

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4 DEPARTMENT OF LAND CONSERVATION )

5 AND DEVELOPMENT, )

6 )  
7                   Petitioner, )

8 )  
9           vs. )

10 COOS COUNTY, )

11                   Respondent, )

12 )  
13           and )

14 )  
15 CHARLES H. MARKHAM, )

16 )  
17                   Intervenor-Respondent. )

LUBA No. 94-231

FINAL OPINION  
AND ORDER

18  
19  
20  
21           Appeal from Coos County.

22  
23  
24           Walter Perry III, Assistant Attorney General, Salem,  
25 filed the petition for review. With him on the brief was  
26 Celeste J. Doyle, Assistant Attorney General, Virginia L.  
27 Linder, Solicitor General, Thomas A. Balmer, Deputy Attorney  
28 General, and Theodore R. Kulongoski, Attorney General.  
29 Walter Perry III and Celeste J. Doyle argued on behalf of  
30 petitioner

31  
32           No appearance by Coos County.

33  
34           Charles H. Markham, Bandon, filed the response brief  
35 and argued on his own behalf.

36  
37           GUSTAFSON, Referee; LIVINGSTON, Referee, participated  
38 in the decision.

39  
40                           REMANDED                           07/14/95

41  
42           You are entitled to judicial review of this Order.  
43 Judicial review is governed by the provisions of ORS  
44 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving an  
4 exception to Statewide Planning Goal 3 (Agricultural Lands)  
5 and Goal 4 (Forest Lands), amending the comprehensive plan  
6 designation of two portions of a 34-acre parcel from  
7 "Forest" to "Rural Residential" and amending the zone  
8 designation from "Forestry/Mixed Use" to "Rural Residential-  
9 2."

10 **MOTION TO INTERVENE**

11 Charles Markham (intervenor) moves to intervene on the  
12 side of respondent. There is no opposition to the motion  
13 and it is allowed.<sup>1</sup>

14 **MOTION TO FILE REPLY BRIEF**

15 On May 25, 1995, petitioner submitted a motion to file  
16 a reply brief. A reply brief accompanied the motion. As  
17 the basis for the motion, petitioner cited new arguments  
18 intervenor raised in his brief, which was filed April 10,  
19 1995. Oral argument was scheduled for May 31, 1995,  
20 following a holiday weekend.

21 Under OAR 661-10-039, a motion to file a reply brief  
22 must be made "as soon as possible after respondent's brief  
23 is filed." Petitioner does not explain its 45-day delay in  
24 moving to file a reply brief, which gave intervenor only six

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<sup>1</sup>Intervenor lives on and manages a 107-acre resource site near the subject site, and appeared on behalf of the applicants before the county.

1 days, including a holiday weekend, to prepare for oral  
2 argument. Petitioner's motion was not filed as soon as  
3 possible after intervenor's brief was filed.

4 Petitioner's motion to file a reply brief is denied.

5 **FACTS**

6 The applicants applied to the county for a  
7 comprehensive plan amendment, an exception to Goals 3 and 4,  
8 and a zone change to allow them to create two rural  
9 residential home sites on a four-acre portion of a 34-acre  
10 forest resource parcel. Each of the proposed home sites is  
11 approximately two acres. The applicants propose to retain  
12 the remaining 30 acres for resource use.

13 The two proposed home sites (the proposed exception  
14 area) are located one mile east of Highway 101, along a  
15 county road. The proposed exception area is bisected by the  
16 county road, with one proposed home site west of the road,  
17 and the other, along with the remaining resource parcel,  
18 east of the road. Much of the area adjacent to the county  
19 road, between the proposed exception area and Highway 101,  
20 is zoned RR2, and is developed with several nonresource  
21 dwellings. Otherwise, the proposed exception area is  
22 surrounded by larger resource parcels, ranging in size from  
23 40 to over 200 acres.

