

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40

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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
WALLOWA COUNTY,)
)
Respondent,)
)
and)
)
D. KEITH HUGHES,)
)
Intervenor-Respondent.)

LUBA No. 98-188
FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Roger A. Alfred, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

No appearance by respondent Wallowa County.

D. Rahn Hostetter, Enterprise, filed the response brief and argued on behalf of intervenor-respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 10/28/99

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

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance amending plan and zoning map designations for a 50-
4 acre parcel from Exclusive Farm Use (EFU) to Rural Residential (R-1) and approving an
5 exception to Statewide Planning Goal 3 (Agricultural Lands).

6 **MOTION TO INTERVENE**

7 D. Keith Hughes, the applicant below, moves to intervene on the side of the
8 respondent. There is no opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject property is a 50-acre parcel lying west of State Highway 82 (Wallowa
11 Lake Highway) and north of the City of Joseph. The property is bordered on the north by
12 Wilson Lane, and beyond that, by rural residentially zoned property. To the northeast, across
13 Highway 82, is property zoned Rural Residential. Property to the east, also across Highway
14 82, is zoned EFU. Property to the southeast is zoned for residential use, and is located within
15 the City of Joseph. To the south of the property is a 25-acre parcel designated EFU, and to
16 the west is a 192-acre parcel, also zoned EFU. The two EFU properties to the south and west
17 each have one dwelling on them.

18 The subject property is undeveloped, and is currently leased for grazing. It is
19 transversed by a sewer easement for the City of Joseph's sewer line. An agreement between
20 intervenor and the city permits up to two dwellings to be connected to the sewer line. The
21 property is not served by public or community water systems. Access to the property is from
22 Wilson Lane. Russell Lane is parallel to the subject parcel's southern boundary and lies on
23 the south property line of the adjacent 25-acre parcel. Russell Lane is located within the City
24 of Joseph's city limits.

25 In 1996, intervenor's predecessor in interest submitted an application to the county for
26 an "irrevocably committed" exception to Goal 3 and a plan amendment and zone change

1 from EFU to R-1 for the subject property. At the time, the subject property was combined
2 with the twenty-five acre parcel to the south. Petitioner Department of Land Conservation
3 and Development (DLCD) appealed that decision, and the parties stipulated to a voluntary
4 remand. Sometime after that, the subject property was partitioned from the 25-acre parcel. In
5 1998, intervenor submitted a new application for an irrevocably committed exception and a
6 plan amendment and zone change to Rural Residential. The county approved the application.

7 This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioner asserts that the county misconstrued applicable law, failed to make
10 adequate findings of fact, and made findings not supported by the evidence in the record
11 when it concluded that the subject property is irrevocably committed to nonresource uses.
12 Petitioner argues that the findings regarding compliance with the exceptions criteria are
13 inadequate to show that the property is irrevocably committed to nonresource use because
14 existing adjacent land uses and other relevant factors make uses allowed by the goal
15 impracticable. Intervenor argues to the contrary, that the findings and evidence supporting
16 them are sufficient to support approval of the application.

17 In *Lovinger v. Lane County*, ___ Or LUBA ___ (LUBA No. 98-085, March 9, 1999),
18 slip op 4-5, *aff'd* 161 Or App 198, ___ P2d ___ (1999), we summarized the framework for
19 irrevocably committed exceptions as follows:

20 “OAR 660-004-0028(1) allows a local government to adopt an exception to a
21 statewide planning goal ‘when the land subject to the exception is irrevocably
22 committed to uses not allowed by the applicable goal because existing
23 adjacent uses and other relevant factors make uses allowed by the applicable
24 goal impracticable[.]’

