

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

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4                                   CAROL SEATON and DEANNA HAMMER,  
5   *Petitioners,*

6  
7   vs.

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9                                   JOSEPHINE COUNTY,  
10   *Respondent.*

11  
12   LUBA No. 2004-049

13  
14   FINAL OPINION  
15   AND ORDER

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17                   Appeal from Josephine County.

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19                   Carol Seaton, and Deanna Hammer, Grants Pass, represented themselves. Carol Seaton  
20 filed the petition for review on her own behalf.

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22                   No appearance by Josephine County.

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

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26                                   REMANDED                                   06/28/2004

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

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**NATURE OF THE DECISION**

Petitioners appeal a county decision approving comprehensive plan and zoning map amendments from Residential to Commercial and a zone change from Rural Residential 1-Acre Minimum (RR-1) to Rural Commercial (RC).

**FACTS**

The property is a .33-acre undeveloped parcel which is located near the Rogue River just outside of the City of Grants Pass urban growth boundary. The property is located in an exception area that was approved when the original county comprehensive plan was adopted. The prior comprehensive plan map designation was Residential, and the property was zoned Rural Residential 1-Acre Minimum (RR-1). The challenged decision changes the comprehensive plan map designation to Commercial and rezones the property Rural Commercial (RC). Properties to the north, east, and west are zoned RR-1, and the property to the south is zoned Woodlot Resource. The owner of the property is the applicant, and he also owns the parcel to the east, which is improved with a residence.

**FIRST AND SECOND ASSIGNMENTS OF ERROR**

Rural Land Development Code (RLDC) 46.040 provides the approval criteria for comprehensive plan and zoning map amendments. Two of those criteria are set out below:

- “C. Requests involving changes to the plan and/or zone maps shall demonstrate the land has adequate carrying capacity to support the densities and types of uses allowed by the proposed plan and zone designations. The adequacy of carrying capacity, at a minimum, shall be evaluated using the criteria below. \* \* \*
- “1. The proposed density and types of uses can be supported by the facility, service and other applicable development standards contained in this code or contained in other applicable federal, state and local rules and regulations governing such densities and types of uses.

1           “2.     Other physical characteristics of the land and surrounding area  
2           make the land suitable for the proposed density and types of uses,  
3           to include consideration of existing or potential hazards (flood,  
4           wildfire, erosion), the degree of slopes, the presence of wetlands,  
5           geologic formations, mineral deposits and any other similar natural  
6           or man-made conditions or circumstances[.]”

7           **A.     Minimum Lot Size**

8           Although RLDC 46.040.C.1 is ambiguous, petitioners read the reference to “applicable  
9           development standards” in that criterion to require that when the zoning and comprehensive plan  
10          map designations for a parcel are changed, the parcel must comply with the development standards  
11          that will apply under the new comprehensive plan and zoning map designations and it must be  
12          possible to develop the parcel in accordance with those development standards. One of the  
13          applicable development standards in the RC zone is a one-half acre minimum lot size. RLDC  
14          62.040.B.1. Petitioners argue that the decision improperly rezones a .33-acre parcel RC when the  
15          RC zone minimum lot size is one-half acre. The only findings addressing this issue state:

16           “The [county] finds that the evidence in the whole written record in the form of  
17           reports, maps, documents and analysis together with testimony on behalf of the  
18           applicant shows compliance with the criteria for a Comprehensive Plan Amendment  
19           and Zone Change.” Record 21.

20          The county’s findings are inadequate to respond to petitioners’ challenge that the parcel  
21          does not meet the minimum lot size requirements for the RC zone. While there may be reasons that  
22          a parcel that does not meet RC zone minimum lot size requirement may nonetheless be rezoned RC,  
23          those reasons are not explained in the county’s findings.<sup>1</sup>

24          The first assignment of error is sustained.

25           **B.     Traffic, Water, and Septic Capacity**

26          Petitioners argue the county’s decision that the parcel has adequate carrying capacity is not  
27          supported by substantial evidence in regards to traffic, water, and septic capabilities. As a review

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<sup>1</sup> The applicant below did not intervene in this appeal, and the county did not appear to defend its decision.

1 body, we are authorized to reverse or remand the challenged decision if it is “not supported by  
2 substantial evidence in the whole record.” ORS 197.835(9)(a)(C). Substantial evidence is evidence  
3 a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor*  
4 *and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or  
5 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff’d* 108 Or  
6 App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our  
7 judgment for that of the local decision maker. Rather, we must consider all the evidence in the  
8 record to which we are directed, and determine whether, based on that evidence, the local decision  
9 maker’s conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or  
10 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App  
11 584, 588, 842 P2d 441 (1992).

12 The county’s findings regarding access state:

13 “The property has frontage on one county road and one state highway. The access  
14 to the county road is adequate for the proposed use and if a request is made for  
15 access to the state highway a traffic study would be required to determine impacts  
16 on the road system.” Record 20.

17 The county’s findings rely on proposed access to the county road, Fruitdale Drive, to satisfy  
18 access requirements. Petitioners argue, however, that there is no evidence in the record to support  
19 the finding that the parcel can be accessed from Fruitdale Drive. Petitioners state that Fruitdale  
20 Drive is 30 feet higher in elevation than the parcel and that the elevation difference will make such  
21 access impossible. The staff report also states that access from Fruitdale Drive would require  
22 overcoming an approximate 15-20 foot drop in elevation in less than 20-25 feet. Record 62.  
23 According to petitioners, such a steep grade would violate county driveway standards. We agree  
24 with petitioners that there is not substantial evidence in the record to support a finding of access  
25 from Fruitdale Drive. The findings are nothing more than a conclusion that access is available from  
26 Fruitdale Drive. All of the evidence that has been called to our attention suggests such access may  
27 not be possible.

1           Regarding access from the state highway, Rogue River Highway, petitioners cite to evidence  
2 that a traffic impact study (TIS) would be required by the Oregon Department of Transportation  
3 before it will grant access to Rogue River Highway. Petitioners also state that there is no TIS in the  
4 record. While there may be evidence in the record to support the county’s findings, notwithstanding  
5 the absence of a TIS, we will not search the record for such evidence without any assistance. The  
6 county’s finding that the parcel has adequate access is not supported by substantial evidence.

7           The county’s findings regarding water and septic capacity state:

8           “The [county] finds that the evidence presented by the applicant in the form of well  
9 logs and septic evaluations as well as personal knowledge expressed by the owner  
10 and his representative for the subject property and adjoining lands demonstrates  
11 that the property does not meet the carrying capacity for the existing zone but does  
12 have the ability to be developed as commercial property using a septic holding  
13 tank.” Record 20.

14           The staff report states that the parcel currently has no water or approved on-site sewage  
15 disposal capabilities. Record 162. The staff report also states that there is no septic site evaluation  
16 or well report for the parcel. *Id.* While there are well logs from nearby properties, that does not  
17 necessarily mean water is available on the subject parcel. *Doob v. Josephine County*, 31 Or  
18 LUBA 275, 279 (1996). Petitioners also challenge the conclusion that septic disposal could be  
19 accomplished with a holding tank. The findings provide only a mere conclusion that a septic holding  
20 tank would be adequate. Absent any assistance from the county pointing to evidence in the record  
21 demonstrating that a holding tank would be adequate, we agree with petitioners that the decision is  
22 not supported by substantial evidence.

23           The second assignment of error is sustained.

24           **THIRD ASSIGNMENT OF ERROR**

25           RLDC 46.040.D.1 provides:

26           “The change in designations at the location is consistent with the character of the  
27 surrounding area. Consistency shall be demonstrated by a detailed review of the  
28 relationship between the area covered by the proposed change in designations and  
29 the surrounding area, subject to the following rules.

1           “a.     The detailed review shall describe the similarities or dissimilarities between  
2           the area of proposed change and the surrounding area based upon parcel  
3           size and ownership patterns, zoning, existing or authorized land uses and  
4           structures, public facilities and services, and natural or man-made features.

5           “b.     The detailed review shall include a written statement explaining the rationale  
6           used to include or exclude areas from study, and be supported by zoning  
7           maps, aerial photographs, contour maps, and any other public or private  
8           records, statistics or other documents necessary or helpful to establish the  
9           character of the area and show how the change will be consistent.”

10           The county’s findings regarding whether the proposed changes are consistent with the  
11           character of the surrounding area state:

12           “The property is located in an exception area that was acknowledged as built and  
13           committed to uses other than resource use. The exception area contained  
14           residential, commercial and industrial. The character of the area is one of mixed use  
15           with commercial uses scattered along Rogue River Highway consistent with the  
16           requested change.

17           “\* \* \* \* \*

18           “The [county] finds that the proposed change is consistent with the current  
19           development pattern in the area and that public services and facilities are adequate  
20           for the intended use based on the standards of the Comprehensive Plan and the  
21           testimony in the record.

22           “\* \* \* \* \*

23           “The [county] finds that the requested use is consistent with the adopted exception  
24           area.” Record 20.

25           Petitioners argue that the proposed change is not consistent with character of the  
26           surrounding area, because the surrounding area is actually primarily residential in nature. We need  
27           not discuss the evidence cited by petitioners because the county’s conclusory findings are  
28           inadequate to demonstrate that the approval criterion is met. RLDC 46.040.D.1 clearly requires a  
29           “detailed review” of the relationship between the area proposed for change and the surrounding  
30           area. If the county engaged in such a detailed review it is not apparent from its findings. Where a  
31           local code requires that a proposed development be compatible with some aspect of the

1 surrounding area, the local government must explain why the proposed development will be  
2 compatible. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98, 115 (1992).

3 The third assignment of error is sustained.

4 **FOURTH ASSIGNMENT OF ERROR**

5 The decision appears to adopt an irrevocably committed exception to Goal 14  
6 (Urbanization).

7 “The [county] finds that the exception being requested is based on the character of  
8 the subject property and the surrounding uses and their impacts on the subject  
9 property under the category of a committed exception. Thus exception is to Goals  
10 3, 4 and 14 and is appropriate in accordance with the Oregon Administrative Rules.

11 “The [county] finding that the evidence in the record describes the exception area,  
12 the characteristics of uses and their interaction and concludes that the burden has  
13 been met to show that the request meets the criteria for an exception.” Record 21.

14 The requirements for taking an irrevocably committed exception are extensive. *See*  
15 *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 361-63 (2000)  
16 (describing requirements for committed exception). The county’s findings do not make a serious  
17 attempt to meet those requirements. The county’s findings are inadequate to demonstrate the  
18 requirements for a committed Goal 14 exception have been met.

19 The fourth assignment of error is sustained.

20 The county’s decision is remanded.