

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

4 PAUL E. FOLAND and CONSTANCE J. FOLAND,
5 *Petitioners,*
6

7 vs.
8

9 JACKSON COUNTY,
10 *Respondent,*
11

12 and
13

14 OREGON DEPARTMENT OF TRANSPORTATION,
15 *Intervenor-Respondent.*
16

17 LUBA No. 2009-109
18

19 DANIEL FOLLIARD, JAMES McINTOSH, LOIS LANGLOIS,
20 DAN BATY, JOHN EASTER and MICHAEL BIANCO,
21 *Petitioners,*
22

23 vs.
24

25 JACKSON COUNTY,
26 *Respondent,*
27

28 and
29

30 OREGON DEPARTMENT OF TRANSPORTATION,
31 *Intervenor-Respondent.*
32

33 LUBA No. 2009-112
34

35 ALLEN BAKER, JOHN WEISINGER,
36 STEVEN STOLZER, JEAN MORGAN, MICHAEL MORGAN,
37 SUZANNE FREY and GAIL ZARO,
38 *Petitioners,*
39

40 vs.
41

42 JACKSON COUNTY,
43 *Respondent,*
44

45 and

1
2 OREGON DEPARTMENT OF TRANSPORTATION,
3 *Intervenor-Respondent.*

4
5 LUBA No. 2009-113

6
7 FINAL OPINION
8 AND ORDER
9

10 Appeal from Jackson County.

11
12 Paul E. Foland and Constance J. Foland, Ashland, filed a petition for review and
13 Constance J. Foland argued on her own behalf.

14
15 Anne C. Davies, Eugene, filed a petition for review and argued on behalf petitioners
16 Baker *et al* and Folliard *et al*.

17
18 No appearance by Jackson County.

19
20 Bonnie Heitsch, Assistant Attorney General, Salem, filed the response brief and
21 argued on behalf of the Oregon Department of Transportation. With her on the brief was
22 John R. Kroger, Attorney General.

23
24 BASSHAM, Board Member; HOLSTUN, Board Chair; participated in the decision.

25
26 RYAN, Board Member, concurring.

27
28 REMANDED

06/04/2010

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving exceptions to Statewide Planning Goal 3 (Agricultural Lands), Goal 11 (Public Facilities and Services) and Goal 14 (Urbanization), and related comprehensive plan map and zoning map amendments, in order to site an interstate highway rest area and welcome center on land zoned Exclusive Farm Use. The challenged decision also approves an access road.

REPLY BRIEFS

Petitioners Baker *et al* (Baker) and Folliard *et al* (Folliard) move for permission to file a joint reply brief under OAR 661-010-0039, to respond to new matters they allege were raised for the first time in the response brief. Intervenor Oregon Department of Transportation (ODOT) objects to the reply brief, arguing that the reply brief does not respond to new matters raised in ODOT’s response brief. We agree with ODOT that portions of the reply brief contain responses to statements and arguments in the response brief that do not qualify as “new matters” under OAR 661-010-0039. Accordingly, we will not consider subsections A or C. Subsections B, D, E, and G respond to new matters raised in the response brief, and those sections of the reply brief are allowed.¹ Baker’s and Folliard’s motion is granted in part.

Petitioners Folands (Foland) move for permission to file a reply brief to respond to new matters they allege were raised in the response brief. ODOT also objects to the Foland reply brief, arguing that it does not respond to any new matters raised in ODOT’s response brief and includes new arguments that were not presented in the Foland petition for review. We agree with ODOT that the Foland reply brief does not respond to new matters raised in the response brief. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16, 19-20 (2007)

¹ There is no subsection “F.”

1 (new matters are responses that an argument should fail regardless of its stated merits, or
2 responses to assignments of error that could not reasonably have been anticipated by a
3 petitioner). Foland's motion is denied.

4 **FACTS**

5 The challenged decision approves ODOT's application to site a rest area and
6 welcome center on an 18-acre parcel of land located approximately 500 feet south of the
7 urban growth boundary (UGB) of the City of Ashland. In 1996, ODOT closed the Siskiyou
8 Safety Rest Area and Welcome Center, located near Milepost 10 on Interstate 5, because the
9 rest area experienced safety issues due to its location at approximately 2,650 feet above sea
10 level, just north of the Siskiyou Summit on a 6% downgrade slope, and its insufficient
11 deceleration ramp and sighting distance. The welcome center that was sited at the closed rest
12 area was relocated to the U.S. Forest Service's Ashland Ranger District building in the City
13 of Ashland, where it is still located.

14 In 2008, ODOT applied to site a new rest area and welcome center serving
15 northbound traffic on ODOT's property between Mileposts 12 and 13, about 2.5 miles north
16 of the closed rest area. The site is approximately 500 feet south of the City of Ashland's
17 urban growth boundary. Exits to the City of Ashland are located at Mileposts 11 and 14.
18 There is an interstate interchange within the City of Ashland at Milepost 14, approximately
19 1.5 miles north of the subject property.

20 The property is zoned Exclusive Farm Use (EFU) and is located on the east side of I-
21 5, at an elevation of 2,100 feet above sea level. Prior to its acquisition by ODOT in 1999, the
22 property was used for cattle grazing. The property is surrounded by other resource lands
23 used for grazing, and growing crops, fruit trees, berries and cane. Approximately one-half
24 mile north of the property lies Crowson Road, a county road, and a residential subdivision,

1 Oak Knoll Meadows. An irrigation ditch, the “Dunn Ditch,”² parallels the property on the
2 west side of Interstate-5, and lateral pipes from the Dunn Ditch run under I-5 onto the ODOT
3 property at various locations. Record Exhibit AF. Foland’s property, together with other
4 properties located near the subject property, possess a right to use water from the Dunn Ditch
5 for irrigation. Record 2554-55. A sewer line that connects to the City of Ashland’s sewer
6 system and had previously served the closed rest area traverses the property from north to
7 south, along the east side of I-5.

8 The proposal includes entrance and exit ramps, approximately 4.5 acres for
9 approximately 60 car and 13 RV parking spaces, driveways, an area for staff parking, an
10 interpretive area, a picnic area, a pet area, walkways, drinking fountains, and ornamental
11 landscaping. The proposal also includes three separate buildings, including an
12 approximately 1,800-square foot restroom building, a 576-square foot “travel kiosk,” and an
13 approximately 3,800-square foot welcome center building. Record 1411-12, 1418. Finally,
14 the proposal includes construction of a new access road from the north boundary of the rest
15 area to connect to Crowson Road, located approximately 200 feet north of the north
16 boundary of the rest area. The proposed access road is located entirely on the subject parcel.

17 After conducting six public hearings, the planning commission voted to recommend
18 approval of the application to the board of county commissioners. After conducting several
19 more public hearings, the board of county commissioners adopted the planning commission’s
20 recommendation and voted to approve the applications. These appeals followed.

21 **INTRODUCTION**

22 The proposed rest area and welcome center are not uses that are allowed under
23 Statewide Planning Goal 3 (Agricultural Lands) and ORS 215.283(1) and (2) on land zoned
24 EFU. ORS 197.732 and Statewide Planning Goal 2, Part II(c) allow a local government to

² The same irrigation ditch is alternatively referred to in various places in the record as the “Houck-Dunn-Homes Ditch,” and the “Houck Ditch.” In this opinion we refer to the ditch as the Dunn Ditch.

1 plan and zone land for uses not allowed under the statewide planning goals if the local
2 government identifies “[r]easons [that] justify why the state policy embodied in the
3 applicable goals should not apply.” This type of statewide planning goal exception is
4 referred to as a “reasons” exception, to distinguish it from the “physically developed” and
5 “irrevocably committed” exceptions that are authorized by Goal 2, Part II(a) and (b). Under
6 ORS 215.283(3), in order to gain approval of the rest area and welcome center, ODOT
7 sought the disputed reasons exception to Statewide Planning Goals 3, 11, and 14.³

8 In most circumstances, a reasons exception to allow development on EFU-zoned land
9 would require application of the standards set forth in OAR 660-004-0020 and 660-004-
10 0022. Those rules are set forth in Appendix A. However, for exceptions that are required in
11 order to site “transportation facilities and improvements” on rural lands, OAR chapter 660,
12 division 12, the transportation planning rule (TPR) provides different exception standards.
13 OAR 660-012-0070.⁴ The TPR exception standards set out in OAR 660-012-0070 require

³ ORS 215.283(3) provides, in part:

“Roads, highways and other transportation facilities and improvements not allowed under subsections (1) and (2) of this section may be established, subject to the approval of the governing body or its designee, in areas zoned [EFU] subject to:

“(a) Adoption of an exception to the goal related to agricultural lands and to any other applicable goal with which the facility or improvement does not comply[.]”

⁴ In *1000 Friends of Oregon v. Yamhill County*, 203 Or App 323, 120 P3d 684 (2005), the Court of Appeals held that the OAR 660-012-0070 TPR exception standards and the exception standards in OAR 660-004-0020 and 660-004-0022 are not identical, and both sets of standards must be satisfied in order to site “transportation facilities and improvements” on lands that are subject to Goal 3. 203 Or App at 333-34. In response to the Court of Appeals’ decision, the Department of Land Conservation and Development (DLCD) amended OAR 660-012-0070 in several respects, and in July, 2006, the current version of OAR 660-012-0070 took effect. The current version of OAR 660-012-0070(2) allows reasons exceptions for “transportation facilities and improvements” without applying the OAR 660-004-0020 and 660-004-0022 exception standards:

“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 chapter 660, division 4 and OAR chapter 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.”

1 identification of the need for a transportation facility and a demonstration that measures not
2 requiring an exception, such as improvements to existing transportation facilities, cannot
3 reasonably satisfy that need. OAR 660-012-0070(4). The TPR exception standards also
4 require a demonstration that lands that do not require an exception to Goal 3 (non-exception
5 locations) cannot reasonably accommodate the transportation facility. OAR 660-012-
6 0070(5). The required demonstration regarding alternative measures and alternative non-
7 exception lands under OAR 660-012-0070(4) and (5) requires that “cost, operational
8 feasibility, economic dislocation and other relevant factors” must be addressed. OAR 660-
9 012-0070(6). The TPR exception standards allow the local government to utilize
10 “thresholds,” or required features or characteristics, in order to judge whether a measure or
11 non-exception location alternative can reasonably accommodate the transportation need.
12 The county’s thresholds are the focus of petitioners’ assignments of error and they are
13 discussed in more detail below.

14 **FIRST ASSIGNMENT OF ERROR (BAKER)/FIRST AND SECOND ASSIGNMENTS**
15 **OF ERROR (FOLAND)**

16 **A. OAR 660-012-0070(1): “Transportation Facilities and Improvements”**

17 OAR 660-012-0070(1) provides that:

18 *“Transportation facilities and improvements which do not meet the*
19 *requirements of OAR 660-012-0065 require an exception to be sited on rural*
20 *lands.” (Emphasis added.)*

21 Baker and Foland allege in their first assignment of error that the county erred in failing to
22 adopt adequate findings explaining why the proposed rest area and welcome center qualify as
23 “transportation facilities and improvements” under OAR 660-012-0070(1), so that the TPR
24 exception standards rather than the exceptions standards set forth in OAR 660-004-0020 and
25 660-004-0022 apply. Baker first argues that the county erred in failing to explain why the
26 proposed rest area and welcome center are “transportation facilities” and in failing to respond

1 to opponents’ arguments that the rest area and welcome center do not qualify as
2 transportation facilities.

3 **1. Failure to Respond to Opponents’ Arguments**

4 The board of county commissioners incorporated the recommendation of the county
5 planning commission, which adopted several pages of findings. According to Baker, none of
6 the incorporated findings specifically addressed Baker’s and Foland’s contention that the
7 proposed rest area and welcome center are not “transportation facilities [or] improvements”
8 and are therefore not eligible to meet the TPR exception standards rather than the exception
9 standards set forth in OAR 660-004-0020 and 660-004-0022.

10 ODOT responds by pointing to the board of commissioners’ finding that “* * * the
11 application complies with the Oregon Administrative Rules for exceptions * * *.” Record 4.
12 ODOT also points to findings of the planning commission that “the application, with the
13 recommended conditions of approval, sufficiently addresses the exception criteria * * * that
14 [are] required for an amendment and approval of the application.” Record 7. Finally, ODOT
15 points to places in the record where the issue of whether the rest area and welcome center are
16 a transportation facility was addressed: in the initial application materials, and in ODOT’s
17 final rebuttal to the board of commissioners. Record 90.

18 The planning commission adopted findings that concluded in relevant part:

19 “Because [the exception] involves taking ‘reasons’ exceptions, it requires an
20 amendment to the Jackson County Comprehensive Plan. As an exception and
21 plan amendment, ODOT must demonstrate compliance with the following
22 criteria:

23 “ORS 197.732 (Goal Exceptions)

24 “Statewide Planning Goal 2, Part II

25 “OAR 660-012-0070 (Exceptions for Transportation
26 Improvements on Rural Land) * * *.” Record 16.

27 ODOT’s application includes the following statement:

1 “Relocating the Rest Area/Welcome Center on land zoned [EFU] requires
2 goal exceptions pursuant to ORS 215.283(3) and the * * * Transportation
3 Planning Rule, OAR 660, Division 12. Because a Rest Area/Welcome Center
4 is a transportation facility, the applicable exception standards are those set out
5 in OAR 660-012-0070.” Record 1282.

6 In a footnote, ODOT explained:

7 “Because rest areas are considered highway related facilities (see, e.g., ORS
8 215.283(1)([k])), and because welcome centers are typically associated with
9 rest areas both in Oregon and nationally, welcome centers are an accessory
10 use to the rest area when proposed in conjunction with a rest area.
11 Accordingly, the proposed welcome center is included as part of the exception
12 for the rest area.” Record 1282, n 6.

