

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 DAVID MORGAN and MATTHEW MORGAN,
5 *Petitioners,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2002-002

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Douglas County.

18
19 Daniel A. Terrell, Eugene, filed the petition for review on behalf of petitioners. With
20 him on the brief was the Law Office of Bill Kloos, PC.

21
22 No appearance by Douglas County.

23
24 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
25 participated in the decision.

26
27 REMANDED

04/12/2002

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

31

NATURE OF THE DECISION

Petitioners appeal a county decision that approves a statewide planning goal exception and changes the comprehensive plan and zoning map designations for a 2.2-acre property.

FACTS

The applicant owns a 112.5-acre parcel that is designated Agriculture on the county comprehensive plan map and zoned Exclusive Farm Use – Grazing (FG). The property is located approximately eight miles west of the City of Roseburg, several miles outside the urban growth boundary. In 1976, B & V Enterprises, a family-owned business, was established on the property. That business operated “principally as a local dealership for livestock trailers.” Record 9.

By 1984, the business had changed its name to Roseburg Trailer Works. In that year, the applicant was granted a conditional use permit for a home occupation, which allowed the applicant to manufacture livestock trailers and farm gates. Record 227-30. At that time, the applicant employed “6 or 7 employees” and the business was conducted in a “48 [foot] by 100 [foot] barn.” Record 227. The 4,800 square foot barn had originally been built as an “accessory agricultural structure.” *Id.* The 1984 conditional use permit decision imposed a number of conditions on the home occupation. Among those conditions were conditions limiting the operating hours and days and limiting the number of employees to no more than five employees. The 1984 conditional use permit also included the following finding:

“The Home Occupation provision as worded in the Douglas County Land Use and Development Ordinance is an exact replication of language developed by the Legislat[ure] and placed in State Statutes to encourage the development of budding cottage industries. At such time as the industry became successful and fully productive it was evidently conceived that the business would move to property designated and zoned for the use. Hence, the limitation on number of employees (5) and the disclaimer that the existence of the successful home occupation shall not be used as a justification for a zone change. The Home

1 Occupation in question may have already passed this point as a successful
2 business venture requiring location at a site which would allow additional
3 employees. This approval must be limited to five employees only.” Record
4 229.

5 Pursuant to the above-described 1984 conditional use permit, Roseburg Trailer
6 Works manufactured “its own line of livestock trailers.” Record 9. The decision challenged
7 in this appeal includes the following description of the subsequent growth and current extent
8 of the business:

9 “* * * Over the course of the last seventeen years, Roseburg Trailer Works
10 has gained a reputation for producing a high-quality, yet affordable, line of
11 livestock trailers. Consequently, the company has experienced steady growth
12 and now employs twenty-three people on a full-time basis. At its present size,
13 the manufacturing operation exceeds the limits that were imposed by the
14 County under the terms of the 1984 [conditional use permit] and consequently
15 is now operating in violation of that permit.

16 “* * * Roseburg Trailer Works now occupies a site encompassing just a little
17 over two acres. Current facilities on the site include [an] 11,200 square foot
18 fabrication and finishing building together with several small storage
19 buildings. The current work force of twenty-three is composed of nine
20 employees engaged in welding and fabrication, nine in painting and finishing
21 operations, three employees in administrative operations, and two
22 owner/manager positions. Manufacturing operations on the site occur
23 between the hours of 7:00 AM and 4:00 PM, Monday through Friday. The
24 company produces five basic models of livestock trailers which range in size
25 from 10 feet to 23 feet in length. The company has been producing an
26 average of about 400 livestock trailers each year for the past several years.
27 Finished trailers are stored on the property awaiting shipment to dealers
28 located throughout the western United States – no retail activity occurs on the
29 site.

30 “[A]s a consequence of expanding the business beyond the limits of the 1984
31 [conditional use permit], the company has been faced with either having to
32 significantly scale back the size of its operations and lay off more than half its
33 work force, or relocate the entire operation to industrially zoned property in
34 an urban area. Until late last year, when Douglas County adopted the new
35 ‘Rural Industrial’ (ME) zone, there were no other zoning districts available
36 that would allow the business to continue to operate at its present size on land
37 that is zoned for farm use. The new ME zone classification was recently
38 added to the Land Use Development Ordinance for the purpose of allowing
39 the continued operation of pre-existing industrial uses that are located in rural
40 areas outside of urban growth boundaries. The ME zone is primarily intended

1 to support resource related industries and rural levels of industrial
2 development that have a limited impact on other surrounding uses in rural
3 settings.” Record 9-10.

