BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRIAN OOTEN,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

BRUCE D. GOLDSON,
Intervenor-Respondent.

LUBA No. 2014-069

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

David J. Petersen and Duncan B. Delano, Portland, filed the petition for review and Duncan B. Delano argued on behalf of petitioner. With them on the brief was Tonkon Torp LLP.

No appearance by Clackamas County.

A. Richard Vial, Lake Oswego, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were David M. Phillips and Vial Fotheringham LLP.

RYAN, Board Chair, participated in the decision.

BASSHAM, Board Member, concurring.

HOLSTUN, Board Member, concurring.

REMANDED 11/20/2014

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

Petitioner appeals a decision by the county approving a comprehensive plan amendment and zone change.

MOTION TO INTERVENE

Bruce D. Goldson (intervenor) moves to intervene on the side of the county. There is no opposition to the motion and it is granted.

FACTS

The subject property contains two parcels totaling approximately 8.15 acres, bordered by Highway 213 on the west and Quail Crest Lane on the south. We refer to the southern approximately one-half of the property as "Tax Lot 1000" and to the northern approximately one-half of the property as "Tax Lot 1100." Tax Lot 1000 contains a dwelling, a 1,248 square foot accessory building, and a large parking and circulation area. Tax Lot 1100 contains a dwelling, a 4,200 square foot shop building, a 24 x 32 (768) square foot shop/garage, and parking areas. Both tax lots contain trees and landscaping. Access to the property is from two driveways with direct access to Highway 213. Since 1980, the property has been designated Rural on the county's comprehensive plan map and zoned Rural Residential Farm Forest 5-acre (RRFF-5). Adjacent properties to the north and east ranging from 2 acres to 40 acres are also designated Rural and zoned RRFF-5 and contain dwellings and wooded areas. We discuss the current designation and zoning of the property and adjacent properties later in this opinion.

Intervenor purchased Tax Lot 1000 in 1991 and Tax Lot 1100 in 1996. Intervenor operates a paving business from the subject property. Uses on the property include an office for the paving business and automobile, truck and

heavy equipment storage and repair. Intervenor also uses the property for vehicle and RV sales, and employs up to 40 people on the property.

There have been several previous attempts by intervenor to verify and expand some of the existing uses on each tax lot. We briefly summarize those attempts and their results here. A 1991 letter from the county to intervenor confirmed that as of 1967, Tax Lot 1000 contained a dwelling and a 1,248 square foot building used for "a two person business * * * [for] installing wiring and welding hitches on RVs and trailers" that qualified as a legal nonconforming use of Tax Lot 1000. Record 941. In 1991, intervenor received county approval to expand that nonconforming use to allow "storage of construction equipment on the site." Record 927.

Intervenor's 1997 attempt to confirm the use of Tax Lot 1100 for "auto, RV and light truck repair and incidental vehicle sales" partially succeeded. The county found the use was a nonconforming use allowed in the 24 x 32 square foot shop on Tax Lot 1100. Record 909. Intervenor's attempt to confirm the nonconforming use of the 4,200 square foot building on Tax Lot 1100 for "repair and maintenance of heavy construction vehicles and equipment" failed. That 1997 decision also found that the 4,200 square foot building was constructed after 1979. Record 913. A 1998 attempt to gain county approval to expand the uses on Tax Lot 1100 also failed.

In 2013, intervenor applied to change the comprehensive plan map designation from Rural to Rural Industrial (RI) and to rezone Tax Lots 1000 and 1100 to Rural Industrial District (RI), the county's zone that implements the RI plan designation. The board of commissioners partially approved the applications, but redesignated and rezoned only the portions of the subject property that are developed with shop buildings and parking and circulation

areas accessory to those shop buildings, and the driveway, leaving the Rural designation and RRFF-5 zoning in place for the two dwellings and the portions of the property that are treed. Record 37. The board of commissioners also limited the uses of the subject property to the "same as the existing land uses." Record 13. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In 1980, the county adopted, and the Land Conservation and Development Commission (LCDC) acknowledged, an exception to the applicable statewide planning goals and the subject property was designated Rural and zoned RRFF-5.[1] OAR 660-004-0018(1) is entitled "Planning and Zoning for Exception Areas" and provides:

> "This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and **do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception.** Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and

[1] In 1980, Statewide Planning Goal 2 (Land Use Planning), Part II provided for an exceptions process whereby a local government could adopt an exception to the applicable resource goals. *See 1000 Friends of Oregon v. Clackamas County*, 3 Or LUBA 281, 285 n 1 (1981) (quoting the then-applicable version of Goal 2). As that opinion explains, in the course of dealing with the exceptions process, LCDC also developed a contested-case procedure for taking what has come to be codified as an "irrevocably committed" exception. *Id*. at 286-91.

ORS 197.732(2)(a), enacted in 1983, now describes a physically developed exception, and ORS 197.732(2)(b) describes an irrevocably committed exception.

allow continuation of existing types of development in the exception area. *Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule*." (Underlining, bold, and italics added).

OAR 660-004-0018(2) was amended in 2011 and currently provides:

> "For 'physically developed' and 'irrevocably committed' exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those:
>
> "(a) That are the same as the existing land uses on the exception site;
>
> "(b) That meet the following requirements:
>
> "(A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals, and are consistent with all other applicable goal requirements;
>
> "(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and
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> "(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;
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> "(c) For uses in unincorporated communities, the uses are consistent with OAR 660-022-0030, 'Planning and Zoning of Unincorporated Communities', if the county chooses to designate the community under the applicable provisions of OAR chapter 660, division 22; *and*
>
> "(d) For industrial development uses and accessory uses subordinate to the industrial development, the industrial uses may occur in buildings of any size and type provided

> the exception area was planned and zoned for industrial use on January 1, 2004, subject to the territorial limits and other requirements of ORS 197.713 and 197.714."" (Emphasis added.)

We set out the entire text of OAR 660-004-0018 in the appendix.

In several prior versions of OAR 660-004-0018(2), the word "or" appeared, first between OAR 660-004-0018(2)(a) and (b), and later between OAR 660-004-0018(2)(c) and (d). The 2011 amendments replaced the word "or" between (c) and (d) with "and." "And" is generally used to describe conjunctive requirements. Accordingly, we conclude that subsections (2)(a) and (2)(b) apply to the application for a plan amendment and zone change. *Halperin v. Pitts*, 352 Or 482, 495, 287 P3d 1069 (2012) (courts will not rewrite the express language of a statute).

