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

MITCHELL JONES,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

WILLAMETTE UNITED FOOTBALL CLUB,
Intervenor-Respondent.

LUBA No. 2021-040

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Carrie A. Richter filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

Nathan K. Boderman filed a response brief and argued on behalf of respondent. Also on the brief was Stephen L. Madkour.

Wendie L. Kellington filed a response brief and argued on behalf of intervenor-respondent. Also on the brief was Sarah C. Mitchell and Kellington Law Group, PC.

RUDD, Board Member; ZAMUDIO, Board Chair, participated in the decision.

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

AFFIRMED 11/29/2021

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer approval of a conditional use permit (CUP) authorizing a sports facility on property zoned Rural Residential Farm Forest 5-Acre (RRFF-5).

PETITIONER'S MOTION TO TAKE OFFICIAL NOTICE AND INTERVENOR'S MOTION TO STRIKE

Petitioner attaches to the petition for review a copy of Clackamas County Court Order No. 78-1932 (the County Order), which was adopted on October 26, 1978, and which amended the Clackamas County Comprehensive Plan (CCCP) to take exceptions to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands). App to Petition for Review 49-52. In a footnote, the petition for review states, "LUBA may take official notice of local government enactments." Petition for Review 8 n 4 (citing *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695, *aff'd*, 101 Or App 458, 790 P2d 1213, *rev den*, 310 Or 243 (1990)). We treat that statement as petitioner's motion to take official notice of the County Order.

ORS 40.090(7) recognizes an Oregon county's "ordinance, comprehensive plan or enactment" as law that may be judicially noticed, and we will take official notice of judicially noticed law where it is relevant to an issue on appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 691-96 (2007). The County Order is potentially subject to judicial notice as a local enactment. We understand

petitioner to argue that the County Order is relevant because the subject property was part of an exception area identified in the County Order and because the County Order limits the types of uses that the county may allow in the RRFF-5 zone. Petition for Review 8-9.

Intervenor-respondent (intervenor) moves to strike the County Order and petitioner's arguments relying on it. In its motion to strike, intervenor advises that the County Order was reversed by the Land Conservation and Development Commission (LCDC) and is therefore ineffective. Motion to Strike 2 (citing *1000 Friends of Oregon v. Clackamas Cty*, 3 Or LUBA 281 (1981); *1000 Friends of Oregon v. Clackamas Cty*, 3 Or LUBA 316 (1981)); *see also 1000 Friends v. Clackamas Cty*, 2 LCDC 265, 288 (1979) ("The Exception Statements covering the contested areas do not make a clear demonstration of commitment and, therefore, violate Goals 2, 3, and 4 so that the Rural Plan Amendment is ineffective to change the designation of the contested areas to 'Rural.'").[1] Petitioner has not established how a reversed, ineffective, extra-record county order may be relevant to our review, and we conclude that it is not.

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[1] LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.825(1). However, between the passage of Senate Bill 100 in 1973 and LUBA's creation in 1979, LCDC, the circuit courts, and the Court of Appeals shared authority to review such decisions. *Former* ORS 197.300(1) (1975), *repealed by* Or Laws 1979, ch 772, § 26; ORS chs 28, 34; ORS 183.480; ORS 183.484. Selected LCDC opinions from 1973 to 1980 are published in a three-volume Oregon LCDC Decisions reporter.

In their first assignment of error, petitioner asks that we reject the hearings officer's interpretation of the Clackamas County Zoning and Development Ordinance (CCZDO) based on information contained in the County Order about the nature of the subject property in 1978 and the purported scope of the exception that was adopted thereby. As to its impact on the scope of the exception, given that it was reversed, it is not clear to us how the County Order may be relevant to a legal issue is in this appeal. Further, ORS 197.835(2) generally limits our review to the record. In *Reeves v. Yamhill County*, the court explained that, where the issue is not the bare fact of whether an exception was taken, the text of the exception must be placed in the record for the county to consider and interpret and for the parties to address. 132 Or App 263, 267-68, 888 P2d 79 (1995). In such circumstances, judicial, and by extension official, notice is not appropriate. *See Nicholson v. Clatsop County*, 148 Or App 528, 536-37, 941 P2d 566 (1997) (refusing to take judicial notice of an extra-record county ordinance that the petitioner argued necessarily informed the correct interpretation of a code-required setback). Similarly, here, in order for us to consider it, petitioner was required to place the County Order into the record, and petitioner may not avoid that requirement through official notice. Lastly, we do not take official notice of adjudicative facts and, therefore, we do not consider the County Order as evidence of the character of the subject property in 1978. *Schaff v. City of Medford*, 79 Or LUBA 317, 319 (2019). The County Order is not a proper subject for official notice.

