

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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

LBNW LLC,
Intervenor-Respondent.

LUBA No. 2023-008

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Rory Isbell filed the petition for review and reply brief and argued on behalf of petitioner.

David Doyle filed the joint respondent's and intervenor-respondent's brief on behalf of respondent.

D. Adam Smith filed the joint respondent's and intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief were J. Kenneth Katzaroff, Bailey M. Oswald, and Schwabe, Williamson & Wyatt, P.C.

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

REMANDED

04/24/2023

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

NATURE OF THE DECISION

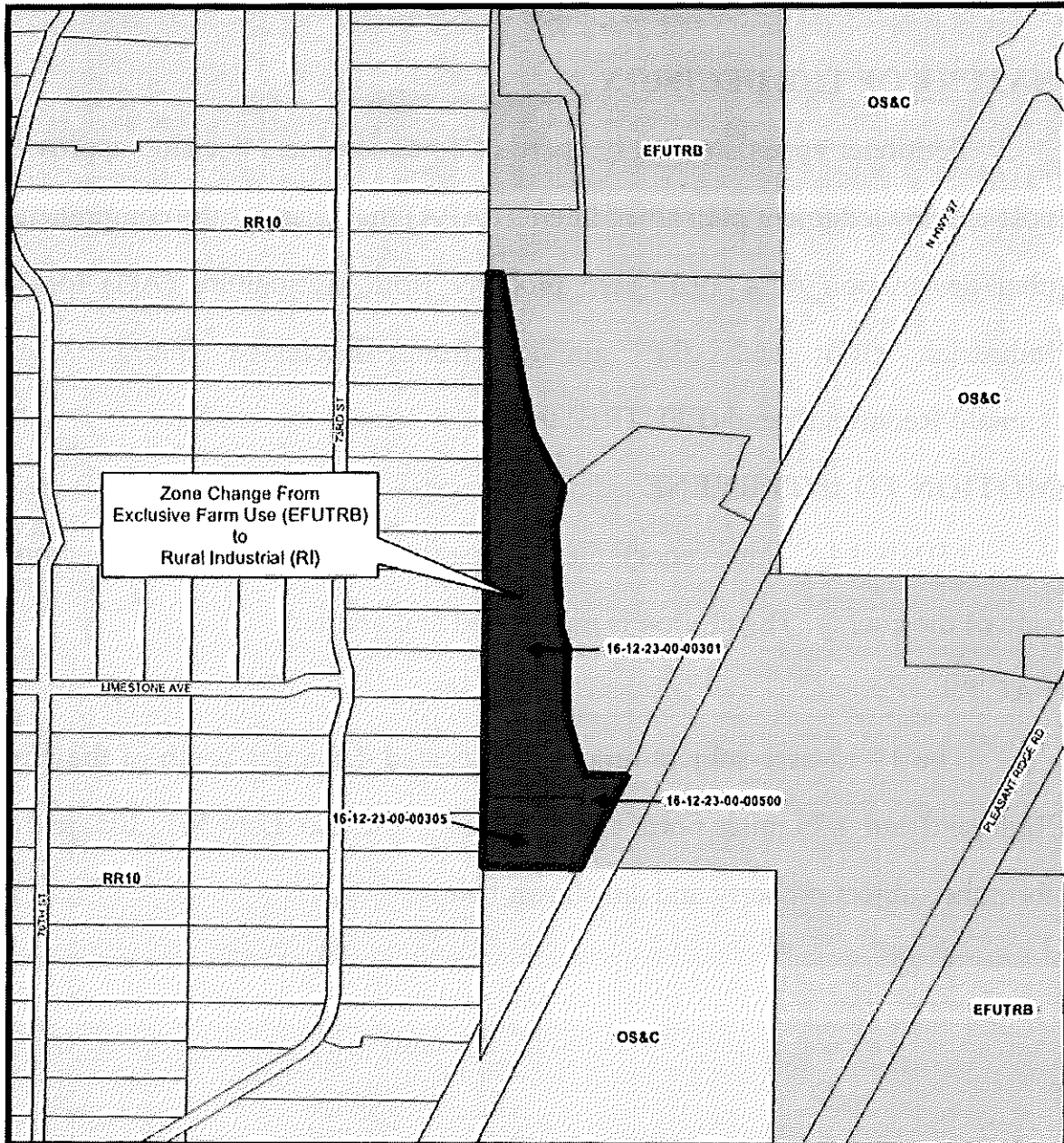
Petitioner appeals a county board of commissioners decision approving a post-acknowledgment plan amendment (PAPA) that changes the comprehensive plan designation of a 19.12-acre property from Agriculture (AG) to Rural Industrial (RI) and the zoning from Exclusive Farm Use - Tumalo/Redmond/Bend (EFUTRB) to RI.

MOTION TO INTERVENE

LBNW LLC (intervenor), the applicant below, moves to intervene on the side of the county. The motion is unopposed and granted.

FACTS

The 19.12-acre subject property is located 4.5 miles south of the city of Redmond and 4.25 miles north of the city of Bend. Tax Lots 301, 305, and 500 form the subject property and are shown below.



Record 7.

“Tax Lot 301 (15.06 acres) is landlocked between Tax Lots 305 (3.00 acres) and 500 (1.06 acres) to the south. Highway 97 corridor, a Central Oregon Irrigation District (COID) canal, and two (2) Exclusive Farm Use (EFU) properties currently receiving farm tax deferral are located to the east. A rural residential subdivision is located to the west.” Record 34.

1 An open space park is located to the south of Tax Lots 305 and 500.

2 “Tax Lots 305 and 500 are developed with structures associated with
3 a historic ‘diesel implement and repair shop’ use on those properties,
4 which has taken place for the majority of the last 40 years. Tax Lot
5 301 is developed with a residential manufactured dwelling that is
6 currently unoccupied; this Tax Lot is not currently in use. The
7 properties are relatively level with mild undulating topography and
8 a slight upward slope along the western boundary adjoining the
9 residential subdivision to the west. Vegetation consists of juniper,
10 sage brush, and grasses. The subject properties are not currently
11 receiving farm tax deferral nor are they currently engaged in farm
12 use.” *Id.*

13 The county’s AG plan designation and EFUTRB zone implement
14 Statewide Planning Goal 3 (Agricultural Lands). Intervenor applied for a PAPA
15 to change the plan designation of the subject property from AG to RI and the
16 zoning from EFUTRB to RI.

17 The subject property is within the Landscape Management (LM)
18 combining zone, a zone that is applied as part of the county’s Statewide Planning
19 Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces)
20 program for protecting scenic resources. Intervenor did not request removal of
21 the subject property’s LM zoning.¹

22 The county’s inventory of Goal 5 resources identifies as a scenic resource
23 “[a]ll land within one-quarter of a mile” of “U.S. Highway #97.” Record 1957.

¹ As discussed below, in the first assignment of error, petitioner argues that the county’s decision violates Goal 5.

1 The county's 1992 economic, social, environmental and energy (ESEE) analysis
2 found that allowing uses that conflict with the scenic resource could increase
3 county tax receipts, improving the county's ability to provide public services and
4 attract new residents and businesses. The ESEE analysis also found that
5 protecting the scenic resource could increase development costs by requiring, for
6 example, longer driveways and more landscaping. On the other hand, the ESEE
7 analysis concluded that protecting the scenic resource from conflicting uses
8 would provide benefits such as (1) the reduction in erosion and pollution that is
9 associated with greater retention of vegetation and (2) the enhanced livability that
10 is associated with high visual quality. The ESEE analysis ultimately concluded:

11 "Based on the ESEE analysis, the resource and the conflicting uses
12 are important relative to each other, and the identified ESEE
13 consequences should be balanced so as to allow the conflicting uses
14 but in a limited way so as to protect the resource to a desired extent.
15 Under OAR 660-16 the resource is classified as '3C' and the
16 conflicting uses are specifically limited.

