BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL L. WALKER, HAL ANTHONY,
STEVE LIEBENBERG, SUSAN LIEBENBERG,
WAYNE MCKY, MADELYN READMOND,
BOB ROTACH, JAMES SARGENT,
PATRICIA SARGENT and WILLIAM STEIN,
Petitioners,

and

HOLGER T. SOMMER,
Intervenor-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

WARD OCKENDEN,
Intervenor-Respondent.

LUBA No. 2008-224

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Michael L. Walker, Hal Anthony and Wayne McKy, Grants Pass, Steve Liebenberg, Susan Liebenberg, Bob Rotach, James Sargent, Patricia Sargent and William Stein, Merlin, filed the petition for review and Michael L. Walker argued on his own behalf. Hal Anthony, Wayne McKy, Steve Liebenberg, Susan Liebenberg, Bob Rotach, James Sargent, Patricia Sargent, William Stein and Madelyn Readmond represented themselves.

Holger T. Sommer, Grants Pass, represented himself.

No appearance by Josephine County.

Ward Ockenden, Grants Pass, filed the response brief and Jack H. Swift argued on behalf of intervenor-respondent.

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

HOLSTUN, Board Member, did not participate in the decision.

REMANDED 12/15/2009

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 county decision approving comprehensive plan and zoning map amendments from resource to nonresource designations.

REPLY BRIEF

Petitioners move for permission to file a reply brief. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor applied for comprehensive plan and zoning map amendments for his 158-acre parcel. The property consists of approximately 147 acres designated in the Josephine County Comprehensive Plan (JCCP) as Forest and zoned Woodlot Resource 80-acre minimum (WR-80), and approximately 11 acres designated in the JCCP as Agricultural and zoned Farm Resource 80-acre minimum (FR-80). The approximately 147 acres of the WR-80 portion of the property consist of lands that have been logged in the past, while the approximately 11 acres of the FR-80 portion of the property is located near Quartz Creek. Lands to the south are generally in rural residential use while lands to the east, north, and west are in resource use. The property is adjacent to Hugo Road and south of Quartz Creek Road, and is approximately one mile from the I-5 ramps for Merlin-Galice Road (I-5/Louse Creek). The requested amendments would change the designation for the entire parcel to Residential and the zoning to Rural Residential 5-acre minimum (RR-5).

The planning commission recommended denial of the plan and zone amendments. Intervenor appealed to the board of county commissioners (BCC), which held a public hearing and made a tentative decision to approve the application. The BCC subsequently conducted another hearing on the matter at the request of intervenor. After the additional public hearing, the BCC again approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In order to amend the plan and zoning designations for land currently planned and zoned for resource use to nonresource use, the county must demonstrate that the subject property does not qualify either as agricultural land under Statewide Planning Goal 3 (Agricultural Lands) or as forest land under Statewide Planning Goal 4 (Forestlands). Petitioners challenged the county's findings that the subject property does not meet the definition of forestlands found in Goal 4.

In approving the amendments, the county relied on a JCCP policy that provides several tests for determining whether land is considered forest land based on the "rate of return" of the predominant soil, and concluded it was not.[1] However, prior to the final decision on the amendments, in April, 2008, the Land Conservation and Development Commission (LCDC) adopted amendments to the rules regarding designation of forestlands at OAR 660-006-0005 and –0010, which became effective on April 18, 2008. Under the first assignment of error, petitioners argue that Josephine County erred in relying on the JCCP rate of return provisions to replan and rezone land currently designated forestland to nonresource use and that it should have applied the new LCDC rules.

Intervenor responds that because his application was filed and deemed complete before the new rules were adopted under the goal post rule of ORS 215.427(3)(a) the new rules do not apply to his application.[2] While intervenor is correct that the goal post rule

---

[1] *See Doob v. Josephine County*, 48 Or LUBA 227 (2004) (explaining the relevant JCCP provisions and holding that it was permissible for Josephine County to rely on its "internal rate of return" (IRR) system to make such determinations); *Sommer v. Josephine County*, 49 Or LUBA 134, 201 Or App 528, 120 P3d 9277 (2005) (same).

