1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 FRIENDS OF YAMHILL COUNTY and
5 JAMES LUDWICK,
6 *Petitioners,*
7
8 and
9
10 DEPARTMENT OF LAND CONSERVATION
11 AND DEVELOPMENT,
12 *Intervenor-Petitioner,*
13
14 vs.
15
16 YAMHILL COUNTY,
17 *Respondent,*
18
19 and
20
21 ROBERT D. PARK and DEBORAH JEFFRIES,
22 *Intervenors-Respondent.*
23
24 LUBA No. 99-122
25
26 FINAL OPINION
27 AND ORDER
28
29 Appeal from Yamhill County.
30
31 William K. Kabeiseman, Portland, filed the petition for review and argued on behalf
32 of petitioners. With him on the brief was Preston, Gates and Ellis, LLP.
33
34 Roger A. Alfred, Assistant Attorney General, Salem, filed the petition for review and
35 Richard M. Whitman, Assistant Attorney General, Salem, argued on behalf of intervenor-
36 petitioner. With them on the brief were Hardy Myers, Attorney General, and Michael D.
37 Reynolds, Solicitor General.
38
39 No appearance by Yamhill County.
40
41 Peter Livingston, Portland, filed the response brief and argued on behalf of
42 intervenors-respondent. With him on the brief was Lane, Powell, Spears and Lubersky, LLP.
43
44 BRIGGS, Board Member; and BASSHAM, Board Chair, participated in the decision.
45

1 REMANDED 05/18/2000
2
3 You are entitled to judicial review of this Order. Judicial review is governed by the
4 provisions of ORS 197.850.
5

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision approving a comprehensive plan map
4 amendment and zone change from Agriculture Forestry Large Holding (AFLH) to Very Low
5 Density Residential (VLDR-5), and taking an exception to Statewide Land Use Planning
6 Goals 3 (Agricultural Lands) and 4 (Forest Lands).[1]

7 **MOTIONS TO INTERVENE**

8 The Department of Land Conservation and Development (DLCD) moves to intervene
9 on the side of petitioners, and Robert Park and Deborah Jeffries (intervenors), the applicants
10 below, move to intervene on the side of respondent. There is no opposition to these motions
11 and they are allowed.[2]

12 **FACTS**

13 This is the second time a decision regarding the subject property is before us. In
14 *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996) (*Yamhill County I*), we described the
15 relevant facts as follows:

16 "The subject property, which is divided into three separate tax lots, includes
17 approximately 60 acres of resource land presently in agricultural use,
18 consisting of Christmas trees and grass. The property slopes steeply, at an
19 elevation of between 1,450 and 1,600 feet. The soil is Laurelwood silt loam in
20 Natural Resource Conservation Service (NRCS) capability classes III and IV;
21 it is therefore high value farmland soil. The forest productivity capability of
22 the subject property is 160 cubic feet per acre, per year. There are two small
23 forested areas. Apart from a gravel road, an agricultural building and a small
24 shed, the property is vacant.

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[1]In the interim between the initial application in 1995 and the present proceeding, the property was rezoned from AFLH to Exclusive Farm Use district (EF-40). That action does not affect our analysis.

[2]When addressing petitioners' arguments, we shall refer to Friends of Yamhill County and James Ludwick as "petitioners" throughout. When addressing petitioners' and DLCD's arguments together, we shall refer to the parties as "Friends and DLCD."

> "Before the challenged decision, the subject property was designated Agricultural/Forestry by the county's comprehensive plan and zoned Agricultural/Forestry-20 (AF-20). In 1981, the county denied a request to redesignate and rezone the property to [VLDR] to permit a planned unit development. In 1994, the county approved lot-of-record applications for each of the three tax lots.
>
> "Bald Peak State Park lies adjacent to the subject property to the west. The land to the north and east is in exception areas. It is zoned VLDR-5, and is being developed with residences. The land to the south is zoned AF-20, and is currently in agricultural use. In the vicinity of the subject property are other large, resource-zoned parcels, which are principally in timber production.
>
> "The development application filed by intervenors in May, 1995 states it will require 'Exception to be adopted by Yamhill County in compliance with Oregon Statewide Planning Goal (2) Part II(b).' * * *" 31 Or LUBA at 490.

