

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

FRIENDS OF MARION COUNTY,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

LOIS PFENNIG,
Intervenor-Respondent.

LUBA No. 2021-043

FINAL OPINION
AND ORDER

Appeal from Marion County.

Andrew Mulkey filed the petition for review and reply brief and argued on behalf of petitioner.

Scott A. Norris and Wallace W. Lien filed the joint response brief. Scott A. Norris argued on behalf of respondent. Wallace W. Lien argued on behalf of intervenor-respondent.

RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED

11/22/2021

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

NATURE OF THE DECISION

Petitioner appeals a county decision approving (1) an exception to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), (2) a comprehensive plan map amendment from Special Agriculture to Rural Residential, (3) a zoning map amendment from Special Agriculture (SA) to Acreage Residential 2-acre minimum (AR-2), and (4) a partition creating one 16.46-acre parcel and two 2-acre parcels.

BACKGROUND

The county's SA zone implements Goal 3's objective "[t]o preserve and maintain agricultural lands" and the county applies the zone

"in areas characterized by small farm operations or areas with a mixture of good and poor farm soils where the existing land use pattern is a mixture of large and small farm units and some acreage homesites. The farm operations range widely in size and include grazing of livestock, orchards, grains and grasses, Christmas trees and specialty crops." Marion County Code (MCC) 17.137.010.

The unimproved, 20.46-acre subject property has high-value soils, is planted with an unirrigated hay crop, and is zoned SA. It is located west of 62nd Avenue SE, south of Macleay Road SE, and north of Culver Drive SE, with a small amount of frontage on an undeveloped right-of-way.¹ Properties

¹ The undeveloped right-of-way is identified as Wickiup Street SE. Record 9.

1 immediately to the west and south have the same SA zoning as the subject
2 property, are in agricultural use, and include dwellings. Record 9.

3 The county's Acreage Residential (AR) zones are intended to

4 "provide appropriate regulations governing the division and
5 development of lands designated rural residential in the Marion
6 County Comprehensive Plan. [AR] zones are areas that are suitable
7 for development of acreage homesites. Such areas are necessary to
8 meet the housing needs of a segment of the population desiring the
9 advantages of a rural homesite." MCC 17.128.010.

10 Properties immediately to the north and east of the subject property are zoned
11 AR-2 and developed with residences. Record 9. Petitioner sought to change the
12 zoning of the subject property from SA, the zoning it shares with properties to
13 the west and south, to AR-2, the zoning of the properties to the north and east.
14 Below is an aerial photograph of the subject property and its immediate environs.



Record 431. The photo is from the north, facing south. The bottom of the photo is north, and the right side of the photo is west.

Changing the zoning of the subject property to AR requires an exception to Goal 3.² ORS 197.732(2)(b) provides that an exception may be obtained when

“[t]he land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission

² The county concluded that a Goal 14 exception was also required because intervenor sought to change the zoning of the subject property to a zone with a minimum parcel size of less than ten acres. Record 18. Goal 14 is “[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.”

1 [(LCDC)] rule to uses not allowed by the applicable goal because
2 existing adjacent uses and other relevant factors make uses allowed
3 by the applicable goal impracticable[.]”

4 This type of exception is known as an “irrevocably committed” exception. The
5 LCDC rules applicable to irrevocably committed exceptions are set out in OAR
6 660-004-0028. OAR 660-004-0028(2) provides:

7 “Whether land is irrevocably committed depends on the relationship
8 between the exception area and the lands adjacent to it. The findings
9 for a committed exception therefore must address the following:

10 “(a) The characteristics of the exception area;

11 “(b) The characteristics of the adjacent lands;

12 “(c) The relationship between the exception area and the lands
13 adjacent to it; and

14 “(d) The other relevant factors set forth in OAR 660-004-
15 0028(6).”

16 On July 24, 2019, the hearings officer held a public hearing on the
17 application. On December 10, 2019, the hearings officer issued a report
18 recommending denial of the application for an exception to Goal 3, which would
19 require denial of the other applications. On February 24, 2021, the board of
20 county commissioners held a *de novo* public hearing on the applications. On
21 March 24, 2021, the board of county commissioners approved the applications,
22 including approval of an irrevocably committed exception.

23 This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Introduction**

3 Petitioner's first assignment of error is that the county misconstrued OAR
4 660-004-0028(2). We will reverse or remand a decision that misconstrues the
5 applicable law. ORS 197.835(9)(a)(D).

6 **B. Preservation**

7 ORS 197.763(1) provides:

8 "An issue which may be the basis for an appeal to [LUBA] shall be
9 raised not later than the close of the record at or allowing the final
10 evidentiary hearing on the proposal before the local government.
11 Such issues shall be raised and accompanied by statements or
12 evidence sufficient to allow the governing body, planning
13 commission, hearings body or hearings officer, and the parties an
14 adequate opportunity to respond to each issue."

15 In the petition for review, petitioner identified the first assignment of error as
16 having been preserved in (1) a letter that petitioner submitted into the record
17 before the board of county commissioners and (2) the hearings officer's
18 recommendation, which is referenced in that letter. Intervenor-respondent
19 (intervenor) and the county (together, respondents) argue that that citation to the
20 hearings officer's decision was insufficient, and petitioner did not preserve the
21 first assignment of error.

