BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COLUMBIA RIVERKEEPER,
Petitioner,

vs.

CLATSOP COUNTY,
Respondent,

and

SAM KARAMANOS and
J & S RESERVE, LLC,
Intervenors-Respondents.

LUBA No. 2009-118

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Brett VandenHeuvel, Hood River, and Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Clatsop County.

Seth J. King, Portland, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief were Michael C. Robinson, Roger A. Alfred and Perkins Coie LLP.

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

REMANDED 05/26/2010

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that approves a statewide planning goal exception and comprehensive plan and zoning map amendments.

MOTION TO STRIKE

Intervenors move to strike color copies of zoning maps that are attached to the petition for review. Black and white copies of those zoning maps are included in the record. Record 25-30. We deny the motion to strike and take official notice of the color copies of the zoning maps, although our review of those color maps has no bearing on our decision.

INTRODUCTION

Intervenors-respondents (intervenors) own approximately 129 acres of land a short distance north of the community of Westport, between the Westport Slough and the Columbia River. Until the county adopted the decision on appeal, approximately 55 of those acres were zoned Residential Agriculture – 1 (RA-1), which permits development of single family dwellings and requires a two-acre minimum lot size. Clatsop County Land and Water Development and Use Ordinance (LWDUO) 3.194(1). The remaining 74 acres of intervenors' property were zoned Open Spaces, Parks and Recreation (OPR). A sizeable portion of the property, in both the RA-1-zoned and OPR-zoned portions of the property, is wetlands. A map at Record 343 shows the former and approved zoning and the location of the wetlands.

Intervenors' request can be described as a request to (1) reduce the size of the RA-1-zoned portion of the property, (2) shift the location of the reduced RA-1-zoned portion of the property to include an upland area of the property that does not contain wetlands, and (3) zone the balance of the property, including the wetlands, Lake and Wetland (L&W). To accomplish the desired rezoning and realignment of the property the following actions were

approved.[1] First, eight of the 55 acres that were already zoned RA-1 retained that zoning and were unaffected by the rezoning. Second, the other 47.35 acres that were formerly zoned RA-1 were rezoned L&W. Third, 52.39 acres of the 74.24 acres formerly zoned OPR were rezoned L&W. Fourth, the remaining 21.85 acres formerly zoned OPR were rezoned RA-1. Those 21.85 acres are located adjacent to the eight acres that were already zoned RA-1, and as previously noted do not include wetlands. The four actions are set out below:

Acreage Involved	**Zone Change**
1. 8.00 Acres	RA-1 No change in zoning
2. 47.35 Acres	RA-1 to L&W
3. 52.39 Acres	OPR to L&W
4. 21.85 Acres	OPR to RA-1
Total = 129.59 Acres	

Statewide Planning Goal 14 (Urbanization) requires that local governments adopt urban growth boundaries (UGBs) to separate urban lands (lands inside UGBs) from rural lands (lands that lie outside UGBs). Goal 14 has been interpreted generally to prohibit urban uses of rural lands, unless an exception to Goal 14 can be justified. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 477, 724 P2d 268 (1986). The subject property is rural land. We understand the parties to agree that the first three of the above actions would not require a statewide planning goal exception to Goal 14 —presumably because they do not authorize urban use of rural land. However, the parties assume that the fourth rezoning action, the rezoning of 21.85 acres from OPR to RA-1, does require an exception to Goal 14.

The parties' assumption that rezoning 21.85 acres from OPR to RA-1 and allowing those acres to be developed residentially requires a Goal 14 exception is based on OAR 660-004-0040(7)(i). OAR 660-004-0040 is the Land Conservation and Development Commission's rule that explains "Application of Goal 14 to Rural Residential Areas." OAR

[1] Related comprehensive plan map amendments were also required, but like the parties we focus our discussion on the zoning map amendments.

660-004-0040(7)(i) requires that when a county designates "rural residential areas," it must do one of two things:

> "(A) Require that any new lot or parcel have an area of at least ten acres, or
>
> "(B) Establish a minimum size of at least two acres for new lots or parcels in accordance with the requirements for an exception to Goal 14 in OAR chapter 660, division 14. * * *"

The lots that intervenors plan to create from the newly rezoned 21.85 RA-1 zoned acres and the previously zoned 8 RA-1 zoned acres will be smaller than 10 acres, and could possibly be as small as two acres. For that reason, the parties assume that OAR 660-004-0040(7)(i)(B) requires approval of a Goal 14 exception.