In his first assignment of error, petitioner argues that OAR 660-004-0018(1) and (3) require the county to take a reasons exception to Statewide Planning Goal 3 (Agricultural Land) and Goal 4 (Forest Land) in order to change the plan and zoning map designations of the property from Rural and RRFF-5 to RI to allow the industrial uses that are allowed in the RI zone. For the following reasons, we agree with petitioner that the county has not established that redesignating the property to allow industrial uses does not require new exceptions to Goals 3 and 4.

As relevant here, if a proposed plan and zone designation satisfies the requirements of OAR 660-004-0018(2)(a), which limits new uses on the exception site to (1) "those * * * [t]hat are the same as the existing land uses on the exception site;" and (2)(b)(A) – (C), which limits those that will maintain the land as "'[r]ural [l]and' as defined by the goals[,]" then no new reasons exception is required. If the uses on the exception site are not limited to the

same as existing land uses and to uses that will maintain the lands as rural land, then a reasons exception to the applicable resource goals is required. OAR 660-004-0018(3).

In its decision, the county found that a reasons exception to Goals 3 and 4 is unnecessary, based on the 1980 exception that designated the subject property Rural and zoned it RRFF-5. Record 12-13. Although it is not entirely clear, the county appears to believe that due to the 1980 exception, Goals 3 and 4 no longer apply at all to the property. If that is the county's belief, it is erroneous. The 1980 exception had the effect of taking an exception to Goals 3 and 4 only for the uses that were justified in the exception, presumably the uses allowed in the RRFF-5 zone. But as OAR 660-004-0018(1) provides, adopting new plan and zone designations that would allow changes to the existing types of uses requires the application of the standards in OAR 660-004-0018(2) through (4).

The county also adopted findings that address OAR 660-004-0018(2)(a) and (2)(b)(A) – (C), which appear to take the position that the proposed uses allowed under the RI zone are consistent with those rules because the decision limits the uses on the property to the "existing uses" on the property, and because the RI zone will maintain the land as "rural land." Record 12. Petitioner argues that the county's findings that OAR 660-004-0018(2)(b)(A) – (C) are satisfied are inadequate.

The county's findings that the proposed change to the RI plan and zone designation meets OAR 660-004-0018(2)(b)(A) – (C) are set out below:

"The proposal is consistent with OAR 660-004-0018 because:

"a. The Board has limited the uses of the site to the same as the existing land uses. See Order Exhibit C, condition no. 1.

> The applicant has proposed to continue the existing uses on the property. No new uses have been identified or proposed that require further analysis to determine if they are 'rural' in nature.
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> "b. The County's Rural Industrial Plan designation and implementing RI zoning district has recently been amended and acknowledged to be in compliance with Statewide Planning Goals 11 and 14.
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> "c. The findings addressing Statewide Planning Goals 11 and 14 demonstrate that the rural uses, density and public facilities will maintain the land as rural land. The property is not located in a public sewer or surface water district. The Rural Industrial Plan designation will not require or allow the extension of public sewer to the property. The existing uses and limited future uses contemplated for the property will not require the provision for extension of additional public services and facilities. The record demonstrates the rural uses, density and public facilities will not commit adjacent or nearby resource lands to other uses because there are no resource lands in adjacent or close to the subject property. * * *" Record 12-13.

Petitioner does not develop any argument as to why the county's findings that OAR 660-004-0018(2)(b)(A) – (C) are met are inadequate; he merely asserts that they are inadequate. Petition for Review 17. We think the county's findings are adequate to explain why the RI plan and zone designations meet OAR 660-004-0018(2)(b)(A) – (C). Accordingly, petitioner's challenge to the county's findings adopted in response to OAR 660-004-0018(2)(b)(A) – (C) provides no basis for reversal or remand.

Petitioner also argues that in finding that OAR 660-004-0018(2)(a) is met, the county erred in considering the uses that *currently exist* on the property. We agree with petitioner that the requirement in OAR 660-004-0018(2)(a) that the proposed uses be the "same as the existing land uses on the

exception site" requires the county to consider the uses that were "recognized or justified" in the 1980 exception statement. It does not allow the county to consider current uses on the site that were not "recognized or justified" in the 1980 exception statement. To read the provision as allowing the county to consider current uses on the exception site would make the provision meaningless, because all an applicant would need to show is that the existing use exists on the site, regardless of whether the initial exception statement that took an exception to the applicable resource goals "recognized or justified" the use.[2]

Turning to that question, the record is exceedingly sparse regarding the type or types of exceptions that were approved in 1980 to allow the property to be designated in the county's comprehensive plan as Rural and zoned RRFF-5. The only evidence in the record regarding the 1980 exception is a letter from petitioner's attorney that describes a statement from the planning director to petitioner's attorney that the 1980 exception was either a "physically developed" exception or "irrevocably committed" exception, or both. Record 804. There is nothing in the record or elsewhere cited to our attention that indicates what uses were justified or recognized in the 1980 exception. On the state of the current record, the county has no basis to conclude whether rezoning the property RI to allow the proposed industrial uses exceeds the scope of the uses recognized in the 1980 exception.

Remand is necessary for the county to determine, in the words of OAR 660-004-0018(1), what uses on the property were "recognized or justified by

[2] There is no dispute that many of the current industrial uses and structures on the property did not exist in 1980.

the applicable exception" in 1980, in order to determine whether the RI plan and zone designation allows uses that are "the same as the existing land uses on the site" as required by OAR 660-004-0018(2)(a). If the uses proposed for the property under the RI designation are not the same as the uses that were "recognized or justified" by the exception as required by OAR 660-004-0018(2)(a), then intervenor will need to seek a reasons exception as required by OAR 660-004-0018(3).

Finally, we disagree with intervenor that petitioner's argument is a collateral attack on the 1980 exception decision. The 1980 exception decision did not insulate all future changes in the plan and zone designations of the property from needing an exception for uses not recognized or justified under the exception.

A portion of the first assignment of error is sustained.

SECOND AND FOURTH ASSIGNMENTS OF ERROR

The Rural Industrial Section of the Land Use Chapter of the Clackamas County Comprehensive Plan (CCCP), Section 3.0(a) provides as relevant here:

> "Areas may be designated Rural Industrial when * * * [A]reas shall have an historical commitment to industrial uses[.]"