In *Yamhill County I*, the petitioner argued that the county's decision failed to demonstrate compliance with OAR 660-004-0022, or OAR 660-004-0028.[3] We remanded that decision based on our determination that the county's findings were inadequate to demonstrate compliance with either OAR 660-004-0022 or OAR 660-004-0028. After remand, the applicant revised his application to address only the "committed" exception requirements found in OAR 660-004-0028. The staff report on remand and notices of the remand hearing indicated that evidence addressing OAR 660-004-0018 and OAR 660-004-0028 would be considered by the decision maker during the course of the remand proceedings.

During the proceedings on remand, the board of commissioners received testimony and other evidence that the Christmas tree operation has been abandoned and that no farm

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[3]OAR 660-004-0022 allows development otherwise not permitted by Goals 3 and 4 where the local government demonstrates that there are reasons that justify that particular development ("reasons" exception). OAR 660-004-0028 allows development otherwise not permitted by Goals 3 and 4 where the local government demonstrates that development surrounding the subject parcel irrevocably commits the parcel to nonresource use ("committed" exception). OAR 660-004-0018 requires that the local government adopt zoning designations for the exception area that, in the case of a "reasons" exception, will be consistent with the uses approved by the exception or, in the case of a "committed" exception, will ensure that uses allowed in the exception area will remain rural, and will also ensure that the rural uses will be compatible with adjacent or nearby resource uses.

1 activity is currently occurring on the property. The applicants also submitted a report from a
2 certified forester indicating that the property has a negative present net value for timber
3 production. In addition, the evidence clarified that the rural residential area to the east was
4 subdivided prior to adoption of the goals. The rural residential area to the north was
5 subdivided in 1985, pursuant to an exception to the statewide land use planning goals. The
6 residential area to the north has three dwellings adjacent to the subject property. The
7 residential area to the east does not have any dwellings immediately adjacent to the subject
8 property; however, there are some dwellings within the subdivision farther to the east. One of
9 the three undeveloped rural residential lots abutting the subject property to the east is owned
10 by intervenors. Two 20-acre resource parcels, also owned by intervenors, are located
11 immediately to the south of the subject property.

12 The board of commissioners considered the evidence, and approved the zone change
13 and related committed exception to Goals 3 and 4. As part of its decision, the board of
14 commissioners adopted a finding concluding that because only OAR 660-004-0028 was
15 addressed in LUBA's opinion, any issues raised regarding compliance with OAR 660-004-
16 0018 would not be considered.

17 This appeal followed.

18 **ANALYTICAL FRAMEWORK**

19 In *Lovinger v. Lane County*, 36 Or LUBA 1, *aff'd* 161 Or App 198, 984 P2d 958
20 (1999) we set out the factors that must be addressed to approve irrevocable exceptions under
21 OAR 660-004-0028(2)[4] and OAR 660-004-0028(6)[5] as follows:

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[4]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;

1 “OAR 660-004-0028(1) allows a local government to adopt an exception to a
2 statewide planning goal ‘when the land subject to the exception is irrevocably
3 committed to uses not allowed by the applicable goal because existing
4 adjacent uses and other relevant factors make uses allowed by the applicable
5 goal impracticable[.]’

“(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-[004]-0028(6).”

[5]OAR 660-004-0028(6) provides, 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. 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. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;

“(f) Physical development according to OAR 660-[004]-0025; and

“(g) Other relevant factors.”

1 "OAR 660-004-0028(2) requires that a committed exception determination
2 must address certain factors, particularly the characteristics of the exception
3 area, *i.e.* the subject property, characteristics of the adjacent lands, and the
4 relationship between the exception area and adjacent lands. OAR 660-004-
5 0028(3) requires that for an exception to Goal 3 (Agricultural Lands), the
6 local government must demonstrate that 'farm uses' as defined in
7 ORS 215.203 are impracticable in the exception area. OAR 660-004-0028(4)
8 requires that a committed exception must be supported by findings of fact
9 addressing all applicable factors of OAR 660-004-0028(6) and explain why
10 those facts support the conclusion that the uses allowed by the applicable goal
11 are impracticable in the exception area." 36 Or LUBA at 5-6 (footnotes
12 omitted).

