BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CONCERNED CITIZENS
OF MALHEUR COUNTY,
Petitioner,

vs.

MALHEUR COUNTY,
Respondent,

and

TREASURE VALLEY
RENEWABLE RESOURCES, LLP,
Intervenor-Respondent.

LUBA No. 2004-008

FINAL OPINION
AND ORDER

Appeal from Malheur County.

Michael W. Franell, Eagle Creek, filed the petition for review and argued on behalf of petitioner.

Jeffrey L. Kleinman, Larry Epstein, Robert D. Van Brocklin, Michelle Rudd, and Ellen Hawes Grover, Portland, filed a joint response brief on behalf of respondent and intervenor-respondent. With them on the brief was Stoel Rives, LLP. Jeffrey L. Kleinman and Larry Epstein argued on behalf of respondent and Robert D. Van Brocklin argued on behalf of intervenor-respondent.

Steven Shipsey, Assistant Attorney General, Salem, filed a state agency brief on behalf of the Department of Land Conservation and Development. With him on the brief were Hardy Myers, Attorney General and Mary Williams, Solicitor General.

Joseph H. Hobson, Jr., Lake Oswego, filed an amicus brief on behalf of the Oregon Farm Bureau Federation. With him on the brief was Hobson & Bernasek, LLP.

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

AFFIRMED 06/30/04

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that approves a comprehensive plan and zoning map amendment and an exception to Statewide Planning Goal 3 (Agricultural Lands) to allow a bio-refinery and agricultural processing plant to be approved on a 115-acre parcel.

FACTS

The subject property is located approximately one mile south of the City of Ontario, outside of the city's urban growth boundary. The property is bounded on the north by the Oregon Eastern Railroad, Alameda Avenue to the west, a Union Pacific Railroad mainline to the east and Railroad Avenue to the south. Interstate 84 is located northeast of the subject property; Oregon State Highway 201 lies to the west. The property includes Class I agricultural soils and has been used in the past for cultivated crops, including onions and sugar beets. It is otherwise undeveloped. Nearby properties include lands zoned EFU and used for row crops and land zoned and developed for rural residential use.

In 2003, Treasure Valley Renewable Resources, LLP (intervenor), a consortium of regional farmers and their families, applied to site a bio-refinery and agricultural processing plant on the subject property. As proposed, the facility will produce wheat and barley bran, protein, starch, and beta glutens. By-products of the plant will include ethanol, commercial grade carbon dioxide, wet distiller's grain and, eventually, bio-diesel and glycerin. The wet distiller's grain will be sold to dairy and cattle operations in the area. As proposed, approximately 60 persons will be employed full-time at the facility, which would operate 24 hours a day, seven days a week.

Intervenor anticipates that approximately 90 percent of the raw material used at the facility would be trucked to the site from nearby farms, and that approximately 90 percent of the finished product will be shipped by rail. An estimated 75-90 round-trip truck trips will be made from Tuesday through Friday, with additional trips being made on Monday and during harvest season. No truck trips are planned during the weekends.

In its application, intervenor proposed to (1) establish a new zoning district, the Agricultural Processing Plant Industrial Zone (M-3 zone), (2) amend the comprehensive plan by adopting an exception to Goal 3 for the proposed facility, pursuant to ORS 197.732 and OAR 660-004-0020 and 0022, (3) designate the subject property as Industrial on the county's comprehensive plan map, and (4) apply the newly established M-3 zone to the subject property.

Petitioner, an unincorporated association, appeared before the planning commission and the county court in opposition to the application. Petitioner was particularly concerned with the effect the proposal may have on water availability, noise, air quality and traffic on nearby roads.

The county court approved the application with conditions. This appeal followed.

MOTION TO DISMISS

Under ORS 197.830(2)(b), a petitioner at LUBA must have appeared before the local government. On March 9, 2004, intervenor moved to dismiss this appeal, arguing that petitioner does not have standing to appeal to LUBA, because the notice of intent to appeal that was filed with LUBA named "Citizens Against Bio-Refinery" as petitioner and that entity did not appear below. In its response to the motion, petitioner conceded that a group by the name of "Citizens Against Bio-Refinery" did not appear below. However, petitioner argued that there was no dispute that "Concerned Citizens of Malheur County" did appear below, and that Citizens Against Bio-Refinery was comprised of the same persons that were members of Concerned Citizens of Malheur County. Petitioner conceded that the notice of intent to appeal misidentified the petitioner, and asked that the notice of intent to appeal be modified to identify "Concerned Citizens of Malheur County" as petitioner, rather than "Citizens Against Bio-Refinery."

In an order issued April 7, 2004, we concluded that the error petitioner made was a technical violation of our rules. In doing so, we noted that ORCP Rule 26A allows the substitution of a real party in interest in a civil action, and analogized the failure to properly identify the petitioner in this case to an error in naming the real party in interest in a civil proceeding. We therefore

allowed the substitution of "Concerned Citizens of Malheur County" for "Citizens Against Bio-Refinery" as petitioner in this appeal and denied the motion to dismiss.

Respondent and intervenor-respondent (respondents) renew their motion to dismiss. We decline to reconsider our earlier order. The renewed motion to dismiss is denied.

STATE AGENCY BRIEF

The Department of Land Conservation and Development (DLCD) filed a state agency brief pursuant to ORS 197.830(8) to address the manner in which the county applied OAR 660-004-0020 and 0022.[1] There is no opposition to the brief, and it is allowed.

AMICUS BRIEF

Oregon Farm Bureau Federation (Farm Bureau) moves to file an amicus brief, pursuant to OAR 661-010-0052.[2] According to the Farm Bureau, it is the largest voluntary farm organization in the state and, as such, has a "strong general interest in ensuring that the laws regulating the use of Oregon's agricultural land are appropriately interpreted and applied." Amicus Brief 1.

