

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 SHELLEY WETHERELL  
5 and FRIENDS OF DOUGLAS COUNTY,  
6 *Petitioners,*

7  
8 vs.

9  
10 DOUGLAS COUNTY,  
11 *Respondent.*

12  
13 LUBA No. 2003-022

14  
15 FINAL OPINION  
16 AND ORDER

17  
18 Appeal from Douglas County.

19  
20 James J. Nicita, Portland, filed the petition for review.

21  
22 Paul E. Meyer, County Counsel, Roseburg, represented respondent.

23  
24 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,  
25 participated in the decision.

26  
27 REMANDED

05/19/2003

28  
29 You are entitled to judicial review of this Order. Judicial review is governed by the  
30 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county decision that approves exceptions to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) and changes the comprehensive plan map and zoning map designations for 6.5 acres of land to allow rural residential use of that land.

**INTRODUCTION**

The applicants’ motion to intervene in this appeal was previously denied, because it was not timely filed under ORS 197.830(7)(a). The county did not file a brief, and petitioners waived oral argument. We decide this appeal based on the written arguments in the petition for review and the record filed by the county in this matter.

**FACTS**

The applicants below own approximately 20 acres of land that has a comprehensive plan map designation of “Farm Forest Transitional” and a zoning map designation of “Agriculture and Woodlot.” Although there is some question whether the soils on the subject property are of a quality that requires protection for farm use under Goal 3, it is not disputed that the subject property is forestland that is subject to protection under Goal 4.<sup>1</sup> Therefore, at a minimum, an exception to Goal 4 must be justified to plan and zone the property for rural residential use.

The applicants reside in a house on the 20 acres. The applicants’ son resides in an accessory building on the 20 acres that has been adapted for residential use without county

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<sup>1</sup> Although the challenged decision adopts statewide planning goal exceptions for Goals 3 and 4, it also adopts a finding that the subject property falls “outside the Goal 3 definition of agricultural land.” Record 11. The county has established a forest site class threshold of 80 cu/ft/ac/yr for identifying forestlands subject to protection under Goal 4. The subject property exceeds that threshold. According to the Douglas County Comprehensive Plan (DCCP), the Farm Forest Transitional designation is applied to implement both Goal 3 and Goal 4. DCCP 15-10. According to the Douglas County Land Use and Development Ordinance (LUDO), the Agriculture and Woodlot zoning designation is applied to “conserve lands of marginal agricultural and timber production.” LUDO 3.6.000.

1 approval. The challenged decision approves exceptions to Goals 3 and 4 to allow 6.5 acres  
2 of the subject property to be designated “Rural Residential Five Acres” on the DCCP map  
3 and to allow that 6.5 acres to be rezoned to “Rural Residential – 5 Acres (5R).” Record 4.  
4 These comprehensive plan and zoning designations would allow continued residential use of  
5 the accessory building and would also allow the applicants to divide their 20 acres to create a  
6 new 6.5 acre parcel around that accessory building.

7 **FIRST ASSIGNMENT OF ERROR**

8 “Reasons exceptions” are authorized by statute, statewide planning goal and  
9 administrative rule to allow uses of land that would otherwise not be allowed under the  
10 statewide planning goals. ORS 197.732(1)(c); Goal 2 (Land Use Planning); OAR 660-004-  
11 0020; OAR 660-004-0022.<sup>2</sup> In four subassignments of error, petitioners challenge the  
12 county’s findings regarding each of the four reasons exception standards.

13 **A. Reasons Why the Goal Policies Should not Apply**

14 The first of the four standards for a reasons exception under ORS 197.732(1)(c)  
15 requires that the county establish that there are reasons why the state policies embodied in  
16 Goals 3 and 4 should not be applied to the subject property. OAR 660-004-0022 elaborates

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<sup>2</sup> ORS 197.732(1)(c) and Goal 2, Part II(c) set out four identically worded standards that must be met to approve a reasons exception. OAR 660-004-0020 and 660-004-0022 add considerable additional detail to those standards. The four ORS 197.732(1)(c) standards for a reasons exception are as follows:

- “(A) Reasons justify why the state policy embodied in the applicable goals should not apply;
- “(B) Areas which do not require a new exception cannot reasonably accommodate the use;
- “(C) The long term environmental, economic, social and energy consequences resulting from the use 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 in areas requiring a goal exception other than the proposed site; and
- “(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.”

