BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA ANDERSON,
Petitioner,

and

NEAL MIDDLEBROOK,
Intervenor-Petitioner,

vs.

COOS COUNTY,
Respondent,

and

JEFFREY MARINEAU and E.R. McINTOSH,
Intervenors-Respondent.

LUBA No. 2005-117

FINAL OPINION
AND ORDER

Appeal from Coos County.

Linda Anderson, Coos Bay, filed the petition for review. Jannett Wilson, Eugene, argued on behalf of petitioner.

Neal Middlebrook, North Bend, represented himself.

No appearance by Coos County.

Douglas M. DuPriest, Eugene, filed the response brief and argued on behalf of the intervenors-respondent. With him on the brief were Zack P. Mittge and Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock, PC.

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

REMANDED 03/08/2006

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 a county decision approving a comprehensive plan amendment from "Forest" to "Rural Residential," a zone change from "Forest" with a mixed use overlay to "Qualified Rural Residential-5" (Q RR-5), and taking an irrevocably committed exception to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands).

MOTION TO INTERVENE

Jeffrey Marineau and E.R. McIntosh, the applicants below, move to intervene on the side of respondent. Neal Middlebrook moves to intervene on the side of petitioner. There are no objections to these motions, and they are allowed.

MOTION TO AMEND PETITION FOR REVIEW
MOTION TO STRIKE

The original petition for review filed on December 21, 2005 was missing one page of the first assignment of error—page 11. In its response brief, intervenors-respondent (intervenors) move to strike petitioner's first assignment of error on the ground that it was not filed within the time allowed by OAR 661-010-0030(1).[1] *See Weeks v. City of Tillamook*, 23 Or LUBA 255, 256 (1992) (untimely filing of petition for review is not a technical violation and is grounds for dismissal); *see also Fechtig v. City of Albany*, 27 Or LUBA 480, 483, *aff'd* 130 Or App 433, 882 P2d 138 (1994) (denying "motion for reversal," filed three weeks after petition for review was filed, because motion was merely an attempt to supplement the arguments made in the petition for review). Intervenors argue that petitioner is essentially requesting an amendment to her petition for review, and that under *Fechtig* and *Weeks*, her motion should be denied and her first assignment of error stricken.

---

[1] OAR 661-010-0030(1) provides, in relevant part:

> "The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board."

The omission of page 11 was apparently an oversight on the part of petitioner. Petitioner became aware of this oversight on January 3, 2006, and supplied intervenors' attorney with a copy of page 11 on January 4, 2006. Intervenors filed their response brief one week later, on January 11, 2006, and included a response to the first assignment of error.

We disagree with intervenors' suggestion that a petition for review can never be amended or corrected. *See, e.g.*, OAR 661-010-0030(3), (6). Under OAR 661-010-0300(6), amendments to petitions for review may be allowed "in accordance with OAR 661-010-0005," which provides:

> "These rules are intended to promote the speediest practicable review of land use decisions, in accordance with ORS 197.805 - 197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of the parties shall not interfere with the review of a land use decision * * *."

Fechtig stands for the proposition that a petitioner may not, after the petition for review is filed and the deadline for filing the petition for review expires, supplement the arguments presented therein. However, we often allow corrections to petitions for review, in furtherance of the purpose statement in our rules, pursuant to OAR 661-010-0030(3) and (6). *See, e.g.*, *Kane v. City of Beaverton*, 49 Or LUBA 512, 518, *aff'd* 202 Or App 431, ___ P3d ___ (2005) (allowing intervenors-petitioner to belatedly sign the signature page of a timely filed petition for review); *Kellogg Lake Friends v. City of Milwaukie*, 16 Or LUBA 1093, 1095 (1988) (LUBA will allow amendments to correct errors or omissions in a petition for review if doing so will not materially interfere with respondent's ability to respond).

Apparently intervenors' attorney contacted someone as soon as he noticed the omission of page 11. Petitioner then provided the missing page as soon as she was made aware of its omission. Intervenors fully responded to the arguments that appear on page 11. Accordingly, we do not see that petitioner's inadvertent omission of page 11 prejudiced intervenors' substantial rights in any way.