17 "For supporting goals and policies see the Deschutes County
18 Comprehensive Plan Year 2000 pages 78-92 (the Transportation
19 Chapter) and pages 123-126 (the Open Spaces Chapter).

20 "For implementing measures, see Deschutes County Code Title
21 18.84, the [LMZ zone] as adopted by ordinances 92-033 and 92-
22 034." Record 1959.

23 The 1992 ESEE analysis identifies the LM zone as the program for protecting the
24 Highway 97 scenic resource from "[d]evelopment * * * which would excessively

1 interfere with” the scenic resources. Record 1958. As noted, intervenor did not
2 request removal of the subject property’s LM zoning.

3 On April 26, 2022, a county hearings officer held the initial public hearing
4 concerning intervenor’s application. On July 12, 2022, the hearings officer issued
5 their decision recommending that the board of commissioners approve
6 intervenor’s application. On September 7, 2022, the board of commissioners held
7 a *de novo* public hearing on the application. On September 28, 2022, the board
8 of commissioners approved the application. This appeal followed.

9 **THIRD ASSIGNMENT OF ERROR**

10 Statewide Planning Goal 14 (Urbanization) is “[t]o provide for an orderly
11 and efficient transition from rural to urban land use, to accommodate urban
12 population and urban employment inside urban growth boundaries, to ensure
13 efficient use of land, and to provide for livable communities.” We will reverse or
14 remand a PAPA that is not in compliance with the goals. ORS 197.835(6).
15 Petitioner argues that the board of commissioners misconstrued the applicable
16 law when it determined that the application was consistent with Goal 14, because
17 the board’s findings concluding that the RI zone does not permit urban uses
18 “quote[] * * * six findings from a separate case involving a separate property and
19 adopt[] them for the subject property.” Petition for Review 32. The board
20 explained that “[t]he Hearings Officer in this matter * * * repeated those six
21 findings, concluding that they were ‘not constrained to the facts and
22 circumstances at issue in the [separate case]’ meaning that those ‘findings apply

1 universally to any application submitted relying on the [Deschutes County Code
2 (DCC) and Deschutes County Comprehensive Plan (DCCP)] RI provisions.”
3 Record 22. Petitioner, however, maintains that the board was required to engage
4 in a site-specific inquiry as to whether the PAPA would violate Goal 14 by
5 allowing urban uses on the subject property.²

6 As the county and intervenor (respondents) point out, we recently
7 addressed whether the board could properly rely upon its acknowledged RI zone
8 regulations to ensure that Goal 14 is met. In *Central Oregon Landwatch v.*
9 *Deschutes County*, ___ Or LUBA ___, ___ (LUBA No 2022-075, Dec 6, 2022)
10 (*Aceti V*) (slip op at 17-18), *aff'd*, 324 Or App 655, 525 P3d 895 (2023), we
11 concluded that

12 “the county correctly determined that the policies and provisions of
13 the DCCP and DCC that apply to the RI zone are independently
14 sufficient to demonstrate that PAPAs that apply the RI plan
15 designation and zone to rural land are consistent with Goal 14 and
16 that uses and development permitted pursuant to those

² Specifically, petitioner argues:

“Without meeting the criteria for an exception to Goal 14, and without applying the relevant inquiry as to whether this PAPA, for this specific property, complies with Goal 14, the decision misconstrues and misapplies applicable law and should be reversed or remanded. If it is not reversed or remanded on those grounds, it should be remanded for failing to make adequate findings supported by substantial evidence that the [*1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) (*Curry County*)] Goal 14 factors have been satisfied.” Petition for Review 36 (citations omitted).

1 acknowledged provisions constitute rural uses, do not constitute
2 urban uses, and maintain the land as rural land. The acknowledged
3 DCC chapter 18.100 provisions that will apply to all development
4 on the property will ensure that any allowed uses and development
5 constitute rural use of rural land, consistent with Goal 14.”³

6 The board of commissioners found that approving the application will not
7 result in urban uses on the subject property:

8 “DCC Chapter 18.100 implements DCCP Policies 3.4.9 and 3.4.23,
9 which together direct land use regulations for the Rural Commercial
10 and [RI] zones to ‘allow uses less intense than those allowed in
11 unincorporated communities as defined by [OAR] 660-022 or its
12 successor,’ to ‘assure that urban uses are not permitted on rural
13 industrial lands.’ The [board of commissioners] adopted this finding
14 in support of Ordinance 2018-126, which was appealed and
15 sustained by LUBA and the Court of Appeals.

16 “* * * [A]s the [board of commissioners] found in adopting
17 Ordinance 2018-126, which was appealed and sustained by LUBA
18 and the Court of Appeals, the application of DCC Title 18 to any
19 development proposed on Rural Commercial or [RI] designated land
20 will ensure that the development approved is consistent with the
21 requirements set forth in DCCP Policies 3.4.12 and 3.4.27 [to] not
22 adversely affect surrounding area agricultural or forest land, or the
23 development policies limiting building size (DCCP Policies 3.4.14
24 and 3.4.28), sewers (DCCP Policies 3.4.18 and 3.4.31) and water
25 (DCCP Policies 3.4.19 and 3.4.32) intended to limit the scope and

³ In *Aceti V*, ___ Or LUBA at ___ (slip op at 3-6), we identified and summarized the prior *Aceti* cases: *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); and *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).

1 intensity of development on rural land.

2 “* * * DCCP Policy 3.4.28 includes a direction that, for lands
3 designated and zoned RI, new industrial uses shall be limited to a
4 maximum floor area of 7,500 square feet per use within a building,
5 except for the primary processing of raw materials produced in rural
6 area, for which there is no floor area per use limitation.

7 “* * * DCCP Policy 3.4.31 includes a direction that, for lands
8 designated and zoned RI, residential and industrial uses shall be
9 served by [Oregon Department of Environmental Quality] approved
10 on-site sewage disposal systems.

11 “* * * DCCP Policy 3.4.32 includes a direction that, for lands
12 designated and zoned RI, residential and industrial uses shall be
13 served by on-site wells or public water systems.” Record 22-23.

14 Petitioner summarizes its third assignment of error as follows:

15 “The decision is not in compliance with Goal 14 because it is a
16 PAPA that fails to address whether the PAPA complies with Goal
17 14 under the [*1000 Friends of Oregon v. LCDC*, 301 Or 447, 724
18 P2d 268 (1986) (*Curry County*)] factors and impermissibly bases its
19 findings for Goal 14 compliance with the County’s acknowledged
20 comprehensive plan and not Goal 14 itself.” Petition for Review 29.

21 Considerations for determining whether a particular use is urban or rural derive
22 from our decision in *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989). In
23 *Shaffer*, we explained that, in *Curry County*, the Supreme Court held (1) “that
24 any decision which allows ‘urban use’ of rural land must comply with Goal 14
25 by including such land within an urban growth boundary (UGB) or must take an
26 exception to Goal 14” and (2) that the interpretation of “urban use” is primarily
27 for the Land Conservation and Development Commission (LCDC). 17 Or LUBA
28 at 927. Because LCDC had not adopted goal amendments or rules defining

1 “urban use” and “rural use” or providing standards for determining whether a use
2 was urban or rural, we stated that it was left to us to determine whether a use was
3 urban or rural:

4 “Under the Supreme Court’s decision in *Curry County*, it may well
5 be there is nothing inherently rural or urban about residential,
6 commercial, industrial or other types of uses. Rather there are
7 merely a number of relevant factors to be considered, such as parcel
8 size, intensity of use, necessity for urban facilities and proximity to
9 a UGB.” *Id.* at 928 (citation omitted).

