

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON

3  
4 ROGUE ADVOCATES,  
5 *Petitioner,*

6  
7 vs.

8  
9 JACKSON COUNTY,  
10 *Respondent,*

11 and

12  
13 EDWARD L. COX, II,  
14 *Intervenor-Respondent.*

FEB08'10 AM10:10 LUBA

15  
16 LUBA No. 2009-102

17  
18 FINAL OPINION  
19 AND ORDER

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21  
22 Appeal from Jackson County.

23  
24 Sean T. Malone, Eugene, filed the petition for review and argued on behalf of  
25 petitioner.

26  
27 G. Frank Hammond, County Counsel, Medford, filed a response brief and argued on  
28 behalf of respondent.

29  
30 Mark S. Bartholomew, Medford, filed a response brief and argued on behalf of  
31 intervenor-respondent. With him on the brief was Hornecker, Cowling, Hassen & Heysell,  
32 LLP.

33  
34 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,  
35 participated in the decision.

36  
37 REVERSED

02/08/2010

38  
39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county decision approving comprehensive plan and zoning map amendments from resource designations to rural residential designations.

**FACTS**

The subject property consists of five parcels totaling approximately 343 acres located on the eastern shoulder of Johns Peak in the Rogue-Applegate Upland that separates the drainages of the Applegate River and Rogue River. The parcels are designated Forestry/Open Space and zoned for forest uses under comprehensive plan and land use regulations that implement Statewide Planning Goal 4 (Forest Lands). Intervenor applied to the county to change the tract’s comprehensive plan designation to Rural Residential and to rezone the tract to Rural Residential, 10-acre minimum (RR-10).<sup>1</sup> Intervenor did not seek an exception to Goal 4, but instead sought to demonstrate that the tract is not “forest land” as defined by Goal 4. This is the second time this matter has been before us. In *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007), we sustained a number of challenges to the county’s approval of the comprehensive plan and zoning map amendments. On remand, the county again approved the amendments. This appeal followed.

**ASSIGNMENT OF ERROR**

There is no dispute that the subject property does not meet the definition of “forest land” in Goal 4 or “agricultural land” under Goal 3 (Agricultural Lands), and may potentially be replanned and rezoned for uses not allowed under those goals. The issue presented in this appeal is whether under the county comprehensive plan the county may apply the county’s “Rural Residential” comprehensive plan map designation to “nonresource” land that is not subject to Goals 3 or 4.

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<sup>1</sup> The Rural Residential Land plan designation is implemented by five zoning districts: RR-2.5, RR-5, RR-5(A), RR-10 and RR-00.

1 Under state law, when land is not farm or forest land that is subject to Goals 3 or 4, an  
2 exception to those goals need not be taken to plan and zone land for uses that are not allowed  
3 by those goals. *Bates v. Josephine County*, 28 Or LUBA 21, 30-31 (1994). However, the  
4 petitioners in *Lofgren* argued, and petitioner in the present appeal argues, that under the  
5 Jackson County Comprehensive Plan (JCCP), the Rural Residential designation is reserved  
6 for land subject to Goals 3 and 4, for which an exception must be taken for uses not allowed  
7 by the goals, and that the county has adopted a specific comprehensive plan designation,  
8 Rural Use, for “nonresource” land that is not subject to Goals 3 and 4.

9 Petitioner raises three subassignments of error: (1) the county misconstrued the JCCP  
10 to find that the Rural Residential designation may be applied to property that is not subject to  
11 Goals 3 and 4; (2) the county failed to consider relevant legislative history when it  
12 interpreted the JCCP; and (3) the county misconstrued relevant case law.

13 **A. Whether the County Misconstrued the JCCP**

14 JCCP Rural Residential Map Designation Criterion 2(A) provides:

15 “Currently designated Agricultural or Forest/Open Space Lands *may not be*  
16 *designated as Rural Residential unless an exception to the applicable Goal 3*  
17 *or 4 is justified* in accordance with the Goal 2 Exceptions Process, ORS  
18 197.732, and OAR 660, Division 4.” (Emphasis added.)

19 The text of criterion 2(A) appears to prohibit application of the Rural Residential designation  
20 to land that is currently designated Forest/Open Space, unless an exception to Goals 3 or 4 is  
21 justified. Because an exception to Goals 3 or 4 is sensible only if land is farm land or forest  
22 land subject to Goals 3 or 4, a clear implication of criterion 2(A) is that the Rural Residential  
23 designation is intended for lands subject to Goals 3 or 4, *i.e.* resource land.

24 Consistent with criterion 2(A), the JCCP Map Designations Element Rural  
25 Residential Land purpose statement states:

26 “*Exceptions to statewide planning Goals 3, 4 and 14 (as applicable) are*  
27 *required* to establish Rural Residential lands outside adopted Urban Growth  
28 Boundaries.” (Emphasis added.)

