BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM LUDWICK, et al, Petitioners, vs. YAMHILL COUNTY, Respondent, Eagle Point Homeowners Association, Intervenor.	LUBA Nos. 83-117 83-118 83-119 FINAL OPINION AND ORDER

Appeal from Yamhill County.

Scott O. Pratt, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Daryl S. Garrettson, McMinnville, filed a response brief and argued the cause on behalf of Respondent County.

John W. Hitchcock, McMinnville, filed a response brief and argued the cause on behalf of Intervenor Eagle Point Homeowners Association.

Michael B. Huston, Salem, filed an intervenor's brief on behalf of LCDC.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee; participated in the decision.

REVERSED IN PART, REMANDED IN PART 07/16/84

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

Opinion by Kressel.

NATURE OF DECISION

Petitioners seek review of two ordinances and a related order adopted by the Yamhill County Board of Commissioners. Ordinance No. 357 changed the comprehensive plan designation of approximately 350 acres from "Commercial Forestry" to "Very Low Density Residential" (VLDR). Ordinance No. 358 made a parallel change in the zoning designation of the property, from F-40 to VLDR-5. Finally, Board Order No. 83-530 granted conceptual approval of intervenor's proposal for a planned unit development (PUD) on the property.

FACTS

The soils on the property are in class III and IV. The land is also "forest land" as defined under statewide Goal 4 (Forest Lands). Slopes on the property range from 7 to 50 percent, with the predominant slopes being in the 12 to 30 percent range. The site is characterized by seasonal stream flows, rocky outcroppings and a mixed forest cover of deciduous and coniferous trees.

Prior to 1973 much of the property in question was divided into lots of approximately 5 acres. The divisions did not comply with applicable legal requirements. See Yamhill County v. Ludwick, 294 Or 778, 663 P2d 398 (1983). Fifty-nine lots were created and sold before the land was made subject to comprehensive plan and zoning controls.[1] Each conveyance was subject to restrictive convenants which, among other things,

prohibited destruction or removal of trees for commercial purposes. The area was described in the declaration of restrictions as the Eagle Point Ranch.

County officials suspended issuance of new building permits for Eagle Point Ranch in 1978 because of inadequate access, waste disposal facilities, fire protection and other serious deficiencies.[2] Fourteen structures had been built as of the date the county made the decisions appealed in this case. An unspecified number are capable of occupancy on a year-round basis.[3] The lots are presently in 47 separate ownerships.

The Eagle Point Ranch was made subject to the county's comprehensive plan in 1974, when it was designated "Commercial Forestry." It was zoned AF-20 (Agricultural/Forestry-20 acre minimum) in 1976. The zoning designation was changed in 1980 to F-40 (Forestry-40 acre minimum). However, a provision of the zoning ordinance treats many of the lots as buildable "lots of record." See Section 1204.02, Yamhill County Zoning Ordinance.[4] Yamhill county zoning ordinance and comprehensive plan have been acknowledged by LCDC.

Agricultural and forest uses adjoin Eagle Point Ranch on three sides. Access to the property is through a rural residential subdivision (Meadowview Estates) immediately to the east. Meadowview Estates consists of approximately 330 acres. There are 53 lots and 12 dwellings. The subdivision was exempted from Goal 3 and 4 requirements when LCDC acknowledged an exception for the area. Petitioners own lots within

Meadowview Estates.

In February, 1983, intervenor filed applications for a plan and zone change and for conceptual approval of a PUD for Eagle Point Ranch. The applications were approved, subject to various conditions, in November 1983. This appeal followed.

The final order recognizes the applications are subject to review for conformance with the statewide planning goals, among other approval criteria. With respect to conformance with Goal 4 the order reflects three alternative approaches: (1) the goal is satisfied because the approved changes to the plan and zoning map comply with the relevant policies in the county's comprehensive plan, (2) the changes comply with Goal 4 because the approved PUD and the existence of restrictive covenants assure that only uses allowed by the goal will take place and (3) if the goal is not satisifed by the foregoing, valid reasons exist for an exception pursuant to ORS 197.732.

