BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FAMILIES FOR RESPONSIBLE GOVERNMENT, INC., CHEMAWA SCHOOL BOARD, JAMES G. TRYON, DAVID PULLIAM, DONALD SUTHERLAND, DONALD EARLE, MICHAEL J. TRYON, EMIL A. VALISH, TOMI KELLOGG and DAVID STEPP, Petitioners, v. MARION COUNTY, Respondent, and TRANS ENERGY SYSTEMS, INC., Participant.	LUBA NO. 82-054 FINAL OPINION AND ORDER

Appeal from Marion County.

Corinne Sherton, Salem, filed a petition for review and argued the cause for Petitioners. With her on the brief were O'Donnell, Sullivan & Ramis.

Robert Cannon, Salem, filed a brief and argued the cause for Respondent.

David A. Rhoten, Salem, filed a brief and argued the cause for Participant. With him on the brief were Rhoten, Rhoten & Speerstra.

Cox, Referee; Bagg, Referee; participated in the decision; Reynolds, Chief Referee, dissenting in part.

Affirmed 11/15/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

COX, Referee.

NATURE OF PROCEEDING

Petitioners seek review of Marion County Ordinance No. 625 adopted May 26, 1982. The contested ordinance approved (1) a comprehensive plan amendment to the Salem Urban Area Land Use Map from "Developing Residential" to "Community Services;" (2) an amendment to the Marion County Zone Map from "Residential Agricultural" (RA) to "Public" (P); (3) a conditional use permit for a solid waste disposal site and power generation facility; and (4) a variance to the building height limitation in the P zone. The subject property is 22 acres of a 53 acre parcel located at 3165 Chemawa Road, NE, Salem. The property is owned by applicants Gene and Carolyn Biggins. Petitioners request this Board to invalidate the effect of Marion County Ordinance No. 625.

STANDING

Both Respondents Marion County and Trans Energy Systems, Inc., the firm proposing to build the Solid Waste Disposal Facility (hereinafter Facility) contest the standing of petitioners Chemawa School Board. Respondents also object in general to petitioners' statement of standing on the grounds that it contains "zealous and unwarranted statements" relating to the facility. When asked to clarify their objection to petitioners, other than Chemawa School's, statement of standing, respondents explained their objections relate more to the nature and style of petitioners' statement rather than the substantive issue of standing.

With regard to Chemawa School Board, respondents contest

school are within site, sound and smell of the property that was the subject of the proceeding below and of the proposed facility. The allegation of standing goes on to allege the board is adversely affected and aggrieved by the decision. None of these allegations is contested by respondents. The sole basis for respondents' objection to standing is as above stated.

Standing to appear before this Board is governed by 1979 Oregon Laws, ch 772, as amended by 1981 Oregon Laws, ch 748, sec 4(3) which provides:

> "Any person who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for a review of a quasi-judicial land use decision if the person:
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> "(a) appeared before the local government or special district governing body or state agency orally or in writing; and
>
> "(b) was a person entitled as of right to notice and hearing prior to the decision to be reviewed or was a person whose interests are adversely affected or who was aggrieved by the decision."

ORS 197.015(15) defines person to be

> "any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind."

We grant standing to the School Board to the extent it is representing its own interests. Respondents may very well be correct that if the School Board is to represent the interests of the school and its students, it would need to be represented by appropriate counsel. However, respondents do not contest the right of the School Board to represent its own interests, whatever those might be, through private counsel.[1] Therefore, we believe all petitioners, including Chemawa School

Board in the capacity of representative of its own interests, have standing to proceed before this Board in this matter.

ALLEGATIONS OF ERROR

Petitioners summarize their arguments as follows:

> "The County's decision to approve a comprehensive plan amendment, zone change, conditional use permit and variance for a Garbage Burner on a portion of an active form [sic] on the outskirts of Salem violates Statewide Planning Goals 2, 3 and 14 because the conversion of this agricultural land to an urban, nonfarm use was not properly justified through use of the Goal 3 conversion factors, Goal 2 exception process and Goal 14 urban growth boundary establishment factors. It violates Goals 6 and 11 because the existence of an efficient and safe method of providing water to, and disposing of the waste water from, the facility has not been demonstrated. It violates Goal 5 because conflicts with the nearby Chemawa Indian School, a cultural center for Native Americans, were not properly considered.
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> "The County's decision also violates both the Salem Area and Marion County Comprehensive Plans in that it was made without there being an Area Advisory Committee assigned to the subject area; it approves industrial development in an unserviced area outside city limits without the agreement of the City of Salem; no adequate site selection study was performed or documented; the availability of adequate water and sewer services was not established; and the impact of dioxins in smokestack emissions on human health was not considered.
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> "Finally, the County's decision violates the Marion County Zoning Ordinance in that compatibility with adjacent uses was not adequately considered; the special provisions on conditional use permits for solid waste disposal sites were not followed; and a variance to the height requirement of the zone was improperly granted."

FACTS

On March 10, 1982, an application was filed with the Marion County Planning Department for a comprehensive plan amendment, zone change, conditional use and variance on a portion of the subject property. The initial public hearing on the request

was convened on March 25, 1982 but continued until April 5, 1982 to provide for additional notice required by Marion County Zoning Ordinance. Public hearings on the matter were held on April 5 and April 7, 1982. At the close of the April 7 hearing, the Marion County Commissioners ordered that the record before them be kept opened for written submissions until April 13, 1982. Then on April 12, 1982, the commissioners determined that persons other than the staff and applicant could submit rebuttal information through April 19, 1982. On April 21, 1982, Marion County directed its staff to prepare findings of fact, conclusions and conditions approving the application. On April 26, 1982, the commissioners adopted Ordinance 625 approving the plan amendment, zone change, conditional use permit and variance for the proposed solid waste treatment facility.

On May 26, 1982, LCDC acknowledged, as in compliance with the Statewide Goals, Salem's entire comprehensive plan. On June 10, 1982, LCDC acknowledged Marion County's entire comprehensive plan as being in compliance with the Statewide Goals.[2]

The subject property is governed by provisions of the Salem Area Comprehensive Plan and applicable city and Marion County implementing ordinances. The procedural elements of Marion County's Comprehensive Plan are applicable throughout the county. For property outside Salem's city limits but inside its UGB, provisions of Salem's Comprehensive Plan have been adopted as part of Marion County's Comprehensive plan.

The subject site is a 22 acre portion of a 53 acre parcel

which is currently being farmed. The 22 acre parcel contains farm residences, barns and machine sheds. The entire 53 acre parcel is comprised of USCS Class II soils. The 22 acre portion is within the Salem Area Urban Growth Boundary but outside the present Salem city limits. The property is zoned Developing Residential. The remaining 31 acres are outside of the Salem UGB and designated EFU.

To the west of the subject 22 acre parcel is a 10 acre parcel within the Salem UGB and presently being farmed. To the west of that 10 acre parcel and adjoining the northern tip of the subject property is Interstate 5 right of way. On the other side of the Interstate 5 right of way is acreage residential development and some farming. Northeast of the subject property are onion farms. To the east of the subject land are farm parcels which are not within the Salem UGB. To the south of the property is Chemawa Indian School property and Oregon Highway Division land being held for the proposed Chemawa Interchange. Southern Pacific Railroad tracks cross the southeast corner of the subject 22 acre parcel. A Bonneville Power Authority transmission line easement runs generally along the northeast side of the 22 acre site.

