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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
YAMHILL COUNTY,)
)
Respondent,)
)
and)
)
ROBERT D. PARK and DEBORAH)
JEFFRIES,)
)
Intervenors-Respondent.)

LUBA No. 96-008
FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Dorothy S. Cofield, Portland, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 08/23/96

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the board of county
4 commissioners approving amendments to the county's
5 comprehensive plan and zoning maps and taking exceptions to
6 Statewide Planning Goals 3 and 4.

7 **MOTION TO INTERVENE**

8 Robert D. Park, the applicant below, and Deborah
9 Jeffries, an owner of the subject property, move to
10 intervene in this proceeding. There is no opposition to the
11 motion, and it is allowed.

12 **FACTS**

13 The subject property, which is divided into three
14 separate tax lots, includes approximately 60 acres of
15 resource land presently in agricultural use, consisting of
16 Christmas trees and grass. The property slopes steeply, at
17 an elevation of between 1,450 and 1,600 feet. The soil is
18 Laurelwood silt loam in Natural Resource Conservation
19 Service (NRCS) capability classes III and IV; it is
20 therefore high value farmland soil. The forest productivity
21 capability of the subject property is 160 cubic feet per
22 acre, per year. There are two small forested areas. Apart
23 from a gravel road, an agricultural building and a small
24 shed, the property is vacant.

25 Before the challenged decision, the subject property
26 was designated Agricultural/Forestry by the county's

1 comprehensive plan and zoned Agricultural/Forestry-20 (AF-
2 20). In 1981, the county denied a request to redesignate
3 and rezone the property to Very Low Density Residential
4 (VLDR) to permit a planned unit development. In 1994, the
5 county approved lot-of-record applications for each of the
6 three tax lots.

7 Bald Peak State Park lies adjacent to the subject
8 property to the west. The land to the north and east is in
9 exception areas. It is zoned VLDR-5, and is being developed
10 with residences. The land to the south is zoned AF-20, and
11 is currently in agricultural use. In the vicinity of the
12 subject property are other large, resource-zoned parcels,
13 which are principally in timber production.

14 The development application filed by intervenors in
15 May, 1995 states it will require "Exception to be adopted by
16 Yamhill County in compliance with Oregon Statewide Planning
17 Goal (2) Part II(b)."¹ Record 141. Goal 2, Part II(b)

¹Goal 2, Part II provides, in relevant part:

"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;

"(b) 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;
or

"(c) The following standards are met:

1 describes the "committed" exception. The county's notice to
2 petitioner summarizes the proposal as: "Plan amendment and
3 zone change from Agriculture Forestry (AF-20) to Very Low
4 Density Residential (VLDR-5); Exception to Goals 3 and 4."
5 Record 140.

6 In response to the notice, petitioner sent the
7 following comments on June 30, 1995:

8 "Based on the information submitted for our review
9 including the County's June 26, 1995 staff report,
10 we recommend that this request not be approved.
11 The information provided with the application is
12 not adequate to support a 'built' or 'committed'
13 exception to goal 3 [660-04-025 (built) or 660-04-
14 028 (committed)].

15 "An exception under OAR 660-04-025 or 028 requires
16 either a demonstration that the land in question
17 is 'physically developed' or 'irrevocably
18 committed' to uses not allowed by goal 3 'because
19 existing adjacent uses and other relevant factors'
20 make farm and forest uses 'impracticable.' An

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

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

"(3) The long-term environmental, economic, social and
energy consequences resulting from the use of 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

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

"* * * * *"

1 exception under this rule requires, at a minimum,
2 evidence that conflicts from adjacent uses make
3 farm uses 'impracticable.' Information is not
4 provided about how existing uses makes continued
5 resource use of the subject parcel
6 'impracticable.' To the contrary, the staff
7 report demonstrates that the 60 acres is currently
8 in farm use (Xmas trees and field crops). The
9 [Soil and Water Conservation District] notes that
10 a wide variety of crops can be grown on the
11 parcels with the soils present at the subject
12 elevation. The soils are defined as 'high-value
13 farmland' and also has [sic] a forest productivity
14 of 160 cu ft per year of wood fiber. Therefore,
15 the applicant has not provided substantial
16 evidence and reasons to support approval of this
17 exception to goal 3." Record 78.