[2] ORS 215.427(3)(a) provides:

> "If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

freezes as of the date of the application the standards and criteria that govern an application for a permit, limited land use decision, or zone change, the goal post rule does not freeze the standards that govern comprehensive plan amendments. *Anderson v. Lane County*, 57 Or LUBA 562, 567 (2008). Therefore, the goal post rule does not shield the county from applying the new rules.

Intervenor also argues that petitioners failed to raise the issue of compliance with the new rules when they had the opportunity below, and petitioners are therefore precluded from raising the issue at LUBA, pursuant to ORS 197.763(1) and ORS 197.835(3).[3] Petitioners initially respond that the issue of compliance with the then-current rules was raised before the rules were changed. While petitioners are correct that the issue of compliance with *former* OAR 660-006-0005 and -0010 were raised, that is a different issue than the issue raised in this assignment of error, which is whether the rule amendments have the effect of superseding the county's acknowledged rate of return system for determining whether land is forest land. Arguing that the county must apply the old rules does not give "fair notice" to the county and other participants that petitioners believe the amended rules supersede the county's legislation. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991).

Petitioners also respond that there was no opportunity below to raise the issue of compliance with the new rules. The new rules were adopted on March 21, 2008, and

---

[3] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

became effective on April 18, 2008. When the new rules became effective on April 18, 2008, the record in this proceeding had been closed by the county after the March 12, 2008 hearing. If the county had adopted its final written decision around that time, we would likely agree with petitioners that the issue could not have been raised below and therefore could be raised at LUBA. On August 4, 2008, however, the county conducted another public hearing, to determine whether to grant intervenor's request for a rehearing. Members of the public testified on a wide range of issues. Record 633-35. At the conclusion of that hearing, the BCC voted to hold a rehearing on the applications, limited to issues regarding carrying capacity under Josephine County Rural Land Development Code (RLDC) 46.040.C, which we discuss below in our resolution of the fourth assignment of error. During that August 4, 2008 hearing, petitioners had the opportunity to bring the issue to the attention of the BCC but did not. Under ORS 197.763(1) and 197.835(3), petitioners were required to at least give the BCC the opportunity to consider the issue. Petitioners' argument is therefore waived.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Goal 4 defines forest lands to include "adjacent or nearby lands which are necessary to permit forest operations or practices." Josephine County Rural Land Development Code (RLDC) 46.050.B.3 and 46.050.C implement this portion of Goal 4, and include additional provisions not found in Goal 4.[4] RLDC 46.050.C.3 requires that in making this

---

[4] RLDC 46.050 provides the "Non-Resource Land Criteria." RLDC 46.050.B.3 provides:

> "The land is not necessary to permit farm practices or forest operations to continue or occur on adjacent or nearby resource zoned lands, subject to the rules and procedures as set forth in subsection C below."

RLDC 46.050.C provides:

> "Land is necessary to permit farm practices or forest operations on adjacent or nearby lands when the land within the lot or parcel provides a special land use benefit, the continuance of which is necessary for the adjacent or nearby practice or operation to continue or occur. * * *."

determination the county describe "existing or potential farm practices and forest operations on adjacent or nearby lands" and "provide an analysis of how the uses permitted by the proposed non-resource designations may or may not significantly impede or significantly increase the cost of accepted farm practices or forest operations." Petitioners argue that the county mistakenly determined that the property is not forest land because the property is not "necessary to permit forest operations or practices" on adjacent or nearby lands.

Petitioners first argue that the county findings do not provide the required analysis of forest operations on adjacent or nearby lands or an analysis of the effect on forest operations. Petitioners also argue that the county erred in not responding to letters from the Bureau of Land Management (BLM), which operates a seed orchard to the east of the subject property. Finally, petitioners argue that evidence in the record indicates that the Oregon Department of Forestry (ODF) is concerned with potential conflicts between forest operations on resource lands and increasing rural residential development.

