

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ARTHUR SPIRO, ELISABETH SPIRO
5 and LYLE BLOCK,
6 *Petitioners,*

7
8 vs.

9
10 YAMHILL COUNTY,
11 *Respondent.*

12
13 LUBA No. 99-171

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from Yamhill County.

19
20 Christine M. Cook, Portland, filed the petition for review and argued on behalf of
21 petitioners.

22
23 Fredric Sanai, Assistant County Counsel, McMinnville, filed the response brief and
24 argued on behalf of respondent.

25
26 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
27 participated in the decision.

28
29 REMANDED

06/01/00

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

33

NATURE OF THE DECISION

Petitioners appeal the county’s approval of a church in a rural residential zone.

FACTS

The subject property is a vacant five-acre parcel zoned Agriculture-Forestry (AF-10), a rural residential zone. The property is located on Old Yamhill Road, a two-lane local road without sidewalks. Old Yamhill Road runs north of Highway 240 for approximately one mile, and intersects the highway at both the east and west ends of that mile. Twenty-one dwellings exist along Old Yamhill Road and, particularly on weekends, the road is used for walking, biking, horseback riding and other non-vehicular uses.

On May 6, 1999, a land use consulting firm submitted an application for a conditional use permit to locate a church on the subject property, on behalf of a congregation currently located in the City of Newberg. At the time of application, the membership of the church was 180 persons. The proposed church holds a maximum of 240 persons. Based on a 240-person membership, it is estimated that the church will generate 350 vehicle trips on Sundays, with approximately 120 vehicle trips during the peak hour of church services. As proposed, the church would obtain water from a well to be dug on the subject property, storing the water in a holding tank of indeterminate size. To address whether the proposed well would be adequate, the consultant submitted a report and testimony from a hydrogeologic firm (Kleinfelder report). The Kleinfelder report calculates the church’s water usage over the last five years at its existing location at an average 310 gallons per day (gpd), and estimates that a well dug on the subject property could produce 1,200-2,400 gpd, sufficient to satisfy the church’s estimated water needs.

The county planning commission conducted a public hearing on June 17, 1999, and denied the application. The applicant appealed to the county board of commissioners, which held a hearing September 9, 1999, and overturned the planning commission decision, thus

1 approving the application.

2 This appeal followed.

3 **OBJECTIONS TO RESPONSE BRIEF**

4 Petitioners move to strike portions of the county’s response brief, arguing that several
5 assertions of fact in that brief are not supported by the record. That a brief may include
6 allegations of fact that are not supported by substantial evidence is not grounds for striking
7 those allegations from the brief. *Hammack & Associates, Inc. v. Washington County*, 16 Or
8 LUBA 75, 78, *aff’d* 89 Or App 40, 747 P2d 373 (1987). However, where allegations of fact
9 in a brief are not supported by the record, we disregard those allegations. *Id.*

10 One of the assertions of fact that petitioners challenge is the reference on page 18 of
11 the response brief to an “existing” well. The county concedes that the referenced well does
12 not exist. The other disputed allegations of fact are essentially arguments rather than
13 assertions of fact.

14 **APPLICABLE LAW**

15 The county approved the proposed church pursuant to conditional use criteria at
16 Yamhill County Zoning Ordinance (YCZO) 1202.02.¹ YCZO 1202.02(B) requires that the

¹YCZO 1202.02 provides:

“A conditional use may be authorized * * * upon adequate demonstration by the applicant that the proposed use will be compatible with vicinity uses, and satisfies all relevant requirements of this ordinance and the following general criteria;

- “A. The use is listed as a conditional use in the underlying zoning district;
- “B. The use is consistent with those goals and policies of the Comprehensive Plan which apply to the proposed use;
- “C. The parcel is suitable for the proposed use considering its size, shape, location, topography, existence of improvements and natural features;
- “D. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district;

1 use be consistent with any applicable goals and policies in the Yamhill County
2 Comprehensive Plan (YCCP). The county concluded that three YCCP policies identified by
3 petitioners, I.B.1.c, I.B.1.d, and IV.A.1.i, do not apply to the proposed use or, if they do, that
4 the proposed use is consistent with those policies.²

5 As a threshold issue, petitioners challenge the county’s determination that the three
6 YCCP policies do not apply. In the challenged decision, the county first concludes that none
7 of the three policies are mandatory applicable approval criteria because (1) they have been

“E. The proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use; and

“F. The use is or can be made compatible with existing uses and other allowable uses in the area.”

