

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

4 BRENT LEATHERS and LEATHERS OIL)
5 COMPANY,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 MARION COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 FLYING J, INC.,)
18)
19 Intervenor-Respondent.)

LUBA No. 95-125
FINAL OPINION
AND ORDER

20
21
22 Appeal from Marion County.
23

24 Edward J. Sullivan, Portland, filed the petition for
25 review and argued on behalf of petitioners. With him on the
26 brief were Wendie L. Kellington and Preston Gates & Ellis.
27

28 Jane Ellen Stonecipher, Assistant County Counsel,
29 Salem, and Kenneth D. Helm and Ted W. Baird, Portland, filed
30 the response brief. With them on the brief was Michael J.
31 Hansen, County Counsel, and O'Donnell Ramis Crew Corrigan &
32 Bachrach. Kenneth D. Helm argued on behalf of intervenor-
33 respondent.
34

35 LIVINGSTON, Chief Referee; GUSTAFSON, Referee,
36 participated in the decision.
37

38 REMANDED 05/30/96
39

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a favorable decision of the board of
4 county commissioners (commissioners) on an administrative
5 review application for approval of both (1) a truck stop
6 site plan; and (2) certain uses on the site.

7 **MOTION TO INTERVENE**

8 Intervenor-respondent Flying J, Inc. (intervenor) moves
9 to intervene in this proceeding on the side of respondent.
10 There is no opposition to the motion, and it is allowed.

11 **MOTION TO FILE REPLY BRIEF**

12 Petitioners move to file a reply brief. There is no
13 opposition to the motion, and it is allowed.

14 **FACTS**

15 The challenged plan, for a truck stop to be separately
16 operated, includes 29 acres, comprising three components, of
17 17, 10 and 2 acres. The 29 acres (the subject property)
18 were originally part of a 87-acre farm parcel zoned
19 Exclusive Farm Use (EFU). The 17- and 10-acre components
20 are presently zoned Interchange District-Limited Use Overlay
21 (ID-LU). The 2-acre component is zoned ID.¹

¹The challenged decision does not specifically address the uses allowed on the 2-acre component, although the approved truck stop site plan includes it. Petitioners state, without reference to the record, that the 2-acre component "was partitioned (apparently sometime in 1981 or 1983) from [a] parent parcel and granted a statewide planning goal exception." Petition for Review 3. The exception is not included in the record.

1 Four county ordinances address all or part of the
2 subject property. Ordinance 765, adopted on August 5, 1987,
3 partitioned the 17-acre component from the parent 87-acre
4 parcel, granted a "reasons" exception to Goal 3 for the 17
5 acres, and rezoned them from EFU to ID.^{2,3} Record 269-300.
6 Ordinance 765 describes the subject property as follows:

7 "1. The * * * property is located on the
8 northwest corner of the intersection of Ehlen
9 Road and Bents Road. The subject 87 acre
10 parcel is designated Primary Agriculture in
11 the Marion County Comprehensive Plan and
12 zoned EFU * * *. The southeast 2 acres of
13 the subject property are currently designated
14 Interchange Development and zoned ID * * *.
15 The purpose for this designation and zone is
16 to provide for the location of needed highway
17 service commercial facilities.^[4] This

²The application before the commissioners that resulted in the adoption of Ordinance 765 included the 10-acre component of the subject property. However, the commissioners deferred consideration of the 10 acres without prejudice until such time as the applicant provided further evidence in support of a finding of need. Record 238.

³Ordinances 765, 777 and 784 each contain a nearly identical Section IV ("Action") which states that they take an exception to Goal 3, without mentioning Goal 14. However, each Section III of the ordinances ("Adoption of Findings and Conclusions") adopts the Findings of Fact and Conclusions set forth in an Exhibit A. Record 201, 234, 269. That Exhibit A in turn adopts the "Findings and Conclusions regarding compliance with Statewide Land Use Goals 1 through 14 on pages 11 to 21 of Addendum A." Record 205, 237, 273. Addendum A is attached to the Exhibit A of each ordinance, and most of Addendum A is incorporated by reference into each Exhibit A. Addendum A states, in connection with a Goal 2 exceptions analysis, that "major truck service plazas are not characteristically an urban activity." Record 225, 256, 289. With respect to Goal 14, Addendum A states specifically: "The criteria for a Goal Exception to Goal 14 are addressed under Goal 2. Based on that evaluation, the proposal qualifies for an Exception to Goal 14." Record 232, 263, 296.

⁴The proposed "needed highway service commercial facilities" include

1 property is near the Fargo Road Interchange
2 with Interstate 5.

