BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AILEEN P. KAYE, and DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioners, vs. MARION COUNTY, Respondent, and LYNN BAXTER, Intervenor-Respondent.	LUBA Nos. 92-007 and 92-010 FINAL OPINION AND ORDER

Appeal from Marion County.

Mark P. Reeve and Daniel H. Kearns, Portland, filed a petition for review and argued on behalf of petitioner Kaye. With them on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

Jane Ard, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of petitioner Department of Land Conservation and Development. With her on the brief was Charles Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

Jane Ellen Stonecipher, Salem, filed a response brief and argued on behalf of respondent.

Helen L. Cooper, Salem, filed a response brief on behalf of intervenor-respondent. With her on the brief was Ferder, Ogdahl, Brandt & Casebeer. Kim Hoyt argued on behalf of intervenor-respondent.

KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 07/13/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an ordinance approving (1) a comprehensive plan map amendment from Special Agriculture to Rural Residential and zone change from Special Agriculture (SA) to Acreage Residential (AR) for 72.5 acres of the subject 468 acre property, (2) conceptual approval[1] for a planned development (PD) for both the SA and AR zoned portions of the property, (3) conditional use permits for the 85 dwellings to be placed on the AR zoned portion of the

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[1]The challenged decision states the following concerning "conceptual approval":

> "Chapter 121 - Planned Development. Section 121.220 provides that a planned development may be approved as an outline plan following a public hearing The outline plan is similar to the conceptual approval process identified in the Subdivision and Partitioning Ordinance. The [board of commissioners] finds that the proposed planned development as modified and conditioned meets the applicable procedural requirements in Section 121.200 et. seq. and Section 121.300 et seq., except that the standards for minor thoroughfares in Subsection 121.652 have been varied to conform to adopted county standards for roads in rural subdivisions." Record 28.

The Board does not have a copy of the county's Subdivision and Partitioning Ordinance.

property,[2] and (4) a conditional use permit for an 18 hole golf course on the SA zoned portion of the property.[3]

MOTION TO INTERVENE

Lynn Baxter moves to intervene on the side of respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

MOTION TO FILE A BRIEF IN EXCESS OF 50 PAGES

On the day the petition for review was due, petitioner Kaye filed a 64 page brief and a motion for permission to file a brief in excess of 50 pages. Because no party objects to the motion, it is allowed. However, we note that a party who requests permission to file a brief in excess of the clear limits imposed by OAR 660-10-030(2)(b), on the day such brief is due, assumes risks that either its brief will be stricken or the pages in the brief following page 50 will not be considered by the Board.

FACTS

The undeveloped subject property consists of 468 acres, currently planned Special Agriculture and zoned SA, an

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[2]PDs are a permitted use in the AR zoning district, and a conditional use in the SA zoning district. Although the proposed 85 dwellings are themselves to be located on the portions of the property to be zoned AR, the open space, PD roads and other infrastructure are to be located on the SA zoned portions of the property. Because of this, the county apparently determined that conditional use permits for the PD dwellings are required.

[3]The decision states "[t}he golf course will be a separate open space lot tied to the planned development." Record 25.

exclusive farm use zone.[4] Approximately 340 acres of the subject property contain U.S. Soil Conservation Service (SCS) Class VI soils. The rest of the property -- approximately 128 acres -- contains SCS Class III and IV soils. Properties to the west, north and east are planned Special Agriculture and zoned SA. Properties to the south are planned Primary Agriculture and zoned Exclusive Farm Use (EFU). Interstate 5 (I-5) is located on the west side of the subject property. The subject property is located approximately eight miles outside the City of Salem Urban Growth Boundary (UGB).

The proposal is to establish on the subject property a "championship" 18 hole golf course, club house, pro shop, practice range and cafe/snack bar, as well as a planned development clustering 85 dwellings on the replanned and rezoned 72.5 acres.[5] This 72.5 acres consists of four separate areas located on the subject 468 acre property.

The PD will be served by a community water system, and a service district will be formed to manage the community water system. The PD dwellings will be served by individual septic systems or by community septic systems located in

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[4]The subject property includes several tax lots, held in a single ownership.

[5]The application requested permission to cluster a total of 184 dwellings on the subject property. However, the county approved only 85 dwellings.

nearby common areas. Record 12 (condition 3), 23, 24. While it is somewhat unclear, it appears the proposed golf course will be served by an on-site septic system.

FIRST ASSIGNMENT OF ERROR (DLCD)

> "The county misconstrued the applicable law and failed to make adequate findings supported by substantial evidence that 72.5 acres of the 468-acre subject parcel [is] not agricultural land as defined in Goal 3 and OAR 660-05-005(1). Because the 72.5 acres is agricultural land as a matter of law, the county should have taken an exception to Goal 3 when amending its acknowledged comprehensive plan and land use regulations."

