

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

3 DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
4 Petitioner,)
5 vs.)
6 KLAMATH COUNTY,)
7 Respondent,)
8 and)
9 JOHN M. SCHOONOVER,)
10 Intervenor-Respondent.)

LUBA No. 88-025
FINAL OPINION
AND ORDER

11
12 Appeal from Klamath County.

13 Gabriella I. Lang, Salem, filed the petition for review and
14 argued on behalf of petitioner Department of Land Conservation
and Development. With her on the brief were Dave Frohnmayer,
15 Attorney General; William F. Gary, Deputy Attorney General; and
Virginia L. Linder, Solicitor General.

16 John M. Schoonover, Klamath Falls, filed a response brief
and argued on his own behalf.

17 No appearance by respondent Klamath County.

18 SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee,
19 participated in the decision.

20 REMANDED 07/22/88

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

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1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals Klamath County Order No. 88-216,
4 amending the comprehensive plan map from Forestry to Rural and
5 the zoning map from Forestry (F) to Rural, 5-acre (R-5) for an
6 80 acre ownership known as "Tract 1214."

7 FACTS

8 Tract 1214 is owned by intervenor-respondent (respondent)
9 Schoonover. The property consists of soils with Class V timber
10 site productivity rating, qualifying it for protection as
11 forest land under the Klamath County Comprehensive Plan
12 (plan). Record 2, 52. Tract 1214 is surrounded predominantly
13 by land designated and zoned for forestry use, with some
14 designated and zoned for rural residential use. Adjacent
15 parcel sizes range from five to over 1,000 acres.

16 On April 28, 1981, before acknowledgment of the plan by the
17 Land Conservation and Development Commission (LCDC), respondent
18 obtained county approval of a preliminary subdivision plan to
19 divide Tract 1214 into 16 five-acre lots. The record does not
20 demonstrate that the county applied the Statewide Planning
21 Goals (goals) in approving the preliminary subdivision plan.

22 The county subsequently adopted a "committed" exception to
23 Goal 4 (Forest Lands) for Tract 1214. LCDC refused to
24 acknowledge the county's committed exception in acknowledgment
25 reviews of the county's plan in 1982, 1983, 1984 and 1985. On
26 December 13, 1985, the county changed the plan designation/zone

1 of Tract 1214 to Forestry/F. The county's plan and land use
2 regulations were acknowledged by LCDC on December 19, 1985.

3 Tract 1214 contains a 26 foot dead-end gravel road,
4 culverts, drainage ditches, and service poles for electricity
5 and telephone lines, all installed by respondent. Respondent
6 has also obtained septic system approvals for all 16 lots, and
7 septic system permits for two lots. The record does not
8 indicate when these improvements were made or what legal
9 standards were applied in obtaining any county approvals or
10 permits required for their installation. The county approved a
11 final subdivision plat for Tract 1214 in September, 1987.

12 FIRST ASSIGNMENT OF ERROR

13 "The County violated Goal 2, Part II(b), Goal 4 and
14 ORS 197.732 when it approved the plan amendment and
15 zone change. It also failed to comply with
OAR 660-04-028 in justifying a 'committed' exception
to Goal 4."

16 SECOND ASSIGNMENT OF ERROR

17 "The County erred in relying on past land divisions
18 made without application of the goals to demonstrate
irrevocable commitment of the subject property."

19 THIRD ASSIGNMENT OF ERROR

20 "The county erred in relying on development of the
21 subject property without application of state land use
22 laws in concluding that the subject property was
irrevocably committed to nonresource use."

23 A. Requirement for an Exception to Goal 4

24 Petitioner argues that, since the subject property was
25 designated as forest lands by the county's acknowledged
26 comprehensive plan, a decision to redesignate and rezone the
Page property for nonresource use must be based on a Goal 2 (Land

1 Use Planning) exception to Goal 4. Petitioner contends the
2 county attempted to adopt an exception to Goal 4 for Tract 1214
3 and challenges its adequacy in the first three assignments of
4 error.

5 Respondent's argument is that the county's prior approval
6 of the subdivision of his property complied with all applicable
7 legal requirements. Therefore, "due consideration and the
8 tenets of due process" require that the county's decision
9 approving the plan amendment and zone change be affirmed,
10 irrespective of whether the county properly adopted an
11 exception to Goal 4 for Tract 1214.¹ Respondent's Brief 5.

