BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES JOHNSON, CATHY JOHNSON
and SUSAN THOMAS,
Petitioners,

vs.

MALHEUR COUNTY,
Respondent,

and

JOHN ZUEGER,
Intervenor-Respondent.

LUBA No. 2008-049

FINAL OPINION
AND ORDER

Appeal from Malheur County.

Anthony B. James, Dallas, filed the petition for review and argued on behalf of petitioners. With him on the brief was Shetterly, Irick and Ozias.

No appearance by Malheur County.

R. David Butler II, Vale, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Butler & Looney, PC.

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

REMANDED 08/22/2008

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

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the county approving a comprehensive plan map and
4 zoning map amendment from exclusive farm use to rural residential by taking physically
5 developed and irrevocably committed exceptions to Statewide Planning Goals 3
6 (Agricultural Lands) and an exception to Statewide Planning Goal 14 (Urbanization).

7 **FACTS**

8 The subject property is a 28.46 acre parcel located approximately four miles west of
9 Vale, Oregon. The subject property was originally part of an approximately 40-acre parcel,
10 from which two separate five-acre parcels were partitioned when the property was zoned
11 General Farm Use (F-2). A dwelling is located on the subject property, and the two five-acre
12 parcels are each developed with dwellings.[1] The property is zoned Exclusive Farm Use
13 (EFU), consists of Class III and Class IV soils, and possesses thirteen acres of water rights.
14 Properties to the south of the subject property are 69 acres and 76 acres and are zoned EFU.
15 To the east of the subject property is a 77-acre parcel zoned EFU, to the west of the subject
16 property is a 38.79-acre parcel zoned EFU, and to the north of the subject property is a 192-
17 acre parcel zoned EFU. Each of the properties surrounding the subject property contain one
18 dwelling. All of the surrounding properties, as well as the subject property, are currently
19 being farmed.

20 Intervenor applied to change the comprehensive plan map and zoning map
21 designations for the subject property from EFU to Rural Residential (R-1). The minimum
22 parcel size in the R-1 zone is one acre. Malheur County Zoning Ordinance 6-3C-4. The
23 planning department issued a staff report that concluded that the application materials failed
24 to support the granting of either physically developed or irrevocably committed exceptions to

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[1] Although it is not entirely clear from the record, we understand those two five-acre parcels to be developed with non-farm dwellings.

Goal 3. Record 209-213. The planning commission voted to recommend denial of the application to the county court. The county court voted to approve the application, adopted exceptions to Goals 3 and 14, and adopted and incorporated by reference intervenor's proposed findings of fact and conclusions of law. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners challenge the county's determination that a physically developed exception to Goal 3 was justified. Under OAR 660-004-0025(1), in order to approve a physically developed exception, the local government must establish that "the land subject to the exception is physically developed *to the extent that it is no longer available for uses allowed by the applicable goal*." OAR 660-004-0025(1) (emphasis added.) OAR 660-004-0025(2) provides guidance for local governments in determining whether land has been physically developed with uses other than those allowed by a goal:

> "Whether land has been physically developed with uses not allowed by an applicable Goal, will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception." OAR 660-004-0025(2).

The county appears to have relied on the dwelling, well, and septic system, as well as a private road located on the subject property to conclude that the property meets the requirements for adoption of a "physically developed" exception to Goal 3. Petitioners assert that there is no evidence in the record that the dwelling and associated septic system, well, and road mean that the property is no longer available for uses allowed under Goal 3, and that in fact the evidence in the record indicates that the property is currently being farmed. Therefore, petitioners argue, the county erred in concluding that a physically developed exception was justified.

1 Intervenor has not responded to petitioners' argument in any meaningful way. We
2 agree with petitioners that the county erred in relying on the dwelling and associated well
3 and septic system serving it, and the road located on the property, to conclude that a
4 physically developed exception to Goal 3 was justified. Those developments alone do not
5 appear to us to prevent the property from being used for farm use under Goal 3.

6 The first assignment of error is sustained.

7 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

8 **A. Introduction**

9 OAR 660-004-0028(1) provides that a local government may adopt an exception to a
10 statewide planning goal when land is "irrevocably committed to uses not allowed by the
11 applicable goal because existing adjacent uses and other relevant factors make uses allowed
12 by the applicable goal impracticable." *See also* ORS 197.732(1)(b) (same). Under
13 OAR 660-004-0028(2), whether land is irrevocably committed "depends on the relationship
14 between the exception area and the lands adjacent to it," considering the characteristics of the
15 exception area, adjacent lands, the relationship between the two, and other relevant factors.
16 The local government need not demonstrate that every use allowed by the applicable goal is
17 "impossible," but must demonstrate that, as relevant here, "[f]arm use as defined in
18 ORS 215.203," is impracticable. OAR 660-004-0028(3). ORS 197.732(6)(b) provides that
19 LUBA "shall determine whether the local government's findings and reasons demonstrate"
20 that the standards of an irrevocably committed exception "have or have not been met[.]" As
21 the Court of Appeals has noted, "* * * an exception must be just that – exceptional." *1000*
22 *Friends of Oregon v. LCDC*, 69 Or App 717, 731, 688 P2d 103 (1984).

