

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6  
7 vs.

8  
9 JEFFERSON COUNTY,

10 *Respondent.*

11  
12 LUBA No. 2011-106

13  
14 DEPARTMENT OF LAND  
15 CONSERVATION AND DEVELOPMENT,

16 *Petitioner,*

17  
18 vs.

19  
20 JEFFERSON COUNTY,

21 *Respondent.*

22  
23 LUBA No. 2011-109

24  
25 FINAL OPINION  
26 AND ORDER

27  
28 Appeal from Jefferson County.

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30 Paul D. Dewey, Bend, filed a petition for review on behalf of petitioner Central  
31 Oregon Landwatch.

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33 Steven E. Shipsey, Assistant Attorney General, Salem, filed a petition for review on  
34 behalf of petitioner Department of Land Conservation and Development. With him on the  
35 brief were Erin L. Donald, Assistant Attorney General and John Kroger, Attorney General.

36  
37 No appearance by Jefferson County.

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39 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,  
40 participated in the decision.

41  
42 REVERSED

02/23/2012

43  
44 You are entitled to judicial review of this Order. Judicial review is governed by the  
45 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county decision that approves an exception to Statewide Planning Goal 3 (Agricultural Lands) and amends the county’s comprehensive plan and zoning maps to allow rural residential development of agricultural land.

**FACTS**

The subject property includes 189.5 acres and is located a short distance southeast of the City of Madras. The property lies outside the city’s Urban Growth Boundary (UGB), and outside city limits, but a majority of the subject property lies within an area that the city has designated as an Urban Reserve. Record 202.<sup>1</sup> As explained in more detail below, the result in this appeal is dictated by that Urban Reserve designation and restrictions that the Land Conservation and Development Commission (LCDC) has adopted for the planning and zoning of such Urban Reserve lands.

The subject property is located in an exclusive farm use (EFU) zone. The statutory EFU zone, Goal 3 and the LCDC rules that implement the statute and Goal 3 allow a number of uses, but generally those laws require preservation of agricultural land for farm use and would not permit the property to be divided for rural residential development. The county approved the requested exception to Goal 3 to change the comprehensive plan map designation from “Range Land” to “Rural Land” and to change the zoning map designation from “Exclusive Farm Use-Rangeland” to “Rural Residential (RR-10).” The property owners propose to divide the 189.5 acres into 18 lots of approximately 10 acres each and develop an equestrian themed rural residential development that would include “arenas, equestrian trails, pastures and paddocks.” Record 10. Petitioners Department of Land Conservation and

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<sup>1</sup> It appears that approximately 111 of the 189.5 acres are located within the City of Madras Urban Reserve. Record 202, 232.

1 Development (DLCD) and Central Oregon Land Watch (COLW) opposed the application  
2 below and appeal the county's final decision.

3 **INTRODUCTION**

4 In DLCD's first assignment of error and petitioner COLW's first, third and fourth  
5 assignments of error, petitioners argue the county erred in applying the OAR 660-004-  
6 0020(2) standards governing "reasons" exceptions and in applying the OAR 660-004-0022(2)  
7 standard that governs reasons exceptions for rural residential development specifically. In  
8 DLCD's second and COLW's fifth assignments of error, petitioners argue the county's  
9 findings inadequately address OAR 660-012-0060, which is part of LCDC's transportation  
10 planning rule. In its second assignment of error, petitioner COLW contends the county  
11 erroneously found that certain limiting factors that make the subject property less productive  
12 for farm use justify the approved reasons exception.

13 The applicant has not intervened in this appeal and the county has not appeared to  
14 defend its decision. That means LUBA must consider petitioners' arguments in this appeal  
15 with no response to those arguments. Although we generally agree with petitioners'  
16 arguments under the above-described assignments of error, and likely would remand the  
17 county's decision based on all of those assignments of error if it were necessary to reach and  
18 decide those assignments of error, we do not do so. Petitioner DLCD's third assignment of  
19 error and COLW's sixth assignment of error allege that OAR 660-021-0040(4), which limits  
20 planning and zoning for resource lands that have been designated as an Urban Reserve,  
21 prohibits approval of an exception to Goal 3 for such lands for the purpose of rezoning  
22 agricultural land to allow rural residential development. We agree with petitioners, and  
23 because that means the county's decision is prohibited as a matter of law and the county's  
24 decision must be reversed in any event, we turn directly to those assignments of error and do  
25 not decide petitioners' other assignments of error.