Petitioner argues the county erred by failing to take an exception to Statewide Planning Goal 3 (Agricultural Lands) when it redesignated from Special Agriculture to Rural Residential, and rezoned from SA to AR, the 72.5 acre portion of the subject 468 acre property. While there is no dispute that the 72.5 acre portion of the property[6] consists of SCS Class VI soils, petitioner argues the entire 468 acre property (which includes the 72.5 acres) consists of "agricultural land" as defined in Goal 3 and the Goal 3 rule -- OAR 660-05-010 et seq.

Goal 3 defines "agricultural land" as follows:

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[6]The 72.5 acre portion of the property consists of four separate areas. One of the areas is located near the extreme southwestern border of the property, another is located near the extreme southeastern border of the property, another is located near the extreme northwestern border of the property, and the final area is located in the mid-northern region of the property.

> "[i]n western Oregon [agricultural land] is land of predominantly Class I, II, III and IV soils * * * as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event." (Emphasis supplied.)

OAR 660, Division 5 (hereafter the Goal 3 rule) implements Goal 3. OAR 660-05-005(1) defines agricultural land as including:

> "(a) Lands classified by the U.S. Soil Conservation Service (SCS) as predominantly Class I-IV soils in Western Oregon * * *.
>
> "(b) Other lands in different soil classes which are suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and
>
> "(c) Land which is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

OAR 660-05-010 further identifies the types of land a county must inventory as agricultural land, and the factors which must be considered in identifying agricultural land:

> "(1) All land defined as 'agricultural land' in [OAR] 660-05-005(1) shall be inventoried as

agricultural land. Lands in other than capability classes I-IV * * * that are adjacent to or intermingled with lands in capability classes I-IV * * * within a farm unit, shall be inventoried as agricultural lands even though these lands may not be cropped or grazed.

"(2) When a jurisdiction is determining the predominant soil capability classifications of a tract of land it need only look to the land within the tract being inventoried. However, whether land is 'suitable for farm use' requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definitions of agricultural land set forth at OAR 660-05-005(1)(b). This inquiry requires the consideration of conditions existing outside the tract being inventoried. Even if a tract of land is not predominantly class I-[IV] soils or suitable for farm use, Goal 3 nevertheless defines as agricultural 'lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands.' A determination that a tract of land is not agricultural land requires findings supported by substantial evidence which address each of the factors set forth in OAR 660-05-005(1).

"(3) Goal 3 attaches no significance to the ownership of a tract of land when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership must be examined to the extent that a tract of land is either 'suitable for farm use' or 'necessary to permit farm practices to be undertaken on adjacent or nearby lands' outside the tract of land.

"* * * * *" (Emphases supplied.)

In sum, Goal 3 and the Goal 3 rule require that land be considered agricultural land in four circumstances. First,

land is agricultural land if it has the requisite soil classifications. Second, land is agricultural land if it is "intermingled with or adjacent to" SCS Class I-IV land within a "farm unit." Third, land is agricultural land if it is suitable for farm use. Fourth, land is agricultural land if it is necessary to permit farm practices to be undertaken on adjacent or nearby lands.

For purposes of determining whether the replanned and rezoned 72.5 acres[7] consist of "agricultural lands," the county determined, in part, the following:

> "All of the [soils on the 72.5 acres] are designated Steiwer and Chehulpum silt loams, 3 to 40 percent slopes with a Class VIe-1 agricultural soils rating (SCE) in the Soil Survey of Marion County (USDA Soil Conservation Service, September 1972). This report identifies the following pertinent characteristics of this soil capability unit: These soils are on foot slopes and foothills. Permeability is moderate to slow and the available water capacity is very low or low. Fertility is moderate to low. Runoff is medium to rapid, and erosion is a moderate to severe hazard. These soils are not suitable for cultivated crops and are used mainly for pasture, for grass grown for seed, and as woodland. This report does not assign a woodland suitability group to this soil type. Oak is the dominant tree species. These soils are droughty. Grasses make little growth late in summer and in the fall. Irrigation of these soils is limited.
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> "Although there are grass seed operations in the South Salem hills they occur where there are

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[7]Apparently, the 72.5 acres consist of four separate tax lots. However, we do not understand these tax lots to ever have been divided from the 468 acre subject property held in a single ownership.

> significant areas of gently sloping land to safely accommodate necessary equipment. The four areas can be characterized as the upper slopes of ridges that are too narrow and often too steep for management as part of a grass seed operation. The productivity of the seasonal forage on the hillsides is so limited, whether considering each of the 4 areas or the entire property that a commercial cattle grazing operation has proven infeasible." Record 30-31.

