BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| NENA LOVINGER, ROBERT EMMONS and KEITH STANLEY, | ) | |
| Petitioners, | ) | |
| vs. | ) | |
| | ) | LUBA No. 98-085 |
| LANE COUNTY, | ) | |
| | ) | FINAL OPINION |
| Respondent, | ) | AND ORDER |
| and | ) | |
| JAMES and BETTY WIEMERS, | ) | |
| Intervenors-Respondent. | ) | |

Appeal from Lane County.

Tracy Pool Reeve, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Reeve and Reeve, PC.

No appearance by Lane County.

Allen L. Johnson, Eugene, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Johnson, Kloos & Sherton.

HOLSTUN, Board Chair.

REMANDED 03/09/99

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

Opinion by Holstun.

**NATURE OF THE DECISION**

Petitioners appeal the county's adoption of an ordinance amending the plan and zoning designations and approving an exception to Goals 3 with respect to a 19.84-acre parcel zoned for exclusive farm use use.

**MOTION TO INTERVENE**

Intervenors-respondent James and Betty Wiemers (intervenors), the applicants below, move to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property is a 19.84-acre parcel designated agricultural and zoned Exclusive Farm Use 40-acre minimum (E-40), improved with two single-family dwellings, a barn, and several outbuildings. The property was first zoned Farm Forestry 20-acre minimum (FF-20) in 1976, rezoned to Impacted Forest Land (F-2) in 1984, and finally rezoned to E-40 in 1989 to reflect intervenors' farm use of the site. The soils on the property are predominantly prime agricultural soils, class I and II. The property possesses water rights to the adjacent Fall Creek, a large stream that borders the property to the north. Adjoining the subject property to the east is a large parcel zoned Rural Residential 10-acre minimum (RR-10) developed with a dwelling. Adjoining the subject property to the west across Church Road are several small parcels zoned for rural residential uses and improved with dwellings and a church. Adjoining the subject property to the south across Place Road are several large parcels zoned for forest resource (F-2) uses. To the southeast across Place Road are several large parcels zoned RR-10 and developed with rural residences. On a larger scale, the general area of the subject property is characterized by a narrow strip of rural residential uses running east-west along the valley floor of Fall Creek, with forest resource uses on the uplands north and south of the creek. The closest property zoned for agricultural

use is over a mile away, although a number of adjacent and nearby properties support small-scale agricultural or resource uses.

Intervenors bought the property in 1962 when it was part of a 132-acre farm, on which they conducted farming and grazing activities on a large scale. Intervenors sold most of the 132-acre farm in the 1970s, retaining only the subject property and a contiguous 1.94-acre parcel that is zoned and developed for rural residential use. During most of the 1980s, intervenors continued to conduct large-scale farming and grazing activities on the subject property in conjunction with nearby leased lands. In 1988, intervenors ceased farming and grazing activities on leased lands, but have continued to and currently raise sheep on the subject property, and continued to benefit from farm tax deferral of the property. In 1992, 1993, and 1994, intervenors reported gross earnings of $6,163, $7,219 and $9,142 per year, respectively, from their sheep operation on the subject property.

In December 1996, intervenors applied for a plan amendment, zone change and exception to Goals 3 and 4, seeking to rezone the subject property to Rural Residential 5-acre minimum (RR-5). County staff recommended denial of the application on the grounds that the subject property consists of prime farmland and that even small farms of around 20 acres or less in size can profitably produce a range of crops and agricultural products. The county planning commission held an evidentiary hearing, and recommended denial of intervenors' application for the reasons stated in the staff report. In December 1997, the county board of commissioners conducted a further evidentiary hearing, and on April 22, 1998, approved intervenors' application for a plan and zone change and adopted an irrevocably committed exception to Goals 3 and 4.

This appeal followed.

**FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR**

Petitioners argue that the county misconstrued the criteria for committed exceptions at OAR 660-004-0028, and made inadequate findings not supported by substantial evidence in concluding that farm uses are impracticable on the subject property.

We briefly describe the framework for irrevocably committed exceptions set forth in OAR 660-004-0028. OAR 660-004-0028(1) allows a local government to adopt an exception to a statewide planning 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[.]"

