

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a zone map
4 amendment.

5 **MOTION TO INTERVENE**

6 Myrna Rafalovich, the applicant below, moves to
7 intervene on the side of the respondent. There is no
8 opposition, and the motion is allowed.

9 **FACTS**

10 The subject property is 13.17 acres. It is designated
11 Residential on the county comprehensive plan map, and Rural
12 Residential - 5 Acre Minimum (RR-5) on the zoning map. Rec.
13 57. The application seeks approval of a zone change from
14 RR-5 to Rural Residential - 1 Acre Minimum (RR-1).¹ The
15 zoning designations of surrounding property are RR-5 to the
16 south and west; RR-1 to the east; and Tourist Commercial and
17 Rural Commercial Center to the north. The subject property
18 and surrounding area are part of or adjacent to the
19 unincorporated settlement of Merlin; the staff report states
20 that "[t]he development is a contiguous extension of the
21 town of Merlin." Record 57-58. Of the 68 lots within 1000
22 feet of the subject property, 56 are less than 2 acres in
23 size. Many of the lots to the east are less than 1 acre, in

¹The application does not seek a comprehensive plan amendment, and petitioner concedes that the criteria concerning comprehensive plan amendments cited in his brief are inapplicable.

1 subdivisions platted prior to zoning. There is testimony
2 that there is no public sewer or public water in the area of
3 the subject property. However, no party identifies specific
4 evidence or findings concerning the availability of such
5 services in the Merlin area generally.

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioner contends that "the county improperly
8 concluded that there was an adequate potable water supply on
9 the land." Petitioner identifies Comprehensive Plan Goal
10 11, Policy 6(a) and Rural Land Development Code ("RLDC")
11 47.030(B)(3) as criteria that require a showing of adequate
12 potable water.² Petitioner's argument challenges both the

²Comprehensive Plan Goal 11, Policy 6 states in relevant part:

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

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

"* * * * *

"c. Availability of adequate public facilities and services to support the projected intensity of use.

"* * * * *"

RLDC 47.030(B) states in relevant part:

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

"* * * * *

1 adequacy of the findings and their evidentiary support.

2 Other than a general finding that "the proposal
3 complies with the Josephine County Goals #3, #4, #6, #10 and
4 #11, plus the Rural Land Development Code Articles #47 and
5 #48," the county's only finding on the issue of adequate
6 potable water states "[t]he area is served with electric and
7 telephone, and has adequate water." Record 21. The record
8 contains no evidence concerning wells on the subject
9 property. The average yield for the 23 wells in the
10 quarter-section area surrounding the subject property is
11 more than 20 gallons per minute, with yields ranging from
12 six to 90 gallons per minute. The applicant testified that

"3. Demonstrate the carrying capacity of the land to support the uses permitted in the proposed Zone (as defined in Section 11.030(64), adequate access as defined in section 11.030(9) and any other physical characteristics determined applicable in the pre-application conference);

"4. The property effected [sic] by the proposed change of Zone will have available adequate public facilities and services to support the projected intensity of uses in the proposed Zone.

"* * * * *"

RLDC 11.030(64) provides the following definition:

"CARRYING CAPACITY. The ability of land to support proposed development as determined by an evaluation of suitability for sewage disposal, the adequacy of the domestic groundwater supply (quantity and quality), the presence of adequate off-site roads, the suitability of soil and terrain to support on-site roads; the presence or absence of flood, fire or erosion hazards, and the applicability of other special land use concerns (e.g., watershed protection, protection of wildlife and fishery habitat, the presence of scenic easements, airport flight paths, the availability of emergency services, etc.)."

1 a well on an adjoining parcel produced 28 gallons per minute
2 of "good quality" water. Record 40.

3 Findings must (1) identify the relevant approval
4 standards, (2) set out the facts which are believed and
5 relied upon, and (3) explain how those facts lead to the
6 decision on compliance with the approval standards. Heiler
7 v. Josephine County, 23 Or LUBA 551, 556 (1992). See also,
8 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
9 21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or
10 LUBA 829, 835 (1989). Additionally, findings must address
11 and respond to specific issues, raised in the proceedings
12 below, that are relevant to compliance with applicable
13 approval standards. Hillcrest Vineyard v. Bd. of Comm.
14 Douglas Co., 45 Or App 285, 293, 608 P2d 201 (1980); Norvell
15 v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896
16 (1979); Skrepetos v. Jackson County, 29 Or LUBA 193, 208
17 (1995); McKenzie v. Multnomah County, 27 Or LUBA 523, 544-45
18 (1994).

