

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF YAMHILL COUNTY

5 and DEAN KLAUS,

6 *Petitioners,*

7
8 vs.

9
10 YAMHILL COUNTY,

11 *Respondent,*

12
13 and

14
15 DUANE SHARER and DIANE SHARER,

16 *Intervenors-Respondent.*

17
18 LUBA No. 2005-057

19
20 FINAL OPINION

21 AND ORDER

22
23 Appeal from Yamhill County.

24
25 Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

26
27 No appearance by Yamhill County.

28
29 David Doyle, Dallas, filed the response brief and argued on behalf of intervenors-
30 respondent. With him on the brief was Doyle Law Firm, PC.

31
32 BASSHAM, Board Member; DAVIES, Board Chair, participated in the decision.

33
34 REMANDED

06/29/2005

35
36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision re-approving, on remand from LUBA, comprehensive plan and zoning map amendments for a 3.85-acre parcel.

MOTION TO INTERVENE

Duane Sharer and Diane Sharer (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

We set out the pertinent facts in *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160 (2004):

“The subject property is located immediately adjacent to the City of McMinnville urban growth boundary (UGB), approximately halfway between the City of McMinnville and the City of Lafayette. The property is within an area that was subject to a committed exception to Statewide Planning Goal 3 (Agricultural Lands), adopted in 1980, to allow rural residential uses. The exception area is not within an ‘unincorporated community’ as that term is defined by OAR 660-022-0010(10).

“The subject property is currently developed with a single-family residence and several buildings associated with a storage business. The county initially approved the storage business in 1994 as a home occupation, to allow storage of recreational vehicles in an accessory building to the residence. [Intervenors] expanded the home occupation storage business after 1994, and the current storage business occupies three buildings totaling 21,298 square feet, including a mini-storage unit. The square footage devoted to the current business exceeds the 10 percent maximum parcel coverage standards applicable in the VLDR 2.5 zone, but the county has declined to enforce those standards against the facility. In 1998, the county planning commission denied intervenors’ application to modify the home occupation approval to allow up to 46,000 square feet of additional storage and denied their request for a variance from the maximum parcel coverage requirements.

“Intervenors then applied to the county for comprehensive plan and zoning map amendments, in order to facilitate expansion of the storage business. A storage business is allowed in the LI zone as a use that is similar to permitted uses in the LI zone, subject to site design review. Intervenors did not submit a site design review application, but their plan and zoning amendment application included a site plan and other information proposing two additional 8,064-square foot buildings,

1 expanding the structural area devoted to the storage business to a total of 37,426
2 square feet.

3 “The county planning commission held a hearing on the application, and forwarded
4 it to the county board of commissioners without a recommendation. After
5 conducting a hearing, the commissioners voted 2-1 to approve the plan and zoning
6 amendments, subject to a limited use overlay zone that limits uses on the subject
7 property to “mini-storage and the storage of personal property and vehicles.” The
8 overlay zone further requires that “[a]ny expansion of the use must be shown to be
9 consistent with [Statewide Planning] Goal 14 or have an exception taken to Goal
10 14.” 47 Or LUBA at 161-63 (footnotes omitted).

11 We remanded the county’s initial decision, holding that the county must adopt findings
12 addressing Goal 14 and either demonstrate that the proposed amendments are consistent with the
13 goal or take an exception to the goal. Further, we required the county to explain why it need not
14 consider vacant industrial or commercial-zoned lands within the City of McMinnville UGB, in
15 demonstrating compliance with code criteria requiring a showing of “demonstrable need” for the
16 zone change.

17 On remand, the county held hearings and the county board of commissioners voted 2-1 to
18 approve the requested plan and zoning amendments, with supplemental findings. The county’s
19 decision limits the proposed mini-storage facility to 39,000 square feet, and concludes that, so
20 limited, the amendments are consistent with Goal 14. This appeal followed.