12 A local government must adopt a goal exception when an
13 applicable statewide planning goal would otherwise prohibit its
14 proposed action. 1000 Friends of Oregon v. Wasco County Court,
15 299 Or 344, 352, 703 P2d 207 (1985). An exception to Goal 4 is
16 required to allow nonfarm or nonforest uses on forest lands.
17 Jensen v. Clatsop County, 14 Or LUBA 776, 779 (1986). On the
18 other hand, an exception to Goal 4 is not required to allow
19 nonforest uses on nonforest land. See Holland v. Lane
20 County, ___ Or LUBA ___ (LUBA No. 87-106; April 13, 1988).

21 Thus, there are two possible ways a county can justify a
22 decision to allow nonforest use of land which was previously
23 designated and zoned as forest land in the county's
24 acknowledged plan and land use regulations. One is to take an
25 exception to Goal 4. The other is to adopt findings which
26 demonstrate the land is not forest land subject to Goal 4.

1 In this case, the basis for the county's decision is not
2 clear. The decision portion of the county's order states that
3 the plan and zoning map changes should be granted because "the
4 circumstances presented are exceptional." Record 4-5. The
5 county's findings state:

6 "The Commissioners find that an exception to Goal 4
7 should not now be required as the exceptions had
8 previously been submitted and accepted, the
9 subdivision completed in all aspects and approved,
10 however, in order to complete the record we add the
11 exceptions as they currently exist. The Commissioners
12 find that the land is irrevocably committed to a
13 subdivision use. * * * " Record 3.

14 The findings in the staff report, incorporated by reference
15 into the board of commissioners' decision,² state that "as
16 the application [for a plan amendment and zone change] concerns
17 a resource zone, an 'Exceptions Statement' is required."
18 Record 52.

19 Taken together, we interpret these statements as indicating
20 the county intended to base its decision on an "irrevocably
21 committed" exception to Goal 4³ and attempted to adopt such
22 an exception.⁴

23 B. Adequacy of the Exception to Goal 4

24 Petitioner argues in its first assignment that the county's
25 findings supporting a conclusion of irrevocable commitment are
26 deficient because they fail to address the factors set out in
27 OAR 660-04-028(6), as required by OAR 660-04-028(2) and (4).
28 Citing OAR 660-04-028(6)(c)(A), petitioner specifically charges
29 in its second assignment that the county impermissibly relies

1 on a prior land division approved without application of the
2 goals. Petitioner also claims in its third assignment that the
3 county erroneously relies on site improvements, such as a
4 gravel road and drainage system, which do not necessarily make
5 forest uses impracticable and without establishing that such
6 improvements were made in compliance with applicable land use
7 laws.

8 Petitioner further argues in its first assignment that the
9 county's findings are not adequate to comply with (1) the
10 standard for an exception based on irrevocable commitment set
11 out in ORS 197.732(1)(b) and Goal 2 - Part II(b), or (2) the
12 requirement of ORS 197.732(4) for findings of fact and a
13 statement of reasons demonstrating that the standard of ORS
14 197.732(1)(b) has been met. According to petitioner, the
15 findings do not show that existing adjacent uses and other
16 relevant factors make uses allowed by Goal 4 impracticable.

17 Respondent replies that the county did not rely only on the
18 prior subdivision approval and that the subdivision approval
19 and on-site improvements were made in accordance with county
20 ordinances and state statutes.

21 The county's attempted "irrevocably committed" exception is
22 pursuant to ORS 197.732(1)(b):

23 "The land subject to the exception is irrevocably
24 committed as described by commission rule to uses not
25 allowed by the applicable Goal because existing
adjacent uses and other relevant factors make uses
allowed by the applicable Goal impracticable; * * * "

26 ORS 197.732(1)(b) is implemented by OAR 660-04-028, which

1 provides in relevant part:

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

5 "(a) the characteristics of the exception area;

6 "(b) the characteristics of the adjacent land;

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

8 "(d) the other relevant factors set forth in
9 OAR 660-04-028(6).

