

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. 94-037
10 COLUMBIA COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 MCFARLAND CASCADE HOLDINGS,)
17)
18 Intervenor-Respondent.)

21 Appeal from Columbia County.

23 Charles Swindells, Portland, filed the petition for
24 review and argued on behalf of petitioner.

26 No appearance by respondent.

28 Michael C. Robinson, Portland, filed the response brief
29 and argued on behalf of intervenor-respondent. With him on
30 the brief was Stoel Rives Boley Jones & Grey.

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

35 REMANDED 07/07/94

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 Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving an
4 "irrevocably committed" exception to Statewide Planning
5 Goal 4 (Forest Lands), a comprehensive plan map amendment
6 from Forest Resources to Rural Residential, and a zone
7 change from Primary Forest (PF-76) to Rural Residential
8 (RR-5), for an approximately 143-acre parcel.

9 **MOTION TO INTERVENE**

10 McFarland Cascade Holdings, the owner of the subject
11 property and the applicant below, moves to intervene in this
12 proceeding on the side of respondent. There is no
13 opposition to the motion, and it is allowed.

14 **ASSIGNMENT OF ERROR**

15 Petitioner contends the challenged decision fails to
16 comply with the requirements of ORS 197.732(1)(b), Goal 2
17 (Land Use Planning), Part II(b), and OAR 660-04-028 for an
18 "irrevocably committed" exception to Goal 4. Petitioner
19 argues the county's findings are deficient in several
20 respects for failure to adequately address the factors set
21 out in OAR 660-04-028(2) and (6). Petitioner also argues
22 certain county findings are not supported by substantial
23 evidence in the whole record. Petitioner further argues the
24 decision fails to include an adequate statement of reasons,
25 required by OAR 660-04-028(4), explaining why the facts
26 found support a conclusion that uses allowed by Goal 4 are

1 impracticable on the subject property.

2 Intervenor contends many of the challenges made by
3 petitioner concerning whether the county's findings
4 adequately address the factors required to be considered by
5 OAR 660-04-028(2) and (6), and whether there is evidentiary
6 support for the county's findings in the record, may not be
7 raised before this Board because they were not sufficiently
8 raised below. ORS 197.763(1) and 197.835(2). Intervenor
9 also argues the county's findings satisfy the requirements
10 of OAR 660-04-028 for demonstrating the subject property is
11 irrevocably committed to rural residential use.

12 ORS 197.732(1)(b) provides that a local government may
13 adopt an exception to a statewide planning goal when:

14 "The land subject to the exception is irrevocably
15 committed as described by [Land Conservation and
16 Development Commission] rule to uses not allowed
17 by the applicable goal because existing adjacent
18 uses and other relevant factors make uses allowed
19 by the applicable goal impracticable[.]"
20 (Emphasis added.)

21 ORS 197.732(6)(a) provides that when reviewing a local
22 government decision approving or denying a goal exception,
23 this Board is bound by any finding of fact which is
24 supported by substantial evidence in the record. However,
25 ORS 197.732(6)(b) provides that in conducting such a review,
26 this Board:

27 " * * * shall determine whether the local
28 government's findings and reasons demonstrate that
29 the standards of [ORS 197.732(1)] have or have not
30 been met[.]"

1 Consequently, even where a local government's findings
2 address all factors made relevant under OAR 660-04-028, and
3 are supported by substantial evidence in the record, it is
4 still this Board's responsibility to determine whether the
5 findings demonstrate compliance with the above emphasized
6 standard of ORS 197.732(1)(b).

7 Our usual approach to reviewing local government
8 decisions adopting irrevocably committed exceptions is first
9 to resolve any contentions that the findings fail to address
10 issues relevant under OAR 660-04-028 or address issues not
11 properly considered under OAR 660-04-028. We next consider
12 any arguments that particular findings are not supported by
13 substantial evidence in the record.¹ Finally, we determine
14 whether the findings that are relevant and supported by
15 substantial evidence are sufficient to demonstrate
16 compliance with the standard of ORS 197.732(1)(b) that "uses
17 allowed by the goal [are] impracticable." We omit the first
18 two steps of this process here because we conclude, as
19 explained below, that even if the county's findings are
20 assumed to be adequate to address all factors relevant under
21 OAR 660-04-028, and are assumed to be supported by
22 substantial evidence in the record, those findings are
23 insufficient to demonstrate that carrying on uses allowed by

¹When carrying out these first two steps, we generally also address any claims by respondent that specific issues sought to be raised by petitioners were waived due to failure to raise them during the proceedings below.

1 Goal 4 on the subject property is impracticable.²

2 We have reviewed the county's findings. The following
3 is a summary of the findings of fact adopted by the county:

4 The subject property contains 143.16 acres and is
5 composed of Douglas fir site class 2 soils.
6 Record 11A, 14, 24. The property contains no
7 structures. Record 11A. The property was logged
8 15-20 years ago, but was not replanted with
9 Douglas fir and has been taken over by deciduous
10 trees. Id. The alder trees currently growing on
11 the property do not satisfy the Oregon Department
12 of Forestry's reforestation requirements.
13 Record 27.

