BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WM. GARY KINNETT, CHERYLL KINNETT,
DAN WILLIS, LEAH WILLIS, CARRIE BOOTH,
TERRY DAMEWOOD, SHARYON DAKE,
and CAROL DAMEWOOD,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

SINGLETREE INVESTMENTS L.L.C.,
Intervenor-Respondent.

LUBA No. 2009-055

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Ann B. Kneeland, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Douglas County.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring and Mornarich, P.C.

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

AFFIRMED 08/03/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision approving a comprehensive plan amendment that approves comprehensive plan and zoning map amendments to allow the future establishment of a truck maintenance and repair facility.

MOTION TO INTERVENE

Singletree Investments LLC, the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

The challenged decision is the county's decision on remand from our decision in *Kinnett v. Douglas County*, 57 Or LUBA 184 (2008). We take the facts from *Kinnett I*:

> "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.
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> "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 northwest, across Stocks Lane, is an MRC-zoned area that serves as a terminal for a logging company." *Id.* at 185-86.

In *Kinnett I*, we remanded the decision because we determined that the county's findings were inadequate to demonstrate how the application complied with Douglas County Land Use and Development Ordinance (LUDO) 6.500.2, which requires, in part, that the county find:

> "(b) That the [comprehensive plan] amendment provides a reasonable opportunity to satisfy a local need for a different land use. A demonstration of need for the change may be based upon special studies or other factual information."

We held:

> "Whether the amendment 'provides a reasonable opportunity to satisfy a local need for a different land use' seems to call for findings of fact and property-specific reasoning to establish (1) that there is a local need for a different land use and (2) that the amendment 'provides a reasonable opportunity to satisfy [the identified] local need.' The second sentence of LUDO 6.500(2)(b) certainly suggests that those findings will require an evidentiary showing of some sort that is geographically specific. The findings rely entirely on support from comprehensive policies that lend no particular support, and do not cite any other evidence that would support a finding of local need." *Kinnett I*, *Id.* at 190.

On remand, the planning commission adopted findings to address LUDO 6.500.2.b, and approved the application. Petitioners appealed the decision to the board of county commissioners, which declined review of the planning commission's decision. This appeal followed.

ASSIGNMENTS OF ERROR

A. What is the "Local Need for a Different Land Use"?

In the first subassignment of error under the first assignment of error, and in a portion of the first subassignment of error under the second assignment of error, petitioners argue that the county erred in defining the "local need" referred to in LUDO 6.500.2.b as a county-wide need for freight trucking businesses, but limiting its analysis of whether the amendment provides a "reasonable opportunity to satisfy [the] local need" to sites that are within the Dixonville Rural Community (DRC), rather than considering sites located in a variety of locations throughout the county. Petitioners argue that in so doing, the county relied on inconsistent interpretations of the word "local" as used in LUDO 6.500.2.b.

Intervenor responds that the county's conclusion that there is a general need for freight trucking businesses in a variety of locations within the county is a reasonable reading

of the phrase "local need" as used in LUDO 6.500.2.b and that the county properly made such a determination. Intervenor explains that the county found that the general need for freight trucking businesses within the county is accompanied by a need for appropriately zoned sites for these businesses dispersed in various locations throughout the county, in a variety of sizes, and with a variety of service levels. Intervenor also notes that the county concluded, in the alternative, that a local need exists for freight trucking sites specifically in rural communities that have direct access to state highways.

As explained above, we remanded the decision in *Kinnett I* because we determined that the relevant standard required findings of fact and property specific reasoning that identified in a "geographically specific" way the local need that the proposed amendment satisfied. On remand, the county found in relevant part:

> "* * *In today's modern economy, however, local freight trucking operations have played an increasingly important role in facilitating local manufacturers' need to get specialized or time sensitive products to increasingly diverse, specialized and widely dispersed markets and end-users. Local trucking businesses are able to provide our primary industries with a greater degree of reliability, flexibility and timely access to the many small but increasingly specialized markets that are emerging in our modern economy than can be achieved by traditional fixed transportation networks (i.e. railroads). Without the presence of an efficient flexible and reliable local truck transportation support system, the county's primary manufacturing and other resource-related businesses would simply be unable to operate as they presently do. It is within this context that numerous small to medium-size freight trucking businesses have been created and continue to thrive in our area despite the difficulties that arise from a rapidly changing and often uncertain economic environment. It is therefore imperative that local public policy actions (such as approving needed land use changes) recognize and facilitate the continued viability of these local transport operations by ensuring an adequate supply of appropriately zoned sites of suitable sizes, types, locations and service levels." Record 8.