No party objects to the Farm Bureau's motion, and the amicus brief is allowed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (EXCEPTION TO GOAL 3)

As relevant, ORS 197.732(1) allows a local government to adopt an exception to a statewide planning goal to allow a use that would not otherwise be permitted by that goal, provided the local government justifies its decision by demonstrating that the proposal complies with the standards set out in ORS 197.732(1). There are three kinds of statewide planning goal exceptions: (1) physically developed exceptions, (2) irrevocably committed exceptions and (3) reasons

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[1] ORS 197.830(8) provides, in relevant part, that "[i]f a state agency whose * * * rule * * * policy or other action is at issue is not a party to the proceeding, it may file a brief with [LUBA] as if it were a party."

[2] OAR 661-010-0052(1) provides, in relevant part:

> "A[n] * * * organization may appear as amicus only by permission of the Board on written motion. The motion shall set forth the interest of the movant and state reasons why a review of relevant issues would be significantly aided by participation of the amicus."

exceptions. The exception that is at issue in this appeal is a reasons exception. The statutory standards that govern reasons exceptions are set out in ORS 197.732(1)(c).[3] The Land Conservation and Development Commission has adopted administrative rules that restate and supplement the statutory reasons exception standards. The relevant administrative rules, OAR 660-004-0020(2) and OAR 660-004-0022(3), are lengthy and are not reproduced here.

The county adopted findings to support its conclusion that the exception was justified. With respect to the required considerations under OAR 660-004-0020(2) and 660-004-0022(3), the county found that the proposed use requires a site with particular features: (1) 70-75 acres, (2) central location within the agricultural market area it serves, (3) access to rail and truck transportation corridors, (3) adequate water and electrical service and availability of natural or bottled gas, (4) relatively level topography to avoid excessive grading costs, and (5) a willing seller. In addition, the county found that other characteristics, such as (1) a relatively unpopulated area, (2) a reasonable purchase price, (3) proximity to wheat, barley and corn crops, and (4) additional acreage for test plant plots, would be desirable, but not critical attributes. Record 18.

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[3] ORS 197.732(1) provides, in relevant part:

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

"* * * * *

"(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."

The county found that the subject property has significant economic advantages in comparison to other sites within the county, because of its proximity to major transportation corridors, the ready availability of local raw materials to produce products that either add value to lower value agricultural products grown on a rotational basis within the county or would serve local market needs. Record 44. The county also found that alternative locations were too large or too small, not adequately served by utilities or transportation facilities, or were not available for sale. Record 25-30. The county then concluded that intervenor had demonstrated that the subject property is the only site that includes all of the required and desired attributes and that an exception is justified on that basis.

In the first two assignments of error, petitioner challenges those findings and the adequacy of the evidentiary record to support those findings. Petitioner contends that the county's findings do not demonstrate that the subject property, which includes Class I soils, must be developed for industrial use. In its third assignment of error, petitioner contends that the county did not adequately quantify the effect the proposed facility would have on air quality and road capacity or adopt conditions of approval that would adequately address those impacts.

A. The Amicus Brief

Before turning to the parties' arguments concerning the adequacy of the statewide planning goal exception that was adopted by the county, we first consider the position asserted by the Farm Bureau in its amicus brief. Amicus Farm Bureau argues that that the proposed use should be allowed in exclusive farm use zones, without an exception to Goal 3, because it

> "processes farm crops grown in the area and * * * does not force a significant change in accepted farm practices on surrounding lands devoted to farm use and does not significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use [and therefore] should be considered an activity that is acceptable in an exclusive farm use zone. Farming is a use of the land to produce goods. A proper commercial activity that further processes the goods from that area should be seen as a necessary extension of the farming." Amicus Brief 2.

The statutory exclusive farm use zone allows "[c]ommercial activities that are in conjunction with farm use." ORS 215.213(2)(c); 215.283(2)(a). Although the Farm Bureau cites no statutes in support of its argument, we assume it contends that the proposed use is properly viewed as a commercial activity that is in conjunction with farm use. The county did not adopt the Farm Bureau's position. As we stated above, the challenged decision takes the position that the proposed facility is not allowed in the county's exclusive farm use zone and requires an exception to Goal 3. DLCD agrees with that conclusion. Petitioner also agrees that a reasons exception is necessary to allow the use and argues that the county has not adequately justified the exception it approved.

There are no well-defined factors that distinguish run-of-the-mill commercial or industrial uses, which happen to use agricultural products in their business, and commercial activities that are properly viewed as being "in conjunction with farm use. Amicus Farm Bureau offers no suggestions for better defining the distinguishing factors. That shortcoming in the amicus brief aside, as we have already noted no other party in this appeal adopts the position asserted in the amicus brief, and if we were to adopt it we would have to remand the county's decision to apply the standards at ORS 215.296(1), which apply to commercial activities in conjunction with farm use. We do not believe it is appropriate to remand a county decision based on a legal theory that is not asserted by any of the parties to an appeal. We turn to petitioner's challenge to the county's exception.

B. OAR 660-004-0020(2)(b) Alternatives Analysis (First Assignment of Error)

OAR 660-004-0020(2)(b) requires that the county's exception findings discuss why other "[a]reas which do not require a new exception cannot reasonably accommodate the proposed use." In *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1994), we interpreted OAR 660-004-0022(2)(b) to "express a preference for using an alternative site that does *not* require a goal exception" and that if it is a "close call" between two sites and one of the sites does not require a goal exception then the choice between the two must be reasonable. *Id*. at 344. In *Pacific Rivers Council*, LUBA remanded the county's decision, in part because the county had not

adequately explained why the chosen property, a parcel subject to Goal 4 (Forest Lands), was a more reasonable site than a pre-existing exception area that would (1) cost more to build on, (2) require the demolition of a residence and (3) have greater impacts on residents of a rural residential exception area. We concluded in *Pacific Rivers Council* that the pre-existing exception site had enough of the essential attributes the county deemed necessary to provide a reasonable alternative, especially because OAR 660-004-0020(2)(b) expresses a preference for the use of land that does not require a goal exception over land that does require an exception. Petitioner contends the county utilized unsupported site criteria in rejecting other sites that would not require an exception and ignored one reasonable alternative site that would not require an exception.

1. Site Criteria

As previously noted, one of the planned facility outputs is ethanol. There is evidence in the record that ethanol facilities have been constructed on parcels with fewer than 15 acres. Petitioner contends that the county has failed to adequately justify why 70-75 acres of land is needed to develop the proposed facility, when those other ethanol facilities have been established on much smaller parcels.

