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FILED: February 16, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY and CHERYL MCCAFFREY,
Petitioners,

and

LEE DOES, AMY DOES, GRACE SCHAAD, and RANEE SOLOMONSSON,
Petitioners below,

v.

CITY OF NEWBERG,
Respondent.

Land Use Board of Appeals
2010015

A146619

Argued and submitted on November 23, 2010.

James S. Coon argued the cause for petitioners. With him on the brief was Swanson Thomas & Coon.

Terrence D. Mahr, City Attorney, City of Newberg, argued the cause for respondent. With him on the brief was Corrine C. Sherton.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Rosenblum, Judge.

SCHUMAN, P. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[X] Costs allowed, payable by Petitioners.
[ ] Costs allowed, to abide the outcome on remand, payable by

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1 SCHUMAN, P. J.

2 Petitioners seek review of a Land Use Board of Appeals (LUBA) decision
3 regarding the City of Newberg's Economic Opportunities Analysis (EOA), a part of its
4 comprehensive plan. Newberg originally adopted an EOA in January 2006. In February
5 2010, the city council passed, over petitioners' opposition, an ordinance adopting a
6 revised and updated EOA. Petitioners appealed to LUBA, advancing six assignments of
7 error. LUBA rejected some of those assignments but sustained others, resulting in a
8 remand of the ordinance. Petitioners now seek review in this court of the assignments
9 that LUBA rejected. We affirm, and write to address only one of those assignments.

10 One function of an EOA is to allow local governments to "compare the
11 demand for land for industrial and other employment uses to the existing supply of such
12 land," OAR 660-009-0015, in order to provide a reasoned basis for planning, OAR 660-
13 009-0000. To accomplish that comparison, a city's EOA must (1) identify types of
14 industrial or other "employment uses" that, based on trends, are projected to locate or
15 expand in the city, and (2) specify the number of sites that are needed to accommodate
16 such uses. OAR 660-009-0015. The dispute in this case involves the parties' differing
17 interpretations of the rule for classifying sites. That rule provides that the EOA "must
18 identify the number of sites by type reasonably expected to be needed to accommodate
19 the expected employment growth based on the *site characteristics typical of expected*
20 *uses*." OAR 660-009-0015(2) (emphasis added). Thus, for example, if a city projects
21 that 10 warehouses will be needed to accommodate projected job growth, the EOA will

1 specify that it projects the need for 10 sites that have "site characteristics" that are
2 "typical of" warehouses (for example, large size, access to major highways, etc.).

3 Complicating matters, however, OAR 660-009-0005(11) provides that "site
4 characteristics"

> 5 "means the attributes of a site *necessary* for a particular industrial or other
> 6 employment use to operate. Site characteristics include, but are not limited
> 7 to, a minimum acreage or site configuration including shape and
> 8 topography, visibility, specific types or levels of public facilities, services
> 9 or energy infrastructure, or proximity to a particular transportation or
> 10 freight facility such as rail, marine ports and airports, multimodal freight or
> 11 transshipment facilities, and major transportation routes."

12 (Emphasis added.) Thus, while OAR 660-009-0015(2) refers to site characteristics that
13 are "typical of" certain uses, OAR 660-009-0005(11) provides that a site characteristic is
14 a characteristic that is *necessary* for such uses. Therein lies the dispute. As petitioner
15 explains:

> 16 "'Site characteristics' are important because they define what existing
> 17 urban land can be used to accommodate economic growth. If a site
> 18 characteristic such as minimum acreage is defined broadly--for example if
> 19 one assumes that an industry needs 50-acre contiguous parcels--existing
> 20 urban land is less likely to suffice, and the EOA will suggest expanding the
> 21 Urban Growth Boundary to urbanize more farmland. If, on the other hand,
> 22 site characteristics are defined narrowly, to include only what an industry
> 23 actually needs in order to operate, existing urban lands are more likely to
> 24 accommodate that development."

25 To illustrate, presume that a warehouse *absolutely cannot exist* unless it is on a site that is
26 at least two acres, yet, *typically*, warehouses not only need two acres, but they also need
27 level ground and access to major highways. It is more likely that qualifying sites are
28 available within the Urban Growth Boundary if the only criterion for such sites is that

they contain two acres, than it is if the criteria also include level ground and access to major highways.

