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. 96-051 FINAL OPINION AND ORDER

Appeal from Yamhill County.

F. Blair Batson, Portland, filed the petition for review and argued on behalf of petitioner.

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 Christen C. White and Ball Janik & Novack.

LIVINGSTON, Referee; HANNA, Chief Referee, participated in the decision.

REMANDED 10/07/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the county board of commissioners allowing construction of a nonfarm dwelling on a 3.17-acre parcel designated Agriculture Forestry Large Holding (AFLH) and zoned Agriculture Forestry/20 Acre District (AF-20).

MOTION TO INTERVENE

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

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address intervenors' argument that petitioner failed to raise certain issues below and therefore waived his right to raise them at LUBA. Intervenors oppose the motion on the grounds that the reply brief is untimely. Intervenors also contend the "reply to third new matter" made in the reply brief buttresses an argument already made in the petition for review, and argues that if the reply brief is allowed, the "reply to third new matter" should not be considered.

A. Timeliness

Intervenors filed their brief on May 10, 1996. Petitioner filed his motion to file a reply brief, accompanied by the reply brief, on May 31, 1996. Oral

argument was held at LUBA on June 6, 1996.

Our rules require that "A request to file a reply brief * * * be filed as soon as possible after respondent's brief is filed." OAR 661-10-039. OAR 661-10-039 sets no firm deadline for filing a request to file a reply brief and is worded to invite an explanation when a request to file a reply brief appears to be tardy.

Petitioner's attorney explains in an affidavit that she was on vacation when intervenors' brief was filed. Because she did not return from vacation until May 17, 1996 and had oral argument in another case before LUBA scheduled for May 21, 1996, as well as another deadline to meet; and because the reply brief required 42.5 hours to research and write, she was unable to complete it before May 31, 1996.

In the absence of an explanation, a reply brief filed less than a week before oral argument might ipso facto be considered late. See, e.g., DLCD v. Coos County, 29 Or LUBA 415, 417 (1995). In this case, however, petitioner's explanation is adequate to show the reply brief was filed as soon as possible after respondent's brief was filed.

Intervenors contend they are substantially prejudiced by the receipt of a 20-page reply brief only three working days before oral argument. However, the timeline imposed by our rules affecting reply briefs is intended less to provide a second opportunity for respondents, including intervenors-respondent, to research issues already argued in their own

brief than to provide a reasonable opportunity for respondents and this Board to review the reply brief. Under the circumstances of this case, we consider three days barely adequate, but adequate nonetheless. This Board can better perform its review function by reading a reply brief prior to oral argument than by hearing for the first time at oral argument petitioner's response, supported by unfamiliar case citations, to new matters raised in a respondent's brief.

The motion to file a reply brief is allowed.

B. Reply to Third New Matter

Petitioner's reply brief addresses three "new matters," as that term is used in OAR 661-10-039.[1] Intervenors argue specifically against our consideration of petitioner's arguments with respect to the third "new matter." These arguments reply to an argument in the intervenors' response brief that is a cousin of the "raise it or waive it" arguments addressed in the reply brief as the first and second "new matters." Intervenors argue in their brief that a participant must raise specific matters below or waive the right to detailed findings addressing those matters.

We think intervenors' argument raises a "new matter," because it does not directly dispute petitioner's contentions in the petition for review regarding what

[1]OAR 661-10-039 states, in relevant part, that "[a] reply brief shall be confined solely to new matters raised in the respondent's brief."

constitutes adequate findings, but instead maintains that in certain circumstances, detailed findings are not required. We agree with intervenors that petitioner elaborates in his reply brief on the subject of what constitutes adequate findings, a topic also discussed at length in the petition for review. However, petitioner does so in order to respond to the third "new matter" raised in intervenors' brief. We therefore consider the entire reply brief.

FACTS

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

In 1989, the former owner of the subject property applied for a nonfarm dwelling. Testimony in that proceeding established that no permits for nonfarm dwellings on substandard lots in the area had been issued since at least 1979. Materials submitted by the applicant to the county in this proceeding state that one lot of record dwelling was approved in 1994 on Section 3-3-33, Tax Lot

500-501. Record 33. Between 1979 and 1989, large agricultural investments totaling many millions of dollars were made, primarily in vineyards, in the area of the subject property.

