BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

FRIENDS OF MARION COUNTY,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

LOIS PFENNIG,
Intervenor-Respondent.

LUBA No. 2021-043

FINAL OPINION
AND ORDER

Appeal from Marion County.

Andrew Mulkey filed the petition for review and reply brief and argued on behalf of petitioner.

Scott A. Norris and Wallace W. Lien filed the joint response brief. Scott A. Norris argued on behalf of respondent. Wallace W. Lien argued on behalf of intervenor-respondent.

RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED 11/22/2021

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county decision approving (1) an exception to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), (2) a comprehensive plan map amendment from Special Agriculture to Rural Residential, (3) a zoning map amendment from Special Agriculture (SA) to Acreage Residential 2-acre minimum (AR-2), and (4) a partition creating one 16.46-acre parcel and two 2-acre parcels.

BACKGROUND

The county's SA zone implements Goal 3's objective "[t]o preserve and maintain agricultural lands" and the county applies the zone

> "in areas characterized by small farm operations or areas with a mixture of good and poor farm soils where the existing land use pattern is a mixture of large and small farm units and some acreage homesites. The farm operations range widely in size and include grazing of livestock, orchards, grains and grasses, Christmas trees and specialty crops." Marion County Code (MCC) 17.137.010.

The unimproved, 20.46-acre subject property has high-value soils, is planted with an unirrigated hay crop, and is zoned SA. It is located west of 62nd Avenue SE, south of Macleay Road SE, and north of Culver Drive SE, with a small amount of frontage on an undeveloped right-of-way.[1] Properties

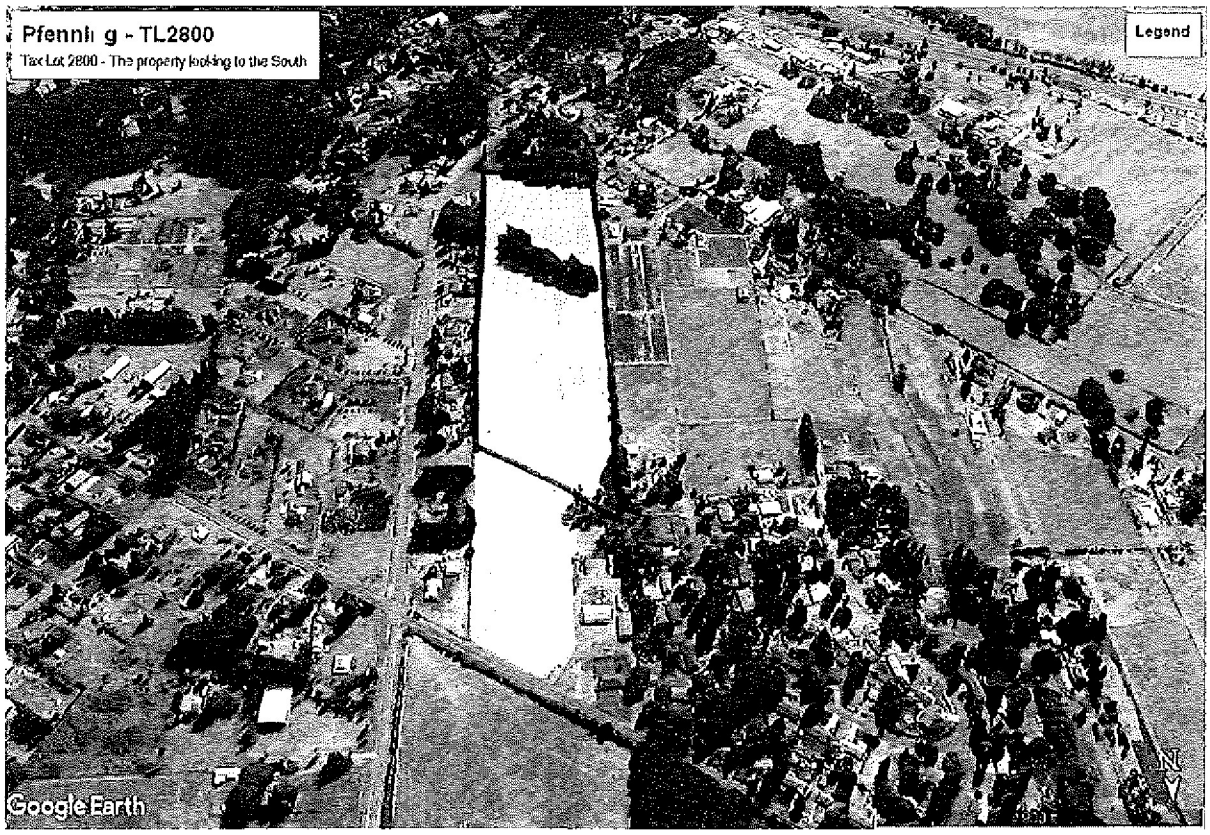
[1] The undeveloped right-of-way is identified as Wickiup Street SE. Record 9.

immediately to the west and south have the same SA zoning as the subject property, are in agricultural use, and include dwellings. Record 9.