²YCCP Policy I.B.1.c and .d provide:

“(c) All proposed rural area development and facilities:

“1. Shall be appropriately, if not uniquely, suited to the area or site proposed for development;

“2. Shall not be located in any natural hazard area, such as a floodplain or area of geologic hazard, steep slope, severe drainage problems or soil limitations for building or sub-surface sewage disposal, if relevant;

“3. Shall be furnished with adequate access and an adequate individual or community water supply, if required * * *.

“(d) No proposed rural area development shall require or substantially influence the extension of costly services and facilities normally associated with urban centers, such as municipal water supply and sanitary sewerage or power, gas and telephone services, nor shall it impose inordinate additional net costs on mobile, centralized public services, such as police and fire protection, school busing or refuse collection.”

YCCP Policy IV.A.1.i provides:

“Yamhill County will accommodate the location of non-profit, institutional organizations as defined by the Internal Revenue Code in the designated agriculture and forestry small holding areas on the Plan Map, provided such uses are compatible with such areas, the stated goals and policies of the plan are fully complied with, and such uses are established and regulated as planned unit developments under the zoning ordinance.”

1 implemented in the county’s code, and (2) each are stated in aspirational rather than
2 mandatory terms. The basis for the first determination is language at YCCP 2 which states:

3 “Implementation of the County goals and policies can occur in several ways.
4 Many are implemented through County ordinance. Other goals and policies
5 will apply to individual issues or proposals put forth by both the private and
6 public sectors.”

7 Petitioners argue, and we agree, that the county’s finding that the three policies have
8 been implemented in the county’s code is inadequate and, to the extent that finding contains
9 or implies an interpretation of any YCCP or YCZO provision, that interpretation is
10 inadequate for review. ORS 197.829(2).³ The county’s findings do not identify any YCZO
11 provisions that implement the three policies, or why it believes the YCCP policies at issue
12 are among the goals and policies that are implemented in the code rather than those that
13 “apply to individual issues or proposals.”

14 We also agree with petitioners that the county’s findings that each of the three
15 policies is stated in aspirational rather than mandatory terms are inconsistent with the text of
16 those policies. YCCP I.B.1.c requires that “[a]ll proposed rural area development and
17 facilities * * * shall be appropriately, if not uniquely, suited to the area”; and that such
18 development “shall be furnished” with an adequate individual or community water supply.⁴
19 YCCP I.B.1.d states that “[n]o proposed rural area development shall require or substantially
20 influence” the extension of services normally associated with urban centers. YCCP IV.A.1.i
21 states that the county “will accommodate” the location of certain institutional uses in zones
22 such as the AF-10 zone, “provided such uses” meet specified requirements. Such terms are

³ORS 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.”

⁴The decision goes on to explain that YCCP I.B.1.c.2 does not apply to the particular use proposed here, because none of the conditions listed in that subsection are present. Petitioners do not challenge that determination.

1 mandatory. Absent some textual or contextual explanation for why these policies do not
2 apply to the rural development proposed here, the county’s unexplained conclusion to the
3 contrary is inconsistent with the terms of those policies and “clearly wrong.”
4 ORS 197.829(1)(a);⁵ *Jebousek v. City of Newport*, 155 Or App 365, 367, 963 P2d 116
5 (1998); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992
6 (1992).

7 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

8 Petitioners argue that the county’s findings of compliance with YCZO 1202.02(B)
9 through (F) and with YCCP I.B.1.c.3 are inadequate and not supported by substantial
10 evidence, insofar as they address the adequacy of the water supply to meet the needs of the
11 proposed church without adversely affecting neighboring wells.