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioners challenge the county’s conclusion that the plan and zoning amendments to allow
23 expansion of the existing mini-storage facility is consistent with Goal 14.¹ The county’s decision lists

¹ Goal 14 is to “provide for an orderly and efficient transition from rural to urban land use.” A county that converts rural land to “urban uses” must either show that its action complies with Goal 14 or take an exception to the goal. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 470-71, 742 P2d 268 (1986). Goal 14 also provides, in relevant part, that

“In unincorporated communities outside urban growth boundaries counties may approve uses, public facilities and services more intensive than allowed on rural lands by Goal 11 and 14, either by exception to those goals, or as provided by [Land Development and Conservation] Commission rules which ensure such uses do not:

1 seven considerations in support of that conclusion.² Petitioners argue that none of those
2 considerations, singly or cumulatively, demonstrates that the proposed facility is consistent with Goal
3 14.

4 One of the more important considerations is the size of the facility, limited to 39,000 square
5 feet of indoor floor space and an unspecified amount of outdoor storage space. The decision cites
6 and relies upon OAR 660-022-0030(11), which limits the size of industrial uses in unincorporated
7 communities to “small scale, low impact uses,” defined in relevant part as a “building or buildings not

“(1) adversely affect agricultural and forest operations, and

“(2) interfere with the efficient functioning of urban growth boundaries.”

² The county’s decision states:

“The Board finds that the applicant’s requested Comprehensive Plan amendment and zoning amendment (to allow expansion of their existing mini-storage facility) is consistent with Goal 14. Evidence of Goal 14 compliance includes:

“[1] The subject property is located on rural land outside of the McMinnville urban growth boundary and is not located within a designated unincorporated community;

“[2] A maximum building size limitation of 39,000 square feet is requested by the applicant;

“[3] The proposed use is a small-scale low impact industrial use consistent with OAR 660-022-0030(11), which defines such uses as those industrial uses taking place within a building or buildings that do not exceed 60,000 square feet of floor area within urban unincorporated communities and that do not exceed 40,000 square feet of floor area for industrial uses within all other unincorporated communities;

“[4] The use has demonstrated compatibility with adjacent urban uses;

“[5] The proposed use does not require the extension of urban services;

“[6] The proposed use has no significant traffic impacts;

“[7] It is not necessary for the use to be located with associated ‘urban’ industry.

“The Board finds that (1) the maximum building size requested by the applicant is not greater than 39,000 square feet; (2) the existing mini-storage facility has, for the past eight years, demonstrated compatibility with adjacent urban uses, has not required an extension of urban services, has not created significant traffic impacts, and has not required co-location with ‘urban uses.’ * * *” Record 2.

1 exceeding 40,000 square feet of floor space.”³ OAR chapter 660, division 022 implements Goal
2 14, and establishes standards for the planning and zoning of unincorporated communities. The
3 county reasons, apparently, that because the proposed facility is limited to 39,000 square feet of
4 indoor floor space and therefore would qualify as a “small scale, low-impact use” allowed under
5 OAR 660-022-0030(3) if located within an unincorporated community, that is an indication that the
6 facility may be allowed on rural lands outside an unincorporated community consistent with Goal 14.

³ OAR 660-022-0030 provides, in relevant part:

“(3) County plans and land use regulations may authorize only the following new or expanded industrial uses in unincorporated communities:

“(a) Uses authorized under Goals 3 and 4;

“(b) Expansion of a use existing on the date of this rule;

“(c) Small-scale, low impact uses;

“* * * * *

“(4) County plans and land use regulations may authorize only the following new commercial uses in unincorporated communities:

“(a) Uses authorized under Goals 3 and 4;

“(b) Small-scale, low impact uses;

“(c) Uses intended to serve the community and surrounding rural area or the travel needs of people passing through the area.