The county concluded the 72.5 acre portion of the property to be replanned and rezoned, is not agricultural land as defined by Goal 3 and the Goal 3 rule. Specifically, the county concluded the 72.5 acres do not consist of SCS Class I-IV soils, and are not within a "farm unit." The county also determined that the 72.5 acres are not "other lands suitable" for agricultural uses. Finally, the county determined that because there was no active grass seed or livestock grazing operation occurring within the 468 acre subject property, the 72.5 acres are not "necessary to permit farm practices" on such "nearby or adjacent lands." Record 34-35. We consider these bases for determining the 72.5 acres are not agricultural land separately below.[8]

A. Farm Unit

The question presented under this subassignment of error is whether subject 468 acre property is a "farm

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[8]There is no dispute that the 72.5 acres do not consist of SCS soil classes I-IV.

unit."[9] If it is a farm unit, then under OAR 660-05-010(1), the 72.5 acres being replanned and rezoned must be considered agricultural land.

While it is true that portions of the 468 acre property have been grazed, intermittently, by a very few cattle and fewer horses and the property receives a special farm assessment, those facts of themselves are not enough to make the property a "farm unit." There is not, and has not historically been, any active, ongoing agricultural use of the property and no evidence of any efforts to manage the property as an economically viable farming operation. Further all of the property, except for 128 acres, consists of SCS Class VI soils. The county determined these factors establish the past agricultural use of the property was "insignificant" and inadequate to convert the 468 acre property to a farm unit. Under these circumstances, we agree that the agricultural activities on the 468 acre property are insufficient to require a determination that the property is a "farm unit."

This subassignment of error is denied.

B. Other Lands Suitable

Petitioner argues the county did not adequately consider farm uses in the area to determine whether the 72.5 acres are suitable for agricultural use under

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[9]Neither Goal 3 nor the Goal 3 rule define the term "farm unit."

OAR 660-05-005(1)(b). Petitioner points out the Marion County Comprehensive Plan (plan) states that the Special Agriculture plan designation is designed to facilitate the following agricultural operations:

> "* * * orchards, grass seed and grains, grazing and a few speciality crops such as wine grapes and Christmas trees. * * *." Plan, Agriculture Section, p. 23.

Petitioner contends the county failed to consider whether the tract is suitable for agricultural activities listed in the plan, other than grazing and grass seed operations for which the county concluded the 72.5 acres are unsuited.[10]

In determining whether a tract is considered "other land suitable" for agricultural uses under OAR 660-05-005(1)(b), a local government must determine what agricultural uses are occurring on "nearby or adjacent lands." OAR 660-05-010(3). While the rule could be clearer, it seems reasonably apparent that the purpose of this inquiry is twofold. First, the county is to ascertain the nature of other agricultural uses occurring in the area, to determine whether the tract can be put to similar uses. Second, the county is to determine whether the tract can

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[10]In the applicant's submission below, it states:

> "The major agricultural use in the area is the Willamette Valley Vineyard and Winery, which is also located along Enchanted Way. The vineyard is an agricultural use, and the winery serves as a commercial activity in conjunction with the farm use which is open to area residents and tourists." (Emphasis supplied.) Record 144.

reasonably be combined with such nearby or adjacent uses and used as a part of those operations.

In this case, we cannot tell what "nearby lands" the county considered in determining the nature of the agricultural uses in the area. Further, the county failed to consider whether the 72.5 acres are suitable for the use which the applicant pointed out to be the "major" agricultural use in the area (vineyards), as well as the orchards, grain production and Christmas tree agricultural uses the plan indicates that properties having the subject property's characteristics should be able to accommodate. In addition, the county failed to explain its rationale for limiting its consideration of agricultural uses in the area to those uses occurring on the 468 acre property of which the 72.5 acres are a part.

We agree with petitioner that the challenged decision fails to establish the 72.5 acres do not constitute "other lands in different soil classes which are suitable for farm use" under OAR 660-05-005(1)(b).

This subassignment of error is sustained.

C. Land Necessary to Permit Farm Practices on Adjacent or Nearby Land

We determine above the challenged decision fails to establish that the tract is not "other land suitable" for agricultural production under OAR 660-05-005(1)(b). One of the reasons we determine the challenged decision fails to establish the tract is not land subject to

OAR 660-05-005(1)(b) is that the decision does not adequately identify what the agricultural uses on adjacent or nearby lands are. Similarly, because the challenged decision does not establish the nature of the agricultural uses on adjacent or nearby lands, there is no basis for determining whether the tract is "land necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."[11]

This subassignment of error is sustained.

Petitioner DLCD's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (DLCD)

> "The county misconstrued the applicable law and failed to make adequate findings of fact supported by substantial evidence that the proposed plan and zone amendment would result in a 'rural' use and [is] therefore consistent with Goal 14."