Before turning to the parties' Goal 14 exception arguments, we first note that we question whether OAR 660-004-0040(7)(i)(B) applies in this case. By its terms, OAR 660-004-0040 applies to lands located outside UGBs "that are planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3 (*Agricultural Lands*), Goal 4 (*Forest Lands*), or both has been taken." It seems unlikely to us that the 21.85 aces of OPR zoned land qualify as land that is "planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3 (*Agricultural Lands*), Goal 4 (*Forest Lands*), or both has been taken." The challenged decision admittedly rezones the 21.85 acre for residential uses, but that decision does not adopt exceptions to Goals 3 or 4. If exceptions to Goals 3 or 4 have not been adopted for the 21.85 acres, it would appear that OAR 660-004-0040(7)(i) does not apply in this case.

If OAR 660-004-0040(7)(i) does not apply in this case, an exception to Goal 14 to rezone 21.85 OPR-zoned acres to allow those acres and an adjoining 8 acres that are already zoned for rural residential development to be developed into four 7+ acre lots, as intervenors appear to propose, would only be required if the factors discussed in *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or at 498-511 make such an exception necessary. Those factors include lot size, density, proximity to urban growth boundaries, and services that will

be needed for the residential development. It seems likely to us that a good case could be made that a rezoning action that permits approximately 30 acres of land to be developed into 7.5 acre residential lots does not authorize an urban use of rural land.[2]

But even if a Goal 14 exception is not required, an exception to Goals 3 or 4 might be necessary. Unless a Goal 3 or 4 exception was adopted when the OPR zoning was applied, which seems unlikely, an exception to Goal 3 would be necessary to now zone the 21.85 acres RA-1, if the 21.85 acres qualify as agricultural land. Given the location of the property between the Westport Slough and the Columbia River, it seems quite possible that the property's soils qualify as agricultural land.

Although we have the above-noted questions about whether the county correctly concluded that a Goal 14 exception is required by OAR 660-004-0040(7)(i) and whether a Goal 3 exception perhaps should have been adopted either in place of or in addition to the Goal 14 exception, we are in no position to answer those questions on our own. Petitioner does not argue that the county should have adopted an exception to Goal 3. No party argues that OAR 660-004-0040(7)(i) does not apply or that it does not require that the county approve a Goal 14 exception to approve intervenors' request. We therefore will assume, as the parties do, that a Goal 14 exception was required and that a Goal 3 exception was not required.

ASSIGNMENT OF ERROR

The petition for review includes a single assignment of error that is broken down into four subassignments of error. The state legal standards for exceptions appear in a number of different places and overlap significantly. ORS 197.732 (the statutory exception standards); Goal 2, Part II (the statewide planning goal exception standards); OAR chapter 660, division

[2] On the other hand, if the 29.85 acres could be developed into as many as two-acre lots as possible, which appears to be the case, then it is certainly possible that a Goal 14 exception might be required under the *1000 Friends of Oregon (Curry County)* factors, since that development will enlarge an existing subdivision to the north.

4 ("Interpretation of Goal 2 Exception Process"); OAR 660-012-0070) ("Exceptions for Transportation Improvements on Rural Land"); OAR chapter 660, division 14 ("Urban Development on Rural Lands"). Those different exception standards vary somewhat in their wording and level of detail. As the above discussion suggests, figuring out which exception standards apply and how they apply can be complicated. Assuming, as we do, that a Goal 14 exception is required in this case, OAR 660-014-040 is the more particular rule, and the rule that establishes the standards for the exception that is before us in this appeal. *VinCEP v. Yamhill County*, 215 Or App 414, 422-23, 171 P3d 368 (2007). This case is complicated somewhat because the decision and briefs also address exception standards that do not apply.

A. Inadequate Reasons

OAR 660-0014-0040 sets out standards for "Establishment of New Urban Development on Undeveloped Rural Lands." OAR 660-014-0040(2) provides:

> "A county can justify an exception to Goal 14 to allow establishment of new urban development on undeveloped rural land. Reasons that can justify why the policies in Goals 3, 4, 11 and 14 should not apply can include but are not limited to findings that an urban population and urban levels of facilities and services are necessary to support an economic activity that is dependent upon an adjacent or nearby natural resource."

