BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

UMPQUA PACIFIC RESOURCES
COMPANY, INC.,
Intervenor-Respondent.

LUBA No. 2005-174

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Shelley Wetherell, Umpqua, filed the petition for review and argued on her own behalf.

No appearance by Douglas County.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich and Aitken, PC.

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

REMANDED 05/15/2006

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 single family dwelling not in conjunction with farm use (nonfarm dwelling).

MOTION TO FILE REPLY BRIEF

Petitioner requests permission to file a reply brief. Pursuant to OAR 661-010-0039, a reply brief may be allowed to respond to "new matters" raised in a response brief.[1] Intervenor objects to the filing of the reply brief. With few exceptions, intervenor's objections are merely additional argument on the merits of the "new matters" addressed by petitioner in her reply brief.

Petitioner addresses three issues in her reply brief. We will address each issue, and intervenor's response, in turn. First, petitioner contends that intervenor, in its response brief, raised the issue that the subject property is not in an exclusive farm use (EFU) zone and that ORS 215.284 does not apply.[2] According to petitioner, that issue is a "new matter," and it is appropriate for her to respond to it in a reply brief. Intervenor contends that petitioner raised the issue first in her petition for review when she stated that the subject property is in a farm/forest zone.

We do not agree that petitioner's statement that the subject property is in a farm/forest zone in any way raised the issue whether ORS 215.284 applies. Rather,

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

> "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."

[2] As will be explained in more detail below, ORS 215.284 is the statute that provides local governments the authority to allow nonfarm dwellings in exclusive farm use zones.

1 intervenor raised that issue for the first time in its response brief, and petitioner was entitled
2 to respond to that "new matter" in her reply brief.
3 The second issue that petitioner seeks to address in her reply brief is intervenor's
4 contention that OAR 660-033-0130(4)(c)(C) does not apply directly to the challenged
5 decision.[3] Again, intervenor argues that petitioner raised the issue of the applicability of
6 OAR 660-033-0130(4)(c)(C) in her petition for review. Petitioner merely assumes in her
7 petition for review that OAR 660-033-0130 applies. In its response brief, intervenor argues
8 that the rule does not apply because the county land use regulations are acknowledged. This
9 is a new matter raised for the first time in intervenor's response brief, and petitioner is
10 entitled to respond to it.
11 Finally, petitioner seeks to respond to intervenor's contention that petitioner waived
12 the issue of intervenor's soil expert's qualifications by not challenging the expert's
13 qualifications below. *See Caine v. Tillamook County*, 24 Or LUBA 627 (1993) (it is
14 appropriate to allow petitioner to respond to waiver arguments in a reply brief). Intervenor
15 does not argue that petitioner is not entitled to address the waiver issue in a reply brief;
16 rather, it provides a substantive response to petitioner's argument that she did not waive the
17 issue. However, intervenor's argument that petitioner did not sufficiently raise the issue
18 below is not a basis to deny the reply brief; rather, it is a basis to deny the related assignment
19 of error because the issue was not raised. *Anderson v. Coos County*, ___ Or LUBA ___
20 (LUBA No. 2005-117, March 8, 2006) slip op 5. Accordingly, petitioner's response to
21 respondent's claim that she waived the issue is proper for a reply brief.
22 Petitioner's request to file a reply brief is granted.

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[3] As discussed in more detail below, OAR 660-033-0130(4)(c)(C) is the basis of petitioner's fourth assignment of error challenging the county's conclusion that the "stability test" imposed by that rule is satisfied.

1 **FACTS**

2 The subject property is a vacant three-acre parcel zoned Farm/Forest (FF) and
3 designated Farm/Forest Transitional (FFT) in the Douglas County Comprehensive Plan. The
4 subject property is planted in a vineyard, which has been managed commercially for
5 approximately 30 years. The Natural Resource Conservation Service (NRCS) soils
6 classification mapping indicates that the entire property is composed of Rosehaven/215,
7 which is a Class II soil. The subject property lies on the south side of Doerner Road. Lands
8 to the east, south and west of the subject property are used for pastureland.

9 On March 14, 2005, intervenor filed an application for approval of a nonfarm
10 dwelling. Intervenor's application included a report from a soils scientist, who surveyed the
11 property and concluded that .3 acres of the property is composed of Class VI and VII soils.
12 Intervenor proposes to locate the dwelling on the .3-acre portion of the property containing
13 the Class VI and VII soils. The planning director approved the application, and petitioner
14 and Friends of Douglas County appealed to the county planning commission. On October 6,
15 2005, the planning commission affirmed the planning director's decision. On November 23,
16 2005, the Douglas County Board of Commissioners declined petitioner's and Friends of
17 Douglas County's request for review of the planning commission's decision.

18 This appeal followed.

19 **INTRODUCTION**

20 The exclusive farm use statute, specifically ORS 215.284, and the administrative rule
21 implementing the statute set forth the criteria for approval of a nonfarm dwelling in an
22 exclusive farm use zone. ORS 215.284(2); OAR 660-033-0130(4)(c).[4] The subject property

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[4] ORS 215.284(2) provides:

> "In counties not described in subsection (1) of this section, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designee, in any area zoned for exclusive farm use upon a finding that:

"(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;

"(b) The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel may not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land;

"(c) The dwelling will be sited on a lot or parcel created before January 1, 1993;

"(d) The dwelling will not materially alter the stability of the overall land use pattern of the area; and

"(e) The dwelling complies with such other conditions as the governing body or its designee considers necessary."