Respondents answer that an ethanol plant is only one component of the proposed facility and that other components, including the grain processing plant, the bio-diesel plant, the recycled water plant, the warehousing shipping and receiving areas, internal roads, rail lines and power structures, parking and administrative facilities, require more than the seven to 17 acres needed to establish the ethanol facility by itself. Respondents also argue that there is evidence in the record, including a plan that depicts a conceptual layout of the subject property and shows that approximately 50 acres will be needed for the industrial buildings themselves, 6.9 acres will be needed for internal roads, 4.1 acres will be needed for rail support and 18.34 acres will be needed for rail. Record 491. According to respondents, that evidence constitutes substantial evidence in support of the county's finding that a 75-80 acre parcel is the minimum required for the proposed facility. We agree.

2. Nyssa Industries Property as an Alternative

Petitioner contends that one site that is currently zoned for industrial use, the Nyssa Industries property, includes all of the attributes listed by the county as necessary for the proposed use. Petitioner contends that the two reasons given by the county for rejecting the Nyssa Industries site (complicated title issues and lack of short-line rail access) are not sufficient to show that the Nyssa Industries site is not a reasonable alternative.[4] Petitioner contends that there is evidence in the record that the corporation that owns the Nyssa Industries property is willing to work with intervenor in the sale of the property. With respect to the short-line rail issue, petitioner argues that the Nyssa Industries property has access to the Union Pacific main-line.[5] Petitioner argues that intervenor has not demonstrated why use of a short-line is so necessary to the operation of the proposed facility, when the main-line in the area is often used in a manner that emulates a short-line, and main-line rail is available to the Nyssa Industries property.

Respondents counter that the findings adequately address why the county believes that the Nyssa Industries property is not a reasonable alternative to the subject property, and further contend that those findings are supported by substantial evidence. Respondents cite to evidence in the record that only two of the many shareholders in Nyssa Industries testified that they would be willing to work with intervenor to facilitate development of the Nyssa Industries property, and that

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[4] The county's findings with respect to the Nyssa Industries parcel state, in relevant part:

> "* * * In the late 1940s and early 50s, Nyssa and Ontario established stock-funded development organizations to acquire and develop land. The skeletons of both remain. Nyssa Industries Corporation owns some land, but most of the original stockholders are deceased and there is an effort underway to untangle the stock ownership. * * *" Record 42.

> "The 80-acre Nyssa [Industries] site cannot reasonably accommodate the [proposed] use because the site is in numerous ownerships and the possibility of obtaining the site in a single ownership would be impossible in the time frame necessary for [intervenor] to construct the proposed facility. There is no rail service to the site at this time, and the Study [of alternative sites prepared by intervenor and adopted by the county] indicates that rail lines that formerly served the property have been removed." Record 25.

[5] As we understand it, a short-line railroad is a railroad that operates in a limited geographic area. It serves that local area and provides a link to one or more mainline rail operators, who operate long-distance railroads that transport goods long distances.

Nyssa Industries board members had restricted ability to convey property because of the complicated shareholder ownership in the corporation. As a result of the many shareholders and the complicated nature of governance, intervenor testified that acquisition of the property could not be accomplished within a reasonable time. Record 2765-66. Respondents argue that that testimonial evidence was relied upon by the county and is reflected in the county's findings.

With respect to the short-line rail issue, respondents contend that it is undisputed that rail access is a necessary site component, that short-line rail is preferred to main-line rail, and that the subject property has existing access to a short-line railway system. Respondents point to testimony that short-line railroads offer better, more flexible service, better rates and more economical means to access local markets than direct connections to main-line railroads. Respondents contend that the evidence shows that the subject property and the Nyssa Industries site are not comparable, because rail access, a necessary site attribute, is inadequate at the Nyssa Industries site, and is readily available at the subject property.

Petitioner has not challenged the county's finding that, while it may be possible for intervenor to purchase the Nyssa Industries site, the complicated nature of its present ownership means that the transfer could not be consummated in a timely manner. In addition, petitioner has not challenged the findings that while the Nyssa Industries property formerly had rail service, such rail service does not currently exist. Those findings, and the evidence on which they are based, are adequate to explain why the Nyssa Industries property is not a reasonable alternative to the subject property.

The first assignment of error is denied.

C. OAR 660-004-0020(2)(c) Long Term Environmental, Economic, Social and Energy Consequences Analysis (Second Assignment of Error)

OAR 660-004-0020(2)(c) requires that the county adopt findings that explain why

> "[t]he long-term environmental, economic, social and energy [(ESEE)] 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 county considered and rejected five of six sites that would require a goal exception because they did not meet all of the necessary site characteristics. Record 25-29. The county also identified potential ESEE impacts of developing the proposed facility at the proposed site. The county then compared those impacts to the impacts that would occur if the proposed use was sited on parcels that were identified by parties as comparable. Record 31-48. The county concluded that to the extent developing at the proposed site would have ESEE impacts, those impacts would be similar in type and scale wherever the use was located. The county further found that the impacts from developing on the subject property would not be "significantly more adverse" than developing on other identified alternative sites that would require an exception.

Petitioner argues that the findings are inadequate to explain why the county concluded that impacts on traffic would not be significantly more adverse near the subject property than in other locations. Petitioner contends that Alameda Avenue, identified as a minor collector in the county's transportation systems plan (TSP), will be used as the primary street access to the subject property. The county's TSP explains that minor collectors "generally [carry fewer] than 500 vehicle trips per day." According to petitioner, the record shows that Alameda Avenue currently carries more than 500 vehicle trips per day. Petitioner argues that another parcel, the Navarre Property, has all of the identified site requirements and does not have the same negative traffic impacts that developing at the subject property will have. Petitioner also argues that the Navarre Property will require a shorter municipal water extension. For these reasons, petitioner argues that the proposed site has significantly more adverse impacts than the Navarre Property.

