

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 1000 FRIENDS OF OREGON,
5 *Petitioner,*

6
7 vs.

8
9 MORROW COUNTY,
10 *Respondent,*

11 and

12
13
14 PORT OF MORROW,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2020-029

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Morrow County.

23
24 Andrew Mulkey, Portland, filed the petition for review and a reply brief,
25 and argued on behalf of petitioner.

26
27 Justin W. Nelson, Morrow County Counsel, filed a joint response brief and
28 argued on behalf of respondent.

29
30 Seth J. King, Portland, filed a joint response brief and argued on behalf of
31 intervenor-respondent. With him on the brief was Perkins Coie LLP.

32
33 RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
34 Member, participated in the decision.

35
36 REMANDED 07/10/2020

37
38 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

1 may approve an exception to a statewide planning goal if the government
2 identifies sufficient reasons that “justify why the state policy embodied in the
3 applicable goals should not apply.” OAR 660-004-0020(2)(a). Intervenor stated
4 in its application that “[t]he principal reason for this application is to facilitate
5 expansion of development into the easterly portion of the Port of Morrow
6 Industrial Park, consistent with the Port’s utility and road network investments,
7 and to begin to provide connectivity within the industrial lands from [the East
8 Beach Industrial Park adjacent to the Port of Morrow Industrial Park] to the
9 [property and east of the property, the former Umatilla Army Ordinance Depot
10 site (the Depot)].” Record 872. Intervenor later identified the desire to locate a
11 data center on the property and posited that a data center constituted industrial
12 development for purposes of OAR 660-004-0022(3).

13 Intervenor argued to the county that the property met the site needs
14 identified by the potential data center operator: 85 acres, access to 115 kv
15 transmission lines, and proximity to agricultural use for discharge water. Record
16 408. Surrounded by agricultural land, the property is proximate to a location for
17 wastewater discharge and intervenor planned to provide needed facilities and
18 services to the property by extending eastward “the same urban-scale facilities
19 and services that were approved in the 1988 exception to serve the Port’s
20 Industrial Park, and subsequent goal exceptions to serve lands between the Port
21 Industrial Park and the East Beach Industrial Park.” Record 30. Intervenor argued
22 that the reasons exception was warranted because the data center “would have a

1 significant comparative advantage that would benefit the County economy and,
2 in this case, it would result in no net loss of resource productivity” due to a
3 proposed concurrent rezoning of 89.6-acres of irrigated and farmed land located
4 south of the East Beach Industrial Park, and known as the Bombing Range
5 property, from PI to EFU. Record 399.

6 The planning commission held a public hearing and considered and
7 recommended approval of the application. The board of commissioners held a
8 public hearing to consider the application and on February 5, 2020, approved the
9 application based upon findings related to the stated need for the property in order
10 to develop the data center.

11 This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 OAR 660-004-0022(3)(a) through (c) identify three independent bases for
14 a reasons exception for industrial development on rural lands. Petitioner’s first
15 assignment of error is “the county failed to comply with OAR 660-004-
16 0022(3)(c) and its decision is not supported by substantial evidence in the whole
17 record.” Petition for Review 5, 10. Petitioner also argues in the body of the
18 petition that the board of county commissioners failed to explain why the use
19 requires a location on resource lands as required by OAR 660-004-0020(2)(a).
20 Petition for Review 19. For the reasons set forth below, we sustain this
21 assignment of error.

1 **A. OAR 660-004-0022(3)(c)**

2 **1. Locational Advantage**

3 **a. Substantial Evidence**

4 The county’s decision must be supported by substantial evidence, that is,
5 evidence a reasonable person would rely upon to make a decision. *Dodd v. Hood*
6 *River County*, 317 Or 172, 855 P2d 608 (1993); *Younger v. Portland*, 305 Or
7 346,752 P 2d 262 (1988). As discussed above, petitioner argues that the “county
8 lacked substantial evidence in the record to conclude that the location of the
9 exception area provides a *significant comparative* advantage to the proposed
10 industrial *use* – a data center – due to its location.” Petition for Review 11
11 (emphases in original). For the reasons set forth below, we sustain this
12 subassignment of error.

13 Petitioner argues that the decision is not supported by substantial evidence
14 because the record does not provide evidence of whether facilities currently exist
15 near the property relative to other locations, and which facilities will need to be
16 extended. Petition for Review 12-14. Intervenor testified:

17 “The existing Port industrial park to the northwest of the proposed
18 parcel to be converted to industrial zoning is served with a full range
19 of facilities and services that are of sufficient size and capacity to
20 accommodate both existing and future industrial development.
21 Many of these facilities and services predated the 1988 goal
22 exceptions and helped provide a basis for the Goal 11 and Goal 14
23 exceptions authorizing urban scale public facilities and services and
24 urban scale industrial uses on the Port property.” Record 750.

