

NATURE OF THE DECISION

Petitioner appeals a comprehensive plan map amendment, a zoning map amendment and an exception to Statewide Planning Goal 3 (Agricultural Lands).

FACTS

Intervenors purchased the subject 25.93-acre parcel in 1990. Before the decision that is before us in this appeal was adopted, the property was designated North/South County Agriculture by the county’s comprehensive plan and was zoned Exclusive Farm Use (EFU). The county’s EFU zone imposes a 160-acre minimum lot or parcel size.

The property is divided into roughly equal parts by Birch Creek. Intervenors were granted approval to locate a farm dwelling on the part of the property that lies east of Birch Creek. For 12 years, intervenors operated a mink farming business in buildings that are located on the part of the property that lies west of Birch Creek. Intervenors have water rights to use surface water from Birch Creek and well water to irrigate most of the property. Record 112-18. Well water is available on both the eastern and western parts of the property, and both parts of the property have approved septic systems. The property has been rented for horse pasture since the mink farm was discontinued in 2002. Intervenors sought the disputed exception and comprehensive plan and zoning map amendments to allow the property to be divided into two similarly sized parcels so that a non-resource dwelling could be constructed on the western parcel.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to intervenors’ argument in their response brief that petitioner did not raise the issues that are presented in the petition for review during the local proceedings and, for that reason, has waived his right to raise those issues at LUBA. Petitioner’s motion is granted.

1 **INTRODUCTION**

2 **A. Statewide Planning Goal Exceptions**

3 Part II of Statewide Planning Goal 2 (Land Use Planning) and ORS 197.732(1)
4 authorize three types of exceptions to the Statewide Planning Goals.¹ First, an exception
5 may be granted when property is physically developed in ways that render the property
6 unavailable for the uses that are allowed under the applicable statewide planning goals. Goal
7 2 Part II(a). Second, an exception may be approved where the property is irrevocably
8 committed to uses that are not allowed by the applicable goal or goals. Goal 2 Part II(b).
9 Finally, an exception may be granted where the four criteria set out at Goal 2 Part II(c) are
10 met. This final type of exception is referred to as a “reasons” exception. The decision that is
11 before us in this appeal approves a “reasons” exception. In four subassignments of error,

¹The wording of ORS 197.732(1) and Goal 2 Part II are identical. Goal 2 Part II provides:

“A local government may adopt an exception to a goal when:

“(a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;

“(b) The land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

“(c) The following standards are met:

“(1) Reasons justify why the state policy embodied in the applicable goals should not apply;

“(2) Areas which do not require a new exception cannot reasonably accommodate the use;

“(3) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

“(4) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.”

1 petitioner alleges that the county failed to demonstrate that the appealed exception complies
2 with the four reasons exception criteria set out in Goal 2 Part II(c)(1) through (4).

3 **B. Waiver**

4 Generally, issues that form the basis for an appeal at LUBA must be raised locally,
5 before the record closes after the final evidentiary hearing in a quasi-judicial land use
6 proceeding. ORS 197.763(1). LUBA generally may not consider issues that are not raised in
7 accordance with ORS 197.763. ORS 197.835(3).² Intervenors argue that petitioner waived
8 the issues he presents in his four subassignments of error because he failed to raise those
9 issues before the county.

10 In his reply brief, petitioner first responds that the county’s notices of hearing did not
11 specifically refer to the particular statutory and administrative rule sections that govern
12 reasons exceptions, as required by ORS 197.763(3)(b).³ Therefore, petitioner argues, under
13 ORS 197.835(4)(a) petitioner may raise issues at LUBA concerning the county’s reasons
14 exception even if those issues were not raised below.⁴ As intervenors correctly pointed out
15 at oral argument, ORS 197.763(3)(b) only requires that the county list in its notice applicable
16 comprehensive plan and land use ordinance criteria. ORS 197.763(3)(b) does not require
17 that the county list *statutory* or *administrative rule* criteria. *Van Dyke v. Yamhill County*, 35
18 Or LUBA 676, 684 (1999). Any lack of specificity in the county’s notices regarding the
19 applicable statutory and administrative rule criteria governing reasons exceptions does not

² ORS 197.835(3) provides the following limit on LUBA’s scope of review:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

³ ORS 197.763(3)(b) requires that the county’s notice of quasi-judicial land use hearings must “[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue.”

