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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

ANTHONY J. ACETI,
Intervenor-Respondent.

LUBA No. 2022-075

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Carol Macbeth filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by Deschutes County.

Bill Kloos filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 12/06/2022

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a decision of the board of county commissioners approving a post-acknowledge plan amendment (PAPA) to change the subject property's comprehensive plan designation from agricultural to rural industrial (RI) and to change its zoning from exclusive farm use (EFU) to RI.

MOTION TO INTERVENE

Anthony J. Aceti (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

BACKGROUND

A. Subject Property Description

The subject property is comprised of 21.54 acres and is located at the intersection of Highway 97 and Tumalo Road. The subject property is developed with a large warehouse building that is used to store hay, seed, and farm machinery. The northwestern corner of the subject property is adjacent to a rural residential subdivision. The subject property is near an area generally referred to as Deschutes Junction, which was developed with rural industrial and rural commercial uses prior to the adoption of the Deschutes County Comprehensive Plan (DCCP) in 1979 and its acknowledgement by the Land Conservation and Development Commission (LCDC) in 1981. In adopting the plan designation and zoning for Deschutes Junction, the county took a physically developed exception

to Statewide Planning Goal 3 (Agricultural Lands).[1] The subject property is near, but not within, the Deschutes Junction exception area.

B. Prior LUBA Appeals and Decisions

This is the fifth time that the plan designation and zoning of the subject property have been disputed before LUBA. *See Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016) (*Aceti I*); *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 441 (*Aceti II*), *aff'd*, 288 Or App 378, 405 P3d 197 (2017); *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (*Aceti III*), *aff'd*, 298 Or App 375, 449 P3d 534 (2019); *Central Oregon Landwatch v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-028, June 18, 2021) (*Aceti IV*), *aff'd*, 315 Or App 673, 501 P3d 1121 (2021). We summarized the prior appeals and decisions in *Aceti IV*. We summarize them again here and discuss them in more detail in the analysis below.

In 2016, the county approved a plan designation and zone change to RI for the subject property. That approval included an exception to Statewide Planning Goal 14 (Urbanization). In *Aceti I*, we affirmed the county's conclusion that the

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[1] As discussed at length below, this appeal concerns Statewide Planning Goal 14 (Urbanization). We note that, in 1979 and 1981, exceptions to Goal 14 were not required for rural commercial and industrial uses. *See 1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) (*Curry County*) (holding that Goal 14 prohibits urban use of rural land and observing that exceptions to Goal 14 were neither explicitly permitted nor required until LCDC promulgated OAR chapter 660, division 14, in 1983).

subject property is not agricultural land. 74 Or LUBA at 159-68. However, while the subject property is not protected agricultural land, it is rural land, which may not be used for urban uses. We remanded for inadequate findings related to the Goal 14 exception. However, we noted that the RI zone does not necessarily authorize urban uses of rural land and suggested that an exception to Goal 14 was not required. *Id.* at 168-74.

On remand, intervenor amended its application to withdraw its Goal 14 exception request, and the county again approved the plan designation and zone change. Petitioner challenged that decision in *Aceti II*. We reversed because the then-applicable DCCP limited the RI plan designation to three specific geographic exception areas. DCCP 3.4 (2011). We rejected petitioner's categorical argument that all industrial development is urban and requires a Goal 14 exception to be sited on rural land. *Aceti II*, 75 Or LUBA at 449. We observed that DCCP 3.4 (2011) provided that the RI plan designation and zone bring the exception areas into compliance with Goal 14 by ensuring that they remain rural because the uses allowed in the RI zone are less intensive than those allowed in unincorporated communities. *Id.* at 445. We did not reach or resolve the parties' dispute about whether the RI zone regulations in Deschutes County Code (DCC) 18.100.010 to 18.100.090 so limit the industrial uses allowed in the RI zone that they will not constitute urban uses. *Id.* at 445 n 4.

In 2018, the county amended the DCCP to allow RI designation and zoning of land outside the three existing exception areas. Petitioner appealed those

amendments in *Aceti III*, arguing, among other things, that the county's decision failed to comply with Goal 14 because the amendments would allow urban uses of rural land. Petitioner further argued that the DCC RI zone regulations—which were not amended concurrently in 2018 with the DCCP amendments—allow urban uses of rural land. We rejected those arguments. *Aceti III*, 79 Or LUBA at 260-61.