25 “OAR 660-004-0028(2) requires that a committed exception determination
26 must address certain factors, particularly the characteristics of the exception
27 area, *i.e.* the subject property, characteristics of the adjacent lands, and the
28 relationship between the exception area and adjacent lands.¹ OAR 660-004-
29 0028(3) requires that for an exception to Goal 3 * * *, the local government
30 must demonstrate that ‘farm uses’ as defined in ORS 215.203 are

1 impracticable in the exception area. OAR 660-004-0028(4) requires that a
2 committed exception must be supported by findings of fact addressing all
3 applicable factors of OAR 660-004-0028(6) and explain why those facts
4 support the conclusion that the uses allowed by the applicable goal are
5 impracticable in the exception area.²”

6 “ _____

7 “¹OAR 660-004-0028(2) provides:

8 ‘Whether land is irrevocably committed depends on the relationship between the exception
9 area [*i.e.* the subject property] and the lands adjacent to it. The findings for a committed
10 exception therefore must address the following:

11 ‘(a) The characteristics of the exception area;

12 ‘(b) The characteristics of the adjacent lands;

13 ‘(c) The relationship between the exception area and the lands adjacent to it; and

14 ‘(d) The other relevant factors set forth in OAR 660-04-028(6).”

15 “²OAR 660-004-0028(6) provides, in relevant part:

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

17 ‘(a) Existing adjacent uses;

18 ‘(b) Existing public facilities and services (water and sewer lines, etc.);

19 ‘(c) Parcel size and ownership patterns of the exception area and adjacent lands:

20 ‘(A) Consideration of parcel size and ownership patterns under subsection (6)(c)
21 of this rule shall include an analysis of how the existing development
22 pattern came about and whether findings against the Goals were made at the
23 time of partitioning or subdivision. Past land divisions made without
24 application of the Goals do not in themselves demonstrate irrevocable
25 commitment of the exception area. Only if development (*e.g.*, physical
26 improvements such as roads and underground facilities) on the resulting
27 parcels or other factors make unsuitable their resource use or the resource
28 use of nearby lands can the parcels be considered to be irrevocably
29 committed. Resource and nonresource parcels created pursuant to the
30 applicable goals shall not be used to justify a committed exception. * * *;

31 ‘(B) Existing parcel sizes and contiguous ownerships shall be considered
32 together in relation to the land’s actual use. For example, several
33 contiguous undeveloped parcels (including parcels separated only by a road
34 or highway) under one ownership shall be considered as one farm or forest
35 operation. The mere fact that small parcels exist does not in itself constitute
36 irrevocable commitment. * * *;

37 ‘(d) Neighborhood and regional characteristics;

- 1 ‘(e) Natural or man-made features or other impediments separating the exception area
2 from adjacent resource land. * * *;
3 ‘(f) Physical development according to OAR 660-004-0025; and
4 ‘(g) Other relevant factors.’”
5

6 We turn to petitioner’s challenges to the county’s findings.

7 **A. Existing adjacent uses (OAR 660-004-0028(2)(b) and (6)(a))**

8 Petitioner argues that the county failed to adopt findings that adequately describe the
9 characteristics of the adjacent lands and the existing use of those adjacent lands, as required
10 by OAR 660-004-0028(2)(b) and (6)(a). Petitioner contends that, in order to understand the
11 nature of the land and the development pattern in the area, the findings regarding adjacent
12 property should describe soil types, topography, ownership, and whether adjacent properties
13 zoned for resource use are in farm use. If adjacent properties are in farm use, petitioner
14 argues that the findings must identify what types of agricultural activities are occurring on
15 them. Petitioner argues that it is also necessary, under OAR 660-004-0028(6), that the
16 findings address the historical use of adjacent parcels, both for resource and nonresource
17 purposes. Petitioner argues that the county has not adopted such findings in this case.
18 Petitioner also argues that there are no findings regarding the nature and level of
19 development on the adjacent residential lands to the north. Instead, petitioner claims that the
20 findings only identify the zoning designations of the property.

21 Intervenor contends that the focus on the inquiry under the rule is on those uses on
22 adjacent properties that render resource use of the subject site impracticable. Intervenor
23 argues that the county adequately described adjacent lot sizes, improvements on lots, zoning,
24 transportation, and urban services located on adjacent lands. Intervenor argues that petitioner
25 has not cited to any legal requirement that OAR 660-004-0028(2)(b) or OAR 660-004-
26 0028(6)(a) requires discussion of the resource uses in the detail that petitioner would require.

