

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 FRIENDS OF LINN COUNTY,  
5 MARGARET E. LANG and LETHA PAILLE,  
6 *Petitioners,*

7  
8 vs.

9  
10 LINN COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 RICHARD SILVA and DONNA SILVA,  
16 *Intervenors-Respondent.*

17  
18 LUBA No. 2001-186

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from Linn County.

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25 Christine M. Cook, Portland, filed the petition for review and argued on behalf of  
26 petitioners.

27  
28 No appearance by Linn County.

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30 Richard Silva, Stayton, filed the response brief on his own behalf. Donna Silva,  
31 Stayton, represented herself.

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

35  
36 REMANDED

02/26/2002

37  
38 You are entitled to judicial review of this Order. Judicial review is governed by the  
39 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county decision adopting an irrevocably committed exception to Statewide Goal 3 (Agricultural Lands), changing the comprehensive plan map designation from Agricultural Resource to Rural Residential, and adopting a zone change from exclusive farm use (EFU) to Rural Residential five-acre minimum (RR-5) for a 14.36-acre parcel.

**MOTION TO INTERVENE**

Richard Silva and Donna Silva, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

This case is before us for a second time. We quote the relevant facts from our prior opinion:

“The subject property is a flat rectangular parcel adjoining a county road on the south. Prior to 1981, the subject property consisted of two separate parcels in common ownership. A dwelling was constructed on one parcel in 1952. In 1981, the then-landowner applied for a conditional use permit to site a manufactured dwelling as an accessory farm dwelling. The county approved the permit, on the condition that the two parcels be consolidated and the accessory dwelling be utilized to maintain resource activities on the consolidated parcel.

“The property has a history of use as farmland, primarily for grazing. Ninety percent of the soils on the subject property consist of high-value soils. Two winter creeks cross the property, creating standing water on portions of the property during the winter. Bordering the subject property on the west and south is an exception area consisting of 14 parcels, ranging in size from 2.41 acres to 13.35 acres. The parcels within the exception area are all developed with residences. The exception area is itself surrounded by lands zoned EFU. The subject property is bordered on the north, east and southeast by other properties zoned EFU, some of which are developed with residences. All of the parcels adjoining the subject property are currently used for farm uses, primarily grazing.

“Intervenor applied to the county for an exception to Statewide Planning Goal 3 (Agricultural Lands), proposing to subdivide the property into two parcels, each with one of the existing dwellings. The county planning commission held a hearing on March 14, 2000, and recommended denial of the

1 application. The board of commissioners then held a hearing, and voted to  
2 approve the application. The county’s final decision purports to take an  
3 ‘irrevocably committed’ exception to Goal 3, based on OAR 660-004-0028  
4 and criteria in the county’s comprehensive plan and code. \* \* \*” *Friends of*  
5 *Linn County v. Linn County*, 39 Or LUBA 74, 75-76 (2000).

6 We remanded the county’s earlier decision for failure to address the criteria for an  
7 irrevocably committed exception at OAR 660-004-0028. On remand, the county held a  
8 hearing and adopted additional findings, again approving an irrevocably committed  
9 exception for the subject property. This appeal followed.

10 **ASSIGNMENT OF ERROR**

11 Petitioners contend that the county’s decision fails to demonstrate that the subject  
12 property is irrevocably committed to uses not allowed by Goal 3. According to petitioners,  
13 the county’s findings do not adequately address the requirements of OAR 660-004-0028, and  
14 rely on factors that are not properly considered under the rule.<sup>1</sup> Finally, petitioners argue,

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<sup>1</sup> OAR 660-004-0028 provides, in relevant part:

- “(1) A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]  
  
\* \* \* \* \*
- “(2) 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:
  - “(a) The characteristics of the exception area;
  - “(b) The characteristics of the adjacent lands;
  - “(c) The relationship between the exception area and the lands adjacent to it; and
  - “(d) The other relevant factors set forth in OAR 660-004-0028(6).
- “(3) 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

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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:

“(a) Farm use as defined in ORS 215.203;

“\* \* \* \* \*

“(4) A conclusion that an exception area is irrevocably committed shall be supported by findings of fact which address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area.

