BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEBBY TODD,
Petitioner,

vs.

CITY OF FLORENCE,
Respondent.

LUBA No. 2006-068

FINAL OPINION
AND ORDER

Appeal from City of Florence.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioner.

Emily N. Jerome, Eugene, filed the response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick, PC.

BASSHAM, Board Chair.

HOLSTUN, Board Member, concurring.

REMANDED 08/29/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city ordinance amending the city comprehensive plan and adopting an exception to Statewide Planning Goal 11 (Public Facilities and Services), in order to extend city sewer services outside the city urban growth boundary onto tribal trust land.

FACTS

Adjacent to the city limits and urban growth boundary (UGB) lies the Hatch Tract, a 91-acre tract that is held in trust for the federally-recognized Confederated Tribes of the Coos, Lower Umpqua, and Suislaw Indians (the Tribes). Because the tract is federally-protected trust land, the city lacks authority to regulate the use of the tract, even if the tract were inside the city limits and UGB. The tract is currently developed with a casino in a temporary structure, office space, a 30-space recreational vehicle park, and 315 parking spaces. Development on the property is currently served by water wells and an on-site wastewater treatment facility with a limited capacity.

The Tribes plan extensive new development on the tract, potentially including a 60,000 to 100,000-square foot permanent casino building, a 100-unit hotel, two restaurants, a 10,000-square foot conference center, a 5,000-square foot commercial/retail space, and a tribal administrative building. Such development would either require that the existing on-site wastewater treatment facility be significantly upgraded, or that the tract be served by the city treatment system. In November 2005, city voters authorized the city to enter into an intergovernmental agreement (IGA) with the Tribes under which the city would extend its sewer services to the Hatch tract, as well as two other pieces of tribal property.[1] The city and the Tribes entered into such an IGA. After consulting with the state Department of Land

[1] The challenged decision authorizes only extension of services to the Hatch tract, and does not authorize extension of services to the other two tribal properties.

Conservation and Development (DLCD), the city determined that an exception to Goal 11 is necessary in order to extend sewer services outside the UGB.

The city planning commission and city council held public hearings, at the conclusion of which the city council adopted an ordinance that amends the comprehensive plan to include a "reasons" exception to Goal 11. The findings adopted to support the ordinance take the position that because the city lacks authority to regulate land uses on the subject property, for purposes of the reasons exception criteria the "proposed use" is the extended sewer system itself, not the development that would be served by the extended sewer system.

This appeal followed.

INTRODUCTION

Goal 11 is "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." In relevant part, Goal 11 prohibits the "extensions of sewer lines from within urban growth boundaries * * * to serve land outside those boundaries[.]"[2] ORS 197.732(1) and Goal 2, Part II(c) allow a local government to adopt a "reasons" exception to a Goal requirement or prohibition where, based on consideration of four factors, the local government identifies reasons that "justify why the state policy embodied in the applicable goals should not apply[.]"

OAR 660-004-0020(1) implements the statute and goal, and provides that:

> "If a jurisdiction determines there are reasons consistent with OAR 660-004-0022 to use resource lands for uses not allowed by the applicable Goal *or to allow public facilities or services not allowed by the applicable Goal*, the

[2] Goal 11 provides, in relevant part:

> "Local Governments shall not allow the establishment or extension of sewer systems outside urban growth boundaries or unincorporated community boundaries, or allow extensions of sewer lines from within urban growth boundaries or unincorporated community boundaries to serve land outside those boundaries, except where the new or extended system is the only practicable alternative to mitigate a public health hazard and will not adversely affect farm or forest land."

justification shall be set forth in the comprehensive plan as an exception." (Emphasis added).[3]

OAR 660-004-0020(2) sets out the four factors that must be addressed when taking a goal exception.[4] All four factors involve to some extent analysis of the "use" or "proposed use" or words to that effect.

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[3] The emphasized language was added to OAR 660-004-0020(1) in 2004, along with language at OAR 660-004-0020(2)(b)(B)(iv) that requires that the local government address whether "the proposed use [can] be reasonably accommodated without the provision of a proposed public facility or service?" *See* n 4, below.

[4] OAR 660-004-0020(2) provides, in relevant part:

> "The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:
>
> "(a) 'Reasons justify why the state policy embodied in the applicable goals should not apply': The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;
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> "(b) 'Areas which do not require a new exception cannot reasonably accommodate the use':
>
> "(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;
>
> "(B) 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 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?

OAR 660-004-0020(1) references OAR 660-004-0022, which describes appropriate reasons for various specific types of uses. OAR 660-004-0022(1) is a catch-all provision that applies to "uses not specifically provided for in subsequent sections of this rule or in OAR 660-012-0070 or OAR chapter 660, division 014."[5] The catch-all provision lists a set

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> "(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?
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> "* * * * *
>
> "(c) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in 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. * * * 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;
>
> "(d) 'The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.' * * *."

[5] OAR 660-004-0022 provides, in relevant part:

> "An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:
>
> "(1) For uses not specifically provided for in subsequent sections of this rule or in OAR 660-012-0070 or OAR chapter 660, division 14, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:
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> "(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either

of non-exclusive reasons why the policy embodied by the applicable goals should not apply, including, *inter alia*, a "demonstrated need" for the proposed use.

