BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KELLY GORDON,
Petitioner,

vs.

POLK COUNTY,
Respondent,

and

KEVIN LEEDERS and KAREN NISHIMURA,
Intervenors-Respondent.

LUBA No. 2005-110

FINAL OPINION
AND ORDER

Appeal from Polk County.

Kelly Gordon, Monmouth, filed the petition for review and argued on his own behalf.

No appearance by Polk County.

Kevin Leeders and Karen Nishimura, Sheridan, filed a response brief on their own behalf. Edward J. Sullivan, Portland, argued on behalf of intervenors-respondent.

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

REMANDED 12/09/2005

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals an ordinance amending the comprehensive plan map and zoning map and adopting an irrevocably committed exception to allow rural residential development on a 41.90-acre parcel.

FACTS

The subject property is a 41.90-acre parcel designated and zoned Farm Forest (FF). The property was once the southeastern corner of a 240-acre parcel. Starting in 1975, the parent parcel underwent a series of partitions to allow rural residential development, known as Mountain Springs Estates. The subject property is the remnant parcel remaining from those partitions. In 1986, during periodic review, the county took an exception to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) for the area including the subject property, and rezoned the area to allow rural residential development. The county's action was successfully challenged. On remand from the Court of Appeals, the county withdrew the subject property from the exception area and the property retained its plan designation and zoning to FF.

Intervenors-respondent (intervenors) bought the subject property in 1990. In 1993, the county approved intervenors' application for a dwelling in conjunction with forest use. Intervenors' dwelling takes access from Evergreen Lane, which currently dead-ends at the north-east property line. Evergreen Lane continues as a platted but unimproved 40-foot wide easement that runs along and within the northern border of the subject property. Intervenors' dwelling is located in the northwestern corner of the subject property, on the northern bank of Gooseneck Creek, which flows across the northwestern portion of the property. Gooseneck Creek is joined by an unnamed tributary that flows northward for 1,250 feet across the approximate middle of the property. The subject parcel is vegetated with mixed age stands of fir and alder. All of the soils on the subject property are rated for forest productivity. Approximately 71 percent of the soils on the subject

property are also Class II through IV agricultural soils, and 62 percent of the soils are defined as "high-value farmland" under OAR 660-033-0020(8).

Large publicly-owned parcels zoned Timber Conservation (TC) adjoin the subject property to the south and southeast and have similar soils, topography and drainage as the subject property. To the east is a 40-acre parcel zoned FF and managed for timber production. The southern and eastern boundaries of the subject property are fenced. To the north and west of the subject parcel is the 198-acre Mountain Springs Estate exception area, zoned Acreage Residential 5-acre minimum (AR-5). Lands north and west of the exception area are zoned either TC or FF. When intervenors acquired the subject property in 1990, the area of the former 240-acre parent parcel included seven dwellings. At the time of the application, the area of the former 240-acre parent parcel included more than 20 dwellings. The size of parcels within the exception area ranges from 5 acres to 13 acres. Within 750 feet of the subject property there are 12 parcels zoned AR-5, with eight dwellings and four vacant parcels. Of the nearby AR-5 zoned parcels, two parcels are large enough for partition, for a potential of 14 AR-5-zoned parcels and dwellings within 750 feet of the subject property.

In 2004, intervenors applied to the county to redesignate the subject property to Rural Lands and rezone it to Acreage Residential 10-acre minimum (AR-10), which would potentially allow an additional three dwellings on the property. After conducting a public hearing, the county hearings officer recommended denial, on the ground that the application did not meet the requirements for taking an exception to Statewide Planning Goals 3 (Agricultural Land) and 4 (Forest Lands). The county board of commissioners conducted a public hearing, deliberated, and voted 2-1 to approve the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the county's finding that the subject property is "irrevocably committed" to uses not allowed under Goal 4.[1]

A local government may adopt an exception to a goal when land is "irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." OAR 660-004-0028(1). Whether land is irrevocably committed depends on the characteristics of the proposed exception area, the characteristics of adjacent lands, the relationship between the exception area and the adjacent lands, and other relevant factors. OAR 660-004-0028(2).[2] Local governments need not demonstrate

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[1] The county's decision includes almost no discussion of Goal 3 and the practicability of farm uses on the property. While petitioner's first assignment of error purports to challenge the county's adoption of an exception to Goals 3 and 4, petitioner's arguments under the first assignment of error are exclusively concerned with Goal 4 and forest uses. Intervenors respond in kind. Accordingly, we focus our analysis on the exception to Goal 4.