We agree with intervenor that the county properly identified the local need for the comprehensive plan amendment under LUDO 6.500.2.b. First, LUDO 6.500.2.b is a fairly subjective standard, and only requires that the county reasonably determine that there is a local need for the proposed land change use based on information available to it. Second,

petitioners' characterization of the county's interpretation of the phrase "local need" is not entirely accurate. As we understand it, the county identified the "local need" as a need for sites for freight trucking businesses that are located in various parts of the county, including in rural communities like Dixonville. Petitioners do not dispute the county's finding that there is a need for freight trucking businesses, and do not explain how the county's additional characterization of the need as requiring those businesses to be sited in various locations throughout the county, including in rural communities on sites with direct access to a state highway, is inconsistent with LUDO 6.500.2.b. We do not see anything inherently incongruous in the county's identification of a local need for sites for freight trucking businesses located in various locations on properties of various zoning classes and sizes as failing to satisfy LUDO 6.500.2.b.

In support of their argument, petitioners cite *Just v. Lane County*, 50 Or LUBA 399 (2005). In *Just*, the county interpreted the term "ownership" as used in several sections of the same comprehensive plan policy in inconsistent ways. In the present appeal, the county did not adopt inconsistent interpretations of the phrase "local need," but rather defined the local need in terms of the need for freight trucking businesses in dispersed areas throughout the county. *Just* does not assist petitioners.

B. Does the plan amendment provide a "Reasonable Opportunity To Satisfy a Local Need"?

During the proceedings on remand, intervenor submitted a list of thirteen industrially zoned properties in the DRC, totaling 37 acres, accompanied by an explanation of why those properties were not suitable to fill the identified local need for sites for a freight trucking business. Record 167-170. In their second subassignment of error under the first assignment of error, and in a portion of the first subassignment of error under the second assignment of error, petitioners argue that intervenor's analysis of 37 acres of available industrially-zoned land in the DRC is flawed and fails to account for other properties within the DRC. We set out petitioners' argument:

> "[T]he scope of the analysis [of 37 acres] is too small to support the conclusion that there are insufficient industrially-zoned lands in the [DRC] as a whole. In Finding 5, the county states there [are] 820 acres in the [DRC] and that 434 acres are zoned for residential use. The finding also accounts for 256 acres zoned for heavy industrial use at the Roseburg Forest Products site. However, the county makes no accounting for the remaining 130 acres of lands, presumably zoned rural industrial or heavy industrial, except for the 37 acres within the applicant's land analysis. * * * Still there are 93 acres, two and a half times the land actually analyzed, within the [DRC] and zoned for rural industrial or heavy industrial which are not revealed or analyzed. Without more comprehensive information about the supply of industrial lands in the whole of the [DRC], it is impossible to find, based on substantial evidence that there is a Community-wide need for more industrial lands." Petition for Review 11-12 (record cites and footnotes omitted).

Intervenor responds first by arguing that petitioners are precluded from raising the issue under ORS 197.835(3) because the issue was not raised below. Intervenor also argues that petitioners failed to exhaust their remedies under ORS 197.825(2)(a) and may not raise the issue for the first time on appeal to LUBA, because petitioners did not raise the issue in their notice of review filed under LUDO 2.500.5(c).[1] *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003).

In *Miles*, opponents of a grocery store appealed the planning commission's approval to the city council. The local code required opponents to specify the grounds for their appeal. The opponents in *Miles* listed four grounds for their appeal. After the city affirmed the

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[1] ORS 197.825(2)(a) provides that LUBA's jurisdiction:

> "Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

LUDO 2.500.5. provides

> "Every Notice of Review shall contain:
>
> "a. A reference to the decision sought to be reviewed;
>
> "b. A statement as to how the petitioner qualifies as a party;
>
> "c. *The specific grounds relied upon in the petition request for review*; and
>
> "d. The date of the decision sought to be reviewed." (Emphasis added.)

