

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DOUGLAS E. McLANE and
5 ANDREW L. SCHORR, Jr.,
6 *Petitioners,*

7
8 vs.

9
10 KLAMATH COUNTY,
11 *Respondent.*

12
13 LUBA No. 99-161

14
15 FINAL OPINION
16 AND ORDER

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18 Appeal from Klamath County.

19
20 Douglas E. McLane and Andrew L. Schorr, Jr. filed the petition for review and
21 argued on their own behalf.

22
23 No appearance by respondent.

24
25 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
26 participated in the decision.

27
28 REMANDED

04/10/2000

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal the county’s decision changing the comprehensive plan designation and zoning of 10 acres of land from Forestry Range to Non-Resource.

FACTS

The subject property is a vacant 121.41-acre parcel designated in the county’s comprehensive plan as Forestry Range and zoned Forestry Range (FR). The predominant soil type on the property is 74D Stukel-Capona Loam, Soil Capability Class VI. The property includes sagebrush, juniper, ponderosa pine, and several large rock outcroppings. The FR zone is a mixed farm and forest zone, applied to lands that consist of a juniper-sagebrush-bitterbrush vegetation cover with a forest productivity rating of Class VII. The surrounding property consists of parcels zoned and used for farm uses or forest uses, or both.

In May 1999, the owner of the subject property applied to the county to amend the plan designation from Forestry Range to Non-Resource and the zoning from FR to Non-Resource (NR). The NR zone is designed for lands that are predominantly composed of soils in Class VII and VIII. The NR zone would allow up to five dwellings to be built on the subject property, although the applicant later amended the application to accept a planning staff condition that only one homesite be allowed on the property. In a combined proceeding, the planning commission and board of commissioners conducted a hearing on the application. The planning commission voted 4-2 to recommend denial of the application. The board of commissioners then deliberated and voted 2-1 to reject the planning commission’s recommendation and approve the application, with modifications. The final decision approved the plan and zone change for only a 10-acre homesite at the western edge of the property, and left the remaining 111.41 acres in the Forestry Range designation and zone.

This appeal followed.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 In these assignments of error, petitioners argue that the county misconstrued the
3 applicable law and adopted inadequate findings in taking a Statewide Planning Goal 2, Part
4 II(c) “reasons” exception to Goals 3 (Agricultural Lands) and 4 (Forest Lands), pursuant to
5 ORS 197.732 and OAR 660-004-0020.

6 A “reasons” exception pursuant to Goal 2 and the statute and rule requires that the
7 local government address four factors: (1) whether there are reasons why the state policy
8 embodied in the applicable goals should not apply; (2) whether there are areas not requiring a
9 new exception that cannot reasonably accommodate the proposed use; (3) whether the long-
10 term environmental, economic, social and energy consequences resulting from the use at the
11 proposed site are not significantly more adverse than would result from the same proposal
12 being located in other areas requiring an exception; and (4) whether the proposed use is
13 compatible or can be made compatible with other adjacent uses. ORS 197.732(1)(c); Goal 2,
14 Part II(c); OAR 660-004-0020(2).

15 The county’s exception findings consist of the following:

16 “As this plan/zone change involved resource plans/zones, an Exception
17 Statement was required pertaining to Goal 4. Based on the Goal Exception
18 criteria as defined by [ORS] 197.732, this application demonstrates the
19 ‘reasons exception.’ Due to the property’s topography, physical location, soil
20 types, and availability of adequate public facilities, this property fulfills the
21 Exception Statement criteria. The property is comprised of sagebrush,
22 juniper, and several large rock outcroppings. These rock outcroppings are
23 comprised of 35-65% slopes. The property’s topography with its steep slopes
24 and numerous rock outcroppings would limit potential agriculture practices.

25 “Based on the Klamath County Comprehensive Plan [KCCP] this property is
26 not defined as prime timberland. Utilizing the Oregon Department of
27 Forestry’s Ponderosa Pine Index, the timber yield on the subject property is
28 classified as [Class] VI. This falls outside the prime timberland classification,
29 which is I-V. In addition, the soils are comprised primarily of Class VI and
30 VII soils. * * * All of these soils are not considered prime farmland or prime
31 forestland.” Record 2.

1 We agree with petitioners that the county’s findings adopting a reasons exception to
2 Goals 3 and 4 misconstrue the applicable law and are inadequate. The findings make no
3 attempt to address the factors that OAR 660-004-0020(2) requires the county to address.¹

¹OAR 660-004-0020(2) provides

“The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:

“(a) ‘Reasons justify why the state policy embodied in the applicable goals should not apply’: The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;

“(b) ‘Areas which do not require a new exception cannot reasonably accommodate the use’:

“(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;

“(B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under the alternative factor the following questions shall be addressed:

“(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?

“(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?

“(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

“(C) This alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local

- 1 Neither is there any attempt to explain why the challenged exception qualifies under any of
2 the permissible reasons set out at OAR 660-004-0022(1) and (2).² There is, to cite a few

government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding.