1           In *Lofgren*, the county redesignated the subject property to Rural Residential and  
2 rezoned it to RR-10, a zone that implements the Rural Residential plan designation. The  
3 county did not explain in its findings why it believed it could apply the Rural Residential  
4 plan designation to land that was not subject to Goal 4 and for which an exception had not  
5 been justified, notwithstanding the language of criterion 2(A). The petitioners argued that  
6 under criterion 2(A), the Rural Residential plan designation can only be applied to resource  
7 land under Goal 3 or Goal 4, and then only if an exception is justified to the applicable goal.  
8 In response, intervenor cited to a 2006 memorandum in the record from county counsel,  
9 opining in response to a staff inquiry that no exception to either Goal 3 or 4 is required under  
10 criterion 2(A), where the subject property is found to be nonresource land that is not subject  
11 to either Goal 3 or Goal 4, because in that circumstance those goals are not “applicable.”<sup>2</sup>

12           We agreed with the petitioners that criterion 2(A), particularly read in context,  
13 appears to restrict the Rural Residential designation to resource land, and that under the  
14 JCCP the Rural Use designation appears to be the intended vehicle to permit rural residential  
15 development of nonresource lands.<sup>3</sup> However, because the board of county commissioners

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<sup>2</sup> The 2006 memorandum stated, in relevant part:

“Moving next to the Rural Residential Land section of the Comp Plan, the Map Designation Criteria section appears dispositive. Section 2(A) states that Forest/Open Space Lands may not be designated Rural Residential unless an ‘applicable’ exception to Goal 4 is ‘justified.’ Once again, an applicable exception is not justified if the evidence clearly proves the land located within a Forestry designation on the Comp Plan Map is not forest land by definition as set out in Oregon law and local ordinance that define the physical characteristics of forest land. Thus, I believe the County can comfortably interpret its Comp Plan consistent with state law as applied under *Bates*.” *Lofgren*, 55 Or LUBA at 144-45, n 11.

<sup>3</sup> We stated in *Lofgren*:

“The relevant portion of the county counsel’s letter \* \* \* considered only the language of Rural Residential map designation criterion 2(A), which provides that ‘[c]urrently designated Agricultural or Forest/Open Space Lands may not be designated as Rural Residential unless an exception to the applicable Goal 3 or 4 is justified in accordance with the Goal 2 Exceptions Process, ORS 197.732, and OAR 660, Division 4.’ That language, in isolation, is somewhat ambiguous, and can be read as county counsel apparently understood it to mean that an exception to Goals 3 or 4 is necessary only if one or more of those goals happen to be

1 did not address the issue, and the decision had to be remanded for other reasons, we  
2 remanded on that issue as well, to allow the county to address that issue in the first instance.  
3 In explaining why we chose to remand the decision to consider that issue rather than  
4 resolving the interpretative issue on our own under ORS 197.829(2), we explained that:

5 “[W]e do not hold that the Rural Residential map designation criteria must  
6 *necessarily* be interpreted in the foregoing manner [that an exception is  
7 required], and do not intend to foreclose a contrary interpretation. The county  
8 counsel did not consider the context provided by the Rural Use map  
9 designation criteria, and there may be other relevant context or legislative  
10 history that points in a different direction. Further, while it can be surmised  
11 that staff and the county commissioners agreed with the county counsel’s  
12 interpretation or at least the ultimate conclusion, there are no findings  
13 addressing the issue or adopting the county counsel’s interpretation as the  
14 county’s. Because remand is necessary in any event \* \* \*, we believe that it is  
15 appropriate to remand the decision under this subassignment of error to allow

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‘applicable,’ and need not be understood to mean that whether Goal 3 or 4 is ‘applicable’ depends on whether the land is ‘currently designated’ as agricultural land or [as] forest land. However, as petitioners note, the purpose language to the Rural Residential map designation element includes similar language and, in our view, that language tends to support the latter interpretation more than the former.

“As noted above, the purpose language states that ‘[e]xceptions to statewide planning Goals 3, 4 and 14 (as applicable) are required to establish Rural Residential lands \* \* \*.’ This use of the term ‘applicable’ in the purpose statement seems to suggest that some but not necessarily all of the listed goals will apply in taking the required exception, which in turn suggests that the county intended a similar meaning to the use of the word ‘applicable’ in criterion 2(A). While neither the purpose statement nor criterion 2(A) explicitly exclude the possibility that no goals at all may apply, at the same time there is no particular language contemplating that possibility, either, and certainly no express language indicating that the county need not take an exception if ‘currently designated’ resource lands are in fact found not be protected by the resource goals. To the contrary, the rural residential map designation provisions uniformly speak of exceptions as ‘required’ or in similar mandatory terms.

“The ambiguity on this point is clarified somewhat by the Rural Use map designation criteria, which is relevant context. The Rural Use plan map designation is clearly intended to be applied in circumstances, such as the present one, where the landowner demonstrates that the resource goals do not apply, and in fact can only be applied in that circumstance. Read in that context, the Rural Residential map designation provisions mandating an ‘exception’ and the absence of any language suggesting the contrary convey the strong impression that the county intended the Rural Residential designation to apply exclusively to exceptions lands, while the Rural Use designation applies exclusively to nonresource lands for which no exception is required. Petitioners assert, and neither the county nor intervenor disputes, that the plan map distinction between rural residential lands and rural nonresource lands is intended to reflect similar distinctions made in the administrative rules governing designation of rural residential lands.” 55 Or LUBA at 147-49 (footnote omitted).

