BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF NEWBERG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 98-141
YAMHILL COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
BAKER ROCK CRUSHING COMPANY,	)	
	)	
Intervenor-Respondent.	)	

Appeal from Yamhill County.

Pamela J. Beery and Christopher A. Gilmore, Portland, filed the petition for review. With them on the brief was Beery & Elsner. Pamela J. Beery and Terrence D. Mahr argued on behalf or petitioner.

John C. Pinkstaff, Assistant County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Frank M. Parisi, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Parisi & Parisi.

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

REMANDED 07/29/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner City of Newberg (city) appeals a Yamhill County (county) decision that changes the county zoning map designation for the subject property from Mineral Resource District (MR-2) to Heavy Industrial District (HI) and applies a Limited Use Overlay to limit the allowed uses on the subject property to those proposed by the applicant.

MOTION TO INTERVENE

Baker Rock Crushing Company (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION TO STRIKE

The county moves to strike Appendix V to the petition for review, which contains a letter dated July 8, 1998, from the city council to the county board of commissioners (commissioners). The July 8, 1998 letter is not in the record of the proceedings below. The county argues that the petition for review relies on the July 8, 1998 letter to demonstrate that the city raised during the proceedings below the issue of whether relevant provisions of the city comprehensive plan apply to the challenged decision as review criteria.

At oral argument, the city responded that the July 8, 1998 letter was "placed before" and not rejected by the final decision maker during the proceedings below as defined by OAR 661-010-0025(1)(b) and thus the letter is or should be part of the local record that the city can rely upon to demonstrate that certain issues were raised below. However, even assuming that the letter was placed before the decision maker within the meaning of OAR 661-010-0025(1)(b), the time to object to documents allegedly omitted from the record submitted to LUBA is long past. The county's motion to strike Appendix V to the petition for review is granted.

FACTS

The subject property is a 20-acre parcel located between 14th Street on the north and

the Willamette River on the south, within the city's urban growth boundary (UGB) but outside the city limits. The property is bordered on the west by River Road with scattered rural residences further to the west. On the east, the property is bordered by two city-owned vacant parcels formerly used for landfill and sewage treatment purposes and a marine park called Roger's Landing. Adjacent to Roger's Landing and the city-owned parcels to the east is the Smurfit pulp and paper mill on 145 acres of land zoned HI. To the north of 14th Street lay vacant property zoned for agricultural and forestry uses, and further north, a railroad line and residential uses that are within the city limits.

The subject property is topographically marked by a steep escarpment that separates the lower portion of the property near the river within the river's flood plain from an upper bench. The lower portion of the property is located within the Willamette River Greenway. Intervenor has operated an aggregate processing and storage facility on the property for 25 years that has involved shipping aggregate to the site by barge, washing and crushing the rock, and then transporting the aggregate on trucks via 14th Street to its ultimate destination. At the height of intervenor's aggregate operation in 1993, intervenor's operation produced 283,000 tons of aggregate and generated an average of 22 trucks per hour using the 14th Street truck route.

The subject property is designated "industrial" under both the city and county comprehensive plans. In 1979, the city and county entered into an Urban Area Growth Management Agreement (UAGMA) that requires, in relevant part, that zone changes outside city limits but within the UGB "shall be processed by Yamhill County and shall be forwarded to the City Council for its recommendation." UAGMA VII(3)(a). Where the city's recommendation is required, the UAGMA provides that "the City and County need not agree upon a decision." UAGMA III(5)(b). The UAGMA does not specify what standards are applied in processing a zone change or other applications within the UGB, but does provide that:

> "The 1979 Comprehensive Plan Land Use Map adopted by the City of Newberg on July 2, 1979, shall be the plan map for the area within the [UGB], and shall replace conflicting portions of the Yamhill County Comprehensive Plan Map (1974) pertinent to this area. Where said maps conflict, Yamhill County shall initiate the process necessary for consideration of a map amendment." UAGMA III(1).

