

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a
4 comprehensive plan map amendment and zone change.

5 **MOTION TO INTERVENE**

6 Robert Leonhardt (intervenor), the applicant below,
7 moves to intervene on the side of respondent. There is no
8 objection to the motion, and it is allowed.

9 **FACTS**

10 Intervenor applied to the county for approval of a
11 comprehensive plan map amendment from Forest Resource to
12 Residential, and a zone change from Woodlot Resource (WR) to
13 Rural Residential - 5 Acre Minimum (RR-5) for a 40-acre
14 parcel. The parcel is located east of the I-5 freeway, and
15 is separated from the freeway by a narrow strip of WR-zoned
16 property. The properties east of the subject parcel and
17 west of the freeway are zoned RR-5. The property
18 immediately north is zoned WR. Adjacent to the southeastern
19 border is an approximately 3-acre parcel zoned WR. The
20 remaining property directly to the south is zoned Rural
21 Commercial (RC). The property south of these adjacent
22 parcels is zoned RR-5.

23 Petitioner appeals the county board of commissioner's
24 (board) approval of the application.

25 **FIRST ASSIGNMENT OF ERROR**

26 Petitioner challenges the county's finding that there

1 is an adequate supply of domestic water available to serve
2 the property on the basis that the adequacy of the supply is
3 based upon the availability of water on surrounding
4 properties, and not on the subject property. Petitioner
5 contends the county's findings do not establish compliance
6 with the county's comprehensive plan (plan) Goal 11,
7 Policies 4(a) and 6(a); and the county Rural Land
8 Development Code (RLDC) 47.030(B)(3) and (6).¹

¹Plan Goal 11, Policy 4(a) states:

"In order to amend the Comprehensive Plan map, it will be necessary to demonstrate compliance with applicable Statewide Planning Goals and conformance with the text of the Josephine County Comprehensive Plan. At a minimum, such changes should demonstrate:

"a. Physical capability of the land to support permitted uses: e.g. adequate water supply, septic suitability, soil quality, and adequate access."

Plan Goal 11, Policy 6(a) states:

"In order to obtain a change of zone, it will be necessary to demonstrate compliance with applicable Statewide Planning Goals and conformance with the text of the Josephine County Comprehensive Plan, Zoning Ordinance, and other implementing ordinances. At a minimum, such changes should demonstrate:

"a. Physical capability of the land to support permitted uses: e.g. adequate water supply, septic suitability, soil quality, and adequate access."

RLDC 47.030(B) states, in relevant part,

"A request for a change of zone designation shall be reviewed against the following criteria:

"* * * * *

"3. Demonstrate the carrying capacity of the land to support the uses permitted in the proposed Zone (as defined in

1 With regard to quality and quantity of domestic water,
2 the county's finding of compliance with each of the criteria
3 upon which this challenge is based states:

4 "Both the Applicant's submittal and the Staff
5 Report included area well logs and a recent water
6 purity analysis on a well next to the property.
7 These proved that the average well in the area
8 produces 14.41 gallons per minute and averages
9 172.57 feet deep with no potability problems. It
10 was found that adequate, potable well water is
11 available on the property." Record 9.

12 Intervenor argues that the relevant plan and code
13 criteria do not require the "site-specific" determination of
14 the quality and quantity of the domestic water supply that
15 petitioner urges.² Intervenor further argues the county's
16 interpretation that evidence from surrounding properties can
17 be used to demonstrate compliance with the challenged
18 criteria is entitled to deference, and that the evidence
19 from surrounding properties establishes an adequate supply
20 and quality of domestic water on this site.

Section 11.030(64), adequate access as defined in Section
11.030(9) and any other physical characteristics
determined applicable in the pre-application conference);

"* * * * *

"6. Demonstrate the property's suitability for the uses
allowed in the proposed Zone, and that the request is
consistent with the purpose of the proposed Zone[.]

"* * * * *"

²Intervenor adds that the well logs in the record show that one of the
examined wells was, in fact, on the subject parcel, but that intervenor had
not been able to locate that well. The county's findings do not rely on
the presence of any on-site wells.

