

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

JOSEPH SCHAEFER,
Petitioner,

and

CITY OF WILSONVILLE,
Intervenor-Petitioner,

vs.

MARION COUNTY,
Respondent,

and

TLM HOLDINGS, LLC,
AURORA AIRPORT IMPROVEMENT ASSOCIATION,
ARON FAEGRE, BRUCE BENNETT, and
LIFE FLIGHT NETWORK, LLC,
Intervenors-Respondents.

LUBA No. 2025-085

MERCEDES RHODEN-FEELY,
Petitioner,

and

CITY OF WILSONVILLE,
Intervenor-Petitioner,

vs.

MARION COUNTY,
Respondent,

1
2 and
3

4 TLM HOLDINGS, LLC,
5 AURORA AIRPORT IMPROVEMENT ASSOCIATION,
6 ARON FAEGRE, BRUCE BENNETT, and
7 LIFE FLIGHT NETWORK, LLC,
8 *Intervenors-Respondents.*
9

10 LUBA No. 2025-086
11

12 CITY OF AURORA,
13 *Petitioner,*
14

15 and
16

17 CITY OF WILSONVILLE,
18 *Intervenor-Petitioner,*
19

20 vs.
21

22 MARION COUNTY,
23 *Respondent,*
24

25 and
26

27 TLM HOLDINGS, LLC,
28 AURORA AIRPORT IMPROVEMENT ASSOCIATION,
29 ARON FAEGRE, BRUCE BENNETT, and
30 LIFE FLIGHT NETWORK, LLC,
31 *Intervenors-Respondents.*
32

33 LUBA No. 2025-087
34

35 1000 FRIENDS OF OREGON,
36 *Petitioner,*
37

38 and

1 CITY OF WILSONVILLE,
2 *Intervenor-Petitioner,*

3
4 vs.

5
6 MARION COUNTY,
7 *Respondent,*

8
9 and

10
11 TLM HOLDINGS, LLC,
12 AURORA AIRPORT IMPROVEMENT ASSOCIATION,
13 ARON FAEGRE, BRUCE BENNETT, and
14 LIFE FLIGHT NETWORK, LLC,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2026-001

18
19 FRIENDS OF FRENCH PRAIRIE,
20 *Petitioner,*

21
22 and

23
24 CITY OF WILSONVILLE,
25 *Intervenor-Petitioner,*

26
27 vs.

28
29 MARION COUNTY,
30 *Respondent,*

31
32 and

33
34 TLM HOLDINGS, LLC,
35 AURORA AIRPORT IMPROVEMENT ASSOCIATION,
36 ARON FAEGRE, BRUCE BENNETT, and
37 LIFE FLIGHT NETWORK, LLC,
38 *Intervenors-Respondents.*

2
3 FINAL OPINION
4 AND ORDER
5

6 Appeal from Marion County.
7

8 Petitioner Schaefer filed a petition for review and reply briefs and argued
9 on behalf of themselves.
10

11 Petitioner Rhoden-Feely filed a petition for review and reply briefs on
12 behalf of themselves.
13

14 David J. Robinson filed a petition for review and reply briefs on behalf of
15 petitioner City of Aurora.
16

17 Andrew Mulkey filed a petition for review and reply brief and argued on
18 behalf of petitioners 1000 Friends of Oregon and Friends of French Prairie.
19

20 Amanda Guile-Hinman filed the intervenor-petitioner's brief and reply
21 briefs and argued on behalf of intervenor-petitioner.
22

23 Steve Elzinga filed the respondent's brief. Also on the brief was Andrew
24 Mittendorf.
25

26 Wendie L. Kellington filed intervenors-respondents' briefs and argued on
27 behalf of intervenors-respondents. Also on the brief was Kellington Law Group
28 PC.
29

30 ZAMUDIO, Board Chair; BASSHAM, Board Member, participated in the
31 decision.
32

33 WILSON, Board Member, did not participate in the decision.
34

35 REMANDED 07/29/2026
36

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

NATURE OF THE DECISION

Petitioners appeal Ordinance No. 1485, which approves a post-acknowledgement plan amendment (PAPA) to expand the Aurora State Airport airport boundary and conditional use permit (CUP) for airport uses on land zoned for Exclusive Farm Use (EFU).

MOTION TO FILE AN AMENDED PETITION FOR REVIEW

LUBA review is expedited. Unless the parties otherwise stipulate, opening briefs must be filed and served 21 days after the date the record is received or settled by the Board and response briefs must be filed 42 days after the date the record is received or settled. OAR 661-010-0030(1); OAR 661-010-0035(1). We received the record on March 18, 2026, and no party filed record objections. Thus, the petitions for review in these consolidated appeals were due on April 8, 2026. On April 8, 2026, petitioner Schaefer filed a petition for review (original petition for review). On April 28, 2026, we issued an order approving the parties' stipulated one-week extension to file the response briefs no later than May 6, 2026, and one-week extension to file the reply briefs no later than May 20, 2026.

On May 4, 2026, two days before the response briefs were due, and without any further stipulated extended briefing schedule, Schaefer filed a motion to file an amended petition for review along with a proposed amended petition for review.

OAR 661-010-0030(6) (Jan 15, 2025) provided:

1 “Amended Petition: A petition for review which fails to comply with
2 section (4) of this rule may, with permission of the Board, be
3 amended. The Board shall determine whether to allow an amended
4 petition for review to be filed in accordance with OAR 661-010-
5 0005.”

6 We have explained that we “will allow an amendment to correct errors or
7 omissions in a petition for review if doing so serves a purpose and will not
8 materially interfere with either respondents’ ability to respond to the petition for
9 review or our ability to meet the statutory deadline for our final opinion.” *Kellogg*
10 *Lake Friends v. City of Milwaukie*, 16 Or LUBA 1093, 1095 (1988)). OAR 661-
11 010-0030(6) authorizes LUBA to allow amendments only to correct technical
12 errors in the petition for review and does not provide any authority for
13 supplementing the petition for review. *Fechtig v. City of Albany*, 27 Or LUBA
14 480, 483, *aff’d*, 130 Or App 433, 882 P2d 138 (1994), *rev den*, 320 Or 507 (1995).

15 Schaefer’s motion states that the assignments of error in the original
16 petition for review and the proposed amended petition for review are the same
17 and that “the amended petition is necessary to provide an opportunity for
18 inclusion of documents in the supplemental record which may be approved by
19 LUBA pursuant to petitioner’s motion for official notice.” Motion to File an
20 Amended Petition for Review 1.

21 Intervenors-respondents (intervenors) respond that we should deny
22 Schaefer’s motion to file an amended petition for review because it is untimely,
23 misrepresents the nature of the amendments, and granting the motion and
24 accepting the proposed amended petition for review would prejudice intervenors’

1 substantial rights. Intervenors assert, and we agree, that OAR 661-010-0030(6)
2 permits amendments to the petition for review only when the petition fails to
3 comply with the requirements of OAR 661-010-0030(4), which specifies the
4 required contents of the petition. Schaefer's motion does not allege that the
5 original petition for review fails to comply with OAR 661-010-0030(4), or that
6 the amended brief is submitted to rectify any noncompliance. Instead, Schaefer
7 expressly states that the purpose of the amended petition for review is to
8 supplement the record. Schaefer's amended petition is not authorized under our
9 rules and is denied.

10 **MOTION TO TAKE OFFICIAL NOTICE**

11 LUBA's review is generally limited to the local record and LUBA is
12 generally not a fact finder, with very limited exceptions that do not apply here.
13 ORS 197.835(2).¹ We may take official notice of relevant law as defined in ORS

¹ ORS 197.835(2) provides:

“(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.

“(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.”

1 40.090.² A motion for official notice must explain the relevance of the document
2 to an issue in the appeal and the authority for taking notice under ORS 40.090.
3 OAR 661-010-0046; *Confederated Tribes of Coos, Lower Umpqua and Siuslaw*
4 *Indians v. City of Coos Bay*, LUBA No 2020-012 (May 4, 2021) (slip op at 5).³

² ORS 40.090 provides, in relevant part:

“Law judicially noticed is defined as:

“(1) The decisional, constitutional and public statutory law of Oregon, the United States, any federally recognized American Indian tribal government and any state, territory or other jurisdiction of the United States.

“(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.

“* * * * *

“(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

³ OAR 661-010-0046(2) provides, in part:

“(a) A motion to take official notice shall contain a statement explaining with particularity what the material sought to be noticed is intended to establish, how it is relevant to an issue on appeal, and the authority for notice under ORS 40.090.
* * *

1 We may not “take official notice of facts within documents that are subject
2 to notice under [ORS 40.090], if notice of those facts is requested for an
3 adjudicative purpose (*i.e.*, to provide evidentiary support or countervailing
4 evidence with respect to an applicable approval criterion that is at issue in the
5 challenged decision).” *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692
6 (2007); *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606
7 (1995). Documents that we officially notice do not become part of the local record
8 or provide evidentiary support for the parties’ arguments or for the challenged
9 decision itself. *Oster v. City of Silverton*, 79 Or LUBA 1058, 1065-66 (2019).

10 On December 19, 2025, petitioner Schaefer filed the notice of intent to
11 appeal. On January 22, 2026, the county withdrew its decision for
12 reconsideration, which suspended these appeals by operation of OAR 661-010-
13 0021(2). On January 24, 2026, while these appeals were suspended, and before
14 we received the county’s decision on reconsideration or Schaefer’s petition for
15 review, Schaefer moved that we take official notice of six documents.

16 Intervenors oppose the motion as to all six documents. Intervenors
17 generally argue that Schaefer attempts to use official notice as a substitute for

“(b) A motion to take official notice is unnecessary where the items in ORS 40.090(7) are relied upon in the decision, are within or cited to in the record, or are included with a petition for review according to OAR 661-010-0030(4)(f) [(a copy of any comprehensive plan provision, ordinance or other provision of local law cited in the petition)].”

1 placing documents into the local record and to improperly raise new issues that
2 were waived because they were not raised below. Intervenor also argue that
3 Schaefer improperly offers the documents to establish facts.

4 At the outset, we agree with intervenors that, because we will only take
5 official notice of *law* that is relevant to *an issue on appeal*, we will not take
6 official notice of *facts*, and we will only take official notice of law that is relevant
7 to an issue that is properly before us, and not any issue that was waived. A motion
8 to take official notice is not a proper place to assert error in the challenged
9 decision or to raise new issues. However, we need not and do not reach
10 intervenors' waiver arguments in resolving the motion to take official notice.
11 With that foundation, we proceed to resolve the motion.

12 **A. Marion County Ordinance No. 1424 (October 21, 2020) and**
13 **Marion County Ordinance No. 1302 (March 10, 2020)**

14 Ordinance No. 1424 is the county's prior decision for the subject property,
15 which was the subject of *Schaefer v. Marion County*, LUBA No 2020-108 (Oct
16 12, 2021), *rev'd and rem'd*, 318 Or App 617, 509 P3d 718 (2022), LUBA No
17 2020-108 (July 7, 2022), *rev'd and rem'd*, 323 Or App 390, 523 P3d 1142 (2022),
18 LUBA No 2020-108 (Mar 14, 2023). Ordinance No. 1302 is a prior county
19 decision approving the HTS Helicopters heliport with offices, warehouses, and
20 repair shops on the adjacent property just south of the subject property. In their
21 motion to file an amended petition for review, Schaefer states Ordinance Nos.
22 1302 and 1424 "were entered into the record by the applicant." Schaefer does not

1 provide record citations for those documents. However, we will consider that
2 statement as true and it renders Schaefer's motion to take official notice of those
3 documents moot.

4 **B. Oregon Aviation Board and Oregon Department of Aviation's**
5 **Petition for Review to the Oregon Supreme Court**

6 In *Schaefer v. Oregon Aviation Board*, which we discuss later in this
7 opinion, the Court of Appeals interpreted OAR 660-012-0065(3)(n), a Land
8 Conservation and Development Commission (LCDC) administrative rule
9 providing that “[e]xpansions or alterations of public use airports that do not
10 permit service to a larger class of airplanes” are consistent with Statewide
11 Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), 11 (Public Facilities and
12 Services), and 14 (Urbanization). 312 Or App 316, 495 P3d 1267, *adh’d to as*
13 *modified on recons*, 313 Or App 725, 492 P3d 782, *rev den*, 369 Or 69 (2021)
14 (*OAB*). We will refer to that series of appeals and decisions as *OAB*, without
15 differentiating between our decisions and the courts’ decisions. Oregon Aviation
16 Board (*OAB*) and Oregon Department of Aviation (*ODAV*) sought and were
17 denied Supreme Court review. 369 Or 69 (2021).

18 Schaefer moves us to take official notice of the *OAB/ODAV* petition for
19 review in the Supreme Court to establish those agencies’ proffered interpretation
20 of OAR 660-012-0065(3)(n) in that document. Schaefer argues that “[t]he
21 petition provides relevant context for LUBA to apply OAR 660-012-0065(3)(n)
22 in this case, consistent with the Court of Appeals’ ruling, because it describes the

1 airport owner’s understanding of that ruling.” Motion to Take Official Notice 3-
2 4. Petitioner argues that ORS 40.090(2) provides authority for official notice of
3 the OAB/ODAV petition for review in the Supreme Court as a public official act
4 of an executive state agency.

5 Intervenor’s respond that law that is noticeable under ORS 40.090(2) as
6 “[p]ublic * * * official acts” are “government actions that function as relevant
7 law, *e.g.*, agency decisions/orders, permits, rules, etc.” Intervenor’s Response to
8 Motion for Official Notice 4. We have not historically construed the phrase
9 “official acts” so narrowly. Instead, we have taken official notice of agency plans,
10 manuals, and other guidance documents under ORS 40.090(2). *See Foland v.*
11 *Jackson County*, 18 Or LUBA 731, 739-40, *aff’d*, 101 Or App 632, 792 P2d 1228
12 (1990), *aff’d*, 311 Or 167, 807 P2d 801 (1991) (taking notice of a Department of
13 Land Conservation and Development (DLCD) destination resort handbook under
14 ORS 40.090(2)); *Shaff v. City of Medford*, 79 Or LUBA 317, 321 (2019) (noting
15 that LUBA may take official notice of an Oregon Department of Transportation
16 manual under ORS 40.090(2)). However, as far as we are aware, we have never
17 held that an agency’s legal interpretation or argument articulated in a brief or
18 other filing in a specific litigation is an “official act” subject to official notice.
19 Plans, manuals, and guidance documents are published by an agency and, thus,
20 bear an imprimatur establishing official approval, sanction, or endorsement of the
21 ideas contained therein. We are not convinced that a brief filed in a specific
22 litigation bears that same apparent agency authorization. Accordingly, we agree

1 with intervenors that a statement in a brief is not an official act subject to official
2 notice under ORS 40.090(2). *Accord 1000 Friends of Oregon v. Jackson County*,
3 76 Or LUBA 488 (2017) (concluding that a copy of a memorandum from the
4 assistant director of the Oregon Department of Energy (ODOE) to a DLCD staff
5 person, expressing ODOE’s opinion on the applicability of Statewide Planning
6 Goal 13 (Energy) as justification for approval of an exception to Statewide
7 Planning Goal 3 to site solar energy facilities on agricultural land is not an
8 “official act” of ODOE subject to judicial notice under ORS 40.090(2)).
9 Moreover, OAR 660-012-0065(3)(n) is part of the Transportation Planning Rule,
10 an LCDC administrative rule, not an OAB/ODAV administrative rule.
11 Accordingly, OAB/ODAV’s proffered interpretation of that administrative rule
12 is not an official act with respect to that rule. *See id.* at 491 (“Whatever the scope
13 of an ‘official act’ of an agency, we believe that the act must concern matters
14 within the agency’s authority or jurisdiction to be subject to judicial notice under
15 ORS 40.090(2).”).

