BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

JACK WAYMIRE,
Intervenor-Respondent.

LUBA No. 2000-054

FINAL OPINION
AND ORDER

Appeal from Lane County.

Lynne A. Perry, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

No appearance by Lane County.

P. Steven Cornacchia, Eugene, filed the response brief on behalf of intervenor-respondent. With him on the brief was Hershner, Hunter, Andrews, Neill and Smith, LLP.

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

REMANDED 02/09/01

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a county decision amending the comprehensive plan, rezoning the subject property from E-40 (exclusive farm use 40-acre minimum) to RR-2 (rural residential 2-acre minimum), and taking an irrevocably committed exception and a physically developed exception to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands).

MOTION TO INTERVENE

Jack Waymire (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 proposed exception area is located in the Mohawk Valley northeast of the City of Springfield. The subject property consists of 14.18 acres and is roughly rectangular in shape, with the north and south sides more than four times the length of the east and west sides. Approximately two acres on the east end of the property are developed with a house, detached garage, and other outbuildings. The soils are predominantly prime agricultural soils. The subject property was in hay production when purchased by intervenor in 1995, and has received preferential farm tax assessment since at least 1985.

The subject property is bordered on the north, south, and west by properties zoned E-40. All of these properties receive preferential farm or forest tax assessment. The adjacent parcel to the north contains a dwelling. The adjacent parcel to the south does not contain a dwelling, and is used as a family summer retreat and outdoor activity area. The adjacent parcel to the west contains a dwelling, and is used for grazing. The subject property is bordered to the east by RR-2 zoned properties in the Mountain Shadows Subdivision, of which 27 out of 28 lots have dwellings. The access to the subject property is through the subdivision.

In November 1998, intervenor applied to the county to amend the comprehensive plan to designate the subject property as residential rather than agricultural and to rezone the property from E-40 to RR-2. The county planning commission conducted a public hearing and recommended denial of the application. The board of county commissioners conducted a public hearing and approved the application on March 29, 2000.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in adopting an irrevocably committed exception to Goals 3 and 4. According to petitioner, the county failed to address relevant considerations and based its decision on improper considerations. Petitioner also argues that many of the county's findings are not supported by substantial evidence. Finally, petitioner contends that the county's findings are inadequate to demonstrate that resource use is impracticable on the subject property.

Irrevocably committed exceptions must be just that—exceptional. *1000 Friends of Oregon v. LCDC*, 69 Or App 717, 731, 688 P2d 103 (1984). ORS 197.732(1)(b), Goal 2 Part II(b), and OAR 660-004-0028(1) all establish the same standard for granting an irrevocably committed exception: "[E]xisting adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." To implement that standard, OAR 660-004-0028(4) provides:

> "A conclusion that an exception area is irrevocably committed shall be supported by findings of fact which address all applicable factors of [OAR 660-004-0028(6)] 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."

Our usual tripartite approach for reviewing decisions adopting irrevocably committed exceptions is to: (1) resolve any contentions that the findings fail to address issues relevant under OAR 660-004-0028 or address issues not properly considered under OAR 660-004-0028; (2) consider any arguments that particular findings are not supported by substantial

evidence in the record; and (3) determine whether the findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standards of ORS 197.732(1)(b) that uses allowed by the goal are impracticable. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994). Although petitioner assigns error under all three steps of the analysis, there is no need to resolve the relevancy and evidentiary challenges to the findings because we conclude that, even assuming that the findings address the proper issues and are supported by substantial evidence, the county's findings as a whole are insufficient to demonstrate that uses allowed by the goal are impracticable. *Id*. at 476-77 (declining to resolve evidentiary disputes because even if resolved in county's favor the county's findings fail to demonstrate compliance with OAR 660-004-0028 and ORS 197.732(1)(b)).

OAR 660-004-0028(2) requires that an irrevocably committed exception must address certain factors, particularly the characteristics of the subject property, characteristics of the adjacent lands, and the relationship between the exception area and adjacent lands.[1] OAR 660-004-0028(6) sets forth additional factors that must be considered in determining whether the uses allowed by the goal are impracticable in the proposed exception area.[2] In

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[1] OAR 660-004-0028(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 660-004-0028(6)."

