BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SAM BROWN, PETER CARLSON and NORTH MADRAS HEIGHTS NEIGHBORHOOD ASSOCIATION, Petitioners, vs. JEFFERSON COUNTY, Respondent, and C. GORDON SHOWN and CLIFFORD C. SWEATTE, Intervenors-Respondent.	LUBA No. 96-091
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. JEFFERSON COUNTY, Respondent, and C. GORDON SHOWN and CLIFFORD C. SWEATTE, Intervenors-Respondent.	LUBA No. 96-095

FINAL OPINION AND ORDER

Appeal from Jefferson County.

Bill Kloos, Eugene, filed a petition for review and

argued on behalf of petitioners Sam Brown, Peter Carlson and North Madras Heights Neighborhood Association. With him on the brief was Johnson, Kloos & Sherton.

Celeste J. Doyle, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of DLCD. With her on the brief was Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

No appearance by respondent.

John A. Rankin, Tualatin, filed the response brief and argued on behalf of intervenors-respondent.

LIVINGSTON, Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 08/18/97

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal a decision of the board of county commissioners (county board) that changes the comprehensive plan designation of 70.4 acres from Exclusive Farm Use (EFU) - Intensive Agriculture to Rural Residential and rezones the land from Exclusive Farm Use A-1 to Rural Residential (RR).

MOTION TO INTERVENE

C. Gordon Shown and Clifford C. Sweatte (intervenors), the applicants below, move to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property consists of two lots (49.46 acres and 20.94 acres) located about two miles northeast of Madras. A lateral canal of the North Unit Irrigation District (NUID) forms the curved northern boundary and continues south near the eastern boundary of the property. The land to the east of the property is zoned EFU. There is a 3.7-acre parcel between the property and the NUID canal to the east, which is used for a residence and a feedlot; beyond that, to the east of the canal, is an irrigated 120-acre parcel used for commercial agriculture.

The land to the north, which is separated from the subject property by the NUID canal, is zoned Existing Rural Development (ERD). It is used for small hobby farms and

other residential and farm uses.

The land to the northwest and west is a 98-acre parcel divided by the NUID canal. About 50 acres of the 98 acres are located to the north of the canal and are in irrigated commercial agriculture. The remaining acreage to the south of the canal is not irrigated and is unused.

The land to the south and southwest is zoned RR. The land to the south adjoining the western half of the southern boundary has been developed with residences on small lots. The owners of these residences hold in common the land to the south adjoining the eastern half of the southern boundary. That land is zoned EFU.

In summary, more than half of the boundary of the subject property adjoins EFU-zoned land and most of the remaining boundary adjoins ERD-zoned land. Less than a quarter of the boundary adjoins land presently zoned RR.

The soil type on approximately 61 percent of the site is 24B (Caphealy-Reuter sandy loam). According to the findings, soil type 24B is always mapped as a complex. Record 37. Caphealy is Class IV soil and Reuter is Class VIe soil. Id. Thus regardless of whether Caphealy or Reuter predominates, the property is agricultural land under the Goal 3 definition.

The property originally was intended by intervenor Shown to be the third and fourth phases of the Bitterbrush Ridge subdivision and was included, together with the first

and second phases, in the county's "M-7" exception area, which was acknowledged by the Land Conservation and Development Commission (LCDC) in July, 1982. The acknowledgment of the M-7 and other exception areas, based on a conclusion that they were both needed and committed, was appealed to the Court of Appeals, which remanded on the basis that not all of the committed exceptions were justified. 1000 Friends of Oregon v. LCDC (Jefferson County), 69 Or App 717, 688 P2d 103 (1984) (1000 Friends/ (Jefferson County)). The court explained:

> "Areas M-2, M-5, M-6, M-7, M-9, and M-13 together run along the northeastern boundary of the Madras UGB and part way down its eastern side. They have areas of residential development and also, as ground and aerial photographs make abundantly clear, a large irrigated agricultural area at their heart, directly connected with agricultural areas within the UGB. Other portions of the areas are in dry land farming or are unused. The residential areas, including partially developed platted subdivisions, are probably either built upon or committed, but we cannot say from the information in the record that the agricultural area or the undeveloped areas are committed.
>
> "The northern portions of M-2 and M-5 are undeveloped and in large parcels which the county has not shown to be committed. According to 1000 Friends, they include several 40-acre parcels. These exceptions areas also include part of the irrigated agricultural section we described above. M-6 consists almost entirely of irrigated agriculture. M-7 is at the edge of these areas and, except for a few houses at the northern end, is entirely undeveloped. The county's only justification for an exception for the undeveloped portion is that it will provide for projected population growth." Id. at 729.

On remand the county removed the subject property from the M-7 exception area, rezoning it for exclusive farm use, but successfully established an exception with respect to the first and second phases of the Bitterbrush Ridge subdivision, based on the degree to which physical development had taken place within and adjacent to those phases. Exceptions were ultimately taken on land to the southwest (M-5), south (M-7) and north (M-8) of the subject property.[1] The county's comprehensive plan and implementing regulations were acknowledged in 1985. The plan exception findings state with respect to the M-5, M-7 and M-8 exception areas that development standards and setback requirements contained in the zoning ordinance (and, in the case of the M-5 and M-7 exception areas, the subdivision ordinance) should ensure that resource/non-resource conflicts remain limited or do not substantially increase.[2]

Describing what has occurred since 1985, the challenged decision states:

> "In the intervening years, Phase I and II, located to the south of the subject property and consisting of 16 lots, have been developed and sold. Mr. Shown expected that a subdivision final plat approval could be obtained for the subject property when the availability of rural residential lands reached a low enough level that

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[1]The location of the exceptions and adjacent uses relative to the subject property is shown on a map at Record 495.

[2]The plan exception findings are attached as an appendix to petitioner Brown's petition for review. See Appendix 48, 53 and 60.

additional RR lands were justified.

> "* * * The subject property consisted of two phases of a tentatively approved, unrecorded and undeveloped subdivision, consisting of 37 lots. The property owner has submitted a proposed Revised Tentative Plat with this application for Plan Amendment which consists of 30 lots, sized between 2.0 and 2.6 acres each." Record 35.

Approximately 90 property corners have been marked in connection with the subdivision proposed in 1984. The lots have been approved for septic systems. There are two rough, unimproved roads on the property.

The planning commission, in a tie vote, effectively recommended denial of the proposed plan and zoning map amendments. The county board held a de novo hearing on the application and voted to approve, adopting a final order and findings in April, 1996.

This appeal followed.