3 * * * * *

4 "3. Surrounding uses consist of [a Unocal] truck
5 stop/gas station/restaurant to the east on 20
6 acres of land zoned ID. The purpose of the
7 proposal is to provide additional acreage to
8 expand this facility. * * * To the northeast
9 is a 9+ acre parcel in an ID zone that has
10 been partially developed as a trucking
11 company headquarters. South of Ehlen Road on
12 12 acres zoned ID is Leathers oil/gas
13 station/truck stop. To the west of Leathers
14 is an undeveloped ID zoned parcel of 22 acres
15 currently being farmed. The 22 acres
16 surrounds several smaller parcels developed
17 with truck and auto repair businesses. Uses
18 to the west, north, and northeast are
19 predominantly commercial farm operations on
20 land zoned EFU * * *. There are several
21 acreage homesites to the north, adjacent to
22 Bents Road." Record 271-72.

23 Ordinance 765 states, in Addendum A:

24 "The key aspects of this proposal to consider,
25 then, are that it is for the expansion of an
26 existing business which has experienced a
27 significant increase in traffic, as a direct
28 result of its location." Record 247.

29 Ordinance 765 was conditioned on a new alignment of
30 Bents Road and the submission of a detailed site plan prior
31 to the issuance of any building permits or the establishment
32 of any use related to the truck stop on the 17-acre

"an automated card-lock fueling system, additional mechanical and maintenance services, an expanded motel, additional restaurant and food service facilities, additional truck driver services and the badly needed expanded truck parking area. The parking area [was to be] planned to provide 150 truck spaces and 50 trailer storage spaces." Record 246.

1 component.

2 Concerned by the potential for inappropriate urban
3 development at this rural interchange, the Department of
4 Land Conservation and Development (DLCD) appealed Ordinance
5 765 to LUBA. The county reconsidered its decision and, on
6 November 16, 1987, adopted Ordinance 777, which repeals
7 Ordinance 765, while reiterating almost all of its
8 provisions. Ordinance 777 adds that "[t]he conditions of
9 approval limit the rezoned land to those uses proposed by
10 the applicants and addressed in the Findings * * *."
11 Record 239. Ordinance 777 also contains a new condition
12 (11) that "[a]ny proposed conditional use or use variance
13 proposed on the lands rezoned by this action shall require a
14 revised exception to the Statewide Planning Goals."
15 Record 242.

16 On January 15, 1988, the commissioners adopted
17 Ordinance 784, which addresses the 10 acres excluded from
18 the rezone under Ordinances 765 and 777. Ordinance 784
19 rezones the 10 acres to ID and grants a Goal 3 exception,
20 subject to stated conditions. Record 207.

21 Ordinance 784 states, in finding 13,

22 "* * * [T]he intent of Zoning Condition #1 in
23 Ordinance 777 was to retain the ID zoned land west
24 of Bents Road in one ownership unless a modified
25 goal exception and partition is approved by the

1 County.^[5] Further, the intent was that this land
2 be developed with the land east of Bents Road as
3 an integrated truck stop under one management. It
4 is recognized that the land east of Bents Road is
5 in different ownership from that of the truck stop
6 operator. To ensure that the 10 acres rezoned by
7 this action is developed and operated as part of
8 the truck stop the proposed partition should be
9 amended to a lot line adjustment.^[6] This
10 modification consolidates the ownership of the 10
11 acres with the 17 acres rezoned in [Ordinance 777]
12 and prevents its partitioning without County
13 approval and a revised goal exception." (Emphasis
14 added.) Id.

15 Like Ordinance 777, Ordinance 784 imposes a condition
16 that any proposed conditional use or use variance proposed
17 for the rezoned land shall require a revised exception to
18 the Statewide Planning Goals (goals). Record 209.
19 Ordinance 784 also states, under the rubric "Zoning
20 Conditions":

21 * * * * *

⁵Condition 1, found in Exhibit B to both Ordinance 765 and Ordinance 777, provides:

"The 19+ acre parcel created by the partitioning * * * and the 20 acre parcel to the east owned by the truck stop developer shall be considered a single parcel for land use purposes. Any partitioning or lot line adjustment shall require County approval and shall be consistent with the intent to provide for the expansion of the truck stop and related facilities. If the dedication of right-of-way to realign Bents Road bisects the property * * * it shall not divide the parcel along the road unless a partition is approved by the County." Record 240, 297.

⁶There are additional statements in Ordinances 777 and 784 that the rezone was intended to permit expansion of the existing truck stop. See Record 224, 238 and 242.

1 "4. The intent of rezoning the 10 acres is to
2 provide area for truck and trailer parking.
3 Other truck stop related uses or facilities
4 may only be located on the subject 10 acres
5 if construction and engineer [sic]
6 considerations require it.

7 "* * * * *" Record 209.

8 On August 19, 1988, an attorney for the proposed user
9 of the rezoned 27 acres complained in a letter to the county
10 that the "under one management" provision in Ordinance 784,
11 finding 13, created practical problems in financing
12 improvements on the subject property. Record 187-88. In
13 response, on May 17, 1989, the commissioners adopted
14 Ordinance 826, which deleted finding 13 and repealed the
15 portions of Ordinances 777 and 784 pertaining to the zone
16 change from EFU to ID. Record 102. Ordinance 826 rezoned
17 the entire 27-acre parcel from EFU to ID-LU. The ordinance
18 states:

19 "It is not the intent of the repeals and actions
20 in this Section to modify the change in land use
21 designation to Interchange Development and taking
22 in [sic] exception to Statewide Goal 3,
23 Agricultural Lands, approved in Ordinances 777 and
24 784." Record 99.

