

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 FRIENDS OF LINN COUNTY, LETHA  
5 MAY PAILLE, JOHN GARY ZOLKOSKE,  
6 CAROL A. ZOLKOSKE, LAURA A.  
7 ZOLKOSKE, JOHN LEWIS ZOLKOSKE,  
8 and MARGARET E. LANG,  
9 *Petitioners,*

10  
11 vs.

12  
13 LINN COUNTY,  
14 *Respondent,*

15  
16 and

17  
18 RICHARD SILVA,  
19 *Intervenor-Respondent.*

20  
21 LUBA No. 2000-107

22  
23 FINAL OPINION  
24 AND ORDER  
25

26 Appeal from Linn County.

27  
28 Christine M. Cook, Portland, filed the petition for review and argued on behalf of  
29 petitioners.

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31 No appearance by Linn County.

32  
33 Richard Silva, Stayton, filed the response brief and argued on his own behalf.

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

36  
37 REMANDED

11/08/2000

38  
39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.  
41

**NATURE OF THE DECISION**

Petitioners appeal a county decision amending the comprehensive plan map designation from Agricultural Resource to Rural Residential and adopting a zone change from Exclusive Farm Use (EFU) to Rural Residential five-acre minimum (RR-5) for a 14.36-acre parcel.

**MOTION TO INTERVENE**

Richard Silva (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**FACTS**

The subject property is a flat rectangular parcel adjoining a county road on the south. Prior to 1981, the subject property consisted of two separate parcels in common ownership. A dwelling was constructed on one parcel in 1952. In 1981, the landowner at that time applied for a conditional use permit to site a manufactured dwelling as an accessory farm dwelling. The county approved the permit, on the condition that the two parcels be consolidated and the accessory dwelling be utilized to maintain resource activities on the consolidated parcel.

The property has a history of use as farmland, primarily for grazing. Ninety percent of the soils on the subject property consist of high-value soils. Two winter creeks cross the property, creating standing water on portions of the property during the winter. Bordering the subject property on the west and south is an exception area consisting of 14 parcels, ranging in size from 2.41 acres to 13.35 acres in size. The parcels within the exception area are all developed with residences. The exception area is itself surrounded by lands zoned EFU. The subject property is bordered on the north, east and southeast by other properties zoned EFU, some of which are developed with residences. All of the parcels adjoining the subject property are currently used for farm uses, primarily grazing.

1           Intervenor applied to the county for an exception to Statewide Planning Goal 3  
2 (Agricultural Lands), proposing to subdivide the property into two parcels, each with one of  
3 the existing dwellings. The county planning commission held a hearing on March 14, 2000,  
4 and recommended denial of the application. The board of commissioners then held a  
5 hearing, and voted to approve the application. The county’s final decision purports to take  
6 an “irrevocably committed” exception to Goal 3, based on OAR 660-004-0028 and criteria in  
7 the county’s comprehensive plan and code. However, it also contains findings addressing  
8 the criteria at OAR 660-004-0020 and 660-004-0022 for taking a “reasons” exception to  
9 Goal 3.

10           This appeal followed.

11           **FIRST ASSIGNMENT OF ERROR**

12           Petitioners argue that the county failed to apply the criteria for an “irrevocably  
13 committed” exception at ORS 197.732, Statewide Planning Goal 2 (Land Use Planning) and,  
14 most particularly, OAR 660-004-0028. Petitioners also argue that even if the county had  
15 applied the correct criteria, the undisputed facts in the record do not demonstrate that the  
16 subject property is irrevocably committed to uses not allowed by Goal 3.

17           The county’s decision quotes OAR 660-004-0028(1), but otherwise fails to address or  
18 find compliance with any of the requirements for an irrevocably committed exception set  
19 forth at OAR 660-004-0028(1) through (6). Instead, the decision addresses certain “Rural  
20 Residential Locational Criteria” in the county’s comprehensive plan. The Locational Criteria  
21 set forth a three-step process that assigns points to property based on a number of criteria,  
22 including proximity to blocks of committed parcels, the size of and development on the  
23 subject property, and the number of other parcels within one-quarter mile that are less than  
24 10 acres in size. If enough points are assigned in this process, then the subject property is  
25 deemed “committed land.” The county applied the Locational Criteria, and determined that  
26 the subject property had sufficient points to qualify as “committed land.”

