provide assistance with such an application.
25. Michael Regan is a resident of the Redland Community, residing on S. Jean Drive. Mr. Regan submitted a September 13, 2022 email stating he is opposed to this application for a zone change for safety reasons. He points out that S. Jean Drive is a rural road that currently serves nine residential homes on adjacent RA-2 zone property (including his own) and dead-ends into the subject property. Mr. Regan asserts that when he purchased his own property and built his home he was aware that S. Jean Drive might be extended into the adjacent undeveloped RRFF-5 zone subject property, but assumed that there would be no more than six new residential homes built on 5-acre lots. Mr. Regan opposes the proposed zone change, stating that he expects most new residents of the site would use S. Jean Drive, and this is not a road that can accommodate 15-30 more cars during commute times. Mr. Regan points to the following safety issues:
- (a) Blinding sun turning left on S. Jean Dr. during certain times of the year, describing near accidents with current neighbors.
 - (b) Blind spots on S. Jean Dr. due to hills and curves. Mr. Regan describes the entrance onto Fieldstone from S. Jean Rd. as having limited visibility.
 - (c) Speeding not enforced, making safety worse.
 - (d) Development has already significantly increased the traffic and safety issues on Redland Road, and adding 15 more homes will make it worse.
26. Graham Miller is a resident of the Redland Community who resides near the subject property. He submitted written comments in a September 14, 2022 email strongly objecting to this proposed zone change on the basis of safety and noise concerns. He describes Fieldstone Ln. as currently a dead-end road that is quiet and traffic-free, where his small children play out in front of his home (this road dead ends into the subject property). Mr. Miller contends that: "[a] zone change contemplating using Fieldstone Ln., as well as Jean Drive, would

dramatically increase the traffic flow past my home and would materially frustrate the purpose of why we chose to move into this neighborhood in the first place.”

27. Marianne Baumgarth is also a resident of the Redland Community and one of the homeowners on Fieldstone Lane. She submitted a September 14, 2022 email to express her concerns regarding the proposal for a zone change from RRFF-5 to RA-2 for the subject property. Ms. Baumgarth is strongly opposed to using any part of her neighborhood as an access road to the subject property, including either Jean Drive or Fieldstone Lane. Ms. Baumgarth reports that there are many small children in her neighborhood as well as people (some with pets) walking the road on a daily basis. Ms. Baumgarth also reports that the Fieldstone HOA dues pay for all maintenance on their neighborhood storm drain as well as the shoulders on the road.
28. Cary and Juli Bubenik are residents of the Redland Community, residing in one of the homes on S. Jean Drive that dead-ends into the subject property. They submitted a September 15, 2022 letter opposing the application, describing themselves as: “11 year home owners in the Fieldstone Neighborhood, a licensed Civil Engineer in the State of Oregon, with over 35 years’ experience in major design and construction projects throughout the State” writing to submit comments in opposition to the proposed zone change from RRFF-5 to RA-2. The Bubeniks compare this proposal to nearby development off Marklund Drive to the South of the proposal site, noting that only 6 homes were added off an improved road maintained by the County in an already developed neighborhood fronting two major roads designed for traffic flow directly onto Redland Road, whereas their own neighborhood is unimproved. They assert that, if the zone change for the site approved, and the site fully developed with homes, then access should be provided directly onto Redland Road. The Bubeniks provide the following additional reasons for their opposition:
 - (a) The applicant’s traffic study and analysis does not consider the fact that the traffic on Jean drive will nearly triple from the current trips generated from 9 homes to 24 homes in total, asserting that most if not all new homeowners will use Fieldstone Ln. to the end to access the new lots.
 - (b) Of the 29 homes using Fieldstone Ln to access Redland Road (asserting the 35 homes as noted in the proposal study is incorrect) “the proposed zoning change utilizing our Neighborhood increases the access to Redland Road by 50% and thus also increases the ongoing danger of this access which has had numerous rear end accidents.”
 - (c) The storm system in the Fieldstone Neighborhood is maintained and costs for repairs paid for by the HOA. The Bubeniks report storm system overloads, damage, and repair expense due to groundwater runoff to the west, describing the water table as close to grade or approximately 1 foot below grade, and thus unable to handle any additional runoff related to the proposed zone change.
 - (d) The Bubeniks contend that Fieldstone Ln. and Jean Drive cannot handle the 50% increase in trips potentially generated by the proposed development. They point to Jean Drive as having both horizontal and vertical line of sight issues causing several near misses of vehicle accidents.
29. Karry Rogers is also a resident of the Redland Community and one of the homeowners on Fieldstone Lane. Ms. Rogers submitted a September 15, 2022 letter to the County in

opposition of the proposed zone change for the subject property. Ms. Rogers stated that she built her home in the Fieldstone development near the back so she wouldn't have to deal with traffic. Ms. Rogers points to assurances from the County that the property to the north was 20-acre zone and to the west was 5-acre zone property, meaning if homes were ever built on these sides they would be on large 5-acre lots and would not result in a large addition of traffic. She also points to numerous issues the Fieldstone neighborhood has experience with deterioration of S. Fieldstone Ln. and S. Jean Dr., asserting these roads will not support construction traffic, and such traffic would create a safety hazard for the neighborhood.

