

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

STEVE DOOB,)
)
Petitioner,)
)
and)
)
DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Intervenor-Petitioner,) LUBA
No. 94-018)
)
vs.) FINAL OPINION
) AND ORDER
JOSEPHINE COUNTY,)
)
Respondent,)
)
and)
)
WARD OCKENDEN,)
)
Intervenor-Respondent.)

Appeal from Josephine County.

Steve Doob, Merlin, filed a petition for review and argued on his own behalf.

Celeste J. Doyle, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of intervenor-petitioner. With her on the brief were Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Walter L. Cauble, Grants Pass, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Schultz, Salisbury, Cauble, Versteeg & Dole.

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

3

4

REMANDED

05/25/94

5

6 You are entitled to judicial review of this Order.
7 Judicial review is governed by the provisions of ORS
8 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving a
4 comprehensive plan map amendment from Forest to Residential
5 and zone change from Woodland Resource (WR) to Rural
6 Residential - 5 Acre Minimum (RR-5).

7 **MOTION TO INTERVENE**

8 Ward Ockenden, the applicant below, moves to intervene
9 on the side of respondent in this appeal proceeding. There
10 is no objection to the motion, and it is allowed.

11 **FACTS**

12 The subject property is an undeveloped parcel,
13 approximately 154 acres in size, located between the
14 communities of Hugo and Merlin. To the north and east of
15 the subject property is land managed by the U.S. Bureau of
16 Land Management (BLM), to the south is land zoned RR-5, and
17 to the west is land zoned Exclusive Farm Use.

18 The planning commission recommended approval of the
19 proposal and, after a public hearing, the county board of
20 commissioners approved the proposal. This appeal followed.

21 **FIRST ASSIGNMENT OF ERROR (DOOB)**

22 Petitioner contends the record contains different
23 descriptions of the property affected by the proposal, and
24 that it is unclear what property is subject to the
25 challenged decision.

26 The challenged decision contains the following

1 narrative description of the subject property:

2 "* * * The subject property is located off of Hugo
3 Road in Josephine County more particularly
4 described as 35-6-8 Tax Lot 100, consisting of
5 157.93 acres. Part of the applicant's property is
6 west of Hugo Road. This part consists of
7 approximately 12 acres and is designated Farm and
8 is zoned Farm Resource. The part west of Hugo
9 Road is not part of the application for
10 comprehensive plan amendment and zone change."
11 Record 21.

12 The challenged decision also states that the area for
13 which the comprehensive plan and zoning map designations are
14 to be changed "is attached as Exhibit 'A'." Record 12.
15 Attached to the challenged decision as "Exhibit A" is a map
16 showing the affected property. The map is titled "OCKENDEN
17 COMPREHENSIVE PLAN & ZONE CHANGE 35-6-8, Tax Lot 100" and
18 contains the words "AREA OF CHANGE" superimposed across a
19 parcel of land easily distinguished from other property on
20 the map by dark hatch marks. Record 14. The challenged
21 decision adequately describes the property affected by the
22 proposal.

23 This assignment of error is denied.

24 **FIRST AND SECOND ASSIGNMENTS OF ERROR (DLCD)**

25 The acknowledged Josephine County Comprehensive Plan
26 (plan) incorporates a document entitled "Using Internal Rate
27 of Return to Rate Forest Soils for Application in Land Use
28 Planning." This document, generally referred to as the
29 Cumulative Internal Rate of Return (CIRR), sets out the
30 plan's acknowledged methodology for rating forest soils.