The Navarre Property is adjacent to the subject property, and the county found that the both parcels would use the same road system for access. The site requirements mean that approximately the same number of vehicle trips will be generated by the facility wherever it is located. The only difference between the two parcels with respect to access is that vehicles traveling to the subject parcel will pass by a rural residential subdivision and vehicles traveling to the

Navarre Property will not. The county disagreed with petitioner that that difference was enough to establish that developing the subject property will result in "significantly more adverse" ESEE consequences. We agree with respondents that that finding is adequate to explain the county's conclusion that developing the subject property will not have significantly more adverse ESEE consequences than developing the Navarre Property, and that conclusion is supported by substantial evidence.

With respect to the water supply question, the county found that adequate water supplies are available to the subject property and that intervenor had demonstrated that there would be no adverse ESEE consequences from extending a water line from the city to the property. Petitioner has not established why the longer water line will mean that developing the subject property rather than the Navarre Property will result in "significantly more adverse" ESEE consequence. Accordingly, petitioner's argument does not provide a basis for reversal or remand.

The second assignment of error is denied.

D. OAR 660-004-0020(2)(d) Compatibility with Adjacent Uses (Third Assignment of Error)

OAR 660-004-0020(2)(d) requires a finding that

> "[t]he proposed uses are compatible with other adjacent uses or will be so rendered though measures designed to reduce adverse impacts."

Petitioner argues that the county failed to adopt findings supported by substantial evidence that demonstrate that the proposed facility (1) will meet air emission standards, (2) will not generate excessive odors or (3) will not generate traffic that will cause a significant change in transportation facilities.

1. Air Emissions and Odor

Petitioner argues that the proposed ethanol and bio-diesel facilities will generate air-borne particulates that will adversely affect neighboring properties. According to petitioner, thermal oxidizers are the only proven method to ensure that air emissions and odors generated by ethanol plants are minimized. Petitioner contends that the county's reliance on regulatory standards

established by the Department of Environmental Quality (DEQ) is not adequate to ensure that impacts are minimized, because DEQ does not have standards that measure odors and DEQ is not aggressive in monitoring either emissions or odors.

Petitioner also asserts that there is no evidence regarding potential emission and odors that will be generated by the bio-diesel plant. Petitioner contends that the county's conditions of approval are inadequate to ensure that the impacts that will result from the operation of the bio-diesel plant will be compatible with adjacent uses.

The county found that the proposed facility will be compatible with adjacent and nearby residential uses.[6] With respect to air emissions, the county relied on evidence that tends to show that no more than 100 tons of each regulated airborne particulate will be generated by the proposed facility in any given year. The county found that the amount of air-borne particulates that will be generated will not result in a significant impact on area agricultural or residential uses and to the

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

> "[Petitioner has] repeatedly [argued] that the proposed project would emit strong objectionable odors. [Intervenor] has responded to this issue. Odor problems most usually associated with ethanol plants are due to feed drying operations. [Intervenor] does not plan to dry its feed, but will instead provide wet feed to cattle and dairy operations. * * * Furthermore, testimony from Scott Fairley with DEQ indicates that [intervenor] has been working with DEQ on this issue and that any operation installed at the site will be required to meet certain emission standards. * * * The proposed * * * project will also use a CO2 recovery system that will recover odors from the ethanol purification and liquidation process. * * *
>
> "[Petitioner fails] to acknowledge these accommodations at [intervenor's] facility, preferring to rely on anecdotal evidence from plants such as the Potlatch plant in Lewiston, Idaho, or the Gopher State Plant in Minnesota. This anecdotal evidence is not persuasive. [Intervenor] has represented that [its] project will be constructed differently and will utilize different processes than were used at the Potlatch and Gopher State facilities. Again, [intervenor] will not be drying any feed. It will also utilize different ingredients and will be located in a different environment. * * * Further, [intervenor] has developed a site plan to locate the ethanol and other plant operations as far away from the residential areas as possible on the site * * *, and there is evidence in the record that the prevailing winds are away from the residential area. * * *
>
> "Furthermore, the M-3 zone specifically regulates odor and prohibits the creation of nuisances from operations. * * * Last, the County Court has placed a condition of approval on this zone change with respect to odors. With these protections in mind, the County Court finds that odors are not expected to cause significant adverse impacts." Record 35-37 (Citations to evidence omitted.)

extent there would be an impact, DEQ regulations require that intervenor use the most advanced technology available to mitigate the impact.

Finally, the county found that the M-3 zoning designation criteria assure residents that no proposed use with adverse impacts on surrounding properties will be permitted. With respect to odor, respondents argue that the county found that the odor likely to be generated by the proposed facility will not normally extend beyond the boundaries of the 115-acre parcel, and the odor that might occasionally be carried across the boundaries would not adversely affect agricultural activities on neighboring properties. The findings conclude that even if some odors may be emitted from the subject property, those odors will not adversely affect the closest rural residential area, which is located approximately three-quarters of a mile away.

We agree with respondents that the findings are adequate to explain why emissions from the proposed facility will not generate odors or air emissions that will adversely affect neighboring properties. We also agree with respondents that those findings are supported by substantial evidence. Also, in the absence of evidence from petitioner that the proposed bio-diesel plant will generate emissions or odors that cannot be addressed in the same manner as emissions from the ethanol plant, we conclude that the county could reasonably assume that any additional emissions and odors attributable to bio-diesel production can be dealt with through site review and that DEQ permit regulations are adequate to ensure that emissions from the bio-diesel plant will not have an effect on residential uses within the area.

2. Traffic Impacts

In addressing traffic impacts under the 660-004-0020(2)(d) compatibility standard, the county found that "[t]he required site design review will ensure that traffic impacts remain compatible with the County Transportation System Plan." Record 49.

We address petitioner's traffic impact arguments in more detail in our discussion of the sixth assignment of error below. For the reasons explained there, we agree with respondents that the

county's finding that traffic impacts will not result in a violation of the 660-004-0020(2)(d) compatibility standard are adequate and are supported by substantial evidence.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues that the county erred by not adopting any findings addressing Statewide Planning Goal 12 (Transportation) or the Transportation Planning Rule (TPR).

