BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

ANTHONY ACETI,
and STEVE MULKEY
Intervenors-Respondents.

LUBA No. 2016-012

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Carol Macbeth, Bend, filed the petition for review and argued on behalf of petitioner.

No Appearance by Deschutes County.

Dan Terrell, Eugene, filed the response brief and argued on behalf of intervener-respondent Anthony Aceti. With him on the brief was the Law Office of Bill Kloos, PC.

Steve Mulkey, Bend, represented himself.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 8/10/16

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals amendments to a county comprehensive plan map and zoning map and the adoption of an exception to Statewide Planning Goal 14 (Urbanization) for two tax lots located between the cities of Bend and Redmond, next to Highway 97 at Deschutes Junction.

MOTIONS FOR REPLY BRIEF

Petitioner moves to file a reply brief. The motion is unopposed and the motion is granted.

FACTS

Intervenor-Respondent Anthony Aceti (intervenor) owns the subject 21.59 acres. The decision challenged in this appeal changes the comprehensive plan map designation for the property from Agriculture to Rural Industrial and changes the zoning from Exclusive Farm Use Tumalo/Bend Subzone (EFU) to Rural Industrial Zone. The challenged decision also approves an irrevocably committed exception to Goal 14.

The subject property consists of tax lots 201 and 104. A map of the property is attached as an appendix to this opinion. Tax lot 201 makes up the bulk of the property. Southbound Highway 97 on-off ramps and approach form the northern boundary of the subject property. The subject property is bordered by Highway 97 on the east. Tumalo Road bisects tax lot 201 and passes over Highway 97. The property to the west is improved with a school. The subject

property is spotted with sparse stubble left from a failed hay crop fifteen years ago. A recent site-specific soil survey determined that subject property has predominantly poor quality soils. The property is generally level with an existing warehouse and gravel parking lot located on the northern part of Tax Lot near Tax Lot 104 and the intersection of the Highway 97 on-off ramps and Tumalo Road.

On October 1, 2015, a hearings officer issued an eighty-one page decision recommending approval of an irrevocably committed exception to Goal 14 and the comprehensive plan and zoning map amendments. The board of county commissioners held a de novo public hearing on the application, and on January 6, 2016 approved the Goal 14 exception and amendments to the plan and zoning map, and incorporated the hearings officer's decision as findings.

FIRST ASSIGNMENT OF ERROR

OAR 660-033-0020(1) defines "Agricultural land," as that term is used in Goal 3 (Agricultural Lands), to include land that is (1) classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-VI soils in Eastern Oregon, (2) land in other soil classes that is suitable for farm use, considering several specified factors, (3) land required to allow farm practices to be carried out on adjacent or nearby agricultural lands and (4) land that is adjacent to or intermingled with lands with soil capability classes I-VI

within a farm unit.[1] OAR 660-033-0030(2) clarifies that in making the first determination (predominant soil classification) the appropriate focus is on the 21-acre property, but in determining if land that falls outside the requisite soil classifications is nevertheless suitable for farm use (OAR 660-033-0020(1)(a)(B)) or "necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands" the focus is broader than the individual

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

> "(a) 'Agricultural Land' as defined in Goal 3 includes:
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> > "(A) Lands classified by [NRCS] as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;
> >
> > "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and
> >
> > "(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.
>
> "(b) Land in capability classes other than I-IV/I-VI that is adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed;
>
> "(c) 'Agricultural Land' does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4."

property under consideration.[2] The county determined that the subject property does not qualify as agricultural land:

> "Substantial evidence in the record supports a finding that the property is not Agricultural Land as it consists of predominantly Class VII and VIII soils and is further unsuitable for farm use considering profitability and factors in the Goal 3 administrative rule, including, among other things, difficulties associated with irrigating the property, impacts of nearby heavy traffic and transportation, the bisection of the property with the construction of Tumalo Road, surrounding commercial and industrial uses, and the relatively small size of the parcel." Record 58.

Petitioner argues that the county erred in a number of ways when it determined that the subject property is not agricultural land.