13 In adopting its findings, which specifically refer to OAR 660-012-0070, we
14 understand the planning commission to have agreed with ODOT that the rest area and
15 welcome center qualify as “transportation facilities and improvements” under OAR 660-012-
16 0070(1). Although not directly responding to each of petitioners’ arguments on the issue, the
17 board of commissioners adopted the planning commission recommendation and findings,
18 including its conclusion that the TPR exceptions standards were met. That indicates that the
19 board of commissioners concluded that the rest area and welcome center are “transportation
20 facilities and improvements” within the meaning of the rule. Baker and Foland assign error
21 to that conclusion in their petitions for review. We do not see that it was error for the board
22 of commissioners to fail to adopt findings responding to their specific arguments, and we
23 address those arguments below in resolving the assignments of error.

24 **2. Rest Area**

25 Baker and Foland argue that the proposed rest area does not qualify as a
26 “transportation facilit[y] and improvement[.]” as that term is used in OAR 660-012-0070(1).
27 The TPR includes a definition of “transportation facilities,” but does not separately define
28 “transportation improvements.” “Transportation facilities” are defined in OAR 660-012-
29 0005(30) as:

1 “ * * * any physical facility that moves or assist[s] in the movement of
2 people or goods including facilities identified in OAR 660-012-0020 but
3 excluding electricity, sewage and water systems.”

4 Baker and Foland argue that the rest area is not a “physical facility that moves or assists in
5 the movement of people or goods” within the meaning of “transportation facility” at OAR
6 660-012-0005(30). According to Baker, *Interstate 5* is the “transportation facility,” and at
7 most the rest area could be said to be an improvement appurtenant to that transportation
8 facility. Baker argues that OAR 660-012-0070 permits ODOT to take a reasons exception
9 under that rule only for “transportation facilities and improvements,” which does not include
10 facilities that are merely appurtenant or accessory to transportation facilities.

11 Both Baker and Foland cite to contextual language in the TPR and ORS Chapter 215
12 to support their view that a rest area does not move or assist in the movement of people or
13 goods, and thus does not fall within the OAR 660-012-0005(30) definition of transportation
14 facility. Foland notes that OAR 660-012-0020, referenced in OAR 660-012-0070(1), lists
15 various elements that must be included in all transportation system plans (TSPs). OAR 660-
16 012-0020(2) requires plans for roads, public transportation, bicycle and pedestrian paths, air,
17 rail, water and pipeline transportation, parking, etc., but does not include any reference to
18 rest areas. Based on the type of transportation elements required in a TSP under OAR 660-
19 012-0020, Foland argues that a “transportation facility” must necessarily be some kind of
20 “physical infrastructure for the actual conveyance or ‘movement’ of people or goods,” or at
21 least “facilities with the purpose of transferring people and/or goods from one conveyance to
22 another.” Foland Petition for Review 5-6.

23 Both petitioners also point out that the ORS 215.283(1)(k) and ORS 215.283(2)(s)
24 permit improvements to existing “rest areas” as permitted or conditional uses, and that both
25 statutes place rest areas within a category described as “highway related facilities.”⁵

⁵ ORS 215.283 provides in relevant part:

1 Petitioners argue that because the statutory term “highway related facilities” expressly
2 includes rest areas, but the TPR definition of “transportation facilities” does not expressly
3 include rest areas, the TPR definition of “transportation facilities” should not be interpreted
4 to include rest areas.

5 Foland also points to the definition of “minor transportation improvements” found at
6 OAR 660-012-0005(15), to argue that the term “transportation * * * improvements” is
7 intended to include only linear facilities such as roads, and does not include facilities that
8 merely provide traveler services.⁶ Finally, Foland points to the definition of “transportation
9 improvements” found in the Jackson County Land Development Ordinance (LDO)
10 13.3(278), which provides in relevant part that “[a]ccessory uses include maintenance yards,

“(1) The following uses may be established in any area zoned for exclusive farm use:

“ * * * * *

“(k) Minor betterment of existing public road and highway related facilities such as maintenance yards, weigh stations and rest areas, within right of way existing as of July 1, 1987, and contiguous public-owned property utilized to support the operation and maintenance of public roads and highways.

“ * * * * *

“(2) The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296:

“ * * * * *

“(s) Improvement of public road and highway related facilities, such as maintenance yards, weigh stations and rest areas, where additional property or right of way is required but not resulting in the creation of new land parcels.”

⁶ OAR 660-012-0005(15) defines “minor transportation improvements” as including:

“ * * * signalization, addition of turn lanes or merge/deceleration lanes on arterial or collector streets, provision of local streets, transportation system management measures, modification of existing interchange facilities within public right of way and design modifications located within an approved corridor. * * * Minor transportation improvements do not include new interchanges; new approach roads within the influence area of an interchange; new intersections on limited access roadways, highways or expressways; new collector or arterial streets, road realignments or addition of travel lanes.”

1 stockpile sites, weigh stations, or rest areas.” Because LDO 13.3(278) describes a rest area
2 as an “accessory use,” Foland argues, rest areas should not be viewed as a “transportation
3 facility” as defined in OAR 660-012-0005(30) or a “transportation * * * improvement” under
4 OAR 660-012-0070(1).

5 ODOT responds, and we agree, that the proposed rest area is a facility that clearly
6 “assists in the movement of people and goods” and thus falls within the TPR definition of
7 “transportation facilities.” The proposed rest area allows northbound travelers to exit the
8 freeway after crossing the Siskiyou Pass, rest, use the restroom, and gather information
9 before entering the freeway again and continuing north on I-5.⁷ On its face, that function
10 “assists in the movement of people or goods.”

11 Petitioners’ contextual arguments for a narrow understanding of the term
12 “transportation facilities and improvements” are unpersuasive. In our view, the relevant
13 context supports ODOT’s broader view of that term. Turning first to OAR 660-012-0020,
14 which lists the required elements of a TSP, the definition of “transportation facilities” at
15 OAR 660-012-0005(30) states that the term “include[s] facilities identified in OAR 660-012-
16 0020,” but does not limit the scope of “transportation facilities” to those identified in
17 OAR 660-012-0020. Further, OAR 660-012-0020 sets out in very general terms the required
18 elements and plans for TSPs adopted by local governments. That ODOT did not require
19 local governments to specifically plan for “rest areas,” which are typically associated with
20 interstate highways, does not carry the suggestion that a rest area does not “assist in the
21 movement of people or goods” and thus fall within the TPR definition of “transportation
22 facility.”

⁷ Although there is no rule or statutory definition of “rest area,” ODOT cites to the following definition of “safety rest area” at 23 CFR 752.3(a) as an accurate description of the intended function of a rest area:

“A roadside facility safely removed from the traveled way with parking and such facilities for the motorist deemed necessary for his rest, relaxation, comfort and information needs. The term is synonymous with ‘rest and recreation areas.’”

1 With respect to ORS 215.283(1)(k) and (2)(s), we agree with ODOT that the
2 legislature’s inclusion of “rest areas” within the description of “highway related facilities”
3 does not mean that rest areas are excluded from the TPR term “transportation facilities and
4 improvements.” In fact, considering the relevant ORS chapter 215 and TPR provisions as a
5 whole, the stronger impression is that the TPR term “transportation facilities and
6 improvements” was intended to be a broad umbrella term that includes rest areas and other
7 facilities that the legislature describes as “highway related facilities” in ORS 215.283(1)(k)
8 and (2)(s), but which do not qualify under those statutes.

9 As noted, ORS 215.283(1) and (2) provide for various transportation improvements
10 to roads and other facilities as permitted or conditionally permitted uses within the EFU
11 zone, without an exception to Goal 3. See OAR 660-012-0065(3)(b) (providing for
12 “[t]ransportation improvements that are allowed or conditionally allowed by * * * ORS
13 215.283” on rural lands without an exception). The scope of “transportation improvements”
14 permitted under OAR 660-012-0065(3)(b) presumably includes those described in
15 ORS 215.283(1)(k) and 215.283(2)(s), which as noted provide for “[m]inor betterment” and
16 “[i]mprovement of public road and highway related facilities, such as maintenance yards,
17 weigh stations and rest areas * * *.” See n 5. Thus, improving or expanding an *existing* rest
18 area under ORS 215.283(2)(s) is a conditionally permitted use, allowed on rural lands
19 without an exception, pursuant to OAR 660-012-0065(3)(b).

20 ORS 215.283(1) and (2) work in tandem with ORS 215.283(3), which as noted
21 provides that “[r]oads, highways and other transportation facilities and improvements not
22 allowed under subsections (1) and (2)” may be established, subject to the adoption of an
23 exception to applicable goals. See n 3. Notably, ORS 215.283(3) is the actual source of the
24 term “transportation facilities and improvements” that is used in OAR 660-012-0070(1) and
25 that is the focus of the parties’ arguments. In context, it is apparent that ORS 215.283(3) is
26 describing an open-ended category of transportation uses that is one part of a continuum with

1 those transportation facilities and improvements that are allowed without an exception in
2 ORS 215.283(1) and (2). It is clear, for example, that expansion of an *existing* rest area
3 under ORS 215.283(2)(s) is a permitted conditional use, but construction of an identical *new*
4 rest area would require an exception to Goal 3 pursuant to ORS 215.283(3), because a *new*
5 rest area is “not allowed under subsections (1) and (2).” In other words, given the language
6 of ORS 215.283(3) and the structure of the statutory scheme, it is clear that the phrase
7 “transportation facilities and improvements” is intended to encompass facilities such as rest
8 areas and other “highway related facilities.”

9 The Land Conservation and Development Commission (LCDC) implemented the
10 statutory scheme by adopting a similar bifurcated continuum in OAR 660-012-0065 and
11 OAR 660-012-0070. The former rule identifies the “transportation facilities, services and
12 improvements” that may be permitted without an exception. As noted, improvements to
13 existing rest areas and other “highway related facilities” under ORS 215.283(2)(s) are
14 permitted without an exception, and are described in OAR 660-012-0065(3)(b) as
15 “transportation improvements.” Thus, an improvement to an existing rest area is a
16 “transportation improvement,” and a subset of the “transportation facilities, services and
17 improvements” that are allowed without a goal exception. LCDC implemented
18 ORS 215.283(3) by providing in OAR 660-012-0070(1) for “[t]ransportation facilities and
19 improvements” that “do not meet the requirements of OAR 660-012-0065” and therefore
20 require an exception. The parallel structure and phrasing of the rule and statute make it clear
21 that OAR 660-012-0070 is intended to govern the transportation uses referenced in
22 ORS 215.283(3). Because ORS 215.283(3) clearly requires an exception for “highway
23 related facilities” such as maintenance yards, weigh stations and rest areas that do not satisfy
24 the requirements of ORS 215.283(1) and (2), the strongest inference is that LCDC intended
25 OAR 660-012-0070(1) to govern such uses. That intent is confirmed in the broad definition
26 of “transportation facilities” to include facilities that “assist” in the movement of people or

1 goods. Highway related facilities such as maintenance yards, weigh stations and rest areas
2 clearly “assist in the movement” of people and goods.

3 In sum, contrary to petitioners’ arguments, consideration of the statutory context and
4 scheme indicates that LCDC intended “transportation facility” to include the facilities such
5 as rest areas that the legislature described in ORS 215.283(1) and (2) as “highway related
6 facilities.”

7 Foland’s last two contextual arguments are also unpersuasive. OAR 660-012-
8 0005(15) defines “minor transportation improvements” to include a non-exclusive list of
9 minor improvements to transportation facilities. *See* n 6. The listed improvements and the
10 exclusions to that list almost entirely involve improvements to roads or similar linear
11 facilities. Foland argues that OAR 660-012-0005(15) provides context suggesting that the
12 scope of the term “transportation * * * improvements” used in OAR 660-012-0070(1) is not
13 intended to include non-linear facilities such as rest areas. However, the definition of “minor
14 transportation improvement” does not categorically exclude improvements to non-linear
15 facilities such as rest areas. Indeed, as noted above, OAR 660-012-0035(3)(b) explicitly
16 characterizes uses allowed under ORS 215.283(1) and (2), including improvements to a rest
17 area, as a “transportation improvement,” which does not suggest that LCDC intended to limit
18 the meaning of the term “transportation * * * improvement” to exclude rest areas. Finally,
19 we agree with ODOT that the LDO definitions indicating that the county code characterizes
20 rest areas as “accessory” transportation improvements does not have any bearing on
21 construction of the provisions of OAR 660-012-0070.

22 In sum, we agree with ODOT that the proposed rest area is properly viewed as a
23 transportation facility that can be approved under the exception criteria in OAR 660-012-
24 0070, and the county did not err in failing to apply the exception criteria in OAR chapter
25 660, division 004.

1 **3. Welcome Center**

2 Finally, Baker and Foland argue that even if the rest area itself is viewed as a
3 transportation facility, the welcome center component of the rest area is an entirely different
4 use from the rest area and must independently qualify as a “transportation facility or
5 improvement” in order to be approved under the OAR 660-012-0070 TPR exception process.
6 Baker and Foland first challenge ODOT’s reasoning stated in its application, quoted above,
7 that the welcome center is an “accessory use” to the rest area and therefore qualifies for
8 review under the TPR exception standards. In support of their argument petitioners point to
9 OAR 660-012-0070(10), which provides:

10 “An exception taken pursuant to this rule does not authorize uses other than
11 *the transportation facilities or improvements* justified in the exception.”
12 (Emphasis added.)

13 According to petitioners, the main purpose of the welcome center is to promote tourism and
14 commerce in the region and around the state, and because the welcome center does not move
15 or assist in the movement of people or goods, it therefore does not qualify as a transportation
16 facility.

17 Although it is a closer question, we disagree with petitioners that the proposed
18 welcome center component of the rest area cannot be approved under the definition of
19 “transportation facility” set out in OAR 660-012-0005(30). Like the rest area itself, the
20 welcome center “assists in the movement” of northbound travelers crossing into Oregon from
21 California, by providing information on where in Oregon travelers might choose to go. In
22 this respect, the welcome center is simply a more elaborate version of an information kiosk
23 or signboard that provides travel information to interstate travelers, and that is a common
24 feature in rest areas. That in providing travel information to travelers the welcome center
25 might also serve the interests of local and regional commerce and tourism does not mean that
26 the welcome center does not “assist in the movement” of travelers, by providing travel
27 information.