1 The CIRR contains a list of Josephine County soil types and
2 gives each soil class a numerical value.¹ The plan states
3 that soils having a CIRR of 3.5 or greater are considered
4 forest land, while soils with a CIRR below 3.5 are
5 considered "non-resource" soils. The challenged decision
6 determines the CIRR for the subject property is 3.15, less
7 than the 3.5 benchmark for forest land.²

8 The county justified the proposed plan amendment and
9 zone change on the basis that the soils on the subject
10 property are a new category of soil -- Tallowbox. The
11 proposed Tallowbox soil type is currently under study by the
12 U.S. Soil Conservation Service (SCS) to determine whether it
13 should be included in the SCS soil survey for Jackson
14 County. However, at the time the challenged decision was
15 adopted, the SCS study concerning the proposed Tallowbox
16 soil classification in Jackson County was at a preliminary
17 stage. Josephine County used the preliminary information
18 developed for the Jackson County study to make the
19 challenged decision.

20 Petitioner contends that by relying on a soil type that

¹Once the soil type is determined, other variables are considered in determining the CIRR value assigned to the property.

²The challenged decision seems to ascribe great weight to the fact that the consultant who assisted the county in the development of the plan CIRR provisions was also the applicant's consultant who stated the subject property has a CIRR of 3.15. However, the fact that a prior county consultant now represents a development applicant, of itself, does not lend any greater weight to the conclusions of such a consultant.

1 is not included in the acknowledged plan CIRR provisions,
2 the county improperly amended its acknowledged plan.

3 We do not understand the parties to dispute that the
4 existing plan CIRR evaluation method is difficult to use and
5 probably inadequate. We also do not understand any of the
6 parties to dispute that the plan allows for the refinement
7 of the soil types mapped by the published SCS survey with
8 regard to particular property, on a case-by-case basis. The
9 parties' dispute centers on whether the soils on the subject
10 property may be identified as a soil type that is not
11 included in the acknowledged plan CIRR provisions.

12 We agree with petitioner that while the comprehensive
13 plan may authorize case-by-case refinement of the soil types
14 mapped by the published SCS survey, within soil categories
15 already included in the acknowledged plan CIRR provisions,
16 it does not authorize identification of soils as types not
17 included in the plan CIRR provisions in individual,
18 quasi-judicial land use proceedings. The challenged
19 decision relies on a determination that the subject property
20 contains Tallowbox soils to justify the proposed plan
21 amendment and zone change. Because Tallowbox soils are not
22 listed and given a numerical value in the acknowledged CIRR,
23 the challenged decision has the effect of improperly
24 amending the acknowledged county plan to include Tallowbox
25 soils in the CIRR without following postacknowledgment plan
26 amendment procedures. See Loud v. City of Cottage Grove,

1 ____ Or LUBA ____ (LUBA No. 93-104, October 27, 1993).

2 These assignments of error are sustained.

3 **SECOND AND THIRD ASSIGNMENTS OF ERROR (DOOB)**

4 **THIRD ASSIGNMENT OF ERROR (DLCD)**

5 Petitioners argue the challenged decision erroneously
6 concludes the proposal complies with applicable plan
7 policies. Petitioners also contend the subject property
8 contains agricultural and forest land and, therefore, is
9 subject to Statewide Planning Goals (Goals) 3 (Agricultural
10 Lands) and 4 (Forest Lands). Petitioners argue the county
11 improperly failed to take exceptions to these goals.

12 **A. Forest Land**

13 Plan Goal 11, Policy 5(B) requires that application of
14 a nonresource plan map designation be supported by findings
15 establishing the following:

16 "The land does not fall within Goal 4 requirements
17 as shown by:

18 "1. The soils have a [CIRR] of less than 3.5.

19 "2. The land is not needed for watershed,
20 wildlife and fisheries protection and
21 recreation.

22 "3. There are no extreme physical conditions that
23 require maintenance of vegetative cover.

24 "4. This is not forested land in an urban area or
25 agricultural area which provides urban
26 buffers, wind breaks, wildlife and fisheries
27 habitat, livestock habitat, scenic corridors
28 and recreational use.

29 "5. This land is not part of a larger forest
30 use."

1 **1. CIRR Rating**

2 We determine above the county erroneously relied upon a
3 Tallowbox soil classification in determining the subject
4 property has a CIRR less than 3.5 and, therefore, is not
5 forest land.³ On remand, the county will be required to
6 evaluate the CIRR for the subject property based on the
7 acknowledged plan CIRR provisions. Therefore, we do not
8 consider petitioners' other arguments concerning the
9 county's erroneous determination that the property has a
10 CIRR of less than 3.5.