“\* \* \* \* \*

“(6) 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. \* \* \*;

“(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

1 the findings and the record as a whole do not support the ultimate conclusion required by the  
2 rule that uses allowed by Goal 3 are “impracticable.”

3 **A. OAR 660-004-0028**

4 The county’s initial decision did not address the requirements of OAR 660-004-0028.  
5 We did not resolve the findings and evidentiary challenges raised in the petition for review in  
6 the first appeal, on the grounds that until the county addressed the rule’s requirements,  
7 petitioners’ findings and evidentiary challenges under the rule were premature. We  
8 commented, however, that the county and intervenors would be well-advised to consider  
9 those challenges before attempting to demonstrate that the property is irrevocably committed  
10 under the rule. 39 Or LUBA at 78 n 2. On remand, the county adopted findings that address  
11 the requirements of the rule, and again approved an exception. Petitioners now renew many  
12 of the same challenges raised in the earlier appeal, and also advance specific challenges to  
13 the county’s findings under the rule.

14 The county did not file a response brief. Intervenor Richard Silva filed a three-page  
15 response brief that, for the most part, does not address the specific arguments in the petition  
16 for review. Given the absence of focused responses to the specific arguments in the petition  
17 for review, we see no purpose in addressing each of those arguments in detail. For the  
18 following reasons, we agree with petitioners that the county’s findings and the evidence in  
19 the record do not support the county’s ultimate conclusion that the property is irrevocably  
20 committed to nonfarm uses. In reaching that conclusion, we address several of petitioners’  
21 more significant allegations of legal error.

22 The impracticability standard is a demanding one. *1000 Friends of Oregon v.*  
23 *Yamhill County*, 27 Or LUBA 508, 519 (1994). The subject property is composed of 90  
24 percent high-value farm soils, and has a long history of farm use, including recent farm use.

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“(g) Other relevant factors.”

1 It is bordered on two sides by small acreage parcels zoned RR-5, and on two sides by parcels  
2 zoned EFU. The county’s decision suggests that rural residential uses of property within the  
3 adjoining RR-5 zone render farm use of the subject property impracticable. However, the  
4 county’s findings do not explain why. The mere existence of residential uses near property  
5 proposed for an irrevocably committed exception does not demonstrate that such property is  
6 committed. *Prentice v. LCDC*, 71 Or App 394, 403-04, 692 P2d 642 (1984).

7 The only cited evidence of any possible conflict between farm use of the subject  
8 property and adjoining rural residential uses is a letter from a nearby farmer stating that “the  
9 surrounding area has many homes, so \* \* \* farming activity [on the subject property] may  
10 become a nuisance to these neighbors.” Record 44. However, this evidence is legally  
11 insufficient to establish that the adjoining residential uses render farm use of the subject  
12 property impracticable, particularly in light of the history of farm use on the subject property.  
13 As we stated in *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 365-  
14 66, *aff’d* 171 Or App 149, 15 P3d 42 (2000), where the subject property is currently in farm  
15 use and has a history of farm use, it is insufficient to rely on long-standing site characteristics  
16 or long-standing adjacent conflicting uses, without identifying recent or imminent changes  
17 affecting the subject property that, alone or in combination with long-standing factors, render  
18 continued farm use impracticable.

19 The county’s decision attempts to draw a distinction between “farm use” as defined at  
20 ORS 215.203(2)(a) and “hobby farming,” and concludes that much of the farming activity on  
21 adjoining parcels zoned RR-5 and even those on adjoining parcels zoned EFU is actually  
22 “hobby farming” rather than “farm use.”<sup>2</sup> The significance of that distinction and the

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<sup>2</sup> ORS 197.203(2)(a) provides in relevant part:

“As used in this section, ‘farm use’ means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or

1 county's conclusion is not clear to us. The focus of OAR 660-004-0028 is on whether  
2 adjoining uses or other relevant factors render resource use of the subject property  
3 impracticable. Even if adjoining farm uses are accurately characterized as "hobby farming,"  
4 under the county's understanding of that term, that does nothing to demonstrate that such  
5 hobby farming renders farm use of the subject property impracticable.

