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

FRIENDS OF MARION COUNTY,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

LOIS PFENNIG, TRUSTEE OF THE
HENRY O. AND LOIS M. PFENNIG TRUST,
Intervenor-Respondent.

LUBA No. 2025-062

FINAL OPINION
AND ORDER

Appeal from Marion County.

John D. Butterfield filed the petition for review and reply brief and argued on behalf of petitioner.

Cody Walterman filed a joint respondents' brief and argued on behalf of respondent. Also on the brief was Isaac Helland, Mark C. Hoyt, and Sherman, Sherman, Johnnie & Hoyt, LLP.

Isaac Helland filed a joint respondents' brief and argued on behalf of intervenor-respondent. Also on the brief was Cody Walterman, Mark C. Hoyt, and Sherman, Sherman, Johnnie & Hoyt, LLP.

ZAMUDIO, Board Chair; BASSHAM, Board Member, participated in the decision.

WILSON, Board Member, did not participate in the decision.

REVERSED 03/12/2026

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals Ordinance No. 1484 adopted by the board of commissioners approving (1) an exception to Statewide Planning Goal 3 (Agricultural Lands), (2) a comprehensive plan map amendment from Special Agricultural (SA) to Rural Residential, (3) a zoning map amendment from SA to Acreage Residential 10-acre minimum (AR-10), and (4) a partition to divide the subject property into two parcels, one containing 10 acres and the other containing 10.46 acres.

MOTION TO INTERVENE

Lois Pfennig, Trustee of the Henry O. and Lois M. Pfennig Trust, the applicant below, moves to intervene on the side of the county. No party opposes the motion and it is allowed.

BACKGROUND

The challenged decision is the county's decision on remand from *Friends of Marion County v. Marion County*, LUBA No 2021-043 (Nov 22, 2021) (*Pfennig I*). The subject property is approximately 20.46 acres, located west of 62nd Avenue SE, south of Macleay Road SE, and north of Culver Drive SE. The parcel is currently planted with a cover crop, is specially assessed for agriculture, and contains soils that are defined as high value for agriculture.

> "According to [t]ax records, in 2002 the property was being farmed for grass seed. Since 2005, the parcel has been planted in cover crops, but has not been actively farmed since that time. Nearly all of

> the[] farm-zoned properties in the adjacent area are currently specially assessed as farmland by the Assessor and are in various types of agricultural production." Record 21.

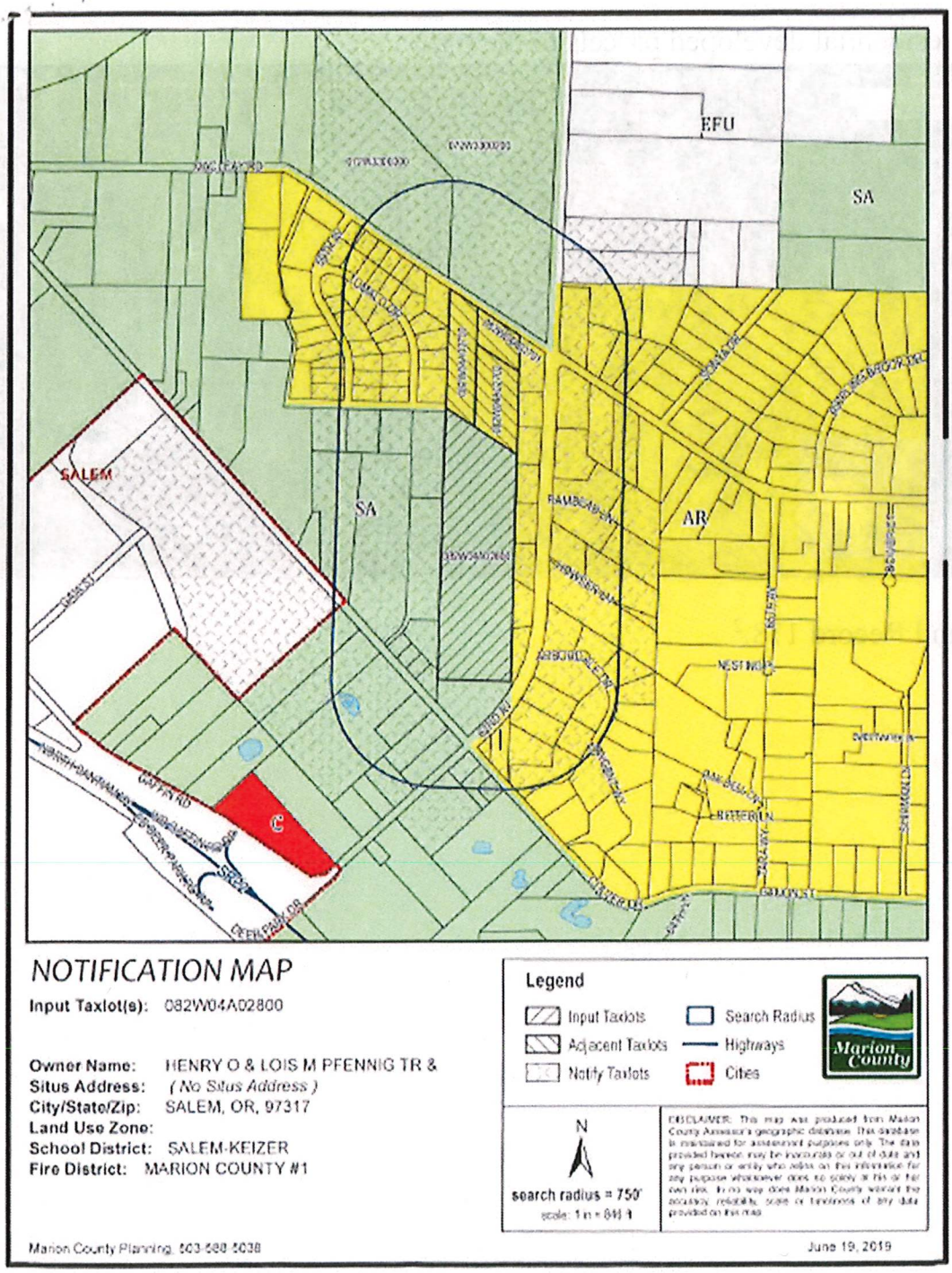
Properties to the north and east are zoned AR and developed with small rural residential lots.

