

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

3
4 ANNE SQUIER,
5 *Petitioner,*

6
7 vs.

8
9 MULTNOMAH COUNTY,
10 *Respondent,*

11 and

12
13 FREVACH LAND COMPANY,
14 *Intervenor-Respondent.*

15
16
17 LUBA No. 2014-074

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Multnomah County.

23
24 Carrie A. Richter, Portland, filed the petition for review and argued on
25 behalf of petitioner. With her on the brief was, Edward J. Sullivan and Garvey
26 Schubert Barer.

27
28 Jed Tomkins, Portland, County Counsel, filed a response brief and
29 argued on behalf of respondent.

30
31 Steve C. Morasch, Vancouver, filed the response brief and argued on
32 behalf of intervenor-respondent. With him on the brief was Schwabe
33 Williamson & Wyatt, P.C.

34
35 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
36 Member, participated in the decision.

37
38 AFFIRMED

02/04/2015

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

NATURE OF THE DECISION

Petitioner appeals a hearings officer’s decision on a request for an interpretation, concluding that an exception to Statewide Planning Goal 14 (Urbanization) is not necessary to convert a boat moorage and facilities in an existing marina to allow a houseboat moorage at a maximum density of one houseboat per 50 feet of waterfront.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address arguments made in the response briefs regarding waiver and preservation of issues. The reply brief is allowed.

MOTION TO FILE AMICUS BRIEF

Pursuant to OAR 661-010-0052, 1000 Friends of Oregon moves to file an *amicus curiae* brief that is aligned with petitioner’s interest. Intervenor-respondent Frevach Land Company (intervenor) objects, arguing that the proposed amicus brief should not be allowed, because amicus has not demonstrated that LUBA’s “review of relevant issues would be significantly aided by participation of the amicus.” OAR 661-010-0052(1).

We agree with intervenor. The proposed amicus brief consists only of the personal recollection of a staff attorney for amicus, stating that she participated in the rule-making leading to adoption of OAR 660-004-0040, an administrative rule that implements Goal 14 with respect to residential use of rural land. In relevant part, amicus states only that she does not recall that the issue of houseboats or houseboat moorages arose during rule-making.

Post-enactment recollections of persons participating in legislative proceedings are not probative legislative history. *Salem-Keizer Association of*

1 *Classified Employees v. Salem-Keizer School District 24J*, 186 Or App 19, 27,
2 61 P3d 970 (2003); *David v. City of Hillsboro*, 57 Or LUBA 112, 136, *aff'd*
3 223 Or App 761, 197 P3d 1152 (2008). The amicus brief does not include, or
4 discuss, any legislative history of relevant rule-making. Because the amicus
5 brief does not include anything that would significantly aid LUBA's review,
6 the motion to allow the amicus brief is denied.

7 **MOTIONS TO STRIKE**

8 The county moves to strike the nine-page summary of material facts in
9 the petition for review, arguing that the summary includes a number of legal
10 arguments and includes few citations to the record, contrary to OAR 661-010-
11 0030(4)(b)(C), which requires the petition for review to include a summary of
12 material facts with citations to the pages of the record where support for the
13 facts alleged can be found.

14 Petitioner responds that including legal arguments in the summary of
15 material facts and failing to include record citations for all facts alleged are
16 "technical errors" that do not warrant striking those portions of the brief, absent
17 a showing of prejudice to other parties' substantial rights. OAR 661-010-0005.
18 We agree with petitioner that the county has not demonstrated that petitioner's
19 violations of OAR 661-010-0030(4)(b)(C) warrant striking portions of the
20 petition for review or prejudice the county's substantial rights to prepare and
21 present its positions in this appeal. The legal arguments in the summary are
22 repetitions of arguments located elsewhere in the brief, and the county does not
23 identify any material factual assertions lacking citation to the record. Further,
24 as will soon be evident to the reader, this appeal is almost entirely concerned
25 with legal rather than factual issues. The motion to strike the summary of
26 material facts is denied.

1 The county also moves to strike a sentence in petitioner’s statement of
2 the standard of review that asserts that the county’s decision misconstrues the
3 applicable law. The county argues that that sentence is argumentative and does
4 not belong in the section of the petition for review setting out the standard of
5 review. The county disputes that its decision misconstrues the applicable law.

6 The motion to strike is denied. The county does not attempt to
7 demonstrate that any violation of LUBA’s rules in petitioner’s statement of the
8 standard of review prejudices its substantial rights. In such circumstances, a
9 motion to strike is not warranted. The far better practice is to briefly note the
10 violation in the corresponding section of the response brief and clarify any
11 disputed points raised by the violation.

12 **FACTS**

13 Intervenor owns a 16.68-acre parcel adjacent to Multnomah Channel.
14 All but two acres of the property is located within the City of Portland urban
15 growth boundary (UGB). The two acres outside the UGB carry county zoning
16 of Multiple Use Agriculture-20 (MUA-20), codified at Multnomah County
17 Code (MCC) 34.2800 *et seq.* Based on on-line county zoning maps, it appears
18 that the MUA-20 zone also applies to the submerged area of the Multnomah
19 Channel adjacent to the two-acre portion of intervenor’s property that includes
20 the existing marina. Those submerged lands are owned by the State of Oregon
21 and presumably leased by the Oregon Department of State Lands to intervenor.
22 The two-acre upland portion of intervenor’s property is developed with parking
23 and support facilities for intervenor’s existing marina. The marina currently
24 consists of a boat moorage and three unapproved houseboats, or floating

1 dwellings.¹ Intervenor intends to convert the existing boat moorage to a
2 houseboat moorage.

3 The MUA-20 zone allows, as a conditional use, “houseboats and
4 houseboat moorages”² in certain designated areas of the Multnomah Channel,
5 including the two-acre portion of the subject property, subject to standards at
6 MC 34.6750 *et seq.* that could potentially result in relatively dense residential
7 houseboat development. In particular, MCC 34.6755 provides that the
8 “maximum density of houseboats shall not exceed one for each 50 feet of
9 waterfront.” Depending on how the 1:50 ratio in MCC 34.6755 is interpreted
10 and applied to the two-acre portion of intervenor’s property, that upland area
11 could provide facilities to serve a large number of houseboats lining the shore,
12 spaced 50 feet apart.

13 The central dispute in this appeal is whether approving a conditional use
14 application for a maximally dense houseboat moorage allowed in the MUA-20
15 zone requires an exception to Goal 14. Goal 14 generally prohibits urban uses
16 of rural land, including urban levels of residential development, absent an
17 exception to the goal. *1000 Friends of Oregon v. LCDC (Curry County)*, 301
18 Or 447, 724 P2d 268 (1986). In 2000, the Land Conservation and
19 Development Commission (LCDC) adopted an administrative rule, OAR 660-

¹ MCC 34.6750(A) describes a “houseboat” as “any floating structure designed as a dwelling for occupancy by one family and having only one cooking facility.” For purposes of this appeal, we understand a houseboat to consist of a single family residential structure built on a floating barge, which is connected or served by septic, parking and other facilities located on an adjacent upland area.