The challenged decision determines the following with respect to the compliance of the proposed plan amendment and zone change with Goal 14 (Urbanization):

> "The development within the four areas proposed for AR zoning will be rural. [T]he type and density of the proposed housing and the level of services provided have been significantly modified and conditioned to ensure that it remains rural in character. The overall density of the development

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[11]It may be that the fact the property has not historically been used by agricultural operations in the area is strong evidence that the land is not "necessary" for those operations. However, OAR 660-05-005(1)(c) requires an analysis based on the current agricultural operations in the area, which the county's findings do not identify.

> is lower than identified as the appropriate range for rural residential areas in the Comprehensive Plan. The proposed rezoning of 72.5 acres will not allow urbanization. However, clustering the dwellings instead of placing them on scattered larger acreages, makes urbanization of the undeveloped portions of the property much more feasible should some of this area be included in the urban growth boundary sometime in the future." Record 37.

Petitioner contends a plan map amendment and zone change that authorize a PD with 85 dwellings located on 72.5 acres[12], a community water system, and a water service district to serve the PD, allow an urban use outside an urban growth boundary and, therefore, an exception to Goal 14 is required.

Intervenor-respondent and respondent (respondents) argue it would be erroneous to determine the dwelling density of the proposal based only on the replanned and rezoned 72.5 acres where the 85 dwellings are to be established. Respondents argue the challenged decision correctly calculates overall dwelling density based on the entire 468 acre property. Respondents contend that so calculated, the dwelling density of the proposal is one dwelling per 5.5 acres. Respondents argue such density is not an urban level of use.

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[12]The minimum lot size permitted in the AR zone is one acre. However, PDs are a permitted use in the AR zone and the applicable regulations for PDs allow lot sizes as small as 6,000 square feet. As a condition of approval for the PD and conditional use permit, the decision requires that residential lots in the proposed PD be at least 20,000 square feet. Record 12 (condition 3).

In addition, the challenged decision states:

> "* * * The proposed AR zone is an acknowledged rural residential zone and does not allow the conversion of rural land to urbanizable land. * * *" Record 35.

In this regard, respondents noted at oral argument that the challenged decision simply applies the acknowledged Rural Residential plan designation and AR zoning district to the subject property. Respondents suggest that petitioners' arguments are really impermissible collateral attacks on the Rural Residential plan designation and AR zoning district as those arguments, i.e. that the AR zone allows urban uses in violation of Goal 14, could have been made at the time of acknowledgment. Respondents contend the Rural Residential plan designation and AR zoning district are acknowledged to be in compliance with Goal 14 and, therefore, to allow rural rather than urban level uses.

A. Whether the Proposal Allows Urban Use

Density is one of the relevant factors in determining whether a particular proposal authorizes an urban level use. 1000 Friends of Oregon v. LCDC (Curry Co.), 301 Or 447, 503-11, 724 P2d 268 (1986). To determine the dwelling density allowed by the proposed plan amendment and zone change, the county relied on the lower overall density resulting when the entire 468 acre property is considered. Even though the decision replans and rezones 72.5 acres of the property for residential use, the much higher

residential density that will occur on these 72.5 acres was not considered. The average residential density on the 72.5 acres is one dwelling for each .86 acres of property. Further, the PD authorized by the proposed plan amendment and zone change is to be served by a community water system and a service district is to be formed to manage the community water system which, under the challenged decision, is also proposed to serve nearby Interchange Commercial zoned properties.[13] While the county may properly consider the lower overall residential density of the entire project, it cannot ignore the obviously urban nature of an 85 unit residential development occupying 72.5 acres simply because it will be surrounded by a significant amount of open space.

In 1000 Friends of Oregon v. LCDC (Curry Co.), supra 301 Or at 504-05, the Court stated:

> "We accept the concessions of [petitioner] that residential density of one house per ten acres is generally 'not an urban density,' and of LCDC that areas of 'half-acre residential lots to be served by community water and sewer' are 'urban type.'"

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[13]Initially, the proposal was also to be served by a community sewer system as well. However, the challenged decision determines:

> "Although the Plan policies indicate that community sewer systems may be appropriate to serve rural development, the [board of commissioners] concludes that such a system requires the financial support of the large number of dwellings requested by the applicant. Because such density served by a sewer system could be considered urban, the [board of commissioners] chooses to eliminate the proposed sewer system and reduce the density commensurate with the ability of the property to support subsurface sewage disposal systems." Record 22-21.

