BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BONNIE W. RIGGS, JON H. RIGGS,
COLLEEN A. MCLEAN-BOWEN, ROBERT C. BOWEN,
GREGORY L. BIERMAN, and ANN WALKER BIERMAN,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

CARL BARRON,
Intervenor-Respondent.

LUBA No. 98-157

Appeal from Douglas County.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson, Kloos & Sherton.

No appearance by respondent.

David B. Smith, Tigard, filed the response brief and argued on behalf of intervenor-respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 12/27/99

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a decision to approve a plan amendment and zone change for a 101-acre parcel.

MOTION TO INTERVENE

Carl Barron (intervenor), the applicant below, moves to intervene in this appeal on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is a 101-acre parcel located in the Sylman Valley, approximately one-half mile west of the City of Roseburg Urban Growth Boundary. The parcel is located near the center of a 529-acre area designated Farm Forest Transitional (FFT) on the Douglas County Comprehensive Plan (DCCP) map and is zoned Farm/Forest (FF). The property surrounding the FF area is primarily zoned rural residential. The challenged decision changes the DCCP map designation for the property to Rural Residential 5 Acre (RR5) and changes the zoning to Rural Residential 5 Acre (5R).

From 1950 through 1974, the subject property was part of a 337.5-acre sheep ranch known as the Busenbark Ranch. In 1974, the 337.5-acre tract was divided into three smaller parcels, and conveyed into separate ownership; however, the entire tract continued to be managed as a sheep ranch until 1996. In 1996, the owner of the subject property, who managed the entire ranch, discontinued ranching operations and sold the subject property to intervenor. The subject property was sold to intervenor as "residential" land. Record 361.

In 1996, intervenor applied for a plan amendment and zone change based upon a "reasons" exception to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands). In that application, intervenor sought to establish that there was a demonstrated need for rural residential housing in the vicinity. The Douglas County Planning Commission (commission) approved intervenor's application; however, after opponents appealed that

decision, intervenor requested an opportunity to revise his application to show that the property was not resource land which warranted an agricultural designation under Goal 3 or a forest land designation under Goal 4.

The commission approved intervenor's revised applications for the plan amendment and zone change on the basis that the applicant had shown that the property was not resource land. Petitioners appealed the commission's decision to the Douglas County Board of Commissioners (board of commissioners). The board of commissioners adopted an order affirming the commission's decision. Petitioners appealed to LUBA.

After petitioners filed the petition for review at LUBA, intervenor requested a voluntary remand of the decision to address the matters raised in the petitioners' brief. LUBA granted the motion for voluntary remand to the county. The board of commissioners remanded the decision to the commission to receive additional evidence and to respond to the issues raised in the petition for review. Petitioners requested a *de novo* hearing on the applications, which the commission denied in favor of a hearing that was limited to those issues that were raised in the petition for review. After receiving additional testimony, the commission again approved the application. The board of commissioners reviewed that commission decision on the record and adopted a decision approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Under this assignment of error petitioners raise three issues to support their contention that the county erred in determining that the subject property is not agricultural lands as defined by Goal 3 and OAR 660-033-0020(1).[1] Under each issue, petitioners argue

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[1] OAR 660-033-0020(1) provides:

"(a) 'Agricultural land' as defined in Goal 3 includes:

"(A) Lands classified by the U.S. Soil Conservation Service (SCS) as predominantly Class I-IV soils in Western Oregon * * *;

that the county (1) failed to comply with Goal 3 because it improperly construed the applicable law, (2) failed to adopt sufficient findings to support the decision, and (3) made a decision that is not supported by substantial evidence in the whole record. *See* OAR 661-010-0071(2) (providing bases for LUBA to remand a land use decision). In addressing each of petitioners' subassignments of error, we address petitioners' Goal 3 and OAR 660-033-0020 interpretive arguments before considering the adequacy of the county's decision with respect to findings and evidentiary support.

A. "Farm Unit" under OAR 660-033-0020

OAR 660-033-0020(1)(b) defines "agricultural land" under Goal 3 to include land in capability classes other than I-IV that is "adjacent to or intermingled with lands in capability classes I-IV * * * within a farm unit." Petitioners argue that the county misconstrued OAR 660-033-0020(1)(b) by determining that the 337.5-acre tract owned as one unit prior to 1974 (Busenbark Ranch) is not a "farm unit" under that rule.[2] Petitioners argue that from at least 1950 until 1996, the subject parcel was being managed as a "farm unit" with the other two parcels that formed the Busenbark Ranch. Petitioners contend that it is this larger tract that should be considered when determining whether the subject parcel is "intermingled with other agricultural soils within a farm unit" as provided for in OAR 660-033-0020(1)(b). Petitioners contend that the historical management demonstrates that the subject property falls within the meaning of "farm unit" pursuant to OAR 660-033-0020(1)(b).

