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

DAVID LETT,)
)
Petitioner,)
)
vs.)
)
YAMHILL COUNTY,)
)
Respondent,)
)
and)
)
KATHERINE DURANT and KENNETH)
DURANT,)
)
Intervenors-Respondent.)

LUBA No. 97-008
FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Lynne A. Perry, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Miller, Nash, Wiener, Hager & Carlsen.

No appearance by respondent.

Richard H. Allan, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Ball Janik.

LIVINGSTON, Administrative Law Judge; GUSTAFSON, Chief Administrative Law Judge, participated in the decision.

REMANDED 10/15/97

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county board of
4 commissioners (county board) approving a conditional use
5 permit for a nonfarm dwelling on a 3.17-acre parcel
6 designated Agriculture Forestry Large Holding (AFLH) and
7 zoned Agriculture Forestry/20 Acre District (AF-20).

8 **MOTION TO INTERVENE**

9 Katherine Durant and Kenneth Durant (intervenors) move
10 to intervene on the side of the respondent. Katherine
11 Durant was the applicant below. There is no opposition to
12 the motion, and it is allowed.

13 **FACTS**

14 The application at issue in this proceeding was also
15 the subject of Lett v. Yamhill County, ___ Or LUBA ___ (LUBA
16 No. 96-051, October 7, 1996) (Lett I). As we stated in Lett
17 I:

18 "The subject property is a vacant 3.17-acre parcel
19 located in the county's hill country and zoned
20 Agriculture/Forestry Use (AF-20). The property,
21 which fronts on Breyman Orchards Road, is bordered
22 on the east by a two-acre nonfarm parcel with a
23 dwelling, and on the north and west by much larger
24 parcels with dwellings. Agricultural uses
25 predominate on surrounding properties, which are
26 zoned either AF-20 or Exclusive Farm Use (EFU-40)
27 and range in size from less than two acres to more
28 than 50 acres.

29 "In 1989, the former owner of the subject property
30 applied for a nonfarm dwelling. Testimony in that
31 proceeding established that no permits for nonfarm
32 dwellings on substandard [sized] lots in the area

1 had been issued since at least 1979. Materials
2 submitted by the applicant to the county in this
3 proceeding state that one lot of record dwelling
4 was approved in 1994 on Section 3-3-33, Tax Lot
5 500-501. * * * Between 1979 and 1989, large
6 agricultural investments totaling many millions of
7 dollars were made, primarily in vineyards, in the
8 area of the subject property.

9 "The county approved the former owner's nonfarm
10 dwelling application based on the standards
11 applicable at that time, and this Board remanded
12 that approval. Blosser v. Yamhill County, 18 Or
13 LUBA 253 (1989).

14 "On July 7, 1995, intervenor Katherine Durant
15 applied for a nonfarm dwelling. Petitioner
16 objected to the application, and included as
17 attachments to his letter some, perhaps all, of
18 the file generated in Blosser, supra. * * * The
19 county planning director denied the application,
20 and Ms. Durant then appealed to the board of
21 county commissioners. On December 15, 1995, Ms.
22 Durant submitted a listing of tax lots, apparently
23 in the vicinity of the subject property, including
24 the names of their owners and the property size,
25 current use, tax deferral status and soil types. *
26 * * She also submitted a map that identifies the
27 subject property and indicates which substandard-
28 sized lots have dwellings and which do not, within
29 a marked circle that is stated to have a radius of
30 approximately one-half mile. * * *.

31 "Based on this new information, the staff report,
32 issued on January 4, 1996, recommended approval of
33 the application, 'because approval would not alter
34 the stability of the existing land use pattern in
35 the area.' * * * Staff prepared another map that
36 covers a somewhat larger area and shows (1)
37 substandard parcels without dwellings where there
38 can be no dwellings because of the soil types; and
39 (2) substandard parcels without dwellings where
40 dwellings are either 'potential' or 'potential
41 with complications.' * * * After a hearing, the
42 county commissioners voted to approve the
43 application." Lett I, slip op 5-6 (footnotes and
44 citations to record omitted).

1 Following our remand in Lett I, the county gave notice
2 identifying the issues to be considered as follows:

3 "1) Whether nonfarm dwellings can be built on
4 lots or parcels 20 [acres] or larger within a
5 1/2 mile radius of the subject property.

6 "2) Whether Tax Lot 4304-1600 is a potential site
7 for a nonfarm dwelling.

8 "3) Whether Tax Lot 4304-1700 will remain
9 ineligible [for] a nonfarm dwelling for a
10 term that is reasonable for purpose of the
11 stability analysis of YCZO 403.03(E)(4).