1 the board of commissioners to address this interpretative issue in the first  
2 instance.” 55 Or LUBA at 149 (emphasis in original).

3 On remand, the county commissioners adopted by incorporation the interpretation of  
4 criterion 2(A) set forth in the county counsel’s 2006 memorandum in *Lofgren*. In addition,  
5 the county adopted an expanded interpretation and contextual analysis, which also focuses on  
6 the term “applicable” as used in criterion 2(A) and the similar phrase “as applicable” used in  
7 the Rural Residential purpose statement. The county’s findings state, in relevant part:

8 “[The county] interprets the \* \* \* ‘as applicable’ modifier [in the Rural  
9 Residential purpose statement] to mean that exceptions to the statewide  
10 planning goals are required if the statewide planning goals are ‘applicable’ in  
11 a particular case. The [county] reaches its interpretation and findings for the  
12 reasons that follow.

13 “The Forestry/Open Space Land Map Designations Element of the [JCCP]  
14 states that the four principal forest land environments described in the Forest  
15 Lands Element must be designated for Forestry and Open Space unless an  
16 exception to Goal 4 is taken. JCCP Forestry/Open Space Map Designations  
17 Element 2(A). Because the [county] previously found that the subject property  
18 is nonresource, the [county] finds that an exception is not necessary.

19 “Because of the requirement under the Forestry/Open Space Map  
20 Designations Element that land within the principal forest land environments  
21 must not be rezoned unless an exception is taken, the [county] concludes that  
22 the ‘as applicable’ language of the JCCP Rural Residential Land Purpose  
23 statement and JCCP Rural Residential Land Map Designation Element 2(A)  
24 means that an exception is needed only when an exception is ‘applicable’ to a  
25 particular property. In this case, an exception is not applicable, because of the  
26 previous findings with regard to the property not being resource land. If the  
27 JCCP was intended to require an exception in all cases, there would be no  
28 need to include the ‘as applicable’ language. Goal exceptions are only  
29 required when they are otherwise mandated by the JCCP.

30 “The [county] finds a textual analysis supports this conclusion. If there is  
31 more than one possible meaning to the provision, which LUBA implies, the  
32 [county] could apply legislative history to determine the meaning.  
33 Unfortunately, no legislative history relevant to this question appears to exist.  
34 Because of that, the [county] is forced to apply legislative maxims in order to  
35 resolve the meaning of the ordinance. One such maxim is that the [county]  
36 should apply the policy it believes the enacting [body] was pursuing.

1 “The policy supporting the applicable provisions is that RR zoning not be  
2 applied to lands subject to Goals 3 and 4. The regulations use the word  
3 ‘applicable’ to describe the goals. Applicable means the goal must apply.  
4 This leaves three possibilities for qualifying for RR zoning: Goal 3 applies but  
5 the use is excepted (meaning the goal is not operative); Goal 4 applies but the  
6 use is excepted (meaning the goal is not operative); or neither goal applies and  
7 neither goal is therefore operative. All three possibilities are conceptually  
8 equivalent in that in none of the possibilities does the goal operate. Therefore,  
9 the [county] could thus reasonably conclude that the policy of the regulations  
10 would be served by allowing RR zoning on nonresource, non-exception land  
11 where no resource goal is operative.

12 “The [county’s] interpretation that a goal exception is not necessary is in  
13 keeping with existing precedent, which states that if land is shown to be  
14 nonresource, a goal exception is not necessarily required.

15 “Finally, LUBA commented that the Rural Use designation appears to  
16 contemplate an application such as this, where the property is not resource and  
17 does not require an exception. The [county] finds that the fact that the Rural  
18 Use designation does not require an exception does not mean that the Rural  
19 Residential Designation does require an exception. The [county] interprets  
20 the JCCP to mean that an exception may be required when seeking a Rural  
21 Residential Designation. The [county] finds that no such exception is required  
22 in this case.” Record 5-7 (underline in original, citations omitted).

23 **1. Standard of Review**

24 Under ORS 197.829(1), we may only overturn a local government’s interpretation of  
25 its own ordinances if it is inconsistent with the express language, purpose, or policy of the  
26 ordinance, or is contrary to a statute, goal, or administrative rule that the local legislation  
27 implements.<sup>4</sup> Petitioner argues that the county’s interpretation is inconsistent with the

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<sup>4</sup> ORS 197.829(1) provides, in relevant part:

“[LUBA] 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:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

1 express language of the map designation criteria and purpose statement of the JCCP.  
2 “Whether a local government’s interpretation of its ordinance is ‘inconsistent’ with the  
3 language of local land use laws depends on whether the interpretation is plausible, given the  
4 interpretive principles that ordinarily apply to the construction of ordinances under the rules  
5 of *PGE[ v. Bureau of Labor and Industries, 317 Or 606, 859 P2d 1143 (1993)]*.” *Foland v.*  
6 *Jackson County, 215 Or App 157, 164, 168 P3d 1238, rev den 343 Or 690, 174 P3d 1016*  
7 *(2007)*. Our task is not to determine whether the county’s interpretation “was ‘correct’ in  
8 some absolute sense of choosing among various plausible interpretations, but, instead, merely  
9 whether that interpretation satisfied *PGE*’s first level threshold of plausibility.” *Siporen v.*  
10 *City of Medford, 231 Or App 585, 599, 220 P3d 427 (2009)*.

