

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

SEP 22 12 34 PM '89

DEPARTMENT OF LAND CONSERVATION,)
AND DEVELOPMENT,)
Petitioner,)
vs.)
JOSEPHINE COUNTY,)
Respondent.)

LUBA No. 89-063
FINAL OPINION
AND ORDER

Appeal from Josephine County.

Gabriella I. Lang, Salem, filed the petition for review on behalf of petitioner. With her on the brief were Dave Frohnmayer, James E. Mountain, Jr., and Virginia L. Linder.

No appearance by respondent.

SHERTON, Referee; HOLSTUN, Chief Referee, participated in the decision.

REMANDED 09/22/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals Josephine County Ordinance No. 89-13, which adopts a comprehensive plan map amendment from Forest to Rural Residential, and a zone change from Forest Commercial (FC) to Rural Residential 5 Acre Minimum (RR5), for a 39 acre parcel.

FACTS

The subject parcel is vacant. It has previously been logged, and presently contains second growth timber. The parcel has a "very high" Cumulative Internal Rate of Return (CIRR) rating of 4.7, "well above" the county's 3.50 threshold CIRR rating for forest land. Record 35, 36. It also has a "high" forest soils site index. Record 35. The parcel is composed of predominantly agricultural Class IV, non-irrigated soils. Id.

The parcel is adjoined on the west by a 31.8 acre parcel, containing one dwelling, also planned Forest and zoned FC. The land adjoining the parcel to the south, east and north is planned Rural Residential and zoned RR5. To the south is Pinewood Subdivision, composed of 22 lots from 2.5 to 5.0 acres in size, about half of which have dwellings. Record 34. To the east of the parcel is "scattered residential [development] along Rockydale Road." Record 21. To the north, in the triangle between Rockydale Road and Redwood Highway, there are 15 lots, from 1 to 6 acres in size, most of which have dwellings. Record 35. The subject parcel is one mile south of the urban growth boundary of the City of Cave Junction.

1 In November, 1988, the owner of the parcel applied to the
2 county for a plan map amendment to Residential and a zone change
3 to RR5. Record 39-43. On February 14, 1989, after a public
4 hearing, the planning commission adopted a decision recommending
5 denial of the plan amendment and zone change. Record 57. On
6 April 26, 1989, after a further public hearing, the board of
7 commissioners adopted an ordinance and findings approving the
8 requested plan amendment and zone change, and an exception to
9 Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest
10 Lands).¹ This appeal followed.

11 _____
12 ¹Josephine County Ordinance No. 89-13 provides only that the county
13 adopted a plan map amendment and a zone change for the subject property.
14 Petition for Review, Appendix I. However, the findings document
15 accompanying Ordinance No. 89-13, separately signed and dated by the board
16 of commissioners, has a "Decision" section which states that the board of
17 commissioners:

18 " * * * approve[s] the request for a Comprehensive Plan
19 Amendment from Forest to Rural Residential, a Zone Change from
20 Forest Commercial (FC) to Rural Residential 5 Acre Minimum
21 (RR5) and take[s] exception to Goals 3 and 4 for property
22 located southerly of Nolan Road and westerly of Rockydale
23 Road." (Emphasis added.) Record 6.

24 It appears from the portion of the county findings document emphasized
25 above that the county attempted to adopt an exception to Goals 3 and 4,
26 although that intent is not reflected in Ordinance No. 89-13 itself.

27 Statute, goal and administrative rule provisions clearly require that
28 the findings and reasons justifying a goal exception be adopted as part of
29 the county's comprehensive plan. ORS 197.732(8); Goal 2, Part II,
30 definition of "exception"; OAR 660-04-000(2) and 660-04-015(1); Johnson v.
31 Tillamook County, ___ Or LUBA ___ (LUBA No. 87-074, August 8, 1988), slip
32 op 6; Confederated Tribes v. Wallowa County, 14 Or LUBA 92, 100 (1985). In
33 this case, the county did not adopt any findings in support of an exception
34 to Goals 3 and 4 as part of its plan. However, since petitioner does not
35 assign this omission as error, and contends that a goal exception was
36 adopted by the county, we will consider any county findings in support of
37 Ordinance No. 89-13 which are relevant to the criteria for an exception as
38 being part of the county's attempted goal exception. DLCD v. Klamath
39 County, ___ Or LUBA ___ (LUBA No. 88-025, July 22, 1988), slip op 13.

