

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

3  
4       SID FRIEDMAN and                               )  
5       JOHN BLANKENBILLER,                            )  
6    )  
7                        Petitioners,                    )  
8    )  
9               and                                        )  
10    )  
11       CITY OF NEWBERG,                                )  
12    )  
13                        Intervenor-Petitioner,                                )  
14    )                       LUBA No. 91-200  
15               vs.                                        )  
16    )                       FINAL OPINION  
17       YAMHILL COUNTY,                                )                       AND ORDER  
18    )  
19                        Respondent,                    )  
20    )  
21               and                                        )  
22    )  
23       MARK BARTLETT and PATTI BARTLETT,                                )  
24    )  
25                        Intervenors-Respondent.                                )

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27  
28       Appeal from Yamhill County.

29  
30       Mary Kyle McCurdy, Portland, filed a petition for  
31 review and argued on behalf of petitioners.

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33       Terrence D. Mahr, Newberg, filed a petition for review  
34 and argued on behalf of intervenor-petitioner.

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36       John M. Gray, Jr., McMinnville, filed a response brief  
37 and argued on behalf of respondent.

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39       Wallace W. Lien, Salem, filed a response brief and  
40 argued on behalf of intervenors-respondent.

41  
42       HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,  
43 Referee, participated in the decision.

44  
45                       REMANDED                               05/27/92

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision granting a zoning  
4 map amendment for 20 acres of a 29.14 acre parcel.

5 **MOTION TO INTERVENE**

6 The City of Newberg moves to intervene on the side of  
7 petitioners. Mark Bartlett and Patti Bartlett move to  
8 intervene on the side of respondent. There is no opposition  
9 to the motions and they are allowed.

10 **FACTS**

11 The subject property is designated Very Low Density  
12 Residential (VLDR) by the Yamhill County Comprehensive Plan.  
13 Prior to adoption of the disputed decision, the property was  
14 zoned Agriculture/Forestry Small Holding District (AF-10).<sup>1</sup>  
15 Property with the VLDR plan designation may also be zoned  
16 VLDR-1, VLDR-2 1/2 and VLDR-5. These VLDR zoning  
17 designations require minimum lot sizes of 1, 2 1/2 and 5  
18 acres, respectively. The challenged decision amends the  
19 county zoning map to designate 20 acres of intervenor-  
20 respondent's property VLDR-2 1/2.

21 The subject property is located adjacent to the City of  
22 Newberg Urban Growth Boundary (UGB). The property is  
23 located in the North Newberg Exception Area, an area subject  
24 to an acknowledged exception to Statewide Planning Goal 3

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<sup>1</sup>The AF-10 zoning district limits residential density to one dwelling per 10 acres.

1 (Agricultural Lands). Intervenors-respondent plan to  
2 develop the 20 acres rezoned VLDR-2 1/2 as an eight lot  
3 residential subdivision.

4 **PETITIONERS' SECOND AND FOURTH ASSIGNMENTS OF ERROR**

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6 **INTERVENOR PETITIONER'S FOURTH AND SEVENTH ASSIGNMENTS OF**  
7 **ERROR**

8 Among the county requirements that must be met to  
9 approve a quasi-judicial zoning map amendment are the  
10 following requirements of Yamhill County Zoning Ordinance  
11 (YCZO) 1208.02:

12

"\* \* \* \* \*

13

"B. That there is an existing, demonstrable need  
14 for the particular uses allowed by the  
15 requested zone, considering the importance of  
16 such uses to the citizenry or the economy of  
17 the the area, the existing market demand  
18 which such uses will satisfy, and the  
19 availability and location of other lands so  
20 zoned and their suitability for the uses  
21 allowed by the zone.

22

"\* \* \* \* \*

23

"D. That other lands in the County already  
24 designated for the proposed uses are either  
25 unavailable or not as well-suited for the  
26 anticipated uses due to location, size or  
27 other factors.