11 This subassignment of error is sustained.

12 **2. Urban Buffer**

13 Petitioners assert that findings supporting the
14 determination of compliance with plan Goal 11, Policy
15 5(B)(4), that the subject property does not provide an urban
16 buffer, lack evidentiary support.

17 No party cites evidence to support the determination
18 that the subject property is not forested or agricultural
19 land providing urban buffers. We will not search the record
20 to find evidence to support determinations of compliance
21 with applicable approval standards. Eckis v. Linn County,
22 110 Or App 309, 313, 821 P2d 1127 (1991).

³We note the finding that a poor CIRR rating for the property is supported by the fact that an expert observed no site index trees on the subject property, appears to be unsupported by substantial evidence. We are aware of no evidence in the record that refutes petitioners' claim that the property was logged in 1988, explaining the property's lack of site index trees.

1 This subassignment of error is sustained.

2 **3. Part of a Larger Forest Use**

3 The county adopted findings that the subject property
4 is not part of a larger forest use, as required by plan
5 Goal 11, Policy 5(B)(5). Specifically, the county adopted
6 findings that:

7 "BLM land to the east of the subject property is
8 virtually all cleared of timber. It is rated as
9 non-commercial forest land. The property to the
10 north is managed as low intensity forest land."
11 Record 28.

12 "[There was testimony] that the BLM lands to the
13 north of the property [are] low intensity forest
14 land and that the BLM only intends to do some
15 helicopter salvage logging on this land which will
16 result in minimal board feet being harvested.
17 This is because the land is so low in
18 productivity. [T]he BLM tract to the east is in
19 non-commercial forest and non-forest. The BLM has
20 shown very little interest in managing this land.
21 This parcel to the east has a BLM cultivated seed
22 orchard nursery. [Testimony established] that the
23 subject property is not part of a larger forest
24 use since the BLM's management of its land is
25 minimal. We concur in [this testimony] and make
26 it part of these findings.

27 "We find that there is no evidence that the
28 subject property is in any way needed by the BLM
29 for any forest uses on its land, or that the BLM
30 land would be needed by the subject property for
31 any forest use.

32 "* * * * *

33 "[The] assistant manager for the BLM seed orchard
34 appeared at the hearing. He stated he was not
35 opposed [to] or in favor of the application. If
36 the BLM considered the subject property to be part
37 of the BLM's forest use, then the witness would
38 have so stated. He did not, therefore, this is

1 further support of our findings that the subject
2 property is not part of a larger forest use.

3 * * * * *

4 "Some of the opponents made the broad assertion
5 that the property is part of a larger forest.
6 However, none of the opponents provided any
7 specifics on how the subject property was part of
8 a larger forest use. Therefore, we reject this
9 testimony." Record 36-38.

10 Petitioners assert the county findings that the subject
11 property is not part of a larger forest use are erroneous,
12 and not supported by substantial evidence in the record.
13 However, petitioners do not explain why these findings are
14 inadequate to establish the subject land is not part of a
15 larger forest use, and we do not see that they are.
16 Further, there is at best conflicting evidence on the
17 question of whether the subject parcel is part of a larger
18 forest use. The choice between conflicting, believable
19 evidence belongs to the county. Angel v. City of Portland,
20 22 Or LUBA 649, 659, aff'd 113 Or App 169 (1992).

21 This subassignment of error is denied.

22 **B. Agricultural Land**

23 Plan Goal 11, Policy 5(A) requires the application of a
24 nonresource plan map designation to be supported by certain
25 findings demonstrating that the land is not subject to
26 Statewide Planning Goal 3, including a determination that:

27 "The land is unsuitable for farm use considering
28 soil fertility, grazing, climate, irrigation, land
29 use patterns, technology and accepted farm
30 practices." Plan Goal 11, Policy 5(A)(2).