1 **B. OAR 660-012-0070(3) and (4): Transportation Need**

2 OAR 660-012-0070(3) and (4) provide that a TPR exception must identify and
3 explain the transportation need consistent with OAR 660-012-0030.⁸ The requirement to

⁸ OAR 660-012-0070(3) and (4) provide:

“(3) An exception shall, at a minimum, decide need, mode, function and general location for the proposed facility or improvement:

“(a) The general location shall be specified as a corridor 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;

“(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;

“(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.;

“(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.

“(4) 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.”

1 identify the need derives from the more general requirement under Goal 2, Part II(c)(1) that
2 the exception must explain the reasons why Goal 3 should not apply. ODOT identified the
3 need for the rest area and welcome center as “* * * to provide essential rest, safety and
4 tourist information services to persons traveling northbound on Interstate 5 from California
5 across Siskiyou Pass.” Record 1302. ODOT then described the need more specifically as:

6 “To Provide for the Safety of the Traveling Public.

7 “To Relocate the Decommissioned Siskiyou Rest Area in the Area as required
8 by FHWA [Federal Highway Administration].

9 “To Provide for the Travel Needs of Visitors to Oregon.” Record 1302-04.

10 Baker initially argues that the county failed to address the opponents’ challenges to
11 the transportation need, and instead relied on statements in ODOT’s application, which was
12 introduced prior to opponents’ statements. However, as explained above, the planning
13 commission adopted several pages of findings regarding the transportation need for the
14 project, based on ODOT’s initial application and subsequent testimony and evidence that
15 was submitted to the planning commission. The board of commissioners adopted the
16 planning commission’s recommendation and findings as its own, and also concluded:

17 “The Board of Commissioners finds that the need for a new Siskiyou Safety
18 Rest Area and Welcome Center has been established and is supported by
19 substantial evidence and testimony. * * *” Record 3.

OAR 660-012-0030 provides in relevant part:

“Determination of Transportation Needs

“(1) The TSP shall identify transportation needs relevant to the planning area and the scale of the transportation network being planned including:

“(a) State, regional, and local transportation needs;

“(b) Needs of the transportation disadvantaged;

“(c) Needs for movement of goods and services to support industrial and commercial development planned for pursuant to OAR 660-009 and Goal 9 (Economic Development).”

1 We think the board of commissioners’ findings that ODOT established the need for the rest
2 area and welcome center are adequate, and that it was not error for the board of
3 commissioners not to respond to all of the opponents’ arguments.

4 As explained above, ODOT identified a need “to provide for the safety of the
5 traveling public” and “to replace the decommissioned Siskiyou Safety Rest Area.” Relying
6 on guidance provided by the “AASHTO Guide for Development of Rest Areas on Major
7 Arterials and Freeways,” ODOT maintained:

8 “[A] rest area is needed a short distance north of Siskiyou Pass to enable
9 drivers to relax and recover from any accumulated stress or fatigue after travel
10 through the steep and circuitous mountain area. Lacking a rest stop at the
11 proposed site * * * the next rest area serving northbound traffic would be at
12 the Valley of the Rogue exit, another 33 miles farther north near Milepost
13 45B. Given the terrain and the effects of winter driving conditions, the
14 approximately 58 mile distance from the Klamath River Safety Rest Area in
15 California to the Valley of the Rogue Safety Rest Area is too great a distance
16 between rest areas, particularly during the winter months when travel through
17 Siskiyou Pass is often slow, hazardous and exhausting.

18 “FHWA recommends that no more than one hour of drive time should elapse
19 between safety rest area facilities, depending on service needs and
20 deficiencies. It also recommends that safety rest areas be spaced no greater
21 than 60 miles apart. * * *

22 “* * * * *

23 “While closure of the Siskiyou Safety Rest Area mitigated the immediate
24 safety hazards it produced, ODOT felt a need to replace the rest area, and
25 indeed, the [FHWA] required that it be replaced ‘in kind’ at a safe location.”
26 Record 1302-03.

27 Petitioners first argue that there is not substantial evidence in the record to support ODOT’s
28 statement that travel in the area of Siskiyou Pass is unsafe, and assert that evidence in the
29 record “appears to suggest an unusually low number of accidents.” Baker Petition for Review
30 16. Petitioners also argue that ODOT’s application, and the county’s findings, misconstrued
31 what the AASHTO guidelines actually provide. According to petitioners, the AASHTO
32 guidelines do not contain the recommendations that ODOT described in its application. As
33 an example, Foland points to language in the AASHTO guidelines that rest area spacing

1 should consider the presence of “alternative stopping opportunities and services,” such as
2 those provided by the City of Ashland. Record 1749. Finally, petitioners argue that ODOT’s
3 statement that the FHWA “requires” the closed rest area to be replaced is inaccurate.

4 ODOT responds that the replacement of the closed rest area is included in the Rogue
5 Valley Regional Transportation Plan as a needed transportation project, consistent with OAR
6 660-012-0030(1)(a). Record 42, 67, 4064; *see* n 8. ODOT also points to evidence in the
7 record that the county considered regarding road geometry, regular adverse winter weather
8 conditions, and other factors, including AASHTO guidelines for safety rest areas, in
9 concluding that a safety rest area is needed. Finally, ODOT explains that in 1997, 2001, and
10 2008, the FHWA stated and reiterated its position that its 1996 approval of the closure of the
11 former rest area was given with the understanding that the rest area would be reconstructed
12 as soon as possible. Record 3811-12, 3868-69.

13 We agree with ODOT that the evidence in the record supports the county’s
14 conclusion that safety concerns warrant a rest area and that the AASHTO guidelines support
15 the location of the rest area at Milepost 12.5. We do not think that the fact that 14 years have
16 elapsed since the FHWA originally approved the closure has any bearing on whether the rest
17 area is required to be reconstructed under the original closure approval, and we agree with
18 ODOT that the FHWA is requiring its replacement.

19 Finally, Baker and Foland challenge the need that ODOT described as “to provide for
20 the travel needs of visitors to Oregon.” Similar to their challenges to the welcome center,
21 Baker and Foland assert that the identified need is not a transportation need, but rather a
22 desire to increase tourist spending in the area. In support of their arguments, Baker and
23 Foland point to statements in the record from ODOT and others that refer to the need to
24 provide information about tourist opportunities in the Ashland area and the state.

25 ODOT responds by noting that the identified need states that there is a need to
26 provide for the “travel needs” of visitors. ODOT explains that providing a rest area with

1 restrooms, picnic tables, pet areas, and informational kiosks provides for the travel needs of
2 visitors. ODOT also points to the AASHTO Design Guidelines discussed above, and federal
3 regulations that allow rest areas to provide both motorist information such as maps and
4 directions, and information that can promote tourism, albeit with a restriction that there can
5 be no commercial activity associated with the distribution of information. 23 CFR 752.8(a);
6 23 USC 111. We agree with ODOT that the identified need to provide for the needs of
7 travelers to the state at the rest area and welcome center is a legitimate transportation need
8 identified by the county and that the need is supported by substantial evidence in the record.

9 Finally, Foland also alleges that the county failed to make determinations under OAR
10 660-012-0070(3) regarding the mode and general location of the proposed rest area. ODOT
11 responds that the county properly identified the mode (highway use) and general location (I-
12 5 southern corridor) for the proposed facility. Record 1305. We agree with ODOT and reject
13 Foland's arguments without further discussion.

14 **C. OAR 660-012-0070(4), (5), and (6): Thresholds**

15 Under OAR 660-012-0070(4), in order to approve the exception, the county must
16 conclude that alternative *measures* that do not require an exception, such as improvements to
17 existing facilities, cannot reasonably accommodate the identified transportation need. *See n*
18 8. Under OAR 660-012-0070(5), the county must conclude that alternative "locations" or
19 sites that do not require an exception cannot reasonably accommodate the identified
20 transportation need.⁹ In considering alternative measures and sites, the rule allows the
21 county to rely on thresholds that are generally applicant-identified required characteristics
22 that a proposed location must possess in order to address the identified transportation need,

⁹ OAR 660-012-0070(5) provides:

"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 Goals 3 or 4."

1 and requires the county to justify any such thresholds.¹⁰ If an alternative measure or location
2 not requiring an exception does not satisfy a threshold, then the county is not required to
3 consider it in determining whether to approve an exception. OAR 660-012-0070(6)(b); *1000*
4 *Friends of Oregon v. Yamhill County*, 49 Or LUBA 640, 652, *rev'd on other grounds*, 203 Or
5 App 323, 126 P3d 684 (2005).

6 ODOT identified ten thresholds.¹¹ The parties initially disagree about the standards
7 against which LUBA reviews the chosen thresholds. According to Baker, the requirement of

¹⁰ 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.

“(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.”

¹¹ The thresholds that ODOT identified are found at Record 1307-1309 and are set out below:

“1. Site Size and Depth.

“2. Proximity to ‘Snow Zone.’

“3. Beyond Steep Grades.

“4. Merging and Diverging Traffic Movements.

“5. Proximity to and Visibility from Interstate 5 Northbound Lanes.

“6. Location Before the South Ashland Interchange (Exit 14).

“7. Cost.

1 OAR 660-012-0070(6) that the county justify the thresholds used requires the county to
2 relate each threshold to an identified transportation need. ODOT disagrees, and argues that
3 in order to justify the thresholds as required by the rule, the county must merely determine
4 that the thresholds are “reasonable.” As ODOT explains it:

5 “Under [*1000 Friends v. Yamhill County*], the validity of thresholds must be
6 determined based on their reasonableness for testing alternative locations, and
7 not on whether the threshold justifies the underlying need for the safety rest
8 area.” Response Brief of ODOT 32-33.

9 We agree with Baker that the requirement to justify the thresholds that will be used to
10 eliminate alternatives means that the county must explain how each threshold relates to an
11 identified transportation need. OAR 660-012-0070(6) provides in relevant part that in
12 determining the “reasonableness” of alternative measures or sites under subsection (4) and
13 (5) of the rule, “[t]he thresholds chosen to judge whether an alternative method or location
14 cannot reasonably accommodate the *proposed transportation need* or facility must be
15 justified in the exception.” OAR 660-012-0070(4) provides in relevant part that “[f]urther,
16 the exception shall demonstrate that *there is transportation need identified* consistent with
17 the requirements of OAR 660-012-0030 which cannot reasonably be accommodated through
18 one or a combination of the following measures not requiring an exception * * *.” Those
19 provisions specifically require that the county evaluate the thresholds chosen in relation to
20 the identified transportation need.

21 **1. Threshold 6 – Location Before Exit 14**

22 Baker and Foland argue that ODOT’s threshold that the proposed rest area and
23 welcome center must be located prior to the South Ashland Interchange at Exit 14 does not

“8. Impact to Ashland Urban Growth Boundary and Planning Process.

“9. Operational Feasibility and Safety.

“10. Economic Displacements.”

1 relate to an identified transportation need, and that therefore the threshold is not justified as
2 required by OAR 660-012-0070(6).¹² According to petitioners, threshold 6 relates to the
3 county's desire to increase tourism revenues within the city and the region, and not to any of
4 the three identified needs for a safety rest area, discussed above.

5 ODOT responds that threshold 6 is related to the identified safety need to replace the
6 closed rest area with a new rest area in the same general location, in order to provide a safe
7 location for drivers who have just driven over Siskiyou Pass to stop and rest before
8 continuing their travels. ODOT explains that AASHTO guidelines recommend that rest
9 areas should provide maps and directions before travelers enter an urban zone where traffic is
10 more difficult to navigate. ODOT also points to evidence in the record that a task force

¹² Threshold 6 is described in ODOT's application as:

"The multi-billion dollar travel industry in Oregon is a vital part of the state and local economies. The industry is represented primarily by retail and service firms, including lodging establishments, restaurants, retail stores, gasoline service stations and other types of businesses that sell their products and services to travelers. It also is represented by unique tourist attractants like Oregon Shakespeare Festival in Ashland.

"The money that visitors spend on various goods, services, and recreational and cultural activities while in Oregon produces business receipts at these firms, which in turn employ Oregon residents and pay their wages and salaries. State and local government units also benefit from the tax receipt that travel generates. The state government collects taxes on lodging, motor fuel and the income of travel industry employees. Local governments also collect taxes on lodging, auto rentals and in some instances (including Ashland), on restaurant dining. Total direct travel spending in Oregon was \$7.9 billion in 2006, a 6.7 percent increase over the preceding year.

"With its Oregon Shakespeare Festival, Ashland is a nationally recognized tourist destination that contributes significantly to the economies of Ashland, Jackson County and the State of Oregon. Because Ashland is the southern I-5 gateway to the State of Oregon, it is critical that the Rest Area/Welcome Center be located before motorists pass by the Interstate 5 South Ashland Interchange (Exit 14). According to Travel Oregon, its border welcome center program will play an important role in welcoming visitors to Oregon. Research conducted prior to the decommissioning of the former Siskiyou Rest Area showed that for every dollar spent in operating the welcome center program, 41 new dollars were generated in visitor spending as visitors chose to extend their stays with their new found information. In short, welcome centers make a positive difference in the travel and spending patterns of visitors. Locating the Rest Area north of the South Ashland Interchange defeats the purpose of having a gateway Welcome Center welcoming people to Ashland and Oregon. Additionally, a location prior to Exit 14 makes good common sense to minimize vehicle miles traveled and avoid unnecessary fuel consumption for Welcome Center visitors who choose to visit Ashland." Record 1308.

1 recommended that the rest area be located north of the “snow zone” and south of state
2 highway 66, which connects to I-5 at Exit 14.

3 While we agree with ODOT that all of the reasons cited in its brief for locating the
4 rest area prior to Exit 14 relate to the identified safety need for a rest area north of Siskiyou
5 Pass, and reasonably close to the summit, the problem with those cited reasons is that they
6 are not mentioned in ODOT’s description of threshold 6 from the application, which the
7 board of commissioners apparently relied on in justifying the threshold. ODOT’s description
8 of threshold 6 is focused almost exclusively on locating the rest area prior to Exit 14 so that
9 those drivers will be made aware of all of the opportunities presented within the city and
10 region for recreation, lodging, and entertainment. We do not see how that threshold is
11 justified given the identified need to provide a safe place for drivers to stop and rest after
12 crossing Siskiyou Pass. As a result, we do not think the county has adequately justified
13 threshold 6 to explain why “* * * alternative method[s] or location[s] cannot reasonably
14 accommodate the *proposed transportation need*.” OAR 660-012-0070(6).