10 * * * * *

11 "(4) A conclusion that an exception area is
12 irrevocably committed shall be supported by findings
of fact which address all applicable factors of
section (6) of this rule * * * "

13 OAR 660-04-028(6)(c) requires the county's exception
14 findings to address parcel size and ownership patterns of the
15 exception area. Paragraph (A) of this subsection provides:

16 "Consideration of parcel size and ownership patterns
17 under subsection (6)(c) of this rule shall include an
18 analysis of how the existing development pattern came
19 about and whether findings against the Goals were made
20 at the time of partitioning or subdivision. Past land
21 divisions made without application of the Goals do not
22 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. * * * "

23 The findings in support of the exception rely on the prior
24 subdivision approval and on the existence of improvements such
25 as roads, culverts and drainage facilities on the property.⁵

26 The findings include a conclusional statement that the

1 subdivision and existing development on the property were
2 "legal in all respects." Record 3.

3 With regard to the subdivision, the findings do not state
4 that findings addressing the goals were made at the time of
5 approval of the preliminary plan. Furthermore, respondent has
6 not cited evidence in the record which would clearly support
7 such a finding or a determination that the subdivision did
8 comply with the goals at the time of its approval.⁶ The
9 county's reliance on the prior subdivision approval, therefore,
10 does not comply with OAR 660-04-028(6)(c).

11 The county's findings concerning the on-site improvements
12 do not establish when the improvements were installed and
13 whether they were placed on the property in compliance with
14 applicable land use regulations.⁷ Irrevocably committed
15 exceptions cannot be based on improvements installed in
16 violation of land use regulations. DLCD v. Klamath County, ___
17 Or LUBA ___ (LUBA No. 87-019; August 26, 1987); see Lemmon v.
18 Clemmens, 47 Or App 583, 589, 646 P2d 633, rev den 293 Or 634
19 (1982).

20 The county's findings also fail to explain how the existing
21 physical improvements on the subject property make resource use
22 of the property impractical. This analysis is required by OAR
23 660-04-028(6)(c)(A). Respondent cites no evidence in the
24 record which clearly establishes that the on-site improvements
25 were installed in compliance with applicable land use
26 regulations and that the improvements render resource use of

1 the property impractical.

2 The county's decision does not comply with OAR 660-04-028.
3 Therefore, the second and third assignments of error and, in
4 part, the first assignment of error must be sustained. Because
5 the county's findings do not comply with OAR 660-04-028, which
6 implements the "irrevocably committed" exception standard of
7 ORS 197.732(1)(b), they also fail to comply with that provision
8 of the statute and with the requirement of ORS 197.732(4)
9 requiring exceptions findings which demonstrate that the
10 standard of ORS 197.732(1) is met.⁸ Therefore, the remainder
11 of the first assignment of error must be sustained as well.

12 The first, second and third assignments of error are
13 sustained.

14 FOURTH ASSIGNMENT OF ERROR

15 "The County erred in failing to demonstrate compliance
16 with its own ordinances governing plan and zone
changes."

17 Petitioner argues the county's findings are inadequate to
18 demonstrate compliance with Klamath County Land Development
19 Code (code) criteria for quasi-judicial changes of plan and
20 zone designations. According to petitioner, the findings
21 simply state the conclusion of compliance, without stating the
22 facts and reasons supporting the conclusion. Petitioner
23 specifically cites code 48.003 as an example of a criterion
24 addressed only by conclusional findings in the decision.⁹
25 Code 48.003 establishes the following criteria for approval of
26 a quasi-judicial plan map amendment:

1 "A. The proposed change is in compliance with the
2 Statewide Planning Goals;

3 "B. The proposed change is in conformance with all
4 policies of the Klamath County Comprehensive
5 Plan; and

6 "C. The proposed change is supported by specific
7 studies or other factual information which
8 documents the public need for the change."

9 We agree with petitioner that conclusional findings are
10 inadequate. DLCD v. Klamath County, supra, at 8-9. The
11 findings must set out the pertinent facts and explain the
12 rationale for concluding the facts demonstrate compliance with
13 the applicable legal criteria. McNulty v. City of Lake Oswego,
14 14 Or LUBA 366, 373, aff'd 83 Or App 275 (1986). With this
15 standard in mind, we review petitioner's claim that the
16 findings addressing each of the above subsections of code
17 48.003 are impermissibly conclusional.