4 The challenged decision goes on to recognize that an exception to Statewide Planning
5 Goal 3 (Agricultural Land) will be required to zone the land for rural industrial use. The
6 challenged decision approves an exception and approves the requested comprehensive plan
7 map amendment from Agriculture to Industrial and a zoning map amendment from FG to the
8 county’s new rural industrial ME zone. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Goal 2, Part II (a) through (c) and ORS 197.732(1)(a) through (c) authorize three
11 categories of statewide planning goal exceptions: (1) physically developed exceptions, (2)
12 irrevocably committed exceptions, and (3) reasons exceptions.¹ The challenged decision

¹The statutory and goal provisions for statewide planning goal exceptions at Goal 2, Part II (a) through (c) and ORS 197.732(1)(a) through (c) are identically worded. ORS 197.732(1) is set out below:

“A local government may adopt an exception to a goal if:

“(a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;

“(b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

“(c) The following standards are met:

“(A) Reasons justify why the state policy embodied in the applicable goals should not apply;

“(B) Areas which do not require a new exception cannot reasonably accommodate the use;

“(C) 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

“(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.”

1 approves a reasons exception to Goal 3. The four ultimate criteria that must be satisfied to
2 approve a reasons exception are set out at ORS 197.732(1)(c). In their first assignment of
3 error, petitioners allege the county failed to demonstrate those four criteria are satisfied.

4 **A. Reasons Justify why the State Policy in the Goal Should not Apply (ORS**
5 **197.732(1)(c)(A))**

6 The Land Conservation and Development Commission (LCDC) has adopted an
7 administrative rule that elaborates on the requirements that must be met to justify an
8 exception. OAR chapter 660, division 4. With regard to ORS 197.732(1)(c)(A), the first of
9 the four criteria that must be met, OAR 660-004-0022 elaborates on the permissible reasons
10 for an exception. OAR 660-004-0022 takes the approach of specifically identifying
11 permissible reasons for exceptions for certain uses and goals in OAR 660-004-0022(2)
12 through (10) and identifying permissible reasons for all other uses in OAR 660-004-0022(1).
13 *See DLCD v. Umatilla County*, 39 Or LUBA 715 (2001) (generally discussing the framework
14 established by OAR 660-004-0022).

15 The county found that a reasons exception is justified based on the permissible
16 reasons set out at OAR 660-004-0022(1); petitioners argue the county erred in applying OAR
17 660-004-0022(1) and contend that the county should have applied OAR 660-004-0022(3).²

²As relevant, OAR 660-004-0022 provides:

“An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:

“(1) For uses not specifically provided for in subsequent sections of this rule or OAR 660, division 014, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

“(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Statewide Goals 3 to 19; and either

1 The challenged decision approves rural industrial development. Because OAR 660-
2 004-0022(3) governs reasons exceptions for such rural industrial development, and the OAR
3 660-004-0022(1) provisions for all other uses do not apply, the county erred in applying
4 OAR 660-004-0022(1).

5 Although we agree with petitioners that the county erred by applying OAR 660-004-
6 0022(1) rather than OAR 660-004-0022(3), it is far from clear whether that error, in and of
7 itself, provides a basis for remand. Both of these subsections purport to establish a non-
8 exclusive list of reasons that may be used. In other words, reasons that are not listed in OAR
9 660-004-0022(1) or OAR 660-004-0022(3) could be used to justify an exception under each

“(b) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this subsection must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or

“(c) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site.

“* * * * *

“(3) Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts include, but are not limited to, the following:

“(a) The use is significantly dependent upon a unique resource located on agricultural or forestland. Examples of such resources and resource sites include geothermal wells, mineral or aggregate deposits, water reservoirs, natural features, or river or ocean ports; or

“(b) The use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas; or

“(c) The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county’s gain from the industrial use, and the specific transportation and resource advantages which support the decision.”

1 of those subsections of the rule. Although it is unlikely that LCDC intended this result, as
2 OAR 660-004-0022(1) and (3) are written, there is also nothing that expressly precludes use
3 of the same reasons specified in OAR 660-004-0022(1) to justify rural industrial
4 development under OAR 660-004-0022(3). Because of this ambiguity in the rule, we also
5 consider petitioners' challenge to the county's findings that address OAR 660-004-0022(1).