15 However, as we explain later in this opinion, because the county considered
16 alternative locations north of Exit 14 and rejected those locations for failing to meet other
17 thresholds, the county’s failure to justify threshold 6 in relation to the identified
18 transportation need does not warrant reversal or remand.

19 **2. Threshold 2 – Proximity to Snow Zone**

20 Baker and Foland challenge ODOT’s threshold that the rest area should be located
21 “outside of and beyond the ‘snow zone,’ which is that area where travelers frequently
22 encounter the probability of icy winter road conditions.” Record 1307. In explaining
23 threshold 2, ODOT stated:

24 “For northbound traffic traveling over Siskiyou Pass, the snow zone extends
25 from the Oregon/California border to approximately Milepost 11. There,
26 Interstate 5 begins to level out and become less circuitous and the worst of the
27 mountain crossing is over. Locating the Rest Area outside the snow zone also
28 better permits routine daily maintenance of the Rest Area/Welcome Center to

1 be performed, because it generally will avoid the need to install traction
2 devices during inclement weather.” Record 1307.

3 According to Baker and Foland, ODOT’s description of the location of the relevant “snow
4 zone” is inconsistent with a different description of the snow zone set forth in an e- mail
5 message from an ODOT district manager that described the snow zone as extending from the
6 California border to mile post 20. Record 2107. If that description of the snow zone is used,
7 then the proposed location falls within the “snow zone” and fails to meet threshold 2.

8 ODOT responds that the description of a snow zone as extending from the California
9 border to mile post 20 is a description used for highway maintenance purposes and for
10 enforcement of chain and traction tire laws. After opponents raised the issue, ODOT
11 explained that where threshold 2 refers to the “snow zone,” it is referring to the area between
12 the border and milepost 11 that receives the most snowfall and where sanding, de-icing and
13 other operations are necessary to maintain highway safety. Record 3931. If the snow zone is
14 located between the border and milepost 11, then the approved location is located outside of
15 the snow zone.

16 We disagree with Baker and Foland that ODOT’s threshold 2 changed during the
17 course of the proceedings below. The application explains threshold 2 as requiring a site
18 located outside of the snow zone that is further described as “that area where travelers
19 frequently encounter the probability of icy winter road conditions.” We also disagree with
20 Baker and Foland that the evidence in the record indicates that the snow zone extends north
21 from the border to milepost 20. Subsequent evidence and testimony introduced later in the
22 proceedings expounded on the description in ODOT’s application by explaining that the area
23 where travelers frequently encounter winter conditions is located from milepost 0 to milepost
24 11. That the threshold uses the term “snow zone,” while confusing, does not mean that the
25 term is absolutely defined for all purposes as the area where chain laws and traction tires may
26 be required. ODOT explained, and the county ultimately concluded, that the threshold to
27 locate the rest area outside of the area where winter weather frequently occurs, which the

1 evidence indicates is south of milepost 11, met the transportation need to provide travelers
2 with a safe place to stop and rest after crossing the summit of Siskiyou Pass.

3 **3. Threshold 3 – Beyond Steep Grades**

4 Baker challenges ODOT’s threshold that the proposed rest area must be sited in an
5 area of I-5 where there is a 3% or less slope.¹³ The grade at the proposed location is
6 approximately 2.4%. The grade at the closed rest area was approximately 6%. Baker argues
7 that the county erred in failing to respond in its findings to challenges to this threshold by
8 opponents.

9 ODOT responds that the county found:

10 “The Board of Commissioners finds that opponents raised many issues and
11 concerns including whether the proposed site was safe from the standpoint of
12 traffic safety * * * However, considering the record as a whole, including
13 credible and substantial testimony offered on ODOT’s behalf by ODOT
14 engineers * * * the Board of Commissioners finds that the opponents concerns
15 are unwarranted or overstated * * *.” Record 3.

16 We agree with ODOT that the county’s findings are adequate to explain that it chose to rely
17 on ODOT’s engineers and experts regarding appropriate grade for the rest area rather than on
18 the opponents’ evidence and testimony regarding threshold 3.

19 **4. Threshold 9 – Operational Feasibility and Safety**

20 Baker argues that the county’s findings do not adequately explain how the proposed
21 site satisfies threshold 9. Threshold 9 requires that the proposed location be “safe and

¹³ The explanation of this threshold provides:

“For safety reasons the Rest Area and Welcome Center need to be located along a stretch of Interstate 5 that is relatively flat. Steep downgrades, such as the nearly six (6) percent downgrade on I-5 at the former Siskiyou Rest Area, create the threat of runaway trucks which may then enter the Rest Area at full speed with no brakes posing a serious safety risk. In fact, several times trucks at full speed with no brakes entered the former Siskiyou Rest Area. One such truck breached the North embankment and flew over the edge and down the side of the mountain. Additionally on steep slopes, vehicles leaving the Rest Areal and merging with Interstate 5 traffic are at risk from run-away trucks that have lost their brakes. During the 30 years the former Rest Area was in use, there were fatalities, several accidents and many close calls. To avoid such safety risks, a maximum threshold of a three (3) percent slope along the Interstate 5 mainline next to the Rest Area is established.” Record 1307.

1 operationally feasible,” and must not violate applicable road design and engineering
2 standards. Record 1309. Baker argues that opponents presented expert testimony and
3 evidence refuting ODOT’s analysis that the proposed site is safe, and the county failed to
4 address that evidence and testimony in its findings.

5 ODOT responds by pointing to the county’s finding, quoted above, that concluded
6 that substantial evidence in the record supports a finding that the proposed location is
7 operationally safe and feasible. ODOT also points out that opponents’ evidence and
8 testimony, while prepared and introduced into the record by an aeronautical engineer, is not
9 “expert” testimony because an aeronautical engineer is not an expert in roadway or traffic
10 engineering. We agree with ODOT that being an aeronautical engineer does not qualify a
11 person as an expert in road or traffic engineering. In light of that, we also agree that the
12 county’s findings are adequate to explain that it chose to rely on ODOT’s evidence and not to
13 rely on opponents’ evidence.

14 **5. Threshold 1- Site Size and Depth**

15 ODOT explained threshold 1 as follows:

16 “To be operationally feasible, a Rest Area/Welcome Center requires at least
17 15 acres in size and at least 500 feet in depth. A minimum of 15 [of] acres are
18 required to accommodate access from and back onto the freeway, vehicle
19 parking, and buildings (including restrooms), as well as landscaped areas
20 where people can walk pets, have a meal or relax, and which provide
21 buffering from the freeway and adjoining uses. A minimum 500 foot depth is
22 required to provide adequate access to and from the mainline, provide
23 buffering from the mainline, and provide parking and space for buildings.”
24 Record 1307.

25 Baker argues that threshold 1 is not justified because the amount of land needed (15 acres) is
26 attributable to the welcome center, and the record does not indicate the amount of land
27 needed without the welcome center. ODOT responds that the size requirement was based on
28 estimates of the amount of land needed for access from and back to I-5, parking for 60
29 vehicles and 13 RVs, rest rooms, landscaped areas, pet areas and the welcome center. ODOT
30 also responds that Baker’s statement that the size of the site is solely attributable to the

1 welcome center is not supported by any evidence in the record and is also incorrect. We
2 agree with ODOT that Baker has failed to explain why the amount of land needed is
3 attributable to the welcome center, and that threshold 1 is justified in relation to the need to
4 provide a safe location for the rest area.

5 **6. Threshold 5 – Proximity to and Visibility from I-5**

6 Finally, Baker challenges ODOT’s threshold that the rest area must be located not
7 more than one-quarter mile from I-5 and the location must be visible from the northbound
8 lanes of I-5. Baker argues that the county’s findings fail to address opponents’ arguments
9 that the record does not support ODOT’s position that a location that is not visible from the
10 freeway lanes will not be as heavily used as a location that is visible. ODOT responds that
11 evidence in the record demonstrates that rest areas are most effective where they are
12 conveniently located with easy access to and from the freeway, and visible from the freeway
13 prior to the exit to enter the rest area, and that the county addressed opponents arguments and
14 explained that it chose to rely on ODOT’s evidence. We agree with ODOT that threshold 5
15 is justified in relation to the identified need to provide a location for the rest area that is most
16 likely to be used by the traveling public.

17 In summary, with one exception related to its justification of threshold 6, we disagree
18 with Baker and Foland that the county failed to justify the thresholds as required under OAR
19 660-012-0070(6). However, as explained below, even though the county failed to justify
20 threshold 6 in relation to the identified transportation need, the county determined that
21 alternative measures and sites could not reasonably accommodate the proposed facility
22 because they did not meet other identified thresholds. Accordingly, the county’s failure to
23 justify threshold 6 does not provide a basis for reversal or remand of the decision.

24 **D. Alternative Measures – Improvements to Existing Facilities**

25 Baker and Foland argue that the county’s findings that the transportation need cannot
26 reasonably be accommodated through improvements to existing transportation facilities are

1 inadequate and are not supported by substantial evidence in the record. Baker and Foland
2 argue that the county failed to explain why improvements could not be made to the Valley of
3 the Rogue Rest Area located at Exit 45, the Suncrest Rest Area located on the west side of I-
4 5 at milepost 22 (serving southbound traffic), or the Port of Entry weigh station site located
5 on the east side of I-5 at milepost 18 (serving commercial vehicles).

6 The board of commissioners found:

7 “[O]pponents identified several potentially available alternative sites for the
8 Rest Area located outside of Ashland’s UGB, e.g., [Record 2819-2860
9 (Skreptos Letter)]. However, these alternative sites are problematic because
10 1) They do not allow for easy off/on access to I-5; and/or 2) They require
11 northbound visitors to ‘backtrack’ in order to visit Ashland, one of the area’s
12 significant tourist destinations; and/or 3) They require large scale capacity
13 expansions or other modifications to existing infrastructure in order to
14 accommodate projected traffic. Additionally, ODOT’s analysis and evidence
15 (e.g. [Record 3383-3431 and Record 3920-3942] shows that these proposed
16 sites are not feasible from an operational or safety standpoint and cannot
17 reasonably accommodate the identified need. For these reasons, they do not
18 require more detailed study.” Record 3.

19 By these findings, we understand the board of commissioners to have concluded based on
20 evidence and arguments presented by ODOT found at Record 72-73 that, under OAR 660-
21 012-0070(4), improvements to existing transportation facilities do not meet the identified
22 thresholds and therefore, cannot reasonably accommodate the identified need. Record 72
23 and 73 contains an analysis by ODOT’s consultant explaining why improvements to the Port
24 of Entry site and the Suncrest Rest Area do not meet identified thresholds. Regarding the
25 Valley of the Rogue Rest Area, ODOT considered and rejected improvements to that facility
26 because it does not meet the threshold of being located close to but outside of the snow zone.
27 ODOT also points out that because the existing facilities are located on rural lands outside of
28 the Ashland UGB, it is not clear that goal exceptions would not be required for
29 improvements to the existing facilities, making OAR 660-012-0070(4) inapplicable to those
30 sites. We agree with ODOT that the county’s findings, including incorporated portions of
31 the planning commission findings and ODOT’s application, are adequate to explain why

1 improvements to existing transportation facilities do not meet the identified thresholds and
2 cannot reasonably accommodate the identified need.

3 **E. Alternative Sites Not Requiring an Exception**

4 Baker argues that under OAR 660-012-0070(5), the county’s findings regarding
5 whether non-exception sites can reasonably accommodate the proposed use are inadequate
6 and are not supported by substantial evidence in the record. First, Baker argues, because the
7 county has failed to justify threshold 6 (that the rest area be located south of Exit 14), it erred
8 in relying on threshold 6 to eliminate alternative non-exception locations: 1) north of
9 Ashland, 2) between Exit 14 and Exit 19 in the city of Ashland, and 3) on the east side of I-5
10 at Exit 19. Also according to Baker, OAR 660-012-0070(6)(b) requires the county to explain
11 why those non-exception sites do not meet other thresholds, and the county failed to provide
12 that explanation.

13 The board of commissioners found:

14 “The Board of Commissioners finds that ODOT’s application includes
15 thresholds that relate to whether alternative sites not requiring goal exceptions
16 can reasonably accommodate the use. For purposes of this application, all of
17 those sites are in the City of Ashland. The evidence provided by ODOT and
18 the City of Ashland clearly indicates that there are no sites within the City’s
19 urban growth boundary that could reasonably accommodate the need here
20 identified.” Record 3.

21 **1. “North of Ashland”**

22 ODOT responds that OAR 660-012-0070(6)(c) places the burden on parties to the
23 proceedings to “specifically describe with supporting facts why [any alternative] locations
24 can more reasonably accommodate the identified transportation need, taking into
25 consideration the identified thresholds.” The rule provides that detailed evaluation of
26 alternative sites identified during the proceedings below is not required unless that burden is
27 satisfied. According to ODOT, no party below identified sites that are located “north of
28 Ashland” with sufficient specificity to require the county to perform a detailed evaluation of
29 those alternatives under OAR 660-012-0070(6)(c). We agree with ODOT. Baker does not

1 provide any citations to any places in the record where sites “north of Ashland” other than
2 the sites located within Ashland’s UGB and at Exit 19 discussed below were identified with
3 specific detail by parties as required by OAR 660-012-0070(6)(c). *See* n 10.