1 on the types of reasons that may be used and may not be used to justify an exception for  
2 certain specified uses on resource lands, such as agricultural and forest lands. As relevant,  
3 OAR 660-004-0022 provides:

4 “An exception under Goal 2, Part II(c) can be taken for any use not allowed  
5 by the applicable goal(s). The types of reasons that may or may not be used to  
6 justify certain types of uses not allowed on resource lands are set forth in the  
7 following sections of this rule:

8 “(1) *For uses not specifically provided for in subsequent sections of this*  
9 *rule or OAR 660, division 014, the reasons shall justify why the state*  
10 *policy embodied in the applicable goals should not apply. Such*  
11 *reasons include but are not limited to the following:*

12 “(a) There is a demonstrated need for the proposed use or activity,  
13 based on one or more of the requirements of Statewide Goals 3  
14 to 19; and either

15 “(b) A resource upon which the proposed use or activity is  
16 dependent can be reasonably obtained only at the proposed  
17 exception site and the use or activity requires a location near  
18 the resource. \* \* \*; or

19 “(c) The proposed use or activity has special features or qualities  
20 that necessitate its location on or near the proposed exception  
21 site.

22 “(2) Rural Residential Development: For rural residential development the  
23 reasons cannot be based on market demand for housing, except as  
24 provided for in this section of this rule, assumed continuation of past  
25 urban and rural population distributions, or housing types and cost  
26 characteristics. A county must show why, based on the economic  
27 analysis in the plan, there are reasons for the type and density of  
28 housing planned which require this particular location on resource  
29 lands. A jurisdiction could justify an exception to allow residential  
30 development on resource land outside an urban growth boundary by  
31 determining that the rural location of the proposed residential  
32 development is necessary to satisfy the market demand for housing  
33 generated by existing or planned rural industrial, commercial, or other  
34 economic activity in the area.” (Emphasis added.)

35 The county applied the general standard at OAR 660-004-0022(1), which applies to  
36 uses that are not specifically provided for in subsequent sections of OAR 660-004-0022, and  
37 found that the exception will allow the applicants’ son “to continue living on [the] property

1 in an existing accessory structure that he has occupied for many years without the benefit of  
2 requisite land use permits.” Record 17. The findings go on to conclude that approval of the  
3 exception will not “materially alter the site or otherwise remove any of the site from resource  
4 use.” *Id.* The county concludes, “therefore the site has special features and qualities that  
5 necessitate maintaining [the accessory residence] at the same location on the proposed  
6 exception site.” *Id.*

7 Petitioners correctly point out that the county applied OAR 660-004-0022(1) when  
8 OAR 660-004-0022(2) is the applicable section. The county’s failure to apply the correct  
9 subsection of OAR 660-004-0022 requires that we sustain the first subassignment of error.  
10 *DLCD v. Umatilla County*, 39 Or LUBA 715, 723 (2001). We also conclude that the  
11 county’s findings are inadequate to demonstrate compliance with either  
12 OAR 660-004-0022(1) or OAR 660-004-0022(2). The historical residential use of the  
13 subject property by the applicants’ son without required land use approvals (which is pivotal  
14 to the county’s ultimate finding of compliance with the first of the ORS 197.732(1)(c)  
15 standards) has nothing to do with the standards set forth in OAR 660-004-0022(1) or (2).

16 The first subassignment of error is sustained.

17 **B. Areas That Do Not Require an Exception Cannot Reasonably**  
18 **Accommodate the Use**

19 Petitioners contend the county makes no attempt to consider whether areas that do not  
20 require Goal 3 and Goal 4 exceptions could accommodate a residence for the applicants’ son,  
21 as required by the second of the reasons exception criteria at ORS 197.732(1)(c)(B). *See* n 2.  
22 Instead, petitioners argue, the county finds that the ORS 197.732(1)(c)(B) standard is met  
23 because allowing the applicants’ son to continue to occupy the dwelling that he has been  
24 occupying without required approvals will meet the personal needs of the applicants and  
25 avoid economic and personal hardship of moving to a site that does not require an exception.  
26 Petitioners contend that the reasons given by the county for finding that the

1 ORS 197.732(1)(c)(B) standard is met are inadequate because they do not address the  
2 statutory standard.

3 Petitioners are correct. Whether requiring the son to move to areas that do not require  
4 an exception would cause a personal or economic hardship on these particular applicants or  
5 their son has no bearing on whether there are areas that do not require an exception that  
6 could reasonably accommodate a dwelling for the applicants' son.

7 This subassignment of error is sustained.

8 **C. Consequences of Developing the Proposed Area are not Significantly**  
9 **More Adverse than the Consequences of Developing Other Areas That**  
10 **Require an Exception**

11 Under ORS 197.732(1)(c)(C), the county must compare the proposed exception area  
12 with other alternative areas that also would also require an exception and find that selecting  
13 the proposed exception area will not have significantly more adverse environmental,  
14 economic, social and energy consequences than selecting one of those alternative areas for an  
15 exception.

