

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

3  
4 CHERYLL KINNETT, WM. GARY KINNETT,  
5 DAN WILLIS, LEAH WILLIS, CARRIE BOOTHE,  
6 TERRY DAMEWOOD, CAROL DAMEWOOD,  
7 and SHARYON DAKE,  
8 *Petitioners,*

9  
10 vs.

11 DOUGLAS COUNTY,  
12 *Respondent.*

13  
14 LUBA No. 2008-066

15  
16  
17 FINAL OPINION  
18 AND ORDER

19  
20 Appeal from Douglas County.

21  
22 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of  
23 petitioners. With her on the brief was the Goal One Coalition.

24  
25 No appearance by Douglas County.

26  
27 Stephen Mountainspring, Roseburg, filed an amicus brief on behalf of Singletree  
28 Investments LLC.

29  
30 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,  
31 participated in the decision.

32  
33 REMANDED

08/05/2008

34  
35 You are entitled to judicial review of this Order. Judicial review is governed by the  
36 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a hearings officer’s decision that approves comprehensive plan and zoning map amendments to allow the future establishment of a truck maintenance and repair facility.

**AMICUS**

Singletree Investments LLC (Singletree), the applicant below, moved to intervene on the side of respondent in this appeal. Petitioners opposed that motion as untimely filed. Singletree requested that LUBA treat the intervenor-respondent’s brief that it filed on June 23, 2008 as an amicus brief, if LUBA denied its motion to intervene. In an order dated June 25, 2008, we denied the motion to intervene as untimely filed and granted Singletree’s request that its intervenor-respondent’s brief be accepted and treated as an amicus brief.

**FACTS**

The subject property is 3.62 acre parcel located east of the City of Roseburg on the north side of state highway 138 (North Umpqua Highway) at the intersection of Stocks Lane and North Umpqua Highway, within the Dixonville Rural Community. The property is located within an area where the county has adopted an irrevocably committed exception pursuant to Part II of Statewide Planning Goal 2 (Land Use Planning). ORS 197.732(2)(b); OAR 660-004-0028. The challenged decision changes the comprehensive plan map designation for the property from Committed Residential – 2 Acre (RC2) to Industrial (IN) and changes the zoning map designation from Rural Residential (RR) to Rural Community Industrial (MRC). The applicant plans to construct a freight truck yard and terminal.

The property is vacant and flat and has frontage on North Umpqua Highway. Access to and from the property from North Umpqua Highway will be across Stocks Lane, an existing private road that adjoins the subject property to the west, and a frontage road. The adjoining properties to the north and east are developed with single family dwellings. To the

1 northwest, across Stocks Lane, is an MRC-zoned area that serves as a terminal for a logging  
2 company.

3 The Douglas County Planning Commission heard and approved the application on  
4 January 17, 2008. The commission's decision was appealed to the board of commissioners,  
5 which declined review on April 16, 2008. This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 OAR chapter 660, division 12, the transportation planning rule (TPR), was adopted  
8 by the Land Conservation and Development Commission to implement Statewide Planning  
9 Goal 12 (Transportation). Under OAR 660-012-0060, the county was required to consider  
10 whether the comprehensive plan and zoning map amendments would "significantly affect"  
11 transportation facilities and, if so, adopt appropriate mitigation measures to ensure that the  
12 land uses allowed by the map amendments "are consistent with the identified function,  
13 capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of  
14 the facility." *Mason v. City of Corvallis*, 49 Or LUBA 199, 215-16 (2005). In their first  
15 assignment of error, petitioners allege the county "misconstrued and misapplied" the TPR in  
16 two ways. First, petitioners argue the county erred by considering only the traffic impacts of  
17 the proposed use, rather than the traffic impacts of the uses that could be developed under the  
18 new MRC industrial zoning designation. Second, petitioners argue that the county's finding  
19 that the proposal will not significantly affect transportation facilities is conclusory and is not  
20 supported by substantial evidence.