[2] OAR 660-004-0028 provides, in relevant part:

> "(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:
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> "(a) The characteristics of the exception area;
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> "(b) The characteristics of the adjacent lands;
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> "(c) The relationship between the exception area and the lands adjacent to it; and
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> "(d) The other relevant factors set forth in OAR 660-004-0028(6).
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> "(3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(1)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule. Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible.' For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:
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> "(a) Farm use as defined in ORS 215.203;

that uses allowed by the goals are "impossible," only that certain uses allowed by the goals are "impracticable." OAR 660-004-0028(3). Specifically, the local government must consider whether the following uses are impracticable: (1) farm use as defined at ORS 215.203, (2) propagation or harvesting of a forest product as specified in OAR 660-033-0120 and (3) forest operations or forest practices as specified in OAR 660-006-0025(2)(a). *Id*.

Here, the county primarily relied on two types of considerations in concluding that the uses allowed under Goal 4 are impracticable on the subject property.[3] First, with respect to the

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"(b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and

"(c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a).

"* * * * *

(6) Findings of fact for a committed exception shall address the following factors:

"(a) Existing adjacent uses;

"(b) Existing public facilities and services (water and sewer lines, etc.);

"(c) Parcel size and ownership patterns of the exception area and adjacent lands:

"* * * * *

"(d) Neighborhood and regional characteristics;

"(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;

"(f) Physical development according to OAR 660-004-0025; and

"(g) Other relevant factors."

[3] The county adopted the following staff findings addressing OAR 660-004-0028(3) as the basic rationale for concluding that the subject property is irrevocably committed to non-resource uses. That rationale is repeated under other findings addressing other provisions of OAR 660-004-0028.

"The applicant identified trespassing from residents to the north and west as existing economic, social and environmental impacts that affect their forest management practices. The

characteristics of the subject property, the county found that "[p]ropagation or harvesting of a forest product" on the subject property is limited by various setbacks and other restrictions on forestry operations. These restrictions include (1) 3 acres occupied by the current dwelling in conjunction with forest use, (2) 1.5 acres occupied by unimproved easements on the property, including the platted but unimproved Evergreen Lane along the northern border, (3) 8 acres of timber along the eastern boundary needed to protect the current dwelling and other houses to the west from high winds, (4) a 50-foot buffer along 500 feet of the western property boundary needed to protect a

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existing economic, social and environmental impacts include destruction of fences, destruction of both young and older trees by off road vehicles, illegal use of campfires and fireworks during the late months of summer, and the unauthorized cutting of trees for firewood. The impacts have occurred even though fencing is in place where appropriate, 'No Trespassing' signs are posted, and the owners have insisted trespassers leave the subject property and the owners have notified law enforcement to report suspicious activity. The applicant stated that thinning of trees on the subject property by logger Jim Evans was halted due to the liability risk from curious onlookers from the surrounding rural residential area.

"The applicant contends that high velocity easterly winds originating from the Columbia Gorge suggests that the applicant leave untouched 8 acres of trees on the eastern boundary. The applicant states that those trees protect the subject property as well as the homes of Mountain Springs Estates. The applicant states that a 1,250–foot long tributary flows through the entire center of the subject property from south to north and [600] feet of Gooseneck Creek flows from west to east and joins with the tributary. The applicant states that Oregon Department of Forestry (ODF) rules for timber harvesting prohibits logging practices for 70 feet in either direction of Gooseneck Creek and 50 feet in either direction of the tributary. The western lot line of the subject property (500 feet) borders on a domestic water diversion right and the Oregon Forest Practices Act (FPA) requires a no cut buffer within 50 feet of it. The applicant contends that the total number of acres removed from commercial forest production due to water setbacks is 5.87 acres. Staff finds that Oregon Administrative Rule (OAR) 629-635-0310 requires a 100-foot riparian management area width on either side of a large fish-bearing stream, which is 200 feet less than the figure used by the applicant. OAR 629-640-0100(2) would require all vegetation within 10 feet of the high water level be retained, all trees within 20 feet of the high water mark be retained, and all trees leaning over the channel be retained. The remainder of the riparian management area could be harvested as long as a standard target conifer tree basal area is left consistent with OAR 629-635.