1 **THIRD ASSIGNMENT OF ERROR (DLCD) SIXTH ASSIGNMENT OF ERROR**  
2 **(COLW)**

3 As previously noted, a majority of the subject property has been designated as an  
4 Urban Reserve by the City of Madras. The county has applied its Urban Reserve Overlay  
5 Zone in recognition of that Urban Reserve designation. The designation and rezoning has  
6 significance for future UGB amendments. ORS 197.298 establishes a priority system for  
7 expanding UGBs. If a need is demonstrated for a UGB expansion, the first priority land to be  
8 included in the UGB is “land that is designated urban reserve land under ORS 195.145, rule  
9 or metropolitan service district action plan.” ORS 197.298(1)(a).

10 The county relied in part on the subject property’s Urban Reserve designation as a  
11 reason for approving the exception to Goal 3 to permit rural residential development of the  
12 subject property. That finding is set out below:

13 “\* \* \* The County’s Comprehensive Plan and Zoning Ordinance have, by  
14 adoption of the Urban Reserve Overlay Zone and applying it to this property  
15 acted on hearings, studies and information establishing, legislatively, why this  
16 property is appropriate for RR-10 zoning in preparation for planned ultimate  
17 inclusion within the Madras Urban Growth [Boundary].” Record 17.

18 The sentiment expressed in the above-quoted finding, *i.e.*, that the property’s Urban Reserve  
19 designation lends support for the county’s decision to approve a Goal 3 exception and rezone  
20 the property from EFU-Rangeland to RR-10, is expressed elsewhere in the county’s findings.  
21 Record 12, 13, 15. For the reasons explained below, not only does the subject property’s  
22 Urban Reserve designation not lend any *support* for the county’s exception and RR-10  
23 rezoning, LCDC rules governing Urban Reserve lands *prohibit* the disputed exception and  
24 RR-10 rezoning.

25 LCDC has adopted an administrative rule that governs designation and protection of  
26 Urban Reserve areas until they are included inside a UGB. OAR chapter 660, division 21.  
27 The key sections of that administrative rule are OAR 660-021-0040(1) through (4), which are  
28 set out below:

1           “(1)    Until included in the urban growth boundary, lands in urban reserves  
2                   shall continue to be planned and zoned for rural uses in accordance  
3                   with the requirements of this rule and the applicable statutes and goals,  
4                   but in a manner that ensures a range of opportunities for the orderly,  
5                   economic and efficient provision of urban services when these lands  
6                   are included in the urban growth boundary.

7           “(2)    Urban reserve land use regulations shall ensure that development and  
8                   land divisions in *exception areas and nonresource lands* will not  
9                   hinder the efficient transition to urban land uses and the orderly and  
10                  efficient provision of urban services. These measures shall be adopted  
11                  by the time the urban reserves are designated\* \* \*. The measures may  
12                  include:

13                   “(a)    Prohibition on the creation of new parcels less than ten acres;

14                   “(b)    Requirements for clustering as a condition of approval of new  
15                   parcels;

16                   “(c)    Requirements for preplatting of future lots or parcels;

17                   “(d)    Requirements for written waivers of remonstrance against  
18                   annexation to a provider of sewer, water or streets; and

19                   “(e)    Regulation of the siting of new development on existing lots  
20                   for the purpose of ensuring the potential for future urban  
21                   development and public facilities.

22           “(3)    For *exception areas and nonresource land* in urban reserves, land use  
23                   regulations shall prohibit zone amendments allowing more intensive  
24                   uses, including higher residential density, than permitted by  
25                   acknowledged zoning in effect as of the date of establishment of the  
26                   urban reserves. Such regulations shall remain in effect until such time  
27                   as the land is included in the urban growth boundary.

28           “(4)    *Resource land* that is included in urban reserves shall continue to be  
29                   planned and zoned under the requirements of applicable statewide  
30                   planning goals.” (Emphases added.)