11 **2. Text of Criterion 2(A)**

12 For the following reasons, we conclude that the county’s interpretation of criterion  
13 2(A) is not consistent with the text and context of that provision. As a preliminary matter,  
14 we note that criterion 2(A), as one of the Rural Residential map designation criteria, is the  
15 key text, the meaning of which is immediately at issue. The other provisions cited by the  
16 county, intervenor and petitioner, such as the Rural Residential designation purpose  
17 statement, are essentially context for criterion 2(A).

18 As set out above, criterion 2(A) states that “[c]urrently designated Agricultural or  
19 Forest/Open Space Lands may not be designated as Rural Residential unless an exception to  
20 the *applicable* Goal 3 or 4 is justified \* \* \*.” (Emphasis added.) The 2006 county counsel  
21 interpretation adopted by the board of commissioners on remand paraphrases criterion 2(A)  
22 to state that “Forest/Open Space Lands may not be designated Rural Residential unless an  
23 ‘applicable’ exception to Goal 4 is ‘justified.’” *See* n 2. If the subject land happens to be

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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.”



1 nonresource land, the county reasons, then neither Goal 3 nor Goal 4 “apply,” no exception is  
2 necessary, and as a result the prohibition in criterion 2(A) does not operate to restrict  
3 application of the Rural Residential designation to nonresource lands.

4 As a textual matter, that is a possible reading of criterion 2(A), although if the county  
5 intended the phrase “unless an exception to the applicable Goal 3 or 4 is taken” to mean that  
6 the Rural Residential designation can be applied to nonresource lands *not* subject to Goals 3  
7 and 4, and for which no exception is required, it chose an obscure way to express that intent.

8 In *Lofgren*, we expressed agreement with petitioner’s interpretation of criterion 2(A),  
9 which turned in part on the fact that the *subject* of criterion 2(A) is “[c]urrently designated  
10 Agricultural or Forest/Open Space Lands,” *i.e.*, lands that are currently designated under  
11 *either* Goal 3 or Goal 4. That subject expresses a dichotomy: land is currently designated  
12 under either Goal 3 or Goal 4, and no third possibility is suggested. That in turn strongly  
13 suggests that the term “applicable” in the phrase “unless an exception to the applicable Goal  
14 3 or 4 is taken” simply indicates that an exception will be required to *either* Goal 3 or Goal 4,  
15 whichever is applicable, depending on whether the land is currently designated as  
16 agricultural land under Goal 3 or forest land under Goal 4. We continue to believe that that  
17 interpretation is a much stronger textual reading of criterion 2(A). Under that reading,  
18 criteria 2(A) functions essentially to limit application of the Rural Residential designation  
19 and its implementing zones to resource lands that are subject to Goals 3 and 4. As we  
20 discussed in *Lofgren* and again below, that reading is considerably strengthened by the fact  
21 that the county has adopted a separate map designation that is designed for and limited to  
22 nonresource lands not subject to Goals 3 and 4.

### 23 3. Context of Criterion 2(A)

24 Turning to consideration of context, the most immediate context is the Rural  
25 Residential purpose statement. As noted, that purpose statement provides in relevant part  
26 that “[e]xceptions to statewide planning Goals 3, 4 and 14 (as applicable) are required to

1 establish Rural Residential lands outside adopted Urban Growth Boundaries.” That language  
2 is essentially the affirmative restatement of the prohibition in criterion 2(A), and expressly  
3 mandates goal exceptions for lands designated Rural Residential. However, like criterion  
4 2(A), the purpose statement’s requirement for goal exceptions is qualified, in this case by the  
5 parenthetical phrase “as applicable.” The phrase it qualifies is “Goals 3, 4 and 14.” As  
6 discussed below, Statewide Planning Goal 14 (Urbanization) and its implementing  
7 administrative rules prohibit or restrict urban uses on rural lands, including residential  
8 densities below ten acres in size, unless an exception to Goal 14 is taken. In the  
9 interpretation adopted on remand, the county focuses on that parenthetical phrase “as  
10 applicable” and reasons that the phrase refers not only to circumstances where Goal 3 but not  
11 Goal 4 applies, and vice versa, but also is intended to refer more broadly to circumstances  
12 where neither resource goal applies, and therefore no exception to the resource goals is  
13 required. Again, that is a textually permissible reading of the purpose statement, but if that  
14 was the intent it is poor draftsmanship to insert into language mandating exceptions in order  
15 to establish the Rural Residential designation such an obscure, parenthetical exception. A  
16 more straightforward view of that purpose language is that it simply acknowledges the  
17 possibility that Goal 3 or Goal 4 will apply, or vice versa, depending on whether the land is  
18 farm or forest land.<sup>5</sup> That view is consistent with the dichotomous subject of criterion 2(A),  
19 discussed above. It is reasonable to presume that when the county used the same word  
20 “applicable” in the purpose statement it had the same dichotomous sense in mind, and did not  
21 intend to introduce a new meaning, the possibility that property currently designated under  
22 Goal 3 or 4 is in fact subject to neither resource goal.