1 The board's interpretation of its own ordinances is
2 entitled to deference and, under ORS 197.829(1), we will
3 affirm that interpretation unless it is inconsistent with
4 the language, purpose or underlying policy of the
5 comprehensive plan or regulation it interprets, or is
6 contrary to state statute, goal or rule. Clark v. Jackson
7 County, 313 Or 508, 514-15, 836 P2d 710 (1992); Zippel v.
8 Josephine County, 128 Or App 458, 876 P2d 854, rev den 320
9 Or 272 (1994). In addition, when the local government fails
10 to provide an interpretation or provides one that is
11 inadequate for review, under ORS 197.829(2) we may provide
12 our own determination.

13 In this case, although petitioner argued below that the
14 county's plan and code require on-site evaluation of water
15 quality and quantity, the county's findings do not discuss
16 its contrary conclusion. Rather, we must rely on the
17 county's implicit interpretation that water supplies on
18 surrounding properties are sufficient to establish adequacy
19 of water quality and quantity on the subject parcel. That
20 interpretation is inadequate for our review since we cannot
21 determine the legal or factual basis for the county's
22 conclusion. While evidence from surrounding properties may
23 be adequate to establish certain characteristics or capacity
24 of the subject property in some instances, the governing
25 body must first establish the essential relationship between
26 the properties before such reliance is credible. See Reeves

1 v. Yamhill County, 30 Or LUBA ____ (LUBA No. 95-111, October
2 31, 1995), slip op 8.

3 Moreover, in this case it appears that the board's
4 interpretation of the challenged plan and code provisions
5 may be contrary to their language or intent. For example,
6 plan Goal 11, Policies 4(a) and 6(a) both refer to the
7 "physical capability of the land"; RLDC 47.030(B)(3) refers
8 to "the carrying capacity of the land to support the uses"
9 and RLDC 47.030(B)(6) refers to "the property's suitability
10 for the uses." (Emphasis added.) "Carrying capacity" is
11 further defined in RLDC 11.030(64) as "[t]he ability of land
12 to support proposed development as determined by an
13 evaluation of * * * the adequacy of the domestic groundwater
14 supply[.]" A facial reading of these provisions suggests
15 they refer specifically to the land at issue and that, in
16 fact, they require a site-specific determination. Without a
17 specific interpretation that establishes otherwise, or a
18 demonstration that the conditions on surrounding lands can
19 be relied upon to determine the water quality and quantity
20 on the subject parcel, the county cannot rely on the water
21 quality and quantity of other parcels to satisfy these
22 criteria.

23 This assignment of error is sustained.

24 **SECOND ASSIGNMENT OF ERROR**

25 Plan Goal 11, Policy 4(3) requires "the availability of
26 adequate public services to support the projected intensity

1 of use." Petitioner contends there is inadequate sheriff
2 service to serve the property, and that, therefore, the
3 county's finding that public services are available is not
4 based upon substantial evidence in the record.

5 The evidence upon which petitioner bases this
6 contention is an open letter sent by the county sheriff to
7 residents of the county to encourage support of a bond levy
8 to increase funding of the sheriff's office. The letter is
9 not directed at the subject application, nor does it in any
10 way refer to a lack of public services available to serve
11 this particular site.

12 In finding compliance with plan Goal 11, Policy 4(e),
13 the board rejected petitioner's argument by finding:

14 "The Board concludes the letter is general in
15 nature, was written in the context of budget
16 reductions and a pending levy vote to restore
17 funding. To this extent, the letter represents an
18 effort to campaign for the restoration of funding
19 to the Sheriff's Office, and not to provide
20 evidence directly relating to the criteria
21 contained in Goal 11.4e. The Board further notes
22 the letter makes absolutely no reference to
23 applicant's proposed plan and zone change, nor
24 does it even reference the issue of land
25 development generally. For this reason, the Board
26 finds no probative value in the letter to this
27 application." Record 10.