Intervenors' motion to strike is denied. Petitioner's motion to amend her petition for review is granted.

MOTION TO FILE REPLY BRIEF

Petitioner requests permission to file a reply brief, pursuant to OAR 661-010-0039.[2] She argues that waiver arguments are the proper subject of a reply brief, and that her reply brief responds to arguments in the response brief that certain issues were waived because they were not raised at the local level. *Kurahashi Partners v. City of Bend*, 46 Or LUBA 791, 792, *aff'd* 194 Or App 327, 95 P3d 756 (2004).

Intervenors seem to argue that the substance of petitioner's reply brief is not limited to new matters, as required by OAR 661-010-0039. We disagree. The reply brief merely argues that the issues that intervenors allege were waived were cited by the county in the challenged findings. Petitioner argues that she is therefore entitled to respond to those findings. Intervenors may be correct that petitioner's citation to the challenged findings to support her argument that certain issues were not waived is not sufficient to demonstrate that those issues were in fact raised below. However, that is not a basis to deny the reply brief; rather, it is a basis to deny the related assignment of error because the issue was not raised. We address the substance of that argument below, under petitioner's respective assignments of error.

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

FACTS

The subject property is a 20.12-acre undeveloped parcel, tax lot 2200, and is roughly rectangular in shape. The property contains a seasonal creek and a perennial stream that flows north to south through the western portion of the property. The perennial stream

---

[2] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. * * * A reply brief shall be confined solely to new matters raised in the respondent's brief."

supports domestic water rights for five families whose properties lie to the south of the subject property. The point of diversion for those water rights is somewhere between 100 and 1000 feet south of the subject property. The area 1000 feet on either side of the perennial stream is designated by Coos County Public Health as a Sensitive Area. The soils in the proposed exception area are identified by the United States Department of Agriculture Natural Resources Conservation Service (NRCS) as 26C Geisel silt loam, 2 to 12 percent slopes and 54E Templeton, 30-50 percent slopes. The western portion of the property, near the perennial stream, contains the land with the steeper slopes.

Lands to the east of the proposed exception area are zoned RR-5, and lands to the south and west are zoned RR-2. The property directly to the north, tax lot 1100, is zoned "Forest," as is the property to the north of tax lot 1100. Other than these resource parcels to the north, the area is highly developed with residences, and there are approximately 43 parcels and 35 dwellings within the 160-acre square in which the subject property lies.

At the time intervenors purchased the subject property in January, 2004, it was forested. Soon thereafter, intervenors logged the property, and on February 24, 2005, filed the subject application. Approval of the application would permit one additional dwelling on the subject property.[3] On June 2, 2005, the Coos County Planning Commission conducted a public hearing and voted to recommend approval. On June 22, 2005 and July 13, 2005, the Coos County Board of Commissioners conducted public hearings on the matter, and adopted an ordinance approving the amendments and zone change on July 13, 2005. Following an appeal to this Board, the county withdrew its decision for reconsideration. On October 19, 2005, the county again approved the application.

This appeal followed.

---

[3] All parties appear to agree that the property currently qualifies for one forest template dwelling. ORS 215.750.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner argues that the county erred in adopting an irrevocably committed exception to Goals 3 and 4.[4] According to petitioner, the county failed to address relevant issues and based its decision on improper considerations. Other findings, petitioner argues, are either not supported by substantial evidence or are based on misconstruction of applicable law.[5] Finally, petitioner contends that the county's findings are inadequate to demonstrate that resource use is impracticable on the subject property.

Irrevocably committed exceptions must be just that--exceptional. *1000 Friends of Oregon v. LCDC*, 69 Or App 717, 731, 688 P2d 103 (1984). ORS 197.732(1)(b), Goal 2 Part II(b), and OAR 660-004-0028(1) all establish the same standard for granting an irrevocably committed exception: "existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." To implement that standard, OAR 660-004-0028(4) provides:

> "A conclusion that an exception area is irrevocably committed shall be supported by findings of fact which address all applicable factors of [OAR 660-004-0028(6)] and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area."

