BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

FINIS CARTER, THOMAS W. EDWARDS, and R.B. FOWLER AND BEVERLY FOWLER AS TRUSTEES OF THE BRUCE FOWLER AND BEVERLY FOWLER TRUST,
Intervenors-Respondent.

LUBA No. 2002-064

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Thomas S. Smith, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Preston, Gates & Ellis, LLP.

No appearance by Yamhill County.

Lisa K. Day, Newberg, filed the response brief and argued on behalf of intervenors-respondent. With her on the brief was Gunn & Day, LLP.

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

AFFIRMED 09/30/2002

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 a county decision approving a comprehensive plan amendment and zone change for a 24.87-acre parcel from AF-10 (Agriculture/Forestry) to VLDR 2.5 (Very Low Density Residential).

MOTION TO INTERVENE

Finis Carter, Thomas W. Edwards, and R.B. Fowler and Beverly Carter as Trustees of the Bruce Fowler and Beverly Fowler Trust (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This matter is before us for a second time. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002). We recite the pertinent facts from our earlier opinion:

> "Intervenors' property is an approximately 25-acre parcel located off of Highway 99 between the cities of Newberg and Dundee. The property is part of an exception area that the county adopted as a committed exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) in 1980. At that time the county designated the subject property VLDR on the comprehensive plan, although it remained zoned AF-10.
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> "The property currently contains three residences. Land to the west and southwest is zoned AF-10 and VLDR 5. Land to the north, northwest, and southeast is zoned VLDR 2.5. Land to the northeast is zoned LI (Light Industrial) and VLDR 1. The property completely surrounds a 2.13-acre inholding zoned HI (Heavy Industrial) that is currently used for recreational vehicle storage and as an athletic club.
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> "Intervenors applied for a zone change from AF-10 to VLDR 2.5 before the county planning commission, which was unable to reach a decision and forwarded the application to the county board of commissioners with no recommendation. The board of commissioners approved the application. * * *" 41 Or LUBA at 249.

On appeal to LUBA, we sustained four of six assignments of error, and remanded the decision to the county (1) to consider whether the proposed rezoning would violate statewide planning Goal 14 (Urbanization); (2) to address Yamhill County Comprehensive Plan

(YCCP) Rural Area Development Goal I.B.1; and (3) to justify the study area selected for purposes of Yamhill County Zoning Ordinance (YCZO) 1208.02(B) and (D).

On remand, the board of county commissioners held a non-evidentiary hearing on April 11, 2002, and voted to reapprove intervenors' application with the adoption of additional findings.[1] This appeal followed.

FIRST ASSIGNMENT OF ERROR

The county's decision on remand concluded that no exception to Goal 14 was necessary because the proposed rezoning (1) would not allow urban use of rural land and (2) would not impermissibly affect the ability of nearby urban growth boundaries (UGBs) to perform their urbanization function. Petitioner challenges both conclusions.

The county's decision lists nine reasons why residential development allowed under the proposed zoning would not constitute urban development, in violation of Goal 14.[2]

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[1] We cite to the record of the first proceeding as "Record I" and the record of the second proceeding as "Record II."

[2] The challenged decision offers the following reasons why the proposed rezoning would not allow urban use of rural land:

> "1. A zone change to VLDR is consistent with the Comprehensive Plan designation of Very Low Density Residential (VLDR). The County has previously concluded that a property plan designated VLDR complies with the Comprehensive Plan Goals and Policies for rural residential use.
>
> "2. The land to the north, east and northwest is zoned VLDR 2.5; the land to the northeast is zoned VLDR-1; other lands to the southwest are zoned VLDR-5 and AF-10; and none of the surrounding land is zoned for resource use. Consequently, the predominant use of the surrounding properties is rural residential.
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> "3. One parcel zoned AF-10 which has an agricultural use in the form of a winery will not be adversely affected by the zone change. * * * Because this farm use is over 200 feet to the southwest, rezoning of the subject lot should not have any adverse effect on this farm use and should not commit resource land to non-resource use.
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> "4. The subject property would have on-site water and sewer systems.
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> "5. The minimum lot size will be 2.5 acres and the new Goal 14 rule governing lot size averaging will prevent creation of 1-acre parcels (the smallest permissible lot size would be 2 acres). This will help to ensure that the parcels created will be significantly large enough that they will not appear to be at an urban density.

