

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

3
4 SEABREEZE ASSOCIATES LIMITED PARTNERSHIP
5 and FREDERICK QUIRIN,
6 *Petitioners,*

7
8 vs.

9
10 TILLAMOOK COUNTY,
11 *Respondent,*

12
13 and

14
15 OREGON DEPARTMENT OF LAND CONSERVATION
16 AND DEVELOPMENT and VICTOR AFFOLTER,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2014-106

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Tillamook County.

25
26 Damien R. Hall, Portland, filed the petition for review and argued on
27 behalf of petitioners. With him on the brief was Ball Janik LLP.

28
29 William K. Sargent, County Counsel, Tillamook, filed a joint response
30 brief on behalf of respondent.

31
32 Steven E. Shipsey, Assistant Attorney General, Salem, filed a joint
33 response brief and argued on behalf of intervenor-respondent Oregon
34 Department of Land Conservation and Development.

35
36 Courtney Johnson, Portland, filed a joint response brief on behalf of
37 intervenor-respondent Victor Affolter. With her on the brief was Crag Law
38 Center.

1 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
2 Member, participated in the decision.

3

4

REMANDED

04/16/2015

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

NATURE OF THE DECISION

Petitioners appeal a legislative decision that in relevant part adopts a Coastal Hazards Overlay zone (the Nesk CH zone) that limits land divisions and development on lands subject to coastal erosion in the rural unincorporated community of Neskowin.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address standing and other issues raised in the joint response brief. There is no opposition to the motion or reply brief, and it is allowed.¹

FACTS

Neskowin is designated in the county’s comprehensive plan as a rural unincorporated community. In 2009, in response to extensive beachfront erosion caused by winter storms, the county formed the Neskowin Coastal Hazards Committee to study and recommend means to protect Neskowin from further erosion and coastal flooding. The resulting document, the Neskowin Coastal Erosion Adaptation Plan, included a recommendation to create an overlay zone, the Nesk CH zone, covering approximately 320 acres of Neskowin, which is intended to reduce the vulnerability of new development to coastal erosion hazards.

Among other restrictions, the Nesk CH zone limits land divisions, prohibits construction on newly created lots, prohibits new accessory dwelling units, requires all new structures to be movable and located in the safest area of a site, and imposes geological reporting standards. The Nesk CH overlay zone

¹ The standing challenge was withdrawn at oral argument.

1 is applied to portions of several residential base zones within Neskowin,
2 including the Nesk RR (Rural Residential) zone, the Nesk R-1 (Low Density
3 Rural Residential) zone, and the Nesk R-3 (High Density Rural Residential)
4 zone. The Nesk R-3 base zone allows multi-family dwellings and planned
5 development with attached single family dwellings. However, under the Nesk
6 CH overlay zone, new residential development is generally restricted to one
7 single-family dwelling per existing lot.

8 The county planning commission conducted public hearings on the
9 proposed comprehensive plan and land use regulations, and recommended
10 approval to the county board of commissioners. The commissioners conducted
11 public hearings and, on November 5, 2014, adopted Ordinance OA-14-01
12 approving the amendments. This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 Petitioners argue that the county’s decision includes no findings
15 addressing compliance with any of the statewide planning goals. According to
16 petitioners, the staff reports to the planning commission and the county board
17 of commissioners listed only Statewide Planning Goals 7 (Areas Subject to
18 Natural Hazards), 14 (Urbanization) and 18 (Beaches and Dunes) as applicable.
19 For the reasons stated in the second and third assignments of error, petitioners
20 argue that other goals were also applicable, specifically Statewide Planning
21 Goal 2 (Land Use Planning) and 10 (Housing), and the county therefore erred
22 in failing to adopt findings addressing those applicable goals.

23 The parties agree that the county’s decision is a legislative decision, and
24 that in the present case no statute, goal or administrative rule requires the
25 county to adopt findings addressing the applicable statewide planning goals.

