BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOLGER T. SOMMER,
Petitioner,

and

LYNDA SPANGLER, RAYMOND KONOPA,
MICHAEL L. WALKER, WAYNE MCKY
and HAL ANTHONY,
Intervenors-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

ORVILLE F. MEADE,
Intervenor-Respondent.

LUBA No. 2004-131

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Holger T. Sommer, Merlin, filed the petition for review and argued on his own behalf.

Lynda Spangler, Raymond Konopa, Merlin, represented themselves.

Michael L. Walker, Wayne Mcky and Hal Anthony, Grants Pass, filed a petition for review and argued on their own behalf.

John M. Junkin, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Bullivant Houser Bailey, PC.

Duane Wm. Schultz, Grants Pass, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 04/05/2005

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

Petitioners appeal a county decision that changes the comprehensive plan and zoning map designations for a 15-acre parcel.

MOTION TO INTERVENE

With one exception, LUBA previously allowed all motions to intervene in this appeal. The exception is the motion that was filed on behalf of Hugo Neighborhood Association and Historical Society. In an August 24, 2004 order, LUBA ruled that the Hugo Neighborhood Association and Historical Society's motion to intervene would be denied unless an amended motion signed on its behalf by an active member of the Oregon State Bar was received on or before September 1, 2004. Because no such amended motion to intervene was filed, we deny the Hugo Neighborhood Association and Historical Society's motion to intervene.

REPLY BRIEF

Intervenor-respondent's response brief was filed on January 28, 2005 and was received by LUBA on January 31, 2005. Petitioner filed a request to file a reply brief on February 22, 2004. That request along with an undated 8-page reply brief was received by LUBA on February 23, 2005, one day before oral argument. Intervenor-respondent objects that the reply brief was not filed "as soon as possible after respondent's brief [was] filed," as required by OAR 661-010-0039. Intervenor-respondent also argues the reply brief is not limited to "new matters" raised in its response brief, as required by the rule. We agree with intervenor-respondent on both points, and we deny petitioner's request to file a reply brief.

FACTS

Statewide Planning Goal 3 (Agricultural Lands) includes a definition of "Agricultural Land[s]."[1] Statewide Planning Goal 4 (Forest Lands) includes a definition of "Forest Lands."[2] Agricultural Lands and Forest Lands are considered resource lands.[3]

The subject property includes approximately 15 acres. Prior to the appealed decision, the property was designated Agriculture by the county comprehensive plan and was designated Farm Resource (FR) by the county zoning ordinance. Both the plan map designation and the zoning map designation were adopted to implement Statewide Planning Goal 3. Under Land Conservation and Development Commission administrative rules, lands that may be subject to protection under both Goal 3 and Goal 4 may be planned and zoned either for forest uses under Goal 4 or for farm uses under Goal 3. OAR 660-006-0015(2); 660-033-030(4). Therefore, the fact that the subject property was planned and zoned for farm uses under Goal 3 does not necessarily mean that the property is not subject to Goal 4 and would be subject to protection under that goal even if Goal 3 did not apply.

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[1] Goal 3 defines Agricultural Land, in part, as follows:

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

[2] Goal 4 includes the following definition:

> "Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

[3] The reference to resource lands generally is meant to include lands that are subject to Goals 3, 4, 16 (Estuarine Resources), 17 (Coastal Shorelands), 18 (Beaches and Dunes). The lands subject to these goals are all subject to relatively stringent restrictions that are intended to protect the resource values that are present on those lands. The only resource lands at issue in this appeal are Agricultural Lands and Forest Lands.

The appealed decision changes the comprehensive plan map designation to Residential and the zoning map designation to Rural Residential – 5 Acre. Neither of those designations implements Statewide Planning Goals 3 or 4. There are two permissible procedures available for the county to take such action. First, the county can take an exception to Goals 3 and 4, pursuant to ORS 197.732. Second, the county can demonstrate that, notwithstanding the prior Agricultural comprehensive plan designation and the FR zoning designation, neither Goal 3 nor Goal 4 applies to the subject property. *Caine v. Tillamook County*, 25 Or LUBA 209, 218 (1993); *DLCD v. Josephine County*, 18 Or LUBA 798, 802 (1990). The county took the second approach in this case.[4]

The primary dispute in this appeal concerns the appropriate role that JCCP Goal 11, Policy 3 plays in changing the existing FR zoning designation of property to a nonresource zoning designation that will in turn permit development of the property that would otherwise be prohibited by Goals 3 and 4.[5] The challenged decision applied Goal 11, Policy 3(A) and concluded that the

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[4] Josephine County Comprehensive Plan (JCCP) expressly recognizes these two options. As relevant, JCCP Goal 11, Policy 2(B) provides:

> "Requests involving changes for lands from a resource designation to a nonresource designation shall either comply with statewide exception criteria contained in Oregon Revised Statutes 197.732, and as implemented in Oregon Administrative Rules, Chapter 660, Division 4, or demonstrate the land is nonresource *pursuant to the criteria contained in [Goal 11,] Policy 3* * * *." (Emphasis added).

As we explain below, the proper interpretation and application of Goal 11, Policy 3 is at the heart of this appeal.

