

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

3  
4                   JOSEPH SCHAEFER,  
5                   *Petitioner,*

6  
7                   vs.

8  
9                   MARION COUNTY,  
10                  *Respondent,*

11  
12                  and

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

16  
17                  LUBA No. 2020-108

18  
19                  FINAL OPINION  
20                  AND ORDER

21  
22                  Appeal on remand from the Court of Appeals.

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24                  Joseph Schaefer represented themselves.

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26                  Scott A. Norris represented respondent.

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28                  Alan M. Sorem represented intervenor-respondent.

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

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33                  RUDD, Board Member, did not participate in the decision.

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35                  REVERSED

03/14/2023

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**

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

**FACTS**

This matter is on remand from the Court of Appeals for a second time. The underlying facts are set out in our prior decisions and we do not reiterate them here. *Schaefer v. Marion County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-108, July 7, 2022), *rev'd and rem'd*, 323 Or App 390, 523 P3d 1142 (2022) (*TLM II*); *Schaefer v. Marion County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-108, Oct 12, 2021), *rev'd and rem'd*, 318 Or App 617, 620, 509 P3d 718 (2022) (*TLM I*).

**FIRST ASSIGNMENT OF ERROR**

In the first assignment of error, petitioner argues that OAR 660-012-0060(5) precludes the county from relying on OAR 660-004-0022 to approve an exception to Goal 3. OAR 660-012-0060(5) provides: “The presence of a transportation facility or improvement shall not be a basis for an exception to

1 allow residential, commercial, institutional, or industrial development on rural  
2 lands under this division or OAR 660-004-0022 and 660-004-0028.” There is no  
3 dispute that the Airport is a “transportation facility.” *See former* OAR 660-012-  
4 0005(30) (Aug 15, 2014), *renumbered as* OAR 660-012-0005(46) (Aug 17,  
5 2022) (“‘Transportation Facilities’ means any physical facility that moves or  
6 assist[s] in the movement of people or goods including facilities identified in  
7 OAR 660-012-0020 but excluding electricity, sewage and water systems.”).

8 In *TLM II*, we rejected petitioner’s argument. Petitioner sought judicial  
9 review and argued that OAR 660-012-0060(5) prohibits a Goal 3 exception based  
10 on access to the airport because the airport is a transportation facility and the  
11 presence of the airport was the sole basis for the county’s determination that an  
12 exception to Goal 3 was justified under OAR 660-004-0022 for the proposed  
13 commercial and industrial development. The court agreed with petitioner. The  
14 court concluded that proximity to the Airport underpinned the county’s reasoning  
15 allowing the exception for airport-related uses on the subject property. *See*  
16 *Schaefer*, 323 Or App at 400 (“The county’s reasoning does not depend on any  
17 attribute of either the applied-for development or its proposed location that is not  
18 directly tied to the airport. Stated differently, when the airport is removed from  
19 the calculus, the county’s reasoning collapses entirely.”).

20 In a footnote, the court stated:

21 “[T]he county found that the applied-for commercial uses were  
22 justified under OAR 660-004-0022(1)(b), but it also found that the  
23 applied-for industrial uses were justified under OAR 660-004-

1 0022(3)(a) and (c). Although petitioner’s first assignment of error  
2 before LUBA applied to both parts of the county’s analysis, LUBA  
3 did not expressly address the latter group of uses. Because we are  
4 reversing LUBA’s order as to petitioner’s first assignment of error  
5 before LUBA, on remand, LUBA will have the opportunity to  
6 address both parts of the county’s reasoning.” *Schaefer*, 323 Or App  
7 at 398 n 5.

8 OAR 660-004-0022(3)(a) provides that a reasons exception may be  
9 supported when the county finds that “[t]he use is significantly dependent upon  
10 a unique resource located on agricultural or forest land. Examples of such  
11 resources and resource sites include geothermal wells, mineral or aggregate  
12 deposits, water reservoirs, natural features, or river or ocean ports.” OAR 660-  
13 004-0022(3)(c) provides that a reasons exception may be supported when the  
14 county finds that “[t]he use would have a significant comparative advantage due  
15 to its location (e.g., near existing industrial activity, an energy facility, or  
16 products available from other rural activities), which would benefit the county  
17 economy and cause only minimal loss of productive resource lands.”

18 Given the court’s interrelated conclusions that (1) the county did not  
19 identify any reason for the exception that is independent of the airport and (2)  
20 OAR 660-012-0060(5) prohibits a Goal 3 exception based on access to the airport  
21 because the airport is a transportation facility, we do not perceive how OAR 660-  
22 004-0022(3)(a) and (c) could support the Goal 3 exception based on the record  
23 and the county’s reasoning in this appeal.

24 The first assignment of error is sustained for the reasons explained in the  
25 court’s decision.

1        The county's decision is reversed.