25 The board of county commissioners explained in the decision that:

1 “The Goal 11 exception granted in this decision is to allow for [the
2 extension of sewer and water utilities] onto the newly designated
3 Paterson Ferry Road property.” Record 75.

4 The board therefore understood that facilities would be extended to serve the
5 property. Response Brief 10.

6 Petitioner argues that the record lacks a full accounting of the existing
7 facilities and therefore

8 “the county lacks substantial evidence in the record to conclude that
9 the vast majority of those facilities or services currently occur *near*
10 the Paterson Ferry exception area relative to other locations. The
11 applicant cannot rely on disclosing only part of the whole picture of
12 its various facilities for the purpose of proving up an exception under
13 OAR 660-004-0022(3)(c).” Petition for Review 13 (emphasis in
14 original).

15 The services are located approximately 1.5 miles away from the property.
16 Petitioner does not establish that a distance of 1.5 miles may not be considered
17 “near” for purposes of justifying an exception. In *1000 Friends v. Jackson*
18 *County*, 292 Or App 173, 423 P3d 793 (2018), *rev den*, 365 Or 657 (2019), the
19 Court of Appeals concluded that a substation located approximately 1.5 miles
20 from the exception site was a permissible locational advantage.

21 Petitioner argues that intervenor identified facilities and public services
22 found within the Port of Morrow and East Beach Industrial Parks but cannot
23 conclude that those are locational advantages without knowledge of “the full
24 extent of the existing relevant facilities” relative to other locations. Petition for
25 Review 13. The county and intervenor (collectively, respondents) point to the
26 statement in the staff report that service providers, including those providing

1 power, fiber optic, water, and waste process water, said they could serve the site.
2 The planning commission staff report includes the statement, “Planning staff
3 engaged a meeting with some of the entities that would have responsibility for
4 providing utilities – power, fiber, water, waste water and process water. All of
5 those present confirmed that they had the ability to deliver the service they
6 represent to the site.” Record 738-39. The statement by providers, as reflected in
7 the staff report, that they have the capacity to provide service to the property is
8 substantial evidence upon which a reasonable person would rely to conclude that
9 the exception property can be served.

10 Moreover, the board based its finding that the property has a significant
11 comparative advantage on the basis of its finding that alternative locations cannot
12 reasonably accommodate the use. Record 78, 80-81. Although we agree with
13 petitioner that without a complete understanding of the extent of services in the
14 alternative locations, the county cannot judge whether the property has a service-
15 based locational advantage for a data center, alternative sites were not rejected
16 based upon the unavailability of services. After petitioner’s initial comments on
17 the application, intervenor explained that the data center operator’s site criteria
18 included the need for 85 or more contiguous and generally square or rectangular
19 acres, immediate proximity to a 115 kv transmission line, and a location near
20 agricultural use for discharge water. Sites were eliminated for a variety of
21 reasons, including failure to meet these criteria, but were not eliminated because
22 of service unavailability. Therefore the absence of an inventory of existing

1 infrastructure in the record does not undermine the board’s conclusion that the
2 exception area provides a significant comparative advantage.

3 Petitioner also argues that the

4 “county lacks support for its findings that the Paterson Ferry
5 exception area results ‘in a significant comparative advantage’
6 because the data center will be located ‘near other Port-related
7 industrial development at the East Beach Industrial Park.’ R[ecord]
8 78-79. As explained above, the data center does not qualify as other
9 port-related industrial development. That use does not meet any of
10 the requirements for a port-related industrial use. R[ecord] 29-30 n
11 6.” Petition for Review 21.

12 Petitioner challenges the board’s finding but does not explain why a data center
13 is not “other port-related” industrial development. We will not develop
14 petitioner’s argument for it. *Deschutes Development Co. v. Deschutes County*, 5
15 Or LUBA 218, 220 (1982).

16 We therefore agree with respondents that none of the above arguments
17 support a conclusion that the decision is not supported by substantial evidence.

