BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY,
*Petitioner,*

vs.

YAMHILL COUNTY,
*Respondent*,

and

FINIS CARTER, THOMAS W. EDWARDS and
R.B. FOWLER AND BEVERLY FOWLER AS
TRUSTEES OF THE BRUCE FOWLER AND
BEVERLY FOWLER TRUST,
*Intervenors-Respondent*.

LUBA No. 2001-114

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

William K. Kabeiseman, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Preston Gates & Ellis.

No appearance by Yamhill County.

Michael G. Gunn, Newberg, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 01/10/2002

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 a county decision that approves a zone change from AF-10 (Agriculture/Forestry) to VLDR 2.5 (Very Low Density Residential).

## MOTION TO INTERVENE

Finis Carter, Thomas W. Edwards, and R.B. Fowler and Beverly Carter as Trustees of the Bruce Fowler and Beverly Fowler Trust (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

## FACTS

Intervenors' property is an approximately 25-acre parcel located off of Highway 99 between the cities of Newberg and Dundee. The property is part of an exception area that the county adopted as a committed exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) in 1980. At that time the county designated the subject property VLDR on the comprehensive plan, although it remained zoned AF-10.

The property currently contains three residences. Land to the west and southwest is zoned AF-10 and VLDR 5. Land to the north, northwest, and southeast is zoned VLDR 2.5. Land to the northeast is zoned LI (Light Industrial) and VLDR 1. The property completely surrounds a 2.13-acre inholding zoned HI (Heavy Industrial) that is currently used for recreational vehicle storage and as an athletic club.

Intervenors applied for a zone change from AF-10 to VLDR 2.5 before the county planning commission, which was unable to reach a decision and forwarded the application to the county board of commissioners with no recommendation. The board of commissioners approved the application. This appeal followed.

## MOTION TO ALLOW REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to intervenors' challenge to petitioner's standing and arguments that petitioner waived certain arguments

made in the petition for review by failing to raise those issues below. ORS 197.763(1); 197.835(3). We allow the motion and consider the reply brief. *See Boom v. Columbia County*, 31 Or LUBA 318, 319 (1996) (reply brief allowed where respondent challenges a petitioner's standing); *Caine v. Tillamook County*, 24 Or LUBA 627 (1993) (reply brief allowed to respond to waiver arguments).[1]

**STANDING**

Intervenors challenge our jurisdiction to hear this appeal based upon the Court of Appeals' decision in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *pet for rev pending*. The Court of Appeals held that in order for an appellant to establish standing before that court, the decision must have a "practical effect" on the appellant's rights. *Id*. at 549-50. According to intervenors, petitioner's only appearance before the county consisted of a letter containing general objections to the proposed zone change, which does not demonstrate any practical effect on petitioner's rights.

We have considered this issue before. *See Doob v. Josephine County*, ___ Or LUBA ___ (LUBA No. 2001-134, Order on Motion to Dismiss, November 26, 2001). As we have explained, the standing concerns identified in *Utsey* involve a separation of powers issue and an appellant's standing before the *judicial branch*. LUBA is an administrative agency and part of the executive branch. ORS 197.810. Thus, the standing concerns at issue in *Utsey* do not apply to standing before LUBA. Standing before LUBA is determined by ORS 197.830, and it is undisputed that petitioner has standing under the statute.[2] Therefore, we have jurisdiction to hear this appeal.

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[1] The reply brief also addresses what petitioner characterizes as a new issue raised by the response brief that the county adopted a new exception as part of the decision. At oral argument, counsel for intervenors conceded that the county did not adopt a new exception. Therefore, we need not consider that issue addressed by petitioner in the reply brief.

[2] ORS 197.830(2) provides in pertinent part:

> "[A] person may petition the board for review of a land use decision * * * if the person:

**MOTION TO TAKE EVIDENCE**

Petitioner moves the Board to take evidence not in the record to respond to intervenors' standing challenge pursuant to *Utsey* that the decision does not have any practical effect on petitioner's rights. Petitioner seeks to introduce affidavits from its members that purport to establish organizational and representational standing.

OAR 661-010-0045(1) provides that the Board may take evidence not in the record to resolve disputed factual allegations regarding standing. OAR 661-010-0045(2)(a) provides:

> "A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and *how those facts will affect the outcome of the review proceeding*." (Emphasis added.)