Petitioner's motion to take official notice is denied.

Intervenor's motion to strike petitioner's arguments relying on the County Order is granted.

PETITIONER'S MOTION TO STRIKE

Intervenor's response to the second assignment of error incorporates arguments from its response to the first assignment of error.[2] Petitioner argues that this results in intervenor's response brief exceeding the 11,000-word limit placed on response briefs by OAR 661-010-0035(3)(a) and OAR 661-010-0030(2)(b). Accordingly, petitioner moves to strike a portion of intervenor's response brief.

Intervenor's response brief includes a motion to strike the County Order discussed above. In response to petitioner's motion to strike a portion of its response brief, intervenor submitted (1) an amended response brief removing its motion to strike the County Order and (2) a separate motion to strike the County Order. The amended response brief raises no new issues and reduces the length of the response brief by the number of words in the motion to strike the County Order. We may allow the filing of an amended brief, and we conclude that doing so in this case is consistent with affording all interested persons reasonable notice

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[2] Intervenor's response brief states, "Goal 14 does not apply *for all the reasons explained in the First Assignment, p. 19-29, which arguments are, for brevity, incorporated herein.*" Intervenor's Response Brief 30 (emphasis added).

and opportunity to prepare and present their case. OAR 661-010-0035(5). The amended response brief and motion to strike the County Order are accepted.

Intervenor acknowledges that, even with the removal of its motion to strike the County Order, its amended response brief exceeds the 11,000-word limit if we count the words in the incorporated arguments twice when determining the total word count. Accordingly, intervenor submitted an alternative motion for overlength brief. Nothing in our rules or case law requires that we double count language that is incorporated into other arguments within the same brief, and we decline to do so.

Petitioner's motion to strike is denied.

Intervenor's alternative motion for overlength brief is denied as moot.

BACKGROUND

This appeal follows our decisions in *Jones v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2019-063, June 8, 2020) (*Jones I*), and *Jones v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2019-135, June 8, 2020) (*Jones II*). As we explained in *Jones II*,

> "[Intervenor] seeks to develop a sports facility on a 24-acre property zoned RRFF-5 and located at 1521 Borland Road (Borland Road site). The Borland Road site is 'bordered to the north by the Southlake Foursquare Church and I-205; to the east by the Tualatin River; to the south by other RRFF-5 [zoned] properties; and to the west by Borland Road.' Intervenor's proposed sports facility includes:
>
> > 'three outdoor artificial turf sports fields, an indoor turf training field, an operational building containing a group

> training room, a concessions area, restrooms, equipment storage, and staff offices. Other park facilities would include parking, an outdoor sports court, picnic area, barbeque area, playground, walking and jogging [trails], an ecological observation station, runoff water retention ponds, and a septic [field].'" ___ Or LUBA at ___ (slip op at 3) (citations omitted).

Intervenor applied for a CUP for the proposed facility. Pursuant to CCZDO 1203.03, a CUP requires findings that the following criteria are met:

> "A. The use is listed as a conditional use in the zoning district in which the subject property is located.
>
> "B. The characteristics of the subject property are suitable for the proposed use considering size, shape, location, topography, existence of improvements, and natural features.
>
> "C. The proposed use complies with Subsection 1007.07, and safety of the transportation system is adequate to serve the proposed use.
>
> "D. The proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the zoning district(s) in which surrounding properties are located.
>
> "E. The proposed use is consistent with the applicable goals and policies of the [CCCP].
>
> "F. The proposed use complies with any applicable requirements of the zoning district and any overlay zoning district(s) in which the subject property is located, Section 800, Special Use Requirements, and Section 1000, Development Standards."

