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

CENTRAL OREGON LANDWATCH,
Petitioner,

and

1000 FRIENDS OF OREGON,
WILLIAM BUCHANAN, ELIZABETH BUCHANAN,
KEYSTONE CATTLE & PERFORMANCE HORSES, LLC,
REDSIDE RESTORATION PROJECT ONE, LLC,
and PAUL J. LIPSCOMB,
Intervenors-Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

710 PROPERTIES, LLC,
CHARLES THOMAS, and ROBERT TURNER,
Intervenors-Respondents.

LUBA No. 2023-006

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Petitioner,

and

1000 FRIENDS OF OREGON,
REDSIDE RESTORATION PROJECT ONE, LLC,
and PAUL J. LIPSCOMB,
Intervenors-Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

710 PROPERTIES, LLC,
CHARLES THOMAS, and ROBERT TURNER,
Intervenors-Respondents.

LUBA No. 2023-009

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Carol Macbeth filed a petition for review and reply brief and argued on behalf of petitioner Central Oregon Landwatch.

Erin Donald filed a petition for review and reply brief and argued on behalf of petitioner Department of Land Conservation and Development. Also on the brief was Ellen F. Rosenblum, Attorney General.

Andrew Mulkey filed an intervenor-petitioner's brief and argued on behalf on intervenor-petitioner 1000 Friends of Oregon.

Jeffrey L. Kleinman filed an intervenors-petitioners' brief and reply brief on behalf of intervenors-petitioners William Buchanan, Elizabeth Buchanan, and Keystone Cattle & Performance Horses, LLC.

Keenan Ordon-Bakalian filed an intervenor-petitioner's brief and reply brief and argued on behalf of intervenor-petitioner Redside Restoration Project One, LLC. Also on the brief were James D. Howsley and Jordan Ramis PC.

David Doyle filed the respondent's brief on behalf of respondent.

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

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

REMANDED 07/28/2023

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

Opinion by Rudd.

NATURE OF THE DECISION

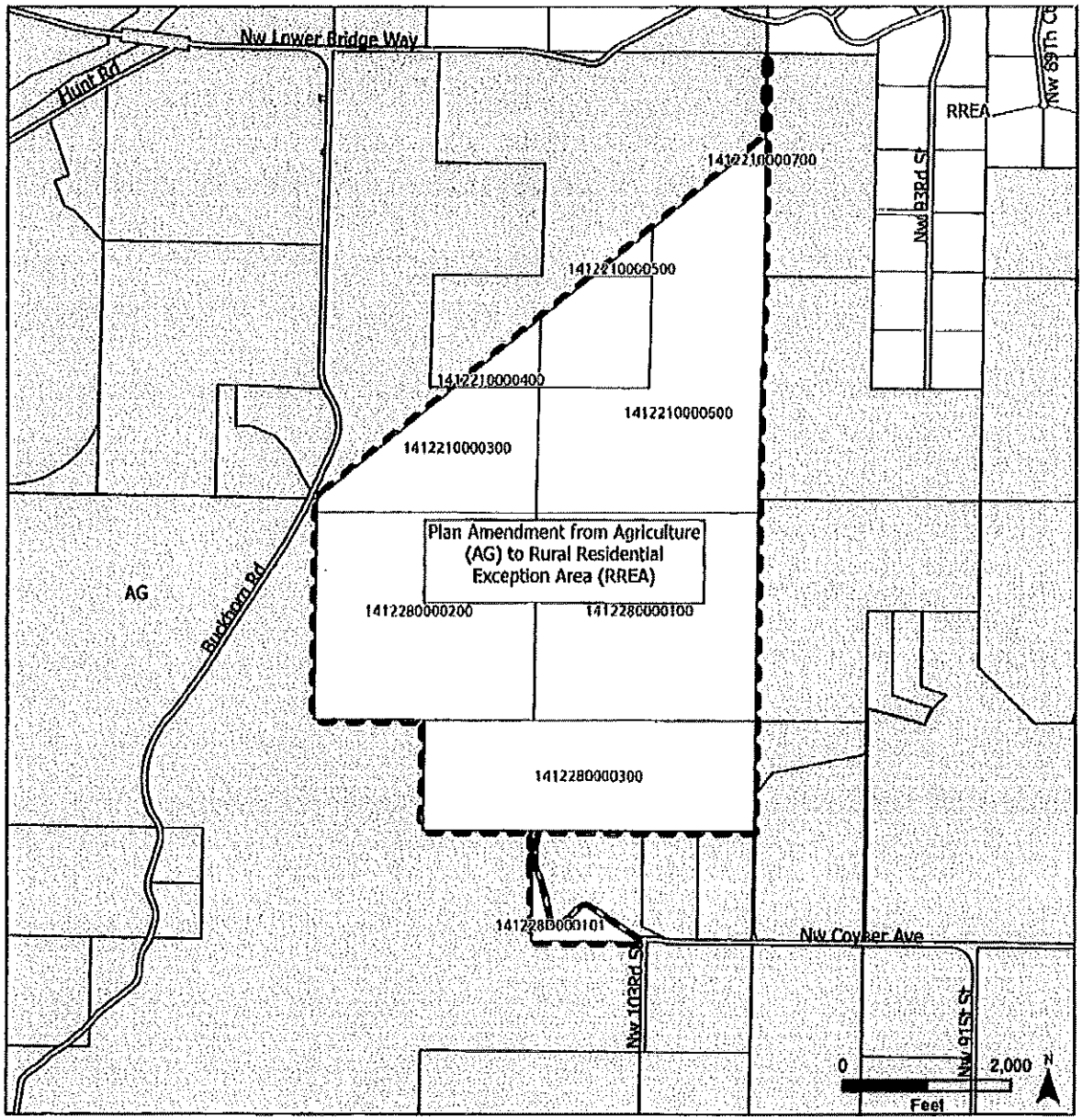
Petitioners appeal a board of county commissioners decision approving a post-acknowledgment plan amendment (PAPA) that changes the comprehensive plan designation of a 710-acre property from Agriculture (AG) to Rural Residential Exception Area (RREA) and the zoning from Exclusive Farm Use - Terrebonne Subzone (EFUTE) to Rural Residential - 10 Acre Minimum (RR-10).

FACTS

The 710-acre subject property is located west of the unincorporated community of Terrebonne and the city of Redmond. It is over four miles from the City of Redmond's urban growth boundary (UGB), and it is north of Highway 126. Record 34, 42, 119. Nine lots of record, identified by tax lot, form the subject property.

> "The subject property is undeveloped except for one tax lot (10325 NW Coyner Avenue), which is developed with a nonfarm dwelling (County Land Use File #CU-05-103). Two other lots of record have valid nonfarm dwelling approvals. Access to the property is provided at the western terminus of NW Coyner Avenue, a County-maintained rural local roadway, and the northern terminus of NW 103rd Street, a County-maintained rural local roadway." Record 41.

The subject property is shown below.



Record 6.

"The subject property is predominately surrounded by EFU-zoned lands with large-scale farm/agricultural uses apparent near the northwest boundary of the subject property." Record 44. "There is property zoned [RR-10] to the

northeast of the subject property containing large-lot rural residential uses within the Lower Bridge Estates Subdivision." *Id.*

Intervenor-respondent 710 Properties, LLC (710 Properties), applied for a PAPA to change the plan designation of the subject property from AG to RREA and the zoning from EFUTE to RR-10. On April 19, 2022, a county hearings officer held the initial public hearing concerning 710 Properties' application. On June 2, 2022, the hearings officer issued their decision recommending that the board of commissioners approve 710 Properties' application. On August 17, 2022, the board of commissioners held a *de novo* public hearing on the application. On December 14, 2022, the board of commissioners approved the application. These appeals followed.

NONCOMPLIANT INTERVENOR-PETITIONER'S BRIEF

In its brief, intervenor-respondent Robert Turner (Turner) argues that intervenor-petitioner 1000 Friends of Oregon's (1000 Friends') brief does not comply with our rules. Specifically, Turner argues that 1000 Friends' brief does not comply with OAR 661-010-0030(4)(b)(B) and OAR 661-010-0050(6)(a). OAR 661-010-0050(6)(a) provides, "If intervention is sought as a petitioner, the brief shall be filed within the time limit for filing the petition for review, and shall satisfy the requirements for a petition for review in OAR 661-010-0030." OAR 661-010-0030(4) provides:

"The petition for review shall:

"* * * * *

"(b) Present a clear and concise statement of the case, in the following order, with separate section headings:

"* * * * *

"(B) A brief summary of the arguments appearing under the assignments of error in the body of the petition[.]"

Turner argues that 1000 Friends' brief does not include the summary of arguments required by OAR 661-010-0030(4)(b)(B). Turner observes that 1000 Friends' brief is 10,911 words long, 89 words shy of the 11,000-word limit for intervenor-petitioner's briefs set forth in OAR 661-010-0030(2)(b) and OAR 661-010-0050(6)(a). Turner argues that, had 1000 Friends' brief included the requisite summary of arguments, it would have exceeded the word limit. Turner argues that that violation is not a technical violation because the county and intervenors-respondents were required to review and respond to what is effectively an overlength intervenor-petitioner's brief and because Turner was required to divert time and resources to discovering and addressing the violation in their own brief. To remedy the violation, Turner requests that we disregard 1000 Friends' brief in its entirety.

Treating Turner's request as a motion to strike, 1000 Friends filed a response arguing that, while the statement of the case at the beginning of its brief does not include a summary of arguments, each assignment of error in the body of its brief contains a summary of the arguments therein. 1000 Friends observes that Turner does not argue that any of the arguments in 1000 Friends' brief are not readily discernible, and 1000 Friends argues that the violation is therefore a

technical violation not affecting the substantial rights of the parties. OAR 661-010-0005. 1000 Friends argues that we should not disregard its brief in its entirety because, notwithstanding the violation, its brief "substantially conforms" to the requirements of OAR 660-010-0030. OAR 660-010-0030(3) ("The Board may refuse to consider a brief that does not substantially conform to the requirements of this rule."). We agree. Given the clarity of 1000 Friends' arguments in the body of its brief, the lack of a summary of arguments at the beginning of its brief did not affect Turner's substantial rights.[1]

Turner's motion to strike is denied.