25 Ordinance 826 does not alter previous ordinances
26 "regarding the approved exception to the applicable [goals]
27 or the approved change in the [county comprehensive plan]."
28 Record 100. Findings 4-6 explain:

29 "4. The proposed owner/developer of the 29 acres
30 is the present lessee-operator of the
31 adjacent [Unocal] Truck Stop. Since the
32 inception of the proposal the intent was to

1 develop the site as an extension of the
2 existing truck-stop facilities and services
3 and to develop it in such a manner as to
4 create integrated facilities. * * *
5 Commentary by the applicants' Planning
6 Consultant and correspondence with the
7 Director of the Department of Land
8 Conservation and Development (DLCD) clearly
9 supports this interpretation.

10 "5. In response to the proposal, the Board of
11 Commissioners recognized the need to limit
12 the uses to those in conjunction with the
13 extension of the existing facility. Adoption
14 of Ordinance #777 included the condition
15 requested by the DLCD that required a new
16 exception for any change in use or any
17 partitioning. This practically ensured that
18 the subject property would remain under one
19 ownership. The Board specifically stipulated
20 that the existing truck-stop and the rezoned
21 property '* * * shall be considered a single
22 property for land use purposes.'

23 "6. This point was again emphasized in Ordinance
24 #784 which rezoned an additional 10 acres.
25 The Board noted that the 27 acres would, in
26 fact, be under separate ownership from the
27 adjacent truck-stop. However, in Finding #13
28 the Board stated its intention that to ensure
29 an integrated facility the development needed
30 to be 'under one management.'" Record 101.

31 The parties dispute the meaning of "additional
32 findings" in Ordinance 826. Because these findings are at
33 the heart of the case, we quote them at length:

34 * * * * *

35 "2. The site plan in this case shows development
36 to consist of a motel, laundry, exercise,
37 shower and restroom facilities, truck and
38 trailer parking spaces, truck tire and
39 maintenance shop, a truck wash, service bays,
40 office and card-lock fueling system, and a

1 restaurant.

2 "3. The language in [Ordinance 784] Finding #13
3 was developed to address the concerns of DLCD
4 that development be limited as follows:

5 "(a) The County would apply their 'Limited
6 Use Overlay Zone' to this property. The
7 zone would permit only the truck repair
8 facilities outright. All other uses in
9 the ID zone would be permitted
10 conditionally.

11 "(b) The County would issue a conditional use
12 permit for the motel and restaurants,
13 but with the stipulation that they be
14 built concurrent with or subsequent to
15 the expanded truck stop facilities.

16 "(c) The County would adopt a condition
17 stipulating that a revised exception
18 will be required prior to approval of
19 additional conditional uses listed in
20 the zone.

21 "4. The County adopted DLCD suggestion #3, as
22 Condition #10 in Ordinance 784:

23 "'Any proposed Conditional Use or use
24 variance proposed on the land rezoned by this
25 action shall require a revised exception to
26 the Statewide Planning Goals.'

27 "In addition, site plan review was required
28 to ensure that permitted uses were developed
29 consistent with the DLCD requirements.

30 "5. * * * The goal of the applicants is to ensure
31 there are no conditions requiring a
32 management link between these two separate
33 properties, even though it is agreed the
34 development will be coordinated and
35 integrated with uses on the Unocal property
36 east of Bents Road.

37 "6. * * * The intent was that this 29 acres of
38 land be developed and maintained as a

1 coordinated full service truck stop with the
2 land east of Bents Road.

3 "In order to implement this intent, deletion
4 of Finding #13 in Ordinance 784 and revised
5 zone change conditions applying to the 27
6 acres and partitioning conditions applying to
7 the entire 29 acres are necessary.

8 "7. The permitted uses in the ID zone are limited
9 by MCZO 150.030.^[7] The following services
10 proposed for the rezoned area: (motel,
11 restaurant, key card fuel delivery system,
12 and any parking accessory to these uses) are
13 permitted uses in this zone. Duplicating
14 these uses is not necessary and must be
15 limited by the Limited Use Overlay Zone in
16 order to be consistent with the Board's
17 intent and the concerns of DLCD.

18 "8. The proposed mechanical and personal
19 services, i.e., truck tire and maintenance
20 shop with storage yard, truck wash and

⁷MCZO 150.030 provides:

"COMMERCIAL USES. Within any Interchange District, no building, structure or premises shall be used, arranged or designed to be used, erected, structurally altered or enlarged, except for one or more of the following commercial uses:

"(a) Service station (gas, oil, lubricating, minor repair);

"(b) Towing service;

"(c) Traveler accommodations:

"(1) Hotels and motels;

"(d) Eating place, restaurant, cafe, coffee shop, dining room and tea room;

"(e) Drive-in eating and snack facilities;

"(f) Vending machines, automatic merchandising;

"(g) Outdoor advertising signs (billboards).