1 ASSIGNMENT OF ERROR

2 "In approving the comprehensive plan amendment and
3 zone change, the county did not comply with the
4 requirements for an exception to Goals 3 and 4, as
5 stated in Goal 2, ORS 197.732, and OAR 660 Division 4.
6 The County's decision and findings are not supported
7 by substantial evidence in the record."

8 The findings adopted by the county, in their entirety, are:

9 "A. The property is bordered on the north and south
10 by small lots.

11 "B. It is within 1/4 mile of Highway 199.

12 "C. It is within 1 mile of the Cave Junction Urban
13 Growth Boundary.

14 "D. There is no large old growth timber on the
15 property.

16 "E. The property has been previously logged and the
17 soil disturbed.

18 "F. The soils, even though rated as high for forest
19 production and Class IV Agricultural Soils, are
20 river bottom lands for a portion of the property
21 and very rocky thus severely restricting
22 resource management.

23 "G. It would take substantial effort to have a
24 profitable forest operation because of the
25 nature of the secondary timber growth and the
26 size of the property.

 "H. It is not appropriate or possible to manage this
 parcel as forest land or farm land because of
 the close proximity of residential lots.

 "I. The property is in an impacted area and
 therefore not within the deer winter range.

 "J. No known Goal 5 natural or historic sites are
 located on the property." (Emphasis added.)
 Record 5.

 The county's conclusion states as follows:

 "Based upon the above evidence and findings, the Board
 of County Commissioners concluded the Comprehensive

1 Plan Amendment and Zone Change request for Jack Nolan
2 did comply with the requirements of Josephine County
and State law pertaining to such matters." Id.

3 Petitioner argues that the county's findings and conclusion
4 do not demonstrate that the criteria for an exception to Goals 3
5 and 4 were met. Petitioner claims the county's decision does
6 not identify whether it adopted a "reasons," "committed" or
7 "developed" type of exception. Petitioner argues the county's
8 findings do not comply with ORS 197.732 and OAR 660-04-020
9 through 660-04-028. According to petitioner, the findings are
10 impermissibly conclusionary, and do not explain how the facts
11 found satisfy the criteria for a goal exception, as required by
12 ORS 197.732(4), Goal 2, Part II and OAR 660-04-020.

13 Petitioner contends that findings A to E merely recite
14 facts in the record. Petitioner further argues that findings G
15 and H are conclusionary because they do not explain how the
16 county arrived at these conclusions or what evidence was relied
17 on. For instance, petitioner asserts that finding H is
18 conclusionary because it does not explain how the proximity of
19 residential lots affects farm or forest management. Petitioner
20 maintains that divided ownerships do not automatically take land
21 out of resource use, citing 1000 Friends of Oregon v. LCDC
(Jefferson County), 69 Or App 717, 727-728, 688 P2d 103 (1984).

22 Finally, petitioner claims that the findings are not
23 supported by substantial evidence in the record. With regard to
24 finding H, petitioner argues that although there is evidence in
25 the record that there are residential lots near the subject
26

1 parcel, it is not clear how many residences there are or where
2 they are located. Petitioner further contends that there is no
3 evidence in the record concerning the impact of these residences
4 on farm or forest management of the subject parcel.

5 We agree with petitioner that the findings and conclusions
6 adopted to justify a goal exception must include not only
7 findings setting out the facts that support a goal exception,
8 but also a statement of reasons explaining why the facts found
9 lead to the conclusion that the applicable exception criteria
10 are satisfied.² DLCD v. Douglas County, ___ Or LUBA ___ (LUBA
11 No. 88-096, February 16, 1989), slip op 5. However, our
12 determination of whether the county complied with this
13 requirement is complicated by the county's failure to identify
14 which type of goal exception it adopted and, therefore, which
15 goal exception criteria are applicable to the county's decision.
16 See 1000 Friends of Oregon v. LCDC (Jefferson County), 69 Or App
17 at 722.

18 The statute, goal and administrative rules recognize three
19

20 ²ORS 197.732(4) provides:

21 "A local government approving or denying a proposed exception
22 shall set forth findings of fact and a statement of reasons
23 which demonstrate that the standards [for a goal exception]
have or have not been met."

24 Additionally, OAR 660-04-015(1) states, in relevant part:

25 "A local government approving a proposed exception shall adopt
26 as part of its comprehensive plan findings of fact and a
statement of reasons which demonstrate that the standards for
an exception have been met. * * *"

1 types of goal exceptions, generally referred to as "reasons,"
2 "committed" and "developed" exceptions. As the county's
3 findings do not state that the subject parcel is physically
4 developed, it is clear that the county did not intend to adopt a
5 "developed" exception, pursuant to ORS 197.732(1)(a), Goal 2,
6 Part II(a) and OAR 660-04-025. Furthermore, because the
7 county's findings do not discuss whether areas not requiring an
8 exception can reasonably accommodate the proposed use, the long
9 term environmental, economic, social and energy consequences of
10 the proposed use at the subject site, or the compatibility of
11 the proposed use with adjacent uses, we conclude the county did
12 not intend to adopt a "reasons" exception, pursuant to
13 ORS 197.732(1)(c), Goal 2, Part II(c) and OAR 660-04-020.

14 It appears to us that the county attempted to adopt a
15 "committed" exception to Goals 3 and 4. Adoption of a
16 "committed" exception is justified when:

17 "[t]he land subject to the exception is irrevocably
18 committed [as described by Land Conservation and
19 Development Commission rule] to uses not allowed by
20 the applicable goal because existing adjacent uses and
other relevant factors make uses allowed by the
applicable goal impracticable * * *" ORS
197.732(1)(b); Goal 2, Part II(b); OAR 660-04-028(1).

21 In addition, more detailed criteria for approving a "committed"
22 exception are found in OAR 660-04-028(2) through (8).

23 County findings A through H have potential relevance to the
24 criteria for a "committed" goal exception. Of these findings,
25 only findings F through H offer any explanation of why
26 particular facts lead the county to its conclusions. Finding F

1 states that the soils of the subject parcel, although rated high
2 for forest production and as agricultural Class IV, severely
3 restrict resource management. However, that resource management
4 is severely restricted does not necessarily make uses allowed by
5 Goal 3 and 4 impracticable, which is the standard for approval
6 of a "committed" exception. Furthermore, the findings do not
7 establish what portion of the parcel is rocky, river bottom
8 land, or why the presence of such land makes use of the parcel
9 for resource uses impracticable.³

10 Finding G states that because of (1) the nature of the
11 secondary timber growth on the parcel, and (2) the size of the
12 parcel, it would take substantial effort to have a profitable
13 forest operation. This finding does not establish compliance
14 with the standard for a "committed" exception because requiring
15 "substantial effort" to carry out a profitable timber operation
16 does not mean that forest uses of the parcel are impracticable.
17 Furthermore, the finding does not explain why the small size of
18 the parcel and nature of the timber growth on the parcel would
19 make forest uses impracticable. Finally, Finding G does not
20 address potential farm use of the property at all.

21 Finding H states that it "is not * * * possible to manage
22

23
24 ³We note that the record indicates that except for an area of Class VI
25 "Josephine Gravelly Loam, 35 to 55% slope extending along an old river bed
26 in a 200 foot swath from the southeast corner NNW through the property,"
the majority of the soil on the property is in agricultural class IV, if
not irrigated. Record 35. Furthermore, Josephine Gravelly Loam is rated
as suitable for timber production, as are the other soils on the parcel.
Record 21-25.

1 this parcel as forest land or farm land."⁴ This is a
2 determination which would satisfy the impracticable for farm or
3 forest uses "committed" exception standard, if the basis for the
4 determination were explained in the county's decision. However,
5 in this case, finding H is insufficient to justify a "committed"
6 goal exception because it does not explain why the "close
7 proximity of residential lots" makes it impracticable (or
8 impossible) to manage the subject parcel for farm or forest
9 uses. See Ludwick v. Yamhill County, 11 Or LUBA 281, 294
10 (1984), aff'd 72 Or App 224, rev den 299 Or 443 (1985).

11 Because the county's findings are inadequate to demonstrate
12 compliance with the criteria for an exception to Goals 3 and 4,
13 the assignment of error is sustained.⁵

14 The county's decision is remanded.

21 ⁴Finding H also states that it is not appropriate to manage this parcel
22 as farm or forest land. However, such a determination does not relieve the
23 county from having to apply Goals 3 and 4 to the parcel. Since the parcel
qualifies as agricultural and forest land, Goals 3 and 4 require that it be
managed for farm or forest uses, unless an exception to these goals is
justified.

24 ⁵Because the county's findings are inadequate to justify its decision,
25 no purpose would be served by discussing petitioner's additional allegation
26 that the findings are not supported by substantial evidence. DLCD v.
Columbia County, ___ Or LUBA ___ (LUBA No. 87-109, March 15, 1988), slip
op 7; McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986).