



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 6, 2006

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Mill Creek Office Building
555 – 13th Street NE, Suite 2
Salem, OR 97301-4178

Re: Comparative Analysis of OAR 660-004-0020 with OAR 660-012-0070 with proposed amendments.
DOJ File No. 734-120-GG0865-04

The development of the revisions to OAR 660-012-0070 focused exclusively on consolidating the procedural requirements for an exception to goals 3, 4, 11, or 14 for the development of transportation improvements on rural lands into one rule. At the time the changes were contemplated, the committee relied upon a LUBA decision which held that “OAR 660-012-0070(4) sets out the analysis that is required to demonstrate that the state policy embodied in the applicable goals should not apply. That analysis substitutes for direct application of ORS 197.732(1)(c)(A) and Goal 2, Part II(c)(1).” *1000 Friends et al. v. Yamhill County*, LUBA No 2004-0169 at page 8 issued July 21, 2005. Accordingly, the proposed rule revisions focused only on clarifying the procedural requirements for taking a Goal 3, 4, 11 or 14 exception for transportation improvements on rural lands. No consideration was given to the substantive content of the provisions.

On December 21, 2005 the Court of Appeals disagreed with LUBA and concluded that while “local governments are faced with no mean task when addressing the standards in OAR chapter 660, division 4 and OAR chapter 660 division 12, the two sets of standards are not necessarily incompatible... [and] both sets of requirements must be harmonized, if necessary and applied.” *1000 Friends of Oregon et al. v. Yamhill County CA-A129506* at page 11, issued December 21, 2005. I have attached a copy of the decision at Attachment C. In light of this ruling, I have analyzed the provisions of OAR 660-004-0020 to determine if the substantive content of the general provision in division 4 has been fully captured in Section 0070 with the proposed amendments.

The side by side analysis is found in Attachment A. I have noted in color highlighting where the substance of a provision in division 4 was not included in Section 0070, as proposed. There are seven omissions. Some of the omissions are very minor and may have little practical effect to the application of the rule. In providing this analysis, I recognized that proposed Section 0070 addresses the process for taking a Goal 3, 4, 11 or 14 exception for a transportation improvement and that Section 0070 may include specific language to address the unique circumstances of transportation improvements. These specific requirements are not found in the more general exception requirements of division 4 and are not noted in the analysis.

Using the copy of the final amendments to OAR 660-012-0070 issued by Frank Angelo on September 16, 2005, I have inserted proposed language that could be considered to address the seven identified omissions. This is found at Attachment B.

I have listed the four affected sections below.

1. SECTION 660-012-0070 (3)

- (b) The size, design and capacity of the proposed facility or improvement shall be described generally, but in sufficient detail to allow a general understanding of the likely impacts of the proposed facility or improvement and to justify the amount of land for the proposed transportation facility. Measures limiting the size, design or capacity may be specified in the description of the proposed use in order to simplify the analysis of the effects of the proposed use;

The focus of the rule as written currently requires findings for the size of the facility. This additional requirement would require justification that the amount of land needed for the size of the facility.

2. SECTION 660-012-0070(5)

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

This addition reflects the language in division 4. Practically, it may be unnecessary to include as the reverse inquiry "why non-exception alternatives can not reasonable accommodate the proposed transportation facility" is clearly stated in the rule. Inclusion of this provision would underscore the importance of protecting resource land by requiring jurisdictions to include a specific finding as to why the facility must be placed upon resource lands.

3. SECTION 660-012-0070(7)

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

- (a) Compare the long-term economic, social, environmental and energy consequences of the proposed location and other alternative locations requiring exceptions. The exception shall describe the characteristics of each alternative location considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the location for the proposed transportation facility or improvement, and the typical positive and negative consequences resulting from the transportation facility or improvement at the proposed location with measures designed to reduce adverse impacts;
- (b) Determine whether the net adverse impacts associated with the proposed exception location, with mitigation measures designed to reduce adverse impacts, are significantly more adverse than the net impacts from other locations which would also require an exception. A proposed exception location would fail to meet this requirement only if the affected local government concludes that the impacts associated with it are significantly more adverse than the other identified exception sites. The exception shall include the reasons why the consequences of the needed transportation facility or improvement at the proposed exception location 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 location. Where the proposed goal exception location is on resource lands subject to goals 3 or 4, the exception shall include 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;

The addition of the term "long-term" aligns the scope of the ESEE analysis with that in division 4.

The inclusion of the mitigation measures into the analysis aligns the scope of the analysis with that in division 4.

The description of what factors the comparison should consider is helpful direction and is aligned with language in division 4.

The methodology of the ESEE analysis and inclusion of the specific requirements to consider productivity and long term sustainability will carry forward the policy considerations of division 4 that were not carried forward in the initial amendments.

4. SECTION 660-012-0070 (8)

- (b) Demonstrate how the proposed transportation improvement is compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts; “Compatible” is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.

Inclusion of the definition of compatibility will help provide clarity and bring the matter into consistency with division 4.

Sincerely,

Bonnie Heitsch
Assistant Attorney General
Government Services Section

BEH:nog/GENO9013.DOC

Encl: Attachment A – analysis of 660-04-0020
Attachment B - track changes version of amendments to OAR 660-012-0070
Attachment C – Court of Appeals Decision

c: Bob Cortright, DLCD
Jerri Bohard – ODOT
Steve Shipsey - DOJ

Attachment A
Analysis of OAR 660-004-0020 and proposed OAR 660-012-0070

<p>660-004-0020</p> <p>Goal 2, Part II(c), Exception Requirements</p>	<p>Comparison to the currently proposed Section 660-012-0070</p>
<p>(1) If a jurisdiction determines there are reasons consistent with OAR 660-004-0022 to use resource lands for uses not allowed by the applicable Goal or to allow public facilities or services not allowed by the applicable Goal, the justification shall be set forth in the comprehensive plan as an exception.</p>	<p>Language in Section 0070(1) identifies the circumstances which invoke a goal exception.</p>
<p>(2) The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:</p> <p>(a) “Reasons justify why the state policy embodied in the applicable goals should not apply”: The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;</p>	<p>Proposed 0070(4) incorporates the first sentence of (a).</p> <p>The standard of review is set forth in 0070(1)(b).</p> <p>0070(3) expressly identifies that the <i>size</i> of the proposed facility be identified but does not present the equivalent determination of whether the size of facility or the <i>amount</i> of land for the facility is appropriate. Identification of the size of a transportation facility may practically address the same policy consideration in division 4 because the size of most transportation facilities is determined by established right-of- way standards. For a few transportation facilities such an airport expansion or development of a rest area, the inquiry may be appropriate.</p> <p>Division 4 also includes findings as to why the use requires a location on resource land. Section 0070(5) provides that the exception shall demonstrate that <i>non-exception locations</i> cannot reasonably accommodate the proposed transportation facility. Non-exception locations includes locations on resource lands as well as on rural lands but not</p>

(b) “Areas which do not require a new exception cannot reasonably accommodate the use”:

(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,

deemed resource lands or lands that are irrevocably committed to non resource use and it can be assumed that the inquiry is addressed by these provisions. However, there is no equivalent provision that directly analyzes why the use requires a location on resource land. (2)

This provision is found in 0070(4).

