BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent,

and

PARADISE HILLS, LLC,
Intervenor-Respondent.

LUBA No. 2001-029

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Steven E. Shipsey, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Reginald R. Davis, County Counsel, Klamath Falls, and Michael L. Spencer, Klamath Falls, filed a joint response brief on behalf of respondent and intervenor-respondent. With them on the brief was Spencer and Spencer, LLP. Michael L. Spenser argued on behalf of intervenor-respondent.

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

REMANDED 06/29/2001

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

The Oregon Department of Land Conservation and Development (DLCD) appeals a county decision approving (1) a comprehensive plan amendment from Non-Resource to Rural and (2) a zone change from Non-Resource (NR) to Rural Residential (R-5).

MOTION TO INTERVENE

Paradise Hills, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

This is the second time this matter has been appealed to LUBA. In *DLCD v. Klamath County*, 38 Or LUBA 769, 771-72 (2000) (*Klamath County I*) we stated the relevant facts as follows:

> "The subject property is east of U.S. Highway 97 (Highway 97), approximately two and one-half miles north of the urban growth boundary of the City of Klamath Falls. This tract of land is surrounded by lands zoned and planned for nonresource and rural residential use. Of the lands surrounding the tract that are zoned R-5, the average lot size is between 2.11 and 3.54 acres. About half of these lots are developed with homes.
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> "The terrain on the subject property is hilly with an average slope of approximately 18 percent. However, some slopes are as steep as 30 percent. The soil types are mostly gravelly loam with underlying rock. The water table is several hundred feet below the ground surface. According to testimony from intervenor's expert, there are 54 domestic wells in the area ranging in depth from 25 to 250 feet.
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> "Shady Pine Road lies to the north of the property and intersects with Highway 97. The decision anticipates that access to the interior roads on the subject property will be from Shady Pine Road. South Wocus Road lies to the south of the subject property and also intersects with Highway 97.
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> "In 1995, the county approved an 830-acre subdivision project known as Paradise Hills, Tract 1316, on the subject property. This subdivision created 36 20-acre residential lots. In 1998, an application to change the zoning on the subject property from NR to R-5 was denied. In 1999, intervenor submitted new applications to the county to amend the designation on the comprehensive plan map designation from NR to Rural Residential and the

> zoning map designation from NR to R-5. Intervenor also submitted an application requesting approval for either a planned unit development (PUD) or a 118-lot subdivision. Various county and state departments and the planning commission recommended denial of the three applications. Despite these recommendations, on April 11, 2000, the board of commissioners orally voted to approve both the comprehensive plan and the zoning map amendments. On May 2, 2000, the county adopted a written order amending the zoning map designation from NR to R-5. In the order, the county found that the change 'will not result in urbanization and therefore an exception to Goal 14 is not required.' * * * The order also concluded that the proposed change will not significantly affect transportation facilities." (Footnotes, record citation omitted.)

In our initial decision, we held that the county failed to adopt a comprehensive plan amendment in conjunction with the zoning map change and, therefore, we remanded the decision to allow the county to consider the comprehensive plan amendment in tandem with the zone change. In addition, we concluded that on remand the county would need to adopt findings demonstrating that the plan amendment is consistent with Statewide Planning Goal 14 (Urbanization) and Klamath County Comprehensive Plan (KCCP) policies implementing Goal 14. Further, we concluded that the county's decision failed to comply with the Transportation Planning Rule (TPR) because the decision relied on mitigation to avoid a determination that the proposed rezoning would "significantly affect a transportation facility" as that concept is used in OAR 660-012-0060(1). Finally, we concluded that the county erred in concluding that the proposed rezoning would not significantly affect the Highway 97/South Wocus Road intersection.

