BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JON POTTS,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2004-113

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

James H. Bean, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Lindsay, Hart and Weigler, LLP.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

DAVIES, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 02/09/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioner appeals the county's denial of his application for a comprehensive plan map amendment from Forest to Rural Residential and zone change from Timber (TBR) to Rural Residential Farm Forest - 10 acres (FF-10).

FACTS

The facts pertinent to this appeal have been twice cited by this Board. *Potts v. Clackamas County*, 40 Or LUBA 371 (2001)(*Potts I*); *Potts v. Clackamas County*, 42 Or LUBA 1, *aff'd* 183 Or App 145, 52 P3d 449 (2002)(*Potts II*). We quote the relevant facts again here:

> "The subject property is a six-acre parcel zoned Timber (TBR). The property is located on a level ridge at an approximately 2,100-foot elevation. Soils on the property are Zygore gravelly loam, 5-30 percent slopes. Surrounding lands are zoned TBR.
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> "In 1996, the property was logged of all merchantable timber. The property was then partially replanted with a variety of seedlings, in an attempt to start a Christmas tree farm. That same year the county approved an agricultural building on the property, in conjunction with the proposed Christmas tree farm. The landowner instead constructed a two-bedroom dwelling. In 1997, the county threatened enforcement proceedings against the landowner for zoning violations and other issues involving the illegally constructed dwelling. In 2000, petitioner purchased the property, and filed [an application in an attempt to legalize the dwelling.]
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> "Petitioner's application materials state that petitioner believes the subject property is nonresource land and therefore can be redesignated for rural residential use without an exception to resource goals such as Statewide Planning Goal 3 (Agricultural Lands) and 4 (Forest Lands). Petitioner supported his application with studies from three soil and forestry experts that concluded, generally, that the subject property was not suitable for agriculture or commercial forestry. County staff apparently disagreed with petitioner's theory, at least with respect to Goal 4. The county thereafter processed the application as a request to adopt exceptions to Goals 3 and 4, pursuant to OAR 660-004-0022, 660-004-0025 and 660-004-0028. The staff report concluded that exceptions to Goals 3 and 4 were warranted, but recommended denial of the application based on noncompliance with certain county comprehensive plan provisions. The planning commission conducted a hearing on April 9,

> 2001, and voted to recommend denial of the application, on the grounds that an exception to Goal 4 was necessary and petitioner had not met the burden of proof to justify an exception to Goal 4.
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> "The board of county commissioners (commissioners) then conducted a hearing on May 2, 2001. At the conclusion of the hearing, the commissioners voted 2-1 to deny the application, finding that petitioner had failed to demonstrate that an exception to Goal 4 was justified. * * *." 40 Or LUBA at 372-73 (citations omitted).

Petitioner appealed that denial to LUBA. We remanded the county's decision in *Potts I* because the county had failed to address petitioner's argument that the property is not resource land subject to Goals 3 and 4. The county erroneously assumed that in order to redesignate resource land to nonresource use, an exception was required.[1] On remand, the county adopted findings concluding that the subject property is forest land, and it therefore denied the application for a plan amendment and zone change that would allow redesignation for nonresource use. Petitioner again appealed. We affirmed the county's denial, concluding that petitioner had not demonstrated, as a matter of law, that the subject property is not suitable for commercial forest uses. *Potts II*, 42 Or LUBA at 7.

On January 8, 2004, petitioner filed another application, seeking essentially the same approval that he previously had been denied in *Potts II*. The new application includes the same studies submitted in support of the previous application, which the county denied. According to petitioner, the application also includes "substantially additional expert testimony in support of a finding that his property was not suitable for commercial forest use." Petition for Review 3.[2] On April 12, 2004, the planning commission recommended

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[1] A county can justify a decision to allow nonresource use of land designated and zoned for resource use in one of two ways. First, it can approve an exception to Goals 3 and 4. Alternatively, it can adopt findings that demonstrate the land is not resource land under Goal 3 and Goal 4. *DLCD v. Klamath County*, 16 Or LUBA 817 (1988).

[2] Petitioner provides several record citations for the new evidence submitted: Record 309, 320-34, 16-17 and 281-87. Petition for Review 3. It appears that only the last two citations are to new evidence submitted for this application. The new evidence includes letters from two forestry experts and verbal testimony from one of

denial of the application. The minutes and recommendation itself indicate a continued misunderstanding by the members of the planning commission regarding the nature of the application; *i.e.*, that the application was one for approval of an exception to Goal 4, rather than an application for nonresource designation based on findings that the land is not agricultural land under Goal 3 or forest land under Goal 4.[3] The county board of commissioners conducted a public hearing on May 5, 2004, and denied the application on July 1, 2004.[4] Petitioner appeals the county's denial.

