LUBA
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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOSEPH SCHAEFER,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

TLM HOLDINGS LLC,
Intervenor-Respondent.

LUBA No. 2020-108

FINAL OPINION
AND ORDER

Appeal from Marion County.

Joseph Schaefer filed the petition for review and reply brief and argued on behalf of themselves.

Scott A. Norris and Alan M. Sorem filed the joint response brief. Scott A. Norris argued on behalf of respondent. Alan M. Sorem argued on behalf of intervenor-respondent. Also on the brief was Saalfeld Griggs PC.

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

REMANDED 10/12/2021

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners approving an application for (1) a comprehensive plan map amendment to change the plan designation of property adjacent to the Aurora State Airport (the Airport) from Primary Agriculture (PA) to Public and Semi-Public (P), (2) a zoning map amendment to change the zoning designation of the property from Exclusive Farm Use (EFU) to P, (3) exceptions to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), and (4) a conditional use permit authorizing various airport-related uses on the property.

FACTS

The subject 16.54-acre parcel is zoned EFU and is bordered on the east by Airport Road, a county road. Properties to the east of Airport Road are zoned EFU and farmed. Properties to the north, west, and south of the subject property are part of the Airport and zoned P. The Airport is owned and managed by the State of Oregon. We take the description of the use of properties to the north, west, and south of the subject property from the challenged decision:

> "The property bordering the Subject Property directly to the north * * * is a 3.71-acre parcel, zoned [P] * * *. This property contains six buildings that are all related to airport use. Five of the buildings house twelve hangars offering storage options to private aircraft owners with direct access to the Airport and runway. Each hangar is individually owned and possesses a unique tax lot number on Marion County Assessor Map No. 04-1W-02D. Further north is a 21.42-acre parcel owned by Oregon Department of Aviation ('ODA') with airport hangars, offices, and a tarmac * * *. The

> property bordering the Subject Property directly to the south * * * is 27.47 acres and owned by US Leaseco, Inc. This is the site of Helicopter Transport Services, which charters heavy lift and fire suppression helicopters. To the southwest is a group of privately owned properties commonly referred to as the Southend Corporate Airpark [(the Airpark)]. It consists a number of hangars, office, maintenance, repair, engineering and design spaces serving Columbia Helicopters, FLIR Systems, Inc., Erickson Inc., Life Flight Network, Metal Innovations, Inc., Van's Aircraft, Wilson Construction and other companies operating airport and aircraft-related uses together with Fixed Based Operator (FBO) LYNX, which provides fuel and direct aircraft, pilot and customer support services." Record 12-13 (boldface omitted).

The subject property is located within the horizontal surface district of the airport overlay zone, described in Marion County Code (MCC) chapter 17.177, which limits uses of the subject property. The subject property is encumbered by a taxiway easement that allows users direct access to the Airport's runway. Intervenor-respondent (intervenor) applied for comprehensive plan map and zoning map amendments to change the plan and zoning designations from PA and EFU to P with a Limited Use (LU) overlay, exceptions to Goals 3 and 14, and a conditional use permit to authorize the future development of ten categories of airport-related uses allowed in the LU overlay: aircraft hangars; air medevac and emergency medical technician services; aviation facilities; air charter operations; aircraft fixed based operations; airport-related administration; aerospace- and aerodynamic-related uses; design, maintenance, and similar uses

of aircraft and related equipment; aviation-related schools; and public health and safety services intended to serve the airport.[1] Record 63-65.

The subject property contains soils that make on-site wastewater treatment infeasible.[2] The Airport includes a shared septic system at the Airpark, located

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[1] The challenged decision describes the proposed development as follows:

> "[Intervenor] anticipates the initial use of these facilities will consist primarily of hangars, but may also include maintenance and repair facilities, storage, management office space, research and development, flight testing, equipment sales and service, and other airport-related uses allowed under the required zone. The Subject Property would be developed under the Marion County Building Code and leased to multiple tenants. The proposed site plan and descriptions are conceptual only. Tenant 1 would have access to 7.02 acres of the Subject Property and the taxi lane. Hangar Y is proposed to be approximately 52,870 square feet, with a parking area, and office/maintenance/shop space proposed to be multiple stories and approximately 49,590 square feet. Tenant 2 would have access to 2.42 acres. Hangar X is proposed to be 32,000 square feet with a taxi lane, parking area, and a multiple story office/maintenance/shop space proposed to be approximately 22,500 square feet. Tenant 3 would have access to 5.0 acres of space. Hangar W is proposed to be 36,000 square feet and include a taxi lane, parking area, and a multi-story office/maintenance/shop space proposed to be approximately 48,000 square feet. Tenant 4 would have access to 2.0 acres. Hangar V is proposed to be approximately 29,410 square feet together with a taxi lane and parking area." Record 13.

[2] The decision explains the prior use of the subject property as follows:

> "The Subject Property was the site of a Methodist church camp and later a religious retreat, training center and church. The Subject Property has not been in resource use for several decades and is not

adjacent to the subject property, that was installed after the county approved a reasons exception to Statewide Planning Goals 11 (Public Facilities and Services) and 14 in 2004 (the 2004 Exception). Record 537-48. As part of its application, intervenor proposes to provide wastewater treatment for the subject property either by connecting to the Airpark's shared septic system or through on-site holding tanks that are periodically pumped.

In March 2019, the hearings officer held a hearing on the application, and, in November 2019, they recommended conditional approval of the application. In June 2020, the board of county commissioners held *de novo* hearings on the application and, at the conclusion, left the record open until July 15, 2020. In August 2020, the board of county commissioners deliberated and approved the application, and, in October 2020, it adopted findings and conclusions in support of the decision.

The board of county commissioners concluded that no exceptions to Goals 3 or 14 were required because the application is consistent with Goals 3, 4, 11, and 14 as a matter of law pursuant to OAR 660-012-0065(3)(n). We discuss those findings in detail in our resolution of the sixth assignment of error. In the

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specially assessed for farm or forest use. The Subject Property was developed with a house of worship, two dwellings, several cabins, a meeting hall, snack bar, and an office building, along with roads, parking areas, well, several septic systems, and infrastructure for electricity and gas service. Remediation would likely be required to make the parcel suitable for resource use." Record 39.

alternative, the board of county commissioners approved exceptions to Goals 3 and 14 pursuant to OAR 660-004-0020, 660-004-0022, and 660-004-0040. Petitioner challenges those findings in portions of their first, second, third, fourth, fifth, sixth, and tenth assignments of error.

This appeal followed.

SIXTH ASSIGNMENT OF ERROR

OAR 660-012-0065, adopted by the Land Conservation and Development Commission (LCDC), "identifies transportation facilities, services and improvements which may be permitted on rural lands consistent with Goals 3, 4 [(Forest Lands)], 11, and 14 without a goal exception." OAR 660-012-0065(1). OAR 660-012-0065(3) provides:

> "The following transportation improvements are consistent with Goals 3, 4, 11, and 14 subject to the requirements of this rule:
>
> "* * * * *
>
> "(n) Expansions or alterations of *public use airports* that do not permit service to a larger class of airplanes[.]" (Emphasis added.)

The board of county commissioners relied on OAR 660-012-0065(3)(n) to conclude that the application for comprehensive plan map and zoning map amendments to expand the Airport is consistent with Goals 3, 4, 11, and 14.[3] In

[3] There is no dispute that the proposed expansion of the Airport does not "permit service to a larger class of airplanes."

the sixth assignment of error, petitioner includes several subassignments of error that challenge the board of county commissioners' reliance on OAR 660-012-0065(3)(n).

Citing ORS 197.763(1), the county and intervenor (respondents) respond, initially, that several of the issues presented in the sixth assignment of error were not raised prior to the conclusion of the initial evidentiary hearing, and petitioner may not raise them for the first time at LUBA. ORS 197.763(1) requires that issues be not only raised below but also accompanied by statements or evidence sufficient to afford the local decision maker an opportunity to respond. *See Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991) (the "raise it or waive it" principle embodied in ORS 197.763(1) does not limit the parties on appeal to the exact same arguments made below, but it does require that the issue be raised below with sufficient specificity so as to prevent "unfair surprise" on appeal). We address the waiver argument first before turning to the subassignments of error.

A. Waived Issues

In a portion of the second subassignment of error, petitioner argues that OAR 660-012-0065(3)(n) is inconsistent with and conflicts with (1) ORS 197.175(2)(a) and (e), which require that comprehensive plan map amendments and simultaneous land use decisions subject to those amendments comply with the statewide planning goals, and (2) ORS 197.732(1)(b)(B) and (2), which authorize exceptions to the statewide planning goals for comprehensive plan map

amendments that fail to comply therewith. Relatedly, petitioner argues that LCDC lacked authority to adopt OAR 660-012-0065(3)(n). Respondents respond that petitioner failed to raise those issues prior to the close of the initial evidentiary hearing and may not do so for the first time at LUBA. ORS 197.763(1); ORS 197.835(3).

In the petition for review, petitioner cites Record 435 to 436, 830, 855, 937, and 5483 to demonstrate that the issues raised in the sixth assignment of error were preserved.[4] Petitioner does not otherwise respond to the waiver argument. We have reviewed the cited record pages, and we agree with respondents that nothing in them raises the issues that are presented in the second subassignment of error. The cited record pages do not show that fair notice was provided. Accordingly, petitioner may not raise those issues for the first time on appeal.

In the third subassignment of error, petitioner challenges the board of county commissioners' reliance on the definition of "airport" at OAR 660-013-0020(1) and the legislative policy of "encourage[ing] and support[ing] the continued operation and vitality of Oregon's airports" at ORS 836.600 to conclude that the proposed expansion of the Airport is consistent with Goals 3,

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[4] OAR 661-010-0030(4)(d) requires each assignment of error in the petition for review to demonstrate that the issue raised in the assignment of error was preserved during the proceedings below or, where an assignment raises an issue that was not preserved, to state why preservation is not required.

4, 11, and 14 as a matter of law. Petitioner argues that the definition of "airport" at OAR 660-013-0020(1) is inconsistent with the definition of "airport" at ORS 836.605(2), which petitioner argues limits airport boundaries to those that existed in 1994. Petitioner also argues that OAR 660-013-0040(1) requires the county to adopt a map showing the Airport's boundaries, which petitioner argues the county has not done. Accordingly, petitioner argues that ORS 836.600 does not apply, since the subject property is not actually part of an "airport" for purposes of that statute. Petition for Review 47-48.

Respondents argue that the issues presented in the third subassignment of error were not raised prior to the close of the initial evidentiary hearing, and petitioner is precluded from raising them for the first time on appeal to LUBA. We have reviewed the record pages cited by petitioner, and we agree with respondents that nothing in them raises the issues that are presented in the third subassignment of error. The cited record pages do not show that fair notice was provided. Petitioner may not raise those issues for the first time on appeal.

In the fourth subassignment of error, petitioner argues that ORS 836.640 to 836.642 do not apply to the decision. Again, respondents respond that petitioner failed to raise that issue below. We agree. The cited record pages do not show that fair notice was provided. Moreover, the fourth subassignment of error does not actually assign error to the decision. Rather, it maintains that "the Decision correctly does not rely on [ORS 836.640 to 836.642]." Petition for

Review 49. Accordingly, even if it were not waived, the fourth subassignment of error would provide no basis for reversal or remand.

The second subassignment of error is denied, in part. The third and fourth subsassignments of error are denied.

B. OAR 660-012-0065(3)(n) Applies

In the portion of the second subassignment of error that is not waived, petitioner argues that the board of county commissioners improperly relied on OAR 660-012-0065(3)(n) to find that the proposed comprehensive plan map and zoning map amendments are consistent with Goals 3, 4, 11, and 14 as a matter of law and that, accordingly, no goal exceptions are required.[5] The essential issue

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[5] The board of county commissioners found:

> "The City of Aurora argued that OAR 660-012-0065(3)(n) does not apply to [intervenor's] Proposal and only applies to development of ODA-owned facilities. Such a construction is inconsistent with the definition of OAR 660-013-0020(1), which is the implementing rule for [Statewide Planning Goal 12 (Transportation)] as it applies to airport facilities. The specific definition of an airport to include 'all adjacent land used in connection with the aircraft' clearly applies to the Subject Property that is adjacent to the [Airport Layout Plan] boundary and is benefited by a taxi-lane easement. The text 'including but not limited to land used for existing airport uses' also expressly addresses that the Subject Property has not yet been used for existing uses. Had the intent been to limit the definition to only land with existing uses, the text would not have expressly stated it was not limited to such existing airport used lands. Aurora's argument that the Subject Property must be excluded is inconsistent with the text and context of OAR 660-012-0065(3)(n), OAR 660-013-0020(1), and ORS 836.600." Record 57.

that petitioner presents in this portion of the second subassignment of error is the meaning of the phrase "public use airport" in OAR 660-012-0065(3)(n).