⁴ ORS 197.835(4)(a) provides in part that a petitioner may raise issues at LUBA that were not raised below if “[t]he local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b) * * *.” In that circumstance “a petitioner may raise new issues based upon applicable criteria that were omitted from the notice.”

1 excuse petitioners from the ORS 197.763(1) requirement that the issues presented in this
2 appeal must have been raised before the county. *Id.*

3 Following oral argument, on January 26, 2007, petitioner submitted a letter to
4 respond to intervenors' oral response to the arguments petitioner advanced in his reply brief.
5 In that letter, citing *Central Klamath Country CAT v. Klamath County*, 40 Or LUBA 111,
6 123 (2001), petitioner argues for the first time that the issues presented in his four
7 assignments of error were not waived, because the applicants identified the applicable
8 statutory and rule criteria in their application. Petitioner contends that action by the
9 applicants was sufficient to preserve the issues presented in his four subassignments of error.

10 Intervenors respond in a letter, also dated January 26, 2007, that petitioner's post oral
11 argument letter-argument is presented too late and is without merit. We agree that the
12 argument is untimely, and reject the argument for that reason. There is no reason why
13 petitioner could not have included the argument that is presented in the January 26, 2007
14 letter in his reply brief. We also agree with intervenors that the issue presented in
15 petitioner's four subassignments of error is whether the county adequately demonstrated that
16 relevant exception criteria are met in this case, not whether those criteria apply. There is no
17 dispute about what exception criteria apply. Although the application was sufficient to raise
18 an issue regarding whether those criteria apply; the application was not sufficient to raise an
19 issue regarding whether those criteria are satisfied. *Miles v. City of Florence*, 44 Or LUBA
20 411, 414-16, *rev'd on other grounds* 190 Or App 500, 79 P3d 382 (2003).

21 Finally, petitioner argues in his reply brief that a transcript attached to intervenors'
22 brief and a transcript attached to petitioner's reply brief demonstrate that the issues presented
23 in his four subassignments of error were preserved.

24 Petitioner and intervenors dispute the scope of the legal issue presented in the first
25 subassignment of error. However, whether that issue is (1) generally whether the disputed
26 exception is justified with adequate reasons, (2) whether the particular features of the subject

1 property provide adequate reasons for an exception, or (3) whether a need for rural
2 residential development is an adequate reason, the issue presented in the first subassignment
3 of error was adequately raised by petitioner below.⁵ Petitioner admittedly did not couch his
4 arguments in terms of the particular exception standards. But as petitioner points out, the
5 county's notice does not identify the particular exception standards either.

6 We also agree with petitioner that the same testimony that is adequate to raise the
7 issue presented in the first subassignment of error is sufficient to raise the issue presented in
8 the second subassignment of error. That issue is whether the county adequately
9 demonstrated that other sites, which do not require an exception, could not reasonably
10 accommodate the proposed use.

11 Petitioner's third subassignment of error concerns whether the county adequately
12 compared the consequences of allowing the proposed use at the subject property with other
13 properties that would also require an exception. Goal 2 Part II(c)(3). Petitioner's fourth
14 subassignment of error concerns whether the proposed use will be compatible with other
15 adjacent uses. Goal 2 Part II(c)(4). We agree with intervenors that nothing cited by
16 petitioner raises any issue regarding these criteria.⁶

⁵ Petitioner's testimony includes the following:

“So this property that's Brad's, I was raised on it[; it] was my Great-Great Grandfather's part of the homestead part of the ranch farm that I own now. It actually is pretty good farm ground. It can be farmed with [sic] or whatever. I'll just start part of my concerns – Converting this from EFU you have to show clear need and I don't believe at this time that there's a clear need for this. Measure 37 within 2 mi. on both sides of this we have 2 fairly large [M]easure 37 claims that are going to supply quite a lot of RR and that's the Wyland property and PCC and also right up across from the cemetery right there this commission just a few months ago okayed the Perkins RR development and they have a bunch of RR lots up there. So there's really no need to take this out of EFU. * * *” Intervenor-Respondents' Brief Appendix A (Partial Transcript of May 25, 2006 Umatilla County Planning Commission Meeting) 1.

⁶ In the transcript attached to petitioner's reply brief, there is testimony that the now defunct mink farm on the subject property adversely affected adjoining properties. That testimony is not sufficient to raise any compatibility question about the proposal to divide the property and place an additional residence on the property.