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<sup>5</sup> Goal 14 also may or may not apply, depending on whether the residential density and services permitted under the proposed zoning implicates the goal, as refined under OAR 660-004-0040, which we discuss below.

1           Although the parties do not discuss it, the Rural Residential purpose statement also  
2 states that one purpose of the Rural Residential designation is “to allow for small scale farm  
3 activities even where the land may not *entirely* qualify as agricultural land.” (Emphasis  
4 added.) If criterion 2(A) had the meaning the county ascribes to it, that the Rural Residential  
5 designation can be applied to land that does not qualify at all as agricultural land protected  
6 under Goal 3, the purpose statement would presumably say that: “even where the land *does*  
7 *not* qualify as agricultural land.” Instead, the purpose statement refers to land that at least  
8 partially qualifies as agricultural land.<sup>6</sup>

9           Turning to context outside the Rural Residential map designation element, the county  
10 considered on remand language in the Forestry/Open Space Land map designation element.  
11 One of the criteria used to designate land Forestry/Open Space states that:

12           “The four principal forest land environments described in the Forest Lands  
13 Element of this Plan are inventoried as commercial forest lands and must be  
14 designated for Forestry and Open Space unless the land is otherwise qualified  
15 as agricultural or aggregate resource land, *or an exception to Goal 4 is taken.*”  
16 (Footnote omitted, emphasis added).

17 This criterion provides that certain lands described in the Forest Lands Element must be  
18 designated Forestry/Open Space, with two exceptions, one of them being where “an  
19 exception to Goal 4 is taken.” From that unexceptional proposition, the county draws the  
20 negative inference that if land is *not* in one of the four principal forest environments  
21 described in the Forest Lands Element, then no exception to Goal 4 is *ever* required in order  
22 to redesignate that land to something other than Forestry/Open Space. Whatever the validity  
23 of that logical inference as a general proposition, it says little or nothing regarding the  
24 meaning of the Rural Residential Map Designation Criteria, specifically criterion 2(A). As

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<sup>6</sup> Under Goal 3 and OAR 660-033-0020(1), land may qualify as agricultural land (and therefore require an exception to permit uses not allowed by the goal) even if it due to soil quality or other limitations it may not be economically farmed or grazed. Presumably, that is what the county meant by referring to lands that do not “entirely” qualify as agricultural land.

1 noted, criterion 2(A) specifically prohibits redesignating lands “currently designated” under  
2 Goals 3 or 4 to Rural Residential without taking an exception to the applicable goal.  
3 Criterion 2(A) does not refer to the forest environments described in the Forest Lands  
4 Element or include any language suggesting that whether the subject property is, as a factual  
5 matter, among those environments is a consideration in redesignating land to Rural  
6 Residential.

7 In his response brief intervenor identifies three other provisions in the Forestry/Open  
8 Space Map Designation Element that he argues also provide relevant context: Criteria 2(D),  
9 (E) and (F). Criterion 2(D) states that an applicant may demonstrate by providing  
10 substantive site specific evidence that the subject property is not forest land. Criterion 2(E)  
11 states that Goal 4 is deemed to apply to lands with certain characteristics, except where an  
12 exception is taken. Criterion 2(F) provides that where an applicant demonstrates that  
13 property is not protected by Goal 4, another rural lands designation and zoning district may  
14 be established. We have considered those provisions but as far as we can tell none offer any  
15 particular insight into whether the county’s interpretation of Rural Residential Map  
16 Designation criterion 2(A) is consistent with the express language, purpose and policy  
17 underlying that provision. None of those provisions mention the Rural Residential  
18 designation, or suggest either that it can be applied to nonresource land or that it cannot be  
19 applied to nonresource land.

20 In our view, the most revealing context is the prior version of the Rural Residential  
21 map designation element, and the Rural Use map designation element. Context of a statute  
22 or ordinance being construed includes previous versions of the statute or ordinance. *Century*  
23 *Properties, LLC v. City of Corvallis*, 207 Or App 8, 14, 139 P3d 990 (2006). Although the  
24 parties do not discuss it, we note that the 1989 JCCP included versions of both the Rural  
25 Residential and Rural Use map designations, and that the text of those map designations has  
26 been significantly amended since then, apparently in 2004 as part of periodic review overhaul

1 of the JCCP, including significant amendments to the map designation element.<sup>7</sup> In our  
2 view, the changes made between 1989 and 2004 significantly undercut the county’s  
3 interpretation, and strongly support petitioner’s view that in adopting criterion 2(A) and  
4 related changes the county intended to limit the Rural Residential designation to resource  
5 lands subject to Goals 3 and 4, following an exception to those goals, while allowing  
6 residential development on nonresource lands pursuant to the Rural Use designation.

