

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county ordinance adopting an
4 exception to Statewide Planning Goal 3 (Agricultural Land)
5 to allow a church on a 7.4-acre parcel,¹ changing the
6 comprehensive plan map designation of that parcel from
7 Agricultural/Forestry Large Holding to Public, and changing
8 the zoning of the parcel from Exclusive Farm Use (EF-40) to
9 Public Assembly Institutional (PAI).²

10 **MOTION TO INTERVENE**

11 Lee Ruff Stark Architects, the applicant below, moves
12 to intervene in this proceeding on the side of respondent.
13 There is no opposition to the motion, and it is allowed.

14 **FACTS**

15 The subject parcel contains a dwelling and associated
16 outbuildings. It is composed of Class II and III soils and
17 is currently used to produce grass and grain crops. The
18 subject parcel is surrounded by other EF-40 zoned property
19 used for vineyards and to produce grass and grain crops.
20 Highway 99W abuts the subject parcel to the west. The City

¹The challenged decision adopts a "reasons" goal exception under ORS 197.232(1)(c), OAR 660-04-020 and 660-04-022, rather than a "physically developed" or "irrevocably committed" goal exception.

²The decision also imposes a Limited Use Overlay (LUO) zone on the subject parcel, limiting its use to a church and accessory uses, and denies a request to partition the subject parcel into two parcels of 1.7 and 5.7 acres. However, these aspects of the decision are not at issue in this appeal.

1 of Amity's urban growth boundary and city limits are located
2 approximately 1,000 feet south of the subject parcel.

3 The proposed church would be used by a congregation of
4 approximately 60 families living in the Amity area. More
5 than one-half of these families live outside the City of
6 Amity. The Amity congregation currently uses a church in
7 McMinnville, which is also used by two other full-size
8 congregations. The decision states:

9 "* * * The McMinnville [church] is at capacity
10 and there is insufficient space there for the
11 Amity ward members, which creates scheduling and
12 group identity problems for the Amity ward
13 members. In order to allow the congregation's lay
14 clergy an opportunity to provide service within
15 the ward, church policy provides that when
16 congregations reach a certain size within certain
17 geographic boundaries, the wards must divide into
18 separate congregations. * * *" Record 7.

19 **WAIVER**

20 Petitioner's first assignment of error contends the
21 challenged decision violates OAR 660-33-120 because that
22 rule does not allow new churches to be built on high value
23 farmland. Petitioner's fourth and fifth assignments of
24 error contend the challenged decision fails to comply with
25 Yamhill County Zoning Ordinance (YCZO) 1208.02D and 904.04C,
26 which establish requirements for consideration of
27 alternative sites in adopting zone changes and goal
28 exceptions, respectively. Intervenor-respondent
29 (intervenor) contends these issues cannot be raised before
30 LUBA because they were not raised during the county

1 proceedings, as required by ORS 197.763(1) and 197.835(2).³

2 Petitioner responds to intervenor's waiver argument
3 simply by contending she argued before the county that good
4 farm land should not be used for a church. Petitioner does
5 not cite places in the record where compliance with
6 OAR 660-33-120, YCZO 1208.02D or YCZO 904.04C was discussed
7 or where these provisions or their operative terms were
8 mentioned below. See Spiering v. Yamhill County, 25 Or LUBA
9 695, 711-12 (1993); ODOT v. Clackamas County, 23 Or LUBA
10 370, 375 (1992). Neither does petitioner contend she may
11 raise new issues pursuant to ORS 197.835(2)(a) or (b). See
12 n3, supra. Consequently, we agree with intervenor that the

³ORS 197.763(1) provides, in relevant part:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the [local government decision maker], and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides, in relevant part:

"Issues [raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues [before LUBA] if:

"(a) The local government failed to follow the requirements of ORS 197.763; or

"(b) The local government made a land use decision * * * which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

1 issues petitioner seeks to raise in her first, fourth and
2 fifth assignments of error are waived.

3 **SECOND ASSIGNMENT OF ERROR**

4 Petitioner contends the proposed church use is an urban
5 use and, therefore, cannot be allowed on rural land without
6 an exception to Statewide Planning Goal 14 (Urbanization).
7 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447,
8 474-75, 724 P2d 268 (1986). Petitioner argues that because
9 there is no definition of the term "urban use" in any
10 statute, goal or administrative rule, a determination of
11 whether a particular use is urban or rural in nature must be
12 made on a case-by-case basis. Caine v. Tillamook County, 25
13 Or LUBA 209, 220 n13 (1993).

