BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KELLY GORDON,
*Petitioner,*

vs.

POLK COUNTY,
*Respondent,*

and

CHRIS WRIGHT,
*Intervenor-Respondent.*

LUBA No. 2007-102

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.

Mark D. Shipman, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Saalfeld Griggs, PC.

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

BASSHAM, Board Member, did not participate in the decision.

REMANDED 09/18/2007

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 map amendment, zone map change, and exceptions to Statewide Planning Goal 3 (Agricultural Land), Goal 4 (Forest Land), and Goal 14 (Urbanization).

## MOTION TO INTERVENE

Chris Wright, the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is granted.

## FACTS

The subject property is a 26.28-acre parcel with a comprehensive plan map and zoning designation of Farm Forest (FF).[1] Properties surrounding the subject property to the north, south, east, and west are designated and zoned FF. Two roads cross the property and provide access to several adjacent and nearby parcels. A spring that serves as the domestic water source for nearby properties is located on the property.

The applicant applied to change the comprehensive plan map designation from FF to Rural Lands, and to change the zoning designation from FF to Acreage Residential 5-acre minimum (AR-5), in order to partition the property into five parcels so that a dwelling could be constructed on each new parcel. The hearings officer conducted a hearing and recommended approval of the application. 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

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

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[1] The FF zone is a zone that implements Goal 3 and Goal 4.

1 by the applicable goal impracticable." Under OAR 660-004-0028(2), whether land is
2 irrevocably committed "depends on the relationship between the exception area and the lands
3 adjacent to it," considering the characteristics of the exception area, adjacent lands, the
4 relationship between the two, and other relevant factors. In his first assignment of error,
5 petitioner argues that the county improperly described the characteristics of the exception
6 area and the characteristics of adjacent lands in determining that uses allowed by Goal 3 and
7 Goal 4 are impracticable under OAR 660-004-0028(2). Intervenor answers that the county's
8 findings describing the exception area and the lands adjacent to it are adequate to show that
9 the uses allowed by Goal 3 and 4 are impracticable.

10 The county's findings regarding the characteristics of the subject property describe
11 the size, shape, and soil composition of the property. The findings note that a 60-foot wide
12 road easement bisects the property and a smaller road is located on the property. The
13 findings note that the property contains a spring that serves as the domestic water source for
14 other properties in the vicinity. The findings also state that the property has "not been
15 actively used for a farm and/or forest operation." Record 45. The county's findings
16 regarding the characteristics of adjacent lands explain that those lands are accessed over the
17 60 foot easement on the subject property, that all of the twelve adjacent properties are zoned
18 FF, and that eight of those parcels contain dwellings. The findings also discuss the average
19 size of those properties as being smaller than the subject property.

20 In describing the relationship between the subject property and the adjacent lands, the
21 findings state:

22 "[a]pplicant contends it is apparent that the current relationship between the
23 proposed exception area and the lands adjacent to it is one of service. The
24 proposed exception area contains vital transportation facilities that serve as
25 the primary access point for adjacent uses. It also contains a spring that
26 serves as the domestic water source for properties located in Salt Creek.
27 These site improvements and the surrounding residential development pattern
28 make resource use of the property cost prohibitive and disruptive to
29 neighboring uses." Record 46.

1 We agree with petitioner that the county's findings do not adequately explain why the
2 relationship between the exception area and adjacent lands commits the subject property to
3 non-resource uses. The county concludes without explanation that the roads and the spring
4 located on the subject property make resource use of it impracticable. The county also
5 appears to presume that the residential uses that exist on adjacent lands mean that resource
6 use of the subject property is impracticable, without citing to any evidence supporting that
7 presumption. The record does not indicate whether the dwellings on adjacent lands are
8 resource or nonresource dwellings, or dwellings that existed prior to zoning. Moreover, the
9 evidence in the record indicates that all of the adjacent properties are zoned Farm/Forest, and
10 that ten of the twelve adjacent parcels receive a forest deferral exemption from property
11 taxes, indicating that those properties are at least partially in forest use. Record 43-44, 143.
12 The county's findings are inadequate to explain why existing adjacent uses and other
13 relevant factors make uses allowed by the applicable goal "impracticable." *See Gordon v.*
14 *Polk County*, __ Or LUBA __ (LUBA No. 2007-047, June 5, 2007, slip op 5) ("[t]he mere
15 presence of adjoining residential uses is not sufficient to conclude that resource lands are
16 irreversibly committed to non-resource uses").