1 service bays with an office, truck and
2 trailer parking, laundry, exercise, shower
3 and restroom facilities proposed to be
4 developed on the subject property are
5 conditional uses under MCZO 150.040 (A) (B)
6 (C) and MCZO 15.090. Conditional uses are
7 granted for the above uses.

8 "9. The proposed mechanical and personal services
9 were included in the original application and
10 were identified on the site plan. Sufficient
11 findings are contained in * * * Ordinances
12 777 and 784 showing that these conditional
13 uses meet the applicable criteria and these
14 findings and conclusions are incorporated
15 herein by this reference.

16 "10. * * * [T]he conditions in Exhibit B supersede
17 all the repealed conditions contained in
18 Ordinance #777 and #784 and repealed Finding
19 #13 in Ordinance 784. The conditions limit
20 the rezoned land to those uses proposed by
21 the applicants as required by OAR 660-04-
22 18(3)(a)." Record 101-03.

23 The conditions in Exhibit B, to which finding 10
24 refers, include the following:

25 * * * * *

26 "3. Prior to being issued any building permits or
27 establishing any use related to the truck
28 stop on the 27 acres, the applicants shall
29 submit the following plans for review and
30 comment * * *

31 * * * * *

32 "• A detailed site development plan showing
33 compliance with the development
34 standards of the ID zone * * *

35 "4. Including the 10 acres described in Ordinance
36 784 is intended to provide area for truck and
37 trailer parking. Other truck stop related
38 uses or facilities may only be located on the

1 subject 10 acres if construction and
2 engineering considerations require it, and
3 the Board of Commissioners approve[s].

4 * * * * *

5 "10. * * * [A]ny proposed conditional use or use
6 variance proposed on the land rezoned by this
7 action shall require a revised exception to
8 the Statewide Planning Goals.

9 * * * * *

10 "13 All uses granted as conditional uses or
11 approved as a permitted use under this
12 decision are identified on the applicants'
13 site plan dated June 15, 1987. The size of
14 the allowed uses is not limited except that
15 the motel is limited to 100 units. Any
16 additional uses or expansion of the motel or
17 restaurant beyond that shown on the site plan
18 approved under Condition #3 shall require a
19 conditional use permit. Uses listed as a
20 permitted use in the ID zone, other than
21 those identified on the site plan, are
22 designated as conditional uses by the limited
23 Use Overlay zone in order to meet the
24 requirements of State Administrative Rules
25 for goal exceptions.

26 "14. There shall be no duplication of services or
27 uses between the 27 acre rezoned area and the
28 existing Unocal truck stop facility located
29 east of Bents Road, except as identified on
30 the applicants' site plan of June 15, 1987.
31 Development on the 27 acre rezoned area is
32 considered an extension of the uses and
33 services provided by the Unocal truck stop
34 located on the east side of Bents Road.

35 * * * * * Record 105-06.

36 On June 12, 1995, after notice and a hearing, the
37 commissioners adopted the challenged decision, in the form

1 of an administrative review order.⁸ This appeal followed.

⁸What the challenged decision purports to accomplish is set forth in the following recitals:

"* * * * *

"5. On January 5, 1995, the Applicant submitted an administrative review application requesting permission to obtain approval of the uses indicated on an attached site plan and obtain site plan approval excluding grading and drainage. The site plan submitted with the application enumerated the following uses:

"a. Travel Plaza facility including restaurant/dining area, fast food restaurant, sales/cashier area, driver's facility with laundry, showers, and lounge, plus an office and storage areas.

"b. Proprietary automated fueling system.

"c. 100 unit motel.

"d. Proposed storm water retention area.

"e. Diesel service fueling system.

"f. Truck scales.

"g. Associated and automobile parking.

"6. In addition to the general approvals requested as outlined in the preceding finding, Applicant requested clarification of three issues:

"a. Whether a small portion of a truck scale and two to four diesel fueling islands can be located in a ten acre area restricted to truck and trailer parking by Ordinance 826.

"b. Verification that a 'convenience store' located on the Flying J facility would not duplicate services already provided by the travel store and truckers store at the Unocal Truck Stop.

"c. Whether the proprietary automated fueling system proposed by Applicant is an equivalent service to the automatic fueling system approved in the June 15, 1987 site plan.

1 **FIRST, THIRD AND FIFTH ASSIGNMENTS OF ERROR**

2 In these overlapping assignments of error, petitioners
3 contend that certain uses allowed by Ordinance 826 are not
4 allowed by Ordinances 777 and 784 and the "reasons"
5 exceptions to the goals taken at the time the county adopted
6 Ordinances 777 and 784. Petitioners maintain that because
7 an exception to the goals was not taken when additional uses
8 were permitted on the subject property by Ordinance 826, the
9 county cannot rely on Ordinance 826 to allow the uses.