Petitioners challenge each of the county's contentions with respect to Goal 4. In the first assignment of error they take issue with the contention the goal is satisifed (points (1) and (2), above). The second assignment of error challenges the sufficiency of the Goal 4 exception.

For the reasons set forth below, we agree an exception to Goal 4 is required. Further, we conclude that, of the three bases for an exception relied on by the county, only one (irrevocable commitment) is available in this case. We also find it necessary to remand the challenged decisions for

further findings with respect to the irrevocable commitment exception.

FIRST ASSIGNMENT OF ERROR

Petitioners first contend the county erred in relying on its acknowledged comprehensive plan policies as the sole measure of compliance with Goal 4. The county contends[5] "it is the policies and goals of the comprehensive plan which govern any and all plan map amendments." Brief of Respondent County at 6 (emphasis added). The county claims support for this generalization in the text of Goal 4 and in the Supreme Court's opinion in Byrd v. Stringer, 295 Or 311, 66 P2d 1332 (1982).

The pertinent language in Goal 4 reads as follows:

> "Forest Land shall be retained for the production of wood fiber and other forest uses. Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." OAR 660-15-000(4) (emphasis added).

Although a literal reading of the emphasized language in Goal 4 may give some support to the county's argument, we do not believe such a reading is appropriate. Changes in existing forest land uses can be authorized by a variety of governmental actions. Where those actions do not involve changes in the acknowledged plan itself, such as where a conditional use permit or a land division is approved, we agree the plan serves as the controlling document. The decision in Byrd v. Stringer,[6] supra, supports this result, as does Goal 4.[7]

However, where the change in use cannot be carried out without a change in the acknowledged plan, as here, neither the cited language in Goal 4 nor the Supreme Court's holding in Byrd, supra, provide guidance.[8] Instead, such post-acknowledgement plan amendment cases fall within the provisions of ORS 197.835(4). That statute reads as follows:

> "(4) Notwithstanding the provisions of subsections 2 and 3 of this section, the board shall reverse or remand a decision to adopt an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation if the amendment or new regulation does not comply with the goals. The board shall find the amendment or new land use regulation in compliance with the goals, if:
>
> "(a) The board determines that the amendment to an acknowledged land use regulation or the new land use regulation is consistent with specific related land use policies contained in the acknowledged comprehensive plan; or
>
> "(b) The amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation, on the whole, comply with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature."

Under the statute, it is clear post-acknowledgement plan changes must comply with the purposes of the statewide goals unless the acknowledged plan contains "specific related land use policies" governing the action.[9] No distinction is made in the statute between changes to the map and changes to the text portions of an acknowledged plan.

Based on the foregoing, we reject the argument that compliance of the challenged decisions with the county's

comprehensive plan policies constitutes compliance with Goal 4. Petitioners' first objection under the goal is therefore well-taken.

As noted earlier, the final order makes an alternative argument that the decisions in question comply with Goal 4. Under this argument, it is claimed that as a result of the approved PUD and the restrictive covenants applicable to each lot in the Eagle Point Ranch, the proposal "...will preserve and maintain the forest character" and meet the purposes of the goal. Record at 14. In connection with this point, Finding 3 stresses the potential for uncoordinated land use if the individual "lots of record" in Eagle Point are developed.[10] By contrast, the Finding 3 describes the approved PUD as (1) preserving forest cover by protecting against fire, (2) preserving open space, (3) protecting and enhancing wildlife habitat, and (4) protecting against soil erosion. Because these activities correspond to uses defined as "forest uses" by Goal 4,[11] the county maintains the challenged decisions satisfy the goal.

