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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
COOS COUNTY,)
)
Respondent,)
)
and)
)
JOHN L. KNUTSON and JERRY BRODIE,)
)
Intervenors-Respondent.)

LUBA No. 95-047
FINAL OPINION
AND ORDER

Appeal from Coos County.

Jane Ard, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Douglas M. DuPriest, Eugene, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Hutchinson, Anderson, Cox & Coons.

GUSTAFSON, Referee; HANNA, Referee, participated in the decision.

REMANDED 12/07/95

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a
4 comprehensive plan amendment and zone change, and an
5 exception to Statewide Planning Goal 4.

6 **MOTION TO INTERVENE**

7 John L. Knutson and Jerry Brodie (intervenors) move to
8 intervene on the side of respondent. There is no opposition
9 to the motion, and it is allowed.

10 **FACTS**

11 Intervenors applied for a comprehensive plan amendment,
12 zone change and exceptions to Statewide Planning Goals 3 and
13 4 for a parcel bordering Tenmile Lake. The parcel consists
14 of one lot of approximately 28 acres (Tax Lot 600) and eight
15 smaller lots, each of which is two acres or less in size.
16 Four of the smaller lots are developed with lakefront
17 residences. One of the smaller lots, Tax Lot 500, is
18 located within Tax Lot 600, and is designated a separate lot
19 for purposes of a domestic water right. Two of the smaller
20 lots are approximately one-quarter acre each, and have float
21 homes attached to them. One two-acre lot is undeveloped,
22 and is located between two of the smaller, developed lots.

23 The parcel is located at the end of a peninsula,
24 surrounded by the lake. A gravel road, known as Potato
25 Bottom Road, extends through Tax Lot 600, and provides the
26 sole road access to some of the smaller lots within the

1 exception area. It also provides the sole road access to
2 numerous other, developed rural residential lots on the
3 peninsula, fronting the lake. All lots in the exception
4 area (except Tax Lot 500), and the other lots dependent upon
5 Potato Bottom Road for road access, also have boat access
6 from the lake.

7 Tax Lot 600 is steeply sloped toward the lake. The
8 Oregon State Forestry Department classifies it as a Douglas
9 Fir species site, though it is covered primarily with scrub
10 alder. It was recently harvested as part of the harvesting
11 of a larger forestry operation on an adjacent forest site.
12 Because of the steepness of the slope, removing logs from
13 the site required log trucks to be pulled out by
14 Caterpillar, necessitating numerous and extended closures of
15 Potato Bottom Road. In addition, during the harvesting the
16 road had to be regravelled periodically to permit passage
17 for both logging and residential vehicles.

18 Petitioner appealed the county's initial approval of
19 the application, on the basis that the county had not
20 justified its exceptions to Goals 3 and 4. The county
21 stipulated to a remand. After additional hearings and
22 submission of additional evidence, the county again approved
23 the application, but without a Goal 3 exception.

24 This appeal followed.

25 **DISCUSSION**

26 Petitioner makes one assignment of error. Petitioner

1 alleges the county has not demonstrated that the exceptions
2 site is irrevocably committed to uses not allowed by Goal 4,
3 as required by OAR 660-04-028. Petitioner contends the
4 county has misconstrued the exception requirements for
5 evaluation of uses other than commercial forestry uses, and
6 that the record lacks substantial evidence to support a
7 conclusion that the property could not be utilized for any
8 other non-commercial uses allowed by Goal 4. It further
9 contends the county has not established that the parcel
10 cannot be used for commercial forestry operations.

11 **A. Segregation of Exception Area**

12 Intervenor's contend that petitioner does not challenge
13 compliance with the exceptions criteria for any of the lots
14 within the exception area other than Tax Lot 600. On that
15 basis, intervenors urge us to "summarily affirm" the Goal 4
16 exception as to those lots.

17 Petitioner does not challenge the county's findings
18 that the smaller lots are irrevocably committed to uses not
19 allowed by Goal 4. Its allegations focus on Tax Lot 600.
20 If the other, smaller lots constituted the entire exception
21 area, the county's Goal 4 exception could be affirmed.
22 However, the county did not segregate the lots; it adopted a
23 single exception covering all nine affected lots. Our
24 review of the county's exception must be based on the
25 decision the county made. We cannot segregate the single
26 exception area in contravention of the application and the

1 county's decision.

2 **B. Commercial Forestry Uses**

3 Petitioner challenges the county's conclusion that
4 commercial forestry use of Tax Lot 600 is impracticable on
5 both legal and evidentiary grounds. In addition to
6 challenging the evidentiary basis for the county's
7 conclusion, petitioners allege the county has misinterpreted
8 the requirement of OAR 660-04-028(2)(c) that the findings
9 address "[t]he relationship between the exception area and
10 the lands adjacent to it * * *."¹ According to petitioner,
11 the county has reversed the standard: instead of
12 demonstrating that the adjacent non-resource uses make
13 resource use of Tax Lot 600 impracticable, the county
14 concluded that resource use of the subject property impairs
15 the non-resource uses of the surrounding property.

