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

SHEILA DOOLEY and JILL BARKER,
Petitioners,

vs.

WASCO COUNTY,
Respondent,

and

DAVID WILSON,
Intervenor-Respondent.

LUBA No. 2019-065

FINAL OPINION
AND ORDER

Appeal from Wasco County.

Mike J. Sargetakis, Portland, filed the petition for review and a reply brief, and argued on behalf of petitioners. With him on the brief was Oxbow Law Group.

Meredith J. Barnes, The Dalles, filed a response brief and argued on behalf of respondent. With her on the brief was Bradley V. Timmons and Timmons Law PC.

William H. Sumerfield, Hood River, filed a response brief and argued on behalf of intervenor-respondent.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

REMANDED 01/14/2020

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

Petitioners appeal a decision by the board of county commissioners approving physically developed and irrevocably committed exceptions to Statewide Planning Goal 4 (Forest Lands), together with a comprehensive plan map amendment from Forest to Forest-Farm and a zone map amendment from Forest (F-2) (80) to Forest Farm (F-F) (10).

MOTION TO INTERVENE

David Wilson, the applicant below (intervenor) moves to intervene on the side of the respondent. No party opposes the motion and it is allowed.

MOTION TO AMEND PETITION FOR REVIEW

OAR 661-010-0030(4)(d) requires that each assignment of error state the standard of review. In its response brief, the county objected to petitioners' failure to comply with OAR 661-010-0030(4)(d) in their first, third and fourth assignments of error. Petitioners then moved to amend their petition pursuant to OAR 661-010-0030(6) to include sections stating the standard of review for those assignments of error.

We conclude that petitioners' failure to specifically state the standard of review in their first, third and fourth assignments of error is a technical violation that did not prejudice the substantial rights of any other participant in this appeal. OAR 661-010-0005. Accordingly, an amended petition for review is unnecessary and petitioners' motion is denied.

FACTS

The subject property is approximately 40 acres and was created pursuant to a partition approved in 2017. The property slopes from approximately six percent on the north to approximately 10 percent on the south. Record 20. The property includes a single-family dwelling and an accessory structure on the western half of the property, both of which are served by a driveway running along the western property line; a second dwelling that is no longer used as a dwelling that was served by a driveway running through the center of the property; a pump house, a barn and two wells. Record 18. The property contains two soil types, 49C and 50D, which are both Class IV soils in 4A, subclass A. The site index for both soil types is 70, which has a 20 to 49 cubic feet per acre per year potential yield for Ponderosa Pine. Record 19, 1331. The property includes primarily Oregon White Oak trees and Ponderosa Pine, as well as a few Douglas fir trees. Record 20. The remaining unforested portion of the property is grass. An aerial image indicates several acres planted in crops on the western half of the property. Record 20.

The subject property is adjacent to Seven Mile Hill Road.[1] To the north of Seven Mile Hill Road and to the east of the subject property are lots of approximately five acres in size and zoned Rural-Residential (R-R) (5), R-R (10)

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[1] A vacant 0.7-acre property owned by the county and zoned F-2 separates part of the subject property from Seven Mile Hill Road. Record 24.

and F-F (10) that are part of larger subdivisions that largely pre-date zoning.[2] To the south of the subject property is a 69-acre parcel zoned Forest F-2 (80) (F-2) that is owned by intervenor and that includes a single family dwelling and accessory structures. A portion of that 69-acre parcel is currently in farm use. Record 20. To the south of that 69-acre parcel for approximately five miles is that is zoned F-2 and managed for forestry or grazing. Record 25.

To the west of the subject property lies a split-zoned 16.3-acre property with 5 acres zoned F-F (10), and the remaining approximately 11 acres zoned F-2, and a 439-acre parcel zoned F-2 and managed for commercial forestry. All of the parcels that are immediately adjacent to west, east and south of the subject property possess similar soil types and slopes as the subject property.

Intervenor applied for an exception to Statewide Planning Goal 4 (Forest Lands) and a concurrent comprehensive plan amendment from Forest to Forest-Farm and a zone map amendment from F-2 to F-F (10). The F-2 zone is a forest resource zone. The F-F (10) zone is a non-resource zone. Wasco County Land Use and Development Ordinance 3.221. The board of county commissioners approved the application, and this appeal followed.

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[2] Two subdivisions were platted in 1911 and 1912. One subdivision was platted in 1979. Record 24.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Because the subject property is designated "Forest," approval of the comprehensive plan amendment and zone change required the board of commissioners to approve an exception to Goal 4 under Goal 2 and OAR chapter 660, division 4. The board of commissioners approved both an irrevocably committed exception and a physically developed exception. Petitioners' first, second, and third assignments of error contain largely overlapping and repetitive arguments that challenge the county's irrevocably committed exception, and for that reason we address those assignments of error together.