19 In Doob v. Josephine County, 31 Or LUBA ___ (LUBA No.
20 95-229, June 14, 1996), decided after the county made its
21 decision in this case, we considered a similar challenge to
22 a zone change and comprehensive plan amendment involving the
23 same criteria. In that case, the county's decision did not
24 explicitly interpret the cited plan and code provisions as
25 applying to the area surrounding the proposed zone change
26 rather than to the land that is the subject of the zone

1 change. Nor did it explain why a conclusion concerning "the
2 physical capability of the land" or "the carrying capacity
3 of the land" could be based solely on evidence from
4 surrounding properties. We concluded:

5 "Without a specific interpretation that
6 establishes otherwise, or a demonstration that the
7 conditions on surrounding lands can be relied upon
8 to determine the water quality and quantity on the
9 subject parcel, the county cannot rely on the
10 water quality and quantity of other parcels to
11 satisfy these criteria." Id., Slip op 6.

12 The county's decision in this case suffers from a
13 similar deficiency. The county did not interpret its
14 comprehensive plan and RLDC to require only a showing of
15 adequate water in the area surrounding the zone change, and
16 we decline to make such an interpretation for it. In the
17 absence of such an interpretation, the conclusory statement
18 that "the area * * * has adequate water" fails to explain
19 how facts about surrounding properties "[d]emonstrate the
20 carrying capacity of the land to support the uses permitted
21 in the proposed Zone." The county's findings must identify
22 the uses permitted by the proposed zoning, and if the only
23 evidence of water supply is from surrounding properties,
24 must explain how that evidence leads to the conclusion that
25 there is an adequate water supply to support those uses.

26 Because the county's findings are inadequate, no
27 purpose would be served by addressing petitioner's challenge
28 to their evidentiary support.

29 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner contends that the county's finding that
3 adequate law enforcement services are available is not
4 supported by substantial evidence. Comprehensive plan Goal
5 11, Policy 6(c) and RLDC 47.030(B)(4) require a showing that
6 the property affected by the zone change will have available
7 "adequate public facilities and services to support the
8 projected intensity of use."

9 Petitioner points to a letter from the Josephine County
10 sheriff dated July 5, 1995, which was submitted by
11 petitioner at the board of county commissioners meeting on
12 February 14, 1996. The letter is addressed "To Whom It May
13 Concern," and does not refer to the subject property or
14 application. It states in part:

15 "At our current staffing level, we have only the
16 ability to respond to and handle life threatening
17 calls. These calls include only those instances
18 when there is an immediate life threatening danger
19 to citizens, or there exists a disaster or an
20 immediate threat to public order. Our staffing
21 levels do not allow us to do general patrol,
22 traffic enforcement, burglaries, thefts, or
23 enforcement of public order and peace (except in
24 those situations where there is an immediate
25 threat of loss of life).

26 * * * * *

27 "The Sheriff and the Sheriff's Office have the
28 knowledge, desire, and ability to provide adequate
29 law enforcement for this community. The current
30 funding level for the Sheriff's Office makes it
31 impossible to provide this service." Record 50-
32 50A.

33 The relevant county finding does not specifically

1 address the sheriff's letter, but states:

2 "The level of sheriff protection is in agreement
3 with the voting public and as prevalent in the
4 rest of the county." Record 21.

5 As a review body, we are authorized to reverse or
6 remand the challenged decision if it is "not supported by
7 substantial evidence in the whole record."
8 ORS 197.835(7)(a)(C). Substantial evidence is evidence a
9 reasonable person would rely on in reaching a decision.
10 City of Portland v. Bureau of Labor and Ind., 298 Or 104,
11 119, 690 P2d 475 (1984); Bay v. State Board of Education,
12 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes
13 County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In
14 reviewing the evidence, however, we may not substitute our
15 judgment for that of the local decision maker. Rather, we
16 must consider and weigh all the evidence in the record to
17 which we are directed, and determine whether, based on that
18 evidence, the local decision maker's conclusion is supported
19 by substantial evidence. Younger v. City of Portland, 305
20 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon
21 v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992).
22 If there is substantial evidence in the whole record to
23 support the city's decision, LUBA will defer to it,
24 notwithstanding that reasonable people could draw different
25 conclusions from the evidence. Adler v. City of Portland,
26 25 Or LUBA 546, 554 (1993).