28 We agree. The county relied upon substantial evidence
29 in the record to conclude public facilities and services can
30 support the uses allowed by the request. The sheriff's open
31 letter to the community does not so undermine the evidence
32 upon which the county relied to compel a contrary

1 conclusion. See Younger v. City of Portland, 305 Or 346,
2 752 P2d 262 (1988).

3 This assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioner contends generally that the county's
6 findings do not establish compliance with Statewide Planning
7 Goal 3. Specifically, however, he challenges only two of
8 the bases upon which the county found compliance with plan
9 Goal 11, Policy 5(A), which implements Goal 3 and states:

10 "5. In order to demonstrate that land is non-
11 resource in capability and therefore appropriate
12 for a non-resource Comprehensive Plan designation,
13 the following information shall be provided:

14 "A. The land does not fall within [Statewide
15 Planning] Goal #3 requirements as shown by:

16 "1. The soils are predominantly other than
17 Class I-IV.

18 "2. The land is unsuitable for farm use
19 considering soil fertility, grazing,
20 climate, irrigation, land use patterns,
21 technology and accepted farm practice.

22 " * * * * "

23 **A. Soils**

24 It is undisputed that without irrigation, the subject
25 property contains Class VI soils and that with irrigation,
26 the soils would be Class III. Petitioner challenges the
27 county's conclusion that the request complies with Goal 11,
28 Policy 5(A)(1) based on the county's interpretation of the
29 policy as follows:

1 "The Board concludes the property is predominately
2 other than Class I-IV. The Board further
3 concludes that the language contained in this
4 policy was intended to make a strict reference to
5 the 'actual' rating of the property at the time of
6 the application, and was not intended to refer to
7 the 'potential' rating of the property. To
8 interpret this criteria to mean 'potential' class
9 ratings would be ineffective to reach the intended
10 result, because it would leave applications
11 undecided or delayed, and would frustrate the
12 identification of non-resource soils by
13 eliminating the use of available information."
14 Record 12.

15 The county concludes that, because the subject parcel
16 presently has no irrigation rights, it has Class VI soils
17 and is, therefore, non-resource land under plan Goal 11,
18 Policy 5(A)(1).

19 Intervenor urges that we must defer to the county's
20 interpretation of its policy under the Clark line of cases
21 and ORS 197.829(1). However, under ORS 197.829(1)(d), we
22 owe no deference to a local interpretation if it "[i]s
23 contrary to a state statute, land use goal or rule that the
24 comprehensive plan provision or land use regulation
25 implements." Rather, where a plan provision or land use
26 regulation is clearly designed to implement a goal or goals,
27 the local government may not interpret such a plan provision
28 or land use regulation in a manner inconsistent with the
29 goals it implements. Forster v. Polk County, 115 Or App
30 475, 478, 839 P2d 241 (1992).

31 Plan Goal 11, Policy 5(A) is designed to implement, and
32 in fact essentially mirrors, the requirements for compliance

1 with Goal 3. Therefore, we owe deference to the county's
2 interpretation only to the extent that interpretation is
3 consistent with Goal 3.

4 Goal 3 defines "agricultural land" to be:

5 "in western Oregon * * * land of predominantly
6 Class I, II, III and IV soils * * * as identified
7 in the Soil Capability Classification System of
8 the United States Soil Conservation Service, and
9 other lands which are suitable for farm use taking
10 into consideration soil fertility, suitability for
11 grazing, climatic conditions, existing and future
12 availability of water for farm irrigation
13 purposes, existing land-use patterns,
14 technological and energy inputs required, or
15 accepted farming practices." (Emphasis added.)

16 Given the express language in Goal 3 that future
17 availability of water for irrigation must be considered in
18 evaluating suitability of soils for agricultural uses, the
19 county's interpretation that it need not consider potential
20 availability of irrigation in determining soil suitability
21 is incorrect. We will not defer to the county's
22 interpretation.