10 “In our decisions subsequent to *Curry County*, we have consistently
11 taken the position that, in the absence of interpretive rule or goal
12 amendments adopted by LCDC, whether a residential, commercial,
13 industrial or other type of use is ‘urban’ or ‘rural’ requires a case by
14 case determination, based on relevant factors identified in various
15 opinions by this Board and the courts.” *Id.* at 931 (footnote omitted).

16 In *Aceti V, ___ Or LUBA at ___* (slip op at 24), we determined that
17 petitioner’s arguments challenging the county’s alternative *Shaffer* findings did
18 not provide a basis for reversal or remand⁴:

19 “[T]he county and our decisions in prior appeals have illuminated
20 the procedural history of the county’s adoption of the applicable RI
21 designation and zone and demonstrated that the applicable DCCP
22 policies and DCC implementing regulations limit rural industrial
23 uses to an intensity less than that allowed by the Unincorporated
24 Communities Rule in order to comply with Goal 14. [The

⁴ The *Shaffer* factors for determining whether an industrial use is urban or rural are whether (1) the use employs a small number of workers, (2) the use is significantly dependent on a site-specific resource and there is a practical necessity to site the use near the resource, (3) the use is of a type typically located in rural areas, and (4) the use does not require public facilities or services.

1 Department of Land Conservation and Development] found that
2 those policies and regulations are sufficient to demonstrate
3 compliance with Goal 14. Petitioner has not established that that
4 conclusion is incorrect or subject to challenge in this appeal.”

5 Petitioner’s reference to *Curry* factors rather than *Shaffer* findings does not
6 lead to a different result. For the reasons set out in *Aceti V*, we conclude that the
7 county was entitled to rely on its acknowledged RI zone to ensure compliance
8 with Goal 14, and we do not address this element of the assignment of error
9 further.

10 Petitioner also argues that, if we do not reverse or remand the decision on
11 the grounds that the decision misconstrues and misapplies the applicable law, we
12 should remand the decision “for failing to make adequate findings supported by
13 substantial evidence that the *Curry County* Goal 14 factors have been satisfied.”
14 Petition for Review 36. Because petitioner’s inadequate findings and substantial
15 evidence challenges are dependent on our concluding that the county (1) could
16 not rely on the RI provisions to conclude that the application is consistent with
17 Goal 14 and (2) was required to apply the *Curry County* factors, we do not
18 address them further.

19 The third assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 Goal 3 is “[t]o preserve and maintain agricultural lands.” Petitioner’s
22 second assignment of error is that the board of commissioners’ determination that
23 the subject property is not agricultural land protected by Goal 3 misconstrues the

1 applicable law found in Goal 3 and OAR 660-033-0020(1)(a) and is not
2 supported by substantial evidence.

3 **A. Background**

4 OAR 660-033-0020(1)(a) provides that “agricultural land,” as defined in
5 Goal 3, includes:

6 “(A) *Lands classified by the U.S. Natural Resources Conservation*
7 *Service (NRCS) as predominately Class I-IV soils in Western*
8 *Oregon and I-VI in Eastern Oregon;*

9 “(B) Land in other soil classes that is suitable for farm use and
10 defined in ORS 215.203(a), taking into consideration soil
11 fertility; suitability for grazing; climatic conditions; existing
12 and future availability of water for farm irrigation purposes;
13 existing land use patterns; technological and energy inputs
14 required; and accepted land use patterns;

15 “(C) Land that is necessary to permit farm practices to be
16 undertaken on adjacent or nearly agricultural lands.”
17 (Emphasis added.)

18 ORS 215.211 allows a site-specific analysis of soils where a person believes that
19 such information would, compared to the information provided by the NRCS,
20 assist a county in determining whether land is agricultural land. OAR 660-033-
21 0030(5) implements ORS 215.211 and provides:

22 “(a) *More detailed data on soil capability than is contained in the*
23 *[NRCS] soil maps and soil surveys may be used to define*
24 *agricultural land. However, the more detailed soils data shall*
25 *be related to the NRCS land capability classification system.*

26 “(b) If a person concludes that more detailed soils information
27 than that contained in the Web Soil Survey operated by the
28 NRCS, would assist a county to make a better determination

1 of whether land qualifies as agricultural land, the person must
2 request that the department arrange for an assessment of the
3 capability of the land by a professional soil classifier who is
4 chosen by the person, using the process described in OAR
5 660-033-0045.

6 “(c) This section and OAR 660-033-0045 apply to:

7 “(A) *A change to the designation of a lot or parcel planned*
8 *and zoned for exclusive farm use, forest use or mixed*
9 *farm-forest use to a non-resource plan designation and*
10 *zone on the basis that such land is not agricultural*
11 *land; and*

12 “(B) Excepting land use decisions under section (7) of this
13 rule, any other proposed land use decision in which
14 more detailed data is used to demonstrate that a lot or
15 parcel planned and zoned for exclusive farm use does
16 not meet the definition of agricultural land under OAR
17 660-033-0020(1)(a)(A).

18 “(d) This section and OAR 660-033-0045 implement ORS
19 215.211, effective on October 1, 2011. After this date, only
20 those soils assessments certified by the department under
21 section (9) of this rule may be considered by local
22 governments in land use proceedings described in subsection
23 (c) of this section. However, a local government may consider
24 soils assessments that have been completed and submitted
25 prior to October 1, 2011.

26 “(e) This section and OAR 660-033-0045 authorize a person to
27 obtain additional information for use in the determination of
28 whether a lot or parcel qualifies as agricultural land, but do
29 not otherwise affect the process by which a county determines
30 whether land qualifies as agricultural land as defined by Goal
31 3 and OAR 660-033-0020.” (Emphases added.)

1 Intervenor engaged a qualified soil scientist to prepare detailed soils
2 assessments for the three tax lots that together comprise the subject property and
3 submitted those soils assessments to the county.

4 The board of commissioners found:

5 “The [NRCS] map shown on the County’s GIS mapping program
6 identifies three soil complex units on the property: 31A, Deschutes
7 sandy loam, 0 to 3 percent slopes; 38B, Deskamp-Gosney complex,
8 0 to 8 percent slopes; and 58C, Gosney-Rock outcrop-Deskamp
9 complex, 0 to 15 percent slopes.

10 *“As discussed in detail below in the Soils section, an Agricultural*
11 *Soils Capability Assessment (Order 1 soil survey) was conducted on*
12 *each of the three properties and determined that the subject*
13 *properties do not constitute agricultural land as defined in*
14 *Statewide Planning Goal 3 and are generally comprised of unsuited*
15 *Class 7 and 8 soils as detailed in [DCC] and DLCD definitions.”*
16 Record 34-35 (emphasis added).

17 **B. First Subassignment of Error**

18 Again, for purposes of Goal 3, “agricultural land” includes lands in Eastern
19 Oregon classified by the NRCS as predominantly Class 1 to 6.⁵ OAR 660-033-
20 0020(1)(a)(A). Eastern Oregon, as defined by OAR 660-033-0020(5), includes
21 the county. Petitioner argues that the board of commissioners’ determination that
22 the soils on Tax Lot 301 are not predominantly Class 1 to 6 is not supported by
23 substantial evidence in the whole record. According to petitioner, the only

⁵ The rule uses roman numerals to designate soil classes. Because the decision does not, we refer to Class 1 to 6 rather than Class I to VI.