Finally, OAR Chapter 660, division 011 implements Goal 11, and like the goal prohibits the extension of a sewer system outside a UGB except in limited circumstances.[6] OAR 660-011-0060(9) allows the extension of a sewer system outside the UGB where the local government approves a reasons exception to Goal 11, subject to land use regulations that "prohibit the sewer system from serving any uses or areas other than those justified in the exception."[7] OAR 660-011-0060(9) also provides a non-exclusive example of a reason

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

[6] OAR 660-011-0060(2) provides:

> "Except as provided in sections (3), (4), (8), and (9) of this rule, and consistent with Goal 11, a local government shall not allow:
>
> "(a) The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries;
>
> "(b) The extension of sewer lines from within urban growth boundaries or unincorporated community boundaries in order to serve uses on land outside those boundaries[.]"

[7] OAR 660-011-0060(9) provides, in full:

> "A local government may allow the establishment of new sewer systems or the extension of sewer lines not otherwise provided for in section (4) of this rule, or allow a use to connect to an existing sewer line not otherwise provided for in section (8) of this rule, provided the standards for an exception to Goal 11 have been met, and provided the local government adopts land use regulations that prohibit the sewer system from serving any uses or areas other than those justified in the exception. Appropriate reasons and facts for an exception to Goal 11 include but are not limited to the following:
>
> "(a) The new system, or extension of an existing system, is necessary to avoid an imminent and significant public health hazard that would otherwise result if the sewer service is not provided; and

that might justify an exception to Goal 11, to "avoid an imminent and significant public health hazard." With that overview, we turn to petitioner's assignments of error.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

These assignments of error challenge the city's findings under OAR 660-004-0020(2)(b)—(d). A consistent theme throughout these assignments of error is petitioner's contention that the city erred in viewing the "proposed use" for purposes of OAR 660-004-0020(2)(b)—(d) to be the sewer extension itself, and not the permanent casino, hotel, etc. that the Tribes plan and that the sewer extension will serve and facilitate.[8] According to petitioner, OAR 660-004-0020(2)(b) through (d) require the city to evaluate whether the proposed *development* that would be served by the extended sewer system can be accommodated within the UGB or other areas that do not require a new exception, etc. For example, petitioner argues that while there may be some basis for concluding that the proposed *casino* cannot be accommodated within the UGB, because it can only be sited on trust land, there is no evidence that the proposed *hotel* and other *commercial development* cannot be accommodated within the UGB.

The city generally responds that, in taking a Goal 11 exception, the "proposed use" for purposes of OAR 660-004-0020(2)(b)—(d) is properly viewed as the public facility that is established or extended outside the UGB, not the development that may be served or facilitated by those uses. According to the city, whether to adopt amendments that allow such development is evaluated exclusively under other Goals that may govern or prohibit the proposed development, for example Goals 3, 4 or 14, and such development is never evaluated under Goal 11. That approach is even more appropriate in the present case, the

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> "(b) There is no practicable alternative to the sewer system in order to avoid the imminent public health hazard."

[8] Petitioner makes a similar argument regarding OAR 660-004-0022(1) in the first assignment of error, which we address below.

city argues, because the Hatch tract is trust land and not subject to the statewide planning goals; indeed neither the city nor the county has jurisdiction to review or approve development on the tract. Further, the city notes that the Tribes have the legal right to construct a wastewater treatment facility sized to accommodate the proposed development, and need not rely on the city to extend its services.

In support of that view of the "proposed use," the city cites *DLCD v. Umatilla County*, 39 Or LUBA 715, 724-25 (2001). That case involved a county decision adopting exceptions to Goals 3, 11 and 14 to allow residential development with community water and sewer facilities adjacent to an existing rural golf course. We remanded the decision in order for the county to determine whether the proposed development was rural residential development, in which case the county was required to apply criteria at OAR 660-004-0022(2), or urban residential development, in which case the county was required to apply OAR 660-014-0040. We also remanded the county's Goal 11 findings under OAR 660-004-0022(1), because the county limited its analysis of the "proposed use or activity" to the proposed *housing*, and did not separately justify the need for community sewer and water facilities. Assuming without deciding that the proposed housing was rural rather than urban residential development, we held that "because community water and sewer are not generally necessary for rural residential development, those facilities must be approved as a separate use." *Id.* at 725. It is not enough, we held in *DLCD v. Umatilla County*, to demonstrate under OAR 660-004-0022(1)(a) that the proposed housing is needed or justified; the county must also establish that there is also a demonstrated need for the proposed community water and sewer facilities. *Id.* at 727.