Our usual tripartite approach for reviewing decisions adopting irrevocably committed exceptions is to (1) resolve any contentions that the findings fail to address issues relevant

---

[4] Petitioner's second assignment of error challenges the county's conclusion that an exception to Goal 3 is justified. Her third assignment of error challenges the county's conclusion that an exception to Goal 4 is justified.

[5] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

under OAR 660-004-0028 or rely on factors that are not properly considered under OAR 660-004-0028, (2) consider any arguments that particular findings are not supported by substantial evidence in the record, and (3) determine whether the findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standards of ORS 197.732(1)(b) that uses allowed by the goal are impracticable. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994). Although petitioner's assignments of error make challenges under all three steps of the analysis, we need not resolve all of petitioner's challenges under the first two steps because we conclude that one crucial finding on which the county's conclusion relies is unsupported by substantial evidence.

OAR 660-004-0028(2) provides that an irrevocably committed exception must address certain factors, particularly the characteristics of the subject property, characteristics of the adjacent lands, and the relationship between the exception area and adjacent lands.[6] OAR 660-004-0028(6) sets forth additional factors that must be considered in determining whether the uses allowed by the goal are impracticable in the proposed exception area.[7] In

---

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

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

[7] OAR 660-004-0028(6) provides, in pertinent part:

> "Findings of fact for a committed exception shall address the following factors:
>
> "(a) Existing adjacent uses;
>
> "(b) Existing public facilities and services (water and sewer lines, etc.);

evaluating the county's findings under OAR 660-004-0028, we independently determine whether the standards provided for in ORS 197.732(1)(b) are satisfied, based on the findings of fact that are supported by substantial evidence. In performing that review, we are not required to defer to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for an irrevocably committed exception. *Laurance v. Douglas County*, 33 Or LUBA 292, 297-99, *aff'd* 150 Or App 368, 944 P2d 1004 (1997).

A. Goal 4

Under OAR 660-004-0028(3), local governments taking exceptions to Goal 4 are required to demonstrate propagation or harvesting of a forest product, and forest operations or forest practices are impracticable.[8] In this case, the county found that such resource use of

---

"(c) Parcel size and ownership patterns of the exception area and adjacent lands:

"(A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the Goals were made at the time of partitioning or subdivision. Past land divisions made without application of the Goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors make unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. Resource and nonresource parcels created pursuant to the applicable goals shall not be used to justify a committed exception;

"(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment.

"(d) Neighborhood and regional characteristics;

"(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land;

"(f) Physical development according to OAR 660-004-0025; and

"(g) Other relevant factors."

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

the proposed exception area was impracticable due to the existence of rural residential properties to the east, west and south; the impacts of resource use on those adjacent residential properties; the steep slopes and streams on the property; the relatively small size of the subject property; problems with controlling brush due to the soils on the subject property; and the high risk of contamination of a water source for nearby properties by use of herbicides and pesticides on the subject property. The county's findings addressing why resource use of the proposed exception area is impracticable are lengthy, and we will not quote them in full here. Briefly, the county focused on the risk of contamination to the water source as a result of aerial spraying of herbicides and pesticides that it found would be necessary to ensure reforestation. It noted the steep slopes and proximity of those steep slopes to the stream on the property that would likely cause any chemicals applied to runoff directly into the water source. Record II 16.[9]

The focus of OAR 660-004-0028 is on the relationship between the proposed exception area and the surrounding area, and whether that relationship renders resource use of the property impracticable. *DLCD v. Curry County*, 151 Or App 7, 11, 947 P2d 1123

> "* * * It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible.' For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:
>
> "(a) Farm use as defined in ORS 215.203;
>
> "(b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and
>
> "(c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a)."

OAR 660-006-0025(2)(a) describes those forest uses as follows:

> "Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, *application of chemicals*, and disposal of slash[.]" (Emphasis added).

[9] The county filed a record before the decision was withdrawn for reconsideration and another record on reconsideration. Both records begin at page 1. We will refer to the first record as "Record I" and the second record as "Record II."

