BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

OR SOLAR 7, LLC,
Intervenor-Respondent.

LUBA No. 2017-066

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Meriel L. Darzen, Bend, filed the petition for review and argued on behalf of petitioner.

Joel C. Benton, County Counsel, Medford, filed a response brief and argued on behalf of respondent.

Josh Newton, Bend, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Ellen H. Grover, Benjamin C. Seiken and Karnopp Petersen LLP.

Steven E. Shipsey, Assistant Attorney General, Portland, filed a state agency brief on behalf of Department of Land Conservation and Development.

Damien R. Hall, Portland, filed an amicus curiae brief on behalf of Oregon Solar Energy Industries Association. With him on the brief was Ball

Janik LLP.

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

REVERSED 10/27/2017

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a reasons exception to Statewide Planning Goal 3 (Agricultural Lands) to site a solar power facility on 80-acres of high-value farmland.

MOTION FOR REPLY BRIEF

Petitioner moves to file a reply brief to address waiver issues raised in intervenor-respondent's (intervenor's) response brief. There is no opposition to the motion, and it is allowed.

FACTS

The subject parcel is high-value irrigated farmland, zoned for exclusive farm use (EFU), with a majority of Class I soils. The property is located adjacent to the City of Medford's urban growth boundary (UGB) and city limits to the east.

In 2015, intervenor entered into a long-term lease with the property owner, in order to site an 80-acre photovoltaic solar power generation facility ("solar facility") on 90 acres of the property. The proposed solar facility has the capacity to generate approximately 10 megawatts (MW) of electricity, which would be transmitted to PacifiCorp's Sage Substation. The Sage Substation is located approximately one mile to the east, within the Medford UGB and city limits, on land zoned for industrial use.

Also in 2015, intervenor signed a Power Purchase Agreement (PPA) with PacifiCorp, which authorizes intervenor to deliver up to 10 MW of electricity to the Sage Substation at a price set by the Oregon Public Utilities Commission. Under state and federal law, utilities such as PacifiCorp are obligated to allow a "Qualifying Facility" such as the proposed solar facility to connect to its transmission and distribution networks, subject to available capacity, price controls, and other constraints. For technical and economic reasons, intervenor proposed to connect to PacifiCorp's grid at a substation, which is a facility that steps down electricity from high-voltage transmission lines to a voltage suitable for local distribution. PacifiCorp has hundreds of substations in the state, and a number of substations in Jackson County. Not all substations have the capacity and ability to accept a connection from a Qualifying Facility, but the Sage Substation does.

ORS 215.283(2)(g) authorizes a county to approve "[c]ommercial utility facilities for the purpose of generating power for public use by sale" in the EFU zone, as a conditional use. The Land Conservation and Development Commission (LCDC) has adopted administrative rules that restrict the size and density of power generation facilities, including solar facilities, on agricultural land. Under the current rules, a solar facility on high-value farmland is limited in size to 12 acres, unless an exception is taken to Statewide Planning Goal 3

(Agricultural Land). OAR 660-033-0130(38)(f).[1] The criteria for a reasons exception are set out in ORS 197.732 and OAR chapter 660, division 4, specifically OAR 660-004-0020 and OAR 660-004-0022, which we discuss below.

In January 2016, intervenor applied to the county for a reasons exception to Goal 3, along with a minor zone change and comprehensive plan amendment, to authorize the solar facility, subject to a Limited Use (LU) overlay. The application was deemed complete on November 30, 2016. The application justified the reasons exception based alternatively on two provisions of OAR 660-004-0022. First, under OAR 660-004-0022(1)(a), intervenor argued that there is a "demonstrated need" for the solar facility, based on the requirements of a statewide planning goal.[2] Specifically,

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[1] OAR 660-033-0130(38)(f) provides, in relevant part:

> "For high-value farmland described at ORS 195.300(10), a photovoltaic solar power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4."

[2] OAR 660-004-0022(1) provides, in relevant part:

> "For uses not specifically provided for in this division, or in OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

intervenor argued that Statewide Planning Goal 13 (Energy Conservation) requires the county to promote renewable energy sources such as solar energy.[3] With respect to the other elements of OAR 660-004-0022(1)(a), intervenor argued that the Sage Substation is a "resource" for purposes of OAR 660-004-0022(1)(a)(A), and the proposed solar facility requires a location within 1.5 miles of that resource. *See* n 2. For the same reason, intervenor also argued that the solar facility has "special features or qualities that necessitate its location on or near the proposed exception site." OAR 660-004-0022(1)(a)(B).

> "(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either
>
> > "(A) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this paragraph must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or
> >
> > "(B) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."

[3] Goal 13 is "To Conserve Energy." Goal 13 also provides that "[l]and and uses developed on the land shall be managed and controlled so as to maximize the conservation of all forms of energy, based upon sound economic principles."

Alternatively, intervenor argued that the proposed solar facility constitutes "industrial development" for purposes of OAR 660-004-0022(3), and that a reasons exception is also warranted under that provision because the facility would "have a significant comparative advantage due to its location" near "an energy facility," *i.e.*, the Sage Substation.[4] Intervenor argued that the solar facility would benefit the county economy, by among other things providing temporary construction jobs and a small number of permanent maintenance jobs, and would cause only minimal loss of productive resource lands.

