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

BETTY WODARCZAK, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
YAMHILL COUNTY, )  
 )  
Respondent, )  
 )  
and )  
 )  
LAURA JONHSON, )  
 )  
Intervenor-Respondent. )

LUBA No. 97-236  
FINAL OPINION  
AND ORDER

Appeal from Yamhill County.

Gary P. Shepherd, Portland, filed the petition for review.

No appearance by county.

No appearance by Laura Johnson.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 05/19/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's decision amending the  
4 comprehensive plan and zoning map designation of a three-acre  
5 portion of a tract from Exclusive Farm Use/20 acre minimum  
6 (EF-20) to Very Low Density Residential/2.5 acre minimum  
7 (VLDR-2.5), approving a conditional use permit for an  
8 extraterritorial water connection, and approving an exception  
9 to Statewide Planning Goal 3.

10 **MOTION TO INTERVENE**

11 Laura Johnson (intervenor), the owner of the subject  
12 property, moves to intervene on the side of the respondent.  
13 There is no opposition to the motion, and it is allowed.

14 **FACTS**

15 The subject property is a 3-acre tract zoned EF-20,  
16 consisting of five lots, all on special assessment for farm  
17 use. The subject property is part of a 14-acre tract owned by  
18 intervenor, composed of similar adjacent lots also zoned EF-  
19 20. Soils on the subject property are predominately Class III  
20 and Class IV high-value farmland soils. The subject property  
21 is currently in pasture and grass, and was used for grazing  
22 sheep until intervenor bought the 14-acre tract in 1991. A  
23 creek runs through the northern portion of the subject  
24 property.

25 The area surrounding and including the subject property  
26 was platted as a subdivision in 1909, resulting in

1 approximately 85 lots of various sizes in the immediate area.  
2 The subject property is surrounded on three sides, to the  
3 north, east, south, and southwest, by lands zoned and used for  
4 agricultural or forestry purposes.

5 The area to the west and northwest of the subject  
6 property is comprised of 66 lots zoned VLDR-2.5, forming the  
7 unincorporated Cove Orchard Community. The part of the Cove  
8 Orchard Community immediately adjacent to the subject property  
9 is a Goal 3 "physically developed" and "irrevocably committed"  
10 exception area approved in 1995. The county's 1995 Goal 3  
11 exception did not include the subject property because of its  
12 lack of development and large tract size in a single  
13 ownership. Several dozen of the lots in the Cove Orchard  
14 Community are developed with homes, but enough vacant lots  
15 exist to aggregate approximately 20 buildable tracts.

16 Both the subject property and the Cove Orchard Community  
17 are within the boundaries of the Cove Orchard Water  
18 Association (association), but the association has no new  
19 water hook-ups available. The LA Water Cooperative  
20 (cooperative) has a water line along Cove Orchard Road, which  
21 borders the subject property to the southeast.

22 On August 1, 1997, intervenor filed an application with  
23 the county for a zone change, comprehensive plan amendment and  
24 exception to Goal 3, and a conditional use permit for an  
25 extraterritorial water hookup to the cooperative's water line.  
26 The staff report recommended denial and the planning

1 commission denied the application. Intervenor appealed to the  
2 county board of commissioners (commissioners), who reversed  
3 the planning commission's denial, thus approving the  
4 application.

5 This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioner challenges the findings and evidence  
8 supporting the Goal 3 exception approved by the commissioners,  
9 who found that the subject property is "irrevocably committed"  
10 to nonresource uses.

11 An "irrevocably committed" exception requires a  
12 determination that uses allowed by the applicable goal, Goal  
13 3, are impracticable on the subject property because of  
14 existing adjacent uses. OAR 660-04-028(1).<sup>1</sup> Pursuant to OAR  
15 660-04-028(2), whether land is irrevocably committed

16 "depends on the relationship between the exception  
17 area and the lands adjacent to it. The findings for  
18 a committed exception therefore must address the  
19 following:

20 "(a) The characteristics of the exception area;

21 "(b) The characteristics of the adjacent lands;

22 "(c) The relationship between the exception area and  
23 the lands adjacent to it; and

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<sup>1</sup> 660-04-028(1) provides:

"A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable."

1           "(d) The other relevant factors set forth in OAR  
2           660-04-028(6)."