Intervenor subsequently applied to the county to change the plan designation and zone of the subject property to RI to allow unspecified rural industrial uses. The county approved the changes, finding, among other things, that the changes were consistent with Goal 14. Petitioner appealed in *Aceti IV*, arguing, among other things, that the county erred in concluding that the approved changes allowed only rural and not urban use of the subject property and, thus, that no Goal 14 exception was required. In concluding that the approved changes would not allow urban use of the subject property, the county agreed with intervenor that the DCCP rural economic policies that are implemented by DCC chapter 18.100 do not allow urban uses on RI-designated and RI-zoned land. Petitioner did not challenge that finding on appeal in *Aceti IV*.

The county also applied the inquiry derived from *Shaffer v. Jackson County*, 17 Or LUBA 922, 931 (1989), to explain why applying RI zoning to the subject property would not result in urban uses. With respect to the *Shaffer* factors, the county found that the potential industrial uses allowed under RI

zoning would employ a small number of workers. On appeal, we assumed, without deciding, that the *Shaffer* test applied, because no party argued that it did not apply. Based on that assumption and the lack of argument that the *Shaffer* test did not apply, we agreed with petitioner that the county made inadequate findings regarding one aspect of the *Shaffer* test, the number of workers that could be employed in industrial uses of the subject property. We remanded for the county to explain, consistent with the *Shaffer* test, why it concluded that the potential uses would employ a small number of workers.

On remand, the board of commissioners adopted findings providing three independent and alternative reasons why the decision is consistent with Goal 14. First, the board found that the DCCP RI policies and implementing DCC RI zone regulations will allow only rural uses of property designated and zoned RI. We understand the board to have concluded that the applicable regulations are facially sufficient to demonstrate compliance with Goal 14. Second, the board adopted separate findings that the regulations in DCC chapter 18.100, as applied to the subject property, will ensure that the use of the land constitutes a rural use. Third, the board found that, if the *Shaffer* test applies, then, under a "worst case" scenario, a maximum of 90 workers would be employed on the subject property under RI designation and zoning and that 90 is a "small" number of employees, indicating a rural use under that test.

This appeal followed.

MOTION TO TAKE EVIDENCE

LUBA may take evidence not in the record in

> "the case of *disputed factual allegations* in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." OAR 661-010-0045(1) (emphasis added).

A motion to take evidence must include a statement "explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). It is the movant's burden to demonstrate a sufficient basis for LUBA to take evidence outside the record.

Petitioner moves LUBA to take as evidence a screenshot of a Google aerial map of the subject property that shows a link labeled "Blue-Box Storage - Bend" and a screenshot of the webpage to which the link leads. Petitioner seeks to establish that a commercial business is operating on the subject property in violation of the current EFU zoning, as discussed under the fifth assignment of error.

Intervenor responds that we should deny the motion to take evidence because intervenor does not dispute that there are businesses operating on the subject property in violation of the EFU zoning regulations, which the land use application and proceeding on remand are intended to address.

We will take evidence outside the record to resolve disputed factual allegations in the parties' briefs. Intervenor does not dispute the factual allegation in the petition for review that Blue Box Storage is operating on the subject property in violation of the EFU zoning regulations. Accordingly, we accept that fact as true and deny the motion to take evidence.

FIFTH ASSIGNMENT OF ERROR

In the fifth assignment of error, petitioner argues that the county committed procedural error that prejudiced petitioner's substantial rights by failing to ascertain whether the subject property is in violation of applicable land use regulations or to list DCC 22.20.015 as an applicable approval criterion. Intervenor responds that the county's decision is a decision on remand, petitioner did not assign error to the original decision's notice and findings related to DCC 22.20.015, and, therefore, petitioner has waived its right to raise those issues in this proceeding.

DCC 22.20.015(A) provides that, if a property is in violation of applicable land use regulations, the county shall not make a land use decision, approve development, or issue a building permit for that property. "A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement ('VCA')." DCC 22.20.015(C). As part of the land use application process, an applicant is required to certify either that

the subject property is currently in compliance with the DCC and any prior land use approvals or that the application is for the purpose of bringing the property into compliance. DCC 22.20.015(B). Notwithstanding a violation, the county may issue a land use approval if "[i]t results in the property coming into full compliance with all applicable provisions of the federal, state, or local laws, and [DCC], including sequencing of permits or other approvals as part of a [VCA]." DCC 22.20.015(D)(1).