On March 23, 2017, the county planning commission held a hearing on the application. The planning commission's deliberations resulted in a 2-2 tie

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[4] OAR 660-004-0022(3) provides, in relevant part:

> "Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts may include, but are not limited to, the following:
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> "* * * * *
>
> "(c) The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county's gain from the industrial use, and the specific transportation and resource advantages that support the decision."

vote on a motion to approve, and the planning commission accordingly recommended denial due to failure to obtain a majority in favor of the application.

The board of commissioners held a hearing on May 10, 2017. Petitioner submitted testimony in opposition. On June 14, 2017, the commissioners issued a decision approving the reasons exception to Goal 3, based on two alternative bases: (1) demonstrated need to meet the requirements of Goal 13, under OAR 660-004-0022(1)(a), and (2) rural industrial development under OAR 660-004-0022(3).

This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Alternative Reasons

Petitioner argues that the county erred in adopting alternative reasons exceptions under both OAR 660-004-0022(1)(a) and OAR 660-004-0022(3). According to petitioner, if the proposed use qualifies as a "rural industrial use," as the county found, then it must be justified under OAR 660-004-0022(3), not the "catch-all" category at OAR 660-004-0022(1), which applies only to "uses not specifically provided for in this division[.]" *See Morgan v. Douglas County*, 42 Or LUBA 46, 52 (2002) (a county errs in applying OAR 660-004-0022(1) to adopt a reasons exception for rural industrial development, instead of OAR 660-004-0022(3)).

Intervenor responds initially that this issue was not raised below with the specificity required by ORS 197.763(1).[5] Petitioner replies that the Department of Land Conservation and Development (DLCD) raised a similar issue in its testimony below, stating that the county must "select one rule provision or another and focus on that alone."[6]

As intervenor notes, DLCD's argument was somewhat different than petitioner's argument in this appeal. For example, DLCD viewed OAR 660-004-0022(1)(a) to be the most applicable provision, and questioned whether the proposed use qualifies as "rural industrial development" for purposes of OAR

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[5] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] 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."

[6] DLCD stated:

> "We agree [with] the applicant that OAR 660-004-0022(1) is likely the most applicable provision and are uncertain whether or not a utility scale solar project is properly considered a rural industrial activity. We are not convinced that something less than the most applicable provision, in this case OAR 660-004-0022(3) is also available for consideration. Put another way, we do not see this as an "either-or situation." If that were the case there would be no point in identifying multiple categories of uses to consider. We believe the county must select one rule provision or another and focus on that alone." Record 560.

660-004-0022(3). *See* n 6. Nonetheless, DLCD clearly took the position that the county must apply one provision or the other, and should not apply both. That is essentially the issue raised by petitioner in the first subassignment of error. We conclude that the "issue" of whether the county may justify exceptions under both provisions was adequately raised below, even though the specific arguments made below about which provision is more appropriate differ somewhat from those made on appeal.

On the merits, intervenor does not dispute that if a more specific provision for a reasons exception applies, the general "catch-all" provision at OAR 660-004-0022(1) is inapplicable. However, intervenor argues that given the uncertainty during the proceedings below (shared by DLCD and others) regarding whether the proposed solar facility is properly characterized as "rural industrial development," the county did not commit reversible error in adopting alternative reasons exceptions under both OAR 660-004-0022(1)(a) and 660-004-0022(3).

We generally agree with intervenor. As we noted in *Morgan*, both OAR 660-004-0022(1)(a) and OAR 660-004-0022(3) set out a *non-exclusive* list of acceptable reasons to justify an exception. We stated:

> "Although it is unlikely that LCDC intended this result, as OAR 660-004-0022(1) and (3) are written, there is * * * nothing that expressly precludes use of the same reasons specified in OAR 660-004-0022(1) to justify rural industrial development under OAR 660-004-0022(3)." 42 Or LUBA at 52.

We went on to evaluate challenges to the findings articulated under OAR 660-004-0022(1), to determine if those reasons were sufficient to justify a reasons exception for rural industrial development. Similarly, in the present case, we see nothing in the rule that would preclude the county from attempting to justify a reasons exception for an indisputable rural industrial use using the standards set out in the "catch-all" provision at OAR 660-004-0022(1), in lieu of the non-exclusive set of reasons listed in OAR 660-004-0022(3). Because the county is not limited to the reasons set out in OAR 660-004-0022(3) to justify rural industrial development, and can attempt to identify other reasons, including those set out in OAR 660-004-0022(1), it is not error, or at least it is not reversible error, to attempt to justify reasons exceptions under both OAR 660-004-0022(1) and OAR 660-004-0022(3) in the same decision, particularly where there is uncertainty regarding whether the proposed use is properly characterized as a rural industrial use. Errors made under one set of reasons standards may be harmless if the county adequately justifies an exception under a different set of reasons standards. Accordingly, we conclude that petitioner's categorical argument under the first subassignment of error that the county must choose one basis over another does not provide a basis for reversal or remand.