3           A Goal 3 exception does not require that the county  
4 demonstrate that every use allowed by the applicable goal is  
5 impossible, but the county must demonstrate that farm uses as  
6 defined in ORS 215.203 are impracticable.<sup>2</sup> A determination  
7 that land is irrevocably committed to uses not allowed by Goal  
8 3 must be accompanied by findings of fact and a statement of  
9 reasons explaining why the facts support the conclusion that  
10 farm uses are impracticable in the exception area. OAR 660-  
11 04-028(4).

12           The challenged decision concludes that "[a]n exception to  
13 Goal 3 is justified because the [subject property] is  
14 unsuitable for farming, and the adjacent small residential  
15 lots, roads, water and sewer contribute to the area being  
16 irrevocably committed to residential use." Record 15. That

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<sup>2</sup>ORS 215.203(2)(a) provides:

"'Farm use' means 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 and storage of the products raised on such land for human use and animal use and disposal by marketing or otherwise. '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 species. It does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267(1)(e) or 321.415(5)."

1 conclusion is based on the following findings:

2 "The [commissioners] find that there are a  
3 substantial number of small parcels in separate  
4 ownerships which are developed or clustered around a  
5 road designed to serve these parcels. The  
6 [commissioners] find that this, coupled with the  
7 physical improvements in the area including Cove  
8 Orchard Road, the abandoned Southern Pacific Rail  
9 line, and sewer and water lines along the road, make  
10 the nearby subject site unsuitable for resource use.  
11 Given that there are 88 lots in the immediate area  
12 (66 lots in the adjacent VLDR-2.5 zone to the  
13 southwest, 19 lots in the AF-10 zone to the  
14 southeast) with 41 lots already developed, taken  
15 together with the physical improvements such as  
16 roads and sewer and water service adjacent to the  
17 site, the [commissioners] find that the subject site  
18 is part of a larger area which is irrevocably  
19 committed to nonresource use.

20 "The OAR allows consideration of other factors which  
21 may make farm use on the lots impracticable. The  
22 application states that there are limitations to  
23 farm use because of the creek and associated high  
24 water table in the floodplain. Erosion problems are  
25 also cited by the applicant, although the Soil  
26 Survey indicates the slopes are only 3-12% and  
27 'erosion is a slight to moderate hazard in  
28 unprotected areas during rainy periods.' The Soil  
29 Survey also states that 'tilth is moderately good,  
30 but cultivation is restricted by seepage during  
31 winter and early spring.' The [commissioners] find  
32 that these limitations make farming impracticable,  
33 and that the characteristics of the area make the  
34 lots irrevocably committed to residential use."  
35 Record 11.

36 Petitioner argues on several grounds that the county's  
37 findings and statements of reasons supporting the exception  
38 are inadequate and not supported by substantial evidence.

39 **A. Characteristics of the Subject Property**

40 The decision relies on two characteristics of the subject  
41 property for its conclusion that farming is impracticable: the  
42 high water table in winter months and potential erosion during

1 rainy periods on the slight to moderate 3-12% slopes.  
2 Petitioner contends that neither factor demonstrates that  
3 farming is impracticable on the subject property.

4 Petitioner notes that the subject property is currently  
5 specially assessed for farm use, possesses soils that classify  
6 it as high-value farmland, was used to graze sheep for decades  
7 until 1991, and, further, is bordered by parcels in the  
8 creek's floodplain that are presently in resource use.  
9 Petitioner argues that the decision fails to explain why the  
10 high water table during winter and spring is an impediment to  
11 agriculture or grazing, or, even assuming it is, why a high  
12 water table during winter and early spring would affect the  
13 capability of the subject property for farm uses during summer  
14 and fall, when most agricultural activities occur in Oregon.  
15 With respect to the decision's reference to erosion,  
16 petitioner contends that the county fails to explain why  
17 erosion or the presence of slight to moderate slopes on the  
18 subject property would make farm use impractical. Finally,  
19 petitioner notes that the county specifically found that the  
20 subject property is similar in character to the farm and  
21 forest lands to the north, east, south and southwest that are  
22 zoned and used for resource purposes, and that the subject  
23 property is not similar in character to the adjacent rural  
24 residential lots in the Cove Orchard Community.

25 For the reasons petitioner cites, and particularly in  
26 light of the historical and recent use of the subject property

1 for grazing, we agree that the county's findings regarding the  
2 characteristics of the subject property and their affect on  
3 the practicality of farm uses on the subject property are  
4 inadequate. The county fails to explain why either of the two  
5 cited characteristics would make grazing, or any farm use,  
6 impracticable.

