BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, Petitioner, vs. COLUMBIA COUNTY, Respondent, and MCFARLAND CASCADE HOLDINGS, Intervenor-Respondent.	))))))))))))
	LUBA No. 95-084 FINAL OPINION AND ORDER

Appeal from Columbia County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Michael C. Robinson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Stoel Rives.

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

REMANDED 03/20/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a county order approving an "irrevocably committed" exception to Statewide Planning Goal 4 (Forest Lands), a comprehensive plan map amendment from Forest Resources to Rural Residential, and a zone change from Primary Forest (PF-76) to Rural Residential (RR-5), for an approximately 143-acre parcel.

MOTION TO INTERVENE

McFarland Cascade Holdings (intervenor), the owner of the subject property and the applicant below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

JURISDICTION

Intervenor challenges the Board's jurisdiction over this appeal, on the basis that petitioner did not file a timely notice of intent to appeal. We have already decided that the notice of intent to appeal was timely. See 1000 Friends of Oregon v. Columbia County, 29 Or LUBA 597 (1995). We based our decision on evidence that the county used a postage meter to place postage on the envelope used to mail notice of its decision. The metered date was within 21 days of the date the notice of intent to appeal was delivered to LUBA. Id. at 598.

Intervenor now renews its jurisdictional challenge, arguing that under Erb v. Common Council of Eugene, 22 Or

App 497, 539 P2d 1125 (1975), the critical date is not that shown on the postmark, but the date the notice was actually mailed. However, in this case, unlike Erb, there is apparently no postmark. Moreover, while postmarks are applied after mailing, metered postage is applied prior to mailing. To find that the notice was mailed prior to the metered date, as intervenor's argument requires, we would have to find that the county postage meter was set to print a date one day after the date of actual mailing. We decline to do so, and again reject intervenor's jurisdictional challenge.

FACTS

This appeal is from a county decision made after a remand from LUBA. See 1000 Friends of Oregon v. Columbia County, 27 Or LUBA 474 (1994) ("Columbia I").[1] On remand the county reopened the record and reconsidered the application. On March 29, 1995, the county again approved the application. This appeal followed.

The following facts, stated on pages 2 and 3 of the Petition for Review, are not in dispute.[2] The subject property contains 143.16 acres located approximately five

[1]References to the record preceding LUBA's remand order in Columbia I are to "Record A ___." References to the record following LUBA's remand order in Columbia I are to "Record B ___."

[2]Intervenor accepts petitioner's summary of material facts. Intervenor's Brief 2.

miles west of Rainier, Oregon. It was logged in 1979 and was not replanted thereafter. However, as a result of natural regeneration, an area of 119 acres now satisfies Oregon Department of Forestry (ODOF) restocking requirements. Circuit court enforcement proceedings against the owner resulted in replanting of the remaining 24 acres in Douglas fir. The property contains 15-year-old stands of alder and some 20-year-old cedar.

The subject property contains no structures. Except for an existing exception area located immediately to the west, all lands adjoining or near the property are zoned PF-76. The existing exception area is "Phase I" of the Lost Creek Heights Subdivision preliminary plat. Phase I contains 90 acres, including 15 dwellings on 28 lots.

The subject property was to be "Phases II and III" of the Lost Creek Heights Subdivision. The preliminary plat for the entire subdivision was approved in February, 1979. However, final plat approval and recording occurred only for Phase I.[3]

ASSIGNMENT OF ERROR

A. Introduction

Petitioner contends the county's decision misconstrues the law applicable to taking an "irrevocably committed"

[3]In Columbia I, there is a more complete statement of the facts found by the county prior to that opinion. See 27 Or LUBA at 477-78.

exception to Statewide Planning Goal 4, fails to make adequate findings and is not supported by substantial evidence in the whole record.

The applicable law is found in Goal 2, Part II(b), ORS 197.732(1)(b), and OAR 660-04-028, which state the same test:

> "A local government may adopt an exception to a goal when the land subject to the exception 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 660-04-028(1).

OAR 660-04-028 describes the approach that must be taken in determining if land is irrevocably committed.[4] In

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[4]OAR 660-04-028 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:

"(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).

"* * * * *

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

"(a) Existing adjacent uses;

Columbia I we remanded without considering whether the criteria of OAR 660-04-028 had been properly addressed, because we concluded the findings were generally "insufficient to demonstrate that carrying on uses allowed by Goal 4 on the subject property is impracticable," and that the findings therefore failed to satisfy ORS 197.732(1)(b). 27 Or LUBA at 476-77.

