BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANCEFIELD FARM CO.,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2007-188

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Michael C. Petersen, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Heltzel, Upjohn, Williams, Yandell, Roth, Smith & Petersen, P.C.

No appearance by Yamhill County.

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

REMANDED 06/26/2008

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 county approval of a comprehensive plan amendment from Agriculture/Forestry Large Holding to Very Low Density Residential (VLDR), and a zone change from Exclusive Farm Use 80 (EF-80) to VLDR 2.5, by taking an irrevocably committed exception to Statewide Planning Goals 3 (Agricultural Land) and 14 (Urbanization).

FACTS

The subject property is a 3.15-acre parcel zoned EF-80, located near to the City of Amity. The majority of the property (81%) is composed of Woodburn Silt Loam Class II soil that is identified as high value soils pursuant to OAR 660-033-0020(8)(c)(D). The property receives agricultural tax deferral, and until 2006 was used to pasture sheep.

Property to the east, across a Southern Pacific Railroad track, is inside city limits and the urban growth boundary and developed with residences. To the north of the subject parcel lies a 2.15-acre property owned by the applicant that is zoned EF-80 and developed with a single-family residence. The property to the south of the subject parcel is 7.33 acres and predominately zoned EF-80. A small portion of the property to the south is zoned Lower Density Residential (LDR) and developed with a single family dwelling. The subject property is bordered on the west by Salt Creek, and lies partially within the floodplain of the creek. Across Salt Creek lies a 150-acre farm parcel owned by petitioner, part of a large-scale farming operation.

The applicant applied to the county for comprehensive plan and zoning map amendments based on an irrevocably committed exception to Goal 3 and an exception to Goal 14, with the apparent intent of establishing one single family dwelling on the property. The planning commission recommended approval and on September 5, 2007, the board of commissioners approved an ordinance adopting the requested plan and zoning amendments,

pursuant to the requested exceptions. This appeal followed.

INTRODUCTION

OAR 660-004-0028 provides the criteria for determining whether a parcel can qualify for an irrevocably committed exception. OAR 660-004-0028(1) permits a local government to adopt an exception to a statewide planning goal "when the land subject to the exception 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* Goal 2 (Land Use Planning), Part II and ORS 197.732(1)(b) (same). Under OAR 660-0040-0028(2), whether the subject land is irrevocably committed "depends on the relationship between the exception area and the lands adjacent to it." The irrevocably committed exception must address certain factors, particularly the characteristics of the subject property, characteristics of the adjacent lands, and the relationship between the exception area and the adjacent lands.[1]

OAR 660-004-0028(3) requires that for an exception to Goal 3, the local government must demonstrate that "[f]arm use as defined in ORS 215.203" is impracticable in the exception area. Although the "impracticable" to farm standard is a high standard, OAR 660-004-0028(3) expressly provides that it is not the same as an "impossibility" to farm standard.[2] OAR 660-004-0028(6) sets forth additional factors that must be considered in

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[1] OAR 660-004-0028(2) provides:

> "Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:
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> "(a) The characteristics of the exception area;
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> "(b) The characteristics of the adjacent lands;
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> "(c) The relationship between the exception area and the lands adjacent to it; and
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> "(d) The other relevant factors set forth in OAR 660-004-0028(6)."

[2] OAR 660-004-0028(3) provides:

determining whether the uses allowed by the goal are impracticable in the proposed exception area.[3]

"Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(1)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule. Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible.' For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:

"(a) Farm use as defined in ORS 215.203;

"(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)."

[3] OAR 660-004-0028(6) requires that the findings of fact for a committed exception 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 makes 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. * * * ;

"(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. * * *

"(d) Neighborhood and regional characteristics;

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[.]"Under this standard of review LUBA is bound by any findings of fact that are supported by substantial evidence, but LUBA is not required to defer to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for an irrevocably committed exception. *Laurance v. Douglas County*, 33 Or LUBA 292, 297-99, *aff'd* 150 Or App 368, 944 P2d 1004 (1997).[4]

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under the first assignment of error petitioner argues the county made inadequate findings not supported by substantial evidence when concluding the property is irrevocably committed to uses not allowed in the EF-80 zone. Under the second assignment of error, petitioner contends the county misconstrued OAR 660-004-0028 in concluding the subject parcel is irrevocably committed to a nonresource use.

> "(e) Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;
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> "(f) Physical development according to OAR 660-004-0025; and
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> "(g) Other relevant factors."

[4] ORS 197.732(6) provides:

> "Upon review of a decision approving or denying an exception:
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> "(a) [LUBA] shall be bound by any finding of fact for which there is substantial evidence in the record of the local government proceedings resulting in approval or denial of the exception;
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> "(b) [LUBA] shall determine whether the local government's findings and reasons demonstrate that the standards of subsection (2) of this section have or have not been met; and
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> "(c) [LUBA] shall adopt a clear statement of reasons which sets forth the basis for the determination that the standards of subsection (2) of this section have or have not been met."

The applicant has not intervened in this appeal, and the county has not filed a response to the petition for review. For the following reasons, we agree with petitioner that the county's findings addressing OAR 660-004-0028(2) are inadequate and fail to demonstrate that the subject property is irrevocably committed to uses not allowed in the zone.

A. Irrevocably Committed Exception

The "fundamental test" for an irrevocably committed exception is whether "the relationship between the proposed exception area and the nearby parcels renders the proposed exception area impracticable for resource use," considering all the factors listed in OAR 660-004-0028. *Wetherell v. Douglas County*, 51 Or LUBA 730 (2006); *DLCD v. Curry County*, 151 Or App 7, 11, 947 P2d 1123 (1997).

