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. 2022-045

FINAL OPINION
AND ORDER

Appeal from Wasco County.

Mike Sargetakis filed a petition for review and reply brief argued on behalf of petitioners. Also on brief was Law Office of Mike Sargetakis, LLC.

Christopher D. Crean filed a response brief and argued on behalf of respondent. Also on brief was Beery, Elsner & Hammond, LLP.

William H. Sumerfield filed intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

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

REVERSED 10/31/2022

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 an irrevocably committed exception 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).

FACTS

The challenged decision is the second time the board of county commissioners has approved an irrevocably committed exception to Goal 4 for the subject property. *Dooley v. Wasco County*, ___ Or LUBA ___ (LUBA No 2019-065, Jan 14, 2020) (*Dooley I*). The subject property is zoned Forest 2 (80) (F-2). We take the facts in part from *Dooley I*:

> "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. 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. 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. The property includes primarily Oregon White Oak trees and Ponderosa Pine, as well as a few Douglas fir trees. 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." *Id.* at ___

(internal record citations omitted) (slip op at 4).

The subject property is bordered on the north by Seven Mile Hill Road.[1] To the north of Seven Mile Hill Road are lots of approximately five acres in size and zoned Rural-Residential (R-R) (5), R-R (10) and F-F (10) that are part of larger subdivisions that largely pre-date zoning. To the east of the subject property are three parcels zoned F-F (10). One of the parcels includes a dwelling. Further to the east of those parcels are residences on five-to-10-acre parcels.

To the south of the subject property is a 69-acre parcel zoned F-2 (80) (F-2) that is owned by intervenor-respondent (intervenor) and that includes a single-family dwelling and accessory structures. Record 77. A Bonneville Power Administration transmission line and associated easement runs through that property. Record 78. To the south of that 69-acre parcel, for approximately five miles, is land that is zoned F-2 and managed for forestry or grazing. Record 77. To the west of the subject property are (1) a split-zoned 16.3-acre property with 5 acres zoned F-F (10), and the remaining approximately 11 acres zoned F-2; and (2) a 439-acre parcel zoned F-2 and managed for commercial forestry. Record 76.

In *Dooley I*, we sustained petitioners' first, second, and third assignments of error that challenged the county's approval of an irrevocably committed exception to Goal 4. We first observed that the county applied an incorrect

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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 75.

standard in evaluating the potential for forest operations on the property. *Dooley I*, ___ Or LUBA at ___ (slip op at 14). We also agreed with petitioners that the county's findings incorrectly focused on alleged conflicts from conducting commercial forestry on the property with nearby residential uses, but did not consider whether forest operations that are smaller in scale would create similar conflicts that render forest use of the property impracticable. Additionally, we agreed with petitioners that given the soil types on the property, the county's findings did not establish that forest use of the property is impracticable or explain why trees could not be planted on the property. Finally, we agreed 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. *Dooley I*, ___ Or LUBA at ___ (citing *Prentice v. LCDC*, 71 Or App 394, 403, 692 P2d 642 (1984)) (holding that 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) (slip op at 15).

During the proceedings on remand, intervenor submitted a site-specific soil survey prepared by a soil scientist (Soil Survey) that concluded that the subject property is comprised of 51.8 percent soils categorized as Class VII.[2] The planning commission held a hearing on remand and tied in a vote to recommend

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[2] According to the staff report "Class VII soils have very severe limitations that make them unsuited to cultivation and that restrict their use largely to pasture or range, *woodland*, or wildlife." Record 62 (emphasis added).

denial of both the physically developed and the irrevocably committed exceptions. Record 9. The board of county commissioners held hearings on March 16, 2022 and April 6, 2022 and voted to approve the irrevocably committed exception. Record 1, 6. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is that the challenged decision is not supported by adequate findings because the documents that comprise the county's findings are not adequately identified. ORS 197.732(4) provides that "[a] local government approving or denying a proposed exception shall set forth findings of fact and a statement of reasons that demonstrate that the standards of subsection (2) of this section have or have not been met." 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[.]"

At the outset, we note that the record transmitted by the county does not contain an order, ordinance, resolution, or any other official action by the board of county commissioners approving intervenor's applications. Rather, the document that is identified in the record as the final land use decision is found at Record 1-3. Record 1-3 is a document entitled "Board of Commissioners Notice of Decision" that describes (1) the decision date; (2) the notification date; (3) the request for a goal exception; and (4) summaries of the board of county commissioners' decisions approving the applications.