13 The approach LUBA follows in reviewing decisions that adopt committed exceptions
14 is described in *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994):

15 "[We first] resolve any contentions that the findings fail to address issues
16 relevant under OAR 660-004-0028 or address issues not properly considered
17 under OAR 660-004-0028. We next consider any arguments that particular
18 findings are not supported by substantial evidence in the record. Finally, we
19 determine whether the findings that are relevant and supported by substantial
20 evidence are sufficient to demonstrate compliance with the standard of
21 ORS 197.732(1)(b) that 'uses allowed by the goal [are] impracticable.'"
22 (Footnote omitted.)

23 In this case, Friends' and DLCD's assignments of error overlap. Rather than address
24 the assignments of error in the order presented in the petitions for review, we address the
25 arguments presented in the petitions for review in the manner described in *1000 Friends of*
26 *Oregon v. Columbia County*.

27 **FINDINGS CHALLENGES**

28 Petitioners challenge the county's findings addressing several OAR 660-004-0028(2)
29 and (6) factors.

30 **A. Characteristics of and Uses on Adjacent Lands (OAR 660-004-0028(2)**
31 **and (6)(a) and (c)(B))**

32 DLCD argues that the county's findings misapply OAR 660-004-0028(2) and OAR
33 660-004-0028(6)(a) and (c)(B) because they do not describe the uses and characteristics of
34 the resource lands immediately to the south of the subject parcel. Friends and DLCD contend

1 that an accurate description of the uses and characteristics of those lands is particularly
2 critical in this case, where abutting properties to the south and east are also owned by the
3 applicants. Petitioners contend that, for the purposes of the analysis described in OAR 660-
4 004-0028(6)(c)(B), the county erred by not considering the proposed exception area, the two
5 resource parcels to the south and the rural-residential property to the east as one "farm or
6 forest operation." *See* n 5.

7 Intervenors respond that the county was not obliged to consider the property
8 ownership patterns in the vicinity of the subject parcel. According to intervenors, OAR 660-
9 004-0028(6)(c)(B) must be considered only when the local government justifies its decision
10 in part based on the parcelization of the exception area and the area surrounding it. Here,
11 intervenors argue, the county's decision was not based on the parcelization of adjacent
12 property. In addition, intervenors explain that the residentially zoned parcel to the east is not
13 and will not be put to resource use and, therefore, it is inappropriate to include that parcel in
14 a farm or forest operation.[6] Finally, intervenors argue that the county was not obliged to look
15 at resource uses on adjacent lands, when the focus of the OAR chapter 660, division 4 rules
16 is on those uses that impede resource uses of the subject property.

17 We agree that OAR 660-004-0028(6)(c)(B) does not require that the county include
18 those contiguous undeveloped parcels that are *not* zoned for resource use as one farm or
19 forest operation. However, we believe the rule does require that the county consider the
20 adjacent parcels to the south that are zoned for resource use in its analysis of whether the
21 subject parcel is irrevocably committed to nonresource uses. Contrary to intervenors'

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[6]Intervenors also respond that this issue is waived, because it was not raised in DLCD's initial petition for review. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (issues finally decided in a prior appeal of the same decision may not be reargued in a subsequent appeal); *Tylka v. Clackamas County*, 24 Or LUBA 296, 304 (1992) (petitioners could not raise an issue in a later appeal where they could have, but failed to, raised it in the first appeal). Friends and DLCD have not waived this argument, as the initial record and decision did not identify the adjacent property to the south and east as being in the same ownership as the subject property. Therefore, we address Friends' and DLCD's arguments on the merits.

1 understanding of the requirements of OAR 660-004-0028(2) and (6), contiguous parcels in
2 the same ownership zoned for resource use are relevant to the inquiry of whether a property
3 is committed to nonresource use. In *DLCD v. Wallowa County*, ___ Or LUBA ___ (LUBA
4 No. 98-188, October 28, 1999), slip op 5-6, we stated:

> 5 "The goal and statutes that permit exceptions on resource lands require an
> 6 analysis of why existing uses on adjacent lands render resource uses on the
> 7 subject parcel impracticable. *See* Goal 2-Part II and ORS 197.732(b). To that
> 8 end, OAR 660-004-0028(2)(b) and OAR 660-004-0028(6)(a) require a
> 9 description of the characteristics of adjacent land and the existing uses
> 10 occurring on them. The required description is not limited to the nonresource
> 11 uses that bolster a claim of irrevocable commitment. Instead, the findings
> 12 must accurately reflect the land use patterns and uses of property adjacent to
> 13 the subject parcel and present a complete picture of the development of the
> 14 area. This complete picture is necessary to support a conclusion that the
> 15 subject parcel is irrevocably committed to nonresource use."

