

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

12
13
14 OREGON DEPARTMENT OF
15 ENVIRONMENTAL QUALITY,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2016-020

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Deschutes County.

24
25 Paul D. Dewey, Bend, filed the petition for review and argued on behalf
26 of petitioner.

27
28 David Doyle, County Counsel, Bend, filed a response brief on behalf of
29 respondent.

30
31 Diane Lloyd, Assistant Attorney General, Salem, filed a response brief
32 and argued on behalf of intervenor-respondent. With her on the brief was Ellen
33 F. Rosenblum, Attorney General.

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

37
38 REMANDED 11/01/2016

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

NATURE OF THE DECISION

Petitioner appeals a county ordinance adopting a reasons exception to Statewide Planning Goal 11 (Public Facilities and Services) in order to allow sewer systems in rural unincorporated lands in the county.

MOTION TO INTERVENE

The Oregon Department of Environmental Quality (DEQ), an applicant below, moves to intervene on the side of respondent. The motion is allowed.

FACTS

In 2007, DEQ, the Oregon Department of Land Conservation and Development (DLCD), and the United States Geologic Survey (USGS) commenced a study of a 247-square-mile area of southern Deschutes County and northern Klamath County, described sometimes as the “La Pine Sub-basin.” Some aquifers in the study area that supply drinking water for approximately 18,000 residents range from less than two feet to thirty feet below the surface. The study area additionally contains areas with highly porous and permeable soils, with no impervious layer to protect deeper aquifers from nitrate contamination.

The decision explains that approximately 7,000 improved lots spread across both counties currently use a septic system for sanitary waste disposal, and obtain water from the aquifers via individual on-site wells. A GIS analysis identified 3,353 high groundwater lots, of which 2,153 are vacant. 1,823 of

1 those 2,153 vacant lots are zoned Rural Residential – 10 Acre Minimum (RR-
2 10) or RR-10 and Floodplain (FP). Record 129. The 2007 USGS study
3 assumed full build out by 2019 of all lots that could be developed, and
4 concluded that the La Pine Sub-basin is at risk of having nitrate levels
5 exceeding federal and state levels for drinking water at the assumed full build
6 out year of 2019. The 2007 USGS study also concluded those nitrate levels
7 would remain high and eventually dissipate over approximately 140 years after
8 full build out.¹ In 2013, DEQ issued a steering committee report that
9 recommended the installation of sewer systems on the lands identified in the
10 report’s study area. Connection to the new sewer lines, however, would be
11 optional for property owners. Record 125.

12 In 2015, DEQ, DLCD, and the county applied to amend the county’s
13 Comprehensive Plan (DCCP) to take an exception to Statewide Planning Goal
14 11 (Public Facilities and Services). The Goal 11 exception allows the
15 establishment of new sewer systems and the extension of existing sewer

¹ The challenged decision describes the USGS study’s conclusions:

“These studies have generally reached the conclusion that the groundwater aquifer is vulnerable to increasing concentrations of nitrates and other contaminants associated with domestic sewage. The USGS study predicted nitrate concentrations increasing above the federally adopted drinking water standard throughout the area over time. Concentrations would increase for about 140 years after full build-out, at which time more than 9,000 acres would have groundwater concentrations exceeding 10 mg/L.” Record 139.

1 systems on various lands spread over approximately 180 square miles in the
2 county and identified on 18 maps attached to the decision, described as
3 “unsewered areas between Sunriver and the Klamath County border; this area
4 is formally defined as those unincorporated portions of Deschutes County
5 contained in Townships 19S, 20S, 21S, and 22S and Ranges 9E, 10E and 11E,
6 except those areas authorized for sewer.” Record 125.² A series of maps that
7 are part of the ordinance shows that these exception areas generally include
8 relatively small platted lots, but include some larger properties, located
9 generally west of a 25-mile-long section of Highway 97 that extends south
10 from Sunriver past the City of La Pine to the Klamath County border. Record
11 101-19. The planning commission held two public hearings on the proposed
12 exception area and the board of county commissioners held one public hearing.
13 The board of county commissioners adopted Ordinance 2016-007 approving an
14 exception to Goal 11. This appeal followed.

15 **INTRODUCTION**

16 We begin by briefly describing the applicable law. Goal 11 is “[t]o plan
17 and develop a timely, orderly and efficient arrangement of public facilities and
18 services to serve as a framework for urban and rural development.” Goal 11
19 provides, in relevant part:

20 “Local Governments shall not allow the establishment or
21 extension of sewer systems outside urban growth boundaries or

² A township equals 36 square miles.

1 unincorporated community boundaries, or allow extensions of
2 sewer lines from within urban growth boundaries or
3 unincorporated community boundaries to serve land outside those
4 boundaries, except where the new or extended system is the only
5 practicable alternative to mitigate a public health hazard and will
6 not adversely affect farm or forest land.

7 “Local governments may allow residential uses located on certain
8 rural residential lots or parcels inside existing sewer district or
9 sanitary authority boundaries to connect to an existing sewer line
10 under the terms and conditions specified by Commission rules.

11 “Local governments shall not rely upon the presence,
12 establishment, or extension of a water or sewer system to allow
13 residential development of land outside urban growth boundaries
14 or unincorporated community boundaries at a density higher than
15 authorized without service from such a system.”

