BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF LINN COUNTY,
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

DAN DERBY and MARY DERBY,
Intervenors-Respondent.

LUBA No. 2000-070

FINAL OPINION
AND ORDER

Appeal from Linn County.

Jamie B. Jefferson, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Linn County.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Weatherford, Thompson, Ashenfelter and Cowgill, P.C.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 10/20/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the county's decision amending the comprehensive plan map designation from Farm/Forest (FF) to Rural Residential and adopting a zone change from FF to Rural Residential five-acre minimum (RR-5) for a 35-acre property.

MOTION TO INTERVENE

Dan Derby and Mary Derby (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is a long, narrow parcel that adjoins the North Santiam River for one-half mile. Two-thirds of the property consists of a lower riparian area with alluvial soils rated Class VII for agricultural capability. The Class VII soils have potential for limited timber production and have a wood fiber productivity rating of 60 cubic feet per acre per year. The remaining one-third of the property consists of a steep upland portion with a mix of Class II, Class IV and Class VI soils. The property is partially forested, and receives a farm tax deferral. A dwelling and several outbuildings exist on the upland portion of the property. Intervenors have lived on the property since 1969, and conducted limited timber harvests in 1991, 1993, 1995, 1996 and 1997, yielding a total of 88,000 board feet of timber.

The North Santiam River is a designated habitat for two federally listed fish species, and the river bank is subject to a 100-foot buffer under the state Forest Practices Act (FPA). The river frontage across the river from the subject property consists of Fisherman's Bend Park, a public park operated by the federal Bureau of Land Management (BLM). To the east of the subject property along the river lie three five-acre parcels zoned FF, developed with dwellings. To the southeast the subject property touches on an area within the Mill City urban growth boundary, zoned for heavy industrial use, and containing a saw mill. To the south and southwest, the subject property is bordered by the two-lane Lyons-Mill City Drive

and an adjoining railroad right of way. Across the road and railroad further to the south and southwest lie four parcels zoned FF, ranging from 1.89 acres to 46.11 acres in size. Two of those parcels are developed with dwellings. To the west of the subject property lies a 12.35-acre parcel zoned FF, developed with a dwelling. Adjacent on the north and northwest is a rural subdivision zoned Rural Residential 2.5-acre minimum (RR-2.5). Although zoned RR-2.5, the subdivision has a number of lots smaller than one acre. Four of the lots in the subdivision are developed with dwellings, the remainder are undeveloped.

After replantings from earlier timber harvests failed, a representative of the state extension service investigated and informed intervenors that the timber on the property was infected with widespread laminated root rot. Intervenors then retained the services of an arborist and other consultants, who identified 14 different types of diseases infecting the timber on the property and adjoining properties. The consultants recommended final harvest of all commercial timber on the property to avoid further loss of value to the existing tree stock, and replanting with disease-resistant tree species. However, the consultants concluded that the identified diseases could not be eradicated or effectively controlled to allow future merchantable timber harvests, in part because of the probability of reinfection from trees on adjoining properties in nonresource use.

In 1999, intervenors filed an application with the county seeking an exception to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) based on a "reasons" exception pursuant to OAR 660-004-0022, but later withdrew that application. Intervenors then applied for an exception to Goals 3 and 4 based on an "irrevocably committed" exception pursuant to OAR 660-004-0022, together with comprehensive plan map and zoning map amendments. The county planning commission recommended approval of the application on February 8, 2000. The county board of commissioners conducted a *de novo* hearing on March 1, 2000, and on March 15, 2000, voted to approve the application.

This appeal followed.

INTRODUCTION

The standards for approving an irrevocably committed exception are set forth at OAR 660-004-0028(1) through (6). A local government may take an exception to a goal on the grounds that land is irrevocably committed to uses not allowed by the goal when it finds that "existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]" OAR 660-004-0028(1); *see also* ORS 197.732(1)(b) (same). Whether land is irrevocably committed depends on the relationship between the exception area and the adjacent lands, considering the characteristics of the exception area, adjacent lands, their relationship and other relevant factors. OAR 660-004-0028(2).[1] For exceptions to Goals 3 or 4, the local government need only demonstrate that "farm uses as defined in ORS 215.203"; "[p]ropagation or harvesting of a forest product"; and "[f]orest operations or forest practices" are impracticable. OAR 660-004-0028(3)(a), (b) and (c).[2]

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

> "Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:
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> "(a) The characteristics of the exception area;
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> "(b) The characteristics of the adjacent lands;
>
> "(c) The relationship between the exception area and the lands adjacent to it; and
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> "(d) The other relevant factors set forth in OAR 660-[004]-0028(6)."