Pursuant to UAGMA III(1), the county adopted Ordinance 214, which provides in relevant part:

> "The [commissioners have] reviewed the City's Comprehensive Plan, a copy of which is attached and by this reference is made a part hereof, and hereby adopts the City Plan Map designations for that area of Yamhill County which is within the City's UGB and is outside of the corporate limits of the City. The Planning Director is hereby authorized and directed to amend the Yamhill County Comprehensive Plan [YCCP] Map accordingly.
>
> "In amending the [YCCP], where the [YCCP] does not have a designation which corresponds to the City Plan Map designation, the Director may designate such property as 'Future Urbanizable Lands.'"

In February 1998, intervenor and the city jointly applied to the county for (1) a zone change from MR-2 to HI, (2) a similar use determination, and (3) a Willamette River Greenway Permit for an area including the subject property and one of the adjacent city-owned lots. The purpose of the application was to allow intervenor to operate a permanent asphalt batch plant on the city lot. A permanent asphalt batch plant is prohibited in the MR-2 zone, but is allowed, subject to a similar use determination, in the HI zone. At some point thereafter, intervenor dropped plans to locate the plant on the city-owned lot, and instead proposed locating it on the lower portion of the subject property. As proposed, the asphalt batch plant would produce approximately 50,000 tons of asphalt per year, and generate five truck trips during the peak hour.

Pursuant to UAGMA VII(3)(a), the application was forwarded to the city for its recommendation. The city council adopted a resolution that recommended denial of the requested zone change, similar use determination and Willamette River Greenway Permit. Intervenor then withdrew its request for a Willamette River Greenway Permit, and modified

its application to propose placing the asphalt batch plant on the upper bench of its property, outside the Willamette River Greenway. The commissioners conducted an evidentiary hearing on June 11, 1998, at which the city testified in opposition. On July 2, 1998, the commissioners closed the record, deliberated and voted to approve the zone change and similar use determination. The commissioners reopened the record on August 4, 1998, to receive testimony rebutting certain alleged ex parte communications, and on that date issued its written decision approving the requested zone change and similar use determination.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

The city argues that the county improperly construed the applicable law by finding that the Newberg Comprehensive Plan (NCP) goals and policies do not apply to an application for a zone change within the UGB.

The challenged decision finds that the NCP text does not apply to intervenor's application:

> "When making a land use decision concerning property within the [UAGMA] area, it is the county's responsibility to interpret the [UAGMA], and to make all interpretations of law related to the County's decision. The City retains its advisory function * * *. The County interprets the [UAGMA] to require only that the County apply City of Newberg plan map designations within the Newberg UGB. * * *
>
> "* * * * *
>
> "The Goals and Policies of the [NCP] are not applicable to this application. Under the terms of the [UAGMA], only the Planning Map designations of the [NCP] are relevant to this application. No plan map amendments are being requested by the applicant, and the proposed industrial zoning and use of the subject parcel is consistent with the City's designation of the land as 'Industrial' in its comprehensive plan. Indeed, under the [NCP], designation of the subject parcel as 'Heavy Industrial' is more appropriate than its current zoning. The City's plan states that 'Heavy industrial uses should be located in the area near Smurfit Newsprint, an existing pulp and paper mill.' [The subject property is] located in close proximity to the Smurfit mill." Record 15 (emphasis in the original, footnote omitted).

The decision nonetheless makes "precautionary findings" of compliance with certain NCP goals and policies. Record 33-47.

The city argues that the requirement at UAGMA III(1) that the NCP map shall be the "plan map" for the area within the UGB means that the county must also apply the NCP text, particularly its applicable goals and policies, in rezoning the subject property. The city argues that the county's interpretation effectively destroys the coordination between the city's plan map and text, because the NCP map designations cannot be applied without consideration of the associated NCP text. See Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 13, 569 P2d 1063 (1977) (the coordination requirement of ORS 197.015(5) requires that comprehensive plan maps must be consistent with applicable textual provisions).

Further, the city notes that UAGMA III(4) requires that the city and county work together in a coordinated effort to achieve the goals of both jurisdiction's comprehensive plan. More importantly, the city explains, UAGMA III(2) specifies that lands outside the UGB "shall be maintained in accordance with the [YCCP]." The city reasons that, read in context with UAGMA III(2), UAGMA III(1) implies that the NCP in its entirety applies inside the UGB. Finally, the city argues that to the extent the county made findings of compliance with NCP goals and policies, those findings are inadequate because they fail to address several applicable NCP provisions.