OVERLENGTH RESPONDENT'S AND INTERVENOR-RESPONDENT'S BRIEFS

Each of the respondent's and intervenor-respondent's briefs incorporates arguments from the other briefs. In its reply brief, intervenor-petitioner Redside Restoration Project One, LLC (Redside), moves to strike the incorporations as

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[1] OAR 661-010-0065(3) provides that "[a]ll motions must be filed as a separate document and shall not be included with any other filing." The purposes of that rule are at least twofold. First, requiring that motions to strike, motions to take official notice, motions to take evidence not in the record, and the like be filed as separate documents rather than included in briefs better ensures that LUBA and the parties will become aware of and fully address such motions. Second, requiring that such motions be filed as separate documents rather than included in briefs better ensures that the parties will focus their limited briefing space on the merits of an appeal rather than procedural matters. Turner's inclusion of its motion to strike in its brief is a violation of OAR 661-010-0065(3).

improperly allowing the county and intervenors-respondents to exceed the 11,000-word limit for respondent's and intervenor-respondent's briefs.

"While incorporation of arguments in another brief in the appeal is a common practice, such incorporation is permissible only if it is otherwise consistent with LUBA's rules." *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539, 542 (2013). OAR 661-010-0030(2)(b), OAR 661-010-0035(2), and OAR 661-010-0050(6)(b) limit respondent's and intervenor-respondent's briefs to 11,000 words unless LUBA grants permission for an overlength brief. No party has requested leave to file an overlength brief. By incorporating arguments from the other briefs, the county and intervenors-respondents have effectively submitted overlength briefs without obtaining LUBA's permission. *See Herring v. Lane County*, 54 Or LUBA 417, 420 (2007) (allowing a respondent's brief to incorporate arguments in a proposed but disallowed *amicus* brief where the incorporation did not cause the respondent's brief to exceed the applicable page limit).

Nonetheless, granting Redside's motion to strike would have no practical effect because, regardless of the incorporation by reference, we will consider the arguments in each party's separate brief. Thus, any violation of our rules is a "technical violation" within the meaning of OAR 661-010-0005.[2]

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[2] As previously noted, OAR 661-010-0065(3) provides that "[a]ll motions must be filed as a separate document and shall not be included with any other

Redside's motion to strike is denied.

INTRODUCTION

We have organized this opinion into sections addressing the assignments of error concerning Statewide Planning Goal 3 (Agricultural Lands), the assignments of error concerning miscellaneous statutory and local provisions, and the assignments of error concerning Statewide Planning Goal 14 (Urbanization).[3]

GOAL 3 ASSIGNMENTS OF ERROR

The county's AG plan designation and EFUTE zone implement Goal 3. Goal 3 is "[t]o preserve and maintain agricultural lands." OAR 660-033-0020(1)(a) provides that "agricultural land," as defined in Goal 3, includes:

> "(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominately Class I-IV soils in Western Oregon and I-VI in Eastern Oregon;
>
> "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes;

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filing." Redside's inclusion of its motion to strike in its reply brief is a violation of OAR 661-010-0065(3).

[3] In spite of our encouragement to the parties to coordinate their briefing to avoid repetitive and overlapping arguments and assignments of error, four briefs with overlapping assignments of error were filed in these consolidated appeals. We have organized the opinion in this manner because of the overlapping assignments of error.

Intervenor-petitioner Paul J. Lipscomb did not file a brief.

existing land use patterns; technological and energy inputs required; and accepted land use patterns;

"(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

Generally, counties must apply Exclusive Farm Use (EFU) zones to "agricultural land." OAR 660-033-0090(1).

The board of commissioners' findings include the following description of the subject property:

> "A majority of the property sits on a plateau running from the southwest to the northeast of the subject property boundary. Topography is varied with portions of lava rimrock present along the west and northwest edges with steep to very steep slopes below. Vegetation is typical of the high desert and includes juniper trees, sage brush, rabbit brush, and bunch grasses. [710 Properties] emphasizes the steep topographical decline on the property, the fact that there is 'lava rock all over the property,' and 'sparse ground cover and juniper.'
>
> "The subject property does not have water rights and is not currently being farmed or irrigated in conjunction with farm use. There is no known history of the property having had irrigation rights. There is no known history of agriculture or farm use, as defined in ORS 215.203 on the subject property. According to the Deschutes County Assessor's office, only one tax lot within the project area, Assessor's Map 14-12-28, Tax Lot 300, is currently receiving farm tax deferral, but does not appear to be engaged in farm use. The record does not include any evidence the subject property is engaged, or has ever been engaged, in farm use." Record 41-42 (footnote omitted).

In approving the challenged PAPA, the board of commissioners concluded that the subject property is not "agricultural land" under OAR 660-033-0020(1)(a). In various assignments of error and subassignments of error,

petitioners and intervenors-petitioners argue that the county erred in reaching that conclusion.

A. OAR 660-033-0020(1)(a)(A)

For purposes of Goal 3, "agricultural land" includes "[l]ands classified by the [NRCS] as predominately Class I-IV soils in Western Oregon and I-VI in Eastern Oregon." OAR 660-033-0020(1)(a)(A). Eastern Oregon, as defined by OAR 660-033-0020(5), includes the county. 710 Properties engaged a qualified soil scientist to prepare a detailed soils assessment for the subject property and submitted that site-specific soils assessment to the county. The county found:

> "The [NRCS] map shown on the County's GIS mapping program identifies six soil complex units on the property: 63C, Holmzie-Searles complex, 106E, Redslide-Lickskillet complex, 101D, Redcliff-Lickskillet-Rock outcrop complex, 106D, Redslide-Lickskillet complex, 71A, Lafollette sandy loam, and 31B, Deschutes sandy loam. Per [Deschutes County Code (DCC)] 8.04, Soil complex 31A and 71A are considered high-value soils when irrigated.
>
> "As discussed in detail below in the Soils section, there is no irrigation on the subject property, except for water applied to landscaping associated with the nonfarm dwelling on Tax Lot 301. *A soil study conducted on the property determined the subject property contains approximately 71 percent Land Capability Class 7 and 8 nonirrigated soils*, including stony shallow soils over bedrock, more characteristic of the Lickskillet series, along with significant rock outcrops. Where surface stoniness was not apparent, the soils were typically moderately deep with sandy loam textures throughout or with some loam textures in the subsurface, more consistent with the Statz series." Record 42 (emphasis added).

Because the site-specific soils assessment determined that 71 percent of the subject property is Class 7 and 8 soils, while only 29 percent is Class 6 soils, the board of commissioners concluded that the subject property is not predominantly Class 1 to 6 soils and, therefore, not "agricultural land" under OAR 660-033-0020(1)(a)(A).[4]

1. Reliance on Site-Specific Soils Assessment

The NRCS mapping for the subject property identifies the property as containing 76 percent 63C, Holmzie-Searles complex, soil. Record 4695. We understand 63C soil to be Class 6 soil in the NRCS classification system when nonirrigated. Record 4697. Accordingly, the NRCS mapping for the subject property identifies the property as containing at least 76 percent Class 6 soils.

In its first assignment of error, petitioner Central Oregon Landwatch (COLW) argues that the county misconstrued OAR 660-033-0020(1)(a)(A) in concluding that it could rely on 710 Properties' site-specific soils assessment to conclude that the subject property is not predominantly Class 1 to 6 soils, notwithstanding that the NRCS mapping identifies the subject property as predominantly Class 1 to 6 soils. COLW argues that lands that the NRCS mapping identifies as predominantly Class 1 to 6 soils are *per se* "agricultural land" for purposes of OAR 660-033-0020(1)(a)(A). In support of that argument,

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[4] 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.

COLW quotes the following passage from *1000 Friends of Oregon v. LCDC (Linn Co.)*:

> "[Petitioner] premises his second point on the reasonably clear language of Goal 3 and the unequivocal language of OAR 660-05-005(1) to the effect that land comprised of the specified soil classes is *per se* agricultural and that suitability considerations are relevant only to whether land which is *not* predominantly comprised of such soils is *also* 'agricultural land.'
>
> "* * * It may be that factors such as wetness and slope can be relevant to whether an exception to Goal 3 may be taken for land in western Oregon that consists predominantly of Class I-IV soils. However, the goal and the [Land Conservation and Development Commission (LCDC)] rule leave no room to conclude that land which is so comprised is not, *per se*, 'agricultural land,' whether or not it can be used for agriculture." 85 Or App 18, 22-23, 735 P2d 645, *adh'd to as modified on recons*, 86 Or App 26, 738 P2d 215, *rev den*, 304 Or 93 (1987).

COLW argues that, "[a]s the inventor of the land capability classification system Classes [1-6], the NRCS must be presumed to be in the best position to recognize Class [6] soil when it sees it, and to correctly categorize the soils it identifies and names into the proper land capability classes it invented." COLW's Petition for Review 14. COLW observes that the site-specific soils assessment is an "Order 1 soil survey," which the NRCS's Technical Soil Services Handbook describes as a "supplement" that cannot "replace or change" the NRCS mapping. Record 3817-18. COLW argues that the county cannot substitute its interpretation of the significance of Order 1 soil surveys for that of the NRCS, which invented them.

Intervenor-respondent Charles Thomas (Thomas) argues that we must consider the effect of ORS 215.211 and OAR 660-033-0030(5) on the definition of "agricultural land." Thomas's Intervenor-Respondent's Brief 18. ORS 215.211 provides:

> "(1) If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the [NRCS] would assist a county to make a better determination of whether land qualifies as agricultural land, the person must request that the Department of Land Conservation and Development arrange for an assessment of the capability of the land by a professional soil classifier who is:
>
> "(a) Certified by and in good standing with the Soil Science Society of America; and
>
> "(b) Chosen by the person.
>
> "* * * * *
>
> "(5) This section authorizes a person to obtain additional information for use in the determination of whether land qualifies as agricultural land, but this section does not otherwise affect the process by which a county determines whether land qualifies as agricultural land."

OAR 660-033-0030(5) implements ORS 215.211 and provides:

> "(a) *More detailed data on soil capability than is contained in the [NRCS] soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.*
>
> "(b) If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the NRCS, would assist a county to make a better determination of whether land qualifies as agricultural land, the person must

request that the department arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045.

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

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

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

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

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

ORS 215.211 and OAR 660-033-0030(5) allow a site-specific soils assessment where a person believes that such information would, compared to the NRCS mapping, assist a county in determining whether land is agricultural land.

The county argues that *Linn Co.* is inapposite because, whereas that decision was issued in 1987, the legislature did not enact ORS 215.211 until 2010 and LCDC did not adopt OAR 660-033-0030(5) until 2012. We agree. *Linn Co.* did not concern site-specific soils assessments at all.

In its reply brief, COLW argues that OAR 660-033-0030(5) and OAR 660-033-0020(1)(a)(A) govern different actors. According to COLW, while ORS 215.211 and OAR 660-033-0030(5) *allow individual persons* to provide more detailed data on soil capacity than is contained in the NRCS mapping, OAR 660-033-0020(1)(a)(A) *requires counties* to designate land that the NRCS mapping identifies as predominantly Class 1 to 6 soils as agricultural land. We understand COLW to argue that land that the NRCS mapping identifies as predominantly Class 1 to 6 soils must be considered agricultural land regardless of what a site-specific soils assessment reveals.

COLW's argument is inconsistent with the text of ORS 215.211 and OAR 660-033-0030(5), which provide that the more detailed soils information is intended to "assist the county to make a better determination of whether land qualifies as agricultural land" than the NRCS mapping would allow, and which provide that the more detailed soils information is intended "for use in the determination of whether land qualifies as agricultural land." If a county was

bound by the NRCS mapping, then more detailed soils information could not "assist" the county and the county could not "use" that information to make a "better" determination than the NRCS mapping would allow.

We conclude that the county did not misconstrue OAR 660-033-0020(1)(a)(A) in concluding that it could rely on the site-specific soils assessment to determine that the subject property is not predominantly Class 1 to 6 soils, notwithstanding that the NRCS mapping identifies the subject property as predominantly Class 1 to 6 soils.

COLW's first assignment of error is denied.

2. Adequacy of Site-Specific Soils Assessment

In its third assignment of error, petitioner Department of Land Conservation and Development (DLCD) argues that the board of commissioners misconstrued OAR 660-033-0020(1)(a)(A) in concluding that the subject property is not predominantly Class 1 to 6 soils. Rather than determining whether *all nine lots, considered together*, are predominantly Class 1 to 6 soils, DLCD argues that the board of commissioners should have determined whether *each individual lot* is predominantly Class 1 to 6 soils. DLCD argues, "With 206 acres of Class [6] soils on site, and nine lots, it is quite possible that one or more of the lots has predominantly Class [6] soils and qualifies as 'agricultural land' under OAR 660-033-0020(1)(a)(A)." DLCD's Petition for Review 28-29. Because neither the site-specific soils assessment nor the findings quantify the soil types on each individual lot, DLCD argues that remand is required for the county to

make those determinations and reassess whether any individual lots are predominantly Class 1 to 6 soils.

Thomas responds that this issue is waived because no party raised it below. Issues before LUBA on review "shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.797, whichever is applicable." ORS 197.835(3). To be preserved for LUBA review, an issue must "be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." ORS 197.797(1).

In its petition for review, and again in its reply brief, DLCD identifies its third assignment of error as having been preserved in an April 19, 2022, letter that 1000 Friends submitted into the record. Record 4212-13.

DLCD observes that ORS 197.797(1) requires only that parties raise "issues" below, not that they individual "arguments." *SOPIP, Inc. v. Coos County*, 57 Or LUBA 44, 64 (2008). DLCD argues that 1000 Friends' April 19, 2022, letter raised the issue of compliance with OAR 660-033-0020(1)(a)(A) and that that was sufficient to preserve the issue raised in its third assignment of error.

When attempting to differentiate between "issues" and "arguments," there is no "easy or universally applicable formula." *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001). While a petitioner is not required to establish that a precise argument made on appeal was made below, that does not mean that "any

argument can be advanced at LUBA so long as it has some bearing on an applicable approval criterion and general references to compliance with the criterion itself were made below." *Id.* (emphasis omitted). A particular issue must be identified in a manner detailed enough to give the decision-maker and the parties fair notice and an adequate opportunity to respond. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991); *see also Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d 712 (2008) ("[I]issues [must] be preserved at the local government level for board review * * * in sufficient detail to allow a thorough examination by the decision-maker, so as to obviate the need for further review or at least to make that review more efficient and timely.").

We have reviewed the cited pages referencing correspondence from 1000 Friends, and the issue raised in DLCD's third assignment of error was not preserved. The site-specific soils assessment includes a table quantifying the different soil types on the subject property and four maps depicting where each soil type can be found. Record 4674, 4679-82. Although 1000 Friends' April 19, 2022, letter argues that the four maps included in the soils assessment are not sufficiently legible to allow for verification of the quantities listed in the table, 1000 Friends did not argue that the soils assessment was inadequate for failing to

quantify the soil types on each individual lot.[5] We conclude that 1000 Friends' April 19, 2022, letter did not identify the issue raised in DLCD's third assignment of error in a manner detailed enough to give the county and the parties fair notice and an adequate opportunity to respond. Accordingly, the issue is waived.

DLCD's third assignment of error is denied.

B. OAR 660-033-0020(1)(a)(B)

In addition to lands in Eastern Oregon classified by the NRCS or a site-specific soils assessment as predominantly Class 1 to 6 soils, for purposes of Goal 3, "agricultural land" includes "[l]and in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and

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[5] OAR 660-033-0045(6)(a) provides that DLCD must review site-specific soils assessments by "[p]erforming completeness checks with reporting requirements for all submitted assessments." DLCD's September 2021 "Soil Assessment Completeness Review" for the subject property states:

> "In accordance with OAR 660-033-0045(6)(a), [DLCD] finds that this soils assessment is complete and consistent with reporting requirements. The county may make its own determination as to the accuracy and acceptability of the soils assessment. DLCD has reviewed the soils assessment for completeness only and has not assessed whether the parcel qualifies as agricultural land as defined in OAR 660-033-0020(1) and 660-033-0030." Record 2222.

For the location of the project site, the completeness review lists nine lots: "T14S, R12E, Section 21, 28 and 28D, Tax Lots 300, 400, 500, 600, 700, 100, 200, 300, 101, Deschutes County, Oregon." *Id.*

energy inputs required; and accepted farming practices." OAR 660-033-0020(1)(a)(B).

> "'[F]arm use' means the current employment of land *for the primary purpose of obtaining a profit in money* by raising, harvesting and selling crops or 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 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, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection." ORS 215.203(2)(a) (emphasis added).

The board of commissioners concluded that the subject property is not suitable for farm use because "no person would undertake agricultural activities on the subject property for the primary purpose of obtaining a profit in money." Record 22. The board of commissioners concluded that the shallow, poor quality soils on the subject property will not hold sufficient water to support the growth of crops without irrigation. The board of commissioners concluded that the cost of establishing an irrigation system and water supply on the subject property would be $8,635,000. Assuming that a loan with a favorable interest rate could

be obtained to finance that cost, the board of commissioners concluded that the annual payment on such a loan would be $345,400. The board of commissioners observed that, according to the U.S. Department of Agriculture's 2017 Census of Agriculture, the average annual gross income of profitable farms in the county is $31,739. Accordingly, the board of commissioners concluded that that the subject property is not suitable for growing crops. Record 24-25.

The board of commissioners concluded that the only farm use for which non irrigated land that is predominantly Class 7 and 8 soils, such as the subject property, is potentially suitable for is dryland grazing. Relying on (1) a formula developed by the Oregon State University (OSU) Extension Service for the income from grazing cattle and (2) estimates of the amount of forage grown on-site provided by DLCD, the Oregon Department of Agriculture (ODA), and the Oregon Department of Fish and Wildlife (ODFW), the board of commissioners concluded that the subject property could generate $4,899 per year in gross income in dry years and $9,798 in wet years. Accordingly, the board of commissioners concluded that the subject property is not suitable for dryland grazing. Record 22-23. Specifically, the board of commissioners concluded, "[T]he property may be used for grazing livestock but there is inadequate forage on the property to generate net income for a rancher from grazing." Record 23. In reaching that conclusion, the board of commissioners also relied on testimony from several farmers and ranchers. Record 24. The board of commissioners concluded that the subject property is not suitable for raising poultry, stabling or

training equines, or establishing a feed lot for similar reasons: Sufficient feed cannot be grown on-site. Record 26-27.

The board of commissioners also incorporated the county hearings officer's findings. Record 19-20. Those findings address each of the factors listed in OAR 660-033-0020(1)(a)(B) individually: soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices. Record 77-80.

1. Profitability

Again, OAR 660-033-0020(1)(a)(B) defines "agricultural land" to include land that is "suitable for farm use" based on a number of factors, and ORS 215.203(2)(a) defines "farm use" to include farm activities that are undertaken "for the primary purpose of obtaining a profit in money."

a. Capital Costs

The board of commissioners found that "[t]he expenses to establish an irrigation system and the shallow, poor quality soils present on the subject property would prevent a reasonable farmer from believing that he or she would ever make a profit in money by conducting irrigation water-dependent farm uses on the subject property." Record 25. In reaching that conclusion, the board of commissioners estimated that the cost of establishing an irrigation system and water supply on the subject property would be $8,635,000 and that the annual payment on a favorable loan to finance that cost would be $345,400.