16 The county's findings do not address the characteristics of the adjacent resource
17 properties to the south or the uses occurring on them other than to state that a ravine
18 physically separates the subject property from the parcels to the south. Therefore, the
19 county's findings do not comply with OAR 660-004-0028(2)(b) and OAR 660-004-
20 0028(6)(a). The findings also do not explain why the county did not consider the subject
21 property along with other contiguous resource parcels in the same ownership as one resource
22 parcel when considering "[p]arcel size and ownership patterns" under OAR 660-004-
23 0028(6)(c). The fact that the county did not rely on small parcel sizes to *justify* the disputed
24 exception does not mean the entire ownership did not have to be considered under OAR 660-
25 004-0028(6)(c) because viewing the entire ownership as a farm or forest operation may make
26 it less likely that other relevant factors result in irrevocable commitment.[7]

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[7]To the extent that physical impediments separate the subject property from adjacent resource lands, they may be considered under OAR 660-004-0028(6)(e). *See* n 5.

1 **B. Impacts of Residential Uses (OAR 660-004-0028(2), (6)(a) and (c)(A))**

2 Petitioners argue that the county failed to comply with the relevant standards
3 regarding the impact that residential use of adjacent properties has on the subject property,
4 because the county's findings do not establish that the conflicts originate from parcels
5 created prior to the adoption of the statewide planning goals. Friends and DLCD contend that
6 it is more likely that the complaints originated from the residents of dwellings immediately
7 adjacent to the subject parcel to the north than from the more distant residences to the east,
8 and that, to the extent the decision is based on conflicts with rural residential uses established
9 pursuant to the goals, those conflicts cannot be considered.

10 Intervenors argue that the board of commissioners concluded that there are conflicts
11 between activities related to resource uses on the property, *e.g.*, aerial pesticide spraying and
12 helicopter harvesting of Christmas trees, and adjacent residential uses, and that those general
13 concerns are not limited to the neighbors to the north.

14 In the prior appeal in this matter, we explained that "under OAR 660-004-0018 and
15 660-004-0028, conflicts with rural residential development in exception areas created
16 pursuant to the applicable goals cannot be used to justify a committed exception on the
17 subject property." *Yamhill County I*, 31 Or LUBA at 500. The challenged decision relies, in
18 part, on conflicts between adjoining residential development and certain resource-related
19 activities. The county's findings therefore must establish that the cited conflicts the county is
20 relying on are conflicts with residential development on lots or parcels to the east (which
21 were created before the statewide planning goals) and not with residential development on
22 the adjoining lots to the north (which were created after the statewide planning goals were
23 adopted). The county may not rely, in whole or in part, on conflicts with development in the

1 subdivision to the north. The county's findings do not establish that the conflicts the county
2 relied upon are conflicts with residential development to the east.[8]

3 **C. Impacts of Park Uses (OAR 660-004-0028(6)(c)(A))**

4 At oral argument, DLCD argued for the first time that the county could not consider
5 the limitations on resource uses of the subject parcel as a result of the existence of Bald Peak
6 State Park, as the park was established pursuant to the goals. OAR 660-004-0028(6)(c)(A).
7 Because this argument was not raised in the briefs, we do not consider the argument further.
8 *Ward v. City of Lake Oswego*, 21 Or LUBA 470, 482 (1991).

9 **D. Farm Tax Deferral**

10 Petitioners argue that, based on our decision in *Lovinger*, the county had to consider
11 whether the property is currently receiving farm tax deferral as part of its determination that
12 farm use of the property is not practicable. According to petitioners, the county's findings do
13 not specifically address the subject property's farm tax deferral.

14 Intervenors argue that the tax status of the property is not among the factors listed in
15 OAR 660-004-0028(2) and (6).

16 We disagree with petitioners that *Lovinger requires* the county to adopt findings, in
17 all cases, addressing farm tax deferral as part of its committed exceptions analysis. In
18 *Lovinger*, consideration of the tax status of the property was raised in response to an
19 argument that the property needed to generate some income from farm use of the property in
20 order to provide a farmer with an incentive to continue to use the property for agricultural
21 purposes. We do not have that issue here, and petitioners have not pointed to any other

[8]This defect would not be fatal if we could say that the evidence is such that it clearly shows the residential conflicts the county relied on were based only on the residential development to the east. However, the evidence to which we are directed is not conclusive on that point.