The Notice of Decision includes a signature line for the senior planner, although it is unsigned, and lists four "attachments." The attachments are listed as "A Time Limits and Appeal Information;" "B – Vicinity Map;" "C – Staff Report;" and "D – Exhibit," which is further broken down into 19 exhibits. Attachment A in turn includes the following statement: "Findings of Fact: Findings of Fact approving this request may be reviewed at the Wasco County Planning Department * * * or are available on the Wasco County Planning Department website: * * * [website address omitted]." Record 3 (boldface omitted).

Petitioners argue that to the extent the board of county commissioners' decision includes incorporated findings, that incorporation failed to satisfy the two-part test we articulated in *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992). In *Gonzalez*, we explained:

> "[I]f a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." 24 Or LUBA at 259 (footnote omitted).

The county responds that "[t]he staff report and exhibits that support the decision are Attachments C and D. Rec at 5-836." Response Brief 4. Again, the record does not include any order, ordinance, or any other official action by the

board of county commissioners approving intervenor's applications, and thus does not include any clear statement that purports to incorporate as findings the record pages reference by the county in its response brief. However, even assuming for purposes of this opinion that the county incorporated Record 5 through 836 as findings, those record pages are comprised of 19 different exhibits that are part of Attachment D. It appears to us that Record 5 through 836 is virtually the entire record of the proceedings. Some of the documents included in Exhibits 1 through 18 are submittals from intervenor that take the position that the criteria are met. One of the exhibits is Exhibit 19, at Record 686 to 836, which are submittals from petitioners that take the position that the applicable criteria for an irrevocably committed exception are not met. Adopting virtually an entire record as findings (including conflicting documents) does not identify the standards the county found to be applicable or the facts the county found to be true and, therefore, does not aid us in performing our review function. *Jackson-Josephine Forest Farm Assn. v. Josephine County*, 12 Or LUBA 40, 42 (1984).

We agree with petitioners that the county's attempted incorporation, if it occurred at all, of Record 5 through 836 fails the *Gonzalez* test because a reasonable person reading the decision would not be able to identify which documents are incorporated in the findings, where the findings purport to incorporate conflicting documents, some that attempt to demonstrate that the applications should be approved and others that the attempt to demonstrate that the applications should be denied.

The first assignment of error is sustained.

In a typical appeal, based on our sustaining the first assignment of error, we would remand the decision to the local government to either adopt findings in support of the decision or identify the adopted findings. However, because petitioners' second assignment of error alleges that the county's decision warrants reversal under OAR 661-010-0071(1)(c), we proceed to address that assignment of error based on petitioners' assumptions and the county's and intervenor's assertions about the portions of the record that constitute the county's findings.[3] For the reasons explained under the second assignment of error, even assuming that the county adopted the findings and evidence in the record, the county's decision is prohibited.

SECOND ASSIGNMENT OF ERROR

Petitioners second assignment of error is that the county's findings and reasons, assuming they are located at Record 5 through 836, do not demonstrate that the standards of an irrevocably committed exception can be met. 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[.]" We owe no deference to the local governing body's decision or any interpretation of the

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[3] OAR 661-010-0071(1)(c) states that a land use decision shall be reversed when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law."

relevant statutes and rules. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271, 844 P2d 206 (1992).

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); *see also* 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.[4] OAR 660-004-0028(6) requires that the local government's findings consider a number of factors, including existing adjacent uses; existing public facilities; parcel size

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[4] 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;
>
> "(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)."

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.[5] The local government need

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

> "(6) Findings of fact for a committed exception shall address the following factors:
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> "(a) Existing adjacent uses;
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> "(b) Existing public facilities and services (water and sewer lines, etc.);
>
> "(c) Parcel size and ownership patterns of the exception area and adjacent lands:
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> "(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 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;

"(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

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, et al v. Lincoln Co.*, 14 Or LUBA 26, 31 (1985)).

A. First Subassignment

Petitioners' first subassignment of error restates its first assignment of error, which we sustain for the reasons explained above.

B. Second and Third Subassignments

OAR 660-004-0028(2) requires the findings for a committed exception to address

> "(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
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> "(d) The other relevant factors set forth in OAR 660-004-0028(6)."

"(g) Other relevant factors."

