BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY,
*Petitioner*,

vs.

YAMHILL COUNTY,
*Respondent*,

and

MATTHEW POWELL, RENEE POWELL,
ROBERT TRAVERS, JUDITH TRAVERS
and CHEHALEM PARK AND
RECREATION DISTRICT,
*Intervenors-Respondent.*

LUBA No. 2004-089

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Ian Simpson, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Yamhill County.

John A. Rankin, Sherwood, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 09/21/2004

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

Opinion by Davies.

**NATURE OF THE DECISION**

Petitioner appeals the county's approval of an exception to Statewide Planning Goal 3 (Agricultural Lands) for 38.71 acres (the exception area), an amendment to the comprehensive plan map designation for the exception area from Agriculture/Forestry Large Holding to Agriculture/Forestry Small Holding and a zone change from Exclusive Farm Use (EF-20) to Agriculture Forestry Small Holding (AF-10).

**MOTION TO INTERVENE**

Matthew and Renee Powell, Robert and Judith Travers and Chehalem Park and Recreation District (intervenors) move to intervene on the side of respondent Yamhill County. There is no opposition to the motion and it is allowed.

**MOTION TO FILE REPLY BRIEF**

On August 10, 2004, petitioner filed a motion to file a reply brief. Oral argument was scheduled for 9:00 a.m. on August 12, 2004. At oral argument, intervenors objected, in part, because the motion was untimely. Following oral argument, on August 19, 2004, intervenors filed a written response to the motion to file a reply brief.

OAR 661-010-0039 requires that a party file a motion for a reply brief "as soon as possible after the respondent's brief is filed."[1] Intervenors argue that the reply brief was not filed as soon as possible after the respondent's brief was filed, the untimeliness of the motion prejudiced their substantial rights, and petitioner's motion should be denied.

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[1] OAR 661-010-0039 provides:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief * * *."

LUBA will deny permission to file a reply brief that is not filed "as soon as possible" after the respondent's brief only if a respondent's substantial rights are prejudiced. *Shaffer v. City of Salem*, 29 Or LUBA 592, 593-94 (1995) (reply brief submitted 35 days after the response briefs were filed, but 27 days prior to oral argument, did not violate respondent's substantial rights). Where respondents do not have adequate time to review the brief and prepare a response for oral argument, however, their substantial rights are prejudiced, and a request to file a reply brief will be denied. *See Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 322, *aff'd* 163 Or App 592, 988 P2d 422 (1999) (32-page reply brief filed two days before oral argument and more than a month after response briefs were filed violates respondents' substantial rights). Whether respondents have adequate time to respond to the motion and prepare for oral argument depends on the length of the reply brief and the timing of oral argument. *Id*. The length of time the reply brief is filed after respondent's brief is also a critical factor. OAR 661-010-0039. *See* n 1.

In this case, intervenors' response brief was filed on July 30, 2004. The motion to file a reply brief was filed eleven days later, on August 10, 2004. Intervenors' attorney did not receive the motion or the five-page reply brief by mail until noon on August 11, 2004, less than 24 hours before oral argument. However, he did receive a fax copy of the brief at 11:14 a.m. on August 10, 2004. For purposes of determining prejudice to intervenors' substantial rights, it is the earlier of these dates that is relevant.

The filing of a five-page reply brief eleven days after the intervenors' brief, even assuming it was not filed "as soon as possible" after intervenors' brief was filed, did not prejudice intervenors' substantial rights where intervenors received a copy of the reply brief approximately 48 hours before oral argument.

Petitioner's motion to file a reply brief is allowed.

**FACTS**

The subject property includes three tax lots: tax lot 100 (21.27 acres, 20.27 acres of which is on farm tax deferral); tax lot 101 (16.86 acres, 16.45 acres of which is on farm tax deferral) and

tax lot 102 (.58 acres). Tax lot 102 is surrounded by tax lot 101 and tax lots 101 and 102 together comprise one legal lot. Tax lots 101 and 102 are owned by intervenor Chehalem Park and Recreation District, and another individual owns a life estate in tax lot 102. Intervenors Robert and Judith Travers own tax lot 100, which is a separate legal lot. Tax lots 100 and 102 are developed with single-family dwellings.

