

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION
5 AND DEVELOPMENT,

6 *Petitioner,*

7
8 and

9
10 FRIENDS OF YAMHILL COUNTY,

11 *Intervenor-Petitioner,*

12
13 vs.

14
15 YAMHILL COUNTY,

16 *Respondent.*

17
18 LUBA No. 2002-011

19
20 FINAL OPINION

21 AND ORDER

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23 Appeal from Yamhill County.

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25 Steven E. Shipsey, Assistant Attorney General, Salem, filed a petition for review on
26 behalf of petitioner. With him on the brief were Hardy Myers, Attorney General, and
27 Michael D. Reynolds, Solicitor General.

28
29 William K. Kabeiseman, Portland, filed a petition for review on behalf of intervenor-
30 petitioner. With him on the brief was Preston, Gates and Ellis, LLP.

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32 No appearance by Yamhill County.

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

36
37 REMANDED

05/09/2002

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

NATURE OF THE DECISION

The Department of Land Conservation and Development (DLCD) and Friends of Yamhill County (FOYC) challenge a county decision that amends the comprehensive plan map designation for a 10-acre parcel from Agriculture/Forestry Large Holding (AFLH) to Agriculture/Forestry Small Holding (AFSH), rezones the property from exclusive farm use (EF-80) to Agriculture/Forestry Small Holding (AF-10), and takes an exception to Statewide Planning Goal 3 (Agricultural Lands).

MOTION TO INTERVENE

FOYC moves to intervene on the side of petitioner. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a triangular-shaped 10-acre parcel located approximately five miles north of the City of Newberg. The property consists of an upper bench area on the northern corner of the parcel, which borders a public road, and a steeply sloping portion that descends to the valley floor 400 feet below. The property is not currently developed. Property to the south is zoned EF-80 and is used for a Christmas tree farm. Properties to the east and west are also zoned EF-80, including an old quarry site. Properties to the north, across the public road, are zoned rural residential.

The property owners submitted an application for a comprehensive plan and zone change. The Yamhill County Planning Commission recommended approval, and the Yamhill Board of County Commissioners approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR (DLCD)

DLCD argues that the county's decision must be reversed because, as a matter of law, a local government cannot take an exception to a statewide planning goal to allow a use that could be allowed under the relevant statewide planning goal. According to DLCD, the

1 challenged decision would allow one single-family dwelling on the property, but the same
2 ultimate result could be obtained by applying for a dwelling not in conjunction with farm use
3 (“nonfarm dwelling”) that is allowed under exclusive farm use (EFU) zoning, which
4 implements Statewide Planning Goal 3.

5 As discussed at greater length later in this opinion, the county took an exception to
6 Goal 3 to adopt a zone change from an EFU zoning designation to a rural residential
7 designation. OAR 660-004-0000(2) describes the purpose of exceptions to the goals:

8 “An exception is a decision to exclude certain land from the requirements of
9 one or more applicable statewide planning goals in accordance with the
10 process specified in Goal 2, Part II, Exceptions. The documentation for an
11 exception must be set forth in a local government’s comprehensive plan. Such
12 documentation must support a conclusion that the standards for an exception
13 have been met. The conclusion shall be based on findings of fact supported by
14 substantial evidence in the record of the local proceeding and by a statement
15 of reasons which *explain why the proposed use not allowed by the applicable*
16 *goal should be provided for.* The exceptions process is not to be used to
17 indicate that a jurisdiction disagrees with a goal.” (Emphasis added.)¹

18 The comprehensive plan and zoning map changes adopted by the county rezone the
19 subject property to AF-10. AF-10 is a rural residential designation under the Yamhill County
20 Zoning Ordinance (YCZO) that allows one single-family dwelling on a 10-acre parcel.
21 YCZO 501.06. Because the subject property is 10 acres, only one single-family dwelling
22 may be approved after the exception is taken. DLCDC asserts that one single-family dwelling
23 could be approved as a nonfarm dwelling without taking an exception to Goal 3.² See ORS
24 215.284 (nonfarm dwelling approval criteria). DLCDC argues that the “proposed use” for
25 purposes of OAR 660-004-0000(2) is a single-family dwelling, and because that use could be
26 allowed as a nonfarm dwelling under Goal 3, the county is prohibited from taking an
27 exception.

¹ OAR 660-004-0022 also provides that “[a]n exception under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s).”

² The decision also suggests that a nonfarm dwelling could be approved on the property. Record 8, 21.