The county's findings state:

> "The [BCC] finds that the subject property is not necessary to permit farm or forest practices on adjacent or nearby lands in accordance with the requirements of Section 46.050.C. The [BCC] received testimony regarding access, water supplies, wind breaks, impact buffering, minimizing land use conflicts, preservation and protection of soil, air, water, watershed and vegetation amenities and retention of normal wildfire [fighting] strategies. The [BCC] finds that farm use in the area is limited to isolated farm parcels that are to the west and southwest that have a majority of Class III soils and have irrigation rights. These parcels are either isolated from the subject property by Quartz Creek or have intervening residential lands between the subject property and the farm use. The farm uses are grazing and hay production. There are no factors existent on the subject property that are necessary for the farm use practices on the isolated farm parcels in the area considering the factors in the criteria. This finding is based on testimony and evidence in the record and inspection of aerial photographs. No testimony was introduced to establish the interrelationship that would require the subject property to remain as currently zoned in order for farming to continue. Additional testimony was introduced regarding forest lands in the area to evaluate the necessity of the subject property for continued forest use. The BLM lands to the north are not managed for timber production and are scheduled for fire fuels reduction. The seed orchard to the east is at a lower

> elevation and is intensely managed for tree seed production. No testimony was offered to establish a need for the subject property in order to continue the seed production. The [BCC] finds that the proposed change meets the applicable criteria based on the testimony offered by experts in farm and forest that describe the physical limitations that preclude resource management." Record 63-64.

Petitioners' first argue that the county's findings are inadequate because they fail to address the relevant criteria. We disagree. The above quoted findings are squarely directed at the question of whether the subject property is land "necessary" to permit farm or forest practices on nearby or adjacent lands. The findings describe adjacent and nearby farm and forest operations and explain why the county believes nonresource use of the subject property will not significantly affect those farm or forest operations.

A closer question exists as to whether the county's findings are adequate to respond to the issue raised below regarding whether resource use of the subject property is necessary to permit the farm and forest practices on nearby BLM land, including operation of the BLM's seed orchard. Petitioners cite to letters from the BLM seed orchard administrators that express concerns about residential development near the orchard. Those letters, however, do not express the BLM's belief that the subject property is necessary for the continued operation of the orchard, merely that conflicts with residential uses may occur. The BLM suggested that any residential uses adjacent to the seed orchard include a 150-foot setback from the orchard. While petitioners are correct that the decision does not impose any setback from BLM land, that does not mean that even without the setbacks that the subject property is necessary to permit operation of the seed orchard. In fact, it tends to demonstrate that the subject property in itself is not necessary at all to continue the existing farm and forest uses. The possibility that certain potential uses might cause some conflicts with the existing farm and forest uses does not demonstrate that the subject property is necessary for continued farm and forest operations. Furthermore, the fact that BLM believed a 150-foot buffer would reduce conflicts with the seed orchard suggests that any potential impacts are not so severe

that the continued planning and zoning of the subject property as resource land is necessary for existing farm and forest operations.

Finally, petitioners' reference to ODF's concerns about residential development adjacent to or nearby lands in forest use are references to generalized concerns expressed by ODF, and do not point to any concerns that are specific to the subject property or the area surrounding the subject property. As such, those arguments provide no basis for reversal or remand of the decision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Goal 4 defines forest lands to also include "other forested lands that maintain soil, air, water and fish and wildlife resources." RLDC 46.050.D and 46.050.E implement this portion of Goal 4.[5] Petitioners argue that the county mistakenly determined that the property is not forest land because it is not "other forested lands that maintain soil, air, water and fish and wildlife resources," and that the county's findings that the subject property is not "other forested lands" are inadequate.

Petitioners argue that the subject property is "other forested lands" under Goal 4 because it maintains deer and fish habitat. According to petitioners, the subject property is primarily forested and provides critical habitat area for deer. Petitioners also argue that Quartz Creek and Bummer Creek, creeks on the western portion of the property, are class I

---

[5] RLDC 46.050.D provides that land is not forest land subject to Goal 4 if:

> "The land is not other forested lands that maintain soil, air, water and fish and wildlife resources."

RLDC 46.050.E provides:

> "If the proposed plan designation is Rural Residential, the lot or parcel must be shown to be entirely outside of the critical habitat area (i.e. above 2500' or designated as impacted) on the official 1985 Deer Winter Range map, as adopted or amended."

streams that provide habitat for endangered Coho salmon. Therefore, according to petitioners, the subject property is other forestlands that maintain fish and wildlife resources.

