

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

3
4 JON S. POTTS,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2001-095

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Jon S. Potts, Oregon City, filed the petition for review and argued on his own behalf.

20
21 Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and
22 argued on behalf of respondent.

23
24 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,
25 participated in the decision.

26
27 REMANDED

09/10/2001

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

31

NATURE OF THE DECISION

Petitioner appeals a county denial of his application to amend the comprehensive plan map designation of a six-acre parcel from Forest to Rural, and a corresponding zoning map amendment to allow rural residential uses.

FACTS

The subject property is a six-acre parcel zoned Timber (TBR). The property is located on a level ridge at an approximately 2,100-foot elevation. Soils on the property are Zygore gravelly loam, 5-30 percent slopes. Surrounding lands are zoned TBR.

In 1996, the property was logged of all merchantable timber. The property was then partially replanted with a variety of seedlings, in an attempt to start a Christmas tree farm. That same year the county approved an agricultural building on the property, in conjunction with the proposed Christmas tree farm. The landowner instead constructed a two-bedroom dwelling. In 1997, the county threatened enforcement proceedings against the landowner for zoning violations and other issues involving the illegally constructed dwelling. In 2000, petitioner purchased the property, and filed the subject application.

Petitioner's application materials state that petitioner believes the subject property is nonresource land and therefore can be redesignated for rural residential use without an exception to resource goals such as Statewide Planning Goal 3 (Agricultural Lands) and 4 (Forest Lands). Record 213. Petitioner supported his application with studies from three soil and forestry experts, which concluded, generally, that the subject property was not suitable for agriculture or commercial forestry. County staff apparently disagreed with petitioner's theory, at least with respect to Goal 4. The county thereafter processed the application as a request to adopt exceptions to Goals 3 and 4, pursuant to OAR 660-004-0022, 660-004-0025 and 660-004-0028. The staff report concluded that exceptions to Goals 3 and 4 were warranted, but recommended denial of the application based on noncompliance with certain

1 county comprehensive plan provisions. The planning commission conducted a hearing on
2 April 9, 2001, and voted to recommend denial of the application, on the grounds that an
3 exception to Goal 4 was necessary and petitioner had not met the burden of proof to justify
4 an exception to Goal 4. Record 157.

5 The board of county commissioners (commissioners) then conducted a hearing on
6 May 2, 2001. At the conclusion of the hearing, the commissioners voted 2-1 to deny the
7 application, finding that petitioner had failed to demonstrate that an exception to Goal 4 was
8 justified. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioner argues that the county erred in failing to approve or deny the application
11 based on petitioner’s position, expressed throughout the proceedings below, that the subject
12 property is neither agricultural nor forest land as defined under state law, and thus does not
13 require an exception to Goals 3 and 4.¹

14 According to petitioner, the issue of whether the application could be approved under
15 petitioner’s theory, without adopting an exception to Goals 3 and 4, was raised numerous
16 times before the county. However, the county’s decision does not adopt findings addressing

¹The parties’ arguments focus almost exclusively on issues related to Goal 4. The challenged decision does not address whether an exception to Goal 3 is warranted, apparently because it concludes that petitioner failed to satisfy the exception criteria with respect to Goal 4. Our discussion follows the parties in focusing primarily on issues related to Goal 4. Goal 4 is:

“To conserve forest lands by maintaining the forest land base and to protect the state’s forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.”

Goal 4 defines “forest lands” as

“those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.”

1 that issue. Instead, petitioner argues, the county denied the application because petitioner
2 failed to satisfy standards that, under petitioner’s theory, he was not required to meet.
3 Petitioner contends that remand is necessary for the county to adopt findings addressing
4 whether the subject property is nonresource land and thus not subject to Goals 3 and 4.

5 The only findings in the challenged decision are as follows:

6 “1. The applicant requests approval of a Comprehensive Plan map
7 amendment from Forest to Rural and corresponding zone change from
8 TBR to RRFF-5 or FF-10.

9 “2. The requested Comprehensive Plan map amendment requires that
10 exceptions be taken to Statewide Goals 3 and 4. The Board finds that
11 the only possible exception to those Goals, an ‘irrevocably committed’
12 exception, is not justified. While the applicant has pointed out some
13 difficulties in using the property for forest purposes, the evidence in
14 the record as a whole convinces this Board that it is not
15 ‘impracticable’ to use the property for the propagation and harvesting
16 of a forest product, or for forest operations or practices.” Record 2.