The county's findings acknowledge the proposed land use is principally residential in nature.[12] By its terms, Goal 4 does not list residential use as a permissible "forest use." However, both LCDC and this Board have indicated residential use may be authorized on forest land if the use is either (1) necessary and accessory to listed forest uses, see e.g., Lamb v. Lane County, 7 Or LUBA 137, 143 (1983), or (2) a nonforest

use meeting criteria designed to retain and protect forest land. See Grden v. Umatilla County, __ Or LUBA ___ (LUBA No. 83-073, January 6, 1984); Hood River County Acknowledgement Order, Staff Report at 43 (10/15/81); Tillamook County Acknowledgement Order, Staff Report at 79-82 (11/17/82); and Coos County Acknowledgement Order, Staff Report at 113B (6/24/83). See also, Publisher's Paper Co. v. Benton County, 63 Or App 632, 638-40, 665 P2d 1241 (1983).[13]

The county's Goal 4 findings address neither of these avenues for citing residential uses on forest lands. Instead, they seem to straddle the distinction between forest and non-forest proposals by describing the rural residences as "for forest purposes." See Finding 3(c)(1), Record at 15. The idea seems to be that the special PUD controls imposed by the county, combined with private enforcement of the restrictive covenants calling for retention of the land's open-space character, will be more consistent with the forest uses listed in Goal 4 than would be uncoordinated development on the individual "lots of record" at Eagle Point Ranch.

The PUD approach may well present advantages over uncoordinated development of the "lots of record." However, the inquiry in this portion of the appeal is not which residential proposal is preferable, but whether the challenged land use decisions comply with Goal 4. The express purpose of the goal is "to conserve forest land for forest uses." OAR 660-15-000(4). That purpose would be easily frustrated if the

siting of numerous dwellings on small lots - even lots designed for compatibility with a resource environment - could be authorized. Cf Mason v. Linn County, ___ Or LUBA ___ (LUBA No. 83-036, September 13, 1983).[14] Correspondingly, we do not believe Goal 4 can be implemented by private covenants for the preservation of open-space and protection of wildlife in what nevertheless amounts to a large-scale rural residential development.

We conclude the county's findings are inadequate to demonstrate conformance of the challenged decisions to Goal 4. The extensive residential development permitted by the approved applications has not been found to be "necessary and accessory" to forest uses. Lamb v. Lane County, supra. Nor has the county demonstrated the development can be authorized as a non-forest residential use.[15] We therefore sustain this assignment of error.

SECOND ASSIGNMENT OF ERROR

Anticipating the challenged decisions might contravene Goal 4, the county took an exception to the goal in connection with the plan change from "Commercial Forestry" to "Very Low Density Residential."[16] The final order justifies the exception on three grounds, corresponding to those previously recognized by LCDC under Goal 2, Part II and now codified in ORS 197.732(1).[17] First, the findings state that extensive parcelization and the existence of restrictive covenants prohibiting agricultural and forest uses on the property are

reasons why the state policy embodied in Goal 4 should not apply. (See ORS 197.732(1)(c)). Second, additional findings explain the land is "physically developed to the extent that it is no longer available for the uses allowed by the applicable goal." (See ORS 197.732(1)(a)). Finally, the remaining findings maintain the land is "irrevocably committed" to uses not allowed by Goal 4, making those uses "impracticable." (See ORS 197.732(1)(b)).

Petitioners take issue with each exception rationale advanced by the county. We consider their objections below.

Exception Based on ORS 197.732(1)(c) (reasons, alternatives, comparative impacts and compatibility)

ORS 197.732(1)(c) provides:

"(1) A local government may adopt an exception to a goal when:

"(c) The following standards are met:

"(A) Reasons justify why the state policy embodied in the applicable goals should not apply;

"(B) Areas which do not require a new exception cannot reasonably accommodate the use;

"(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designated to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

"(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

As noted above, the county justified a Goal 4 exception under these standards on grounds the land has been divided, sold and restricted in use so as to foreclose forest uses. In pertinent part, the findings state:

> "The property in question was parcelized by conveyance beginning in 1968, and partition approved in 1969 and 1971. Prior to the adoption of the 1974 comprehensive plan which was the first restriction placed on the property by any zoning authority, the land was already held by 47 owners, and there are presently 47 owners holding the property in question. In addition, the restrictive covenants imposed on the property at the time it was developed, prior to the imposition of any planning or zoning controls would prevent utilization of the property for agriculture or forestry purposes. Therefore, since the property cannot be utilized for the policies set forth in the applicable goals, the only relief that can be provided for the property owners in question is to allow the property to develop pursuant to a PA/Z change." Exception Finding 1, Record at 35.