The board of commissioners interpreted the word "areas" to mean that the subject property is the appropriate "area" for consideration.[3] In his second

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[3] The county found:

> "The Board finds that the subject property is the appropriate 'area' of consideration for evaluating this policy for the same reasons identified under Policy 1.0 in the Rural Section of the Comprehensive Plan. The term 'areas' includes the parcels/property which are this application. Opponents argued that the effect of defining the subject property as the 'area'

assignment of error, petitioner argues that the board of commissioners improperly construed the term "areas" too narrowly to include only the subject 8.15 acre property, and that it should have considered the "areas" to be a larger area surrounding the subject property.

Under ORS 197.829(1), the board of commissioners' interpretation of its comprehensive plan is reversible if it "is inconsistent with the express language of the comprehensive plan or land use regulation." Under *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), LUBA's standard of review under ORS 197.829(1) is highly deferential, and LUBA must defer to the county commissioner's interpretation unless it is implausible. Petitioner has not demonstrated that the board of commissioners' interpretation of the term "areas" as used in Section 3.0(a) is inconsistent with any express language of the county's comprehensive plan or land use regulations, or that it is implausible.

The board of commissioners also concluded that the property has a "historical commitment to industrial uses" because many of the existing industrial uses on the subject property have been in existence for over 45 years, and the board of commissioners was not required by Section 3.0 to ignore the existing uses on the property even if those uses have not been legally established. Record 32. Petitioner first argues that the board of commissioners improperly construed the phrase "historical commitment to industrial uses" to include the illegal uses that currently exist on the property, and that it should

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> result[s] in illegal 'spot zoning' and is inconsistent with the comprehensive plan. The Board finds that the purpose of Policy 3.0(a) is in fact to recognize the historical use of properties and apply the appropriate plan and zone designations." Record 31.

have construed the phrase to include only lawful uses. In subsection D of the second assignment of error, we also understand petitioner to argue that the uses on the property are not "industrial uses" as defined in Clackamas County Zoning Ordinance (CCZO) 202, and therefore the board of commissioners' interpretation of the phrase used in Section 3.0(a) is inconsistent with CCZO 202.[4] Finally, in subsection E of the second assignment of error, we understand petitioner to argue that the board of commissioners' decision to redesignate the portion of the property that includes a new driveway shown at Record 38 improperly construes Section 3.0, because since the driveway access does not yet exist that portion of the subject property does not have a "historical commitment to industrial uses."

Petitioner has not demonstrated that the board of commissioners' interpretation of the phrase "historical commitment" as including all of the activities on the property over the past 45 years without regard to whether some of the uses are legally established is inconsistent with any of the express language of the comprehensive plan or the CCZO, or that it is implausible. We also reject petitioner's argument that the uses on the property are not "industrial uses" as defined in CCZO 202 for purposes of determining whether Section 3.0 is met. CCZO 201.01 makes clear that the CCZO definitions are "for the purpose of clarifying the provisions" of the CCZO. Petitioner has not demonstrated why a CCZO definition must be used when interpreting a phrase used in the county's comprehensive plan.

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[4] CCZO 202 defines "industrial use" to mean "[t]he use of land and/or structures for the manufacturing or processing of primary, secondary, or recycled materials into a product; warehousing and associated trucking operations; wholesale trade; and related development."

In his fourth assignment of error, we also understand petitioner to argue that the county failed to consider the impacts of redesignating only portions of the property RI on the remaining portion of the property that remains zoned RRFF-5. Intervenor responds, and we agree, that the board of commissioners' decision to redesignate and rezone only the portion of the property that the board concluded has a historical commitment to industrial uses is consistent with Section 3.0's requirement that "areas" to be redesignated to RI shall have a historical commitment to industrial uses.

In Subsection E of the second assignment of error, petitioner assigns error to the inclusion of the driveway in the area to be redesignated. Based on the county's reasoning in the decision, which narrows the redesignation to only areas of the subject property that the board of commissioners found have a historic commitment to industrial uses, we agree with petitioner that where the decision redesignates the new driveway that is required by Condition 2, the decision does not explain how that portion of the property has a historical commitment to industrial uses. Accordingly, we sustain Subsection E of the second assignment of error.

The second assignment of error is sustained, in part. The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The Rural Industrial section of the Land Use Chapter of the Clackamas County Comprehensive Plan, Section 1.0, provides:

> "The Rural Industrial plan designation may be applied in non-urban areas to provide for industrial uses that are not labor-intensive and are consistent with rural character, rural development, and rural facilities and services."

The county's findings conclude that because some industrial use of the subject property has been in existence for a long period of time, that industrial use of the property is part of the rural character of the area. The county's findings also conclude that because the RI plan designation is a rural plan designation and the RI zone limits the type and scale of uses to uses that are appropriate for rural development, the rural industrial uses on the property will be consistent with the rural character of the area:

> "The subject property is located outside of the Metro UGB and service district boundary and is considered a non-urban area. The Rural Industrial Plan designation and implementing RI zoning district limits the type and scale of uses which are appropriate for rural development. * * *
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> "Opponents raised issues about the compatibility of rural industrial uses and conflicts with the rural character of the area. The Board finds the Rural Industrial plan designation is a rural zone. The existing industrial uses of the property, which have existed for over 45 years is part of the rural character of this area. Furthermore, the Rural Industrial Plan policies contemplate rural industrial uses in rural areas of the County because the policies are intended to recognize areas historically committed to industrial uses." Record 30.

In his third assignment of error, petitioner argues that the county improperly construed Section 1.0 when it concluded that the longstanding industrial uses on the property make those uses "consistent with the rural character, rural development and rural facilities and services" of the area. Petitioner also argues that the findings fail to respond to evidence in the record regarding the inconsistency of the proposed industrial uses with the rural character and development in the area surrounding the subject property. Finally, petitioner argues that the county failed to adopt any findings explaining why the proposed industrial uses are not "labor intensive."

The county's decision takes the position that because some types and levels of industrial use have occurred on the property for a long period of time, at least those types and levels of industrial uses are part of the rural character of the area. We cannot say that position improperly construes Section 1.0, or that it is implausible.

However, we agree with petitioner that the county's findings are inadequate to respond to issues raised regarding the inconsistency of the proposed RI designation with the rural character of the area, particularly the adjacent RRFF-5 zoned properties. Merely because some historic types and levels of industrial uses of the property are part of the rural character of the area does not mean that the existing or proposed types and levels of industrial uses allowed under the RI designation are consistent with the rural character of the area. We also agree with petitioner that the county's findings are inadequate where the findings fail to address the requirement that the RI designation is "not labor intensive," particularly where the evidence in the record is that intervenor currently employs up to 40 people on the property.