16 The prohibition in the Goal on new sewer systems and extension of existing
17 sewer systems outside of urban growth boundaries was adopted by LCDC in
18 1994, in response to the Supreme Court’s decision in *1000 Friends of Oregon*
19 *v. LCDC (Curry County)*, 301 Or 447, 724 P2d 268 (1986). As the Court of
20 Appeals explained in *Gisler v. Deschutes County*, 149 Or App 528, 535, 945
21 P2d 1051 (1997):

22 “[T]he overall objectives of [Goal 11] are to regulate development
23 as well as services and facilities, to coordinate development levels
24 with service and facility levels and, together with Goal 14, to
25 channel intensive uses and development to existing urban and
26 urbanizable land first before allowing the conversion of or intense
27 nonresource uses on the rural land that comprises the areas outside
28 UGBs.”

29 “ * * * * *

30 “[T]he requirements of Goal 11 go well beyond the limitation on
31 the location of sewers * * * the goal also regulates the location,

1 pace and direction of residential and other development, and it
2 limits—and requires coordination between—the placement of
3 urban-level development and urban-level services and facilities on
4 rural land * * *.” *Id.* at 535-36.

5 OAR Chapter 660, division 011 implements Goal 11, and like the Goal
6 prohibits the establishment or extension of a sewer system outside a UGB
7 except in limited circumstances.³ OAR 660-011-0060(9) was adopted by
8 LCDC in 2005, and allows the extension of a sewer system outside the UGB
9 where the local government approves a reasons exception to Goal 11 and
10 adopts land use regulations that “prohibit the sewer system from serving any
11 uses or areas other than those justified in the exception.” OAR 660-011-
12 0060(9) provides examples of reasons that could justify an exception to Goal
13 11, including to avoid an “imminent and significant public health hazard.”

³ OAR 660-011-0060(2) provides:

“Except as provided in sections (3), (4), (8), and (9) of this rule,
and consistent with Goal 11, a local government shall not allow:

“(a) The establishment of new sewer systems outside urban
growth boundaries or unincorporated community
boundaries;

“(b) The extension of sewer lines from within urban growth
boundaries or unincorporated community boundaries in
order to serve uses on land outside those boundaries;

“(c) The extension of sewer systems that currently serve land
outside urban growth boundaries and unincorporated
community boundaries in order to serve uses that are
outside such boundaries and are not served by the system on
July 28, 1998.”

1 ORS 197.732(1) and Goal 2, Part II(c) allow a local government to adopt
2 a “reasons” exception to a Goal where, based on consideration of four factors,
3 the local government identifies reasons that “justify why the state policy
4 embodied in the applicable goals should not apply[.]”⁴ ORS 197.732(1)(b)
5 defines “exception” to mean in relevant part “a comprehensive plan provision,
6 including an amendment to an acknowledged comprehensive plan, that * * *
7 [i]s applicable to specific properties or situations and does not establish a
8 planning or zoning policy of general applicability[.]” OAR 660-004-0020(2)
9 sets out and expands on the four factors in Goal 2, Part (II)(c) that must be
10 addressed when adopting a reasons exception. Against that regulatory
11 backdrop, we address petitioner’s assignments of error.

⁴ Goal 2, Part (II)(c) provides the following standards for a reasons exception:

- “(1) Reasons justify why the state policy embodied in the applicable goals should not apply;
- “(2) Areas which do not require a new exception cannot reasonably accommodate the use;
- “(3) The long-term environmental, economic, social and energy consequences resulting from the use of the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
- “(4) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.”

1 **SECOND ASSIGNMENT OF ERROR**

2 OAR 660-011-0060(9) provides:

3 “A local government may allow the establishment of new sewer
4 systems or the extension of sewer lines not otherwise provided for
5 in section (4) of this rule, or allow a use to connect to an existing
6 sewer line not otherwise provided for in section (8) of this rule,
7 provided the standards for an exception to Goal 11 have been met,
8 and provided the local government adopts land use regulations
9 that prohibit the sewer system from serving any uses or areas other
10 than those justified in the exception. Appropriate reasons and facts
11 for an exception to Goal 11 include but are not limited to the
12 following:

13 “(a) The new system, or extension of an existing system, is
14 necessary to avoid an imminent and significant public health
15 hazard that would otherwise result if the sewer service is not
16 provided; and, there is no practicable alternative to the
17 sewer system in order to avoid the imminent public health
18 hazard, or

19 “(b) The extension of an existing sewer system will serve land
20 that, by operation of federal law, is not subject to statewide
21 planning Goal 11 and, if necessary, Goal 14.”⁵

22 In sum, OAR 660-011-0060(9) allows the county to take a reasons exception to
23 Goal 11 “provided the standards for an exception to Goal 11 have been met[.]”

24 The reason the county gave for the exception is that a “public health
25 issue” from nitrate contamination of ground water in the southern part of the
26 county is “inevitable unless sewers can be made potentially available” in the
27 southern part of the county. Record 95. The county reasoned that the

⁵ Subsection (9)(b) of the rule was adopted in 2008.

1 “combination of existing and planned land uses, depth to groundwater, [and]
2 infrastructure needs related to the distribution and disposal of wastewater”
3 make a public health issue “inevitable” but not “imminent.” *Id.*

4 In its second assignment of error, petitioner argues that having
5 concluded that the sewers are not “necessary to avoid an imminent and
6 significant public health hazard that would otherwise result if the sewer service
7 is not provided,” OAR 660-011-0060(9)(a) does not provide a basis to justify
8 the exception. The county and DEQ respond that the two examples included in
9 subsection (9)(a) and (b) are not intended to describe the complete universe of
10 “appropriate reasons and facts” that could warrant a reasons exception to Goal
11 11, and that the county properly relied on OAR 660-011-0060(9) and the
12 reasons exception standards in OAR 660-004-0020 and -0022 as the basis for
13 the exception.