18 **b. Adequacy of Findings**

19 The county approved the challenged exception under OAR 660-004-
20 0022(3)(c), which provides:

21 “(3) Rural Industrial Development: For the siting of industrial
22 development on resource land outside an urban growth boundary,
23 appropriate reasons and facts may include, but are not limited to, the
24 following:

25 “* * * * *

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

10 Petitioner argues that the county’s “findings fail to establish what
11 particular activities provide locational benefits to the data center compared to
12 other locations.” Petition for Review 12. Findings must identify the relevant
13 criteria and the evidence relied upon and explain why the evidence relied upon
14 leads to the ultimate decision. *Heiller v. Josephine County*, 23 Or LUBA 551
15 (1992). The board of county commissioners found that OAR 660-004-0022(3)(c)
16 was met because

17 “*based upon the findings and evidence summarized in response to*
18 *OAR 660-004-0020(2)(b) below*, the data center developer had
19 specific site requirements, which it determined could reasonably be
20 accommodated by the Paterson Ferry Road Property. The Board
21 finds that these facts support the conclusion that the data center
22 development is location-dependent, which causes the Paterson Ferry
23 Road Property to have a significant comparative advantage over
24 other sites.” Record 78 (emphasis added).

25 OAR 660-004-0020(2)(b) provides that a reasons exception is subject to
26 the following approval standard:

27 “‘Areas that do not require a new exception cannot reasonably
28 accommodate the use.’ The exception must meet the following
29 requirements:

- 1 “(A) The exception shall indicate on a map or otherwise describe
2 the location of possible alternative areas considered for the
3 use that do not require a new exception. The area for which
4 the exception is taken shall be identified;
- 5 “(B) To show why the particular site is justified, it is necessary to
6 discuss why other areas that do not require a new exception
7 cannot reasonably accommodate the proposed use. Economic
8 factors may be considered along with other relevant factors in
9 determining that the use cannot reasonably be accommodated
10 in other areas. Under this test the following questions shall be
11 addressed:
- 12 “(i) Can the proposed use be reasonably accommodated on
13 nonresource land that would not require an exception,
14 including increasing the density of uses on nonresource
15 land? If not, why not?
- 16 “(ii) Can the proposed use be reasonably accommodated on
17 resource land that is already irrevocably committed to
18 nonresource uses not allowed by the applicable Goal,
19 including resource land in existing unincorporated
20 communities, or by increasing the density of uses on
21 committed lands? If not, why not?
- 22 “(iii) Can the proposed use be reasonably accommodated
23 inside an urban growth boundary? If not, why not?
- 24 “(iv) Can the proposed use be reasonably accommodated
25 without the provision of a proposed public facility or
26 service? If not, why not?
- 27 “(C) The ‘alternative areas’ standard in paragraph B may be met
28 by a broad review of similar types of areas rather than a
29 review of specific alternative sites. Initially, a local
30 government adopting an exception need assess only whether
31 those similar types of areas in the vicinity could not
32 reasonably accommodate the proposed use. Site specific
33 comparisons are not required of a local government taking an
34 exception unless another party to the local proceeding

1 describes specific sites that can more reasonably
2 accommodate the proposed use. A detailed evaluation of
3 specific alternative sites is thus not required unless such sites
4 are specifically described, with facts to support the assertion
5 that the sites are more reasonable, by another party during the
6 local exceptions proceeding.”

7 As set out in full above, OAR 660-004-0020(2)(b) requires the local government
8 to analyze alternative areas and discuss why other areas that do not require a new
9 exception cannot reasonably accommodate the proposed use.

10 The findings related to OAR 660-004-0020(2)(b) include the finding that:

11 “[R]easonable alternative locations that do not require an exception
12 cannot reasonably accommodate the proposed use. As support for
13 this conclusion, the Board relies upon the detailed alternatives
14 analysis prepared by the Port and dated December 20, 2019. In this
15 analysis, the Port presented specific reasons why each of the
16 alternatives identified by [petitioner], including those within
17 existing Port industrial parks, could not reasonably accommodate
18 the proposed use. [] The Board finds that the Port’s analysis was
19 based upon the site-selection limitations applicable to the data center
20 use. [] The Board finds that [petitioner’s] testimony does not
21 undermine the detailed and credible alternatives analysis presented
22 by the port.” Record 80.