In justifying the exception on the basis of these circumstances, we believe the county miscontrued ORS 197.732(1)(c). We read this statute to provide for goal exceptions where the land has not yet been divided or developed in connection with the variant use. In other words, an exception is available under ORS 197.732(1)(c) where a proposed use not permitted by a goal is needed, not where the preexistence of such a use prevents goal conformance or makes it impracticable. Were this not the case, the legislature would not have made consideration of alternative locations for the use a requirement. See ORS 197.732(1)(c), (B) and (C).[18] Nor would it have been necessary for the legislature to specifically provide, as it did, for exceptions based on

physical development or commitment of the land in question to uses not allowed by the goal. See ORS 197.732(1)(a) and (b).

The approach we take on this point is consistent with our prior rulings in analagous circumstances and with LCDC's construction of the present law. For example, in 1000 Friends v. Douglas County, 4 Or LUBA 148 (1981), we construed the forerunner of ORS 197.732(1)(c) to require proof that economic activities in a rural resource area justify plans to site new residences on nearby resource lands. We stressed that a market demand for rural housing was an insufficient reason for an exception based on "need":

> "It is commercial, industrial or other economic activities which result in employment opportunities that create the 'need' for housing in rural locations. Thus, need cannot be based solely on market demand for housing, arbitrary assumptions about urban rural allocation of population or even housing types and cost characteristics. The 'need' must be a consequence of commercial, industrial or economic activities which themselves require a rural location." 4 Or LUBA at 159.

See also Still v. Marion County, 42 Or App 115, 122-123, 600 P2d 433 (1979), rev den (1980).

Consistent with the Douglas County case, we do not believe Yamhill County can justify a Goal 4 exception under ORS 197.732(1)(c) based on circumstances which merely reflect market demands for rural housing that predated the statewide goals. Those circumstances may justify exceptions on other grounds, but they are not relevant for purposes of ORS 197.732(1)(c).

The point discussed above is recognized by an administrative rule promulgated by LCDC in connection with ORS 197.732(1)(c). In pertinent part the rule provides:

> "(1) Rural Residential Development: For rural residential development the reasons cannot be based on market demand for housing except as provided for in this section of this rule, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics. A county must show why, based on the economic analysis in the plan, there are reasons for the type and density of housing planned which require this particular location on resource lands. A jurisdiction could justify an exception to allow residential development on resource land outside an urban growth boundary by determining that the rural location of the proposed residential development is necessary to satisfy the market demand for housing generated by existing or planned rural industrial, commercial, or other economic activity in the area." OAR 660-04-022(1) (emphasis added).[19]

Based on the foregoing, we agree with petitioners the county has not justified an exception in this case under ORS 197.732(1)(c). We turn next to the county's arguments the exception is justified on other grounds.

Exception Based on ORS 197.732(1)(a) (physical development)

ORS 197.732(1)(a) provides:

> "(1) A local government may adopt an exception to a goal when:
>
> "(a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal"

This provision reflects a long standing LCDC exception policy developed principally in cases arising under Goals 3 (agricultural lands) and 4 (forest lands). The policy

recognized that certain rural lands could not be considered available for resource use because of preexisting, non-resource development.[20] See 1000 Friends of Oregon v. Clackamas County, 3 Or LUBA 281, 286-291 (1981). The following rule has been adopted by LCDC to implement ORS 197.732(1)(a):

> "OAR 660-04-025(2) 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, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception."

The county sought to bring Eagle Point Ranch within the coverage of ORS 197.732(1)(a) based on the following facts: (1) the land is divided into 59 parcels, (2) the average parcel size is five acres, (3) the parcels are in 47 ownerships, (4) there are 14 structures utilized either part or full time for dwelling purposes, and (5) restrictive covenants prevent farm or forest use of the land. See Exception Finding 5, Record at 38.