14 Petitioner argues the proposed church is an urban use
15 because the record shows 44% of the households in its
16 congregation are in the City of Amity and another 15% of the
17 congregation's households are located closer to other
18 churches within neighboring urban growth boundaries.
19 Petitioner also notes the decision finds the Amity UGB will
20 eventually be expanded to include the subject parcel.
21 Petitioner further argues that the proposed use of an
22 on-site sewage disposal system does not establish the
23 proposed church is not urban. DLCD v. Douglas County, 17
24 Or LUBA 466, 473 (1991).

25 The challenged decision finds:

26 " * * * Goal 14 is not applicable and * * * no
27 Goal 14 exception is required because the proposed

1 use will not require extension of urban services
2 (sewer or water), and extension of such services
3 is prohibited under the LUO [zone] unless a
4 Goal 14 exception is taken.

5 "Furthermore, a majority of the church members
6 reside outside of the [Amity] city limits and UGB
7 and the church will primarily serve residents of
8 the unincorporated area. Therefore, * * * Goal 14
9 does not apply, and * * * a Goal 14 exception [is
10 not required]." Record 18-19.

11 We agree with intervenor that churches are not
12 inherently urban in nature. The above findings indicate the
13 proposed church will not require urban services and will
14 serve a primarily rural congregation.⁴ Other findings
15 indicate the proposed structure will be used for religious
16 services and the church's educational programs. Record 7,
17 9, 10. We conclude the proposed use is not an urban use
18 requiring an exception from Goal 14.

19 The second assignment of error is denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 When a local government adopts a "reasons" exception,
22 ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b) require that
23 "[a]reas which do not require a new [goal] exception cannot
24 reasonably accommodate the use." Petitioner challenges the
25 county's determination of compliance with
26 ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b) in several
27 respects.

⁴Petitioner does not challenge the evidentiary support for these findings.

1 **A. Limitations of Alternative Sites Analysis**

2 Petitioner contends the county erred by not considering
3 available parcels inside UGBs in the county other than the
4 City of Amity's UGB. City of LaGrande v. Union County, 25
5 Or LUBA 52 (1993). Petitioner also contends the county
6 improperly excluded from its analysis land within the Amity
7 UGB that is currently zoned for another purpose or where a
8 conditional use permit would be required for the proposed
9 use. Brandt v. Marion County, 22 Or LUBA 473, 481 (1991),
10 rev'd on other grounds 112 Or App 30 (1992).

11 Our decision in City of LaGrande, supra, does not
12 support petitioner's argument. In City of LaGrande, 25
13 Or LUBA at 63-64, we found that if a need for additional
14 industrial land in the City of Island City's UGB was
15 demonstrated, the county did not have to consider land
16 within the neighboring City of LaGrande UGB as an
17 alternative to a proposed Island City UGB amendment. Here,
18 the county found that the "reason" justifying the proposed
19 goal exception under ORS 197.732(1)(c)(A) and
20 OAR 660-04-020(2)(a) is the need for a church to serve a
21 congregation located in and around the City of Amity.
22 Petitioners do not challenge this determination of the
23 "reason" for the exception and, given this reason, the
24 county is not required to consider as alternative sites land
25 within the UGBs of other cities in the county.

26 We agree with petitioners that the county could not

1 properly limit its consideration of alternative sites within
2 the Amity UGB only to sites where a church is an outright
3 permitted use under the current zoning. However, there is
4 nothing in the findings indicating the county categorically
5 excluded from its alternatives analysis land within the
6 Amity UGB where a church would require a zone change or
7 conditional use permit.⁵

8 This subassignment of error is denied.

9 **B. Sites on Applicant's Survey**

10 The record includes a survey made by the applicant of
11 possible sites in and around the Amity UGB. Record 63-68.
12 The survey identifies 40 individual sites and states why the
13 applicant found the sites unacceptable. Petitioner contends
14 the reasons given by the applicant for rejecting sites 11,
15 15 and 24, including Greenway concerns, no improved access,
16 steep inclines and wet soil, are not sufficient to establish
17 the sites cannot reasonably accommodate the proposed church.
18 See Simmons v. Marion County, 22 Or LUBA 759, 771 (1992);
19 Weist v. Jackson County, 18 Or LUBA 627, 632 (1990).