While *DLCD v. Umatilla County* indicates that the public facility *and* the development that facility will serve must be justified as "proposed uses" under OAR 660-004-0020(1) and 660-004-0022, the facts in that case did not require us to decide what analysis is undertaken where the local government is only approving the establishment or

extension of public facilities, and not the development the facilities will serve. However we might have decided that question under the rules as they stood in 2001, as noted above OAR 660-004-0020(2) was amended in 2004 in ways that make the city's interpretation less tenable.[9]

The 2004 amendments added OAR 660-004-0020(2)(b)(B)(iv), among other language. *See* n 4. That subsection requires that the local government ask and answer whether "the proposed use [can] be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?" It seems clear for purposes of OAR 660-004-0020(2)(b)(B)(iv) that the "proposed use" and a "proposed public facility or service" are two different things. In the context of a Goal 11 exception to extend public facilities to serve proposed development on lands outside the urban growth boundary, the "proposed use" can only be the proposed development served by the facility extension. OAR 660-004-0020(2)(b)(B)(iv), at least, appears to require the local government to evaluate both the "proposed use" and any public facilities proposed to serve that use.

As the city notes, it is true that, in most circumstances where a city approves a Goal 11 exception to extend urban public facilities outside a UGB onto rural land, the city will not have jurisdiction over the property to be served by the facilities and will not directly review or approve that proposed development, or adopt goal exceptions necessary to allow such development. In the typical case, it will be a county, not a city, that will adopt any needed exceptions to Goals 3, 4 or 14 necessary to allow proposed development on rural land outside the UGB.

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[9] The framework for interpreting statutes set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), also applies to interpretation of administrative rules. The focus in either case is on discerning the intent of the enacting body, in the case of OAR 660-004-0020, the Land Conservation and Development Commission (LCDC). The starting point of the analysis is the text and context of the statute or rule. *Id.* at 610-611. If the text and context can reasonably be construed in more than one way, examination of legislative history is appropriate. *Id.* at 611-612. If legislative history is unclear, after consideration of the text, context and legislative history, then resort to general maxims of statutory construction is permissible. *Id.* at 612.

In the present case, no goal exceptions or other local government approvals are required to allow the development proposed by the Tribes. Nonetheless, a Goal 11 exception is necessary pursuant to the criteria in OAR 660-004-0020(2) if the city is to extend the city sewer system to serve the Hatch tract. OAR 660-004-0020(2)(b)(B)(iv) plainly requires the jurisdiction taking a Goal 11 exception to make certain determinations regarding the "proposed use," which as the rule is worded can only mean something different than the "proposed public facility or service" that is being extended. We therefore disagree with the city that the "proposed use," at least for purposes of OAR 660-004-0020(2)(b)(B)(iv), is the public facility that is being established or extended.

Moreover, we see no basis to understand "proposed use" as that term is used elsewhere in OAR 660-004-0020(2)(b) through (d) to mean something different than "proposed use" as that term is used in OAR 660-004-0020(2)(b)(B)(iv). Read as a whole, it seems reasonably clear that where the criteria in OAR 660-004-0020(2)(b) through (d) require evaluation of the "proposed use" the local government must evaluate the uses that will be facilitated by the proposed exception to Goal 11, as well as the proposed facility extension, even if those uses are not subject to the city's jurisdiction or approval authority, and even if those uses do not require a goal exception. In doing so, the city would not, of course, be approving or denying the proposed development, or adopting goal exceptions to allow that development. Rather, it would determine whether the extension of public facilities to serve certain uses served by that extension is justified under the rule's criteria.

Admittedly, it is awkward, at least, to apply the criteria in OAR 660-004-0020(2)(b)—(d) to evaluate a "proposed use" that does not require a goal exception and that is not even subject to any local government's review authority. Those criteria are obviously written to address the more typical case, where the "proposed use" requires a Goal 3, 4 or 14 exception, in addition to any exception required to establish or extend public services to serve those uses. However, it is equally awkward to apply the rule criteria under the city's

view that the "proposed use" is the proposed extension of public services. That view is inconsistent with the language of OAR 660-004-0020(2)(b)(B)(iv), as discussed above. In addition, as the city commented in its findings, application of the criteria in OAR 660-004-0020(2)(b) to evaluate *only* the extension of public services rapidly becomes a circuitous exercise.[10] The alternatives analysis required by OAR 660-004-0020(2)(b) has little or no meaning if the city evaluates only the extension of services to serve a particular property, and does not ask whether the uses facilitated by that extension can be accommodated at other sites, or without the provision of public services. Similarly, the ESEE analysis required by OAR 660-004-0020(2)(c) is an empty exercise if the only property being evaluated is the subject property onto which public facilities are extended. And it makes little sense to evaluate only the compatibility of public facilities with adjacent uses under OAR 660-004-0020(2)(d) without also considering the uses served by those facilities, because typically it is the land use that impacts adjacent uses, not the public facilities that may serve those uses. The focus of OAR 660-004-0020(2)(d) is clearly on the proposed use of the land, and only tangentially on public facilities that may serve those uses.