The county and intervenor respond that the commissioners correctly interpreted the UAGMA and their interpretation is entitled to deference under ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992). Respondents argue that the terms of UAGMA III(2) are limited to NCP map designations, and that the county adopted, in Ordinance 214, only NCP map designations. According to respondents, nothing in either the

UAGMA or Ordinance 214 suggests that either the county or city intended that NCP text provisions be applicable to zone changes within the UGB.[1]

We need not and do not decide whether the county's interpretation of UAGMA III(1) is entitled to deference under ORS 197.829(1) and Clark, because we agree with respondents that the commissioners correctly interpreted UAGMA III(1) even under a nondeferential standard of review. Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994); McCoy v. Linn County, 90 Or App 271, 275-76, 752 P2d 323 (1988) (in reviewing a local government interpretation of a provision other than by the governing body that enacted it, LUBA's standard of review is whether the interpretation is reasonable and correct). Absent a statutory provision or agreement to the contrary, development within a UGB and outside a city's corporate limits is subject to the county's jurisdiction, and to compliance with the county's development ordinance and comprehensive plan. See ORS 215.170. UAGMA III(1) specifies that NCP map designations apply within the UGB, but the agreement is otherwise silent regarding which jurisdiction's land use regulations and comprehensive plan text is applicable to development within the UGB. We disagree with the city that UAGMA III(2) or other provisions of the agreement make NCP policies and goals applicable as well.

Further, we disagree with the city that application of the NCP map designations without also applying associated NCP text renders the elements of the city's plan uncoordinated. Sunnyside Neighborhood merely states the unexceptional proposition that when a local government amends its comprehensive plan it must ensure that the plan text and map are consistent. That case does not stand for the broader proposition advanced by the city, that a local government cannot adopt or apply another jurisdiction's map designations

[1]Both respondents advance the alternative argument that the NCP map is also not applicable, notwithstanding UAGMA III(1), because the effect of Ordinance 214 was to make corresponding designations in the county's plan map the applicable designations. In light of our resolution of this assignment of error on other grounds, we need not and do not consider this alternative argument. However, we note that both the challenged decision and the county staff report applied the NCP map designations, not the county's map designations.

without also adopting or applying that jurisdiction's comprehensive plan text. The city has not demonstrated that either the UAGMA or other authority requires that the county apply NCP goals and policies to lands within the UGB.[2]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The city argues that the county improperly construed Yamhill County Zoning Ordinance (YCZO) 1208.02(A), by finding that certain goals and policies of the YCCP were not applicable approval criteria, and by failing to consider other appropriate locations for the proposed asphalt batching plant in the county as a whole.

YCZO 1208.02(A) requires that proposed zone changes be "consistent with the goals, policies and any other applicable provisions of the Comprehensive Plan." The challenged decision identifies five applicable YCCP goals and policies, but finds that they are "aspirational":

> "The county finds that the goals and policies specified in this section are applicable to this approval, and that no other goals, policies or other provisions are applicable. The county has not identified any [YCCP] goals or policies that are approval criteria. The goals and policies discussed in these findings below are aspirational and help to establish the context for decision making by the county." Record 15.

As an alternative basis for the decision, the commissioners went on to consider the five identified YCCP goals and policies and concluded that the proposed zone change is consistent with those goals. We address petitioner's specific challenges below.

A. YCCP I.H.1, I.H.1.a, I.H.1.b, I.H.1.e, and I.H.1.g

The city argues, first, that the county erred in finding that the five YCCP goals and policies it addressed are not mandatory approval criteria. The city does not address the text

[2]Resolution of the first assignment of error on this basis makes it unnecessary to consider respondents' arguments that the city waived the issue of whether NCP goals and policies applied, by failing to raise that issue and by affirmative waiver.

of these five goals and policies individually, but argues that some of them contain terms such as "will be located" or "will develop" with respect to industrial uses that should be construed in a mandatory rather than a precatory sense, rendering those goals and policies mandatory approval criteria.

