

SEP 13 3 34 PM '83

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

3	ROBERT MASON,)	
)	
4	Petitioner,)	
)	LUBA NO. 83-036
5	vs.)	
)	FINAL OPINION
6	LINN COUNTY,)	AND ORDER
)	
7	Respondent.)	

8 Appeal from Linn County.

9 Robert Scherzer, Portland, filed a petition for review and
argued the cause for Petitioner.

10 James V. B. Delapoer, Albany, filed a brief and argued the
11 cause for Intervenor. With him on the brief were Long, Post,
Delapoer & Koos, P.C.

12 Respondent Linn County waived appearance.

13 BAGG, Board Member.

14 Remanded. 9/13/83

15 You are entitled to judicial review of this Order.
16 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 Bagg, Board Member.

2 INTRODUCTION

3 Petitioner appeals a decision by the Linn County Board of
4 Commissioners approving a planned unit development, herein PUD,
5 on agricultural land. Petitioner contends the county's
6 findings were not adequate to support exceptions to Statewide
7 Planning Goals 3 and 4.

8 FACTS

9 The proposed PUD is for a 111 unit clustered residential
10 development on Hale Butte in Linn County. The PUD is to
11 contain an effluent disposal system, whereby residential wastes
12 will be treated on site and applied to the agricultural portion
13 of the site by spray irrigation, thus providing irrigation and
14 fertilization for the farmland. The subject parcel consists of
15 252.58 acres surrounded by agricultural lands, wooded areas,
16 rural residential homesites and a quarry. Twenty-five acres of
17 this total are to be used for the residential units.

18 The planning commission granted final Stage III approval
19 for this development on September 15, 1982. Petitioner herein,
20 Robert Mason, appealed Stage III approval to the Board of
21 Commissioners. The commissioners heard the appeal on November
22 10, 1982 and decided to consider the matter of the exceptions
23 to Goals 3 and 4 separately. Exceptions to Goal 3
24 (agricultural lands) and Goal 4 (forest lands) were taken for
25 the 25 acres used by the residential development. The
26 exceptions were granted by the county in its order no. 83-097

1 issued March 18, 1983. The exceptions were taken both under
2 the "built and committed" test and by means of the "Part II -
3 Exceptions" process in LCDC Goal 2.¹ Petitioner appeals the
4 grant of exceptions in that order.

5 ASSIGNMENT OF ERROR NO. 1

6 "Respondent Linn County failed to take a proper
7 exception to Goal 3 and goal 4 of Oregon Land Use Laws
8 under the 'Irrevocable Commitment' test.

9 "A. The County failed to make the findings required
10 by the 'irrevocable commitment' test.

11 "B. The County's finding that the land was
12 'committed' is not supported by substantial evidence
13 in the record."

14 Petitioner's first assignment of error alleges the county
15 failed to take a proper exception to LCDC Goals 3 and 4 under
16 the "irrevocable commitment" test. See 1000 Friends of Oregon
17 v. Bd. of Comm'rs of Marion County, 1 LCDC 57 (LCDC No. 75-006,
18 1977). The Board understands petitioner to argue the findings
19 do not address all relevant criteria and are not supported by
20 substantial evidence.

21 Intervenor argues the county's finding are adequate to
22 support the conclusion of irrevocable commitment to non-farm
23 use. Intervenor stresses findings showing the level of public
24 services constructed on the site.

25 In 1000 Friends of Oregon v. Douglas County, 4 Or LUBA 24,
26 31 (1981), LUBA set out the criteria for a "built and
27 committed" exception:

1 ** * * We hold in sum that a conclusion of irrevocable
2 commitment to nonresource (nonfarm or nonforest) use
3 must at a minimum be based on detailed findings,
4 supported by substantial evidence showing that the
5 subject land cannot now or in the foreseeable future
6 be used for any purpose contemplated in statewide
7 goals 3 and/or 4 because of one or more of the
8 following:

9 "(a) Adjacent uses;

10 "(b) Parcel size and ownership patterns

11 "(c) Public services;

12 "(d) Neighborhood and regional characteristics;

13 "(e) Natural boundaries;

14 "(f) Other relevant factors." (Footnote omitted).