FIRST ASSIGNMENT OF ERROR (BROWN)

Petitioners in LUBA No. 96-091 (hereinafter Brown) contend the challenged decision erroneously concludes the subject property is irrevocably committed to uses not allowed by Goals 3 and 4.

The applicable law is found in Goal 2, Part II(b), ORS 197.732(1)(b) and OAR 660-04-028, which state the same test:

> "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."

OAR 660-04-028 further describes the approach that must be taken in determining if land is irrevocably committed.[3]

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[3]OAR 660-04-028 provides, in relevant part:

"* * * * *

"(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 660-04-028(6).

"(3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(1)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule. Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource-protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible'. For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:

"(a) Farm use as defined in ORS 215.203;

"(b) Propagation or harvesting of a forest product as specified in OAR 660-33-120; and

"(c) Forest operations or forest practices specified in OAR 660-06-025(2)(A).

"* * * * *

"(6) Findings of fact for a committed exception shall address the following factors:

"(a) Existing adjacent uses;

"(b) Existing public facilities and services (water and sewer lines, etc.);

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

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

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

ORS 197.732(6) provides that upon review of a decision approving or denying a goal exception,

> "(a) [LUBA] * * * shall be bound by any finding of fact for which there is substantial evidence in the record of the local government proceedings resulting in approval or denial of the exception;
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> "(b) [LUBA] upon petition * * * shall determine whether the local government's findings and reasons demonstrate that the standards of subsection (1) of this section have or have not been met; and
>
> "(c) [LUBA] * * * shall adopt a clear statement of reasons which sets forth the basis for the determination that the standards of [ORS 197.732(1)] have or have not been met."

In 1000 Friends of Oregon v. Columbia County, 27 Or

> separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations.
>
> "(d) Neighborhood and regional characteristics;
>
> "(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;
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> "(f) Physical development according to OAR 660-04-025; and
>
> "(g) Other relevant factors.
>
> "* * * * *"

LUBA 474, 476 (1994), we explained:

> "Our usual approach to reviewing local government decisions adopting irrevocably committed exceptions is first to resolve any contentions that the findings fail to address issues relevant under OAR 660-04-028 or address issues not properly considered under OAR 660-04-028. We next consider any arguments that particular findings are not supported by substantial evidence in the record. Finally, we determine whether the findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standard of ORS 197.732(1)(b) that 'uses allowed by the goal [are] impracticable.'"

We concluded:

> "[E]ven where a local government's findings address all factors made relevant under OAR 660-04-028, and are supported by substantial evidence in the record, it is still this Board's responsibility to determine whether the findings demonstrate compliance with the above emphasized standard of ORS 197.732(1)(b) [that existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable.]"[4] Id.

Findings 4-54 of the challenged decision address the Goal 2 exceptions criteria in minute detail. Record 32-51. Brown attacks the findings on numerous grounds organized under three headings: (1) the decision does not demonstrate that the subject property is irrevocably committed to uses not allowed by Goals 3 and 4; (2) the decision does not demonstrate that uses allowed by Goal 3 are not practicable

[4]However, as we stated in Laurence v. Douglas County, ___ Or LUBA ___ (LUBA No. 96-180, June 20, 1997), slip op 8-9, our review responsibility is limited to issues raised and arguments made.

on the subject property; and (3) the decision does not limit uses in the exception area as required by OAR 660-04-018(2) or, in the alternative, does not make adequate findings, supported by substantial evidence, that the uses in the proposed exception area will comply with OAR 660-04-018(2).[5]

A. Irrevocable Commitment

The county's conclusion that the property is irrevocably committed to non-resource use is stated in findings 49-54, which determine that farm use, as defined in ORS 215.203(2), is not "economically feasible" on the

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[5]OAR 660-04-018(2) provides:

> "'Physically Developed' and 'Irrevocably Committed' Exceptions to goals other than Goals 11 and 14. Plan and zone designations shall limit uses to:
>
> "(a) Uses which are the same as the existing types of land use on the exception site; or
>
> "(b) Rural uses which meet the following requirements:
>
> "(A) The rural uses are consistent with all other applicable Goal requirements; and
>
> "(B) The rural uses will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-04-028; and
>
> "(C) The rural uses are compatible with adjacent or nearby resource uses.
>
> "(c) Changes to plan or zone designations are allowed consistently with subsection (a) or (b) of this section, or where the uses or zones are identified and authorized by specific related policies contained in the acknowledged plan.
>
> "(d) Uses not meeting the above requirements may be approved only under provisions for a reasons exception as outlined in OAR 660-04-020 through 660-04-022."

subject property and that the "propagation or harvesting of forest product" also is not feasible. Record 50-51. Relying in part on our opinion in Sandgren v. Clackamas County, 29 Or LUBA 454, 458 (1995), Brown contends that in determining that uses allowed by the applicable goals are impracticable, the county inappropriately focused its findings on the limitations of the subject property itself rather than on the effects of existing adjacent uses and other relevant factors on the property.

Intervenors respond that in DLCD v. Curry County, 28 Or LUBA 205, 210 (1994), aff'd 132 Or App 393 (1995), this Board recognized that consideration of the characteristics of the subject property as one of the "other relevant factors" is appropriate. Intervenors maintain that the "plain language of the law," by which we understand intervenors to mean OAR 660-04-028, "does not require an emphasis on the impact of 'existing adjacent uses' to the exclusion of 'other relevant factors.'" Intervenors' Brief 10.

Committed exceptions "must be based on facts illustrating how past development has cast a mold for future uses." 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 724 P2d 268 (1986) (quoting Halvorson v. Lincoln Co., 14 Or LUBA 26, 31 (1985)). To take a committed exception "require[s] an analysis of how existing development on some parcels affects practicable uses of

others." Id. OAR 660-04-028(2) states that whether land is irrevocably committed "depends on the relationship between the exception area and the land adjacent to it." (Emphasis added.)

