

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

3  
4                   JOSEPH SCHAEFER,  
5                   *Petitioner,*

6  
7                   vs.

8  
9                   MARION COUNTY,  
10                  *Respondent,*

11                  and

12  
13  
14                  TLM HOLDINGS LLC,  
15                  *Intervenor-Respondent.*

16  
17                  LUBA No. 2020-108

18  
19                  FINAL OPINION  
20                  AND ORDER

21  
22                  Appeal on remand from the Court of Appeals.

23  
24                  Joseph Schaefer represented themselves.

25  
26                  Scott A. Norris represented respondent.

27  
28                  Alan M. Sorem represented intervenor-respondent.

29  
30                  ZAMUDIO, Board Chair; RYAN, Board Member; RUDD, Board  
31 Member, participated in the decision.

32  
33                  REMANDED

07/07/2022

34  
35                  You are entitled to judicial review of this Order. Judicial review is  
36 governed by the provisions of ORS 197.850.

**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**

This matter is on remand from the Court of Appeals. *Schaefer v. Marion County*, 318 Or App 617, 509 P3d 718 (2022). We restate the facts from our prior decision. *Schaefer v. Marion County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-108, Oct 12, 2021) (*TLM I*).

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

1 buildings that are all related to airport use. Five of the buildings  
2 house twelve hangars offering storage options to private aircraft  
3 owners with direct access to the Airport and runway. Each hangar is  
4 individually owned and possesses a unique tax lot number on  
5 Marion County Assessor Map No. 04-1W-02D. Further north is a  
6 21.42-acre parcel owned by Oregon Department of Aviation  
7 ('ODA') with airport hangars, offices, and a tarmac \* \* \*. The  
8 property bordering the Subject Property directly to the south \* \* \*  
9 is 27.47 acres and owned by US Leaseco, Inc. This is the site of  
10 Helicopter Transport Services, which charters heavy lift and fire  
11 suppression helicopters. To the southwest is a group of privately  
12 owned properties commonly referred to as the Southend Corporate  
13 Airpark [(the Airpark)]. It consists a number of hangars, office,  
14 maintenance, repair, engineering and design spaces serving  
15 Columbia Helicopters, FLIR Systems, Inc., Erickson Inc., Life  
16 Flight Network, Metal Innovations, Inc., Van's Aircraft, Wilson  
17 Construction and other companies operating airport and aircraft-  
18 related uses together with Fixed Based Operator (FBO) LYNX,  
19 which provides fuel and direct aircraft, pilot and customer support  
20 services." Record 12-13 (boldface omitted).

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

1 operations; aircraft fixed based operations; airport-related administration;  
2 aerospace- and aerodynamic-related uses; design, maintenance, and similar uses  
3 of aircraft and related equipment; aviation-related schools; and public health and  
4 safety services intended to serve the airport.<sup>1</sup> Record 63-65.

5 The subject property contains soils that make on-site wastewater treatment  
6 infeasible.<sup>2</sup> The Airport includes a shared septic system at the Airpark, located

---

<sup>1</sup> 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.

<sup>2</sup> The decision explains the prior use of the subject property as follows:

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

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

14 The board of county commissioners concluded that no exceptions to Goals  
15 3 or 14 were required because the application is consistent with Goals 3, 4 (Forest

---

“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 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.

1 Lands), 11, and 14 as a matter of law pursuant to OAR 660-012-0065(3)(n). In  
2 the alternative, the board of county commissioners approved exceptions to Goals  
3 3 and 14 pursuant to OAR 660-004-0020, 660-004-0022, and 660-004-0040.  
4 Petitioner challenged those findings in portions of their first, second, third, fourth,  
5 fifth, sixth, and tenth assignments of error.

6 In *TLM I*, we agreed with respondent’s application of OAR 660-012-  
7 0065(3)(n) and their conclusion that no exception to Goals 3 or 14 was required.  
8 Petitioner sought judicial review of our decision.<sup>3</sup> The Court of Appeals  
9 concluded that our decision represented a mistaken interpretation of OAR 660-  
10 012-0065(3)(n). The court concluded that “[r]equests for comprehensive plan  
11 amendments and zone changes, like the ones at issue here, sought by private  
12 parties without corresponding expansion of the airport boundary through the  
13 airport planning process are not expansions of public use airports within the  
14 meaning of OAR 660-012-0065(3)(n).” *Schaefer*, 318 Or App at 620.

15 The court also concluded that we erred in rejecting petitioner’s contention  
16 that, as a matter of law, the proposed uses will increase the intensity of uses and  
17 facilities approved by the 2004 Exception because the 2004 Exception did not  
18 contemplate any development on the subject parcel. *Id.* at 639. Finally, the court  
19 concluded that we improperly rejected as unpreserved petitioner’s argument that

---

<sup>3</sup> 1000 Friends of Oregon and the City of Aurora filed amicus briefs in the Court of Appeals.

1 the county erred in relying on the provisions of ORS 836.600 to 836.630 to  
2 approve the requested land-use actions without goal exceptions. *Id.* at 639-40.

3 **SIXTH ASSIGNMENT OF ERROR**

4 OAR 660-012-0065, adopted by the Land Conservation and Development  
5 Commission (LCDC), “identifies transportation facilities, services and  
6 improvements which may be permitted on rural lands consistent with Goals 3, 4,  
7 11, and 14 without a goal exception.” OAR 660-012-0065(1). OAR 660-012-  
8 0065(3) provides:

9 “The following transportation improvements are consistent with  
10 Goals 3, 4, 11, and 14 subject to the requirements of this rule:

11 “\* \* \* \* \*

12 “(n) Expansions or alterations of public use airports that do not  
13 permit service to a larger class of airplanes[.]”

14 The county relied on OAR 660-012-0065(3)(n) to conclude that the  
15 application for comprehensive plan map and zoning map amendments to expand  
16 the Airport is consistent with Goals 3, 4, 11, and 14.<sup>4</sup> In the sixth assignment of  
17 error, petitioner challenges the county’s reliance on OAR 660-012-0065(3)(n).  
18 The court agreed with petitioner that OAR 660-012-0065(3)(n) does not apply to  
19 the application. Accordingly, the sixth assignment of error is sustained, in part,  
20 and we proceed to address petitioner’s challenges to the county’s alternative

---

<sup>4</sup> There is no dispute that the proposed expansion of the Airport does not  
“permit service to a larger class of airplanes.”

1 findings that the exceptions standards at OAR 660-004-0020, 660-004-0022, and  
2 660-004-0040 are met.

### 3 **FIRST ASSIGNMENT OF ERROR**

4 In the first assignment of error, petitioner argues that OAR 660-012-  
5 0060(5) precludes the county from relying on OAR 660-004-0022 to approve an  
6 exception to Goal 3. OAR 660-012-0060(5) provides: “The presence of a  
7 transportation facility or improvement shall not be a basis for an exception to  
8 allow residential, commercial, institutional, or industrial development on rural  
9 lands under this division or OAR 660-004-0022 and 660-004-0028.” There is no  
10 dispute that the Airport is a “transportation facility” for purposes of OAR 660-  
11 012 or that the county relied on the presence of the Airport as a basis for the  
12 exception to allow airport-related uses on the subject property. *See* OAR 660-  
13 012-0005(30) (“‘Transportation Facilities’ means any physical facility that  
14 moves or assist[s] in the movement of people or goods including facilities  
15 identified in OAR 660-012-0020 but excluding electricity, sewage and water  
16 systems.”).

17 Respondents respond, and we agree, that petitioner’s argument conflicts  
18 with our prior interpretation of OAR 660-012-0060(5) in *Columbia Riverkeeper*  
19 *v. Columbia County*, 78 Or LUBA 547, 577-81 (2018) *aff’d*, 297 Or App 628,  
20 443 P3d 1184 (2019) (*Riverkeeper II*). In *Riverkeeper II*, we explained that OAR  
21 660-012-0060(5) is intended to prohibit only an exception based on the existence



1 of a transportation facility and not otherwise appropriate for an exception for  
2 reasons set out in OAR 660-004-0022.

3 “An easy-to-imagine example is an exception to allow commercial  
4 or industrial uses on rural or resource land that are rendered  
5 economically feasible due only to the presence of an adjoining  
6 public highway. Conversely, it makes no policy sense to interpret  
7 OAR 660-012-0060(5) to effectively prevent local governments  
8 from adopting an exception necessary to improve or expand existing  
9 docks, ports or similar transportation facilities, where that exception  
10 is otherwise authorized by a reason that LCDC has specifically  
11 deemed to be appropriate.” *Riverkeeper II*, 78 Or LUBA at 581.

12 OAR 660-004-0022(1)(b) provides for a reasons exception based on  
13 demonstrated need and that “[t]he proposed use or activity has special features or  
14 qualities that necessitate its location on or near the proposed exception site.”  
15 Here, the county concluded that the reason justifying the Goal 3 exception is that  
16 airport-related uses need to be located proximate to the airport. Record 25-26.

17 Respondents point out that OAR 660-012-0065(3)(n) authorizes  
18 replacement or expansion of an airport without taking a goal exception, where  
19 the expansion does not permit a larger class of airplanes. Thus, under that scheme,  
20 certain airport expansions that permit a larger class of airplanes *do* require a goal  
21 exception. However, no such goal exception would be possible under petitioner’s  
22 broad interpretation of OAR 660-012-0060(5).

23 Consistent with our reasoning and conclusion in *Riverkeeper II*, we  
24 conclude that OAR 660-012-0060(5), does not prohibit a reasons exception for  
25 airport-related uses that need to be located proximate to the Airport for purposes

1 allowed under OAR 660-004-0022(1)(b). We address below petitioner’s  
2 challenges to the county’s conclusion that OAR 660-004-0022 supports the  
3 exception.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 OAR 660-004-0020(2)(a) requires the county to explain why and what  
7 reasons justify the exception to the applicable goals. “The exception shall set  
8 forth the facts and assumptions used as the basis for determining that a state  
9 policy embodied in a goal should not apply to specific properties or situations,  
10 including the amount of land for the use being planned and why the use requires  
11 a location on resource land[.]” *Id.*; ORS 197.732(4).

12 The decision approves a conditional use permit for 123,000 square feet of  
13 office space for aviation related office uses. See n 1 (description of proposed  
14 development). The county-imposed LU allows only “airport-related uses, which  
15 require being on land within or immediately adjacent to the Airport and generally  
16 require access to the runway for their most efficient operation.” Record 34. The  
17 county found that the proposed uses must be located at the Airport:

18 “Aron Faegre, P.E. and Architect has served and developed airport-  
19 related uses professionally for 36 years. Mr. Faegre provided an  
20 affidavit and supporting letters identified above and incorporated  
21 herein by this reference providing more detailed explanation as to  
22 why the proposed uses cannot be reasonably accommodated on  
23 properties outside of an airport.

24 “The Board concurs in the Hearings Officer’s determination that

1 evidence demonstrating that uses that require runway access  
2 preclude being on other lands not located adjacent to an airport;  
3 however, the Board concludes that, even if an airport-related use  
4 does not need direct runway access, it still should be located  
5 adjacent to the airport. As Mr. Faegre demonstrated, allowed uses  
6 must be at an airport for efficient and quality use. Those uses  
7 practically must be located as part of airport clusters, which are  
8 inherently at airports. Thus, the Applicant has demonstrated that  
9 non-resource land that would not require an exception, including  
10 increasing the density of uses on non-resource land, such as  
11 commercial, industrial or public lands at non-airport locations,  
12 cannot reasonably accommodate the proposed use. There are no  
13 available lands of sufficient size within the study area within or  
14 adjacent to an airport. Therefore, the factor supports the Proposal.

15 “The Board rejects Wilsonville’s argument that lands within its city  
16 limits zoned for commercial or industrial use can satisfy the need  
17 for airport-related use land. It ignores the substantial evidence in the  
18 record that the uses proposed cannot be reasonably accommodated  
19 outside of an airport. The Subject Property is the only available  
20 property in the study area with access to an airport runway that can  
21 serve commercial jets and other aircraft. It is not reasonable to  
22 presume all future hangar, service and repair shops, pilot services,  
23 and other related uses can be accommodated by lands without  
24 reasonable access to an airport runway within Wilsonville. Such  
25 access must be safe and direct as provided in the Subject Property's  
26 taxi-lane easement.” Record 35.

27 Petitioner argues that the decision lacks findings supported by evidence  
28 that general office functions require a location on resource land. If we understand  
29 petitioner’s argument, petitioner’s unstated premise is that the county can only  
30 grant an exception to Goal 3 if the airport-related uses themselves have some  
31 nexus with other farm or rural uses. That premise is not supported by the  
32 exception standards, which allow exceptions when the proposed use or activity

1 has special features or qualities that necessitate its location on or near the  
2 proposed exception site.<sup>5</sup> OAR 660-004-0022 expands on OAR 660-004-  
3 0020(2)(a) by giving examples of the types of reasons that may justify  
4 exceptions, including demonstrated need for the activity and special features of  
5 the proposed use or activity that necessitate its location on the proposed exception  
6 site. The disputed reasons exception is based on demonstrated need and that the  
7 proposed aviation related office uses require a location near the Airport with  
8 access to the Airport. In those circumstances, the county’s findings that the  
9 proposed aviation related office uses require a location near the Airport with  
10 access to the Airport satisfy the OAR 660-004-0020(2)(a) requirement for  
11 findings that the approved office uses require a location on resource land.

12 With respect to general aviation uses, petitioner challenges the county’s  
13 finding that

14 “Applicant provided substantial evidence that airport-related uses  
15 must generally be located proximate to airports, and that some uses  
16 require on-airport land or locations with taxi easements. Applicant  
17 has further demonstrated that there is need for 16.54 acres at this  
18 Airport. The analysis below finds the use cannot be sited on already

---

<sup>5</sup> For example, in *1000 Friends of Oregon v. Yamhill County*, the county found reasons justified an exception to Goal 3 to develop a highway on resource land. 52 Or LUBA 418 (2006). The county explained the need to serve the large numbers of through trips that pass through the exception area, impacts to Dundee’s adopted economic and community development objectives, and the fact that highways, unlike other land uses, are linear and must travel through rural lands to connect cities and regions of the state. *Id.* at 423.

1           excepted lands.” Record 33.

2           Petitioner argues that finding is inadequate because it fails to explain what  
3           evidence leads to the conclusion that what petitioner characterizes as “urban  
4           aviation” uses require a location on resource land. That argument also relies on a  
5           premise that the aviation uses for which the exception is sought must have some  
6           nexus with other farm or rural uses.

7           The exception standards do not require the county to make any findings  
8           that the airport-related uses have a nexus with other farm or rural uses.  
9           Accordingly, petitioner’s findings and substantial evidence arguments provide no  
10          basis for reversal or remand.

11          The county’s conclusion that the airport related uses require a location on  
12          resource land relies, in part, on the county’s finding that the subject property is  
13          benefited by an easement that provides access to the runway (taxiway easement).  
14          See Record 14 (“The Subject Property is subject to the taxi lane easement, giving  
15          the Subject Property direct access to the runway via the taxiway.”); Record 29  
16          (“The Subject Property is bordered by P-zoned airport-related properties north,  
17          west and south and is the last remaining undeveloped property with a taxiway  
18          easement and the opportunity for [“through the fence”] access to the runway,  
19          taxiways and aprons, making it a logical parcel for eventual airport-related  
20          development.”); *id.* (“Applicant’s revised site plan and testimony adequately  
21          explained that the ultimate users of the Subject Property will require use of the  
22          runway access taxi easement directly.”); Record 50 (“The Subject Property is

1 benefited by a taxiway easement that runs through the property, providing access  
2 to the runway.”). Petitioner argues that those findings are not supported by  
3 substantial evidence because the purported taxiway easement in the record is not  
4 a taxiway easement that *benefits* the site. Instead, it *burdens* the site and grants to  
5 “the United States of America and the State of Oregon the right, privilege and  
6 license to use the space over the real property hereinabove described for the use  
7 and benefit of aircraft.” Record 6545.

8 Respondents respond that the issue of the validity and benefit of a taxiway  
9 easement are waived because petitioner did not raise that issue below. To be  
10 preserved for LUBA review, an issue must “be raised and accompanied by  
11 statements or evidence sufficient to afford the governing body, planning  
12 commission, hearings body or hearings officer, and the parties an adequate  
13 opportunity to respond to each issue.” ORS 197.797(1). Petitioner does not  
14 respond to that waiver argument in the reply brief. In the petition for review,  
15 petitioner cites record pages 832 and 5483 as raising the issue of a lack of need  
16 for locating this use on resource land. We have reviewed those pages and they do  
17 not raise any issue with respect to a taxiway easement. We agree with respondents  
18 that issue is waived. Therefore, petitioner’s findings and substantial evidence  
19 challenges based on the purported taxiway easement provide no basis for remand.

20 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 To show why the particular site is justified for an exception, the county  
3 must evaluate “why other areas that do not require a new exception cannot  
4 reasonably accommodate the proposed use.” OAR 660-004-0020(2)(b)(B).

5 OAR 660-004-0020(2)(b)(C) provides:

6 “The ‘alternative areas’ standard in paragraph B may be met by a  
7 broad review of similar types of areas rather than a review of  
8 specific alternative sites. Initially, a local government adopting an  
9 exception need assess only whether those similar types of areas in  
10 the vicinity could not reasonably accommodate the proposed use.  
11 Site specific comparisons are not required of a local government  
12 taking an exception unless another party to the local proceeding  
13 describes specific sites that can more reasonably accommodate the  
14 proposed use. A detailed evaluation of specific alternative sites is  
15 thus not required unless such sites are specifically described, with  
16 facts to support the assertion that the sites are more reasonable, by  
17 another party during the local exceptions proceeding.”

18 During the local proceeding, opponents argued that areas that do not  
19 require a new exception can reasonably accommodate the proposed use,  
20 including land around existing airports. The county rejected that argument and  
21 concluded that no alternative areas that do not require a new exception could  
22 reasonably accommodate the proposed use. The county relied on intervenor’s  
23 study area and described the alternative areas analysis.

24 “Applicant surveyed available lands at or near Aurora and other  
25 airports within about a 25-mile range. The perimeter was chosen  
26 based on an approximate 30-minute driving distance from Aurora  
27 Airport to airports with similar uses. The area includes Hillsboro  
28 Airport, McMinnville Municipal Airport, Portland International  
29 Airport (PDX), Mulino State Airport, McNary Field in Salem and

1 Troutdale Airport. PDX, Hillsboro, and Troutdale are owned by the  
2 Port of Portland; Mulino and Aurora are state-owned; and  
3 McMinnville and McNary are city-owned. Applicant’s study area is  
4 large enough to contain sufficient comparative airports and is  
5 appropriate for evaluating the proposed Goal 3 exception.

6 “\* \* \* \* \*

7 “Applicant looked for commercial, industrial and, in Marion  
8 County, P-zoned property within the study area that might  
9 accommodate airport-related uses. Applicant owns an undeveloped,  
10 4.52-acre, P-zoned parcel adjacent to the taxiway at the Aurora  
11 Airport (Assessor's Map 041W02D TL 1700). Applicant states the  
12 parcel is too small for the contemplated development and is already  
13 committed to two 42,912 square foot hangars, one of which has  
14 already been purchased. With each hangar taking up nearly an acre  
15 each, the 4.52-acre parcel likely cannot reasonably accommodate  
16 Applicant’s proposed airport-related uses. Applicant also consulted  
17 real estate listings and contacted the Aurora Airport manager and  
18 found no other parcels available at the Airport.

19 “Applicant also looked at properties on or near alternative airports  
20 in the study area. Applicant contacted the airport managers and  
21 received no positive response about on-airport lands. Applicant also  
22 searched various real estate listings for airport-adjacent industrial or  
23 commercial zoned parcels of ten acres or more within a UGB. The  
24 ten-acre parcel size reasonably acknowledges that a smaller  
25 development may work for Applicant’s purposes. The search turned  
26 up two available properties; one in Salem and one in Hillsboro. The  
27 Salem property is a 12.45-acre, industrial zoned parcel on 25th  
28 Street, a City of Salem major arterial roadway. The parcel is across  
29 the road from McNary Field. Location across 25th Street means no  
30 immediate runway access for hangar and other uses needing on-site  
31 location. The Hillsboro UGB site is an 18.73-acre, industrial zoned  
32 property at 5340 NW 253rd Avenue, one-half mile from Hillsboro  
33 Airport; also making runway access a problem.” Record 33-34.



1           Intervenor searched available listings and contacted the airport managers  
2 for each of the above-mentioned airports inquiring whether the airports have any  
3 parcels “available for purchase, 10 acres or larger, inside the fence with runway  
4 access, and no such parcels were identified.” Record 6504; *see also* Record  
5 7617.<sup>6</sup>

6           Petitioner argues that the county misconstrued OAR 660-004-0020(2)(b)  
7 by concluding that land is “not available” if it is not for sale. Respondents respond  
8 that the proposed uses require location at the Airport to serve the Airport’s unmet  
9 needs. Respondents dispute that the county considered “available” only those  
10 properties that intervenor identified as for sale. Moreover, respondents respond  
11 that the record has no evidence of properties for lease, on-airport or off, of a  
12 sufficient size with a runway access available, within the study area that could  
13 have been considered available for the proposed use. Response Brief 26.

14           Petitioner replies, and we agree, that the record demonstrates that  
15 intervenor’s alternative areas search included only properties for sale, not lease.  
16 Record 6504, 7617. Petitioner argues, and we agree, that availability for sale is  
17 not the legal standard for the required initial alternatives analysis under OAR  
18 660-004-0020(2)(b)(B). In *Columbia Riverkeeper v. Columbia County*, 70 Or

---

<sup>6</sup> Intervenor identified two properties for sale within the search area and over 10 acres in size. Intervenor concluded that neither is a suitable alternative area. The first property is 12.45 acres, zoned Industrial, and located adjacent to Salem McNary Field across 25th Street and has no access to the airport. The second property is 18.73 acres located half a mile from the Hillsboro Airport.

1 LUBA 171, 195, *aff'd*, 267 Or App 637, 342 P3d 181 (2014) (*Riverkeeper I*), we  
2 explained: “In conducting the alternative sites analysis required by OAR 660-  
3 004-0020(2)(b), the county cannot limit its analysis to lands controlled by the  
4 applicant, or conclude that an alternative site controlled by others is not available  
5 for industrial development simply due to different ownership or control.” Land  
6 available for lease must be considered unless the record demonstrates that the  
7 property owner is “categorically unwilling” to lease the land. *Id.*; *see also*  
8 *Riverkeeper II*, 78 Or LUBA at 587 (Zamudio, Board Member, concurring)  
9 (“[A]n applicant or local government could avoid meaningful consideration of  
10 alternative sites if allowed to exclude areas that are either contractually obligated  
11 or in different ownership, and thereby obtain approval for a preferred location for  
12 an exception.”).

13 “Initially, a local government adopting an exception need assess only  
14 whether those similar types of areas in the vicinity could not reasonably  
15 accommodate the proposed use.” OAR 660-004-0020(2)(b)(C). Here, the county  
16 assessed “similar types of areas in the vicinity” by looking at other airports within  
17 intervenor’s study area. The county relied on the intervenor’s alternative areas  
18 analysis as its basis to conclude that OAR 660-004-0020(2)(b) is satisfied.  
19 Because intervenor’s alternative areas analysis was limited to property available  
20 for sale, the county did not consider properties under different ownership that  
21 may be available for lease. Stated differently, the county limited its initial  
22 analysis to lands that intervenor could purchase and control and impermissibly

1 concluded that “similar types of areas in the vicinity” are not available for airport-  
2 related development simply due to different ownership or control. We conclude  
3 that the county thereby misconstrued OAR 660-004-0020(2)(b), and the decision  
4 that no alternative area is available that does not require a new exception is not  
5 supported by substantial evidence in the record.

6 Intervenor bears the ultimate burden to prove that the exception  
7 requirements are satisfied. *Fasano v. Washington Co. Comm.*, 264 Or 574, 588,  
8 507 P2d 23 (1973). We observe that OAR 660-004-0020(2)(b)(C) imposes a  
9 burden shifting framework. Again, OAR 660-004-0020(2)(b)(C) provides:

10 “The ‘alternative areas’ standard in paragraph B may be met by a  
11 broad review of similar types of areas rather than a review of  
12 specific alternative sites. Initially, a local government adopting an  
13 exception need assess only whether those similar types of areas in  
14 the vicinity could not reasonably accommodate the proposed use.  
15 Site specific comparisons are not required of a local government  
16 taking an exception unless another party to the local proceeding  
17 describes specific sites that can more reasonably accommodate the  
18 proposed use. A detailed evaluation of specific alternative sites is  
19 thus not required unless such sites are specifically described, with  
20 facts to support the assertion that the sites are more reasonable, by  
21 another party during the local exceptions proceeding.”

22 Petitioner has identified evidence in the record that alternative areas may be  
23 available for lease at McNary Field on undeveloped property “suitable for  
24 hangars, aprons, and business development.”<sup>7</sup> Record 2560; Reply Brief 4.

---

<sup>7</sup> 2012 Salem Airport Master Plan and Airport Layout Plan, describes the acreage available at different sites within and adjacent to the airport that have

1           On remand, the county should consider and make findings on whether land  
2 available for lease that does not require a new exception can reasonably  
3 accommodate the use.

4           The third assignment of error is sustained.

5       **FOURTH ASSIGNMENT OF ERROR**

6           The county must find that “[t]he proposed uses are compatible with other  
7 adjacent uses or will be so rendered through measures designed to reduce adverse  
8 impacts.” OAR 660-004-0020(2)(d).<sup>8</sup> Petitioner argues that the decision  
9 misconstrues OAR 660-004-0020(2)(d) because the proposed uses are not  
10 compatible with surrounding farm uses and there is no mitigation of identified  
11 conflicts with farm uses in the decision. Adjacent uses include farm uses. Existing  
12 farm uses on surroundings lands includes plowing that creates dust and the use  
13 of slow-moving farm equipment on and across Airport Road.

---

proximity to an airport, taxiway access, and inclusion in a master plan. Record  
2403-2582.

<sup>8</sup> OAR 660-004-0020(2)(d) provides:

“‘The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.’ The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”

1           **A.   Dust**

2           Petitioner argues that the decision acknowledges that dust caused by farm  
3 use conflicts with aviation uses. Petitioner argues that the decision “erroneously  
4 places the burden to avoid adverse compatibility impacts on farm operators” and  
5 that “the cost of customary farm practices would be increased for dust  
6 mitigation.” Petition for Review 24.

7           Petitioner’s argument is unavailing for two reasons. First, the county’s  
8 findings concerning dust describe why *the subject property*, which is not in farm  
9 use, is not a suitable site for farm uses and do not describe a conflict between the  
10 proposed use and surrounding resource uses.<sup>9</sup> Second, the exception  
11 compatibility criterion is concerned with impacts from the proposed use on  
12 resource management practices. The potential conflict from dust created by farm  
13 uses is an impact on the proposed use. Nothing in the applicable exception criteria  
14 or decision imposes any obligation on surrounding farm uses to mitigate dust  
15 impacts on the proposed aviation uses within the exception area.

---

<sup>9</sup> The county found that “there is no credible evidence in the record that the Proposal will cause a significant loss of productive resource lands. Testimony from the Applicant and area farmers support the conclusion that losing the Subject Property for farming would not be significant due to the constraints against creation of dust onsite for safety of air travel, small size, and historical non-farm use.” Record 30. The county explained that the subject property has “unique features allowing it access to the runway and creating an ideal location for the proposed use. Conversely, natural resource uses are constrained because of the safety concern caused by smoke, dust, or fowl commonly associated with natural resource uses.” Record 50.

1           **B.     Increased Flight Traffic**

2           The staff report concluded that the development “will result in more  
3 aircraft being based at the Aurora Airport and increase the number of takeoffs  
4 and landings[.]” Record 6400. Petitioner argues that the county erred by failing  
5 to make findings showing how increased flight operations comply with the  
6 compatibility rule in OAR 660-004-0020(2)(d). Petitioner relies on *Brockman v.*  
7 *Columbia County*, 59 Or LUBA 302 (2009), where we explained that intervenors  
8 and the county have the evidentiary burden of proof concerning the compatibility  
9 of the proposed uses with the existing adjoining uses. We remanded on that issue  
10 because no party

11           “identified any evidence in the record regarding how much  
12 additional air traffic might be expected at the airport as a result of  
13 the uses authorized by the disputed exception. Until that is known,  
14 the county is simply not in a position to know if that increased air  
15 traffic will be incompatible with adjoining uses. If the increased air  
16 traffic will not be incompatible with adjoining uses, the proposal  
17 complies with OAR 660-004-0020(2)(d). Even if increased air  
18 traffic might be incompatible with adjoining uses, the county is  
19 required under OAR 660-004-0020(d) and 660-013-0040(6) to  
20 consider ‘measures designed to reduce adverse impacts’ and take  
21 ‘reasonable steps to eliminate or minimize the incompatibility  
22 through location, design, or conditions.’ Those measures and  
23 reasonable steps may be sufficient to conclude that the proposed  
24 uses will be compatible notwithstanding the additional air traffic  
25 impacts.” *Id.* at 318.

26           Respondents respond that no party raised the issue of impacts from  
27 increased flight traffic during the local proceeding. Instead, the only impacts

1 regarding flight traffic raised involved helicopters hovering over the property for  
2 an extended period, which is prohibited by condition of approval number 5.

3 Petitioner has not responded to explain where this issue of impacts from  
4 increased flight traffic was preserved or why preservation is not required. We  
5 conclude that this issue is waived.

### 6 **C. Increased Road Traffic**

7 The site is bordered on the east by Airport Road, a county road. Properties  
8 to the east of Airport Road are zoned EFU and farmed for hay, grass seed, and  
9 fresh market vegetables. The total number of vehicle trips generated by a  
10 reasonable worst-case development level is estimated to be 1,592 daily trips.

11 Record 55.

12 A farmer who farms fresh market vegetables on approximately 100 acres  
13 on the west side of the Airport and approximately 100 acres located on the east  
14 side of the Airport, directly east of Airport Road, submitted testimony on the  
15 traffic impacts on their farm use. Record 5632. The farmer explained:

16 “Farming operations of both sides of the airport rotate fresh  
17 vegetables year-round in small plots, thus requiring ingress and  
18 egress year-round for soil preparation and harvesting. To farm this  
19 much land, Aurora Farms owns 14 tractors, 5 of which carry  
20 specialized implements (plows, chisels, harrows, etc.) that must  
21 move from plot to plot on a weekly or bi-weekly schedule and thus  
22 side to side of the Aurora Airport. Besides moving slower than  
23 traffic on any local roads, many of these implements are wider than  
24 a single lane of traffic. Some implements have already been forced  
25 to be duplicated (i.e., permanently located on one side of the airport  
26 or another) due to traffic and associated potential vehicular accident

1 risks.” Record 5633.

2 In addition to safety concerns, the farmer described estimated increases in travel  
3 time and associated costs for labor due to increased travel time. Record 5634.

4 The farmer explained that the farm’s packing, washing, and cooling facilities are  
5 on the west side of the Airport, and it would be cost prohibitive to replicate those  
6 facilities on the east side of Airport Road to avoid the danger and cost of farm  
7 traffic delays caused by increased traffic on Airport Road. The farmer opined that  
8 “[d]evelopment of the type being considered by TLM Holdings will dramatically  
9 impact surface transportation, and adequate traffic mitigation is an absolute  
10 necessity to allow existing farms near the airport to continue to operate.” Record  
11 5634.

12 With respect to compatibility with adjacent farm uses, the county found:

13 “Comments from farm operators in the area did not claim the  
14 proposed use itself would negatively affect farm operations, except  
15 that additional traffic on Airport Road would exacerbate dangerous  
16 conditions at farm entrances during high speed, rush hour traffic  
17 times caused by traffic levels that currently (and/or during the  
18 planning horizon) exceed planned levels based on current traffic  
19 levels. Applicant’s revised TIA and subsequent traffic  
20 memorandums and response letters explain the proposed conditions  
21 of approval adequately mitigate Applicant’s proportionate impact  
22 on the affected traffic facilities. Condition of approval No. 2 will  
23 ensure that resource management of land at present levels  
24 surrounding and nearby the site proposed for urban development is  
25 assured notwithstanding the proposed use.” Record 45.



1           Petitioner argues that the county failed to make adequate findings  
2 explaining how traffic impacts will be mitigated to make the proposed use  
3 compatible with surrounding farm uses.

4           Respondents respond, initially, that the issue of compliance with OAR  
5 660-004-0020(2)(d) was not raised below and was waived. Petitioner replies, and  
6 we agree, that the issue was raised below. Record 835.

7           On the merits, respondents respond that the decision establishes that  
8 appropriate mitigation will be provided based on conditions of approval 2  
9 through 4, which require frontage improvements and proportional share  
10 payments for upgrades to four intersections, two of which are on Airport Road.<sup>10</sup>

---

<sup>10</sup> Conditions of Approval 2, 3 and 4 are:

“2. Prior to building permit issuance, design and obtain a Major Construction Permit for rural type frontage improvements along the Airport Road subject property frontage that are anticipated to include vegetation clearing, gravel road shoulder, slope and open system drainage work. Prior to issuance of a Building Department Certificate of Occupancy, construct and acquire final inspection approval of the roadway related improvements.

“3. At the time of zone change approval, remit a proportional share in the amount of \$6,000 for the impact of the proposed use toward the cost of planning, designing, and constructing the following project:

“• OR551 / Ehlen Road Intersection East Bound/West Bound Left Turn Lanes.

1           Petitioner argues that the findings are inadequate to explain how those  
2 required improvements mitigate the traffic impacts to farm uses. We agree. Even  
3 if the conditions of approval mitigate some of the general traffic impacts, the  
4 county did not explain how that mitigation renders the proposed use compatible  
5 with farm uses that will be impacted from increased traffic on Airport Road.  
6 Remand is required for the county to make adequate findings on that issue. *See*  
7 *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979)

---

“4. Prior to building permit issuance, remit a proportional share at a rate of \$200/trip (in 2020 dollars and adjusted at the time of development according to the SCCI) for the impact of the proposed use calculated in daily trips using ITE methodology toward the cost of planning, designing, and constructing the following projects:

- “• OR551 / Arndt Rd Intersection East Bound/West Bound Left Turn Lanes
- “• Airport Rd / Ehlen Rd Intersection Signalization & East Bound Left Turn Lane
- “• Airport Rd / Arndt Rd Intersection West Bound Right Turn Lane

“MCPW Engineering has reviewed the updated April 2019 TIA and also concurred with total trip generation, distribution analysis, and the proportional share calculation methodology summarized in DKS’s Memorandum dated March 4, 2020. All daily vehicle trip estimates and subsequent proportionate share contributions listed under this condition shall be calculated using the latest edition of the ITE Trip Generation Manual and are subject to review and approval by Marion County Public Works.” Record 395-96.

1 (findings must address and respond to specific issues relevant to compliance with  
2 applicable approval standards that were raised in the proceedings below).

3 The fourth assignment of error is sustained, in part.

4 **FIFTH ASSIGNMENT OF ERROR and PORTION OF TENTH**  
5 **ASSIGNMENT OF ERROR**

6 **A. Goal 14 (Urbanization)**

7 Goal 14 is “[t]o provide for an orderly and efficient transition from rural  
8 to urban land use, to accommodate urban population and urban employment  
9 inside urban growth boundaries, to ensure efficient use of land, and to provide  
10 for livable communities.” OAR 660-014-0040 is LCDC’s rule governing  
11 establishment of new urban development on undeveloped rural lands. The county  
12 found that the “P-zone, subject to the limited use overlay zone, will allow  
13 industrial and commercial airport and airport-related uses. The proposed use  
14 would be urban in nature but appropriate for this rural location.” Record 58.  
15 Absent the application of OAR 660-012-0065(3)(n), which the Court of Appeals  
16 determined is inapplicable, there is no dispute that the proposed uses require a  
17 Goal 14 exception. OAR 660-014-0040(2) provides:

18 “A county can justify an exception to Goal 14 to allow establishment  
19 of new urban development on undeveloped rural land. Reasons that  
20 can justify why the policies in Goals 3, 4, 11 and 14 should not apply  
21 can include but are not limited to findings that an urban population  
22 and urban levels of facilities and services are necessary to support  
23 an economic activity that is dependent upon an adjacent or nearby  
24 natural resource.”

1           Petitioner argues that the decision violates OAR 660-014-0040(2) because  
2 the uses are not dependent on a natural resource. Petitioner also argues that the  
3 findings are inadequate because they fail to address OAR 660-014-0040(2).

4           Respondents respond, and we agree, OAR 660-014-0040(2) does not limit  
5 the bases for a reasons exception to uses that are dependent on a natural resource.  
6 OAR 660-014-0040(2) expressly provides a non-exclusive basis for a reasons  
7 exception. Petitioner’s arguments under OAR 660-014-0040(2) are based on an  
8 incorrect interpretation of that rule and provide no basis for reversal or remand.

9           The fifth assignment of error, first subassignment, is denied.

10          To approve a reasons exception, a county must show, among other things,  
11 “that the proposed urban development cannot be reasonably accommodated in or  
12 through expansion of existing urban growth boundaries.” OAR 660-014-  
13 0040(3)(a). Petitioner argues that the decision violates OAR 660-014-0040(3)(a)  
14 because the uses can be accommodated within the existing urban growth  
15 boundaries of McMinnville, Metro, Redmond, and Salem.

16          Intervenor’s study area for the Goal 3 exception alternatives analysis  
17 includes other airports within about a 25-mile range from the Airport. “The  
18 perimeter was chosen based on an approximate 30-minute driving distance from  
19 Aurora Airport to airports with similar uses” and covers multiple counties.  
20 Record 33. Differently, intervenor’s study area for the Goal 14 analysis includes  
21 only Marion County. The county found that was an appropriate study area.

22          “The large Goal 3 study area ran from Salem to Portland to bring in

1 several airports for study. There is no requirement for the Goal 3 and  
2 14 study areas to be the same. Applicant looked at Marion County  
3 when considering Goal 14, and it makes sense to narrow the study  
4 area when looking at potential urbanization of Marion County land.  
5 Specifically, it is reasonable to interpret OAR 660-014-0040(1)  
6 definition of ‘undeveloped rural land’ to include ‘all land outside of  
7 acknowledged urban growth boundaries except for rural areas  
8 committed to urban development’ to be limited to such lands within  
9 the reviewing county rather than the entire State of Oregon, United  
10 States, or elsewhere. The narrower study area is appropriate  
11 considering the text of OAR 660-014-0040(2) through (4) and the  
12 emphasis on analyzing the impact of urban uses on rural lands by a  
13 county reviewing the Proposal. (See OAR 660-014-0040(3)  
14 emphasis on expanding existing UGBs, which if located in other  
15 jurisdictions would be beyond the scope of practical analysis or  
16 authority of a reviewing County.)” Record 43.

17 Petitioner argues that the county misconstrued OAR 660-014-0040(3)(a)  
18 by limiting the analysis to Marion County.

19 Respondents respond that the limited study area for the Goal 14 analysis is  
20 appropriate because the county “has no say in the urbanization of land outside its  
21 borders” and “[t]here must be some geographic limit for the Goal 14 analysis,  
22 and it makes sense for Respondent to set that limit as it did.” Response Brief 35.