> "(B) Land in other soil classes that is 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
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> "(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

[2]It is undisputed that the soils on the subject property are predominantly non-agricultural soils, and that the remainder of the former Busenbark Ranch contains a greater percentage of agricultural soils.

The county concluded that the subject property is not part of a "farm unit" under OAR 660-033-0020(1)(b) for two reasons. First, the county determined that the Busenbark Ranch is not a "farm unit" because the land constituting the "farm unit" must be in common ownership of the applicant. Second, the county found that the history of sheep grazing on the property constitutes a "livestock feed yard" because the evidence shows that there is insufficient forage for the number of animals confined, and supplemental forage has to be supplied to the sheep on a year-round basis. The county then determined that a "livestock feed yard" is a "commercial use in conjunction with farming" as provided in ORS 215.283(2)(a), and therefore is, by definition, a non-farm use. The county concluded that, because petitioners could only provide evidence regarding 46 years of use of the property for a sheep operation, which the county determined to be a commercial use in conjunction with farming, petitioners could not show that the historical use of the property was farm use as part of a farm unit.

1. Common Ownership

The county found that for the "intermingled" portion of the agricultural land definition to apply, the intermingled lands must be in common ownership. The county stated:

> "First, it is undisputed that there are some Class I-IV soils on the rest of the Busenbark [R]anch. The [board of commissioners] notes that it appears that LUBA has concluded at least twice that the intermingled lands test of OAR 660-033-0020(1) applies only where the adjacent or intermingled land is owned by the applicant. *DLCD v. Curry County*, 28 Or LUBA 205, 208-209 (1994). *Brown v. Coos County*, 31 Or LUBA 142, 156 (1996). Thus, since only the subject property is owned by the applicant, with the land with Class I-IV soils being owned by the Busenbarks, we find that the subject property is not intermingled with, or adjacent to, NRCS Class I-IV land within a farm unit." Record 55.

Intervenor argues that, based on case law, the county correctly determined that the definition of a "farm unit" as that term is used in OAR 660-033-0020(1)(b) is predicated on ownership. According to intervenor, because the subject parcel is not owned in common with

one of the adjacent parcels, it cannot be considered part of a larger "farm unit." Intervenor cites *Dept. of Land Conservation v. Coos County*, 117 Or App 400, 403, 844 P2d 907 (1992); *Brown*, 31 Or LUBA at 156; *DLCD v. Curry County*, 28 Or LUBA at 208-09, *aff'd Dept. of Land Conservation v. Curry County*, 132 Or App 393, 888 P2d 592 (1995); and *Kaye/DLCD v. Marion County*, 23 Or LUBA 452 (1992) as support for his contention that ownership is the determinative factor in a showing that a parcel is part of a farm unit.

The term "farm unit" is not defined in statute or the administrative rules. The Court of Appeals has stated that the analysis required by OAR 660-033-0020(1)(b) is one of location: "whether land that is not of agricultural quality is interspersed with land that is." *Dept. of Land Conservation v. Curry County*, 132 Or App at 398. The court continued:

> "To qualify as 'agricultural land' under [OAR 660-033-0020(1)](b), both the higher and lower quality lands must be part of a farm unit. An objective of subsection (b) appears to be to prevent piecemeal fragmentation of farm land and to make all land in the unit part of a contiguous whole. Thus, the rule's purpose is not to measure the quality of particular land in the unit, except to require that the unit contain some class I-IV soils. The fact that all of the land comprises a single operating farm unit makes the quality of particular parts of it a marginal factor in determining whether the unit is 'agricultural,' and a central consideration in identifying the rule's objective to be the preservation of the unit as a whole." *Id.*

The cases intervenor cites, and those relied on by the county, involved lands that were in common ownership at the time of application and thus are not dispositive of the question here. From those cases we conclude that common ownership between a subject parcel and adjacent agricultural land is an indication that the parcel is a part of a "farm unit," *DLCD v. Curry County*, 28 Or LUBA at 208-09; however, common ownership is not determinative. OAR 660-033-0030(3) provides that "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land."

We conclude that the fact that the subject property is not owned by the same person who owns adjacent farm parcels does not conclusively establish that the subject parcel is *not* part of a single farm unit. Lands in diverse ownership that are nonetheless jointly managed as

a single operating farm unit may constitute a "farm unit" for purposes of OAR 660-033-0020(1)(b).[3]

This subassignment of error is sustained.

2. Livestock Feed Yard

The county's alternative basis for determining that the subject property is not a "farm unit" as that term is used in OAR 660-033-0020(1)(b) is that the historical use of the property for sheep grazing was not a farm use as defined in ORS 215.203(2)(a). The county reasoned that the sheep operation constituted a "livestock feed yard" because of evidence that, during the time the parcel was operated as a sheep ranch, there was insufficient forage for the number of animals confined, and supplemental forage had to be supplied to the sheep on a year-round basis. The county then determined that a "livestock feed yard" was a "commercial use in conjunction with farming" as provided in ORS 215.283(2)(a), and therefore, by definition, a non-farm use.

Petitioners argue that the county's alternative finding is an attempt by the county to apply the deferential standard of review a local government receives under ORS 197.829(1) to an interpretation of provisions of state administrative law. We agree that the county's interpretation of the uses on intervenor's property, to the extent it constitutes a determination of whether property is being put to "farm use" as defined by ORS 215.203(2)(a) within a "farm unit" under OAR 660-033-0020(1)(b), is not subject to deference. Using the reasonableness standard as articulated in *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1988), we find that grazing approximately 200 head of sheep on a 337.5-acre parcel for over 40 years does not constitute "commercial activities that are in conjunction with farm use," a non-farm use under ORS 215.283(2)(a). ORS 215.203(2)(a) clearly includes the

[3] It may be that under the facts of this case the county could conclude, the historical use of the subject property as part of the Busenbark Ranch notwithstanding, that the subject property is no longer part of a farm unit by virtue of the cessation of joint farm activity on the subject property in 1996. However, the county made no finding to that effect, and we express no opinion in that regard.

raising, feeding, management and sale of livestock within the definition of "farm use." *See Pekarek v. Wallowa County*, ___ Or LUBA ___ (LUBA No. 98-094, July 30, 1999) slip op 13, 18 (pasturing cattle is a farm use even if the soils could not support grazing on the subject property on a commercial scale); *DLCD v. Crook County*, 26 Or LUBA 478, 493 (1994) (past use of property for grazing is a substantial obstacle to finding the property unsuitable for grazing); *Clark v. Jackson County*, 17 Or LUBA 594, 606 (1989) (same).[4]

This subassignment of error is sustained.

B. Land Suitable for Farm Use under OAR 660-033-0020(1)(a)(B)

The county identified "whether or not the property is non-resource land" as an issue remaining to be considered on remand. Record 641. Under Goal 3 and OAR 660-033-0020(1)(a)(B), land is agricultural land if it

> "is 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[.]"

A local government must evaluate each of the factors provided in OAR 660-033-0020(1)(a)(B) to determine whether land is suitable as agricultural land. *Doob v. Josephine County*, 31 Or LUBA 275, 283-84 (1996).

Petitioners argue that evidence presented regarding the historical use of the property for grazing purposes, effects of past substandard management, the use of forage improvement practices, existing land use patterns, and possible farm use other than grazing establish that the property is suitable for farm use. Citing OAR 660-033-0030(5), petitioners argue that

[4] The county's characterization of sheep grazing as a non-farm "commercial activity in conjunction with farm use" begs the question of what farm use the grazing was in conjunction with.

obtaining a profit from the farm use is not a factor in determining whether property is agricultural land under Goal 3.[5]

Intervenor argues that the county correctly concluded the subject property was not suitable for sheep grazing because it was never capable, even in conjunction with the parent Busenbark Ranch, of producing adequate forage for the sheep. Intervenor argues that past management practices are not relevant in the suitability determination. Intervenor also argues that whether the use of forage improvement techniques might make land suitable for grazing is not relevant to whether the subject property is suitable for grazing. Intervenor contends that the county made adequate findings that the subject property was not agricultural land by considering the existing land use pattern, which it concluded was residential. Intervenor asserts that petitioners waived the argument that possible farm uses other than grazing practices may be successfully employed on the subject parcel. We address the waiver issue first.