30. In her September 15, 2022 letter, Ms. Rogers also points to the lack of a storm drainage system in the Fieldstone neighborhood, pointing to numerous issues with flooding and overflows and difficulties maintaining their detention system. Ms. Rogers asks a number of questions concerning whether any future development of the subject property would involve requirements for an adequate storm drainage system to prevent water from coming onto Fieldstone properties such as hers. Ms. Rogers also refers to the traffic study submitted by the applicant, questioning whether it included all of the accidents on S. Redland Rd. involving vehicles turning onto S. Fieldstone Ln. She reports there have been numerous accidents at this intersection due to inadequate line of site. Ms. Rogers asserts that no new traffic should not be added to the Fieldstone neighborhood, pointing to Potter Road or directly onto Redland Rd. as alternatives. Ms. Rogers points to a past proposal by the applicants to change the zoning for their property that was denied, and points to vagueness in the zoning law, asserting it should not now be interpreted "to fit the needs of one property owner when it impacts all of us in Fieldstone."
31. Prior to closing the record, the Hearings Officer asked whether any party or member of the audience wanted an opportunity to provide additional evidence, arguments, or testimony, and no one requested this opportunity. Ms. Isenhardt affirmed that the applicants wished to waive the period for final written argument. The hearings officer closed the hearing, stating that the record would close at 4:00 pm that day to allow for submission of the discussed exhibits.

C. BACKGROUND FACTS

1. The subject property is Tax Lot 2000 of Assessor's Map 22E36 with situs address 17449 S Redland Road (see Assessor's Map, Exhibit 3a). It is an approximately 29.1-acre lot of record, with a current Clackamas County Comprehensive Plan (Plan) land use designation of Rural (R) and located in the Rural Residential Farm Forest Five-Acre (RRFF-5) zoning district.
2. The subject property is located in a predominantly rural area, with an established rural residential character and pattern of development. The western edge of the unincorporated community of Redland is located approximately ¼-mile from the subject property. Immediately east and south of the subject site are properties zoned RA-2 and there are numerous platted subdivisions in the general area of the subject property that have lot sizes at or under 2 acres. The nearby unincorporated community of Redland contains primarily residential lots around 1 acre in size, as well as a school, church, gas station and several other commercial businesses.

3. Immediately west of the subject site are properties zoned RRFF-5 and immediately to the north are properties ranging in size from approximately five acres to over 70 acres that are zoned TBR (Timber). Most of these properties, including those zoned TBR are developed with dwellings.
4. The subject taxlot has gently sloping topography, with the highest elevations in the southwestern portions of the property. According to the applicants' statement, the site contains areas with slopes around 10% and no steeply sloped areas. The property contains a single-family home built in 1956 and several outbuildings, including an agricultural building that was built in the early 1990s. A large portion of the site appears to be either in agricultural production or open fields; with the northernmost portion of the appearing to be heavily treed. There are no known wetlands, streams or other protected resource areas on the property.
5. The subject site's current RRFF-5 zoning took effect in 1979 after the Rural Plan Amendment for this area was adopted. The subject property is part of Rural Plan Amendment Area (RUPA) #50 of the RUPA I, Contested Areas. In 1991, a Hearing's Officer (HO) denied a proposal to change the zoning of this property and the adjacent property to the west from RRFF-5 to RA-2 (See Z0910-91-Z, Exhibit 3b). At that time, the HO found that the parcels did not meet the requirements in the Comprehensive Plan that parcels be "generally two acres or smaller" or that the area was "significantly affected" by development. While these exact same criteria are contained in the current Comprehensive Plan and must be considered for this application for a RA-2 zoning designation, two notable changes have occurred since 1991:
 - (a) In 2000, the Board of County Commissioners (BCC) interpreted the policy that parcels in the "area" must be "generally two acres or smaller" in a different manner than had been previously interpreted by the HO and the BCC. In 1991, the HO relied on an interpretation that this policy meant the "area" to be analyzed included all of the RUPA #50 area that was zoned RRFF-5 and a demonstration must be made that the subject area was either improperly included in the RRFF-5 district or that the parcels within the RRFF-5 district in the area are generally two acres or smaller. The more recent BCC interpretation (see BO2000-57, Exhibit 3c) has construed this policy to mean that the "area" to be analyzed includes all "Rural" parcels wholly or partially within a ¼-mile radius of the subject site and that more than half of the parcels in that "area" must be two acres or smaller. This more recent interpretation is used as the basis for evaluating the current proposal.
 - (b) In 1991, the properties abutting the subject site to the east had not been divided and developed into 2-acre lots, despite being within the RA-2 zoning district. These properties have since been developed, which affect the demonstration required under Plan policy related to whether the area is "significantly affected" by development.
6. The applicants' proposal is to change the zoning designation of the property from Rural Residential Farm Forest 5-acre (RRFF-5) to Rural Area Residential 2-acre (RA-2) in order to subdivide the property into up to 15 lots for single-family home development. **No new construction or land uses are proposed in this application; no subdivision is proposed in this application.** Rather, the Applicants are effectively seeking to change the number of lots potentially allowable on the property from 6 lots (under the current RRFF-5 zoning) to 15 lots (under the RA-2 zoning); a net increase of up to 9 rural residential lots.