A. Introduction

An irrevocably committed exception may be approved where "[t]he land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]" ORS 197.732(2)(b); OAR 660-004-0028(1). 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.[3] OAR 660-

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

004-0028(6) requires that the local government's findings consider a miscellany of factors, including existing adjacent uses; existing public facilities; parcel size and ownership patterns in the area; neighborhood and regional characteristics; natural or man-made features separating the exception area from adjacent resource land; and other relevant factors, in order to reach its ultimate conclusion that the property is or is not irrevocably committed.[4] The local government need

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"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)."

[4] OAR 660-004-0028(6) provides:

"(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:

"(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 and uses approved 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 the subject parcels or 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

not demonstrate that every use allowed by the applicable goal is "impossible," but must demonstrate that, as relevant here, "[p]ropagation or harvesting of a forest product" and "[f]orest operations or forest practices as specified in OAR 660-006-0025(2)(a)" are impracticable. OAR 660-004-0028(3)(b)-(c). Committed exceptions "must be based on facts illustrating how past development has cast a mold for future uses." *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 501, 724 P2d 268 (1986) (quoting *Halvorson v. Lincoln Co.*, 14 Or LUBA 26, 31 (1985)).

ORS 197.732(6)(b) provides that LUBA "shall determine whether the local government's findings and reasons demonstrate" that the standards of an

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> 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 committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations;
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> "(d) Neighborhood and regional characteristics;
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> "(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."

irrevocably committed exception "have or have not been met[.]" Contrary to the county's argument in its response brief, we owe no deference to the local governing body's decision or any interpretation of the relevant statutes and rules. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992). Our usual tripartite approach for reviewing decisions adopting irrevocably committed exceptions is to (1) resolve any contentions that the findings fail to address issues relevant under OAR 660-004-0028 or rely on factors that are not properly considered under OAR 660-004-0028, (2) consider any arguments that particular findings are not supported by substantial evidence in the record, and (3) determine whether the findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standards of ORS 197.732(2)(b) that uses allowed by the goal are impracticable. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994).

B. Characteristics of and Uses on Adjacent Lands (OAR 660-004-0028(2), (6)(a))

Petitioners argue that the county's findings addressing OAR 660-004-0028(2)(b) and (c) inadequately describe the characteristics of adjacent lands and the relationship of the subject property to adjacent lands by focusing too much attention on the adjacent lands to the east and north of Seven Mile Hill Road that are developed with residences, with only a cursory discussion of the existing forest zoning and timber production occurring on the properties to the south and

the west of the subject property. Petitioners argue that the findings fail to adequately address the existing forest uses on resource lands adjacent to the property, and fail to adequately describe "[p]arcel size and ownership patterns of the exception area and adjacent lands * * * [and] how the existing development pattern came about" as required by OAR 660-004-0028(6)(c)(A).

We agree with petitioners. While the findings appear adequate to describe some of the characteristics of lands adjacent to the subject property by identifying existing uses and zoning, as required by OAR 660-004-0028(2)(b), those findings also spend considerable ink discussing subdivided property located almost a mile away from the subject property (the "Fletcher Tract"), for reasons that are not apparent. Record 25-26. We agree with petitioners that the findings the county adopted are not adequate to describe the relationship of the subject property to adjacent lands as required by OAR 660-004-0028(2)(c). First, in describing the relationship of the subject property to adjacent lands, the findings conclude that because the subject 40-acre property is the only parcel zoned F-2 that fronts on Seven Mile Hill Road "[t]his creates a unique situation where the subject parcel is enclosed on three of its sides by residentially-zoned properties, most of which are used for residential purposes. If the subject parcel was used for aforestry operation it could be potentially disruptive to this residential community."[5]

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[5] In a different finding, the county characterizes the subject property as being "enclosed on three of its sides by existing residential development." Record 28. That statement is more accurate than the quoted statement that the subject

Record 26. The findings do not address at all the relationship of the subject property to the adjacent approximately 450 acres of F-2 zoned lands located to the west of the subject property that are in timber production and/or that possess soils suitable for forestry production, or the approximately 2,000 acres of resource land that are in forest use located immediately south of intervenor's 69-acre adjacent F-2 parcel to the south of the subject property, or the potential for resources use of the property in conjunction with the adjacent F-2 zoned properties.

Second, the mere existence of residential uses near a property proposed for an irrevocably committed exception does not demonstrate that such property is necessarily committed to nonresource use. *Prentice v. LCDC*, 71 Or App 394, 403-04, 692 P2d 642 (1984). The findings explain that most of the residential subdivisions adjacent to and nearby the subject property pre-dated planning and zoning laws, but do not explain why the existence of those pre-existing residential uses means that the subject property is irrevocably committed to nonresource use.

