BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| JOHN CHAMBERS, | ) | |
| | ) | |
| Petitioner, | ) | LUBA No. 90-025 |
| | ) | |
| vs. | ) | FINAL OPINION |
| | ) | AND ORDER |
| CLACKAMAS COUNTY, | ) | |
| | ) | |
| Respondent. | ) | |

Appeal from Clackamas County.

Jon S. Henricksen, Gladstone, filed the petition for review and argued on behalf of petitioner. With him on the brief was Henricksen, Grafe & Grove,P.C.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

KELLINGTON, Referee; SHERTON, Chief Referee, HOLSTUN, Referee, participated in the decision.

AFFIRMED 07/19/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clackamas County Board of Commissioners denying an application for a comprehensive plan amendment to redesignate a 21 acre parcel from Forest to Rural, and to rezone the parcel from Transitional Timber 20 acre district (TT-20), to Rural Residential Farm Forest 5 acre district (RRFF-5).

FACTS

The subject property is located on a hillside. There are 30 houses at the top of the hill and within a 1/2 mile radius of the subject property there are an additional 141 houses. The properties to the east, northwest and south are zoned TT-20. The properties to the west, southwest and north are zoned RRFF-5. The City of Gresham is located two miles from the subject property.

The soils on the subject property are Douglas Fir site class III. The parcel previously was 31 acres in size. However, the county approved two divisions of the subject property and, consequently, the property presently consists of 21 acres. Prior to 1979 (the time at which the subject property was zoned TT-20), petitioner improved the property with an "extra wide road, electrical service suitable for easy expansion and an underground telephone cable capable of handling twelve different lines." Petition for Review 3.

The planning commission recommended approval of

petitioner's application to redesignate and rezone the subject property as proposed. However, the board of commissioners denied petitioner's application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The County erred in not considering the threshold issue of whether or not the property in question is agricultural or forest land coming under the protection of Goals 3 and 4."

Petitioner argues the county erroneously determined that the subject property requires an exception to Statewide Planning Goal 4 (Forest Lands) before it may be redesignated and rezoned as proposed.[1] Petitioner argues that the subject property does not qualify as forest land as it is described in Goal 4. However, the county argues the subject property qualifies as forest land as it is defined in the acknowledged Clackamas County Comprehensive Plan (plan).

Petitioner does not challenge the county's argument

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[1]Petitioner also argues the subject property does not qualify as agricultural land under Goal 3 (Agricultural Lands). The challenged decision does state "[a]n exception from LCDC Goals 3 and 4 is necessary, if the request is to be approved." However, this is the only place in the challenged decision where such a statement is found. Additionally, in the same paragraph which refers to Goal 3, the county also states "[w]hile the subject property is not prime agricultural or forest land, it is nevertheless suitable for forest uses as contemplated by Goal 4, the Comprehensive Plan, and the TT-20 district." Record 84-85. Additionally, the county only adopted findings regarding an exception to Goal 4. Finally, the county does not argue in its brief that the subject property qualifies as agricultural land, or that an exception to Goal 3 is required. Under these circumstances, it appears the county's statement in the introductory paragraph to the staff report (which comprises the county findings), that an exception to Goal 3 is required, is surplusage. Accordingly, we need not review the evidentiary support for this statement.

that the subject land qualifies as forest land under the plan, and the land appears to qualify as forest land, as the county argues. Under these circumstances, absent an explanation why the acknowledged plan standards do not control, the county was correct in determining that the subject land is forest land under the terms of the plan and that an exception to Goal 4 is required before the subject land could properly be redesignated and rezoned for nonforest uses.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Even if the property is properly designated as 'resource' property falling within the protection of * * * [Goal] 4, respondent did not base its decision on substantial evidence that an exception to Goal 4 based on Goal 2, Part II(a), OAR 660-04-025 and ORS 197.732(1)(a), physical development, has not been proven."

The county adopted the following findings in determining a Goal 4 exception is not justified:

> "This property does not meet the requirements for taking an exception from LCDC Goal 4. The applicant has offered no evidence in support of such an exception. The property currently is undeveloped, and therefore, does not meet OAR 660-04-025. * * * An exception to Goal 4 cannot be justified." Record 86.

Petitioner argues the county erroneously determined the proposal to redesignate the land from Forest to Rural and to rezone the subject property from TT-20 to RRFF-5, is not justified under the "physical development" exception

standards contained in Goal 2, Part II(a), ORS 197.732(1)(a)[2] and OAR 660-06-025. Petitioner argues under these standards an exception based on "physical development" may be approved based upon natural features of the property rather than improvements to the property.

We agree with the county that petitioner's interpretation of the "physical development" standard is incorrect. The physical development referred to in Goal 2, Part II(a), ORS 197.732(1)(a) and OAR 660-04-025 cannot be satisfied by identifying naturally occurring features of the property.[3] See Ludwick v. Yamhill County, 11 Or LUBA 281,

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[2]ORS 197.732(1)(a) provides:

> "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.
>
> "* * * * *"

[3]That the physical improvements referred to must be improvements actually constructed on the property is apparent from OAR 660-04-025 which provides in relevant part:

> "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 area 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."

291, 300 n 22 (1984), aff'd 72 Or App 224, rev den 299 Or 443 (1985) (distinguishing between the "natural state" of a site and the "actual development" on the site).

