

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

3  
4                                   CENTRAL OREGON LANDWATCH,  
5                                                 *Petitioner,*  
6                                                         vs.

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8                                   DESCHUTES COUNTY,  
9                                                 *Respondent,*

10  
11                                                         and

12  
13                                                         ANTHONY ACETI,  
14                                                         *Intervenor-Respondent.*

15  
16                                                         LUBA No. 2017-009

17  
18                                                         FINAL OPINION  
19                                                         AND ORDER

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21                                   Appeal from Deschutes County.

22  
23                                   Carol E. Macbeth, Bend, filed the petition for review and argued on  
24 behalf of petitioner.

25  
26                                   No Appearance by Deschutes County.

27  
28                                   Bill Kloos and Dan Terrell, Eugene, filed the response brief, and Bill  
29 Kloos argued on behalf of intervenor-respondent. With them on the brief was  
30 the Law Office of Bill Kloos, PC.

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

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35                                   REVERSED                                   06/15/2017

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

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**NATURE OF THE DECISION**

Petitioner appeals a decision by the board of county commissioners concerning a 21.59-acre property located next to Highway 97, between the cities of Redmond and Bend, at Deschutes Junction. The decision changes the Deschutes County Comprehensive Plan (DCCP) map designation from Agriculture to Rural Industrial and changes the zoning from Exclusive Farm Use Tumalo/Bend Subzone (EFU) to Rural Industrial (RI).

**FACTS**

LUBA remanded the county’s first decision in this matter. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016) (*COLW Aceti I*).<sup>1</sup> In that decision LUBA rejected petitioner’s assignment of error that challenged the county’s findings that the subject property’s soils do not qualify as agricultural land that must be protected under Goal 3 (Agricultural Lands). But LUBA sustained petitioner’s other assignment of error that challenged the adequacy of the county’s Statewide Planning Goal 14 (Urbanization) exception. The county concluded that the requested Goal 14 exception was justified because the subject property is irrevocably committed to urban uses. In *COLW Aceti I*, we concluded that the county failed to provide the required

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<sup>1</sup> There are a large number of appeals titled *Central Oregon Landwatch v. Deschutes County*. We insert the name of the applicant to help distinguish this case and its predecessor from the others.

1 explanation for why the subject property, surrounded by relatively low intensity  
2 uses, is irrevocably committed to urban uses:

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

24 “Whether approving an irrevocably committed exception to Goal  
25 14 to allow urban uses of rural land and then applying a zone that  
26 was adopted to limit industrial uses to rural industrial uses is  
27 inconsistent or not, if the county wants to approve an irrevocably  
28 committed exception to Goal 14, it must supply the reasoning that  
29 supports the conclusion that the rural use of the property is  
30 impracticable, with the result that it is committed to urban uses.  
31 That reasoning is missing, and remand is therefore required.”  
32 *COLW Aceti I*, 74 Or LUBA at 170-71 (emphasis in original).

33 Following our remand, the applicant and county abandoned the Goal 14  
34 exception, and the county again approved the requested comprehensive plan

1 and zoning map amendments, and supported that decision with findings that  
2 the challenged map amendments do not authorize urban uses and therefore do  
3 not require an exception to Goal 14.

4 **FIRST ASSIGNMENT OF ERROR**

5 The central issue presented in the first assignment of error is whether the  
6 Rural Industrial DCCP map designation, and thus the corresponding RI zoning  
7 designation, is limited to certain existing exception areas that are identified in  
8 the DCCP. While one of the three Rural Industrial exception areas identified in  
9 the DCCP (Deschutes Junction) is near the subject property, the subject  
10 property is not included in any of the three exception areas identified in the  
11 DCCP. Petitioner takes the position that the Rural Industrial plan map  
12 designation is limited to those three exception areas; the county's decision  
13 takes the position that it is not.

14 We note that this issue appears to us to be one that could have been  
15 raised in *COLW Aceti I*, but was not raised in that appeal. However, intervenor  
16 does not argue that this issue is one that could have and should have been  
17 raised in *COLW Aceti I*, or that LUBA's consideration of that issue has been  
18 waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).  
19 Petitioner's first assignment of error also raises other issues, as do its remaining  
20 assignments of error, but because the issue described above is dispositive, we

1 limit our consideration of the first assignment of error to that issue.<sup>2</sup> Resolving  
2 that issue requires that we set out relevant DCCP text at some length.

