BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JACKSON COUNTY CITIZENS' LEAGUE,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

ROGUE VALLEY MANOR, NAUMES, INC., and
EVELYN NYE,
Intervenors-Respondent.

LUBA No. 99-139

FINAL OPINION
AND ORDER

Appeal from Jackson County.

F. Blair Batson, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Jackson County.

Gregory S. Hathaway and E. Michael Conners, Portland, filed the response brief and argued on behalf of intervenors-respondent. With them on the brief was Davis Wright Tremaine LLP.

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

BASSHAM, Board Chair; concurring.

AFFIRMED 05/12/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision granting conditional use approval to expand an existing golf course from 9 holes to 18 holes and to construct a golf learning center on property zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

Rogue Valley Manor, Naumes, Inc. and Evelyn Nye, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION

The existing Rogue Valley Manor Planned Unit Development (PUD) was originally approved in 1984. The PUD approval was amended in 1991 and 1994, and the PUD now occupies 214 acres and includes 1,036 dwelling units, 16,000 square feet of office space and the nine-hole Quail Point Golf Course, which includes a driving range. The existing PUD is located entirely within the City of Medford urban growth boundary (UGB). The existing PUD is not directly at issue in this appeal.

The challenged decision approves an expansion of the existing PUD onto 252 acres of EFU-zoned land. Some of that EFU-zoned land is inside the UGB and some of it is outside the UGB.[1] The approved expansion onto 48 acres of EFU-zoned land *inside* the UGB includes a three-hole addition to the golf course along with an additional area that is reserved for future development.[2] The approved expansion onto 204 acres of EFU-zoned land *outside* the UGB will allow construction of a six-hole addition to the existing golf course and a golf

[1]The record indicates that a 1.14-acre area of the 204 acres located outside the UGB is zoned for rural residential use and is improved with a dwelling. No party argues that this exception to the otherwise entirely EFU-zoned 252-acre addition is legally significant.

[2]The record indicates that the applicant intends to request at a later date that the city annex the area within the UGB and approve an amendment of the PUD that will allow additional residential and commercial development inside the UGB, along with the three-hole portion of the golf course expansion that is to be located inside the UGB. Record 146.

learning center.[3]

This is the second time a county decision concerning the disputed golf course expansion has been appealed to this Board. In *DLCD v. Jackson County*, 33 Or LUBA 302 (1997) (*Jackson County I*) we reversed the county's decision based on OAR 660-033-0120 and 660-033-0130(18).[4] On appeal our decision was reversed by the Court of Appeals.

> "[T]he language of [OAR 660-033-0130](18) itself is unambiguous, and cannot plausibly be read as limiting the expansions of golf courses that it authorizes on EFU land to those circumstances where the existing golf course is also located on land that is zoned EFU. Rather, the plain import of the text of the section is that * * * any existing golf course, regardless of the zoning or quality of land on which it is located, qualifies for expansion onto EFU and high-value farmland to which it is contiguous." *DLCD v. Jackson County*, 151 Or App 210, 221, 948 P2d 731 (1997) (*Jackson County II*).

As relevant in this appeal, *Jackson County II* established that nothing identified by the petitioners in the Goal 3 implementing rules at OAR 660-033-0120 and 660-033-0130(18) prohibits the disputed golf course expansion.

On remand from the Court of Appeals, we considered the petitioners' remaining assignments of error that we did not address in *Jackson County I*. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999) (*Jackson County III*). Those assignments of error argued the disputed golf course expansion violates legal requirements that are independent of OAR 660-033-0120 and 660-033-0130(18). As explained more fully below, in *Jackson County III*, we remanded the county's decision so that it could consider (1) whether the approved golf course expansion is an urban use that violates Jackson County Comprehensive Plan Urbanization Policies and (2) whether the challenged decision violates a Jackson County

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[3]According to the record, the golf learning center includes "four practice holes, a driving range, and three practice greens." Record 146-148.

[4]These rules implement Statewide Planning Goal 3 (Agricultural Lands). In our decision in *Jackson County I*, we concluded that the rules only allow expansion of a golf course onto EFU-zoned high value farmland if the existing golf course is also located on EFU-zoned land. Because the existing Quail Point Golf Course is not located on EFU-zoned land, we concluded in *Jackson County I* that the rules do not permit the requested expansion. 33 Or LUBA at 311.

Land Development Ordinance (LDO) provision that requires that the approved expansion have minimal adverse impacts on "abutting properties and the surrounding area."[5]

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under its first assignment of error, petitioner argues the county erred by failing to find that the existing golf course is an "urban" use.[6] Under its second assignment of error, petitioner argues the county erred by failing to find that the golf course expansion violates Jackson County Comprehensive Plan Urbanization Policies.[7]

A. Jackson County III

In our decision in *Jackson County III* we rejected the petitioners' arguments that the challenged decision should be remanded because it violates Goal 14 (Urbanization). We explained:

> "The difficulty with petitioners' argument is that petitioners fail to establish why Goal 14 applies to this permit decision. Absent circumstances not present here, the statewide planning goals are not generally applicable to decisions applying acknowledged comprehensive plan provisions and land use regulations. ORS 197.646; 197.835(5); *Byrd v. Stringer*, 295 Or 311, 316-17, 666 P2d 1332 (1983). Petitioner DLCD suggests that because it raised below the possible applicability of Goal 14, the county was obligated to make

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[5]LDO 260.040(2) provides, in part:

> "[T]he location, size, design, and operating characteristics of the proposed use will have minimal adverse impact on the livability, value, or appropriate development of abutting properties and the surrounding area."

