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

OREGON SHORES CONSERVATION COALITION,
LENORA LAWRENCE and BERNIE WOLFF,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

PORT OF TILLAMOOK BAY,
Intervenor-Respondent.

LUBA No. 2004-130

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns, PC.

William K. Sargent, Tillamook County Counsel, Tillamook, represented respondent.

E. Andrew Jordan, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Jordan Schrader PC.

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

REVERSED 01/18/2005

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

NATURE OF THE DECISION

Petitioners appeal an ordinance amending the county comprehensive plan and land use regulations to establish plan policies and zoning governing a new rural unincorporated community.

FACTS

Intervenor-respondent Port of Tillamook Bay (the Port) operates an industrial park on a former U.S. Navy blimp base approximately two miles south of the City of Tillamook’s urban growth boundary, along Highway 101. The industrial park consists of approximately 1,965 acres, including the 975-acre Tillamook County Airport, a 635-acre industrial park, and 354 acres of land belonging to various public agencies. Uses on the industrial park currently consist of a mix of industrial, public and agricultural uses.¹ The industrial park is zoned General Industrial (M-1). Most of the park is also subject to the Tillamook Airport Obstruction (TAO) overlay zone. The industrial park is served by its own sanitary sewer system, and its own water distribution system, which distributes water received from the City of Tillamook.

In 2002, the county amended the M-1 zone to allow as conditional uses (1) convention facilities, including motels and restaurants, and (2) a golf course. The 2002 decision also adopted exceptions to Statewide Planning Goals 11 (Public Facilities and Services) and 14 (Urbanization), to accommodate the new urban uses allowed in the amended

¹ Current and approved uses in the industrial park include: the airport, air museum, 40 small industrial enterprises, 70 large industrial enterprises, an approved 10,000 square foot convention facility, approved 130-room hotel, approved restaurant, approved 18-hole golf course, open space (wetlands and wooded hills), public facilities, public service institutions including an Oregon State Correctional Facility, the Oregon State Youth Accountability Facility, the Tillamook County Sheriff’s Office, Oregon State Police, Tillamook School District facilities, Tillamook County ATV Training Center, Port facilities, power generator, railroad maintenance facility, aircraft hangers, a composting facility, and a number of non-industrial uses such as softball fields and a mini-storage facility. Record 574-75. Approximately 1000 acres of the Port property are undeveloped. Approximately 600 acres of the undeveloped acres are used for grazing. *Id.*

1 M-1 zone. The Port subsequently applied for and received conditional use approval for a
2 10,000-square foot convention center, a 130-room hotel, a restaurant, and golf course,
3 although those facilities have not yet been constructed.

4 On September 19, 2003, the Port applied to the county to establish a 1,718.8-acre
5 rural unincorporated community, pursuant to OAR chapter 660, division 022. The proposed
6 community, known as South Prairie, consists of (1) two parcels owned by the Port within the
7 industrial park, totaling 1,683 acres, and (2) two privately owned areas, totaling 35.8 acres,
8 known as sub-areas 2 and 3. Both the Port-owned parcels and the two sub-areas are subject
9 to exceptions to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), taken
10 in the 1980s. One of the two Port-owned parcels is 84 acres in size and located in the
11 northeast corner of the proposed community area, separated from the larger Port-owned
12 parcel and the two sub-areas by several parcels owned by other public agencies. This 84-acre
13 parcel is undeveloped. The private lands in sub-areas 2 and 3 are located at the southeast and
14 southwest corners, respectively, of the larger Port-owned parcel. Sub-area 2 is zoned Rural
15 Residential and consists of seven tax lots, totaling 15.06 acres, developed with dwellings.
16 Sub-area 3 is zoned Rural Commercial and consists of 10 tax lots, totaling 20.75 acres, most
17 of which are developed with public and commercial uses.