In the first subassignment of error under its third assignment of error, COLW argues that the cost of establishing an irrigation system and water supply is a "capital cost" and that the board of commissioners misconstrued ORS 215.203(2)(a) in considering capital costs in determining whether a farmer would be able to grow crops on the subject property for the primary purpose of obtaining a profit in money. In *Wetherell v. Douglas County*, the Supreme Court determined that an LCDC rule prohibiting consideration of profitability when determining whether land is "agricultural land," was inconsistent with ORS 215.203(2)(a) and Goal 3. 342 Or 666, 160 P3d 614 (2007). The Supreme Court explained:

> "The factfinder may consider 'profitability,' which includes consideration of the monetary benefits or advantages that are or may be obtained from the farm use of the property *and* the costs or expenses associated with those benefits, to the extent such consideration is consistent with the remainder of the definition of 'agricultural land' in Goal 3." *Id.* at 682 (emphasis in original).

COLW observes that the Supreme Court defined "profit," for purposes of ORS 215.203(2)(a), to mean "the excess or the net of the returns or receipts over the costs or expenses *associated with the activity that produced the returns*." *Id.* (emphasis added). We understand COLW to argue that the relevant costs or expenses, for purposes of evaluating profitability, are those associated with the day-to-day operations of the farm use under consideration. COLW's argument is not specific to a particular farm use but, rather, broadly that "[t]he County's decision confuses the concepts of intangible assets, a farmer's profit or loss from

engaging in a farm activity, and a farmer's intent in pursuing that farm activity." COLW's Petition for Review 34.

710 Properties responds, and we agree, that, even if COLW is correct that the board of commissioners should not have based its consideration of profitability on the full cost of establishing an irrigation system and water supply, $8,635,000, the board of commissioners also considered the estimated annual payment on a favorable loan to finance that cost, $345,400. COLW has not established that the board of commissioners erred in considering that cost or expense in determining whether a farmer would be able to use the subject property for the primary purpose of obtaining a profit in money from farm use. Pursuant to OAR 660-033-0020(1)(a)(B), the suitability of land for farm use may include consideration of the existing and future availability of water for irrigation. The annual cost of procuring water for irrigation is a permissible consideration when evaluating whether land is suitable for farm use.

The first subassignment of error under COLW's third assignment of error is denied.

b. Reasonable Farmer

In the second subassignment of error under its third assignment of error, COLW argues that the board of commissioners misconstrued ORS 215.203(2)(a) in concluding that the subject property is not suitable for farm use because a "reasonable farmer" would not have an expectation of obtaining a profit in money from growing crops thereon. Record 25. COLW argues that ORS 215.203(2)(a)

contains no reasonableness standard and that the board of commissioners' interpretation inserts into that statute what has been omitted, contrary to ORS 174.010.[6] COLW argues that, "[t]hough a farmer may lack business acumen, the phrase 'primary purpose of obtaining a profit in money' refers to the intent of a farmer to obtain a profit in money from farm activity." COLW's Petition for Review 35. We understand COLW to argue that whether land would be employed "for the primary purpose of obtaining a profit in money," for purposes of ORS 215.203(2)(a), is a subjective test that focuses on the actual intent of the farmer.

We have previously rejected such an interpretation. In *Friends of the Creek v. Jackson County*, we explained:

> "[W]e do not believe the legislature intended, by requiring that the land be currently employed 'for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops,' to require an inquiry into the primary actual motivation of particular land owners. Such an inquiry could easily have the anomalous result of having a farm that is indistinguishable from its neighbor fall outside the ORS 215.203(2)(a) definition of farm use, simply because its owner happened to be primarily motivated by something other than the monetary return that is realized from selling the crops that are raised on the property." 36 Or LUBA 562, 576 (1999).

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[6] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." (Emphasis added.)

In *Cox v. Polk County*, we explained:

> "The 'primary purpose' requirement is directed at the activities that are occurring on the land, not the actual motivations of the owner or operator that conducts those activities. For example, a proposed poplar tree farm could be owned and operated by (1) a bona fide farmer who earns most of his or her income from the farm, (2) a doctor living in an EFU zone who earns a small part of his or her income from the farm, or (3) a real estate investment trust that holds the property for long-term speculative purposes and earns a tiny fraction of its income from the annual farm profits. So long as [crops] are raised, harvested and sold for a gross profit, in our view, it does not matter that the particular owner of the * * * farm may primarily be motivated to operate the * * * farm by factors other than the profit that is actually realized by raising and selling the [crops]." 39 Or LUBA 1, 11-12 (2000).

Thus, whether land may be employed "for the primary purpose of obtaining a profit in money," for purposes of ORS 215.203(2)(a), is an objective test that focuses on the activities that would be occurring on the land.

Accordingly, we have explained that the question under OAR 660-033-0020(1)(a)(B) is "whether a *reasonable farmer* would be motivated to put the land to agricultural use, for the primary purpose of obtaining a profit in money." *Landwatch Lane County v. Lane County*, 77 Or LUBA 368, 371 (2018) (emphasis added). Similarly, we have said that the question is "whether the property is capable of farm use with a *reasonable expectation* of yielding a profit in money." *Doherty v. Wheeler County*, 56 Or LUBA 465, 472 (2008) (internal quotation marks omitted; emphasis added). The board of commissioners did not err in considering whether a "reasonable farmer" would have an expectation of

obtaining a profit in money from growing crops on the subject property. Record 25.

The second subassignment of error under COLW's third assignment of error is denied.

COLW's third assignment of error is denied.

c. Commercial Scale

In *Wetherell v. Douglas County*, we explained that "Goal 3 protects small-scale agricultural uses as well as large-scale ones," and we concluded that the county in that case erred in applying what was "essentially a 'commercial-scale' agricultural operation standard under OAR 660-033-0020(1)(a)(B)." 50 Or LUBA 167, 184-85 (2005), *rem'd on other grounds*, 204 Or App 732, 132 P3d 41 (2006), *rem'd on other grounds*, 342 Or 666, 160 P3d 614 (2007). In a portion of the first subassignment of error under its first assignment of error, Redside argues that the board of commissioners, like the county in *Wetherell*, misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that the subject property would be suitable for farm use only if it could support farm activities at a relatively large, commercial scale or intensity.

We do not understand the board of commissioners to have concluded that the subject property is not suitable for farm use because it cannot support farm activities at a commercial scale. In other words, the county did not conclude that, while a farmer might have a reasonable expectation of obtaining a profit in money, that profit would not be large enough to support farm activities at a

commercial scale. Rather, we understand the board of commissioners to have concluded that, based on the factors listed in OAR 660-033-0020(1)(a)(B), a farmer would not have a reasonable expectation of obtaining *any* profit in money from engaging in any of the farm activities listed in ORS 215.203(2)(a). *See, e.g.*, Record 24 ("No reasonable farmer would conduct a cattle or other livestock operation on the subject property intending to make *a profit in money* from the endeavor." (Emphasis added.)); Record 25 ("The expenses to establish an irrigation system and the shallow, poor quality soils present on the subject property would prevent a reasonable farmer from believing that he or she would ever make *a profit in money* by conducting irrigation water-dependent farm uses on the subject property." (Emphasis added.)). Accordingly, this argument provides no basis for reversal or remand.

This portion of the first subassignment of error under Redside's first assignment of error is denied.

d. Weight of Profitability as a Consideration

Again, OAR 660-033-0020(1)(a)(B) defines "agricultural land" to include land that is "suitable for farm use" based on a number of factors. We have explained:

> "[*T*]*he considerations listed in OAR 660-033-0020(1)(a)(B)*—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices—*are the primary drivers* of any determination under the rule whether land is 'suitable for farm use'

as defined in ORS 215.203(2)(a). * * *

"* * * * *

"* * * [W]hile *profitability* is a permissible consideration in determining whether land is agricultural land under the rule definition, it *is a relatively minor consideration*, and one with a large potential for distracting the decision maker and the parties from the primary considerations listed in the rule definition—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices." *Wetherell v. Douglas County*, 58 Or LUBA 638, 655-57 (2009) (emphases added).

Again, ORS 215.203(2)(a) provides:

"As used in this section, *'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 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 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, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. '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 or land described in ORS 321.267 (3) or 321.824 (3)." (Emphases

added.)

DLCD's second assignment of error, the first subassignment of error under Redside's first assignment of error, and a portion of intervenors-petitioners William Buchanan, Elizabeth Buchanan, and Keystone Cattle & Performance Horses, LLC's (collectively, Keystone's) assignment of error are that the board of commissioners misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in its consideration of the profitability of farm uses on the subject property. DLCD, Redside, and Keystone argue that, in determining whether the subject property is suitable for farm use, rather than treating the factors listed in OAR 660-033-0020(1)(a)(B) as the primary drivers of the determination and profitability as a relatively minor consideration, the board of commissioners reduced the inquiry "to a binary test with profitability as the determining factor of whether Goal 3 protection applies." DLCD's Petition for Review 18. While the county's findings address each of the factors listed in OAR 660-033-0020(1)(a)(B) individually, DLCD, Redside, and Keystone observe that almost all of those findings ultimately relate to profitability.

710 Properties responds that the county properly related its findings addressing each of the factors listed in OAR 660-033-0020(1)(a)(B) to profitability. 710 Properties argues that profitability is not merely a factor in addition to those listed in OAR 660-033-0020(1)(a)(B). Rather, 710 Properties observes that profitability is part of the definition of "farm use" itself at ORS 215.203(2)(a) and that OAR 660-033-0020(1)(a)(B) requires a determination of

whether the subject property is "suitable for *farm use*" based on the listed factors. (Emphasis added.) 710 Properties argues that the question is not whether, based on the factors listed in OAR 660-033-0020(1)(a)(B) as well as profitability, the property is suitable for engaging in any of the farm activities listed in ORS 215.203(2)(a). Rather, 710 Properties argues that the question is whether, based on the factors listed in OAR 660-033-0020(1)(a)(B), a farmer would have a reasonable expectation of obtaining a profit in money from engaging in any of the farm activities listed in ORS 215.203(2)(a).