A party may generally raise an issue on appeal to LUBA only if that issue was raised before the local hearings body. ORS 197.835(3); ORS 197.797(1). A petitioner may raise a new issue to LUBA if the local government failed to list the applicable criteria for a decision. ORS 197.835(4)(a). "However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government." *Id.*

First, petitioner asserts that the challenged decision is a legislative decision to which preservation requirements do not apply. We conclude that the challenged decision is a quasi-judicial PAPA to which ORS 197.797 applies. *Strawberry Hill Wheelers v. Benton County*, 287 Or 591, 602-03, 601 P2d 769 (1979); *Sullivan v. Polk County*, 49 Or LUBA 543 ,447-50 (2005).

Second, petitioner cites *former* ORS 197.763(3)(b) (2019), *renumbered as* ORS 197.797(3)(b) (2021), in support of its fifth assignment of error. ORS 197.797(3)(b) provides that a local government must provide notice of a quasi-judicial land use hearing and include in that notice a list the criteria that apply to

the application. Petitioner argues that it was not required to raise this issue during the local proceeding because DCC 22.20.015 was not identified in the local notice of proceeding as an applicable criterion. Petitioner asserts that, after the county issued the challenged decision on remand, petitioner's attorney learned that a commercial storage company is operating on the subject property. Petition for Review 43. Petitioner argues that county should have addressed, in the remand proceeding, whether the subject property is in violation of any applicable land use regulations to determine whether the county had the authority to approve the application.

In the original decision, the hearings officer found that, in a separate code enforcement proceeding, the county had determined that businesses were operating on the subject property in violation of the EFU zoning regulations. Record 634. We noted that fact in our decision in *Aceti IV*. ___ Or LUBA at ___ (slip op at 4 n 2). The hearings officer observed that the code enforcement proceeding record was sealed and was not included in the record before the hearings officer on the PAPA. The record before the hearings officer included a staff report that stated that there was an active code enforcement case and that approval of the PAPA would be "a step toward resolving the code enforcement case." Record 634. The hearings officer quoted the staff report, which stated:

> "The proposed plan amendment and zone change will not result in the property coming into full compliance with all application provisions of federal, state, or local laws, and the [DCC]. If the plan amendment and zone change are approved, additional land use

> applications will be required to review the proposed use for full compliance with applicable provisions. However, the proposal is recognized as a sequential step in achieving full compliance. A [VCA] has not been secured. Based on this information, staff believes approval of the proposed plan amendment and zone change are permitted under this section if a [VCA] is secured." Record 635.

The hearings officer concluded that DCC 22.20.015(A), when considered in conjunction with subsections (B) and (D), did not prevent the county from approving the PAPA, which the hearings officer found would be a step towards resolving the violations. The hearings officer found that approval of the proposed PAPA is permitted under DCC 22.20.015(D) if a VCA is secured, and they required a VCA as a condition of approval. Record 635.

Intervenor argues that, in *Aceti IV*, petitioner could have but did not challenge the county's findings and conclusions for DCC 22.20.015. Intervenor argues that petitioner is precluded from raising the issue on appeal from the county's decision on remand.

On review of post-remand proceedings, petitioners are foreclosed from raising issues at LUBA that were "conclusively decided against them by the first final and reviewable LUBA decision." *Beck v. City of Tillamook*, 313 Or 148, 150, 831 P2d 678 (1992). That rule is commonly referred to as "the law of the case." *See also Green v. Douglas County*, 63 Or LUBA 200, 206, *rev'd and rem'd on other grounds*, 245 Or App 430, 263 P3d 355 (2011) ("Under *Beck*, a party at LUBA fails to preserve an issue for review if, in a prior stage of a single

proceeding, that issue is decided adversely to the party or that issue could have been raised and was not raised.").

Petitioner replies that the issue is not waived because DCC 22.20.015(A) applies to every land use decision the county makes.

We agree with intervenor that the issue of whether the county can approve the application consistent with DCC 22.20.015 is waived. Petitioner was made aware in the initial proceeding that uses of the subject property violated the DCC. The county determined that the proposed PAPA is a step toward remedying the violations and achieving full compliance. Petitioner could have but did not challenge the hearings officer's application of DCC 22.20.015 in *Aceti IV*. We agree with intervenor that petitioner is thereby precluded from raising that issue in this appeal challenging the county's decision on remand.