LUBA's standard of review is set out at ORS 197.835(9).[3] Before turning to petitioner's specific arguments, we note that petitioner generally

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[2] OAR 660-033-0030(2) provides:

> "When a jurisdiction determines the predominant soil capability classification of a lot or parcel it need only look to the land within the lot or parcel being inventoried. However, whether land is 'suitable for farm use' requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the lot or parcel being inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural 'Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands.' A determination that a lot or parcel is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in 660-033-0020(1)."

appears to argue that there is evidence a reasonable decision maker could have relied on to conclude that the subject property *is made up of Class I through IV soils* and therefore qualifies as agricultural land under OAR 660-033-0020(1)(a)(A). *See* n 1. That is not the issue on appeal. In deciding whether the county's decision must be remanded under ORS 197.835(9)(a)(C), because it is "not supported by substantial evidence in the whole record," the question is whether the evidence the county relied on to conclude the property *is not made up of Class I through IV soils* is supported by substantial evidence, *i.e.*, evidence a reasonable person would believe. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). If we conclude that the county's conclusion is

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[3] ORS 197.835(9) provides in relevant part:

> " * * * [LUBA] shall reverse or remand the land use decision under review if the board finds:
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> > "(a) The local government or special district:
> >
> > > "(A) Exceeded its jurisdiction;
> > >
> > > "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
> > >
> > > "(C) Made a decision not supported by substantial evidence in the whole record;
> > >
> > > "(D) Improperly construed the applicable law; or
> > >
> > > "(E) Made an unconstitutional decision[.]"

supported by substantial evidence, it does not matter whether the evidentiary record also includes substantial evidence that would support a decision that county did not adopt. *Heceta Water District v. Lane County*, 24 Or LUBA 402, 427 (1993). We also note that petitioner either argues or comes very close to arguing that LUBA should reweigh the evidence regarding the quality of the soils on the property. As intervenor correctly notes, in performing substantial evidence review under ORS 197.835(9)(a)(C), LUBA may not reweigh the evidence. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

A. The Property's Predominant Soils Classification

As noted above, in Eastern Oregon, "[l]ands classified by [NRCS] as predominantly Class * * * I-VI soils" are considered "Agricultural Land." OAR 661-033-0020(1)(a)(A). *See* n 1. Petitioner's first subassignment of error begins on page 12 of the petition for review and continues to the top of page 21 of the petition for review. In this subassignment of error petitioner challenges the county's finding that the subject property is predominantly Class VII and VIII soils and therefore is not agricultural land under OAR 661-033-0020(1)(a)(A). Petitioner argues that the decision is not supported by substantial evidence because the NRCS soil survey identifies the subject property as predominantly Class VI soils, which are Class III soils when irrigated. Petitioner advances four arguments under this subassignment of error: (1) the property's history of irrigated agriculture shows it is agricultural

land, (2) there has been no change in the irrigated status of the property, (3) there has been no change in the soils, and (4) the Borine Study which the county relied on does not establish that the property is predominantly Class VII and VIII soils. We consider petitioner's fourth argument first.

1. The Borine Study

Petitioner recognizes that the county relied on the site-specific Borine Study, which concluded the property is predominately Class VII and VIII soils, but argues that that study is simply incorrect, since the NRCS has not identified any acreage of capability Class VII and Class VIII soils in the entire irrigated farmland base of the NRCS Upper Deschutes subbase hydrologic unit. According to the NRCS that unit includes Classes III, IV, and VI soils. Based predominantly on the NRCS determinations and past irrigation and farming practices on the property, petitioner asserts that the county's findings that the soils are Class VII and VIII are defective because they are inconsistent with the NRCS evidence in the record. Specifically, at oral argument, petitioner stressed that the evidence it relies on supports its position that it is highly unlikely that the soils are Class VII or worse because no rational person would irrigate and attempt to grow hay on soils that are so poor they would not appreciably benefit from irrigation. If we understand petitioner correctly, since it is not disputed that the property has been irrigated in the past, and hay crops were raised on the property, petitioner contends that it follows that the property could not be predominantly Class VII and VIII soils.

Intervenor responds that notwithstanding NRCS's determination, the Borine Study is substantial evidence to support the county's determination that the subject property is not agricultural land. The Borine Study consists of a site-specific soils analysis that included 43 soil data points,[4] five transects[5] and 276 site observations. The study was prepared by Roger Borine, a certified professional soils classifier. The Borine Study concluded that approximately eighty percent of the subject property is Land Capability Class VII and VIII soils, and twenty percent is Land Capability Class III - VI soils. Accordingly, Borine determined that the subject property is not predominantly Class I through VI soils. Intervenor notes that OAR 660-033-0030 permits the use of more detailed data on soil capability than provided by NRCS soil maps to define agricultural land.[6] Further, the Department of Land Conservation and

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[4] At these data points, the soils were excavated with a backhoe or shovel. Record 1358.