The image below shows the subject property outlined in red.

Original Record 418.[1]

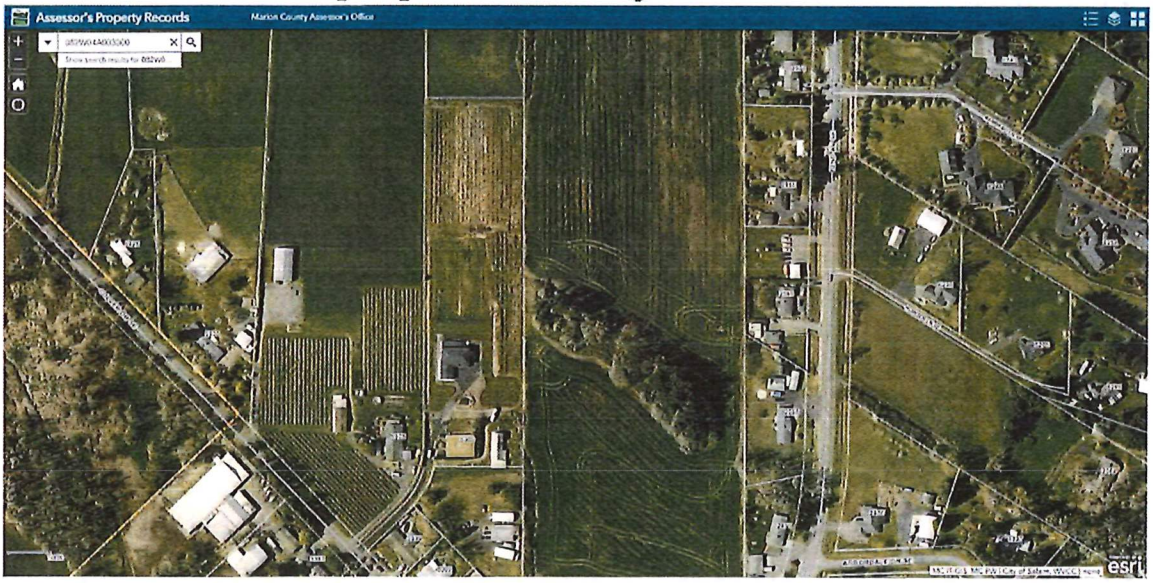
[1] Original Record refers to the record in *Pfennig I*, LUBA No. 2021-043.

The map below shows the subject property in hatching lines and zoning.



Original Record 364.

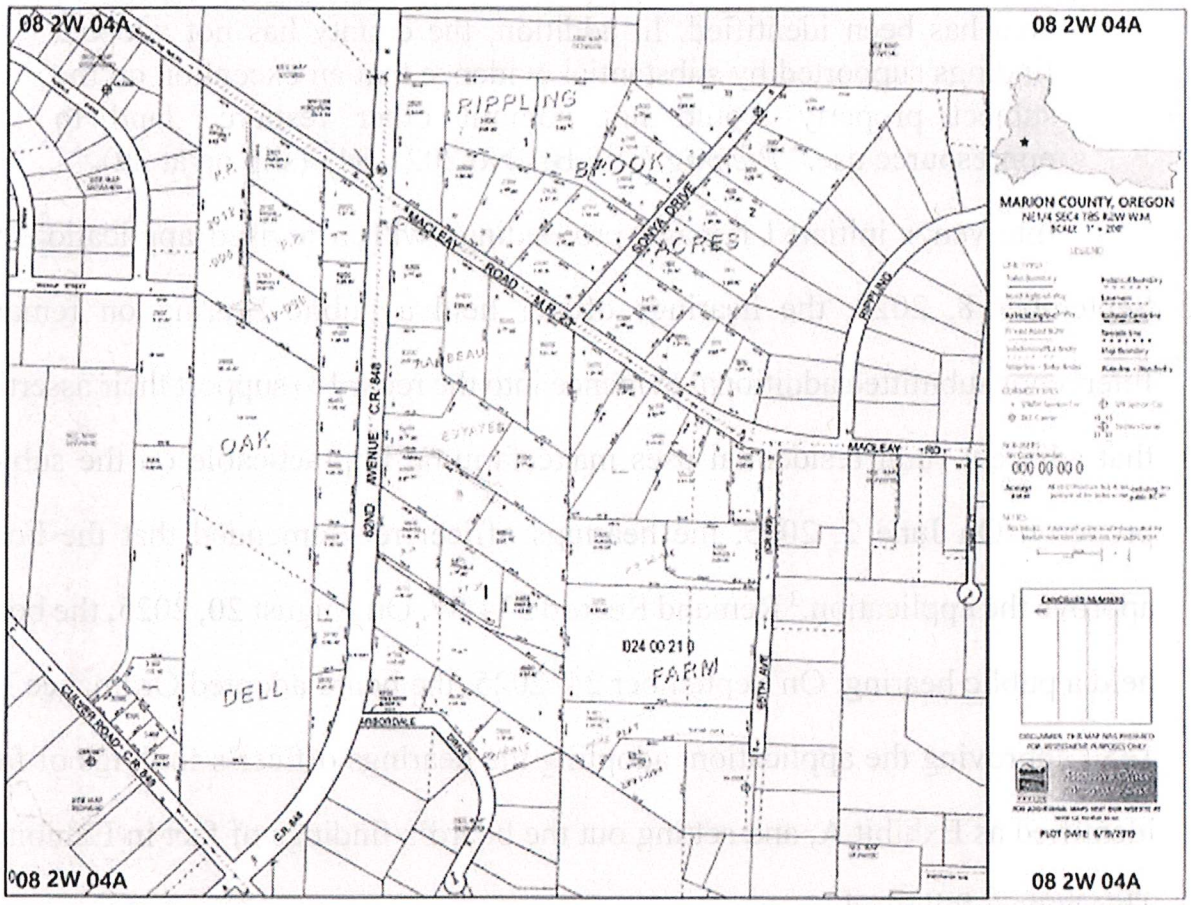
The image below shows a portion of the subject property in the middle with residential developed parcels to the right.



