

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 1000 FRIENDS OF OREGON,
5 FRIENDS OF YAMHILL COUNTY,
6 COLUMBIA EMPIRE FARMS, INC.,
7 FAIR HOUSING COUNCIL OF OREGON
8 and CHARLIE HARRIS,
9 *Petitioners,*

10
11 vs.

12
13 YAMHILL COUNTY,
14 *Respondent,*

15
16 and

17
18 OREGON DEPARTMENT
19 OF TRANSPORTATION,
20 *Intervenor-Respondent.*

21
22 LUBA Nos. 2004-169, 2004-171, 2004-172, 2004-173,
23 2004-180, 2004-194, 2004-197, 2004-214, and 2004-215

24
25 FINAL OPINION
26 AND ORDER

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28 Appeal from Yamhill County.

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30 Christine M. Cook, Portland, filed a petition for review and argued on behalf of 1000
31 Friends of Oregon and Friends of Yamhill County.

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33 Jeffrey G. Condit, Portland, filed a petition for review and argued on behalf of Columbia
34 Empire Farms. With him on the brief were Kelly S. Hossaini and Miller Nash, LLP.

35
36 Charlie Harris, Portland, filed a petition for review and argued on his own behalf and on
37 behalf of Fair Housing Council et al. With him on the brief was the Community Development Law
38 Center.

39
40 Fredric Sanai, Assistant County Counsel, McMinnville, filed a joint response on behalf of
41 respondent. Mark J. Greenfield, Portland, argued on behalf of respondent.

42
43 Bonnie E. Heitsch, Assistant Attorney General, Salem, filed a joint response brief and

1 argued on behalf of intervenor-respondent. With her on the brief was Kathryn A. Lincoln.

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

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6 AFFIRMED

07/21/2005

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

NATURE OF THE DECISION

Petitioners appeal three ordinances adopted by the county to allow the design and construction of a highway bypass, create a new interchange zoning district, and adopt exceptions to Statewide Planning Goal 3 (Agricultural Lands), Goal 11 (Public Facilities and Services), and Goal 14 (Urbanization).

FACTS

Intervenor-respondent Oregon Department of Transportation (ODOT) has been involved in a lengthy process to develop what is known as the Newberg-Dundee Transportation Improvement Project (NDTIP). The NDTIP is a bypass project for state Highway 99 between (from southwest to northeast) the cities of Dayton, Newberg, and Dundee.¹ The purpose of the bypass is to alleviate congestion on Highway 99, particularly in Dundee where the highway narrows from four lanes to two. The NDTIP also includes connections to Highways 18 and 219, and includes a new road connecting the bypass to existing Highway 99 in Dundee. The proposed bypass is an approximately 11 mile long, four-lane limited access highway extending through rural lands in Yamhill County and through the Newberg and Dundee urban areas. Exceptions to goals 3, 11, and 14 are required to locate the bypass on rural lands.

The bypass is being developed as a tiered environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA). In the first tier, transportation objectives are developed and studied. The first tier identifies a corridor that is approximately 40% wider than the actual road right-of-way will occupy to allow for siting flexibility during the second tier, or design level phase. During the second tier, ODOT will review different bypass alignment alternatives within the selected corridor. During the second tier, ODOT must also determine the location of supporting

¹ The cities of Dayton, Dundee and Newberg also adopted decisions approving the NDTIP for their respective jurisdictions. Those decisions were also appealed. Our separate final opinion and orders in those companion cases are also issued today.

1 roadways, intersecting roadways, and interchange connections and identify modifications or
2 improvements to existing elements of the local street network that are necessary to support the
3 bypass project or to achieve compliance with the applicable comprehensive plans.

4 Eight alternatives were analyzed, and ODOT and the county selected alternative “Modified
5 3J” as the preferred alternative. The preferred alternative begins in the southwest at a location near
6 the existing junction of Highway 99 and 18, called the Dayton Interchange. The Dayton Interchange
7 is located on Class I soils that are planned and zoned for exclusive farm use (EFU). The Dayton
8 Interchange adjoins vacant land within Dayton’s urban growth boundary (UGB). To the northeast
9 of the Dayton Interchange, the bypass parallels Highway 99 to the south and is also south of an
10 existing railroad track that extends to Newberg. This portion of the bypass will be located entirely
11 on EFU land, most of which is prime farmland.

12 Continuing to the northeast, the bypass crosses land that is mostly zoned EFU, with some
13 affected properties zoned for rural residential use. The proposed East Dundee interchange, which
14 connects the bypass to Highway 99, is located in the section of the bypass between Dundee and
15 Newberg. The interchange and connector road are located on EFU and rural residential lands.
16 South of the proposed interchange is vacant land within the Dundee UGB. Outside the UGB, rural
17 residential land is located just north and northeast of the proposed interchange. East of the
18 proposed Highway 219 interchange in Newberg, the bypass crosses EFU land, reenters Newberg,
19 and then terminates east of the Newberg UGB at the East Newberg Interchange. We have
20 included a map from Record 731 at the end of the opinion. The county approved the proposed
21 bypass after extensive local hearings. This appeal followed.

22 **MOTIONS TO STRIKE AND TO TAKE EVIDENCE NOT IN THE RECORD**

23 In petitioner Columbia Empire Farms’ (CEF) petition for review, Appendix D was attached
24 to support the fourth assignment of error. Appendix D is a map from the record that was altered to
25 show CEF’s property superimposed on the map. ODOT moved to strike the appendix and to take
26 evidence outside of the record to submit its own map and documentation regarding ownership in the

1 area. At oral argument, ODOT agreed that appendix D correctly displays the location of CEF's
2 property and withdrew its motion to strike and motion to take evidence outside of the record.
3 Therefore, those motions are now moot.

4 **FIRST ASSIGNMENTS OF ERROR (FRIENDS AND CEF)**

5 1000 Friends of Oregon and Friends of Yamhill County (collectively "Friends") and CEF
6 argue that the county improperly took an exception under ORS 197.732(1)(c)(A) and Goal 2, Part
7 II (c)(1).² OAR 660-004-0022 provides that an exception may be taken for transportation
8 improvements on rural lands pursuant to OAR 660-012-0070.³ OAR 660-012-0070 sets out the
9 requirements for obtaining such an exception.⁴ The county adopted lengthy findings identifying and

² ORS 197.732(1) provides in pertinent 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."

Goal 2, Part II (c)(1) provides:

"Reasons justify why the state policy embodied in the applicable goals should not apply[.]"

³ OAR 660-004-0022 provides in pertinent part:

"An exception * * * can be taken for any use not allowed by the applicable goals(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:

"* * * * *

"(12) Goal 12-Transportation. Improvements on Rural Lands. Transportation improvements not allowed on rural lands as provided for in OAR 660-012-0065 require an exception pursuant to OAR 660-012-0070 and this division."