23 The application includes a statement that "[i]f
24 irrigation were available, it might be possible to generate
25 some agricultural production on this site. There is no
26 irrigation available, however, and thus successful farm
27 production is impossible." Record 48. Another statement
28 adds, "Irrigation water rights to Jumpoff Joe Creek [south
29 of the site] are not held and, therefore, irrigating the
30 property for agricultural production is not possible." It
31 is, presumably, these statements upon which the county

1 relied to conclude irrigation is not "available." However,
2 these statements are insufficient to determine (1) whether
3 irrigation is not available because no attempt has been made
4 to irrigate or to obtain water rights; or (2) whether
5 irrigation is not available because the site lacks a
6 feasible irrigation source or because water rights from the
7 creek are unavailable.

8 Given that the SCS soil survey rates soils on the site
9 as Class III when irrigated, the county must consider the
10 potential for achieving Class III soils on the parcel. This
11 requires the county to, at a minimum, consider in its
12 evaluation of the soils, the feasibility of providing
13 irrigation to the parcel. Without such an evaluation, the
14 county's findings are inadequate to reach a conclusion
15 regarding the suitability of the soil under plan Goal 11,
16 Policy 5(A)(1).

17 This subassignment of error is sustained.

18 **B. Suitability for Farm Use.**

19 Petitioner next contends the findings are inadequate to
20 establish compliance with plan Goal 11, Policy 5(A)(2),
21 because they consider only the soils on the property, and do
22 not address the other factors listed in that policy.

23 Plan Goal 11, Policy 5(A)(2) requires that the county
24 demonstrate that the land does not fall within Goal 3
25 requirements by establishing that

26 "[t]he land is unsuitable for farm use considering
27 soil fertility, grazing, climate, irrigation, land

1 use patterns, technology and accepted farm
2 practice.³

3 The county's finding of compliance with this policy
4 states:

5 "It was found that the soils on the property are
6 not suitable for farm uses for the reasons cited
7 under Goal 11, Policy 4b above." Record 12.

8 The findings regarding Policy 4b explain that the class VIe
9 soil type on the property is not suitable for farming, and
10 conclude:

11 "Conflicting evidence was presented that the
12 property had been farmed in the past, but this
13 evidence was inconclusive. As no irrigation is
14 available to the property[,] [i]t was found that
15 the property is not resource land." Record 10.

16 The county's findings are inadequate to establish
17 compliance with this policy. This policy is intended to
18 establish compliance with Goal 3, which requires evaluation
19 beyond the current soil classification to the other listed
20 factors which bear on the suitability of the property for
21 agricultural use. In addition to its consideration of the
22 potential for irrigating the property, as discussed above,

³This policy corresponds to the definition of agricultural land stated in the Goal 3 rule, which includes, in addition to Class I-IV soils (in western Oregon):

"Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility, suitability for grazing, climactic conditions, existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices[.]" OAR 660-33-020(1)(B).

1 the county must evaluate each of the other factors listed in
2 plan Goal 11, Policy 5(A)(2) before it can decide whether
3 the land is agricultural land under Goal 3.

4 Petitioner also challenges the county's findings on
5 evidentiary grounds. Specifically, petitioner contends the
6 county should have found the subject property suitable for
7 agricultural use because it was zoned for agricultural use
8 in the past, because it is surrounded on more than one-half
9 of its perimeter by WR-zoned land, and because of evidence
10 in the record of a 62-year-old man who testified that, prior
11 to his birth, his father had farmed the property. We find
12 that none of these facts compels a conclusion that the
13 property is suitable for agricultural use. Nonetheless,
14 since the suitability of the site for agricultural use is an
15 approval criterion, to the extent these facts reflect issues
16 relevant to the county's evaluation of this criterion, they
17 were raised below and the county must address them in its
18 findings. See City of Wood Village v. Portland Area Metro
19 LGBC, 48 Or App 79, 87, 616 P2d 528 (1980), Hillcrest
20 Vineyard v. Board of Comm. Douglas Co., 45 Or App 285, 293,
21 608 P2d 201 (1980).