Remand Record 178.[2]

[2] Remand Record refers to the record in LUBA No 2025-065.

The image below shows the pattern of parcelization in the area.



Original Record 253.

In 2021, the county approved intervenor-respondent's (intervenor's) original application. Petitioner appealed and we remanded in *Pfennig I*. We determined that

> "the county's decision relie[d] on findings that do not comply with the applicable rules and that are not supported by substantial evidence. The standards for an irrevocably committed exception have not been met because resource use of the subject property has not been shown to be impracticable. The evidence in the record is that the allegedly conflicting rural residential uses have long been present in the area, the subject property is currently farmed and

> adjacent to property currently being farmed, other farm use occurs in the study area, and no relevant, imminent land use change in the area has been identified. In addition, the county has not adopted findings supported by substantial evidence that an exception on the subject property would not commit other resource land to nonresource use." *Pfennig I*, LUBA No 2021-043 (slip op at 29).

Intervenor initiated remand proceedings with a revised application. On September 8, 2022, the hearings officer held a public hearing on remand. Intervenor submitted additional evidence into the record to support their assertion that adjacent rural residential uses make farming impracticable on the subject property. On June 2, 2025, the hearings officer recommended that the board approve the application.[3] Remand Record 234-37. On August 20, 2025, the board held a public hearing. On September 24, 2025, the board adopted Ordinance No. 1484 approving the application, adopting the hearings officer's findings of fact, identified as Exhibit A, and setting out the board's findings of fact in Exhibit B. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county's decision is not supported by adequate findings because the board adopted two exhibits as findings without identifying and resolving conflicting findings. Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the conclusion that the approval standards are

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[3] It is unclear to us what caused the delay between 2022 and 2025.

met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). As the court explained in *Sunnyside Neighborhood v. Clackamas Co. Comm.*,

> "[n]o particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based." 280 Or 3, 21, 569 P2d 1063 (1977).

"Final decisions may incorporate findings in other documents prepared by staff or an applicant, but * * * they may not do so in a way that leaves the parties and [LUBA] guessing which documents are made part of the decision or where the necessary findings may be located in the record." *DLCD v. Tillamook County*, 33 Or LUBA 323, 325 (1997). In *Gonzalez v. Lane County*, we explained the general standard for the adequacy of findings incorporated by reference:

> "[I]f a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." 24 Or LUBA 251, 259 (1992) (footnote omitted).

The county adopted two exhibits as findings supporting the challenged decision, Exhibit A and Exhibit B. *See* Remand Record 5-33. Exhibit A is the "Findings of Fact and Additional Findings of Fact and Conclusions of Law contained in Section V and VI of the Hearings Officer's decision dated June 2,

2025[.]" Remand Record 3. Exhibit B is the board's findings and conclusions and contains the following statement:

> "The following findings are made in support of the approval decision and as supplement to the findings of Hearings Officer's Recommendation [(Exhibit A)] adopted on August 20, 2025 * * * to support the approval decision. In the event any findings or conclusions set forth here are different from or contradictory to the findings or conclusions in [Exhibit A], the findings set forth here shall control." Remand Record 29.

Petitioner argues that this statement undermines effective appellate review because the decision does not identify and resolve any contradictory findings.

Intervenor and the county (together, respondents) respond that the board clearly indicated its intent to incorporate Exhibits A and B as findings and specified that the findings in Exhibit B control over any conflicting findings in Exhibit A. We agree that incorporation is sufficient to satisfy the *Gonzalez* standard. A reasonable person reading the decision would be able to identify the findings and resolve any conflicts in favor of findings in Exhibit B. A local government is permitted to incorporate by reference conflicting findings, so long as the local government indicates which findings control in the event of conflicts. *Squires v. City of Portland*, 31 Or LUBA 335, 338 (1996). Petitioner has not cited and we are not aware of any authority that requires the local government to identify and resolve conflicting findings.

Petitioner further argues that the board's incorporation by reference is overly broad and fails to clearly identify the document or portions of the

documents incorporated as findings. Petitioner points to the board's findings on remand, Exhibit B, finding 14, which states:

> "The testimony and evidentiary facts submitted by Mr. Lien and Mr. Pfennig are adopted as findings to support the decision made herein, and any evidence or allegation that are contrary are not adopted as facts and are rejected here." Remand Record 32.