"Based on these findings, staff concludes that ODF rules would limit timber-harvesting practices consistent with the limitations determined by the applicant. The applicant states that the 3.00 acres where the current dwelling sits and the 1.50 acres reserved for necessary existing easements combined with the acreage removed from production for water setback reasons leaves little acreage remaining for the profitable propagation and harvesting of trees. The applicant contends that resource use on the subject property is impracticable due to recent changes in the surrounding community, the physical limitations inherent in the subject property and the destructive and disruptive behavior of trespassers. The applicant states that his leads to a less than profitable forest enterprise. A forest enterprise must be profitable in order to be practicable. * * *" Record 34-35 (paragraph breaks added).

domestic water diversion right, and (5) state administrative rules that limit logging to some degree within 100 feet of Gooseneck Creek and, to a lesser extent, the unnamed tributary.

Second, with respect to the relationship between the subject property and adjacent uses, the county found that trespassing from residents of dwellings in the exception area had adversely impacted forest management of the property in various ways, including destruction of young trees by off road vehicles, illegal use of campfires and fireworks during the late months of summer, and unauthorized cutting of trees for firewood. The county also cited an experience where a logger on the property curtailed a timber thinning operation to protect the safety of curious neighbors who trespassed onto the property to watch. The county agreed with the applicant that rezoning the subject property to allow four dwellings on 10-acre parcels would reduce trespassing and protect adjoining resource lands, because the additional residents and smaller parcels would allow more effective monitoring of illegal activities. Petitioner challenges the county's reliance on both considerations.[4]

A. Characteristics of the Subject Property

With respect to the setbacks and other restrictions that allegedly limit harvesting timber on the property, petitioner disputes the county's finding that eight acres of timber along the eastern boundary of the property must remain standing to protect dwellings from eastern winds and the threat of windthrow, *i.e.*, trees toppled by the wind. Petitioner argues there is no evidence in the record to support that finding. On the contrary, petitioner cites to his testimony based on a site visit indicating no signs of toppled or broken trees along the eastern boundary, notwithstanding the fact

[4] Petitioner also notes a statement by one of the county commissioners that voted to approve the application that the commissioner "owns most of the colored land on the map and he probably knows more about that land that surrounds this property than anybody does." Record 63. The commissioner went on to state that he had consulted with county counsel and did not believe his ownership of land in the area is a conflict of interest requiring recusal, because he would not benefit financially from any decision taken on the application. *Id.* While noting the commissioner's statement, petitioner does not assign error to the commissioner's participation in the challenged decision, and we do not consider it further.

that the adjoining parcel had been logged of all trees and thus the trees along the eastern boundary were directly exposed to east winds.[5]

Petitioner also challenges the county's reliance on riparian setbacks and other restrictions on logging imposed under the Forest Practices Act (FPA). According to petitioner, protection of riparian areas under the FPA is an allowed use on Goal 4 lands and is indeed one of the "[f]orest operations or forest practices" referenced under OAR 660-006-0025(2)(a). We understand petitioner to argue that FPA riparian protection measures cannot possibly be a factor that renders "forest operations or forest practices" impracticable, because such measures are in themselves forest practices. In any case, petitioner argues, the FPA riparian protection measures in fact allow some logging within most of the riparian setback area.

Intervenors respond that the county properly considered the limitations on logging within the riparian areas and the eight acre area needed to protect dwellings against windthrow, and that the county's findings on these points are supported by substantial evidence. According to intervenors, these limitations and others leave only a portion of the subject property available for resource use.

We generally agree with petitioners that the record does not support the finding that eight acres of timber along the eastern border must remain unlogged, in order to protect intervenors' dwelling and dwellings in the exception area from windthrow. We are not cited to any evidence that logging trees on the eastern portion of the property will cause trees on the western side of the property or in the exception area further west to fall on dwellings. The subject property has historically been in forest use and is currently in forest use, and there is no indication in the record

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[5] Petitioner cites to following testimony:

> "It is interesting that when the commissioners and I went to the east property boundary line; there was little evidence that there was a wind problem there. If the 'big' east winds from the Columbia river gorge were toppling trees to necessitate leaving this eight-acre [portion] from harvesting, I did not see any evidence of that at the location we were at. No root wads out of the ground, no toppled trees, no evidence of wind problems at all. If there is a wind problem with east winds, when the 40 acre property to the east was logged, trees on the subject property would have been knocked down in waves. There is no evidence of this type of wind disturbance at this site we visited." Record 59.

that past logging on the property or in the area in general has caused windthrow that threatens dwellings in the area. As petitioner notes, the 40-acre parcel adjoining the subject property on the east has been logged, directly exposing the trees on the subject property to east winds, without any consequence to the subject property or exception area cited to us. Even if a potential threat of windthrow is assumed, intervenors cite no legal obligation on their part to withdraw land from forest operations in order to protect property from windthrow. Intervenors might voluntarily choose to do so, but a voluntary choice to withdraw resource land from resource use is not a factor that renders resource use "impracticable."[6] The county erred to the extent it found that the eastern eight acres of the property is not available for propagation and harvesting of forest products, and in relying on that finding to conclude that forestry operations on the subject property are impracticable.

However, we disagree with petitioner that FPA-required riparian protection measures that limit logging within riparian areas are in themselves "forestry practices." OAR 660-004-0028(3)(c) refers to "forest practices as specified in OAR 660-006-0025(2)(a)." That rule, in turn, provides that:

> "The following uses pursuant to the Forest Practices Act (ORS Chapter 527) and Goal 4 shall be allowed in forest zones:
>
> "(a) Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash[.]"

While "forest practices" is not limited to the examples specified in the rule, the general interpretative principle of *ejusdem generis* would suggest that unlisted practices would resemble those listed, which uniformly include practices necessary to plant, manage or harvest timber. Further, OAR 660-006-0025(3) provides a separate list of uses allowed on forest lands, including

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[6] In addition, we note that the record includes a septic system evaluation for a dwelling and septic field on the eastern portion of the property, near the eastern property line, where there is apparently a scenic view of the Cascade Range. Record 345. As far as we can tell, construction of a dwelling, driveway, firebreaks, and septic field at the depicted location would involve removing at least some trees in the same area that intervenors state must be preserved from logging.

"[u]ses to conserve soil, air and water quality and to provide for wildlife and fisheries resources," which would seem to include the FPA riparian protection measures. OAR 660-006-0025(3)(a). Because OAR 660-004-0028(3)(c) specifically refers to forest practices described in OAR 660-006-0025(2), and that rule does not appear to encompass riparian protection requirements, we conclude that the county did not err in taking into account such requirements in determining the extent to which the characteristics of the subject property, which includes its streams, render propagation and harvesting of a forest product impracticable, for purposes of OAR 660-004-0028(3)(c).

That said, as the staff report and county findings note, intervenors' application misstated the extent to which such riparian protection requirements limit logging operations on the property. *See* n 2. Intervenors' application stated that the riparian protection requirements "prohibit" logging within 200 feet of both Gooseneck Creek and the unnamed tributary, for a total of 17 acres of the subject property. Record 382. As the findings explain, that estimate was based on an erroneous understanding of the applicable setbacks, and further failed to appreciate that the administrative rules in fact allow logging within most of the setback area. The findings do not determine how much land is restricted from logging under the applicable requirements, correctly understood, but petitioner asserts that it is no more than two acres, and we see nothing in the record to the contrary. While the county did not err in considering restrictions on logging imposed under the riparian protection regulations, we tend to agree with petitioners that riparian regulations prohibiting or restricting logging on two acres of a 41.9-acre parcel do little to demonstrate that propagation and harvesting of forest products on the property is impracticable.

B. Trespass and Vandalism

The focus of the analysis under OAR 660-004-0028 is the relationship between the proposed exception area and adjacent lands, and how that relationship and other relevant factors commit the proposed exception area to uses not allowed by the Goals. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489, 504-05 (2000). With respect to the relationship

between the subject property and adjacent lands, the county relied principally on intervenors' testimony regarding trespass and vandalism, apparently by residents of the exception area and their guests, to conclude that the forest operations and practices are impracticable.[7] In addition, intervenors relate an incident in 2004 when they found garbage on the public land south of the

[7] Intervenors testified as follows:

> "In 1990, when the applicants purchased the 41.9 acres, the surrounding area was truly Rural. Today the proximity of 41.9 acres to the populated community of Mountain Springs Estates has brought about dramatic changes. In 1990 there were seven dwellings on the original 240 acre plat. This provided the residents of Mountain Springs Estates an abundance of open areas and trails to wander. At that time 41.9 acres was left relatively untouched by the residents and fulfilled its farm/forest designation to propagate trees. As each new home site was developed open space was reduced and the number of local residents to use that open space has increased. This has led local residents to discover the 41.9 acres as a place to capture that uncrowded outdoor feeling.
>
> "In the early 1990s the applicants were okay with the occasional neighbor who enjoyed the beauty of the area while hiking the few narrow trails. As the years progressed, to the later part of the decade, the occasional neighbor became more frequent than occasional. Hiking became biking, then motor biking, then all terrain vehicles and then off-road vehicles. The unauthorized motor vehicles cut additional trails into the forest. These trails became wider and wider as we entered into the new millennium. On several occasions the applicants witnessed blatant destruction of newly planted trees by off-road vehicles.
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> "The more home sites that were occupied, the more people that spent their time on the 41.9 acres. These people had a need for firewood to burn in the winter. The wide trails allowed access for people in pickup trucks to cut trees to provide wood. Unfortunately good timber has been cut to provide firewood.
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> "Young adults have a natural need to group together. In an urban environment this might take place at the mall or a fast food restaurant. In a setting such as Mountain Springs Estates there are no such establishments. From time to time their gathering place has become 41.9 acres. Adolescence is a time for rebellion and mischievous behavior. This can often present a clear and present danger to a forest. The fact is the applicants have seen the remains of campfires and spent fireworks in the hot dry months of summer. There was probably no intent to do harm but when fire and fireworks combine with a dry forest, accidents often happen. * * *
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> "To prevent negative actions from happening on 41.9 acres, no trespassing signs were posted in the mid 1990s. The applicants often need to replace the signs, which are found tossed to the ground. In one instance a new off road vehicle trail was cut to circumvent the no trespassing sign. The implication in this topic is that the neighbors are trespassers and firewood gatherers. Although this may be true, the disturbing fact is that guests of neighbors often cause the damage. In one instance when the applicants were out to enjoy a walk on the 41.9 acres they encountered a local resident and his friends riding dirt bikes and all terrain vehicles. When asked to remove themselves from the property they were verbally abusive. The applicants spent the remainder of that day collecting empty beer cans and other litter which had been left behind." Record 297-98.

subject property, which they believed to be evidence of unlawful squatting. A sheriff's deputy investigated, but concluded that the garbage came from temporary camping, a permitted activity, rather than illegal squatting. Record 207. Intervenors also found a section of fence destroyed and a new trail between the subject property and the public land to the south, and believed either that local residents cut the trail and fence to access the public land, or squatters cut the trail and fence to obtain access to the subject property. Record 205. Finally, the record includes a letter from a logger who encountered curious neighbors on the property during a logging operation.[8]

Petitioner argues that the cited incidents of trespass and vandalism by residents of the exception area do not demonstrate that forest operations and practices are impracticable on the subject property. According to petitioner, intervenors' claim to being harassed by trespassing, vandalizing neighbors is contradicted by intervenors' other testimony that intervenors have invited neighbors to walk or bicycle on the subject property and enjoy friendly relations.[9] Petitioner also

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[8] The record includes the following letter from a logger hired to thin the subject property:

> "You have asked that I express in written form what I experienced while logging your 41.9-acre property at 23230 Mountain Springs Dr. in the spring/summer of 2003.
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> "As you know I worked alone while doing the logging. As a logger I am always concerned with safety for myself and those that may be close at hand. On several occasions I was surprised to look up and notice onlookers who happened by to watch my work. Anyone within viewing distance is also within the area that might cause them harm from falling trees. During a conversation with the onlookers I discovered they lived within walking distance in the local area.
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> "With so many homes in your small area on Mountain Springs/Evergreen any logging presents the danger of harm to local residents. I am in favor of whatever can be done to prevent injury to local residents." Record 339.