The county's response to a third basis for remand in *Jackson County III* is not challenged in this appeal.

[6]The petitioners in the first round of appeals in this matter included Jackson County Citizens' League, Chris N. Skrepetos and the Department of Land Conservation and Development. Jackson County Citizens' League is the only petitioner in the current appeal.

[7]LDO 260.040(1) requires that, in granting a conditional use permit, the county must find the proposal complies with the county's comprehensive plan. In *Jackson County III* we noted that the Jackson County Comprehensive Plan includes Urbanization Policies, which require that the county "prohibit urban development outside urban growth boundaries" and require that "urban uses must occur within urban growth boundaries." 36 Or LUBA at 99. Finding 1 of the "Urban Lands" portion of the Jackson County Comprehensive Plan states, in part: "Development at urban densities may occur within [the] urban growth boundary, however, outside the urban growth boundary urban development is prohibited." Petition for Review of Jackson County Citizens' League and Chris N. Skrepetos (*Jackson County I*), Appendix 24.

> findings demonstrating that the proposed use is rural, or take an exception to Goal 14. However, as intervenors point out, this Board has held that uses allowed by statute in EFU zones are not subject to the additional requirement that the use be rural or that an exception to Goal 14 be taken. *Washington Co. Farm Bureau v. Washington Co*., 17 Or LUBA 861, 878 (1989). Thus, absent some explanation for why Goal 14 is applicable or could be applicable to the challenged conditional use permit application, the mere fact that a party raised the issue of compliance with Goal 14 below does not obligate the county to make findings regarding Goal 14." *Jackson County III*, 36 Or LUBA at 97-98.

Having concluded that Goal 14 does not apply directly to the challenged decision, because the challenged decision is a permit decision adopted under an acknowledged comprehensive plan, we turned to the petitioners' arguments that the approved golf course expansion violates Jackson County Comprehensive Plan Urbanization Policies that were adopted to implement Goal 14.

The county did not address its Urbanization Policies in its initial decision, and we concluded that the county erred in failing to do so. In reaching that conclusion, we rejected the applicant intervenors' argument that because the EFU zoning statutes and relevant Goal 3 rules authorize approval of golf courses on EFU-zoned lands, that necessarily means that a particular golf course, such as the one at issue in this appeal, could not violate a county Urbanization Policy that prohibits urban uses on rural lands. We explained:

> "* * * Intervenors' argument misses [petitioners'] point. That golf courses are permitted on EFU land says nothing regarding whether the existing golf course constitutes an urban use because of its location and links with residential and commercial development within the City of Medford, and, if so, whether expansion of that existing urban use across the urban growth boundary onto rural land is consistent with the county's Urbanization Policies.
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> "*We agree with [petitioners] that remand is necessary for the county to determine whether the existing use constitutes an urban use given its location and links with urban uses within the city, and, if so, whether expansion of that urban use onto rural land violates the county's Urbanization Policies.*" *Jackson County III*, 36 Or LUBA at 100 (emphasis added).

In summary, our decision in *Jackson County III* rejected the petitioners' argument that Goal 14 applies *directly* to prohibit the challenged expansion. However, we agreed with

the petitioners that the county must address the question of whether its Urbanization Policies, which were adopted to implement Goal 14, might prohibit the disputed golf course expansion.

As will become clearer in our discussion of the county's decision on remand, the parties apparently read the above-emphasized language in our decision in *Jackson County III* to suggest that the answer to whether the existing golf course or PUD is "urban" necessarily answers the question of whether the proposed expansion of the existing golf course or PUD is also urban and thereby violates the county's Urbanization Policies.[8] To the extent that reading of our decision in *Jackson County III* is possible, it was not intended. Because no party disputes that the county's Urbanization Policies prohibit urban development on rural lands, such a reading would make the second inquiry required by our decision in *Jackson County III, i.e*. "whether expansion of that urban use onto rural land violates the county's Urbanization Policies," superfluous.

B. The County's Decision on Remand

The relevant county findings concerning whether the disputed golf course expansion violates its Urbanization Policies are set forth in the margin and can be summarized as follows.[9]

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[8]The parties dispute whether the challenged decision represents an expansion of the PUD or only approves an expansion of the golf course.

[9]The findings that we summarize in the text are as follows:

> "* * * LUBA instructed the County to interpret its urbanization policies and make a finding as to whether the existing use is urban in nature and if so, whether the expansion of that use violates the County's urbanization policies.
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> "JCCL [Jackson County Citizens' League] used LUBA's unfortunate phrasing of the issue to contrive a slightly new argument. JCCL argues that the existing use is a PUD, which they assert is urban in nature. Thus, JCCL argues that the expansion of that use onto rural EFU land violates the County's urbanization policies.
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> "The Board disagrees. The Board has reviewed the entire Application and finds that it relates exclusively to the proposed expansion of a golf course. Furthermore, we do not define the existing use as the PUD. The Board finds that the Application relates to a single use: a golf

1. The disputed decision approves an expansion of the Quail Point Golf Course, not an expansion of the larger PUD of which it is a part.

2. The Urbanization Policies prohibit "urban development" outside UGBs, but do not define "urban development."

3. The Urbanization Policies refer to housing within the urban area as an urban use, but make no reference to uses permitted by state and local law on EFU-zoned land.

4. The existing Quail Point Golf Course "is neither inherently an urban use nor inherently a rural use; it is a neutral use." Record 10.

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course. The Application does not relate to any other use that is part of the PUD. Accordingly, the Application proposes an expansion of that single use: a golf course. The Board concludes that it does not have to evaluate for consistency with the urbanization policies any use other than a golf course.