In *Jones I*, petitioner appealed a planning director decision concluding that the proposed facility is conditionally allowed in the RRFF-5 zone as a use similar

to other uses conditionally allowed in the zone. In *Jones II*, petitioner appealed a hearings officer approval of a CUP for the subject property, which concluded that CCZDO 1203.03(A) was met based on the planning director's decision that the proposed facility is conditionally allowed as a similar use.

We remanded the county's decision in *Jones I* based on deficiencies in the county's procedure.[3] No party appealed our decision in *Jones I.* We remanded the county's decision in *Jones II* because it relied on the remanded *Jones I* decision to find that CCZDO 1203.03(A) was met. We denied petitioner's assignments of error in *Jones II* that other CUP approval criteria were not met. Intervenor appealed our decision in *Jones II*, and the Court of Appeals affirmed that decision in *Jones v. Willamette United Football Club*, 307 Or App 502, 479 P3d 326 (2020).

On remand from *Jones II*, the hearings officer concluded that the only remaining issue was whether the proposed facility is conditionally allowed in the RRFF-5 zone, as required by CCZDO 1203.03(A). The hearings officer adopted findings that the proposed facility, with its individual elements considered as a unit, is a park, a use listed as conditionally allowed in the RRFF-5 zone. Record

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[3] In *Jones I*, we remanded the similar use determination because we concluded that the county committed a procedural error in failing to provide notice to the petitioner of intervenor's application. The county's decision on remand in *Jones I* is the subject of petitioner's appeal in LUBA No. 2020-121. The parties agreed to suspend the appeal in LUBA No. 2020-121 pending the outcome of another, presumably this, appeal.

14. The hearings officer also adopted alternative findings that the proposed facility is allowed in the RRFF-5 zone when its individual elements are considered separately, with some elements listed expressly, some elements allowed as support uses, and some elements allowed as similar uses.[4] Accordingly, the hearings officer approved the CUP.

This appeal followed.

THIRD ASSIGNMENT OF ERROR

As explained above, approval of a CUP requires that the hearings officer find that the proposed use is listed as a conditional use in the zoning district in which the subject property is located. CCZDO 1203.03(A). Petitioner's third assignment of error is that the hearings officer erred in interpreting the uses listed in the CCZDO to include intervenor's proposed facility. For the reasons set forth below, we deny this assignment of error.

Petitioner argues that the list of recreational uses that are conditionally allowed in the RRFF-5 zone has no meaning if any recreational use can be allowed and that nothing in that list authorizes the proposed facility. Petition for Review 29. CCZDO Table 316-1 lists as conditionally allowed in the RRFF-5 zone "**Recreational Uses**, including boat moorages, community gardens, country clubs, equine facilities, gymnastics facilities, golf courses, horse trails, pack

[4] The hearings officer's decision incorporates by reference some of the similar use determinations made by the hearings officer in the decision on appeal in LUBA No. 2020-121.

stations, parks, playgrounds, sports courts, swimming pools, ski areas, and walking trails," similar uses, and support uses such as concessions, restrooms and maintenance uses. (Boldface in original.) CCZDO Table 316-1 also lists as conditionally allowed in the RRFF-5 zone

> "**Recreational Uses, Government-Owned**, including amphitheaters; arboreta; arbors, decorative ponds, fountains, gazebos, pergolas, and trellises; ball fields; bicycle and walking trails; bicycle parks and skate parks; equine facilities; boat moorages and ramps; community buildings and grounds; community and ornamental gardens; courtyards and plazas; fitness and recreational facilities, such as exercise equipment, gymnasiums, and swimming pools; horse trails; miniature golf, putting greens, and sports courts; pack stations; parks; picnic areas and structures; play equipment and playgrounds; nature preserves and wildlife sanctuaries; ski areas; tables and seating; and similar recreational uses." (Boldface in original.)

Petitioner argues that the list of examples provided for recreational uses, both government- and nongovernment-owned, establishes that the nongovernment-owned recreational uses that are conditionally allowed on the subject property do not include the proposed facility. For example, petitioner maintains, "Nothing in [the list of nongovernment-owned recreational uses] includes ball games played on a 'field' such as soccer, football or lacrosse." Petition for Review 28. According to petitioner, the recreational uses conditionally allowed in the RRFF-5 zone are "typically pastoral, informal, and rely on connecting to the natural condition of the land. They do not suggest attracting an urban population or serving as a regional attraction." Petition for Review 31-32.