[5] JCCP Goal 11, Policy 3 provides, in relevant part:

> "**Non-Resource Land Criteria.** Authorized lots or parcels (but not portions thereof) which have been zoned Woodlot Resource or Farm Resource may be designated as non-resource when the application demonstrates compliance with the following criteria and rules:
>
> "A. The land within the lot or parcel is non-farm land because:
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> "(1) The predominant (greater than 50%) soil or soils are rated Class V or above in the *Soil Survey of Josephine County*, as adopted or amended in the plan data base (soils having both an irrigated and non-irrigated class ratings will be rated based on whether irrigation rights are or are not perfected at the time the application is filed); and

"(2) The land is otherwise unsuitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices[.]

"* * * * *

"B. The land within the lot or parcel is non-forest land because

"(1) It is not included within the following definition of forest land:

"A lot or parcel is considered forest land when the predominant (more than 50%) soil or soils on the parcel have an internal rate of return of 3.50 or higher (if a single forest-rated soil is present), or composite internal rate of return of 3.50 or higher (if multiple forest-rated soils are present).

"For the purpose of this criterion, any evaluation of the internal rates of return for forest soils shall be made pursuant to the document entitled, *Using The Internal Rate Of Return To Rate Forest Soils For Applications In Land Use Planning (1985)*, by Lawrence F. Brown, as amended; or

"(2) If a determination cannot be made using the internal rate of return system as described in subsection B(1) above, the land is shown to be unsuitable for commercial forest uses based upon a combination of proofs, to include (but not limited to) the site index or cubic foot calculations, the testimony of expert witnesses, information contained in scientific studies or reports from public and private sources, historic market data for the relevant timber economy, and any other substantive testimony or evidence regarding the commercial productivity of the subject land, which taken together demonstrate the land is not protected by Statewide Goal 4 ; and

"(3) The land is not necessary to permit farm practices or forest operations to continue or occur on adjacent or nearby resource zoned lands, subject to the rules and procedures as set forth in subsection C below.[3]

"* * * * *."

Footnote 3 in the above quoted text of Goal 11, Policy 3(B)(3) makes it clear that the Goal 11, Policy 3(B) process may only be used to redesignate lands that are currently zoned Woodland Resource:

"Only lands zoned in the Woodlot Resource zone may qualify as non-forest lands (see [the first paragraph of Goal 11 Policy 3 above which limits the Non-Resource Lands Criteria to the Woodlot Resource and Farm Resource zones]). Lands zoned in the Forest Commercial zone are not eligible for this option. The basis for this distinction lies in the county's ability to ascertain the commercial viability of forest lands based upon the Internal Rate of Return (IRR) system, as it has been applied within the acknowledged plan. The IRR system, in conjunction with the county's further ability to ascertain other locational factors, demonstrates that Woodlot Resource zoned lands have qualified commercial forest value and are generally situated in proximity to other non-commercial forest or non-resource lands. The county is able to make

subject property is "non-farm land." The challenged decision also applied Goal 11, Policy 3(B) and found that the subject property is "non-forest land."

THE ELIASON APPEAL

In our recent decision in *Doob v. Josephine County (Eliason)*, ___ Or LUBA ___ (LUBA No. 2004-083, November 10, 2004) we discussed the history of JCCP Goal 11, Policy 3 at some length and reached certain conclusions about the role that provision plays in redesignating resource lands for nonresource use.[6] We set out the relevant discussion below:

> "Because the meaning of JCCP Goal 11, Policy 3(B) is at issue * * *, we describe its genesis and evolution in some detail. As noted above, the NRCS [Natural Resource Conservation Service] soils survey, adopted in 1983, describes 111 soils found in the county. Table 6 of the NRCS soil survey lists 67 of those 111 soils as 'suitable for production of commercial trees.' The absence of a soil on Table 6 indicates that 'information was not available.' Table 6 lists Siskiyou (70F and 71F) and Holland (42D) as suitable for commercial forestry, but does not list Clawson (17B).
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> "In 1985 the county commissioned a consultant, Brown, to develop a system to rate the suitability of lands in the county for commercial forestry, in order to determine the appropriate zoning for such lands. The Brown Report started with the 67 soils listed at Table 6 of the NRCS soil survey, and did not evaluate the 44 other soils described in the survey. As an initial matter, the Report removed 11 of the 67 listed soils from further consideration, nine soils that are typically located at high elevations on public lands, and two high-value agricultural soils. The Report then evaluated the remaining 56 soils to determine the expected internal rate of return (IRR), considering investment costs and the expected rate of return on that investment over the harvest cycle, using the 30-year average return for the bond market as a benchmark. The IRR system also includes a method to calculate the composite internal rate of return (CIRR), for parcels with more than one rated soil, based on the weighted average by acreage.
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> "Under the IRR/CIRR system, lands with an IRR/CIRR value of 4.0 or greater are considered high quality, suitable for the most protective forest zone. Lands with an IRR/CIRR value between 3.50 percent and 4.0 percent are considered marginal

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this finding based upon the GIS mapping and analysis contained in the report, *Locational Factors Affecting Woodlot Resource Lands*, by Michael Snider (March 22, 1999). This publication is made a part of the comprehensive plan by this reference."

[6] In this opinion we sometimes refer to *Doob v. Josephine County (Eliason)* as the Eliason appeal.

quality, suitable for the less protective WR zone. Lands with an IRR/CIRR value less than 3.50 are not considered to be suitable for commercial forestry, and the Brown Report recommends non-forest zoning for such lands. The wood-fiber production threshold between marginal and unsuitable soils corresponds approximately to 85 cubic feet per acre per year, *i.e.*, the Brown Report considers lands that produce less than 85 cubic feet per acre per year of wood fiber as unsuitable for commercial forestry, and as lands that are not protected under Goal 4. According to the Brown Report, 27 of the 56 soils evaluated have an IRR value higher than 3.50, while 29 fall below that threshold. The three IRR-rated soils on the subject property have IRR values below 3.50.