16 OAR 660-04-028(2)(c) requires that the county find that
17 adjacent non-resource lands make resource use of the subject

¹OAR 660-04-028(2) states, in its entirety:

(2)Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:

- (a) The characteristics of the exception area;
- (b) The characteristics of the adjacent lands;
- (c) The relationship between the exception area and the lands adjacent to it; and
- (d) The other relevant factors set forth in OAR 660-04-028(6).

1 property impracticable. Intervenors contend, however, that
2 in certain circumstances establishing that existing adjacent
3 non-resource uses are precluded by resource uses also
4 establishes that resource uses are precluded by adjacent
5 non-resource uses. Intervenors assert that is the situation
6 here.

7 For example, with regard to the access road, petitioner
8 argues that while closure of the road for harvesting
9 operations may impair the surrounding residential uses, that
10 impairment is not relevant to whether resource uses are
11 precluded by residential uses. Intervenors respond that the
12 two issues are inextricably related, and that, given the
13 relationship of Tax Lot 600 to the surrounding residential
14 uses, all of which are dependent on Potato Bottom Road, the
15 impact of road closures on the surrounding residences
16 equally impacts the ability to use (and close) the road for
17 harvesting purposes.

18 While intervenors' analysis could lend support to a
19 conclusion that the surrounding residential uses make
20 resource use of Tax Lot 600 impracticable, that is not what
21 the county found. The county concluded that the forest use
22 of Tax Lot 600 impairs the surrounding residential uses.
23 The county has not correctly identified and applied the
24 standard. In order to justify an irrevocably committed
25 exception, the county must determine, based on evaluation of
26 the facts, that the surrounding residential uses make

1 resource use of Tax Lot 600 impracticable.

2 Petitioner also argues the county has not established
3 factually that commercial forest use of Tax Lot 600 is
4 impracticable. Intervenors respond that petitioner has
5 merely identified certain conditions of the property and
6 evaluated them in isolation. Intervenors argue that
7 cumulatively, the county's findings demonstrate that
8 commercial forestry use is impracticable on Tax Lot 600. As
9 intervenors explain,

10 "The cumulative weight of a variety of limitations
11 and problems can be sufficient to support a
12 committed exception, where a smaller subset of
13 those constraints might not be adequate to sustain
14 the exception." Intervenors' Response Brief 10.

15 We agree with intervenors' premise that numerous
16 factors which, when viewed in isolation may not be
17 sufficient to justify an irrevocably committed exception,
18 may cumulatively justify such an exception. However, the
19 standard for evaluating requests for irrevocably committed
20 exceptions remains. As we have previously explained, the
21 impracticability standard for committed exceptions is a
22 demanding standard, and findings must do more than recite
23 facts addressing the relevant factors. The findings must
24 explain why the facts upon which it relies lead to a
25 conclusion that uses allowed by Goal 4 are impracticable.
26 1000 Friends of Oregon v. Yamhill County, 27 Or LUBA 508
27 (1994); DLCD v. Josephine County, 18 Or LUBA 88 (1989).
28 Moreover, the evaluation of the limitations and explanation

1 of how those limitations cumulatively support the county's
2 conclusion must be in the county's findings and not merely
3 in the intervenor's brief.

4 The county's findings in this case explain its
5 objections to petitioner's analyses (both in its first
6 petition for review and in its correspondence to the
7 county), recite its conclusions that the exception area is
8 irrevocably committed and, in a separate attached exhibit,
9 recite the facts which support the decision. Nowhere in the
10 findings is there any evaluation of the facts or any
11 analysis demonstrating how or why the facts support its
12 conclusions. The county's findings do not establish that,
13 in fact, the cumulative limitations on the use of Tax Lot
14 600 compel the conclusion that use of that lot for
15 commercial forestry uses is impracticable.

16 **C. Other Goal 4 Uses**

17 Petitioner alleges the county's findings both misapply
18 the law and are otherwise inadequate to establish that it is
19 impracticable to use Tax Lot 600 for other uses allowed by
20 Goal 4.

21 Intervenors respond that the county evaluated the other
22 uses specified in the Goal 4 and in the county's code, and
23 that the record contains substantial evidence that no other
24 forest uses are practicable on Tax Lot 600.² Intervenors

²Goal 4 uses are defined as follows:

1 specified and analyzed other potential uses and, based on
2 the evidence in the record, argue that this analysis
3 establishes such impracticability. Intervenors further
4 argue that, to the extent the county's findings are
5 inadequate, intervenors have pointed to evidence in the
6 record to support the impracticability; and to the extent
7 the findings may go too far in their legal analysis of the
8 requirement for evaluation of other uses, they are
9 surplusage.

