BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
Petitioner,

vs.

COOS COUNTY,
Respondent,

and

ALLAN CONVERSE and LUPE CONVERSE,
Intervenors-Respondent.

LUBA No. 2000-146

LISA DeSALVIO and LEAGUE OF
WOMEN VOTERS,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

ALLAN CONVERSE and LUPE CONVERSE,
Intervenors-Respondent.

LUBA No. 2000-152

FINAL OPINION
AND ORDER

Appeal from Coos County.

Steven E. Shipsey, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of petitioner Department of Land Conservation and Development. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Caroline E. Kuerschner, Portland, filed a petition for review and argued on behalf of petitioners Lisa DeSalvio and League of Women Voters.

No appearance by Coos County.

Roger Gould, Coos Bay, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 02/08/2001

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision amending the county's comprehensive plan and land development ordinance and adopting an irrevocably committed exception to Statewide Planning Goal 4 (Forest Lands).[1]

MOTION TO INTERVENE

Allan and Lupe Converse (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is an 80.84-acre parcel in Coos County, located northeast of the City of Bandon. The challenged decision adopts an irrevocably committed exception to Goal 4 to rezone the western 40.21 acres of the parcel (proposed exception area) from F (forest 80-acre minimum) to RR-5 (rural residential five-acre minimum). A mobile home and outbuilding are currently located in the proposed exception area. The entire parcel is designated forestland for tax purposes. The soils in the proposed exception area are classified by the United States Department of Agriculture Natural Resources Conservation Service as suitable for timber production. Intervenors submitted an independent soils analysis that states that the soils are not conducive to useful timber production. The proposed exception area is currently used for residential purposes for the mobile home and includes a wooded area.

Immediately adjacent properties to the north, east, and south are zoned F. Those properties are designated as forestland for tax purposes. The parcel is bordered on the west by Seven Devils Road, a county road. Immediately adjacent properties to the west are zoned

[1] This appeal involves two separate appeals of the same decision. The Department of Land Conservation and Development (DLCD) is the petitioner in LUBA No. 2000-146. Lisa DeSalvio and the League of Women Voters (League) are the petitioners in LUBA No. 2000-152. Unless specifically differentiated, we will use "petitioners" to refer to all petitioners.

RR-5. A number of RR-5 zoned properties are located a short distance to the south of the proposed exception area. Some of the RR-5 zoned properties also are designated forestland for tax purposes.

In April 2000, intervenors applied to the county to amend the comprehensive plan and zoning designation from F to RR-5. The application was originally processed as a reasons exception, and the county planning department recommended denial.[2] The county planning commission held a public hearing on June 1, 2000, at which intervenors indicated they were seeking an irrevocably committed exception rather than a reasons exception. The county planning commission recommended approval of the application and forwarded that recommendation to the county board of commissioners. The county board of commissioners conducted public hearings on June 29, 2000, and July 18, 2000. The county board of commissioners approved the application and adopted the challenged decision on August 16, 2000.

This appeal followed.

LEAGUE OF WOMEN VOTERS' (LEAGUE'S) FIRST ASSIGNMENT OF ERROR

The League argues that the challenged decision violates ORS 215.780 and county ordinances implementing the statute that prohibit partitions of resource land into parcels of less than 80 acres.[3] This issue was not raised below. The parties dispute whether the issue may be raised at LUBA pursuant to ORS 197.835(4)(a) because the county did not list the

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[2] OAR chapter 660 division 4 provides for three general types of exceptions: reasons exceptions (OAR 660-004-0022), physically developed exceptions (OAR 660-004-0025), and irrevocably committed exceptions (OAR 660-004-0028).

[3] ORS 215.780(1) provides:

> "Except as provided in subsection (2) of this section, the following minimum lot or parcel sizes apply to all counties:
>
> "* * * * *
>
> "(c) For land designated forestland, at least 80 acres."

statute or implementing ordinances as applicable approval criteria.[4] We need not address whether the issue should have been raised below, because we find that ORS 215.780 is not an applicable approval criterion in this case.

