BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KELLY GORDON,
Petitioner,

vs.

POLK COUNTY,
Respondent.

LUBA No. 2007-047

FINAL OPINION
AND ORDER

Appeal from Polk County.

Kelly Gordon, Monmouth, filed the petition for review and argued on his own behalf.

No appearance by Polk County.

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

HOLSTUN, Board Chair, did not participate in the decision.

REMANDED 06/05/2007

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 county decision approving an application for a comprehensive plan amendment, zone map change, and an exception to Statewide Planning Goals 3 (Agricultural Land) and 4 (Forest Land).

FACTS

The subject property is a 33.69-acre parcel with a comprehensive plan map and zoning designation of Farm Forest (FF). The soils on the property are composed of Class IIE, IIIE, and IVE. Almost one-half of the property is composed of Class III and IV soils that are identified as high value soils pursuant to OAR 660-033-0020(8)(c)(D). Properties surrounding the subject property within a 2000-foot radius to the north, south, east, and west are generally designated FF or Rural Lands and are zoned FF or Acreage Residential – 5-acre minimum (AR-5). At least some of the properties within that radius are part of an existing exception area created by the county and approved by the Department of Land Conservation and Development when the county initially zoned lands within the county. Record 46. There is a large barn on the southeast edge of the property. Record 178.

The applicants applied to change the comprehensive plan map designation from FF to Rural Lands, and to change the zoning designation from FF to Acreage Residential 10-acre minimum (AR-10), in order to partition the property into three parcels and build three residences. The hearings officer conducted a hearing and recommended approval of the application, and the board of commissioners voted to approve the application and adopted the findings in the hearings officer's report. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Introduction

OAR 660-004-0028(1) provides that a local government may adopt an exception to a statewide planning goal when land is "irrevocably committed to uses not allowed by the

applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." *See also* ORS 197.732(1)(b) (same). Under OAR 660-004-0028(2), whether land is irrevocably committed "depends on the relationship between the exception area and the lands adjacent to it," considering the characteristics of the exception area, adjacent lands, the relationship between the two, and other relevant factors. The local government need not demonstrate that every use allowed by the applicable goal is "impossible," but must demonstrate that "[f]arm use as defined in ORS 215.203," "[p]ropagation or harvesting of a forest product" and "[f]orest operations or forest practices" are impracticable. OAR 660-004-0028(3). ORS 197.732(6)(b) provides that LUBA "shall determine whether the local government's findings and reasons demonstrate" that the standards of an irrevocably committed exception "have or have not been met[.]"

B. The County's Decision

In his first assignment of error, petitioner argues that the county misconstrued and violated applicable law, made inadequate findings, and made findings not supported by substantial evidence in determining that the property was irrevocably committed to uses not allowed in the FF zone. Petitioner's first assignment of error contains three "subparts," which we address in order.

1. Characteristics of the Exception Area

Petitioner's arguments in the first subpart challenges the county's findings under OAR 660-04-0028(2) regarding the characteristics of the exception area. However, those arguments are not particularly clear. Petitioner appears to argue that the county's findings that the subject property has been and is currently being used for hay production and forestry are inconsistent with its ultimate conclusion that an irrevocably committed exception is warranted, and that the county improperly limited its inquiry regarding the current agricultural and forestry uses on the site to "commercial" scale agriculture and forestry. However, petitioner's arguments under this subpart are not sufficiently developed to allow us

to decide this subpart. For example, petitioner does not cite us to any particular findings or evidence that are challenged. Without some assistance from petitioner, the arguments under the first subpart of the first assignment of error provide no basis for reversal or remand.

2. Relationship between the Exception Area and Adjacent Lands

Under the second subpart, petitioner challenges the county's analysis under OAR 660-004-0028(2)(c), which requires that the findings address "the relationship between the exception area and the lands adjacent to it." In his report, the hearings officer discussed the uses on lands within a study area of a 2000-foot radius from the subject property, concluding that because most of those properties have residences, "the proposed zone change would be consistent with the land uses and pattern of development in the area." Record 56. The hearings officer noted that:

> "Most of the large parcels in the vicinity have a residence, as well as some kind of agricultural use, including grasses and some grazing or forest uses. There are some woodlots on the far western edge of the study area. There are some abandoned fruit tree orchards (prunes) to the northeast and southeast in the study area. There are also some fruit trees associated with smaller lots, almost all of which are used primarily as residences." Record 55.