23 **B. Second Assignment of Error**

24 In their second assignment of error, petitioners argue that the county's findings are
25 inadequate to explain the county's conclusion that an irrevocably committed exception to
26 Goal 3 was justified. Petitioners note that the record demonstrates that the property is

1 currently employed for farm use, and that all of the lands adjacent to the subject property
2 except the two five-acre parcels that were partitioned from the larger 40-acre parcel are in
3 crop production. All of the adjacent parcels except the two five-acre parcels are larger than
4 the subject property. Petitioners also note that the mere fact that adjacent parcels include
5 dwellings does not support a conclusion that those parcels are irrevocably committed to
6 nonresource uses.

7 As noted, the initial staff report analyzed the relevant factors set forth in OAR 660-
8 004-0028(2) and (6) and concluded that an irrevocably committed exception was not justified
9 based on those factors. The planning commission recommended to the county court that the
10 application be denied. As noted, the county court adopted the applicant's proposed findings
11 as its findings. Those findings appear to conclude that because the subject property is
12 divided by a road running north to south through the property, because there is a dwelling
13 located on the subject property and there are dwellings located on the two five-acre parcels
14 that were partitioned from the larger 40-acre parcel, and because the adjacent parcels to the
15 south that are in farm use are separated from the subject property by a county road, the
16 subject property is irrevocably committed to nonresource use.

17 In reviewing a county's decision that property is irrevocably committed to
18 nonresource uses, LUBA is not required to give any deference to the county's explanation
19 for why it believes the facts demonstrate compliance with the legal standards for a committed
20 exception. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 78 (2000). We do
21 not think the county's explanation for why it believes the cited facts are sufficient to support
22 an irrevocably committed exception is adequate. Those findings do not recognize or address
23 the fact that all of the adjacent properties are larger than the subject property and are
24 currently in farm use, or that the subject property is currently in farm use, all of which point
25 to a conclusion that the subject property is not irrevocably committed to nonresource use.
26 Those findings also do not explain why the presence of dwellings on the subject property and

adjacent properties commit the subject property to nonresource use. Unless there are significant additional factors not mentioned in the county's findings, the subject property is not "irrevocably committed to uses not allowed by [Goal 3]," within the meaning of OAR 660-004-0028(1).

Intervenor concedes that the county's findings generally fail to support a determination that the subject property is irrevocably committed to nonresource use, but requests remand to the county for "further analysis," rather than a reversal of the county's decision, as petitioners request. Respondent's Brief of Intervenor-Respondent 10, 12-15. Although we seriously question, based on the facts cited by petitioners, intervenor, and the county, whether the applicant can demonstrate on remand that the subject property is irrevocably committed to nonresource use, we cannot say at this point that the county's decision is "prohibited as a matter of law" such that reversal is the proper remedy. OAR 661-010-0071(1)(c).

The second assignment of error is sustained.

C. Third Assignment of Error

In the third assignment of error, petitioners argue that the decision fails to comply with OAR 660-004-0028(4). OAR 660-004-0028(4) requires the county to support a conclusion that an area is irrevocably committed with " * * * findings of fact which address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area." We sustained petitioners' second assignment of error and agreed with petitioners that the county's findings are inadequate to explain why an irrevocably committed exception is warranted. We similarly sustain the third assignment of error and agree with petitioners that the county's decision approving an irrevocably committed exception is not supported with the findings of fact or statement of reasons required by the rule.

The third assignment of error is sustained.

1 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

2 In the fourth assignment of error, petitioners argue that the county's findings that an
3 exception to Goal 14 is justified under OAR 660-004-0040 are not supported by substantial
4 evidence.[2] In the fifth assignment of error, petitioners argue that the county erred in failing
5 to adopt findings under OAR 660-004-0018.[3]

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[2] OAR 660-004-0040 provides in relevant part:

> "(1) The purpose of this rule is to specify how Statewide Planning Goal 14 (*Urbanization*) applies to rural lands in acknowledged exception areas planned for residential uses.
>
> "(2) (a) This rule applies to lands that are not within an urban growth boundary, that are planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3 (*Agricultural Lands*), Goal 4 (*Forest Lands*), or both has been taken. Such lands are referred to in this rule as rural residential areas. * * *"

[3] OAR 660-014-0018 provides:

> "(1) Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.
>
> "(2) For 'physically developed' and 'irrevocably committed' exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those:
>
> "(a) That are the same as the existing land uses on the exception site;
>
> "(b) That meet the following requirements:
>
> (A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals and are consistent with all other applicable Goal requirements; and
>
> (B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and
>
> (C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses; * * *"

1 The county adopted an exception to Goal 14, and adopted and incorporated the
2 applicant's proposed findings and conclusions. Record 17-18. Those findings and
3 conclusions addressed OAR 660-004-0040, but did not address OAR 660-004-0018.
4 Intervenor does not respond to petitioners' arguments regarding the county's Goal 14
5 findings except to request remand rather than reversal. Without some assistance from
6 intervenor, we will not search the record for evidentiary support for the county's OAR 660-
7 004-0040 findings. On remand, if this application goes forward, the county must address
8 petitioner's evidentiary challenge and respond to petitioner's contention that OAR 660-014-
9 018 findings are required.
10 The county's decision is remanded.