(1997). The county's findings appear to rely, at least in part, on the residential development on three sides of the subject property to demonstrate irrevocable commitment. However, the mere existence of residential uses near a property proposed for an irrevocably committed exception does not demonstrate that such property is necessarily committed to nonresource use. *Prentice v. LCDC*, 71 Or App 394, 403-04, 692 P2d 642 (1984). Additionally, intervenors concede that much of the residential development on which the county relies has been in existence for many years, and the subject property has been, until intervenors purchased the property and logged the timber, in resource use for many years. Reliance upon longstanding adjacent rural residential uses is insufficient to demonstrate that continued resource use of a proposed exception area has become impracticable in the absence of recent or imminent changes affecting the subject property. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 365-66 (2000). The only such factor the county identifies is the risk of contamination of the nearby water source that it claims renders resource use impracticable.

The challenged decision relies on findings that the soils on the subject property limit its productivity as forestland due to severe plant competition. In order to control the brush in areas where the property has been cleared, the findings conclude that aerial spraying of chemicals is necessary. However, because of the risk of harm and liability resulting from possible contamination of the domestic drinking water source just south of the property, the challenged decision finds aerial spraying is impracticable on the subject property, which makes forest use impracticable. The challenged findings provide:

> "Given the magnitude of the harm posed by the herbicide application necessary for forest operations on the site and the liability risks associated with such practices, we conclude that continued propagation of a forest product within the exception area is impracticable." Record II 12.

Petitioner challenges, first, the county's findings that non-chemical methods are ineffective in controlling the invasive weeds on the subject property. Petitioner argues, as

she did below, that various manual and mechanical methods are adequate to control the brush on the property. Petitioner also questions whether *further* applications of chemicals are necessary, now that the property has been replanted. The findings address each of the possible non-chemical alternatives, and rejects them for various reasons. The challenged decision does not directly consider whether chemicals will need to be applied in the future—only that chemicals are required to manage the invasive weeds.

The findings rely on the Pacific Northwest Weed Management Handbook (Handbook), submitted by intervenors. However, the Handbook appears to focus on "site preparation" as the time for chemical application; *i.e.*, prior to replanting.[10] The subject property was replanted some time after the property was logged and before the subject application was filed. The record does not indicate whether chemicals were used prior to replanting or at any time after replanting. In any event, the challenged decision is based upon the presumption that chemicals will be necessary in the future. It may very well be that, even if chemicals were applied before replanting, additional applications will be necessary. However, there is not substantial evidence in the record that that is so.[11] Intervenors allege that the "need for intensive maintenance and preparation clearly anticipates more than one chemical application." Intervenor-Respondents' Brief 22. However, they cite to no evidence to support that contention, nor to any evidence that whatever applications might be necessary have not already occurred. Accordingly, the county's finding that chemicals are required is not supported by substantial evidence.

---

[10] Even intervenors concede that it is the site preparation that requires intensive maintenance:

> "The facts in this case are that the *intensive site preparation* that is now required for the first time in 40 or more years is likely to contaminate drinking water for adjacent rural residential development." Intervenor-Respondents' Brief 20 (emphasis added).

[11] The Handbook provides: "All conifer seedlings grow best if free of weed competition for at least 2 years." Record I 80.

Many of petitioner's remaining arguments assume that the county's findings that the use of chemicals is necessary are supported by substantial evidence. Although we have determined that those findings are not supported by substantial evidence, we will address petitioner's other arguments in the interests of judicial efficiency.

Petitioner argues that, even if chemicals are necessary, speculative impacts from possible future application of herbicides, pesticides and fertilizers are the "occasional inconvenience" that rural residents must be willing to accept. *Friends of Linn County v. Linn County*, 42 Or LUBA 235, 246 (2002). The Court of Appeals has recognized that certain conflicts must be endured by rural residents:

> "People who build houses in an agricultural area must expect some discomforts to accompany the perceived advantages of a rural location. If problems of this sort by themselves justified a finding of commitment, it would be impossible to establish lasting boundaries between agricultural and residential areas anywhere, yet establishing those boundaries is basic to the land use planning process." *1000 Friends of Oregon v. LCDC*, 69 Or App at 728.