7 **B. Adjacent Development**

8 The decision relies on several characteristics of the  
9 adjacent developed area to justify the conclusion that farm  
10 uses on the subject property are impracticable. The decision  
11 finds that the number of small, developed parcels in the Cove  
12 Orchard Community to the west of the subject property,  
13 physical improvements including an abandoned rail line and a  
14 county road, and the presence of sewer and water lines along  
15 the county road, all combine to make the subject property  
16 unsuitable for resource use because the subject property is  
17 "part of a larger area which is irrevocably committed to  
18 nonresource use." Record 11.

19 Petitioner argues that the county's findings regarding  
20 the relationship between adjacent development and the subject  
21 property misconstrues the factors set out at OAR 660-04-  
22 028(6), are inadequate, and are not supported by substantial  
23 evidence in the record.

24 OAR 660-04-028(6) sets out a list of factors to be  
25 considered when determining whether land is irrevocably



1 committed to uses not allowed by the relevant Goal.<sup>3</sup>  
2 Petitioner contends, first, that the county misapplies the  
3 factors set out in OAR 660-04-028(6)(c) in its consideration  
4 of the small developed parcels adjacent to the subject  
5 property in the Cove Orchard Community.

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<sup>3</sup>OAR 660-04-028(6) states, in relevant part:

"Findings of fact for a committed exception shall address the following factors:

- "(a) Existing adjacent uses;
- "(b) Existing public facilities and services (water and sewer lines, etc.);
- "(c) Parcel size and ownership patterns of the exception area and adjacent lands:
  - "(A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the Goals were made at the time of partitioning or subdivision. Past land divisions made without application of the Goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors make unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. \* \* \*;
  - "(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations."

1           Petitioner states, correctly, that the mere existence of  
2 adjacent small parcels in separate ownership or the  
3 parcelization of the subject property do not in themselves  
4 justify a conclusion that the property is irrevocably  
5 committed to uses not allowed by Goal 3. OAR 660-04-  
6 028(6)(c)(A) and (B). Petitioner contends, and we agree, that  
7 the decision fails to explain why the relationship between the  
8 small developed parcels within the Cove Orchard Community and  
9 the subject property renders farm uses impracticable on the  
10 property. The county makes no findings of any conflicts  
11 between adjacent residential uses and farm uses on the subject  
12 property or otherwise provides any explanation why residential  
13 uses in the Cove Orchard Community render farm uses on the  
14 subject property impracticable.<sup>4</sup>

15           Petitioner argues next that the county fails to explain  
16 why the presence of physical improvements in the area commits  
17 the subject property to nonfarm uses. The physical  
18 improvements consist of a county road adjacent to the subject  
19 property, and water and sewer lines buried within the road's  
20 right-of-way. We agree with petitioner that the county has  
21 not provided any explanation why the presence of those

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<sup>4</sup>Even if the county had made findings with respect to conflicts, those conflicts would almost certainly stem from rural residential development in the exception area directly adjacent to the subject property. Conflicts from residential development in exception areas created pursuant to the applicable goals cannot be used to justify a committed exception on resource lands. DLCD v. Yamhill County, 31 Or LUBA 488, 500 (1996).

1 physical improvements on land adjacent to the subject property  
2 renders the property unsuitable for farm uses.<sup>5</sup>

3 **C. OAR 660-04-018(2)**

4 Finally, petitioner challenges the county's failure to  
5 limit future uses on the subject property to avoid committing  
6 adjacent or nearby resource lands to nonresource use, as  
7 required by OAR 660-04-018(2)(b)(B).<sup>6</sup> Petitioner notes that  
8 much of the surrounding resource land, including the remainder  
9 of the 14-acre tract under intervenor's ownership, consists of  
10 small lots and parcels that are very similar to the subject  
11 property. Petitioner contends that the county may attempt to  
12 use the Goal 3 exception and approval of VLDR-2.5 zoning on  
13 the subject property to justify similar exceptions on adjacent  
14 resource lands, much as the county used the adjacent exception

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<sup>5</sup>Those improvements may make the subject property suitable for rural residential development, but that is not the inquiry that OAR 660-04-028 demands.