"Based on the Brown Report, the county adopted the predecessor to JCCP Goal 11, Policy 3 in 1985, which was then codified at Goal 11, Policy 5(B)(1). That version provided simply that lands with an IRR or CIRR rating below 3.50 were not forest lands. Because the Brown Report rated only 56 of the soils in the county, questions arose as to how to apply Goal 11, Policy 5(B)(1) to parcels with one of the 55 soils not rated by the Brown Report or soils not described in the NRCS soil survey. With respect to new soils not described in the NRCS soil survey, the county initially attempted to assign IRR values to those soils on a case-by-case basis. However, in *Doob v. Josephine County*, 27 Or LUBA 293 (1994) (*Doob I*), this Board held that the county erred in applying the IRR/CIRR methodology to a soil not listed in the NRCS soil survey. Because the new soil was not listed in the NRCS soil survey, nor given a numerical value under the acknowledged IRR/CIRR process embodied in the Brown Report, we held that the decision had the effect of improperly amending the comprehensive plan to assign IRR/CIRR values to soils without following post-acknowledgment amendment procedures. 27 Or LUBA at 297.

"With respect to soils described in the NRCS soil survey but not rated in the Brown Report, the county first attempted to include those soils in the IRR/CIRR system by informally assigning them a nominal 2.00 IRR value. However, the county abandoned this practice after an enforcement action was filed with the Land Conservation and Development Commission in 1995. County planning staff subsequently formulated a 'clarifying policy,' under which the 55 unrated soils were essentially deemed to be unsuitable for commercial forestry and such soils were not considered in applying the IRR/CIRR system. However, in an appeal of a decision applying the 'clarifying policy,' LUBA held that the 'clarifying policy' amounted to an improper amendment to the JCCP. *Doob v. Josephine County*, 31 Or LUBA 275, 286 (1996) (*Doob II*).

"In 1999, as part of periodic review, the county amended JCCP Goal 11, Policy 3 to take the form applied in the present case. Similar to earlier versions, Goal 11, Policy 3(B)(1) provides that a lot or parcel is considered forest land when the predominant soil has an IRR or CIRR of 3.50 or higher, based on the Brown

Report. *See* n [5]. However, a new subsection (2) was added to provide that '[i]f a determination cannot be made using the internal rate of return system' described in (B)(1), then the land may be shown to be unsuitable for commercial forestry based on a variety of factors that, taken together, demonstrate that the land is not protected under Goal 4. JCCP Goal 11, Policy 3(B)(2).

"In *Doob v. Josephine County*, 41 Or LUBA 303 (2002) (*Doob III*), the county applied the amended JCCP Goal 11, Policy 3 to determine that a parcel with unrated soils, *i.e.*, soils that are among the 111 soils described in the NRCS soil survey but not among those rated under the Brown Report and assigned a IRR/CIRR value, was not forest land as determined under Goal 11, Policy 3(B)(1). The petitioner argued that because the soils on the parcel were unrated under the IRR/CIRR system the county must determine whether the parcel is 'forest land' under the test at Goal 11, Policy 3(B)(2). We agreed, noting that:

> "'* * * JCCP Goal 11, Policy 3(B)(2), by its terms, applies where 'a determination cannot be made using the internal rate of return system' under JCCP Goal 11, Policy 3(B)(1). If that language does not mean that JCCP Goal 11, Policy 3(B)(2) applies in cases where the soils have not been assigned an internal rate of return, it is difficult to imagine when JCCP Goal 11, Policy 3(B)(2) would ever apply.' 41 Or LUBA at 313.

"We also noted the county's argument in its brief, which was not reflected in the decision, that the county intended Goal 11, Policy 3(B)(1) to govern rated *and* unrated soils in the NRCS soil survey, and intended Goal 11, Policy 3(B)(2) to govern *only* new soils that are not described in the NRCS soil survey. However, we saw nothing in the text of Goal 11, Policy 3(B) that supported that interpretation, and noted that the record included no findings or legislative history supporting that interpretation.

"On remand, the county in *Doob III* adopted interpretative findings concluding that, based on legislative history, the county did intend Goal 11, Policy 3(B)(1) to govern both rated and unrated soils, and Goal 11, Policy 3(B)(2) to govern only new soils. That decision on remand was appealed to LUBA, but the appeal was ultimately dismissed because the petitioner failed to timely submit the petition for review. *Doob v. Josephine County*, 43 Or LUBA 473 (2003) (*Doob IV*).

"In the present case, the county has adopted interpretative findings similar to those that were adopted on remand in *Doob III*, based on legislative history in the record. Based on that view of JCCP Goal 11, Policy 3(B), the county found that the subject property is 'non-forest land' under 3(B)(1), because the majority of the property consists of Siskiyou soils with IRR values less than 3.50." *Doob v.*

Josephine County (Eliason), slip op 8-12 (footnotes and record citations omitted).[7]

We agreed with the county in *Doob v. Josephine County (Eliason)* that the property at issue in that appeal was composed predominantly of soils that had been assigned IRR values and that the CIRR for that property was less than 3.50. The question in the Eliason appeal then became whether the county could rely on that finding under Goal 11, Policy 3(B)(1) to conclude that the subject property in that appeal was nonresource land, without further consideration of whether the soils on the property might qualify as forest land under the broad Goal 4 definition of "Forest Lands." *See* n 2. We agreed with the county in the Eliason appeal that it could rely exclusively on Goal 11, Policy 3(B)(1), and we rejected the petitioner's contrary argument that Goal 4 must be applied directly, concluding that the petitioner's contrary argument was a collateral attack on the acknowledged JCCP Goal 11, Policy 3(B).[8] In their second assignment of error, intervenors-petitioners in this appeal ask us to reconsider that part of our decision in the Eliason appeal.