Petitioner argues that the cited reasons, considered either singly or together, do not suffice to demonstrate that the residential uses allowed under the proposed rezoning are not urban uses. A common theme to petitioner's critiques of the county's reasons is that, in petitioner's view, the area surrounding the subject property already has urban characteristics given (1) the relative density of residential and nonresource development in the area, (2) the area's location between two nearby UGBs, and (3) the presumed reliance of residents of the area on urban services provided within the UGBs, such as shopping and employment. We understand petitioner to argue that the residential partition and development allowed by the proposed rezoning would increase the current trend toward converting the area between the Newberg and Dundee UGBs into a *de facto* urban extension of those cities. According to petitioner, the county erred in finding that the area is predominantly rural residential in character, and that development of the subject property would be similar to that character,

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> "6. On site constraints and other restrictions will restrict this development to a maximum of seven parcels, which is consistent with the predominant zoning and development in the area and which will ensure that the proposed zone change will extend the existing pattern and provide for infill development in a manner that is consistent with both the plan and the requested zone.
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> "7. Rezoning the subject property will not require the extension of public services beyond what is presently available to the property.
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> "8. Rezoning the subject property will not commit the adjacent or nearby resource land to non-resource uses. None of the surrounding properties are zoned for resource use. The subject property is irrevocably committed to rural residential use which is the predominant land use in the immediate vicinity.
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> "9. There are two parcels zoned VLDR 5 [in the surrounding area], both of which are developed as rural residential use. There are five tracts zoned AF/10 in Section 24, with one tract being partially zoned R/I, and one tract zoned AF/10 in Section 25 which is partially zoned Highway Commercial. All of these tracts total 41.96 acres in size with the average parcel size being 6.9 acres, which is much less than the required 10 acres associated with AF/10 zoning. Three of the tracts zoned AF/10 are less than the 10 acre minimum for AF/10 zoning. This pattern appears to be stable given the success of the winery and vineyard and the success and expansion of the highway commercial operation. The rural residential uses in the vicinity, under present zoning, may not be further divided. All of these factors support the position that the predominant use of the surrounding properties is rural residential and the proposed development is consistent with the development pattern of the area." Record II 7-8 (record citations omitted).

and hence also rural, because the county has not analyzed whether surrounding development complies with Goal 14 or not. If the surrounding development is not consistent with Goal 14, petitioner argues, then the similarity between that development and development allowed under the proposed rezoning merely establishes that the latter is adding to an already existing pattern of urban use.

Determining whether residential development outside a UGB is urban or rural for purposes of Goal 14 is an uncertain task. As a rule of thumb, residential lot sizes of one acre or less are clearly urban, while lot sizes greater than 10 acres are clearly rural. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 504-05, 724 P2d 268 (1986); *Kaye/DLCD v. Marion County*, 23 Or LUBA 452, 462-64 (1992); *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 80, *aff'd* 89 Or App 40, 747 P2d 373 (1987). Densities between those two extremes may be viewed as urban or rural depending on the types of urban services provided and the proximity of the proposed development to urban growth boundaries. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or at 506-507. Provision of public water or sewer systems is an important but nonconclusive indicator of urban development. *Id.* at 504.

The inherently nebulous question of what is urban and what is rural was made more concrete with the adoption of OAR 660-004-0040, which provides standards for application of Goal 14 to acknowledged rural exception areas planned for residential uses. Because intervenors' application was filed prior to the rule's adoption, the rule does not directly apply here. However, even though the rule does not directly apply, it provides pertinent guidance when determining whether proposed residential development is urban or rural under Goal 14. As relevant here, the rule specifies that the creation of any new lot or parcel smaller than two acres in a rural residential area is considered an urban use. OAR 660-004-0040(5) and (7).[3]

[3] OAR 660-004-0040 provides in relevant part:

In the present case, the county relied upon the two-acre minimum in OAR 660-004-0040(5) and (7) to conclude that any residential subdivision pursuant to the proposed rezoning could not create lots smaller than two acres, and for that reason and others would not be an urban use. Consideration of the rule supports the county's finding that residential development allowed under the proposed rezoning, at least considered in isolation, would not constitute an urban use. Petitioner's arguments to the contrary are not persuasive.

Petitioner's more forceful argument is not that the residential development allowed under the proposed rezoning would *itself* be urban in nature, but that the cumulative effect of such development in the already heavily developed area between the nearby Newberg and Dundee UGBs contributes to a trend toward urbanization of that area, and undermines the effectiveness of those UGBs. The county findings conclude that the predominant land use in the immediate area is rural residential use, and that, given restraints on further division, that land use pattern is stable. With respect to the impact on nearby UGBs, the county's findings state:

> "* * * Although the property is between Newberg and Dundee, it is not adjacent to either City's UGB or URA [Urban Reserve Area].