While the proposal does not necessarily approve a community sewer system, a community septic system is possible under the challenged decision. See Record 12 (condition 3), 23, 24. We believe several factors establish the challenged decision approves an urban level use outside of an urban growth boundary in violation of Goal 14, and an exception, pursuant to Goal 2, is required. These factors are the potentially allowable minimum lot size for PDs in the AR zone (6,000 square feet), the relatively small minimum lot size actually allowed by the challenged decision (20,000 square feet), the proposed average dwelling density on the 72.5 acres (one dwelling per .86 acres), together with the proposed community water system and service district.

This subassignment of error is sustained.

B. Effect of Acknowledgment

There are two reasons why respondents' acknowledgment analysis is incorrect. First, the proposed plan amendment from Special Agriculture to Rural Residential and zone change from SA to AR could have secondary effects on the county's acknowledged plan and zoning regulations which were unanticipated at the time of acknowledgment. In an analytically similar situation, the Court of Appeals stated the following:

> "* * * Petitioner is completely correct in its hypothetical assertion that a plan amendment could affect provisions of the plan that it does not

> directly change in such a way that they will have an application that is at odds with the goals and which they did not have at the time of acknowledgement. Comprehensive plans are coordinated and -- axiomatically, if not tautologically -- comprehensive documents. * * * An amendment to one provision can affect the way in which another provision operates, and the new or changed operation of the unamended provision may be inconsistent with the goals. Those 'secondary effects' are goal compliance problems, and they are as much the product of the plan amendment as are any goal violations that the amendment introduces into the provisions which it changes directly. We therefore do not agree that LUBA's review of plan amendments for goal compliance * * * is limited to the provisions that the amendments directly create or alter." (Citations omitted; emphases in original.) 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 98, 718 P2d 753 (1986).

Second, it is not simply the abstract application of the Rural Residential plan designation and the AR zoning district, and its potential small minimum lot size, which petitioners contend necessitates the application of Goal 14. The analysis of whether a particular proposed use will allow an urban or a rural use within the meaning of Goal 14 requires a case by case analysis, 1000 Friends of Oregon v. LCDC (Curry Co.), supra, 301 Or at 521. Therefore, it is necessary to evaluate the characteristics of the particular proposal at issue to determine the applicability of, and compliance with, Goal 14. Here, petitioners point out the proposal includes 85 dwellings clustered on 72.5 acres of land, the potential for community septic systems, a community water system, and a service district to serve the

PD, outside of an urban growth boundary. The Supreme Court has made it clear, that in determining the applicability of Goal 14, these factors are among those which must be considered. 1000 Friends of Oregon v. LCDC (Curry Co.) supra, 301 Or at 503-511. Thus, it is the particular effects of applying the Agricultural Residential plan designation and AR zoning district to the particular land at issue here which raises the issue of Goal 14 compliance. Accordingly, to the extent the county concludes the proposal is rural in nature simply by relying upon acknowledgment of its Agricultural Residential plan designation and AR zoning district, the county is in error.

This subassignment of error is sustained.

Petitioner DLCD's second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR (KAYE)

> "Marion County misconstrued and misapplied the applicable law and made a decision not supported by substantial evidence or adequate findings in approving the plan amendment and zone change and granting conceptual approval of the PD for 85 non-farm dwellings. These actions violate [MCZO] chapters 123 and 137, ORS 215.416(9), the County's subdivision and partitioning ordinance, applicable goals and policies of the Marion County Comprehensive Plan and Statewide Planning Goals 2, 3, 4, 11 and 14."[14]

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[14]Petitioner Kaye's and Goal 3 and 14, and associated Goal 2 arguments (that the county should have taken exceptions to Goals 3 and 14) are nearly identical to petitioner DLCD's arguments which we resolve above.

Petitioner Kaye contends the county erred by failing to apply Goal 4, and by inadequately applying Goal 11.

A. Goal 4

Petitioner Kaye contends that Goal 4 (Forest Lands) applies to the proposal, and the county erred in failing to (1) adopt findings establishing compliance with Goal 4, or (2) take an exception to that goal. The county determined that Goal 4 is inapplicable to the proposal because:

> "* * * the subject property was not designated as forest land in the acknowledged County Comprehensive Plan at the time the state adopted the Forest Lands Goal * * *." Record 29.

The SA zone states it is "intended to be a farm zone consistent with ORS 215.203." The plan acknowledges that some timber may be harvested from Special Agriculture designated parcels. However, the plan states the following:

> "A few areas have good to marginal timber site class capability and there are scattered patches of existing marketable trees throughout the area. As the trees are harvested very few landowners are investing in reforestation of their land. Instead it is either placed in a small hobby operation or it remains idle. There is value in maintaining the existing forested areas for harvest. However, it is questionable whether there is significant interest or potential to encourage long term timber production for most of these lands. The same factors that are limiting agricultural production are limiting timber production in the area: small lot parcelization, existing development and close proximity to Salem's urban area. The forested parcels in the [SA] area will

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Accordingly, no purpose is served in specifically addressing those arguments again under petitioner Kaye's assignments of error.