² MCC 34.6750(B) describes a “houseboat moorage” as “the provision of facilities for two or more houseboats.”

1 004-0040, that clarifies what kinds and density of residential development of
2 rural lands are consistent with Goal 14. Among the key questions in this
3 appeal are whether the relevant county comprehensive plan provisions and land
4 use regulations governing houseboat moorage development are inconsistent
5 with Goal 14 or OAR 660-004-0040 because they allow urban development of
6 rural land and, if so, whether those plan and code provisions are deemed
7 acknowledged to comply with the goal and the rule, such that the goal and rule
8 would not apply directly to a conditional use application to construct a
9 houseboat moorage on intervenor's property. *Byrd v. Stringer*, 295 Or 311,
10 316-17, 666 P2d 1332 (1983).

11 Intervenor's request to the county to answer the above questions was
12 prompted, apparently, by the 2010 adoption of Ordinance 1153, which adopted
13 an exception to Goal 14 to allow expansion of a houseboat moorage at a
14 different marina, the Rocky Pointe Marina, that is also located on land zoned
15 MUA-20. In that proceeding, county staff took the position that OAR 660-
16 0040-0040 requires an exception to Goal 14 to approve the proposed expansion
17 of the Rocky Pointe houseboat moorage.³ The landowner duly applied for a

³ That position was apparently prompted by a 2006 letter from Department of Land Conservation and Development (DLCD) staff, expressing the view that OAR 660-004-0040 and Goal 14 would prohibit approval of a houseboat moorage connected to an upland parcel on which a dwelling is placed, or approval of a dwelling on an upland parcel connected to an existing houseboat moorage. Record 319, 331. The DLCD letter also opined that connecting a houseboat moorage to septic facilities that also serve a dwelling on the upland parcel would constitute a "sewer system" prohibited on rural lands under Statewide Planning Goal 11 (Public Facilities and Services) and its implementing rule, and therefore would also require an exception to Goal 11. Record 331-32. No issue is raised in the present appeal whether a Goal 11

1 Goal 14 exception, and the county board of commissioners ultimately approved
2 the exception and associated comprehensive plan amendment. Intervenor
3 subsequently filed the present request for an interpretation, seeking a county
4 determination whether a Goal 14 exception is necessary to approve a
5 conditional use application to convert a boat marina to a houseboat moorage.⁴
6 In its application, intervenor took the position that (1) a Goal 14 exception is
7 not required because a houseboat moorage is allowed as a conditional use
8 under the county's comprehensive plan and land use code, which are
9 acknowledged to comply with Goal 14, and (2) OAR 660-004-0040 does not
10 regulate houseboat moorages. Record 378.

11 The county planning director agreed with intervenor that no Goal 14
12 exception is required because the county's plan and code provisions
13 authorizing houseboat moorages at urban densities are acknowledged to
14 comply with Goal 14 and OAR 660-004-0040. Petitioner appealed the

exception is necessary to develop intervenor's property with a houseboat
moorage.

⁴ Specifically, intervenor asked the county to answer two questions:

- “1. Is a Goal 14 exception required under OAR 660-004-0040 to redevelop an existing moorage including conversion of existing boat slips to houseboats under the acknowledged provisions of the County code, including MCC 34.6755.
- “2. Assuming a Goal 14 exception is required to redevelop a moorage, does the rural reserve rule in OAR 660-027-0070(3) or the County's implementation of the rural reserves rule in Policy 6-A(6) of the County's comprehensive framework plan prohibit applications for goals exceptions to redevelop an existing moorage?”
Record 378.

1 planning director’s interpretation to the hearings officer. After conducting a
2 hearing, the hearings officer issued a decision on July 23, 2014, affirming the
3 planning director’s decision that the acknowledged status of the county’s plan
4 and code provisions means that no Goal 14 exception is required.
5 Additionally, the hearings officer agreed with intervenor that OAR 660-004-
6 0040 does not regulate houseboat moorages.⁵

7 This appeal followed.

8 **LEGISLATIVE BACKGROUND**

9 Petitioner challenges the hearings officer’s decision in five assignments
10 of error. Common to all five assignments of error are contentions regarding the
11 complex history and acknowledged status of the county’s comprehensive plan
12 and land use regulations. We here provide a brief overview of the relevant
13 county legislation in the context of the applicable goal, rule and statutory
14 requirements.

15 **A. 1980: MUA-20 Zone Adopted**

16 Historically, houseboat moorages in the Multnomah Channel pre-date
17 the statewide planning program. Goal 14 was originally adopted in 1974, and
18 last amended in 2000. The county’s Comprehensive Framework Plan,
19 originally adopted in 1977, includes policies that designate certain areas as
20 suitable for houseboat moorages, including the area of the subject property.
21 The areas on the Multnomah Channel designated for houseboats and houseboat

⁵ Neither the hearings officer nor the planning director answered the second, contingent question posed by intervenor’s request for interpretation: whether the rural reserves rule at OAR 660-027-0070 prohibit taking a Goal 14 exception for a houseboat moorage on the subject property. We also do not consider that question.

1 moorages have at all relevant times been zoned MUA-20, a zone that was
2 originally adopted, subject to exceptions to Statewide Planning Goals 3
3 (Agricultural Lands) and 4 (Forest Lands), and acknowledged by LCDC in
4 1980. The MUA-20 zone allows a single family dwelling on a single lot or
5 parcel as a permitted use, with a minimum 20-acre lot size for new residential
6 lots or parcels. As noted, the MUA-20 zone allows “houseboats and houseboat
7 moorages,” as a conditional use.

8 **B. 1982: Waterfront Use Provisions**

9 In 1982, the county adopted “Waterfront Use” provisions, codified at
10 *former* MCC 11.15.7505 *et seq.*, that set out standards for houseboat and
11 houseboat moorages allowed as a conditional use in the MUA-20 zone. Record
12 224-25. *Former* MCC 11.15.7505 is identical, word-for-word, with the current
13 “Waterfront Use” provisions codified at MCC 34.6750 *et seq.*, including the
14 maximum 1:50 density ratio.⁶ As discussed below, the county has made no

⁶ MCC 34.6750 and 34.6755 provide:

“34.6750- HOUSEBOATS AND HOUSEBOAT MOORAGE

The location of a houseboat or the location or alteration of an existing houseboat moorage shall be subject to approval of the approval authority:

“(A) Houseboats shall mean any floating structure designed as a dwelling for occupancy by one family and having only one cooking facility.

“(B) Houseboat moorage shall mean the provision of facilities for two or more houseboats.

“(C) Location Requirements: Houseboats shall be permitted only as designated by the Comprehensive Plan.

1 textual or substantive changes to the Waterfront Use standards since 1982. For
2 convenience, we sometimes refer to MCC 11.15.7505 *et seq.* and MCC
3 34.6750 *et seq.* collectively as the “Waterfront Use provisions.”

