

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

DERYL SANDGREN and PEGGY SANDGREN,)

Petitioners,)

and)

FRANK WALKER,)

Intervenor-Petitioner,)

vs.)

CLACKAMAS COUNTY,)

Respondent,)

and)

JUDY WISELY and JIM WISELY,)

Intervenors-Respondent.)

LUBA No. 95-038

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Deryl Sandgren and Peggy Sandgren, Molalla, filed the petition for review. Peggy Sandgren argued on her own behalf.

Stacy L. Fowler, Assistant Clackamas County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

Judy Wisely and Jim Wisely, Colton, filed a response brief. Judy Wisely argued on her own behalf.

GUSTAFSON, Referee; LIVINGSTON, Referee, participated in the decision.

AFFIRMED

07/27/95

You are entitled to judicial review of this Order.

1 Judicial review is governed by the provisions of ORS
2 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's denial of a
4 comprehensive plan map amendment and zone change requiring
5 exceptions to Statewide Planning Goal 3 (Agricultural Lands)
6 and Goal 4 (Forest Lands.)

7 **MOTION TO INTERVENE**

8 Frank Walker moves to intervene on the side of
9 petitioners. There is no opposition to the motion, and it
10 is allowed.

11 **FACTS**

12 Petitioners applied for a comprehensive plan map
13 amendment to change the designation on their property from
14 Forest to Rural and a corresponding zone change from TBR
15 (Timber District) to RA-2 (Rural Area Single Family
16 Residential District.) Because the property is designated
17 Forest, the comprehensive plan map amendment requires
18 exceptions to Goals 3 and 4.

19 Immediately after purchasing the subject 17.27 acre
20 parcel in 1993, petitioners requested and obtained county
21 approval for a nonresource dwelling. They have since placed
22 a manufactured home on the parcel's northwest corner. They
23 have also had utilities, including electricity, water and
24 cable television, extended to serve the dwelling.

25 Petitioners' property is bordered to the north, east
26 and west by resource properties ranging in size from 3 to 40

1 acres. To the south is rural residential development, with
2 properties ranging in size from .5 to 4 acres. Petitioners'
3 property has historically been used for commercial timber
4 production, though petitioners have never used it for any
5 commercial timber production.

6 The county denied petitioners' application, finding it
7 failed to satisfy the requirements for either a physically
8 developed or an irrevocably committed exception to
9 Goals 3 and 4, and otherwise failed to satisfy county
10 requirements for a comprehensive plan map amendment or zone
11 change. This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 Petitioners contend the county's findings misconstrue
14 the applicable law, are not based on substantial evidence,
15 and ignore the substantial testimony provided by the
16 applicants. Petitioners argue the county's earlier
17 approval of their application for a nonresource dwelling
18 "diminish[ed] the usefulness of this land for commercial
19 timber production." Petition for Review 5. Petitioners
20 further argue the county's approval of their nonresource
21 dwelling request is conclusive evidence that the parcel is
22 not appropriate for commercial timber production.
23 Petitioners argue that, on that basis alone, the county
24 should have approved their requests.

25 In addition, petitioners contend they meet the
26 requirements for a physically developed exception to Goals 3

1 and 4 under OAR 660-04-025(1) because there is a nonresource
2 home on the site, and the site is fully served by urban
3 utilities. Petitioners contend they meet the requirements
4 for an irrevocably committed exception to Goals 3 and 4
5 under OAR 660-04-028 because (1) the adjacent uses are
6 predominately nonresource; (2) the property has a "full
7 complement of urban services"; and (3) the parcel size and
8 ownership patterns of the parcel and adjacent lands are more
9 consistent with rural residential than forest uses.
10 Petition for Review 8.

11 The standards for approving either a physically
12 developed or an irrevocably committed exception to Goals 3
13 and 4 are demanding. To approve a physically developed
14 exception, the county must find that the property has been
15 physically developed to such an extent that all Goal 3 or 4
16 resource uses are precluded. Uses established in accordance
17 with the goals cannot be used to justify a physically
18 developed exception.¹

¹OAR 660-04-025(2) requires the following evaluation for a physically developed exception:

"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, sewers and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an

1 To approve an irrevocably committed exception, the
2 county must find that all uses allowed by the goals are
3 impracticable, primarily as a result of uses established on
4 adjacent parcels.² As we have repeatedly recognized, the
5 impracticability standard is a demanding one. See 1000
6 Friends of Oregon v. Yamhill County, 27 Or LUBA 508, 519-20
7 (1994).

8 Because the challenged decision denies development
9 approval, the county need only adopt findings, supported by
10 substantial evidence, demonstrating that one approval
11 standard is not met. Garre v. Clackamas County, 18 Or LUBA
12 877, aff'd 102 Or App 123 (1990); Baughman v. Marion County,
13 17 Or LUBA 632, 636 (1989). Further, to overturn, on
14 evidentiary grounds, the county's determination that an
15 applicable approval criterion is not met, it is not
16 sufficient for petitioners to show there is substantial
17 evidence in the record to support their position. Rather,
18 the "evidence must be such that a reasonable trier of fact
19 could only say petitioners' evidence should be believed."
20 Thomas v. City of Rockaway Beach, 24 Or LUBA 532, 534

exception being taken shall not be used to justify a physically
developed exception."

²OAR 660-04-028(1) allows a local government to adopted an irrevocably
committed exception

"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[.]"