The city's argument, to the extent it is sufficiently developed for review, fails to challenge the county's findings that the proposed zone change is consistent with the five identified YCCP goals and policies. The county made a finding of compliance with YCZO 1208.02(A) and addressed the identified YCCP goals and policies essentially as if they were mandatory approval criteria. Thus, even assuming the city's interpretation of certain YCCP goals and policies is correct, the county's misconstruction of law constitutes harmless error.[3]

B. YCCP I.H.1.i

The city argues that the county erred in implicitly finding that YCCP I.H.1.i is not applicable and does not constitute a mandatory approval criterion. YCCP I.H.1.i provides:

> "Industrial development will utilize the transportation system in an efficient and safe manner and reduce energy consumption by identifying for industrial development areas with alternative transportation opportunities, and by locating employment opportunities close to public transportation and, where appropriate, in community areas."

The city contends that the terms "will utilize" sets YCCP I.H.1.i apart from more general statements in YCCP I.H, and thus renders that provision a mandatory approval criterion.

Respondents argue that the county correctly deemed YCCP I.H.1.i not to constitute an applicable, mandatory approval criterion, because by its terms YCCP I.H.1.i merely directs legislative consideration of transportation issues in identifying areas for industrial development, and does not apply to a development request in an area that the county has already designated for industrial use. We agree with respondents that the city has not

[3]Resolution of this subassignment of error on this basis makes it unnecessary for us to consider respondents' argument that the county's interpretation is adequate for review and entitled to deference under ORS 197.829(1) and (2).

established that YCCP I.H.1.i provides a mandatory approval criterion with respect to a quasi-judicial zone change application.

This subassignment of error is denied.

C. YCCP V.A.1.b

The city argues that the county erred in failing to consider YCCP V.A.1.b, which provides:

> "Yamhill County will, in making land use decisions relative to industrial or other uses likely to pose a threat to air quality, consider proximity of the proposed use to residential areas and meteorological factors such as seasonal prevailing wind direction and velocity."

The city argues that the proposed asphalt batch plant will impact air quality, particularly with respect to nearby residential uses, and that the challenged decision must be remanded to address YCCP V.A.1.b.

Respondents argue, first, that the city failed to raise the issue of whether YCCP V.A.1.b applies and thus has waived that issue. ORS 197.763(1); 197.835(3). At oral argument, the city responded in part by relying on ORS 197.835(4)(a), which provides that a petitioner may raise new issues to LUBA if:

> "The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

The city contends that because the notice of the hearings below did not list applicable YCCP provisions as required by ORS 197.763(3)(b), petitioner may now raise new issues with respect to the omitted provisions, including YCCP V.A.1.b. The notice of the evidentiary proceedings below listed several provisions of the county's zoning ordinance, but refers simply to the "Yamhill County Comprehensive Plan" without specifying any provisions of the YCCP. Record 296. Notwithstanding, respondents rely on the last sentence of ORS 197.835(4)(a) and argue that the Board should refuse to allow issues

regarding YCCP V.A.1.b to be raised because the city could have raised those issues before the county. The county argues that the reference to the "Yamhill County Comprehensive Plan" in the notice was sufficient, given the city's concerns regarding "air quality" impacts expressed in the city's resolution recommending denial, to put the city on notice that compliance with any YCCP provisions regarding air quality must be raised before the county.

We disagree with respondents. In Tandem Development Corp. v. City of Hillsboro, 33 Or LUBA 335 (1997), the Board refused to consider new issues raised in the petition for review regarding the applicability of a provision that was codified on the same page as provisions that the petitioner had quoted and relied upon in filing a local appeal. In Visher v. City of Cannon Beach, ___ Or LUBA ___ (LUBA No. 98-030, August 21, 1998), aff'd 158 Or App 146, 973 P2d 372, rev den 328 Or 595 (1999), we distinguished Tandem Development Corp. because the provision at issue in Visher was located in a completely different section of the comprehensive plan from provisions that the notice had listed as applicable. In the present case, the notice failed to list any YCCP provisions. Even if the notice had listed the provisions in YCCP section III that the county ultimately found to be applicable, that notice would not suffice to put the city on notice that any provisions of YCCP section V applied. We decline to apply ORS 197.835(4)(a) in a manner that requires petitioner to comb through the entire comprehensive plan looking for applicable criteria that are omitted from the notice. Because respondents do not point to any other circumstances indicating that the city could have raised the issue of YCCP V.A.1.b's applicability, we conclude that the city may raise that issue on appeal. ORS 197.835(4)(a).