Petitioner argues that OAR 660-012-0065(3)(n) does not apply because the application seeks to expand the Airport to allow for private development. Therefore, petitioner argues, the application is not for the "[e]xpansion[] or alteration[] of [a] *public use airport*[]." (Emphasis added.) Relatedly, petitioner argues that the proposed expansion is not of a "public use airport" because it is not proposed by a public owner of the Airport and because the subject property is not owned by, and will not be owned by, a public entity but, rather, will remain in private ownership.

Respondents respond that the Airport is a "public use airport" within the meaning of OAR 660-012-0065(3)(n). Response Brief 45. Respondents respond that petitioner's interpretation of the phrase "public use airport" is not supported by anything in the express language of the rule or in related rules or statutes.

"The meaning of an administrative rule is a question of law, governed by the same principles that apply to the interpretation of statutes." *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (citing *State v. Hogevoll*, 348 Or 104, 109, 228 P3d 569 (2010); *Tye v. McFetridge*, 342 Or 61, 69, 149 P3d 1111 (2006)). We begin with a brief description of the rules and enabling legislation leading to LCDC's adoption of OAR 660-012-0065(3)(n) in its current form before turning to the meaning of the phrase "public use airport."

OAR chapter 660, division 12, implements Statewide Planning Goal 12 (Transportation) and is known as the Transportation Planning Rule (TPR). LCDC first adopted the TPR in 1991. The 1991 TPR provided that "[p]ersonal use airports and expansions or alterations of public use airports that do not permit service to a larger class of airplanes" were consistent with Goals 11 and 14 and could be located on rural lands. OAR 660-012-0065(4)(o) (May 8, 1991).

ORS 215.283(3) was subsequently enacted in 1993. Or Laws 1993, ch 792, § 14. That statute has not been amended since its enactment, and it provides:

> "Roads, highways and other transportation facilities and improvements not allowed under subsections (1) and (2) of this section may be established, subject to the approval of the governing body or its designee, in areas zoned [EFU] *subject to*:
>
> "(a) Adoption of an exception to the goal related to agricultural lands and to any other applicable goal with which the facility or improvement does not comply; *or*
>
> "(b) ORS 215.296 for those uses identified by rule of [LCDC] as provided in section 3, chapter 529, Oregon Laws 1993."[6] (Emphases added.)

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[6] Oregon Laws 1993, chapter 529, section 3, provides:

> "The Department of Transportation shall, by March 30, 1994, submit to [LCDC] proposed rules identifying the other roads, highways and transportation facilities that may be allowed pursuant to ORS 215.213(10)(b) and 215.283[(3)](b). [LCDC] shall adopt rules implementing ORS 215.213(10)(b) and 215.283[(3)](b) by June 30, 1994."

Thus, ORS 215.283(3) allows transportation facilities to be established on EFU-zoned land, subject to either (1) an exception to Goal 3 and any other applicable goals or (2) compliance with ORS 215.296 "for those uses identified by rule of [LCDC] as provided in section 3, chapter 529, Oregon Laws 1993."[7]

LCDC amended the TPR in 1995, thereby adopting OAR 660-012-0065(3)(n) in its current form.[8] Unlike OAR 660-012-0065(4)(o) (May 8, 1991),

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[7] ORS 215.296(1) requires an assessment of whether a proposed nonfarm use on EFU land would "'[f]orce a significant change' in accepted farm practices or '[s]ignificantly increase the cost' of those practices on surrounding agricultural lands." *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 434, 435 P3d 698 (2019) (quoting ORS 215.296(1)(b)).