Mr. Lien is an attorney who represented intervenor before the county and on appeal in *Pfennig I*. "Larry Pfennig is a lifelong farmer in Marion County, and is the owner of Pfennig Farms, Inc. Mr. Pfennig has been associated with the subject parcel for almost his entire life." Remand Record 9. Petitioner points out that

> "Mr. Lien and Mr. Pfennig submitted approximately 77 pages of testimony and exhibits in the remand proceeding, along with verbal testimony at two public hearings and substantial submittals in the original proceeding. The County nowhere specifies if all these submittals qualify as 'testimony and evidentiary facts,' which purportedly overrule any evidence that is contrary." Petition for Review 16.

In reviewing the decision and record, it is sufficiently clear that the county referenced and relied upon Mr. Pfennig's affidavit dated September 13, 2022, at Remand Record 253 to 255, Mr. Lien's declaration at Remand Record 364 to 367, and oral testimony at the September 8, 2022, and August 20, 2025, remand hearings. See Remand Record 9, 10, 18, 30, 31 (describing and relying on those documents and testimony). We conclude that "a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the

opportunity to review the specific documents thus incorporated." *Gonzalez*, 24 Or LUBA at 259.

Finally, petitioner argues that the decision does not include a clear statement of reasons explaining why the facts found in the decision lead to the conclusion that the applicable exception criteria are satisfied. Petitioner points out that Exhibit B does not set out the exception criteria and argues that the county cannot rely on the statements of reasons in Exhibit A, because the decision states that Exhibit B's findings control. As explained above, that board adopted both Exhibit A and Exhibit B as findings and *only where they conflict* does Exhibit B control. Petitioner does not identify a conflict in the Exhibit B findings that undermines the Exhibit A findings that the exception criteria are satisfied. This argument is undeveloped for our review and provides no basis for remand. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

Petitioner's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error is that the county misconstrued the analysis required by OAR 660-004-0028(2)(b) and (c) and failed to explain how it determined which properties constitute adjacent lands. OAR 660-004-0028(2) provides:

> "(2) Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:

"(a) The characteristics of the exception area;

"(b) The characteristics of the adjacent lands;

"(c) The relationship between the exception area and the lands adjacent to it; and

"(d) The other relevant factors set forth in OAR 660-004-0028(6)."

OAR 660-004-0028(6)(d) requires the county to adopt findings of fact addressing "[n]eighborhood and regional characteristics[.]" In *Pfennig I* we found that the county had analyzed neighborhood and regional characteristics under OAR 660-004-0028(6)(d) but failed to identify adjacent land uses and the relationship between those uses and the subject property, as required by OAR 660-004-0028(2)(b) and (c). LUBA No 2021-043 (slip op at 9-10).

On remand, intervenor evaluated existing adjacent uses in a study area that includes 13 parcels that total 29.91 acres. Remand Record 17. Eleven of the thirteen parcels are developed with dwellings, and one of the vacant parcels is owned by intervenor. Four of the parcels are zoned SA and seven are zoned AR. The county agreed with intervenor that the adjacent lands study area information resolved the remand issue under OAR 660-004-0028(2)(b) and (c). The county also agreed with intervenor that the original study area established neighborhood and regional characteristics to satisfy the analysis required by OAR 660-004-0028(2)(d) and (6)(d). Remand Record 18, 30.

The board adopted the hearings officer's findings describing the characteristics of the adjacent lands as follows:

"There are six parcels immediately adjacent to the east of the subject property between the property and 62nd Avenue SE. These parcels are all one acre or less, are zoned AR, and each contain a non-farm dwelling. To the south is a 2.93 acre parcel that is zoned SA with a non-farm dwelling. Immediately adjacent to the west are four parcels that are all zoned SA that range from one-half acre to four acres in size. All of these parcels have non-farm dwellings. One of these parcels includes a blueberry operation, the size and scope of which is disputed. To the north of the property are two parcels owned by [intervenor] that are 9.62 and 2 acres in size. These parcels are also zoned AR, and the 9.62-acre parcel includes a dwelling. * * *" Remand Record 16-17.

The board adopted and reiterated similar findings regarding the "adjacent study area" in Exhibit B as follows:

"7. While the larger Study Area is helpful in understanding the neighborhood, the actual legal standard of review for an irrevocably committed exception is for a Study Area that involves only a review of parcels that are 'adjacent' to the subject property.

"8. The adjacent study area includes 13 parcels that total 29.91 acres, for an average parcel size of 2.3 acres. 11 of the 13 parcels have houses, and one of two vacant parcels is owned by [intervenor] who will be selling it for the development of an additional rural residential dwelling. Four of these parcels have the SA zoning, and seven have the AR zoning. However, only one parcel has farm tax deferral status. All but two of these adjacent parcels have existing dwellings. With the exception of the replacement dwelling on TL3000, every dwelling on adjacent lands was built prior to the application of comprehensive planning regulations. Nine of the parcels have been zoned for Acreage Residential uses, and 4 for Special Agriculture use. Except for the [intervenor] owned land, there is only one parcel that exceeds 4 acres in size (TL 3000 which is 4.66 acres). The adjacent lands study includes sufficient information in order to make a determination of compliance with the law in this case.

> "9. The physical features of the property and its uses, and the development pattern of the lands bordering the subject property support a determination that the adjacent study area is adequate to consider the property's relationship with adjacent uses. The combination of the larger Study Area for area analysis and the adjacent Study Area satisfies all review requirements for an irrevocably committed exception analysis." Remand Record 30.

As described further below under the third assignment of error, the findings discuss the land use history and the relationship between the subject property and the adjacent lands. The county adequately identified adjacent lands.