OAR 660-033-0130(4)(c) provides that, in counties located outside the Willamette Valley, a single-family residential dwelling, not provided in conjunction with farm use, may be approved, after required review, upon a finding that:

"(A) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;

"(B) (i) The dwelling is situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land; and

"(ii) A lot or parcel or portion of a lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself. If a lot or parcel or portion of a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, then the lot or parcel or portion of the lot or parcel is not 'generally unsuitable'. A lot or parcel or portion of a lot or parcel is presumed to be suitable if, in Western Oregon it is composed predominantly of Class I-IV soils or, in Eastern Oregon, it is composed predominantly of Class I-VI soils. Just because a lot or parcel or portion of a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use; or

"* * * * *

"(C) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of

1 is zoned farm/forest (FF), which is a mixed farm and forest zone. OAR 660-006-0050
2 authorizes counties to establish agriculture/forest zones, and provides that "[t]he county shall
3 apply either OAR Chapter 660, Division 6 [Forest Lands] or 33 [Agricultural Lands]
4 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of
5 the tract on January 1, 1993." OAR 660-006-0050(2).[5] For the FF zone, the county adopted
6 code provisions, Douglas County Land Use Development Ordinance (LUDO) 3.43.100, that
7 implement the applicable provisions of ORS 215.284(2) and OAR Chapter 660, Division
8 33.[6] In response to several of petitioner's assignments of error, intervenor argues that the

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nonfarm dwellings on other lots or parcels in the area similarly situated by applying the standards set forth in paragraph (4)(a)(D) of this rule. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area by applying the standards set forth in paragraph (4)(a)(D) of this rule; and

"(D) The dwelling complies with such other conditions as the governing body or its designate considers necessary."

[5] OAR 660-006-0050 provides:

"Uses Authorized in Agriculture/Forest Zones

"(1) Governing bodies may establish agriculture/forest zones in accordance with both Goals 3 and 4, and OAR Chapter 660, Divisions 6 and 33.

"(2) Uses authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-006-0025 and 660-006-0027, subject to the requirements of the applicable section, may be allowed in any agricultural/forest zone. The county shall apply either OAR Chapter 660, Division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993.

"(3) Dwellings and related structures authorized under section (2), where the predominant use is forestry, shall be subject to the requirements of OAR 660-006-0029 and 660-006-0035."

[6] The challenged decision, in several instances, appears to concede that the applicable provisions of the LUDO implement ORS 215.284(2):

"The only means by which the applicant can construct a dwelling on his property is via approval of a request for a non-farm dwelling as authorized by ORS 215.284(2)." Record 5.

"LUDO §3.5.075 permits a single-family dwelling not in conjunction with farm use (non-farm dwelling) in the FF zone subject to the criteria set out in LUDO Article 43. The review criteria of Article 43 echoes the criteria listed in ORS 215.284." Record 6.

EFU statute and administrative rule are not applicable to the application. It contends that because the subject property is not zoned for *exclusive* farm use, the EFU statute, and ORS 215.284(2) in particular, do not apply.[7] Petitioner contends that the challenged decision assumes that ORS 215.284(2) is applicable and that intervenor cannot now, for the first time, argue that it does not apply.

We agree with petitioner. The challenged decision recognizes that the applicable provisions of the LUDO implement ORS 215.284; it also appears to recognize that those local provisions must be interpreted to be consistent with the statutory provisions they were intended to implement. *See* n 6; Record 11; *see also DLCD v. Crook County*, 34 Or LUBA 243, 248 (1998) (where local provision implements state standard, interpretation of those local provisions must be consistent with state standards); *Leathers v. Marion County*, 144 Or App 123, 130, 925 P2d 148 (1996); *Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076 (1992) (same). To the extent intervenor now argues that the local code provisions can be interpreted inconsistently with ORS 215.284 because the subject property is designated a mixed farm/forest zone, not an *exclusive* farm use zone, neither intervenor nor the county took that position or argued that issue below, and it is therefore too late to raise that issue now. ORS 197.835(3). For purposes of this opinion, we rely upon the

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> "The Planning Commission notes that the statutory standard established in ORS 215.284(2)(b), as well as in LUDO Section 3.43.100(b), requires a demonstration that '*The dwelling will be situated upon land that is generally unsuitable for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.*' While subsection (4) of LUDO Section 3.43.100(b) explains that the unsuitability of a parcel or portion of parcel for one kind of farm use does not mean it is unsuitable for all farm uses, subsection (4) does not establish an additional approval standard beyond the statutory standard in ORS 215.284(2)(b), nor does it otherwise change that standard." Record 11 (emphasis in original).

[7] As explained below, petitioner argues that ORS 215.284 is potentially relevant because ORS 215.284(2)(a) requires demonstration that the proposed dwelling *or activities associated with the proposed dwelling*, will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use. LUDO 3.43.100.1.a, on the other hand, arguably does not require consideration of "activities associated with the proposed dwelling" for purposes of demonstrating compliance with this criterion.

1 caselaw that provides that the statute applies directly and that local regulations that
2 implement a statute must be interpreted in a way that is consistent with state statute.

3 Intervenor also challenges petitioner's contention or assumption that the standards set
4 forth in OAR 660-033-0130 apply directly to the challenged decision. It argues that the
5 LUDO has been acknowledged, and therefore, to the extent the requirements of OAR 660-
6 033-0130 differ from the requirements set forth in LUDO 3.43.100, the administrative rule
7 does not apply. This argument is specific to petitioner's fourth assignment of error, and we
8 will address it under our discussion of that assignment.

9 **FIRST ASSIGNMENT OF ERROR**

10 ORS 215.284(2) and OAR 660-033-0130 provide that a county may approve a
11 nonfarm dwelling if the county finds, among other things, that the portion of a lot or parcel
12 upon which an applicant seeks to site the dwelling is "generally unsuitable * * * for the
13 production of farm crops and livestock or merchantable tree species." The LUDO
14 implements these provisions. LUDO 3.43.100.1.b.[8]

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[8] LUDO 3.43.100.1.b provides, in pertinent part:

> "The dwelling will be situated upon a lot or parcel, or portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.
>
> "(1) A lot or parcel, or portion of a lot or parcel, shall not be considered unsuitable solely because of the size or location if it can reasonably be put to farm or forest use in conjunction with other adjacent land.
>
> "(2) A lot or parcel, or portion of a lot or parcel, is not generally unsuitable simply because it is too small to be farmed profitably by itself. If a lot or parcel, or portion of a lot or parcel, can be sold, leased, rented or otherwise managed as part of a commercial farm or ranch it is not generally unsuitable.
>
> "(3) A lot or parcel, or portion of a lot or parcel, is presumed to be suitable if it is composed of predominantly Class I-IV soils.
>
> "(4) A lot or parcel, or portion of a lot or parcel, being unsuitable for one farm use does not mean it is unsuitable for all farm uses."