We will reverse or remand a land use decision that improperly construes the applicable law. ORS 197.835(9)(a)(D). In construing the law, we consider the text and context of the law at issue in order to determine the intent of the enacting body. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009).

The hearings officer interpreted the term "park," a recreational use listed in CCZDO Table 316-1, to include the proposed facility. "Park" is not defined in the CCZDO. The hearings officer referred to the plain meanings of "park" based on numerous definitions, including

> "a piece of ground in or near a city or town kept for ornament or recreation;"
>
> "an area of land, usually in a largely natural state, for the enjoyment of the public, having facilities for rest and recreation, often owned, set apart, and managed by a city, state, or nation;"
>
> "an enclosed area or a stadium used for sports: a baseball park;"
>
> "in a town, an open public area with grass and trees, often with sports fields or places for children to play;"
>
> "an area in the countryside, often with an important natural feature such as water or mountains, that is protected by the government for people to enjoy;"
>
> "a large area of land with grass and trees, usually surrounded by fences or walls, and specially arranged so that people can walk in it for pleasure or children can play in it;"
>
> "an area of land that is used for a particular purpose: an office/a business park;" and

"an area of land for playing sports on." Record 14-15 (emphases omitted).

Although some of those definitions are consistent with petitioner's "pastoral" description of what they believe to be appropriate parks, other definitions are not, and the listed uses include seemingly nonpastoral playgrounds and swimming pools. The proposed facility is specially arranged so that children can play in it, and it is an area of land for playing sports on. Thus, it is consistent with the plain meaning of "park."

Furthermore, we agree with the hearings officer that the term "park" is not confined to urban settings. The hearings officer referenced examples of existing parks in the region with some or all of the elements of the proposed facility and concluded that "the fact that most, if not all, of the cited parks are located in urban areas is not relevant to whether the facilities constitute a 'park.'" Record 15. As the hearings officer explained, "the size, scope, and intensity of the use are not relevant to determining whether a proposed use, '[is] listed as a conditional use in the zoning district in which the subject property is located.'" Record 26 (quoting CCZDO 1203.03(A)). Instead, the size, scope, and intensity of a use are addressed in other CUP approval criteria:

"B. The characteristics of the subject property are suitable for the proposed use considering size, shape, location, topography, existence of improvements, and natural features.

"* * * * *

"D. The proposed use will not alter the character of the surrounding area in a manner that substantially limits,

> impairs, or precludes the use of surrounding properties for the primary uses allowed in the zoning district(s) in which surrounding properties are located." CCZDO 1203.03.

In this case, the question is whether the proposed facility is a park use conditionally allowed in the RRFF-5 zone, as required by CCZDO 1203.03(A). Whether the subject property is *suitable* for a park use with the proposed elements is addressed through other CUP approval criteria. We agree with the hearings officer that, "[a]lthough the [CCZDO] lists many of the individual uses proposed on the site as some form of 'recreational uses,' i.e., playgrounds, walking rails, sports courts, community and ornamental gardens, and picnic areas, when several such uses are combined into a single facility it is a park." Record 15.

Although petitioner maintains that the hearings officer's interpretation of "park" is overly broad, the hearings officer correctly concluded that the CCCP is relevant context for interpreting the CCZDO. In support of their conclusion that the proposed facility is a park, even though it is privately owned and managed, the hearings officer cited CCCP Policy 9.B.8.4. Record 15. That policy is to

> "[e]ncourage the private sector to help meet the recreation needs of county residents and visitors. The recreation program should use private facilities on a program-by-program basis when public facilities are not available. Where appropriate, nonprofit organizations will be encouraged to operate special purpose parks and facilities (e.g., nature exhibits, historic sites)."

The CCCP's express support of nonprofit organizations operating special-purpose parks lends further support to the hearings officer's interpretation.[5]

The hearings officer also cited the County Parks Plan in concluding that the elements of the proposed facility are appropriate in community parks. Record 16. The County Parks Plan identifies children's play areas, basketball courts, multi-purpose paved courts, sports fields, open multi-use grass areas/natural open space, and picnic areas as appropriate facilities within community parks. Record 51. The hearings officer correctly interpreted CCZDO Table 316-1 in concluding that the proposed facility, which features these types of active recreation areas, is a park and is conditionally allowed in the RRFF-5 zone.

