BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WALLACE SHAFFER, Petitioner, vs. JACKSON COUNTY, Respondent, and EVER READY CONSTRUCTION CO. and JAMES C. MILLER, III, Intervenors-Respondent.	LUBA No. 89-015 FINAL OPINION AND ORDER

Appeal from Jackson County.

Max M. Miller, Jr., Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Tonkon, Torp, Galen, Marmaduke & Booth.

No appearance by respondent Jackson County.

Gregory S. Hathaway, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Garvey, Schubert & Barer.

SHERTON, Referee; HOLSTUN, Chief Referee, participated in the decision.

REMANDED 07/07/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals Jackson County Ordinance No. 89-1, which amends the Jackson County Comprehensive Plan and Zoning Map (map) designation for a 4.13 acre area from Exclusive Farm Use (EFU) to Rural Limited Industrial (RLI) to allow operation of an asphalt batch plant.

MOTION TO INTERVENE

Ever Ready Construction Co. and James C. Miller, III move to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is granted.

FACTS

A county decision to approve the subject map amendment was reviewed by LUBA in Shaffer v. Jackson County, ___ Or LUBA ___ (LUBA No. 88-029, August 11, 1988) (Shaffer I).[1] In Shaffer I, we stated:

> "The property is part of a 435 acre tax lot which in turn is part of a cattle ranch of about 4,000 acres. Record [I] 2. The property is presently used for cattle grazing and as an aggregate stockpile site. The property is approximately one and one-half miles from Dead Indian Road and is connected to Dead Indian Road by a private way.
>
> "There is a quarry located within a mile and one-half of the property, and rock from the quarry will be used by the proposed asphalt batch plant. The asphalt from the proposed plant is to be used in the Ashland and Talent areas of Jackson County." Shaffer I, slip op at 2.

In Shaffer I, we remanded the county ordinance approving the subject map designation change because the county had not

determined whether the proposed asphalt batch plant is an urban or rural use. We stated:

> "Because the county did not determine whether the proposed use is urban or rural, and because the nature of the use suggests that indeed it may be urban, we believe the county must either include the site within an urban growth boundary, take an exception to [Statewide Planning] Goal 14 [(Urbanization)] or demonstrate in its decision that the use is rural, not urban. Without such action, we are required to remand the decision. * * * " Shaffer I, slip op at 6.

The procedure followed by the board of commissioners after our remand of Shaffer I is an issue in this appeal. On September 14, 1988, the board of commissioners adopted Order No. 270-88. That order notes the basis for our remand of Shaffer I, and provides in part:

> "2.1 The Board of Commissioners concludes that, on the basis of evidence already received, it will consider adoption of findings in support of the concept that the batch plant is a rural use, and will consider amending its land use action document to adopt such findings. No further hearing shall be held, but the Board will consider such briefs as the parties may elect to submit within ten days.
>
> "2.2 The Board of Commissioners hereby orders that parties be afforded an opportunity to supply briefs providing their opinions and proposing findings on the matter within ten days * * *. The Board further directs the Planning Director to provide proposed written findings on the issue and to submit the same to the Board * * *." Record 89.

Petitioner and intervenor Miller submitted briefs to the board of commissioners. In his brief, petitioner requested that the board of commissioners open the record to accept evidence on the issue of whether the proposed batch plant is a rural or urban use. Record II 79. On February 2, 1989, the

board of commissioners held a public hearing to consider adoption of the ordinance challenged in this appeal. The notice of the hearing stated that "the record in this matter is closed to all matters other than arguments based on evidence already in the record on the issue of whether the proposed use is urban or rural." Record II 68. The proposed ordinance was adopted by the board of commissioners on February 15, 1989. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"The Proposed Asphalt Batch Plant Is Not A Rural Use."

The parties disgaree on (1) the scope of our review of the county's determination that the proposed asphalt batch plant is a rural use, (2) the inherent urban or rural nature of the proposed plant, and (3) the adequacy of the county's findings to support its determination that the proposed plant is rural. We address each of these issues separately below.

A. Scope of LUBA Review

Petitioner argues that whether the proposed asphalt batch plant is a rural use or an urban use is a purely legal determination and, therefore, LUBA owes no deference to the county's interpretation of what constitutes an urban or rural use. Hammack & Associates, Inc. v. Washington County, 89 Or App 40, 45, 747 P2d 373 (1987). Petitioner maintains that the Land Conservation and Development Commission (LCDC) and LUBA "have the responsibility for evaluating the term 'urban use,'" citing 1000 Friends of Oregon v. LCDC (Curry County),

301 Or 447, 507, 724 P2d 268 (1986) (Curry County). Petition for Review 7.

Intervenors argue that LUBA's scope of review in this case is limited to whether the county "properly exercised its discretion in reaching the factual determination that the proposed use is rural in nature." Intervenors' Brief 10. Intervenors point out that in Shaffer I, slip op at 4, LUBA directed the county to "determine the intensity or nature of the [proposed] use." According to intervenors, LUBA must affirm the county's determination that the proposed use is rural in nature so long as the county correctly evaluated the relevant facts and based its decision on substantial evidence in the whole record. Intervenors contend that LUBA cannot substitute its judgment for that of the county as to the nature of the proposed use.

