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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF LAND CONSERVATION  
AND DEVELOPMENT,  
*Petitioner,*

vs.

UMATILLA COUNTY,  
*Respondent,*

and

PENDLETON COUNTRY CLUB,  
*Intervenor-Respondent.*

LUBA No. 2000-097

GARY RHINHART,  
*Petitioner,*

vs.

UMATILLA COUNTY,  
*Respondent,*

and

PENDLETON COUNTRY CLUB,  
*Intervenor-Respondent.*

LUBA Nos. 2000-101 and 2000-102

FINAL OPINION  
AND ORDER

Appeal from Umatilla County.

Steven E. Shipsey, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of petitioner Oregon Department of Land Conservation and Development. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Daniel Kearns, Portland, filed a petition for review on behalf of petitioner Gary

1 Rhinhart. With him on the brief was Reeve Kearns, PC.

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No appearance by Umatilla County.

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Douglas E. Hojem represented intervenor-respondent.

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BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,  
8 participated in the decision.

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REMANDED

04/26/2001

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

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**NATURE OF THE DECISION**

Petitioners appeal a decision amending the county’s comprehensive plan and zoning code to allow residential development on agricultural land adjoining an existing golf course.

**MOTION TO INTERVENE**

The Pendleton Country Club (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property is a 94-acre portion (the exception area) of a 248-acre tract owned by intervenor, located off Highway 395 seven miles south of the City of Pendleton, and five miles north of the City of Pilot Rock. The entire tract is planned and zoned for agricultural use, and consists topographically of the Birch Creek valley and adjoining slopes.

An 18-hole golf course, commenced in 1957 and completed in 1987, occupies 150 acres of the valley floor. The golf course includes a driving range, practice green, practice bunkers, a clubhouse, a swimming pool, and storage buildings. The golf course currently averages 25,000 rounds of golf per year, near its capacity. Membership currently numbers 350, although the course is open to members of the general public who live outside the county. Approximately 30 to 35 percent of golf rounds on the course are from non-member or tourist participants. The clubhouse provides luncheons and dinners, and is available as a meeting room for wedding receptions and other functions. The facility serves as a focal point for social and recreational activity for Pendleton and the surrounding area.

The proposed exception area is an upper bench area in the eastern portion of the 248-acre tract, overlooking the golf course. Soils in the exception area consist of Soil Capability Classes III (36.5 acres), IV (7.5 acres) and VII (42.5 acres). The exception area is traversed by the access road to the golf course. The exception area has been farmed in the past, but is

1 currently unused. Surrounding lands consist of irrigated and dryland farms, with a small area  
2 of lands zoned for rural residential use to the west.

3 In 1999, intervenor submitted an application to the county to (1) amend the  
4 comprehensive plan designation for the exception area from Agriculture to Rural Residential;  
5 (2) establish a new zone, “Golf Course Development-2” (GCD-2); and (3) amend the zoning  
6 map designation from exclusive farm use (EFU) to GCD-2. The GCD-2 zone would allow  
7 up to 55 attached and detached single-family homes and townhouses in the exception area,  
8 served by community domestic water, wastewater collection and treatment/disposal facilities.

9 The planning commission conducted a hearing on the application and on October 29,  
10 1999, voted to recommend denial to the board of commissioners (commissioners). The  
11 commissioners conducted a hearing on January 10, 2000, that was continued to February 2,  
12 2000. At the February 2, 2000 hearing, the commissioners closed the evidentiary record,  
13 deliberated, and voted to approve the application. On June 7, 2000, the commissioners  
14 adopted an ordinance approving the application. The county’s decision adopts exceptions to  
15 Statewide Planning Goals 3 (Agricultural Lands), 11 (Public Facilities and Services) and 14  
16 (Urbanization). This appeal followed.

17 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

18 Petitioners<sup>1</sup> challenge the county’s exceptions to Goals 3, 11 and 14, arguing that the  
19 county’s decision misconstrues the applicable law, and fails to demonstrate that exceptions  
20 are justified under the applicable law.

21 The county’s decision adopts a “reasons” exception to Goals 3, 11 and 14 pursuant to  
22 ORS 197.732(1)(c), Goal 2, Part II(c) and OAR 660-004-0020(2), which set forth criteria for  
23 reasons exceptions.<sup>2</sup> Petitioners challenge the county’s findings under the first three criteria.