The county's Acreage Residential (AR) zones are intended to

> "provide appropriate regulations governing the division and development of lands designated rural residential in the Marion County Comprehensive Plan. [AR] zones are areas that are suitable for development of acreage homesites. Such areas are necessary to meet the housing needs of a segment of the population desiring the advantages of a rural homesite." MCC 17.128.010.

Properties immediately to the north and east of the subject property are zoned AR-2 and developed with residences. Record 9. Petitioner sought to change the zoning of the subject property from SA, the zoning it shares with properties to the west and south, to AR-2, the zoning of the properties to the north and east. Below is an aerial photograph of the subject property and its immediate environs.



Record 431. The photo is from the north, facing south. The bottom of the photo is north, and the right side of the photo is west.

Changing the zoning of the subject property to AR requires an exception to Goal 3.[2] ORS 197.732(2)(b) provides that an exception may be obtained when

> "[t]he land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission

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[2] The county concluded that a Goal 14 exception was also required because intervenor sought to change the zoning of the subject property to a zone with a minimum parcel size of less than ten acres. Record 18. Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."

> [(LCDC)] rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]"

This type of exception is known as an "irrevocably committed" exception. The LCDC rules applicable to irrevocably committed exceptions are set out in OAR 660-004-0028. OAR 660-004-0028(2) provides:

> "Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:
>
> "(a) The characteristics of the exception area;
>
> "(b) The characteristics of the adjacent lands;
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> "(c) The relationship between the exception area and the lands adjacent to it; and
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> "(d) The other relevant factors set forth in OAR 660-004-0028(6)."

On July 24, 2019, the hearings officer held a public hearing on the application. On December 10, 2019, the hearings officer issued a report recommending denial of the application for an exception to Goal 3, which would require denial of the other applications. On February 24, 2021, the board of county commissioners held a *de novo* public hearing on the applications. On March 24, 2021, the board of county commissioners approved the applications, including approval of an irrevocably committed exception.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Introduction

Petitioner's first assignment of error is that the county misconstrued OAR 660-004-0028(2). We will reverse or remand a decision that misconstrues the applicable law. ORS 197.835(9)(a)(D).

B. Preservation

ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or allowing the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to allow the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

In the petition for review, petitioner identified the first assignment of error as having been preserved in (1) a letter that petitioner submitted into the record before the board of county commissioners and (2) the hearings officer's recommendation, which is referenced in that letter. Intervenor-respondent (intervenor) and the county (together, respondents) argue that that citation to the hearings officer's decision was insufficient, and petitioner did not preserve the first assignment of error.

We have reviewed the cited pages, and the issues raised in the first assignment of error were preserved. Petitioner explained in its February 8, 2021 letter that it opposes the application and

> "agree[s] with the Hearings Officer that the most important objection to the proposal lies in compliance with OAR 660-004-0028 and therefore the application is not satisfied. [Petitioner] point[s] to the analysis by the Hearings Officer that substantiates the **DENIAL** recommendation as follows." Record 95 (boldface in original; citation omitted).

Petitioner's letter sets out in great detail the reasons why the hearings officer concluded that the applicable standards are not met. Record 95-98. Although petitioner's letter does not specifically cite subsection (2), the letter does cite OAR 660-004-0028 generally, and the referenced hearings officer findings relate to OAR 660-004-0028(2). Petitioner's letter refers to the "[r]elationship between the exception area and the land adjacent to it" and "[o]ther relevant factors," the operative language used in OAR 660-004-0028(2). Record 97. Those references were sufficient to preserve this issue. *See Wetherell v. Douglas County*, 58 Or LUBA 101, 116 (2008) (testimony that the applicant has not shown why a parcel formerly part of a larger ranch cannot be used in conjunction with adjacent and nearby farm properties is sufficient to raise the issue of compliance with OAR 660-033-0030(3), notwithstanding that the petitioner failed to cite the rule). We proceed to address the merits of the first assignment of error.

C. OAR 660-004-0028

Petitioner's first assignment of error intermingles arguments that the county misconstrued the law and made inadequate findings. We first discuss the county's construction of the law and then its findings.

1. Misconstruction of Law

As set out above, the criteria for an irrevocably committed exception found in OAR 660-004-0028(2)(b) and (c) require consideration of both the characteristics of adjacent lands and of the relationship between the proposed exception area and the adjacent lands. OAR 660-004-0028(2)(d) and OAR 660-004-008(6)(d) require consideration of the neighborhood and regional characteristics, that is, the surrounding lands. We discuss the county's findings relating to both adjacent and surrounding lands below.