23 The findings explain that the board determined that the locational
24 advantage was supported by the alternatives analysis. The county reasoned that
25 the data center use would have a significant comparative advantage due to its
26 location because the property met the data center’s identified needs: the property
27 is an appropriate size and shape for the use, at 85 or more contiguous and
28 generally square or rectangular acres; the property can be developed with access
29 to 115 kv transmission lines; and the property is adjacent to agricultural land that

1 the data center can use to discharge water. To support its conclusion that the
2 property has a locational advantage, the county relied on the Port's alternatives
3 analysis that explained why each of the alternatives sites identified, including
4 those within existing Port industrial parks, could not accommodate the data
5 center's identified needs. In other words, the county reasoned that the locational
6 advantage criteria in OAR 660-004-0022(3)(c) was satisfied because the Port had
7 established that no reasonable alternative exists, based on the same evidence that
8 the Port submitted to satisfy the OAR 660-004-0020(2)(b) alternatives analysis.
9 Respondents argue that the board found, based on the alternatives analysis, that
10 the Paterson Ferry Road Property is the only site that satisfied the data center's
11 identified needs. Respondents argue petitioner does not challenge the board's
12 adopted findings that OAR 660-004-0022(3)(c) is met based on the OAR 660-
13 004-0020(2)(b) alternatives analysis.

14 Where a party "disagrees with the [local government's] decision without
15 attempting to demonstrate error in the [local government's] findings that interpret
16 and apply [approval criterion, the party] fails to provide a basis for reversal or
17 remand." *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 603 (2000).
18 The board of commissioners found that the alternatives analysis was "based upon
19 the site-selection limitations applicable to the data center use." Record 80.
20 Because the findings do not dismiss an alternative based on an absence of features
21 such as fiber optic cable, gas lines or wastewater line, petitioner's argument that

1 there is not evidence of whether these features are available at the alternative sites
2 does not state a basis for reversal or remand.

3 Petitioner also argues, however, that “[t]he county’s decision and findings
4 fail to demonstrate that the proposed ‘use would have a significant comparative
5 advantage due to its location.’ OAR 660-004-0022(3)(c).” Petition for Review
6 11. Because we sustain the second assignment of error based upon the inadequacy
7 of the alternatives analysis, and the board of commissioner’s finding of a
8 significant comparative advantage relies upon that alternatives analysis, we
9 sustain this subassignment of error.

10 This subassignment of error is sustained in part.

11 **2. Minimal Loss of Productive Resource Land**

12 OAR 660-004-0022(3)(c) provides that reasons may justify an exception
13 and allow an industrial use on rural land where:

14 “The use would have a significant comparative advantage due to its
15 location (e.g., near existing industrial activity, an energy facility, or
16 products available from other rural activities), which would benefit
17 the county economy *and cause only minimal loss of productive*
18 *resource lands*. Reasons for such a decision should include a
19 discussion of the lost resource productivity and values in relation to
20 the county’s gain from the industrial use, and the specific
21 transportation and resource advantages that support the decision.”
22 (Emphasis added.)

23 Petitioner argues that “[t]he county lacks substantial evidence in the record
24 to show that locating a data center on the Paterson Ferry exception area would

1 ‘cause only minimal loss of productive resource lands.’” Petition for Review 19-
2 20 (quoting OAR 660-004-0022(3)(c)). We agree.

3 Petitioner argues that the record does not support a finding of minimal loss
4 of resource land because:

5 “The record shows that the applicant’s proposed exception for the
6 data center and the expansion of services that goes along with it will
7 only hasten the further reduction of productive EFU land between
8 East Beach and the Depot. The county’s decision fails to
9 demonstrate that the decision will only cause a minimal loss of
10 productive resource lands. OAR 660-004-0022(3)(c).” Petition for
11 Review 21.

12 Intervenor argued in its application that extending services to the property
13 would facilitate the later extension of those services further west to the Depot.
14 Petitioner opposed the application, arguing in part that the use of the Paterson
15 Ferry property to facilitate future extension of urban services further east was
16 improper. Record 242. We have held that “[t]he focus of OAR 660-004-
17 0022(3)(c) is on weighing the comparative cost/benefits of replacing resource use
18 of the exception area with rural industrial uses, and ‘loss of productive resources’
19 refers to resources within the exception area.” *Columbia Riverkeeper v. Columbia*
20 *County*, 70 Or LUBA 171, 192, *aff’d*, 267 Or App 637, 342 P3d 181 (2014). The
21 board adopted the exceptions “to authorize development of a data center use and
22 related public facilities and services on the Paterson Ferry Road Property,” not to
23 allow development of the distant Depot property. Record 71. Therefore,

1 speculation concerning future rezoning applications does not establish error. We
2 conclude, however, that the county failed to perform the required analysis.