B. Demonstrated Need Based on Goal 13 Requirement to Develop Renewable Energy

Under the second sub-assignment of error, petitioner challenges the county's findings under the first element of OAR 660-004-0022(1)(a), that

"[t]here is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19[.]" *See* n 2. The county found:

> "Goal 13, in the context of the policies set forth in the State's energy policy, as well as federal and state statutes, establish a general requirement to utilize renewable resources, including the in-[s]tate siting of renewable energy production facilities such as the proposed project, and therefore establishes a 'demonstrated need' as required under OAR 660-004-0022(1)(a)." Record 2.

Petitioner argues that the county misconstrued the applicable law in concluding that Goal 13 establishes a requirement or obligation for the county to utilize renewable energy sources such as the proposed solar facility. According to petitioner, Goal 13 in relevant part requires only that the county "conserve" energy, and does not impose any requirement to develop renewable energy. *See* n 3. Petitioner cites *Middleton v. Josephine County*, 31 Or LUBA 423, 430 (1996) for the proposition that, in order to meet the demonstrated need element of requirement of OAR 660-004-0022(1)(a), the county must find that it is "unable to satisfy its obligations under one or more of Goals 3-19 absent the proposed exception." Because Goal 13 establishes no *requirements* regarding developing or providing renewable energy, petitioner contends that the county is not in a position where it cannot satisfy its obligations regarding Goal 13, absent the proposed exception.

Intervenor responds that the Goal 13 requirement to "maximize the conservation of all forms of energy" implies the obligation to promote the use of renewable energy to prevent the waste of a natural resource. *See* n 2.

Intervenor argues that the guidelines for implementing Goal 13 act as context for interpreting the Goal 13 obligation to "maximize the conservation of all forms of energy," and notes that Goal 13, Guideline 5 states that:

> "Plans directed toward energy conservation within the planning area should consider as a major determinant the existing and potential capacity of the renewable energy sources to yield useful energy ouput. * * * Whenever possible, land conservation and development actions provided for under such plans should utilize renewable energy sources."

Intervenor argues that further context is provided by OAR 660-033-0130(38), which as noted above allows a solar facility on high-value farmland as a conditional use, subject to a 12-acre maximum size and other constraints. Intervenor argues that a solar facility use itself is entirely consistent with the EFU designation and Goal 3; it is only the *size* of the proposed facility that requires an exception to Goal 3. As noted, OAR 660-033-0130(38) expressly provides that an exception may be taken to authorize a solar facility larger than 12 acres. *See* n 1. Intervenor argues that "demonstrated need" based on the "requirements of Goals 3-19," a range that includes Goal 13, is the most straightforward basis under OAR 660-004-0022 to seek an exception for an oversized solar facility. When these provisions are read together, intervenor argues, they support the county's interpretation that Goal 13 imposes a requirement to promote development of renewable energy, including solar energy, and that as contemplated by OAR 660-033-0130(38) that requirement

can form the basis for an exception to Goal 3 to approve an oversize solar facility.

We disagree with the county and intervenor that implicit in the Goal 13 requirement to "conserve" energy is an affirmative obligation for counties to promote the development of renewable energy. While development of renewable energy is certainly consistent with the Goal 13 requirement to "conserve" energy, the goal includes no express mandates regarding the development of renewable energy sources. The express requirement that "[l]and and uses developed on the land shall be managed and controlled so as to maximize the conservation of all forms of energy" falls far short of including a requirement for cities and counties to promote the development of renewable energy. As the DLCD argues in its state agency brief, LCDC has defined the relevant terms "conserve," "conservation," and "develop" in ways that do not suggest that the Goal 13 requirement to "maximize the conservation of all forms of energy" is intended to impose on local governments a requirement to promote the development of new energy sources in general, or renewable energy in particular.[7]

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[7] LCDC has provided the following relevant definitions of terms used in the statewide planning goals:

"**CONSERVE**. To manage in a manner that avoids wasteful or destructive uses and provides for future availability.

"**CONSERVATION**. The act of conserving the environment."

The guidelines that accompany the goals are advisory, and do not impose mandatory requirements. ORS 197.015(9). Even considered as context, Goal 13, Guideline 5, is couched in qualified and hortatory terms, and does little to suggest that the Goal 13 requirement to conserve energy imposes on local governments the obligation to promote development of renewable energy.

OAR 660-033-0130(38) certainly indicates that LCDC assumed that it is possible to obtain a reasons exception to Goal 3 to allow an oversize solar facility, but there is no reason to believe that LCDC, in adopting the rule, intended that the justification for such an exception would be a "requirement" in Goal 13 that at best is an implicit one. As discussed below, we believe that to the extent LCDC considered the matter, it likely assumed that a reasons exception for an oversize solar facility would be justified under OAR 660-004-0022(3), for industrial development on rural lands.

Finally, intervenor argues that, in *Middleton* and other cases, LUBA recognized that an exception can be justified under OAR 660-004-0022(1)(a) based not only the requirements of Goals 3-19, but also on the requirements in the local acknowledged comprehensive plan. 31 Or LUBA at 429 (quoting *1000 Friends of Oregon v. Marion County*, 18 Or LUBA 408, 413 (1989). Intervenor cites several provisions in Chapter 11 (Energy) of the Jackson

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"**DEVELOP**. To bring about growth or availability, to construct or alter a structure, to conduct a mining operation, to make a physical change in the use or appearance of land, to divide land into parcels, or to create or terminate rights of access." Statewide Planning Goals and Guidelines, Definitions.