<sup>6</sup> OAR 660-04-018(2) states:

"'Physically Developed' and 'Irrevocably Committed' Exceptions to goals other than Goals 11 and 14. Plan and zone designations shall limit uses to:

"(a) Uses which are the same as the existing types of land use on the exception site; or

"(b) Rural uses which meet the following requirements:

"(A) The rural uses are consistent with all other applicable Goal requirements; and

"(B) The rural uses will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-04-028; and

"(C) The rural uses are compatible with adjacent or nearby resource uses."

1 area within the Cove Orchard Community to justify an exception  
2 on the subject property.

3 We agree with petitioner that the county failed to comply  
4 with OAR 660-04-018(2) by not limiting uses on the subject  
5 property to ensure that the Goal 3 exception thereon would not  
6 tend to commit adjacent and nearby resource lands to  
7 nonresource uses. The decision provides no limits to  
8 permitted uses on the subject property under the VLDR-2.5  
9 zoning, or otherwise ensures that uses permitted on the  
10 property are compatible with uses on adjacent or nearby  
11 resource land.

12 For the foregoing reasons, we conclude that the county's  
13 decision approving a Goal 3 exception on the subject property  
14 misconstrues the applicable law and is based on inadequate  
15 findings. Because the county's findings are inadequate, we do  
16 not discuss petitioner's evidentiary challenge. DLCD v.  
17 Yamhill County, 31 Or LUBA at 502.

18 The first assignment of error is sustained.

19 **SECOND ASSIGNMENT OF ERROR**

20 Petitioner challenges the county's findings of compliance  
21 with the provisions of Yamhill County Zoning Ordinance (YCZO)  
22 1208.02(B) and (D), which respectively require that an  
23 applicant for a proposed zone change demonstrate that a need  
24 and market demand for uses allowed by the requested zone  
25 exists in the area, and that other lands in the county already

1 zoned for the proposed use are unavailable or not as well  
2 suited for those uses.<sup>7</sup>

3 With respect to YCZO 1208.02(B), the challenged decision  
4 finds:

5 "Analysis of address maps shows \* \* \* approximately  
6 20 vacant residential lots in the area. The  
7 proposed zone change would add five additional lots  
8 (lots 213, 214, 215, 216, and 217) because the lots  
9 created by the old subdivision are recognized and  
10 now will become developable even if they are smaller  
11 than the VLDR-2.5 minimum lot size. The  
12 [commissioners] find that there is a demonstrable  
13 need for these five additional residential lots.

14 "Testimony was received by the applicant that there  
15 is a market demand for residential lots in the Cove  
16 Orchard area, although the lack of water has likely  
17 hampered the marketability of vacant lots." Record  
18 8-9.

19 With respect to YCZO 1202.08(D), the decision finds:

20 "The [commissioners] find that other lands in the  
21 county already designated for the proposed uses are  
22 either unavailable or not as well-suited for the  
23 anticipated uses due to location, size, or other  
24 factors \* \* \*."

25 "\* \* \* [T]here are approximately 20 vacant  
26 residential parcels in Cove Orchard. It is likely  
27 that the inability to get water has limited the

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<sup>7</sup>YCZO 1208.02 provides in relevant part:

"(B) There is an existing demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone.

"\* \* \* \* \*

"(D) Other lands in the county already designated for the proposed uses are either unavailable or not as well-suited for the anticipated uses due to location, size, or other factors."

1 marketability of lots in the area. In this respect,  
2 the subject property is more suited than many of the  
3 lots because it is adjacent to Cove Orchard Road,  
4 where there is an LA Water Co-op line. [Parts of  
5 the subject property] are within the 100 year  
6 floodplain. While development is not prohibited in  
7 the floodplain, it makes the [subject property] less  
8 suitable for residential use than many of the other  
9 VLDR lots in the area." Record 10.

10 Petitioner contends that the decision's findings with  
11 respect to YCZO 1208.02(B) and (D) misconstrue those  
12 provisions and are not supported by substantial evidence,  
13 particularly given that 20 vacant lots already zoned and  
14 suitable for rural residential use exist within the Cove  
15 Orchard Community.