17 The county responds that the commissioners considered petitioner’s argument that the
18 property was not subject to Goals 3 and 4, and implicitly rejected that argument when they
19 concluded, in the above-quoted passage, that exceptions to those goals were required.
20 According to the county, the conclusion that exceptions to Goals 3 and 4 are required rests
21 on the premise that the subject property is subject to Goals 3 and 4. Because that premise is
22 contrary to petitioner’s argument, the county contends, the commissioners necessarily
23 rejected that argument.

24 The county is correct that the above-quoted findings seem to implicitly reject
25 petitioner’s position that the subject property is not subject to Goals 3 and 4. Nonetheless,
26 we agree with petitioner that the county’s findings are inadequate. Where an issue is raised
27 below regarding compliance with applicable approval criteria, the findings supporting the
28 decision must respond to that issue. *Rouse v. Tillamook County*, 34 Or LUBA 530, 536
29 (1998); *Suydam v. Deschutes County*, 29 Or LUBA 273, *aff’d* 136 Or App 548, 901 P2d 269
30 (1995). While findings of noncompliance with applicable criteria need not be as exhaustive

1 or detailed as findings necessary to show compliance with such criteria, they must be
2 sufficient to explain the local government’s conclusion that the applicable criteria are not
3 met. *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 270 (2000); *Eddings v.*
4 *Columbia County*, 36 Or LUBA 159, 162 (1999). In the present case, the challenged
5 findings simply conclude without explanation that exceptions to Goals 3 and 4 are required
6 and the standards for an exception to Goal 4 are not met. The unexplained, unstated
7 premises supporting those conclusory findings are inadequate as a response to petitioner’s
8 arguments that exceptions to Goals 3 and 4 are not required.²

9 The first assignment of error is sustained.

10 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

11 These assignments of error present a miscellany of arguments, some of which seem to
12 challenge the commissioners’ conclusion that an exception to Goal 4 is not warranted under
13 the exception criteria, and others which seem to challenge the evidentiary support for the
14 commissioners’ presumption that the subject property is resource land protected by Goals 3
15 and 4.

16 As our discussion of the first assignment of error indicates, remand is necessary for
17 the county to adopt findings addressing the issue raised below, regarding whether the subject
18 property is resource land under Goals 3 and 4. In the present posture, it would be premature
19 for the Board to address the arguments in the second and third assignments of error.
20 Accordingly, we do not reach these assignments of error.³

21

²We note, in passing, that the county staff report contains a discussion concluding that the subject property is “forest land” as defined under provisions of the county’s comprehensive plan that apparently implement Goal 4. Record 193-94. The challenged decision does not adopt the staff report, or any other document, as findings. We express no opinion regarding the adequacy of the discussion in the staff report, if adopted by the commissioners, but simply bring it to the parties’ attention as a potential starting point for proceedings on remand with respect to Goal 4.

³In doing so, we do not intend to express any opinion regarding the merits of the arguments under these assignments of error. However, we note that ORS 197.732(4) requires that a local government’s approval or denial of a proposed exception “shall set forth findings of fact and a statement of reasons which demonstrate

1 **FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH AND NINTH ASSIGNMENTS OF**
2 **ERROR**

3 In these assignments of error, petitioner identifies a host of issues involving the
4 county's comprehensive plan, including Clackamas County Comprehensive Plan Forest
5 Policy 1.0, Forest Policy 2.0, Rural Policy 1.0 and Rural Policy 2.0. However, as explained
6 above, the county's decision denying petitioner's application was based on state law, and not
7 on any provision of the county's comprehensive plan. Petitioner does not explain why, given
8 this posture, any of the alleged errors involving the comprehensive plan provide a basis to
9 reverse or remand the county's decision.⁴

10 We do not foreclose the possibility that, depending on what course the county adopts
11 on remand, some of the issues raised in these assignments of error might become relevant on
12 remand. However, we agree with the county that petitioner has not demonstrated that the
13 issues raised in these assignments of error are relevant to the decision before us.
14 Consequently, we do not reach the merits of the fourth, fifth, sixth, seventh, eighth and ninth
15 assignments of error.

16 The county's decision is remanded.

that the standards" for taking an exception "have or have not been met." If the county again concludes on remand that the subject property is resource land and that an exception is required to allow rural residential use of the property, the county may wish to consider on remand whether the above-quoted findings are sufficient to set forth the findings of fact and statement of reasons required by ORS 197.732(4).

⁴In several of these assignments of error, petitioner challenges staff interpretations or applications of several comprehensive plan provisions. Because the commissioners did not adopt the staff report as findings or otherwise base their decision on the staff report, misinterpretations in the staff report, if any, do not provide a basis for reversal or remand.