22 We have reviewed the cited pages, and the issues raised in the first
23 assignment of error were preserved. Petitioner explained in its February 8, 2021
24 letter that it opposes the application and

1 “agree[s] with the Hearings Officer that the most important
2 objection to the proposal lies in compliance with OAR 660-004-
3 0028 and therefore the application is not satisfied. [Petitioner]
4 point[s] to the analysis by the Hearings Officer that substantiates the
5 **DENIAL** recommendation as follows.” Record 95 (boldface in
6 original; citation omitted).

7 Petitioner’s letter sets out in great detail the reasons why the hearings officer
8 concluded that the applicable standards are not met. Record 95-98. Although
9 petitioner’s letter does not specifically cite subsection (2), the letter does cite
10 OAR 660-004-0028 generally, and the referenced hearings officer findings relate
11 to OAR 660-004-0028(2). Petitioner’s letter refers to the “[r]elationship between
12 the exception area and the land adjacent to it” and “[o]ther relevant factors,” the
13 operative language used in OAR 660-004-0028(2). Record 97. Those references
14 were sufficient to preserve this issue. *See Wetherell v. Douglas County*, 58 Or
15 LUBA 101, 116 (2008) (testimony that the applicant has not shown why a parcel
16 formerly part of a larger ranch cannot be used in conjunction with adjacent and
17 nearby farm properties is sufficient to raise the issue of compliance with OAR
18 660-033-0030(3), notwithstanding that the petitioner failed to cite the rule). We
19 proceed to address the merits of the first assignment of error.

20 **C. OAR 660-004-0028**

21 Petitioner’s first assignment of error intermingles arguments that the
22 county misconstrued the law and made inadequate findings. We first discuss the
23 county’s construction of the law and then its findings.

1 **1. Misconstruction of Law**

2 As set out above, the criteria for an irrevocably committed exception found
3 in OAR 660-004-0028(2)(b) and (c) require consideration of both the
4 characteristics of adjacent lands and of the relationship between the proposed
5 exception area and the adjacent lands. OAR 660-004-0028(2)(d) and OAR 660-
6 004-008(6)(d) require consideration of the neighborhood and regional
7 characteristics, that is, the surrounding lands. We discuss the county's findings
8 relating to both adjacent and surrounding lands below.

9 Findings 15, 16, and 17 provide, in part:

10 “15. Characteristics, existing uses, and parcel size and ownership
11 patterns of adjacent lands; neighborhood and regional
12 characteristics. * * *

13 “* * * * *

14 “[Intervenor] completed an evaluation of all parcels within
15 one mile of the subject property. This area encompassed six
16 assessor's maps, for a total of 676.23 acres. The study area
17 included a total of 196 tax lots, plus four parcels that were
18 non-buildable, due to government ownership or size/shape.
19 Records from the assessor for the 196 parcels show that the
20 vast majority of ownerships are of only one parcel. The size
21 and location of this study area are hereby found to be
22 acceptable for this analysis.

23 “* * * * *

24 “16. The study area encompasses 676.23 acres, or 1.06 square
25 miles, surrounding the subject property, which is found to be
26 sufficient to address this criterion. Based on this information,
27 it is hereby determined that the surrounding properties
28 irrevocably commit the subject property to non-resource uses.

1 “17. Relationship between the exception area and the lands
2 adjacent to it. Once it is established that the surrounding area
3 irrevocably commits the subject property to non-resource
4 uses, a review of the relationship factors between the subject
5 property and the surrounding neighborhood must be made to
6 determine if resource uses on the subject property have
7 become impracticable. Based on the evidence in this Record,
8 and the findings set forth hereafter, it is determined that the
9 relationship factors do make resource use of the subject
10 property impracticable.” Record 11-13 (italics and
11 underscoring in original).

12 Petitioner argues that the county improperly construed OAR 660-004-
13 0028(2) when it declared the exception area irrevocably committed without
14 undertaking the required analysis of adjacent land.³ Respondents respond that the
15 county did perform the requisite analysis and that, although that analysis may not
16 be in petitioner’s preferred format or order, it is adequate, and petitioner merely
17 disagrees with the county’s conclusion.

18 Finding 16 does not include an interpretation of law but, instead, makes a
19 conclusory statement that “it is hereby determined that the surrounding properties
20 irrevocably commit the subject property to non-resource uses.” Record 13.

21 We agree with petitioner that Finding 17 misconstrues the law. We have
22 previously described the required analysis for irrevocably committed exceptions:

³ As explained further below, other relevant factors set out in OAR 660-004-0028(6)(d) include “[n]eighborhood and regional characteristics.” OAR 660-004-0028(6)(d). We understand the intervenor’s study area to represent the county’s identification of the surrounding properties for assessment of “neighborhood and regional characteristics.”

1 “Under OAR 660-004-0028, an irrevocably committed exception to
2 applicable statewide planning goals is warranted where, based on
3 consideration of the factors enumerated in the rule, the local
4 government concludes that uses allowed by the goals are
5 impracticable in the exception area. OAR 660-004-0028(1).
6 Whether uses allowed by the goals are impracticable depends on the
7 characteristics of the exception area, the adjacent lands, the
8 relationship between the exception area and adjacent lands, and
9 other relevant factors. OAR 660-004-0028(2). While the local
10 government’s findings need not demonstrate that every use allowed
11 by the goals is ‘impossible,’ the findings must demonstrate that farm
12 uses allowed by ORS 215 .203, propagation or harvesting of a forest
13 product, and forest operations or forest practices are ‘impracticable.’
14 OAR 660-004-0028(3). Finally, OAR 660-004-0028(6) sets forth a
15 number of factors the local government must consider in taking an
16 irrevocably committed exception.” *Friends of Douglas County v.*
17 *Douglas County*, 46 Or LUBA 757, 761-62 (2004) (footnotes
18 omitted).