16 **C. Chapter 5 of the 2012 Aurora State Airport Master Plan**

17 In *OAB*, we dismissed the petitioners’ appeal of an OAB decision adopting
18 findings to support a 2012 revision to the Airport Master Plan for the Aurora
19 State Airport because we concluded that the challenged decision was not a “land
20 use decision” as defined in ORS 197.015(10)(a)(B). 81 Or LUBA 819 (2020),
21 *rev’d and rem’d*, 312 Or App 316, 495 P3d 1267, *adh’d to as modified on recons*,
22 313 Or App 725, 492 P3d 782, *rev den*, 369 Or 69 (2021). The petitioners

1 appealed our decision to the Court of Appeals, and the court reversed and
2 remanded our decision. 312 Or App 316, 495 P3d 1267, *adh'd to as modified on*
3 *recons*, 313 Or App 725, 492 P3d 782, *rev den*, 369 Or 69 (2021). In *OAB*, one
4 basis for the Court of Appeals reversing and remanding our decision was the
5 court's conclusion that the record of the proceedings before LUBA must include
6 the "version of the master plan that [OAB] approved on October 27, 2011, along
7 with any other materials that [OAB] considered at that meeting." 312 Or App at
8 326, 345-46. We directed respondents to transmit and serve a fifth supplemental
9 record containing that version of the master plan. The respondents responded that
10 all responsive items had been submitted after reasonable investigative effort to
11 locate any missing records. We ultimately remanded for further proceedings after
12 concluding that the record was not sufficient to allow review because it was
13 missing an item that the court ruled is necessary to resolve the appeal—namely,
14 the approved 2012 Master Plan. *Schaefer v. Oregon Aviation Board*, LUBA Nos
15 2019-123/127/129/130 (Apr 11, 2022).

16 Schaefer moves that we take official notice of Chapter 5 of the 2012
17 Aurora State Airport Master Plan. Schaefer argues that Chapter 5 is intended to
18 establish ODAV's position that, for airport expansions, the restrictions on airport
19 use of land zoned for exclusive farm use (EFU) may make a zone change
20 unfeasible and an exception to Goal 3 would be required. Schaefer argues that
21 ODAV's position is relevant to the issue raised in this appeal that the county erred
22 in concluding that subject property need not be rezoned from EFU to Public to

1 allow an airport expansion. Petitioner argues that the 2012 Aurora State Airport
2 Master Plan is a public official act of OAB.

3 Intervenor respond that the document is not an official enactment and also
4 that Schaefer improperly requests we consider it as factual support for Schaefer's
5 legal argument. We agree on both counts. The disputed document was
6 laboriously litigated, determined to not have been properly adopted and, thus, is
7 not an official act subject to official notice. *See East Park, LLC v. City of Salem*,
8 LUBA No 2022-050 (Aug 30, 2022) (slip op at 3-4) (draft documents are not
9 "official acts" under ORS 40.090(2) and are not subject to official notice).
10 Moreover, ODAV's understanding of how EFU zoning and Goal 3 operate is not
11 noticeable law. *1000 Friends of Oregon*, 76 Or LUBA at 491.

12 **D. Marion County's Comment Letter to ODAV, Dated September**
13 **19, 2025**

14 Schaefer moves that we take official notice of a letter from the Marion
15 County Planning Director submitted to ODAV in response to that agency's
16 request for comments on the 2025 Aurora State Airport Master Plan. Schaefer
17 argues that the letter establishes the county's understanding that airport uses and
18 structures are not allowed on land zoned EFU, and thus require a zone change to
19 Public. Schaefer asserts that the letter is relevant to the appeal issue that the
20 county erred in concluding that subject property need not be rezoned from EFU
21 to Public to allow an airport boundary expansion and argues that the letter

1 demonstrates the county's interpretation in the challenged decision is new and
2 arbitrary.

3 Intervenor's argue that the planning director's letter is not law or an official
4 act of the county, but is merely an opinion provided during ODAV's process. We
5 agree. In addition, while we regularly consider legislative history in interpreting
6 state statutes and administrative rules, we do not have authority to take official
7 notice of local legislative history. *Friends of Marion County v. Marion County*,
8 LUBA Nos 2021-088/089 (Apr 21, 2022) (slip op at 4 n 1); *Martin v. City of*
9 *Central Point*, 73 Or LUBA 422, 426 (2016); *19th Street Project v. City of The*
10 *Dalles*, 20 Or LUBA 440, 447-48 (1991).

11 Schaefer's motion to take official notice is denied.

12 **BACKGROUND**

13 **A. Airport History and Description**

14 The Aurora State Airport (Airport) was established in 1943 and served as
15 a base for military training flights. After World War II, the Airport was given to
16 the state by the federal government, and it is now owned by ODAV and OAB.
17 The Airport is in unincorporated Marion County, approximately 1/4 mile from
18 the City of Aurora, two miles from the City of Wilsonville, and approximately
19 1/4 mile from the southern boundary of Clackamas County. *OAB*, 81 Or LUBA

1 819. The Airport is a pilot site for through-the-fence (TTF) operations. ORS
2 836.642(2); ORS 836.640(5).⁴

3 The “[a]irport boundary’ includes the combined public and private
4 properties that are permitted to have direct access to the airport runway by
5 aircraft.” ORS 836.640(1). The Airport is comprised of 146 acres with a
6 committed exception to Goal 3 (1980 Committed Exception). *Murray v. Marion*
7 *County*, 23 Or LUBA 268, 270 (1992). The 1980 Committed Exception land
8 includes Columbia Helicopters, Life Flight, and most of the Airport property,
9 except the 3.07 southernmost acres added by reasons exceptions to Goal 3 in
10 1994. Record 8,511.⁵ Reasons exceptions to Goals 11 and 14 were approved in
11 2004 for the Southend Corporate Airpark (the HDSE Properties) to share a septic
12 system (2004 Reasons Exception). Record 13,264.

⁴ ORS 836.640(5) provides:

“‘Through the fence operation’ means a customary and usual aviation-related activity that:

“(a) Is conducted by a commercial or industrial user of property within an airport boundary; and

“(b) Relies, for business purposes, on the ability to taxi aircraft directly from the property employed for the commercial or industrial use to an airport runway.”

⁵ The county explained that an exception identified by petitioners as the 1993 exception was appealed and remanded, the county subsequently adopted a new exception in 1994. Respondent’s Brief 14-15; Record 8,510-11.

1 **B. Airport Planning**

2 **1. Federal Law**

3 Public airports receive federal funds for development, maintenance and
4 operation. Federal law requires airport master planning for airports that are
5 included in the federal National Plan of Integrated Airport Systems, as a
6 precursor to obtaining federal funding for airport improvements. The Federal
7 Aviation Administration's (FAA's) Airport Improvement Program funds the
8 planning process. FAA guidance provides that airport master plans should be
9 consistent with local and state plans. FAA Advisory Circular 150/5070-6B,
10 *Airport Master Plans* (2005).

11 **2. State Law**

12 Pursuant to ORS 835.015, ODAV is required to develop "a plan for the
13 development of airports, state airways, airplane industries and aviation
14 generally." This includes adopting master plans for airports owned by the state.
15 ODAV adopted an airport master plan for the Airport in 1976 and adopted
16 updates in 1988 and 2000.

17 ORS 197.180(1) requires that state agency programs that affect land use
18 must comply with the statewide planning goals and must be compatible with
19 acknowledged city and county comprehensive plans. An airport master plan is a
20 "program affecting land use" within the meaning of OAR 660-030-0005(2) and,
21 accordingly, it is subject to the requirements of ORS 197.180. ODAV has

1 adopted a state agency coordination program to ensure that its programs affecting
2 land use satisfy the requirements in ORS 197.180, at OAR 738-130-0005 *et seq.*

3 ORS 215.283 sets out uses permitted on EFU-zoned land. ORS 215.283(3)
4 provides:

5 “Roads, highways and other transportation facilities and
6 improvements not allowed under subsections (1) and (2) of this
7 section may be established, subject to the approval of the governing
8 body or its designee, in areas zoned for exclusive farm use subject
9 to:

10 “(a) Adoption of an exception to the goal related to agricultural
11 lands and to any other applicable goal with which the facility
12 or improvement does not comply; *or*

13 “(b) ORS 215.296 for those uses identified by rule of the Land
14 Conservation and Development Commission as provided in
15 section 3, chapter 529, Oregon Laws 1993.”⁶

16 In 1993, through Senate Bill 1057, the legislature directed LCDC to adopt
17 rules identifying transportation improvements that may be established on

⁶ Oregon Laws 1993, chapter 529, enacted Senate Bill 1057. Oregon Laws 1993, chapter 529, section 2, amended ORS 215.283 to add what was then subsection (5), which is current subsection (3). Oregon Laws 1993, chapter 529, section 3, provided:

“The Department of Transportation shall, by March 30, 1994, submit to the Land Conservation and Development Commission proposed rules identifying the other roads, highways and transportation facilities that may be allowed pursuant to ORS 215.213(10)(b) and 215.283(5)(b). The Land Conservation and Development Commission shall adopt rules implementing ORS 215.213(10)(b) and 215.283(5)(b) by June 30, 1994.”

1 agricultural land, thereby implementing what is now ORS 215.283(3)(b). Or
2 Laws 1993, ch 529, § 3. In 1995, LCDC amended OAR 660-012-0065 and
3 included subsection (3)(n), providing that “[e]xpansions or alterations of public
4 use airports that do not permit service to a larger class of airplanes” are consistent
5 with Goals 3, 4, 11, and 14.

6 ORS 836.600, enacted in 1995, establishes a general state policy that
7 encourages and supports the “continued operation and vitality of Oregon’s
8 airports. Such encouragement and support extends to all commercial and
9 recreational uses and activities described in ORS 836.616(2).” ORS 836.630(3)
10 provides that the statutes and rules promulgated in accordance with the statutes
11 “shall be liberally construed to further” this policy. ORS 836.625(1) provides that
12 “[t]he limitations on uses made of land in [EFU] zones described in ORS 215.213
13 and 215.283 do not apply to the provisions of ORS 836.600 to 836.630 regarding
14 airport uses.”

15 ORS 836.616(2) provides:

16 “Within airport boundaries established pursuant to commission
17 rules, local government land use regulations shall authorize the
18 following uses and activities:

19 “(a) Customary and usual aviation-related activities including but
20 not limited to takeoffs, landings, aircraft hangars, tie-downs,
21 construction and maintenance of airport facilities, fixed-base
22 operator facilities and other activities incidental to the normal
23 operation of an airport;

24 “(b) Emergency medical flight services;

- 1 “(c) Law enforcement and firefighting activities;
- 2 “(d) Flight instruction;
- 3 “(e) Aircraft service, maintenance and training;
- 4 “(f) Crop dusting and other agricultural activities;
- 5 “(g) Air passenger and air freight services at levels consistent with
- 6 the classification and needs identified in the State Aviation
- 7 System Plan;
- 8 “(h) Aircraft rental;
- 9 “(i) Aircraft sales and sale of aviation equipment and supplies;
- 10 and
- 11 “(j) Aviation recreational and sporting activities.”

12 *See also* OAR 660-013-0100 (setting out airport uses that local governments must
13 allow within an airport boundary).

14 **3. Local Law**

15 The 1976 Aurora Airport Master Plan (1976 Airport Plan) is included in
16 the Marion County Comprehensive Plan (MCCP). The county’s Rural
17 Transportation System Plan incorporates by reference the 2000 update to the
18 1976 Airport Plan. Record 6,617. The Airport is zoned Public (P), and airport
19 and airport-related commercial and industrial uses are conditional uses in the P
20 zone. Marion County Zoning Ordinance (MCZO) 17.171.030(A). The county
21 also applies an Airport Overlay (AO) zone to lands adjacent to the Airport, most
22 of which are zoned EFU. MCZO 17.177.010 to .070.

1 **C. Prior Appeals and Decisions**

2 These appeals are the third set of relatively recent appeals in which
3 expansion of or planning for the expansion of the Airport have been litigated
4 before LUBA.⁷ We describe those other cases as context for the issues in these
5 cases. We reiterate the following facts from the Court of Appeals' decision in
6 *OAB*.

7 In 2011, OAB adopted a Master Plan for the Airport. In 2019, OAB
8 belatedly adopted findings of land use compatibility to comply with the land use
9 coordination requirements in ORS 197.180 and OAR 738-130-0055(6).⁸ OAB
10 determined that the Master Plan complied with the M CCP and, because of that

⁷ As discussed further below, a prior expansion of the Airport was challenged and remanded in *Murray v. Marion County*, 23 Or LUBA 268, 270 (1992).

⁸ ORS 197.180(1) provides as follows:

“Except as provided in ORS 197.277 or subsection (2) of this section or unless expressly exempted by another statute from any of the requirements of this section, state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use:

“(a) In compliance with the goals, rules implementing the goals and rules implementing this section; and

“(b) In a manner compatible with acknowledged comprehensive plans and land use regulations.”

OAR 738-130-0055(6) provides as follows: “The Aviation Board shall adopt findings of compatibility with the acknowledged comprehensive plans of affected cities and counties and findings of compliance with applicable statewide planning goals when it adopts the final facility plan.”

1 compliance, there was no need to consider whether the Master Plan complied
2 with any statewide planning goals. Alternatively, OAB determined that the
3 Master Plan complied with the goals.

4 The petitioners appealed to LUBA, contending that the Master Plan that
5 OAB adopted in 2011 was not in the record and, in any case, that the 2012 Master
6 Plan, which was in the record, was not compatible with the MCCP or the
7 statewide planning goals. The petitioners asserted, among other things, that the
8 Airport Layout Plan contained in the 2012 Master Plan showed the airport
9 development extending onto nearby land that is zoned EFU. We rejected all of
10 the petitioners' challenges, concluded that the 2012 Master Plan complied with
11 the MCCP and that the goals did not apply, and dismissed the appeal. *OAB*, 81
12 Or LUBA 819 (2020).

13 The petitioners sought judicial review. The Court of Appeals agreed with
14 the petitioners City of Aurora and City of Wilsonville that we erred by denying
15 petitioners' objection that the Master Plan approved in 2011 was not in the record.
16 The Court of Appeals held that we also erred in the following four ways: (1)
17 concluding that the Master Plan does not include airport-related development on
18 EFU land; (2) misconstruing ORS 836.642 (establishing a through-the-fence
19 (TTF) pilot program) and, based on that misconception, concluding that the
20 airport expansion complies with various provisions of the MCCP and Goal 14
21 because any land use at the Airport is a rural use as a matter of law; and (3)
22 misconstruing OAR 660-012-0065(3)(n) in concluding that the changes proposed

1 in the Master Plan were not changes that would “permit service to a larger class
2 of airplane” and, consequently, that the Master Plan complied with Goals 3, 11,
3 and 14 as a matter of law.⁹ *OAB*, 312 Or App at 316-20. We ultimately remanded
4 for further proceedings after concluding that the record was insufficient to allow
5 review because it was missing the approved Master Plan, an item that the court
6 concluded was necessary to resolve the appeal. *Schaefer v. Oregon Aviation*
7 *Board*, LUBA Nos 2019-123/127/129/130 (Apr 11, 2022).

8 While *OAB* was making its way up and down the appellate ladder, the
9 petitioners appealed a decision by the county board of commissioners approving
10 intervenor TLM’s application for (1) a comprehensive plan map amendment to
11 change the plan designation of property adjacent to the Airport from Primary
12 Agriculture (PA) to Public and Semi-Public (P), (2) a zoning map amendment to
13 change the zoning designation of the property from EFU to P, (3) exceptions to
14 Goals 3 and 14, and (4) a CUP authorizing various airport-related uses on the
15 property. *Schaefer v. Marion County*, LUBA No 2020-108 (Oct 12, 2021), *rev’d*

⁹ OAR 660-012-0065(3)(n), part of the LCDC Transportation Planning Rule, provides:

“(3) 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.”

1 *and rem'd*, 318 Or App 617, 509 P3d 718 (2022), LUBA No 2020-108 (July 7,
2 2022), *rev'd and rem'd*, 323 Or App 390, 523 P3d 1142 (2022) (*Schaefer*).

3 The board of commissioners concluded that no exceptions to Goals 3 or 14
4 were required because the application was consistent with Goals 3, 4, 11, and 14
5 as a matter of law pursuant to OAR 660-012-0065(3)(n). In the alternative, the
6 board of commissioners approved exceptions to Goals 3 and 14 pursuant to OAR
7 660-004-0020, 660-004-0022, and 660-004-0040. The petitioner challenged
8 those findings. We agreed with the county's application of OAR 660-012-
9 0065(3)(n) and the conclusion that no exception to Goals 3 or 14 was required.
10 The petitioner sought judicial review and the Court of Appeals concluded that
11 our decision represented a mistaken interpretation of OAR 660-012-0065(3)(n).
12 *Schaefer*, 318 Or App at 620. The court concluded that "[r]equests for
13 comprehensive plan amendments and zone changes, like the ones at issue here,
14 sought by private parties without corresponding expansion of the airport
15 boundary through the airport planning process are not expansions of public use
16 airports within the meaning of OAR 660-012-0065(3)(n)." *Id.* The court agreed
17 with the petitioner that OAR 660-012-0065(3)(n) did not apply.

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

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

3 On remand, we agreed with the county's alternative reasoning supporting
4 the approval, that reasons exceptions to Goals 3 and 14 were justified by the
5 proximity to the Airport under reasons exception rules at OAR 660-004-0022.
6 *Schaefer*, LUBA No 2020-108 (July 7, 2022), *rev'd and rem'd*, 323 Or App 390,
7 523 P3d 1142 (2022). The petitioner sought judicial review and the Court of
8 Appeals agreed that the county's approval and our decision violated OAR 660-
9 012-0060(5), which prohibits goal exceptions for industrial uses of rural lands
10 based on the presence of a transportation facility. *Schaefer*, 323 Or App 390.

11 On remand, we concluded that, given the court's interrelated conclusions
12 that (1) the county did not identify any reason for the exception that is
13 independent of the Airport, and (2) OAR 660-012-0060(5) prohibits a Goal 3
14 exception based on access to the Airport because the Airport is a transportation
15 facility, we did not perceive how OAR 660-004-0022 could support the Goal 3
16 exception based on the record and the county's reasoning. Thus, we reversed the
17 approval. *Schaefer v. Marion County*, LUBA No 2020-108 (Mar 14, 2023).

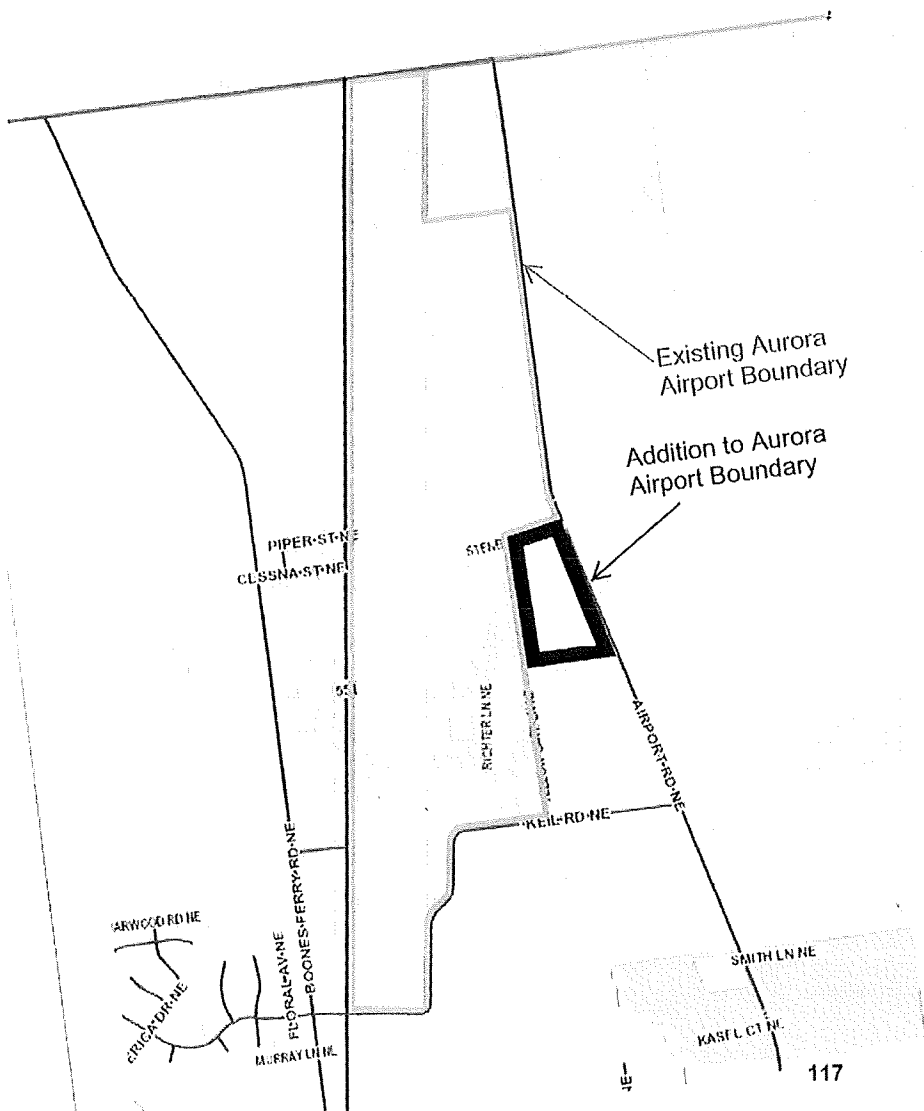
18 **D. Site Description**

19 The subject property is a 16.54-acre parcel designated Primary Agriculture
20 and zoned EFU that was outside the airport boundary. *Schaefer*, 318 Or App at
21 624-30. The subject property is not a part of any of the existing exception land.
22 The subject property is vacant and has not been in farm or forest use for at least

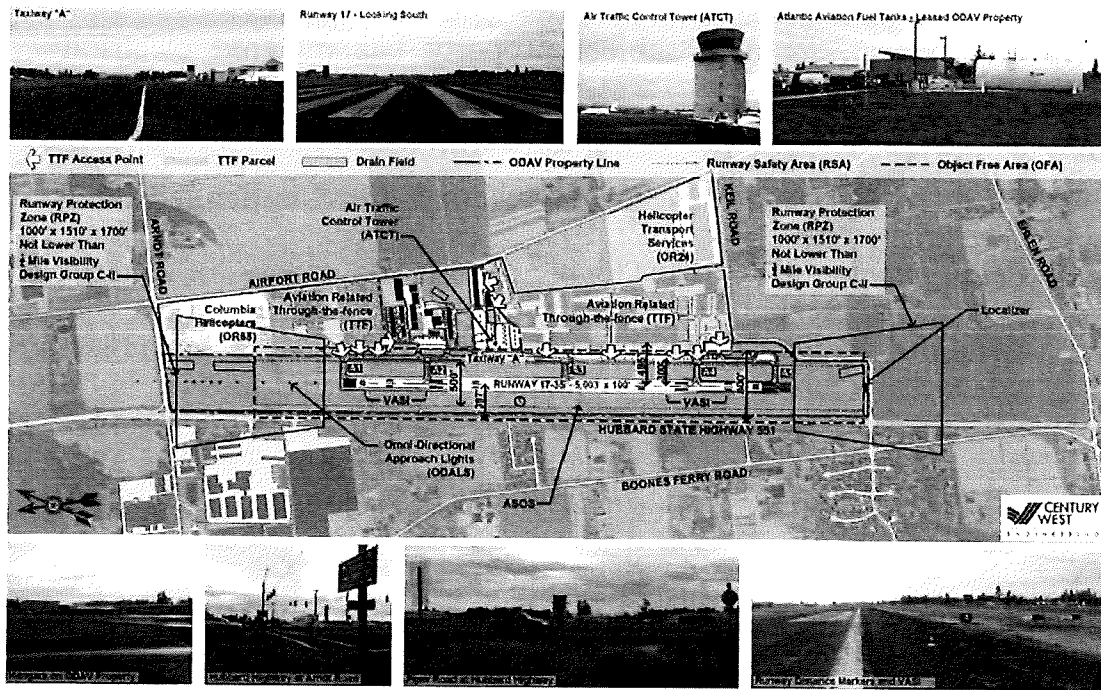
1 the past 50 years. Record 17. The property was most recently used as a church
2 camp and retreat. *Id.* The subject property has metered electricity and is
3 connected to a gas main. Record 18.

4 **E. Application, Procedural History, and Challenged Decision**

5 On September 18, 2024, TLM applied to the county for a comprehensive
6 plan amendment to expand the airport boundary to include the subject property
7 and a CUP to allow a facility for fixed wing aircraft and helicopters.



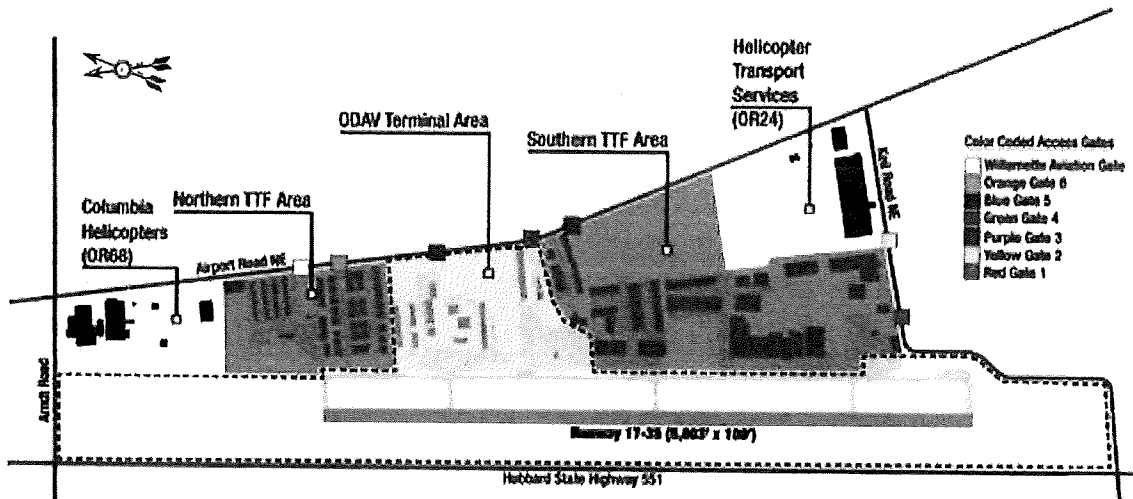
Record 117.



1

2 Record 2,414.

FIGURE 2-16: AURORA STATE AIRPORT GA TERMINAL AND TTF AREAS



Source: Developed by Century West Engineering

3

4 Record 2,423.

1 The application did not seek to change the subject property's
2 comprehensive plan designation or zoning. A county hearings officer conducted
3 a public hearing and recommended approval. The board of commissioners
4 conducted a public hearing and approved the applications in Ordinance 1485,
5 which was appealed to LUBA. The county withdrew its decision for
6 reconsideration and issued a decision with revised findings, again approving the
7 applications. This appeal followed.

8 **THE AIRPORT PLANNING RULE (OAR 660-013-0040)**

9 **1000 Friends of Oregon and Friends of French Prairie Assignment of Error**

10 In a single assignment of error, petitioners 1000 Friends of Oregon and
11 Friends of French Prairie (together, Friends) argue that the county erred by
12 misconstruing and misapplying the airport planning rule and underlying statutes,
13 ORS 836.610 and OAR 660-013-0040. Friends argue that the county “put the
14 cart before the horse” by approving a private party’s application for an airport
15 boundary expansion prior to ODAV adopting an update of the Airport Master
16 Plan. Friends argue that the submission of a facility site plan for sponsor approval
17 for the proposed use is a pre-requisite to an airport boundary expansion and the
18 county lacked the legal authority to expand the airport boundary.

19 Intervenors respond that airport *land use* planning and airport *aviation*
20 planning are related but distinct processes, and all required approvals must be
21 obtained before airport uses can be developed and operate. Thus, “whether the
22 horse pulls the cart or the horse pushes the cart, nothing can be built or operated

1 until both the horse and the cart arrive.” Intervenor-Respondents’ Brief to
2 Friends 10-11. Conditions of approval require TLM to obtain ODAV’s approval
3 and submit ODAV’s approved facility site plan and the ODAV TTF contract.¹⁰
4 Record 115-16.

5 For the reasons explained below, we agree with intervenors that while
6 OAR 660-013-0040 prescribes a process for airport boundary expansion and
7 OAR 738-014-0050 prescribes standards and guidelines for TTF operations,
8 nothing cited to us prohibits the county from approving the comprehensive plan
9 amendment for the airport boundary expansion and CUP for aspects of the
10 aviation operations, and conditioning those land use approvals on ODAV’s

¹⁰ The county found:

“The Board notes that ultimately, implementation of the proposed airport land use boundary expansion and approval of airport related uses on the subject property requires approvals from several different bodies. The focus in this decision is on the required land use approval from the County. The County notes that the applicant will also need to obtain various other approvals from ODAV, the Federal Aviation Administration (‘FAA’), and the Oregon Department of Environmental Quality (‘DEQ’) prior to any construction or operations. Consequently, the findings demonstrate that the proposal complies with each of the relevant land use standards and demonstrates that it is feasible to obtain all other necessary permits. Furthermore, this decision imposes conditions of approval to ensure the required permits are obtained before the proposed uses are developed and become operational.” Record 14.

1 approval and completion of required ODAV processes prior to development and
2 operation of the approved land uses.

3 Local governments are required by statute to amend their comprehensive
4 plan and land use regulations consistent with the rules for airports adopted by the
5 LCDC under ORS 836.616 and 836.619. ORS 836.610. OAR chapter 660,
6 division 13 is LCDC's Airport Planning Rule. The Airport Planning Rule
7 requires the county to adopt a map showing the location of the airport boundary
8 and the location of existing and planned runways, taxiways, aprons, tie-down
9 areas, and navigational aids. OAR 660-013-0040. The Airport Planning Rule
10 requires a local government projection of aeronautical facility and service needs.
11 OAR 660-013-0040(4). Expansions of existing airport uses must be based on the
12 projected needs for such uses and economic and use forecasts supported by
13 market data. OAR 660-013-0040(5). The Airport Planning Rule requires the local
14 government to request the airport sponsor to provide the economic and use
15 forecast information, which is subject to local government review, modification
16 and approval as part of the airport planning process. OAR 660-013-0040(9).

17 Expanded airport uses must be supported by adequate types and levels of
18 public facilities and services and be sited in a manner that is "compatible with
19 existing and planned land uses surrounding the airport" and "consistent with
20 applicable provisions of the acknowledged comprehensive plan, land use
21 regulations, and any applicable statewide planning goals." OAR 660-013-
22 0040(5)(c), (e). Provision of public facilities and services and transportation

1 facilities or systems for the airport must be “consistent with applicable state and
2 local planning requirements.” OAR 660-013-0040(7).

3 The Airport Planning Rule also requires ODAV to prepare and adopt a
4 state Aviation System Plan (state ASP) “to provide state policy guidance and a
5 framework for planning and operation of a convenient and economic system of
6 airports, and for land use planning to reduce risks to aircraft operations and
7 nearby land uses.” OAR 660-013-0030(1). If ODAV has not adopted a state ASP,
8 then the local government must coordinate airport-related comprehensive plan
9 and land use regulations with ODAV. OAR 660-013-0030(2).

10 Friends argue that, under those rules, a private party cannot unilaterally
11 apply for an airport boundary expansion to include private adjacent land. Friends
12 contend that the decision violates the coordination requirements in OAR 660-
13 013-0030(2) and the requirement in OAR 660-013-0040(9) that the county
14 request the economic and use forecast information used to justify the airport
15 expansion from the airport sponsor, ODAV.¹¹

¹¹ OAR 660-013-0030(2) provides, in part:

“Local comprehensive plan and land use regulation requirements shall be consistent with adopted elements of the state ASP and shall be coordinated with affected state and federal agencies, local governments, airport sponsors, and special districts. If a state ASP has not yet been adopted, the city or county shall coordinate the preparation of the local comprehensive plan and land use regulation requirements with [ODAV]. Local comprehensive plan and land use regulation requirements shall encourage and support the continued

1 Intervenors respond, and we agree, the Airport Planning Rule does not
2 prohibit a private party from applying for an airport boundary expansion or
3 prohibit the county from expanding the airport boundary in the county's
4 comprehensive plan, prior to and subject to ODAV review and approval. The
5 Airport Planning rule requires the county to coordinate with ODAV. So long as
6 the requirements of the rule are met before any development occurs, the county
7 may exercise its land use planning authority upon the request of a private party.
8 The decision does not violate the coordination requirement in OAR 660-013-
9 0030(2).

10 TLM submitted an economic and use forecast analysis from a draft 2023
11 version of the Aurora State Airport Master Plan, which was created by ODAV,
12 the airport sponsor. Record 2,369. The county reviewed and approved that
13 analysis, as authorized by OAR 660-013-0040(9). Friends do not explain why
14 TLM submitting the ODAV analysis to the county is materially different from
15 the county requesting that analysis directly from ODAV. That process did not
16 violate OAR 660-013-0040(9).

17 Friends argue that TLM obtained ODAV's participation and support in the
18 airport boundary expansion outside the land use agency coordination required by
19 ORS 197.180, which, as explained above, requires state agencies to carry out
20 their duties in compliance with statewide planning goals "[i]n a manner

operation and vitality of airports consistent with the requirements of
ORS 836.600 through 836.630."

1 compatible with acknowledged comprehensive plans and land use regulations.”
2 The challenged decision is a PAPA subject to LUBA review. Friends do not
3 identify or explain what different or greater participatory or other procedural
4 rights under ORS 197.180 were circumvented by the county’s process and
5 ODAV’s participation. Thus, that argument provides no basis for remand.

6 Friends also assert that the county’s decision conflicts with the Court of
7 Appeals’ articulation in *Schaefer* of how a TTF approval could precede an airport
8 boundary expansion. 318 Or App at 637-38. In that case, TLM contended that
9 county approval of TTF operations expanded the airport boundary. The court
10 rejected that argument and found that the real property covered by the TTF site
11 plan could be incorporated into the airport boundary, but a TTF site plan approval
12 itself did not expand the airport boundary. The court in that case did not address
13 whether a private party might apply for and obtain county land use approval of
14 an airport boundary expansion, conditioned on ODAV review and approval. The
15 challenged decision is not inconsistent with *Schaefer*.

16 Friends’ assignment of error is denied.

17 **TRANSPORTATION PLANNING RULE (OAR 660-012-0065(3)(n))**

18 **Schaefer Second Assignment of Error; City of Aurora Second Assignment**
19 **of Error; Rhoden-Feely First Assignment of Error**

20 Again, OAR 660-012-0065(3)(n) provides that “[e]xpansions or
21 alterations of public use airports that do not permit service to a larger class of
22 airplanes” are consistent with Goals 3, 4, 11, and 14. The county found that OAR

1 660-012-0065(3)(n) applies because the application is for the expansion of the
2 Airport, which is a public use airport, and the decision only approves airport uses
3 and activities that the county must allow within the Airport boundary pursuant to
4 ORS 836.616 and OAR 660-013-0100. The county quoted ORS 836.625(1) for
5 the proposition that the limitations on uses made of land in EFU zones do not
6 apply to airport uses. Record 20, 31. Nevertheless, the county concluded that the
7 uses in the application are allowed under ORS 215.283(3) and OAR 660-012-
8 0065(3)(n) as conditional uses in the EFU zone. Petitioners Schaefer, City of
9 Aurora, and Rhoden-Feely (collectively, petitioners) argue that the county
10 misconstrued OAR 660-012-0065(3)(n). We address those contentions together.

11 **A. Public Use**

12 Petitioners argue that the approved uses are for a private heliport and
13 airport-related commercial and industrial uses, which are not public uses, and
14 private uses are not “transportation facilities” within the meaning of ORS
15 215.283(3).

16 The county found:

17 “[T]he proposal is an ‘expansion * * * of a public use airport.’ There
18 can be no reasonable dispute that the Aurora State Airport is a public
19 use airport. In fact, no one claims otherwise. Further, the OAR 738-
20 005-0010(110) definition of ‘public use airport’ is an airport that is
21 open to the flying public. The Aurora Airport is owned and managed
22 by the State of Oregon and is open to the flying public. Moreover,
23 the statutory definition of ‘airport boundary’ refers to ‘the *combined*
24 *public and private properties* that are permitted to have direct access
25 to the airport runway by aircraft.’ (Emphasis supplied.) ORS
26 836.640(1). Indeed, the Court of Appeals expressly decided that

1 expanding the Aurora Airport land use boundary to include the
2 subject property is the only way that the through the fence airport
3 uses that the legislature in ORS 836.640-842 expressly
4 contemplated on the subject and other private property adjacent to
5 the Aurora Airport can occur, is through an expansion of the Aurora
6 Airport land use boundary to include such private property, exactly
7 as proposed here. *Schaefer v. Marion County*, 318 Or App 617
8 (2022). As the Court of Appeals explained, there is already
9 ‘privately owned land that is part of the “ultimate airport boundary”
10 on the 1976 airport layout plan’ that is ‘zoned P and is developed
11 with airport related uses.’ *Id.* That has not changed the fact that the
12 Aurora Airport is a public use airport. As the legislature
13 contemplated, the subject property will be a ‘through the fence’
14 operation at the Aurora Airport per ORS 836.640-642 that ODAV
15 will control through the referenced ‘Through the Fence Agreement,’
16 a copy of the template for which is in the record. The proposal is an
17 expansion of a public use airport.” Record 11-12.

18 Petitioners argue that OAR 660-012-0065(3)(n) does not apply because the
19 proposed uses are private airport-related commercial and industrial uses and
20 because the subject property will not be open to the flying public. Respondents
21 respond, and we agree, that the county correctly reasoned that the Airport is a
22 public use airport and the regulatory scheme allows privately owned land and
23 private operations within the boundaries of a public use airport as airport uses.
24 The decision only approves airport uses and activities that the county must allow
25 within the Airport boundary pursuant to ORS 836.616(2) and OAR 660-013-
26 0100. Thus, the county did not err in applying OAR 660-012-0065(3)(n) to the
27 proposal to expand the public use airport, even though the expansion area consists
28 of privately owned property that will not be open to the flying public.

1 **B. Regulatory Scheme**

2 The county found that the site will be a TTF operation, which

3 “means a customary and usual aviation-related activity that:

4 “(a) Is conducted by a commercial or industrial user of property
5 within an airport boundary; and

6 “(b) Relies, for business purposes, on the ability to taxi aircraft
7 directly from the property employed for the commercial or
8 industrial use to an airport runway.” ORS 836.640(5).

9 Petitioners argue that the proposed uses of the expansion area are TTF
10 commercial and industrial uses that do not qualify as airport uses that are allowed
11 within a public use airport under the applicable rules and statutes. Intervenor
12 respond, and we agree, that the county correctly construed ORS 215.283(3)(b)
13 and OAR 660-012-0065(3)(n) in context with ORS 836.616(2) and ORS
14 836.640(5). Those regulations can be harmonized and applied together, as the
15 county did in this case.

16 The legislature and LCDC have provided that uses of EFU land are
17 generally constrained by Goals 3, 11, and 14, and permissible nonfarm uses are
18 limited to those enumerated in ORS 215.283. In ORS 215.283(3)(b), the
19 legislature authorized and directed LCDC to adopt rules governing transportation
20 improvements on resource land. In OAR 660-012-0065(3)(n), LCDC limited
21 airport-related uses that do not require goal exceptions to “[e]xpansions or
22 alterations of public use airports that do not permit service to a larger class of
23 airplanes.” Airport regulations expressly contemplate private airport-related uses

1 operated on private property that is included within an airport boundary,
2 including TTF operations. ORS 836.640(1), (5).

3 Petitioners attempt to construct a conflict between, or a hierarchy among,
4 land use regulations and airport regulations that does not exist in the regulatory
5 scheme. Whenever possible, we construe statutes to be consistent with one
6 another. *See* ORS 174.010 (“[W]here there are several provisions or particulars
7 such construction is, if possible, to be adopted as will give effect to all.”). We
8 agree with intervenors that the county correctly determined that ORS 836.616(2)
9 and OAR 660-013-0100 prescribe the character of airport uses for land use
10 authorization purposes. So long as the uses fall within those regulations, the
11 county must allow them within an airport boundary, and the county may expand
12 the airport boundary to allow those uses on EFU land under OAR 660-012-
13 0065(3)(n). We agree with respondents that petitioners have not demonstrated
14 that the county misconstrued or misapplied OAR 660-012-0065(3)(n) and
15 associated rules and statutes.

16 **C. Inconsistent County Interpretations of OAR 660-012-0065(3)(n)**

17 Petitioners contend that the county misconstrued OAR 660-012-
18 0065(3)(n) by intentionally, arbitrarily, and inconsistently interpreting it when
19 compared to past county decisions that required resource land be redesignated
20 and rezoned Public and goal exceptions adopted for airport-related commercial
21 and industrial uses for the subject property, HTS heliport, and Southend
22 Corporate Airpark. In those past county decisions, the county characterized those

1 uses as development on private property for the benefit of the property owners
2 and not as transportation improvements to the airport. City of Aurora Petition for
3 Review 21 (citing Record 6,076-77). Petitioners argue that the county
4 impermissibly and arbitrarily changed its interpretation of OAR 660-012-
5 0065(3)(n) to reach the conclusion that the uses are allowed as a public
6 transportation facility.

7 Petitioners cite *Bemis v. City of Ashland* for the proposition that “if, in
8 reinterpreting an approval standard the local government chooses an
9 interpretation that is less consistent with the text and context, etc., than another
10 interpretation, that would tend to support the inference that the local government
11 deliberately acted arbitrarily and inconsistently from case to case.” 48 Or LUBA
12 42, 65 n 14 (2004). In that case, we explained

13 “that under certain circumstances ORS 227.178(3) and judicial
14 doctrine limit the authority of local governments to change an
15 existing interpretation *of a local provision* in the course of a quasi-
16 judicial permit proceeding. Petitioners cite *Holland v. City of*
17 *Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998) for the
18 proposition that a local government may not use its authority to
19 reinterpret *code provisions* in the course of a quasi-judicial
20 proceeding in a manner that conflicts with the protections afforded
21 by ORS 227.178(3), or that is inconsistent with the purpose of that
22 statute, or that attempts to circumvent the requirements of the
23 statute.” *Id.* at 52 (emphases added).

24 *Bemis* concerns the so-called goalpost rule embodied in ORS 227.178(3),
25 which the Court of Appeals has interpreted to limit the ability of a local
26 government to change long-standing interpretations and application of local code

1 provisions in the course of approving or denying a land use application. In
2 *Holland*, the Court of Appeals reasoned that “where ORS 227.178(3) applies, its
3 emphasis is on consistency, not correctness.” 154 Or App at 459. Petitioners also
4 cite *Alexanderson v. Clackamas County* for the proposition “that inconsistent
5 interpretations by a local decision maker might, under some circumstances, be a
6 basis for a reversal of the local decisions.” 126 Or App 549, 552, 869 P2d 873,
7 *rev den*, 319 Or 150 (1994). As intervenors emphasize, that case also concerned
8 interpretation and application of local code provisions and the analysis of whether
9 a local government acted arbitrarily in context of the local government
10 interpretation of its local code.

11 Differently, this case concerns the county’s application of a complex state
12 regulatory scheme governing land use and airport planning and expansion. We
13 analyze a local government’s interpretation of state law for legal correctness.
14 *Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076, *rev den*, 315
15 Or 271 (1992). Petitioners do not cite, and we are not aware of any authority that
16 prevents a local government from applying a correct interpretation of *state law*,
17 even if that interpretation differs from how the local government has applied or
18 interpreted that state law in a different land use application. Similarly, petitioners
19 do not identify any authority for LUBA to reverse or remand such a decision
20 based on inconsistent local interpretations of state law. Again, the question before
21 us is whether the county correctly applied state law in this decision, not whether
22 the county has inconsistently applied state law across several decisions.

1 Petitioners have not identified any legal basis for a remedy based on inconsistent
2 interpretations of OAR 660-012-0065(3)(n). Accordingly, we need not analyze
3 whether or how the county's decision is inconsistent with prior county decisions.

4 For the foregoing reasons, the assignments of error that challenge the
5 county's interpretation and application of OAR 660-012-0065(3)(n) are denied.

6 **THE COUNTY EFU ZONE (MCC 17.136.050(J)(4))**

7 **Schaefer First Assignment of Error**

8 The county determined that airport uses are "other transportation
9 facilities," which are conditional uses in the EFU zone under
10 MCC.17.136.050(J)(4), which permits as conditional uses in the EFU zone

11 "[r]oads, highways, and other transportation facilities and
12 improvements not otherwise allowed in this chapter, when an
13 exception to statewide Goal 3 and any other applicable statewide
14 planning goal with which the facility or improvement does not
15 comply, and subject to OAR Chapter 660, Division 12."

16 Schaefer argues that the county misconstrued MCC 17.136.050(J)(4).
17 Schaefer points out that "airport and airport-related commercial and industrial
18 uses" are listed as conditional uses in the Public zone. MCC 17.171.030(A).
19 "Heliport" is listed as a conditional use in the Commercial and Industrial zones.
20 MCC 17.145.030(E); MCC 17.165.040(L). Those uses are not listed as permitted
21 or conditional uses in the EFU zone in MCC 17.136. Schaefer argues that,
22 because these uses are expressly listed conditional uses in other zones but not in
23 the EFU zone, they are prohibited in the EFU zone, under the statutory

1 construction canon *expressio unius est exclusio alterius* meaning that the
2 expression of one thing is the exclusion of another. Schaefer observes that

3 “[b]oth LUBA and the Court of Appeals have recognized that where
4 a regulation specifically authorizes a use in one zone and does not
5 authorize that specific use in second zone, a more general
6 authorization of uses in the second zone should generally not be
7 interpreted to include the more specifically authorized use in the first
8 zone.” *Friends of Jefferson County v. Jefferson County*, 48 Or
9 LUBA 107, 120 (2004).

10 Schaefer argues that rule applies even more stringently in these
11 circumstances because nonfarm uses of EFU land allowed by ORS 215.283 must
12 be narrowly construed consistent with the primary policy of preserving
13 agricultural land for agricultural uses. *Craven v. Jackson County*, 308 Or 281,
14 288, 779 P2d 1011 (1989); *Warburton v. Harney County*, 39 Or LUBA 398, 407,
15 *aff’d*, 174 Or App 322, 25 P3d 978, *rev den*, 332 Or 559 (2001).

16 Intervenors respond that Schaefer’s argument relies on a
17 mischaracterization of the approved uses as heliport and commercial and
18 industrial uses. Intervenors argue that the approved uses are properly categorized
19 as “airport uses” as a matter of law and fact because Condition 7 expressly limits
20 the allowed uses to those identified in ORS 836.616(2) and OAR 660-013-0100.
21 Record 114-15. The uses authorized by the decision are those permitted under
22 ORS 215.283(3)(b) and OAR 660-012-0065(3)(n). The county reasoned that the
23 MCC 17.136.050(J)(4) reference to OAR 660-012 means that the local code
24 provision allows all of the uses that OAR 660-012 allows.

1 We agree with intervenors that Schaefer characterizes the approved uses
2 as heliport and commercial and industrial uses only within the context of other
3 uses provided in the MCC. Schaefer's characterization of the uses fails to
4 acknowledge the overlapping and integrated state regulatory framework for
5 airport and transportation uses on agricultural land that we analyzed earlier in this
6 decision. Helicopters are "aircraft." 836.605(1); OAR 660-013-0020(2). An area
7 used for takeoff and landing of aircraft is an "airport" and takeoff and landing
8 activities are airport uses. ORS 836.605(2); ORS 836.616(2); OAR 660-013-
9 0100(1).

10 While nonfarm uses under ORS 215.283 must be narrowly construed, the
11 airport uses described in ORS 836.616(2) must be liberally construed. ORS
12 836.630(3); ORS 836.625. Local government land use regulations must authorize
13 airport uses described in ORS 836.616(2) on land within airport boundaries. ORS
14 836.616(2). The county's interpretation of MCC.17.136.050(J)(4) is consistent
15 with that framework. We agree with intervenors that the county did not
16 misconstrue MCC.17.136.050(J)(4) to characterize the proposed uses as "airport
17 uses" and therefore allowed in the EFU zone as "other transportation facilities
18 and improvements not otherwise allowed in this chapter."

19 Schaefer's first assignment of error is denied.

1 **MCCP RURAL INDUSTRIAL POLICY 3 AND URBAN GROWTH**
2 **POLICY 7**

3 **Schaefer Third Assignment of Error**

4 Schaefer argues that the county misconstrued MCCP Rural Industrial
5 Policy 3 and Urban Growth Policy 7 and its decision lacks adequate findings
6 supported by substantial evidence on those policies.

7 Rural Industrial Policy 3 provides:

8 “A non-resource-related industrial use should not be permitted on
9 resource lands unless an evaluation of the relevant County and State
10 goals and the feasibility of locating the proposed use in an urban
11 growth boundary or rural non-resource lands show that the proposed
12 site on resource lands is the most suitable.” Schaefer argues that “the
13 assembly of aircraft and aircraft components” are non-resource-
14 related industrial uses that the county approved by approving uses
15 listed in OAR 660-013-0100(5).¹²

¹² OAR 660-013-0100(5) provides that the local government shall adopt land use regulations that authorize the following uses and activities within the airport boundary:

“Aircraft Service, Maintenance and Training, including activities, facilities, and accessory structures provided to teach aircraft service and maintenance skills, maintain, service and repair aircraft and aircraft components, but not including activities, structures, and facilities for the manufacturing of aircraft for sale to the public or the manufacturing of aircraft related products for sale to the public. ‘Aircraft Service, Maintenance and Training’ includes the construction of aircraft and aircraft components for personal use. The assembly of aircraft and aircraft components is allowed as part of servicing, maintaining, or repairing aircraft and aircraft components.”

1 Schaefer argues that the record identifies the urban Salem Airport as a feasible
2 alternative location for these uses. Schaefer asserts that the county erred in failing
3 to make findings addressing this policy.

4 Intervenor's respond that the decision does not approve rural industrial uses
5 and, therefore, Rural Industrial Policy 3 does not apply and the county did not err
6 in not addressing that policy. Intervenor's emphasize that OAR 660-013-0100(5)
7 provides that "[t]he assembly of aircraft and aircraft components is allowed as
8 part of servicing, maintaining, or repairing aircraft and aircraft components" and
9 does not "includ[e] activities, structures, and facilities for the manufacturing of
10 aircraft for sale to the public or the manufacturing of aircraft related products for
11 sale to the public." Thus, the approved uses are limited to airport uses, and not
12 broader commercial industrial uses.

13 The county approved the proposed uses within the proposed expanded
14 airport boundary solely as airport uses that are required to be allowed within an
15 airport boundary under ORS 836.616(2) and OAR 660-013-0100. The decision
16 does not approve any use that is not an airport use. While airport uses might
17 otherwise be characterized as industrial uses, those uses are properly
18 characterized as airport uses if they are within an airport boundary. We agree
19 with intervenor's that Schaefer's argument regarding Rural Industrial Policy 3
20 relies on the incorrect premise that the county erred in characterizing the
21 approved uses as airport uses instead of industrial uses. The county did not err in
22 not addressing Rural Industrial Policy 3.

1 The MCCP Urban Growth Policies provide, in part:

2 “In defining urbanizable land areas with urban growth boundaries,
3 it is necessary to provide implementation measures to effect their
4 purpose. Urban growth policies can provide guidance in making the
5 land use decisions that will direct the future of the urbanizable land
6 areas. The mutual agreement of the cities and the County to these
7 policies is vital to the effective coordination and cooperation
8 necessary to implement each urban growth program. The following
9 are urban growth policies that should guide the conversion of the
10 urbanizable areas adjacent to each city to urban uses:

11 “* * * * *

12 “7. Urban densities shall be established only within recognized
13 growth boundaries unless an exception to Goal 14 (Urbanization) is
14 obtained.”

15 The county found that Policy 7 does not apply. First, the county determined
16 that the Urban Growth Policies only apply to development within an urban
17 growth boundary (UGB) and Policy 7 does not apply because the subject property
18 is not within a UGB. Record 87. Next, the county reasoned:

19 “[R]ural public use airports are a unique use in that specific urban
20 uses on rural land are permitted and state and local land use
21 regulations govern how they may be expanded. This legal
22 framework operates outside the traditional cities – UGB framework
23 where urban uses are intended to be located, as well as the land use
24 framework that allows urban uses on rural land only if an exception
25 to Goal 14 is obtained, which is reflected in Policy 7. Here, the
26 applicant has demonstrated that it complies with the requirements
27 for expanding a public use airport such that OAR 660-012-
28 0065(3)(n) applies. That rule provides that such expansions of
29 public use airports are consistent with Goal 14, therefore no
30 exception to Goal 14 is required to allow the proposed airport uses
31 and expansion of the airport boundary.” Record 91.

1 Schaefer argues that the approved boundary expansion and conditional
2 uses are “urban density” and the county’s interpretation misconstrues Policy 7 by
3 interpreting “shall” to not be mandatory and inserting an exemption for airport
4 expansions that is not in Policy 7.

5 Intervenor’s respond, and we agree, the county did not err in finding that
6 the Urban Growth Policies only apply to land within a UGB. Schaefer does not
7 challenge that finding and, thus, has not demonstrated the county’s general
8 conclusion that those policies do not apply misconstrues Policy 7.

9 Schaefer’s third assignment of error is denied.

10 **DESIGN CAPACITY (MCC 17.136.060(I)(1))**

11 **City of Aurora First Assignment of Error; City of Wilsonville First and**
12 **Second Assignments of Error**

13 As previously stated, the county determined that airport uses are “other
14 transportation facilities,” which are conditional uses in the EFU zone.
15 MCC.17.136.050(J)(4). MCC 17.136.060 sets out criteria for conditional uses in
16 the EFU zone. MCC 17.136.060(I)(1) provides:

17 “No enclosed structure with a design capacity greater than 100
18 people, or group of structures with a total design capacity of greater
19 than 100 people, shall be approved within three miles of an urban
20 growth boundary unless an exception is approved pursuant to OAR
21 Chapter 660, Division 004.”

1 **A. Interpretation of MCC 17.136.060(I)(1)**

2 The county interpreted MCC 17.136.060(I)(1) to only require exceptions
3 for uses where a statewide planning goal would otherwise prohibit the use. The
4 county reasoned that MCC 17.136.060(I)(1) is intended to implement OAR 660-
5 033-0130(2)(a), which implements Goal 3.¹³ The county explained:

6 “The state law that MCC 17.136.060(I) apparently implements
7 provides the most plausible answer to this question. In this regard,
8 OAR 660-033-0130(2) has language that is nearly identical to MCC
9 17.136.060(I). OAR 660-033-0130 implements Goal 3. That means
10 that the goal to which an exception is supposed to be taken is Goal
11 3. But here, state law expressly states the proposal is *consistent with*
12 Goal 3 and so no purpose is served by taking a Goal 3 exception
13 where LCDC has adopted a specific rule that says the proposal is
14 consistent with that goal. The Goal 3 use table – OAR 660-033-0120
15 table - lists ‘Transportation improvements on rural lands allowed by
16 OAR 660-012-0065’ as a reviewable EFU use; there is no cross-
17 reference to ‘(2)’ – OAR 660-033-0130(2) that appears for that line.
18 Under OAR 660-033-0130’s opening paragraph, the absence of a
19 numeric reference means 0130 does not add any minimum criteria—
20 which includes subsection (2)’s 100-person cap. Put differently, the
21 Board finds that LCDC deliberately did not attach the 100-
22 person/three-mile limit to TPR-authorized transportation
23 improvements in OAR 660-012-0065(3)(n).” Record 26 (emphasis

¹³ OAR 660-033-0130(2)(a) provides:

“No enclosed structure with a design capacity greater than 100 people, or group of structures with a total design capacity of greater than 100 people, shall be approved in connection with the use within three miles of an urban growth boundary, unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4, or unless the structure is described in a master plan adopted under the provisions of OAR chapter 660, division 34.”

¹⁴ The introductory paragraph of OAR 660-033-0130 provides:

“The following requirements apply to uses specified, and as listed in the table adopted by OAR 660-033-0120. For each section of this rule, the corresponding section number is shown in the table. Where no numerical reference is indicated on the table, this rule does not specify any minimum review or approval criteria. Counties may include procedures and conditions in addition to those listed in the table, as authorized by law.”

OAR 660-033-0120 provides, in part:

“The specific development and uses listed in the following table are allowed in the areas that qualify for the designation pursuant to this division. All uses are subject to the general provisions, special conditions, additional restrictions and exceptions set forth in this division. The abbreviations used within the table shall have the following meanings:

“* * * * *

“(2) ‘R’ Use may be allowed, after required review. The use requires notice and the opportunity for a hearing. Minimum standards for uses in the table that include a numerical reference are specified in OAR 660-033-0130. Counties may prescribe additional limitations and requirements to meet local concerns.

“* * * * *

“(4) ‘#’ – Numerical references for specific uses shown in the table refer to the corresponding section of OAR 660-033-0130. Where no numerical reference is noted for a use in the table, this rule does not establish criteria for the use.”

1 The county reasoned that the 100-person design capacity criterion in MCC
2 17.136.060(1) and OAR 660-033-0130(2)(a) do not apply because OAR 660-
3 012-0065(3)(n) makes Goal 3 inapplicable to airport uses within an expanded
4 airport boundary. The county observed that OAR 660-012-0065(3)(n) does not
5 impose a structural 100-person design capacity limit dependent on proximity to
6 an urban growth boundary.

7 Petitioners argue that the decision misconstrues MCC 17.136.060(I)(1)
8 because it is inconsistent with the text of that provision and inserts an exemption
9 in contravention of ORS 174.010.¹⁵ LUBA does not defer to the governing body's
10 interpretation of a local provision that implements and adopts state statutory
11 language. *Kenagy*, 115 Or App at 134. We review the county's interpretation for
12 legal correctness. Intervenors respond, and we agree, the county correctly
13 interpreted MCC 17.136.060(I)(1) and determined that it does not apply because
14 it is a Goal 3 implementing standard and OAR 660-012-0065(3)(n), in context
15 with related statutes and rules, deems an airport expansion to allow airport uses
16 to be consistent with Goal 3 as a matter of law. As the county reasoned, that
17 conclusion is consistent with and supported by the structure and substance of

¹⁵ ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 OAR 660-033-0120 and OAR 660-033-0130, under which the design capacity
2 standard in OAR 660-033-0130(2)(a) does not apply to transportation
3 improvements on rural lands as allowed by OAR 660-012-0065, of which OAR
4 660-012-0065(3)(n) is part. The county did not improperly insert an exemption
5 into MCC 17.136.060(I)(1) in the guise of an interpretation. Rather, the county's
6 conclusion that the CUP provision does not apply flows from a proper
7 construction of that provision.

8 **B. Substantial Evidence of Design Capacity**

9 In the alternative, the county found that the design capacity of the
10 structures on the property will be less than 100 people. Petitioners argue that the
11 decision lacks adequate findings supported by substantial evidence to support the
12 county's conclusion that the design capacity of the approved buildings is less than
13 100 people. We affirm the county's conclusion that MCC 17.136.060(I)(1) does
14 not apply. Accordingly, we need not and do not reach petitioners' challenges to
15 the county's alternative analysis and conclusion that the structures on the
16 property have a design capacity of less than 100 people.

17 The assignments of error based on MCC 17.136.060(I)(1) are denied.

1 **GOAL 11 (PUBLIC FACILITIES AND SERVICES); ORS 836.608(5)(a);**
2 **OAR 660-013-0040(5)(c); OAR 660-011-0060**
3 **City of Aurora Third Assignment of Error; Rhoden-Feely Third Assignment**
4 **of Error**

5 Petitioners argue that the wastewater facilities and fire protection services
6 provided for the new airport uses are not authorized by Goal 11 because they
7 impermissibly allow extension of those services for urban level of development
8 on resource land. Petitioners also argue that the findings are inadequate because
9 they do not explain how the extensions of sewer or firefighting water service are
10 authorized by Goal 11.

11 **A. Background**

12 Goal 11 is “[t]o plan and develop a timely, orderly and efficient
13 arrangement of public facilities and services to serve as a framework for urban
14 and rural development.” OAR 660-015-0000(11). Planning requirements for
15 airports must include “[p]rovisions for airport uses not currently located at the
16 airport or expansion of existing airport uses * * * [w]hen such uses can be
17 supported by adequate types and levels of public facilities and services and
18 transportation facilities or systems *authorized by applicable statewide planning*
19 *goals[.]*” OAR 660-013-0040(5)(c) (emphasis added).

20 The subject property has existing electric and gas services and on-site well
21 water for the new airport uses. With respect to fire protection, the county found
22 the subject parcel is served by the Aurora Fire Department and Marion County

1 Sheriff's Department. The county observed that the subject property will become
2 a part of the Aurora Airport Water Control District (AAWCD). Record 49. The
3 county found that existing fire and police services for the subject property are
4 adequate for the proposed uses.

5 The site does not have soils appropriate for a traditional on-site septic tank
6 and drainfield. Record 12,851. TLM's consultant EMS concluded that
7 wastewater disposal options include (1) holding tanks with effluent hauled offsite
8 or (2) a treatment system on the property and the effluent piped to a drainfield on
9 a different property. The report stated that capacity exists within existing
10 wastewater systems at HDSE and/or Columbia Helicopters that can
11 accommodate additional treated effluent. Record 12,852. The decision does not
12 include a Goal 11 exception for extension of sewer service.

13 With respect to public facilities and services, the county found, initially,
14 that the proposed airport boundary expansion and the proposed airport uses,
15 including authorization for the subject property to connect to an existing sewer
16 system within the airport boundary, are consistent with Goal 11 because OAR
17 660-012-0065(3)(n) provides that expansions and alterations of a public use
18 airport that do not permit service to a larger class of airplane are deemed to be
19 consistent with Goal 11. The county found that TLM could feasibly manage
20 wastewater on-site with storage and hauling. The county also found that the site
21 should be able to dispose wastewater on another property within the airport

1 boundary, consistent with Goal 11, pursuant to OAR 660-012-0065(3)(n).

2 However, the findings recognize that,

3 “[b]ecause the original proposal for the HDSE system entitled only
4 six specific airport properties to connect to the sewer system,
5 allowing the subject property to connect to the system likely requires
6 new land use approval, which the Board notes would require prior
7 notice and opportunity for public participation.

8 “Similarly, Columbia Helicopters likely has excess capacity with its
9 existing septic drain field system that could accommodate
10 wastewater from the proposed uses. Use of that drainfield by the
11 proposal would follow a proceeding in which Columbia Helicopters
12 obtain required land use approval to do so.” Record 67.

13 The county further found that “the credible and persuasive evidence
14 establishes that the proposed uses can be supported by adequate types and levels
15 of public facilities and services, to include transportation facilities, consistent
16 with applicable statewide planning goals (Application Exhibits 36, 37, 39, 42,
17 43) OAR 660-013-0040(5)(c).” Record 100.

18 Petitioners argue that Goals 11 and 14 work together ““to channel intensive
19 uses and development to existing urban and urbanizable land first before allowing
20 the conversion of or intense non-resource uses on the rural land that comprises
21 the areas outside UGBs.”” City of Aurora Petition for Review 30 (quoting *Gisler*
22 *v. Deschutes County*, 149 Or App 528, 535, 945 P2d 1051 (1997)). Petitioners
23 argue that Goal 11 and Goal 14 prohibit the conversion of resource land to urban
24 development outside UGBs and that the prohibitions of Goals 11 and 14 cannot
25 be avoided by serving urban level of uses with private services and facilities.

1 Thus, petitioners argue that the county misconstrued Goal 11, ORS
2 836.608(5)(a), and OAR 660-013-0040(5)(c) by finding that the proposed airport
3 uses can be served by wastewater disposal and firefighting water on other airport
4 properties.