In quasi-judicial land use proceedings, parties generally must raise issues locally to preserve their right to assert those issues on appeal to LUBA. ORS 197.763(1); 197.835(3). Respondents contend that neither petitioner nor any other party raised any Goal 12 or TPR issues and, for that reason, those issue are therefore waived in this appeal. ORS 197.763.

Respondents appear to be technically correct. However, the county has adopted the relevant parts of the TPR, almost word for word, as part of the Malheur County Zoning Ordinance (MCZO). In their sixth assignment of error, petitioner assigns error based on those TPR-related MCZO provisions and incorporates its arguments under the fourth assignment of error in support of its sixth assignment of error. Therefore, while we agree with respondents that the fourth assignment of error was waived, the *argument* presented in support of that assignment of error applies equally to the nearly identically worded MCZO transportation related provisions, and we consider those arguments under the sixth assignment of error.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Malheur County Comprehensive Plan (MCCP) Goal 12 is "[t]o provide and encourage a safe, convenient, and economic transportation system. That goal is followed by a number of policies. Two of those policies are set out below:

> "15. The county will encourage the provision of adequate access to industrial zones in and around cities so that industrial zones can be accessed without going through downtown and residential areas." MCCP 35.

> "20. Developers creating a demand for improvement of unimproved county or public use road rights-of-way will be responsible for those improvements. After the improvements have been made, the developer may petition the County Court to accept such roads, upon meeting county standards, into the county road maintenance program." *Id*.

Petitioner argues that some of the traffic leaving the subject property will travel north on Alameda Avenue to 18th Avenue, a county urban collector and city minor arterial, which connects with Interstate Highway 84 to the east. According to petitioner, that traffic will pass through a rural residential subdivision that lies a short distance north of the subject property. Petitioner argues that under policy 15 above, traffic should be required to travel west on Railroad Avenue and then north on Highway 201 to 18th Avenue, thereby avoiding that rural subdivision. Petitioner contends that because Railroad Avenue must be improved to accommodate traffic to and from the subject property, under policy 20 above, the county should have required that intervenor be responsible for needed improvements to Railroad Avenue.

Respondents point out that policy 15 does not *mandate* that access to industrial zones not pass through downtown or residential areas, it *encourage[s]* that result. Respondents also point out that it is not accurate to say traffic from the subject property will pass *through* a rural subdivision to the north. A map in the records shows only eight homes between the subject property and 18th Avenue, which is located approximately a mile to the north. Respondents contend that the rural subdivision referenced by petitioner is located west of Alameda, and that there is no subdivision on the east side of Alameda. According to respondents, "under any commonly accepted definition of the word 'through,' traffic from the proposed site will not travel through a residential area." Respondents' Brief 33 (footnote omitted). We do not consider the question of whether the *encourage* language of policy 15 renders the policy nonmandatory. Even if routing industrial traffic through a subdivision would violate policy 15, we agree with respondents that industrial traffic that passes along one side of a rural subdivision, which would be the case with traffic traveling north from the subject property on Alameda Avenue to 18th Avenue, does not pass *through* a residential area.

With regard to policy 20, respondents argue that Railroad Avenue is not *unimproved* and, for that reason alone, policy 20 simply does not apply. Alternatively, even if policy 20 does apply, respondents contend that policy 20 does not state *when* it applies. According to respondents there is nothing inconsistent with policy 20 in imposing a condition of approval on the disputed zoning map amendment such that the routing of traffic to and from the subject property, and the level of that traffic, will be assessed during site plan review and intervenor will be required at that time to demonstrate that the expected traffic will not exceed the capacity of Alameda Avenue or Railroad Avenue under the TSP. For the reasons explained in our discussion of the sixth assignment of error below, we agree with respondents.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

MCZO 6-10-7 provides, in relevant part:

> "[I]n considering an amendment to the text or the Zoning Maps, the Planning Commission and County Court shall determine the following:
>
> "A. That the proposed change is consistent with the comprehensive plan.
>
> "B. That the level of development in other locations has reached the point where additional land is needed for the proposed uses and that the area of the proposed change can best meet such needs.
>
> "C. That adequate rural services are available and will not be overburdened.
>
> "D. That amendments to the zoning text or zoning map [which] would significantly affect a transportation facility shall assure that allowed land uses are consistent with the function, capacity, and level of service of the facility identified in the transportation system plan. This is accomplished by one of the following:
>
> "1. Limiting allowed land uses to be consistent with the planned function of the transportation facility.
>
> "2. Amending the [TSP] to ensure that existing improved or new transportation facilities are adequate to support the proposed land uses consistent with the requirement of the Transportation Planning Rule; or

"3. Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.

"A text or zoning map amendment significantly affects a transportation facility if it:

"4. Changes the functional classification of an existing or planned transportation facility;

"5. Changes standards implementing a functional classification system;

"6. Allows types or levels of land use that would result in levels of travel or access that are inconsistent with the functional classification of a transportation facility; or

"7. Would reduce the level of service of the facility below the minimum acceptable level identified in the [TSP]."[7]

A. MCZO 6-10-7(B)

Petitioner incorporates its arguments with respect to the OAR chapter 660 division 004 alternatives analysis and argues that the county's findings are inadequate to support a conclusion that MCZO 6-10-7(B) is met.

Respondents argue that this subassignment of error is not sufficiently developed for review. In the alternative, respondents argue that the county adopted findings that petitioner has not refuted that explain why the county concluded that MCZO 6-10-7(B) has been met, and those findings are supported by substantial evidence.[8]

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[7] The text of MCZO 6-10-7(D) is nearly identical to TPR text at OAR 660-012-0060(1) and (2). MCZO 6-10-7(D) numbers MCZO 6-10-7(D)(1)-(3) in the same way we have in the text quoted above, but MCZO 6-10-7(D) numbers the final four numbered paragraphs (1) through (4). We have renumbered those paragraphs from (1) through (4) to (4) through (7) to avoid confusion with the first three numbered paragraphs.