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[7] In one of the omitted footnotes we set out county findings that interpreted relevant provisions of Goal 11, Policy 3:

> "'Although the *Brown Report* does not entitle the excluded soils as 'non-forest,' the Board concludes this is the only reasonable conclusion that can be made from the fact that they did not qualify [in Table 6 of the NRCS soil survey] as being 'suitable for the production of commercial trees.' When the Board adopted the language in the first paragraph of subsection B.1, it was our clear intent to completely eliminate the 55 soils then existing in the NCRS/county soil data base, but not covered by the *Brown Report*, from consideration under subsection B.1 * * *. On this basis, subsection B.1 is meant to determine whether land is forest land based upon the predominant presence of IRR/CIRR rated soils only.
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> "'* * * * *
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> "'Regarding the operation of subsection B.2, the Board finds that this subsection is meant to cover only those cases where 'new soils' are involved. We also find that 'new soils' refers to soils that are not in the county's soil data base, the [NRCS soil survey]. This is the only circumstance when the *Brown Report* cannot be used to determine forest lands, because the soils will be outside of both the acknowledged soil data base and the acknowledged IRR system.' * * *" *Doob v. Josephine County (Eliason)*, n 7 slip op 12.

[8] We explained our decision in this regard as follows:

> "* * * Rightly or wrongly, the Brown Report evaluated only 56 of the 67 soils listed in Table 6 of the NRCS soil survey, and rated as suitable for commercial forestry only 27 of those 56 soils. JCCP Goal 11, Policy 3(B)(1) requires usage of the Brown Report IRR/CIRR values in

In the Eliason appeal, we did not have to consider whether the county was correct in its position that it can assume that the *unrated* soils are non-forest lands that are eligible for redesignation as non-resource lands under Goal 11, Policy 3(B)(1), without applying the analysis that is required by Goal 11, Policy 3(B)(2). That issue is presented in this appeal in intervenors-petitioners' fourth assignment of error.

SECOND ASSIGNMENT OF ERROR (INTERVENORS-PETITIONERS)

In this assignment of error, intervenors-petitioners contend that we were wrong in concluding in the Eliason appeal that the county may rely entirely on Goal 11, Policy 3 to determine whether the subject property is non-resource land that need not be protected under Goal 4. As intervenors-petitioners correctly point out, the challenged decision adopts a comprehensive plan amendment, and the statewide planning goals apply directly to comprehensive plan amendments. ORS 197.175(2)(a); *1000 Friends of Oregon v. Jackson County*, 79 Or App 93, 97, 718 P2d 753 (1986). Intervenors-petitioners contend that the county must determine whether the subject property qualifies as forest land under the broad Goal 4 definition of forest land. *See* n 2. Only if the subject property is shown to be outside the broad Goal 4 definition of forest land, intervenors-petitioners argue, can the county conclude that the subject property is non-resource land that need not be protected for forest uses under Goal 4.

At the outset, we note that we tend to agree with intervenors-petitioners that the IRR analysis that underlies Goal 11, Policy 3(B) seems to be designed to allow lands that were previously designated for protection as forest lands under Goal 4 to be redesignated as non-resource land, almost solely on the basis of their anticipated future profitability for commercial forest use. There is nothing in the language of Goal 4 that either expressly authorizes such an approach in

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determining whether land is "non-forest land" under that subsection. Therefore, at least for soils evaluated by the Brown Report and given IRR/CIRR values, those IRR/CIRR values are the appropriate means for determining whether land composed predominantly of rated soils is forest land under JCCP Goal 11, Policy 3(B). Petitioner's arguments that the Brown Report conflicts with the NRCS soil survey or that the IRR/CIRR system uses inaccurate figures are impermissible collateral attacks on JCCP Goal 11, Policy 3(B)." Slip op at 13.

general or authorizes the particular IRR process that has been developed by the county. Furthermore, as far as we can tell, the IRR process does nothing to prevent nonresource land designations for lands that might otherwise qualify as forest land under the part of the Goal 4 definition of forest lands that includes lands located close to commercial forest lands that are "adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources." However, notwithstanding the seeming inconsistency between the Goal 4 standard for identifying forest lands and the acknowledged Josephine County procedure and standards for allowing some forest lands to be redesignated as non-resource lands under Goal 11, Policy 3, the fact remains that the Goal 11, Policy 3 procedure and standards are acknowledged as complying with the statewide planning goals.