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<sup>1</sup>Petitioner Rhinhart joins in the first and second assignments of error in the petition for review filed by Oregon Department of Land Conservation and Development (DLCD).



1 sections (2) through (10) of OAR 660-004-0022 set forth specific criteria for particular types  
2 of uses or particular types of protected resources. For present purposes, the relevant section  
3 is OAR 660-004-0022(2), which provides criteria for adopting a reasons exception to allow  
4 rural residential development.<sup>4</sup> Also relevant in the present case, indeed of critical  
5 importance, is OAR 660-014-0040, which provides criteria for adopting a reasons exception  
6 to Goal 14.<sup>5</sup>

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analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or

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

<sup>4</sup>OAR 660-004-0022(2) provides:

“For rural residential development the reasons cannot be based on market demand for housing, except as provided for in this section of this rule, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics. A county must show why, based on the economic analysis in the plan, there are reasons for the type and density of housing planned which require this particular location on resource lands. A jurisdiction could justify an exception to allow residential development on resource land outside an urban growth boundary by determining that the rural location of the proposed residential development is necessary to satisfy the market demand for housing generated by existing or planned rural industrial, commercial, or other economic activity in the area.”

<sup>5</sup>OAR 660-014-0040 provides in relevant part:

“(1) As used in this rule, ‘undeveloped rural land’ includes all land outside of acknowledged urban growth boundaries except for rural areas committed to urban development. This definition includes all resource and nonresource lands outside of urban growth boundaries. \* \* \*

“(2) A county can justify an exception to Goal 14 to allow incorporation of a new city or establishment of new urban development on undeveloped rural land. Reasons which can justify why the policies in Goals 3, 4, 11, and 14 should not apply can include but are not limited to findings that an urban population and urban levels of facilities and services are necessary to support an economic activity which is dependent upon an adjacent or nearby natural resource.

“(3) To approve an exception under this rule, a county must also show:

“(a) That Goal 2, Part II(c)(1) and (c)(2) are met by showing the proposed urban development cannot be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development at existing rural centers;

1 Under this framework, determining which criteria apply requires that the local  
2 government identify the character of the use for which a reasons exception is proposed. If  
3 the proposed exception involves circumstances or uses not governed by OAR 660-004-  
4 0022(2) through (10) or OAR chapter 660, division 14, then OAR 660-004-0022(1)(a)–(c)  
5 provides the applicable criteria for determining whether reasons justify the proposed  
6 exception. If, on the other hand, the proposed exception is intended to allow *urban*  
7 development, then OAR 660-004-0022(1) directs the county to OAR 660-014-0040.  
8 Conversely, if the proposed exception is intended to allow *rural residential* development,  
9 then OAR 660-004-0022(1) directs the county to OAR 660-004-0022(2).

10 In the present case, the county adopted reasons exceptions to Goals 3, 11 and 14.  
11 These goals are clearly implicated, because the exception is intended to allow, and the GCD-  
12 2 zone permits, small-lot detached and attached residential development on agricultural land,  
13 supported by community sewer and water facilities.<sup>6</sup> *1000 Friends of Oregon v. Yamhill*  
14 *County*, 27 Or LUBA 508, 521 (1994) (exceptions to Goal 3 that allow residential

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- “(b) That Goal 2, Part II(c)(3) is met by showing the long-term environmental, economic, social and energy consequences resulting from urban development 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 on other undeveloped rural lands, considering [certain factors;]
  - “(c) That Goal 2, Part II(c)(4) is met by showing the proposed urban uses are compatible with adjacent uses or will be so rendered through measures designed to reduce adverse impacts considering [certain factors;]
  - “(d) That an appropriate level of public facilities and services are likely to be provided in a timely and efficient manner;
  - “(e) That incorporation of a new city or establishment or new urban development of undeveloped rural land is coordinated with comprehensive plans of affected jurisdictions and consistent with plans that control the area proposed for incorporation.”

<sup>6</sup>We use the phrase “community sewer and water facilities” in this opinion as shorthand for facilities on rural lands that are not limited to the needs and requirements of rural lands, or that are otherwise prohibited by Goal 11, and therefore require an exception to Goal 11.

1 development on lots much smaller than 10 acres must address Goals 11 and 14); *see also*  
2 OAR 660-004-0040 (rule effective October 4, 2000, providing that an exception to Goal 14  
3 is required for proposals or zones allowing new rural lots or parcels smaller than two acres).

4 Unfortunately, the county’s decision fails to recognize an important threshold issue:  
5 whether the proposed development is urban or rural. The county’s Goal 14 exception  
6 necessarily implies that the proposed uses are urban in nature.<sup>7</sup> However, the decision’s  
7 findings directed at Goal 14 refer to the proposed development as “rural residential housing.”  
8 Record 39. The county’s decision does not appear to recognize that those characterizations  
9 are mutually exclusive, and result in having to satisfy different sets of criteria. Perhaps  
10 because of this fundamental confusion, the county failed to address applicable criteria and  
11 addressed criteria that are probably inapplicable.<sup>8</sup> For example, as petitioners point out, the  
12 county’s Goal 14 exception does not address OAR 660-014-0040, governing exceptions for  
13 new urban development, and its Goal 3 exception does not address OAR 660-004-0022(2),  
14 governing exceptions for new rural residential development. More confusing still is the  
15 county’s Goal 11 exception: the county’s decision applies both OAR 660-004-0022(1) *and*  
16 (2), without recognizing that, depending on how the proposed use is characterized, at most  
17 one and perhaps neither of those provisions apply with respect to the proposed community  
18 facilities under Goal 11.

19 These fundamental confusions regarding the relevant legal framework and criteria  
20 make plenary remand necessary. We therefore do not address each of petitioners’ specific  
21 challenges to the county’s findings directed at the ultimate standard in OAR 660-004-  
22 0020(2)(a). Instead, we address in detail only those challenges that may arise again or in a

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<sup>7</sup>At various points, the challenged decision expresses the county’s belief that the *existing* golf course is an *urban* use, apparently because of the significant role the facility plays in the recreational and social life of the Pendleton and Pilot Rock urban areas. It is not clear what role, if any, that belief plays in the county’s considerations under Goals 3, 11 and 14, and therefore we need not and do not address it.

<sup>8</sup>To be fair to the county, the pertinent rule provisions and their interrelationship are not models of clarity.

1 different guise on remand. We also provide the following observations, to assist the parties  
2 on remand.

3 Assuming that the proposed use is for urban residential development, the county must  
4 satisfy OAR 660-004-0020(2)(a) by addressing the requirements of OAR 660-014-0040. We  
5 have some doubt that the proposed development *can* satisfy those requirements, particularly  
6 the requirement that “urban population and urban levels of facilities and services are  
7 necessary to support an economic activity which is dependent upon an adjacent or nearby  
8 natural resource.” OAR 660-014-0040(2). Nonetheless, any judgment on that point is  
9 premature, because the county has not addressed OAR 660-014-0040. Assuming, for the  
10 sake of discussion, that the proposed development complies with OAR 660-014-0040, there  
11 would then be no need to address the requirements of either OAR 660-004-0022(1) or (2)  
12 with respect to either Goal 3 or Goal 11. That is because reasons that justify a Goal 14  
13 exception under OAR 660-014-0040 *also* must be sufficient to justify exceptions to Goals 3,  
14 4 and 11, if exceptions to those goals are required. OAR 660-014-0040(2); *see* n 5. In this  
15 context, no *additional* reasons for purposes of OAR 660-004-0020(2)(a) are necessary to  
16 establish exceptions to Goals 3, 4 and 11 once the local government demonstrates reasons to  
17 justify new urban development under OAR 660-014-0040.

18 On the other hand, it may be that the proposed use is correctly characterized as *rural*  
19 residential development, or that the application can be modified on remand to make it qualify  
20 as rural residential development.<sup>9</sup> If the proposed development is rural residential  
21 development, a Goal 14 exception is not necessary and the county need not address OAR  
22 chapter 660, division 14. In order to approve a reasons exception to Goal 3 to allow rural

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<sup>9</sup>We have some question whether it is possible to correctly characterize residential development that is served by a community water and sewer system as rural residential development. *See* OAR 660-014-0030(3)(c) (public water and sewer are indicia of urban levels of development); OAR 660-004-0040(7)(e)(D) (prohibiting new rural planned unit developments with community sewer systems). Assuming without deciding that it is possible to have rural residential development with community water and sewer, we discuss the criteria that would have to be satisfied to take a reasons exception to Goal 11 to approve such development below.

1 residential development, the county must satisfy OAR 660-004-0020(2)(a) by demonstrating  
2 that reasons justify the proposed rural residential development under OAR 660-004-0022(2).

3 As we noted above, it is not clear that residential development served by community  
4 water and sewer facilities requiring an exception to Goal 11 can be characterized as *rural*  
5 residential development. The applicable goals and rules are less than clear about the kinds of  
6 reasons that may or may not be used to justify a Goal 11 exception.<sup>10</sup> Assuming it is  
7 possible to approve new residential development with community water and sewer without  
8 taking an exception to Goal 14, the criteria that govern the reasons that may justify new rural  
9 residential development, which are set out at OAR 660-004-0022(2), do not govern the  
10 reasons that may justify a community water and sewer system for such rural residential  
11 development.<sup>11</sup> Rather, the general provisions at OAR 660-004-0022(1) establish the criteria  
12 that would govern the reasons that may or may not be used to approve a Goal 11 exception to  
13 allow establishment or extension of community water and sewer into previously unserved  
14 rural areas. In other words, because community water and sewer are not generally necessary  
15 for rural residential development, those facilities must be approved as a separate use.  
16 Moreover, because none of the specific provisions of OAR 660-004-0022(2) through (10)  
17 apply to community sewer and water facilities on rural land, the general criteria of OAR 660-  
18 004-0022(1) apply.

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<sup>10</sup>Goal 11 is “[t]o plan and develop a timely, orderly, and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.” Goal 11 requires that urban and rural development be supported by types and levels of public facilities and services “appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served.” In relevant part, Goal 11 prohibits local governments from allowing the “establishment” of sewer systems outside urban growth boundaries or unincorporated community boundaries, unless it is the only practicable alternative to mitigate a public health hazard.

<sup>11</sup>The presumption under OAR 660-014-0040 is that urban residential development on resource land will require exceptions to Goal 3 or 4 as well as exceptions to Goals 11 and 14 to allow an urban level of development with urban levels of services and facilities on rural resource land. OAR 660-014-0040 expressly addresses the reasons that may be used for such exceptions to Goals 3, 4, 11 and 14. A different presumption applies to rural residential development. Rural residential development, because it is properly viewed as rural rather than urban, does not require an exception to Goal 14. Similarly, such development will generally not require an exception to Goal 11, because it will not require an urban level of services and facilities.

1 In summary, the county must first determine whether the proposed development is  
2 correctly viewed as (1) urban residential development; (2) rural residential development with  
3 services and facilities that do not require an exception to Goal 11, *i.e.*, facilities that are  
4 appropriate for and limited to rural areas, and do not involve the establishment or extension  
5 of a sewer system; or (3) rural residential development with services and facilities that  
6 require an exception to Goal 11. In the first case, the reasons that may be used to justify  
7 exceptions to Goals 3, 11 and 14 under OAR 660-004-0020(2)(a) are governed by OAR 660-  
8 014-0040. In the second case, the reasons that may be used to justify an exception to Goal 3  
9 under OAR 660-004-0020(2)(a) are governed by OAR 660-004-0022(2). In the third case,  
10 the reasons that may be used to justify an exception to Goal 3 to allow the rural residential  
11 development are set out at OAR 660-004-0022(2), while the reasons that may be used to  
12 justify an exception to Goal 11 are set out at OAR 660-004-0022(1).

13 In the present case, as noted above, the county’s findings do not address OAR 660-  
14 014-0040 in approving exceptions to Goals 3, 11 and 14, nor do they address OAR 660-004-  
15 0022(2) to approve an exception to Goal 3 in approving rural residential development. The  
16 county did adopt findings approving an exception to Goal 11 under OAR 660-004-0022(1)  
17 and (2). To assist the parties on remand, we address to the extent necessary petitioners’  
18 challenges to the county’s findings under those provisions.