21 **A. Waiver**

22 Singletree first argues that petitioners waived the issues presented under the first  
23 assignment of error:

24 "[Petitioners] failed to raise this issue in their appeal of the planning  
25 commission's decision to the board of county commissioners. Record 48-49."  
26 Amicus Brief 2-3.

1           The county did not file a brief in this appeal, and the only brief that was submitted in  
2 defense of the county’s decision is Singletree’s amicus brief. In *Concerned Citizens v.*  
3 *Malheur County*, 47 Or LUBA 208, 216 (2004), we refused to consider an argument that, if  
4 meritorious, would have required remand, where that argument was advanced only in an  
5 amicus brief and was not asserted by any of the parties to the appeal. In *Friends of Bryant*  
6 *Woods Park v. City of Lake Oswego*, 26 Or LUBA 594 (1993), we denied a motion to file an  
7 amicus brief, where the only issue raised in the amicus brief was not raised in the petition for  
8 review. Although petitioners do not respond to the waiver defense that Singletree presents in  
9 the amicus brief, based on our decisions in *Concerned Citizens* and *Friends of Bryant Woods*  
10 *Park*, we question whether amicus Singletree may assert a waiver defense in this appeal.  
11 Given our question, the fact that the parties do not address the question and the fact that we  
12 agree with Singletree regarding the merits of the first assignment of error, we turn to the  
13 merits and do not consider Singletree’s waiver defense further.

14           **B.       The Merits**

15           On the merits, the county’s findings explain that North Umpqua Highway has a  
16 functional capacity of over 30,000 trips per day and the estimated current level of traffic is  
17 6,000 trips per day. The county then finds that it is estimated that the proposed freight truck  
18 yard and terminal would add “196” trips per day. Record 89 (finding number 13).<sup>1</sup> Finding  
19 13 is, as petitioners point out, apparently based on the proposed use rather than the uses that  
20 are potentially allowable under MRC zoning. But the next finding, finding number 14, is not  
21 so limited:

22           “Given the limited potential for further development on the subject parcel due  
23 to it size (2.40 acres), the location of the property next to existing industrial  
24 uses and considering the range of uses that are allowed in the proposed MRC

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<sup>1</sup> The planning commission adopted the planning staff report as part of its findings. Record 56. When the board of commissioners declined to review the planning commission’s decision, the planning commission’s decision was incorporated into the county’s final decision in this matter. Record 27.

1 zone which might be developed on a site of its size, any likely future  
2 industrial development would not generate traffic volumes that would exceed  
3 the functional capacity of the North Umpqua Highway and the connecting  
4 road system.” Record 90 (finding number 14).

5 Finding number 14 seems to adopt the analysis that petitioners contend the county  
6 failed to adopt and concludes that the range of uses that would be allowed on the property  
7 under MRC zoning would not significantly affect North Umpqua Highway or “the  
8 connecting road system.” The record includes a letter from the Oregon Department of  
9 Transportation (ODOT) that concludes that “the proposed industrial land uses on the  
10 property are not expected to significantly affect the North Umpqua Highway’s function,  
11 capacity or performance standards.” Record 106. ODOT goes on to point out that Stocks  
12 Lane will need to be “made adequate to ensure the safety and operations of industrial traffic  
13 accessing the highway” and recommended several conditions of approval to ensure adequate  
14 access to North Umpqua Highway. *Id.* Petitioners do not make any attempt to explain why  
15 finding number 14 is inadequate to establish that the disputed map amendments will not  
16 significantly affect nearby transportation facilities or why the letter from ODOT and other  
17 evidence in the record is insufficient to establish that given the current significant excess  
18 capacity on North Umpqua Highway the disputed map amendments will not significantly  
19 affect nearby transportation facilities.