[8] The 1995 TPR amendments also adopted OAR 660-012-0065(5), which provides:

> "For transportation uses or improvements listed in *subsections (3)(d) to (g) and (o) of this rule* within an [EFU] or forest zone, a jurisdiction shall, *in addition to demonstrating compliance with the requirements of ORS 215.296*:
>
> "(a) Identify reasonable build design alternatives, such as alternative alignments, that are safe and can be constructed at a reasonable cost, not considering raw land costs, with available technology. The jurisdiction need not consider alternatives that are inconsistent with applicable standards or not approved by a registered professional engineer;
>
> "(b) Assess the effects of the identified alternatives on farm and forest practices, considering impacts to farm and forest lands, structures and facilities, considering the effects of traffic on the movement of farm and forest vehicles and equipment and

OAR 660-012-0065(3)(n) in its current form, quoted above, does not mention "personal use airports," and it provides that "[e]xpansions or alterations of public use airports that do not permit service to a larger class of airplanes" are consistent with Goals 3 and 4 in addition to Goals 11 and 14.

The phrase "public use airports" is not defined in LCDC's rules. However, at the time LCDC adopted OAR 660-012-0065(4)(o) (May 8, 1991), and at the time LCDC adopted OAR 660-012-0065(3)(n) in its current form in 1995, an Oregon Department of Transportation (ODOT) Aeronautics Division rule defined "public use airport" to mean an airport that is "[o]pen to the flying public considering performance and weight of the aircraft being used. May or may not be attended or have services available." OAR 738-020-0015(2)(b) (Sept 20, 1989).

Given that the definition of "public use airport" in OAR 738-20-015(2)(b) (Sept 20, 1989) was in effect when LCDC adopted OAR 660-012-0065(4)(o)

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considering the effects of access to parcels created on farm and forest lands; and

"(c) Select from the identified alternatives, the one, or combination of identified alternatives that has the least impact on lands in the immediate vicinity devoted to farm or forest use." (Emphases added.)

While the issue is not presented in this appeal, we note that OAR 660-012-0065(5) appears to be LCDC's implementation of ORS 215.283(3)(b), which subjects the transportation facilities that LCDC has identified by rule to compliance with ORS 215.296. *See Van Dyke v. Yamhill County*, 78 Or LUBA 530, 544 n 12 (2018) (explaining ambiguities in the rule).

(May 8, 1991); when ODOT submitted proposed rules to LCDC in response to Oregon Laws 1993, chapter 529, section 3; and when LCDC adopted the current version of OAR 660-012-0065(3)(n) in 1995, we conclude that the phrase "public use airports" in OAR 660-012-0065(3)(n) has the meaning in OAR 738-020-0015(2)(b) (Sept 20, 1989). Petitioner does not dispute that the Airport is open to the flying public. Accordingly, we agree with respondents that OAR 660-012-0065(3)(n) applies to the proposed comprehensive plan map and zoning map amendments to expand the Airport because the Airport is a "public use airport" within the meaning of the rule.[9]

Although petitioner does not dispute that the Airport is "open to the flying public," they argue that the record includes no evidence that the *subject property* will be open to the flying public. However, whether the subject property will be open to the flying public is not relevant. OAR 660-012-0065(3)(n) applies to expansions and alterations of "public use airports," not to individual components or concessionaires of public use airports. Stated differently, nothing in OAR 660-012-0065(3)(n) requires every aspect of a public use airport to be "open to the

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[9] The board of county commissioners relied on the definition of "airport" in OAR 660-013-0020(1), which is part of the Airport Planning Rule. However, because that definition was not adopted by LCDC until 1996, it does not provide context for interpreting the term "public use airport" in OAR 660-012-0065(3)(n), which was adopted in 1995. *See Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997) (later-enacted statutes are not context for what the legislature intended an earlier-adopted statute to mean).

flying public." Rather, OAR 660-012-0065(3)(n) requires that the airport as a whole be open to the flying public to qualify as a public use airport.

Petitioner also argues that OAR 660-012-0065(3)(n) does not apply where the airport expansion is for privately owned development adjacent to the public use airport. However, nothing in the definition of "public use airport" limits its scope to airports owned by public entities, and nothing in OAR 660-012-0065(3)(n) prohibits expansions or alterations of public use airports for privately owned development adjacent thereto. We conclude that the proposed expansion of the Airport falls squarely within the ambit of OAR 660-012-0065(3)(n). Accordingly, the proposed expansion of the Airport is consistent with Goals 3, 4, 11, and 14 as a matter of law, and no exception is required.