1. Waiver

Intervenor argues that petitioners did not raise the issue of whether possible farm uses other than grazing practices may be successfully employed on the subject in their first petition for review and did not raise the issue during the proceedings on remand below. Intervenor contends that that issue is therefore waived.

In their initial petition for review (LUBA No. 97-061), petitioners challenged the adequacy of the county's findings regarding OAR 660-033-0020(1)(a)(B), arguing that the county failed to respond to evidence in the record that other local properties that are similar to the subject property are producing garden crops. Record 856. Petitioners also cite to

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[5] OAR 660-033-0030(5) provides:

> "Notwithstanding the definition of 'farm use' in ORS 215.203(2)(a), profitability or gross farm income shall not be considered in determining whether land is agricultural land or whether Goal 3, 'Agricultural Land', is applicable."

several places in the remand record where petitioners raised the issue of alternative crops, and whether the subject property, if used for purposes other than sheep grazing, could be suitable for farm use. *See* Record 161-162, 676.

Where an issue is adequately raised before the local government, ORS 197.763(1) does not restrict the particular arguments regarding that issue which the petitioner may raise on appeal. *DLCD v. Tillamook County*, 34 Or LUBA 586, 590-91 (1998); *see State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) (distinguishing between raising an issue at trial, identifying a source for a claimed position, and making a particular argument). We conclude that petitioners adequately raised the issue of alternative crop production both in their initial petition for review and during the remand proceedings below; therefore, petitioners may raise the issue of whether the subject property is suitable for alternative crops or livestock operations in this appeal.

2. Application of the "Suitability" Standard

We now turn to intervenor's argument that the county properly applied the provisions of OAR 660-033-0020(1)(a)(B). Intervenor contends that the record contains substantial evidence that the subject property contains poor soils, cannot support grazing activities absent supplemental forage on a year-round basis, lacks water rights for agricultural purposes, and that poor climatic conditions result in an inability to store rain water sufficient to conduct farm operations. Further, intervenor cites information in the record to show that the property lies near rural residential uses, and that the entire 529-acre FFT-designated area that includes the subject property is merely an agricultural enclave amidst rural residential uses. Intervenor also refers to findings by the county that show that the property could only become a viable agricultural unit if a great deal of investment was made in the property and the potential yield from the property did not warrant such an investment. Intervenor argues that all of this evidence shows that the property is not suitable for agricultural use, and therefore is not agricultural land.

The county found that "[s]uitability for grazing is determined by, and dependent upon, the capability of the subject property to grow adequate forage for the raising of sheep." Record 32. That finding is inconsistent with this Board's opinion in *Clark*. In *Clark*, the Board considered the past use of the subject property for grazing regardless of whether the subject property, standing alone, could be used as a self-sufficient farm unit:

> "Even if we assume the 40 acres cannot be used successfully as a self sufficient farm unit, that does not mean the 40 acres is generally unsuitable for grazing livestock, a farm use. *Pilcher v. Marion County*, 2 Or LUBA 309 (1981); *Stringer v. Polk County*, 1 Or LUBA 104, 108 (1980). The record clearly shows the 40 acres has been used for livestock grazing as part of the larger livestock operation conducted on the farm unit encompassing the 40 acre site. Although the record also shows the 40 acres, viewed in isolation, has constraints which limit its suitability for livestock grazing, the county's findings fall short of showing the 40 acres is generally unsuitable for grazing in view of its past use for such purposes. *See Walter v. Linn County*, 6 Or LUBA 135, 138 (1982).
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> "We stop short of determining that in view of the past use of the 40 acres for grazing purposes the county *could not* adopt findings that show the 40 acres is generally unsuitable for such purposes. *See 1000 Friends of Oregon v. LCDC (Umatilla County)*, 85 Or App 88, 96, 735 P2d 1295 (1987). However, although we cannot say as a matter of law the past use of the property precludes a finding that the property is generally unsuitable for grazing, the evidence in the record of such use is a substantial obstacle in making such a finding." 17 Or LUBA at 606 (emphasis in original).

Similarly, in *Hearne v. Baker County*, 34 Or LUBA 176 (1998), the Board held that the fact that property cannot be farmed as an economically self-sufficient farm unit is irrelevant if the property is otherwise suitable to produce farm crops and livestock. The subject property in *Hearne* had historically been used for grazing livestock. The Board held that the county erred by limiting its suitability analysis to whether the property was "suited for farm use on a *commercial* scale," because the proper inquiry is whether the subject property can reasonably be put to farm use alone or in conjunction with other land. 34 Or LUBA at 188.