7. The application includes a May 31, 2022 Zone Change Analysis performed by Lancaster Mobley, stamped by Registered Professional Engineer Jennifer Elise Danziger, that analyzes transportation considerations around the proposed zone change. In this written memorandum, Lancaster Mobley discusses transportation considerations around the proposed zone change for the site. Lancaster Mobley uses the larger description of the site as an approximately 30.6-acre parcel zoned RRFF-5, noting that the reasonable maximum buildout potential for the site under RRFF-5 zoning is 6 units and the reasonable maximum buildout potential for the site under RA-2 zoning is fifteen units. Lancaster Mobley calculates trip generation for both zoning scenarios, providing detailed trip generation calculations. These trip generation calculations project a net increase of 7 morning peak hour, 8 evening peak hour, and 86 daily trips.
8. The May 31, 2022 Zone Change Analysis performed by Lancaster Mobley also included data from ODOT's Crash Date System, reviewing approximately five years of the most available crash history at then intersection of S Redland Road and S Fieldstone Lane, in addition to the roadway segment of S Fieldstone Lane. Lancaster Mobley reported there was one crash during the analysis period: a rear-end collision at the intersection of S Redland Road and S Fieldstone Lane resulting in property damage only. Lancaster Mobley concluded that the proposed zone change's impact "may be considered a 'small increase' that will not cause further degradation of the nearby transportation facilities. Therefore, the proposed zone change is expected to have a minimal impact on the operability and safety of the surrounding transportation system."
9. This application is substantially similar to County Planning File Z0910-91-Z, resulting in a Hearing's Officer decision dated 11/29/1991 denying an application to change the zoning for the subject property from RRFF-5 zone to RA-2 zone. County staff involved in reviewing County Planning File Z0910-91-Z recommended denial of the proposed zone change and the Hearings Officer agreed, finding the proposal not consistent with the Clackamas County Comprehensive Plan. In this decision, the Hearings Officer noted that the Clackamas County Board of County Commissioners (BCC) also twice considered whether the subject property should be included within the RRFF-5 zoning district or the RA-2 zoning district. On both occasions the BCC determined that the subject property was appropriately zoned RRFF-5. The Hearings Officer provided some additional discussion, correctly noted that the legislative determination by the BCC is entitled to a presumption of legislative regularity. The Hearings Officer reviewed the area of consideration, correctly stating that the BCC determination should be upheld unless the record shows that the subject property was improperly included within the RRFF-5 subarea, or that either land uses or legal requirements have substantially changes since that BCC determination. Further, the BCC defined two relevant terms:
 - (a) The term "generally" means a simple majority of the parcels, within the area under consideration.⁷
 - (b) The term "generally two acres or smaller" in Policy 13.1(a) means parcels no more than 2.0 acres."⁸

⁷ BCC File Z0373-99-I Order No. 2000-57.

⁸ BCC File Z0373-99-I Order No. 2000-57.

10. The Hearings Officer County issuing the 11/29/1991 decision in Planning File Z0910-91-Z, referenced findings that:
 - (a) the record does not support a finding that parcel sizes within the subarea are generally two acres or smaller. The Hearings Officer specifically referenced the BCC interpretation of the meaning of the term “generally” and found it not sufficient to demonstrate that approximately half of the parcels within the subarea are two acres or less.
 - (b) The subject property is removed from the rural center boundary and part of a larger block which contains parcels large enough to accommodate farming activities. The Hearings Officer specifically noted that, although the subject property was affected by development because of the extensive parcelization and rural residential development surrounding it, it was not significantly affected. Thus finding that the record did not demonstrate that the surrounding extensive parcelization or development effectively precluded the possible use of the subject property for all the primary uses of the RRF-5 zone.

11. Service providers:
 - (a) Sewer: The subject properties are not located within a public or private sewer district. Septic systems would be required for any future development.
 - (b) Water: The subject properties are located within Clackamas River Water service district.
 - (c) Fire Protection: Clackamas RFPD #1

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

D. DISCUSSION

This application is subject to the standards and criteria of Clackamas County Zoning and Development Ordinance (ZDO) Section 1202, Zone Changes, and the Comprehensive Plan. Oregon Administrative Rules and Statewide planning Goals 11, 12, and 14 are also applicable when determining whether a Goal Exception is required for the zone change. This application is being processed as a Type III Permit, pursuant to Section 1307. A Type III Permit is quasi-judicial in nature, and involves land use actions governed by standards and approval criteria that require the use of discretion and judgment. The issues associated with the land use action may be complex and the impacts significant, and conditions of approval may be imposed to mitigate the impacts and ensure compliance with this Ordinance and the Comprehensive Plan. The Type III procedure is a quasi-judicial review process where the review authority receives testimony, reviews the application for conformance with the applicable standards and approval criteria, and issues a decision. The Hearings Officer has jurisdiction to hear and decide applications for zoning changes pursuant to Section 1307 as shown by Table 1307-1. The Hearings Officer has reviewed the entire record of this proceeding, finding the evidence presented is reliable, probative and substantial evidence upon which to base a determination in these matters. Clackamas County Land Use and Zoning Staff reviewed these Sections of the ZDO and Comprehensive Plan in conjunction with this proposal and

makes the following findings and conclusions, *reviewed, adopted and/or modified by the Hearings Officer as denoted by boldface type in italics.*

PART 1. SUBMITTAL REQUIREMENTS – ZONING CHANGE

Subsection 1202.02 of the County ZDO lists the information that must be included in a complete application for a Zone Change. This application includes a completed land use application form, site plan, application fee and completed supplemental application addressing the criteria in Section 1202 of the ZDO. The application also includes a description of the proposed use and vicinity map, and a transportation study. All the submittal requirements under Subsection 1202.02 are included in the application. The application was submitted on July 7, 2022. The application was deemed complete for the purposes of Oregon Revised Statutes (ORS) 215.427 on July 25, 2022. Notice was issued on August 10, 2022 for the September 25, 2022 hearing. The 150-day deadline established by state law for processing this application is December 22, 2022.