[9] Intervenors testified:

> "As was verbally expressed during the Hearing, we welcome our neighbors to enjoy the natural beauty of the subject property. They are welcome on foot and they are welcome on bicycle. If they should happen to see us while on our property we hope to exchange pleasantries and a smile. * * *
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> "Conversely, unauthorized trespassers who ride motorbikes, ATV's, or off-road vehicles are unwelcome. The same is true for those people who would steal timber or seek to entertain themselves with fireworks, campfires or fire of any nature. * * *" Record 244-45.

argues that trespass and vandalism is a problem for any large tract of forest land near rural residential areas, including the lands south and east of the subject property, and by themselves such incidents do not render forest use impracticable. With respect to the testimony of the logger who encountered residents during a logging operation, petitioner argues that that one incident does little to demonstrate that logging is impracticable on the subject property.

Intervenors respond that trespass and vandalism by residents of the exception area, combined with the other factors the county considered, including the easements and other limitations that reduce the amount of land available for harvesting timber, suffice to demonstrate that the subject property is irrevocably committed to nonresource uses. With respect to trespass and vandalism, intervenors cite a statement by petitioner that "trespassers are to be lived with especially if one has more land than they are able to visually see from their dwelling." Intervenors argue that the three new dwellings authorized under the proposed AR-10 zone would alleviate the very issue identified by petitioner, the inability of the residents of one dwelling to monitor activities on a 41.9-acre parcel.

We generally agree with petitioner that the cited incidents of trespass and vandalism add little to the county's conclusion that the subject property is irrevocably committed to nonresource uses. As far as we can tell from intervenors' testimony, most of the cited problems with trespass and vandalism stem not from *trespassers* but rather from occasional inappropriate behavior by some *invitees* and their guests. Given the mutual invitation to pass across lands in the neighborhood, the neighbors apparently understand that the "no trespassing" signs that intervenors put up do not apply to them. That mutual invitation goes far in providing a probable explanation as to why the neighbors felt entitled to enter the property to watch the logging operation.

> "During the Hearing we related our enjoyable experience of neighbors coming together through a common thread in our community. This common thread is a 1.9 mile trail that circumnavigates the majority of Rural Lands of the original 240 acres. This trail passes through many of the AR-5 parcels in the area. Our friends and neighbors own these parcels. We pass respectfully and quietly through our friends property and they pass respectfully and quietly through our property. * * *" Record 246.

Intervenors state that they enjoy friendly relations with their neighbors. On this record there is no reason to believe that intervenors could not advise neighbors when logging activities will occur on the property, and request that neighbors refrain from entering the property during such activities. For that matter, the record provides no basis to believe that intervenors could not with at least some success request that the neighbors and their guests refrain from the negative behavior cited, or, if that failed, revoke entirely the invitation for some or all neighbors to enter their property.

Finally, we tend to agree with petitioner that some level of trespass and vandalism is an inevitable aspect of maintaining large tracts in forest use, particularly near rural residential areas. It is likely that trespass and vandalism occurs on other lands in the area, including the 40-acre parcel zoned FF that adjoins the subject property on the east. Unless such incidents rise to such a level that they actually hinder or preclude forest operations on a significant part of the property, such incidents are unlikely to contribute much to a finding that the subject property is irrevocably committed to residential uses.

C. Conclusion

OAR 197.732(6)(b) provides that LUBA "shall determine whether the local government's findings and reasons demonstrate that the standards [for an exception] have or have not been met[.]" The county's findings and reasons in the present case fall far short of demonstrating that the subject property is irrevocably committed to residential uses. While the subject property is subject to easements and setback requirements that limit or preclude logging on at least several acres, the property has productive forest soils and has historically been and is currently in forest use despite those limitations. The only change cited to us is recent residential development within the exception area to the north and west, which increased incidents of trespass and vandalism on the property. However, as noted, many of those incidents apparently involve invitees to the property. The behavior of such invitees and their continued entitlement to enter the subject property is, to some extent, within intervenors' control and influence. Even if intervenors cannot reduce to zero the

incidents of unwelcome trespass and vandalism, as noted above such incidents are to some extent part and parcel of managing timber lands near residential development.