1 We do not agree. The emphasized language from OAR 660-004-0000(2) does not
2 constitute a threshold standard that must be met before an application for an exception may
3 be considered by the county. The standards for approving a nonfarm dwelling are very strict,
4 and frequently may not be satisfied. ORS 215.284; OAR 660-033-0130(4). The possibility
5 that the subject property might satisfy those standards is speculative. We see no requirement
6 in OAR 660-004-0000(2) or elsewhere that requires the applicant to exhaust every potential
7 alternative means to obtain approval for a dwelling in an agricultural zone before applying
8 for an exception to Goal 3 to allow agricultural land to be rezoned for rural residential use.

9 The first assignment of error (DLCD) is denied.

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

11 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (FOYC)**

12 DLCD and FOYC (together, petitioners) argue that the county misconstrued the
13 applicable law and adopted inadequate findings in adopting a reasons exception to Goal 3.
14 Statewide Planning Goal 2, Part II(c), ORS 197.732, and OAR 660-004-0020 provide the
15 criteria for taking a reasons exception.³ Petitioners argue that the county’s findings that

³ OAR 660-004-0020(2) provides:

“The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:

“(a) ‘Reasons justify why the state policy embodied in the applicable goals should not apply’: The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;

“(b) ‘Areas which do not require a new exception cannot reasonably accommodate the use’:

“(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;

“(B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably

accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under the alternative factor the following questions shall be addressed:

“(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?”

“(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?”

“(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?”

“(C) This alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding.

“(c) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception. The exception shall describe the characteristics of each alternative area considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts;

1 address the relevant provisions either conclude that the standard is *not* met, or fail to explain
2 why alternative sites are not suitable to meet the identified need. Finally, DLCD argues that
3 the challenged decision does not adequately address OAR 660-004-0020(2)(d) because the
4 findings do not demonstrate how the proposed uses are compatible with adjacent and nearby
5 resource uses or could be made compatible with those uses.

6 **A. OAR 660-004-0020(2)(a)**

7 OAR 660-004-0020(2)(a) requires the county to demonstrate that there are reasons
8 why the state policy embodied in the applicable goal should not apply. *See* n 3. OAR 660-
9 004-0022 describes the types of reasons that can justify the approval of certain types of uses
10 not otherwise allowed on resource land. In the present case, OAR 660-004-0022(2) provides
11 the specifically applicable criteria for adopting a reasons exception to allow the proposed
12 rural residential development.⁴

“(d) ‘The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.’ The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”

⁴ OAR 660-004-0022 provides in relevant part:

“An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:

“* * * * *

“(2) Rural Residential Development: For rural residential development the reasons cannot be based on market demand for housing, except as provided for in this section of this rule, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics. A county must show why, based on the economic analysis in the plan, there are reasons for the type and density of housing planned which require this particular location on resource lands. A jurisdiction could justify an exception to allow residential development on resource land outside an urban growth boundary by determining that the rural location of the proposed residential development is necessary to satisfy the market demand for housing generated by existing or planned rural industrial, commercial, or other economic activity in the area.”

1 The county’s findings specifically state that the application does not satisfy the
2 requirements of OAR 660-004-0020(2). Record 17. Furthermore, the only findings
3 addressing OAR 660-004-0022 state:

4 “The applicant failed to justify OAR 660-004-0022, Reasons Necessary to
5 Justify an Exception Under Goal 2, Part II(c), Criteria (1) and (2) and all
6 pertinent criteria within that requirement.” Record 19.

7 The county neither explains how it can approve an application for a reasons exception that
8 does not meet approval criteria, nor provides any alternative basis for approving the
9 application. The decision includes some findings that assert the property is unsuitable for
10 farm use and better suited for rural residential use. Even assuming the truth of those
11 assertions, however, those assertions are inadequate to support a reasons exception under
12 OAR 660-004-0020 or 660-004-0022. *McLane v. Klamath County*, 37 Or LUBA 888, 894
13 (2000).

14 **B. OAR 660-004-0020(2)(b)**

15 OAR 660-004-0020(2)(b) requires the county to perform an alternative areas analysis
16 to show that other areas that do not require a new exception cannot reasonably accommodate
17 the proposed use. *See* n 3. The county identifies OAR 660-004-0020(2)(b) as an approval
18 criterion. The county specifically found that OAR 660-004-0020(2) is *not* satisfied:

19 “The applicant failed to justify OAR 660-004-0020, Goal 2, Part II(c),
20 Exception Requirement (2) and all pertinent criteria within that requirement.”
21 Record 17.