19 **1. OAR 660-004-0022(1)**

20 Petitioners argue that the county’s findings under OAR 660-004-0022(1) misconstrue  
21 the applicable law and fail to demonstrate reasons why the Goal 11 policy should not  
22 apply.<sup>12</sup> We generally agree.

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<sup>12</sup>The county’s findings under OAR 660-004-0022(1) state:

“a. There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of statewide Goals 3 through 19.

1           The county’s findings under OAR 660-004-0022(1)(a) appear to view the “proposed  
2 use or activity” under Goal 11 as the proposed *housing*, not the proposed community water  
3 and sewer facilities. The county’s findings purport to justify the housing, and then conclude  
4 that the infrastructure is also justified because it is “integral” to the housing. That view is  
5 understandable, given that water and sewage disposal facilities do not typically stand alone,  
6 but are intended as infrastructure to support other uses. However, the county’s findings fail  
7 to recognize that the relevant exception taken here is for the proposed *community* water and  
8 sewer facilities, which are not allowed on rural lands without an exception to Goal 11. It is  
9 not enough to demonstrate, presumably under OAR 660-004-0022(2) and any applicable  
10 provisions of the county’s comprehensive plan and statewide planning goals, that the  
11 proposed housing is needed or justified. The county must also establish that there is a  
12 “demonstrated need” for the proposed community water and sewer facilities, in order to

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“Finding: Goal 10 requires a wide variety of housing be provided within each jurisdiction. There is no other area under the Umatilla County jurisdiction that can offer a recreational golf course lifestyle together with permanent residential housing. An integral component of providing that residential housing is the necessary community facilities, domestic water and wastewater collection and treatment, to service the development.

“b. A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed Exception site.

“Finding: This is the only site in Umatilla County with an existing 18-hole golf course facility which can be provided with residential housing without disturbing the golf course activity. This is the only site in the County that can offer the golf course lifestyle to its members. A poll of the 300 members indicated well over 50 members were seriously interested in having a homesite at the golf course. There are no other sites within the Umatilla County area that can satisfy this need.

“c. The proposed use or activity has special features or qualities that necessitate its location on or near the proposed Exception site.

“Finding: The primary activity of the site is the 18-hole golf course. Homesites surrounding existing golf courses across the nation are considered by golfers as the epitome of the golfing recreational lifestyle. The demand for golf course homesites is the primary reason for new golf course developments throughout the nation.” Record 37-38.

1 support the proposed housing. The county’s findings do not explain why the proposed  
2 facilities are “integral” to the proposed housing, or why such housing cannot be supported by  
3 noncommunal facilities, such as individual septic systems and wells, that do not require an  
4 exception to Goal 11.

5 In any case, the county’s justifications for the proposed housing are insufficient. The  
6 findings refer to Statewide Planning Goal 10 (Housing) as justification for a need for housing  
7 to facilitate the “recreational golf course lifestyle.”<sup>13</sup> OAR 660-004-0022(1)(a) requires a  
8 “demonstrated need” for the proposed use or activity, based on one or more of the  
9 “requirements” of certain goals. Goal 10 is concerned with the provision of needed housing.  
10 Nothing in Goal 10 requires the county to provide for housing to facilitate the “recreational  
11 golf course lifestyle.” Absent justification for the proposed housing under OAR 660-004-  
12 0022(2) or support for such housing in the county’s comprehensive plan or Goal 10  
13 inventory, there is no basis to conclude under Goal 10 that there is a “demonstrated need” for  
14 such housing, as that concept is used in OAR 660-004-0022(1)(a).

15 The same general flaws permeate the county’s findings under OAR 660-004-  
16 0022(1)(b) and (c), and no further discussion of petitioners’ challenges to those findings is  
17 warranted in the present posture of this case.

## 18 2. OAR 660-004-0022(2)

19 As we discussed above, the county applied OAR 660-004-0022(2) in allowing  
20 community water and sewer facilities under its Goal 11 exception, but did not apply that

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<sup>13</sup>Goal 10 is “[t]o provide for the housing needs of citizens of the state.” Further, Goal 10 requires that:

“Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.”