planning commission's decision, the opponents appealed the decision to LUBA. At LUBA, the petitioners raised assignments of error based on arguments different from the four grounds of appeal specified to the city council in their appeal of the planning commission's decision. LUBA considered an assignment of error that had not been raised before the city council, finding that because the issue had been raised before the planning commission, the petitioners therefore satisfied the raise it or waive it requirement of ORS 197.763(1) and 197.835(3). While the Court of Appeals agreed that raising the issue before the planning commission satisfied the raise it or waive it requirement of ORS 197.763(1) and 197.835(3), the Court also held that the exhaustion of remedies requirement of ORS 197.825(2)(a) was not satisfied:

> "In the land use area, we have applied waiver analysis to issues in other contexts that were initially raised and adequately preserved. Consistently with the exhaustion principle expressed in ORS 197.825(2)(a), and to give that principle force, parties should be required to pursue their available local remedies *and* to present their substantive claims to the local appeal body; their failure to do so should be deemed to be a waiver of those claims. Requiring parties to pursue a local appeal process, without also requiring them to raise issues that they later raise to LUBA as a basis to invalidate the local decision, would permit parties to 'step [] through the motions' of the local appeal process without presenting the substance of their objections to the local body." *Id*. at 508-09 (emphasis in original, citation omitted).

LUDO 2.500.2.c requires a notice of review to contain "the specific grounds relied on in the petition request for review." In their notice of review, petitioners argued that the planning commission's analysis of 37 acres of available industrial lands within the DRC was too limited because it did not take into account other industrially zoned lands located in other communities, such as Glide, Green, and North Roseburg. Record 68-69. However, the issue that petitioners raise in the second subassignment of error, and in a portion of the first subassignment of error under the second assignment of error, alleges that intervenor's analysis of the 37 acres of available industrial properties *within the DRC* was too narrow, in the context of total available acreage within the DRC. That is not the same issue that was presented in the notice of review, alleging that the county should have considered

industrially-zoned lands outside of the DRC in determining how the local need should reasonably be satisfied.

We agree intervenor that petitioners failed to state the issue raised in the second subassignment of error under the first assignment of error, and in a portion of the first subassignment of error under the second assignment of error in the notice of review filed under LUDO 2.500.5.c, and therefore failed to satisfy the exhaustion of remedies requirements of ORS 197.825(2)(a). Accordingly, petitioners may not raise the issue for the first time on appeal to LUBA.

However, even if petitioners had sufficiently raised the issue in the notice of review, we do not see that the county erred in relying on intervenor's analysis of 37 industrially zoned properties within the DRC. First, as quoted above, petitioners argue that 130 additional acres within the DRC are "presumably" zoned industrial, and that 93 acres of that 130 acres are not "revealed or analyzed." Petition for Review 12. Other than merely speculating about the zoning of other properties in the DRC, petitioners' argument provides no examples of other industrially-zoned properties located within the DRC that intervenor failed to include in its analysis. Without a more concrete allegation that the analysis of lands within the DRC excludes some suitable lands, petitioners' argument provides no basis for reversal or remand.

In the second subassignment of error under the second assignment of error, petitioners argue that the evidence in the record is insufficient to show that the subject property provides a "reasonable opportunity to satisfy the identified local need" under LUDO 6.500.2.b. First, petitioners argue that the county erred in relying on testimony from intervenor's representative because that testimony contained contradictions. Second, petitioners argue that the evidence relied on by the county is not "substantial."[2] Finally,

[2] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C).

petitioners argue, the evidence in the record demonstrates that approving the comprehensive plan amendment "will have [a] detrimental effect on the surrounding community." Petition for Review 16.

Intervenor responds, and we agree, that there is substantial evidence in the record upon which the county concluded that the subject property provides a "reasonable opportunity to satisfy the local need." The statements of intervenor's representative, while not entirely clear, do not in themselves demonstrate that the subject property is insufficient to satisfy the identified local need. Moreover, intervenor's analysis of the subject property explains that the property's direct access onto a state highway, together with its suitable size and location for a freight trucking business, are reasons that the subject property reasonably satisfies the need for the land use change. Record 162-170. That constitutes substantial evidence on which a reasonable decision maker could rely, and the county was entitled to rely on that evidence.

Finally, we do not understand the relationship between petitioners' argument that the evidence demonstrates that the amendment will have a "detrimental effect on the surrounding community" and the standards contained in LUDO 6.500.2.b. Nothing in the relevant standard requires the county to analyze whether the land use change will have a detrimental effect on the surrounding community. As such, petitioners' argument provides no basis for reversal or remand of the decision.

The county's decision is affirmed.