As an initial point, petitioner contends that the county must find that all uses allowed by Goal 4 have become impracticable on the subject property. Petitioner is correct. See DLCD v. Coos County, ___ Or LUBA ___ (LUBA No. 95-047, December 7, 1995); Sandgren v. Clackamas County, 29 Or LUBA 454 (1995); DLCD v. Yamhill County, 27 Or LUBA 508

"(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 660-04-025; and

"(g) Other relevant factors.

"* * * * *"

(1994); DLCD v. Curry County, 26 Or LUBA 34 (1993). However, petitioner confines its discussion to the approach taken by the county with respect to commercial forest uses.

The challenged decision contains pages of repetitive, largely descriptive findings, but the approach taken is adequately summarized at the outset:

> "The subject property is irrevocably committed to uses not allowed in Goal 4 lands because of the level of physical development and the costs incurred to reach that level of development. * * * The relevant factors are:
>
> "(1) Potential impacts to Phase I from commercial forestry activities on Phases II and III (this site);
>
> "(2) The physical development of over 5,050' of gravel roads designed to residential standards in Phases II and III;
>
> "(3) The presence of large unusable areas constituting 72.28 acres for commercial forestry within this site, such as wetlands, riparian buffers, extraterritorial impact zones next to major power transmission lines, and disturbed soil areas * * *;
>
> "(4) The location of a major power transmission line along the northern boundary of the property;
>
> "(5) The capital expenditures directly invested in Phases II and III and the carry-over capital expenditures from Phase I that are linked to Phases II and III. These expenditures include: streets, water lines, electric power, design, engineering, and surveying; and
>
> "(6) The general development of the area within one-half mile from the property. * * *" Record B54.

B. Characteristics of Exception Area

Of the above-quoted list, only items (2) and (3) pertain to characteristics of the subject property itself. Item (2) refers to three gravel roads totaling less than a mile in length and occupying at most 7.26 acres in area. Record B57. Even if these roads have no utility whatsoever for commercial forestry, their existence does not make the entire property impracticable for commercial forest use. See DLCD v. Columbia County, 15 Or LUBA 302, 305 (1987).

Item (3) is apparently based on a table, prepared by intervenor's consultant, which lists the following "areas having limitations for commercial forest use": "Gravel roads and R.O.W." (7.26 acres); "Leveled land for dwellings" (19.51 acres); "Debris piles" (34.43 acres); "Wetland areas" (7.02 acres); "Stream margins" (3.35 acres); and "Danger tree zone" (1.21 acres). "Total Restricted Areas for Commercial Forestry": 72.78 acres. Record B166. The challenged decision states:

> "The building of the roads, the leveling of land for dwellings, the establishing of a large area for storing topsoil and debris piles (in the northeast corner), the danger tree zone next to the BPA Power line right-of-way, and the natural wetland areas and riparian margins result in more than half of the property being unavailable or unsuitable for commercial timber production. Collectively, these areas amount to 72.78 acres, or 51.5%, of the total land area in Phases II and III. The areas that theoretically could be utilized for timber are in scattered amorphous pockets, and the largest single contiguous block of land that remains after the above-referenced

> exclusion areas is a 26-acre block located in the north-central portion of the property. * * *" Record B61.

These findings, which are central to the county's conclusion that the subject property cannot practicably be managed for commercial forestry, go well beyond the statement of intervenor's consultant. Furthermore, the undisputed facts that (1) as a result of natural regeneration, an area of 119 acres now satisfies Oregon Department of Forestry (ODOF) restocking requirements; and (2) the balance of the property has been replanted in Douglas fir belies the county's finding that 72.78 acres are unsuitable or unavailable for forest use.

C. Characteristics of Adjacent Lands

Items (1) and (4)-(6) of the above-quoted list pertain to the characteristics of adjacent lands. With respect to item (1) (potential impacts), the challenged decision finds that

> "The western portion of Phase II would be susceptible to change in practices or cost of conducting commercial forestry because non-resource dwellings [in Phase I] are close to the boundary. <u>This is not the case with the northern, southern, or eastern boundaries where dwellings would have much larger setbacks from active resource sites</u>." Record B58. (Emphasis added.)

We understand the decision to say that with the exception of Phase I, located to the west of the subject property, development on adjacent parcels will not impede commercial forestry on the subject property. With respect

to the impacts of development on Phase I, located to the west of the subject property, the findings are speculative and conclusory:

> "Five dwellings exist within 75' to 200' of a 1,000' segment of the western boundary of Phase II. These dwellings are capable of affecting the manner in which the adjoining forest lands can be managed, particularly with respect to aerial spraying * * * . A dwelling that could potentially impact forest practices is also located near the southwest corner of Phase I." Record B58. (Emphasis added.)