19 “It is the relationship between the subject property and adjacent uses that is the
20 ‘focal criterion’ for an irrevocably committed exception.” *Friends of Linn County*
21 *v. Linn County*, 38 Or LUBA 868, 886 (2000) (citing *DLCD v. Curry County*,
22 151 Or App 7, 11, 947 P2d 1123 (1997)). In Finding 17, the county explains that
23 it determines whether the surrounding area irrevocably commits the subject
24 property to nonresource use before it determines whether *the relationship*
25 between the surrounding property and the subject property make resource use
26 impracticable. This misstates the required analysis. The OAR 660-004-0028
27 factors must be analyzed before it is possible to conclude that the surrounding
28 property commits the subject property to nonresource use, and we agree with
29 petitioner that the county misconstrued the law in Finding 17.

1 We proceed to discuss the findings to determine whether the county
2 performed the requisite analysis, the misconstruction of law notwithstanding, as
3 respondents contend.

4 **2. Inadequate Findings**

5 Petitioner argues that the county described lands and uses that generally
6 surround the subject property in Finding 15 and declared in Finding 16 that those
7 properties irrevocably commit the subject property to nonresource use without
8 defining the adjacent lands, determining how the adjacent lands affect the subject
9 property, and describing the relationship between the two areas. Petition for
10 Review 10. According to petitioner, “[s]imply put, the county’s findings do not
11 explain how average parcel size within a square mile study area has any impact
12 on the ability to farm the subject property.” Petition for Review 16. Findings must
13 identify the applicable criteria and the evidence relied upon and explain how the
14 evidence leads to the conclusion that the applicable criteria are or are not met.
15 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

16 Finding 14 is titled “Characteristics, parcel size, and ownership patterns of
17 the exception area.” Record 11. As indicated above, Finding 15 is titled
18 “Characteristics, existing uses, and parcel size and ownership patterns of adjacent
19 lands; neighborhood and regional characteristics.” *Id.* Although those findings do
20 not cite OAR 660-004-0028(2)(a) and (b), their titles mirror those provisions. We
21 also understand that Finding 15 is intended to address “[n]eighborhood and
22 regional characteristics,” as required by OAR 660-004-0028(2)(d) and (6)(d).

1 Nothing in Findings 14, 15, or 16 explains the basis for the conclusion in
2 Finding 16 that the study area is sufficient to address “this criterion.” Even if we
3 assume that the criteria being addressed are OAR 660-004-0028(2) and (6) and
4 that the evidence upon which Finding 16 relies is found in Findings 14 and 15,
5 neither Finding 14, 15, nor 16 explains *why* the selected study area is sufficient
6 for purposes of the analysis required by OAR 660-004-0028(2) or (6), that is,
7 why the study area appropriately informs the required evaluation of the
8 relationship between adjacent lands and the subject property, and other relevant
9 considerations such as neighborhood and regional characteristics.

10 Moreover, the findings fail to analyze the relationship between the adjacent
11 lands, the study area, and the subject property. Whether an exception to Goal 3 is
12 allowed turns on whether farm use of the subject property is impracticable given
13 the characteristics of the exception area and adjacent lands, the relationship
14 between the exception area and adjacent lands, and other relevant factors. OAR
15 660-004-0028(2); *Simmons Family Properties, LLC v. Polk County*, ____ Or
16 LUBA ____ (LUBA No 2021-007, July 28, 2021). Again, “other relevant factors”
17 include “neighborhood and regional characteristics.” OAR 660-004-0028(6)(d).

18 OAR 660-004-0028(2)(a) requires a consideration of the characteristics of
19 the subject property. Finding 14 describes the subject property as generally flat
20 with a slight slope, a small stand of scrub trees in its southern half, and an
21 electrical power line along its eastern boundary. Record 11. Finding 14 also
22 describes the subject property as the largest of the farm parcels “between the AR-

1 zoned lands, and North Santiam Highway and the Salem-Keizer Urban Growth
2 Boundary.” *Id.*

3 OAR 660-004-0028(2)(b) requires a consideration of the adjacent lands.
4 Finding 15 repeatedly describes certain properties as “immediately adjacent” to
5 the subject property. Finding 15 identifies six parcels immediately east of the
6 subject property, each of which is zoned AR, is one acre or less in size, and
7 contains a dwelling. Immediately west of the subject property, Finding 15
8 identifies four SA-zoned parcels with dwellings that are .5, 1.25, 3.17, and 4.66
9 acres in size. One of those parcels contains a blueberry operation and is in farm
10 tax deferral. Lastly, Finding 15 describes the two parcels immediately north of
11 the subject property as AR-zoned parcels owned by intervenor. One of those
12 parcels, which is 9.62 acres, contains a dwelling. The other parcel, which is two
13 acres, does not. Findings 14 and 15 therefore discuss the characteristics of the
14 subject property and adjacent lands, as required by OAR 660-004-0028(2)(a) and
15 (b).