"The urbanization policies provide that urban development is prohibited outside the urban growth boundary. The urbanization policies do not define those uses that are urban or those uses that are rural. The only reference within the text of the urbanization policies to an 'urban use' is housing within the urban area. There is no reference in the urbanization policies that uses permitted by state and local law on EFU land could be categorized urban in nature and thus prohibited outside the UGB. The Board finds that it has authority to interpret its urbanization policies in conjunction with its land use laws to determine whether the expansion of the Quail Point Golf Course complies with the urbanization policies.

"The Board finds that the existing Quail Point Golf Course is neither inherently an urban use nor inherently a rural use; it is a neutral use. Similar to other neutral uses, such as churches, farm stands, and parks, golf courses are often located in rural as well as urban areas. The Board further finds that many neutral uses, including golf courses, have characteristics consistent with rural uses, i.e. open spaces, vast vegetation, and other aesthetically pleasing visual features.

"Jackson County has historically permitted on rural land, either conditionally or outright, numerous neutral uses. [LDO] Chapter 218 identifies the uses allowed on rural EFU land. In adopting Chapter 218, the Board intended to be consistent with state law, and allow uses on rural EFU land that are expressly allowed under ORS * * * 215.283.

"One other element of our Comprehensive Plan is pertinent to this matter and assisted the Board in interpreting its urbanization policies in this case: Jackson County's Agricultural Land Element. The Agricultural Land Element is specific to agricultural lands and it acknowledges that non-agricultural uses may be approved on rural EFU land, subject to appropriate mitigation.

"When the Board enacted [LDO] Chapter 218, it was aware of its Agricultural Land Element and its urbanization policies. The Board's intent in drafting Chapter 218 was to allow on rural EFU land * * * those uses expressly allowed under * * * ORS 215.283. The Board's enactment of Chapter 218 was an express acknowledgment that the uses allowed in * * * ORS 215.283 are not inconsistent with the County's Agricultural Land Element or its urbanization policies." Record 9-10.

5. The county has historically permitted neutral uses on rural land, either conditionally or outright.

6. In adopting LDO Chapter 218, the county intended to allow those uses that are expressly allowed by ORS 215.283, and LDO Chapter 218 is "an express acknowledgment that the uses allowed in * * * ORS 215.283 are not inconsistent with the County's [U]rbanization [P]olicies." *Id*.

We understand the county to have concluded that any use that is allowable under ORS 215.283 may be permitted in the county's EFU zone without violating its Urbanization Policies, because such uses are "neutral" uses rather than inherently urban uses.

C. Petitioner's Arguments

Petitioner argues that the county's decision on remand is not responsive to our decision in *Jackson County III*. Petitioner argues that rather than determine whether the existing use inside the UGB is urban, the county concluded the existing golf course is "neutral." Petitioner also makes a six-point argument that it contends demonstrates that the challenged decision violates the county's Urbanization Policies.

First, petitioner argues that because the county's Urbanization Policies implement Goal 14, they may not be interpreted in a way that is contrary to Goal 14. Second, petitioner argues that Goal 14 prohibits approval of urban uses on rural, EFU-zoned land. Third, petitioner argues "that the existing golf course, and the PUD of which it is a part, is clearly urban." Petition for Review 11. Fourth, petitioner argues the proposed expansion will intensify the existing urban use that is being expanded and, therefore, the expansion is also an urban use. Fifth, petitioner argues that because Goal 14 would prohibit the allegedly "urban" golf course expansion, if Goal 14 applied directly, the county's Urbanization Policies must also be interpreted to prohibit the golf course expansion, and the county misinterpreted its Urbanization Policies in failing to do so.

We turn to the first of petitioner's arguments.

1. ORS 197.829(1)(d)

As previously noted, it is not disputed that the county's Urbanization Policies were adopted to implement Goal 14. This means that although Goal 14 does not apply directly to the challenged decision, Goal 14 nevertheless remains a relevant consideration. If the county interprets its Urbanization Policies to allow an urban use that Goal 14 would prohibit, ORS 197.829(1)(d) requires that we reject such an interpretation.[10] *See Leathers v. Marion County*, 144 Or App 123, 130-31, 925 P2d 148 (1996) (county interpretation of acknowledged land use legislation is reversible under ORS 197.829(1)(d) if the interpretation would allow uses that are prohibited by the statewide planning goals that the legislation was adopted to implement).

2. Applicability of Goal 14 to Rural, EFU-Zoned Land

a. Intervenors' Waiver Arguments

As noted earlier in this opinion, our decision in *Jackson County III* rejected the petitioners' argument that Goal 14 applies directly to the county's initial decision in this matter. In doing so we expressed two reasons for reaching that conclusion. The first, and dispositive, reason was that the statewide planning goals do not apply to a permit decision such as this one that is governed by acknowledged comprehensive plans and land use regulations. However, in the portion of our decision in *Jackson County III* quoted earlier in this opinion, we also cited our decision in *Washington Co. Farm Bureau*, which we described as holding that "uses allowed by statute in EFU zones are not subject to the

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[10] As relevant, ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "* * * * *
>
> "(d) *Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.*"

additional requirement that the use be rural or that an exception to Goal 14 be taken." 17 Or LUBA at 878.

Intervenors argue that petitioner's failure to appeal our decision in *Jackson County III* and assign error to the part of our decision discussing *Washington Co. Farm Bureau* precludes petitioner's argument in this appeal that Goal 14's prohibition against urban uses on rural lands applies on rural EFU-zoned land as well as other rural lands.[11] We do not agree. As petitioner correctly notes, our rejection in *Jackson County III* of the petitioners' argument that Goal 14 applies directly in this matter was based on the inapplicability of the statewide planning goals to a permit decision, such as this one, that is governed by an acknowledged comprehensive plan and land use regulations. 36 Or LUBA at 97-98. Therefore, our reference in *Jackson County III* to *Washington Co. Farm Bureau* was *dictum*, and the Court of Appeals would not have considered a challenge to our decision in *Jackson County III* based on that *dictum*. Petitioner has not waived its right to argue that Goal 14's prohibition against approving urban uses on rural lands applies to rural EFU-zoned lands as well as other rural land, as part of its argument that the county's Goal 14 implementing policies must be interpreted to impose that same prohibition.

We turn to the question of whether Goal 14's general prohibition against approving urban uses on rural land applies on EFU-zoned land. As previously noted, we concluded in our decision in *Washington Co. Farm Bureau* that Goal 14 did *not* apply in that manner. In its brief, petitioner cites a number of appellate court and LUBA decisions that have discussed and applied Goal 14's prohibition against allowing urban uses on rural lands.[12] However,

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[11]Again, in this appeal petitioner does not make this argument to show that the challenged decision violates Goal 14. Rather, the argument is advanced as the first part of petitioners' argument that the county's interpretation of its Urbanization Policies, which must not be contrary to Goal 14, is in fact contrary to Goal 14 and, therefore, incorrect.

[12]The Goal 14 cases that petitioner cites and relies upon for the proposition that Goal 14 prohibits urban uses on rural lands include the following: *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986) (*Curry County*) (exceptions to Goals 3 and 4 to allow rural residential, commercial and industrial

none of the cases cited by petitioner concerns a land use decision approving a permit for a use that is authorized by ORS 215.213 and 215.283 on EFU-zoned lands.[13] Petitioner's only direct argument that our decision in *Washington Co. Farm Bureau* is wrong was presented for the first time at oral argument, in response to the argument in intervenors' response brief in this appeal that *Washington Co. Farm Bureau* is controlling. Petitioner contends that the

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development); *Hammack v. Washington County*, 89 Or App 40, 747 P2d 373 (1987) (exceptions to Goals 3, 4 and 11 to allow an outdoor performing arts center); *Christian Life Center v. Washington County*, 36 Or LUBA 200, *aff'd* 162 Or App 390, 991 P2d 582 (1999) (permit for school in a rural residential zone); *Brown v. Jefferson County*, 33 Or LUBA 418 (1997) (change of plan and zoning designations from EFU to rural residential); *Doob v. Josephine County*, 31 Or LUBA 275 (1996) (change of plan and zoning map designations from designations implementing Goal 4 (Forest Lands) to rural residential plan and zoning designations); *Cox v. Yamhill County*, 29 Or LUBA 263, (1995) (exception to Goal 3 and change of planning and zoning from Agriculture/EFU to public plan and zoning designations to allow approval of a church); *Churchill v. Tillamook County*, 29 Or LUBA 68, (1995) (ordinance adopting new residential zones for rural unincorporated community); *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994) (ordinances adopting exceptions to Goals 3 and 4 and applying rural residential planning and zoning to lands previously planned and zoned for resource use); *Kaye/DLCD v. Marion County*, 23 Or LUBA 452 (1992) (approval of rural residential planning and zoning designations and approval of 85 dwellings in conjunction with approval of a golf course on other EFU-zoned land); *Parmenter v. Wallowa County,* 21 Or LUBA 490, 495 (1991) (land use regulation amendment to allow a variety of utility facilities in EFU and rural/nonresource zones); *DLCD v. Klamath County*, 19 Or LUBA 459, 464-65 (1990) (plan and zoning map amendments from Agriculture/EFU to rural residential); *1000 Friends of Oregon v. Marion County*, 18 Or LUBA 408, 427 (1989) (plan and zoning map amendments from Agriculture/EFU to Interchange to permit expansion of recreational vehicle park); *Shaffer v. Jackson County*, 17 Or LUBA 922, 946 (1989) (plan and zoning map amendment from EFU to rural industrial to allow asphalt batch plant); *Holland v. Lane County*, 16 Or LUBA 583, 594 (1988) (plan and zoning map amendments from Forest to rural residential); *Shaffer v. Jackson County*, 16 Or LUBA 871, 873 (1988) (plan and zoning map amendment from EFU to rural industrial to allow asphalt batch plant); *1000 Friends of Oregon v. Clackamas County*, 3 Or LUBA 316, 327 (1981) (plan amendments designating rural areas for nonfarm and nonforest uses); *Medford v. Jackson County*, 2 Or LUBA 387 (1981) (creation of an urban containment boundary around developed rural lands); *Ashland v. Jackson County*, 2 Or LUBA 378 (1981) (plan amendment and zone change approving exceptions to Goal 3 and planning and zoning land for commercial development); *Conarow v. Coos County*, 2 Or LUBA 190, 193 (1981) (approval of neighborhood store on rural land committed to nonresource use).

Christian Life Center involved application of an acknowledged code requirement that schools outside UGBs on rural land be "scaled to serve the rural population." However the property at issue in that appeal was not in an EFU zone. All the remaining cases involved circumstances where Goal 14 applied directly. Most of the cases involve amendments to acknowledged comprehensive plans or land use regulations. *Conarow* involved a permit issued under an unacknowledged land use regulation. The leading case, *Curry County*, involved judicial review of an LCDC acknowledgment order.

[13]Our decision in *Kaye/DLCD v. Marion County*, *see* n 12, concerned a development that included a golf course on EFU-zoned lands. However, the Goal 14 arguments in that case were directed at residential development that was approved with the golf course on land that was rezoned by the challenged decision to remove the prior EFU zoning. That case lends no support to petitioner's contention that Goal 14's prohibition against urban use of rural lands applies to an application for a permit for a use that is allowed by statute on EFU-zoned lands.