The second subassignment of error is denied.

The sixth assignment of error is denied, in part.

FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, AND TENTH ASSIGNMENTS OF ERROR

As explained above, in the alternative to its conclusion that the proposed expansion of the Airport is consistent with Goals 3, 4, 11, and 14 as a matter of law pursuant to OAR 660-012-0065(3)(n), the board of county commissioners approved exceptions to Goals 3 and 14 pursuant to OAR 660-004-0020, 660-004-0022, and 660-004-0040.

Petitioner's first through fifth assignments of error, the first subassignment of error under the sixth assignment of error, and the first subassignment of error

under the tenth assignment of error challenge the county's alternative findings that the exceptions standards at OAR 660-004-0020, 660-004-0022, and 660-004-0040 are met. In the first assignment of error, petitioner argues that OAR 660-012-0060(5) precludes the county from relying on OAR 660-004-0022 to approve an exception to Goal 3. In the second, third, and fourth assignments of error, petitioner argues that the county's conclusion that OAR 660-004-0020(2) is met is not supported by substantial evidence or adequate findings and improperly construes the rule. Petitioner also challenges the county's findings under OAR 660-004-0020 in the first subassignment of error under the sixth assignment of error. In the fifth assignment of error, petitioner argues that the county's conclusion that OAR 660-014-0040, the rule that applies to certain exceptions to Goal 14, is met are not supported by substantial evidence or adequate findings. Also in the fifth assignment of error, and in the first subassignment of error under the tenth assignment of error, petitioner argues that the county's decision requires an exception to Goal 11 and is not supported by substantial evidence in the record.

Because we conclude above that the county correctly concluded that OAR 660-012-0065(3)(n) applies to the proposed expansion of the Airport, the proposed expansion is consistent with Goals 3, 4, 11, and 14 as a matter of law. It would be inconsistent with "sound principles governing judicial review" to issue what would be an advisory opinion on the above-described assignments of

error, and we deem it more consistent with those principles to address only the county's dispositive findings. ORS 197.805.

Accordingly, we do not resolve the first through fifth assignments of error, the first subassignment of error under the sixth assignment of error, or the first subassignment of error under the tenth assignment of error.

SEVENTH ASSIGNMENT OF ERROR

Statewide Planning Goal 6 (Air, Water and Land Resources Quality) is "[t]o maintain and improve the quality of the air, water and land resources of the state."[10] "Goal 6 requires that the local government establish that there is a *reasonable expectation* that the use that is seeking land use approval will also be able to comply with the state and federal environmental quality standards that it must satisfy to be built." *Friends of the Applegate v. Josephine County*, 44 Or

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[10] Goal 6 further provides, in part:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources.
>
> "**Waste and Process Discharges** -- refers to solid waste, thermal, noise, atmospheric or water pollutants, contaminants, or products therefrom." (Boldface in original.)

LUBA 786, 802 (2003) (emphasis in original). The board of county commissioners found that Goal 6 is met because there are feasible options for wastewater treatment:

> "No public sewer service is available. Standard on-site wastewater disposal is not feasible without procuring off-site drain field facilities, which is feasible. [Intervenor] examined alternatives to standard septic systems, and favors tying into the digester system on the [Airpark] property to the west. The [Airpark] was approved subject to a Goal 11 exception. Before connecting to such a system, [intervenor] would need to obtain a modification to the existing Goal 11 exception approval to include the property. Evidence from [intervenor's] engineer attested to the system's ability to accommodate such use as a feasible option. Other possible alternatives include having a holding tank and trucking wastewater off the site or procuring off-site drain field facilities. Reusing water for plant watering and toilet flushing is also being considered to reduce the amount of water going into the wastewater disposal system. [Intervenor] has shown there are feasible options available for wastewater disposal." Record 37.

Petitioner cites more conclusory findings in other parts of the decision and argues that those findings are inadequate to explain why the board of county commissioners concluded that Goal 6 is met. However, petitioner does not address or otherwise challenge the above-quoted findings. Absent any challenge to those findings, petitioner's argument provides no basis for reversal or remand.