[2]OAR 660-004-0028(3) provides:

> "Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(1)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule. Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible.' For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:
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> "(a) Farm use as defined in ORS 215.203;

The local government's findings and conclusion that an exception area is irrevocably committed must address all applicable factors of OAR 660-004-0028(6) and must explain why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area. OAR 660-004-0028(5). Finally, OAR 660-004-0028(6) requires that the local government's findings consider a miscellany of factors, including existing adjacent uses; existing public facilities; parcel size and ownership patterns in the area; neighborhood and regional characteristics; natural or man-made features separating the exception area from adjacent resource land; and other relevant factors in order to reach its ultimate conclusion that the property is or is not irrevocably committed.[3]

"(b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and

"(c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a)."

[3]OAR 660-004-0028(6) provides:

"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. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for land adjoining those parcels;

"(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. * * *

ORS 197.732(6) requires that, upon review of a decision approving or denying an exception, LUBA "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[.]" In *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 99-122, May 18, 2000), slip op 14, we described our review under ORS 197.732(6)(b) as requiring that we

> "determine whether the standards provided for in ORS 197.732(1)(b) have been met as a matter of law. In performing that review, we are not required to give any deference to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for a committed exception." (Footnote omitted.)

In *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994), we set forth our "usual approach" to addressing challenges to an irrevocably committed exception under ORS 197.732(1) and 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 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 standard of ORS 197.732(1)(b) that 'uses allowed by the goal [are] impracticable.'" (Footnote omitted.)

Petitioner challenges the county's findings and conclusions under OAR 660-004-0028 and the evidentiary support for those findings, in the course of nine assignments of error that follow, roughly, the tripartite approach described in *1000 Friends of Oregon v. Columbia County*. For the reasons explained below, we conclude that the county's findings

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> "(d) Neighborhood and regional characteristics;
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> "(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;
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> "(f) Physical development according to OAR 660-[004]-0025; and
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> "(g) Other relevant factors."

and conclusions under OAR 660-004-0028 are deficient in certain respects, but that, with respect to the exception to Goal 4, the county's findings and conclusions and the evidence supporting them are adequate to demonstrate that uses allowed by that goal are impracticable. Under our analysis, some of petitioner's assignments of error and intervenors' responses can be, and are, addressed in a summary fashion. Further, because we reach different conclusions with respect to the county's Goal 3 and Goal 4 exceptions, our analysis combines and separates discussion of certain assignments of error, and proceeds in a manner that achieves, by different means, the same end as the approach described in *1000 Friends of Oregon v. Columbia County*.

GOAL 4 EXCEPTION

A. Fourth Assignment of Error

The county's exception to Goal 4 rests primarily on the county's conclusion that the prevalence and resistance of various tree diseases on the subject property render propagation and harvesting of forest products impracticable. Under this assignment of error, petitioner argues that the presence of disease on the subject property is an "other relevant factor" under OAR 660-004-0028(6)(g) that reflects the alleged unsuitability of the subject property for resource use. Petitioner cites *DLCD v. Curry County*, 33 Or LUBA 313, 318-20, *aff'd as modified* 151 Or App 7, 947 P2d 1123 (1997), for the proposition that the purported unsuitability of the exception area for resource use is not an "other relevant factor" for purposes of approving an irrevocably committed exception under OAR 660-004-0028(6)(g). According to petitioner, the county cannot consider evidence designed to prove that, due to certain characteristics of the subject property, the property is not suitable for resource use.

In *DLCD v. Curry County*, the Court of Appeals disagreed with LUBA's conclusion that characteristics of the subject property cannot constitute an "other relevant factor" considered under OAR 660-004-0028(6). However, the court stated that the relationship between the subject property and existing adjacent uses is the "focal criterion" for an

irrevocably committed exception, and that the county erred to the extent it gave "exclusive or 'preponderant' weight to the characteristics of the exception area alone." 151 Or App at 11. The court then agreed with LUBA that the decision must be remanded for findings regarding the relationship between the property and adjacent uses, subject to the one modification in LUBA's analysis. *Id.* at 12.

In the present case, petitioner's argument rests on the single proposition in LUBA's *DLCD v. Curry County* decision that was rejected in the Court of Appeals' opinion. Consequently, petitioner is incorrect that the county erred in considering salient characteristics of the subject property, specifically the presence of tree disease on the property, as an "other relevant factor" under OAR 660-004-0028(6). Although the county cannot give "exclusive or preponderant weight" to such characteristics, it is not error to consider them.

The fourth assignment of error is denied.

