

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

DEPARTMENT OF LAND CONSERVATION )  
AND DEVELOPMENT, )  
 )  
Petitioner, )  
 )  
vs. )  
 ) LUBA No. 89-133  
JOSEPHINE COUNTY, )  
 ) FINAL OPINION  
Respondent, ) AND ORDER  
 )  
and )  
 )  
G. DENNIS WALTMAN and SHERI L. )  
WALTMAN, )  
 )  
Intervenors-Respondent. )

Appeal from Josephine County.

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

No appearance by respondent.

Duane Wm. Schultz, Grants Pass, filed a response brief and argued on behalf of intervenors.

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

AFFIRMED

02/13/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner challenges Josephine County Ordinance 89-22 which amends the Josephine County Comprehensive Plan (Plan) designation for 12.5 acres of land from "Forest" to "Rural Residential," and changes the zoning designation from Forest Commercial (FC) to Rural Residential 2.5 acre minimum (RR-2.5).

MOTION TO INTERVENE

G. Dennis Waltman and Sheri L. Waltman, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 12.5 acre portion of an 82 acre parcel owned by intervenors. The 12.5 acres are separated from the remainder of the property by Cheney Creek Road, which adjoins the subject property on the north. Adjoining properties south of Cheney Creek Road are zoned RR-2.5. Some of the properties are in forest use and some are developed with single family residences. Approximately 25 acres located across Cheney Creek Road are in pasture.

The subject property was logged in 1986, and the property apparently was not replanted at that time. The subject property was included in a soil and water conservation plan for intervenors' 82 acres in 1987.

Petitioner sets forth additional relevant facts as

follows:

"The record contains considerable information about the soils on the 12.5 acres and there is conflicting evidence about whether it can be used for agricultural or forestry [uses]. The applicant's soil consultant and forester provided evidence about site class, slope, and potential for forest and crop production. This evidence is contradicted by an area soil scientist from the soil conservation service. For example, the latter contradicts the former's evidence about the effect of calcium in Pollard soil, suggesting it would have a beneficial affect [sic] on plant growth[,] especially Douglas fir. \* \* \*" Petition for Review 4.

Following hearings before the planning commission and the board of county commissioners, the ordinance approving plan and zone map amendments that allow nonresource use of the property was adopted. This appeal followed.

ASSIGNMENT OF ERROR

"In approving the comprehensive plan amendment and zone change, the county did not comply with the requirements for an exception pursuant to Goal 2, ORS 197.732, and OAR 660 Division 4."

Petitioner argues that an exception is required to convert resource land to nonresource use. ORS 197.732; Statewide Planning Goal (Goal) 2, Part II; OAR Chapter 660, Division 4. Petitioner contends that because the county did not adopt findings explaining how applicable exception standards are met, the county's decision must be remanded.

The findings adopted by the county include the following:

"B. The testimony received shows that the soils

have less potential for resource management than the Josephine County Soil Survey would indicate. In fact the calcium deposits that have impacted the area reduce the soil rating to a non resource rating of 3.3.

" \* \* \* \* \*

"E. The majority of the parcel does not have class IV or better agricultural soils.

" \* \* \* \* \*

"G. The site specific soil evaluation has revealed additional information to show that the County Soil Survey does not accurately portray the soil potential of the property." Record 6-7.

"A. The land in question has less than 50% class IV agricultural soils, it does not have irrigation rights, and it is not an active part of a larger farm operation.

"B. The soils on the parcel have a rating of 3.3 based on an evaluation by a soil scientist and there fore [sic] are considered as non-resource in nature.

" \* \* \* \* \* " Record 9.

After quoting several of the county's findings, including the above, petitioner states: "[f]rom the foregoing [findings] and from proceedings in the record \* \* \*, it appears that the county attempted to justify a 'committed' exception to Goals 3 and 4."<sup>1</sup> Petition for

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<sup>1</sup>Petitioner's citations to the record show the applicant contended the property was not resource land during the hearing before the county commissioners. Record 14-17. The planning staff report cited goal exception standards and concluded those standards were not met. Record 31-33, 43. The planning commission minutes for the May 1, 1989 meeting

Review 8. Petitioner goes on to explain why it believes the county's findings are inadequate to demonstrate that the requirements for a committed exception set forth at ORS 197.732(1)(b), Goal 2, Part II(b) and OAR 660-04-028 are met.

