

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 1000 FRIENDS OF OREGON,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 92-085
10 MARION COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 JON ISBERG and DOLORES ISBERG,)
17)
18 Intervenors-Respondent.)

21 Appeal from Marion County.

23 Blair Batson and Mary Kyle McCurdy, Portland, filed the
24 petition for review and argued on behalf of petitioner.

26 Jane Ellen Stonecipher, Salem, and Robert L. Engle,
27 Woodburn, filed a response brief on behalf of respondent and
28 intervenors-respondent. With them on the brief was Engle &
29 Schmidtman. Jane Ellen Stonecipher argued on behalf of
30 respondent, and Robert L. Engle argued on behalf of
31 intervenors-respondent.

33 KELLINGTON, Referee; HOLSTUN, Chief Referee,
34 participated in the decision.

36 REMANDED 09/09/92

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance approving (1) a plan
4 amendment from Primary Agriculture (PA) to Interchange
5 Development (ID); (2) a zone change from Exclusive Farm Use
6 (EFU) to Interchange District - Limited Use Overlay; and (3)
7 a conditional use permit to authorize the expansion of an
8 existing recreational vehicle (RV) park.

9 **MOTION TO INTERVENE**

10 Jon Isberg and Dolores Isberg, the applicants below,
11 move to intervene on the side of respondent. Petitioner
12 does not object to the motion, and it is allowed.

13 **FACTS**

14 This is the second time an appeal of a decision
15 authorizing the expansion of an existing RV park at the
16 subject location has been appealed to this Board. We
17 remanded the county's prior decision granting the requested
18 land use approvals in 1000 Friends of Oregon v. Marion
19 County, 18 Or LUBA 408 (1989). The relevant facts, as set
20 out in that opinion, are as follows:

21 "This appeal concerns an expansion of an existing
22 RV park, located at the Aurora/Donald interchange
23 on Interstate 5. The material facts are set out
24 in petitioner's brief as follows:

25 '* * * The existing RV park has 84
26 spaces for RV's; the expansion would
27 allow 77 additional RV spaces, restrooms
28 and an open area.

1 ''The plan amendment, zone change and
2 permit are for approximately 5 acres of
3 an approximately 11.45-acre parcel. The
4 entire parcel is zoned EFU. The 5 acres
5 are currently used for growing Christmas
6 trees. The remaining 6 acres are
7 proposed to be used as the sewer
8 treatment facility; a portion of this 6
9 acres contains the existing sewage
10 treatment facilities for the RV park. *
11 * *

12 ''The parcel is bordered on two sides
13 (northern and eastern) by EFU land. The
14 property to the east comprises the Yule
15 Tree Farms Christmas tree farm. The
16 record does not indicate the current use
17 of the EFU land to the south of the
18 11.45 acre parcel. The property is
19 bordered on the west by I-5 and on the
20 north by an existing RV park, a gas
21 station, a convenience grocery store and
22 a trucking company service terminal on
23 land zoned ID.

24 ''The applicants own the existing RV
25 park, the gas station, convenience store
26 and the trucking company service
27 terminal. Mr. Isberg also is a
28 principal in Yule Tree farms.

29 ''The applicants own an unspecified
30 number of acres of undeveloped land,
31 already zoned ID, at the interchange to
32 the north of the RV park. There is also
33 an unspecified number of acres of
34 undeveloped land zoned ID on the other
35 (west) side of the highway from the
36 interchange that the applicants do not
37 own.'' (Citations omitted.) Id. at
38 409-10.

39 On remand the county conducted further hearings on
40 intervenors' application. The hearings officer recommended

1 that the application be denied. The board of commissioners
2 approved the application, and this appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 "Respondent misconstrued the applicable law,
5 failed to make an adequate finding and made a
6 decision not supported by substantial evidence in
7 the record as a whole, in concluding that
8 'reasons' within the meaning of Goal 2, Part II,
9 ORS 197.732, and OAR 660-04-020 and 022 justified
10 allowing the nonfarm use on agricultural land.
11 The decision also is not in compliance with
12 Statewide Planning Goals 2 and 3."

13 **SECOND ASSIGNMENT OF ERROR**

14 "The respondent's conclusion that the application
15 complies with OAR 660-04-020(2)(b) misconstrues
16 the applicable law, does not constitute a
17 sufficient finding, and is not based on
18 substantial evidence in the whole record."