In Curry County, 301 Or at 502, the Oregon Supreme Court held that any decision which allows "urban use" of rural land must comply with Goal 14 by including such land within an urban growth boundary (UGB) or must take an exception to Goal 14. The court also stated that it considered the interpretation of the term "urban use" to be primarily the job of LCDC:

> "* * * We reiterate that the interpretation of 'urban uses' is primarily for LCDC, subject to judicial review only for consistency with the statutes authorizing LCDC to adopt the goals and with the policies of the goals themselves. LCDC, however, must develop some interpretation of 'urban uses,' either by formulating a general definition or by elaborating the meaning ad hoc from case to case. LCDC may even choose to address that issue * * * by amending the

> goals, guidelines, or definitions in accordance with ORS 197.235 to 197.245, or by promulgating new or amended administrative rules, in accordance with ORS chapter 197 and ORS 183.325 to 183.410." Curry County, 301 Or at 521-522.

However, at this time, LCDC has not adopted goal amendments or administrative rules defining the terms "urban use" and "rural use" or providing standards for determining whether a specific use is urban or rural. Therefore, our review of local government determinations on whether a use is urban or rural proceeds on a case by case basis, under relevant opinions by this Board and by the appellate courts. Washington County Farm Bureau v. Washington County, ___ Or LUBA ___ (LUBA Nos. 88-104 and 88-105, June 21, 1989), slip op 12. Under the Supreme Court's decision in Curry County, 301 Or at 507, it may well be there is nothing inherently rural or urban about residential, commercial, industrial or other types of uses.[2] Rather, there are merely a number of relevant factors to be considered, such as parcel size, intensity of use, necessity for urban facilities and proximity to a UGB. Hammack & Associates, Inc. v. Washington County, ___ Or LUBA ___ (LUBA No. 87-037, September 11, 1987), slip op 35, n 6, aff'd 89 Or App 40 (1987).

In reviewing local government determinations of whether a particular use is urban or rural, we are bound by any finding of fact adopted by the local government addressing such relevant factors which is supported by substantial evidence in the whole record. ORS 197.830(11)(c). However, we are not

bound in any way by the legal conclusion concerning the urban or rural character of a particular use which a local government draws from such facts. "The meaning of Goal 14 is a question of state law, and no deference is owed to a county's interpretation." Hammack & Associates, Inc. v. Washington County, 89 Or App at 45.

B. The Proposed Use is Inherently Urban

Petitioner asserts there is no question that an asphalt batch plant is an industrial use. Petitioner argues that under both state law and the county plan, industrial uses are deemed urban uses, and must be sited within UGBs absent an exception to Goal 14. According to petitioner, the county plan recognizes that industrial uses are urban and should occur within UGBs, as this Board stated in Shaffer I, slip op at 5. Petitioner further contends that both this Board and the Court of Appeals have found that industrial uses are inherently urban uses which should be located within UGBs, citing 1000 Friends of Oregon v. LCDC (Umatilla Co.), 85 Or App 88, 92, 735 P2d 1295, modified 86 Or App 364, 738 P2d 1392 (1987); Schultz v. Yamhill County, 15 Or LUBA 87, 97 (1986).

Petitioner also argues that decisions by LCDC and this Board concerning commercial uses demonstrate that even if an asphalt batch plant is not an inherently urban use, the specific batch plant proposed in this case is urban. Petitioner cites the following cases in which commercial uses were found to be urban: City of Sandy v. Clackamas County,

3 LCDC 139 (1980) (90,000 square foot shopping center); City of Ashland v. Jackson County, 2 Or LUBA 378 (1981) (56 acre "interchange commercial" zone); Allm v. Polk County, 13 Or LUBA 237 (1985) (office building/warehouse complex); Hammack & Associates, Inc. v. Washington County, supra, (performing arts center). A contrary conclusion was reached in Conarow v. Coos County, 2 Or LUBA 190 (1981) (2,500 square foot grocery store), where the proposed commercial use was held to be rural. According to petitioner, the distinguishing factor in these cases was whether the use "is appropriate for, but limited to, the needs and requirements of the rural uses to be served." Conarow v. Coos County, 2 Or LUBA at 193. Petitioner argues because the proposed asphalt batch plant is planned to serve urban markets, it is not limited to meeting the requirements of the rural area and, therefore, is an urban use.

Intervenors respond that LUBA's decision in Shaffer I is inconsistent with the argument that all industrial uses are inherently urban. Intervenors reason that had LUBA determined that all industrial uses are urban, it would not have remanded the county's decision in Shaffer I for the county to determine whether the proposed batch plant is urban or rural. Intervenors argue that LUBA also recognized in Loos v. Columbia County, ___ Or LUBA ___ (LUBA No. 87-103, April 13, 1988) and Hammack & Associates, Inc. v. Washington County, supra, that there is nothing inherently urban or rural about industrial uses, but rather that such a determination must be made on a

case by case basis.

Intervenors also argue that the fact the products of an industrial use are used in urban areas is not a sufficient reason for terming that industrial use urban. Intervenors point out that farm products are generally used in urban areas, but that does not make farm uses urban.

As we noted in Shaffer I, the county plan's findings on industrial land uses include a statement that "most industrial development is considered to be urban in nature, and should therefore, only occur within existing cities or urban growth boundaries." (Emphasis added.) Plan p. 518. This finding does not say that the county deems every industrial use to be urban, and does not preclude the county from concluding that a particular industrial use is rural in nature.[3]

In early LUBA opinions concerning exceptions to Goals 3 (Agricultural Lands) and 4 (Forest Lands) to allow industrial uses on rural resource land, there are general statements to the effect that industrial uses should be located on lands within UGBs. See Wright v. Marion County, 1 Or LUBA 164, 170 (1980); Eugene v. Lane County, 2 Or LUBA 330, 334-335 (1981). These cases were decided at a time when it was not generally recognized that Goal 14 itself prohibits urban use of rural lands, regardless of whether such rural lands are resource lands subject to Goals 3 or 4. This approach was followed in Schultz v. Yamhill County, 15 Or LUBA 87, 97 (1986), where we stated that under Goal 14 "nonfarm and nonforest related

industrial uses are to be located inside urban growth boundaries."