16 The challenged decision concludes:

17 "The [board of commissioners] finds that any attempt to relocate the  
18 applicants' existing residential improvements on the proposed site to an  
19 alternative site requiring a goal exception would probably result in more  
20 adverse long term environmental, economic, social and energy consequences  
21 than is likely to result from allowing the applicants' son to continue to reside  
22 on the proposed exception site." Record 18.

23 The challenged decision simply speculates that development of alternative exception  
24 sites would have significantly more adverse consequences. It is not clear whether the county  
25 actually considered *any* other potential exception areas. The county's conclusory finding is  
26 not sufficient to demonstrate compliance with ORS 197.732(1)(c)(C).

27 This subassignment of error is sustained.

1           **D.      Compatibility With Adjacent Land Uses**

2           The fourth reasons exception criterion is set out at ORS 197.732(1)(c)(D). Petitioners  
3 argue that while the county’s findings state that the proposal will be compatible with an  
4 adjacent exception area, the findings do not address the remaining adjacent properties or  
5 establish that the proposed use will be compatible with resource uses on those properties.  
6 Petitioners are correct.

7           This subassignment of error is sustained.

8           The first assignment of error is sustained.

9           **SECOND ASSIGNMENT OF ERROR**

10          LUDO 6.500(2) imposes county criteria for comprehensive plan amendments. As  
11 relevant, LUDO 6.500(2) requires that the applicant demonstrate:

12          “a.      That the Amendment complies with the Statewide Planning Goals[,  
13                   and]

14          “b.      That the amendment provides a reasonable opportunity to satisfy a  
15                   local need for a different land use. A demonstration of need for the  
16                   change may be based upon special studies or other factual  
17                   information.”

18          **A.      Compliance With the Statewide Planning Goals**

19          The standard imposed by LUDO 6.500(2)(a) essentially duplicates the statutory  
20 requirement at ORS 197.175(2), which requires that comprehensive plan amendments must  
21 comply with the statewide planning goals. The challenged decision relies on the findings  
22 that were adopted to support the Goal 3 and Goal 4 exceptions to demonstrate that the  
23 amendment complies with the statewide planning goals. The county also adopts other  
24 findings that cite a DCCP recognition of a “public need to provide opportunities for  
25 nonresource-related residential uses in rural areas when it can be demonstrated that such  
26 nonresource uses do not negatively impact the resource value of surrounding lands.” Record  
27 19.

1 We have already concluded that the county’s Goal 3 and Goal 4 statewide planning  
2 goal exception findings are inadequate. The county’s general reference to a public need for  
3 “opportunities for rural nonresource-related residential uses in rural areas” is not sufficient to  
4 demonstrate that the proposed amendment complies with the statewide planning goals, as  
5 LUDO 6.500(2)(a) and ORS 197.175(2) require.

6 This subassignment of error is sustained.

7 **B. Local Need for a Different Land Use**

8 LUDO 6.500(2)(b), unlike LUDO 6.500(2)(a), appears to be entirely a local  
9 requirement that is not mandated by any statute. The LUDO 6.500(2)(b) standard, “local  
10 need for a different land use,” is ambiguous. Petitioners argue the county identifies no “local  
11 need for a different land use.” Petitioners argue the only “need” that the county identifies in  
12 support of the proposed amendment is the applicants’ personal desire that their son be  
13 allowed to continue to live in an accessory structure that he has occupied for some time  
14 without required land use approval. Petitioners contend that the applicants’ personal desire  
15 does not constitute a “local need for a different land use,” within the meaning of  
16 LUDO 6.500(2)(b).

17 We tend to agree with petitioners’ argument under LUDO 6.500(2)(b), as far as it  
18 goes. However, as noted above, the county also adopted a general finding that there is a  
19 public need for “opportunities for rural nonresource-related residential uses in rural areas.”  
20 Petitioners do not specifically challenge that finding, which is clearly directed at  
21 LUDO 6.500(2)(b). While the cited “public need” is not necessarily the equivalent of the  
22 “local need” that is referenced in LUDO 6.500(2)(b), we see no reason why there might not  
23 be significant overlap between the two. Given the lack of any specific challenge to that  
24 county finding in petitioners’ arguments concerning LUDO 6.500(2)(b), we reject this  
25 subassignment of error.

26 The second assignment of error is sustained in part.

1           The county's decision is remanded.