Findings 15, 16, and 17 provide, in part:

> "15. *Characteristics, existing uses, and parcel size and ownership patterns of adjacent lands; neighborhood and regional characteristics.* * * *
>
> "* * * * *
>
> "[Intervenor] completed an evaluation of all parcels within one mile of the subject property. This area encompassed six assessor's maps, for a total of 676.23 acres. The study area included a total of 196 tax lots, plus four parcels that were non-buildable, due to government ownership or size/shape. Records from the assessor for the 196 parcels show that the vast majority of ownerships are of only one parcel. The size and location of this study area are hereby found to be acceptable for this analysis.
>
> "* * * * *
>
> "16. The study area encompasses 676.23 acres, or 1.06 square miles, surrounding the subject property, which is found to be sufficient to address this criterion. Based on this information, it is hereby determined that the surrounding properties irrevocably commit the subject property to non-resource uses.

> "17. *Relationship between the exception area and the lands adjacent to it.* Once it is established that the surrounding area irrevocably commits the subject property to non-resource uses, a review of the relationship factors between the subject property and the surrounding neighborhood must be made to determine if resource uses on the subject property have become impracticable. Based on the evidence in this Record, and the findings set forth hereafter, it is determined that the relationship factors do make resource use of the subject property impracticable." Record 11-13 (italics and underscoring in original).

Petitioner argues that the county improperly construed OAR 660-004-0028(2) when it declared the exception area irrevocably committed without undertaking the required analysis of adjacent land.[3] Respondents respond that the county did perform the requisite analysis and that, although that analysis may not be in petitioner's preferred format or order, it is adequate, and petitioner merely disagrees with the county's conclusion.

Finding 16 does not include an interpretation of law but, instead, makes a conclusory statement that "it is hereby determined that the surrounding properties irrevocably commit the subject property to non-resource uses." Record 13.

We agree with petitioner that Finding 17 misconstrues the law. We have previously described the required analysis for irrevocably committed exceptions:

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[3] As explained further below, other relevant factors set out in OAR 660-004-0028(6)(d) include "[n]eighborhood and regional characteristics." OAR 660-004-0028(6)(d). We understand the intervenor's study area to represent the county's identification of the surrounding properties for assessment of "neighborhood and regional characteristics."

> "Under OAR 660-004-0028, an irrevocably committed exception to applicable statewide planning goals is warranted where, based on consideration of the factors enumerated in the rule, the local government concludes that uses allowed by the goals are impracticable in the exception area. OAR 660-004-0028(1). Whether uses allowed by the goals are impracticable depends on the characteristics of the exception area, the adjacent lands, the relationship between the exception area and adjacent lands, and other relevant factors. OAR 660-004-0028(2). While the local government's findings need not demonstrate that every use allowed by the goals is 'impossible,' the findings must demonstrate that farm uses allowed by ORS 215 .203, propagation or harvesting of a forest product, and forest operations or forest practices are 'impracticable.' OAR 660-004-0028(3). Finally, OAR 660-004-0028(6) sets forth a number of factors the local government must consider in taking an irrevocably committed exception." *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757, 761-62 (2004) (footnotes omitted).

"It is the relationship between the subject property and adjacent uses that is the 'focal criterion' for an irrevocably committed exception." *Friends of Linn County v. Linn County*, 38 Or LUBA 868, 886 (2000) (citing *DLCD v. Curry County*, 151 Or App 7, 11, 947 P2d 1123 (1997)). In Finding 17, the county explains that it determines whether the surrounding area irrevocably commits the subject property to nonresource use before it determines whether *the relationship* between the surrounding property and the subject property make resource use impracticable. This misstates the required analysis. The OAR 660-004-0028 factors must be analyzed before it is possible to conclude that the surrounding property commits the subject property to nonresource use, and we agree with petitioner that the county misconstrued the law in Finding 17.

We proceed to discuss the findings to determine whether the county performed the requisite analysis, the misconstruction of law notwithstanding, as respondents contend.

2. Inadequate Findings

Petitioner argues that the county described lands and uses that generally surround the subject property in Finding 15 and declared in Finding 16 that those properties irrevocably commit the subject property to nonresource use without defining the adjacent lands, determining how the adjacent lands affect the subject property, and describing the relationship between the two areas. Petition for Review 10. According to petitioner, "[s]imply put, the county's findings do not explain how average parcel size within a square mile study area has any impact on the ability to farm the subject property." Petition for Review 16. Findings must identify the applicable criteria and the evidence relied upon and explain how the evidence leads to the conclusion that the applicable criteria are or are not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

Finding 14 is titled "Characteristics, parcel size, and ownership patterns of the exception area." Record 11. As indicated above, Finding 15 is titled "Characteristics, existing uses, and parcel size and ownership patterns of adjacent lands; neighborhood and regional characteristics." *Id.* Although those findings do not cite OAR 660-004-0028(2)(a) and (b), their titles mirror those provisions. We also understand that Finding 15 is intended to address "[n]eighborhood and regional characteristics," as required by OAR 660-004-0028(2)(d) and (6)(d).