18 The Port's application proposes that most of the Port-owned lands would remain in an
19 amended version of the preexisting M-1 zoning. However, the Port proposes that 83 acres
20 near the approved hotel and golf course would be zoned SPR-3 (South Prairie High Density
21 Urban Residential), which allows 5,000-square foot lots.

22 The county board of commissioners held a hearing on the Port's proposal January 28,
23 2004, and on July 14, 2004, adopted findings approving the requested comprehensive plan
24 and land use regulation amendments. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Designation and planning for unincorporated communities is governed by
3 OAR chapter 660, division 22. OAR 660-022-0010(10) defines “unincorporated
4 community” in relevant part to include a “settlement” that is (1) identified in a county’s
5 acknowledged comprehensive plan as a “rural community”, “service center”, “rural center”,
6 “resort community,” or similar term prior to October 28, 1994 (the date of adoption of
7 OAR 660, division 22), or (2) listed in the Department of Land Conservation and
8 Development (DLCD)’s January 30, 1997 “Survey of Oregon’s Unincorporated
9 Communities.”² In addition, prior to October 28, 1994, the settlement must have met the
10 definition of one of the four types of unincorporated communities described at OAR 660-
11 022-0010(6) through (9).³

² OAR 660-022-0010(10) provides:

“‘Unincorporated Community’ means a settlement with all of the following characteristics:

- “(a) It is made up primarily of lands subject to an exception to Statewide Planning Goal 3, Goal 4 or both;
- “(b) It was either identified in a county’s acknowledged comprehensive plan as a ‘rural community’, ‘service center’, ‘rural center’, ‘resort community’, or similar term before this division was adopted (October 28, 1994), or it is listed in the Department of Land Conservation and Development’s January 30, 1997 ‘Survey of Oregon’s Unincorporated Communities’;

“* * * * * [; and]

- “(e) It met the definition of one of the four types of unincorporated communities in sections (6) through (9) of this rule, and included the uses described in those definitions, prior to the adoption of this division (October 28, 1994).”

³ OAR 660-022-0010(6) through (9) provide:

- “(6) ‘Resort Community’ is an unincorporated community that was established primarily for and continues to be used primarily for recreation or resort purposes: and
 - “(a) Includes residential and commercial uses; and
 - “(b) Provides for both temporary and permanent residential occupancy, including overnight lodging and accommodations.

1 The proposed South Prairie community is not on the January 30, 1997 DLCD Survey
2 of Oregon Unincorporated Communities.⁴ The Urbanization Element of the Tillamook
3 County Comprehensive Plan (TCCP), adopted in 1984, includes an extensive discussion of
4 unincorporated communities in the county, and identifies 15 rural areas as some type of
5 unincorporated community.⁵ The TCCP Urbanization Element does not identify or discuss
6 the South Prairie area or the industrial park. Nothing in the TCCP describes the South Prairie
7 area or the industrial park as a “rural community,” “service center,” “rural center” or “resort
8 community.” Apparently, there is no TCCP description of the South Prairie area as a distinct
9 area. However, in various places the Population and Economy element of the TCCP refers to

“(7) ‘Rural Community’ is an unincorporated community which consists primarily of permanent residential dwellings but also has at least two other land uses that provide commercial, industrial, or public uses (including but not limited to schools, churches, grange halls, post offices) to the community, the surrounding rural area, or to persons traveling through the area.

“(8) ‘Rural Service Center’ is an unincorporated community consisting primarily of commercial or industrial uses providing goods and services to the surrounding rural area or to persons traveling through the area, but which also includes some permanent residential dwellings.

“(9) ‘Urban Unincorporated Community’ is an unincorporated community which has the following characteristics:

“(a) Include at least 150 permanent residential dwellings units;

“(b) Contains a mixture of land uses, including three or more public, commercial or industrial land uses;

“(c) Includes areas served by a community sewer system; and

“(d) Includes areas served by a community water system.”