15 Fairly read, Linn County made findings of fact on each of
16 these criteria except "f". The findings discuss adjacent uses
17 and parcelization. The findings also discuss improvements in
18 place on the property and what public services are available.
19 For the most part, however, the findings tend to show how it is
20 the site for the 110 unit housing development will be
21 adequately buffered from surrounding agricultural and open
22 space lands.² See Record 5-11. Such facts do not show
23 commitment.

24 Two county findings on public facilities and services,
25 stressed by intervenors as showing commitment also fail to
26 establish why the improvements preclude any uses contemplated
27 by Goals 3 and 4. The relevant findings are:

28 "1. Existing public facilities and services presently
29 constructed on the site include the following:

30 "a. One 75,000 gallon water reservoir

- 1 constructed in 1973;
- 2 "b. 2,914 feet of 6 inch water line, 1,010 feet
3 of 8 inch water line and 195 feet of 10 inch
4 water line installed in 1973;
- 5 "c. One well with wellhouse capable of pumping
6 in excess of 180 gallons per minute,
7 constructed in 1973;
- 8 "d. Approximately 4,400 feet of roadway
9 constructed in 1972 accessing on Mason Road
10 and extending northeasterly to the homesite
11 area;
- 12 "e. Drainage channel improvements installed in
13 1982;
- 14 "f. Clearing and grubbing of approximately 4,500
15 linear feet of roadway in 1982.

16 "2. The applicants have heretofore invested
17 approximately \$475,283.00 in improvements on the
18 subject parcel. These improvements break down as
19 follows:

20	"a. Road Construction	\$210,280.00
21	"b. Water System Construction	\$ 47,349.00
22	"c. Engineering & Consulting	\$207,654.00
23	"d. Boundary Survey	\$ 10,000.00
24	"e. Total	\$475,283.00"

Record 6.3

25 The list of existing improvements on the property under
26 Finding No. 1, supra, fails to show why the improvements
preclude any farm or forest use. The existence of improvements
alone is not enough to establish irrevocable commitment. Nor
does the fact the intervenor has expended considerable sums of
money establish commitment sufficient to preclude agricultural
or forest use of the property. Expenditure may be evidence of
the extent of improvements, but the mere fact of monetary
investment does not prove the land can not now or in the

1 foreseeable future be used for any purpose contemplated in
2 Goals 3 and 4.⁴

3 The Board concludes the county's findings, taken together,
4 are insufficient to establish the property in question is
5 irrevocably committed to nonfarm and nonforest uses. See Shaw
6 Cause, Inc. v. Marion County, 4 Or LUBA 82 (1981).

7 This assignment of error is sustained.

8 ASSIGNMENT OF ERROR NO. 2

9 "Linn County Board of Commissioners erred in finding a
10 Goal 2 exception to Goal 3 by not making proper
findings."

11 "A. The County failed to make the findings of Need
12 [sic] as required by Goal 2, Part II."

13 Petitioner argues the county's findings do not support a
14 Goal 2, Part II exception to Goal 3. Petitioner claims the
15 apparent rationale of intervenor and the county, to give the
16 county the opportunity to gain experience with alternative
17 waste disposal systems in a rural environment, does not show a
18 "need" as contemplated by Goal 2, Part II (a). Petitioner
19 insists the use is residential, and there is no need shown for
20 a residential development outside the urban growth boundary.

21 Intervenor asserts adequate reasons for an exception were
22 shown. Intervenor also argues for a less stringent
23 interpretation of Goal 2, Part II (a) that may previously have
24 been applied. Intervenor asserts the county found the proposal
25 will improve agricultural productivity on the parcel as a
26 whole. The project will allow desirable rural residential

1 housing compatible with neighboring farm uses and will give the
2 county the opportunity to study an innovative effluent disposal
3 system, according to intervenor. Intervenor would have the
4 Board weigh these positive factors against what intervenor
5 considers to be an absence of negative factors.