> be treated as a secondary farm related resource that is in transition to other uses, primarily small scale farming. Since these areas are not well suited to long term timber land production, the [SA] zone will attempt to protect the existing timber resource and after harvest, allow their conversion to smaller parcels that, based on personal choice, may be used for small woodlots or small farms.
>
> "It is the intent of the [SA] designation to recognize and encourage transition of these lands into a more efficient and intensive agricultural area of special commodity production. * * *" Plan, Agricultural Lands, Section 23. (Emphasis supplied.)

We believe these statements in the plan constitute a determination that the land to which the Special Agriculture designation is applied is not forest land as defined by Goal 4. Further, this determination has been acknowledged by LCDC. Accordingly, we agree with the county that Goal 4 is inapplicable to a proposal to redesignate land designated Special Agriculture by the acknowledged plan.

This subassignment of error is denied.

B. Goal 11

Petitioner Kaye argues that because the proposed plan amendment and zone change will allow the provision of urban level services outside of an urban growth boundary, the proposal violates Goal 11 (Public Facilities and Services). Washington Co. Farm Bureau v. Washington Co., 17 Or LUBA 861, 879 (1989) (Goal 11 proscribes provision of an urban level facility in a rural area to serve rural users).

We determine above that the plan amendment and zone change would allow urban level uses, based on several factors including that the proposal is to cluster 85 dwellings on 72.5 acres of land, possibly allow a community septic system, and create a community water system and water service district. We agree with petitioner that where it is determined that the proposed services will serve an urban level use, then those services are properly considered urban level services.

This subassignment of error is sustained.

Petitioner Kaye's first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR (KAYE)

> "Marion County misconstrued and misapplied the applicable law and made a decision not supported by adequate findings or substantial evidence in approving the conditional use permits for the 85 non-farm dwellings and the golf course. This action violated ORS 215.283(3) and 215.416(9), [MCZO] Chapters 119 and 137, and [plan] policies pertaining to agricultural lands, rural development, urbanization, transportation, environmental quality and natural resources."

Under this assignment of error, petitioner challenges the approval of the conditional use permits for the 85 PD dwellings as well as the conditional use permit for the golf course.

A. Conditional Use Permits for Dwellings

The county applied its conditional use permit criteria to the proposed open space, roads and water supply system

that would serve the proposed dwellings, but which would be located on the SA zoned land. The county did not apply its conditional use permit criteria to the 85 proposed dwellings, because they are permitted uses in the AR zoning district, where they will be located.

However, the conditional use permits for the dwellings and their infrastructure depend upon the validity of the plan amendment and zone change, which would allow the dwellings to be established on the AR zoned portions of the property in the first place. We determine above that the proposed plan amendment and zone change fail to comply with Goals 3, 11 and 14. Accordingly, the conditional use permits for the dwellings and infrastructure to serve the proposed dwellings are also invalid.

This subassignment of error is sustained.

B. Conditional Use Permit for Golf Course

Marion County Zoning Ordinance (MCZO) 137.040 establishes the following standards for approval of a conditional use permit in the SA zone:

"* * * * *

"(c) Uses * * * shall be situated on generally unsuitable land for farm use considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the parcel.

"(d) The following criteria apply to all uses in 137.030 except [farm dwellings].

"(1) The use is compatible with farm or forest uses and is consistent with ORS 215.243; and

"(2) It does not interfere seriously with farming or forest practices on adjacent lands; and

"(3) It does not materially alter the stability of the overall land use pattern of the area; and

"(4) Adequate fire protection and other rural services are available; and

"(5) Will not have a significant adverse impact on timber production, grazing land, watersheds, fish and wildlife habitat, soil and slope stability, air and water quality and outdoor recreation activities; and

"(6) The proposed use complies with the purpose and intent of the agricultural policies in the Marion County Comprehensive Plan.

"(e) The following criteria apply to [golf courses] if the criteria in 137.040(c) cannot be satisfied.

"(1) There is a demonstrated need that the use will satisfy for area residents or the general public which outweighs the need for, or benefits of, the existing or potential farm or forest use; and

"(2) There is no other feasible location for the proposed use that would satisfy 137.040(c); and

"(3) It will not cause adverse long term environmental, economic, social and energy consequences for the area, the region or the state.