12 "4) In light of evidence submitted in the prior
13 County proceeding and any new evidence
14 submitted with regard to Issues 1-3, whether
15 the proposed dwelling will comply with the
16 stability standard of YCZO 403.03(E)(4)."¹
17 Record 223.²

18 After public hearings on December 4 and 18, 1996, the
19 county board voted to approve the application on December
20 30, 1996. This appeal followed.

21 **ASSIGNMENT OF ERROR**

22 **A. Scope of Review**

23 The scope of our review in this appeal does not include
24 issues that were resolved in Lett I. Beck v. Tillamook
25 County, 313 Or 148, 831 P2d 678 (1992). Although ORS

¹The county ultimately concluded that neither Tax Lot 4304-1600 nor Tax Lot 4304-1700 are susceptible to development with nonfarm dwellings. Petitioner does not challenge that conclusion, which resolves the second and third issues in the county's notice.

²Citations to the record on remand are to "Record ____." Citations to the record in Lett I are to "Record A____."

1 197.763(7) permits a party to raise new issues which relate
2 to new evidence or testimony admitted during the proceedings
3 on remand or the "criteria for decision-making which apply
4 to the matter at issue," we may not consider issues that a
5 party could have, but did not, raise in a prior appeal.
6 Beck, 313 Or at 153.

7 Here, as in Lett I, petitioner assigns error to the
8 county's determination of compliance with YCZO 403.03(E)(4),
9 which provides:

10 "The dwelling will not materially alter the
11 stability of the overall land use pattern of the
12 area. In determining whether a proposed nonfarm
13 dwelling will alter the stability of the overall
14 land use pattern of the area, the cumulative
15 impact of nonfarm dwellings on other lots or
16 parcels in the area similarly situated shall be
17 considered."³

18 In Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989),
19 we described the three-step approach that must be taken in
20 determining whether a nonfarm dwelling will materially alter
21 the stability of the overall land use pattern in the area of
22 a particular property:

23 "First, the county must select an area for
24 consideration. The area selected must be

³YCZO 403.03(E)(4) rephrases OAR 660-33-130(4)(a)(D), which provides:

"The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated."

1 reasonably definite including adjacent land zoned
2 for exclusive farm use. Second, the county must
3 examine the types of uses existing in the selected
4 area. In the county's determination of the uses
5 occurring in the selected area, it may examine lot
6 or parcel sizes. However, area lot or parcel
7 sizes are not dispositive of, or even particularly
8 relevant to, the nature of the uses occurring on
9 such lots or parcels. It is conceivable that an
10 entire area may be wholly devoted to farm uses
11 notwithstanding that area parcel sizes are
12 relatively small. Third, the county must
13 determine that the proposed nonfarm dwelling will
14 not materially alter the stability of the existing
15 uses in the selected area." Id. at 1246.

16 In Lett I, petitioner made three subassignments of
17 error, each addressing one step of the Sweeten analysis:
18 (1) the county failed to make findings adequate to explain
19 why it limited the "area for consideration" to a one-half
20 mile radius around the subject property; (2) the county
21 failed to make adequate findings presenting a clear picture
22 of the balance of uses comprising the existing land use
23 pattern in the area or the stability of the pattern; and (3)
24 there was not substantial evidence in the record to support
25 a conclusion that the cumulative impact of approving the
26 nonfarm dwelling would not materially alter the stability of
27 the overall land use pattern of the area. With respect to
28 (1), we concluded petitioner had failed to raise the
29 appropriate area for consideration as an issue below and had
30 therefore waived it under ORS 197.763(1). Petitioner made
31 three arguments in support of (2): first, it was impossible
32 to determine which, if any, of the 35-40 dwellings within

1 the selected area were nonfarm dwellings and which were
2 farm-related dwellings; second, it was impossible to
3 determine what farm uses were occurring other than on the
4 nine parcels identified as being used for vineyards and
5 orchards; and third, no land use was described for many
6 other parcels in the area, including those greater than 20
7 acres in size. We responded to the first argument by
8 stating, "In this case, petitioner does not explain, and we
9 do not see, why it is pertinent which dwellings are farm and
10 which are nonfarm." Lett I, slip op at 15-16. We responded
11 to the second argument by stating:

12 "Information as to the particular farm use on each
13 parcel in the area is pertinent because, as the
14 parties recognize, it may indicate the amount and
15 nature of farm-related capital investment on that
16 parcel, and that, in turn, may help to determine
17 the degree of commitment to continued farm use,
18 which itself bears on stability." Lett I, slip op
19 at 16.

20 We responded to the third argument by requiring that the
21 county consider the cumulative impacts of

22 "existing nonfarm dwellings (including the one
23 apparently approved in 1994 on Section 3-3-33, Tax
24 Lot 500-501) and the proposed nonfarm dwelling on
25 these lots or parcels, as well as on lots or
26 parcels smaller than 20 acres." Lett I, slip op
27 at 17.

