BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF TRANSPORTATION and DEPARTMENT OF LAND CONSERVATION DEVELOPMENT,	)	
Petitioners,	)	LUBA Nos. 98-038 and 98-039
vs.	)	
COOS COUNTY,	)	FINAL OPINION AND ORDER
Respondent,	)	
and	)	
MENASHA DEVELOPMENT CORPORATION,	)	
Intervenor-Respondent.	)	

Appeal from Coos County.

Kathryn A. Lincoln, Assistant Attorney General, filed the petition for review and argued on behalf of petitioner Oregon Department of Transportation. With her on the brief was Hardy Myers, Attorney General; David Schuman, Deputy Attorney General; Virginia L. Linder, Solicitor General; and Celeste J. Doyle, Assistant Attorney General.

Roger A. Alfred, Assistant Attorney General, filed the petition for review and argued on behalf of petitioner Department of Land Conservation and Development. With him on the brief was Hardy Myers, Attorney General; David Schuman, Deputy Attorney General; and Michael Reynolds, Solicitor General.

No appearance by Coos County.

Steve C. Morasch, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Wendie L. Kellington, Portland.

GUSTAFSON, Board Chair; HANNA, Board Member, and HOLSTUN, Board Member, participated in the decision.

REMANDED 10/22/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal the county's adoption of an ordinance amending the comprehensive plan and zoning designation of a 125-acre parcel from Exclusive Farm Use (EFU) to Rural Residential 5-acre (RR-5).

MOTION TO INTERVENE

Intervenor-respondent Menasha Development Corporation (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioner Oregon Department of Transportation (ODOT) moves to file a reply brief, pursuant to OAR 661-10-039. ODOT argues, and we agree, that intervenor's response brief raises new matters regarding jurisdiction, alleged constitutional violations, and the applicability of the moratorium statute at ORS 197.505 to 197.540, and thus a reply brief is permitted under OAR 661-10-039.

ODOT's reply brief is confined to the three new matters raised in intervenor's response brief. Accordingly, ODOT's motion to file the reply brief is allowed.

FACTS

The subject property is a 125-acre parcel located approximately six miles north of the North Bend/Coos Bay area, approximately one-half mile east of Highway 101, and one and one-quarter miles from the Pacific Ocean. The property borders the unincorporated community of Hauser. Access to and from the property is via local roads onto Highway 101, which is a facility designated as a highway of statewide importance.

The property is zoned EFU and consists generally of vacant forested and vegetated hillsides and terraces. Soils on the property consist of Bandon Sandy Loam, Class III (19%),

Bandon Blacklock Loam, Class VI (55%), Bullards Sandy Loam, Class IV (23%), and Coquille Silt Loam, Class IV (3%).

In August 1996, intervenor applied to the county for a comprehensive plan amendment to redesignate the property from Agricultural to Rural Residential, and a zone change from EFU to RR-5. The requested amendments are intended to allow up to 25 rural residential homesites on five-acre lots, after future subdivision approval. The county conducted hearings, determined that the subject property was neither farm or forest land as defined by Statewide Planning Goals 3 and 4, and approved intervenor's application on January 21, 1998. The county mailed the decision on January 22, 1998.

This appeal followed.

JURISDICTION (LUBA NO. 98-038)

Intervenor argues that this Board lacks jurisdiction over ODOT's appeal (LUBA No. 98-038) because ODOT filed its appeal on February 12, 1998, 22 days from the date the challenged decision became final on January 21, 1998.

Intervenor acknowledges that the challenged decision in this case involves plan and land use regulation amendments and thus the appeal period in this case is governed by the second sentence of ORS 197.830(8), which allows a notice of intent to appeal to be filed 21 days after the challenged decision is mailed to parties entitled to notice under ORS 197.615.[1] However, intervenor contends that ODOT is not a "part[y] entitled to notice under ORS 197.615" because ODOT did not make a written request for notice as required by ORS 197.615(2)(a)(B). Intervenor concludes that ODOT's appeal period is governed by the first

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[1]ORS 197.830(8) provides in relevant part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615."

sentence of ORS 197.830(8), and thus ODOT's appeal is untimely because it was filed more than 21 days after the decision became final.