The entire property slopes down to the south and is predominantly forested on the steeper slopes of the northeast. The flatter pastureland on tax lot 101 has been grazed, but the steeper original orchard area on tax lot 100 has not been farmed since the 1970's or before. Record 2. The property is composed predominantly of high value farmland.

The subject property is located about one mile north of the City of Newberg. The properties abutting the subject property to the east, south and west are zoned AF-10 with predominantly rural residential uses and some associated farm uses. The county adopted an exception for those surrounding lands in 1980. The subject property, although originally proposed as part of that 1980 exception area, was excluded from the exception area before it was approved. The properties to the north are zone EF-20, and are used for commercial tree farms, small and large natural woodlots, rural residential use, small scale farms and small pasture areas.

Intervenors Matthew Powell and Renee Powell are prospective purchasers of the western portion of tax lot 100. On July 8, 2003, they submitted an application for a plan amendment and zone change to change the planning designation and zoning on the three tax lots from EF-20 to AF-10. On January 8, 2004, the planning commission conducted a hearing and forwarded the matter to the board of commissioners with no recommendation. Record 183. The board of commissioners conducted its own hearing and, on May 13, 2004, approved the application. This appeal followed.

**ASSIGNMENT OF ERROR**

Petitioner raises one assignment of error, entitled "Reasons Exception," with four sub-assignments of error. Intervenors respond to the sub-assignments of error as four separate assignments of error. We adopt petitioner's format and address each sub-assignment in turn.

**A. Goal 3 Exception**

The county's decision adopts a "reasons" exception to Goal 3 pursuant to ORS 197.732(1)(c), Goal 2, Part II(c) and OAR 660-004-0020(2), which set forth four standards or factors that must be considered in approving a reasons exception.[2]

OAR 660-004-0020(2) implements Goal 2, Part II(c) and ORS 197.732(1)(c), and elaborates on the four standards for adopting a reasons exception.[3] OAR 660-004-0022

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[2] A local government may take an exception to a statewide planning goal under ORS 197.732(1)(c), Goal 2, Part II(c) and OAR 660-004-0020(2) where it finds that the following standards are met:

> "(A) Reasons justify why the state policy embodied in the applicable goals should not apply;
>
> "(B) Areas which do not require a new exception cannot reasonably accommodate the use;
>
> "(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 areas requiring a goal exception other than the proposed site; and
>
> "(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." ORS 197.732(1)(c).

[3] OAR 660-004-0020(2) provides, in relevant part:

> "(2) 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

prescribes "[t]he types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands" for purposes of Goal 2, Part II(c)(A) and OAR 660-004-0020(2)(a). OAR 660-004-0022(1) provides three criteria for determining whether reasons justify uses that would otherwise not be allowed by applicable statewide planning goals.[4] Subsections (2) through

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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?

"(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? 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.

"* * * * *"

[4] OAR 660-004-0022(1) provides:

(12) of OAR 660-004-0022 set forth specific criteria for particular types of uses or particular types of protected resources. Where the particular type of use proposed is one of those listed in subsections (2) through (12), the three criteria in subsection (1) do not apply. *See DLCD v. Umatilla County*, 39 Or LUBA 715, 719 (2001); *Wetherell v. Douglas County*, 44 Or LUBA 567, 571-72 (2003). The relevant section here is OAR 660-004-0022(2), which provides criteria for adopting a reasons exception to allow rural residential development.[5]

Petitioner challenges the county's findings that (1) the subject property is not resource land, (2) the applicants' market analysis provides reasons to justify approving an exception to Goal 3 under OAR 660-004-0022(2), and (3) the applicants' alternative sites analysis provides reasons justifying taking an exception to Goal 3 under OAR 660-004-0020(2)(b)(B).

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> "(1) For uses not specifically provided for in subsequent sections of this rule or OAR 660, Division 014, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:
>
> > "(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Statewide Goals 3 to 19; and either
> >
> > "(b) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this subsection must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or
> >
> > "(c) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."

[5] OAR 660-004-0022(2) provides:

> "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."

**B. *DLCD v. Yamhill County***

We address petitioner's fourth sub-assignment of error first because, if we sustain that sub-assignment of error, it is unnecessary to reach petitioner's other sub-assignments of error.