The county's findings state:

> "* * * In order to be regarded as forest land, the soils must have a rating for timber production or the site needs to be managed for forest uses such as watershed protection or wildlife or fisheries habitat. The site is found to not have any of the above required characteristics.
>
> "* * * * *
>
> "The [BCC] finds that based on studies submitted and testimony offered that the quality of air, water and land resources will be maintained by the approval of this request. * * *" Record 64.

Petitioners offer no focused challenge to the county's finding that, in order to be land that maintains fish and wildlife resources for purposes of Goal 4 and RLDC 46.050(D), the property must be managed for wildlife or fisheries habitat. With respect to deer habitat resources, RLDC 46.050.E provides that if a resource property is to be replanned Rural Residential that the parcel must be "entirely out of *critical* habitat area (i.e. above 2500' or *designated as impacted*)." (Emphasis added.) Intervenor cites to evidence that the subject property is designated as impacted and therefore, is "entirely out of critical habitat area." The staff report states the subject property "is designated 'impacted' on Josephine County's official Deer Winter Range Map and therefore not subject to development restrictions for deer habitat." Record 1431. Maps provided by intervenor demonstrate that the subject property is designated as impacted. Record 1662. Under the county's unchallenged finding, the property is not managed for deer habitat and therefore, the subject property is not "other forested lands" that maintains wildlife resources for winter range deer habitat.

As to maintaining fish habitat resources, petitioners argue that "Class I" streams cross the subject property, those streams are habitat for endangered salmon species, and residential development of the property would impact that habitat. Therefore, petitioners argue, the property must remain in forest use to maintain those fish habitat resources. Intervenor

responds that the mere fact that class I streams that provide habitat for a federally protected species cross the property does not necessarily mean that the property is other lands that "maintain" fish habitat for purposes of Goal 4 and RLDC 46.050(D). As noted above, the county found that only if the subject property is "managed for wildlife or fisheries habitat" can the property be other forested lands that maintain soil, air, water and fish and wildlife resources. Petitioners do not challenge that finding, or demonstrate that the subject property or the streams that cross it are "managed" for habitat. Absent a more focused challenge, petitioners' arguments do not provide a basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

RLDC 46.040.C requires in relevant part that "[r]equests involving changes to the plan and/or zone maps * * * demonstrate the land has adequate carrying capacity to support the densities and types of uses allowed by the proposed plan and zone designations."[6] Petitioners argue that the county erred in finding that there are adequate ground water resources to support the proposed changes. The county's findings state:

> "The [BCC] finds that the evidence presented by the applicant in the form of well logs, water quality report and septic evaluation of the property as well as

---

[6] RLDC 46.040.C provides in relevant part:

> "Requests involving changes to the plan and/or zone maps shall demonstrate the land has adequate carrying capacity to support the densities and types of uses allowed by the proposed plan and zone designations. The adequacy of carrying capacity, at a minimum, shall be evaluated using the criteria listed below. * * *
>
> "1. The proposed density and types of uses can be supported by the facility, service and other applicable development standards contained in this code or contained in other applicable federal, state and local rules and regulations governing such densities and types of uses.
>
> "2. Other physical characteristics of the land and surrounding area make the land suitable for the proposed density and types of uses, to include consideration of existing or potential hazards (flood, wildfire, erosion), the degree of slopes, the presence of wetlands, geologic formations, mineral deposits and any other similar natural or man-made conditions or circumstances * * *."

testimony from experts in their fields, demonstrates that the property has the carrying capacity for the intended use. The evidence was substantial and convincing notwithstanding the testimony of those in opposition that have not provided any significant testimony contrary to the evidence provided by the applicant." Record 60.

"* * * * *

"* * * The property is not located in a documented water quality problem area. Testing has shown the water supply to be safe as evidenced by a water lab testing report. * * *" Record 64-65.