[8] With respect to 6-10-7(B) the county found:

"* * * Concerned Citizens [argues] that [intervenor] has failed to demonstrate that there is inadequate land for industrial development. The County Court disagrees. There is unrebutted testimony in the record that the City and the County currently have a poor industrial base. * * * The record contains an exhaustive alternatives analysis of available and identified industrial areas. That analysis provides substantial evidence demonstrating that the existing industrial areas cannot reasonably accommodate the proposed use. This evidence is also

We consider arguments that are incorporated by reference to the extent we can understand how the incorporated arguments apply. *Barton v. City of Lebanon*, 45 Or LUBA 214, 223-24 (2003), *aff'd* __ Or App __, __ P3d __ (2004). Here, we understand petitioner to argue that the findings and evidence are not adequate to show that alternative industrial land is not available that can be developed for the proposed use. We agree with respondents that the county has adequately explained why it believes that a site of type and size that is needed for the proposed use is not currently included in the county's industrial land base and that the proposed zoning is necessary to allow for the proposed use. Petitioner's subassignment of error is denied.

B. MCZO 6-10-7(C)

Intervenor plans to secure some of the water it will need for the proposed facility from the City of Ontario. Currently, approximately 80 percent of the needed water supply is available from the city. The county found that by the end of 2005, improvements to the city water supply and distribution system will be completed so that all needed water will be supplied by the city. The county also found that if an adequate supply of water could not be supplied by the city, wells and water rights transfers will enable intervenor to obtain all needed water.[9]

> unrebutted and Concerned Citizens [has] not identified any other industrial sites that can reasonably accommodate the use.
>
> "Concerned Citizens also [argues] that [intervenor] has not demonstrated that the reason for the need for additional land is the existing level of development. The County Court disagrees. [MCZO] 6-10-7(B) does not require the county to ignore the site requirements of the use in assessing whether to approve a zone change. For example, a use that requires 70 acres cannot be accommodated on an undeveloped site totaling only 20 acres. In other words, the County must consider whether the existing level of development precludes a parcel within the UGB from being able to reasonably accommodate the use. [Intervenor] has made just such a showing--viz. there are no available Industrial lands that can reasonably accommodate the use. Furthermore, the alternatives analysis demonstrates that the proposed site best meets the needs of the proposed * * * facility or a similar agricultural processing facility. Last, the proposed site for the M-3 zoning is consistent with the existing land use pattern in the area. Industrial zoning existing on three sides of the City, primarily along rail lines. * * *
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> "This criterion is met." Record 65-66.

[9] The county's findings with respect to MCZO 6-10-7(C) state in relevant part that "* * * [w]ater service can be obtained through the City, but such service will not promote the development of any new residential use. * * *." Record 66. That conclusion is apparently based on other findings found at Record 63-64 that conclude that extending a municipal water line to the subject property will not convert rural land to urban land. Other findings

According to petitioner, the proposed facility will require approximately 302.4 million gallons a year. Petitioner explains that if existing water rights are transferred, and intervenor's plan to recycle processing water succeeds, only 209.8 million gallons a year will be available to serve the facility's water needs, resulting in a 92.6 million gallon shortfall. Petitioner argues that the anticipated water shortfall is inconsistent with a finding that adequate water is available on site to serve the proposed use, and the county's finding that municipal water needs to be supplied to the site in order to satisfy the facility's water needs only proves that rural water sources are inadequate.

We understand the county to interpret MCZO 6-10-7(C) to be met if an applicant demonstrates that needed rural services can be provided when necessary to support the proposed use. Petitioner has not challenged that interpretation or the county's findings that there is an aquifer that is available to ensure that adequate water supply is available if that option becomes necessary. Petitioner therefore has not provided a basis for reversal or remand.

C. MCZO 6-10-7(D)

Alameda Avenue and Railroad Avenue are designated as minor collectors in the TSP. The TSP provides that minor collectors "generally" carry fewer than "500 vehicle trips per day." [10] Petitioner argues that some of the trips to and from the subject property will travel along Alameda Avenue, which connects the subject property with 18th Avenue to the north. Petitioner also points out that Railroad Avenue, which provides the only other street access to the subject property, will have to be improved before it can provide that access. Petitioner argues that either Alameda Avenue or Railroad Avenue will have to be used and, whichever road is used, the change in zoning

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at Record 32-33, 59, 60-61 and 63 describe the types of water rights that are currently available to serve the subject property, and conclude that those agricultural water rights can be transferred, and that a large aquifer lies underneath the property that can be tapped if the municipal water extension proves to be infeasible.

[10] The TSP provides that "[m]inor collector routes in Malheur County are generally less than 500 vehicle trips per day. * * * These roads are typically 20-24 feet wide with narrow, gravel shoulders and posted speeds anywhere from 25-55 miles per hour." Record 489. The TSP includes an inventory of rural roads that is dated 1997. That inventory indicates that Alameda Avenue carried 501 to 1000 trips per day at that time. Record 490.

will therefore allow a use that will "significantly affect a transportation facility," within the meaning of MCZO 6-10-7(D).

It is not clear to us why petitioner believes a rezoning decision that will generate additional trips on Railroad Avenue would significantly affect that transportation facility, within the meaning of MCZO 6-10-7(D)(4) through (7). We understand petitioner to argue that a rezoning decision that will generate additional trips on Alameda Avenue would significantly affect that transportation facility, because it would result in levels of travel or access that are "inconsistent with the functional classification" of Alameda Avenue as a minor collector, within the meaning of MCZO 6-10-7(D)(6). Petitioner may be correct regarding Alameda Avenue if (1) the rezoning decision will allow development that will put additional trips onto Alameda Avenue, and (2) putting additional trips on a minor collector that is already carrying 501 to 1000 trips per day results in levels of travel or access that are inconsistent with Alameda Avenue's functional classification as a minor collector. *See* n 10.

However, the challenged decision neither clearly adopts nor clearly rejects petitioner's view of the legal consequence of adding additional trips to Alameda Avenue.[11] Just as importantly, the challenged decision does not authorize any additional trips on Alameda Avenue. Instead the challenged decision notes the existing condition of Alameda Avenue and Railroad Avenue and other nearby roads, discusses the proposed use and the roads the proposal use is likely to use and imposes condition of approval 3. We quote below the county's findings addressing MCZO 6-10-7(D) and condition of approval 3.