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

On July 7, 1995, intervenor Katherine Durant applied for a nonfarm dwelling.[2] Petitioner objected to the application, and included as attachments to his letter some, perhaps all, of the file generated in Blosser, supra. Record 47-130. The county planning director denied the application, and Ms. Durant then appealed to the board of county commissioners. On December 15, 1995, Ms. Durant submitted a listing of tax lots, apparently in the vicinity of the subject property, including the names of their owners and the property size, current use, tax deferral status and soil types. Record 33-36. She also submitted a map that identifies the subject property and indicates which substandard-sized lots have dwellings and which do not, within a marked circle that is stated to have a radius of approximately one-half mile. Record 136.

[2]The application does not expressly address the applicable zoning ordinance criteria, but justifies a nonfarm dwelling as the "highest and best use of the property." Record 134.

Based on this new information, the staff report, issued on January 4, 1996, recommended approval of the application, "because approval would not alter the stability of the existing land use pattern in the area." Record 31. Staff prepared another map that covers a somewhat larger area and shows (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."[3] Record 135. After a hearing, the county commissioners voted to approve the application.

ASSIGNMENT OF ERROR

A. Introduction

In 1993, after our decision in Blosser, supra, the legislature amended the provisions for nonfarm dwellings in EFU zones, effective November, 1993. Those provisions are now codified at ORS 215.284(1), which retains the stability standard that was one basis for our remand in Blosser.[4] ORS

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[3]As the challenged decision observes, the map submitted by Ms. Durant and the map prepared by staff are not perfectly consistent. For example, Ms. Durant's map shows Tax Lot 3333-900 to be without a dwelling; the staff map shows it to have a dwelling. To the extent petitioner bases his argument on discrepancies in the evidence, they are discussed below.

[4]ORS 215.284(1) states:

> "In the Willamette Valley, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designate, in any area zoned for exclusive farm use upon a finding that:

215.284(1)(d). In rules that became effective on March 1, 1994, the Land Conservation and Development Commission also incorporated the stability standard for nonfarm dwellings. OAR 660-33-130(4)(a). Yamhill County Zoning Ordinance (YCZO) 403.03(E)(4), which implements OAR 660-33-130(4)(d), states the stability standard as follows:

> "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 overall land use pattern of the area, the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated shall be considered."

Petitioner assigns error to the county's application of the three-part inquiry necessary for determining whether a nonfarm dwelling would materially alter the stability of the overall land use pattern of the area. In Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989), we described the

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> "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;
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> "(b) The dwelling will be sited on a lot or parcel that is predominantly composed of Class IV through Class VIII soils that would not, when irrigated, be classified as prime, unique, Class I or Class II soils;
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> "(c) The dwelling will be sited on a lot or parcel created before January 1, 1993.
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> "(d) The dwelling will not materially alter the stability of the overall land use pattern of the area; and
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> "(e) The dwelling complies with such other conditions as the governing body or its designate considers necessary."

three-step approach that must be taken in determining whether a nonfarm dwelling will materially alter the stability of the overall land use pattern in the area of a particular property:

> "First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. In the county's determination of the uses occurring in the selected area, it may examine lot or parcel sizes. However, area lot or parcel sizes are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels. It is conceivable that an entire area may be wholly devoted to farm uses notwithstanding that area parcel sizes are relatively small. Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area. Id. at 1246.

Petitioner makes three subassignments of error, each addressing one step of the Sweeten analysis: (1) the county failed to make findings adequate to explain why it limited the "area for consideration" to a one-half mile radius around the subject property; (2) the county failed to make adequate findings presenting a clear picture of the balance of uses comprising the existing land use pattern in the area or the stability of the pattern; and (3) there is not substantial evidence in the record to support a conclusion that the cumulative impact of approving the nonfarm dwelling will not materially alter the stability of the overall land use pattern of the area.

B. Step One - Area

Intervenors contend petitioner did not raise the issue of the one-half mile radius determination before the county and is thus barred from raising it before LUBA.