⁴ The Survey of Oregon Unincorporated Communities is a survey conducted by DLCD in 1993, revised in 1997, in which DLCD and the counties identified candidates for recognition as unincorporated communities. Record 170. For Tillamook County, the survey lists the following 16 communities: Barview, Beaver, Cape Meares, Cloverdale, Falcon Cove, Hebo, Idaville, Mohler, Neahkahnie, Neskowin, Oceanside, Netarts, Pacific City/Woods, Syskeyville, Tierra Del Mar, and Twin Rocks. Record 171.

⁵ The TCCP identifies the following unincorporated communities: four urban unincorporated communities (Neahkahnie, Twin Rocks, Watseco and Barview), five rural unincorporated communities (Oceanside, Netarts, Cloverdale, Pacific City and Neskowin), and six semi-urban unincorporated communities (Falcon Cove, Idaville, Cape Meares, Beaver, Hebo and Tierra Del Mar). Record 172-77.

1 the Port of Tillamook Bay Industrial Park as an “industrial park.” TCCP Population and
2 Economy Section 3.53.

3 The county found that the TCCP term “industrial park” is similar to the term “service
4 center,” one of the terms listed in OAR 660-022-0010(10)(b), and therefore that the proposed
5 South Prairie community, which is composed predominantly of the industrial park, was
6 “identified” in the TCCP for purposes of OAR 660-022-0010(10)(b). The county went on to
7 conclude that the proposed community fell within the definition of “Rural Service Center” at
8 OAR 660-022-0010(8), and therefore satisfied OAR 660-022-0010(10)(e). Petitioners
9 challenge both conclusions.

10 **A. OAR 660-022-0010(10)(b): Similar Term**

11 Petitioners argue that the county misconstrued the applicable law in concluding that
12 the proposed South Prairie community was “identified in a county’s acknowledged
13 comprehensive plan as a ‘rural community,’ ‘service center,’ ‘rural center,’ ‘resort
14 community,’ or similar term,” for purposes of OAR 660-022-0010(10)(b). Petitioners
15 emphasize that neither the Port property nor the South Prairie area as a whole is identified in
16 the TCCP list of unincorporated communities. That omission is significant, petitioners argue,
17 because it indicates that the county did not regard either the Port property or the South Prairie
18 area to be unincorporated communities of any kind when it adopted the TCCP or at any time
19 prior to 1994.

20 Petitioners further dispute the county’s conclusion that the TCCP reference to the Port
21 property as an “industrial park” is “similar” to the terms “rural community”, “service center,”
22 “rural center” or “resort community.” To be similar, we understand petitioners to argue, the
23 TCCP must use terms that suggest some kind of community. According to petitioners, the
24 term “industrial park” does not denote or connote a community.

25 Petitioners also note that the TCCP refers only to the Port property, and does not refer
26 collectively to the Port property and the privately owned sub-areas that make up the proposed

1 community. At best, petitioners argue, the TCCP refers to *part* of the proposed community,
2 the industrial park. Finally, petitioners contend that the county erred in relying on non-TCCP
3 documents to support the conclusion that the TCCP reference to “industrial park” is intended
4 to mean something similar to “service center.”⁶

5 The Port responds that the TCCP term “industrial park,” read in context with other
6 documents the county relied upon, is sufficiently similar to the term “service center” to
7 qualify under OAR 660-022-0010(10)(b). According to the Port, when the county used the

⁶ The county’s findings state, in relevant part:

“The [South Prairie area] is a settlement with an early and broken history. Before 1940 it was a viable rural agrarian community in which a public school was established and a grange hall, local county store, tavern, and cemetery. This old community pattern was broken when the United States Government purchased extensive farmland for a Naval Air Station. Then first with the naval operation and later with the Port of Tillamook Bay the area became an amalgam of the older rural agrarian community and the newer military, rural industrial service center. The community services were intensified during the 1980s and 1990s as the Port matured in its role as the major service provider for industrial development and other land-extensive and safety institutions (i.e., corrections, sheriff and police). Like most of the communities Tillamook County designated as ‘unincorporated communities in 1998 after the State Land Conservation and Development Commission adopted OAR 660 Div. 022 in October 1994 (See Board Order OA 97-01) South Prairie (an area that included the Port of Tillamook Bay) was historically recognized in the 1984 [TCCP] by its dual distinctions: a rural residential community with the place name of South Prairie and a community with water and sewer facilities recognized by its institutional name, the Port of Tillamook Bay. * * * The dominant uses at the Port qualify the area as a ‘service center’ type of ‘unincorporated community’ that encompasses the industrial, commercial, institutional, and residential uses in the South Prairie Community. (See Board’s comments from public hearing on January 28, 2004).

“This long established ‘settlement’ is made up of lands with exceptions to Statewide Goals 3 or 4 (1984 County Comprehensive Land Use Plan); was designated in the [TCCP] as an industrial park, portraying it as a service center by the uses allowed in the M-1 zoning ordinance and a September 1981 County document titled ‘Tillamook County Economic Development Fact Book,’ at pages 78-81*, and it was recognized as a rural community by the South Prairie area rural residential zoning as contained in the 1984 [TCCP] and the evidence contained in the Board minutes circa 1950-1980s approving uses and activities in the community of South Prairie; is two miles outside the Tillamook city Urban Growth Boundary; is not incorporated as a city; and meets the definition of ‘rural service center’ contained in [OAR 660-022-0010(8)], with requisite uses in place prior to October 28, 1994. (Reference testimony by applicant during Board hearing of January 8, 2004) (See Part ‘A’ Findings, Section III and V).

“*The substance of what the County Comprehensive Plan, M-1 zoning ordinance and ‘Economic Development Fact Book’ apply to the term ‘industrial park’ makes this term similar to ‘service center,’ one of the terms listed at [OAR 660-022-0010(10)(b)].” Record 96-97 (emphasis original).

1 term “industrial park” in the TCCP to describe the Port property it meant more than that term
2 might mean in other circumstances. Because the Port property has historically included a
3 wide range of uses that provide at least some services to the surrounding area, the Port argues
4 that the TCCP term “industrial park” as applied to the Port property meant something similar
5 to “service center.” Further, the Port argues that it is not necessary that the TCCP identify the
6 entire proposed community as a community or center of some kind; it is sufficient that the
7 TCCP identifies *part* of the proposed community—here, the industrial park—as one of the
8 listed terms or a similar term.

9 We agree with the Port that OAR 660-022-0010(10) does not require that the
10 comprehensive plan apply one of the listed terms or a similar term to the *entirety* of the
11 proposed community. Assuming that the proposed community indeed qualifies as an
12 “unincorporated community” under OAR 660-022-0010(10)(a) through (e), the geographic
13 *scope* of the community is determined under OAR 660-022-0020. Thus, that a
14 comprehensive plan identifies only a portion of the geographic extent of a proposed
15 community using one of the listed terms or a similar term is not fatal.

16 However, we agree with petitioners that the county erred in concluding that the TCCP
17 identifies the Port property with one of the listed terms or a similar term. The rule does not
18 define “service center,” although it defines what appears to be a related term, Rural Service
19 Center, as one type of unincorporated community. *See* n 3. Although the intent of OAR 660-
20 022-0010(10)(b) is not entirely clear to us, the rule appears to embody a policy choice that the
21 universe of “unincorporated communities” is limited to settlements or communities of some
22 kind that the local government has explicitly recognized as such in its comprehensive plan
23 prior to October 28, 1994, or that are listed in the DLCD survey. Thus, in evaluating whether
24 a comprehensive plan term is “similar” to one of the listed terms, it is necessary to look not
25 only at linguistic similarity, but also whether the purportedly similar term denotes a
26 settlement or community of some kind.

