BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLIANCE FOR RESPONSIBLE LAND USE
IN DESCHUTES COUNTY,
Petitioner,

and

F. DUANE LEE, DENNY EBNER,
MARILYN EBNER, JEROME FORSTER,
JANET FORSTER, ROY SCHULKE
and TONI SCHULKE,
Intervenors-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

BARCLAY MEADOWS BUSINESS PARK, LLC,
SISTERS SCHOOL DISTRICT NO. 6 and
CITY OF SISTERS,
Intervenors-Respondent.

LUBA Nos. 2001-027 and 2001-028

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Susan Isabel Boyd, Alameda, CA, filed a petition for review and argued on behalf of petitioner.

Ken Brinich, Bend, filed a petition for review and argued on behalf of intervenor-petitioner F. Duane Lee.

Aron D. Yarmo, Bend, filed a petition for review and argued on behalf of intervenors-petitioner Denny Ebner, Marilyn Ebner, Jerome Forster, Janet Forster, Roy Schulke and Toni Schulke. With him on the brief was Yarmo and Wasley.

Laurie E. Craghead, Assistant County Counsel, Bend, filed a response brief and

argued on behalf of respondent.

Stephen T. Janik, Portland, filed a response brief and argued on behalf of intervenors-respondent Barclay Meadows Business Park, LLC and Sisters School District No. 6. With him on the brief were Nancy Craven, Kristin L. Udvari and Ball Janik.

Steven D. Bryant, Redmond, filed a response brief and argued on behalf of intervenor-respondent City of Sisters. With him on the brief was Bryant, Emerson and Fitch.

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

REMANDED 08/31/2001

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 appeals two county decisions that (1) expand the City of Sisters' urban growth boundary (UGB) to include two parcels; (2) amend the parcels' comprehensive plan designation from Agriculture to Industrial; and (3) rezone the parcels from Exclusive Farm Use (EFU) to Light Industrial (IL).

FACTS

The property that is the subject of these appeals includes two adjacent parcels that lie just north of the City of Sisters' (the city's) UGB. The western parcel is 29.75 acres in size, rectangular in shape, and owned by intervenor-respondent Sisters School District No. 6 (hereafter the school parcel). The eastern parcel is 35 acres in size, square in shape, and owned by intervenor-respondent Barclay Meadows Business Park, LLC (hereafter the Barclay parcel). Both parcels are vacant, zoned EFU, and possess soils with a National Resource Conservation Service (NRCS) rating of VIe when not irrigated. Neither parcel possesses irrigation rights.

To the north of both parcels is an area zoned Rural Residential (RR-10) that is developed with 10-acre homesites. To the east, the Barclay parcel abuts Camp Polk Road, a designated collector street. The city airport lies further to the east. Seven acres of the Barclay parcel are within the airport's Runway Protection Zone (RPZ). To the west, the school parcel abuts Pine Street, also a designated collector street. Further west is a 77.02-acre parcel, which is owned by the United States Forest Service (USFS) and zoned Urban Area Reserve (UAR-10). The city's UGB abuts the school parcel to the south. Property to the south within the UGB is zoned for industrial use and developed with two industrial parks. South of the Barclay parcel are two small parcels zoned EFU, the city's UGB and industrial areas within the UGB. Approximately one-half mile to the south is the city's central area,

transected by Oregon Highway 20 (Highway 20). Pine Street and Camp Polk Road intersect Highway 20.

In 1997, the city adopted a draft revision of its comprehensive plan that identifies the need for approximately 67 acres of industrial land for economic development and employment. The city's plan is currently before the Land Conservation and Development Commission (LCDC) for review. The draft comprehensive plan recommends that the subject properties be included within the UGB and designated industrial in order to provide adequate industrial-zoned land during the 1997-2017 planning period. In 1998, city residents approved a ballot measure authorizing annexation of the subject properties.

The city has not yet adopted a transportation system plan (TSP), as required by OAR chapter 660, division 12. However, the draft comprehensive plan proposes construction of a new arterial, known as the McKinney Butte collector, that runs east from Highway 20 through the subject properties.

In May 1999, intervenor-respondent Barclay Meadows Business Park, LLC (Barclay) submitted its application to (1) amend the UGB to include the Barclay parcel, (2) adopt an exception to Statewide Planning Goal 3 (Agricultural Lands), and (3) adopt related comprehensive plan and zoning map changes. In July 1999, intervenor-respondent Sisters School District No. 6 (school district) submitted a similar application for the school parcel. A county hearings officer held a combined public hearing on the applications on August 17, 1999. On November 16, 1999, the hearings officer recommended denial of both applications, on the grounds that (1) industrial uses allowed under IL zoning would be incompatible with adjacent rural residential development; and (2) the existing transportation system could not accommodate the increased traffic generated by the proposed industrial development. The hearings officer's decision identified several measures that could bring the proposals into compliance with applicable criteria.

The applicants modified their applications to reflect the hearings officer's recommendations. Specifically, the applicants, the county and the city entered into development agreements that (1) impose limitations on the types of industrial uses allowed on the subject properties; (2) impose additional setbacks from the northern property lines; (3) restrict development so that generated traffic will not exceed 68 percent of the worst-case scenario for p.m. peak hour trips identified in a traffic impact study; and (4) require the applicants to pay part of the cost of constructing the McKinney Butte collector and part of the cost of signalizing three intersections with Highway 20 that would be affected by the proposed development.

On January 26, 2000, the board of county commissioners (BOCC) conducted a public hearing on the hearings officer's decision. After an additional hearing limited to testimony by city officials, the BOCC closed the record on March 31, 2000. On December 27, 2000, the BOCC issued separate written decisions approving the proposed UGB amendments, goal exception, and plan and zoning amendments. These appeals followed.

STANDING

The county's response brief challenges the standing of intervenor-petitioner F. Duane Lee (Lee), arguing that Lee failed to "appear" before the county during its proceedings with respect to the Barclay parcel, for purposes of ORS 197.830(2).[1] According to the county, Lee's only appearance with respect to either county decision is a letter submitted March 30,

[1]ORS 197.830(2) provides:

> "Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:
>
> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

2000, which limits its comments to the school district's application. Record 98.[2] The county argues that Lee should be dismissed from LUBA No. 2001-027.

Lee responds, and we agree, that his March 30, 2000 letter directs comments at both applications and is sufficient to satisfy the ORS 197.830(2) requirement that Lee appear either orally or in writing before the local government. Lee has standing to appeal LUBA No. 2001-027.[3]

The county also notes that intervenors-petitioner Denny Ebner, Marilyn Ebner, Jerome Forster, Janet Forster, Roy Schulke and Toni Schulke have referred to themselves collectively as "Friends of Trapper Point" in several pleadings. The county does not object to the individual standing of the above-named intervenors-petitioner; however, the county objects that "Friends of Trapper Point" does not exist as an organization and no such entity is a party to this appeal.

As we understand the parties' pleadings, we agree with the county that no organization known as "Friends of Trapper Point" has intervened in this appeal. The above-named parties' motion to intervene is based on the individual appearance of each person. As far as we can tell, the named intervenors-petitioner simply use "Friends of Trapper Point" or its acronym FOTP as a shorthand reference to themselves, in part to distinguish themselves from Lee, who intervened separately and filed a separate petition for review. With that understanding, we follow the parties in using that shorthand reference.

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[2]The county incorporated the record in LUBA No. 2001-027 into the record in LUBA No. 2001-028, and vice versa, and both records contain a number of identical or similar documents. We follow the parties in citing only to the record in LUBA No. 2001-028, unless noted otherwise.

[3]The county's response brief also argues that petitioner and intervenors-petitioner lack "standing" to raise certain issues before LUBA because those parties failed to raise those issues before the county. Respondent's Brief 1-2. The county's arguments are more appropriately analyzed as a matter of waiver under ORS 197.763(1) and 197.835(3), rather than a matter of standing. To the extent necessary, we address the county's waiver arguments in resolving the assignments of error based on the allegedly waived issues.