Intervenor recognizes that the Court of Appeals' decision in ODOT v. City of Oregon City, 153 Or App 705, 959 P2d 615 (1998) is contrary to its position. In ODOT, the court held, under circumstances identical to the present one, that ODOT's appeal was timely filed under the second sentence of ORS 197.830(8), notwithstanding that ODOT had not requested written notice of the decision and thus was not "entitled to notice" under ORS 197.615. The court determined that the second sentence of ORS 197.80(8) tolls the appeal period for any party with standing to appeal the decision until the local government mails notice of the decision to Department of Land Conservation and Development (DLCD), as required by ORS 197.610, and not only for persons entitled to notice under ORS 197.615. 153 Or App at 708.

The court's decision in ODOT controls the present case, which presents identical jurisdictional facts. Intervenor's motion to dismiss LUBA No. 98-038 is denied.

FIRST ASSIGNMENT OF ERROR (DLCD)

DLCD argues that the county misconstrued the applicable law and violated the rules implementing Statewide Planning Goal 4 when it determined that the subject property is not "suitable for commercial forest uses" and hence not forest land subject to Goal 4.

Goal 4 defines forest lands subject to that goal as

> "those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

The county determination that the subject property is not "suitable for commercial forest uses" and is thus not "forest land" as defined by Goal 4 is based on reports submitted by the applicant's consultants, particularly a professional forestry consultant's report (the

Stuntzner report). The Stuntzner report states that, according to estimates produced by the Oregon Department of Forestry (DOF) and the Natural Resources Conservation Service (NRCS),[2] the subject property has a wood fiber productivity rating of 111 cubic feet per acre per year (cf/ac/yr). However, the Stuntzner report finds that, based on examination of the physical characteristics of the subject property, the actual productivity of the subject property is only 48.48 cf/ac/yr. Accordingly, the Stuntzner report concludes, and on that basis the county finds, that the subject property is not suitable for commercial forestry.[3]

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[2]The NRCS was known until October 1995 as the Soil Conservation Service (SCS).

[3]The challenged decision finds, in relevant part:

> "Mr. Stuntzner testified that the Property is not suitable for commercial forestry uses because of the physical characteristics of the Property. The physical characteristics examined by Mr. Stuntzner include soil, drainage, rainfall, temperature, altitude, slope, aspect, wind and fog. Mr. Stuntzner testified that the combined effect of these characteristics limit the Property's potential for timber production to a level that is below acceptable commercial productivity rates.
>
> "* * * * *
>
> "Mr. Stuntzner explained how and why the Property's physical characteristics make it unsuitable for forest use[:]
>
> > '"The physical characteristics of the Menasha property that limit its suitability for commercial forest uses include the seasonal high water table that decreases seedling survival rates. The summer droughtiness and dense vegetation also decreases seedling survival rates. These factors negatively effect tree size and density (quality and quantity).
> >
> > '"The site is susceptible to unobstructed high winds which blow the tops out of trees and cause wind compression checking on the exposed windward side of the trees. These factors also decrease the quality and quantity of the stand.'
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> "Mr. Stuntzner also explained the technical methods used to estimate the Property's potential for timber production in cubic feet per acre per year. Mr. Stuntzner explained that the United States Department of Agriculture has promulgated 'normal yield tables' from which potential for timber production may be estimated. Although the 'normal yield tables' do take into consideration soil and slope, [they] do not take into consideration other site specific characteristics such as elevation and susceptibility to fog, rain and wind. * * *
>
> "* * * * *

DLCD argues that the county's reliance on the Stuntzner report is inconsistent with OAR chapter 660, division 6, the rule implementing Goal 4. According to DLCD, OAR 660-006-0005 requires that, for purposes of determining whether land is "forest land" under Goal 4, local governments must rely on data provided by the NRCS in determining the cf/ac/yr productivity of forest lands. OAR 660-006-0005(2) defines the term "Cubic Foot Per Acre" to mean

> "the average annual increase in cubic foot volume of wood fiber per acre for fully stocked stands at the culmination of mean annual increment as reported by the USDA Soil Conservation Service. Where [NRCS] data are not available or are shown to be inaccurate, an alternative method for determining productivity may be used. An alternative method must provide equivalent data and be approved by the Department of Forestry."