Petitioner asserts that the proffered affidavits will affect the outcome of this proceeding by "establishing petitioner's standing and allowing [the] Board to complete the review process begun by the filing of the petition for review." Motion to Take Evidence Not in the Record 2-3. As previously discussed, however, petitioner has standing to pursue this appeal pursuant to ORS 197.830 without resort to the disputed affidavits.

The present case is readily distinguishable from the case cited by petitioner in support of its motion, *Wilbur Residents v. Douglas County*, 34 Or LUBA 634, *aff'd* 156 Or App 518, 972 P2d 1229 (1998), *rev den* 328 Or 293 (1999). In *Wilbur Residents*, the relevant legal question was whether the petitioners were "adversely affected" and entitled to standing under ORS 197.830(3).[3] That question could not be resolved without taking additional evidence. 34 Or LUBA at 643. In the present case, petitioner has standing to bring this appeal to

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> "(a) Filed a notice of intent to appeal the decision as provided in [ORS 197.830(1)]; and
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> "(b) Appeared before the local government * * * orally or in writing."

[3] ORS 197.830(3) provides in pertinent part:

> "If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board[.]"

1 LUBA under ORS 197.830(2), and accepting or rejecting the affidavits will not affect the

2 outcome of this proceeding. Therefore, petitioner's motion to take evidence is denied.

3 **FIRST ASSIGNMENT OF ERROR**

4 As previously noted, exceptions to Goals 3 and 4 were adopted for the property in

5 1980. Petitioner argues that the county was required by OAR 660-004-0018 to take another

6 exception to Goals 3 and 4 to approve the proposed zone change.[4]

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[4] OAR 660-004-0018 provides:

"(1) Purpose. This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.

"(2) For 'physically developed' and 'irrevocably committed' exceptions to goals, plan, and zone designations shall authorize a single numeric minimum lot size and shall limit uses, density, and public facilities and services to those:

"(a) Which are the same as the existing land uses on the exception site; or

"(b) Which meet the following requirements:

"(A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals and are consistent with all other applicable Goal requirements; and

"(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and

"(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses.

"(3) Uses, densities, and public facilities and services not meeting section (2) of this rule may be approved only under provisions for a reasons exception as outlined in section (4) of the rule and OAR 660-004-0020 through 660-004-0022.

"(4) 'Reasons' Exceptions:

"(a) When a local government takes an exception under the 'Reasons' section of ORS 197.732(1)(c) and OAR 660-004-0020 through 660-004-0022, plan

1 Initially, intervenors assert that petitioner waived the issue of whether the proposed
2 rezoning requires a new exception to Goals 3 and 4, by not raising that issue at the local
3 government level. ORS 197.763(1); 197.835(3). Petitioner cites to a portion of the record
4 where a party asserted that the proposed rezoning does not address and show compliance
5 with Goal 14 (Urbanization) and OAR 660-004-0018(2), because there is no demonstration
6 that the resulting development will be rural. Record 423. Petitioner concedes that no
7 argument was made below that OAR 660-004-0018 requires the county to adopt a new
8 exception. However, petitioner contends, where the *issue* of compliance with a criterion is
9 raised below, ORS 197.763(1) does not also require petitioner to raise the same *arguments*
10 regarding that criterion that were raised below. *DLCD v. Curry County*, 33 Or LUBA 728,
11 733 (1997).

12 The distinction between "issues" and "arguments" is elusive, and does not lend itself
13 to an easy or universally applicable formula. *Reagan v. City of Oregon City*, 39 Or LUBA
14 672, 690 (2001). The touchstone of waiver analysis is whether "fair notice" was given to the
15 parties and decision maker, such that a reasonable person would know that the issue must be
16 addressed. *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991).

17 In the present case, we have considerable doubt that the cited portions of the record
18 are sufficient to give the parties and the county "fair notice" that OAR 660-004-0018
19 requires the county to take a new exception under the present circumstances. We need not
20 resolve whether that issue is waived, however, because we conclude for the following
21 reasons that the rule does not require that the county take a new exception, and therefore the
22 assignment of error must be denied in any event.