12 In the challenged decision, the county summarizes the evidence and conclusions
13 stated in the Kleinfelder report, and addresses the adequacy of the water supply in the context
14 of YCZO 1202.02(D):

15 “Kleinfelder conducted a general hydrogeologic overview of the Newberg
16 area and concluded that the groundwater system underlying the proposed site
17 should be capable of providing the quantity of water need[ed] to meet the
18 proposed church needs without adversely impacting other nearby groundwater
19 users. * * * Development plans for the proposed use call for the installation
20 of an on-site septic system and domestic groundwater well, and the [church’s]
21 water usage over the period 1994-1999 [at its existing site] is estimated to be
22 approximately 310 gallons per day or 9624 gallons per month (which is
23 comparable to another church with about 200 members). Kleinfelder
24 evaluated select well logs from [Oregon Water Resources Department] which
25 were drilled between 1957 and 1998. * * * All wells surveyed performed
26 satisfactorily except two which were old and not designed properly. * * *

⁵ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation; * * *”

1 Based on this data and conservative assumptions, Kleinfelder estimates that
2 the potential daily yield for wells in the area ranges from approximately 1,200
3 to 2,400 gpd, and therefore, the groundwater system underlying the site
4 should be capable of providing the quantity of water needed. [Kleinfelder]
5 indicated that a holding tank (to be sized based on Fire Marshall's
6 recommendation) will be used, and that it will require about one hour of
7 pumping at night. 310 gallons per day is slightly more than the amount of
8 water used by a single family residence (250 gpd for a family of four). * * *"
9 Record 11-12 (footnote omitted).

10 **A. Inconsistent Findings**

11 Petitioners argue, first, that the county's findings with respect to the water supply are
12 inadequate, because the county adopts by reference several documents, including a May 6,
13 1999 report that is part of the Kleinfelder report. Petitioners point out that the May 6, 1999
14 report erroneously calculated the church's average water usage at its existing site to be 500
15 gallons per *month*, or 17 gpd, and relied on that erroneous calculation to conclude that the
16 groundwater supply can meet the church's needs without impacting other users. Record 260-
17 61. Petitioners argue that, if the county adopted the Kleinfelder report as *findings*, then its
18 findings are in conflict with each other, as the county concludes elsewhere in the decision
19 that the church's average water usage at its existing site is 310 gpd. In short, petitioners
20 contend that the county's findings are inadequate because they rely on concededly erroneous
21 facts that are contradicted by other findings.

22 The challenged decision discusses the three documents comprising the Kleinfelder
23 report, including the May 6, 1999 report, and states that those "three documents are hereby
24 adopted by this Board and incorporated into these findings by this reference." Record 11.
25 The decision also addresses the inconsistency between the initial estimate of 500 gallons per
26 month and the subsequent estimate of 310 gpd:

27 "Initially, applicants incorrectly estimated, based on a misreading of their
28 prior years' water bills, that water usage had been 500 gallons per month.
29 However, the bills were in cubic feet rather than gallons, and therefore the
30 estimate of water use was revised upwards to 300-400 gpd or 9600 gallons per
31 month. This is approximately the same as a single family residence, and
32 Kleinfelder found, and the Board is persuaded, that the revised water usage

1 figure does not cause a change in the conclusions reached by Kleinfelder.”
2 Record 12 n 1.

3 The practice of incorporating other decisions or documents as findings or statements
4 of relied-upon fact frequently presents problems, and local governments that do so run the
5 risk of adopting inconsistent findings. *Gonzalez v. Lane County*, 24 Or LUBA 251, 259
6 (1992); *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98, 106 (1992).
7 However, in this case the decision explains the discrepancy between the two estimates,
8 affirms the second estimate, and states that the discrepancy does not affect either
9 Kleinfelder’s or the county’s conclusions with respect to the adequacy of the proposed well.
10 The county’s findings do not, as petitioners argue, rely on erroneous facts that are
11 contradicted by the county’s own findings.

