

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

3
4 PATRICIA BRANDT, GERTRUDE BRANDT,)
5 LORI CRAVEN, ESTHER ERIKSON,)
6 WAYNE FELLER, MARY FELLER, GUY)
7 SAMPSON, MINETTA SAMPSON, HENRY)
8 WATSON and JEANNE WATSON,)
9)

10 Petitioners,)
11)

12 vs.) LUBA No. 91-101

13)
14 MARION COUNTY,) FINAL OPINION
15) AND ORDER

16 Respondent,)
17)

18 and)
19)

20 BLAZER INDUSTRIES, INC.,)
21)

22 Intervenor-Respondent.)
23

24
25 Appeal from Marion County.

26
27 M. Chapin Milbank, Salem, filed the petition for review
28 and argued on behalf of petitioners.

29
30 Jane Ellen Stonecipher, Salem, filed a response brief
31 and argued on behalf of respondent.

32
33 James L. Murch, Salem, filed a response brief and
34 argued on behalf of intervenor-respondent. With him on the
35 brief was Sherman, Bryan, Sherman & Murch.

36
37 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
38 Referee, participated in the decision.

39
40 REMANDED 12/19/91

41
42 You are entitled to judicial review of this Order.
43 Judicial review is governed by the provisions of ORS
44 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county ordinance which (1) amends
4 the Silverton Urban Growth Boundary (UGB) to add 8.7 acres,
5 (2) changes the comprehensive plan map designation for the
6 subject property to Industrial, (3) rezones the subject
7 property Industrial Commercial (IC), and (4) approves a
8 conditional use permit for the manufacture of prefabricated
9 structural wood products on the subject property.

10 **MOTION TO INTERVENE**

11 Blazer Industries, Inc., the applicant below, moves to
12 intervene in this proceeding on the side of respondent.
13 There is no opposition to the motion, and it is allowed.

14 **FACTS**

15 Prior to the adoption of the appealed ordinance, the
16 subject 8.7 acres were designated Agricultural and zoned
17 Exclusive Farm Use (EFU). The land adjoining the subject
18 property to the northwest, north and east is also designated
19 Agricultural and zoned EFU. The land adjoining the subject
20 property to the south is within the Silverton UGB, and is
21 designated and zoned for residential use. The land
22 adjoining the subject property to the southwest is within
23 the Silverton UGB, designated Industrial, zoned IC and is
24 part of intervenor's existing operation for the manufacture
25 of structural wood products.

26 In December 1987, intervenor applied to the county for

1 a comprehensive plan amendment and zone change to add the
2 subject property to the Silverton UGB, to allow expansion of
3 its existing industrial operation. Intervenor also
4 requested a change in the plan map designation for the 8.7
5 acres to Industrial, and a change in the zoning to IC.¹
6 During the course of reviewing the application, the county
7 and intervenor became aware that a conditional use permit is
8 required for the manufacture of prefabricated structural
9 wood products in the IC zone. The county thereafter treated
10 intervenor's application as also requesting a conditional
11 use permit for the manufacture of prefabricated structural
12 wood products on both the 8.7 acres proposed to be added to
13 the UGB and rezoned IC (the subject property) and the 3.15
14 acres of IC zoned property already within the UGB which is
15 the site of intervenor's existing operation.

16 On August 30, 1988, after a public hearing, the county
17 hearings officer issued a recommendation that the requested
18 UGB amendment, plan map amendment, zone change and
19 conditional use permit be denied. The board of
20 commissioners held public hearings on the proposed UGB
21 amendment, plan map amendment, zone change and conditional
22 use permit on October 12, 1988 and December 5, 1990. On
23 April 3, 1991, the board of commissioners adopted an order

¹The original application refers to 5.45 acres. Record 583. However, subsequent documents in the record refer to the proposed amendments as affecting 8.7 acres, and the parties do not dispute this figure.

1 approving a conditional use permit for the manufacture of
2 prefabricated structural wood products on the 3.15 acres of
3 IC zoned property already within the UGB. That order was
4 affirmed in Brandt v. Marion County, ___ Or LUBA ___ (LUBA
5 No. 91-042, September 18, 1991) (Brandt I).