> "The property is [bordered] on two sides by railroads. It has immediate road access to Alameda Avenue. Railroad Avenue provides connection to Alameda and Highway 201 to intersect with 18th Avenue and access to Interstate 84.

[11] Respondents argue in their briefs that allowing traffic from the proposed facility to use Alameda Avenue, notwithstanding that the TSP designates that street as a minor collector and notwithstanding that it may currently be carrying far more than the 500 trips per day that the TSP states are "generally" carried by minor collectors, would not violate the TSP or significantly affect a transportation facility under MCZO 6-10-7(D). The challenged decision does not clearly adopt or reject that interpretation of the TSP and MCZO 6-10-7(D) either.

"While the number and frequency of truck trips will vary depending on the particular proposal, [intervenor] has estimated that the project will generate approximately 75 to 90 truck loads per day, 5 days a week (except during harvest season, when truck loads may increase somewhat). * * *

"Eighteenth Avenue is designated as an urban collector by the County and a minor arterial by the City. It is also designated as a truck route by the City, and ODOT has indicated that this route can accommodate the projected truck traffic from [intervenor's] project. * * * Highway 201 is a four-lane state highway. Addition of truck trips to Highway 201 is similarly consistent with the road's designation and capacity.

"Alameda Avenue is classified as a Minor Collector, but the County's TSP permits Alameda Avenue to carry 501 to 1,000 trips per day. * * * No traffic will be routed on Alameda that exceeds its functional classification. This is required in the site design review process and by condition of approval.

"Railroad Avenue is classified as a Minor Collector which generally carries less than 500 trips per day. If Railroad Avenue is to be utilized, improvements would be required * * *.

"[Intervenor] has not committed to any particular route for its truck trips. Truck trips will be dispersed in many different directions to serve the facility's markets. [Intervenor] has been and will continue to work with the County and ODOT to identify the best route for truck trips directed to I-84. If necessary, [intervenor] will be required to direct a significant portion of its truck traffic to the routes identified by the County and ODOT. In short, no route will be identified that violates the classifications and capacities of the road system. In addition, during site design review, [intervenor] is required to demonstrate that it will not contribute traffic trips that will exceed the capacities of relevant facilities. This limitation on the allowed land uses in the M-3 zone is reinforced by condition[s] of approval. The zoning amendment therefore will not allow types or levels of land use that would result in levels of travel or access that are inconsistent with the functional classification [of] a transportation facility or reduce acceptable levels of service on these facilities."

"* * * * *

"D. CONDITIONS OF APPROVAL

"* * * * *

"3. Any applicant who proposes to conduct a manufacturing, repair, storage or processing use authorized in the M-3 zone on the Goal 3 exception land created by this ordinance, is prohibited from contributing new traffic trips that exceed road designation classifications listed in the County [TSP] for

> traffic facilities on the date that the operating permit for the proposed use is issued by the County. Prior to the issuance by DEQ of an operating permit, an applicant that proposes to conduct a manufacturing, repair, storage or processing use on the Goal 3 exception land created by this ordinance must submit evidence to the Planning Department which indicates that the proposed use, when operational, will not contribute new traffic trips that exceed the functional classification of the relevant transportation facilities or that reduce the levels of such facilities below levels identified as acceptable by the Oregon Department of Transportation or applicable locally adopted TSP." Record 67-69.

Condition of approval 3 essentially requires that the proposed use not significantly affect a transportation facility by requiring that intervenor demonstrate in the future that the proposed use will not generate trips that significantly affect a transportation facility, within the meaning of MCZO 6-10-7(D)(6)-(7). Specifically, the condition requires that any generated trips not "contribute new traffic trips that exceed the functional classification of the relevant transportation facilities or that reduce the levels of service of such facilities below levels identified as acceptable * * *." Record 69. Although condition 3 simply suggests intervenor must "submit evidence to the Planning Department" to show that this will be the case, the findings say this will happen in site plan review, which is required in the M-3 zone.[12] MCZO 6-31A.6; Record 84.

In *ODOT v. City of Klamath Falls*, 39 Or LUBA 641, 660-61, *aff'd* 177 Or App 1, 34 P3d 667 (2001), a case that also involved a zoning ordinance amendment, we noted that local governments may not amend their zoning ordinance and defer findings of compliance with the TPR.

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[12] One of the considerations in site design review is "the capacity of the streets and roads to carry the volume of traffic so that such capacity is not exceeded * * *." MCZO 6-5-5. This provision is somewhat ambiguous, in that it refers to "capacity" rather than to "functional classification" and "level of service." However, we understand respondents to concede that the proposal will not be allowed to add trips to Alameda Avenue that would exceed its minor collector functional classification:

> "[n]o traffic will be routed on Alameda [Avenue] that exceeds the road's functional classification. This is required in the site design review process and by condition of approval." Respondents' Brief 28-29.

Petitioner and respondents may disagree about whether adding trips to Alameda Avenue will cause that street to exceed its functional classification. But we do not understand the parties to dispute that intervenor will be required to establish in design review that any trips it adds to Alameda Avenue will not cause that street to exceed its functional classification.

In that case the city had determined that part of the property at issue could be developed without significantly affecting transportation facilities and part of the property could not be developed without significantly affecting a transportation facility. 39 Or LUBA 658-659. We concluded that the city could impose a condition on the rezoning, which *prohibited* development in part of the rezoned site. The prohibition imposed by the condition remained in effect, unless and until, a specific, identified transportation facility improvement was constructed. That transportation facility was needed to prevent traffic from that part of the rezoned site from overloading and therefore significantly affecting that transportation facility was constructed. 39 Or LUBA at 660-61. We described the city's action in *ODOT v. City of Klamath Falls* as an action that limited allowed uses under OAR 660-012-0060(1)(a) to ensure that the rezoning decision would be consistent with the "functional classification" of the transportation facility. *Id*. [13]

In a recently decided case, we sustained a variation of the approach taken by the city in *ODOT v. City of Klamath Falls*. *Citizens for Protection of Neighborhoods v. City of Salem*, ___ Or LUBA ___ (LUBA No. 2003-201, June 9, 2004) (*CFPN v. City of Salem*). In *CFPN v. City of Salem*, the city also determined that a part of a rezoned area could be developed without significantly affecting transportation facilities, but if other parts of the property were immediately developed under the new zoning, transportation facilities could be significantly affected. To address this potential problem under the TPR, the city prohibited development on those other parts of the property until master plans were approved for those other parts of the property. Under relevant city land use regulations, those master plans were required to apply city standards that "substantially replicate[d] the standards at OAR 660-012-0060." *CFPN v. Salem*, slip op at 9.