The third assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

In his fifth assignment of error, we understand petitioner to argue that the county improperly construed the CCZO in failing to apply the provisions of CCZO 1206 governing nonconforming uses to the application for a plan amendment and zone change. We addressed and rejected similar arguments in *Swyter v. Clackmas County*, 40 Or LUBA 166 (2001) and *Huff v. Clackamas County*, 40 Or LUBA 264 (2001). In *Swyter*, the petitioner argued that the county's decision to approve a plan amendment and zone change that had the

effect of legalizing some illegal uses on the property was inconsistent with the county's provisions governing abandonment of nonconforming uses. We held:

> "As the county correctly points out, different criteria are applied to (1) establish the existence of a right to continue a nonconforming use and (2) change a property's comprehensive plan and zoning map designations. Neither ORS 215.130(7)(a) nor ZDO 1206.02 are directly relevant in changing the comprehensive plan and zoning map designations, and they certainly do not have the prohibitive effect that petitioner argues they have." *Swyter*, 40 Or LUBA at 176.

In *Huff*, we held that "[n]othing in ORS 215.130 [the statute governing nonconforming uses] pertains to or constrains a county's ability to rezone land to allow uses that, under preexisting zoning, might not be permitted as nonconforming uses." 40 Or LUBA at 273. We reach the same conclusions here.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

In his sixth assignment of error, petitioner argues that the county's decision improperly fails to apply the building design and other development standards in CCZO 1000 and the standards governing project size, landscaping, and parking in CCZO 1100 to the uses existing on the subject property. Intervenor responds that "[b]oth past and future development activities will be subject to the appropriate permitting processes and development standards." Response Brief 20. Although we are not entirely sure what that response means, petitioner has not demonstrated that CCZO 1000 and CCZO 1100 apply to the proposed plan amendment and zone change, where no permits for development are sought.

The sixth assignment of error is denied.

SEVENTH AND TENTH ASSIGNMENTS OF ERROR

CCZO 1202.01(E) provides that in order to approve the zone change, the county must find that "[s]afety of the transportation system is adequate to serve the level of development anticipated by the zone change." Condition 2 requires closure of the southern access point onto Highway 213. Record 39. Condition 3 requires intervenor to construct a new driveway near the north boundary of the property "to achieve adequate intersection sight distance * * *." Record 39.

During the proceedings before the board of county commissioners, intervenor generally discussed the location of the new driveway as approximately 100 feet from one of the existing access points to be closed. However, the final decision approves the exact location of the new driveway as shown in Exhibit B at Record 38. Record 37. Exhibit B appeared for the first time as an attachment to the final decision.

In his seventh assignment of error and in a portion of his tenth assignment of error, petitioner argues that the county committed a procedural error when it accepted and relied on Exhibit B to approve the location of the new driveway and determined that the new driveway means that the "[s]afety of the transportation system is adequate" under CCZO 1202.01(E).[5] Petitioner argues that accepting that new evidence prejudiced his substantial right to challenge the location of the new driveway as failing to satisfy CCZO 1202.01(E). Intervenor responds that Exhibit B is not evidence, and that even if it is, the specific location of the driveway 100 feet to the north is not new

[5] ORS 197.835(9)(a)(B) provides that LUBA may remand a decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner."

evidence because the relocation of the driveway was proposed by intervenor during the proceedings below.[6]

We agree with petitioner that the county committed a procedural error that prejudiced his substantial rights when it accepted Exhibit B after the record was closed, and relied on Exhibit B and the location of the driveway to conclude that CCZO 1202.01(E) is satisfied, where the exact location of the driveway had not been determined prior to the close of the record. On remand, the county must allow adequate opportunity to respond to that new evidence.

Also in a portion of his tenth assignment of error, petitioner argues that the county's findings are inadequate to explain why the proposal satisfies CCZO 1202.01(E), where the record contains evidence that a new access point at the north end of the subject property will cause safety issues for the properties located to the north and across Highway 213, and the county's findings fail to address the issue. In response, intervenor points to evidence in the record from intervenor's traffic engineers that the transportation system is adequate and argues that the county is entitled to and did rely on intervenor's experts to conclude that CCZO 1202.01(E) is satisfied.

We agree with petitioner that because an issue was raised regarding whether a new driveway to the north complies with CCZO 1202.01(E), and the findings fail to address the issue, remand is required.

CCZO 1202.01(A) provides that the zone change to RI must be consistent with the comprehensive plan. In the final portion of his tenth assignment of error, petitioner argues "[a]s explained throughout this brief, the

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[6] ORS 197.763(9)(b) defines "[e]vidence" to mean "facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

rezoning of part of the Property to Rural Industrial is inconsistent with numerous comprehensive plan policies and goals." Petition for Review 41. We understand that argument to be derivative of petitioner's second, third and fourth assignments of error. We have sustained portions of petitioner's second and fourth assignments of error that challenge the applications' consistency with CCCP Section 1.0 and Section 3.0, and on remand the county will need to address the bases for remand. Accordingly, it would be premature for us to resolve the portion of the tenth assignment of error that argues that CCZO 1202.01(A) is not met with respect to those CCCP sections. We have denied portions of petitioner's second and fourth assignments of error, and his third assignment of error, and accordingly the portion of the tenth assignment of error that is derivative of those assignments of error is also denied.

The seventh assignment of error and a portion of the tenth assignment of error are sustained.

EIGHTH ASSIGNMENT OF ERROR

The county's final decision "limit[s] the uses of the site to the same as the existing land uses. See Order Exhibit C, condition no 1." Record 13. Condition 1 provides:

> "Future uses of the property are limited to those identified in Table 604-1: Permitted Uses in the RI District, paragraph 'A. Construction and Maintenance Contractors,' as of the effective date of this order; except that building movers shall not be a permitted use." Record 39 (Emphasis in original).

In a portion of his eighth assignment of error, petitioner argues that the county's findings are inadequate because the portion of the decision limiting the uses to "the same as the existing land uses" is inconsistent with condition 1's authorization of *all* of the uses listed in CCZO Table 604-1, paragraph A,

except for building movers, because many of the uses listed in Table 604-1, paragraph A do not currently exist on the property.[7]

Intervenor does not provide any meaningful response to the argument. We agree with petitioner that the decision's limit on uses of the subject property to those uses that currently exist on the property appears to be inconsistent with condition 1's allowance of all uses specified in paragraph A, where some of the uses in paragraph A do not currently exist on the property. Remand is required for the county to clarify which uses, if any, the site is limited to and revise condition 1, if necessary, to reflect those limits.