27 There is un rebutted evidence that the subject property

1 is served by the sheriff's office, and that the property
2 "would have the same amount of law enforcement services as
3 anyone else in the County." Record 40. That is substantial
4 evidence that law enforcement service is adequate for
5 purposes of Goal 11, Policy 6(c) and RLDC 47.030(B)(4). The
6 letter from the sheriff, which appears to be a general
7 statement of funding needs, does not so undermine the
8 evidence on which the county relied as to compel a contrary
9 conclusion. See Doob v. Josephine County, 31 Or LUBA ___
10 (LUBA No. 95-225, June 14, 1996), slip op 7.³

11 This assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 Petitioner states: "The county improperly approved one
14 acre minimum rural residential zoning on the subject
15 property without adequate consideration of Goal 14."⁴
16 Petitioner cites 1000 Friends of Oregon v. LCDC (Curry Co.),
17 301 Or 447, 724 P2d 268 (1986) ("Curry County") and DLCD v.
18 Klamath County, 16 Or LUBA 23 (1987), contending that one-
19 acre minimum lot size zoning "is just the sort of small lot
20 zoning which LUBA in its 1987 ruling said had to comply with
21 or be excepted from Goal 14." Petition for Review 10.

³In the cited case, the same letter was submitted by the petitioner, but the county made a detailed finding characterizing the sheriff's letter as without probative value. No party in this case explains why a similar finding was not adopted here.

⁴Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use."

1 We first address why the statewide goals are applicable
2 to this zone change. The county's decision amends the
3 zoning ordinance rather than the comprehensive plan. The
4 statewide goals do not independently apply to a zoning
5 ordinance amendment if the comprehensive plan contains
6 specific policies or other provisions which provide the
7 basis for the zoning ordinance amendment. ORS
8 197.835(7)(b); Opus Development Corp. v. City of Eugene, 28
9 Or LUBA 670, 677 (1995). As we have addressed in the
10 preceding assignments of error, there are specific
11 comprehensive plan policies for such zone changes. However,
12 comprehensive plan Goal 11, Policy 6, which is quoted at
13 greater length in footnote 1, requires that an applicant
14 "demonstrate compliance with applicable Statewide Planning
15 Goals." Thus the plan itself requires a determination
16 whether Goal 14 is applicable.

17 Intervenor contends that, because the property is
18 already designated residential by the plan and the zoning
19 code, the decision does not "convert" the land at all. In a
20 related vein, intervenor contends that DLCD v. Klamath
21 County, should be distinguished because it involved a change
22 from a forestry zone to a residential zone, and thus
23 "clearly involved a conversion of 'resource land' which is
24 not the case here." Response Brief 5.

25 The subject property is designated "Residential" on the

1 comprehensive plan map.⁵ The comprehensive plan policy
2 describing the Residential designation is part of
3 comprehensive plan Goal 10, Policy 1, and states in
4 pertinent part:

5 "1. The Comprehensive Plan Map shall be used as a
6 guide and shall show the land use in Josephine
7 County. The general land use categories and their
8 implementing zones are as follows:

9 * * * * *

10 "E. Residential (R) The areas that are
11 committed to residential use or are
12 determined to be non-resource lands. Rural
13 Residential will include those areas that are
14 committed to non-resource uses, or determined
15 to be non-resource in capability; and used
16 primarily for residential development. The
17 rural character of these areas shall be
18 preserved by appropriate lot sizes to insure
19 that uses do not exceed the physical
20 capability of the land and services shall be
21 provided to the extent necessary to maintain
22 a rural lifestyle."

23 The comprehensive plan does not distinguish among
24 various densities of "residential," but the zoning ordinance
25 provides for three rural residential zones: Rural
26 Residential - 1 Acre Minimum, Rural Residential - 2.5 Acre
27 Minimum, and Rural Residential - 5 Acre Minimum. RLDC
28 60.020. Except for lot size and width requirements, all
29 three zones are regulated by the same standards,

⁵Because the comprehensive plan provides that all land within the urban growth boundary is to be designated "UGB," we understand the "residential" plan designation to apply only to rural lands.