⁴ At the time of the decision, OAR 660-012-0070 provided:

"(1) Transportation facilities and improvements which do not meet the requirements of OAR 660-012-0065 require an exception to be sited on rural lands.

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- “(2) Where an exception to Goals 3, 4, 11, or 14 is required, the exception shall be taken pursuant to ORS 197.732(1)(c), Goal 2, OAR chapter 660, division 4 and this division.
- “(3) An exception adopted as part of a TSP or refinement plan shall, at a minimum, decide need, mode, function and general location for the proposed facility or improvement:
- “(a) The general location shall be specified as a corridor within which the proposed facility or improvement is to be located, including the outer limits of the proposed location. Specific sites or areas within the corridor may be excluded from the exception to avoid or lessen likely adverse impacts;
 - “(b) The size, design and capacity of the proposed facility or improvement shall be described generally, but in sufficient detail to allow a general understanding of the likely impacts of the proposed facility or improvement. Measures limiting the size, design or capacity may be specified in the description of the proposed use in order to simplify the analysis of the effects of the proposed use;
 - “(c) The adopted exception shall include a process and standards to guide selection of the precise design and location within the corridor and consistent with the general description of the proposed facility or improvement. For example, where a general location or corridor crosses a river, the exception would specify that a bridge crossing would be built but would defer to project development decisions about precise location and design of the bridge within the selected corridor subject to requirements to minimize impacts on riparian vegetation, habitat values, etc.;
 - “(d) Land use regulations implementing the exception may include standards for specific mitigation measures to offset unavoidable environmental, economic, social or energy impacts of the proposed facility or improvement or to assure compatibility with adjacent uses.
- “(4) To address Goal 2, Part II(c)(1) the exception shall demonstrate that there is a transportation need identified consistent with the requirements of OAR 660-012-0030 which cannot reasonably be accommodated through one or a combination of the following measures not requiring an exception:
- “(a) Alternative modes of transportation;
 - “(b) Traffic management measures; and
 - “(c) Improvements to existing transportation facilities.
- “(5) To address Goal 2, Part II(c)(2) the exception shall demonstrate that non-exception locations cannot reasonably accommodate the proposed transportation improvement or facility.
- “(6) To determine the reasonableness of alternatives to an exception under sections (4) and (5) of this rule, cost, operational feasibility, economic dislocation and other relevant factors shall be addressed. The thresholds chosen to judge whether an alternative method or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception.

1 describing the transportation need. OAR 660-012-0070(3) and (4). The purpose of the project is
2 “to improve regional and local transportation along the Ore. 99W corridor in the Newberg-Dundee
3 area.” Record 4792. The parties agree that there is a serious traffic problem that must be solved.
4 The parties disagree about how to solve the problem.⁵

5 Petitioners first argue that identifying a transportation need under OAR 660-012-0070 is
6 not sufficient to justify an exception under ORS 197.732(1)(c)(A). According to petitioners, the
7 county must, in addition to finding a transportation need, separately demonstrate that the state policy
8 embodied in the applicable goals should not apply. We disagree. OAR 660-004-0022 provides a
9 specific list of the types of reasons that satisfy the need for an exception. Transportation
10 improvements on rural lands are one of those specific reasons. Pursuant to OAR 660-004-

“(7) To address Goal 2, Part II(c)(3), the exception shall:

- “(a) Compare the economic, social, environmental and energy consequences of the proposed location and other alternative locations requiring exceptions;
- “(b) Determine whether the net adverse impacts associated with the proposed exception site are significantly more adverse than the net impacts from other locations which would also require an exception. A proposed exception location would fail to meet this requirement only if the affected local government concludes that the impacts associated with it are significantly more adverse than the other identified exception sites;
- “(c) The evaluation of the consequences of general locations or corridors need not be site-specific, but may be generalized consistent with the requirements of section (3) of this rule.

“(8) To address Goal 2, Part II(c)(4), the exception shall:

- “(a) Describe the adverse effects that the proposed transportation improvement is likely to have on the surrounding rural lands and land uses, including increased traffic and pressure for nonfarm or highway oriented development on areas made more accessible by the transportation improvement;
- “(b) Adopt as part of the exception, facility design and land use measures which minimize accessibility of rural lands from the proposed transportation facility or improvement and support continued rural use of surrounding lands.”

⁵ Friends suggest that the county and ODOT’s claimed “need” is actually just a desire. While it may be true that respondents’ identification or characterization of the “transportation need” might significantly limit the possible solutions, we do not agree with Friends that the need does not exist. Any arguments that the identified need is merely a desire are rejected without further discussion.

1 0022(12), the requirements of OAR 660-012-0070 must also be satisfied. OAR 660-012-
2 0070(4) sets out the analysis that is required to demonstrate that the state policy embodied in the
3 applicable goals should not apply. That analysis substitutes for direct application of ORS
4 197.732(1)(c)(A) and Goal 2, Part II (c)(1).

5 Petitioners also challenge the thresholds identified by the county and ODOT to achieve a
6 solution to the transportation need. OAR 660-012-0070(6) requires consideration be given to
7 cost, operational feasibility, economic dislocation, and other relevant factors in determining the
8 reasonableness of alternatives. The rule also requires that the thresholds chosen to judge whether
9 an alternative not requiring a goal exception can reasonably accommodate the transportation need
10 must be justified. *See* n 4. The county found that:

11 “The thresholds selected here to judge the ability of non-exception locations or
12 methods to ‘reasonably accommodate’ the identified transportation needs for (1)
13 the Bypass and (2) the East Dundee Interchange * * * include operational
14 feasibility; * * * consistency with Dundee’s adopted Transportation System Plan
15 and its 2022 Dundee Vision Statement; cost; safety; and other ‘relevant factors’
16 such as travel time, hours of congestion and delay and overall transportation facility
17 performance.” Record 159-160.

18 ODOT and the county used the Oregon Highway Plan (OHP) highway mobility standards
19 as a threshold.⁶ Friends argue that use of the OHP’s statewide freight mobility standard as a
20 threshold at all was incorrect because the OHP standards are not “absolute” standards. First,
21 Friends argue, alternative mobility standards are permitted where “it would be infeasible to meet
22 [the] standards.” OHP Action 1F.3. Second, Friends assert that the mobility standards vary from

⁶ Thresholds are standards that a proposed alternative must meet in order to address the identified transportation need. Highway 99 is currently classified as a statewide highway and a designated freight route. The primary function of statewide highways is to provide inter-urban and inter-regional mobility and to connect large urban areas, ports, and major recreation areas. The management objective for statewide highways is “to provide safe and efficient, high-speed, continuous-flow operation” in urban and rural areas, with minimal interruption to flow in urban areas. OHP 1A.1. State designated freight routes are intended to facilitate interstate, intrastate, and regional movement of trucks. OHP 1C. Highway mobility performance standards have been assigned to each classification of highway. Highways classified as state highways that also function as freight routes must operate at a volume to capacity (V/C) ratio of .75 inside UGBs and .70 in areas outside of UGBs. New bypasses must be designed for moderate to high speeds at freeway or expressway standards. OHP 1H.2, 1H.5b.