In summary, although there is no smooth way to interpret and apply OAR 660-004-0020(2)(b)—(d) in the present circumstances, it seems reasonably clear that (1) the criteria in OAR 660-004-0020(2)(b)—(d) apply to the proposed Goal 11 exception, (2) those criteria require some evaluation of the "proposed use," (3) the "proposed use" and the public facilities established or extended pursuant to a Goal 11 exception are different things that must be separately evaluated, and (4) in the context of a Goal 11 exception to establish or extend public facilities to serve proposed development, such development must be evaluated

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[10] The city's findings addressing OAR 660-004-0020(2)(b)(B)(iv) state, in full:

> "As explained above, the 'proposed use' is the extraterritorial extension of public wastewater facilities. Therefore, this question becomes circuitous. By its very nature, approval of the proposed use means that public facilities will be provided outside the UGB." Record 44.

under the criteria in OAR 660-004-0020(2)(b)—(d) as the "proposed use," even if that use does not itself require a goal exception. While it is hard to tell if it is an oversight or a deliberate policy choice, for whatever reason the text of OAR 660-004-0020(2)(b)—(d) was drafted in a manner that requires local governments to evaluate the proposed use of land subject to a Goal 11 exception, even if no other goal exception or approval is necessary to allow those uses.[11]

Accordingly, we agree with petitioner that the city made a general analytical error in treating the proposed facility extension as the "proposed use." Given the pervasiveness of the county's analytical error, there is no point in addressing the specific arguments under these assignments of error. Remand is necessary for the county to adopt findings that justify the "proposed use" of the subject property under OAR OAR 660-004-0020(2)(b)—(d), consistent with the view of that term expressed in this opinion.

The second, third and fourth assignments of error are sustained.

FIRST ASSIGNMENT OF ERROR

Under this assignment of error, petitioner challenges the city's findings under OAR 660-004-0020(2)(a) and OAR 660-004-0022(1)(a) and (c) that "[r]easons justify why the state policy embodied in the applicable goals should not apply[.]" *See* ns 4, 5.

[11] We are directed to no legislative history indicating whether LCDC considered how OAR 660-004-0020(2)(b)—(d) should be applied when the only goal exception needed or sought is to Goal 11. One possibility is that LCDC did not intend that the language requiring evaluation of the "proposed use" be applied at all when the use served by newly established or extended public facilities does not require a goal exception. Some of the criteria in OAR 660-004-0020(2)(b)—(d) would only be relevant in particular circumstances if that were the case. For example, OAR 660-004-0020(2)(b)(B)(iv) appears to require an answer only when the "provision of a proposed public facility or service" is involved. Presumably, if no public facility or service is provided or proposed, then the local government's findings need only note that fact and move on to other, more relevant criteria. Similarly, LCDC may have intended that if there is no "proposed use" that requires a goal exception, the criteria in OAR 660-004-0020 that require evaluation of the "proposed use" simply do not apply. However, as noted, the "proposed use" is the predominant focus of OAR 660-004-0020(2)(b)—(d), and if the criteria that require evaluation of the "proposed use" do not apply to a Goal 11 exception then there is not much in the rule that must be addressed, perhaps only OAR 660-004-0020(2)(a). Yet, the 2004 amendments strongly suggest that LCDC intended that the criteria in OAR 660-004-0020(2)(b)—(d) apply to Goal 11 exceptions. That leads us to conclude that LCDC intended what the plain text of OAR 660-004-0020(2)(b)—(d) appears to require, that an exception to Goal 11 is allowed only when proposed uses served by newly established or extended facilities also satisfy the exception criteria.

Specifically, petitioner challenges the city's findings under OAR 660-004-0022(1)(a) and (c) that there is a "demonstrated need for the proposed use or activity," and that the "proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site." *See* n 5.

A. Applicability of OAR 660-004-0022(1)(a)—(c)

The city apparently questioned, initially, whether OAR 660-004-0022 even applies, because the second sentence of the rule states that 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." *See* n 5 (emphasis added). The Hatch Tract, as tribal trust land, is not "resource land" as that term is defined at OAR 660-004-0005(2), because it is not subject to Goal 3 (Agricultural Lands), 4 (Forest Lands) or other identified statewide planning goals that govern resource lands.[12] However, on the advice of DLCD, the city adopted findings addressing OAR 660-004-0022(1)(a)—(c). We do not understand the city to dispute on appeal that OAR 660-004-0022(1) applies, and therefore we assume for purposes of this opinion that OAR 660-004-0022 applies to a reasons exception that does not involve resource lands.[13]

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[12] OAR 660-004-0005(2) defines "Resource Land" as "land subject to the statewide Goals listed in OAR 660-004-0010(1)(a)—(g) except subsections (c) and (d)." That list includes Goals 3 and 4, and the estuarine and coastal Goals (16, 17, and 18), but not Goal 14 (Urbanization) or Goal 11. Thus, land subject only to Goal 11 would not be "resource land," the way the rule definition is worded. The city asserts, and it seems undisputed, that the Hatch Tract is not subject to any resource statewide planning goals—or any statewide planning goals at all—and is not "resource land."