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and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception;

"(b) When a local government changes the types or intensities of uses or public facilities and services within an area approved as a 'Reasons' exception, a new 'Reasons' exception is required."

The 1980 exception retained the existing zoning for properties located within the exception area but changed the comprehensive plan designation to VLDR. The present decision approves a zone change from the zoning designation that was in place when the exception was approved to make the zoning designation consistent with the comprehensive plan designation. The decision states that a new exception to Goals 3 and 4 is not required.

Petitioner argues that OAR 660-004-0018(1) requires that "[a]doption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule." Therefore, petitioner argues, intervenors' proposed zone change requires the county to take another exception to Goals 3 and 4. We disagree. We assume without deciding that OAR 660-004-0018(1) applies to zoning map amendments for properties in exception areas that are approved long after the original exception was taken. However, even if the proposed zone change does allow a change in density, a new exception to Goals 3 and 4 is not required. Assuming OAR 660-004-0018(1) applies in the present case, a proposed zone change that would permit the existing density to be changed would require the local government to apply "the standards outlined in this rule." The subject property is located within an exception area that was approved as an irrevocably committed exception to Goals 3 and 4. OAR 660-004-0018(2) provides the "standards outlined in this rule" for irrevocably committed exceptions. However, nothing in OAR 660-004-0018(2) requires that the county adopt a new exception to Goals 3 and 4.[5]

Petitioner cites *Flying J. Inc. v. Marion County*, 170 Or App 568, 13 P3d 516 (2000), for the proposition that a new exception is required here. *Flying J. Inc.*, however, involved a reasons exception. *Id.* at 572. OAR 660-004-0018(4) specifically addresses situations in

[5] Petitioner does not argue or assign error to the county's failure to address or show compliance with the requirements of OAR 660-004-0018(2), other than to argue that the rule requires a new exception to Goals 3 and 4 under the present circumstances.

which a local government changes the types or intensities of uses or public facilities and services for an area approved as a reasons exception. *See* n 4. Because the property was not originally approved through a reasons exception, *Flying J. Inc.* is inapposite. Petitioner has not established any other basis for concluding that the county erred by not taking another exception to Goals 3 and 4.

The first assignment of error is denied.

## SECOND ASSIGNMENT OF ERROR

Petitioner argues that the decision fails to address Goal 14 (Urbanization) and violates the goal by designating rural land for urban uses. According to petitioner, because the decision creating the exception area took only an exception to Goals 3 and 4, the county is required to demonstrate that the uses allowed by the proposed zone change comply with Goal 14.

The county concluded that no exception to Goal 14 was required, but the only reason given for why Goal 14 is not applicable is that the application was filed before OAR 660-004-0040 was adopted and took effect:

> "The effective date of Oregon Administrative Rule 660-004-0040 (the 'Application of Goal 14 to Rural Residential Areas') was [after the application was filed], section (6) of said OAR which states:
>
> "' After the effective date of this rule, a local government's requirements for minimum lot or parcel sizes in rural residential areas shall not be amended to allow a smaller minimum for any individual lot or parcel size without an exception to Goal 14.'
>
> "1) Since the zone change application for the subject property was submitted prior to the effective date of the said OAR, the said OAR 660-004-0040 is not applicable to this application, and thus, an exception to Goal 14 is not required." Record 15.

By definition, land that (1) is located outside an acknowledged UGB and (2) is not the subject of an exception to Goal 14 is *rural* land.[6] While the county is correct that OAR 660-004-0040 postdates the disputed application, and therefore does not apply to the application, the county incorrectly assumes that this also means that Goal 14 does not apply. OAR 660-004-0040 was adopted to clarify how local governments may plan and zone rural land for residential development without violating Goal 14. However, application of Goal 14 to rural lands did not begin with OAR 660-004-0040. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 477, 724 P2d 268 (1986). Goal 14 has long prohibited urban intensity residential development. *Id.* at 504-05. Similarly, Goal 14 has long required that local governments consider the impact that allowing significant residential development on rural lands may have on nearby urban growth boundaries (UGBs). *Holland v. Lane County*, 16 Or LUBA 583, 594-95 (1988); *1000 Friends of Oregon v. Clackamas Cty*, 3 Or LUBA 326-27 (1981).[7] Simply stated, while OAR 660-004-0040 itself may not apply to the disputed application, Goal 14 and the cases that describe the scope of Goal 14 and provided the impetus for LCDC to adopt OAR 660-004-0040 do apply.

