

LAND USE
BOARD OF APPEALS

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

AUG 28 1 31 PM '87

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT)

Petitioner,)

vs.)

KLAMATH COUNTY,)

Respondent,)

and,)

JAMES A. SMEJKAL, SANDEE SIMMONS,)
and ROBERT A. SMEJKAL,)

Participants.)

LUBA No. 87-019

FINAL OPINION
AND ORDER

Appeal from Klamath County.

David G. Ellis, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief were Dave Frohnmayer, Attorney General; William F. Gary, Deputy Attorney General and Virginia L. Linder, Solicitor General .

Robert C. Boivin, Klamath Falls, filed a response brief and argued on behalf of respondent. With him on the brief were Boivin and Uerlings, P.C.

Fern Eng, Eugene, filed a response brief and argued on behalf of participants.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

REMANDED

8/28/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals an amendment to a Klamath County
4 Comprehensive Plan and an accompanying zone change. The
5 county's decision changes the plan designation of a 120 acre
6 parcel from forest to rural and changes the zoning designation
7 on the property from Forestry (F) to Rural One-Acre Minimum
8 (R-1). Petitioner asks that we reverse the decision.

9 FACTS

10 The county plan and zone change was made on February 12,
11 1987. It includes an exception to Statewide Planning Goal 4,
12 the forest lands goal.

13 The property consists of soils qualifying it for protection
14 as forest land, under the Klamath County Comprehensive Plan.
15 Adjacent property is in forest use. Lots ranging from two to
16 ten acres exist southwest of the property.

17 The county previously attempted to have this property
18 classified as rural residential and excepted from provisions of
19 Goal 4. LCDC rejected such requests in 1982, 1983, 1984, and
20 1985. The county's comprehensive plan and zoning ordinances
21 are now acknowledged by the Land Conservation and Development
22 Commission to be in compliance with statewide planning goals,
23 and the subject property is designated as forest land in the
24 acknowledged plan.

25 The applicants made some improvements to the property, but
26 the record does not disclose when these improvements were

1 made. The property was given final subdivision plat approval
2 in 1984. The record before us on this appeal does not reveal
3 whether the county considered and applied its land use
4 regulations then in existence, or statewide planning goals to
5 the subdivision approval decision.

6 FIRST ASSIGNMENT OF ERROR

7 "The County improperly relied upon development
8 activities on the property conducted without
9 compliance with the County's plan or ordinances or the
10 goals to justify a "committed" exception to Goal 4.

11 Petitioner argues the county's attempt to take an exception
12 to statewide planning Goal number 4 must fail because the
13 county has not demonstrated that the property is "committed" to
14 nonresource use.

15 The county's attempted exception is under the provisions of
16 ORS 197.732.(1)(b):

17 "The land subject to the exception is irrevocably
18 committed as described by commission rule to uses not
19 allowed by the applicable Goal because existing
20 adjacent uses and other relevant factors make uses
21 allowed by the applicable Goal impracticable"

22 The statute is implemented by OAR 616-04-028 which
23 provides, in part, that

24 "Whether land is irrevocably committed depends on the
25 relationship between the exception area and the lands
26 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 land;

"c) the relationship between the exception area
and the lands adjacent to it; and

1 "d) the other relevant factors set forth in
2 OAR 660-04-028(6)." OAR 660-04-028(2).¹

3 The petitioner claims the county's reliance on certain
4 development activities on the property is insufficient to show
5 compliance with the exception statute or the rule. The
6 petitioner further argues that nothing in the record shows when
7 these various improvements were made and, therefore,

8 "it is impossible to determine from the record where
9 improvements were made after application of the land
10 use laws. Nor can it be determined whether the
11 Klamath County Board of Commissioners was aware that
12 they should not be considering improvements made
13 without application of the land use laws as
14 justification for committed exception to Goal 4."
15 Petition for Review at 6-7.

16 The county's exception statement is as follows

17 "Findings demonstrating that the 12-acre subdivision
18 has been irrevocably committed to non-resource use
19 pursuant to OAR 660-04-028.

20 "1. Adjacent existing uses are mixed forestry
21 and rural residential. Forestry uses in the
22 general are interspersed with 5-acre lots.
23 Extensive parcelization exists to the north
24 and east of the site.

25 "2. Facilities and physical improvements for
26 non-forest uses include:

"a. Construction of a two-mile, 32 foot
wide gravel road to county standards at
a cost of \$24,000.

"b. Development of access roadways at a
cost of \$4,500.

"c. Construction of a double lane bridge
with concrete abutments for access to
lots on east side of Deschutes River at
a cost of \$7,500.

"d. Placement of one mobile home and septic
system.

1 "e. Electric service availability to each lot.

2 "f. Installation of 11 septic tanks throughout
3 the subdivision.

4 "3. The developer has also incurred expenses in the
5 preparation of surveys, maps and septic feasibility
6 reports in addition to those items identified in
7 finding number two.

8 "4. Forest soils on the property are site rated at 5 and
9 6. While this soil is technically forest land as
10 defined in the Klamath County Comprehensive Plan, it
11 is at the lowest end of the productivity scale for
12 protected forestland.

13 "5. Final plat approval was granted by Klamath County
14 for a subdivision for this entire site on July 24,
15 1984.

16 "6. Consistent with subdivision approval parcels have
17 been transferred to separate ownerships such as that
18 no individual or entity owns more than 10 contiguous
19 acres within the 120 acres site (refer to December
20 9, 1985 letter from Robert A. Smejkal, attorney at
21 law, attached).