Petitioners contend the county's recitation of facts is not accompanied by the legislatively required explanation of why the facts demonstrate the exception standard is satisfied. They also contend the facts do not demonstrate the land is so physically developed as to be unavailable for uses allowed by

Goal 4.

The objection to the county's failure to explain in the order why an exception is warranted is well taken. The county must do more than list information about parcel size, ownership patterns and number of existing structures. Such information is a necessary, but not a sufficient basis for an exception under ORS 197.732(1)(a). What is additionally required is (1) more detailed findings concerning the extent and location of the existing physical development, see OAR 660-04-025(2), and (2) a reasonable explanation of why the facts make the land unavailable for resource purposes. See ORS 197.732(4). See also, 1000 Friends of Oregon v. Douglas County, 4 Or LUBA 24, 31 (1981); 1000 Friends of Oregon v. Clackamas County, 3 Or LUBA 316, 325-326 (1981).[21]

More importantly, however, we conclude the above-listed facts, do not justify an exception based on physical development, as the law requires. ORS 197.732(1)(a). The existence of a few structures on 350 acres of forest land hardly qualifies as physical development which would make the entire site unavailable for forest use. The remaining factors relied on by the county, i.e., parcelization, multiple ownership, and restrictive covenants bear no discernible relationship to physical development.[22] Accordingly, we conclude this aspect of the county's order cannot be sustained.

Exception Under ORS 197.732(1)(b) (irrevocable commitment)

The county's third rationale for an exception to Goal 4

arises under ORS 197.732(1)(b). The statute provides:

> "(1) A local government may adopt an exception to a goal when:
>
> "(b) The land subject to the exception is irrevocably committed as described by 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"

In accordance with the statute, LCDC has promulgated a rule describing the factors to be considered where an exception is based on irrevocable commitment. OAR 660-04-028. In pertinent part, the rule reads as follows:

> "(2) Whether land has been irrevocably committed will depend upon the situation at the specific site and the areas adjacent to it. The exact nature and extent of the areas found to be irrevocably committed shall be clearly set forth in the justification for the exception, and those must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall address the following factors:
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> "(a) Existing adjacent uses;
>
> "(b) Public facilities and services (water and sewer lines, etc.);
>
> "(c) Parcel size and ownership patterns of the exception area and adjacent lands;
>
> "(i) Consideration of parcel size and ownership patterns under section (2)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the goals were made at the time of partitioning or subdivision. Past land divisions made without application of the goals do not in themselves demonstrate irrevocable commitment of the divided land. Only if existing development on the resulting parcels or other factors prevent their resource use or the resource

use of nearby lands can the parcels be considered to be irrevocably committed. Resource and nonresource parcels created pursuant to the applicable goals shall not be used to justify a committed exception.

"(ii) Existing parcel sizes and their ownership shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered only as one farm or forest operation. The mere fact that small parcels exist does not alone constitute irrevocable commitment. Small parcels in separate ownerships are more likely irrevocably committed if the parcels are developed, or clustered in a large group as opposed to standing alone or are not adjacent to or are buffered from designated resource land.

"(d) Neighborhood and regional characteristics;

"(e) Natural boundaries or other buffers separating the exception area from adjacent resource land;

"(f) Physical development according to OAR 660-04-025; and

"(g) Other relevant factors.

"(3) A conclusion that land is irrevocably committed to uses not allowed by the applicable goal shall be based on one or more of the factors listed in section (2) of this rule. The conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion that it is impracticable to apply the goal to the particular situation or area." OAR 660-04-028.

The county based its claim the land is irrevocably committed to uses not allowed by Goal 4 on the same facts relied on for an exception based on physical development. See page 14, supra. The pertinent finding reads as follows:

"The board finds that the land subject to the

> exception is irrevocably committed because of other relevant factors which make the uses allowed by the applicable goals impracticable. Particularly the board finds that due to parcel size and ownership, i.e., 59 parcels, an average size of 5 acres, 47 owners coupled with 14 lots, containing structures already constructed for part time and permanent dwellings and restrictive covenants which prevent the utilization of the property for farm and forest purposes that the property is irrevocably committed to nonfarm, nonforest uses and therefore an exception is justified." Exception Finding 6, Record at 38.