OAR 660-004-0028(2) requires that a committed exception determination must address certain factors, particularly the characteristics of the exception area, i.e. the subject property, characteristics of the adjacent lands, and the relationship between the exception area and adjacent lands.[1] OAR 660-004-0028(3) requires that for an exception to Goal 3 (Agricultural Lands), the local government must demonstrate that "farm uses" as defined in ORS 215.203 are impracticable in the exception area. OAR 660-004-0028(4) requires that a committed exception must be supported by findings of fact addressing all applicable factors

[1]OAR 660-004-0028(2) provides:

> "Whether land is irrevocably committed depends on the relationship between the exception area [i.e. the subject property] and the lands adjacent to it. The findings for a committed exception therefore must address the following:
>
> "(a) The characteristics of the exception area;
>
> "(b) The characteristics of the adjacent lands;
>
> "(c) The relationship between the exception area and the lands adjacent to it; and
>
> "(d) The other relevant factors set forth in OAR 660-04-028(6)."

of OAR 660-004-0028(6) and explain why those facts support the conclusion that the uses allowed by the applicable goal are impracticable in the exception area.[2]

In 1000 Friends of Oregon v. Columbia County, 27 Or LUBA 474, 476 (1994), this Board described our approach to reviewing decisions adopting committed exceptions under OAR 660-004-0028:

> "[We first] resolve any contentions that the findings fail to address issues relevant under OAR 660-004-0028 or address issues not properly considered under OAR 660-004-0028. We next consider any arguments that particular

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[2]OAR 660-004-0028(6) provides, in relevant part:

> "Findings of fact for a committed exception shall address the following factors:
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> "(a) Existing adjacent uses;
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> "(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. Resource and nonresource parcels created pursuant to the applicable goals shall not be used to justify a committed exception. * * * ;
>
> "(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. * * * ;
>
> "(d) Neighborhood and regional characteristics;
>
> "(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. * * *;
>
> "(f) Physical development according to OAR 660-04-025; and
>
> "(g) Other relevant factors."

> findings are not supported by substantial evidence in the record. Finally, we determine whether the findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standards of ORS 197.732(1)(b) that 'uses allowed by the goal [are] impracticable.'" (Footnote omitted).

Petitioners organize the first, second and third assignments of error, with accompanying subassignments of error, according to the tripartite approach described in Columbia County. For example, the first assignment of error generally challenges the county's findings with respect to the various factors considered under OAR 660-004-0028. The second assignment challenges the evidentiary basis for those findings. And the third assignment of error challenges the county's ultimate conclusion that farm uses are impracticable on the property, arguing in particular that the county misconstrued the applicable standard. Petitioners state after each assignment and subassignment of error that, for the reasons stated therein, the county's decision should be reversed or remanded. However, the ultimate issue is whether "findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standard of ORS 197.732(1)(b) that 'uses allowed by the goal [are] impracticable.'" Columbia County, 27 Or LUBA at 476. Accordingly, to a certain extent we combine our discussion of petitioners' assignments of error, and focus our consideration on the inquiries prescribed in the analytical framework set forth in Columbia County.

We first address petitioners' challenges to the county's findings and, in so doing, their arguments that some of those findings are not supported by substantial evidence. Petitioners argue that those findings (1) inadequately address the characteristics of the exception area; (2) inadequately address the relationship between the exception area and lands adjacent to it, or explain why that relationship shows that farm use of the subject property is impracticable; (3) improperly consider adjacent exception areas created under the statewide planning goals; (4) fail to consider contiguous ownership of land in determining that farm uses are impracticable; and (5) fail to consider or conclude that all farm uses, particularly

noncommercial or nontraditional farm uses, are impracticable on the subject property. Finally, we consider petitioners' arguments that the findings that are relevant and supported by substantial evidence are insufficient to demonstrate that uses allowed by Goal 3 are impracticable.

**A. Characteristics of the Exception Area (OAR 660-004-0028(2)(a))**

Petitioners argue that the county failed to make adequate findings regarding the characteristics of the proposed exception area, but instead focused its findings solely on the characteristics of adjacent lands, contrary to the requirements of OAR 660-004-0028(2)(a). Petitioners further suggest the county must identify characteristics of the exception area that make farm use in the exception area impracticable and that the county has failed to do so, citing Wodarczak v. Yamhill County, ___ Or LUBA ___ (LUBA No. 97-236, May 19, 1998) slip op 7-8.

Intervenors respond, and we agree, that the county's findings regarding the characteristics of the subject property, the exception area, suffice to satisfy OAR 660-004-0028(2)(a). The county's findings describe the size, current use, soils, improvements, and topography of the exception area, and further note that only 14 acres of the subject property is suitable for farm uses because the remainder consists of physically developed areas, riparian vegetation, wet and rocky areas, and a swale that crosses the property. Petitioners do not identify what other relevant characteristics of the subject property the county failed to address.