1 **A. First Subassignment of Error**

2 Petitioner argues that the county misconstrued applicable law and made inadequate
3 findings unsupported by substantial evidence in concluding that the .3-acre portion of the lot
4 or parcel on which the nonfarm dwelling will be located is generally unsuitable for the
5 production of farm crops and livestock or merchantable tree species.

6 **1. The Parties' Arguments**

7 Petitioner argues that the subject property has been used for a commercial vineyard
8 for more than 30 years. She cites previous opinions of this Board holding that past farming
9 use on a property is a "substantial obstacle" to determining that the property is generally
10 unsuitable.[9] *Clark v. Jackson County*, 17 Or LUBA 594, 606 (1989). She also contends
11 that, pursuant to OAR 660-033-0130(4)(c)(B)(ii), the quality of the soils on the subject
12 property, Class II soils, create a presumption that the portion of the parcel is suitable for the
13 production of crops. *See* n 4. She identifies photographs in the record that, she alleges, show
14 the .3-acre portion and that there is no indication in those photographs that the .3-acre portion
15 is any different than the rest of the subject property.

16 Intervenor explains that it is the portion of the parcel where the nonfarm dwelling will
17 be sited, not the entire property, that must satisfy the generally unsuitable criterion. The fact
18 that the subject property itself has a history of farm use or is composed of high quality farm
19 soils does not create a presumption that a particular portion of the property is necessarily
20 generally suitable for the production of crops. It cites to LUDO 3.34.100.1.b(3), which
21 provides:

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[9] We have explained that the standard at issue in this case, "generally unsuitable * * * for the production of farm crops and livestock or merchantable tree species" is often referred to, in shorthand, as "generally unsuitable for farm use." However, that latter standard applies in other circumstances, and is not the standard applicable here. Because the actual standard at play here is so lengthy, we sometimes refer to a property that is "generally unsuitable * * * for the production of farm crops and livestock or merchantable tree species" as merely "generally unsuitable."

> "A lot or parcel, or portion of a lot or parcel, is presumed to be suitable if it is composed of predominantly Class I-IV soils."

Intervenor contends that its soils expert studied the soils of the .3-acre portion and determined that it was composed of two soils, Dickerson Loam and Nonpareil Loam, class VI and VII soils. According to intervenor, the record reflects that the .3-acre portion has had "repeated crop failures." Intervenor argues that the alleged presumptions cited by petitioner do not apply in this circumstance, where the portion of the property is composed of class VI and VII soils and has not produced grapes. It also points out that the county found that for purposes of determining whether a portion of the parcel is "generally unsuitable" for the production of farm crops, the "crop" is the fruit produced by the vines; *i.e.*, the grapes, not the vines themselves. Record 23. Thus, while the portion of the property might be suitable for growing vines, that same portion might be unsuitable for producing grapes.

Petitioner argues that the county's findings are not supported by substantial evidence because (1) the soils scientist, whose opinion the county relied upon, is not an expert in viticulture, (2) the county disregarded the testimony of two qualified viticulturists, and (3) the county also disregarded other evidence that other vineyards in the county are being managed on the same soils that the expert claims are present on the portion at issue in this appeal. Finally, petitioner argues that the county's findings do not establish that the .3-acre portion is generally unsuitable for the production of livestock or crops other than vineyards or grapes.

2. Discussion

We first address petitioner's argument that the county erred in failing to address the presumption set forth in OAR 660-033-0130(4)(B)(ii), *see* n 4, or the "substantial obstacle" created by past farming. We agree with intervenor's response that the "generally unsuitable" determination relies on a demonstration that the portion of the property, not the subject property itself, is generally unsuitable for the production of farm crops and livestock or merchantable tree species. Therefore, if *the portion* of the property is composed of Class I-

1 IV soils or has been historically farmed, then there is a presumption that *the portion* is
2 generally suitable for farm use and there is a substantial obstacle to demonstrating that it is
3 not.

4 With regard to the classification of the soils on the .3-acre portion of the property, the
5 county relied on a soils expert who concluded that the portion was composed of Class VI and
6 VII soils. Because the expert concluded that the portion of the property at issue is composed
7 of Class VI and VII soils, the county did not err in failing to address the presumption set
8 forth in OAR 660-033-0130(4)(c)(B)(ii).[10]

9 The county's conclusion that the .3-acre portion is generally unsuitable for the
10 production of farm crops and livestock or merchantable tree species is based almost entirely
11 on the intervenor's expert's report. In her petition for review, petitioner challenges the
12 qualification of that expert to render an opinion on the suitability of that portion for a
13 vineyard. She contends that he is a soils scientist, not a viticulturist, and is not qualified to
14 determine whether land with Class VI and VII soils is suitable for a vineyard.

15 Intervenor argues that petitioner failed to challenge the expert's credentials at the
16 local level, and has therefore waived the issue. It also notes that several previous county
17 decisions challenged by petitioner relied upon the same expert's opinion, and that petitioner
18 did not challenge his credentials in those appeals. In her reply brief, petitioner responds that
19 she "recalls testifying orally to the effect that [the expert], to her knowledge, has no
20 experience growing grapes." Reply Brief 4. However, she provides no record citation for
21 this assertion. It is petitioner's burden to establish that she raised the issue below and to
22 identify where in the record the issue was raised. *Davenport v. City of Tigard*, 27 Or LUBA
23 243, 247 (1994). A mere assertion that petitioner recalls raising the issue, without citation to

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[10] We do not understand petitioner to challenge the expert's qualifications to determine the soil types on the .3-acre portion, or his conclusion as to those soil types. As discussed below, we understand petitioner to challenge the expert's qualifications to render an opinion that the .3-acre portion is generally unsuitable for growing grapes.

