

LAND USE
BOARD OF APPEALS

SEP 25 3 33 AM '87

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

DEPARTMENT OF LAND CONSERVATION)
LAND DEVELOPMENT)

LUBA No. 87-049

Petitioner,)

FINAL OPINION
AND ORDER

v.)

LINCOLN COUNTY,)

Respondent.)

Appeal from Lincoln County.

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

Wayne Belmont, Newport, filed a response brief and argued on behalf of Respondent Lincoln County.

Dennis L. Bartoldus, Newport, filed a response brief and argued on behalf of Respondent-Participant, Dorothea Williams.

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

REMANDED

09/29/87

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 seeks reversal of a comprehensive plan amendment
4 and zone change in Lincoln County. The challenged ordinance,
5 Ordinance No. 252, amends the county comprehensive plan for
6 approximately 14 1/2 acres from "Forest Land" to "Disbursed
7 Residential," and the zone designation from "Timber
8 Conservation" (TC) to "Rural Residential" (RR-5). As part of
9 this change, the county order takes an exception to statewide
10 planning Goal #4, the Forest Land goal.

11 FACTS

12 The subject property is on the eastern side of Devil's Lake
13 Road on the northeast portion of Devil's Lake in Tillamook
14 County. The property was designated as forest land under the
15 Lincoln County plan, which has been acknowledged by the Land
16 Conservation and Development Commission (LCDC) as being in
17 compliance with statewide planning goals. The property
18 consists of Douglas Fir site class 2 and 3 soils.

19 The property is bordered on the east by a 79 plus acre
20 parcel zoned TC, on the south by a 26 acre parcel zoned TC and
21 on the north by a 10 acre parcel also zoned TC. The Lincoln
22 City urban growth boundary abuts the western border of the
23 property. The applicant owns a 3.11 acre parcel zoned
24 residential (7500 square feet minimum lot size) on the west of
25 the subject property.

26 A residence on the property is served by natural gas,

1 electricity, telephone and television cable.

2 ASSIGNMENT OF ERROR

3 "The County's findings and conclusions fail to explain how
4 the evidence in the record demonstrates that the standards
5 of 197.732 and OAR 660-04-028 for an exception based on
irrevocable commitment have been satisfied."

6 Petitioner alleges the county failed to show an exception
7 was justified. In particular, petitioner complains Lincoln
8 County did not explain why the facts it found demonstrate that
9 resource use of the property was not practical.

10 The standards controlling a goal exception based on
11 irrevocable commitment are found in ORS 197.732(1)(b). The
12 statute provides

13 "A local government may adopt an exception to a goal
when:

14 "(b) The land subject to the exception is irrevocably
15 committed as described by commission rule to uses not
16 allowed by the applicable goal because existing
adjacent uses and other relevant factors make uses
17 allowed by the applicable goal impracticable * * *."
(See also Goal 2, Part II(b).)

18 LCDC has promulgated a rule explaining the showing
19 necessary to sustain the finding of a commitment. In pertinent
20 part, OAR 660-04-028 provides as follows:

21 "(1) A local government may adopt an exception to a
22 goal when the land subject to the exception is
23 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.

24 "(2) Whether land is irrevocably committed depends on
25 the relationship between the exception area and the
lands adjacent to it. The findings for a committed
26 exception therefore must address the following:

1 "(a) the characteristics of the exception area;

2 "(b) the characteristics of the adjacent lands;

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

4 "(d) the other relevant factors set forth in OAR
5 660-04-028(6)."

5 OAR 660-04-028(6) provides as follows:

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

8 "(a) existing adjacent uses;

9 "(b) existing public facilities and services (water
10 and sewer lines, etc.);

11 "(c) parcel size and ownership patterns of the
12 exception area and adjacent lands;

12 "(A) Consideration of parcel size and ownership
13 patterns under subsection (6)(c) of this rule shall
14 include an analysis of how the existing development
15 patterns came about and whether findings against the
16 Goals were made at the time of partitioning and
17 subdivision. Past land divisions made without
18 application of the Goals do not in themselves
19 demonstrate irrevocable commitment of the exception
20 area. Only if development (e.g., physical
21 improvements such as roads and underground facilities)
22 on the resulting parcels or other factors make
23 unsuitable their resource use or the resource use of
24 nearby lands can the parcels be considered to be
25 irrevocably committed. Resource and nonresource
26 parcels created pursuant to the applicable goals shall
27 not be used to justify a committed exception. For
28 example, the presence of several parcels created for
29 nonfarm dwellings or an intensive commercial
30 agricultural operation under the provisions of an
31 exclusive farm use zone cannot be used to justify a
32 committed exception for land adjoining those parcels.