Even if, as petitioner argues, the county was required to reapply DCC 22.20.015 to its decision on remand, we conclude that petitioner could have raised the issue before the county during the proceeding on remand. Petitioner asserts that petitioner's attorney first learned of a specific commercial use of the subject property after the challenged decision was issued. However, petitioner was made aware in the initial proceeding that uses of the subject property violated the DCC. Whether those preexisting code violations persisted or new violations occurred, petitioner could have raised the issue of code compliance and application of DCC 22.20.015 during the remand proceeding. Thus, we refuse to

consider the issue raised in the fifth assignment of error under ORS 197.835(4)(a).

The fifth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued the applicable law in concluding that the decision does not require an exception to Goal 14 because the RI zone regulations ensure that urban uses will not be allowed on the subject property. Petitioner argues that county erred in finding that no exception to Goal 14 is required based on prior acknowledgement of the RI zone's compliance with Goal 14 under different circumstances.

The board of commissioners found:

> "[T]he policies and provisions of the DCCP and DCC are independently sufficient to both demonstrate that [PAPAs] that apply the [RI] plan designation and zoning to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land." Record 30.

> "[T]he RI zone regulations have been acknowledged by [the Department of Land Conservation and Development (DLCD)] to comply with Goal 14 and the application of those regulations is independently sufficient to demonstrate that this [PAPA], which applies the RI plan designation and zone to the subject property, also complies with Goal 14. The adopted and acknowledged use limitations, dimensional standards, off-street parking and loading standards, site design, additional requirements, solar setbacks, and restrictions imposed under DCC 18.100.030 through .080 and other invoked DCC provisions so limit the scale, scope and intensity of allowed uses and development on the subject property to effectively

> prevent urban use of rural land. * * * [T]he DCC 18.100 provisions that will apply to all development on the property will ensure that any allowed uses and development will constitute rural use of rural land consistent with Goal 14 and related comprehensive plan rural and urbanization policies even if one or more uses does not necessarily employ a small number of workers. Consequently, an exception to Goal 14 is not required to approve the applications." Record 35-36.

As we explained in *Aceti IV*, in 2002, the county amended the DCCP and DCC to limit the uses authorized in the RI zone to rural uses. Those amendments ensured that uses allowed on RI-zoned lands comply with Goal 14. The county adopted what is now DCCP Policy 3.4.23, which applies to lands designated and zoned RI and provides: "To assure that urban uses are not permitted on rural industrial lands, land use regulations in the [RI] zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor." The 2002 amendments also restricted new rural industrial uses, except primary processing of raw materials produced in rural areas, to a maximum of 7,500 square feet of floor space within a building. That floor-area limitation is codified in DCC 18.100.040(H)(1).[2] In 2003, DLCD

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[2] DCC 18.100.040(H)(1) provides:

> "The maximum size of a building is 7,500 square feet of floor space. The maximum square footage in a building or buildings for a single allowable use, as defined in DCC 18.100.020 and 18.100.030, on an individual lot or parcel shall not exceed 7,500 square feet. There is no building size limit for uses that are for the primary processing of raw materials produced in rural areas."

issued an order acknowledging the 2002 ordinances as consistent with Goal 14. The county further amended the RI zone use limitations in 2004, 2009, and 2018. There is no dispute that those amendments are acknowledged as consistent with Goal 14. ORS 197.625(1).[3]

As explained above, in 2018, the county amended the DCCP to allow RI designation and zoning of land outside three existing exception areas. Petitioner appealed. We observed that, in adopting the DCCP amendments, the county found that future applications seeking to apply the RI plan designation will be required to demonstrate that the proposed use is consistent with all the statewide planning goals, including Goal 14. *Aceti III*, 79 Or LUBA at 260. The county concluded:

> "The proposed amendment is consistent with Goal 14 because not only must any application for Rural Commercial or [RI] plan designation demonstrate it is consistent with Goal 14, but, as DCCP Policy 3.4.9 and 3.4.23 direct, land use regulations for the Rural

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[3] ORS 197.625(1) provides:

> "A local decision adopting a change to an acknowledged comprehensive plan or a land use regulation is deemed to be acknowledged when the local government has complied with the requirements of ORS 197.610 and 197.615 and either:
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> "(a) The 21-day appeal period set out in ORS 197.830(9) has expired and a notice of intent to appeal has not been filed; or
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> "(b) If an appeal has been timely filed, [LUBA] affirms the local decision or, if an appeal of the decision of [LUBA] is timely filed, an appellate court affirms the decision."