Petitioner also argues that the county improperly considered only properties that share a boundary line with the subject property as "adjacent" for purposes of OAR 660-004-0028(2). Respondents respond that "'[a]djacent lands' means lands that are adjacent—not lands that are nebulously close by." Joint Respondents' Brief 13. We agree that the county did not misconstrue the adjacent lands analysis. In *Lovinger v. Lane County*, 36 Or LUBA 1, 13 (1999), we found that a study area of one mile around the proposed exception area did not satisfy the OAR 660-004-0028(2) requirement to consider adjacent lands. In *Pfennig I*, we remanded the county's decision because the county had failed to properly consider the characteristics of the adjacent lands and the relationship between the subject property and adjacent lands, including reference to "an adjacent blueberry farm to the west" and that "[t]here are rural residential uses adjacent to the subject property[.]" LUBA No 2021-043, (slip op at 19, 22). The county did not err in considering "adjacent lands" as those properties that share a property line boundary with the subject property.

Petitioner also argues that Exhibit B, finding 7, demonstrates that the county did not consider regional characteristics, and thus misconstrued OAR 660-004-0028 and failed to make required findings under OAR 660-004-0028(2)(d). Petition for Review 19-20. Respondents respond, and we agree, that petitioner mischaracterizes the decision. On remand, the county considered characteristics of the adjacent lands and the relationship between the proposed exception area and the lands adjacent to it, as required by OAR 660-004-0028(2)(b) and (c) and our decision in *Pfennig I*. As set out above, the county findings demonstrate that the county described and considered uses on adjacent lands based on evidence submitted on remand. The county also considered the neighborhood and regional characteristics evidenced by "the larger Study Area" based on evidence submitted in *Pfennig I*. The county did not misconstrue OAR 660-004-0028 and it made adequate findings required by OAR 660-004-0028(6)(d).

Petitioner's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is that the county's conclusion that the criteria for a Goal 3 irrevocably committed exception in ORS 197.732(2)(b) and OAR 660-004-0028 are satisfied is not supported by substantial evidence. Petitioner further argues that the conflicts identified by the county, even if accepted as being supported by substantial evidence, are insufficient to support a conclusion that farm use is impracticable on the subject property. For the reasons

explained below, we agree with the latter argument and, thus, we need not and do not resolve petitioner's substantial evidence challenges.

ORS 197.732(2)(b) requires that "[t]he land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]" OAR 660-004-0028(1) provides:

> "A local government may adopt an exception to a goal when 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[.]

Other relevant factors are set out in OAR 660-004-0028(6). We have explained:

> "The local government's findings and conclusion that an exception area is irrevocably committed must address all applicable factors of OAR 660-004-0028(6) and must explain why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area. OAR 660-004-0028(4). Finally, OAR 660-004-0028(6) requires that the local government's findings consider a miscellany of factors, including existing adjacent uses; existing public facilities; parcel size and ownership patterns in the area; neighborhood and regional characteristics; natural or man-made features separating the exception area from adjacent resource land; and other relevant factors, in order to reach its ultimate conclusion that the property is or is not irrevocably committed." *Friends of Linn County v. Linn County*, 38 Or LUBA 868, 873-74 (2000) (footnote omitted).

A local government that claims a goal exception has the burden of persuasion. ORS 197.350(2). When reviewing a local government's decision approving or denying a goal exception, we are bound by any finding of fact that is supported by substantial evidence in the record. ORS 197.732(6)(a). We are required to "determine whether the local government's findings and reasons demonstrate that the standards of [ORS 197.732(2)] have or have not been met[.]" ORS 197.732(6)(b). We have described our review under ORS 197.732(6)(b) as requiring that we "determine whether the standards provided for in ORS 197.732([2])(b) have been met as a matter of law. In performing that review, we are not required to give any deference to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for a committed exception." *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 78 (2000) (footnote omitted).

A. Adjacent residential uses do not irrevocably commit the subject property to nonresource use.

The county found that the subject property is irrevocably committed to nonresource use based on impacts to the subject property from the adjacent rural residential uses—namely, aquifer limitations, water and chemical overspray onto the subject property, trespass, and fire risk—and because the surrounding area is predominantly rural residential due to parcelization and residential uses. Remand Record 18, 30-31.

We begin by setting out the relevant findings.

"The lack of water on the subject property as a critical issue for the impracticability of farming it, as well as overspray from neighboring properties and significant trespass due to the location adjacent to non-farm houses and busy streets. The risk of fire to dry land crops is very high making liability a tremendous problem, and obtaining affordable liability and fire insurance impossible. Chemical overspray from adjoining properties presents an additional problem for growing any kind of crop on the subject property." Record 30-31.

The county recounted and relied on Mr. Pfennig's testimony.

"Larry Pfennig is a lifelong farmer in Marion County, and is the owner of Pfennig Farms, Inc. Mr. Pfennig has been associated with the subject parcel for almost his entire life. Mr. Pfennig states that the subject property does not have a farm well and there are no current water rights associated with the property, which Mr. Pfennig argues limits the parcel's productivity for farm uses. Mr. Pfennig is concerned about the impact of farm uses on the aquifer; that is, that use of water will have an impact on surrounding properties. On the other hand, because of the proximity of small, landscaped lots, the subject property has experienced overspray of landscape irrigation. Mr. Pfennig indicates that overspray from landscaping can result in damage to crops and impact his ability to readily farm the parcel and that he has lost one acre of crop from the overspray. Mr. Pfenn[ig] argues * * *, in declaration and in testimony, [that they] provided evidence of conflict between water availability and overspray. Mr. Pfennig testified about an incident in which he lost one acre of crop from overspray from a now non-existing blueberry patch on adjacent property. Mr. Pfennig has not actively farmed the property since 2005 because it was not practical to do so. Mr. Pfennig testified that based on the size of the parcel, the lack of water rights, and conflicts from neighboring properties, farming the property was not productive or cost effective. Mr. Pfenn[ig] presented evidence that the impacts from residential neighbors in non-farm uses has generated impacts that conflict with farming. Mr. Pfenn[ig] noted trespass, fire damage, overspray, and use of property (horseback riding, walking dogs, motorcycle riding) that results in his property being incompatible with farming. Mr. Pfennig notes the possible