1 the record, is not sufficient to demonstrate that petitioner raised the issue. Accordingly, we
2 decline to address the issue of the expert's qualifications.

3 We turn now to petitioner's contention that intervenor faces a substantial obstacle in
4 demonstrating that the portion is generally unsuitable because it has been part of a
5 commercial vineyard for the past 30 years. Intervenor responds that there is no evidence that
6 the .3-acre portion has ever successfully been farmed. Its argument relies upon the county's
7 interpretation that in determining whether the .3-acre portion is generally unsuitable for the
8 production of farm crops, the term "farm crops" refers to the grapes, not the vines.[11]
9 Petitioner generally challenges that interpretation and contends that the findings indicate that
10 the county shifted the burden of proof, and relied on the *absence* of evidence; *i.e.*, the
11 absence of evidence that the vines located on the .3-acre portion of the property have
12 produced grapes. *See DLCD v. Curry County*, 33 Or LUBA 728, 742-43 (1997) (local
13 government must make appropriate findings based on substantial evidence, not an absence of
14 findings, on a point on which the applicant bears the burden of proof).

15 Even if the county's interpretation could be sustained, the county's conclusion that
16 the .3-acre portion is generally unsuitable for growing grapes is not supported by substantial
17 evidence in the record. As noted earlier, the county's conclusion is based entirely on the
18 opinion of intervenor's expert. That expert's report does not assert or conclude that the .3-

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[11] The challenged decision provides:

> "The applicable standard does not require the site to be incapable of growing plants, but rather it requires the site to be 'generally unsuitable' for the production of farm crops. With respect to a wine grape vineyard, the 'crop' is the fruit produced by the vines, not the vines themselves. While the objector's testimony makes numerous references to the vines growing on the property, the Commission finds nothing in the record to support a conclusion that the subject 0.30 acre site is suitable for producing a crop of wine grapes. The mere presence of grape vines within a particular portion of a vineyard does not by itself imply that that portion of the property is generally suited for producing a crop of grapes. Again, the Commission must rely on the more substantial and credible evidence contained in the soil scientist's report concerning the generally unsuitable [sic] of the site for the production of farm crops, which we take to infer includes wine grapes." Record 23.

1 acre portion has not, or is not now, producing grapes.[12] Rather, it merely identifies some
2 areas with stunted vines and jumps to the conclusion that the portion is generally unsuitable.
3 To the extent the challenged decision is based on the absence of evidence of grapes on the .3-
4 acre portion, the county impermissibly shifted the burden of proof to the opponents. To the
5 extent the challenged decision relies on the fact that the vines in the .3-acre portion have not
6 produced grapes, that fact is not supported by substantial evidence in the record.[13]

7 Finally, petitioner argues that there is no evidence in the record that the property is
8 generally unsuitable for the production of crops other than grapes or for livestock. Petition
9 for Review 11. *See* OAR 661-033-0130(4)(c)(B)(ii). ("Just because a lot or parcel or portion
10 of a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another
11 farm use."). Intervenor relies on the general conclusions in the challenged decision, which in
12 turn relies upon intervenor's expert, that the portion of the property is "generally unsuitable"
13 for the production of farm crops and livestock or merchantable tree species. However,
14 neither the challenged findings nor intervenor's expert's soils report addresses whether the
15 portion is suitable for pastureland or for strawberries, wheat, grain or buckwheat, which a
16 neighboring property owner testified had been grown on the .3-acre portion prior to its use as

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[12] The report provides:

> "Most of the parcel is planted with wine grape vines which exhibit varying degrees of vigor depending on their location within the vineyard. (This observation was validated by the soils mapping and analysis described in this report.) I also noted that the vineyard is not irrigated, as a source of water for irrigation is not available in this area. The influence of this factor is most significant on that portion of the property where the soils are particularly shallow, and where I observed significant 'gaps' within the rows which are apparently the result of drought-induced die-off. Within this band of very shallow soil, I also observed that the surviving vines are stunted and exhibit markedly reduced vigor compared to the vines growing on the balance of the property." Record 342.

[13] Petitioner also argues that the county's decision is not supported by substantial evidence because (1) photographs in the record do not support intervenor's contention that the .3-acre portion is significantly different than other areas of the vineyard, (2) the county disregarded the testimony of two qualified viticulturists who testified regarding the suitability of the site for the production of grapes, and (3) the county disregarded evidence that other vineyards in the county are managed on the same soils that the county concluded were generally unsuitable for the production of grapes. We need not address these additional evidentiary arguments because we conclude that there is no evidence that the .3-acres does not grow grapes.

a vineyard. Record 124. Accordingly, we agree with petitioner that the conclusion that the portion of the subject property is generally unsuitable for the production of farm crops other than vineyards or for grazing livestock is not supported by substantial evidence in the record.

The first subassignment of error under petitioner's first assignment of error is sustained.

B. Second Subassignment of Error

Petitioner argues that in determining whether the portion of the subject property is generally unsuitable, the county was required to consider not only the portion on which the proposed dwelling would be located, but also the portion of the property that would include "necessary amenities" such as the well, septic system and driveway.[14] She contends that the .3-acre portion identified by intervenor is insufficient to accommodate these necessary amenities, and that the county's conclusion that the dwelling is situated upon a portion of the lot or parcel that is generally unsuitable land, pursuant to ORS 215.284(2)(b), erroneously considers only to the footprint of the dwelling location.