[5] The transects are shown at Record 1362.

[6] OAR 660-033-0030(5) provides in relevant part:

> "(a) More detailed data on soil capability than is contained in the [NRCS] soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.
>
> "(b) If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the NRCS * * * would assist a county to make a better

Development (DLCD) certified the Borine Study. Record 1373. Intervenor also points out that even if owners of the property were able to grow some hay on the property in the past in conjunction with a larger haying operation on a much larger farm unit, that does not necessarily mean the Borine Study's conclusions are not substantial evidence that the soils on the 21-acre property are predominantly Class VII and VIII.

We agree with intervenor. The Borine Study is evidence a reasonable person would rely on and the county was entitled to rely on it. As intervenor notes, the NRCS maps are intended for use at a higher landscape level and include the express statement "Warning: Soil Ratings may not be valid at this scale." Record 316. Conversely, the Borine Study extensively studied the site with multiple on-site observations and the study's conclusions are uncontradicted, other than by petitioner's conclusions based on historical farm use of the property. This study supports the county's conclusion that the site is not predominantly Class VI soils.

2. History of Irrigation/No Change in Irrigation Status

The property apparently has between 15 and 19 acres of water rights, and has held those water rights since at least 1968. As recently as 1996, the

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> determination of whether land qualifies as agricultural land, the person must request that the [Department of Land Conservation and Development] arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045."

property was irrigated to produce hay. In its second and third arguments under this subassignment of error, petitioner argues this history establishes that the subject property qualifies as agricultural land. Petitioner argues the county erroneously found that there has been a change in irrigation status when it determined that "[t]he land has not been irrigated since the overpass was constructed and cut through the established irrigation system." Record 44. Petitioner argues that there is no reason that the land cannot be irrigated because it was irrigated until at least 1996.

Intervenor responds that the decision actually identifies a number of changed circumstances that make irrigation of the subject property problematic and of questionable value:

> "[W]hile petitioner's quoted findings implies that there was only one change in circumstance, the findings actually contain two pages of specific findings regarding historic changes to the near-by irrigation system * * *. Those findings include, among other things: the practical destruction of the closest irrigation pond due to ODOT widening Highway 97 in 1991; the creation of the replacement irrigation pond located downhill and half a mile away on Half Mile Lane, the refusal of the seller or new property owners of Tax Lot 1100 to [grant] an easement to convey water to the subject property in 2006 when the Barretts sold the land on which the new pond is located; the lack of an easement across Tax lot 1200 abutting the subject property; the Intervenor's failed 2003 attempt to construct a new irrigation pond on the subject property; the reduction of irrigation rights from 21.4 acres in 1995 to 16 acres in 2015 and the construction of the approach to the Deschutes Junction Overpass across the subject property making it necessary to use hand lines rather than wheel lines, even if water is available. * * *" Intervenor-Respondent's Brief 24-25.

We agree with intervenor that there is substantial evidence in the record that irrigating the subject property would have to overcome a number of obstacles and would not likely produce enough in the way of increased production to make such irrigation practical. More to the point, intervenor argues the Borine Report shows that the predominant Class VII and VIII soils on the property remain Class VII and VIII soils even if they were irrigated. Record 1329 (Table 2-Order 1 Soils Survey Map Units and Interpretations). In other words, even with irrigation, the subject property would not qualify as agricultural land under OAR 661-033-0020(1)(a)(A). Petitioner's irrigation arguments do not establish that the county erred in finding that the subject property does not qualify as agricultural land under OAR 661-033-0020(1)(a)(A).

3. No Change in Soils

Petitioner's make one additional argument under this subassignment of error:

> "In order for the soil quality on the subject property to drop from irrigated Class III, suitable for crop cultivation, to Class VII and Class VIII, not capable of improvement by irrigation, the soils on the property must have undergone a radical change for the worse. However, there is no evidence of any such change in the interval since the land was last used for irrigated agriculture." Petition for Review 17.

Petitioner's final argument under this subassignment of error is essentially a contention that because NRCS rates the soils on the property as Class III with irrigation and because the property has been used for irrigated

crop production in conjunction with adjoining property in the past, only a change in the physical characteristics of the soils could explain the Borine Study conclusion that the soils are predominantly Class VII and VIII, and that there is no evidence of such a physical change in the soils.