The requirement for a map is found in the proposed rule 0070(9)(a)

This provision requires a description of the identification and description of other alternative areas which do not require an exception. Proposed rule 0070 (4) (a) (b) (c) and (5) require an equivalent determination specific to transportation facilities which includes an evaluation of alternate modes, traffic management measures and other non-exception transportation improvements.

The proposed language to 0070(6) provides the equivalent reasonableness analysis. The proposed language was modified during the amendment process to reflect language from OAR 660-004-0020(2)(b)(B). It the determination of “reasonableness” 0070(6) includes consideration of cost, operational feasibility, economic dislocation and other relevant factors. These are economic factors specific to transportation facilities.

0070 does not expressly require an inquiry to the questions raised in (i-iv).

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?

(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? 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. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding.

(c) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed location. The exception shall describe the characteristics of each alternative areas 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

That line of inquiry is directed at the types of site specific uses and not to locating linear transportation facilities or public facilities that support development. The evaluation criteria in 0070(4) and (5) and (6) (a) provide more specific review of issues and design considerations unique to public transportation facilities to address the inquiry.

An equivalent evaluation is included in the proposed language for 0070(6)(c). The language in 0070 refers to locations and not specific sites which is appropriate for transportation facilities.

0070 (7) does not provide a description of how the ESEE evaluation should be conducted. (4)

0070(7) does not expressly include consideration of the adverse impacts to ESEE resources *with mitigation measures*. (3)

This provision regarding the scope of the evaluation of alternative sites is proposed to be added to the proposed rule at 0070(7)(c).

<p>reasons why the consequences of the 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;</p> <p>(d) “The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts”. The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. “Compatible” is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.</p>	<p>This provision requiring the determination of the productivity of the resource land and specific impacts to resource land is not incorporated into proposed 0070. (5)</p> <p>The term “long term” is not included in the proposed 0070. (6)</p> <p>Consideration of effects on water table and other public service improvements are not included in the proposed Section 0070. These types of impacts are more appropriately directed at site specific types of improvements that require public services to support it. As transportation facilities are typically public infrastructure which support development, this inquiry is not likely to be relevant.</p> <p>Rule 0070(8) (b) includes an equivalent compatibility analysis.</p> <p>The standard of review is rephrased in 0070(8)(c).</p> <p>Proposed rule 0070 does not include the definition of compatibility. (7)</p>
<p>(3) If the exception involves more than one area for which the reasons and circumstances are the same, the areas may be considered as a group. Each of the areas shall be identified on a map, or their location otherwise described, and keyed to the appropriate findings.</p>	<p>There is no equivalent provision for this. However, this is identified for a site specific selection and may not be applicable to evaluating the location of a linear transportation facility.</p>
<p>(4) For the expansion of an unincorporated community defined under OAR 660-022-0010, or for an urban</p>	<p>Not applicable for transportation facilities.</p>

unincorporated community pursuant to OAR 660-022-0040(2), The exception requirements of subsections (2)(b), (c) and (d) of this rule are modified to also include the following:

(a) Prioritize land for expansion: First priority goes to exceptions lands in proximity to an unincorporated community boundary. Second priority goes to land designated as marginal land. Third priority goes to land designated in an acknowledged comprehensive plan for agriculture or forestry, or both. Higher priority is given to land of lower capability site class for agricultural land, or lower cubic foot site class for forest land;

(b) Land of lower priority described in subsection (a) of this section may be included if land of higher priority is inadequate to accommodate the use for any one of the following reasons:

(A) Specific types of identified land needs cannot be reasonably accommodated on higher priority land; or

(B) Public facilities and services cannot reasonably be provided to the higher priority area due to topographic or other physical constraints; or

(C) Maximum efficiency of land uses with the unincorporated community requires inclusion of lower priority land in order to provide public facilities and services to higher priority land.

Stat. Auth.: ORS 197

Stats. Implemented ORS 197.732

Hist.: LCDC 5-1982, f. & ef 7-21-82; LCDC 9-1983, f. & ef. 12-30-83; LCDC 8-1994, f. & cert. ef. 12-5-94; LCDD 3-2004, f. & cert. ef. 5-7-04

BEH:nog/GenO8867

Attachment B
Suggested Amendments to 660-012-0070 to address omissions.

Proposed Amendments: 660-012-0070 Exceptions for Transportation Improvements on Rural Lands. The underlined language would address the omissions identified in Appendix A.	<u>Commentary</u>
<p>SECTION 660-012-0070(1)</p> <p>(1) Transportation facilities and improvements which do not meet the requirements of OAR 660-012-0065 require an exception to be sited on rural lands.</p> <p>(a) A local government approving a proposed exception shall adopt as part of its comprehensive plan findings of fact and a statement of reasons that demonstrate that the standards in this rule have been met. A local government denying a proposed exception shall adopt findings of fact and a statement of reasons explaining why the standards in this rule have not been met. However, findings and reasons denying a proposed exception need not be incorporated into the local comprehensive plan.</p> <p>(b) The facts and reasons relied upon to approve or deny a proposed exception shall be supported by substantial evidence in the record of the local exceptions proceeding.</p>	
<p>SECTION 660-012-0070 (2)</p> <p>(2) When an exception to Goals 3, 4, 11, or 14 is required to locate a transportation improvement on rural lands, the exception shall be taken pursuant to ORS 197.732(1)(c), Goal 2 and this division. The exceptions standards in OAR 660, Division 4 and OAR 660, Division 14 shall not apply. Exceptions adopted pursuant to this Division shall be deemed to fulfill the requirements for goal exceptions required under ORS 197.732(1)(c) and Goal 2.</p>	
<p>SECTION 660-012-0070 (3)</p> <p>(3) An exception shall, at a minimum, decide need, mode, function and general location for the proposed facility or improvement:</p> <p>(a) The general location shall be specified as a corridor</p>	