18 A. Statewide Planning Goals

19 In addition to the conclusional statement of compliance
20 with code 48.003 quoted in footnote 9, supra, the decision
21 includes findings addressing Goals 2, 4 and 14.¹⁰ Record
22 2-4, 55. Petitioner does not explain how these findings are
23 impermissibly conclusional. We will not make petitioner's
24 arguments for it. See Deschutes Development v. Deschutes
25 County, supra.

26 We conclude the findings addressing Statewide Planning
Goals other than Goals 2, 4 and 14 are impermissibly
conclusional. This subassignment of error is sustained in part.

1 B. Comprehensive Plan Policies

2 In addition to making the conclusional statement of
3 compliance with code 48.003 quoted in footnote 9, supra, the
4 decision incorporates by reference a section of the staff
5 report entitled "Conformance with Relevant Klamath County
6 Policies." Record 52-54. Under nine subheadings corresponding
7 to chapters of the county plan, this section sets out findings
8 apparently addressing plan policies. Petitioner does not
9 explain how these findings are impermissibly conclusional.

10 This subassignment of error is denied.

11 C. Public Need

12 We are not cited to any finding demonstrating compliance
13 with this criterion other than the conclusional statement of
14 compliance with code 48.003 quoted in footnote 9, supra.

15 This subassignment of error is sustained.

16 The fourth assignment of error is sustained, in part.

17 The decision of Klamath County is remanded.

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FOOTNOTES

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Respondent may intend, by the use of the term "tenets of due process," to argue that there is a constitutionally based reason why an exception to Goal 4 is not required in this case. However, no such argument is developed in respondent's brief. We will not supply respondent with legal theories or make respondent's arguments for him. See Portland Oil Service, Inc. v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 87-076; December 9, 1987); Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

2

The findings in support of Order 88-216 state:

"The Klamath County Board of Commissioners hereby incorporates the staff report, the past record by reference and adopts the statements therein as its own findings of fact." Record 3.

The county's decision must state, or clearly refer to documents which state, the facts believed to be true. Designating an entire record as findings does not tell the facts the county found to be true, as a record will include contradictory information. We therefore decline to consider the record to be findings of fact. Jackson-Josephine Forest Farm Assn. v. Josephine County, 12 Or LUBA 40, 42 (1984). On the other hand, the county may incorporate by reference into its decision the findings set out in an identifiable staff report. Astoria Thunderbird v. City of Astoria, 13 Or LUBA 154, 162 (1985). We construe the above-quoted provision to incorporate into the county's findings the facts and conclusions set out on pages 1-5 of the staff report at Record 49-55.

3

Section 1.5 of the county's findings, at Record 3-4, states that the county finds that "forest uses are impractical and has considered the seven forest use designations set forth in Goal 4." This section appears to address the appropriateness of the subject property for each of the seven types of "forest uses" identified in Goal 4, and concludes that "this land could not be put to use under the 7 areas defined under Goal 4 in its undeveloped state and that the current level of development and future development are appropriate."

While this section of the findings can be interpreted to

1 address the "impracticable" standard for demonstrating
2 irrevocable commitment found in ORS 197.732(1)(b), it could
3 also be argued that this section is an attempt by the county to
4 find that the subject property is not "forest land," and
5 therefore that the appealed plan amendment and zone change do
6 not require an exception to Goal 4. However, no such argument
7 has been made by the parties.

8 Because of this, and in light of the fact that the county
9 designated this land as forest land in its acknowledged plan
10 and states elsewhere in its findings that an exception to Goal
11 4 is required (Record 52), we do not interpret the county's
12 decision as being alternatively based on a determination that
13 Goal 4 does not apply because the subject property is not
14 forest land.

15 _____
16 4

17 We also have difficulty in determining what constitutes the
18 county's attempted goal exception. Statute and administrative
19 rule provisions clearly require that the findings and reasons
20 justifying the exception be adopted as part of the county's
21 plan. ORS 197.732(8); OAR 660-04-000(2); OAR 660-04-015(1);
22 Confederated Tribes v. Wallowa County, 14 Or LUBA 92, 100
23 (1985). In this case, the only plan amendment approved by the
24 decision is an amendment to the plan map designation for the
25 subject property. Record 5. The decision does not adopt any
26 findings in support of an exception as part of the plan.
27 However, as petitioner has not assigned this omission as error
28 and contends that an exception was adopted, we will consider
29 any county findings in support of Order 88-216 which are
30 relevant to the criteria for an exception as being part of the
31 county's attempted goal exception.

