

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

03/20/19 11:45 LUBA

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4                                   CENTRAL OREGON LANDWATCH,

5   *Petitioner,*

6  
7   vs.

8  
9                                   DESCHUTES COUNTY,

10   *Respondent,*

11  
12   and

13  
14                                   ANTHONY J. ACETI,

15   *Intervenor-Respondent.*

16  
17                                   LUBA No. 2018-126

18  
19                                   FINAL OPINION

20   AND ORDER

21  
22                   Appeal from Deschutes County.

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

26  
27                   D. Adam Smith, Assistant County Counsel, Bend, filed a joint response  
28 brief and argued on behalf of respondent.

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30                   Daniel A. Terrell, Eugene, filed a joint response brief and argued on behalf  
31 of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos,  
32 PC.

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34                   RYAN, Board Chair; ZAMUDIO, Board Member, participated in the  
35 decision.

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37                   RUDD, Board Member, did not participate in the decision.

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AFFIRMED

03/20/2019

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

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**NATURE OF THE DECISION**

Petitioner appeals a decision by the county that amends the text of the county’s comprehensive plan to remove language that limited application of the Rural Industrial (RI) and Rural Commercial (RC) plan designations to specific areas described in the comprehensive plan.

**FACTS**

This appeal arises out of and is related to our prior decision in *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 441, *aff’d*, 288 Or App 378, 405 P3d 197 (2017) (*COLW Aceti II*).<sup>1</sup> We describe *COLW Aceti II* in order to provide background for the county’s decision to amend the Deschutes County Comprehensive Plan (DCCP).

In *COLW Aceti II*, we reversed a board of county commissioners’ decision that approved a comprehensive plan map change and zone map change for property designated Agriculture and zoned Exclusive Farm Use to RI. We concluded that the express language of the DCCP limited application of the RI plan designation to certain existing exception areas identified in the DCCP. We rejected the board of county commissioners’ interpretation of the applicable

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<sup>1</sup> There are a 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. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016) (*COLW Aceti I*) preceded *COLW Aceti II*, but *COLW Aceti I* has no bearing on our analysis in this case.

1 provisions of the DCCP as inconsistent with the express language found in DCCP  
2 Section 3.4.

3 Prior to the challenged decision, the applicable version of the DCCP 3.4  
4 provided:

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

11 Section 3.4 then described the RI designation as follows:

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

19 “The Rural Industrial designation applies to the following  
20 acknowledged exception areas:

21 “Redmond Military

22 “Deschutes Junction

23 “Bend Auto Recyclers.”

24 In *Aceti II*, we reasoned that the above-quoted language limited the RI  
25 designation as applicable to only those three identified areas. However, we noted  
26 that the county might extend application of the RI destination beyond those three

1 areas by amending DCCP Section 3.4 to remove that limiting language. 75 Or  
2 LUBA 441, 450.

3 After the Court of Appeals affirmed our decision, the county adopted the  
4 challenged amendments, which amend the text of the DCCP. The amendments  
5 do not amend the county's comprehensive plan map or the county's zoning map  
6 or apply the RI or RC plan designations to any property. The amendments remove  
7 the express language in the DCCP quoted above that we and the Court of Appeals  
8 held limited application of the RI plan designation to those areas specified in  
9 DCCP 3.4. The amendments also removed limiting language that applied to the  
10 RC plan designation. Because the three areas listed in prior DCCP 3.4 were the  
11 only areas in the county that were subject to the RI plan designation, the effect of  
12 the plan amendments is to allow the county to potentially approve an application  
13 to change the comprehensive plan designation for any property in the county to  
14 RI, provided the application is consistent with all applicable statutes, rules, the  
15 provisions of the DCCP, and the provisions of the Deschutes County Code (DCC)  
16 governing plan amendments.