10 Ordinance 826 relies on the applicants' June 15, 1987
11 site plan to determine what uses were allowed by Ordinances
12 777 and 784. Record 106. That raises the question of
13 whether the uses identified in Ordinances 777 and 784, for
14 which goal exceptions were taken, include all of the uses
15 shown on the site plan. Respondents answer they do, relying
16 on a statement in Addendum A that is incorporated by
17 reference into Ordinances 777 and 784:

18 "A concept layout of the proposed new facilities
19 and the area they will occupy on the proposed site
20 accompanies this report.^[9] The new facilities
21 will be in addition to the existing business."
22 Record 215, 246.

23 Respondents' answer ignores the condition attached to

"* * * * *

The challenged decision clarified the issues stated in (a)-(c) by answering in the affirmative the questions posed.

⁹The "concept layout" is the June 15, 1987 site plan, which has been submitted as an oversized exhibit.

1 both Ordinances 777 and 784, in response to concerns
2 expressed by DLCD, that any proposed conditional use shall
3 require a revised exception to the goals. Nothing in the
4 record shows DLCD was aware that any conditional uses had
5 been allowed or that the county itself recognized that the
6 June 15, 1987 site plan included conditional uses and
7 intended these conditional uses be allowed over DLCD's
8 objections. We agree with petitioners that Ordinances 777
9 and 784 allow only the uses permitted outright in the ID
10 zone.¹⁰ An expansion of allowed uses cannot occur without a
11 revised goal exception.¹¹ OAR-660-04-018(3).¹²

¹⁰The uses identified by petitioners that are not permitted as outright uses in the ID zone include the proposed convenience store and truck maintenance facilities, including truck tire and maintenance, truck wash, truck parking and service facilities. Petition for Review 16.

¹¹Respondents view the first assignment of error as arising out of a dispute over the interpretation of a local land use "enactment," and argue at length that the deferential standard of review set forth in Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) should apply. Respondents acknowledge that the adoption of ORS 197.829(1), which refers only to comprehensive plans and land use regulations, may have modified the Clark standard to eliminate deferential review of mere "enactments." Since we consider the failure to take an exception to the goals to be a violation of statutes and statewide regulations, we do not reach the question of whether we owe the same deference to the local governing body's interpretation of an enactment that is neither its comprehensive plan nor a land use regulation as we do to that body's interpretation of its own comprehensive plan and land use regulations.

¹²OAR-660-04-018(3) states:

"'Reasons' Exceptions:

"(a) When a local government takes an exception under the 'Reasons' section of ORS 197.732(1)(c) and OAR 660-04-020 through 660-04-022, plan and zone designations must limit

1 Respondents argue that because the period has passed
2 for appealing Ordinance 826, it is acknowledged.
3 ORS 197.625(1). Petitioners maintain that ORS 197.625(1)
4 does not apply, because proper notice of the adoption of
5 Ordinance 826 was never given to DLCD, as required by ORS
6 197.610 and 197.615. See Oregon City Leasing v. Columbia
7 County, 121 Or App 173, 177, 854 P2d 490 (1990); DLCD v.
8 City of St. Helens, 29 Or LUBA 485, 495, aff'd 138 Or App
9 222 (1995).

10 We again agree with petitioners. Ordinance 826 recites
11 that "required notice was provided to the Department of Land
12 Conservation and Development." Record 97. However, the
13 record does not contain copies of either a 45-day notice to
14 DLCD of a proposed amendment, required by OAR 660-18-020(1),
15 or the notice of adoption, required by OAR 660-18-040(1).

16 The challenged decision summarily rejects petitioners'
17 contention, made during the local proceedings, that an
18 exception should have been required before conditional uses
19 were allowed on the subject property. Record 8. Yet the
20 record does not show an exception was taken to the goals, as
21 required by Ordinances 777 and 784, before conditional uses
22 were allowed by findings 8 and 9 of Ordinance 826. It

the uses and activities to only those uses and activities
which are justified in the exception.

"(b) When a local government changes the types or intensities
of uses within an exception area approved as a 'Reasons'
exception, a new 'Reasons' exception is required."

1 appears the county did not view the adoption of Ordinance
2 826 as an amendment to its comprehensive plan, and, for that
3 reason, failed to notify DLCD before and after adoption.¹³
4 However, to allow additional uses on the subject property,
5 the county was required to take an exception, and taking an
6 exception necessitates a plan amendment. ORS 197.732(8).

7 In the third assignment of error, petitioners make the
8 additional argument that the county should be required to
9 take a revised exception to Goal 3 because the exception to
10 Goal 3 taken when Ordinances 777 and 784 were adopted
11 contemplated that the subject property would be used to
12 expand the Unocal truck stop and not as a separate business
13 serving both truck and automobile customers. Petitioners
14 contend the site plan approved by the challenged decision
15 increases the impact on adjacent resource land.