1 area to area. ODOT and the county respond that the transportation planning rule (TPR) requires
2 the state to establish standards for facility performance that it deems acceptable on state facilities.
3 OAR 660-012-0020(3)(a)(B). They argue that “use of the mobility performance standards is
4 justified because they are consistent with the state performance standards acknowledged in the state
5 TSP.” Combined Response Brief 33.

6 ORS 197.180 and OAR 660-012-0015(1) require ODOT to “prepare, adopt and amend”
7 a state TSP that “shall identify a system of transportation facilities and services adequate to meet
8 identified state transportation needs.” OAR 660-012-0020(3)(a)(B) provides that in developing a
9 state TSP “the transportation capacity analysis shall be consistent with standards of facility
10 performance considered acceptable by the affected state or regional transportation agency.” The
11 OHP serves as the state TSP in compliance with those requirements.

12 Highway mobility performance standards are used to plan for and manage the operations of
13 highways. The OHP measures highway mobility performance and capacity by measuring the
14 volume to capacity (V/C) ratio. The OHP assigns different mobility performance standards,
15 depending on the classification of the highway. Higher classification highways utilized for a less
16 congested flow of traffic have a higher mobility performance standard (lower V/C) than lower
17 classification highways. The portion of Highway 99 at issue is classified as a statewide highway that
18 is also a freight route. The county set the mobility performance standards for a statewide freight
19 route as its performance threshold when evaluating alternatives.

20 “Because the Oregon 99W/Oregon 18 corridor will continue to serve the function
21 of a Statewide Highway and freight route, the transportation improvements selected
22 must comply with ODOT mobility standards for this type of highway.” Record
23 160.

24 Friends argue that the county incorrectly adopted the OHP standards for expressways and
25 bypasses as threshold criteria. According to Friends, by requiring any alternative to meet the
26 performance standards for mobility, speed, and access for a statewide highway, an expressway, a
27 freight route, and a bypass, the county “effectively forced the selected alternative to be a bypass

1 through rural lands requiring significant goal exceptions.” Friends’ Petition for Review 11.
2 Respondents explain that the standards for bypasses and expressways were not applied to the non-
3 exception alternatives as threshold criteria:

4 “[O]ne of the other thresholds adopted by the Board was that the solution had to
5 meet ODOT’s operational standards. That means that if the selected alternative
6 were aligned on Oregon 99W, it would have to meet the performance mobility
7 standards of a statewide freight route but if the selected alternative were a bypass
8 solution, it would have to meet the bypass criteria in the OHP. Bypasses
9 constructed on new alignments must be designed as freeways or expressways.

10 “Similarly, expressway standards were not used to compare alternatives that were
11 not bypasses. 1000 Friends’ reasoning is backwards. Once it was determined that
12 the solution would be a bypass, then and only then were the expressway standards
13 applied.” Combined Response Brief 36-37.

14 Friends argue that it was improper to use the thresholds in the OHP. However, they do not
15 persuasively explain why. Presumably, *some* thresholds had to be used, and we do not see that the
16 county was barred from using the standards in the OHP. Although petitioners do not agree with the
17 consequences of using the OHP thresholds, we see no error in respondents utilizing those
18 thresholds.

19 Friends’ and CEF’s first assignments of error are denied.

20 **SECOND ASSIGNMENTS OF ERROR (FRIENDS AND CEF)**

21 Petitioners argue that the county erred in its application of the alternatives analysis. ORS
22 197.732(1)(c)(B) requires that in order to take an exception, the county must demonstrate that
23 “[a]reas which do not require a new exception cannot reasonably accommodate the use.” OAR
24 660-004-0020(2) provides that an exception may not be approved to allow a use if there are
25 alternative lands that can accommodate the use that: (1) do not require exceptions; (2) are already
26 exception areas; or (3) are within UGBs.⁷ Petitioners offered a number of alternatives that they

⁷ OAR 660-004-0020(2)(b)(B) provides:

“To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors

1 believed would satisfy the transportation need and fall in one of these three categories and would
2 obviate the necessity of taking the exception actually taken by the county.

3 Petitioners first argue that the county erred in refusing to consider many of the alternatives
4 they suggested by imposing an improper evidentiary burden on petitioners to demonstrate that the
5 alternatives were reasonable. OAR 660-004-0020(2)(b)(C) requires that proposed alternatives
6 must be “specifically described with facts to support the assertion that the sites are more
7 reasonable.” According to petitioners, the alternatives they suggested easily satisfied this standard
8 and were improperly rejected by the county.

9 The county and ODOT respond that the alternatives were rejected on their merits. They
10 also argue, however, that petitioners did not establish that their suggested alternatives are reasonable
11 alternatives, because petitioners did not establish that those alternatives meet the performance
12 thresholds dictated by the OHP. Under OAR 660-004-0020(2)(b)(C), it is simply not enough to
13 declare that particular sites are more reasonable; the alternative must also be described with “facts
14 to support the assertion that the sites are more reasonable.” We understand respondents to argue
15 that these facts must include facts that show that the proposed alternatives meet the relevant
16 thresholds identified and justified under OAR 660-012-0070(6).

can be considered along with other relevant factors in determining that the use cannot reasonably
be accommodated in other areas. Under the alternative factor the following questions shall be
addressed:

- “(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?
- “(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?
- “(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?
- “(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?”

1 OAR 660-012-0070(6) provides that the reasonableness of non-exception alternatives is
2 determined by the thresholds, in this case the OHP. The rule requires the consideration of “cost,
3 operational feasibility, economic dislocation and other relevant factors.” As discussed in the first
4 assignments of error, those thresholds include highway mobility standards. Petitioners appear to
5 ignore these factors and to focus almost exclusively on impacts to agricultural land. Unless a
6 proposed alternative meets the identified OHP performance standards, the proposed alternative will
7 not meet the identified transportation need and it does not matter whether the alternative would have
8 a smaller impact on agricultural land.

9 CEF cites *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000), *rev'd on other*
10 *grounds* 173 Or App 321, 21 P3d 1108 (2001) for the proposition that the county shifted the
11 burden to petitioners to demonstrate that their alternatives were better instead of requiring the
12 county to demonstrate that the proffered alternatives would not work. In *Residents of Rosemont*,
13 Metro erred by concluding that resource land would accommodate the identified housing need
14 better than available nonresource land. Whether the alternatives were better, however, was not the
15 issue before the county in this case. The issue was whether the proffered alternatives could
16 reasonably accommodate the identified transportation need at all. The county found that the
17 alternatives could not meet this need. Therefore, this case does not have to be remanded under the
18 reasoning in *Residents of Rosemont*.