17 This appeal followed.

## 18 **INTRODUCTION**

19 The county's first comprehensive plan, adopted in 1979 and acknowledged  
20 in 1981, applied the RI and Rural Service Center (RSC) plan designations to the

1 areas listed in pre-amended DCCP 3.4.<sup>2</sup> The 1979 version of the DCCP included  
2 an irrevocably committed exception to Goal 3 for the properties designated RI  
3 and RSC. DCCP 5.10 (Goal Exception Statements). At the time, exceptions to  
4 Goal 14 were not required or taken. *Id.*

5 In 2002, the Land Conservation and Development Commission (LCDC)  
6 adopted the Unincorporated Communities Rule at OAR 660-022. Thereafter, as  
7 part of periodic review, the county adopted Ordinances 2002-126 and 2002-127  
8 (2002 Ordinances). Record 450-455. The 2002 Ordinances amended the DCCP  
9 and the DCC to ensure that areas planned and zoned RI and RC would allow  
10 fewer uses and smaller industrial structures than were allowed under the then-  
11 existing RI and RSC plan and zone designations, and under the Unincorporated  
12 Communities Rule. *See* n 2. Therefore, areas planned and zoned RI and RC would  
13 remain rural. Record 455, 458. As far as we are aware, the 2002 Ordinances were  
14 subsequently acknowledged by LCDC.

15 Petitioner and the county and intervenor-respondent (together,  
16 respondents) have very different theories about the legal effect of the pre-  
17 amendment language included in the 1979 version of the DCCP and the 2002  
18 Ordinances, and about the authority of the county to amend or remove that

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<sup>2</sup> The first DCCP applied the “Rural Service Center” designation to a number of properties. In 2002, as part of periodic review, the county eliminated the Rural Service Center designation and replaced it with a new designation, Rural Commercial (RC). Record 451.

1 language. Under petitioner's theory, DCCP 3.4 as it existed prior to the  
2 challenged amendments, memorialized a prior county decision to limit the lands  
3 in the county to which the RI plan designation could be applied to only the  
4 irrevocably committed exception areas listed in DCCP 3.4, which were in  
5 existence when the DCCP was originally adopted in 1979. Stated differently,  
6 petitioner understands the RI plan designation to be a limited designation that the  
7 county may only apply to exception areas that were in existence and designated  
8 RI when the DCCP was first acknowledged. Petition for Review 4 ("The county  
9 has erred in believing that the RC or RI designations can be expanded outside  
10 their established boundaries without an irrevocably committed, built, or reasons  
11 exception to the applicable goals").

12 The county, on the other hand, does not understand the RI and RC plan  
13 designations to be limited designations that the county may only apply to existing  
14 exception areas. The county views the DCCP as a working document that is  
15 required to be updated to reflect existing conditions and future planning  
16 obligations, and that nothing in the statewide planning goals or the DCCP  
17 prohibits the amendments that the county adopted that expand the areas in the  
18 county to which the RI and RC plan designations may be applied, provided those  
19 areas meet all applicable statutory and rule requirements.

20 As we explain below in resolving petitioner's assignments of error, we  
21 think the county's theory is correct. Petitioner does not identify anything in Goal  
22 14, the rules that implement Goal 14, the DCCP, or any other authority to support

1 its position that the county may not adopt the challenged amendments to remove  
2 the language that LUBA held limited the county’s ability to apply the RI zone in  
3 areas of the county other than those listed in DCCP 3.4. Counties have wide  
4 latitude to adopt and revise the comprehensive plan or the zoning ordinance. ORS  
5 215.050. Amendments to the comprehensive plan need only comply with the  
6 statewide planning goals. ORS 197.175(2)(a). Against that backdrop, we address  
7 petitioner’s assignments of error.