16 Respondents reply that the approved site plan will have
17 fewer impacts on adjacent resource land than the June 15,
18 1987 site plan. The challenged decision itself finds that
19 the proposed plan minimizes the impact on adjacent uses
20 because of the location of the "travel plaza" as far away as
21 possible from adjacent farm land. Record 7.

22 We do not agree with petitioners that the earlier Goal
23 3 exception was expressly limited to serve "large trucks" to

¹³If that appearance is incorrect, the county may make findings on remand, supported by substantial evidence in the record, explaining why it concludes a properly noticed plan amendment was taken.

1 the exclusion of automobiles. Addendum A states that the
2 Unocal truck stop is "oriented to the I-5 traveller [sic]"
3 and adds that "providing for auto travellers and tourists is
4 a natural and typical adjunct to every truck stop."
5 Record 245.

6 However, we do agree with petitioners that the
7 challenged decision abandons one of the basic assumptions
8 used to justify granting a Goal 3 exception at the time
9 Ordinances 777 and 784 were adopted. Addendum A
10 unequivocally states the facilities on the subject property
11 are to be an expansion of the existing Unocal truck stop,
12 integrated with the existing facilities. Record 224, 255
13 288. That is repeated in Ordinances 765 and 777, finding 3;
14 Ordinance 784, finding 13; and Ordinance 826, "additional
15 findings" 5 and 6, and condition 14. Record 102, 106, 206-
16 07, 235, 271. A finding that the proposed site plan
17 minimizes impacts on adjacent farm property does not answer
18 the question whether an independent truck stop in
19 combination with the existing Unocal truck stop will result
20 in a greater intensity of use than an expanded Unocal truck
21 stop alone. Although it is a close call, we believe the
22 change from an expansion of an existing truck stop to an
23 independent truck stop with its own "travel plaza"
24 represents a change in either the type or the intensity of
25 the proposed use, justifying another notice to DLCD. ORS
26 197.610; OAR 660-04-018(3).

1 The first, third and fifth assignments of error are
2 sustained.

3 **SECOND ASSIGNMENT OF ERROR**

4 Petitioners contend the challenged decision authorizes
5 urban uses without taking an exception to Goal 14.
6 Petitioners state that "[n]o Goal 14 exception has
7 previously been taken on this property." Petition for
8 Review 21.¹⁴

9 Ordinances 777 and 784 do not clearly take an exception
10 to Goal 14. In the actual texts of the ordinances,
11 excluding exhibits incorporated by reference, mention is
12 made only of an exception to Goal 3. Record 202, 234.
13 However, Addendum A, which is incorporated by reference,
14 contains an analysis of Goal 14 as it applies to the
15 original expansion proposal, and concludes, "the proposal
16 qualifies for an Exception to Goal 14. Record 232, 263.
17 Yet in its Goal 2 exceptions analysis, Addendum A also
18 states that the policies of Goal 14 should not apply
19 "because major, enroute truck service plazas are not a

¹⁴Similar statements can be found in the Petition for Review at 23 and 28. However, they are inconsistent with the position taken by petitioners in the local proceedings. In a letter dated June 9, 1995, which was delivered after the close of the final hearing, petitioners told the commissioners: "The exceptions in Ordinances 777 and 784 were also to Statewide Planning Goal 14, Urbanization." Record 11b.

The first assignment of error states twice that Ordinances 777 and 784 took an exception to Goal 3 and 4. Petition for Review 15. Since neither ordinance addresses Goal 4, we initially understood this to be a typographical error referring to Goal 14. Now we are not sure what was intended.

1 characteristically urban use." Record 224-25, 255-56.

2 Both the county and DLCD were apparently unaware that
3 an exception to Goal 14 was being taken when Ordinances 777
4 and 784 were adopted. Even if a Goal 14 exception was
5 acknowledged at that time, like the exception to Goal 3, it
6 was premised on an expansion of the existing Unocal truck
7 stop rather than on the establishment of an additional,
8 independent truck stop. Because the new proposal signifies
9 a change in the type or intensity of the use in an exception
10 area, the county must (1) make findings showing either that
11 Goal 14 does not apply or the proposal complies with an
12 existing Goal 14 exception; or (2) take a new Goal 14
13 exception.

14 The second assignment of error is sustained.

15 **FOURTH ASSIGNMENT OF ERROR**

16 Petitioners contend that in allowing uses other than
17 truck and trailer parking in the 10-acre component of the
18 subject property (the truck parking area), the challenged
19 decision misapplies Ordinance 826, condition 4:¹⁵

20 "Including the 10 acres described in Ordinance 784
21 is intended to provide area for truck and trailer
22 parking. Other truck stop related uses or
23 facilities may only be located on the subject 10
24 acres if construction and engineering
25 considerations require it, and the Board of

¹⁵The challenged decision allows a truck scale and two to four diesel fueling islands in the truck parking area. Record 8.