"* * * * *"

1. MCZO 137.040(c) and (e)

Petitioner argues the county erroneously determined the proposed golf course will be "situated on generally unsuitable land for farm use," as required by MCZO 137.040(c). However, petitioner does not challenge the county's findings that the golf course satisfies MCZO 137.040(e), an alternative standard to MCZO 137.040(c). The challenged decision determines compliance with MCZO 137.040(e) as follows:

> "[MCZO] 137.040(e)(1) - The use must meet a public need. Evidence in the record substantiates the popularity of golfing and the need in the Salem area for an additional golf course. The subject property is easily accessible, well buffered and ideally located for a golf course. The property is currently available for use as a sanitary landfill. The alternative golf course use is a far superior use of the property which preserves open space and air and water quality of the area, as well as retaining other environmental values. The resource value of the subject property which would be developed into a golf course is negligible, and therefore the value as a golf course outweighs the needs for, and benefits of, any potential farm use.
>
> "[MCZO] 137.040(e)(2) - No alternative site generally unsuitable for farm use. Use of any other feasible 160+ acre area in one ownership for a golf course would likely take farmland out of production and would most likely have impacts on adjacent farming activities. This conclusion is supported by several other applications for golf courses in farm zones. The subject property is a large tract of generally unsuitable land for farming, with the two canyons providing golf course area well removed from adjacent farm use. The proposed location satisfies MCZO 136.040(c) better than any other feasible location.

> "[MCZO] 137.040(e)(3) - No adverse environmental, economic, social or energy consequences for the area, region or state. The activity proposed, golfing, does not generate any environmental or social hazards. The subject property is [several] miles from Salem, the regional population center, and close to two smaller communities, Jefferson and Turner. Interstate 5 and Enchanted Way provide convenient access. A golf course at this location will not create adverse economic circumstances for these communities and should provide economic benefits when visiting golfers need food and accommodations. The golf course will compliment the tourist facilities provided to the north along Enchanted Way and in Salem." Record 19-20.

Petitioner's arguments concerning why the golf course does not satisfy the generally unsuitability standard of MCZO 137.040(c), do not establish why the findings of compliance with MCZO 137.040(e), the alternative to that standard, are not adequate. Accordingly, this subassignment of error provides no basis for reversal or remand of the challenged decision.

This subassignment of error is denied.

2. MCZO 137.040(d)(1) and (2)

Petitioner argues the county failed to identify farm uses in the area, to determine whether the proposed golf course will be compatible with those identified farm uses, and to determine whether whether it will seriously interfere with those farm uses.

In Sweeten v. Clackamas County, 17 Or LUBA 1234, 1240-41, this Board determined that findings addressing nearly identical local compatibility and serious

interference standards, which failed to identify the farm uses in the area and to explain how the proposal will be compatible with those farm uses, were inadequate. Similarly, here, the county failed to identify farm uses in the area, and to explain how the golf course will be compatible with those farm uses and whether the golf course will seriously interfere with those identified uses. Accordingly, the challenged decision fails to establish compliance with MCZO 137.040(d)(1) and (2).

This subassignment of error is sustained.

3. MCZO 137.040(d)(3)[15]

For purposes of determining whether the golf course would materially alter the stability of the area, the challenged decision identifies the area under consideration as the South Salem hills. Petitioner contends this is an inadequate description of the area considered. We disagree. The "South Salem hills" describes a large hilly area outside of South Salem, which is geographically distinct, and reasonably capable of identification.

Next, while the challenged decision does not specifically identify the farm uses in the area and, thus, fails to comply with MCZO 137.040(d)(1) and (2), the challenged decision determines that the South Salem hills

[15]The findings establishing compliance with this standard are located at Record 16 and 27.

contain a mixture of uses, including seasonal grazing lands, woodlands and residential developments, with one such residential development consisting of more than 700 acres. The findings determine that based on buffering characteristics of the subject property and the numerous residential developments in the area, among other things, the proposal will not "materially alter the stability of the area." We believe these findings are adequate to establish compliance with MCZO 137.040(d)(3).

This subassignment of error is denied.

4. MCZO 137.040(d)(4)

Petitioner challenges the evidentiary support for the county's determination that there are adequate rural facilities available to serve the proposed golf course.[16] Specifically, petitioner contends the record does not support a determination that the traffic systems in the area are adequate to serve the proposal or that the proposed sewer facilities will be adequate to handle the sewerage needs of the golf course.[17]

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[16]The county adopted findings that (1) the traffic systems in the area were adequate to handle the proposal and are in fact under capacity, and (2) the proposed method for sewage disposal was adequate to handle sewage generated by the proposal. Record 28-29 and 21-22, 23, 24, respectively.

[17]Petitioner also argues that the record does not support a determination that the golf course will not overburden area public schools. However, petitioner does not explain, and we do not understand, how a golf course would have any impact on schools.