31           Although the subject property is *resource land* and therefore not governed by OAR  
32           660-021-0040(2) and (3), we briefly discuss all subsections of OAR 660-021-0040 to provide

1 context for the subsections of OAR 660-021-0040 that do apply.<sup>2</sup> Turning first to OAR 660-  
2 021-0040(1), that section of the rule applies to all lands that are designated as Urban  
3 Reserves, whether they are resource lands, exception areas or nonresource lands. OAR 660-  
4 021-0040(1) makes it clear that the limitations imposed by OAR chapter 660, division 21  
5 apply from the time lands are first designated as Urban Reserves until the UGB is amended to  
6 include such lands so that they can be developed for urban uses. The final clause of this one-  
7 sentence section requires that the rural planning and zoning that is applied during that period  
8 of time must be applied “in a manner that ensures a range of opportunities for the orderly,  
9 economic and efficient provision of urban services when these lands are included in the urban  
10 growth boundary.” Approving an exception to allow a two-parcel, 189.5-acre, undeveloped  
11 EFU-zoned property to be divided into 18 lots and developed with equestrian facilities and a  
12 house on each lot is arguably inconsistent with the final clause of OAR 660-021-0040(1).  
13 However, because the disputed exception and rezoning is more clearly prohibited by the last  
14 subsection of OAR 660-021-0040, we need not and do not rely on the arguable inconsistency  
15 of the county’s action with the final clause of OAR 660-021-0040(1).

16 OAR 660-021-0040(2) applies to “exception areas and nonresource lands” that are  
17 designated as Urban Reserves, and therefore does not apply to the subject property because it  
18 is resource land. OAR 660-021-0040(2) addresses development and development patterns in  
19 these areas, and sets out the measures that the rule requires local governments to adopt to  
20 “ensure that development and land divisions in exception areas and nonresource lands will  
21 not hinder the efficient transition to urban land uses and the orderly and efficient provision of  
22 urban services.” Those measures must be adopted before or at the same time land is

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<sup>2</sup> OAR 660-021-0010(2) defines “[r]esource [l]and” as “land subject to the statewide planning goals listed in OAR 660-004-0010(1)(a) through (g) except subsections (c) and (d).” The referenced statewide planning goals include Goal 3, Goal 4 (Forest Lands), Goal 16 (Estuarine Resources), Goal 17 (Coastal Shorelands), and Goal 18 (Beaches and Dunes). As previously noted, the subject property is agricultural land that is subject to Goal 3.

1 designated as an Urban Reserve and may include the restrictions and requirements set out in  
2 OAR 660-021-0040(2)(a) through (e).

3 OAR 660-021-0040(3) also applies to “exception areas and nonresource land[s]” that  
4 are designated as Urban Reserves and addresses the zoning of such areas and prohibits  
5 rezoning of Urban Reserve lands for “more intensive uses.” More intensive uses include  
6 “higher residential densities” than were permitted under the zoning in effect when the land  
7 was designated as an Urban Reserve. If the subject *resource land* was instead an *exception*  
8 *area or non-resource land* at the time it was designated an Urban Reserve, it is clear that  
9 OAR 660-021-0040(3) would prohibit rezoning the property to permit higher residential  
10 density, as the county has done here. The question that we must answer is whether the county  
11 can approve an exception and zone change to allow higher residential density on resource  
12 land, when it is clear that OAR 660-021-0040(3) would bar the county from doing so for land  
13 that qualified as an exception area or nonresource land on the date the Urban Reserve  
14 designation was first applied. Although it could be clearer, we believe that question is  
15 answered in the negative by OAR 660-021-0040(4).

16 The complete text of OAR 660-021-0040(4) provides that “[r]esource land that is  
17 included in urban reserves shall continue to be planned and zoned under the requirements of  
18 applicable statewide planning goals.” There is no dispute that the subject property is subject  
19 to Goal 3 and qualifies as “resource land.” *See* n 2. And there is no dispute that a majority of  
20 the subject property is included in an Urban Reserve and no dispute that it qualified as  
21 “resource land” when it was designated as an Urban Reserve. The question reduces to the  
22 meaning of the requirement that such Urban Reserve designated resource lands “shall  
23 continue to be planned and zoned under the requirements of applicable statewide planning  
24 goals.” We conclude those words are a somewhat imprecise way of saying that when  
25 resource lands are designated as an Urban Reserve, they must continue to be planned and  
26 zoned for the resource uses they were planned and zoned for under Goal 3, Goal 4, Goal 16,

1 Goal 17 or Goal 18 until they are included in the UGB. But in any event, whatever the  
2 precise meaning of those words may be, there is simply no way they can be interpreted to  
3 allow the county to approve a Statewide Planning Goal exception to rezone resource land for  
4 uses that are *inconsistent with* the “requirements of the statewide planning goals” that the  
5 subject agricultural land be placed in an EFU zone and preserved and maintained for farm  
6 and other uses allowed in an EFU zone.