4 **C. 1986: Curry County**

5 As noted, in 1986 the Oregon Supreme Court’s *Curry County* decision
6 interpreted Goal 14 to prohibit counties from adopting legislation that allows

“(D) Criteria for Approval: In approving an application pursuant to this subsection, the approval authority shall find that:

“(1) The proposed development is in keeping with the overall land use pattern in the surrounding area;

“(2) The development will not adversely impact, or be adversely affected by normal fluvial processes;

“(3) All other applicable governmental regulations have, or can be satisfied; and

“(4) The proposed development will not generate the untimely extension or expansion of public facilities and services including, but not limited to, schools, roads, police, fire, water and sewer.

“34.6755 DENSITY

“The maximum density of houseboats shall not exceed one for each 50 feet of waterfront frontage. The Hearings Officer in approving a houseboat moorage may reduce the density below the maximum allowed upon finding that:

“(A) Development at the maximum density would place an undue burden on school, fire protection, water, police, road, basic utility or any other applicable service.

“(B) Development at the maximum density would endanger an ecologically fragile natural resource or scenic area.”

1 urban use of rural land, absent an exception to Goal 14. During the early
2 1990s, the county’s land use legislation underwent periodic review, but the
3 Land Conservation and Development Commission (LCDC) apparently did not
4 require amendments to any county plan or code provisions governing
5 houseboat moorages at that time.

6 **D. 1997: Ordinance 887 Adopts Rural Area Plan**

7 In 1997, the county enacted Ordinance 887, which adopts the Sauvie
8 Island/Multnomah Channel Rural Area Plan (SI/MC plan) as part of the
9 county’s comprehensive framework plan. The subject property is located within
10 the SI/MC plan area. The SI/MC plan includes Policy 10, which establishes a
11 policy to inventory and determine the status of existing houseboat moorages on
12 the Multnomah Channel, many of which were nonconforming uses or
13 otherwise unapproved. The SI/MC plan narrative discusses the existing MUA-
14 20 provisions for houseboat and houseboat moorages, and the Waterfront Use
15 provisions then codified at MCC 11.15.7505, including the maximum 1:50
16 density ratio. Record 117-18. However, Ordinance 887 did not adopt or
17 amend any MCC provisions. The county processed Ordinance 887 as a post-
18 acknowledgment plan amendment, pursuant to ORS 197.610 *et seq.*

19 **E. October 4, 2000: OAR 660-004-0040 is Effective**

20 In 2000, LCDC adopted an amendment to Goal 14 authorizing LCDC to
21 adopt a rule providing that Goal 14 does not prohibit “development and use of
22 one single-family dwelling on a lot or parcel” that meets certain qualifications.⁷

⁷ Goal 14 as amended in 2000 provides, in relevant part:

“Single-Family Dwellings in Exception Areas

1 OAR 660-004-0040, which became effective on October 4, 2000, is that rule.
2 As discussed below, OAR 660-004-0040 generally limits the density and
3 characteristics of residential development of certain rural lands to ensure that
4 such development is consistent with Goal 14 as interpreted by *Curry County*.

5 **F. November 30, 2000: Ordinance 953 Recodifies Zoning**
6 **Ordinance**

7 On November 30, 2000, a few weeks after OAR 660-004-0040 became
8 effective, the county enacted Ordinance 953, which re-organized and re-
9 codified the county's entire land use code, with no substantive changes. The
10 code provisions at MCC 11.15.7505 governing Waterfront Use and houseboat
11 moorages were re-codified at MCC 34.6750 *et seq.*, without any textual
12 changes. The county processed Ordinance 953 as a post-acknowledgment plan
13 amendment.

“Notwithstanding the other provisions of this goal, the commission may by rule provide that this goal does not prohibit the development and use of one single-family dwelling on a lot or parcel that:

- “(a) Was lawfully created;
- “(b) Lies outside any acknowledged urban growth boundary or unincorporated community boundary;
- “(c) Is within an area for which an exception to Statewide Planning Goal 3 or 4 has been acknowledged; and
- “(d) Is planned and zoned primarily for residential use.”

1 **G. May 16, 2002: Ordinance 982 Amends MUA-20 zone to**
2 **Implement OAR 660-004-0040**

3 On May 16, 2002, the county adopted Ordinance 982, which was
4 intended to implement OAR 660-004-0040 and conform the county’s code to
5 the new rule requirements that became effective October 4, 2000. Ordinance
6 982 amended language in the MUA-20 zone, and other zones, in several
7 particulars. However, Ordinance 982 made no changes to MCC 34.6750 or any
8 code provisions concerning houseboat moorages. The county processed
9 Ordinance 982 as a post-acknowledgment plan amendment.

10 **H. October 31, 2002: Ordinance 997 Repeals and Re-Adopts**
11 **Many Ordinances**

12 On October 31, 2002, the county adopted Ordinance 997, which re-
13 pealed and re-adopted, without any changes, a large number of ordinances,
14 including Ordinances 953 and 982, in order to provide publication notice that
15 was omitted when those ordinances were originally adopted.⁸ The county did
16 not process Ordinance 997 as a post-acknowledgment plan amendment.

⁸ Ordinance 997 was apparently prompted by LUBA’s remand in *Ramsey v. Multnomah County*, 43 Or LUBA 25, 32 (2002), which involved an appeal of Ordinance 967. LUBA concluded in relevant part that Ordinance 967 was of “no legal effect” because it had been adopted without providing the publication notice required by ORS 215.060. On remand, the county chose to correct that defect, along with similar notice defects involving a number of other ordinances not at issue in *Ramsey*, by repealing and re-adopting those ordinances, which together comprise all or nearly all of the county’s land use code.

1 **I. 2010: Ordinance 1153 Adopts Goal 14 Exception for Rocky**
2 **Pointe Houseboat Moorage**

3 Finally, as noted, in 2010, the county board of commissioners adopted
4 Ordinance 1153, which adopts exceptions to Goals 11 and 14 to allow
5 expansion of the Rocky Pointe houseboat moorage, and amends the SI/MC
6 plan map to note that exception.

7 With that overview, we now address the assignments of error.

8 **FIRST, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

9 Petitioner argues, and no party in this appeal appears to dispute, that
10 development of intervenor’s property with a houseboat moorage at the
11 maximum intensity potentially allowed under the 1:50 ratio at MCC 34.6755
12 could constitute an “urban use” of rural land for purposes of Goal 14, as
13 interpreted by *Curry County*. To the extent that premise is disputed, we agree
14 with petitioner that a houseboat moorage at that maximum density could easily
15 constitute an urban use.

16 The hearings officer did not conclude otherwise, or even address the
17 issue. Instead, the hearings officer concluded that no exception to Goal 14 is
18 required to approve a conditional use permit application to construct a
19 houseboat moorage that is connected to septic and other services on the two-
20 acre upland portion of intervenor’s property zoned MUA-20, because the
21 acknowledged status of the relevant county legislation shields intervenor from
22 direct application of either Goal 14 or OAR 660-004-0040. *Compare* ORS
23 197.175(2)(c) with ORS 197.175(2)(d), *see* n 12. In addition, with respect to
24 OAR 660-004-0040, the hearings officer concluded that the administrative rule
25 simply does not include regulations governing houseboat moorages.