1 We turn now to the two subassignments of error that raise issues that petitioner
2 preserved in his testimony below.

3 **ASSIGNMENT OF ERROR**

4 **A. First Subassignment of Error - Reasons Justify Why the Goal Policy**
5 **Should not Apply**

6 Goal 3 is to “[p]reserve and maintain agricultural lands.” Goal 3 recognizes that the
7 state’s agricultural land use policy is set out at ORS 215.243.⁷ The challenged decision
8 would change the planning and zoning for the subject property so that it could be divided
9 into two parcels. Intervenors apparently plan to develop the westerly parcel with a rural
10 residence. We understand petitioner to argue that the challenged decision does not provide
11 adequate reasons to justify not applying the state policy favoring preservation of agricultural
12 land in large blocks through EFU zoning.

⁷ ORS 215.243 provides:

“The Legislative Assembly finds and declares that:

- “(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.
- “(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state’s economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.
- “(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.
- “(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones.”

1 **1. The Land Conservation and Development Commission’s (LCDC)**
2 **Exception Rules**

3 LCDC has adopted rules that elaborate considerably on the kinds of reasons that may
4 and may not be used to justify a statewide planning goal exception to allow uses or
5 development that would not otherwise be allowed by applicable statewide planning goals.
6 OAR 660-004-0020; 660-004-0022. OAR 660-004-022 sets out detailed requirements for
7 applying the first of the Goal 2 Part II(c) criteria, the Goal 2 Part II(c)(1) “reasons” criterion.
8 *See* n 1. The permissible reasons that may be relied on to approve a reasons exception
9 depend on the “use” or “development” that the reasons exception is being approved to allow.
10 ORS 660-004-022, subsections (2)-(12) identify 11 different categories of uses or
11 development and describe the reasons or analysis that that may be used to authorize each
12 category of uses or development. ORS 660-004-022(1) applies when adopting a reasons
13 exception for “uses not specifically provided for in [OAR 660-004-0022(2) through (12)].”
14 OAR 660-004-0022(1) and (2) are set out in the margin.⁸ The challenged decision applies

⁸ OAR 660-004-0022 provides in relevant part:

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

“(1) For uses not specifically provided for in subsequent sections of this rule or in OAR 660-012-0070 or chapter 660, division 14, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

“(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either

“(b) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this subsection must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or

“(c) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site.

1 OAR 660-004-0022(2), because the disputed exception was adopted to allow rural residential
2 development. OAR 660-004-0022(1) is set out to provide context.

3 **2. The County’s Findings**

4 The county’s findings addressing the Goal 2 Part II(c)(1) reasons criterion are set out
5 below:

6 *“* * * The proposed Comprehensive Plan amendment to change the*
7 *designation of this site from Agriculture to Rural Residential is justified by the*
8 *particular circumstances that are unique to the property.* The site is part of
9 an area with a mix of lot areas and Comprehensive Plan Designations. The
10 site is located north and west of Coombs Canyon road, which forms a physical
11 barrier between development in the Birch Creek [area] within Coombs
12 Canyon and dry land farms to the south. The site is bisected by Birch Creek,
13 which creates two lots for practical purposes of maintenance and security,
14 owing to limitations on access. Both sides of the creek have septic system
15 approvals and currently have functioning systems in place. If eventually
16 divided to create two parcels as the applicants hope, both will have irrigation
17 water and sufficient area to maintain some level of agricultural activities. The
18 existing buildings west of the creek could accommodate an indoor arena,
19 horse boarding, or similar activities.” Record 20 (Emphasis added).

20 Before turning to the county’s findings addressing the more detailed requirements of
21 OAR 660-004-0022(2), we note an argument advanced by intervenors and comment on the
22 adequacy of the above findings.

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

1 Intervenors contend that the first sentence in the above-quoted findings shows that the
2 county did not rely on a market demand for rural residential development as a reason for the
3 challenged exception. Intervenors also contend that petitioner fails to challenge that reason.⁹

4 As our discussion below of the county’s findings concerning OAR 660-004-0022(2)
5 makes clear, intervenors’ position that the disputed exception is based solely on the physical
6 characteristics of the property and surrounding area is impossible to square with those
7 findings. We also reject intervenors’ contention that petitioner ignored the county’s position
8 that physical features of the property and surrounding area make farming the property
9 difficult and therefore, presumably, supply a reason to allow division of the property and
10 rural residential development. The argument on pages six and seven of the petition for
11 review is adequate to challenge that contention.