6 OAR 660-004-0022(1) requires a threshold finding and then requires that one of two
7 alternative findings be made. The threshold finding is that "[t]here is a demonstrated need
8 for the proposed use or activity, based on one or more of the requirements of Statewide Goals
9 3 to 19." As petitioners correctly note, this requirement is not met by simply finding a
10 market demand for the proposed use. Rather the county must find that it is "unable to satisfy
11 its obligations under one or more of Goals 3-19 absent the proposed exception." *Middleton*
12 *v. Josephine County*, 31 Or LUBA 423, 430 (1996). Although the county suggests the
13 successful business on the subject property adds to the county's economy, the county does
14 not attempt to show that the exception is required to meet its obligations under Goals 3-19.
15 Neither does the county attempt to adopt or justify the alternative finding set out at OAR
16 660-004-0022(1)(b). Instead, the county appears to rely on the alternative finding set out at
17 OAR 660-004-0022(1)(c).³ However, the county does not explain why it believes the home
18 occupation that it approved in 1984 constitutes an "established industrial use," or why that
19 would provide a sufficient reason for an exception under OAR 660-004-0022(1)(c). Other
20 parts of the decision make it clear that much of the existing industrial activity on the site was
21 developed in violation of the 1984 conditional use permit that authorized a much more

³The county's finding is as follows:

"[T]o the extent to which the subject 2.20 acre site is physically developed and irrevocably committed to the established industrial use, there is sufficient evidence in the record to demonstrate that the proposed exception site has special features or qualities that necessitate the continued location of the use on the proposed exception site." Record 18.

1 limited home occupation. The county may not rely on such unauthorized industrial activity
2 to justify an exception.

3 We agree with petitioners that the county failed to demonstrate that reasons justify
4 why the state policy in Goal 3 should not apply, as required by ORS 197.732(1)(c)(A), Goal
5 2, Part II(c), and OAR 660-004-0020(2)(a) and OAR 660-004-0022(3). This subassignment
6 of error is sustained.

7 **B. Remaining Reasons Exception Criteria**

8 The remaining three criteria that must be satisfied to justify a reasons exception are
9 set out at ORS 197.732(1)(c)(B) through (D). *See* n 1. The first of those criteria requires
10 that the county establish that other areas that do not require an exception “cannot reasonably
11 accommodate the use.” The second requires that the county show that the “long term
12 environmental, economic, social and energy consequences resulting from the use at the
13 proposed site” would not be significantly worse than locating the site at other sites that
14 would require an exception. The third criterion requires that the county show that “[t]he
15 proposed uses are compatible with other adjacent uses.” Petitioners argue the county failed
16 to address these three criteria. Petitioners are correct.

17 This subassignment of error is sustained.

18 The first assignment of error is sustained.

19 **SECOND ASSIGNMENT OF ERROR**

20 Under this assignment of error, petitioners argue that the findings the county adopted
21 to support its reasons exceptions can be read to suggest that the subject property qualifies for
22 a physically developed exception or an irrevocably committed exception. *See* n 3.
23 Petitioners contend the finding is an unsupported conclusion and does not demonstrate that a
24 physically developed or irrevocably committed exception is justified here. We agree with
25 petitioners.

26 The second assignment of error is sustained.

1 **THIRD ASSIGNMENT OF ERROR**

2 **A. Comprehensive Plan and Zoning Map Amendment Criteria**

3 The Douglas County Land Use and Development Ordinance (LUDO) includes
4 provisions that govern quasi-judicial comprehensive plan map and zoning map amendments.
5 The comprehensive plan map amendment criteria require that the plan amendment comply
6 with the statewide planning goals. The zoning map amendment criteria require that the
7 proposed zoning map designation be consistent with the comprehensive plan. Petitioners
8 contend because the reasons exception has not been justified, it follows that the plan map and
9 zoning map amendments violate those LUDO provisions. We agree.

10 This subassignment of error is sustained.

11 **B. LUDO 3.23B.100(1)**

12 LUDO 3.23B.100 provides, in part:

13 “In the ME zone, the following uses and their accessory buildings and uses
14 are permitted subject to the general provisions and exceptions set forth by this
15 ordinance.

16 “1. Industrial uses existing on or before December 31, 2000, not otherwise
17 listed in this zone, and, if in a building or buildings, the total square
18 footage does not exceed 7,500 square feet.”

19 LUDO 3.23B.200(2)(B) imposes the following property development standard:

20 “Buildings supporting a use existing on or before December 31, 2000, may be
21 expanded up to 7,500 sq. ft.”

22 Although the challenged decision finds that the LUDO 3.23B.200(2)(B) property
23 development standard does not apply, because the existing 11,200 square foot building is not
24 being expanded, the challenged decision does not address LUDO 3.23B.100(1). We agree
25 with petitioners that it appears that LUDO 3.23B.100(1) applies and that the proposal
26 violates LUDO 3.23B.100(1).

27 This subassignment of error is sustained.

28 The county’s decision is remanded.