3 As part of the appealed decision, the county rezoned the formerly PI zoned
4 Bombing Range property EFU and the formerly EFU zoned property PI. Because
5 the amount of land zoned EFU in the county is unchanged, the county concluded
6 that there is no net loss of resource land. Record 78. The board of commissioner’s
7 findings fail to perform the required analysis because they do not discuss the
8 *quality* or productivity of the resource lands in the proposed exception area, or
9 otherwise attempt to describe in qualitative terms what removing the EFU zoning
10 of the proposed exception area means for resource land productivity.

11 This subassignment of error is sustained.

12 **B. OAR 660-004-0020(2)(a)**

13 OAR 660-004-0020(2)(a) requires that:

14 “‘Reasons justify why the state policy embodied in the applicable
15 goals should not apply.’ The exception shall set forth the facts and
16 assumptions used as the basis for determining that a state policy
17 embodied in a goal should not apply to specific properties or
18 situations, including the amount of land for the use being planned
19 and *why the use requires a location on resource land* [.]” (Emphasis
20 added.)

21 We agree with petitioner that the county’s findings fail to explain why the data
22 center use requires a location on resource lands, as opposed to otherwise suitable
23 non-resource lands. *See VinCep v. Yamhill County*, 55 Or LUBA 433, 441 (2007)
24 (county’s findings are inadequate to explain why the proposed hotel use required

1 location on resource lands as opposed to otherwise suitable non-resource lands,
2 where the findings failed to establish that a hotel setting among vineyards was
3 categorically impossible to find or develop within or adjacent to urban growth
4 boundaries or on otherwise suitable non-resource lands).

5 Petitioner argues that the decision fails to explain why the data center
6 requires a location on resource land. Petition for Review 19. According to
7 petitioner, the county's "implied answer" to why the use has to be on resource
8 land is

9 "because ability to extend urban water and wastewater services to
10 the use would provide benefits not directly to the use itself or its
11 location on resource land. The location likely hinders the use by
12 adding costs because it requires the extension of services greater
13 distances than would otherwise be required if the use was located
14 within or immediately adjacent to East Beach or the Port." Petition
15 for Review 19.

16 The board found that:

17 "[A]s explained above, the use requires a location on resource land
18 because the proposed location, would have a comparative advantage
19 (particularly over the existing isolated location on Bombing Range
20 Road) that would benefit the County economy and, in this case,
21 result in no net loss of agriculturally zoned property." Record 79;
22 Response Brief 12.

23 The board's findings do not explain why the data center use must be
24 located on resource lands. The first assignment of error is sustained in part.

1 **SECOND ASSIGNMENT OF ERROR**

2 **A. OAR 660-004-0020(2)(b)**

3 We described the alternative site evaluation process in *Columbia*
4 *Riverkeeper*, 70 Or LUBA 171:

5 “Once the local government has identified sufficient ‘[r]easons
6 under OAR 660-004-0020(2)(a), and in this case OAR 660-004-
7 0022(3), to authorize a use not allowed by the applicable goal, the
8 next step is to demonstrate that ‘[a]reas that do not require a new
9 exception cannot reasonably accommodate the use.’ OAR 660-004-
10 0020(2)(b) (the reasonable accommodation standard). This step
11 requires evaluation of alternative sites within existing exception
12 areas, irrevocably committed resource lands, and urban growth
13 boundaries.

14 “Once the local government has demonstrated that the proposed use
15 cannot be reasonably accommodated on lands that do not require a
16 new exception, the local government must demonstrate that the
17 ‘long-term environmental, economic, social and energy [ESEE]
18 consequences resulting from the use at the proposed site * * * are
19 not significantly more adverse than would typically result from the
20 same proposal being located in [other] areas requiring a goal
21 exception [.]” OAR 660-004-0020(2)(c) (the ESEE standard). This
22 step requires an evaluation of the ESEE consequences of developing
23 the exception area, compared with the typical ESEE consequences
24 of developing other resource lands.

25 “Additionally, the local government must determine that the
26 ‘proposed uses are compatible with other adjacent uses or will be so
27 rendered through measures designed to reduce adverse impacts.’
28 OAR 660-004-0020(2)(d) (the compatibility standard).

29 “Finally, at the end of the process, the local government must adopt
30 plan and zone designations that effectively ‘limit the uses, density,
31 public facilities and services, and activities to only those that are
32 justified in the exception.’ OAR 660-004-0018(4)(a).” *Id.* at 178-79.

1 In its second assignment of error, petitioner argues that the “exception fails
2 to address possible alternative areas or explain why areas that do not require an
3 exception cannot reasonably accommodate the use.” Petition for Review 23.
4 Although we reject a number of petitioner’s arguments, we agree with petitioner
5 that the board of county commissioners has not adequately explained why
6 alternative areas cannot accommodate the use, and sustain the assignment of
7 error.