Under OAR 660-014-0040(2), the county must provide one or more "reasons" "why the policies in Goal * * * 14 should not apply." In this case, the county was required to provide a reason why the Goal 14 prohibition on developing urban uses or an urban intensity of uses on rural lands should not apply here.

Petitioner argues the county provided inadequate reasons for the Goal 14 exception. The county did not rely on the reason set out at OAR 660-014-0040(2), but as intervenors point out, the reason set out in the rule is illustrative and is not exclusive. The county's findings addressing this criterion are set out below:

> "The proposed exception area is part of a larger proposal that is essentially a land swap. The applicant seeks to reconfigure the zoning to better reflect the extent of the wetlands on the site and to relocate RA-1 zoning to the upland

> areas that are currently zoned OPR. The area of RA-1 zoning will be reduced in size (55.35 ac to ~30 ac) and the area with the Comprehensive Plan designation of 'Conservation Other Resources' will be increased." Record 167.

Petitioner is correct that the finding that the new L&W zoning may offer superior protection to the wetlands on the site is not a reason to allow arguably urban density development on the 21.85 OPR-zoned acres that are rezoned RA-1. Applying L&W zoning to the formerly OPR and RA-1 zoned portions of the property where the wetlands are located can be done without approving an exception. However, the point the county appears to be making in the last sentence quoted above is that the 129 acre property, as it was zoned before the disputed decision, included 55.35 RA-1 zoned acres that could in theory be developed with two-acre lots. As rezoned, the 129 acre property now has only 29.85 acres zoned RA-1, and other county findings suggest those acres are only to be divided into four approximately 7.5-acre lots.

We do not see why a net reduction in potential development density on rural lands could not be a sufficient reason under OAR 660-014-0040(2) to allow the 21.85 OPR zoned acres to be rezoned to RA-1 to produce the proposed zoning reconfiguration. For example, if the 55.35 acres could be developed into as many as 27 residential lots, as some of the county's findings suggest, and the rezoning will leave the property capable of only being divided into four residential lots as other findings suggest, such a reduction in potential development density would seem to be a valid reason to grant an exception to Goal 14 to allow the 21.85 OPR zoned acres to be rezoned RA-1. The increase in residential density on 21.85 OPR-zoned acres would be more than off-set by the reduction in the total number of RA-1 zoned acres and the reduced density at which those 29.85 RA-1 zoned acres can be developed. In that circumstance, granting an exception to allow that reconfiguration and residential density reduction to be achieved would be more consistent with the policies of Goal 14 than applying Goal 14 to preclude the reconfiguration.

However, the county's findings and decision are simply too inconsistent regarding the development potential of the former 55.35 RA-1 zoned acres and the development potential of the resulting 29.85 RA-zoned acres. The county adopted the analysis in the June 2, 2009 staff report and the analysis in intervenors' application. Those analyses use different assumptions for pre-decision and post-decision development potential of the RA-1 zoned portion of the property. The county found that the development potential of the 55.35 RA-1 zoned acres range from "up to 27 dwelling units" (Record 168) to "more than twenty" (Record 307). However, in addressing the alternative location standard that is at issue in the next subassignment of error, the applicant's analysis seems to say the wetlands on the property may constrain potential development such that it might not even be possible to develop four dwellings on the 55.35 RA-1 zoned acres.[3] If the wetlands on the property and other constraints are such that the 55.35 RA-1 zoned acres can only be developed into a handful of lots, notwithstanding the two-acre minimum lot size, there is no real reduction in density to provide a reason for granting the Goal 14 exception.

It is also unclear how many lots the relocated 29.85 RA-1 zoned acres can be divided into under the challenged decision. The applicant appears to propose only four 7+ acre lots. Record 305. But the county's staff report seems to assume that the 29.85 acres can be divided into two-acre lots.[4] The decision does not appear to be conditioned on intervenors' developing the 29.85 acres with no more than four dwellings, and it appears that there is

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[3] That finding is as follows:

> "Under current Clatsop County land use regulations, the existing RA1-zoned land on tax lot 200 could accommodate the proposed use [meaning the four dwellings intervenors propose] without an additional exception. However, this would violate state and federal wetland regulatory programs, and would be inconsistent with the owner's desire to restore and enhance wetland habitat on the southern part of tax lot 200." Record 308.