Petitioner also argues that the county's conclusion that the uses allowed by the LU overlay will be able to comply with applicable environmental standards is not supported by evidence in the record because there is no evidence of an approvable drain field on the property. Respondents respond, and we agree, that

the evidence in the record demonstrates that there are feasible options for sewage disposal. Petitioner does not challenge or address that evidence, and it is evidence that a reasonable person would rely upon to conclude that the uses allowed on the subject property will be able to comply with applicable environmental standards.

Finally, citing *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 406 (1994), petitioner argues that the county was required but failed to assess the cumulative impacts of septic waste discharges from existing and proposed development. Respondents do not respond to that argument.

By its terms, Goal 6 requires consideration of the cumulative effects of proposed future development and existing development, and it prohibits plan amendments allowing future development that, alone or combined with existing development, will violate or threaten to violate state or federal environmental standards. We agree with petitioner that the county's findings are inadequate because they fail to consider the cumulative effects of septic waste discharges from proposed development and existing development.

The seventh assignment of error is sustained, in part.

EIGHTH AND TENTH ASSIGNMENTS OF ERROR

MCC 17.119.070 provides:

> "Before granting a conditional use, the director, planning commission or hearings officer shall determine:
>
> "A. That it has the power to grant the conditional use;
>
> "B. *That such conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone*;

> "C. That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood." (Emphasis added.)

In the eighth assignment of error and in the second subassignment of error under the tenth assignment of error, petitioner challenges the board of county commissioners' conclusion that the development standards for uses in the P zone do not apply to the conditional use application and that only the conditional use criteria at MCC 17.119.070 apply. The purpose of the P zone is "to provide regulations governing the development of lands appropriate for specific public and semi-public uses and to ensure their compatibility with adjacent uses." MCC 17.171.010. In the eighth assignment of error, petitioner argues that MCC 17.119.070(B) makes MCC 17.171.010 an approval criterion for the conditional use application. Stated differently, petitioner argues that, because MCC 17.119.070(B) requires that the proposed conditional use be in harmony with the purpose and intent of the zone, the conditional use approval must ensure compatibility with adjacent uses and establish compliance with the development standards for the P zone.

The board of county commissioners concluded that MCC 17.171.060, which provides the development standards for the P zone, was not an approval criterion for the conditional use application:

> "MCC 17.171.060 contains development standards in the P-zone. They are not mandatory approval criteria for the comprehensive plan map amendment, zone change or conditional use criteria.

> [Intervenor] is not proposing any development concurrent with the Proposal. The City of Aurora's comments regarding nonconformance with MCC 17.171.060 are not a basis for denial of the application. The conditional use criteria are identified in MCC 17.119.070. Review of conformance with the development standards will occur during the County's building permit and site plan review." Record 19.

The board of county commissioners also addressed petitioner's argument that MCC 17.119.070(B) requires a compatibility determination at this stage:

> "The Board disagrees in part with arguments from opponents regarding their interpretation of [MCC] 17.119.070(B). Opponents['] assert[ion] that the conditional use permit must be denied 'without individualized compatibility' considerations is unnecessary and contradicts the text of the code. The conditional use criteria do not require general compatibility with surrounding uses. Such analysis has been repeatedly addressed above regarding other criteria (including the exception criteria). It need not be repeated. Moreover, it is not required by the text of [MCC] 17.119.070(B).
>
> "As Condition No. 1, the Board has imposed [an LU] overlay zone with ten (10) categories of proposed uses. In proposing this [LU] overlay zone, [intervenor] adequately responded to the Hearings Officer's request to memorialize the list of allowed uses through [an LU] overlay zone." Record 63.

Below those findings is a table that explains why each category of uses allowed in the LU overlay is "in harmony with the purpose and intent of the [P] Zone." Record 63-65.

Petitioner argues that the board of county commissioners' interpretation of MCC 17.119.070(B) and MCC 17.171.010 is inconsistent with the express language of those provisions. Respondents respond, and we agree, that the board of county commissioners' interpretation of those provisions is not inconsistent

with their express language or purpose and is plausible. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Accordingly, we affirm it. ORS 197.829(1). Nothing in the express language of MCC 17.119.070(B) converts MCC 17.171.010, the purpose statement for the P zone, into a mandatory approval criterion for conditional uses. Rather, MCC 17.119.070(B) requires the county to review the purpose of the P zone and determine that proposed conditional uses "will be in harmony with" that purpose. The board of county commissioners adopted findings that the conditional uses authorized by the LU overlay will be in harmony with the purpose of the P zone. Record 63-65. Petitioner does not challenge those findings.