8 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

9 The standard of review that applies to our review of the county’s  
10 amendment of its comprehensive plan is set out at ORS 197.835(6), and requires  
11 us to reverse or remand an amendment to the comprehensive plan if the  
12 amendment is not in compliance with the statewide planning goals.<sup>3</sup> An  
13 additional standard of review of the county’s decision is set out at ORS  
14 197.835(9).<sup>4</sup>

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<sup>3</sup> Petitioner cites ORS 197.732 as LUBA’s standard of review of the county’s decision. ORS 197.732 provides the statutory standards governing exceptions to the statewide planning goals, and does not provide a standard of review by which LUBA reviews a comprehensive plan amendment.

<sup>4</sup> ORS 197.835(6) provides:

“The board shall reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals.”

ORS 197.835(9) provides in part:



1           Petitioner’s first and second assignments of error are difficult to follow,  
2 and contain overlapping and repetitive arguments. Additionally, many of those  
3 arguments appear to depend on our agreement with petitioner’s understanding  
4 that we describe above of the limiting effect of the pre-amendment DCCP  
5 language. The arguments presented in various places throughout the first and  
6 second assignments of error are: (a) that the county’s decision fails to comply  
7 with Goal 14 because the amendments will allow urban uses on rural land, that  
8 the findings that the county adopted to demonstrate compliance with Goal 14 are  
9 inadequate (Petition for Review 11-12, 25), and that unamended provisions of

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“In addition to the review under subsections (1) to (8) of this section,  
the board shall reverse or remand the land use decision under review  
if the board finds:

“(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[.]”

1 DCC 18.100.010 allow urban uses on rural land in contravention of Goal 14;<sup>5</sup> (b)  
2 that the county's findings are inadequate to demonstrate compliance with OAR  
3 660-014-0040(3)(a); (c) that the county's findings regarding compliance with  
4 Goals 3, 5, 6, 7, 8, 10, 11 and 13 are inadequate, and improperly defer a finding  
5 of compliance with those goals to a future proceeding in which the RI or RC plan  
6 designation is applied to property; and (d) that the county failed to demonstrate  
7 compliance with OAR 660-004-0018.

8 **A. Goal 14 and DCC Rural Industrial Zone Provisions**

9 Statewide Planning Goal 14 (Urbanization) prohibits urban uses on rural  
10 lands. *See generally 1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447,  
11 498-511, 724 P2d 268 (1986) (*Curry County*) (Goal 14 implicitly prohibits urban  
12 uses on rural lands). DCC 18.100.010 – 18.100.090 contains the zoning and  
13 development standards for the RI zone. We understand petitioner to argue that  
14 the amendments to the DCCP fail to comply with Goal 14 because the  
15 amendments convert rural land to urban uses, and that the county's adopted and  
16 acknowledged RI zone, at DCC 18.100.010 – 18.100.090 impermissibly allows  
17 urban uses in contravention of Goal 14. Petition for Review 12, 24-25. We also  
18 understand petitioner to argue that the county's findings are inadequate to explain  
19 why the amendments do not allow urban uses of rural land.

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<sup>5</sup> Petitioner's first and second assignments of error reference Statewide Planning Goal 11 (Public Facilities), but no argument regarding Goal 11 is developed.

1           The county adopted findings that the DCCP amendments are consistent  
2 with Goal 14:

3           “The proposed amendment is consistent with Goal 14 because not  
4 only must any application for Rural Commercial or Rural Industrial  
5 plan designation demonstrate it is consistent with Goal 14, but, as  
6 DCCP Policy 3.4.9 and 3.4.23 direct, land use regulations for the  
7 Rural Commercial and Rural Industrial zones ensure that the uses  
8 allowed are less intensive than those allowed for unincorporated  
9 communities in OAR 660 Division 22, and are consequently not  
10 urban uses.” Record 31.<sup>6</sup>

11 In those findings, the county essentially concluded that because the amendments  
12 only amend the DCCP text and do not apply the RI plan designation to any  
13 property, the amendments themselves cannot allow urban use of rural land. The  
14 findings explain that a future application for the RI plan designation will be  
15 required to demonstrate that the proposed use is consistent with all of the  
16 statewide planning goals, including Goal 14.