However, in Curry County, the Supreme Court remanded LCDC's order acknowledging the county's plan and land use regulations so LCDC could determine whether the Goal 3 and 4 "exception areas" designated for rural, commercial or industrial use would allow urban uses of rural land and, therefore, violate Goal 14. The court pointed out that neither the county nor LCDC discussed whether the commercial and industrial uses proposed by the county's plan outside UGBs are "urban." Curry County, 301 Or at 507. The court also said:

> "Because LCDC did not do the analysis necessary to determine whether the county's plan would allow the conversion of 'rural land' to 'urban uses,' neither the Court of Appeals nor this court could be in a position to decide whether the county should have taken exceptions to Goal 14." Curry County, 301 Or at 511.

Curry County reflects a position by the Supreme Court that there is nothing inherently "urban" or "rural" about residential, commercial or even industrial uses, and that it is primarily the responsibility of LCDC to interpret what the terms "urban use" and "rural use" mean. In our decisions subsequent to Curry County,[4] we have consistently taken the position that, in the absence of interpretive rules or goal amendments adopted by LCDC, whether a residential, commercial, industrial or other type of use is "urban" or "rural" requires a case by case determination, based on relevant factors identified in various opinions by this Board and the courts.

Grindstaff v. Curry County, 15 Or LUBA 100, 112-113 (1986) (residential use); Hammack & Associates, Inc. v. Washington County, supra (commercial use); Loos v. Columbia County, supra (industrial use); Shaffer I, supra (industrial use); Washington County Farm Bureau v. Washington County, supra (transportation use). Thus, we do not agree with petitioner that an industrial use is per se an urban use.[5]

The additional factor claimed by petitioner to be determinative of urban use status, i.e., not being limited to serving the needs and requirements of the rural area, is derived solely from our opinions concerning the urban/rural nature of commercial uses. This factor might be significant, or even determinative, in deciding whether a commercial use is urban or rural. However, this factor need not have the same relevance with regard to other types of uses.[6] We agree with intervenors that if this factor were determinative for all types of uses, most farm uses would be urban. With regard to industrial uses, we find the fact that the product of an industrial use will be used in urban areas is relevant to a determination of whether that industrial use is urban, but it is not conclusive.

This subassignment of error is denied.

C. The County's Findings Do Not Support Its Conclusion

Petitioner argues that nine findings specifically adopted by the county to address the issue of whether the proposed asphalt batch plant is an urban or rural use do not support a

conclusion that the proposed use is rural.

Intervenors defend each of the findings challenged by petitioner. Intervenors also argue that, because no single factor is determinative of whether a particular use is urban or rural, even if LUBA sustains petitioner's challenges to particular findings, LUBA must in any case determine whether the findings which survive petitioner's challenges are adequate to support a conclusion that the proposed use is rural.

We first consider petitioner's individual challenges to nine of the county's findings. We next determine whether there are other county findings which are relevant to deciding whether the proposed use is urban or rural. Finally, we determine whether the findings which survive petitioner's challenges, and any other relevant county findings, support a determination that the proposed asphalt batch plant is either an urban or rural use.

1. Finding 2.8.A

The county's finding states:

> "The existence of the Rural Limited Industrial Zone, adopted in compliance with OAR 660-04-022(3), recognizes all industrial uses are not necessarily urban in nature." Record II 13.

Petitioner argues that this finding misconstrues OAR 660-04-022(3), the RLI zone and the definition of "urban use." According to petitioner, OAR 660-04-022(3) sets out bases for exceptions to the requirement that industrial uses be sited within UGBs. According to petitioner, the fact that this

rule, and the RLI zone, allow for certain industrial uses to be sited in rural areas does not mean that those uses are "rural," or that they can be sited in a rural area without an exception to Goal 14.

Intervenors respond that petitioner's challenge to this finding is based on his mistaken belief that industrial uses are inherently urban. Intervenors maintain this finding simply represents a recognition that the county plan and RLI zone recognize the existence of rural industrial uses.

Under the previous subassignment of error, we rejected petitioner's contentions that neither the county plan nor the goals recognize the possibility of industrial uses which are rural in nature. Thus, we agree with intervenors that this finding simply is a recognition that, under the plan and RLI zone, it is possible for an industrial use to be deemed rural in nature. However, such recognition is irrelevant to a determination of whether a particular industrial use is urban or rural in nature and, therefore, is irrelevant to a conclusion that the proposed asphalt batch plant is rural.

2. Finding 2.8.B

The county's finding states:

> "There is no need for the provision or extension of even a minimum level of public or municipal services, including water or sewer, to support the proposed facility." Record II 13.

Petitioner concedes that "whether or not a use requires urban services obviously bears on whether a use is urban."

Petition for Review 12. However, petitioner argues that the fact that an industrial use will not require urban services does not render it rural. On that basis, petitioner maintains that the above-quoted finding does not support the conclusion that the proposed use is rural.