28

There are a number of problems with the county's  
29 findings addressing these standards and with the evidentiary  
30 support for the county's conclusion that these standards are  
31 met. The first problem is that it is not clear upon what  
32 area the county based its analyses. The findings refer to  
33 both the North Newberg Exception Area and other rural

1 exception areas in the Newberg area. Record 7-8. Although  
2 it is clear that rural exception areas outside the Newberg  
3 area were not considered, it is not clear whether the  
4 county's decision was based solely on the perceived need for  
5 additional VLDR-2 1/2 zoned property within the North  
6 Newberg Exception area or whether the decision is based on a  
7 perceived need for VLDR-2 1/2 zoned property generally in  
8 the entire Newberg area.

9 If the county considers the North Newberg Exception  
10 Area to be the relevant area for purposes of YCZO  
11 1208.02(B), it made no attempt to justify the selection of  
12 such a limited area. Further, the county's decision appears  
13 to justify limiting the analysis required by YCZO 1208.02(B)  
14 by placing importance on the close proximity of the subject  
15 property to the cities of Newberg and Portland. To the  
16 extent proximity to the cities of Newberg and Portland is an  
17 important consideration, the challenged decision does not  
18 explain how limiting the relevant area of consideration  
19 under YCZO 1208.02(B) and 1208.02(D) to the North Newberg  
20 exception area is justified.<sup>2</sup>

21 The second problem concerns the requirement of  
22 YCZO 1208.02(B) that the rezoning be based on need for

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<sup>2</sup>Stated differently, the county offers no basis for assuming an existing need for rural homesites in Yamhill County, offering convenient commuting to both Newberg and Portland, could only be reasonably satisfied in the North Newberg Exception area. While it may be that only the North Newberg Exception Area satisfies such a need, the county's decision does not explain why such is the case.

1 "particular uses." In some respects, the county's decision  
2 appears to be based on a need for rural low density housing  
3 generally. In other respects, the county bases its decision  
4 upon a need for rural housing on 2 1/2 acre lots.<sup>3</sup> Assuming  
5 the county relies on a need for rural housing on 2 1/2 acre  
6 lots, the county makes no attempt to explain in its findings  
7 the basis for its assumption of the existence of such a  
8 particularized need. Although the county's acknowledged  
9 comprehensive plan does recognize a need to provide rural  
10 housing, and the YCZO provides a number of zones where such  
11 housing can be satisfied, it does not necessarily follow  
12 that the plan and YCZO recognize a need for rural housing on  
13 lots of a particular size. Although we do not necessarily  
14 foreclose the possibility of the county demonstrating the  
15 existence of a need for rural housing on 2 1/2 acre lots,  
16 the challenged decision does not show that such a  
17 particularized need exists. Absent such a demonstration,  
18 the county may not assume, as it apparently does in the  
19 challenged decision, that the existing rural housing need  
20 cannot be satisfied on presently vacant VLDR-1 and VLDR-5  
21 zoned property.

22 A third problem, related to the foregoing, is the

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<sup>3</sup>Finding 5 at Record 8 states an assumption that residences on 2 1/2 acre lots are considered a type of use distinct from residences on one or five acre lots. However, much of the testimony offered in support of the existence of a demand for rural housing does not appear to be limited to lots of particular sizes.

1 county's failure to articulate in its findings that it  
2 considered "the importance of [the particular use] to the  
3 citizenry or the economy of the the area." Rather, the  
4 importance of rural housing to the citizenry or economy of  
5 the area is simply assumed.

6 Aside from the problems identified above, the  
7 evidentiary record does not establish the existence of a  
8 need or market demand for VLDR-2 1/2 zoned lands.<sup>4</sup>  
9 Considering all rural exception areas in the Newberg area,  
10 there are 2,029 acres zoned VLDR-2 1/2. If the 486 existing  
11 dwellings on this VLDR-2 1/2 zoned land are not considered,  
12 there remains a potential for 325 additional units on VLDR-2  
13 1/2 zoned land in these exception areas.<sup>5</sup> Within the North  
14 Newberg Exception Area, there are approximately 900 acres,  
15 of which 384 acres are zoned VLDR-2 1/2. If the 95 existing  
16 dwellings on VLDR-2 1/2 zoned land within the North Newberg  
17 Exception Area are not considered, there is a potential for  
18 58 more dwellings in this exception area on VLDR-2 1/2 zoned  
19 land.

