

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

3
4 GORDON SCOTT,
5 *Petitioner,*

6
7 vs.

8
9 CROOK COUNTY,
10 *Respondent,*

11
12 and

13
14 DOUG DENT,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-241

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Crook County.

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24 Gordon C. Scott, Jr., Prineville, filed the petition for review and argued on his own
25 behalf.

26
27 Heidi Bauer and David M. Gordon, Prineville, filed a joint response brief and David
28 M. Gordon argued on behalf of respondent. With them on the brief were Jeffrey M. Wilson
29 and Miller Nash LLP.

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31 Jeffrey M. Wilson, Prineville, filed a joint response brief and argued on behalf of
32 intervenor-respondent. With him on the brief were Heidi Bauer, David M. Gordon and
33 Miller Nash LLP.

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

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38 AFFIRMED

06/05/2008

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

NATURE OF THE DECISION

Petitioner appeals a county decision adopting an irrevocably committed exception to Statewide Planning Goal 3 (Agricultural Lands) to allow a 41-acre parcel to be rezoned from Exclusive Farm Use (EFU-2) to Rural Residential (R-5).

FACTS

The subject 41-acre property is lot 14 of the Ochoco Creek Resort Planned Unit Development (PUD). The property has 39 acres of irrigation rights, has Class III and IV agricultural soils, and is used to grow alfalfa. A large flooded gravel pit or pond occupies the center of the property. Other lots within the PUD border the subject property on the east, west and south, range from two to six acres in size, and are zoned and developed with residential uses. To the north is Highway 26. Across Highway 26 are several large parcels zoned and used for agriculture.

Intervenor-respondent (intervenor) applied to the county for an irrevocably committed exception to Goal 3, along with comprehensive plan and zoning amendments to allow the property to be divided and developed with residential uses. The application cited evidence of conflicts between agricultural use of the property and adjoining residential uses. The planning commission recommended denial of the application, based in part on a finding that identified conflicts were minor. The county court conducted a hearing and approved the application. This appeal followed.

ASSIGNMENT OF ERROR

In an order dated March 21, 2008, the Board allowed petitioner to file an amended petition for review to correct several deficiencies in the original petition for review, but disallowed pages 9-15 of the amended petition for review, which included several new arguments or assignments of error that were not presented in the original petition for review. As explained in the Board's March 21, 2008 order, the amended petition for review includes

1 no “assignments of error” denominated as such, but instead briefly lists six reasons or
2 arguments why petitioner believes the county’s decision should be reversed or remanded. As
3 intervenor notes, petitioner’s arguments are not particularly well-developed. We address
4 each argument and intervenor’s responses in turn.

5 **A. Characteristics of Existing Adjacent Uses**

6 Petitioner’s first argument appears to challenge the county court’s finding that the
7 “the characteristics of the existing adjacent uses are predominantly rural residential
8 subdivisions.” Record 5. Petitioner directs our attention to an aerial photograph at Record
9 235 that appears to show lands within a mile or more radius of the subject property, and
10 argues that the majority of the area shown on that aerial photograph is farmland rather than
11 rural residential land. In a footnote, petitioner quotes four headnotes from four LUBA
12 opinions.

13 The challenged county’s finding is apparently directed at OAR 660-004-0028(2)(b)
14 and (6)(a), which require the county to address the characteristics of adjacent lands and
15 existing adjacent uses. As intervenor notes, the focus of OAR 660-004-0028(2)(b) and (6)(a)
16 is on *adjacent* lands and uses, not the character of or uses in the larger area within a one-mile
17 radius of the subject property.¹ Petitioner’s argument that the larger area as a whole is

¹ OAR 660-004-0028 provides, in relevant part:

- “(2) 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:
 - “(a) The characteristics of the exception area;
 - “(b) The characteristics of the adjacent lands;
 - “(c) The relationship between the exception area and the lands adjacent to it; and
 - “(d) The other relevant factors set forth in OAR 660-004-0028(6).

“* * * * *

1 predominantly farmland does not demonstrate that the challenged finding is inadequate or
2 not supported by substantial evidence.

3 It is not clear what role the quoted headnotes play in petitioner’s first argument.
4 Understood generously, quotation of those headnotes suggest that petitioner believes that the
5 record does not support the county’s finding that conflicts or the relationship between farm
6 use of the subject property and adjacent residential uses make farm use of the property
7 impracticable. However, that presumed argument is too undeveloped to review. Without
8 some argument or focused challenge to the county’s findings regarding the relationship
9 between the subject property and adjacent lands, petitioner’s first argument provides no basis
10 for reversal or remand.