<p>within which the proposed facility or improvement is to be located, including the outer limits of the proposed location. Specific sites or areas within the corridor may be excluded from the exception to avoid or lessen likely adverse impacts. Where detailed design level information is available, the exception may be specified as a specific alignment;</p> <p>(b) The size, design and capacity of the proposed facility or improvement shall be described generally, but in sufficient detail to allow a general understanding of the likely impacts of the proposed facility or improvement <u>and to justify the amount of land for the proposed transportation facility.</u> Measures limiting the size, design or capacity may be specified in the description of the proposed use in order to simplify the analysis of the effects of the proposed use;</p> <p>(c) The adopted exception shall include a process and standards to guide selection of the precise design and location within the corridor and consistent with the general description of the proposed facility or improvement. For example, where a general location or corridor crosses a river, the exception would specify that a bridge crossing would be built but would defer to project development decisions about precise location and design of the bridge within the selected corridor subject to requirements to minimize impacts on riparian vegetation, habitat values, etc.;</p> <p>(d) Land use regulations implementing the exception may include standards for specific mitigation measures to offset unavoidable environmental, economic, social or energy impacts of the proposed facility or improvement or to assure compatibility with adjacent uses.</p>	<p>This addresses omission (1)</p>
<p>SECTION 660-012-0070 (4)</p> <p>To address Goal 2, Part II(c)(1) the exception shall provide reasons justifying why the state policy in the applicable goals should not apply. Further, the exception shall demonstrate that there is a transportation need identified consistent with the requirements of OAR 660-012-0030 which cannot reasonably be accommodated through one or a combination of the following measures not requiring an exception:</p>	

<p>(a) Alternative modes of transportation; (b) Traffic management measures; and (c) Improvements to existing transportation facilities.</p>	
<p>SECTION 660-012-0070 (5) (5) To address Goal 2, Part II(c)(2) the exception shall demonstrate that non-exception locations cannot reasonably accommodate the proposed transportation improvement or facility. <u>The exception shall set forth the facts and assumptions used as the basis for determining why the use requires a location on land subject to statewide goals 3 or 4.</u></p>	<p>This phrase addresses the second omission.</p>
<p>SECTION 660-012-0070 (6) (6) To determine the reasonableness of alternatives to an exception under sections (4) and (5) of this rule, cost, operational feasibility, economic dislocation and other relevant factors shall be addressed. The thresholds chosen to judge whether an alternative method or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception. (a) In addressing sections (4) and (5) of this rule, the exception shall identify and address alternative methods and locations that are potentially reasonable to accommodate the identified transportation need. (b) Detailed evaluation of such alternatives is not required when an alternative does not meet an identified threshold. (c) Detailed evaluation of specific alternative methods or locations identified by parties during the local exceptions proceedings is not required unless the parties can specifically describe with supporting facts why such methods or locations can more reasonably accommodate the identified transportation need, taking into consideration the identified thresholds.</p>	
<p>SECTION 660-012-0070 (7) (7) To address Goal 2, Part II(c)(3), the exception shall: (a) Compare the <u>long-term</u> economic, social, environmental and energy consequences of the proposed location and other alternative locations requiring exceptions. <u>The exception shall describe the</u></p>	<p>Insertion of the word "long-term" addresses omission 6.</p>

characteristics of each alternative location considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the location for the proposed transportation facility or improvement, and the typical positive and negative consequences resulting from the transportation facility or improvement at the proposed location with measures designed to reduce adverse impacts;

(b) Determine whether the net adverse impacts associated with the proposed exception location, with mitigation measures designed to reduce adverse impacts, are significantly more adverse than the net impacts from other locations which would also require an exception.

A proposed exception location would fail to meet this requirement only if the affected local government concludes that the impacts associated with it are significantly more adverse than the other identified exception sites. The exception shall include the reasons why the consequences of the needed transportation facility or improvement at the proposed exception location 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 location. Where the proposed goal exception location is on resource lands, subject to statewide planning goals 3 or 4, the exception shall include 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;

(c) The evaluation of the consequences of general locations or corridors need not be site-specific, but may be generalized consistent with the requirements of section (3) of this rule. Detailed evaluation of specific alternative locations identified by parties during the local exceptions proceeding is not required unless such locations are specifically described with facts to support the assertion that the locations have significantly fewer net adverse economic, social, environmental and energy impacts than the proposed exception location.

The first paragraph addresses omission 4. The last sentence which includes "with measures" addresses omission 3.

This is intended to address omission 3.

This addresses omission 5

<p>SECTION 660-012-0070 (8)</p> <p>(8) To address Goal 2, Part II(c)(4), the exception shall:</p> <p>(a) Describe the adverse effects that the proposed transportation improvement is likely to have on the surrounding rural lands and land uses, including increased traffic and pressure for nonfarm or highway oriented development on areas made more accessible by the transportation improvement;</p> <p>(b) Demonstrate how the proposed transportation improvement is compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts: <u>“Compatible” is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.</u></p> <p>(c) Adopt as part of the exception, facility design and land use measures which minimize accessibility of rural lands from the proposed transportation facility or improvement and support continued rural use of surrounding lands.</p>	<p>Insertion of the definition of compatibility addresses omission 7.</p>
<p>SECTION 660-012-0070 (9)</p> <p>(9) (a) Exceptions taken pursuant to this rule shall indicate on a map or otherwise the locations of the proposed transportation facility or improvement and of alternatives identified under subsections 4 (c), (5) and (7) of this rule.</p> <p>(b) Each notice of a public hearing on a proposed exception shall specifically note that a goal exception is proposed and shall summarize the issues in an understandable manner.</p>	
<p>SECTION 660-012-0070 (10)</p> <p>10). An exception taken pursuant to this rule does not authorize uses other than the transportation facilities or improvements justified in the exception.</p> <p>(a) Modifications to unconstructed transportation facilities or improvements authorized in an exception shall not require a new exception if the modification is located entirely within the corridor approved in the exception.</p> <p>(b) Modifications to constructed transportation facilities</p>	

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

(c) Notwithstanding subsections (a) and (b) of this section, the following shall require new goal exceptions:

- (1) New intersections or new interchanges on limited access highways or expressways, excluding replacement of an existing intersection with an interchange.
- (2) New approach roads located within the influence area of an interchange.
- (3) Modifications that change the functional classification of the transportation facility.
- (4) Modifications that reduce the effectiveness of facility design measures or land use measures adopted pursuant to Section 8(c) of this rule to minimize accessibility to rural lands or support continued rural use of surrounding rural lands, unless the area subject to the modification has subsequently been relocated inside an urban growth boundary.