14 Petitioner’s assignment of error requires us to ascertain the meaning of
15 the phrase “appropriate reasons and facts for an exception to Goal 11 include
16 but are not limited to the following[.]” The meaning of an administrative rule is
17 a question of law, governed by the same principles that apply to the
18 interpretation of statutes. *Gunderson, LLC v. City of Portland*, 352 Or 648,
19 662, 290 P3d 803 (2012). We first examine the text and context of the rule to
20 determine the intent of LCDC in adopting the rule. The text of the rule includes
21 the phrase “include but are not limited to” in describing examples of
22 “appropriate reasons and facts” that could justify a reasons exception to Goal

1 11. When they precede a list of examples, statutory terms such as “includes”
2 and “including but not limited to” typically convey an intent that the
3 accompanying examples be read in a nonexclusive sense. *State v. Kurtz*, 350 Or
4 65, 74, 249 P3d 1271 (2011). Our interpretation of the general term
5 “appropriate reasons and facts” includes consideration of the specific examples
6 listed. *Schmidt v. Mt. Angel Abbey*, 347 Or 389, 404, 223 P3d 399 (2009).
7 Accordingly, the listed examples are two examples of “appropriate reasons and
8 facts” that could justify a reasons exception to Goal 11. As examples of
9 “[a]ppropriate reasons and facts for an exception to Goal 11,” OAR 660-011-
10 0060(9)(a) and (b) also provide context for determining the scope of the
11 general term “appropriate reasons and facts,” but they do not state the only
12 “acceptable reasons and facts for an exception to Goal 11” to extend a sewer
13 system into a rural area to solve a public health problem.

14 The administrative rule history supports DEQ’s and the county’s position
15 that the rule is not intended to describe the complete universe of situations that
16 could justify a reasons exception to Goal 11.⁶ The rule history confirms that

⁶ A DLCD staff report to LCDC in preparation for LCDC’s consideration of the rule amendment at its February 2005 meeting explains that the existing rules for a reasons exception at OAR 660-004-0022 can be relied on to establish “appropriate facts and reasons” for a Goal 11 exception:

“The proposal is to provide local governments with an appropriate reason necessary for taking an exception to Goal 11. The proposed term ‘avoid an imminent and significant public health hazard’ adds clarity to the existing exceptions process under Goal 2 by

identifying a particular situation necessary to justify the exception. Rules establishing other reasons necessary to justify an exception can be found in OAR 660-004-0022. Examples of appropriate reasons necessary to justify exceptions to other goals include, but are not limited to: demonstrated need for use based on one or more of the goals; a use being significantly dependent on a unique resource; a use having special or unique qualities requiring a particular location; a use cannot [be] located in a UGB due to impacts that are hazardous or incompatible in densely populated areas; and a use has a significant comparative advantage due to its location.” January 18, 2005 Report to LCDC on Agenda Item 5, February 2-4, 2005 LCDC Meeting, at 12.

An “Overview and Line-by-Line Description of the Proposed Amendments to Goal 11 and OAR 660-011-0060 Regarding Sewer Service in Rural Areas” prepared for LCDC hearings on the proposed rule amendments in November 2004, described the proposed language that became OAR 660-011-0060(9):

“This is new Section (9) being added in order to clarify that an exception may be taken for those situations where the standards under Goal 11 should not apply to a specific rural area. This section provides where it may be appropriate to apply the relevant criteria for a ‘reasons’ exception in order to authorize the sewer service under certain conditions.

“A ‘reasons’ exception to Goal 11 may include that the new system or extension of service is necessary to avoid an imminent and significant public health hazard that would otherwise result if sewer service is not provided, and there is no practicable alternative to the sewer system in order to avoid the imminent public health hazard. The current rule requires that public health hazards have to be determined by the [DEQ] or Health Division to initially ‘exist in the area.’ After the public health hazard determination is made, the local government has to amend its land use regulations consistent with the rule. Once that work is complete the sewer services may be extended into the rural area. Without changing the legal standards for exceptions, the proposed amendment identifies a situation where it would be appropriate to

1 LCDC did not intend subsections (9)(a) and (b) of the rule to establish the
2 closed universe of “appropriate reasons and facts” to justify a reasons
3 exception and that a reasons exception could be adopted if the criteria for
4 reasons exceptions in OAR 660-004-0020 and -0022 are met.

5 To the extent petitioner’s second assignment of error takes the position
6 that “appropriate reasons and facts” justifying a reasons exception to Goal
7 11 must fall under either OAR 660-011-0060(9)(a) or (b), we reject that
8 position.

9 In its second assignment of error, petitioner also argues that even if OAR
10 660-011-0060(9)(a) and (b) are merely examples of “appropriate reasons and
11 facts” for a Goal 11 exception:

12 “The County has essentially amended [OAR 660]-0060(9)(a) to
13 remove ‘imminent’ and ‘public health hazard’ with ‘inevitable’
14 and ‘public health issue.’ * * * Where a rule provides very specific
15 and strict standards to be met and also utilizes the language of the
16 ‘include but are not limited to’ those specific and strict standards,
17 it is not appropriate to undermine those specific and strict
18 standards by lessening those standards. Other ‘appropriate reasons
19 and facts’ for a Goal 11 exception must be of a different kind from
20 what is specified. They cannot be a lesser standard of the same
21 thing in [OAR 660-011]-0060(9)(a).” Petition for Review 15-16.

