BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. CURRY COUNTY, Respondent, and PIGEON POINT CORPORATION, Intervenor-Respondent.	LUBA No. 96-210 FINAL OPINION AND ORDER

Appeal from Curry 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.

David B. Smith, Tigard, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 06/26/97

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals a comprehensive plan amendment and zone change, which includes approval of a Statewide Planning Goal 2 exception to Goals 3 and 4.

MOTION TO INTERVENE

Pigeon Point Corporation, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This is the second time the challenged decision has been before us. The facts are fully set forth in DLCD v. Curry County, 30 Or LUBA 294 (1996) (Curry County I). As relevant here, the subject property consists of 65 acres, designated and zoned Forest Grazing (FG), located approximately 13 miles north of the Gold Beach Urban Growth Boundary. Portions of the property were commercially logged in 1992, apparently to create homesite viewsheds.

The property is bordered to the west by residential development on parcels recently partitioned from the subject parcel. As part of one or more of those partitions, the applicant submitted a forest management plan for the subject property. North of the subject property is another 65-acre parcel on which is located the Prehistoric Gardens theme park. Until 1990, the theme park parcel was zoned entirely Rural Commercial (RC). In 1990, 25 acres of that parcel

were redesignated and zoned FG. The record does not reflect whether the theme park was the subject of a goal exception; nor does the record indicate where on the 65-acre parcel the 40 acres designated RC and the 25 acres designated FG are located.

Highway 101 borders the property to the east. The property on the east side of Highway 101 is designated and zoned FG and used for resource purposes. Both the subject property and that property east of Highway 101 are subject to a 300-foot scenic buffer overlay, which regulates uses of the property adjacent to the highway. Properties to the south of the subject property are designated and zoned FG and used for resource purposes.

We remanded the county's initial approval of an irrevocably committed exception to Goals 3 and 4 for failure to establish that the subject property is irrevocably committed to nonresource use. In part, we determined that the county's summary conclusion that the property was not suitable for farm use, and its conclusion that the property could not be used for commercial forestry uses, were not adequate to establish that all Goal 3 and Goal 4 resources uses on the subject property were impracticable. We also determined that the county's conclusions that use of the subject property for resource use was impracticable because of the scenic buffer along Highway 101 and the Prehistoric Gardens theme park were inadequate and not supported by

substantial evidence.

After additional hearings, the county again approved the application. This appeal followed.

WAIVER

Intervenor contends that during the remand hearing petitioner did not adequately re-raise arguments regarding the scope of uses allowed by Goals 3 and 4 or the adequacy of the evidence regarding Highway 101 and has therefore waived its right to raise them here. Intervenor acknowledges that petitioner raised these issues during the initial evidentiary hearing prior to the first appeal.

Petitioner cites to the record on remand where these issues were generally raised.

ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the board 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 * * * and the parties an adequate opportunity to respond to each issue."

The references to the remand record to which petitioner has directed us are general and, if considered in isolation, may not have been sufficiently specific to enable the county to respond to these issues. However, this proceeding involves much more than the record of the hearings on remand. Petitioner raised these issues during the initial hearing on the application. Our remand order was based on

these issues. The county's findings on remand specifically discuss these issues in detail. Petitioner has unquestionably raised these issues with sufficient specificity prior to the final evidentiary hearing to afford the county and intervenor an adequate opportunity to respond.[1]

ASSIGNMENT OF ERROR

Petitioner contends the county misconstrued the applicable law and made inadequate findings not supported by substantial evidence in the record when it determined that the subject property is irrevocably committed to uses not permitted by the goals.

ORS 197.732(1)(b) and Goal 2, Part II and OAR 660-14-028(1) state:

> "A local government may adopt an exception to a goal when 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 land uses and other relevant factors make uses allowed by the applicable goal[s] inapplicable[.]"

A. Misconstruction of Irrevocably Committed Standard

Petitioner argues the county misconstrued the standards for an irrevocably committed exception in two respects: (1) the county has not determined that all uses allowed by Goals

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[1]Intervenor also argues petitioner was provided proposed findings of approval, and that its failure to raise issues regarding the adequacy of those findings and the evidence upon which they are based precludes it from raising those issues here. ORS 197.763 does not require petitioner to locally challenge proposed findings prepared after the close of the record.

3 and 4 are impracticable on the subject property; and (2) the county has relied primarily on the characteristics of the subject property, rather than adjacent properties, in its determination.