Further, we disagree with petitioners' suggestion that OAR 660-004-0028 requires the county to find that characteristics of the subject property are sufficient in and of themselves to commit the property to nonresource uses. Our decision in Wodarczak does not assist petitioners. In Wodarczak, the county made conclusory findings that certain characteristics of the subject property made farming impracticable. We held that the county's findings were inadequate because they failed to explain why those characteristics rendered farm uses on the

property impracticable, particularly in light of recent and historical use of the property for grazing, a farm use. Slip op 7-8. Wodarczak does not hold that OAR 660-004-0028 requires the county to find that the exception area's characteristics alone render the area impracticable for farm uses. See DLCD v. Curry County, 151 Or App 7, 11-12, 947 P2d 1123 (1997) (OAR 660-004-0028 requires consideration of all the factors enumerated in that rule, including the characteristics of the exception area and adjacent lands).

**B. Characteristics of and Relationship with Adjacent Lands (OAR 660-004-0028(2)(b) and (c))**

OAR 660-004-0028(2)(b) and (c) require the county to address the characteristics of adjacent lands and the relationship between the exception area and the lands adjacent to it, and explain why that relationship makes uses allowed by the applicable goal, here Goal 3, impracticable in the exception area.

With respect to the characteristics of adjacent lands, the challenged decision finds that adjacent lands are primarily zoned and/or used for rural residential purposes, including "grazing small numbers of livestock, raising berries, gardens and woodlots on a 'hobby' or noncommercial sideline basis. The [county] finds these uses are 'rural' and are similar to the use of the Subject Property." Record 21. Regarding the relationship and any conflicts or impacts between adjacent lands and the subject property, the county finds:

> "In the February 18, 1997 Planning Commission public hearing minutes the planning staff stated surrounding development had no current impact on the site, except for dogs entering the property. The Subject Property is presently used for raising sheep. Dogs can and do kill sheep. The issue of dogs and livestock is a significant impact in any rural area, where it is normal to kill dogs that are caught harassing livestock. If the property had been used for other, more intensive agricultural activities, it is probable that other impacts with surrounding development such as dust, chemical use, and noise would have taken place. Such probable impacts have had the current effect of [deterring] the current owners, as proved experienced farmers, from initiating such more intensive activities." Record 14.

Further, in supplemental findings the county noted a "history of increasing conflicts between the residual sheep operation and increasing traffic, harassment of sheep by neighborhood

dogs, noise complaints, and other incidents of nearby rural residential development." Record 50.[3]

Petitioners argue that these findings do not satisfy OAR 660-004-0028(2) and are not supported by substantial evidence because there are no specific findings regarding conflicts other than dogs harassing sheep and there is no evidence in the record that would support such findings. Petitioners contend that even if dogs have entered the property, there is no evidence that those dogs have killed sheep or harassed them to the extent of making raising sheep on the subject property impracticable. Petitioners note that because the subject property has historically been used for raising sheep and is currently being used for that purpose any problem with dogs has obviously not made it impracticable to raise sheep. Finally, petitioners contend that the county's rationale regarding potential conflicts arising from more intensive uses is pure speculation and not based on any evidence in the record.

Intervenors respond that the county's findings adequately examine the relationship between the exception area and adjacent property and that the county's findings with respect to conflicts or impacts arising from that relationship are supported by substantial evidence. Intervenors cite to evidence in the record that "many loose dogs in the area had killed [intervenors'] lambs and ewes." Record 123 (testimony of intervenor Betty Wiemers).

The gist of petitioners' argument is directed not at whether the county made the requisite findings and explanation, but whether the adopted findings and explanation satisfy the ultimate inquiry under OAR 660-004-0028, whether uses allowed by Goal 3 are impracticable on the subject property. We address that ultimate inquiry below. For present purposes, we confine our analysis to whether petitioners have demonstrated that the county's findings fail to address relevant factors under OAR 660-004-0028 or address factors not

[3]Petitioners focus on the findings regarding harassment by dogs, and do not challenge the findings regarding "noise complaints" and "increased traffic." However, it is not clear whether the "noises" referred to are sounds generated by the sheep herd or other noises. Similarly, it is not clear what possible impact "increased traffic" has on the sheep operation or vice versa.

properly considered under OAR 660-004-0028, and whether required findings are supported by substantial evidence in the record. Columbia County, 27 Or LUBA at 476. We agree with intervenors that the county addressed the relationship between the exception area and adjacent lands, and that the county's findings, at least with respect to dogs entering the property and killing sheep, are supported by substantial evidence. We also agree that the county adopted an explanation of why the county believes the relationship between the exception area and adjacent lands make farm use of the subject property impracticable. As stated, we address below whether the findings and explanation concerning those factors, combined with the county's other findings under OAR 660-004-0028, demonstrate that farm uses on the subject property are impracticable.