There is no dispute that whether or not a use requires urban services is a relevant, but not determinative, factor in deciding whether a use is urban or rural. See Curry County, 301 Or at 505; Hammack & Associates, Inc. v. Washington County, slip op at 35, n 6; Shaffer I, slip op at 10, n 1; but see Conarow v. Coos County, 2 Or LUBA at 193 (rural uses must require "no or hardly any public services"). Accordingly, it is clear that the above-quoted finding is relevant to whether the proposed use is urban or rural. Petitioner does not challenge the evidentiary support for this finding. Therefore, we are bound by the facts found, and will consider this finding in determining whether the proposed asphalt batch plant is an urban or rural use.

3. Finding 2.8.C

The county's finding states:

> "Operation of the proposed use will require only 3 employees at any one time." Record II 13.

Petitioner argues this finding is irrelevant because the number of employees necessary to operate the proposed use is not indicative of whether a use is urban or rural. Petitioner asserts that many farming operations are labor intensive while

many urban uses are not. Petitioner contends that certain uses likely to be considered urban, such as placing three or more residences on the subject 4.13 acres, do not involve a large number of people.

Petitioner further argues that the challenged finding is not supported by evidence in the record. According to petitioner, the original application, which proposed both concrete and asphalt batch plants, indicated a need for 10 full-time and 15-20 seasonal employees. Record I 259. Petitioner maintains that after the concrete plant was dropped from the applicant's proposal, no additional evidence was submitted concerning the number of employees required by the asphalt plant alone.

Intervenors argue that we recognized in Shaffer I that the number of employees required to operate the proposed asphalt plant is relevant to whether the use is urban or rural. Intervenors further argue that the number of employees relates to the nature and intensity of a use because it can affect the services required by the use.

Intervenors agree that the record of the county's proceeding in Shaffer I shows only that the combined concrete and asphalt batch plants would have required ten full-time employees and 15-20 seasonal employees. However, intervenors assert that in argument on remand, the applicant stated that the asphalt plant alone would require only three full-time employees. Record II 83. Intervenors maintain that, in any

case, the evidence in the record supports a finding that the proposed use will require less than ten full-time employees, i.e., few employees.

In Shaffer I, slip op at 4, we stated that number of employees is information relevant to determining the intensity or nature of a use. We also agree with intervenors that the number of employees is relevant to the services required by the use. Both the intensity of a use and the services required by a use are relevant in determining whether the use is urban or rural. Hammack & Associates v. Washington County, supra; Loos v. Columbia County, slip op at 21; Washington County Farm Bureau v. Washington County, slip op at 32, n 12. We, therefore, conclude that number of employees is relevant to determining whether a use is urban or rural.

However, we agree with petitioner that the challenged finding on the number of employees required by the asphalt plant is not supported by substantial evidence in the record. The statement in the original application, cited by both parties, supports only a finding concerning the employment at a combined concrete and asphalt batch plant operation. The document in the county's record on remand to which we are cited by intervenors states that there will be only three employees at the proposed asphalt batch plant at any one time. Record II 83. However, this document is not evidence, but rather is a memorandum of legal argument in support of a determination that the proposed use is rural.[7] We are cited

to no evidence in the record supporting the challenged finding.[8]

Because the challenged finding is not supported by substantial evidence in the record, we will not consider it in determining whether the proposed use is urban or rural.

4. Finding 2.8.D

The county's finding states:

> "Operation of the proposed use will be in conjunction with and significantly dependent upon other rural activity being carried out or upon the subject property, namely, rock quarrying." Record II 13.

Petitioner argues this finding is relevant to the justification for an exception to Goal 14 to allow the proposed urban use outside a UGB, but does not support a conclusion that the proposed use is rural. According to petitioner, many industries are resource dependent to some extent, but that does not make them rural. Petitioner also asserts that the existing quarry and stockpile operation are conditional uses and, therefore, should not be used to support increased development of the site.

Petitioner also argues that the finding that the proposed use is "significantly dependent" on the quarrying operation conducted on the same property is not supported by the record. According to petitioner, the record does not support the required finding that the proposed asphalt plant needs to be near the existing quarry in order to be economically viable. Petitioner argues that a location within the Ashland UGB would

be at least as convenient to market areas. Furthermore, even though siting the asphalt plant within the Ashland UGB would necessitate hauling aggregate and other materials to the UGB, petitioner points out that the approved site requires hauling aggregate 1 1/2 miles from the existing quarry to the site. Petitioner notes other materials necessary for producing asphalt similarly must be hauled to the approved site.

Intervenors contend LUBA previously stated that the fact a proposed industrial activity is significantly dependent on a unique site specific resource is evidence that the proposed use is rural, citing Eugene v. Lane County, 2 Or LUBA 330 (1981). Intervenors also argue that significant dependence on a site specific resource is relevant to the "operating characteristics" and the "intensity and nature of the use," which LUBA found relevant to a determination of whether a proposed use is urban or rural in Shaffer I, slip op at 4.

Intervenors also argue that there is substantial evidence in the record that "the proposed asphalt batch plant is dependent upon the natural resource from which the asphalt will be processed." Intervenors' Brief 15-16. Intervenors cite portions of their memorandum on remand, the county staff report[9] and the application for the plan and zone change.