On the merits, the county argues that YCCP V.A.1.b is not applicable, because it is applicable only when a land use decision is "likely to pose a threat to air quality." The county made findings with respect to other criteria that the applicant must obtain all necessary Department of Environmental Quality (DEQ) permits and satisfy all applicable

DEQ regulatory requirements, and that "the very low levels of emissions" from the proposed plant do not pose human health risks. Record 23. To the extent complaints about emissions go to odor rather than health risks, the county argues that such complaints do not constitute evidence of a "threat to air quality" within the meaning of YCCP V.A.1.b. We understand the county to argue that the Board should interpret YCCP V.A.1.b as being limited to the kind of air quality concerns addressed by DEQ, and that the above findings and their supporting evidence "clearly supports" a finding either that YCCP V.A.1.b is inapplicable or that the proposed asphalt batch plant is consistent with that provision. ORS 197.829(2);[4] 197.835(11)(b).[5]

We decline to interpret YCCP V.A.1.b as the county suggests. It is not at all clear that YCCP V.A.1.b is directed or limited to the types of emissions that DEQ regulates. To the extent the county relies on ORS 197.835(11)(b), findings that the plant's emissions do not pose human health risks do not "clearly support" a finding of compliance with YCCP V.A.1.b.

This subassignment of error is sustained.

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[4]ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

[5]ORS 197.835(11)(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 and remand the remainder to the local government, with direction indicating appropriate remedial action."

D. YCZO 1208.02(B)

The city argues that the county misconstrued YCZO 1208.02(B) to require that the county consider only alternative sites zoned HI within the city's UGB and not other alternative sites within the county. YCZO 1208.02(B) requires a finding that:

> "There is an existing, demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone."

The county found compliance with YCZO 1208.02(B) based on the following interpretation:

> "In addressing [YCZO 1208.02(B)], the county considers the Newberg area, including the urban and urbanizable land with the Newberg [UGB], to be the relevant area for analysis. This approach is reasonable, considering that 1) the use is an urban, heavy industrial use; 2) the use will be located within the Newberg UGB, in an area that has been plan designated 'Industrial' * * *; 3) the applicant has stated that its primary market for products from its proposed facility will be the area within the Newberg UGB (although it will also be able to serve rural Yamhill County and other nearby cities)." Record 18.

The city argues that this interpretation is inconsistent with the text of YCZO 1208.02(B) and "clearly wrong" because nothing in that provision authorizes the county to consider an area less than the entire county. ORS 197.829(1); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992). Respondents argue, and we agree, that the county's interpretation is well within the discretion afforded by ORS 197.829(1) and Clark. YCZO 1208.02(B) requires the county to evaluate the "economy of the area" and the "market demand" that the proposed use will satisfy, both of which suggest a scope of analysis less than the entire county.

The city also raises an evidentiary challenge to the county's finding of compliance with YCZO 1208.02(B), arguing that there is not substantial evidence in the record that the proposed facility's "primary market" is the Newberg area. Respondents cite to the decision's unchallenged findings of fact that (1) there is an annual need for 48,000 tons of asphalt in the

Newberg area, (2) the Newberg area is the fastest growing part of the county, and (3) transportation costs are high and local sources of asphalt are few, resulting in significantly higher local prices. Substantial evidence is evidence a reasonable person would rely upon in making a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984). Respondents argue, and we agree, that these unchallenged facts constitute evidence that a reasonable person could rely on to conclude that the Newberg area will be the "primary market" for the proposed facility. Accordingly, the city has not demonstrated that the county's finding of compliance with YCZO 1208.02(B) is unsupported by substantial evidence in the record.

This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

The city argues that the county improperly construed YCZO 1208.02(C) as applying only to the proposed use rather than to more intensive uses allowed in the HI zone; and by applying a Limited Use Overlay (LUO) in violation of YCZO 904. YCZO 1208.02(C) requires a finding that:

> "The proposed [zone] change is appropriate considering the surrounding land uses, the density and pattern of development in the area, any changes which may have occurred in the vicinity to support the proposed amendment and the availability of utilities and services likely to be needed by the anticipated uses in the proposed district."

