

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MART STORM,
5 *Petitioner,*

6
7 vs.
8

9 YAMHILL COUNTY,
10 *Respondent,*

11 and

12
13 OREGON DEPARTMENT
14 OF TRANSPORTATION,
15 *Intervenor-Respondent.*
16

17 LUBA No. 2012-066
18

19
20 FINAL OPINION
21 AND ORDER
22

23 Appeal from Yamhill County.

24
25 Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf
26 of petitioner.
27

28 No Appearance by Yamhill County.
29

30 Bonnie Heitsch, Assistant Attorney General, Department of Justice, Salem, filed the
31 response brief and argued on behalf of intervenor-respondent. With her on the brief was
32 Ellen Rosenblum, Attorney General.
33

34 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
35 participated in the decision.
36

37 AFFIRMED

12/27/2012
38

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

NATURE OF THE DECISION

Petitioner appeals an ordinance amending the county’s comprehensive plan and zoning code, and adopting exceptions to statewide planning goals to authorize construction of a temporary interchange for the proposed Newberg Dundee Bypass.

MOTION TO INTERVENE

The Oregon Department of Transportation (ODOT) moves to intervene on the side of respondent. There is no opposition and the motion is allowed.

FACTS

In 2004, the county approved the Newberg Dundee Bypass (Bypass), an 11-mile limited access highway with four interchanges, to be located along a new alignment east of the Cities of Newberg and Dundee and continuing south to the City of Dayton. The four proposed interchanges are located at (1) Highway 99W (99W) northeast of Newberg, (2) Highway 219 south of Newberg, (3) 99W north of Dundee, and (4) Highway 18 just north of Dayton. The Bypass alignment crosses agricultural land outside urban growth boundaries and thus required exceptions to statewide planning goals 3 (Agricultural Lands), 11 (Public Facilities and Services) and 14 (Urbanization). At the time the county approved the Bypass, there was no funding available to actually construct the Bypass.

In 2009, the legislature enacted HB 2001, the Jobs and Transportation Act (JTA). The JTA allocated \$192 million to ODOT to construct the northern half of the Bypass, known as Phase 1. Phase 1 involves construction of a two-lane limited access highway beginning in the north near Newberg at the originally proposed interchange with 99W, but terminating south of Dundee at a new temporary interchange with 99W. ODOT contemplates that when funding is available for future phases, the remainder of the Bypass will be constructed south to Dayton, and the temporary Phase 1 interchange south of Dundee

1 will be removed. The main issue in this appeal is the location of that temporary interchange
2 with 99W.

3 ODOT's preferred location for the temporary interchange is immediately south of
4 Dundee. ODOT analyzed several alternatives in that area, two within the city and requiring
5 no additional goal exceptions, and two on rural land that require additional goal exceptions.
6 ODOT's preferred alternative, Alternative B, extends westward from the original Bypass
7 alignment, crosses on an elevated bridge over a railroad track that parallels 99W, crosses
8 over 99W, and then loops back around to intersect with 99W. Alternative B crosses rural
9 agricultural land and requires exceptions to Goals 3, 11 and 14.

10 Petitioner owns property approximately one-half mile further south of Dundee, near
11 the current intersection of 99W and a local county road, Fulquartz Landing Road. Fulquartz
12 Landing Road in the area runs east to west and currently runs perpendicular to and intersects
13 with the proposed Bypass route in the area, and then crosses the railroad tracks at a grade-
14 level crossing, before intersecting 99W.¹ In 2011, the county approved a modification to the
15 Bypass alignment to authorize construction of an overpass for Fulquartz Landing Road, so
16 that when the Bypass is constructed in that area Fulquartz Landing Road will cross over the
17 Bypass alignment, the railroad tracks, and 99W on an elevated bridge, then loop back to
18 intersect with another local road, and ultimately link back to 99W. The 2011 decision
19 adopted additional exceptions to the statewide planning goals to authorize construction of the
20 overpass.