3 Chapter 3 of the DCCP is entitled “Rural Growth Management.” Section  
4 3.4 of the DCCP is entitled “Rural Economy,” and includes text addressing the  
5 Rural Commercial and Rural Industrial plan designations. We first set out  
6 portions of the text addressing the Rural Commercial plan designation, before  
7 turning to the Rural Industrial text, because the Rural Commercial text  
8 provides context for understanding the Rural Industrial text:

9 **“Rural Commercial and Rural Industrial**

10 “In Deschutes County there are a handful of properties zoned  
11 Rural Commercial and Rural Industrial. These designations  
12 recognize uses that predated State land use laws. New commercial  
13 or industrial sites are controlled by State regulation and additional  
14 development is anticipated to be minimal and only for specific  
15 sites, such as around the Bend Airport.

16 *“Rural Commercial*

17 “The Rural Commercial plan designation applies to specific  
18 exception areas located outside unincorporated communities and  
19 urban growth boundaries. The rural commercial uses and services  
20 in these areas are limited in size and scope to those that are less  
21 intensive than uses allowed in Unincorporated Communities. The  
22 uses and densities are limited by the zoning, thereby maintaining  
23 rural integrity.

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<sup>2</sup> For example petitioner argues under the current version of Goal 14, without an exception to Goal 14, all new industrial development is limited to urban growth boundaries, unincorporated communities, and the circumstances set out in ORS 197.713 and 197.714 for certain lands that were “planned and zoned for industrial use on January 1, 2004.”

1           “The Rural Commercial designation applies to the following  
2           acknowledged exception areas:

- 3           “•     Deschutes Junction
- 4           “•     Deschutes River Woods Store
- 5           “•     Pine Forest
- 6           “•     Rosland
- 7           “•     Spring River[.]” *Id.* (Italics and boldface in original;
- 8           underscoring added.)

9           DCCP Section 3.4 goes on to explain that Deschutes Junction, Deschutes  
10          Woods Store and Spring River exception areas previously were designated as  
11          “Rural Service Centers” in the DCCP, but when the Land Conservation and  
12          Development Commission (LCDC) adopted the OAR chapter 660, division 22  
13          “Unincorporated Communities” administrative rule, and defined “rural service  
14          centers” in a way that disqualified these three areas, the three areas were  
15          designated Rural Commercial in the DCCP (and zoned Rural Commercial) “to  
16          ensure that they remain rural and that the uses allowed are less intensive than  
17          those allowed in unincorporated communities as defined in OAR 660-022.” *Id.*  
18          DCCP Section 3.4 explains that the other two exception areas, Rosland and  
19          Pine Forest, are “commercial centers which historically were committed to  
20          commercial uses prior to the adoption of zoning regulations,” and were  
21          designated Rural Commercial in 2002 and 2007. *Id.* DCCP Section 3.4 then

1 describes each of the five Rural Commercial designated areas and the  
2 surrounding properties.<sup>3</sup>

3 Relevant text from DCCP Section 3.4 addressing the Rural Industrial  
4 plan designation is set out next, below. The county follows the same approach  
5 that it did with the Rural Commercial designation, by limiting that designation  
6 to specifically identified exception areas.

7 *“Rural Industrial*

8 “The Rural Industrial plan designation applies to specific  
9 exception areas located outside unincorporated communities and  
10 urban growth boundaries. The Rural Industrial plan designation  
11 and zoning brings these areas into compliance with state rules by  
12 adopting zoning to ensure that they remain rural and that the uses  
13 allowed are less intensive than those allowed in unincorporated  
14 communities as defined in OAR 660-022.[<sup>4</sup>]

15 “The Rural Industrial designation applies to the following  
16 acknowledged exception areas.

17 “ Redmond Military

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<sup>3</sup> We omit that description of the Rural Commercial areas for brevity, but include the exception area descriptions from the portion of DCCP Section 3.4 addressing the Rural Industrial designation below.

<sup>4</sup> A significant area of disagreement between petitioner and the county is whether the RI zone actually limits the industrial uses allowed in the RI zone so that they are less intensive than the uses allowed in unincorporated communities under OAR chapter 660, division 22 and will not constitute “urban uses” that are generally prohibited on rural land by Goal 14. We need not and do not attempt to resolve that disagreement in this opinion.