At the time of this application, ORS 197.732, Goal 2 and OAR 660-04-028 required that findings justifying an exception must establish that all of the uses allowed by the applicable goals are impracticable.[2] During the pendency of this application, the 1995 Legislative Assembly amended ORS 197.732 with an instruction to the Land Conservation and Development Commission (LCDC) to "adopt rules establishing * * * [w]hich uses allowed by the applicable goals must be found impracticable in order to justify such an exception." LCDC responded with amendments to OAR 660-04-028, which limit the scope of the uses a county must consider in evaluating an irrevocably committed exception.[3] Because

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[2]At the time of the application, OAR 660-04-028(4) stated:

> "A conclusion that an exception area is irrevocably committed shall be supported by findings of fact which address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area."

[3]As amended, OAR 660-04-028(3) now states:

> "For exceptions to Goals 3 and 4, local governments are required to demonstrate that only the following uses or activities are impracticable:
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> "(a) Farm use as defined in ORS 214.203;

those amendments were not effective at the time of this application, both parties agree they do not apply here.[4]

Petitioner lists several statutes containing uses permitted by Goals 3 and 4 that the county has not evaluated. Petitioner does not, however, refer to any specific use allowed under either of the goals that the county has failed to consider. Intervenor responds that the scope of uses petitioner contends the county must evaluate is beyond that required by the goals. It contends that the county has adequately evaluated uses identified in the goals themselves, and concluded that all of those uses are impracticable on the subject property.

We noted in 1000 Friends of Oregon v. Yamhill County, 27 Or LUBA 508, 518 n6 (1994):

> "[E]ven if the county were potentially required to consider suitability for [all uses allowed by Goal 3], OAR 660-04-028(3) provides that in adopting an irrevocably committed exception, '[i]t shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible".' We understand OAR 660-04-028(3) to provide that findings adopted in support of an irrevocably committed exception need not necessarily specifically address each and every use potentially allowable under the Goal, at least

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> "(b) Propagation or harvesting of a forest product as specified in OAR 660-33-120; and
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> "(c) Forest operations or forest practices as specified in OAR 660-06-025(2)(a).

[4]Since neither party asserts that the amended rules apply to this case, we do not address that issue.

> where no specific issue is raised concerning suitability for particular uses allowed by the goal. More general findings may suffice."[5]

The list of uses the county considered is extensive and, since petitioner cites no additional Goal 3 or 4 use that may be suitable, it may be that the range of uses evaluated by the county could be sufficient for purposes of evaluating whether the subject property is irrevocably committed to nonresource uses. However, the problem with the county's evaluation is that the focus of its inquiry is incorrect.

The county has evaluated the suitability of numerous uses allowed under Goals 3 and 4 based upon the physical characteristics of the subject property. Based on its conclusions regarding those characteristics, the county has determined that the subject property is not suitable for any Goal 3 or Goal 4 resource uses. Such an evaluation might be appropriate if the inquiry were whether the subject property

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[5]The version of OAR 660-04-028(3) applicable in that case, as in this case, stated:

> "Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(1)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule. Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource-protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible'."

is properly designated for resource uses, but that is not the inquiry here. The purpose of an irrevocably committed exception is to allow acknowledged resource property (i.e., property that has been acknowledged to be physically appropriate for resource uses) to be used for nonresource purposes when uses on adjacent property and "other relevant factors" render the property irrevocably committed to nonresource uses. The county's conclusion that the subject property is itself not suitable for resource use does not address the appropriate inquiry.

Intervenor stresses that the factors relevant to an irrevocably committed exception are "stated in the conjunctive, which indicates that both 'existing adjacent uses' and 'other relevant factors' must be satisfied cumulatively, in conjunction with each other." Response Brief 11. Therefore, intervenor argues, the "other relevant factors" in OAR 660-04-028(6)(g) and uses on adjacent properties are equally relevant in determining whether the subject property is irrevocably committed to nonresource use.[6] We agree with intervenor that all the factors listed

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[6]OAR 660-04-028(2) and (6) include the factors relevant to the county's evaluation of whether the subject property is irrevocably committed to nonresource use:

> "(2) 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:
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> "(a) The characteristics of the exception area;

in OAR 660-04-028(6) are applicable to the irrevocably committed exception inquiry. However, we disagree that the county has properly applied the those factors in this case.

The county's decision rests almost exclusively on a single "other relevant factor"; that is, that the subject property is physically unsuitable for any Goal 3 or Goal 4

"(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 660-04-028(6).