11 **B. Parcel Size and Ownership Patterns of the Property and Adjacent Lands**

12 Petitioner next challenges the county’s finding, directed at OAR 660-004-0028(6)(c),
13 that the parcel size and ownership patterns of adjacent lands support a finding that the subject
14 property is irrevocably committed to rural residential uses. Record 5. Petitioner argues
15 simply that “[p]arcel size and ownership patterns on adjacent lands indicate a preponderance

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- “(6) 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:

 - “(d) Neighborhood and regional characteristics;
 - “(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;
 - “(f) Physical development according to OAR 660-004-0025; and
 - “(g) Other relevant factors.”

1 of active farm use.” Amended Petition for Review 6. Again, without more developed
2 argument or a more focused challenge to the county’s finding, petitioner’s disagreement with
3 that finding provides no basis for reversal or remand.

4 **C. Neighborhood and Regional Characteristics**

5 Petitioner’s third argument challenges the county’s finding under OAR 660-010-
6 0028(6)(d), which concludes that neighborhood and regional characteristics indicate a
7 “predominance of rural residential development making farm use impractical.” Record 6.
8 Again citing to the aerial photograph at Record 235, petitioner argues that “[a] small cluster
9 of homes amid a vast expanse of farmland natural resources does not preclude normal
10 farming practices on any parcel in [the] area as is shown in Aerial Image on page 00235.”
11 Amended Petition for Review 6. We understand petitioner to argue that, viewed on the scale
12 of the aerial photograph at Record 235, the record indicates that the predominant
13 characteristic of the neighborhood and region is agricultural rather than rural residential.

14 Intervenor cites to testimony that 73 percent of the parcels within a one-mile radius of
15 the property are less than five acres in size, including 18 lots in the immediate vicinity of the
16 subject property that average 2.5 acres in size. While that testimony is not particularly
17 compelling evidence in itself that the character of the neighborhood and region is
18 predominantly rural residential rather than agricultural, we agree with intervenor that
19 petitioner has not demonstrated that the county’s finding to that effect is not supported by
20 substantial evidence. The county appears to have focused on the area in the immediate
21 vicinity of the subject property as the relevant neighborhood and region, while petitioner
22 appears to argue for a more expansive view of the neighborhood and region. However,
23 petitioner does not explain why the county must adopt that more expansive view or why the
24 aerial photograph at Record 235 so undermines the evidence the county chose to rely upon
25 that the county’s finding under OAR 660-004-0028(6)(d) is not supported by substantial
26 evidence.

1 **D. Features or Impediments Separating the Subject Property from Adjacent**
2 **Resource Land**

3 In addressing OAR 660-004-0028(6)(e), the county found in relevant part that
4 Highway 26 separates the subject property from farmland to the north. Record 6. Petitioner
5 argues:

6 “How can a State Highway be an impediment to [intervenor]? He farms no
7 adjacent property. Roads and Highways must make [it] easier to access his
8 fields for the other land he farms. The existing physical barriers to his parcel
9 were already there when he bought the property. All the development around
10 lot 14 is separated by a road that has two access points directly to [the] field.”
11 Amended Petition for Review 7 (footnote omitted).

12 In the omitted footnote, petitioner quotes a headnote from a LUBA opinion. The headnote
13 has no obvious correlation to the above-quoted argument.

14 Petitioner’s point seems to be that Highway 26 is not an “impediment” because
15 intervenor owns no farm land north of the highway and if he owns farm land elsewhere the
16 highway in fact makes it easier to access and use both sets of properties together. We agree
17 with intervenor that petitioner’s arguments on this point do not demonstrate reversible error.
18 OAR 660-004-0028(6)(e) requires the county to identify natural or man-made features or
19 impediments that separate the exception area from adjacent resource lands. *See* n 1. The
20 rule is not limited to adjacent resource properties that the applicant owns, so the fact that
21 intervenor does not own the farm land north of the highway and does not attempt to use the
22 subject property in conjunction with that farm land is immaterial. Similarly, the rule is
23 directed at adjacent resource lands, so whether intervenor owns non-adjacent farm land and
24 could use the highway to travel between those lands is immaterial.

25 The county’s finding does not explain why Highway 26 is an impediment to
26 conjoined use of the subject property and farm land north of the highway, but intervenor cites
27 to testimony to the effect that the physical barrier presented by the highway makes conjoined
28 use more difficult than would be the case if the highway did not separate the two parcels.
29 Petitioner does not dispute that testimony, or explain why the difficulty of conjoined use

1 presented by the highway separating the two parcels is not a relevant consideration for
2 purposes of addressing the OAR 660-004-0028(6) factors.