17 In his first assignment of error, petitioner also alleges that the county erred in
18 determining that under OAR 660-004-0028(3), use of the subject property for "[f]arm use as
19 defined in ORS 215.203," "[p]ropagation or harvesting of a forest product" or "[f]orest
20 operations or forest practices" is impracticable, by limiting its analysis to those activities on a
21 commercial scale. Intervenor answers that the county's findings are adequate and supported
22 by substantial evidence in the record.[2]

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[2] The county found:

> "Applicant states that, as indicated in the Soil Survey of Polk County, the subject property is unfit for farm use. Propagation and harvest of forest products is not defined in OAR 660-033-0120. Under OAR 660-006-0025(2)(a), forest operations or forest practices include, but are not limited to, reforestation of forestland, road construction and maintenance, harvesting

1 We agree with petitioner that the county's findings are inadequate to explain why the
2 uses described in OAR 660-004-0028(3) are impracticable. First, the findings state that the
3 applicant claimed in the application that the subject property is "unfit for farm use," but the
4 findings do not contain an explanation as to whether or why the county concluded that "farm
5 uses as defined in ORS 215.203" are impracticable, particularly in light of the presence of
6 soils specified in OAR 660-033-0020(8)(c)(D) on the subject property.[3] Second, the
7 evidence in the record from applicant's forester indicates that the soils on the property are
8 suitable for growing Douglas Fir trees, and the findings do not explain why, in light of this
9 evidence, forest uses of the property are impracticable. Record 154-155. Finally, it appears
10 that the county improperly limited its analysis of whether the uses specified in the rule are

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of a forest tree species, application of chemicals, and disposal of slash. To determine whether forest product propagation and harvest, and forest operations or practices are practicable on the subject property or on a portion of the property, forest products need to be defined. OAR 660-033-0130(6) provides the following forest products definition in relation to a 'facility for the primary processing of forest products':

"* * * * *

"Timber, then, is the focus of forest products for land use purposes on forestland. Just as the farm use definition contemplates more than just growing crops, and includes a purpose of obtaining a profit in money, timber implies more than just growing trees, and imputes a purpose of obtaining a profit in money as well.

"Applicant maintains that since the area was zoned FF in 1981, six additional parcels located directly downslope of the subject property were created for non-resource use. The parcels were created through the following land use actions: LD-90-002 & CU90-011 and LD-91-10 & CU-91-34. The Hearing Officer who decided those cases supported approval of the non-resource land divisions because of the parcelization and land use pattern of the surrounding area. Further, the Hearings Officer who decided those cases found that the subject land division applications would not interfere with accepted resource uses on adjoining lands because of the lack of commercial scale resource operations in the surrounding area.

"Application notes that Polk county recognized the land use pattern and character of the surrounding area as being rural residential, rather than resource based. As such, the proposed exception area was not adequately protected from the adverse impacts of additional residential development in the surrounding area. The safety measures needed to protect this residential development from landslide hazards, coupled with the site preparation needed to protect Buzzard Spring from contamination, result in forest use of the subject property being cost prohibitive and impracticable." Record 46-47.

[3] The soils on the property are composed of Class IIE, IIIE, IVE, and VIE. Approximately 33% of the property is composed of Class II and III soils, which means the property is "high value farmland" as defined in OAR 660-033-0020(8). Record 30. OAR 660-033-0090 limits uses on land identified as high value farmland.

1 impracticable to whether those activities can be performed on a commercial scale. The test
2 under the rule is not whether the property is capable of supporting "commercial" levels of
3 agriculture. *Lovinger v. Lane County*, 36 Or LUBA 1, 18 (1999).

4 The first assignment of error is sustained.

5 **SECOND ASSIGNMENT OF ERROR**

6 In his second assignment of error, petitioner argues that the county's findings are
7 inadequate to show compliance with OAR 660-004-0028(4) and (6). Intervenor responds
8 that petitioner is raising issues regarding those rules for the first time in his petition for
9 review, and that such issues are therefore waived under ORS 197.763(1).[4] Petitioner has not
10 responded to intervenor's assertion that petitioner failed to raise issues regarding compliance
11 with those rules during the proceedings below. Therefore, petitioner is precluded under ORS
12 197.763(1) from raising the issues presented in his second assignment of error.

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 In his third assignment of error, petitioner argues that the county's decision fails to
16 comply with OAR 660-004-0018. OAR 660-004-0018(2) requires that zoning applied to
17 lands that are subject to "irrevocably committed" exceptions shall limit uses, densities and
18 services to those that "will not commit adjacent or nearby resource lands to non-resource
19 use" and that "are compatible with adjacent or nearby resource uses."[5] The purpose of

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[4] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

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

1 OAR 660-004-0018(2) is to ensure that physically developed and irrevocably committed
2 exceptions do not have the effect of committing further resource lands in the area to non-
3 resource use. *Friends of Linn County v. Linn County*, 53 Or LUBA 420, 439 (2007).

4 Petitioner argues that "[t]he proposed use of this land is inconsistent with what is
5 occurring on the immediate adjacent lands. Creation of an isolated parcel of AR-5
6 residential property surrounded by FF resource land would promote conversion of
7 surrounding resource land to non-resource land." Petition for Review 16. Apparently
8 relying in part on the existence of an AR-5 zone in nearby proximity to the subject property,
9 and in part on the existence of dwellings on the majority of the adjacent properties, the
10 county found that the proposed use of the property for residential uses will not differ from
11 the way that adjacent lands are being used.[6]

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> "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:
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> "* * * * *
>
> "(b) That meet the following requirements:
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> "* * * * *
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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
>
> "(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses[.]"