Nothing in Findings 14, 15, or 16 explains the basis for the conclusion in Finding 16 that the study area is sufficient to address "this criterion." Even if we assume that the criteria being addressed are OAR 660-004-0028(2) and (6) and that the evidence upon which Finding 16 relies is found in Findings 14 and 15, neither Finding 14, 15, nor 16 explains *why* the selected study area is sufficient for purposes of the analysis required by OAR 660-004-0028(2) or (6), that is, why the study area appropriately informs the required evaluation of the relationship between adjacent lands and the subject property, and other relevant considerations such as neighborhood and regional characteristics.

Moreover, the findings fail to analyze the relationship between the adjacent lands, the study area, and the subject property. Whether an exception to Goal 3 is allowed turns on whether farm use of the subject property is impracticable given the characteristics of the exception area and adjacent lands, the relationship between the exception area and adjacent lands, and other relevant factors. OAR 660-004-0028(2); *Simmons Family Properties, LLC v. Polk County*, ___ Or LUBA ___ (LUBA No 2021-007, July 28, 2021). Again, "other relevant factors" include "neighborhood and regional characteristics." OAR 660-004-0028(6)(d).

OAR 660-004-0028(2)(a) requires a consideration of the characteristics of the subject property. Finding 14 describes the subject property as generally flat with a slight slope, a small stand of scrub trees in its southern half, and an electrical power line along its eastern boundary. Record 11. Finding 14 also describes the subject property as the largest of the farm parcels "between the AR-

zoned lands, and North Santiam Highway and the Salem-Keizer Urban Growth Boundary." *Id.*

OAR 660-004-0028(2)(b) requires a consideration of the adjacent lands. Finding 15 repeatedly describes certain properties as "immediately adjacent" to the subject property. Finding 15 identifies six parcels immediately east of the subject property, each of which is zoned AR, is one acre or less in size, and contains a dwelling. Immediately west of the subject property, Finding 15 identifies four SA-zoned parcels with dwellings that are .5, 1.25, 3.17, and 4.66 acres in size. One of those parcels contains a blueberry operation and is in farm tax deferral. Lastly, Finding 15 describes the two parcels immediately north of the subject property as AR-zoned parcels owned by intervenor. One of those parcels, which is 9.62 acres, contains a dwelling. The other parcel, which is two acres, does not. Findings 14 and 15 therefore discuss the characteristics of the subject property and adjacent lands, as required by OAR 660-004-0028(2)(a) and (b).

OAR 660-004-0028(2)(c) and (d) require analyses of "[t]he relationship between the exception area and the lands adjacent to it" and "[t]he other relevant factors set forth in OAR 660-004-0028(6)." Again, the other relevant factors set out in OAR 660-004-0028(6) include "[n]eighborhood and regional characteristics." OAR 660-004-0028(6)(d). We understand the study area to represent the county's identification of the "[n]eighborhood and regional characteristics." The study area is an analysis of all parcels within one square

mile of the subject property, including 196 tax lots and four parcels that are non-buildable due to government ownership, size, or shape. Finding 15 describes the study area, stating that the vast majority of ownerships are of one parcel and that,

> "[n]ortherly of the subject property, across Macleay Road on assessor's map 7-2W-33, all three tax lots are in farm deferral and range in size from 19.94 to 94.95 acres. All are zoned SA. Heading south in the study area across the intersection of Culver Road and Deer Park Drive, onto Assessors map 8-2W-04D, 11 of the 19 properties on this map located south of this intersection are in farm deferral, and all are zoned SA. TL 2300 (11.60 acres) on assessor's map 8-2W-04C also lies south of this intersection, is included in the study area, and is in farm deferral." Record 12.

As indicated above, the county fails to explain the study area's relationship, other than geographic, to the proposed exception area—that is, why it is an appropriate neighborhood or region for study.[4] Findings 14, 15, and 16 also do not establish how the adjacent properties irrevocably commit the subject property to nonresource use, that is, they fail to analyze the evidence of interaction between the adjacent properties and the subject property.

As indicated above, Finding 17 is titled "Relationship between the exception area and the lands adjacent to it." The county concludes in Finding 17 that "[i]t is impracticable to employ reasonable farming practices on the subject

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[4] As petitioner states, "[u]ltimately, the county's decision never explains the relevance of such a large study area or how the characteristics of the study area as a whole comply with the various requirements in OAR 660-004-0028(2) and (6)." Petition for Review 18.

property due to the small size, lack of water rights for irrigation, access limitations and the presence of the high voltage electrical power line that crosses the entire width of the subject property." Record 13. Those are, however, characteristics of the subject property, and they do not describe the relationship between the subject property and the adjacent properties, which is the focal point of the irrevocably committed analysis.