Petitioner argues that the county's findings fail to address how the adjacent uses conflict with or affect the subject property and render farm use of the property impracticable, and are insufficient to demonstrate that the property is irrevocably committed to nonresource uses. We generally agree with petitioner that the county's findings addressing OAR 660-004-0028(2) are inadequate. However, we need not address the adequacy of those findings in detail because we also agree with petitioner that the findings as a whole do not demonstrate that the subject property is irrevocably committed to nonresource uses.

As petitioner notes, the findings do not identify any conflicts with adjoining uses or other reasons why the relationship between the subject property and adjacent uses renders the property irrevocably committed to rural residential use.[5] The subject property is

[5] The staff report findings addressing compliance with OAR 660-004-0028(2)(a) through (c) state:

> "*Characteristics of the exception area*: The proposed exception area is about 3.15 acres in size. The property slopes down to the west into Salt Creek. The western two-thirds of the property are in the 100-year Flood Hazard Overlay zone. The exception area is bordered by the City of Amity to the east and by Salt Creek to the west. The property has been used in the past as pasture.

predominately composed of high value soil as defined in OAR 660-033-0020(8)(c)(D), is in farm tax deferral, and has historically and until recently been used for grazing. The findings discuss the two small parcels and two dwellings to the north and south, but do not discuss how those parcels and dwellings were created and approved. Under OAR 660-004-0028(6)(c)(A), resource and nonresource parcels created pursuant to the applicable goals may not be used to justify a committed exception. Even if the adjacent parcels to the north and south were created prior to the goals, the findings identify nothing about those parcels or the dwellings thereon that limits or impacts resource use of the subject property. The mere existence of residential uses near a proposed exception area is not sufficient to demonstrate that the area is irrevocably committed. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 366 (2000).

Petitioner argues that the county focuses almost exclusively on the small size of the subject property and the purported difficulty of using the property in conjunction with the two adjoining EF-80 zoned parcels to the north and south, or with the 150-acre parcel across Salt Creek to the west. While the size of the subject property and the existence of natural

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> "*Characteristics of the adjacent lands*: Property to the east is inside the Amity City limits and contains developed urban residential parcels. Properties to the north and south are of a size similar to the applicant's parcel and are each developed with a single-family residence. Property to the west is part of a large scale farming operation. The property is planted with a grass or grain crop. This farming operation is physically separated from the subject parcel by Salt Creek.
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> "*The relationship between the exception area and the lands adjacent to it*: The proposed exception area is similar in character to the adjacent lands to the north and south that are each developed with a home-site. The use of the subject property has been for low intensity agriculture, predominately pasture. The natural feature of Salt Creek effectively separates the subject property from the resource property to the west (farm land) and the proposed urban use of the subject property will therefore not affect the farm land to the west and will not lead to the urbanization of that property across Salt Creek to the west. The lands to the east is in urban use, the parcel to the south cannot be accessed due to the existence of a ravine and therefore cannot be combined with the subject property. A significant portion of the 2.15 acre property to the north also owned by the applicant is within the 100 flood overlay zone and there is a ravine which separates the 2.15 acre parcel from the property north which is in separate ownership. These natural features make in impracticable to combine the subject property with other resource properties." Record 7-8.

barriers between the subject property and adjacent resource lands are appropriate considerations under OAR 660-004-0028(2)(a) and 660-004-0028(6)(e), given the history of grazing use on the subject property in isolation from adjacent resource lands, we agree with petitioner that the county has not established that size of the property, the existence of Salt Creek, or the "ravines" separating the property from the adjoining resource parcels to the north and south lend any particular support to the finding that the property is irrevocably committed to nonresource use.[6]

The findings also do not identify anything about the railroad track on the east side or the urban development further to the east that conflicts with or otherwise contributes to rendering the subject property irrevocably committed to nonresource use. As far as the findings or record establishes, the railroad track buffers the subject property from impacts of urban development within the city.

In sum, we agree with petitioner that the findings fail to demonstrate that the subject property is irrevocably committed to nonresource uses under the OAR 660-004-0028.

B. Goal 14 Exception

As noted, the county adopted an exception to Goal 14 as well as Goal 3. However, the petition for review does not specifically assign error to the Goal 14 exception, and we therefore do not consider it further.[7]

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[6] The findings do not explain why the "ravines" would significantly impede conjoined grazing use of the subject property with either or both of the properties to the north and south. The proposed access to the subject property is via the parcel to the north owned by the applicant. It is not clear why a driveway can be constructed across the intervening ravine but sheep are apparently unable to cross it.

[7] Although we need not and do not address the adequacy of the Goal 14 exception, we observe that it is not at all clear to us why the county believed an exception to Goal 14 is necessary. The decision at one point describes the proposed dwelling on a 3.15-acre parcel served by a septic system and an individual well as an "urban use." Record 8. However, the county elsewhere finds that the subject property is irrevocably committed to "rural residential use," and that the property is not "committed to an urban level of development." Record 8-9. It is not clear why an exception to Goal 14 would be necessary to facilitate the "rural residential use" the county found the property is committed to, or why the county believes that the single dwelling allowed under the proposed plan and zoning amendments constitutes an "urban use."

The first and second assignments of error are sustained.

The county's decision is remanded.