Attachment C

FILED: December 21, 2005

IN THE COURT OF APPEALS OF THE STATE OF OREGON

1000 FRIENDS OF OREGON,
FRIENDS OF YAMHILL COUNTY,
FAIR HOUSING COUNCIL OF OREGON,
and CHARLIE HARRIS,

Petitioners below,

and

COLUMBIA EMPIRE FARMS, INC.,

Petitioner,

v.

YAMHILL COUNTY
and DEPARTMENT OF TRANSPORTATION,

Respondents.

2004-169, 2004-171, 2004-172, 2004-173, 2004-180,
2004-194, 2004-197, 2004-214, 2004-215; A129506

Judicial Review from Land Use Board of Appeals.

Argued and submitted September 26, 2005.

Jeffrey G. Condit argued the cause for petitioner. With him on the brief were Kelly S. Hossaini and Miller Nash LLP.

Kathy A. Lincoln, Assistant Attorney General, argued the cause for respondents. With her on the joint brief were Hardy Myers, Attorney General, Mary H. Williams, Solicitor General, Erin C. Lagesen and Bonnie E. Heitsch, Assistant Attorneys General, and Rick Sanai.

Before Haselton, Presiding Judge, and Brewer, Chief Judge, and Deits, Judge pro tempore.

BREWER, C. J.

Reversed in part and remanded for further review in consideration of all relevant exception criteria, including provisions of OAR chapter 660, division 4; otherwise affirmed.

BREWER, C. J.

Petitioner, Columbia Empire Farms, Inc., seeks review of a Land Use Board of Appeals (LUBA) decision upholding three Yamhill County ordinances.⁽¹⁾ The ordinances approve exceptions to Statewide Land Use Planning Goals 3, 11, and 14, and amend the Yamhill County Comprehensive Plan text and map and zoning ordinance text and map to facilitate location of a proposed highway, the Newberg-Dundee Bypass (the bypass). Petitioner makes five assignments of error. As a principal theme, those assignments of error assert that LUBA misinterpreted applicable statutes and Land Conservation and Development Commission (LCDC) rules governing exceptions to statewide land use planning goals that are required for the siting of highways on rural agricultural land. We review the challenged aspects of LUBA's decision for errors of law, ORS 197.850(9)(a); *Kelley v. Clackamas County*, 158 Or App 159, 165, 973 P2d 916 (1999), and reverse in part and affirm in part.

We take the pertinent history of the case from LUBA's decision:

"Intervenor-respondent Oregon Department of Transportation (ODOT) has been involved in a lengthy process to develop what is known as the Newberg-Dundee Transportation Improvement Project (NDTIP). The NDTIP is a bypass project for state Highway 99 between (from southwest to northeast) the cities of Dayton, Newberg, and Dundee. The purpose of the bypass is to alleviate congestion on Highway 99, particularly in Dundee where the highway narrows from four lanes to two. The NDTIP also includes connections to Highways 18 and 219, and includes a new road connecting the bypass to existing Highway 99 in Dundee. The proposed bypass is an approximately 11 mile long, four-lane limited access highway extending through rural lands in Yamhill County and through the Newberg and Dundee urban areas. Exceptions to goals 3, 11, and 14 are required to locate the bypass on rural lands.

"The bypass is being developed as a tiered environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA). In the first tier, transportation objectives are developed and studied. The first tier identifies a corridor that is approximately 40% wider than the actual road right-of-way will occupy to allow for siting flexibility during the second tier, or design level phase. During the second tier, ODOT will review different bypass alignment alternatives within the selected corridor. During the second tier, ODOT must also determine the location of supporting roadways, intersecting roadways, and interchange connections and identify modifications or improvements to existing elements of the local street network that are necessary to support the bypass project or to achieve compliance with the applicable comprehensive plans.

"Eight alternatives were analyzed, and ODOT and [Yamhill County (the county)] selected alternative 'Modified 3J' as the preferred alternative. The preferred alternative begins in the southwest at a location near the existing junction of Highway 99 and 18, called the Dayton Interchange. The Dayton Interchange is located on Class I soils that are planned and zoned for exclusive farm use (EFU). The Dayton Interchange adjoins vacant land within Dayton's urban growth boundary (UGB). To the northeast of the Dayton Interchange, the bypass parallels Highway 99 to the south and is also south of an existing railroad track that extends to Newberg. This portion of the bypass will be located entirely on EFU land, most of which is prime farmland.

"Continuing to the northeast, the bypass crosses land that is mostly zoned EFU, with some affected properties zoned for rural residential use. The proposed East Dundee interchange, which connects the bypass to Highway 99, is located in the section of the bypass between Dundee and Newberg. The interchange and connector road are located on EFU and rural residential lands. South of the proposed interchange is vacant land within the Dundee UGB. Outside the UGB, rural residential land is located just north and northeast of the proposed interchange. East of the proposed Highway 219 interchange in Newberg, the bypass crosses EFU land, reenters Newberg, and then terminates east of the Newberg UGB at the East Newberg Interchange. We have included a map from Record 731 at the end of the opinion. The county approved the proposed bypass after extensive local hearings."⁽²⁾

1000 Friends of Oregon v. Yamhill County, 49 Or LUBA 640, 642-43 (2005) (footnote omitted). The proposed bypass would run through petitioner's farm.

In its first assignment of error, petitioner asserts that LUBA erred in upholding the county's interpretation of ORS 197.732(1)(c)(A),⁽³⁾ which codifies Goal 2, Part II, and establishes standards for taking exceptions to statewide land use planning goals and in upholding the county's interpretation of OAR 660-012-0070(4),⁽⁴⁾ an LCDC rule governing exceptions for transportation improvements on rural land. We address petitioner's particular arguments after the following background discussion of the statutes and rules governing exceptions in light of the procedural history of this case.