The remaining portion of the eighth assignment of error challenges the county's decision under the Transportation Planning Rule at OAR 660-012-0060, and we address it below in our resolution of the ninth assignment of error.

The eighth assignment of error is sustained, in part.

NINTH ASSIGNMENT OF ERROR

OAR 660-012-0060, the Transportation Planning Rule (TPR), provides that if a plan amendment would "significantly affect" an existing or planned

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[7] CCZO Table 604-1, paragraph A provides the following uses are permitted in the RI zone:

> "A. Construction and Maintenance Contractors
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> > "This category includes contractors engaged in construction and maintenance of buildings and their component parts (e.g., roofing, siding, windows), fencing, decking, building systems (e.g., plumbing, electrical, mechanical), landscaping, and infrastructure (e.g., roads, utilities). Also included are excavation contractors, building movers, pest control services, and janitorial services."

transportation facility, the local government must put in place measures to mitigate the impacts.[8]

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[8] OAR 660-012-0060 provides, in relevant part:

> "(1) If an amendment to * * * an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule * * *. A plan or land use regulation amendment significantly affects a transportation facility if it would:
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> " * * * * *
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> "(c)(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.
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> "(2) If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below * * *:
>
> " * * * * *
>
> "(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures 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."

A. Performance of Affected Facilities

As relevant here, a plan amendment would "significantly affect" a transportation facility if, within the relevant planning period, the amendment would degrade the performance level of a facility that is otherwise projected not to meet applicable performance standards. Intervenor's traffic impact analysis (TIA) estimated current traffic generated from the subject property from intervenor's current business and residential uses, and compared that traffic to traffic that could be generated from the most intensive reasonably developable uses allowed in the RI zone. Intervenor's TIA concluded that the traffic generated by the new uses would worsen, or accelerate, a projected failure at the end of the planning period of the left turn movement at the intersection of Highway 213 and Henrici Road.[9] Record 440. Accordingly, the TIA concluded that the plan amendment will have a significant effect on left turning vehicle movement at the intersection of Highway 213 and Henrici Road. The TIA recommended that the significant effect could be mitigated with the design and installation of a two-stage left turn lane on Highway 213 south of Henrici Road. The county imposed Condition 6, requiring that in the future intervenor install the two-stage left turn lane, and concluded that with the condition of approval, the "significant effects" would be fully mitigated. OAR 660-012-0060(2)(d); *see* n 8.

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[9] The county's Transportation System Plan (TSP) projects that at the end of the planning period in 2035, even without an increase in traffic from the plan amendment, that left turn movement will operate at 98 percent of capacity, and that intersection would fail to meet ODOT's allowable volume to capacity ratio of 75 percent. Record 440.

Intervenor's TIA also concluded that with the plan amendment the westbound approach from the subject property southbound onto Highway 213 would accelerate a failure of that approach and cause it to operate above ODOT's allowable volume to capacity ratio sooner than it would otherwise, and recommended the addition of a southbound left turn lane for the westbound approach from the subject property onto Highway 213. The county imposed Condition 4, requiring that in the future intervenor install a southbound left turn lane on the subject property, and Condition 5, requiring that as warranted, a second southbound left turn lane be installed.

In his ninth assignment of error, petitioner first argues that intervenor's analysis improperly measures the increase in traffic between the current zone and the new zone by measuring traffic generated from existing uses on the property that are not authorized under the current zoning or approved as a non-conforming use. According to petitioner, "[h]ad the correct baseline been used, the increase in traffic * * * would have been much greater, and would likely trigger a significant impact finding under OAR 660-012-0060." Petition for Review 39. That argument is puzzling, because as explained above, the county *did* find that the increased traffic under the RI zone would significantly affect two transportation facilities, and pursuant to OAR 660-012-0060(2)(d) imposed conditions intended to mitigate that significant effect.

Nonetheless, petitioner is correct that the county has not established that traffic generated by the *current* industrial uses of the property—many of which are illegal and unapproved under the RRFF-5 zoning—is an appropriate means of establishing the baseline to determine whether the redesignation to RI "significantly affects" a transportation facility within the meaning of OAR 660-012-0060(1). The relevant question posed by OAR 660-012-0060(1) is

whether the *rezone from RRFF-5 to RI* significantly affects one or more transportation facilities in one or more of the ways described in OAR 660-012-0060(1). A straightforward means to answer that question is to compare the most traffic-generative use reasonably allowed in the RRFF-5 zone with the most traffic-generative use reasonably allowed in the RI zone. Comparing the amount of traffic generated by the *current* uses of the property with the most-traffic generative use allowed in the RI zone does not answer the question posed by OAR 660-012-0060(1), and may in fact provide misleading answers, unless the current uses of the property happen to be the most traffic-intensive uses allowed in the RRFF-5 zone, which is not the case. As explained, most of the current industrial uses of the property are not allowed in the RRFF-5 zone at all, and those current industrial uses include unlawful and unapproved expansions of a nonconforming use. Because the traffic generated by current industrial use of the property, which includes a business that employs 40 workers, almost certainly exceeds the traffic generated by the largely residential uses allowed under the RRFF-5 zone or the verified scope of the lawful nonconforming use, the county's approach may significantly underestimate the size or extent of the significant affect of the zone change to RI, and potentially the size or type of mitigation required under OAR 660-012-0060(2) to offset that significant effect. For example, had the traffic analysis properly compared traffic generated under RRFF-5 zone with traffic generated under the RI zone, it is possible that additional transportation facilities may be significantly affected, or more extensive mitigation be required or required sooner. Remand is necessary for the county to make that determination.

B. Conditions 4, 5 and 6

Conditions 4, 5, and 6 require in relevant part that "with each future proposed phase of development" intervenor must submit a traffic analysis to (1) address the need for a future southbound left turn lane at the intersection of Highway 213 and the new driveway, (2) address the need to widen the future southbound left turn lane to two lanes that access Highway 213, and (3) address the need for left-turn lane improvements at the Highway 213/Henrici Road intersection. Depending on the results of the traffic analysis, intervenor may be required to provide and pay for transportation improvements to mitigate the effects of its development. Record 39. The decision explains that the county adopted Conditions 4, 5 and 6 to mitigate the effects of the plan amendment to demonstrate that the proposal meets the TPR. Record 18.

In portions of his eighth and ninth assignments of error, we understand petitioner to argue that conditions 4, 5 and 6 are inadequate to mitigate the effects of the plan amendment on the affected transportation facilities, because the conditions do not explain the circumstances that would trigger the new traffic study and required improvements.