[2] OAR 660-004-0028(6) provides, in pertinent part:

> "Findings of fact for a committed exception shall address the following factors:
>
> "(a) Existing adjacent uses;

evaluating the county's findings under OAR 660-004-0028, we must determine whether the standards provided for in ORS 197.732(1)(b) have been met as a matter of law. In performing that review, we are not required to give any deference to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for an irrevocably committed exception. *Laurance v. Douglas County*, 33 Or LUBA 292, 297-99, *aff'd* 150 Or App 368, 944 P2d 1004 (1997), *rev den* 327 Or 192 (1998).

Under OAR 660-004-0028(3), local governments taking exceptions to Goals 3 and 4 are required to demonstrate that farm use, propagation or harvesting of a forest product, and forest operations or forest practices are impracticable.[3] In this case, the county found that

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"(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. * * *;

"(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. * * *

"(d) Neighborhood and regional characteristics;

"(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. * * *;

"(f) Physical development according to OAR 660-004-0025; and

"(g) Other relevant factors."

[3] OAR 660-004-0028(3) provides:

such resource use of the proposed exception area was impracticable due to the existence of rural residential properties to the east, the existence of farm dwellings on adjacent parcels, the wetness and droughtiness of the soils on the subject property, the inability to incorporate the subject property into neighboring properties in resource use, and the impacts of resource use on adjacent residential properties. The county's findings addressing why resource use of the proposed exception area is impracticable state:

> "* * * The most compelling characteristic of the exception area is the subject property's linkage with the RR-2 zoned parcels to the east. The subject property is directly adjacent to RR-2 zoned parcels, and the only access to this site is through that exception area (Mountain Shadows Subdivision street). Residential uses are already developed in the RR-2 zoned area to the east.
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> "* * * * *
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> "* * * To the north, west and south of the subject property are small acreage parcels averaging 16.91 acres in size. The subject property cannot practically be assimilated for farm use with these small parcels since each small parcel is developed and all [are] under different ownership. Without subsurface drainage and practicable water irrigation rights, the soil's wetness and droughtiness limits the site's use to grazing in late spring and early summer. In addition, the commercial cattle grazing operations further to the south and to the north cannot practically incorporate the subject property into their operation because these grazing operations are not adjoining. In addition, the region's grazing operations do not use the subject site nor surrounding smaller parcels based on small parcel sizes, limited road access through Mountain Shadows Subdivision, parcels all being under different ownership and the general area's wetness and droughtiness (the area's commercial grazing operation has not been seeking additional land which is limited to late spring and early summer grazing). * * *

> "* * * It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible'. For exceptions to Goals 3 or 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 215.203;
>
> "(b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and
>
> "(c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a)."

> "* * * * *
>
> "* * * Agricultural use of the subject parcel will create Agricultural-related traffic, which will conflict with many of the Residential area's activities. The type and severity of the actual agricultural impacts varies with the agricultural pursuit and may include but is not limited to noise from agricultural equipment, dust from disking, harrowing, planting, harvesting, etc., smells from hogs, cattle, etc. and spraying of pesticide, fertilizers, etc.
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> "The fact that the surrounding Exclusive Farm Use-zoned lots are relatively small (average size is 17 acres), long and narrow parcels with long dimension oriented east/west, all the surrounding land being developed with dwellings on three sides, all under different ownership and the only vehicular access is through a residential subdivision hampers agricultural pursuits on the subject site. * * *" Record 17-18.