8 Contrary to petitioner’s assertion, the findings address alternative sites.
9 The board of county commissioners found that:

10 “[R]easonable alternative locations that do not require an exception
11 cannot reasonably accommodate the proposed use. As support for
12 this conclusion, the Board relies upon the detailed alternatives
13 analysis prepared by the Port and dated December 20, 2019. In this
14 analysis, the Port presented specific reasons why each of the
15 alternatives identified by [petitioner], including those within
16 existing Port industrial parks, could not reasonably accommodate
17 the proposed use.[] The Board finds that the Port’s analysis was
18 based upon the site-selection limitations applicable to the data center
19 use. [] The Board finds that [petitioner’s] testimony does not
20 undermine the detailed and credible alternatives analysis presented
21 by the Port. * * * The Board also relies upon testimony from two
22 cities near the Paterson Ferry Road Property (Boardman to the west
23 and Irrigon to the east) that they could not accommodate the
24 proposed data center campus within their respective city limits.”
25 Record 80.

26 Findings must be based on substantial evidence in the whole record, that
27 is, evidence a reasonable person would rely upon to support a decision. *Dodd*,

1 317 Or 172; *Younger*, 305 Or 346. Substantial evidence supports the board of
2 commissioner’s decision.

3 Contrary to petitioner’s assertion, the decision maps or describes the
4 location of potential alternative sites. Record 80, 251-52. Those materials satisfy
5 the requirement that the exception decision “indicate on a map or otherwise
6 describe the location of possible alternative areas considered for the use that do
7 not require a new exception.” OAR 660-004-0020(2)(b)(A).

8 The county found that the proposed data center use requires a location
9 close to agricultural uses for disposal of wastewater, proximity to 115 kV
10 transmission lines of power and approximately 85 acres. The county relied on a
11 letter from the Executive Director of the Port in support of the application dated
12 December 6, 2019, which states, in part:

13 “According to the Developer, its site needs are as follows:

14 “• Size: 85+ contiguous acres

15 “• Shape: Generally square or rectangular in order to accommodate
16 necessary positioning of Developer’s improvements.” Record 408-
17 09.

18 The county did not make any findings explaining why the data center use requires
19 a land area of 85 or more acres, and no party has pointed to any evidence in the
20 record that provides that explanation.

21 In the petition for review, petitioner argues that the county’s decision is
22 not supported by substantial evidence because the Port, rather than the ultimate

1 data center operator, provided the description of the site requirements, and the
2 record does not include information from the ultimate operator beyond the Port's
3 statement describing the site requirements. Petition for Review 25-26. According
4 to petitioner, "An applicant who fails to provide a business record of the
5 developer's requirements or a document generated by the developer itself does
6 not provide substantial evidence of the locational requirements." Petition for
7 Review 26.

8 We do not understand petitioner to argue that the county's decision is not
9 supported by substantial evidence because the Port's description of the site
10 requirements is not credible since it is not accompanied by any explanatory
11 information; only that the evidence regarding the site requirements is not credible
12 because it was provided by the Port, rather than the ultimate data center operator.¹
13 *Id.* However, petitioner does not identify a basis for error in the county's reliance
14 on the Port's characterization of the site requirements, or any requirement in the
15 exception rules that the ultimate user of the property be the party to introduce
16 evidence into the record. Contrary to petitioner's assertion, intervenor was
17 allowed to describe the developer's site requirements. We therefore turn to
18 specific sites discussed in the alternatives analysis. Sites within or adjacent to the

¹ If petitioner had made the former argument, we likely would agree that the county's decision is not supported by substantial evidence where the record includes only a statement from the Port regarding site requirements, unsupported by any other explanatory information.

1 PI zone are described at Record pages 251-55 and we number them A1-A14.
2 Sites within the General Industrial (MG) zone, as well as additional sites adjacent
3 to the PI zone, are described at Record pages 256-58 and we number them B1-
4 B9.

5 **1. Alternative Sites Properly Removed From Consideration**

6 **a. Sites Requiring an Exception**

7 OAR 660-004-0020(2)(b) provides that approving a reasons exception
8 requires a determination that ““Areas that do not require a new exception cannot
9 reasonably accommodate the use.”” The alternatives analysis explains that Sites
10 A7, A8, A9, A10 and sites B1, B2, B3, B4 and B5 require an exception. Record
11 254, 256-57. Further analysis of these sites is not required.