28 With respect to (3), we agreed with petitioner that
29 there was not substantial evidence that only two parcels in
30 the identified area were eligible for nonfarm dwellings. In
31 particular, we agreed that there was not substantial

1 evidence in the record to support the conclusion that Tax
2 Lots 1600 and 1700 had no potential for a nonfarm dwelling.
3 Based on the limited evidence identified by petitioner to
4 support his contention that a Phylloxera infestation
5 threatened to wipe out the large capital investment required
6 to develop vineyards, we rejected his challenge to the
7 county's conclusion that lots presently in vineyards would
8 not be used for nonfarm dwellings because of that
9 investment. Finally, we concluded that because the county's
10 elimination of all parcels greater than 20 acres was based
11 on a flawed application of the "similarly situated"
12 standard, no purpose would be served by addressing
13 petitioner's final challenge to the county's conclusion that
14 permitting the proposed nonfarm dwelling would not
15 materially alter the stability of the overall land use
16 pattern of the area.

17 A dispute over the appropriate scope of the proceedings
18 on remand and the scope of our review pervades the arguments
19 of the parties. At least part of the dispute is fueled by
20 an inconsistency in our opinion in Lett I. As noted above,
21 YCZO 403.03(E)(4) expressly requires that in determining
22 whether a proposed nonfarm dwelling will alter the stability
23 of the overall land use pattern of the area, the county must
24 consider the cumulative impact of nonfarm dwellings on other

1 lots or parcels in the area.⁴ In view of the code
2 requirement, we erred in stating that petitioner had failed
3 to show that it was pertinent which dwellings within the
4 selected area were farm and which were nonfarm. However,
5 despite this misstatement, we correctly instructed the
6 county to consider the cumulative impacts of existing
7 nonfarm dwellings and the proposed nonfarm dwelling on lots
8 or parcels in the selected area. That cannot be done
9 without determining which existing dwellings within the
10 selected area are nonfarm.

11 Petitioner argues that in determining which lots are
12 similarly susceptible to the development of nonfarm
13 dwellings, as directed in Lett I, the county must consider
14 whether, in the future, some lots may be developed with lot-
15 of-record dwellings or replacement dwellings and some
16 existing dwellings may be converted from farm to nonfarm
17 use. Intervenors respond that because petitioner failed to
18 raise the possibility of such development in Lett I, he is
19 precluded from doing so now.⁵

20 Petitioner's second subassignment of error in Lett I
21 challenged the county's findings regarding existing uses on

⁴This requirement was not discussed in Sweeten.

⁵The county permitted the introduction of evidence concerning lot-of-record dwellings, replacement dwellings and dwelling conversions and made alternative findings based on that evidence, but indicated that it considered these issues beyond the scope of our remand order in Lett I. Record 6, 18-19, 23.

1 three grounds, described above, which did not include the
2 county's failure to consider the potential for lot-of-record
3 dwellings, replacement dwellings or the conversion of farm
4 dwellings to nonfarm dwellings. Although we instructed the
5 county to consider on remand the cumulative impacts of
6 existing nonfarm dwellings, including a lot-of-record
7 dwelling that had been approved, we did not instruct the
8 county to consider the impacts of potential lot-of-record
9 dwellings or replacement dwellings or the conversion of farm
10 dwellings to nonfarm dwellings.

11 Petitioner's third subassignment of error in Lett I
12 also did not mention potential lot-of-record dwellings,
13 replacement dwellings or the conversion of farm dwellings to
14 nonfarm dwellings.⁶ Petitioner did mention "the changes to
15 the nonfarm dwelling criteria in 1993," but only in the
16 context of ORS 215.284. Petition for Review (Lett I) 3, 23.

17 Petitioner is correct that the central issue before
18 LUBA on appeal in Lett I, and the county on remand, was
19 "whether the proposed dwelling will comply with the
20 stability standard of YCZO 403.03(E)(4)." Petitioner's
21 Reply Brief 9. However, as we discussed in Lett I,

⁶Our resolution of petitioner's third subassignment of error, which focused on the possible development of two additional nonfarm dwellings was consistent with the distinction we drew between farm and nonfarm dwellings in concluding, following the second subassignment of error, that the county must, on remand, consider the cumulative impacts of existing nonfarm dwellings and the proposed nonfarm dwelling on lots or parcels in the selected area.