5 Intervenor respond, variously, that (1) ORS 836.608(5)(a) does not apply
6 to the Aurora Airport, (2) OAR 660-011-0060(9) does not apply, because the
7 decision does not allow extension of sewer service to another *rural* property, (3)
8 the county correctly interpreted Goal 11 and OAR 660-013-0040(5)(c) in concert
9 with OAR 660-012-0065(3)(n), and (4) the findings and evidence demonstrate
10 the new airport uses are supported by adequate public facilities.¹⁶

11 **A. ORS 836.608(5)(a)**

12 Petitioners rely on ORS 836.608(5)(a) for the proposition that, prior to
13 allowing new airport uses, a local government must determine that the new
14 airport uses are or will be supported by adequate public facilities and services
15 authorized by applicable statewide land use planning goals. Petitioners argue that
16 the county's decision misconstrues ORS 836.608(5)(a). Intervenor respond, and
17 we agree, ORS 836.608(5)(a) does not apply here because it is limited to new
18 airport uses at private-use airports and privately owned public-use airports. ORS

¹⁶ Intervenor also respond that the City of Aurora's preservation statement is inadequate and some of the issues presented in the city's third assignment of error are waived. There is significant overlap between the City of Aurora's third assignment of error and Rhoden-Feely's third assignment of error. We conclude that the issues that we address in this decision were preserved for our review.

1 836.608(2), (3)(b), and (5).¹⁷ The Airport is a publicly owned public use airport.
2 Thus, petitioners’ arguments under ORS 836.608(5)(a) provide no basis for
3 remand.

¹⁷ ORS 836.608 provides, in part:

“(2) A local government shall recognize in its planning documents the location of *private-use airports and privately owned public-use airports* not listed under ORS 836.610(3) if the airport was the base for three or more aircraft, as shown in the records of the Department of Transportation, on December 31, 1994. * * *

“* * * * *

“(3)(b) A local government may authorize the establishment of a new use described in ORS 836.616(2) at an airport described in subsection (2) of this section following a public hearing on the use. The hearing shall be for the purpose of establishing compliance with adopted clear and objective standards relating to the compatibility and adequacy of public facilities and services as provided under subsection (5) of this section. Standards and requirements as adopted by the local government shall further the policy of ORS 836.600 to the maximum extent practicable.

“* * * * *

“(5) A local government shall *authorize a new use described in subsection (3)(b) of this section* provided the use:

“(a) Is or will be supported by adequate types and levels of public facilities and services and transportation systems authorized by applicable statewide land use planning goals[.]” (Emphases added.)

1 **B. Fire Protection**

2 **1. Aurora Airport Water Control District Service**

3 Petitioners argue that the extension of service of AAWCD to serve the
4 subject property is not authorized by Goal 11 and the county erred in failing to
5 require a Goal 11 exception for extension of that service. Intervenor's respond that
6 joining the Airport's water control district to access stored water for firefighting
7 purposes does not require a new Goal 11 exception for two reasons: (1) ORS
8 836.616(2)(c) requires the county to allow "firefighting activities" within the
9 airport boundary, and (2) OAR 660-012-0065(3)(n) states that expansion of a
10 public use airport (and impliedly, the airport uses allowed within such an airport)
11 is consistent with Goals 3, 11, and 14. We agree. Petitioners do not cite any
12 authority indicating that the legislature or LCDC intended to require Goal 11
13 exceptions for expanding firefighting activities within airport boundaries, and we
14 agree with intervenors that provision of water for firefighting purposes
15 constitutes a firefighting activity. The county did not err in failing to perform a
16 Goal 11 analysis or require a Goal 11 exception for the extension of AAWCD
17 service to the subject property.

18 **2. Adequacy of Firefighting Water Supply**

19 Petitioners argue that there is no evidence or findings that AAWCD has
20 adequate water to extinguish a major fire in the proposed new structures.
21 Petitioners point to evidence in the record that the existing system has an

1 inadequate flow capacity to fight a major fire under the standards of the Oregon
2 Fire Code for many airport hangars and businesses. Record 8,196; Record 9,283.

3 Intervenor's respond that petitioners' assertion that there is inadequate flow
4 capacity mischaracterizes the evidence in the record. Intervenor's point to Record
5 8,196, which petitioners cite and is a civil engineer's report to AAWCD that
6 provides, in relevant part:

7 "A connection of the [AAWCD] system to the City of Aurora water
8 system will also allow for increased water capacity for firefighting
9 purposes. The current airport water system has a total tank capacity
10 of 248,000 gallons, which allows for the Oregon Fire Code
11 minimum standard pumping rate of 1500 gallons per minute for 2
12 hours. The installation of that system was a great improvement over
13 the prior complete lack of any fire protection water at the airport.
14 Hooking up to the City of Aurora system will in the future allow for
15 increasing this fire flow to higher levels such as 3750 gpm for 3
16 hours which is a more appropriate flow under the standards of the
17 Oregon Fire Code for many of the airport hangars and businesses."
18 Record 8,196.

19 Record 9,283 is a letter from AAWCD to the board of county
20 commissioners and states, in part: "When used for fighting a fire, the system is
21 limited to the 248,000 gallons of water in the tanks that thus may not provide
22 adequate fire flows for a major conflagration." Intervenor's respond, and we
23 agree, both quoted statements assert that the AAWCD system would perform
24 better for firefighting purposes if it were connected to the city water system to
25 increase flow. However, neither statement evidences that the current AAWCD

1 system is inadequate to serve the approved airport expansion for fire protection
2 purposes.

3 **C. Wastewater Disposal**

4 The county approved an on-site wastewater system and also alternatively
5 authorized connection to the HDSE facility or the Columbia Helicopters drain
6 field/system,

7 “without the need to amend this land use approval, should the
8 appropriate land use and DEQ permits for such extensions and
9 connections be obtained by those owners. * * * [A]pproval here to
10 use either of those systems does not authorize the use of those
11 systems without further action demonstrating that such use is
12 allowed.” Record 67.

13 Petitioners argue that the county misconstrued Goal 11 and OAR 660-011-
14 0060(1)(b) by concluding that the Airport 1980 exception area properties from
15 which wastewater disposal services may be extended would require further land
16 use approval, but that the subject property that would connect to the extension
17 does not require a Goal 11 exception. OAR 660-011-0060 is part of LCDC’s
18 Public Facilities Planning Rule and governs sewer service to rural lands. There is
19 no dispute that the subject property is rural land and the challenged decision does
20 not change the designation or zoning of the subject property, so it will remain
21 rural, resource-zoned land within the airport boundary.

22 That rule provides that local governments may allow “the extension of
23 sewer lines * * * or allow a use to connect to an existing sewer line * * * provided
24 the standards for an exception to Goal 11 have been met, and provided the local

1 government adopts land use regulations that prohibit the sewer system from
2 serving any uses or areas other than those justified in the exception.” OAR 660-
3 011-0060(9). Petitioners argue that the application required Goal 11 exceptions
4 for both the properties extending the service, and the subject property, which is
5 the property receiving the service and, thus, the county erred by not taking an
6 exception.

7 Intervenor respond, initially, that, if we affirm the county’s decision that
8 OAR 660-012-0065(3)(n) applies, then our Goal 11 analysis should end there
9 because that rule deems airport uses as compliant with Goal 11; thus, the county
10 could not require a Goal 11 exception. However, that seemingly straightforward
11 rule application does not resolve whether or how OAR 660-011-0060(9) and
12 OAR 660-013-0040(5)(c) apply if, as we have concluded above, OAR 660-012-
13 0065(3)(n) applies and the subject property remains resource-zoned rural land.
14 We proceed to analyze those rules below.

15 Intervenor respond that the decision “does not invoke OAR 660-011-
16 0060(9)” because it does not authorize the extension of any off-site sewer system.
17 Petitioners argue, and we agree, the decision approves the subject property
18 connection to an existing, off-site sewer system, which is an extension of a sewer
19 system, as defined in OAR 660-011-0060(1)(b), which provides:

20 “‘Extension of a Sewer System’ means the extension of a pipe,
21 conduit, pipeline, main, or other physical component *from or to an*
22 *existing sewer system* in order to provide service to a use, regardless
23 of whether the use is inside the service boundaries of the public or

1 private service provider. The sewer service authorized in section (8)
2 of this rule is not an extension of a sewer[.]” (Emphasis added.)

3 Intervenor also argue that the decision does not authorize extension of a
4 sewer system because Condition of Approval 25 provides that a sewer connection
5 is allowed only if all necessary land use approvals are obtained. Record 116.
6 Condition 25 provides:

7 “Prior to obtaining building permits the applicant shall receive all
8 necessary septic approvals from Marion County Septic and/or
9 Oregon DEQ. Any connection to offsite wastewater systems would
10 require land use approval on the other parcels. The subject parcel
11 will not require additional land use approval for such connection
12 once all other required approvals from other departments have been
13 received.” Record 116.

14 We agree with petitioners that Condition 25 authorizes a sewage line connection
15 from the subject property to an offsite wastewater system without a Goal 11
16 review or exception.

17 Intervenor respond that this issue is not controlled by an ordinary Goal 11
18 analysis. Instead, intervenors argue, the Goal 11 issue is controlled by OAR 660-
19 012-0065(3)(n), which, as the Court of Appeals explained in *Schaefer*, represents
20 LCDC’s balancing Goals 3, 4, 11, 12, and 14 with respect to airport expansions
21 and provides that such expansions that do not permit service to a larger class of
22 airplanes are deemed consistent with Goals 3, 4, 11, and 14. 312 Or App at 341.
23 Intervenor argue that petitioners’ argument manufactures a conflict among OAR
24 660-011-0060(9), OAR 660-013-0040(5)(c), and OAR 660-012-0065(3)(n),

1 while, in intervenors' view, the county's decision gives effect to them all.
2 Intervenor-Respondents' Brief to City of Aurora 43.

3 "When interpreting an administrative rule, we seek to divine the intent of
4 the rule's drafters, employing essentially the same framework that we employ
5 when interpreting a statute. Under that analytical framework, we consider the text
6 of the rule in its regulatory and statutory context." *Noble v. Dept. of Fish and*
7 *Wildlife*, 355 Or 435, 448, 326 P3d 589 (2014) (internal citation omitted) (citing
8 *State v. Hogevooll*, 348 Or 104, 109, 228 P3d 569 (2010)). "In construing statutes
9 and administrative rules, we are obliged to determine the correct interpretation,
10 regardless of the nature of the parties' arguments or the quality of the information
11 that they supply to the court." *Gunderson, LLC v. City of Portland*, 352 Or 648,
12 662, 290 P3d 803 (2012) (citing *Dept. of Human Services v. J.R.F.*, 351 Or 570,
13 579, 273 P3d 87 (2012), and *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997)).
14 Whenever possible, we construe statutes and rules in a manner that gives effect
15 to all. *See* ORS 174.010 ("[W]here there are several provisions or particulars such
16 construction is, if possible, to be adopted as will give effect to all.").

17 OAR 660-011-0000 provides a purpose statement that applies to OAR
18 660-011-0060:

19 "The purpose of this division is to aid in achieving the requirements
20 of Goal 11, Public Facilities and Services, OAR 660-015-0000(11),
21 interpret Goal 11 requirements regarding public facilities and
22 services on rural lands, and implement ORS 197.712(2)(e), which
23 requires that a city or county shall develop and adopt a public facility
24 plan for areas within an urban growth boundary containing a

1 population greater than 2,500 persons. The purpose of the plan is to
2 help assure that urban development in such urban growth boundaries
3 is guided and supported by types and levels of urban facilities and
4 services appropriate for the needs and requirements of the urban
5 areas to be serviced, and that those facilities and services are
6 provided in a timely, orderly and efficient arrangement, as required
7 by Goal 11. The division contains definitions relating to a public
8 facility plan, procedures and standards for developing, adopting, and
9 amending such a plan, the date for submittal of the plan to the
10 Commission and standards for Department review of the plan.”

11 As we understand it, petitioners argue that the approved airport uses are
12 urban-level commercial and industrial development on rural land, and extension
13 of wastewater services to or from the subject property, which is rural land, is not
14 authorized by Goal 11. Differently, intervenors argue that airport uses, while they
15 can be intensive for service purposes, are not urban uses for purposes of Goal 11,
16 and are, instead, airport uses that are regulated and analyzed differently from
17 urban commercial and industrial uses for purposes of Goals 11 and 14. We agree
18 with intervenors.

19 The legislature expressly exempted ORS 836.616(2) airport uses from
20 compliance with the statewide planning goals in ORS 836.616(3), which
21 provides:

22 “All land uses and activities permitted within airport boundaries,
23 ***other than the uses and activities established under subsection (2)***
24 ***of this section***, shall comply with applicable land use laws and
25 regulations. A local government *may authorize commercial,*
26 *industrial and other uses* in addition to those listed in subsection (2)
27 of this section *within an airport boundary* where such uses are
28 consistent with applicable provisions of the acknowledged
29 comprehensive plan, *statewide land use planning goals* and

1 commission rules and where the uses do not create a safety hazard
2 or limit approved airport uses.” (Italics and boldface added.)

3 The legislature authorized LCDC to adopt rules for uses and activities
4 allowed within airport boundaries. ORS 836.616(1). However, those rules must
5 be interpreted consistently with ORS 836.616(2) and (3).

6 The Airport Planning Rule “implements ORS 836.600 through 836.630
7 and Statewide Planning Goal 12 (Transportation).” OAR 660-013-0010. As
8 stated above, planning requirements for airports must include “[p]rovisions for
9 airport uses not currently located at the airport or expansion of existing airport
10 uses * * * [w]hen such uses can be supported by adequate types and levels of
11 public facilities and services and transportation facilities or systems *authorized*
12 *by applicable statewide planning goals*[.]” OAR 660-013-0040(5)(c) (emphasis
13 added).

14 OAR 660-012-0065 “identifies transportation facilities, *services and*
15 *improvements* which may be permitted on rural lands consistent with Goals 3, 4,
16 11, and 14 *without a goal exception*.” OAR 660-012-0065(1) (emphasis added).
17 “Expansions or alterations of public use airports that do not permit service to a
18 larger class of airplanes” “are consistent with Goals 3, 4, 11, and 14[.]” OAR
19 660-012-0065(3)(n), (1).

20 The county found that because the approved uses are limited to those in
21 ORS 836.616(2), no Goal 11 exception is required for the extension of sewage
22 lines from the subject property in order to serve those limited uses. We agree with

1 intervenors that that conclusion harmonizes the applicable statutes and
2 administrative rules.

3 Petitioners' Goal 11 assignments of error are denied.

4 **GOAL 12 (TRANSPORTATION)**

5 **City of Aurora Fourth Assignment of Error; Rhoden-Feely First and Third** 6 **Assignments of Error**

7 **A. Goal 12 Background**

8 Goal 12 is "[t]o provide and encourage a safe, convenient and economic
9 transportation system." OAR 660-015-0000(12). "Transportation Facility --
10 refers to any physical facility that moves or assists in the movement of people
11 and goods excluding electricity, sewage and water." *Id.* Goal 12 Planning
12 Guideline A.3 provides: "No major transportation facility should be planned or
13 developed outside urban boundaries on Class I and II agricultural land, as defined
14 by the U.S. Soil Conservation Service unless no feasible alternative exists." Goal
15 12 Implementation Guideline B.1 provides:

16 "The number and location of major transportation facilities should
17 conform to applicable state or local land use plans and policies
18 designed to direct urban expansion to areas identified as necessary
19 and suitable for urban development. The planning and development
20 of transportation facilities in rural areas should discourage urban
21 growth while providing transportation service necessary to sustain
22 rural and recreational uses in those areas so designated in the
23 comprehensive plan."

24 Goal 12 does not define the phrase "major transportation facility."

25 Petitioners argue that the Airport is a major transportation facility because it

1 provides a high level and volume of flight operations and related aviation
2 services. Intervenors and respondent do not dispute that the Airport would be
3 considered a major transportation facility for purposes of Goal 12.

4 **B. ORS 836.608(5)(a) and OAR 660-013-0040(5)(c)**

5 Petitioners argue that the county misconstrued ORS 836.608(5)(a) and
6 OAR 660-013-0040(5)(c) by allowing new airport uses contrary to Goal 12
7 without utilizing Planning Guideline A.3 or Implementation Guideline B.1, or
8 developing alternative means to achieve Goal 12.

9 As we explained above, ORS 836.608(5)(a) does not apply to the Airport.
10 Like the Goal 11 analysis above, because the approved uses are limited to those
11 in ORS 836.616(2), no Goal 12 exception is required. ORS 836.616(3). OAR
12 660-013-0040(5)(c) does not independently require compliance with Goal 12 or
13 a Goal 12 exception for the approved airport uses.

14 **C. Airport Planning Rule and Goal 12**

15 Compliance with the Airport Planning Rule is deemed to satisfy the
16 requirements of Goal 12. *See* OAR 660-013-0160(3) (“Compliance with the
17 requirements of this division shall be deemed to satisfy the requirements of
18 Statewide Planning Goal 12 (Transportation) and OAR 660, division 12 related
19 Airport Planning.”). The county relied on OAR 660-013-0160(3) and found that
20 the proposal complies with the Airport Planning Rule, and so is deemed to satisfy
21 Goal 12 and the implementing Transportation Planning Rule at OAR 660,
22 division 12. Record 25, 68.

1 The City of Aurora argues that, as applied, the Airport Planning Rule is
2 inconsistent with Goal 12 because the decision locates a major and urban
3 transportation facility on Class II soil in a rural area which is neither necessary
4 nor suitable for urban development.

5 Intervenors respond, initially, that petitioners have not demonstrated that
6 the issue that OAR 660-013-0160(3) is inconsistent with Goal 12 was raised
7 below and, thus, that issue was waived. Intervenors-Respondents' Brief to City
8 of Aurora 46.

9 ORS 197.835(3) limits LUBA's scope of review to those issues "raised by
10 any participant before the local hearings body as provided by ORS 197.195 or
11 197.797, whichever is applicable." ORS 197.797(1) requires that, to be preserved
12 for LUBA review, an issue must "be raised and accompanied by statements or
13 evidence sufficient to afford the governing body, planning commission, hearings
14 body or hearings officer, and the parties an adequate opportunity to respond to
15 each issue." "Each assignment of error must demonstrate that the issue raised in
16 the assignment of error was preserved during the proceedings below. Where an
17 assignment raises an issue that is not identified as preserved during the
18 proceedings below, the petition shall state why preservation is not required."
19 OAR 661-010-0030(4)(d).

20 The City of Aurora does not respond to intervenors' waiver argument. In
21 the absence of a response demonstrating that the issue that OAR 660-013-0160(3)

1 is inconsistent with Goal 12 was preserved, or explaining why preservation is not
2 required, we agree with intervenors that this issue is not preserved for our review.

3 On the merits, we also agree with intervenors that the expansion of the
4 airport for airport uses is expressly permitted under OAR 660-012-0065(3)(n),
5 which is part of the Transportation Planning Rule that implements Goal 12. The
6 county correctly concluded that compliance with the Airport Planning Rule is
7 deemed to satisfy Goal 12.

8 Petitioners' Goal 12 assignments of error are denied.

9 **INTENSIFICATION OF USE IN EXISTING EXCEPTION AREA**

10 **(OAR 660-004-0018)**

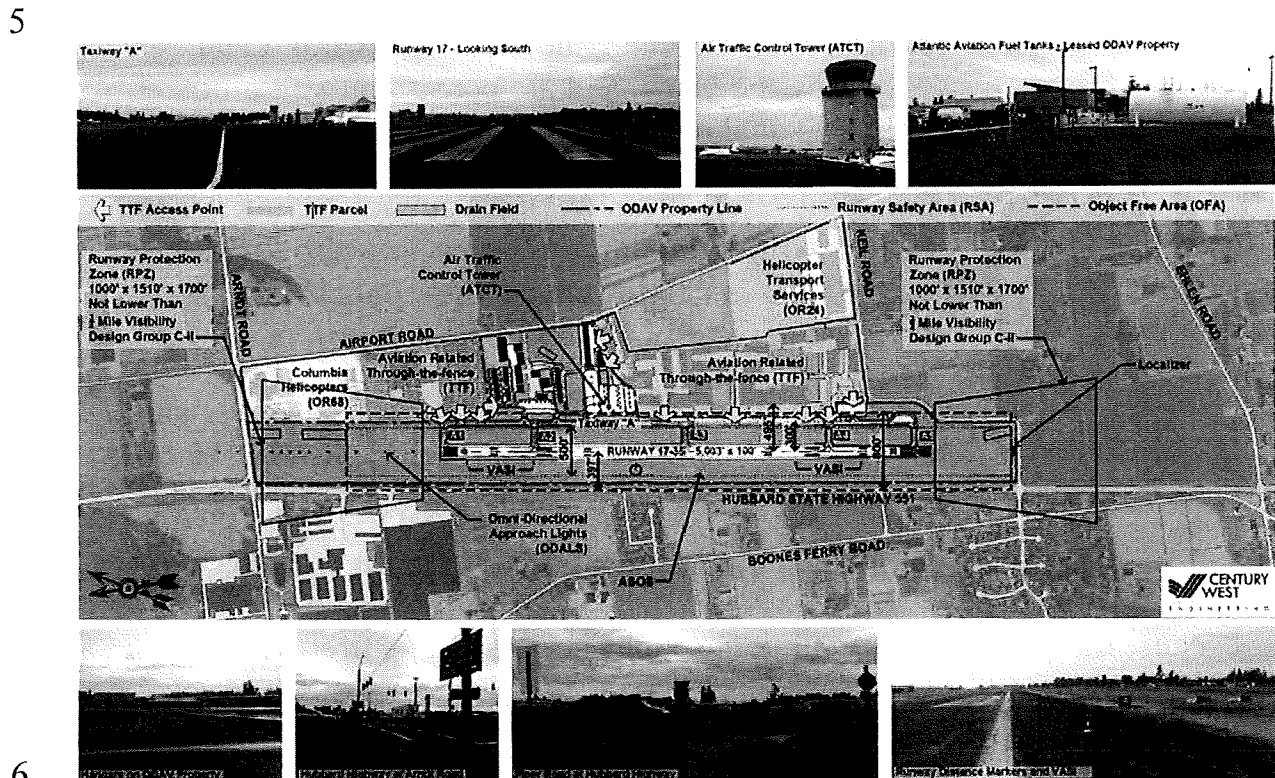
11 **Schaefer Fourth Assignment of Error; Rhoden-Feely Second Assignment of** 12 **Error**

13 Petitioners Schaefer and Rhoden-Feely argue that the decision violates
14 OAR 660-004-0018 because the decision increases the intensity of uses on
15 existing exception land without taking new exceptions.

16 **A. Background**

17 In 1980, the county took a committed exception to Goal 3 for most of the
18 Airport land, including the land with existing Columbia Helicopters and Life
19 Flight operations. Record 7,393. The 1980 exception area is designated Public
20 Use on the MCCP map and is zoned Public (P). *Murray*, 23 Or LUBA at 273. In
21 1994, the county approved an exception to Goal 3 for 3.07 acres of agricultural
22 land adjoining the southern and southeastern boundaries of the 1980 exception

1 area, with corresponding plan and zoning map changes from EFU to P. Record
2 8,511. In 2004, the county adopted reasons exceptions to Goals 11 and 14 for the
3 existing Southend Corporate Airpark (HDSE Properties) to share a septic system.
4 Record 13,264.¹⁸ The image below shows the location of the existing airport uses.



7 Record 2,414.

8 OAR 660-004-0018 governs planning and zoning for exception areas. As
9 relevant to the 1980 committed exception, OAR 660-004-0018(2) provides that

¹⁸ In 2010, the county adopted reasons exceptions to Goals 3 and 14 for airport related industrial uses outside of the airport boundary. Record 6,064. Petitioners do not assert that the challenged decision has any impact on that 2010 exception area.

1 “all plan and zone designations shall limit uses, density, and public
2 facilities and services to those that satisfy (a) or (b) or (c) and, if
3 applicable, (d):

4 “(a) That are the same as the existing land uses on the exception site;

5 “(b) That meet the following requirements:

6 “(A) The rural uses, density, and public facilities and
7 services will maintain the land as ‘Rural Land’ as
8 defined by the goals, and are consistent with all other
9 applicable goal requirements;

10 “(B) The rural uses, density, and public facilities and
11 services will not commit adjacent or nearby resource
12 land to uses not allowed by the applicable goal as
13 described in OAR 660-004-0028; and

14 “(C) The rural uses, density, and public facilities and
15 services are compatible with adjacent or nearby
16 resource uses[.]”

17 Schaefer argues that the county misconstrued OAR 660-004-0018(2)(a)
18 because the decision fails to limit the public airport, public firefighting water, and
19 the private sewer services and facilities uses to the existing uses. Schaefer argues
20 that the county misconstrued OAR 660-004-0018(2)(b)(A) because the decision
21 will not maintain the 1980 committed exception land as “Rural Land.”

22 “When a local government changes the types or intensities of uses or
23 public facilities and services within an area approved as a ‘Reasons’ exception, a
24 new ‘Reasons’ exception is required.” OAR 660-004-0018(4)(b). Schaefer
25 argues that the decision violates OAR 660-004-0018(4)(b) because it increases
26 the intensity of the sewer and airport uses on the 1993 reasons exception and

1 2004 reasons exception lands without a new reasons exception.¹⁹ Petitioners
2 argue that use of the Airport's air traffic control tower, existing airport runway,
3 and non-potable firefighting water as part of the AAWCD require modifications
4 of the prior exceptions that approved the uses, or new exceptions.

5 Schaefer argued below that OAR 660-004-0018 governs the 1980
6 committed exception land where the septic system and drain field serving
7 Columbia Helicopters, the runway, the aircraft control tower, and the public
8 firefighting water service are located.

9 The county found as follows:

10 "The Board finds that the credible and persuasive evidence in the
11 record demonstrates that septic can be provided for the property
12 without the subject property having to connect to the HDSE or
13 Columbia Helicopter septic systems. This decision authorizes land
14 use approval for connection should HDSE or Columbia Helicopters
15 seek and gain approval to do so if the owner of the subject property
16 wishes to establish such connection. In that circumstance, this
17 approval says that it need not be modified to allow such a
18 connection. The Board here pauses to respond to Mr. Schaefer's
19 objection that the Columbia Helicopter drainfield/system cannot be
20 extended to serve the proposal asserting it is subject to a goal
21 exception that allowed it to be approved and OAR 660-004-
22 0018(2)(a) limits the exception to the intensity of uses that drove the
23 exception in the first place. Nothing suggests that the Columbia
24 Helicopter septic system was approved under a goal exception. The

¹⁹ As explained above, the exception identified by petitioners as the 1993 exception was appealed and remanded. The county subsequently adopted a different, and more limited exception in 1994. Respondent's Brief 14-15; Intervenor-Respondents' Brief to Schaefer 49-50; Record 8,510-11.

1 Board finds that it almost certainly is a septic system that predates
2 the requirement that an exception be required to install it. The Board
3 also finds that regardless, the objections about the limits on the
4 existing approvals for HDSE and Columbia do not matter because
5 in order for Columbia or HDSE to expand their septic systems to
6 serve the subject property they would have to get whatever land use
7 and DEQ approval is required to do so. This decision merely decides
8 that if such occurs, that this decision need not be modified for the
9 subject property to connect.” Record 63.

10 **B. Waiver**

11 Intervenor respond, initially, that the only issues raised below with
12 sufficient specificity were related to the sewer and septic systems on the
13 Columbia Helicopter and HDSE Properties. As quoted immediately above, the
14 decision expressly addressed those issues. Intervenor assert that the issues that
15 the entire proposal is an intensification of use or of public facilities or services
16 approved under the 1980 committed exception and any other later reasons
17 exception was never raised below and, if it had been, then intervenors and the
18 county could have addressed those issues. Intervenor contend that no party
19 raised any exception expansion issue with respect to use of the air traffic control
20 tower, existing airport runway, and non-potable firefighting water as part of the
21 AAWCD. Intervenor argue that petitioners have waived the right to raise the
22 “intensification of airport uses” issue in the first instance in this proceeding,
23 except as it relates to the 2004 reasons exception for the HDSE sewer system.
24 ORS 197.797.

25 The “raise it or waive it” principle does not limit the parties on appeal to
26 the exact same arguments made below, but it does require that the issue be raised

1 below with sufficient specificity so as to prevent “unfair surprise” on appeal.
2 *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d
3 1078 (1991); *Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074
4 (Apr 8, 2022), *aff’d*, 321 Or App 505 (2022) (nonprecedential memorandum
5 opinion), *rev den*, 370 Or 740 (2023) (slip op at 6). A particular issue must be
6 identified in a manner detailed enough to give the governing body and the parties
7 fair notice and an adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46.
8 When attempting to differentiate between “issues” and “arguments,” there is no
9 “easy or universally applicable formula.” *Reagan v. City of Oregon City*, 39 Or
10 LUBA 672, 690 (2001).

11 Petitioner Rhoden-Feely does not respond to the waiver argument.
12 Petitioner Schaefer’s preservation statement in the petition for review quotes
13 Record 1,253 to 1,254:

14 “OAR 660-004-0018(2)(a) is violated because the plan amendment
15 will increase the intensity of sanitary sewer uses on the existing
16 Columbia Helicopters Properties and ODAV Properties, and
17 increase the intensity of air traffic control uses on the ODAV
18 Property, and fails to limit the uses, densities and services to the
19 same as the existing land uses on the Original Committed Exception
20 for the Columbia Helicopters Properties and ODAV Properties
21 taken in the 1980s.

22 “OAR 660-004-0018(2)(b)(A) is violated because the increased
23 intensity of uses on existing committed exception lands allowed by
24 the plan amendment will not maintain the Original Committed
25 Exception land owned by Columbia Helicopters and ODAV as rural
26 land.

1 “OAR 660-004-0018(4)(b) is violated because the plan amendment
2 increases the intensity of the sewer and aviation uses on the Aurora
3 State Airport, Southend Airpark, and HDSE Properties reasons
4 exception lands without taking a new reasons exception for those
5 properties, which is required by law, even if the existing exception
6 areas can accommodate the increased intensities as a matter of
7 engineering.” (Citations omitted.)

8 Based on those quotes, we conclude that Schaefer sufficiently raised the
9 issue that OAR 660-004-0018 requires the county to adopt new exceptions to
10 allow the newly approved airport uses on the subject property to use development
11 on or within the existing airport area with respect to use of the air traffic control
12 tower, which Schaefer expressly referenced, and the airport runway, which is a
13 central “aviation use” at the airport. While we agree with intervenors that the
14 latter argument was not developed below, the standard for preservation of an
15 issue for review before LUBA “requires no more than fair notice to adjudicators
16 and opponents, rather than the particularity that inheres in judicial preservation
17 concepts.” *Boldt*, 107 Or App at 623.

18 However, the quoted passages do not raise with sufficient specificity to
19 provide the opportunity to respond to the issue that the subject property’s
20 inclusion in the AAWCD to use its non-potable water for firefighting constitutes
21 an “intensification” of an existing exception area use that required modifying the
22 existing exceptions or taking a new exception for the existing airport areas served
23 by the AAWCD. That issue is waived.

1 **C. Intensification Analysis**

2 **1. Inadequate Findings**

3 Petitioners argue that the county's findings are inadequate because the
4 decision does not address the issue of the intensified use of the traffic control
5 tower and the airport runway in existing exception areas. We agree that the
6 findings are inadequate on those issues. However, for the reasons explained
7 immediately below, we agree with intervenors' response that the county did not
8 err in failing to apply OAR 660-004-0018. Accordingly, a remand for findings
9 on that issue would serve no purpose.

10 **2. OAR 660-012-0065(3)(n) renders OAR 660-004-0018**
11 **inapplicable with respect to prior exceptions to Goals 3,**
12 **11, and 14 for the airport.**

13 Intervenors respond that exceptions to Goals 3, 11, and 14 are not required
14 by the plain terms of OAR 660-012-0065(3)(n) and, thus, the standards for
15 exception areas at OAR 660-004-0018 do not apply to any intensification of use
16 on the existing airport exception areas. Intervenors reason that, if the use is an
17 expansion or alteration of a public use airport that is deemed consistent with
18 Goals 3, 4, 11, and 14, then no exception from those goals can be required for
19 such expansion or alteration both for the expansion area (here, the subject
20 property) and the existing airport that is being expanded to include the expansion
21 area. Intervenors argue:

22 "The whole point of OAR 660-012-0065(3)(n) is that a qualifying
23 expansion or alteration of a public use airport is deemed consistent
24 with the specified goals without the necessity for a Goal 3, 4, 11, or

1 14 exception. Petitioner cannot repackage the very same airport
2 expansion as an ‘intensification’ of existing exception lands and
3 thereby force the County back into the exceptions process that OAR
4 660-012-0065(3)(n) says is not required.” Intervenors-Respondents’
5 Brief to Schaefer 47.

6 We agree with intervenors’ proffered interpretation of OAR 660-012-
7 0065(3)(n) and OAR 660-004-0018. LCDC adopted OAR 660-012-0065(3)(n)
8 in 1995. *Schaefer*, LUBA No 2020-108 (Oct 12, 2021) (slip op at 13); LCDC 3-
9 1995, f. & cert. ef. 3-31-95. At that time, OAR 660-004-0018 was effective.
10 LCDC 9-1983, f. & ef. 12-30-83; LCDC 1-1986, f. & ef. 3-20-86. Nothing in
11 OAR 660-012-0065(3)(n) suggests that in exempting airport expansions from the
12 exception process for Goals 3, 11, and 14, LCDC intended to maintain as
13 applicable to such expansions the intensification rules at OAR 660-004-0018
14 with respect to existing airport area exceptions to Goals 3, 11, or 14. We agree
15 with intervenors that petitioners’ assertion that OAR 660-004-0018 governs
16 intensification of existing airport uses resulting from expansion of a public use
17 airport would render OAR 660-012-0065(3)(n) meaningless. We do not see how
18 both of those rules could be applied to the situation presented in this case.²⁰ The
19 county did not err in failing to apply OAR 660-004-0018.

20 These assignments of error are denied.

²⁰ This interpretation begs a question of whether and why the 2004 shared sewer facility required Goals 11 and 14 exceptions, as that development would seem to qualify as an alteration of a public use airport under OAR 660-012-0065(3)(n). We observe that the findings supporting the 2004 reasons exceptions do not refer to OAR 660-012-0065(3)(n). Record 13,266-74.

1 **UNACKNOWLEDGED PLAN AMENDMENT (ORS 197.175)**

2 **City of Aurora Fifth Assignment of Error**

3 The City of Aurora (Aurora) argues that the conditional use approval
4 misconstrues ORS 197.175(2)(e) because it erroneously relies on the
5 unacknowledged plan amendment expanding the airport boundary to conclude
6 that Goals 3, 11, and 14 do not apply, and lacks the findings required by ORS
7 197.625(4). A county is required to “[m]ake land use decisions and limited land
8 use decisions subject to an unacknowledged amendment to a comprehensive plan
9 or land use regulation in compliance with those land use goals applicable to the
10 amendment.” ORS 197.175(2)(e). A PAPA that is appealed to LUBA is deemed
11 to be acknowledged when the local government has complied with the PAPA
12 notice requirements and LUBA affirms the local decision or, if the LUBA
13 decision is appealed, an appellate court affirms the decision. ORS 197.625(1).

14 “Approval of a land use decision, expedited land division or limited
15 land use decision that is subject to an effective but unacknowledged
16 provision of a comprehensive plan or a land use regulation *must*
17 *include findings of compliance with* land use statutes, *statewide land*
18 *use planning goals* and administrative rules of [LCDC]
19 implementing the statutes or goals *that apply to the decision and that*
20 *the unacknowledged provision implements.*” ORS 197.625(4)
21 (emphases added).

22 Aurora argues that the comprehensive plan amendment expanding the
23 airport boundary to include the subject property is not acknowledged because it
24 was appealed. Aurora asserts that the county incorrectly assumed the
25 unacknowledged plan amendment was in effect, and thereby failed to adopt any

1 findings to demonstrate the approved conditional uses comply with Goals 3, 11,
2 12, and 14. Therefore, under ORS 197.175(2)(e) and ORS 197.625(4), the CUP
3 approval lacks adequate findings of compliance with those goals.

4 Intervenor respond, initially, that Aurora waived this issue by failing to
5 raise it below. Aurora replies that, because the decision listed the “Statewide
6 Planning Goals” as relevant criteria, the county had fair notice that ORS
7 197.175(2)(e) required goal compliance findings. Record 7. Aurora further
8 asserts that preservation is not required for inadequate findings under ORS
9 197.625(4), because petitioner would not have had an opportunity to challenge
10 the decision findings until after the decision issued. The only requirement is to
11 show that the issue of compliance with the applicable criteria was raised, and
12 multiple parties raised issues of compliance with Goals 3, 11, 12, and 14. *Bruce*
13 *Packing Company v. City of Silverton*, 45 Or LUBA 334, 352 (2003) *aff’d*, 191
14 Or App 305, 82 P3d 653 (2003) (citing *Lucier v. City of Medford*, 26 Or LUBA
15 213, 216 (1993) (“a petitioner is not required to anticipate the actual findings a
16 local government ultimately adopts[.]”)).

17 Intervenor respond, and we agree, that Aurora could have and did not
18 argue to the county that, because the applications were consolidated, ORS
19 197.175(2)(e) and ORS 197.625(4) required the county to make goal compliance
20 findings on otherwise applicable goals, unless and until acknowledgment of the
21 PAPA expanding the airport boundary. In other words, unless and until LUBA
22 and the Court of Appeals affirm the PAPA expanding the airport boundary, any

1 CUP required goal compliance findings. We agree this issue is waived. ORS
2 197.797.

3 Moreover, this assignment of error is, at best, a contingent assignment of
4 error. In this decision, we reject all challenges to the comprehensive plan
5 amendment expanding the airport boundary and affirm that portion of the
6 decision. Thus, for purposes of this appeal, that PAPA decision is acknowledged
7 upon our issuing this opinion. If, in the likely event that our decision is appealed,
8 and the Court of Appeals does not affirm our disposition of the PAPA portion of
9 the decision, then OAR 660-012-0065(3)(n) will no longer shield the conditional
10 uses from application of Goals 3, 11, and 14, and the CUP approval that is
11 dependent on the PAPA approval will no longer be valid. So, the current appellate
12 challenges to the PAPA decision might render ORS 197.175(2)(e) and ORS
13 197.625(4) inapplicable if the PAPA is affirmed, or the resolution of the current
14 appeals might render the CUP fatally flawed. In either event, we see no purpose
15 that can be served by remanding in this decision for further CUP goal compliance
16 findings under ORS 197.175(2)(e) and ORS 197.625(4).

17 This assignment of error is denied.

18 **HARMONY WITH THE EFU ZONE (MCC 17.119.070(B))**

19 **Rhoden-Feely Fourth Assignment of Error**

20 Rhoden-Feely argues that the county misconstrued conditional use
21 criterion MCC 17.119.070(B) because the airport boundary expansion and
22 aviation, commercial, and industrial uses are not in harmony with the purpose

1 and intent of the EFU zone. MCC 17.119.070(B) requires a conditional use to
2 “be in harmony with the purpose and intent of the zone.” MCC 17.119.010
3 defines a conditional use as follows:

4 “A conditional use is an activity which is basically similar to other
5 uses permitted in the zone, but due to some of the characteristics of
6 the conditional use, which are not entirely compatible with the zone,
7 such use could not otherwise be permitted in the zone.”

8 The county determined that airport uses are “other transportation
9 facilities,” which are conditional uses in the EFU zone under
10 MCC.17.136.050(J)(4), which permits as conditional uses in the EFU zone:

11 “Roads, highways, and other transportation facilities and
12 improvements not otherwise allowed in this chapter, when an
13 exception to statewide Goal 3 and any other applicable statewide
14 planning goal with which the facility or improvement does not
15 comply, and subject to OAR Chapter 660, Division 12.”

16 The express purposes of the EFU zone are as follows:

17 “The purpose of the EFU (exclusive farm use) zone is to provide
18 areas for continued practice of commercial agriculture. It is intended
19 to be applied in those areas composed of tracts that are
20 predominantly high-value farm soils as defined in OAR 660-033-
21 0020(8). These areas are generally well suited for large-scale
22 farming. It is also applied to small inclusions of tracts composed
23 predominantly of non-high-value farm soils to avoid potential
24 conflicts between commercial farming activities and the wider range
25 of non-farm uses otherwise allowed on non-high-value farmland.
26 Moreover, to provide the needed protection within cohesive areas it
27 is sometimes necessary to include incidental land unsuitable for
28 farming and some pre-existing residential acreage.

29 “To encourage large-scale farm operations the EFU zone
30 consolidates contiguous lands in the same ownership when required

1 by a land use decision. It is not the intent in the EFU zone to create,
2 through land divisions, small-scale farms. There are sufficient small
3 parcels in the zone to accommodate those small-scale farm
4 operations that require high-value farm soils. Subdivisions and
5 planned developments are not consistent with the purpose of this
6 zone and are prohibited.

7 “To minimize impacts from potentially conflicting uses it is
8 necessary to apply to non-farm uses the criteria and standards in
9 OAR 660-033-0130 and in some cases more restrictive criteria are
10 applied to ensure that adverse impacts are not created.

11 “The EFU zone is also intended to allow other uses that are
12 compatible with agricultural activities, to protect forests, scenic
13 resources and fish and wildlife habitat, and to maintain and improve
14 the quality of air, water and land resources of the county.

15 “The EFU zone is intended to be a farm zone consistent with OAR
16 660, Division 033 and ORS 215.283.” MCC 17.136.010.

17 Petitioners argued to the county that MCC 17.119.070(B) is violated
18 because commercial, industrial, and aviation uses are not in harmony with the
19 purposes of the EFU zone. The county made lengthy findings interpreting and
20 applying MCC 17.119.070(B) and found that the proposed use is harmonious
21 with the purpose and intent of the EFU zone. Record 37-39.

22 The county found that the proposal is subject to and satisfies the farm
23 impacts test and does not impose any significant adverse impacts on nearby
24 agricultural operations. The county found that transportation impacts on traveling
25 farm vehicles will be minimal. The county observed that MCC 17.136.010
26 recognizes a broad range of nonagricultural uses allowed on agricultural land that
27 are deemed to be consistent with Goal 3 and harmonious with zones that

1 implement Goal 3, which the county reasoned includes airport expansions that
2 are deemed consistent with Goal 3, as authorized by ORS 215.283(3)(b) and
3 OAR 660-12-0065(3)(n).

4 The county also found that the proposal is in harmony with the purpose
5 and intent of the EFU zone because the subject property is in an area that the
6 1976 Aurora Airport Master Plan designates as acceptable for airport related
7 development under private ownership. The county found that 1976 Aurora
8 Airport Master Plan is a part of the MCCP. The county interpreted the 1976
9 master plan as contemplating that the subject property will be a part of the
10 Airport's land use boundary, developed under private ownership with airport
11 related uses. The county found that

12 "the EFU zone that is applied to the subject property is necessarily
13 burdened and informed by the above unique airport related land use
14 regulatory program that is established, imposed on the subject
15 property and contemplated by the [MCCP] inclusion of the 1976
16 Aurora Airport Master Plan as a part of the County's Comprehensive
17 Plan. Accordingly, the Board finds that in addition to the reasons
18 stated in other findings under this provision, that the proposal is in
19 harmony with the purpose and intent of the EFU zone because the
20 EFU zone applied to this property is applied to the subject property
21 with the understanding that the airport related designations from the
22 1976 Master Plan establish the ultimate contemplated uses of the
23 subject property." Record 39.

24 Intervenors respond, and we agree, petitioner does not challenge all of the
25 findings that interpret MCC 17.119.070(B) and conclude that that discretionary
26 conditional use standard is satisfied. We must defer to the county's interpretation

1 of its own plan or regulation if that interpretation is not “inconsistent with the
2 express language of the comprehensive plan or land use regulation” or
3 inconsistent with the underlying purposes and policies of the plan or regulation.
4 ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776
5 (2010) (applying ORS 197.829(1)). Rhoden-Feely has not demonstrated that the
6 county’s interpretation and application of MCC 17.119.070(B) is implausible.

7 This assignment of error is denied.

8 **CUP EFFECTIVE DATE (MCC 17.119.180 and 17.119.190)**

9 **City of Wilsonville Third Assignment of Error**

10 Intervenor-petitioner City of Wilsonville (Wilsonville) argues that the
11 county misconstrued MCC 17.119.180 and 17.119.190 to delay the effective date
12 of the CUP decision. MCC 17.119.180 governs the effective date of conditional
13 uses and provides:

14 “Conditional uses granted by the director, planning commission or
15 hearings officer under the provisions of this title shall not be
16 effective until 15 days after the mailing of the notice of decision;
17 provided, however, in case call up of the proceedings has been
18 requested by the board or an appeal has been taken as herein
19 provided, the conditional use shall not be effective until the planning
20 commission, hearings officer or board has acted on the call up or
21 appeal.”

22 MCC 17.119.190 provides that a conditional use right must be exercised to be
23 effective:

24 “Conditional uses granted under this title shall be effective only
25 when the exercise of the right granted thereunder *shall be*
26 *commenced within two years from the effective date of that*

1 *conditional use, unless a longer period be specified or thereafter*
2 *allowed by the director, planning commission, hearings officer, or*
3 *board. In case the right has not been exercised, or extension*
4 *obtained, the conditional use shall be void.* A written request for an
5 extension of time filed with the director prior to the expiration of the
6 conditional use shall extend the running of the conditional use
7 period until the director, planning commission, hearings officer or
8 board has acted on the request.” (Emphases added.)²¹

9 TLM requested and the county approved a delayed effective date for the
10 conditional use approval so that the effective date for the commencement of the
11 two-year exercise period would be date that the last required decision becomes
12 final, following exhaustion of all administrative and/or judicial appeals. Those
13 decisions include: (1) the challenged PAPA and CUP; (2) an ODAV decision
14 approving development of the site, and (3) a DEQ decision approving the noise
15 plan. The county recognized the likely event of continuing opposition and lengthy
16 appeals processes that could result in the expiration of the CUP before TLM is
17 able to use it. The county interpreted MCC 17.119.190 to authorize a delayed
18 effective date and longer approval period.

19 Wilsonville argues that the county only has the authority under MCC
20 17.119.190 to extend the two-year period from the effective date, but not to delay
21 the effective date. We agree. MCC 17.119.190 allows later extensions of the time

²¹ While no party mentions it to us, we observe that the two-year limitation in MCC 17.119.190 appears to implement OAR 660-033-0140, which prescribes a two-year development initiation period for a discretionary decision approving a proposed development on agricultural or forest land outside an urban growth boundary. No party raises that rule in this appeal, and we do not address it further.

1 period that an applicant may implement the approved land use, but nothing in
2 either regulation permits delaying the effective date to a date other than that
3 described in MCC 17.119.180. While we agree with the county that lengthy
4 appeal processes are likely to prevent TLM from developing the uses allowed by
5 the CUP within the two-year expiration period, we also agree with Wilsonville
6 that the county only has the authority under MCC 17.119.190 to extend the two-
7 year period from the effective date, but not to delay the effective date. The
8 extension language in MCC 17.119.190 refers to extending the right to exercise
9 the conditional use, not to extend the effective date from which that right
10 commenced. The effective date is established by MCC 17.119.180, not MCC
11 17.119.190.

12 The county responds that it plausibly interpreted the language “unless a
13 longer period be specified or thereafter allowed by the * * * board” in MCC
14 17.119.190, to allow the county to approve delaying the effective date to an
15 indeterminate date. However, that interpretation does not account for MCC
16 17.119.180, which establishes the effective date.

17 MCC 17.119.190 states that conditional uses are effective “only when the
18 *exercise of the right* granted thereunder *shall be commenced within two years*
19 *from the effective date* of that conditional use, unless a longer period be specified
20 or thereafter allowed by the * * * board.” The “longer period” refers to an
21 extended period after the effective date in which to “exercise the right” to the
22 conditional use, not an indefinitely delayed effective date. The county’s

1 interpretation is inconsistent with the plain text of MCC 17.119.180 and MCC
2 17.119.190 and thus, not entitled to deference under ORS 197.829(1) or *Siporen*,
3 349 Or 247. Remand is required for the county to modify the effective date of the
4 CUP to the date that the board of county commissioners acted on the local appeal.

5 This assignment of error is sustained.

6 The county's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2025-085/086/087 2026-001/002 on July 29, 2026, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 29th day of July, 2026.



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