1 Turning to the TCCP language at issue, the county’s decision does not explain why it
2 believes the term “industrial park” is linguistically or semantically similar to any of the listed
3 terms, and we do not see that it is. To begin with, the decision does not identify where in the
4 TCCP the term “industrial park” appears. Presumably, the county found that term in section
5 3.53 of the TCCP Population and Economy element, which discusses the Port of Tillamook
6 Bay Industrial Park. However, nothing in that section suggests any reason to view the Port
7 property as anything more than a large and economically important industrial park.⁷

8 We agree with petitioners that it is significant that the TCCP does not include or
9 discuss the industrial park or the South Prairie area in the plan element that addresses
10 unincorporated communities. It is reasonably clear that when the county adopted the TCCP
11 in 1984 it did not regard the Port property or the South Prairie area as an unincorporated
12 community of any kind. That in turn strongly suggests that the TCCP reference to the Port
13 property as an “industrial park” was not intended to recognize the Port property as some kind
14 of settlement or community. It also seems significant that the county had at least two
15 additional chances after 1984 to recognize the Port property or the South Prairie area as some
16 kind of unincorporated community, but did not: in 1993 when DLCD conducted its survey,
17 and again in 1997 when it revised the survey to include additional communities, at the
18 request of certain counties.⁸

⁷ Section 3.53 of the TCCP Population and Economy element states, in relevant part:

“The Port of Tillamook Bay’s Industrial Park is the only existing site in the county of significant size (1,550 acres) which can accommodate diversified industrial development without major impact on surrounding land uses. The combination of a first-class feeder airport facility with convenient highway and power supplies to the site are fully adequate and the sewage disposal system is being upgraded to accommodate future growth. In all respects the site needs to be planned, zoned and developed to meet its full potential to strengthen and diversify the economic base of Tillamook County.”

⁸ The findings quoted at n 6 refer to a Board Order OA-97-01, an order adopted in 1998 that apparently amended the TCCP Unincorporated Communities element to implement OAR chapter 660, division 22. That order is not in the record and the copy of the TCCP on file with LUBA does not appear to include those amendments. From the description of the order in the quoted findings, the order does not identify the Port property or the South Prairie area as an unincorporated community of any kind.

1 The county’s conclusion under OAR 660-022-0010(10)(b) is based less on linguistic
2 or semantic similarity between the TCCP term “industrial park” and the term “service
3 center,” than it is on consideration of various non-TCCP documents, specifically (1) the M-1
4 zone, (2) the description of the Port property in the Tillamook County Economic
5 Development Fact Book, (3) the rural residential zoning of sub-area 2, and (4) prior county
6 actions approving various activities and uses in the area, such as liquor licenses and dance
7 events. We generally agree with petitioners that non-TCCP documents are of little assistance
8 in determining whether the TCCP identifies the proposed South Prairie community as one of
9 the listed terms or a “similar term.” The inquiry under OAR 660-022-0010(10)(b) is whether
10 the *comprehensive plan* identifies the proposed unincorporated community as one of the
11 listed terms or a similar term.⁹

12 Even if the cited non-TCCP documents are considered as context, as the Port
13 suggests, we do not see that those documents illuminate the meaning of “industrial park.”
14 The decision does not explain why consideration of either the M-1 zone or the fact book
15 supports the conclusion that “industrial park” means something similar to “service center.”
16 As far as we can tell, the uses allowed in the M-1 zone prior to the 2002 amendments do not
17 suggest that M-1 zoned property in general or the Port property in particular function as
18 “service centers” or something similar. The description of the Port property in the fact book
19 likewise does not suggest that the Port is anything more than an industrial park. Record 181-
20 86.¹⁰ Similarly, the fact that sub-area 2 is zoned for rural residential use does not suggest that

⁹ The Port asserts, in a footnote, that the Tillamook County Economic Development Fact Book is part of the TCCP. The Port does not explain the basis for that assertion, and the county’s findings do not appear to treat the fact book as part of the TCCP.