We rejected the same argument intervenors make here in DLCD v. Curry County (Pigeon Point), ___ Or LUBA ___ (LUBA No. 96-210, June 26, 1997), slip op 8-10, where we explained:

> "The county has evaluated the suitability of numerous uses allowed under Goals 3 and 4 based upon the physical characteristics of the subject property. Based on its conclusions regarding those characteristics, the county has determined that the subject property is not suitable for any Goal 3 or Goal 4 resource uses. Such an evaluation might be appropriate if the inquiry were whether the subject property is properly designated for resource uses, but that is not the inquiry here. The purpose of an irrevocably committed exception is to allow acknowledged resource property (i.e., property that has been acknowledged to be physically appropriate for resource uses) to be used for nonresource purposes when uses on adjacent property and 'other relevant factors' render the property irrevocably committed to nonresource uses. The county's conclusion that the subject property is itself not suitable for resource use does not address the appropriate inquiry.
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> "* * * * *
>
> "* * * [T]he purported unsuitability of the subject property for resource use is not an 'other relevant factor' for purposes of OAR 660-04-028(6)(g). The subject property has been acknowledged to be Goal 3 and 4 resource property. Findings that the property should not be considered resource property, i.e., that the acknowledgment was wrong, cannot be an 'other

> relevant factor' to support an irrevocably committed exception. 'Other relevant factors,' the [catchall] phrase at the end of a lengthy enumeration of specific factors in OAR 660-04-028(6), must necessarily relate to why property otherwise suitable for resource uses is, for some intervening reason, rendered impracticable for any of those resource uses."

In 1000 Friends/(Jefferson County), the Court of Appeals rejected the argument that because land within proposed exception areas, one of which included the subject property, was less productive and therefore unused, a committed exception was justified. The court explained:

> "That land is unused is not a basis for finding it committed to non-resource uses. The issue is not whether making the land available for non-resource use would interfere with the existing resource uses but whether the land is committed to non-resource uses. Evidence that it is not used for any purpose is, if anything, evidence that it is not committed." Id. at 726 n8 (emphasis in original).

As Brown points out, while findings 17-22 describe the current zoning, parcelization and agricultural capability of the surrounding area; access; available public facilities and services; and present adjacent land uses, the findings do not explain what impact, if any, these characteristics have on the practicability of uses on the subject property. Finding 25, which is the only finding that directly addresses the relationship between adjacent lands and the subject property, focuses on the similarities between them.[6]

[6]Finding 25 states in material part:

Finding 24 focuses in part on possible conflicts between agricultural use on the subject property and adjacent residential uses and emphasizes the role that the NUID canal and the availability of irrigation play in separating the property and adjacent exception areas from other adjacent areas which are devoted to commercial agriculture.

Brown's petition for review, pages 13-17, addresses at great length each subpart of findings 24 and 25 concerning existing adjacent uses. For the reasons stated by Brown, the findings do not demonstrate that the subject property is irrevocably committed to non-resource uses.

As Brown observes, apart from some development in accord with the zoning and parcelization that existed in 1985, there have been no changes relevant to the status of the subject property since the decision in 1000 Friends/(Jefferson County). The exception findings adopted at that time concluded that existing development standards ensured that resource/non-resource conflicts would not increase. These findings, which were required by OAR 660-04-018(2)(b)(B) to justify the 1985 exceptions, preclude

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"The subject property shares with this [adjacent rural residential] land, the same general topography in relationship to the NUID lateral as well as the same general soil types, vegetation, lack of irrigation water, agricultural capability, public facilities and services, and access to U.S. Highway 97. These factors inextricably link the subject property to the surrounding RR lands to the west and south, and in contrast by that very linkage, distance [it] from the commercial agricultural lands to the east and northwest." Record 50.

finding now that resource/non-resource conflicts have increased to the point that a committed exception is justified. That is because, as OAR 660-04-028(6)(c)(A) makes clear, conflicts with rural residential development in exception areas created pursuant to the applicable goals cannot be used to justify a committed exception on resource lands. DLCD v. Yamhill County, 31 Or LUBA 488, 500 (1996).

The fact that there are physical similarities between the exception areas acknowledged in 1985 and the subject property does not, of itself, mean the property should become an exception area. In its opinion, the Court of Appeals expressly recognized the similarities between the characteristics of the exception areas eventually adopted and other proposed exception areas, including the subject property, but found those similarities did not justify taking exceptions for the other proposed exception areas. 69 Or App at 728.

Brown addresses at length each of the "other relevant factors" stated in OAR 660-04-028(6). Petition for Review 17-21. We note our agreement with Brown's analysis. We particularly agree that findings 34-39, which address neighborhood and regional characteristics under OAR 660-04-028(6)(d) by concluding that "there will continue to be an increasing demand for additional rural residential homesites in the foreseeable future," Record 53, are irrelevant to a conclusion that a committed exception is justified; and that

findings 43 and 44, which address OAR 660-04-028(6)(f) and which incorporate by reference findings 7-16, contain nothing to suggest the subject property itself is physically developed for other uses.

B. Impracticability

1. Applicable Standard

On December 23, 1996, after the petitions for review were filed but before intervenors' brief was filed, OAR 660-04-028(3) was amended pursuant to ORS 197.732(3)(b) to include the following language:

> "For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:
>
> "(a) Farm use as defined in ORS 215.203;
>
> "(b) Propagation or harvesting of a forest product as specified in OAR 660-33-120; and
>
> "(c) Forest operations or forest practices specified in OAR 660-06-025(2)(A)."

As amended, OAR 660-04-028(3) clarifies and reduces somewhat the burden a local government must satisfy to demonstrate that an irrevocably committed exception is justified. Cf. DLCD v. Yamhill County, 31 Or LUBA at 499 (1996) (holding under the old rule that to approve an irrevocably committed exception, a county must find that all uses allowed by the goals are impracticable).

We may review a local government decision under rules adopted after the date of a challenged decision if a remand would be based on a failure to comply with rules since

superseded. Id. See also Sommer v. Douglas County, 70 Or App 465, 468, 689 P2d 1000 (1984) (applying newly adopted standards prior to remand of acknowledgment order to LCDC). Because the new version of OAR 660-04-028(3) must be applied on remand, we apply it in our review.

2. Discussion

Findings 49-54 of the challenged decision state the bases for the county's conclusion that the subject property is impracticable for Goal 3 uses:

> "49. Goal 3: Agricultural Lands, states that 'Counties may authorize farm uses and those non-farm uses defined by commission rule that will not have significant adverse effects on accepted farm or [forest] practices.'
>
> "50. Section 301 of the [Jefferson County Zoning Ordinance] JCZO allows the following uses outright in the A-1 zone:
>
> "1. Farm uses as defined in ORS 215.203(2).
>
> "2. The propagation or harvesting of a forest product, etc.
>
> "3. A utility facility necessary for public services.
>
> "4. Dwellings and other buildings customarily provided in conjunction with farm use as referred to in Paragraph (a) of subsection (2) of ORS 215.203.
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> "51. ORS 215.203 defines farm use as 'the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale or produce of livestock * * *.' The above findings (No. 7 through 25), relative to the characteristics of the proposed exception area and the

surrounding area, demonstrate that such farm uses are not economically feasible on the subject property.