[13] OAR 660-004-0022 can be read to limit application of the rule to reasons exceptions involving resource lands. However, it does not expressly state that, and it is not clear to us that that reading is compelled by the second sentence of OAR 660-004-0022 or consistent with other rule language and context. OAR 660-004-0022(2) and (3) list reasons applicable to allowing rural residential and industrial development with specific reference to "resource lands," but that reference makes sense, because rural residential and industrial development are generally allowed on non-resource lands without the need for an exception. In contrast, the catch-all provision at OAR 660-004-0022(1) does not refer to "resource lands." Similarly, OAR 660-004-0022(4)—(12) provide reasons for various types of lands or uses protected or governed by various goals, without reference to "resource lands." For example, OAR 660-004-0022(4) governs expansions of rural unincorporated communities, and appears to apply whether that expansion is onto resource land or non-resource land. OAR 660-004-0022(12) governs transportation improvements not allowed on "rural lands," and again appears to apply whether or not the rural lands are also resource lands. Further, the syntax of OAR 660-

Petitioner argues that OAR 660-004-0022(1) elaborates on the general requirement at OAR 660-004-0020(2)(a) that the local government identify reasons that "justify why the state policy embodied in the applicable goals should not apply[.]" The city found, and petitioner agrees, that the "policy" embodied in Goal 11 is that "urban levels of public facilities belong inside UGBs." Record 41.

OAR 660-004-0022(1) provides a non-exclusive set of "reasons" that, if found to be present, would justify not applying the state policy embodied in the applicable goals. The city's findings include two paragraphs under the heading of OAR 660-004-0020(2)(a), and a number of additional paragraphs under the headings for OAR 660-004-0022(1)(a) and (c).[14] As an initial matter, the city argues that petitioner misreads OAR 660-004-0022(1) to provide the *exclusive* set of reasons that justify not applying the state policy embodied in the goals. The city argues that petitioner's challenges to the city's findings addressing OAR 660-004-

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004-0020(1) makes it clear that OAR 660-004-0022 applies to reasons exceptions that "allow public facilities or services not allowed by the applicable Goal[.]" A Goal 11 exception may certainly be required to extend services to non-resource lands, and nothing in OAR 660-004-0020 suggests that OAR 660-004-0022 would not apply in such circumstances.

[14] The city's findings under the heading of OAR 660-004-0020(1)(a) state, in full:

> "Finding: The state policy embodied in Goal 11 is that urban levels of public facilities belong inside UGBs. That policy should not apply with respect to the provision of wastewater services to a site directly adjacent to a UGB and under the jurisdiction of a sovereign nation. As a sovereign nation, the Tribes have significant authority to develop the site to meet their needs without compliance with state or local land use regulations. The Tribes have developed, and intend to intensify, urban-level uses on the Tribal Properties. This makes the Tribal Properties much different from other lands outside of the UGB to which Goal 11 is intended to be applied. Due to the Tribal Properties' close proximity to the City, ensuring that sewage is treated properly is a critical concern to the residents of the City of Florence. Improperly treated sewage would potentially be a health hazard to the community as well as have the effect of degrading water quality of the area.
>
> "One way the Tribes could avoid this would be to construct their own wastewater treatment facility. From a practical point of view this is expensive and would be a duplication of services that the City already provides. Avoiding duplication of services would be beneficial to both the Tribes and the City. In addition to fiscal considerations, the extension of the existing City of Florence wastewater treatment facilities to the Tribal Properties will benefit both entities because it will significantly decrease the possibility of a public health hazard. Two major sewerage systems in relatively close proximity serving the same area would double the potential for a system failure to occur in a treatment system. These reasons justify the extension of wastewater facilities outside the Florence UGB." Record 41.

0022(1)(a) and (c) do not provide a basis for reversal or remand, if the city's other findings articulate sufficient "reasons" justifying why the state policy embodied in the goals should not apply. In other words, the city argues, it does not matter if the city failed to identify a "demonstrated need for the proposed use or activity" based on the requirements of Goals 3 through 19, or failed to identify "special features or qualities that necessitate" locating the proposed use on the subject property, if the county's other reasons suffice to satisfy OAR 660-004-0020(2)(a).

The city's findings specifically addressing OAR 660-004-0022(1)(a) and (c) are longer and not set out here, but those findings mostly elaborate on the basic "reasons" in the findings quoted in n 14. For example, in the above-quoted passage the city cites the potential for "degraded water quality" resulting from improperly treated sewage if the Tribes' treatment plant is not upgraded or replaced with city facilities. In its findings under OAR 660-004-0022(1)(a) the city concludes that there is a "demonstrated need" to extend city facilities to avoid violating the requirements of Statewide Planning Goal 6 (Air, Water, and Land Quality), with respect to degraded water quality.

As far as we can tell, the "reasons" set out in the above-quoted findings involve (1) the expense to the Tribes in upgrading the existing system, (2) the potential for "health hazards" from having two independent sewer systems, one of which is run by the Tribes, and (3) the Tribe's sovereignty and its right to develop the tract with urban uses without state or local approval.

While the city is correct that the reasons set out in OAR 660-004-0022(1) are non-exclusive, petitioner's arguments are not necessarily limited to the findings that address those particular reasons. Petitioner also appears to challenge the findings quoted in n 14 that may be read to describe other reasons independent of the reasons set out in OAR 660-004-0022(1). Accordingly, we see no basis to deny this assignment of error without considering the merits of petitioner's arguments.