20 The first assignment of error is denied.

## 21 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

22 LUDO 6.500(2) sets out standards for approval of comprehensive plan map  
23 amendments. LUDO 6.500(2) requires, in part, that the county find:

24 “(b) That the amendment provides a reasonable opportunity to satisfy a  
25 local need for a different land use. A demonstration of need for the  
26 change may be based upon special studies or other factual  
27 information[; and]

28 “(c) That the particular property in question is suited to the proposed land  
29 use, and if an exception is involved, that the property in question is  
30 best suited for the use as compared to other available properties.”

1 We will refer to these two standards as the “local need” standard (LUDO 6.500(2)(b)) and  
2 the “suitability” standard (LUDO 6.500(2)(c)).

3 **A. The Local Need Standard (Second Assignment of Error)**

4 To address the local need standard, the county adopted the following findings:

5 **“Finding No. 18**

6 “Plan policy for rural communities provides for additional industrial uses  
7 adjacent to rural residential uses but urges care to minimize impacts on  
8 residential lands.

9 **“Finding No. 19**

10 “The proposed amendments will further a county policy to encourage  
11 industrial development in rural communities to support area logistics and  
12 stimulate economic investment, thereby providing a reasonable opportunity to  
13 satisfy a local need.

14 **“Finding No. 20**

15 “The applicant has demonstrated there is a public need for the proposed  
16 amendment and has reasonably demonstrated that said public need would best  
17 be served by changing the Plan designation of the property.” Record 91.

18 Petitioners argue the county improperly relied on the applicant’s desire to develop the  
19 subject property, rather than an identified local need for the disputed development.  
20 Petitioners also argue the above-quoted findings are inadequate because they fail to identify  
21 the referenced plan policies and identify no evidence that the “proposed amendment meets a  
22 ‘local need.’” Petition for Review 7.

23 We agree with petitioners that it appears that the county relied almost entirely on the  
24 applicant’s desire to develop the subject property, rather than any identified “local need for a  
25 different land use” “[t]hat the amendment provides a reasonable opportunity to satisfy,” as  
26 LUDO 2.500(2)(b) requires. The comprehensive plan policies that are referenced in findings  
27 18 and 19 are not specifically identified in the decision. In its brief, amicus sets out Douglas  
28 County Comprehensive Plan (DCCP) language and speculates that the authors of findings 18

1 and 19 had that plan language in mind. We set out that language below and have added our  
2 own numbers to make it easier to refer to that plan language:

- 3 1. “[H]elp assure the maintenance and expansion of existing industry or  
4 the establishment of new industry on lands that are committed to and  
5 designated for an industrial use.”
- 6 2. “Develop and maintain an inventory of Residential, Industrial, and  
7 Commercial lands in each Rural Community to address any needed  
8 land supplies that may be identified in future updates and changes to  
9 the County Comprehensive Plan. Providing for other commercial and  
10 industrial uses within or near existing Rural Communities is also  
11 important to each of the Rural Communities and the economy of  
12 Douglas County.”
- 13 3. “To provide the opportunity for rural industrial uses while protecting  
14 existing plans for industrial uses within Urban Unincorporated Areas  
15 (UUA’s) and Urban Growth Boundaries (UGB’s).”
- 16 4. “Industrial uses shall be limited to small scale low impact use as that  
17 term is defined in OAR 660-22.” Amicus Brief 7.

18 Number 1 above sets out the “Intent” of the DCCP Industrial designation in rural  
19 communities. Prior to the disputed decision, the subject property was not designated for  
20 industrial use and the county’s findings make no attempt to show that the vacant subject  
21 property is committed to industrial use. Even if the subject property was committed to and  
22 designated for industrial use, an intent to maintain and expand industry on lands that are  
23 “committed to and designated for industrial use” has no obvious bearing on whether there is  
24 a “local need for a different land use” on the subject property or whether the subject property  
25 would provide “a reasonable opportunity to satisfy” such a local need if it exists.

26 Number 2 expresses a DCCP Policy of developing and maintaining an inventory to  
27 address needed land supplies. The inventory referenced in number 2 might lend some  
28 support to a finding of local need, but the challenged decision does not disclose or discuss  
29 what that inventory shows for Dixonville Rural Community.

