BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JON S. POTTS,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2001-201

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Jon S. Potts, 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; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 04/01/2002

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

FACTS

The challenged decision is the county's decision on remand from *Potts v. Clackamas County*, 40 Or LUBA 371 (2001). We recite the pertinent facts from that case:

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

> "The board of county commissioners (commissioners) then conducted a hearing on May 2, 2001. At the conclusion of the hearing, the commissioners voted 2-1 to deny the application, finding that petitioner had failed to demonstrate that an exception to Goal 4 was justified. This appeal followed." 40 Or LUBA at 372-73.[1]

We remanded the county's decision because the county failed to address petitioner's argument that the subject property is not resource land subject to Goals 3 and 4, and therefore no exceptions to those goals were required. In remanding on that basis, we expressed no opinion on the merits of that argument.

On remand, the county held a hearing before the commissioners on December 19, 2001. On the same date, the commissioners again voted 2-1 to deny the application, based on new findings concluding that the subject property is forest land subject to Goal 4. This appeal followed.

FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

A. Suitable for Commercial Forest Uses

The parties agree that the relevant inquiry under Goal 4 is whether the subject property is "suitable for commercial forest uses."[2] The county's findings conclude that the property is "suitable for commercial forest uses," based on eight items of evidence in the record, including the testimony of three neighbors; a letter from the Department of Land

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[1]The cited evidence is in the record of the original proceedings, at Record 46-48, 52, 57, 75, 155, 191, 199, and 276-279. We will cite to the record of the proceedings on remand in the form "Record (2001-201)."

[2]Goal 4 defines "forest lands" subject to that goal as follows:

> "Forest lands are 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."

Conservation and Development; the staff report; and the timber management assessment, one of the expert reports submitted by petitioner.[3]

Petitioner contends that the cited evidence does not constitute substantial evidence supporting the county's findings under Goal 4, particularly in light of the contrasting evidence petitioner submitted, including the testimony of three expert witnesses. Petitioner recognizes that, in order to overturn the county's denial on evidentiary grounds, it is not sufficient for petitioner to show there is substantial evidence in the record supporting his position. Rather, the evidence as a whole must be such that a reasonable trier of fact could only say that petitioner's evidence should be believed. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to* 151 Or App 16, 949 P2d 1225 (1997). In other words, petitioner can prevail only if he demonstrates that his evidence must be believed as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 600 P2d 1241 (1979). Here, petitioner contends that the evidence in the record is such that a reasonable trier of fact can only conclude that the subject property is not "suitable for commercial forest uses."

Goal 4 does not define or describe what it means by "suitable for commercial forest uses," nor are those terms or similar terms defined in the administrative rule implementing Goal 4, at OAR chapter 660, division 6. In *DLCD v. Coos County*, 32 Or LUBA 430, 438 (1997), we rejected the county's view that "commercial" means "profitable," for purposes of

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[3]The county's findings state, in relevant part:

> "[The commissioners] continue to find that the subject property is 'forest land' as defined by Goal 4 because it is suitable for commercial forest use. This conclusion is supported by the following evidence presented to the [commissioners] in [the] prior proceeding on this application [listing evidence, with record citations].
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> "This evidence leads the [commissioners] to conclude that with proper management this property could produce a forest crop. The facts [that] the lot might not produce a profit on its own, and has not been managed properly in the recent past, do not mean it is not 'suitable for commercial forest uses' as that term is used in Goal 4." Record (2001-201) 2-3.

the Goal 4 definition of forest lands. Similarly, in *Waugh v. Coos County*, 26 Or LUBA 300, 314 (1993), we held that Goal 4 protects nonprime forest lands, and rejected a finding that Goal 4 did not apply to land simply because it had a "cubic foot site index" of only 63 cubic feet per acre per year. Further, in *Dept. of Transportation v. Coos County*, 35 Or LUBA 285, 294 n 5 (1998), *rev'd on other grounds* 158 Or App 568, 976 P2d 68 (1999), we questioned whether evidence that the subject property could produce only 48.48 cubic feet per acre per year was sufficient to conclude that the property was not "suitable for commercial forest uses." These cases suggest that it is capability or potential for production of commercial tree species that is at issue in determining a property's suitability for commercial forest uses, not necessarily the past or current level of production, or whether the property is or could be part of a commercial-scale timber business. *See Waugh* and *Dept. of Transportation* (rezoning agricultural lands to residential uses requires application of Goal 4 and consideration of whether the property is suitable for commercial forest uses). However, neither these cases nor any other cases, rules or statutes brought to our attention provide a generally applicable test for determining whether land is "suitable for commercial forest uses."

