

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

3  
4       DAVID A. BREMER,                               )  
5    )  
6                Petitioner,                            )  
7    )  
8                vs.                                     )  
9    )               LUBA No. 93-022  
10       JOSEPHINE COUNTY,                            )  
11    )               FINAL OPINION  
12                Respondent,                           )  
13    )               AND ORDER  
14                and                                    )  
15    )  
16       NORMAN C. WINGERD and                        )  
17       B. DAVID WINGERD,                            )  
18    )  
19                Intervenors-Respondent.                                )

20  
21  
22                Appeal from Josephine County.

23  
24                David Bremer, Grants Pass, filed the petition for  
25 review and argued on his own behalf.

26  
27                No appearance by respondent.

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

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

35  
36                REMANDED                               06/03/93

37  
38                You are entitled to judicial review of this Order.  
39 Judicial review is governed by the provisions of ORS  
40 197.850.

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 **MOTION TO INTERVENE**

8 Norman C. Wingerd and B. David Wingerd move to  
9 intervene on the side of respondent in this appeal  
10 proceeding. There is no objection to the motion, and it is  
11 allowed.

12 **FACTS**

13 The subject property consists of two tax lots which  
14 together comprise 67.9 acres. The subject property is  
15 currently designated Forest in the plan and zoned Woodlot  
16 Resource-20 acre minimum (WR-20). The proposal is to  
17 redesignate the subject property Residential and rezone it  
18 Rural Residential 2.5 acre minimum (RR-2.5).

19 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

20 The challenged decision determines the subject property  
21 is "committed" to residential use and approves a committed  
22 goal exception for the subject property.<sup>1</sup> The "committed"

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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 contains soils suited for forest and agricultural uses, although it determines that the soils are not of the highest quality for either.

1 goal exception is based on findings that a railroad  
2 right-of-way on the western edge of the subject property  
3 "creates a physical barrier" between lands to the west of  
4 the subject property (which are considered "woodlands") and  
5 lands to the east, north and south of the subject property  
6 (which are primarily zoned RR-2.5 and Rural Residential-5  
7 acre minimum, and are primarily developed for residential  
8 use).<sup>2</sup> Record 26-27.

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

11 "\* \* \* existing adjacent uses and other relevant  
12 factors make uses allowed by the applicable goal  
13 impracticable."

14 To satisfy this requirement, the challenged decision must  
15 identify the applicable goals and contain findings of fact  
16 supporting the exception and explaining how those facts  
17 justify the exception. Makepeace, supra, slip op at 5; DLCD  
18 v. Josephine County, 18 Or LUBA 88, 92-93 (1989). Here, the  
19 decision fails to identify the goals to which an exception  
20 is taken.<sup>3</sup> In addition, while the decision sets out some

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<sup>2</sup>The plan designation and zone of the nine acre parcel immediately north of the subject parcel are identical to that of the subject parcel. This Board remanded a county decision approving a committed goal exception, plan amendment and zone change to allow residential uses of that parcel, in Makepeace v. Josephine County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-025, May 25, 1993).

<sup>3</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

1 facts, it does not provide an adequate justification of why  
2 those facts establish that it is impracticable to use the  
3 subject property for farm or forest uses. Specifically, the  
4 challenged decision fails to explain why the railroad  
5 bordering the property's western edge and residential uses  
6 to the east, south and north of the subject property make  
7 farm and forest uses of the subject property impracticable.<sup>4</sup>  
8 1000 Friends of Oregon v. LCDC (Lane Co.), 305 Or 384,  
9 413-14, 752 P2d 271 (1988); 1000 Friends of Oregon v. LCDC  
10 (Curry Co.), 301 Or 447, 724 P2d 268 (1986); DLCD v.  
11 Josephine County, supra, 18 Or LUBA at 94.

12 The first and second assignments of error are

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(Forest Lands), although that intention is not indicated in the challenged decision. See DLCD v. Josephine County, 18 Or LUBA at 90 n 1.

<sup>4</sup>The challenged decision states a soil scientist determined the subject property has a Cumulative Internal Rate of Return (CI RR) rating of 3.7, and characterized the soils on the subject property as:

"\* \* \* low productivity versions of Holland, Siskiyou, and Tethrock soils." \* \* \* Record 26.

However, these findings (and others on Record 14-15) do not establish that a "low productivity version" of Holland, Siskiyou, and Tethrock soils makes forest uses of the property impracticable.

The findings also state:

"\* \* \* The proximity of residential uses would be in conflict with any operation that attempted to manage the [subject property] for Forest [use]. Being separated by the railroad right-of-way, [the subject property is] not part of a larger forest. The land is not needed for Forest uses." Record 26-27.

These findings do not explain why the subject property's proximity to residences makes it impracticable to use the subject property for forest uses.

1 sustained.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioner argues that the statement in the challenged  
4 decision that the Bureau of Land Management (BLM) "is  
5 divesting itself of [its] forest uses in the residential  
6 areas" is not supported by substantial evidence in the  
7 record. Record 27.

8 It is not clear whether this statement is necessary to  
9 the county's decision. However, to the extent this  
10 statement is an attempt to establish that BLM lands in the  
11 vicinity of the subject property will not be managed for  
12 forest uses in the future, it is conclusory and is not  
13 supported by substantial evidence in the record.<sup>5</sup>

14 The third assignment of error is sustained.

15 The county's decision is remanded.

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<sup>5</sup>Petitioner cites evidence not in the record to establish that the challenged finding concerning the intentions of the BLM is erroneous. Our review is limited to the record of proceedings developed below. ORS 197.830(13)(a). Because this information is not in the record, we do not consider it in reaching our decision here that the challenged finding lacks evidentiary support.