Petitioner argues that the county's decision must be reversed and the application denied, because the proposed use, a dwelling, is a use that is already allowed under Goal 3. Petitioner argues that the Court of Appeals, in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), *rev dis* 336 Or 126 (2003), held that 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. Petition for Review 13.

The facts and the court's analysis in *DLCD v. Yamhill County* are important to understanding the Court of Appeals' holding in that case. In that case, the applicant applied for a plan amendment and zone change from an exclusive farm use zone and plan designation (EF-80) to Agriculture/Forest Small Holding (AF-10) for a 10-acre parcel of land in order to build a single-family dwelling on the parcel. Nonfarm dwellings were permitted conditionally under the existing zone and a dwelling was permitted outright under the proposed zone. The county's findings acknowledged that "an alternative method to establish a dwelling on the parcel 'is through a nonfarm dwelling process.'" *Id*. at 558. The county, however, approved the exception.

The Department of Land Conservation and Development (DLCD) appealed the county's decision to this Board, arguing that a local government cannot take an exception to a statewide planning goal "to allow a use that is, in fact, allowable under the relevant planning goal." We rejected DLCD's argument:

> "The standards for approving a nonfarm dwelling are very strict, and frequently may not be satisfied. ORS 215.284; OAR 660-033-0130(4). The possibility that the subject property might satisfy those standards is speculative. We see no requirement in OAR 660-004-0000(2) or elsewhere that requires the applicant to exhaust every potential alternative means to obtain approval for a dwelling in an agricultural zone before applying for an exception to Goal 3 to allow agricultural land to be rezoned for rural residential use." *DLCD v. Yamhill County*, 42 Or LUBA 126, 129 (2002).

The Court of Appeals reversed our decision. *Id*. at 559. The court based its decision on an interpretation of the definition of "exception" in OAR 660-004-0000(2).[6] It read the language, "proposed use not allowed by the applicable goal" within the context of the rule:

> "[The context] demonstrates that the exceptions process is not designed to allow plan amendments and zone changes in order to permit uses that are, in fact, allowed by the applicable goals. In particular, Goal 2's definition of 'exception' provides, in part, that an exception is something that '[d]oes *not* comply with some or all goal requirements applicable to the subject properties or situations[.]' (Emphasis added.) Conversely, as pertinent here, Goal 3 *allows* for nonfarm dwelling uses on agricultural lands, and no exception need be taken to build a nonfarm dwelling on agricultural lands. OAR 660-004-0010(1)(a)." *Id*. at 561 (emphasis in original).

The Court concluded that the exceptions process was not available under the circumstances of that case. *Id*. at 562.

The parties in this case present two very different interpretations of the holding in *DLCD v. Yamhill County.* Those different interpretations are the result of different understandings of the nature of the threshold inquiry that is required to determine if a statewide planning goal exception is a permissible way to obtain approval for a proposed use of land. In rejecting LUBA's analysis in *DLCD v. Yamhill County,* the Court of Appeals clarified that this threshold inquiry is whether the proposed use is the "type of use" that is allowed by the applicable statewide planning goals. If the proposed use is the "type of use" that the goals allow, or conditionally allow subject to approval standards, an exception cannot be approved to authorize the proposed use.

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[6] OAR 660-004-0000(2) provides:

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

> "LUBA, for its part, framed the issue, in essence, as whether there should be some sort of exhaustion requirement--that is, that an applicant must first fail to qualify for a nonfarm dwelling under Goal 3 and the various statutory provisions pertaining to nonfarm dwellings before being able to utilize the exceptions process to rezone the property and build the dwelling. That approach misperceives the proper function of the exception process. The operative principle is not 'exhaustion'--*i.e.*, whether an application for a particular use has been approved or denied--but whether the *type of use* is allowed under the pertinent goal. Here, the property at issue is subject to Goal 3. Goal 3 allows nonfarm dwellings to be built under certain circumstances specified in ORS chapter 215. If an applicant wishes to build a nonfarm dwelling on property subject to Goal 3, then the applicant must satisfy the criteria set forth in one of the relevant provisions of ORS chapter 215. The applicant does not have the option of building that dwelling on that property through the exceptions process and rezoning if the applicant fails to satisfy the criteria of ORS chapter 215. That is so because the *type* of use in question--the use of the property for a nonfarm dwelling in this case--*is* permitted under the relevant goal." 183 Or App at 562 (emphases in original).