1 Commissioners approve[s]."¹⁶ Record 55.
2 Petitioners argue (1) the commissioners were required to
3 make findings determining the proposed uses of the truck
4 parking area are "other truck stop related uses or
5 facilities"; (2) there is not substantial evidence to
6 support a finding that the proposed uses are "truck stop
7 related uses or facilities"; and (3) the "construction and
8 engineering considerations" relied upon by the challenged
9 decision do not justify locating the proposed uses in the
10 truck parking area.

11 The first and second arguments depend upon a
12 distinction we have already rejected between automobile uses
13 and truck stop uses. Moreover, we agree with respondents
14 that truck scales are indisputably a truck stop related
15 facility, and because diesel fuel islands serve trucks far
16 more often than automobiles, they clearly are as well.¹⁷

17 The third argument addresses finding 15(c) of the
18 challenged decision:

19 "Applicant proposes placing a small curbed section
20 of a truck scale and two to four diesel fueling
21 islands on the subject property in the [truck
22 parking area]. The realignment of Bents Road is a
23 construction and engineering consideration that

¹⁶Ordinance 784, condition 4, quoted supra, imposes the same constraint on the location of truck stop related uses or facilities in the truck parking area.

¹⁷However, we conclude in our discussion of the seventh assignment of error that truck scales cannot be allowed without a revised exception to Goal 3.

1 has required this Applicant to re-configure its
2 site plan. The 10 acre parcel originally intended
3 for truck parking on the 1987 site plan contains
4 no truck parking on the [present] site plan
5 because the alignment of Bents Road necessitated
6 that the truck parking be placed elsewhere on the
7 site. The Board finds that the incursions of the
8 truck scale and fueling islands are minimal and
9 necessary for safe traffic flow on the site and
10 are necessitated by the realignment of Bents
11 Road." Record 9.

12 Petitioners contend that because it was known at the
13 time Ordinances 784 and 826 were adopted that Bents Road
14 would have to be moved, the movement of Bents Road cannot be
15 used as a "construction and engineering consideration" to
16 justify allowing uses other than truck parking in the truck
17 parking area. Petitioners also contend that the actual
18 reason for the encroachment into the truck parking area is
19 the reconceptualization of the proposed development as an
20 independent truck stop, and therefore, revised goal
21 exceptions must be taken.

22 The need for revised goal exceptions has been addressed
23 under previous assignments of error, and is not revisited
24 here. We disagree with petitioners' other contention. The
25 fact that it was known when Ordinances 784 and 826 were
26 adopted that Bents Road would have to be moved does not mean
27 moving Bents Road did not subsequently generate
28 "construction and engineering considerations" that warranted
29 the minor encroachment of truck stop related uses into the
30 truck parking area. The county's interpretation of
31 condition 4 of Ordinances 784 and 826 is both reasonable and

1 correct.¹⁸

2 The fourth assignment of error is denied.

3 **SIXTH, SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR**

4 The sixth, seventh and eighth assignments of error
5 contend that (1) under the guise of "interpretation," the
6 challenged decision adds a convenience store and truck
7 scales to the uses permitted under Ordinances 777, 784 and
8 826; (2) amending Ordinances 784 and 826 cannot be
9 accomplished by an order, but must be done by ordinance; and
10 (3) permitting such uses is contrary to the exceptions taken
11 in Ordinances 777 and 784.

12 MCZO 176.020 states:

13 "When the Limited Use Overlay zone is applied, the
14 uses permitted in the underlying zone shall be
15 limited to those permitted uses specifically
16 referenced in the ordinance adopting the Limited
17 Use Overlay zone. Until the Overlay zone has been
18 removed or amended through the rezoning process,
19 the only permitted uses in the zone shall be those
20 specifically referenced in the adopting ordinance.
21 Uses that would otherwise be permitted may only be
22 allowed if a conditional use permit is approved."
23 (Emphasis added.)

24 There is no dispute that the truck scales and proposed
25 convenience store are not identified on the June 15, 1987
26 site plan. The challenged decision, in findings 15(d) and
27 16, concludes that truck scales and the proposed convenience

¹⁸Because the reasonable and correct standard is satisfied, we need not decide whether we must defer, under ORS 197.829(1) and Clark, supra, to the commissioners' interpretation of Ordinances 784 and 826. See n11, supra. See also Larsson v. City of Lake Oswego, 26 Or LUBA 515, 522 (1994).

1 store are accessory uses "incidental, appropriate, and
2 subordinate to [the] approved uses." Record 9-10. However,
3 since accessory uses are still uses, these findings do not
4 adequately explain why they are not prohibited by Ordinance
5 826, which applies the Limited Use Overlay Zone. Ordinance
6 826, condition 13, states that "[a]ll uses granted as
7 conditional uses or approved as a permitted use under this
8 decision are identified on the applicants' site plan dated
9 June 15, 1987," and requires a goal exception for any
10 additional uses approved. Record 106. The county cannot
11 effectively amend Ordinance 826 under the guise of
12 interpretation. See Murphy Citizens Advisory Comm. v.
13 Josephine County, 26 Or LUBA 181, 184 (1993); Loud v. City
14 of Cottage Grove, 26 Or LUBA 152, 157 (1993).