7 The 1989 version of the Rural Residential map designation did not include criterion  
8 2(A). Nor did the 1989 version include the language that now exists in the Rural Residential  
9 purpose statement stating that exceptions to Goals 3, 4 and 14 are required to apply the Rural  
10 Residential designations. Instead, the 1989 Rural Residential designation included criteria  
11 that expressly permitted lands to be designated Rural Residential, if those lands either  
12 “presently designated or qualif[ied] for the Rural Use designation,” or met the exception  
13 criteria under Goal 2.<sup>8</sup> In other words, under the express terms of the 1989 JCCP, there was  
14 no question that the Rural Residential designation could be applied to nonresource lands  
15 designated as Rural Use or that qualify for the Rural Use designation. Significantly, the  
16 county amended the Rural Residential map designation element to *eliminate* the 1989  
17 language providing that the Rural Residential designation can be applied to lands that qualify

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<sup>7</sup> LUBA does not possess a copy of the 1989 JCCP, but an electronic copy is available on the county’s website.

<sup>8</sup> The 1989 JCCP Rural Residential Map Designation provided in relevant part:

“Zoning District Criteria: Criteria A through C, below, all apply when designating lands for Rural Residential use:

- “A) Lands that
  - “i) Are presently designated or qualify for the Rural Use designation; or
  - “ii) Meet the exception criteria as described in OAR 660-004, Interpretation of Goal 2 Exceptions Process, or lie within an urban growth boundary.” (Bold in original).

1 for the Rural Use designation, and replaced it with the current language, including criterion  
2 2(A).

3 It is difficult to imagine any reason why the county would *eliminate* JCCP language  
4 expressly permitting the Rural Residential designation to be applied to nonresource lands,  
5 and in its place adopt language such as that in criterion 2(A) that *prohibits* applying the Rural  
6 Residential designation to lands other than those for which an exception for Goals 3 or 4 has  
7 been justified, that is, resource lands, unless the county intended to limit application of the  
8 Rural Residential designation to resource lands.

9 On the other hand, it is very understandable why the county would choose to amend  
10 the Rural Residential map designation element to limit application of the designation to  
11 resource lands, given the context in which those amendments likely occurred. As noted,  
12 Goal 14 and the administrative rules implementing the goal proscribe establishment of urban  
13 uses on rural land, including residential uses at certain density or intensity. The Rural  
14 Residential plan designation is implemented by RR zoning districts that permit residential  
15 subdivisions on rural land at densities ranging from 2.5 acres to 10 acres. Such residential  
16 densities implicate Goal 14, and require that the county address Goal 14 and either establish  
17 that the density allowed under the proposed plan and zoning designations are consistent with  
18 Goal 14 or justify an exception to the goal.<sup>9</sup>

19 In 2000, the Land Conservation and Development Commission (LCDC) adopted  
20 OAR 660-004-0040, which addresses application of Goal 14 to rural residential areas.  
21 Notably, OAR 660-004-0040 distinguishes between lands intended for rural residential uses  
22 for which an exception to Goals 3 or 4 has been taken, known as “rural residential areas,”

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<sup>9</sup> This is reflected in JCCP Rural Residential Map Designation Element 3(B), which provides that “[z]oning districts permissible within the Rural Residential category may not permit residential densities exceeding one single family residence per ten acres unless otherwise allowed within an acknowledged urban growth boundary, unincorporated community, or where a Goal 14 exception has been taken.”

1 and “nonresource lands,” defined at OAR 660-004-005(3) as land that is not subject to  
2 specified goals, including Goals 3 and 4. OAR 660-004-0040 applies *exclusively* to rural  
3 residential areas, *i.e.*, lands for which an exception to Goals 3 and 4 have been taken. OAR  
4 660-004-0040 expressly does *not* apply to or govern nonresource lands. OAR 660-033-  
5 0040(2)(c)(F).

6 OAR 660-004-0040 in relevant part provides that for rural residential areas  
7 designated after the effective date of the rule, the county must either (1) require that any new  
8 lot or parcel have an area of at least ten acres, or (2) establish a minimum size of at least two  
9 acres for new lots or parcels in accordance with the requirements for an exception to Goal 14.  
10 OAR 660-004-0040(7)(i)(A) and (B). Although we cannot confirm this from the existing  
11 record or the legislation available to us, given the timing of the 2004 amendments it seems  
12 reasonable to surmise that those amendments were intended to conform the Rural Residential  
13 designation and its zones to OAR 660-004-0040, which was adopted in 2000. Because the  
14 rule applies *exclusively* to lands for which exceptions to Goals 3 and 4 have been taken, it  
15 would have made perfect sense to eliminate the old language expressly permitting the Rural  
16 Residential designation to be applied to nonresource lands, and replace it with language such  
17 as that in criterion 2(A), prohibiting application of the designation to land unless an  
18 exception to Goals 3 or 4 has been justified. In other words, it seems highly likely that at  
19 some point after 2000 the county chose to modify its plan map designation and zoning  
20 scheme so that residential use of resource land subject to Goals 3 or 4 is exclusively  
21 governed by the Rural Residential designation and OAR 660-004-0040, while residential use  
22 of nonresource lands is governed by the Rural Use designation, which is expressly designed  
23 for and limited to nonresource lands, and does not require an exception to Goals 3, 4 or 14 to  
24 allow residential uses.<sup>10</sup>

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<sup>10</sup> The Rural Use Map Designation Element states, in relevant part:

1           That intent is also evident from the differences between the 1989 Rural Use  
2 designation and the current Rural Use designation language apparently adopted in 2004. The  
3 1989 Rural Use designation made no mention of Goals 3, 4 or 14 or exceptions to those  
4 goals, and seemed to function largely as a holding designation for nonresource lands until  
5 they can be “rezoned to a more appropriate zone.” Under the 1989 Rural Residential map  
6 designation element, land could first be designated as Rural Use, and then re-designated and  
7 rezoned to Rural Residential, to permit land divisions for rural residential uses. Subsequent  
8 amendments eliminated that express language. Apparently at the same time, the Rural Use  
9 designation was also amended to make it explicitly clear that the Rural Use designation is  
10 restricted to lands not subject to Goals 3 or 4, and cannot be applied to lands for which  
11 exceptions to Goals 3 or 4 have been taken. Taken together, the unmistakable impression  
12 from these amendments is that the county intended to eliminate the old scheme under which  
13 the Rural Residential designation could be applied to nonresource lands that are designated  
14 Rural Use or qualify for designation as Rural Use, and consistent with OAR 660-004-0040

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“1)       Purpose: *The Rural Use designation is provided for lands outside urban growth boundaries or unincorporated community boundaries that are not deemed to be Forestry/Open Space or Agricultural lands as set forth in this Comprehensive Plan and Statewide Planning Goals 3 and/or 4. This designation is only applied where very low intensity rural development is found to be appropriate over the foreseeable future due to topographic, environmental, natural hazard, public access, or needed public service constraints. This designation is not intended for exception areas established pursuant Statewide Planning Goal 2 where Goals 3, 4 or 14 would otherwise be applicable.*

“2)       Map Designation Criteria: In the existing Agricultural Land and Forestry/Open Space Comprehensive Plan map designations, Statewide Planning Goals 3 and/or 4 apply to the areas so designated unless the applicant can demonstrate otherwise. The burden is on the applicant to demonstrate to the County that Goals 3 and 4 are inapplicable based on all of the following criteria:

“A)       The proposed Rural Use site does not meet the definitions of ‘Agricultural Land’ and ‘Forest Lands’ contained in the Statewide Planning Goals, and as set forth in the Definitions Element, Map Designations Element, Agricultural Lands Element, and the Forest Lands Element of the Jackson County Comprehensive Plan.” (Emphases added.)



1 adopt a new scheme with a clear “fork in the road,” under which rural residential areas  
2 subject to OAR 660-004-0040 are exclusively governed by the Rural Residential designation  
3 and its implementing zones, while residential development of nonresource lands not subject  
4 to the rule are exclusively governed by the Rural Use designation and its implementing zone.

5 An additional indication of that intent is based on subsequent amendments to the  
6 Rural Use designation. In 2006, the county amended the Rural Use map designation element  
7 and created several new zones implementing that designation, to permit residential land  
8 divisions at densities of 20 acres, 30 acres and 40 acres. The record includes legislative  
9 history from the 2006 amendments, submitted by petitioner. Record 103-112. The county  
10 declined to consider that legislative history, because it is not legislative history of criterion  
11 2(A) or the Rural Residential designation, but instead history of amendments to the Rural  
12 Use designation.<sup>11</sup> The county’s refusal to consider that legislative history is challenged  
13 under the second sub-assignment of error, which we do not address here. However, for  
14 present purposes we see no error in considering that legislative history for purposes of  
15 understanding the intent behind the 2006 amendments to the Rural Use designation, at the  
16 level of text and context. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (under  
17 ORS 174.020(3), a court may consider legislative history offered by the parties when  
18 considering text and context, giving that history such weight as it appears to merit).<sup>12</sup>  
19 Understanding the intent of those 2006 Rural Use amendments may be helpful, because as  
20 explained above the Rural Use designation is part of a scheme that appears to assign distinct  
21 and perhaps exclusive roles to the Rural Residential and Rural Use designations.

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<sup>11</sup> The county was apparently advised that no legislative history of the Rural Residential designation itself exists.

<sup>12</sup> Although ORS 174.020 pertains to interpretation of statutes, courts also apply them in construing ordinances. *Western Land & Cattle, Inc. v. Umatilla County*, 270 Or App 202, 210, 214 P3d 68 (2009).

1 The legislative history of the 2006 amendments includes a memorandum dated May  
2 11, 2006 from the county's land use consultant to the commissioners. That consultant  
3 apparently was also the lead staff with respect to the 2004 amendments. In the  
4 memorandum, the consultant advised the commissioners:

5 "The Rural Residential Rule (OAR 660-004-0040) is applicable to lands that  
6 are not within an urban growth boundary, that are placed and zoned primarily  
7 for residential uses, and for which an exception to Statewide Planning Goal 3  
8 (Agricultural Lands), Goal 4 (Forest Lands), or both has been taken.  
9 (Emphasis added). Such lands are referred to in the rule as *rural residential*  
10 *areas*. That is to say, lands for which an exception to Statewide Planning  
11 Goals 3 and 4 is not required (non-resource lands) are not subject to the rural  
12 residential rule. For this reason, the Map Designations Element of the [JCCP]  
13 does not provide a mechanism for obtaining a Rural Residential designation  
14 for Rural Use qualified lands. *See* Rural Residential Land Map Designation  
15 Criterion 2(A). This was a contentious issue that the Board and Planning  
16 Commission will well remember. Non-resource qualified lands may be  
17 designated Rural Use Land, Commercial Land with Rural Service  
18 Commercial zoning, or Industrial Land as qualified and pursuant to the Map  
19 Designations Element." Record 103 (underline and italics in original).