The county limited its analysis of service availability under YCZP 1208.02(C) to the proposed use, finding that:

> "The proposed change is appropriate considering the availability of utilities and services likely to be needed by the anticipated uses in the proposed district. When an applicant has provided sufficient detail regarding its anticipated long-term use of the property subject to a zone change application, the county interprets YCZO 1208.02(C) as requiring the County to consider only the applicant's proposed use as the 'anticipated use.' In this instance, the applicant has * * * stated that all utilities and services that it is likely to need for its anticipated use are available at the site. * * *" Record 22.

Similarly, the county found that:

> "[T]he 'anticipated uses' specified in YCZP 1208.02(C) consist solely of the applicant's proposed uses, because the county is imposing a Limited Use Overlay on the subject parcel under YCZO 904, limiting uses allowed outright on the property to the uses that have been proposed by the applicant." Record 22.

The city argues that the county's interpretation of YCZO 1208.02(C) is "clearly wrong" because nothing in that provision suggests that the county can consider the availability of services based on anything less than the entire range of uses allowed in the HI zone. Further, the city argues that the county erred in relying on the LUO District described by YCZO 904, because that provision authorizes use of the LUO District only in three circumstances, none of which is present here.[6]

Respondents argue, and we agree, that the county's interpretation of YCZO 1208.02(C), limiting the scope of "anticipated uses" for purposes of service availability to the proposed use, is consistent with the text of that provision. ORS 197.829(1); see also Huntzicker v. Washington County, 141 Or App 257, 261, 917 P2d 1051, rev den 324 Or 322 (1996) (a governing body's interpretation of a local provision is clearly wrong where no person could reasonably interpret the provision in the manner the local body did). A reasonable person could construe the term "anticipated uses" to denote something less than the range of uses allowed in the HI zone. With respect to YCZO 904, we agree with respondents that the city has not demonstrated that the county's reliance on the LUO District provides a basis for reversal or remand. Even if the LUO District is limited to the three circumstances listed in YCZO 904.01, something the county disputes, the city has not

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[6]YCZO 904.01 describes the purpose of the LUO District:

> "The purpose of the [LUO] District is to limit permitted use(s) and activities in a specific location to only those uses and activities which are justified and approved through Comprehensive Plan exceptions under ORS 197.732 or other authorized statutory or administrative rule procedure."

explained why the county's use of the LUO District in this case for a purpose not contemplated by YCZO 904 is more than harmless error.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The city contends that the county's finding of compliance with the compatibility requirement of YCZO 1208.02(C), particularly the finding that the proposed asphalt batch plant will not have significantly adverse impacts on nearby residential areas in terms of noise, odor, and truck traffic impacts, is not supported by substantial evidence.

A. Continuation of Existing Aggregate Production

The city argues, first, that the county's findings regarding adverse impacts are based on the flawed premise that use of the property will be less intense because it is limited to asphalt batching. However, the application and decision contemplate that the existing aggregate processing operation will continue, the city argues, and given the cumulative impacts of both operations, the county's finding that adverse impacts will be less intense are not supported by substantial evidence.

Intervenor responds that both the application and the decision expressly limit aggregate production to the volume necessary for the production of asphalt onsite, and that the asphalt batch plant will produce an approximate annual volume of 50,000 tons of asphalt, considerably less than the 283,000 tons of aggregate produced by the existing operation in 1993. We agree with intervenor that the decision limits aggregate production on the subject property to that necessary for the proposed asphalt batch plant, and that the county's finding regarding the intensity of the proposed facility is not flawed for the reason argued under this subassignment of error.

This subassignment of error is denied.[7]

B. Pattern of Development

The city next argues that the county's finding that the predominate "pattern of development in the area" is industrial is not supported by substantial evidence. The challenged decision finds in relevant part:

> "The 'pattern of development in the area' is predominantly heavy industrial, considering: 1) the presence of the Smurfit mill, which is the largest heavy industrial use anywhere in Yamhill County; 2) the presence of a closed landfill subject to 50-60 years of post-closure monitoring; 3) the past use of the City of Newberg parcels as a sewage treatment plant; 4) the use of the applicant's parcel, and current zoning of that parcel, for the transport, storage, sorting, crushing and other processing of aggregate." Record 20.