30 That the county has a policy “[t]o provide the opportunity for rural industrial uses,”  
31 Number 3 above, does not establish that there is a “local need for a different land use” on the

1 subject property or that the subject property would provide “a reasonable opportunity to  
2 satisfy” such a local need if it exists.

3 Finally, the policy expressed in Number 4 above (to limit rural industry to “small  
4 scale low impact use”) has absolutely no bearing on whether there is a “local need for a  
5 different land use” on the subject property or whether the subject property would provide “a  
6 reasonable opportunity to satisfy” such a local need if it exists.

7 We do not mean to foreclose the possibility that the DCCP may include a policy that  
8 establishes that the disputed comprehensive plan map amendment complies with the LUDO  
9 6.500(2)(b) local need standard. However, it seems highly unlikely that the county has  
10 adopted such a DCCP policy. Whether the amendment “provides a reasonable opportunity to  
11 satisfy a local need for a different land use” seems to call for findings of fact and property-  
12 specific reasoning to establish (1) that there is a local need for a different land use and (2)  
13 that the amendment “provides a reasonable opportunity to satisfy [the identified] local need.”  
14 The second sentence of LUDO 6.500(2)(b) certainly suggests that those findings will require  
15 an evidentiary showing of some sort that is geographically specific. The findings rely  
16 entirely on support from comprehensive policies that lend no particular support, and do not  
17 cite any other evidence that would support a finding of local need.

18 The second assignment of error is sustained.

19 **B. The Suitability Standard (Third Assignment of Error)**

20 As explained above, LUDO 6.500(2)(c) requires that the county find that that the  
21 subject property “is suited to the proposed land use.”<sup>2</sup> Because no exception is required, the  
22 alternative sites comparison required by the last clause of LUDO 6.500(2)(c) does not apply.  
23 Petitioners argue the county “misconstrued” the LUDO 3.38.100(2)(b) and 6.500(2)(c)

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<sup>2</sup> A similar suitability standard is imposed on the zoning map amendment by LUDO 3.38.100(2)(b), which requires that the county find “[t]he site is suitable to the proposed zone[.]”

1 suitability standards and that the county’s findings concerning the suitability standards are  
2 not supported by substantial evidence.

3 For some reason, the county combined its findings concerning the local need and  
4 suitability standards under a single heading. Record 91-93. Petitioners fault the county for  
5 combining its findings concerning the local need and suitability standards, because they  
6 impose somewhat different standards. However, the county’s organization of its findings,  
7 alone, provides no basis for reversal. In its suitability findings, the county first agrees with  
8 the applicant that

9 “The property is well suited for the proposed use. It is flat, bordering [a] four  
10 lane state highway..and bordering other MRC zoned property.” Record 91.

11 The county’s suitability findings also include the following:

12 “The proposed amendment places rural community industrial in the portion of  
13 the Dixonville Rural Community near existing industrial uses. However,  
14 lands immediately adjacent to the proposed amendment are designated rural  
15 residential. \* \* \* In order to minimize conflicts between the proposed  
16 industrial use and the existing adjacent residential uses, it is appropriate to  
17 [apply] additional standards to the proposed freight truck yard and terminal  
18 business to ensure orderly development and sufficient buffers. After  
19 reviewing correspondence from neighbors of the proposed facility voicing  
20 concerns over its compatibility with adjacent residential uses, the Design  
21 Review Overlay was deemed the most appropriate remedy for potential  
22 conflicts between the proposed freight truck yard and terminal and nearby  
23 residential uses. Therefore, a Design Review Overlay (AC) will be applied to  
24 the property to ensure the minimization of conflicts between the proposed  
25 industrial use and the existing adjacent residential uses. \* \* \*

26 “\* \* \* \* \*

27 “If the Plan Amendment and Zone Change proposed herein is approved,  
28 application of the AC overlay to the property will ensure that issues relating to  
29 the proposed use including vehicular access, aesthetics and land use  
30 compatibility are addressed with respect to adjacent and nearby rural  
31 residential land uses.” Record 92-93.<sup>3</sup>

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<sup>3</sup> The challenged decision imposes the following conditions:

1           Petitioners cite concerns that were expressed below concerning traffic impacts and  
2 water and runoff concerns. Petitioners contend the county improperly deferred its finding  
3 concerning the LUDO 3.38.100(2)(b) and 6.500(2)(c) suitability standards to the design  
4 review overlay and drainage plan review, which is a ministerial process at which they will  
5 have not participatory rights.