22 We agree with petitioner that the “reasons and facts” that the county
23 relied on in this decision are not within the scope of “appropriate reasons and
24 facts for an exception to Goal 11” that are permissible under OAR 660-004-

base an exception on documentation that sewer service would avoid a significant and imminent public health hazard before it can manifest itself.” Overview, at 4-5.

1 0020 and OAR 660-011-0060(9), although not for precisely the reason
2 petitioner argues. In particular we do not agree that permissible “reasons and
3 facts” “must be of a different kind from what is specified” in OAR 660-011-
4 0060(9)(a) and (b), or that “[t]hey cannot be a lesser standard of the same thing
5 in [OAR 660-011]-0060(9)(a).”

6 As we have already explained, OAR 660-011-0060(9)(a) provides
7 “useful context for interpreting the general term[s]” “appropriate reasons and
8 facts,” even though it does not set out the universe of acceptable reasons and
9 facts that could justify a Goal 11 exception. *Schmidt*, 347 Or at 402. The
10 context supplied by OAR 660-011-0060(9)(a) suggests far more than abstract
11 or speculative public health concerns are needed to warrant a Goal 11
12 exception to extend sewers into rural lands. It also is important to remember
13 that under one of the criteria for approving a reasons exception, the applicant is
14 required to demonstrate that “[r]easons justify why the state policy embodied in
15 the applicable goals should not apply[.]” ORS 197.732(2)(c)(A). An exception
16 must be “exceptional.” *1000 Friends of Oregon v. LCDC*, 69 Or App 717, 731,
17 688 P2d 103 (1984).

18 The reasons and facts that the county relied on to conclude a Goal 11
19 exception is warranted here are set out at Record 150-51. The differences
20 between the reasons and facts stated in OAR 660-011-0060(9)(a) and the
21 reasons and facts the county relied on in this case is expressed below as a
22 modification of OAR 660-011-0060(9)(a), with omitted language in brackets

1 and strikethrough and new language in bold and underlined, to assist in
2 comparing the reasons and facts that under OAR 660-011-0060(9)(a) may
3 justify an exception to Goal 11 to the reasons and facts the county actually
4 relied on:

5 “(a) The new system, or extension of an existing system,
6 [is] **may be** necessary to avoid an [~~imminent and~~
7 ~~significant~~] **inevitable** public health [~~hazard~~] **issue**
8 that would otherwise result if **the option of**
9 **providing** sewer service is not [~~provided~~] **available**;
10 and, **it is determined in the future that for some or**
11 **all of the areas included in the exception area** there
12 is no practicable alternative to the sewer system in
13 order to avoid the [~~imminent~~] **inevitable** public health
14 [~~hazard~~] **issues** [.]”

15 If the record in this case established that the facts are that failure to
16 require sewers to serve existing lots and lots that will be developed in the
17 future within the exception area will result in an “inevitable” “public health
18 issue,” specifically by making the aquifer used by thousands of people to
19 become contaminated so that it no longer meets federal drinking water
20 standards, we likely would agree that is an acceptable reason under OAR 660-
21 011-0060(9)(a) for a Goal 11 exception to extend the sewers. And the fact that
22 the public health concern is stated as an “issue” rather than a “hazard” and
23 stated as “inevitable” rather than “imminent,” would not change that result
24 even if those different word choices result in a somewhat more permissive set
25 of reasons and fact than OAR 660-011-0060(9)(a). Again, OAR 660-011-

1 0060(9)(a) is context rather than a strictly limiting factor. Those differences
2 are not much of a departure from OAR 660-011-0060(9)(a).

3 The problem is that those are not the facts the county found. The county
4 has not found that it *is necessary* to extend sewers. It has found it *may be*
5 *necessary* if septic systems and Advanced Treatment Technology (ATT)
6 systems turn out to be inadequate. The exception gives the county permission
7 in advance to provide sewers to some, all, or none of 11,000 lots scattered over
8 180 square miles of rural property, depending on whether the county decides in
9 the future that sewers are the best solution to solve an inevitable public health
10 problem. Under the exception, as few as zero acres may be served by sewer, or
11 all 11,000 lots included in the entire 180 square miles may be served to address
12 the county’s concerns about the aquifer. By any standard, that is a radical
13 departure from the example of an acceptable exception in OAR 660-011-
14 0060(9)(a). So radical that, given the context that OAR 660-011-0060(9)(a)
15 provides in determining whether those reasons and facts fall with
16 “[a]ppropriate reasons and facts for an exception to Goal 11,” as used in 660-
17 011-0060(9), the county’s reasons and facts do not qualify as “appropriate.” To
18 be clear, it is the scope of the exception (11,000 lots), the area of the exception
19 (180 square miles), and the indefiniteness of the number and location of the
20 lots, if any, that will be connected to the sewer system that makes it improper.
21 We express no view here on whether there may be “[a]ppropriate reasons and

1 facts for an exception to Goal 11,” within the meaning of OAR 660-011-
2 0060(9), for a more limited and certain exception.