4 **2. “Between Exits 14 and 19”**

5 ODOT considered a 27-acre parcel located north and east of Exit 14 within the city of
6 Ashland’s UGB, a location not requiring an exception. ODOT concluded that if the rest area
7 were developed at that location, the northbound exit ramps to the rest area would be located
8 in close proximity to the current Exit 14 on-ramps, creating safety issues, and that an
9 alternative design to re-route traffic would also cause safety issues. ODOT further
10 determined that the parcel is designated for future residential use and that removing the
11 parcel from the city’s inventory of housing units would require the city to expand its UGB
12 onto surrounding resource land. For those reasons, ODOT concluded that the alternative
13 location within Ashland’s UGB could not “reasonably accommodate” the identified
14 transportation need. We agree with ODOT that based on safety concerns, the 27-acre parcel
15 could not reasonably accommodate the identified transportation need and did not meet
16 requirements of threshold 9, relating to operational feasibility and safety.

17 In addition, Baker also alleges that the county failed to consider

18 “* * * at least two other locations in the same general vicinity that could
19 accommodate the proposed uses. Just west of I-5, across the freeway from the
20 27-acre parcel, are two vacant adjacent parcels that are each between 5 and 10
21 acres. There is another location just south of the 27-acre parcel, on the west
22 side of I-5 that contains numerous vacant adjacent parcels. Neither the map
23 [attached to a letter from the city of Ashland planning director Molnar],
24 Molnar’s letter, nor ODOT’s findings indicate the zoning of those properties
25 or discusses why those locations are not considered.” Baker Petition for
26 Review 33.

27 In response to that argument, ODOT responds that the sites described in the quote above
28 were not identified with specificity during the proceedings below, and therefore the county
29 was not required to provide a detailed evaluation of those sites. Baker does not provide a
30 citation to any place in the record where the specific sites described in the petition for review

1 were described “with supporting facts why such * * * locations can more reasonably
2 accommodate the identified transportation need, taking into consideration the identified
3 thresholds.” We agree with ODOT that the county was not required to consider any of those
4 sites.

5 **3. “Exit 19”**

6 Opponents identified an alternative site on the east side of I-5 at Exit 19, and Baker
7 argues that the county failed to address that alternative site, as required by OAR 660-012-
8 0070(6)(c). ODOT responds that after parties raised the alternative site, ODOT examined
9 the site and concluded that the intersection of the Exit 19 ramps and South Valley View Road
10 already possessed high volume traffic conditions that would be exacerbated by adding traffic
11 from the rest area, creating unsafe queuing at off ramps. Record 222-223. Thus, according
12 to ODOT, the site failed to meet threshold 9, requiring alternative sites to demonstrate
13 operational feasibility and safety. We think the county and ODOT adequately addressed the
14 alternative site at Exit 19.

15 **F. Alternative Sites Requiring an Exception: OAR 660-012-0070(7) and (8)**

16 **1. Application of Thresholds**

17 Goal 2, Part II(c)(3) allows the county to adopt a reasons exception when “[t]he long-
18 term environmental, economic, social and energy [ESEE] consequences resulting from the
19 use of the proposed site with measures designed to reduce adverse impacts are not
20 significantly more adverse than would typically result from the same proposal being located
21 in areas requiring a goal exception other than the proposed site.” OAR 660-012-0070(7)
22 implements Goal 2, Part II(c)(3) and requires the county to evaluate whether there are
23 alternative sites also requiring an exception that would have fewer adverse impacts than the
24 proposed site.¹⁴

¹⁴ OAR 660-012-0070(7) provides:

1 Baker first argues that the county erred in limiting its review of other potential sites
2 requiring a goal exception, including any site located west of I-5, to only sites that met all of
3 the identified thresholds. ODOT responds that Baker is precluded under ORS 197.763(1)
4 and ORS 197.835(3) from raising the issue of whether the county can limit its consideration
5 of other sites requiring an exception to sites that meet all of the thresholds, because no party
6 raised that issue during the proceedings below.¹⁵ In the reply brief, Baker responds by citing

“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 site, 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; and
- “(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.”

¹⁵ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the

1 to record pages that generally discuss alternative sites. However, those record pages do not
2 appear to present the issue that is presented by Baker in the petition for review: whether the
3 thresholds can be used to eliminate any requirement to consider alternatives requiring an
4 exception under OAR 660-012-0070(7).

5 Baker next responds that general challenges to ODOT’s alternative sites analysis and
6 to the county’s ESEE analysis of exception alternatives were raised below, and that it is not
7 necessary that the specific argument regarding whether thresholds can eliminate
8 consideration of potential exception sites must have been raised below. We disagree with
9 Baker that the issue presented in the petition for review was raised below with sufficient
10 specificity to allow the governing body an opportunity to respond to it. Bringing general
11 challenges to an applicant’s alternative sites analysis under OAR 660-012-0070(7) is not
12 sufficient to raise an issue regarding whether the thresholds described in OAR 660-012-
13 0070(6) can be applied to eliminate alternative sites requiring a goal exception. *Graser-*
14 *Lindsey v. City of Oregon City*, 56 Or LUBA 504, *aff’d* 221 Or App 702, 191 P3d 813
15 (2008). Accordingly, we do not consider Baker’s argument that the thresholds that are
16 authorized by OAR 660-012-0070(6) to eliminate non-exception alternatives from
17 consideration may not be similarly used under OAR 660-012-0070(7) to eliminate
18 alternatives that do require an exception.

19 **2. Alternative Sites Identified by Parties**

20 Baker also argues that the county failed under OAR 660-012-0070(7)(c) to conduct a
21 “[d]etailed evaluation of specific alternative locations identified by parties” during the

proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 proceedings below. See n 14. Baker argues that parties to the proceedings identified
2 alternative sites that also require an exception, including two resource sites on the east side
3 of I-5, and the county failed to address those sites in “detail” as required by the rule. Those
4 sites are described in Baker’s petition for review as “a site near Exit 19 and the Port of Entry
5 site * * *.” Baker Petition for Review 38. However, in a previous section of Baker’s
6 petition for review, discussed above under our discussion of OAR 660-012-0070(4) and (6),
7 Baker took the position that the “site near Exit 19” and the “Port of Entry site” were
8 alternative sites *not* requiring a goal exception under OAR 660-012-0070(4). Baker Petition
9 for Review 31, 33. Similarly, the party who identified those sites alleged that the site located
10 at Exit 19 was “on land zoned for rural residential use * * * not requiring an exception” and
11 that the Port of Entry site was an existing transportation facility not requiring an exception.
12 Record 2832, 2848-49. ODOT responded to that initial identification and conducted an
13 analysis for each site under OAR 660-012-0070(6), which applies to alternative sites that do
14 not require an exception, and concluded that they could not reasonably accommodate the
15 proposed transportation facilities based on their lack of conformance to the identified
16 thresholds. Baker may not now argue that the county was required to evaluate those same
17 sites under OAR 660-012-0070(7), which only applies to sites requiring an exception.

18 3. ESEE Analysis

19 OAR 660-012-0070(7)(b) provides in relevant part that:

20 “* * * The exception shall include the reasons why the consequences of the
21 needed transportation facility or improvement at the proposed exception
22 location are not significantly more adverse than would typically result from
23 the same proposal being located in areas requiring a goal exception other than
24 the proposed location. Where the proposed goal exception location is on
25 resource lands subject to Goals 3 or 4, *the exception shall include the facts*
26 *used to determine which resource land is least productive; the ability to*
27 *sustain resource uses near the proposed use; and the long-term economic*
28 *impact on the general area caused by irreversible removal of the land from*
29 *the resource base[.]” (Emphasis added.)*

1 In the ESEE analysis, ODOT considered properties within the larger area it identified as
2 “Alternative Area B” that are resource land, including a property south of the proposed site
3 and north of Clayton Creek. Record 1313, 1391. The ESEE analysis concluded in relevant
4 part:

5 “While soil types vary somewhat among the resource lands east of Interstate
6 5, according to the National Resource Conservation service (NRCS) any
7 alternative location will largely occupy the same soil type: Medford Silty Clay
8 Loam (127A), as shown on Exhibit 2.5. This is because the proposed used
9 cannot be moved north more than about 200 feet without violating ODOT
10 vertical alignment standards, and all other Alternative Area B lands to the
11 south are occupied by the same soil type which occurs as well at the proposed
12 location.

13 “Based upon Exhibit 2.8, the subject property and potential sites located
14 within Alternative Area B also are similarly irrigated and have similar
15 topography and pasture grasses. Other than soils and irrigation there are no
16 other features which distinguish the resource productivity of the proposed
17 location in relation to other Alternative Area B sites. An irrigation ditch runs
18 along the eastern boundary of the subject property. While construction of the
19 Rest Area should not impact that ditch, ODOT would agree to a condition of
20 approval to ensure that water flow continues through its property to other
21 properties and that irrigation water rights are not interrupted during the
22 irrigation season.

23 “As to the ability to sustain resources used near the Rest Area, fencing and
24 landscaping along the agriculture interface will mitigate all potential adverse
25 impacts to the cattle grazing operation adjoining the proposed location, such
26 as trespass or mischief. Fencing and landscaping similarly could mitigate
27 adverse impacts at other Alternative Area B sites.” Record 1314.

28 **a. “Facts Used to Determine Which Resource Land is Least**
29 **Productive”**

30 Foland challenges the ESEE analysis, arguing first that it was error to limit the
31 analysis to only sites on the east side of I-5 and to the south of the proposed site. ODOT
32 responds that under OAR 660-012-0070(7)(c), it was not required to provide site-specific
33 analyses of every site located within Alternative Area B, absent any identification by Foland
34 or other parties of specific locations that may have fewer ESEE impacts than the proposed
35 site. ODOT also explains that, in accordance with OAR 660-012-0070(7)(c), it generally

1 evaluated the ESEE consequences of locating the rest area on resource lands on the west side
2 of I-5 and concluded, consistent with OAR 660-012-0070(3), that those sites would not
3 satisfy the identified need to provide a safe rest area. We agree with ODOT.

4 Foland also argues that the finding that alternative locations on resource land will
5 occupy the same soil types is incorrect and is not supported by substantial evidence in the
6 record. According to Foland, the soil types on many properties located in Alternative Area B
7 are different from the soil type on the proposed site (Medford Silty Clay Loam (127A)),
8 which carries a class I rating with irrigation. ODOT responds that the soil types on the
9 alternative location it did evaluate (south of the proposed site and north of Clayton Creek) is
10 largely the same soil type as the proposed site. Record 1383. We agree with ODOT that the
11 record supports the county's determination that the soil types on the alternative locations are
12 similar.

13 Foland also disputes the finding that the proposed site and potential sites within
14 Alternative Area B are similarly irrigated. Based on a water rights map that shows water
15 rights for properties located within Alternative Area B, Foland argues that many of the
16 properties within that Alternative Area are not irrigated, while the proposed site is irrigated,
17 making it more productive resource land than other sites. ODOT responds that the proposed
18 site as well as the potential site it evaluated south of the proposed site both have water rights
19 and are irrigated, and thus the finding that they are similarly irrigated is correct. Record
20 1389. We agree with ODOT.

21 Foland next argues that the finding that alternative locations within Alternative Area
22 B have similar topography and vegetation is incorrect and not supported by substantial
23 evidence, because the topography and vegetation on the west side of I-5 is steep, planted in
24 woodland or crops, while the topography and vegetation on the proposed site is pasture grass.
25 ODOT responds that the proposed site as well as the potential site it evaluated south of the

1 proposed site have similar topography and are planted in grasses. Record 1387. We agree
2 with ODOT.

3 Finally, Foland argues that the ESEE analysis failed to give proper consideration to
4 the fact that the proposed site contains class I soils when irrigated and class IV soils without
5 irrigation. ODOT responds that the ESEE analysis compared the soils for the proposed site
6 with the soils on a potential site located near the proposed site and found the impacts to be
7 substantially similar. ODOT argues that there is no prohibition on a local government taking
8 an exception involving prime farmland as long as it concludes that, based on evaluation of all
9 of the impacts, the ESEE effects of the proposed site are not significantly more adverse than
10 they would be if the project was sited on another location. We agree with ODOT.

11 **b. “Ability to Sustain Resource Uses Near the Proposed Use”**
12 **(OAR 660-012-0070(7)(b))/Compatibility with Adjacent**
13 **Uses (OAR 660-012-0070(8)(b))**

14 OAR 660-012-0070(7)(b) requires the county to consider the ability to sustain
15 resource uses near the proposed rest area and welcome center. *See* n 14. OAR 660-012-
16 0070(8)(b) requires the county show the proposed rest area and welcome center will be
17 compatible with adjacent uses.¹⁶ Foland next argues that developing the rest area on the
18 proposed site will affect the ability of neighboring properties to sustain agricultural uses near
19 the proposed rest area, and that the county’s findings do not adequately evaluate or address
20 the impacts that siting the rest area at the proposed location will have on Foland’s water
21 rights and irrigation system. Foland also argues that because of those impacts, the county

¹⁶ OAR 660-012-0070(8)(b) provides in relevant part:

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

“ * * * * *

“(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[.]”

1 could not reasonably determine under OAR 660-012-0070(8)(b) that the rest area is
2 compatible with other adjacent uses.

3 Several properties adjacent to and near the proposed rest area possess rights to use
4 water from the Dunn Ditch for irrigation. Record 2553-2555. The Dunn Ditch is located on
5 the west side of I-5. The rights to use water from the Dunn Ditch were first established in
6 1852 and were further confirmed by a decree of the Jackson County Circuit Court in 1919
7 (the Rogue River Decree). The Rogue River Decree adjudicated the rights of various users
8 of water of the Rogue River and its tributaries, including Neil Creek, which provides water to
9 the Dunn Ditch. The decree confirms the right of water for irrigation of 465.20 acres
10 described in the decree, with each property that is a part of the 465.20 acres entitled to the
11 amount of water specified in the decree.¹⁷ As we understand it, those water rights are
12 associated with the properties identified at Record 1377 and on Exhibit AF as tax lots 101
13 (also referred to as the Provost property), tax lot 700 (also referred to interchangeably as both
14 the Johnson property and the Radio Station property), tax lot 725 (also referred to as the
15 Reynolds property) and tax lot 729 (also referred to as the Foland property). There is
16 apparently no single “point of diversion” associated with the places of use of the water rights
17 adjudicated in the decree; rather, a 1995 certificate issued by the Oregon Water Resources
18 Department confirming cancellation of the rights of one of the holders to some of the water
19 in the ditch lists the diversion point as “Houck-Dunn-Homes Ditch.” Record 2536. Water

¹⁷ The Rogue River Decree more specifically provides:

“* * * Nothing in this decree, or in the findings, herein, shall be construed to be a limitation upon the rights of the various owners of said Houck-Dunn-Homes ditch, from said Neil Creel, reducing the quantity of water to which they are jointly entitled through said ditch under and by virtue of said decrees mentioned in said findings, and so long as said owners of said ditch shall maintain at the head thereof a flume in accordance with the provisions of said decrees, and shall comply with said decrees, in every particular, the rights to divert through said ditch the quantity of water specified in said decrees, and in the manner therein provided, is hereby recognized and confirmed; and the quantity to which said claimants are entitled as a prior right shall be measured accordingly in the distribution of water among the several ditches.” Record 2555.