The Hearings Officer concurs with staff findings that the submittal requirements of Subsection 1202.02 are met.

PART 2. ZONING CHANGE

This application is subject to Clackamas County Zoning and Development Ordinance (ZDO) Section 1202, *Zone Changes* and the Clackamas County Comprehensive Plan. Because the subject properties are rural exception lands with a “Rural” Comprehensive Plan designation, they are also subject to the rules in OAR 660-004-0040 that require, in some cases, a new exception Statewide Planning Goal 14, *Urbanization*, when changing the zoning designation. Compliance with the applicable regulations is discussed below.

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

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

Background: Comprehensive planning following adoption of the Statewide Planning Goals and the creation of the Department of Land Conservation and Development (DLCD) involved determining which rural lands could accommodate residential development and be acknowledged as Rural Exception Lands, pursuant to an exception to statewide Planning Goals 3 and 4. However, when the state’s Land Conservation and Development Commission (LCDC) became concerned that certain counties were allowing urban uses on rural land, the application of Goal 14, *Urbanization*,

became an integral part of the comprehensive planning process.⁹ Specifically, for Clackamas County, the adoption of Rural Exception Lands was authorized through the Rural Plan Amendment or RUPA process, which included a number of different Comprehensive Plan amendment packages for different rural areas of the County. As part of the RUPA process, LCDC and Metro required the County to make Goal 14 compliance findings for the rural exception lands to allow for a rural land use designation with 10-acre, 5-acre, and 2-acre minimum lot sizes; the County's rural Comprehensive Plan land use designation and minimum parcel sizes (10-acre, 5-acre, and 2-acre) were determined by the State to comply with Goal 14.

Subsequently, as part of the 1986 DLCD Periodic Review process the County was required to "submit information on existing potential development patterns, Goal 14 exceptions for certain areas, analyses of rural areas and revised plan policies and ordinances consistent with Goal 14/Curry County decision" (Reference DLCD Order No. 00073). DLCD Order 00631 (7/2/96) modified this work task and created new Task 13, 14 and 15 to address Curry County issues. The new Task 13 description was "Resolve the Goal 14 issues raised in the Curry County Supreme Court decision for the areas Zoned RRFF5, RA-2, RR, RC, HL, and RI located outside of unincorporated communities". From what County staff can determine in our records, the original component of Task 13 that included "inventory information on exception areas, Goal 14 exceptions for certain areas, analysis of rural areas, and revised plan policies and ordinances, as necessary to be consistent with Goal 14 and the Curry County decision" (No. 5 of original Periodic Review Task 8, periodic review work program approval DLCD Order No. 00073), was completed and acknowledged by DLCD prior to the second Task 13 modification in 1997 (DLCD No. 00804). Regardless of what components of Task #13 were satisfied during what time period, DLCD approved the full Periodic Review Task #13 in 2002 (Order No. 001365), without requiring the County to take Goal 14 exceptions for existing RA-2 or RRFF5 zoning. Staff assumes the documentation and Goal 14 consistency findings submitted as part of the Periodic Review Task 13 (previously task #8) was sufficient for DLCD to determine that the County's existing exception areas were consistent with Goal 14 and did not need a post-Curry County Goal 14 exception. As such, Staff finds that the County acknowledged, post-1986 Curry County, Goal 14 consistency findings for rural minimum lot sizes of 2 acres, 5 acres, and 10 acres. Since Comprehensive Plan adoption, zone changes on rural residential lands have been subject to the same set of Zoning and Development Ordinance approval criteria in Section 1202 and Rural Land Use policies in the Comprehensive Plan.

In 2000, LCDC adopted administrative rules in OAR 660-004-0040 to respond to the Oregon Supreme Court's Curry County 1986 Decision. For rural residential areas designated after the effective date of OAR 660-004-0040, OAR 660-004-0040(7)(i) requires a minimum lot or parcel size of two acres. Any lot sizes between 10 acres and 2 acres must be justified by an exception to Goal 14. LCDC recognized that some local government like Curry County, had already adopted comprehensive plan and land use regulation amendments incorporating Goal 14 consistency findings as addressed in the Supreme Court's 1986 Curry County decision, and that those amendments had already been acknowledged by LCDC¹⁰. However, there were varying interpretations of this OAR section following adoption and how it applied to zone changes on individual properties within rural residential zoning districts.

⁹ 1000 Friends of Oregon v. LCDC (1986 Curry County), 301 Or 447.