In Eugene v. Lane County, 2 Or LUBA at 335, we said that there must be a showing that a proposed industrial activity is "significantly dependent upon a unique site specific resource located in the subject area" in order to justify an exception

to Goals 3 or 4. LCDC incorporated a similar statement into its administrative rule setting out acceptable reasons justifying goal exceptions for the siting of industrial uses on rural resource land.[10] However, there is no inherent reason why a particular factor cannot be relevant both to a goal exception for a proposed use and to a determination of whether that proposed use is urban or rural. Whether it is "significantly dependent" on a site specific resource is one of the operating characteristics of an industrial use which is relevant to a determination of whether that use is urban or rural in nature. We, therefore, conclude that the challenged finding is relevant to such a determination.[11]

However, being "significantly dependent" on a site specific resource must require more than showing a proposed industrial use utilizes the resource as a raw material, or the proposed use would be more profitable if sited at the location of a site specific resource. Many industrial uses employ raw materials which at one time were extracted from or produced upon rural land. Furthermore, to term uses "rural" simply because they can be conducted more cheaply on rural land would undermine the purposes of Goal 14. At a minimum, to find an industrial use is "significantly dependent" on a site specific resource requires a showing that there is a practical necessity for siting the proposed use on rural land near the site specific resource.[12] We consider petitioner's evidentiary challenge to the county's "significantly dependent" finding in light of

this interpretation.

The evidence to which we are cited in the record consists of the following statements in the staff report and application:[13]

> "* * * The selected location for the [asphalt] batch plant is a superior choice due in part to its close proximity to significant basaltic shale resources situated within one and one-half miles east of the subject location. These aggregate resources are the raw materials needed for the batch plant operations. The extraction of the resources as well as the processing will occur in the same general area, thus reducing the need for hauling and stockpiling of materials from the site. * * * " (Emphasis added.) Record I 213.

> "* * * The access road continues east another 1 1/4 miles to a basaltic shale quarry located in Section 4. The quarry is zoned Aggregate Resource (AR).

> "The batch plant operation would utilize crushed specification rock and manufactured sand from the quarry. The crushed rock would be hauled over the private road and stockpiled at the plant site. A conditional use permit to stockpile rock at the subject site was recently approved by the County under a separate application." Record I 256.

The above-quoted evidence merely establishes that the proposed asphalt plant will utilize raw materials produced at the quarry located 1 1/2 miles to the east, and that locating the asphalt plant only 1 1/2 miles from the quarry will reduce the necessary hauling and stockpiling of material from the quarry. The evidence also states that the subject location is a "superior choice" for the proposed use. The evidence does not establish that there is a practical necessity to locate the asphalt batch plant on rural land surrounding the quarry

producing crushed rock and sand, or that the proposed asphalt plant would not be a viable operation if located on urban land, such as that within the Ashland UGB two miles away.[14] Thus, the challenged finding is not supported by substantial evidence that the proposed asphalt plant is "significantly dependent" on a site specific resource located in the subject rural area, and cannot be relied upon to support a conclusion that the proposed use is rural in nature.

5. Finding 2.8.E

The county's finding states:

> "The proposed use is not typically located within the city or other densely populated area and, as limited herein, it is not otherwise associated with a density of development characteristic of urban uses or areas." Record II 13.

Petitioner argues the above finding is irrelevant because, even if the proposed use were typically found in rural areas, that would not make it a rural use. Petitioner also argues the finding is not supported by substantial evidence in the record. According to petitioner, the evidence in the record shows similar uses in the county are located in urban areas. Petitioner cites maps submitted by the planning consultant for intervenor Ever Ready Construction Co. and portions of the application.[15] Record I 140-142, 273-274, 277.

Intervenors argue that the typical location of a proposed use is relevant to whether the nature of the use is urban or rural because it is indicative of the appropriateness of the use in relation to the surrounding area. Intervenors also

argue that the evidence in the record does not indicate that asphalt batch plants are typically located within "cities or densely populated areas." Intervenors' Brief 17. According to intervenors, one similar use is located within Medford city limits, but is not located in a densely populated area.

The type and intensity of uses typically found in the county's urban and rural areas is relevant to a determination of whether a particular use is urban or rural in nature. See Grindstaff v. Curry County, 15 Or LUBA at 113; Halvorson v. Lincoln County, 14 Or LUBA 26, 32 (1985). Thus, whether a proposed use is typically located in urban or rural areas of the county is also relevant to a determination of whether that use is urban or rural.

However, the challenged finding does not say whether the proposed use is typically located in urban or rural areas of Jackson County. Rather, it says that it is not typically located in "cities or densely populated areas." Portions of the urban or urbanizable areas within UGBs may be outside of city limits and may not have dense populations. Thus, the finding does not squarely address the relevant issue.[16]

6. Finding 2.8.F

The county's finding states:

> "The proposed use will not generate urban levels of traffic. No significant new traffic will be generated, as several rural aggregate resources uses are already allowed on or near the subject property. Hauling the aggregate from the site in the form of asphalt, rather than in its raw state, will not generate additional traffic to or from the property."

Petitioner argues this finding is not supported by the record. According to petitioner, the record shows that the original combined concrete and asphalt plant proposal would have generated 450-500 new truck trips per year on local roads, but the record does not indicate the portion of these trips related to the asphalt plant alone. Petitioner also argues that operation of the asphalt plant will require shipment onto the subject site of the materials used to make asphalt.

Intervenors argue that there is substantial evidence in the record to support the county's determination that the proposed use will not generate urban levels of traffic. Intervenors cite minutes and testimony from the board of commissioners' March 31, 1988 hearing on their application.

The evidence in the record to which we are directed includes statements by intervenors' consultant that "the only new traffic generated would be for the concrete batch plant." Record II 28. The consultant also stated that oil for the asphalt mix would be imported to the subject site, and such deliveries would occur three or four times per year. Record II 31. Petitioner cites no conflicting or detracting evidence. Because the evidence in the record would allow a reasonable person to make the challenged finding, we conclude that the challenged finding is supported by substantial evidence

7. Finding 2.8.G

The county's finding states:

> "Based on testimony by the applicant, it is probable that the proposed use will not be operated more than 120 days out of the 8-month annual asphalt paving season." Record II 13.