The suitability standard requires that the local government consider whether the subject parcel or portion thereof can reasonably be put to farm use in conjunction with

adjacent or nearby lands. There is evidence in the record that adjacent property is in farm production, and that it is possible for the subject property to be used in conjunction with those operations. The county must not only consider the property's suitability for producing crops but also its suitability for producing livestock, in conjunction with adjoining and nearby properties. *DLCD v. Crook County*, 34 Or LUBA 243, 256 (1998).

In the present case, the county found the subject property was not suitable for grazing:

> "Suitability for grazing is determined by, and dependent upon, the capability of the subject property to grow adequate forage for the raising of sheep. [Petitioners] argued that Mr. Mosher's letter established that productivity could be improved on the subject property by working with the landowner on the application of fertilizer and other soil remediation techniques, which [intervenor]'s consultant had disregarded in concluding the land was unsuitable.
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> "[Intervenor]'s agricultural consultant, Mr. Day, had disputed that assertion in his 1997 report: 'to move this particular parcel toward the theoretical maximum level of production, it would be necessary to * * * improve soil fertility * * *. However, the production limitations imposed by the nature of the soils, etc. [soil texture and soil depth] would remain.' 1997 Day Report at 9. The report went on to address hay production for forage: 'Replacement with desirable species would require suppression of the plants growing there now, tillage, fertilization, etc. * * *. This would be quite expensive and would present a hazard of soil erosion during the establishment phase * * *. Even if all of the Class III and IV soils were successfully established in a hay crop, the acreage available would not be adequate to justify the substantial cost of harvest equipment [and it would be impracticable to bring in equipment].' 1997 Day Report at 11. Thus Mr. Day's report established that forage production was not feasible on the subject property, even with fertilizer." Record 60.

The county concluded that the Day testimony was credible and his conclusions were well-founded. The county proceeded to address petitioners' arguments in three categories: (1) viable farming occurs on the same, or similar, soils in the county; (2) similar land had been rehabilitated and the same could be done to the subject parcel; and (3) proper management could make the subject property a profitable farm.

We agree with petitioners that the county's decision improperly construes applicable law. The county's analysis is based on the erroneous premise that the suitability of the subject property for agriculture is measured by the profitability of sheep grazing on the subject property, considered in isolation. Because that mistaken premise permeates the county's discussion of petitioners' arguments, we remand to the county for a re-evaluation of the subject property's suitability for farm use in conjunction with adjacent and nearby parcels.

Because the county's findings are inadequate, no purpose would be served by considering whether those findings are supported by substantial evidence. *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 373 (1986), *aff'd* 83 Or App 275, 730 P2d 628 (1987).

The second subassignment of error is sustained.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county failed to comply with Statewide Planning Goal 11 (Public Facilities and Services) because it failed to determine whether it is feasible to provide fire protection service to rural residential development on the subject property. Petitioners point to portions of the record where concerns regarding the adequacy of fire protection were raised and argue that there is a history of fires in the Sylman Valley. Petitioners further contend that there will be inadequate fire protection service access to rural residential development on the subject property. Petitioners argue that this evidence undermines the county's findings and shows that the county made a decision unsupported by substantial evidence in the whole record to support its decision that Goal 11 has been satisfied.

Because the application is for a plan amendment and zone change, Goal 11 is potentially applicable to this decision. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 521 (1994); *Caine v. Tillamook County*, 22 Or LUBA 687, 695 (1992). Goal 11 requires that the county "plan and develop a timely, orderly and efficient arrangement of

public facilities and services to serve as a framework for urban and rural development." Goal 11 provides that "rural development shall be guided and supported by types and levels of * * * rural public facilities and services appropriate for, but limited to, the needs and requirements of the * * * rural areas to be served." Goal 11 defines "Rural Facilities and Services" as "facilities and services suitable and appropriate solely for the needs of rural lands."[6] The goals define public facilities and services to include "activities * * * necessary for the public health, safety and welfare."[7]

The county found that "there is nothing in Goal 11 that mandates the demonstration of feasibility of adequate fire protection." Record 24. Nevertheless, the county found that Goal 11 was satisfied in this case:

> "We also note that the purpose of Goal 11 is to limit provision of public services on rural lands to rural levels of service, and to proscribe urban levels of service. *Washington County Farm Bureau v. Washington County*, 17 Or LUBA 861, 879-880 (1990). We do not believe Goal 11 in this case requires the submission of a petition for annexation to Fire District No. 2 before approval of a plan amendment and zone change for the subject property. It is undisputed that [intervenor] requested the County coordinate with the fire district. The County did, and the Fire District responded on January 6, 1998, stating that 'written statements would * * * be submitted at such time the request for land division is requested.' It also indicated it would act on an annexation petition at that time. We believe those statements are sufficient to show compliance with the commands of Goal 11 for guidance and support by types and levels of rural fire protection service appropriate for, but limited to, rural residential needs and requirements, if approval of an annexation petition

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[6] The statewide planning goals define "rural land":

> "Rural lands are those which are outside the urban growth boundary and are:
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> "(a) Non-urban agricultural, forest, or open space lands or,
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> "(b) Other lands suitable for sparse settlement, small farms or acreage homesites with no or hardly any public services, and which are not suitable, necessary or intended for urban use."

[7] The DCCP provisions addressing Goal 11 include fire protection, and note that inclusion in a rural fire protection district is a consideration in approving rural residential subdivsions. DCCP Public Facilities Objective C, Policy 8.

> is made a condition of approval of any future division of the subject property." Record 24-25.

The county concluded that the proposed plan amendment and zone change comply with Goal 11 subject to the condition in its decision that no land division of the subject property be approved until annexation of the subject property to the fire district or until a fire protection services contract with the fire district is executed. *Id.*

In our view, adequate fire protection is among the public services necessary for public health, safety, and welfare that must be considered under Goal 11. Goal 11 may not mandate a showing that adequate fire protection is currently available, but it at least requires a demonstration that adequate fire protection is feasible. The county must determine the need for and appropriate level of fire protection service on the subject property before it can make a finding that the goal requirements are satisfied. The feasibility determination must (1) consider the type of fire service that is currently available, if any; (2) determine the appropriate level of fire service for the rural residential use; and (3) determine the feasibility of providing such service, if it does not already exist. The county has not determined the level of service required by the subject property and, therefore, is unable to determine whether the fire district, by annexation or contracting for services, is capable of providing the appropriate level of service.

Petitioners also argue that the decision fails to address the issue of the fire district's procedure manual requirement that, under the foreseeable circumstances of the case, an approved second fire apparatus access road must be provided. The board of commissioners adopted the commission's finding that "the Procedures of the Fire District did not establish any approval criteria for the plan amendment and zone change." Record 73. Petitioners do not challenge the county's finding that the fire district's procedure manual requirement is not an approval criterion; therefore this subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the decision must be remanded pursuant to ORS 197.835(9)(a)(D) because it fails to address requirements of Douglas County Land Use and Development Ordinances (LUDO) 6.500.2(b) and (c) for approval of a quasi-judicial comprehensive plan amendment.[8] LUDO 6.500.2 requires that an application for a comprehensive plan amendment address and meet particular standards:

> "a. That the Amendment complies with the Statewide Planning Goals adopted by the Land Conservation and Development Commission pursuant to ORS 197.240 or as revised pursuant to ORS 197.245.
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> "b. That there is a public need for a change of the kind in question.
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> "c. That such need will be best served by changing the Plan Designation of the particular piece of property in question as compared with other available property."

The county found "the proposed plan amendment and zone change complies with Goals 2, 3, 11, and 12, and thus fully complies with [LUDO] 6.500.2." Record 26. However, the county does not make a specific finding with regard to either LUDO 6.500.2(b) or (c).

Intervenor contends that petitioners waived this issue for two reasons. First, intervenor argues that petitioners did not raise it in their first petition for review and the county limited the proceedings to issues that were the basis of the remand, citing *O'Rourke v. Union County*, 31 Or LUBA 174, 176 (1996). In *O'Rourke*, we decided that on remand, the county could properly limit its review to those issues that were specifically identified in the petition for review. Intervenor also argues that petitioners waived the issue by failing to object to the scope of the issues identified by the county on remand.

In their reply brief, petitioners distinguish *O'Rourke* from the present case on the basis that *O'Rourke* involved a remand following a decision on the merits of the case by this Board. This appeal concerns a decision following a *voluntary* remand at the request of the

[8]ORS 197.835(9)(a)(D) requires LUBA to reverse or remand a land use decision if the Board finds the local government improperly construed the applicable law.

local government. Petitioners argue that "where the local government limits the scope of its evidentiary hearings after a voluntary remand, an issue can still be raised before LUBA if it was raised before the local government during the *initial* local government proceedings." Reply Brief 6 n 2 (emphasis in the original).

Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992) provides some guidance on this issue. In *Beck*, the Supreme Court held that on appeal of a local land use decision, a petitioner must seek judicial review of legal issues that LUBA decides against them in the final order at that time, and not subsequently during an appeal of the local proceedings on remand. While that is not the case presented on a voluntary remand, the reasoning of the court is instructive. The court considered ORS 197.835(9), ORS 197.850, ORS 197.763(7), and ORS 197.830(10), and summarized those statutes as providing, respectively, that

> "(1) when reviewing a local land use decision, LUBA shall decide as many issues as possible even when remanding others; (2) LUBA's 'final order' is subject to judicial review, without regard to whether it orders a remand of some or all issues before it; (3) when a local hearings body reopens the record, only new evidence and new issues relating to that new evidence are to be considered; and (4) appeals to LUBA are generally limited to issues raised before the local hearings body." 313 Or at 151.

The court read the statutory provisions together and held:

> "* * * When the record is reopened at LUBA's direction on remand, the 'new issues' [under ORS 197.763(7)] by definition include the remanded issues, but not the issues that LUBA affirmed or reversed on their merits, which are old, resolved issues.
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> "Finally, ORS 197.830(10) provides, with exceptions not relevant here, that '[i]ssues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763.' *If the record is reopened for the consideration or reconsideration of specific issues, ORS 197.763(7), then a subsequent appeal to LUBA generally is limited to such of those issues as an appellant may wish to raise*. None of LUBA's rules interprets these statutes to the contrary or provides for reconsideration or revival of a legal issue previously decided in a final order." 313 Or at 153-54 (emphasis added).

In the case of a voluntary remand, there will be no "old, resolved issues" resulting from that remand. The question intervenor's waiver argument raises is whether an appeal of a local government decision after voluntary remand is limited to the issue(s) identified in the petition for review filed in the initial appeal, if any. LUBA will grant a motion to remand a challenged decision that is submitted after the petition for review is filed, so long as the respondent represents to the Board that it will consider and address on remand all issues raised in the petition for review. *Brugh v. Coos County*, 30 Or LUBA 467, 469 (1996). Voluntary remand does not *limit* proceedings to issues in the petition for review, but the local government must agree to address those issues raised therein.

Under petitioners' argument, on a subsequent appeal, a petitioner in a LUBA proceeding that is voluntarily remanded would be in a better position than a petitioner that obtained a final order by LUBA remanding the local government's decision. That is because under petitioners' argument, the petitioner in the voluntary remand could raise issues before this Board from the *initial* local government proceeding that the other petitioner would be prohibited from raising. An issue that could have been but was not raised in an initial petition for review may not be raised in a subsequent petition for review after remand proceedings, whether those proceedings result from a LUBA final order on the merits or a voluntary remand. Allowing a petitioner on appeal of a voluntarily remanded decision to raise pre-existing issues that the petitioner did not raise on the remand would be inconsistent with the policy the legislature enacted at ORS 197.805.[9] *Mill Creek Glen Protection Assoc. v. Umatilla County*, 88 Or App 522, 527, 746 P2d 728 (1987) (where an issue is not raised in the initial petition for review, it may not be raised during a later appeal, notwithstanding that

[9] ORS 197.805 provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

the petitioners in the later appeal did not appear in the earlier appeal); *Cf. Hendgen v. Clackamas County*, 119 Or App 55, 58 n 3, 849 P2d 1135 (1993) (noting that where the petitioners had presented the issues *at every level of review* they are not precluded from raising them again on remand). *See also Hribernick v. City of Gresham*, 158 Or App 519, 520, 974 P2d 791 (1999) (where LUBA grants the local government and applicant motion for voluntary remand of a land use decision, the petitioner is not foreclosed from *reasserting* in subsequent proceedings any points that the petitioner raised before LUBA).

The county identified LUDO 6.500.2 as the source of the requirement that the application at issue comply with the statewide planning goals. Record 74, 77, 462. Petitioners could have raised but failed to raise compliance with LUDO 6.500.2(b) and (c) in their initial petition for review. Petitioners have waived the right to raise that issue before this Board. ORS 197.835(3).

The third assignment of error is denied.

The county's decision is remanded.