INTRODUCTION

The three petitions for review filed in these cases present 27 assignments or subassignments of error. At oral argument, petitioner withdrew its second, ninth and sixteenth assignments of error. Generally, the remaining assignments or subassignments of error fall into several discrete sets of challenges directed at the following: (1) the county's Statewide Planning Goal 14 (Urbanization) findings; (2) the county's "reasons" for taking an exception under OAR 660-004-0010(1)(c)(B)(i); (3) the county's alternative sites analysis pursuant to OAR 660-004-0010(1)(c)(B)(ii); (4) the county's analysis of environmental, social, economic and energy (ESEE) consequences pursuant to OAR 660-004-0010(1)(c)(B)(iii); (5) the county's findings regarding compatibility of the proposed industrial use pursuant to OAR 660-004-0010(1)(c)(B)(iv); and (6) the county's findings under OAR 660-012-0060, the Transportation Planning Rule (TPR). This opinion is organized accordingly.

FIRST ASSIGNMENT OF ERROR (PETITIONER)
FIRST ASSIGNMENT OF ERROR, FIRST SUBASSIGNMENT (FOTP)
SECOND ASSIGNMENT OF ERROR, SECOND SUBASSIGNMENT (LEE)

In these assignments of error, petitioner, FOTP and Lee challenge the county's findings under Goal 14.[4] Petitioner argues that the county's findings are summary and fail to

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[4]Goal 14 is to "provide for an orderly and efficient transition from rural to urban land use." Goal 14 provides that amendment of a UGB shall be based upon considerations of the following factors:

> "(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
>
> "(2) Need for housing, employment opportunities, and livability;
>
> "(3) Orderly and economic provision for public facilities and services;
>
> "(4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
>
> "(5) Environmental, energy, economic and social consequences;

demonstrate compliance with the seven factors of Goal 14, as required by OAR 660-004-0010(1)(c)(B).[5] FOTP challenges the county's finding that there is a demonstrated need for the UGB amendment. Lee challenges the county's findings addressing factor 4 of Goal 14.

A. Adequacy of Goal 14 Findings

The county's decisions contain sets of findings of compliance with Goal 14, factors 1 through 7, that refer to and incorporate findings in other parts of the decisions, including findings addressing OAR 660-004-0010(1)(c)(B). Record 48-50. Petitioner argues that the

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> "(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,
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> "(7) Compatibility of the proposed urban uses with nearby agricultural activities."

[5]OAR 660-004-0010(1) provides that the Goal 2 exception process is generally applicable to statewide planning goals that prescribe or restrict certain uses of resource lands. OAR 660-004-0010(1)(c) states that such goals include:

> "Goal 14 * * * except as provided for in paragraphs (l)(c)(A) and (B) of this rule, and OAR 660-014-0000 through 660-014-0040:
>
> "* * * * *
>
> "(B) When a local government changes an established urban growth boundary it shall follow the procedures and requirements set forth in Goal 2 'Land Use Planning,' Part II, Exceptions. An established urban growth boundary is one which has been acknowledged by the Commission under ORS 197.251. Revised findings and reasons in support of an amendment to an established urban growth boundary shall demonstrate compliance with the seven factors of Goal 14 and demonstrate that the following standards are met:
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> "(i) Reasons justify why the state policy embodied in the applicable goals should not apply (this factor can be satisfied by compliance with the seven factors of Goal 14);
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> "(ii) Areas which do not require a new exception cannot reasonably accommodate the use;
>
> "(iii) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
>
> "(iv) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

county's findings are inadequate to demonstrate compliance with Goal 14. According to petitioner, "the seven factors are summarily dismissed as having been discussed in the findings above. * * * The county's casual treatment of the seven factors of Goal 14 does not rise to the level of scrutiny required to 'demonstrate compliance.'" Petition for Review 14. Petitioner seems to suggest that the findings must be evaluated without the incorporated findings, or that it is impermissible for the county to incorporate other findings by reference. However, petitioner does not explain why that is so, and we see no reason why the county's Goal 14 findings cannot incorporate other findings by reference.[6] Petitioner makes no attempt to demonstrate under this assignment of error that the county's Goal 14 findings, including the incorporated findings, are inadequate. Accordingly, we reject petitioner's findings challenge under this assignment of error.

B. Goal 14, Factors 1 and 2: Need

FOTP argues that the county's demonstration of "need" for purposes of Goal 14, factors 1 and 2, is not supported by substantial evidence.

The county found that the applicants had demonstrated a need for at least 82 acres of additional industrial-zoned land to meet the city's projected employment and economic development needs for the next 20 years. The county relied on evidence from the applicants, based on two different methods for estimating the need for industrial land through the year 2020.

The first method examines the historical rate at which industrial land has been absorbed within the city UGB. Based on data from the city, the applicants estimated the historic absorption rate to be 3.3 acres per year. From this figure, the study derived an

[6]Such reference should identify the findings that are incorporated. *See Gonzalez v. Lane County*, 24 Or LUBA 251, 258-59 (1992) (local government findings that incorporate documents or findings located in other documents must reasonably identify the document or portions of the document so incorporated). In the present case, the disputed findings do not identify exactly which other findings are incorporated. However, petitioner does not argue, and we do not see that it is the case, that lack of more specific reference impairs petitioner's or the Board's ability to locate the incorporated findings.

estimated need over twenty years of 83.85 acres.

The applicants also estimated need based on an "employee-per-acre" method recommended by LCDC. The school district, using one set of assumptions, estimated a need for an additional 38.04 acres of industrial land under this method. Barclay, using a different set of assumptions, estimated a need for an additional 82 acres of industrial land under this method. The county found Barclay's assumptions to be more reasonable. The county then concludes:

> "Because the two methodologies produce almost the same result (*i.e.* absorption rate shows need for 84 acres, employee-per-acre shows need for 82 acres), the [BOCC] need not decide which is more accurate. Based on evidence in the record, the [BOCC] finds the applicant has shown that Sisters needs at least 82 additional acres of industrial land to meet its Goal 9 requirements." Record 16.

FOTP does not challenge the county's conclusions under the historical absorption rate method, or the evidence underlying those conclusions. Instead, FOTP questions Barclay's assumptions used for the employee-per-acre method and argues that, if more reasonable or supportable assumptions are used, the need for industrial lands is considerably less than 82 acres.

We need not resolve the parties' contentions regarding the correct assumptions to be used in the employee-per-acre method. The county did not choose one method over another, but rather found that *both* methods demonstrated a need for "at least 82 additional acres." Even if FOTP is correct regarding the evidentiary insufficiency of the assumptions underlying the employee-per-acre method, that would not itself disturb the evidentiary sufficiency of the county's finding based on the historical absorption rate method.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). FOTP has not demonstrated that a reasonable person could not rely upon the historical absorption rate to estimate the city's need for industrial land. Consequently, we conclude that the county's

estimated need of "at least 82 additional acres" is supported by substantial evidence.

C. Goal 14, Factor 4: Maximum Efficiency of Land Uses

Lee argues that the county's findings addressing factor 4 fail to explain why including the subject parcels within the UGB is "efficient," given the restrictions imposed by the development agreements that limit the types of industrial uses and land area that can be developed.

The county responds that no party raised any issue below regarding whether the development agreements restricted development of the subject properties in a manner that affected factor 4. In any case, the county argues, its findings suffice to demonstrate that inclusion of the subject properties is consistent with factor 4.

Lee does not respond to the county's waiver argument, or identify any place in the record where any party raises an issue whether, given the restrictions imposed by the development agreements, inclusion of the subject properties is consistent with factor 4. Accordingly, the issue raised under Lee's second assignment of error, second subassignment, is waived. ORS 197.763(1); 197.835(3).

Petitioner's first assignment of error, FOTP's first assignment of error, first subassignment, and Lee's second assignment of error, second subassignment, are denied.

THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, AND TENTH ASSIGNMENTS OF ERROR (PETITIONER)

These assignments of error challenge the sufficiency of the county's reasons for adopting an exception pursuant to OAR 660-004-0010(1)(c)(B)(i). That standard requires the county to state reasons that "justify why the state policy embodied in the applicable goals should not apply." The county's findings state three such "reasons": (1) the subject properties are unsuitable for farm use; (2) the city needs additional industrial-zoned land; and (3) the subject properties are suitable for industrial designation and zoning. Petitioner's third, fourth, fifth, sixth, seventh and eighth assignments of error challenge the first of these

"reasons," *i.e.* that the subject properties are unsuitable for farm use. The tenth assignment of error challenges the third "reason," that the subject properties are suitable for industrial use.

OAR 660-004-0010(1)(c)(B)(i) goes on to state that "this factor can be satisfied by compliance with the seven factors of Goal 14." *See* n 5. As noted above, the county's decisions adopt findings addressing the seven factors of Goal 14. We concluded, above, that petitioner and intervenors-petitioner failed to demonstrate the insufficiency of those findings and the evidence supporting them. From that conclusion it would seem to follow that the county's Goal 14 findings also state a legally sufficient "reason" for purposes of OAR 660-004-0010(1)(c)(B)(i). *See 1000 Friends of Oregon v. City of North Plains*, 130 Or App 406, 412, 882 P2d 1130 (1994) (OAR 660-004-0010(1)(c)(B) establishes a separate standard of compliance that obviates the need for a reasons exception). However, the explicit connection between OAR 660-004-0010(1)(c)(B)(i) and the seven Goal 14 factors, together with the county's somewhat backwards approach in applying those factors in this case, makes it necessary to consider petitioner's arguments under these assignments of error.[7] We consider those arguments to the extent they might demonstrate error in the county's findings addressing the Goal 14 factors, which incorporate and rely on OAR 660-004-0010(1)(c)(B)(i) findings.

The county's findings directed at Goal 14, factors 1 and 2 rely heavily on the findings supporting the second "reason": the city's need for additional industrial-zoned land. These assignments of error do not challenge that "reason" or, by extension, the findings under Goal

[7]OAR 660-004-0010(1)(c)(B)(i) seems to envision that the findings addressing this criterion will simply rely on or incorporate findings that are adopted elsewhere in the decision to address Goal 14, factors 1-7. However, as we explained in addressing petitioner's first assignment of error, the county proceeded in almost the opposite way. The county's findings addressing Goal 14, factors 1-7 rely on findings the county adopted in addressing OAR 660-004-0010(1)(c)(B)(i). In the case of Goal 14, factors 1 and 2, the county relies almost entirely on findings it adopted under OAR 660-004-0010(1)(c)(B)(i), and incorporated by reference, rather than vice versa.

14, factors 1 and 2. It is not clear whether any of the challenges to the first and third "reasons" in these assignments of error could, if sustained, affect the sufficiency of the county's other Goal 14 findings. The county's findings under factor 6, retention of agricultural land, refer to and incorporate the county's findings regarding the suitability of the subject properties for farm use.[8] Similarly, some of the reasons the county gives for concluding that the subject property is suitable for industrial use are potentially relevant to factor 4, maximum efficiency of land uses.[9] Arguably, petitioner's challenges to some of these "reasons," if sustained, could affect the sufficiency of the county's Goal 14 findings.

However, after reviewing the third, fourth, fifth, sixth, seventh, eighth and tenth assignments of error, we conclude that even if some or all of those assignments are sustained, petitioner would not thereby demonstrate insufficiency in the county's Goal 14 findings. It is important to recognize in this context that Goal 14, factors 3 through 7 must be considered together and balanced, but individual factors are not independent approval criteria. *D. S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 25, 994 P2d 1205 (2000). The goal of

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[8]The county's findings of compliance with Goal 14, factor 6, state:

> "As discussed in detail in the findings, incorporated by reference herein, the [BOCC] has found the subject property is classified as Class VI without irrigation, the lowest priority in the preservation of agricultural lands. The subject property has no irrigation, does not have high-value soils and is significantly smaller than the minimum size the comprehensive plan indicates is typical for a commercial farm, or to make a profit in farming in the [EFU] zone. Based upon these findings, [the BOCC finds] the proposal is consistent with this Goal 14 factor." Record 49-50.

[9]The county's findings concerning Goal 14, factor 4 state in relevant part:

> "The [BOCC] finds the applicant's proposal is consistent with this Goal 14 factor because it will allow the subject property to be developed with industrial uses similar to those already existing on adjacent industrial-zoned land within the Sisters UGB. As discussed in the findings above and incorporated by reference herein, the subject property and the adjacent school district property are the two parcels most suitable to provide the industrial land supply required by Goal 9. Public facilities and services are available and adequate to serve the proposed development. The location is the only logical area for industrial use and the acreage is sufficient to provide the City with an industrial land supply of suitable sizes, locations and services to meet a variety of industrial needs. For these reasons and as further supported by the findings above, incorporated by reference herein, the [BOCC] finds the proposal satisfies this Goal 14 factor." Record 49.

consideration under factors 3 through 7 is to determine the "best" land to include within the UGB, based on appropriate consideration and balancing of each factor. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565, 584 (2000), *rev'd and rem'd on other grounds*, 174 Or App 406 (2001). Therefore, to prevail, petitioner must show that the county misapplied the pertinent factors or reached key conclusions that are not supported by substantial evidence, in a manner that demonstrates legal error or insufficiency in the county's ultimate conclusion that the subject properties are the "best" land to include within the UGB, after considering and balancing each factor.

Petitioner's arguments under these assignments of error fall short of that demonstration. For example, petitioner's fourth assignment of error faults the county for concluding that the subject properties have poor quality soils as one basis for its determination that the subject properties are not suitable for farm use. Petitioner argues that the soils on the subject properties are NRCS Class VIe, which are defined as agricultural soils in eastern Oregon. OAR 660-033-0020(1)(a)(A). Petitioner contends that these soils are presumptively suitable for farm use, which undermines the county's conclusion that the subject properties are not suitable for farm use. Petitioner is of course correct that in eastern Oregon land with Class VI soils is defined as agricultural land and is presumably suitable for farm use. However, the suitability of the subject properties for farm use has little direct bearing on the inquiry required by Goal 14, factor 6. Factor 6 requires that the county consider retention of agricultural land, with lowest priority given to Class VI agricultural land. There is no dispute in this case that the subject properties have soils that qualify them for the lowest priority for retention under factor 6. Petitioner does not argue that there are other agricultural lands with lower priority soils that are potential candidates for inclusion within the UGB. Consequently, the county correctly concluded that consideration of factor 6 supports inclusion of the subject properties. Petitioner's arguments under the fourth assignment of error, even if generously construed as a challenge to the county's finding

under factor 6, do nothing to demonstrate error in that finding. Nor do those arguments demonstrate error in the county's ultimate conclusion that the subject properties are the best lands to include within the UGB under Goal 14, after considering and balancing each factor. Petitioner's other assignments of error similarly fail to demonstrate error in any of the county's Goal 14 findings.

Petitioner's third, fourth, fifth, sixth, seventh, eighth and tenth assignments of error are denied.

ELEVENTH ASSIGNMENT OF ERROR (PETITIONER)

FIRST ASSIGNMENT OF ERROR, FOURTH SUBASSIGNMENT (FOTP)

These assignments of error challenge the county's alternative sites analysis under OAR 660-004-0010(1)(c)(B)(ii), which requires the county to find that lands that do not require a new exception cannot reasonably accommodate the use. *See* n 5.

The county's findings under OAR 660-004-0010(1)(c)(B)(ii) state the county's general approach:

> "The [BOCC] finds that this criterion requires an alternative analysis to determine whether there is land not requiring a goal exception that reasonably could accommodate industrial development without having to expand the Sisters UGB. We find such analysis should include vacant and underdeveloped land within the UGB and nonresource land—*i.e.* exception areas—outside the UGB. We further find that the phrase 'cannot reasonably accommodate the use' requires a determination of whether the alternative sites are suitable for industrial development considering: 1) the typical operating characteristics and site and locational requirements of industrial uses; 2) the need to locate industrial uses so that adequate infrastructure can be provided; and 3) the location of potentially conflicting uses." Record 20.