17           The county also concluded that, because the RI plan and zone designations  
18 have been acknowledged to comply with Goal 14, uses allowed in those zones  
19 are not urban uses. Petitioner challenges that finding, arguing that “[t]he County’s  
20 existing RI Zone permits, among other intensive industrial uses \* \* \*. These uses  
21 are manifestly urban[.]” Petition for Review 11-12. Petitioner also argues that for

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<sup>6</sup> The county also adopted findings that the amendments are consistent with DCCP 3.4.23. Record 34-35.

1 that reason, the county was required to amend the DCC to demonstrate  
2 compliance with Goal 14.

3 Respondents respond, and we agree, that the county correctly found that  
4 the challenged text amendments do not allow any urban uses on rural land  
5 because the amendments do not apply the RI plan designation to any property,  
6 but merely expand the allowable locations in the county that *could be* the subject  
7 of an application to change the plan designation to RI. Petitioner does not point  
8 to anything in Goal 14, or the DCCP itself, that prevents the county from adopting  
9 the amendments.

10 Respondents also respond that petitioner's arguments that DCC  
11 18.100.010 allows urban uses are an impermissible collateral attack on an  
12 acknowledged land use regulation. We agree. No provisions of the DCC were  
13 amended by the challenged decision and accordingly, an appeal of amendments  
14 to the DCCP is not the appropriate place to challenge those acknowledged DCC  
15 provisions. *Homebuilders Ass'n of Lane County v. City of Eugene*, 77 Or LUBA  
16 56, (2018); *Shamrock Homes, LLC v. City of Springfield*, 68 Or LUBA 1, 14  
17 (2013).

18 **B. OAR 660-014-0030(3)(a)**

19 OAR 660-014-0030 is an LCDC rule that governs approval of irrevocably  
20 committed exceptions to Goal 14 to allow urban uses on rural land. Petitioner  
21 argues that the county was required to demonstrate that the amendments comply  
22 with OAR 660-014-0030(3)(a), which provides:

1 “A decision that land is committed to urban levels of development  
2 shall be based on findings of fact, supported by substantial evidence  
3 in the record of the local proceeding, that address the following:

4 “(a) Size and extent of commercial and industrial uses[.]”

5 Respondents respond that OAR 660-014-0030(3)(a) applies only when an  
6 irrevocably committed exception is sought to establish urban development on  
7 rural land, and because the amendments do not approve an exception, the rule  
8 does not apply. We agree.

9 **C. Statewide Planning Goal 3 (Agricultural Land)**

10 Petitioner also argues that the county’s findings are inadequate to  
11 demonstrate compliance with Statewide Planning Goal 3 (Agricultural Land).  
12 According to petitioner, the county was required to determine “what specific  
13 pieces of real property qualify for the [RI and RC designations] and what uses  
14 will be permitted if they do qualify[.]” Petition for Review 20.

15 The county found:

16 “These resource goals are not applicable to the proposed  
17 amendments because they propose no plan designation changes,  
18 zoning map changes, development or land use changes on  
19 agricultural or forest lands. The proposed amendments only grant  
20 the County the authority to make decisions that may implicate Goals  
21 3 or 4 in the future. Any future applications for a site-specific  
22 comprehensive plan designation change will have to demonstrate  
23 consistency with Goals 3 and 4 or demonstrate that the subject  
24 property does not meet the definition of Agricultural Land as  
25 denoted in OAR 660-004-0005.” Record 27.

26 Respondents respond that the county’s finding that Goal 3 is not implicated by  
27 the decision because no land is re-designated or re-zoned by the amendments is

1 adequate to address Goal 3. We agree. Petitioner does not identify any statute,  
2 goal or other applicable law that requires the county to identify all specific  
3 properties in the county that could qualify for the RI or RC designation in the  
4 future in adopting the challenged amendments to the DCCP.