However, we agree with intervenors that contamination of drinking water through chemical application on adjacent lands is not one of the minor discomforts the Court likely had in mind. *See also Prentice*, 71 Or App at 403 (conflicts resulting from odors, noise, spraying and dust are a consequence of rural life and are not sufficient to justify an irrevocably committed exception).

Petitioner also argues that the state and federal regulations regarding reforestation in general and application of chemicals in particular are sufficient to protect the adjacent property owners from contamination of their water source. Intervenors respond, and the findings conclude, that aerial application of herbicides is an abnormally dangerous activity and that violators are subject to strict liability for any damages caused by spraying activities. *See Chase v. Henderson*, 265 Or 431, 432, 509 P2d 1188 (1973) (spraying of chemicals is an ultrahazardous activity and sprayer may be held liable regardless of intention or negligence). The challenged findings provide, on this point:

> "Finally, with regard to opponent's argument that regulation will prevent the potential harm from occurring, we would like to believe that to be the case. Unfortunately, in practical reality there is a variety of circumstances (changes in wind direction, unexpected precipitation, etc.) that could render even strict adherence to the pesticide regulations meaningless. Spills, human error or other accidents must also be taken into account. Moreover, as aerial spraying of hazardous chemicals is by its nature an abnormally dangerous and ultra-hazardous activity, Applicants would be held strictly liable for <u>any</u> harm that resulted to nearby property owners because of these intangibles. The limitations against suits for resource practices extend only to negligence suits and does not eliminate the risk of claims based on strict liability.
>
> "As Applicants face unlimited strict liability with regard to aerial spraying necessary of successful propagation of forest products near the mass of residential houses in the area, we conclude that such propagation is impracticable and the site is irrevocably committed to rural residential uses." Record II 18 (emphasis in original).

The county also relies on the classification by the Coos County Public Health Department of all but approximately three acres of the proposed exception area as a "Sensitive Area."[12] We address the county's reliance on the sensitive area designation first.

A letter from the Coos County Public Health Department, quoted in the application, recommends as follows:

> "Because of the physical proximity of the property identified as (24-13-13 TL 2200) to at least one drinking water system, the property owner should be discouraged from making pesticide, herbicide or fertilizer applications that could have adverse health effects via use of a neighborhood stream as a drinking water source. *The actual use of such products is at the discretion of the property owner as allowed by law and any pertinent land use restrictions.*
>
> "* * * * *
>
> "Solely from the perspective of public health, properties within a sensitive area would be best zoned and/or managed in a way to discourage practices

[12] Intervenors argue that petitioner failed to raise the "issue" of the Sensitive Area during the local proceedings and has therefore waived it. We disagree. A letter in opposition was submitted during the local proceedings that includes the language from the Coos County Public Health Department quoted below, and argues that, despite the sensitive area designation, state laws and regulations are sufficient to "prevent the alleged conflict from occurring." Record I 189. We conclude that the issue regarding the county's reliance on the Sensitive Areas was sufficiently raised below.

> inviting discharges of chemical contamination." Record I 133 (emphasis added).[13]

It appears the county relies on the sensitive area designation in support of its contention that intervenors would be exposing themselves to a heightened risk of liability if they applied chemicals within the sensitive area. The sensitive area designation, however, does not preclude the property from being zoned or used for forest uses. Neither does the sensitive area designation prohibit a property owner from applying pesticide, herbicide or fertilizer within the designated area. Intervenors do not argue that it does. Rather, the letter merely discourages application of chemicals *that could contaminate the water*. It specifically states that use of chemicals is at the discretion of the property owner, as allowed by law. We agree with petitioner that this letter, and thus the sensitive area designation, imposes no greater liability on intervenors than is otherwise imposed by law. We turn now to the question of what liability is imposed by law.

The Oregon courts have recognized aerial spraying of pesticides and herbicides as an abnormally dangerous activity for which strict liability applies. *Loe et ux v. Lenhardt et al*, 227 Or 242, 362 P2d 312 (1961). However, it is not as clear that intervenors would be held strictly liable for injury caused by chemicals that are not applied aerially. *See Speer & Sons Nursery v. Duyck*, 92 Or App 674, 759 P2d 1133 (1988). In *Speer*, the court cited the following excerpt from the Supreme Court in *Loe*:

> "it is the duty of the court to decide as a matter of law whether a given activity, *in a given factual setting*, is or is not extra hazardous." *Loe*, 227 Or at 249 (emphasis added).