We do not understand intervenors to dispute that if the county's decision relies on exceptions to Goals 3 (Agricultural Lands) and 4 (Forest Lands), the county's findings are inadequate to demonstrate statutory, Goal and rule exception standards are satisfied. Rather, intervenors dispute petitioner's initial premise, i.e., that the county's decision is, or is required to be, based on exceptions to Goals 3 and 4. Intervenors contend an exception is not required to plan and zone the subject property for nonfarm and nonforest use, because the county found the property is not agricultural or forest land protected by Goals 3 and 4.<sup>2</sup>

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show the planning commission considered the requested approval to include a request for an exception. Record 133.

<sup>2</sup>"Agricultural Land" and "Forest Lands" are defined in these Goals as follows:

"Agricultural Land \* \* \* is land of predominantly Class I, II, III and IV soils \* \* \* as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby

Intervenors point out that the county's comprehensive plan includes a policy that sets forth the information which must be provided and standards which must be addressed to show land is nonresource land. Plan Goal 11, Policy 5. Among the standards specified in that plan policy for showing property is not agricultural land subject to protection under Goal 3 is "[t]he soils are predominantly other than Class I-IV." Among the standards specified for showing property is not forest land subject to protection under Goal 4 is "[t]he soils have a composit Internal Rate of Return of less than 3.50." The county found both of these standards were satisfied in finding the property was not resource land subject to Goals 3 and 4. See findings quoted supra.

Intervenors concede the county did not specifically cite Plan Goal 11, Policy 5 in its decision, but contend it is clear from the county's findings that its decision was based on a determination that the subject property is neither agricultural nor forest land. Intervenors cite

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lands shall be included as agricultural land in any event." Oregon's Statewide Planning Goals (1985) at 6.

"Forest lands--are (1) lands composed of existing and potential forest lands which are suitable for commercial forest uses; (2) other forested lands needed for watershed protection, wildlife and fisheries habitat and recreation; (3) lands where extreme conditions of climate, soil and topography require the maintenance of vegetative cover irrespective of use; (4) other forested lands in urban and agricultural areas which provide urban buffers, wind breaks, wildlife and fisheries habitat, livestock habitat, scenic corridors, and recreational use." Id.

findings and evidence in the record which they contend are adequate to show compliance with the other standards specified in Plan Goal 11, Policy 5 for demonstrating that land is not resource land.

We agree with intervenors that where a local government demonstrates that property is not agricultural or forest land protected by Goals 3 and 4, it may plan and zone the property for nonfarm or nonforest use without taking an exception to those goals. See Niemi v. Clatsop County, 6 Or LUBA 147, 152 (1982). In such circumstances, it is not sufficient for a petitioner in a review proceeding before this Board to allege only that the local government failed to demonstrate that an exception to Goals 3 and 4 is justified. Unless the findings that the property is not subject to Goals 3 and 4 are inadequate or are not supported by substantial evidence, failure to take an exception to those Goals provides no basis for remand. Therefore, a petitioner challenging such a local government decision before this Board must first successfully attack the determination that the property is not agricultural or forest land

We also agree with intervenors that the findings adopted by the county, quoted above, demonstrate that the county's decision to plan and zone the property for nonfarm and nonforest use is based on determinations that the property is not agricultural land or forest land protected

by Goals 3 and 4, not on determinations that the property qualifies for an exception to Goals 3 and 4. Petitioner does not challenge the legal sufficiency of, or evidentiary support for, the county's findings that the property is not resource land subject to protection under Goals 3 and 4.<sup>3</sup>

Because petitioner challenges neither the adequacy of nor evidentiary support for the county's findings that the property is not resource land protected by Goal 3 and 4 and those determinations, if correct and supported by substantial evidence in the record, would make exceptions to Goals 3 and 4 unnecessary, this assignment of error is denied.

The county's decision is affirmed.

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<sup>3</sup>We agree with intervenors that petitioner's observation in the statement of facts in the petition for review, quoted earlier in this opinion, that the evidence concerning the suitability of the property for agricultural and forest use is conflicting, is not sufficient to constitute a challenge that the county's decision is not supported by substantial evidence. Evidence concerning a relevant issue or standard may be conflicting and nevertheless constitute substantial evidence to support a particular finding or decision concerning the issue or standard. See City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1974); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976).