"52. Furthermore, given the above findings, the propagation or harvesting of forest product is not feasible. Also, public utility facilities are adequate to serve the subject property and the adjacent area. Therefore, the location of a utility facility on the subject property is not likely in the near future.

"53. The County ordinances only allow dwellings in conjunction with a farm use and [do] not permit non-farm dwellings in the EFU zone. Because the subject property and its existing use fails to meet the definition of farm use contained in ORS 215.203(2)(a), and because the JCZO requires the applicant for a farm dwelling to meet a minimum $10,000 per year income requirement, all the uses applicable to Goal 3 and allowed by the County are either impracticable or impossible.

"54. The Board finds that the criteria for taking of an exception to Goal 3, Agriculture, using OAR 660-04-028 [are] satisfied by the above findings. The surrounding rural residential lands are irrevocably committed to nonresource uses. Due to the characteristics of the proposed exception area, the surrounding adjacent area, and the relationship between the two, and because of existing adjacent uses and other relevant factors, all described in detail above, uses allowed by Goal 3 and by Section 301 of the JCZO are impracticable or impossible on the subject property. Therefore, the subject property is irrevocably committed to nonresource use." Record 55-56.

As Brown points out, the findings addressing farm use are not consistent with the definition of "farm use" in ORS 215.203(2). In 1000 Friends of Oregon v. Yamhill County, 27

Or LUBA at 518, we stated:

> "[W]e reject the county's suggestion that it may establish the level of profitability necessary to qualify as a 'farm use,' as that term is defined by ORS 215.203, at [the] same level that would qualify a farm use as a commercial agricultural enterprise. The goals protect and allow farm and forest uses other than commercial agricultural and forest enterprises."

The appropriate standard is whether the subject property is "capable, now or in the future, of being 'currently employed' for agricultural production 'for the purpose of obtaining a profit in money.'" In 1000 Friends of Oregon v. Benton County, 32 Or App 413, 426, 573 P2d 651 (1978), the court discussed the origin of ORS 215.203 as a tax statute. The court then explained:

> "The legislative history of ORS 215.203 indicates that the use of the term "profit" in that statute does not mean profit in the ordinary sense, but rather refers to gross income * * * [I]f the lands meet the definition of "agricultural lands" as provided in Goal 3,[7] and are capable of current employment for agricultural production for the purpose of earning money receipts, Goal 3 is applicable and the county is required to address the considerations set forth in the operative provisions of that goal." Id. at 429. See also Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1997); 1000 Friends of Oregon v. Douglas Cty., 4 Or LUBA 24, 31-32 (1981).

Finding 51 states that findings 7-25 "demonstrate that * * * farm uses are not economically feasible on the subject

[7]As noted above, the subject property does meet the Goal 3 definition of "agricultural lands."

property." Finding 11(e) states the subject property "is not suitable for commercial agricultural production." Record 38. Finding 13(e) states "the possibility of other agricultural uses for the site * * * have not been well established as viable commercial activities." Record 39. Finding 13(g) states the

> "size and site characteristics of the subject property preclude its use for agricultural production and the property is unsuitable for any commercial agricultural production. * * * [T]he property is incapable of producing a commercial agricultural product with the expectation of a reasonable economic return." Record 40.

These findings, together with above-quoted findings 51 and 53, are unclear as to what standard the county employed in evaluating the subject property for a committed exception, but they do suggest the county employed the "commercial agricultural enterprise" standard we rejected in 1000 Friends of Oregon v. Yamhill County.

Brown also challenges finding 13(f), which states:

> "The rural residential development, as well as the presence of the NUID lateral, lack of irrigation water rights and the partially intervening small 3.70 acre parcel with its prescriptive easement make the option of combining the property with other parcels to the east or northwest for agricultural uses very difficult and impracticable." Record 39-40.

As Brown points out, this finding does not address the possibility of combining the subject property with the 48 acres of similar land immediately adjacent to the west, which itself is part of a larger 98-acre tract that includes

50 acres of irrigated land to the north of the NUID. It does not explain why the subject property could not be placed in farm use in combination with the 3.7-acre EFU-zoned parcel to the east or why the 3.7-acre parcel makes "combining the property with other parcels to the east or northwest for agricultural uses very difficult and impracticable." Finally, it does not explain why it finds the NUID a barrier to farming the subject property in combination with land to the east.

C. Failure to Limit Uses

Brown contends the challenged decision does not adequately limit future uses in the proposed exception area to avoid committing adjacent or nearby resource land to nonresource use. See OAR 660-04-018(2)(b)(B). See also Johnson v. Lane County, 31 Or LUBA 454, 470 (1996) (requiring explanation or analysis showing compliance with OAR 660-04-018(2)(b)(B)). Intervenors respond that under OAR 660-04-018(1), the standards in OAR 660-04-018(2) do not apply, because the challenged decision does not allow changes in the types of existing uses.

OAR 660-04-018(1) provides, in material part:

> "Physically developed and irrevocably committed exceptions under OAR 660-04-025 and 660-04-028 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions which would allow changes in existing types of uses requires application of standards outlined in this rule." (Emphasis added.)

The rule is somewhat unclear, because it appears to apply equally to physically developed and irrevocably committed exceptions; and the latter are based primarily on characteristics, including development, of adjacent property, rather than of the exception area itself. Nevertheless, we understand the emphasized language to say that the type of development proposed for the exception area must already exist there, at least to some degree, at the time an exception is taken. Because there is no rural residential development presently on the subject property, the standards in OAR 660-04-018(2) apply.

Intervenors also argue that the statement in OAR 660-04-028(3) that "[c]ompliance with this rule shall constitute compliance with the requirements of Goal 2, Part II," means that no other rule, such as OAR 660-04-018, applies in determining compliance. We disagree with intervenors, based on the unequivocal language in OAR 660-04-018 stating that it does apply to irrevocably committed exceptions.

Finding 24(g), which addresses OAR 660-04-018, states:

> "Given the substantial subdivision and rural residential development to the south, west and north, agricultural use of the subject property could create conflicts related to: increased dust, manure odor, flies, livestock escape, property damage, and possible interference with vehicular traffic on local roads. These conflicts are only one of the factors which show the impracticability of agricultural uses. Such conflicts alone would not justify a finding of irrevocable commitment because the establishment of lasting boundaries between agricultural and

> residential uses would be impossible. However, in this case, the Board finds that the NUID lateral forms a natural physical and topographic barrier between the subject property, and the more productive farm land to the east and northwest. Allowing the subject property to be developed as rural residential would eliminate the potential for conflicts between agricultural uses (assuming such were possible) on the subject property and the existing surrounding residential uses. Furthermore, the Board finds that approving this exception and zone change would not create an ever increasing expansion of rural residential uses into resource lands because of the physical barriers discussed above." Record 49.