> introduction of hazards to farming from animals entering the property. Mr. Pfennig recognizes Oregon's Right to Farm protections, but notes that despite his right to farm, doing so on this property does not shield him from conflicts with the nearby residential uses. Mr. Pfenn[ig] argues that the limitations of the property itself (water rights, lack of well, size, surrounding residential uses) make farming impractical for the purpose of obtaining a profit. Mr. Pfennig states that as a lifelong farmer in this area, no farm uses, no matter how the term is defined can practicably be carried on the subject property with houses lining nearly all sides, and some as close as 20 feet from the property line.
>
> "* * * * *
>
> "Mr. Pfennig testified that the water from a neighboring operation came forty feet into the property, and ruined approximately one acre of property. Five acres of the subject property were burned by fire. The damage from fire, in addition to ongoing trespass issues, were factors for Mr. Pfennig to determine replanting was not justified after the fire. Mr. Pfennig attempted to farm with a cover crop year after year, and in 2005, quit because there was no profit in it and the neighbors were unhappy with his farming operations. Of the twenty acres, Mr. Pfennig indicated that at best 14-15 acres were farmable. While it is common for property to include non-tillable land, with the lack of irrigation and water rights, the capability of the parcel to be productively farmed is limited." Remand Record 9-10.

1. Irrigation

With respect to water availability, the county observed that "Mr. Pfennig states that the subject property does not have a farm well and there are no current water rights associated with the property, which Mr. Pfennig argues limits the parcel's productivity for farm uses." Remand Record 9. The county found that "[t]he lack of water on the subject property as a critical issue for the impracticability of farming it," and "aquifer fragility caused by neighboring

residential landscaping" is a nonspeculative conflict that causes the subject property to be irrevocably committed. Remand Record 16, 18, 30. The county also found:

> "The ability to have water to irrigate crops is critical. [Intervenor] has experienced many conflicts with neighbors, including impact of farm uses on the aquifer, both from the farm wells, and to the farm wells. The subject property does not have a farm well, and there are no current water rights associated with it." Remand Record 32.

Petitioner argues that the record contains no professional expert opinion as to the availability of water from the aquifer and argues that intervenor can apply to obtain a groundwater permit for irrigation. Petition for Review 29. Petitioner acknowledges the board expressly adopted Mr. Pfennig's testimony and rejected contrary evidence. Remand Record 32. We accept as true for purposes of this decision that there are no current water rights for the subject property and the aquifer that would be tapped for irrigation is limited by other farm and residential uses in the area.

Irrigation availability is a relevant factor for designating agricultural land or removing that resource designation. *See* OAR 660-033-0020(1) (defining "agricultural land" for purpose of Goal 3, which includes "taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices"); OAR 660-033-0030 (identifying agricultural land). Differently, the

committed exception criteria focus on development patterns. Petitioner argues that

> "[i]rrigation availability is not a relevant factor in determining whether land is irrevocably committed to nonresource use, as irrigation availability is a characteristic of the subject property itself and, therefore, is not relevant in considering the actual focal criterion for an irrevocably committed exception: the relationship between the subject property and the adjacent uses." Petition for Review 25 (citing *Friends of Linn County*, 38 Or LUBA at 886).

In *Central Oregon Landwatch v. Jefferson County*, LUBA No 2025-023 (Oct 31, 2025) (*MAC IV*), *aff'd*, 347 Or App 454 (2026) (slip op at 53-54), we observed that irrigation availability is not a listed factor in the committed exception criteria. However, we considered lack of irrigation an "other relevant factor" for considering whether agricultural use of the subject property is practicable OAR 660-004-0028(2)(d); OAR 660-004-0028(6)(g). While we agree with petitioner that the relationship between the subject property and adjacent uses remains the focus of the irrevocably committed analysis, we conclude that the county may consider irrigation availability as an "other relevant factor."

Here, the evidence shows that the subject property lacks water rights and a farm well and that the aquifer that would provide groundwater for farm use of the subject property is limited by surrounding farm and residential uses. This consideration does not demonstrate that farm use of the subject property is impracticable. The county did not find that irrigated agriculture is the only

practicable farm use of the subject property. It is undisputed that the subject property previously supported grass seed and wheat crops and currently supports a cover crop, which is evidence that at least some crops can be grown on the subject property without irrigation or with aquifer-limited irrigation. Moreover, as petitioner observes, the county made no finding that the subject property cannot practicably be used for other farm uses, such as raising livestock. *See* ORS 215.203(2)(a) (defining "farm use" as including "the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof"). We agree with petitioner that lack of water rights and aquifer limitations are not sufficient reasons to conclude that the subject property is irrevocably committed to nonresource use.

2. Water Overspray

The county found that the "because of the proximity of small, landscaped lots, the subject property has experienced overspray of landscape irrigation," and that Mr. Pfennig "lost one acre of crop from the overspray." Remand Record 9. Mr. Pfennig testified about an incident in which he lost one acre of crop from overspray from a former blueberry crop on adjacent property. Remand Record 253. Petitioner correctly observes that agricultural overspray is not a consideration in an irrevocably committed exception analysis.

With respect to residential landscape irrigation overspray, the findings state that "overspray from landscaping can result in damage to crops." Remand Record 9.