The proposed use for the subject site is a mass burning refuse incineration/electric generation plant (the facility). The facility is planned to burn approximately 145,000 tons of refuse per year. As planned, the facility would generate 60,000 MWHR of electricity per year. The facility would be housed in a building 103 feet in height above grade with smoke stacks extending to a height considerably above the building.

The original application also included a request for a power substation and a transfer station on the property. However, during the course of the hearing on the application, the transfer station request apparently was withdrawn.

DECISION

The primary question before this Board is whether the Statewide Goals apply to this appeal. The facts reveal that the contested decision was made prior to the Land Conservation and Development Commission's acknowledgment of either Salem's or Marion County's Comprehensive Plans. Both those plans, however, were acknowledged prior to this Board receiving the petitioners' notice of intent to appeal. Both respondents at oral argument agreed that Ordinance 625, the subject of this appeal, was not included in the material submitted to LCDC for acknowledgment. Therefore, the acknowledged comprehensive plans for Marion County and the City of Salem, do not recognize the amendments made to the comprehensive plans and zone change which were accomplished by the contested ordinance. The acknowledged plans for both governments do indicate this property is within the Salem urban growth boundary but they indicate the property to be zoned for residential use.

Respondent Trans Energy Systems, Inc. (Trans Energy) argues that LCDC acknowledgment of the Salem Area Comprehensive Plan on May 26, 1982 ousts this Board of authority to apply the Statewide Goals to this quasi-judicial land use action. Trans Energy reasons that once the LCDC has acknowledged a comprehensive plan, this Board has no function to perform regarding the goal issues, citing Fujimoto v. Land Use Board of

Appeals, 52 Or App 875 (1981).[3] Therefore, Trans Energy argues that the factual status of the present case ousts LUBA's jurisdiction to consider petitioners' issues regarding Goals 2, 3, 5, 6, 11 and 14, i.e. all the Statewide Goal issues raised by petitioners.

Finally, Trans Energy argues that the issues regarding the application of the goals in this proceeding were before the Land Conservation and Development Commission in the form of requests for stay orders. (See Footnote 1). Apparently Trans Energy believes that by denying the petitioners' stay of the acknowledgment orders governing this property, the LCDC has indicated the comprehensive plans as they existed at the time of acknowledgment govern this property. We do not so interpret the stay orders.[4]

While we can agree that the acknowledgment orders issued by LCDC on May 26, 1982, and June 10, 1982, respectively (and those continuance orders addressed by respondent in footnote 2) render moot some of petitioners' allegations of goal violations, we can not agree that all petitioners' allegations of goal violations are rendered moot in this particular factual situation.

In summary, we find that petitioners' allegations regarding Goals 3, 5, 14 and part of Goal 2 have been rendered moot. The merits of petitioner's allegations regarding another portion of Goal 2 and Goals 6 and 11 are addressed in depth, however, since uses allowed on the subject property by Ordinance 625 differ from those contemplated in the comprehensive plan submitted to LCDC for acknowledgment. After analyzing the

county's findings and record, we find that the county has properly applied those portions of Goals 2, 6 and 11 we address indepth. We, therefore, deny petitioners' allegations of error regarding the statewide goals.

GOAL 2

Petitioners' allegations regarding Statewide Goal 2 are twofold. First, they argue the county's decision violates Goal 2 because the decision is not consistent with applicable comprehensive plans. Second, petitioners argue Ordinance 625 violates the goal by allowing a non-farm use on agricultural land without taking a proper exception. Addressing petitioner's second assertion first, we find that since the property is within an acknowledged urban growth boundary, there is no requirement that the county take an exception to the farm lands goal. The LCDC has already determined by its act of acknowledgment that the county was correct in designating this property other than farm land.

Referring to petitioners' assertion that the decision is not consistent with applicable comprehensive plans, we find petitioners' arguments to be unpersuasive. Petitioners claim that the county's approval of Ordinance 625 violates numerous provisions of the Marion County Comprehensive Plan. The Salem Area Comprehensive Plan governing this property has been adopted by Marion County as part of its plan. Petitioners here argue that the Marion County Comprehensive Plan and thus the applicable portions of the Salem Area Comprehensive Plan was violated in four particulars. We will deal with each assertion in the order that it appears in petitioners' petition for

review.

"A. The decision was made in violation of Marion County Citizen Involvement Policy 6 and Marion County Citizen Involvement Program in not having an Area Advisory Committee for the subject property."

Marion County Comprehensive Plan, Citizen Involvement Policy 6 states:

"The general public shall be afforded the opportunity to be involved in all phases of the planning process as provided for in the Citizen Involvement Program adopted by the Board of Commissioners."

Petitioners argue that this policy was not followed because the county has not included the subject property within any of its Area Advisory Committees (AAC). Petitioners claim that the Area Advisory Committees play an essential role in carrying out the Citizen Involvement Program (CIP) required by Statewide Goal 1. Petitioners reason that since the Marion County CIP was acknowledged to be in compliance with Statewide Goal 1, the county's failure to follow provisions of its CIP violates Statewide Goal 2. Petitioners argue that when land use actions or planning decisions concerning areas not governed by an AAC are being considered, concerned citizens are deprived of participation opportunities promised them by Goal 1 and Marion County's CIP. Those opportunities include having technical information made available to them through an AAC, which itself is guaranteed technical, financial and human assistance by the county planning staff. Petitioners claim no AAC was given an opportunity to review the proposed actions. Petitioners then conclude their rights were substantially prejudiced by the non-existence of an AAC because an AAC could have provided

petitioners with technical information in an understandable form. As petitioners state:

> "Petitioners were unable, although repeated requests were made, to obtain from the County such technical information in an understandable form. All that was made available to petitioners and other concerned citizens was literally drawers full of lengthy and duplicative technical documents, as is evidenced by the record in this case. Technical questions asked by petitioners at the hearing on this matter were not answered (see Rec. pp. 9930-9941). Because of this, petitioners were not able effectively to prepare for the hearings on this matter in the short time allowed."

Respondents reply that substantive provisions of the Marion County Plan apply only outside urban growth boundaries. Since the subject area is located inside the Salem Urban Growth Boundary, they argue it is controlled by the Salem Area Comprehensive Plan provisions. Under that plan, there is no specific requirement that an AAC be formed. Therefore, they reason reference by petitioners to the AAC is irrelevant. Respondent argues that the prevailing zoning ordinance (Salem's) and state statutes dictating notification requirements provide for the citizen input contemplated and necessary to carry out a quasi-judicial proceeding. They claim those provisions have been met.

We conclude respondents have not erred in failing to establish an AAC for this area. If this were deemed to be a substantive issue, the Marion County provision for citizen input does not control in this fact situation and thus there is no requirement that an AAC exist. If we were to call this a procedural issue, petitioners have not shown with any particularity how they allegedly were prejudiced by lack of an AAC or in the way they were allowed to participate in the

contested decision. 1979 Or Laws, Chapter 772, Sec 5(4)(a)(B). The petitioners were actively involved in making the record upon which the county's decision was based and reviewing the material which the proponents of the facility relied on in their presentations. The petitioners were represented by an attorney. The due process protections afforded petitioners by state statute and Salem's ordinances are not contested by petitioners. Therefore, we deny petitioners' allegations regarding citizen input.