18 The staff report to the planning commission recommended
19 denial, based in part on the failure to meet the criteria
20 for a committed exception. Record 134. On July 6, 1995,
21 the planning commission voted to deny the application on the
22 grounds stated in the staff report. Record 85.

23 Intervenors' representative apparently met with
24 Department of Land Conservation and Development (DLCD) staff
25 following the planning commission vote. Materials submitted
26 by intervenors dated September 27, 1995 state "recent
27 meetings with the Department of Land Conservation and
28 Development and a more clear identification of the key
29 issues justify a re-evaluation of the criteria." Record 36.
30 After performing the re-evaluation, intervenors, for the
31 first time, made arguments in support of a "reasons"
32 exception under Goal 2, Part II(c).

33 On December 15, 1995, the board of commissioners

1 adopted the challenged decision, which takes both reasons
2 and committed exceptions to Goals 3 and 4.² With respect to
3 petitioner's comments, the county's findings state:

4 "In response to a notice of the application, DLCD
5 responded by recommending that the request not be
6 approved because information does not support a
7 'built' or 'committed' goal exception. However,
8 applicant's representative * * * indicated that he
9 has discussed this with DLCD and been informed by
10 them that their position was based on the
11 erroneous assumption that the zone change was for
12 a VLDR 2.5, rather than VLDR 5, zoning district.
13 Therefore, the Board finds that there is
14 sufficient information to support a 'built' or
15 'committed' exception notwithstanding the
16 previously stated opposition from DLCD." Record
17 14.

18 The notice of adoption to DLCD, mailed December 18, 1995,
19 addresses the reasons and committed exceptions by stating
20 only that an "exception to Goals 3 and 4" was taken."
21 Record 1.

22 **WAIVER**

23 Intervenor's argue petitioner is precluded by ORS
24 197.763(1) and 197.835(3) from raising arguments pertaining
25 to the first assignment of error, which concerns the reasons
26 exception, and that part of the second assignment of error

²Ordinance 600, which sets forth the challenged decision states: "In adopting the plan amendment specified in this ordinance, the county hereby takes an exception from Statewide Planning Goals 3 and 4." (Emphasis added.) Record 4. The supporting findings themselves, however, address the criteria for both a reasons exception and a committed exception to Goals 3 and 4.

1 that pertains to Goal 4.³

2 **A. Reasons Exception**

3 Petitioner argues that notwithstanding its failure to
4 raise the issue of the reasons exception in the local
5 proceedings, ORS 197.620(2) and ORS 197.835(4) allow it to
6 raise that issue before LUBA.⁴ Intervenors respond that

³ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) limits this Board's scope of review to issues raised by any participant before the local hearings body "as provided by ORS * * * 197.763."

⁴ORS 197.620(2) provides:

"Notwithstanding the requirements of ORS 197.830(2), the director or any other person may file an appeal of the local government's decision under ORS 197.830 to 197.845, if an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation differs from the proposal submitted under ORS 197.610 to such a degree that the notice under ORS 197.610 did not reasonably describe the nature of the local government final action."

ORS 197.835(4) provides, in relevant part:

"A petitioner may raise new issues to the board if:

** * * * *

"(b) The local government failed to follow the requirements of ORS 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the

1 because of the meetings between their representative and
2 DLCD staff, at which the possibility of taking a reasons
3 exception was discussed, DLCD was on notice that a reasons
4 exception had been applied for.

5 We agree with petitioner that the unrecorded meeting
6 between DLCD staff and intervenors' representative was
7 insufficient to notify DLCD that the proposal submitted
8 under ORS 197.610 had been modified.⁵ Even the notice
9 mailed to DLCD after the county made its decision speaks of
10 "exception," not "exceptions." Because DLCD was not
11 properly made aware that a reasons exception had been
12 requested during the local proceedings, it may challenge the
13 adoption of a reasons exception before LUBA.