Oregon Supreme Court's decision in *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997) (*Lane County*) effectively overruled our decision in *Washington Co. Farm Bureau*.

Intervernors make a second waiver argument in response to that argument. In view of petitioner's failure to present any argument in its petition for review in this appeal concerning *Washington Co. Farm Bureau*, intervenors argue LUBA should refuse to consider whether our decision in *Washington Co. Farm Bureau* is inconsistent with *Lane County*. We have some sympathy for intervenors' position. Although we have already agreed with petitioner that the portion of our decision in *Jackson County III* discussing *Washington Co. Farm Bureau* was *dictum*, and would not have provided a basis for appeal to the Court of Appeals, the relevance of that case to the question of the applicability of Goal 14 to EFU-zoned lands is obvious, and petitioner's failure to include argument in its petition for review that *Lane County* effectively overrules *Washington Co. Farm Bureau* or that *Washington Co. Farm Bureau* was wrongly decided for other reasons is difficult to understand. Nevertheless, we do not agree with intervenors that the issue has been waived or that it would be improper for LUBA to consider the issue. Indeed, in view of the position taken in intervenors' response brief, resolution of that issue is the central question that is presented in these two assignments of error.[14]

b. *Lane County*

One of the questions presented in *Lane County* was whether LCDC rules that expressly restrict and prohibit certain uses on high value farmland are inconsistent with ORS 215.213 and therefore exceed LCDC's rulemaking authority, simply because those rules restrict and prohibit uses that the legislature has deemed to be permissible in EFU zones under ORS 215.213. The Supreme Court held that LCDC did not exceed its rulemaking authority. The Supreme Court held that a county's authority to allow nonfarm uses on EFU-

[14]LUBA requested, and the parties submitted, post oral argument memoranda on the merits of this issue and whether the issue could be considered.

zoned land pursuant to ORS 215.213 "[is] subordinate to the statewide land use planning goals * * *." 325 Or at 583. The court explained:

> "* * * LCDC's regulations have long provided that a county's decision to place land inside an EFU zone does not thereby insulate that land from regulations designed to implement the goals adopted under ORS chapter 197. For example, an otherwise permitted use of land zoned for exclusive farm use could be prohibited or limited if that land happened also to be a wetland, a wildlife habitat, a historic site, or another resource protected under Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). * * *" 325 Or at 582.

Applying that reasoning here, we have no doubt that LCDC *could* adopt a statewide planning goal or administrative rule to require that counties not approve an application for a permit to construct an otherwise permissible use in an EFU zone, unless the county finds that the proposed use is not "urban." However, that is not the question that is presented in this appeal. The relevant question here is whether *Goal 14* imposes such a requirement.

c. *Washington Co. Farm Bureau*

Our decision in *Washington Co. Farm Bureau* that the Goal 14 prohibition against approving urban uses on rural lands does not apply in EFU zones was based, in part, on our conclusion that the legislature intended to allow counties to approve uses authorized by ORS 215.213 and 215.283 without an additional requirement, "unexpressed in the language of the statute, that the use be rural or an exception to Goal 14 be taken." 17 Or LUBA at 878. Given the lack of any language in the statute that *expressly* insulates the uses that are otherwise allowable in EFU zones from any prohibitions or limitations that might be imposed by Goal 14, this basis for our decision in *Washington Co. Farm Bureau* is at least subject to question after *Lane County*. However, our decision in *Washington Co. Farm Bureau* was also based, in part, on our conclusion that nothing in Goal 14 itself purports to directly regulate EFU-zoned rural lands.

> "We also note that nothing in Goal 3 or the administrative rule adopted by LCDC at OAR 660 division 5 interpreting Goal 3 provides that uses expressly allowable under ORS 215.213 or 215.283 nevertheless must be limited in

> scale and intensity to comply with Goal 14's prohibition against urban uses of rural lands. *We decline to read such a requirement into Goals 3 and 14 in the absence of some suggestion in the goal language or LCDC's interpretative rules that it intends to require a case by case, urban/rural analysis for uses the legislature specified in ORS 215.213 and ORS 215.283*." 17 Or LUBA at 878 n 15 (emphasis added).

To elaborate on this second basis for our decision in *Washington Co. Farm Bureau*, we first note that the Oregon Supreme Court's decision in *Curry County* clearly found that Goal 14 does prohibit urban uses on rural lands. In reaching that conclusion, the Supreme Court rejected arguments that Goal 14 *only* applies to decisions that establish or amend UGBs. 301 Or at 470-71. In *Curry County*, the county had taken exceptions to Goals 3 and 4 and, relying on those Goal 3 and 4 exceptions, had authorized arguably urban levels of residential, commercial and industrial development on those lands without also applying or taking exceptions to Goal 14. The question presented in that case was whether Goal 14 must be applied or an exception to Goal 14 must be taken to authorize arguably urban development on Goal 3 and 4 exception lands. The court answered that question in the affirmative.[15]

A number of cases following *Curry County* have established in other contexts that Goal 14 or comprehensive plan policies or land use regulations adopted to implement Goal

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[15]The court explained its holding as follows:

> "Conversion of 'rural land' to 'urban uses' must be supported either by compliance with the requirements of Goal 14 or by an exception to that goal. This conclusion follows from the goal's express purpose '[t]o provide for an orderly and efficient transition from rural to urban land use' and its provision that '[u]rban growth boundaries shall be established to identify and separate urbanizable land from rural land,' from the policies discussed in [*Perkins v. City of Rajneeshpuram*, 300 Or 1, 706 P2d 949 (1985)] and in earlier cases prohibiting 'urban uses' of 'rural land,' and from the provisions of ORS 197.732 and OAR chapter 660, divisions 4 and 14, authorizing the taking of exceptions to Goal 14. In practice, once an objector has charged that a decision affecting 'rural land' outside an urban growth boundary is prohibited by Goal 14, a local government may do any one of three things: (1) make a record based on which LCDC enters a finding that the decision does not offend the goal because it does not in fact convert 'rural land' to 'urban uses'; (2) comply with Goal 14 by obtaining acknowledgment of an urban growth boundary, based upon considering of the factors specified in the goal; or (3) justify an exception to the goal." 301 Or at 477.