In the next portion of their allegation of error regarding Statewide Goal 2, petitioners allege:

> "B. The decision violates SACP General Development Policy 11 by not demonstrating that a balanced program of recycling , waste reduction, landfill and other disposal methods will be maintained; and by not documenting the process leading to selection of subject property as the best site for a Garbage Burner."

The Salem Area Comprehensive Plan General Development Policy 11 states:

> "The disposal of solid wastes shall be accomplished with a minimal negative impact on the land, air and water resources of the region. A balance program of recycling, waste reduction, conventional landfill disposal and other methods shall be encouraged. The City and Counties shall participate cooperatively in the planning for a new landfill site and related solid waste operations. Site selection for new landfill operations, or to expand existing facilities, should make use of the latest locational methodologies and maximize citizen participation during the entire planning process." (Emphasis added).

Petitioners believe this policy requires the county (1) to demonstrate that permitting the proposed facility is consistent with maintaining a balanced program of recycling, waste reduction, landfill disposal and other methods of solid waste

disposal; and (2) to document the process used in selecting the subject property as the best site for a Marion County solid waste burning facility, including setting out the criteria used, reasons for using them, specific alternative sites considered, the result of applying the criteria to the different sites, and an explanation of why the subject property was chosen.

With regard to their first assertion, petitioners allege that the proposed facility is planned to handle 100 percent of the volume of waste currently generated by the county. As a result, they claim the finding that recycling will not result in net reduction in the waste load necessary to efficiently operate the proposed facility is not supported by substantial evidence. Petitioners argue the record shows that large reductions in waste volume can be obtained through an intensive recycling effort and that the facility as proposed will result in discouraging recycling and waste reduction.

Respondents reply that Policy 11 contains no specific mandates, rather it is a generalized statement of direction as to how to proceed with solid waste management. Respondents argue since there are no mandates involved in this portion of the policy, there can be no violation thereof. Marion County points out that it has followed the guidelines of Policy 11 and that, in fact, the entire effort put forth by the Solid Waste Advisory Committee was an effort to provide such a balanced program. Furthermore, argues respondents, state law requires recycling as part of a county solid waste program and, therefore, the fears that the county will somehow ignore the

requirement for recycling are unfounded. The county points out Marion County's ordinance envisions a transfer station as part of the proposed facility operations. That transfer station, says the county, will enhance recycling efforts by increasing the removal of non-combustible items from the waste stream. Furthermore, respondent argues that new recycling opportunities will result such as the potential of using ash produced by the facility as a road base material. Finally, the county points out that complete recycling of solid waste is accomplished because the facility converts solid waste to electrical energy.

We agree with respondent. ORS 459.015 and 459.125 et seq. require Marion County to be concerned about the recycling of materials which would otherwise be disposed of as solid waste. Specifically ORS 459.153 states:

> "It is not the intent of the Legislative Assembly that Marion County, under ORS 459.125 and 459.135, take any action that would hinder or discourage recycling activities in the county."

In addition, the findings in the record indicate the county weighed and is continuing to weigh a balanced solution to its waste disposal problems. There presently exists an approved land use permit for a landfill on what is known as the "I-5" site south of Salem. That approval has come before this Board and is now on appeal to the Court of Appeals. Considering the balanced program the county is adopting, the possibility of landfilling clearly remains and must be considered. In addition, the county considered the recycling concept when it evaluated the BTU value of solid waste. Each of those factors was taken into consideration in the approval of the mass burn

facility.

The second aspect of petitioners' concern regarding Policy 11 is that it requires the county demonstrate how the particular site chosen has the least negative impact on land, air and water resources. Petitioners also argue the county failed to explain or document the criteria and process it used to conclude the subject property was the best site for the facility.

Respondents reply that petitioners are misconstruing Policy 11. They point out the policy instructs that disposal of solid waste shall be accomplished with "a minimal negative impact" and not as petitioners argue the "least negative impact." In addition, respondents point out that the policy refers to landfills and not mass burning facilities. They argue that, nevertheless, alternatives were considered. These included not only alternative sites but alternative methods of disposal on those sites. All viable alternative solutions to Marion County's solid waste problems were considered by the Marion County Solid Waste Advisory Committee and the work of that committee was adopted by the county argue respondents.[5]

We once again agree with respondents. Policy 11 addresses landfills and not mass burning facilities. It also refers to accomplishing the disposal of solid waste with a "minimal impact" and not as petitioners argue, "the least impact." There is a significant difference between the analysis of minimal impact to the land and an imposition of a least impact standard. The findings reveal Marion County has determined that solid wastes will be disposed of with a minimal impact on

land, air and water resources. As an example, included in the findings are comparisons between the proposed facility and land fills as well as considerations of impact of the facility on air, water, and land. (See discussion infra).

Petitioners next argue as part of their allegations regarding Statewide Goal No. 2 that:

> "C. The decision violates SACP Growth Management Policy 8 by allowing industrial development outside of the City of Salem and county service districts, were sewer and water services are not available, without the agreement of the City of Salem."

Salem Growth Management Policy 8 states:

> "Within the urban growth boundary, residential subdivision, commercial and industrial development shall be permitted only within the county service districts or within the City of Salem where public sewer and water services are available and other urban facilities are scheduled pursuant to an adopted growth management program. Exceptions to this policy may be permitted if mutually agreed to by the city and the appropriate county." (Emphasis added)

The thrust of petitioners' argument is that the proposed facility is an industrial development outside of city and county service districts and public sewer and water service is not available. Furthermore, they claim there has been no agreement, between the city and county on how to provide such services. The county responds that this is not an industrial commercial development. It argues that the decision is not encompassed within the meaning and intent of Salem's Growth Management Policy No. 8 and that a local government's interpretation of its own ordinance must be given great weight. Here Marion County argues that it has zoned this property Public, that the proposed facility is a Community

Service Facility and, therefore, the development is not the type covered by Growth Management Policy No. 8. In the alternative the county argues that if Policy 8 were applicable the word "available" is open to interpretation and it found both sewer and water services are available.

We need not address the county's alternative argument. Its findings describe in detail how it arrived at its decision to zone this property Public (P) and why it believes such a zone is consistent with the Salem Comprehensive Plan. Specifically, the county found:

> "16. Urban Growth Policy 8 indicates that residential subdivisions, commercial and industrial development must be located within a sewer and water district or the city where public services are available or scheduled for installation in the growth management program. The proposed facility is a community service facility and, therefore, is not the type of development covered by this policy."