6 On July 5, 1991, the board of commissioners adopted an
7 ordinance approving the requested UGB amendment, plan map
8 amendment, zone change and conditional use permit for the
9 expansion of intervenor's operation onto the subject
10 property. This appeal followed.

11 **PRELIMINARY ISSUE**

12 Under all of petitioners' assignments of error,
13 petitioners' argument includes detailed identification of
14 inconsistencies between the findings adopted by the hearings
15 officer, in support of her recommendation to deny the
16 proposal, and the findings adopted by the board of
17 commissioners in support of its ordinance approving the
18 proposal. However, the board of commissioners' disagreement
19 with the hearings officer is not, in itself, a basis for
20 reversal or remand of the challenged decision. Accordingly,
21 we address infra only the additional issues argued by
22 petitioners under their assignments of error. Because the
23 third and fifth assignments of error raise no additional
24 issues, they are denied without further discussion.

25 **FIRST ASSIGNMENT OF ERROR**

26 "The Marion County Commissioners approval of
27 [intervenor's] request fails to set forth the

1 specific criteria, supporting facts and
2 justification for the decision based on these
3 facts and criteria."

4 **SEVENTH ASSIGNMENT OF ERROR**

5 "The Board [of Commissioners] erred in finding
6 that Goal 14 requirements had been met."

7 **A. Adequacy of Findings in General**

8 Petitioners contend the county's findings fail to
9 identify the criteria applicable to its decision.
10 Petitioners also contend the county's findings are generally
11 inadequate because they are conclusory. Petitioners argue
12 the findings "must set out pertinent facts and explain the
13 rationale for concluding the facts demonstrate compliance
14 with the applicable legal criteria." Petition for Review 4.

15 The findings in support of the challenged ordinance
16 identify the applicable Statewide Planning Goals (Goals) as
17 1, 2, 3, 6, and 9-14. Record d. The findings also cite as
18 applicable the City of Silverton Comprehensive Plan² and
19 certain provisions of the Marion County Zoning Ordinance.
20 Record f. Petitioners do not explain why these findings are
21 inadequate to identify the applicable standards. Further,
22 petitioners do not identify any specific findings they
23 believe to be conclusory, or explain why such findings are
24 essential to the challenged decision.

25 This subassignment of error is denied.

²Marion County has adopted the City of Silverton Comprehensive Plan to govern the unincorporated land within the Silverton UGB.

1 **B. Goals 2 (Land Use Planning) and 14 (Urbanization)**

2 Goal 14 requires that in adopting a UGB amendment, a
3 local government comply with the requirements of Goal 2 for
4 goal exceptions. Under Goal 2, Part II(c)(2), one of the
5 standards for approving a goal exception is:

6 "Areas which do not require a new [goal] exception
7 cannot reasonably accommodate the use[.]"³

8 We understand petitioners to argue that the county's
9 findings are inadequate to establish compliance with Goal 2,
10 Part II(c)(2), and are not supported by substantial evidence
11 in the record. Petitioners argue the record shows that 54%
12 of the industrial zoned land already within the Silverton
13 UGB (comprising 108 acres) is vacant. Petitioners further
14 argue there is evidence in the record that there are
15 alternative industrially zoned sites available which are
16 sufficiently large and have necessary public facilities
17 available. Petitioners argue the county's findings fail to
18 explain why these alternative sites cannot reasonably
19 accommodate the proposed use. Petitioners also argue the
20 findings improperly rely upon an assertion that relocation
21 of intervenor's manufacturing operation to one of these
22 other sites is not economically feasible. According to
23 petitioners, cost savings alone is not sufficient reason to
24 justify expansion of a UGB. Abrego v. Yamhill County, 2

³Goal 2, Part II has been codified at ORS 197.732. Goal 2,
Part II(c)(2) is also ORS 197.732(1)(c)(2).

1 Or LUBA 101 (1980).

2 Respondent and intervenor (respondents) argue that
3 intervenor's need to expand its existing industrial
4 operation is well documented in the record. Respondents
5 also argue that the record clearly shows it would be
6 impractical, unsafe and disruptive to split intervenor's
7 expanded operation between its existing site and a new site
8 located elsewhere within the UGB.