12 **b. Sites Failing to Meet the Developer’s Minimum Site Size**

13 The developer’s site requirements include a minimum site size of 85 acres.
14 Site A13 (as well as Sites B4 and B5, excluded from further consideration above)
15 does not meet the minimum property size and does not require further analysis.
16 Petitioner argues in its petition that the consideration should have been given to
17 combining sites to achieve the minimum lot size. The county was only required
18 to consider specific sites identified by petitioner. *See* OAR 660-04-0020(2)(b)(C)
19 (“Site specific comparisons are not required of a local government taking an
20 exception unless another party to the local proceeding describes specific sites that
21 can more reasonably accommodate the proposed use.”). Absent any argument
22 below that proposed combining lots, and petitioner has identified none, the

1 county was not required to independently assess whether alternative sites could
2 accommodate the proposed use by combining lots to meet the 85-acre need.

3 **c. Sites Unavailable Due to Level of Investment in Other Use**
4 **or Ownership Status**

5 Sites A1 and A2 are the sites of a fully designed and funded rail project,
6 and the remainder parcels existing post-development of the rail project do not
7 meet the developer's minimum site size. Site A3 is the site of a proposed digester
8 facility to process wastewater. It is 100 percent designed and permitting is almost
9 complete. Site A11 is being developed with a data center by the site owner. Site
10 A12 is being developed with a substation. We held in *1000 Friends v. Jackson*
11 *County*, 76 Or LUBA 270, 292 (2017), *aff'd in part, rev'd in part*, 292 Or App
12 173, 423 P3d 793 (2018), *rev dismissed*, 365 Or 657 (2019), that if a proposed
13 solar facility could connect to other substations with capacity, the alternatives
14 must consider those sites even if the applicant already had a contract with one
15 provider. Here, there is substantial evidence that the identified sites are
16 committed to other investment intensive uses and do not have capacity to
17 accommodate the data center use.

18 **2. Sites Requiring Further Consideration**

19 We agree with petitioner that the county's decision does not adequately
20 explain its conclusion that there are *no* reasonable alternative locations on non-
21 resource lands. Further analysis of the following sites is necessary.

1 **a. Sites Lacking Evidence of Investment in Physical**
2 **Development or Inability to Acquire**

3 The alternatives analysis relied upon by the board disregarded some
4 alternatives on non-resource lands based upon either the existing use or
5 contractual obligations, without an inquiry into whether the site might
6 nonetheless be available for the data center use. In *Columbia Riverkeeper*, we
7 explained that:

8 “[A]bsent evidence that PGE is categorically unwilling to sublease
9 part or all of its leasehold to other industrial users, or that the leased
10 lands cannot otherwise be reasonably made available for
11 development through acquisition or termination of the leasehold
12 interest, the fact that 445 vacant areas is subject to PGE’s leasehold
13 does not mean that such lands are unavailable or cannot reasonably
14 accommodate proposed rural industrial uses. In conducting the
15 alternative sites analysis required by OAR 660-004-0020(2)(b), the
16 county cannot limit its analysis to lands controlled by the applicant,
17 or conclude that an alternative site controlled by others is not
18 available for industrial development simply due to different
19 ownership or control.” 70 Or LUBA 171, 195.

20 With respect to a site the county dismissed because it would require
21 acquisition of more parcels, we held in *Columbia Riverkeeper* that the findings
22 must explain “why unspecified economic costs associated with assembling
23 parcels combined with other factors, means that the * * * site cannot reasonably
24 accommodate the proposed uses.” *Id.* at 199. Here, the board of commissioners
25 must evaluate whether land under contract, Site A5, or currently used for the
26 disposal of wastewater, A14, may nonetheless be available for data center use
27 because it is not clear that these sites are committed to incompatible development.

1 Similarly, Site B9 was dismissed from consideration because it is in federal
2 ownership and its ownership transfer timeline is unknown. The fact that the
3 timing of transition is unknown does not mean that it is necessarily unknowable
4 and outside the data center development window. Further information is required
5 in order to determine whether these properties could be made available for the
6 datacenter in a timely manner.

7 **b. Sites Lacking Evidence of the Additional Cost of**
8 **Development**

9 The board of commissioners dismissed Site B8 from consideration because
10 much of the site is covered in wetlands and removal and fill of the wetlands will
11 increase risk and will increase costs in an amount in the tens of thousands of
12 dollars. Record 256. With respect to the presence of wetlands, we concluded in
13 *Columbia Riverkeeper* that “the mere presence of wetlands is not sufficient basis
14 to reject an alternative site, absent findings and evidence that due to regulatory,
15 cost or other relevant factors it is unreasonable to expect that the site can be
16 developed.” 70 Or LUBA 171, 198.. Here, there is no discussion of the relative
17 cost associated with the wetlands to the cost of the data center development as a
18 whole.