Petitioner also argues that the hearings officer erred in finding that the proposed facility includes sports courts. Petition for Review 27. As explained above, the hearings officer adopted alternative findings that intervenor's proposed facility is, when its individual elements are considered separately, conditionally allowed. Record 18-25. This includes the hearings officer's findings "that the proposed basketball and volleyball courts are 'sports courts,' which are listed as conditional uses in Table 316-1," and that the proposed soccer fields are similar to sports courts. Record 18, 20-22. Because we agree that the

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[5] In addition, CCCP Policy 9.B.5.2 lists as development needs "[b]all fields *as part of neighborhood and community parks, with sufficient area for several different simultaneous activities*" and "[*m*]*ultipurpose courts* in neighborhood and community parks." (Emphases added.) Those references are consistent with the hearings officer's conclusion that the proposed facility is a park.

proposed facility is a park, petitioner's challenges to the hearings officer's alternative findings provide no basis for reversal or remand, and we do not address them.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error is that the findings are inadequate with respect to "the prevalence of spectators not engaged in active recreation." Petition for Review 32. The hearings officer concluded that the recreational uses listed in CCZDO Table 316-1 do not involve members of the public passively observing sports like Madison Square Garden or Wrigley Field. Record 14. Petitioner argues that the hearings officer erred by making that finding but failing to recognize that a large number of the people using the proposed facility will be spectators, *e.g.*, parents watching their kids play while enjoying concessions, and will not be actively recreating. As we understand the argument, petitioner contends that the hearings officer expressly excluded accommodations for "passive viewing of sporting activity" from the "park" use listed in CCZDO Table 316-1. Petition for Review 35. From that premise, petitioner argues that the hearings officer was required, but failed, to make more detailed findings explaining how the proposed facility's accommodations for spectators are part of a "park" use. In other words, petitioner argues that the hearings officer concluded that spectating is not an activity included in a park use, and the hearings officer made inadequate findings regarding spectators' use of the proposed facility.

We agree with intervenor that, when the findings are read in context, the hearings officer did not conclude that whether the proposed facility is a park turns on whether spectators will use it. The hearings officer stated:

> "All of the non-government recreational uses listed in [CCZDO] Table 316-1 involve individuals participating in some form of active recreation; golfing, gardening, walking, riding horses, playing games on sports court[s], swimming, etc. 'Recreational uses' does not involve members of the public passively observing other persons engaged in sports or performance. Therefore, a major league sports venue like Wrigley Field or a performance venue [like] Madison Square Gardens would not qualify as a non-government 'recreational use' in the RRFF-5 zone." Record 14.

The hearings officer did not find that the absence of spectators or amenities used by spectators was their basis for determining that the proposed facility is conditionally allowed. The hearings officer explained that Madison Square Garden and Wrigley Field are examples of venues where spectators pay to observe professionals and are not the type of use described in more detail in our resolution of the third assignment of error:

> "d. * * * In this case[, intervenor] proposed ball fields as a component of a park and parks are allowed as a non-government recreational use in the RRFF-5 zone. [Intervenor] proposed to develop the ball fields as a component of a proposed park.
>
> "f. Opponents argued that this interpretation of the term 'park' would allow a use such as Fenway Park as a 'park' or Madison Square Gardens as a 'garden.' However, as noted above, these facilities are clearly not 'recreational uses' as they do not allow public use of the recreational facilities.

Despite the names, these are sports or performance venues, not parks or gardens.

"g. The fact that the application refers to the proposed use as 'a recreational development for youth soccer and other sports including games and training' or as 'a facility for youth sports' does not change the nature of the use. As with Fenway Park and Madison Square Gardens discussed above, it is the nature of the use, rather than its title that determines whether the use is a 'park.'" Record 17.

Adequate findings identify the relevant criteria and the evidence relied upon and explain why the evidence leads to the conclusion that the criteria are or are not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). The hearings officer did not make their decision based on an unsupported finding that a lack of spectators controls whether a use is a "park" or that the presence of spectators negates a finding that a use is a park.