The county's findings then discuss vacant and underdeveloped lands within the UGB and exception lands outside the UGB, and conclude that none of these lands can reasonably accommodate the proposed industrial use. Record 20-26.

Petitioner does not challenge the county's approach or its understanding of the requirements of OAR 660-004-0010(1)(c)(B)(ii). Petitioner argues first that the county underestimated the amount of vacant residential land that could potentially be rezoned for

industrial uses. Petitioner and FOTP then challenge the county's conclusions regarding several specific sites both within and outside the UGB. Finally, petitioner contends that the county failed to address OAR 660-004-0020(2)(b).[10]

A. Residential Lands

The county found that vacant residentially-zoned lands within or outside the UGB cannot reasonably accommodate the proposed industrial use for several reasons. Among those reasons was that the city has identified a need for an additional 142 acres of residential lands over the next 20 years and that rezoning residentially-zoned lands to allow industrial uses will cause an additional shortage in the city's future housing inventory. Petitioner questions that reasoning, noting that the vacant residential lands inside and outside the UGB discussed in the county's decisions total 217 acres. Petitioner argues that if 217 acres of vacant residential land are available, and the city needs only an additional 142 acres over the next 20 years, then there is a surplus of vacant residential land that could potentially be rezoned industrial.

Barclay and the school district respond that the city's future residential needs require 142 acres of residential land *in addition* to its existing inventory of vacant residential lands within the UGB, and that if the existing inventory and the needed 142 acres are added together, petitioner's alleged surplus of residential lands vanishes.[11] We agree. As far as we can tell from the figures the parties cite to us, a surplus of residential land does not exist.

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[10]OAR 660-004-0020(2)(b) is set out in n 12.

[11]Intervenors-respondent cite us to Record 1540 (LUBA No. 2001-027), which apparently is part of the residential lands need calculation from the city's draft comprehensive plan. Record 1540 appears to indicate that the city's total residential land need over the 20-year planning period is 348 acres, and that the current UGB can provide 206 acres of that need, requiring that an additional 142 acres be found outside the UGB. If the city's total residential land need is 348 acres, the fact that the county's decisions discuss 217 acres of vacant residential land inside and outside the UGB does not indicate the existence of a surplus.

B. Alternative Sites within the UGB

1. Vacant Sites

The county's decisions evaluate a vacant 14.61-acre parcel and a vacant 43.66-acre parcel, both zoned UAR-10, and determine that neither can reasonably accommodate the proposed industrial use. The county's findings state:

> "* * * The buildable land inventory indicates the larger [43.66-acre] parcel is adjacent to the Pines Manufactured Home Park. The inventory indicates 10 acres of this parcel are committed to a community septic system for the park which will be needed until the municipal sewer system is in place, and the remainder of the site is planned for expansion of the park. Finally, the record shows that the City has targeted this property for residential zoning to help meet its projected need of 142 acres of residential land. For these reasons, and because this parcel is located adjacent to relatively high-density residential development with which industrial uses would likely conflict, the [BOCC] finds this parcel cannot reasonably accommodate industrial uses.
>
> "The record indicates the 14.61-acre parcel is located adjacent to existing industrial development. However, the record indicates this parcel was annexed by the City in September of 1997 and rezoned to RH [High Density Residential] and CG [General Commercial] to meet projected needs for residential and commercial land during the next twenty years. For these reasons, the [BOCC] finds this parcel cannot reasonably accommodate industrial development. Furthermore, this parcel is too small to supply the 82 acres of industrial land needed." Record 21-22 (LUBA No. 2001-027 (footnote omitted).

Petitioner challenges the cited reasons why these parcels cannot reasonably accommodate the proposed industrial use. With respect to the 43.66-acre parcel, petitioner contends that the county cannot rely upon the planned use of that parcel in conjunction with the adjoining manufactured home park. Petitioner argues that the city has recently passed a bond measure to pay for a municipal sewer system. Once that system is constructed, petitioner argues, vacant land will no longer be needed for a septic system. Further, petitioner repeats its arguments that there is a surplus of residential land and thus no need to use this parcel to meet the city's future residential needs. Finally, petitioner argues that the county erred in finding incompatibility between relatively high-density residential

development and industrial uses, for the same reasons discussed later in this opinion under the thirteenth assignment of error.

With respect to the 14.61-acre parcel, petitioner argues that the surplus of residential land makes it unnecessary to use this parcel for high-density residential and commercial uses. Petitioner also argues that the inability of the 14.61-acre parcel to satisfy the identified need for 82 acres of industrial land is immaterial, because there is no requirement that the identified need must be satisfied by one parcel.

The county adopted findings addressing the impact of future sewer improvements on the buildable land inventory, and concluding that those improvements will not make more land available for industrial uses. Record 24. Petitioner does not challenge those findings. We rejected, above, petitioner's argument that there is a residential land surplus. For the reasons explained in our discussion of the thirteenth assignment of error, below, we disagree with petitioner that the county erred in considering conflicts between adjacent higher-density residential development and proposed industrial uses. Petitioner may be correct that the county erred in relying on the inability of the 14.61 parcel to satisfy the entire identified need for industrial lands; however, we conclude that the county's other reasons suffice to demonstrate why these two parcels cannot reasonably accommodate the proposed use.

2. Partially Developed Sites

The county also evaluated several partially developed sites, including tax lot 100, a 77.02-acre portion of a 330-acre parcel owned by the USFS. Tax lot 100 is zoned UAR-10 on city maps. Two-thirds of tax lot 100 is developed with a USFS compound, leaving 25 acres potentially available for development. The county concluded that tax lot 100 cannot reasonably accommodate the proposed use because it is owned by the federal government and is therefore not subject to local land use planning. The county also relied on testimony from USFS staff that the agency has no intention of removing tax lot 100 from USFS use and in fact has expressed interest in removing the property from the city's plan and zoning map

altogether. The county rejected arguments that the city could purchase the property from the USFS under a federal law that allows agencies to sell federal property if the need for the property cannot be accommodated by other means. The county reasoned that the subject properties can accommodate the need for industrial land, and therefore it was highly unlikely that the city could make a case for sale of tax lot 100 under federal law.

FOTP argues that the county erred in rejecting tax lot 100, citing to evidence that the USFS would be willing to consider exchanging a portion of tax lot 100 for other property of equal value, if that exchange was with a public entity such as the city and was in the public interest. FOTP contends that the county erred in failing to consider this possibility. We disagree. FOTP does not dispute that the city lacks planning and zoning jurisdiction over tax lot 100. The county is not required to explore the speculative possibility that tax lot 100 might someday fall within the city's planning and zoning jurisdiction. FOTP has not demonstrated that the county erred in rejecting tax lot 100.

C. Alternative Sites outside the UGB

Petitioner argues that the county erred in concluding that tax lot 1202, a vacant 36.02-acre parcel adjacent to the city's UGB and zoned RR-10, cannot reasonably accommodate the proposed industrial use. The county reached that conclusion based on findings that tax lot 1202 is surrounded by residential uses, is needed to satisfy the city's identified need for future residential lands, does not have adequate access for industrial uses, and is located far from existing industrial uses. Petitioner disputes the sufficiency of these reasons.

We agree with intervenors-respondent that the cited reasons, particularly the lack of adequate access for industrial uses, suffice to demonstrate that tax lot 1202 cannot reasonably accommodate the proposed industrial use.

D. OAR 660-004-0020(2)(b)

Finally, petitioner argues that the county erred in failing to address the requirements of OAR 660-004-0020(2)(b).[12] The county's findings cite to the rule, but state only that "[t]he [BOCC] has addressed this factor in the findings above, which are incorporated by reference herein." Record 32. Presumably, the above-quoted statement is intended to incorporate the county's findings under OAR 660-004-0010(1)(c)(B)(ii).