ORS 197.835(3) states that issues raised before LUBA "shall be limited to those raised by any participant before the local hearings body" as provided by ORS 197.763. ORS 197.763(1), which was amended by the 1995 legislature, is quoted below, showing the effect of the amendment:[5]

> "An issue which may be basis for an appeal to the **Land Use** Board **of Appeals** shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised [*with sufficient specificity so as*] **and accompanied by statements or evidence sufficient** to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

Intervenors argue the amendment increases the required degree of specificity with which issues must be raised below before they can be the basis for an appeal to LUBA. Intervenors contend that based on presentations by county staff and intervenors, petitioner should have anticipated the county would, in its findings, adopt an area with a radius of one-half mile as the area for consideration under the first step of Sweeten.

Petitioner replies that in his initial comments on the

[5]Text in bold type was added; bracketed, italicized text was deleted.

application, he raised the criteria stated in YCZO 403.03(E), OAR 660-33-120 and 660-33-130(4)(a), and ORS 215.284(4).[6] He remarks that the 1989 record, which he placed in this record, contains his and Mr. Blosser's comments challenging the 1989 application's compliance with the stability standard. He notes the first and second staff reports in this case address the stability standard, while

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[6]Petitioner's comments include the following:

> "I oppose this application, as I and Bill Blosser did (on the same piece of land in 1989) for the same reasons we submitted in 1989. Although there have been changes in land use laws since that time, the basic criteria still apply to the subject parcel.
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> "I * * * oppose this application because it does not comply with the review criteria in section 403.03(E) of the Yamhill County Zoning Ordinance for nonfarm dwellings of [sic] the criteria in OAR 660-33-120 and 660-33-130(4) or ORS 215.284.
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> "* * * * *
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> "The applicant has not demonstrated that the dwelling will not materially alter the stability of the overall land use pattern of the area. The applicant has not identified the other lots and parcels that are similarly situated properties in the area.
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> "* * * * *
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> "I am resubmitting into the record the evidence from the 1988 and 1989 hearings on the Hernandez case. * * *"
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> "In conclusion, the applicant has not shown the application complies with the review criteria * * *. It should therefore be denied.
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> "The change in law did not change the requirement that the stability of the land use pattern in farming areas be maintained. Nonfarm dwellings still may not be allowed when their cumulative effect would be the [sic] convert an area from predominately agricultural to predominately residential. * * *" Record 47-48.

reaching opposite conclusions as to whether it is met. He does not contend he specifically addressed the applicant's materials and comments with respect to the adoption of an area with a radius of one-half mile as the area for consideration. Indeed, at the hearing he acknowledged the change in the staff's recommendation had caught him by surprise. Record 20.

The 1995 amendment to ORS 197.763(1) adds a requirement that issues not only be raised, but also be accompanied by statements or evidence sufficient to afford the local decision maker an opportunity to respond. The amendment imposes an additional requirement for "statements or evidence," but it does not modify the meaning of "sufficient." What is "sufficient" still depends upon whether the governing body, planning commission, hearings body or hearings officer, and the parties are afforded an adequate opportunity to respond to each issue. See Boldt v. Clackamas County, 107 Or App 619, 623, 813 P2d 1078 (1991) (fair notice to adjudicators and opponents is sufficient); Cox v. Yamhill County, 29 Or LUBA 263, 266 (1995); Craven v. Jackson County, 29 Or LUBA 125, 132, aff'd 135 Or App 428, rev den 321 Or 512 (1995); Spiering v. Yamhill County, 25 Or LUBA 695, 712 (1993) (issue is waived if not sufficiently raised to enable a reasonable decision maker to understand the nature of the issue; discussion of specific provisions or their operative terms is sufficient).

As we stated in Lucier v. City of Medford, 26 Or LUBA 213, 216 (1993), before a petitioner may raise local government compliance with a particular criterion or procedural requirement as an issue before this Board, the petitioner must raise the issue of compliance with that criterion before the local decision maker.