1           “ Deschutes Junction<sup>[5]</sup>

2           “ Bend Auto Recyclers

3           “*Rural Industrial Designated Areas*

4           “The Redmond Military site consists of tax lot 1513000000116  
5 and is 35.42 acres, bounded by the Redmond Urban Growth  
6 Boundary to the west and agricultural lands (EFU) surrounding the  
7 remainder of the property.

8           “The Deschutes Junction site consists of the following tax lots:  
9 161226C000107 (9.05 acres), 16126C000106 (4.33 acres),  
10 161226C000102 (1.41 acres), 161226C000114 (2.50 acres),  
11 portions 161226C000300 (12.9 acres). 161226C000301 (8.93  
12 acres), 161226A000203 (1.5 acres) and those portions of  
13 161226C000111 located west of the Burlington Northern-Santa Fe  
14 railroad tracks (16.45 acres). Generally, the Deschutes Junction  
15 site is bordered on the west by Highway 97, on the east by the  
16 Burlington Northern Railroad, on the north by Nichols Market  
17 Road (except for a portion of 1612226A000111), and on the south  
18 by EFU-zoned property owned by the City of Bend.

19           “Bend Auto Recyclers consists of tax lot 1712030000111 and is  
20 13.41 acres, bounded by Highway 97 to the west, and Rural  
21 Residential (MUA-10) lands to east, north and south.” *Id.* (Italics  
22 in original; underscoring added.)

23           Petitioner argued to the county that the subject property cannot be  
24 designated Rural Industrial because it is not included in one of the three  
25 “acknowledged exception areas” specifically identified above, *i.e.*, the  
26 Redmond Military, Deschutes Junction and Bend Auto Recyclers exception

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<sup>5</sup> As we noted earlier, the subject property is located on the west side of Highway 97, in an area generally referred to as Deschutes Junction. The subject property is located across from the Deschutes Junction Rural Industrial site, which is located on the east side of Highway 97.



1 areas.<sup>6</sup> The county adopted findings to reject that argument and interpreted  
2 DCCP Section 3.4 to permit the county to apply the Rural Industrial plan  
3 designation to any property, as long as it is located outside urban growth  
4 boundaries and outside designated unincorporated communities, and either: (1)  
5 does not qualify as agricultural or forest land or (2) is the subject of an  
6 exception to Goal 3 (Agricultural Lands) or Goal 4 (Forest Lands):

7 “COLW also narrowly reads the following Comprehensive Plan  
8 statement:

9 ““The Rural Industrial plan designation applies to  
10 specific exception areas located outside  
11 unincorporated communities and urban growth  
12 boundaries. The Rural Industrial plan designation and  
13 zoning brings these areas into compliance with state  
14 rules by adopting zoning to ensure that they remain  
15 rural and that the uses allowed are less intensive than  
16 those allowed in unincorporated communities as  
17 defined in OAR 660-022.’<sup>7]</sup>

18 “COLW focuses on the term ‘exception area’ to contend that RI  
19 uses are permitted only in exception areas, despite also arguing  
20 that RI uses are permitted only in unincorporated communities.  
21 The County Board reads this provision more broadly, giving  
22 weight to the language that notes the role state rules have

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<sup>6</sup> Although the parties do not discuss these exceptions, we assume they were exceptions to Goal 3 (Agricultural Lands), rather than exceptions to Goal 14 (Urbanization), because the Rural Industrial plan designation and RI zone are intended to limit industrial uses to those that are rural in nature. Assuming the Rural Industrial plan designation and RI zone do so, an exception to Goal 14 would be unnecessary.

<sup>7</sup> This is the same DCCP language that we set out earlier, just before the detailed description in the DCCP of the three Rural Industrial exception areas.

1 regarding permitted uses. The County Board recognizes, as it did  
2 in the decision affirmed by LUBA in this proceeding, that the  
3 designation of land as not suitable for agricultural use does not lie  
4 solely through the exception process under state rules. The County  
5 Board interprets the use of the term exception area in this passage  
6 broadly to include any lands that have been lawfully deemed not  
7 subject to the resource goals (Goals 3 and 4) for whatever reason.  
8 Consequently, the County Board interprets the above  
9 comprehensive plan language as not prohibiting the designation of  
10 individual properties for rural industrial uses where those  
11 properties qualify for such designation because they have either  
12 received an exception to Goal 3, or because the provisions of Goal  
13 3 do not apply to them because they do not meet the definition of  
14 ‘agricultural land’ and are therefore nonresource land.

