

BEFORE THE LAND USE BOARD OF APPEALS

1  
2  
3 JOHN E. MAKEPEACE, )  
4 )  
5 Petitioner, )  
6 )  
7 vs. )  
8 )  
9 JOSEPHINE COUNTY, )  
10 )  
11 Respondent, )  
12 )  
13 and )  
14 )  
15 B. DAVID WINGERD and )  
16 NORMAN C. WINGERD, )  
17 )  
18 Intervenors-Respondent. )

LUBA No. 93-025  
FINAL OPINION  
AND ORDER

19  
20  
21 Appeal from Josephine County.

22  
23 John E. Makepeace, Grants Pass, filed the petition for  
24 review and argued on his own behalf.

25  
26 No appearance by respondent.

27  
28 B. David Wingerd, Fairfax, Virginia, and Norman C.  
29 Wingerd, Sacramento, California, filed the response brief  
30 and argued on their own behalf.

31  
32 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,  
33 Referee, participated in the decision.

34  
35 REMANDED 05/25/93

36  
37 You are entitled to judicial review of this order.  
38 Judicial review is governed by the provisions of ORS  
39 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance approving an amendment  
4 to the Josephine County Comprehensive Plan (plan), zone  
5 change and exception to the Statewide Planning Goals  
6 (Goals).

7 **MOTIONS TO INTERVENE**

8 B. David Wingerd and Norman C. Wingerd move to  
9 intervene on the side of respondent in this appeal  
10 proceeding. There are no objections to the motions, and  
11 they are allowed.

12 **MOTION FOR PERMISSION TO FILE "ORAL BRIEF"**

13 After oral argument, intervenor-respondent B. David  
14 Wingerd requested that we consider a document entitled "Oral  
15 Brief." Intervenor states the oral brief reflects his  
16 comments during oral argument.

17 Petitioner objects to the motion.

18 Our rules do not provide for the submission of notes or  
19 other documents that parties rely on in presenting oral  
20 argument, unless those documents have previously been  
21 included in the record before LUBA.

22 Intervenor-respondent B. David Wingerd's motion that we  
23 consider his "Oral Brief" is denied.

24 **FACTS**

25 The subject property consists of 9 acres and is  
26 currently designated Forest in the plan and zoned Woodlot

1 Resource-20 acre minimum (WR-20). The proposal is to  
2 redesignate the subject property Residential and rezone it  
3 Rural Residential 2.5 acre minimum (RR-2.5).

4 **FIRST ASSIGNMENT OF ERROR**

5 "In authorizing the creation of the 9 acre parcel  
6 as a legal lot the county did not comply with the  
7 requirements of ORS 92.010 et seq. and Josephine  
8 County Planning, zoning, partitioning ordinances  
9 and regulations under Section 1.006(20)(ii)."

10 The challenged decision states "[t]he tax lot is a  
11 legal lot \* \* \*." Record 26. Petitioner argues the subject  
12 parcel was unlawfully created in 1991 by a partition  
13 decision of the board of county commissioners and,  
14 therefore, the subject parcel is not a "legal lot."  
15 Petitioner argues that in the 1991 partition decision the  
16 county did not apply, but should have applied, the  
17 requirements in the Josephine County Zoning Ordinance (JCZO)  
18 governing minimum lot sizes in the WR-20 zone and the  
19 partitioning requirements of ORS chapter 92.

20 The challenged decision does not approve a partition of  
21 land and, for that reason, the minimum lot size provisions  
22 and the partitioning requirements of ORS Chapter 92 are  
23 irrelevant to the challenged decision. Further, we are  
24 cited to nothing that requires the county to determine  
25 whether the subject parcel is a "legal lot" as a  
26 prerequisite to approving a plan and zone change for the  
27 subject property. In the absence of a specific standard  
28 requiring such an inquiry, it is unnecessary for a local

1 government to reexamine the legality of a lot or parcel.  
2 McKay Creek Valley Assoc. v. Washington County, 118 Or App  
3 543, 548-49, \_\_\_\_ P2d \_\_\_\_ (1993). It is petitioner's  
4 burden to establish a basis upon which we may reverse or  
5 remand the challenged decision, and petitioner has not done  
6 so here. Deschutes Development v. Deschutes County, 5 Or  
7 LUBA 218, 220 (1982). As far as we can tell, the county's  
8 conclusion that the subject parcel is a legal lot is  
9 surplusage and does not, of itself, provided a basis for  
10 reversal or remand of the challenged decision. Vestibular  
11 Disorder Consult. v. City of Portland, 19 Or LUBA 94, 104  
12 (1990).