The conditions require that "with each future proposed phase of development" the applicant must submit a traffic analysis to address the need for improvements. From that language, if there is never a "future proposed phase of development" then the traffic analysis and mitigation required by the industrial use of the property allowed under the RI zone will never be triggered, and the traffic impacts from the plan amendment and zone change will never be mitigated. Accordingly, we agree with petitioner that conditions 4, 5 and 6 are inadequate to mitigate the significant effect of the zone change. While conditions with timing elements are an acceptable method of mitigation

of traffic impacts, so that required improvements are built only when needed, under these conditions there may never be a trigger to evaluate whether the mitigation that is required by the plan amendment and zone change needs to be constructed.

The eighth and ninth assignments of error are sustained.

The county's decision is remanded.

Bassham, Board Member, concurring.

I concur with the majority opinion in all respects, but write separately to note an important issue regarding OAR 660-004-0018 that the parties do not squarely confront and LUBA's opinion does not resolve.

Under the first assignment of error, the majority opinion first concludes that, as currently written, OAR 660-004-0018(2)(a) and (b) are conjunctive, rather than disjunctive, requirements. I agree with that conclusion. While making (2)(a) and (b) conjunctive does not make much sense and probably was not the intent of the 2011 amendments, LUBA should not attempt to correct that problem by interpretation. If LCDC did not intend (2)(a) and (b) to be conjunctive, LCDC is the most appropriate body to fix that problem.

The majority opinion next concludes under OAR 660-004-0018(2)(a) that the scope of "existing" uses does not include illegal or unapproved uses that were not authorized or recognized in the 1980 exception. I also agree with that conclusion.

Finally, the majority opinion concludes that the county's findings under OAR 660-004-0018(2)(b)(A) through (C) are adequate to demonstrate compliance with those standards. I agree with respect to OAR 660-004-0018(2)(b)(B) and (C). Those standards are concerned with impacts on

adjoining or nearby resource lands, and there is no dispute that no resource lands are adjacent or nearby.

However, the county's findings are arguably inadequate to address OAR 660-004-0018(2)(b)(A), which requires a finding that "[t]he rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals, *and are consistent with all other applicable goal requirements*." (Emphasis added). The county's findings address the first clause of OAR 660-004-0018(2)(b)(A) regarding maintaining the land as rural land, but do not address the second clause, emphasized above, regarding consistency with all other applicable goal requirements.

Petitioner argues generally that the proposed industrial uses require new exceptions to Goals 3 and 4. Intervenor disputes generally that Goals 3 and 4 continue to apply to the subject property at all. However, neither party ties those arguments to the language in OAR 660-004-0018(2). Specifically, petitioner does not fault the county for failing to address the requirement that the proposed use be "consistent with all other applicable goal requirements," or argue that that language requires the county to determine whether the proposed industrial uses are consistent with Goals 3 and 4. Because the issue is not well joined or briefed, I cannot fault the majority opinion for not addressing that issue. Nonetheless, it is an important question whether Goals 3 and 4 continue to apply to the property, and whether in rezoning the property to allow new uses not recognized in the original exception OAR 660-004-0018(2)(b)(A) requires the county to consider whether the new uses are consistent with Goals 3 and 4. LUBA should take up that question in the next appropriate case, or even better LCDC should consider amendments to clarify its intent.

OAR 660-004-0018 does not provide a clear answer to the question, and unfortunately the case law on this point is muddled. OAR 660-004-0018(1) provides that "[e]xceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception." It is clear under this language that an exception to Goal 3 does not allow a local government to zone the exception area to allow new uses that are inconsistent with another goal for which no exception is taken, such as Goal 4 or 14. In rezoning the exception area to allow new uses, OAR 660-004-0018(2)(b)(A) requires the local government to evaluate whether the new uses are consistent with "other goal requirements," including goals for which no exception has been taken, and if the answer is no, then that standard is not met and the rezone will require a new reasons exception to the applicable goal requirements.

However, it is less clear that OAR 660-004-0018(2)(b)(A) requires a local government to assess whether new uses proposed for a Goal 3 exception area must be evaluated to determine whether those new uses not recognized in the exception are consistent with Goal 3 requirements. Under OAR 660-004-0018(1), a goal exception to a portion of a goal does not relieve the local government from remaining goal requirements and only authorizes those uses recognized or justified in the exception, which suggests that a Goal 3 exception for a particular use, say rural residential, does not relieve the local government from the obligation to consider whether new uses are consistent with the remaining Goal requirements. On the other hand, it is possible to read OAR 660-004-0018(2)(b)(A) to apply only to those goals for which no exception was taken, and an exception to Goal 3 for a particular use means that Goal 3 no

longer applies to the subject property with respect to any new uses that would otherwise be prohibited by Goal 3. That is apparently the understanding that the county operated under in the present case.

Until fairly recently, LUBA's cases have held that Goal 3 continues to apply to a Goal 3 exception area as to those uses not justified or recognized in the exception, and that in rezoning the exception area to allow new uses under OAR 660-004-0018(2) and its earlier iterations the local government must consider whether the new uses are consistent with Goal 3. *See, e.g.*, *Allm v. Polk County*, 13 Or LUBA 257, 271-73 (1985) (rezoning a Goal 3 exception area justified on rural residential uses, to allow new commercial uses, required a new Goal 3 exception under an earlier version of OAR 660-004-0018); *Schultz v. Yamhill County*, 15 Or LUBA 87, 93-96 (1986) (under OAR 660-004-0018 a new Goal 3 exception is necessary to rezone property for industrial uses, where the exception area was justified based on rural residential uses); *Geaney v. Coos County*, 34 Or LUBA 189, 201 (1998) (a new Goal 3 exception is necessary to rezone an exception area justified on rural residential uses to allow new commercial uses).

In 1998, OAR 660-004-0018(2)(b) was amended into its current form, adding new requirements but retaining the requirement that the proposed uses be "consistent with all other applicable goal requirements." The requirement that the proposed uses be "consistent with all other applicable goal requirements" was formerly the *only* requirement in OAR 660-004-0018(2)(b)(A), but as amended that language was placed rather obscurely at the end of OAR 660-004-0018(2)(b)(A). Perhaps due to that obscure placement, LUBA cases after 1998 typically omit that language in paraphrasing OAR 660-004-0018(2)(b)(A), and have never discussed it.