10 An initial problem with intervenor's analysis is that
11 the required evaluation of other uses is in the intervenors'
12 brief, and not in the county findings. That there may be
13 facts in the record, or even in the findings, which could
14 support a conclusion that other uses allowed under Goal 4
15 are impracticable, does not excuse the county from the
16 requirement that it analyze and evaluate the facts to show
17 how it reached its conclusion that other forest uses are
18 impracticable.

19 More significantly, the county misconstrued the
20 requirements of an exception to Goal 4. Not only did the

"Uses which may be allowed subject to standards set forth in this goal and administrative rule are: (1) uses related to and in support of forest operations; (2) uses to conserve soil, water and air quality, and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment; (3) locationally dependent uses; (4) forest management dwellings that are necessary for, and accessory to, forest operations; and (5) other dwellings under prescribed conditions."

1 county not explain why other Goal 4 uses were impracticable,
2 it concluded that it was not required to evaluate those
3 uses. Rather, it concluded an obligation to evaluate other
4 forest uses was inconsistent with the Goal 4 requirements.
5 The county found:

6 * * * * *

7 "10. The 'other uses' are essentially for the
8 benefit of the public and this Board finds
9 that preservation of lands solely for these
10 other uses to be inconsistent with the
11 language and intent of the applicable
12 comprehensive plan policies, the Forest
13 Practices Act and Goal 4. Land suitable for
14 commercial forestry contributes to the forest
15 land base and the local economy and
16 protection of the 'other uses' in conjunction
17 with this principal use is acceptable and the
18 subject property does not meet this standard.
19 The 'other uses' do not provide any direct
20 economic benefit to the private land owner
21 nor do they contribute substantially to the
22 local or state forest economy by making the
23 forest practice of continuous growing and
24 harvesting of forest tree species
25 economically efficient. The Board finds that
26 the leading use of forest lands (continuous
27 growing and harvesting of forest tree
28 species) should be consistent with sound
29 management of soil, air, water, and fish and
30 wildlife resources which is regulated by the
31 State Forest Practices Act and administered
32 by the Department of Forestry, not by the
33 County.

34 "The Board finds the construction of Goal 4
35 to be the opening policy statement followed
36 by guidelines regarding uses, planning and
37 implementation strategies and the County's
38 comprehensive plan and implementing
39 ordinances are consistent with this format.
40 This Board finds that the 'leading use' of

1 continuous growing and harvesting of forest
2 tree species to be impracticable on the
3 subject property.

4 "* * * * *

5 "13. The Board finds that any land, regardless of
6 zoning, can and does contribute to the
7 maintenance of soil, air, water and fish and
8 wildlife resources. Ornamental trees,
9 shrubs, and ground cover found in rural and
10 urban areas serve to protect these values.
11 The concept that any land that serves to
12 maintain these values must be designated
13 'forest' land would make an exception to Goal
14 4 impossible, which is clearly not the intent
15 of the Goal 2 exceptions process.

16 "* * * * *

17 "14. The Board finds that a requirement to
18 demonstrate that all of the 'other uses' are
19 impracticable in addition to demonstrating
20 that the leading use (economically efficient
21 forest practices) is impracticable is not
22 consistent with the OAR 660-04-028(3)
23 provision regarding not requiring the local
24 government to demonstrate that every use
25 allowed by the applicable [goal] be
26 impossible, or the applicable provisions of
27 the County Comprehensive Plan." Record 24-5.

28 We agree with the county that other forest uses that
29 may have some public value may nonetheless be impracticable
30 under Goal 4 because they provide no benefit to the property
31 owner. Goal 4 does not mandate that all natural resources
32 be preserved for their public value, without regard to their
33 usefulness to the private property owner. However, the
34 county's findings go far beyond this standard. The county's
35 determination that an evaluation of other forest uses would
36 be inconsistent with Goal 4, and that it therefore need not

1 conduct such an evaluation, is wrong as a matter of law.
2 Both Goal 4 and the Goal 2 exceptions process mandate such
3 an evaluation. See OAR 660-04-028; DLCD v. Coos County, 29
4 Or LUBA 415, 419 (1995); DLCD v. Curry County, 26 Or LUBA 34
5 (1993).

6 After the required evaluation, the county may conclude
7 that no other forest uses are practicable on Tax Lot 600.
8 However, before it can reach this conclusion, the county
9 must identify the other Goal 4 forest uses and evaluate
10 their practicability on the subject site.³

11 **CONCLUSION**

12 The county has not demonstrated that Tax Lot 600 is
13 irrevocably committed to uses not allowed by Goal 4.

14 The county's decision is remanded.

³We note that, in their argument that commercial forestry uses are not practicable on Tax Lot 600, intervenors stress that the lot is covered with alder, which they contend is not a commercial species. If intervenor is correct that alder is not a commercial forestry use, the county must evaluate the practicability of the site for growing and harvesting alder in its evaluation of other uses allowed by Goal 4.