Petitioners first argue that the proposed rural residential zoning would have a deleterious effect on the existing aquifer that supplies water to nearby properties as well as the subject property. According to petitioners, the first problem with the county's findings is that they do not consider the carrying capacity of the surrounding area as opposed to merely the carrying capacity of the subject property. Petitioners argue that the county failed to consider the impacts 29 rural residential dwellings will have on the existing aquifer and how that impact will affect water users in the surrounding area.

RLDC 11.030 defines "carrying capacity" as:

"The ability of land to support proposed development as determined by an evaluation of suitability for sewage disposal, *the adequacy of the domestic groundwater supply (quantity and quality)*, the presence of adequate off-site roads, the suitability of soil and terrain to support on site roads, the presence or absence of flood, fire or erosion hazards, and the applicability of other special land use concerns (e.g. watershed protection, protection of wildlife and fishery habitat, the presence of scenic easements, airport flight paths, the availability of emergency services, etc.)." (Emphasis added.)

Petitioners argue that "carrying capacity" applies to groundwater supplies on lands surrounding the subject property as well as the subject property itself because the definition of "carrying capacity" includes the "adequacy of the domestic groundwater supply." According to petitioners, RLDC 46.040.C.2 and 3 demonstrate that adequate carrying capacity of the surrounding area is also an approval criterion.[7] Petitioners argue that the

[7] RLDC 46.040.C.2 and 3 provide:

language "physical characteristics of the land and surrounding area make the land suitable for the proposed density and types of uses" demonstrates that the groundwater carrying capacity of the surrounding area must be considered. According to petitioners, even if groundwater supplies are sufficient for the proposed dwellings, if the dwellings would adversely affect groundwater supplies for uses on surrounding lands, then the subject property is not "suitable."

We agree with intervenor, however, that there is nothing in RLDC 46.040.C that requires a consideration of the impacts of the proposed uses on the surrounding area. The focus is on the effect of the physical characteristics of the surrounding area *on* the proposed uses, not the effect of the proposed uses on the surrounding area. If something about the surrounding area would prevent the subject property from providing adequate groundwater carrying capacity, then the amendments might run afoul of RLDC 46.040.C. There is nothing in RLDC 46.040.C, however, that requires the county to consider the impact of the proposed uses on the surrounding area's groundwater capacity.

Petitioners also argue that the county improperly found that the subject property has adequate groundwater carrying capacity to support the proposed uses. According to petitioners, the well logs from only one well from the subject property were used and that is insufficient to demonstrate that the entire property has adequate groundwater supplies or that there is sufficient water for 29 dwellings. Petitioners cite two earlier Josephine County cases involving the same issue. In *Doob v. Josephine County*, 31 Or LUBA 275 (1996), we held

---

"2. *Other physical characteristics of the land and surrounding area make the land suitable* for the proposed density and types of uses, to include consideration of existing or potential hazards (flood, wildfire, erosion), the degree of slopes, the presence of wetlands, geologic formations, mineral deposits and any other similar natural or man made conditions or circumstances;

"3. The land in its natural state accommodates the proposed uses and densities, or special alterations or mitigation plans can make the land achieve the carrying capacity described under items [1] and [2] above[.]" (Emphasis added.)

that well logs from the surrounding area, but nothing from the subject property itself, were not sufficient to demonstrate that the subject property had adequate groundwater supplies. We rejected the county's implicit interpretation that no information from the subject property itself was required. *Id.* at 278-79. In *Doob v. Josephine County*, 32 Or LUBA 376 (1997), we held that evidence from two wells on the subject property along with numerous well logs from the surrounding area were sufficient to demonstrate that there was sufficient groundwater carrying capacity for 12 dwellings on a 14-acre parcel. *Id.* at 378. Petitioner argues that under the parameters established by the *Doob* cases, there is not substantial evidence to support the county's finding that there is sufficient groundwater carrying capacity.