Petitioner argues that this finding is irrelevant to a determination that the proposed use is rural because, even though an urban use may occur on only a few days per year, it is nonetheless urban on those days. Petitioner also argues that the finding is not supported by the record because the application states that the asphalt plant would operate 7 or 8 months a year. Record I 259. According to petitioner, nothing in the decision limits the proposed plant to 120 operating days per year.

Intervenors respond that the limited nature of the proposed use is one of the operating characteristics relevant to determining whether the proposed use is urban or rural. Intervenors argue the limited period of use "contributes to the minimal impact of the use on the property and surrounding area and is further evidence of the rural nature of the use." Intervenors' Brief 20. Intervenors also argue that the finding is supported by the application and the testimony of the applicant's consultant. Record I 35, 259.

In Hammack & Associates, Inc. v. Washington County, supra, slip op at 9, we stated with regard to a proposed performing arts center which would offer 20 performances per season that, "while the use may exhibit urban characteristics only a few days per year, it is an urban use on those days." We agree

with petitioner that the fact the proposed asphalt batch plant would operate only 120 days per year is not relevant to a determination of whether it is an urban or rural use on those days.

8. Finding 2.8.H

The county's finding states:

> "The nature of the zoning confines the use to that which is described in the land use action and thus does not allow any industrial development other than the precise activity described and does not authorize the expansion of the nonfarm activity or the introduction of any other nonfarm activity. The parcel on which the use is permitted is isolated and surrounded by several thousand acres of land in single ownership, zoned so as to control and prevent the expansion of the same or related uses." Record II 13.

Petitioner argues that this finding is irrelevant to whether the proposed batch plant is urban or rural. Petitioner argues the proposed plant is urban regardless of whether it will spawn expansion of other urban uses.

Intervenors argue that the above finding addresses the intensity and nature of the proposed use, which they say LUBA directed the county to evaluate in Shaffer I.

We agree with petitioner that the fact the county's decision does not allow any industrial development of the subject site other than the approved asphalt batch plant is not relevant to whether the approved asphalt plant is urban or rural.

9. Finding 2.3

The county's finding states:

> "* * * the use cannot be located inside an urban growth boundary without significant adverse impacts that are incompatible in densely populated areas. This conclusion is also supported by information submitted by opponents of the proposal, including signators to petitions received, which indicate a general incompatibility of the use with a densely populated area based on an apparent perceived notion that batch plants cause sight, odor, and noise degradation of a populated area such as the city of Ashland and its urban growth boundary area." Record II 11.

Petitioner argues this finding is irrelevant to whether the proposed use is urban or rural. Intervenors contend that the appropriateness of the use in a densely populated urban area is a relevant consideration.

In Hammack & Associates, Inc. v. Washington County, slip op at 35, n 7, we addressed this same issue, stating that

> "[a proposed use] may be an urban use that generates unacceptable and unmanageable offsite impacts (e.g., noise) such that it cannot practicably be located in urban areas. * * * If that is the case, an exception may be justified to permit its location outside the urban area. Such problems do not render an otherwise urban use a rural use."

Furthermore, the Court of Appeals agreed with this position in Hammack & Associates v. Washington County, 89 Or App at 45. We, therefore, conclude that the challenged finding is irrelevant to whether the proposed use is urban or rural.

10. Other Findings

In addition to relying on findings 2.3 and 2.8.A-H, discussed above, the county's decision states that its conclusion that the proposed asphalt plant is rural is also based on findings 1.5, 2.2, 2.4 and 2.6. Record II 12.

Finding 2.2 states that the county's RLI zoning district

was patterned after LCDC's administrative rule concerning goal exceptions for industrial development on rural resource lands, OAR 660-04-022(3), and was acknowledged by LCDC. Finding 2.4 states that the proposed use would have "a significant comparative advantage due to its location near products available from other rural activities which would benefit the county economy and cause only minimal loss of productive resource land." Record II 12. This finding parallels the provisions of OAR 660-04-022(3)(c).

As we said in Shaffer I, under Curry County, supra, the county must either demonstrate that the proposed use is rural, include the subject site within a UGB or take an exception to Goal 14. In Shaffer I, we concluded that compliance with the criteria for applying the RLI zone is not sufficient to ensure compliance with Goal 14. We stated:

> "Neither OAR 660-04-022(3), establishing reasons for an exception from statewide planning goals to allow rural industrial development, nor the RLI designation itself expressly provides that an exception from Goal 14 need not be taken to rezone rural property to permit urban type industrial development." (Footnote omitted.) Shaffer I, slip op at 5.

Findings 2.2 and 2.4 may be relevant in justifying an exception to Goal 14 to allow the proposed use on rural land, but they are not relevant in determining whether the proposed use is rural and, therefore, in compliance with Goal 14.

Finding 2.6 states that the subject site is part of a several thousand acre ownership which has been used for a cattle ranch. It also states that use of the subject site for

the proposed asphalt batch plant operation will not materially reduce the agricultural use of the property. We fail to see how this finding is relevant to a determination of whether the proposed use is urban or rural.

Finding 1.5 incorporates by reference the findings of the planning department staff report. See n 9. We discussed some of these findings in section 4 above, and concluded they were not sufficient to demonstrate that the proposed use is "significantly dependent" on a site specific resource in the rural area. The parties do not argue, and we do not find, that any other findings in the staff report are relevant to a determination of the urban or rural nature of the proposed use, and do not duplicate findings already discussed in sections 1-9 above.