Brown argues that because, in findings 30-33, the county relies on the smaller lot sizes and greater development density on adjacent rural residential uses to support its conclusion that the subject property is committed, notwithstanding the separation effected by the NUID, it is inconsistent for the county also to conclude that because of the NUID, smaller lot sizes and greater development density on the subject property will not tend to commit adjacent resource lands. We agree. We also agree the findings cannot ignore the impacts of greater density on the 3.5-acre EFU parcel to the east, which is on the same side of the NUID as the subject property.

The findings do not demonstrate that the subject property is irrevocably committed to uses not allowed by Goals 3 and 4, that uses allowed by Goal 3 are not practicable on the subject property, or that the development of the proposed exception area at the density permitted by

the RR zone will not act to commit adjacent or nearby resource land to nonresource use. Because the findings are inadequate, we do not address Brown's contentions that the findings are not supported by substantial evidence.

Brown's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (BROWN)

Brown contends the county violated applicable statutes, in particular ORS 215.050(1), and administrative rules by adopting the challenged exception and plan change by order rather than by ordinance.[8] We do not see that ORS 215.050(1) specifically requires plan amendments be adopted by ordinance, and Brown does not identify any administrative rules stating this requirement. Brown does not explain how "ordinance procedures" differ from "order procedures." The county's adoption of the challenged exception and plan change by order rather than by ordinance is not a basis for reversal or remand. Baker v. City of Milwaukie, 271 Or 500, 511, 533 P2d 772 (1985); Boom v. Columbia County, 31 Or LUBA 318, 323 (1996); City of Oregon City v. Clackamas County, 17 Or LUBA 476, 487, aff'd 96 Or App 651, rev den 308 Or 315 (1989).

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[8]OAR 215.050(1) provides:

> "Except as provided in ORS 527.722, the county governing body shall adopt and may from time to time revise a comprehensive plan and zoning, subdivision and other ordinances applicable to all of the land in the county. The plan and related ordinances may be adopted and revised part by part or by geographic area."

Brown's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (BROWN)

The Jefferson County Comprehensive Plan (JCCP) states the following requirement in connection with quasi-judicial plan map amendments:

> "6. In order to submit a favorable recommendation for the proposed change [i.e., amendment to the plan map] to the County Court, the Planning Commission shall establish the compelling reasons and make the following findings of fact for the proposed change:
>
> "A. The proposed change will be in conformance with the statewide planning goals.
>
> "B. There is a demonstrated public need for the proposed public change." JCCP at 191.

The challenged decision does not expressly interpret the "demonstrated public need" requirement, but finds that because of market demand, the available supply of rural residential property in the area has been consumed, creating a need for more rural residential property that justifies an exception. Record 53, 66. Brown contends the challenged decision misapplies the "demonstrated public need" requirement by treating it as the equivalent of market demand.

To the extent Brown argues that the county's findings do not justify an exception of any kind based on "demonstrated public need," Brown is correct for at least three reasons.

First, it is unclear how the county's "demonstrated public need" standard relates to the exceptions process. The standard applies to all "quasi-judicial revisions," not just to exceptions.[9]

Second, the challenged decision grants a committed exception, not a reasons (needs) exception. OAR 660-04-028, which states the bases for committed exceptions, does not mention need.

Third, even if the county had applied the standard to justify a reasons exception, the market demand for rural residential development does not constitute a public need that justifies the designation of such lands for non-resource use.[10] Still v. Board of County Comm'rs, 42 Or App 115, 122, 600 P2d 433 (1979); Bridges v. City of Salem, 19 Or LUBA 373, 380 (1990).

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[9]The standard may have been included in the JCCP in response to Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973), where the Oregon Supreme Court held that someone seeking a zone change must show that there is a "public need for the kind of change in question * * *." The Fasano "public need" requirement now applies only when local governments include a requirement for such a showing in their comprehensive plan or land use regulations. Neuberger v. City of Portland, 288 Or 155, 170, 603 P2d 771 (1979), rehearing den 288 Or 585 (1980); Friends of Cedar Mill v. Washington County, 28 Or LUBA 477, 485 (1995).

[10]OAR 660-04-022 states the criteria for a reasons exception and includes, at OAR 660-04-022(1)(a), a requirement for "a demonstrated need for the proposed use or activity," based on reasons stated in 660-04-022(1)(b) and (c). OAR 660-04-022(2), which addresses reasons exceptions for rural residential development, expressly states that the reasons justifying an exception for rural residential development cannot be based on market demand for housing, except as provided in the rule. If the challenged decision granted a reasons exception on the basis of public need as shown by a market demand for housing, it would violate OAR 660-04-022(2).

Brown's third assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR (DLCD)
FOURTH ASSIGNMENT OF ERROR (BROWN)[11]

A. Effect of Periodic Review

The county is presently participating in periodic review pursuant to ORS 197.628 to 197.650. One periodic review task (Task 6) is to address the Goal 14 urban/rural development issue raised in 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 724 P2d 268 (1986) (Curry County).[12] DLCD contends that because the question of

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[11]Brown adopts DLCD's arguments with respect to Brown's remaining assignments of error.

[12]The task is set forth in LCDC Required Amendments Remand Order 93-RA-909, December 23, 1993 (Order 93-RA-909), which is attached as Appendix B to DLCD's petition for review. Order 93-RA-909 specifically requires the county to:

> "1. Provide the following information for each acknowledged exception area:
>
> "a. The location and amount of land;
>
> "b. The applicable zoning;
>
> "c. Proximity to UGB;
>
> "d. Available public and private facilities and services;
>
> "e. The capacities of existing facilities;
>
> "f. Development constraints (e.g., groundwater limited);
>
> "g. Existing land uses (dwellings, retail uses, warehouses, resorts, etc.);
>
> "h. The number and size of vacant lots or parcels; and

whether the two-acre minimum lot size is appropriate for

"i. The amount of buildable land on parcels or lots greater than:

"- 5-acres in the RR * * * zones; * * *

"2. Either:

"a. Demonstrate that the exception area meets the definition of 'rural lands' in the Statewide Goals and will remain rural under the existing zoning consistent with the Curry County decision; or

"b. Show via a Goal 14 exception that the area (or part of the area) is committed to urban uses and that urban zoning is justified; or

"c. Take a Goal 14 'reasons' exception where an area is currently committed to a rural level of development but needs to be zoned to accommodate higher intensity (urban) uses.