The county's basic rationale is that rezoning the subject property to allow 10-acre parcels and up to three additional dwellings would reduce incidents of trespass and vandalism on the subject property, because the additional residents could more effectively monitor the smaller parcels. While that rationale is sound as far as it goes, it is premised on the conclusion, rejected above, that trespass and vandalism render forest use of the entire subject property impracticable. The county also reasons that residential development of the subject property and anticipated reduction in unauthorized trespassing would "limit impacts to the forest management practices on the properties to the south and east[.]" Record 37. We do not understand the latter conclusion. The county noted elsewhere that "[a]dditional dwellings on the subject property may have an incremental impact on timber uses to the south and east that may make it more difficult or costly to manage the land for timber production." Record 27. It is not easy to reconcile that finding with the above finding that residential development of the subject property would "limit impacts to the forest management practices on the properties to the south and east[.]" The county does not explain how allowing additional residential development adjacent to large timber parcels is expected to protect those parcels from the adverse impacts of residential development. The subject property currently acts as a buffer between the exception area and large timber parcels. If that buffer is removed and replaced with more intensive residential development, it is difficult to see how adverse impacts on the timber parcels would be reduced. If the residents within the exception area can no longer trespass on the subject property, they may transfer their activities to the timber parcels. Further, the new residents on the subject property may be just as inclined to trespass on large unmonitored timber lands as their neighbors.

For the foregoing reasons, we agree with petitioner that the county's findings and reasons fail to demonstrate that the subject property is irrevocably committed to residential uses. The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county failed to address whether the proposed rezoning to AR-10 is consistent with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). According to petitioner, residential development allowed under the AR-10 zone is a conflicting use with respect to Gooseneck Creek, which is a large fish-bearing stream listed on the county's Goal 5 inventory of significant resources. In addition, petitioner argues that a strip of land along the southern border of the subject property is within a deer and elk winter range, and that the county must address whether residential development allowed under the AR-10 zone is consistent with that resource. Petitioner argues that the county failed to address consistency with Goal 5, but instead simply found that impacts on Goal 5 resources can be addressed at the time of development, under a management plan.

Intervenors respond that county did indeed adopt a finding addressing the creek and winter range.[10] With respect to winter range, the county concluded that under the county code development authorized under the FF and AR-10 zones is exempt from the deer and winter elk standards. With respect to the creek, intervenors argue that the county relied on code provisions designed to protect fish habitat, specifically the requirement to submit a management plan at the time

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[10] Intervenors cite to the following finding, which addresses a code provision requiring that the proposed zone change be consistent with the purpose of the proposed zone. One of the purposes of the AR-10 zone is to provide for rural residential homesites "and yet not adversely affect fish and wildlife resources and habitat areas[.]"

> "The subject property contains significant resource areas, as shown on the Polk County Significant Resource Areas Map. Gooseneck Creek is also identified as a significant fish stream on the Significant Resources Map. In addition, the southern portion of the subject property is located within a deer and elk winter range. The [FF and AR-10] zones are exempt from the deer and elk winter range standards of the Significant Resource Overlay zone, pursuant to PCZO 182.050(A). The applicant is not proposing development activity as part of this application. Prior to development on the subject parcel, local, state and federal permits may be required. The applicant would be required to submit a management plan to the Polk County Planning Division for development activity in the fish habitat area prior to issuance of permits for the development activity, pursuant to PCZO 182.040 and 182.050. The property owner would be required to coordinate the required management plan with the Oregon Department of Fish and Wildlife (ODFW) * * *." Record 26.

of development. Intervenors argue that these requirements are sufficient to ensure compliance with Goal 5.

We generally agree with petitioners that the time to address consistency with Goal 5 is at the time of the challenged plan amendment. OAR 660-023-0250(3)(b) (local governments must address the requirements of Goal 5 and the Goal 5 rule when adopting a post-acknowledgment plan amendment that "allows new uses that could be conflicting uses" with a particular Goal 5 resource). Adopting zoning that would increase residential density 400 percent would seem to allow new uses that "could be conflicting uses." In some cases, a local government can rely on its existing acknowledged Goal 5 program to protect significant resources, notwithstanding that it adopts amendments that allow new or more intensive uses that could conflict with significant Goal 5 resources. However, the local government must still address the requirements of the Goal 5 rule. *See generally NWDA v. City of Portland*, __ Or LUBA __ (2003-162 et al, October 5, 2005), slip op 23-27 (describing analysis required in adopting a post-acknowledgment plan amendment that triggers the rule under OAR 660-023-0250(3)(b)). The county's findings do not address the Goal 5 rule requirements.

The second assignment of error is sustained.

The county's decision is remanded.