9 Respondents further argue the record shows moving
10 intervenor's entire operation to an alternative site within
11 the UGB is not feasible for several reasons. First, there
12 is no alternative site within the UGB where intervenor's
13 operation would be an outright permitted use. According to
14 respondents, intervenor's operation would require at least a
15 conditional use permit, and in some instances a zone change,
16 on any alternative site within the UGB. Second, relocating
17 intervenor's operation on any sufficiently large,
18 industrially zoned alternative site within the UGB would
19 require either (1) heavy truck traffic through residential
20 areas, or (2) sewer and water line extensions of 1/3 and 1/2
21 mile, respectively. Third, it would be economically
22 infeasible for intervenor to move its entire operation to
23 another location.

24 The only county findings which arguably address Goal 2,
25 Part II(c)(2) provide:

26 " * * * The manufacturing process cannot be split,
27 and relocation is not economically feasible. No

1 other suitable location with adequate urban
2 services is available now or will be in the near
3 future." Record e.

4 Petitioners do not dispute intervenor's need to expand
5 its operation. Neither do petitioners dispute the
6 infeasibility of splitting intervenor's manufacturing
7 operation between two separate locations. What petitioners
8 dispute is the adequacy of and evidentiary support for the
9 findings that there are no other adequate sites for
10 intervenor's expanded operation within the UGB and that,
11 even if there were such sites, Goal 2, Part II(c)(2) would
12 be satisfied because it is economically infeasible for
13 intervenor to relocate its entire operation.

14 What Goal 2, Part II(c)(2) requires is described in OAR
15 660-04-020(2)(b), which provides in relevant part:

16 "(A) The exception shall indicate on a map or
17 otherwise describe the location of possible
18 alternative areas considered for the use,
19 which do not require a new exception. * * *

20 "(B) To show why the particular site is justified,
21 it is necessary to discuss why other areas
22 which do not require a new exception cannot
23 reasonably accommodate the proposed use.
24 Economic factors can be considered along with
25 other relevant factors in determining that
26 the use cannot reasonably be accommodated in
27 other areas. * * *

28 * * * * *

29 "(C) This alternative areas standard can be met by
30 a broad review of similar types of areas
31 rather than a review of specific alternative
32 sites. * * * Site specific comparisons are
33 not required of a local government taking an

1 exception, unless another party to the local
2 proceeding can describe why there are
3 specific sites that can more reasonably
4 accommodate the proposed use. * * *
5 (Emphasis added.)

6 In this case, the findings neither indicate on a map
7 nor describe the location of alternative areas considered by
8 the county. Additionally, the findings do not explain how
9 the county defined the "suitable locations" and "adequate
10 urban services" referred to in the finding quoted above.
11 Furthermore, the record shows that specific alternative
12 sites which would not require a new goal exception were
13 identified by petitioners and by the City of Silverton
14 (city). Record 151-53, 614-17. The findings fail to
15 address these sites and explain why they cannot reasonably
16 accommodate intervenor's expanded operation.

17 Accordingly, we agree with petitioners that the
18 county's findings are inadequate to satisfy Goal 2,
19 Part II(c)(2). However, even where findings supporting an
20 appealed decision are inadequate, this Board may
21 nevertheless affirm the decision if the parties identify
22 evidence in the record which "clearly supports" the
23 decision. ORS 197.835(9)(b).

24 We have reviewed the evidence in the record cited by
25 the parties. That evidence includes a statement by
26 intervenor's attorney that intervenor's expanded operation

1 will require 11.85 acres.⁴ Record 133. There are
2 statements by intervenor's attorney that there are no
3 available parcels of sufficient size within the Silverton
4 UGB where intervenor's operation would not require a zone
5 change or conditional use permit. Record 133, 183, 233,
6 240. Additionally, there are unsupported statements by
7 intervenor's attorney and in the application that it is not
8 economically feasible for intervenor to relocate its
9 operation within the Silverton UGB. Record 240, 453-54,
10 603.