In *Wetherell*, the applicant sought to demonstrate that the subject property was not "agricultural land" for purposes of Goal 3. To that end, the applicant provided an economic analysis, referred to as the "Day report," which "concluded that the annual and amortized expenses of conducting a grazing operation using accepted farm practices far exceed the likely annual revenues, given inherent limitations such as poor soils and the current neglected condition of the property." 58 Or LUBA at 655. In a portion of one subassignment of error, the petitioners argued that the county misconstrued the applicable law by placing too much weight on profitability. We observed that economic analyses are inherently subject to manipulation.[7]

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[7] We explained:

> "[A]n economic analysis like that of the Day report is highly manipulable, and can yield dramatically different results depending

The county's findings "extensively discuss[ed] the considerations set out in OAR 660-033-0020(1)(a)(B), and conclude[d] based on those considerations

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on what variables are assumed and what approaches are used. To take one example, by far the largest of the assumed expenses under the Day report is for fertilizer, in amounts and at intervals in excess of the amounts and intervals applied to the property in its previous history of grazing, even though the Day report concludes that application of fertilizer in those amounts would be uneconomical and not significantly improve productivity. The parties dispute, among many other things, whether 'accepted farming practices' would include annual application of fertilizer and in such amounts on the subject property. We do not resolve that dispute here, but it illustrates the difficulty in assigning the appropriate role and weight to an economic analysis such as the Day report. Depending on what assumptions and variables are used, such economic analyses could easily conclude that is 'unprofitable' to graze land that historically has been grazed profitably or, for that matter, that it is 'profitable' to graze land that in fact cannot be grazed profitably. In *Wetherell III*, the Court seemed to caution against relying too heavily on such economic analyses of profitability. *See* 342 Or at 683 (rejecting arguments that 'if particular land currently is "profitable" or produces "gross farm income," then that land necessarily meets the "farm use" test and is properly classified as agricultural land under Goal 3, whereas if the land is "unprofitable" for farming or produces no "gross farm income," then it necessarily is not agricultural land under Goal 3').

"* * * Because an economic analysis such as the Day report yields hard numbers, it is easy to assign an unwarranted significance to the analysis, and fail to appreciate that it is based on highly variable assumptions regarding hypothetical farm uses, and that its conclusions are only as reliable as its assumptions." *Wetherell*, 58 Or LUBA at 656-57.

that the property [was] not agricultural land under the definition." *Id.* at 657. The county's findings also

> "extensively discuss[ed] profitability and rel[ied] heavily on the Day report to conclude that the subject property [was] not suitable for farm use as defined in ORS 215.203(2)(a), in part because the county believed, based on the Day report, that no farm use of the property could reasonably be expected to yield a profit." *Id.*

The intervenor argued that,

> "even if different assumptions are used[,] the gap between annual income and annual and amortized expenses is so large that under no likely scenario would a prudent farmer be motivated to graze the subject property *alone or in conjunction with other property with the expectation of obtaining a profit in money*." *Id.* at 656 (emphasis added.)

We were unable to conclude that the county's findings "place[d] preponderant or inappropriate weight on profitability or in considering profitability fail[ed] to give sufficient weight to the factors listed in OAR 660-033-0020(1)(a)(B)." *Id.* at 657.We therefore denied that portion of the subassignment of error.

Here, the board of commissioners related the various factors to their impact on the profitability of farming activities on the subject property. Those factors properly inform whether a farmer would have a reasonable expectation of obtaining a profit by engaging in any of the farm activities listed in ORS 215.203(2)(a) and, therefore, inform whether the property is suitable for farm use. We conclude, however, that the board of commissioners did err in placing undue weight on the profitability of farm use *on the subject property*. In various assignments of error, COLW, DLCD, and Redside emphasize that the definition

of "farm use" at ORS 215.203(2)(a) requires not that a farm activity *actually* be profitable but that it be undertaken for the *primary purpose* of obtaining a profit. DLCD argues that "[t]he key language in ORS 215.203(2)(a) is as follows: '"farm use" means the current employment of land *for the primary purpose* of obtaining a profit in money by [one or a combination of the listed activities.]'" DLCD's Petition for Review 23 (emphasis in brief). "[T]he profitability aspect of the definition relates to the primary *purpose* of the activity." *Id.* at 24 (emphasis in original). As we discuss in our resolution of a subsequent assignment of error, the board of commissioners' decision fails to consider the ability to use the subject property with a primary purpose of obtaining a profit in money *in conjunction with other property*. The county found:

> "The state agencies repeatedly assert that the barriers to farming the subject property set forth by [710 Properties] could be alleviated by combining farm operations with other owned and/or leased land, whether adjacent to the subject property or not. The Hearings Officer finds that the definition of 'farm use' in ORS 215.203(2)(a) refers to '***land***,'—not 'lands,'—and does not include any reference to 'combination' or requirement to 'combine' with other agricultural operations. Therefore, if the subject property, in and of itself cannot be engaged in farm use for the primary purpose of obtaining a profit in money, it does not constitute agricultural land." Record 76 (boldface and italics in original).

ORS 215.203(2)(a) refers to the employment of land for the primary purpose of obtaining a profit by engaging in a farm activity. "Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either 'suitable for farm use' or 'necessary to permit farm practices to be

undertaken on adjacent or nearby lands' outside the lot or parcel." OAR 660-033-0030(3). Relating the profitability of farm related activity solely to the activity on the subject property places undue weight on profitability. The board of commissioners improperly weighed the consideration of profitability of the subject property operating independently.

DLCD's second assignment of error, the first subassignment of error under Redside's first assignment of error, and this portion of Keystone's assignment of error are sustained.

2. Source of Feed

Again, the board of commissioners concluded that the subject property is not suitable for grazing, raising poultry, stabling or training equines, or establishing a feed lot because sufficient feed cannot be grown on-site. For example, the board of commissioners found:

> "The suitability test, as indicated by DLCD/ODA/ODFW comments, relates to whether the subject property itself can support a farm use. This means that the land must be able to produce crops or forage adequate to feed livestock raised on the property; something that severely limits the size of any operation." Record 26.

The first subassignment of error under DLCD's first assignment of error and the second and fourth subassignments of error under Redside's first assignment of error are that the board of commissioners misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that land is suitable for farm uses involving animals only if sufficient feed can be grown on-site. DLCD

and Redside argue that that interpretation is not supported by the text of OAR 660-033-0020(1)(a)(B) or ORS 215.203(2)(a), both of which are silent as to the source of the feed that is necessary to sustain animals involved in farm uses. DLCD and Redside argue that there is no apparent reason why forage grown on-site cannot be supplemented with feed imported from off-site, which would enable the subject property to sustain more animals and, potentially, obtain a profit in money. DLCD and Redside argue that the board of commissioners' interpretation inserts into OAR 660-033-0020(1)(a)(b) and ORS 215.203(2)(a) limitations that have been omitted, contrary to ORS 174.010. *See* n 6.

710 Properties responds that this issue is waived because no party raised it below. In its petition for review, and again in its reply brief, DLCD identifies its first assignment of error as having been preserved in an April 19, 2022, letter that it, ODA, and ODFW submitted into the record (state agency letter). Record 1427-38. We have reviewed the cited pages, and, for the following reasons, we conclude that this issue was preserved.

Again, for purposes of Goal 3, "agricultural land" includes land that is "suitable for farm use" based on a number of factors. OAR 660-033-0020(1)(a)(B). One of those factors is "soil fertility." In addressing soil fertility, the state agency letter argued:

> "Soil fertility can be an important factor in commercial agricultural operations. However, the presence of productive soils is not always necessary. Many types of farm uses are not dependent on specific soil types and others tend to benefit from less productive soils.

> *Feedlots, whether commercial or personal, are frequently located on lands with low soil fertility.*" Record 1429 (emphasis added).

Responding to the state agency letter, 710 Properties argued:

> "[T]he claim that a feedlot could be sustained by the land is clearly unreasonable. *It is obvious that hay and feed grown on farms with superior soils would need to be imported to the subject property to feed the livestock* * * *. Notwithstanding the fact that *suitability analysis for farm use relates to a particular piece of land and its ability to support a farm use*, accepting COLW's or the Agency Letter's claim that a feedlot could be established is essentially a claim that a feedlot could be established anywhere, either on productive farm land or in a Walmart parking lot. But that argument runs in the face of the purpose of Goal 3—which is to protect lands that can actually be used to grow food and would make meaningless almost every consideration enumerated by the rule." Record 651-52 (footnote omitted; emphases added).

Like 710 Properties, the county hearings officer recognized the state agency letter's feedlot example as an argument that forage grown on-site can be supplemented with feed imported from off-site:

> "COLW's claim that 'soil capability * * * is irrelevant' because some farm uses are 'unrelated to soil type' is erroneous because the definition of 'Agricultural Land' provided by Goal 3 makes soil fertility and the suitability of the soil for grazing the exact issues that must be considered by the County to determine whether the subject property is 'land in other soil classes that is suitable for farm use.' *DLCD, ODFW and ODA make the same mistake in ignoring the ability of the land itself, rather than imported feed, to support a farm use*. The fact that the suitability test is tied to the specific soil found on a subject Property by the Goal 3 definition makes it clear that the proper inquiry is whether the land itself can support a farm use. Otherwise, any land, no matter how barren, would be classified as farmland—which it is not and should not be." Record 64 (emphasis added).

Finally, the board of commissioners found, "While hay and feed may be imported to increase production of livestock, that is not a correct measure of whether the land proposed for rezoning can support a particular farm use—the question asked by the definition of Agricultural Land in Goal 3." Record 27.