19 Similarly, the board erred in excluding Sites A4 and A6 because they were
20 too close to other existing or planned data centers to avoid general, undefined,
21 issues of facility proximity and interdependence, without a discussion of the
22 nature of those issues, potential for mitigation of problems with interdependence

1 and the relative development cost to address them. Additional evaluation of these
2 sites is required.

3 **3. Sites Inconsistent With Extension of Facilities to Depot**
4 **Site**

5 Lastly, we also agree with petitioner that the inconsistency of Sites B6, B7
6 and B8 with intervenor's objective of ultimately extending services out to the
7 Depot is not a sufficient basis for concluding that none of those sites can
8 reasonably accommodate the proposed use. Extension of facilities to the Depot
9 site is unrelated to the data center's siting requirements and not a basis for
10 excluding an alternative site.²

11 This subassignment of error is sustained.

12 **B. OAR 660-004-0020(2)(c)**

13 Once the local government has demonstrated that the proposed use cannot
14 be reasonably accommodated on lands that do not require a new exception, the
15 local government must demonstrate that the "long-term environmental,
16 economic, social and energy [ESEE] consequences resulting from the use at the
17 proposed site * * * are not significantly more adverse than would typically result
18 from the same proposal being located in [other] areas requiring a goal

² Proximity to residential uses is not a valid reason for excluding Sites B6 and B7 from further consideration because distance from residential uses is a developer site preference, not a site requirement.

1 exception[.]” OAR 660-004-0020(2)(c) (the ESEE standard).³ This step requires
2 an evaluation of the ESEE consequences of developing the exception area,
3 compared with the typical ESEE consequences of developing other resource
4 lands. Petitioner argues that the board’s findings are inadequate to show that the
5 ESEE consequences of developing the exception area are not significantly more
6 adverse than the typical ESEE consequences of developing other resource lands.⁴

7 Respondents respond that the ESEE Standard only required the county to
8 complete a detailed ESEE evaluation of specific alternative sites if the sites were
9 “described with facts to support the assertion that the sites have significantly
10 fewer adverse impacts during the local exceptions proceeding.” OAR 660-004-
11 0020(2)(c). The board concluded during the local proceeding that petitioner did
12 not describe alternative resource sites with facts to support the assertion that the

³ OAR 660-004-0020(2)(c) requires that the county determine that:

“The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site.”

⁴ Petitioner argues that other sites identified by petitioner are better because they would not encourage the extension of facilities to the Depot site to the same extent, and that the county cannot “ignore the applicant’s intent and enhanced ability to further develop EFU land north of I-84 for industrial uses [if] allows the proposed data center on the exception area.” Petition for Review 30.

1 sites have fewer adverse impacts.⁵ Petitioner does not point to any place in the
2 record that describes with facts to support its assertion that developing the use on
3 alternative sites on resource lands identified by petitioner have significantly
4 fewer adverse impacts than developing the use on the subject property.
5 Accordingly, we agree with respondents that the county was not required to
6 complete a detailed ESEE analysis of other resource sites. Petitioner’s arguments
7 provide no basis for reversal or remand of the decision.

8 This assignment of error is sustained in part.

9 **DISPOSITION**

10 Petitioner requests reversal of the challenged decision and, in the
11 alternative, requests remand. OAR 661-010-0071(1)(c) provides that LUBA shall
12 reverse a land use decision when the “decision violates a provision of applicable
13 law and is prohibited as a matter of law.” OAR 661-010-0071(2)(b) provides that
14 LUBA shall remand a land use decision when the “decision is not supported by

⁵ The board found:

“[A]lternative sites identified by Friends on the record do not require further consideration under this aspect of the rule for two reasons. First, the Board is only required to conduct a ‘detailed evaluation of specific alternative sites’ when the sites are ‘specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts.’ The Board finds that [petitioner’s] list of alternative sites did not present this ‘specific’ factual description. Additionally, the Board finds that none of the sites identified by [petitioner] could host the use for the reasons explained in the Port’s December 20, 2019 alternatives analysis.” Record 82-83.

1 substantial evidence in the whole record.” We sustained part of the first
2 assignment of error based on inadequate findings and a lack of substantial
3 evidence, and part of the second assignment of error based upon an insufficient
4 analysis of alternative locations. Remand is the appropriate disposition.

5 The county’s decision is remanded.