15 Since the challenged decision does not purport to amend
16 Ordinance 826, we do not reach petitioners' argument that
17 the county cannot amend an ordinance with an order.

18 Finally, the exception taken in Ordinances 777 and 784
19 is limited to specifically enumerated uses, and does not
20 include a convenience store and truck scales. Record 206,
21 215, 239, 246. Permitting these uses requires conditional
22 use permits, which in turn requires revised exceptions.

23 The sixth, seventh and eighth assignments of error are
24 sustained.

25 **NINTH ASSIGNMENT OF ERROR**

26 Petitioners contend the notice provided by the county

1 of the hearings before the commissioners did not satisfy the
2 requirements of ORS 197.763, because the decision approves
3 the proposed site plan, "which include[s] more than the
4 three issues identified in the notice." Petition for Review
5 36. Petitioners contend the commissioners did not consider
6 their written comments, submitted after the hearing, that
7 addressed "issues raised for the first time in the
8 findings." Id. Finally, petitioners contend the alleged
9 deficiencies in the notice prejudiced their substantial
10 rights because had the notice been adequate, "the
11 commissioners would have had the benefit of that analysis."
12 Id.

13 ORS 197.763(3)(a) states that the notice provided by
14 the county shall "[e]xplain the nature of the application
15 and the proposed use or uses which could be authorized."
16 The county's notice states the purpose of the hearing is

17 "to receive testimony on an application to develop
18 within the 10 acre restricted area, verification
19 that there is no duplication of service created by
20 the proposed convenience store and clarification
21 of Ordinance 784 on the definition of a card lock
22 fueling station on a 27 acre parcel in an ID * * *
23 zone on property located * * *." Record 28.

24 We agree with petitioners that the notice fails to
25 satisfy ORS 197.763(3)(a), because a reasonable person
26 without additional information could not tell from the
27 notice that approval of a revised site plan was likely to
28 result. See Kevedy, Inc. v. City of Portland, 28 Or LUBA
29 227, 232 (1994). The notice does not explain that the

1 application is for a site plan review.

2 However, petitioners do not show they were
3 substantially prejudiced as a result, and therefore provide
4 no basis for remand. ORS 197.840(9)(c). Petitioners'
5 written comments are included in the record. Nothing
6 supports petitioners' contention that the comments were not
7 considered by the commissioners.

8 The ninth assignment of error is denied.

9 **TENTH ASSIGNMENT OF ERROR**

10 **A. Waiver**

11 Respondents contend that the issues raised by this
12 assignment of error were not raised below and were therefore
13 waived under ORS 197.763(1). Petitioners reply that because
14 the notice of intent to appeal was filed prior to the
15 effective date of ORS 197.835(4)(b) (1995 edition) and
16 because there were various violations of ORS 197.763 in the
17 local proceeding, the waiver provision in ORS 197.763(1)
18 does not apply. See Wuester v. Clackamas County, 25 Or LUBA
19 425, 427-30 (1993).

20 ORS 197.835(4)(b) (1995 edition) does not apply to
21 cases in which the notice of intent to appeal was filed
22 prior to the effective date of the statute. Ramsay v. Linn
23 County, ___ Or LUBA ___ (LUBA No. 94-202, January 5, 1996)
24 slip op 3-6. Petitioners contend the county failed to
25 comply with ORS 197.763 in various respects. Since we have
26 already concluded, under the ninth assignment of error, that

1 the notice of the commissioners' hearing failed to satisfy
2 ORS 197.763(3)(a), we do not address these contentions
3 further. We must consider this assignment of error,
4 notwithstanding petitioners' failure to raise it below and
5 notwithstanding petitioners' failure to show prejudice as a
6 result of the inadequacy of the county's notice of hearing.
7 See Shapiro v. City of Talent, 28 Or LUBA 542, 544 (1995).

8 **B. Inclusion of Goal Exception**

9 This assignment of error states, "The record
10 erroneously fails to include the Goal 3 exception governing
11 the two acres." Petition for Review 36.

12 Our rules require that record objections be filed
13 within 10 days following receipt of the record by the person
14 filing the objection. OAR 661-10-026. The record in this
15 proceeding was filed on July 20, 1995, and supplemented
16 twice in response to objections filed by petitioners. This
17 objection could have been raised upon receipt of the
18 original record. See Edwards v. City of Portland, 25 Or
19 LUBA 809, 811 (1993). Yet petitioners did not raise the
20 objection until after the record was settled. Petitioners'
21 objection is untimely.

22 The tenth assignment of error is denied.

23 The county's decision is remanded.