6 In support of this argument, intervenor quotes a number of
7 the county's findings.

8 "The proposal will allow the construction of 111
9 clustered single family residences on the
10 non-productive soil and will thereby allow prospective
11 home buyers a rural residential option which may not
12 otherwise be available, and will reduce the need for
13 expansion from urban centers into productive farm land
14 to satisfy future housing needs. (Record 14,
15 Conclusion #2) .

16 "The Board finds that the proposal will not have the
17 net effect of diminishing the agricultural
18 productivity of the entire parcel but rather, will
19 significantly increase agricultural productivity and
20 crop yield on the parcel and that when the loss of
21 resource land is weighed against the gain in
22 productivity, the net effect will be a substantial
23 enhancement of the agricultural value of the parcel.
24 (Record 14, Conclusion #4)

25 "In evaluating why this use should be provided for the
26 Board determines that the term 'use' includes
substantially more than just rural homesites. The use
also includes the spray irrigation effluent disposal
system with many benefits including, but not limited
to, the increase in productivity of affected lands.
(Record 15, Conclusion #15)

"The Board concludes that a clustered rural
residential development on poor soil, utilizing a land
application effluent disposal system for the
enhancement of adjoining farm land should be provided
for. In reaching this conclusion the Board balances
the loss of resource soil against the benefits gained
by the proposal. In weighing these alternatives the
Board concludes that resource land in the homesite
area is insignificant in amount and quality and that
as a consequence the County loses little or nothing in

1 the way of agricultural capability by allowing this
2 development. On the other hand, this specific
3 proposal benefits the County in the following
4 significant ways:

5 "(a) Increasing the agricultural productivity of
6 the affected land by 32.3%;

7 "(b) By providing technological data and
8 practical experience relative to the viability of
9 effluent disposal systems of the type in question;

10 "(c) In providing rural residential homesites of
11 a type not otherwise available in Linn County."
12 (Record 15, 16, Conclusion #15).

13 Respondent urges the following standard should apply:

14 "The question of whether the alternative uses should
15 be provided for is properly answerable by focusing not
16 simply on whether there is an absolute need for the
17 use in question but whether, given the balancing of
18 the benefits and disadvantages, the use 'should' be
19 provided for." Brief of Intervenor at 19.

20 The county's findings are inadequate to establish why the
21 development should be allowed. There is no finding that
22 existing or projected housing needs can not be accommodated
23 within the urban growth boundary. The county states the
24 development will provide a rural residential option for
25 prospective home buyers and "reduce the need for expansion from
26 urban centers to productive farmland to satisfy future housing
needs." Record 14, Conclusion 2. Even if pressure and desire
for rural residential homesites were established, pressure and
desire amount to market demands. Market demands are
insufficient to avoid Goal 3 requirements for preserving
agricultural lands.⁵ Still v. Board of County Comm'rs., 42
Or App 115, 600 P2d 433 (1979), rev den. The Board concludes

1 the county's findings fail to show a compelling reason to
2 provide for the residential use.⁶

3 Similarly, the findings do not establish any reason why an
4 innovative sewage disposal system must be established on
5 agricultural land. There is no "compelling reason" why an
6 experimental sewage disposal system should be established. The
7 county's findings that it will "gain experience with
8 alternative waste disposal systems in a rural environment" does
9 not constitute a "compelling reason" to place a 110 unit
10 planned unit development on agricultural land.