[6] The county found:

> "* * * The proposed use, density, public facilities and services will be compatible with adjacent and nearby resource uses. * * * There are twelve properties that are contiguous to the subject property. These properties range from 3.34 acres to 25 acres. The average size of these properties is 9.25 acres, and the median size of surrounding properties is 5.40 acres. According to the Polk County Assessor records, seven of these contiguous properties contain a residential dwelling (one parcel contains two dwellings), and another two were approved for dwellings in 2005. * * *
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> "All properties contiguous to the subject property are zoned Farm/Forest. Properties approximately 500 feet south and 760 feet east of the subject property are located within the

1 Intervenor maintains that the findings are adequate to show that the proposed
2 exception will not commit adjacent land to non-resource use. However, the county's
3 reasoning in the present case is nearly identical to the reasoning that we rejected in *Gordon v.*
4 *Polk County*:

5 "Here, the county appears to have concluded that residential use of properties
6 in the vicinity of the subject property and smaller average parcel sizes of those
7 properties have committed the subject property to non-resource use, and also
8 concluded that residential uses of the subject property will not commit other
9 adjacent properties to non-resource use. Although those conclusions are not
10 necessarily inconsistent, the county must provide some explanation, supported
11 by the record, for why residential uses that commit one resource property to
12 residential use will not result in that same residential use committing other
13 resource lands in the area." *Gordon v. Polk County*, __ Or LUBA __ (LUBA
14 No. 2007-047, June 5, 2007, slip op. 11) (citing *Friends of Linn County v.*
15 *Linn County*, 53 Or LUBA 420 (2007)).

16 In the present case, as noted above, all of the adjacent properties are resource lands that are
17 designated and zoned Farm/Forest, and the majority of those lands receive a forest deferral
18 from property taxes. Even if a majority of those parcels contain dwellings, the record does
19 not contain information as to whether the dwellings predate or post-date zoning of those
20 properties or whether they were approved as resource or nonresource dwellings. The county
21 has not adequately explained why residential uses that commit the subject property to
22 residential use will not result in that same residential use committing other resource lands in
23 the area to residential use.

24 The third assignment of error is sustained.

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AR-5 zone, and the property approximately 360 feet north of the subject property is located within the [Timber Conservation] zone. The AR-5 zone is a residential zone that has a five-acre minimum parcel size and permits one dwelling per parcel. The [Timber Conservation] zone is a resource zone that has an 80-acre minimum parcels size and restricts the establishment of dwellings on properties in that zone. The subject property is located within an area where uses tend to be predominantly residential to the south, east, and west, and resource based to the north of the subject property. * * *" Record 42-43.

**FOURTH ASSIGNMENT OF ERROR**

In his fourth assignment of error, petitioner argues that the county's findings are inadequate to show compliance with Polk County Zoning Ordinance (PCZO) 115.050. In pertinent part, PCZO 115.050 requires that the county determine that the current plan designation for the subject property is no longer appropriate due to changing conditions in the surrounding area, and that the proposed plan designation conforms to the intent of relevant plan policies and goals. PCZO 115.050(A)(2) and (3).

Regarding PCZO 115.050(A)(2), the county found that criterion was met in part because the county has approved property line adjustments in the vicinity of the subject property that created parcel sizes that are similar to the size of the proposed parcels on the subject property. Aside from mentioning that finding, petitioner does not explain why that finding is error. As such, petitioner states no basis for finding error in the county's finding regarding PCZO 115.050(A)(2).

Regarding PCZO 115.050(A)(3), the county found that the existence of the spring on the subject property makes resource use of the property "cost prohibitive" due to required stream buffers, and thus, no longer available for resource uses. The county also found that there is no existing forest resource on the subject property, and that the property is not suitable for commercial forest use "given the rural residential character of the surrounding area* * *." Record 32-33. Petitioner challenges these findings and points to evidence in the record that the property contains soils suitable for growing Douglas Fir, and other "high value soils" suitable for agriculture, and that all of the adjacent properties are zoned FF.

The county's findings that the existence of the spring make forest practices "cost prohibitive" do not explain how the proposal to remove the subject property from a resource designation is consistent with the intent of the goals and policies of the Polk County Comprehensive Plan for agricultural lands, and the purpose and intent of the FF zone. Also, the county's finding that resource use of the property on a commercial scale is "cost

1 prohibitive" applies an inappropriate standard. The test under the applicable rules is not

2 whether the property is capable of supporting "commercial" levels of agriculture or forestry.

3 The fourth assignment of error is sustained, in part.

4 The county's decision is remanded.