However, we do agree with petitioners' final point that the county's findings regarding potential conflicts from more intensive farm uses are speculative and not based on any evidence in the record. Intervenors do not direct us to any evidence substantiating the county's speculations regarding more intensive farm uses. Accordingly, we will not consider those findings in determining whether the county's ultimate findings and reasons demonstrate that the standards of ORS 197.732(1) have been met.

**C. Adjacent Exception Areas Created Pursuant to Statewide Goals**

Petitioners argue that the county erred in considering potential conflicts between three existing exception areas, 537-1, 543-1 and 544-1, adjacent to the subject property that were created pursuant to the statewide planning goals. Petitioners explain that "conflicts with rural residential development in exception areas created pursuant to applicable goals cannot be used to justify a committed exception on the subject property." DLCD v. Yamhill County, 31 Or LUBA 488, 500 (1996); see OAR 660-004-0028(6)(c)(A) ("Resource and nonresource parcels created pursuant to the applicable goals shall not be used to justify a committed exception"). Alternatively, petitioners argue that the county's findings do not adequately establish how or when the adjoining exception areas were created and that,

without such findings, the county's reliance on adjacent nonresource parcels as justifying the exception is impermissible. Johnson v. Lane County, 31 Or LUBA 454, 462 (1996).

The three exception areas at issue form, together, an area approximately two miles long and one-quarter mile wide, with the subject property being roughly in the middle of that area. The three exception areas contain 86 parcels, all of which were created prior to adoption of the statewide planning goals except for eight parcels. Record 23. Intervenors respond that, no matter when or how the three exception areas were approved, the county can properly consider conflicts with land uses or land divisions established prior to the statewide planning goals. However, the difficulty here is that intervenors do not point to any findings or evidence regarding how and when the parcels adjacent to the subject property were created. The focus of OAR 660-004-0028(2) and 660-004-0028(6)(c)(A) is the relationship between the subject property and lands "adjacent to it." A finding that the majority of the 86 parcels within one mile of the subject property were created before application of the statewide planning goals does not satisfy the requisite inquiry into when and how lands adjacent to the subject property were created and developed. We agree with petitioners that the county's findings do not determine when and how the adjacent parcels and development were created, and that, without such findings, we cannot determine whether or not the county impermissibly considered conflicts from nonresource uses on parcels created pursuant to the statewide planning goals. Johnson, 31 Or LUBA at 462.

**D. Failure to Consider Contiguous Parcel under Common Ownership**

OAR 660-004-0028(6)(c)(B) requires the county to consider the use of the subject property in conjunction with contiguous parcels under common ownership in determining whether farm uses are impracticable on the subject property. Petitioners argue that the county erred in not considering the contiguous 1.94-acre parcel owned by intervenors in determining whether farm uses are impracticable on the subject property. Further, petitioners explain that the county relied heavily on the fact that the subject property is 19.84-acres in

size, less than the minimum size guideline of 20-acres for practicable farm use where land is bordered by nonresource uses on three sides.[4] Petitioners contend that the county's failure to consider the contiguous 1.94-acre parcel is particularly egregious given the county's reliance on the 20-acre minimum stated in the working paper guideline. Had the county included the 1.94 acre parcel, petitioners argue, the property under consideration would have exceeded 20 acres in size and thus met the working paper guideline.

Intervenors respond that the county properly did not consider the 1.94-acre parcel in conjunction with the 19.84-acre subject property, because the former is part of an acknowledged exception area. Intervenors argue that, as a necessary part of the acknowledgment process, the Land Conservation and Development Commission (LCDC) has already determined that the 1.94-acre parcel cannot practicably be used for farm or forest purposes, either alone or in conjunction with other lands, including the subject property. Intervenors contend that considering that 1.94-acre parcel in conjunction with the subject property would improperly reopen an issue and, in effect, allow the county and LUBA to reexamine the validity of an acknowledged exception.