11 What is shown by the county's order is a desirable
12 development. It is desirable for aesthetic reasons and has the
13 incidental benefit of providing an irrigation source for farm
14 land. It is nonetheless first and foremost a residential
15 development. There are other methods of irrigating crops that
16 do not depend upon putting a 110 planned unit development on
17 the property. See discussion under Part B, *infra*. The
18 county's desire to experiment with sewage disposal as a source
19 of irrigation may be possible without constructing a new
20 residential PUD. There may be places where effluent could be
21 pumped to land in farm use, in or out of the UGB, and thereby
22 provide the county with its experimental use. The county has
23 not exhausted the non-resource land alternatives for this
24 project and has failed to show by compelling reasons and facts
25 why a residential use with incidental agricultural benefit
26 belongs outside an urban growth boundary.⁷

1 "B. The County has failed to meet the alternatives
2 criteria under Goal 2, Part II."

3 In this subassignment of error, petitioner argues the
4 county failed to identify alternative sites which might be used
5 for the proposed project. Petitioner contends it is not enough
6 to say no such sites exist without identifying undeveloped
7 parcels and stating why they are inadequate for the proposed
8 use.

9 Intervenor responds that since no alternative sites exist
10 with the requisite characteristics of this development, the
11 county is not required to identify sites that failed the test.
12 Intervenor says petitioner has the burden of identifying
13 alternative sites that could accommodate this development.

14 As the Board understands the county's findings, the county
15 relied on the testimony of Ron Bentz.

16 "to the effect that the proposed site is the only one
17 in Linn County without regard to present zoning
18 designations which contains both the necessary
19 physical characteristics for the effluent disposal
20 system proposed and the physical and social amenities
21 necessary to allow development." Record 17.

22 The findings of fact supporting the conclusion that the
23 proposed site is the only one suitable rest in part on the
24 perceived desirability of the new sewage system along with the
25 rural residences. The county found the site must have:

- 26 "a. slope of less than 20%;
- "b. ground water table at least four feet from the
surface;
- "c. stable geological formations not subject to
flooding;

- 1 "d. suitable topography for normal operations;
- 2 "e. soil with a minimum rooting depth of 24";
- 3 "f. an absence of rapid draining soil;
- 4 "g. adequate room for buffer strips." Record 16.

5 The homesites must contain the following amenities, according
6 to Mr. Bentz:

- 7 "a. it must possess a pleasing view;
- 8 "b. it should be hillside land;
- 9 "c. it must be in close proximity to major
10 transportation facilities;
- 11 "d. have limited access to the development;
- 12 "e. have strong 'neighborhood' identity;
- 13 "f. have attractive rural settings;
- 14 "g. protected views;
- 15 "h. appropriate rural residential zoning and
16 comprehensive plan designation." Record 17.

17 In this case, the matter of whether or not there are
18 alternative sites to house the development depends on whether
19 or not there is a need for development under Goal 2, Part II
20 (a). The intervenor and the county have made it effectively
21 impossible to consider alternative sites other than those on
22 resource land. The development, by its nature, claims to be
23 dependent upon "attractive rural" land with "suitable
24 topography for normal agricultural operations." Under normal
25 circumstances, the question of whether alternative sites are
26 available is a question of whether alternative sites on
non-resource land are available. See 1000 Friends of Oregon v.
Douglas County Bd. of Comm'rs, 4 Or LUBA 148 (1981).

27 The Board believes that only if compelling reasons and
28 facts exist for this particular kind of development can
29 alternative locations be considered in the terms presented by
30 the county. Because the Board finds the county has failed to

1 show by compelling reasons and facts why this use should be
2 provided, the question of alternative sites is of little
3 importance.

4 The Board notes, however, that the county has not explored
5 whether there might be vacant land within an urban growth
6 boundary upon which the development might be constructed even
7 with the proposed effluent disposal system.⁸

8 "C. The County failed to properly find compelling
9 reasons and facts to permit the non-goal use in
10 light of the long-term environmental, economic
11 and social energy consequences of the
12 subdivision."

11 Petitioner argues the county did not adequately address
12 long-term consequences of the development. Petitioner claims
13 the findings are conclusional and do not address the long term
14 consequences of placing this development on agricultural land.
15 Petitioner points to evidence in the record that shows
16 "numerous problems inherent in the type of site proposed by the
17 intervenors. [sic]" Petition for Review at 20.