> "Water also comes into play when neighbors overspray their own landscaping irrigation onto the farm field and damage or retard crops. These issues are particularly prevalent along the eastern boundary where the parcels are very small and landscaping, decks and house are within just a few feet from the boundary line of the subject property. If it were just one parcel, the impact might not be so bad, but here, we have six parcels along the eastern boundary and another on the southwestern boundary. Water conflicts of availability and overspray are real and not speculative." Remand Record 32.

As petitioner points out, even if some residential landscaping overspray impacts the subject property along the property line, there is no evidence that it impacts the entire subject property or so diminishes the acreage available for farm use so as to irrevocably commit the entire subject property to nonresource use. We also agree with petitioner that the county did not find that the harm of crop damage due to water overspray applies to all potential farm crops or other farm uses, such as animal husbandry. We agree with petitioner that water overspray is not a sufficient reason to conclude that the subject property is irrevocably committed to nonresource use.

3. Chemical Overspray

The county found that "[c]hemical overspray from adjoining properties presents an additional problem for growing any kind of crop on the subject property." Remand Record 31; *see also* Remand Record 10 ("Larry Pfennig states

that on this subject property, he has seen overspray of chemicals that has taken large swaths of property out of production."); Remand Record 254 (Mr. Pfennig testified that he "specifically recall[ed] neighbors who use chemical pesticides and herbicides on their lawn and landscaping, the result of which was to destroy or infect my crop along that easterly line").

Similar to water overspray, even if some residential landscaping chemical overspray impacts the subject property along the property line, there is no evidence that it impacts the entire subject property or so diminishes the acreage available for farm use so as to irrevocably commit the entire subject property to nonresource use. The county did not find that the harm of crop damage due to chemical overspray applies to other farm uses, such as animal husbandry. We agree with petitioner that chemical overspray is not a sufficient reason to conclude that the subject property is irrevocably committed to nonresource use.

4. Fire Risk

Mr. Pfennig testified that a fire caused by kids playing with matches destroyed acres of a wheat crop. Remand Record 254. The county found that five acres of the subject property were burned by fire. Remand Record 10. Petitioner argues, and we agree, that an isolated and apparently accidental incident of fire, while unfortunate, is not sufficient to demonstrate that farm use is impracticable.

5. Trespass

The county found that "[e]vidence in the record demonstrates that trespass on the subject property is prevalent. The trespassers almost always have dogs that

have to be walked or get loose, utilizing the property as a public open space. Trespass creates additional liability that increases risk and add[s] to the cost of insurance." Remand Record 32.

> "Mr. Pfennig testified that the land has been used for motorcycle riding, and horseback riding, and that the property is regularly trespassed upon by neighbors with dogs. * * * Mr. Pfennig also indicated the concern of introduction of parasites or contaminants to the land caused by the trespass by humans and animals." Remand Record 11.

While proximity to residential uses may increase risk and incidents of trespass, those concerns are not sufficient to demonstrate that the adjacent residential uses irrevocably commit the subject property to nonresource use.[4] We agree with petitioner that, if risk of trespass were sufficient to support an irrevocably committed exception, such an exception could be applied to nearly every resource-zoned property that abuts residentially zoned land, which would make such exceptions unexceptional. *See 1000 Friends of Oregon v. LCDC*, 69 Or App 717, 728, 688 P2d 103 (1984) (observing that, if conflicts between agricultural and residential uses such as spray drift were adequate to support an exception, then "it would be impossible to establish lasting boundaries between

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[4] The hearings officer suggested that maintaining the land in a cover crop, as opposed to active farming, might increase incidence of trespass and recommended that intervenor provide evidence "that the neighbor's trespass is not the result of his not farming the subject property." Remand Record 19.

agricultural and residential areas anywhere, yet establishing those boundaries is basic to the land use planning process").

The above-analyzed conflicts do not, individually or cumulatively, support the county's conclusion that the subject property is irrevocably committed.

B. Neighborhood and regional characteristics, including parcelization of adjacent and surrounding properties, do not commit the subject property to nonresource use.

The county also appears to have relied on the neighborhood and regional characteristics, including parcelization of adjacent and surrounding properties to support their conclusion that the subject property is irrevocably committed. One of the factors the county must address for a committed exception is "[p]arcel size and ownership patterns of the exception area and adjacent lands[,]" under OAR 660-004-0028(6)(c), which provides, in part:

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

The county described the land use history of the area as follows:

"The property is 20.46 acres in size and is the largest parcel among the SA zoned properties located between Macleay Road SB and Culver Road. According to [t]ax records, in 2002 the property was being farmed for grass seed. Since 2005, the parcel has been planted in cover crop, but has not been actively farmed since that time. Nearly all of these farm-zoned properties in the adjacent area are currently specially assessed as farmland by the Assessor and are in various types of agricultural production.

"Most of the dwellings in the immediate vicinity of the subject parcel, in both the SA zone and the AR zone, were built in the 1960s and early 1970s and review of historical air photos show that use of the farmland has not changed since the area was first developed. The subject parcel is adjacent to Goal Exception Area 21.1 - Macleay, identified in Appendix A of the Marion County Comprehensive Plan. This exception area was already developed with small residential lots at the time the Comprehensive Plan was acknowledged in 1987, although many of the larger parcels were partitioned during the 1980s and 1990s into one-to-two-acre residential lots. Oak Meadows Subdivision, composed of 59th Avenue SE, Tumalo Drive SE and Wickiup Street SE, was platted in 1957 as a suburban residential subdivision of one half acre lots. Oak Dell Farm Subdivision was platted in 1914 and composed of ten 16- to 20-acre hobby farm parcels. The subject parcel is a part of Oak Dell Farm, located at the western edge. The other parcels in Oak Dell Farm were later further divided to create the one- to eight-acre rural residential lots located adjacent to 59th Avenue SE and east, between Macleay Road SB and Culver Drive SE/ Ganon Street SE, as can be seen on the Exception Area map. The parcel directly north of the subject parcel was originally a portion of Lot I of Oak Dell Farm and later included in the exception area because it was located in between the residentially developed areas of Oak Meadows and Oak Dell Farm, located on the south side of Macleay Road SE. This property has been owned by [intervenor] since

> acknowledgement of the Marion County Comprehensive Plan in 1987, and was partitioned in 2007 and again in 2015." Remand Record 21.