1 identifying a broad code standard does not invariably
2 preserve all of the issues that could be raised in
3 connection with that standard. Petitioner is also correct
4 that we sustained petitioner's second subassignment of error
5 in Lett I because the county had not evaluated all parcels
6 that were similarly situated (i.e., "'similarly
7 circumstanced' in susceptibility to development of nonfarm
8 dwellings"), in particular those parcels larger than 20
9 acres which the county had excluded from consideration
10 without explanation. Lett I, slip op at 16. However, the
11 argument that lots or parcels with the potential for lot-of-
12 record dwellings, replacement dwellings and conversion
13 dwellings must be considered as similarly situated to the
14 proposed nonfarm dwelling was not made in Lett I with
15 respect to parcels of any size. We agree with intervenors
16 that this issue cannot be raised now. We do not decide here
17 whether these dwellings fall within the ambit of the term
18 "nonfarm dwelling."

19 **B. Area for Consideration**

20 The challenged decision discusses whether the area
21 under consideration should be defined by intervenors' map or
22 the staff map but does not reach a clear conclusion. See
23 Record 5. The decision and the parties in their briefs
24 discuss both areas in the alternative. We think it is clear
25 that the area under discussion in Lett I and the area the
26 county was to consider on remand was the larger area

1 included by both maps. Therefore, we review the findings
2 addressing the larger area, termed "the 2/3 mile radius" by
3 the challenged decision.⁷

⁷As we noted in Lett I, intervenor Katherine Durant submitted a map (at Record A136) that identified the subject property and indicated which substandard-sized lots have dwellings and which do not within a marked circle that was stated to have a radius of "approximately" one-half mile. Lett I, slip op at 6. Staff prepared another map (at Record A135) that covered a somewhat larger area and showed (1) substandard parcels without dwellings where there can be no dwellings because of the soil types; and (2) substandard parcels without dwellings where dwellings are either "potential" or "potential with complications."

The challenged decision in Lett I contains a finding that refers to the staff map and the staff's testimony that the area contained is "slightly more than one-half mile." Record A9. The finding also refers to the map submitted by Ms. Durant, which is described as "depicting parcels within a one-half mile radius." Id. The finding states, "The Board finds that a radius of approximately one-half mile is consistent with the County's practice in evaluating applications for nonfarm dwellings and is adequate to define the potential area of concern for this application." Id. The finding adds that while there are "minor inconsistencies" between the maps, "the picture of the land use pattern of the area is essentially the same." Record A10. The finding then discusses the information found on both maps.

The petition for review in Lett I first described the area identified by the county as "all land * * * within an approximately one-half mile radius of the property for which the nonfarm dwelling was sought." Petition for Review (Lett I) 4. Thereafter, petitioner referred to the radius of the area as either "one-half mile" or "approximately one-half mile." See, e.g., Petition for Review (Lett I) 4-6, 13-15. Intervenors' brief in Lett I quoted the finding that discussed "a radius of approximately one-half mile" and thereafter referred to the "one-half mile radius." See, e.g., Response Brief (Lett I) 3-6.

In Lett I we discussed the small discrepancies between intervenors' map and the staff map. Lett I, slip op at 7 n3. We quoted the portion of the decision that discussed the staff map. Lett I, slip op at 13-14. Since neither party contended in Lett I that our review should be limited to the map prepared by intervenor, as opposed to by the staff, and since both parties apparently used the term "one-half mile radius" (or variants thereof) as shorthand for the more accurate "approximately one-half mile radius," we did the same. Lett I, slip op at 9-13.

1 **C. First Subassignment of Error: Existing Land Use**
2 **Pattern and Stability of the Pattern.**

3 **1. Existing Land Use Pattern**

4 In DLCD v. Crook County, 26 Or LUBA 478, 491-92 (1994),
5 this Board stated that Sweeten requires

6 "a clear picture of the existing land use pattern
7 [in the selected area], the stability of that
8 existing land use pattern, and an explanation for
9 why introducing [the proposed development] will
10 not materially alter that stability."

11 We referred to DLCD v. Crook County in Lett I and explained:

12 "The purpose of requiring a clear picture of the
13 existing land use pattern is to evaluate what
14 impacts a proposed development will have on the
15 stability of that pattern. Information not
16 pertinent to the evaluation need not be obtained,
17 and whether the picture is sufficiently clear
18 depends on the facts of a particular case." Lett
19 I, slip op at 15.

20 Petitioner contends that for three reasons the findings
21 do not adequately respond to our remand order as it pertains
22 to existing uses: first, the county did not discuss four
23 out of 13 parcels under 20 acres for which it failed to
24 provide adequate findings prior to Lett I; second, the
25 county refused to consider information submitted by
26 petitioner on seven parcels of less than 20 acres without
27 determining that these parcels were among the original nine
28 for which the uses had already been described; and third,
29 the findings identify only the dwellings and acreages
30 planted to grapes, without describing the sizes of the
31 parcels devoted to other farm uses identified in the

1 findings, such as orchards, Christmas tree farms, alfalfa,
2 grass crops and pasture.