1           Petitioners argue, and we agree, that the county erred in failing to apply the criteria  
2 for an irrevocably committed exception at OAR 660-004-0028. As petitioners point out, in  
3 addition to the statutory and rule-based requirement that the county apply those criteria in  
4 taking a committed exception to Goal 3, the county’s comprehensive plan itself requires that  
5 land can be designated for rural residential purposes only if the requirements of OAR chapter  
6 660, division 4 are met.<sup>1</sup> The role of the “Locational Criteria” in that process, if any, is  
7 uncertain. Nothing identified to us in the LCCP or the Locational Criteria purports to waive  
8 or supplant any requirement of state law in taking committed exceptions to applicable  
9 statewide planning goals. *Cf. League of Women Voters v. Metro. Service Dist.*, 99 Or App  
10 333, 338, 781 P2d 1256 (1989) (a plan amendment pursuant to local acknowledged criteria  
11 that are specifically designed to omit certain requirements of a statewide planning goal  
12 cannot be challenged for lack of compliance with the omitted goal requirements). Further,  
13 we are aware of no other reported cases involving committed exceptions taken by Linn  
14 County where the county applied the Locational Criteria instead of the criteria at OAR 660-  
15 004-0028. *See, e.g., Friends of Linn County v. Linn County*, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
16 2000-070, October 20, 2000) (county decision taking an exception to Goals 3 and 4 under  
17 OAR 660-004-0028, in order to rezone resource land to RR-5).

18           It may be that the Locational Criteria represent the standards under which the county  
19 initially determined which lands should be zoned for rural residential uses, as part of the  
20 development and acknowledgment of its comprehensive plan. It may be that the Locational  
21 Criteria represent a policy overlay providing additional criteria for lands that meet the state  
22 requirements for an exception. Whatever the case, we agree with petitioners that the county

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<sup>1</sup>Linn County Comprehensive Plan (LCCP) Rural Residential Lands Policy 22 provides:

“Land that is committed or developed with rural residential uses may be designated Rural Residential if the applicable requirements in Oregon Administrative Rules [Chapter 660] Division 4 can be met. A Comprehensive Plan amendment is required before the Rural Residential Plan designation can be applied.”

1 erred in failing to apply the relevant statutory, goal and rule-based requirements for an  
2 irrevocably committed exception.

3 Intervenor does not dispute that OAR 660-004-0028 is applicable to the county's  
4 decision, but argues that the county's findings under the Locational Criteria, and the  
5 evidence in the whole record, suffice to demonstrate compliance with the rule's  
6 requirements. We disagree. The Locational Criteria bear no obvious relationship to the  
7 rule's requirements. For example, the "focal criterion" of OAR 660-004-0028 is whether the  
8 relationship between the subject property and adjacent lands renders resource use, in this  
9 case farm use, of the subject property "impracticable." *DLCD v. Curry County*, 151 Or App  
10 7, 11, 947 P2d 1123 (1997). The Locational Criteria contain no standards that require  
11 considering the relationship of the subject property with adjacent lands or whether that  
12 relationship is such that, along with other relevant considerations, resource use of the subject  
13 property is impracticable.

14 Because we conclude the county erred in failing to apply the requirements of  
15 OAR 660-004-0028, there is no purpose in addressing petitioners' additional arguments  
16 under this assignment of error, to the effect that the evidence in this case fails to demonstrate  
17 compliance with those requirements. Any such arguments are premature.<sup>2</sup>

18 The first assignment of error is sustained.

19 **SECOND ASSIGNMENT OF ERROR**

20 To the extent the county's decision purports to adopt a "reasons" exception to Goal 3  
21 under OAR 660-004-0020 and 660-004-0022, petitioners argue that the county misconstrued  
22 the applicable law and its findings fail to demonstrate compliance with the criteria for a  
23 "reasons" exception.

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<sup>2</sup>We add, however, that on remand intervenor and the county would be well advised to consider those arguments before attempting to demonstrate that the property is irrevocably committed under OAR 660-004-0028.

1           Intervenor responds that this assignment of error should be denied, because the  
2 county’s decision is based entirely on a committed exception, and the county did not intend  
3 to adopt a “reasons” exception. Intervenor does not dispute petitioners’ contention that, if  
4 the county did take an exception to Goal 3 under OAR 660-004-0020 and 660-004-0022, its  
5 findings misconstrue and fail to demonstrate compliance with those criteria.

6           Petitioners are correct that the county’s decision contains findings that address and  
7 find compliance with certain provisions of OAR 660-004-0020 and 660-004-0022. Record  
8 22-24. It is not clear whether the county intended to adopt an exception to Goal 3 under  
9 those criteria. To the extent it did so, we agree with petitioners that the county’s findings are  
10 inadequate to demonstrate compliance with those criteria.<sup>3</sup>

11           The second assignment of error is sustained.

12           The county’s decision is remanded.

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<sup>3</sup>In light of intervenor’s position that the county did not intend to take a “reasons” exception to Goal 3, it is unlikely that issues under OAR 660-004-0020 or 660-004-0022 will arise on remand. Therefore, no point would be served in discussing petitioners’ arguments. We note only that we particularly agree with petitioners’ assertion that the county failed to address the requirements of OAR 660-004-0022(2), which govern application of a “reasons” exception to allow rural residential uses.