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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
COLUMBIA COUNTY,)
)
Respondent.)

LUBA No. 96-174

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review 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.

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

REMANDED 11/27/96

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 from Agriculture Resource to
5 Rural Residential and a zone change from Forest Agriculture
6 (FA-19) to Rural Residential (RR-5).

7 **FACTS**

8 The facts are stated in petitioner's brief as follows:

9 "The subject property consists of a single parcel
10 of 9.95 acres. It is located about 3 miles
11 southwest of the City of St. Helens (Rec. 38) and
12 has access to a county road * * *. Prior to the
13 challenged decision, the parcel was designated
14 'Agricultural Resource,' and was zoned FA-19
15 (Forest Agriculture - 19 acres). (Rec. 16, 19).
16 The eastern portion of the parcel is currently
17 developed with a single family dwelling, a shop
18 and a barn. (Rec. 16). Soils on the property are
19 predominately capability classes II and III, and
20 are 'well suited to farm use.' (Rec. 17). Soils
21 on the other portions of the parcel are in
22 capability class IV, which is 'well suited to
23 Douglas Fir production.' (Rec. 17).

24 "The subject property is bordered on the west by
25 an 80 acre forest parcel (Rec. 21), which is zoned
26 Primary Forest (PF-76). (Rec. 17). The subject
27 property is bordered on the north, east and south
28 by other parcels zoned Forest Agriculture (Rec.
29 21, 78), ranging in size from 10 to 38.8 acres.
30 (Rec. 78). Lands designated and zoned Rural
31 Residential (RR) lie to the northeast and
32 southeast of the subject property, however, none
33 of those RR lands are contiguous to the subject
34 property." Petition for Review 2-3.

35 The county board of commissioners approved an
36 application to amend the comprehensive plan designation and
37 change the zone to permit residential development on the

1 subject property. The approval includes both irrevocably
2 committed and physically developed Statewide Planning Goal 2
3 exceptions to Goals 3 and 4, based on findings that the
4 subject property is both irrevocably committed to non-
5 resource uses, and that it is physically developed so as to
6 preclude non-resource use.

7 **ASSIGNMENT OF ERROR**

8 ORS 197.732(1)(a) and (b) and OAR 660-15-000(2) each
9 state that Goal 2 exceptions to allow non-resource use on
10 resource land may be taken when:

11 "The land subject to the exception is physically
12 developed to the extent that it is no longer
13 available for uses allowed by the applicable goal;
14 [or]

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

21 Petitioner contends the county's findings that the subject
22 property justifies an irrevocably committed exception and a
23 physically developed exception to Goals 3 and 4 are based on
24 inadequate findings, fail to address all applicable facts,
25 do not explain why the facts support or lead to the
26 conclusions made, and are not supported by substantial
27 evidence in the whole record.

28 **A. Irrevocably Committed Exception**

29 OAR 660-04-028(1) requires that, to justify an
30 irrevocably committed exception, the local government must

1 establish that:

2 "the land subject to the exception is irrevocably
3 committed to uses not allowed by the applicable
4 goal because existing adjacent uses and other
5 relevant factors make uses allowed by the goal
6 impracticable[.]"

7 This rule requires that the county analyze and establish
8 that none of the uses permitted by the applicable goals is
9 practicable on the subject property. See 1000 Friends of
10 Oregon v. Yamhill County, 27 Or LUBA 508, 518 n6 (1994).

11 OAR 660-04-028(4) specifies the requirements for
12 findings that the land satisfies the irrevocably committed
13 standard:

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

22 Those findings must be supported by substantial evidence.
23 ORS 197.835(9)(a)(C); 1000 Friends of Oregon v. City of
24 North Plains, 27 Or LUBA 372, 377-78, aff'd 130 Or App 406
25 (1994).

26 Petitioner argues:

27 "The challenged decision does not address the
28 practicability of the uses allowed by Goals 3 and
29 4. Nor does the challenged decision make findings
30 addressing the factors that must be analyzed to
31 justify an irrevocably committed exception. OAR
32 660-04-028(6). Nor does the challenge decision
33 explain why the facts found support the conclusion
34 that the property is irrevocably committed. OAR

1 660-04-028(4). [footnote omitted.] Instead, the
2 challenged decision seems to rely on a statement
3 submitted by the applicant, and simply concludes
4 that the subject property is 'irrevocably
5 committed to non-resource uses.' (Rec. 15). This
6 conclusion is not supported by the analysis
7 required by OAR ch. 660, div. 4, adequate
8 findings, or substantial evidence in the record."