"3. Revise policies and ordinances, as necessary, to prohibit new urban services (such as urban sewer or water systems) in rural areas except where an exception to Goals 11 and 14 has [been] justified; and

"4. Where appropriate, develop, revise and apply zones to lands identified under the appropriate category under Task 2 above. Zones applied to 'rural lands' must: (a) retain these areas as sparse settlements; (b) contain minimum land division standards which assure that the ultimate density allowed will not require or demand urban-type utility and facility services; and (c) limit the amount and type of development to uses which do not generate the demand for urban-type commercial uses and other support services beyond the demand appropriately associated with farm, forest and rural residential areas. To satisfy this requirement the county must:

"* * * * *

"b. Justify the following minimum lot sizes as appropriate to maintain rural levels of development * * * :

"C.1 Single family dwelling - 2 acres.

"* * * * *"

rural lands is one the county must address in periodic review, LCDC has exclusive jurisdiction over the issue pursuant to ORS 197.644. DLCD maintains that the county may not adopt, as a post-acknowledgment plan amendment, findings and conclusions that a two-acre minimum lot size is "rural" in all areas of the county. DLCD asks us to hold that because findings 23-27 and 86-99 address a periodic review work task, they "may not be acknowledged or deemed acknowledged by any action of [LUBA], because [LUBA] may not review those findings for Goal compliance." DLCD Petition for Review 6. DLCD also asks us to hold that findings 23-27 and 86-99 must be submitted to DLCD and LCDC for review pursuant to ORS 197.628 to 197.650.

Intervenors respond that while the challenged decision does rezone the subject property for rural residential use, it neither authorizes a two-acre minimum lot size nor finds that a two-acre residential density is rural throughout the county. Intervenors argue further that because Task 6 specifies that it applies only to acknowledged exception areas and because the county's decision applies to an unacknowledged area, the decision to amend the plan map and rezone the property is not subject to the exclusive jurisdiction of LCDC.

The challenged decision rezones the property to RR. Under JCZO 304 C.1, the authorized minimum lot size on RR land is two acres. We do not agree with intervenors that

because an actual decision as to lot sizes will not be made until a subdivision plat is filed and approved, the challenged decision does not authorize 2-acre lot sizes for the subject property. The language of the decision itself suggests otherwise. After noting that several opponents were willing to accept a 5-acre lot size, but not a 2-acre lot size, the decision states that

> "[a]fter approving the exception, the County has limited ability to establish an appropriate zone for the property. The ERD zone is specifically applied to existing residential development of small acreage lots that have already established residential and hobby farm and limited agricultural uses. The only other appropriate zone in the County is the rural residential zone." Record 63.

We understand that subdivision approval will depend upon compliance with the JCZO. Since the JCZO permits 2-acre lot sizes in the RR zone, there will be no opportunity at the time of subdivision approval to object to the permitted lot size on the ground that it does not comply with Goal 14.[13]

Intervenors' contention that the challenged decision does not find that a two-acre residential density is rural throughout the county is contradicted by finding 95, which states that the county board "finds the minimum 2-acre

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[13]If the JCZO were amended prior to an application for subdivision approval, the amended standards would apply. However, it is not certain that the JCZO will be amended prior to an application for subdivision approval.

parcel size of the rural residential zone is not urban" for several reasons, including that the county "has a long established policy of allowing rural residential developments at a 2-acre minimum lot size well established in the JCCP and JCZO." Record 64.

Underlying intervenors' contention that Task 6 does not apply to unacknowledged exception areas is the premise that even when the county is undergoing periodic review, a process over which LCDC has exclusive jurisdiction, the county must be free to adopt post-acknowledgment amendments under ORS 197.610 to 197.625. We agree with that premise. Except as explained below, the existing, acknowledged versions of the county's plan and zoning ordinance continue to apply until they are amended as a result of the acknowledgment of a final decision during periodic review. See OAR 660-25-020(2) and OAR 660-25-160.[14] Because periodic review can take years, the unacceptable effect of prohibiting post-acknowledgment amendments during periodic review would be to postpone development indefinitely. We conclude the county may amend its plan and zoning map by

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[14]OAR 660-25-020(2) defines "final decision" as:

> "[T]he completion by the local government of a work program task, including the adoption of supporting findings and any amendments to the comprehensive plan or land use regulations. A decision is final when the local government's decision is transmitted to [DLCD] for review."

OAR 660-25-160 explains when a work program task is deemed acknowledged.

redesignating and rezoning property to any existing acknowledged designation or zone, as long as the amendment does not violate any statute, rule or statewide planning goal. We have jurisdiction under ORS 197.610 to 197.625 to review such amendments, as opposed to amendments made as part of a final decision during periodic review. LCDC has exclusive jurisdiction over the latter pursuant to ORS 197.644.[15]

Because we view the process resulting in the challenged decision to be separate from the periodic review process, we do not agree with DLCD that findings 23-27 and 86-99 address a periodic review work task or that these findings must be submitted to DLCD and LCDC for review pursuant to ORS 197.628 to 197.650. Because the findings were made in support of a quasi-judicial decision that is not itself part of periodic review, ORS 197.620 and ORS 197.835 require that we review that decision and its supporting findings for goal compliance.

This subassignment of error is denied.

B. Application of Goal 14

DLCD contends the findings are inadequate to

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[15]We note that the effect of acknowledging the proposed plan and zoning map amendment will be to create an exception area subject to Task 6, if Task 6 is still ongoing. The applicants have yet to file for subdivision approval. If Task 6 is completed (acknowledged) before the final approval of intervenors' application, any subsequent development proposals will be subject to any changes to the plan and zoning ordinance that have been made as a result of periodic review.

demonstrate compliance with Goal 14 and are not supported by substantial evidence. DLCD specifically questions what it characterizes as the county's conclusion that a two-acre residential density is always "rural."[16] DLCD notes that the appellate courts and LUBA have consistently held that lot sizes between the extremes of 10 acres (rural) and one-half acre (urban) must be analyzed on a case-by-case basis, see, e.g., Curry County at 505 (including cases cited in note 35); Kaye/DLCD v. Marion County, 23 Or LUBA 452, 462-64; Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 80, aff'd 89 Or App 40 (1987). DLCD maintains that the county has not performed the necessary analysis. According to DLCD, the size of the area, its proximity to acknowledged UGBs, and the types and levels of services