Another factor, as mentioned above, is the "neighborhood and regional characteristics[.]" OAR 66-010-0028(6)(d). The findings state that, in the larger study area intended to address the neighborhood characteristics,

> "there are 196 buildable Tax Lots, plus four non-buildable parcels. Of the 196 buildable parcels, there are 20 parcels in Commercial or Industrial use and 176 in residential use. There are 160 houses on the 176 residential parcels. This equates to 91% of the residential parcels are already developed with single family dwellings. The study area encompassed 676.23 acres, or 1.06 square miles. The average parcel size in the study area is 3.45 acres. The median parcel size is 2 acres. Of the 176 residential parcels, 131 are under 2 acres in size, and 51 of those are one acre or under in size, this equates to 74% of the parcels in the study are * * * parcels that are under 2 acres in size. Only 24 of the 196 total parcels are in a resource deferral program, meaning only 12% of the parcels are in farm use sufficient to qualify for a tax break." Remand Record 29-30.

Regarding adjacent lands, the findings state:

> "T[he identified conflicts] are particularly prevalent along the eastern boundary where the parcels are very small and landscaping, decks and house[s] are within just a few feet from the boundary line of the subject property. If it were just one parcel, the impact might not be so bad, but here, we have six parcels along the eastern boundary and another on the southwestern boundary." Remand Record 32.

1. Parcel Size of the Exception Area (the Subject Property)

The subject property is approximately 20.46 acres. Intervenor argued below that "the size of the parcel and the close proximity of residential uses make contiguous farm uses impractical." Remand Record 10. The county observed that

"[o]f the twenty acres, Mr. Pfennig indicated that at best 14-15 acres were farmable. While it is common for property to include non-tillable land, with the lack of irrigation and water rights, the capability of the parcel to be productively farmed is limited." *Id.* However, it does not appear that the county relied on the size of the subject property to support its decision. The county properly focused its parcelization analysis on the adjacent and surrounding uses. *See* Remand Record 17 (discussing average parcel size of the surrounding uses and citing *Friends of Linn County v. Linn County*, 44 Or LUBA 349, 356 (2003) for the statement that "[t]he focus of an irrevocably committed exception must be preponderantly on the adjacent properties, rather than any limitations inherent in the subject property itself"); *see also* Remand Record 18 (observing that Mr. Pfennig detailed characteristics of the property including small size, lack of water rights for irrigation, access limitations, and the presence of high voltage electrical power lines, and clarifying that "the focus of the exception is with respect to the conflicts with the surrounding properties: irrigation and chemical overspray, trespass by neighbors and their animals, including motorcycles, and risk of fires").

2. Parcel Size and Ownership of Adjacent Lands

The land use history of the area demonstrates that parcelization and residential uses in the area have not significantly changed since originally divided and developed prior to land use regulation, or approved as exception area development. Agricultural uses in the area have also not substantially changed

since the area was first developed.[5] The county has not carried its burden to persuade that parcel size and ownership patterns commit the subject property to nonresource use. ORS 197.350(2); ORS 197.732(6)(b).

Petitioner's third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error challenges the county's conclusion that the approved Goal 3 exception, comprehensive plan amendment, zone change, and partition will not commit adjacent agricultural land to nonresource use. OAR 660-004-0018(2)(b)(B). We sustain petitioner's third assignment of error challenging the Goal 3 exception and as explained immediately below we reverse the county's decision. We therefore need not and do not reach or resolve petitioner's fourth assignment of error.

DISPOSITION

Petitioner requests that we reverse the county's Goal 3 exception approval "because [i]ntervenor has not and cannot demonstrate that the subject parcel is

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[5] Respondents respond that there has been a recent change on an adjacent parcel, in that a blueberry operation has, since *Pfennig I*, changed ownership and that the county "found explicitly" that there is no viable blueberry operation on adjacent property. Joint Respondents' Brief 25 (quoting Remand Record 33). Even accepting for the sake of this analysis that the adjacent property is not currently producing blueberries or other farm products, that adjacent property is still in farm deferral status and respondents do not point us to any evidence in the record that shows that the adjacent property is no longer capable of supporting farm uses.

irrevocably committed to uses not allowed by Goal 3." Petition for Review 3. We will reverse a land use decision if "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We understand petitioner to contend that the county's decision is "prohibited as a matter of law," because it is impossible for intervenor to show that the property is irrevocably committed to non-farm uses under the circumstances reflected in the record.

For the reasons explained above, the county has adequately identified the adjacent uses and the subject property's relationship with those uses and the surrounding area. However, the county has failed to establish that the subject property is irrevocably committed to non-farm uses. Reversal is appropriate where, after remand, the record and decision fail to support a conclusion that the property is irrevocably committed to nonresource use. *Dooley v. Wasco County*, LUBA No 2022-045 (Oct 31, 2022). The record does not support the county's conclusion that the subject property is irrevocably committed, and we find that no additional findings or evidentiary proceedings on remand are likely to support such a conclusion because, under the circumstances described in the application, and for the reasons described in this opinion, it is impossible for intervenor to show that the subject property is irrevocably committed to non-farm use.

The county's decision is reversed.