The county concluded that ORS 215.284(2)(b) does not require that "necessary amenities" such as a driveway, well or septic system be located on the unsuitable portion of the parcel. Record 25. Intervenor agrees and contends that the definition of "dwelling" in the LUDO only refers to the structure itself.[15] However, the county's interpretation of LUDO 3.43.100 is constrained because, as explained earlier in this opinion, it implements statutory standards, *i.e.*, ORS 215.284.

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[14] Based on our disposition of petitioner's first subassignment of error, it is unnecessary to address this subassignment of error. However, in the interest of judicial efficiency, we will address it.

[15] LUDO 1.090(2) defines "dwelling" as follows:

> "DWELLING: A building or portion thereof which is occupied in whole or in part as a home, residence, or sleeping place, either permanently or temporarily, but excluding hotels and motels."

1 In allowing nonfarm dwellings on land that is generally unsuitable, the legislature's
2 assumption was clearly that the dwelling would be located on the generally unsuitable
3 portion and the remainder of the property that is generally suitable would remain available
4 for farm uses. Under the county's interpretation, as long as the dwelling is located on land
5 that is generally suitable, then improvements that will likely be required to make the
6 dwelling functional—such as driveway, well and septic—can be located outside that
7 generally unsuitable portion and can occupy additional lands, presumably lands that are
8 generally suitable for the production of crops, from crop production. We do not believe that
9 is consistent with the purpose of the FF zone or with the state's agricultural land use policy
10 to preserve farmland.

11 By allowing nonfarm dwellings on a portion of a parcel that is generally unsuitable,
12 the legislature intended to allow the nonfarm use of land that, although combined with other
13 lands in the parcel that are suitable for the production of farm crops, is not itself generally
14 suitable. Nothing in the statute cited to us suggests that the legislature intended to allow the
15 portion of the property that is suitable for the production of farm crops to be used for the
16 nonfarm use. And it certainly did not intend to allow improvements such as driveways,
17 wells, septic systems and drainfields to occupy lands suitable for growing crops just because
18 the dwelling itself is situated on a portion of the parcel that is generally unsuitable.

19 The challenged decision does include an alternative finding that "the entire three acre
20 parcel is not planted with a vineyard and there are several areas where the 'necessary
21 amenities' could be located without interfering with the vineyard." Record 25. However,
22 this statement is not supported by substantial evidence. An aerial photograph in the record
23 indicates that almost the entire parcel is planted in vineyard. Record 274. The proposed plot
24 plan depicts the proposed driveway accessing the dwelling via an existing driveway on the
25 northwestern portion of the property. Record 133. That driveway would eliminate at least
26 some of the existing vineyard lying outside the .3-acre portion, as shown on the aerial

1 photograph. Further, the plot plan does not indicate where the septic tank, drainfield or well
2 will be located. Neither does the record indicate how any of these improvements can be
3 constructed without removing large portions of the vineyard from farm use. On remand, the
4 county must explain how the identified improvements will be located on the generally
5 unsuitable portion.

6 The second subassignment under petitioner's first assignment of error is sustained.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner argues that the county's conclusion that the .3-acre portion of the property
9 is "generally unsuitable" for the production of farm crops and livestock or merchantable tree
10 species is not supported by adequate findings because the county fails to adopt *any* findings
11 addressing whether the portion of the property is generally unsuitable for the production of
12 merchantable tree species. Intervenor responds by citing to two places in the challenged
13 decision where, it contends, findings addressing the production of merchantable tree species
14 can be found.[16] We understand intervenor to take a very strict reading of petitioner's
15 argument. It contends that because petitioner fails to realize that the findings do address the
16 suitability of the property for the production of merchantable tree species, she fails to
17 challenge those findings. Thus, according to intervenor, her second assignment of error fails
18 to provide a basis to reverse or remand the challenged decision.

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[16] Those portions of the challenged decision provide:

> "The applicant has instead presented factual information * * * that demonstrates a portion of the parcel consists of land that is generally unsuitable for the production of * * * merchantable tree species * * *." Record 9.

> "[T]he applicant has presented factual and credible information * * * which demonstrates that a 0.30 acre portion of the parcel consists of land that is generally unsuitable for the production of * * * merchantable tree species * * *." Record 10.

We agree with intervenor that petitioner does not explain how, or even argue that, the county's findings are inadequate or unsupported by substantial evidence in the record. Accordingly, the second assignment of error does not provide a basis for reversal or remand.

Petitioner's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues, in her third assignment of error, that the challenged findings are inadequate to demonstrate that the proposed dwelling "or activities associated" with the proposed dwelling will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use, pursuant to ORS 215.284(2)(a). Petitioner argues, first, that the findings do not address her contention below that the remaining portions of the existing vineyard on the subject property are "nearby lands" for purposes of the statute, and that the findings must therefore address how constructing the proposed dwelling will not force a significant change in or significantly increase the cost of accepted farming practices on the remaining portions of the vineyard. Petitioner also argues that the determination in ORS 215.284(2)(a) applies not only to the proposed dwelling, but also to facilities associated with the dwelling, such as the septic system, well and driveway.

Intervenor responds that LUDO 3.43.100.1.a, unlike ORS 215.284(2)(a), does not require consideration of "activities associated with" a proposed nonfarm dwelling.[17] *See* n 4. It refers only to the "permitted non-farm dwelling." Intervenor argues that because the county's land use regulations are acknowledged, only the LUDO applies, and the county was

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[17] LUDO 3.43.100.1 provides, in relevant part:

> "Building permits proposed under this article for lands zoned FG, FC, and FF shall conform to the following criteria and shall be processed pursuant to § 2.060.1.
>
> "a. Any permitted non-farm dwelling shall not force a significant change in or significantly increase the cost of accepted farming practices on nearby land devoted to farm or forest use."