14 prohibit urban development on rural lands. *See* n 12. However, we believe it is significant that none of those cases hold that the prohibition against "urban" development on "rural" lands applies on rural EFU-zoned property. It is clear that on rural, nonresource lands or on rural lands for which an exception to Goals 3 or 4 has been taken, Goal 14 requires that the uses a county authorizes for such lands in its comprehensive plan and land use regulations must be limited to rural uses. The reason and need for this limitation was noted in *Curry County*. The express requirements in Goal 14 to establish UGBs that provide sufficient urban land for urban uses is meaningless if counties are free to allow urban uses on rural nonresource and exception lands. *Curry County*, 301 Or at 474-75. However, that same reasoning and need does not apply with equal force to rural, EFU-zoned lands, which were not at issue in *Curry County*. In the case of rural, EFU-zoned lands, the legislature specifies the permissible uses. Significantly, residential use of EFU-zoned lands is extensively regulated by statute in ways that would appear to preclude the possibility of urban residential development of EFU-zoned lands. *See, e.g.*, ORS 215.283(1)(e) and (f) (relative dwellings and dwellings in conjunction with farm use); 215.284 (nonfarm dwellings); 215.700 to 215.780 (other dwellings in farm and forest zones). For some nonresidential uses the legislature goes further and limits the size or permissible impacts of those uses.[16] Admittedly, some of the uses that are permissible in EFU zones can have urban characteristics and can have impacts that are similar to impacts generated by urban uses.

[16]Uses allowed in EFU zones by ORS 215.213(2) and 215.283(2) may only be approved if the use complies with the requirements of ORS 215.296. ORS 215.296(1) requires that such nonfarm uses not "[f]orce a significant change in * * * or * * * [s]ignificantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use." For other uses, the statutes specifically limit the size and operating characteristics of the use. *See* ORS 215.448 (home occupations); 215.452 (wineries). The 1999 legislature adopted extensive statutory changes addressing the siting requirements for public utilities in EFU zones. ORS 215.275. At least one use apparently is completely exempted from all EFU zoning restrictions and the requirements of the statewide planning goals generally, provided certain statutory requirements are met. ORS 215.306 (filming activities in EFU zones). Our listing here is intended to be illustrative rather than exhaustive and demonstrates that the legislature has shouldered the burden of adopting a relatively comprehensive zoning scheme for EFU-zoned lands, with which counties must conform their zoning ordinances.

Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 82 *aff'd* 89 Or App 40, 747 P2d 373 (1987). However, the otherwise unlimited ability of counties to authorize urban uses on rural nonresource and exception lands, that is limited by Goal 14 under *Curry County*, does not exist for EFU-zoned lands, even without Goal 14. Counties may only approve those uses that the legislature has authorized in EFU zones.

Admittedly the Oregon Supreme Court's holding in *Curry County* concludes that the Goal 14 prohibition against approval of urban uses applies to "rural" lands, and the court does not expressly limit its holding to the exception or nonresource rural lands that were at issue in that case.

> "* * * We hold that any county whose comprehensive plan converts 'rural land' outside of established urban growth boundaries to 'urban uses' must either (1) show that its action complies with Goal 14, or (2) take an exception to Goal 14 * * *." 301 Or at 470-71.

We also find nothing in the lengthy reasoning that supports the court's holding in that case that either requires or directly supports so limiting its holding. Nevertheless, the issue of whether the prohibition against approving urban uses on rural lands that the court concluded was properly derived from the intent and purpose of Goal 14 should also apply to rural EFU-zoned lands, where the permissible uses are established and limited by the legislature, was not presented in *Curry County*. Had that issue been presented in *Curry County*, we believe the Supreme Court would have required a clearer expression of that intent in Goal 14, or required that LCDC take the approach that it took in *Lane County*; *i.e.*, adopt an interpretive administrative rule that expressly identifies the prohibitions and limitations that LCDC wishes to impose on the uses that the legislature has determined are appropriate in rural EFU zones. We adhere to our conclusion in *Washington Co. Farm Bureau* that Goal 14 does not require that counties determine on a case-by-case basis whether applications for uses that are authorized by statute on EFU-zoned lands must nevertheless be denied, if they can be characterized as "urban."

3. The County's Urbanization Policies

We agree with petitioner that the county's decision on remand concerning its Urbanization Policies is not responsive to our decision in *Jackson County III*. In particular, we have already disagreed with the county's apparent central thesis that simply because Goal 3 and LCDC's Goal 3 implementing rules may allow golf courses as a category of use on EFU-zoned land, that necessarily means no other statewide planning goal requirement could limit or prohibit the use. We also believe the task of determining whether a use is urban or rural for purposes of applying Goal 14 or policies that implement Goal 14 is sufficiently problematic without introducing the additional concept of "neutral" uses. We reject that approach as it is stated in the challenged decision, to the extent it was intended as a general interpretation of the county's Urbanization Policies regarding rural lands that are not zoned EFU.