20 As far as we can tell, the perceived problem that motivated the 2006 amendments was  
21 the fact that the old scheme, whereby nonresource lands could be freely designated Rural  
22 Residential, was no longer operative, which meant that applicants with land that qualified as  
23 nonresource land could not further divide the land for residential use. The perceived solution  
24 was to amend the Rural Use designation and create new RU implementing zones that allow  
25 land division for residential use on nonresource land, but at densities that clearly do not  
26 implicate Goal 14, which the county ultimately did. That solution makes sense if indeed the  
27 county understood in 2006 that under the new scheme nonresource land could not  
28 redesignated Rural Residential and take advantage of the RR zones. That solution makes no  
29 sense if nonresource land can be freely designated Rural Residential, which is the effect of  
30 the county's interpretation. While the foregoing legislative history is not probative of the  
31 meaning of criterion 2(A) or the Rural Residential designation language or the intent of the  
32 county when those provisions were adopted, it does tend to confirm that the Rural Use

1 designation is intended to operate within a scheme in which it plays a separate, mutually  
2 exclusive role in tandem with the Rural Residential designation.

3 That scheme is entirely undermined by the county's interpretation of criterion 2(A).  
4 Under the county's interpretation, an applicant to redesignate nonresource land to allow  
5 residential use could freely choose to apply for either the Rural Residential designation or the  
6 Rural Use designation, with the only apparent difference being the density at which  
7 residences can develop. But if Rural Residential is not limited to farm and forest lands for  
8 which an exception to Goal 3 or 4 has been justified, and nonresource lands can be freely  
9 designated as Rural Residential, it is not clear why the Rural Use designation exists at all.

10 Petitioner's interpretation, on the other hand, is entirely consistent with that scheme,  
11 and the foregoing context. In sum, while the text of criterion 2(A) itself might be somewhat  
12 ambiguous, considered in context it is simply not plausible to interpret criterion 2(A) to allow  
13 the Rural Residential designation to be applied to nonresource lands not subject to Goals 3 or  
14 4. We conclude that the county's interpretation is inconsistent with criterion 2(A)'s express  
15 language, purpose and underlying policy. ORS 197.829(1)(a)-(c). Further, given that the  
16 Rural Residential provisions were apparently intended to comply with OAR 660-004-0040,  
17 and that rule applies exclusively to lands subject to Goals 3 or 4 to which an exception has  
18 been taken, the county's interpretation is arguably contrary to the administrative rule that the  
19 Rural Residential provisions implement.<sup>13</sup> ORS 197.829(1)(d). Accordingly, we cannot  
20 affirm the county's interpretation under ORS 197.829(1).

21 The first subassignment of error is sustained.

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<sup>13</sup> For example, it is not clear to us that it would be consistent with the rule for a county to apply a RR zone that implements the rule to nonresource lands not governed by the rule. OAR 660-004-0040 provides a safe harbor of sorts for purposes of applying Goal 14 to rural residential development. Residential development of nonresource lands is not governed by the rule, but is nonetheless subject to the direct requirements of Goal 14, and may require an exception to Goal 14. It is not clear whether and how the county considers and applies Goal 14, in applying an RR zone that implements the rule.

1           **B.       Second and Third Subassignments of Error**

2           In the second subassignment of error, petitioner argues that the county erred in  
3 refusing to consider local legislative history from 2006 amendments to Rural Use Map  
4 Designation provisions, some of which was discussed above. However, petitioner identifies  
5 no statute, rule or other authority that *obligates* the county to consider local legislative  
6 history in interpreting its legislation, however useful or not it may be, or that makes refusal to  
7 consider local legislative history a reversible error in itself. In any case, given our  
8 disposition of the first subassignment of error, there is no need to address the arguments  
9 under the second subassignment of error.

10           In the third subassignment of error, petitioner argues that the county misconstrued the  
11 “common law” by relying on decisions from other counties that allow Rural Residential  
12 zoning without taking an exception. Again, given our disposition of the first subassignment  
13 of error we need not address the arguments under this subassignment of error. We do not  
14 reach the second and third subassignments of error.

15           **CONCLUSION**

16           For the foregoing reasons, the county misinterpreted its comprehensive plan  
17 provisions to allow land not subject to Goals 3 or 4 to be redesignated to Rural Residential.  
18 Because it is undisputed that the subject property is not farm or forest land subject to Goals 3  
19 or 4, the county erred in redesignating the subject property to Rural Residential. If the  
20 county wishes to allow owners of nonresource lands to choose between Rural Residential and  
21 Rural Use designations, it must amend its comprehensive plan to allow that choice. Under  
22 the existing comprehensive plan, the “decision violates a provision of applicable law and is  
23 prohibited as a matter of law,” and we must reverse the decision. OAR 661-010-0071(1)(c).

24           Accordingly, the county’s decision is reversed.