¹⁰ Oar 660-004-0040(3)(b)

Application of OAR 660-004-0040(6) and Goal 14 Exceptions: In 2007, LUBA dealt directly with the question of how OAR 660-004-0040 applies to changes in minimum lots sizes in rural residential areas (see *Oregon Shores Coalition v. Curry County*, 53 Or LUBA 503(2007), Exhibit 3e). While there were two main issues raised by this case, and discussed in the 9/1/22 letter from DLCDC staff, the issue relevant to this particular proposal is whether a zone change that does not change the Plan designation but simply allows for a two acre lot size for land divisions, rather than a 5-acre lot size, would require an exception to Goal 14. Regarding this particular issue, LUBA concluded the following:

We set out the text of OAR 660-004-0040(6) again below: “After the effective date of this rule, a local government’s requirements for minimum lot or parcel sizes in rural residential areas shall not be amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14 pursuant to OAR 660, Division 014.” (Emphasis added.)

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

Per County Planning staff’s and County Counsel’s reading of *Oregon Shores Coalition v. Curry County*, OAR 660-004-0040 would not explicitly require a Goal 14 exception for a proposed zone change from RRFF-5 to RA-2 due to the following:

- (1) Rural exception lands in Clackamas County were already acknowledged as such on 10/4/00 (the effective date of the afore-mentioned Rule amendments) and the County has not amended the provisions of the Comprehensive Plan to allow a smaller minimum lot size in its Rural Exception Lands than was previously allowed. Nor has the County changed the process or criteria of approval for such a zone change, as regulated by ZDO Section 1202 and the Comprehensive Plan.
- (2) The County’s Comprehensive Plan was reviewed and acknowledged by LCDC for compliance with Statewide Planning Goal 14 during initial acknowledgement and during Periodic Review from 1986-2002. The rural land exception documents (RUPA I, II, III, and IV) included Statewide Goal 14 findings for rural residential exception lands. LCDC determined that the County did not allow any ‘urban uses’ on rural lands and, as such, the County was determined to be compliant with Goal 14.
- (3) Furthermore, as discussed above, the County has acknowledged, post-1986 Curry County Goal 14 consistency findings for minimum lot sizes of 2 acres, 5 acres, and 10 acres. The County has one Rural land use designation identified in the Comprehensive Plan, which includes three minimum lot sizes (2 acre, 5 acre and 10 acre) with thresholds for changing

from one minimum lot size to another. This is very similar to how Curry County's Rural plan designation is set up, except that they did not have a 2 acre minimum lot size acknowledged for consistency with post-1986 Curry County Goal 14 requirements. As such, County staff the carve out situation LUBA created in LUBA 503, 2007 is applicable to Clackamas County and that, in this particular case, a Goal 14 exception is not explicitly required to rezone from RRFF-5 to RA-2.

In their letter dated 9/1/22, DLCD staff seems to be distinguishing Clackamas County's situation from the 2007 Curry County case because they had a single rural zone with two minimum lot sizes so, in effect, there was no zone change, even though they were applying Comprehensive Plan criteria to decide whether to apply the 10-acre or the 5-acre minimum lot size standard. Clackamas County, on the other hand has one Comprehensive Plan designation (Rural), under which there may be several options for specific designations with 10, 5, or 2-acre minimum lot sizes that are determined based on applying certain Comprehensive Plan criteria. County staff feels there is no functional or substantive difference in the structure of the Curry and Clackamas County's processes in this instance: both are applying Comprehensive Plan criteria to choose between different, acknowledged minimum lot sizes, through a process that was previously acknowledged to comply with Goal 14. And in both scenarios, the outcome is the same – rural residential development may happen at a higher density (with a smaller minimum lot size) than would have been allowed prior to the change.

Further, in its 2007 decision, LUBA does not explicitly refer to “zone changes”, rather it explicitly states that the cited OAR does not apply to an *ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size*. In the case of this proposal, the reduction is from a five-acre to a two-acre minimum lot size under the same set of circumstance as in Curry County (i.e. an ordinance that already allowed for such a reduction). As such, Staff has determined that a Goal 14 exception under OAR 660-004-0040(6) is not required for the proposed zone change.

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

What is “urban” and what is “rural” is not explicitly clear in the context of Goal 14 since Statewide Planning Goals contain no definition of urban or rural uses. Additionally, while it is clear that OAR 660-004-0040 applies to urban development on rural land, “urban development” is not defined in the OARs. That said, the statewide Planning Goals do contain the following definitions of rural and urban land:

RURAL LAND. Rural lands are those which are outside the urban growth boundary and are:

- (a) Non-urban agricultural, forest or open space lands or,*
- (b) Other lands suitable for sparse settlement, small farms or acreage homesites with no or hardly any public services, and which are not suitable, necessary or intended for urban use,*

URBAN LAND. Land inside an urban growth boundary.

The meaning of these terms in the context of individual applications has been contemplated in many different case law discussions over the years. See, Jackson County Citizens League v. Jackson County, 38 Or LUBA 37, 48 (2000). The key case, 1000 Friends v. LCDC (Curry Co.), 301 Or. at 505 and those cases since Curry Co. make it clear that residential parcel sizes at either extreme are either clearly urban (one acre lots are urban) or clearly rural (10 acre lots are rural) but contain no bright line for anything in between. According to the Courts, these decisions must be made on a case-by-case basis since state law does not draw a line between urban and rural use based on parcel size alone. Additional considerations in an analysis of what constitutes urban development on rural land include the necessity for the extension of public services such as sewer and water¹¹. In general, relevant case law suggests that three main areas of consideration must be addressed to make a determination that a use is rural:

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

The proposed zone change, which increases the development potential by up to nine single-family residential lots, involves public water service from Clackamas River Water. Clackamas River Water serves a very large area outside the Portland Metro UGB, including properties immediately north of the subject property that are zoned TBR (a “natural resource zoning district”) and properties as far as three miles east of the subject property and farther away from the UGB are also serviced by CRW. Having access to public water service does not in and of itself constitute an “urban level of service. State law, in fact, allows for public water service outside of UGBs. Unlike water service, however, public sewer service is explicitly prohibited outside of a UGB (except in specific circumstances), and as such is a better proxy for “urban levels of service”. Development on the subject site is and will continue to be served with on-site septic systems and does not need to connect to public sewer. As such, planning staff finds that the proposed services to a new parcel in this area would still be a rural level of service. ***The Hearings Officer concurs with this analysis and in these staff findings.***

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

¹¹ Conarow v. Coos County, Or LUBA 190,193 (1981), Kayne/DLCD v. Marion County, 23 Or LUBA 452, 462-64 (1992) Hammock and Associates, Inc. v. Washington County, 16 Or LUBA 75, 80, aff'd 89 Or App 40, 747 P.2d 373 (1989); Grindstaff v. Curry Co., 15 Or LUBA 100 (1986); Schaffer v. Jackson Co., 16 Or LUBA 871 (1988); 1000 Friends of Oregon v. Yamhill Co., 27 Or LUBA 508 (1994); Metropolitan Service District v. Clackamas County, 2 Or LUBA 300, 307 (1981).

The subject property is located approximately 3.5 miles from the Portland Metro Urban Growth Boundary, so it is not directly adjacent to City limits or located adjacent to any urban uses. The addition of up to nine new lots this proposed zone change would authorize would not impact the ability of nearby UGBs to perform their urbanization function. Furthermore, the proposed RA-2 zoning is an acknowledged rural zoning district which is found immediately adjacent to the subject site on the east and south and, if approved, the subject property would be developed consistent with the pattern of development in the Redland area. ***The Hearings Officer concurs with this analysis and in these staff findings.***

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

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

In addition, the 15-lot subdivision that may result from the proposed zone change would only increase the potential number of single-family dwelling lots by nine and would, in fact, contain many fewer lots than the rural subdivisions that abut the eastern boundary of the site, which contain a total of 35, two-acre lots.

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

In her September 1, 2022 email asserting that a Goal 14 exception pursuant to the provisions of OAR 660-014-0030 is required for the proposed zoning change, Ms. Reid from DLCD states: "It is our position that a Goal 14 exception is necessary in this case. While the effective zoning of RRF-5 is consistent with the provisions of OAR 660-004-0040(6) and is deemed compliant with Goal 14, changing the effective zoning to RA-2, which would amend the applicable requirements regarding minimum parcel size to allow a greater amount of development, triggers OAR 660-004-0040(7)." This position implies that the creation of any new lot or parcel in a rural residential neighborhood triggers OAR 660-004-0040(7)'s requirement to take an exception to Goal 14, regardless whether the lot is larger or smaller than two acres. This is the same issue addressed in Oregon Shores Coalition v. Curry County, 53 Or LUBA 503(2007), with a relevant portion of the text discussed above set out again below for reference:

While the text of OAR 660-004-0040(6) could be clearer, we believe it refers to the amendment to allow a smaller minimum lot size and does not refer to an existing acknowledged zoning ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size in

the RR zone without an exception. Relevant context supports the more narrow reading as well. As we noted earlier, when LCDC adopted OAR 660-004-0040 in 2000, it expressly provided that local governments like Curry County with Comprehensive Plans and land use regulations that had been acknowledged for compliance with Goal 14 after the Supreme Court's Curry County decision were not required to amend their comprehensive plans and land use regulations to comply with OAR 660-004-0040.

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

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

Here, Clackamas County has specified a minimum lot size of 2-acres or larger for each rural residential area. This proposal is merely to change this parcel's zoning from the County's RRF-5 zone to the RA-2 zone, still requiring a minimum lot size of 2-acres or larger within an acknowledged exception area planned for rural residential uses. The proposed zone will permit a rural residential use with public water as the only available public facilities (a rural level of service), while not receiving or requiring urban levels of service. In particular, development on the subject site is and will continue to be served with on-site septic systems and does not need to connect to public sewer. The record shows no potential impact to the ability of nearby UGBs to perform their urbanization function. Rather, approval of the proposed zone will result in the subject property being developed consistent with the pattern of development in the Redland area: sparse settlement on acreage lots. Thus, the subject property's proposed RA-2 zone remains a rural residential use in an existing rural residential area and no Goal 14 exception is required.

B. Zoning and Development Ordinance (ZDO) Findings

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

Submittal requirements

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

Hearings Officer Final Order
Z0331-22-Z
Bleszinski Zone Change

The application was submitted on July 7, 2022. The application was deemed complete on July 25, 2022. As such, the 150-day deadline established by state law for processing this application is December 22, 2022. ***The Hearings Officer concurs in these staff findings.***

Zone change approval criteria of Zoning and Development Ordinance Section 1202.03

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

A. Section 1202.03(A):

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

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

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

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

Policy 2.A.1 Require provisions for opportunities for citizen participation in preparing and revising local land use plans and ordinances. Insure opportunities for broad representation, not only of property owners and County wide special interests, but also of those within the neighborhood or areas in question.

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

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

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

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

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

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

a. Parcels are generally two acres or smaller.