In *League of Women Voters v. Metro Service Dist*., 99 Or App 333, 781 P2d 1256 (1989), the Court of Appeals considered an acknowledged procedure for amending the Metro urban growth boundary (UGB) in some circumstances without applying two of the factors that would otherwise apply under Goal 14 (Urbanization). Because the UGB amendment was governed by an acknowledged procedure that was adopted to replace direct application of Goal 14 in limited circumstances, the Court of Appeals concluded that a direct review of the amendment against those Goal 14 factors was "impossible or futile:"

> "* * * We said in *Ludwick v. Yamhill County* [72 Or App 224, 696 P2d 536 (1985)] and reiterated in *1000 Friends of Oregon v. Jackson Co*., * * * that the 'fact that a comprehensive plan has been acknowledged obviously does not mean that amendments to the plan will also comply with the goals.' 72 Or App at 231. We emphasized in those cases that amendments to acknowledged comprehensive plans and land use regulations are independently reviewable for goal compliance, without reference to the fact that the underlying plans and regulations are in compliance. However, we also made it clear in *1000 Friends of Oregon v. Jackson Co*., * * * that LUBA and we could not go behind an amendment under review to redetermine the goal compliance of acknowledged provisions that are not directly or indirectly affected by the amendment. *See also Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986).

> "The problem is not that petitioners have launched a *de facto* attack on the acknowledged ordinance, but that the amendment that they do challenge is a clone of the ordinance. The amendment cannot be invalidated without holding, in all but name, that the ordinance is also invalid. Consequently, the existence of the acknowledged ordinance makes independent goal compliance review of the amendment impossible or futile. The principal error that petitioners ascribe to the amendment is that it was adopted without consideration of the two Goal 14 factors that the ordinance purports to make inapplicable to amendments of this kind. Unlike *1000 Friends of Oregon v. Jackson Co*., * * * and *Ludwick v. Yamhill County*, * * * the aspects of this plan amendment that assertedly violate the goals simply mirror provisions of the acknowledged land use regulation." 99 Or App at 337-38.

Although the question is closer in this case than it was in *League of Women Voters*, Josephine County's Goal 11, Policy 3(B) process for redesignating WR and FR-zoned lands for non-resource use is sufficiently similar to the acknowledged procedure for amending the Metro UGB that was at issue in *League of Women Voters* that we conclude that the same rule should apply here. Although the question that must be asked and answered to designate WR and FR-zoned land for nonresource use under Goal 11, Policy 3 is different from and less exacting than asking whether the WR or FR-zoned land is accurately described as forest land under the Goal 4 definition of forest land, Goal 11, Policy 3 is the county's adopted procedure and standards for redesignating FR-zoned land for non resource use and it has been acknowledged by LCDC.

The question is closer in this case because intervenors-petitioners identify an arguable anomaly in JCCP Goal 10, Policy 1(A). JCCP Goal 10, Policy 1(A), sets out how the county *applies* zoning to lands that are designated "Forest" by the comprehensive plan. The county applies either Forest Commercial (FC-80) or WR zoning to such lands. JCCP Goal 10, Policy 1(A)(1) describes the FC-80 zone, which is the zone the county applies to its best forest land. JCCP Goal 10, Policy 1(A)(2) describes the WR zone, which is applied to less productive forest land.[9] The

[9] Goal 10, Policy 1(A)(2) provides:

> "Lands with the following characteristics shall be zoned Woodlot Resource (WR):

arguable anomaly is presented in JCCP Goal 10, Policy 1(A)(2)(c), which appears to require that parcels with a CIRR of less than 3.50 must nevertheless be placed in a WR zone if they fall within the broad Goal 4 definition of forest land despite their low CIRR.[10]

Intervenors-petitioners cite JCCP Goal 10, Policy 1(A)(2)(c) and argue that it shows that the Goal 11, Policy 3 process was adopted as an *additional* standard for redesignating WR and FR-zoned lands for non-resource use rather than a replacement for direct application of the Goal 4 definition of forest land. We agree with intervenors-petitioners that its seems anomalous to adopt a policy that requires that all forest land, within the meaning of Goal 4, be placed within either the FC or WR zone and then adopt a policy like JCCP Goal 11, Policy 3 that allows some of the less productive of those WR-zoned lands to be later designated as non-resource lands—even though those lands presumably were designated WR in the first place because they qualify as less productive forest lands within the meaning of Goal 4 and presumably still do.

Whatever LCDC's and the county's reasoning in allowing FR and WR-zoned lands to be redesignated as nonresource lands under criteria that are less protective than would apply if the

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> "(a) parcels of land generally not managed, or incapable of being managed, for commercial forestry;
>
> "(b) parcels generally smaller than 40 acres with a CIRR between 3.5 and 3.9;
>
> "(c) *parcels with a CIRR below 3.5 which, by definition, as described by Goal 2, Policy 7, are forest lands*;
>
> "(d) parcels provided with facilities and roads intended primarily for servicing rural noncommercially managed forest lands;
>
> "(e) parcels with soils which have CIRR of 4.00 or above but are surrounded by parcels described in a-d above." (Emphasis added.)

[10] JCCP Goal 10, Policy 1(A)(2)(c) refers to JCCP Goal 2, Policy 7. As relevant JCCP Goal 2, Policy 7 provides:

> "Josephine County shall provide zoning classifications which will protect and conserve for forestry uses all rural commercial forest lands, non-commercial forest lands, *and any other forest lands as defined in LCDC Goal 4*. * * *"

Therefore, when initially applying zoning to its forest lands, JCCP Goal 10, Policy 1(A)(2)(c) and Goal 2, Policy 7 appear to require that the county apply WR zoning to all lands in the county that fall within the Goal 4 definition of forest land even though that parcel may have a CIRR of less than 3.50.