18 Intervenor says petitioner is rearguing the evidence and
19 merely complaining evidence favorable to his position was not
20 found persuasive by the county.

21 The county's findings are not just conclusions but go into
22 some considerable detail on the effect of the wastewater system
23 on nearby land; on the economic consequences of constructing
24 the project; on the social consequences of the project and on
25 the energy consequences resulting from the particular kind of
26 water and sewer system planned. The findings include

1 conditions that are designed to limit the "consequences" of
2 this development on farmland. If a need for this development
3 had been shown, the county's discussion of consequences might
4 be adequate. As it is, however, whether the use is
5 sufficiently buffered from resource lands is not very
6 important. The consequences of the placement of this use is
7 the removal of resource land. This consequence is not
8 permissible absent a showing of need.

9 "D. The County failed to find compelling reasons and
10 facts in addressing the issue of compatibility."

11 Petitioner argues the county's findings of compatibility of
12 the project with surrounding lands fail to adequately address
13 issues of dust, noise and visual effects. Petitioner maintains
14 the existence of natural barriers and buffering are not enough
15 to make a nonfarm use compatible with surrounding agricultural
16 uses.

17 Intervenor says the county's finding are sufficient to
18 support the conclusion that the development is compatible with
19 surrounding agricultural uses. Intervenor directs the Board's
20 attention to findings of limited vehicular access to the parcel
21 through adjacent farmlands, isolation of residential sites by
22 natural barriers and buffers and the county's requirement that
23 intervenor comply with certain provisions in the McDonough
24 Study. The McDonough study provided suggestions on how to
25 minimize adverse effects of urban development on rural areas.
26 Intervenor further suggests the county finding that the

1 proposed use will enhance agricultural use of the property is
2 enough to support the conclusion of compatibility with
3 surrounding agricultural practices.

4 The matter of compatibility under Goal 2, Part II is
5 dependent, at least in this case, upon an adequate finding of
6 why the use should be provided for on resource land. If a need
7 for a residential development such as the one proposed could be
8 shown, then the matter of how it could be made compatible with
9 agricultural land would be ripe for consideration. Here,
10 however, the issue of compatibility under Goal 2, Part II(d) is
11 not ready for review.

12 This assignment of error is sustained.

13 ASSIGNMENT OF ERROR NO. 3.

14 "Linn County Board of Commissioners erred in finding a
15 Goal 2 exception to Goal 4 by not making proper
findings."

16 Petitioner asserts the county failed to make proper
17 findings to support an exception to Goal 4. Petitioner
18 maintains the county erred in not addressing potential forest
19 uses other than commercial timber uses. Petitioner also argues
20 the county failed to apply the proper economic standard in
21 deciding the land was not suitable for commercial forest uses.

22 Intervenor replies the county considered all applicable
23 Goal 4 criteria to determine the parcel was not usable for any
24 purposes contemplated by Goal 4. Intervenor disagrees with the
25 apparent view of petitioner that the county must find no gross
26 profit can be derived from any forest use of the property.

1 Intervenor urges the proper standard is whether the property is
2 suitable for commercial forest use.

3 The county treated the subject property as forest land when
4 it decided an exception to the requirements of Goal 4 was
5 necessary. Therefore, whether or not the county addressed all
6 the definitional criteria of "forest land" in Goal 4 is
7 irrelevant. Similarly, petitioner's complaint that the county
8 did not properly consider all possible forest uses of the
9 property is not relevant. The county took an exception. These
10 issues are relevant only if the county were to argue the land
11 is either not forest land at all or somehow not suitable for
12 forest uses.

13 The Board has already discussed the adequacy of the
14 exception. See Assignment of Error No. 1, supra. This
15 assignment of error is denied.