As petitioners point out above, it is not clear which adjacent lands within exception lands were created or developed pursuant to applicable statewide planning goals. However, we need not resolve whether intervenors are correct that the acknowledged status of the exception area that includes the 1.94-acre contiguous parcel means that the county need not consider that parcel in conjunction with the subject property. OAR 660-004-0028(6)(c)(B) provides, by way of example, that "several contiguous undeveloped parcels" under one ownership shall be considered as one farm or forest operation. (Emphasis added). We conclude that where a contiguous parcel of this size under the same ownership as the subject property has already been fully developed for a nonresource use, OAR 660-004-028(6)(c)(B)

[4]The guideline is set forth in a working paper developed by a county technical advisory committee.

does not require the county to consider that parcel in determining whether farm uses on the subject property are practicable. In the present case, the contiguous 1.94-acre parcel has already been fully developed with a single-family dwelling and the infrastructure needed to support the rural residential use for which it is zoned.[5] Accordingly, the county did not err in failing to consider the contiguous 1.94-acre parcel for purposes of OAR 660-004-0028.

**E. Traditional Commercial Farmer Standard**

Petitioners argue that the county misconstrued OAR 660-004-0028(2) in adopting a "commercial farm" standard in determining whether farm uses as defined in ORS 215.203 on the subject property are impracticable.[6] Further, petitioners contend the county misconstrued OAR 660-004-0028(2) in limiting its consideration of farm uses to historical or traditional farm uses, and rejecting consideration of a broader range of possible farm uses, including nontraditional crops or agricultural products.

The challenged decision finds that:

> "Testimony submitted at the February 18, 1997 Planning Commission public hearing asserted that alternative farm crops, such as organic produce and

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[5]We leave open the question of whether a parcel larger than the 1.94-acre parcel under at issue here may be "undeveloped" within the meaning of OAR 660-004-0028(6)(c)(B), even though part of that larger parcel is developed with a dwelling.

[6]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, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. 'Farm use' does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267 (1)(e) or 321.415 (5)."

> bamboo could be practicable on the Subject Property, given its size and soils. Planning Commissioners stated the resource value of the site as determined by its soil types will not change, while farming practices can change. Other testimony submitted at the same hearing stated that traditional farm practices such as sheep raising and growing non-organic produce is impracticable and nonprofitable on the Subject Property, based on actual experience and site characteristics. [Intervenors] submitted additional information * * * which states conversion from traditional to alternative farming is expensive and many alternative crops have no established market, making them difficult to sell.
>
> "Denial of this application would implement the Planning Commission comment * * * by requiring a change of farming practices used on the site from traditional to experimental. This exceeds the policy direction provided by LCDC Goal 3 and the [Lane County Rural Comprehensive Plan (RCP)]. It would set a precedent for prohibiting the redesignation of any EFU parcel for rural residential use * * *. Nothing in the LCDC goals, LCDC rules or the RCP requires the creation of an alternative farming land bank from parcels that are too small to be considered reasonable in size, location and setting for farming by traditional prudent commercial farmers applying traditional prudent farming practices." Record 15-16 (emphasis added).

Thus, the county appears to interpret OAR 660-004-0028 and ORS 215.203(2)(a) as requiring that the subject property be evaluated only for that subset of farm uses that a "traditional prudent commercial farmer" would find practicable.

**1. Commercial Farming**

Petitioners argue, first, that the county's interpretation of OAR 660-004-0028 is inconsistent with cases that have rejected a "commercial" farm standard. 1000 Friends v. Benton County, 32 Or App 413, 428-29, 575 P2d 651 (1978); McCulloch v. Washington County, ___ Or LUBA ___ (LUBA No. 97-149, November 21, 1997) slip op 2; 1000 Friends of Oregon v. Yamhill County, 27 Or LUBA 508, 517-18 (1994).

In 1000 Friends of Oregon v. Yamhill County, we rejected as inconsistent with Goal 3 a committed exception based on findings that "commercial" farming was impracticable in the exception area. We held that, while the county may have latitude to set a threshold level of profitability for determining when "farm uses" are impracticable,

> "we reject the county's suggestion that it may establish the level of profitability necessary to qualify as a 'farm use,' as that term is defined by ORS 215.203, at the same level that would qualify a farm use as a commercial agricultural enterprise. The goals protect and allow farm and forest uses other than commercial agricultural and forest enterprises." 27 Or LUBA at 518.