The fourth assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error is that the hearings officer erred because their interpretation of "park" and "sports court" authorizes densities consistent with an urban use without an exception to Statewide Planning Goal 14 (Urbanization) and in violation of the CCCP.[6] We agree with intervenor that petitioner has not preserved those issues for review.

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[6] Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."

ORS 197.763(1) provides:

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

OAR 661-010-0030(4)(d) provides, in part, "Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required." Below, petitioner argued broadly that the proposed use is urban in nature and, therefore, inappropriate. The purpose of the preservation requirement is to prevent unfair surprise. *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991). Some uses that could be considered "urban," such as community centers or schools, are conditionally allowed on land zoned for exclusive farm use. ORS 215.283(2)(e), (aa). Petitioner's contention that the proposed use is urban and, therefore, inappropriate in the RRFF-5 zone did not provide fair notice that it was their position that the proposal required a Goal 14 exception.

Furthermore, petitioner did not preserve a challenge to compliance with the CCCP. Petitioner could have raised that issue in *Jones II* and failed to do so.[7] In the decision challenged in this appeal, the hearings officer correctly observed that "[c]oncerns regarding the impact of the use on surrounding properties and whether the use is consistent with the [CCCP] were addressed in the prior CUP decision and affirmed by LUBA. The hearings officer has no authority to reconsider those issues in this proceeding." Record 12.

As we explain above, in *Jones II*, petitioner appealed the hearings officer's prior approval of the CUP. We remanded the county's decision based on errors that led the county to conclude that "[t]he use is listed as a conditional use in the zoning district in which the subject property is located." CCZDO 1203.03(A). We denied petitioner's assignments of error that other CUP approval criteria are not satisfied. One CUP approval criterion is that "[t]he proposed use is consistent with the applicable goals and policies of the [CCCP]." CCZDO 1203.03(E). In

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[7] Petitioner's testimony below argued that "[intervenor] fails to take into account the use and density limitations imposed by the 'Rural Use' designation whether imposed by virtue of [the CCZDO] 316-1 purpose statement, the RRFF-5 zone, the Rural Residential Comprehensive Plan designation, OAR 660-[0]04-0018(2), or the County's obligation to protect rural lands from urban uses." Record 448. Petitioner also testified that "project opponents have continually raised concerns that the intensity, density and scale of this facility makes it an urban use and as a result, it cannot be deemed either a listed or similar use in a Rural Use planned area." Record 459. Petitioner also cites places in the record in *Jones II* where petitioner argued that the proposed use is not permitted because it is urban in nature. Petition for Review 13.

Jones II, the hearings officer concluded that CCZDO 1203.03(E) is met based on their consideration of numerous CCCP goals and policies:

> "Chapter Four Land Use, Rural Goal 1 provides: 'To provide a buffer between urban and agricultural or forest uses.' The definition of rural lands specifically states that: '[R]ural lands are exception lands, as defined in [OAR] 660-004-0005(1), that are outside urban growth boundaries and Unincorporated Communities and are suitable for sparse settlement, such as small farms, woodlots, or acreage home sites, lack public facilities or have limited facilities and are not suitable, necessary, or intended for urban, agricultural, or forest use.' The exception lands around and including the subject property serve as a buffer between urban uses to the north and east and resource lands to the south and west. *Opponents argue that the proposed use would be an urban use and therefore not provide a buffer.* As discussed earlier, the County determined that the proposed use is similar to recreational uses which are permitted in the RRFF-5 zone. Thus, it would appear that the County does not consider the proposed use to be an urban use. Even if the mere fact that such uses are permitted in the RRFF-5 zone is not in itself enough to show consistency with the goal, *the proposed use is certainly not an intensive urban use such as commercial, industrial, or high-density residential use that would not provide a buffer. The proposed use is consistent with this goal.*
>
> "Chapter Four Land Use, Rural Goal 2 provides: 'To perpetuate the rural atmosphere while maintaining and improving the quality of air, water, and land resources.' This is such a vague aspirational goal, it is difficult to apply it towards an individual permit application. The proposed use is an allowed conditional use in the RRFF-5 zone, and *as discussed it is not an intensive urban type use. While it may have [a] different type of rural atmosphere than unimproved land, I cannot say it does not perpetuate the rural atmosphere.* The proposed use would not adversely impact air, water, or land resources—and it specifically protects the Tualatin River from any adverse impacts. Therefore, the proposed use at the least maintains the quality of the air, water, and land resources. The proposed use is

consistent with this goal." *Jones II* Record 21 (emphases added).