Petitioners challenge the adequacy of the finding under ORS 197.732(1)(b). In particular they contend (1) the county provided no explanation why parcelization, multiple ownership and restrictive covenants constitute irrevocable commitment, (2) the finding does not demonstrate consideration of existing adjacent uses, as allegedly required by OAR 660-04-028 and (3) the finding does not show why sale or lease of the property is not adequate to allow its management for forest uses, as required under Coleman v. Lane County, 5 Or LUBA 1 (1982).

We believe the county's best argument for an exception lies under ORS 197.732(1)(b). The division of the tract into 59, 5 acre lots, and the existence of 47 ownerships may not make all forest uses impossible, but the circumstances at least suggest impracticability. Be that as it may, we cannot conclude at this stage that an exception is warranted.

Two considerations support our decision that a remand for additional findings is required. First, the final order does not contain any explanation of why the facts render uses allowed by Goal 4 "impracticable." ORS 197.732(4) and OAR

660-04-028(3). Indeed, other findings in the order, (those supporting the claim Goal 4 is satisfied) suggest the land can and will be put to forest use if developed as a PUD. See text of Footnote 13, supra. We agree with petitioners these findings are inconsistent with the exception claim. If the land can be put to resource use while supporting an extensive rural residential development, it would appear the land does not qualify for an exception under ORS 197.732(1)(b).

To support the exception under ORS 197.732(1)(b), the findings must clearly explain why the facts make the resource uses identified by Goal 4 impracticable. See also, OAR 660-04-028(2)(c)(i). The county's findings do not satisfy this test.

In conjunction with the above, we believe a remand is also in order because the findings are deficient in certain important respects. First, the findings do not describe the current use of the property in sufficient detail. The reference to 14 "structures," only some of which are utilized for full time dwelling purposes, does not present a clear picture of the extent to which the land is actually committed to nonforest uses. Further, if the county's position is that 5 acre lots cannot be individually put to forest use, an effort must be made to demonstrate the impracticability of forest management of the land in larger blocks, by sale, lease or other arrangement. See Coleman v. Lane County, 5 Or LUBA 1, 9, (1982).

Based on the foregoing, we conclude as follows. First, exceptions under ORS 197.732(1)(a) and (c) are not available in this case. The county's allowance of such exceptions must be reversed. Second, the findings at this stage are inadequate to support an exception under ORS 197.732(1)(b). A remand is therefore in order.

Reversed in part, remanded in part.

FOOTNOTES

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1 The many problems engendered by the unlawful division and sale of these rural lots were brought to our attention in Yamhill County v. Ludwick, 3 Or LUBA 271 (1981). Our opinion described the problems as "a basket of snakes." Id at 272.

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2 One of the county's finding states:

"The Board finds that a certain squalor exists in the Eagle Point Ranch area as the result of development which occurred prior to the imposition of restrictions on development by the Yamhill County Planning Department in its first effort to upgrade and improve the situation presently existing in the area. The squalor appears in the form of vault privies, outhouses, substandard structures and other nonconforming uses and inadequately constructed or maintained roads. In addition, some residents must haul water to and from the sites." Finding 8, Record at 22.

The unsuitability of the land for immediate development is also described in Yamhill County v. Ludwick, 294 Or 778, 663 P2d 398 (1983).

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3 The extent of actual development of the property is not made clear in the county's order. One finding describes the current uses as "various activities from camping to recreational visitation." Finding 3(c)(2), Record at 15. Another states that six septic permits have been issued and nine sites have received subsurface sewage site evaluation approvals. Finding 5(2), Record at 20. Roads serving the lots have apparently not been adequately constructed or maintained. Finding 8, Record at 22. Water must be hauled to the property. Id. No fire protection system is available. Finding 3(c)(2), Record at 15.