5 **D. Statewide Planning Goals 5, 6, 7, 8, 10, 11, and 13**

6 Petitioner argues that the county impermissibly deferred finding  
7 compliance with Goals 5, 6, 7, 8, 10, 11, and 13. The county adopted findings  
8 explaining why it concluded that the goals cited by petitioner are not implicated  
9 by the county's decision: because the decision only amends the text of the DCCP  
10 to allow the county to consider future applications for an RI or RC plan  
11 designation, at which time such an application will be required to establish  
12 compliance with those goals. Record 27-31. We agree with the county that  
13 because the decision only amends the text of the DCCP, but does not apply the  
14 RI or RC plan designations to any property, Goals 5, 6, 7, 8, 10, 11, and 13 are  
15 simply not implicated.

16 **E. OAR 660-004-0018**

17 OAR 660-004-0018 sets out the requirements for adoption of plan and  
18 zone designations for exception areas. Petitioner's success under this argument  
19 depends on its success under the theory that the pre-amendment DCCP allowed  
20 the county to apply the RI and RC plan designations *only* to the areas that existed  
21 when the county adopted the DCCP in 1979. For the same reasons we rejected

1 petitioner’s theory above, we reject the argument that OAR 660-004-0018 applies  
2 to the county’s decision here.

3 The first and second assignments of error are denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioner’s third assignment of error again articulates its theory that the  
6 RI plan designation is a limited designation that the county may only apply to  
7 exception areas that were in existence and designated RI when the DCCP was  
8 first acknowledged. Petitioner argues that the county’s decision impermissibly  
9 “expand[s] the fixed boundaries of a set of irrevocably committed exceptions in  
10 order to accommodate growth of future industrial and commercial uses.” Petition  
11 for Review 35. For the reasons described above, we reject petitioner’s arguments.  
12 Nothing in the statewide planning goals or the DCCP itself, and nothing cited to  
13 us by petitioner, supports petitioner’s theory.

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 In its fourth assignment of error, petitioner argues that the county’s  
17 decision fails to satisfy the standards for an exception at ORS 197.732. According  
18 to petitioner, the DCCP amendments take an exception to the applicable goals  
19 and that exception does not satisfy the applicable rules governing exceptions.  
20 Respondents respond, and we agree, that the county’s decision does not take an  
21 exception to any statewide planning goals. Petitioner’s arguments under the  
22 fourth assignment of error largely restate its arguments under the first, second

1 and third assignments of error, and for the reasons we describe above, we also  
2 reject them here.

3 The fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 In its fifth assignment of error, petitioner argues that the amendments to  
6 the DCCP fail to comply with the requirements for a reasons exception at OAR  
7 660-004-0022, and that the county was required in this decision to adopt a reasons  
8 exception to Goal 3. Respondents respond that the county was not required to  
9 adopt a reasons exception to Goal 3 in order to adopt the amendments to the  
10 DCCP, because the amendments do not apply the RI or RC plan designation to  
11 any property. We agree with respondents and accordingly, petitioner’s arguments  
12 provide no basis for reversal or remand of the decision.

13 The fifth assignment of error is denied.

14 **SIXTH ASSIGNMENT OF ERROR**

15 In its sixth assignment of error, petitioner argues that the amendments to  
16 the DCCP are inconsistent with DCCP 5.2. Petitioner also argues that the county  
17 failed to establish a need for additional rural industrial or rural commercial uses.

18 DCCP 5.2 provides that “[i]ndustrial, commercial and urban and suburban  
19 residential uses are not *generally* appropriate on rural lands.” (Emphasis added.)  
20 Petitioner does not develop any argument explaining why the amendments to the  
21 DCCP are inconsistent with that provision. Petitioner also does not cite any  
22 statute, rule or other authority that requires the county to demonstrate, in adopting



1 the challenged amendments, that a need exists to expand rural industrial and rural  
2 commercial uses in the county. Accordingly, the sixth assignment of error  
3 provides no basis for reversal or remand of the decision.

4 The sixth assignment of error is denied.

5 The county's decision is affirmed.