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 "[The f]indings and conclusions fail to explain  
16 why the facts support a conclusion that  
17 agriculture and forest uses are impracticable."

18 The challenged decision determines the subject property  
19 is "committed" to residential use and approves a committed  
20 exception for the subject property.<sup>1</sup> The "committed" goal  
21 exception is based on findings that a railroad right-of-way  
22 on the western edge of the subject property "creates a

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<sup>1</sup>This is not a situation where the challenged decision includes unchallenged findings that the subject property is not forest or agricultural land. See DLCD v. Josephine County, 18 Or LUBA 798 (1990). Here, the challenged decision includes specific findings that the subject property (1) is resource land that was logged in 1977, and (2) contains soils suited for forest and agricultural uses.

1 physical barrier between lands to the west of the subject  
2 property" (which are considered "woodlands") and lands to  
3 the east (which are primarily zoned RR-2.5 and Rural  
4 Residential-5 acre minimum, and primarily used for  
5 residential use). Record 26-27.

6 To approve a committed exception, OAR 660-04-028(6)(c)  
7 requires a determination that:

8       "\* \* \* existing adjacent uses and other relevant  
9       factors make uses allowed by the applicable goal  
10       impracticable."

11 To satisfy this requirement, the challenged decision must  
12 identify the applicable goals and contain findings of fact  
13 both supporting the exception and explaining how those facts  
14 justify the exception. DLCD v. Josephine County, 18 Or LUBA  
15 88, 92-93 (1989). Here, the decision fails to identify the  
16 goals to which an exception is taken.<sup>2</sup> In addition, while  
17 the decision sets out some facts, it does not provide an  
18 adequate justification of why those facts establish that it  
19 is impracticable to use the subject property for farm or  
20 forest uses. Specifically, the challenged decision fails to  
21 explain why the railroad bordering the property's western  
22 edge and the residential uses to the east of the subject  
23 property, make farm and forest uses of the subject property

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<sup>2</sup>The decision does refer to the use of the subject property for farm or forest uses. Therefore, for the purposes of this opinion, we assume the county intended to adopt an exception to Goals 3 (Agricultural Lands) and 4 (Forest Lands), although that intention is not indicated in the challenged decision. See DLCD v. Josephine County, 18 Or LUBA at 90 n 1.

1 impracticable.<sup>3</sup> 1000 Friends of Oregon v. LCDC (Lane Co.),  
2 305 Or 384, 413-14, 752 P2d 271 (1988); 1000 Friends of  
3 Oregon v. LCDC (Curry Co.), 301 Or 447, 724 P2d 268 (1986);  
4 DLCD v. Josephine County, supra, 18 Or LUBA at 94.

5       Intervenors-respondent (intervenors) suggest that if we  
6 determine the county's findings supporting the committed  
7 exception are inadequate, then under ORS 197.835(9)(b)<sup>4</sup> we  
8 may conclude there is evidence in the record to "clearly  
9 support" a committed exception. Intervenor contends that  
10 there is such evidence in the record.

11       We examined the evidence in the record cited by  
12 intervenor and do not agree that it "clearly supports" a  
13 determination that the subject property qualifies for a  
14 committed exception to Goals 3 and 4.

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<sup>3</sup>The challenged decision acknowledges that the Cumulative Internal Rate of Return (CIRR) rating of the subject property (3.78) is relatively high, better than the CIRR rate that usually establishes suitability of land for WR-20 zoning (3.50). Record 27. The findings go on to state:

"\* \* \* the proximity of residentially developed properties would present a conflict with any forestry operation on this property. Being separated by the railroad right-of-way, [the subject property] and the two lots to the south are not part of a larger forest. The land is not needed for forest use." Id.

These findings do not establish that it is impracticable to use the subject property for forest uses.

<sup>4</sup>ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions \* \* \* but the parties identify relevant evidence in the record that clearly supports the decision or a part of the decision, the board shall affirm the decision \* \* \*."

1           The second assignment of error is sustained.

2   **THIRD ASSIGNMENT OF ERROR**

3           "The findings do not support satisfaction of  
4           County Goal 11 requirements governing plan and  
5           zone changes."

6           The Josephine County Comprehensive Plan [plan] provides  
7   that in order to approve a plan amendment:

8           "It will be necessary to demonstrate compliance  
9           with \* \* \* the tex[t] of the [plan] \* \* \*."

10          The challenged decision states:

11          "The property appears to meet county goals and  
12          policies." Record 27.

13   This is the only finding addressing the proposal's  
14   compliance with the plan. This equivocal conclusion does  
15   not constitute adequate findings explaining why the proposal  
16   complies with the county plan.

17          The third assignment of error is sustained.

18          The county's decision is remanded.