C. Impracticability of Forest Uses (OAR 660-004-0028(3))

In their third assignment of error, petitioners argue that the county's findings are inadequate to explain why the uses listed in OAR 660-004-0028(3) are impracticable. OAR 660-004-0028(3) provides in relevant part that

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property is enclosed on three of its sides by "residentially zoned properties," which the record demonstrates is not accurate, because, although they contain residences, the properties to the west and south of the subject property are zoned F-2, a Goal 4 resource zone. Record 26.

> "For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:
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> "(a) Farm use as defined in ORS 215.203;
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> "(b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and
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> "(c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a)."[6]

The county found that

> "the current level of residential development has increased to the point that *commercial resource use* has become impracticable. The exception area is surrounded on three sides by existing residential development, with the potential for additional residential development in the future. Conflicts caused by the proximity of residential neighbors on three sides require added expense related to fire protection, fencing and general control of the area, and prevent the use of spraying to control insects and vegetation that competes with commercial tree species. Further conflicts with residences arise because of the noise associated with commercial operations and the safety risks of logging near residential property.
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> "The steps that would need to be taken to efficiently and effectively manage timber production in the area makes such uses impracticable." Record 28 (emphasis added).

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[6] Forest operations or forest practices specified in OAR 660-006-0025(2)(a) are:

> "Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash[.]"

The county's findings emphasize the potential conflicts that resource use of the subject property would produce with adjacent and nearby existing residential uses from fire protection requirements, fencing and spraying. First, petitioners argue that commercial viability is not the measure of practicability. Petition for Review 25. Second, in their second assignment of error, petitioners argue that the county's findings are not supported by substantial evidence where the undisputed evidence shows the subject property contains merchantable tree species in its southern portion and contains soil types that are capable of supporting Ponderosa Pines (20-49 cubic feet per year). Record 19; Record 1331. Petitioners argue that given the undisputed evidence that the soil types on the property support Ponderosa Pines, the county's findings are inadequate to explain why the remaining open portion of the subject property could not be planted and uses for forestry purposes.

We agree with petitioners. The correct standard is not whether commercial forestry operations are practicable on the subject property, and the county must consider forest operations that are smaller in scale and generate less revenue than commercial forestry operations. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 75 (2000). Further, as the staff report explains, the state and county recognize parcels as small as two acres as eligible for forest tax deferral. Record 1345.

Moreover, the county's findings, quoted above, focus on alleged conflicts with nearby residential uses from conducting commercial forestry on the

property, but do not consider whether forest operations that are smaller in scale would create similar conflicts that render forest use of the property impracticable. We also agree with petitioners that given the soil types on the property, the county's findings do not establish that forest use of the property is impracticable or explain why trees could not be planted on the property. Finally, we agree with petitioners that the county's finding that conflicts with residential uses resulting from spraying are not a basis to find that resource use of the subject property is impracticable. *Prentice*, 71 Or App at 403 (conflicts resulting from odors, noise, spraying and dust are a consequence of rural life and are not sufficient in themselves to justify an irrevocably committed exception).

The first, second and third assignments of error are sustained.

FOURTH ASSIGNMENT OF ERROR

The board of county commissioners approved a physically developed exception and in the alternative, an irrevocably committed exception. In the fourth assignment of error, petitioners challenge the county's conclusion that a physically developed exception was justified.

Under OAR 660-004-0025(1), in order to approve a physically developed exception, the local government must establish that "the land subject to the exception is physically developed *to the extent that it is no longer available for uses allowed by the applicable goal*." OAR 660-004-0025(1) (emphasis added). OAR 660-004-0025(2) provides guidance for local governments in determining

whether land has been physically developed with uses other than those allowed by a goal:

> "Whether land has been physically developed with uses not allowed by an applicable goal, will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception." OAR 660-004-0025(2).

The county relied on the two dwellings, accessory structures, well, and driveways to conclude that the property meets the requirements for adoption of a "physically developed" exception to Goal 4:

> "The development pattern that exists on this property makes forestry uses impractical. These include the current home and outbuildings located halfway up the property on the western side after an approximately 1000 [foot] driveway, the old farmhouse in the center after a 400 [foot] driveway and the old barn another 240 [feet] further south, within 450 [feet] of the rear property line. The latter two more than half bisects the property contributing to the physically developed nature of the subject parcel. The property is also serviced by two wells, and a pump house located in the north central portion of the parcel, approximately 190 feet south of the road. Due to these physical developments, and the impracticality of conducting forestry uses around them, a physically developed exception would apply." Record 20.