1 collectively set forth in RLDC Article 61, "Rural
2 Residential Zone." RLDC 61.010 states the purpose of the
3 Rural Residential Zone:

4 "The purpose of this Zone is to preserve the rural
5 character of Josephine County while providing
6 areas for rural residential living. This Zone
7 provides a classification for lands already
8 committed to residential development, or for lands
9 which have been excepted from the Statewide
10 Planning Goals on Agriculture and Forest Lands.
11 Densities established by this Zone for developing
12 areas are intended to ensure that development does
13 not exceed the carrying capacity of the land to
14 support sewage disposal systems, consumptive
15 groundwater withdrawal, and environmental
16 quality."

17 Assuming that the comprehensive plan, zoning code and
18 zoning map were acknowledged through the LCDC acknowledgment
19 process and that any subsequent amendments are deemed
20 acknowledged, the status of the county's scheme is that
21 rural residential areas that presently allow one-acre lots
22 are acknowledged as in compliance with Goal 14, and that any
23 rural residential area that has 2.5 or 5 acre minimum zoning
24 must demonstrate compliance with "applicable statewide
25 Goals" before it can be rezoned for 1 acre minimum lot
26 sizes.

27 Because the acknowledged plan does not establish that
28 this zone change complies with Goal 14, the county must
29 determine whether the change allows an urban use, and thus
30 whether Goal 14 is applicable. As the Supreme Court said in
31 the context of plan acknowledgment by the Land Conservation

1 and Development Commission ("LCDC"):

2 "In practice, once an objector has charged that a
3 decision affecting 'rural land' outside an urban
4 growth boundary is prohibited by Goal 14, a local
5 government may do any one of three things: (1)
6 make a record based on which LCDC enters a finding
7 that the decision does not offend the Goal
8 because it does not in fact convert 'rural land'
9 to 'urban uses'; (2) comply with Goal 14 by
10 obtaining acknowledgment of an urban growth
11 boundary, based upon considering of the factors
12 specified in the goal; or (3) justify an exception
13 to the goal" Curry County, 301 Or at 477.

14 Whether the decision allows an "urban use," and thus
15 requires an exception to Goal 14, is a question of state
16 law. See Leathers v Marion County, 144 Or App 123, 130, __
17 P2d __ (1996), holding generally that "questions pertaining
18 to the need for or sufficiency of statewide goal exceptions
19 are governed by applicable provisions of state law."⁶ Curry

⁶In Leathers, the issue was whether approval of a conditional use pursuant to an acknowledged zoning ordinance allowed urban uses not authorized by a previous Goal 14 "Reasons" exception. After stating its general holding, the court went on:

"However, petitioner's argument appears implicitly to posit that it is a question of local law whether the county's decision does change the types and intensities of uses and thereby implicates the state requirement that revised exceptions be taken. We disagree with that implicit point. The nature of the uses is integral to --- if not part of the same question as --- whether the exceptions are required. As such, it is a component of that question of state law." Leathers v. Marion County, 144 Or App at 130-131.

The specific holding in Leathers involved changes in the types or intensities of uses within an exception area approved as a "Reasons" exception, for which a revised exception is required by OAR 660-04-018(b). However, we perceive no grounds for concluding that the general holding is not applicable to changes in intensity or use in an exception area approved as a "physically developed" or "irrevocably committed" exception, which we

1 County provides the framework for addressing that question.
2 Among other issues, the court identified the state
3 administrative rule listing criteria to be addressed in
4 deciding that land is committed to urban levels of
5 development for purposes of establishing urban growth
6 boundaries for new cities, including size and extent of
7 commercial and industrial uses; location, number and density
8 of residential dwellings; location of urban levels of
9 facilities and services, including at least public water and
10 sewer facilities; and parcel size and ownership patterns.
11 However, the court emphasized that "these criteria
12 themselves do not say at what 'size,' 'extent,' 'number,'
13 'density' or 'ownership pattern' the line between urban and
14 non-urban is to be found." Curry County , 301 Or at 504.

15 The county's decision responds to petitioner's argument
16 concerning the applicability of Goal 14 with findings that
17 endorse the acknowledged Rural-Residential-1 Acre zone and
18 recognize the 1.5 acre size limitation. The import of the
19 findings is that the change does not allow urban uses, and
20 thus that Goal 14 is not applicable. The relevant findings
21 state:

22 "K. The Board endorses the Rural-Residential-1
23 Acre, acknowledging that the applicant agreed to a

understand the subject property to be. As our discussion of Curry County
reflects, the issues relevant to Goal 14 are site-specific, and exceptions
generally do not establish planning or zoning policy of general
applicability. ORS 197.732(8).