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[12]OAR 660-004-0020(2) provides criteria for addressing the standard in Goal 2, Part II(c) that "[a]reas which do not require a new exception cannot reasonably accommodate the use." In relevant part, OAR 660-004-0020(2)(b) provides:

> "'Areas which do not require a new exception cannot reasonably accommodate the use':
>
> "(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;
>
> "(B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under the alternative factor the following questions shall be addressed:
>
> "(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?
>
> "(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?
>
> "(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?
>
> "(C) This alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding."

Petitioner does not argue that the incorporated findings under OAR 660-004-0010(1)(c)(B)(ii) are inadequate to demonstrate compliance with OAR 660-004-0020(2)(b). As explained above, the fact that the county addressed compliance with one criterion by incorporating findings addressing a similar (in this case, identical) criterion does not itself demonstrate that the county's findings are inadequate. Absent focused argument by petitioner that the incorporated findings are inadequate to demonstrate compliance with OAR 660-004-0020(2)(b), petitioner's argument under this subassignment does not provide a basis for reversal or remand.

Petitioner's eleventh assignment of error and FOTP's first assignment of error, fourth subassignment are denied.

TWELFTH ASSIGNMENT OF ERROR (PETITIONER)

Petitioner challenges the adequacy of the county's ESEE analysis under OAR 660-004-0010(1)(c)(B)(iii) and 660-004-0020(2)(c).[13] According to petitioner, the county's findings are cursory and fail to identify and discuss the environmental, social, economic and energy consequences the county purports to evaluate.

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[13] *See* n 5. OAR 660-004-0020(2)(c) sets forth standards for addressing Goal 2, Part II(c)(3), and provides:

> "The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception. The exception shall describe the characteristics of each alternative area considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts[.]"

The county's findings under OAR 660-004-0010(1)(c)(B)(iii) conclude essentially that other resource lands that are potential candidates for urbanization are better, more productive resource lands than the subject properties and therefore the ESEE consequences of converting those lands to nonresource uses would be significantly more adverse than converting the subject properties.[14] The county's findings under OAR 660-004-0020(2)(c) address the specific issues required under that rule.[15] If we understand petitioner correctly, it

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[14]The county's findings state, in relevant part:

> "[The BOCC] finds that the applicant must demonstrate [under OAR 660-004-0010(1)(c)(B)(iii) and 660-004-0020(2)(c)] that including the subject property within the Sisters UGB will not create [ESEE] consequences that are significantly more adverse than those that would typically result from including other land zoned EFU or Forest in the Sisters UGB for industrial use.
>
> "The record indicates that there is other resource land abutting the Sisters UGB on the west and south. To the southwest is the Patterson Llama Ranch zoned EFU and engaged in commercial farm use. The [BOCC] finds that including this land within the Sisters UGB for industrial use would convert productive farm land to industrial uses, creating significantly more adverse ESEE consequences than converting the unproductive subject property to industrial use. To the southeast are other parcels zoned EFU. The [BOCC] is aware that these parcels are engaged in farm use consisting of livestock grazing on irrigated pasture. Therefore, the [BOCC] finds that converting these parcels to industrial use also would have significantly more adverse ESEE consequences than would result from the applicant's proposal. Finally, to the northwest and south are parcels zoned for forest use. Nothing in the record suggests that these parcels have been or are being harvested for timber. However, we take note of the fact that no commercial timber cutting is currently taking place in or immediately adjacent to the City of Sisters. However, in any case, the [BOCC] finds that converting the subject property to industrial use would not create significantly more adverse ESEE consequences than converting forest-zoned land to such use." Record 26-27.

[15]The county's findings under OAR 660-004-0020(2)(c) state in relevant part:

> "The [BOCC] has addressed this factor in the findings above, which are incorporated by reference herein. However, the [BOCC] makes the following additional findings addressing specific aspects of this criterion. [The incorporated findings conclude] that the subject property is not suitable for farm use due to its poor soils, lack of irrigation and location and that because of its unsuitability there will not be adverse economic impacts from permanently removing the property from the agricultural resource base. * * * There are no other resource uses or EFU- or forest-zoned properties near the subject property.
>
> "The [BOCC] finds there is no evidence in the record that the applicant's proposal will have any impacts on the water table. * * * The record indicates that there are no special service districts that would be affected by the applicant's proposal. Furthermore, and as specifically discussed in the findings below, the applicant's Development Agreement with the City of Sisters and the County, with ODOT's approval, under which the applicant agrees to

argues that the county must specifically identify particular environmental, social, economic and energy consequences of the proposed use and explain with respect to each consequence why it is not significantly more adverse than would result from the same proposal being located on other resource lands.

We disagree that either rule requires such detailed findings, at least where no issue is raised below regarding particular alternative sites or ESEE consequences. OAR 660-004-0020(2)(c) provides that a "detailed evaluation of specific alternative sites" is not required unless a party makes a specific showing below that other sites are more reasonable. Petitioner does not dispute the central premise of the county's findings, that other resource lands adjacent to the UGB are better or more productive and therefore the ESEE consequences of their conversion to urban uses would be significantly more adverse than converting the subject properties. Nor does petitioner identify any issues regarding particular ESEE consequences that were raised below or that the county's findings should otherwise specifically address.

Petitioner's twelfth assignment of error is denied.

THIRTEENTH ASSIGNMENT OF ERROR (PETITIONER)

FIRST ASSIGNMENT OF ERROR, SECOND AND THIRD SUBASSIGNMENTS (FOTP)

FIRST ASSIGNMENT OF ERROR AND SECOND ASSIGNMENT OF ERROR, FIRST SUBASSIGNMENT (LEE)

Under these assignments of error, petitioner and intervenors-petitioner challenge the county's findings under OAR 660-004-0010(1)(c)(B)(iv), which requires a finding that the

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contribute $152,295 to fund traffic improvements, exclusive of any traffic-related SDC [system development charge] and other traffic related charges, and to restrict the level of development of the subject property to ensure the v/c [volume to capacity] ratios identified in the Oregon Highway Plan (OHP) for all affected intersections will not be exceeded, ensures that the ESEE consequences are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception." Record 33 (LUBA No. 2001-027) (footnote omitted).

"proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." *See* n 5.

A. Inconsistent Comparisons

Petitioner contends that the county erred in using a different set of industrial uses in evaluating compliance with OAR 660-004-0010(1)(c)(B)(iv) than were used in evaluating compliance with OAR 660-004-0010(1)(c)(B)(ii).

According to petitioner, the county found that rezoning the subject properties to light industrial uses would be compatible with adjacent uses, in part because the IL zone does not allow most "heavy industrial" uses, with the exception of boat-building, fuel oil distribution, and wrecking yards, which are allowed as conditional uses. However, petitioner argues, the county's findings with regard to the ability of alternative sites to accommodate the proposed use under OAR 660-004-0010(1)(c)(B)(ii) considered the "proposed uses" evaluated under that standard to include all industrial uses, not limited to light industrial uses. For example, petitioner points to one of the county's findings with regard to the 43.66-acre parcel zoned UAR-10, which concluded that:

> "[B]ecause this parcel is located adjacent to relatively high-density residential development with which industrial uses likely would conflict, the [BOCC] finds this parcel cannot reasonably accommodate industrial uses." Record 22.

It is not clear to us that the county actually used a different standard in applying the two rule provisions. The quoted finding, and others petitioner cites, use the undifferentiated term "industrial." However, nothing in the cited findings mentions or relies on industrial uses not allowed in the IL zone to conclude that alternative sites cannot accommodate the proposed use. It seems equally if not more probable that when the findings under OAR 660-004-0010(1)(c)(B)(ii) use the term "industrial" they refer to uses allowed in the proposed IL zone. As petitioner and intervenors-petitioner strenuously argue, even light industrial uses can conflict with adjacent residential development. Finally, as intervenors-respondent point out, conflict between industrial and adjoining uses was generally only one factor in the

county's conclusions that each alternative site cannot reasonably accommodate the proposed use. Even assuming that petitioner is correct that the county used inconsistent standards, as we explained in addressing the eleventh assignment of error, petitioner has not demonstrated inadequacy or lack of evidentiary support for the county's ultimate conclusions that no alternative sites can reasonably accommodate the proposed use.