21 During the proceedings on ODOT's application in this case, petitioner appeared and
22 requested that the county consider as an alternative constructing the new temporary

¹ Confusingly, the Bypass alignment also crosses a different stretch of Fulquartz Landing Road that runs north to south, located near the southeastern edge of the City of Dundee urban area, where a different overpass is planned. However, as far as we can tell, the northern Fulquartz Landing Road crossing or overpass plays no role in this appeal. All references in this opinion to the Fulquartz Landing Road site or overpass are to the site one-half mile south of the City of Dundee.

1 interchange at the site of the Fulquartz Landing Road overpass, essentially converting the
2 already approved overpass to an interchange at that location. ODOT representatives testified
3 in response that providing for a 99W interchange at and extending the Bypass to a southern
4 terminus one-half mile south of the preferred location would cost an additional \$60 million,
5 which would exceed the budget allocation for Phase I under the JTA. ODOT also testified
6 that constructing an interchange at the Fulquartz Landing Road site would mean destruction
7 of historic structures. Based on that testimony, the county rejected the southern terminus
8 interchange at the site of the Fulquartz Landing Road overpass as an alternative, and did not
9 consider that alternative further. After evaluation of other alternatives, the county approved
10 ODOT's preferred Alternative B. This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 **A. Introduction**

13 Statewide Planning Goal 2, Part II(c), sets out general criteria for taking goal
14 exceptions. Under Part II(c)(1), the local government must articulate reasons that justify why
15 the state policy embodied in the applicable goals should not apply. Under Part II(c)(2), the
16 local government can approve the exception only if it finds that areas that do not require a
17 new exception cannot reasonably accommodate the use. This step of the Goal 2 exception
18 process requires evaluation of alternative locations for the proposed use that do not require
19 new goal exceptions. Under Part II(c)(3), the local government must evaluate alternative
20 locations that also require new goal exceptions, and can approve the proposed location only
21 if it finds that the long-term environmental, economic, social and energy (ESEE)
22 consequences resulting from the use of the proposed site are not significantly more adverse
23 than would typically result from alternative sites that also require an exception.

24 OAR 660-012-0070 provides specific criteria for taking goal exceptions for
25 transportation improvements on rural land. OAR 660-012-0070(5) and (6) implement Goal
26 2, Part II(c)(2), and set out the criteria used to evaluate alternative locations that do not

1 require an exception.² Under OAR 660-012-0070(6), the local government must evaluate
2 alternatives that do not require a new exception pursuant to certain factors or “thresholds,”
3 such as cost, operational feasibility and other relevant factors. ODOT proposed and the
4 county accepted the following thresholds: (1) cost within the JTA Phase 1 allocation, (2)
5 operational feasibility, (3) least economic and social displacement, and (4) conformance with
6 the JTA’s description of where Phase I must be located.

7 OAR 660-012-0070(6)(b) provides that detailed evaluation of an alternative is not
8 required when the alternative does not meet an identified threshold. Where a party proposes
9 an alternative that does not require a new exception, OAR 660-012-0070(6)(c) provides that
10 detailed evaluation of that alternative is not required unless the proponents “specifically
11 describe with supporting facts why such methods or locations can more reasonably

² OAR 660-012-0070 provides in relevant part:

- “(5) To address Goal 2, Part II(c)(2) the exception shall demonstrate that non-exception locations cannot reasonably accommodate the proposed transportation improvement or facility. The exception shall set forth the facts and assumptions used as the basis for determining why the use requires a location on resource land subject to Goals 3 or 4.

- “(6) To determine the reasonableness of alternatives to an exception under sections (4) and (5) of this rule, cost, operational feasibility, economic dislocation and other relevant factors shall be addressed. The thresholds chosen to judge whether an alternative method or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception.
 - “(a) In addressing sections (4) and (5) of this rule, the exception shall identify and address alternative methods and locations that are potentially reasonable to accommodate the identified transportation need.
 - “(b) Detailed evaluation of such alternatives is not required when an alternative does not meet an identified threshold.
 - “(c) Detailed evaluation of specific alternative methods or locations identified by parties during the local exceptions proceedings is not required unless the parties can specifically describe with supporting facts why such methods or locations can more reasonably accommodate the identified transportation need, taking into consideration the identified thresholds.”