1 The goal and statutes that permit exceptions on resource lands require an analysis of
2 why existing uses on adjacent lands render resource uses on the subject parcel impracticable.
3 See Goal 2-Part II and ORS 197.732(b). To that end, OAR 660-004-0028(2)(b) and OAR
4 660-004-0028(6)(a) require a description of the characteristics of adjacent land and the
5 existing uses occurring on them. The required description is not limited to the nonresource
6 uses that bolster a claim of irrevocable commitment. Instead, the findings must accurately
7 reflect the land use patterns and uses of property adjacent to the subject parcel and present a
8 complete picture of the development of the area. This complete picture is necessary to
9 support a conclusion that the subject parcel is irrevocably committed to nonresource use. See
10 *DLCD v. Curry County*, 151 Or App 7, 11-12, 947 P2d 1123 (1997) (“[T]he fundamental test
11 for an irrevocable commitment exception * * * requires surrounding areas and their
12 relationship to the exception area to be the basis for determining whether the exception is
13 allowable.”)

14 Here, the findings do not describe the resource parcel to the east of the subject
15 property at all, nor do the findings describe the characteristics of the properties to the west
16 and south of the subject property that are in agricultural use. The findings conclude that the
17 25-acre EFU parcel to the south is a nonfarm parcel because of the existence of a dwelling on
18 the property. However, the findings do not explain whether the dwelling was approved as a
19 farm or nonfarm dwelling, or otherwise describe why the dwelling itself renders the
20 remainder of the parcel unsuitable for agricultural activities.

21 The county adopted the following findings with regard to the residential uses adjacent
22 to the subject parcel:

23 “**FINDING 7.13:** Applicant/Owner has submitted sufficient evidence in the
24 form of oral testimony and documentation to support its application.
25 Applicant addressed the characteristics of the exception area and adjacent
26 lands and the relationship between the two.” Record 6-7.

1 **FINDING 7.19:** The existing adjacent parcels are in separate ownerships,
2 are developed, and are clustered around Russell Lane and Wilson Lane.”
3 Record 7.

4 We agree with petitioner that findings are inadequate to describe the characteristics of
5 adjacent lands and the uses located on them. Neither does the conclusory finding that the
6 applicant addressed the characteristics of the area and the relationship between the parcel and
7 adjacent property show what the county relied upon to support its conclusion that the subject
8 parcel is irrevocably committed to residential uses. The existence of separate ownerships on
9 adjacent property does not demonstrate the level of density or the types of development that
10 have occurred on them. *See Pekarek v. Wallowa County*, ___ Or LUBA ___ (LUBA No. 98-
11 094, July 30, 1999), slip op 16 (A finding that “existing adjacent parcels are in separate
12 ownerships, are developed, and are clustered around Ski Run Road and Lakeshore Drive” is
13 inadequate to explain what it is about the adjacent uses that make farm uses on the subject
14 property impracticable.)

15 **B. Relationship between the exception area and adjacent lands (OAR 660-**
16 **004-0028(2)(c))**

17 Petitioner argues that the county’s findings failed to address the relationship between
18 the exception area and adjacent lands. Intervenor counters that the county adopted detailed
19 findings to describe the relationship between the subject parcel and adjacent lands.

20 The county court’s findings regarding OAR 660-004-0028(2)(c) are as follows:

21 **FINDING 7.17:** It is well known that pasturing of livestock in an area
22 surrounded by residential uses presents serious difficulties in containing the
23 livestock at all times and in delivering and picking up the livestock without
24 adequate corral facilities. Driving the livestock to and from the pasture over
25 heavily traveled roads serving residential areas makes use of the pasture
26 impracticable and negatively impacts numerous residential driveways and
27 yards.

28 **FINDING 7.18:** The property is surrounded on three sides by residential
29 use. In order to provide an adequate ‘buffer’, as provided for on all land use
30 planning, this zone change must be approved. Without approval of the zone
31 change, the flow of land use from the northern boundary of the City of Joseph
32 is directly into Exclusive Farm Use lands and then to Rural Residential Lands.

1 This is not appropriate. Approval of this application will result in harmony
2 with land use planning efforts to create ‘buffer’ zones between urban and rural
3 land uses.” Record 7.