Nevertheless, these defects in the county's decision on remand are not fatal. It is clear from the county's decision on remand that it interprets its Urbanization Policies to impose no more of an obligation on the disputed golf course expansion onto EFU-zoned lands than the obligation that would be imposed by Goal 14 if the goal applied directly. That interpretation may not be rejected under ORS 197.829(1)(d). We have already concluded that Goal 14 does not require that the county determine whether an application for a permit to develop a use that is authorized on EFU-zoned land qualifies as "urban development." Therefore a remand for the county to make that same determination under its Urbanization Policies here would serve no purpose.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

LDO 260.040(2) requires that all conditional use permits satisfy several criteria including the following:

> "* * * the location, size, design, and operating characteristics of the proposed use will have minimal adverse impact on the livability, value, or appropriate development of abutting properties and the surrounding area."

In the initial appeal in this matter, the petitioners argued that the county hearings officer's findings failed to address LDO 260.040(2) adequately because they failed to respond to testimony offered by the City of Medford that allowing the proposed golf course expansion would preempt the city's ability to decide where the city's future urban growth should occur. In opposing that argument, the intervenors argued that "appropriate development of the surrounding area" referred to development contemplated by the *current* planning designations and zoning of the properties within the area. Because the county did not interpret LDO 260.040(2) in its initial decision, we remanded in *Jackson County III*, directing the county to determine whether "appropriate development of the surrounding area" refers to development contemplated by the current planning and zoning designations or whether it includes potential changes in those planning and zoning designations.[17] On remand, the county specifically found that LDO 260.040(2) only requires consideration of the development allowed by the *current* planning and zoning designations of abutting properties and the surrounding area and therefore does not require that the county consider

[17]The relevant portion of our decision in *Jackson County III* states:

> "* * * Because the hearings officer did not recognize the applicability of LDO 260.040(2) to the city's concerns, the challenged decision contains no interpretation of that provision. Neither petitioners nor intervenors invoke our authority under ORS 197.829(2) to determine, in the absence of an adequate interpretation, whether the county's decision is correct. Even if the parties had done so, it is doubtful that the present occasion is an appropriate one to exercise that authority. Both parties present plausible, but radically conflicting interpretations of LDO 260.040(2). If petitioners' view of LDO 260.040(2) is correct, then we agree with petitioners that the county's findings are inadequate because the county failed to apply LDO 260.040(2) in addressing the city's concerns. Accordingly, we remand the issue to the county to determine, in the first instance, the meaning of LDO 260.040(2) and whether it must apply that provision in addressing the city's concerns." 36 Or LUBA at 104.

the city's concern that the challenged golf course expansion may in the future impact city decisions concerning expansion of its urban growth boundary[18]

In this appeal, petitioner argues that even though the county determined that the LDO 260.040(2) requirement to consider impacts on "development of abutting properties and the surrounding area" only requires consideration of *existing* comprehensive plan and zoning designations, it failed to address how this golf course expansion would impact the development of the surrounding urban lands within the existing UGB that are not zoned EFU. In this regard, petitioner argues there is not substantial evidence in the record to support the hearings officer's finding that the land surrounding the proposed use is zoned EFU because the record includes a map that "shows there is vacant, unplatted land inside the UGB to the north of the golf course expansion site that has not yet been annexed by the City of Medford." Petition for Review 36-37.

Petitioner appears to be correct that all of the "abutting properties and the surrounding area" inside the UGB are not zoned EFU, as the hearings officer's findings suggest is the case.[19] However, intervenors argue that petitioner waived the argument it

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[18] The relevant hearings officer's findings state:

> "The Board interprets JCLDO 260.040(2) to apply only in the context of the present planning designations and zoning. The Board finds that any other interpretation would require the Board to engage in speculation as to what possible future planning designations and zoning may apply in any given area and then, whether proposed uses would be compatible with those possible planning designations and zoning. The Board agrees with its Hearings Officer and determines that it is not appropriate planning to engage in such speculation and, therefore, adopts its interpretation set forth above. Based upon the above interpretation, the Board finds that there is substantial evidence in the record to support the finding that the proposed expansion of the Quail Point Golf Course will result in minimal or no adverse impact on the appropriate development of abutting properties in the surrounding area. The Board finds that the land surrounding the proposed expansion is zoned EFU. The Applicants' proposal, which calls for extensive buffering, and the testimony of the owner of a farming operation adjacent to existing golf courses, as well as the owner of a farming operation adjacent to the proposed expansion, support the finding that there will be no adverse impact on future development of the surrounding area. Consequently, the criteria in JCLDO 260.040(2) have been satisfied." Record 11-12.

[19]The map cited by petitioner shows the abutting Rogue Valley Manor property is zoned SFR-4, as are several parcels that are located a short distance to the north. Therefore at least some of the abutting property is

presents under this assignment of error, because it could have been but was not raised in the initial appeal that led to our remand concerning LDO 260.040(2). At oral argument, petitioner indicated that its sixth assignment of error in the initial appeal raised the issue it raises here.

We have reviewed the petitioners' sixth assignment of error in the initial appeal. We agree with intervenors that the argument that petitioner presents in this assignment of error was not sufficiently raised in the first appeal and, for that reason, may not be raised now.