3 **a. Use and Size of Farm Parcels**

4 We discuss petitioner's first and third contentions
5 together. In the Lett I Petition for Review, petitioner
6 contended that

7 "[i]t is * * * impossible to determine what farm
8 uses are occurring beyond the identified 9 parcels
9 with vineyards and orchards. Moreover, both the
10 county's and the applicant's maps show that there
11 are many other parcels in the area -- for which no
12 land use is described." Petition for Review (Lett
13 I) 16.

14 We responded:

15 "Information as to the particular farm use on each
16 parcel in the area is pertinent because, as the
17 parties recognize, it may indicate the amount and
18 nature of farm-related capital investment on that
19 parcel, and that, in turn, may help to determine
20 the degree of commitment to continued farm use,
21 which itself bears on stability." Lett I at 16.

22 Petitioner did not, in Lett I, identify four parcels by
23 lot numbers for which findings as to a particular farm use
24 were missing and does not do so here.⁸ Intervenors argue
25 that neither Sweeten nor subsequent cases require the
26 findings to describe, on a lot-by-lot basis, the farm uses
27 in the area. We agree with intervenors that it is possible,

⁸We suspect petitioner is referring to those lots identified on intervenors' map as "substandard without a dwelling" which are not labeled as being used as vineyards. See Record A136. However, in Lett I, petitioner also referred to 11 additional properties identified as "substandard without a dwelling" on the planner's map. Petition for Review (Lett I) 6. See Record A135.

1 by reliance on other data, to satisfy the stability standard
2 without identifying the particular farm use on each parcel.

3 **b. Exclusion of Evidence on Seven Parcels**

4 In Lett I petitioner contended that in view of a
5 Phylloxera infestation which could decimate nonresistant
6 root stock, the county could not rely on the capital
7 investment in vineyards as support for its conclusion that
8 vineyards would not be converted to nonfarm use. We
9 concluded that "in view of the limited evidence in the
10 record concerning the extent of the Phylloxera infestation,
11 the county's conclusion [that lots presently in vineyards
12 will not be used for nonfarm dwellings] is not
13 unreasonable." Lett I, slip op at 19.

14 During the local proceedings on remand, petitioner
15 submitted a letter dated December 9, 1996 that listed the
16 vineyard parcels 20 acres or larger in the subject area by
17 tax lot and provided information as to the owners, acreages
18 and Phylloxera-resistant status of the rootstocks. Record
19 71-73. Apparently on the basis of issue preclusion, the
20 county declined to consider the current or potential future
21 uses of lots or parcels under 20 acres in size, with the
22 exception of Tax Lots 4304-1600 and 4304-1700. Record 18.
23 Because the county's failure to discuss the susceptibility
24 of lots greater than 20 acres in size to the development of
25 nonfarm dwellings was a basis for remand in Lett I, the
26 county did consider the Phylloxera infestation as it might

1 affect those lots.

2 Petitioner now contends that the county erred in
3 excluding information contained in petitioner's December 9,
4 1996 letter regarding seven parcels of less than 20 acres
5 because the county failed to determine that these were among
6 the nine parcels whose use was shown to be vineyards in the
7 proceedings prior to Lett I. We agree that excluding this
8 information without determining first that it did not
9 pertain to parcels other than the nine parcels whose use was
10 shown to be vineyards prior to Lett I was error, in light of
11 our statement in Lett I that the particular farm uses on the
12 other parcels were pertinent as bearing on the level of
13 capital investment.

14 **2. Stability of Existing Land Use Pattern**

15 Petitioner contends the county's stability analysis is
16 deficient for two reasons: first, according to petitioner,
17 the findings provide no information on the extent of
18 nonresource use, whether by total dwellings, parcels or
19 acres; and second, while YCZO 403.03(E)(4) requires
20 assessment of the stability of the "overall land use pattern
21 of the area," the findings, according to petitioner, address
22 only the stability of the vineyard use in the area and not
23 the historic or current stability of other area land uses or
24 of the overall land use pattern on which the stability of
25 the vineyard and other farm uses relies.

26 Intervenors respond that a lot-by-lot description of

1 the area is not required.⁹ Intervenors contend a clear
2 picture of the pattern of the area is set forth in the
3 county's findings in this decision and its earlier decision,
4 based on information in the record to which intervenors
5 provide citations.¹⁰

⁹Intervenors point to Thomas v. Wasco County 30 Or LUBA 302, 309 (1996) to support their contention that LUBA has approved less detailed findings concerning area and existing uses. However, the adequacy of the findings concerning the relevant area and the existing uses within that area was not disputed in Thomas. The issue in Thomas was whether the unique nature of the subject parcel would prevent a "domino effect" if it were developed as a nonfarm dwelling. Id.