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[16]The Statewide Planning Goals contain no definition of urban or rural uses. They do contain the following definitions of rural and urban land:

> "**RURAL LAND.** Rural lands are those which are outside the urban growth boundary and are:
>
> "(a) Non-urban agricultural, forest or open space lands or,
>
> "(b) Other lands suitable for sparse settlement, small farms or acreage homesites with no or hardly any public services, and which are not suitable, necessary or intended for urban use."
>
> "**URBAN LAND.** Urban areas are those places which must have an incorporated city. Such areas may include lands adjacent to and outside the incorporated city and may also:
>
> "(a) Have concentrations of persons who generally reside and work in the area.
>
> "(b) Have supporting public facilities and services."

which must be provided to it are all important factors to be considered. Curry County at 305. Goal 14 does not allow uses that could undermine the effectiveness of existing UGBs or become magnets for urban development outside of UGBs. Curry County at 474 n 19, 507. DLCD contends the factors important to Goal 14 compliance are stated in periodic review Task 6.

Intervenors respond that (1) the findings do include a site-specific analysis; and (2) the findings do not conclude that a two-acre parcel size is always rural in the county. We agree with intervenors as to (1) and disagree as to (2).

Findings 7, 9, 12, 14-27, 78 and 86-97 address the considerations stated in Curry County and described above.[17] The findings are site-specific.

However, as DLCD points out, the county's conclusion that residential development on two-acre lots is not an urban use rests in substantial part on findings which say that such development has not been viewed as an urban use in the past, in part because of existing provisions in the JCCP and JCZO. For example, finding 94 states:

> "The [county] Board finds that the proposed plan amendment does not need to show compliance with or take an exception to Goal 14 because the County is not converting rural land outside the Madras UGB to urban uses, for the following reasons:

[17]These considerations are similar to the factors listed in the first step of Task 6.

"a. Allowing single family residences on dryland that has no viable agricultural potential at established RR densities of 2.0 acres and larger in conformance with an acknowledged comprehensive plan does not convert the land to urban uses.

"* * * * *

"c. Recently, the County has approved and secured acknowledgment without appeal for an exception for Madras Estates Subdivision, a rural residential subdivision with approximately 100 lots of predominantly 2 acres in size, without addressing Goal 14.

"* * * * *

"f. Goal 14 is intended to provide an orderly and efficient transition from rural to urban uses, not to protect resource land. In contrast, the County's rural residential lands are intended to provide a buffer between urban uses inside urban growth boundaries and agricultural lands outside, and thereby protect valuable productive resource lands." Record 63-64 (emphasis added.)

Finding 95 states:

"The Board finds the minimum 2-acre parcel size of the rural residential zone is not urban and therefore Goal 14 is not applicable to the subject Plan Amendment for the following reasons:

"* * * * *

"c. The County has a long established policy of allowing rural residential developments at a 2-acre minimum lot size well established in the JCCP and JCZO, and has approved such rural residential developments as the Madras Estates Subdivision * * *.

"* * * * *" Record 64-65.

We concluded above that comprehensive plan and zoning

ordinance provisions that are being reevaluated in periodic review remain in effect until they are amended. However, as a general rule, amendments to a comprehensive plan, including the plan map, must comply with the goals. 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 718 P2d 753 (1986); Ludwick v. Yamhill County, 72 Or App 224, 231, 696 P2d 536, rev den 299 Or 443 (1985). Because the goals apply directly to plan amendments, the county cannot rely on provisions in its comprehensive plan and zoning ordinance to show Goal 14 compliance. To avoid frustrating the correct application of the goals to the proposed plan and zoning map amendments in this case, the findings must demonstrate, without reliance on past practices or on plan and code provisions subject to revision during periodic review, that Goal 14 is satisfied.

This subassignment of error is sustained.

DLCD's first assignment of error and Brown's fourth assignment of error are sustained, in part.

SECOND ASSIGNMENT OF ERROR (DLCD)
FIFTH ASSIGNMENT OF ERROR (BROWN)

A. Introduction

In its second assignment of error, DLCD makes additional arguments in support of its contention that the county has not adequately justified its conclusion that the challenged decision would result in a rural use. DLCD advises that because the county has not adopted an exception to Goal 14, the subject property must be viewed as rural

land for purposes of Goal 11.[18] Thus DLCD argues both that the proposed facilities and services are more consistent with urban uses than rural uses, in violation of Goal 14, and that the county's findings do not demonstrate that the proposed facilities and services are consistent with Goal 11 as it applies to rural uses.

B. Discussion

Both of DLCD's arguments require a determination of whether the proposed facilities and services are consistent with rural use. Under Goal 14, a decision to allow an intensification of use outside an urban growth boundary (UGB) cannot be allowed to undermine the effectiveness of adjacent urban growth boundaries. Curry County at 474 n19 (quoting cases expressing concern about "leapfrogging development" and "residential sprawl"). One way this may occur is through the provision of urban facilities and services to rural areas.[19] Kaye/DLCD at 464; Metropolitan

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[18]Goal 11 (Public Facilities and Services) requires the "orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." As explained in Goal 11, "rural facilities and services" refers to "facilities and services suitable and appropriate solely for the needs of rural lands."

[19]Goal 11 defines "urban facilities and services" to include "key facilities" and police protection; sanitary facilities, storm drainage facilities, planning, zoning and subdivision control; health services; recreation facilities and services; energy and communication services; and community governmental services. The goal definitions state that "key facilities" are:

> "Basic facilities that are primarily planned for by local government but which also may be provided by private enterprise

Serv. Dist. v. Clackamas Cty., 2 Or LUBA 300, 307 (1981).

The proposed development is approximately two miles from the city of Madras UGB. The challenged decision states that the subject property, as well as existing dwellings in the surrounding area "do not receive City services of any kind." Record 47. According to a letter from the city administrator quoted in the findings, the city "'has no overriding interest or concerns' relative to the impact of the proposed rural residential subdivision on the City." Id.

DLCD contends the opinion of the city administrator is not substantial evidence to support the county's conclusion that the proposal will not affect the UGB. DLCD also challenges the statement that the subject property, as well as existing dwellings in the surrounding area, do not receive city services. DLCD advises that evidence at Record 43, 296 and 306 shows the same water system that serves the city will serve the proposed development and that children in the development will attend city public schools. DLCD also argues that the challenged decision does not address transportation and other city services as they impact Goal 14 considerations.