The nature and scope of the "type of use" inquiry is the critical question. Petitioner would interpret those words broadly. There is no dispute that the EFU zoning that must be applied to agricultural lands to implement Goal 3 allows a number of different kinds of farm-related dwellings and also allows dwellings that "are not in conjunction with farm use" in certain limited circumstances and subject to stringent approval standards.[7] If the "type of use" inquiry simply calls for determining whether "dwellings" are allowed in EFU zones, the answer is yes. If that is the nature of the inquiry, under the above-quoted language in the Court of Appeals' decision in *DLCD v. Yamhill County*, an exception to Goal 3 could never be approved to authorize dwellings on lands that are subject to Goal 3. Because every county comprehensive plan that we have seen includes exceptions to Goal 3 for lands that are planned and zoned for rural residential development, that result would have to come as a surprise to DLCD. Given the number of LCDC acknowledgment orders that have been

[7] Nonfarm dwellings are authorized by ORS 215.284. Other farm-related dwellings are allowed under ORS 215.283: dwellings customarily provided in conjunction with farm use generally, ORS 215.283(1)(f); dwellings for relative of farm operator assisting in management of farm use, ORS 215.283(1)(e); seasonal farm worker accessory farm dwellings, OAR 660-033-0130(24); and historic property replacement dwellings in conjunction with farm use, ORS 215.283(1)(o). Other dwellings that are neither farm dwellings nor nonfarm dwellings include: lot of record dwellings, OAR 660-033-0130(3); hardship dwellings, ORS 215.283(2)(l); and replacement dwellings, ORS 215.283(1)(s).

remanded by the Court of Appeals for inadequately justified exceptions to Goal 3 to allow rural residential development, it would also come as a surprise to the Court of Appeals. Further, it would be inconsistent with DLDC's administrative rules, which specifically provide for exceptions for "rural residential development." OAR 660-004-0022(2).

It is possible to read the Court of Appeals' decision in *DLCD v. Yamhill County* to impose a much more circumscribed "type of use" inquiry in determining whether a statewide planning goal exception may be approved to authorize the construction of dwellings on EFU-zoned land. The Court of Appeals' decision was based on the court's understanding that the applicant, who sought approval for a single dwelling on an existing 10-acre parcel, could just as easily have applied for a nonfarm dwelling under the applicable EFU zoning without seeking an exception to Goal 3 to allow the property to be rezoned for rural residential use:

> "[T]he applicant could have applied to build a nonfarm dwelling on the property and obtained the same result without any exception to Goal 3 being taken and the property being rezoned." 183 Or App at 559.

> "The sole question presented concerns whether LUBA's interpretation of the rule--that a local government can take an exception to provide for a proposed use even if that use could occur without taking an exception--is correct." 183 Or App at 561.

Turning to the decision at issue in this appeal, this is not a case where the applicant is seeking approval for a "type of use" that could be approved as a nonfarm dwelling without approving an exception to Goal 3. The applicant seeks to divide tax lot 100 into two lots of approximately 10 acres each, so that an existing dwelling can remain on one of those new parcels and a new dwelling may be constructed on the other new parcel. Petitioner makes no attempt to explain how such a use of tax lot 100 could be authorized under the applicable EFU zoning, and we do not see how it could. The "type of use" that the county authorized in the disputed exception on appeal in this case is not among the types of uses that the county could have authorized as a nonfarm dwelling or under any other theory under the applicable EFU zone that is called to our attention.

Petitioner's fourth sub-assignment of error is denied.

**C. Waiver**

Intervenors argue that petitioner's three remaining sub-assignments of error were not properly raised below and are therefore waived. ORS 197.835(3) limits the issues that may be raised before LUBA to "those raised by any participant before the local hearings body" as provided by ORS 197.763.[8] Intervenors argue that under ORS 197.763(1), a petitioner must not only raise an issue, but the issue raised must also be accompanied by statements or evidence sufficient to afford the local decision maker an opportunity to respond.[9] Intervenors argue that, here, the requirement for "statements and evidence" has not been satisfied.