¹⁰The county's Lett I findings are at Record A10:

"Although there are minor inconsistencies between the two maps, the picture of the land use pattern of the area is essentially the same. Of the parcels of approximately 20 acres and smaller, approximately half already have dwellings. According to staff's map, 6 parcels have two dwellings. Grapes are the principal crop in the area, with filbert orchards and wheat or seed crops also represented. With substantial agricultural activity in the area, the area could not be characterized as 'rural residential.' On the other hand, there are approximately 35-40 dwellings within the radius depicted on staff's map (the number cannot be determined precisely because the map does not purport to show the actual location of the dwellings on their respective parcels). The addition of one or even several dwellings would not materially alter the stability of the land use pattern of the area.

"On staff's map, [the subject property] is depicted in yellow. Staff testified that the parcels highlighted in orange are approximately 20 acres or less in size, and are predominantly Class I-III soils. In other words, these substandard parcels could not be approved for nonfarm dwellings because they cannot satisfy the standard of YCZO 403.03(E)(2), set forth above. Two parcels (Tax Lots 1600 and 1700, highlighted in blue) would be eligible for nonfarm dwellings based on soils. However, Tax Lot 1600 has been in forest deferral, and would not qualify for a nonfarm dwelling based on YCZO 403.03(E)(6). Tax Lot 1700, although privately owned, is currently tax exempt because it is used by the City of Dayton for watershed protection. Based on staff's map, the Board concludes that at most two parcels (Tax

1 The challenged decision describes the existing land use
2 pattern of the area as follows:

3 "Within the 2/3-mile radius shown on the staff
4 map, there are approximately 40 dwellings. Six
5 parcels within the * * * 2/3 mile radius have two
6 dwellings. * * * Of the parcels with dwellings
7 within the 2/3-mile radius, there are
8 approximately 20 under 10 acres in size, 12
9 between 10 acres and 20 acres in size, and 9 lots
10 or parcels 20 acres or larger in size. In other
11 words, there are a substantial number of existing
12 dwellings, many located on small parcels.

13 "Parcel sizes within the [area] range from under 2
14 acres to over 150 acres. The parties appear to
15 agree that most of the parcelization occurred
16 before the area was zoned in the 1970s. * * *

17 "Although there are a substantial number of
18 existing dwellings, there is also significant farm
19 use in the area. Vineyards are by far the most
20 significant farm use in terms of acreage. Parcels
21 planted to wine grapes range from less than 5
22 acres in size to 96 acres. On parcels located

Lots 308 and 312, in the northwest corner of the area and highlighted in brown) may foreseeably be approved for nonfarm dwellings. As discussed below, that would not materially affect the stability of the land use pattern of the area.

"There is a second -- and independent -- basis for finding that the approval of a nonfarm dwelling on [the subject property] will not have an individual or cumulative effect on the stability of the land use pattern of the area: as shown on the applicant's map * * * , 9 out of [sic] 13 of the 'similarly situated' parcels (i.e., parcels up to approximately twenty acres, without dwellings) are planted with vineyards or filbert orchards. The Board agrees with the applicant that the high cost of planting vineyards and orchards, and the value of farm tax deferral for such properties, makes it unlikely that any of those properties will be converted to nonfarm use as a consequence of the individual or cumulative effect of approval of a nonfarm dwelling on Tax Lot 201. As discussed above, several other parcels are either owned or controlled by the City of Dayton for watershed protection and are highly unlikely to be developed with nonfarm dwellings."

1 partially or entirely within the 2/3-mile radius,
2 at least 400 acres are currently planted to wine
3 grapes. On parcels located partially or entirely
4 within the 1/2-mile radius, there are at least 300
5 acres planted in wine grapes. Other farm uses
6 within the 2/3-mile radius * * * include orchards,
7 Christmas tree farms, alfalfa, grass crops, and
8 pasture. As also indicated above, the City of
9 Dayton owns and leases several tax lots for water
10 shed and water storage facilities.

11 "The area planted in vineyards appears to have
12 expanded significantly in the last seven or eight
13 years. As [petitioner] has documented, Fox Glove
14 Properties and Domaine Drouhin Oregon have
15 acquired over 225 acres that are now planted to
16 wine grapes on grafted (Phylloxera-resistant)
17 rootstock. It appears this activity has occurred
18 largely or entirely since 1988. [Ms. Durant's]
19 letter of December 11, 1996 also indicates that
20 Tax Lot 2300, Section 4-3-04, owned by Red Hills
21 Farm is presently being planted to wine grapes on
22 Phylloxera-resistant rootstock. We conclude that
23 vineyard use in the area is not only stable, it is
24 increasing despite the existence of a substantial
25 number of dwellings (including dwellings on small
26 parcels)." Record 24-25.