14 **B. Goal 4 Committed Exception**

15 There is no dispute petitioner received proper notice
16 of intervenors' application for committed exceptions to
17 Goals 3 and 4. Petitioner argues that its June 30, 1995
18 comments were sufficient to raise in the local proceedings
19 the issue of the Goal 4 committed exception.

20 To avoid waiver of a particular issue through failure

issue could have been raised before the local government;
or

"(c) The local government made a land use decision or limited
land use decision which is different from the proposal
described in the notice to such a degree that the notice
of the proposed action did not reasonably describe the
local government's final action."

⁵The parties do not agree on what was discussed at the meeting.

1 to raise it below, ORS 197.763 requires "no more than fair
2 notice to adjudicators and opponents, rather than the
3 particularity that inheres in judicial preservation
4 concepts." Boldt v. Clackamas County, 107 Or App 619, 623,
5 813 P2d 1078 (1991). Identifying criteria by name or
6 section numbers is not required. Id. at 624. The decision
7 maker and the parties must have an adequate opportunity to
8 respond to the issues, and must not be surprised unfairly at
9 LUBA. See Citizens for Resp. Growth v. City of Seaside, 26
10 Or LUBA 458, 464 (1994).

11 The phrase "forest productivity of 160 cu ft per year
12 of wood fiber" in DLCD's June 30, 1995 comments can only
13 refer to use of the subject property as forest land, which
14 is regulated under Goal 4.⁶ The staff report prepared for
15 the board of commissioners analyzes the potential of the
16 subject property for farm and forest uses, and concludes
17 that neither use is made impracticable by adjacent uses and
18 other relevant factors. Record 70. Notwithstanding DLCD's
19 failure to specify Goal 4 in its June 30, 1995 comments, the
20 planning commission had recommended denial of the
21 application for failure to satisfy the exceptions criteria
22 for both Goals 3 and 4. We conclude the issue of the Goal 4
23 committed exception was adequately raised to give both the
24 board of commissioners and intervenors an opportunity to

⁶Forest lands, which are assessed under ORS Chapter 321, are expressly
excepted by ORS 215.203 from consideration as lands in farm use.

1 respond. Indeed, intervenors did respond in a memorandum
2 submitted prior to the hearing before the board of
3 commissioners. Record 49-50. There was thus no unfair
4 surprise at LUBA, and therefore no waiver under ORS 197.763.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioner contends the challenged decision misapplies
7 the applicable law, as it is found in ORS 197.732 and
8 administrative rules, in finding a reasons exception is
9 justified on the subject property.

10 The criteria for a reasons exception are found in both
11 OAR 660-04-020 and OAR 660-04-022. The challenged decision
12 does not contain any findings that address OAR 660-04-022.
13 The absence of required findings requires remand.⁷

14 Petitioner also challenges the county's reliance on
15 Goal 5 in concluding that reasons justify an exception to
16 Goals 3 and 4. The decision states:

17 "The property is generally unsuitable for the
18 production of timber due to a serious conflict
19 with Statewide Goal 5. Bald Peak State Park,
20 located immediately to the west, is classified as
21 a 'State Viewpoint.' If the subject property is
22 converted to timber use, the view to the east and
23 south from Bald Peak State Park would be lost.
24 Testimony from the Oregon Parks and Recreation
25 Department clearly states that 'without the
26 viewpoint, the property would lose its value for

⁷ORS 197.835(11)(b) allows us to affirm all or part of a decision clearly supported by the record, notwithstanding inadequate findings, when intervenors identify relevant evidence which clearly supports the challenged decision, but intervenors have not done so in this case. See Waugh v. Coos County, 26 Or LUBA 300, 306-08 (1993).

1 the State and the site would be reassessed for
2 value of retention.'" Record 8.

3 We agree with petitioner that in the absence of a
4 showing that the county has followed the process set forth
5 in OAR Chapter 660, Division 16, to place the state
6 viewpoint on its Goal 5 inventory, it may not rely on Goal 5
7 to protect the viewpoint from the impact of the trees on the
8 subject property. Friends of Forest Park v. LCDC, 129 Or
9 App 28, 877 P2d 130 (1994).