11. Conclusion

As we explained in the introduction to this assignment of error, we must determine whether the findings which survived petitioner's challenges, and any other relevant county findings, support a determination that the proposed asphalt batch plant is either an urban or rural use. The only such findings are the following:

> "There is no need for the provision or extension of even a minimum level of public or municipal services, including water or sewer, to support the proposed facility."
>
> "* * * * *
>
> "The proposed use will not generate urban levels of traffic. No significant new traffic will be

> generated, as several rural aggregate resources uses are already allowed on or near the subject property. Hauling aggregate from the site in the form of asphalt, rather than in its raw state, will not generate additional traffic to or from the property." Record II 13.

In Shaffer I, slip op at 4, we identified "the amount of truck traffic expected to service the [proposed asphalt] plant" as a consideration relevant to the intensity and nature of the use. By this, we meant the number, size and frequency of trucks associated with the proposed use, i.e., the number, size and frequency of trucks entering and exiting the subject 4.13 acre site to deliver raw materials and the number entering and exiting the site to pick up the finished asphalt products.

The finding concerning traffic quoted above is not responsive to this issue. Rather, it addresses whether operation of the asphalt plant will increase the amount of truck traffic already entering and leaving the much larger ownership, of which the subject 4.13 acre site is a part, due to the existing aggregate extraction and processing operations carried out on that ownership. Even if the truck traffic entering and leaving the subject ownership does not increase overall, that does not mean that the level of traffic is rural in nature. Thus, the county's finding on truck traffic fails to establish that urban levels of truck traffic will not be associated with the proposed use.

In conclusion, the only finding adopted by the county which is both relevant and supported by substantial evidence is that

the proposed use does not require urban services. However, as we stated in section 2 above, and in Shaffer I, slip op at 10, n 1, such a finding is not sufficient to establish that the proposed use is rural. What is missing from the county's decision is specific factual findings describing (1) relevant characteristics of the proposed use (such as number of employees, noise, odor, dust and other pollutants emitted, associated traffic); (2) the ultimate use of the products of the proposed use (e.g., whether for urban or rural uses, and in what proportions); (3) the characteristics of urban development in nearby UGBs; (4) where other similar uses in the county are located; and (5) whether there is a practical necessity to locate the proposed use in the rural area, close to a site-specific resource. It may not be essential that findings on all of these factors be adopted. However, a sole finding on lack of need for urban services is clearly inadequate to support a conclusion that the proposed use is rural.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.[17]

SECOND ASSIGNMENT OF ERROR

> "Jackson County Prejudged The Issue And Excluded Potentially Relevant Evidence."

Petitioner argues that one reason the county's initial decision was remanded in Shaffer I was that LUBA was unable to determine from the decision whether the proposed use was rural or urban. According to petitioner, LUBA found the county had

not addressed this issue in its first proceedings, although evidence in the record indicated the subject use might be urban. According to petitioner, because the county did not address the urban/rural issue in its hearings in Shaffer I, it was inappropriate for it to decide on remand that the proposed use is rural without reopening the record for submittal of evidence on this issue. Petitioner contends the procedure followed by the county prejudiced his due process rights.

Intervenors argue the county was not required to reopen the hearing to allow submittal of additional factual evidence on the urban/rural issue because petitioner had a full opportuntiy in the original proceeding to present evidence regarding the nature of the proposed use. Intervenors claim that in the first county proceedings petitioner's attorney specifically raised this issue, arguing that the application requested a change from agricultural use to urban use; and, therefore, the county was required to take a Goal 14 exception. Record I 66.

Intervenors also argue that petitioner has not shown that his substantial rights were prejudiced by the county's refusal to reopen the hearing, as required by ORS 197.835(8)(a)(B). Intervenors maintain petitioner does not assert any fact necessary to the determination of the nature of the proposed use which he did not have the opportunity to present in the first instance.

Unless petitioner shows that some legal criterion was violated by the county's action, we cannot grant relief. Lane

County School Dist. 71 v. Lane County, 15 Or LUBA 150, 153 (1986). Petitioner claims only that the county's procedure on remand was "totally inappropriate" and "prejudiced petitioner's due process rights." Petition for Review 18. Petitioner may intend the latter claim to be an allegation that in refusing to allow petitioner to submit evidence on remand, the county deprived petitioner of due process of law and, therefore, acted unconstitutionally. However, no such argument is developed in the petition for review. We decline to consider claims of unconstitutionality where, as here, they are unsupported by legal argument. Portland Oil Service Company v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 87-076, December 9, 1987), slip op 20; Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 166 (1985).

The second assignment of error is denied.

The county's decision is remanded.

FOOTNOTES

1 The county record in Shaffer I is included in the county record in this review proceeding, and shall be cited as "Record I." The record compiled by the county after our remand in Shaffer I shall be cited as "Record II."

2 The only uses recognized by the Supreme Court as generally agreed upon to be urban or rural in nature are residences at a density of one house per ten acres (rural) and residences on half-acre lots served by community water and sewer systems (urban). Curry County, 301 Or at 505; see also Hammack & Associates, Inc. v. Washington County, ___ Or LUBA ___ (LUBA No. 87-037, September 11, 1987), slip op 6, aff'd 89 Or App 40 (1987).

3 In any case, petitioner did not allege in Shaffer I, and does not allege in this appeal, that a determination that the proposed use is rural violates the county's plan. Rather, we understand petitioner to contend that such a determination violates Goal 14.