We are not directed by intervenor to any evidence that supports the conclusion that aerial spraying will be inhibited by the presence of the five mentioned dwellings, and we will not search the record for it. See Calhoun v. Jefferson County, 23 Or LUBA 436, 439 (1992). The findings themselves do not cite any evidence of interference with forest uses from the existing residential development.[5] Indeed, the findings with regard to property to the north actually undermine the conclusion that aerial spraying and other forest practices cannot coexist with residential development:

> "The property is bordered on the north by three commercial timber holdings * * * . A 59-acre parcel is owned by [property owner], but it only has a 230' boundary with Phase II. In his interview [the property owner] indicated that the existence of dwellings in Phase I has had absolutely no impact on his forest operations. No

[5]We note that ORS 30.930 to 30.947 protect those engaging in farming and forest practices against most nuisance or trespass claims.

> incidences of wood theft, vandalism, trespass, or all terrain vehicle trespass have occurred. No complaints have ever been filed against him, despite the fact that he uses helicopter spraying." Record B58.

The challenged decision finds with respect to item (4), the major transmission line, that property north of the property is being managed successfully for forestry, notwithstanding "practical difficulties." Record B62-63.

Item (5) addresses capital expenditures on adjacent properties. These would be relevant only if they detracted from management of the subject property for forest uses. See Sommer v. Douglas County, 70 Or App 465, 470, 689 P2d 1000 (1984). The challenged decision does not find that they do.

The findings with respect to item (6), general development of the area, including parcelization, are contradictory and confusing. The challenged decision states that there are a total of 55 "non-resource parcels" and 111 "non-resource dwellings" located in a one-half mile "study area.[6]" Record B56. It states elsewhere that there are 111 "ownerships" within the study area, ranging in size from less than one acre to over 284 acres, and that 95 of these are in non-resource use and 15 in resource use. Record B67. It also finds that

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[6]The references to a "study area," here and elsewhere in the challenged decision, are not clearly explained.

> "the existence of 20 structures (dwellings or shops) on adjacent or near-by parcels and a road system intended for rural residential development demonstrates that this area is adjacent to non-forest uses." Record B50.

Intervenor's brief directs us to the following findings for an explanation of why the parcelization pattern, whatever it is, makes Goal 4 uses on the subject property impracticable:

> "This analysis assumes that Phases II and III would be utilized for commercial forest use. The residents in Phase I would have their modest residential streets impacted by 80,000-pound loaded log trucks when harvestings occur. Rocks and mud carried from the logging site on truck tires would have to be removed from the streets to prevent damage to automobile tires and to the street surface. Heavy equipment utilized for logging and clearing such as D-9 cats would have to be brought in by 'lowboy' trailers, often at hours that would be disturbing to nearby residents. Oversized vehicles associated with logging practices would have a difficult time negotiating the modest turning radii of the residentially designed streets. All other resource parcels in the area either have direct access to Highway 30 or major county collector roads; thus the subject parcel is the only resource parcel in the study area where logging equipment would have to pass through a residential area in order to reach a major collector or arterial street.
>
> "Five residences are located within 200' of the site's boundary. Helicopters would routinely be employed to dispense chemical herbicides and fertilizers at very early morning hours in Phase I near the five residences. Although these residences are set back at least 75' from the Phase II boundary, the spraying, which customarily occurs from 5:00 a.m. to 8:00 a.m., would be disruptive to the occupants." Record B64.

These findings appear to be based entirely on speculation and, in any case, do not explain why parcelization within the study area irrevocably commits the subject property to non-resource use.

D. Conclusion

The county's findings continually shift the focus away from the proper inquiry, which is whether and why existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable on the proposed exception area. The failure of adjacent property owners to manage their lands actively and successfully, the frustrated intentions of a developer in creating a large-capacity water system in 1979 to serve the subject property, the earlier approval of a three-phase subdivision, the property's potential for non-resource use and similar considerations discussed in the challenged decision do not support the county's determination that the subject property is irrevocably committed to non-resource use.

Because the findings as to the characteristics of the exception area and adjacent lands are so fundamentally flawed, no purpose would be served by discussing further the county's application of the criteria in OAR 660-04-028(2) and (6). As in Columbia I, the challenged decision fails to make the demonstration required by ORS 197.732(1)(b) to

justify an irrevocably committed exception.[7]

The assignment of error is sustained.

The county's decision is remanded.

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[7]ORS 197.732(1)(b) provides:

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