23 We agree with petitioner that the county’s narrow interpretation of OAR  
24 660-014-0040(3)(a) is not supported by the text or underlying policy of that rule.  
25 OAR 660-014-0040(3)(a) provides that the county must show “that the proposed  
26 urban development cannot be reasonably accommodated in or through expansion  
27 of existing urban growth boundaries or by intensification of development in  
28 existing rural communities.” While the county correctly observed that it has no  
29 authority to expand an urban growth boundary in another county, nothing in the

1 text of OAR 660-014-0040(3)(a) supports the county’s interpretation that it need  
2 only consider areas over which the county has planning authority. That  
3 subsection refers to “existing urban growth boundaries” and “existing rural  
4 communities” and does not limit the scope of that inquiry to the county  
5 considering the Goal 14 exception.

6 The county’s interpretation of OAR 660-014-0040(3)(a) is also at odds  
7 with the underlying policy governing reasons exceptions. The statewide planning  
8 goals are the foundation of statewide land use planning. Exceptions are  
9 exceptional. *1000 Friends of Oregon v. LCDC*, 69 Or App 717, 731, 688 P2d 103  
10 (1984). A reasons exception is the most limited type of exception. *See*  
11 *Riverkeeper I*, 70 Or LUBA at 181-82 (explaining that a reasons exception is a  
12 more limited vehicle than physically developed and irrevocably committed  
13 exceptions). The policy of Goal 14 is implemented by concentrating urban uses  
14 on urban and urbanizable land. That policy is served by the requirement in OAR  
15 660-014-0040(3)(a) that the county show that urban uses should be allowed on  
16 undeveloped rural land because it cannot be accommodated within or adjacent to  
17 an existing urban area, even if that area is in a different county.

18 We agree with petitioner that the county misconstrued OAR 660-014-  
19 0040(3)(a) by limiting its Goal 14 analysis to areas within Marion County. On  
20 remand, the county must consider areas outside the county in its analysis under  
21 OAR 660-014-0040(3)(a).

1 With respect to areas within Marion County, the county concluded that the  
2 proposed use cannot be reasonably accommodated in or through expansion of  
3 existing urban growth boundaries.

4 The county observed that McNary Field is within the Salem city limits and  
5 a City of Salem UGB expansion would not provide more land at McNary Field.  
6 Petitioner argues, and we agree, that the finding fails to address land at Salem  
7 Airport evidenced by the 2012 Salem Airport Master Plan and the Airport Layout  
8 Plan, which describe the acreage available at different sites within and adjacent  
9 to the airport that have proximity to an airport, taxiway access, and inclusion in  
10 a master plan. Record 2403-2582. There is no evidence the land has since been  
11 developed or that the property owner, the City of Salem, is unwilling to lease it.

12 Presumably, the county disregarded that evidence based on intervenor's  
13 evidence that there is not a sufficient amount of land available for sale at McNary  
14 Field. We determined that available for sale limitation is erroneous for the  
15 alternatives analysis required under OAR 660-004-0020(2)(b)(C). The county  
16 should consider whether land available for lease can "reasonably accommodate"  
17 the proposed uses under OAR 660-014-0040(3)(a).

18 The City of Aurora UGB is about a half mile away from the subject  
19 property with EFU-zoned farmland in between. The county explained that the  
20 City of Aurora originally proposed including the Airport in its UGB during the  
21 city's acknowledgment process, but that part of the UGB proposal was not

1 approved by LCDC. Thus, the UGB likely would not be extended to include the  
2 subject site because of the intervening resource land. Record 43-44.

3 Petitioner argues that the county's conclusion that the use cannot be  
4 accommodated by expansion of the City of Aurora's UGB is based on a legally  
5 erroneous assumption that the UGB expansion would require Goal 3 and 14  
6 exceptions. OAR 660-004-0010(l)(d)(C) ("When a local government changes an  
7 established urban growth boundary applying Goal 14 as amended April 28, 2005,  
8 a goal exception is not required unless the local government seeks an exception  
9 to any of the requirements of Goal 14 or other applicable goals."); OAR 660-024-  
10 0020(l)(a)-(b) (explaining that Goals 3 and 4 are not applicable when establishing  
11 or amending a UGB and "[t]he exceptions process in Goal 2 and OAR chapter  
12 660, division 4, is not applicable unless a local government chooses to take an  
13 exception to a particular goal requirement"). Petitioner points to *Zimmerman v.*  
14 *LCDC*, 274 Or App 512, 533 (2015), in which the Court of Appeals affirmed a  
15 UGB expansion onto 266 acres of EFU land around the Scappoose Airport.  
16 Petitioner argues that case demonstrates that expanding Aurora's UGB across  
17 EFU land is feasible, and does not require goal exceptions.

18 Respondents respond that the county's decision did not solely rely on its  
19 conclusion that an Aurora UGB expansion would require goal exceptions.  
20 Instead, the county explained that the City of Aurora had previously attempted to  
21 include a property south of the subject property within its UGB and LCDC  
22 rejected it. We agree that information, combined with the fact that additional



1 resource land lies between the subject property and the city's UGB supports the  
2 county's conclusion that it is unlikely that the use could be reasonably  
3 accommodated by expanding Aurora's UGB.

4 The fifth assignment of error, second subassignment, is sustained, in part.

5 **B. Goal 11**

6 Goal 11 is "[t]o plan and develop a timely, orderly and efficient  
7 arrangement of public facilities and services to serve as a framework for urban  
8 and rural development." To approve a reasons exception, a county must show,  
9 among other things, "[t]hat an appropriate level of public facilities and services  
10 are likely to be provided in a timely and efficient manner." OAR 660-014-  
11 0040(3)(d). The county found:

12 "The appropriate level of facilities and services will be provided in  
13 a timely manner. In short, the Subject Property would tie into the  
14 Airport fire suppression system at a nearby hook up and be served  
15 by the Aurora Fire Protection District, with a possible resiliency  
16 center with fire station locating on the Subject Property. The Subject  
17 Property will have its own water system supported by an on-site  
18 well. Options other than traditional on-site subsurface disposal are  
19 feasible and available for this site. With improvements and  
20 permitting, adequate stormwater management is feasible. Law  
21 enforcement service is provided by the Marion County Sheriff's  
22 Office. Expansion of the City of Aurora UGB is unnecessary to  
23 serve the proposed uses nor is there a need to expand urban public  
24 services. Applicant may connect to the existing septic system  
25 benefitting the adjoining property to the south of the Subject  
26 Property; however, such connection is unnecessary to serve the  
27 Subject Property." Record 45.

1           Petitioner argues that the finding that the proposed uses will not require  
2 public services is not supported by adequate findings or substantial evidence.  
3 Petitioner also argues county must make findings on adequacy and timing of  
4 public services, even when the proposed uses will not require public facilities and  
5 services.