Those findings do not specifically discuss the lands *adjacent* to the subject property, as required by the rule, but instead rely on a study area that includes lands within a 2000-foot radius from the subject property. The rule requires findings and analysis of *adjacent* uses. *See Friends of Douglas County v. Douglas County*, 46 Or LUBA 757, 770 (2004) (the focus of the rule is the relationship between the subject property and adjacent uses, rather than uses approximately one-half mile from the subject property). Petitioner cites to evidence that most of the adjacent parcels are used for farm and forest uses, and the record indicates that some of the adjacent parcels are zoned FF, and others are zoned AR-5. Record 223. We agree with petitioner that it is the character of adjacent lands that is significant for purposes of OAR 660-004-0028(2)(c), and not the character of more distant lands elsewhere in the "vicinity" that the county apparently relied upon.

Moreover, petitioner argues that the county's findings merely cite to the existence of residential uses in the vicinity, and appear to presume that such residential uses conflict with or otherwise render resource use of the subject property impracticable, without citing to any evidence supporting that presumption. Some of those residences are located on lands that are zoned and used for agriculture or forestry. We agree with petitioners that the county's findings do not adequately explain why the relationship between the exception area and adjacent lands commit the subject property to non-resource uses, even assuming that the character of those adjacent lands were primarily "residential." The mere presence of adjoining residential uses is not sufficient to conclude that resource lands are irreversibly committed to non-resource uses. The second subpart of the first assignment of error is sustained.

3. Resource Use of the Exception Area is Impracticable

Under the third subpart, petitioner argues that under OAR 660-040-0028(3) the county was required to, but did not, find that "farm uses as defined in ORS 215.203," "propagation or harvesting of a forest product" and "forest operations or forest practices" are all impracticable. Petitioner also argues that the county misconstrued the applicable provisions of the rule in limiting its discussion and analysis to the practicability of commercial farm and forestry uses. Petitioner argues that "the suitable analysis is not one of commercial viability" and that "[i]f a farmer can obtain 'gross income' from farm use on the subject property, then resource use is practicable, and an exception is unwarranted." Petition for Review 10.

In his report, the hearings officer noted that although an approximately 5-acre portion of the subject property is a woodlot containing older Douglas Fir, that forested area is close to a stream and the required stream buffers make that area too small for *commercial* forestry use. Record 56 (emphasis added). The findings also note that non high-value soils limit potential forest uses and that the high value soils located on the property are "isolated" in the

middle of the property. The findings conclude that "[t]his type of resource use is impractical due to size and due to isolation within a surrounding residential community." Record 56.

The findings also discuss several types of "farm uses," including nurseries and irrigated and dry orchards. The findings explain that there is not sufficient water available for those uses, and that the parcelization present in the vicinity creates potential for tree and shrub diseases. The findings also speculate regarding potential conflicts between those farm and forestry uses and neighbors due to dust, slow-moving vehicles, and spraying.

After discussing the various reasons why farm and forest uses are impracticable, the hearings officer concluded:

> "The dominance of smaller-acreage rural residential uses in this area, as opposed to resource uses, make resource uses impracticable at this site."
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> " * * * * *
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> "* * * The original large farms in the foothills to the north of the City of Dallas have long since been divided into smaller parcels. As noted, the average parcel size for the 66 parcels in the [2000 foot radius study area] surrounding [the subject property] is 12.6 acres. The majority of the property consists of non high-value soils, which from the soil standpoint, is not a typical resource land site. The best soils are on the steepest terrain on this property, and isolated in the middle of the property. These are practical difficulties for resource use of the site." Record 57-58.

We agree with petitioner that the above findings are inadequate to explain why the activities specified in the rule are "impracticable," especially in light of evidence in the record that the property is currently in hay production, contains at least 5-acres of Douglas fir and white oak trees, and includes soil types consistent with growing ponderosa pine. Although it is not entirely clear, the findings that rely mainly on testimony and evidence from commercial orchard operators indicate that the hearings officer considered the practicability of those farm uses only on a commercial scale. Record 57. In addition, although the findings speculate regarding conflicts with spraying and dust, they cite to no evidence that such conflicts have hindered resource use of the subject property.