As noted previously, the Board of County Commissioners (BCC) interpreted this criteria in 2000, through Board Order 2000-57 (see Exhibit 3c). This interpretation replaced a previous interpretation of Rural land use policies that was the basis for the prior denial of a proposed zoning change in the subject property.

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

Based on information provided by the Applicants in their application materials, including a GIS analysis of all properties that are wholly or partially within ¼ mile of the boundaries of the subject property, this policy can be met. Specifically, the Applicants’ submitted analysis concluded that there were 120 total properties within the ¼-mile area and of those 120 properties, 61, or 50.8%, are two acres or smaller in size. And the applicant notes, “*it can be found that the parcelization weighs in favor of the proposed zone change to RA-2.*”

Policy 4.MM.11.1(a) is met. *The Hearings Officer concurs with this analysis and in these staff findings. As noted, there has been a change in the interpretation of rural land use policies that was part of the basis for the prior denial. Further, the record shows that there is a change in parcelization from that relied upon for the prior denial, with a simple majority of the parcels within the area under consideration (within ¼ mile of the site) identified as two acres or smaller in size.*

b. The area is significantly affected by development

“Significantly affected” is not internally defined by the Plan or ZDO. At a most basic interpretation, the fact that the aforementioned GIS analysis found over 97% of the parcels located within a ¼ -mile of the subject site were developed and only three of the

120 parcels in that area not developed, could reasonably lead one to conclude the area is “significantly affected” by development (see table below).

This conclusion can be further refined by looking at the hierarchical structure of the policies of 4.MM.11 of the Plan, which include the approval criteria and policies for all three zones included in the Rural Comprehensive Plan designation (FF-10, RRFF-5 and RA-2). In this section of the Plan, “significantly affected” is the term used to describe properties that are generally 2 acres or smaller. “Affected” is the term used to describe properties that are generally 5 acres or 10 acres. Based on the analysis of the 120 properties partially or wholly within ¼ mile of the subject property, 52.5% of the developed properties are 2 acres or less and would thus be considered “significantly affected” by development.

Total Lots Within ¼ mile	Total Developed Lots	Total Undeveloped Lots	Developed Lots 2 acres or less	Percentage of all developed lots 2 acres or less
120	117	3	63	52.5%

In addition, as the applicant noted, “*there are RA-2 zoned properties to the east and south of the site. The site is the same distance from the Redland rural center as the properties directly south of the site, which are zoned RA-2. The subdivision to the east of the site has 2 street stubs (Fieldstone and Jean) to the site to allow for future development. The site is on the north side of S Redland Road, a main through roadway.*” Staff concurs that these are all indications of the area being significant affected by development and also notes that because of the site’s proximity to the rural commercial enter of Redland; there is also a school, church and a number of commercial businesses developed in the general area of the subject.

Policy 4.MM.11.1.b is met. *The Hearings Officer concurs with this analysis and in these staff findings.*

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

The subject site includes one parcel and, as noted previously in this report, there are no steep slopes or other topographical features that would limit the development of the property. In addition, there are no known wetlands or soils that would negatively affect the suitability of the site for development with homes.

Policy 4.MM.11.2.c is met. *The Hearings Officer concurs in these staff findings.*

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

The subject site is within the service boundaries of Clackamas River Water (CRW). The Applicants have submitted a Statement of Feasibility for the proposed subdivision that is signed by CRW, indicating that they have capacity to serve a maximum of 15 lots allowable in the RA-2 zoning district. The Applicants further noted that water service is available in both the “stubbed” streets on the eastern boundary of the site (S Fieldstone and S Jean).

Policy 4.MM.11.2.d is met. *The Hearings Officer concurs in these staff findings.*

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

The subject property is approximately ¼-mile west of the boundary of the unincorporated community of Redland and has direct access via S Redland Road, a major arterial, to both Redland and to the City of Oregon City (approximately 3.5 miles to the west). While the term “proximity” has not been specifically defined or interpreted in direct context of this policy, Staff finds it more than reasonable to conclude that a ¼-mile distance with direct access along a major arterial to an unincorporated community constitutes “proximity.”

Policy 4.MM.11.1.e is met. The Hearings Officer concurs with this analysis and in these staff findings

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

This policy is not applicable because the properties are not adjacent to the Urban Growth Boundary.

Policy 4.MM.11.1.f is not applicable. The Hearings Officer concurs in this staff finding.

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

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

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

The only policy found in this chapter that is relevant to this application is found in the Roadways section. **The Hearings Officer concurs in this staff finding.**

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

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

The applicant submitted a Transportation Impact Analysis (TIA), completed by Lancaster Mobley and dated **[May 31, 2022]**, which was completed to assess this proposal’s compliance with the TPR and ZDO Sections 1202.03(C) and (D). Based on the analysis and conclusions found in this TIA:

- The proposed zone change would result in a net increase of nine dwelling units, assuming full buildout of the existing (RRFF-5) compared to the proposed (RA-2) zoning designations;
- The proposed zone change is projected to generate a net increase of 7 morning peak hour, 8 evening peak hour, and 86 daily trips;
- The impacts of the Applicants' proposal are too small to affect or alter the functional classification of any existing or planned transportation facility or to degrade the performance of any nearby transportation facilities; and
- *“Accordingly, the Transportation Planning Rule and Clackamas County general approval criteria are satisfied and no mitigation is necessary or recommended.”*

Notice of this application, including its TIA, was provided to the County's Transportation Engineering (TE) Division; TE staff has indicated via email (Exhibit 4) that they concur with the analysis and conclusions of the TIA. As such, the proposal is consistent with the requirements of the TPR.