While petitioners are correct that the 1996 *Doob* case held that sufficient groundwater supplies had not been demonstrated, that is almost entirely because there was no evidence of water supply on the subject property itself. We would likely agree with petitioners that there is not substantial evidence to support the decision if there were no evidence whatsoever from the subject property. But that is not the case. Petitioners also argue that unlike the later *Doob* case, where there were only 12 proposed dwellings on only 14 acres, the subject property is much larger and will contain more dwellings. According to petitioners, the larger parcel size and greater number of dwellings requires a different result in the present case. The question, however, is still whether there is substantial evidence to support the county's decision.[8] The 1997 *Doob* case demonstrates that a combination of evidence from the subject

[8] 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). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 188, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on the evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1998); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 91992).

property with evidence from the surrounding area may be sufficient to demonstrate adequate groundwater carrying capacity. That is precisely the evidence in the record in the present case. The evidence submitted by intervenor consists of an analysis of the water carrying capacity that utilizes a well on the subject property, data from well logs in the surrounding area, and data from observation wells from the Oregon Water Resources Department. While the subject property is larger and there are more proposed dwellings, those factors do not dictate a different result. A reasonable person could rely on the evidence submitted by intervenor to conclude that there is adequate groundwater carrying capacity.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners raise three subassignments of error relating to transportation impacts of the proposed development. We understand the parties to agree that Hugo Road, which directly serves the proposed development, has more than adequate capacity to serve the development. The problem lies with the Interstate 5 and Louse Creek interchange (I-5/Louse Creek). Although the I-5/Louse Creek interchange is approximately six and one-half miles from the subject property, Hugo Road is the direct route to the highway, and the interchange is considered a transportation facility that could be affected by the proposed development. The I-5/Louse Creek interchange already exceeded state performance standards in 2008, and intervenor's traffic study concluded that the proposed development will further degrade the interchange in the year 2010 when the development is expected to occur.[9]

In the first subassignment of error, petitioners argue that the county's decision violates RLDC 46.040.C, which requires the applicant to demonstrate that "the land" has adequate carrying capacity to accommodate the development. The county's findings state:

---

[9] Apparently, the proposed 29 dwelling development will have the effect of further degrading the I-5/Louse Creek interchange, but if the development were limited to 25 dwellings it would not affect the interchange. Record 1216.

> "The property has frontage on a county road. The road is a Rural minor collector, intended for the concentration and movement of traffic. The [BCC] finds that the road is a maintained county road and has adequate capacity to accommodate the proposed project. The [BCC] received testimony from the County Engineer in response to questions concerning the suitability of the road for the project raised by those in opposition. The [BCC] finds that the roadway meets the Level of Service (LOS) standards established in the County Master Transportation Plan. The [BCC] finds that the standard for approval of the roadway and transportation system must be 'adequate' for carrying capacity and the code uses AASHTO standards as a guide and not a requirement. The [BCC] finds that Hugo Road and other nearby roads provide a traffic network in the area that meets or exceeds county standards for roads to serve the proposed density. Additional access through the extension of an onsite county road will provide adequate access to meet concerns regarding the carrying capacity of the land. The [BCC] finds that the testimony from the County Engineer as well as statements from the Oregon Department of Transportation and traffic impact studies (TIS) prepared by JRH Traffic Engineers and the sight distance calculations of the Galli Group are sufficient to conclude that the roadway system is safe and meets the criteria of the ordinance to show adequate carrying capacity for both onsite and offsite roads." Record 60.

As discussed above, RLDC defines "carrying capacity" to include " * * * [t]he ability of land to support proposed development as determined by an evaluation of * * * the presence of adequate off-site roads[.]" It is not clear from the findings quoted above whether the county's conclusion that the off-site roads are adequate includes the I-5 Louse Creek interchange, which the record shows already falls below state performance standards. On remand, the county should clarify whether its conclusion includes the I-5 Louse Creek interchange and if so, explain the basis for that conclusion.

In the second and third subassignments of error, petitioners argue that the decision violates the transportation planning rule (TPR) at OAR 660-012-0060. OAR 660-012-0060(1) provides that if a plan amendment would "significantly affect" an existing transportation facility, the local government must put in place one or more measures specified in OAR 660-012-0060(2).[10] The findings specifically addressing the TPR provide:

---

[10] OAR 660-012-0060(1) provides, in relevant part:

"Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:

"(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);

"(b) Change standards implementing a functional classification system; or

"(c) *As measured at the end of the planning period identified in the adopted transportation system plan*:

"(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

"(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or

"(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan." (Emphasis added).