4 The lone exception is Schultz v. Yamhill County, supra, which was decided just two months after the Supreme Court's opinion in Curry County. However, we note that in Schultz v. Yamhill County, the industrial use concluded to be an urban use not allowed outside UGBs, a metal fabrication plant, was not only a nonfarm, nonforest related use, but also was unrelated to use of any natural resource found at its location.

5 The Court of Appeals opinion in Umatilla County, supra, does not require us to find otherwise. In that case, the county designated 1400 acres of rural land for "heavy industrial use" without an exception to Goal 14, and LCDC acknowledged the county's plan. The court stated:

> "* * * [OAR 660-04-022(3)], previous LCDC policy and the very nature of industrialization suggest that industrial uses are urban uses. Because LCDC has not explicitly construed Goal 14 to the contrary, we cannot say whether such a construction would be

> sustainable. LCDC should explain whether heavy industry is an urban use. Because it has nor done so, it has not explained why the facts led it to the conclusion that industrial use of this land would not violate Goal 14. * * *" Umatilla County, 85 Or App at 92.

Thus, although the court stated that the nature of industrial uses suggests such uses are urban, it did not find that Goal 14 requires every industrial use to be considered an urban use. The court simply would not accept an unexplained conclusion by LCDC that 1400 acres of heavy industry is not an urban use.

6

In Conarow v. Coos County, 2 Or LUBA at 193, n 4, we specifically noted that the "appropriate for, but limited to" standard for determining whether commercial uses are urban or rural might not be sufficient by itself to determine the rural or urban character of other types of uses, such as industrial, transportation or recreation uses.

7

The memorandum was submitted by intervenor Miller in response to an order adopted by the board of commissioners after our remand of the county's initial decision in Shaffer I. That order states that the board of commissioners "will consider adoption of findings in support of the concept that the [asphalt] batch plant is a rural use," "on the basis of evidence already received." (Emphasis added.) Record II 89. The order also affords the parties "an opportunity to submit briefs providing their opinion and proposed findings on the matter * * *." Id. Furthermore, in their response brief, intervenors describe the statement concerning employees in the memorandum as argument, and do not contend that the county reopened the evidentiary record on remand. We, therefore, conclude that the statement in intervenor's memorandum does not constitute evidence in the record upon which the challenged finding could be based.

8

ORS 197.835(10)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board

shall affirm the decision or the part of the decision supported by the record * * *."

Intervenors argue that the evidence in the record supports a finding that the proposed use will require "few" employees. Intervenors' Brief 14. However, in this case, the evidence identified by the parties concerning full-time and seasonal employees at a combined concrete and asphalt batch plant operation does not clearly support a determination concerning the number of employees required by an asphalt batch plant operation alone.

9

The actual citation by intervenors, Record I 177, is to a portion of the county planning commission's findings, which is also part of the board of commissioners' findings (Record II 18). However, this portion of the planning commission's findings came from the planning department staff report, which was incorporated into the planning commission's decision. We treat intervenors' citation to evidence in the record as being to the corresponding portion of the staff report, at Record I 213.

10

OAR 660-04-022(3) provides in relevant part:

"Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts [for a goal exception] include but are not limited to the following:

"(a) The use is significantly dependent upon a unique resource located on agricultural or forest land. * * *

" * * * * * * "

11

We do not believe, however, that the fact that a proposed use will be operated "in conjunction with" other rural uses is indicative of whether the proposed use is itself urban or rural.

12

In making such a showing, it is necessary to consider not only the technological and other practical reasons for siting the industrial use near the site specific resource, but also

any additional costs associated with locating the use on rural land near a site specific resource. For instance, an industrial use might not be "significantly dependent" on a site specific resource, and there may be no practical necessity for locating the use on rural land near that resource, if the rural location results in significant additional costs to secure other needed raw materials or to transport the final product to market or its place of use.

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13 Intervenors also cite a portion of the memorandum submitted as argument on remand of Shaffer I. However, statements in this document, for the reasons stated in n 7, supra, do not constitute evidence.

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14 The county staff report, which constitutes both findings and evidence in support of the decision (see n 9), states the applicant demonstrated there are no potential sites for the proposed use available within the Ashland UGB. Record I 219. Under ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b), this fact is relevant to justification of an exception to Goal 14 for the proposed use, but it is not relevant to a determination of whether the proposed use is urban or rural in nature.

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15 Petitioner also cites an exhibit attached to his memorandum on remand. Record II 81. This exhibit, a page from the Jackson County telephone book listing under "Asphalt & Asphalt Products," was attached to petitioner's memorandum in support of his request that the county reopen the evidentiary record and accept evidence on the question of whether the proposed use is urban or rural. Record II 78. As previously stated (see n 7), the county chose not to reopen the evidentiary record, and we do not consider statements in the memorandum, or exhibits attached thereto, to constitute evidence which can support or detract from the county's decision.

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16 Because the finding is not on point, no purpose would be served by determining whether the finding is supported by substantial evidence. DLCD v. Columbia County, ___ Or LUBA ___ (LUBA No. 87-109, March 15, 1988), slip op 7; McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986). Furthermore, we note that the evidence to which we are cited in the record does not clearly support a finding that asphalt batch plants are typically located in rural (or urban) areas of the county. We

cannot discern from the maps or descriptions of the locations of other asphalt related operations in the record whether those locations are inside or outside of UGBs. Record I 140-142, 273-274, 277.

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17 Because the county has not established that the proposed use is a rural use, has not included the subject site within a UGB, and has not adopted an exception to Goal 14, we must remand the county's decision for failure to comply with Goal 14.