We conclude that the state agency letter gave the county and the parties fair notice and an adequate opportunity to respond to the argument that forage grown on-site can be supplemented with feed imported from off-site. Accordingly, the issue is not waived.

On the merits, 710 Properties' response is two-fold. First, 710 Properties defends the county's conclusion that whether the subject property would be able to obtain a profit in money if forage grown on-site was supplemented with feed imported from off-site does not matter for purposes of determining whether the subject property is suitable for farm use. 710 Properties argues that, under ORS 215.203(2)(a) and OAR 660-033-0020(1)(a)(B), it is the subject property's capacity for farm use that must be analyzed, not whether other lands' capacity for farm use can make the subject property suitable for farm use. 710 Properties repeats its argument below that, if feed imported from off-site could make otherwise unsuitable land suitable for farm use and therefore agricultural land, then "any and all lands—including a Walmart parking lot—would * * * qualify to be protected as Goal 3 protected land. That cannot be the law." 710 Properties' Intervenor-Respondent's Brief 17.

We agree with DLCD and Redside that the board of commissioners' interpretation is not supported by the text of OAR 660-033-0020(1)(a)(B) or ORS 215.203(2)(a), both of which are silent as to the source of the feed that is necessary to sustain animals involved in farm uses. That interpretation inserts what has been omitted, contrary to ORS 174.010. *See* n 6. Under ORS 215.203(2)(a), "farm use" includes the feeding, breeding, management, and sale of livestock and poultry and the stabling or training of equines. Whether livestock, poultry, and equines are sustained with forage grown on-site or feed imported from off-site, their feeding, breeding, management, sale, stabling, and training potentially qualify as farm uses. The board of commissioners misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that land is suitable for farm uses involving animals only if sufficient feed can be grown on-site.

In response to 710 Properties' argument that, under the foregoing interpretation, any and all lands—including a Walmart parking lot—would qualify as agricultural lands, we repeat that, in determining whether land is suitable for dryland grazing, the question is whether, based on the factors listed in OAR 660-033-0020(1)(a)(B), a farmer would have a reasonable expectation of obtaining a profit in money from that activity. That requirement remains, even though forage grown on-site may be supplemented by feed imported from off-site.

710 Properties' second response is that at least two ranchers testified below that it would be infeasible to supplement forage grown on the subject property with feed imported from elsewhere. Record 1417, 3022. 710 Properties argues that no party offered contrary credible testimony or evidence.

It may be that, even if feed is imported from off-site, the subject property is not suitable for the feeding, breeding, management, and sale of livestock and poultry or the stabling or training of equines for the primary purpose of obtaining a profit in money, given the factors listed in OAR 660-033-0020(1)(a)(B). However, the board of commissioners did not reach that conclusion. Instead, as quoted above, the board of commissioners erroneously concluded that it need not consider whether forage grown on-site can be supplemented by feed imported from off-site. On remand, the county will have an opportunity to evaluate the testimony that 710 Properties cites through the proper lens and reach its own conclusion.

The first subassignment of error under DLCD's first assignment of error and the second and fourth subassignments of error under Redside's first assignment of error are sustained.

3. On-Site Construction and Maintenance of Equipment and Facilities

"'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection." ORS 215.203(2)(a). The county found that "storage and maintenance of equipment is

not, in and of itself, a farm use unless such equipment is for the production of crops or a farm use on the subject property." Record 78.

In the second subassignment of error under its first assignment of error, DLCD argues that the board of commissioners misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that land is suitable for the "construction and maintenance of equipment and facilities used for" farm activities only if those farm activities also occur on the subject property. DLCD argues that that interpretation is not supported by the text of OAR 660-033-0020(1)(a)(B) or ORS 215.203(2)(a). DLCD argues that, as long as the equipment and facilities are used for farm activities, the construction and maintenance thereof are farm uses, regardless of whether those farm activities occur on the subject property or elsewhere.

710 Properties defends the county's conclusion. 710 Properties argues that, under ORS 215.203(2)(a) and OAR 660-033-0020(1)(a)(B), the question is whether the *subject property* is suitable for farm use, not whether the subject property is suitable for supporting farm uses on *other lands*. 710 Properties argues that, if land was suitable for the construction and maintenance of equipment and facilities used for farm activities even where those farm activities occur elsewhere, then "*every land* in Oregon [would] be Goal 3 lands because it too could support hay storage or a machine shop." 710 Properties' Intervenor-Respondent's Brief 37 (emphasis in original). 710 Properties observes that, in addition to lands in Eastern Oregon classified by the NRCS or a site-specific soils

assessment as predominantly Class 1 to 6 soils and land in other soil classes that is suitable for farm, for purposes of Goal 3, "agricultural land" includes "[l]and that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural land." OAR 660-033-0020(1)(a)(C). In light of that context, 710 Properties argues that, where equipment and facilities are constructed or maintained on certain land, but where the farm activities for which that equipment and those facilities are used occurs on other land, the land on which the equipment and facilities are constructed and maintained is "agricultural land" only if that construction and maintenance is "necessary" to permit the farm practices on the other land. 710 Properties argues that no party raised the issue below that the construction and maintenance of equipment and facilities on the subject property is "necessary" to permit farm practices elsewhere and that that issue is therefore waived.

We do not understand DLCD to argue that the construction or maintenance of equipment and facilities on the subject property is "necessary" to permit farm practices elsewhere under OAR 660-033-0020(1)(a)(C). Rather, DLCD argues that land may be "suitable" for the construction and maintenance of equipment and facilities used for farm activities under OAR 660-033-0020(1)(a)(B) even where those farm activities occur on other lands. We agree with DLCD. Under ORS 215.203(2)(a), "farm use" includes the construction and maintenance of equipment and facilities used for farm activities. Whether those farm activities occur on the subject property or elsewhere, the construction and maintenance of

the equipment and facilities used therefor is a farm use. The board of commissioners misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that land is suitable for that farm use only if the farm activities occur on the same land.

In response to 710 Properties' argument that, under the foregoing interpretation, all lands in Oregon would qualify as agricultural land because they could support hay storage or a machine shop, we repeat that, in determining whether land is suitable for the construction and maintenance of equipment and facilities, the county must consider the factors listed in OAR 660-033-0020(1)(a)(B): soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices. That requirement remains, even though the farm activities for which the equipment and facilities are used occur elsewhere.

It may be that, even if the farm activities for which the equipment and facilities are used occur elsewhere, the subject property is not suitable for the construction and maintenance of the equipment and facilities used therefor, given the factors listed in OAR 660-033-0020(1)(a)(B). However, the board of commissioners did not reach that conclusion. Instead, the board of commissioners erroneously concluded that land is suitable for that farm use only if the farm activities occur on the same land. On remand, the county will have an

opportunity to evaluate the evidence in the record through the proper lens and reach its own conclusion.

The second subassignment of error under DLCD's first assignment of error is sustained.

4. Nearby or Adjacent Land

The county found:

> "The state agencies repeatedly assert that the barriers to farming the subject property set forth by [710 Properties] could be alleviated by combining farm operations with other owned and/or leased land, whether adjacent to the subject property or not. The Hearings Officer finds that the definition of 'farm use' in ORS 215.203(2)(a) refers to '***land***,'—not 'lands,'—and does not include any reference to 'combination' or requirement to 'combine' with other agricultural operations. Therefore, if the subject property, in and of itself cannot be engaged in farm use for the primary purpose of obtaining a profit in money, it does not constitute agricultural land. There is no requirement in ORS 215.203(2)(a) or OAR Chapter 660-033 that a certain property must 'combine' its operations with other properties in order to be employed for the primary purpose of obtaining a profit in money and thus, engaged in farm use." Record 76 (boldface and italics in original).

OAR 660-033-0030(3) provides, "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is * * * 'suitable for farm use' * * *." The third subassignment of error under DLCD's first assignment of error, the third subassignment of error under Redside's first assignment of error, and a portion of Keystone's assignment of error are that, in light of OAR 660-033-0030(3), the board of commissioners

misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that it was not required to consider whether the subject property is suitable for farm use in conjunction with nearby or adjacent land.

710 Properties responds that this issue is waived because no party raised OAR 660-033-0030(3) below. While it may be true that no party specifically cited OAR 660-033-0030(3) in their testimony, the state agency letter argued that utilizing a five-to-six-month grazing season "in conjunction with other lands" would make the subject property more suitable for dryland grazing, and the hearings officer found that the state agencies had "repeatedly" argued that the county was required to consider nearby or adjacent land. Record 76, 1430. We conclude that the county and the parties had fair notice and an adequate opportunity to respond to that argument. Accordingly, the issue is not waived.

We agree with DLCD, Redside, and Keystone that the county misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that it was not required to consider whether the subject property is suitable for farm use in conjunction with nearby or adjacent land. We have previously explained that "[t]he suitability for farm use inquiry must * * * consider the potential for use in conjunction with adjacent or nearby land." *Landwatch Lane County*, 77 Or LUBA at 371 (citing OAR 660-033-0030(3)); *see also Wetherell*, 50 Or LUBA at 186-87 (OAR 660-033-0030(3) requires counties to consider whether the subject parcel can be used in conjunction with

nearby or adjacent land in other ownerships in determining whether the parcel is "suitable for farm use" under OAR 660-033-0020(1)(a)(B)).

On the merits, we do not understand 710 Properties to defend the county's conclusion that it was not required to consider nearby or adjacent land in determining whether the subject property is suitable for farm use under OAR 660-033-0020(1)(a)(B). Instead, 710 Properties observes that several farmers and ranchers testified that they would not consider incorporating the subject property into their farm operations. It may be that the subject property is not suitable for farm use even in conjunction with nearby or adjacent land. However, the county did not reach that conclusion. Instead, as quoted above, the county erroneously concluded that it need not consider nearby or adjacent land at all. On remand, the county will have an opportunity to evaluate the testimony that 710 Properties cites through the proper lens and reach its own conclusion. We observe that Keystone submitted testimony expressing its desire to use the subject property in conjunction with its existing farming operations, and a business plan to do that. Record 1583-602. On remand, the county should evaluate that testimony through the proper lens, as well.