33 "(B) Existing parcel sizes and contiguous ownerships
34 shall be considered together in relation to the land's
35 actual use. For example, several contiguous parcels
36 (including parcels separated by a road or highway)
37 under one ownership shall be considered as one farm or
38 forest operation. The mere fact that small parcels
39 exist does not in itself constitute irrevocable

1 commitment. Small parcels in separate ownerships are
2 more likely to be irrevocably committed if the parcels
3 are developed, clustered in a large group or clustered
4 around a road designed to serve these parcels. Small
5 parcels in separate ownerships are not likely to be
6 irrevocably committed if they stand alone amidst
7 larger farm or forest operations, or are buffered from
8 such operations.

9 "(d) neighborhood and regional characteristics;

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

17 "(f) physical development according to OAR 660-04-025;
18 and

19 "(g) other relevant factors."

20 In this case, the county stated facts about the terrain,
21 size of property; and its order includes some facts about
22 surrounding development. However, the county order does not
23 explain how any of these facts show that the property is not
24 suitable for forest use. For example, the county found the
25 property slopes from east Devil's Lake Road on a "westward
26 facing slope" but does not explain how the slope affects
suitability for forest uses. Similarly, the county order
states there are "numerous houses along East Devils Road which
are both primary residences and second homes or vacation
homes." There is no discussion of how the presence of these
homes affect forest uses on the subject property. Indeed, the
order does not even say how close these residences are to the
redesignated land.

1 The county lists other facts about the property in the
2 vacinity which may have something to do with the property's
3 suitability for timber use, but does not explain the exact
4 relationship between the facts and resource.

5 The county finally concludes that

6 "WHEREFORE, based on the foregoing Findings of Fact,
7 the Lincoln County Board of Commissioners hereby
8 concludes that an error was made in planning tax lot
9 300 by forest land and zoning it timber conservation.
10 The County Commission hereby concludes that the plan
11 designation on the property should be changed to
12 dispersed residential and the zone designation on the
13 property should be RR-5."

14 This finding does not justify the exception. Finding error
15 in the original forest use designation does not provide a valid
16 basis for the decision. We are cited to nothing in the
17 county's land use regulations allowing changes to plan and zone
18 designations on a finding of error in the original zoning. See
19 Schultz v. Yamhill Co. ___ Or Luba ___ (LUBA No. 86-053,
20 10-22-86).

21 Respondent argues there are sufficient facts in the record
22 to show the property is committed to nonresource use.¹ We do
23 not agree. The facts in the record cited by respondent, like
24 those recited in the county's findings, do not illustrate that
25 the subject property is committed to nonresource use. The fact
26 that development is nearby, that public utilities serve the
27 property or properties nearby, and the fact that the property
28 is not under a timber tax deferral do not determine the
29 suitability of the subject property for timber production or

1 other forest uses. We find nothing in the record which
2 "clearly supports the decision or part of the decision" made by
3 the county in this proceeding.

4 Under such circumstances, we are required to remand the
5 county's decision.

6 Remanded.

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FOOTNOTES

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3 1 See 1987 Oregon Laws Chapter 729, Sec 2 (amending ORS
4 197.835) which provides, in part

5 "Whenever the findings are defective because of failure to
6 recite adequate facts or legal conclusions or failure to
7 adequately identify the standards or their relation to the
8 facts, but the parties identify relevant evidence in the
9 record which clearly supports the decision or a part of the
10 decision, the board shall affirm the decision or the part
11 of the decision supported by the record and remand the
12 remainder to the local government, with direction
13 indicating appropriate remedial action."
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