Petitioners therefore focus on the word "necessary." They argued before the Newberg city council, and then to LUBA, that, under the ordinary definition of the word "necessary," a site characteristic must be something "that cannot be done without" or that "must be had" in order for an industrial or other employment use to operate. *See Webster's Third New Int'l Dictionary* 1511 (unabridged ed 2002). The city, however, argued that it could adopt as site characteristics those attributes that would give the city a competitive advantage with respect to attracting industrial and employment uses.

LUBA rejected both petitioners' and the city's respective interpretations of the term "site characteristics." LUBA explained:

> "Applying [the ordinary methodology for interpreting administrative rules] here, the text of OAR 660-009-0005(11) itself suggests [the Land Conservation and Development Commission (LCDC)] did not intend that a site characteristic must be an attribute that cannot be done without or an attribute that must be had. OAR 660-009-0005(11) includes a non-exclusive list of examples. Given a properly motivated developer, it is hard to see how a specific site "shape" or "visibility" could ever be an attribute that could not be done without. Perhaps more importantly, both petitioners and the city ignore the language in OAR 660-009-0015(2), quoted above, which is the rule that actually requires the city to identify sites based on site characteristics. OAR 660-009-0015(2) directs that identification of needed sites is to be 'based on the site characteristics *typical* of expected uses.' (Emphasis added.) The choice of the word 'typical' in OAR 660-009-0015(2) strongly suggests that LCDC intended the word 'necessary' in OAR 660-009-0005(11) to mean something other than 'cannot be done without.' While 'typical' attributes would presumably include those attributes that are absolutely necessary to construct and operate a business, 'typical' attributes would also likely include those attributes that while not 'necessary,' in the dictionary sense of the word, are nevertheless typically required for a business to operate successfully."

LUBA continued:

> "If the words 'attributes of a site necessary for a particular industrial or other employment use to operate,' in the definition of 'site characteristics' are viewed in context with the language of 660-009-0015(2), we believe that site characteristics are properly viewed as attributes that are *(1) typical of the industrial or employment use and (2) have some meaningful connection with the operation of the industrial or employment use. If the record demonstrates that an attribute is both typical and has some meaningful connection with the operational requirements of the industrial or employment use, we believe OAR 660-009-0005(11) and 660-009-0015(2) would permit the city to list it as a site characteristic.* OAR 660-009-0005(11) and 660-009-0015(2) do not require that the city go further, as petitioners argue, and demonstrate that the site characteristic is essential, in the sense it would not be possible to construct or operate the industrial or employment use without the attribute."

(Emphasis added.)

LUBA then considered the revised EOA in light of that understanding of the administrative rules and determined that the "short findings and the material in the record cited by the city are simply not sufficient to establish that the [challenged] siting standards * * * are 'typical' of the industries the city seeks to attract. Additional findings and perhaps additional evidence will be required to make that demonstration."

Petitioners are not satisfied with LUBA's remand to the city. In their petition for judicial review, they contend that LUBA's test--that is, whether the site characteristic is "typical" and has "some meaningful connection" to the use--effectively "reads the 'necessity' requirement out of the rule * * *." They further contend that there is no evidence in the record that the challenged site characteristics meet that more stringent standard ("cannot be done without"), and they urge us to send the case back to LUBA with instructions to reverse the city's decision.

1 We review LUBA's decision--more specifically, its construction of the
2 administrative rule at issue, OAR 660-009-0005(11)--to determine whether the decision
3 is "unlawful in substance." ORS 197.850(9)(a); *Stewart v. City of Salem*, 231 Or App
4 356, 358, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010). Our objective is to determine
5 the intent of LCDC, the body that promulgated the rule. *Wetherell v. Douglas County*,
6 235 Or App 246, 256, 230 P3d 976, *rev den*, 349 Or 57 (2010) (quoting *State v.*
7 *Papineau*, 228 Or App 308, 311, 208 P3d 500, *rev den*, 346 Or 590 (2009)). In making
8 that determination, we use the same methodology used to interpret a statute, starting with
9 an examination of the text of the rule in context. *Wetherell*, 235 Or App at 256-57.
10 Here, as set out above, the parties' dispute centers on the meaning of the
11 term "necessary" as it appears in the phrase "attributes of a site necessary for a particular
12 industrial or other employment use to operate * * *." OAR 660-009-0005(11).
13 Petitioners urge us to use the *Webster's* dictionary definition, whereas the city defends
14 LUBA's two-pronged "typical plus some meaningful connection" test.
15 Although "necessary" is commonly used to denote something
16 "indispensable," the word has long proved more elastic in legal parlance. Nearly a
17 century ago, in *State v. Young*, 74 Or 399, 406, 145 P 647 (1915), the Oregon Supreme
18 Court observed:

19 "The word 'necessary' must be construed in the connection in which
20 it is used. It is a word susceptible of various meanings. It may import
21 absolute physical necessity, or that which is only convenient or useful or
22 essential: 5 Words and Phrases, p. 4705. The courts have many times
23 construed the word 'necessary,' and it has almost universally been held to

1 mean needful or convenient; especially is this the case where the word is
2 used in conjunction with other and stronger terms."

3 Little has changed since *Young* to make the term "necessary," so far as it
4 appears in statutes or administrative rules, any less ambiguous when read in isolation. As
5 *Black's Law Dictionary* 1029 (6th ed 1990) explains,

6 "This word must be considered in the connection in which it is used, as it is
7 a word susceptible of various meanings. It may import absolute physical
8 necessity or inevitability, or it may import that which is only convenient,
9 useful, appropriate, suitable, proper, or conducive to the end sought. It is
10 an adjective expressing degrees, and may express mere convenience or that
11 which is indispensable or an absolute physical necessity. *It may mean*
12 *something which in the accomplishment of a given object cannot be*
13 *dispensed with, or it may mean something reasonably useful and proper,*
14 *and of greater or lesser benefit or convenience, and its force and meaning*
15 *must be determined with relation to the particular object sought.*"

16 (Emphasis added.)[1] *See, e.g., 1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384,
17 395, 752 P2d 271 (1988) (noting that "historic battles were fought over the meaning of
18 'necessary' in the United States Constitution") (citing *McCulloch v. Maryland*, 17 US
19 316, 4 Wheat 316 (1819) (national bank could be considered "necessary" within the
20 meaning of "necessary and proper" clause of Article I, section 8, of the United States
21 Constitution)); *State ex rel Dept. of Rev. v. Capital Shelters*, 295 Or 561, 563, 668 P2d
22 1214 (1983) ("The term 'necessary,' as contained by the statute [ORS 305.190], means
23 relevant to the purposes of a lawful investigation and the object of a demonstrable,

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[1] Indeed, later editions of *Black's Law Dictionary* have abandoned any effort to offer a singular definition of the word "necessary," instead defining it only with respect to particular terms or phrases in which it is used. *See, e.g., Black's Law Dictionary* 1130 (9th ed 2009) (separately defining terms such as "necessary and proper," "necessary damages," "necessary deposit," "necessary diligence," "necessary inference," "necessary party," and "necessary repair").

1 practical need."); *Moore Mill & Lbr. Co. v. Foster*, 216 Or 204, 235, 336 P2d 39 (1959)
2 ("It is our belief that the word 'necessary,' as used in Art I, § 18, means 'reasonably
3 necessary' as that term is employed in ORS 376.510. We further believe that the meaning
4 of the term 'reasonably necessary' is indicated with sufficient clarity by its context."); *In*
5 *re Feehely's Estate*, 182 Or 246, 256, 187 P2d 156 (1947) ("Litigation is necessary, in the
6 sense of the [statutory phrase "necessary litigation"], if it is reasonable, useful and
7 proper."); *Oregon Shores v. Oregon Fish and Wildlife*, 62 Or App 481, 490-91, 662 P2d
8 356, *rev den*, 295 Or 259 (1983) (holding that the term "necessary" expresses "non-
9 completed legislation" that could be interpreted as "reasonably necessary" rather than
10 "indispensable"); *cf. J. R. Simplot Co. v. Dept. of Agriculture*, 340 Or 188, 197-98, 131
11 P3d 162 (2006) (the phrase "reasonably necessary to cover the cost of inspection and
12 administration" is an "'inexact term' that expresses a complete legislative policy").
13 In other words, context is critical in determining whether the word
14 "necessary" means "indispensable" (as petitioners contend) or something less stringent,
15 such as "reasonably necessary" or "useful" or "convenient." Thus, we turn to the relevant
16 context in which the definition of "site characteristics," including the word "necessary,"
17 appears.
18 The definition of "site characteristics" at issue is part of Division 9 of
19 LCDC's administrative rules. "The intent of [Division 9] is to link planning for an
20 adequate land supply to infrastructure planning, community involvement and
21 coordination among local governments and the state." OAR 660-009-0000. "The