The third subassignment of error under DLCD's first assignment of error, the third subassignment of error under Redside's first assignment of error, and this portion of Keystone's assignment of error are sustained.

DLCD's first assignment of error, Redside's first assignment of error, and Keystone's assignment of error are sustained.

5. Findings and Substantial Evidence

Several farmers and ranchers submitted testimony indicating that they did not believe the subject property is suitable for grazing cattle. In an April 26, 2022, letter, 710 Properties argued that the subject property is not suitable for a variety of other farm uses including elk ranching, sheep ranching, goats, game birds, poultry/chickens/eggs, alpacas, a vineyard, lavender, hemp, honey/bees, a feed lot, and horse boarding and training. Record 3065-68. The letter has 80 exhibits, many of which are intended to support those arguments.[8] Record 3070-419.

In concluding that the subject property is not suitable for grazing cattle, the board of commissioners relied on the farmer and rancher testimony:

> "We have considered the vast amount of combined experience of these farmers and ranchers in conducting similar operations and find their testimony more probative and persuasive than that offered by the opposition on the issue of whether the subject property is suitable for farm use as defined by ORS 215.203. Based on evidence and comments submitted into the record from ranchers and farmers, including James M. Stirewalt, Rand Campbell, Matt and Awbrey Cyrus, Russ Mattis, Zach Russell, Craig May, the Board finds the subject property is not suitable for dryland grazing. No reasonable farmer would conduct a cattle or other livestock operation on the subject property intending to make a profit in money from the endeavor." Record 24.

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[8] The letter states, "Commenters suggested any number of additional farm uses could be made on the Property. We provide evidence of these types of uses now and their requirements to be a 'farm use' and done as a for-profit operation." Record 3065.

In concluding that the subject property is not suitable for other farm uses, the board of commissioners relied on 710 Properties' April 26, 2022, letter: "[710 Properties] provided extensive evidence that a wide array of farm activities, including those identified by the State agencies, would not be feasible on the subject property and would not be able to be conducted with an intention to make a profit in money." Record 26.

In its fourth assignment of error, DLCD argues that the board of commissioners' findings that the subject property is not suitable for farm use are inadequate and not supported by substantial evidence. DLCD argues that the farmer and rancher testimony on which the board of commissioners relied to conclude that the subject property is not suitable for grazing cattle is conclusory and unhelpful. DLCD also argues that the information contained in the exhibits to 710 Properties' April 26, 2022, letter is "basic, factsheet-type information that someone might glance through to learn about an animal." DLCD's Petition for Review 32.

Adequate findings are required to support quasi-judicial land use decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 596 P2d 1063 (1977). Generally, findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). In addition, findings must address and respond to specific issues relevant to compliance with

applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). LUBA shall reverse or remand a decision that is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

710 Properties responds that this issue is waived because no party raised it below. We agree with DLCD's response that, in order to preserve the right to challenge at LUBA the evidentiary support for findings adopted to address a relevant criterion, a petitioner must challenge the proposal's compliance with that criterion during the local proceedings. The evidence ultimately relied on by the decision-maker need not be anticipated and specifically challenged during the local proceedings. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993). DLCD challenged the application's compliance with OAR 660-033-0020(1)(a)(B) during the local proceedings. It was not required to anticipate that the board of commissioners would ultimately rely on the information contained in the exhibits to 710 Properties' April 26, 2022, letter or the farmer and rancher testimony and specifically challenge that evidence. Accordingly, the issue is not waived.

As explained above, the board of commissioners erroneously concluded (1) that it need not consider whether forage grown on-site can be supplemented by feed imported from off-site, (2) that land is suitable for the construction and

maintenance of equipment and facilities used for farm activities only if those farm activities occur on the same land, and (3) that it need not consider nearby or adjacent land at all. Because we remand the county's decision for the board of commissioners to evaluate the evidence in the record through the proper lens, and because the board of commissioners may adopt new or different findings on remand based on the correct analytical framework, we do not resolve DLCD's fourth assignment of error.

C. OAR 660-033-0020(1)(a)(C)

In addition to lands in Eastern Oregon classified by the NRCS or a site-specific soils assessment as predominantly Class 1 to 6 soils and other lands that are suitable for farm use, for purposes of Goal 3, "agricultural land" includes "[l]and that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." OAR 660-033-0020(1)(a)(C). In its application, 710 Properties provided four tables (one for each cardinal direction) listing the surrounding EFU-zoned properties, listing their current uses, listing their potential farm practices, and explaining why none of them needed the subject property in order to conduct those farm practices. Record 4646-48.

In addressing OAR 660-033-0020(1)(a)(C), the state agency letter argued:

> "There is little discussion that we found in the information provided in support of the plan amendment that adequately discusses impacts to area farm operations. The discussion provided by [710 Properties] focuses primarily on an assertion that any subsequent development of the subject property (because of the proposed plan amendment and rezone) would not adversely impact surrounding farming and

ranching operations primarily because the property is separated by topography that would provide adequate buffers. This conclusion is not supported by any comprehensive evaluation of the farming and ranching practices that are associated with existing and potential future farm uses in the surrounding area. Without an adequate analysis of the impact on adjacent or nearby agricultural lands, there are many questions that have not been evaluated. For example, what would the cumulative impacts of additional residential water use be to water supply for area irrigated agriculture in the region? Unlike applications for irrigation use, residential wells are exempt uses and thus there would be no evaluation for injury to other water users in the area. What would be the traffic implications? What would the siting of more dwellings do to the ability to utilize certain agricultural practices? Would the expansion of residential development in the area provide greater opportunities for trespass from adjacent properties onto area farming operations?" Record 1432.

The hearings officer found, "[T]here is no showing that the subject property is necessary for farming practices on any surrounding agricultural lands. There is no evidence that *the subject property contributes* to any such practices, nor that *other lands depend on use of the subject property* to undertake any farm practices." Record 75 (emphases added).

The board of commissioners found:

"The State agencies raised the issue of traffic impacts related to the Goal 3 issue of whether land is necessary to permit farm practices to be undertaken on nearby lands. *Traffic issues are not, however, a relevant consideration in addressing this issue because Goal 3 asks whether the 'land' to be rezoned, the subject property, is needed by area farms to conduct farm practices on their properties.* Additionally, the record supports the finding that the small amount of traffic associated with the proposed change will not prevent farm practices associated with area farm uses of growing hay and grazing livestock from occurring in the area." Record 29 (emphasis added).

Accordingly, the board of commissioners concluded that the subject property is not necessary to permit farm practices on adjacent or nearby lands.

1. Preservation of Agricultural Land in Large Blocks

In the first subassignment of error under its first assignment of error, 1000 Friends argues that the board of commissioners misconstrued OAR 660-033-0020(1)(a)(C) in concluding that the subject property is not necessary to permit farm practices on adjacent or nearby lands because the challenged PAPA will create an "island" of nonresource land within a large block of agricultural land. 1000 Friends observes that the agricultural policy of the state includes the following:

> "The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and *the preservation of such land in large blocks is necessary* in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation." ORS 215.243(2) (emphasis added).

1000 Friends also observes that OAR chapter 660, division 33, implements ORS 215.243. OAR 660-033-0010. Accordingly, 1000 Friends argues that the language of ORS 215.243(2) informs whether land is "necessary" to permit farm practices on adjacent or nearby lands under OAR 660-033-0020(1)(a)(C). Specifically, 1000 Friends argues that land is "necessary" to permit farm practices on adjacent or nearby lands, under OAR 660-033-0020(1)(a)(C), if it is necessary that the land be considered agricultural land in order to preserve a

"large block" of such land. In other words, if redesignating and rezoning land from agricultural to nonresource would result in a "river" or "lake" of nonresource land in an otherwise "large block" of agricultural land, then the land proposed for redesignation and rezoning is "necessary" to permit farm practices on adjacent or nearby lands under OAR 660-033-0020(1)(a)(C). 1000 Friends argues that the subject property is located within such a "large block" of agricultural land (*i.e.*, the surrounding EFU-zoned lands), that the challenged PAPA will create an "island" of nonresource land therein, and that the board of commissioners therefore erred in concluding that the subject property is not "agricultural land" under OAR 660-033-0020(1)(a)(C).

Thomas responds that this issue is waived because no party raised it below. In its petition for review, 1000 Friends identifies its first assignment of error as having been preserved in approximately 50 pages of applicant and opponent testimony. LUBA will not search the record or large page ranges cited in the petition for review to determine whether an issue was raised below. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528, 532-33 (2019). A citation to 50 pages in the record is not sufficiently specific to establish that an issue was preserved. A petitioner must quote or point to a specific page, passage, or portion of an audio recording to demonstrate where an issue was raised in the local proceedings. Accordingly, the issue is waived.

The first subassignment of error under 1000 Friends' first assignment of error is denied.

2. Traffic Impacts

Again, for purposes of Goal 3, "agricultural land" includes "[l]and that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." OAR 660-033-0020(1)(a)(C). Again, in addressing OAR 660-033-0020(1)(a)(C), the state agency letter argued that it was not clear how water, traffic, nuisance, and trespass impacts under the new RR-10 zoning would impact area farming operations. The hearings officer found, "[T]here is no showing that the subject property is necessary for farming practices on any surrounding agricultural lands. There is no evidence that *the subject property contributes* to any such practices, nor that *other lands depend on use of the subject property* to undertake any farm practices." Record 75 (emphases added). The board of commissioners found:

> "The State agencies raised the issue of traffic impacts related to the Goal 3 issue of whether land is necessary to permit farm practices to be undertaken on nearby lands. *Traffic issues are not, however, a relevant consideration in addressing this issue because Goal 3 asks whether the 'land' to be rezoned, the subject property, is needed by area farms to conduct farm practices on their properties.* Additionally, the record supports the finding that the small amount of traffic associated with the proposed change will not prevent farm practices associated with area farm uses of growing hay and grazing livestock from occurring in the area." Record 29 (emphasis added).