[13] The county's decision in this case under the similarly worded MCZO 6-10-7(D) is probably more accurately characterized as "[l]imiting allowed land uses to be consistent with the planned function of [transportation facilities]" under MCZO 6-10-7(D)(1), rather than a decision that the zoning amendment does not significantly affect a transportation facility, within the meaning of MCZO 6-10-7(D)(4)-(7). Petitioner does not argue that the city's possible mischaracterization of its approach to comply with MCZO 6-10-7(D) requires remand.

Returning to the decision at issue in this appeal, the county has not taken the approach the city took in *ODOT v. City of Klamath Falls*. The county does not identify one or more transportation facility improvements that would allow the subject property to operate without significantly affecting transportation facilities or prohibit development on the rezoned property until any such needed transportation facility improvements are completed. However, the county's decision is similar to the approach that was taken by the city in *CFPN v. Salem*. The question we must consider here is whether the county's approach in this case is sufficiently similar to the approach the city took in *CFPN v. Salem* to avoid petitioner's contention that the city has (1) improperly deferred determining whether the proposal will generate trips that will significantly affect a transportation facility and (2) improperly deferred adopting changes to the TSP that will be required to keep trips from the subject property from significantly affecting transportation facilities.

As we have already noted, MCZO 6-10-7(D) does not exactly replicate OAR 660-012-0060. However, as was the case in *CFPN v. Salem*, the language of the local code is substantially similar to the rule language. Unlike *CFPN v. Salem*, the county has not imposed a condition of approval that requires that intervenor apply and demonstrate compliance with MCZO 6-10-7(D) during site plan review. However, the county has effectively imposed an even more restrictive condition by requiring that intervenor show that the proposal will not significantly affect a transportation facility. As we read condition 3, when intervenor seeks site plan approval it must show that the proposed facility will not significantly affect a transportation facility. Under condition 3, if it ultimately turns out that the proposal will significantly affect a transportation facility, it is at least unclear whether intervenor would have the option of applying one or more of the mitigation measures identified under MCZO 6-10-7(D)(1)-(3) to secure site plan approval. Although condition 3 does not cite MCZO 6-10-7(D)(6) and (7), it is clear that intervenor must apply the substantive standard embodied in those sections and demonstrate that the proposal will neither allow trips that are inconsistent with the minor collector functional classifications assigned to

Alameda Avenue and Railroad Avenue (or the functional classifications of any other transportation facilities) nor reduce any applicable performance standards.

The challenged decision also does not clearly prohibit development on the subject property until intervenor establishes that there will be no significant impact on transportation facilities. Instead condition 3 merely prohibits any "manufacturing, repair, storage or processing use" that would generate traffic that is inconsistent TSP functional classifications or exceed applicable levels of service. However, the M-3 zone only allows one use outright, "agricultural product processing." Farm uses are the only allowed conditional uses. Any agricultural product processing use would at least qualify as a "processing use." If no "manufacturing, repair, storage or processing use" can be allowed under condition 3 until intervenor establishes in site plan review that the proposal will not generate trips that would be inconsistent TSP functional classifications or exceed applicable levels of service, the county has effectively prohibited development of the only permitted use on the property until the required demonstration of compliance with MCZO 6-10-7(D) is assured.

A final potentially significant difference between this case and *CFPN v. Salem*, as we have already noted, is the lack of clarity in condition 3 concerning *how* intervenor will be required to go about demonstrating that the proposed use will not significantly affect any transportation facilities. As we have previously noted, condition 3 does not specifically require that this demonstration be made in site plan review, although one of the site plan review standards seems to impose that requirement. *See* n 12.

There is no question that site plan review is required for an agricultural processing use such as the one proposed in this case. MCZO 6-31A.6. Although condition 3 does not expressly state that the required demonstration that the trips that will be generated by the proposal will not significantly affect transportation facilities must occur in site plan review, we attribute that to a lack of clarity in the condition rather than an intent on the county's part to allow that demonstration to be made in some unidentified and informal setting. It is sufficiently clear from reading the decision as a whole that intervenor's demonstration that the proposed facility will not significantly affect a

transportation facility must occur in site design review.[14] Site design review under the county's discretionary site design review criteria at MCZO Chapter 5 would constitute a "permit," within the meaning of ORS 215.402(4) and would for that reason require notice and a quasi-judicial hearing under ORS 215.416 and MCZO Title 6, Chapter 11. The process that intervenor will be required to follow to demonstrate the proposed use will not significantly affect a transportation facility is sufficiently similar to the master plan approval process in *CFPN v. Salem* to assure that notice and a public process will be employed and that process will lead to a decision that will be subject to review to determine whether any county decision concerning whether intervenor adequately demonstrates the proposal will not significantly affect a transportation facility is correctly decided.

In summary, the proposed development cannot proceed without site design review approval. Therefore, there could be no effect on transportation facilities, significant or otherwise, unless petitioner receives site design review approval. Even if the county's site design decision ultimately allows some use of Alameda Avenue or Railroad Avenue, petitioner does not explain why appealing such a site design review decision does not provide an adequate opportunity for petitioner to challenge any county decision that would allow additional traffic on those facilities. We conclude that the approach the county has taken in this case is sufficiently similar to the approach the city took in *CFPN v. Salem* to ensure that its rezoning decision will not significantly affect a transportation facility, within the meaning of MCZO 6-10-7(D)(4)-(7).

The sixth assignment of error is denied.

The county's decision is affirmed.

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[14] The findings explain "[n]o traffic will be routed on Alameda that exceeds its functional classification. This is required in site design review process and by condition of approval." Record 68.