1 evidence in the record for certain portions of Tax Lot 301 is NRCS data showing
2 that Tax Lot 301 contains predominantly soils protected by Goal 3. Petition for
3 Review 16-17.

4 LUBA shall reverse or remand a decision that is not supported by
5 substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial
6 evidence is evidence that a reasonable person would rely on in making a decision.
7 *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

8 The record includes a copy of the NRCS “Soil Survey of Upper Deschutes
9 River Area, Oregon, including parts of Deschutes, Jefferson, and Klamath
10 Counties.” Record 2065. The NRCS soil classes are described in the NRCS
11 publication as follows:

12 “Class [1] soils have few limitations that restrict their use.

13 “Class [2] soils have moderate limitations that reduce the choice of
14 plants or that require moderate conservation practices.

15 “Class [3] soils have severe limitations that reduce the choice of
16 plants or that require special conservation practices, or both.

17 “Class [4] soils have very severe limitations that reduce the choice
18 of plants or that require very careful management, or both.

19 “Class [5] soils are not likely to erode but have other limitations,
20 impractical to remove, that limit their use.

21 “Class [6] soils have severe limitations that make them generally
22 unsuitable for cultivation.

23 “Class [7] soils have very severe limitations that make them
24 unsuitable for cultivation.

1 *“Class [8] soils and miscellaneous areas have limitations that*
2 *nearly preclude their use for commercial crop production.”* Record
3 2247 (emphasis added).

4 The NRCS publication defines “miscellaneous area” as “an area that has little or
5 no natural soil and supports little or no vegetation.” Record 2338.

6 Tax Lot 301 is developed with an unoccupied residential manufactured
7 dwelling and bounded by an irrigation canal. The NRCS mapping for Tax Lot
8 301 is shown below and identifies the property as containing 31A, Deschutes
9 Sandy loam, 0 to 3 percent slopes; 38B, Deskamp-Gosney complex, 0 to 8
10 percent slopes; and 58C Gosney-Rock outcrop-Deskamp, 0 to 15 percent slopes.
11 Record 3008. We understand 31A and 38B soils to be Class 6 in the NRCS
12 classification system and 58C soil to be Class 8. Under OAR 660-033-
13 0020(1)(a)(A), which provides that, in Eastern Oregon, Class 6 soils are
14 agricultural land for purposes of Goal 3, the majority of Tax Lot 301 is
15 agricultural land if one relies on the NRCS map shown below. The 31A soil is
16 shown in the southeastern corner of Tax Lot 301, the 38B soil is shown in the
17 middle of the property running in a north-south direction, and the 58C soil is
18 shown along the western boundary.



1

2 Record 3007.

1 As we explained above, “[m]ore detailed data on soil capability than is
2 contained in the [NRCS] soil maps and soil surveys may be used to define
3 agricultural land. However, the more detailed soils data shall be related to the
4 NRCS land capability classification system.” OAR 660-033-0030(5)(a).

5 The NRCS mapping explain that map units shown on a soil map represent
6 the major kinds of soil or miscellaneous areas on a property and that “Class 8
7 soils and miscellaneous areas have limitations that preclude commercial plant
8 production and that restrict their use to recreational purposes, wildlife habitat,
9 watershed, or esthetic purposes.” Record 3008-09.

10 The graphic below, taken from the soil scientist’s report for Tax Lot 301,
11 groups the soil on Tax Lot 301 into suitable and unsuitable categories with the
12 areas generally suitable for agriculture designated “6” and the areas generally
13 unsuitable designated “7” or “8.” Like the more general NRCS data, the soil
14 scientist’s report concludes that the property contains 31A, 38B, and 58C soils.
15 However, the soil scientist’s report provides more detailed information for the
16 property. An irrigation canal runs along the eastern edge of the property and is
17 designated “8” by the soil scientist. An area in the southwestern corner of the
18 property is labeled “infrastructure” and also designated “8” by the soil scientist.
19 The board of commissioners’ findings discuss the soil scientist’s approach:

20 “[The soil scientist] explained why the acreage labelled as ‘impact
21 areas’ or ‘infrastructure’ in his Order 1 Surveys were so labelled.
22 Specifically, [the soil scientist] testified that he classified that
23 acreage as something other than Class I-VI soils because the

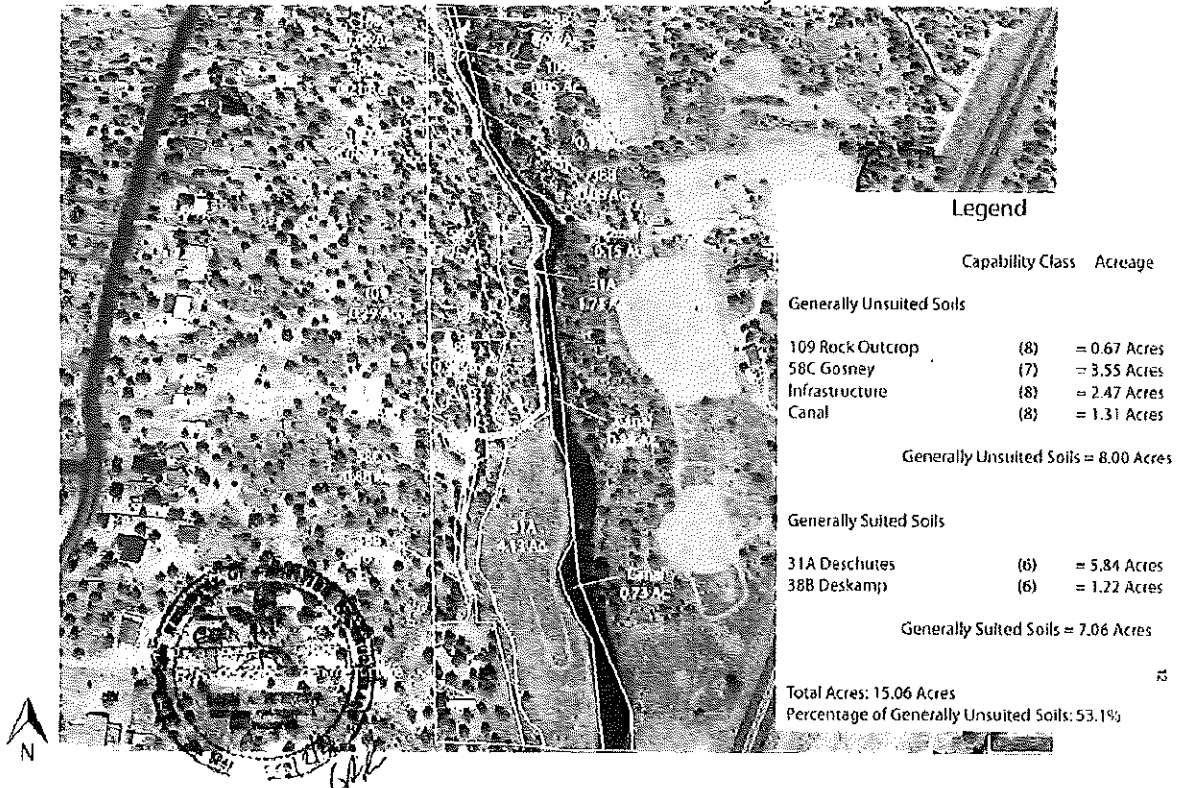
rehabilitation of those previously developed (or still developed) areas was not practical or economical. For example, the Order 1 Soils Survey[] for Taxlot 305 more fully explains that past development of the subject property in essence destroyed the minimal amounts of original, native soil. When it comes to the canal acreage on two of the three subject properties, the development of the canal decades ago impacted any potential Class I-VI soils within that acreage in the same manner.” Record 29.