> "(5)(a) A rural residential zone currently in effect shall be deemed to comply with Goal 14 if that zone requires any new lot or parcel to have an area of at least two acres.
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> "(b) A rural residential zone does not comply with Goal 14 if that zone allows the creation of any new lots or parcels smaller than two acres. For such a zone, a local government must either amend the zone's minimum lot and parcel size provisions to require a minimum of at least two acres or take an exception to Goal 14. Until a local government amends its land use regulations to comply with this subsection, any new lot or parcel created in such a zone must have an area of at least two acres.
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> "* * * * *
>
> "(7)(a) The creation of any new lot or parcel smaller than two acres in a rural residential area shall be considered an urban use. Such a lot or parcel may be created only if an exception to Goal 14 is taken. This subsection shall not be construed to imply that creation of new lots or parcels two acres or larger always complies with Goal 14. The question of whether the creation of such lots or parcels complies with Goal 14 depends upon compliance with all provisions of this rule."

> "* * * The rezoning will not require any extension of urban services from either the City of Newberg or the City of Dundee. The subject parcel will rely upon existing services. The site is currently served with electrical power by PGE. * * * The proposed development will include individual wells and sewage disposal systems. The property is within the established Dundee rural fire protection district." Record II 9 (record citations omitted).

We addressed a similar argument regarding cumulative impact of proposed rural residential development in *DLCD v. Klamath County*, ___ Or LUBA ___ (LUBA No. 2002-036, July 11, 2002). In that case, the petitioner argued that the rural area surrounding the Klamath Falls UGB was partially developed with rural residential development, and that the proposed rezoning, which would allow over 100 five-acre lots within two miles of the UGB, would encourage similar rezonings and development, with the result that the effectiveness of the UGB would be undermined. We rejected that argument, commenting:

> "Nothing in Goal 14 expressly requires the county to analyze the potential impact of the proposed rezoning on similar property in the area or the cumulative impact of the potential rezonings and development in the area on the Klamath Falls UGB. Even if such requirements can be implied, we agree with respondents that the concern DLCD expresses with regard to cumulative impact can be addressed at the time any subsequent rezoning applications are being reviewed." Slip op at 8.

We again find OAR 660-004-0040 instructive as to what Goal 14 requires with respect to assessing the impact of proposed rural residential development on nearby lands and nearby UGBs. As noted above, the rule generally provides that a minimum parcel size of two acres complies with Goal 14, assuming compliance with all other requirements of the rule. Nothing in the rule expressly requires evaluation of the cumulative impact of proposed rural residential development on other properties, or on a UGB. The rule does impose a larger minimum parcel size where proposed rural residential development is within the urban reserve area of specified cities, or within one mile of the UGBs of those cities, if no urban reserve area is established. OAR 660-004-0040(8).[4] One of the cities specified in OAR 660-

[4] OAR 660-004-0040(8) provides, in relevant part:

004-0040(8) is the City of Newberg. The county found that the subject property is not within Newberg's urban reserve area and is approximately one-half mile from Newberg's UGB. Record II 10. Nothing else in the rule has any arguable bearing on petitioner's concern regarding cumulative impact or impact on UGBs. Therefore, to the extent the rule provides guidance on the question of the cumulative impact of the proposed rezoning on other property or nearby UGBs, consideration of the rule supports the county's conclusion that the proposed rezoning complies with Goal 14.

"(8)(a) Notwithstanding the provisions of Section 7 of this rule, divisions of rural residential land within one mile of an urban growth boundary for any city or urban area listed in paragraphs (A) through (E) of this subsection shall be subject to the provisions of subsections (8)(b) and (8)(c).

"* * * * *

(D) Newberg;

"* * * * *

(b) If a city or urban area listed in Subsection (8)(a):

"(A) Has an urban reserve area that contains at least a twenty-year reserve of land and that has been acknowledged to comply with OAR 660, division 021; or

"(B) Is part of a regional growth plan that contains at least a twenty-year regional reserve of land beyond the land contained within the collective urban growth boundaries of the participating cities, and that has been acknowledged through the process prescribed for Regional Problem Solving in ORS 197.652 through 197.658; then any division of rural residential land in that reserve area shall be done in accordance with the acknowledged urban reserve ordinance or acknowledged regional growth plan.

"(c) Notwithstanding the provisions of Section 7 of this rule, if any part of a lot or parcel to be divided is less than one mile from an urban growth boundary for a city or urban area listed in Subsection (8)(a), and if that city or urban area does not have an urban reserve area acknowledged to comply with OAR 660, division 021, or is not part of an acknowledged regional growth plan as described in Subsection (b), Paragraph (B), of this section, the minimum area of any new lot or parcel there shall be ten acres."