In this case, the overarching issue that petitioner seeks to raise concerns the adequacy of the county's findings to justify why the state policy embodied in Goal 3 should not apply. Petitioner made statements with regard to the specific issues it now seeks to raise on appeal (market demand, whether the property is resource land, and the adequacy of the alternative sites analysis) in its local appeal letter:

> "Oregon Administrative Rule (OAR 660-004-022(2)) does not allow a reasons exception to be taken for rural residential development unless the demand for housing is generated by existing or planned rural industrial, commercial, or other economic activity in the area.
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> "The desire of the applicant to live in a rural area or on a particular rural parcel in a particular school district is not a 'reason' the statewide planning goals should not apply." Record 148.

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[8] Petitioner appears to understand intervenors to argue that the issues were not properly raised because petitioner itself did not raise the issues at the local level. We do not understand intervenors to make that argument, and we do not address it further.

[9] ORS 197.763(1) provides:

> "An issue which may be basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

> "The site is primarily south-facing Jory soils and a majority of the site is high-value farmland." Record 147.

> "To justify a 'Reasons' exception, the applicant must demonstrate that the proposed use cannot reasonably [be] accommodated on land that does not require a new exception. * * *.

> "The desire of an applicant to live in a new, rather than an existing home, is not a 'reason' the statewide planning goals should not apply, nor is it a reason to limit the alternative sites analysis to vacant parcels, or homes needing extensive remodeling, as the applicant has done." Record 148.

The issues petitioner appeals to this Board were raised "and accompanied by statements or evidence" sufficient to enable a reasonable decision maker to understand the nature of those issues.

We reject intervenors' waiver arguments with regard to all three remaining sub-assignments of error.

**D. Not Resource Land**

Petitioner challenges the county's reason to grant an exception because the subject property is not resource land. The county's findings include numerous explanations why the subject property is not resource land. Record 11-13. We note, first, a fundamental misconception in the county's approach. Where a local government demonstrates that property is not agricultural or forest land; *i.e.*, not resource land, it may plan and zone that property for nonfarm or nonforest use without taking an exception. *Niemi v. Clatsop County*, 6 Or LUBA 147, 152 (1982). That land is not resource land is generally not a reason to take an exception to resource goals; it is generally a reason that an exception is unnecessary. Therefore, if the county is correct in concluding that the subject property is not resource land, an exception would not be required.

However, the county's finding that the subject property is not resource land is not supported by the record.[10] Petitioner points out that most of the subject property is on farm tax deferral, and the information submitted by applicant demonstrates that "the subject property is

[10] The basis for the county's finding that the property is not resource land is unclear.

predominantly High Value Farmland, pursuant to * * * ORS 215.710, with 60.9% of the subject property soils being listed as high value and 39.1% not listed."[11] Record 232. Intervenors' only response is that a property that qualifies for farm tax deferral is not necessarily resource land.[12] While the county's findings rely on the intervenors' information demonstrating the high quality of the soils on the subject property, the findings minimize the significance of the quality of the soils by emphasizing the similarities between the subject property and the nearby exception lands.

In order to show that land is not resource land, an applicant must demonstrate that it does not qualify as agricultural land or forest lands. *See Friends of Linn County v. Linn County*, 42 Or LUBA 235, 239-40 (2002). "Agricultural Land" is defined in Goal 3 as follows:

> "Agricultural Land * * * is land of predominantly Class I, II, III and IV soils * * * as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in

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[11] ORS 215.710 provides:

> "(1) For purposes of ORS 215.705, high-value farmland is land in a tract composed predominantly of soils that, at the time the siting of a dwelling is approved for the tract, are:
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> "(a) Irrigated and classified prime, unique, Class I or Class II; or
>
> "(b) Not irrigated and classified prime, unique, Class I or Class II.
>
> "(2) In addition to that land described in subsection (1) of this section, for purposes of ORS 215.705, high-value farmland, if outside the Willamette Valley, includes tracts growing specified perennials as demonstrated by the most recent aerial photography of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture taken prior to November 4, 1993. For purposes of this subsection, 'specified perennials' means perennials grown for market or research purposes including, but not limited to, nursery stock, berries, fruits, nuts, Christmas trees or vineyards but not including seed crops, hay, pasture or alfalfa."