11 There is also a finding by the city planning commission
12 that there are 108 vacant industrially zoned acres within
13 the city. Record 563. There is a letter from city staff
14 which identifies one 82 acre vacant industrially zoned area,
15 portions of which have sewer and water services immediately
16 available, and portions of which are located adjacent to
17 residential neighborhoods. Record 151-52. The letter also
18 identifies a vacant 25 acre parcel designated for industrial
19 use, but currently zoned Acreage Residential - 5 Acre
20 Minimum (AR-5), adjacent to other industrial development,
21 and requiring certain extensions of sewer and water lines.
22 Record 152-53. Finally, the record includes Department of
23 Economic Development documents identifying four vacant

⁴Intervenor's existing 3.15 acre site and the 8.7 acres which are proposed to be added to the Silverton UGB by the challenged decision total 11.85 acres.

1 available industrially zoned sites in the area, ranging from
2 6 to 67 acres in size.⁵ Record 614-17.

3 The above described evidence does not "clearly support"
4 a determination that there are no alternative sites which do
5 not require a new goal exception which can reasonably
6 accommodate intervenor's expanded operation. From this
7 evidence, it is not possible to clearly identify what sites
8 the county considered or how it defined a "suitable
9 location." For the county to exclude sites from
10 consideration because the proposed use would require a zone
11 change or conditional use permit, as advocated by intervenor
12 during the proceeding below, would be error. See 1000
13 Friends of Oregon v. Metro Service Dist., 18 Or LUBA 311,
14 329 (1989); Loos v. Columbia County, 16 Or LUBA 528, 535
15 (1988). Additionally, the evidence cited does not identify
16 how the county determined what constitutes "adequate urban
17 services" for the proposed use.⁶ Finally, the evidence
18 includes the identification of certain available urban or
19 urbanizable sites without clearly establishing reasons why

⁵It appears possible that the two larger sites identified in the letter by the city at Record 151-53 might be the same two sites identified on the Department of Economic Development documents at Record 614-15. However, there are discrepancies between the site information on the two sets of documents.

⁶It appears the county may have found alternative sites inadequate at least in part because they require the extension of city sewer lines for the provision of those services. However, it appears that the subject site is not served by city sewer lines either. Record e. Whether the subject property is served by city water lines is unclear.

1 those sites cannot reasonably accommodate the proposed use.
2 While we agree with respondents that economic factors can be
3 considered along with other factors in demonstrating
4 compliance with Goal 2, Part II(c)(2),⁷ an unsupported
5 assertion by the applicant that it is economically
6 infeasible for it to relocate its expanded operation to any
7 alternative site is not evidence which in itself clearly
8 supports a determination that Goal 2, Part II(c)(2) is
9 satisfied.

10 This subassignment of error is sustained.

11 The first and seventh assignments of error are
12 sustained, in part.

13 **SECOND ASSIGNMENT OF ERROR**

14 "The Board [of Commissioners] erred in finding
15 that Goal 3 -- Agricultural Lands, had been
16 satisfactorily met by the evidence in the record."

17 Petitioners contend the following finding is conclusory
18 and without evidentiary support:

19 "This expansion will occur on land that, even
20 though it is zoned EFU, is not now nor likely to
21 be used for agricultural production. * * *"
22 Record e.

23 That a finding is impermissibly conclusory, or is
24 without evidentiary support in the record, is a basis for

⁷The opinion cited by petitioners, Abrego v. Yamhill County, 18 Or LUBA at 108, establishes that the lesser cost of land outside a UGB is not sufficient justification for adding additional land to a UGB to accommodate a proposed use. It does not say that any consideration of cost, such as the cost of relocating an existing industrial operation, is irrelevant to justifying a UGB amendment.

1 reversal or remand only if that finding is essential to the
2 challenged decision. Beck v. City of Tillamook, 18 Or LUBA
3 587, 603 (1990); Moorefield v. City of Corvallis, 18 Or LUBA
4 95, 101 (1989). Therefore, where petitioners challenge the
5 adequacy of or evidentiary support for a specific finding,
6 they must also explain why that finding is essential to
7 demonstrating compliance with an applicable approval
8 standard. League of Women Voters v. Metro Service Dist., 17
9 Or LUBA 949, 978, aff'd 99 Or App 333 (1989), rev den 310 Or
10 70 (1990); Vizina v. Douglas County, 16 Or LUBA 936, 944
11 (1988). Here, petitioners offer no explanation of why the
12 finding quoted above is essential to the county's
13 determination of compliance with Goal 3.

14 The second assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 "The Board [of Commissioners] erred in finding
17 Goal 11 requirements had been met."

18 Goal 11 (Public Facilities and Services) is:

19 "To plan and develop a timely, orderly and
20 efficient arrangement of public facilities and
21 services to serve as a framework for urban and
22 rural development.

23 "* * * * *"

24 Petitioners contend that city water and sewer services
25 will have to be extended to serve intervenor's expanded
26 industrial operation, while other serviced industrial
27 properties remain vacant. Petitioners argue "[t]his is
28 hardly a timely, orderly or efficient arrangement of public

1 facilities to serve as a framework for urban and rural
2 development as required by Goal 11." Petition for
3 Review 11.

4 Petitioners' argument is based on the premise that
5 adding additional unserviced land to a UGB for industrial
6 use while there is vacant serviced land designated for
7 industrial use already within the UGB is per se a violation
8 of Goal 11.⁸ However, Goal 11 does not require that all, or
9 any particular portion of, serviced land be occupied before
10 additional unserviced land can be added to a UGB. Goal 11
11 simply requires that unserviced land added to a UGB can be
12 provided with appropriate types and levels of public
13 facilities, in a timely, orderly and efficient manner, as
14 provided in the local government's acknowledged
15 comprehensive plan and land use regulations.

16 Here, the challenged decision states that adequate
17 water and septic services are available to serve the subject
18 8.7 acres. Record e. Petitioners do not challenge these
19 findings. Neither do petitioners contend that providing
20 sewage disposal service to an urban industrial use via an
21 on-site septic sewage disposal system is inconsistent with
22 Goal 11 or the acknowledged county plan and land use

⁸Petitioners' argument also makes the assumption that city sewer services will be extended to the subject property. However, as discussed in the text, infra, the decision provides that intervenor's expanded operation on the subject property will be served by an on-site sewage disposal system.

1 regulations. Petitioners present an insufficient basis
2 under this assignment of error for reversing or remanding
3 the challenged decision.

4 The fourth assignment of error is denied.

5 **SIXTH ASSIGNMENT OF ERROR**

6 "The Board [of Commissioners] erred in finding
7 Goal 13 requirements had been met."

8 Petitioners argue:

9 "With regard to Goal 13, Energy Conservation, the
10 record suggests that [intervenor's] present
11 operation having grown without planning is very
12 inefficient. No demonstrable efficiency plan was
13 presented to the Board [of Commissioners] giving
14 any factual basis that an increase in size would
15 allow for a more energy efficient operation.
16 * * * This is contrary to the Goal [13]
17 requirements." Petition for Review 12.

18 Petitioners' argument under this assignment of error is
19 based on the premise that Goal 13 requires a decision to add
20 certain land to a UGB, and designate and zone that land for
21 the expansion of an existing industrial use, be supported by
22 a determination that the expansion will result in a more
23 energy efficient operation. Petitioners contend there is no
24 evidentiary support in the record for such a determination.

25 Goal 13 provides, in total:

26 "To conserve energy.

27 "Land and uses developed on the land shall be
28 managed and controlled so as to maximize the
29 conservation of all forms of energy, based upon
30 sound economic principles."

31 Although we agree with petitioners that Goal 13 may

1 apply to comprehensive plan and land use regulation
2 amendments to allow particular development proposals,
3 Goal 13 is primarily directed toward the development of
4 local government land management implementing measures which
5 maximize energy conservation. In any event, Goal 13 does
6 not provide that additional land may only be designated and
7 zoned industrial for the expansion of an existing industrial
8 use where the expanded use is shown to be more energy
9 efficient than the existing use.

10 This assignment of error is denied.

11 The county's decision is remanded.