> "1. The proposed unit is a combined solid waste storage, incineration and electrical generation facility. Possible land use designations for the proposed use in the SACP are the Industrial and Community Services designations. The Industrial designation is characterized as suited to 'Industrial uses which place heavy demands on public facilities or cause significant impacts on the environment.' The proposed facility will increase traffic. It can provide its own water supply and waste water disposal. It will not place demands on schools, but could require fire suppression services. Although the waste-to-energy facility will involve air emissions sufficient technology exists to satisfy the national ambient air quality standards as exhibited by currently operating plants elsewhere in the United States.
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> * * * *
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> "The Community Services designation includes sites and facilities in both public and private ownerships such as health and medical, religious, educational, cultural, governmental, administrative, and protective services and

cemeterys [sic] (Exhibit 10). The proposed facility will be privately owned, but operated under contract to Marion County and subject to a solid waste disposal franchise. State Law (ORS 459) gives the County the responsibility of providing facilities for solid waste disposal. The current landfill is within the area covered by the Salem Area Comprehensive Plan. It is designated Community Services even though privately owned and operated under the County franchise. The City of Salem Sewage Treatment Plant, another type of solid waste disposal site, is also designated Community Services.

"The zones appropriate for lands designated Industrial allow Solid Waste Disposal Sites but do not include Power Generation Facilities. The definition of Solid Waste Disposal Site does not include Power Generation. The only zone that specifically references Solid Waste Disposal and Power Generation is the Public zone. The Public zone is the zone applied to lands designated Community Services in the Salem Area Comprehensive Plan. The County concludes that under existing zone code designations the proposed facility could not be placed on lands designated Industrial because there is no applicable industrial zone permitting the use. Use of the Community Service designation for the existing landfill and the City sewage treatment indicate that Community Services is the appropriate designation to request for the proposed use.

"2. The Community Service designation accommodates a variety of public and quasi-public uses. The public agencies or private interests that provide these facilities typically determine the suitable site independently of any ongoing comprehensive planning process. When the desire site is chosen a Plan and zone change is requested. The Comprehensive Plan only identifies as Community Service those lands that are already developed or those lands intended for a public use. No lands currently desinated Community Service meet the siting criteria for the proposed solid waste facility. Therefore, the County concludes that a request for a Plan Amendment would be necessary for any suitable site within the Urban Growth Boundary."

The county's findings adequately explain its interpretation of its plan and the Salem Comprehensive Plan which it has

adopted. We find the county properly determined Growth Management Policy No. 8 was not applicable to the decision it faced.

Petitioners finally allege in their allegation regarding Statewide Goal 2 that:

> "D. The Decision violates SACP Zone Change Process Consideration (6) in that it has not been demonstrated that adequate water, sewage treatment and storm drainage are or can be made available; and the impacts of dioxins emitted on public health have not been considered."

Process Consideration (6) requires an evaluation of the facility's impact on public health, safety and welfare. Petitioners' argument regarding the county's lack of resolution of the water supply and waste water treatment issues are basically the same arguments that they make in reference to their allegations regarding Goals 6 and 11. Therefore, discussion of those arguments will be found infra under this Board's decision regarding Statewide Goals 6 and 11.

Petitioners next argue they introduced considerable evidence regarding the possibility dioxins will be present in the facility's emissions and that dioxins have a possible negative effect on the public. Petitioners argue that the county only addressed the dioxin evidence in its findings by stating "conficting evidence was presented on the presence and significance of certain deleterious air contaminants in the stack emissions." Petitioners argue that finding is insufficient and that "[t]he County cannot simply defer all its responsibilities to DEQ, particularly when neither DEQ nor the EPA have established standards for dioxins."

The findings regarding the issue of air pollution made by Marion County include the following:

> "Air pollution is regulated by the State Department of Environmental Quality. Preliminary studies show that the air plume will not touch ground within the urban area or within 5 miles of the site. Conflicting evidence was presented on the presence and significance of certain deleterious air contaminants in the stack emissions. The County concludes that the State will establish standards adequate to protect public health and will monitor the operation for conformance. If experience shows that additional treatment is needed, they can amend the permit. * * * The county finds no evidence that the proposed facility is near enough to residences that any adverse impacts are likely." (Industrial Policy 10 Finding).
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> "The conditional use permit includes a condition that the applicant obtain all state permits including permits required by DEQ. DEQ has a separate permitting process that involves a public hearing. By State law this agency has preempted the regulatory responsibility for air quality. DEQ will set air emission standards and enforce these standards during the operation of the facility. If at any time the operator is found by DEQ to be in violation of the permit requirements, they [sic] will require that the plant be shut down the problems corrected. The P zone requires that the use comply with all DEQ environmental regulations. The technology exists to meet reasonable emissions standards. The County finds that, as conditioned, the proposed use will be in compliance with DEQ and any other state regulation that may apply." (Zone Change Review Consideration Finding 3).
>
> "Neighborhood Impacts: Means for minimizing impacts on neighboring development was one of the most important site selection criteria. The subject property was judged to have fewer impacts than other alternatives." (Zone Change Consideration #5 Finding)

The county then placed conditions on the approval granted Trans Energy. Those conditions include the following:

> "3. Prior to the issuance of any building permits, the applicant shall obtain all state and county permits, franchises, and approvals and agree to comply with any permit or franchise requirement and all local, state and federal regulations concerning all aspects of the facilities including fire protection and air emissions requirements."

Contrary to petitioners' argument, the county has addressed the issue of air pollution and deleterious air contaminants. Petitioner do not argue there was no substantial evidence to conflict with the evidence introduced by petitioners. In fact, the record reveals evidence was presented indicating there would be no adverse impact from the dioxin level projected at the proposed facility. A study made for the Environmental Protection Agency indicates currently projected emission levels are not significant enough to justify establishment of standards for regulating emissions. (Record 28-99, 3100-3109, 3110-3328). In addition, Marion County found that if necessary, DEQ will establish standards adequate to protect public health and will monitor the proposed facility for conformance with those standards. Furthermore, the county provided that if experience shows additional treatment is necessary, the air quality permit issued to the facility would be amended and enforced. Petitioners do not allege there is lack of substantial evidence to support the county's findings regarding the obligation for DEQ to assure the air quality. We believe the county sufficiently addressed petitioners' concerns and thus their allegations regarding the air quality issue are denied.

GOAL 3

Petitioners assert:

> "The decision violates Goal 2 and 3 (Agricultural Lands) by allowing an urban nonfarm use on agricultural land without considering the 'conversion' factors of Goal 3 or following the procedures and requirements of Goal 2 for goal exceptions."

We deny petitioners' allegations regarding Goal 3 and refer

the reader back to the first part of our discussion on Goal 2. Salem's Urban Growth Boundary was acknowledged containing the property in question. Once that acknowledgment took place, the subject land was no longer to be considered rural agricultural land for which a Goal 2 exception need be taken. The fact that the Salem Comprehensive Plan designated the subject property Residential is of no moment since the property nevertheless was inside the urban growth boundary. Consequently, we determine that Goal 3 and thus the "exception" portion of Goal 2 are not applicable to this decision. See Fujimoto, supra.

GOAL 5

Petitioners next argue that Marion County's decision violates Goal 5 (Open Spaces, Scenic and Historic Areas and Natural Resources). Petitioners allege Goal 5 is violated

> "by allowing a use which could negatively impact an adjacent 'cultural area' without following the conflict analysis and resolution process set out in Goal 5 and OAR 660-16-000."

Petitioners claim that the Chemawa School meets Goal 5's definition of a "cultural area." They do admit, however, that Chemawa School has not been identified in the Salem Area Comprehensive Plan or the Marion County Comprehensive Plan as a cultural resource.