As noted above, the property is adjacent to FF-10 zoned property on its east. On its west and south sides, the property is adjacent to large parcels zoned F-2, except for a small five-acre parcel zoned FF-10 on its western boundary. The property that is zoned F-2 is managed for grazing or forest uses. Across Seven Mile Hill Road from the property's northern boundary, and further to the east of the subject property are RR-zoned, five-to-10-acre parcels that contain residences.

Petitioners' second subassignment of error and a portion of their third subassignment of error argue that the decision again fails to adequately describe the relationship between the subject property and the adjacent forest-zoned parcels, as required by OAR 660-004-0028(2)(c). Petition for Review 16-17, 31-32. Relatedly, as in *Dooley I*, petitioners argue that the decision again fails to adequately address existing forest uses on resource lands adjacent to the subject property, and in particular to demonstrate why existing active forestry uses on adjacent resource lands render resource use on the subject property impracticable. Petition for Review 19-20, 32-34. Petitioners argue that the county's decision largely readopts findings that focus on adjacent and nearby residential uses, that we concluded were inadequate in *Dooley I*, and fails to address how approving an irrevocably committed exception will not commit other lands in the area to non-resource use.[6] *Gordon v. Polk County*, 54 Or LUBA 351, 361-62 (2007).

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[6] As we explained in *Dooley I*:

Petitioners argue that the county, again, improperly focuses on the subject property and the impact of forestry activities on adjacent and nearby residential uses. Petitioners also point out that the county has mischaracterized the subject property as "being surrounded on three sides by existing residential development," where the record demonstrates that the subject property is adjacent to large resource zoned parcels on the south and west. Petition for Review 19 (citing Record 93).

Intervenor responds by characterizing the subject property as "exist[ing] as a non-resource, residential property since before the zoning system was

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> "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.
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> "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." ___ Or LUBA at ___ (slip op at 12).

adopted. It has been committed to residential use since the late 1800s." Intervenor-Respondent's Brief 8-9 (emphasis omitted). However, that characterization is belied by the property's resource zoning.

Intervenor also responds that the county properly considered adjacent "residential uses" to the north of Seven Mile Hill Road and the "residential characteristics of the surrounding area" in concluding that the potential for conflicts from forest use of the subject property with existing residential uses adjacent to the subject property to the east make resource use of the property impracticable. Intervenor-Respondent's Brief 7-8. As intervenor views it, the subject property's relationship to the adjacent resource-zoned lands is as a "buffer between resource use and more intensive residential uses in the area." Intervenor-Respondent's Brief 20-21. Intervenor also responds that the county correctly concluded that given the subject property's poor soil quality for forest uses, "the subject parcel's overall relationship" with the resource lands to the west and south are "significantly diminished," and "the subject parcel's relationship with those non resource lands to the north, northwest and east are increased due to their similar use and development patterns."[7] Record 89.

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[7] The staff report concluded that "a forest zoned property abutting residentially zoned property is completely out of line with the land use designation and zoning pattern, and not at all in relation to every other unit of land within the Sevenmile Hill area * * * that is within a resource zone." Record 87. We rejected similar findings in *Dooley I* as not supported by the record. *Dooley I*, ___Or LUBA at ___ (slip op at 11).

We agree with petitioners that the findings that address the "relationship between the exception area and the lands adjacent to it" are inadequate to address the adjacent resource lands.[8] OAR 660-004-0028(2)(c). The findings appear to, again, emphasize residential use of properties across Seven Mile Hill Road, and to properties east of the FF-10 zoned parcels adjacent to the subject property on its eastern boundary. However, again, the findings do not adequately address existing forest uses on resource lands adjacent to the subject property, or demonstrate why existing uses on adjacent resource lands render resource use on the subject property impracticable. Importantly, the findings also do not address how approving an irrevocably committed exception will not commit other lands

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[8] Record 93 includes the following:

> "Additional analysis provides that 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 (north, northwest, and east adjacent parcels), will require added expense related to fire protection, fencing and general control of the area if the subject parcel was actively used for forestry or farmed for profit. Also, residential density surrounding the subject parcel significantly limits the use of pest control techniques to regulate insects and invasive vegetation. Additional nuisance type conflicts with residences are likely to arise because of the noise associated with forestry and farm for profit operations. There are also inherent safety risks associated with forestry and farm operations that must be considered if the subject parcel were to be actively used for small-large scale forestry or farm for profit operations, which it currently is not."

in the area to non-resource use. *Gordon*, 54 Or LUBA at 361-62; OAR 660-004-0018(2) (zoning applied to lands that are subject to "irrevocably committed" exceptions shall limit uses, densities and services to those that "will not commit adjacent or nearby resource lands to uses not allowed by the applicable goal" and that "are compatible with adjacent or nearby resource uses." OAR 660-004-0018(2)(b)(B) - (C).).

