

SEP 24 4 40 PM '85

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

3 CHARLES and CONSTANCE COOK,)
4)
5) Petitioners,)
6) LUBA No. 85-046
7) vs.)
8) FINAL OPINION
9) AND ORDER
10) YAMHILL COUNTY BOARD OF)
11) COUNTY COMMISSIONERS,)
12) Respondent.)

13 Appeal from Yamhill County.

14 Gregory S. Hathaway, Portland, filed the petition for
15 review and argued the cause on behalf of Petitioners. With him
16 on the brief were Hermann, Hathaway and Santiago.

17 John M. Gray, Jr., McMinnville, filed the response brief
18 and argued the cause on behalf of Respondent County.

19 Corinne C. Sherton, Salem, filed the response brief and
20 argued the cause on behalf of Participant-Respondent San
21 Vicente Wine Company. With her on the brief were Sullivan,
22 Josselson, Roberts, Johnson and Kloos.

23 DUBAY, Referee; KRESSEL, Chief Referee; BAGG, Referee;
24 participated in this decision.

25 AFFIRMED 09/24/85

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 The county approved a change of zone for a one acre tract
4 from Agriculture/Forestry Small Holding District (AF-10) to
5 Rural Industrial District (RI). The change of zone will permit
6 construction of a winery.

7 FACTS

8 The property is part of 10 acres zoned AF-10. Although the
9 10 acres and surrounding properties are agricultural land, the
10 AF-10 classification was acknowledged by LCDC as an area
11 excepted from the requirements of Goal 3.

12 The applicants for the zone change propose to plant a
13 vineyard on the property and to construct a winery with a
14 tasting room and facilities for retail sales of wine. Grapes
15 grown on the 10 acre tract and grapes grown elsewhere will be
16 used for wine making. Petitioners are neighbors who object to
17 the proposed commercial use.

18 The county's approval of the zone change is before us for
19 the second time. We remanded the first approval in Cook v.
20 Yamhill County, ___ Or LUBA ___ (1985), (LUBA No. 85-003, Slip
21 Opinion 04/03/85), (Cook I, herein). The decision was
22 defective, we said, for failure to meet the requirements of OAR
23 660-04-018. This Land Conservation and Development rule
24 requires a planning jurisdiction to take a new or modified
25 exception to statewide land use goals if a change of use or
26 zone will cause substantial impacts to adjacent properties

1 unless the proposed use was identified and authorized in the
2 acknowledged exception.

3 After our remand, the county reapproved the zone change
4 without holding further public hearings. The county's second
5 order includes new findings about the size and productive
6 capacity of the proposed winery, its water usage and the
7 traffic expected. The order also sets forth an interpretation
8 of "farm use" as found in the ordinance (which mirrors the
9 definition of farm use in ORS 215.203). The order states the
10 proposed winery is a farm use as defined in the ordinance and
11 in ORS 215.203. The order also concludes the winery will not
12 create impacts on adjacent uses greater than other uses allowed
13 outright in the AF-10 Zone.

14 ASSIGNMENT OF ERROR

15 Petitioners' sole assignment of error is that the new
16 findings are inadequate to support the county's conclusion that
17 the proposed winery would not create substantial impacts on
18 adjacent uses.

19 Findings on this issue were prompted by our reference to
20 OAR 660-04-018 in our order of remand. This administrative
21 rule states:

22 "(1) When a jurisdiction changes the types or
23 intensities of uses or zones allowed in an
24 exception area which the Commission has
25 previously acknowledged and when the new use or
26 uses would have a substantial impact upon
adjacent uses, a new or modified exception is
required.

"(2) A new or modified exception is not required where

1 the changed uses or zones were clearly identified
2 and authorized by the previously acknowledged
3 exception."

4 We said the rule was applicable and that the findings did not
5 "disclose the extent of impacts on surrounding land, if any,
6 expected from processing, storing and marketing wine from
7 grapes grown offsite and the effects of such impacts."¹

8 In response to petitioners' assignment of error,
9 respondents make several alternative arguments. First,
10 respondents assert OAR 660-040-018 is satisfied because the
11 findings are adequate to demonstrate there will be no
12 substantial impacts upon adjacent uses by the winery
13 operations. Respondents next argue no exception to Goal 3 is
14 necessary because the winery is either a permitted farm use or
15 a commercial activity in conjunction with farm use.²

16 Respondents' last argument is that a new or modified exception
17 is not necessary because OAR 660-04-018 should not be read to
18 apply to exception areas where the original exception was based
19 on irrevocable commitment of the area to non-resource uses.

20 Respondents further contend the rule is beyond the authority of
21 the Land Conservation and Development Commission (LCDC) to
22 promulgate if it is interpreted to apply to acknowledged
23 exceptions based on irrevocable commitment to non-resource
24 uses.