> "Once that is done, the petitioner may challenge the adequacy of the findings and the supporting evidence to demonstrate the proposal complies with the criterion. The particular findings ultimately adopted or evidence ultimately relied on by the decision maker need not be anticipated and specifically challenged during the local proceedings." Id.

Intervenors contend that because the area of a circle with a one-half mile radius was extensively discussed at the county commissioners' hearing, petitioner had a clear invitation to dispute its use. We agree with intervenors. Although petitioner raised the general issue of compliance with the stability standard in YCZO 403.03(E), OAR 660-33-130(4)(a), and ORS 215.284(4) before the county, area is an essential, stated component of that standard. Defining the area is the first step of the required analysis. It was perfectly evident at the hearing that the county would consider only the area included in a circle with a one-half mile radius. Petitioner expressed no objection below to limiting the stability analysis to that area, and therefore failed to give fair notice to the county of his objection.

This subassignment of error is denied.

C. Step Two - Types of Uses in Area

Petitioner contends the county's findings with respect to the types of uses existing within the selected area are inadequate to satisfy the second step of the Sweeten analysis, as elaborated in DLCD v. Crook County, 26 Or LUBA 478, 491-92 (1994), because they do not provide a clear picture of the existing land use pattern and the stability of that land use pattern.

The challenged decision finds:

> "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.
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> "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 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.
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> "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 or [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." Record 10.

Petitioner does not question the county's premise that if there are substantial practical obstacles to the construction of additional nonfarm dwellings on lots or parcels presently without dwellings, the cumulative effect of permitting a nonfarm dwelling on the subject property will not alter the stability of the land use pattern in the

area. Petitioner does make three specific attacks on the adequacy of the county's findings as they portray the existing land use pattern: first, it is impossible to determine which, if any, of the 35-40 dwellings are nonfarm dwellings and which are farm-related dwellings; second, it is impossible to determine what farm uses are occurring other than on the nine parcels identified as being used for vineyards and orchards; and third, no land use is described for many other parcels in the area. Intervenors do not contest the accuracy of petitioner's statements, except in minor particulars, but contend generally the county's findings are adequate.[7]

The purpose of requiring a clear picture of the existing land use pattern is to evaluate what impacts a proposed development will have on the stability of that pattern. Information not pertinent to the evaluation need not be obtained, and whether the picture is sufficiently clear depends on the facts of a particular case. In this case, petitioner does not explain, and we do not see, why it is pertinent which dwellings are farm and which are nonfarm.

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[7]Intervenors' brief points to additional information in the challenged decision: (1) intervenors' current house is on Tax Lot 3000, close to their own vineyards; (2) a nonfarm dwelling is located on Tax Lot 200, immediately east of the subject parcel; and (3) property to the west of the subject parcel was once platted in 10-acre parcels, but the plat has been vacated. Record 8, 11. At oral argument, intervenors contended materials submitted by the applicant would permit LUBA to find, based on clear evidence, which farm uses exist on 21.26 acres in addition to those parcels identified on intervenors' map as being in vineyards or orchards.

Information as to the particular farm use on each parcel in the area is pertinent because, as the parties recognize, it may indicate the amount and nature of farm-related capital investment on that parcel, and that, in turn, may help to determine the degree of commitment to continued farm use, which itself bears on stability.

The chief reason the findings do not create a clear picture, however, is the absence of any information about uses on certain large parcels which are not entirely contained within the area defined by the challenged decision, but comprise a substantial portion of that area. The county considered only parcels which are substandard in size (less than 20 acres), apparently concluding that only those parcels are "similarly situated," as the term is used in OAR 660-33-130(4)(d) and YCZO 403.03(E)(4). The county then engaged in a process of elimination, ultimately concluding that only two parcels may foreseeably be approved for nonfarm dwellings and those would not materially affect the stability of the land use pattern of the area.