Finding 17 does discuss *potential* conflicts between farming the subject property and neighboring uses:

> "Additional obstacles to farm uses on the subject property include the inability to apply herbicides or pesticides due to the significant level of development on surrounding lands. Application of such chemicals on the subject property would be absolutely necessary in order to produce any kind of commercial crop. Use of manual labor for spraying is cost prohibitive, and the inability to adequately control overspray when houses are within 20-30 feet of the property line make chemical application impossible. Without chemical application, farming is impracticable." Record 13-14.

Finding 17 also concludes:

> "[W]ith houses within just a few feet of the subject property, trespass by folks and animals with attendant crop loss and liability are serious issues for a small farm. In addition, activities on the surrounding properties such as backyard barbeques, where smoke will drift and where escaping fire is possible, cause issues with farming so close to backyards." Record 14.

The conflicts identified by the county are, however, speculative. The county does not purport to conclude that those conflicts currently exist. Rather, the county speculates that they could exist if commercial levels of farming were pursued.

Finding 17 is inadequate because it does not explain how the evidence relied upon leads to the conclusion that the subject property *is* irrevocably committed to nonresource use.

Finding 17 is also inadequate to the extent that it relies on the ability of the subject property to support a "commercial crop." Record 13.

> "The test under OAR 660-004-0028 is not whether a property is capable of supporting commercial agriculture. Further, we find no basis in the text of OAR 660-004-0028, ORS 215.203(2)(a) or the legislative history * * * to read those provisions as establishing a threshold based on whether the property is capable of supporting an economically self-sufficient agricultural operation * * *." *Lovinger v. Lane County*, 36 Or LUBA 1, 18-19, *aff'd*, 161 Or App 198, 984 P2d 958 (1999).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error is that the county misconstrued the term "farm use" and the uses allowed by Goal 3 and, as a result, made inadequate and unsupported findings concerning the subject property and adjacent lands. We will reverse or remand a decision that is not supported by substantial evidence. ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely upon to make a decision. *Younger v. City of Portland*, 305 Or 346, 752 P2d 262 (1988).

ORS 215.203(2)(a) defines "farm use" as

> "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of,

> livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. 'Farm use' does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267(3) or 321.824(3)."

The county concluded that subject property is currently being farmed and receiving tax deferral based on farm use. Record 11. We discussed the relevance of farm tax deferral status in *Friends of Yamhill County v. Yamhill County*:

> "Although we conclude that OAR 660-004-0028(2) and (6) do not specifically require findings concerning a property's tax deferral status, that does not mean that evidence of the property's current or prior farm use tax deferral status is irrelevant. Under ORS 308A.062, EFU-zoned lands must be 'used exclusively for farm use' in order to qualify for special assessment. *See* ORS 308A.059(1) (directing Oregon Department of Revenue to adopt 'a more detailed definition of farm use, consistent with the general definition' of 'farm use' in ORS 308A.056). The definition of 'farm use' in ORS 308A.056 essentially duplicates the definition of 'farm use' found in ORS 215.203. Under ORS 308A.113(1)(a), land that is receiving special assessment for farm use must be disqualified 'upon the discovery that the land is no longer being used as farmland.'

> *Evidence that property is specially assessed under ORS 308A.062 because it is in farm use is certainly relevant evidence concerning whether it is impracticable to put the property to farm use.*" 38 Or LUBA 62, 73 n 9 (2000) (emphasis added).

Despite finding that the subject property is in farm use and receiving farm tax deferral, the county found "relevant to the impracticability of farm use"

> "the small and irregular shape of the parcel and the level of improvements that would be necessary to *adequately* farm the site (irrigation, equipment, access, etc), the wooded area, the presence of electrical transmission lines, the adjoining non-farm dwellings that surround the subject property, as well as the lack of water rights. These difficulties create challenges to farm uses, that together with the other relationship factors * * * show a blanket impracticability of farm use on the subject property." Record 15 (emphasis added).

Petitioner argues that the county's findings approving the exception rely in part on a conclusion by the county that small-scale farming and the hay crop planted on the subject property are not "farm uses" protected by Goal 3. As explained above, "farm use" does not require commercial-scale farming, and the evidence in the record is that the subject property is in "farm use." To the extent that the county concluded that farming must be at a commercial scale in order to be protected or relevant, OAR 660-004-0028(2) and (6) do not include such a requirement.

Further, although the character of the subject property must be considered, the relationship between the subject property and the adjacent properties is the required focus of the analysis. In *DLCD v. Coos County*, we pointed out that

> "[t]he characteristics of the proposed exception area are among the relevant factors that the county may consider in determining

> whether resource uses are impracticable. *However, the focus of OAR 660-004-0028 is on the relationship between the proposed exception area and the surrounding area, and whether that relationship renders resource use of the subject property impracticable.* The county may not give 'exclusive or preponderant weight' to the characteristics of the proposed exception area." 39 Or LUBA 432, 442-43 (2001) (emphasis added) (citing *DLCD*, 151 Or App at 11-12).