We also agree with petitioner that the county improperly limited its analysis of whether the uses specified in the rule are practicable to commercial activities. The test under the rule is not whether the property is capable of supporting "commercial" levels of agriculture. *Lovinger v. Lane County*, 36 Or LUBA 1, 18 (1999).

However, the correctness of petitioner's second assertion quoted above, that an exception is unwarranted if a property can obtain "gross income" from a farm activity, is less clear. After the petition for review in this case was submitted, the Oregon Supreme Court decided *Wetherell v. Douglas County*, __ Or __, __ P3d__ (May 24, 2007). In *Wetherell*, the Court invalidated an administrative rule that precluded counties from considering "profitability or gross farm income" for purposes of determining whether land is agricultural land under Goal 3 as being inconsistent with the definition of "farm use" at ORS 215.203(2)(a). *Id*. at __ (slip op 9). The court concluded that "in determining whether land is 'suitable' for 'farm use' – defined in ORS 215.203(2) as 'the current employment of land for the primary purpose of obtaining a profit in money' by engaging in specified farm or agricultural activities – a local government may not be precluded from considering the costs or expenses of engaging in those activities." *Id*. at __ (slip op 8).

Given the limited briefing in the present case, we decline to speculate on how the holding in *Wetherell* might apply to the somewhat similar task of determining whether farm uses as defined in ORS 215.203(2)(a) are "impracticable" on the subject property under OAR 660-004-0028(3). On remand, the county may, if presented with arguments or evidence based on *Wetherell*, consider in the first instance whether and how the holding in that case applies to the proposed irrevocably committed exception.

The third subpart of the first assignment of error is sustained.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner argues that the county's findings are inadequate to show compliance with OAR 660-004-0028(4) and (6)(a) through (c). OAR 660-004-0028(4) requires findings that address all applicable factors of OAR 660-004-0028(6). The latter rule requires that local governments address, among other things, parcel size and ownership patterns of the exception area and adjacent lands, and natural or man-made features or other impediments that separate the exception area from adjacent resource land.[1]

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[1] OAR 660-004-0028(6) provides, in relevant part:

"Findings of fact for a committed exception shall address the following factors:

"(a) Existing adjacent uses;

"(b) Existing public facilities and services (water and sewer lines, etc.);

"(c) Parcel size and ownership patterns of the exception area and adjacent lands:

"(A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the Goals were made at the time of partitioning or subdivision. Past land divisions made without application of the Goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors make unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. Resource and nonresource parcels created pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for land adjoining those parcels;

"(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably

A. OAR 660-004-0028(6)(a) and (c)

Petitioner challenges the county's findings, arguing that the county was required under OAR 660-004-0028(6)(a) to address existing adjacent uses, which, petitioner notes, the record shows include farm and forest uses. Petitioner also argues that the county misconstrued OAR 660-004-0028(6)(c)(B) when it failed to analyze smaller parcels in contiguous ownership, instead merely noting that there are 66 parcels within a 2000-foot radius with a median size of 12.6 acres. Petitioner argues:

> "* * * such abstract parcel size summaries are not a reliable indicator of capacity of any given tract for resource use. Identification of substandard parcel size without an explanation of why the size of the parcels would interfere with the resource use in the exception area does not justify an irrevocably committed exception." Petition for Review 12-13.

We agree with petitioner. First, in its findings under this subsection of the rule, the county analyzed uses within a 2000-foot radius of the subject property and, apparently, beyond that area in some cases. As noted above, under the rule, the county's findings must focus on existing *adjacent* uses, and parcel size and ownership patterns of the subject property and *adjacent* lands. Absent findings analyzing the lands adjacent to the subject property, those findings are inadequate. Second, we agree with petitioners that the county erred in considering only parcel sizes and not ownership patterns. OAR 660-004-0028(6)(c) requires consideration of both "parcel size and ownership patterns." Finally, if the county chooses to rely on parcel size and parcelization patterns to justify an irrevocably committed exception, it must make the findings required by OAR 660-004-0028(6)(c). The county has not done so.