On remand, the county conducted proceedings to address the issues identified in our decision. DLCD appeared and presented testimony, arguing that the proposed plan amendment and zone change still did not comply with Goal 14 and the TPR. The board of commissioners again approved the comprehensive plan and zoning map amendments. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In *Klamath County I*, we remanded the decision in part to address compliance with Goal 14 and KCCP policies implementing Goal 14.[1] On remand, the county adopted three additional findings addressing Goal 14. Petitioner alleges the county's findings continue to be inadequate to demonstrate compliance with Goal 14.

A. Acknowledgment of the R-5 Zone

The county's first supplemental finding states:

> "[T]he requested plan/zone change [is] consistent with the Land Conservation and Development Commission (LCDC) acknowledged purpose of the R-5 zone to 'establish and maintain areas for rural residential uses.'" Record 2 (citation omitted).

Petitioner argues that this finding is inadequate because it does not explain why the R-5 designation in this circumstance will not result in urban development. Petitioner concedes that the county's R-5 zone was acknowledged in 1985 as a rural zone and was applied to properties for which a Statewide Planning Goal 2 (Land Use Planning) exception was taken from Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). However, petitioner explains that the zone was acknowledged prior to the Oregon Supreme Court's decision in *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986). Therefore, petitioner contends, it may be assumed that the zoning was adopted based on an understanding that lands granted exceptions from Goals 3 and 4 (and used for residential purposes) automatically satisfy the requirement of Goal 14 that development be

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[1]Specifically, we concluded that:

> "* * * The decision does not explain why, where a higher density could be allowed through a PUD, the R-5 zoning designation will ensure the retention of rural densities. * * * That problem aside, the county's findings make no attempt to explain why the county believes developing a 680-acre tract at a density of one unit per five acres (which could result in as many as 136 residential units) is properly viewed as a permissible use of rural land under Goal 14, so long as it is not served by community water and sewer. Finally, * * * without further explanation by the county, we cannot agree with intervenor that, under the county's comprehensive plan and zoning ordinance, it would not be possible to provide community water and sewer to the subject property." 38 Or LUBA at 776-777 (citation omitted).

rural rather than urban in nature. Petitioner contends that the court in *Curry Co.* held that the uses authorized by an exception from Goals 3 and 4 cannot automatically be presumed to comply with Goal 14. Therefore, LCDC's 1985 acknowledgment of the county's R-5 zone does not mean that every application of that zone can be assumed to satisfy Goal 14 as a matter of law. Petitioner argues that the county erred in assuming that the R-5 zone may be applied to other properties within the county without a case-by-case determination of compliance with Goal 14.

Petitioner further argues that, even if the R-5 zoning designation may in some circumstances satisfy Goal 14, in this instance the county has not demonstrated that the impact of this plan amendment and zone change will not violate that goal. Petitioner claims that, rather than conducting the analysis required by our remand decision, the county relies on evidence that merely contrasts lot sizes under an R-5 designation with typical urban lot sizes of one-quarter acre. Petitioner contends that while this comparison may be relevant, it is not adequate to show that development of the subject parcel will not be urban in nature. Petitioner argues that other factors must be considered, including: (1) the site's proximity to the City of Klamath Falls' urban growth boundary (UGB); (2) the possibility that rezoning the subject property would encourage similar rezonings on adjacent and nearby property zoned NR; and (3) the fact that reliance on the City of Klamath Falls to provide a number of urban services to the property may result in a *de facto* expansion of the city to accommodate the service needs of the proposed development.

Respondents[2] argue that the acknowledgment of the county's plan is valid, and claim that the plan's validity cannot be challenged, even if the plan's acknowledgement was based on a legal assumption later overturned in *Curry Co*.

[2]Respondent and intervenor filed a joint response brief. Therefore, we refer to them together as "respondents."

Respondents miss the point. Findings supporting a comprehensive plan amendment must demonstrate that the amendment complies with statewide planning goals, even though the amendment is consistent with other provisions of an acknowledged comprehensive plan. *Volny v. City of Bend*, 37 Or LUBA 493, 509 (2000). Thus, even though the challenged decision may be consistent with the county's R-5 zone, the county still must show compliance with Goal 14 before the comprehensive plan amendment may be approved.