1 not required to consider "activities associated with the dwelling" in determining whether the
2 proposal would force a significant change in or significantly increase the cost of accepted
3 farming practices on nearby lands devoted to farm use. As we explained above, intervenor
4 did not raise this issue during the local proceedings and has therefore waived it. Intervenor
5 also argues in the alternative that even if the statute applies, the term "activities" does not
6 refer to structures or improvements other than the dwelling itself. According to intervenor,
7 the term "activities" refers to "human activities that go along with the dwelling as part of the
8 residential use." Intervenor's Response Brief 14. It therefore contends that LUDO
9 3.43.100.1.a. does not require consideration of such physical improvements, facilities or
10 appurtenances as a driveway, septic system or well.

11 The parties do not offer much assistance in determining what the legislature intended
12 by including "activities associated" with the farm dwelling in the significant impacts
13 determination. We are inclined to agree with intervenor that by using the term "activities,"
14 the legislature did not mean to refer to the infrastructure cited by petitioner here. However,
15 we need not determine what the legislature did intend by that term, because we believe that
16 such infrastructure must be considered in any event. Improvements such as driveways, wells
17 and septic systems could potentially contribute or cause a significant increase in or
18 significantly increase the cost of accepted farming practices on nearby land devoted to farm
19 use, including the remainder of the existing vineyard. Thus, in order to interpret the statute
20 in a way that is consistent with the policies the statute intended to promote; *i.e.*, preserving
21 farmland for farm use, such improvements must be considered part of the dwelling. Those
22 improvements, thus, must be considered in determining whether an application for a nonfarm
23 dwelling will significantly change or increase the cost of accepted farming practices on
24 nearby land devoted to farm use, for purposes of ORS 215.284(2)(a).

25 Further, we agree with petitioner that the remainder of the 3-acre vineyard is
26 considered "nearby land devoted to farm use" for purposes of ORS 215.284(2)(a), and the

county must consider whether there will be a significant change or increase in the cost of accepted farming practices on the existing vineyard. Intervenor does not appear to argue that the remainder of the vineyard is *not* "nearby land," but rather contends that there is substantial evidence supporting the county's findings that the proposed dwelling will not significantly change or increase the cost of farming the vineyard. Intervenor's Response Brief 14. We need not address this argument further, because we have already held that the county erred in failing to consider the improvements associated with that dwelling in making its determination under ORS 215.284(2)(a). On remand, the county must address the improvements and whether the proposal will significantly change or increase the cost of farming practices on nearby lands devoted to farm use, including the existing vineyard.

Petitioner also argues that the challenged findings are inadequate because they fail to address the potential increase in the costs of farming due to the decrease in the availability of water as a result of the well proposed on the subject property. Intervenor argues that the county did, in fact, address this concern.[18] The wells on adjacent properties apparently serve domestic use, and petitioner does not explain how any impact to the water supply for domestic use, even assuming there was an impact, is related to an applicable approval criterion.

Petitioner's third assignment of error is sustained in part and denied in part.

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[18] The challenged findings provide:

> "Although Aenis and Formatin both submitted letters to the record objecting to the development of a dwelling on the applicant's parcel, the Planning Commission notes that the issues they raise in their letters concern potential impacts on their dwellings, but they do not make any mention of potential impacts on farm use activities conducted on their land, nor do they otherwise allege that the proposed non-farm dwelling will force a significant change in or significantly increase the cost of farming practices being conducted on their land." Record 7-8.

1 **FOURTH ASSIGNMENT OF ERROR**

2 LUDO 3.43.100.1.c provides that an applicant for a nonfarm dwelling must
3 demonstrate that the proposed dwelling will not materially alter the stability of the overall
4 land use pattern in the area.[19] *See also* ORS 215.284(2)(d); OAR 660-033-0130(4)(c)(C);

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[19] LUDO 3.43.100.1.c provides:

> "The dwelling will not materially alter the stability of the overall land use pattern of the area. Generally, the intent of the 'materially alter' standard is to consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in FG, FC and FF zoned areas; and, if the application involves the creation of a new parcel for the nonfarm dwelling, to also consider whether or not creation of the new parcel will lead to the creation of other non-farm parcels to the detriment of agricultural practices in FG, FC and FF zoned areas. To address this materially alter standard, the applicant shall provide a 'cumulative impacts analysis'. The cumulative impacts analysis shall consist of the following:
>
> "(1) **Study Area:** The applicant shall identify a study area which must include at least 2,000 acres, or a smaller area of not less than 1,000 acres if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other adjacent agricultural areas.
>
> "(a) If a 1,000 acre study area is selected, then findings shall describe the study area and explain why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the required analysis.
>
> "(b) A map shall depict the study area boundaries and show the location of the subject parcel within the study area.
>
> "(c) Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area.
>
> "(2) **Analysis:** Within the study area described above, the applicant shall
>
> "Identify:
>
> "(a) the broad types of farm uses (i.e. irrigated or nonirrigated crops, pasture or grazing land, etc.);
>
> "(b) the number, location and type of existing dwellings (i.e. farm, non-farm, hardship, etc.);
>
> "(c) predominant soil classifications;
>
> "(d) parcels created prior to January 1, 1993; and
>
> "(e) parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings; then,

1 OAR 660-033-0130(4)(a)(D).[20] The administrative rule sets forth the analysis required in
2 determining whether a proposed dwelling satisfies this stability test.[21] The county adopted
3 findings identifying a study area and addressing the stability standard.

"Determine:

"(f) dwelling development trends since 1993;

"(g) the potential number of nonfarm and owner-of-record dwellings that could be approved; and,

"Develop Findings:

"(h) findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings previously determined.

" (3) **Determination:** The County shall determine whether approval of the potential nonfarm and owner-of-record dwellings, together with existing nonfarm dwellings, will materially alter the stability of the land use pattern in the study area.

"(a) The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area.

"i. to continue operation due to diminished opportunities to expand;

"ii. to purchase or lease farmland; or

"iii. to acquire water rights.

"(b) The stability of the land use pattern will also be materially altered if the existing and potential number of nonfarm and owner-of-record dwellings will diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area."