[12] We need not decide the relevance of farm tax deferral in this instance because we conclude the property is resource land. *But see Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 73-74 n 9 (2000) (fact that property is in farm tax deferral is relevant in determining whether it is impracticable to put the property to farm use for an irrevocably committed exception under OAR 660-004-0028).

> other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event."

Under that definition, "agricultural land" includes lands composed predominantly of Class I through IV soils. Because the subject property is located within the Willamette Valley and is predominantly high value farmland, it is predominantly Class I or Class II soils and falls within the Goal 3 definition of agricultural land. Other lands with poorer soils may also qualify as agricultural land taking into consideration the listed factors, including existing land use patterns. Land that qualifies as "agricultural land" because it is predominantly Class I or Class II soils cannot be classified as something other than agricultural land based on existing land use patterns or any of the other factors listed in the Goal 3 definition of agricultural land.[13] Rather, those factors, including existing land use patterns, are used as a basis to include lands within the definition of agricultural lands that do not qualify based on the soil classification of those lands. The county's findings regarding the subject property's similarity to nearby exception lands might have some relevance in granting an exception to Goal 3, but it cannot provide a basis for determining that a property that is predominantly composed of high value farmland is not agricultural land.

The subject property is clearly agricultural land under the Goal 3 definition. We agree with petitioner that the county erred in finding the subject property is not resource land. This sub-assignment of error is sustained.

**E. Market Analysis**

The Goal 2 administrative rule, OAR 660-004-0022(2), sets out the reasons that may justify an exception for rural residential development. *See* n 5. We explained the meaning of that provision in *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001), as follows:

> "The first sentence of OAR 660-004-0022(2) prohibits a reasons exception for rural residential development based on market demand for housing, assumed

[13] The county's finding that the property is not resource land appears to rely in large part on the steep slopes on the property. However, the property is composed predominantly of Class I-IV soils, and those soils classifications take into consideration the slopes.

> continuation of past urban and rural population distributions, or housing types and cost characteristics. The second sentence of that section describes what a reasons exception for rural residential housing *must* contain: findings based on the economic analysis in the comprehensive plan demonstrating reasons why the type and density of housing planned require this particular location on resource lands. The third sentence provides an exception to the prohibition, in the first sentence, on justifications based on market demand for housing, where the county identifies existing or planned rural industrial, commercial, or other economic activity in the area that generates a market demand for rural housing." *Id*. at 729 (reference to footnote omitted, emphasis in original).

Petitioner argues the county's findings are inadequate because they (1) are not "based on the economic analysis in the comprehensive plan," (2) fail to address why the type and density of housing planned requires this particular location on resource land, (3) fail to identify growth of "existing or planned rural industrial, commercial, or other economic activity in the area that generates a market demand for rural housing," and (4) fail to examine the current housing market within the Newberg Urban Growth Boundary (UGB) or outside the UGB. [14]

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[14] The county's findings addressing this criterion provide:

> "Regarding OAR 660-004-0022(2), the applicants have submitted significant and substantial documentation and information regarding the growth in Yamhill County * * *, which are all incorporated into these findings in its entirety by this reference.
>
> "The Economic Development section of the County's Comprehensive Plan addresses this fact and states that the attraction of new industries in recent years has helped the local economy significantly, and the County's Overall Economic Development Plan has served as 'a guide to the fulfillment of the county's economic development goals and policies.'
>
> "As noted above, the County's own Exception Land analysis contained in Appendix D of the Yamhill County Transportation System Plan (TSP) Final Report, dated March 1996 demonstrates the impact of this economic growth on rural residential lands by finding in 1996 that at least 78.5% of all rural residential properties were then currently developed. Within the Newberg area, the percentage of developed rural residential properties in 1996 actually increased to at least 84%. This increased market demand in the Newberg area is supported by and results from the continued commercial and industrial development within the Newberg urban growth boundary and city limits, as well as from the continued demand for all residential land, including rural residential properties, given Newberg's close proximity to the Portland Metro Area.
>
> "The Summary of the Economic Development section of the Yamhill County Comprehensive Plan states '[T]he economy of Yamhill County is largely based upon agricultural and forestry related industries * * * *' and that the 'County has traditionally been plagued by high levels of unemployment, but the attraction of new industries in recent years has helped to alleviate this condition.'