B. Seventh, Eighth and Ninth Assignments of Error (In Part)

In these assignments of error, petitioner argues that the county's findings regarding the impracticability of forest uses on the subject property are inadequate, are not supported by substantial evidence, and fail to demonstrate that such uses are impractical.[4]

The county's conclusion that propagation and harvesting of forest products on the property are impracticable relies heavily on a 38-page report submitted by a consulting arborist. The report identifies a number of tree diseases on the subject property and surrounding property and, after discussing known control measures for the identified diseases, concludes that those diseases cannot be controlled in a manner that allows

[4]The ninth assignment of error also contains a subassignment directed at the county's conclusions regarding Goal 3 and farm uses. We address that subassignment separately.

sustainable propagation and harvesting of merchantable timber, principally because of reinfection from adjoining properties.[5]

[5]The decision and intervenors cite in particular to the following portions of the report:

> "On December 9, 1999 through January 14, 2000, I inspected and evaluated the viable commercial trees, and planting conditions on [the subject property]. I also visually inspected the non-commercial trees and trees within the riparian management area (100 ft. Buffer from the North Santiam River edge). I found evidence of the following known root and trunk rotting pathogens: ***Armillaria mellea / Armillaria ostoyae / Inonotus dryadeus / Phellinus weirii*** [Laminated Root Rot]***/ Perenniporia subacida*** and to a lesser degree of influence: ***Heterobasidion annosum***. Trunk & sap rotting pathogens and saprophytes: ***Crytoporus volvatus / Ganoderma applanatum / Fomitopsis cajanderi / Fomitopsis officianalis / Fomitopsis pinicola / Phellinus pini / Phellinus igniarius.*** Evidence consisted of fruiting bodies (Conks), rhizomes, mycelium, and setal hyphae. Lab analysis further identified a foliage fungus known as Swiss Needle Cast (***Phaeocryptopus gaeumannii***).
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> "I conclude that if the site remains as one ownership for forestry purposes, that a 'final harvest' of commercial timber should take place as soon as possible. This means to harvest all commercial timber to avoid any further loss in value of the existing tree stock. The common use of replanting Red Alder as a seral species [*i.e.* species in ecological succession] to increase soil nitrogen and reduce 'Laminated Root Rot' inoculum is not feasible because the existing Alder trees are severely diminished by the presence of Armillaria which are actively attacking these trees and are increasing the surface area of known disease. The riparian buffer area and soil conditions in general make aerial spraying impractical and not advised due to the high potential of water contamination this close to the Santiam River. After final harvest, replacement with disease resistant species such as: **Western Red Cedar** / **Incense Cedar** / **Alaskan Yellow** / **Deerborn Cedar** / **Coast Redwood** would be recommended. These trees will not be commercially viable as they still will be susceptible to the heart and root rotting pathogens. They will continue to provide some value in preventing erosion, absorbing ground water and providing climatic conditions conducive to smaller vegetative growth.
>
> "The various and widespread pathogenic diseases on this property and *adjoining BLM park and neighboring sites* will keep this site useless as a sustained commercial forest for an indefinite period beyond the normal 100 year rotation. This site would be better suited for 'urban forest' management, where trees that are structurally weak are removed near 'target' homesites and vegetation is preserved for beneficial air quality. Based upon the climate, known pathogens, lack of sunlight, and due to erosion sensitivity and riparian areas, this site CANNOT utilize known pathogenic control measures." Supplemental Record 2 (emphasis in original; some Latin nomenclature omitted).
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> "**Overall, due to the increase in the past fifty years of pathogenic activity, changes in climatic conditions, host susceptibility and pathogenic airborne influences from neighboring properties, site conditions on the [subject property] are not conducive to commercial forest land growth**. Planting of resistant species for commercial value will be ineffective as they will be damaged by remaining inoculum [spores or tissue that initiates disease], but will still have structural integrity to maintain aesthetic appearances." Supplemental Record 19 (emphasis in original).

1. Other Forest Uses

Petitioner argues, first, that the county erred in failing to consider forestry uses other than commercial forestry operations, including "forest operations" or "practices" as described at OAR 660-006-0025(2)(a). OAR 660-004-0028(3)(c). Petitioner explains that OAR 660-006-0025(2)(a) allows the following in forest zones:

> "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[.]"

Petitioner recognizes that, in *Friends of Yamhill County*, we rejected a similar argument:

> "[T]he 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)." Slip op 11-12.