Further, we have held that the term "profit in money" as used in ORS 215.203(2)(a) means "gross income" rather than "profit" in its ordinary sense of net profit. Brown v. Jefferson County, 33 Or LUBA 418, 433 (1997), quoting 1000 Friends v. Benton County, 32 Or App at 426. In Brown, we noted that the appropriate standard for applying the definition of "farm uses" in the context of OAR 660-004-0028 is whether the subject property is "capable, now or in the future, of being 'currently employed' for agricultural production 'for the purpose of obtaining a profit in money.'" Id. at 433, quoting 1000 Friends v. Benton County, 32 Or App at 426. Thus, in the present case, petitioners argue that the county misconstrued OAR 660-004-0028 in applying a threshold based on the scale and profitability of commercial farms, rather than the lower threshold based on ORS 215.203(2)(a) and OAR 660-004-0028, which focus on whether the subject property is capable of producing gross income from agricultural use.

Intervenors respond that, while Goal 3 does protect farm uses that are smaller and less profitable than commercial agricultural enterprises, the county correctly determined in the present case that "farm uses" are impracticable on the subject property, as that term is defined in ORS 215.203(2)(a). The key element of the definition of "farm use" at ORS 215.203(2)(a), according to intervenors, is whether land is capable of employment "for the primary purpose of obtaining a profit in money[.]" (Emphasis added). Intervenors argue, based on their understanding of the purpose and the legislative history of ORS 215.203(2)(a), that inherent in that definition as applied in the context of committed exceptions is the requirement that the subject property be capable of producing sufficient income from agricultural use of the land that a "prudent farmer" would find it practicable to employ the

land for the primary purpose of producing that income by farm uses, as opposed to a secondary or tertiary purpose.

Intervenors argue that the farm use definition at ORS 215.203(2)(a) is the result of various legislative attempts to reserve resource tax benefits for "bona fide" farmers, and deny those benefits to those whose primary purpose in using the land is not obtaining a profit in money from agricultural uses. According to intervenors, the problem facing the legislature, and presumably resolved in ORS 215.203(2)(a), "is how to adequately define what we all commonly understand as farming: accepted agricultural practices engaged in by people who make their living working the land." Intervenors' Brief 22. We understand intervenors to suggest that in order to give effect to the legislature's intent in the context of the committed exception process, ORS 215.203(2)(a) and OAR 660-004-0028 must be read to exclude from Goal 3 protection lands that cannot produce sufficient gross income to induce a reasonable farmer to attempt to make a living working the land as the primary use of that land. Essentially, intervenors argue that the correct threshold in this context is whether the property is capable of supporting an economically self-sufficient agricultural operation.

We agree with petitioners that the county misconstrued the applicable standard. As indicated above, the test under OAR 660-004-0028 is not whether a property is capable of supporting commercial agriculture. Further, we find no basis in the text of OAR 660-004-0028, ORS 215.203(2)(a) or the legislative history to which intervenors cite to read those provisions as establishing a threshold based on whether the property is capable of supporting an economically self-sufficient agricultural operation, or property on which a reasonable farmer could make a living entirely from agricultural use of the land.[7] Indeed, we doubt that there is any definite or broadly applicable "threshold" in determining whether farm uses are

[7]The present case demonstrates that the interpretation of ORS 215.203(2) advanced by intervenors has not been applied to the subject property. As noted above, for the past decade the county has granted intervenors a farm tax deferral based solely on their agricultural use of the land, the same sheep operation that intervenors now contend does not qualify or should not qualify as a "farm use."

impracticable under OAR 660-004-0028 and ORS 215.203(2)(a). As intervenors point out elsewhere, a determination whether farm uses are impracticable under OAR 660-004-0028 and ORS 215.203(2)(a) is a matter of case-by-case analysis, after consideration of all the factors set forth in the rule.

**2. Traditional Farm Uses**

Petitioners also argue that the county misconstrued the applicable standard in limiting its consideration of whether "farm uses" are practicable on the subject property only to historical or "traditional" farm uses, and failing to consider "alternative" agricultural uses such as growing organic produce, Christmas trees, or nursery stock such as bamboo. Petitioners point out that the staff report listed several profitable crops that can be produced on small holdings of 10 to fifteen acres, and also point to evidence submitted by one of the petitioners regarding a profitable organic produce operation he conducts on nearby property that is smaller than the subject property. Petitioners argue that the county did not adequately address these "alternative" farm uses, and to the extent it addressed them, its findings are not supported by substantial evidence.

Petitioners cite Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293, 608 P2d 201 (1980), for the proposition that the county must consider whether farm uses other than historical or traditional uses may profitably occur on the property. In Hillcrest Vineyard, the court held that the county erred in considering the suitability of the property only for grazing, and failing to consider its suitability as a vineyard, where the record shows nearby land is employed for that purpose. Id. Petitioners contend that the present case is similar, and that the county erred in refusing to consider evidence that the subject property is capable of supporting nontraditional agricultural uses.