24 The county planning commission denied the applicant's  
25 requests, based on its finding that there was not sufficient  
26 evidence that the proposed exception area was irrevocably

1 committed to nonresource uses. On appeal, the county board  
2 of commissioners reversed the planning commission and  
3 approved the application. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioner contends the findings adopting an  
6 irrevocably committed exception to Goals 3 and 4 do not  
7 satisfy ORS 197.732(1)(b), Goal 2, Part II(b) and OAR 660-  
8 04-028. Petitioner specifically contends the county's  
9 findings are inadequate because they do not address all  
10 applicable factors of OAR 660-04-028(6) and are not  
11 supported by substantial evidence that the uses allowed by  
12 the Goals 3 and 4 are impracticable.

13 ORS 197.732(1)(b), Goal 2, Part II(b) and OAR 660-04-  
14 028 all establish the same standard for granting an  
15 exception to the goal requirements: "[E]xisting adjacent  
16 uses and other relevant factors make uses allowed by the  
17 applicable goal impracticable \* \* \*." To implement that  
18 standard, OAR 660-04-028(4) requires that

19 "[a] conclusion that an exception area is  
20 irrevocably committed shall be supported by  
21 findings of fact which address all applicable  
22 factors of section (6) of this rule and by a  
23 statement of reasons explaining why the facts  
24 support the conclusion that uses allowed by the  
25 applicable goal are impracticable in the exception  
26 area."

27 OAR 660-04-028(6) sets out the factors the local government  
28 must apply in evaluating a request for a goal exception.

29 Petitioner contends the county's findings do not

1 adequately address OAR 660-04-028(6) because (1) the  
2 conclusion that the proposed exception area is irrevocably  
3 committed to nonresource use is based solely on  
4 practicability of commercial forest uses in the proposed  
5 exception area; (2) the analysis of the practicability of  
6 forest uses is defective because it is limited to the  
7 physical attributes of the exception area and does not  
8 evaluate existing uses on adjacent lands; (3) the findings  
9 do not demonstrate that all uses allowed by Goal 4 are  
10 impracticable; (4) the findings do not include an evaluation  
11 of adjacent properties necessary to determine whether  
12 existing adjacent uses make resource uses impracticable; and  
13 (5) the findings do not adequately address parcelization and  
14 ownership patterns in adjacent resource zones.

15 Intervenor counters that the extensive findings,  
16 prepared by the applicant and incorporated as an exhibit  
17 into the county's order, demonstrate that the proposed  
18 exception area is irrevocably committed to rural residential  
19 uses.<sup>2</sup> Intervenor further states that the county's  
20 determination that the exception area is not resource land  
21 is incidental to the county's finding that the exception  
22 area is "Irrevocably Committed to a 'Rural Residential  
23 Neighborhood' [sic]." Response Brief 14, 15. Intervenor

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<sup>2</sup>The county's findings incorporate, as an exhibit, more than 100 pages of testimony and evidence prepared by the applicant to demonstrate that the exception area is not adequate for commercial forest uses, and that it is appropriate for rural residential development.

1 argues resource use of the proposed exception area would be  
2 detrimental to the neighborhood since it would create a wind  
3 tunnel through the neighborhood. Intervenor contends that  
4 homes in the proposed exception area would provide a wind  
5 break and sound buffer, and would enhance the aesthetic  
6 values of the neighborhood, and concludes that the exception  
7 is needed "for the good of the neighborhood." Response  
8 Brief 11, 17.

9 As we recently explained in remanding a requested  
10 exception to Goals 3 and 4 in 1000 Friends of Oregon v.  
11 Yamhill County, 27 Or LUBA 508, 519-20 (1994),

12 "the ultimate legal standard for an irrevocably  
13 committed exception in ORS 197.732(1)(b), Goal 2,  
14 Part II(b), and OAR 660-04-028(1) is that 'uses  
15 allowed by the applicable goal are impracticable.'  
16 The impracticability standard is a demanding one.  
17 For this Board to conclude the county correctly  
18 determined the disputed areas are irrevocably  
19 committed to uses not allowed by Goals 3 and 4,  
20 the county must adopt findings explaining why its  
21 ultimate legal conclusion of impracticability  
22 follows from the findings of fact. The specific  
23 findings \* \* \* fail to explain why the disputed  
24 areas are irrevocably committed to uses not  
25 allowed by Goals 3 and 4.\* \* \* There are no  
26 findings explaining why the factual documentation  
27 provided supports the ultimate legal conclusion of  
28 irrevocable commitment, and it is not obvious to  
29 us that it does."