The argument presented in the sixth assignment of error in the first appeal essentially had two parts. First, that LDO 260.040(2) requires that the county consider the impact the challenged decision may have on future planning and zoning for the area. Second, that the challenged decision will preempt the city's ability to determine where future urbanization should occur. Both parts of the petitioners' argument in the initial appeal were tied to impacts of the challenged decision on the city's ability to adopt future plan or land use regulation amendments. The argument petitioner presents under this assignment of error is quite different. That argument is that, regardless of the impact on the city's future urbanization concerns, the county failed to address the impacts that the golf course expansion may have on the "livability, value, or appropriate development of abutting properties and the surrounding area" under their current SFR-4 zoning. To the extent that argument is even suggested in the petitioners' sixth assignment of error in the first appeal, it was not presented with sufficient clarity or sufficiently developed to warrant review or to avoid being waived under *Beck v. City of Tillamook*, 313 Or 148, 155-56, 831 P2d 678 (1992).

The third assignment of error is denied.

The county's decision is affirmed.

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not zoned EFU. In addition, we are uncertain whether the requirement under LDO 260.040(2) to consider the "surrounding area" in addition to "abutting properties" would require consideration of the nearby SFR-4 zoned vacant parcels to the north. The hearings officer's findings rely on the proposed buffers in concluding the adjacent EFU-zoned lands will not be impacted, but those findings do not specifically address potential impacts on the "appropriate development" of the nearby SFR-4 zoned properties.

Bassham, Board Chair, concurring.

I concur with the majority's disposition of the first and second assignments of error, but for somewhat different reasons that I believe warrant separate discussion.

The majority describes the precedent bearing on the central issue presented in these assignments: whether Goal 14's prohibition against approving urban uses on rural lands applies to uses allowed by statute on EFU-zoned land. The starting point for answering that question is, of course, the Supreme Court's holding in *Curry County* that Goal 14 prohibits urban uses on rural lands. I agree with the majority's assessment of *Curry County*: that the court's rationale applies in an undifferentiated manner to "rural lands," without an express limitation to exception or nonresource lands. I also agree with the majority that the rationale and need for applying Goal 14 to rural exception or nonresource lands does not apply with equal force to that subset of rural lands that are zoned EFU. As the majority correctly notes, uses on EFU-zoned land are limited and regulated by statute in a manner that renders it unlikely that any such use would present the characteristics or intensity of urban uses. However, that the rationale and need for applying Goal 14 to rural EFU-zoned lands is not as great as applying it to rural nonresource lands is not to say that there is no such rationale or need. Stated differently, that uses allowed on EFU lands are unlikely to present the characteristics or intensity of urban uses is not to say that some of those uses, in particular instances, never will. Adhering to our Goal 14 holding in *Washington Co. Farm Bureau* means that, at least as far as Goal 14 is concerned, any inquiry into that possibility is foreclosed as a matter of law. The consequence is that a land use with arguably urban characteristics proposed on non-EFU rural land may be subject to evaluation under Goal 14 or Goal 14-based policies, while the same use with identical characteristics on EFU-zoned land may be approved without such evaluation. I can perceive no reason in logic or law why

the rationale of *Curry County* should not apply to such similar circumstances with equal force.[20]

Lane County establishes that a county's authority to allow nonfarm uses on EFU-zoned land pursuant to ORS chapter 215 is subordinate to the statewide planning goals and LCDC's authority to adopt rules based on those goals. As the majority correctly notes, that holding calls into question our primary conclusion in *Washington Co. Farm Bureau*: that the absence of express statutory language subjecting nonfarm uses on EFU lands to Goal 14 indicates a legislative intent that the goal does not apply to such uses.[21] I agree with the majority that *Lane County* does not overrule our alternative conclusion in *Washington Co. Farm Bureau*, 17 Or LUBA at 878 n 15, that Goal 14 does not apply to regulate uses on EFU-zoned lands. However, our alternative conclusion in *Washington Co. Farm Bureau* (like the majority reasoning in this case) relies on an inference drawn from the *absence* of express language in Goal 14 or LCDC's interpretative rules indicating specific intent to subject uses allowed under ORS chapter 215 on EFU lands to an urban/rural analysis. In my view, the stronger inference cuts the other way: as interpreted by *Curry County*, Goal 14 prohibits urban uses on rural lands, and there is nothing in *Curry County*, Goal 14 or the relevant rules or statutes suggesting that the Goal 14 prohibition is limited to that subset of rural lands that are exception or nonresource lands. The absence of any language insulating uses allowed in EFU zones from that broadly-stated Goal 14 prohibition suggests that such uses are subject to that prohibition.

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[20]My assertion that the *Curry County* rationale applies to all rural lands does not imply that I agree with petitioner in the present case that the use proposed here is an urban use.

[21]When the legislature intends to exempt uses on EFU-zoned land from application of any rules or goals adopted by LCDC, it apparently knows how to do so. *See* ORS 215.306 (specified filming activities in EFU zones are not subject to "limitations imposed by or adopted pursuant to ORS 197.040." ORS 197.040 is the statutory authority for LCDC to adopt administrative rules and statewide planning goals).

Notwithstanding the foregoing, I do not advocate that this Board overrule *Washington Co. Farm Bureau*. LUBA should not overrule its own long-standing precedent simply because that precedent drew the wrong inference on an uncertain and highly debatable point of law; more substantial circumstances are required. *See, e.g., Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 224, 939 P2d 625, *rev den* 326 Or 59 (1997) (overruling long-standing precedent that allowed LUBA to exercise jurisdiction over cases in a manner contrary to statute). The answer to the controlling legal issue in this case—whether Goal 14 is limited to rural lands zoned other than EFU—is not so clear that appropriate circumstances exist for LUBA to overrule its own precedent. Accordingly, I join my colleagues in adhering to *Washington Co. Farm Bureau*.

In all other respects, I fully support the majority opinion.