County Comprehensive Plan (JCCP), and argues that those provisions embody a requirement to support the development of renewable energy in the county.[8] However, we note that the cited JCCP provisions are not framed as mandatory *requirements* to promote renewable energy, or suggest that the county would fail to comply with applicable statewide planning goals if the JCCP provision were not implemented. The most pertinent JCCP policy cited simply requires that the county "shall actively *encourage* the development and use of local renewable energy resources[.]" (Emphasis added). In any case, intervenor identifies no findings that the board of commissioners adopted regarding these JCCP provisions. Because the board of commissioners did not take the position that the JCCP includes requirements that could be the basis for an

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[8] Intervenor cites the following JCCP Provisions:

> "Goal: To Effect the Optimum Conservation of Energy and Use of Local Renewable Resources." JCCP 11-1
>
> From the Introduction: "It is the basic intention in the element, that both the long and short-term benefits of energy conservation and use of renewable energy sources be realized in a timely and cost-effective manner." *Id.*
>
> "Policy: The County shall develop and implement land use policies and related planning and implementation techniques that will maximize energy conservation and efficiency." *Id.* at 11-4.
>
> "Policy: The County * * * shall actively encourage the development and use of local renewable energy resources and alternative energy systems on the community, neighborhood and individual homesite level." *Id.* at 11-22.

exception for purposes of OAR 660-004-0022(1)(a), we consider intervenor's arguments on this point no further.

In sum, we agree with petitioner that the county erred in concluding that Goal 13 includes a requirement to promote the development of renewable energy such as the proposed solar facility. Because the reason set out in OAR 660-004-0022(1)(a) is predicated on the requirements of a statewide planning goal, and the county identified no statewide planning goal that requires the county to promote the development of renewable energy, the county erred in concluding that a reasons exception to Goal 3 is justified under the standards set out in OAR 660-004-0022(1)(a).

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioner challenges the county's findings under other elements of OAR 660-004-0022(1)(a). Because we have concluded that the county erred in finding that the first element of OAR 660-004-0022(1)(a) is met, no purpose would be served by evaluating petitioner's challenges to the remaining elements of the test.[9]

We do not reach the second assignment of error.

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[9] We also need not and do not resolve intervenor's argument that the issues raised under the second assignment of error were not raised adequately during the proceedings below, pursuant to ORS 197.763(1).

THIRD ASSIGNMENT OF ERROR

Under the third assignment of error, petitioner argues that the county erred in concluding that an exception is warranted under the standards set out in OAR 660-004-0022(3), for industrial development of rural lands. As discussed below, OAR 660-004-0022(3)(a) through (c) set out three independent bases for a reasons exception for industrial development on rural lands, including circumstances where the industrial use would have a "significant comparative advantage" due to its location near existing industrial activity, an energy facility, or products available from other rural activities.

A. Rural Industrial Development

In Finding 2.5, the county first concludes that the proposed solar facility is a "rural industrial use" for purposes of OAR 660-004-0022(3).[10] Petitioner

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[10] The county's findings state, in relevant part:

> "2.5 While not an 'industrial use' for purposes of Jackson County's [Land Development Ordinance, or LDO], the proposed project is a 'Rural Industrial Use' for purposes of State law governing the exception criteria.
>
> - "Solar facilities, such as the proposed project, are not defined as 'industrial uses' under Jackson County's LDO.
>
> - "State law defines 'industrial use' to include activities 'that generate income form the production, handling or distribution of goods or services.'
>
> - "In addition, solar facilities such as the proposed project are listed as 'industrial uses' under acknowledged plans of a number of other Oregon counties (e.g. Coos, Lake,

challenges that finding, arguing that the proposed facility does not qualify as "industrial" development, because it produces no goods or services, and further will produce few permanent jobs or have much economic impact on the county.

Intervenor responds initially that the issue of whether a solar facility can be an "industrial" development for purposes of OAR 660-004-0022(3) was not raised below, and thus is waived on appeal. ORS 197.763(1). In reply, petitioner concedes that it raised no issues on this point in its testimony, but argues that DLCD submitted a letter during the proceedings below that questioned whether a solar facility is an "industrial use" for purposes of OAR 660-004-0022(3).

Anticipating this response, intervenor argues that DLCD was equivocal regarding whether a "utility scale solar project" qualifies as an industrial use for purposes of OAR 660-004-0022(3), and that DLCD's equivocal testimony on this point was insufficient to provide the county and intervenor fair notice that DLCD intended to contest that point. *See Boldt v. Clackamas County*, 107

Deschutes, Linn and Josephine). LCDC's acknowledgment of county code provisions that list commercial energy generation as an allowed use in industrial zones means including such uses within industrial zones is consistent with Statewide Planning Goal 9 and the state definition of industrial use.

- "Evidence in the record establishes that the proposed project will generate income by producing electricity to be sold to PacifiCorp, and therefore the use falls within the applicable state definition of 'industrial use.'" Record 5.