**1. Market Demand**

While the county's findings addressing this criterion are extensive, we agree with petitioner that the findings fail to demonstrate compliance with the requirements of the rule. The general prohibition in the first sentence of the rule provides that market demand for housing cannot provide a reason for justifying an exception. *See DLCD v. Yamhill County*, 31 Or LUBA 488, 497 (1996) (reasons justifying an exception for rural residential housing cannot be based on market demand, except as provided in the rule). The exception found in the third sentence provides that a local government can use market demand for rural housing to justify a reasons exception only where that demand is generated by "existing or planned rural industrial, commercial, or other economic activity in the area." The county's reliance on the exception to that general prohibition does not find its basis in factual evidence in the record or in the comprehensive plan.

The findings cite to language in the Economic Development section of the county's comprehensive plan regarding growth in the county and recent attraction of new industries. Record 10. However, there is no evidence that the economic growth is from rural industrial, commercial or

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> "Another indicator of rural economic development is the increase traffic counts on rural County roads. The Summary of the Development section of the Yamhill County Comprehensive Plan states that '[D]ue primarily to the increasing traffic load and traffic hazards on all county roads, there is a need to control access points for future development * * *' and '[I]n view of the rapidly increasing cost and decreasing supply of energy, it is imperative that all transportation decisions take into account the conservation of energy.'
>
> "The Board finds that the County should provide sufficient rural residential lands in appropriate ways and locations under the law for as diverse an income level of its citizens as possible, so that such lands are not only available to the wealthy, or to those citizens who either owned the property for a significant period of time or inherited it.
>
> "The Board finds that based on the evidence in the record, the application complies with the requirements of OAR 660-004-0022(2) because the applicants have demonstrated that the subject property is not resource land; that even though the County has not established a specific percentage threshold for developed land, the existing County AF-10 zoned land within the Study Area has been developed to at least 89.1%; and that there is a need for more AF-10 zoned land within the Study Area to satisfy the market demand for housing and park land generated by existing and planned rural and urban industrial, commercial, and other economic activity in the area." Record 10.

other economic activity in the area or that such rural economic growth generates the alleged demand for rural residential development.

The findings themselves concede that the demand for rural residential lands "results from the continued commercial and industrial development *within the Newberg urban growth boundary and city limits*, as well as from the continued demand for all residential land, including rural residential properties, given Newberg's close proximity to the Portland Metro Area." Record 10. That finding directly conflicts with the conclusory finding that "there is a need for more AF-10 zoned land within the Study Area to satisfy the market demand for housing and park land *generated by existing and planned rural and urban industrial, commercial, and other economic activity in the area*." *Id*. (Emphasis added). In short, the evidence in the record clearly supports a conclusion that there is a market demand for rural residential housing. However, nothing supports a finding that the demand is generated by "existing or planned *rural* industrial, commercial, or other economic activity *in the area*."

This sub-assignment of error is sustained.

**2. The Proposed Use Requires Location on Resource Land**

OAR 660-004-0022(2) requires the county to demonstrate why the type and density of housing proposed requires "this particular location on resource lands." Intervenors respond to petitioner's argument that the county's findings fail to address this criterion, in part, by restating that the property is not resource land. Intervenors' Response Brief 13. We have already concluded that the property is resource land. While it is true that intervenors do cite to studies regarding market demand generally, the county's findings do not address why, based on that analysis, the type and density of residential development proposed requires this particular location on resource land.

This sub-assignment of error is sustained.

**F. Alternative Sites Analysis**

An applicant seeking a "reasons" exception must establish that "[a]reas which do not require a new exception cannot reasonably accommodate the [proposed] use." ORS

197.732(1)(c); OAR 660-004-0020(2)(b), *see* n 3. As part of this analysis, an applicant must identify or describe the location of possible alternate sites that do not require a new exception. OAR 660-004-0020(2)(b)(A). The applicant must then explain why those other areas or sites cannot reasonably accommodate the use. OAR 660-004-0020(2)(b)(B). The county adopted findings addressing this standard. Record 5-7, 13-14. The county found that there are 64 "available" AF-10 lots within the area examined by the applicants. Record 7. Petitioner argues that the county's findings demonstrate that the county granted the exception based, in large part, on the economic affordability and convenience of this lot over other nonresource lands. Petition for Review 10-11.