1 requirement that the county is required to adopt findings addressing the tax status of the
2 property.[9]

3 **E. Impracticability of Forest Uses (OAR 660-004-0028(6)(g))**

4 The county concluded that forest uses of the subject property are impracticable, based
5 in part on testimony from the applicants' consulting forester who concluded that the costs of
6 reforestation and forest practices on the property exceed the present value of revenues
7 expected from that reforestation.[10] Petitioners contend that this finding regarding
8 reforestation misapplies the relevant standard because it is based on commercial forestry
9 operations, rather than forest-related activities as a whole.[11] Petitioners also argue that the
10 county failed to consider all of the contiguous property owned by intervenors in its
11 assessment of whether the subject property can practicably be managed for timber
12 production.

13 OAR 660-004-0028(3) provides that, in taking a committed exception to Goals 3 and
14 4, the county need only demonstrate that those forest uses described in OAR 660-006-
15 0025(2)(a) are impracticable. Those uses are:

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[9]Although we conclude that OAR 660-004-0028(2) and (6) do not specifically require findings concerning a property's tax deferral status, that does not mean that evidence of the property's current or prior farm use tax deferral status is irrelevant. Under ORS 308A.062, EFU-zoned lands must be "used exclusively for farm use" in order to qualify for special assessment. *See* ORS 308A.059(1) (directing Oregon Department of Revenue to adopt "a more detailed definition of farm use, consistent with the general definition" of "farm use" in ORS 308A.056). The definition of "farm use" in ORS 308A.056 essentially duplicates the definition of "farm use" found in ORS 215.203. Under ORS 308A.113(1)(a), land that is receiving special assessment for farm use must be disqualified "upon the discovery that the land is no longer being used as farmland." Evidence that property is specially assessed under ORS 308A.062 because it is in farm use is certainly relevant evidence concerning whether it is impracticable to put the property to farm use.

[10]The forester estimated that the initial cost of site preparation and reforestation for each 20-acre parcel is $7,468. The forester estimated that after 60 years, each 20-acre parcel would yield 33.9 thousand board feet, which, after deducting harvest costs, would return approximately $230,520. The forester then discounted $230,520 by seven percent over the 60-year period, resulting in total revenue of $3,978 and a present net value of -$3,490. Record 89.

[11]Petitioners couch this assignment of error as a substantial evidence challenge, but the argument is actually a findings challenge.

> "Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash[.]"

Intervenors argue that the subject parcel is mostly bare land, and must be reforested in order to establish forest practices on the parcel. Intervenors contend that the forest practices described at OAR 660-006-0025(2)(a) are predicated on the existence of timber on the property, and thus the county's conclusion that it is impracticable to grow timber on the property makes it unnecessary to determine whether other types of forest practices are also impracticable. With respect to the standard the county applied, intervenors concede that the correct standard is not whether commercial forestry operations are practicable on the subject property. Intervenors agree that the county must consider forest operations that are smaller in scale and generate less revenue than commercial forestry operations. However, intervenors argue that the county correctly concluded, based on evidence that the subject property has a negative present net value if converted to forest uses, that forest operations on the property are impracticable.

We agree with petitioners that the county erred by failing to consider whether forest operations currently exist on the adjacent resource parcels owned by the applicants. However, intervenors are correct that the county's findings need not address whether forest practices described at OAR 660-006-0025(2)(a) are practicable, once it reaches a supportable conclusion that growing timber is impracticable. In our view, "reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals" et cetera are forest practices that, if impracticable, can render use of a parcel for forestry use itself impracticable, even if that parcel is otherwise capable of growing timber. For example, if "harvesting of a forest tree species" is impracticable on a parcel, then it makes little difference if such tree species can be grown. If the county demonstrates that a forest use of the subject property is impracticable because it cannot grow timber, then no further inquiry is required under OAR 660-006-0025(2)(a).