OAR 660-012-0060(2) provides in relevant part:

"Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:

"(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

"(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.

"(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.

"(d) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.

"(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management

> "The [BCC] finds that State Goal 12 regarding transportation has been met through the transportation plan and implementing ordinances that have been reviewed relative to this request. Testimony from JRH Transportation Engineers and the Public Works Department shows that traffic systems in the area are adequate for the proposed use." Record 65.

It appears to be undisputed that the proposed development would worsen the performance of the I-5 Louse Creek interchange, a transportation facility that is already performing below standards. It thus appears to be undisputed that under OAR 660-012-0060(1), the proposed amendment "significantly affects" the I-5/Louse Creek interchange. Thus, the county was required to, but did not, proceed under OAR 660-012-0060(2). *See* n 10. Furthermore, the findings do not consider the effect of the proposed development on the I-5/Louse Creek interchange at the end of the planning period as required by the TPR, but only consider the effect of the proposed development in 2010. The record is apparently silent about what the impact on the I-5/Louse Creek interchange will be at the end of the planning period in 2025.[11] OAR 661-012-0060(1)(c); *Woodard v. City of Cottage Grove*, 57 Or LUBA 152, 163 (2008), *aff'd* 225 Or App 282, 201 P3d 210 (2009). Because the proposed amendment significantly affects a transportation facility, the county must demonstrate compliance with the TPR under one of the options set forth in OAR 660-012-0060(2).

Intervenor cites a potential mitigating condition of approval as evidence that the amendment complies with the TPR, as follows:

> "Prior to County authorization for development, the applicant shall enter into a 'Cooperative Improvement Agreement' with Josephine County to contribute funds for the design and installation of two (2) traffic signals at the Louse Creek interchange. One (1) traffic signal shall be installed at the Interstate 5 Exit 61 northbound off ramp/Merlin-Galice Road intersection; and one (1) traffic signal installed at the Merlin-Galice Road/Highland Avenue intersection. The traffic signals shall be designed to meet State standards

---

> measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided."

[11] The county's transportation system plan identifies the 20 year planning period envisioned by the TPR as extending to 2025.

subject to approval by ODOT Region 3 and final approval by the State Traffic Engineer." Record 125.

First, the potential condition of approval cited by intervenor is merely a letter from ODOT to the county planning director. Intevenor does not explain how the suggestion in the letter is an applicable condition of approval that meets the requirements of OAR 660-012-0060(2)(e), where the county did not impose such condition. Moreover, according to intervenor "the time for conditions to mitigate possible impacts is at the time of development." Intervenor-Respondent's Brief 22. However, the county must determine compliance with the TPR *and* impose any mitigation measures at the time of the amendment; it may not defer that determination until a later date. *Willamette Oaks v. City of Eugene*, 232 Or App 29, ___ P3d ___ (2009).

Intervenor also appears to argue that the proposed development may be approved pursuant to OAR 660-012-0060(3)(c) because mitigation will prevent further degradation to the interchange. Even assuming that were true, however, there are multiple steps that are required to be taken in permitting such amendments under OAR 660-012-0060(3), and the decision neither discusses those provisions or makes any attempt to demonstrate compliance with the rule.[12] The decision does not demonstrate compliance with the TPR.

---

[12] OAR 660-012-0060(3) provides:

> "(3) Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:
>
> "(a) The facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted;
>
> "(b) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;
>
> "(c) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of

1 The fifth assignment of error is sustained.

2 The county's decision is remanded.

---

the facility by the time of the development through one or a combination of transportation improvements or measures;

"(d) The amendment does not involve property located in an interchange area as defined in paragraph (4)(d)(C); and

"(e) For affected state highways, ODOT provides a written statement that the proposed funding and timing for the identified mitigation improvements or measures are, at a minimum, sufficient to avoid further degradation to the performance of the affected state highway. However, if a local government provides the appropriate ODOT regional office with written notice of a proposed amendment in a manner that provides ODOT reasonable opportunity to submit a written statement into the record of the local government proceeding, and ODOT does not provide a written statement, then the local government may proceed with applying subsections (a) through (d) of this section."