B. Proposed Use or Activity

The parties repeat their arguments with respect to the "proposed use or activity" that must be evaluated under OAR 660-004-0022(1) that were advanced under the "proposed use" language in OAR 660-004-0020(2)(b)—(d). Petitioner argues that the city erred in treating the "proposed use or activity" as the extended sewer line, rather than the casino, hotel, etc. that will be facilitated by that public facility. To the extent the city relies on the reasons set out in OAR 660-004-0022(1)(a)—(c), for the reasons set out above we agree with petitioner that the "proposed use" for purposes of that rule is the proposed use or development that will be served and facilitated by the extended sewer system, not the extended sewer system itself.

However, as noted, the reasons set out in OAR 660-004-0022(1)(a)—(c) are not the exclusive set of reasons that may justify an exception. It is at least theoretically possible for the city to identify a sufficient reason "why the state policy embodied in the applicable goal should not apply" that has nothing to do with the ultimate use or the proposed development of the exception area.[15] With respect to Goal 11, OAR 660-011-0060(9)(a) provides a non-exclusive reason—to avoid an "imminent and significant public health hazard that would otherwise result if the sewer service is not provided[.]" Presumably, the typical circumstances in which the reason set out in OAR 660-011-0060(9) would apply involve existing development served by septic systems that are in danger of failing but have not yet

[15] Unlike the other three factors in OAR 660-004-0020(2)(b)—(d), the first factor described at OAR 660-004-0020(2)(a) ("Reasons justify why the state policy embodied in the applicable goals should not apply") does not refer to a "proposed use" or "use." However, the subsequent text in OAR 660-004-0020(2)(a) does require that the local government set forth the "facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the *use being planned* and why the *use* requires a location on resource land[.]" (Emphasis added). Given that language, it seems that at least some consideration must be given to the "use being planned" under OAR 660-004-0020(2)(a), even if the local government is not relying on the catch-all reasons set out in OAR 660-004-0022(1)(a)—(c) and is attempting to identify a "reason" that does not turn on the "proposed use or activity." However, petitioner does not cite to or advance arguments under the emphasized language in OAR 660-004-0020(1)(a), and we do not consider under this assignment of error whether the city erred in failing to consider "the amount of land for the use being planned[.]"

failed. Such circumstances may well justify a reasons exception to Goal 11 without need to address the reasons set out in OAR 660-004-0022(a)—(c), and therefore without the need to evaluate the "proposed use or activity."

Therefore, if the city can articulate one or more sufficient "reasons" that do not rely on OAR 660-004-0022(1)(a)—(c), the city's pervasive error in characterizing the "proposed use" as the extended sewer system would not necessarily be a basis to reverse or remand the city's findings under that rule. Under both OAR 660-004-0022(1) and 660-011-0060(9), the city is free to identify reasons other than those set out in the rules that "justify why the state policy embodied in the applicable goals should not apply." If the local government takes that approach, then the catch-all criteria at OAR 660-004-0022(1)(a)—(c) do not apply, and there is no requirement to evaluate the "proposed use or activity."

C. Reasons Why the State Policy Embodied in Goal 11 Should Not Apply

Turning to the findings that directly address OAR 660-004-0020(2)(a), quoted at n 14, we agree with petitioner that the first reason—the economic savings to the Tribes from not having to upgrade their current system—is an insufficient "reason" why the state policy embodied in Goal 11 should not apply. In many cases it will be more cost-effective for a developer of lands outside a UGB to rely on extended urban services rather than develop services on site. Such fiscal conveniences, without more, are insufficient to justify why the policy embodied in Goal 11 should not apply. While the reason set out in OAR 660-011-0060(9)(a) (imminent health hazard) is non-exclusive, we believe it is likely that LCDC intended that reasons sufficient to justify a Goal 11 exception must be of comparable force and weight. Similarly, while the catch-all reason set out in OAR 660-004-0022(1) (demonstrated need, etc.) is non-exclusive, LCDC probably intended that other reasons sufficient to justify an exception cross some minimal threshold to ensure that the reasons are not makeweights that render the goal requirement meaningless.

With respect to the second reason, the potential "health hazard" from operating two independent sewer systems, petitioner argues that there is no evidence in the record supporting the city's suggestion that two sewer systems would "double the potential for a system failure[.]" Record 41. Petitioner notes that the DLCD expressed the same concern during the proceedings below. Record 217 ("The staff report and proposed exception statement concludes that somehow the presence of a second wastewater treatment facility in the area doubles the potential for failure. This statement is not supported by facts in the record"). Further, petitioner argues that federal and state agencies have regulatory jurisdiction over any upgrade to the Tribes' wastewater treatment facility, and there is no basis to believe that the Tribes are incapable of complying with those agencies' requirements and safely operating a separate, upgraded wastewater facility.