7 Finally, we note that the above interpretation of OAR 660-021-0040(4) is consistent  
8 with, and therefore finds some contextual support in, OAR 660-027-0070. OAR chapter 660,  
9 division 27 applies to planning of urban and rural reserves in the Portland Metro area and  
10 therefore does not apply in Jefferson County. But similar to OAR 660-021-0040(3),  
11 discussed above, OAR 660-027-0070(2) prohibits zoning amendments to allow new uses or  
12 smaller lots than would be permitted under the zoning that applied when an Urban or Rural  
13 Reserve area is first designated, except in certain specified circumstances. That prohibition  
14 applies to all Metro Urban Reserve areas—resource lands, nonresource lands and exception  
15 areas.<sup>3</sup> OAR 660-027-0070(4) through (6) identify some limitations on that prohibition in  
16 OAR 660-027-0070(2), but none of those limitations would allow a Goal 3 exception to  
17 permit rural residential development on agricultural land. OAR 660-027-0070(4) authorizes  
18 rezoning for certain Goal 5, park, highway and other uses and land divisions, but only does so  
19 if “no exception to Goals 3, 4, 11 or 14 is required.”<sup>4</sup> If OAR 660-027-0070 applied here, the

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<sup>3</sup> OAR 660-027-0070(2) provides:

“In order to maintain opportunities for orderly and efficient development of urban uses and provision of urban services when urban reserves are added to the UGB, counties shall not amend comprehensive plan provisions or land use regulations for urban reserves designated under this division to allow uses that were not allowed, or smaller lots or parcels than were allowed, at the time of designation as urban reserves until the reserves are added to the UGB, except as specified in sections (4) through (6) of this rule.”

<sup>4</sup> OAR 660-027-0070(4) provides:

1   disputed exception to allow rural residential development of land that was planned and zoned  
2   for agricultural use when it was designated as an Urban Reserve would be prohibited.

3           For the reasons explained above, because a majority of the 189.5-acre property is  
4   designated as an Urban Reserve, the county decision to approve an exception and change the  
5   comprehensive plan and zoning map designations to Rural Land and RR-10 respectively, to  
6   allow the 189.5 acres to be divided into 10-acre lots and developed as a equestrian themed  
7   rural residential development, violates OAR 660-021-0040(4) and is prohibited as a matter of  
8   law. Where a “decision violates a provision of applicable law and is prohibited as a matter of  
9   law,” reversal is required. OAR 661-010-0071(1)(c).

10           The county’s decision is reversed.

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- “(4)   Notwithstanding the prohibitions in sections (2) and (3) of these rules, counties may adopt or amend comprehensive plan provisions or land use regulations as they apply to lands in urban reserves, rural reserves or both, *unless an exception to Goals 3, 4, 11 or 14 is required*, in order to allow:
- “(a)   Uses that the county inventories as significant Goal 5 resources, including programs to protect inventoried resources as provided under OAR chapter 660, division 23, or inventoried cultural resources as provided under OAR chapter 660, division 16;
  - “(b)   Public park uses, subject to the adoption or amendment of a park master plan as provided in OAR chapter 660, division 34;
  - “(c)   Roads, highways and other transportation and public facilities and improvements, as provided in ORS 215.213 and 215.283, OAR 660-012-0065, and 660-033-0130 (agricultural land) or OAR chapter 660, division 6 (forest lands);
  - “(d)   Other uses and land divisions that a county could have allowed under ORS 215.130(5) – (11) or as an outright permitted use or as a conditional use under ORS 215.213 and 215.283 or Goal 4 if the county had amended its comprehensive plan to conform to the applicable state statute or administrative rule prior to its designation of rural reserves[.]” (Emphasis added.)