As we have already explained, the differences between NRCS and the Borine Study with regard to their conclusions about the classification of the soils on the property is explained by the high level nature of the NRCS data and the more detailed nature of the Borine Study. Petitioner assigns far too much significance to the historical use of the 21-acre property when it was part of a much larger farm unit.

Petitioner's first subassignment of error is denied.

B. Land In Other Classifications That are Suitable for Farm Use or Adjacent to or Intermingled With Agricultural Land

Petitioner's second subassignment of error, petition for review 21-23, is based on two legal theories. First, under OAR 660-033-0020(1)(a)(B), even if land does not qualify as agricultural land under OAR 660-033-0020(1)(a)(A), because it does not meet the predominantly Class I-VI test, land may qualify as agricultural land "taking into consideration," the factors set out at OAR 660-033-0020(1)(a)(B), which include "accepted farming practices." *See* n 1. Second, under OAR 660-033-0020(1)(b), lands in other classification must be inventoried as agricultural land if they are "adjacent to or intermingled with land in capability classes * * * I-VI within a farm unit * * *." *Id*. We address those legal theories in order.

1. Other Than Class I-VI Lands Taking Into Consideration Farming Practices.

In *Wetherell v. Douglas County*, 62 Or LUBA 80, 83 (2010), LUBA explained:

> "The 'suitable for farm use' test in OAR 660-033-0020(1)(a)(B) refers to the definition of 'farm use' at ORS 215.203(2)(a), which in relevant part means 'the current employment of land for the primary purpose of obtaining a profit in money' by engaging in a number of listed agricultural pursuits, including the 'feeding, breeding, management and sale of, or the produce of, livestock.' For purposes of determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B), a factor that a local government may consider in addition to the seven factors listed in the rule is whether a reasonable farmer would be motivated to put the land to agricultural use, including grazing, for the primary purpose of obtaining a profit in money. *See Wetherell v. Douglas County* (*Great American Properties*), 342 Or 666, 160 P3d 614 (2007) (invalidating an administrative rule that prohibited consideration of profitability). *See also Wetherell v. Douglas County* (*Garden Valley Estates*), 60 Or LUBA 131, 137-147 (2009), *aff'd* 235 Or App 246, 230 P3d 976 (2010) (describing limitations on the analysis of profitability)."

In three pages of analysis, the county determined that based on the listed factors, the subject property is not agricultural land under OAR 660-033-0020(1)(a)(B). Record 58-60.

Petitioner argues that the county only provided a cursory analysis of accepted farm practices, and erred in failing to consider what accepted farm practices neighboring farmers may use to cultivate their own soils for irrigated agriculture, where such neighboring farmland includes similar soils identified by NRCS that are also located on the subject property. The county's findings on accepted farming practices are:

"The applicant states the following in the burden of proof statement:

> "'It is not an accepted farm practice in Central Oregon to irrigate and cultivate poor quality Class VII and VIII soils—particularly where, as here, those soils are adjacent to rural industrial uses, urban density residential neighborhoods that complain about dust and chemicals and to high traffic counts on the surrounding roads and highways. Irrigating rock is not productive.'

"Substantial evidence in the record shows that the subject property does not constitute 'agricultural land' under the Goal 3 administrative rule factors first because it is comprised of Class VI and VII soils, and second, based on a consideration [of] each of the following factors, addressed by the Borine report: soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farm practices." Record 60-61 (original italics omitted).

Intervenor further points to evidence in the record demonstrating that area farmers have considered and rejected using the subject property as part of a farming operation for growing crops and raising cattle, citing testimony of Wierbach (Record 807), Galazzo (Record 811) and Juhl (Record 804-806).

The county's findings regarding OAR 660-033-0020(1)(a)(B) are adequate and supported by substantial evidence. The county determined that commercial agricultural uses in the vicinity are limited, and found that it is not an accepted farm practice to irrigate and cultivate Class VII and VIII soils. Those finding are supported by the record and are sufficient to explain why the county concluded the subject property need not be inventoried as agricultural land under OAR 660-033-0020(1)(a)(B).

2. Land Adjacent To or Intermingled with Lands in a Farm Unit

Under OAR 660-033-0020(1)(b), lands that do not qualify as Class I-VI agricultural lands must nevertheless be inventoried as agricultural land if they are "adjacent to or intermingled with land in capability classes * * * I-VI within a farm unit * * *." The county found that "the subject property is predominantly class VII and VIII soils and would not be considered a farm unit itself nor part of a larger farm unit based on the poor soils and the fact that none of the adjacent property is farmed." Record 62. Petitioner asserts that the subject property was managed as part of a farm unit for almost a century and just because intervenor ceased to manage the parcel as farmland for some time that does not mean the subject property does not qualify as land that is adjacent to or intermingled with agricultural land within a farm unit.

Intervenor disputes petitioner's assertion that the property has been managed as part of a farm unit for almost a century, noting that petitioner only cites its own testimony in support of that position, and that there is conflicting evidence in the record, including evidence that irrigation water was not supplied to the property until 1968. Citing *Riggs v. Douglas County*, 167 Or App 1, 1 P3d 1042 (2000), intervenor argues that although a property may have once been used for farming in conjunction with other parcels as part of a larger farm unit, under the same or different ownership, that does not necessarily mean the property is presently part of a farm unit.

Intervenor argues the purpose of the OAR 660-033-0020(1)(b) farm unit requirement is to preserve and protect large blocks of land for agricultural use. *DLCD v. Curry County*, 132 Or App 393, 398, 888 P2d 592 (1995). Intervenor contends that the property is comparatively small for eastern Oregon at 21.59 acres, and there is a major highway bisecting the parcel that makes it much more difficult to put to farm use. Intervenor contends that the property never contributed significantly to any of the larger farming operations it was a part of in the past. Finally, and most importantly, intervenor points out the subject property is not adjacent to or intermingled with any property that currently constitutes a farm unit. We agree with intervenor.

Petitioner has not shown that the county erred in determining that the property does not qualify as agricultural land under OAR 660-033-0020(1)(b). This sub-assignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county erred by approving an irrevocably committed exception to Goal 14 for the subject property.

A. Waiver

Intervenor initially responds that petitioner waived its right to raise the Goal 14 issues presented in the second assignment of error, because it failed to raise the issues to the county board of commissioners. Intervenor notes that LUBA's scope of review at ORS 197.825(2)(a) provides that LUBA

jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]" As clarified in *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003), the ORS 197.825 exhaustion requirement works in conjunction with the "raise it or waive it" provision at ORS 197.763.[7] Because the county board adopted the hearings officer's decision, intervenor argues petitioner was required to present to the board the Goal 14 exception issue that it raises in its second assignment of error. Intervenor argues petitioner failed to do so.

Citing *Lowery v. City of Portland*, 68 Or LUBA 339 (2013), petitioner argues that a petitioner adequately raises an issue under ORS 197.763(1) and ORS 197.835(3) by either citing the relevant legal standard, presenting argument that includes the operative terms of the legal standard, or taking actions to raise the issue such that the local government knows or should have known that the issue is one that needs to be addressed in its decision. Petitioner submitted an eighteen-page letter to the board of commissioners that contests

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[7] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

the hearings officer's decision and urges denial of the application for a number of reasons. Record 558-75. At Record 572, the title "Exceptions" appears, followed by two single-spaced pages of analysis. Petitioner stated "No irrevocably committed exception is available because * * * the surrounding land uses remain as they have been for the decades, overwhelmingly agricultural and rural residential." Record 573. Petitioner continued,

> "Here, the applicant's rationale for approval essentially argues that the statewide planning goals that protect farmland for farm uses *and direct urban development to land inside urban growth boundaries* should not apply because, in essence, there is a highway to the east and the land is at an intersection. These conditions were not sufficient to change the zoning on the subject property in the past and are not changed since then. The subject property is surrounded, except to the north, by EFU land, which stretches on both sides of the highway. *This is not a sufficient basis for an exception to Goals 3 and 14*." Record 574 (emphases added).

Petitioner argues the above is sufficient to preserve the Goal 14 irrevocably committed exception challenge raised in the second assignment of error. We agree with petitioner.