An "exception" is "a decision to exclude certain land from the requirements of one or more applicable statewide goals * * * ." OAR 660-004-0000(2). ORS 197.732(1)--codifying Goal 2, Part II--allows local governments to adopt exceptions to statewide land use goals if certain requirements are met. There are three types of exceptions, standards for which are set out respectively in ORS 197.732(1)(a), (b), and (c). This case involves exceptions under ORS 197.732(1)(c).

ORS 197.732(1)(c) sets out four standards that local governments must meet in order to adopt an exception under that provision:

"(A) Reasons justify why the state policy embodied in the applicable goals should not apply;

"(B) Areas which do not require a new exception cannot reasonably accommodate the use;

"(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

"(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

LCDC adopted rules implementing those standards. *See* ORS 197.736 (giving LCDC rulemaking authority). We first examine OAR chapter 660, division 4, entitled "Interpretation of Goal 2 Exception Process," which "interprets the exception process as it applies to statewide Goals 3 to 19." OAR 660-004-000(1). In particular, OAR chapter 660, division 4, "explain[s] the three types of exceptions set forth in Goal 2 * * *, Part II," *i.e.*, in ORS 197.732(1). OAR 660-004-0000(1). OAR 660-004-0020(2)(a) to (d) restate the four exception standards from ORS 197.732(1)(c) quoted above and explain how those standards may be met. The first of those four standards, commonly referred to as the "reasons" standard, requires that the local government identify reasons that "justify why the state policy embodied in the applicable goals should not apply[.]" OAR 660-004-0020(2)(a) (quoting ORS 197.732(1)(c)(A)). When, as here, the exception sought involves a use on resource land not allowed under the goals, OAR 660-004-0022 describes types of reasons that may be used. With respect to transportation uses on rural lands, the type of exception sought here, OAR 660-004-0022 provides that "[t]ransportation improvements not allowed on rural lands * * * require an exception pursuant to OAR 660-012-0070 and this division." OAR 660-004-0022(12).

OAR chapter 660, division 12, sets out rules implementing Goal 12, the "Transportation" goal. Both by its own terms and the terms of OAR chapter 660, division 4, an exception for a transportation improvement on rural lands must meet the standards of both divisions. We derive that conclusion from OAR 660-004-0022(12), quoted above, and from OAR 660-012-0070(2), which provides that, "[w]here an exception to Goals 3, 4, 11, or 14 is required, * * * the exception shall be taken pursuant to * * * OAR chapter 660, division 4 and this division." OAR 660-012-0070(4) to (8) set out particular requirements for addressing the four exception standards from ORS 197.732(1)(c)--which, again, mirror the exception standards in Goal 2, Part II(c)--in the context of exceptions that would site transportation improvements on rural lands.

To summarize our review of the background law so far, this exception is a particular type of ORS 197.732(1)(c)--or Goal 2, Part II(c)--exception, namely an exception to allow transportation improvements on rural land. As such, LCDC's rules require that the local government satisfy the four exception standards in ORS 197.732(1)(c)--or Goal 2, Part II(c)--*both* as those standards are explained in the general rules relating to Goal 2 exceptions--OAR chapter 660, division 4--*and* as those standards are explained in the

particular rules relating to those exceptions seeking to allow transportation improvements on rural land--OAR chapter 660, division 12.

As noted, the first ORS 197.732(1)(c) exception standard requires local governments to provide reasons why the pertinent policy in the goals should not apply. ORS 197.732(1)(c)(A). The second ORS 197.732(1)(c) exception standard requires that, in order to adopt an exception, the body seeking the exception must show that areas that would not require an exception cannot reasonably accommodate the use. ORS 197.732(1)(c)(B). Both division 4 and division 12 of OAR chapter 660 flesh out each of those requirements. OAR 660-004-0020(2)(a), (b); OAR 660-012-0070(4), (5). For purposes of discussing petitioner's first assignment of error, we note the following: (1) OAR 660-012-0070(4)--which fleshes out the "reasons" exception standard of ORS 197.732(1)(c)(A)--requires a local government to demonstrate that there is a transportation need that cannot be accommodated through certain specified "measures" that would not require an exception; (2) OAR 660-012-0070(5)--which fleshes out the "areas" exception standard of ORS 197.732(1)(c)(B)--requires that the proposed use cannot be accommodated in another "location" that would not require an exception; (3) OAR 660-012-0070(6) requires that, to determine the reasonableness of "alternatives" (*i.e.*, different, nonexception "measures" under OAR 660-012-0070(4) and different, nonexception "locations" under OAR 660-012-0070(5)), the local government must choose "thresholds" to judge whether the alternative "cannot reasonably accommodate the proposed transportation need * * *." Under OAR 660-012-0070(6), those thresholds must be justified in the exception.⁽⁵⁾

The county identified five such thresholds. The five thresholds related to (1) operational feasibility and minimum compliance with Oregon Highway Plan highway mobility standards (the OHP standards), (2) economic displacements, (3) community livability, (4) consistency with local adopted Transportation System Plan (Yamhill County's TSP) and community vision statements, and (5) highway safety. Petitioners below challenged before LUBA the identification of those thresholds, particularly aspects of the OHP standards.

LUBA upheld the county's choice of thresholds, and particularly the OHP standards. The OHP standards establish preferences for treating designated freight routes as "expressways" and include a bypass policy stating that new bypasses must be designed in accordance with freeway or expressway standards. Before LUBA, ODOT and the county argued that reliance on the OHP standards was appropriate because a provision of the LCDC transportation planning rules, OAR 660-012-0020(3)(a)(B), requires the state to establish standards for transportation facility performance on state highways.⁽⁶⁾ That provision states that, for state and regional transportation facilities, "the transportation capacity analysis shall be consistent with standards of facility performance considered acceptable by the affected state or regional transportation agency[.]" Because the OHP standards serve as the state's "Transportation System Plan" (TSP), as defined in OAR 660-012-0005(32),⁽⁷⁾ LUBA concluded that those standards constitute an appropriate measure of "reasonableness" for testing alternatives to a goal exception under OAR 660-012-0070(4) and (5).