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4 Prior to adoption of the current "lot of record" provision, the county's issuance of permits for dwelllngs on a few of the substantial lots in Eagle Point Ranch was judicially invalidated. Ludwick v. Yamhill County, 294 Or 778, 788 663

P2d 398 (1983). In that case, the court held the lots did not qualify as "existing legal lots of record," under an ordinance conditionally allowing development of such lots, because they had been created in violation of applicable subdivision law. We express no opinion on the correctness of the county's current treatment of the lots as "lots of record" under §1204 of the oridnance.

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5 Intervenor has filed a brief generally concurring in the position taken by the county. We refer only to the county's position in this opinion, intending to cover both briefs by that reference.

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6 Byrd involved review of a permit for a farm dwelling under an acknowledged plan and ordinance. The Supreme Court held LUBA had erroneously reviewed the permit against Goal 3 standards rather than the acknowledged plan, stating "[w]e hold that once acknowledgment has been achieved, land use decisions must be measured not against the goals but against the acknowledged plan and implementing ordinances." 295 Or at 319.

Given the requirement in ORS 197.835(4) that land use decisions amending acknowledged plans are reviewable for goal conformance, the quoted portion of the opinion in Byrd is apparently overbroad.

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7 The result is also dictated by ORS 197.175(2)(d) and ORS 197.835(3).

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8 We note the Goal 4 language relied on by the county does not distinguish between acknowledged and unacknowledged plans. The distinction has become a critical one in the statewide planning program. In light of that distinction, we do not belive the reference to plan conformance in Goal 4 should be read to exempt post-acknowledgment plan amendments from substantive Goal 4 review. Any other result would be patently at odds with the post-acknowledgment legislation enacted in 1981. See, e.g., ORS 197.835(4).

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9 Neither the final order nor the county's brief argues the acknowledged comprehensive plan policies constitute "specific

related land use policies" within the meaning of ORS 197.835(4)(a). The order does state, however, that the challenged plan map amendment complies with the purposes of Goal 4. We discuss this separate contention at page 7-9 of this opinion.

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10 Another finding states that "...in the event the proposal is turned down approximately 36 of the lots may qualify for building permits without discretionary review and the remainder of the lots could apply for conditional use permits for the development of forest dwellings on a site by site basis." Record at 27.

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11 The goal defines the "forest use" as:

> "Forest Uses - are (1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) 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."

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12 For example, Findings Nos. 5 and 6 describe the proposal as a "Rural Residential Development."

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11 In Grden, LCDC and this Board set forth the following standards for non-forest uses in "predominate (sic) forest areas:"

> "a. Is compatible with forest uses;
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> "b. Does not seriously interfere with accepted forest practices on adjacent lands;
>
> "c. Does not alter the stability of surrounding land use patterns;
>
> "d. Is situated on lands unsuitable for forest production consider the terrain, adverse soils or land conditions, drainage and flooding,

vegetation, location and size of tract, and the cost of roads, power and telephone lines...."

We note Grden involved a non-forest use other than a dwelling. However, LCDC's acknowledgment decisions cited at page 8 indicate that approval standards similar to those listed in Grden should be used in non-forest dwelling cases.

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14 Mason involved an exception to Goal 3 for a clustered residential development of 111 units on a 253 acre site in an agricultural area. In rejecting the exception, we said:

"What is shown by the county's order is a desirable development. It is desirable for aesthetic reasons and has the incidental benefit of providing an irrigation source for farm land. It is nonetheless first and foremost a residential development. There are other methods of irrigating crops that do not depend upon putting a 110 planned unit development on the property." (Slip op. at 9).

The preceding statement is of equal applicability in the present case.

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15 Indeed, we believe the county undermines its own arguments that Goal 4 is satisfied in this case by making conflicting findings with reference to the Goal 4 exception. That is, while the findings on goal conformance stress continued forest use, the exception findings describe forest use as "impracticable" because of parcelization, small lots, multiple ownerships and restrictive covenants. Presumbably, approval of the proposed changes will not alter these circumstances.

Preservation of the land for forest use would thus appear to be recognized as unlikely by the county's own findings . We believe a remand is necessary so that this apparent inconsistency in the final order can either be explained or eliminated.