The city responds that following DLCD's suggestion the Tribes obtained a report from a consultant explaining why the Tribes' current system is inadequate to accommodate the proposed development, and detailing why relying on the city's system is a superior choice compared to upgrading the Tribes' system.[16] According to the city, the consultant's

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[16] The consultant's report states, in relevant part:

> ""[T]he following factors should be taken into consideration with regard to avoiding a public health hazard:
>
> > "Not only must the treatment plan be expanded but also additional effluent disposal alternatives must be found, such as additional rapid infiltration beds, spray irrigation or drip irrigation, or reclamation/re-use.
> >
> > "The City of Florence system offers more reliable service, because wastewater treatment plant operators are public employees, and as such must maintain operator certifications and achieve continuing education. If the Tribe chooses to expand their WWTF [wastewater treatment facility] operations, they will be required to hire an operator with at least a Grade Level III Wastewater Operators Certificate.
> >
> > "Without sufficient reliability/redundancy of critical process equipment, there is a higher chance of the existing WWTF not meeting permit requirements and inadvertently discharging insufficiently treated wastewater to the rapid infiltration bed, thus potentially contaminating the groundwater, which is a drinking water aquifer.

report supports the city's findings that extending the city's system is necessary to avoid a potential health hazard.

We are not cited to any evidence supporting the city's finding that having two independent systems "would double the potential for system failure[.]" As far as we are advised, the chance of system failure in a single geographic area depends on the nature and operation of the system, not on how many independent systems exist in that area. It seems unlikely that an expanded single system would have lower chance of failure than two independent but otherwise equivalent systems serving the same geographic area. The city's real concern seems to be that an upgraded system on the Hatch tract may not function as reliably as the city system, even though it would presumably comply with all applicable federal and state regulations. However, the evidence cited to us does not substantiate that concern. For example, the consultant observed that an upgraded facility would require the Tribes to hire a certified operator, but there is no suggestion that the Tribes are incapable of obtaining the services of a certified operator. Similarly, the consultant states that an upgraded facility would require additional disposal alternatives, but does not suggest that such alternatives are not reasonably available. Accordingly, we agree with petitioner that the city's findings that extending the city system is necessary to reduce the potential for health hazards is not supported by substantial evidence.

Turning to the final reason—the trust status of the Hatch tract, and the Tribes' right to develop the tract with urban uses without state or local approval—we understand petitioner to argue that that reason is insufficient to justify an exception to Goal 11. We understand petitioner to argue that a similar rationale could support extending public facilities outside

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> "Most importantly, the Tribes are burdened with the responsibility (by operating an on-site system) of protecting and enhancing natural resources. In the event of a process failure, these resources be become exposed to contamination. Connecting to the City of Florence system eliminates all risks to natural resources and provides additional assurance of better protecting public health and safety." Record 239 (bullets omitted).

UGBs to serve any trust lands, federal lands or other lands that for one reason or another are not subject to the statewide planning goals and local government approvals. According to petitioner, there is no reason why such trust or federal lands that adjoin UGBs cannot be placed within UGBs, making a Goal 11 exception unnecessary and placing any proposed urban uses within UGBs where they belong.

The city responds that the "special status" of the Hatch tract and the Tribes' right to develop urban uses on the tract is a sufficient basis to conclude that the policy embodied in Goal 11 should not apply. We understand the city to argue that, as the city found, the policy embodied in Goal 11 is to ensure that "urban levels of public facilities belong inside UGBs," and that that policy has no application where, as here, lands adjoining a UGB have the legal right and ability to develop urban uses and urban levels of public facilities. We understand the city to argue that it is consistent with the policy embodied in Goal 11 to provide for a single public facility to serve two adjoining areas that each have the legal right and ability to develop at urban densities and to construct urban-level facilities.

Petitioner is correct that one approach the city and Tribes could have taken is to amend the city UGB to include the Hatch tract, obviating the need for a Goal 11 exception. However, a UGB amendment would also require taking a reasons exception under the same four Goal 2, Part II factors and administrative rules that apply in the present case. OAR 660-004-0010(1)(c)(B). We are not aware of any requirement that the city choose a reasons exception to amend the UGB over a reasons exception to Goal 11. Petitioner may also be correct that a similar rationale could justify a Goal 11 exception to serve federal, tribal or other lands not subject to the goals. However, any such exception must stand on its own merits, and the fact that a similar rationale might justify a Goal 11 exception in similar cases does not mean that the rationale is insufficient.

We generally agree with the city that the Tribes' legal right to develop the Hatch tract with urban uses served by urban-level facilities is or can be a sufficient reason to conclude

that the policy embodied in Goal 11 should not apply, for purposes of OAR 660-004-0020(2)(a), and the nonexclusive "other reasons" provisions of OAR 660-004-0022(1) and OAR 660-011-0060(9). The policy underlying Goal 11 seems little offended by allowing a single sewer system to serve two adjoining areas that each have the legal right and practical ability to develop urban uses and urban-level sewer facilities, notwithstanding that one area is within a UGB and the other outside the UGB. Goal 11 requires an "orderly and efficient arrangement of public facilities and services," and it seems consistent with that requirement to allow two adjoining providers of urban-level facilities to coordinate facilities. The evil that the Goal 11 prohibition is intended to prevent—proliferation of urban uses in rural areas caused by the availability of urban-level services extended from UGBs—is not implicated in the present case, because the Tribes have the right to develop urban-level uses and services on the property and have in fact already done so.