6 The characteristics of the subject property may be considered as a relevant factor  
7 under OAR 660-004-0028(6). However, the "focal criterion" is the relationship between the  
8 subject property and existing adjacent uses, and the county cannot give "exclusive or  
9 preponderant" weight to the characteristics of the exception area. *DLCD v. Curry County*,  
10 151 Or App 7, 11, 947 P2d 1123 (1997). The county's decision relies heavily on the  
11 characteristics of the subject property, stressing the existence of two dwellings, barns, corrals  
12 and other improvements, and the presence of two "winter creeks" on the northern portion of  
13 the property.<sup>3</sup> In light of the county's failure to demonstrate that the relationship between  
14 the subject property and adjoining properties renders farm use impracticable, the county's  
15 finding of commitment appears to rest preponderantly on the characteristics of the subject  
16 property.

17 Whatever weight is assigned the subject property's characteristics, the county's  
18 findings regarding those characteristics are inadequate. The county does not explain why the

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horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. \* \* \*

<sup>3</sup> By "winter creek" we understand the county to refer to low areas of the property where runoff from rain and adjacent properties pools and drains across the property from west to east. The county found that for approximately nine months of the year, 29 percent or 4.2 acres of the subject property consists of winter creeks or pond, and water runoff. Record 25.

1 existing improvements render farm use of the property impracticable and, given that most of  
2 them relate to farm use or were approved as necessary for farm use, it is difficult to see why  
3 such improvements make farm use impracticable. The county’s decision suggests that the  
4 “winter creeks” limit farm use of portions of the subject property to some extent, at least  
5 during the wet season.<sup>4</sup> However, the county’s decision does not describe those limitations,  
6 or explain why these long-standing limitations now render farm use of the subject property  
7 impracticable, given the history of farm use on the property.

8 Finally, the county’s decision relies to some extent on certain “Rural Residential  
9 Locational Criteria” in its comprehensive plan, to support a finding that the property is  
10 irrevocably committed under OAR 660-004-0028. In our earlier decision, we held that the  
11 county erred in applying the Locational Criteria instead of OAR 660-004-0028. *Friends of*  
12 *Linn County*, 39 Or LUBA at 77.<sup>5</sup> On remand, the county adopted findings addressing  
13 OAR 660-004-0028(6)(c) that rely exclusively on application of the Locational Criteria.  
14 Petitioners argue that, whatever role the Locational Criteria play in taking an irrevocably

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<sup>4</sup> Petitioners dispute that those limitations are significant. Petitioners cite to staff testimony that many farmers farm through similar drainage areas, or drain the soil by installing culverts or underground drainage systems.

<sup>5</sup> We described the Locational Criteria as follows:

“\* \* \* The Locational Criteria set forth a three-step process that assigns points to property based on a number of criteria, including proximity to blocks of committed parcels, the size of and development on the subject property, and the number of other parcels within one-quarter mile that are less than 10 acres in size. If enough points are assigned in this process, then the subject property is deemed ‘committed land.’” 39 Or LUBA at 76.

We expressed uncertainty over what role, if any, the Locational Criteria could play in taking an irrevocably committed exception under OAR 660-004-0028, commenting:

“It may be that the Locational Criteria represent the standards under which the county initially determined which lands should be zoned for rural residential uses, as part of the development and acknowledgment of its comprehensive plan. It may be that the Locational Criteria represent a policy overlay providing additional criteria for lands that meet the state requirements for an exception. Whatever the case, we agree with petitioners that the county erred in failing to apply the relevant statutory, goal and rule-based requirements for an irrevocably committed exception.” 39 Or LUBA at 77.