Petitioner suggests that the present case is distinguishable from *Friends of Yamhill County*, because the subject property in the present case is currently growing timber, unlike the parcel at issue in that case. However, the current presence or absence of timber on the subject property played no role in our above-quoted analysis of OAR 660-004-0028(3), and provides no basis to distinguish the present case from that in *Friends of Yamhill County*. We repeat that forest operations and practices listed at OAR 660-006-0025(2)(a) are predicated on the ability of land to propagate and harvest timber, and thus the county's impracticability analysis need not consider whether the land is capable of supporting those individual forest practices, once it reaches a supportable conclusion that the propagation and harvesting of

timber is impracticable. Because that is the conclusion the county reached in the present case, we turn to petitioner's challenges to that conclusion.

This subassignment of error is denied.

2. Conflicts with Adjoining Residential Uses

Petitioner argues that to the extent the county relies upon conflicts with adjoining residential uses to conclude that forest uses are impracticable, that reliance misconstrues the applicable law and is not supported by substantial evidence.

Petitioner contends that the record contains no complaints from adjoining residential landowners regarding intervenors' resource use of the property, and no evidence of any conflicts between the subject property and adjoining residential uses. Even if such conflicts exist, petitioner argues, the county cannot rely on conflicts with residential uses in the subdivision to the east of the subject property, because those parcels and the exception area they are within were created pursuant to the statewide planning goals. OAR 660-004-0028(6)(c)(A); *DLCD v. Yamhill County*, 31 Or LUBA 488, 500 (1996).

As we discuss below with respect to the county's Goal 3 exception, petitioner is correct that the record does not support the county's findings that intervenors' resource use of the property "conflicts" with adjoining residential land uses, in the sense that resource use generates complaints or otherwise interferes with those residential uses. However, as we discuss below, the record does support the county's finding that nonresource use of adjoining parcels "conflicts" with sustainable use of the subject property for the propagation and harvesting of forest products, in the sense that the owners of those adjoining parcels have no incentive to control or eradicate tree diseases on their property, and without such measures forestry on the subject property is impracticable.

Petitioner is also correct that parcels created pursuant to the applicable goals cannot be used to justify a committed exception, and thus the county cannot consider conflicts with uses on the RR 2.5-zoned land to the east. OAR 660-004-0028(6)(c)(A). However,

petitioner does not argue that the county cannot consider such conflicts with other lands that border the subject property. Accordingly, petitioner's arguments under this subassignment of error do not provide a basis for reversing or remanding the county's Goal 4 exception.

3. Disease

Petitioner argues that the county's conclusion that the diseases prevalent on the subject property cannot be cured or controlled so as to allow propagation and harvesting of forest products is not supported by substantial evidence, because the county and the arborist's report failed to address viable solutions suggested by petitioner. Petitioner submitted into the record before the county a letter that quotes a federal publication addressing laminated root rot. Record 61-62. The letter quotes a paragraph from the publication, and characterizes that paragraph as suggesting that a site infested with laminated root rot can be replanted with disease-resistant tree species. Further, the letter characterizes the publication as suggesting that a buffer of 50 feet from the property boundaries could protect against reinfection from adjoining properties. Record 62.

The publication petitioner refers to is not in the record. The portion quoted in petitioner's letter at Record 62 does not undermine the evidence supporting the county's conclusions regarding the consequences of disease on the property. As intervenors point out, the publication addresses only one of the 14 diseases found on the subject property. The quoted portion notes that even after replanting with disease-resistant species, laminated root rot "may successfully attack some of the trees and survive into the next rotation." Record 62. The quoted portion does not address the merchantability of disease-resistant species, or undermine the report's conclusion that such species could not, due to continued susceptibility to infection, be harvested as merchantable timber. Finally, the quoted portion of the publication does not support petitioner's contention that a 50-foot buffer could prevent reinfection from adjoining properties. The letter quotes the publication as stating that "[s]ince boundaries of infection centers cannot be determined accurately, that area within 15

[meters] (50 ft) or more of the apparent limits of the center should also be treated as infected." Record 62. The arborist's report discusses a similar point, noting that recommended control for laminated root rot is to cut down all hosts in infection centers along with a 50-foot buffer around each and either replant the site with less susceptible species or treat the inoculum. Supplemental Record 25. In other words, a 50-foot buffer zone for this disease is recommended where the host trees can be cut down and control measures put into place. Petitioner cites to no evidence that a 50-foot buffer is effective in circumstances where the host trees are off-site and thus cannot be cut down or treated.

This subassignment of error is denied.

4. Cooperative Resource Management

Petitioner cites *Friends of Yamhill County* for the proposition that the county must evaluate the practicability of resource use of the subject property in combination with other resource parcels. Petitioner challenges the county's findings that the subject property is separated from resource lands by the river, rural residential uses, and a road and railroad track, and that because of those barriers the subject property "can[not] be combined with any existing viable farm or forest resource land." Record 14. Petitioner contends that there is no evidence that the owners of resource lands in the area were in fact consulted regarding their willingness to incorporate the subject property into their resource operations and that, absent such evidence, the county's findings are not supported by substantial evidence.