16 The apparent basis for both findings is the county's  
17 determination that lack of water has limited the marketability  
18 of the 20 vacant lots, exacerbating a demand for residential  
19 lots and limiting the suitability of those lots to meet the  
20 demand.<sup>8</sup> Petitioner contends these findings are based solely  
21 on the statements of intervenor's real estate agent, which are  
22 self-serving and thus not deserving of weight. In any case,  
23 petitioner argues, there is substantial evidence in the record

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<sup>8</sup>At one point in her brief, petitioner asserts that "market demand" cannot constitute a public need justifying redesignation of resource lands to nonresource lands, citing to cases interpreting a similar "need" criterion in administrative rules governing reasons exceptions to statewide planning goals. See 1000 Friends of Oregon v. Marion County, 18 Or LUBA 408, 411-12 (1989). The present case, however, does not involve a reasons exception, but rather the application of local provisions that specifically require consideration of "market demand" in rezoning property. YCZO 1208.02(B). As such, neither cases like 1000 Friends of Oregon nor administrative rules governing exceptions are controlling as to the meaning of terms in YCZO 1208.02(B). But see YCZO 1208.02(E) (requiring that rezonings under YCZO 1208.02 be consistent with the current Oregon Administrative Rules for exceptions).

1 that the 20 vacant lots are "available" within the meaning of  
2 YCZO 1208.02(B) and (D) and better suited for rural  
3 residential development than the subject property.

4 The record shows that intervenor's real estate agent  
5 conducted a study that listed all properties for sale in the  
6 area including the Cove Orchard Community that are greater  
7 than half an acre and priced less than \$100,000. The real  
8 estate agent testified that the 20 vacant lots in the Cove  
9 Orchard Community

10 "cannot be considered available for building unless  
11 they are for sale to those people who want to build.  
12 Utilities must also be available for these 20  
13 parcels. Given the sewer and water dilemma in the  
14 Cove Orchard area, I doubt utilities are available.  
15 [Intervenor's] parcels have sewer available and a  
16 commitment from LA Water Co-op to provide water with  
17 Yamhill County's approval.

18 "I did a search of the entire Yamhill city (mailing)  
19 area which includes Cove Orchard and came up with 3  
20 properties under \$100,000 (see attached list).

21	"1. 3.5 acres	non-buildable	\$35,000
22	"2. 2.45 acres	subject property	\$57,500
23	"3. 4.97 acres	AF-40	\$65,000

24 "It does not appear that there are a lot of  
25 properties in this area available.

26 "The planning department granted an extraterritorial  
27 water hookup for two tax lots [that were put] on the  
28 market immediately after approval, for \$69,500. It  
29 sold in just 24 days. I would say that demonstrates  
30 demand. Please note the letters from realtors that  
31 have worked in the area. As a Realtor myself, I'm  
32 more than aware of the desperate need for affordable  
33 housing in this area." Record 26.

34 Petitioner disputes, first, the interpretation implied in  
35 the real estate agent's testimony, which the county appears to  
36 have accepted, that property is "available" for purposes of

1 YCZO 1208.02(B) and (D) only when it is actively listed for  
2 sale. Petitioner argues that property should be "available"  
3 for a use within the meaning of YCZO 1208.02(B) and (D) when  
4 it is zoned for that use and undeveloped, regardless of  
5 whether the property is for sale or whether external  
6 constraints exist that limit development for that use.

7 The commissioners did not explicitly interpret the term  
8 "available" as used in YCZO 1208.02(B) and (D). We cannot  
9 tell from the commissioners' discussion of those provisions  
10 whether they construe "available" to mean property actively  
11 listed for sale, property without external development  
12 constraints, property with access to water, or some other  
13 construction. Pursuant to ORS 197.829(2), where the local  
14 government fails to provide an interpretation of a local  
15 provision, or its interpretation is inadequate for review, we  
16 may make our own determination whether the decision is  
17 correct.<sup>9</sup> However, we may decline to interpret the local  
18 provision in the first instance where the purpose of the  
19 provision is unclear and subject to numerous interpretations.  
20 Thomas v. Wasco County, 30 Or LUBA 302, 313 (1996). Declining  
21 to exercise our discretion under ORS 197.829(2) is  
22 particularly appropriate in the present case, where neither

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<sup>9</sup>ORS 197.829(2) states:

"If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."



1 the local government nor intervenor has filed response briefs.  
2 Accordingly, we conclude that remand is necessary for the  
3 county to clarify its understanding of YCZO 1208.02(B) and  
4 (D).

5 Because the city must interpret and reapply the terms of  
6 YCZO 1208.02(B) and (D) on remand, which will result in new  
7 findings, we need not address petitioner's substantial  
8 evidence challenges to the county's findings under those  
9 provisions.

10 The second assignment of error is sustained.

11 The county's decision is remanded.