1 Petitioner’s challenges to these two core conclusions are scattered across
2 the first, third, fourth and fifth assignments of error. We first address the first
3 assignment of error, which concerns the role of OAR 660-004-0040 in
4 answering the question posed by intervenor’s application. We then address the
5 fourth and fifth assignments of error together, which address whether the
6 county’s legislation regarding houseboat moorages are acknowledged to
7 comply with Goal 14. Finally, we address the third assignment of error, which
8 concerns whether the SI/MC plan is acknowledged to comply with Goal 14.

9 **A. First Assignment of Error: OAR 660-004-0040**

10 Petitioner argues that the hearings officer erred to the extent she relied
11 on OAR 660-004-0040 to conclude that a conditional use permit for a
12 houseboat moorage can be approved without an exception to Goal 14.

13 The hearings officer concluded, essentially, that OAR 660-004-0040 is
14 silent regarding houseboat moorages, and includes no provisions governing
15 them. On appeal, petitioner disputes some of the hearings officer’s reasoning,
16 but does not appear to dispute the ultimate conclusion that OAR 660-0040-
17 0040 does not include provisions that govern houseboat moorages. Intervenor-
18 respondent appears to take a similar view. Intervenor-Respondent’s Brief 14
19 (“No provision of OAR 660-004-0040 applies to houseboat moorages”). What
20 appears to concern petitioner under the first assignment of error is what
21 inferences can be drawn from the rule’s silence regarding houseboat moorages.

22 Petitioner argues that the hearings officer misunderstood OAR 660-004-
23 0040 to constitute a complete implementation of Goal 14 with respect to
24 residential development of rural residential areas, and therefore may have
25 inferred from the rule’s silence regarding houseboat moorages that Goal 14
26 itself is not violated by code provisions that allow high-density houseboat

1 moorages in rural residential areas. If so, petitioner disputes that inference, and
2 argues that the rule’s silence regarding houseboat moorages means the rule
3 says nothing about whether high-density houseboat moorages in rural
4 residential areas violate Goal 14 itself. Petitioner argues:

5 “OAR 660-004-0040, which does not expressly address moorages,
6 cannot *sub silentio* serve to shield respondent from its obligations
7 to comply with Goal 14. In the first place, it does not extend an
8 exemption to Goal 14 for floating homes. * * * [U]nless a statute
9 or administrative rule authorizes otherwise, locating urban uses
10 within rural areas requires taking an exception to Goal 14.”
11 Petition for Review 21.

12 We understand petitioner to argue that because nothing in OAR 660-040-0040
13 addresses houseboat moorages or whether or under what circumstances they
14 require an exception to Goal 14, the rule should not be understood to support
15 the proposition that a houseboat moorage on intervenor’s property would not
16 require an exception to Goal 14 in circumstances where Goal 14 applies
17 directly to a decision approving a houseboat moorage.

18 We generally agree with petitioner on this point. OAR 660-004-0040
19 does not purport to constitute a complete implementation of Goal 14 with
20 respect to residential development of rural lands. Therefore, no inference
21 should be drawn from the rule’s silence regarding types of development that
22 are not expressly addressed by the rule. Specifically, no inference should be
23 drawn that such development is either consistent with or prohibited by Goal 14
24 itself.⁹ The rule includes a number of provisions governing minimum lot sizes

⁹ For example, OAR 660-004-0040 does not mention or expressly address certain types of urban residential development such as apartments and similar multi-family dwellings. The absence of provisions addressing such types of urban residential development should not be understood to reflect LCDC’s

1 and densities of specific types of residential uses, including single family
2 dwellings, and mobile and manufactured dwelling parks. However, the rule
3 does not mention houseboats or houseboat moorages, and the specific
4 prohibitions and authorizations it includes cannot readily be applied to
5 houseboat moorages. For example, OAR 660-004-0040(7)(f) prohibits local
6 governments from allowing more than one single family dwelling “to be placed
7 on a lot or parcel[.]” However, that prohibition cannot readily be applied to a
8 houseboat, which is not “placed on” a lot or parcel. Houseboats float in the
9 water over submerged lands owned by the state, and by their nature are not
10 “placed on” those submerged lands or any other lands. Further, while the
11 facilities typically necessary to serve a houseboat moorage (septic treatment or
12 storage, parking, garbage, etc.) are usually located on the adjoining upland
13 parcel, nothing cited to us in the rule addresses, and either authorizes or
14 prohibits, approval of such facilities.¹⁰

15 ORS 197.646(1) requires a local government to implement new goal or
16 rule requirements, and ORS 197.646(3) provides that unless and until a local
17 government implements any such new goal or rule requirements, the new
18 requirements apply directly to the local government’s land use decisions.¹¹ As

intent that such uses are not “urban uses” for purposes of Goal 14, or to suggest
that a county could adopt legislation to allow such uses of rural land without an
exception to Goal 14.

¹⁰ As noted, whether a Goal 11 exception would be necessary to place septic
facilities serving a houseboat moorage on the upland parcel is not an issue in
this appeal.

¹¹ ORS 197.646 provides, in relevant part:

“(1) A local government shall amend its acknowledged
comprehensive plan or acknowledged regional framework

1 noted above, the county attempted to comply with ORS 197.646(1) in 2002,
2 when it adopted Ordinance 982, amending the MUA-20 zone to comply with
3 the new requirements imposed by OAR 660-004-0040. However, because
4 OAR 660-004-0040 includes no requirements regarding houseboat moorages,
5 the county was not obligated by ORS 197.646(1) to amend its land use
6 regulations to implement “new requirements” regarding houseboat moorages.
7 For that reason, there are no “new requirements” that potentially could apply
8 directly to a county decision on a conditional use permit application for a
9 houseboat moorage, pursuant to ORS 197.646(3).

10 OAR 660-004-0040 certainly might have been written to include
11 provisions addressing the unusual nature of houseboat moorages, and clarifying
12 the circumstances and density under which houseboat moorages are permitted
13 without an exception to Goal 14. However, for whatever reason, the rule
14 includes no provisions governing them. The rule neither authorizes nor
15 prohibits houseboat moorages, and does not include any standards that could
16 meaningfully be applied to determine whether and what density of houseboat

plan and land use regulations implementing either plan by a
self-initiated post-acknowledgment process under ORS
197.610 to 197.625 to comply with a new requirement in
land use statutes, statewide land use planning goals or rules
implementing the statutes or the goals.

“* * * * *

“(3) When a local government does not adopt amendments to an
acknowledged comprehensive plan, an acknowledged
regional framework plan or land use regulations
implementing either plan, as required by subsection (1) of
this section, the new requirements apply directly to the local
government’s land use decisions. * * * ”

1 moorages can be approved without an exception to Goal 14. Because the rule
2 does not speak to houseboat moorages, we agree with petitioner that the rule
3 has no direct application in answering the question posed by intervenor’s
4 request: whether intervenor’s existing boat moorage can be converted to a
5 houseboat moorage without taking an exception to Goal 14. The answer to that
6 question depends not on OAR 660-004-0040, which is silent about houseboat
7 moorages, but on whether Goal 14 itself would apply directly to a conditional
8 use permit under the MCC 34.6750 Waterfront Use provisions. And the
9 answer to *that* question depends on whether the MCC Waterfront Use
10 provisions are acknowledged to comply with Goal 14. We address that
11 question below. However, for the reasons above, the arguments under the first
12 assignment of error do not provide an independent basis for reversal or remand,
13 and the first assignment of error is, accordingly, denied.

14 **B. Fourth and Fifth Assignments of Error: MCC Waterfront Use**
15 **provisions Are Acknowledged to Comply with Goal 14**

16 Under the fourth and fifth assignments of error, petitioner challenges the
17 hearings officer’s conclusions that the MCC 34.6760 *et seq.* Waterfront Use
18 provisions authorizing a houseboat moorage under the maximum 1:50 ratio are
19 deemed acknowledged to comply with Goal 14. Because the Waterfront Use
20 provisions are not acknowledged to comply with Goal 14, petitioner argues, the
21 goal would apply directly to any conditional use permit to approve a houseboat
22 moorage under the Waterfront Use provisions, pursuant to OAR
23 197.175(2)(c).¹²

¹² ORS 197.175(2) provides, in relevant part:

1 The hearings officer concluded that the MCC Waterfront Use provisions
2 are acknowledged to comply with Goal 14.¹³ The hearings officer initially

“Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

“(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;

“(b) Enact land use regulations to implement their comprehensive plans;

“(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals;

“(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and

“(e) Make land use decisions and limited land use decisions subject to an unacknowledged amendment to a comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment.”

¹³ The hearings officer’s findings state, in relevant part:

“The MUA-20 zone and zoning ordinance applicable to lands on Sauvie Island, including MCC 34.6755, was last amended, on October 31, 2002 (Ord. 997) *after* the adoption of OAR 660-004-0040. This 2002 ordinance readopted laws that had been previously adopted by the County. These laws were readopted to cure issues about the sufficiency of the notice used by the County when the laws were adopted. Notice of this law [Ord. 997] was not sent to DLCD as required by ORS 197.610 so it did not obtain acknowledgment. ORS 197.625.

1 noted that the MCC Waterfront Use provisions were adopted on October 31,
2 2002, in Ordinance 997, which was not processed as a post-acknowledgment
3 plan amendment pursuant to ORS 197.610 *et seq.* and thus Ordinance 997 is
4 itself not deemed acknowledged pursuant to ORS 197.625(1).¹⁴

“Ordinance No. 953, however, was one of the laws readopted by Ordinance No. 997. Ordinance No. 953 was adopted after October 4, 2000, the effective date of OAR 660-004-0040. Ordinance No. 953 reorganized and codified all County land use laws. It created new chapters, including separate zoning areas for each planning area of the County, and made other amendments to those laws as indicated by Section 1 of the ordinance. Notice of adoption of Ordinance No. 953 was sent to DLCD as required and this law was acknowledged as required by ORS 197.625 as a post-acknowledgment plan amendment. This means that Ordinance No. 953 and the County’s zoning regulations for the MUA-20 zone and the Sauvie Island apply to any application to modify the moorage/marina on the part of the subject property that is located within Multnomah County. Goal 14 is not directly applicable to the review of an application for developments allowed by that ordinance. ORS 197.625(1).” Record 17 (emphasis in original).

¹⁴ ORS 197.625(1) provides:

“A local decision adopting a change to an acknowledged comprehensive plan or a land use regulation is deemed to be acknowledged when the local government has complied with the requirements of ORS 197.610 and 197.615 and either:

“(a) The 21-day appeal period set out in ORS 197.830 (9) has expired and a notice of intent to appeal has not been filed;
or

“(b) If an appeal has been timely filed, the Land Use Board of Appeals affirms the local decision or, if an appeal of the decision of the board is timely filed, an appellate court affirms the decision.”

1 However, the hearings officer noted that Ordinance 997 simply repealed and
2 readopted a number of ordinances, including Ordinance 953, adopted in
3 November 2000, which had recodified the county’s land use code, including
4 the MCC chapter 34 Waterfront Use provisions. Because Ordinance 953 had
5 initially been adopted in 2000 as a post-acknowledgment plan amendment
6 pursuant to ORS 197.610 *et seq.*, the hearings officer concluded that the MCC
7 chapter 34 Waterfront Use provisions were acknowledged to comply with Goal
8 14, and therefore pursuant to ORS 197.625(1) Goal 14 would not apply directly
9 to a conditional use permit application for a houseboat moorage under those
10 code provisions.

11 Under the fifth assignment of error, petitioner argues the houseboat
12 moorage provisions of MCC chapter 34 codified in Ordinance 953 lost
13 whatever acknowledged status they enjoyed in 2002, when Ordinance 997
14 repealed Ordinance 953 and re-adopted it, along with other ordinances, but the
15 county failed to process the re-enacting ordinance, Ordinance 997, as a post-
16 acknowledgment plan amendment. Petitioners contend that because Ordinance
17 997 was not processed as a post-acknowledgment plan amendment and is not
18 itself acknowledged, the ordinances it re-enacted, including Ordinance 953,
19 thereby lost whatever acknowledged status they once possessed.¹⁵ Therefore,

¹⁵ Specifically, petitioner argues:

“[W]hatever benefits of acknowledgment that Ordinance 953 (2000) obtained by acknowledgment when it was initially adopted, those benefits were lost when it was repealed and, because Ordinance 997 (2002) was never acknowledged, the County’s regulations governing floating homes are not excused from the application of the Goals and administrative rules.” Petition for Review 37.

1 petitioner argues, the hearings officer erred in concluding that the
2 acknowledged status of the MCC chapter 34 houseboat moorage provisions
3 shields development of a houseboat moorage at the maximum density allowed
4 under MCC 34.6755 from direct application of Goal 14.

5 Relatedly, under the fourth assignment of error, petitioner argues that the
6 hearings officer erred to the extent she relied on the 2000 adoption of
7 Ordinance 953 to conclude that the MCC chapter 34 Waterfront Use provisions
8 are acknowledged to comply with Goal 14. According to petitioner, Ordinance
9 953 simply recodified the county’s land use ordinances, without any changes.
10 Petitioner notes that the notice supplied to DLCD states that the effect of
11 Ordinance 953 was only to “Reorganize and renumber zoning code. No
12 changes to allowed uses or approval criteria.” Record 165. Petitioner contends
13 that an ordinance that in relevant part simply reorganizes and renumbers
14 existing zoning code provisions is not a “change” for purposes of the post-
15 acknowledgment plan amendment statutes at ORS 197.610 *et seq.*, or the
16 implementing regulations at OAR 660, chapter 018.¹⁶ Petitioner argues that
17 had anyone appealed Ordinance 953 when it was adopted in 2000, they could

¹⁶ ORS 197.610 through ORS 197.625 require local governments to process a “change” to an acknowledged land use regulation pursuant to the procedures set out in those statutes. OAR 660 chapter 018 implements the statute, and in relevant part defines “change” as:

“‘A change’ to an acknowledged comprehensive plan or land use regulation means an amendment to the plan or implementing land use regulations, including an amendment to the plan text or map. This term includes additions and deletions to the acknowledged plan or regulations, the adoption of a new plan or regulation, or the repeal of an acknowledged plan or regulation.”

1 not have challenged the re-codified Waterfront Use provisions as being
2 noncompliant with Goal 14, because the text of those provisions were not
3 “changed” at all, but simply renumbered.

4 **1. Waiver**

5 The county and intervenor respond, initially, that no party raised below
6 any argument that the county’s ordinances adopting the MCC chapter 34
7 houseboat provisions *lost* their acknowledged status in 2002 when they were
8 repealed and re-enacted, and therefore that issue is waived pursuant to ORS
9 197.763(1).¹⁷ The county notes that the alarming implication of petitioner’s
10 argument is that the county’s entire land use code, not limited to Ordinance
11 953, is no longer acknowledged to comply with the statewide planning goals,
12 and hence the goals apply directly to every land use decision the county makes.
13 The county argues that if petitioner had clearly raised below the argument
14 made in the fourth and fifth assignments of error, the hearings officer and
15 county staff would have addressed that issue.

16 Petitioner replies that the “raise it or waive it” principle at ORS
17 197.763(1) does not apply, because the hearings officer’s decision is legislative
18 rather than quasi-judicial in nature. According to petitioner, the hearings
19 officer’s decision is legislative because it is not limited to resolving a concrete

¹⁷ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 dispute under existing laws, but rather adopts a new policy that will apply
2 broadly to all similarly situated marina owners. *See generally Strawberry Hill*
3 *4 Wheelers v. Benton Co. Bd. Of Comm.*, 287 Or 591, 601 P2d 769 (1979)
4 (factors considered to determine whether a land use decision is quasi-judicial
5 rather than legislative include whether the application is (1) bound to result in a
6 decision, (2) is subject to preexisting criteria, and (3) concerns closely
7 circumscribed factual situation or a relatively small number of persons).

8 We disagree with petitioner that the hearings officer's decision is
9 legislative in character. First, it seems highly doubtful that any hearings
10 officer's decision can be viewed as "legislative"; since as a general proposition
11 only a governing body has the authority and ability to adopt laws or otherwise
12 to make a legislative decision. Second, while the hearings officer's decision on
13 intervenor's request for an interpretation concerning potential development of
14 its property may have implications for other marina owners who are similarly
15 situated as intervenor, consideration of the three *Strawberry Hill* factors point
16 preponderantly toward a quasi-judicial decision in this case. Because the
17 hearings officer's decision was quasi-judicial, ORS 197.763(1) applies.

18 In the alternative, petitioner argues that if ORS 197.763(1) applies and
19 the issue was not adequately raised below, LUBA nonetheless has an
20 obligation to correctly interpret the county's ordinances and resolve petitioner's
21 argument that the houseboat moorage provisions adopted by Ordinance 953
22 lost their acknowledged status when Ordinance 953 was repealed and re-
23 enacted by Ordinance 997, an ordinance that itself is not acknowledged.

24 While LUBA certainly has an obligation to correctly construe the
25 applicable law in resolving issues properly before us, the scope of issues that
26 are properly before LUBA is restricted by ORS 197.763(1). We disagree with

1 petitioner that LUBA has the authority to resolve an issue that ORS 197.763(1)
2 squarely places outside our scope of review.

3 Finally, petitioner argues that the issue raised under the fourth and fifth
4 assignments of error was sufficiently raised during the proceedings below, at
5 Record 48. Although it is a close question, we conclude that as the arguments
6 were framed below, no issue was raised below that Ordinance 997 caused
7 Ordinance 953 to lose its acknowledged status.

8 Petitioner argued initially to the planning director that the county's
9 houseboat moorage provisions had *never* become acknowledged to comply
10 with Goal 14. With respect Ordinance 997, petitioner's view was that
11 Ordinance 997 "simply repealed and readopted various actions to cure notice
12 problems" and did not have the effect of *acknowledging* MCC 34.6755 or the
13 county's houseboat moorage regulations. Record 207. At Record 48,
14 petitioner disputes a finding in the initial planning director's decision that
15 Ordinance 997 was acknowledged, again in apparent service to petitioner's
16 argument that Ordinance 997 did not have the effect of acknowledging the
17 county's houseboat moorage regulations. In other words, the position petitioner
18 presented below was that Ordinance 997 made no change with respect to the
19 acknowledged status of the county's houseboat moorage regulations. On
20 appeal to LUBA, however, petitioner advances the diametrically opposed
21 position: that Ordinance 997 in fact changed the acknowledged status of the
22 county's houseboat moorage regulations, by causing those regulations to *lose*
23 their acknowledged status. Had petitioner raised that issue below with the
24 specificity required by ORS 197.763(1), the hearings officer and the county
25 staff could have responded, and mostly likely would have, because the

1 necessary implication of that position, if accurate, is that *none* of the county’s
2 land use regulations are acknowledged.

3 In our view, a reasonable person would not have recognized from
4 petitioner’s arguments below—essentially that Ordinance 997 was a non-event
5 with respect to the acknowledgment status of Ordinance 953 and other
6 ordinances adopting the county’s houseboat moorage provisions—that
7 petitioner was in fact arguing that Ordinance 997 eliminated the acknowledged
8 status of land use regulations. The issue raised in the fifth assignment of error
9 is therefore waived.

10 **2. Ordinance 997 did not “de-acknowledge” Ordinance 953**

11 Because the waiver issue is a close call, and the merits of the fifth
12 assignment of error are closely related, analytically, to the merits of the fourth
13 assignment of error, we will nonetheless address and resolve the merits of the
14 fifth assignment of error. For the following reasons, we disagree with
15 petitioner that in repealing and re-adopting Ordinance 953, Ordinance 997 had
16 the effect of “de-acknowledging” Ordinance 953.

17 Intervenor argues, and we agree, that because Ordinance 997 simply
18 repealed and re-adopted 34 ordinances, without any changes at all, in order to
19 correct publication notice defects in the 34 original ordinances, Ordinance 997
20 did not accomplish a “change” or amendment to the county’s acknowledged
21 land use regulations that would *require* that Ordinance 997 be processed as a
22 post-acknowledgment plan amendment under ORS 197.610 *et seq.*¹⁸ Although

¹⁸ That said, the safer practice is for the local government to process the repeal and re-adoption as a post-acknowledgment plan amendment, even if not required to. Proceeding in that manner would increase certainty over the

1 OAR 660-018-0010(1)(a) defines “change” to include “repeal of an
2 acknowledged plan or regulation,” we believe that language is concerned with
3 a repeal that results in an actual alteration in the local government’s
4 implementation of the applicable goals and administrative rules, for example by
5 deleting a code provision that the local government had formerly relied upon to
6 implement a goal or rule. Where the local government repeals a regulation, but
7 in the same decision re-adopts that same regulation without any change, the
8 repeal does not alter the local government’s implementation of the applicable
9 goals and rules. If the re-adopted but unchanged regulation was acknowledged
10 prior to its repeal and re-adoption, the repeal and re-adoption does not change
11 the acknowledged status of the regulation. As intervenor accurately
12 characterizes it, the adoption of Ordinance 997 was a “non-event” as concerns
13 the acknowledged status of the re-adopted ordinances, at least with respect to
14 whether the statewide planning goals apply directly to subsequent land use
15 decisions made under those re-adopted ordinances.¹⁹

16 Accordingly, the fifth assignment of error is denied.

acknowledged status of the re-adopted ordinances, and reduce potential for disputes such as the present one.

¹⁹ Arguably, a person who did not receive publication notice of one of the ordinances when it was originally adopted, but received that publication notice on its re-adoption, could have timely appealed the re-adopted ordinance and advance whatever legal challenges that person could have made to the original ordinance had the county provided the statutorily required publication notice. However, that is a different question than the one presented in this appeal: whether re-adoption of the ordinance without following the procedures set out in ORS 197.610 *et seq.* “de-acknowledges” the ordinance, such that the statewide planning goals then apply directly to land use decisions made pursuant to the re-adopted ordinance, pursuant to ORS 197.646(3).

1 **3. The MCC chapter 34 Waterfront Use provisions are**
2 **acknowledged to comply with Goal 14**

3 As noted, in the fourth assignment of error petitioner challenges the
4 hearings officer’s conclusion that because the MCC chapter 34 Waterfront Use
5 provisions were re-codified in Ordinance 953 (2000), which was processed as a
6 post-acknowledgment plan amendment, those provisions are therefore
7 acknowledged to comply with Goal 14. Petitioner argues that an ordinance that
8 in relevant part simply recodifies and renumbers an existing code provision
9 does not result in the acknowledgment of that code provision, even if the re-
10 codifying ordinance is processed as a post-acknowledgment plan amendment.
11 To borrow a phrase from intervenor, petitioner might argue that Ordinance 953
12 was a “non-event” with respect to the acknowledged status of the Waterfront
13 Use provisions, and that adoption of Ordinance 953 therefore did not have the
14 effect of acknowledging those provisions.

15 In the abstract, petitioner may be correct that an ordinance that merely
16 re-codifies or re-numbers an existing acknowledged code provision, without
17 making any changes in that code provision, does not result in a new
18 acknowledgment of the code provision, even if the re-codifying ordinance is
19 processed as a post-acknowledgment plan amendment. *See* OAR 660-018-
20 0085(1) (“an adopted *change* to a comprehensive plan or land use regulation is
21 deemed to be acknowledged” when the local government has complied with
22 statutory and rule requirements, among other requirements). Where the
23 ordinance merely recodifies or renumbers an existing acknowledged code
24 provision, there may be no “change” to be acknowledged. However, the
25 problem with that argument is that it simply pushes the relevant
26 acknowledgment event further back in time. The MCC chapter 34 Waterfront

1 Use provisions were originally adopted by ordinance in 1982, and have
2 remained unchanged since that date, other than the re-numbering from MCC
3 chapter 11 to MCC chapter 34 that was accomplished by Ordinance 953. There
4 is no dispute that that 1982 ordinance was processed as a post-acknowledgment
5 plan amendment and was acknowledged to comply with Goal 14 when it was
6 adopted in 1982.

7 It is true that the adoption of the 1982 ordinance pre-dated the Supreme
8 Court's *Curry County* decision in 1986, which was the first time an Oregon
9 appellate court interpreted Goal 14 to prohibit establishment of urban uses on
10 rural land. However, that interpretation did not change the fact that Goal 14,
11 like all other statewide planning goals, is not directly applicable to land use
12 decisions made under acknowledged land use regulations. ORS 197.175(2)(d);
13 *see n 12. Curry County* did not obligate local governments to apply Goal 14
14 directly to their land use decisions made under acknowledged land use
15 regulations. While any *amendments* to the Waterfront Use provisions must be
16 shown to be consistent with Goal 14, as noted, the text of the Waterfront Use
17 provisions has remained unchanged since 1982. Thus, even if petitioner is
18 correct that Ordinance 953 itself did not have the effect of acknowledging the
19 Waterfront Use provisions, that argument does not mean that the Waterfront
20 Use provisions are unacknowledged, and does not mean that Goal 14 would
21 directly apply to a land use decision made under those provisions, pursuant to
22 ORS 197.175(2)(e). *See n 12.* Petitioner's challenges to the hearings officer's
23 conclusions regarding Ordinance 953 do not provide a basis for reversal or
24 remand.

25 Given that disposition, we need not address petitioner's challenges to
26 other findings that rely in part on Ordinances 887 and 982 to conclude that the

1 Waterfront Use provisions are deemed acknowledged to comply with Goal
2 14.²⁰

3 The fourth assignment of error is denied.

4 **C. Third Assignment of Error: OAR 660-004-0040(3)(b)**

5 Under the third assignment of error, petitioner challenges some of the
6 hearings officer’s findings regarding Ordinance 887, which adopted the SI/MC
7 in 1997. We understand petitioner to argue that because the SI/MC was
8 amended in 2010 pursuant to Ordinance 1153—which adopted the Rocky
9 Pointe Goal 14 exception to allow expansion of a houseboat moorage—the
10 1997 acknowledgment of Ordinance 887 no longer shields conditional use
11 applications for houseboat moorages from direct application of Goal 14.

12 That argument is apparently based on the last sentence of OAR 660-004-
13 0040(3)(b), which provides a “safe harbor” for rural residential areas that have
14 been reviewed for compliance with Goal 14 and acknowledged to comply with
15 that goal in a post-acknowledgment plan amendment proceeding that occurred
16 after *Curry County* and before October 4, 2000.²¹ The acknowledged

²⁰ We note however that Ordinances 887 and 982 did not adopt or amend the Waterfront Use provisions. It is not clear how ordinances that did not adopt or amend the Waterfront Use provisions could result in the acknowledgment of those code provisions.

²¹ OAR 660-004-0040(3)(b) provides:

“Some rural residential areas have been reviewed for compliance with Goal 14 and acknowledged to comply with that goal by the department or commission in a periodic review, acknowledgment, or post-acknowledgment plan amendment proceeding that occurred after the Oregon Supreme Court’s 1986 ruling in *1000 Friends of Oregon v. LCDC*, 301 Or 447 (*Curry County*), and before October 4, 2000. Nothing in this rule shall be construed to

1 regulations governing such areas need not be amended (as otherwise required
2 by ORS 197.646(1)) to comply with the provisions of OAR 660-004-0040. *See*
3 n 11. However, the last sentence of OAR 660-004-0040(3)(b) specifies that “if
4 such a local government later amends its plan’s provisions or land use
5 regulations that apply to any rural residential area, it shall do so in accordance
6 with this rule.” Thus, OAR 660-004-0040(3)(b) provides certain acknowledged
7 regulations a limited “safe harbor” from the otherwise immediate obligation
8 under ORS 197.646(1) and (3) to implement the rule’s requirements or apply
9 those requirements directly. When those regulations are amended, however,
10 the “safe harbor” disappears, and the local government is then obligated to
11 amend the regulations in accordance with the rule. We understand petitioner to
12 argue that when the county amended the SI/MC to adopt a Goal 14 exception
13 for the Rocky Pointe houseboat moorage, any “safe harbor” provided by the
14 1997 acknowledgment of Ordinance 887 disappeared, and the county was
15 thereafter obligated to adopt amendments consistent with the rule’s
16 requirements, or apply those requirements directly to land use decisions.

17 Assuming we have characterized petitioner’s argument correctly, there
18 are several problems with it. First, respondents argue that no issue was raised
19 below that Ordinance 1153 amended Ordinance 887 or the SI/MC, or that the
20 legal effect of any such amendment was to make the rule or Goal 14 directly

require a local government to amend its acknowledged comprehensive plan or land use regulations for those rural residential areas already acknowledged to comply with Goal 14 in such a proceeding. However, if such a local government later amends its plan's provisions or land use regulations that apply to any rural residential area, it shall do so in accordance with this rule.”

1 applicable to land use decisions, and thus that issue is waived. ORS
2 197.763(1). Petitioner has not specifically responded to that waiver challenge,
3 and as far as we can tell respondents are correct that no argument was raised
4 below, at least with the specificity required by ORS 197.763(1), that adoption
5 of Ordinance 1153 amended the SI/MC, with the consequence that Goal 14
6 would apply directly to county approval of houseboat moorages.

7 Second, OAR 660-004-0040(3)(b) expressly provides a limited safe
8 harbor only from the *rule*'s requirements. If after October 4, 2000 the local
9 government amends the plan or regulations governing a rural residential area,
10 that safe harbor disappears, and the local government is obligated to conform
11 the amendments to the rule's requirements. Presumably, if the local
12 government fails to do so, the rule's requirements would apply directly,
13 pursuant to ORS 197.646(3). However, we concluded under the first
14 assignment of error that OAR 660-004-0040 does not include any requirements
15 with respect to houseboat moorages. Therefore, the 2010 amendment to the
16 SI/MC did not have the effect of triggering an obligation on the county to
17 amend its houseboat moorage regulations to conform to the rule's
18 requirements, because the rule has no such requirements.

19 OAR 660-004-0040(3)(b) does not purport to provide a safe harbor from
20 Goal 14 requirements that are not embodied in the rule, and the last sentence of
21 OAR 660-004-0040(3)(b) does not obligate the county to implement Goal 14
22 requirements not found in the rule, or suggest that failure to implement such
23 Goal 14 requirements in amending its plan or regulations means that those Goal
24 14 requirements thereafter apply directly to any land use permit the county

1 subsequently issues under its acknowledged plan and land use regulations.²²
2 Petitioner fails to explain how the 2010 amendment to the SI/MC accomplished
3 by Ordinance 1153 had the effect of making Goal 14 itself directly applicable
4 to subsequent county decisions approving a conditional use permit for a
5 houseboat moorage. As respondents note, Ordinance 1153 amended only the
6 SI/MC plan map to indicate that the Rocky Pointe property is subject to a Goal
7 14 exception. There is no dispute that Ordinance 1153 is acknowledged to
8 comply with Goal 14. Petitioner has not provided any legal theory we can
9 understand to the effect that Ordinance 1153 “de-acknowledged” any part of
10 the SI/MC plan, triggered the obligation to amend other portions of the SI/MC
11 plan, or otherwise caused Goal 14 to become directly applicable to county land
12 use permits approving houseboat moorages under the acknowledged plan and
13 land use regulations.

14 The third assignment of error is denied.

15 **D. Conclusion**

16 For the foregoing reasons, petitioner has not demonstrated that the MCC
17 Waterfront Use provisions at MCC 34.7505 and related SI/MC plan provisions
18 are not acknowledged to comply with Goal 14, or that either OAR 660-004-
19 0040 or Goal 14 must be applied directly to a conditional use permit
20 application to site or expand a houseboat moorage under those acknowledged
21 provisions.

22 The first, third, fourth and fifth assignments of error are denied.

²² We understand that the county is currently engaged in a legislative process to update and amend the SI/MC. Future amendments to the SI/MC must, of course, be consistent with Goal 14 as well as OAR 660-004-0040.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner contends that the hearings officer misconstrued the applicable
3 law in concluding that a houseboat moorage at the maximum 1:50 density ratio
4 allowed under MCC 34.6755 is consistent with the county’s comprehensive
5 plan policies.

6 The county’s conditional use permit standards, at MCC 34.6315(A)(7),
7 require a finding that the proposed use will “satisfy the applicable policies of
8 the Comprehensive Plan.” The county’s Comprehensive Framework Plan
9 (CFP) includes the SI/MC, and the two documents include several policies
10 concerning houseboat moorages. CFP Policy 26 states in relevant part that it is
11 the county’s policy to locate houseboats in accordance with “[a]ny other
12 applicable federal, state or local policies that regulate waterway area
13 development.” Policy 26 also sets out criteria for “locating or expanding a
14 houseboat moorage.” Policy 26 Strategy B(1) states that the zoning ordinance
15 should be amended to “[a]llow for the location and expansion of houseboat
16 moorages within designated areas.”

17 SI/MC Policy 10 establishes a procedure for determining the status of
18 existing houseboat moorages in designated areas, and provides in relevant part
19 that if permitted moorages seek modification or alteration of the use, they must
20 meet all applicable zoning codes in effect at the time.

21 Petitioner argues that under Policies 10 and 26 any location or expansion
22 of an existing moorage is subject to compliance with all state policies that
23 regulate waterway area development, which petitioner argues would include
24 Goal 14. Petitioner repeats some of her arguments, rejected elsewhere, that
25 Goal 14 is directly applicable because the county’s Waterfront Use provisions
26 are not acknowledged to comply with Goal 14.

1 Respondents argue that no argument was made below that approval of a
2 houseboat moorage would conflict with Policies 10 or 26, or that those policies
3 effectively subject houseboat moorages to direct application of Goal 14.
4 Petitioner has not directly responded to the waiver challenge. In the petition
5 for review, petitioner cites to Record 209-210 to demonstrate that the issue
6 presented in the third assignment of error was preserved. However, Record
7 209-210 includes no arguments that raise the issue presented in this assignment
8 of error. Therefore that issue is waived.

9 The third assignment of error is denied.

10 The county's decision is affirmed.