32 _____
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34 The relevant county findings provide as follows:

35 "1.3. The Commissioners find that an exception to
36 Goal 4 should not now be required as the exceptions
37 had previously been submitted and accepted, the
38 subdivision completed in all aspects and approved,
39 however, in order to complete the record we add the
40 exceptions as they currently exist. The Commissioners
41 find that the land is irrevocably committed to a
42 subdivision use. The Commissioners find that the
43 improvements to said property, at a cost of
44 \$180,000.00, were made in compliance with all Klamath
45 County Land Use laws as the land was properly zoned
46 for subdivision at the time of the filing of the
47 preliminary plat. The Commissioners further find that

1 the subdivision at the time of development was legal
2 in all respects. Improvements to the property include
3 roads, culverts, and drainage to County standards.
4 The characteristics of the land described in the Staff
5 Report, were characteristics which existed in 1981 and
6 1982, at the time of the development of the property
7 and, thus were not in violation of the state wide
8 planning Goal 4.

9 "1.4. The Commissioners find that the characteristics
10 of this subdivision, the characteristics of the
11 adjacent land, and the relationship between the
12 subdivision and the lands adjacent to it clearly show
13 that the area in question is a rural residential
14 recreational area and not one for which the forestry
15 designation and zoning is appropriate." Record 3.

16

17 Under ORS 197.835(10)(b), we are required to affirm a
18 decision, even if the local government's findings are
19 inadequate, if the parties identify relevant evidence in the
20 record which clearly supports the decision.

21

22 Any improvements made prior to acknowledgment of the
23 county's plan and land use regulations were subject to
24 compliance with the statewide planning goals, as well as the
25 county's plan and regulations. After acknowledgment, any
26 improvements made were subject only to the acknowledged plan
and regulations.

27

28 We note that petitioner's argument under its first
29 assignment of error does not provide any additional bases for
30 holding the county's findings deficient, other than those
31 discussed above with regard to compliance with OAR 660-04-028.
32 Petitioner does make a general allegation that the exception
33 findings are conclusional. However, petitioner does not
34 explain how these findings are impermissibly conclusional,
35 except with regard to reliance on the prior subdivision
36 approval and existing on-site improvements.

37 Petitioner also argues that the record contains admissions
38 by the county and respondent that there is no more evidence to
39 support an exception to Goal 4 for Tract 1214 now than when
40 attempts were made in the past to justify such an exception.
41 These attempts were rejected by LCDC in its 1982, 1983, 1984
42 and 1985 acknowledgment reviews of the county's plan. We agree

1 with petitioner that the county cannot rely on previous
2 exceptions which were rejected by LCDC and subsequently were
3 effectively repealed by the county (see Klamath County
4 Ordinance No. 44.12, adopted December 13, 1985) to justify the
5 exception at issue in this case. However, to the extent
6 petitioner implies that the findings in support of the present
7 exception cannot be legally adequate because the county's
8 previous exceptions were rejected by LCDC, we disagree.

9

The finding cited by petitioner states:

10 "The requested zone change complies with Section
11 48.003 and Section 97.001(2) and all other relevant
12 policies of the Klamath County Comprehensive Plan.
13 The zone change will increase the availability of
14 recreational land and opportunities in Klamath
15 County." Record 4.

16

17 Under the first three assignments of error, supra, we found
18 the findings addressing Goals 2 and 4 inadequate to demonstrate
19 compliance with those goals for other reasons. The decision
20 also includes the following finding addressing Goal 14
21 (Urbanization):

22 "The comprehensive plan change will convert the
23 property to rural residential in accordance with
24 Section 51.003 of the comprehensive plan, the property
25 is outside of an urban area, or an urbanizable area in
26 accordance with the zoning maps and Atlas of the
comprehensive plan, therefore the commissioners take
no exception to Goal 14." Record 4.