Goal 10 defines “needed housing units” as housing types “determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels.”

1 provision under Goal 3 to allow rural residential housing. However, its reasoning under the  
2 Goal 11 exception is directed primarily at the proposed residential development and only  
3 incidentally at the proposed community water and sewer facilities.<sup>14</sup> On remand, an issue  
4 may arise whether the county’s reasoning in attempting to justify a Goal 11 exception under  
5 OAR 660-004-0022(2) would suffice to justify an exception to Goal 3 to allow rural  
6 residential development under that rule. Accordingly, we address petitioners’ challenges to  
7 the county’s findings under OAR 660-004-0022(2).

8         Petitioners argue, and we agree, that the findings under OAR 660-004-0022(2) fail to  
9 demonstrate reasons why the goal policies of Goal 3 should not apply. The first sentence of  
10 OAR 660-004-0022(2) prohibits a reasons exception for rural residential development based  
11 on market demand for housing, assumed continuation of past urban and rural population  
12 distributions, and on housing types and cost characteristics. *See* n 4. The second sentence of  
13 that section describes what a reasons exception for rural residential housing *must* contain:  
14 findings based on the economic analysis in the comprehensive plan demonstrating reasons  
15 why the type and density of housing planned require this particular location on resource  
16 lands. The third sentence provides an exception to the prohibition, in the first sentence, on  
17 justifications based on market demand for housing, where the county identifies existing or  
18 planned rural industrial, commercial, or other economic activity in the area that generates a  
19 market demand for rural housing. The county’s findings under OAR 660-004-0022(2) are

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<sup>14</sup>The county’s findings under OAR 660-004-0022(2) state:

“This is the only location in the County under the County’s jurisdiction on which an existing golf course is located. It is a unique set of circumstances that is slightly over 90 acres of undeveloped land on the golf course, which is out of the way of the existing playing area of the golf course. There is an opportunity to use this acreage, slightly over 90 acres, to provide homesites for the golfing community. There is considerable interest in the golfing community in doing so. In order to provide the housing units with the necessary infrastructure, the water and wastewater collection and treatment facilities must be provided. These can be provided without impacting the quality and quantity of the groundwater or of Birch Creek some 1,000 feet westerly of the proposed site.” Record 38.

1 not based on the economic analysis in the comprehensive plan, and do not provide reasons  
2 for the proposed type and density of residential uses on resource land, other than “interest in  
3 the golfing community.” That interest is simply market demand. However, the county’s  
4 findings make no attempt to establish that the present circumstances fall within the  
5 requirements for considering market demand, in the third sentence of the rule.

6 For the foregoing reasons, we agree with petitioners that the county’s decision does  
7 not demonstrate that “[r]easons justify why the state policy embodied in the applicable goals  
8 should not apply.” OAR 660-004-0020(2)(a).

9 **B. Alternative Sites Analysis**

10 Petitioners challenge the county’s alternative sites analysis, which is required by  
11 ORS 197.732(1)(c)(B), Goal 2, Part II(c)(2), and OAR 660-004-0020(2)(b).<sup>15</sup> According to  
12 petitioners, the county’s alternative sites analysis is impermissibly narrow and fails to

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<sup>15</sup>OAR 660-004-0020(2)(b) provides in relevant part:

- “(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;
- “(B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under the alternative factor the following questions shall be addressed:
  - “(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?
  - “(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?
  - “(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?
- “(C) This alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. \* \* \*”

1 demonstrate that “areas which do not require a new exception cannot reasonably  
2 accommodate the proposed use.” OAR 660-004-0020(2)(b)(B).

3 The county’s alternative sites analysis consists of the following:

4 “There are no other areas in Umatilla County on which rural residential  
5 housing can be placed on an existing 18-hole golf course. There are no other  
6 18-hole golf courses within the County’s Land Use Planning Jurisdiction.”  
7 Record 31.

8 Petitioners contend that, even if the county had demonstrated that golf course  
9 homesites are justified under other provisions of OAR chapter 660, division 4, the county’s  
10 alternative sites analysis errs in limiting the analysis to existing 18-hole golf courses, and  
11 then only to courses within the county’s planning jurisdiction. We agree. The county finds  
12 that other golf courses exist in the county, located within cities and on the Umatilla Indian  
13 Reservation. The county’s decision does not explain why only areas subject to the county’s  
14 planning jurisdiction can meet the need for golf course homesites. Nor does the county  
15 explain why such need can be met only by locating housing on existing 18-hole golf courses.