12 **B. Capacity of the Well and Aquifer**

13 Petitioners also challenge the county’s conclusion that the proposed well could
14 produce at least 1,200 gallons per day. Petitioners argue that no actual well or test well has
15 been dug on the subject property, and that the Kleinfelder report relied exclusively on two
16 sets of evidence: a 1978 study by the Oregon Water Resources Department of groundwater
17 in the Newberg area (1978 study), and a set of well logs from 17 wells within one mile of the
18 subject property. Petitioners argue that the 1978 study is not a reliable source of information
19 regarding *current* conditions, and that any conclusions drawn from the well log data are
20 undermined by evidence in the record that other, unstudied wells in the area, including one
21 within 100 feet of the subject property, are currently experiencing problems with inadequate
22 or declining quantity and quality. Petitioners argue that no reasonable decision maker could
23 rely on the 1978 study or the conflicting evidence regarding the adequacy of wells in the area
24 to conclude that a well on the subject property would produce 1,200 to 2,400 gallons per day.

25 The county responds that the choice of conflicting evidence belongs to the county, if
26 a reasonable person could reach the conclusion the county did. *Tigard Sand and Gravel, Inc.*
27 *v. Clackamas County*, 33 Or LUBA 124, 138, *aff’d* 149 Or App 417, 943 P2d 1106 (1997).

1 Despite the contrary evidence, a reasonable decision maker could rely upon the Kleinfelder
2 report and the evidence it relies upon to conclude that a well on the subject property could
3 produce 1,200 to 2,400 gpd without adversely affecting neighboring wells.

4 **C. Water Usage**

5 Petitioners argue, next, that the county’s findings with respect to the proposed water
6 supply are inadequate because:

7 “The decision does not clearly state that the church will use an average of 310
8 gallons of water per day, or what actual use on a Sunday might be, or what the
9 church will use during months or years of high demand, at its times of peak
10 demand. If it can be inferred that because the average usage over 5 1/2 years
11 was 310 [gpd], the findings do not explain how that leads to an inference that
12 future daily usage will be at that level. These facts are necessary to conclude
13 that YCZO 1202.02(B) – (F) * * * have been satisfied.” Petition for Review
14 20.

15 Petitioners argue that considering the church’s *average* daily or monthly use masks
16 an inconsistent pattern of usage at the church’s existing site, ranging from a low of 3,740
17 gallons during one month to a high of 51,615 gallons during another. Further, petitioners
18 argue that the bulk of the church’s water demands occur on Sunday rather than on a daily
19 basis, and that the relevant inquiry is not whether the proposed well can satisfy the church’s
20 average daily use, but rather whether the well can meet the church’s needs during periods of
21 peak demand, *without affecting neighboring wells*.⁶ Petitioners contend that even a well that
22 produces 1,200 to 2,400 gallons per day might be inadequate to meet the church’s needs on a
23 peak demand day during a peak demand period, unless the county requires that a holding
24 tank of sufficient size is used to store water in advance for such periods. If a tank of
25 inadequate size is ultimately used, petitioners argue, then the church may not be able to meet
26 its needs on a peak demand day without pumping more than 2,400 gallons on such days.

⁶YCZO 1202.02(D) requires that “[t]he proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district.” YCZO 1202.02(F) requires that “[t]he use is or can be made compatible with existing uses and other allowed uses in the area.” *See* n 1.

1 According to petitioners, pumping in excess of 2,400 gpd may be inconsistent with the needs
2 of neighboring wells sharing the common aquifer. Petitioners argue that the county failed to
3 determine how much water will be used during these peak periods, whether a well producing
4 1,200 to 2,400 gpd can meet the demand during those periods, or what size holding tank
5 might be necessary to ensure that it can. In fact, petitioners argue, the county failed to
6 require that the applicants install any holding tank at all, and without any requirement to that
7 effect there is no basis to conclude that one will actually be installed.