19 Although petitioners offered many alternatives that do not require new exceptions, those
20 alternatives do not meet the operational and mobility thresholds identified in the OHP necessary to
21 satisfy the identified transportation need. We recognize that allowing the county and ODOT to
22 utilize the OHP thresholds to identify the relevant transportation need may effectively predetermine
23 the outcome. As long as the thresholds are appropriate, however, as they are here, nothing in the
24 goals, statutes, or rules prevents the county and ODOT from taking that path.

25 Friends' and CEF's second assignments of error are denied.

1
2 **THIRD ASSIGNMENT OF ERROR (FRIENDS)**

3 **FOURTH ASSIGNMENT OF ERROR (CEF)**

4 Petitioners argue that the NDTIP is not compatible with the surrounding area. According to
5 petitioners, the county and ODOT did not comply with OAR 660-012-0070(8), which requires
6 that an exception “describe the adverse effects that the proposed transportation improvement is
7 likely to have on the surrounding rural lands and land uses” and “adopt as part of the exception,
8 facility design and land use measures which minimize accessibility of rural lands from the proposed
9 transportation facility.” Friends argue that the county and ODOT did not adequately consider
10 possible induced growth in the City of McMinnville, which is located approximately three miles west
11 of the western end of the NDTIP, and did not consider the impacts of a recently passed ballot
12 measure, Ballot Measure 37, that may allow greater rural development near the NDTIP. According
13 to Friends, the NDTIP will increase growth in McMinnville, which will need to expand its UGB, and
14 in doing so will convert rural lands to urban uses.

15 The findings describe the potential impacts to rural lands in great detail. Record 197-204,
16 650-58, 689-91, 699-700, 1301-1307, 2722-2726, 4989-5058. These findings address the
17 possibility of induced growth in McMinnville and conclude that there will be a very small statistical
18 difference in the household growth forecast for the year 2030 with or without the bypass. The
19 county concluded that these impacts would be minimal and those findings are supported by
20 substantial evidence in the record. Therefore, the NDTIP induced potential for growth in
21 McMinnville does not violate OAR 660-012-0070(8). Also, Ballot Measure 37 was adopted after
22 the county adopted the challenged decisions. Therefore, the county’s failure to consider the
23 combined impact of the NDTIP and Ballot Measure 37 is not a basis for reversal or remand.

24 ORS 197.732(1)(c)(D) and OAR 660-004-0020(2)(d) require a demonstration that the
25 “proposed uses are compatible with other adjacent uses or will be so rendered through measures

1 designed to reduce adverse impacts.”⁸ CEF provided extensive testimony that the NDTIP would
2 not be compatible with their farm practices. The county was not persuaded by the testimony from
3 CEF. The county adopted extensive findings stating why it disagreed with CEF and explaining why
4 farm uses would not be unduly impacted. Record 715-718. The county acknowledged that the
5 NDTIP would have some adverse impacts on the 300-acre CEF farm in terms of fragmentation,
6 irrigation, and loss of acreage in farming, but it found these impacts could be mitigated to minimize
7 the level of harm. ODOT testified that it “has committed to work with CEF to design and build
8 farm crossings to allow farm equipment and crews access to both sides of the farm and to reconnect
9 irrigation pipes and other facilities.” Record 1377. ODOT also testified that newly adopted plan
10 policies and Interchange Area Management Plans would protect the farm from the pressures of
11 urbanization. Record 5913-5915.

12 While CEF presented contrary compatibility evidence that the county could have relied
13 upon had it chosen to, the county could also reasonably rely on the conclusions it made. Substantial
14 evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v.*
15 *Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). Where the Board concludes
16 that a reasonable person could reach the decision made by the local government, in view of all the
17 evidence in the record, the choice between conflicting evidence belongs to the local government.
18 *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). That a petitioner may

⁸ OAR 660-004-0020(2)(d) provides:

“‘The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.’ The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”

1 disagree with the local government’s conclusions provides no basis for reversal or remand.
2 *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993). In this case, the county reasonably
3 found that the NDTIP will be compatible with CEF’s farming operations.

4 The county’s finding that CEF’s farming operation would only be split into two sections was
5 mistaken. Record 716. As discussed in our disposition of the motion to strike and motion to take
6 evidence, ODOT was incorrect in its belief that the CEF farm would only be split into two sections.
7 In actuality, the CEF farm would be split into three sections. In the findings, the county
8 acknowledged that splitting the farm into three sections would have greater adverse impacts.⁹ That
9 finding, however, was based on an understanding that the farm would not be split into three large
10 separate EFU-zoned portions. The three parcels resulting from the proposed bypass include two
11 primarily EFU-zoned large parcels and a third smaller parcel that is primarily zoned Agricultural-
12 Forestry Small Holding (AF-10) that includes a miniscule .3-acre sliver of EFU land. Petitioners
13 offer no reason why isolating such a small part of the much larger farm unit creates an
14 incompatibility. We do not believe such a small area is significant in the larger context of a 300-acre
15 farm. Accordingly, the finding that the NDTIP would not have unduly adverse impacts on CEF’s
16 farm is supported by substantial evidence even with the inaccuracy. *See* OAR 660-004-
17 0020(2)(d) (“‘Compatible’ is not intended as an absolute term meaning no interference or adverse
18 impacts of any type with adjacent uses.”).

19 Friends’ third assignment of error and CEF’s fourth assignment of error are denied.

⁹ The county’s findings state:

“The [county] would agree that dividing the farm into three pieces would have had significantly greater adverse effects, and ODOT admitted as much in its decision to revise the location of the East Dundee Interchange and its connecting road.” Record 716.

1
2 **THIRD ASSIGNMENT OF ERROR (CEF)**
3 **FIRST ASSIGNMENT OF ERROR (FAIR HOUSING COUNCIL)**

4 Charlie Harris and Fair Housing Council (collectively FHC) and CEF argue that the county
5 misapplied the economic, social, environmental, and energy consequences (ESEE) analysis.¹⁰ ORS
6 197.732(1)(c)(C) and OAR 660-004-0020(2)(c) contain the same language requiring an ESEE
7 analysis comparing the adverse impacts of selecting the proposed exception area with the adverse
8 impacts of selecting other areas that would also require an exception.¹¹ Petitioners argue that the
9 county did not consider the protection of agricultural lands adequately in conducting the ESEE
10 analysis. The county and ODOT respond that because an exception was taken for a transportation
11 facility on rural lands, the more specific provisions of OAR 660-012-0070 apply in place of the
12 more general ESEE analysis requirement at Goal 2, Part II (c)(3), which is restated at ORS

¹⁰ Friends also touch on this issue in their second assignment of error.

¹¹ ORS 197.732(1)(c)(C) provides:

“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[.]”

OAR 660-004-0020(2)(c) provides:

“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 other areas requiring a Goal exception. The exception shall describe the characteristics of each alternative areas considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site 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. Such reasons shall include but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts[.]”