B. ORS 197.732 and OAR 660-014-0030

ORS 197.732(2)(b) provides that a local government may approve an exception to a statewide planning goal if "[t]he land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission [LCDC] rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]" OAR 660-014-0030 is LCDC rule that

governs approval of irrevocably committed exceptions to Goal 14 to allow urban uses of rural land. OAR 660-014-0030(3) and (4) are the most relevant for purposes of the second assignment of error.[8] OAR 660-014-0030(3) sets out four factors that must be considered in granting an irrevocably committed exception to Goal 14. *See* n 8. OAR 660-014-0030(4) then makes it clear that (1) an irrevocably committed exception to Goal 14 must be based on all the OAR 660-014-0030(3) factors and (2) there must be a statement of reasons

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[8] OAR 660-014-0030(3) and (4) provide:

> "(3) A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following:
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> "(a) Size and extent of commercial and industrial uses;
>
> "(b) Location, number and density of residential dwellings;
>
> "(c) Location of urban levels of facilities and services; including at least public water and sewer facilities; and
>
> "(d) Parcel sizes and ownership patterns.
>
> "(4) A conclusion that rural land is irrevocably committed to urban development shall be based on all of the factors listed in section (3) of this rule. *The conclusion shall be supported by a statement of reasons explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development*." (Emphasis added.)

explaining why the facts found in addressing the OAR 660-014-0030(3) factors support a conclusion that the land is committed to urban rather than rural development.

The county adopted findings addressing all of the OAR 660-014-0030(3) factors: Record 94-95. Petitioner argues that a large number of the "facts" the county found are not supported by the record. We need not and do not attempt to resolve all the parties' factual disputes, which are in many cases are largely semantic.[9] Even if we assume the facts stated by the county are accurately stated and supported by substantial evidence in the record, there is a fundamental flaw in the county's Goal 14 exception. The county must do more than address all the factors set out at OAR 660-014-0030(3) and adopt findings of fact. OAR 660-014-0030(4) requires "a statement of reason explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development." That explanation for why the facts the county found support a conclusion that the property is committed to urban use is entirely missing.

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[9] For example the hearings official found "[c]ommercial, industrial, wholesale, and retail businesses now surround the property on its northern and eastern side and a school [is located] on the western side." Record 45. Although it is undisputed that there is rural industrial development across Highway 97 from the property's eastern boundary and rural commercial development at the northeast corner of the property, petitioner disputes that the property is "surrounded" by commercial or industrial development. Petition for Review 36.

That the required explanation for why the property is irrevocably committed to urban uses is entirely missing is hardly surprising. The subject property is located in the vicinity of a variety of farm and rural non-farm uses and is bordered by Highway 97 and divided by Tumalo Road. In the abstract it is difficult to see how being surrounded by rural uses and roadways could ever irrevocably commit *rural* land to *urban* uses, since that requires a finding that "all rural uses, are impracticable." *VinCEP v. Yamhill County*, 215 Or App 414, 425, 171 P3d 368 (2007), *quoting 1000 Friends of Oregon v. LCDC* (*Curry County*), 301 Or 447, 485, 724 P2d 268 (1986). We see no reason why at least some of the rural uses in the vicinity of the subject property could not also be developed on the subject property. In a similar vein, the challenged decision applies the Rural Industrial Zone to the property. As explained below, the Rural Industrial Zone was adopted to allow rural industrial uses and ensure the uses allowed in the Rural Industrial Zone are rural rather than urban in nature. To approve a committed exception to Goal 14 to allow urban uses of the property (because all rural uses are impracticable) and then apply a zoning district that was adopted to limit industrial uses to rural industrial uses would appear on its face to be inconsistent.

Whether approving an irrevocably committed exception to Goal 14 to allow urban uses of rural land and then applying a zone that was adopted to limit industrial uses to rural industrial uses is inconsistent or not, if the county wants to approve an irrevocably committed exception to Goal 14, it must

supply the reasoning that supports the conclusion that the rural use of the property is impracticable, with the result that it is committed to urban uses. That reasoning is missing, and remand is therefore required.