DLCD contends that the county erred in considering the "alternative method" used by intervenor's consultant to estimate the cubic foot per acre productivity of the subject property. According to DLCD, OAR 660-006-0005(2) allows an alternative method of determining productivity only when the NRCS data are shown to be "inaccurate" and when the alternative method is approved by DOF. DLCD argues that the county did not find, and there is no evidence in the record to support a finding, that the NRCS data for the subject property is inaccurate, or that the alternative method used by intervenor's consultant was ever presented to or approved by DOF. Accordingly, DLCD concludes, the county failed to comply with the requirements of OAR 660-006-0005(2) in determining that the subject property is not suitable for commercial forestry.

Intervenor makes a number of responses. The first is a threshold argument that Goal 4 does not apply at all to the challenged plan and zone amendments, and hence any errors the

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> "Mr. Stuntzner testified that the productivity rating of 111 [cf/ac/yr] that DLCD cites is based on the generic forestry reports generated by [DOF]. These generic reports do not take into consideration the site specific field analysis required to accurately predict actual yield.
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> "Mr. Stuntzner testified that the actual yield of the Property would be 48.48 [cf/ac/yr]." Record 46-47.

county committed in determining that the challenged decision complies with Goal 4 do not provide a basis to reverse or remand the challenged decision.

Intervenor reasons that Goal 4 applies only to "forest lands," and that the first sentence of the Goal 4 definition limits "forest lands" to "those lands acknowledged as forest lands as of the date of adoption of this goal amendment." (Emphasis added). According to intervenor, the limitation to acknowledged forest lands in the first sentence of the Goal 4 definition also limits and shapes the way Goal 4 uses the term "forest land" in the second sentence of the Goal definition. As a result, intervenor reads the second sentence of the Goal 4 definition as not requiring a commercial forestry suitability analysis where the subject property is not acknowledged as forest lands and the local government has an acknowledged comprehensive plan. According to intervenor, where a local government has an acknowledged plan, the inquiry into whether Goal 4 applies begins and ends with an inquiry into whether the subject property is acknowledged as forest lands. In the present case, because the subject property is planned and zoned for exclusive farm use under the county's acknowledged plan, it is not "acknowledged as forest land," and therefore, according to intervenor, Goal 4 does not apply to the challenged amendments. Because Goal 4 does not apply, intervenor concludes that the county did not need to undertake an analysis of the subject property's suitability for commercial forestry, and any errors it committed therein do not provide a basis to reverse or remand the decision.

We disagree with intervenor that the term "forest lands" as used in Goal 4 is limited to lands acknowledged as forest lands. OAR 660-06-010 provides that lands inventoried as Goal 3 agricultural land need not be inventoried as forest land. OAR 660-10-010 reflects the fact that many resource lands in Oregon are suitable for both agricultural and forestry uses, and that a designation of land as agricultural land does not mean that the land is not forest land. Westfair Associates Partnerships v. Lane County, 25 Or LUBA 729, 738 (1993).

Intervenor's next responds that the definition of cf/ac/yr in OAR 660-006-0005(2) is

simply a definition, not an approval criterion, and that a definition is only significant in the context of a particular standard in which the defined words are used. Intervenor points out that the definitions of cf/ac/yr at OAR 660-006-0005 are referenced and used in the Goal 4 rule only in OAR 660-06-027, pertaining to "dwellings in forest zones." Thus, intervenor argues that, although productivity as measured in cf/ac/yr is certainly relevant evidence of a property's suitability for commercial forest uses, the particular definition of cf/ac/yr at OAR 660-006-0005(2) is not itself an approval standard with respect to whether land is "suitable for commercial forestry" and thus forest land subject to Goal 4. Accordingly, intervenor argues, the county is not obliged to make findings that the NRCS data are inaccurate in order to use alternative methods or studies, and the county is not limited to alternative methods approved by DOF.