In summary, the city's error in characterizing the "proposed use or activity" as the extended sewer system in its findings addressing the catch-all provision at OAR 660-004-0022(1)(a) and (c) does not provide a basis to reverse or remand under this assignment of error, because the county's findings articulate a sufficient reason why the policy embodied in Goal 11 should not apply that does not rely on OAR 660-004-0022(1)(a) and (c).

The first assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

As noted, OAR 660-011-0060(9) requires that the local government adopting an exception to Goal 11 also adopt "land use regulations that prohibit the sewer system from serving any uses or areas other than those justified in the exception." *See* n 7; *see also* OAR 660-004-0018(4)(a) for a similar but more generally worded requirement. To comply with OAR 660-011-0060(9), DLCD recommended that the city's exception statement

> "be tied to a map that is referenced in the plan. And, the exception must be clear as to the types of uses or activities that will be served by urban services and limit services accordingly. For example, the exception could be linked to

> a land use or master plan prepared by the tribe that identifies uses to be served by the city's services." Record 217.

Although the comprehensive plan amendment includes a map of the Hatch Tract, petitioner contends that neither the map nor the amendment text limits the geographic scope of the extended sewer service. Petitioner notes in this respect that the IGA adopted by the city and tribes contemplates that the city will extend sewer service to two other tribally-owned properties.

In addition, petitioner argues, nothing in the plan amendment limits the uses or types of uses on the site to those justified in the exception. For example, petitioner points out, there is no land use or master plan prepared by the Tribes that the plan amendment is linked to, as DLCD suggested. According to petitioner, that the city cannot impose land use regulations that govern uses on the Hatch Tract does not obviate the requirement in OAR 660-011-0060(9) that the city adopt measures sufficient to "prohibit the sewer system from serving any uses or areas other than those justified in the exception."

The city responds that it adopted a map as part of the comprehensive plan amendment that makes it clear that the extended sewer line can serve only the Hatch Tract. Whatever the IGA may contemplate for the future, the city argues, the fact is that the challenged decision authorizes only service to an identified geographic area, and not other areas, which would require a separate exception for further sewer extensions, when and if one is sought. We agree with the city that the challenged amendments adequately limit the geographic scope of the provided sewer service, for purposes of OAR 660-011-0060(9) and 660-004-0018(4)(a).

With respect to uses, the city contends that it has done all that it legally can, by specifying in the IGA that city sewer service on the tract may serve only residential and commercial uses, not industrial uses. While the IGA can be amended by agreement of the parties, the city argues that the IGA is sufficient to limit use of the tract, to the extent the city is capable of doing so, for purposes of OAR 660-011-0060(9) and 660-004-0018(4)(a).

We agree with petitioner that OAR 660-011-0060(9) requires more than a provision in an IGA limiting use of the subject property to residential and commercial uses, under the present circumstances. We held, above, that at least OAR 660-004-0020(2)(b)—(d) require the city to evaluate the "proposed uses" that will be served by the extended sewer system, even if those uses require no goal exception. In doing so, the city will be required to determine with some specificity what uses or range of uses are proposed on the Hatch tract. The city must adopt land use regulations or comprehensive plan amendments that are adequate to prohibit the sewer system from serving any uses other than those justified in the exception. While any such regulations or comprehensive plan provisions may not directly regulate uses on the Hatch tract, those provisions can require the city to operate its wastewater collection system in a manner that effectively limits uses served by the system to those specifically justified in the exception, consistent with the requirements of OAR 660-011-0060(9).

The fifth assignment of error is sustained.

The city's decision is remanded.

Holstun, Board Member, concurring.

I agree with our resolution of the second, third and fourth assignments of error, but the resulting requirements for approving Goal 11 are awkward. In the more typical case, a decision to extend *urban* sewer lines to serve a use outside the UGB will require both an exception to Goal 11 and an exception to Goal 14 to allow *urban* use of rural land.[17] In those cases, as OAR 660-004-0020(2)(b)—(d) is currently worded, it appears to me that the required exception to Goal 11 will duplicate the required exception to Goal 14. Because no Goal 14 exception is required in this case to authorize an urban use of rural land, it is not a

[17] I use the term urban in its statewide planning goal sense to mean that ill-defined class of uses, facilities and services that must be located inside urban growth boundaries rather than on rural lands that lie beyond UGBs.

typical case. In this atypical case, as OAR 660-004-0020(2)(b)—(d) is currently worded, the required exception to Goal 11 to extend an urban sewer line onto rural land effectively requires the same analysis that a Goal 14 exception would require, even though a Goal 14 exception is not required. That may or may not have been LCDC's intent when it adopted OAR 660-004-0020(2)(b)—(d), but it is the most natural reading of the rule language. Interpreting OAR 660-004-0020(2)(b)—(d) to require that result is somewhat more consistent with the text of OAR 660-004-0020(2)(b)—(d) than the city's interpretation, which renders application of those criteria in adopting a Goal 11 exception problematic at best and meaningless at worst.