With that context in mind, we turn to the specific arguments in petitioner's first assignment of error. Petitioner first challenges LUBA's conclusion that the OHP standards, as used here, constitute an appropriate measure of "reasonableness" for testing alternatives to a goal exception under OAR 660-012-0070(4) and (5). According to petitioner, ORS 197.732(1)(c)(A) and OAR 660-012-0070(4) require that all reasonable alternatives be considered, particularly in consideration of the state policy embodied in Goal 3 relating to preservation of agricultural land. Petitioner reasons that, if, by adopting OHP standards, ODOT can narrow the threshold "so that only a high-speed limited access bypass that displaces the fewest number of existing businesses or residences is a 'reasonable alternative,' farm land will always be the only 'reasonable' location."

Although petitioner suggests that the way the county applied the OHP standards as a threshold violates ORS 197.732(1)(c)(A) and OAR 660-012-0070(4), it does not ground its argument in the wording of either provision. Instead, petitioner's argument is based on the premise that "farmland is different." Particularly, petitioner contends that, because the heavy weight of state policy under Goal 3 is on the preservation of farmland over converting it to urban uses, "the threshold set by the county is so restrictive that it does not comply with ORS 197.732(1)(c)(A) and OAR 660-012-0070(4)." That understanding, however, is not reflected in either ORS 197.732(1)(c)(A) or OAR 660-012-0070(4), and we decline to insert what the legislature and LCDC have omitted. Although it seems that petitioner would require local governments to consider the policy behind the goals under the second ORS 197.732(1)(c) exception standard--the standard related to considering location alternatives--such policy-based balancing must primarily occur when the local government applies the earlier "reasons" step of the exception process. Petitioner does not otherwise explain why the way the county used the OHP standards as a threshold was inappropriate. Accordingly, we affirm LUBA's conclusion that the county did not misuse the OHP standards as a "reasonableness" threshold.

Second, petitioner challenges LUBA's conclusion that "OAR 660-012-0070(4) sets out the analysis that is required to demonstrate that the state policy embodied in the applicable goals should not apply. That analysis substitutes for direct application of ORS 197.732(1)(c)(A) and Goal 2, Part II (c)(1)." *1000 Friends*, 49 Or LUBA at 647 (slip op at 8). Petitioner argues, in part, that "[t]he text of OAR 660-004-0022(12) * * * in no way indicates that transportation facilities through rural lands must only comply with OAR 660-012-0070 and are otherwise given a free pass from having to comply with the other exceptions requirements. LUBA's conclusion to the contrary is in error."

We agree with petitioner. Nothing in ORS 197.732, in Goal 2, Part II, or in the applicable provisions of OAR 660, divisions 4 and 12, countenances permitting an exception to a goal for a transportation improvement based solely on the transportation improvement standards without application of the exception criteria in ORS 197.732, Goal 2, Part II, and OAR chapter 660, division 4. On the contrary, as noted above, both pertinent rule divisions indicate that, in these circumstances, the requirements of *both* divisions must be satisfied. OAR 660-004-0022(12) provides that "[t]ransportation improvements not allowed on rural lands as provided for in OAR 660-012-0065 require an exception pursuant to OAR 660-012-0070 and this division." (Emphasis added.) In complementary

fashion, OAR 660-012-0070(2) provides that, "[w]here an exception to Goals 3, 4, 11, or 14 is required, in addressing Goal 2, Part II(c), the exception shall be taken pursuant to ORS 197.732(1)(c), Goal 2, *OAR chapter 660, division 4 and this division.*" (Emphasis added.) In addition, LCDC has indicated that, "[e]xcept as provided for in OAR chapter 660, division 14, 'Application of the Statewide Planning Goals to the Incorporation of New Cities,' this Division interprets the exception process as it applies to statewide Goals 3 to 19." OAR 660-004-0000(1). That provision demonstrates that, when LCDC means to exempt certain kinds of actions from the exception process in OAR chapter 660, division 4, it knows how to do so. Neither the legislature nor LCDC has indicated that the OAR chapter 660, division 4, exception requirements do not apply in these circumstances.

It is true that OAR 660-012-0070 mirrors the requirements of Goal 2, Part II, and portions of ORS 197.732. As a consequence, application of that provision may often address the exception standards in the goal and the statute. The most cursory review of the requirements of OAR 660-004-0020, however, disabuses a reader of the notion that a comprehensive shortcut for the exception process is available in OAR 660-012-0070. The inquiry required to justify an exception under OAR 660-004-0020 is much more detailed than that set out in Goal 2, Part II, ORS 197.732, and OAR 660-012-0070. Although local governments are faced with no mean task when addressing the standards in OAR chapter 660, division 4, and OAR chapter 660, division 12, the two sets of standards are not necessarily incompatible. Under ordinary principles of rule construction, both sets of requirements must be harmonized, if necessary, and applied. *Dept. of Human Resources v. Trost*, 160 Or App 656, 662, 983 P2d 549 (1999); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 47-50, 911 P2d 350, *rev den*, 323 Or 136 (1996).

The parties do not refer us to any findings in which the county demonstrated its compliance with pertinent portions of both OAR chapter 660, division 4, and OAR chapter 660, division 12. We note, however, that, contrary to LUBA's apparent assumption, and that of respondents in their brief on judicial review, the county's exception document appears to treat both rule divisions as applicable to the issue of why taking land protected by Goal 3 is necessary. The county's findings address at length why alternatives not requiring an exception fail to meet the identified transportation needs. However, as discussed, we disagree with LUBA's conclusion that OAR 660-012-0070(4) provides the exclusive criteria to satisfy ORS 197.732(1)(c)(A) and Goal 2, Part II(c)(1). Accordingly, we must remand LUBA's decision for further review in consideration of all relevant exception criteria, including the provisions of OAR chapter 660, division 4.

In its second assignment of error, petitioner asserts that LUBA erred in upholding the county's decision because the county failed to demonstrate that land not requiring a new exception cannot reasonably accommodate the need for additional transportation capacity. Such a showing is required under ORS 197.732(1)(c)(B), Goal 2, Part II(c)(2), and OAR 660-004-0020(2)(b). Petitioner asserts that the county addressed eight alternatives requiring goal exceptions, but that it failed to consider or prematurely rejected other alternatives not requiring an exception. According to petitioner, the county did not consider other alternatives merely because those alternatives did not meet the operational and mobility thresholds identified in the OHP standards. In petitioner's view,

those omissions transgressed ORS 197.732 and the goal exception criteria set out in OAR chapter 660, division 4.