DLCD replies that definitions can be approval criteria, citing to Willamette University v. LCDC, 45 Or App 355, 608 P2d 1178 (1980) (the definition of "urban" lands in Goal 14 applies to a city's rezoning of land). While we agree with that general proposition, we see nothing in Willamette University that authorizes use of a definition as an approval criterion in contexts where the defined term is not used.

We agree with intervenor that the definition of cf/ac/yr at OAR 660-006-0005(2) is not an approval criterion with respect to whether land is forest land under Goal 4. The preface to the definitions in OAR 660-006-0005 states that those definitions apply "[f]or purposes of this division[.]" Thus, the cf/ac/yr definition at OAR 660-006-0005(2) applies only to the extent it is used in OAR chapter 660, division 6. Intervenor is correct that the only place that definition is used in division 6 is with respect to forest dwellings. It follows that, while measurements of productivity are relevant and perhaps essential to any inquiry into whether land is "suitable for commercial forest uses," nothing in division 6 or Goal 4 directed to our attention requires that the county apply the restrictive definition of cf/ac/yr in OAR 660-006-0005(2) in determining whether the subject property consists of "forest

lands."[4] We conclude that the county did not err in considering or relying upon the productivity estimates in the Stuntzner report for any of the reasons DLCD cites to us.[5]

DLCD's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (DLCD)

DLCD argues that the county's conclusion that the subject property is not suitable for commercial forest uses is not supported by substantial evidence in the record. DLCD repeats its argument, addressed in the first assignment of error, that the county erred in relying primarily on the Stuntzner report even though the alternative method in that report had not been approved by DOF, as DLCD contends OAR 660-006-0005(2) requires.

In addition, DLCD challenges the county's reliance on evidence recited in the Stuntzner report that, according to DLCD, reflect poor management practices rather than the suitability of the soil or parcel for commercial forest uses. DLCD cites to three types of evidence the report, and hence the county, relied upon in finding the subject property unsuitable for commercial forest uses: the existence of dense vegetation, the existence of phytophthora root rot in the area, and measurement of 12 existing Douglas Fir trees on the site. DLCD argues that each type of evidence reflects only poor management practices on the property rather than the suitability of the parcel for commercial forest uses if properly managed.

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[4]It may seem anomalous that applications for forest dwellings are subject to a relatively restrictive definition of productivity, while applications to redesignate and rezone forest lands to nonforest uses are not. However, that result is an artifact of how OAR chapter 660, division 6 is drafted. DLCD has not drawn our attention to any provisions in division 6 that can be construed as requiring application of the cf/ac/yr definition at OAR 660-006-0005(2) to any context other than forest dwellings.

[5]DLCD has not assigned as error the county's conclusion, based on the Stuntzner report, that the estimated potential yield of 48.48 cf/ac/yr is "below acceptable commercial productivity rates," and thus the property is not suitable for commercial forestry. Record I-46, 50. However, nothing in the record directed to our attention explains why a potential yield of 48.48 cf/ac/yr is "below acceptable commercial productivity rates," or why, if so, the property is not suitable for commercial forestry. Our denial of DLCD's first assignment of error should not be construed as approving any particular level of cf/ac/yr for purposes of determining whether land is or is not "forest land" under Goal 4.