The county appears to have ascribed significant weight to the Soil Survey's conclusion that the majority of the subject property contains Class VII soils. Record 63. Such a preponderant focus on the property itself is not appropriate in considering an irrevocably committed exception. The focus in considering an irrevocably committed exception is on the relationship of the adjoining properties to the property. *Friends of Linn County v. Linn County*, 42 Or LUBA 235, 246 (2002); *DLCD v. Curry County*, 151 Or App 7, 11-12, 947 P2d 1123 (1997) ("For a county to give exclusive or 'preponderant' weight to the characteristics of the exception area alone, in performing its analysis, would be contrary to the fundamental test for an irrevocable commitment exception, which requires surrounding areas and their relationship to the exception area to be the basis for determining whether the exception is allowable.").[9]

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[9] It may be appropriate to focus on the quality of soils for forest use in deciding whether a particular property qualifies as forest land under Goal 4 or whether it is non-resource land.

Also in their third subassignment of error, petitioners argue that the county improperly relied on the Soil Survey to assume that the soil quality on adjacent resource-zoned parcels is similar to the soils on the subject property. Intervenor responds, and we agree, that petitioners challenge a finding that the county did not make. The staff report explains that the Soil Survey "cannot override the USDA Order 3 Soil Survey[.]" Record 71.

Also in their third subassignment of error, we understand petitioners to argue that the county's decision that relies on the Soil Survey to evaluate the characteristics of the subject property is not supported by substantial evidence where petitioners' expert called the Soil Survey into question. Under ORS 197.732(6)(a), LUBA is "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 [an] exception." A finding of fact is supported by substantial evidence, "when the record, viewed as a whole, would permit a reasonable person to make that finding." *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Intervenor responds, and we agree, that a reasonable person could rely on the Soil Survey to evaluate the characteristics of the subject property for purposes of the required evaluation of the characteristics of the exception area under OAR 660-004-0028(2)(a).

The second and third subassignments of error are sustained in part.

The second assignment of error is sustained, in part.

CONCLUSION

The ultimate question under OAR 660-004-0028 and ORS 197.732(1)(b), as applied here, is whether the subject property is irrevocably committed to uses not permitted by Goal 4 because existing adjacent uses and other relevant factors make forest use impracticable. An irrevocably committed exception must be based on "findings of fact and a statement of reasons" demonstrating that that standard is met. ORS 197.732(4). On review of a decision approving an exception, LUBA must determine whether the local government's findings and reasons demonstrate that the standards of ORS 197.732(2) have or have not been met. ORS 197.732(6)(b). Further, LUBA must adopt a clear statement of reasons setting forth the basis for our determination that the standards of ORS 197.732(2) have or have not been met. ORS 197.732(6)(c).

For the reasons explained above, the county's findings and reasons – which we assume are located at Record 5 to 836 – are insufficient to demonstrate that the subject property is irrevocably committed to non-forest uses. The county has not sufficiently described the subject property's relationship with adjoining forest uses in terms that would justify a conclusion that forest use of the subject property is impracticable. Considered as a whole, the county's findings and reasons are insufficient to demonstrate that the subject property is irrevocably committed.

Petitioners request that we reverse the decision because under the existing circumstances intervenor cannot demonstrate that the subject property is irrevocably committed to non-forest uses. OAR 661-010-0071(1) provides in

relevant part that the Board shall reverse a land use decision if "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We understand petitioners to contend that the county's decision is essentially "prohibited as a matter of law," because under the circumstances reflected in the record, it is impossible for intervenor to show that the property is irrevocably committed to non-forest uses.

Petitioners are correct that the present record does not support the county's conclusion that the subject property is irrevocably committed. We agree with petitioners that no additional findings or evidentiary proceedings on remand are likely to support such a conclusion because under the circumstances described in the application, and for the reasons described in this opinion, it is impossible for intervenor to show that the subject property is irrevocably committed to non-forest use.

The county's decision is reversed.