> Commercial and [RI] zones ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660 Division 22, and are consequently not urban uses." *Id.*

The county and intervenor responded, and we agreed, that petitioner's arguments that DCC 18.100.010 allows urban uses were an impermissible collateral attack on an acknowledged land use regulation.[4] We reasoned that "[n]o provisions of the DCC were amended by the challenged decision and accordingly, an appeal of amendments to the DCCP is not the appropriate place to challenge those acknowledged DCC provisions." *Aceti III*, 79 Or LUBA at 261.

In this appeal, petitioner argues that the county approved and we affirmed the DCCP amendments that allowed the RI zone to be applied beyond the boundaries of preexisting industrial exception areas "only because demonstrating compliance with Goal 14 would be required to be shown in the future," at the time of application of the RI designation and zone to new property. Petition for Review 36. Petitioner argues:

> "The County cannot perpetually evade demonstrating compliance with Goal 14 by first finding compliance need not be shown in the past when the County adopts a PAPA opening up hundreds of thousands of acres of EFU and forest land to potential industrial development on the basis that compliance with Goal 14 will be shown at the time of individual applications, and then at the time of individual applications say compliance need not be shown because it was shown in the past." *Id.*

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[4] DCC 18.100.010 sets out the uses that are permitted outright in the RI zone, "as limited by DCC 18.100.040, and unless located within 600 feet from a residential dwelling, a lot within a platted subdivision or a residential zone."

Petitioner mischaracterizes the county's conclusions and our analysis in *Aceti III*. Contrary to petitioner's characterization, the county's response to petitioner's Goal 14 argument in that appeal did not rely solely on the future direct application of Goal 14 to PAPA applications to apply the RI designation and zone. Instead, the county concluded that (1) the DCCP amendments were consistent with Goal 14 because they did not apply the RI plan designation to any property and therefore could not allow urban use of rural land, (2) the county would analyze consistency with Goal 14 at the time the county considered applying the RI plan designation to specific property, and (3) land use regulations for the RI zone ensure that the county cannot authorize urban uses therein. We agreed with all three of those conclusions.

Similarly, in *Aceti IV*, in concluding that the approved PAPA would not have allowed urban use of the subject property, the county concluded that the DCCP rural economic policies that are implemented by DCC chapter 18.100 do not allow urban uses on RI-designated and RI-zoned land. Petitioner did not challenge that finding in *Aceti IV*.

We conclude that the county correctly determined that the policies and provisions of the DCCP and DCC that apply to the RI zone are independently sufficient to demonstrate that PAPAs that apply the RI plan designation and zone to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land. The acknowledged DCC chapter

18.100 provisions that will apply to all development on the property will ensure that any allowed uses and development constitute rural use of rural land, consistent with Goal 14.

The fact that DLCD first acknowledged the DCC chapter 18.100 RI zone regulations as consistent with Goal 14 in 2003, at a time when the RI zone was limited to existing exception areas, does not affect our conclusion that those regulations are acknowledged to comply with Goal 14 as applied to the challenged PAPA and after the 2018 DCCP amendments. As we observed in *Aceti IV*, "[w]e have no reason to believe that DLCD's acknowledgment of the 2002 Ordinances as consistent with Goal 14 was premised on the fact that the RI plan designation was at that time limited to specific geographic areas." ___ Or LUBA at ___ (slip op at 28). Petitioner has not provided any argument in this appeal that demonstrates that DLCD's acknowledgment of the 2002 ordinances as consistent with Goal 14 was premised on the fact that the RI plan designation was at that time limited to specific geographic areas.

The third assignment of error is denied.

FIRST, SECOND, AND FOURTH ASSIGNMENTS OF ERROR

In its alternative, precautionary *Shaffer* findings, the county concluded that the use and dimensional standards of the RI zone will limit the number of employees employed by the most intensive potential industrial uses of the property under RI zoning to a small number of employees, ensuring that the industrial uses remain rural and not urban.

In the first, second, and fourth assignments of error, petitioner argues that the county misconstrued the applicable law and made a decision not supported by adequate findings or based on substantial evidence in concluding that the number of employees employed by the most intensive potential industrial uses of the property will be a small number of employees.