In addition, nothing in the express language of MCC 17.119.070(B) or MCC 17.171.010 requires a conditional use permit application to satisfy MCC 17.171.060, the development standards for the P zone, at least in the absence of a concurrent site plan review or building permit application. The board of county commissioners plausibly interpreted the relevant provisions to conclude that the development standards for uses allowed in the P zone apply at the time of building permit and site plan review.

The board of county commissioners adopted alternative findings that one of the development standards cited by participants during the proceedings below, MCC 17.171.060(I), was met: "[Intervenor] provided substantial evidence in the record that demonstrates wastewater from the proposed use can be feasibly managed without affecting the surrounding property or local environmental

resources. The Board finds [intervenor's] evidence satisfies MCC 17.171.060[(I)] * * *." Record 19. In the second subassignment of error under the tenth assignment of error, petitioner argues that that finding is inadequate and not supported by substantial evidence. However, that finding is an alternative finding. We agreed above with respondents' argument that the board of county commissioners' interpretation of the development standards at MCC 17.171.060 as not applying to the conditional use application must be affirmed. Accordingly, petitioner's challenges to the board of county commissioners' alternative finding provides no basis for reversal or remand.

The eighth assignment of error and the second subassignment of error under the tenth assignment of error are denied.

NINTH ASSIGNMENT OF ERROR

As explained above, the county approved a reasons exception to Goals 11 and 14 for the adjacent Airpark in 2004. Record 537-48. In the ninth assignment of error, petitioner argues that OAR 660-004-0018(1) and (4)(b) require a new reasons exception to Goals 11 and 14 because the new uses allowed on the subject property will increase the intensity of the use of the Airpark's septic system and taxiway.[11] Respondents respond, initially, that petitioner failed to preserve that

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[11] OAR 660-004-0018, which implements Statewide Planning Goal 2 (Land Use Planning), provides, in relevant part:

> "(1) Purpose. This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one

issue. In the petition for review, petitioner cites Record 829 to 831 and 5483. We have reviewed the cited record pages, and we agree with petitioner that the issue presented in the ninth assignment of error was raised below. Record 830-31 ("The combination of existing and proposed uses exceeds what was authorized in the prior exceptions for the existing airport, and therefore a new reasons exception is required." (Citing OAR 660-004-0018(1).)).

> goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.
>
> "* * * * *
>
> "(4) 'Reasons' Exceptions:
>
> "(a) When a local government takes an exception under the 'Reasons' section of ORS 197.732(1)(c) and OAR 660-004-0020 through 660-004-0022, plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception.
>
> "(b) When a local government changes the types or intensities of uses or public facilities and services within an area approved as a 'Reasons' exception, a new 'Reasons' exception is required."

However, we agree with respondents that petitioner's arguments provide no basis for reversal or remand because petitioner has not established that, in the challenged decision, the county approved an increase in the intensity of uses allowed at the adjacent Airpark. That is so because petitioner does not argue, let alone identify any place in the record that supports an argument, that the uses and public facilities approved in the 2004 Exception were limited to any particular intensity.

We also agree with respondents that the decision does not authorize or require use of the Airpark's septic system. Rather, the county's decision recognizes that connection to the Airpark's septic system is one feasible option for sewage disposal.

In addition, the decision does not authorize or require an increase in taxiway traffic, and petitioner does not identify any place in the record that establishes that the use of the taxiway was limited to any particular intensity under the 2004 Exception. Stated differently, in order to establish that the proposed uses would increase the intensity of the uses or public facilities that were approved in the 2004 Exception, petitioner must first identify the intensity of the uses and public facilities that were approved in the 2004 Exception. Petitioner does not point to anything in the record that establishes or limits the intensity of the uses or public facilities at the Airpark or that establishes that the conditional uses authorized by the LU overlay will increase the intensity of the uses or public facilities that were allowed at the Airpark through the 2004

Exception. Without a developed argument regarding the approved intensity of those uses or public facilities, petitioner's arguments do not provide a basis for reversal or remand.

The ninth assignment of error is denied.

The county's decision is remanded.