C. Intervenor-Respondent's Argument

Schaffer v. Jackson County, 17 Or LUBA 922 (1989), concerned a comprehensive plan and zoning map amendment to authorize a proposed asphalt batch plant. In that appeal and a prior *Schaffer* appeal, an issue arose concerning whether the proposed asphalt batch plant was correctly viewed as an urban use rather than a rural use, and thus required an exception to Goal 14 to be located outside a UGB. In that circumstance, LUBA explained the county was obligated to "[1] demonstrate that the proposed use is rural, [2] include the subject site within a UGB or [3] take an exception to Goal 14." *Id*. at 944. Despite the fact that the county actually approved an irrevocably committed exception to Goal 14 in this case, intervenor argues the county took the first of the *Shaffer* options:

> "Here despite the fact the County framed its actions using the terminology of an 'exception' to Goal 14, * * * the County's stated purpose for going through the Goal 14 'exceptions' process was 'to assure the subject site is not developed with 'urban' uses.'
>
> "The decision imposed two conditions of approval * * * that restrict[] use of the property to outright permitted and conditional uses allowed in the Rural Industrial zone, expressly prohibit[] pulp and paper manufacturing uses on the property, and require[] new land use applications and review for any change to the plan amendment or zoning. * * *

"As the Hearings Official found, and the County Board adopted, the Rural Industrial plan and zone designations are rural uses. The decision provides:

> "'FINDINGS: The comprehensive plan has the following language for the rural industrial zone:
>
> "'Rural Industrial
>
> "'The Rural Industrial plan designation applies to specific exception areas located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation brings these areas into compliance with state rules by adopting zoning to ensure they remain rural and that uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.
>
> "'Section 18.100.010 states the purpose of the RI Zone is:
>
> "'. . . to encourage employment opportunities in rural areas and to promote the appropriate economic development of rural service centers which are rapidly becoming urbanized and soon to be full-service incorporated cities, while protecting the existing rural character of the area as well as preserving or enhancing the air, water and land resources of the area."[10]

"The County's Rural Industrial Zone provisions * * * not only severely limit the range of permitted and conditional uses, they provide additional use and dimensional limitations to include maximum building sizes. * * * These provisions have been acknowledged as consistent with the Statewide Planning Goals, to

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[10] The copy of Section 18.100.010 attached to intervenor-respondent's brief does not include the quoted language.

> include Goal 14 Urbanization. The County's RI zone does not allow the types of intensive, urban industrial uses that necessitate an exception to Goal 14 such as the RPID zone in *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171, 212-14 (2014) or the RLI zone in *Shaffer*, 17 Or LUBA at 931 because the industrial use is tied to an on-site resource. The county's RI uses are limited to rural uses.
>
> "In short, what the County in fact did was follow the first *Shaffer* approach – to limit the proposed use to rural uses – instead of following through on the third Shaffer approach, taking an exception to Goal 14 to allow urban uses.
>
> "At no point during the local proceedings did Petitioner allege or in any way argue that the uses permitted under the County's Rural Industrial (RI) zone were urban uses or would represent urban uses on rural land. Petitioner alleges for the first time at LUBA that the decision allows urban uses on rural land. Petitioner has waived the right to raise that issue." Intervenor-Respondent's Brief 48-49 (original italics omitted).

Before turning to the merits of the above argument, we reject intervenor's contention that petitioner has waived its right to argue that the RI zone allows urban uses. The hearings officer was concerned that the RI zone might allow urban uses, and that apparently was the reason she approved an irrevocably committed exception to Goal 14 to address that concern. The focus of petitioner's challenge in the second assignment of error is that Goal 14 exception. If the county on remand decides to adopt a different theory, *i.e.*, that the RI zone only allows rural uses and may be applied to the property without an exception to Goal 14, petitioner has not waived its right to challenge that position and it has not waived its right to advance that challenge in this appeal.