16 OAR 660-004-0028(2)(c) and (d) require analyses of “[t]he relationship
17 between the exception area and the lands adjacent to it” and “[t]he other relevant
18 factors set forth in OAR 660-004-0028(6).” Again, the other relevant factors set
19 out in OAR 660-004-0028(6) include “[n]eighborhood and regional
20 characteristics.” OAR 660-004-0028(6)(d). We understand the study area to
21 represent the county’s identification of the “[n]eighborhood and regional
22 characteristics.” The study area is an analysis of all parcels within one square

1 mile of the subject property, including 196 tax lots and four parcels that are non-
2 buildable due to government ownership, size, or shape. Finding 15 describes the
3 study area, stating that the vast majority of ownerships are of one parcel and that,

4 “[n]ortherly of the subject property, across Macleay Road on
5 assessor’s map 7-2W-33, all three tax lots are in farm deferral and
6 range in size from 19.94 to 94.95 acres. All are zoned SA. Heading
7 south in the study area across the intersection of Culver Road and
8 Deer Park Drive, onto Assessors map 8-2W-04D, 11 of the 19
9 properties on this map located south of this intersection are in farm
10 deferral, and all are zoned SA. TL 2300 (11.60 acres) on assessor’s
11 map 8-2W-04C also lies south of this intersection, is included in the
12 study area, and is in farm deferral.” Record 12.

13 As indicated above, the county fails to explain the study area’s relationship, other
14 than geographic, to the proposed exception area—that is, why it is an appropriate
15 neighborhood or region for study.⁴ Findings 14, 15, and 16 also do not establish
16 how the adjacent properties irrevocably commit the subject property to
17 nonresource use, that is, they fail to analyze the evidence of interaction between
18 the adjacent properties and the subject property.

19 As indicated above, Finding 17 is titled “Relationship between the
20 exception area and the lands adjacent to it.” The county concludes in Finding 17
21 that “[i]t is impracticable to employ reasonable farming practices on the subject

⁴ As petitioner states, “[u]ltimately, the county’s decision never explains the relevance of such a large study area or how the characteristics of the study area as a whole comply with the various requirements in OAR 660-004-0028(2) and (6).” Petition for Review 18.

1 property due to the small size, lack of water rights for irrigation, access
2 limitations and the presence of the high voltage electrical power line that crosses
3 the entire width of the subject property.” Record 13. Those are, however,
4 characteristics of the subject property, and they do not describe the relationship
5 between the subject property and the adjacent properties, which is the focal point
6 of the irrevocably committed analysis.

7 Finding 17 does discuss *potential* conflicts between farming the subject
8 property and neighboring uses:

9 “Additional obstacles to farm uses on the subject property include
10 the inability to apply herbicides or pesticides due to the significant
11 level of development on surrounding lands. Application of such
12 chemicals on the subject property would be absolutely necessary in
13 order to produce any kind of commercial crop. Use of manual labor
14 for spraying is cost prohibitive, and the inability to adequately
15 control overspray when houses are within 20-30 feet of the property
16 line make chemical application impossible. Without chemical
17 application, farming is impracticable.” Record 13-14.

18 Finding 17 also concludes:

19 “[W]ith houses within just a few feet of the subject property,
20 trespass by folks and animals with attendant crop loss and liability
21 are serious issues for a small farm. In addition, activities on the
22 surrounding properties such as backyard barbeques, where smoke
23 will drift and where escaping fire is possible, cause issues with
24 farming so close to backyards.” Record 14.

25 The conflicts identified by the county are, however, speculative. The county does
26 not purport to conclude that those conflicts currently exist. Rather, the county
27 speculates that they could exist if commercial levels of farming were pursued.

1 Finding 17 is inadequate because it does not explain how the evidence relied upon
2 leads to the conclusion that the subject property *is* irrevocably committed to
3 nonresource use.

4 Finding 17 is also inadequate to the extent that it relies on the ability of the
5 subject property to support a “commercial crop.” Record 13.

6 “The test under OAR 660-004-0028 is not whether a property is
7 capable of supporting commercial agriculture. Further, we find no
8 basis in the text of OAR 660-004-0028, ORS 215.203(2)(a) or the
9 legislative history * * * to read those provisions as establishing a
10 threshold based on whether the property is capable of supporting an
11 economically self-sufficient agricultural operation * * *.” *Lovinger*
12 *v. Lane County*, 36 Or LUBA 1, 18-19, *aff’d*, 161 Or App 198, 984
13 P2d 958 (1999).

14 The first assignment of error is sustained.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner’s second assignment of error is that the county misconstrued the
17 term “farm use” and the uses allowed by Goal 3 and, as a result, made inadequate
18 and unsupported findings concerning the subject property and adjacent lands. We
19 will reverse or remand a decision that is not supported by substantial evidence.
20 ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person
21 would rely upon to make a decision. *Younger v. City of Portland*, 305 Or 346,
22 752 P2d 262 (1988).