LCDC's 1985 acknowledgement of the county's R-5 zone has the legal effect of establishing that the R-5 zone *may* be applied consistent with Goal 14, to rural lands outside a UGB. However, the 1985 acknowledgment does not have the legal effect of establishing that *all* future applications of the R-5 zone to particular properties, no matter what the circumstances, will also necessarily comply with Goal 14. If, as here, the county wishes to redesignate property to R-5, it must either demonstrate that the zone change will not violate Goal 14 or adopt an exception to Goal 14. In its petition for review in *Klamath County I*, petitioner argued that the proposed amendment would approve urban uses in violation of Goal 14, for the following reasons: the large number of proposed and potential lots (118 proposed, 136 potential); the proposed and potential size of those lots (as small as 2.2 acres proposed; no minimum lot size for a PUD); the proximity to the City of Klamath Falls UGB (approximately two and one-half miles); the potential effect of the development on the UGB; the proposed and potential resulting demand for urban services; and the possibility that the development may include commercial as well as residential uses. We agreed with petitioner that the county's decision in *Klamath County I* failed to demonstrate that the proposed amendment would not approve urban uses in violation of Goal 14. *See* n 1. The county's findings on remand do not address the cited concerns, but instead rely primarily on the fact that the R-5 zone is an acknowledged zone. For the reasons we stated in *Klamath County I* and the reasons stated here, the county has failed to demonstrate compliance with Goal 14.

Brown v. Jefferson County, 33 Or LUBA 418 (1997); *1000 Friends of Oregon v. Clackamas Cty.*, 3 Or LUBA 316, 327 (1981).

B. Establishment of Community Water and Sewer Systems

Petitioner also challenges the county's findings that:

> "[T]he potential for the establishment of a community water and sewer system will not result in the possibility of the establishment of urban uses. Because of the infrastructure required, topography and soil conditions, economic considerations make the feasibility of the establishment of a community water and sewer system an economic impossibility. * * *" Record 2.

According to petitioner, the county failed to cite any provision of its code that would prohibit future urban uses on the subject parcel. Petitioner argues that instead, the county concluded that the property would never acquire the infrastructure necessary to support urban uses because the costs of constructing that infrastructure make it very unlikely that the infrastructure will be built. Petitioner claims that this summary conclusion is insufficient to demonstrate that, despite the costs, community water and sewer will never be constructed on the subject property.

Respondents argue that the county's decision documents in this matter amply support the county's position that development of water and sewer is financially infeasible. Therefore, the possibility that the installation of urban infrastructure will become economically feasible is too remote to warrant concern.

The county could have avoided the necessity of considering whether its action here will permit development of the property with community water and sewer systems at urban densities that would violate Goal 14 if (1) the comprehensive plan and land use regulation approval standards that would have to be satisfied to approve such future development precluded community water and sewer systems or (2) the challenged decision imposed a condition of approval that precluded development of community water or sewer systems. However, the challenged decision does not take the position that plan or land use regulation approval standards impose such a limitation, and apparently the KCCP precludes the county

from imposing such a condition of approval on comprehensive plan amendments or zone changes.[3]

Petitioner argues that the challenged decision would permit future development of the subject property with community water and sewer systems. The county identifies no comprehensive plan or land use regulation standards that would preclude such development and imposed no condition of approval that would preclude development of community water and sewer systems. While it may be possible in these circumstances to rely on economic or practical infeasibility of developing community water and sewer systems on the subject property, the county has not adequately demonstrated such infeasibility here. The decision does not explain why provision of water or sewer to the development would remain economically infeasible if, following the instant plan amendment and zone change, the applicant were to submit a new PUD proposal in which housing sites are clustered together. As far as we can tell, the applicant could submit a new PUD proposal, despite its testimony to the contrary, and would not be required to address Goal 14 to obtain approval of such a PUD. For these reasons, the county's summary conclusion that economic considerations will preclude the establishment of community sewer or water on the subject property is inadequate.