“* * * * *

“(10) For purposes of subsection (b) of section (4) of this rule, a small-scale, low impact commercial use is one which takes place in an urban unincorporated community in a building or building not exceeding 8,000 square feet of floor space, or in any other type of unincorporated community in a building or buildings not exceeding 4,000 square feet of floor space.

“(11) For purposes of subsection (c) of section (3) of this rule, a small-scale, low impact industrial use is one which takes place in an urban unincorporated community in a building or buildings not exceeding 60,000 square feet of floor space, or in any other type of unincorporated community in a building or buildings not exceeding 40,000 square feet of floor space.”

1 Petitioners note that OAR chapter 660, division 022 applies only to unincorporated
2 communities, not planning and zoning on rural lands outside such communities. OAR 660-022-
3 0000(2). However, petitioners agree that OAR 660-022-0030 provides some guidance in
4 determining whether the proposed facility is consistent with Goal 14, although petitioners contend
5 that the county misunderstands the rule. According to petitioners, the proposed mini-storage facility
6 is properly viewed as a “commercial use” rather than an “industrial use,” as those terms are defined
7 at OAR 660-022-0010(1) and (4), because the facility provides retail services.⁴ We understand
8 petitioners to argue that the “storage” listed in the OAR 660-022-0030(11) definition of “industrial
9 use” refers to storage associated with the manufacture, processing or wholesale distribution of
10 products, goods or materials, and does not include a facility offering storage services to the general
11 public on a retail basis. Because the facility is a commercial use, petitioners argue, the appropriate
12 guide is the 4,000-square foot limit on commercial building floor space in OAR 660-022-0030(10),
13 rather than the 40,000-square foot limit for industrial building floor space at OAR 660-022-
14 0030(11).

15 Even if the proposed facility is an industrial use, petitioners contend, the county’s findings fail
16 to demonstrate that an industrial use of that size, location and operational characteristics is consistent
17 with Goal 14. Petitioners emphasize that the subject property is located between the City of

⁴ OAR 660-022-0010 provides, in relevant part:

“For purposes of this division, the definitions contained in ORS 197.015 and the statewide planning goals (OAR Chapter 660, Division 15) apply. In addition, the following definitions apply:

“(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.”

1 Lafayette UGB and the City of McMinnville UGB, and immediately adjacent to the latter.
2 Petitioners also cite to evidence that the vast majority of the proposed facility's customers reside
3 within the UGBs of nearby cities, with approximately 83 percent residing within the UGBs of the
4 cities of Lafayette and McMinnville. Petitioners contend that the proposed facility is no different
5 from the public storage business that Petitioner Klaus operates in the City of McMinnville.

6 We need not and do not decide whether a mini-storage facility is properly viewed as
7 commercial or industrial use as those terms are defined in OAR 660-022-0010.⁵ We agree with
8 petitioners that, even if the proposed facility is an industrial use (and hence OAR 660-022-
9 0030(11) rather than OAR 660-0022-0030(10) provides the pertinent guidance), the county's
10 findings fail to establish that the facility allowed by the challenged amendments is consistent with
11 Goal 14.

12 As DLCD reminded the county during the initial proceedings below, Goal 14 authorizes
13 counties to include within unincorporated communities uses that are more intensive than uses
14 allowed on rural lands outside unincorporated communities. *See* n 1. By negative implication,
15 DLCD argued, the intensity of uses allowed on rural lands outside unincorporated communities must
16 be less than the maximum intensity allowed inside such communities. As noted, OAR 660-022-
17 0030(11) imposes a 40,000-square foot maximum building floor space for industrial uses inside
18 unincorporated communities. The county's decision imposes a building floor space limitation that is
19 slightly less than the maximum allowed in unincorporated communities. The difference in intensity
20 between an industrial use with 39,000 square feet of building floor space and an industrial use with
21 40,000 square feet of building floor space is negligible. The fact that the county limited building
22 floor space to something less than the maximum allowed in unincorporated communities is an

⁵ As we noted in *Bright v. City of Yachats*, 16 Or LUBA 161, 172 (1987), determining whether a use such as a public storage facility is properly characterized as a light industrial or commercial use can be uncertain, and such a use reasonably could be classified as either. Although we need not and do not decide how to categorize such a use under OAR 660-022-0010, it is fair to observe that the answer is by no means clear to us.