23 ORS 215.203(2)(a) defines “farm use” as

24 “the current employment of land for the primary purpose of
25 obtaining a profit in money by raising, harvesting and selling crops
26 or the feeding, breeding, management and sale of, or the produce of,

1 livestock, poultry, fur-bearing animals or honeybees or for dairying
2 and the sale of dairy products or any other agricultural or
3 horticultural use or animal husbandry or any combination thereof.
4 'Farm use' includes the preparation, storage and disposal by
5 marketing or otherwise of the products or by-products raised on such
6 land for human or animal use. 'Farm use' also includes the current
7 employment of land for the primary purpose of obtaining a profit in
8 money by stabling or training equines including but not limited to
9 providing riding lessons, training clinics and schooling shows.
10 'Farm use' also includes the propagation, cultivation, maintenance
11 and harvesting of aquatic, bird and animal species that are under the
12 jurisdiction of the State Fish and Wildlife Commission, to the extent
13 allowed by the rules adopted by the commission. 'Farm use'
14 includes the on-site construction and maintenance of equipment and
15 facilities used for the activities described in this subsection. 'Farm
16 use' does not include the use of land subject to the provisions of
17 ORS chapter 321, except land used exclusively for growing cultured
18 Christmas trees or land described in ORS 321.267(3) or
19 321.824(3)."

20 The county concluded that subject property is currently being farmed and
21 receiving tax deferral based on farm use. Record 11. We discussed the relevance
22 of farm tax deferral status in *Friends of Yamhill County v. Yamhill County*:

23 "Although we conclude that OAR 660-004-0028(2) and (6) do not
24 specifically require findings concerning a property's tax deferral
25 status, that does not mean that evidence of the property's current or
26 prior farm use tax deferral status is irrelevant. Under ORS
27 308A.062, EFU-zoned lands must be 'used exclusively for farm use'
28 in order to qualify for special assessment. See ORS 308A.059(1)
29 (directing Oregon Department of Revenue to adopt 'a more detailed
30 definition of farm use, consistent with the general definition' of
31 'farm use' in ORS 308A.056). The definition of 'farm use' in ORS
32 308A.056 essentially duplicates the definition of 'farm use' found
33 in ORS 215.203. Under ORS 308A.113(1)(a), land that is receiving
34 special assessment for farm use must be disqualified 'upon the
35 discovery that the land is no longer being used as farmland.'

1 *Evidence that property is specially assessed under ORS 308A.062*
2 *because it is in farm use is certainly relevant evidence concerning*
3 *whether it is impracticable to put the property to farm use.” 38 Or*
4 *LUBA 62, 73 n 9 (2000) (emphasis added).*

5 Despite finding that the subject property is in farm use and receiving farm tax
6 deferral, the county found “relevant to the impracticability of farm use”

7 “the small and irregular shape of the parcel and the level of
8 improvements that would be necessary to *adequately* farm the site
9 (irrigation, equipment, access, etc), the wooded area, the presence
10 of electrical transmission lines, the adjoining non-farm dwellings
11 that surround the subject property, as well as the lack of water rights.
12 These difficulties create challenges to farm uses, that together with
13 the other relationship factors * * * show a blanket impracticability
14 of farm use on the subject property.” Record 15 (emphasis added).

15 Petitioner argues that the county’s findings approving the exception rely in
16 part on a conclusion by the county that small-scale farming and the hay crop
17 planted on the subject property are not “farm uses” protected by Goal 3. As
18 explained above, “farm use” does not require commercial-scale farming, and the
19 evidence in the record is that the subject property is in “farm use.” To the extent
20 that the county concluded that farming must be at a commercial scale in order to
21 be protected or relevant, OAR 660-004-0028(2) and (6) do not include such a
22 requirement.

23 Further, although the character of the subject property must be considered,
24 the relationship between the subject property and the adjacent properties is the
25 required focus of the analysis. In *DLCD v. Coos County*, we pointed out that

26 “[t]he characteristics of the proposed exception area are among the
27 relevant factors that the county may consider in determining

1 whether resource uses are impracticable. *However, the focus of OAR*
2 *660-004-0028 is on the relationship between the proposed exception*
3 *area and the surrounding area, and whether that relationship*
4 *renders resource use of the subject property impracticable.* The
5 county may not give ‘exclusive or preponderant weight’ to the
6 characteristics of the proposed exception area.” 39 Or LUBA 432,
7 442-43 (2001) (emphasis added) (citing *DLCD*, 151 Or App at 11-
8 12).

9 Here, there are other lands currently in farm use in the study area, including
10 an adjacent blueberry farm to the west. The current farm use of the property as
11 well as the adjacent blueberry farm suggest that farm use of the subject property
12 is not impracticable. Nonetheless, in Finding 17, the county identified numerous
13 conflicts as support for its impracticability conclusion. Those conflicts include
14 the risk of fire, the inability to apply herbicides or pesticides due to neighboring
15 residential development, the inability to burn slash due to smoke complaints,
16 noise, water availability, and the potential for trespass. Record 13-14.

17 We discussed conflicts with adjacent residential development in *Scott v.*
18 *Crook County*:

19 “The county identified six types of conflicts with adjoining
20 residential uses based on testimony from the applicant and
21 neighboring farmers, including a farmer who formerly leased the
22 subject property: (1) smoke associated with field burning, (2) dust
23 from farming activity, (3) noise from farm equipment, (4) irrigation
24 water spraying or spilling onto adjacent properties, (5) pesticide
25 application, and (6) damage to crops and land from trespassing.” 56
26 Or LUBA 691, 696 (2008).