In 2002 LUBA issued two opinions that can be misread to stand for the proposition that Goal 3 no longer applies to a Goal 3 exception area, and that no Goal 3 exception is ever required to rezone a Goal 3 exception area to allow new uses inconsistent with that goal. In *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002), the county took a Goal 3 exception for rural residential use, and planned the exception area for Very Low Density Residential (VLDR), but retained the existing resource zoning. Later the county approved a rezone of the property to VLDR, the zone that implemented the VLDR plan designation. LUBA rejected the petitioner's argument that the rezone required a new Goal 3 exception, concluding that nothing in OAR 660-004-0018(2) required a new Goal 3 exception in those circumstances. The basis for that conclusion is obvious: of course no new Goal 3 exception is necessary to rezone an exception area to allow rural residential uses *already recognized and justified in the exception*. However, as the author of that opinion I must confess that our conclusion was stated in broader terms that can be read to suggest that no new Goal 3 exception would *ever* be required to allow new uses in a Goal 3 exception area, under any circumstances.

Shortly thereafter, we issued *Doty v. Coos County*, 42 Or LUBA 103, *rev'd and rem'd on other grounds*, 185 Or App 233, 59 P3d 50 (2002), which involved a proposal to rezone a Goal 3 exception area that was justified for industrial uses to a Recreation zone, which would allow a new recreation use prohibited in the industrial zone. The petitioner argued that because a new use not justified in the exception was proposed, a new Goal 3 exception was necessarily required. Citing to *Friends of Yamhill County v. Yamhill County*, we correctly rejected that argument, concluding that OAR 660-004-0018(2) provides the standards for determining whether the new use is allowed subject

to the existing exception. On appeal, the Court of Appeals affirmed on that point, agreeing with LUBA that a mere change in use does not trigger the obligation to take a new Goal 3 exception, and that OAR 660-004-0018(2) provides the standards for determining whether a new exception is required. Specifically, the Court concluded that if the OAR 660-004-0018(2) standards are not met that "the basis for the physically developed or committed lands exception evaporates with an incompatible proposed use, and a new rationale for not applying the otherwise applicable resource goal becomes necessary." 185 Or App at 243.

Unfortunately, our opinion in *Doty* also stated flatly that "a change in uses allowed on land that is already subject to an irrevocably committed or physically developed exception does not require a new exception to Goal 3." 42 Or LUBA at 113. That statement, properly understood, is correct: a change in use does not automatically require a new Goal 3 exception. As we explained later in the opinion, and as the Court concluded, whether a new exception is required is determined by compliance with the standards in OAR 660-004-0018(2). But the above-quoted language can be understood to stand for the broad proposition—one that the county and intervenor appeared to operate under in the present case—that Goal 3 no longer applies to a Goal 3 exception area taken to justify a specific type of use prohibited by the goal, and that no evaluation of whether the proposed uses are consistent with Goal 3 is ever necessary under OAR 660-004-0018(2).

I believe that that broad proposition is incorrect, and that Goal 3 continues to apply to a Goal 3 exception area (except as to uses recognized or justified in the exception), and that OAR 660-004-0018(2)(b)(A) requires the county to evaluate whether proposed new uses not justified in the exception are

consistent with Goal 3, among other applicable goals. If the answer to that question is no, then all of the standards in OAR 660-004-0018(2)(b) are not met, and pursuant to OAR 660-004-0018(3) the local government may be required to take a reasons exception to Goal 3 or other applicable goals.

In the appropriate case where that issue is squarely presented, I would so hold.

Holstun, Board Member, concurring.

I do not agree with one aspect of the majority's reasoning in the first assignment of error. With three members of this Board interpreting OAR 660-004-0018 somewhat differently, LCDC may want to determine which of the three views expressed in this opinion, if any, reflect its intent in adopting the most recent version of OAR 660-004-0018, so that it may amend the rule to more clearly express that intent.

OAR 660-004-0018, which is attached as an appendix to this opinion, is not easy reading. But if you work your way through the text of the rule, it is relatively clear that the rule authorizes several options for planning and zoning exception lands. The OAR 660-004-0018(2) options are authorized following adoption of a "built" or "committed" exception, based on existing development on the property that renders it impractical to plan and zone that property for the uses allowed by applicable goals. Most "built" or "committed" exceptions are taken to plan and zone for uses that are not allowed by Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). [10]

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[10] OAR 660-004-0018 that is set out in the Appendix talks about "uses, densities, public facilities and services, or activities[.]" For brevity in this concurrence I refer to all five of those things as "uses."

The second sentence of OAR 660-004-0018(1) states that a built or committed exception does not authorize planning or zoning a property for uses other than those uses justified by the exception. However, two sentences after that sentence, OAR 660-004-0018(1) states that the rule in fact does authorize planning and zoning a "built" or "committed" exception area for additional uses in limited circumstances.[11] Those limited circumstances are set out in OAR 660-004-0018(2)(b) through (d).

This Board has interpreted OAR 660-004-0018(2)(a) through (d), as it was worded before the 2011 rule amendments, to give local governments four options. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408, 414 (2008) ("OAR 660-004-0018(2) requires plan and zoning designations applied to developed and committed exception areas to limit uses, density, and public facilities and services to those that meet at least one of four requirements."). Two of those options, OAR 660-004-0018(2)(a) and (b), apply generally; two of those options, OAR 660-004-0018(2)(c) and (d), apply in special, specified circumstances.

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[11] Those sentences in OAR 660-004-0018(1) are set out below:

> "Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. * * * Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule."

Under the first option, OAR 660-004-0018(2)(a), a local government may apply "plan and zone designations [to] limit uses * * * to those [uses] * * * [t]hat are the same as the existing land uses on the exception site[.]"

Under the second option, OAR 660-004-0018(2)(b), a local government may apply "plan and zone designations [to] limit uses * * * to those * * * [t]hat meet the * * * requirements [of OAR 660-004-0018(2)(b)(A) through (C)]." In other words, the second option provides a limited opportunity to plan and zone a "developed" or "committed" exception site for uses beyond those that exist on the site at the time of the exception, which were used to justified the exception, so long as the limitations imposed by OAR 660-004-0018(2)(b)(A) through (C) are satisfied. *Doty v. Coos County*, 42 Or LUBA 103, 114 (2002), *rev'd and rem'd on other grounds* 185 Or App 233, 59 P3d 50 (2002); *Leonard v. Union County*, 15 Or LUBA 135, 138 (1986).

The third and fourth options, OAR 660-004-0018(2)(c) and (d), apply in special circumstances (unincorporated communities and industrial development respectively). If a local government wishes to plan and zone an exception area for uses that do not comply with at least one of the four subsections of OAR 660-004-0018(2), a reasons exception is required under OAR 660-004-0018(3) and (4). *Doty v. Coos County*, 185 Or App 233, 243, 59 P3d 50 (2002).