4 “**FINDING 7.27:** The subject parcel is separated from adjacent resource lands
5 by Highway 82, Wilson Lane, and Russell Lane, which will carry increasing
6 levels of traffic. These roads effectively impede practicable resource use of
7 the exception areas.” Record 9.

8 We agree with petitioner that the county’s findings fail to describe the relationship
9 between the subject parcel and the land adjacent to it. The findings fail to describe the
10 relationship between existing grazing operations on the subject property and the agricultural
11 activities on adjacent properties. The generalized statement that livestock operations are
12 incompatible with residential uses is insufficient to show that, in this instance, the particular
13 livestock operations on the subject property are incompatible with existing residential
14 activities. *See Prentice v. LCDC*, 71 Or App 394, 403, 692 P2d 642 (1984) (Effect of
15 residential building does not make farm use incompatible with nearby homes merely because
16 of complaints about odors, noise, spraying and dust, higher taxes, motorcycles, and children
17 and dogs chasing farm animals, because factors cited are consequence of rural life and are
18 not sufficient to justify irrevocable commitment exception.)

19 In addition, the policy that the county adopted of using exception lands as a
20 transitional buffer area between the urban uses within the city limits and the resource uses
21 beyond the residential lands to the north is not a proper basis to establish the relationship
22 between the subject property and the adjacent lands as required by the rule. The “irrevocably
23 committed exception” allows a local government to recognize those areas that are so
24 impacted by adjacent land uses that, in addition to limitations that may be located on the
25 property itself, cause the land to be unsuitable for resource use. The exception process is not
26 intended to be a planning tool to allow the creation of a “transition area” to separate urban
27 from rural uses.

1 Finally, a finding that future increased traffic on adjacent nearby roads will impede
2 practicable resource use of the property is insufficient to show the *current* level of traffic and
3 its *current* impact on resource use of the subject property.¹

4 **C. Existing public facilities and services (OAR 660-004-0028(6)(b))**

5 Petitioner argues that the county failed to adopt findings of fact that describe the
6 public facilities and services provided to the rural residential parcels located to the north of
7 the subject parcel. Intervenor argues that the county did adopt findings describing existing
8 facilities and services. Intervenor contends that the reason why the county did not adopt
9 findings with regard to the existing rural residential area is because there are no public
10 facilities that service it.

11 The county’s findings regarding public facilities and services state:

12 **“FINDING 7.21:** Evidence in the form of pictures, soil capability reports,
13 landowner information within 500 feet of the said parcel showing * * *
14 existing public facilities and services, * * * together with the convincing
15 testimony that the existing adjacent uses are primarily residential and that
16 agricultural activities on the parcel are impracticable (because of poor soil and
17 nearby residential zoning), establishes that the land subject to the exception is
18 irrevocably committed to uses not allowed by Goal 3 because existing
19 adjacent uses and other relevant factors make uses allowed under Goal 3
20 impracticable.”

21 “* * * * *

22 **“FINDING 7.24:** The City of Joseph sewer collection mainline runs through
23 the parcel by easement and the City of Joseph will provide two hook-ups at no
24 cost.”

25 “* * * * *

¹To the extent that the findings do describe the relationship between existing uses on adjacent properties, we question whether they are supported by substantial evidence in the record. One finding determines that the “property is surrounded on three sides by residential use.” Record 7. We agree with petitioner that the existence of residential exception areas at the northeast and southeast corners of the property across Highway 82 do not cause the property to be surrounded on three sides by residential use. We also do not believe that the existence of one dwelling each on the 192-acre and 25-acre resource parcels to the west and south make those parcels residential in nature.

1 **“FINDING 7.26:** The domestic water source from the City of Joseph
2 originates nearby. However, despite the proximity of the water services, it is
3 not realistic to assume that connection to water services would be made to the
4 public facilities. Water sources can be developed on site. * * *

5 **“FINDING 7.27:** The subject parcel is separated from adjacent resource lands
6 by Highway 82, Wilson Lane, and Russell Lane, which will carry increasing
7 levels of traffic. These roads effectively impede practicable resource use of
8 the exception area. * * *

9 **“FINDING 7.28:** The development will access Wilson Lane, then Highway
10 82. The development proposal has advantages for the highway system
11 acknowledged by ODOT letter in that no additional access directly to the
12 highway system will be necessary.” Record 8-9.