In *Friends of Yamhill County*, we remanded the county's decision because it had failed to consider resource use of the subject property in combination with adjacent resource land in *common ownership*, as required by OAR 660-004-0028(6)(c)(B). Slip op 8. OAR 660-004-0028(6)(e) requires that the county consider impediments or obstacles between the exception area and resource lands "that effectively impede practicable resource use of all or part of the exception area[.]" However, that provision does not require that the

county demonstrate that owners of nearby resource land are unwilling to incorporate the subject property into their resource operations.

This subassignment of error is denied.

5. Existing Timber Propagation

Petitioner argues that intervenors have harvested 88,000 board feet of timber from the subject property through 1997, and that the consulting arborist's report indicates that there still exists merchantable timber on the property, notwithstanding the presence of various tree diseases. Petitioner contends that the county failed to address the demonstrated ability of the property to produce timber notwithstanding the impacts of disease.

Intervenors respond, and we agree, that evidence in the record demonstrates that recent replantings have failed and that the merchantable value of the remaining timber on the property is declining due to disease. The arborist's recommendation to harvest the remaining timber appears to reflect the salvage value of those trees, rather than the current capability of the property to produce sustainable levels of merchantable timber. The recent harvests and the existence of remaining timber with some salvage value on the property do not undermine the arborist's report or the county's conclusion that, due to uncontrollable disease, propagation and harvesting of forest products are impracticable.

This subassignment of error is denied.

6. Future Timber Propagation

Finally, petitioner challenges the county's conclusion that the property cannot, in the foreseeable future, be restored to sustainable timber production. That conclusion rested primarily on the arborist's report's determination that available methods of controlling the various diseases prevalent on the property are ineffective. That determination, in turn, rested in large part on the report's determination that adjoining properties, including the BLM park across the river, were infected with the same diseases, and that the predominant nonresource

use of those properties meant that there was no incentive for their owners to attempt eradication of these diseases.[6]

Petitioner argues that, given 60 or 100 years, it may be possible to restore sustainable timber production on the property, notwithstanding the probability of reinfection from adjoining lands and the difficulties in controlling the identified diseases described in the arborist's report. However, petitioner does not identify any means to do so, other than to suggest that cottonwoods are not affected by the identified diseases and thus might be grown on the property as merchantable timber notwithstanding the continued presence of those diseases. That suggestion is based on a statement in intervenors' application at Record 144. However, intervenors point out that the arborist's examination of trees on the subject property found "numerous fallen Cottonwoods" that failed with loss of roots due to root pathogens. Supplemental Record 20; *see also* Supplemental Record 24 (*Armillaria spp.* is the major cause of root rot in Cottonwood). We agree with intervenors that the county's conclusions regarding future timber propagation on the subject property are supported by substantial evidence and sufficiently demonstrate that propagation and harvesting of forest products on the subject property in the foreseeable future is impracticable.

This subassignment of error is denied.

The seventh and eighth assignments of error are denied; the ninth assignment of error, to the extent it challenges the county's Goal 4 exception, is denied.

GOAL 3 EXCEPTION

A. First, Second, Third and Fifth Assignments of Error

Under the first three assignments of error, petitioner challenges the county's findings regarding adjacent lands, existing uses and the subject property's relationship with those

[6]The report also determined that certain potential treatments for certain diseases, such as airborne spraying of chemicals, were inappropriate given the proximity of protected habitat along and in the river, recreational uses across the river, and nearby residential uses.

uses, and the evidence supporting those findings. Specifically, petitioner argues that the county's analysis of adjacent lands and existing adjacent uses under OAR 660-004-0028(2) and (6) is inadequate and unsupported by substantial evidence, and that the county's findings fail to adequately address the relationship between the subject property and adjacent lands under OAR 660-004-0028(2)(c). In the fifth assignment of error petitioner argues that the county's conclusion under OAR 660-004-0028(2)(c), that conflicts with adjacent properties render resource use of the subject property impracticable, is not supported by substantial evidence, because the record contains no evidence of any conflicts with adjacent properties.

Petitioner's findings and evidentiary challenges under these assignments of error are directed at both the Goal 3 and 4 exceptions adopted by the county. However, in our discussion of the seventh, eighth and ninth assignments of error, we determined that the county's findings and evidence are sufficient to demonstrate that uses allowed by Goal 4 are impracticable on the subject property. That conclusion renders it unnecessary to address petitioner's challenges under the first, second, third and fifth assignments of error, to the extent those challenges are directed at the county's Goal 4 exception. Accordingly, we confine our analysis under these assignments to the county's Goal 3 exception.