1 197.732(1)(c)(C) and restated with elaboration at OAR 660-004-0020(2)(c). *See* n 4. We agree
2 with respondents.

3 OAR 660-012-0070(7) provides:

4 “To address Goal 2, Part II(c)(3), the exception shall:

5 “(a) Compare the economic, social, environmental and energy consequences of
6 the proposed location and other alternative locations requiring exceptions;

7 “(b) Determine whether the net adverse impacts associated with the proposed
8 exception site are significantly more adverse than the net impacts from other
9 locations which would also require an exception. A proposed exception
10 location would fail to meet this requirement only if the affected local
11 government concludes that the impacts associated with it are significantly
12 more adverse than the other identified exception sites;

13 “(c) The evaluation of the consequences of general locations or corridors need
14 not be site-specific, but may be generalized consistent with the requirements
15 of section (3) of this rule.”

16 By its terms, OAR 660-012-0070(7) provides the method of complying with the general
17 ESEE analysis requirement of Goal 2, Part II (c)(3). OAR 660-004-0020(2)(c) reiterates the
18 general provisions of the goal and adds additional requirements to compare the agricultural aspects
19 of the resource land including agricultural productivity, sustainability, the long term irreversible
20 impacts of removing the land from the resource base, and the effects of the use on the water table,
21 and the costs of improving roads. In contrast, OAR 660-012-0070(7) requires comparison of the
22 net adverse effects of economic, social, environmental, and energy consequences of the alternative
23 sites requiring goal exceptions. OAR 660-012-0070(7) does not require examination of the
24 agricultural impacts in isolation or elevate those impacts over other ESEE impacts. The county
25 addressed OAR 660-012-0070(7) and found that the preferred alternative qualifies for an
26 exception. Record 685-699. The findings adopted by the county are supported by substantial
27 evidence under the county’s construction of OAR 660-012-0070(7) and OAR 660-004-
28 0020(2)(c). Because petitioners’ evidentiary challenges are based on their construction of the rules,
29 which we do not agree with, their evidentiary challenge is denied.

1 FHC also challenges the ESEE analysis. FHC asserts that the ESEE analysis is inadequate
2 because the county did not consider the ESEE impacts of the entire bypass corridor, but rather
3 focused on the impacts in Yamhill County. According to FHC, the county should have also
4 considered the impacts within the cities of Dayton, Dundee and Newberg. The county and ODOT
5 respond that OAR 660-012-0070 is implemented only when an exception is taken to locate
6 transportation improvements on rural lands. By definition, an ESEE analysis is required only when
7 non-exception locations cannot reasonably accommodate the use. Once the ESEE analysis is
8 undertaken, it compares the net adverse impacts associated with the proposed exception site with
9 “other locations which also require an exception.” OAR 660-012-0070(7). The language of the
10 rule clearly calls for a comparison of one exception location to another exception location; it does
11 not call for comparison of non-exception locations. FHC does not allege or identify any areas
12 within Dayton, Dundee or Newberg where the corridor is proposed to be located that require an
13 exception. Accordingly, the county’s ESEE findings do not misconstrue OAR 660-012-0070(7) in
14 the manner alleged by FHC.

15 CEF’s third assignment of error and FHC’s first assignment of error are denied.

16

17 **FOURTH ASSIGNMENT OF ERROR (FRIENDS)**

18 **SIXTH ASSIGNMENT OF ERROR (CEF)**

19 **THIRD ASSIGNMENT OF ERROR (FHC)**

20 In these assignments of error, petitioners argue that the decision does not comply with OAR
21 Chapter 660, Division 12, the transportation planning rule (TPR). Friends argue that the decision
22 violates OAR 660-012-0060(1) because the bypass will significantly affect a transportation
23 facility.¹² The county found that because the bypass would improve the performance of

¹² OAR 660-012-0060 provides in pertinent part:

“(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:

1 transportation facilities without changing the functional classification, it does not “significantly affect a
2 transportation facility” and therefore does not violate the TPR. Record 113. The county is correct
3 that a plan amendment that improves rather than worsens a transportation facility’s performance
4 does not significantly affect that facility for purposes of OAR 660-012-0060(2)(d). *Friends of*
5 *Eugene v. City of Eugene*, 44 Or LUBA 239, *aff’d* 189 Or App 335, 75 P3d 922 (2003).

6 Friends argue that the county’s traffic analysis is incorrect because it did not take into
7 account the effects of “tolling” and of building the project in “phases.” According to Friends,
8 ODOT has not determined whether any sections of the bypass will require tolls and that phased
9 development is dependent on yet unsecured funding. Although funding has not been determined,

-
- “(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
 - “(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
 - “(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
 - “(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.
- “(2) A plan or land use regulation amendment significantly affects a transportation facility if it:
- “(a) Changes the functional classification of an existing or planned transportation facility;
 - “(b) Changes standards implementing a functional classification system;
 - “(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or
 - “(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP.
- “(3) Determinations under subsections (1) and (2) of this section shall be coordinated with affected transportation facility and service providers and other affected local governments.”

1 those issues will be addressed in the transportation financing program developed pursuant to OAR
2 660-012-0040, which is not required for rural Yamhill County.¹³ Therefore, the county did not
3 violate the TPR.

4 CEF argues that the county violated OAR 660-012-0060(3) because the county did not
5 coordinate with other affected local governments. *See* n 12. The rule, however, only requires that
6 such amendments “shall be coordinated with affected transportation facility and service providers
7 and other affected local governments” when the amendment “significantly affects a transportation
8 facility.” As discussed above, because the amendment does not significantly affect a transportation
9 facility, any lack of coordination is immaterial and the county did not violate the TPR.¹⁴

10 FHC argues that the county violated OAR 660-012-0040 because the elements of the
11 financing program do not meet the requirements of the rule. As noted earlier, however, the financing
12 program requirements do not apply in rural Yamhill County because it is not within a UGB
13 containing more than 2,500 people. *See* n 13. Therefore, the county did not violate the TPR.

14 Friends’ fourth assignment of error, CEF’s sixth assignment of error, and FHC’s third
15 assignment of error are denied.

16 **FIFTH ASSIGNMENT OF ERROR (CEF)**

17 CEF argues that the county improperly deferred making findings demonstrating compliance
18 with numerous discretionary land use standards. According to CEF, the county deferred goal
19 compliance findings for Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces),
20 Goal 6 (Air, Water and Land Resources Quality), and Goal 15 (Willamette River Greenway), and
21 deferred demonstrating compliance with ORS 197.732(1)(c)(D) and Yamhill County
22 Comprehensive Plan (YCCP) Water Resources Goal 1, Policy 1J. We address each in turn.

¹³ Pursuant to OAR 660-012-0040(1), financing programs are only required for areas within an urban growth boundary containing a population greater than 2,500 persons.

¹⁴ Even if coordination was required, we believe the county satisfied the requirements of the rule.