In addition to the findings quoted above, the challenged decision made the following findings with respect to "alternative" agricultural uses, based on a letter submitted by one of intervenors' experts:

> "* * * The [county] finds [that] alternative agricultural systems (i.e. bamboo, organic crops) are rare in Lane County, involve specialized inputs, extensive physical labor by the owner and marketing through channels which are poorly established and subject to extreme price fluctuations. No evidence has been supplied that indicates these alternative agricultural products have the basic market functions of exchange, physical handling, facilitating and processing to support these uses over more traditional types of agriculture that [are] normal [in] the area. The [county] finds alternative agricultural products have not been shown to be a viable farm use on the Subject Property given the Applicant's submissions regarding small size, early frosts, elevation, chemical migration, noise, trespass and distance from markets. * * *" Record 31.

Further, in supplemental findings, the county characterized the organic produce operation conducted by one of the petitioners as something "only an idealistic farmer with atypical fitness, energy, resources, and commitment would undertake or continue" using the subject property. Record 88. The county explained that its findings are based on the "typical reasonable farmer, with typical energy, typical health problems, and typical access to financial resources[.]" Id.

In response to petitioners' contentions, intervenors argue that, to the extent Hillcrest Vineyards requires the county to consider uses other than historical or traditional uses, the county considered those uses in the findings described above, and determined, based on substantial evidence, that those uses are not practicable on the subject property.

We agree with petitioners that the county misconstrued the applicable standard under OAR 660-004-0028 to the extent it applied a standard based solely on the practicability of "traditional" agricultural uses on the subject property. We perceive no basis under either OAR 660-004-0028 or ORS 215.203(2)(a) for limiting the county's consideration to whether the subject property is capable of raising non-organic agricultural products, or refusing to consider horticultural uses such as raising Christmas trees or bamboo, when the feasibility of those uses is raised as an issue before the county. However, it is not clear that the county in fact refused to consider those "alternative" uses. As intervenors point out, the county made several findings regarding the practicability of at least some of the cited uses on the subject property. Those findings are certainly directed at relevant considerations under OAR 660-

004-0028, and petitioners do not appear to challenge the evidentiary basis for the county's findings regarding the characteristics of the cited "alternative" uses, such as the necessity of specialized inputs and the lack of infrastructure, that might bear on the county's ultimate conclusion whether those uses are practicable on the subject property. Accordingly, we conclude that, even if the county articulated the incorrect standard with respect to "traditional prudent farmer," it properly made findings regarding the nontraditional uses that were raised as an issue, and that those findings are supported by substantial evidence.

**F. Legal Sufficiency of the County's Demonstration of Impracticability**

Petitioners contend that, even if the county made findings on all relevant matters under OAR 660-004-0028, and even if those findings are supported by substantial evidence, those findings fail to demonstrate that farm uses are impracticable on the subject property, and thus the county's conclusion to that effect is legally insufficient under ORS 197.732. We agree that, based on the relevant findings, evidence and reasons described above, the county has not demonstrated that uses allowed by Goal 3 are impracticable on the subject property.

As noted above, the county's findings and reasoning regarding the relationship between the subject property and adjacent properties are flawed by the county's failure to determine whether lands and development adjacent to the subject property were created pursuant to the statewide planning goals. If so, any conflicts with residential uses on such lands cannot be used to justify a committed exception on the subject property. DLCD v. Yamhill County, 31 Or LUBA at 500. This defect in the county's findings alone requires that we remand the decision.

Even assuming that all of the lands and uses adjacent to the subject property were created or developed prior to the statewide planning goals, the only concrete conflicts described between the adjacent lands and farm uses on the subject property are episodes of harassment by dogs, including, apparently, episodes where dogs killed some lambs and sheep, and nonspecific "noise" and "traffic" conflicts. Other than those conflicts, the

county's findings uniformly tend to demonstrate that uses on adjacent property, which include cattle, horse and sheep raising, as well as orchards, woodlots and similar small-scale resource uses, are consistent with and do not conflict with or impact farm uses on the subject property.

With respect to the county's other relevant findings and reasons, the primary basis for the county's finding that farm uses are impracticable on the subject property is concerned not with the relationship of the property with adjacent lands but rather the relatively small size of the property. As described above, the county concluded that the subject property was too small and isolated to interest a "traditional prudent commercial farmer" under the standard the county articulated.

"Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it." OAR 660-004-0028(2). The county's findings and reasoning regarding the relationship between the subject property and adjacent lands, and the other factors described in OAR 660-004-0028(6), must demonstrate that uses allowed by Goal 3 are impracticable and that the subject property is irrevocably committed to uses not allowed by the Goal. We agree with petitioners that, given the prime soils on the property and the long history and current use of the subject property for sheep raising and other farm uses, and the presence of very few identified conflicts between adjacent uses and farm uses on the subject property, the county's findings and reasons do not demonstrate that the relationship between the subject property and adjacent lands has irrevocably committed the subject property to uses not allowed by Goal 3, or that uses allowed by the Goal are impracticable. Further, as described above, the county applied the incorrect legal standard in assessing whether farm uses are impracticable on the subject property.

The first, second and third assignments of error are sustained.

**FOURTH ASSIGNMENT OF ERROR**

Petitioners argue that the county failed to comply with LC 16.400(6)(h)(iii), which requires findings that a minor plan amendment does not conflict with applicable policies of the RCP. Petitioners contend that the challenged decision implicates two RCP policies, Policy 3 and Policy 8. Policy 3 is to "[r]eserve the use of the best agricultural soils exclusively for agricultural purposes." Policy 8 provides that, "[w]henever possible, planning goals, policies and regulations should be interpreted in favor of agricultural activities." According to petitioners, the county failed to make adequate findings supported by substantial evidence that the plan amendment does not conflict with RCP Policies 3 and 8, which petitioners characterize as requiring that the best agricultural soils be preserved exclusively for agricultural use, and that when a choice must be made between agricultural and other uses the agricultural uses must prevail.

The challenged decision finds as follows regarding RCP Policies 3 and 8:

> "Goal 3, Policy 8 * * * states that whenever possible the planning process should favor agricultural uses. Because of the parcel's relatively small size, adjacent and nearby residential uses, and lack of nearby farm land, it is impracticable to use it for normal agricultural activities. For these reasons, the Subject Property is no longer available for normal agricultural uses and is most appropriately redesignated for rural residential use.
>
> "Goal 3, Policy 3 states the best agricultural soils should be reserved for farm use. However, Goal 3, Policy 9 specifies [that] better methods should be used to identify farm land, based on its productive capacity. Included in Policy 9 are a number of factors to be considered in this identification, including management suitability, land use patterns, and accepted farm practices.[8] These factors have been examined in the Applicant's Statement and indicate the property, although it has good agricultural soils, is irrevocably committed to non-resource use." Record 33.

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[8]RCP Goal 3, Policy 9 provides that the county should:

> "Actively explore better methods of identifying agricultural lands than those currently used. Such methods should accurately reflect the productive capacity of the land taking into account fertility, suitability for management, climatic conditions, availability of water, land use patterns, and accepted farm practices."

Petitioners further argue that the county misapplied Policy 9 as context for Policy 3. According to petitioners, Policy 9 addresses the adoption of a new methodology for identifying agricultural lands and does not apply to the redesignation of existing, already identified agricultural lands. Petitioners contend that "[r]edesignating high quality agricultural soils from exclusive farm use to rural residential use is contrary to [Policies 3 and 8]." Petition for Review 29.

Although the fourth assignment of error is framed as a challenge to the county's findings and evidentiary record, the gravamen of petitioners' argument is that the county misconstrued Policy 9 and Policy 3, and made a decision contrary to Policies 3 and 8, which petitioners construe as requiring preservation for agricultural use the best agricultural soils notwithstanding how the productive capacity of those soils are affected by other constraints. Intervenors respond that the county properly read Policy 3 in the context of Policy 9, and determined that Policy 3 does not mandate preservation of the best agricultural soils for agricultural use under all circumstances, as petitioners appear to contend. Intervenors argue that the county's interpretation of Policy 3 is not clearly wrong or inconsistent with the terms of any RCP provisions and is thus entitled to deference. ORS 197.829(1); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992).

We agree with intervenors that, insofar as petitioners challenge the county's constructions of the described RCP Goal 3 policies, petitioners have not demonstrated that those constructions are clearly wrong or inconsistent with the terms of the cited provisions. Further, we conclude that the county made adequate findings with respect to Policies 3 and 8. Adequate findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. Le Roux v. Malheur County, 30 Or LUBA 268, 271 (1995). The county's quoted findings adequately explain why, pursuant to the county's understanding of Policies 3, 8 and 9, the facts demonstrate why redesignation of the subject property does not

conflict with those policies. Petitioners make no argument under their substantial evidence challenge, and we consider it no further.

The fourth assignment of error is denied.

The county's decision is remanded.