Respondents reply that at no time during the acknowledgment process has anyone proposed the Chemawa School to be a cultural center. Based on that, respondents argue that petitioners should be foreclosed at this late date from raising the issue.

We agree with respondents, the Chemawa School is not identified as a cultural area in either the Salem Area

Comprehensive Plan or the Marion County Comprehensive Plan. Statewide Goal 5 provides protection only for those sites that have been identified as cultural areas. Since the Chemawa Indian School is not so identified in either "acknowledged" comprehensive plan, we find the Goal has not been violated. More importantly, since LCDC acknowledged both controlling comprehensive plans as being in compliance with Statewide Goal 5, this Board has no role to play in reviewing allegations regarding that goal. Fujimoto, supra. Petitioners' allegations regarding Goal 5 are denied.

GOAL 6

Petitioners allege:

> "The decision violates Goal 6 (Air, Water and Land Resources Quality) by changing the plan map designation to Community Service, and approving a Garbage Burner, without determining either that (1) sewer services can be timely and efficiently provided to the site, or (2) waste water disposal can be handled on-site safely."

Statewide Goal 6 provides:

> "To maintain and improve the quality of the air, water and land resources of the state.
>
> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statues, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards, and implementation plan, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources."

Petitioners' are arguing the county has neither explained how the waste water created by the proposed facility will be

disposed of on site nor addressed the potential impact the waste water may have on the ground water resource. Petitioners state:

> "There is only one conclusory [sic] statement that 'the soils on the site are suitable for on-site disposal of wastewater.' Nor [sic] is there any reference to any substantial evidence in the record supporting such a conclusion. There is evidence in the record that sewers will not be available." (Emphasis added).

Petitioners argue condition of approval 10 is leaving the decision on how Goal 6 will be met to a later date without any criteria to govern that decision. Condition of approval 10 requires the developer to submit an explanation of how wastewater disposal will be accomplished and to obtain approval of the Board of Commissioners before any building permits are issued.

We do not agree with petitioners. First of all, we know of no law, rule or standard which obligates the county to make references to substantial evidence in the record. Second, petitioners' complaint is that the county has neither determined how waste water will be disposed of on-site nor whether such disposal will cause an adverse impact on ground water. Petitioners do not, however, point to any evidence in the record indicating waste water cannot be disposed of on-site or that the waste water that is disposed of will adversely impact the ground water. Futhermore, petitioners do not argue such evidence exists. Goal 6 does not require the county to address such issues when petitioners have failed to focus testimony and evidence thereon.

The county did determine that the soil on and size of the

site are sufficient to accommodate on-site disposal. Further, the county determined that if access to sewer systems proved necessary the facility could be provided with such service. The county also found, as required by Goal 6, that the waste discharges will be monitored by DEQ to assure compliance with applicable statutes, rules and standards. What follows is a selection of county findings pertinent to the issue raised by petitioners. Petitioners do not define what they mean by "waste water." We assume they are referring to water sourced from plant operations. We have not included, for the sake of some brevity, county findings regarding surface drainage which arguably can be classed as waste water. Suffice it to say the county has found surface drainage water will be taken care of in an appropriate manner.

"Goal 6 - Water and Land Resource Quality

"By State Law the State Department of Environmental Quality is given sole responsibility for regulating air quality and waste water discharges. The DEQ has adopted strict standards and procedures to establish specific standards for unique cases, and permit authority with regard to air emissions and waste water discharges. The Salem Area Comprehensive Plan recognizes the State's preemption of this field and their expertise by establishing the DEQ standards as the applicable standard for new development. The proposed Public zone also requires conformance with DEQ environmental regulations. DEQ is aware of concerns regarding possible harmful effects of air emissions and will carefully establish special standards and enforce them through the permit process to protect public health.

"* * * Waste water discharges are not significant. The soils are suitable and there is sufficient areas for on-site disposal. If necessary the facility can be connected to the City sewer system." Findings, p. 36.

"* * * The mass burn facility uses moderate amounts of water, purifies it for boiler use and all wastewater is treated prior to discharge into an onsite subsurface disposal system.

"There is no contact between the raw solid waste and the soil. Therefore, the risk of leachate in the groundwater is eliminated and the risk of water pollution from the waste-to-energy facility is considerably less than with landfill." Findings, p. 17.

"* * * The County concludes that the proposal will either have the necessary services available because of public capital improvements projects that will be completed before the plan is operational or they will be provided as part of the development." Finding, p. 20.

"* * * The elevation of the site will be raised under the building to avoid problems with groundwater. * * * The proposed site was chosen because the groundwater supply is adequate to provide needed water supplies. The site is also suited to an on-site wastewater disposal system. Extension of City sewer and water to the site is considered an option if the cost to the project and ultimately the public are not significantly greater than on site facilities." Findings, p. 20.

"There are no creeks or other physical amenities on the site to be impacted by the construction." Findings, p. 29.

"The Northeast Salem sector plan shows a sewer line of adequate size on the Chemawa Indian School property to the southeast. It can be extended to the proposed facility if the city and the developer determine that the sewer service is necessary. Due to the limited development potential in the subject area the City is not planning to extend the sewer lines to the property so such an extension will be at the developer's expense. The soils on the site are suitable for on-site disposal of wastewater.

"The evidence indicates that two options exist for providing water, sewage treatment and disposal and that storm drainage can be accommodated on-site. The conditions of approval require that these basic services be provided and insure that the public health and safety will not be jeopardized. The development site is not within the identified floodplain so no hazard from flooding will be created." Findings, p. 30

Based on the foregoing, we conclude that the county has performed the role required of it by Goal 6. Even the guidelines in Goal 6 were addressed by the county in its findings. The county has made a relative comparison between the groundwater problems that may result from this mass burn facility and those caused by landfills. It has indicated what sewerage facilities are available or can be made available. It has addressed the concerns of waste water disposal, and the manner in which it has addressed those problems is substantially supported by the record. The record contains engineering and soil studies and has detailed the manner in which drainage will be dealt with from the property. We find no violation of Statewide Goal No. 6.

GOAL 11

Petitioners next assert that the decision of the county violates Statewide Goal 11

> "by changing the plan map designation of the site to Community Service, and approving the Garbage Burner without determining that the development will have an adequate water supply."

Statewide Goal 11 provides:

> "GOAL: To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban rural development.
>
> "Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable and rural areas to be served. A provision for key facilities shall be included in each plan. To meet current and long-range needs, a provision for solid waste disposal sites, including sites for inert waste, shall be included in each plan."

Petitioners claim that the County approved the facility without knowing how it will obtain its water supply. They argue there is no substantial evidence in the record to support the conclusion that there is enough groundwater to supply the proposed facility without adversely impacting domestic and irrigation wells drawing from the same aquifer.

We disagree, the county's findings are extensive regarding the question of the site's access to water. For instance, the county found the groundwater aquifer in the vicinity is extensive and has a recharge capacity of 300,000 gallons per minute (GPM). The county found in comparison to the 300,000 GPM recharge capability of the aquifer that the water requirements for the plant will average only 500 gallons per minute with a maximum requirement of only 1,000 gallons per minute. In addition to its findings regarding the on-site access to water, the county examined the possibility of obtaining city water at the site.