1 deed restriction to have a maximum of eight lots,
2 set to a minimum of 1.5 acres.

3 "L. A rural density is further confirmed with the
4 exhibits. Within one quarter of a mile there are
5 approximately 80 acres of residential land (not
6 including the non-conforming Merlin Tracts) for 26
7 parcels. An urban density would yield 160 or more
8 parcels." Record 21.

9 As petitioner points out, the decision does not impose
10 a condition concerning minimum lot size, but simply limits
11 the total number of lots on the subject property to eight.
12 Applicant's counsel specifically rejected a proposal for 1.5
13 acre minimum lot size. The result may well be seven 1-acre
14 lots, with the balance devoted to an eighth lot and right of
15 way dedications. See, e.g., DLCD v. Douglas County, 17 Or
16 LUBA 466, 473 (1987) (comprehensive plan and zone change
17 from EFU to Rural Residential - 5 Acre must explain why
18 proposed density of 12-13 lots on 79 acres is not an urban
19 use; overall density may not be a factor if planned unit
20 development permits clustering of dwellings). Moreover, we
21 are aware of no case suggesting that 1.5 acre lots are
22 inherently rural rather than urban. To the contrary, the
23 cases cited in Curry County footnotes 19 and 21 and in our
24 subsequent cases suggest that lots of one to two acres are
25 at least suspect, even where urban levels of public water
26 and sewer service are not available. See Curry County, 301
27 Or at 506; DLCD v. Douglas County, 17 Or LUBA at 473 (use of
28 an on-site sewage disposal system is not dispositive). The
29 allowable lot size discussed in Finding (K) is therefore an

1 insufficient basis in itself for determining that the
2 decision would not allow an urban use.

3 Finding (L) discusses the rural nature of the density
4 of the area, but fails to explain why the Merlin Tracts were
5 excluded from the characterization of the density of the
6 area. The conflicting evidence in the record is that there
7 are many lots of 1 acre or less in the immediate vicinity,
8 and that this development is "a contiguous extension of the
9 town of Merlin." Record 58. The fact that there are also
10 some larger parcels in the vicinity does not demonstrate
11 that this decision does not allow an urban use.

12 The decision's summary of relevant testimony includes
13 the following statement, which is not specifically adopted
14 as a finding:

15 "Evidence was presented that the lot size of 1.5
16 acres is rural in both character, in density,
17 served with rural facilities including private
18 well, private septic, and rural standard roads....
19 The change to RR-1 with 1.5 acre parcels will not
20 create an urban use. With no sewer and public
21 water, it is not possible to create new urban
22 sized parcels." Record 18.

23 Intervenor contends that this evidence provides a basis
24 for finding that the resulting uses will be rural. As we
25 noted above, the availability of public sewer and water is a
26 strong indicator of urban levels of development, and is
27 necessary for establishment of a new city. However, it is
28 not determinative. The Supreme Court stated in Curry
29 County, after discussing the various ways the county's plan

1 regulates and allows the provision of public water and sewer
2 to rural areas:

3 "We do not hold that a plan's Goal 11 restrictions
4 on extension of services can never serve as an
5 adequate assurance that development on 'rural
6 land' will not become 'urban uses.' For example,
7 a county could, in its plan, strictly prohibit
8 provision of particular services to certain areas
9 and types of 'rural land'; it could also explain
10 in its exceptions documents why the uses proposed
11 would not require 'urban' levels of services.
12 This county's plan does neither." Curry County,
13 301 Or at 511.

14 The evidence identified by intervenor, and the
15 comprehensive plan provisions identified in the record, do
16 not establish that public water and sewer are prohibited in
17 the area. They demonstrate at most that at the proposed
18 density such services not needed. The county's position may
19 be that the comprehensive plan limitations on lot size that
20 assure the physical capacity or carrying capacity of the
21 land to support proposed uses are sufficient to assure that
22 the proposed uses will not require public water and sewer,
23 and therefore comply with the quoted example from Curry
24 County. If that is the county's position, it must be
25 expressed in findings explaining the location of urban
26 services and why plan provisions prohibit the extension of
27 such services. The county has expressed no such explanation
28 here.

29 This assignment of error is sustained.

30 The county's decision is remanded.