The second assignment of error is denied.[4]

THIRD ASSIGNMENT OF ERROR

> "Even if the property is properly protected by Goal 4, respondent did not base its denial of an exception on substantial evidence * * * regarding the standard of Goal 2, Part II(b), OAR 660-04-028 and ORS 197.732(1)(b), irrevocable commitment to other uses."

The county adopted the following findings regarding whether the "irrevocable commitment" exception standards of Goal 2, Part II(b), OAR 660-04-028 and ORS 197.732(1)(b)[5] are satisfied:

> "* * * While there are rural residential homesites in the immediate area, these homesites have been

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[4]Petitioner also argues the installed road, electrical service and underground telephone cable are adequate to establish that the subject property is "no longer available" for forest use as required by ORS 197.732(1)(a). We agree with the county that these improvements, of themselves, do not establish that the subject property is no longer available for forest use.

[5]ORS 197.732(1)(b) provides:

> "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 * * *
>
> "* * * * *"

> recognized by the existing Rural designation. As previously discussed, the two homesites immediately adjacent to the subject property were created pursuant to the TT-20 district, and cannot now be used to justify changing the resource designation of tax lot 900. The proximity of neighboring development may require additional precautions for timber management * * * but the property is not committed to non-resource use, as OAR 660-04-028 requires. An exception to Goal 4 cannot be justified." Record 86.

Petitioner contends the county erred by determining that an "irrevocable commitment" exception is not justified. Petitioner argues the weight of the evidence establishes it is impracticable to put the subject property to forest use.

To establish that land is "irrevocably committed" to development under the standards set out in Goal 2, Part II(b), OAR 660-04-028 and ORS 197.732(1)(b), it must be shown that "exiting adjacent uses and other factors make uses allowed by the applicable goal impracticable." ORS 197.732(1)(b); 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 460, 724 P2d 268 (1986). However, this Board will not reverse or remand on evidentiary grounds the county decision that the "irrevocable commitment" exception standard is not met, unless petitioner establishes, as a matter of law, that the only reasonable conclusion which can be reached based on the evidence in the whole record is that the "irrevocable commitment" standard is satisfied. See Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d 1241 (1979); see also Baughman v. Marion County, ___ Or LUBA ___ (LUBA No. 88-117, April 12, 1989), slip op 5-6.

There is evidence in the record which establishes petitioner will have difficulty logging the subject property. However, we cannot say as a matter of law the only reasonable conclusion which can be reached on the basis of the evidence in the record is that the subject property cannot practically be put to forest use and is, therefore, "irrevocably committed" to development within the meaning of Goal 2, Part II(b), OAR 660-04-028 and ORS 197.732(1)(b).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "Even if the property is properly protected by Goal 4, respondent did not base its denial of an exception on substantial evidence with regard to the standards of Goal 2, Part II(c), OAR 660-04-020 and ORS 197.732(1)(c)."

Petitioner contends the county failed to address in its findings whether the subject land qualifies for a "reasons" exception under Goal 2, Part II(c), OAR 660-04-020 and ORS 197.732(1)(c).[6]

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[6]ORS 197.732(1)(c) provides:

"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;

The county does not contend that findings were adopted to explain why a "reasons" exception is not justified. However, the county argues that under ORS 197.835(9)(b), the evidence in the record "clearly supports" a finding that petitioner does not satisfy the "reasons" exception standard requiring that "areas which do not require a new exception cannot reasonably accommodate the use."[7] ORS 197.732(1)(c)(B). OAR 660-04-020(2)(b). According to the county, "[t]here are obviously residential home sites available in [the] area already zoned RRFF-5." Respondent's Brief 5.

Because the county cites us to no evidence in support of its contention that there is evidence in the record which clearly supports the findings it failed to make, we are

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> "(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed 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
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> "(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

[7]ORS 197.835(9)(b) provides in relevant part:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or a part of the decision supported by the record * * *."

unable to deny the fourth assignment of error on the basis of ORS 197.835(9)(b). However, the three types of goal exceptions established by ORS 197.732 and OAR Chapter 660 Division 4 (i.e. "physically developed," "irrevocably committed," and "reasons") are separate and independent bases upon which an exception may be granted and require findings addressing different approval standards. Denison v. Douglas County, 101 Or App 131, 143, ___ P2d ___ (1990). In denying a request for approval of an exception, a local government must adopt findings addressing each type of exception which an applicant contends during the local proceedings is justified. However, a local government is not required to adopt findings addressing a type of exception which an applicant does not contend, in the local proceedings, is justified.

There is no contention in the petition for review that petitioner either requested the county to approve a "reasons" exception or argued during the local proceedings a "reasons" exception is justified. Petitioner also does not identify any evidence submitted below in support of such an argument. The application submitted by petitioner, as well as petitioner's proposed findings submitted to the board of county commissioners, include no suggestion that petitioner argued a "reasons" exception was justified. Record 4-7; 102-105. The testimony presented in support of the application during the local proceedings shows the exception

request was based on the "physical development" and "irrevocable commitment" types of exceptions. There is nothing in the record to suggest that the exception request was based on arguments that a "reasons" exception was justified. Record 17-19.

The fourth assignment of error is denied.

The county's decision is affirmed.