1 from the ditch is transported through lateral pipes that cross under the interstate into a
2 distribution ditch running adjacent to I-5, north to south, on the proposed rest area site. We
3 will summarize our understanding of how the water enters that distribution ditch and where
4 the water from the ditch goes from there based on evidence in the record.

5 Foland's description of how water is delivered from the Dunn Ditch to the holders of
6 the water right appears in a few places in the record. We quote relevant portions below

7 "The irrigation procedure is that landowners block the ditch at strategic
8 locations during their time on the rotation to cause the water to overflow the
9 ditch and flood irrigate all the land between it and Clayton Creek through a
10 series of interconnected ditches. * * * It is like a 150 year old soaker hose,
11 gingerly kept intact. * * *." Record 2535.

12 "The ditch as it appears on the east side of the freeway distributes
13 approximately two thirds of the water allocated for the water right from Neil
14 Creek, as shown in the irrigation schedule * * *

15 "The properties with irrigation rights, as a whole are flood irrigated and the
16 system that delivers the water from Neil Creek has evolved and developed
17 over the last 156 years. The entire system was hand dug and the vast majority
18 of the system to this day is maintained by hand. * * *

19 "The * * * ditch as it appears on the east side of the freeway might best be
20 thought of as a 156 year old soaker hose that feeds hundreds if not thousands
21 of laterals spreading water over the property entitled to the water. Laterals are
22 composed of smaller ditches ranging in size from one to two feet wide and
23 several hundreds of feet long down to scratches in the pasture one or two
24 inches wide and several inches long. All working together and dependent one
25 upon the other.

26 "* * * In other words the water starts at the southern end and flows downhill
27 to the north and east with the runoff if any entering Clayton Creek to the north
28 and east. Since in recent years ownership has changed on several properties
29 and tenants have come and gone, informal points of access were established.
30 Parcel 725 [the Reynolds property] has access along its entire western
31 boundary to the * * * ditch * * *. Parcel 700 [the Johnson property] has two
32 points on its southern property line where one larger lateral and the * * * ditch
33 * * * enters the property. The same is also true for parcel 101 [the Provost
34 property].

35 "While informal points of access have been established, these parcels still
36 water as one. The water from the * * * ditch * * * begins on parcel 725 [the
37 Reynolds property], spreads out and then flows to parcel 700 [the Johnson

1 property] and parts of parcel 729 [the Foland property] with parcel 700
2 receiving some water along its entire southern property line and parcel 729
3 [the Foland property] receiving some of its water along its western property
4 line. From there the water flows across [parcel] 700 entering the western
5 most section of parcel 729 [the Foland property] along its entire southern
6 boundary. After leaving parcel 729 [the Foland property] along the northern
7 boundary it proceeds to water parcels 100, 101, 2000, and so on. The water is
8 ushered and moved over the parcels during the times it is allotted during each
9 rotation throughout the State authorized irrigation season (April 1 – October
10 31). See irrigation schedule [at Record 2557]* * *.

11 “* * * [P]aving over or piping any part of the * * * ditch * * * will adversely
12 affect the whole with unforeseen consequences that could be devastating to
13 agriculture on the parcels with a water right. It is **NOT POSSIBLE** to pipe
14 ‘flood.’” Record 3309-3310 (capitals and bold in original).

15 In its ESEE analysis and in subsequent documents responding to the issue, ODOT concluded
16 that the point at which the Foland property diverts water from the Dunn Ditch is located
17 south of the proposed rest area property, on tax lot 725 (the Reynolds property), so that the
18 proposed rest area would not affect Foland’s or any other property owner’s water rights or
19 irrigation system. ODOT also proposed to reroute the distribution ditch that is located on the
20 proposed rest area to the east of the area of the property that is to be developed with the rest
21 area and welcome center.

22 In approving the exception, the county imposed conditions of approval, which
23 provide:

24 “2. Irrigation Interruption: ODOT shall maintain water flow in affected
25 sources of agricultural irrigation, if any, and shall ensure that irrigation
26 water or rights are not interrupted during the irrigation season.”
27 Record 50.

28 “21. Irrigation Features:

29 “(a) Irrigation Ditches.

30 “ODOT shall maintain all existing waterways across its
31 property during and after the construction of the rest area
32 facility.

33 “(b) Access to diversion points.

1 “ODOT agrees to meet with adjacent property owners to
2 develop a plan to re-route the ditch system serving the area, so
3 it will be unnecessary to cross ODOT right-of-way to manage
4 the irrigation to the affected properties.

5 “In the event a plan cannot be agreed upon by all the affected
6 parties and irrigation ditches or diversion points exist on
7 ODOT right-of-way, then ODOT agrees to issue a permit to the
8 affected parties to enter upon state owned property to exercise
9 that right. Before a permit is issued, ODOT will require that
10 each party establish by legal judgment entered by a court of
11 competent jurisdiction that it has a legal right to enter onto
12 state owned property to access the existing diversion point of
13 their right on state owned property.” Record 52.

14 Foland argues that rerouting the distribution ditch will “* * * destroy the system by
15 moving the water to a location past many of the neighbors’ diversion points to a location
16 from which the neighbors can no longer use flood irrigation to move it to their other existing
17 ditches.” Foland Petition for Review 33. Foland also argues that the conditions of approval
18 do not lessen the adverse impacts on neighboring agricultural properties because the
19 conditions place a burden on the holders of the affected water rights to first establish a legal
20 right of access to what they refer to as their “informal diversion points” in order to enter onto
21 the proposed rest area site, rather than requiring ODOT to grant such easements or protect
22 the irrigation rights. We understand Foland to thus argue that the county did not adequately
23 consider the serious impacts to the irrigation rights of neighboring properties in its ESEE
24 analysis, and that had it done so, it would have concluded that developing the rest area on the
25 subject property would hinder the “ability to sustain resource uses near the [proposed rest
26 area]” under OAR 660-012-0070(7)(b) and would have been required to consider other
27 resource lands that are not subject to historic irrigation rights delivered through an intricate
28 distribution system.

29 Condition 2 requires ODOT to ensure that irrigation rights are not interrupted during
30 the irrigation season. That condition presumably requires ODOT to allow irrigators access to
31 any re-routed ditch on ODOT property, and seems sufficient to eliminate any significant

1 differences between the subject property and the other resource property that ODOT and the
2 county considered in the ESEE analysis regarding the ability to sustain resource uses near the
3 subject property under OAR 660-012-0070(7)(b). While condition 21 also requires that
4 holders of the irrigation right establish with the property owner their right to access the
5 diversion points, we fail to see how that requirement could possibly run afoul of OAR 660-
6 012-0070(7)(b) or OAR 660-012-0070(8)(b). That condition simply provides that ODOT
7 can require that people seeking to enter its property for irrigation purposes have a legal right
8 to require that ODOT allow them to do so.¹⁸

9 Finally, Foland argues that the county erred in concluding that the fencing that is
10 required as a condition of approval means that the rest area is compatible with adjacent uses.
11 Foland argues that the condition is inadequate because secure six-foot high fencing is only
12 required on the northern property line of the proposed rest area, and on the south where
13 farming activities are occurring, only a four foot high fence is required. Foland also points
14 out that one of the properties south of the subject property contains a radio tower and argues
15 that a four foot high fence will not be adequate to keep trespassers away from that property,
16 where they could be electrocuted if they come into contact with the tower.

17 ODOT responds by explaining that the four-foot high fence will run along the 900
18 feet of the off-ramp to the rest area, and that it is constructed of woven fabric with three
19 strands of barbed wire. ODOT notes that because the off-ramps will be used by vehicles and
20 will not be open or easily accessible to pedestrians, it is unlikely that trespassers will be able
21 to climb over the barbed wire fence. We agree with ODOT that the county reasonably
22 concluded that with the required fencing, nearby agricultural uses will not be hindered.

23 The assignments of error are denied.

24 **THIRD ASSIGNMENT OF ERROR (FOLAND)/THIRD ASSIGNMENT OF ERROR**

¹⁸ As a practical matter, ODOT as the property owner could at any time require any party seeking access to ODOT's land to establish the legal right to do so prior to entry.

1 **(FOLLIARD)**

2 OAR 660-012-0065(3)(g) provides that certain transportation projects on EFU land
3 do not require exceptions to goals 3, 4, 11 and 14, including as relevant:

4 “[N]ew access roads and collectors * * * where the function of the road is to
5 reduce local access to or local traffic on a state highway. These roads shall be
6 limited to two travel lanes. Private access and intersections shall be limited to
7 rural needs or to provide adequate emergency access.”

8 As previously noted, the proposal includes construction of a new road running from a
9 parking lot at the north boundary of the rest area approximately 200 feet to connect to
10 Crowson Road, a county road located to the north. According to the application, the road
11 would not be accessible to the public but is intended to provide construction access during
12 construction of the rest area, alternative emergency access, and access for welcome center
13 employees and ODOT maintenance personnel, who would otherwise be required to travel on
14 I-5 south for approximately 8 miles to a freeway interchange located to the south and then
15 backtrack onto I-5 north to get to work from the north. The county determined that the
16 proposed access road did not require an exception under OAR 660-012-0065(3)(g) and (5).

17 In these assignments of error, Foland and Folliard *et al* (Folliard) challenge the
18 county’s approval of the access road. Foland argues that the access road is a part of the same
19 proposal to build a “transportation facility” on rural land, and that the road is a
20 “transportation facility” under OAR 660-012-0070(1) that is not exempt from obtaining a
21 goal exception. As such, they argue, an exception must be sought under the TPR exception
22 standards. In support of the argument, Foland also argues that the road does not meet the
23 requirements of OAR 660-012-0065(3)(g). First, Foland argues that because the number of
24 trips that would be generated by welcome center employees and ODOT maintenance
25 personnel using I-5 is so minimal, that the county erred in determining that the access road

1 will “reduce traffic on [I-5]” from those trips.¹⁹ However, we think the county reasonably
2 concluded that the new road would reduce local traffic on I-5. The rule does not specify a
3 numerical measure of reduction that is required in order to rely on the rule. A reduction of
4 six trips per day from I-5 is still a reduction.

5 Foland and Folliard next challenge the county’s conclusion that:

6 “Regarding OAR 660-012-0065(3)(g), following its construction, the
7 proposed service access road will be used exclusively by ODOT maintenance
8 personnel and other state employees or authorized contractors to maintain the
9 Rest Area/Welcome Center, as well as by drivers of emergency vehicles and
10 persons manning the Welcome Center. * * *

11 “* * * The level of traffic associated with the permitted use by authorized
12 personnel would be a level that is appropriate to serve rural area travel needs.”
13 Record 1330.

14 According to Foland and Folliard, the county cannot find that the road will serve “rural area
15 travel needs” consistent with approving an exception to Goal 14, which allows urban levels
16 of use of the subject property.

17 ODOT responds that Foland and Folliard misread the rule, which requires “private
18 access” to the road and “intersections” with the road to be limited to rural needs. As ODOT
19 explains the rule, the third sentence of OAR 660-012-0065(3)(g) limits the connection of
20 private “accesses” such as driveways to the new road unless those accesses serve rural needs
21 or provide emergency access. ODOT explains that it cannot issue a driveway permit where
22 there is no right of access, and because access to the road will be blocked by a locked gate,
23 there is no “private access” to the road. In addition, ODOT points out, the road will provide
24 emergency access to the rest area.

25 We agree with ODOT that the access road meets the requirements of OAR 660-012-
26 0065(3)(g) and an exception is not required. We agree with ODOT that the focus of the third

¹⁹ ODOT maintains that ODOT maintenance personnel will make 2 round trips per day and welcome center personnel will make 4 daily round trips to the rest area. ODOT’s Response Brief 77.

1 sentence of the rule is to regulate new connections to the road, and that the third sentence
2 does not require that the road itself be demonstrated to serve only rural needs.

3 Foland also challenges the county’s consideration of alternative locations on which to
4 site the access road under OAR 660-012-0065(5), which provides:

5 “For transportation uses or improvements listed in subsections (3)(d) to (g)
6 and (o) of this rule within an exclusive farm use (EFU) or forest zone, a
7 jurisdiction shall, in addition to demonstrating compliance with the
8 requirements of ORS 215.296:

9 “(a) Identify reasonable build design alternatives, such as alternative
10 alignments, that are safe and can be constructed at a reasonable cost,
11 not considering raw land costs, with available technology. The
12 jurisdiction need not consider alternatives that are inconsistent with
13 applicable standards or not approved by a registered professional
14 engineer;

15 “(b) Assess the effects of the identified alternatives on farm and forest
16 practices, considering impacts to farm and forest lands, structures and
17 facilities, considering the effects of traffic on the movement of farm
18 and forest vehicles and equipment and considering the effects of
19 access to parcels created on farm and forest lands; and

20 “(c) Select from the identified alternatives, the one, or combination of
21 identified alternatives that has the least impact on lands in the
22 immediate vicinity devoted to farm or forest use.”

23 According to Foland, the fact that ODOT owns the subject property and that it is included in
24 the I-5 right of way should not be a factor in evaluating alternative locations for the road.
25 Foland also takes issue with the county’s conclusion that the subject property is not being
26 farmed because the application takes the position that it is currently used for grazing. We
27 understand Foland to argue that because the county erred in relying on ODOT’s ownership of
28 the subject property and its inclusion within the right of way and erred in determining that
29 the property is not currently being farmed, it was not reasonable for the county to conclude
30 that developing the road in the proposed location has the least impact on surrounding farm
31 lands.