In *Aceti IV*, we observed that, in *Aceti II*, we did not reach the parties' dispute about whether the RI zone regulations so limit the industrial uses allowed in the RI zone that they will not constitute urban uses. It is not clear from our decision in *Aceti II* whether intervenor argued in that appeal that petitioner's arguments were an impermissible collateral attack on the acknowledged DCC.

In adopting the 2018 DCCP amendments, the county took a belt-and-suspenders approach by requiring an applicant for a new RI plan designation to demonstrate compliance with Goal 14, even though the county had already concluded (and DLCD had already acknowledged) that the RI designation and zone policies and regulations comply with Goal 14 by limiting uses to those that are rural in character. In *Aceti III*, we affirmed that belt-and-suspenders approach in response to petitioner's Goal 14 challenge.

In *Aceti IV*, the county agreed with intervenor that the policies of the DCCP, implemented by DCC chapter 18.100, do not allow urban uses on RI-zoned land. Petitioner did not assign error to that finding on appeal. We observed that that unchallenged conclusion "might have been the end of the Goal 14 inquiry." ___ Or LUBA at ___ (slip op at 29). Nevertheless, the county concluded

that it was required to make additional findings to support its conclusion that the DCCP and DCC limit industrial uses to those that are rural in nature. The county applied the *Shaffer* test to explain why applying RI zoning to the subject property will not result in urban uses.

We assumed, for purposes of our decision in *Aceti IV*, that the fact that the RI zone regulations have been acknowledged by DLCD to comply with Goal 14 was not independently sufficient to demonstrate that the challenged PAPA applying the RI plan designation and zone to the subject property also complied with Goal 14. We remanded for further findings on only one of the *Shaffer* factors—the number of employees.

On remand, the board of commissioners asserted that we misunderstood the county's position with respect to the applicability of the *Shaffer* test:

> "*Shaffer* expressly states that if a party challenges whether a proposal would result in an urban use of rural land (which [petitioner] did), [then] the local government is required to ask four initial questions. Furthermore, if any one or more of those questions is not answered in the affirmative (i.e., potentially not indicating a rural use), *Shaffer* states that the decision maker must proceed to the next step. *Shaffer* is silent about whether a County with a comprehensive plan and code acknowledged as consistent with Goal 14 is allowed to skip that second step if there is even a single non-affirmative response, nonetheless two as was the case in the initial decision. The Board of County Commissioners does not have the authority to ignore the express directives of LUBA's *Shaffer* opinion, particularly since the other case cited in the findings and by LUBA, *Columbia Riverkeeper v. Columbia County*, [70 Or LUBA 171, *aff'd*, 267 Or App 673, 342 P3d 181 (2014) (*Columbia Riverkeeper*),] was decided in 2014, well after most counties' codes, to include the DCC, have been acknowledged as consistent with

> Goal 14. The Board of County Commissioners proceeded to the second step of that analysis because the case law said the Board of County Commissioners was required to, not for the reason LUBA assumed.
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> "If, as LUBA suggests in its footnote 9, the *Shaffer* analysis has been superseded by the Unincorporated Communities Rule or acknowledgment of a land use code as consistent with Goal 14, LUBA should expressly state so, because its subsequently dated rulings suggest that is not the case.
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> "Furthermore, the Board of County Commissioners now expressly finds that the policies and provisions of the DCCP and DCC are independently sufficient to both demonstrate that [PAPAs] that apply the [RI] plan designation and zoning to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land. Given that finding, any further analysis under *Shaffer* is redundant and precautionary only." Record 30 (underscoring in original).

We now clarify the applicability of *Shaffer* to the facts of this case, especially in light of our analysis in *Columbia Riverkeeper*. In 1979 and 1981, exceptions to Goal 14 were not required for rural commercial and industrial uses. *See 1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) (*Curry County*) (holding that Goal 14 prohibits urban use of rural land and observing that exceptions to Goal 14 were neither explicitly permitted nor required until LCDC promulgated OAR chapter 660, division 14, in 1983). We issued *Shaffer* in 1989, three years after the Supreme Court issued *Curry County* in 1986, and five years before LCDC adopted the Unincorporated Communities Rule in 1994. In *Aceti IV*, we explained the procedural history of the county's RI zone regulations relative to the Unincorporated Communities Rule. In 2002, to bring

RI zoning into compliance with Goal 14, instead of taking an exception, the county amended the DCCP and DCC to limit the uses authorized in the RI zone to rural uses.