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16 ORS 197.732(8) defines "exception" as follows:

"(8) As used in this section, 'exception' means a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:

"(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

"(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

"(c) Complies with standards under subsection (1) of this section."

See also OAR 660-04-015 (LCDC Rules requiring exception to be part of comprehensive plan).

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17 Until enactment of ORS 197.732 in 1983, exceptions were based on the provisions of Goal 2, Part II. Those provisions authorized relief when, based on "compelling reasons and facts" it was determined that "it is not possible to apply the appropriate goal to specific properties or situations." OAR 660-15-000(2). Four factors were required to be considered: need, alternative locations, long term consequences and compatibility with adjacent uses. See Still v. Marion County, 42 Or App 115, 600 P2d 433 (1979), rev den (1980). Under Goal 2, LCDC also recognized the validity of exceptions to the agricultural and forest lands goals based on compelling reasons and facts showing the land was "built upon or irrevocably committed" to non-resource uses so that application of the resource goals was "impossible." See, e.g., 1000 Friends of Oregon v. Marion County, 1 Or LUBA 33 (1980); 1000 Friends of Oregon v. Clackamas County, 3 Or LUBA 281, 286-291 (1981).

When the 1983 Legislature codified the exceptions process it relaxed the standards for allowing exceptions to some degree. The requirement that exceptions be supported by "compelling" justifications was replaced by a requirement for "reasons" demonstrating compliance with exception standards. ORS 197.732(4) and (6)(b). The strict "impossibility" standard was also eliminated.

The statute now sets forth three distinct bases for exceptions. ORS 197.732(1)(c) provides for relief where four standards, generally corresponding to the factors originally listed in Goal 2, Part II, are satisfied. ORS 197.732(1)(a) gives independent recognition to LCDC's policy of allowing resource-goal exceptions where the land is "physically developed" for uses prohibited by the goal(s). ORS 197.732(1)(b) does the same in the case of lands "irrevocably

committed" to such uses.

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18 The county's findings with reference to the alternative sites criteria in ORS 197.732(1)(c)(B) and (C) illustrate its difficulty in justifying the exception under this statute. The findings concede that "...other areas which have acknowledged exceptions may be developable by and for rural residential purposes," but adds that "development of those lands will not solve the on-going problem relating to the parcelization and ownership of this property in question...." Exception Finding 2, Record at 36 (emphasis added). We believe the availability of other lands to accommodate residential use rules out an exception under ORS 197.732(1)(c)(B) in this case. The county's focus on the circumstances peculiar to this property make it clear the relevant statutory exception provisions are ORS 197.732(1)(a) and (b).

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19 The rule was mandated by ORS 197.732(3) (LCDC shall adopt rules establishing the circumstances under which particular reasons may or may not be used to justify an exception under ORS 197.732(1)(c)).

We note the rule is in line with the legislative history of the 1983 statute. A memorandum concerning the intent of ORS 197.732(1)(c)(A), addressed to the Senate Committee on Environment and Energy, states:

> "However, it is very important to note that it is the intent of this language that the Commission not change its existing policy and rules pertaining to exceptions for rural residential housing on resource lands. The rule now allows housing to support economic activities which require or need a rural location but does not allow rural residential development based solely on a general market demand, past development or population trends." Memorandum to Senator John Kitzhaber, Chairman, Senate Committee on Environment and Energy from Pat Amedeo, May 27, 1983, (emphasis added).

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20 The policy did not always draw a clear distinction between lands developed for non-resource use and lands "committed" to such use by pre-development activities or circumstances. The two were considered points along a continuum of development making the land unavailable for resource use. 1000 Friends of Oregon v. Clackamas County, supra. However, the current

statute distinguishes between the two approaches. Compare ORS 197.732(1)(a) and (1)(b).

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[21] The cited exceptions cases predate the current statute. As the county points out, they were decided when exceptions were available only when application of the substantive goal was "impossible." Nonetheless, the cases can be appropriately cited for the proposition that detailed explanations must accompany claims that certain facts justify an exception.

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[22] As noted in Footnote 3, the county's order provides scant information about the extent of actual development at the site. What information is provided suggests most of the land is in a natural state.