1 accommodate the identified transportation need, taking into consideration the identified
2 thresholds.”

3 For alternatives that would require a new goal exception, OAR 660-012-0070(7) sets
4 out the applicable criteria to implement Goal 2, Part II(c)(3).³ For such alternatives, OAR
5 660-012-0070(7)(c) provides that “[d]etailed evaluation of specific alternative locations
6 identified by parties during the local exceptions proceeding is not required unless such
7 locations are specifically described with facts to support the assertion that the locations have
8 significantly fewer net adverse economic, social, environmental and energy impacts than the
9 proposed exception location.”

10 **B. OAR 660-012-0070(7) Applies**

11 The central issue in the first assignment of error is whether the county erred under
12 OAR 660-012-0070(5) and (6) in rejecting the alternative proposed by petitioner, which is to
13 site the new interchange at the location of the existing exception area for the Fulquartz
14 Landing Road overpass. ODOT’s primary response to the first assignment of error is that
15 petitioner is barking up the wrong tree, because OAR 660-012-0070(5) and (6) apply only to

³ OAR 660-012-0070(7) provides, in relevant part:

“To address Goal 2, Part II(c)(3), the exception shall:

- “(a) Compare the long-term economic, social, environmental and energy consequences of the proposed location and other alternative locations requiring exceptions. * * *;
- “(b) Determine whether the net adverse impacts associated with the proposed exception site, with mitigation measures designed to reduce adverse impacts, are significantly more adverse than the net impacts from other locations which would also require an exception.* * *; and
- “(c) The evaluation of the consequences of general locations or corridors need not be site-specific, but may be generalized consistent with the requirements of section (3) of this rule. Detailed evaluation of specific alternative locations identified by parties during the local exceptions proceeding is not required unless such locations are specifically described with facts to support the assertion that the locations have significantly fewer net adverse economic, social, environmental and energy impacts than the proposed exception location.”

1 alternatives that do not require a new exception. According to ODOT, a new interchange at
2 the site of the Fulquartz Landing Road overpass would require a new exception, both as a
3 matter of engineering and as a matter of law. ODOT argues that because a new exception
4 would be required for that alternative, the standards for evaluating that alternative are
5 supplied by OAR 660-012-0070(7), which petitioner does not invoke.

6 At oral argument, petitioner continued to take the position that no new exception
7 would be required to convert the Fulquartz Landing Road overpass to a new interchange,
8 arguing that it is possible that the new interchange could be constructed within the footprint
9 of the existing exception area for the overpass. However, petitioner cites to no evidence in
10 the record supporting that position. From the maps in the record, it is not at all clear to us
11 that a new interchange between the Bypass alignment and 99W could be physically squeezed
12 into the existing exception area for the overpass. The exception area footprint for the
13 overpass is relatively narrow, designed for a simple overpass of a two-lane county road, not
14 for an interchange of two major highways with the necessary loops and ramps.⁴ If an
15 interchange would require use of additional rural lands outside the existing exception area,
16 then for that reason alone a new exception would be required.

17 More importantly, we agree with ODOT that pursuant to OAR 660-012-0070(10)
18 converting the already approved Fulquartz Landing Road overpass to a new interchange
19 would require a new exception as a matter of law.⁵ OAR 660-012-0070(10) states the general

⁴ Petitioner does not explain what would happen under his proposal to Fulquartz Landing Road and how it would continue to cross the Bypass alignment and the railroad, and connect to 99W. It seems highly improbable that the exception area could accommodate both the overpass and a new interchange, or some combination thereof.

⁵ OAR 660-012-0070(10) provides:

“An exception taken pursuant to this rule does not authorize uses other than the transportation facilities or improvements justified in the exception.