C. Applicability of OAR 660-004-0040

The county's approval in *Klamath County I* was premised on a PUD application that involved 136 lots ranging from 2.2 to 21.4 acres in size; the PUD application also contemplated some commercial uses. *Klamath County I* Record 87. During the remand proceedings, intervenor withdrew its PUD application and testified that it would be

[3]The parties do not dispute this contention, although neither party points to any particular provision in the KCCP or the zoning ordinance that prohibits placing conditions of approval on plan amendments or zone changes.

submitting a rural residential subdivision application, with each lot containing at least five acres.

In the context of the plan amendment and zone change, the county found that "it does not need to discuss the potential of a future PUD application, as any such application would be required to comply with new rural residential regulations adopted by LCDC [(OAR 660-004-0040)] that were not applicable to [the] PUD application [associated with the previously challenged rezone]." Record 2.

Petitioner argues that a potential future PUD application would not be subject to OAR 660-004-0040 because the rule applies only to those lands where an exception to Goals 3 and 4 has been taken. OAR 660-004-0040(2)(a). Petitioner argues that the land in question was initially designated nonresource land, not farm or forest land. Because this land never was designated as farm or forest land, its current designation did not result from an exception to Goal 3 or 4. Therefore, petitioner contends, OAR 660-004-0040 would not apply to a future PUD application on that land.

With respect to potential future PUD applications for the subject parcel, respondents argue that such applications *will* be subject to OAR 660-004-0040. In respondents' view, the county's designation of the subject parcel as "NR" constituted a *de facto* exception to Goals 3 and 4. Therefore, the land in question is subject to OAR 660-004-0040, and thus, by complying with that rule, any subdivision approved on the property will be consistent with Goal 14.

We agree with petitioner that the county's NR-designated land is, by definition, land that is neither agricultural land, subject to Goal 3, nor forest land, subject to Goal 4.[4] In other

[4]KCCP Goal 2, Policy 11 provides in relevant part:

> "Lands which are not agricultural or forest lands as defined in Statewide Planning Goals 3 and 4 shall be designated Non-Resource (NR) and [shall be] subject to the regulations of the [NR] zone contained in the Land Development Code." KCCP 12.

words, NR lands are lands that were never eligible for farm or forest designations under the statewide planning goals and, therefore, no exception from Goals 3 and 4 was needed to designate the lands NR. Therefore, OAR 660-004-0040 does not apply to PUD applications on NR-designated land, nor would OAR 660-004-0040 apply to R-5-designated property that was not previously subject to an exception to Goal 3 or 4. Accordingly, the county erred in failing to consider the potential for future PUD applications allowed under the R-5 zone, for purposes of demonstrating that the proposed amendments are consistent with Goal 14.

D. Conclusion

For the reasons stated, the county's findings, viewed individually or in conjunction with the findings in the county's prior proceedings, are inadequate to demonstrate compliance with Goal 14.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In *Klamath County I*, petitioner alleged that the proposed amendments would violate the TPR because rezoning the subject property to R-5 would "significantly affect" a transportation facility. OAR 660-012-0060(2). In particular, petitioner cited concern for the project's impact on the intersection of Highway 97 and South Wocus Road. We sustained that assignment of error.

On remand, the county found that the amendment would not significantly affect the Highway 97/South Wocus Road intersection, based on three revised assumptions. First, the revised traffic study assumed that full buildout of the proposed subdivision would take twice as long as initially assumed. Second, the revised study estimated that unplanned improvements to Uhrmann Road would reroute 30 percent of traffic generated by existing rural residential development that currently passes through the Highway 97/South Wocus Road intersection. Third, the study assumed that improvement of Uhrmann Road would handle some portion of the traffic generated by the proposed development. The county did

not require construction of the Uhrmann Road improvements as a condition of this approval, but its decision asks that the planning commission consider imposing such improvements as a condition of any future subdivision or PUD approval.