1 committed exception under OAR 660-004-0028, the county’s findings under OAR 660-004-  
2 0028(6)(c) are inadequate because they do not address the requirements of the rule. We  
3 agree. As we noted in our earlier decision, the Locational Criteria bear no obvious  
4 relationship to the requirements of OAR 660-004-0028. 39 Or LUBA at 78. Application of  
5 the Locational Criteria is not sufficient to address the requirements of OAR 660-004-  
6 0028(6)(c).<sup>6</sup>

7 **B. Conclusion**

8 The ultimate question under OAR 660-004-0028 and ORS 197.732(1)(b), as applied  
9 here, is whether the subject property is irrevocably committed to uses not permitted by Goal  
10 3 because existing adjacent uses and other relevant factors makes farm use impracticable.  
11 An irrevocably committed exception must be based on “findings of fact and a statement of  
12 reasons” demonstrating that that standard is met. ORS 197.732(4). On review of a decision  
13 approving an exception, LUBA must determine whether the local government’s findings and  
14 reasons demonstrate that the standards of ORS 197.732(1) have or have not been met.  
15 ORS 197.732(6)(b). Further, LUBA must adopt a clear statement of reasons setting forth the  
16 basis for our determination that the standards of ORS 197.732(1) have or have not been met.  
17 ORS 197.732(6)(c).

18 For the reasons explained above, the county’s findings and reasons are insufficient to  
19 demonstrate that the subject property is irrevocably committed to nonfarm uses. As noted,  
20 the subject property is composed of 90 percent high-value farm soils, and has a long history  
21 of farm use, including recent farm use. The county has not identified any conflicts or other  
22 relevant aspects of the property’s relationship with adjoining uses that would justify a

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<sup>6</sup> The petition for review includes a substantial evidence challenge to the county’s calculations under the Locational Criteria. Petitioners argue that the correct value for step 1, factor 2(c) is –0.50, but that the county improperly awarded the subject property a value of 0.00 for step 1, factor 2(c), with the result that the subject property did not earn sufficient points to satisfy the criteria. Record 57. No party responds to this argument. However, petitioners’ assumption that the value for step 1, factor 2(c) is –0.50 rather than 0.00 may not be correct. *See* Record 54. To the extent this issue has any significance on remand, the county may address it.

1 conclusion that farm use of the subject property is impracticable. None of the identified  
2 characteristics of the subject property suffice to demonstrate that the property is irrevocably  
3 committed to nonfarm uses, particularly given its history of farm use. Considered as a  
4 whole, the county’s findings and reasons are insufficient to demonstrate that the subject  
5 property is irrevocably committed.

6 At oral argument, petitioners suggested that the Board should reverse rather than  
7 remand the county’s decision, because under the existing circumstances intervenors cannot  
8 demonstrate that the subject property is irrevocably committed to nonfarm uses. OAR 661-  
9 010-0071(1) provides in relevant part that the Board shall reverse a land use decision if  
10 “[t]he decision violates a provision of applicable law and is prohibited as a matter of law.”<sup>7</sup>  
11 We understand petitioners to contend that the county’s decision is essentially “prohibited as a  
12 matter of law,” because under the circumstances reflected in the present record, it is  
13 impossible for intervenors to show that the property is irrevocably committed to nonfarm  
14 uses. Petitioners are correct that the present record does not support the county’s conclusion

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<sup>7</sup> OAR 661-010-0071 provides:

- “(1) The Board shall reverse a land use decision when:
  - “(a) The governing body exceeded its jurisdiction;
  - “(b) The decision is unconstitutional; or
  - “(c) The decision violates a provision of applicable law and is prohibited as a matter of law.
  
- “(2) The Board shall remand a land use decision for further proceedings when:
  - “(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);
  - “(b) The decision is not supported by substantial evidence in the whole record;
  - “(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
  - “(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law.”

1 that the subject property is irrevocably committed. Petitioners may well be correct that no  
2 additional findings or evidentiary proceedings on remand are likely to support such a  
3 conclusion. Nonetheless, circumstances change, and therefore remand rather than reversal is  
4 the correct disposition under our rules. OAR 661-010-0071(2); *DLCD v. Wallowa County*,  
5 37 Or LUBA 105, 121 (1999).

6 The county's decision is remanded.