This application is consistent with Chapter 5. The Hearings Officer concurs with this analysis and in these staff findings. The traffic and safety concerns raised by several residents of the Fieldstone Neighborhood are genuine. Even though the impacts of this proposal are too small to degrade the performance of any nearby transportation facilities, the proposed RA-2 zone will impact this neighborhood. However, in light of the persuasive analysis by Lancaster Mobley and the concurrence by the County's Transportation Engineering Division, I was persuaded that the application meets these standards. Approval of this zone change will not significantly affect an existing or planned transportation facility.

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

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

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

Notice of this application has been provided to all appropriate agencies and parties, DLCD and the Redland/Viola/Fischers Mill CPO, and an advertised public hearing before the Hearing's Officer provides an adequate opportunity for interagency coordination of this proposed zone change and demonstrates compliance with this policy.

This policy is met; this application is consistent with Chapter 11. *The Hearings Officer concurs with this analysis and in these staff findings.*

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

B. Section 1202.03(B):

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

The subject property is not located in a public sanitary sewer district and onsite septic systems would be required for each lot allowed under the RA-2 zoning district. Clackamas River Water serves the subject area and has reviewed the proposal and found that they can serve the potential maximum 15 lots allowed by the RA-2 zoning district.

The proposed zone change can be found compliant with 1202.03(B). *The Hearings Officer concurs with this analysis and in these staff findings.*

C. Section 1202.03(C):

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

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

ZDO Subsections 1202.03(C)(1)-(7) define what is meant by an “adequate” transportation system. The Applicant’s submitted TIA, which was completed by a licensed engineer, finds

that the County's existing and planned transportation system is adequate to serve the proposed zone change; no safety mitigation measures are recommended. The County's Transportation Engineering (TE) Division has reviewed the TIA and concurs with its findings.

The proposed zone change can be found compliant with 1202.03(C). *The Hearings Officer concurs with this analysis and in these staff findings. As stated earlier, the traffic and safety concerns raised by residents of the Fieldstone Neighborhood are genuine. The Fieldstone Neighborhood will be affected by any development of the subject property, whether under the existing RRFF-5 zone or proposed RA-2 zone, even though the overall impact is considered a small increase in traffic. In light of the persuasive analysis by Lancaster Mobley and the concurrence by the County's Transportation Engineering Division, I was persuaded that the application meets the above standards and the County's existing and planned transportation system is adequate and will remain adequate with approval of the proposed zone change.*

D. Section 1202.03(D):

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

The applicant's TIA concludes, and TE staff agrees, that the incremental increase in trips will adversely affect the safety of the transportation system: "... the proposed zone change is projected to generate a net increase of 7 morning peak hour, 8 evening peak hour, and 86 daily trips. These projections come from the highest motor vehicle trip generation rate of the proposed zone change. Per the OHP [Oregon Highway Plan], this level of trip generation may be considered a "small increase" in traffic that will not cause further degradation of the nearby transportation facilities. Therefore the proposed zone change is expected to have minimal impact on the operability and safety of the surrounding system."

The proposed zone change can be found compliant with 1202.03(D). *The Hearings Officer concurs with this analysis and in these staff findings. I noted that the Lancaster Mobley study included area data from ODOT's Crash Data System, with a single rear-end collision (resulting in property damage only) within the approximately five year history. In light of the persuasive analysis by Lancaster Mobley and the concurrence by the County's Transportation Engineering Division, I was persuaded that the application also meets the above standards and the safety of the County's transportation system is adequate to serve the level of development anticipated by the proposed zone change.*

Conclusion: Staff finds that the proposed Rural Area, 2-Acre (RA-2) zoning district is consistent with State law; all applicable goals and policies in the Comprehensive Plan; and all applicable ZDO criteria. ***The Hearings Officer concurs.***

PART 3. CONDITIONS OF APPROVAL

Staff recommended approval of the zone change (File No. Z0331-22-Z) from Rural Residential Farm Forest (RRFF-5) zone to Rural Area Residential 2-acre (RA-2) zone, subject to the following conditions, ***reviewed, adopted and/or modified by the Hearings Officer:***

1. The Clackamas County *Non-Urban Area Zoning Map* shall be amended to identify the subject property as being in the Rural Area Residential, 2-acre (RA-2) zoning district.
2. The approval of the application granted by this decision concerns only the applicable criteria for this decision. The decision does not include any conclusions by the county concerning whether the activities allowed will or will not come in conflict with the provisions of the federal Endangered Species Act (ESA). This decision should not be construed to or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination if necessary with the federal agencies responsibility for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated and maintained in a manner that complies with the ESA.

E. DECISION

Based on the findings, discussion, conclusions, and record in this matter, the Hearings Officer finds that the application satisfies all the criteria in Section 1202 of the ZDO and is consistent with the Comprehensive Plan criteria for the Rural Area Residential 2-acre (RA-2) zoning designation, as well as all other applicable Comprehensive Plan policies, and APPROVES Zone Change Application Z0331-22-Z.

Dated: September 22, 2022



Carl D. Cox
Clackamas County Hearings Officer

APPEAL RIGHTS

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