The *Speer* court determined that the trial court erred in determining that "[a]s a matter of law, spraying of chemical herbicides from a land-based applicator in a farming community does not constitute an 'extra-hazardous' or 'abnormally dangerous' activity," because the only

[13] The challenged findings omit the emphasized language. Record II 11.

source of information the trial court had before it was the complaint, which provided an insufficient basis for deciding the issue. *Speer*, 92 Or App at 677.[14] Neither *Speer* nor any other case that we are directed to decides whether ground-based spraying of pesticides or herbicides is an abnormally dangerous activity for which strict liability applies.

Accordingly, the county's conclusion that forest uses are impracticable because of the liability risks associated with application of chemicals depends upon its finding that aerial spraying is necessary. Petitioner argues that the county's finding that aerial spraying of pesticides and herbicides is necessary for the production of forest uses is unsupported by substantial evidence. We turn to that argument now.

Most of the county's findings explain why chemicals, as opposed to non-chemical methods of weed control, are necessary. They do little to explain why aerial spraying, as opposed to hand spraying, is required. The findings on this point provide:

> "While manual clearing might be effective for high value crops grown on a small number of acres, we find such use (or back pack spraying) to be impracticable for forest uses on a parcel this size. This conclusion [of opponents that mechanical methods are possible] is inconsistent with the opinions of the foresters who evaluated this site. Based on the evidence before us, it is unlikely that these are alternatives, even in combination, that would be effective on this site." Record II 16.

However, as petitioner points out, the Handbook does not state or even indicate that aerial spraying is necessary. With regard to aerial versus ground application of herbicides, it provides:

> "The choice of whether to spray foliage from the air or with ground equipment depends upon the size of the job and the equipment available. For most small spray jobs, small equipment is the most satisfactory. Recent developments have shown that a backpack sprayer with adjustable cone nozzles can apply sprays at 3 to 10 gal/A quite uniformly on cover less than 8 ft tall when the applicator can move freely. * * *

---

[14] The trial court dismissed the strict liability claim for failure to state facts sufficient to constitute a claim, pursuant to ORCP 21 A(8). Accordingly, the claim was stricken from the pleadings, and the parties did not have an opportunity to introduce evidence on the strict liability theory.

> "Aerial application involves 5 to 10 gal/A. Ground equipment is very good for small jobs, but the labor required often is excessive on jobs of more than 40 acres, and aerial application is preferred. * * *." Record I 79.

Accordingly, the evidence upon which the county relies supports just the opposite conclusion; *i.e.*, that for properties 40 acres or smaller, manual application is the preferred method.

The findings do not contend that the slope of the property and presence of debris also render manual spraying impracticable. However, intervenors argue in their response brief that they do. They contend that two thirds of the property is composed of the Templeton soil, which has 30 to 50 percent slopes. The record, however, does not support that reference. The subject application and the challenged findings assert that the property is "predominantly composed" of the Templeton soil. The record does not indicate what percentage of the property contains the Templeton soil. The record contains only one rough map showing the slope of the property, Record I 219, and it does not appear to support intervenors' claim in their response brief that two-thirds of the property is composed of the steep slopes of the Templeton soil. In any event, the county did not rely on the steepness of the slope or presence of debris to support its conclusion that aerial spraying is necessary, and intervenors' after-the-fact presentation of this argument in their response brief does not cite to evidence that "clearly supports" its finding that aerial spraying is necessary on the subject property. *See* ORS 197.835(11)(b).[15] Accordingly, that finding is not supported by substantial evidence in the record.

---

[15] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

Intervenors also contend in their response brief that, even if the findings of necessity for aerial spraying are not supported by substantial evidence, the factual circumstances support a conclusion that even manual spraying of chemicals on this property qualifies as an abnormally dangerous activity. They rely on the magnitude of the potential harm and the likelihood of a spill or other contamination of adjacent property owners' drinking water. *See Koos v. Roth*, 293 Or 670, 678, 652 P2d 1255 (1982) ("Whether the danger is so great as to give rise to strict liability depends both on the probability and on the magnitude of the threatened harm.").