109 Rock Outcrop is designated “8” and 58C Gosney is designated “7” by the soil scientist.

Johnson Property

65305 N Hwy 97
Bend, Oregon
T16S R12E Sec. 23 TL #301

Order 1 Soil Survey



Record 3013.

The soil scientist’s report explains:

1 “This very complex and diverse landscape shows a variety of
2 xerophytes. The 31A Deschutes soils show Idaho fescue along with
3 bluebunch wheatgrass in some locations. These rocky, harsh
4 landscapes including Gosney soils show mountain big sagebrush,
5 isolated juniper and very isolated Thurber needgrass. The soils are
6 non-irrigated but the 31A mapping unit has been cleared for pasture
7 and lacks appreciable rock at or near the earth surface. Regarding
8 the geomorphic surfaces and soil mapping units; *the determining*
9 *factor for mapping units present includes the landscape position and*
10 *proximity to the ditch which traverses the property from south to*
11 *north.* The transition from the Deschutes geomorphic surface (31A)
12 to that exhibiting the Gosney, rock outcrops and, intermittently, the
13 Deskamp soil units is abrupt and easy to see and map both in the
14 field and on three-dimension photography. *The southern cleared*
15 *portion is obvious on the soil map* while north of the Irrigation
16 District road which bisects the parcel surface remains recognizable
17 despite [not] being cleared for farm use. The western 1/2 to 2/3rds
18 shows distinctly different landscapes and geomorphic surfaces.
19 Small areas of rock out crop and rubble are intermixed with Class 7
20 Gosney soil mapping unit. *We segregated/delineated in the field and*
21 *posted our Order I Soil Map the various areas showing each soil in*
22 *their pure form.* No complexes are noted on the attached final soil
23 map although the original USDA mapping of a three-soil complex
24 shows the relative complexity of the area’s physiography and
25 contrasting geomorphic surfaces.” Record 3002-03 (emphases
26 added).

27 According to the report, “Class 6 Deschutes soils are present but only the very
28 outer edge of the lot in the northern extreme limits.” Record 3003.

29 The board of commissioners recognized that the soil scientist found that
30 Tax Lot 301 “is comprised of 8.00 acres or 53.1% of generally unsuited soils

1 Capability Class 7 and 8 by Deschutes County and DLCD definitions.”⁶ Record
2 37. Petitioner contends that the consultant rated 1.31 acres underlying the canal
3 and “an inexplicable 2.47 acres labeled ‘infrastructure’ as ‘generally unsuited
4 soils.’”⁷ Petition for Review 19 (quoting Record 3013).

5 Petitioner argues:

6 “The consultant explained during the September 7, 2022 [board of
7 commissioners] hearing that the soils underlying these combined
8 3.78 acres (canal and ‘infrastructure’) of the 15.1 acre tax lot 301
9 were never ‘attested to’ and that the soil classifier was ‘never
10 allowed or hired to go out and try to find out what the soils were
11 underneath, for example, the drainage canal that courses this
12 property.’ * * * He further clarified that ‘the soils taxon that we
13 applied to the underlying materials, including the infrastructure,
14 were subjective and based on conjecture and predictions only. They
15 were never substantiated, they were never intended to be
16 substantiated[.]” Petition for Review 20.

⁶ The findings also recognize that the soil scientist found that Tax Lot 305 is “comprised of 2.45 or 81.7% of the land base as generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions” and that Tax Lot 500 “is comprised of 0.93 acres or 87.7% of generally unsuited soils capability Class 7 and 8 by Deschutes County and DLCD definitions.” Record 37. The board of commissioners accepted the conclusions of the soil scientist, who determined that “[a] large (preponderance) of [each tax lot] is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated).” Record 36-37.

⁷ Petitioner then describes areas on the other tax lots, noting that the soil scientist concluded that Tax Lot 305 had .3 acres of building, 1.74 acres of ancient infrastructure, and .37 acres of drainage canal, and that Tax Lot 500 had .1 acres of building and .76 acres of ancient infrastructure. Petition for Review 21-22.

1 We understand petitioner to argue that, because the soil scientist did not, as part
2 of the Order 1 soil survey, test the soil underlying the portions of Tax Lot 301
3 that are labeled “canal” and “infrastructure” on the scientist’s map, the only
4 evidence in the record regarding the soils in those locations is the NRCS data,
5 which shows that the soils are predominantly Class 6.

6 Petitioner cites the soil scientist’s oral testimony at the September 7, 2022
7 board of commissioners hearing. Petition for Review 20. We have reviewed that
8 testimony and the testimony immediately preceding and following it. Audio
9 Recording, Deschutes County Board of Commissioners, Sept 7, 2022, at 41:18.
10 Petitioner’s counsel argued to the board of commissioners that the soil scientist
11 erred in including the canal area in the analysis. Petitioner’s counsel told the
12 board:

13 “We believe that that soil study is really factually deficient. And, no
14 pun intended, it waters down the amount of land that it deems as
15 unsuitable for agriculture by inflating its denominator of unsuitable
16 lands with the area of this canal. * * * At minimum, [the canal area]
17 should have been left out of the analysis. I’m pretty sure that this
18 soil scientist didn’t survey the soil underneath this canal to analyze
19 its quality. So, it’s really incorrect to have included the area of this
20 canal in the soil study.” *Id.* at 46:10.

21 In rebuttal, the soil scientist testified that the soil under the areas labeled
22 “canal” and “infrastructure” had never been tested by NRCS or the scientist. *Id.*
23 at 54:45. They explained that the NRCS analysis was general and that their Order
24 1 soil survey was site-specific. They testified that the areas labeled “canal” and
25 “infrastructure,” also known as “impact areas,” were the disturbed areas

1 underlying the canal and associated outbuilding improvements. *Id.* at 53:00 -
2 57:48. They explained that their analysis of those areas was subjective and
3 reflected their determination that it was not economically viable to rehabilitate
4 the soil in those areas for agricultural use. They stated that their approach was
5 consistent with the applicable standards and practices. Petitioner has not shown
6 that the soil scientist's approach, and the designation of these areas as Class 8
7 under the NRCS classification system, is not consistent with applicable standards
8 or that the soil scientist failed to evaluate the entire tax lot.

9 Again, the record includes a copy of the NRCS "Soil Survey of Upper
10 Deschutes River Area, Oregon, including parts of Deschutes, Jefferson, and
11 Klamath Counties." Record 2065. As relevant here, the NRCS publication
12 describes Class 8 soils. Record 2247. Petitioner has not explained why the soil
13 scientist was incorrect in concluding that the areas labeled "canal" and
14 "infrastructure" contain Class 8 soils, that is, soils with limitations that nearly
15 preclude their use for commercial crop production.⁸

16 In reviewing the evidence, LUBA may not substitute its judgment for that
17 of the local decision-maker. Rather, LUBA must consider all the evidence to
18 which it is directed and determine whether, based on that evidence, a reasonable

⁸ For example, intervenor's counsel directed the board's attention to the fact that the canal is within a federal easement and cannot be converted to agricultural land. Audio Recording, Deschutes County Board of Commissioners, Sept 7, 2022, at 27:20.

1 local decision-maker could reach the decision that it did. *Younger v. City of*
2 *Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). We agree with respondents
3 that the board of commissioners could reasonably rely on the site-specific Order
4 1 soil survey in determining whether Tax Lot 301 is agricultural land and that the
5 decision is supported by substantial evidence: the soil scientist's evaluation of
6 the subject property and their expert opinion that the areas labeled "canal" and
7 "infrastructure" contain Class 8 soils.