Here, there are other lands currently in farm use in the study area, including an adjacent blueberry farm to the west. The current farm use of the property as well as the adjacent blueberry farm suggest that farm use of the subject property is not impracticable. Nonetheless, in Finding 17, the county identified numerous conflicts as support for its impracticability conclusion. Those conflicts include the risk of fire, the inability to apply herbicides or pesticides due to neighboring residential development, the inability to burn slash due to smoke complaints, noise, water availability, and the potential for trespass. Record 13-14.

We discussed conflicts with adjacent residential development in *Scott v. Crook County*:

> "The county identified six types of conflicts with adjoining residential uses based on testimony from the applicant and neighboring farmers, including a farmer who formerly leased the subject property: (1) smoke associated with field burning, (2) dust from farming activity, (3) noise from farm equipment, (4) irrigation water spraying or spilling onto adjacent properties, (5) pesticide application, and (6) damage to crops and land from trespassing." 56 Or LUBA 691, 696 (2008).

We concluded:

> "That intervenor has not conducted field burning since acquiring the subject property does not mean that past or future field burning is

> not a potential conflict with adjacent residential uses. Similarly, that dust is prevalent in Central Oregon does not mean that dust generated by farm equipment adjacent to residential dwellings is not a potential conflict, for purposes of OAR 660-004-0028. Absent a more developed challenge to the county's findings regarding conflicts, petitioner has not demonstrated a basis for reversal or remand."[5] *Id.* at 697.

In *Scott*, the petitioner did not adequately develop a challenge to the county's reliance on testimony of conflicts from the applicant and neighboring farmers, including a former lessee of the property. Here, petitioner has adequately developed its challenge. The testimony relied upon by the county is argument submitted by intervenor's legal counsel and general speculation as opposed to substantial evidence, that is, evidence a reasonable person would rely upon to reach a decision.

Intervenor's counsel argued:

> "No crop that needs to be sprayed with chemicals could be planted on the site because there are 13 homes on immediately adjacent parcels. Some houses and outbuildings on those surrounding parcels are as close as 20 feet from the property line. It is impossible to employ spraying as a farm practice in an area where non-farm homes are in such close proximity.
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> "Any agricultural practice that creates dust, which most do, would bring complaints from the close by neighbors. The same is true for

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[5] When considering "other relevant factors," the county in *Scott* found it "relevant that a previous lessee of the subject property found it to be not worth the cost of farming due to previous neglect, excessive drainage, above normal fertilization requirements, and the location of an old gravel pit in the center of the parcel." 56 Or LUBA at 697.

> farming practices that involve noise, such as tractors and other farm implements. Of course there is the issue of smell, which comes up with animal husbandry and most recently in hemp production where the drying of the hemp produces a powerfully strong adverse odor. The property does not have an irrigation well, or water rights, and it is doubtful given the circumstances here that water rights could be obtained, or that an irrigation well with sufficient water for farm use could be obtained. The presence of the surrounding homes preclude[s] the use of most normal farming practices, which is why for the past 20 plus years, the land has not been commercially farmed, but instead a cover crop that requires only period[ic] mowing has been maintained, and that done only to retain the propert[y's] farm tax deferral status.
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> "Activities in the non-farm homes that surround the site further prohibit intensive farming on the site. Domestic animals such as dog[s] have a tendency to run loose and disrupt farming practices. There is the risk of fire danger from outdoor fire pits, which could cause significant harm to sensitive crops. Chemicals used on the surrounding properties (such as pesticides on shrubs and gardens, and chemicals applied to lawn and flower beds to get rid of weeds) may be applied without following the federal application guidelines, and cause drift onto the subject property and adversely impact farm activities." Record 240.

We are directed to nothing in the record indicating that intervenor's counsel has expertise on actual farm use conflicts between surrounding properties and the subject property. Although the attachments to the submittal from intervenor's counsel include letters from (1) a backhoe company stating that it was not aware of any legal lots in the area being denied some type of septic system and (2) a well driller stating that they believed aquifers in the area could support development, no professionals with experience in the relevant subject

area were relied upon to support the claims of conflict between farm uses and neighboring uses. Record 174, 195.

In *Oregon Coast Alliance v. City of Brookings*, we explained:

> "[w]hether or not pollution from stormwater runoff from the subject property could adversely impact endangered salmon species, and if so what measures may be necessary to avoid or minimize such impacts, are the kinds of questions that likely require some level of scientific or professional expertise to answer the mere statements of the applicant's attorney do not provide. The mere statements of the applicant's attorney do not provide the required evidentiary foundation necessary to support conclusions regarding such technical questions, even if the city's findings had attempted to address them." 72 Or LUBA 222, 232-33 (2015).

Similarly, here, the submittal from intervenor's counsel does not provide the necessary evidentiary foundation to support conclusions concerning the alleged conflicts due to items such as pesticide application, fire risk, the timing of harvest and resultant noise, the availability of or need for water, or the likelihood of trespass.[6]

There are residential uses adjacent to the subject property, and the county found that a mixture of uses has long coexisted:

> "Most of the dwellings in the immediate vicinity of the subject property, in both the SA zone and the AR zone, were built in the

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[6] Further, the submittal from intervenor's counsel focused on *potential* incompatibility, stating, for example, that "the noise from the tractor, and the dust from the implement *would absolutely cause* complaints from [neighbors with homes within 30 to 35 feet of the activity], especially if the activity took place at night as often happens in the mid-to-late summer during harvest." Record 159.

> 1960s and early 1970s. The subject property is adjacent to Goal Exception Area 21.1 – Macleay, identified in Appendix A of the Marion County Comprehensive Plan. This exception area was already developed with small residential lots at the time the Comprehensive Plan was acknowledged in 1987, although many of the larger parcels were partitioned during the 1980s and 1990s into one to two acre residential lots."[7] Record 11-12.

"Reliance upon longstanding adjacent rural residential uses is insufficient to demonstrate that continued resource use of a proposed exception area has become impracticable in the absence of recent or imminent changes affecting the subject property." *DLCD v. Lane County*, 39 Or LUBA 445, 452 (2001) (citing *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 365-66 (2000)).

> "In evaluating [a local government's] findings and ultimate conclusion under OAR 660-004-0028, we are bound by any finding of fact for which there is substantial evidence in the record. We must determine, based on a 'clear statement of reasons,' whether 'the local government's findings and reasons demonstrate' that the impracticability standard has been met. In making that determination, we are not required to give any deference to the [local government's] explanation for why it believes the facts demonstrate compliance with the standards for an irrevocably committed exception." *Friends of Douglas County*, 46 Or LUBA at 763

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[7] Although the parties do not discuss it, we recognize that OAR 660-004-0028(6)(c)(A) provides, in part:

> "Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for the subject parcels or land adjoining those parcels."

(quoting ORS 197.732(6)(b), (c)) (citing ORS 197.732(6)(a); *Laurence v. Douglas County*, 33 Or LUBA 292, 297-99, *aff'd*, 150 Or App 368, 944 P2d 1004 (1997), *rev den*, 327 Or 192 (1998)).

The county's conclusion in Finding 17 that farm use is made impracticable based on the relationship between the adjacent properties and the subject property is not supported by substantial evidence. We have not been directed to evidence in the record that the area is facing a relevant, imminent change, and the evidence in the record is that the area has long had rural residential uses that have coexisted with farm uses on intervenor's property.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

OAR 660-004-0018(2)(b) provides that irrevocably committed exceptions must meet the following requirements:

> "(A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals, and are consistent with all other applicable goal requirements;
>
> "(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and
>
> "(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses[.]"

Petitioner's third assignment of error is that the county misconstrued and failed to comply with OAR 660-004-0018(2)(b)(B) and that the county's finding that the exception will not commit adjacent or nearby resource land to uses not allowed by Goal 3 is inconsistent with its findings of compliance with OAR 660-

004-0028(2)(c), that is, that the relationship between the subject property and adjacent rural residential uses makes farm use impracticable.

Simply put, petitioner argues that, if the county finds that the past allowance of dwellings on AR-2-zoned lots next to the subject property is problematic for agricultural use of the subject property, then it is inconsistent for the county to conclude that rezoning the subject property to AR-2 and allowing dwellings thereon will not be problematic for the SA-zoned property next to the subject property. Petitioner argues that "[t]he only difference that the county finds between the existing dwellings to the east of the subject property and the dwellings that would abut [the SA-zoned properties to the west of the subject property] is the dwelling setback distance" and that the county's reliance on "claims that it could require owners of the new dwellings to sign a declaratory statement claiming no complaints will be allowed about the activities at the blueberry field" is insufficient. Petition for Review 44. The existing dwellings to the east of the subject property are on land zoned AR and are currently adjacent to the SA-zoned subject property. Petitioner argues that, if the exception is approved, then the subject property will become AR-zoned property adjacent to SA-zoned property to the south and west and any impacts that residential development on AR-zoned land has on SA-zoned property will be pushed further west and impact properties such as that with the blueberry operation.

The county provided descriptions of properties in the study area in its discussion of OAR 660-004-0018, including findings that, "[t]o the south and

west the zoning is SA/[Exclusive Farm Use], however the parcelization and use of those properties, with one exception is not available for agricultural production." Record 15.

> "TL3000 is 4.66 acres in size with a dwelling and a large shop. There is approximately 3 acres of TL3000 planted in blueberries, which provides an income supplement to the property owner, *but not sufficient income for the family to live on.* * * *
>
> "* * * * *
>
> "* * * TL200 is the *only commercially farmed parcel* in the entire study area, and its farm includes farming the arable portions of TL100 and TL300. * * *
>
> "On Map 8.2W.04D *there are seven parcels over 5 acres in size, all of which are on farm deferral except for one* (TL600). All have dwellings on them, except for TL4700 which is the only parcel in the area to utilize a forest deferral. TL600 is 6.23 acres; TL 4200 is 6.75 acres; TL4300 is 14.26 acres; TL4600 is 8.54 acres; TL 5200 is 6.21 acres; and TL 5300 is 5.11 acres in size. This area is quite a ways to the east and south of the subject property. *The lack of farm uses here is due to proximity to Highway 22, and the presence of Fruitland Creek and several ponds along that waterway.* These lands are basically idle in scrub trees and brush.
>
> "On Map 8.2W.04B there are five parcels that exceed five acres in size, excluding parcels zoned for commercial or industrial uses. TL200 is 10.63 acres in size, *is on farm deferral* and has a house. TL500 is 6.07 acres in size, and this is a property there is no information available for. TL700 is 11.9 acres in size, *is only partially on farm deferral* and has a non-farm dwelling. TL900 is 5 acres in size, *is on deferral* and has a non-farm dwelling. This area is quite a ways to the west * * *. *There is no commercial farming going on in this area, and what agricultural activity takes place is a hobby for the use and enjoyment of the owners.*" Record 15-16 (emphases added).

The exception and implementing zone change would allow two-acre parcels on the 20.46-acre subject property. Although the exception and zone change would broaden the extent of the AR-2-zoned properties that the county found made farming the subject property impractical, the county concluded that no more than nine parcels will be possible on the subject property given its shape and the need for a road, and that two-acre lots are consistent with the median size of parcels in the study area. Record 15.

Again, OAR 660-004-0018(2)(b)(B) requires that "[t]he rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028. The county concluded that that rule focuses on "lands available for agricultural production," but the county did not explain what it considers to be "available." Record 15. In its analysis, the county emphasized existing, commercial levels of farming. The county found that, "in the study area, there is *only one true farm*, several hobby farms and a bunch of acreage homesite[s] without any farming activity." Record 17 (emphasis added). Numerous properties in the area are described as not being available for agricultural production based on parcelization and use, but the findings do not explain the basis for concluding that the parcelization and use make the properties unavailable for farming. Record 15.

Further, although the county concluded that new houses "will be appropriately set back, and can be required to sign a Declaratory Statement that

no complaints will be allowed about the activities at the blueberry field," and that the development plan involved here will place only two new houses next to the blueberry field, the county did not explain how the decision restricts the number of houses adjacent to resource land or how setbacks, Declaratory Statements, and the number of new houses will avoid the proximity conflicts, such as trespass and fire risk, that it identified in approving the exception. Record 17. The county misconstrued the law and adopted inadequate findings by not considering "noncommercial" levels of farm use and the impact of the proposed exception and related zone change on the resource land in the area, regardless of the current level of resource use on that resource land.

The third assignment of error is sustained.

DISPOSITION

Petitioner requests reversal of the county's decision because, according to petitioner, the subject property cannot qualify for an irrevocably committed exception as a matter of law. In the alternative, petitioner requests remand. Petition for Review 5, 47. We will reverse a land use decision when we conclude that the decision violates a provision of applicable law and is prohibited as a matter of law. OAR 661-010-0071(1)(c). As relevant here, we will remand a land use decision when we conclude that the findings are insufficient to support the decision, the decision is not supported by substantial evidence in the whole record, or the decision improperly construes the applicable law but is not

prohibited as a matter of law. OAR 661-010-0071(2)(a), (b), (d); ORS 197.835(1).

"Upon review of a decision approving or denying an exception:

> "(a) [LUBA] shall be bound by any finding of fact for which there is substantial evidence in the record of the local government proceedings resulting in approval or denial of the exception;
>
> "(b) [LUBA] shall determine whether the local government's findings and reasons demonstrate that the standards of subsection (2) of this section have or have not been met; and
>
> "(c) [LUBA] shall adopt a clear statement of reasons that sets forth the basis for the determination that the standards of subsection (2) of this section have or have not been met." ORS 197.732(6).

As explained above, the county's decision relies on findings that do not comply with the applicable rules and that are not supported by substantial evidence. The standards for an irrevocably committed exception have not been met because resource use of the subject property has not been shown to be impracticable. The evidence in the record is that the allegedly conflicting rural residential uses have long been present in the area, the subject property is currently farmed and adjacent to property currently being farmed, other farm use occurs in the study area, and no relevant, imminent land use change in the area has been identified. In addition, the county has not adopted findings supported by substantial evidence that an exception on the subject property would not commit other resource land to nonresource use. It seems unlikely to us, based on this record, that the county could approve an irrevocably committed exception

following a correct application of the applicable law. However, we cannot conclude that an irrevocably committed exception for the subject property is prohibited as a matter of law. Accordingly, remand is appropriate instead of reversal.

The county's decision is remanded.