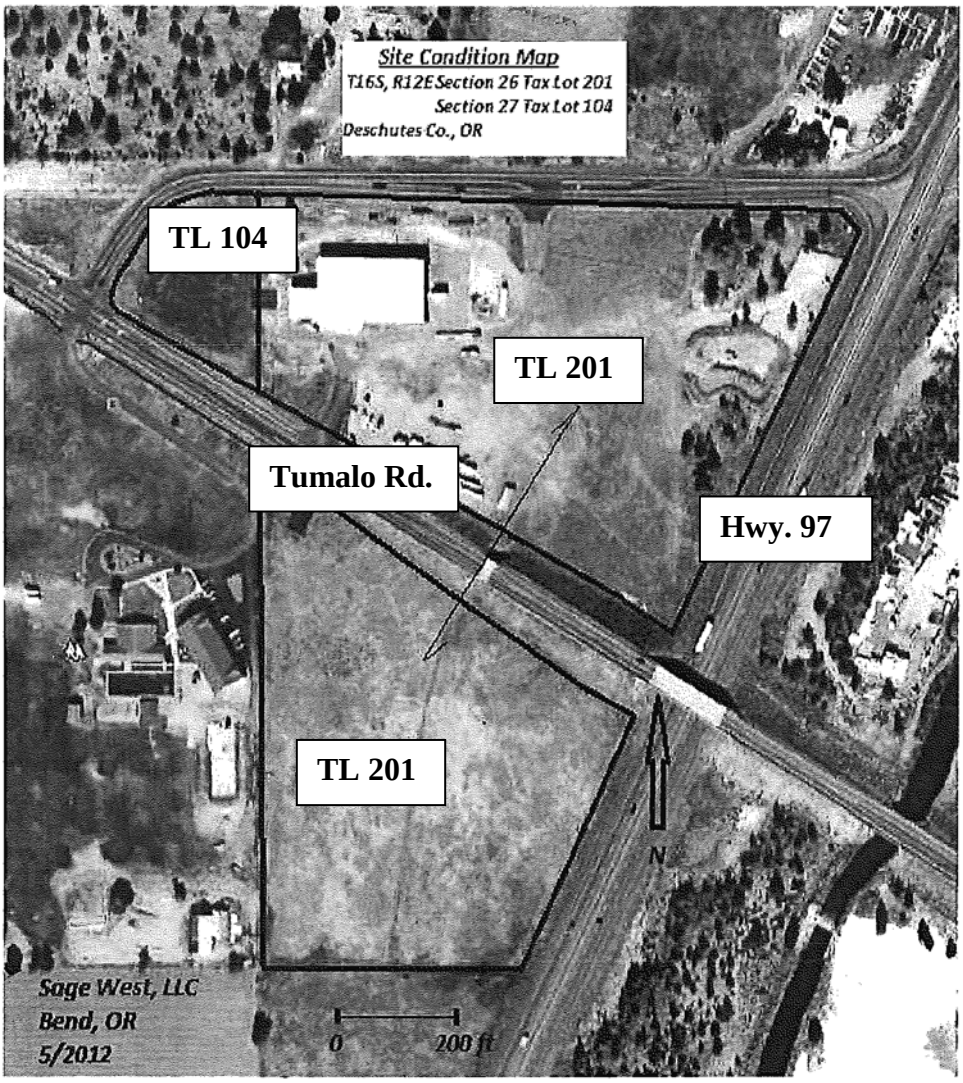
Our reasoning in rejecting intervenor's waiver argument also leads us to reject intervenor's invitation to affirm the county's decision based on a legal theory it did not adopt. The hearings officer's decision does include some language to the effect that the RI zone and the challenged decision, as conditioned, only authorize rural uses. But if that was the hearings officer's legal theory for approving the map amendments it is not stated with anywhere near adequate clarity. What is clear is that the county approved an irrevocably committed exception to Goal 14: "an exception to Goal 14 is required for the proposed plan amendment and zone change." Record 49. The only reason for approving such an exception that we can think of is to authorize urban uses of rural land. The approved exception, had it been affirmed on appeal, would make it irrelevant whether the RI zone allows urban uses. The county did not adopt the legal theory that intervenor-respondent asks us to adopt under the second assignment of error.

Finally, it does appear from the hearings official's decision that she was concerned that some of the uses allowed in the Rural Industrial Zone might be viewed as "'urban' in nature." Record 49. If that was the hearings official's concern, the irrevocably committed exception is at the very least a problematic option for addressing that concern. We say "problematic," because the irrevocably committed exception requires a showing that *all* rural uses are impracticable on the property, rather than other options that would allow a more narrow focus on the potentially urban uses of concern.

The challenged decision only changes the plan and zoning map designations for the property; it does not approve any specific uses on the property. Once any potentially urban uses of concern that might be allowed in the RI zone have been identified, conditions of approval could be imposed to either preclude such urban uses or require approval of a Goal 14 exception in the future before such uses could be authorized in the future. Or if the applicant plans to seek approval for such uses, a more limited "reasons" exception to authorize just those potentially urban uses would seem to offer a far better chance for success than an irrevocably committed exception.

The second assignment of error is sustained.

The county's decision is remanded.


Site Condition Map
T16S, R12E Section 26 Tax Lot 201
Section 27 Tax Lot 104
Deschutes Co., OR
TL 104
TL 201
Tumalo Rd.
Hwy. 97
TL 201
N
Sage West, LLC
Bend, OR
5/2012
0
200 ft

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