This alternative basis, however, is not presented in the challenged findings. It appears for the first time in intervenors' response brief. The challenged findings regarding the impracticability of forest uses rely solely on the theory that aerial spraying of chemicals is necessary in order to control the invasive weeds. Accordingly, petitioner was not afforded an opportunity to present evidence or argument supporting what we assume would be her contention that, under the circumstances, ground-based spraying of chemicals is not an abnormally dangerous activity.[16] It is therefore premature for us to rule on that argument. The county may choose, on remand, to consider whether its decision could be justified on this basis.

The county's conclusion that resource use of the subject property is impracticable hinges on its finding that aerial spraying of chemicals is necessary for reforestation. Because we conclude that that finding is not supported by substantial evidence, the challenged decision fails to demonstrate that uses allowed by Goal 4 are impracticable.[17]

---

[16] The determination of whether ground based chemical spraying is an abnormally dangerous activity is a legal question that relies heavily on the factual circumstances of each particular case. Accordingly, we do not believe it would be appropriate for us to determine whether the anticipated ground spraying would qualify as an abnormally dangerous activity at this juncture.

[17] At oral argument, petitioner argued, for the first time, that intervenors are required to replant the property even if it is zoned for residential use. Given our prior discussion, we need not rely on this as a basis for remanding the challenged decision. However, it appears that petitioner is correct that the reforestation

Petitioner's third assignment of error is sustained.

B. Goal 3

The Goal 3 findings begin by analyzing the characteristics of the subject property and explaining why those characteristics make farm use on the property impracticable.[18] Petitioner contends that those findings fail to focus on the required inquiry; *i.e.*, the relationship of the proposed exception area to the adjacent lands. Petition for Review 14, citing *DLCD v. Curry County (Pigeon Point)*, 151 Or App at 11 (holding that characteristics of proposed exception area are not wholly irrelevant to justifying irrevocably committed exception, but clarifying that giving exclusive or preponderant weight to those characteristics alone is contrary to the fundamental test for an irrevocably committed exception).

Intervenors argue that the characteristics of the subject property are not the sole basis justifying the exception, and we agree. The Goal 3 findings rely on the same risk to the drinking water source that the Goal 4 findings rely on. The county's Goal 3 findings similarly conclude that "applying fertilizer (including sulphur, phosphorous and molybdenum) appears to be necessary" to maintain sufficient forage on the property. Although the county does not rely on a necessity for *aerial* spraying, as it does in its Goal 4 findings, it concludes:

> "Were Applicants to apply chemical fertilizers within this sensitive area with knowledge of: (a) the heightened risk of runoff, (b) the property's slope

---

requirements of the Forest Practices Act apply whether property is designated resource or residential. Accordingly, the high risk of liability that the county relies upon to justify the subject exception, if it applies at all, applies whether the exception is granted or not.

[18] The challenged findings provide, in relevant part:

> "Livestock use is impracticable within the exception area due to the conflicts it would pose to adjacent property owners given the physical limitations of the exception area itself. As noted above, livestock use would be restricted by the characteristics of the underlying soil. The droughtiness of the soil would limit forage during the summer months, while, in the wetter winter months, grazing would need to be restricted to prevent soil compaction. The steepness of the slopes, and the small size of the parcel would limit pasture rotation. Moreover, there are no fences on the site to prevent livestock from ranging onto adjacent parcels." Record II 15.

> toward the steam, (c) the existing uses of the stream for drinking water and (d) the warning of the Coos County Public Health Department, they would be exposing themselves to a substantially heightened and unacceptable risk of liability. We conclude that Applicants cannot operate a livestock operation on their site without exposing themselves to an unacceptable risk of liability and hold that livestock operations are impracticable." Record II 15.