Goal 4 definition of forest land applies directly, Goal 11, Policy 3 was adopted by the county and has been acknowledged by LCDC. It is reasonably clear from the record that the county's overarching purpose in adopting the IRR methodology was to replace the broad Goal 4 definition of forest land with the much more objective IRR methodology. If some of the explicit terms of Goal 11, Policy 3 are at odds with Goal 4, that correction must come via a post-acknowledgment plan amendment or periodic review. We are not free to ignore the county's acknowledged procedure for redesignating FR and WR-zoned lands for non-resource use.

Intervenors-petitioners' remaining arguments under the second assignment of error challenge the county's analysis of unrated soils under Goal 11, Policy 3(B). We address those arguments under intervenors-petitioners fourth assignment of error below.

Intervenors-petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (INTERVENORS-PETITIONERS)

Apparently the IRR system developed in the 1985 Brown Report, which underlies JCCP Goal 11, Policy 3 and other provisions of the JCCP, has not been updated since it was acknowledged in 1985. Under their third assignment of error, intervenors-petitioners contend the county's IRR system is based on faulty and outdated assumptions. Intervenors-petitioners also cite JCCP Goal 2, Policy 6, which states:

> "The CIRR system will be evaluated 2 ½ years from the adoption of this provision to determine its effect on forest management in Josephine County."

Citing *League of Women Voters v. Metro Service Dist*., 17 Or LUBA 949, *aff'd* 99 Or App 333, 781 P2d 1256 (1989), intervenors-petitioners contend that the decision challenged in this appeal is not supported by substantial evidence.

As an initial point, intervenors-petitioners erroneously read JCCP Goal 2, Policy 6 to call for a reevaluation of the validity of the assumptions and data supporting the Brown Report within two and one-half years. JCCP Goal 2, Policy 6 actually calls for a study to "determine [the] effect [of the CIRR System] on forest management in Josephine County." The proposed study was to

examine the effect of the CIRR System, not the validity of the assumptions and data that underlie the CIRR system.

The above-noted problem with intervenors-petitioners' argument aside, the part of our decision in *League of Women Voters v. Metro Service Dist*. that intervenors-petitioners rely on concerned whether Metro's finding that a UGB amendment would improve the efficiency of the transportation system was supported by substantial evidence. In adopting that finding, Metro relied on a 10-year old study that included a recommendation that the study be updated in five years. The recommended 5-year update had not been completed. We concluded in *League of Women Voters v. Metro Service Dist*. that without some evidence that there had not been changes over the years that might render a 10-year old study unreliable, it was not substantial evidence that would support the UGB amendment finding.

The issue intervenors-petitioners attempt to raise in this assignment of error is really whether JCCP Goal 11, Policy 3 is supported by substantial evidence. But the challenged decision does not adopt or amend JCCP Goal 11, Policy 3(B); it *applies* JCCP Goal 11, Policy 3(B). Our review in this appeal is to determine whether the county correctly applied JCCP Goal 11, Policy 3(B), not to determine whether the Brown Report that provides the factual base and assumptions for JCCP Goal 11, Policy 3(B) was flawed from the beginning or is now out of date. Arguments to that effect may be appropriately directed to LCDC in periodic review, but they are not cognizable in this appeal.

Intervenors-petitioners' third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (INTERVENORS-PETITIONERS)

We turn next to the unrated soils issue that we did not need to consider in the Eilason appeal. Specifically, we consider whether, in applying Goal 11, Policy 3(B), the county may assume that unrated soils have an IRR of less than 3.50 and for that reason are nonresource soils.

Although the numbers presented by the applicant's soils expert regarding the number of acres in the subject parcel and percentages of particular soils within that parcel vary somewhat, it is

undisputed that more than 50 percent of the soils on the approximately 15-acre parcel are unrated, meaning they are not among the 56 soil types for which Brown assigned an IRR. The predominant soils on the subject 15-acre parcel are included in the 44 soils that are listed in the NRCS soils survey for Josephine County but are not included in Table 6. Based largely on the notation in Table 6 that "[o]nly the soils suitable for production of commercial trees are listed," the county contends in the challenged decision that it may assume that the soils that are not included on Table 6 are "non-forest" land within the meaning of Goal 11, Policy 3(B).

In our decision in the Eliason appeal, although we did not reach the question that is presented in this appeal, we expressed some skepticism regarding the county's assumptions regarding the 44 unrated soils:

> "While we need not and do not address the merits of the county's interpretation, we note that the key premise to that interpretation is the county's view that Table 6 of the NRCS soil survey is a complete list of soils in the county that the survey deems to be 'suitable for production of commercial trees.' The county infers from Table 6 that the 44 unlisted soils "'did not qualify as being 'suitable for the production of commercial trees.'" * * * *However, the next sentence of Table 6 clearly states that '[a]bsence of an entry indicates that information was not available.' In other words, it appears that the NRCS soil survey did not evaluate the 44 unlisted soils for suitability for commercial forestry, but simply lacked information to make that evaluation.* The Brown Report does not discuss the 44 unlisted soils at all, much less evaluate those soils for suitability for commercial forestry, or explain why an evaluation is not warranted. As far as we can tell, the county's premise that the NRCS soil survey and the Brown Report determined that unlisted soils are not suitable for commercial forestry is incorrect." Slip op 15 n 8 (record citation omitted; emphasis added).