Petitioner's other arguments require no discussion. For the foregoing reasons, petitioner has not established that the county erred in concluding that the proposed rezoning does not require an exception to Goal 14. The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner challenges the county's conclusion that the proposed rezoning is consistent with YCCP Goal I.B.1.[5] The county reached that conclusion after finding in relevant part that the subject property's comprehensive plan designation is for rural residential use, that the immediate area is committed to rural residential use and that development of the subject property is consistent with that development. The county found that the proposed rezoning is consistent with the goal of "urban containment and orderly urban development," for essentially the same reasons the rezoning is consistent with Goal 14.

Petitioner repeats its arguments that the surrounding area is more accurately characterized as a species of urban development rather than rural development.[6] Petitioner does not argue, and the county did not find, that YCCP Goal I.B.1 imposes more stringent restrictions on development on rural lands than does Goal 14. We held, above, that petitioner had failed to demonstrate error in the county's conclusion that the proposed rezoning is consistent with Goal 14. Petitioner's similar arguments here also fail to demonstrate error in the county's findings regarding YCCP Goal I.B.1.

The second assignment of error is denied.

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[5] YCCP Goal I.B.1 is:

> "To provide an adequate amount of land, development areas and sites to accommodate those uses which are customarily found in rural areas or require or are better suited to rural locations, without compromising the basic goal relating to urban containment and orderly urban development."

[6] Petitioner argues that the surrounding area already contains one-acre and 2.5-acre residential uses, heavy and light industrial uses, and commercial uses. According to petitioner, '[t]his combination of uses certainly smells like an urban duck and walks like an urban duck. The urban 'quacking' in the Exception Area keeps getting louder." Petition for Review 16-17.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

In our previous decision, we remanded the county's decision to address YCZO 1208.02(B) and (D), specifically to justify the study area the county employed to show compliance with those criteria.[7] The county's study area contained approximately 400 parcels and consisted of approximately 2,000 acres in exception areas 1.5 and 1.8 surrounding the subject parcel. We noted in our earlier decision that YCZO 1208.02(D) expressly requires the county to consider "other lands in the County." We held that, although YCZO 1208.02(D) does not necessarily require the county to consider all land zoned VLDR throughout the entire county, the county must justify its limitation of the scope of a smaller study area. 41 Or LUBA at 260. Because the county's findings of compliance with YCZO 1208.02(B) were also based on the study area, we remanded for further findings addressing that criterion as well.

On remand, the county interpreted the phrase "other lands in the County" as not requiring a study of every possible property in the county.[8] Studying land in the vicinity of

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[7] YCZO 1208.02 requires in relevant part that, in order to rezone property, the county find that:

> "(B) There is an existing, demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone."
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> "* * * * *
>
> "(D) Other lands in the County already designated for the proposed uses are either unavailable or not as well-suited for the anticipated uses due to location, size or other factors."

[8] The county adopted similar findings with respect to YCZO 1208.02(B) and (D), stating in relevant part:

> "2. The County has previously interpreted the phrase 'other lands in the County' to mean other property located within the County. Under the County's interpretation, a study of other property located within the County is reasonable and a study of every possible property in the County is not required. Studying land in the vicinity of a subject property satisfies the requirement to study other lands in the County already designated for the proposed zoning and/or uses.

the subject property, the county found, satisfies YCZO 1208.02(B) and (D). In addition, the county articulated several reasons why the chosen study area was reasonable.

Petitioner challenges the county's interpretation of the phrase "other lands in the County" as not requiring consideration of lands beyond the "vicinity" of the subject property. According to petitioner, the plain language of YCZO 1208.02(D) speaks broadly of "other lands" and if the drafters of that language intended something narrower they would have so specified. Petitioner also disputes the county's reasons for limiting the study area, arguing that there are undoubtedly other, similar exception areas in the county or in the Newberg/Dundee area that could be included in the study area.