13 Intervenor may be correct that there are no public facilities that service the rural
14 residential area to the north.² With regard to the main sewer line, which runs through the
15 subject parcel, it is not clear whether the line connects some dwellings within the rural
16 residential area to the city’s sewer system. Even if it does, the county makes no attempt to
17 explain why the sewer line commits the property to nonresource use. The county’s findings
18 are inadequate to show the nature and level of public services on adjacent property, and
19 whether those public services support a conclusion that the subject property is irrevocably
20 committed to nonresource use.³

21 **D. Parcel size and ownership pattern (OAR 660-004-0028(6)(c))**

22 Committed exceptions ““must be based on facts illustrating how past development
23 has cast a mold for future uses.”” *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447,
24 501, 724 P2d 268 (1986) quoting *Halvorson, et al v. Lincoln Co.*, 14 Or LUBA 26, 31
25 (1985). A committed exception “require[s] an analysis of how existing development on some
26 parcels affects practicable use of others.” 301 Or at 501. In this case, petitioner argues that

²However, there is conflicting evidence in the record on that point. For example, the record indicates that Wilson Lane provides the primary access to the residential lots to the north and to the subject property. It is not clear whether roads should be considered to be a public facility.

³The existence of Highway 82, by itself, is not a basis for an exception to Goal 3. See OAR 660-012-0060(4).

1 the county’s findings are inadequate to show whether the development that has occurred on
2 parcels within the area has made farm use of the subject parcel impracticable.

3 Finding 7.22 of the county’s decision states:

4 “Detailed records of parcel size and ownership patterns demonstrate the
5 existing development pattern and establishes that there are 75 parcels of land
6 under 10 acres and 5 parcels of land under 25 acres in the study area[. T]here
7 are 61 residences in the same area. Fifty-nine of the residences and all of the
8 parcels under 10 acres were created pursuant to the exceptions process and in
9 accord with planning regulation and procedure.” Record 8.

10 Intervenor argues that the record provides the necessary support for the county’s
11 findings, as the record provides current tax and deed information, and includes an aerial
12 overlay of the tax map for reference.

13 OAR 660-004-0028(6)(c)(A) requires findings of fact that address “parcel size and
14 ownership patterns how the existing development pattern came about.” We agree with
15 petitioner that finding 7.22 does not 1) identify the relevant study area; 2) show how the
16 existing development pattern came about; or 3) explain how the evidence cited in the finding
17 supports a conclusion that the subject parcel is so impacted by adjacent development that
18 farm use of the property is impracticable. To the extent that intervenor argues that the record
19 “clearly supports” the county’s findings such that we should accept the evidence intervenor
20 cites to in lieu of the necessary findings, we reject the argument. *Salo v. City of Oregon City*,
21 ___ Or LUBA ___ (LUBA No. 98-173, July 14, 1999), slip op 13. (“ORS 197.835(11)(b)
22 authorizes LUBA to remedy minor oversights and imperfections in local government land
23 use decisions, but does not allow LUBA to assume the responsibilities assigned to local
24 governments, such as the weighing of evidence.”)

25 **E. Neighborhood and regional characteristics (OAR 660-004-0028(6)(d))**

26 Petitioner argues that the county failed to adopt findings to identify neighborhood and
27 regional characteristics, and failed to identify physical development on the subject property
28 which may commit the property to nonresource use. Intervenor argues that the general

1 information section of the county’s decision adequately identifies neighborhood and regional
2 characteristics.

3 The general information section of the county’s decision identifies the Joseph Airport
4 as being located adjacent to and west of the City of Joseph. It also describes the location of
5 the Boise Cascade plant. However, neither one of these facilities is described in relation to
6 the subject property, nor does the decision show how the airport or the plant may affect the
7 resource uses of the subject property.

8 We agree with petitioner that the county’s findings inadequately address
9 neighborhood and regional characteristics, as required by OAR 660-004-0028(6)(d).