The county first points out that the above-emphasized language from our opinion in the Eliason appeal is probably wrong about the intended meaning of the Table 6 notation that "absence of an entry indicates that information was not available." All of the 56 soils that are listed in Table 6 include a listing of one or more "common trees" with "potential productivity." In all cases at least one of those common tree species is followed by a "Site index" which is an index of the soil's productivity for that common tree species. However, for some soil types there is more than one

common tree species listed with potential productivity. In some of those cases, no site index is shown and instead a notation such as the following is shown:

Common Trees	Site Index
Douglas fir----------	114(3)
-	---
Ponderosa pine----------	---
California black oak------	---
Pacific madrone----------	

As the county correctly points out, the blank entries under the Site Index are likely the noted "absence[s] of an entry," and the note probably was not referring to the 44 soils that were not included on Table 6.

However, we continue to believe that the county reads more than is warranted into the other Table 6 notation that "[o]nly soils suitable for production of commercial trees are listed." It is true that the words "suitable for production of commercial trees" are similar to some of the words used in the Goal 4 forest lands definition. *See* n 2. However, the words are not identical. It may be that whatever considerations led the NRCS to omit those 44 soils from Table 6 would also support a broader assumption that some or all of those 44 soil types are not "forest lands," as Goal 4 defines that term. However, there are a number of possible explanations for that notation that would call such a conclusion into question.[11] Given the amount of effort that was expended through the Brown Report to compute an IRR for the soils listed in Table 6, it is hard to understand why that report would not expressly address those 44 soils and explain why it is appropriate to assume that those 44 soil types are non-resource soils without performing an IRR analysis, if that was one of the intended results of the IRR analysis in the Brown Report. If the Brown Report had clearly stated

[11] Beyond the Goal 4 definition language that expands the definition of forest lands beyond lands that are "suitable for commercial forest uses," the NRCS decision not to list one or more of those 44 soils on Table 6 could easily be attributable to a lack of sufficient information to determine whether some or all of those 44 soils are "suitable for production of commercial trees." If there is anything in the NRCS soil survey that explains how the determination to add soils to Table 6 or leave them off was made, no party cites us to that explanation.

that it can be assumed that the 44 soils that are not included on Table 6 have an IRR of less than 3.50, even though the Brown Report does not actually assign an IRR to those soils, and LCDC had acknowledged the Brown Report with that stated assumption, we would almost certainly be required to defer. However, that assumption is not expressed in the Brown Report, as far as we can tell. The Brown Report simply does not address the unrated soils at all. And we cannot assume that LCDC acknowledged the policy with that understanding.

We next turn to the county's argument that the language in Goal 11, Policy 3(B)(2), makes it clear that the unrated soils are treated as soils with an internal rate of return of less than 3.50 under Goal 11, Policy 3(B)(1). Again, if Goal 11, Policy 3(B)(2) actually clearly stated that position and if LCDC had acknowledged such plan language or approved it in periodic review, we would likely be required to defer. However, the operative language in Goal 11, Policy 3(B)(2) actually says "[i]f a determination cannot be made using the internal rate of return system as described in Subsection B(1) above, the land is shown to be unsuitable for commercial forest uses based upon a combination of proofs * * *." That language is not fairly read to say that the procedure set out in Subsection B(2) *only* applies where the county encounters soils that are not included in the 111 soils identified in the county soils survey, as the county argued in the Eliason appeal.[12] We continue to believe that language is reasonably read to say that where a determination cannot be made under Subsection B(1) because the predominant soils do not have an assigned IRR, the alternative "combination of proofs" method in Subsection B(2) is the county's acknowledged method for making a determination regarding whether the property qualifies as nonresource property. The predominant soils may not have an assigned IRR because those soils are (1) among the 44 soils that

[12] The county's interpretation to that effect adds a significant qualification to Goal 11, Policy 3(1) and (2) that is simply not there, and that qualification is inconsistent with the language that is there. ORS 197.829(1). That interpretation is also arguably contrary to Goal 4, which does not contemplate a process where a local government can assume that soils are not within the Goal's definition of "forest land," without a stated legal and factual basis for making that assumption. ORS 197.829(1)(d).

the NRCS did not include on Table 6, (2) among the 11 soils on Table 6 that Brown elected not to rate, or (3) not among the 111 soils in the NRCS county soils survey.

Finally, before turning to the remaining assignments of error, we note that the county has included 220 pages of what it calls "Internal Rate of Return" "Legislative History." Most of those documents postdate the Brown Report and are not really legislative history of the Brown Report or Goal 11, Policy 3(B). In any event, while some of those documents express a conclusion that unrated soils should be considered nonresource soils, that does not mean that there is factual or legal support for that conclusion. As we have already pointed out, no one has pointed to anything in the NRCS soil survey that explains how NRCS reached a conclusion that only the 67 included soils that are included on Table 6 are "suitable for commercial tree production." Perhaps if the Brown Report had provided that missing explanation, instead of simply proceeding as though it were a given that those 44 soils are not forest land within the meaning of Goal 4, we could agree with the county that it can assume that the unrated soils are nonresource lands. However, if some of those 44 soils were not included on Table 6 solely because they are more commonly used for agricultural purposes or because NRCS lacked sufficient data at the time to confirm the suitability of one or more of those 44 soils for commercial forest use, the omission of those soils from Table 6 does not necessarily mean those soils are not suitable for commercial forest use, and it certainly does not mean that parcels with those soils could not fall within the broad Goal 4 definition of forest land.