27 We concluded:

28 “That intervenor has not conducted field burning since acquiring the
29 subject property does not mean that past or future field burning is

1 not a potential conflict with adjacent residential uses. Similarly, that
2 dust is prevalent in Central Oregon does not mean that dust
3 generated by farm equipment adjacent to residential dwellings is not
4 a potential conflict, for purposes of OAR 660-004-0028. Absent a
5 more developed challenge to the county's findings regarding
6 conflicts, petitioner has not demonstrated a basis for reversal or
7 remand.”⁵ *Id.* at 697.

8 In *Scott*, the petitioner did not adequately develop a challenge to the
9 county's reliance on testimony of conflicts from the applicant and neighboring
10 farmers, including a former lessee of the property. Here, petitioner has adequately
11 developed its challenge. The testimony relied upon by the county is argument
12 submitted by intervenor's legal counsel and general speculation as opposed to
13 substantial evidence, that is, evidence a reasonable person would rely upon to
14 reach a decision.

15 Intervenor's counsel argued:

16 “No crop that needs to be sprayed with chemicals could be planted
17 on the site because there are 13 homes on immediately adjacent
18 parcels. Some houses and outbuildings on those surrounding parcels
19 are as close as 20 feet from the property line. It is impossible to
20 employ spraying as a farm practice in an area where non-farm homes
21 are in such close proximity.

22 “Any agricultural practice that creates dust, which most do, would
23 bring complaints from the close by neighbors. The same is true for

⁵ When considering “other relevant factors,” the county in *Scott* found it “relevant that a previous lessee of the subject property found it to be not worth the cost of farming due to previous neglect, excessive drainage, above normal fertilization requirements, and the location of an old gravel pit in the center of the parcel.” 56 Or LUBA at 697.

1 farming practices that involve noise, such as tractors and other farm
2 implements. Of course there is the issue of smell, which comes up
3 with animal husbandry and most recently in hemp production where
4 the drying of the hemp produces a powerfully strong adverse odor.
5 The property does not have an irrigation well, or water rights, and it
6 is doubtful given the circumstances here that water rights could be
7 obtained, or that an irrigation well with sufficient water for farm use
8 could be obtained. The presence of the surrounding homes
9 preclude[s] the use of most normal farming practices, which is why
10 for the past 20 plus years, the land has not been commercially
11 farmed, but instead a cover crop that requires only period[ic]
12 mowing has been maintained, and that done only to retain the
13 propert[y's] farm tax deferral status.

14 "Activities in the non-farm homes that surround the site further
15 prohibit intensive farming on the site. Domestic animals such as
16 dog[s] have a tendency to run loose and disrupt farming practices.
17 There is the risk of fire danger from outdoor fire pits, which could
18 cause significant harm to sensitive crops. Chemicals used on the
19 surrounding properties (such as pesticides on shrubs and gardens,
20 and chemicals applied to lawn and flower beds to get rid of weeds)
21 may be applied without following the federal application guidelines,
22 and cause drift onto the subject property and adversely impact farm
23 activities." Record 240.

24 We are directed to nothing in the record indicating that intervenor's
25 counsel has expertise on actual farm use conflicts between surrounding properties
26 and the subject property. Although the attachments to the submittal from
27 intervenor's counsel include letters from (1) a backhoe company stating that it
28 was not aware of any legal lots in the area being denied some type of septic
29 system and (2) a well driller stating that they believed aquifers in the area could
30 support development, no professionals with experience in the relevant subject

1 area were relied upon to support the claims of conflict between farm uses and
2 neighboring uses. Record 174, 195.

3 In *Oregon Coast Alliance v. City of Brookings*, we explained:

4 “[w]hether or not pollution from stormwater runoff from the subject
5 property could adversely impact endangered salmon species, and if
6 so what measures may be necessary to avoid or minimize such
7 impacts, are the kinds of questions that likely require some level of
8 scientific or professional expertise to answer the mere statements of
9 the applicant’s attorney do not provide. The mere statements of the
10 applicant’s attorney do not provide the required evidentiary
11 foundation necessary to support conclusions regarding such
12 technical questions, even if the city’s findings had attempted to
13 address them.” 72 Or LUBA 222, 232-33 (2015).

14 Similarly, here, the submittal from intervenor’s counsel does not provide the
15 necessary evidentiary foundation to support conclusions concerning the alleged
16 conflicts due to items such as pesticide application, fire risk, the timing of harvest
17 and resultant noise, the availability of or need for water, or the likelihood of
18 trespass.⁶

19 There are residential uses adjacent to the subject property, and the county
20 found that a mixture of uses has long coexisted:

21 “Most of the dwellings in the immediate vicinity of the subject
22 property, in both the SA zone and the AR zone, were built in the

⁶ Further, the submittal from intervenor’s counsel focused on *potential* incompatibility, stating, for example, that “the noise from the tractor, and the dust from the implement *would absolutely cause* complaints from [neighbors with homes within 30 to 35 feet of the activity], especially if the activity took place at night as often happens in the mid-to-late summer during harvest.” Record 159.

1 1960s and early 1970s. The subject property is adjacent to Goal
2 Exception Area 21.1 – Macleay, identified in Appendix A of the
3 Marion County Comprehensive Plan. This exception area was
4 already developed with small residential lots at the time the
5 Comprehensive Plan was acknowledged in 1987, although many of
6 the larger parcels were partitioned during the 1980s and 1990s into
7 one to two acre residential lots.”⁷ Record 11-12.