10 **F. Physical development of the subject property (OAR 660-004-0025 and**
11 **0028(6)(f))**

12 Petitioner argues that the county failed to adopt findings addressing physical
13 development of the subject property as described in OAR 660-004-0025. OAR 660-004-0025
14 requires the county to consider the extent to which physical development of the subject
15 property commits the subject property to nonresource use. Intervenor has not cited to any
16 findings in the decision or any evidence in the record to show that the county addressed this
17 factor.

18 **G. Farm use of the subject property under ORS 215.203(2)(a)**

19 Petitioner argues that there is no evidence in the record to support a conclusion that
20 the adjacent residential use has rendered agricultural use of the property impracticable.
21 Petitioner claims that the county’s findings do not show that present residential uses of the
22 adjacent property have so impacted the subject property that farm use cannot continue on the
23 property and that the county’s finding that agricultural use of the property is not cost-
24 effective does not equate to a finding of impracticability. In addition, petitioner claims that
25 the findings do not demonstrate that the soils on the property cannot be put to agricultural
26 use. According to petitioner, “the evidence in the record establishes that the property is

1 currently in farm use, has been in continuous farm use for at least the past 34 years, is
2 surrounded on three sides by farm land, and is treated as a farm for tax purposes.” Petition
3 for Review 11.

4 Intervenor argues that petitioner interprets the provisions of the administrative rule to
5 require that agricultural use of the property is *impossible*, not just impracticable, and that this
6 interpretation is contrary to the provisions of the relevant administrative rule. In addition,
7 intervenor argues that pasturing or livestock grazing is not “farm use” as that term is defined
8 in ORS 215.203(2)⁴. Therefore, intervenor argues, it is not true that the property is currently
9 and has been in farm use for 34 years. Intervenor claims the fact that the property has been
10 grazed does not show that the primary purpose of the use is for a profit in money from the
11 agricultural activities, as required by ORS 215.203(2), because the owners have permitted
12 grazing only to reduce the potential for fire and not to obtain a profit in money. Thus,
13 intervenor contends that the fact that cattle have been pastured on the property does nothing
14 to show that the property is currently in farm use.

15 With regard to farm use of the property, the county found:

16 “The parcel is currently in farm deferral and is currently rented for livestock
17 pasture. Pasturing livestock produces minimal net income and is pastured
18 primarily to keep the vegetation in check for fire protection purposes. The
19 parcel produces an annual income of \$1,400.00 less expenses for spray,
20 irrigation, fencing, etc. The land is only conducive to irrigated pasture use.

21 “100% of the parcel is composed of 267A-Redmont Gravelly Silt Loam (0 to
22 3% slope) with a capability class of 4C * * *.

⁴ORS 215.203(2)(a) defines “farm use” as including:

“[T]he current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock * * *.”

1 “There was an independent Soil Survey [of the subject property] on August 7
2 through 9, 1998. * * * The Cordilleran Connection performed the survey,
3 which was signed by Robert Ottersberg.

4 “**CONCLUSIONS OF THE INDEPENDENT SOIL SURVEY:** The soil of
5 the * * * site, as shown in the Soil Survey, is fine loamy over sandy Skeletal
6 mixed frigid type halploxeroll. A yield capability class of 4S appears to be
7 appropriate due to the high level of rock fragments at a shallow depth and the
8 resulting low available water holding capacity in the rooting zone.

9 “The parcel is fenced around it[s] perimeter and does not lie in a flood zone.”
10 Record 3.

11 “**FINDING 7.14:** Agricultural use of the subject property is not cost-effective
12 and is, therefore, impracticable.” Record 7.