9 We agree. The applicant's statement, upon which the
10 county appears to rely exclusively to support its
11 conclusion, is not reflected in or incorporated into the
12 county's findings. Moreover, even if it had been adequately
13 incorporated into the findings, the evidence in the
14 statement does not establish that the subject property is
15 irrevocably committed to resource land. To the extent it is
16 even responsive to the requirements of OAR 660-04-028, the
17 analysis within the application is wholly incomplete. For
18 example, the application does not include any analysis of
19 the practicability of the uses allowed by Goals 3 or 4. In
20 addition, the analysis fails to establish how uses on
21 surrounding lands makes resource use of the subject property
22 impracticable. Given that the property is surrounded on all
23 four sides by resource property, the burden to establish
24 compliance with the rule may be insurmountable. However, to
25 the extent the county believes compliance with OAR 660-04-
26 028 can be shown, it has not yet made findings establishing
27 that compliance. 1000 Friends of Oregon v. Columbia County,
28 ___ Or LUBA ___ (LUBA No. 95-084, March 20, 1996); 1000
29 Friends of Oregon v. Columbia County, 27 Or LUBA 474, 476

1 (1994).

2 The first subassignment of error is sustained.

3 **B. Physically Developed Exception**

4 In order to justify a physically developed exception,
5 the local government must establish that "the land subject
6 to the exception is physically developed to the extent that
7 it is no longer available to uses allowed by the applicable
8 goal." OAR 660-04-025(1). OAR 660-04-025(2) describes the
9 physically developed standard as follows:

10 "Whether land has been physically developed with
11 uses not allowed by an applicable Goal, will
12 depend on the situation at the site of the
13 exception. The exact nature and extent of the
14 areas found to be physically developed shall be
15 clearly set forth in the justification for the
16 exception. The specific area(s) must be shown on
17 a map or otherwise described and keyed to the
18 appropriate findings of fact. The findings of
19 fact shall identify the extent and location of the
20 existing physical development on the land and can
21 include information on structures, roads, sewer
22 and water facilities, and utility facilities.
23 Uses allowed by the applicable goal(s) to which an
24 exception is being taken shall not be used to
25 justify a physically developed exception."

26 The county's sole finding purporting to establish
27 compliance with this requirement is found in the
28 recommendation of the planning commission, which is
29 incorporated into the challenged decision, as follows:

30 "The applicants point out that a circle with a
31 radius of 1/4 mile, centered on the northeast
32 corner of their property, includes 12 dwellings, 8
33 of which are on lots of less than 5 acres.
34 However, if the 1/4 mile radius is centered on the
35 center of the applicants' property, it includes

1 only 4 dwellings, 1 of which is on a parcel of
2 less than 4 acres.

3 "Two of the 4 surrounding parcels have dwellings.
4 The request would permit the development of at
5 least one more dwelling on the property, if a
6 variance can be approved to permit a new parcel of
7 less than 5 acres. Other facilities and services
8 in the area are power, telephone, school, police,
9 etc.

10 "D & P Lane, which is used for access to the
11 property, is a 20' wide easement, which cannot be
12 considered adequate for any substantial
13 development in the area. In any event, §604.5A of
14 the Zoning Ordinance would require the property to
15 have 50' of frontage on a public right-of-way
16 before a partition could be approved." Record 12.
17 (Emphasis in original.)

18 To the extent these findings are even relevant to
19 compliance with the rule, they do not establish that the
20 subject property is physically developed with non-resource
21 uses. The record shows that the property is developed with
22 a single residence and a barn. The findings do not even
23 attempt to establish how this development renders the
24 subject property physically developed so as to preclude use
25 of the property for all uses allowed by Goals 3 and 4.

26 As with the request for an irrevocably committed
27 exception, given the facts of this case, the burden to
28 establish that the subject property justifies a physically
29 developed exception, may be insurmountable. Again, however,
30 to the extent the county believes compliance with OAR 660-
31 04-025 can be shown, it has not yet made findings
32 establishing that compliance.

- 1 The second subassignment of error is sustained.
- 2 The assignment of error is sustained.
- 3 The county's decision is remanded.