In the present case, petitioner's evidentiary challenge consists of criticizing the evidence relied upon by the county, and arguing that the testimony of petitioner's experts so undermines the evidence the county relied upon as to establish, as a matter of law, that the subject property is not suitable for commercial forest uses. The county concedes that the record would support a conclusion either that the property is suitable or that it is unsuitable for commercial forest uses. However, the county argues, because the record contains substantial evidence supporting the county's conclusion it must, therefore, be affirmed.

We need not recite each item of disputed evidence and the parties' arguments regarding that evidence. For the following reasons, we agree with the county that petitioner has not demonstrated that the record as a whole establishes, as a matter of law, that the subject property is not suitable for commercial forest uses.

The testimony of petitioner's experts indicates that the subject property consists of Zygore soils, a "very productive" soil with a Douglas Fir site index of 130 to 165. Record 277. Because of soil compaction from a previous logging operation, effects of poor maintenance on soil quality, and other limitations, the property's actual site index is in the range of 90 to 110, a "medium productivity range." *Id.* Despite those problems, if properly planted and maintained, the subject property would nonetheless yield $81,300 worth of commercial timber at 50 years, after an investment of $7,450. Record 278.[4] The foregoing undisputed facts are drawn from the timber management assessment submitted by petitioner, and relied upon by the county to conclude that the property is suitable for commercial forest uses. Considering the record as a whole, including countervailing evidence, a reasonable trier of fact could rely on the foregoing evidence to conclude that the subject property is suitable for commercial forest uses. Accordingly, petitioner has not demonstrated, as a matter of law, that the subject property is not suitable for commercial forest uses.

B. Bias

The fourth assignment of error contains an assertion that "one of the commissioners not only based his decision on opinion, but was also biased," citing to Record 64, 69, 72, and Record (2001-201) 27. Petition for Review 32. If that assertion is intended as an assignment of error, it is not sufficiently developed. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) (it is not LUBA's function to supply petitioner with legal theories or

[4]The timber management assessment ultimately concludes that the subject property could not produce a "positive financial benefit" to the owner, based on a calculation that the projected total income of $81,300, if discounted at eight percent over 50 years, results in a negative "net present value" relative to the total costs of $7,450. Record 278. It is worth noting that such calculations of "net present value" are not particularly relevant to demonstrating that timber production under Goal 4 is "impracticable" for purposes of taking a Goal 2 exception to Goal 4. *Dhillon v. Clackamas County*, 40 Or LUBA 397, 400 (2001), *aff'd* 179 Or App 742, ___ P3d ___ (2002); *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 75-76 (2000). Without some explanation, it is difficult to see why a calculation of "net present value" is determinative of the similar question here, whether land is forest land under Goal 4.

make petitioner's case for petitioner). In any event, we disagree that the cited record pages demonstrate that one of the commissioners was "biased."

To obtain remand or reversal on the basis of alleged bias, the petitioner must demonstrate in a clear and unmistakable manner that a decision maker was incapable of making a decision based on the evidence and argument before him. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001). The cited pages involve statements by Commissioner Sowa, in which he indicates that he knows the subject property and has known the area for "50-some years." Record (2001-201) 27. Apparently because of that knowledge, the commissioner states that "I'm kinda prejudiced but not prejudiced enough to not make a decision." *Id.* Similarly, in the initial proceeding, the commissioner stated that "as I guess you've already gathered, I have quite a bit of history with this area, and [I am] maybe a little prejudiced but there's certain things that have to be in the record in order for us to have an exception[.]" Record 64. The commissioner ultimately voted to deny the application, during the initial proceedings and on remand.

It is not clear why the commissioner felt that his knowledge of the area rendered him "kinda prejudiced," but the strongest inference is that he had personal knowledge of the timber potential of land in that area. *See* Record (2001-201) 27 ("I can't see any evidence that indicates to me that if the type of effort was put out that the neighbors and the forest land owners around there commonly do in these lowland timberlands, trees would be established on this piece of property so * * * I can't come to any conclusion other than this is resource land[.]"). Read in context, the commissioner's statement that he is "kinda prejudiced" does not demonstrate that the commissioner was incapable of making a decision based on the evidence and argument before him.

The first, second, third and fourth assignments of error are denied.

The county's decision is affirmed.