Intervenor makes a number of responses. The dispositive response is intervenor's argument that the county took into account a number of physical characteristics of the subject property, including soils, drainage, rainfall, temperature, altitude, slope, aspect, and the effects of wind and fog, and determined that the combined effect of these characteristics limit the property's potential for timber production to a level below acceptable commercial productivity rates. To the extent the county also took into account or relied upon physical characteristics related to past management practices rather than the suitability of the property, which intervenor disputes, that error does not undermine the county's conclusion, based on the whole record, that the property is not suitable for commercial forest uses. Substantial evidence exists to support a finding when the record, viewed as a whole, would permit a reasonable person to make that finding. Dodd v. Hood River County, 317 Or 172, 179, 855 P2d 608 (1993). We agree with intervenor that, even discounting the evidence DLCD cites, a reasonable person could conclude based on the evidence in the whole record that the subject property is not suitable for commercial forest uses.

DLCD's second assignment of error is denied.

ASSIGNMENT OF ERROR (ODOT)

ODOT argues that the county's decision violates the requirements of OAR 660-012-0060, part of the Transportation Planning Rule (TPR). OAR 660-012-0060(1) requires that any plan or land use regulation amendment allowing uses that "significantly affect" a transportation facility be mitigated in one of three ways to ensure consistency with the identified function, capacity and level of service of the facility.[6] Pursuant to OAR 660-012-

[6]OAR 660-012-0060(1) provides:

> "Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility. This shall be accomplished by either:

0060(2)(d), a plan or land use regulation amendment "significantly affects" a transportation facility if it, inter alia, "[w]ould reduce the level of service of the facility below the minimum acceptable level identified" in the applicable transportation service plan.

ODOT explains that Highway 101 is designated in the Oregon Highway Plan (OHP) as a highway of statewide importance, and that a statewide highway in a rural area, including any intersections, should function at a level of service (LOS) of "C."[7] ODOT argues that the traffic study submitted by the intervenor in the present case shows that the proposed rural subdivision will affect three intersections with Highway 101, each of which is presently operating at a LOS of "E," well below the minimum acceptable LOS identified in the OHP. According to ODOT, the traffic study shows that the proposed rural subdivision will add enough additional traffic to Highway 101 that the "reserve capacity" of the Highway 101/Wildwood Drive intersection will be reduced by 29 percent, from 28 vehicles per peak hour to 20 vehicles per peak hour.

> "(a) Limiting allowed land uses to be consistent with the planned function, capacity and level of service of the transportation facility;
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> "(b) Amending the TSP [Transportation System Plan] to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division; or
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> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes."

[7]ODOT explains that

> "'Level of Service' is a term used to describe the quality of traffic flow. Levels of service A to C are considered good; Urban streets and signalized intersections are typically designed for level of service D. Level of service E is considered to be the limits of acceptable delay. F is considered unacceptable by most drivers." ODOT's Petition for Review 6, n 3.

Further, at oral argument the parties explained that there is an essential correlation between the reserve capacity of a facility and its level of service. Facilities such as the affected intersections on Highway 101 with an identified LOS of "C" have a reserve capacity of 200 to 299 vehicles during peak hours. The same facilities at LOS "D" have a reserve capacity of 100 to 199 vehicles, while facilities at LOS "E" has a reserve capacity of 0-99 vehicles. Record I-143.

The county made findings that the proposed amendment did not "significantly affect" Highway 101 within the meaning of OAR 660-012-0060, stating:

> "The level of service at the identified intersections is already below the minimum acceptable level. Thus, applicant's proposal cannot 'reduce' the level of service below the minimum acceptable level and applicant's proposal cannot 'result' in levels of service which are inconsistent with the functional classification of the transportation facility because those things have already happened.
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> "ODOT argues that the proposal will further reduce the level of service below the minimum acceptable level. ODOT argues for a rule that would freeze all zoning once an intersection drops below the minimum acceptable level. However, that is not what the rule says. Under OAR 660-012-0060, a significant effect does not occur unless the plan or land use regulation amendment causes the intersection to drop below the minimum acceptable level." Record I-60.