Intervenors-petitioners' fourth assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR (INTERVENORS-PETITIONERS)

In their first assignment of error, intervenors-petitioners list eleven separate issues that they contend the county inadequately responded to. Those issues repeat issues that are presented and addressed in our discussion of intervenors-petitioners' other assignments of error. The first assignment of error provides no separate basis for reversal or remand.

Intervenors-petitioners' first assignment of error is denied.

FIRST AND SECOND ASSIGNMENTS OF ERROR (PETITIONER)

This matter was sent to the board of county commissioner by the planning commission. At its November 5, 2003 hearing in this matter, with all three members of the board of commissioners present, the matter was continued to November 12, 2003. At that meeting, with only two members of the board of commissioners present, the board of commissioners voted to approve intervenor-respondent's application and directed his representative to prepare findings. Subsequently, the board of commissioners conducted additional hearings to receive additional documents and testimony regarding the IRR Policy. The board of commissioners ultimately adopted its written decision on July 14, 2004. That written decision is signed by two members of the board of commissioners. Only one of the two board of commission members who voted to approve the application on November 12, 2003, signed the written decision. The other member of the board of commissioners who signed the July 14, 2004 written decision is the member who was absent on November 12, 2003.

In his first two assignments of error, petitioner contends the county committed error by reopening the evidentiary record to receive additional evidence concerning the IRR Policy and that it was error for the board of commissioners member who was absent on November 12, 2003 to sign the final written decision. Even if it was error to reopen the evidentiary record after the oral decision in this matter was rendered, which does not appear to be the case, petitioner does not argue that his right to participate in those additional proceedings was improperly limited in any way or that his substantial rights were prejudiced by the county's action. Although one of the two board of commission members who signed the final written decision was absent on November 12, 2003 when the oral decision to approve the application was adopted, that member otherwise participated throughout this proceeding and there was nothing improper about his signature on the final written decision, which we understand to indicate his approval of the final decision. With his signature and the signature of the other member of the board of commissioners, the requisite approval of a majority of the board of county commissioners was given.

Petitioner's first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR (PETITIONER)

OAR 660-004-0040 was adopted and became effective on October 4, 2000. That rule sets out how Statewide Planning Goal 14 (Urbanization) applies to rural lands for which exceptions to Goals 3 and 4 have been approved, when they are planned and zoned for residential use. Petitioner contends the county should have applied this rule in approving the disputed application, and erred by not doing so.

The record includes a November 27, 2002 letter signed by a county planner in which the planner concludes that OAR 660-004-0040 need not be applied in this case, because the original application was submitted before the rule became effective on October 4, 2000. Record 900-01. However, petitioner contends the original application includes a document that is dated several months after October 4, 2000:

> "Part of the original application is a hand drawn plot plan [Record 544] which is dated 5/23/01. How can a document [that is] dated later than the 'determined' application date, be part of that application?" Petition for Review 7.

Intervenor-respondent's brief can be read to say that petitioner may not question the planner's determination. We reject that suggestion. However, intervenor-respondent also points out that OAR 660-004-0040 applies to lands for which exceptions to Goals 3 and 4 have been approved. No exception to Goals 3 and 4 has been approved for the subject property. OAR 660-004-0040(2)(c)(E) and (F) specifically provide that OAR 660-004-0040 does not apply to either "resource land" or "nonresource land." Since the subject property is either resource land or nonresource land, OAR 660-004-0040 does not apply. Although the county may have been wrong about why OAR 660-004-0040 does not apply, that error provides no basis for reversal or remand.

Petitioner's third assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR (PETITIONER)

In his fourth assignment of error, petitioner contends the planning commission's vote in this matter to recommend denial of the application was 6-2 rather than 6-3. Petitioner contends the planning commission is knowledgeable in land use matters and suggests that if the board of commissioners had known the vote was 6-2 rather than 6-3 it might have agreed with the planning commission.

Petitioner's reason for believing the vote was 6-2 is that one planning commission member was listed as absent at the beginning of the meeting where the planning commission took action. That reasoning is questionable. Moreover, as intervenor-respondent points out, the board of commissioners is responsible for adopting the final decision in this matter and is in no way bound by the planning commission's recommendation. We fail to see any error.

Turning to petitioner's fifth assignment of error, petitioner points to alleged discrepancies in the applicant's soil analyses. The applicant's soil analyses differed in significant ways from the NRCS soil survey for Josephine County. Based on those discrepancies, petitioner contends that "[e]ssentially the question is : who to believe?" Petition for Review 11. Most of the discrepancies that petitioner identifies are relatively minor discrepancies in the claimed acreage of the property. Those discrepancies are not of the kind or degree that necessarily render the analyses the kind of evidence that a reasonable person would not rely on.[13] Accordingly, those analyses constitute substantial evidence that the county was entitled to rely on. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). Petitioner's arguments under this assignment of error are essentially an invitation to LUBA to reweigh the evidence and reach a different conclusion than the board of county commissioners reached regarding which evidence to believe. Our scope of review regarding the

[13] Petitioner does argue that a September 17, 2000 soil report includes erroneous assumptions about the IRR of certain unrated soils. We have already addressed this aspect of the county's decision in resolving intervenors-petitioners' fourth assignment of error and we do not address it further here.

evidence supporting the county's decision is not *de novo* and we do not reweigh the evidence. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

Petitioner's fourth and fifth assignments of error are denied.

The county's decision is remanded.