[4] The county's findings include the following:

> "The RA-1 area will be reduced to approximately 30 acres (no more than 15 possible dwellings) with 22 acres within the requested exception area." Record 168.

nothing in the decision that would preclude dividing the 29.85 acres into two-acre lots. In fact the notice of decision to LCDC states that the 29.85 acres can be developed into up to 14 lots. Record 6. If the constrained 55.35 RA-1 zoned acres can only be developed with a few lots due to wetland constraints and the 29.85 RA-1 zoned acres can be divided into two-acre lots, the effect of the decision may be to significantly increase residential development on the property. In that case, there would be no reason to grant the Goal 14 exception.

It may be that the county intended to limit development of the 29.85 RA-1 zoned acres to four lots and it may be that despite development constraints posed by the wetlands on the 55.35 acres, the 55.35 acres could be developed into a sufficient number of lots that the approved zone change effects a significant reduction in development density potential. If so, the county can make that clearer on remand. Based on the current record and decision, there are simply too many inconsistencies and unanswered questions in the county's decision to establish a valid reason for a Goal 14 exception.

The first subassignment of error is sustained

B. Inadequate Alternatives Analysis

OAR 660-014-0040(3)(a) requires that the county show that the proposed urban development could not reasonably be accommodated inside an "urban growth boundary" or in an "existing rural community," since sites in these areas would not require an exception to Goal 14.[5] OAR 660-014-0040(3)(b) requires that intervenors consider other rural sites that would also require a Goal 14 exception for the proposed development and demonstrate that consequences of developing the proposed site, as compared to these other potential exception

[5] OAR 660-014-0040(3)(a) requires that intervenors and the county show:

> "That Goal 2, Part II (c)(1) and (c)(2) are met by showing that the proposed urban development cannot be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development in existing rural communities."

sites, are not "significantly more adverse."[6] The alternatives analyses required by OAR 660-014-0040(3)(a) and (b) can be a daunting task where there are many potential alternative sites for the proposed residential development. In its second and third subassignments of error, petitioner argues the county's findings regarding alternative sites are inadequate.

Because we have already concluded that intervenors failed to establish a valid reason for the requested Goal 14 exception, the county's decision must be remanded without regard to the adequacy of intervenors' alternatives analysis under OAR 660-014-0040(3)(a) and (b). Therefore an extended discussion of the shortcomings of the alternatives analysis is not necessary. As petitioner points out, intervenors summarily reject the possibility of any alternative sites within UGBs because "[t]he proposed rural residential density (about one dwelling per 7.5 acres) is neither feasible nor desirable within an urban area." Record 308. Intervenors also summarily dismiss adjacent lands that are already zoned for rural residential development because those "lots are too small to accommodate the proposed rural residential uses."[7] *Id*. While intervenors may prefer lots that are approximately 7.5 acres in size, they may not use that preference to declare urban areas impractical, because the lots are too large for urban areas, and declare nearby one-acre rural residential lots impractical because they

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[6] OAR 660-014-0040(3)(b) requires that intervenors and the county show:

> "That Goal 2, Part II (c)(3) is met by showing that the long-term environmental, economic, social and energy consequences resulting from urban development at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on other undeveloped rural lands, considering:
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> "(A) Whether the amount of land included within the boundaries of the proposed urban development is appropriate, and
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> "(B) Whether urban development is limited by the air, water, energy and land resources at or available to the proposed site, and whether urban development at the proposed site will adversely affect the air, water, energy and land resources of the surrounding area."

[7] If we understand intervenors correctly, they take the position that the proposed residential uses will include both residences and outbuildings that cannot be accommodated on the approximately one-acre lots that adjoin the property to the north.

are too small. Allowing intervenors' preference to operate in that way renders the OAR 660-014-0040(3)(a) alternatives analysis meaningless.

With regard to the OAR 660-014-0040(3)(b) requirement to show that the consequences of developing the proposed site are not "significantly more adverse" than would be the case at other potential exception sites, intervenors provide a fairly detailed explanation for why they believe the consequences of developing the proposed site will be minimal. However, what is completely missing from the findings addressing OAR 660-014-0040(3)(b) is any attempt to compare the consequences of developing the proposed site with any other potential exception site.