ODOT argues that the county misinterpreted OAR 660-0012-0060(2) as being triggered only when a particular plan or zone amendment allows uses that will cause the LOS of an intersection to fall from its minimum acceptable level (here, LOS "C") to a lower LOS. ODOT notes that the actual terms of OAR 660-012-0060(2)(d) do not refer to causation but rather state that a plan or land use regulation amendment significantly affects a facility if it "[w]ould reduce the level of service of the facility below the minimum acceptable level * * *." (Emphasis added). ODOT argues that the affected Highway 101 intersections are already at LOS E, two categories below the minimum acceptable level of service, and that the proposed plan amendment will produce additional traffic that will further reduce the already unacceptable LOS. According to ODOT, to interpret OAR 660-012-0060(2) as the county does "would allow unlimited amendments with corresponding traffic impacts to a facility once it has fallen below the minimum acceptable LOS -- an absurd result." ODOT's Petition for Review 7.

Further, ODOT points out that there are vacant parcels along Highway 101 in the vicinity of the affected intersections that are already zoned for development and which, when

developed as permitted, will further degrade Highway 101's capacity and level of service. ODOT argues that

> "[t]he only way to try to limit the steady increase in traffic on Highway 101 is to prevent properties currently zoned for low intensity use from being zoned to higher use and contributing to the traffic problem. That was the intention of the administrative rule based on Goal 12 [OAR 660-012-0060]. It would defeat the intent of OAR 660-012-0060 to allow additional impact on the traffic facility just because the facility is already over capacity." ODOT's Petition for Review 9.

ODOT also disputes the county's contention that, under ODOT's view of OAR 660-012-0060(2), that rule "freezes" all rezoning once a facility falls below the minimum acceptable LOS. ODOT argues that once the county has properly determined under OAR 660-012-0060(2) that a proposed plan or land use regulation amendment "significantly affects" a transportation facility, the county can still allow the proposed amendment pursuant to OAR 660-012-0060(1), as long as it ensures that the uses allowed by the amendment are consistent with the identified function, capacity and level of service of the facility, by means of one or more of the options presented at OAR 660-012-0060(1)(a) to (c). Thus, the county can allow the proposed amendment if the county either (a) limits allowed land uses to be consistent with the facility, (b) amends the county's transportation system plan to provide facilities adequate to support the proposed uses, or (c) alters land use designations, densities or design requirements to reduce demand for automobile travel and meet travel needs through other modes. ODOT contends that the availability of those enumerated options demonstrate that application of OAR 660-012-0060 will not "freeze" future rezonings.

Intervenor defends the county's interpretation of OAR 660-012-0060(2), arguing that it is consistent with the literal text of the rule in finding a significant effect only when a particular proposal generates traffic volumes that will actually cause the LOS of a facility to sink to a LOS that is below the minimum acceptable. Intervenor argues that ODOT's interpretation is inconsistent with the causative element implicit in the rule, and further that ODOT's interpretation is absurd because, reduced to its logical conclusion, it requires that

once a facility is below the minimum acceptable LOS a plan or zone amendment allowing any increase in traffic, even one additional automobile trip, triggers the requirements of OAR 660-012-0060.

We agree with ODOT that the county misconstrued OAR 660-012-0060(2)(d). The evident purpose of OAR 660-012-0060(2)(d), to ensure that plan and zoning amendments are consistent with the identified function, capacity and level of service of affected transportation facilities, is fatally undermined by any reading that permits unlimited reductions in capacity and LOS simply because a transportation facility is already below the minimum acceptable LOS. Allowing further degradation in the capacity and LOS of facilities already below minimally acceptable standards is contrary to the terms and the evident intent of the TPR.

Intervenor is correct that OAR 660-012-0060(2)(d) contains an implied causative element, in that the circumstances that implicate OAR 660-012-0060 include circumstances where a proposed amendment allows uses that cause a facility to fall from an acceptable LOS to a lower LOS. However, we disagree with intervenor that OAR 660-012-0060(2)(d) is confined to those circumstances. Intervenor's interpretation of OAR 660-012-0060(2)(d) would ignore circumstances where a facility is already below the minimum acceptable LOS and proposed amendments will further reduce the capacity or LOS of that facility. Such amendments may have far more significant impacts on reserve capacity and hence levels of service than amendments that merely cause a shift from the identified minimally acceptable LOS to the next lowest category.[8]