The majority opinion changes this past operation of the rule in two fairly significant respects, based entirely on a 2011 amendment to OAR 660-004-0018(2) that replaced the conjunction between OAR 660-004-0018(2)(c) and (d) from "or" to "and." If that word-change between OAR 660-004-0018(2)(c) and (d) is interpreted to make OAR 660-004-0018(2)(a) and (b) conjunctive, as today's majority opinion does, LUBA's prior understanding of the rule is changed in at least two significant respects. First, planning and zoning for uses

beyond those that justified the "developed" or "committed" exception is no longer possible under OAR 660-004-0018(2)(b)—even if the standards set out there can be met—because those *additional* "uses" would necessarily fail to satisfy OAR 660-004-0018(2)(a). Second, even planning and zoning for the uses that justified a built or committed exception is not possible, unless the standards set out at OAR 660-004-0018(2)(b)(A) through (C) are met. If planning and zoning for the existing uses cannot be shown to comply with OAR 660-004-0018(2)(b)(A) through (C), presumably, under the majority opinion, a reasons exception under OAR 660-004-0018(3)-(4) would be required to plan and zone the built or committed exception area for the uses that justified the built or committed exception. I believe that gives the change in the conjunction separating OAR 660-004-0018(2)(c) and (d) an unwarranted meaning that is inconsistent with the stated purpose of OAR 660-004-0018. I would note that ironically the change in conjunction between OAR 660-004-0018(2)(c) and (d) clearly *does not* have the effect of making subsections (c) and (d) of OAR 660-004-0018(2) conjunctive requirements. The text of each of those subsections identifies the circumstances where each of those subsections of OAR 660-004-0018(2) apply, and the applicability of those two subsections of OAR 660-004-0018(2) is unaffected by the conjunction that separates them. Subsections (a) through (d) of OAR 660-004-0018(2) can be read as a series of options whether the conjunction separating OAR 660-004-0018(2)(c) and (d) is "or" or "and." I would continue to interpret OAR 660-004-0018 as a series of separate planning and zoning options, despite the 2011 conjunction change.

The other concurring opinion would significantly limit the OAR 660-004-0018(2)(b) option, based on what I believe to be a misreading of some

language in OAR 660-004-0018(2)(b)(A). That language requires that the "rural uses" authorized by OAR 660-004-0018(2)(b) "must be consistent with all other applicable goal requirements[.]" The concurrence would require a reasons exception to plan and zone the exception area for any "uses" other than the presumably rural residential uses that were identified to justify the built or committed exception, and would require a reasons exception here to authorize rural industrial uses. But that language only implicates other "*applicable* goal requirements" after a built or committed exception to Goals 3 or 4 or other goals is approved. For example, if a property is a site with significant inventoried Goal 5 resources, the planning and zoning would have to comply with Goal 5, notwithstanding a built or committed exception to Goals 3 and 4. But once a built or committed exception to Goals 3 and 4 has been approved to plan and zone agricultural or forest land for uses that are not authorized by Goals 3 and 4—in this case rural residential use with five acre minimum lot sizes—I do not believe a reasons exception to Goals 3 and 4 is necessary to plan and zone that land for rural industrial use, provided the standards set out in ORS 660-004-0018(2)(b)(A) through (C) are met. Interpreting OAR 660-004-0018(2)(b)(A) in the way the other concurring opinion does limits the applicability of OAR 660-004-0018(2)(b) in a way that I believe is inconsistent with the text of OAR 660-004-0018(2)(b)(A) and inconsistent with one of the main purposes of OAR 660-004-0018.

For reasons that I need not get into here, I agree with the majority and concurring opinions that approving a "built" or "committed" exception to Goals 3 and 4, at least conceptually, does not mean the committed land ceases to be agricultural land or forest land and does not mean Goals 3 and 4 are entirely inapplicable to the exception land. The built or committed exception

simply authorizes a local government to plan and zone the exception area for uses that those goals would otherwise not permit. It is OAR 660-004-0018(2)(b) that in turn authorizes local governments to plan and zone the exception area for additional uses beyond the existing uses, provided the standards set out at OAR 660-004-0018(2)(b)(A) through (C) are met. I do not agree with the concurring opinion's suggestion that the "consistent with all other applicable goals" language in OAR 660-004-0018(2)(b)(A) necessitates a finding that those additional uses are consistent with Goal 3 or 4 or necessitates a reasons exception if they are not consistent with Goals 3 or 4—again, so long as the standards set out at OAR 660-004-0018(2)(b)(A) through (C) are met.

Appendix

OAR 660-004-0018

Planning and Zoning for Exception Areas

(1) Purpose. This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.

(2) For "physically developed" and "irrevocably committed" exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those:

(a) That are the same as the existing land uses on the exception site;

(b) That meet the following requirements:

(A) The rural uses, density, and public facilities and services will maintain the land as "Rural Land" as defined by the goals, and are consistent with all other applicable goal requirements;

(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and

(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;

(c) For uses in unincorporated communities, the uses are consistent with OAR 660-022-0030, "Planning and Zoning of Unincorporated Communities", if the county chooses to designate the community under the applicable provisions of OAR chapter 660, division 22; and

(d) For industrial development uses and accessory uses subordinate to the industrial development, the industrial uses may occur in buildings of any size and type provided the exception area was planned and zoned for industrial use on January 1, 2004, subject to the territorial limits and other requirements of ORS 197.713 and 197.714.

(3) Uses, density, and public facilities and services not meeting section (2) of this rule may be approved on rural land only under provisions for a reasons exception as outlined in section (4) of this rule and applicable requirements of OAR 660-004-0020 through 660-004-0022, 660-011-0060 with regard to sewer service on rural lands, OAR 660-012-0070 with regard to transportation improvements on rural land, or OAR 660-014-0030 or 660-014-0040 with regard to urban development on rural land.

(4) "Reasons" Exceptions:

(a) When a local government takes an exception under the "Reasons" section of ORS 197.732(1)(c) and OAR 660-004-0020 through 660-004-0022, plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception.

(b) When a local government changes the types or intensities of uses or public facilities and services within an area approved as a "Reasons" exception, a new "Reasons" exception is required.

(c) When a local government includes land within an unincorporated community for which an exception under the "Reasons" section of ORS 197.732(1)(c) and OAR 660-004-0020 through 660-004-0022 was previously adopted, plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that were justified in the exception or OAR 660-022-0030, whichever is more stringent.