B. Compatibility with Rural Residential Uses

Petitioner and FOTP challenge the evidentiary support for the county's finding that the proposed use, as limited to mitigate adverse impacts, is compatible with the adjacent Trapper Point subdivision.[16]

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[16]The county's findings under OAR 660-004-0010(1)(c)(B)(iv) state in relevant part:

> "* * * Opponents who are residents of the Trapper Point subdivision argue the applicant's proposal will *not* be compatible with their rural residences because it will reduce their privacy and property values, will negatively impact their mountain and pasture views and will place incompatible uses in close proximity to their homes. They expressed particular concerns about the breadth of uses permitted in the IL zone.
>
> "Although the residents of Trapper Point do not have a guarantee that their mountain and pasture views will never be affected by development on the subject property, their concerns are legitimate. However, the [BOCC] finds that the provisions of the City ordinances are adequate to protect these residents and ensure that the uses allowed on the subject property will be compatible with adjacent residential uses. [The IL zone] does not allow asphalt or concrete batch plants or junk yards either outright or conditionally. The City IL zone does permit boat building, wrecking yards and fuel oil distributors subject to a conditional use permit, the approval criteria for which prohibit approval unless the applicant demonstrates minimal adverse impact on livability, value or permissible development of [the] surrounding area * * * and no detrimental effect to health, safety or welfare of [the] area or general welfare of [the] urban area. The [BOCC] finds that these conditional use approval criteria will ensure that any heavier industrial uses which *could* be permitted conditionally under the *City* IL zoning will be compatible with adjacent uses, or can be rendered so with the mitigation measures authorized through conditional use approval or approval of these uses can be denied based on failure to meet the conditional use criteria.
>
> "Because we find that the uses authorized under the City IL zone will be compatible with the adjacent uses, can be rendered so through mitigation measures or can be denied, this should end our inquiry. However, in response to the concerns of the Trapper Point residents, the applicant voluntarily agreed to prohibit the heavier industrial uses on the property through the imposition of a Limited Use Combining Zone and through use restrictions contained in a Development Agreement, authorized by state statute. The applicant has further voluntarily agreed, through the Development Agreement, to increase the setbacks from the northern property line to 50 feet for buildings up to 20 feet in height and 100 feet for buildings over 20 feet in height." Record 30-31 (emphasis in original; footnote omitted).

FOTP argues, first, that the county impermissibly deferred analysis of conflicts under OAR 660-004-0010(1)(c)(B)(iv) to future decisions, when it concluded that "any heavier industrial uses" will be mitigated in the conditional use approval process to be compatible with adjacent uses. Record 30. We disagree. The county recognized that industrial uses that *might* be allowed as conditional uses under the city's IL zone in the future *might* have adverse impacts if allowed. However, the county also recognized that approval of such conditional uses in the future would be subject to an approval criterion that would preclude approval, absent a demonstration that the conditional use would have "minimal adverse impact on livability, value or permissible development of [the] surrounding area * * * and no detrimental effect to health, safety, or welfare of [the] area or [the] urban area." *See* n 15. We see no reason why application of such an approval criterion would not be sufficient to ensure the compatibility with adjacent uses that OAR 660-004-0010(1)(c)(B)(iv) requires. FOTP does not argue otherwise and neither does FOTP argue that the conditional uses could be approved in the future without first providing notice and an opportunity for a public hearing or local appeal. In these circumstances, we reject FOTP's argument that the "measures designed to reduce adverse impacts" referred to in the rule must be identified and imposed *as part of the challenged decision*. Further, FOTP's argument fails to acknowledge the county's alternative finding, that the "heavier industrial uses" discussed in the disputed finding are prohibited under the Limited Use Combining Zone imposed on the subject properties.

Petitioner and FOTP next argue that the proposed use is incompatible with adjacent uses for the same reasons that the county's alternative sites analysis concluded that industrial use is incompatible with adjacent residential use. As discussed above, the county's alternative sites analysis under OAR 660-004-0010(1)(c)(B)(ii) rejected several sites in part because they were adjacent to residential uses. For example, as noted above, the county rejected a 43.66-acre parcel zoned UAR-10, in part, because industrial use would conflict

with adjacent high-density residential development. Petitioner and FOTP argue that the same conflicts will exist between the proposed industrial use of the subject properties and the Trapper Point subdivision, and therefore the same conclusion must be reached with respect to whether proposed industrial use of the subject properties is compatible with adjacent rural residential development.

We generally agree with petitioner and FOTP that the alternative sites analysis under OAR 660-004-0010(1)(c)(B)(ii) cannot reject alternative sites on grounds that apply equally well to the subject property. *See DLCD v. Douglas County*, 38 Or LUBA 542, 562 (2000) (questioning rejection of alternative sites based on soil limitations that also affect the preferred property). However, petitioner and FOTP have not demonstrated that that principle applies in this case. For one thing, the alleged inconsistency involves findings under two separate criteria: one that requires a "broad review of similar types of areas" (OAR 660-004-0020(2)(b)(C)) to determine whether such areas can "reasonably accommodate" the proposed use, and another that requires a site-specific analysis of compatibility between the use proposed on the subject property and specific adjacent uses. The differences in focus, scope and detail between the analyses required by OAR 660-004-0010(1)(c)(B)(ii) and (iv) make it difficult to establish that the county's conclusions under those standards are actually inconsistent.

Second, petitioner and FOTP have not demonstrated that the same conflicts that justified in part the county's rejection of certain sites are also present with respect to the subject properties and the Trapper Point subdivision. To use the above example regarding the 43.66-acre UAR-10 parcel, the level of conflicts that might arise between industrial use and adjoining *high-density* urban residential development is likely to be of a different order and magnitude than the conflicts that might arise between industrial use and adjoining rural residential homes on 10-acre lots. To cite another example, the county rejected tax lot 1202

in part because it was surrounded by residential uses. By contrast, as intervenors-respondent point out, the subject properties are bordered by residential uses only to the north.

In short, the county's partial reliance on residential conflicts in its alternative sites analysis does not compel a finding that the proposed use is incompatible with the Trapper Point subdivision under OAR 660-004-0010(1)(c)(B)(iv). Nor does it demonstrate inconsistency in the county's findings, or fatally undermine the evidentiary support for the county's findings under OAR 660-004-0010(1)(c)(B)(iv).

Finally, FOTP and Lee argue that the evidence in the record does not support the county's finding that the proposed use, as mitigated, is compatible with adjoining residential uses. According to these parties, the applicants failed to rebut evidence from residents of Trapper Point that industrial uses would limit views and cause noise, dirt and traffic impacts on adjoining residential uses. FOTP and Lee contend that the setbacks and other limitations in the development agreements and other conditions imposed are insufficient to ensure compatibility. At oral argument, FOTP stressed that nothing in the agreements or conditions limits the level of noise that could impact adjoining residential uses. FOTP acknowledged that Department of Environmental Quality (DEQ) regulations would apply to limit noise from any industrial use, but argued that those regulations are insufficient to prevent conflicts and ensure compatibility between industrial and residential uses.

FOTP and Lee's arguments appear to presume that compatibility requires elimination of conflicts or adverse impacts. However, as used in OAR 660-004-0010(1)(c)(B)(iv), the term "compatibility" does not mean no interference or adverse impacts of any type. OAR 660-004-0020(2)(d). A reasonable person could conclude from the record, as the county did, that the limitation on uses, the setbacks and other restrictions imposed by the decisions or that otherwise will apply to proposed industrial uses, are sufficient to ensure "compatibility" with adjoining rural residential uses.