Intervenors direct our attention to findings 16 and 22. Finding 22 states that the same level of public facilities

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and are essential to the support of more intensive development, including public schools, transportation, water supply, sewage and solid waste disposal."

and services that will be available to the subject property is presently available to all the surrounding land. Record 47-48. This finding is not helpful to a determination of compliance with Goals 11 and 14 in this case, because it does not explain whether or how these goals were applied to the surrounding properties.

Finding 16 specifically describes various public facilities, including county roads, U.S. Highway 97, water, sanitary sewer, storm drainage, electric power, telephone, TV cable, natural gas, police, fire and schools, and their availability to the subject property. Of these, water and schools are the only two that clearly would be at urban levels. See Record 40-43.[20] The record supports finding 16(c) and (l) to the effect that providing access to city water and public schools will not have significant negative impacts on these urban services. Record 296, 306.

In Metropolitan Serv. Dist. v. Clackamas Cty., we declined to find that a two-acre minimum lot size is urban as a matter of law. 2 Or LUBA at 307. However, a two-acre minimum lot size on property located within two miles of the Madras UGB, in combination with the provision of an urban water system and access to the Madras public schools, raises valid concerns about the impacts of the proposed subdivision

[20]The water system required to support the county fire district would include fire hydrants "spaced no more than 1000 feet from structures." Record 635.

on the UGB. See Doob v. Josephine County, ___ Or LUBA ___ (LUBA No. 96-090, February 5, 1997), slip op 14 (holding that lots of one to two acres are "suspect" as rural, even where public water and sewer service are not available). Finding 23, which contains the opinion of the city administrator quoted above, is inadequate to alleviate those concerns.[21]

Finally, DLCD raises two concerns related to transportation facilities which may be affected by the proposed development. The first concern arises from finding 28, which states that public testimony from proponents and opponents addressed various topics, including "traffic safety and capacity of Hilltop Lane" and concludes that "this testimony is not evidence relevant to the criteria for approval of the plan amendment and zone change, but [is] relevant to a subsequent subdivision application and site planning process." Record 51. With respect to finding 28, DLCD states that the county "must address all relevant issues concerning Goal 14 compliance that were raised during the local proceedings." DLCD Petition for Review 17. We agree with DLCD's statement; however, we do not see that Goal 14 compliance was raised in connection with the transportation issues addressed in finding 28.

[21]As DLCD points out, the statement in finding 23 that the subject property and surrounding properties will not or do not receive city services of any kind is simply wrong.

DLCD's second concern arises from its contention that because a right turn deceleration lane on Highway 97 may be required to serve the proposed subdivision, the roadways may become "urban facilities" in violation of Goal 14. DLCD notes that new lanes that require additional right-of-way are not among the transportation facilities listed in OAR 660-12-065 as not requiring an exception to Goals 3, 4, 11 and 14. Intervenors respond that it is not clear that a right turn deceleration lane on Highway 97 will be required and, therefore, the proper time for determining whether a goal exception is required is at the time of subdivision approval, when actual density can be established and traffic impacts can be more clearly and carefully measured.

The only evidence DLCD identifies which suggests improvements may be required to Highway 97 is a statement in a letter to the county planning director from a "region planner" at the Oregon Department of Transportation (ODOT), to the effect that the region planner "encourage[s] the applicants to contact the ODOT District Office to see if other improvements (such as a right turn deceleration lane) might be needed." Record 279. Nevertheless, the challenged decision, in reliance on the letter, apparently adopts the conclusion that a right turn deceleration lane might be needed. Record 41.

DLCD is correct that OAR 660-12-065 does not specify new lanes that require additional right-of-way among the

listed transportation facilities that do not require an exception to Goals 3, 4, 11 and 14. See OAR 660-12-065(3). However, OAR 660-12-065(3)(o) does permit:

> "Transportation facilities, services and improvements other than those listed in this rule that serve local travel needs. The travel capacity and level of service of facilities and improvements serving local travel needs shall be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan or to provide adequate emergency access."

If the county makes adequate findings to show intervenors have established the proposed subdivision is a rural land use, OAR 660-12-065(3)(o) may permit the transportation facilities necessary to serve the proposed subdivision, including a right turn deceleration lane on Highway 97.

DLCD's second assignment of error and Brown's fifth assignment of error are sustained.

THIRD ASSIGNMENT OF ERROR (DLCD)

DLCD contends the county's finding that the population outside the city of Madras will continue to increase is not based on substantial evidence. However, the challenged finding serves only to support the subsequent finding that "there is and will continue to be an increasing demand for additional rural residential homesites in the foreseeable future." Record 53. As we stated in the discussion of Brown's first assignment of error, the subsequent finding is irrelevant to an evaluation of whether a committed exception is justified. Therefore, we do not reach DLCD's substantial

evidence challenge.

FOURTH ASSIGNMENT OF ERROR (DLCD)
SIXTH ASSIGNMENT OF ERROR (BROWN)

DLCD contends the county erred in accepting the opinion of an ODOT transportation planner, expressed in a telephone conversation with intervenors' attorney (whose memorandum of the conversation is at Record 278), to the effect that the Transportation Planning Rule (TPR) set forth in OAR chapter 660, division 12, does not apply to the challenged decision. Intervenors respond that the county was entitled to rely on the "expert written opinion" of the transportation planner.[22]

We must remand if the county (or the transportation planner upon whose opinion the county relied) improperly construed state law in concluding the TPR does not apply. ORS 197.835(9)(a)(D). As DLCD advises, in amending its acknowledged comprehensive plan map and zoning map, the county must ensure that such amendments comply with all applicable goals. The TPR, which implements Goal 12, applies to amendments to acknowledged comprehensive plan maps and zoning maps that significantly affect a transportation facility. OAR 660-12-060(1). OAR 660-12-060(2) explains that a plan amendment significantly affects

[22]Intervenors also cite the letter from the ODOT region planner discussed above in connection with Goal 14. That letter does not say that the TPR does not apply, but only that ODOT is not opposed to the proposed plan amendment. Record 279.

a transportation facility when it

> "* * * * *
>
> "(c) Allows types or levels of land uses which would result in levels of travel or which are inconsistent with the functional classification of a transportation facility; or
>
> "(d) Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP."

As stated above, the challenged decision, in reliance on the letter of an ODOT region planner, apparently adopts the conclusion that a right turn deceleration lane on Highway 97 might be needed if the contemplated subdivision is approved. Because there are no findings addressing the TPR, it is unclear whether OAR 660-12-060 is satisfied with respect to the impact of the contemplated subdivision on Highway 97.

DLCD's fourth assignment of error and Brown's sixth assignment of error are sustained.

The county's decision is remanded.