3 Petitioner’s second assignment of error is sustained.

4 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

5 In its first assignment of error, petitioner argues that the county’s
6 decision does not qualify as an “exception” within the meaning of the term set
7 out in ORS 197.732(1)(b)(A) because the county has not adequately explained
8 the “specific properties or situations” that the exception applies to, or even
9 identified with precision the amount of land or number of lots subject to the
10 exception. Rather, according to petitioner, the ordinance impermissibly
11 “establish[es] a planning or zoning policy of general applicability” that allows
12 sewer systems in order to facilitate residential development on rural lands in
13 the county. In its closely-related third assignment of error, petitioner argues
14 that the reasons for the Goal 11 exception set forth in the part of the county’s
15 decision addressing OAR 660-004-0020(2)(a) are not based on facts and
16 assumptions that are supported by substantial evidence in the record, and do
17 not sufficiently explain why the state policy embodied in Goal 11 “should not
18 apply to specific properties or situations, including the amount of land for the
19 use being planned and why the use requires a location on resource land[.]”

20 In its response brief, the county takes the position that “[t]he challenged
21 legislative amendment is specific to identified and existing rural residential lots
22 (Rec. 8-26), and a specific situation, to wit, high groundwater and nitrates.”

1 County’s Response Brief 2. For the reasons that follow, we agree with
2 petitioner that the record does not support the county’s description in its
3 response brief of: (1) the “specific properties” for which the exception is
4 approved, and (2) the specific “situation[.]” that the exception was adopted to
5 address.

6 According to petitioner, the exception area includes approximately
7 11,000 improved and unimproved lots in the county, in an area covering
8 approximately 180 square miles. DEQ and the county do not dispute
9 petitioner’s calculation of the number of lots or area included in the exception.
10 The decision includes 18 maps attached to the Ordinance that map the areas
11 that are included in the Goal 11 exception. The decision includes the following
12 description of the property that is depicted on the maps and subject to the
13 exception:

14 “The affected lands are either exception lands already; lands in
15 other categories that are adjacent to exception lands and have
16 existing residential settlement pattern and/or are surrounded by
17 public lands; lands in other categories that have an existing
18 residential settlement pattern and are surrounded by public lands.”
19 Record 124.

20 The findings also describe the high groundwater area:

21 “The provided maps and written description of the affected area
22 with high groundwater, i.e. depth to groundwater is 24 inches or
23 less. A GIS analysis that included any lot with any amount of high
24 groundwater identified approximately 3,353 high groundwater lots
25 of which 2,153 are currently vacant. Of those vacant lots, 1,823

1 are zoned either Rural Residential, 10-acre minimum (RR-10) or
2 are split-zoned RR-10 and Flood Plain (FP).”⁷ Record 128-39.

3 The findings regarding the Transportation Planning Rule (TPR) at OAR 660-
4 012-0060 similarly describe the area studied for purposes of demonstrating
5 compliance with the TPR as

6 “[a]ny vacant lot that GIS research indicated had high groundwater
7 was considered a red lot, regardless if the high groundwater area
8 consisted of 1% or 100% of the lot. This identified 1,823 vacant
9 lots as red lots[.]”⁸ Record 153.

⁷ Other findings describe “75 percent of the approximately 14,000 properties in the area [that are] two acres or less.” Record 151. Still other findings describe “15,000 lots of one-half to one acre in size [that] were platted prior to enactment of Oregon’s land use planning laws * * * these lots are located within a corridor near the scenic Deschutes River and the Little Deschutes River. Subdivision developers marketed these lots nationally with no promise of infrastructure improvements and without an understanding of the region’s high water table or the aquifer’s vulnerability. Currently, there are approximately 7,000 improved lots in the La Pine region study area [that] use conventional onsite systems and individually owned drinking water wells. Most of these wells draw from the most vulnerable upper 100 feet of the aquifer.” Record 124.

The decision also describes the exception area as including “all existing platted lots and other lands necessary for community water supply and wastewater treatment infrastructure. No upzoning or increases of development densities *other than allowed by current zoning* shall occur within the Goal 11 exception area.” Record 141 (emphasis added).

⁸ According to the transportation study, the county considers these 1,823 lots to be undevelopable due to the depth to groundwater of 24 inches or less. Record 954.

1 Nothing in the county’s decision, or on the maps attached to the
2 decision, or on any map in the record precisely identifies (1) the amount of land
3 included, (2) the number of lots included, (3) whether the lots are developed or
4 undeveloped, (4) the zoning of the lots, or (5) the groundwater levels of each
5 lot or mapped area. From the findings we observe that the GIS study identified
6 not 11,000, but rather 3,353 high groundwater lots, with 2,153 vacant, resulting
7 in 1,200 high groundwater lots that are already developed. There is no map in
8 the record that we can decipher that shows the location of those developed and
9 vacant high groundwater lots. The figure at Record 955 is at such a small scale
10 that it is impossible to locate the lots that are supposed to be depicted. The map
11 at Record 783 shows the general areas where the lots are located, but does not
12 permit identification of individual lots. We also observe that the GIS study
13 identified 1,823 of those lots identified as vacant that are zoned RR-10 or RR-
14 10/FP, but there is no identification of the zoning of the other 330 high
15 groundwater lots that are apparently not zoned RR-10 or RR-10/FP.

16 OAR 660-004-0020(2)(a) is set out in full at n 11. The section of the
17 findings that addresses OAR 660-004-0020(2)(a) includes the following
18 description of the “use being planned:”

19 “* * *This situation is unique because the facility being authorized
20 is necessary to support the proposed use by improving the basin’s
21 groundwater quality over time. *The subject lands are planned and*
22 *zoned to receive residential development.* Failing to authorize
23 sewer service will eventually create unacceptable levels of
24 contamination in the groundwater and place citizens at risk of
25 health concerns.