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those experts. Record 16-17 (testimony of Ken Lathrup), Record 124-28 (written submittal by Ken Lathrup), Record 281-88 (written submittal by Keith Jehnke).

[3] The April 12, 2004 planning commission minutes reflect the following comment by one of the commissioners following a motion to deny the application and immediately prior to the vote: "Comm. Hauck wanted to state that the reason for his motion was the applicant failed to make any argument for an exception to Goal 4 within the application." Record 163.

[4] The county adopted the following findings in support of its decision denying petitioner's application:

"Based upon the evidence and testimony presented, this Board makes the following findings:

"1. In 2000, these applicants made substantially the same application, which was denied by this Board, a decision ultimately upheld by the Land Use Board of Appeals.

"2. The applicants, as stated by Mr. Potts himself, are not asking that this Board approve an exception to Goal 4; rather, they are asserting that Goal 4 does not apply to this property at all, because it is not resource land, and therefore an exception is not required. In order to justify a Comprehensive Plan amendment and zone change removing the Forest designations on this basis, the applicants must prove that the property is not suitable for commercial forest uses.

"3. In addition to submitting much of the same evidence provided in the proceeding on the prior application, the applicants have submitted some new evidence. Even this new evidence, however, is similar to, and adds little weight to, their previous arguments. It demonstrates at most that this property might not be capable of producing a profit on its own, and that there may be difficulties involved in using the property for commercial forest uses, but these problems do not rise to the level of making the property unsuitable for commercial forest use.

"4. After weighing the prior and more recent evidence on both sides, this Board continues to conclude that the property is suitable for commercial forest uses, and that removal of the Forest Comprehensive Plan designation is not justified.

"5. While the Board does not believe the question of an exception is before it, an exception to Goal 4 would not be appropriate for the reasons stated in the Planning Staff Report/Recommendation.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county misapplied state law by relying on the county's 1974 comprehensive plan map, which designates the subject property for forest use, to determine that the subject property is forest land subject to Goal 4. The crux of petitioner's argument is that the county processed and decided his application applying the wrong criteria. Statewide Planning Goal 4 provides, in relevant part:

> "Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses * * *."

Petitioner argues that where, as here, an applicant seeks redesignation as nonresource land, the relevant inquiry is whether the subject property is suitable for commercial forest uses. He alleges that the county, yet again, treated his application as one for approval of an exception to Goal 4, not as one seeking designation as nonresource land, and that it therefore failed to evaluate his application under the proper standard.

The county concedes that the record reflects some confusion by planning staff, the planning commission and even members of the board of commissioners.[5] However, as the county correctly points out, the challenged decision is what is on appeal. The proper inquiry is whether the challenged decision correctly applied the applicable law. The challenged decision not only clearly states that the "applicants must prove that the property is not suitable for commercial forest uses," but also clearly states that an exception is not required. *See* n 4, Finding 2.

> "NOW, THEREFORE, IT IS HEREBY ORDERED that the requested Comprehensive plan amendment and zone change are denied." Record 3-4.

[5] The minutes of the May 5, 2004 board of commissioners' hearing provide the following summary of a statement made by one of the commissioners: "Mr. Chairman as staff stated that we looked at this property twice before and both times you were told that it would be inappropriate to transfer or go through the exception process to transfer this land from Resource Land to Rural Land." Record 25.

Petitioner's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision is not supported by adequate findings addressing the applicable standard; *i.e.*, whether the subject property is "suitable for commercial forest use." He argues that the findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards." Petition for Review 7 (citing *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613 (1997)). He contends that the findings are inadequate for the following reasons: (1) there are no findings explaining the definition of "suitable for commercial forest use," (2) there are no findings addressing whether the subject property is "suitable for commercial forest uses, and (3) the findings do not explain what evidence the county relied on in reaching its conclusion. Because there are essentially no findings, petitioner contends, we must assume that the board of commissioners relied on the planning commission recommendation and staff report, which were based on the wrong standard.

As discussed above, the misunderstanding of the applicable criterion by the planning staff and planning commission, or even by a member of the board of commissioners, cannot invalidate an otherwise valid decision by the board of commissioners. Although the county's findings are admittedly scant, as discussed below they do address the applicable criterion and explain how the facts relied upon lead to the county's conclusion that the criterion is not satisfied.