1 (1993); Schmaltz v. City of Hood River, 22 Or LUBA 115, 119
2 (1991); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987);
3 Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982).
4 Petitioners must demonstrate they sustained their burden of
5 proof of compliance with applicable criteria as a matter of
6 law. Jurgenson v. Union County Court, 42 Or App 505, 600
7 P2d 1241 (1979); Consolidated Rock Products v. Clackamas
8 County, 17 Or LUBA 609, 619 (1989).

9 The county determined that none of the approval
10 criteria for either a physically developed or an irrevocably
11 committed exception were satisfied. With regard to the
12 physically developed exception, the only development on the
13 parcel is a nonresource dwelling, approved pursuant to OAR
14 660-06-028,³ to which petitioners have extended utilities.
15 The county found that the single dwelling was insufficient
16 to justify a physically developed exception.⁴

17 The essence of petitioners' argument that the site is
18 irrevocably committed to nonresource uses is that their
19 property is not appropriate for commercial timber
20 production. However, even if the evidence could support a
21 conclusion that the parcel is not adequate for commercial
22 timber production, such a conclusion would not justify an

³OAR 660-06-028 was repealed effective January, 1994.

⁴That dwelling was developed with a use allowed under Goal 4, pursuant to OAR 660-06-028. The county could not rely on the existence of that dwelling to justify a physically developed exception.

1 exception to Goals 3 and 4. See DLCD v. Curry County, 26 Or
2 LUBA 34 (1993) (Showing only that commercial forestry uses
3 are impracticable in the proposed exception area does not
4 justify an irrevocably committed exception.)⁵ To satisfy
5 the irrevocably committed exception, petitioners must show
6 all uses allowed by the applicable goals are impracticable.

7 The county determined that the request did not justify
8 an irrevocably committed exception because the physical
9 characteristics of the property, including the soils, do not
10 render it irrevocably committed to nonresource uses. It
11 further found that the rural residential development south
12 of the property did not irrevocably commit the property to
13 nonresource uses, and that there were continuing resource
14 uses of properties to the north, east and west. In
15 addition, the county determined that the existence of public
16 facilities and services installed to serve the residence on
17 the site did not irrevocably commit the remainder of the
18 site to nonresource uses.

19 Petitioners have not sustained their burden of
20 establishing compliance with each of the approval criteria.
21 There is substantial evidence in the record to support each

⁵In addition, the primary consideration under OAR 660-04-028 for an irrevocably committed exception is the existing uses on adjacent lands. Evidence that commercial forest uses are not practicable on the parcel proposed for an exception does not adequately address the irrevocably committed exception requirements since that evidence does not evaluate practicability of commercial forest uses on adjacent lands. DLCD v. Coos County, ___ Or LUBA ___, (LUBA No. 94-231, July 14, 1995), slip op 4.

1 of the county's findings that the proposal satisfies neither
2 the physically developed nor the irrevocably committed
3 exceptions criteria.⁶

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioners contend the county inappropriately zoned
7 the subject property at the time the comprehensive plan was
8 adopted.

9 At issue in this appeal is petitioners' application for
10 a comprehensive plan map amendment and zone change for their
11 property. Whether the county properly designated and zoned
12 the property in the first place is not relevant to, and
13 cannot be challenged in, this appeal.

14 The second assignment of error is denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 Petitioners argue the county "accepted evidence into
17 the record that was not substantiated by substantive
18 evidence or verifiable evidence." Petition for Review 12.
19 We understand petitioners to argue under this assignment of
20 error that the county improperly weighed the evidence in

⁶Petitioners do not challenge the county's findings that the request does not satisfy other county criteria for a comprehensive plan map amendment and zone change. To reverse or remand the county's denial of petitioners' requests, this Board would have to determine that the findings as to each approval criterion for each of the requests are not supported by substantial evidence and that only petitioners' evidence should be believed. See Thomas, 24 Or LUBA at 534. Even if petitioners had sustained the heavy burden of satisfying the exceptions criteria, we would be required to affirm the county's decision based on petitioners' failure to challenge the other criteria upon which the county based its denial.

1 reaching its conclusion.⁷

2 Petitioners disagree with the county's evaluation of
3 the evidence, and the conclusion it reach based on that
4 evidence. However, the responsibility for evaluating
5 evidence and determining what evidence to believe lies with
6 the county. 1000 Friends of Oregon v. Marion County, 116 Or
7 App 584, 588, 842 P2d 441 (1992.); City of Barlow v.
8 Clackamas County, 26 OR LUBA 375, 381 (1994). This Board
9 cannot reweigh the evidence. Rather, our review is limited
10 to determining whether the whole record contains evidence
11 upon which a reasonable person could rely to reach the
12 conclusions the county did here. Younger v. City of
13 Portland, 305 Or 346, 752 P2d 262 (1988). That petitioner
14 may disagree with the county's conclusions provides no basis
15 for this Board to reverse or remand the challenged decision.
16 McGowan v. City of Eugene, 24 Or LUBA 540, 546 (1993).

17 The record contains evidence adequate to support the
18 county's decision.

19 The third assignment of error is denied.

20 The county's decision is affirmed.

⁷To the extent petitioners object that the record includes incorrect information, and that the county erred by accepting such information, that objection is without merit. The record consists of evidence presented to and accepted by the local decision maker. The accuracy of the information has no bearing on whether it is part of the record. Testa v. Clackamas County, 26 Or LUBA 596 (1993).