1 ODOT responds that the county properly determined that the portion of the right of
2 way on which the road is proposed to be sited is not being farmed. ODOT also responds that
3 ODOT conducted an alternatives analysis to consider other locations, including locating an
4 access road from Highway 66, located east of the subject property, to the site. ODOT
5 concluded that the cost of locating an access road in that alternative location was
6 substantially higher due to the need for bridges and culverts over Neil and Clayton Creeks.
7 Record 1331. We agree with ODOT that the county’s alternatives analysis reasonably
8 concluded that the location with the least impact on surrounding farm uses is the proposed
9 location.

10 In the third assignment of error, Folliard argues that the proposed access road violates
11 a FHWA Policy Statement that provides in relevant part:

12 “Ramps providing access to rest areas, information centers, and weigh stations
13 within the Interstate controlled access are not considered access points for the
14 purpose of applying this policy. These facilities shall be accessible to
15 vehicles only to and from the Interstate System. Access to or from these
16 facilities and local roads and adjoining land is prohibited. The only allowed
17 exception is for access to adjacent publicly owned conservation and recreation
18 areas, if access to these areas is only available through the rest area, as
19 allowed under 23 CFR 752.5(d).”

20 Folliard argues that the issue regarding whether the proposal complies with the federal policy
21 quoted above was raised below and the county failed to address it, requiring remand.

22 ODOT responds initially by arguing that LUBA’s “jurisdiction” does not extend to
23 determining whether a land use decision is consistent with federal law, other than resolving
24 constitutional issues. However, LUBA has jurisdiction over “land use decisions” as defined
25 in ORS 197.015(10)(a). In reviewing land use decisions, our scope of review extends to
26 issues regarding a decision’s compliance with federal law. LUBA has routinely reviewed
27 assignments of error that allege land use decisions violate federal laws. *See, e.g., Young v.*
28 *Jackson County*, 58 Or LUBA 64, 80-81 (2008), *aff’d* 227 Or App 290, 205 P3d 890 (2009)
29 (holding that administrative rule prohibiting siting of churches within three miles of an urban

1 growth boundary without an exception violates the Religious Land Use and Institutionalized
2 Persons Act of 2000, 42 USC 2000cc (RLUIPA)); *Curl v. City of Bend*, 56 Or LUBA 746,
3 760, *aff'd* 222 Or App 525, 195 P3d 492 (2008) (determining that 47 USC 332 prohibits a
4 local government from imposing conditions of approval requiring filters to reduce radio
5 frequency interference).

6 On the merits, ODOT responds that the access road does not run afoul of the FHWA
7 policy cited by Folliard because it is not a public road open to use by the public, but is gated
8 and access controlled. For that reason, ODOT argues, the access road is not inconsistent
9 with the FHWA policy. We agree with ODOT.

10 The assignments of error are denied.

11 **FIRST ASSIGNMENT OF ERROR (FOLLIARD)/THIRD ASSIGNMENT OF**
12 **ERROR (FOLAND)**

13 As described above, an existing sewer line that previously served the now-closed rest
14 area to the south runs through the proposed rest area property and connects to the City of
15 Ashland's sewer system. Statewide Planning Goal 11 (Public Facilities and Services) and
16 the administrative rule that implement Goal 11 prohibit the extension of sewer lines from
17 within urban growth boundaries to serve land outside those boundaries except in limited
18 circumstances.²⁰ One of those circumstances is set out in OAR 660-011-0060(9):

²⁰ OAR 660-011-0060 provides in relevant part:

- “(2) Except as provided in sections (3), (4), (8), and (9) of this rule, and consistent with Goal 11, a local government shall not allow:
 - “(a) The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries;
 - “(b) The extension of sewer lines from within urban growth boundaries or unincorporated community boundaries in order to serve uses on land outside those boundaries;
 - “(c) The extension of sewer systems that currently serve land outside urban growth boundaries and unincorporated community boundaries in order to

1 “A local government may allow the establishment of new sewer systems or
2 the extension of sewer lines not otherwise provided for in section (4) of this
3 rule, or allow a use to connect to an existing sewer line not otherwise
4 provided for in section (8) of this rule, provided the standards for an exception
5 to Goal 11 have been met, and provided the local government adopts land use
6 regulations that prohibit the sewer system from serving any uses or areas other
7 than those justified in the exception. Appropriate reasons and facts for an
8 exception to Goal 11 *include but are not limited to* the following:

9 “(a) The new system, or extension of an existing system, is necessary to
10 avoid an imminent and significant public health hazard that would
11 otherwise result if the sewer service is not provided; and, there is no
12 practicable alternative to the sewer system in order to avoid the
13 imminent public health hazard, or

14 “(b) The extension of an existing sewer system will serve land that, by
15 operation of federal law, is not subject to statewide planning Goal 11
16 and, if necessary, Goal 14.” (Emphasis added.)

17 In order to connect the existing sewer line to the proposed rest area, ODOT sought an
18 exception to Goal 11 under OAR 660-004-0020 and -0022, set out in full at Appendix A.

19 The county concluded that an exception to Goal 11 may not be required. However, in
20 the alternative, the county approved an exception under OAR 660-004-0020 and -0022,
21 relying on the same reasons that it relied on in approving the exception under OAR 660-012-
22 0070, and incorporated its findings for the TPR exception into its findings supporting the
23 Goal 11 exception.²¹ Folliard and Foland challenge the county’s conclusion that a goal

serve uses that are outside such boundaries and are not served by the system
on July 28, 1998.”

“Sewer System” is defined in OAR 660-011-0060(1)(f) as:

“[A] system that serves more than one lot or parcel, or more than one condominium unit or
more than one unit within a planned unit development, and includes pipelines or conduits,
pump stations, force mains, and all other structures, devices, appurtenances and facilities used
for treating or disposing of sewage or for collecting or conducting sewage to an ultimate point
for treatment and disposal.”

²¹ The county found:

“For the reasons set forth by ODOT in ODOT’s Exhibit 1, and with the stipulations as noted
in the above findings, this application to connect the Rest Area/Welcome Center with public
sewer is consistent with and satisfies the requirements for taking a ‘reasons’ goal exception to
Goal 11 as set out in OAR 660, Division 4.” Record 25.

1 exception may not be required. However, because we conclude below that the county's Goal
2 11 exception is justified, even if Folliard and Foland were correct, at most the county's
3 finding would be harmless error.

4 Folliard and Foland argue that the county erred in relying on its approval of the
5 exceptions for the rest area and welcome center under the TPR exception standards to
6 conclude that the proposed Goal 11 exception meets the requirements of OAR 660-004-0020
7 and -0022. Folliard argues that the reasons identified by the county and ODOT cannot also
8 justify the Goal 11 exception under OAR 660-004-0022.

9 ODOT responds that the county properly evaluated the proposed use of the property
10 for a rest area and welcome center under OAR 660-004-0022, and properly incorporated the
11 findings for the TPR reasons exception into its analysis of the Goal 11 exception. Record
12 1324-26. ODOT cites *Friends of Marion County v. Marion County*, 59 Or LUBA 323
13 (2009), *aff'd* 233 Or App 488, 227 P3d 198 (2010), in support of its argument. In *Friends of*
14 *Marion County*, the county approved an exception to Goal 11, relying in large part on the
15 same reasons it relied on to approve a reasons exception to Goal 14. We concluded that the
16 reasons that justify one goal exception may be sufficient to justify another goal exception,
17 depending on the applicable goals and the circumstances ("the same set of reasons might
18 well constitute a partial or complete justification for both goal exceptions"). 59 Or LUBA at
19 337.

20 We agree with ODOT that it was reasonable for the county to rely on the
21 justifications for the TPR exceptions for the rest area in justifying the reasons for the Goal 11
22 exception under OAR 660-004-0022 and OAR 660-011-0060(9). We also agree with ODOT
23 that the county's findings indicate that it evaluated the evidence in the record regarding
24 alternative locations for the sewer line and alternative methods of disposal (a septic system),
25 and conducted an ESEE analysis as required by OAR 660-004-0020(2)(c). Record 1325.
26 Although Folliard argues that the reasons relied on to justify a Goal 11 exception cannot be

1 “makeweights,” Folliard does not explain how the reasons cited by the county qualify as
2 “makeweights” or otherwise fail to provide justification for the exception. The county
3 reasonably concluded that an on-site septic system would not be adequate to handle the
4 volume of projected waste from the rest area, given that the soils on the site are not ideal for
5 a septic system and given the amount of waste projected to be generated. The county also
6 concluded that the proposed use of the sewer line requires a location close to or on the rest
7 area site. Those findings are adequate to explain the reasons for the Goal 11 exception, and
8 it was reasonable for the county to rely on the evidence in the record regarding the proposed
9 sewer line extension as support for its justification.

10 These assignments of error are denied.

11 **SECOND ASSIGNMENT OF ERROR (FOLLIARD)**

12 ODOT’s proposal includes obtaining water service from the City of Ashland by
13 extending city water lines to the subject property. The county found:

14 “The extension of water, phone and electrical service to the Rest Area is
15 consistent with Goal 11. * * *” Record 33.

16 The county imposed a condition of approval requiring ODOT to obtain final approval from
17 the City of Ashland to connect to its water service. Record 4.

18 As explained above, ODOT sought and the county granted exceptions to Goals 3 and
19 14 for the proposed rest area to be sited on rural land. In approving an exception to Goal 14
20 for the rest area, we understand the county to have determined that a rest area serving over a
21 million visitors a year is an urban use of rural land that would otherwise be prohibited by
22 Goal 14 without an exception. The question presented in this assignment of error is whether
23 an exception to Goal 11 is required in order to extend city water services to that rest area and
24 welcome center.

25 Goal 11 provides that “urban and rural development shall be guided and supported by
26 types and levels of urban and rural public facilities and services appropriate for, but limited

1 to, the needs and requirements of the urban, urbanizable and rural areas to be served.” Goal
2 11 also provides in relevant part:

3 “Local governments shall not rely upon the presence, establishment, or
4 extension of a water or sewer system to allow residential development of land
5 outside urban growth boundaries or unincorporated community boundaries at
6 a density higher than authorized without service from such a system.”²²

7 Finally, Guideline A.2 of Goal 11 provides that “[p]ublic facilities and services for rural
8 areas should be provided at levels appropriate for rural use only and should not support urban
9 uses.”

10 The administrative rules implementing Goal 11 are found at OAR 660-011-0000 *et*
11 *seq.*, which has the stated purpose of “aid[ing] in achieving the requirements of Goal 11,
12 Public Facilities and Services, * * * [and] interpret[ing] Goal 11 requirements regarding
13 public facilities and services on rural lands * * *.” Under OAR 660-011-0005(5), “[p]ublic
14 facility includes water, sewer, and transportation facilities, but does not include buildings,
15 structures or equipment incidental to the direct operation of those facilities.”

16 OAR 660-011-0065 implements the language quoted above from Goal 11:

17 **“Water Service to Rural Lands**

18 “(1) As used in this rule, unless the context requires otherwise:

19 “(a) ‘Establishment’ means the creation of a new water system and
20 all associated physical components, including systems
21 provided by public or private entities;

22 “(b) ‘Extension of a water system’ means the extension of a pipe,
23 conduit, pipeline, main, or other physical component from or to
24 an existing water system in order to provide service to a use
25 that was not served by the system on the applicable date of this

²² The first iteration of that language became a part of Goal 11 in 1994 and provided:

“For land that is outside urban growth boundaries and unincorporated community boundaries, county land use regulations shall not rely upon the establishment or extension of a water system to authorize a higher residential density than would be authorized without a water system.”

1 rule, regardless of whether the use is inside the service
2 boundaries of the public or private service provider.

3 “(c) ‘Water system’ shall have the same meaning as provided in
4 Goal 11, and includes all pipe, conduit, pipeline, mains, or
5 other physical components of such a system.

6 “(2) Consistent with Goal 11, local land use regulations applicable to lands
7 that are outside urban growth boundaries and unincorporated
8 community boundaries shall not:

9 “(a) Allow an increase in a base density in a residential zone due to
10 the availability of service from a water system;

11 “(b) Allow a higher density for residential development served by a
12 water system than would be authorized without such service; or

13 “(c) Allow an increase in the allowable density of residential
14 development due to the presence, establishment, or extension
15 of a water system.”

16 “(3) Applicable provisions of this rule, rather than conflicting provisions of
17 local acknowledged zoning ordinances, shall immediately apply to
18 local land use decisions filed subsequent to the effective date of this
19 rule.”

20 In the second assignment of error, Folliard argues that the county erred in concluding that an
21 exception to Goal 11 was not required for the extension of city water services to the proposed
22 rest area. Folliard argues that Goal 11 prohibits the extension of the City of Ashland’s water
23 service onto the rest area site. Folliard argues that merely because OAR 660-011-0065
24 specifically regulates the creation and extension of sewer and water systems for residential
25 uses does not mean that Goal 11 is not also concerned with the extension of urban water
26 systems onto rural lands for non-residential uses that are urban uses.

27 ODOT responds that Goal 11 and the rules that implement Goal 11 do not require an
28 exception in order to extend water service from the City of Ashland to the proposed rest area
29 because it is not a residential use. According to ODOT, the provisions of OAR 660-011-
30 0065 limit the need for an exception to Goal 11 for water service outside a UGB to
31 residential uses. According to ODOT, because the rule does not prohibit extending water

1 service outside of the city of Ashland’s UGB to the proposed rest area, no exception to Goal
2 11 is required.