30 The county's findings in this case are inadequate to  
31 justify an exception to Goals 3 and 4. First, the findings  
32 address only the practicability of commercial forestry uses,  
33 and do not address other commercial and non-commercial uses  
34 allowed by Goals 3 and 4 on agricultural and forest lands.

1 Showing only that commercial forestry uses are impracticable  
2 in the proposed exception area does not justify an  
3 irrevocably committed exception. DLCD v. Curry County, 26  
4 Or LUBA 34 (1993).

5 Second, the findings address the practicability of  
6 commercial forest uses only in the exception area, and not  
7 on adjacent lands, which is required for an irrevocably  
8 committed exception. See Dennis v. Douglas County, 101 Or  
9 App 131, 789 P2d 1388 (1990).

10 Third, the findings do not satisfy the requirements of  
11 OAR 660-04-028(6)(c) regarding the evaluation of adjacent  
12 parcels. The findings include a conclusion that the  
13 adjacent parcels are nonresource parcels. However, there  
14 are no findings regarding when and how the existing  
15 development pattern occurred or whether past land divisions  
16 were made through application of the goals. These findings  
17 are required to determine whether the county can consider  
18 the existing uses of any adjacent parcels in evaluating  
19 whether those uses make resource uses in the exception area  
20 impracticable under OAR 660-04-028(6)(c).

21 Fourth, the county's findings do not address  
22 parcelization and ownership patterns in adjacent forest  
23 zones as required by OAR 660-04-028(6)(c)(B).

24 A finding that surrounding neighbors support the  
25 exception "for the good of the neighborhood" does not  
26 address the factors of OAR 660-04-028(6). Nor does the

1 finding that resource dwellings will provide a windbreak,  
2 sound barrier and aesthetic values. Findings to justify a  
3 committed goal exception must address the factors of  
4 OAR 660-04-028(6), and be supported by substantial evidence  
5 explaining how conflicts between existing uses and resource  
6 uses operate in a particular instance to render the subject  
7 property irrevocably committed. See DLCD v. Curry County,  
8 26 Or LUBA at 37 (1993).

9 Because the county's findings are inadequate, no  
10 purpose would be served by addressing petitioner's  
11 additional allegation that the findings are not supported by  
12 substantial evidence. DLCD v. Columbia County, 16 Or LUBA  
13 467, 471 (1988); DLCD v. Columbia County, 15 Or LUBA 302,  
14 305 (1987); McNulty v. City of Lake Oswego, 14 Or LUBA 366,  
15 373 (1986).

16 The first assignment of error is sustained.

17 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

18 Petitioner alleges the county's findings do not  
19 establish that the comprehensive plan amendment complies  
20 with Goals 3 or 4.

21 Unless the local governing body adopts an exception to  
22 one or more statewide planning goals pursuant to ORS 197.732  
23 and Goal 2, Part II, comprehensive plan amendments must  
24 comply with all statewide planning goals. ORS  
25 197.175(2)(a).

26 The county purports to take an exception to Goals 3 and

1 4. Since we have determined the county's findings do not  
2 satisfy the requirements for a goal exception, the  
3 comprehensive plan amendment must comply with Goals 3 and 4.  
4 The county's order includes no findings that the  
5 comprehensive plan amendment complies with either Goal 3 or  
6 Goal 4.

7 The second and third assignments of error are  
8 sustained.

9 The county's decision is remanded.