That said, we do not find it necessary to address petitioner's findings and evidentiary challenges in detail. Even assuming that the county's findings under OAR 660-004-0028(2)(b) and (6)(a) adequately address all relevant factors and are supported by substantial evidence, petitioner is correct that the county's findings as a whole fail to demonstrate that the relationship between the subject property and adjacent lands renders farm use impracticable. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA at 476-77 (omitting analysis of findings and evidentiary challenges, where the findings fail to demonstrate that uses allowed by the relevant goal are impracticable).

The county's conclusion regarding impracticability for farm use is based almost entirely on its findings that (1) uses in the surrounding area are predominantly if not entirely

nonresource in nature, and (2) the subject property is isolated from any resource uses in the area by the river, the county road and railroad track, and adjoining parcels in nonresource use. What is missing is any explanation for why those factors render farm use of the subject property impracticable. That surrounding uses are nonresource in nature, even assuming that is true, is insufficient to demonstrate that those uses render farm use of the subject property impracticable. *See Prentice v. LCDC*, 71 Or App 394, 403-04, 692 P2d 642 (1984) (the mere existence of residential uses near property proposed for an irrevocably committed exception does not demonstrate that such property is irrevocably committed to nonfarm uses).

Similarly, the fact that the subject property is isolated from other parcels in resource use fails to explain why that isolation renders farm use of the subject property impracticable. Petitioner is correct that the county's findings do not identify any conflicts with adjacent uses or any other reason why the relationship between the subject property and adjacent lands renders farm use impracticable. It is the relationship between the subject property and adjacent uses that is the "focal criterion" for an irrevocably committed exception. *DLCD v. Curry County*, 151 Or App at 11. Without an explanation why the relationship between the subject property and adjoining uses renders farm use impracticable, the county's exception to Goal 3 rests preponderantly, if not exclusively, on the characteristics of the subject property itself. We address, below, several challenges to the county's findings regarding the subject property's inherent limitations for farm use. It suffices here to repeat that the county's exclusive or preponderant reliance on the characteristics of the subject property to demonstrate an irrevocable commitment is inconsistent with OAR 660-004-0028. *Id*.

The first, second, third and fifth assignments of error are sustained to the extent they are directed at the county's Goal 3 exception. Otherwise, they are denied.

B. Sixth and Ninth Assignments of Error (In Part)

In these assignments of error, petitioner challenges the evidentiary support for the county's findings regarding the practicability of farm uses on the subject property, and the county's ultimate conclusion that such uses are impracticable.

1. Tax Deferral Status

Petitioner first challenges the county's failure to take into account the fact that the subject property has received a farm tax deferral since 1989. Petitioner argues that tax deferral status is a "factor" that must be considered under the county's Goal 3 exception analysis, citing to *Lovinger v. Lane County*, 36 Or LUBA 1, *aff'd* 161 Or App 198, 984 P2d 958 (1999). However, as intervenors point out, the issue of tax status in *Lovinger* was raised in response to an argument that property currently generating farm income was nonetheless not capable of farm uses. We specifically rejected in *Friends of Yamhill County* the same argument made here: that tax deferral status is a "factor" that must be considered in all cases in taking an exception to Goal 3. Slip op 10.

This subassignment of error is denied.

2. Soil Quality

The county found, based on a county soil survey and the reports of intervenors' consultants, that the subject property is predominantly composed of Class V through VII nonagricultural soils, and the subject property is not suitable for growing crops or grazing livestock.[7] Petitioner argues that approximately one-third of the subject property, about 10 acres, contains Class II, high-value soils that are rated for hay, pasture and small grain production, and thus that the county's findings are not supported by substantial evidence.

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[7]We note that the subject property may not meet the definition of "agricultural land" as defined in Goal 3 and OAR 660-033-0020(1), because it does not possess predominantly Class I-IV soils. However, the county's decision does not take the position that the subject property is not "agricultural land" as defined by the goal and rule, and we express no opinion whether the county could redesignate the subject property for nonagricultural uses without taking an exception to Goal 3.

Intervenors cite to evidence that due to various topographic limitations the subject property cannot be tilled or provide pasture for livestock. Record 142-44. Petitioner does not challenge that evidence, or explain why, given that evidence, the county's conclusion regarding suitability for growing crops or grazing livestock is not supported by substantial evidence.

This subassignment of error is denied.