22 Although other findings may have been adopted to demonstrate compliance with OAR 660-
23 004-0020(2)(b), those findings are far from sufficient to establish compliance with the rule.

24 **C. OAR 660-004-0020(2)(c)**

25 OAR 660-004-0020(2)(c) requires the county to determine whether the
26 environmental, social, economic and energy (ESEE) consequences of the proposed use are
27 significantly more adverse than those that would result from the same proposal being located
28 in other areas requiring an exception. *See* n 3. The county’s findings address the ESEE

1 consequences of developing the subject property, however, the rule requires that the findings
2 also describe the “characteristics of each alternative area considered by the jurisdiction for
3 which an exception might be taken.” Although a detailed evaluation of specific alternative
4 sites is not required, there must be *some* analysis of alternative sites. The rule requires that
5 the county’s findings “include the reasons why the consequences of the use at the chosen site
6 are not significantly more adverse than would typically result from the same proposal being
7 located in areas requiring a goal exception other than the proposed site.” The county’s ESEE
8 analysis, while addressing the subject property, does not consider any other sites, nor does it
9 explain how the consequences at the proposed site are not significantly more adverse than
10 would result from other sites.

11 **D. OAR 660-004-0020(2)(d)**

12 OAR 660-004-0020(2)(d) requires the county to “describe how the proposed use will
13 be rendered compatible with adjacent land uses.” *See* n 3. The findings do not adequately
14 describe the uses on adjacent properties, particularly the EF-80 properties to the east and
15 west. Even if the adjacent uses were adequately described, the findings do not describe how
16 the proposed use will be rendered compatible with those uses.

17 The second assignment of error (DLCD) and the first, second and third assignments
18 of error (FOYC) are sustained.

19 **FOURTH ASSIGNMENT OF ERROR (FOYC)**

20 Yamhill County Zoning Ordinance (YCZO) 1208.02(B) requires an applicant for a
21 zone change to demonstrate that:

22 “There is an existing, demonstrable need for the particular uses allowed by the
23 requested zone, considering the importance of such uses to the citizenry or the
24 economy of the area, the existing market demand which such uses will satisfy,
25 and the availability and location of other lands so zoned and their suitability
26 for the use allowed by the zone.”

27 FOYC argues that the county’s decision does not adequately address this criterion, in
28 that no market study was submitted to support the county’s conclusion that there is a

1 “demonstrable need” for one 10-acre parcel in this location. To the extent the county’s
2 decision relies on the evidence the applicant provided regarding market need, FOYC argues
3 that evidence is not substantial evidence to support the decision because the criterion requires
4 a market study, or some other evidence that addresses whether the proposed amendment will
5 be of some “importance * * * to the citizenry or the economy.”

6 The county examined a study area consisting of five square miles around the property
7 and determined that there was a lack of rural residentially zoned land within that area. In its
8 analysis, the county did not consider “the importance of [the] uses to the citizenry or the
9 economy” or the “suitability [of other appropriately zoned land] for the use allowed by the
10 zone.”

11 The fourth assignment of error (FOYC) is sustained.

12 **FIFTH ASSIGNMENT OF ERROR (FOYC)**

13 YCZO 1208.02(D) requires an applicant for a zone change to show that:

14 “Other lands in the County already designated for the proposed uses are either
15 unavailable or not as well suited for the anticipated uses due to location, size
16 or other factors.”

17 FOYC argues that the findings the county adopted are inadequate and not supported
18 by substantial evidence. FOYC contends that, at the very least, the findings need to justify
19 the chosen study area. As discussed under the fourth assignment of error, the county found
20 that this requirement was met based upon a study of the surrounding five square miles.
21 YCZO 1208.02(D) expressly requires the county to consider “other lands in the county.”
22 Although the county need not necessarily consider all rural residential land throughout the
23 county, in order to restrict the scope of the study area, the county must justify the selected
24 study area. *Friedman v. Yamhill County*, 23 Or LUBA 306, 309 (1992) (county must explain
25 what factors allow it to reduce the size of the study area under YCZO 1208.02(D)). The
26 county has not provided any justification for limiting the scope of the study area to five
27 square miles.

28 The fifth assignment of error (FOYC) is sustained.

1 The county's decision is remanded.