3 OAR 660-011-0065 took effect in July, 1998, in response to the Court of Appeals’
4 decision in *Dept. of Land Conservation v. Lincoln County*, 144 Or App 9, 925 P2d 135
5 (1996). In *Lincoln County*, DLCD challenged the county’s approval of 113 residential lots
6 on a 50-acre parcel of land outside of an urban growth boundary (the “Mariner’s Village”
7 development). The property was within the boundaries of an existing water district, and the
8 proposed density of the subdivision was higher than would otherwise be permitted without
9 the property’s location within the water district boundaries. LUBA held that under a prior
10 version of Goal 11, the proposed extension of water lines to each individual lot from the
11 main water district line violated Goal 11 because it was an “extension of a water system”
12 under the then-applicable Goal 11 language. *See* n 22. The Court of Appeals disagreed,
13 finding that the phrase “establishment or extension of a water system” referred to the “new
14 or expanded presence of water systems in areas where none was present before.” *Id.* at 17
15 (emphasis in original).

16 In response to the court’s holding, LCDC enacted OAR 660-011-0065, the current
17 language of which is quoted above. The rule does make clear that Goal 11 is concerned with
18 the presence or availability of a sewer or water system facilitating increased residential
19 density on rural land, presumably because that could lead to rural land being put to urban use
20 in contravention of Goal 14. However, the history of the enactment of that rule indicates that
21 LCDC did not intend to address the universe of concerns under Goal 11 in enacting the rule,
22 or to in all circumstances allow a water system to serve *non-residential* urban uses on rural
23 land without an exception to Goal 11.²³ Thus, we agree with Folliard that OAR 660-011-

²³ We note that DLCD’s rules governing Goal 14 exceptions for lands that are “irrevocably committed” to urban use require consideration of the “location of urban levels of facilities and services; including at least public water and sewer facilities.” OAR 660-014-0030(3)(c).

1 0065 does not purport to identify the universe of Goal 11 concerns regarding extension of
2 water systems onto rural land. Where the extension of a water system onto rural lands is
3 proposed to facilitate an urban use of that land, the extension is prohibited without an
4 exception to Goal 11.²⁴ In the present case, the county granted an exception to Goal 14 for
5 the rest area and welcome center, presumably because a use that attracts over a million
6 visitors a year constitutes an urban use. Goal 11 prohibits the extension of city water
7 services to serve that urban use on rural land without an exception to Goal 11.

8 We note that where an exception to Goal 14 is required in order to site an urban use
9 on rural land, a corresponding exception to Goal 11 will be required where the intensity of
10 urban use of land requires the provision of public sewage facilities and services for health
11 and safety reasons. In that circumstance, it may well be that the same factors that justify an
12 exception for extending the city’s sewer system onto the subject property, or the same factors
13 that justify the Goal 14 exception to site the urban use on rural land, could serve as
14 justification for extending water service onto the property. However, an exception to Goal
15 11 to extend water service is still required.

16 Folliard’s fourth assignment of error is sustained.

17 The county’s decision is remanded.

18 Ryan, Board Member, concurring.

19 I respectfully concur because although I agree with the majority that the decision
20 should be remanded, and I agree with the majority that the proposed rest area can be viewed
21 as a “transportation facility” under the rule definition, I disagree with the majority that the

²⁴ In *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 84-85, *aff’d* 89 Or App 40, 747 P2d 373 (1987), a case that predates the adoption of OAR 660-011-0065, the county approved an exception to Goal 11 in order to extend water and sewer services from the City of Wilsonville to a location outside of the city limits in order to provide city services to a commercial use, a proposed amphitheater. LUBA concluded that the Goal 11 exception was inadequate, and the Court of Appeals concluded that the proposed use was an urban use.

1 welcome center can be evaluated under the TPR exception standards.²⁵ OAR 660-012-
2 0070(10) provides that “[a]n exception taken pursuant to this rule does not authorize uses
3 *other than the transportation facilities or improvements* justified in the exception.” In my
4 view, that language requires that all components of a proposal that seeks review under the
5 TPR exception standards must in fact be “transportation facilities or improvements.”

6 Although the issue may seem largely academic, whether the welcome center
7 component of the proposal is a “transportation facility or improvement” is important because
8 the TPR exception standards provide a different, and arguably more streamlined, path to
9 obtain approval of a reasons exception for *transportation projects* on resource land. As the
10 Court of Appeals noted in *1000 Friends of Oregon v. Yamhill County*, 203 Or App 323, 333-
11 34, 120 P3d 684 (2005), the exceptions standards set forth in OAR 660-012-0070 are not
12 identical in language or substance to the exceptions standards set forth in OAR 660-004-
13 0020 and -0022. Even after the 2006 amendments to OAR 660-012-0070 were adopted by
14 LCDC, key differences remain. One key difference is that OAR 660-012-0070(6) does not
15 include provisions similar to OAR 660-004-0020(2)(b)(B)(i) – (iv). Practically, OAR 660-
16 012-0070(6) allows the early elimination of other measures and non-exception alternative
17 sites that do not meet the thresholds established by the applicant. There does not appear to
18 be a similar allowance in the general exception rules, which require consideration of non-
19 exception sites if the proposed development can be “reasonably accommodated” on those
20 sites. And the TPR exception standards certainly do not mirror or incorporate the provisions
21 of OAR 660-014-0040, the standards applicable to a reasons exception under Goal 14 for
22 urban use of rural land.

23 In my view, the welcome center is not a “transportation facility or improvement”
24 under OAR 660-012-0070(1) or OAR 660-012-0005(30). I do not think the welcome center,

²⁵ Baker and Foland do not challenge other buildings to be sited on the property, such as the restroom building or the travel kiosk. Accordingly, I express no opinion on the lawful status of those buildings.

1 as described in ODOT’s application and the record “* * * assists in the movement of goods
2 or people” within the meaning of the term “transportation facility.” It does not serve a
3 transportation purpose, except in the most general sense due to its proposed location within a
4 rest area. It is not similar to any of the listed transportation facilities in OAR 660-012-0020,
5 and neither the county nor ODOT has provided an explanation as to how the welcome center
6 meets the definition of “transportation facility.” The welcome center is not dependent on a
7 location within a rest area in order to accomplish its stated purpose, and conversely, the rest
8 area is not dependent on having a welcome center located adjacent to it in order to serve its
9 stated purpose. Each could be separately located without affecting the other’s functionality.

10 ODOT’s site plan indicates that the development will contain three separate
11 buildings: an 1,800-square foot restroom building, a separate 576-square foot “travel kiosk,”
12 and an approximately 4,000-square foot welcome center. Record 1411-12. Although the
13 record does not make clear what uses the welcome center will encompass, or what different
14 purpose it will serve than the “travel kiosk,” testimony below from ODOT, local
15 governments, chambers of commerce and hospitality organizations in the area indicates that
16 the proposed use of the welcome center building appears to be to establish a tourist
17 information center to promote local, regional and statewide commerce and business
18 activities.²⁶ Record 2354. Presumably, the distributed tourist information will include
19 information and promotional literature about businesses, activities, and events in the City of
20 Ashland, the Rogue Valley, and the state of Oregon. *See* Response Brief of ODOT 29 (“[a]s
21 this safety rest area is the southern gateway to Oregon it is reasonable that the state and the

²⁶ The board of commissioners’ findings conclude:

“The Board of Commissioners finds that the need for a new Siskiyou Safety Rest Area and Welcome Center has been established and is supported by substantial evidence and testimony. This evidence and testimony demonstrates that, among other things, the loss of approximately 50,000 visitors per year to the Welcome Center following the closure of the former Siskiyou Rest Area signifies a substantial lost opportunity for improved tourism in Jackson County.” Record 3.

1 Travel Information Council and the respective Chambers of Commerce would want to
2 distribute information that welcomes tourists to the state”). However, building a separate
3 building for the purpose of distributing “tourist information” that primarily urges motorists to
4 spend time and money at specified locations within the state, is not the same as distributing
5 “travel information” from a “travel kiosk” that provides maps, road condition, and weather
6 information helpful to travelers to assist them in moving on in their journey. While
7 promoting local, regional, and statewide tourism is a laudable goal, and likely garnered
8 support for the project from nearby communities and businesses, it does not qualify the
9 welcome center as a transportation facility under OAR 660-012-0070(1) so that the
10 applicant-determined thresholds can eliminate non-exception alternative measures and
11 sites.²⁷

12 I do not dispute the convenience, efficiency or cost-effectiveness of locating the
13 welcome center adjacent to the rest area, or locating it reasonably close to the point of entry
14 of travelers into the state. However, there is frequently tension between Oregon’s land use
15 laws protecting agricultural land and development that is most easily or cost-effectively
16 facilitated on resource land. That does not mean that ease of development should supply a
17 reason to develop that land without compliance with Goal 3 or Goal 14. I agree with Baker
18 and Foland’s argument that the welcome center is not a “transportation facility or
19 improvement” under OAR 660-012-0070(1). I would sustain that portion of Baker’s
20 assignment of error and Foland’s first assignment of error that so argue, and remand the
21 decision in order for the county to apply the reasons exception standards at OAR 660-004-
22 0020 and -0022, and OAR 660-014-0040, to the proposed welcome center.

²⁷ As discussed in the opinion, one of ODOT’s thresholds is that the welcome center must be located prior to the first interchange exit within the city limits of the City of Ashland, in order to better capture tourist dollars before travelers bypass Ashland. Record 1308.

APPENDIX A

660-004-0020

Goal 2, Part II(c), Exception Requirements

(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.

(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”:

(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?

(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

1 reasonably accommodate the proposed use. Site specific comparisons are not required of a
2 local government taking an exception, unless another party to the local proceeding can
3 describe why there are specific sites that can more reasonably accommodate the proposed
4 use. A detailed evaluation of specific alternative sites is thus not required unless such sites
5 are specifically described with facts to support the assertion that the sites are more
6 reasonable by another party during the local exceptions proceeding.

7 (c) The long-term environmental, economic, social and energy consequences resulting from
8 the use at the proposed site with measures designed to reduce adverse impacts are not
9 significantly more adverse than would typically result from the same proposal being located
10 in other areas requiring a Goal exception. The exception shall describe the characteristics of
11 each alternative areas considered by the jurisdiction for which an exception might be taken,
12 the typical advantages and disadvantages of using the area for a use not allowed by the Goal,
13 and the typical positive and negative consequences resulting from the use at the proposed site
14 with measures designed to reduce adverse impacts. A detailed evaluation of specific
15 alternative sites is not required unless such sites are specifically described with facts to
16 support the assertion that the sites have significantly fewer adverse impacts during the local
17 exceptions proceeding. The exception shall include the reasons why the consequences of the
18 use at the chosen site are not significantly more adverse than would typically result from the
19 same proposal being located in areas requiring a goal exception other than the proposed site.
20 Such reasons shall include but are not limited to, the facts used to determine which resource
21 land is least productive; the ability to sustain resource uses near the proposed use; and the
22 long-term economic impact on the general area caused by irreversible removal of the land
23 from the resource base. Other possible impacts include the effects of the proposed use on the
24 water table, on the costs of improving roads and on the costs to special service districts;

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

32 (3) If the exception involves more than one area for which the reasons and circumstances are
33 the same, the areas may be considered as a group. Each of the areas shall be identified on a
34 map, or their location otherwise described, and keyed to the appropriate findings.

35 (4) For the expansion of an unincorporated community defined under OAR 660-022-0010, or
36 for an urban unincorporated community pursuant to OAR 660-022-0040(2), The exception
37 requirements of subsections (2)(b), (c) and (d) of this rule are modified to also include the
38 following:

39 (a) Prioritize land for expansion: First priority goes to exceptions lands in proximity to an
40 unincorporated community boundary. Second priority goes to land designated as marginal
41 land. Third priority goes to land designated in an acknowledged comprehensive plan for

1 agriculture or forestry, or both. Higher priority is given to land of lower capability site class
2 for agricultural land, or lower cubic foot site class for forest land;

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

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

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

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

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12 **Reasons Necessary to Justify an Exception Under Goal 2, Part II(c)**

13 An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable
14 goal(s). The types of reasons that may or may not be used to justify certain types of uses not
15 allowed on resource lands are set forth in the following sections of this rule:

16 (1) For uses not specifically provided for in subsequent sections of this rule or in OAR 660-
17 012-0070 or chapter 660, division 14, the reasons shall justify why the state policy embodied
18 in the applicable goals should not apply. Such reasons include but are not limited to the
19 following:

20 (a) There is a demonstrated need for the proposed use or activity, based on one or more of the
21 requirements of Goals 3 to 19; and either

22 (b) A resource upon which the proposed use or activity is dependent can be reasonably
23 obtained only at the proposed exception site and the use or activity requires a location near
24 the resource. An exception based on this subsection must include an analysis of the market
25 area to be served by the proposed use or activity. That analysis must demonstrate that the
26 proposed exception site is the only one within that market area at which the resource
27 depended upon can reasonably be obtained; or

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

30 (2) Rural Residential Development: For rural residential development the reasons cannot be
31 based on market demand for housing, except as provided for in this section of this rule,
32 assumed continuation of past urban and rural population distributions, or housing types and
33 cost characteristics. A county must show why, based on the economic analysis in the plan,
34 there are reasons for the type and density of housing planned which require this particular
35 location on resource lands. A jurisdiction could justify an exception to allow residential
36 development on resource land outside an urban growth boundary by determining that the
37 rural location of the proposed residential development is necessary to satisfy the market

1 demand for housing generated by existing or planned rural industrial, commercial, or other
2 economic activity in the area.

3 (3) Rural Industrial Development: For the siting of industrial development on resource land
4 outside an urban growth boundary, appropriate reasons and facts include, but are not limited
5 to, the following:

6 (a) The use is significantly dependent upon a unique resource located on agricultural or forest
7 land. Examples of such resources and resource sites include geothermal wells, mineral or
8 aggregate deposits, water reservoirs, natural features, or river or ocean ports; or

9 (b) The use cannot be located inside an urban growth boundary due to impacts that are
10 hazardous or incompatible in densely populated areas; or

11 (c) The use would have a significant comparative advantage due to its location (e.g., near
12 existing industrial activity, an energy facility, or products available from other rural
13 activities), which would benefit the county economy and cause only minimal loss of
14 productive resource lands. Reasons for such a decision should include a discussion of the lost
15 resource productivity and values in relation to the county's gain from the industrial use, and
16 the specific transportation and resource advantages which support the decision.