We understand "similarly situated" in this context to mean "similarly circumstanced" in susceptibility to development of nonfarm dwellings.[8] While size is one factor

[8]Webster's Third New International Dictionary 2129 (1981) defines "situated" as follows:

to consider in determining which parcels are situated similarly to the subject parcel, see Stefan v. Yamhill County, 18 Or LUBA 820, 836-37 (1990), it is not the only factor. The county may not eliminate all lots or parcels 20 acres or larger from its analysis without explaining the basis for its implicit conclusion that nonfarm dwellings will not be built on those lots or parcels. If nonfarm dwellings can be built on lots or parcels 20 acres or larger, the county must consider the cumulative impacts of existing nonfarm dwellings (including the one apparently approved in 1994 on Section 3-3-33, Tax Lot 500-501) and the proposed nonfarm dwelling on these lots or parcels, as well as on lots or parcels smaller than 20 acres.

This subassignment of error is sustained.

D. Step Three - Types of Uses in Area

Petitioner's third subassignment of error is a substantial evidence challenge to findings supporting the ultimate finding or conclusion that only two additional parcels in the identified area are "similarly situated." Petitioner makes separate arguments with respect to first, the county's conclusion that only two parcels in the identified area are eligible for nonfarm dwellings; and second, the county's conclusion that permitting the proposed

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"**1:** having a site, situation, or location **:** LOCATED (a town ~ on a hill) **2:** CIRCUMSTANCED (his family, while not rich, were comfortably ~)."

nonfarm dwelling on the subject parcel and the two eligible parcels will not materially alter the stability of the overall land use pattern of the area.

We addressed above petitioner's contention that the exclusion from the county's analysis of lots greater than 20 acres is inappropriate.[9] Petitioner also contends that the simple fact that, under YCZO 403.03(E)(6), Tax Lot 1600 must be taken out of forest deferral for three years prior to construction of a nonfarm dwelling does not support the conclusion that Tax Lot 1600 should be viewed as ineligible for a nonfarm dwelling. We understand petitioner to argue the stability criterion requires consideration and evidence of ineligibility lasting longer than three years, and therefore, because the county's conclusion that Tax Lot 1600 is ineligible for a nonfarm dwelling is based on consideration of an unacceptably brief period, that conclusion is not supported by substantial evidence.

Substantial evidence is evidence a reasonable person would accept as adequate to support a conclusion. Reeves v. Washington County, 24 Or LUBA 483, 490 (1993). We agree with petitioner that while it is true that Tax Lot 1600 will be ineligible for a nonfarm dwelling for three years, three

[9]Intervenors contend that because petitioner did not question below the adequacy of the evidence supporting the county's findings, petitioner waived these substantial evidence challenges under ORS 197.763(1) and 197.835(3). However, a petitioner is not required to question below the adequacy of evidence accepted into the record to support findings ultimately adopted by the county. Lucier, supra, 26 Or LUBA at 216.

years is too short a period to justify a conclusion that Tax Lot 1600 has no real potential for a nonfarm dwelling.

Next, petitioner argues that the present use of Tax Lot 1700 as a leased, tax-exempt watershed for the City of Dayton does not mean it will not eventually become eligible for a nonfarm dwelling, particularly if the lease should expire. We agree with petitioner that without more information concerning the nature and duration of the lease, the county has an inadequate evidentiary basis for its conclusion that Tax Lot 1700 will remain ineligible for a nonfarm dwelling during a term that is reasonable for purposes of the stability analysis.

Finally, petitioner argues that the county's conclusion that lots presently in vineyards will not be used for nonfarm dwellings because of the large capital investment required to develop vineyards is not supported by substantial evidence in view of the Phylloxera infestation that could wipe out that investment. The only evidence of the Phylloxera infestation is petitioner's own statement that "Blosser's vineyard, which adjoins, pretty much almost adjoins [the subject] property, has one of the most serious infestations of Phylloxera in the Willamette Valley." Petition for Review, Appendix 37. We agree with intervenors that in view of the limited evidence in the record concerning the extent of the Phylloxera infestation, the county's conclusion is not unreasonable.

Because the county's method of selecting "similarly situated" lots or parcels within the area is flawed, no purpose would be served by addressing petitioner's final challenge to the county's conclusion that permitting the proposed nonfarm dwelling will not materially alter the stability of the overall land use pattern of the area.

This subassignment of error is sustained, in part.

The assignment of error is sustained, in part.

The county's decision is remanded.