BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MUKHTIAR DHILLON,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2001-100

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Mukhtiar Dhillon, Oregon City, filed the petition for review and argued on his own behalf.

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

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

AFFIRMED 09/19/2001

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner challenges a decision by the county to deny a comprehensive plan map amendment from Forest to Rural and a corresponding zone change from Agriculture/Forest (AG/F) to Rural Agriculture, 2 Acre District (RA-2).

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief, pursuant to OAR 661-010-0039. The county does not object to the proposed reply brief. It is allowed.

FACTS

Petitioner, the applicant below, owns a 23-acre parcel currently designated Forest on the county comprehensive plan map and zoned AG/F. It contains Agricultural Class II-IV soils. Approximately 10 acres are considered either prime or high-value agricultural soils. According to the county staff report the soils are capable of producing an average of 147 cubic feet per acre per year of commercial tree species. One dwelling currently exists on the property. It was established in 1982, pursuant to code provisions that permitted farm-related dwellings.

From 1980 until 1999, petitioner operated a hazelnut orchard on the property. However, the orchard became infected with Eastern Filbert Blight, which decimated the hazelnut yield. Upon the recommendation of the Oregon Department of Agriculture, petitioner removed all infected trees in 2000. After researching various crop options, petitioner decided to cease farming the property. In June 2000, petitioner submitted the subject application to rezone the property so that it could be developed for residential uses.

The planning staff and planning commission recommended denial of the application, based on petitioner's failure to justify either a "physically developed" or an "irrevocably committed" exception to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest

Lands). After a public hearing, the board of county commissioners denied petitioner's application. This appeal followed.

DECISION

The petition for review contains four pages of commentary by petitioner regarding the soils on the property, the "irrevocably committed" exceptions process, and various policies contained in the comprehensive plan and zoning ordinance. The remainder of the petition for review contains copies of documents that appear to support petitioner's contention that the subject property is not suitable for farm uses. The petition for review does not contain assignments of error as required by our rules. OAR 661-010-0030(4)(d). Nevertheless, to the extent we are able to discern petitioner's allegations of error from the arguments presented in the petition for review, we will consider those allegations. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999). We understand petitioner to argue that the county's decision regarding compliance with the criteria for an irrevocably committed exception is not supported by substantial evidence.

The county also understands the petition for review to present a substantial evidence challenge to the county's decision. The county concedes that there is evidence in the record to support petitioner's contention that the property is not suitable for resource use; however, the county argues that the board of county commissioners relied on the testimony of neighbors in the vicinity to conclude that farm use is not impracticable. The county also relied upon the staff report that was incorporated as part of the decision. The staff report recommends denial based on evidence that the soils on the property are all class IV or better agricultural soils, the property has been used as a filbert orchard in the past, the soils are suitable for commercial timber production, the property is adjacent to other properties in resource use, and the surrounding residential uses would not prohibit spraying on the property.

Petitioner contends that farm and forest uses on the subject property are not practicable. However, the documents that petitioner relies upon in his petition for review demonstrate that, while farm uses may be somewhat limited, both farm and forest uses may be conducted on the property.

We will not overturn a local denial of an application on evidentiary grounds unless the evidence is such that a reasonable trier of fact could only say petitioner's evidence should be believed. *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532, 534 (1993); *Schmaltz v. City of Hood River*, 22 Or LUBA 115, 119 (1991). Petitioner must demonstrate that he sustained his burden of proof as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 600 P2d 1241 (1979); *Consolidated Rock Products v. Clackamas County*, 17 Or LUBA 609, 619 (1989). We have reviewed the evidence cited in the petition for review. This evidence is not sufficient to overturn the county's denial of petitioner's application.

The challenged decision finds that an irrevocably committed exception to Goals 3 and 4 is necessary to approve the subject application. 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: "existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable."

As stated above, the property contains approximately 10 acres of high value or prime agricultural soils. The property has recently been in agricultural use and, according to petitioner's forest report, may be put to forest use. Petitioner relies on a forester's conclusion that commercial forest use of the subject property has a "negative present value."[1] However,

[1]The forester estimated that the initial cost of site preparation and reforestation would be $12,765. The forester estimated that harvesting the property after 40 years would yield $132,000. The forester then "discounted" $132,000 by 8 percent over the 40-year period, resulting in a figure of $5,626. This figure, subtracted from the presumed $12,765 initial investment, yielded a "negative present value" of -$7,139. Record 171-72.

a conclusion that a property has a negative present value as forestland is inadequate to demonstrate that forest uses are impracticable without explaining the relevance of that conclusion on impracticability of forest uses. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 75-76 (2000). Petitioner has not established, as a matter of law, that farm and forest uses on the subject property are impracticable.

The county's decision is affirmed.[2]

[2]The petition for review also discusses numerous comprehensive plan policies and zone change criteria. It is not clear whether these comments are intended (or sufficient) to challenge the staff findings regarding these policies and criteria that were adopted by the challenged decision. Even if so intended, there is no purpose in addressing such challenges, because we have affirmed the county's independent determination that petitioner failed to satisfy the requirements for an irrevocably committed exception. To support denial of a land use application, the local government need only establish the existence of one adequate basis for denial. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635 (1995).