19 The county took a "reasons" exception to Goal 3
20 (Agricultural Lands), pursuant to OAR 660-04-020 and
21 660-04-022, to justify the proposed use. Petitioner argues
22 the evidence in the record does not support a conclusion
23 that there is a need for additional RV spaces, as required
24 by OAR 660-04-022(1), or that there are no alternative
25 locations for such spaces which do not require an exception
26 that could reasonably accommodate the use, as required by
27 OAR 660-04-020(2)(b). We address each evidentiary challenge
28 separately below.

1 **A. Need**

2 To justify the nonresource use of resource zoned land,
3 OAR 660-04-022(1) imposes the following relevant
4 requirements:

5 "(a) There is a demonstrated need for the proposed
6 use or activity, based on one or more of the
7 requirements of Statewide Goals 3 to 19; and
8 * * *

9 * * * * *

10 "(c) The proposed use or activity has special
11 features or qualities that necessitate its
12 location on or near the proposed exception
13 site."

14 The county determined there is a demonstrated need for
15 additional RV spaces along the I-5 corridor within Marion
16 County. Petitioner contends this determination is not
17 supported by substantial evidence in the whole record.

18 Petitioner first identifies evidence that a number of
19 RV spaces are available, albeit at relatively long distances
20 from the I-5 corridor, in places like Detroit Lake
21 recreational area and Silver Creek Falls State Park.
22 However, the proposal is to expand an existing RV park to
23 serve the I-5 traveling public. Therefore, we agree with
24 respondents that in determining the need for additional RV
25 spaces in this case, the county may evaluate whether a need
26 for more RV spaces exists in those areas reasonably
27 available to RV travelers from the I-5 corridor.

28 There is evidence in the record that the existing RV
29 park owned by intervenors has turned away potential RV

1 customers on a regular basis due to a lack of space. There
2 is evidence in the record that, at least as of 1989, another
3 RV park located along the I-5 corridor (Champoeg park) is
4 often full. However, there is also evidence in the record
5 that a relatively new RV park with 141 spaces has been
6 established since 1989, a few miles to the south of
7 intervenors' RV park, near I-5 in the City of Woodburn
8 (Woodburn RV park). Respondents cite the following
9 statement by intervenors' land use consultant to establish
10 that the Woodburn RV park cannot accommodate freeway
11 travelers:

12 " * * * Two new RV parks have been built and are
13 operating at capacity. * * *" Record 37b.

14 However, this conclusory statement fails to identify the RV
15 parks to which it refers. Even if one were to assume that
16 this statement refers to the Woodburn RV park and the Salem
17 RV park (discussed below), there is nothing to which we are
18 cited that provides a basis for the conclusion. There is no
19 other evidence establishing whether the Woodburn RV park has
20 turned away potential RV customers because it is full.¹

¹Respondents cite the following statement by intervenors' land use consultant as evidence that the Woodburn RV park cannot adequately serve the traveling public:

"The additional campground spaces are needed despite the development of a new campground at the Woodburn interchange. That campground was developed after the original application for this proposal. * * *" Record 52.

1 Further, there is evidence that there is a RV park (Salem RV
2 park) within the Salem urban growth boundary near the
3 Santiam Highway exit from I-5. Nothing in the record, other
4 than the consultant's conclusion quoted above, establishes
5 that the Salem RV park is at capacity and cannot adequately
6 serve the needs of the RV traveling public. Respondents
7 argue the Salem RV park may, at some point in the future, be
8 displaced because of possible future freeway improvements.
9 However, this does not establish that the Salem RV park is
10 now unable to serve any identified need. Nor does it
11 address whether the Salem RV Park will be able to relocate
12 if necessary in the future, and continue to accommodate the
13 traveling RV public. Accordingly, we agree with petitioner
14 that a reasonable person would not conclude that there
15 exists a need for additional RV spaces along the I-5
16 corridor, based on the evidence in the whole record.²

17 This assignment of error is sustained.

18 **B. Sites Not Requiring an Exception**

19 Even if we were to agree with respondents that a need
20 exists for additional RV spaces in this portion of the I-5

This conclusory statement fails to explain why the Woodburn RV park cannot accommodate any need for RV spaces to serve the traveling public.

²Respondents argue that Ordinance 883, adopted February 14, 1991, which encourages expansion of existing development at rural freeway interchanges "before additional lands are zoned for interchange development" provides support for their argument that the proposal satisfies OAR 660-04-020 and OAR 660-04-022. However, we fail to see how Ordinance No. 883 lends any support to respondents' position.

1 corridor, the applicants would be required to establish
2 compliance with OAR 660-04-020(2)(b), which provides, in
3 part:

4 "(b) Areas which do not require a new exception
5 cannot reasonably accommodate the use':

6 " * * * * *

7 "(B) To show why the particular [exception]
8 site is justified, it is necessary to
9 discuss why other areas which do not
10 require a new exception cannot
11 reasonably accommodate the proposed use.
12 Economic factors can be considered along
13 with other relevant factors in
14 determining that the use cannot
15 reasonably be accommodated in other
16 areas. Under the alternative factor the
17 following questions shall be addressed:

18 "(i) Can the proposed use be reasonably
19 accommodated on nonresource land
20 that would not require an
21 exception, including increasing
22 the density of uses on nonresource
23 land * * *."

24 " * * * * *

25 "(iii) Can the proposed use be reasonably
26 accommodated inside an urban
27 growth boundary? * * *

28 " * * * * *

29 These provisions express a strong preference that
30 nonresource lands, including lands within existing Urban
31 Growth Boundaries (UGBs), be utilized for nonresource uses
32 before resource land is committed to such uses.
33 Specifically, these provisions require an analysis of
34 nonresource areas that do not require an exception to

1 determine whether such areas, including areas within
2 existing UGBs, can accommodate the proposed use. Here, the
3 challenged decision does not explain why the Woodburn and
4 Salem RV parks, which appear to be within UGBs, cannot
5 reasonably be expanded to accommodate the proposed use.
6 Further, no analysis is included in the challenged decision
7 concerning whether there is ID zoned land within the
8 Woodburn, Salem, or other I-5 corridor UGBs which could
9 reasonably accommodate 77 RV spaces.³ As we stated in 1000
10 Friends of Oregon v. Marion County, 18 Or LUBA at 422-23:

11 "[B]ecause the county did not include areas within
12 urban growth boundaries within its broad review,
13 the scope of the county's review was improperly
14 narrow."

15 This problem was not cured on remand, and the decision does
16 not establish compliance with OAR 660-04-020(2).

17 This subassignment of error is sustained.

18 The first and second assignments of error are
19 sustained.

20 **THIRD ASSIGNMENT OF ERROR**

21 "The county misconstrued the applicable law,
22 failed to make adequate findings, and made a
23 decision unsupported by substantial evidence in
24 the record as a whole, and not in compliance with
25 Goals 2 and 3, in concluding that Goal 3 should
26 not apply to the subject property because the

³There is a statement in the challenged decision that the City of Donald UGB cannot accommodate the proposed use because it is located "over a mile to the west." Record 19. However, this conclusion does not explain why the City of Donald UGB cannot reasonably accommodate the proposed use.

1 property did not constitute a 'commercial farm
2 unit'".

3 The challenged decision includes, as one of the
4 justifications for the "reasons" exception, that the use of
5 the subject property does not constitute a "commercial farm
6 use." Under this assignment of error, petitioner contends
7 the county erroneously concluded the property is not a
8 "commercial farm unit." Petitioner argues, in the
9 alternative, that even if the subject property does not
10 constitute a commercial farm, that fact alone does not
11 constitute a sufficient basis for a reasons exception.

12 In view of our disposition of the first two assignments
13 of error, we agree with petitioner's alternative argument.

14 The third assignment of error is sustained.

15 **FIFTH ASSIGNMENT OF ERROR**

16 "The county's decision is not in compliance with
17 Statewide Planning Goal 14, misconstrues the
18 applicable law, and is not supported by
19 substantial evidence in the record."

20 Under this assignment of error, petitioner argues the
21 county was required to take an exception to Goal 14
22 (Urbanization) because the proposed use is urban in nature.
23 Respondents do not dispute that the proposal is urban in
24 nature. Respondents' Brief 17. However, respondents
25 contend "as a matter of law, [the county's] reasons
26 exception to Goal 3 satisfies the criteria for a 'reasons'
27 exception to Goal 14. * * *" Id.

1 The subject property is not located within an urban
2 growth boundary and, therefore, by definition is "rural
3 land." The Oregon Supreme Court has explained, where a
4 local government proposes to convert rural land to urban or
5 urbanizable land,⁴ it must either amend its plan to include
6 the property within an urban growth boundary or take an
7 exception to Goal 14.⁵ 1000 Friends of Oregon v. LCDC

⁴The goals define "urbanizable land" as follows:

"Urbanizable lands are those lands within the urban growth boundary and which are identified and:

- "(a) Determined to be necessary and suitable for future urban uses
- "(b) Can be served by urban services and facilities
- "(c) Are needed for expansion of an urban area." (Emphasis supplied.)

The goals define "urban land" as:

"* * * those places which must have an incorporated city. Such areas may include lands adjacent to and outside the incorporated city * * *." (Emphasis supplied.)

⁵OAR 660-04-010(1)(c) provides that OAR 660-14-000 through 660-14-040 apply to exceptions to Goal 14. Where rural land is being converted to urban uses without first including such land within an urban growth boundary, OAR 660-14-040(2) provides that:

"A county can justify an exception to Goal 14 to allow * * * establishment of new urban development on undeveloped rural land. Reasons which can justify why the policies in Goals 3, 4, 11 and 14 should not apply can include but are not limited to findings that an urban population and urban levels of facilities and services are necessary to support an economic activity which is dependent on an adjacent or nearby natural resource." (Emphasis supplied.)

1 (Curry Co.), 301 Or 447, 477, 734 P2d 268 (1986) (Curry
2 County).⁶ We determine above that the county's reasons
3 exception to Goal 3 is deficient. To the extent the reasons
4 exception to Goal 3 is also intended to be a reasons
5 exception to Goal 14, it is deficient for essentially the
6 same reasons.

7 Finally, respondents argue that the county took an
8 adequate reasons exception to Goal 14 under OAR 660-14-040.⁷

OAR 660-14-040(3) describes how the exception standards of Goal 2, Part II are to be met in taking the kind of exception to Goal 14 authorized by OAR 660-14-040(2).

⁶In Curry County, supra, 301 at 459, the Supreme Court stated the following with regard to "how the exceptions process should * * * work:"

"First a local government takes inventory of the resources, the existing uses, and the potential uses of its lands to determine which Goals apply. For example, it may find that an area consists of agricultural land as defined in Goal 3 but does not contain any forest land as defined by Goal 4; the exclusive farm use requirement of Goal 3, but not the forest requirement of Goal 4 applies to that land. Second, the local government identifies the uses that conflict with requirements of the goals. For example, the county may wish to establish non-farm residences on agricultural lands, a use which generally conflicts with Goal 3. Third, for each conflict it identifies, the local government decides whether to plan and zone land consistently with the goal's requirements or to seek an exception."

⁷OAR 660-14-040(2) and (3) provide, in relevant part:

"(2) A county can justify an exception to Goal 14 to allow * * * establishment of new urban development on undeveloped rural land. Reasons which can justify why the policies on Goals 3 * * * and 14 should not apply can include but are not limited to findings that an urban population and urban levels of facilities and services are necessary to support an economic activity which is dependent upon an adjacent or nearby natural resource.

1 We first note that in none of the notices provided below was
2 there ever any indication that a Goal 14 exception was
3 contemplated by the county. Further, the decision itself
4 states that only a Goal 3 exception is taken (Record 5).
5 One part of the findings supporting the decision determines
6 that the proposal satisfies Goal 14 (Record 25), and buried
7 near the end of the findings supporting the decision are
8 findings purporting to take a Goal 14 exception under
9 OAR 660-14-040 (Record 27). Under these circumstances, a
10 proper Goal 14 exception was not taken in the decision.

11 We note that petitioner contends that, as a general
12 proposition, a Goal 14 exception under OAR 660-14-040 may
13 not be taken in this case because the caption of that rule
14 relates only to the incorporation of new cities. We do not
15 agree. The scope of OAR 660-14-040(2), by its terms, is not
16 limited to the incorporation of new cities, but provides a
17 procedure for taking a Goal 14 exception for establishing
18 urban development on rural land. See Caine v. City of
19 Tillamook, ____ Or LUBA ____ (LUBA No. 91-091, February 20,

"(3) To approve an exception under this rule, a county must also show:

"(a) That Goal 2 Part II(c)(1) and (c)(2) are met by showing the proposed urban development cannot be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development at existing rural centers.

"* * * * "

1 1992), slip op 16. However, for the reasons stated under
2 the first and second assignments of error, the county failed
3 to adequately establish that the proposed development cannot
4 reasonably be accommodated within existing urban growth
5 boundaries on lands not requiring an exception to Goal 14.

6 The fifth assignment of error is sustained.

7 **FOURTH ASSIGNMENT OF ERROR**

8 "The county misconstrued the applicable law,
9 failed to make adequate findings, and made a
10 decision not supported by substantial evidence in
11 the whole record, and not in compliance with Goals
12 2 and 3, in approving 'built' and 'committed'
13 exceptions for the subject property."

14 Under this assignment of error, petitioner challenges
15 the conclusions in the challenged decision that "built" and
16 "committed" exceptions to Goal 3 are justified under
17 OAR 660-04-025 and OAR 660-04-028, respectively.

18 **A. Built Exception**

19 OAR 660-04-025 provides:

20 "(1) A local government may adopt an exception to
21 a goal when the land subject to the exception
22 is physically developed to the extent that it
23 is no longer available for uses allowed by
24 the applicable goal.

25 "(2) Whether land has been physically developed
26 with uses not allowed by an applicable Goal,
27 will depend on the situation at the site of
28 the exception. The exact nature and extent
29 of the areas found to be physically developed
30 shall be clearly set forth in the
31 justification for the exception. The
32 specific area(s) must be shown on a map or
33 otherwise described and keyed to the
34 appropriate findings of fact. The findings

1 of fact shall identify the extent and
2 location of the existing physical development
3 on the land and can include information on
4 structures, roads, sewer and water
5 facilities, and utility facilities. Uses
6 allowed by the applicable goal(s) to which an
7 exception is being taken shall not be used to
8 justify a physically developed exception."

9 The only structures "built" on the subject property are
10 underground sewer lines. Regardless of the presence of
11 sewer lines, Christmas trees have been cultivated on the
12 property in the past. We do not agree that the presence of
13 the sewer lines justifies a "built" exception under OAR 660-
14 04-025. Further, the county may not rely on the sewer lines
15 to justify an exception under OAR 660-04-025 as those lines
16 were approved while the property was zoned EFU and subject
17 to Goal 3.

18 This subassignment of error is sustained.

19 **B. Committed Exception**

20 OAR 660-04-28(1) provides, in part:

21 "A local government may adopt an exception to a
22 goal when the land subject to the exception is
23 irrevocably committed to uses not allowed by the
24 applicable goal because existing adjacent uses and
25 other relevant factors make uses allowed by the
26 applicable goal impracticable.

27 " * * * * "

28 Respondents argue the subject property is surrounded on
29 three sides by ID development, and that this establishes the
30 parcel is committed to ID development uses. As we
31 understand it, those parcels were zoned ID pursuant to Goal

1 3 exceptions taken several years previous to the challenged
2 decision. It is improper to rely on the development
3 authorized by an existing exception to justify an additional
4 committed exception. See OAR 660-04-018(2)(b)(B).
5 Moreover, the fact that there are ID zoned parcels
6 surrounding the subject parcel on three sides pursuant to
7 the earlier Goal 3 exceptions in the area does not establish
8 the subject property is committed to ID development.

9 We also note the challenged decision does not describe
10 the nature of the interference between the sewer lines and
11 potential farm uses of the subject parcel to show why the
12 property is committed to urban use. Respondents do point
13 out that the subject property is relatively small. However,
14 the size of the parcel alone does not establish that it is
15 committed to urban use, and the challenged decision fails to
16 establish the subject property cannot be utilized in
17 conjunction with farm land to the east. While the farm land
18 to the east is in a different ownership, that does not
19 establish the subject property could not be utilized for
20 farm purposes in conjunction with that farm land. In sum,
21 there is nothing in the challenged decision to establish
22 that the subject parcel is irrevocably committed to urban
23 use.

24 This subassignment of error is sustained.

25 The fourth assignment of error is sustained.

26 The county's decision is remanded.

1