15 “However, for such properties, [DCCP] Policies 3.4.28, 3.4.31,  
16 3.4.32 and 3.4.33 provide standards, which have been incorporated  
17 into and implemented by DCC 18.100, that apply to rural  
18 industrial development to help ensure that such uses are developed  
19 at rural levels of intensity consistent with state rules.[<sup>8</sup>] While the

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<sup>8</sup> Those policies are set out below:

“Policy 3.4.28 New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.

“\* \* \* \* \*

“Policy 3.4.31 Residential and industrial uses shall be served by [Department of Environmental Quality] approved on-site sewage disposal systems.

“Policy 3.4.32 Residential and industrial uses shall be served by on-site wells or public water systems.

1 [DCCP] permits industrial uses in unincorporated communities  
2 and in urban areas, it does not prohibit rural industrial uses at rural  
3 levels of intensity on rural lands.

4 “COLW’s proposed interpretations ignore the plan language and  
5 plan policies that most directly address the purpose and  
6 application of the Rural Industrial designation to new properties.  
7 As presented in the findings, the County Board concludes that the  
8 RI designation and zoning is not limited to only unincorporated  
9 communities and existing exception areas as COLW asserts.”  
10 Record 26-27.

11 The above findings mischaracterize some of the arguments petitioner  
12 made to the county, and rely on several plan policies that have nothing to do  
13 with identifying what properties may be eligible for the Rural Industrial plan  
14 designation to conclude that the Rural Industrial plan designation may be  
15 broadly applied to any rural lands that are not planned or zoned for resource  
16 protection under Goals 3 or 4 and are located outside designated  
17 unincorporated communities.

18 We are mindful that our standard of review under ORS 197.829(1) and  
19 *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) is deferential, and  
20 we generally must affirm a county governing body’s plausible interpretations  
21 of its land use legislation.<sup>9</sup> Petitioner briefly mentions Goal 14 in its argument

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“Policy 3.4.33 Community sewer systems shall not be allowed in  
Rural Industrial zones.”

<sup>9</sup> ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local  
government’s interpretation of its comprehensive plan and land

1 under the first assignment of error and suggests the county’s interpretation of  
2 DCCP 3.4 is inconsistent with Goal 14, which petitioner contends DCCP 3.4  
3 was adopted in part to implement. That may be an attempt by petitioner to  
4 invoke ORS 197.829(1)(d). *See* n 9. But petitioner does not develop that  
5 argument other than to argue that all industrial development is urban in nature  
6 and requires a Goal 14 exception unless located within an urban growth  
7 boundary or a designated unincorporated community. We reject that broad  
8 argument.

9 As the arguments are presented under the first assignment of error, our  
10 standard of review of the county’s interpretation of DCCP Section 3.4 is set out  
11 at ORS 197.829(1)(a), and the county’s interpretation cannot be affirmed if it  
12 “[i]s inconsistent with the express language of the comprehensive plan \* \* \*.”  
13 For the reasons explained below, the county’s interpretation of DCCP Section

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use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 3.4 “[i]s inconsistent with the express language of” DCCP Section 3.4 which  
2 was quoted earlier.<sup>10</sup> Given that DCCP language, the county’s broad  
3 interpretation of DCCP Section 3.4 to permit the Rural Industrial designation to  
4 be applied to any rural lands outside an urban growth boundary or  
5 unincorporated community, as long as that rural land is not agricultural or  
6 forest land, is implausible and is not affirmable under ORS 197.829(1)(a).

7 It is the county’s interpretation, not petitioner’s interpretation, which  
8 fails to give meaning to the only DCCP language that actually addresses what  
9 properties are eligible for the Rural Commercial and Rural Industrial plan  
10 designation. Petitioner emphasized the underscored language in the DCCP  
11 language quoted above. *See* n 10. It may be that language does not expressly  
12 foreclose the possibility that the county might be able to identify additional  
13 areas that are built or committed to rural industrial development, take an  
14 exception to the applicable resource goals, if any, and add those areas to DCCP  
15 Section 3.4. However, unless and until that happens it is inconsistent with that

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<sup>10</sup>That DCCP language is set out below:

“The Rural Industrial plan designation applies to specific exception areas located outside unincorporated communities and urban growth boundaries.” DCCP Section 3.4 at 11.