1 That said, we disagree with intervenors that the county's findings regarding the
2 impracticability of forest operations on the subject property focus on the relevant inquiry.
3 The county's findings rely heavily on the forester's conclusion that the subject property has a
4 negative present net value if converted to forestry uses, without explaining what relevance a
5 forestry operation's present value has on whether forestry uses are impracticable on the
6 subject property.[12]

7 **EVIDENTIARY CHALLENGES**

8 Petitioners argue that several of the county's findings are not supported by substantial
9 evidence. Specifically, petitioners argue that the findings regarding the agricultural soils
10 designation, conflicts arising from adjacent residential uses, the impracticability of farm and
11 forest uses, and the impacts of Bald Peak State Park are not supported by substantial
12 evidence in certain respects. Two of these evidentiary challenges are more properly
13 characterized as challenges to whether the county correctly applied the relevant standards
14 rather than whether there is evidence in the record to support the county's findings on those
15 points. We addressed those challenges in the prior section. Two others are more accurately
16 viewed as challenges to the county's conclusions that the undisputed evidence leads to a
17 conclusion that the subject property is irrevocably committed to nonresource use. We address
18 those challenges below. The only purely evidentiary challenge brought by Friends and
19 DLCD involves the county's findings that certain incidents of vandalism are attributable to
20 visitors from Bald Peak State Park, rather than other persons unconnected to the park. We
21 need not resolve the assignment of error on this issue because we conclude that, even if the
22 evidentiary challenge is resolved in the county's favor, it does not affect our analysis of
23 whether the county correctly concluded that vandalism, by visitors to the park or others,

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[12]The fact that each 20-acre portion of the subject property will yield net revenues of $230,520 over 60 years on a $7,468 investment would seem to all but conclusively establish that forest uses are practicable on the subject property. Without additional explanation, we cannot discern why the *present value* of that net revenue has any bearing on whether forest uses are practicable.

1 demonstrates that agricultural or forest use of the subject property is impracticable. *1000*
2 *Friends of Oregon v. Columbia County*, 27 Or LUBA at 476-77.

3 **CONCLUSIONS REGARDING IRREVOCABLE COMMITMENT**

4 **A. Standard of Review**

5 Petitioners argue that in performing our review function pursuant to ORS
6 197.732(6)(b), our review should be "independent."[13] Petitioners contend LUBA may accept
7 the findings of fact the county adopted which are supported by substantial evidence, but
8 should make an independent decision as to whether those findings lead to the conclusion that
9 the property is irrevocably committed.

10 We disagree that our role under ORS 197.732(6)(b) is properly characterized as one
11 of "independent" review. In *Laurance v. Douglas County*, 33 Or LUBA 292, 297-99, *aff'd*
12 150 Or App 368, 944 P2d 1004 (1997), *rev den* 327 Or 192 (1998), we held that the review

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[13]ORS 197.732(6) provides, in relevant part:

> "Upon review of a decision approving or denying an exception:
>
> "(a) [LUBA] shall be bound by any finding of fact for which there is substantial evidence in the record of the local government proceedings resulting in approval or denial of the exception;
>
> "(b) [LUBA] upon petition * * * shall determine whether the local government's findings and reasons demonstrate that the standards of [ORS 197.732(1)] have or have not been met; and
>
> "(c) [LUBA] * * * shall adopt a clear statement of reasons which sets forth the basis for the determination that the standards of [ORS 197.732(1)] have or have not been met."

ORS 197.732(1) provides, in relevant part:

> "A local government may adopt an exception to a goal if:
>
> "* * * * *
>
> "(b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule 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 requirements established in ORS 197.732 are equivalent to our obligation under ORS
2 197.835 to review the findings and conclusions of law and issue an opinion addressing all of
3 the issues raised in the briefs. We may not make an independent decision, based on
4 considerations that are outside the scope of the briefs or the evidence to which we are
5 directed. However, petitioners are correct that in reviewing the county's decision, LUBA
6 must determine whether the standards provided for in ORS 197.732(1)(b) have been met as a
7 matter of law.[14] In performing that review, we are not required to give any deference to the
8 county's explanation for why it believes the facts demonstrate compliance with the legal
9 standards for a committed exception.