16 This subassignment of error is sustained.

17 **C. Environmental, Economic, Social and Energy (ESEE) Consequences**

18 Petitioners argue that the county’s ESEE analysis fails to undertake the analysis  
19 required by OAR 660-004-0020(2)(c) and is flawed by the county’s failure to consider  
20 alternative sites.<sup>16</sup>

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<sup>16</sup>OAR 660-004-0020(2)(c) provides:

“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 other areas requiring a Goal exception. The exception shall describe the characteristics of each alternative area considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the

1           The county’s findings address the ESEE consequences of developing housing on the  
2 subject property, but do not attempt to demonstrate that such development is not significantly  
3 more adverse than would typically result from the same proposal being located in other areas  
4 requiring a goal exception. Unlike the alternative sites analysis required by OAR 660-004-  
5 0020(2)(b), which focuses on areas *not* requiring a goal exception, OAR 660-004-0020(2)(c)  
6 requires comparison with other areas for which a goal exception would be necessary. We  
7 agree with petitioners that the county’s decision does not undertake the analysis required by  
8 OAR 660-004-0020(2)(c).

9           For the foregoing reasons, the county’s decision fails to demonstrate that the  
10 standards of ORS 197.732(1)(c), Goal 2, Part II(c), and OAR 660-004-0020(2) are met.  
11 ORS 197.732(6)(b).

12           This subassignment of error is sustained.

13           The first and second assignments of error are sustained.

14 **ASSIGNMENT OF ERROR (RHINHART)**

15           Petitioner Rhinhart argues that the county committed procedural error that prejudiced  
16 his substantial rights, when it accepted evidence after the close of the evidentiary record and  
17 based its decision in part on that evidence.

18           According to petitioner, after the close of the evidentiary record on February 2, 2000,  
19 the commissioners chose to accept and consider evidence in a special report prepared by  
20 planning staff. The minutes of the February 2, 2000 hearing state in relevant part:

21           “[The Board Chair] indicated there is some additional information that he  
22 would like to add to the record which is [relevant] to [intervenor’s]  
23 application. Upon his request, planning staff did some research on previous

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use at the chosen site 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. Such reasons shall include but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts[.]”

1 zoning actions and proposals by the county relative to the area in question.  
2 \* \* \*

3 “\* \* \* \* \*

4 “After consulting with County Counsel, the Board unanimously concurred to  
5 append the previous record of exhibits for this hearing, and to include the  
6 additional information compiled by staff and referenced by [the Board Chair]  
7 in his deliberations; said information to be added to the minutes of this  
8 meeting.” Record 118-19.

9 Petitioner argues that the commissioners’ acceptance of new evidence in the planning  
10 staff research after the close of the evidentiary record constituted an *ex parte* contact in  
11 violation of ORS 215.422(3). Petitioner argues that remand is necessary to allow petitioner  
12 and other parties to review, respond to and rebut that new evidence. *Opp v. City of Portland*,  
13 153 Or App 10, 955 P2d 768, *rev den* 327 Or 620 (1998); *Horizon Construction, Inc. v. City*  
14 *of Newberg*, 114 Or App 249, 834 P2d 523 (1992).

15 Petitioner is correct that the county erred in accepting and relying on evidence  
16 submitted after the close of the evidentiary record, without offering participants an  
17 opportunity for rebuttal. *Brome v. City of Corvallis*, 36 Or LUBA 225, 235-36, *aff’d sub*  
18 *nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999) (acceptance of  
19 new evidence after close of the evidentiary record without providing an opportunity for  
20 rebuttal is a violation of ORS 197.763(6) rather than a violation of the statutes governing *ex*  
21 *parte* communications). Although petitioner relies upon an inapposite statute for specific  
22 authority, his larger argument that the county committed procedural error warranting remand  
23 is correct.

24 Petitioner Rhinhart’s assignment of error is sustained.

25 The county’s decision is remanded.