1 appropriate consideration; however, the difference here is so minimal that that consideration lends
2 little weight to the county’s conclusion that the facility is consistent with Goal 14.

3 As we stated in our initial opinion, evaluating the size of building floor space allowed under
4 the proposed plan and zoning amendments is not the only, and perhaps not even the best, approach
5 to demonstrating whether uses allowed on rural lands outside unincorporated communities are
6 consistent with Goal 14. *Friends of Yamhill County*, 47 Or LUBA at 170.⁶ We agree with
7 petitioners that the location of the proposed facility, its proximity to UGBs, and its operational
8 characteristics, particularly the population it is likely to serve, are more telling factors in this case.
9 The county’s decision does not address these factors at all, other than noting that the subject
10 property is outside the City of McMinnville UGB. The considerations the decision does address,
11 quoted at n 2, are either makeweights or insufficient, alone or cumulatively, to demonstrate
12 consistency with Goal 14. For example, the fact that the existing mini-storage business is
13 compatible with adjacent urban uses within the UGB does nothing to indicate that either the existing
14 or expanded business is a rural use. If anything, it would suggest the contrary. That the business
15 does not require the extension of urban services is an appropriate, but not compelling consideration.
16 That the business does not have “significant” traffic impacts says little about whether it is an urban or
17 rural use; not all urban uses have “significant” traffic impacts.⁷ Like petitioners, we are not sure what
18 the county means in finding that it is not necessary to locate the proposed mini-storage facility “with
19 associated urban industry.” There appears to be no dispute that the facility must be located close to

⁶ We also noted that the site plan for the proposed facility depicts several areas on the subject property to be used for “proposed outside storage,” presumably to store RVs or other items too large to fit within one of the several storage buildings. *Id.* at 162, n 1. Those outside storage areas are apparently not included in the estimated total square footage. Although no party takes issue with the county’s focus on indoor square footage, it is not clear to us that proposed industrial or commercial use of outdoor areas is irrelevant under Goal 14, at least where OAR 660-022 does not apply. For example, in evaluating amendments that would allow a 100,000-square foot outdoor RV sales lot and a 1,000-square foot sales office on rural land outside an unincorporated community, it would seem strange to focus exclusively on the size of the building.

⁷ We observe, however, that if the facility were located within the City of McMinnville UGB closer to the bulk of its customers in that city, there would probably be even fewer traffic impacts.

1 its overwhelmingly urban customer base. Moreover, the facility does not appear to be associated
2 with *any* industry, urban or otherwise, which if anything tends to support petitioners’ contention that
3 it is more accurately viewed as a commercial rather than an industrial use.

4 In short, the considerations cited by the county do not demonstrate that the use allowed by
5 the amendments is consistent with Goal 14. Given the location of the proposed facility adjacent to
6 the City of McMinnville UGB and between that city and the UGB of the nearby City of Lafayette,
7 and given the undisputed evidence that almost all of the customers served by the facility reside within
8 those UGBs or nearby UGBs, no reasonable person could conclude that the facility allowed by the
9 challenged amendments is consistent with Goal 14.

10 The first assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 Yamhill County Zoning Ordinance (YCZO) 1208.02(B) and (D) require findings that
13 “[t]here is an existing demonstrable need for the particular uses allowed by the requested zone,”
14 based on “market demand,” and other considerations, and that “[o]ther lands in the county already
15 designated for the proposed uses are either unavailable or not as well-suited for the anticipated uses
16 due to location, size, or other factors.”⁸ YCZO 1208.02(A) requires a finding that the proposed

⁸ YCZO 1208.02 provides:

“(A) The proposed change is consistent with the goals, policies, and any other applicable provisions of the Comprehensive Plan.