6           If petitioners were correct that the county deferred to a ministerial, non-public  
7 process its finding that the LUDO 3.38.100(2)(b) and 6.500(2)(c) suitability standards are  
8 met in this case, remand would be required. The county’s finding concerning the LUDO  
9 3.38.100(2)(b) and 6.500(2)(c) suitability standards must be made as part of the public  
10 process that applies to comprehensive plan and zoning map amendments. *Rhyne v.*  
11 *Multnomah County*, 23 Or LUBA 442, 447-48 (1992). The county could defer the required  
12 finding, but in that event it would have to ensure the required findings would later be made in  
13 a similarly public process where petitioners would have participatory rights. *Gould v.*  
14 *Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007). However, the requirement  
15 that the county’s finding concerning the LUDO 3.38.100(2)(b) and 6.500(2)(c) suitability  
16 standards must be made as part of the public process that led to the decision that is before us  
17 in this appeal does not mean the county cannot, as part of those findings, recognize and rely  
18 in part on additional ministerial review and approvals that will be required for development  
19 of the property. The county did not err by recognizing in its findings concerning LUDO  
20 3.38.100(2)(b) and 6.500(2)(c) that additional ministerial review will be required and that the

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- “1. Application of the Design Review Overlay shall include, among other things, fencing or vegetative screening installed along the north and east side of the subject property to minimize adverse impacts on nearby properties.
  - “2. A drainage plan covering the entirety of the subject property must be completed to the satisfaction of the Douglas County Planning Department as part of a ministerial review under the Design Review Overlay prior to any structural development on the subject property.” Record 30.

1 purpose of that review is to address, among other things, ingress, egress and compatibility  
2 with adjoining properties.

3 Petitioners fail to appreciate how subjective the LUDO 3.38.100(2)(b) and  
4 6.500(2)(c) suitability standards are. The requirement that the subject site be *suitable* for the  
5 proposed comprehensive plan and zoning map designations does not mean that the site can  
6 have no unresolved limitations or shortcomings. LUDO 3.38.100(2)(b) and 6.500(2)(c) only  
7 require that the county reasonably conclude that the subject property is suitable for the  
8 proposed zoning designation and land use. In the findings quoted above, the county found  
9 that the subject property “is well suited for the proposed use.” Record 91. That finding  
10 appears to be based in large part on the fact that the site is flat and vacant, presumably  
11 making it relatively easy and less expensive to develop for industrial use than a developed  
12 site with uneven topography. The county also found that the subject property is located next  
13 to a major transportation facility that will provide needed access. The county recognized that  
14 concerns had been raised about potential traffic impacts, impacts on adjoining residences and  
15 drainage impacts. The county imposed conditions of approval to ensure that a subsequent  
16 ministerial review addresses those concerns. We conclude that a reasonable decision maker  
17 could rely on the property’s physical and locational advantages and the ministerial review  
18 that will occur later in the design review overlay process to find in the challenged decision  
19 that the site is suitable for the proposed zoning map designation and land use, as required by  
20 LUDO 3.38.100(2)(b) and 6.500(2)(c). We do not agree with petitioners that the county  
21 deferred the required finding or that a reasonable person could not find that the subject  
22 property is suitable for the proposed zoning designation and land use, based on the  
23 evidentiary record that supports the challenged decision.

24 The third assignment of error is denied.

25 The county’s decision is remanded.