The petitioners erroneously argue that the 20 gallon per minute recharge from precipitation on the immediate site indicates there is an inadequate water supply. Petitioners do not take into account the United States Geological Service report found beginning at page 1007 of the record. They also fail to consider an underground water resources map (Record page 7793), which addresses the aquifer in-flow, out-flow and total groundwater storage capacity. Petitioners overlook the USGS report and the water resource map indicating an under-flow from the south serving the site of 2,033 gallons per minute, recharge from rainfall of 195,600 gallons per minute and

storage of 4,000,000 acre feet of water.

Notwithstanding those favorable preliminary analyses, Trans Energy Systems, Inc. is obligated to obtain a formal hydrology report to insure there will be no impact on the water resources of any other property owners. (Record 1006). In addition, if it is found to be more economical to obtain water from the City of Salem, Trans Energy Systems will pursue agreements with the city regarding extension of services. According to the record, discussions are currently underway with city officials for that purpose. The county's findings are extensive regarding the issue of extension of water lines and the availability of groundwater. Petitioners arguments regarding Goal 11 are denied.

GOAL 14

Petitioners allege

> "The decision violates Goal 14 (Urbanization) because it allows an urban use on rural agricultural land without demonstrating, based on the seven factors of Goal 14, that the land should be within the UGB."

This property is contained within an urban growth boundary which has been acknowledged by LCDC. Therefore, this Board has no role to perform in reviewing this allegation of error. Fujimoto, supra.

Based on the foregoing, we find petitioners' allegations regarding portions of Statewide Goal 2, and Goals 3, 5 and 14 are moot or at a minimum, this Board has no function to perform in reviewing those allegations, Fujimoto, supra. In response to petitioners' allegations regarding other portions of Goals 2, and Goals 6 and 11, this Board finds that the allegations

are unfounded.

SECOND ASSIGNMENT OF ERROR

The petitioners' second assignment of error has been answered in its entirety in our ruling on their Goal 2 issues supra. Therefore, their second assignment of error is denied.

THIRD ASSIGNMEMT OF ERROR

Here petitioners allege the county's order granting the requested conditional use permit and variance violates the Marion County Zoning Ordinance. Petitioners' allegations raise three issues with which this Board must deal. We will address each issue individually.

Petitioners first allege:

> "The decision violates the requirements of Marion County Zoning Ordinance (MCZO) Section 119.070(b) and 117.010 that a conditional use in the Public (P) Zone must be compatible with adjacent uses in that relevant issues regarding compatibility with adjacent farm land are not addressed in the findings."

MCZO Section 171.010 sets forth the purpose of the Public Zone as follows:

> "The purpose and intent of the P zone is to provide regulations governing the development of lands appropriate for specific public and semi-public uses and to ensure their compatibility with adjacent uses. It is intended that this zone be applied to individual parcels shown to be an appropriate location for a certain public or semi-public use.***"

MCZO Section 171.030(j) indicates that the proposed facility requires a conditional use permit to be located in a P zone. Pursuant to MCZO 119.070, in granting a conditional use permit it must be determined that the use will be in harmony with the purpose and intent of the zone in which it is being placed. Therefore, the county must have found the proposed

facility to be in harmony with the purpose and intent of the P zone, which itself requires compatibility with adjacent uses. . The adjacent uses relevant to petitioner's concerns in this case are farms. Area farmers related how even a minute fallout of ash or other particulates from the facility at the wrong time in a season could cause major harm to their crops. Petitioners claim the county's findings on the issue of "compatibility" ignore the farmers' testimony.

We do not agree with petitioners' position. While the county's findings do not specifically mention the farmers' fallout concern they do address, in fairly complete terms, the issue of air pollution and particulate air emissions. The county recognized in its findings that:

> "Conflicting evidence was presented on the presence and significance of certain deleterious air contaminates in the stack emissions. The county concludes that the state will establish standards adequate to protect the public health and will monitor the operation for conformance. If experience shows that additional treatment is needed they can amend the permit." Record p. 9857.

The county also found as we quoted above, that:

> "The conditional use permit includes a condition that the applicant obtain all state permits including permits required by DEQ. DEQ has a separate permitting process that involves a public hearing. By state law this agency has pre-empted the regulatory responsibility for air quality. DEQ will set air emission standards and enforce those standards during the operation of the facility. If at any time the operator is found by DEQ to be in violation of the permit requirements they (sic) will require that the plant be shut down and the problems corrected. The P zone requires that the use comply with all DEQ environmental regulations. Technology exists to meet reasonable emission standards. The county finds that, as conditioned, the proposed use will be in compliance with DEQ and any other state regulation that may apply." Record p. 9863.

The record contains evidence pertaining to the DEQ permit process and requirement that the facility undergo extensive testing before being allowed to operate. The DEQ permit procedure includes public hearings on both the air quality and solid waste permit issues applicable to this case. In a letter from the supervisor of the Planning and Development Section, Air Quality Division, Department of Environmental Quality, it is stated:

> "During the permit drafting process DEQ reviews environmental concerns. DEQ will require at least Best Available Control Technology (BACT) on the project for air pollution control, if it proceeds.
>
> "The applicant will be required to do extensive computer modeling of the airshed that will determine if and where ambient air quality standards might be violated. These computer models have large safety factors built into them to make certain they will perdict the worst possible air pollution situations. If the modeling predicts potential local impacts, control techniques more restrictive than BACT would be required before plant start-up.
>
> "DEQ will require continuous monitoring of furnace conditions such as temperature and air flow.
>
> "DEQ will require continuous pollution monitoring in the stack." Record 7904.

The findings indicate the air quality will be strictly mentioned by DEQ. The fact there is a public hearing process which will allow input by harmed or potentially harmed individuals furthers the protections built into the process of permit granting and monitoring. We believe the county properly applied its conditional use permit standards and built into the approval the protections necessary to assure petitioners' concerns will be dealt with appropriately. We find no error.

Petitioners next assert:

"The decision violates the requirements of MCZO Section 120.310 to 120.380 for obtaining a conditional use permit for a solid waste disposal site."

The ordinance sections cited govern applications for solid waste disposal sites which by definition include "dumps, landfills, sanitary landfills, incinerators and composting plants ****" (Emphasis added). Petitioners claim Marion County approved the conditional use permit without requiring the applicant to submit an accurate plot plan showing location of the proposed structure, roads and topography; a plan for rehabilitation and use of the site; a copy of a filed application for a solid waste franchise; and the agreement required by MCZO Section 120.380.[6] We find otherwise.

The record, which consists of over 10,000 pages of material, gives one a clear understanding of where this plant will be located and the streets that serve it. The record includes materials which serve the purpose of a plot plan by showing location of the proposed structures, roads and topography although it apparently does not have those matters specifically set forth in detail or we have not been pointed to them by respondent. After reviewing the record one easily gains an understanding of what the proposed structures will look like even though apparently no specific proposal yet exists to indicate where on the lot those structures will be erected. There is a soil study and a geological study of the area which illustrates the topography.

The plan for rehabilitation and use of this site is certainly clear from the record even though there may not be an item specifically labeled as such. The requirement of a

rehabilitation plan is more applicable to landfills than the permanent incineration facility proposed by the applicant in this case.