> "The county relied on the building size limitation in the Unincorporated Communities Rule as the primary means of ensuring that industrial uses in the RI zone would remain rural, consistent with Goal 14. 'Small-scale, low impact industrial uses,' defined as industrial uses 'which take[] place in an urban unincorporated community in a building or buildings not exceeding 60,000 square feet of floor space, or in any other type of unincorporated community in a building or buildings not exceeding 40,000 square feet of floor space,' are allowed in unincorporated communities. OAR 660-022-0030(11). The 2002 Ordinances restrict new rural industrial uses, except primary processing of raw materials produced in rural areas, to a maximum of 7,500 square feet of floor space within a building. That floor area limitation is codified in DCC 18.100.040(H)(1).
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> "Ordinance 2002-126 adopted what is now DCCP Policy 3.4.23, which applies to lands designated and zoned RI and provides: 'To assure that urban uses are not permitted on rural industrial lands, land use regulations in the [RI] zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor.' Ordinance 2002-127 amended DCC chapter 18.100, the RI zone regulations. On January 23, 2003, DLCD issued Order No. 001456, acknowledging the 2002 Ordinances as consistent with Goal 14." *Aceti IV*, ___ Or LUBA at ___ (slip op at 18-19).

Thus, the procedural history of the county's RI designation and zone support the county's conclusion that the county has previously determined and DLCD has previously acknowledged that application of the RI designation and zone will not allow any urban industrial use of rural land.

Columbia Riverkeeper is distinguishable in multiple respects. That appeal involved a reasons exception to Goal 3 for industrial use of resource land. The county found that Goal 14 was not applicable because, according to the county, the proposed PAPA did not authorize urban uses on rural lands. The county adopted alternative Goal 14 findings. First, the county concluded that, to the extent the amendments authorized urban uses on rural land, OAR 660-004-0022(3), which sets out reasons that can justify an exception to allow rural industrial uses of resource land, provides an "exemption" from Goal 14. Second, the county concluded that the same reasons and findings supporting the exception to Goal 3 also supported an exception to Goal 14. The petitioner challenged the county's primary conclusion and its two alternative conclusions.

We observed that the county did not provide any explanation for its conclusion that the amendments authorized no urban uses. We observed that the county's Rural Industrial Planned Development (RIPD) zone was intended to implement OAR 660-004-0022(3) and allow industrial uses that are justified under reasons exceptions to the *resource* goals, *i.e.*, Goal 3 and Statewide Planning Goal 4 (Forest Lands). We concluded that application of the RIPD zone under a reasons exception to a resource goal pursuant to OAR 660-004-0022(3) did not mean that the proposed industrial uses did not also require an exception to Goal 14 if the proposed use was an urban industrial use rather than a rural industrial use. We stated that, "[t]o our knowledge, LCDC has not adopted any rule-making that clarifies how to answer the highly problematic question of

whether an industrial use is urban or rural in nature." *Columbia Riverkeeper*, 70 Or LUBA at 211. The parties did not brief, and we did not analyze, the Unincorporated Communities Rule or the relevance of that rule to the applicable inquiry. We remanded for the county to address whether any of the proposed uses of the exception area constituted the urban use of rural land, citing *Shaffer* as providing a framework for the inquiry to determine whether an industrial use is rural or urban.

Differently, here, the county and our decisions in prior appeals have illuminated the procedural history of the county's adoption of the applicable RI designation and zone and demonstrated that the applicable DCCP policies and DCC implementing regulations limit rural industrial uses to an intensity less than that allowed by the Unincorporated Communities Rule in order to comply with Goal 14. DLCD found that those policies and regulations are sufficient to demonstrate compliance with Goal 14. Petitioner has not established that that conclusion is incorrect or subject to challenge in this appeal.

Accordingly, we affirm the county's primary conclusion that the policies and provisions of the DCCP and DCC are independently sufficient to demonstrate that PAPAs that apply the RI plan designation and zone to rural land are consistent with Goal 14. In other words, uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land, consistent with Goal 14.

Accordingly, petitioner's arguments under the first, second, and fourth assignments of error, which challenge the county's alternative *Shaffer* findings, provide no basis for reversal or remand.

The first, second, and fourth assignments of error are denied.

The county's decision is affirmed.