16 This matter is remanded to the Linn County Board of
17 Commissioners for action not inconsistent with this opinion.

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FOOTNOTES

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Goal 2, Part II Exceptions states:

4 "When, during the application of the statewide goals
5 to plans, it appears that it is not possible to apply
6 the appropriate goal to specific properties or
7 situations, then each proposed exception to a goal
8 shall be set forth during the plan preparation phases
and also specifically noted in the notices of public
hearing. The notices of hearing shall summarize the
issues in an understandable and meaningful manner.

9 "If the exception to the goal is adopted, then the
10 compelling reasons and facts for that conclusion shall
be completely set forth in the plan and shall include:

11 "(a) Why these other uses should be provided for;

12 "(b) What alternative locations within the area could
be used for the proposed uses;

13 "(c) What are the long term environmental, economic,
14 social and energy consequences to the locality, the
15 region or the state from not applying the goal or
permitting the alternative use;

16 "(d) A finding that the proposed uses will be
17 compatible with other adjacent uses."

18 2

The Board notes the intervenor comments that

19 "those findings and conclusions set forth under the
20 heading 'Adjacent Uses-Neighborhood and Regional
21 Characteristics' and 'Natural Boundaries' are relevant
22 primarily as they establish the compatibility of a PUD
with adjacent uses." (Emphasis added). Brief of
Intervenor at 11.

23 A finding of compatibility for a proposed use with resource
24 land does not establish irrevocable commitment. The county
25 must establish why adjacent uses preclude use of such a parcel
for farm or forest purposes. 1000 Friends of Oregon v. Douglas
County, supra at 31.

1 3
2 Finding of fact 1(d) refers to roads that have been
3 constructed or improved to the property, not through it.

4 4
5 Intervenor's expenditures for surveying and consulting
6 costs are not relevant to establish commitment. Only costs of
7 improvements themselves are arguably relevant in determining
8 the extent of improvements.

9 5
10 "The compelling reasons cannot be based on market demand
11 for housing, assumed continuation of past urban and rural
12 population distribution, or housing types and cost
13 characteristics." OAR 660-04-020(2)(a)(B).

14 6
15 Indeed, there is no finding if an unmet housing need in
16 Linn County. Need for housing in rural areas is addressed in
17 OAR 660-04-020(2)(a)(B):

18 "A jurisdiction could justify an exception to allow
19 residential development on resource land outside an
20 urban growth boundary, by determining that the rural
21 location of the proposed residential development is
22 necessary to satisfy the housing generated by existing
23 or planned rural industrial, commercial or other
24 economic activity in the area."

25 The county has shown no such economic activity in the area.
26 While the proposed development may provide jobs for a limited
amount of time, it is not the type of economic activity that
creates housing needs.

27 7
28 While the Board does not believe "why these other uses
29 shall be provided for "always means "need," the Board believes
30 something more than mere desirability is required. Dep't of
31 Land Conservation and Dev. v. Tillamook Cty, 3 Or LUBA 138
32 (1981). This reason for another use must compel the
33 conclusion that the use should be allowed. 1000 Friends of
34 Oregon v. Clackamas Cty, 3 Or LUBA 281 (1981). This standard
has not been met.

35 See OAR 660-04-020(2)(a)(C) for examples of "compelling
36 reasons" that make it impossible to apply the goal.

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2 The Board notes the county's finding "that the proposed
3 site is the only one in Linn County . . . which contains . . .
4 the necessary physical characteristics for the effluent
5 disposal system proposed" (Record 17) contradicts one of the
6 county's findings supporting need:

7 "The Board determines the county will gain substantial
8 benefits from information and experiences acquired
9 through the use of the spray effluent system on the
10 subject parcel and that with the information so
11 gained, the county will be in a position to better
12 evaluate the viability of this system for other sites
13 throughout the county." (Emphasis added) Record 14.

14 If the unique effluent disposal system is beneficial for its
15 potential to solve waste disposal problems in other areas of
16 the county, other sites in the county must exist where this
17 system might be located. Some other sites might be within
18 urban growth boundaries. There are no findings on this matter,
19 however. See generally Abrego v. Yamhill Co., 2 Or LUBA 101
20 (1980).
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