10 We now turn to that aspect of our analysis.

11 **B. Impracticability of Resource Use**

12 Petitioners argue that the county's findings do not demonstrate that resource uses on
13 the subject property are impracticable. First, petitioners argue that the county relied too
14 heavily on the characteristics of the subject property and its limited utility for resource
15 activities to determine that resource use of the property is impracticable. Second, petitioners
16 argue that, to the extent uses on adjacent and nearby property interfere with resource uses on
17 the subject property, those conflicts are insufficient to demonstrate that the subject property
18 is irrevocably committed to rural residential uses. For example, petitioners contend that
19 vandalism, whether or not generated from the users of Bald Peak State Park, is a temporary
20 situation that may be reduced or eliminated by methods less drastic than the rezoning
21 proposed by the applicants. Petitioners contend that the applicants need to demonstrate that
22 other methods to address vandalism, including the establishment of the three dwellings

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[14]We have described this review of the county's findings of impracticability as a "demanding one." *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 519 (1994). "For this Board to conclude the county correctly determined the disputed areas are irrevocably committed to uses not allowed by Goals 3 and 4, the county must adopt findings explaining why its ultimate legal conclusion of impracticability follows from the findings of fact." *Id.*

1 currently permitted on the subject property, are insufficient to curb the vandalism against the
2 resource uses.[15] Third, petitioners argue that even if all of what the county found is true, the
3 findings and evidence do not necessarily lead to the conclusion that the subject property is
4 irrevocably committed to nonresource uses. Petitioners contend that the conflicts that the
5 county relied upon are the same conflicts that LUBA found to be "make-weights" in its
6 earlier decision and, although intervenors have added more evidence into the record to
7 substantiate their application, the situation is not so different from the facts in *Yamhill*
8 *County I* that a committed exception is now justified.

9 Intervenors respond that the characteristics of the subject parcel are relevant
10 considerations as to whether resource use of the subject property is impracticable. OAR 660-
11 004-0028(g) and *DLCD v. Curry County*, 151 Or App 7, 11, 947 P2d 1123 (1997) ("under
12 OAR 660-004-0028, the county may consider the characteristics of the property for which
13 the exception is sought"). According to intervenors, the location of the subject property and
14 the impacts of elevation and climatic conditions, combined with the conflicts arising from
15 adjacent land uses, clearly establish that the subject property is irrevocably committed to
16 nonresource use. As for vandalism, intervenors contend that the incidents the county relied
17 upon to determine that damage to the subject property and equipment located on it makes
18 farm or forest use of the subject property impracticable are merely representative, and unless
19 residential development at the proposed levels is approved, the vandalism will continue.
20 Intervenors argue that fences have been installed, and gates have been locked, but those
21 actions have not and will not substantially impede the destruction of crops and farm
22 equipment. According to intervenors, the county correctly found that the level of vandalism,
23 coupled with the conflicts with the residential uses and the limitations of the parcel itself,
24 makes it clear that resource use is impracticable.

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[15]The county found that the 12 dwellings that would be allowed pursuant to the zone change are sufficient to limit vandalism, but the three currently permitted dwellings are not.

1 In *DLCD v. Curry County*, the Court of Appeals held that:

2 "[A]n irrevocable commitment exception to Goals 3 and 4 must take into
3 account the activities on and availability for resource use of surrounding areas
4 as well as the area for which the exception is proposed. For a county to give
5 exclusive or 'preponderant' weight to the characteristics of the exception area
6 alone, in performing its analysis, would be contrary to the fundamental test for
7 an irrevocable commitment exception, which requires surrounding areas and
8 their relationship to the exception area to be the basis for determining whether
9 the exception is allowable." *DLCD v. Curry County*, 151 Or App at 11-12
10 (citation omitted).

11 In other words, committed exceptions "must be based on facts illustrating how past
12 development has cast a mold for future uses." *1000 Friends of Oregon v. LCDC (Curry Co.)*,
13 301 Or 447, 501, 724 P2d 268 (1986).

14 Here, we agree with petitioners that the relevant findings that are supported by
15 substantial evidence are insufficient to demonstrate that the property is irrevocably
16 committed to rural residential uses because uses on adjacent lands and other factors have
17 made farm and forest use of the subject property impracticable. The county has not evaluated
18 the practicability of resource use of the subject property in combination with resource parcels
19 to the south. Nor has the county demonstrated that complaints from residents of the rural
20 residential development to the east about farm and forest activities on the subject property
21 impede such resource activities. The county has not demonstrated that other methods to limit
22 vandalism to the property, including the establishment of three residences, could not achieve
23 the same aims as rezoning the property would. Further, the relevant findings and evidence in
24 the record do not demonstrate that forest use of the property is impracticable.