1 “Based on this explanation *the ‘use being planned’ is existing*
2 *homes and some new households on lands planned and zoned for*
3 *residential development.* The proposed facilities would be sewer
4 service that is not otherwise available under Goal 11. The ultimate
5 outcome will be cleaner groundwater that will remain available as
6 a source of drinking water for area residents and not pose a threat
7 to contaminate nearby surface water.” Record 138 (emphases
8 added).

9 Those findings are followed by two pages of text under the heading “Reasons”
10 that describe the porous, sandy nature of the soils in the 247 square mile study
11 area with no protective intervening layer, and the shallow depth of the aquifers
12 from the surface, ranging from 2 feet to 100 feet deep; past incidences in the
13 1980’s of groundwater contamination in the city of La Pine; and studies and
14 models that predict groundwater contamination increasing after assumed “full
15 build out” in 2019, until in 140 years over 9,000 acres could have groundwater
16 concentrations exceeding the federal standards. Record 139-40. The exception
17 is described in those findings as necessary “to allow a broader range of options
18 for domestic wastewater treatment and disposal.”⁹ Record 140.

19 It appears that the county is attempting to address two problems with the
20 exception, a potential existing problem and a potential future problem. The first
21 problem is, in the words of the county, an “inevitable” groundwater

⁹ Another option discussed in the findings is to require conversion of traditional septic systems to ATT systems that possess nitrogen reducing capability. However, the county concluded that ATT systems will not address what the county characterizes as the “long term problem” and they do not “offer the best level of groundwater protection for the area as a whole.” Record 140.

1 contamination problem caused by existing residential development on 1,200
2 high groundwater lots with porous soils, which are served by on-site septic
3 systems. That existing problem could be made worse by development of 1,853
4 currently vacant lots zoned RR-10 and RR-10/FP in the high groundwater area
5 with porous soils, and by assumed development of an additional 330 lots with
6 similar circumstances whose zoning is not identified. The county's findings
7 that sewers may be needed to address this possible problem appear to be
8 supported by evidence in the record (except that as noted, it is simply not
9 possible to discern the location of those high groundwater lots from the maps
10 included in the record.)

11 There is an obvious flaw in the county's solution (an exception to Goal
12 11 to provide the option of sewer service to 11,000 lots) to solve the identified
13 problem (1,200 high ground water lots with septic tanks and 2,183
14 undeveloped high ground water lots that either threaten or pose a threat to
15 shallow aquifers if developed with septic tanks). The county's decision does
16 not explain or give a reason why the 7,697 lots that apparently are not located
17 in high ground water areas and therefore do not pose a threat to shallow
18 aquifers if developed with septic tanks are included in the exception area. The
19 county's decision also appears to be much closer to a "planning or zoning
20 policy of general applicability" to the southern part of the county than an
21 "exception" as defined in ORS 197.732(1)(b). For example, the findings
22 explain:

1 “An area-wide Goal 11 exception would allow for the highest and
2 best level of wastewater control and is necessary to protect public
3 health in the area. The area requires a regional solution to what is
4 truly an area-wide problem, one with increasing risks the longer a
5 set of comprehensive solutions is not in place. Up to this point,
6 public agencies including DEQ have looked at individual property
7 risk on a site by site basis. This strategy will fail because it
8 prohibits greater regional planning and infrastructure to address a
9 significant and regional health risk.” Record 151.

10 In our view, the county must distinguish between (1) the 3,353 high
11 groundwater lots that are either already developed with houses or that are
12 vacant but could be developed with houses, for which there appears to be a
13 reason that might support an exception to protect the groundwater, and (2) the
14 areas that it is proposing to serve with sewers in order to more easily allow
15 future houses on rural lands, but that the record does not demonstrate are
16 located in high groundwater areas. The current record and findings do not
17 support the county’s approach in lumping those diverse circumstances together
18 into a single reasons exception.

19 Stated differently, the county’s apparent desire to facilitate maximum
20 residential development on rural lands in the county is not a sufficient reason to
21 include an additional 7,697 lots that are not high groundwater lots, without
22 identifying the specific reasons that apply to those additional lots that justifies
23 the exception. OAR 660-004-0020(2)(a). Absent a more focused explanation
24 and identification by the county of the approximately 7,697 properties that are
25 not part of the 3,353 high groundwater lots, but are included in the exception
26 area, and the specific situation that the exception for the additional lots seeks to

1 address, we agree with petitioner that the exception more closely resembles a
2 “planning or zoning policy of general applicability” for the southern portion of
3 the county than an “exception” as defined in ORS 197.732(1)(b).

4 We also agree with petitioner that the exception does not include
5 adequate findings explaining why OAR 660-004-0020(2)(a) is met. *See* n 11.
6 We list a few of the inadequacies here. First, the county needs to explain what
7 it means in the findings quoted above by “lands that are planned and zoned for
8 residential development.” If the county means to include lands in zoning
9 categories that are something other than RR-10 or RR-10/FP, as it apparently
10 has, then the county’s assumption that those lands are “planned and zoned for
11 residential development” and will develop with houses needs a better
12 explanation. Conversely, if the county intends to only include lands that are
13 zoned RR-10 or RR-10 and Floodplain, then the county appears to have
14 included a significant amount of land in other zoning categories.