8 The first subassignment of error is denied.

9 **C. Second Subassignment of Error**

10 Petitioner's second subassignment of error is that the board of
11 commissioners erred in finding that Tax Lot 301 is not agricultural land because
12 it is in fact agricultural land under ORS 215.203(2)(a) and OAR 660-033-
13 0020(1)(a)(B). Petitioner maintains that Tax Lot 301 is "agricultural land" under
14 the "[l]and in other soil classes that is suitable for farm use as defined in ORS
15 215.203(2)(a)" prong of OAR 660-033-0020(1)(a)(B). Petition for Review 24.

16 OAR 660-033-0020(1)(a)(B) defines "agricultural land" for purposes of
17 Goal 3 and provides that it includes "[l]and in other soil classes that is suitable
18 for farm use as defined in ORS 215.203(2)(a), taking into consideration soil
19 fertility; suitability for grazing; climatic conditions; existing and future
20 availability of water for farm irrigation purposes; existing land use patterns;
21 technological and energy inputs required; and accepted farming practices."

1 (Emphasis added.) ORS 215.203(2)(a) defines “farm use” and provides, in part,
2 that it means

3 “*the current employment of land for the primary purpose of*
4 *obtaining a profit in money* by raising, harvesting and selling crops
5 or the feeding, breeding, management and sale of, or the produce of,
6 livestock, poultry, fur-bearing animals or honeybees or for dairying
7 and the sale of dairy products or any other agricultural or
8 horticultural use or animal husbandry or any combination thereof.”⁹

⁹ DCC 18.04.030 incorporates the statutory definition of “farm use” and provides:

“*Farm use’ means the current employment of land for the primary purpose of obtaining a profit in money* by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. ‘Farm use’ includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. ‘Farm Use’ also includes the current employment of the land for the primary purpose of obtaining a profit in money by stabling or training equines, including but not limited to, providing riding lessons, training clinics and schooling shows. ‘Farm use’ also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. ‘Farm use’ includes the on-site construction and maintenance of equipment and facilities used for the activities described above. ‘Farm use’ does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3). *Current employment of the land for farm use also includes those uses listed under ORS 215.203(2)(b).*” (Emphases added.)

1 (Emphasis added.)

2 ORS 215.203(2)(b)(G) provides that “‘current employment’ of land for farm use”
3 includes “[w]ater impoundments lying in or adjacent to and in common
4 ownership with farm use land.” Petitioner maintains that the irrigation canal on
5 the subject property is a water impoundment under ORS 215.203(2)(b)(G), that
6 such a water impoundment is a farm use, and, therefore, that the land is suitable
7 for farm use and is agricultural land.

8 First, petitioner argues that the board of commissioners’ findings are
9 inadequate because they do not “address the question of whether the canal use of
10 [Tax Lot 301] is a ‘farm use’ and thus satisfies the ‘suitable for farm use’ prong
11 of Goal 3 and OAR 660-033-0020(1)(a)(B).” Petition for Review 26. More
12 specifically, petitioner argues that the board of commissioners “misconstrue[d]
13 and misappl[ied] the applicable law in finding that the canal portion of the
14 property is not ‘agricultural land’ when it is currently in ‘farm use.’” *Id.*

15 We agree with respondents that whether the canal is a “water
16 impoundment,” as described in ORS 215.203(2)(b)(G), does not control whether
17 the canal portion of the property contains “agricultural land.” The board of
18 commissioners found, “[Petitioner’s] new water impoundment theory does not
19 change the Hearings Officer’s findings regarding OAR 660-033-0020(1)(a),
20 because [COID’s] Pilot Butte Canal running through [intervenor’s] properties is
21 not an agricultural activity with the primary purpose of obtaining a profit in
22 money for [intervenor.]” Record 30 (citation omitted). In *Doherty v. Wheeler*

1 County, we explained that the definition of “current employment” of land for
2 farm use in ORS 215.203(2)(b) serves a different purpose than the definition of
3 “farm use” in ORS 215.203(2)(a) and does not establish, as a matter of law, that
4 land is “agricultural land” under OAR 660-033-0020(1):

5 “[T]he structure of ORS 215.203(2) reflects its history, and * * *
6 under an earlier statutory scheme one of the functions of the
7 definition of ‘farm use’ in ORS 215.203(2) was to determine which
8 properties qualified for preferential farm tax assessment. * * * [T]he
9 structure of ORS 215.203(2) continues to reflect that earlier
10 statutory scheme, even though ORS 215.203(2) no longer has
11 anything to do with qualifying land for farm tax assessment. As
12 noted above, many of the circumstances listed in ORS 215.203(2)(b)
13 do not readily fall within the terms of the definition of ‘farm use’ in
14 ORS 215.203(2)(a). * * *

15 “In any case, whatever the current relationship between the ‘farm
16 use’ definition in ORS 215.203(2)(a) and the ‘current employment’
17 definition in ORS 215.203(2)(b), the immediate question for
18 purposes of OAR 660-033-0020(1)(B) is whether the subject
19 property is *suitable* for farm use as defined by ORS 215.203(2)(a),
20 not whether the land qualifies under ORS 215.203(2)(b)(E) as the
21 ‘current employment’ of land for farm use. Thus, the question is
22 whether the land is *suitable* for being used for the primary purpose
23 of obtaining a profit in money by raising, harvesting and selling
24 crops or the feeding, breeding, management and sale of, or the
25 produce of, livestock, etc, not whether the property qualifies as
26 ‘wasteland,’ or ‘land lying fallow’ or falls within one of the other
27 circumstances listed in ORS 215.203(2)(b).” 56 Or LUBA 465, 470-
28 71 (2008).

29 Similarly, whether the canal is a water impoundment under ORS
30 215.203(2)(b)(G) does not answer the question of whether Tax Lot 301 is suitable
31 for being used for the primary purpose of obtaining a profit in money through

1 one of the identified mechanisms. We reject petitioner's argument that the
2 property is suitable as a matter of law because it qualifies as a water
3 impoundment.¹⁰ Petitioner has not identified a basis for reversal or remand with
4 respect to the definition of "current employment."

5 Petitioner also argues that the canal is a farm use under OAR 660-033-
6 0020(1)(a)(B) because the canal supports the employment of land, including the
7 subject property, for the primary purpose of obtaining a profit in money by raising
8 crops and/or livestock. According to petitioner, "it is hard to dispute that an
9 agricultural canal is not an agricultural use as it supplies agricultural irrigation
10 water to thousands of farm properties throughout Central Oregon, including the
11 subject property," and the board's conclusion that the canal is not an agricultural
12 use is contradicted by the evidence in the record because the subject property has
13 water rights, receives water from the canal, and has used that water to irrigate
14 pasture land. Petition for Review 27.

15 The board of commissioners incorporated by reference the hearings
16 officer's analysis of whether the subject property is suitable for farm use. Record
17 28. Those findings include that the property's existing irrigation rights have been
18 leased since 2016 to improve Deschutes River in-stream flow and that "[t]he

¹⁰ Respondents argue that the canal is not a water impoundment under ORS 215.203(2)(b)(G) because it is not in common ownership with the subject property. Joint Respondent's and Intervenor-Respondent's Brief 37. We need not and do not address this argument.

1 leased irrigation rights do not compensate for the poor soils in a manner such that
2 the subject property could be engaged in 'farm use,' for the primary purpose of
3 obtaining a profit in money." Record 65. The findings also conclude that a
4 neighboring property identified by petitioner as evidence that a farm use could
5 be undertaken on the subject property was not in fact comparable because the
6 subject property is "compromised by an irrigation district easement that renders
7 a significant portion of the property useless" and unsuitable for grazing. Record
8 63. It is not sufficient for petitioner to disagree with the board. Rather, petitioner
9 must address the board's findings and indicate why they are incorrect. "In order
10 to prevail on a substantial evidence challenge, a petitioner must identify the
11 challenged findings and explain why a reasonable person could not reach the
12 same conclusion based on all the evidence in the record." *Stoloff v. City of*
13 *Portland*, 51 Or LUBA 560, 568 (2006). Petitioner does not address the findings
14 adopted by the board of commissioners and does not provide a basis for reversal
15 or remand.