“(B) There is an existing demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone.

“(C) The proposed change is appropriate considering the surrounding land uses, the density and pattern of development in the area, any changes which may have occurred in the vicinity to support the proposed amendment and the availability of utilities and services likely to be needed by the anticipated uses in the proposed district.

1 zone change is consistent with applicable comprehensive plan policies. Yamhill County Revised
2 Goals and Policies (YCRGP) Policy I.H.1.b directs the county to locate industrial lands within
3 UGBs “to the greatest extent possible.”⁹

4 In the county’s initial decision, and again in the decision on remand, the county found
5 compliance with YCZO 1208.02(B) and (D) based on a study intervenors submitted of available
6 LI-zoned lands in the county. That study did not take into account LI-zoned land within the UGBs
7 of any cities, or other industrial or commercial zoned lands within UGBs that allow public storage
8 facilities. We remanded the county’s initial decision to explain why the county need not consider
9 such lands, given (1) the direction in YCRGP Policy I.H.1.b to locate industrial lands within UGBs
10 “to the greatest extent possible,” (2) the purpose statement of the LI zone, indicating that the LI
11 zone is intended in part to provide for industrial uses within UGBs,¹⁰ (3) evidence in the record that
12 there are over 600 acres of vacant industrial and commercial zoned lands within the City of
13 McMinnville’s UGB that allow public storage facilities, and (4) evidence in the record that a large
14 majority of the “market demand” comes from the residents of that city. 47 Or LUBA at 175.

“(D) Other lands in the county already designated for the proposed uses are either unavailable or not as well-suited for the anticipated uses due to location, size, or other factors.

“(E) The amendment is consistent with the current Oregon Administrative Rules (OARs) for exceptions, if applicable.”

⁹ YCRGP Policy I.H.1.b provides:

“To the greatest extent possible, industrial areas will be located within urban growth boundaries. Those industrial areas located outside urban growth boundaries will be compatible with the industrial development goal and will be located where they can be adequately served by necessary major utility lines, including electric power substations and transmission lines, trunk sewer lines, trunk water lines, and where appropriate, trunk gas lines.”

¹⁰ The purpose statement for the LI zone states:

“The purpose of the LI District is to provide for light and general industrial uses with similar service needs within urban growth boundaries and in other locations which are or will be compatible with adjacent urban development. Such areas shall maintain high performance standards for light and general industrial uses and shall coordinate site and building design through application of the site design review process.”

1 On remand, the county adopted the following finding:

2 “In ascertaining whether adequate industrial zoning exists or if additional industrial
3 zoning is needed, the Board interprets YCZO 1208.02(B) and (D) and YCRGP
4 Policy I.H.1.b to restrict the county’s review and consideration to only lands
5 located outside of the UGB. There are several reasons for the county to limit its
6 analysis to only lands located outside of the UGB. First, the Board finds that the
7 county does not have jurisdiction within the identified limits of municipal
8 corporations (cities), and has only shared jurisdiction within identified UGB
9 boundaries. Secondly, the Board finds that the need for industrial land within the
10 adjacent UGB for McMinnville and Lafayette is oriented towards attracting
11 business-related uses which require additional public facilities and services.
12 Because of this, the municipal jurisdictions have a desire to maintain shovel-ready
13 industrial property that can be readily and economically developed for uses that
14 require urban facilities and services. In the case of the current application, the
15 requested use requires no or minimal improvements to the property. As such, the
16 light industrial lands in the cities are not comparable (or relevant) with regard to the
17 county’s inventory of light industrial lands.” Record 3.

18 Petitioners argue, and we agree, that the foregoing interpretation of YCZO 1208.02(B) and
19 (D) is not affirmable, even under the somewhat deferential standard of review for interpretations of
20 local government regulations under ORS 197.829(1) and *Church v. Grant County*, 187 Or App
21 518, 69 P3d 759 (2003).