14 The property was included in a 240 acre
15 subdivision preliminary plat approved by the
16 county in 1979. Record 28. Phase 1 of that
17 subdivision was developed as the Lost Creek
18 Heights subdivision, adjoining the subject
19 property. Id. The Lost Creek Heights subdivision
20 has 90 acres, containing 28 lots, 15 of which are
21 developed with single family dwellings.
22 Record 23. The subject property comprised
23 Phases 2 and 3 of 1979 preliminary subdivision
24 plat, for which a final plat was never recorded.
25 Record 28.

26 The community water system currently serving the
27 Lost Creek Heights subdivision was originally
28 designed to serve up to 75 residential hookups,
29 enough to serve all three phases of the
30 subdivision proposed in 1979. Record 28. The
31 community water system has three water wells, only
32 one of which is needed to serve the Lost Creek

²We are aware of the requirement of ORS 197.835(9)(a) that "to the extent possible consistent with the time requirements of ORS 197.830(14) [for issuance of the board's final opinion and order], the board shall decide all issues presented to it when reversing or remanding a land use decision * * *." However, in this case, it is not possible to address all of the many issues raised by petitioner without incurring a lengthy delay in issuing the Board's final opinion and order.

1 Heights subdivision.³ Id. With the installation
2 of another 30,000 gallon holding tank and
3 activation of a second water well, the water
4 system can easily handle up to 75 residential
5 hookups. Id.

6 The property contains several roads constructed to
7 serve rural residential development. Record 27.
8 The roads are graded and contain an aggregate base
9 nine to twelve inches deep. Id. Trees may not be
10 planted in these roads because of the deep gravel
11 base, which cannot be economically removed. Id.

12 To the north and south of the subject property are
13 large power line easements for the Bonneville
14 Power Administration (BPA). Record 30.
15 Highway 30 is one-half mile north of the property.
16 Id.

17 To the west of the subject property is the Lost
18 Creek Heights subdivision. Record 14. Four of the
19 dwellings in this subdivision are located adjacent
20 to the western boundary of the subject property.
21 Record 23. To the north, east and south of the
22 property are "[f]orest uses and rural residential
23 development."⁴ Record 14. To the south are two
24 large tracts of forest lands, 104 acres and 166
25 acres in size. Record 11F. The section in which
26 the subject property is located and the adjoining
27 section to the south contain a total of 27
28 structures -- either dwellings or shops.⁵ Record
29 23, 29. The average parcel sizes in these two

³We note the findings do not indicate that any of these wells, or any other parts of the existing community water system, are located on the subject property.

⁴The findings do not include any sort of map or diagram depicting the plan and zoning designations of the surrounding properties. However, at oral argument the parties agreed that all land surrounding the subject property, except for the Lost Creek Heights subdivision, is designated and zoned for forest use.

⁵A section contains 640 acres. Therefore, the figure of 27 structures in two sections represents an average of one structure per 47.4 acres.

1 sections are 14.8 and 24.6 acres.⁶ Record 11F,
2 29.

3 The area in which the subject property is located
4 is within one mile of the Allston Corner rural
5 center, a small commercial center serving rural
6 residential development. Record 31. This rural
7 center consists of about 12 acres, with parcel
8 sizes ranging from one-quarter acre to two acres.
9 Id.

10 The county's decision does not explain the reasons why
11 the above described facts, if assumed to be true,
12 demonstrate it is impracticable to put the subject property
13 to uses allowed by Goal 4, especially forest operations and
14 related uses. With regard to the gravel roads, the only
15 development existing on the subject property, the findings
16 simply make a conclusory statement that the "presence of the
17 roads makes it impracticable to conduct forest operations
18 because of the amount of area lost to the roads."
19 Record 27. However, the findings do not state what amount
20 of the property is occupied by gravel roads and do not
21 explain why the presence of the roads makes it impracticable
22 to use the remainder of the property for forest operations.

23 With regard to other uses existing on adjacent
24 properties, the decision contains almost no explanation of
25 why such uses make forest operations on the subject property
26 impracticable. The decision states the existence of (an
27 unspecified number of) rural residences on adjacent

⁶The section with an average parcel size of 14.8 acres includes the 28-lot, 90-acre, Lost Creek Heights subdivision.

1 properties creates the possibility of trespass or complaints
2 regarding forest operations.⁷ According to the decision,
3 "the potential for complaints and other [legal] actions
4 impact[s] the property's potential for forest use because
5 they make such use more expensive and problematic."
6 Record 30. The decision also states the two BPA easements
7 "separat[e] the site from other forest lands." Record 32.
8 These statements are insufficient to explain why it is
9 impracticable to use the subject property for uses allowed
10 by Goal 4 and, therefore, do not satisfy ORS 197.732(1)(b).

11 The assignment of error is sustained.

12 The county's decision is remanded.

⁷The findings indicate four of the rural residential dwellings in the Lost Creek Heights subdivision are on lots adjoining the subject property. Record 23. Presumably the other 11 dwellings in the Lost Creek Heights subdivision are on lots that do not directly adjoin the subject property. Of the remaining 12 structures in the two-section area considered by the county, which are located on land designated and zoned for forest use, it is unclear how many of them are dwellings and where any such dwellings are located in relation to the subject property.