15 Second, the county also needs to explain the basis for its apparent
16 assumption that all one-half to two-acre lots in the county, which the USGS
17 study counts as about 60% of the included lots, that were platted prior to the
18 enactment of county or state zoning laws are individually developable because
19 the county has “planned and zoned” the lots for residential uses, particularly

1 considering Goal 14 and the Goal 14 rules regarding urbanization and
2 density.¹⁰

3 Third, and most importantly, the county needs to explain how sewer
4 service that the county describes as “*necessary* to guard against unacceptable
5 levels of pollution in the area’s groundwater that would expose citizens to
6 health risks” will correct the problem when connection to the sewer system is
7 entirely optional. Record 142 (emphasis added). As noted earlier, ORS

¹⁰ We see at least two potential ways that Goal 14 could be relevant here. First, as we understand the facts, a majority of the included lots are zoned RR-10, which requires a 10-acre minimum lot size, even though many or most of those lots are between one-half and one acre in size. It is not clear from the record whether the county considered Goal 14 or the Goal 14 rule’s restrictions on urban-level density in rural areas in initially zoning those lots RR-10, or whether the county determined that it was unnecessary to consider Goal 14 and the urbanization rules because as a practical matter those lots would be required to be aggregated or would be unable to develop at urban levels of density due to septic limitations. If the county now takes an exception to Goal 11 to allow sewers to serve those one-half to one acre lots, then the direct consequence of that action will be that those lots may be able to develop at urban-level densities with urban levels of service. Stated differently, if the Goal 11 exception changes the only circumstances that currently prevent urban-level development on these rural lands, the county may be required to consider whether the Goal 11 exception will lead to urban levels of development and whether the exception is consistent with Goal 14.

Second, from the maps attached to the Ordinance, it appears that several of the lots that are adjacent to previously platted subdivisions may be future phases of previously platted subdivisions. Record 104-119. Analysis of potential development of those future phases of previously platted subdivisions to determine whether the existence of urban levels of public facilities makes development of those lots at urban level densities possible may also be required.

1 197.732(1)(b)(A) expressly states that an exception is not appropriately used to
2 “establish a planning or zoning policy of general applicability.” An exception
3 to allow sewer systems that are entirely optional seems much more like a
4 planning policy of general applicability than an exception.

5 For the above reasons, remand is required in order for the county to
6 more precisely identify the specific properties and the specific reasons that
7 apply to those properties that justify a Goal 11 exception for those properties.

8 **FOURTH ASSIGNMENT OF ERROR**

9 In the fourth assignment of error, petitioner argues that the county’s
10 findings regarding OAR 660-004-0020(2)(b), (c), and (d) are inadequate.¹¹

¹¹ OAR 660-004-0020(2) provides, in relevant part:

“The four standards in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are described in subsections (a) through (d) of this section, including general requirements applicable to each of the factors:

“(a) ‘Reasons justify why the state policy embodied in the applicable goals should not apply.’ The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations, including the amount of land for the use being planned and why the use requires a location on resource land;

“(b) ‘Areas which do not require a new exception cannot reasonably accommodate the use.’ The exception must meet the following requirements:

“(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas

considered for the use that do not require a new exception. The area for which the exception is taken shall be identified;

“(B) To show why the particular site is justified, it is necessary to discuss why other areas that do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under this test the following questions shall be addressed:

“(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?

“(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses not allowed by the applicable Goal, including resource land in existing unincorporated communities, or by increasing the density of uses on committed lands? If not, why not?

“(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

“(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?

“* * * * *

1 OAR 660-004-0020(2)(a) through (d) require analysis of the “use” or the
2 “proposed use.” OAR 660-004-0020(2)(b) through (d) require an assessment of
3 “alternative areas” that could accommodate “the proposed use;” an analysis of
4 the long term environmental, social, economic, and energy (ESEE)
5 consequences resulting from the proposed use and comparing the “proposed

“(c) ‘The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a goal exception other than the proposed site.’ The exception shall describe: the characteristics of each alternative area considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. * * * The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to a description of the facts used to determine which resource land is least productive, the ability to sustain resource uses near the proposed use, and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts to be addressed include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts;

“(d) ‘The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.’ * * *.”

1 site” with alternative sites; and an analysis of whether the “proposed uses” are
2 or can be made compatible with adjacent uses.¹²

3 The county found that the “use” is “existing homes and some new
4 households on lands being planned and zoned for residential development.”
5 Record 138. The lands are described as “exception lands already; lands in other
6 categories that are adjacent to exception lands and have existing residential
7 settlement pattern and/or are surrounded by public lands; lands in other
8 categories that have an existing residential settlement pattern and are
9 surrounded by public lands.” Record 124. The county also found that the use
10 cannot be accommodated inside an urban growth boundary because the lots to
11 be served by sewers are located in unincorporated areas of the county, so using

¹² *Todd v. City of Florence*, 52 Or LUBA 445 (2006), is a case involving a reasons exception to Goal 11 to extend city sewer lines to property outside of the city. In *Todd*, we observed about the then-applicable version of OAR 660-004-0020(2):

“[It is] awkward, at least, to apply the criteria in OAR 660-004-0020(2)(b)—(d) to evaluate a ‘proposed use’ that does not require a goal exception. * * * Those criteria are obviously written to address the more typical case, where the ‘proposed use’ requires a Goal 3, 4 or 14 exception, in addition to any exception required to establish or extend public services to serve those uses.” *Id.* at 456.