Respondents reply that the county rejected petitioner's proposed alternatives because those alternatives did not satisfy the applicable transportation facility requirements, not because it failed to apply the applicable exception criteria. In addition, respondents assert that petitioner's proposals were not specific enough to require consideration under OAR 660-004-0020(2)(b)(C) and (c). That rule states that "[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 * * *." OAR 660-004-0020(2)(c).

Petitioner counters that its proposals satisfied OAR 660-004-0020(2)(b)(C) and (c), but that LUBA rejected its argument merely because it mistakenly believed that it had to consider only the goal exception requirements set out in OAR 660-012-0070. We disagree with petitioner's characterization of LUBA's analysis. LUBA expressly rejected petitioner's alternative sites because it found that those sites did not satisfy the OHP standards. As discussed, LUBA did not err in upholding the county's use of those standards as "thresholds" for determining whether a proffered alternative is suitable for the planned transportation improvement project. In addition, LUBA did not ignore the specificity requirements of OAR 660-004-0020(2)(b)(C) and (c); instead, it specifically discussed those provisions in addressing petitioner's proposed alternatives.⁽²⁾ We therefore reject petitioner's second assignment of error.

In its third assignment of error, petitioner asserts that LUBA erred in upholding the county's application of ORS 197.732(1)(c)(C). That statute requires a local government adopting an exception to show that the

"long term environmental, economic, social and energy [(ESEE)] consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site[.]"

According to petitioner, the county disregarded that requirement by finding that neither the application of OAR 660-012-0070(7) nor the application of OAR 660-004-0020(2)(c)⁽²⁾ establishes a priority for agricultural land when a local government determines that a transportation need cannot be met by alternatives that do not require a new exception. Petitioner argues that LUBA's approval of the county's interpretation of ORS 197.732(1)(c)(C) was an error in substance and, further, resulted in a decision that was not supported by an "adequate factual base" as required by Goal 2.

Although it recognized that OAR 660-004-0020(2)(c) requires an assessment of the agricultural qualities of resource land and the impacts of removing the land from the resource base, LUBA concluded that OAR 660-012-0070(7) provides the method of complying with the general ESEE analysis requirement of Goal 2, Part II(c)(3). LUBA agreed with the county's view that OAR 660-012-0070 supersedes the exception

requirements of OAR chapter 660, division 4, and it also determined that the county's findings were supported by substantial evidence.

Pursuing a consistent theme, petitioner disputes LUBA's understanding of the relationship between the exception and transportation planning rules. Petitioner asserts that the exception rule, OAR 660-004-0020(2)(c), required the county to choose the alternative that was least disruptive to resource land and that the county failed to make that choice. Petitioner urges that the error had practical effects because "four of the seven Southern Bypass alternatives considered in that phase did a much better job of avoiding resource land, limiting impacts on adjacent resource lands, and utilizing exception lands than Alternative 3J, the chosen alternative."

Although LUBA opined that "OAR 660-012-0070(7) provides the method of complying with the general ESEE analysis requirement of Goal 2, Part II (c)(3)," the county considered the more extensive ESEE compliance criteria set out in the Goal 2 implementing rule, OAR 660-004-0020(2)(c), to be applicable. The county also made detailed findings regarding several alternative routes for the bypass. In those findings, the county compared the expected impacts of the several alternative routes on agricultural enterprises.

Although the county's findings may be adequate to address all relevant ESEE criteria, we conclude that LUBA's analysis was mistakenly limited to OAR 660-012-0070(7). In order to properly perform its review of the county's decision, LUBA also was required to address whether the county's comparisons were sufficient to satisfy the criteria specified in OAR 660-004-0020(2)(c). The latter rule establishes comprehensive criteria for consideration of the economic, social, environmental, and energy consequences of a particular alternative, whereas OAR 660-012-0070(7) merely adds refinements to those criteria. In particular, OAR 660-004-0020(2) explicitly requires scrutiny of agricultural productivity, sustainability, and the long-term effects of removing land from the agricultural resource base.¹⁰ OAR 660-012-0070(7) does not contain that requirement. Instead, OAR 660-012-0070(7)(b) provides that, to address Goal 2, Part II(c)(3), the decision maker must

"[d]etermine whether the net adverse impacts associated with the proposed exception site are significantly more adverse than the net impacts from other locations which would also require an exception. A proposed exception location would fail to meet this requirement only if the affected local government concludes that the impacts associated with it are significantly more adverse than the other identified exception sites[.]"

Respondents remonstrate that the more specific provisions addressing transportation uses in OAR chapter 660, division 12, should prevail. Otherwise, respondents argue, contrary to the mandate of OAR 660-012-0070(7), consideration of agricultural impacts will be elevated over any other ESEE impacts. As respondents see things, nothing in the applicable statutes or rules suggests that, when considering transportation alternatives, greater weight is owed to the goal of preserving agricultural land than to other matters.

The difficulty with respondents' approach is that OAR 660-012-0070(2) expressly provides that not only must the provisions of that rule be applied when taking an exception to goals protecting rural agricultural land for a transportation improvement, but the requirements of OAR chapter 660, division 4, Goal 2, and ORS 197.732(1)(c) must be followed as well. If LCDC had intended for transportation improvement exception requirements to be limited to those set out in OAR chapter 660, division 12, it could easily have said so. It did not, however, and whatever difficulty may inhere in applying the two sets of standards, agencies planning transportation improvements on rural land are obliged to apply the rules according to their terms. Consequently, on remand, LUBA must determine whether the county's findings satisfied the criteria in OAR 660-004-0020(2)(c), as well as OAR 660-012-0070(7).

In its fourth assignment of error, petitioner asserts that LUBA incorrectly interpreted ORS 197.732(1)(c)(D), OAR 660-004-0020(2)(d), and OAR 660-012-0070(8)(c), when it upheld the county's failure to require ODOT to implement adequate mitigation measures to ensure that the proposed bypass will be compatible with petitioner's farming operation. LUBA concluded that the county did not err in finding that there would be some adverse impacts on petitioner's farming enterprise, including fragmentation and loss of acreage for farming, but that those impacts could be mitigated to minimize the level of harm.