8 “Reliance upon longstanding adjacent rural residential uses is insufficient to
9 demonstrate that continued resource use of a proposed exception area has become
10 impracticable in the absence of recent or imminent changes affecting the subject
11 property.” *DLCD v. Lane County*, 39 Or LUBA 445, 452 (2001) (citing *Jackson*
12 *County Citizens League v. Jackson County*, 38 Or LUBA 357, 365-66 (2000)).

13 “In evaluating [a local government’s] findings and ultimate
14 conclusion under OAR 660-004-0028, we are bound by any finding
15 of fact for which there is substantial evidence in the record. We must
16 determine, based on a ‘clear statement of reasons,’ whether ‘the
17 local government’s findings and reasons demonstrate’ that the
18 impracticability standard has been met. In making that
19 determination, we are not required to give any deference to the [local
20 government’s] explanation for why it believes the facts demonstrate
21 compliance with the standards for an irrevocably committed
22 exception.” *Friends of Douglas County*, 46 Or LUBA at 763

⁷ Although the parties do not discuss it, we recognize that OAR 660-004-0028(6)(c)(A) provides, in part:

“Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for the subject parcels or land adjoining those parcels.”

1 (quoting ORS 197.732(6)(b), (c)) (citing ORS 197.732(6)(a);
2 *Laurence v. Douglas County*, 33 Or LUBA 292, 297-99, *aff'd*, 150
3 Or App 368, 944 P2d 1004 (1997), *rev den*, 327 Or 192 (1998)).

4 The county's conclusion in Finding 17 that farm use is made impracticable based
5 on the relationship between the adjacent properties and the subject property is not
6 supported by substantial evidence. We have not been directed to evidence in the
7 record that the area is facing a relevant, imminent change, and the evidence in the
8 record is that the area has long had rural residential uses that have coexisted with
9 farm uses on intervenor's property.

10 The second assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 OAR 660-004-0018(2)(b) provides that irrevocably committed exceptions
13 must meet the following requirements:

14 “(A) The rural uses, density, and public facilities and services will
15 maintain the land as ‘Rural Land’ as defined by the goals, and
16 are consistent with all other applicable goal requirements;

17 “(B) The rural uses, density, and public facilities and services will
18 not commit adjacent or nearby resource land to uses not
19 allowed by the applicable goal as described in OAR 660-004-
20 0028; and

21 “(C) The rural uses, density, and public facilities and services are
22 compatible with adjacent or nearby resource uses[.]”

23 Petitioner's third assignment of error is that the county misconstrued and failed
24 to comply with OAR 660-004-0018(2)(b)(B) and that the county's finding that
25 the exception will not commit adjacent or nearby resource land to uses not
26 allowed by Goal 3 is inconsistent with its findings of compliance with OAR 660-

1 004-0028(2)(c), that is, that the relationship between the subject property and
2 adjacent rural residential uses makes farm use impracticable.

3 Simply put, petitioner argues that, if the county finds that the past
4 allowance of dwellings on AR-2-zoned lots next to the subject property is
5 problematic for agricultural use of the subject property, then it is inconsistent for
6 the county to conclude that rezoning the subject property to AR-2 and allowing
7 dwellings thereon will not be problematic for the SA-zoned property next to the
8 subject property. Petitioner argues that “[t]he only difference that the county finds
9 between the existing dwellings to the east of the subject property and the
10 dwellings that would abut [the SA-zoned properties to the west of the subject
11 property] is the dwelling setback distance” and that the county’s reliance on
12 “claims that it could require owners of the new dwellings to sign a declaratory
13 statement claiming no complaints will be allowed about the activities at the
14 blueberry field” is insufficient. Petition for Review 44. The existing dwellings to
15 the east of the subject property are on land zoned AR and are currently adjacent
16 to the SA-zoned subject property. Petitioner argues that, if the exception is
17 approved, then the subject property will become AR-zoned property adjacent to
18 SA-zoned property to the south and west and any impacts that residential
19 development on AR-zoned land has on SA-zoned property will be pushed further
20 west and impact properties such as that with the blueberry operation.

21 The county provided descriptions of properties in the study area in its
22 discussion of OAR 660-004-0018, including findings that, “[t]o the south and

1 west the zoning is SA/[Exclusive Farm Use], however the parcelization and use
2 of those properties, with one exception is not available for agricultural
3 production.” Record 15.

4 “TL3000 is 4.66 acres in size with a dwelling and a large shop. There
5 is approximately 3 acres of TL3000 planted in blueberries, which
6 provides an income supplement to the property owner, *but not*
7 *sufficient income for the family to live on.* * * *

8 “* * * * *

9 “* * * TL200 is the *only commercially farmed parcel* in the entire
10 study area, and its farm includes farming the arable portions of
11 TL100 and TL300. * * *

12 “On Map 8.2W.04D *there are seven parcels over 5 acres in size, all*
13 *of which are on farm deferral except for one* (TL600). All have
14 dwellings on them, except for TL4700 which is the only parcel in
15 the area to utilize a forest deferral. TL600 is 6.23 acres; TL 4200 is
16 6.75 acres; TL4300 is 14.26 acres; TL4600 is 8.54 acres; TL 5200
17 is 6.21 acres; and TL 5300 is 5.11 acres in size. This area is quite a
18 ways to the east and south of the subject property. *The lack of farm*
19 *uses here is due to proximity to Highway 22, and the presence of*
20 *Fruitland Creek and several ponds along that waterway.* These
21 lands are basically idle in scrub trees and brush.