3 **E. Conflicts with Adjacent Residential Uses**

4 The county identified six types of conflicts with adjoining residential uses based on
5 testimony from the applicant and neighboring farmers, including a farmer who formerly
6 leased the subject property: (1) smoke associated with field burning, (2) dust from farming
7 activity, (3) noise from farm equipment, (4) irrigation water spraying or spilling onto
8 adjacent properties, (5) pesticide application, and (6) damage to crops and land from
9 trespassing.²

10 Petitioner appears to challenge the evidentiary basis for those identified conflicts.
11 For example, with respect to smoke associated with field burning, petitioner asserts that the
12 property has not been burned since acquired by intervenor. With respect to dust, petitioner
13 responds that dust is a fact of life in central Oregon. Petitioner advances similar comments
14 against each of the six identified conflicts.

15 Intervenor argues, and we agree, that petitioner’s disagreements with the city’s
16 finding regarding conflicts does not demonstrate reversible error. That intervenor has not
17 conducted field burning since acquiring the subject property does not mean that past or future
18 field burning is not a potential conflict with adjacent residential uses. Similarly, that dust is
19 prevalent in central Oregon does not mean that dust generated by farm equipment adjacent to

² For some reason, the county addressed conflicts between the subject property and adjoining residential uses under OAR 660-004-0028(6)(f), which allows the county to consider “[p]hysical development according to OAR 660-004-0025[.]” The county apparently understood the dwellings on adjoining residential lots to constitute “physical development” for purposes of OAR 660-004-0025. However, OAR 660-004-0025 is concerned with physical development of the *exception area*, or the subject property, not adjoining lands. OAR 660-004-0028(5) makes it clear that in considering an irrevocably committed exception, a county may consider the extent to which the subject property includes physical development that, in combination with the factors listed in OAR 660-004-0028(6), render the property committed to uses not allowed by the applicable goal. There is apparently no “physical development” of the subject property that would preclude agricultural use, with the possible exception of the gravel pit/pond in the center of the property. In any case, petitioner does not allege that the county erred in discussing conflicts between resource use of the property and adjoining uses under OAR 660-004-0028(6)(f) instead of under other, more pertinent factors, such as OAR 660-004-0028(6)(a), and we do not consider the question further.

1 residential dwellings is not a potential conflict, for purposes of OAR 660-004-0028. Absent
2 a more developed challenge to the county’s findings regarding conflicts, petitioner has not
3 demonstrated a basis for reversal or remand.

4 **F. Other Relevant Factors**

5 Under OAR 660-004-0028(6)(g), other relevant factors, the county court identified
6 two relevant factors to consider:

7 “The Court finds, pursuant to OAR 660-004-0028(6)(g), other factors relevant
8 to their decision. First, the Court finds it relevant that the Crook County
9 Comprehensive Plan, page 48, states that the County may permit subdivisions
10 on non-productive farm land. The Court also finds it relevant that a previous
11 lessee of the subject property found it to be not worth the cost of farming due
12 to previous neglect, excessive drainage, above normal fertilization
13 requirements, and the location of an old gravel pit in the center of the parcel.”
14 Record 6.

15 In his final argument, petitioner states that intervenor has taken two to three cuttings
16 of alfalfa from the subject property every year since he acquired it. Intervenor responds that
17 petitioner does not cite to any support in the record for his assertion that intervenor has taken
18 two to three cuttings of alfalfa from the property every year, or explain the significance of
19 that assertion. We agree with intervenor that without citation to the record, petitioner’s
20 unsupported assertion regarding the productivity of the subject property is insufficient to
21 demonstrate any error in the above-quoted finding.

22 Petitioner also argues that the testimony of the prior lessee is “immaterial” and that
23 intervenor should “make that claim and support it with fact.” Amended Petition for Review
24 7. Petitioner does not explain why the difficulties of agricultural use of the property as
25 testified to by the former lessee are not properly viewed as “other relevant factors” under
26 OAR 660-004-0028(6)(g), or explain why such testimony can only come from intervenor.

27 Finally, petitioner argues that intervenor’s burden of proof statement is “insufficient”
28 and that the staff report includes many factual errors. However, petitioner does not identify
29 any alleged insufficiencies in the burden of proof statement. Such general allegations do not

1 provide a basis for reversal or remand. With respect to the staff report, which the county
2 court did not adopt as part of its decision, petitioner identifies only two alleged inaccuracies,
3 a statement that the gravel pit/pond is a “dry irrigation pond,” and a statement that the
4 vegetation on the subject property consists of sage brush, junipers, native grasses, and alfalfa.
5 Record 49. Even assuming those statements are inaccurate, petitioner fails to demonstrate
6 that those staff statements played a role in the county court’s decision or that any essential
7 findings relied on them. Absent such a demonstration, petitioner’s arguments do not provide
8 a basis for reversal or remand.

9 The assignment of error is denied.

10 The county’s decision is affirmed.