8 Petitioners also argue that the county's findings are inadequate because they do not
9 address whether the proposed water supply is adequate to satisfy increased church
10 membership or activities in the future. Petitioners note that the capacity of the proposed
11 structure is 240 persons, and the church shows a pattern of increased membership over recent
12 years. Petitioners argue that there is no basis to assume, as the county apparently did, that
13 the water demands of a 240-member church would be the same as the current 180-member
14 church. Further, petitioners note that the county compared the church's historical water
15 usage with a "comparable" church of 200 members, which used an average of 409 gpd for
16 the same time period as the subject church. Petitioners argue that, based on that evidence, no
17 reasonable person could conclude that a 240-member church would use 310 gpd, 25 percent
18 less than the comparable 200-member church.

19 The county responds that its findings regarding water usage are adequate and
20 supported by substantial evidence. According to the county, it is not necessary, or possible,
21 to predict exactly what the church's future water usage will be on the subject property, either
22 as an average or during peak days or peak periods. The county argues that it suffices for the
23 county to find that a well on the property can produce in excess of 1,200 gpd and that the
24 church has historically needed no more than an average of 310 gpd. The county contends
25 that, even assuming petitioners are correct that if church membership increases to capacity
26 the church will require more than an average 310 gpd, and that peak periods of use may

1 greatly exceed that figure, a reasonable decision maker could conclude that the water supply
2 would nonetheless suffice to meet the church's needs. With respect to the holding tank, the
3 county argues that the applicant proposed a holding tank, the size of which will be
4 determined by the fire marshal, to meet both domestic and fire suppression water needs, and
5 there is no need for the county to specify a minimum tank size or impose as a condition of
6 approval something the applicant proposes to do anyway.

7 We agree with the county that it could rely on historical and comparable water usage
8 rates as an indicator of the church's future water demands at the subject property, and draw
9 reasonable inferences from that evidence without necessarily determining exactly what those
10 future demands will be. In other words, that the church might actually require more than 310
11 gpd is of no significance if the county concludes, based on the evidence, that it will require
12 no more than 1,200 gpd. However, petitioners argue, and the county does not seem to
13 dispute, that the church's historical water usage has varied dramatically and is concentrated
14 into periods of peak demand, which renders average daily use a misleading indicator of what
15 the church's actual needs will be during any particular day. Given that the church has, even
16 with a smaller membership, historically used as much as 51,615 gallons per month, a
17 reasonable decision maker could not conclude that a well producing 1,200 to 2,400 gallons
18 per day could meet that peak demand without a holding tank of sufficient size to meet peak
19 demand days.⁷

20 The challenged decision does not impose a condition that limits daily withdrawal to
21 the 1,200 to 2,400 gpd that the Kleinfelder report determined could be withdrawn without
22 adversely affecting neighboring wells. Had the county imposed such a limit on daily

⁷If water usage is concentrated in periodic weekly events, such as Sundays, then water demand on such days during a peak month might easily exceed the 1,200 to 2,400 gpd maximum withdrawal rate that the proposed well can support without adversely affecting neighboring wells. For example, assuming a peak month of 51,615 gallons with most of that usage occurring on four peak days during the month, the demand on those days could greatly exceed 2,400 gpd.

1 withdrawal, it might be appropriate to assume, as the county did in the challenged decision,
2 that the church will install a water storage tank with sufficient capacity to meet peak demand
3 days without imposing a condition to that effect.⁸ In that circumstance, pumping in excess of
4 2,400 gpd to meet such peak demands would not be an option and, as a practical matter, the
5 church would have to install a holding tank of sufficient capacity to meet the expected peak
6 demands.