¹⁰ The fact book states, in relevant part:

“Port of Tillamook Bay Industrial Park – Description.

“The Port Industrial Park is located on property which was a U.S. Navy Blimp base during World War II. The total site is 1,965 acres. Of this acreage, 975 acres are the Tillamook

1 the county recognized sub-area 2, much less the adjoining industrial park, as a community of
2 some kind. Finally, the county’s actions in approving various non-industrial uses or activities
3 in the area do nothing to establish that the TCCP identifies the area as one of the listed terms
4 or a similar term.

5 In sum, we agree with petitioners that the county erred in concluding that the TCCP
6 identifies the Port property or the South Prairie area in terms similar to “service center,” for
7 purposes of OAR 660-022-0010(10)(b). This subassignment of error is sustained.¹¹

8 **B. OAR 660-022-0010(10)(e): Rural Service Center**

9 To qualify as an “unincorporated community” as defined at OAR 660-022-0010(10),
10 the proposed community must satisfy the definition of one of the four types of unincorporated
11 communities in OAR 660-022-0010(6) through (9), and include the uses described in those
12 definitions, prior to October 28, 1994. *See* n 2. The county found that the proposed South
13 Prairie community meets the definition of “Rural Service Center” at OAR 660-022-0010(8).

County Airport. 354 acres belong to other public agencies. The Industrial Park consists of 635 acres.

“Of the 635 acres, 220 are presently developed in industrial uses. Louisiana Pacific utilizes 167 acres. Public Utilities and the railroad use another 53 acres, leaving 362 acres available for future development. Almost any size of parcel can be arranged from 1/2 acre up to 50 acres or more (see map).

“The Port Industrial Park is located 4 miles south of Tillamook City on U.S. Highway 101. The terrain is flat.” Record 182.

¹¹ Petitioners argue that if LUBA sustains this subassignment of error the county’s decision must be reversed, because as a matter of law the proposed community cannot qualify as an unincorporated community under OAR 660-022-0010(10)(b). Based on the record before us, it appears highly unlikely that the county could reach a sustainable conclusion that the TCCP identified the Port property or South Prairie area as a listed term or similar term prior to October 28, 1994, for purposes of OAR 660-022-0010(10)(b). Therefore, we agree with petitioners that reversal is warranted under OAR 661-010-0071(1)(c) (LUBA shall reverse when the decision violates a provision of applicable law and is prohibited as a matter of law). Normally, that conclusion would make it unnecessary to address petitioners’ other assignments and subassignments of error. We choose, however, to go on to address the second subassignment of error under the first assignment of error, which challenges the county’s findings under OAR 660-022-0010(10)(e). We do so because the question of whether the comprehensive plan has identified an unincorporated community as a “service center” or similar term under OAR 660-022-0010(10)(b) and the question of whether the proposed community qualifies as a “rural service center” under OAR 660-022-0010(8) are, it seems to us, closely related questions. Our resolution of the second question may aid judicial review of our resolution of the first question.

1 OAR 660-022-0010(8) defines “Rural Service Center” as an unincorporated community
2 consisting primarily of (1) commercial or industrial uses (2) that provide goods and services
3 to the surrounding rural area or to persons traveling through the area, and (3) some permanent
4 residential dwellings. *See* n 3.

5 Petitioners argue that, while the record includes evidence regarding the current uses of
6 the Port property, as well as uses approved but not yet constructed such as the convention
7 center, hotel and golf course, the record does not establish what uses were present prior to
8 October 28, 1994. In addition, petitioners argue that there is no evidence that the proposed
9 community consists primarily of commercial and industrial uses “providing goods and
10 services to the surrounding rural area or to persons traveling through the area,” for purposes
11 of OAR 660-022-0010(8). According to petitioners, most of the current industrial uses on the
12 property serve statewide, regional, national or international markets, rather than the
13 surrounding rural area or persons traveling through the area.