1 Petitioners argue the findings are inadequate to
2 support a determination that the subject property is
3 unsuitable for farm use. Petitioners contend the county
4 findings are internally inconsistent on this point.
5 Petitioners argue the challenged decision contains findings
6 that there is no irrigation available to allow agricultural
7 use of the subject property. However, petitioners also cite
8 contradictory findings that irrigation is available to
9 support residential landscaping. Petitioners also cite
10 internally inconsistent findings (discussed below),
11 determining the soils on the subject property are too
12 erodable to support agriculture, but are not too erodable to
13 support residential construction and road building. We
14 agree with petitioners that the county's findings
15 determining the subject property is unsuited for
16 agricultural use are inadequate.

17 This subassignment of error is sustained.

18 **C. Zone Change**

19 In addition to the requirements for applying a
20 nonresource plan map designation established by plan
21 Goal 11, Policy 5, plan Goal 11, Policy 6 requires a zone
22 change to be supported by certain findings.

23 **1. Capacity of the Land**

24 Plan Goal 11, Policy 6(A) requires findings
25 demonstrating the following:

26 "Physical capability of the land to support

1 permitted uses: e.g. adequate water supply, septic
2 suitability, soil quality, and adequate access."

3 Petitioners contend the findings that the proposal
4 complies with these standards are inconsistent with other
5 findings justifying a determination of compliance with other
6 standards -- that the property is not agricultural or forest
7 land. Petitioners point out that on the one hand, the
8 county adopted findings determining the subject property has
9 a significant erosion problem rendering it unsuited for
10 resource use, but on the other hand determined that erosion
11 is not a problem if the subject property is used for
12 residential use and "proper construction techniques are
13 used." Compare Record 30-31 with Record 35. In addition,
14 the challenged decision contains findings that with regard
15 to residential development:

16 "* * * As much vegetation as possible should be
17 left undisturbed to minimize erosion during and
18 after construction activity. * * *" Record 35.

19 The above finding suggests there very well may be
20 extreme physical conditions that require the maintenance of
21 vegetative cover, contrary to the requirement of plan
22 Goal 11, Policy 5(B)(3). These findings do not increase the
23 credibility of the other findings determining that the
24 subject property can well support residential development.
25 In any event, the challenged decision does not reconcile how
26 the disturbances inevitably created by roads and homesites
27 and other residential uses are less problematic than the

1 disturbance potentially caused by resource use of the
2 subject property. This conflict between the findings
3 sufficiently undermines the findings of compliance with plan
4 Goal 11, Policies 5(B)(3) and 6(A) to render those findings
5 inadequate.

6 This subassignment of error is sustained.

7 **2. Public Safety**

8 Plan Goal 11, Policy 6(B) requires findings
9 demonstrating:

10 "Preservation and promotion of the public health,
11 safety and welfare."

12 Petitioners contend the findings fail to adequately
13 establish the proposal will not result in increased fire
14 danger to the area.

15 The county adopted findings explaining that fire
16 suppression services are available to serve the subject
17 property and that the proposal will actually decrease fire
18 danger in the area. Petitioners do not explain why the
19 county's findings regarding fire safety are inadequate.
20 While we question whether the county's conclusions that RR-5
21 zoning for property will enhance fire safety in all cases,
22 petitioners do not establish the county's findings are
23 inadequate in this regard or that they lack evidentiary
24 support. Deschutes Development Corp. v. Deschutes County, 5
25 Or LUBA 218, 220 (1982).

26 This subassignment provides no basis for reversal or
27 remand of the challenged decision, and it is denied.

1 These assignments of error are sustained, in part.

2 **CONCLUSION**

3 On remand, the county must either adopt adequate
4 findings supported by substantial evidence that the subject
5 property is neither agricultural nor forest land under the
6 requirements of both the plan and the goals, or take an
7 exception to the applicable goals.

8 The county's decision is remanded.