1 **A. Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas,**
2 **and Open Spaces)**

3 CEF argues that the challenged decision’s finding that any impacted Goal 5 resource sites
4 will be mitigated as provided for in the Collaborative Environmental and Transportation Agreement
5 for Streamlining Record of Agreement (CETAS) is an improper deferral.¹⁵ CEF alleges that the
6 CETAS merely calls for future planning and that there is no indication that the county will comply
7 with hearing and notice requirements in this second planning stage. Respondents assert that Goal 5
8 does not apply to this proceeding. The challenged decision includes findings to that effect.¹⁶ The
9 county then goes on to make alternative findings that even if Goal 5 applies, the NDTIP complies

¹⁵ Respondents explain the significance of the CETAS as follows:

“CETAS * * * * is an agreement to a specific alternative (Modified 3J) with specific mitigation measures among the regulatory stakeholders. The agencies involved are the regulatory agencies including DEQ, DLCDD, DSL, EPA, FHWA, ODFW, NOAA, SHPO, USCOE, USFWS. Failure to meet mitigation requirements and agreements will result in permits not being issued by the regulatory agencies.” Combined Response Brief 104 n 60.

¹⁶ The findings state:

“OAR 660-023-0250(3)(b) governs the applicability of Goal 5 to this proceeding. Under that provision, local governments are not required to apply Goal 5 in consideration of a post-acknowledgment plan amendment (PAPA) ‘unless the PAPA affects a Goal 5 resource.’ As relevant to this proceeding, the rule then states that a PAPA would affect a Goal 5 resource if the PAPA ‘allows *new uses* that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list.’ (Emphasis added.)

“The Board believes that under the terms of this rule, Goal 5 does not apply to this proceeding. This is because (1) the only impacted significant Goal 5 resource sites are four creeks with fish and riparian resources that are also identified as fish habitat; and (2) the County’s acknowledged Goal 5 Comprehensive Plan policies already permit development of the nature here proposed within these resource sites. More particularly, because the Bypass and East Dundee Interchange are uses already authorized within affected resource sites under the County’s acknowledged Goal 5 program, they would not be ‘new uses’ within the terms of OAR 660-023-0250(3)(b), and Goal 5 does not apply.” Record 701-02.

“In summary, the Board believes that OAR 660-023-0250(3)(b) is intended to apply only to ‘new’ conflicting uses that have not previously been authorized in Goal 5 resource sites under an acknowledged Goal 5 program. Because the acknowledged Yamhill County Comprehensive Plan already permits new roads within these resource areas, there is no need to amend the County’s Goal 5 program, and Goal 5 does not apply. If the County’s Goal 5 program had authorized only certain specific uses within these resource areas, and if this application involved other uses not so authorized, then Goal 5 would apply. However, the County finds that this is not the case here.” Record 703.

1 with Goal 5. CEF does not acknowledge or challenge the county’s findings that Goal 5 does not
2 apply, but challenges only the county’s alleged deferral of compliance with Goal 5. Because CEF
3 fails to challenge the county’s alternative finding that Goal 5 does not apply, CEF’s Goal 5 challenge
4 provides no basis for reversal or remand.

5 **B. Statewide Planning Goal 6 (Air, Water and Land Resources Quality)**

6 CEF argues that the challenged findings concede that compliance with the noise mitigation
7 requirements of Goal 6 is being deferred improperly until the design phase. CEF Petition for
8 Review 30.¹⁷ Respondents do not argue that the findings explicitly find that the NDTIP complies
9 with Goal 6. Rather, they argue that compliance with Goal 6 is demonstrated in another document,
10 the Location Draft Environmental Impact Statement (LDEIS). *See Witham Parts v. ODOT*, 42
11 Or LUBA 435, 451, *aff’d* 185 Or App 408, 61 P3d 281 (2002) (legislative findings require only
12 an adequate factual base, and that support need not necessarily be found in the findings).

13 Goal 6 requires that atmospheric discharges such as noise must not threaten to violate or
14 violate applicable state or federal environmental quality rules or standards. Goal 6, OAR 660-015-
15 0000(6). Compliance with Goal 6 only requires that the local government explain why it is
16 reasonable to expect that applicable state and federal standards can be met by the proposed use,
17 based on reasonably available information. *Eckis v. Linn County*, 19 Or LUBA 15, 35 (1990)).
18 The LDEIS demonstrates that the sound engineers conducted a worst case scenario, using Federal
19 Highway Administration methodology. During the design phase, the exact roadway alignment will
20 undergo an additional noise evaluation. It is difficult to understand what further studies respondents
21 could have conducted at this stage when the exact design and location is not yet determined. The

¹⁷ CEF cites the LDEIS, which provides:

“Under the Bypass and all other identified build alternatives, noise impacts would occur at noise sensitive sites such as parks, schools, and residences (particularly in rural areas). This is particularly true where no roadways currently exist. Techniques available to decrease noise impacts include noise walls, below-grade roadway sections, or design using intervening topography. Noise impacts will be addressed in more detail during the design phase of the project.” Record 4341-42.

1 fact that a further, more detailed study will be conducted at the design phase is not an improper
2 deferral where there is an adequate factual base demonstrating compliance with Goal 6.

3 **C. Statewide Planning Goal 15 (Willamette River Greenway)**

4 CEF again argues that the findings of compliance with Goal 15 are based, at least partially,
5 on the CETAS and improperly defer compliance until the design phase. Respondents assert that the
6 county found that the bypass will be “located entirely outside of the Willamette River Greenway,
7 and that the Bypass location near the Greenway will not adversely affect the Greenway.”
8 Combined Response Brief 108. They contend that the “Board found that Modified 3J, with the
9 mitigation measures identified by the CETAS Agreement adequately complies with Goal 15.”
10 Combined Response Brief 108. It appears to us that the challenged decision concludes that the
11 NDTIP complies with Goal 15 based on the conditions imposed by the CETAS. Based on those
12 findings, respondents argue that there was no deferral, and we do not see that there is.
13 Accordingly, CEF’s Goal 15 arguments do not provide a basis for remand.

14 **D. ORS 197.732(1)(c)(D)**

15 Petitioners argue that the findings improperly defer compliance with ORS
16 197.732(1)(c)(D).¹⁸ Respondents counter that petitioners do not articulate why the findings they
17 cite are inadequate. *Camp v. Josephine County*, 23 Or LUBA 6, 10 (1992) (petitioner must
18 include adequate argument to explain basis for allegation of error). We agree with respondents.
19 Petitioners do not even attempt to identify which findings for which goal exceptions they allege are
20 insufficient. Accordingly, this subassignment of error does not provide a basis for reversal or
21 remand.