Intervenor next argues that "ODOT's request for mitigation of traffic impacts of the amendment is premature and unconstitutional under Article I, sections 18 and 20 of the

[8]For example, under intervenor's interpretation of OAR 660-012-0060(2)(d), if a facility has a minimum acceptable LOS of "C" and currently has a reserve capacity of 201 vehicles per peak hour, a plan amendment that results in a reduction of reserve capacity from 201 to 199 vehicles would cause a shift from LOS "C" to LOS "D" and thus would "significantly affect" the facility. However, once that shift had occurred, a plan amendment that reduces reserve capacity from 199 to less than zero and thus drops the LOS two categories from "D" to "F" would not "significantly affect" the facility.

Oregon Constitution and the Fifth and Fourteenth Amendment to the United States Constitution." Intervenor's Response Brief 39. Intervenor argues that the cited constitutional provisions forbid the county from conditioning or denying intervenor's application for a plan and zoning amendment based on potential traffic impacts that may result from future applications for development of the property but that do not result from the pending application itself. Schultz v. City of Grants Pass, 131 Or App 220, 227-28, 884 P2d 569 (1994) (the city cannot impose on a partition approval mitigatory exactions directed at speculative impacts from housing that might be built on the new parcels after future subdivisions).

We understand intervenor to argue that, if ODOT is correct regarding the meaning of OAR 660-012-0060(2)(d), then on remand the city will be forced to impose on intervenor developmental exactions in the form of transportation improvements to mitigate the impacts of the proposed subdivision, and that such exactions will violate the cited constitutional provisions and the rule described in Schultz. However, intervenor does not explain why the correct application of OAR 660-012-0060 compels the county to impose unconstitutional exactions on the plan amendment. OAR 660-012-0060 requires the county ensure that plan and zone amendments are consistent with the classification, capacity and LOS of a facility by adopting one of three enumerated options. None of those options and nothing in OAR 660-012-0060 drawn to our attention requires the county to impose on the applicant mitigatory exactions in the form of transportation improvements.[9]

Intervenor also asserts several variants of its argument that application of OAR 660-012-0060 as we have construed it here would result in an unconstitutional taking of property. First, intervenor reasons that (1) any economically beneficial use of the property would

[9] Intervenor may be correct that if the county decides to impose such exactions as a condition of approving the plan and zoning amendment, such impositions could potentially run afoul of the takings provisions of the Oregon and federal constitutions. However, that issue is not before us.

generate at least some traffic; (2) under ODOT's view of OAR 660-012-0060 no plan amendment allowing any traffic generating use may be approved; and therefore (3) application of OAR 660-012-0060 denies intervenor of any economically beneficial use of the property, which constitutes an unconstitutional regulatory takings of property. The flaw in intervenor's reasoning is that OAR 660-012-0060 applies only to plan and land use regulation amendments; the subject property is currently designated and zoned for a range of permitted and conditional uses that may generate any amount of traffic without implicating OAR 660-012-0060.

Intervenor's second, related argument is that applying OAR 660-012-0060 to prohibit rezoning the property to residential uses deprives intervenor of any economically beneficial use of the property because the property cannot be farmed for a profit under its current agricultural zoning. Intervenor notes that the county determined that the subject property is not suitable for the farm uses for which is it currently designated and zoned, finding specifically that the subject property "could not be farmed for a profit." Record I-32. However, that finding does not demonstrate that the property has no economically beneficial uses under its current zoning. Agricultural designation and zoning allows a number of outright permitted and conditional uses that are not limited to farming. See e.g. ORS 215.283(1) and (2). Intervenor has not cited to any evidence in the record establishing that the property has no economically beneficial uses under its current zoning, even if it cannot be farmed profitably. Further, as we noted above, application of OAR 660-012-0060 as we have construed it does not "prohibit" rezoning of the subject property. It merely requires that any rezoning having a significant affect on a transportation facility be consistent with the identified function, capacity and level of service of Highway 101, by means of one or more of the options enumerated in OAR 660-012-0060(1).