[20] OAR 661-033-0130(4)(a)(D) provides:

"The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:

"(i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the

1 **A. Incorporation of Staff Report**

2 Petitioner first argues that the challenged findings are inadequate because they fail to
3 explain what facts the county relied upon or how whatever facts it did rely upon led to the
4 county's conclusion that the stability test is satisfied. She appears to challenge the county's
5 attempt to incorporate by reference the planning staff's findings.[22] Petition for Review 18.
6 The case that petitioner cites, *Staus v. City of Corvallis*, 48 Or LUBA 254, 266 (2004), *aff'd*
7 199 Or App 217, 111 P3d 759 (2005), is distinguishable. In that case, the challenged
8 decision purported to incorporate hundreds of pages of written testimony, minutes and other
9 written documents without specifically identifying them. We held that where a local

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location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;

"(ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot-of-record dwellings that could be approved under subsections (3)(a), (3)(d) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993 and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;

"(iii) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

[21] For ease of reference, we will refer the standard set forth in LUDO 3.43.100.1.c as the "stability test."

[22] The challenged decision provides:

"For the purpose of establishing the character of the existing land use pattern in the 2,200 acre study area, the Planning Commission makes the following findings based on the facts derived from the applicant's cumulative impact analysis, as well as the findings contained in the Planning Department's written staff report which the Commission incorporates herein by reference." Record 12.

1 government incorporates by reference documents in the record in a manner that makes it
2 difficult or impossible to determine which part of the written testimony supports the approval
3 and is therefore intended to be incorporated, the attempt to incorporate the document fails.
4 Here, the county clearly identified the findings contained in the staff report, and petitioner
5 does not provide an argument why the county's incorporation of those findings is inadequate
6 to explain its reasoning in support of its conclusion that the stability test is satisfied.

7 **B. Study Area**

8 Intervenor identified an approximately 2,200-acre study area for purposes of
9 determining whether the proposal satisfied the stability test.

10 **1. Representative of the Area**

11 Petitioner contends that OAR 660-033-0130(4)(a)(D)(i) requires that the county
12 adopt findings explaining why the chosen study area is representative of the surrounding area
13 and the challenged findings fail to do so. She argues that the study area that the county
14 relied on in this case is skewed, "concentrating north of the property where more
15 development has occurred rather than containing areas to the south where there is
16 agricultural use." Petition for Review 18.

17 Intervenor argues that petitioner erroneously relies on cases that directly apply the
18 administrative rules. *See, e.g.*, *Wolverton v. Crook County*, 34 Or LUBA 515, 525 (1998);
19 *Frazee v. Jackson County*, 45 Or LUBA 263, 273 (2003). It contends that the LUDO is
20 acknowledged and therefore has been determined to be consistent with the statewide
21 planning goals and the administrative rules implementing the goals. Accordingly, it asserts,
22 the LUDO, not the administrative rules, applies. Because the LUDO does not require that
23 study areas 2,000 acres or larger be justified, intervenor argues, and the study area in this
24 case is 2,200 acres, the county was not required to justify its use of the study area.
25 Intervenor's Response Brief 16-17, citing *Epp v. Douglas County*, 46 Or LUBA 480 (2004).

In *Epp*, we addressed the same code language at issue in this case. The full extent of the petitioner's argument was that the decision failed to state "why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by [the stability test]." *Id*. at 488. We held:

> "While the administrative rule does require this, the LUDO is slightly different. LUDO 3.43.100(1)(c)(1) only requires such an explanation if the study area is less than 2,000 acres. If the study acre is at least 2,000 acres then no such explanation is required. In the present appeal, the study area is over 2,000 acres. Therefore, under the LUDO, the county was not required to provide the findings petitioner argues it was required to make. The LUDO is acknowledged to comply with OAR Chapter 660, division 33. Therefore, compliance with the LUDO is sufficient. *DLCD v. Douglas County*, 28 Or LUBA 242, 254 (1994). Petitioner's argument does not provide a basis for reversal or remand. Furthermore, the county adopted extensive findings explaining why it believes the proposed development will not materially alter the stability of the overall land use pattern of the area. Petitioner does not challenge these findings." *Id*. at 488-89 (footnote and citations omitted).

In her reply brief, petitioner argues that OAR 660-006-0050, which authorizes local governments to establish agriculture/forest zones, requires counties to apply the standards for siting dwellings found either in OAR Chapter 660, Division 6 (Forest Lands) or Division 33 (Agricultural Lands). *See* n 5. She contends that OAR 660-006-0050 requires direct application of the rule even though the LUDO is acknowledged. She argues that to the extent *Epp* is inconsistent with OAR 660-006-0050(2), it should be overruled.

First, we are not convinced that OAR 660-006-0050 independently requires the direct application of Division 33 rules where a comprehensive plan is acknowledged. However, we need not resolve, in this case, the issue whether OAR 660-033-0130 applies directly, because we have consistently held that a local government cannot interpret or apply its acknowledged land use regulations in a manner that is inconsistent with the statutory provision that those regulations implement. *DLCD v. Crook County*, 26 Or LUBA 478, 488 (1994). It appears that our decision in *Epp* did not consider whether an interpretation of LUDO 3.43.100.1.c not

to require justification of a study area of at least 2,000 acres is consistent with the implementing statute—ORS 215.284(2)(d).

Prior to the adoption of the administrative rule implementing the stability test set forth in ORS 215.284(2)(d), OAR 660-033-0130(4)(c)(C) and OAR 660-033-0130(4)(a)(D), LUBA caselaw provided the analysis required in determining compliance with the statutory stability test. *Sweeten v. Clackamas County*, 17 Or LUBA 1234 (1989). The three-part inquiry set forth in *Sweeten* provides:

> "First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. * * * Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area." *Id*. at 1245-46.