22 “On Map 8.2W.04B there are five parcels that exceed five acres in
23 size, excluding parcels zoned for commercial or industrial uses.
24 TL200 is 10.63 acres in size, *is on farm deferral* and has a house.
25 TL500 is 6.07 acres in size, and this is a property there is no
26 information available for. TL700 is 11.9 acres in size, *is only*
27 *partially on farm deferral* and has a non-farm dwelling. TL900 is 5
28 acres in size, *is on deferral* and has a non-farm dwelling. This area
29 is quite a ways to the west * * *. *There is no commercial farming*
30 *going on in this area, and what agricultural activity takes place is a*
31 *hobby for the use and enjoyment of the owners.”* Record 15-16
32 (emphases added).

1 The exception and implementing zone change would allow two-acre
2 parcels on the 20.46-acre subject property. Although the exception and zone
3 change would broaden the extent of the AR-2-zoned properties that the county
4 found made farming the subject property impractical, the county concluded that
5 no more than nine parcels will be possible on the subject property given its shape
6 and the need for a road, and that two-acre lots are consistent with the median size
7 of parcels in the study area. Record 15.

8 Again, OAR 660-004-0018(2)(b)(B) requires that “[t]he rural uses,
9 density, and public facilities and services will not commit adjacent or nearby
10 resource land to uses not allowed by the applicable goal as described in OAR
11 660-004-0028. The county concluded that that rule focuses on “lands available
12 for agricultural production,” but the county did not explain what it considers to
13 be “available.” Record 15. In its analysis, the county emphasized existing,
14 commercial levels of farming. The county found that, “in the study area, there is
15 *only one true farm*, several hobby farms and a bunch of acreage homesite[s]
16 without any farming activity.” Record 17 (emphasis added). Numerous properties
17 in the area are described as not being available for agricultural production based
18 on parcelization and use, but the findings do not explain the basis for concluding
19 that the parcelization and use make the properties unavailable for farming.
20 Record 15.

21 Further, although the county concluded that new houses “will be
22 appropriately set back, and can be required to sign a Declaratory Statement that

1 no complaints will be allowed about the activities at the blueberry field,” and that
2 the development plan involved here will place only two new houses next to the
3 blueberry field, the county did not explain how the decision restricts the number
4 of houses adjacent to resource land or how setbacks, Declaratory Statements, and
5 the number of new houses will avoid the proximity conflicts, such as trespass and
6 fire risk, that it identified in approving the exception. Record 17. The county
7 misconstrued the law and adopted inadequate findings by not considering
8 “noncommercial” levels of farm use and the impact of the proposed exception
9 and related zone change on the resource land in the area, regardless of the current
10 level of resource use on that resource land.

11 The third assignment of error is sustained.

12 **DISPOSITION**

13 Petitioner requests reversal of the county’s decision because, according to
14 petitioner, the subject property cannot qualify for an irrevocably committed
15 exception as a matter of law. In the alternative, petitioner requests remand.
16 Petition for Review 5, 47. We will reverse a land use decision when we conclude
17 that the decision violates a provision of applicable law and is prohibited as a
18 matter of law. OAR 661-010-0071(1)(c). As relevant here, we will remand a land
19 use decision when we conclude that the findings are insufficient to support the
20 decision, the decision is not supported by substantial evidence in the whole
21 record, or the decision improperly construes the applicable law but is not

1 prohibited as a matter of law. OAR 661-010-0071(2)(a), (b), (d); ORS
2 197.835(1).

3 “Upon review of a decision approving or denying an exception:

4 “(a) [LUBA] shall be bound by any finding of fact for which there
5 is substantial evidence in the record of the local government
6 proceedings resulting in approval or denial of the exception;

7 “(b) [LUBA] shall determine whether the local government’s
8 findings and reasons demonstrate that the standards of
9 subsection (2) of this section have or have not been met; and

10 “(c) [LUBA] shall adopt a clear statement of reasons that sets forth
11 the basis for the determination that the standards of subsection
12 (2) of this section have or have not been met.” ORS
13 197.732(6).

14 As explained above, the county’s decision relies on findings that do not
15 comply with the applicable rules and that are not supported by substantial
16 evidence. The standards for an irrevocably committed exception have not been
17 met because resource use of the subject property has not been shown to be
18 impracticable. The evidence in the record is that the allegedly conflicting rural
19 residential uses have long been present in the area, the subject property is
20 currently farmed and adjacent to property currently being farmed, other farm use
21 occurs in the study area, and no relevant, imminent land use change in the area
22 has been identified. In addition, the county has not adopted findings supported
23 by substantial evidence that an exception on the subject property would not
24 commit other resource land to nonresource use. It seems unlikely to us, based on
25 this record, that the county could approve an irrevocably committed exception

1 following a correct application of the applicable law. However, we cannot
2 conclude that an irrevocably committed exception for the subject property is
3 prohibited as a matter of law. Accordingly, remand is appropriate instead of
4 reversal.

5 The county's decision is remanded.