16 The second subassignment of error is denied.

17 The second assignment of error is denied.

18 **FIRST ASSIGNMENT OF ERROR**

19 Goal 5 is "[t]o protect natural resources and conserve scenic and historic
20 areas and open spaces." OAR 660-023-0250(3) provides:

21 "Local governments are not required to apply Goal 5 in
22 consideration of a PAPA unless the PAPA affects a Goal 5 resource.
23 For purposes of this section, a PAPA would affect a Goal 5 resource

1 only if:

2 “* * * * *

3 “(b) The PAPA allows new uses that could be conflicting uses
4 with a particular significant Goal 5 resource site on an
5 acknowledged resource list[.]”¹¹

6 A portion of the subject property is located within one-quarter mile of Highway
7 97 and is therefore included on the county’s inventory of Goal 5 scenic resources.
8 Petitioner’s first assignment of error is that “[t]he decision misconstrues and
9 misapplies Goal 5 and OAR 660-023-0250(3)(b) by approving a [PAPA] that
10 allows new uses that could be conflict with inventoried significant Scenic View
11 Goal 5 resources and without applying Goal 5.” Petition for Review 5.

12 **A. Waiver**

13 ORS 197.797(1) provides:

14 “An issue which may be the basis for an appeal to [LUBA] shall be
15 raised not later than the close of the record at or following the final
16 evidentiary hearing on the proposal before the local government.
17 Such issues shall be raised and accompanied by statements or
18 evidence sufficient to afford the governing body, planning
19 commission, hearings body or hearings officer, and the parties an
20 adequate opportunity to respond to each issue.”

21 ORS 197.835(3), which addresses LUBA’s scope of review, provides that
22 “[i]ssues shall be limited to those raised by any participant before the local
23 hearings body as provided by ORS 197.195 or 197.797, whichever is applicable.”

¹¹ If Goal 5 applies, then the local government is required to comply with OAR 660-023-0040 and OAR 660-023-0050.

1 As the Court of Appeals has explained, “those statutes comprise a so-called ‘raise
2 it or waive it’ requirement, whereby before an issue may be raised to LUBA it
3 must first have been raised before the local government along with statements
4 and evidence sufficient to allow the government and parties to respond to it.”
5 *Pliska v. Umatilla County*, 240 Or App 238, 244, 246 P3d 1146 (2010), *rev den*,
6 350 Or 408 (2011). A particular issue must be identified in a manner detailed
7 enough to give the decision-maker and the parties fair notice and an adequate
8 opportunity to respond. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813
9 P2d 1078 (1991); *see also Vanspeybroeck v. Tillamook County*, 221 Or App 677,
10 691 n 5, 191 P3d 712 (2008) (“[I]ssues [must] be preserved at the local
11 government level for [LUBA] review * * * in sufficient detail to allow a thorough
12 examination of the issue by the decision-maker, so as to potentially obviate the
13 need for further review or at least to make that review more efficient and
14 timely.”).

15 Respondents argue that the specific issue of the geographic limitations on
16 where the RI zone could be applied in 1992 was not raised below and may not be
17 raised for the first time at LUBA. Joint Respondent’s and Intervenor-
18 Respondent’s Brief 20.

19 OAR 661-010-0030 requires that a petitioner identify in its petition for
20 review where arguments were preserved below. Petitioner did so. Petition for
21 Review 5; Reply Brief 1-2. Petitioner argued below that

22 “[t]he subject property contains an inventoried Goal 5 resource: a

1 scenic resource along the Highway 97 corridor. Approving the
2 current application would introduce a new ‘conflicting use’—
3 industrial use—requiring the application of Goal 5. OAR 660-023-
4 0250(3). The Hearings Officer decision erred in finding the proposal
5 is consistent with Goal 5.” Record 694.

6 Petitioner also argued below that “Goal 5 applies at the PAPA stage, ORS
7 197.175(2)(a), and this PAPA that proposes the new conflicting uses of the RI
8 zone on a Goal 5-protected resource and triggers the application of Goal 5. OAR
9 660-023-0250(3)(b). The application is inconsistent with Goal 5.” Record 1816.

10 We reject respondents’ argument. Petitioner’s assignment of error is the
11 same issue that petitioner raised below, that is, that OAR 660-023-0250 required
12 the board of commissioners to consider new conflicting uses allowed by rezoning
13 the property to RI. The issue of whether the PAPA allows new conflicting uses,
14 making Goal 5 applicable, was preserved.

15 **B. Conflicting Uses**

16 Petitioner argues that the board has not complied with Goal 5 and OAR
17 660-023-0250 because it has not evaluated whether the new uses allowed by the
18 RI zoning could conflict with the scenic resource. Petitioner maintains that the
19 facts do not support the board’s conclusion that the county “implicitly”
20 considered the RI uses when it adopted the 1992 ESEE analysis.

21 The board of commissioners described petitioner’s arguments in its
22 findings: “[Petitioner] initially argued in its May 31, 2022 submittal that the
23 subject application violates Goal 5 because the [PAPA] will introduce new
24 ‘conflicting uses’—i.e. those uses allowed in the RI zone—on properties

1 governed by the County's [LM zone]." Record 24. The board of commissioners
2 further explained:

3 "[Intervenor] argued that the uses allowed by the RI zone are not
4 new 'conflicting uses' because the County's original [ESEE]
5 analysis adopted as part of Ordinance No 92-05 specifically
6 considered all 'Development within the one-quarter mile overlay
7 zone which would excessively interfere with the scenic or natural
8 appearance of the landscape as seen from the road or alteration of
9 the existing landscape by removal of vegetative cover.' Stated
10 simply, [intervenor] argued that uses allowed by the RI zone were
11 not new conflicting uses because they were implicitly already
12 considered by Ordinance No 92-05 as uses that could 'excessively
13 interfere with the scenic or natural appearance of the landscape as
14 seen from the road.'" Record 25.

15 Site plan review is generally required for new structures in the LM
16 zone.¹² The board of commissioners agreed with intervenor's argument and

¹² DCC 18.84.050 provides:

"A. Any new structure or substantial exterior alteration of a structure requiring a building permit or an agricultural structure within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial exterior alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.

"B. Structures which are not visible from the designated roadway, river or stream and which are assured of remaining not visible because of vegetation, topography or existing development are exempt from the provisions of DCC 18.84.080 (Design Review Standards) and DCC 18.84.090 (Setbacks). An applicant for site plan review in the LM Zone shall conform with the provisions of DCC 18.84, or may

1 adopted findings noting that “the proposed [PAPA] does not remove the subject
2 property from the [LM zone] and thus does not change or diminish the
3 protection afforded to Goal 5 resources on the property, specifically the [LM
4 zoning] of lands within 1/4 mile from the centerline of Highway 97.” *Id.* The
5 findings explain that this protection includes site plan approval prior to
6 construction. *Id.* Respondents argue that the LM zone does not prohibit
7 development but, rather, “simply requires a design review process in order to
8 ensure compatibility.” Joint Respondent’s and Intervenor-Respondent’s Brief
9 24.