20 The county adopted the following findings addressing
21 OAR 660-04-020(2)(b):

22 "[T]he proposed use complies with the requirements
23 under OAR 660-04-020(2)(b) that the areas which do
24 not require a new exception cannot reasonably

⁵Petitioner's challenges regarding the reasons given by the county for rejecting particular sites are addressed under the following subassignments of error.

1 accommodate the use. As explained in paragraph
2 B.5 [sic B.4], the map showing parcels within the
3 Amity city limits and UGB ('the city') shows that
4 there are no parcels which do not require an
5 exception inside the city that are both suitable
6 and available. All suitable land outside the city
7 would require an exception for the proposed use."
8 Record 10.

9 Paragraph B.4.1 (Record 8) describes the survey conducted by
10 the applicant and indicates the challenged decision relies
11 on that survey and its accompanying map, although the
12 decision does not explicitly incorporate the survey and map
13 by reference. However, since no party contends the survey
14 is not part of the county's alternative site findings, we
15 will treat it as such.

16 Site 15 is located outside the Amity UGB. Record 65.
17 Petitioner does not challenge the county's finding that use
18 of such sites would require a goal exception. Therefore,
19 site 15 is not relevant to compliance with
20 ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b).

21 Sites 11 and 24 are located inside the Amity UGB and,
22 therefore, are relevant to compliance with
23 ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b). The cases
24 cited by petitioner, Simmons and Weist, interpret and apply
25 county code and comprehensive plan standards regarding
26 alternative location requirements and, therefore, are not on
27 point. In Pacific Rivers Council, Inc. v. Lane County, 26
28 Or LUBA 323, 344 (1993), we discussed the "cannot reasonably
29 accommodate the use" standard of ORS 197.732(1)(c)(B) and

1 OAR 660-04-020(2)(b):

2 "[ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b)]
3 express a preference for using an alternative site
4 that does not require a goal exception. See 1000
5 Friends of Oregon v. Marion County, 24 Or LUBA 20,
6 26, rev'd on other grounds, 116 Or App 584 (1992).
7 This means close calls favor [an alternative] site
8 that does not require a goal exception. If such a
9 site is a reasonable alternative for the proposed
10 use, a goal exception is not justified. 1000
11 Friends of Oregon v. Metro Service Dist., 18
12 Or LUBA 311, 330 (1989). * * *"

13 We turn to the findings regarding sites 11 and 25. The
14 findings indicate site 11 is 4.75 acres in size, and go on
15 to state:

16 "[O]nly about 45-50% of the land is suitable to be
17 built upon as the south side of the property
18 fronts the river and there is a steep incline in
19 the topography going down to the river, rendering
20 the site too small. Greenway issues are of
21 concern. Property has no improved access."
22 Record 64.

23 The challenged decision determines the proposed use
24 requires a site "at least 3 acres in size and preferably 4-5
25 acres in size." Record 8. Petitioner does not challenge
26 that determination. Considering that a site at least three
27 acres in size is required, a finding that a 4.75-acre site
28 is too small because only 45-50% of the site is buildable,
29 is sufficient to explain why that site is not a reasonable
30 alternative for the proposed use.

31 The findings indicate site 24 is 2.7 acres in size and
32 state:

33 "Parcel is * * * a flag lot with 1/3 acre lying

1 within [the] access strip. Parcel has a steep
2 incline to the east, and a percentage of the
3 parcel becomes very water logged and marshy during
4 the winter and is unbuildable for subject use.
5 Water is flowing across property as of today.
6 Greenway issues are of concern." Record 66.

7 Since the proposed use requires at least three acres, and
8 the findings indicate some portion of the approximately 2.4
9 acres of site 24 outside the "flag pole" access strip are
10 unbuildable due to high water, the above findings are
11 adequate to establish that site 24 is not a reasonable
12 alternative for the proposed use.

13 This subassignment of error is denied.

14 **C. Sites Suggested by Opponents**

15 With regard to the alternative sites analysis required
16 under ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b),
17 OAR 660-04-020(2)(b)(C) states:

18 "* * * Site specific comparisons are not required
19 * * * unless another party to the local proceeding
20 can describe why there are specific sites that can
21 more reasonably accommodate the proposed use. A
22 detailed evaluation of specific alternative sites
23 is thus not required unless such sites are
24 specifically described with facts to support the
25 assertion that the sites are more reasonable by
26 another party during the local exceptions
27 proceeding."