Intervenor's third argument is that, because the subject property has physical characteristics similar to other property in the area that are zoned for rural residential uses,

there is no rational basis to treat its property differently from other land suitable for rural residential zoning through continued imposition of agricultural zoning. Accordingly, intervenor contends that application of OAR 660-012-0060 to prevent rezoning of the subject property would violate the Equal Protection Clause of the United States Constitution. Intervenor cites no authority for the proposition that the Equal Protection Clause requires a local government to rezone land to make it consistent with the zoning of other lands with similar physical characteristics, and we are aware of none. In any case, as noted above, application of OAR 660-012-0060 does not prohibit rezoning of the subject property.

Finally, intervenor argues that application of OAR 660-012-0060 would violate the state moratorium statutes at ORS 197.505 to 197.540.[10] Intervenor explains that the moratorium statutes prohibit the county from engaging in a pattern or practice of delaying or stopping the issuance of permits because of shortages in public facilities, unless the county adopts a moratorium as provided in those statutes. Intervenor contends that an application to change the plan and zoning designation of a parcel is a "permit" as defined in ORS 215.402(4)[11] and as that term is used in ORS 197.505 to 197.540, and that application of OAR 660-012-0060 in this context would result in an illegal de facto moratorium, because the county would essentially deny intervenor's permit application due to shortages in public facilities without meeting the requirements of the moratorium statutes.

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[10]ORS 197.505(1) defines a "moratorium" to mean:

> "* * * engaging in a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for the subdivision and partitioning of, or construction on, any land. It does not include denial or delay of permits or authorizations because they are inconsistent with applicable statutes, rules, zoning or other laws or ordinances, or a public facilities strategy that meets the provisions of ORS 197.768."

[11]ORS 215.402(4) provides:

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.293, 215.317 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. * * *"

ODOT responds, and we agree, that compliance with OAR 660-012-0060 does not constitute the de facto implementation of a moratorium. As ODOT points out, the definition of a moratorium at ORS 197.505(1) specifically excludes denials or delays based on inconsistency with any "applicable statutes, rules, zoning or other laws or ordinances[.]" Thus, even if the county ultimately denies intervenor's application to redesignate and rezone the subject property for failure to comply with OAR 661-012-0060, that denial could not constitute a de facto moratorium.[12] Gisler v. Deschutes County, 149 Or App 528, 537, 945 P2d 1051 (1997).

ODOT's assignment of error is sustained.

ODOT requests that LUBA "rescind" the county's decision. Intervenor challenges that request as not stating a valid basis for either reversal or remand as described in OAR 661-10-071, and thus urges us to disregard ODOT's assignment of error. In its reply brief, ODOT argues that rescission is a synonym for reversal and clarifies that the remedy it seeks is reversal rather than remand. We disagree with intervenor that ODOT's initial choice of words regarding the remedy it seeks provides any basis to disregard its assignment of error. OAR 661-10-005.

We also disagree with ODOT that reversal is appropriate. Pursuant to OAR 661-10-071(1), we must reverse a land use decision only when the governing body exceeds its jurisdiction, the decision is unconstitutional, or the decision is prohibited as a matter of law. ODOT has not established that the county's errors with respect to the TPR fall within any of the bases for reversal under OAR 661-10-071(1).

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[12]ODOT also questions whether an application to change plan and zoning designations could constitute a "permit" within the meaning of ORS 197.505(1) or 215.402(4). ODOT argues that the moratorium statutes concern denials of applications for development where the proposed use is allowed under the current plan and zoning designations, not applications for plan or zoning amendments in order to develop uses not allowed under the existing designations. Our determination that a denial based on noncompliance with OAR 660-012-0060 cannot constitute a de facto moratorium makes it unnecessary to resolve the parties' disagreement over whether an application for plan and zoning amendments is an application for a "permit" within the meaning of ORS 197.505(1) and 215.402(4).

The county's decision is remanded.