The subject property is outside the nearby City of Dundee and City of Newberg UGBs, and the 1980 decision that created the exception area did not take an exception to Goal 14. We do not know why the subject AF-10 zoned property or other AF-10 properties

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[6] The statewide planning goals include the following definition of "rural land":

> "**Rural Land**. Rural lands are those which are outside the urban growth boundary and are:
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> "(a) Non-urban agricultural, forest or open space lands or,
>
> "(b) Other lands suitable for sparse settlement, small farms or acreage homesites with no or hardly any public services, and which are not suitable, necessary or intended for urban use."

[7] Even if the type and density of residential development that is allowed under VLDR 2.5 zoning can be viewed in isolation as rural in nature, zoning large areas for such development in close proximity to an existing UGB may violate Goal 14.

that were included in the exception area were not zoned VLDR 2.5 when the exception was adopted. Although rezoning the subject property or other AF-10 zoned properties to VLDR 2.5 may not result in urban development that would violate Goal 14, the county may not assume that such rezoning will not do so. *DLCD v. Klamath County*, ___ Or LUBA ___ (LUBA No. 2001-029, June 29, 2001), slip op 6; *DLCD v. Klamath County*, 19 Or LUBA 459, 465 (1990). Once objections were raised below that the disputed rezoning violates Goal 14, the county was obligated to consider whether the rezoning would allow urban use of rural land. *Curry Co.*, 301 Or at 477. The county is also obligated to consider whether the density and number of residential units that would be allowed under VLDR 2.5 zoning would impermissibly affect the ability of the nearby UGBs to perform their urbanization function. The county did not address either of those questions. Although we imply no answer to either question, we decline intervenors' invitation to decide those questions on our own when the county did not attempt to do so. The county may well be aware of factors that will bear on those questions that we are not aware of.

The second assignment of error is sustained.

**THIRD ASSIGNMENT OF ERROR**

Petitioner argues that the county's decision fails to comply with Yamhill County Zoning Ordinance (YCZO) 1208.02(A), which requires that the proposed zone change be consistent with the "goals, policies and any other applicable provisions of the Comprehensive Plan." In particular, petitioner asserts that the decision fails to comply with, and that the findings fail to address, Rural Area Development Goal I.B.1, which states the following goal:

> "To provide an adequate amount of land, development areas and sites to accommodate those uses which are customarily found in rural areas or require or are better suited to rural locations, without compromising the basic goal relating to urban containment and orderly urban development."

1 Intervenors assert that the issue of consistency with Goal I.B.1 is waived under ORS
2 197.763(1) and 197.835(3) because it was not raised below. Petitioner concedes that the
3 issue of consistency with Goal I.B.1 was not mentioned below, although petitioner argues
4 that the issue of consistency with several comprehensive plan policies that implement Goal
5 I.B.1 was raised in the record. Record 123-24, 394-99. We agree with petitioner that an
6 argument that the county must address a policy implementing Goal I.B.1 gives "fair notice"
7 that the county must also address the goal the policy implements.[8]

8 The decision does not address this comprehensive plan goal or its implementing
9 policies. Although petitioner cites to evidence in the record that it contends demonstrates
10 that the goal is not satisfied, and intervenors cite to evidence in the record that they believe
11 shows that the decision complies with the goal of urban containment, we will not address the
12 issue of compliance with Goal I.B.1 without some assistance from the county.

13 The third assignment of error is sustained.

14 **FOURTH ASSIGNMENT OF ERROR**

15 YCZO 1208.02(C) requires the county to find that "the proposed change is
16 appropriate considering the surrounding land uses." In addition, comprehensive plan policy
17 I.B.1(C)(1) states that "[a]ll proposed rural area development and facilities [s]hall be
18 appropriately, if not uniquely, suited to the area or site proposed for development."
19 Petitioner argues that the proposed zone change is not appropriate or properly suited to the
20 area because of the HI-zoned inholding, and that the county's decision to the contrary is not
21 supported by substantial evidence.