7 However, in the absence of a condition that limits daily withdrawal to 1,200 to 2,400
8 gpd, the county may not fail to require a holding tank of sufficient capacity to meet peak
9 demand periods. Where daily withdrawal is not limited, the lack of a condition that requires
10 a holding tank of sufficient capacity to meet peak demand periods with a well that produces
11 1,200 to 2,400 gpd means there is nothing that would prevent the church from meeting that
12 peak demand by withdrawing more than 2,400 gpd. If the church did so, neighboring wells
13 may be adversely affected in ways that violate applicable provisions of YCZO 1202.02.

14 On remand the county must require that the applicant supply a supportable estimate
15 of peak demand periods, in addition to average daily demand estimates. With estimates of
16 peak demand periods and average daily demand, the county will be in a position to determine
17 whether a well that produces 1,200 to 2,400 gpd will be sufficient to meet the church's
18 expected daily and peak water demands. In the event peak demand periods exceed 1,200 to
19 2,400 gpd, the county will also be in a position to condition its approval on installation of a
20 holding tank of sufficient capacity to allow those peak demand periods to be met without
21 exceeding daily withdrawal of 1,200 to 2,400 gpd.

22 The first assignment of error is denied. The second and third assignments of error are
23 sustained, in part.

⁸This approach would only work if a well that produces 1,200 to 2,400 gpd would be sufficient to refill the storage tank between peak demand periods. A well that only produced 1,200 gpd (or 36,000 gallons per month) could not meet monthly demands of 51,615 no matter how large the water storage tank is.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioners contend that the county failed to adopt adequate findings supported by
3 substantial evidence, in determining that traffic impacts of the development comply with
4 YCZO 1202.02(B), (D), (E) and (F).

5 **A. Non-Vehicular Traffic**

6 Petitioners argue, first, that the county failed to address evidence that, because of the
7 absence of sidewalks or playgrounds in the area, Old Yamhill Road is frequently used for
8 non-vehicular purposes, such as walking, jogging, bicycle riding, horseback riding,
9 movement of farm machinery, etc. Many of these activities occur on Sunday, the peak
10 period for traffic impacts from the proposed church. According to petitioners, the county's
11 findings and the transportation study on which those findings are based addressed only
12 whether increased traffic from the church would affect *vehicular* use of Old Yamhill Road.
13 Petitioners argue that, when specific issues are raised relevant to compliance with an
14 approval criterion, the county's findings must address those issues. *Thomas v. Wasco*
15 *County*, 30 Or LUBA 302, 310 (1996); *Suydam v. Deschutes County*, 29 Or LUBA 273, *aff'd*
16 136 Or App 548, 901 P2d 269 (1995).

17 The county does not dispute that the county must address the issues raised regarding
18 impacts on non-vehicular use of Old Yamhill Road in finding compliance with YCZO
19 1202.02(B) through (F). However, the county argues that the traffic study and testimony in
20 the record adequately address the issue of impacts on non-vehicular use of Old Yamhill
21 Road, and nothing more is required. We disagree. That there is evidence in the record that
22 might support a finding with respect to a disputed issue does not obviate the need to adopt
23 findings addressing that issue. Because petitioners raised issues relevant to compliance with
24 an approval criterion, and the county's findings fail to address and respond to those issues,

1 the county’s findings are inadequate.⁹

2 This subassignment of error is sustained.

3 **B. Highway 240**

4 Petitioners explain that the applicant’s traffic study calculated the effect of traffic
5 generated by the proposed church on the intersections of Old Yamhill Road and Highway
6 240, and determined, among other things, that even with the additional traffic the accident
7 rate on Highway 240 in the area of those two intersections would continue to be considerably
8 lower than the average of rates on similar highways. Petitioners argue, first, that the traffic
9 study is flawed because it should have compared the intersections’ accident rates to the
10 accident rate on Old Yamhill Road, rather than on Highway 240 and similar highways. We
11 understand petitioners to contend that the traffic study and the county should have considered
12 whether the accident rate for the intersections as influenced by the additional traffic is
13 consistent with the expected accident rate for Old Yamhill Road and thus whether that road
14 is adequate to support the proposed use.