With regard to the solid waste franchise application, the county in its brief states that while the application itself was not included in the record, all the facts necessary for the solid waste franchise application were included as part of the request for proposal (RFP) and response to the RFP filed by Trans-Energy Systems, Inc., pointing to record pages 6032 to 6058 and 6288 to 6356. In as much as the petitioners do not specify how the information contained in the RFP and response to the RFP fails to meet the francise application requirements, we will not attempt to further evaluate their claim. As for the "agreement required by MCZO 120.380," that agreement deals with access to the facility and appears to be designed primarily for a sanitary landfill application. Furthermore, Marion County claims in its brief to be the contract purchaser and has assigned the right of access governed by Section 120.380 to TransEnergy Systems, Inc. Petitioners did not contest those claims. Given the financing structure planned for construction of the facility respondent's claim is logical.

Given the extensive record, we are not sure petitioners' claim here is not merely one of procedural irregularities. To the extent petitioners are claiming the application was not in the required form, we must point out that this Board is governed by Oregon Laws 1979, ch 772, sec 5, sub 4(a)(B), as amended by Oregon Laws 1981, ch 748. That section provides LUBA shall reverse or remand a land use decision under review

only if we find the county to have "failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." There is no allegation by petitioners that they have been prejudiced. Considering the type of facility being proposed here and the enormous size of the record it is hard to conceive how petitioners could have been prejudiced by any failure to follow the subject portions of the Marion County Zoning Ordinance at this stage. The alleged failures pointed to by petitioners all go to information necessary for the county to act on the application, and that information is in the record in one form or another. We see no error.

Petitioners' third allegation under this assignment of error is:

> "A decision to approve a variance to the height requirement of the zone violates MCZO 122.020(a) and (d)."

Petitioners' concern here relates to the fact the proposed structure exceeds the 70 foot height limitation in a P zone. They argue a variance requirement has not been satisfied which requires a showing that

> "[t]here are unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the literal requirements of the ordinance."

The county made findings addressing the various aspects of the Marion County Zoning Ordinance governing variances. In reference to the requirement that unnecessary, unreasonable hardships or practical difficulties be shown the county stated:

> "TransEnergy under contract to Marion County, proposes to provide and operate a waste incineration and power generation facility serving Marion County. There is

no zone in the Marion County Zoning Ordinance that permits a building higher than 70 feet without a variance. This limitation is necessary to ensure that occupied buildings can be protected from fire. But it does not mean that no buildings over 70 feet can be permitted. If adequate fire protection can be provided and there are no other problems created by a higher building, then a variance would be appropriate. The proposed facility will be designed to meet the fire protection standards prescribed by Marion County Fire District #1. They indicate no objection to the height variance."

"Marion County and the City of Salem have recognized the need to accommodate solid waste disposal site and power generation facilities. The possibility that a particular process would require a building greater than 70 feet in height was not anticipated. In this case the proposed facility cannot be developed anywhere in the urban area if a variance is not possible. Such a limit was not intended and cannot be interpreted as an invariable limit preventing implementation of the solid waste system chosen by the County as a means of meeting its lawful responsibility to provide solid waste disposal facilities.

"The developer has no alternative to requesting this variance. The proposed facility is designed to meet all solid waste disposal requirements, year-round for an extended period of time. The county generates approximately 145,000 tons of waste each year. An energy recovery facility capable of handling the county's current and projected waste stream must be 103' in height. The necessity for this height is directly related to established County needs. Enginering technology does not currently exist to create a facility within the 70 foot County height limitation and still dispose of the County' volume of waste. Engineering requirements set the size of the building, as well as its grade placement.

"It is our conclusion that the County enjoys a unique and substantial property right based on its legal responsibility to provide for solid waste disposal; that granting a variance of 33 feet (103 feet where 70 feet is the limit) is necessary for the preservation and enjoyment of the County's right and responsibilities; and that granting this variance will not violate any other provisions of Marion County's land use regulations."

The singular nature of the facility and the unique combination of equipment which must be accommodated in the building create conditions and circumstances that would allow approval of the variance without creating

> a precedent which could be generally applied to other uses in the public zone. Through the franchising process Marion County can limit development of similar facilities."

Petitioners do not allege these findings are not supported by substantial evidence.

Petitioners' argument apparently relies on the consistently held interpretation of "practical difficulties or necessary hardships" as being the equivalent of circumstances that render the property useless without a variance. Erickson v City of Portland, 9 Or App 256, 496 P2d 726 (1972); Moore v Board of Clackamas County Commissioners, 35 Or App 39, 580 P2d 583 (1978); Beinz v City of Dayton, 29 Or App 761, 566 P2d 904 (1977); 3 Anderson, American Law of Zoning, Sec 18.51, (2 Ed 1977). In this case, the county has made no statement that the property may not be put to a profitable use without the variance. However, we believe that the "unncessary hardship or practical difficulty" standard as it applies to public service facilities, for which there has been a clear showing of public need, must be interpreted differently than when applied to strictly private uses. Such an interpretation is not without support. The county views the use to be "singularly important to the community." 3 Anderson, supra, sec 18.81. The petitioners do not challenge the importance of the use. As Anderson explains:

> "A commercial non-conforming user who needs parking facilities cannot satisfy the requirement for a use variance to permit commercial parking without proving that the proposed site will not yield a reasonable return for a conforming use, that the difficulty is caused by unique circumstances, and that the use will

not materially alter the neighborhood. No such burden is usually imposed upon a hospital.***

"This example of special consideration of uses considered essential to the welfare of the community can be multipled in cases which involve schools, churches, public utilities, medical facilities, apartments, off-street parking, truck garage and miscellaneous charitable uses." 3 Anderson supra.

It is our view the traditional interpretation of the hardship criteria simply does not apply to a problem which prompts a public utility or a public facility, such as the one at issue, to seek a variance. The land here may be quite suitable for some purpose consistent with the zoning regulations, but the county has found (and the petitioners have not challenged) that the particular height of this building is required to allow the effective, efficient and economic operation of the facility. We believe, therefore, that where, as here, the public body has shown a public necessity for the particular use or facility, the unnecessary hardship or practical difficulties standard does not mean "no profitable use," but rather means that there is no other way to achieve a necessary public purpose. See generally, 2 Anderson, supra, at sec 1231; Consolidated Edison Company v Hoffman, 43 New York 2d 598, 403 New York 2d 193, 374 NE 2d 105 (1978). We also recognize that, as found by the county, apparently there is no county zone which would allow the proposed facility without a similar variance. The maximum height limitation in all zones is 70 feet.

Petitioners also have argued that since the property owners are the Biggins and since the benefit from the proposed development goes to Trans-Energy Systems, Inc. and Marion

County, there has been no showing that the variance is necessary for the preservation and enjoyment of a substantial right of the property owner. Petitioners claim that the Biggins filed the subject application only under a threat of condemnation.

We are aware of no evidence of duress accompanying this application. Additionally, we do not agree that the standard of "substantial right" to a property owner is applicable in this case. The refuse incineration and electric generation plant benefits the citizens of the county generally. The owner of the property is not applying for the variance to secure a property right or to make beneficial use of his property. The standard simply does not apply where the benefit from the variance goes to the public.[7]

Affirmed.