In the fourth assignment of error, petitioners argue that the county's findings in support of a physically developed exception to Goal 4 are inadequate and that the county improperly construed OAR 660-004-0025 when it concluded that development of approximately 12 percent of the property means that it is "physically developed to the extent that it is no longer available for uses allowed by the applicable goal." Petition for Review 29. Petitioners also assert that the county's findings are not supported by evidence in the whole record, and that the evidence in the record supports a determination that the property is available for uses allowed by Goal 4, including the growing of Ponderosa Pines. Petitioners point to evidence that all of the development on the property combined totals approximately 12 percent of the property, while more than 87 percent of the property is undeveloped. Petitioners also point out that the soil types on the property are capable of supporting Ponderosa Pine at a volume of 57.2 cubic feet per acre per year. Record 711, 1331. Therefore, petitioners argue, the county erred in concluding that a physically developed exception was justified. Finally, petitioners argue that the county erred in relying on the two driveways existing on the property because "[u]ses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception," and roads are allowed under Goal 4 as accessory to forest uses. OAR 660-004-0025(2).

Intervenor responds that managing the subject property for commercial forestry would require "extensive" fire buffers along the eastern and northern

borders that are adjacent to developed residential areas and around the existing dwelling on the property. Intervenor's Response Brief 27. Intervenor also points out that "two strings" of overhead power lines are located on the property, and that forestry uses would require a buffer from those lines. *Id.* We understand intervenor to argue that such extensive buffers mean that the property is "physically developed to the extent it is no longer available" for forestry uses.

The standard for approving a physically developed exception is demanding. *Sandgren v. Clackamas County*, 29 Or LUBA 454, 457 (1995). We agree with petitioners that the county's findings are inadequate to explain why the property is developed to such an extent that it is no longer available for forestry uses. The findings conclude, with reference to the existing development on the property, that "forestry uses [are] impractical." Record 20. Impracticality is relevant to an irrevocably committed exception. However, impracticality is not the standard for a physically developed exception. Instead, the county is required to determine that the property is "physically developed *to the extent that it is no longer available*" for forestry uses. ORS 197.732(2)(a) (emphasis added).[7] A

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[7] ORS 197.732 provides, in part:

"(2) A local government may adopt an exception to a goal if:

"(a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;

conclusion that forestry uses are "impractical" due to approximately 12 percent of the property containing structures or other development is not responsive to the standard. Finally, we agree with petitioners that the county's findings are inadequate where they fail to explain why the two driveways on the property should be considered as physically developed, when roads are uses allowed by Goal 4.

Further, we agree with petitioners that the county's decision is not supported by substantial evidence in the record, where the evidence in the record is that the property has available at least 87 percent of its area for forestry. Intervenor does not attempt to quantify the amount of buffer that would be required to conduct forestry uses or quantify the amount by which that buffer would decrease the amount of property available for forestry uses to such an extent that the property "is no longer available for forestry uses." We conclude that the county's findings in support of its approval of a physically developed exception are not supported by substantial evidence in the record.

The fourth assignment of error is sustained.

DISPOSITION

ORS 197.732(6)(b) provides that LUBA:

> "(b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]"

> "shall determine whether the local government's findings and reasons demonstrate that the [exception standards of OAR 660-004-0028] have or have not been met."

We conclude that the findings do not demonstrate that the property is physically developed to such an extent that it is no longer available for resource use, and that the county's findings regarding the physically developed exception are not supported by substantial evidence in the record. We also conclude that the findings do not demonstrate that the property is irrevocably committed to non-resource uses. Because we conclude that the findings to support a conclusion that the property is irrevocably committed to non-resource use are inadequate to satisfy the relevant criteria, we do not address petitioners' substantial evidence arguments under those criteria. *DLCD v. Columbia County*, 15 Or LUBA 302, 305 (1987).

Petitioners argue that we should reverse, rather than remand the county's decision. OAR 661-010-0071(1)(c) provides that this Board shall reverse a land use decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." In addition, OAR 661-010-0071(2)(a) provides that this Board shall remand a land use decision for further proceedings when "[t]he findings are insufficient to support the decision[.]"

If the county had approved only a physically developed exception, we would likely agree with petitioners that reversal is the appropriate remedy because the evidence in the record demonstrates that approximately 90 percent of the property is undeveloped and available for forest uses. With regard to the

irrevocably committed exception, petitioners may be correct that, under the circumstances described in the application, and when the correct standards are applied by the county, it is extremely unlikely that intervenor will be able show the property is irrevocably committed to nonresource uses. However, we cannot say at this point that the county's decision is prohibited as a matter of law.

The county's decision is remanded.