Petitioner's appeal in *Jones II* did not challenge the hearings officer's determination that CCZDO 1203.03(E) is satisfied because the proposed use is consistent with the CCCP.

> "LUBA has consistently understood *Beck* [*v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992),] to stand for the * * * proposition that issues that could have been, but were not raised in a first appeal of a decision that LUBA remands cannot be raised in an appeal of the decision on remand." *Hatley v. Umatilla County*, 66 Or LUBA 265, 272-73 (2012), *rev'd and rem'd on other grounds*, 256 Or Ap 91, 301 P3d 920, *rev den*, 353 Or 867 (2013) (citing *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009), *aff'd*, 235 Or 246, 230 P3d 976, *rev den*, 349 Or 57 (2010); *DLCD v. Douglas County*, 37 Or LUBA 129 (1999); *Adler v. City of Portland*, 25 Or LUBA 546 (1993)).

"[T]o preserve an issue on appeal, the issue must be raised at all steps in the appeal proceeding where it can be raised, and failure to raise it at an initial step precludes LUBA's review of that issue, even if it raised at a later step, and vice versa." *Id.* at 273. We agree with intervenor that petitioner's second assignment of error is waived.

Furthermore, even if it was not waived, we disagree with petitioner on the merits of its Goal 14 argument. Petitioner does not dispute that the CCZDO is acknowledged. Petition for Review 17 n 6. "'Acknowledgment' means [an LCDC] order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals * * *." ORS 197.015(1). "[A]fter acknowledgment, land use decisions made

under acknowledged plans and regulations need only comply with the acknowledged local legislation. Correspondingly, ORS 197.835(8) confines LUBA's review of local decisions made solely under local plans and regulations to the question of whether the decision complies with the local legislation." *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350, *rev den*, 323 Or 136 (1996) (citing *Foland v. Jackson County*, 311 Or 167, 807 P2d 801 (1991); *Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983)).

> "[A] goal or rule compliance challenge cannot be advanced under ORS 197.829(1)(d) when, however phrased, the argument necessarily depends on the thesis that the acknowledged land use legislation itself does not comply with a goal or rule, and when a direct contention that the acknowledged legislation is contrary to the goal or rule could not be entertained under ORS 197.835." *Id.* at 49.

According to petitioner, the hearings officer erred by concluding that any limitations on park size, scale, or density are imposed by other CUP approval criteria. The hearings officer is required to make land use decisions "in compliance with the acknowledged plan and land use regulations." ORS 197.175(2)(d). The CCZDO allows parks in the RRFF-5 zone with the only restrictions on operations and character contained in the remaining CUP approval criteria. Petitioner's argument necessarily depends on the thesis that the CCZDO does not comply with Goal 14, and petitioner may not challenge the acknowledged CCZDO's compliance with the goals in this proceeding.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

OAR 660-004-0018

> "explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule." OAR 660-004-0018(1).

Petitioner's first assignment of error is that the county's interpretation of "park" and "sports court" as encompassing the proposed facility or elements of the proposed facility is inconsistent with OAR 660-004-0018 and should be reversed or, in the alternative, the decision should be remanded for additional findings.

As indicated above, the subject property is zoned RRFF-5, a zone applied to exception lands.[8] Petitioner's first assignment of error is based in part on their

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[8] RRFF-5 is a rural zone. Pursuant to CCCP chapter 4, "[r]ural lands are exception lands, as defined in [OAR] 660-004-0005(1) * * *. They lack public facilities or have limited facilities and are not suitable, necessary, or intended for urban, agricultural, or forest use." OAR 660-004-0005(1) provides:

> "An 'Exception' is a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:
>
> "(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

assertion that, "in 1978, the County adopted a Comprehensive Plan Amendment Package assigning Rural plan and zoning designations to hundreds of acres within the County including the subject parcel, which received an RRFF-5 designation." Petition for Review 8. Petitioner argues that "the County erred by simply assuming that interpretation of the zoning classification was all that was required without knowing anything about the terms of or limitations imposed by the 1978 'irrevocably committed' exception." Petition for Review 12-13.