We must affirm the county's interpretation of a land use regulation as long as it is consistent with the express language, purpose or policy underlying the regulation. ORS 197.829(1). We cannot say that the county's interpretation is inconsistent with the express language of YCZO 1208.02(D), or otherwise reversible under ORS 197.829(1). Nor

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> "3. To determine compliance with the requirements of YCZO 1208.02[(B) and (D)], the county [directed intervenor's land use consultant to] consider all of the land already zoned for residential use within the vicinity as represented by the maps for Exception Areas 1.5 and 1.8.
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> "* * * * *
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> "7. Consideration of other lands located within Exception Areas 1.5 and 1.8 was reasonable based upon the following factors:
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> "a. The subject parcel is located in the center of the study area.
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> "b. Exception Area 1.8 is 12 square miles in size.
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> "c. Hundreds of parcels zoned VLDR and/or LDR exist within the study area.
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> "d. The County designated the Exception Areas for rural residential use. Presumably, the County intended the Exception Areas for residential housing; and
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> "e. Based upon these factors, the study area considered was reasonable because it contained similar properties in terms of growth, property values and proximity to amenities such as the cities of Newberg and Dundee, shopping and schools." Record 12-13 (record citations omitted).

can we say that the county's justification for limiting the study area to Exception Areas 1.5 and 1.8, pursuant to that interpretation, is inadequate. Petitioner offers no other basis for limiting the study area to something short of the entire county, other than to suggest that it include other exception areas in the county. Although YCZO 1208.02(B) and (D) could be interpreted to require consideration of all rural residential lands, no matter where those lands are located in the county, these provisions need not be interpreted to apply so expansively. The county's interpretation, that the study area need only contain residential land in the "vicinity" of the subject property, is a reasonable interpretation of these provisions and within the county's discretion under ORS 197.829(1).

Finally, petitioner argues that the county's findings fail to address the requirement for a "demonstrable need" for the particular uses allowed by the requested zone. This issue was raised in the prior appeal before LUBA, but not resolved in our decision. The county's previous approval contained findings, based on testimony submitted by a realtor, that there is a tremendous demand for VLDR 2.5-zoned residential property in the area, and a shortage of such properties in the county.[9]

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[9] The county's findings in its original decision state, in relevant part:

> "* * * Regarding the demonstrable need for VLDR 2.5 zoned property, the growth in Yamhill County over the past ten (10) years has led to a tremendous market demand for VLDR 2.5 zoned properties.
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> "* * * Based on the testimony of Newberg realtor Marc Willcuts (both written and oral; Mr. Willcuts' written evidence is attached to this [decision] and hereby incorporated into these Findings by reference), the applicants have shown * * * [that] there are a tremendous number of prospective purchasers of VLDR 2.5 zoned property, with the majority of those prospective purchasers being residents of Yamhill County. The applicants have shown why VLDR 1 or 5 zoned parcels will not fit the needs of these prospective purchasers, and that there is an existing market demand for VLDR 2.5 zoned properties.
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> "* * * A large supply of available VLDR 2.5 zoned properties within the said exception area is necessary to maintain a healthy economy in the County, and 13 available parcels as set forth in Section B [of the decision] are not nearly enough of a supply of VLDR 2.5 zoned parcels within the exception area to maintain a healthy economy and provide for the needs of the citizenry of the area." Record I 8.

Petitioner argues that the county's findings focus solely on supply and never establish demand or "need" for VLDR 2.5 zoned property. According to petitioners, a realtor's opinion regarding market demand is insufficient to establish "need" for rural residential dwellings, and that need may only be determined by evaluating the county's comprehensive plan provisions addressing Statewide Planning Goal 10 (Housing). Petitioner is correct that market demand is insufficient to establish "need" for rural residential housing, for purposes of taking an exception to applicable statewide planning goals that require protection of rural resource lands. *Still v. Board of County Comm'rs*, 42 Or App 115, 122, 600 P2d 433 (1979); *1000 Friends of Oregon v. Marion County*, 18 Or LUBA 408, 413-14 (1989). However, the present case involves land for which an exception to Goals 3 and 4 has already been approved. Petitioner offers no reason why market demand cannot suffice to establish "need" for rural residential housing, which is solely a question of local law under YCZO 1208.02(B), or why such need can only be evaluated against the county's Goal 10 inventory.

With respect to supply, petitioner argues that the county's findings and the record do not support the county's conclusion that only 13 VLDR 2.5-zoned properties in the study area are "available" (*i.e.*, vacant and buildable). We disagree. The county's decision incorporates as findings a letter from a realtor and developer. In that letter, the realtor states that he examined the 59 vacant parcels in the exception area listed as vacant on the county assessor's maps, but found only 23 that are undeveloped. *Id.* The realtor states that he personally examined the 23 parcels, and determined that 10 of them are unbuildable or already in the process of being developed. Record I 50. Although petitioner criticizes these findings and the evidence supporting them, we do not see that either is inadequate to identify the supply of available VLDR 2.5 parcels in the exception area.

The third and fourth assignments of error are denied.

The county's decision is affirmed.