REYNOLDS, Dissenting

I fear the majority has gone beyond interpreting Marion County's variance ordinance and has, in fact, legislated an exception to the variance requirements. The county's variance ordinance neither expressly nor, in my judgment, by implication, makes an exception for public uses of the type involved in this case. The use proposed here must be judged by the same standards as any other use. That application of those standards to this use would result in the use not being allowed is not, in my view, reason for saying an exception should be read into the variance criteria. It is reason for the county to amend the variance criteria or amend the height limitation in the P zone.

I believe the county's findings do not satisfy the requirement that there be "unnecessary, unreasonable hardships or practical difficulties which can only be relieved only by modifying the literal requirements of the ordinance." This language has been interpreted in Oregon that without the variance the property could be put to virtually no benefical use. Marion County does not, in its ordinance, supply a definition of "unnecessary hardship," "unreasonable hardship," or "practical difficulties." In the absence of its own definitions for these terms, I believe the county's ordinance must be interpreted in a light consistent with the interpretation given to those terms by Oregon case law. See also: Standard Supply v City of Portland, 1 Or LUBA 259 (1980). The property involved in this case is good farm land and is located within the City of Salem urban growth boundary.

It is capable of being put to numerous uses other than the one authorized by the county in this case. That the owner cannot use the property for a use it desires does not mean the property is virtually useless without the variance.

I also do not believe a second requirement in the county's variance ordinance has been met. That requirement is that the variance be "necessary for the preservation and enjoyment of the substantial rights of the petitioner." As previously mentioned, the property is capable of many uses other than the one approved by the county's decision in this case. There has been no showing by the county that the variance is needed for the preservation and enjoyment of a substantial right.

For the foregoing reasons, I would hold that Marion County failed to properly apply its zoning ordinance as it relates to the granting of a variance. Accordingly, I respectfully dissent from the majority's affirmance of Marion County's decision granting a variance in this case.

FOOTNOTES

1

Respondents do not challenge the school board's claim that it has its "own interests" or the school board's authority to represent its "own interests" through private counsel. We do not, therefore, reach the issue of whether the school board can have as a matter of law or does have as a matter of fact its "own interests" which it can seek to protect by participating in this appeal. We merely accept as true the school board's assertion for purposes of standing because the assertion is not disputed.

2

While the matter before this Board was pending, petitioners requested from LCDC orders staying the acknowledgments of both the City of Salem's and Marion County's Comprehensive Plans. The petitioners had requested either a stay of the entire acknowledgment order for the City of Salem or a partial stay relative to the subject property and the Chemawa Indian School grounds pending a decision in this matter by this Board. The LCDC denied petitioners' motions for stay by orders dated August 23, 1982.

3

On April 15, 1980, the Land Conservation and Development Commission (LCDC) issued a continuance order in the matter of the Salem Urban Area Comprehensive Plan and Implementing Measures. The City of Salem, Marion County and Polk County had requested acknowledgment of the Salem Urban Area Comprehensive Plan. The Commission ruled among other things that the Salem Urban Area Comprehensive Plan as existing at that time complied with Statewide Planning Goals 1, 8, 11 and 13, but found that a plan did not comply with Goals 2, 5 through 7, 9, 10, 14 and 15.

Again on October 29, 1981, the City of Salem requested LCDC to acknowledge its comprehensive plan and implementing measures. The Commission, on November 24, 1981, in a continuance order stated that the City of Salem's Comprehensive Plan and Implementing Measures complied with Statewide Planning Goals 1, 6 through 8 and 10 through 13. The Commission also held that Goals 3, 4, 16 through 19, did not apply in the City of Salem. The commission found, however, that the Salem Comprehensive Plan, as then existing, did not comply with Goals 2, 5, 9, 14 and 15.

4

The LCDC final order of August 23, 1982, addressing petitioners' request for a stay of Salem's acknowledgment order states, in pertinent part:

"5. The issue of whether Marion County properly applied Statewide Goals to the unacknowledged

Salem Area Comprehensive Plan is presently pending before LUBA.

"6. This is a quasi-judicial action and LUBA will be required to file a recommended opinion with LCDC for review of Marion County's application of Statewide Goals."

5

In July, 1981, the Solid Waste Advisory Committee (SWAC) for Marion County submitted its recommendations for a long-term comprehensive solid waste management program for Marion County. SWAC, made up of over 200 citizen members was established by the county and conducted an extensive solid waste planning effort from 1979 to 1981. The committee report recommended that an energy recovery process be pursued and listed the committee's preferences for different types of energy recovery. One of the SWAC preferences (second preference) was a mass burn facility such as that proposed by Respondent Trans Energy Systems, Inc. Other alternative solutions to the county's refuse problem, which was being brought to a head with the closure of its main solid waste disposal, site by DEQ order, in July, 1983 were considered.

6

MCZO Section 120.380 provides:

"(a) The Governing Body finds and declares that a properly established, maintained, operated, and rehabilitated solid waste disposal site is a utility facility necessary for public ssrvice and, as such, is a valuable asset in improving environmental quality of the County. The Board further finds and declares that an improperly established, operated, maintained, or rehabilitated site may become a public or private nuisance, produce a condition of unsightliness, establish a health hazard or otherwise create a condition detrimental to the environmental quality of the area and of the County. To implement these findings, the Governing Body further finds and declares that it is necessary and appropriate to require agreements from the landowners who apply for a conditional use permit the agreements required by this remedy to reimburse costs of the County incurred in enforcement of Section 120.310 to 120.380 is, upon failure of the landowner or franchise holder to pay such costs, the imposition of lien against the premises.

Section and further finds and declares that the appropriate

"(b) On forms issued by the Planning Department, the landowner who is applying for a conditional use permit for a site pursuant to Section 120.310 to 120.380 and the holder of any franchise to

danger to the public though the creation of a health hazard or a public or private nuisance. After required notice, the Governing Body may hold a public hearing at which all interested persons shall have the right to be heard. After such public hearing and on the basis thereof, the Governing Body shall gave the power to order appropriate county agencies to correct the deficiencies in the establishment, maintenance or operation of the site, or to make the required rehabilitation and restoration.

"(e) The costs incurred by the County in carrying out subsection (d) of this section shall be paid by the landowner or the franchise holder or both. If not paid, the Governing Body may order appropriate action to be taken to impose a lien upon the subject premises.

"(f) The Commission or Hearings Officer may order the filing in the County Deed Records of the conditional use permit including the agreements executed pursuant to this section as a recorded encumbrance on the real property to assure compliance with the conditions and agreements."

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[7] We are mindful that Trans-Energy Systems, Inc. is also a beneficiary of the variance to the extent that it might hope to make a profit on the operation of the plant. Nonetheless, we believe that the fact that a private company is going to be running a facility owned by the county which fills a demonstrated public need and will benefit the citizens of the community generally does not mean that somehow a public purpose is transformed into a purely private purpose thus bringing into effect the "substantial property right" standard.

No evidence of any duress accompanying this application is in the record. Furthermore, we do not agree, given the posture of this case, that this standard is only applicable to the Biggins' interest. The proposal is to build a mass burning refuse incineration and electric generation plant to benefit the citizens of Marion County. As can be seen from the county's findings above, it dealt with the application as if its and Trans-Energy's rights were those being preserved. Again petitioners do not attack the findings for lack of substantial support in the record and we find no error on the part of the county.