1 Absent such a requirement, the mere absence of findings addressing goals
2 applicable to a legislative decision is not, in itself, a basis for remand.²

3 However, the only applicable goals petitioners cite to are Goals 2 and 10,
4 which are the subject of the second and third assignments of error. Petitioners’
5 arguments under the first assignment of error appear to be entirely derivative of
6 arguments made under the second and third assignments of error, and therefore
7 provide no independent basis for reversal or remand. Accordingly, the first
8 assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Under the second assignment of error, petitioners argue that the county
11 erred in failing to consider whether adoption of the Nesk CH zone is consistent
12 with the Housing Element of the county’s comprehensive plan and Statewide
13 Planning Goal 10 (Housing).

14 Goal 10 is “[t]o provide for the housing needs of citizens of the state.”
15 Goal 10 requires that “Buildable lands for residential use shall be inventoried
16 and plans shall encourage the availability of adequate numbers of needed
17 housing units at price ranges and rent levels which are commensurate with the
18 financial capabilities of Oregon households and allow for flexibility of housing
19 location, type and density.” Goal 10 and ORS 197.295(1) define “buildable
20 lands” as “lands in urban and urbanizable areas that are suitable, available and
21 necessary for residential use.” *See also* OAR 660-008-0005(2) (similar

² That said, in order for LUBA and the Court of Appeals to exercise their review functions, at a minimum “there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered.” *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002).

1 definition in the administrative rule implementing Goal 10 and the needed
2 housing statutes). As defined in the Goals, “urban” and “urbanizable” lands
3 refer to lands within urban growth boundaries. Thus, as a general rule, Goal 10
4 imposes specific planning obligations only for lands within urban growth
5 boundaries.

6 One of the fundamental obligations under Goal 10 and related rules and
7 statutes is to provide for a supply of buildable land that is sufficient to meet the
8 projected housing needs for the relevant 20-year planning period. *See generally*
9 ORS 197.296(2) through (7). To oversimplify, local governments that are
10 subject to that obligation must inventory the existing supply of buildable lands
11 within the urban growth boundary under consideration, project housing need
12 for the relevant planning period based on population growth and other factors,
13 and then take specified actions necessary to ensure there is an adequate supply
14 of buildable land within the urban growth boundary during that planning
15 period. The county, as the coordinating body, is responsible for coordinating
16 population projections and the efforts of incorporated cities within its
17 boundaries to meet their Goal 10 obligations.

18 The county’s comprehensive plan Housing Element, adopted in 1982 and
19 acknowledged in 1984 to comply with Goal 10, evaluates housing needs
20 throughout the county, including rural lands outside urban growth boundaries,
21 for the period 1980 to 2000.³ The Housing Element includes inventories of
22 residential land and projections of additional housing needed within Neskowin
23 and other unincorporated communities.

³ As far as we are informed, the county’s Goal 10 inventory has not been amended since its adoption to include a projection of housing need and supply beyond the year 2000.

1 **A. Consistency with Goal 10 and Housing Element**

2 Petitioners contend, and respondents do not dispute, that the Nesk CH
3 zone effectively reduces capacity for new residential development in the
4 unincorporated rural community of Neskowin. Petitioners argue that the
5 county’s Goal 10 inventory relies upon the capacity and supply of residential
6 land within Neskowin to satisfy the demand for needed housing in the county.
7 Because the Nesk CH zone effectively reduces the supply of land in the
8 county’s Goal 10 inventory, petitioners argue, the county must evaluate
9 whether application of the Nesk CH zone is consistent with the county’s
10 obligations under Goal 10 to provide for an adequate supply of buildable land.
11 However, petitioners note, the county adopted no findings regarding Goal 10,
12 and apparently did not consider whether the Nesk CH zone is consistent with
13 Goal 10.

14 Respondents dispute that Goal 10 applies or imposes any obligations on
15 lands within a rural unincorporated community such as Neskowin.
16 Respondents note, correctly, that Goal 10 generally imposes planning
17 obligations on local governments only for urban and urbanizable lands within
18 urban growth boundaries. The only exception, respondents argue, is with
19 respect to expansion of *urban* unincorporated communities, pursuant to OAR
20 660-022-0040.⁴

⁴ OAR 660-022-0040 provides standards for planning and expansion of urban unincorporated communities (UUCs). OAR 660-022-0040(1) provides that “[a]ll statewide planning goals applicable to cities shall also apply to UUCs, except for those goals provisions relating to urban growth boundaries and related requirements regarding the accommodation of long-term need for housing and employment growth.” OAR 660-022-0040(5)(d) provides that if a county expands a UUC in order to accommodate long-term need for housing in

1 With respect to the county’s Housing Element, respondents dispute that
2 the Housing Element or the county’s buildable lands inventory relies on the
3 residential-zoned lands in Neskowin to meet the identified housing needs of the
4 county. According to respondents, the language petitioners cite in the Housing
5 Element that discuss application of Goal 10 to rural communities such as
6 Neskowin are simply noting the existence of “additional housing opportunities”
7 in rural areas, and were not intended to identify such rural lands as part of the
8 county’s Goal 10 needed housing inventory. Response Brief 15.

9 Alternatively, respondents note that in 1999 the county adopted the
10 Neskowin Community Plan (NCP), in part to comply with the requirements of
11 OAR chapter 660, division 022, the unincorporated communities rule, which
12 had been promulgated in 1994. Respondents contend that the 1999 NCP is
13 acknowledged to comply with the statewide planning goals, including Goal 10,
14 and that the sections of the NCP addressing residential use and Goal 10 do not
15 identify residential-zoned lands within Neskowin as needed housing or as part
16 of the county’s buildable lands inventory. Respondents contend that the
17 specific language of the NCP replaces or supersedes the general language of
18 the county’s Housing Element that discusses application of Goal 10 to rural
19 areas including Neskowin.

20 Petitioners reply that the Housing Element clearly regards residential
21 lands within Neskowin as part of the county’s Goal 10 inventory of lands
22 necessary to satisfy the projected need for housing. Even if the county was not

the community, areas designated for residential use in the expansion area must meet “the requirements of statewide planning Goal 10[.]” There are no similar provisions governing planning and zoning of rural unincorporated communities.

1 required to include such lands in its Goal 10 buildable lands inventory,
2 petitioners argue, the county chose to do so, and that choice was acknowledged
3 by LCDC to comply with Goal 10. Under these circumstances, petitioners
4 argue, the county must demonstrate that effectively reducing the residential
5 capacity of land that was identified as needed to satisfy the county's projected
6 need for housing is consistent with Goal 10. With respect to the NCP,
7 petitioners argue that nothing cited in the NCP suggests that the NCP replaces
8 or supersedes the Housing Element.

9 As noted, Goal 10 and the needed housing statutes generally do not
10 impose planning obligations on counties for lands within a rural
11 unincorporated community such as Neskowin, or other rural lands outside
12 urban growth boundaries. By definition, such rural lands are not "buildable
13 lands." Under these circumstances, the only way that application of the Nesk
14 CH zone could *directly* implicate Goal 10 or the needed housing statutes is if
15 the county relied on residential land within Neskowin in determining the
16 amount of buildable land needed within urban growth boundaries to meet the
17 county's planning obligations under Goal 10. In other words, if in adopting the
18 Housing Element the county and cities effectively undersized the urban growth
19 boundaries within its borders, in partial reliance on rural land within Neskowin
20 to meet its identified need for buildable land, then we believe the county could
21 not adopt the Nesk CH zone to reduce the residential capacity within Neskowin
22 without considering the impact of that action on the adequacy of its Goal 10
23 inventory of buildable lands within urban growth boundaries. However, if the
24 supply of buildable land within urban growth boundaries fully met the county's
25 Goal 10 planning obligations, and residential lands within Neskowin are
26 intended to meet only local, rural housing needs, then adoption of the Nesk CH

1 zone does not implicate the supply of buildable land in the county, and thus
2 does not implicate Goal 10 or trigger any obligations under the needed housing
3 statutes.

4 Unfortunately, we cannot tell from the record or the portions of the
5 Housing Element provided to us what role, if any, residential lands within
6 Neskowin play in the county’s Goal 10 inventory. Based on language and
7 tables in the 1984 Housing Element, it is reasonably clear that while the county
8 recognized that it was not required to inventory rural lands as part of its Goal
9 10 inventory, the county deliberately chose to do so. The Housing Element
10 states: “Although building lands inventories are only required for incorporated
11 areas the County is inventorying buildable lands for unincorporated areas to
12 assure that housing needs are being met in these areas.” Housing Element 2.3
13 (Petition for Review Exhibit 4-38). Indeed, the Housing Element notes that the
14 “primary purpose of this projection [of housing need] is to determine housing
15 needs in unincorporated areas of the County[,]” because housing needs in
16 incorporated areas had already been developed in coordination with each city
17 within the county. Housing Element 1.5 (Petition for Review Exhibit 4-30).

18 The Housing Element specifically addresses housing supply and need in
19 Neskowin. Housing Element Table 39 projects the need for 1,310 additional
20 housing units in the southern portion of the county that includes Neskowin.
21 Petition for Review Exhibit 4-34. Table 42 assigns to Neskowin 418 of the
22 1,310 housing units needed in the southern portion of the county, out of a total
23 of some 15,000 additional housing units needed in the county as a whole for
24 the period 1980 to 2000. Exhibit 4-35. Thus, the Housing Element appears to
25 rely on Neskowin to supply at least 418 housing units to meet demand for

1 housing in at least the southern portion of the county, which includes no
2 incorporated areas or urban growth boundaries.

3 The above-quoted passages from the Housing Element can be read to
4 suggest that residential lands within Neskowin were identified and inventoried
5 only to meet local, rural housing needs, and such lands were not intended to
6 meet housing needs that Goal 10 requires be met on buildable lands within
7 urban growth boundaries. However, we cannot say that for sure. As noted, the
8 county's decision includes no findings regarding Goal 10 or the Housing
9 Element, and apparently the county did not consider Goal 10 or the Housing
10 Element during the proceedings below. Absent some findings or stronger
11 evidence on this point, we are not in a position to agree with respondents that
12 adoption of the Nesk CH zone could have no impact on the county's Goal 10
13 inventory of buildable lands within urban growth boundaries. Remand is
14 necessary for the county to consider that possibility.

15 In addition, on remand the county should consider the related question of
16 whether the Nesk CH zone is consistent with the Housing Element itself, even
17 if the county concludes that residential lands within Neskowin serve only local,
18 rural housing needs and play no role in meeting the county's Goal 10
19 obligation to provide an adequate supply of buildable land within urban growth
20 boundaries. Generally, land use decisions, including adoption of new zones,
21 must comply with acknowledged comprehensive plans. ORS 197.175(2)(d).
22 As explained above, the Housing Element seems to rely on Neskowin to supply
23 418 housing units to meet at least local housing demand. Because the Nesk CH
24 zone reduces capacity of residential land within Neskowin, it is possible that
25 the Nesk CH zone impacts Neskowin's ability to supply the housing units that
26 the Housing Element anticipates Neskowin will provide.

1 On this point, the 1999 Neskowin Community Plan or NCP may be
2 relevant. As explained above, respondents argue that the 1999 NCP replaced
3 or superseded the Housing Element with respect to Neskowin. However,
4 nothing cited to us in the NCP suggests an intent to replace or supersede the
5 Housing Element as it applies to Neskowin. Instead, what the NCP arguably
6 does is refine the Housing Element as it applies to Neskowin. We note that
7 NCP 5.4 includes a vacant lands inventory, indicating that in 1997 there were
8 1,084 existing residential lots and 531 existing dwellings, leaving 553 existing
9 vacant residential-zoned lots within the Neskowin unincorporated area.
10 Response Brief, Exhibit 1-21. Further, NCP 5.4 indicates that a potential 1,524
11 new residential lots could be created, which combined with existing vacant lots
12 could potentially provide 2,077 new dwelling units. *Id.* NCP 5.4 ultimately
13 concludes that it would take 56 years to reach the maximum residential
14 capacity within the existing Neskowin unincorporated area, assuming the then-
15 current 2.5 percent annual growth rate continues. *Id.* For that reason, among
16 others, the NCP concludes that there is no need to consider expanding the
17 Neskowin unincorporated area.

18 The NCP vacant lands inventory indicates that in 1997 the Neskowin
19 unincorporated area had significant excess residential capacity, far more than
20 needed to supply the 418 additional dwelling units identified in the Housing
21 Element. Even if those 418 housing units are necessary to meet local housing
22 needs, as projected in the Housing Element, then the excess inventory
23 identified in the acknowledged NCP suggests there may be little risk that the
24 Nesk CH zone would impact Neskowin's ability to provide the 418 housing
25 units that the Housing Element says are needed.

1 However, that is a judgment the county is in a better position to make.
2 On the present record and pleadings, LUBA does not have a basis to conclude,
3 absent findings or consideration of the issue by the county, that application of
4 the Nesk CH zone is consistent with the Housing Element. Remand is
5 necessary for the county to consider that issue.

6 **B. ORS 197.307(4) Needed Housing**

7 Petitioners also argue that, because the county’s Goal 10 inventory
8 identifies residential development within Neskowin as “needed housing,” the
9 requirements of ORS 197.307(4) therefore apply. ORS 197.307(4) prohibits
10 local governments from applying standards to needed housing that are not clear
11 and objective.⁵ According to petitioners, several Nesk CH standards, such as

⁵ ORS 197.303(1) defines “needed housing” in relevant part as “housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels[.]” ORS 197.307 provides, in relevant part:

“(3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

“(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

1 the requirement that development be located on the “most suitable” site, are not
2 clear and objective standards.

3 By its terms, ORS 197.307(4) applies only to “needed housing on
4 buildable land[.]” *See* n 5. “Buildable land” for purposes of ORS 197.295 to
5 197.314 is, by definition, limited to “urban and urbanizable areas,” *i.e.*, land
6 located within an urban growth boundary. ORS 197.295(1).⁶ Thus, rural
7 residential zoning standards would not be subject to the requirements that apply
8 to “needed housing on buildable land,” including the requirement at ORS
9 197.307(4) that only clear and objective standards and conditions be applied to
10 needed housing.

11 As explained above, there is a possibility that the county has relied upon
12 some residential lands in Neskowin in order to meet its Goal 10 obligation to
13 provide sufficient buildable lands within urban growth boundaries to meet
14 projected housing needs. If so, that means at a minimum that the county must
15 evaluate the adequacy of its Goal 10 inventory of buildable lands within urban
16 growth boundaries without considering lands within Neskowin.

See also OAR 660-008-0015 (Goal 10 implementing rule providing that local governments may apply only clear and objective standards to needed housing on buildable land).

⁶ We note an additional reason why it makes little sense to view lands subject to the Nesk CH zone as “buildable lands” for any purpose, including ORS 197.307(4). The Goal 10 rule, at OAR 660-008-0005(2), defines “buildable lands” in relevant part to provide that land is not generally considered “suitable and available” for needed housing if it is “severely constrained by natural hazards as determined under Statewide Planning Goal 7” (Areas Subject to Natural Hazards). The Nesk CH zone was adopted in part to address hazards from coastal erosion and ocean flooding in portions of Neskowin, pursuant to Goal 7.

1 In sum, remand is necessary for the county to first evaluate the role, if
2 any, that lands subject to the Nesk CH zone play in the county’s Goal 10
3 inventory of buildable lands. If the county determines that residential lands
4 within Neskowin serve only local, rural housing needs, then no further
5 evaluation under Goal 10 is required. Second, the county should determine
6 whether applying the Nesk CH zone to residential lands within Neskowin is
7 consistent with whatever role those lands play in the Housing Element, to
8 ensure that the county’s decision is consistent with the acknowledged Housing
9 Element, as modified or refined by the acknowledged NCP.

10 **C. Coordination**

11 Statewide Planning Goal 2 (Land Use Planning) requires the county to
12 coordinate its land use plans with the plans of other affected governmental
13 units. In addition, OAR 660-008-0030(1), part of the administrative rule that
14 implements Goal 10, requires the county to “consider the needs of the relevant
15 region in arriving at a fair allocation of housing types and densities.”⁷
16 Petitioners contend that there is no indication in the record that the county
17 coordinated with other communities in the county in developing the Nesk CH

⁷ OAR 660-008-0030 is entitled “Regional Coordination,” and provides:

“(1) Each local government shall consider the needs of the relevant region in arriving at a fair allocation of housing types and densities.

“(2) The local coordination body shall be responsible for ensuring that the regional housing impacts of restrictive or expansive local government programs are considered. The local coordination body shall ensure that needed housing is provided for on a regional basis through coordinated comprehensive plans.”

1 zone. According to petitioners, coordination is especially important in the
2 present case, because the reduced residential capacity in Neskowin will likely
3 shift demand for new coastal housing from Neskowin to other communities.

4 Respondents argue that OAR 660-008-0030(1), like other provisions of
5 the administrative rule implementing Goal 10, requires coordination only with
6 respect to decisions affecting needed housing on buildable lands within urban
7 growth boundaries, and the rule does not apply to decisions affecting
8 residential zones on rural lands outside urban growth boundaries. We partially
9 agree with respondents. OAR 660-008-0000, the rule’s purpose statement,
10 states that the rule is intended to provide standards for compliance with Goal
11 10 and to implement ORS 197.303 through 197.307, the needed housing
12 statutes. As noted above, Goal 10 and the needed housing statutes impose
13 specific planning requirements only on lands within urban growth boundaries.
14 Generally, nothing in OAR 660 division 008 will apply to county land use
15 decisions affecting only land outside urban growth boundaries. However, it is
16 possible on remand that the county will determine that application of the Nesk
17 CH zone impacts the adequacy of the county’s Goal 10 inventory of buildable
18 lands, which by definition are located only within urban growth boundaries. If
19 so, it is possible that the county may find itself in a position where it is
20 obligated to “consider the needs of the relevant region in arriving at a fair
21 allocation of housing types and densities.” In that circumstance, we agree with
22 petitioners that OAR 660-008-0030(1) would apply.

23 With respect to the general Goal 2 coordination requirement,
24 respondents argue that the record demonstrates that the county conducted
25 extensive outreach and coordination with a number of public entities, and that
26 petitioners do not identify any “affected governmental units” with whom the

1 county failed to coordinate. Goal 2 defines “affected governmental units” as
2 “local governments, state and federal agencies and special districts[.]” A “local
3 government” is generally a city or county. ORS 197.015(13). We agree with
4 respondents that, absent some effort to identify a specific city, county or other
5 governmental unit affected by the county’s decision that the county failed to
6 coordinate with, petitioners have not demonstrated that the county violated the
7 general Goal 2 coordination requirement.

8 The second assignment of error is sustained, in part.

9 **THIRD ASSIGNMENT OF ERROR**

10 Petitioners argue that the county failed to adopt a usable map or legal
11 description of the area that the Nesk CH zone applies to, and that the maps in
12 the record adopted by the county are too small or indefinite to allow affected
13 property owners to determine whether their property is subject to the Nesk CH
14 zone. Petitioners contend that the failure to adopt a usable map means that the
15 county’s decision is not supported by an “adequate factual base,” as required by
16 Goal 2.

17 Respondents argue that the maps in the record transmitted to LUBA are
18 reduced in size for convenience, but that the original map adopted by the
19 county is a much larger version produced from a GIS digital database that
20 depicts the boundary of the Nesk CH zone in relation to tax lots at a suitable
21 scale and level of detail. Respondents request that LUBA take official notice
22 of that larger map, which respondents provided to LUBA at oral argument.

23 Petitioners do not object to the request for official notice, and the request
24 is granted. The original map is at a scale and level of detail that makes it
25 possible to locate the Nesk CH boundary in relation to tax lots. Petitioners’

1 arguments under this assignment of error do not provide a basis for reversal or
2 remand.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 Neskowin was designated as a rural unincorporated community based on
6 exceptions to Statewide Planning Goals 3 (Agricultural Land) or 4 (Forest
7 Lands) or both. Citing *Leathers v. Marion County*, 31 Or LUBA 220 (1996),
8 petitioners argue that because the county’s decision changes the type or
9 intensity of uses allowed in an exception area, the county must adopt a new
10 goal exception.

11 Respondents argue that *Leathers* involved land that was subject to a
12 “reasons” exception to Goals 3 and 4, and therefore concerned application of
13 OAR 660-004-0018(4), which requires that the local government adopt a new
14 reasons exception to change the types or intensities of uses allowed in an area
15 subject to a “reasons” exception. According to respondents, the exceptions
16 adopted for Neskowin are not reasons exceptions, but physically developed or
17 irrevocably committed exceptions. Therefore, respondents argue, *Leathers* is
18 inapposite.

19 Petitioners offer no reason to doubt respondents’ position that the
20 exceptions originally adopted for Neskowin were physically developed or
21 irrevocably committed exceptions to Goals 3 and 4, not reasons exceptions.
22 Accordingly, petitioners’ arguments based on *Leathers* do not provide a basis
23 for reversal or remand. There are circumstances in which new exceptions to
24 the applicable goals are required in order to rezone areas subject to physically
25 developed or irrevocably committed exception areas, to allow new or different
26 uses, densities or public facilities than previously allowed. *See* OAR 660-004-

1 0018(2) and (3); *Ooten v. Clackamas County*, 270 Or App 214, __ P3d __
2 (A158369), April 1, 2015 (discussing OAR 660-004-0018(2)).⁸ However,

⁸ OAR 660-004-0018 provides, in relevant part:

“(2) For ‘physically developed’ and ‘irrevocably committed’ exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those:

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

“(b) That meet the following requirements:

“(A) The rural uses, density, and public facilities and services will maintain the land as ‘Rural Land’ * * *;

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

“(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses; [and]

“(c) For uses in unincorporated communities, the uses are consistent with OAR 660-022-0030 * * *

“* * * * *

“(3) Uses, density, and public facilities and services not meeting section (2) of this rule may be approved on rural land only under provisions for a reasons exception as outlined in section (4) of this rule * * *.”

1 petitioners do not address OAR 660-004-0018(2) or argue that application of
2 the Nesk CH zone in the present case triggers a need under that rule to adopt a
3 new exception.

4 The fourth assignment of error is denied.

5 **FIFTH ASSIGNMENT OF ERROR**

6 Petitioners contend that the county’s decision is inconsistent with two
7 Housing Element policies.

8 Housing Element Policy 3.7 states that in “urban and rural areas where
9 there is a possibility of conversion to urban development, the County will
10 encourage development that can be efficiently converted to higher densities.”
11 Petitioners argue that the Nesk CH zone is inconsistent with Policy 3.7,
12 because it precludes higher density development within areas of Neskowin.
13 However, as respondents note, the findings under Policy 3.7 specify areas in
14 the county where Policy 3.7 is intended to apply: “Places where low density
15 development may be transitory to urban development include some
16 unincorporated communities such as Cape Meares, Beaver, and Tierra Del Mar,
17 rural residential zoned areas near urban growth boundaries, and areas within
18 urban growth boundaries that are not yet serviced with sewer and water.”
19 Policy 3.7 does not mention Neskowin, and petitioners offer no reason to
20 believe that Neskowin is a rural area “where there is a possibility of conversion
21 to urban development” within the meaning of Policy 3.7.

22 The second Housing Element policy petitioners cite is Policy 3.8, which
23 provides that “Tillamook County will modify its zoning ordinance to increase
24 possibilities for construction [of] multi-family housing in medium density
25 urban residential zones.” However, respondents argue, and we agree, that
26 petitioners have not established that the Nesk CH zone is applied to any

1 “medium density urban residential zone,” or that any such urban residential
2 zone exists within the rural community of Neskowin.

3 The fifth assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 Petitioners contend that adoption of the Nesk CH zone violates two
6 county code provisions: Land Use Ordinance (LUO) 2.020(1) and LUO
7 10.050.

8 LUO 2.020(1) provides that zone boundaries shall be shown on maps
9 entitled “Zoning Map of Tillamook County, Oregon.” Petitioners argue that
10 the county’s decision directs that the Nesk CH zone maps be attached to the
11 NCP, but fails to direct that the official county zoning map be amended to
12 depict the new Nesk CH zone boundaries.

13 Respondents argue that following the county’s decision the county has
14 revised the official zoning map as required by LUO 2.020(1), that the amended
15 copy of the official zoning map is available in the county’s offices, and that the
16 new overlay zone has been added to the county GIS system. Respondents
17 argue, and we agree, that petitioners have not established that the county has
18 not complied with LUO 2.020(1). LUO 2.020(1) does not require, as
19 petitioners appear to assume, that the ordinance adopting a zone change
20 specifically direct that the official zoning map be amended. LUO 2.020(1) is
21 more properly understood as a direction to county staff to amend the official
22 zoning map to reflect an adopted zone change, which the county has apparently
23 done.

24 The second code provision is LUO 10.050, which provides that the
25 county board of commissioners shall set all fees, by adoption of an order. One
26 of the new Nesk CH zone standards allows planning staff to determine whether

1 a licensed or certified professional must be retained, at the applicant’s expense,
2 in order to conduct additional review of a coastal hazard area permit
3 application. Petitioners argue that the requirement to pay for a consultant’s
4 review constitutes a “fee” that under LUO 10.050 may be assessed only if the
5 county board authorizes the fee by order. Because the Nesk CH zone was
6 adopted without such an order, petitioners argue, the provision allowing staff to
7 require the applicant to pay the consultant’s fee violates LUO 10.050.

8 Respondents argue that LUO 10.050 does not require that a fee
9 authorized in an ordinance be accompanied by an order setting the fee.
10 According to respondents, no fee or application expense can become effective
11 or be assessed unless and until the board of commissioners adopts an order
12 amending the county’s fee schedule. We are not sure we understand
13 respondents’ position on how a consultant’s fee will be determined or assessed,
14 but we generally agree with respondents that petitioners have not demonstrated
15 that LUO 10.050 requires that an order setting a “fee” that the Nesk CH zone
16 authorizes must accompany or be adopted at the same time as the ordinance
17 adopting the Nesk CH zone, or that LUO 10.050 prohibits the county from
18 adopting regulations that will require payment of a fee, the amount to be
19 determined later by separate order.

20 The sixth assignment of error is denied.

21 **CONCLUSION**

22 For the reasons set out in the second assignment of error, the county’s
23 decision is remanded.