Under ORS 215.780(1)(c), subject to certain exceptions, the minimum lot or parcel size for forestland is 80 acres. Absent one of the enumerated exceptions, a county may not approve a division of resource land if that land division would create parcels that do not meet the minimum parcel size requirement. *Dorvinen v. Crook County*, 153 Or App 391, 957 P2d 180, *rev den* 327 Or 620 (1998); *Alliance for Responsible Land Use v. Deschutes County*, 37 Or LUBA 215 (1999), *aff'd* 166 Or App 166, 995 P2d 1227, *rev den* 330 Or 362 (2000); *Friends of Douglas County v. Douglas County*, ___ Or LUBA ___ (LUBA No. 2000-086, November 27, 2000).

The challenged decision, however, does not approve a division of resource land. The decision merely rezones a portion of an existing parcel. Although the decision states that the applicants propose to divide the exception area into six separate parcels, the decision itself only adopts an irrevocably committed exception and does not approve a division of the subject parcel. Record 10.

The League's first assignment of error is denied.

DLCD'S ASSIGNMENT OF ERROR AND THE LEAGUE'S SECOND, THIRD, AND FOUTH ASSIGNMENTS OF ERROR

Petitioners argue that the county erred in adopting an irrevocably committed exception to Goal 4. According to petitioners, the county failed to address relevant issues and addressed improper issues. Other findings, petitioners argue, are either not supported by

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[4] ORS 197.835(4)(a) provides that a petitioner may raise new issues at LUBA if:

> "The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

substantial evidence or are based on misconstruction of the applicable law. Finally, petitioners contend that the county's findings are inadequate to demonstrate that forest 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 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) requires that:

> "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 goals are impracticable. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994). Although petitioners assign 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)).

In adopting an irrevocably committed exception, OAR 660-004-0028(2) requires the county to 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.[5] 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.[6] In evaluating the county's findings under OAR 660-004-0028, we must

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[5] 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:
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> "(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
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> "(d) The other relevant factors set forth in OAR 660-004-0028(6)."

[6] 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;
>
> "(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. * * *;

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 an exception to Goal 4 are required to demonstrate that farm use, propagation or harvesting of a forest product, and forest operations or forest practices are impracticable.[7] The county found that such resource use of the exception area is impracticable due to existing rural residential uses, the poor quality soils of the exception area, the effects that resource use might have on adjacent

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> "(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. * * *
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> "(d) Neighborhood and regional characteristics;
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> "(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. * * *;
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> "(f) Physical development according to OAR 660-004-0025; and
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> "(g) Other relevant factors."

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

> "* * * 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)."

residential uses, and lack of a commercially viable farm use. The county's reasoning why resource use of the exception area is impracticable states:

> "The facts establish that the exception area is located on Seven Devils Road in a neighborhood where rural residences predominate along Seven Devils Road. Seven Devils Road is a corridor of residential uses for most of the length of the road both northwest and southeast of the exception area.
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> "The facts also establish that the exception area contains poor quality soils that do not support profitable agriculture or forest uses of the property. In addition, the exception area contains large quantities of gorst and diseased trees. To prepare the exception area for either agriculture or forest uses, including propagation and harvesting of trees and the conduct of forest practices, would require either or both herbicide spray and burning.
>
> "A combination of these established facts makes impracticable the conduct of any resource use of the exception area. The cost of preparing the property would render the commercial operation not profitable. More importantly, the activity necessary to make the property useable for resource operations, either agriculture or forest, would have great adverse impact on the numerous residences in close proximity to the exception area. Spraying and/or burning the property poses significant risk to the neighboring residences. Over-spray may harm vegetation on neighboring residences. Fire may spread to the neighboring residential properties. Even the short-term impact of smoke from a controlled burn would adversely impact the neighborhood.
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> "The soils in the exception area do support cranberry growth. However, cost of preparing the property, lack of sufficient water and impact on existing residence water sources and the depressed cranberry market make current employment of the exception area as a commercial cranberry operation not profitable and impracticable.
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> "The facts establish by clear and convincing evidence that conduct of resource use activities on the exception area is not practicable." Record 14.

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). In order to properly analyze that relationship, the characteristics of adjacent lands must be described. OAR 660-004-0028(6)(c) requires that the findings address the parcel size and ownership patterns of adjacent lands and how the existing development pattern came about. The findings fail to do so and instead focus almost exclusively on the RR-5

zoned parcels along Seven Devils Road. The findings must address adjacent lands that may tend to make resource use of the proposed exception area practicable as well as adjacent lands that may tend to make resource use impracticable. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 70-71 (2000).