“The Rural Industrial designation applies to the following [described] exception areas.” *Id.*

1 DCCP language for the county to apply the Rural Industrial plan designation to  
2 sites other than the three identified exception areas.<sup>11</sup>

3 The county's reliance on Policies 3.4.28, 3.4.31, 3.4.32 and 3.4.33 as  
4 authorizing application of the Rural Industrial plan designation to properties  
5 other than the three identified exception areas is difficult to understand. Those  
6 policies simply impose limits on development or redevelopment of uses on the  
7 three Rural Industrial designated properties; they say nothing about whether the  
8 Rural Industrial designation can be applied to properties other than the three  
9 identified exception areas. *See* n 8.

10 We agree with the county that the Rural Industrial plan designation is not  
11 limited to unincorporated communities, and in fact we do not understand

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<sup>11</sup> To be clear, we do not mean to suggest that the county may simply and easily amend DCCP Section 3.4 to add the subject property to the list of eligible areas for the Rural Industrial plan designation. DCCP Section 3.4, as it is currently written, limits the Rural Industrial plan designation to three exception areas that were already developed or committed to industrial uses when the statewide planning program came into existence. It seems highly unlikely that the subject 21.59-acre property qualifies as such a property. So in addition to adding the subject property to the list of areas eligible for Rural Industrial zoning, DCCP Section 3.4 would need to be amended to broaden the type of property that is eligible for the Rural Industrial designation. Those amendments would be post-acknowledgment plan amendments, subject to a number of legal challenges under the statewide planning goals and the Department of Land Conservation and Development's implementing administrative rules. Petitioner's remaining assignments of error, which we do not reach in this decision, raise a number of legal issues that petitioner likely would raise if the county approves such a post-acknowledgment plan amendment.

1 petitioner to argue that the Rural Industrial plan designation is appropriately  
2 applied within unincorporated communities. Although we need not resolve the  
3 issue, we also tend to agree with the county that the Rural Industrial  
4 designation is not necessarily limited to the three exception areas listed in  
5 DCCP Section 3.4, provided the county first amends DCCP Section 3.4 to  
6 remove language that limits application of the Rural Industrial designation to  
7 the three identified sites, or expressly broadens application of the Rural  
8 Industrial designation to other sites deemed to be eligible under DCC Section  
9 3.4 for the Rural Industrial plan designation. But as the DCCP Section 3.4  
10 language quoted earlier makes clear, the Rural Industrial designation is a  
11 limited purpose map designation, in the sense it is a plan designation that was  
12 expressly applied only to three identified areas that had already been built or  
13 committed to rural industrial development, and nothing in DCCP Section 3.4  
14 purports to authorize its application to other properties in other circumstances.  
15 The county's legal theory in this case was not that the 21.59-acre subject  
16 property is already committed to rural industrial use. The county's legal theory  
17 in this case is that the Rural Industrial plan designation may be applied to the  
18 subject property simply because it is not agricultural land, without regard to  
19 whether an exception has been approved for the property because it is built or  
20 committed to industrial use and without regard to whether the subject property  
21 is identified as an area eligible for the Rural Industrial plan designation in  
22 DCCP Section 3.4. That interpretation is inconsistent with the "express

1 language of the comprehensive plan” that is underscored above and set out at n  
2 10. Therefore the county’s decision to apply the Rural Industrial designation to  
3 the subject property “violates a provision of applicable law and is prohibited as  
4 a matter of law.” OAR 661-010-0071(1)(c).

5 The first assignment of error is sustained.

6 **REMAINING ASSIGNMENTS OF ERROR**

7 As the proposal stands under our resolution of the first assignment of  
8 error, the geographically limited DCCP Section 3.4 authorization for the Rural  
9 Industrial plan designation does not include the subject property. Because our  
10 resolution of the first assignment of error requires that the county’s decision be  
11 reversed, we need not and do not consider petitioner’s remaining assignments  
12 of error.

13 The county’s decision is reversed.