Or App 619, 813 P2d 1078 (1991) (the purpose of the "raise it or waive it" requirement at ORS 197.763(1) is to provide "fair notice" of the issue to the decision maker and other parties, so they have an adequate opportunity to respond and address the issue).

We partially agree with intervenor. DLCD stated in relevant part that it was "uncertain whether or not a utility scale solar project is properly considered a rural industrial activity," and while DLCD was not convinced that a solar facility is an industrial use, it was "open to the discussion[.]"[11] A

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[11] DLCD's testimony states, in relevant part:

> "We agree with the applicant that OAR 660-004-0022(1) is likely the most applicable provision and are uncertain whether or not a utility scale solar project is properly considered a rural industrial activity. * * *
>
> "In an attempt to provide some guidance on the subject we conducted a quick review of industrial zoning districts for 10 nearby counties, including Jackson County. Our thinking was that genuine industrial uses would be regularly listed in industrial zoning districts. The results indicate that five counties (Coos, Deschutes, Lake, Linn and Josephine) list commercial energy facilities in some way among potential allowable uses [in industrial districts] and that five (Curry, Douglas, Jackson, Lane and Klamath) do not. We did not directly contact any of the ten mentioned jurisdictions and do not consider our results fully conclusive. At this point we believe it remains a rebuttable presumption that utility scale solar is not rightfully categorized as a 'rural industrial use." Record 560.
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> "As stated previously, we are not convinced that utility scale solar development is rightfully considered rural industrial development.

reasonable person might not discern from DLCD's equivocable statements that it intended to place into controversy and seek resolution of the issue of whether a utility scale solar project qualifies as an industrial use for purposes of OAR 660-004-0022(3).

Nonetheless, as Finding 2.5 demonstrates, the county appears to have recognized that the uncertainty on this point warranted findings, and even relied upon DLCD's research into other counties' acknowledged land use regulations to support its conclusion that the proposed solar facility qualified as an industrial use. While DLCD's letter did not explain the basis for its uncertainty, or frame it in a way that compels recognition as an issue, we conclude that DLCD's testimony was sufficient in the present case to satisfy ORS 197.763(1).[12]

On the merits, as the findings note and intervenor argues, OAR 660-009-0005(3) defines "industrial use," for purposes of Statewide Planning Goal 9 (Economic Development), as "employment activities generating income from the production, handling or distribution of goods." *See also* ORS 197.722(1) (defining "industrial use" for purposes of designating regionally significant industrial areas to mean "employment activities * * * that generate income

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However, we are open to the discussion and offer the following comments and observations." Record 562.

[12] We note that in its state agency brief, DLCD does not take any position on whether a utility scale solar facility can be characterized as an industrial use for purposes of OAR 660-004-0022(3).

from the production, handling or distribution of goods or services"). Petitioner asserts that a solar facility does not produce goods or services, but does not explain why the production of electricity for sale to the public cannot be viewed as the production of goods or services. Petitioner also argues that, aside from 100 initial construction jobs, the proposed solar facility will generate only 1-3 permanent maintenance jobs, not enough permanent jobs in petitioner's view to qualify as an employment activity. However, while the number of permanent jobs created may be a factor to be considered and balanced under the standards at OAR 660-004-0022(3)(c), we do not see that a use that otherwise appears to be an industrial use must be regarded as something else, simply because it will generate only a relatively small number of permanent jobs. A highly automated factory is undoubtedly an industrial use, notwithstanding that it may require few workers. Petitioner has not demonstrated that the county erred in concluding that the proposed solar facility is an "industrial" use for purposes of OAR 660-004-0022(3).

B. Comparative Advantage Due to Location near an Energy Facility

OAR 660-004-0022(3) sets out three independent bases for a reasons exception for rural industrial development, in subsections (a), (b) and (c):

> "Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts may include, but are not limited to, the following:
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> "(a) The use is significantly dependent upon a unique resource located on agricultural or forest land. Examples of such resources and resource sites include geothermal wells,

mineral or aggregate deposits, water reservoirs, natural features, or river or ocean ports;

"(b) The use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas; or

"(c) The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county's gain from the industrial use, and the specific transportation and resource advantages that support the decision."

The county adopted Findings 2.6 to address OAR 660-004-0022(3), focusing on subsection (c).[13] Petitioner argues, initially, that the county erred to the

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[13] The county's findings addressing OAR 660-004-0022(3)(c) state:

"2.6 The proximity of Sage Substation provides a significant comparative advantage, would benefit the local economy, and as approved, does not involve a loss of resource lands.

- "For the reasons set forth above [in section 2.4], the BoC [board of commissioners] finds that solar electricity generation facilities such as the proposed project must be located near existing substations with available transmission capacity in order to be economically viable. While there are a large number of substations across the Pacific Northwest, in order to be feasible, the substation must have the requisite transmission capacity as well as several other attributes.