14 The county’s findings discuss the current uses of the property in some detail,
15 including the approved but not yet constructed conference center, hotel and golf course.¹²

¹² In addition to the findings quoted at n 6, the pertinent findings appear to include the following:

“Tillamook County land use regulations govern the [South Prairie] area, including the major part (a single parcel) that remains held in public ownership by the Port of Tillamook Bay. These public lands are planned and zoned as an ‘industrial park’ [General Industrial (M-1)], which includes [a] listing of specific uses allowed outright only on Port property (namely, power generating facilities; business, government or professional offices; convention facilities including hotel and restaurant; fire or ambulance stations); and a golf course permitted conditionally. Extensive development occurred prior to October 28, 1994. (See Port records indicating uses and dates established).” Record 91.

“* * * The Board concludes that a broad mix of uses serving the immediate area, the rural county and visitors to the county are long-established in the form of home-sites, industry; air, rail and road transportation, natural resources, government offices, community activities, commercial enterprises, tourist attractions, public sanitary and water systems, a cemetery, and public educational facilities. The acknowledged [TCCP] and Development Ordinances allow all of these uses and activities. This representative mix of the current uses and activities was established prior to 1994. * * *” Record 91-92.

“The community recognized by this decision is unincorporated, consists primarily of industrial (752 acres) and commercial/office (765 acres including the airport and recreation) uses (see

1 However, the decision does not distinguish between current uses and the uses that predated
2 October 28, 1994, other than to conclude that a “representative mix” of current uses existed
3 before 1994. With respect to the requirement that the uses that predated October 28, 1994,
4 must have consisted “primarily of commercial or industrial uses providing goods and services
5 to the surrounding rural area or to persons traveling through the area,” the county appears to
6 reason that most of the current and approved uses provide some goods and services to the
7 surrounding rural area and to tourists, and therefore the uses predating October 28, 1994, also
8 provided the requisite goods and services.

9 The Port contends that the county’s findings are adequate and supported by
10 substantial evidence. The Port cites to a list of current and approved uses on the Port
11 property at Record 574-75, and a statement at Record 568 that the uses on that list “almost in
12 their entirety predate October 28, 1994,” as substantial evidence supporting the county’s
13 finding that the requisite uses predated October 28, 1994. *See* n 1 (summary of current and
14 approved uses on the Port property). The Port also argues that it is clear from the record that
15 commercial uses that predate October 28, 1994, including the airport and air museum, serve
16 the surrounding rural area and traveling public. With respect to industrial uses, the Port
17 argues that even if goods are manufactured and shipped outside the surrounding rural area,
18 for example to the Portland metropolitan area, that is still providing a service to the local
19 rural area.

20 Read together, OAR 660-022-0010(10)(e) and 660-022-0010(8) require that the
21 county determine (1) what uses on the subject property existed or predated October 28, 1994,

page 2 of application document), serves the surrounding rural county and the touring public and includes some permanent residential dwellings established prior to creation of the [Port] industrial park. Its primary function is to provide services, such as recreation, tourist attractions, transportation (air and rail) and land with adequate public facilities for industry (i.e., resource processing and manufacturing), commerce (i.e., conferencing and neighborhood retail including community convenience store and local commercial services) and public services (i.e., corrections, public safety, and school). (See Part ‘A’ Findings, Sections III-V).” Record 96 (emphasis original).