3. Farm Uses as Defined at ORS 215.203

Petitioner next argues that the county considered only certain farm uses, specifically growing crops and grazing livestock, and failed to consider other farm uses defined at ORS 215.203. In particular, petitioner argues that the county failed to address a specific farm use included in ORS 215.203(2)(a) that does not depend upon the quality of agricultural soils: riding stables and facilities for the training and boarding of horses.[8]

Intervenors respond that the county is not required to address every possible farm use defined under ORS 215.203(2)(a). *DLCD v Yamhill County*, 31 Or LUBA 488, 499 (1996) (a county need not address every use potentially allowable under the applicable goals; general findings are sufficient, at least when no issue is raised pertaining to a particular use). Intervenors contend that petitioner failed to raise below any issue regarding whether use of the subject property for a stable or equine facility is practicable. However, petitioner identifies a letter submitted to the county below that raises that precise issue. Record 62. Because the issue was raised below, it is not waived, and the county must address that issue

[8]ORS 215.203(2)(a) provides in relevant part:

> "'[F]arm 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' 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. * * *"

and determine whether it is impracticable to use the subject property for a riding stable or facility for the training and boarding of horses. Because the county's findings do not address that issue, the county's ultimate conclusion regarding the impracticability of farm uses on the subject property is inadequate to demonstrate compliance with ORS 197.732.

This subassignment of error is sustained.

The sixth assignment of error is sustained, in part. The ninth assignment of error is sustained to the extent it challenges the county's failure to consider riding stables and equine facilities as a practicable farm use; otherwise it is denied.

TENTH ASSIGNMENT OF ERROR

Petitioner contends that the county failed to address the requirements of OAR 660-004-0018(2)(b), which requires, in relevant part, that the county find that rural uses allowed by an irrevocably committed exception will not commit adjacent or nearby resource lands to nonresource use.

Intervenors respond that petitioner failed to raise the issue of compliance with OAR 660-004-0018(2)(b) below and thus that issue is waived. ORS 197.763(1); ORS 197.835(3). Petitioner does not respond to this waiver argument, or identify any place in the record where the issue of compliance with this provision was raised. Accordingly, it is waived.

The tenth assignment of error is denied.

ELEVENTH ASSIGNMENT OF ERROR

Petitioner contends that the county's findings addressing Linn County Land Development Code (LDC) 921.874(A) misconstrue the applicable law and are not supported by substantial evidence. LDC 921.874(A) requires that prior to amending the comprehensive plan the county must adopt findings showing that (1) the amendment is consistent with the

plan, (2) the amendment is compatible with adjacent uses, and (3) the amendment will not have significant adverse impacts on fish and wildlife habitat.[9]

A. LDC 921.874(A)(1)

Petitioner challenges the county's finding that the amendment is consistent with Linn County Comprehensive Plan (LCCP) 905.330(B), which provides in relevant part:

> "(1) Linn County shall adopt zoning that will maintain the resource orientation of Farm/Forest lands.
>
> "(2) Impacts on the local economy will be assessed before *Comprehensive Plan* amendments are approved to change a Farm/Forest designation to a development designation." (Emphasis in original.)

With respect to the policy at LCCP 905.330(B)(1), the county concluded that the "resource orientation" of the subject property was "limited," and that:

> "The resource orientation of Farm/Forest lands in this vicinity will not be altered by this Plan change. The [subject property] is already essentially isolated from the significant Farm/Forest uses in this vicinity, so its change to a rural residential designation will have minimal impact on actual Farm/Forest uses here." Record 22.

Petitioner argues that the county's conclusion misconstrues the appropriate inquiry under the plan provision, which petitioner contends is whether the amendment will maintain the resource orientation of the subject property, not the surrounding area. To the extent the county addressed the resource orientation of the subject property, petitioner argues, its

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[9]LDC 921.874(A) provides in relevant part:

> "To approve a plan map amendment, findings shall be made that:
>
> "(1) The amendment is consistent with and does not alter the intent of applicable section(s) of the *Comprehensive Plan*;
>
> "(2) The amendment will be compatible with adjacent uses and will not adversely impact the overall land use pattern in the area;
>
> "* * * * *
>
> "(4) The amendment will not have a significant adverse impact on a sensitive fish or wildlife habitat[.]" (Emphasis in original.)

conclusion rests on the unsupported premise that the subject property is not capable of resource use.

The county appears to have understood LCCP 905.330(B)(1) to require consideration of the impacts of the amendment on the resource orientation of both the subject property and surrounding farm and forest uses, primarily the latter. Petitioner has not demonstrated that that interpretation of the plan provision is inconsistent with its language, purpose or the policies underlying it. ORS 197.829(1)(a)-(c). As discussed earlier, there is substantial evidence to support the county's finding that the "resource orientation" of the subject property is "limited." Petitioner does not argue that a finding of consistency with LCCP 905.330(B)(1) requires more.