The county's Goal 3 findings do not rely on the aerial application of chemicals as the Goal 4 findings do. Neither do the findings demonstrate that intervenors would be subject to strict liability for ground-based application of fertilizer on the subject property. Apparently, then, the findings rely on the risk of liability for only *negligent* application of fertilizer that results in the contamination of the neighbors' drinking water. Petitioner argues:

> "The county's findings fail to explain why necessary pesticides, herbicides and fertilizers could not be applied to the subject property in such a way to prevent contamination of the stream, or why safe and prudent farm practices are either extraordinary or impracticable." Petition for Review 14.

We do not see that the risk of liability for negligent application of fertilizers on the subject property provides a sufficient basis to conclude that farm use is impracticable.[19]

Petitioner's second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

In her first assignment of error, petitioner alleges that the challenged decision misconstrues and violates OAR 660-004-0028(6)(c)(A). *See* n 7. OAR 660-004-0028(6)(c)(A) provides that "[r]esource and nonresource parcels created pursuant to the applicable goals shall not be used to justify a committed exception." *See Brown v. Jefferson County*, 33 Or LUBA 418, 430 (1997) (conflicts with development on adjacent exception areas approved under the goals cannot be used to justify a committed exception).

The challenged findings describe the surrounding area and conclude that of the ten lots that surround the proposed exception area, "[n]one of these adjacent properties appear to

[19] It is worth noting that at least two of the property owners who use the water for domestic use appeared locally in opposition to the proposed exception.

have been created as a result of a goal exception." Record II 8. The county then expands its scope of study to the "neighboring" area as well. Of the approximately 40 "neighboring" lots, "[o]nly seven * * * were created as a result of a goal exception. Thus, the vast majority of land divisions on adjacent properties were made in compliance with the goals and were not the result of goal exceptions." Record II 9.

We tend to agree with petitioner that it is unclear from the challenged findings whether the county in fact erroneously relied upon "parcels created pursuant to the applicable goals" to justify the challenged approval. It is also not entirely clear to what extent the county even relied on any factors other than the risk of liability for potential water contamination, discussed above, to justify the proposed committed exception. On remand, the county should clarify these points.

Petitioner's first assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county's findings fail to demonstrate compliance with OAR 660-004-0018(2)(b)(B), which requires intervenors to demonstrate that the proposed exception "will not commit adjacent or nearby resource land to nonresource use."[20] The county's findings provide:

> "Opponents argue that the conversion of this property to rural residential use will irrevocably commit the approximately 70-acre parcel to the North to rural residential use, contrary to [OAR 660-004-0018(2)(b)(B)]. This exception

[20] OAR 660-004-0018(2)(b) provides that rural uses allowed by land and zone designations in a proposed exception area must meet the following requirements:

> "(A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals and are consistent with all other applicable Goal requirements; and
>
> "(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and
>
> "(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses[.]"

> will permit two houses on Tax Lot 2200 with on-site septic and water and all other utilities and services provided by existing systems. Any modest amount of traffic generated by the site will likely travel South and away from the Northern parcels. We do not find any conflict between the proposed rural residential use on Tax Lot 2200 and the forest use on the more northerly parcels. Moreover, the exception for Tax Lot 2200 is not a basis for concluding that this parcel is irrevocably committed. [OAR 660-004-0028(6)(c)(B)]. Hence, we conclude that providing an exception for 2200 will not irrevocably commit the two contiguous forest lots to the North contrary to [OAR 660-004-0018(2)(b)(B)]." Record II 18.

In their response brief, intervenors argue that the one new dwelling that the proposed exception will permit could not be the basis for concluding that the resource property to the north of the subject property, tax lot 1100, is committed to nonresource use. OAR 660-004-0028(6)(c)(A) prohibits using parcels created pursuant to a goal exception to justify a committed exception. Accordingly, the existence of the dwelling on the subject property, permitted by this exception, could not be used to justify a goal exception on the property to the north.

As we recognized earlier, the parties appear to agree that the subject property currently qualifies for one dwelling under the provisions that allow forest template dwellings. *See* n 3. The proposed exception will allow for one additional dwelling in an area that is already concentrated with rural residential development. It is difficult to see how, in these circumstances, one additional dwelling could serve to "commit" tax lot 1100 to nonresource use, even in the absence of OAR 660-004-0028(6)(c)(A).

Petitioner's fourth assignment of error is denied.

The county's decision is remanded.