10 Finally, petitioner directs our attention to the
11 comments of the Oregon Parks and Recreation Department,
12 included in the record:

13 "The current view includes the vista of Mt. St.
14 Helens and Mt. Adams and the rolling valley below.
15 The matter is still not resolved, but the
16 department has every expectation that the owner
17 will be contacted, viable alternatives discussed
18 and a solution implemented. It is incorrect to
19 assume that if this property was rezoned to
20 residential the problem would go away. Without an
21 agreement for vegetative height control to
22 maintain the state scenic viewpoint[,], the issue
23 will still exist." Record 87.

24 In view of these comments, and in the absence of any
25 evidence to the contrary, we agree with petitioner that the
26 county's finding that the property is generally unsuitable
27 for the production of timber due to a serious conflict with
28 the state viewpoint is not supported by substantial evidence
29 in the whole record.

30 On remand, the county should pay particular attention
31 to the basis for granting a reasons exception. Petitioner

1 is correct that under OAR 660-04-022(1), a reasons exception
2 is justified only when there is a demonstrated need for a
3 particular use or type of use to be located on a particular
4 site where the use is otherwise precluded by one or more
5 Statewide Planning Goals.⁸ Although OAR 660-04-022(1)
6 states that for uses not specifically addressed elsewhere in
7 the rule, reasons to justify a reasons exception "include,
8 but are not limited" to those stated in OAR 660-04-
9 022(1)(a)-(c), the county must make clear if it intends to
10 justify a reasons exception on some basis other than those
11 stated in OAR 660-04-022(1)(a) and (b) or (c).⁹ Pacific
12 Rivers Council, Inc. v. Lane County, 26 Or LUBA 323, 334-35

⁸OAR 660-04-022 implements ORS 197.832. OAR 660-04-022(1) provides that for uses not specifically provided for in subsequent sections of the rule, the types of reasons appropriate to justify a "reasons" exception include but are not limited to the following:

- "(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Statewide Goals 3 to 19; and either
- "(b) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this subsection must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or
- "(c) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."

⁹OAR 660-04-022(1)(b) and (c) state alternative bases that, in conjunction with OAR 660-04-022(1)(a), may justify a reasons exception.

1 (1993).

2 Petitioner is also correct that OAR 660-04-022(2),
3 which addresses reasons exceptions for rural residential
4 development, expressly states that the reasons justifying an
5 exception for rural residential development cannot be based
6 on market demand for housing, except as provided in the
7 rule.¹⁰

8 The first assignment of error is sustained.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioner assigns error to the county's finding that
11 the subject property is "irrevocably committed" to uses not
12 allowed by the applicable goals. OAR 660-04-018 and 660-04-
13 028 describe how a local government must analyze and justify
14 a committed exception. OAR 660-04-028(2) and (6) state the
15 issues that must be addressed in the local government's

¹⁰OAR 660-04-022(2) provides:

"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 development in the area."

1 findings.¹¹

¹¹OAR 660-04-028(2) provides:

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

- "(a) The characteristics of the exception area;
- "(b) The characteristics of the adjacent lands;
- "(c) The relationship between the exception area and the lands adjacent to it; and
- "(d) The other relevant factors set forth in OAR 660-004-018(6)."

OAR 660-04-028(6) provides:

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

- "(a) Existing adjacent uses;
- "(b) Existing public facilities and services (water and sewer lines, etc.);
- "(c) Parcel size and ownership patterns of the exception area and adjacent lands:
 - "(A) Consideration of parcel size and ownership patterns under subsection (6)(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 exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors make unsuitable 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. For example, the presence of

1 Petitioner contends the challenged decision does not
2 adequately address OAR 660-04-028(1), which requires that
3 "existing adjacent uses and other relevant factors make uses
4 allowed by applicable goal impracticable." Petitioner
5 observes the decision finds only that it is impracticable to
6 use the subject property for commercial farming, and does
7 not address the other uses allowed by Goals 3 and 4.

8 Intervenors respond that the 1995 legislature amended

several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for land adjoining those parcels;

"(B) Existing parcel sizes and contiguous ownerships 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 as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations.