C. Compatibility with Sisters Airport

FOTP challenges the county's finding that proposed industrial use is compatible with the Sisters Airport, which adjoins the Barclay parcel to the east. FOTP points to a letter from an official in the Aeronautics Division of the Oregon Department of Transportation (ODOT), which states that the division prefers that the subject properties remain in EFU zoning. FOTP contends that the county's findings do not adequately respond to ODOT's concerns or demonstrate that the proposed use is compatible with the airport.[17]

Intervenors-respondent argue, and we agree, that the county's findings are adequate and supported by substantial evidence. The ODOT letter states the agency's preference for agricultural zoning, but does not indicate that proposed industrial use of the Barclay parcel outside the runway protection zone is incompatible with airport uses. Record 1250 (LUBA No. 2001-027). The county's findings address ODOT's concerns and cite to evidence

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[17]The county's findings state in relevant part:

> "With respect to airport proximity, the record shows that 7 acres of the [Barclay property] cannot be developed because it lies within the RPZ. The applicant has indicated an intention to explore park dedication for a portion of the 7 acres which cannot be developed. In its comments on the applicant's proposal, [an official in the Oregon Department of Transportation's Aeronautics Division] recommended that the subject property remain in an agricultural designation because of the RPZ and because Aeronautics believes agricultural zoning will more effectively limit the number of people congregating near the airport. Aeronautics provided no comments addressing the fact that its own chart on compatible land uses identifies various agricultural activities, including grazing, as possibly being incompatible with airport operations. The [BOCC] finds Aeronautics' concerns are legitimate. Operation of light aircraft over populated areas can create safety hazards for persons on the ground. However, the [BOCC] is aware that *industrial* uses typically *are* sited near airports because of the relatively lower numbers of persons present at industrial sites and because property in the vicinity of airports is not considered suitable or desirable for commercial or residential uses due to conflicts and the potential congregation of people. Examples of industrial development in proximity to airports exist in Deschutes County--the airport industrial park west of Roberts Field in Redmond and the large Lancair aircraft manufacturing plant located just east of the Bend Airport runway. Moreover, Clifford Clemens, owner of Sisters Airport, testified in support of the applicant's proposal, stating he believes industrial development can be compatible with the airport. Considering all of these factors, the [BOCC] finds the 28 acres of the subject property not located within the RPZ is suitable for industrial development despite its proximity to the RPZ and the airport." Record 18-19 (LUBA No. 2001-027 (emphasis in original).

supporting its conclusion that the proposed use is compatible with the airport. That conclusion is supported by substantial evidence.

For the foregoing reasons, petitioner's thirteenth assignment of error, FOTP's first assignment of error, second and third subassignments, and Lee's first assignment of error and second assignment of error, first subassignment are denied.

FIFTEENTH ASSIGNMENT OF ERROR (PETITIONER)
SECOND ASSIGNMENT OF ERROR (FOTP)

Petitioner and FOTP challenge the county's findings that the proposed plan amendment and zone change will not violate the TPR.[18] OAR 660-012-0060(1) requires that any plan or land use regulation amendment that "significantly affects" a transportation facility be mitigated, in one or more of four ways specified in the rule.[19] OAR 660-012-0060(2) describes four ways in which a plan or land use regulation amendment can "significantly affect" a transportation facility.[20]

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[18] The TPR, OAR chapter 660, division 12, was adopted by LCDC to implement Statewide Planning Goal 12 (Transportation).

[19] 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 performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:
>
> "(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
>
> "(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
>
> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
>
> "(d) Amending the TSP to modify the planned function, capacity and performance standards as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided."

[20] OAR 660-012-0060(2) provides:

A. OAR 660-012-0060(2)(c)

FOTP challenges the county's finding under OAR 660-012-0060(2)(c) that the proposed use will not allow types or levels of land uses that would result in levels of travel or access inconsistent with the functional classification of a transportation facility. FOTP contends that the applicants' own transportation impact analysis (TIA) shows that the proposed amendment will cause three nearby intersections along Highway 20 to fail and, therefore, the county erred in concluding that the proposal will not significantly affect those transportation facilities.[21] Further, FOTP argues, the county failed to apply one or more of the methods at OAR 660-012-0060(1) sufficient to ensure that allowed land uses are consistent with the function, capacity and performance measure of the affected facilities.

"A plan or land use regulation amendment significantly affects a transportation facility if it:

"(a) Changes the functional classification of an existing or planned transportation facility;

"(b) Changes the standards implementing a functional classification system;

"(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or

"(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP."

[21]The three facilities are the intersections of Highway 20 with Locust Street, Pine Street, and the proposed McKinney Butte collector. The relevant performance standards for these intersections are found in the OHP. The OHP expresses performance standards in terms of a v/c ratio. That ratio is defined as "the peak hour traffic volume (vehicles/hour) on a highway section divided by the maximum volume that the highway section can handle." OHP Policy 1F. The v/ ratio performance standard for the intersections at issue is .75, *i.e*. the standard is met if the volume of peak hour traffic is no higher than .75 of the maximum capacity. Based on input from ODOT, the author of the TIA used a planning period of 1995 to 2015. The TIA assumed that all three intersections would be signalized prior to 2015, and then projected the performance of each intersection in the year 2015 with and without traffic from the proposed development. For the Highway 20/Locust Street intersection, the TIA found that it will operate at a v/c ratio of 0.72 in 2015 without the proposed rezoning. With the rezoning, performance will degrade to 0.91 and result in a queue storage requirement of over 500 feet. With respect to Highway 20/Pine Street, the 2015 v/c ratios are 0.80 without the proposed rezoning and 0.83 with the proposed rezoning. With respect to the Highway 20/McKinney Butte intersection, the 2015 v/c ratios are 0.79 with the proposed rezoning and 0.81 without. Record 44.

The county's findings purport to address OAR 660-012-0060(2)(c) together with (a) and (b).[22] However, those findings do not in fact address the inquiry required by OAR 660-012-0060(2)(c): whether the amendment allows uses or levels of traffic inconsistent with the functional classification of the affected intersections. Instead, they are directed at whether the proposed amendment *changes* the functional classification or the standards implementing the functional classification system of the affected intersections. The county appears to understand that consistency with the functional classification of a facility is demonstrated if the decision changes neither the functional classification nor the standards implementing the classification system. However, that view ignores the very different requirements of OAR 660-012-0060(2)(c). Whatever inquiry OAR 660-012-0060(2)(c) demands, the county errs to the extent it conflates that inquiry with those required under subsections (a) or (b).

That said, it is not clear to us what OAR 660-012-0060(2)(c) requires. The county responds that FOTP has not explained why evidence that the proposed amendment will generate traffic that will violate the v/c performance measure for the affected intersections demonstrates that the amendment allows uses or traffic "inconsistent with the functional classification" of those facilities. The county is correct that evidence regarding performance

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[22]The county's findings state in relevant part:

> "Although the proposed plan amendment and zone change, in and of themselves, will not affect transportation facilities, if approved they would allow industrial development on the subject property that will generate traffic creating impacts on such facilities in the future. However, the [BOCC] finds that the applicant's proposal will not change either the functional classification or standards implementing the functional classification of any affected transportation facilities. The subject property abuts Camp Polk Road, a designated collector street. The classification of this street and the standards relating to collector streets will not be affected by the applicant's proposal. The record also indicates an arterial street is planned to run east-west between Highway 20 and Camp Polk Road in the vicinity of the subject property's southern boundary. The [BOCC] finds the applicant's proposal also will not affect the classification of or standards affecting this planned arterial street. The applicant's proposal would allow industrial development generating traffic affecting three intersections on Highway 20. The record indicates Highway 20 is classified by ODOT as a state highway. The [BOCC] finds the applicant's proposal also will not change the classification of or standards affecting this highway. Thus, the [BOCC] finds that the application does not 'significantly affect' a transportation facility pursuant to (a), (b), and (c) above." Record 39-40 (LUBA No. 2001-027).

measures would appear to be more pertinent to OAR 660-012-0060(2)(d). However, subsection (c) requires consideration of whether "levels of travel" are consistent with the functional classification of facilities, which suggests that inappropriate levels of travel can be inconsistent with such classifications. If so, evidence that the amendment will generate levels of travel that will violate an applicable performance measure may be relevant to that question. Presumably that would depend upon the relevant classification scheme and how such classifications are defined or distinguished from each other. Unfortunately, neither the county's decisions nor the parties' briefs inform us what that scheme and those definitions are.[23]

FOTP also argues under this assignment of error that the TIA on which the county based its conclusions was flawed in several respects. FOTP cites to testimony from a county planner that questions the TIA's assumptions that the affected intersections can be signalized and improved. In addition, FOTP argues that the TIA's traffic projections failed to take into account 700 undeveloped residential lots accessing Camp Polk Road that will add 670 p.m. peak hour trips through the Highway 20/Locust Street intersection. None of the response briefs respond to these arguments. In the present posture of these cases, it is difficult for us to determine the significance of these arguments, because it is unclear whether and to what extent the adequacy of the TIA, the feasibility of future traffic improvements and adequacy of background traffic projections are relevant to OAR 660-012-0060(2)(c).