- “(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 other areas requiring a Goal exception.’ The exception shall describe the characteristics of each alternative areas considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site 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. Such reasons shall include but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts;
- “(d) ‘The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts’. The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”

²OAR 660-004-0022 provides in relevant part:

“An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:

- “(1) For uses not specifically provided for in subsequent sections of this rule or OAR 660, Division 14, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons 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

1 examples, no explanation for why the proposed use “requires a location on resource land,” as
2 OAR 660-004-0020(2)(a) requires, no demonstration that areas that do not require a new
3 exception cannot reasonably accommodate the use, as OAR 660-004-0020(2)(b) requires,
4 and no comparison of the long term environmental, economic, social and energy
5 consequences of locating the use at the proposed site, as opposed to other sites, as OAR 660-
6 004-0020(2)(c) requires.

7 More fundamentally, the “reasons” the county identified bear no relationship to the
8 reasons that can justify an exception specified at OAR 660-004-0022(1)(a) through (c).
9 There is no “demonstrated need for the proposed use” based on Statewide Goals 3 to 19; and
10 there are no findings either (1) that a resource on which the proposed use is dependent can be
11 reasonably obtained only at the proposed exception site, or (2) that the proposed use has
12 special features that necessitate its location on or near the proposed site. The gist of the
13 county’s “reasons” is that the subject property is not prime agricultural land or timber land.

“(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.

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

1 However, neither of those reasons are legally cognizable bases to adopt a reasons exception
2 to Goals 3 and 4.

3 The first and second assignments of error are sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioners challenge the county’s determination that the application satisfied the
6 criteria for amending a comprehensive plan designation at KCCP 47.030(B)(1), (4) and (5).³

7 **A. KCCP 47.030(B)(1)**

8 Petitioners argue, first, that the county failed to adopt adequate findings explaining
9 why the plan amendment does not afford “special privileges” to an individual property owner
10 not available to the general public or outside the overall public interest for the change, as
11 KCCP 47.030(B)(1) requires. Petitioners argue that creating a 10-acre “spot zone” of
12 nonresource land in the middle of a parcel and of an area designated for resource uses,
13 simply so that the property owner can build a rural residence, affords “special privileges” to
14 an individual property owner not available to the general public.

15 The county’s findings regarding KCCP 47.030(B)(1) state:

16 “Based on the soils, topography, and adjacent uses, this property should have
17 been given a non-resource designation. The property’s characteristics indicate
18 that it is neither prime farmland, nor prime timberland.” Record 4.

³KCCP 47.030(B) sets forth criteria for quasi-judicial zone changes, and in relevant part provides:

“A request for a change of zone designation shall be reviewed against the following criteria:

“1. The proposed change of zone designation is in conformance with the Comprehensive Plan and does not afford special privileges to an individual property owner not available to the general public or outside the overall public interest for the change;

“* * * * *

“4. The proposed change of zone designation will have no significant adverse effect on the appropriate use and development of adjacent properties; and

“5. The proposed change is supported by specific studies or other factual information which documents the need for the change.”

1 We agree with petitioners that the county’s findings of compliance with KCCP
2 47.030(B)(1) are inadequate. The finding does not address whether the plan amendment
3 affords “special privileges” to the property owner that are not available to the general public.
4 The county does not explain why the soils, topography and adjacent uses suggest that the
5 property should have been given a nonresource designation, or what relevance the fact that
6 the subject property is not prime farmland or prime timber land has on the inquiry required
7 by KCCP 47.030(B)(1).

8 This subassignment of error is sustained.

9 **B. Remaining Challenges**

10 Petitioners’ remaining arguments challenge the evidentiary bases for the county’s
11 findings of compliance with KCCP 47.030(B)(4) and (5). Our conclusion, above, that the
12 county’s findings with respect to other applicable criteria are inadequate may require the
13 county to conduct further evidentiary proceedings. If that is the case, no purpose would be
14 served in reviewing petitioners’ challenges to the current record. Accordingly, we do not
15 consider those challenges.

16 The third assignment of error is sustained, in part.

17 **FOURTH ASSIGNMENT OF ERROR**

18 In this assignment of error, petitioners challenge the evidentiary bases for the
19 county’s finding of compliance with KCCP 48.030(B).⁴ As discussed earlier, no purpose

⁴KCCP 48.030(B) governs changes to plan designations, and provides in relevant part:

“A request for a change of Comprehensive Plan designation shall be reviewed against the following criteria:

- “1. The proposed change is supported by specific studies or other factual information which documents the public need for the change;
- “2. The proposed change complies with policies of the Comprehensive Plan; and
- “3. The proposed change complies with the Oregon Statewide Planning Goals and Administrative Rules. Exceptions to the Statewide Planning Goals shall be based

1 would be served by addressing petitioners' evidentiary challenges. Accordingly, we do not
2 consider the challenges raised under this assignment of error.

3 The county's decision is remanded.

upon Statewide Planning Goal 2, Part II (Exceptions) as interpreted by Oregon
Administrative Rules (OAR Chapter 660, Division 4)."