15 Petitioners also argue that the traffic study considered only 10 of the 13 accidents that
16 have occurred over the last five years at the intersections, and without considering the
17 remaining three, which are the most recent accidents, the study’s and the county’s
18 conclusions regarding the accident rate are not supported by substantial evidence.

19 The county responds that the study appropriately examined the impact of increased
20 traffic from the proposed use on accident rates at the Old Yamhill Road/Highway 240
21 intersections, in light of accident rates for that stretch of Highway 240 compared to similar
22 highways, rather than compared to Old Yamhill Road. We agree that petitioners have not
23 explained why the study is flawed for failing to compare accident rates with respect to Old

⁹The county does not invoke ORS 197.835(11)(b) or argue that the evidence in the record would “clearly support” a finding of compliance with YCZO 1202.02(B) through (F) with respect to this issue, and thus allow LUBA to affirm the county on this point notwithstanding the inadequate findings.

1 Yamhill Road. That 13 accidents have occurred over a certain period of time in the area of
2 the intersections is meaningless unless that statistic is compared to something. The traffic
3 study relies upon an existing point of comparison for these types of highway intersections;
4 petitioners do not suggest that a similar point of comparison exists for rural roads that
5 intersect with highways.

6 Similarly, we are not persuaded that, because the traffic study did not consider the
7 three most recent accidents, the county could not rely on the study's conclusions regarding
8 the accident rate. Those accidents all occurred after the date of the traffic study, and thus
9 outside the period of time from which the study drew its conclusions. Petitioners have not
10 explained why accidents that occurred after that period of time are relevant to the
11 conclusions drawn from that period of time or, if they are, why a reasonable decision maker
12 could not rely on those conclusions nonetheless.

13 This subassignment of error is denied.

14 The fourth assignment of error is sustained, in part.

15 **FIFTH ASSIGNMENT OF ERROR**

16 Petitioners argue that the county's decision violates YCCP Policy IV.A.1.i, because
17 the church is a "non-profit, institutional" organization "as defined in the Internal Revenue
18 Code" and the county's decision allows it to be located in the AF-10 zone without requiring
19 that that use be regulated as a planned unit development, as YCCP Policy IV.A.1.i requires.
20 *See n 2.*

21 The county interpreted YCCP Policy IV.A.1.i not to apply to the particular use
22 proposed here:

23 "[T]he requirement in this YCCP provision is conditioned upon the use being
24 regulated as a planned unit development. * * * Section 903.02 of the YCZO
25 specifically states that the PUD [planned unit development] Overlay district
26 applies to multi-family and other residential development in the VLDR [Very
27 Low Density Residential] and LDR [Low Density Residential] districts. Since
28 the church is not a residential development and would not be located in the
29 VLDR or LDR districts, PUD provisions are not applicable. The lack of

1 substantial contrary evidence convinces the Board that this policy is
2 inapplicable because the listed conditions are not present, so the policy is not
3 relevant.” Record 6.

4 In its response brief, the county argues that it correctly determined that
5 YCCP IV.A.1.i does not apply to non-residential organizations such as a church, because the
6 policy requires regulation as a planned unit development, and under the county’s regulations
7 such development is residential in nature. The county argues that YCCP IV.A.1.i is intended
8 to apply to institutional *residential* uses such as nursing homes and care facilities, not non-
9 residential uses such as churches, even if churches otherwise fall within the scope of “non-
10 profit, institutional organizations as defined by the Internal Revenue Code.”

11 We agree with the county that the above-quoted finding adequately expresses the
12 board of commissioners’ view that YCCP IV.A.1.i does not apply to non-residential uses
13 such as the proposed church, even if those uses otherwise constitute nonprofit institutional
14 organizations as defined by the Internal Revenue Code. While the policy does not contain
15 any qualification to that effect, and the question is a close one, we cannot say that the
16 county’s interpretation is inconsistent with the text of that provision or clearly wrong.
17 ORS 197.829(1). *See* n 5.

18 The fifth assignment of error is denied.

19 The county’s decision is remanded.