Petitioner claims that in order to comply with LUBA's remand in *Klamath County I*, the county must address the significant effect the proposed amendment would have on the Highway 97/South Wocus Road intersection using the process set forth in OAR 660-012-0060(1). Petitioner challenges the county's finding that the construction of nearby Uhrmann Road would mitigate the traffic impact of the challenged decision on Highway 97, thereby preventing the rezoning from significantly affecting a transportation facility. Petitioner relies on LUBA's decision in *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000) to argue that transportation improvements that are not provided for in the relevant transportation system plan (TSP) may not be considered in determining whether a proposed land use regulation amendment will significantly affect a transportation facility. Rather, petitioner argues, the amendment must be considered without any newly proposed transportation improvements to determine whether it significantly affects the transportation facility. If the decision will result in significant impacts on transportation facilities, *then* the local government can assure that the proposed amendment is consistent with the function and capacity of the affected facilities by amending the TSP to provide for new or improved transportation facilities, or taking one or more of the other actions authorized by OAR 660-012-0060(1).

Finally, petitioner argues that, on remand, the county relied on the revised traffic study to conclude that the intersection would not be significantly affected by the rezone. Petitioner contends that this reassessment was improper because, in *Klamath County I*, LUBA concluded that the rezone *will* significantly affect the Highway 97/South Wocus Road intersection. Petitioner relies on the "law of the case" doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), to argue that the county is prohibited from reexamining whether the proposed amendments will significantly affect a transportation

facility. Instead, petitioner argues, the county must accept the issue as settled and address the expected impacts through one or more of the mitigation mechanisms set forth in OAR 660-012-0060(1).

Respondents argue that the record was appropriately reopened upon remand, and that new evidence was entered into that record, indicating that the map amendments would not significantly affect the intersection in question. Respondents argue that the county is neither precluded from relying on this new evidence, nor precluded from drawing a new conclusion from this evidence. Based on the county's new conclusion that the proposed amendment will cause no significant impact on the intersection, respondents claim that OAR 660-012-0060(1) does not apply.

We agree with respondents that the law of the case doctrine as articulated in *Beck* does not preclude the county from relying on newly acquired evidence to address a remanded legal issue. Intervenor is not precluded from updating its traffic study on remand, nor is the county precluded from reaching a new or different conclusion based on that evidence.

However, as discussed above, the county's conclusion that the disputed map amendments do not significantly affect any transportation facility is based in large part on speculative, unplanned improvements to Uhrmann Road. The county erred in considering those speculative improvements for purposes of determining whether its decision "significantly affects" a transportation facility. *DLCD v. City of Warrenton*, 37 Or LUBA at 941-42; *ODOT v. City of Klamath Falls*, ___ Or LUBA ___ (LUBA No. 2000-147, April 17, 2001).

It is not clear what weight the decision places on the revised assumption regarding the timing of full buildout. In any case, that revised assumption is not sufficient in itself to demonstrate that the proposed amendment will not significantly affect the Highway 97/South Wocus Road intersection. The intersection currently has a level of service (LOS) of C. Apparently, LOS D is the minimum acceptable level of service. The findings state that the

level of service will erode from LOS D to LOS E by 2013 under projected background increases in traffic, not considering traffic generated from the proposed amendment. That the subject property is only partially developed during the relevant time period, rather than fully developed, does little to demonstrate that the traffic impacts of that partial development will not cause the intersection to erode to LOS E earlier than it otherwise would under background conditions. In other words, if the proposed amendment, even assuming partial development, will cause the intersection to fail by 2010 rather than 2013, the amendment will significantly affect that intersection, and the county can approve the amendment only if it imposes one or more of the measures at OAR 660-012-0060(1) to ensure that the amendment is consistent with the identified function, capacity and performance level of the facility. For these reasons, the county's findings fail to demonstrate compliance with the TPR.

The second assignment of error is sustained, in part.

The county's decision is remanded.