For the foregoing reasons, remand is necessary for the county to adopt adequate findings addressing OAR 660-012-0060(2)(c).

B. OAR 660-012-0060(2)(d)

The county found that the proposal does not significantly affect a transportation facility under OAR 660-012-0060(2)(d) because the city does not have a TSP that sets forth

[23]Because the affected intersections involve a state highway, it is possible that the OHP functional classification system would apply, in addition to or instead of a local system.

any applicable performance measure for the affected intersections. Petitioner argues that although the city does not have a TSP, the county should have substituted an alternative standard, in particular, a Deschutes County ordinance that amended the county's comprehensive plan to include new transportation policies and a transportation plan map applicable to land within the city's UGB.

Petitioner appears to believe that the ordinance constitutes the city's TSP or otherwise provides the applicable performance measure for purposes of OAR 660-012-0060(2)(d), but provides no legal argument in support of that supposition. Although OAR 660-012-0010(2) allows a local government to incorporate portions of its acknowledged comprehensive plan into its TSP by reference if the plan meets all or some of the requirements for a TSP, the city does not have a TSP, let alone a TSP that incorporates the particular ordinance petitioner relies upon. The ordinance cited by petitioner does not provide a substitute for a TSP, and petitioner has not demonstrated that the proposal violates OAR 660-012-0060(2)(d).[24]

C. Deschutes Comprehensive Plan

Petitioner makes additional arguments, outside the context of the TPR, that the decisions violate the county comprehensive plan. Petitioner argues that the county failed to require Barclay and the school district to bear the entire cost of constructing the McKinney Butte collector, the arterial street connecting Highway 20 to Camp Polk Road, as required by Sisters Urban Area Transportation Policy 4 (Policy 4). Policy 4 provides:

[24]The county's decision finds that the OHP is not the applicable TSP and does not provide the applicable performance measure for purposes of OAR 660-012-0060(2)(d). The petitions for review of FOTP and petitioner do not challenge that determination, or argue that the v/c ratios in the OHP should be the applicable performance standards under OAR 660-012-0060(2)(d) for a state highway in the absence of a local TSP. At oral argument, FOTP contended that the OHP is the applicable TSP and its performance standards apply for purposes of OAR 660-012-0060(2)(d). However, the Board may not consider issues raised for the first time at oral argument. OAR 661-010-0040(1).

> "The proposed road at the north urban growth boundary [arterial road] will be built as development occurs in the area. The cost of construction is to be borne by the adjacent property owners."

Policy 4 does not require, as petitioner appears to believe, that the applicants in this case must bear the entire cost of constructing the McKinney Butte collector. Be that as it may, Barclay and the school district respond, and we agree, that the county could not require the exactions petitioner demands because the proposal is merely for a comprehensive plan and zone change rather than specific development applications. Any application of the county ordinance must occur once a specific development application is submitted. Furthermore, Barclay and the school district have agreed to pay a proportional share of the improvements, based upon their proportion of trips generated that will use the road, pursuant to the development agreements. If petitioner wished to challenge those figures then it should have appealed the development agreements. Finally, petitioner argues that the development agreements fail to require Barclay and the school district to dedicate a right-of-way for the arterial road. As with the cost of construction, any exactions will be required at the time of specific development applications, and the time to appeal the development agreement has passed.

The fifteenth assignment of error (petitioner) is denied; the second assignment of error (FOTP) is sustained.

THIRD ASSIGNMENT OF ERROR (LEE)

Lee argues that the county decisions violate the "Goal of Citizen Involvement" in approving the applications based on development agreements that county residents cannot enforce and in transferring planning jurisdiction over the subject properties from the county to the city.

The city responds, and we agree, that Lee has not stated a basis to reverse or remand the challenged decisions. First of all, it is not clear whether Lee is referring to Statewide Planning Goal 1 or a local implementation of that goal. In either case, Lee does not explain

why the county's decisions violate any requirements of Goal 1 or its local cognates. Lee does not explain why county residents are on a different footing from city residents with respect to enforcing the development agreements, nor why transfer of jurisdiction from the county to the city affects citizen participation or the rights of county citizens to participate in future city decisions.

The third assignment of error (Lee) is denied.

SEVENTEENTH ASSIGNMENT OF ERROR (PETITIONER)

Petitioner argues in the seventeenth assignment of error that:

> "The county properly identifies [ORS] 197.298 as an applicable standard. Section 11.04 of the Eleventh Assignment of Error is incorporated here by reference. The county's findings are inadequate to demonstrate compliance with ORS 197.298." Petition for Review 39-40 (footnote and record citations omitted).

Section 11.04 of petitioner's eleventh assignment of error challenges the county's finding that tax lot 1202 cannot "reasonably accommodate" the proposed industrial use, for purposes of OAR 660-004-0010(1)(c)(B)(ii). For unexplained reasons the county framed its analysis of tax lot 1202 as an inquiry into whether tax lot 1202 was of higher priority than the subject properties under the ORS 197.298 priority scheme.[25] The county's findings conclude that tax lot 1202 cannot reasonably accommodate the proposed industrial use and therefore the subject properties have higher priority than tax lot 1202 under ORS 197.298.

Intervenors-respondent respond that petitioner's argument under the seventeenth assignment of error is insufficiently developed for review. We agree. Rather than develop an argument explaining why the county's findings under ORS 197.298 are inadequate, petitioner simply incorporates its argument challenging the county's findings under a different standard. The incorporated argument does not mention ORS 197.298, and we are

[25]ORS 197.298(1) prohibits inclusion of land within a UGB except under the priorities set forth in the statute. First priority includes lands designated urban reserve, followed by exception lands, marginal lands, and resource lands. ORS 197.298(3) sets forth several bases to vary that priority scheme.

left to speculate why petitioner believes the county's decision fails to demonstrate compliance with that statute.[26] It is not the Board's function to supply petitioner with legal theories, or make petitioner's case for petitioner. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

Petitioner's seventeenth assignment of error is denied.

FOURTEENTH ASSIGNMENT OF ERROR (PETITIONER)
THIRD ASSIGNMENT OF ERROR (FOTP)

Petitioner's fourteenth assignment of error summarizes and incorporates a number of other assignments of error in the petition for review challenging the county's findings under Goal 2, Part II and OAR 660-004-0010 and 660-004-0020. As far as we can tell, the fourteenth assignment of error provides no independent basis for reversal or remand, and is denied for the same reasons the incorporated assignments of error were denied.

FOTP's third assignment of error simply incorporates all of petitioner's assignments of error. Because none of petitioner's assignments of error resulted in reversal or remand, FOTP's third assignment of error is denied.

The county's decisions are remanded.

[26]Petitioner's point may be that, for the reasons set forth in the eleventh assignment of error, the county's findings fail to demonstrate that tax lot 1202 cannot reasonably accommodate the proposed use for purposes of OAR 660-004-0010(1)(c)(B)(ii) and, therefore the county's findings also fail to demonstrate that the subject properties are lower in priority than tax lot 1202, for purposes of ORS 197.298. If that is petitioner's argument, we rejected its premise in discussing the eleventh assignment of error. Petitioner offers no other basis to conclude that the county's findings under ORS 197.298 are inadequate.