"* * * * *

"(6) 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:

" * * * * *

"(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."

use, regardless of any uses on adjacent properties. However, the purported unsuitability of the subject property for resource use is not an "other relevant factor" for purposes of OAR 660-04-028(6)(g). The subject property has been acknowledged to be Goal 3 and 4 resource property. Findings that the property should not be considered resource property, i.e., that the acknowledgment was wrong, cannot be an "other relevant factor" to support an irrevocably committed exception. "Other relevant factors," the catch-all phrase at the end of a lengthy enumeration of specific factors in OAR 660-04-028(6), must necessarily relate to why property otherwise suitable for resource uses is, for some intervening reason, rendered impracticable for any of those resource uses.[7]

As set forth in OAR 660-04-028(2), the focus of an irrevocably committed exception is on "the relationship between the exception area and the lands adjacent to it." See also 1000 Friends of Oregon v. Yamhill County, 27 Or LUBA 508, 515 (1994) (citing Denison v. Douglas County, 101 Or App 131, 789 P2d 1388 (1990)). In this case, the county has not found that uses on adjacent properties irrevocably commit the subject property to nonresource use. Instead, the county has determined that while those uses do not in themselves make resource use impracticable on the subject

[7]We need not and do not decide here the scope of possible "other relevant factors" to the irrevocably committed exception evaluation.

property, when considered in conjunction with the "other relevant factors," i.e., the unsuitability of the subject property for any resource use, all resource uses are rendered impracticable. Because the other factor considered by the county is not relevant to the evaluation of whether resource property is irrevocably committed to nonresource use, we are left with the county's conclusion that none of the adjacent properties, in themselves, render resource use of the subject property impracticable.

B. Evaluation of Impact from Adjacent Uses

The only remaining question, which the county's decision does not address, is whether cumulatively, the uses on the adjacent properties make resource use of the subject property impracticable. While we leave this question for the county to decide, we note that at this point the evidence in the record to which we have been directed is insufficient to establish such impracticability.

The county determined that while not conclusive, conflicts from the Prehistoric Gardens theme park to the north contribute to the incompatibility of the subject property for resource use. Prior to 1990, the entire 65 acres that encompass the theme park were designated RC. As redesignated, 40 of those acres remain RC, while 25 acres are designated FG. The record does not establish the locations of the two designations or their relationship to each other. The record also does not establish how the

county reached its decision to redesignate 25 acres FG, or whether in that evaluation the 40-acre, RC-designated parcel was evaluated against the goals. These questions must be considered in evaluating the possible cumulative impact of adjacent properties on uses of the subject property.[8]

C. Highway 101

The county did not find that either the separation between the subject property and the resource property to

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[8]Petitioner suggests numerous inferences from the county's findings related to the local proceedings that resulted in the 1990 redesignation of the Prehistoric Gardens parcel, which may be relevant to the county's evaluation on remand:

> "The challenged decision states that '[a]ll 65 acres * * * were zoned RC until 1990 when only 40 acres were allowed to remain in commercial use.' This statement suggests that in 1990, the County revisited the zoning designation of the parcel containing the theme park, and determined that the entire parcel was not properly zoned for rural commercial uses, and at least part of that parcel was then re-zoned for resource uses. Such an action could have been taken only if the County found that the theme park did not preclude resource use of at least part of that parcel. The Staff Report states that:
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> > 'Part of the northerly boundary of the subject property is adjacent to a site exception for the Prehistoric Gardens tourist attraction. The site exception includes that part of the adjacent parcel to the north which has the gift store and model dinosaurs and is zoned Rural Commercial because of pre-existing commercial use [Record 66; emphasis petitioner's].'
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> "This statement suggests that the theme park existed before the goals were adopted. It also suggests that the theme park was appropriately zoned through the exceptions process once the goals were adopted and the County developed its comprehensive plan. Again, such an action would have included some finding that the theme park did not preclude resource use of surrounding areas and on that basis those areas were not included in the Rural Commercial designation." Petition for Review 10-11.

the east caused by Highway 101 or the scenic buffer along Highway 101 made resource use of the subject property impracticable. It did find that the 300-foot scenic buffer would limit resource use. Petitioner notes that ORS 527.755(3), which requires the scenic buffer, also provides exceptions to that requirement. In addition, the staff report notes both the resource property east of Highway 101 is also subject to the requirements of ORS 527.755(3), and that the requirement has not precluded resource use of that property. In considering the possible cumulative impacts of adjacent properties on resource use of the subject property, the actual impact of the ORS 527.755(3) requirements is a relevant factor for the county to consider.

The assignment of error is sustained.

The county's decision is remanded.