1 and (2), considering only those uses, whether the subject property consisted “primarily of
2 commercial or industrial uses providing goods and services to the surrounding rural area or to
3 persons traveling through the area.”¹³ Uses that were developed or approved after October
4 28, 1994, do not enter into the calculus. The application lists 17 uses or types of uses on the
5 Port property as of 2003. Four of those 17 uses are the convention center, hotel, restaurant
6 and golf course, which were approved in 2002. Record 574. The list does not indicate when
7 any of the other uses were established. Other than the conclusory statement in the application
8 that uses on that list “almost in their entirety predate October 28, 1994,” we are cited to no
9 other evidence indicating when those uses were established. Although it seems probable that
10 most of the uses on that list in fact predate October 28, 1994, we agree with petitioners that
11 the county erred in failing to determine what uses on the subject property in fact existed on or
12 predated that date. That determination is a prerequisite to determining whether those uses
13 qualify the subject property as a “Rural Service Center” under OAR 660-022-0010(8).

14 Turning to OAR 660-022-0010(8), the intended meaning of the requirement that the
15 proposed community consist “primarily of commercial or industrial uses providing goods and
16 services to the surrounding rural area or to persons traveling through the area” is not entirely
17 clear to us. First, it is not clear what it means to require that the community consist
18 “primarily” of the requisite commercial or industrial uses. For lack of a better answer, we
19 read it to mean that the *majority* of the subject property must consist of the qualifying
20 commercial and industrial uses, and not other uses.

21 The more difficult ambiguity is what constitutes the qualifying commercial and
22 industrial uses. OAR 660-022-0010(1) and (4) define “commercial use” and “industrial use,”
23 respectively.¹⁴ OAR 660-022-0010(8) adds the additional qualification that the commercial

¹³ Petitioners do not dispute that the proposed community “also includes some permanent residential dwellings” for purposes of OAR 660-022-0010(8).

¹⁴ OAR 660-022-0010 provides, in relevant part:

1 and industrial uses must provide “goods and services to the surrounding rural area or to
2 persons traveling through the area.” We agree with the Port that commercial uses on the
3 subject property, including the airport, air museum, convenience store, etc., almost certainly
4 qualify, assuming they predate October 28, 1994. The fact that some of those uses may also
5 serve more than the surrounding rural area is not a disqualification, if those uses serve the
6 surrounding rural area or persons traveling through the area. Industrial uses present a more
7 difficult question. We do not agree with the Port that manufacture of a product and shipment
8 of that product to an urban area for retail sale constitutes “providing goods and services to the
9 surrounding rural area or to persons traveling through the area.”

10 In sum, the county erred in failing to determine what uses on the subject property
11 existed or predated October 28, 1994. The county also erred in failing to determine which of
12 those uses are qualifying commercial or industrial uses. With respect to industrial uses, the
13 county erred in failing to determine whether products manufactured, processed or stored on
14 the subject property are provided to the surrounding rural area. Finally, the county erred in
15 failing to determine whether the subject property consists “primarily” of those qualifying
16 uses, *i.e.*, whether a majority of the subject property consists of the qualifying uses, as
17 opposed to other uses.¹⁵

“(1) ‘Commercial Use’ means the use of land primarily for the retail sale of products or services, including offices. It does not include factories, warehouses, freight terminals, or wholesale distribution centers.

“* * * * *

“(4) ‘Industrial Use’ means the use of land primarily for the manufacture, processing, storage, or wholesale distribution of products, goods, or materials. It does not include commercial uses.”

¹⁵ We note, as petitioners do, that approximately 1,000 acres of the proposed 1,718.8-acre community is undeveloped, apparently used only for open space or grazing. A significant portion of the remainder is used for a variety of non-commercial and non-industrial purposes. Even including parking lots, roads, runway impact zones and other facilities that serve developed industrial and commercial uses, it may well be that the county cannot reach a sustainable conclusion that the 1,718.80-acre subject property consists “primarily” of qualifying commercial and industrial uses.

1 The first assignment of error is sustained.

2 For the reasons explained above, we do not reach the second, third, fourth or fifth
3 assignments of error, because in sustaining the first assignment of error we conclude that the
4 county’s decision “violates a provision of applicable law and is prohibited as a matter of
5 law.” OAR 661-010-0071(1)(c).

6 The county’s decision is reversed.