25 Petitioners' first, third, sixth and seventh assignments of error, and DLCD's first
26 assignment of error, are sustained. Petitioners' second and fifth assignments of error are
27 sustained, in part. Petitioners' fourth assignment of error is denied.

28 **EIGHTH ASSIGNMENT OF ERROR (PETITIONERS)**

29 Petitioners contend that a condition of approval adopted in response to a concern
30 expressed by the Oregon Parks and Recreation Department (OPRD) is inadequate to prevent

1 what OPRD fears—the loss of the spectacular view from Bald Peak State Park. Petitioners
2 also argue that the condition of approval is not supported by findings or substantial
3 evidence.[16]

4 Intervenors respond that the county cannot compel OPRD to cooperate with the
5 applicants and that the condition of approval is the only way that the county could encourage
6 OPRD to work with the applicants to ensure the scenic view is protected.

7 Petitioners do not cite to any standards that require the county to take steps to protect
8 views from the state park. The park is not listed on the county's Goal 5 inventory, nor are we
9 made aware of any rules, regulations or policies that would be violated if the county failed to
10 adopt measures to protect the park's view. Petitioners' assignment of error provides no basis
11 for reversal or remand.

12 Petitioners' eighth assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR (DLCD)**

14 DLCD contends that the county erred in its remand decision by not addressing the
15 standards found in OAR 660-004-0018(2).[17] DLCD argues that in its petition for review in

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[16]The county's sole condition of approval requires that:

> "Applicant[s] shall invite the participation of the Oregon Parks and Recreation Department in establishing building and development guidelines for future development on the subject property to ensure that the development of the property is visually subordinate to the landscape setting and that views from Bald Peak State Park are protected from encroachment by structures, utilities, and vegetation." Record 15.

[17]OAR 660-004-0018(2) was amended in July 1998. The text in effect at the time of the decision challenged in *Yamhill County I* provided, in relevant part:

> "* * * '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

1 *Yamhill County I* it assigned error to the adequacy of the county's initial findings addressing
2 the rule and to the evidence the county relied upon to support those findings. The county's
3 decision on remand determined that because LUBA's decision did not address OAR 660-
4 004-0018, compliance with the rule was not an issue that must be addressed on remand.

5 Intervenors argue that the county was correct in determining that the scope of the
6 remand was defined by LUBA's final opinion and order in *Yamhill County I* and, therefore,
7 the county was not obliged to address OAR 660-004-0018 in its remand decision. Intervenors
8 contend that if DLCD wanted to contest the county's findings with regard to compliance with
9 OAR 660-004-0018, it should have appealed LUBA's alleged failure to address that issue to
10 the Court of Appeals.

11 DLCD is not precluded from raising arguments on appeal that pertain to assignments
12 of error that were raised, but not finally decided, in its first appeal to LUBA. *Hribernick v.*
13 *City of Gresham*, 158 Or App 519, 520, 974 P2d 791 (1999) (under the rationale of *Beck*,
14 petitioner is not foreclosed from reasserting in subsequent proceedings any points she raised
15 before LUBA and that were not resolved on their merits before LUBA). DLCD is correct that
16 LUBA did not resolve the challenge to the county's findings regarding OAR 660-004-0018
17 raised in *Yamhill County I*, and that the county failed on remand to adopt *any* findings
18 addressing the rule.

19 DLCD's second assignment of error is sustained.

"(B) The rural uses will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and

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

"(c) Changes to plan or zone designations are allowed consistently with subsection (a) or (b) of this section, or where the uses or zones are identified and authorized by specific related policies contained in the acknowledged plan."

1 **CONCLUSION**

2 We are required to reverse or remand decisions that misconstrue applicable law or are
3 not supported by substantial evidence. ORS 197.835(9)(a)(C) and (D). Here, the county's
4 decision relies in part on findings that do not comply with the applicable rule requirements.
5 The findings that do correctly apply applicable rule requirements and are supported by
6 substantial evidence are inadequate to demonstrate that the subject property is irrevocably
7 committed to uses that are not allowed by Goals 3 and 4. Therefore, remand is the
8 appropriate remedy.

9 The county's decision is remanded.