The county adopted a finding that this statutory standard is similar to an "availability" standard in another section of the county's code.[15] That standard provides that the applicant must

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[15] The county found,

> "that the criteria of [OAR 660-004-0020(2)(b)(B)] is very similar to the County's availability criteria contained in [Yamhill County Zoning Ordinance (YCZO)] 1208.02(D), which requires a showing that those other parcels, already zoned for the proposed use, are either unavailable or not as well suited to the proposed use due to location, size or other factors, and which is discussed in the YCZO findings above.
>
> "* * * * *
>
> "The Board finds that the applicants' analysis of availability and suitability for rural residential development summarized in Section (B)(3) above is reasonable to use to find that the proposed use cannot reasonably be accommodated on such other areas." Record 13.

The findings demonstrating compliance with YCZO 1208.02(D) rely on a table prepared by the applicant showing a total of 51 vacant lots zoned AF-10 available for development and 22 potential new lots zoned AF-10 available for development. The applicant determined that some of those otherwise "available" lots were unsuitable for rural residential development, leaving a total 64 suitable vacant or new lots. Based on that analysis, the Board found,

> "that approximately 89.1% * * * of the total AF-10 zoned lands within the Study Area have either been developed and/or are unsuitable for rural residential development, and that therefore there is an existing demonstrable need for more AF-10 rural residential exception land which would be allowed by the requested zone change, after 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, as required by YCZO 1208.02(B). Similarly, the Board also finds that criteria contained in YCZO 1208.02(D) is satisfied by the applicants demonstrating that those other parcels, already zoned for the proposed use, are either unavailable or not as

show "that the other parcels, already zoned for the proposed use, are either unavailable or not as well suited to the proposed use due to location, size or other factors * * *." Record 13. After adopting that standard as the applicable standard here, the county adopts findings that the "availability" standard is satisfied.

That "availability" standard is not consistent with the statutory requirement, and the county's interpretation of a statutory standard is entitled to no deference.[16] *Riggs v. Douglas County*, 167 Or App 1, 10, 1 P3d 1042 (2000) (where bcal legislation merely incorporates an otherwise applicable state standard, a local government's interpretation of that standard is entitled no deference). The "availability" standard, as described in the city's findings, would permit granting an exception if, after comparing the properties, the subject property is better suited to the proposed use than the alternate sites due to location, size, or other factors. The statutory standard allows no such balancing. Under the statute, the county may only look at alternate sites to determine whether those alternate sites can reasonably accommodate the proposed use. The county's interpretation of the applicable standard is significantly less restrictive, and therefore less protective of resource lands, than is the statutory standard. *See Kenagy v. Benton County*, 112 Or App 17, 20 n 2, 826 P2d 1047 (1992) (counties may not adopt regulations for agricultural lands that are less protective than applicable statutory requirements, but counties are free to regulate agricultural land more stringently). The county erred in applying an improper balancing test.

This sub-assignment of error is sustained.

The county's decision is remanded.[17]

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well suited to the proposed use due to location, size or other factors found in the record." Record 7.

[16] Although petitioner does not specifically challenge this interpretation, it is integral to the determination of the arguments petitioner does make regarding the alternative sites analysis.

[17] We do not reverse because we cannot say that the application cannot be approved "as a matter of law." OAR 661-10-0071(1)(c). We do note, however, that the applicants' market analysis and the county's findings appear not to demonstrate compliance with the proper alternative sites analysis. Table 5, discussed in the findings, shows a total 64 suitable sites available within the Study Area. Record 7, *see* n 15. All of those sites could presumably reasonably accommodate the proposed use. *See also Wetherell v. Douglas County*, 44 Or

LUBA 567 (2003) (whether rejecting an exception application would cause a personal or economic hardship on the applicant has no bearing on whether there are areas that do not require an exception that could reasonably accommodate a dwelling for that applicant).