"(d) Neighborhood and regional characteristics;

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

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

"(g) Other relevant factors."

1 ORS 197.732 to require the Land Conservation and Development
2 Commission (LCDC) to adopt rules specifying which uses
3 allowed by the applicable goal must be found impracticable
4 to justify a committed exception. According to intervenors,
5 they should be excused from complying with currently
6 applicable rules because "there is legislation with intent
7 to the contrary." Intervenors' Brief 9.

8 We may review a local government decision under rules
9 adopted after the date of the decision if a remand would be
10 based on a failure to comply with rules since superseded.
11 See 1000 Friends of Oregon v. LCDC, 69 Or App 717, 720-21,
12 688 P2d 103 (1984) (applying recently adopted LCDC rules to
13 examine exceptions taken by a county under the old statutory
14 scheme). However, where no rules have been adopted, we
15 cannot rely on our own (or intervenors') understanding of
16 the legislature's intent in amending ORS 197.732, to apply
17 rules before LCDC adopts them. We therefore apply the rules
18 as they stand.

19 The impracticability standard is a demanding one. To
20 approve an irrevocably committed exception, the county must
21 find that all uses allowed by the goals are impracticable,
22 primarily as a result of uses established on adjacent
23 parcels. Sandgren v. Clackamas County, 29 Or LUBA 454
24 (1995); DLCD v. Coos County, 29 Or LUBA 415 (1995); 1000
25 Friends of Oregon v. Yamhill County 27 Or LUBA 508 (1994).
26 This does not mean the findings must anticipate every

1 conceivable objection by specifically addressing each and
2 every use potentially allowable under the applicable goals.
3 1000 Friends of Oregon v. Yamhill County, 27 Or LUBA 508,
4 518 n6 (1994). More general findings are sufficient, at
5 least when no issue is raised pertaining to a particular
6 use. However, the challenged decision contains neither
7 general nor specific findings addressing the
8 impracticability of Goal 4 uses, and contains findings
9 addressing only the impracticability of commercial farming,
10 one of many Goal 3 uses. We agree with petitioner the
11 findings do not adequately address other uses allowed by
12 Goals 3 and 4.

13 Petitioner also challenges the manner in which the
14 county justifies the committed exception. In response to
15 OAR 660-04-028(2)(a)-(c), which require a discussion of the
16 relationship between the subject property and lands adjacent
17 to it, the county makes findings that refer to the "impacted
18 borders" of the subject property; "expensive single-family
19 dwelling homes" on adjacent properties; complaints of "spray
20 drift, excessive dust, wind and noise generated by * * *
21 helicopters"; and vandalism.¹² Record 10. Petitioner

¹²The challenged decision finds that trespass and vandalism by Bald Peak State Park patrons has "crippled the farm operations to the point where contract harvesters will not leave their equipment on site overnight." Record 10. The decision does not address whether the problem of vandalism could be mitigated without taking an exception through construction of the three lot-of-record dwellings already permitted on the subject property. If mitigation is possible without an exception, a finding that vandalism is

1 contends the analysis improperly justifies the committed
2 exception by reference to adjacent non-resource uses (rural
3 residential development) when OAR 660-04-028(6)(A) forbids
4 using "resource and nonresource parcels created pursuant to
5 the applicable goals to justify a committed exception."¹³

6 We agree with petitioner that under OAR 660-04-018 and
7 660-04-028, conflicts with rural residential development in
8 exception areas created pursuant to the applicable goals
9 cannot be used to justify a committed exception on the
10 subject property.¹⁴ Moreover, the conflicts described in
11 the challenged decision have been characterized as "at best,
12 make-weights" by the Court of Appeals. Prentice v. LCDC, 71
13 Or App 394, 403, 692 P2d 642 (1984). Although such
14 considerations may be a factor in showing that resource use
15 is impracticable, they are not conclusive. As the Court of
16 Appeals stated in 1000 Friends of Oregon v. LCDC, 69 Or App

now a problem does not support the conclusion that conflicts with adjacent
uses commit the subject property to non-resource use.