According to petitioner, OAR 660-012-0070(8)(c) requires that the exception taken for the project must include design and land use measures that will minimize access from the proposed bypass to rural lands and support the continued use of surrounding lands.⁽¹¹⁾ The county failed to impose such mitigation measures as a condition of approving the exception. Petitioner acknowledges that the design of the bypass has not yet occurred and that full consideration of appropriate mitigation measures cannot occur until the design phase of the project is undertaken. Petitioner nonetheless argues that, under such circumstances, compliance with OAR 660-012-0070(8), OAR 660-004-0020(2)(d), and ORS 197.732(1)(c)(D) requires that the county impose a condition of approval that ODOT incorporate mitigation measures at the design phase and that petitioner be permitted to challenge any failure to comply with the measures. Petitioner relies on *Meyer v. City of Portland*, 67 Or App 274, 279-80, 678 P2d 741, rev den, 297 Or 82 (1984), for the proposition that a two-stage exception approval process is legally permissible only if interested parties have a full opportunity to be heard before the decision is final.

The record demonstrates that the bypass is being developed in a two-tiered process. After Federal Highway Administration approval of the "Location Final Environmental Impact Statement," ODOT will begin the second tier of the process, during which it will complete design of the road and interchanges. According to respondents, when the final alignment of the bypass is determined,

"petitioner and the county will have accurate information about the actual impacts of the project, and the county can impose specific conditions of mitigation upon ODOT to address those impacts. * * *

"* * * The petitioner in this matter will have a full opportunity at the next stage of the process to request specific conditions of mitigation that accurately address impacts of the project."

Respondents also note that the project must be found to be in accord with the county's comprehensive plan and statewide goals before final design and the necessary environmental impact statement may be completed and the project constructed.

Missing from respondents' argument is any citation to a source of law requiring such second phase approvals and providing a procedure for participation--and possible appeal--by interested parties. Specific ordinance-based references to the procedural requirements for a second tier of development would have settled this issue. Our review of the county's findings shows, however, that the county understood that hearings would be required as part of future land use decisions regarding Interchange Area Management Plans and final environmental impact statements in order to secure final approval of the project. In an intergovernmental agreement setting out the responsibilities of ODOT and the county, those parties stipulated that "final determination of measures to mitigate impacts to natural resources will require additional land use decision-making by Yamhill County. Only after ODOT has completed the design phase of the Bypass Project can ODOT go forward with construction of the Bypass and East Dundee Interchange."

In view of the county's announced plan to hold further hearings and address mitigation matters and the county's announced use of a phased approval process in its decisions on review, we conclude that, in the first tier of the project, the county was not required to impose a condition requiring mitigation. The county's decision embodies the understanding that mitigation will be required, and we see little practical or substantive difference between a condition calling for future mitigation and an announced phasing of an improvement project that incorporates mitigation as part of future land use decisions. Accordingly, we reject petitioner's fourth assignment of error.

In its fifth assignment of error, petitioner urges us to concurrently decide this case and the related matter of *1000 Friends of Oregon v. City of Dundee*, CA A129505. Below, petitioner asked that LUBA remand the instant decision to the county should the *City of Dundee* decision be remanded. The basis of petitioner's request was its view that, if the city's decision were remanded, the consistency of the instant decision with the city's comprehensive plan would be in question. Because of our disposition of the *City of Dundee* case and this case, we need not further address petitioner's concern. See *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, ___ P3d ___, (2005).

Reversed in part and remanded for further review in consideration of all relevant exception criteria, including provisions of OAR chapter 660, division 4; otherwise affirmed.

Appendix A

1. Petitioners before LUBA were 1000 Friends of Oregon, Friends of Yamhill County, Fair Housing Council of Oregon, Charlie Harris, and Columbia Empire Farms, Inc. Only Columbia Empire Farms, Inc., has petitioned this court for judicial review.

Return to previous location.

2. A copy of the map is appended to this opinion.

Return to previous location.

3. The text of ORS 197.732(1)(c)(A) is set out below. ___ Or App at ___ (slip op at 4).

Return to previous location.

4. OAR 660-012-0070(4) provides:

"To address Goal 2, Part II(c)(1) the exception shall provide reasons justifying why the state policy in the applicable goals should not apply. Further, the exception shall demonstrate that there is a transportation need identified consistent with the requirements of OAR 660-012-0030 which cannot reasonably be accommodated through one or a combination of the following measures not requiring an exception:

"(a) Alternative modes of transportation;

"(b) Traffic management measures; and

"(c) Improvements to existing transportation facilities."

Return to previous location.

5. OAR 660-012-0070(6) provides:

"To determine the reasonableness of alternatives to an exception under sections (4) and (5) of this rule, cost, operational feasibility, economic dislocation and other relevant factors shall be addressed. The thresholds chosen to judge whether an alternative method or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception."

Return to previous location.

6. A "transportation facility" is "any physical facility that moves or assist[s] in the movement of people or goods * * *." OAR 660-012-0005(24).

Return to previous location.

7. OAR 660-012-0005(32) defines "Transportation System Plan" to mean "a plan for one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity of movement between modes, and within and between geographic and jurisdictional areas."

Return to previous location.

8. LUBA's application of OAR 660-004-0020 in this and other portions of its opinion appears to be at odds with its conclusion that transportation improvement exceptions need to satisfy only OAR 660, division 12. See 49 Or LUBA at 647. In light of our holding that the exception criteria of both divisions must be satisfied, LUBA's treatment of this issue on remand will need to be made consistent.

Return to previous location.

9. OAR 660-004-0020(2)(c) recites the same criteria as found in ORS 197.732(1)(c)(C), with some elaboration. OAR 660-004-0020 provides, in part:

"(2) The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:

"(a) 'Reasons justify why the state policy embodied in the applicable goals should not apply': The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;

"(b) 'Areas which do not require a new exception cannot reasonably accommodate the use':

* * * * *

"(c) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in 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 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;

"(d) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts. The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ["Compatible use"] is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses."

Return to previous location.

10. OAR 660-004-0020(2) is quoted in full above. ___ Or App at ___ n 9 (slip op at 14-15 n 5).

Return to previous location.

11. OAR 660-012-0070(8) provides:

"To address Goal 2, Part II(c)(4), the exception shall:

"(a) Describe the adverse effects that the proposed transportation improvement is likely to have on the surrounding rural lands and land uses, including increased traffic and pressure for nonfarm or highway

oriented development on areas made more accessible by the transportation improvement;

"(b) Demonstrate how the proposed transportation improvement is compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts;

"(c) Adopt as part of the exception, facility design and land use measures which minimize accessibility of rural lands from the proposed transportation facility or improvement and support continued rural use of surrounding lands."

Return to [previous location](#).