We have held that for purposes of establishing compliance with ORS 215.284(2)(d), a county must explain what justifies the scope and contours of the study area required under the *Sweeten* analysis. *DLCD v. Crook County*, 34 Or LUBA 243, 251 (1998) (citing *Bruck v. Clackamas County*, 15 Or LUBA 540, 543 (1987)). That holding did not apply only in circumstances where the study area was smaller than a certain size. Accordingly, although the local code may not specifically require a finding justifying the scope of the study area in order to demonstrate compliance with the local code's stability test, it is incumbent upon the local government to explain what justifies the scope and contours of the chosen study area. To the extent *Epp* concludes otherwise, it is overruled.[23] Indeed, the stability test would be

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[23] We also question our conclusion in *Epp* that LUDO 3.34.100 requires justification of the study area *only* where the study area includes at least 2,000 acres. The code allows a study area of 1,000 acres where that smaller area is "a distinct agricultural area," as distinguished from "other adjacent agricultural areas." LUDO 3.43.100.1.c(1). Where a county relies on this smaller area, it must justify its use of that smaller area. While the code does not specifically state, as OAR 660-033-0130(4)(a)(D) does, that the county must adopt findings explaining how a 2,000-acre study area is "representative of the area," it also does not explicitly state that such a demonstration is *not* required. The caselaw interpreting the statute requires findings explaining what justifies the scope and contours of the study area, and the LUDO must be interpreted to be consistent with that requirement.

1 meaningless without a requirement to justify the study area. Without such a requirement, an
2 applicant could choose whatever study area produced the results it desired.

3 That said, petitioner merely argues that the study area is skewed to the north, omitting
4 large agricultural properties to the south.[24] *See* Record 208. The challenged findings do, in
5 fact, appear to rely on the "significantly different character" of the larger parcels to the south
6 as justification to omit them from the study area.[25] While we question the county's reliance
7 on the larger size of the parcels as a reason to omit them from the study area, it appears that
8 the county did adopt findings to justify the study area, and petitioner does not directly
9 challenge those findings. Accordingly, her undeveloped argument that the study area is
10 skewed does not provide a basis to reverse or remand the challenged decision.

11 **2. Types of Dwellings**

12 LUDO 3.43.100.1.c(2)(b) requires the county to identify the "number, location and
13 type" of dwellings existing within the study area. *See* n 19. According to petitioner, the
14 county identified three types of dwellings: non-farm, farm and "post-1993" dwellings. She
15 argues that the county erred because it failed to clearly identify the requisite "types" of
16 dwellings, which she alleges would include identification of template dwellings, farm related

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[24] Intervenor does not argue that there are findings justifying the study area or even provide reasons why the study area is representative of the area. Rather, intervenor relies entirely on his argument that the rule does not apply directly and therefore no justification of the study area is necessary.

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

> "The study area chosen for the applicant's cumulative impact analysis is situated in a transitional area of mixed uses between the Melrose Committed Residential Lands Area lying generally to the north and east, and the forested eastern slopes of the Coast Range bordering to the west. *Lands lying outside the study area are of a significantly different character than those within the boundary*. * * * To the west, the study area runs up against the easterly slopes of Callahan Ridge and the Coast Range where the land use pattern changes to large tracts of both private and government-owned commercial forest land. *Lands lying to the south of the study area are also quite different, in that the ownerships tend to be significantly larger than those within the boundary, and the predominant use is a mix of both farm land and large tracts of commercial timber land.*" Record 12-13 (emphasis added).

1 dwellings, lot of record dwellings and hardship dwellings.[26] Intervenor responds that neither
2 the LUDO nor the administrative rule to which petitioner cites requires that breakdown. We
3 disagree with intervenor, because both the rule and the LUDO appear to require more than
4 the breakdown provided by the county. *See* n 19, 20. However, petitioner does not explain
5 how the county's identification renders its conclusion regarding the stability test inadequate,
6 and we decline to provide that argument for her. Accordingly, her contention fails to provide
7 a basis for reversal or remand.

8 Petitioner also contends that the county identifies as non-farm dwellings some
9 dwellings that should have been identified as farm dwellings. Apparently, some properties
10 that the tax records indicated had special farm or forest assessments were identified by the
11 county as nonfarm dwellings. While petitioner may be factually correct that dwellings on
12 such properties are more appropriately identified as farm dwellings, she does not explain
13 how any of these and other alleged discrepancies would alter the city's conclusion that the
14 stability test is satisfied. Once again, this argument does not provide a basis to reverse or
15 remand the challenged decision.

16 Finally, petitioner raises an issue regarding the county's Goal 14 (Urbanization)
17 exception.[27] She appears to be challenging the county's presumption, for purposes of the
18 stability test, that dwellings on parcels less than 10 acres are not farm dwellings. Intervenor
19 points out, first, that petitioner misquotes or misunderstands the county's Goal 14 exception,

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[26] Petitioner cites OAR 660-010-0130(4)(a)(D)(ii), which provides that the findings must identify the "number, location and type of existing dwellings (farm, nonfarm, hardship, etc.)" within the study area. LUDO 3.43.100.1.c(2)(b) contains similar language. *See* n 19.

[27] Petitioner argues:

> "Douglas County has obtained an Exception to Goal 14 based upon findings that in Douglas County anything above a 5-acre size is rural and that parcels of between 5 and 10 acres in size in many cases are used [for] agriculture or forest purposes. Nothing in state or local law authorizes or justifies the county's peremptory conclusion that dwellings on parcels smaller than 10 acres are not farm dwellings." Petition for Review 19.

1 which identifies parcels less than ten acres as rural. More to the point, intervenor argues that
2 petitioner fails to explain how this argument provides a basis for reversal or remand. As we
3 explained above, even if the county somehow incorrectly identified the type of particular
4 dwellings, she does not explain how any such misidentification would alter the county's
5 conclusion that the stability test is satisfied.

6 Petitioner's fourth assignment of error is denied.

7 The county's decision is remanded.