28 According to petitioner, during the county proceedings,
29 opponents identified several sites which would not require a
30 new goal exception and which they argued could reasonably
31 accommodate the proposed use. Petitioner contends that with
32 regard to three such sites, the county's findings do not

1 satisfy the requirement of OAR 660-04-020(2)(b)(C) for a
2 "detailed evaluation" and reject the site for improper
3 reasons.

4 Petitioner first challenges the adequacy of the
5 county's findings regarding continued use of the McMinnville
6 site. Those findings, quoted in part under "Facts," supra,
7 explain that the McMinnville church is currently used by two
8 other full-size congregations and that there is insufficient
9 space for continued use of the facility by the Amity-based
10 congregation. Record 7. The county's analysis is
11 sufficient to satisfy OAR 660-04-020(2)(b)(C) and explain
12 why continued shared use of the McMinnville church is not a
13 reasonable alternative.

14 Petitioner next challenges the adequacy of the county's
15 findings regarding the "Whiteson" site. The findings state:

16 " * * * Applicant limited the survey [of
17 alternative sites] to properties in close
18 proximity to the City of Amity because the
19 church's educational program requires location of
20 the church within walking distance of the [Amity]
21 schools. Applicant found no other property for
22 which an exception might be taken that was located
23 close enough to be within walking distance of the
24 schools.

25 "Opponents claimed there was one parcel available
26 outside the city (located near Whiteson, north of
27 Amity). However, its location three miles from
28 Amity is too far to be within walking distance of
29 the [Amity] schools and it is therefore unsuitable
30 for the church's educational program." Record 10.

31 Petitioner does not challenge the county's
32 determination that because of the proposed church's

1 after-school educational programs, the proposed church must
2 be located within walking distance of the Amity schools.
3 Neither does petitioner challenge the county's determination
4 that the Whiteson site is not within walking distance of the
5 Amity schools. Petitioner simply argues the above findings
6 are not sufficient to constitute the "detailed evaluation"
7 required by OAR 660-04-020(2)(b)(C). We disagree. Given
8 the county's unchallenged determinations concerning the
9 requirement that the proposed use be located within walking
10 distance of Amity schools, the above findings are adequate
11 to explain why the Whiteson site is not a reasonable
12 alternative for the proposed use.

13 Petitioner finally challenges the adequacy of the
14 county's findings regarding an approximately three-acre site
15 in the City of Amity (hereafter "Amity site"). The county's
16 findings on the Amity site state:

17 "One 2.75 acre site inside the UGB is too small
18 because 1/3 of the land [is] not buildable due to
19 neighborhood opposition and wetlands issues; it
20 also includes buildings which would need to be
21 razed." Record 11.

22 Petitioner contends the existence of wetlands, neighborhood
23 opposition or buildings that need to be razed are not
24 sufficient reasons to conclude the Amity site is unsuitable
25 for the proposed use. Petitioner also contends the finding
26 on neighborhood opposition making a portion of the site
27 unbuildable is not supported by substantial evidence.

28 That a site contains buildings that would have to be

1 removed does not, of itself, mean the site cannot reasonably
2 accommodate a proposed new use under ORS 197.732(1)(c)(B)
3 and OAR 660-04-020(2)(b). See Pacific Rivers Council,
4 supra, 26 Or LUBA at 346. Without additional findings
5 concerning the nature and extent of the buildings that would
6 have to be removed from the Amity site, we cannot conclude
7 the existence of the buildings alone means that the Amity
8 site is not a reasonable alternative for the proposed use.⁶

9 Given the unchallenged determination that the proposed
10 use requires a three-acre site, a finding that 1/3 of the
11 2.75-acre Amity site is unbuildable could provide an
12 adequate basis for concluding that the Amity site is not a
13 reasonable alternative. However, the findings do not
14 explain why or how "neighborhood opposition" makes any
15 portion of the site unbuildable. Further, the parties cite
16 no evidence in the record supporting the county's finding
17 that neighborhood opposition and wetlands make 1/3 of the
18 Amity site unbuildable. Therefore, we conclude the county
19 has not satisfied ORS 197.732(1)(c)(B) and
20 OAR 660-04-020(2)(b) with regard to the Amity site.

21 This subassignment of error is sustained, with regard
22 to the Amity site.

23 The third assignment of error is sustained, in part.

24 The county's decision is remanded.

⁶We also note the parties cite no evidence in the record concerning the nature and extent of the buildings on the Amity site.