1 rule, consistent with OAR 660-004-0018(4), that the uses authorized in a reasons exception
2 are limited to the uses justified in the exception, and that authorization of different uses than
3 those justified requires a new exception. OAR 660-012-0070(10)(a) and (b) set out limited
4 exceptions to that general rule for “modifications” and minor transportation improvements.
5 However, OAR 660-012-0070(10)(c)(A) indicates that a “new interchange” on a limited
6 access highway is not a mere “modification” or minor transportation improvement described
7 in OAR 660-012-0070(10)(a) or (b), and such a new interchange requires a new exception.
8 That is consistent with OAR 660-004-0018(4)(b), which provides that when a local
9 government changes the types or intensities of uses or public facilities and services within a
10 reasons exception area, a new reasons exception is required. Converting the site of a county

“(a) Modifications to unconstructed transportation facilities or improvements authorized in an exception shall not require a new exception if the modification is located entirely within the corridor approved in the exception.

“(b) Modifications to constructed transportation facilities authorized in an exception shall require a new exception, unless the modification is permitted without an exception under OAR 660-012-0065(3)(b)-(f). For purposes of this rule, minor transportation improvements made to a transportation facility or improvement authorized in an exception shall not be considered a modification to a transportation facility or improvement and shall not require a new exception.

“(c) Notwithstanding subsections (a) and (b) of this section, the following modifications to transportation facilities or improvements authorized in an exception shall require new goal exceptions:

“(A) New intersections or new interchanges on limited access highways or expressways, excluding replacement of an existing intersection with an interchange.

“(B) New approach roads located within the influence area of an interchange.

“(C) Modifications that change the functional classification of the transportation facility.

“(D) Modifications that materially reduce the effectiveness of facility design measures or land use measures adopted pursuant to subsection (8)(c) of this rule to minimize accessibility to rural lands or support continued rural use of surrounding rural lands, unless the area subject to the modification has subsequently been relocated inside an urban growth boundary.”

1 road overpass to a new highway interchange would constitute either a change in the type of
2 use or, at the very least, a change in the intensity of the use, even assuming that as an
3 engineering matter an interchange could fit within the existing exception area footprint for
4 the overpass.

5 Accordingly, ODOT is correct that the obligation and standards under which to
6 evaluate petitioner's proposed alternative are found at OAR 660-012-0070(7), not OAR 660-
7 012-0070(5) or (6).

8 **C. Merits of the First Assignment of Error**

9 Most and perhaps all of petitioner's arguments under the first assignment of error are
10 based on, and couched in the terms of, OAR 660-012-0070(5) and (6). In five sub-
11 assignments of error, petitioner argues that the county misconstrued OAR 660-012-0070(5)
12 and (6), and adopted inadequate findings not supported by substantial evidence, in rejecting
13 petitioner's proposed alternative for an interchange at the Fulquartz Landing Road site.

14 Petitioner's misidentification of the applicable rule is fatal to most of the arguments
15 under the first assignment of error. OAR 660-012-0070(7), with its focus on the comparison
16 of net adverse ESEE impacts, is significantly different than OAR 660-012-0070(5) and (6),
17 with their focus on whether reasonable alternatives that do not require new exceptions meet
18 all the identified thresholds. The two sets of rules have different substantive terms, different
19 findings requirements, different triggers for detailed or site-specific evaluations of
20 alternatives, and different standards for raising and addressing specific alternative locations
21 identified by participants.

22 The only arguments under the first assignment of error that arguably are not
23 dependent on OAR 660-012-0070(5) and (6) are the fourth and fifth sub-assignments of
24 error. In those sub-assignments of error, petitioner contends that the record does not include
25 substantial evidence to support the county's finding that rejects the Fulquartz Landing Road
26 area as the site of the new interchange because it would cost an additional \$60 million,

1 exceeding the budget allocated under the JTA, to extend the Bypass one-half mile south of
2 the preferred location, and because construction of an interchange at that site would impact
3 historic properties between the railroad and 99W.⁶ ODOT responds, and we agree, that the
4 record includes substantial evidence to support those findings, to the extent a challenge to
5 such findings is not foreclosed by petitioner’s misidentification of the applicable
6 administrative rule.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Goal 2, Part II(c)(1), and OAR 660-012-0070(4) require that the county shall
10 “provide reasons justifying why the state policy in the applicable goals should not apply.”
11 Further, OAR 660-012-0070(4)(c) requires the county to demonstrate that the identified
12 transportation need “cannot reasonably be accommodated through one or a combination of

⁶ The county’s findings state, in relevant part:

“* * * ODOT first considered whether available funding would enable it to construct Phase 1 beyond the more southerly crossing, where Fulquartz Landing Road intersects with Oregon 99W. Because analysis indicates that the costs of extending Phase 1 this far south of Dundee would both exceed the available funding and impact historic properties between the [railroad] tracks and Oregon 99W, ODOT dropped consideration of this alternative and focused its attention on possible connections to Oregon 99W * * * just south of the Dundee urban area.” Record 106.