The city challenges this finding, arguing that, while each of the adjacent parcels are designated "industrial" on both the city and county's plans, neither the zoning nor the actual use of those parcels is for industrial uses. Instead, the city explains, adjacent zoning consists of Public Works, Agriculture and Forestry, and Very Low Density Residential, while adjacent uses consist of vacant lands, the marine park, and residential uses. Further, the city contends that the city erred in looking at and giving preponderant weight to nonadjacent industrial development, the Smurfit mill further to the east, while ignoring or giving less weight to nonadjacent residential development to the north that is as close or closer to the subject property as the mill.

Intervenor responds, and we agree, that the county's findings regarding the character of the area are supported by substantial evidence. If there is substantial evidence in the whole record to support the local government's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. Stewart v. City of Brookings, 31 Or LUBA 325, 330 (1996). Given the historical use of the

[7]The foregoing also resolves the city's challenge to the county's findings regarding traffic impacts, which the city based on the failure of the traffic study to account for the cumulative truck traffic generated by the existing operation and the proposed asphalt batch plant.

subject property for aggregate processing, the Smurfit mill, and the quasi-industrial uses such as the landfill and former sewage treatment plant, a reasonable person could conclude that the pattern of development in the area was predominantly industrial in character, notwithstanding the existence of nonindustrial uses in the area.

This subassignment of error is denied.

C. Changes in the Area

The city next argues that the county failed to consider, as YCZO 1208.02(C) requires, changes in the area when considering the proposed zoning change. The city contends that the county failed to consider the closing of the landfill, the relocation of sewage treatment facility and the city's efforts to develop park and recreational facilities along the river, all of which the city argues are inconsistent with rezoning the property for heavy industrial uses.

Intervenor responds that YCZO 1208.02(C) requires that the county consider changes that "support the proposed amendment," and does not, as the city suggests, require that the county consider changes in the vicinity that detract from the proposed zone change. We agree with intervenor that the changes YCZO 1208.02(C) requires the county to consider include only changes that support the proposed rezoning, and that the county did not violate YCZO 1208.02(C) by failing to consider the development of recreational opportunities or the change in activities on the city's property.

This subassignment of error is denied.

D. Odor, Noise, and Dust

The city faults the county's finding regarding odor, noise, and dust impacts. The city argues that the evidence the county relied upon indicates that asphalt plants can be operated in proximity with residential development without causing noise and dust problems, but, according to the city, nothing in the record discusses the impacts of odor from asphalt plants.

Intervenor responds by citing to evidence in the record that neighbors of the proposed asphalt plant in its former location had never complained regarding odor, noise, or other

emissions. We agree with intervenor that the cited evidence constitutes substantial evidence supporting the county's findings regarding adverse impacts from odor, noise, and dust.

This subassignment of error is denied.

E. Adjacent Residential Uses

The city faults the county's findings that the nearest residential use to the subject property is 260 feet away to the north, arguing that the county failed to consider impacts on residential dwellings across River Road to the west, and whether those residences are sufficiently buffered from the proposed plant.

Intervenor cites to several places in the decision where the county considered the residential uses to the west of the subject property, and argues that nothing in YCZO 1208.02(C) requires that the county make findings regarding buffering of nearby residential uses. We agree with intervenor that the county's findings regarding impacts on nearby residential uses are not erroneous for any reason stated in this subassignment of error.

This subassignment of error is denied.

F. Location of Plant

Finally, the city argues that there is no evidence in the record establishing where on the subject property the proposed asphalt batch plant will be located, because the only direct evidence in the record of the plant location stems from the original application, when the city and intervenor proposed placing the plant on one of the city-owned lots. Without evidence regarding the proposed location on the subject property, the city contends, the county cannot adequately determine the plant's impacts on nearby uses, or that the plant will not be located on a portion of the property within the floodplain or Willamette River Greenway.

Intervenor responds by citing to testimony in the record indicating that the proposed asphalt batch plant will be located on the upper bench of the subject property, outside the floodplain and Willamette River Greenway area. We agree with intervenor that there is

substantial evidence in the record indicating that the plant is proposed to be located on the upper bench of the subject property.

This subassignment of error is denied.

The fourth assignment of error is denied.

The county's decision is remanded.