- "The BoC finds that Applicant has demonstrated that the Sage Substation is one of only several available within

extent it relied upon subsection (a), which concerns uses that are "significantly dependent upon a unique resource located on agricultural or forest land." Petitioner argues that the bulleted findings under Finding 2.6 describe the Sage Substation as a "necessary resource for the project," perhaps echoing earlier findings in Finding 2.4 addressing the somewhat similar elements of OAR 660-

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> Jackson County capable of supporting solar development such as the proposed project, and therefore constitutes a 'resource' providing not only a significant comparative advantage, but a necessary resource for the proposed project.
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> - "Evidence in the record establishes that the proposed project will initially provide 100 construction jobs and at least one full-time equivalent job during operations. Additionally, the proposed project will provide a revenue stream (via lease payments) for property that exceeds the commercial benefit of the current agricultural operations and will help support ongoing agricultural activities on adjoining land. The development will also result in a significant increase in the tax revenues received by the County for the subject property. Thus, the proposed project will benefit the local economy.
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> - "Evidence in the record establishes that the construction of the proposed project involves driving posts supporting the solar panel arrays, with minimal soil compaction or topsoil removal. As guaranteed by the bond required by Conditions of Approval including herein, after 30 years the site will be returned to substantially the same condition it is in now and will again be suitable for and capable of supporting agricultural activity. As such, the impact to productive resource land is temporary, and no resource lands will be permanently lost as a result of the construction of the proposed project." Record 5-6.

004-0022(1)(a)(A) or (B). *See* n 2. Petitioner argues that to the extent such findings are intended to justify an exception under the similar "significantly dependent upon a unique resource" language of OAR 660-004-0022(3)(a), the findings must fail, because the Sage Substation is not located on agricultural or forest land, but is located within the City of Medford and its UGB.

Intervenor responds that LUBA may affirm the county's decision notwithstanding inadequate findings regarding OAR 660-004-0022(3)(a), pursuant to ORS 197.835(11)(b).[14] According to intervenor, the county's other findings and the evidence in the record suffice to demonstrate that the "use is significantly dependent upon a unique resource" located on agricultural land for purposes of OAR 660-004-0022(3)(a). Intervenor contends that the "unique resource" here is the subject property itself, which has the topographic features, size and sunlight exposure necessary to site a solar facility, including the necessary proximity to the Sage Substation.

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[14] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

We disagree with intervenor's understanding of OAR 660-004-0022(3)(a) and of our authority under ORS 197.835(11)(b). That the subject property is flat, 80 acres in size and exposed to the sun does not render the property a "unique resource" for purposes of OAR 660-004-0022(3)(a). While a "unique resource" might be a geothermal well or something similar that is located on or near the subject property, the general topographic and similar features that render the property suitable for the proposed industrial use do not make the property itself a "unique resource."

Further, ORS 197.835(11)(b) is a limited vehicle that allows LUBA to overlook inadequate findings in cases where the relevant evidence is such that it is "obvious" or "inevitable" that the decision complies with the applicable approval standards. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995). ORS 197.835(11)(b) is not a vehicle that would allow LUBA to affirm a reasons exception based on a reasons standard that the local government apparently did not consider. Further, it is certainly not "obvious" or "inevitable" that a reasons exception could be justified under OAR 660-004-0022(3)(a). As petitioner argues, the findings repeatedly state in various ways that the proposed solar facility is dependent upon the Sage Substation, which the findings characterize as an indispensable "resource" for the proposed use. However, for purposes of OAR 660-044-0022(3)(a) it is clear that such a resource must be located on rural land, specifically agricultural or forest land. Lands designated as Agricultural and Forest under the statewide planning goals

exist only on rural lands, outside urban growth boundaries.[15] *See* OAR 660-033-0020(1)(c) and OAR 660-006-0010. Therefore, because the Sage Substation is located within the city's UGB, it cannot possibly constitute a "resource" for purposes of OAR 660-004-0022(3)(a).

As we understand it, Finding 2.6 focuses mostly if not entirely on OAR 660-004-022(3)(c) as the basis for the exception, and although it refers to and appears to incorporate other findings, presumably those in Finding 2.4, addressing OAR 660-004-0022(1)(a)(A) and (B). As noted, OAR 660-004-0022(3)(c) requires a finding that a proposed industrial use "would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities)[.]" It is not clear whether petitioner argues under OAR 660-004-0022(3)(c), as it did under OAR 660-004-0022(3)(a), that the resource or

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[15] Sometimes former agricultural lands included in a UGB retain their prior EFU zoning, as a means of preserving the land for eventual conversion to urban uses. However, such lands are by definition urbanizable or urban lands, and no longer "agricultural land" as defined in Goal 3 and OAR 660-033-0020. That nuance was apparently overlooked in the present case. We note that intervenor's alternative sites analysis submitted to demonstrate compliance with OAR 660-004-0020(2)(b) ("[a]reas that do not require a new exception cannot reasonably accommodate the proposed use") disqualified a 170-acre site within the UGB on the grounds that the site is still zoned EFU, and therefore would require an exception to Goal 3. Record 458. However, if the site is within the UGB, it is no longer agricultural land under Goal 3, and no exception to Goal 3 would be required.

locational attractor under OAR 660-004-0022(3)(c) cannot, as a matter of law, include a site such as the Sage Substation that is located within a UGB.

Even if petitioner's brief, fairly read, does not advance that argument under OAR 660-004-0022(3)(c), we believe we must have due regard for the proper construction of OAR 660-004-0022(3)(c) in evaluating the parties' arguments regarding that provision. We therefore consider whether OAR 660-004-0022(3)(c) can be interpreted to justify an exception for industrial development on resource land, where the locational attractor at issue is a use or facility located within a UGB, on urban land.