B. OAR 660-004-0028(6)(b)

Petitioner also argues that the county's findings regarding OAR 660-004-0028(6)(b) are inadequate because the county has not explained whether the availability or lack of public

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> committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations."

facilities has committed the property to non-resource use. The county found that the property is currently served by and would continue to be served by wells and septic/drainfield systems, and that there are adequate public facilities and services available for the proposed parcels.

The focus of OAR 660-004-0028(6)(b) is on whether existing public facilities and services on or near the subject property commit the subject property to non-resource uses, not on whether public facilities and services are available to serve the proposed non-resource uses. *Friends of Linn County v. Linn County*, __ Or LUBA __ (LUBA No. 2006-202, March 6, 2007, slip op 14). It is difficult to tell from the county's findings what analysis it engaged in regarding whether the public facilities and services it identified commit the property to non-resource uses under OAR 660-004-0028(6)(b). We agree with petitioner that the county has not adequately addressed OAR 660-004-0028(6)(b).

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, petitioner argues that the county's decision fails to comply with OAR 660-004-0018(2). OAR 660-004-0018(2) requires that zoning applied to lands that are subject to "irrevocably committed" exceptions shall limit uses, densities and services to those that "will not commit adjacent or nearby resource lands to non-resource use" and that "are compatible with adjacent or nearby resource uses."[2] The purpose of

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[2] OAR 660-004-0018(2) provides, in relevant part:

> "For 'physically developed' and 'irrevocably committed' exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those:
>
> "* * * * *
>
> "(b) That meet the following requirements:
>
> "* * * * *

OAR 660-004-0018(2) is to ensure that physically developed and irrevocably committed exceptions do not have the effect of committing further resource lands in the area to non-resource use. *Friends of Linn County*, slip op 18.

Petitioner argues that the county's findings fail to explain why the AR-10 zoning applied to the subject property or the additional residential uses allowed under that zoning will not "commit" adjacent resource lands to non-resource uses. Here, the county appears to have concluded that residential use of properties in the vicinity of the subject property and smaller average parcel sizes of those properties have committed the subject property to non-resource use, and also concluded that residential uses of the subject property will not commit other adjacent properties to non-resource use. Although those conclusions are not necessarily inconsistent, the county must provide some explanation, supported by the record, for why residential uses that commit one resource property to residential use will not result in that same residential use committing other resource lands in the area. *Id.* (county's reliance on minimum parcel size and topographic separation of the subject property from adjacent resource zoned land is a sufficient explanation for why residential use of the exception area would not commit adjacent lands to non-resource use).

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

In his fourth assignment of error, petitioner argues that the county was required to but did not determine whether Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) applied to the application for a zone and map change. Petitioner also argues that the

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> "(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and
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> "(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses[.]"

county was required to analyze the effect of the proposed zone and map change on existing wetlands on the subject property and submit a management plan for the wetlands.

The county found in relevant part:

> "The subject property does not contain significant resource areas inventoried on the Polk County Significant Resource Areas Map. The unnamed stream running from north to south through the subject property is identified on the National Wetland Inventory Dallas quad map as riparian wetland. The applicants are not proposing development activity as part of this application. Prior to development on the subject parcel, local, state and federal permits may be required. The applicants would be required to submit a management plan to the Polk County Planning Division for any development activity, pursuant to [Polk County Zoning Ordinance] 182.040 and 182.050. The property owners would be required to coordinate the required management plan with the Oregon Division of State Lands." Record 50.

Petitioner does not challenge the above finding that the property does not contain resource areas inventoried on the county's acknowledged inventory of Goal 5 resources. If the exception area does not include land on the county's acknowledged inventory of Goal 5 resources, Goal 5 need not be applied, and the county need not adopt an exception to Goal 5. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 522 (1994); OAR 660-023-0250(3) (a local government is not required to apply Goal 5 in consideration of a plan amendment unless the amendment affects a Goal 5 resource).

Petitioner also does not explain why the county's finding quoted above, that a management plan for the wetlands located on the property is not required at present but will be required prior to development of the properties, is inadequate. Accordingly, we reject petitioner's contention that the county erred in failing to require a management plan for the wetlands at this stage of development.

The fourth assignment of error is denied.

The county's decision is remanded.