¹⁸ ORS 197.732(1)(c)(D) provides:

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

“* * * * *

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

1 **E. Water Resources Goal 1, Policy J**

2 CEF argues that the challenged decision erroneously defer findings of compliance with
3 YCCP Water Resources Goal 1, Policy J to the design phase.¹⁹ Respondents cite the lengthy
4 findings that address this policy and conclude that the NDTIP is consistent with this policy.²⁰

¹⁹ Policy J provides:

“It is the policy of Yamhill County to protect riparian vegetation from damage that may result from land use applications for development that is otherwise permitted outright or conditionally under county zoning regulations. To achieve this goal, Yamhill County will review land use applications for development in riparian areas in an effort to mitigate or prevent damage to riparian vegetation that might result from development. For purposes of this policy, ‘riparian areas’ refers to areas within 100 feet measured horizontally from the ordinary high water line of streams identified as ‘Fish Habitat’ in the comprehensive plan inventory (Natural Resource Conservation Plan, Yamhill County, Oregon, May 1979 – U.S.D.A. – Soil Conservation Services), that are not regulated under the Forest Practices Act.”

²⁰ The findings state, in pertinent part:

“Water Resources Goal 1, Policy 1J is addressed in the Exceptions Document. Those findings state that further land use review will be needed to show compliance with this policy. Four riparian corridors identified as providing fish habitat: (1) Chehalem Creek and its tributary; (2) Hess Creek; (3) Miller Creek; and (4) an unnamed creek located between Oregon 99W and Riverwood Road, are subject to review and approval pursuant to Water Policy 1J. The Board finds that it has reviewed the Bypass proposal and the impacts that it may have upon these four riparian areas. The Board examined many documents including the LDEIS at pages 3-30 through 3-46 and Technical memorandum for Fish Ecology, Wetlands, Wildlife Ecology and Water Quality found at ODOT Supporting Documentation, Volume 2, pages 184-197, 441-462, 463-477, 482-486.

“The Board believes and finds that Policy 1J can and will be met, based on the CETAS Record of Agreement that is part of the record of this proceeding. ODOT has worked closely with environmental agencies under the CETAS process to minimize impacts to significant natural resources and to water and air quality. Those agencies include the NOAA-Fisheries, U.S. Fish and Wildlife Department, Environmental Protection Agency, Department of Environmental Quality and Oregon Department of Fish and Wildlife. Through the CETAS process, ODOT and the environmental agencies have reached an agreement whereby ODOT has agreed to incorporate certain measures into its design elements. These include measures to mitigate impacts to riparian zones, wildlife habitat and wetland areas and major tributaries to the Willamette River and the Willamette River floodplain. Specific measures include a commitment to construct bridge crossings that span the width of the flood plains for the respective creeks; implementation of viable stream stabilization strategies for the Chehalem Creek; removing existing fish and wildlife crossing blockages on existing Oregon 99W; and the establishment of a mitigation bank or possible mitigation project. This Board finds that ODOT has committed to mitigate the impacts commensurate with the area and severity of the impact. It also finds that mitigation for habitat impacts will be measured by the ecological value lost.

“The Board concludes that with the measures identified in the CETAS Record, Policy 1J can and will be met. Based on these measures in the CETAS Record, the Board further finds that

1 Admittedly, the findings are initially ambiguous regarding whether they are deferring a finding of
2 compliance with the policy or concluding that the compliance with the policy is feasible given the
3 conditions imposed. (“further land use review will be needed to show compliance with this policy”).
4 However, the final paragraph cited above in n 20, we believe, is clearly a finding of compliance.
5 The county concluded that with the conditions imposed in the CETAS, the policy can and will be
6 satisfied. Petitioners point out the one sentence that suggests the county is deferring compliance, but
7 fail to challenge the findings that demonstrate that compliance is feasible or explain why those
8 findings are inadequate to demonstrate compliance with policy J. Accordingly, this issue does not
9 provide a basis for reversal or remand.

10 CEF’s fifth assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR (FHC)**

12 FHC argues that the decision is inconsistent with various provisions of the YCCP.

13 **A. Water Resource Goal 1, Policy J**

14 We rejected this argument earlier under CEF’s fifth assignment of error.

15 This subassignment of error is denied.

16 **B. Fish and Wildlife Goal 1, Policy A**

17 This policy provides:

18 “Yamhill County will cooperate with the Oregon Fish and Wildlife Department, the
19 Yamhill County cities, the U.S. Agricultural Stabilization and Conservation Service,
20 the Bureau of Reclamation, and the soil and water conservation districts of the
21 region to identify, conserve, and protect fish and wildlife habitat; determine areas of
22 critical imbalance and threats to particular species; and formulate and implement
23 measures for the improvement of existing habitat and the creation of new habitat
24 where needed.”

25 FHC argues that this policy is violated because ODOT rather than the county engaged in
26 the coordination with the natural resource agencies listed in the policy. The county found that the

the Water Resources and Fish and Wildlife policies determined by the Board to be applicable can be met.” Record 256-57, 460-61 (Emphasis added).

1 required cooperation had occurred. Record 256-57. FHC does not challenge that finding, but
2 argues that the cooperation occurred with ODOT rather than the county. When the proposed
3 development involves a multi-jurisdictional bypass like the NDTIP, we see no reason why the
4 county cannot rely on the cooperation between ODOT and the affected agencies.

5 This subassignment of error is denied.

6 **C. Fish and Wildlife Goal 1, Policy D**

7 This policy provides:

8 “Habitat of all species indicated as endangered, threatened, or vulnerable will be
9 preserved. Nesting sites of endangered bird species will be protected and buffered
10 from conflicting uses.”

11 FHC argues that the decision violates this policy because the findings state that it is not
12 known whether there are endangered species in the project area, a statement that is in conflict with
13 the LDEIS, which lists endangered fish in the project area. As respondents explain, however, the
14 findings were based on the LDEIS, which states that the endangered species that FHC believes
15 exist in the project area only “potentially” occur in the project area. In addition, the findings state
16 that adequate measures have been taken to protect the habitat of all threatened and endangered
17 species, regardless of whether the fish are actually present. Those measures include bridges that
18 span the entire width of the flood plain of the creeks that might contain endangered fish and
19 improving fish habitat by removing stream blockages. Record 1374, 2872-74. We agree with
20 respondents that the policy is satisfied.

21 This subassignment of error is denied.

22 **D. Air, Water, and Land Resources Quality Goal 1, Policy 1B**

23 The policy provides:

24 “Yamhill County will, in making land use decisions relative to industrial or other uses
25 likely to pose a threat to air quality, consider proximity of the proposed use to
26 residential areas and meteorological factors such as seasonal prevailing wind
27 direction and velocity.”

1 FHC argues that the decision does not comply with this policy because it does not consider
2 air pollution impacts within the City of Newberg and to migrant farmworker housing of CEF.
3 Respondents argue, and we agree, that impacts of air pollution inside the city is a concern for the
4 city not the county. As respondents point out, FHC is a petitioner in the companion City of
5 Newberg appeal and may raise that issue in that appeal should it choose. The findings also
6 adequately explain that no potential “hotspots,” localized air quality problems, are identified that
7 could cause damage to human health. Record 5249. FHC does not challenge those findings.

