

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 on remand from the Court of Appeals.

Meriel L. Darzen, Bend, represented petitioner.

Joel C. Benton, Medford, represented respondent.

Josh Newton, Bend, represented intervenor-respondent.

Steven E. Shipsey, Assistant Attorney General, Portland, represented Department of Land Conservation and Development as a state agency.

Damien R. Hall, Portland, represented Oregon Solar Energy Industries Association as *amicus*.

RUDD, Board Member; ZAMUDIO, Board Chair; RYAN Board Member, participated in the decision.

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REVERSED

12/5/2019

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

NATURE OF THE DECISION

Petitioner appeals the county’s approval of a reasons exception to Statewide Planning Goal 3 (Agricultural Land) to authorize siting of an 80-acre solar facility on high-value farmland.

FACTS

In 2017, the county board of commissioners approved an exception to Goal 3 (Agricultural Lands), authorizing intervenor Or Solar 7, LLC’s (intervenor’s) development of an approximately 80-acre photovoltaic solar power generation facility on high-value farmland adjacent to the City of Medford’s urban growth boundary (UGB). The exception was approved based on two alternative theories. One basis was a demonstrated need to meet the requirements of Statewide Planning Goal 13 (Energy), and the second was that the development was allowed rural industrial development under OAR 660-004-0022(3), which provides that:

“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:

“(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

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

12 OAR 660-004-0022(3)(c) provides that among the reasons an exception
13 may be justified is that “[t]he use would have a significant comparative advantage
14 due to its location[.]” In *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA
15 270 (2017), we sustained a portion of petitioner’s third assignment of error, in
16 part, and concluded that the exception was not properly allowed under OAR 660-
17 004-0022(3) because the locational attractor, an existing substation, was located
18 in the City of Medford and not on rural land. 76 Or LUBA at 290–91. We held
19 that an urban substation energy facility located approximately 1.5 miles from the
20 exception site and within the City of Medford was not a sufficient locational
21 attractor. *Id.* at 292–93.

22 We concluded, however, that the proposed solar facility qualified as
23 “industrial development” within the meaning of OAR 660-004-0022(3). *Id.* at
24 285.

25 Intervenor appealed our decision to the Court of Appeals and petitioner
26 filed a cross-petition. In *1000 Friends of Oregon v. Jackson County*, 292 Or App
27 173, 423 P3d 793 (2018), the Court of Appeals disagreed with LUBA and agreed

1 with intervenor that the locational advantage which may support a reasons
2 exception is not limited to one located on rural land outside a UGB. *Id.* at 185.
3 However, on petitioner’s cross-petition, the court reversed our decision because
4 it concluded that the solar facility was not “industrial development” for purposes
5 of OAR 660-004-0022(3)(c):

6 “In sum, LUBA erred in concluding that the proposed commercial
7 utility facility use was a[n] ‘industrial development’ under OAR
8 660-004-0022(3)(c) in light of the textual differences in the rule
9 between ‘energy facility’ and ‘industrial activity’ and the necessary
10 differences between a commercial utility facility and industrial
11 development in the context of the application of an [*sic*] OAR 660-
12 004-0022 (3)(c) to except to the uses allowed by Goal 3. Relatedly,
13 the exception was not viable because the proceeding under that part
14 of the rule was not one for the ‘siting’ of industrial development, but
15 instead was one for the varying of a site characteristic required by
16 Goal 3.” *Id.* at 190.

17 The court affirmed LUBA’s disposition of reversal of the decision. *Id.* at 195.

18 The appellate judgment and supplemental judgment provided that the
19 judgments were effective on November 14, 2019.¹

20 **DISPOSITION**

21 For the reasons explained in our prior decision, as modified by the Court
22 of Appeals’ decision, the county’s decision is reversed.

¹ On October 4, 2018, the Supreme Court granted intervenor’s petition for review. 363 Or 727(2018). On October 3, 2019, the Supreme Court granted intervenor’s motion to dismiss its petition for review. 365 Or 657 (2019).