22 The county's findings state that the zone change to rural residential use is appropriate
23 given the existing HI inholding for a number of reasons. The county found that heavy

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[8] We also note that the notices of hearing do not identify Goal I.B.1 as an applicable approval standard. Record 135, 296. That circumstance may allow petitioner to raise new issues regarding Goal I.B.1, notwithstanding the failure to raise such issues below. ORS 197.835(4)(a).

1 industrial use of the property is constrained by its small size, poor access for heavy truck
2 traffic, close proximity to residential development, lack of rail access, and existing wetlands
3 on the property. Record 52-53. The county also found that because current use of the HI
4 property is more commercial in character than industrial, any attempt to return to heavy
5 industrial use would face major challenges, and buffering could mitigate any adverse impacts
6 on residential use. Record 10, 11, 53. Petitioner disputes the adequacy and accuracy of these
7 findings.

8 The county's findings are adequate to explain its ultimate conclusion regarding
9 YCZO 1208.02(C) and policy I.B.1(C)(1). Substantial evidence is evidence a reasonable
10 person would rely on in reaching a decision. *Dodd v. Hood River County*, 317 Or 172, 179,
11 855 P2d 608 (1993). Where the Board concludes that a reasonable person could reach the
12 decision made by the local government, in view of all the evidence in the record, the choice
13 between conflicting evidence belongs to the local government. *1000 Friends of Oregon v.*
14 *Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). That a petitioner may disagree
15 with the local government's conclusions provides no basis for reversal or remand. *McGowan*
16 *v. City of Eugene*, 24 Or LUBA 540, 546 (1993). Petitioner essentially asks that LUBA
17 reweigh the evidence and reach a different conclusion than that reached by the county.
18 While the county certainly could have reached the conclusion advocated by petitioner, it did
19 not. The decision made by the county is supported by evidence that a reasonable person
20 could rely on.

21 The fourth assignment of error is denied.

22 **FIFTH ASSIGNMENT OF ERROR**

23 YCZO 1208.02(D) requires an applicant to show that:

24 "Other lands in the county already designated for the proposed uses are either
25 unavailable or not well-suited for the anticipated uses due to location, size or
26 other factors."

1 The county found that this requirement was met based on a study prepared by a local
2 real estate broker. The study, however, only included property within the original exception
3 area and did not include any properties within the county that are zoned VLDR 2.5 but
4 outside of the exception area. Petitioner challenges the county's reliance on such a limited
5 study area to determine that other lands are unavailable or ill-suited for the proposed use.

6 Intervenors' only response to this assignment of error is that petitioner waived the
7 argument by failing to raise it at the local level. ORS 197.763(1); 197.835(3). There was
8 testimony below that specifically raised this approval standard and stated that the county had
9 not considered other lands in the county. Record 394-99. The county received "fair notice"
10 that the adequacy of its analysis of other lands in the county designated VLDR was
11 challenged, and, therefore, the issue is not waived. *Boldt*, 107 Or App at 623.

12 The exception area contains approximately 400 parcels and consists of less than 2000
13 acres. YCZO 1208.02(D) expressly requires the county to consider "other lands in the
14 county." Although we do not agree with petitioner that YCZO 1208.02(D) *necessarily*
15 requires the county to consider all VLDR land throughout the entire county, the county must
16 justify its limitation of the scope of the study area. *Friedman v. Yamhill County*, 23 Or
17 LUBA 306, 309 (1992) (county must explain what factors allow it reduce the size of the
18 study area under YCZO 1208.02(D)). In the present case, the county has not provided any
19 justification for limiting the study area to the original exception area.

20 The fifth assignment of error is sustained.

21 **SIXTH ASSIGNMENT OF ERROR**

22 YCZO 1208.02(B) requires the county to find "an existing, demonstrable need for the
23 particular uses allowed by the requested zone." The county again relies on the testimony of a
24 local realtor to determine that there is a "severe shortage" of VLDR 2.5 land and a
25 tremendous number of prospective purchasers. Record 47-48. That testimony, however, is
26 also based on the study area that is limited to the original exception area. As discussed in the

1 fifth assignment of error, absent justification for so limiting the scope of the study area, the
2 county may not rely on the reduced study area to determine need.
3 The sixth assignment of error is sustained.
4 The county's decision is remanded.