We repeat the text of OAR 660-004-0022(3)(c), which articulates a sufficient reason for siting industrial development on resource lands where:

> "The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county's gain from the industrial use, and the specific transportation and resource advantages that support the decision."

The first sentence provides three examples of a sufficient locational attractor: "near existing industrial activity, an energy facility, or products available from other rural activities[.]" The third example is qualified as a "rural" activity. However, the phrase "rural activities" is itself qualified with the word "other," denoting that other uses described in the sentence are also types of "rural activities." If that were not the intended meaning, then the third example

would simply say "products available from rural activities[.]" To give some effect to the qualifier "other," the other uses listed in the preceding clauses must also be understood to be limited to "rural" activities. That qualification obviously applies to the industrial use that is proposed (which is located on resource land, and is *ipso facto* "rural"), but that qualification must also apply to the two immediately preceding examples in the same clause: existing industrial activity and an energy facility. In short, the most straightforward reading of the first sentence of OAR 660-004-0022(3)(c) is that LCDC intended that the three locational attractors listed as examples be "rural" uses.

That textual reading is also supported by the context of OAR 660-004-0022(3)(c), which include subsections (a) and (b). As discussed above, OAR 660-004-0022(3)(a) requires that the industrial use be significantly dependent upon a unique resource that is located on agricultural or forest land, which necessarily excludes land within UGBs. OAR 660-004-0022(3)(b) requires that the industrial use "cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas[.]" In our view, both reasons demonstrate a subsidiary concern that "rural industrial development" potentially authorized under subsections (a) and (b) does not undermine the integrity and function of UGBs. As explained below, a broader reading of OAR 660-004-0022(3)(c), which would allow the requirement for a locational attractor to include a site or activity within a UGB, could easily result in development that undermines the function and integrity of that UGB.

Reasons sufficient to justify an exception to a statewide planning goal must be "exceptional." *1000 Friends of Oregon v. LCDC*, 69 Or App 717, 731, 688 P2d 103 (1984). An interpretation of OAR 660-004-0022(3)(c) that would allow a reasons exception for relatively commonplace circumstances cannot be a correct interpretation of the rule. It is common, for example, for existing industrial activities within UGBs to be clustered in industrially zoned areas near the periphery of the urban area. Absent some limitation, a proposed industrial use could relatively easily demonstrate a "significant comparative advantage" simply by being located near such existing clusters of urban industrial activities, on less expensive and less constrained resource land just outside the UGB. However, that approach would undermine not only the protection of resource lands, but also the integrity and function of urban growth boundaries. If OAR 660-004-0022(3)(c) is interpreted to allow reasons exceptions for new industrial uses located on resource land adjacent to an UGB, based on the comparative advantage gained from proximity to existing industrial or other uses on nearby urban or urbanizable lands, then such reasons exceptions could become commonplace, given the strong economic incentives to locate urban-dependent development in proximity to urban resources on comparatively inexpensive resource land.[16] It is highly unlikely that LCDC, in

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[16] As part of the analysis of alternatives sites, intervenor rejected industrial sites within the City of Medford UGB on the grounds that "the high cost of urban land (relative to rural land) renders locating the project on urban land

drafting OAR 660-003-0022(3)(c), intended the rule to allow rural industrial development in a manner that could easily subvert one of the principal structures of the statewide land use program: the urban growth boundary.

In the present case, although the county made no specific findings on this point, the county presumably believes that the Sage Substation qualifies as an "energy facility," the second example listed in OAR 660-004-0022(3)(c), within the meaning of that subsection. However, for the reasons expressed above we believe that OAR 660-004-0022(3)(c) does not contemplate that the comparative advantages of proximity to an energy facility on urban land can justify an exception to Goal 3 to allow industrial development of agricultural land outside a UGB.

Under the foregoing view, a Goal 3 exception under the reasons set forth in OAR 660-004-0022(3)(c) to site a solar facility on resource land would be permissible only if the predicate energy facility (a substation, transmission line or similar facility that could allow the connection) is also located on rural land. Because the Sage Substation, the energy facility that serves as a locational attractor in the present case, is located on urban land, it cannot serve as the basis for a reasons exception under OAR 660-004-0022(3)(c).

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economically infeasible * * *." Record 459. Intervenor estimated that industrial land would have to earn annual lease income of $11,979 per acre to $21,780 per acre to justify the purchase price, and estimated that the proposed solar facility is not economically viable at a lease rate more than $800 per acre. *Id.*

Given the foregoing conclusion, we need not address petitioner's remaining arguments and assignments of error that challenge the county's findings under OAR 660-004-0022(3)(c).