The challenged decision sets out the relevant approval standard: suitability for commercial forest uses. *See* n 4, Finding 2. Petitioner argues, however, that the decision must define "suitable for commercial forest use," and elaborate on the board of commissioner's understanding of that term. Petition for Review 8. He urges us to apply the

considerations found in ORS 526.320 regarding the "suitability" determination.[6] That statute applies to a county's "forestland classification committee" pursuant to ORS 526.310 and requires counties to study forest lands and determine whether such lands are "suitable primarily for the production of timber" or "suitable primarily for grazing or other agricultural use." Under that statute, the determination of "suitability" requires consideration of "climate, topography, elevation, rainfall, soil conditions, roads, extent of fire hazards, recreation needs, scenic values, and other physical, economic and social factors and conditions relating to the land involved." ORS 526.320. Petitioner suggests that those same elements must be considered and addressed in the findings in this case. We disagree. That statute has absolutely no relevance to this case.

We also reject petitioner's contention that the county is required to define the meaning of "suitable for commercial forest uses." This criterion in the county's code parallels language in Goal 4 and OAR 660, division 6, the administrative rule implementing Goal 4. We acknowledged in our decision in *Potts II* that (1) Goal 4 and the Goal 4 rule do not define the term "suitable for commercial forest uses," and (2) there is no "generally applicable test for determining whether land is 'suitable for commercial forest uses.'" *Potts II*, 42 Or LUBA at 5. However, we cited several cases that we concluded

> "suggest that it is capability or potential for production of commercial tree species that is at issue in determining a property's suitability for commercial forest uses, not necessarily the past or current level of production, or whether the property is or could be part of a commercial-scale timber business." *Id*.

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[6] ORS 526.320 provides:

> "Upon establishment of a committee under ORS 526.310, the committee shall investigate and study all forestland within its county and determine which of the land is suitable primarily for the production of timber, which is suitable primarily for joint use for timber production and the grazing of livestock, and which is suitable primarily for grazing or other agricultural use. Such determination shall take into consideration climate, topography, elevation, rainfall, soil conditions, roads, extent of fire hazards, recreation needs, scenic values, and other physical, economic and social factors and conditions relating to the land involved."

The county's findings do not restate this explanation of the meaning of the criterion, but the findings do appear to apply it. *See* n 4, Finding 3.

The challenged findings recite that the county weighed "the prior and more recent evidence on both sides." *See* n 4, Finding 4. Although the county does not spell out in detail the evidence on both sides, it is not required to. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174, 182 (2000); *Lawrence v. Clackamas County*, 46 Or LUBA 101, 106 (2003). In any event, our opinion in the previous appeal, which is referenced in Finding 1 of the challenged decision, summarizes the evidence presented in that previous appeal.[7] Furthermore, the challenged findings summarize the new evidence: "[The new evidence] demonstrates at most that this property might not be capable of producing a profit on its own, and that there may be difficulties involved in using the property for commercial forest uses * * *." *See* n 4, Finding 3. Petitioner does not dispute that that summary of the new evidence is accurate. The county concluded, however, that "these problems do not rise to the level of making the property unsuitable for commercial forest use." *Id.*

These findings provide the required explanation of the basis for the county's determination of noncompliance with the sole applicable approval standard and are adequate.

Petitioner's second assignment of error is denied.

The county's decision is affirmed.

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[7] In *Potts II*, we summarized the evidence as follows:

> "The testimony of petitioner's experts indicates that the subject property consists of Zygore soils, a 'very productive' soil with a Douglas Fir site index of 130 to 165. Because of soil compaction from a previous logging operation, effects of poor maintenance on soil quality, and other limitations, the property's actual site index is in the range of 90 to 110, a 'medium productivity range.' Despite those problems, if properly planted and maintained, the subject property would nonetheless yield $81,300 worth of commercial timber at 50 years, after an investment of $7,450. The foregoing undisputed facts are drawn from the timber management assessment submitted by petitioner, and relied upon by the county to conclude that the property is suitable for commercial forest uses. Considering the record as a whole, including countervailing evidence, a reasonable trier of fact could rely on the foregoing evidence to conclude that the subject property is suitable for commercial forest uses. Accordingly, petitioner has not demonstrated, as a matter of law, that the subject property is not suitable for commercial forest uses." *Potts II*, 42 Or LUBA at 6-7 (footnote and citations omitted).