6           We first observe that OAR 660-014-0040(3)(d) requires the county to find  
7 “[t]hat *an appropriate level* of public facilities and services are likely to be  
8 provided in a timely and efficient manner.” (Emphasis added.) The county found  
9 that the proposed uses will not require any public facilities. If that finding is  
10 supported by substantial evidence, then the “appropriate level of public facilities  
11 and services” would be none.

12           Petitioner argues that the finding that the proposed uses will not require  
13 any public facilities is not supported by substantial evidence in the whole record  
14 and cites evidence in the record that the Aurora Airport Water Control District  
15 and the county have historically supported connection to City of Aurora public  
16 water and sewer services. For example, in 2015, the county supported Senate Bill  
17 534, which would allow airports and cities to enter into agreements for sewer and  
18 water services. The county’s support statement stated:

19           “SB 534 would allow Aurora Airport in Marion County to connect  
20 to the water and sewer services necessary for its continued success  
21 as a regionally significant employer. Wells at the airport have, at  
22 times, been insufficient to provide the water necessary for  
23 businesses located at the airport. Also, septic systems are difficult to  
24 locate at the airport due to soil conditions. The provision of water

1 and sewer service from the City of Aurora would address these  
2 deficiencies in rural services.” Record 1025.

3 Petitioner argues that evidence in the record demonstrates inadequate  
4 firefighting water, potable water, and sanitary sewer facilities and there is no  
5 evidence in the record that the identified deficiencies have been resolved.  
6 Petitioner argues that a reasonable decision maker would not find that the  
7 proposed development would not require public water and sewer facilities.

8 With respect to water supply, respondents point to Record 616 to 624.  
9 Record 616 is a 2018 water quality test from an “outside faucet,” at the subject  
10 site that shows “coliforms absent.” Record 617 includes a flow test that shows 40  
11 gallons per minute over a two-hour test period. Record 618 to 623 is a copy of an  
12 EPA report on arsenic removal. Record 624 is a quote for an arsenic removal  
13 filtration system. We agree with respondents that is evidence that a reasonable  
14 person could rely upon to support the county’s finding that the subject property  
15 can supply its own water system supported by an on-site well and will not require  
16 public water service.

17 With respect to sewage disposal, respondents point to Record 328 to 394,  
18 which includes expert opinion outlining sewage disposal options, including  
19 connecting to the Airpark’s shared septic system or holding tanks and off-site  
20 disposal. We agree with respondents that is evidence that a reasonable person  
21 could rely upon to support the county’s finding that options other than traditional  
22 on-site subsurface disposal are feasible for this site.

1           With respect to fire suppression, respondents point to Record 37, 44, 45,  
2 49, 62, and 6452. Record 37, 44, 45, 49, and 62 include findings that the subject  
3 property is within the Aurora Fire District and can tie into the Airport fire  
4 suppression system. Record 6452 is a request for comment form demonstrating  
5 that the Aurora Fire District “reviewed the proposal and determined that we have  
6 no comment.” We agree with respondents that is evidence that a reasonable  
7 person could rely upon to support the county’s finding that the Subject Property  
8 would tie into the Airport fire suppression system and be served by the Aurora  
9 Fire Protection District.

10           In sum, the county’s finding that the proposed development would not  
11 require public water and sewer facilities and will be served by existing fire  
12 suppression facilities is supported by substantial evidence.

13           The fifth assignment of error, third subassignment, is denied.

14           The tenth assignment of error, first subassignment, is denied.

15           The fifth assignment of error is sustained, in part.

16   **NINTH ASSIGNMENT OF ERROR**

17           As explained above, the county approved a reasons exception to Goals 11  
18 and 14 for the adjacent Airpark in 2004. Record 537-48. In the ninth assignment  
19 of error, petitioner argues that OAR 660-004-0018(1) and (4)(b) require a new  
20 reasons exception to Goals 11 and 14 because the new uses allowed on the subject

1 property will increase the intensity of the use of the Airpark's septic system and  
2 taxiway.<sup>11</sup>

---

<sup>11</sup> 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 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, OAR 660-014-0040, or OAR 660-014-0090, 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.”

1           Petitioner’s argument before the county, and again before LUBA, is that,  
2 as a matter of law, the uses and public facilities approved in any exception are  
3 limited to the intensity necessary for the development for which the exception is  
4 taken. It is undisputed that, when the exception for the adjacent parcel was taken  
5 in 2004, no development was contemplated on the subject parcel. Thus, under  
6 petitioner’s legal theory, as a matter of law, the 2004 Exception did not  
7 encompass any increase in intensity that will result from development of the  
8 subject parcel. Petitioner argues that the decision lacks adequate findings because  
9 it failed to analyze the uses approved in the 2004 Exception or evaluate the  
10 increased intensity of uses and services that will result from the decision, and the  
11 decision unlawfully fails to take a new reasons exception for the increased  
12 intensity of uses on the 2004 Exception lands.

13           The county did not make any findings about whether the proposal will  
14 intensify the uses on land within the 2004 Exception area. Based on the Court of  
15 Appeals’ decision, we conclude that the county erred by not making findings on  
16 that issue. Accordingly, remand is appropriate for the county to make findings  
17 under OAR 660-004-0018 and determine whether a new reasons exception is  
18 required for the 2004 Exception area.

19           The ninth assignment of error is sustained.

20   **SEVENTH ASSIGNMENT OF ERROR**

21           Statewide Planning Goal 6 (Air, Water and Land Resources Quality) is  
22 “[t]o maintain and improve the quality of the air, water and land resources of the

1 state.”<sup>12</sup> “Goal 6 requires that the local government establish that there is a  
2 *reasonable expectation* that the use that is seeking land use approval will also be  
3 able to comply with the state and federal environmental quality standards that it  
4 must satisfy to be built.” *Friends of the Applegate v. Josephine County*, 44 Or  
5 LUBA 786, 802 (2003) (emphasis in original).

6 In *TLM I*, we agreed with petitioner that the county’s findings are  
7 inadequate because they fail to consider the cumulative effects of septic waste  
8 discharges from proposed development and existing development. We sustained  
9 the seventh assignment of error, in part. As far as we can tell, the court’s opinion  
10 does not require us to revisit that disposition.

---

<sup>12</sup> 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.)

1 **EIGHTH ASSIGNMENT OF ERROR and PORTION OF TENTH**  
2 **ASSIGNMENT OF ERROR**

3 In the eighth assignment of error and in the second subassignment of error  
4 under the tenth assignment of error, petitioner challenges the board of county  
5 commissioners' conclusions regarding applicable conditional use criteria. We  
6 denied the eighth assignment of error and the second subassignment of error  
7 under the tenth assignment of error. As far as we can tell, the court's opinion does  
8 not require us to revisit that disposition.

9 The county's decision is remanded.