¹³OAR 660-04-028(6)(A) meshes with OAR 660-04-018(2), which states that
in taking "physically developed" and "irrevocably committed" exceptions,
the local government must limit the rural uses to be allowed in the
proposed exception areas to those which "are compatible with adjacent or
nearby resource uses." OAR 660-04-018(2)(b)(C).

¹⁴At oral argument, intervenors contended for the first time that one of
the adjacent exception areas was not created pursuant to the applicable
goals. We generally do not consider arguments made for the first time at
oral argument before the Board. See DLCD v. Douglas County, 28 Or LUBA
242, 252 (1994). Moreover, the challenged decision does not find what
intervenors contend to be true. If findings were made that the adjacent
exception areas were not created pursuant to the goals, development in
those areas could be considered, under OAR 660-04-028(6)(c)(A), in
determining if a committed exception were justified on the subject
property.

1 717, 728, 688 P2d 103 (1984):

2 "People who build houses in an agricultural area
3 must expect some discomforts to accompany the
4 perceived advantages of a rural location. If
5 problems of this sort by themselves justified a
6 finding of commitment, it would be impossible to
7 establish lasting boundaries between agricultural
8 and residential areas anywhere, yet establishing
9 those boundaries is basic to the land use planning
10 process."

11 Intervenors argue further that conflict factors may
12 cumulatively justify an irrevocably committed exception.
13 See DLCD v. Coos County, ___ Or LUBA ___ (LUBA No. 95-047,
14 December 7, 1995), slip op 8.¹⁵ However, the county's
15 decision relies not on conflict factors but on relatively
16 minor characteristics of the subject property itself,
17 together with the "make-weight" considerations discussed
18 above, to justify the committed exception. Findings as to
19 soil temperature, air temperature, higher rainfall, and
20 excessive cloud cover do not support a finding of
21 irrevocable commitment to non-resource use, particularly
22 when the subject property is presently being used to grow
23 Christmas trees.¹⁶

¹⁵Intervenors' citation reads "DLCD v. Coos County, 30 Or LUBA ___, 175 (199[5])." Because LUBA has not published volume 30 of the LUBA Reports, we assume the page reference is to an electronic reporter. Such page references are not helpful to us. Until our opinions are published, we prefer citations to slip opinions.

¹⁶Intervenors, in arguing the evidence, rely on their own memorandum (at Record 44) to the county to support a statement in their brief that "all of the property qualifies for a set-aside because the overall slopes [sic] of the property exceeds 15%." Intervenors' Brief 8. Intervenors do not

1 Petitioner also challenges the county's decision on the
2 ground that it is not supported by substantial evidence.
3 Because the county's findings are inadequate, we do not
4 discuss petitioner's evidentiary challenge. DLCD v.
5 Columbia County, 16 Or LUBA 467, 471 (1988). The second
6 assignment of error is sustained.

7 The county's decision is remanded.

8
9

identify any evidence in the record that supports the statement in the memorandum. We note, however, a letter from the Yamhill Soil and Water Conservation District that provides evidence to the contrary. The District comments:

"The applicant states that the soil survey mistakenly designated the soil capability because of the difference in elevation on his property, and this higher elevation should have been consider[ed] when classifying the soil capability.

"Mr. Park has previously been informed that this elevation variation has no effect on soil series and classification. He has contacted our office at least three times starting as early as 1980 regarding this issue. At that time a SCS representative visited Mr. Parks' property and took soil samples to determine if the soil was properly classified. He explained in a letter to Mr. Park the soil had the characteristics of Laurelwood Soil. The SCS researched the elevation issue and informed Mr. Park that the soil series and class would not change as long as the soil met the physical characteristics. Elevations would have to be much higher to change from a Mesic Zone to the Frigid Zone. All of this information was provided to Mr. Park in a letter dated October 16, 1980.

"The Board feels strongly that the soil classification is correct and was appropriate regarding the original zoning.

"A variety of crops can be grown on Laurelwood soils at this elevation. * * *

"* * * Changing the zoning will further reduce the agriculture and forestry base in the area." Record 77.

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