Concerning the adequacy of the traffic systems in the area to handle the traffic generated by the golf course, petitioner cites a letter from a traffic engineer for the Oregon Department of Transportation (ODOT). Record 209. This letter outlines several deficiencies at the I-5 interchange near the subject property, which it is expected many people will use to access the golf course.[18] Further, this letter does not, as the county contends, state that the traffic systems in the area are under capacity. Rather it states that the I-5 interchange has "low traffic volumes" and that this may be why the interchange has a "low accident rate." Id. However, this letter does not establish that the interchange, or any other aspect of the road system for that matter, is below design capacity as the challenged decision suggests and, thus, adequate to handle traffic generated by the golf course. Petitioner also points out that the proposed golf course is designed to accommodate large tournaments, at which the number of attendees will significantly exceed the vehicle traffic expected for routine operation of the golf course, and that the challenged decision does not establish adequate traffic system capacity to handle tournament generated traffic.

[18]While the record indicates that the golf course will increase vehicle trips to the property by 180 vehicle trips per day, it does not establish how many vehicle trips are expected during golf tournaments. Record 28-29.

The county cites conclusory statements in the applicant's written submission below as support for the proposition that the traffic systems which will serve the golf course are adequate to handle the traffic it generates. However, there is no explanation in the applicant's submission for why it is believed that the traffic systems that will serve the proposal, are adequate. Consequently, we agree with petitioner that the record lacks substantial evidence to support a determination of compliance with MCZO 137.040(d)(4), with respect to road facilities.

Concerning the adequacy of the the individual septic tanks proposed to serve the golf course, petitioner cites two plan policies which state that historically, Marion County has experienced failures with individual septic tanks, and that one such failure required the establishment of a Sewage Service District. Plan 49. Petitioner contends there is no evidence in the record to establish that an individual septic system will be adequate to handle the sewage generated by the routine operation of the golf course or the operation of the golf course during tournaments.

The county cites testimony in the record that states the proposal will be served by an "oxidation lagoon" and that the system is anticipated to be able to handle sewage generated by the proposal. However, our analysis of this evidence is hampered by the fact that this testimony was apparently given when the proposal was to serve the entire

project with a community sewerage system.[19] Consequently, from the evidence cited by the county, we cannot tell the nature of the sewerage system which will serve the golf course itself and whether that system will be adequate. Accordingly, the determination in the challenged decision that the proposed sewerage system is adequate, is not supported by substantial evidence in the whole record.

This subassignment of error is sustained.

5. MCZO 137.040(d)(5)

Under this subassignment of error petitioner argues the county failed to establish that the proposal would not have a significant adverse impact on fish and wildlife populations, including wildlife populations within wetlands which apparently exist on the property.

The challenged decision determines:

> "No significant adverse impact on other resources. The Oregon Department of Fish and Wildlife reviewed the proposal and expressed serious concern with potential impacts on non-game wildlife. Limited land clearing and other provisions should be required to reduce impacts. Development within identified wetlands may also be an issue. Conditions have been imposed to address these concerns, and the [board of commissioners] is satisfied that reduced density and development clustering ensure that non-game wildlife will not

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[19]The county suggests that the septic system to serve the proposed golf course will be a quasi-community system, as it states in its brief:

> "The evidence in the record shows that conventional septic systems with an oxidation lagoon will serve the proposed dwellings and the golf course." Respondent's Brief 16.

> experience a significant adverse impact." Record 27.

However, no conditions of approval were imposed to limit "land clearing" and no "other provisions" were specifically identified as required to "reduce impacts." The only condition imposed in this regard is the following:

> "The Division of State Lands [DSL] shall determine whether golf course related development will affect any wetlands. Wetlands shall be protected or mitigated according to the requirements of the [DSL]." Record 10.

Under MCZO 137.040(d)(5), it is a county requirement that the applicant establish the proposed golf course will have no significant adverse impact on wildlife, among other things. Therefore, the county must determine whether its standard is satisfied by the proposal. It may not leave it to DSL to decide compliance with the county's own requirements.[20] See Moorefield v. City of Corvallis, 18 Or LUBA 95, 108 (1989).

This subassignment of error is sustained.

6. MCZO 137.040(d)(6)

MCZO 137.040(d)(6) requires that the proposed golf course be consistent with the plan. However, the plan

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[20]In its brief the county argues that because there is no specific reference in MCZO 137.040(d)(5) to protecting wetlands, the county was not required to adopt findings concerning wetland protection. We disagree. MCZO 137.040(d)(5) requires that the proposal not result in significant adverse impact on wildlife. Significant adverse impacts on wildlife habitat is a significant adverse impact on wildlife, regardless of the particular kind of habitat involved.

requirements cited by petitioner essentially mirror requirements of the goals which, we determine above, are not satisfied by the proposal. Consequently, these plan policies are also violated by the proposal.

This subassignment of error is sustained.

Petitioner Kaye's second assignment of error is sustained, in part.

The county's decision is remanded.