Petitioner did not raise the issue of compliance with the County Order below, and we agree with the county and intervenor that that issue was not preserved. Nothing in the record pages cited by petitioner provided notice to the hearings officer or other parties that petitioner maintained that a reversed 1978 exception governed the scale of uses allowed on the subject property. Petition for Review 8:1 to 9:13, 10:22 to 11:14, and 12:23 to 13:2 rely on the County Order, of which we decline to take official notice, and we do not consider those portions of the first assignment of error further. We consider the remainder of the first assignment of error below.

"(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

"(c) Complies with ORS 197.732(2), the provisions of this division and, if applicable, the provisions of OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040."

Petitioner argued before the hearings officer that "[intervenor] fails to take into account the use and density limitations imposed by the 'Rural Use' designation, whether imposed by virtue of [the CCZDO] 316-1 purpose statement, the RRFF-5 zone, the Rural Residential Comprehensive Plan designation, OAR 660-[0]04-0018(2), or the County's obligation to protect rural lands from urban uses." Record 448. Petitioner's first assignment of error includes an assertion that the hearings officer

> "failed to make any findings as to whether the proposed complex meets the other requirements set out in OAR 660-004-0018(2) with respect to uses, densities or activities consistent with the existing exception. Thus, the County's decision should be reversed, or in the alternative, remanded for findings relating to consistency with OAR 660-004-0018." Petition for Review 13.

Petitioner argues that, because the property is located in an exception area, the county was required to make findings that the proposed facility is consistent with uses, densities, or activities authorized by the RRFF-5 exception. Such challenges were required to be raised in *Jones II* and may not be raised now. *Beck*, 313 Or 148.

Furthermore, OAR 660-004-0018 sets out the requirements for adoption of plan and zone designations for exceptions.[9] The CUP is not an adoption of a

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[9] OAR 660-004-0018(2) provides that, for irrevocably committed exceptions, residential plan and zoning designations

"shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those that satisfy *(a) or (b) or (c)* and, if applicable, (d):

"(a) That are the same as the existing land uses on the exception site;

"(b) That meet the following requirements:

"(A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals, and are consistent with all other applicable goal requirements;

"(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and

"(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;"

"(c) For uses in unincorporated communities, the uses are consistent with OAR 660-022-0030, 'Planning and Zoning of Unincorporated Communities', if the county chooses to designate the community under the applicable provisions of OAR chapter 660, division 22;

"(d) For industrial development uses and accessory uses subordinate to the industrial development, the industrial uses may occur in buildings of any size and type provided the exception area was planned and zoned for industrial use on January 1, 2004, subject to the territorial limits and other requirements of ORS 197.713 and 197.714." (Emphasis added.)

plan or zone designation, and OAR 660-004-0018 does not apply to the CUP decision. Petitioner cites *Doty v. Coos County* for the proposition that "a physically developed or irrevocably committed exception will permit only uses that are the same as those already existing on the property or uses that can meet the requirements set out in the rule." 185 Or App 233, 243, 59 P3d 50, *adh'd to on recons*, 186 Or App 580, 64 P3d 1150 (2003). *Doty* concerned comprehensive plan and zoning map amendments. Intervenor's application does not request a comprehensive plan or zoning map change, and we do not agree with petitioner's attempted extension of *Doty* to the interpretation of acknowledged zoning ordinances.

ORS 197.835(8) provides that we "shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations." Petitioner accepts that the CCCP and CCZDO are acknowledged to comply with state law. Petition for Review 17 n 6. Land use decisions are measured against the acknowledged plan and implementing ordinance and not against the goals. *Byrd*, 295 Or at 318-19. The CCZDO identifies the acknowledged uses allowed in the RRFF-5 zone, and the goals do not apply directly to the CUP application. The hearings officer determined that the proposed facility is a "park," and private parks are conditionally allowed in the RRFF-5 zone without an exception to Goals 3 or 4. ORS 215.283(2)(c); OAR 660-006-0050(2). We need not reach the hearings officer's alternative findings

concerning "sports courts." There was no requirement for the hearings officer to make findings concerning OAR 660-004-0018.

The first assignment of error is denied.

The county's decision is affirmed.