1 purpose of this division is to implement Goal 9, Economy of the State (OAR 660-015-
2 0000(9)), and ORS 197.712(2)(a) to (d)." *Id.*

3 Those cited provisions of the implementing statute, ORS 197.712(2), state:

4 "By the adoption of new goals or rules, or the application,
5 interpretation or amendment of existing goals or rules, the Land
6 Conservation and Development Commission shall implement all of the
7 following:

8 "(a) Comprehensive plans shall include an analysis of the
9 community's economic patterns, potentialities, strengths and deficiencies as
10 they relate to state and national trends.

11 "(b) Comprehensive plans shall contain policies concerning the
12 economic development opportunities in the community.

13 "(c) *Comprehensive plans and land use regulations shall provide*
14 *for at least an adequate supply of sites of suitable sizes, types, locations*
15 *and service levels for industrial and commercial uses consistent with plan*
16 *policies.*

17 "(d) Comprehensive plans and land use regulations shall provide
18 for compatible uses on or near sites zoned for specific industrial and
19 commercial uses."

20 (Emphasis added.)

21 In general terms, the identification of "site characteristics" is one of the
22 steps in determining whether the local government's comprehensive plan includes land
23 "suitable" to meet the number of "sites needed to accommodate industrial and other
24 employment uses to implement plan policies." OAR 660-009-0025(1) ("The plan must
25 identify the approximate number, acreage and site characteristics of sites needed to
26 accommodate industrial and other employment uses * * *."); OAR 660-009-0025(2)
27 ("Plans must designate serviceable land suitable to meet the site needs identified in

1 section (1) of this rule."). For purposes of Division 9, LCDC defines "suitable" to mean
2 "serviceable land designated for industrial or other employment use that provides, or can
3 be expected to provide the appropriate site characteristics for the proposed use." OAR
4 660-009-0005(12).

5 In that statutory and regulatory context, we agree with LUBA that "site
6 characteristics" need not be "indispensable" to a particular use in order to be "necessary
7 for a particular industrial or other employment use to operate." The intent of Division 9
8 is to ensure that there is an "adequate supply of land for economic development and
9 employment growth in Oregon," OAR 660-009-0000, which is vital to the health,
10 welfare, and prosperity of the state. *See* ORS 197.712(1) (finding and declaring that "the
11 provision of adequate opportunities for a variety of economic activities throughout the
12 state is vital to the health, welfare and prosperity of all the people of the state"). That
13 overriding intent to allow and plan for anticipated economic growth--in part, through the
14 identification of "site characteristics" that make the land "suitable" to meet the needs of
15 anticipated growth--suggests something other than petitioners' strict "indispensability"
16 test that would take into consideration only those "site characteristics" without which
17 particular industry and employment uses could not operate. Rather, the planning scheme
18 (based on projections and economic trends) suggests, as LUBA adopted, a more
19 pragmatic approach toward accommodating economic growth: That "necessary" site
20 characteristics are those attributes that are reasonably necessary to the successful
21 operation of particular industrial or employment uses, in the sense that they bear some

1 important relationship to that operation. In our view, LUBA's formulation of the relevant
2 inquiry adequately captures the concept of reasonable necessity that is embodied in the
3 rule. Accordingly, we conclude that LUBA did not err in rejecting petitioners' proffered
4 dictionary definition of the term "necessary," given the context in which that term
5 appears.[2]

6 As noted above, LUBA articulated the relevant "site characteristic" test as
7 involving two prongs: (1) that the attribute be "typical of the industrial or employment
8 use" and (2) that it have "some meaningful connection with the operation of the industrial
9 or employment use." The first of those prongs, that the attributes be "typical," appears
10 expressly in OAR 660-009-0015(2), which refers to "site characteristics typical of
11 expected uses." Petitioners do not challenge that aspect of LUBA's remand, and we do
12 not discuss it further.

13 Affirmed.

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[2] Indeed, as LUBA pointed out, the second sentence of the definition of "site characteristics" includes "shape" and "visibility," OAR 660-009-0005(11), attributes that, although important to industrial and employment uses, would not normally be considered "indispensable"--further contextual support that cuts against petitioners' dictionary definition of the term "necessary."