The county also briefly addressed petitioner’s testimony, stating:

“* * * Several people testified that Phase 1 should extend further south and reconnect to Oregon 99W beyond the dip in the road, where Oregon 99W expands from a two lane to a four lane highway. ODOT testified that it considered such an alternative and rejected it for several reasons, not least of which was that the cost of extending Phase 1 to this location would have exceeded its budget for Phase 1. The Board finds ODOT’s testimony to be credible. The Board also heard testimony that ODOT should build the entire section from Newberg to Dayton because money to build future phases is uncertain. While the Board strongly supports completion of the Bypass Project in its entirety, it recognizes that funding is not available at this time to build the project all at once, and it finds that something needs to get built now to relieve the congestion on Oregon 99W in Newberg and Dundee that already is harming communities and businesses along the corridor. The Board finds that it must work within the budget available to it, and that Phase 1 provides a good start that will significantly reduce congestion on Oregon 99W in Newberg and Dundee.” Record 6.

1 the following measures not requiring an exception,” including alternative modes of
2 transportation, traffic management measures, and improvements to existing transportation
3 facilities.

4 Under the second assignment of error, petitioner argues that the only “need”
5 identified for the proposed new *temporary* interchange is the lack of funding to construct the
6 entire Bypass. However, petitioner argues that the record lacks substantial evidence to
7 support the county’s assumption that the new interchange will in fact be “temporary,” and
8 will eventually be removed. Petitioner argues that it strains credulity to believe that ODOT
9 would spend \$25 million on a “temporary” interchange, only to remove it for an additional
10 cost of \$5 million at some point in the future when funding becomes available for other
11 phases. According to petitioner:

12 “[E]ither (1) the ‘Alternative B’ interchange must be considered a permanent
13 feature, in which case it has to be based on a separate need apparent from the
14 need shown to exist for the already-approved improvements envisioned by the
15 acknowledged 2004 and 2011 exceptions, or (2) if the assumption is going to
16 be made that the ‘Alternative B’ interchange is temporary in nature, then that
17 key assumption has to be supported by evidence in the record—as opposed to
18 mere pie-in-the-sky promises or speculation—that the interchange will be
19 removed.” Petition for Review 26.

20 The county’s findings address a similar argument made below, explaining:

21 “ODOT’s findings and reasons document clearly indicates that the South
22 Dundee connection is an interim interchange that will be removed when the
23 Bypass Project is extended to Dayton. It clearly indicates that the new
24 exception is needed to build Phase 1 of the Bypass Project within available
25 funding constraints. * * * Should ODOT change its mind at some future time
26 and decide to make the South Dundee Connection permanent, a new or
27 modified goal exception will be required since the Bypass Project authorizes
28 only four permanent interchanges. Until such future time, however, ODOT
29 and Yamhill County are entitled to rely on the previous land use decisions
30 taken for the Bypass.” Record 5.

31 In other words, the challenged exception authorizes only a temporary interchange, and any
32 attempt to convert that interchange into a permanent one, or to change the location or number

1 of the four permanent interchanges authorized in prior exceptions, will require a new or
2 modified goal exception. Those findings are unchallenged, and accurately state the legal
3 status of the temporary interchange authorized in the present exception. Given those
4 findings, we disagree with petitioner either that the county must justify reasons for a
5 permanent interchange or that the record must include evidence of some guarantee that the
6 temporary interchange authorized in the exception will be removed.

7 The second assignment of error is denied.

8 The county's decision is affirmed.