20 The county explains in its findings that this existing

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<sup>4</sup>Petitioners argue, relying primarily on cases involving Statewide Planning Goal 2 exception requirements, that the county may not properly equate market demand with need. We agree with intervenors-respondent that the language of YCZO 1208.02(B) establishes the relevant inquiries concerning the existence of a particular need under that code section, and market demand is a relevant inquiry.

<sup>5</sup>If vacant VLDR-1 and VLDR-5 zoned lands in these exception areas are considered, in 1990 there was the potential for 789 new rural housing units.

1 potential for residential development on VLDR-2 1/2 zoned  
2 properties is not "available" to satisfy the need for rural  
3 housing on 2 1/2 acre lots because only a small number of  
4 VLDR-2 1/2 zoned properties are presently for sale. We  
5 reject that explanation. The number of VLDR-2 1/2 zoned  
6 properties on the market for sale at any given point in time  
7 is at best an indirect measure of the need or market demand  
8 for such properties. The number of such properties on the  
9 market is a far better indication of the "supply" of such  
10 properties than the "demand" or "need" for them.<sup>6</sup>

11 Finally, two real estate agents testified, based on  
12 their experience, about the lack rural properties offered  
13 for sale in rural areas around the City of Newberg. The  
14 applicant offered similar testimony concerning his lack of  
15 success in locating rural residential property available for  
16 sale in the Newberg area. Intervenors-respondent suggest  
17 this evidence is sufficient to "clearly support" the  
18 county's decision. See ORS 197.835(9)(b).

19 Under ORS 197.835(9)(b), LUBA may overlook inadequate  
20 findings, where the parties identify evidence "which clearly  
21 supports the decision." Conflicting evidence or evidence  
22 which provides a reasonable basis for different conclusions  
23 may constitute "substantial evidence" adequate to support a

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<sup>6</sup>It may well be that the small number of VLDR-2 1/2 zoned properties on the market is evidence of the absence of a market demand or need for such properties.



1 land use decision. See ORS 197.835(7)(a)(C); Douglas v.  
2 Multnomah County, 18 Or LUBA 607, 617, (1990). However,  
3 this Board has interpreted the "evidence \* \* \* which clearly  
4 supports the decision" standard of ORS 197.835(9)(b) as  
5 establishing a higher evidentiary standard than the  
6 "substantial evidence" standard of ORS 197.835(7)(a)(C).  
7 See Blosser v. Yamhill County, 18 Or LUBA 253, 264 (1989).

8 We reject intervenors-respondent's suggestion that the  
9 general testimony by two real estate agents and the  
10 applicant is sufficient to clearly establish the existence  
11 of a "demonstrable need" or "market demand" for VLDR-2 1/2  
12 zoned property that cannot be met on other suitable lands  
13 already zoned VLDR-2 1/2. As we have already pointed out, a  
14 threshold problem is presented by the county's failures to  
15 explain (1) the nature of the particular need to be served  
16 by the rezoning, and (2) the bases for selecting an area  
17 available to satisfy that particular need. In view of those  
18 failures and the undisputed existence of a significant  
19 amount of vacant VLDR-2 1/2 zoned land in the North Newberg  
20 Exception Area, and an even larger amount of vacant VLDR-1,  
21 VLDR-2 1/2 and VLDR 5 zoned land in exception areas located  
22 near the city of Newberg, we cannot agree the cited  
23 testimony is substantial evidence in support of a  
24 determination that the proposal complies with YCZO  
25 1208.02(B) and 1208.02(D), much less evidence which "clearly  
26 supports" such a determination.

1           Petitioners' second and fourth and intervenor-  
2 petitioner's fourth and seventh assignments of error are  
3 sustained, in part.<sup>7</sup>

4           The county's decision is remanded.

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<sup>7</sup>Petitioners and intervenor-petitioner make a variety of other arguments under these assignments of error and under their remaining assignments of error. ORS 197.835(9)(a) requires that we decide all issues when reversing or remanding a decision, to the extent we can do so consistent with the deadline established for issuing our final opinion and order. Resolution of the remaining issues raised by petitioners and intervenor-petitioner would require further extensions of the statutory deadline for issuing our final opinion and order. We therefore do not consider these remaining arguments.