In 2011, LCDC adopted amendments to OAR 660-004-0000 that clarify that the standards in OAR 660-004 apply to all goal exceptions, including a reasons exception pursuant to OAR 660-011-0060(9) and even where the proposed use itself does not require a Goal exception. OAR 660-004-0000(1). Therefore, however awkward the provisions of OAR 660-004-0020 are to apply, they apply to this exception.

1 a different area is not possible. Record 140-41. The county additionally found
2 under OAR 660-004-0020(2)(b)(B)(iv) that “the proposed use [cannot] be
3 reasonably accommodated without the provision of the proposed public
4 facility” because “sewer service is necessary to guard against unacceptable
5 levels of pollution in the area’s groundwater that would expose citizens to
6 health risks.” Record 142.

7 Petitioner argues that the county misconstrued OAR 660-004-0020(2)(b)
8 through (d) and that the county’s findings regarding those criteria are
9 inadequate. According to petitioner (1) the county impermissibly combined
10 existing residential uses with proposed residential uses that the availability of
11 sewers would facilitate, without explaining whether an additional goal
12 exception is required for any of the proposed residential uses; (2) the county
13 failed to evaluate whether alternative areas such as expanding existing UGBs,
14 or alternative treatment methods such as ATT systems, could accommodate the
15 proposed residential without providing sewer systems; (3) the county failed to
16 conduct an ESEE assessment of alternative sites, including the economic
17 consequences of serving approximately 11,000 lots with sewers; and (4) the
18 county failed to address the compatibility of the proposed residential uses with
19 adjacent resource uses.

20 As explained in our resolution of the first and third assignments of error,
21 the county’s findings must first identify the reason or reasons for including
22 7,697 lots that are not high groundwater lots in the exception area. The

1 county's findings addressing subsections (2)(b) through (d) of the rule must
2 then, based on those reasons, address or categorize the proposed residential
3 development on similar and differently situated lots, particularly given that
4 some of the lots are as large as or larger than 10 acres and some are resource-
5 zoned. The findings must also identify the amount and location of the "other
6 lands necessary for community water supply and wastewater treatment
7 infrastructure" that are included in the exception area, particularly if those
8 lands are resource-zoned lands. Record 141, 144. We also agree with petitioner
9 that the county's findings regarding subsection (b)(B)(iv) do not adequately
10 explain why the proposed residential uses cannot be reasonably accommodated
11 without the provision of sewer service, where the exception makes connection
12 to the sewer system optional and thus apparently anticipates and approves of
13 the continued use of traditional and non-traditional septic systems.

14 Finally, one of the difficulties in evaluating how the county applied OAR
15 660-004-0020(2)(b), (c) and (d) is the unclear nature of precisely what the
16 county proposes to do under the exception. If the exception was actually
17 limited to an exception to provide sewer service to specific properties to avoid
18 the public health ramifications of allowing existing or future individual septic
19 systems to make a drinking water aquifer unfit for that purpose, then
20 application of OAR 660-004-0020(2)(b), (c) and (d) would be more
21 straightforward. OAR 660-004-0020(2)(b) and (c) would be satisfied or
22 inapplicable, because providing sewers in other areas would not address the

1 reason for the exception. And application of OAR 660-004-0020(2)(d) would
2 be more manageable, because the location of the sewers, and the new
3 development it would enable would be identified.

4 The fourth assignment of error is sustained.

5 **FIFTH ASSIGNMENT OF ERROR**

6 In its fifth assignment of error, petitioner argues that the county's
7 amendments to the DCCP are inconsistent with DCCP Policy 2.5.19(b), which
8 provides:

9 "If a public health hazard is declared in rural Deschutes County,
10 expedite actions such as legislative amendments allowing sewers
11 or other similar infrastructure."

12 Petitioner argues that because no public health hazard was declared, Policy
13 2.5.19(b) does not allow the county to expedite its legislative amendments
14 allowing sewers on rural lands in the county.

15 DEQ responds, and we agree, that petitioner has not demonstrated that
16 the county's decision to adopt amendments to the comprehensive plan to allow
17 sewers is inconsistent with DCCP Policy 2.5.19(b), which is a part of the
18 chapter addressing water resource policies and provides that one of the
19 county's water resource policies is to:

20 "Coordinate with stakeholders to address water-related public
21 health issues.

22 "a. Support amendments to State regulations to permit
23 centralized sewer systems in areas with high levels of
24 existing or potential development or identified water quality
25 concerns.

1 “b. If a public health hazard is declared in rural Deschutes
2 County, expedite actions such as legislative amendments
3 allowing sewers or similar infrastructure.”

4 Goal 5 of Section 2.5 of the DCCP is “protect and improve water quality in the
5 Deschutes River Basin.” Policy 2.5.19(b) implements Section 2.5’s goal by
6 allowing the county to expedite legislative amendments allowing sewers if a
7 public health hazard is declared, presumably under OAR 660-011-0060(4). The
8 county did not rely on OAR 660-011-0060(4) to support its reasons exception;
9 rather, as discussed above, it relied on OAR 660-011-0060(9). Accordingly,
10 Policy 2.5.19(b) does not apply and there is nothing about the county’s
11 decision that is inconsistent with Policy 2.5.19(b). In addition, petitioner does
12 not argue that the county relied on the policy to “expedite” the amendments to
13 the comprehensive plan and reasons exception.

14 The fifth assignment of error is denied.

15 The county’s decision is remanded.