With respect to LCCP 905.330(B)(2), the county found that only 88,000 board feet of timber had been harvested from the subject property since 1991 and that, with the diminished potential for future harvests due to disease, "the impacts of this Plan [amendment] on the local economy are not significant enough for a separate study [of economic impacts]." Record 22. Petitioner faults this conclusion, arguing that the subject property has been producing commercial timber for the past 10 years and that its conversion to nonresource use will have impacts on the local economy that the county cannot simply ignore.

It is true that the county's findings regarding LCCP 905.330(B)(2) focus on whether a "separate study" is needed, rather than whether the amendment is consistent with LCCP 905.330(B)(2), as required by LDC 921.874(A). However, the county found, essentially, that there will be minimal economic impact due to the reduced potential yield from the diseased trees. That finding satisfies the requirement at LCCP 905.330(B)(2) that "[i]mpacts on the local economy will be assessed." The county's findings with respect to this plan provision are adequate and supported by substantial evidence.

This subassignment of error is denied.

B. LDC 921.874(A)(2)

Petitioner contends that the county's finding that the amendment is compatible with adjacent uses, as required by LDC 921.874(A)(2), is not based on substantial evidence. Petitioner argues that the county's finding is based on the erroneous view that the subject property is surrounded by nonresource uses and is isolated from resource parcels. Petitioner argues that it is undisputed that the majority of adjoining parcels are zoned for resource uses.

The county's conclusion under LDC 921.874(A)(2) focuses on the compatibility of the proposed rural residential uses with the existing rural residential uses on a number of adjoining parcels, some of which are zoned for resource use. Petitioner does not cite to any evidence that the adjoining parcels zoned for resource use are, in fact, used for that purpose, as opposed to residential uses. The focus of LDC 921.874(A)(2) appears to be compatibility with *existing* adjacent uses and the *existing* overall land use pattern in the area, not compatibility with uses that are allowed by the applicable zone and *might* exist in the future. Petitioner has not demonstrated that the county's conclusion under that provision is not supported by substantial evidence.

This subassignment of error is denied.

C. LDC 921.874(A)(4)

The county's decision imposes a 100-foot setback from the North Santiam River, as required by the FPA. However, petitioner argues that the decision fails to comply with LDC 921.874(A)(4), which requires that the county avoid a significant adverse impact on a sensitive fish or wildlife habitat, because the county failed to impose a 200-foot buffer suggested by the Oregon Department of Fish and Wildlife (ODFW). Petitioner argues that the county's determination that a 100-foot buffer is sufficient to avoid adverse impacts on fish and wildlife is not supported by substantial evidence.

An ODFW biologist submitted a letter commenting on the proposal and recommending a 200-foot buffer to protect streambank stability, woody debris input, nutrient input, litter fall and shade functions. The letter states:

> "* * * The current proposal to buffer the site with a 100 foot setback from the North Santiam River does not adequately preserve the unique ecological functions, fish and wildlife species, stream and streambank stabilization functions and floodplain character of this site." Record 203.

The county rejected the ODFW recommendation, finding that the 100-foot buffer was an adequate compromise that serves the interests of all parties. Further, the county's finding asserts that the ODFW letter does not state that the amendment with a 100-foot buffer would have significant adverse impacts on fish or wildlife. Finally, the county quotes a letter from intervenors' consultant, which related a visit by the ODFW biologist to the subject property during which the biologist is reported to have commented that the 100-foot buffer "is probably sufficient," provided certain other measures are implemented. Record 31. The consultant's letter states that these other measures are best dealt with during the land subdivision process. After relating these points, the county's findings conclude that the county has chosen to accept and believe the technical evidence and expert testimony presented by intervenors and that the criterion is satisfied.

Fairly read, the ODFW biologist's letter states that the proposed 100-foot setback "does not adequately preserve * * * fish and wildlife species * * *." Record 203. It is difficult to read that statement, as the county does, to say nothing regarding whether a 100-foot buffer will have a significant adverse impact on fish and wildlife habitat. Neither the county's decision nor intervenors' brief identifies any evidence contradicting the ODFW biologist's statement, or supporting the adequacy of a 100-foot buffer. The comments attributed to the ODFW biologist during the site visit were conditioned on imposition of certain measures that the county, apparently, did not impose. In short, we agree with petitioner that the county's finding of compliance with LDC 921.874(A)(4) is not supported

by substantial evidence, insofar as it addresses the adequacy of a 100-foot buffer to avoid significant adverse impacts on fish and wildlife habitat.

This subassignment of error is sustained.

The eleventh assignment of error is sustained, in part.

The county's decision is remanded.