The focus of OAR 660-004-0028 is on the relationship between the proposed exception area and the surrounding area, and whether that relationship renders resource use of the property impracticable. *DLCD v. Curry County*, 151 Or App 7, 11, 947 P2d 1123 (1997). The county's findings rely primarily on the RR-2 subdivision to the east of the subject property to demonstrate irrevocable commitment. However, the mere existence of residential uses near a property proposed for an irrevocably committed exception does not demonstrate that such property is committed to nonresource use. *Prentice v. LCDC*, 71 Or App 394, 403-04, 692 P2d 642 (1984). Additionally, the subdivision has been in existence for many years, and the subject property has been in resource use for many years. Reliance upon longstanding adjacent rural residential uses is insufficient to demonstrate that continued resource use of a proposed exception area has become impracticable in the absence of recent or imminent changes affecting the subject property. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 365-66 (2000). The county's decision does not identify any such changes. Finally, resource use of the subject property has continued for many years, relying on access through the subdivision. The county does not explain why that longstanding practice has suddenly become impracticable.

The county's findings also rely on the existence of dwellings on adjacent resource parcels to demonstrate that existing adjacent uses have made resource use of the subject property impracticable. The nearby dwellings have been in existence for many years. The resource use of the subject property has continued for many years despite the presence of those dwellings. The county does not explain why such residential uses are consistent with resource use of the adjacent parcels, but also render resource use of the subject property impracticable. *Id*. at 367.

The county relies on findings that the soils on the subject property are unsuitable for farm use because the land could not be farmed without installing expensive subsurface drainage and obtaining irrigation rights. The subject property, however, has been used for hay production and grazing in the past without such improvements. The only logical conclusion is that historical and current farm use of the property was not and is not dependent upon such improvements. *Id*. at 366. The county's conclusion that farm use is impracticable is based primarily on intervenor's unsuccessful attempts to grow kiwi and ginseng, and intervenor's determination that such uses are not sufficiently profitable. Practicable farm use, however, contemplates consideration of whether the subject property is capable now or in the future of being employed for agricultural production in a manner that would produce gross income. *Lovinger v. Lane County*, 36 Or LUBA 1, 17-19, *aff'd* 161 Or App 198, 984 P2d 958 (1999) (rejecting evaluation of the exception area under a commercial farm standard). Given the past farm use of the subject property, the county's findings regarding soils are insufficient to demonstrate that continued or renewed farm use of the proposed exception area is impracticable.

The county's findings that the subject property cannot be combined with adjacent resource uses are also insufficient. The findings rely heavily on adjacent parcel sizes of less than the 40-acre zone minimum and on separate ownership of such parcels. The creation of the substandard parcels occurred prior to the adoption of the goals. OAR 660-004-0028(6)(c)

provides that such land divisions do not themselves demonstrate irrevocable commitment and also provides that small parcels in separate ownership are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations. *See* n 2. The 32.27-acre parcel directly to the west of the subject property is currently used for grazing. The western portion of the subject property is very similar to the adjacent parcel to the west in soils and topography. The county's findings offer no explanation other than separate ownership to demonstrate that the subject property could not be joined with the grazing use of the adjacent parcel.

The county's findings also rely on anticipated adverse impacts of farm use of the subject property on adjacent rural residential uses. While such conflicts may be a factor in showing that farm use is impracticable, they are not conclusive:

> "* * * People who build homes in an agricultural area must expect some discomforts to accompany the perceived advantages of a rural location. If problems of this sort by themselves justified a finding of commitment, it would be impossible to establish lasting boundaries between agricultural and residential areas anywhere, yet establishing those boundaries is basic to the land use planning process." *1000 Friends of Oregon v. LCDC*, 69 Or App at 728.

In conclusion, even resolving all relevancy and evidentiary disputes in favor of the county, the findings are insufficient to demonstrate that resource use of the proposed exception area has been rendered impracticable by existing adjacent uses and other relevant factors.

The first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county erred in taking a physically developed exception to Goals 3 and 4.[4] The challenged decision purports to take a physically developed exception to

[4] OAR 660-004-0025 provides:

Goals 3 and 4 as well as taking the irrevocably committed exception discussed above. The decision, however, does not address the criteria for a physically developed exception. Intervenor concedes that the county's findings regarding a physically developed exception are inadequate.

The second assignment of error is sustained.

The county's decision is remanded.

"(1) A local government may adopt an exception to a goal when 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.

"(2) Whether land has been physically developed with uses not allowed by an applicable Goal, will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception."