BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH COTTER,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2006-127

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Joseph Cotter, Eagle Creek, 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.

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

REMANDED 11/16/2006

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the Clackamas County Board of Commissioners (BOC) approving an application for a comprehensive plan amendment and zone change to convert an 18-acre portion of a 37.65-acre property to nonresource use by finding that an exception to Goal 4 under the "physically developed" exception rule found at OAR 660-004-0025(1) was warranted.

FACTS

The subject property is a 37.65-acre parcel located at the intersection of Wildcat Mountain Road and Eagle Creek Road in Clackamas County.[1] The property contains two large main buildings with parking areas, two smaller storage structures, a scale area, a newer 40 by 60 foot agricultural building, a large yard area and several internal circulation roads into the yard area. Record 40. One of the buildings located on the subject property is currently being used for the fabrication of truck parts and accessories for log trucks and other trucks. Record 103. The applicant provided a brief summary of the past and current uses of the subject property, as follows:

> "In the early 1960's it was known as Jackknife having a store, machine shop and a steam engine sawmill. The 1964 Aerial shows the Machine shop, one small building and the Scale house. Publishers Paper purchased the site in 1967 for decking logs. The 1976 Aerial shows the log decking over much of the site. Times Mirror Land and Timber purchased the site in 1986 for log processing. Dover-Pacific purchased the site in 1990 for a log processing area. Ted Copher purchased the site in 1996 for the machine shop and storage use." Record 104.

The applicant described the current use of the machine shop and supporting buildings as follows:

[1] The applicant did not seek an amendment and rezoning of the entire 37.65 acres, acknowledging that approximately 18 acres of the entire parcel are in forest use.

> "This machine shop supported the logging industry since the late 1800's. Presently it is used to support the surrounding Forest and Farm equipment needs, as well as other companies' machine shop needs." Record 103.

The applicant sought an amendment to the Clackamas County Comprehensive Plan designation from "Forest" to "Rural," and a zone change from "Timber Resource District" to "Rural Industrial" for approximately 18 acres of the 37.65-acre parcel. The planning commission denied the application, and the applicant appealed to the BOC. The BOC approved the application, finding that a "physically developed" exception to Goal 4 was justified. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner asserts that the county improperly approved a "physically developed" exception to Goal 4. Because the subject property is designated "Forest," approval of the comprehensive plan amendment and zone change required the BOC to approve an exception to Goal 4 under Goal 2 and OAR chapter 660, division 4.[2] The BOC adopted a finding that an exception to Goal 4 was justified on the basis that the subject property is physically developed, and adopted a planning staff report as its findings and conclusions. Record 2, 38-41.

Under OAR 660-004-0025(1), in order to approve a physically developed exception, the local government must establish that "the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal." OAR 660-004-0025(2) provides guidance for local governments in determining whether land has been physically developed with uses other than those allowed by a goal:

> "Whether land has been physically developed with uses not allowed by an applicable Goal, will depend on the situation at the site of the exception. The

[2] The BOC also found that the subject property is not agricultural land, and therefore that Goal 3 did not apply. Petitioner has not challenged that finding.

> exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. *Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.*" OAR 660-004-0025(2) (emphasis added).

Petitioner asserts that the only uses for which the land has been developed were allowed uses under Goal 4 and the administrative rules. Therefore, Petitioner argues, the last sentence of OAR 660-004-0025(2) prohibits the county from relying on the existence of such uses in order to justify a physically developed exception.

The county's response is three-pronged. First, the county argues that the phrase "uses allowed by the applicable goal(s)" set forth in the rule should be limited by analogy to the uses set forth in OAR 660-004-0028(3), the administrative rule governing an "irrevocably committed" exception. Second, the county argues that the phrase should be interpreted to include only uses which are allowed *outright* under OAR 660-006-0025(1) and (2), but not other uses allowed on forest lands under OAR 660-006-025(3).[3] Third, the county maintains that although there were timber-related uses of the subject property in the past, the subject property has most recently been used for other purposes as an expanded non-conforming use, so that the current use is not a "use allowed by" Goal 4 under OAR 660-004-0025(2).

The county's attempt to rely on OAR 660-004-0028(3) by analogy is not persuasive. Under the "irrevocably committed" rule found at OAR 660-004-0028, a local government may grant an exception to the statewide planning goals if it can demonstrate that the property is "irrevocably committed to uses not allowed by the applicable goal because existing

[3] The county maintains that the applicant's current use of the subject property is at best a use found in OAR 660-06-0025(3), which conditionally allows certain uses.

adjacent uses and other relevant factors make *uses allowed by the applicable goal impracticable*." OAR 660-004-0028(1) (emphasis added). Further, under OAR 660-004-0028(3), a local government need only show that the following two categories of uses allowed by the applicable goal are "impracticable":

> "(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)."

Under OAR 660-004-0028(3), the Land Conservation and Development Commission (LCDC) specifically limited the phrase "uses allowed by the applicable goal" to *only* those listed in subsections (b) and (c) of the rule. LCDC as a matter of policy could have chosen to limit the "uses allowed by the applicable goal" that cannot be used to justify a "physically developed" exception, by adding limiting language, as it did in OAR 660-004-0028(3)(b) and (c). If there is any analogy to be drawn from OAR 660-004-0028(3)(b) and (c), the analogy works against respondent.

Similarly, we see no reason to interpret the phrase "uses allowed by the applicable goal" to exclude uses conditionally allowed in forest zones under OAR 660-006-0025, merely because such uses are subject to review to analyze impacts to adjacent forest lands. The rule contains an extensive list of uses authorized in forest zones. Under the rule, some uses *must* be allowed outright, some uses *may* be allowed outright, and finally, some uses may conditionally be allowed, depending on the impacts on nearby forest operations.[4]

In interpreting the meaning of an administrative rule, we apply the same principles of interpretation that are used to construe statutes. *Haskins v. Palmateer*, 186 Or App 159 , 164, 63 P3d 31 (2003) (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d

[4] *See Central Oregon Landwatch v. Deschutes County*, __ Or LUBA __ (LUBA No. 2006-098, September 25, 2006) for a discussion of the various categories of uses under OAR 660-006-0025.

1143 (1993)). Our starting point is to examine the text of the regulation itself to give effect to the intent of the enacting body. *Haskins*, 189 Or App at 166 (court will not insert language into administrative rule when the meaning of the rule was unambiguous). The meaning of the phrase "uses allowed by the applicable goal" is unambiguous and not limited by any other word or words, such as "outright" or "unconditionally," and we see no reason to add such words to the phrase as respondent suggests.

Finally, respondent argues that the current use of the property is not a "use allowed under the applicable goal" because it is an expanded nonconforming use.[5] Respondent relies on two parts of the record to support this argument. The first part is a statement by planning staff as reflected in the BOC meeting minutes that references a prior approval of an expansion of a nonconforming use. Record 9. The second part is an undated, unsigned, four-line note to the planning file for the application that is the subject of this appeal. Record 91.

The evidence in the record regarding the existence of a nonconforming use on the subject property is not sufficient to demonstrate that the current use of the property is a legal nonconforming use rather than a use allowed under Goal 4.[6] More importantly, even if the current use of the property is a legal nonconforming use, that fact may or may not be sufficient to demonstrate that a physically developed exception is justified. For example, if the property was originally developed and used for a use allowed by Goal 4, then the fact that those buildings are currently used for a use not allowed by Goal 4 may be immaterial. Respondent does not explain why, even if the current use of the property is a legal

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[5] Clackamas County Zoning Ordinance Section 202 defines "nonconforming use" as:

> "A use of any building, structure or land allowed by right when established or that obtained a required land use approval when established but, due to a change in the zone or zoning regulations, is now prohibited in the zone."

[6] Neither the application nor the staff report contain any discussion of the nonconforming use.

nonconforming use, that is sufficient to show that the use is not a "use allowed under the applicable goal."

The standard for approving a physically developed exception is demanding. *Sandgren v. Clackamas County*, 29 Or LUBA 454, 457 (1995). The BOC finding is not sufficient to demonstrate compliance with OAR 660-004-0025.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner withdrew his second assignment of error at oral argument.

THIRD ASSIGNMENT OF ERROR

Petitioner argues under this assignment of error that the county erred in concluding that the appropriate comprehensive plan designation under the Clackamas County Comprehensive Plan (CCCP) for the subject 18-acre area is "Rural Industrial" rather than "Forest."

The question of whether the subject 18-acre area is appropriately designated "Forest" or "Rural Industrial" under the CCCP depends, in the first instance, on the county's conclusion that the 18-acre area is subject to a physically developed exception to Goal 4. In sustaining the first assignment of error, we remand the decision to the county to re-evaluate whether the subject area qualifies for a physically developed exception consistent with the administrative rule, as construed in this opinion. That remand makes it premature, at least, to resolve the parties' arguments under the third assignment of error. Accordingly, we do not reach or resolve the third assignment of error.

The county's decision is remanded.