27 How much information concerning individual lots or
28 parcels in the selected area is adequate to create a "clear
29 picture," as described in Crook, depends upon the
30 circumstances of a particular case. See Ray v. Douglas
31 County, ___ Or LUBA ___ (LUBA No. 95-237, February 6, 1997)
32 (a clear picture is not created when findings do not make
33 clear whether the discussion of uses on certain properties
34 is complete with respect to those properties and whether the
35 properties discussed are the sole properties in the selected
36 area). The size of the selected area, the number of parcels
37 within the area and the respective sizes of the parcels all

1 may affect how much detail is appropriate. The existence of
2 other similarly situated properties in the area for which
3 similar nonfarm dwelling applications would be encouraged is
4 relevant to a stability determination. Blosser, 18 Or LUBA
5 at 263; McCoy v. Marion County, 16 Or LUBA 284, 292 (1987);
6 Endresen v. Marion County, 15 Or LUBA 60, 66 (1986). In any
7 event, the picture must be clear enough to make the
8 necessary determination that approval of a nonfarm dwelling
9 will not materially alter the stability of the land use
10 pattern in the area.

11 As petitioner contends, the county must make findings
12 that are sufficient to provide a basis for the analysis
13 required by YCZO 403.03(E)(4).¹¹ Fiegi v. Clackamas County,
14 22 Or LUBA 182, 186-87 (1991). These findings must be
15 supported by substantial evidence regarding the relative
16 extent of nonfarm dwellings in the selected area. In Lett
17 I, five parcels under 20 acres were identified within the
18 area that might be eligible for nonfarm dwellings. Besides
19 the subject property, these were Tax Lots 3334-308, 3334-
20 312, 4304-1600 and 4304-1700. On remand, Tax Lots 4304-1600
21 and 4304-1700 were determined to be ineligible, a
22 determination that is not challenged in this appeal. When
23 the county examined parcels greater than 20 acres within the

¹¹Whether the extent of the nonfarm use is described in total dwellings, parcels or acres, the type of description must be justified in terms of the standard: the "cumulative impact of nonfarm dwellings."

1 area, it concluded Tax Lot 3332-2100 might also be eligible
2 for a nonfarm dwelling. Record 27. The challenged decision
3 concludes:

4 "[F]our additional dwellings in an area with
5 approximately 40 dwellings, many on small parcels,
6 will not be a material change, and will not
7 materially alter the stability of the land use
8 pattern because the 'domino effect,' to the extent
9 there is one, ends with the fourth domino.
10 Moreover, at most only two parcels of currently
11 productive agricultural land (Tax Lots [3334-]308
12 and [3334-]312), totaling 11.57 acres, might be
13 converted to nonresource use. This is a very
14 small percentage of the total productive
15 agricultural land in the area. Moreover, such a
16 small change in the total land devoted to resource
17 use is completely overshadowed by the investments
18 in intensive agricultural activities (particularly
19 vineyards and wineries) that the parties have
20 described. The Board believes that such
21 investments, including the demonstrable
22 willingness of property owners to invest in
23 Phylloxera-resistant rootstock, provide convincing
24 evidence of a strong, stable, and long-term
25 concentration of intensive farm use in the area."
26 Record 27.

27 This finding relies in part on the decisions of certain
28 property owners to invest in Phylloxera-resistant rootstock
29 under present circumstances. Not only does it draw a
30 conclusion that may not be justified as to the probable
31 motives of these property owners in making the decision to
32 invest, it also does not explain how the approval of four
33 more dwellings might have affected those decisions or might
34 affect future decisions. Under YCZO 403.03(E)(4), the
35 cumulative impact of nonfarm dwellings on other lots or
36 parcels in the area similarly situated must be considered in

1 determining compliance with the stability standard. An
2 increase of four nonfarm dwellings is a ten percent increase
3 in the total number of dwellings in the area and, unless all
4 of the dwellings are already nonfarm, a greater percentage
5 increase in the number of nonfarm dwellings. How much
6 greater depends on how many of the approximately 40
7 dwellings are already nonfarm dwellings. Until the county
8 identifies what the proportion of nonfarm to farm uses
9 presently is, considering vacant land as well as land
10 occupied by a dwelling, there is no basis upon which the
11 county may make an informed determination as to whether the
12 addition of up to four nonfarm dwellings will or will not
13 materially alter the stability of existing land uses in the
14 area, which present zoning characterizes as agricultural.
15 The extent of resource use may be discussed in different
16 terms, such as total dwellings, parcels, acres, or perhaps
17 all of these, but whatever approach is taken must be
18 justified in the context in which the county is evaluating
19 the application.