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Once the county has identified a sufficient reason to take an exception to a statewide planning goal, the county must determine whether the proposed exception satisfies the standards at ORS 197.732(2)(c) and OAR 660-004-0020(2)(b), including the requirement at ORS 197.732(2)(b) and OAR 660-004-0020(2)(b)(B), to evaluate whether "[a]reas that do not require a new exception cannot reasonably accommodate" the proposed use.[17] To

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[17] OAR 660-004-0020(2)(b) provides:

> "'Areas that do not require a new exception cannot reasonably accommodate the use'. The exception must meet the following requirements:
>
> "* * * * *
>
> "(B) To show why the particular site is justified, it is necessary to discuss why other areas that do not require a new exception cannot reasonably accommodate the proposed use. Economic factors may be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under this test the following questions shall be addressed:
>
> "(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an

demonstrate compliance with this standard, intervenor submitted an alternative site analysis that evaluated whether nine parcels within 1.5 miles of the Sage Substation could reasonably accommodate the proposed solar facility. Under the fourth assignment of error, petitioner challenges the county's findings that intervenor demonstrated that the alternatives analysis standard set forth in ORS 197.732(2)(b) and OAR 660-004-0020(2)(b)(B) was satisfied.

Given our conclusion under the third assignment of error that the Sage Substation is an impermissible locational attractor for purposes of OAR 660-004-0022(3)(c) because it is located on urban land, we need not evaluate petitioner's challenges to the alternatives analysis, which is predicated on proximity and connection to the Sage Substation. Accordingly, we do not reach the merits of the fourth assignment of error.

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exception, including increasing the density of uses on nonresource land? If not, why not?

"(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses not allowed by the applicable Goal, including resource land in existing unincorporated communities, or by increasing the density of uses on committed lands? If not, why not?

"(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

"(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?"

However, we here address a related argument advanced by Amicus Oregon Solar Energy Industries Association. Amicus argues that OAR 660-004-0022 and OAR 660-004-0020(2)(b)(B) should not be interpreted in a manner that effectively precludes taking an exception to site a solar facility. We agree with amicus on that point, but disagree that a solar facility developer may limit the locational attributes of the solar facility or the scope of the alternative sites analysis to sites near a *specific* energy facility or connection point, based solely on the fact that the developer has entered into a contract (a Power Purchase Agreement) with the energy facility owner to connect to a specific energy facility.

In our view, if a proposed solar facility can be connected to other substations with capacity or to other suitable points in the electrical grid, then the alternatives analysis must consider alternative sites that are proximate to such substations or connection points, notwithstanding that the applicant has already contracted with the owner of a specific energy facility to connect to that particular facility. An analysis of alternative sites can consider economic factors along with other relevant factors in determining whether the use can be reasonably accommodated at other sites. OAR 660-004-0020(2)(b)(B). Such an analysis may not differ much from the kind of locational and economic analysis a solar facility developer would perform in any case, in trying to find a suitable location for the facility. We disagree with amicus that requiring a solar facility applicant seeking a reasons exception subject to OAR 660-004-

0020(2)(b)(B) to evaluate whether alternative sites serving different substations or connection points on rural land in the county would present an onerous burden, or otherwise effectively preclude approving a reasons exception for a solar facility.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the findings adopted by the county board of commissioners are inadequate, in two respects. First, the commissioners adopted an unidentified "staff report" as findings. Petitioner acknowledges that the unidentified staff report is presumably the staff report to the planning commission, dated March 14, 2017, which is the only staff report labeled as such in the record. However, petitioner notes that the March 14, 2017 staff report does not include any findings addressing compliance with applicable standards for taking a reasons exception. Instead, the staff report states in relevant part that it adopts the applicant's findings at pages 65 through 73 of the application with respect to compliance with OAR 660-004-0020 and OAR 660-004-0022. Record 248. Finding the application in the record is not easy, since it is not listed in the record table of contents. The application is apparently listed as Exhibit 12 on a schedule of exhibits found at Record 230, but there is no indication where in the record Exhibit 12 is found. Intervenor tells us that the application is located in Record Volume II, and that Record pages 439-447 correspond to pages 65 through 73 of the application, and

constitute the findings incorporated by reference into the March 14, 2017 staff report, which itself was incorporated into the commissioners' decision.

Petitioner contends that this nested attempt to incorporate findings in the application fails, and that therefore the commissioners' decision does not include or effectively incorporate adequate findings addressing compliance with OAR 660-004-0020 and OAR 660-004-0022. *See Gonzalez v. Lane County*, 24 Or LUBA 251, 258-59 (1992) (discussing means to incorporate findings). We need not resolve this assignment of error. Even if we agree with petitioner that the attempted incorporation of the findings in the application failed, and the county's decision is not supported by adequate findings regarding compliance with OAR 660-004-0020 and OAR 660-004-0022, any such error would result at best in remand for the county to adopt or incorporate more adequate findings. As discussed below, we sustained the third assignment of error on terms that require reversal rather than remand. Accordingly, no purpose would be served by addressing the fifth assignment of error.

We do not reach the fifth assignment of error.

DISPOSITION

OAR 661-010-0071(1) provides that LUBA shall reverse a land use decision when the "decision violates a provision of applicable law and is prohibited as a matter of law." As discussed under the third assignment of error, the county misconstrued the applicable law with respect to the only two

alternative reasons advanced to justify the proposed exception to Goal 3. Absent identification of a valid and sufficient reason under OAR 660-004-0022, the proposed reasons exception for a solar facility on the subject property is "prohibited as a matter of law." Accordingly, reversal is the appropriate disposition.

The county's decision is reversed.