10 We agree with petitioner that the board of commissioners misconstrued
11 the applicable law. In *NWDA v. City of Portland*, the court explained that the
12 local government is required to apply Goal 5 if the PAPA allows a new use that
13 could conflict with Goal 5 resources. 198 Or App 286, 299, 108 P3d 589
14 (2005), *rev den*, 338 Or 681 (2005). The questions presented here are whether
15 the new RI zoning allows uses on the subject property that were not allowed
16 under the previous EFU zoning and whether those uses could conflict with
17 protected Goal 5 resources. That the county may have conducted an ESEE
18 analysis in 1992 for other RI-zoned properties in other locations, even nearby
19 locations, and concluded that the LM zone provided the impacted scenic

submit evidence that the proposed structure will not be visible from the designated road, river or stream. Structures not visible from the designated road, river or stream must meet setback standards of the underlying zone.”

resources sufficient protection does not change the requirement to apply Goal 5 to the PAPA for the subject property. In *Root v. Klamath County*, we explained:

“Initially, we understand the county to have generally concluded that OAR 660-023-0250(3)(b) does not apply because the proposed lands are near existing lands that are on the map of eligible lands, and thus any conflicts with Goal 5 resources were previously resolved in the county’s ESEE determination in favor of allowing the conflicting uses (the destination resorts). [Petitioner] challenges this finding, arguing that the fact that the proposed lands might be near other lands already included in the map of eligible lands does not support a conclusion that conflicts with existing Goal 5 resources from allowing mapping those properties as eligible for siting a destination resort were previously addressed when the county adopted its initial map of eligible lands in 1994. We agree with [petitioner]. *First, intervenor does not point to anything in the record that supports its contention that in a previous ESEE analysis, the county determined to allow destination resorts where that use conflicts with inventoried Goal 5 resources. Second, it is not clear from the record how any ESEE analysis that was completed when the initial map of eligible lands was adopted in 1994 could have considered the new 90,000 acres that are proposed to be added or could have considered whether inventoried resources were present on or near any of those lands and if so, what would be the impacts on those resources from new uses.*” 63 Or LUBA 230, 246 (2011) (emphasis added).

Similarly, here, the challenged decision allows new uses that could conflict with inventoried Goal 5 resources, and, for that reason, the county is required to comply with OAR 660-023-0250(3). The board does not identify anything to support a conclusion that the 1992 ESEE analysis considered the potential impact of the uses allowed in the RI zone on *all* lands within one-quarter mile of Highway 97, independent of their zoning at the time. In the

1 phrase “development which *would excessively interfere* with” scenic resources,
2 the term “would” is used as a modal verb to refer to a possibility. When the
3 ESEE analysis was conducted, in 1992, it was not a possibility that
4 “development” of the uses allowed in the RI zone would interfere at all, let
5 alone excessively, with the scenic resource on the subject property because the
6 only uses allowed on the subject property were those allowed under the then-
7 existing EFU zoning.

8 In addition, contrary to respondents’ assertion, this is not a collateral
9 attack on the LM zone, and *Bishop v. Deschutes County*, 79 Or LUBA 380,
10 *aff’d*, 298 Or App 841, 449 P3d 574 (2019), is inapposite. Joint Respondent’s
11 and Intervenor-Respondent’s Brief 26. In *Bishop v. Deschutes County*, an
12 applicant sought (1) a PAPA to include the site of two reservoirs on the
13 county’s inventory of nonsignificant mineral and aggregate resources, (2) a
14 conditional use permit to excavate and construct the reservoirs as facilities used
15 in conjunction with an irrigation system, and (3) approval to fill the reservoirs
16 with an irrigation district’s water. The site was zoned Rural Residential 10-acre
17 minimum (RR-10). The site was also subject to the county’s Wildlife Area
18 (WA) combining zone, which implements the county’s Goal 5 protections for
19 deer habitat. The WA zone generally allowed the conditional uses that were
20 allowed in the base zone. *Bishop*, 79 Or LUBA at 405. Under OAR 660-023-
21 0250(3), a local government with an acknowledged comprehensive plan must
22 apply Goal 5 only if the local government adopts a PAPA that affects a Goal 5

1 resource. We agreed that the PAPA did not affect a Goal 5 resource because it
2 did not allow new uses that could be conflicting uses. *Id.* at 407. The DCC
3 allowed surface mining in conjunction with an irrigation district in the RR-10
4 zone but required that sites proposed for the use be added to the local inventory
5 of nonsignificant mineral and aggregate resources through a PAPA. We
6 concluded that, because authorization of the use in the WA zone was
7 acknowledged to comply with Goal 5, authorization of the use on the subject
8 property typically would not require further evaluation under Goal 5. We
9 explained:

10 “In our view, a PAPA that has as its only practical or legal
11 consequence permission to use one source of water rather a
12 different source, for a land use otherwise allowed by the
13 acknowledged county code and program to achieve the goal, is not
14 a PAPA that allows ‘new uses that could be conflicting uses with a
15 particular significant Goal 5 resource site.’” *Id.*

16 In *Bishop*, the petitioner argued that “the 1992 ESEE analysis is outdated,
17 and fails to take into account the loss of deer winter range and reduction in deer
18 herds over the last several decades, caused by a fragmentation of habitat and
19 other impacts of development, including surface mining.” *Id.* The petitioner
20 argued that the county erred in relying on the facts that (1) the 1992 ESEE
21 analysis did not identify surface mining as a conflicting use with deer winter
22 range and (2) the acknowledged DCC provisions expressly allowed surface
23 mining in conjunction with an irrigation district in the RR-10 zone. We
24 concluded:

1 “As framed [petitioner’s] argument that the county’s
2 acknowledged 1992 [program to achieve the goal] with respect to
3 deer winter range is outdated or inadequate is a collateral attack on
4 the acknowledged status of the county’s land use regulations,
5 rather than an argument that the PAPA ‘allows new uses that could
6 be conflicting uses’ with winter deer range within the meaning of
7 OAR 660-023-0250(3)(b).” *Id.*

8 Here, petitioner’s argument is precisely that the PAPA allows new uses
9 that could be conflicting uses. For the reasons explained above, the county
10 could not have, in its 1992 ESEE analysis, evaluated whether development of
11 those new uses on the subject property would excessively interfere with the
12 protected scenic resource because those uses were not allowed on the property
13 in 1992.

14 In the 1992 ESEE analysis, the county concluded that “[l]and needed and
15 desirable for open space along designated highways and roads should be
16 protected and the conflicting uses limited to some degree.” Record 1959. “The
17 purposes of the [LM zone] are to maintain scenic and natural resources of the
18 designated areas and to maintain and enhance scenic vistas and natural
19 landscapes as seen from designated roads, rivers, or streams.” DCC 18.84.010.
20 “Uses permitted in the underlying zone with which the LM Zone is combined
21 are permitted in the LM Zone, subject to the provisions in DCC 18.84.” DCC
22 18.84.030. “Uses permitted conditionally in the underlying zone with which the
23 LM Zone is combined shall be permitted as conditional uses in the LM Zone,
24 subject to the provisions in DCC 18.84.” DCC 18.84.040. Unlike the PAPA in

1 *Bishop*, this PAPA changes the uses allowed on the property from those
2 allowed in the EFU zone to those allowed in the RI zone.¹³

3 The first assignment of error is sustained.

4 The county's decision is remanded.

¹³ Petitioner also argues that, if the decision is not reversed or remanded on the grounds that the decision improperly construes Goal 5, the decision should be remanded because there is no evidence in the record to support the finding that the uses allowed in the RI zone were implicitly considered when the county adopted its program to achieve the goal for the scenic resource. Because we conclude that the county misconstrued the applicable law, we need not reach the argument that the findings are not supported by substantial evidence.