22 The third assignment of error is sustained.

23 **FOURTH ASSIGNMENT OF ERROR**

24 Petitioner challenges the county's compliance with plan
25 Goal 11, Policy 5(B)(1), which states that land is not
26 forest land if:

1 "B. The land does not fall within [Statewide
2 Planning] Goal 4 requirements as shown by:

3 1. The soils have a composite Internal Rate
4 of Return [(CIRR)] of less than 3.50."⁴

5 In this case, the soils on the subject property are not
6 rated. However, shortly before intervenor's initiation of
7 the application in this case, the county planning office
8 adopted a "clarifying policy" interpreting Goal 11, Policy
9 5(B)(1), as follows:

10 "An authorized parcel of land shall be considered
11 Goal #4 land (forest land) when the predominant
12 (51%) soils on the parcel have an internal rate of
13 return (IRR) or composite internal rate of return
14 (CIRR) of 3.50 or higher. Lands not meeting this
15 test shall be considered non-forest lands."
16 Record 114.

17 In its findings, the county explained the need for this
18 clarifying policy:

19 "* * * The [CIRR] rating system is comparative and
20 the purpose is to determine which soils have
21 'commercial' forest values and are therefore
22 forest resource in value. The numeric threshold

⁴The CIRR is the county's method of evaluating forest soils. We described the role of the CIRR in Doob v. Josephine County, 27 Or LUBA 293, 295 (1995), as follows:

"The acknowledged [plan] incorporates a document entitled 'Using Internal Rate of Return to Rate Forest Soils for Application in Land Use Planning.' This document, generally referred to as the Cumulative Internal Rate of Return (CIRR), sets out the plan's acknowledged methodology for rating forest soils. The CIRR contains a list of Josephine County soil types and gives each soil class a numerical value. The plan states that soils having a CIRR of 3.5 or greater are considered forest land, while soils with a CIRR below 3.5 are considered 'non-resource' soils." See Bates v. Josephine County, 28 Or LUBA 21, 27 (1994).

1 established in the study is 3.50. When more than
2 one forest soil is present on a parcel of land,
3 the soils are averaged together to create a
4 'composite' internal rate of return. When only
5 one soil is present, that soil provides the rating
6 number. When non-forest soils are present no
7 calculation or rating is possible because no
8 numeric value exists.

9 "In this particular case, the soils present on the
10 property are non-forest and no numeric rating
11 exists. This means it is not possible to
12 calculate an internal rate of return or a
13 composite internal rate of return to determine
14 whether the soils are below 3.50. This anomaly
15 has surfaced in other land use cases and the
16 Planning Director, under the direction of this
17 Board, developed a policy to deal with this
18 problem. The Board reaffirms this policy in this
19 case[.]" Record 13.

20 The county then explains, in some detail, the reasons
21 for its new interpretation of Goal 11, Policy 5(B)(1), and
22 concludes:

23 "[T]he Board adopts and applies the Planning
24 Director's Policy of May 17, 1995, to this
25 application. We conclude the land covered by this
26 application does not fall within Statewide Goal 4
27 because the soils are non-forest." Record 14.

28 Petitioner contends the county's clarifying policy
29 amounts to an improper amendment of its comprehensive plan.
30 We agree.

31 As we acknowledged in Doob I, it is evident that the
32 CIRR evaluation method is difficult to administer, and
33 likely inadequate. Doob I, 27 Or LUBA 296. However, as we
34 also stated there, regardless of how difficult or inadequate
35 the CIRR method may be, the county cannot add soils to the

1 CIRR without following postacknowledgment plan amendment
2 procedures. Id. at 297.

3 The county's clarifying policy does far more than
4 clarify or interpret plan Goal 11, Policy 5(B)(1). It
5 substantively changes requirements for compliance with that
6 policy. The county cannot exempt from the required soils
7 evaluation all soils in the county which have not been
8 rated.⁵

9 The county has not established compliance with plan
10 Goal 11, Policy 5(B)(1).

11 The fourth assignment of error is sustained.

12 The county's decision is remanded.

⁵The county notes in its findings that 55 soils have "forest soils" ratings, and more than 50 have "non-forest" soils ratings. We understand this distinction to mean that more than 50 soils in the county have not yet been rated for purposes of establishing a CIRR.