22 "7. The lots within this exception site are 4 to 9 acres
23 in size and no single person or entity owns more
24 than 10 contiguous acres. This compares with
25 commercial timber company holdings which
26 average in excess of 640 acres per ownership. The
27 prospect of these parcels being successfully managed
28 for forest uses is further complicated by the
29 marginal forestry site rating. These factors taken
30 together, the small parcel sizes and ownerships, the
31 large amount of land required to maintain a forestry
32 operation and the relatively [sic] marginal forest
33 site rating demonstrate the irrevocable commitment
34 of this land to non-forest uses.

35 "8. The use of this 120 acre site for
36 recreational-residential uses will not commit
37 adjacent lands to non-resource uses. The
38 maintenance of the trees and riparian vegetation
39 along the Little Deschutes will enhance some forest
40 uses such as watershed protection that would not
41 occur under forest management." (Rec 44-45).

1 As petitioner states, it appears that the county considered
2 improvements made on the property as the basis for the
3 exception. This record does not reveal whether the county's
4 approval of the earlier subdivision was made in compliance with
5 statewide planning goals. The county, then, is relying on acts
6 not shown to be in compliance with applicable land use laws to
7 justify a present exception. We do not believe Oregon Law
8 permits such reliance. Committed land exceptions may not be
9 based upon development in violation of land use regulations.
10 As noted in Lemmon v. Clemens, 47 Or App 583, 589, 646 P2d 633,
11 rev den 293 Or 634 (1982), the county is not permitted to
12 introduce and maintain a use which violates a statewide land
13 use planning goal "and then sustain the continuation and
14 existence of that use by the fact of its existence."

15 Under such circumstances, we agree with petitioner that the
16 county must determine whether the improvements were placed on
17 the property in accordance with applicable law². The county
18 must then explain how the improvements irrevocably commit the
19 property to nonresource use. See our discussion of the
20 adequacy of the county's explanation under assignment of error
21 number two, infra.

22 This assignment of error is sustained.

23 SECOND ASSIGNMENT OF ERROR

24 "The county's findings failed to explain why the facts
25 support a conclusion that forest uses are
26 impacticable."

1 In this assignment of error, petitioner complains the
2 county's findings are not adequate to show that forest uses are
3 impracticable in the exception area as required under OAR
4 660-04-028(4). The parcel was, according to petitioner, zoned
5 and planned for forest use, and afforded the protections
6 provided under the Goal. Forest uses include:

7 "[t]he reduction of trees in the processing of forest
8 products; (2) open space, buffers from noise, and
9 visual separation of conflicting uses; (3) watershed
10 protection and wildlife and fisheries habitat; (4)
11 soil protection from wind and water; (5) maintenance
of clean air and water; (6) outdoor recreational
activities and related support services and wilderness
values compatible with these uses; and (7) grazing
land for livestock." Goal 4.

12 The county only made findings with respect to suitability
13 of the property for commercial forest operations. The county
14 made no findings about other Goal 4 forest uses included in the
15 definition of forest uses quoted above. Under such
16 circumstances, we must agree with the petitioner and the
17 decision must be remanded for the development of adequate
18 findings.³

19 The second assignment of error is sustained.

20 THIRD ASSIGNMENT OF ERROR

21 "The county improperly approved one acre minimum rural
22 residential zoning on the subject property without
consideration of Goal 14."

23 Petitioner's argument, under this assignment of error, is
24 that the county was obliged to make findings considering the
25 applicability of Goal 14 when converting resource land to one
26 acre residential home sites. The county made no such

1 findings. According to the petitioner, the decision must be
2 remanded. Petitioner cites 1000 Friends of Oregon v. DLCDC,
3 301 Or 447, 470, 724 P2d 268 (1986) for the proposition of when
4 a comprehensive plan change converts rural land outside of the
5 urban growth boundary to urban uses, the county must either
6 show that the action complies with Goal 14 or take exception to
7 Goal 14.

8 We agree with petitioner. The county has not addressed why
9 approval of small lot zoning on the property is consistent with
10 rural use. At a minimum, the county must consider whether or
11 not a one acre residential development outside an urban growth
12 boundary is rural or urban, and if urban, the county must take
13 an exception to Goal 14.

14 This assignment of error is sustained.

15 FOURTH ASSIGNMENT OF ERROR

16 "The county findings do not support satisfaction of
17 county ordinances governing plan and zone changes."

18 Petitioner complains that Section 48.003 of a Klamath
19 County zoning ordinance requires a finding that any zone change
20 be in conformance with all relevant policies of the Klamath
21 County Comprehensive Plan. The county's only finding is a
22 conclusional statement that the proposed change is in
23 conformity with the policies of the plan. Record 3.

24 A conclusional statement that the decision complies with
25 the comprehensive plan is insufficient. The county must
26 identify applicable criteria and make findings showing

1 compliance with the criteria.

2 The fourth assignment of error is sustained.

3 The decision of Klamath County is remanded.

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FOOTNOTES

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Bagg to copy OAR 660-04-028

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The county's comprehensive plan and land use regulations were acknowledged by LCDC. Any improvements made prior to acknowledgement were subject to compliance with statewide planning goals, in addition to the county's regulations. After acknowledgement, any improvements were subject only to the acknowledged plan or regulations.

3
We note, in addition, that the county's findings do not explain why the extensive partialization existent to the north and east commit this property to nonresource use. Further, there is no clear explanation of why the particular improvements made on the property make all forest uses impracticable.