22 First, the interpretation does not even address the text of YCZO 1208.02(B) and (D), or
23 that of YCRGP Policy I.H.1.b and other relevant context. Nothing cited to us in
24 YCZO 1208.02(B) or (D) narrows the scope of inquiry to lands subject to the county’s exclusive
25 jurisdiction, and the county’s finding cites no textual or contextual reason for reading such a
26 limitation into the code. YCZO 1208.02(D) requires the county to evaluate lands “in the county,”
27 without qualification.

28 The context of YCZO 1208.02(D) presumably includes YCRGP Policy I.H.1.b, which
29 states a clear policy that the county shall locate industrial uses within UGBs to the greatest extent
30 possible.¹¹ The context also includes the LI zone purpose statement, which indicates that the LI

¹¹ YCRGP Policy I.H.1.b is presumably more than context, since YCZO 1208.02(A) requires a finding that the proposed zone is consistent with applicable comprehensive plan policies. As noted in our previous opinion, the

1 zone is intended to provide for industrial uses within UGBs. Against that context, the county’s
2 apparent position that it has no authority or basis to consider the availability of lands within UGBs
3 for industrial uses is simply untenable. In addition, as petitioners argue, it seems particularly
4 appropriate in the present case for the county to consider the availability of lands within UGBs to
5 meet the identified “market demand” for public storage facilities, given that the “market demand” is
6 almost entirely generated within UGBs. The apparent purpose of YCZO 1208(B) and (D) is to
7 match land need with land supply. It seems inconsistent with that purpose for the county to rely on
8 a purported need generated almost entirely within UGBs, and yet rely exclusively on rural lands
9 outside UGBs to satisfy the identified need.

10 The county’s decision finds, apparently in the alternative, that all of the industrial lands within
11 the City of McMinnville UGB are “unavailable” for purposes of YCZO 1208.02(B) and (D). The
12 decision states that industrial land within the UGB is intended to attract business-related uses that
13 require public facilities and services, and that the cities of McMinnville and Lafayette wish to
14 maintain “shovel-ready” industrial property for uses that require “urban facilities and services.”
15 Record 3. However, the county cites no basis for this finding. As petitioners point out, the City of
16 McMinnville UGB includes 600 acres of vacant land under commercial and industrial zoning that
17 allow public storage facilities as outright permitted uses, which does not suggest that the city wishes
18 to preserve all of its industrial lands for uses that require intensive public services. Even if there
19 were some basis for that view with respect to industrial uses, petitioners argue that the county’s
20 decision does not address the availability of commercial lands that allow public storage facilities.
21 According to petitioners, the City of McMinnville UGB has a 274-acre supply of such commercial-
22 zoned lands.

23 In sum, the city’s interpretation of YCZO 1208.02(B) and (D) to the effect that it lacks
24 authority to evaluate the availability of lands within UGBs is inconsistent with the text, context and

county’s explanation of consistency with YCRGP Policy I.H.1.b is based solely on the city of McMinnville’s lack of response to the application. 47 Or LUBA at 174, n 13.

1 apparent purpose of those provisions. To the extent the county evaluated the availability or
2 suitability of lands within UGBs, its analysis fails to demonstrate that any such lands are “unavailable
3 or not as well-suited.”

4 The second assignment of error is sustained.

5 The county’s decision is remanded.¹²

¹² Petitioner does not request that the county’s decision be reversed, and we do not see that reversal is appropriate under OAR 661-010-0071(1) (providing that LUBA shall reverse a land use decision that is prohibited as a matter of law). It remains at least theoretically possible for the county to justify a reasons exception to Goal 14, although it is fair to say that the standards for such exceptions under OAR chapter 660, division 004 and OAR 660-014-0040 are difficult to satisfy.