20 The first subassignment of error is sustained.

21 **D. Second Subassignment of Error: Similarly Situated**
22 **Parcels**

23 As discussed above, the arguments made under the second
24 subassignment of error, which pertain to future lot-of-
25 record dwellings, replacement dwellings and conversion
26 dwellings were not made in Lett I and cannot be made in this
27 appeal.

1 The second subassignment of error is denied.

2 **E. Third Subassignment of Error: Substantial**
3 **Evidence**

4 Petitioner challenges the evidentiary support for
5 certain findings made by the county. First, petitioner
6 contends that the county's conclusions that certain parcels
7 are not similarly situated are not supported by substantial
8 evidence because (1) three potential lot-of-record
9 "candidates" were inappropriately excluded on the basis that
10 ownership would need to be transferred for those parcels to
11 qualify; (2) six parcels of 20 acres or more were
12 inappropriately excluded on the basis that the soils would
13 not permit a nonfarm dwelling; (3) five parcels of 20 acres
14 or more that indicate little or no farm-related investment
15 or are at risk of Phylloxera infestation were
16 inappropriately excluded although they had the potential for
17 replacement dwellings or dwellings converted to nonfarm use;
18 and (4) the findings do not address parcels of less than 20
19 acres, including 11 parcels that are in non-vineyard use or
20 have not been planted with resistant rootstocks.

21 We agree with intervenors that the substantial evidence
22 challenges set forth in items (1) and (3) must fail because
23 they relate to issues that cannot be raised in this

1 appeal.¹² We also agree with intervenors that substantial
2 evidence supports the county's conclusion that because of
3 the predominant soils, a nonfarm dwelling cannot be
4 permitted under YCZO 402.03(E)(2) on the six parcels
5 identified by petitioner. Petitioner's argument is unclear,
6 but to the extent he contends that dwellings might be
7 permitted under different standards, the issue has been
8 waived. Finally, we agree with intervenors with respect to
9 item (4) that the county did address the 11 parcels when
10 concluding in Lett I that all but four lots less than 20
11 acres in the area are ineligible for nonfarm dwellings under
12 YCZO 402.03(E)(2) because of soils.¹³

13 Petitioner next states three challenges to the county's
14 ultimate conclusion that YCZO 402.03(E)(4) is satisfied:
15 (1) there is not substantial evidence in the record to
16 support a conclusion that the cumulative impact of approving
17 the proposed dwelling would not tip the balance to
18 predominantly residential use; (2) the county incorrectly
19 relied on a finding under YCZO 402.03(E)(1) that the
20 approval will not force a significant change in or

¹²Intervenors do not repeat their waiver argument in response, but refer to sections in their brief and the challenged decision where the argument is made. Response Brief 31-32.

¹³Two of the four remaining lots are Tax Lots 4304-1600 and 4304-1700, for which additional findings concerning ineligibility were made in the challenged decision. The other two lots are Tax Lots 3334-308 and 3334-312, which are among the four lots or parcels the county found are eligible for nonfarm dwellings.

1 significantly increase the cost of accepted farming or
2 forest practices on nearby lands devoted to farm or forest
3 use; and (3) there is not substantial evidence to support
4 the county's findings regarding area stability which are
5 based on the stability of vineyard use, the number of acres
6 planted to grapes and the county's selection of similarly
7 situated parcels.

8 We have analyzed a similar stability standard as it
9 applies in a forest zone and have concluded the question
10 presented by a proposed use is whether it will "tip the
11 balance in the area in favor of nonresource use." Grden v.
12 Umatilla County, 10 Or LUBA 37, 47 (1984). With respect to
13 (1), intervenors respond that the "tip the balance" standard
14 expressed in Grden does not mandate a "simplistic tallying
15 of farm dwellings and nonfarm dwellings." Response Brief
16 35. We agree the stability analysis requires far more than
17 a "simplistic tallying," but without information concerning
18 the relative proportions of farm and nonfarm uses, the
19 stability analysis is impossible.

20 With respect to (2), intervenors dispute petitioner's
21 contention that the unchallenged finding of compliance with
22 YCZO 402.03(E)(2) is used to justify a finding that YCZO
23 402.03(E)(4) is satisfied. We understand the finding to be
24 limited to its conclusion that "the nonfarm dwelling could
25 not reasonably be expected to cause property owners in the
26 area to discontinue farm or forest use of their lots or

1 parcels by interfering with such resource uses." Record 26
2 (emphasis added). We agree with the finding, as it is
3 limited by the emphasized language.

4 We do not reach the substantial evidence challenge
5 stated in (3), in view of our assessment, stated above, that
6 additional findings are required to support the county's
7 conclusion that YCZO 402.03(E)(4) is satisfied.

8 The third subassignment of error is sustained, in part.

9 The assignment of error is sustained, in part.

10 The county's decision is remanded.