Finally, although these two subassignments of error must be sustained for the reasons set out above, we note that if the county had established that the proposed realignment and rezoning of the 129 acres will in fact reduce the density of residential development possible on the 129 acres, and thereby had established a valid reason under OAR 660-014-0040(2) why Goal 14's policy of prohibiting urban development of rural land should not preclude rezoning the 21.85 acres RA-1, the alternatives analysis under OAR 660-014-0040(3)(a) and (b) might very well be quite different. That is because the *quid pro quo* for intervenors' proposal to reduce the development density potential of the existing 55.35 acres of RA-1 zoning is that the smaller area of RA-1 zoning would be located on the upland portion of the 129 acre property and developable at lower density. Sites inside UGBs or existing rural communities and other potential exception sites would likely not be viable alternatives, because the proposed reduction in density assumes the reduced density will be located on intervenors' 129 acres. Although such a reason for allowing a Goal 14 exception also potentially renders the alternatives analysis under OAR 660-014-0040(3)(a) and (b) largely meaningless, that result might be largely unavoidable given the nature of the reason. In *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009), *aff'd* 233 Or App 488, 227 P3d 198 (2010), a partially constructed and long delayed destination resort had been

granted an exception to Goal 4 many years before, but no exception to Goal 14 had been approved even though a condition of approval required construction of an on-site community sewer system. In analyzing the Goal 14 exception that was required to complete development of the proposal and sewer system, we concluded that the alternatives analysis required by OAR 660-014-0040(3)(a) and (b) was appropriately narrowed because the initial approval decision required construction of visitor-oriented accommodations and commercial uses that could "not be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development in existing rural communities." 59 Or LUBA at 345-46; *see* n 5. Although we do not attempt to decide the question here, it may be that similar reasoning would support narrowing the alternatives analysis under OAR 660-014-0040(3)(a) and (b), where an exception is sought to allow a realignment of a site's zoning to reduce the overall development density that would otherwise be allowed on the site. However, as we have already explained, the county would first have to ensure that the realigned zoning of the property will in fact reduce the overall development density.

The second and third subassignments of error are sustained.

C. Compatibility

OAR 660-014-0040(3)(c) requires that intervenors establish that the proposed use will be compatible with adjacent uses.[8] Petitioner first contends that intervenors and the county failed to establish that the proposed residential development will be compatible with

[8] OAR 660-014-0040(3)(c) requires that intervenors and the county show:

> "That Goal 2, Part II (c)(4) is met by showing that the proposed urban uses are compatible with adjacent uses or will be so rendered through measures designed to reduce adverse impacts considering:
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> "(A) Whether urban development at the proposed site detracts from the ability of existing cities and service districts to provide services; and
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> "(B) Whether the potential for continued resource management of land at present levels surrounding and nearby the site proposed for urban development is assured."

the adjacent wetlands and slough. Intervenors' analysis, which the county adopted, assumes the development will be limited to four 7+ acre lots and goes into a fair amount of detail explaining why expected impacts on adjacent properties will be minor. If the decision in fact limited development to four 7.5 acre lots, we believe that unchallenged analysis is sufficient to satisfy OAR 660-014-0040(3)(c). However, as we have already explained, the challenged decision simply approves a total of 29.85 acres of RA-1 zoning, which has a two-acre minimum. We therefore cannot assume only four 7.5-acre lots will be developed.

OAR 660-014-0040(3)(c) requires that intervenors and the county explain whether the following considerations may produce adverse impacts:

> "(A) Whether urban development at the proposed site detracts from the ability of existing cities and service districts to provide services; and
>
> "(B) Whether the potential for continued resource management of land at present levels surrounding and nearby the site proposed for urban development is assured."

Intervenors concede that the county adopted no findings specifically addressing these considerations, but argue that the record clearly shows these considerations are satisfied and that LUBA may therefore reject this challenge under ORS 197.835(11)(b).[9] Again, if the county's decision had actually limited the possible development to four dwellings we might agree with intervenors. If the property is developed to its full potential under the RA-1 zoning, it appears that up to 14 dwellings are potentially possible. There is no analysis regarding whether a 14 lot development would run afoul of OAR 660-014-0040(3)(c)(A) or (B).

This subassignment of error is sustained.

Petitioner's assignment of error is sustained.

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[9] ORS 197.835(11)(b) provides that "[w]henever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

The county's decision is remanded.