Even assuming the county had properly addressed all adjacent lands in its findings, the findings do not explain how the relationship between the proposed exception area and the RR-5 parcels renders the proposed exception area impracticable for resource use, which is the relevant inquiry. *Brown v. Jefferson County*, 33 Or LUBA 418, 429 (1997). The county's findings simply assume the existence of residences on nearby parcels irrevocably commits the proposed exception area to nonresource use. The mere existence, however, of residential uses near the subject property does not demonstrate that the property is committed to nonresource use. *Prentice v. LCDC*, 71 Or App 394, 403-04, 692 P2d 642 (1984). Additionally, many of the RR-5 zoned properties are assessed as forestland for property tax purposes. The county's findings do not explain why residential uses on nearby parcels are consistent with resource uses on those parcels, but those same uses are inconsistent with resource use of the exception area. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 366 (2000).

In addition to not properly addressing the impacts of adjacent lands on the proposed exception area, the county's findings improperly rely on the potential impacts of resource use of the subject property on adjacent residential uses. While such conflicts may be a factor in showing that resource use is impracticable, they are not conclusive.

> "* * * People who build homes in [a resource] 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 [resource] 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.

The county's findings also rely heavily on the purported unsuitability of the proposed exception area itself for resource use. The characteristics of the proposed exception area are among the relevant factors that the county may consider in determining whether resource uses are impracticable. *DLCD v. Curry County*, 151 Or App at 11. However, 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 subject property impracticable. *Id*. at 11-12. The county may not give "exclusive or preponderant weight" to the characteristics of the proposed exception area. *Id*. at 11.

While the parties dispute the evidentiary basis of the county's findings regarding the soils and suitability of the proposed exception area for resource use, even if we were to resolve those disputes in favor of intervenors, the characteristics of the exception area would not justify an irrevocably committed exception. Affirming the challenged decision in this case would require that we give "exclusive or preponderant weight" to the characteristics of the proposed exception area itself, because the county's findings do not identify sufficient impacts from adjacent properties to support an irrevocably committed exception. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489, 505 (2000).

DLCD's assignment of error and the League's second, third, and fourth assignments of error are sustained in part.

LEAGUE'S FIFTH ASSIGNMENT OF ERROR

The League argues that the county failed to adopt findings addressing OAR 660-004-0018(2)(b).[8] The county identified OAR 660-004-0018 as an applicable review criterion, but

[8] OAR 660-004-0018(2)(b) provides that rural uses allowed by plan and zone designations in a proposed exception area must 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

did not adopt any findings to establish compliance with the rule. Intervenors respond that no findings were required regarding this approval criterion. Intervenors argue that by rezoning the proposed exception area to RR-5 the county necessarily satisfied the rule by maintaining rural land. Next, intervenors argue that adopting an irrevocably committed exception can never commit nearby resource land to nonresource use. Finally, intervenors argue that the longstanding rural residential uses that have existed in the vicinity of Seven Devils Road have been compatible with resource uses.

The initial problem with intervenors' argument is that the county did not explicitly or implicitly adopt any findings concerning OAR 660-004-0018(2)(b), nor have intervenors identified evidence in the record which clearly supports a conclusion that the rule is satisfied. ORS 197.835(11)(b). Furthermore, even if the county had adopted intervenors' arguments, such findings would be inadequate. While RR-5 zoning may maintain the proposed exception area as rural land, the mere existence of rural residential zoning in itself does not establish that the development that the exception authorizes will not commit adjacent or nearby resource use to nonresource use or that such development is compatible with adjacent or nearby uses. OAR 660-004-0018(2)(b)(B) and (C). The fact that other rural residential uses have existed along Seven Devils Road does not demonstrate that such rural uses necessarily are compatible with adjacent or nearby resource uses. As the League notes, such a position is impossible to reconcile with the county's findings that those same rural residential uses have irrevocably committed the proposed exception area to nonresource use.

The League's fifth assignment of error is sustained.

The county's decision is remanded.

"(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 resource uses."