12 Returning to the above-quoted findings, they are clearly inadequate to justify a
13 reasons exception to Goal 3. A road divides the subject 26-acre parcel from larger dry land
14 farms to the south. A creek divides the property so that the road that runs along the southern
15 edge of the property must be used to travel between the east and west portions of the
16 property. The property has experienced flooding in the past. There are existing wells and
17 septic systems on the east and west portions of the property. In reviewing exceptions, LUBA
18 is bound by findings of fact for which there is substantial evidence in the record. ORS
19 197.732(6)(a). However, whether the findings of fact that are supported by substantial
20 evidence are sufficient to demonstrate that an exception criterion is met presents a question
21 of state law. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994).

⁹ Intervenors argue:

“It is difficult to understand how Petitioner could completely ignore the actual reasons offered in taking the exception – the unique circumstances of the property, split by a flood-prone waterway that renders the two portions of the property separate units for all practical purposes. Because petitioner never actually challenges the reasons for the exception, as found in the exception statement, LUBA should affirm the County’s decision on this issue.”
Intervenor-Respondents’ Brief 8.

1 LUBA is not bound by the county’s resolution of a question of state law. The facts cited by
2 the county in the findings quoted above are sufficient to show some constraints must be
3 overcome to farm the property; they are not sufficient reasons to support a reasons exception
4 to Goal 3 so that the EFU zoning that Goal 3 requires for the subject 26-acre parcel may be
5 removed to allow the property to be divided for rural residential development.

6 We now turn to the county’s additional findings addressing OAR 660-004-0022(2),
7 which elaborate on the Goal 2 Part II(c)(1) reasons criterion. *See* n 8. As we have already
8 noted, OAR 660-004-0022(2) limits the reasons that may be used to justify a reasons
9 exception to allow rural residential development. The county’s findings addressing OAR
10 660-004-0022(2) rely in part on an unrelated exception, the Perkins Exception. In the
11 Perkins Exception the county relied on (1) market demand for rural housing on 10-acre
12 parcels, (2) past development patterns in the area, and (3) the uniqueness of a housing type
13 that would allow purchase of smaller parcels for mixed residential and agricultural use
14 instead of requiring purchase of the much larger minimum parcel size in the EFU zone. The
15 Perkins Exception also included the following findings:

16 “The proposed rezone is also supported by the following statement in the
17 County’s Comprehensive Plan (Technical Report), p B-31:

18 “‘Lands near suburban and rural residential areas experience
19 accelerated development pressures. Special measures are
20 employed to lessen the burden on normal farming practices
21 near residential development.... Identified rural residential
22 designations should also aid in stopping needless conversion of
23 valuable farm lands. Lot size minimums in rural residential
24 areas should also compliment agricultural operation, generally
25 requiring large lot minimums. In addition, less productive
26 farm lands should be the first areas converted to rural
27 residential development’

28 “The county finds that the proposed rezone is encouraged and supported by
29 the above comprehensive plan policy. The proposed rezone will allow
30 residential uses on unproductive farm lands in larger rural residential lot size
31 minimums * * * and will thereby serve to ease the pressure to convert
32 valuable farm lands to residential uses.” Record 27 (citations omitted).

1 After setting out the Perkins Exception findings, the county’s findings addressing OAR 660-
2 004-0022(2) continue:

3 “The findings and conclusions for Perkins also apply here: The level of
4 agricultural activity on the property will not be materially changed by the
5 change in plan and zone designation. The majority of the property will
6 remain as irrigated pasture, within the flood plain. The outbuildings west of
7 the creek could be used for raising animals as previously occurred, or be
8 converted to an indoor riding arena or similar activity. There are very few
9 ‘RR-10’ properties, which are large enough to support a minimal level of farm
10 use yet within a manageable and affordable size.

11 “As with the Perkins site, the property subject to this application is at the edge
12 of a natural boundary to further expansion of rural residential development.
13 South of Coombs Canyon Road, the land opens to the south and west, with
14 larger property holdings and dry land grain farms. North of Coombs Canyon,
15 along the creek, there is a mix of smaller properties and rural residential
16 designations.

17 “Economic activity in the vicinity that may generate a need for additional
18 housing includes the Sparks Grain Elevator (approximately 1/8 of a mile), the
19 Pendleton Country Club (along Birch Creek, about 2 miles distant), and the
20 landfill near Hoeft Road (2.5 miles). These activities generate approximately
21 8-10 jobs, which could be filled by nearby residents.

22 “In summary, the proposed exception satisfied the requirements of OAR 660-
23 010-0022(2) for the following reasons: [First, t]here is a need for larger lot
24 rural residential land, which can continue to be used for farm-related activities
25 and yet be manageable and affordable. [Second, t]he present size of the site is
26 smaller than the minimum lot area in the EFU district and, more importantly,
27 smaller than the typical economic farm property. [Third, t]here are economic
28 activities in the vicinity of the site, which can justify provision of nearby
29 housing. [Fourth, t]he site is in an area where rural residential development
30 occurred historically, along the creek bottom land. [Fifth, t]he site is in a
31 location that forms a natural boundary to further expansion of rural residential
32 uses to the south, where Coombs Canyon Road crosses Birch Creek at the
33 railroad line. Therefore, approval of the exception is justified.” Record 27-
34 28.

35 The above-quoted findings do not add a great deal to the findings addressing Goal 2
36 Part II(c)(1) that we have already concluded are inadequate to identify reasons that could
37 warrant not applying Goal 3 to the subject property. The fifth summary finding in the last
38 quoted paragraph above, like the findings we have already rejected, cites physical features of

1 the property or surrounding area that may make it more difficult to farm the parcel or make
2 its conversion to rural residential use less objectionable. But those features are not legitimate
3 reasons to approve a reasons exception to Goal 3. We focus below on the remaining
4 summary findings, which are fairly accurate summaries of the other quoted findings quoted
5 above.

6 As intervenors correctly point out, OAR 660-004-0022(2) does not purport to be an
7 exclusive listing of the kinds of reasons that may justify an exception to allow rural
8 residential development. *See* n 8. But the first sentence of OAR 660-004-022(2) does
9 prohibit reliance on a continuation of past development patterns. The fourth summary
10 finding in the last quoted paragraph above relies on past development patterns and is
11 inconsistent with this prohibition.

12 The first and second summary findings appear to be a continuation of suggestions that
13 appear elsewhere in the county findings—that a desire or market demand for smaller
14 agricultural parcels is a legitimate reason for taking an exception to Goal 3 to remove the
15 large minimum lot size protections that EFU zoning applies so that the parcel can be divided
16 into small farm parcels. To the extent these findings are an attempt to establish a market
17 demand for rural residential development, the county has not shown that such market
18 demand falls within one of the exceptions in OAR 660-004-0022(2) that allows reliance on
19 market demand for rural residential development in certain circumstances. To the extent
20 these findings are an attempt to establish a market demand for small scale agricultural
21 opportunities (independent of a demand for rural residential development), we do not believe
22 a generalized market demand for smaller, less expensive farm parcels to allow part-time
23 farming in conjunction with rural residential use is a permissible reason for adopting a Goal
24 3 exception to divide a small farm parcel into smaller farm parcels. Relying on such a
25 generalized market demand as a reason not to apply Goal 3 is directly contrary to Goal 3, the
26 large minimum lot size requirement in EFU zones and the underlying statutory agricultural

1 land use policy set out in ORS 215.413(2) which favors preserving existing farm land in
2 large blocks. *See* n 7.

3 The third summary finding may be an attempt to come within the exception provided
4 in the first and third sentences of OAR 660-004-0022(2), which allow reliance on market
5 demand for housing if the county shows “the proposed residential development is necessary
6 to satisfy a market demand for housing generated by existing or planned rural industrial,
7 commercial, or other economic activity in the area.” If so, that attempt fails as well, because
8 it is not enough to show persons who want to buy the rural residence that the exception
9 would allow might work at the nearby landfill, golf course or grain elevator. The county
10 must show this property is *necessary* to meet the market demand for housing that is created
11 by “rural industrial, commercial, or other economic activity in the area.” The county makes
12 no attempt to make that showing, and given the proximity of the Pendleton urban growth
13 boundary (UGB) and the housing located within that urban area, it seems highly unlikely that
14 it could make that showing.

15 Finally, the findings from the Perkins Exception cite to the county’s comprehensive
16 plan. That finding might be read as an attempt to take advantage of the second sentence of
17 OAR 660-004-0022(2), which allows a county to rely on market demand for rural residential
18 development if an economic analysis in the county’s comprehensive plan demonstrates that
19 “there are reasons for the type and density of housing planned which require this particular
20 location on resource lands.” The cited plan provision is not the kind of comprehensive plan
21 economic analysis that is described in the second sentence of OAR 660-004-0022(2).

22 For the reasons explained above, petitioner’s first subassignment of error is sustained.

23 **B. Second Subassignment of Error – Areas Which Do Not Require an**
24 **Exception Cannot Reasonably Accommodate the Use**

25 Under Goal 2 Part 2(c)(2), the county was required to demonstrate that “[a]reas which
26 do not require a new exception cannot reasonably accommodate the use.” The county
27 adopted the following findings in addressing this criterion:

1 “An exception must consider alternative sites, even when a use is already
2 established or circumstances of a particular property argue for unique
3 circumstances. In this case, alternative sites would have to have immediate
4 access to a County road, which also forms a boundary between the site and
5 larger farm properties. The alternative site would have to have physical
6 features separating it from other farming properties, such as the railroad,
7 county road, large hills that form the walls of Coombs Canyon, a creek
8 bisecting the property that effectively creates two separate parcels, and
9 approved septic sites for each ‘half’ of the property. The applicants were
10 unable to find comparable alternative sites, as the specific circumstances
11 affecting this property and the proposed use as Rural Residential are unusual.

12 “No alternative site is available within an Urban Growth Boundary, which by
13 its nature cannot support Rural Residential development. Land within an
14 UGB is held for future urban-level development, not devoted to small scale
15 farm use.

16 “As previously noted, the site is already committed to the Rural Residential
17 form of small acreage development. The site is relatively small, as compared
18 to neighboring properties that are farmed, and has a residence. The property
19 is split by Birch Creek, which makes access, security, and management
20 problematic.

21 “No public facilities are necessary for the proposed use as Rural Residential.
22 Septic approvals have been granted [f]or both the east and west sides of the
23 creek, and the existing domestic well has sufficient capacity to support a
24 second residence.

25 “In summary, this standard is satisfied because no alternative site that would
26 not also require an exception could accommodate the use. Further, the site is
27 already relatively small and affected by a variety of topographic conditions
28 and physical circumstances that make it well suited for Rural Residential use.”
29 Record 21.

30 As was the case under the first subassignment of error, the above findings
31 demonstrate a fundamental misunderstanding of the statutory, Goal 2 and administrative rule
32 standards for approving exceptions. The particular characteristics of a property might be
33 such that a “built” or “irrevocably committed” exception could be justified. Goal 2 Part II(a)
34 and (b).¹⁰ But the particular characteristics of the subject property in this case almost

¹⁰ See n 1.

1 certainly would not justify an exception under either of those provisions, because the
2 findings frankly concede that farm activity has occurred on the property and is expected to
3 continue in the future. The characteristics of the subject property and surrounding properties
4 that the findings cite appear to present, at most, an exceedingly weak case for an irrevocably
5 committed exception. In the third of the above-quoted findings the county states “the site is
6 already committed to the Rural Residential form of small acreage development.” However,
7 other findings amply demonstrate that such is not the case.

8 Rather than attempt an irrevocably committed exception, the county takes the
9 position that the “use” that the reasons exception is approved for is a rural residential use
10 located on a similarly sized parcel with all the particular cited characteristics of the subject
11 parcel. But there is simply no reason why a rural residential use must already have approved
12 septic systems and wells, “immediate access to a County road, which also forms a boundary
13 between the site and larger farm properties,” “physical features separating it from other
14 farming properties,” or a “creek bisecting the property.” As far as we can tell these are
15 arbitrary and artificial constraints that have the effect of making the comparison required by
16 Goal 2 Part II(c)(2) a largely meaningless exercise. The cited features are not common or
17 necessary attributes of rural residential development, which is the use for which the disputed
18 exception was granted. We do not mean to say that the relevant statutes, Goal 2 and relevant
19 administrative rules preclude identification of subcategories of rural residential development
20 that serves some justifiable submarket. However, the county’s findings in this case do not do
21 so. The county’s assumption that the use must have all of the attributes of the subject
22 property, in applying the alternatives analysis set out in Goal 2 Part II(2), was error.

23 The second subassignment of error is sustained.

24 The county’s decision is remanded.