25 This challenge to the applicability of OAR 660-04-018 was
26 not made in Cook I and is presented for our consideration for
the first time. For the reasons set forth below, we believe

1 the rule was not intended to apply where there is an
2 acknowledged exception based on irrevocable commitment to uses
3 not allowed by the goals as described in ORS 197.732(1)(b).
4 This interpretation requires an affirmance of the county's
5 order.

6 We begin our analysis by noting that ORS 197.732 describes
7 three forms of exceptions to statewide land use goals. The
8 three types are stated as follows:

9 "197.732 Goal exceptions; criteria; rules; review.

10 "(1) A local government may adopt an exception to a
goal when:

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

13 "(b) The land subject to the exception is irrevocably
14 committed as described by commission rule to uses
15 not allowed by the applicable goal because
16 existing adjacent uses and other relevant factors
make uses allowed by the applicable goal
impracticable; or

17 "(c) The following standards are met:

18 "(A) Reasons justify why the state policy
19 embodied in the applicable goals should not
apply;

20 "(B) Areas which do not require a new exception
cannot reasonably accommodate the use;

21 "(C) The long term environmental, economic,
22 social and energy consequences resulting
23 from the use at the proposed site with
measures designed to reduce adverse impacts
24 are not significantly more adverse than
would typically result from the same
25 proposal being located in areas requiring a
goal exception other than the proposed site;
and

26

1 "(D) The proposed uses are compatible with other
2 adjacent uses or will be so rendered through
3 measures designed to reduce adverse impacts."

4 For convenience, we will refer to the types of exceptions
5 described in subsections (a)(b) and (c) of ORS 197.732(1) as
6 "developed," "committed," and "reasons" exceptions.

7 Respondents advance two arguments to support their
8 contention that OAR 660-04-018 should not apply to committed
9 type exceptions. First, respondents point out that there are
10 no provisions in the statute, Goal 2 as amended, or LCDC's
11 interpretive rules³ that require specification of a
12 particular proposed use in establishing a committed exception.
13 Further, the committed exception standards do not require
14 assessment of impacts on adjacent uses. In contrast, the type
15 of exception described in ORS 197.732(1)(c), the "reasons" form
16 of exception, includes a requirement that "[t]he proposed uses
17 will be compatible with adjacent uses...."

18 Respondents' second argument is that if OAR 660-04-018 were
19 to apply to areas subject to an acknowledged committed
20 exception, taking a new exception would be a pointless exercise
21 because the outcome would be another committed exception
22 identical to the original exception. This result is
23 inevitable, say respondents, because, as already stated, the
24 criteria for the new committed exception do not take into
25 account proposed uses or their possible impacts on adjacent
26 uses.

 We find these arguments persuasive. Examination of the

1 statute, Goal 2, and LCDC's interpretive rules show the
2 critical element of a committed exception is the present
3 impracticability of compliance with specified goals. Weighing
4 the impacts of proposed uses is not relevant under this
5 standard.

6 We also attach importance to the fact that lands meeting
7 the criteria in ORS 197.732(1)(b) are irrevocably committed to
8 uses not allowed by the applicable goals. It would be
9 anomolous to interpret OAR 660-04-018 to mean that even after
10 irrevocable commitment status is acknowledged, the area may
11 nonetheless remain subject to compliance with the goal in
12 question and that a new exception procedure is needed to
13 determine whether uses allowed by the applicable goal are
14 possible. It is reasonable, in our opinion, to interpret OAR
15 660-04-018 to require a new or modified exception when a new
16 use or uses would have a substantial impact upon adjacent uses
17 only when the original exception required consideration of
18 impacts on adjacent uses.

19 We therefore agree with respondents that OAR 660-04-018
20 should not be interpreted to require a new or modified
21 exception in the circumstances presented.⁴ The
22 inapplicability of OAR 660-04-018 makes it unnecessary for us
23 to examine whether the findings are adequate to show compliance
24 with the rule. Since petitioners make no other claim of error,
25 the county's order is affirmed.

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FOOTNOTES

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In Cook I the parties agreed that while use of grapes grown onsite is a permitted "farm use" as defined in ORS 215.203(b) and the county ordinance, a change of zone is necessary to allow the use of grapes grown offsite and sale of wine made from such grapes. The county now interprets its ordinance to mean the use of grapes grown offsite is also a farm use. Because we decide this matter on other grounds, we express no opinion on this interpretation by the county.

2
The county's argument that no goal exception is necessary is based on OAR 660-04-010(1)(a). This rule provides an exception to Goal 3 "is not required for any of the farm or non-farm uses permitted in an Exclusive Farm Use (EFU) zone under ORS Chapter 215." Commercial activities that are in conjunction with farm use are allowed in EFU zones by ORS 215.213(2)(c) and 215.283(2)(a).

3
Goal 2, Part II was amended in December, 1983, to include the three types of exceptions authorized by ORS 197.732(1). The administrative rules of LCDC were likewise amended in accordance with the statute. See OAR 660-04-000 et seq.

4
Although it would seem a "developed" exception as defined in ORS 197.732(1)(a) would also not be subject to the requirements of OAR 660-04-018, that issue is not before us.