13 A finding that farm uses on the property are impracticable based on the existence of
14 nearby nonresource development is a demanding standard. While intervenor is correct that
15 the “intent of the exceptions process is to permit flexibility in the application of broad
16 resource protection goals,” the ultimate legal standard for an irrevocably committed
17 exception is that uses allowed by the applicable goal are impracticable. OAR 660-004-
18 0028(3). For this Board to conclude that the county correctly determined the subject property
19 is irrevocably committed to uses not allowed by Goal 3, the county must adopt findings
20 explaining why its ultimate legal conclusion of impracticability flows from the findings of
21 fact. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 519 (1994). The county
22 has not done so in this case. The findings that intervenor relies upon merely discuss the
23 existing use of the subject property, and conclude, based on the limited return on agricultural
24 investment, that farm use is impracticable. The findings make no connection between the
25 neighboring residential uses and whether and how the uses on those properties contribute to
26 making farm use of the subject property impracticable. While it is true that the activities on
27 the subject parcel are part of the factors to consider in determining whether the property is
28 irrevocably committed to nonresource use, the county must also analyze the use of adjacent

1 property to reach its conclusion that the application satisfies the exception criteria. *DLCD v.*
2 *Curry County*, 151 Or App at 11.

3 As for intervenor’s contention that pasturing cattle on the subject property does not
4 constitute farm use if it is done for the primary purpose of controlling fuel for potential fires,
5 we reject the argument. Intervenor’s subjective intent is not controlling where the property is
6 used for farm use, is generating income from that activity, and is receiving farm tax deferral.
7 *See Friends of the Creek v. Jackson County*, ___ Or LUBA ___ (LUBA No. 98-158, August 31,
8 1999) slip op 13-15, *rev pending* ___ Or App ___, ___ P2d ___ (___)(the subjective intent of the
9 landowner is not a factor in determining whether the “primary purpose” of the land is for a
10 profit from farm activities.)

11 **H. Conclusion**

12 ORS 197.732(6)(b) provides that LUBA

13 “* * * shall determine whether the local government’s findings and reasons
14 demonstrate that the [exception standards of OAR 660-004-0028] have or
15 have not been met.”

16 We conclude that the findings do not demonstrate that the property is irrevocably
17 committed to rural residential uses. Because we conclude that the findings to support a
18 conclusion that the property is irrevocably committed to rural residential use either do not
19 exist or are inadequate to satisfy the relevant criteria, we do not address petitioner’s
20 substantial evidence arguments. *DLCD v. Columbia County*, 15 Or LUBA 302, 305 (1987).

21 Petitioner argues that we should reverse, rather than remand the county’s decision, for
22 petitioner “believes that under currently-existing circumstances, an irrevocably committed
23 exception would never be appropriate on the subject property.” Petition for Review 15. OAR
24 661-010-0071(1)(c) provides that this Board shall reverse a land use decision when:

25 “The decision violates a provision of applicable law and is prohibited as a
26 matter of law.”

1 In addition, OAR 661-010-0071(2)(a) provides that this Board shall remand a land use
2 decision for further proceedings when:

3 “(a) The findings are insufficient to support the decision* * *”

4 Petitioner may be correct that, under the circumstances described in the application, it
5 is impossible for the applicant to show the property is irrevocably committed to nonresource
6 use. However, we cannot say that the county’s decision is prohibited as a matter of law,
7 because additional evidence on remand may satisfy the “irrevocably committed” exception
8 standards.

9 The first assignment of error is sustained.

10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioner argues that the county failed to adopt findings addressing the provisions of
12 OAR 660-004-0018(2).⁵ Intervenor agrees that the county failed to adopt specific findings to
13 address OAR 660-004-0018, but argues that, notwithstanding the lack of specific findings,
14 there is evidence in the record sufficient to demonstrate compliance with the relevant
15 standards. However, intervenor fails to cite to those portions of the record which “clearly

⁵OAR 660-004-0018 provides, in relevant part:

“(2) For * * * ‘irrevocably committed’ exceptions to goals, plan and zone designations shall authorize a single numeric minimum lot size and shall limit uses, density, and public facilities and services to those:

“(a) Which are the same as the existing land uses on the exception site;

“(b) Which meet the following requirements:

“(A) The rural uses, density, and public facilities and services will maintain the land as ‘Rural Land’ as defined by the goals and are consistent with all other applicable Goal requirements; and

“(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and

“(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resources.”

1 support” the findings necessary to demonstrate compliance with the administrative rule. For
2 the same reasons we articulated in the first assignment of error, we decline to invoke ORS
3 197.835(11)(b) and search the record to create a factual basis for the county’s decision.

4 The second assignment of error is sustained.

5 The county’s decision is remanded.