8 This subassignment of error is denied.

9 FHC’s second assignment of error is denied.

10 **FIFTH ASSIGNMENT OF ERROR (FRIENDS)**

11 In Friends’ original fifth assignment of error, they raised a procedural assignment of error,
12 arguing that the county erred by relying on the “Heitsch Rebuttal Letter” (rebuttal letter) that was not
13 included in the record. After the petitions for review had been filed, ODOT moved to supplement
14 the record to include the rebuttal letter which was inadvertently left out of the record.²¹ We allowed
15 the rebuttal letter to be included in the record and gave petitioners an additional opportunity to
16 respond to issues regarding the rebuttal letter.

17 In Friends’ supplemental petition for review, they raise new assignments of error. In our
18 order allowing the record to be supplemented and to allow petitioners the opportunity to file
19 supplemental petitions for review, we only allowed petitioners to address issues regarding the
20 rebuttal letter. The new assignments of error raised by Friends are not limited to the rebuttal letter
21 and are rejected without further discussion.

22 The only remaining issue regarding the rebuttal letter that is properly raised or not already
23 resolved in this opinion is whether the county committed a procedural error by allowing the letter to
24 be submitted at the local level. Initially, Friends argue the county erred by allowing ODOT to have

²¹ The parties agreed that the rebuttal letter should have been included in the record, but due to an oversight by the county in preparing the record it was omitted.

1 the final word by submitting the final legal argument that should be reserved for the applicant.
2 According to Friends, because the county rather than ODOT was the actual applicant, it was
3 improper to allow ODOT to have the final word. The county found that ODOT was essentially the
4 applicant and that it was proper to allow ODOT the final word. Record 5903. We agree with the
5 county that in this case, involving a multi-jurisdictional bypass, it was appropriate to treat ODOT as
6 the applicant.²² We also agree with ODOT that the rebuttal letter directly responded to issues
7 raised by Friends and others and offered no new evidence. Therefore, Friends' substantial rights
8 were not prejudiced and remand is not warranted.

9 Friends' fifth assignment of error and supplemental assignments of error are denied.

10 **SEVENTH ASSIGNMENT OF ERROR (CEF)**

11 In its seventh assignment of error, CEF argues that if any of the three decisions challenged in
12 this appeal are remanded, then the remaining decisions must be remanded as well. Because we
13 have not remanded any of the challenged decisions, this assignment of error is moot.

14 **EIGHTH ASSIGNMENT OF ERROR (CEF)**

15 In its eighth assignment of error, CEF argues that if we remand the City of Dundee's
16 decision adopting a comprehensive plan amendment, then this appeal of the county's decision must
17 also be remanded. Because we do not remand the City of Dundee's decision, this assignment of
18 error is moot.

19 **NINTH ASSIGNMENT OF ERROR (CEF)**

20 CEF withdrew its ninth assignment of error regarding the rebuttal letter after the rebuttal
21 letter was included in the record.

²² ORS 197.763(6)(e) requires that the "applicant" be given the right to submit "final written argument" in quasi-judicial land use proceedings. ORS 197.763, however, does not apply to a legislative decision, so there is no statutory requirement that an applicant must have the last word in a legislative proceeding. Someone has to have the last word, and no authority cited to us prevents the county from allowing ODOT to have it.

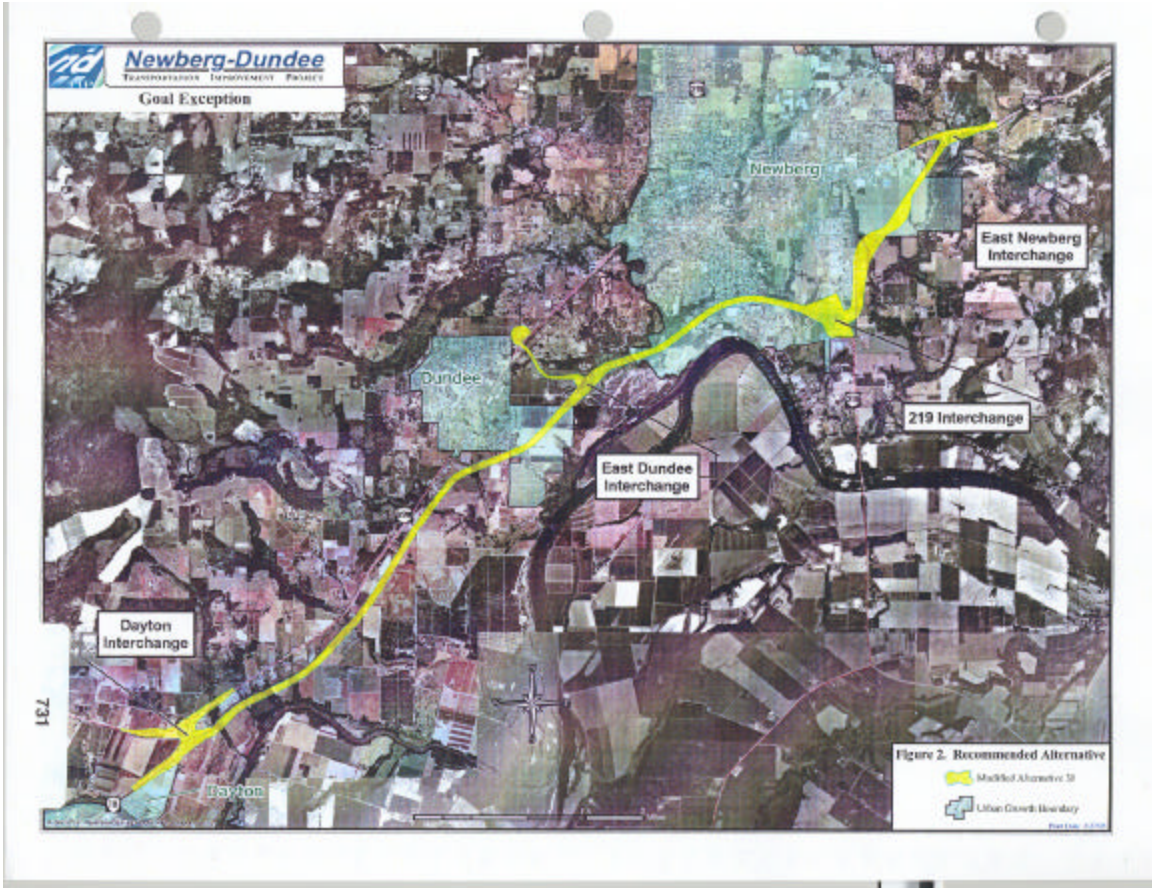
1 **TENTH ASSIGNMENT OF ERROR (CEF)**

2 The tenth assignment of error incorporates the assignments of error of the other petitioners
3 that we have already resolved.

4 CEF's tenth assignment of error is denied.

5 The county's decision is affirmed.

6



1
2