In the second subassignment of error under its first assignment of error, 1000 Friends argues that the county misconstrued OAR 660-033-0020(1)(a)(C) in concluding that land is necessary to permit farm practices on adjacent or nearby lands, under OAR 660-033-0020(1)(a)(C), only if the land actively

"contributes" to such practices or if other lands "depend on use of" the land to engage in such practices. 1000 Friends argues that land is also necessary to permit farm practices on adjacent or nearby lands if the impacts from nonresource use of the land would prevent farm practices on adjacent or nearby lands. Accordingly, 1000 Friends argues that the board of commissioners erred in concluding that traffic impacts are not a relevant consideration.

Thomas responds that the county did not misconstrue OAR 660-033-0020(1)(a)(C). Thomas defends the county's conclusion that OAR 660-033-0020(1)(a)(C) asks whether the land *itself* is necessary to permit farm practices on adjacent or nearby lands, not whether the land's *agricultural designation and zoning*, and the consequent lack of impacts, are necessary to permit farm practices on adjacent or nearby lands.

In *Wetherell*, the county redesignated and rezoned the subject property from resource to rural residential. In doing so, the county concluded that the subject property was not necessary to permit farm practices on adjacent or nearby lands under OAR 660-033-0020(1)(a)(C). In a portion of their first assignment of error, the petitioners argued that, "if the subject property's plan and zoning designations [were] amended to allow the proposed 32 rural residential dwellings, the ensuing conflicts between residential uses and adjacent and nearby farm practices [would] hinder or prevent those practices." 50 Or LUBA at 190-91. We explained that, in order to be "agricultural land" under OAR 660-033-0020(1)(a)(C), "there must be *some connection between the subject property and*

adjacent or nearby farm practices, such that the subject property must remain as 'agricultural land' in order to permit such practices on other lands to be undertaken." *Id.* at 191 (emphasis added). In *Wetherell*, "[t]he county found no evidence of any connection between the subject property and adjacent or nearby farm practices, *or that the subject property must remain as 'agricultural land' in order to permit such practices to be undertaken.*" *Id.* (emphasis added). In addition, the intervenor pointed out that ORS 30.936, the right to farm statute, made it more unlikely that conflicts from rural residential uses could rise to such a level that the subject property would be required to remain as agricultural land in order to permit farm practices on other land.[9]

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[9] ORS 30.936 provides:

> "(1) No farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass.
>
> "(2) Subsection (1) of this section shall not apply to a right of action or claim for relief for:
>
> > "(a) Damage to commercial agricultural products; or
> >
> > "(b) Death or serious physical injury as defined in ORS 161.015.
>
> "(3) Subsection (1) of this section applies regardless of whether the farming or forest practice has undergone any change or interruption."

We also considered OAR 660-033-0020(1)(a)(C) in *Walker v. Josephine County*, 60 Or LUBA 186 (2009). In *Walker*, we considered whether "resource use of the subject property [was] necessary to permit the farm and forest practices on nearby BLM land, including operation of the BLM's seed orchard," and we explained that "[t]he possibility that certain potential uses *might cause some conflicts* with the existing farm and forest uses [did] not demonstrate that the subject property [was] necessary for continued farm and forest operations." 60 Or LUBA at 192-93 (emphasis added).

Although it is a close call, consistent with our decisions in *Wetherell* and *Walker*, we agree with 1000 Friends that OAR 660-033-0020(1)(a)(C) asks not only whether the land itself is necessary to permit farm practices on adjacent or nearby lands but, also, whether the land's resource designation and zoning, and the presumed lack of impacts or conflicts with farming on adjacent or nearby lands, are necessary to permit farm practices on adjacent or nearby lands. Although "necessary" is a high standard, and some conflicts may be allowed, we agree with 1000 Friends that the board of commissioners erred in concluding that traffic impacts are not a relevant consideration.

We observe, however, that the board of commissioners found, apparently in the alternative, that "the record supports the finding that the small amount of traffic associated with the proposed change will not prevent farm practices associated with area farm uses of growing hay and grazing livestock from occurring in the area." Record 29. 1000 Friends argues that those findings are

inadequate in the third subassignment of error under its first assignment of error, which we address below.

The second subassignment of error under 1000 Friends' first assignment of error is denied.

3. Findings

In the third subassignment of error under its first assignment of error, 1000 Friends argues that the county's findings that the subject property is not necessary to permit farm practices on adjacent or nearby lands under OAR 660-033-0020(1)(a)(C) are inadequate. We have explained that, "[w]hen the decision does not describe adjacent or nearby agricultural use, it does not demonstrate that the property is not necessary to permit adjacent and nearby farm practices to continue." *Wetherell v. Douglas* County, 52 Or LUBA 677, 681 (2006) (citing *Kaye/DLCD v. Marion County*, 23 Or LUBA 452, 461-62 (1992)). 1000 Friends argues that the county's findings do not identify the surrounding farm practices or explain whether those practices would be prevented by traffic impacts resulting from the challenged PAPA. 1000 Friends also argues that, although the state agency letter raised the issue of water, traffic, nuisance, and trespass impacts under the new RR-10 zoning, the county's findings related to OAR 660-033-0020(1)(a)(C) do not address water, nuisance, or trespass impacts at all. 1000 Friends argues that the county impermissibly shifted the burden to opponents to demonstrate that the subject property is necessary to permit farm practices on adjacent or nearby lands, rather than requiring 710 Properties to demonstrate that

the subject property is *not* necessary to permit farm practices on adjacent or nearby lands. Finally, 1000 Friends observes that the county found that "[i]mpacts of future development must be reviewed when land use applications are submitted." Record 75. 1000 Friends argues that the county may not defer a finding of compliance with OAR 660-033-0020(1)(a)(C) until after the land is redesignated and rezoned.

Thomas responds that the county did not shift the burden to opponents to demonstrate that the subject property is necessary to permit farm practices on adjacent or nearby lands. Thomas observes that 710 Properties provided four tables (one for each cardinal direction) listing the surrounding EFU-zoned properties, listing their current uses, listing their potential farm practices, and explaining why none of them needed the subject property in order to conduct those farm practices. Record 4646-48. Thomas observes that the county expressly relied on those tables (and reproduced them in its findings) in concluding that the subject property is not necessary to permit farm practices on adjacent or nearby lands. Record 97-100.

We agree with Thomas that the county did not shift the burden to opponents and that the findings do identify the surrounding farm practices. However, we agree with 1000 Friends that the findings are inadequate. As explained above, OAR 660-033-0020(1)(a)(C) requires an evaluation of the impacts that redesignating and rezoning land from agricultural to nonresource will have on adjacent or nearby lands and a determination of whether those

impacts will prevent farm practices on those lands. The county may not defer such a determination until after the land is redesignated and rezoned. The findings do not address water, nuisance, or trespass impacts, despite the fact that the state agency letter raised those issues. And while the board of commissioners concluded that traffic impacts would not prevent farm practices on adjacent or nearby lands, the findings do not set out the facts which the board of commissioners believed and relied upon or explain how those facts led to the board of commissioners' conclusion. Thomas observes that 710 Properties submitted water and traffic analyses into the record. However, the findings related to OAR 660-033-0020(1)(a)(C) do not refer to those analyses, and we will not assume that the board of commissioners relied on them.

The third subassignment of error under 1000 Friends' first assignment of error is sustained.

1000 Friends' first assignment of error is sustained, in part.

MISCELLANEOUS ASSIGNMENTS OF ERROR

A. ORS 215.788 and DCCP Provisions

Deschutes County Comprehensive Plan (DCCP) Section 2.2 provides, in part:

> "[House Bill (HB) 2229 (2009)] authorize[s] counties to reevaluate resource lands and amend their comprehensive plan designations for such lands consistent with definitions of 'agricultural land' and 'forest land.' * * * Anything that does not qualify as farmland or forestland may be rezoned for non-resource use, subject to conditions that development in the non-resource zones be rural in

character, not significantly conflict with surrounding farm and forest practices, and not have adverse [effects] on such things as water quality, wildlife habitat, and fire safety. County rezoning activities must be pursuant to a work plan approved by [DLCD]. This effectively means the work will be done similar to periodic review with the [LCDC] expressly given exclusive jurisdiction to review a county decision."

HB 2229 was codified, in relevant part, at ORS 215.788. Or Laws 2009, ch 873, § 5. ORS 215.788 provides:

"(1) For the purposes of correcting mapping errors made in the acknowledgment process and updating the designation of farmlands and forestlands for land use planning, a county may conduct a legislative review of lands in the county to determine whether the lands planned and zoned for farm use, forest use or mixed farm and forest use are consistent with the definitions of 'agricultural lands' or 'forest lands' in goals relating to agricultural lands or forestlands.

"(2) A county may undertake the reacknowledgment process authorized by this section only if [DLCD] approves a work plan, from the county, describing the expected scope of reacknowledgment. [DLCD] may condition approval of a work plan for reacknowledgment under this section to reflect the resources needed to complete the review required by ORS 197.659 and 215.794. The work plan of the county and the approval of [DLCD] are not final orders for purposes of review.

"(3) A county that undertakes the reacknowledgment process authorized by this section shall provide an opportunity for all lands planned for farm use, forest use or mixed farm and forest use and all lands subject to an exception under ORS 197.732 to a goal relating to agricultural lands or forestlands to be included in the review.

"(4) A county must plan and zone land reviewed under this section:

"(a) For farm use if the land meets the definition of 'agricultural land' in a goal relating to agricultural lands;

"(b) For forest use if the land meets the definition of "forest land" used for comprehensive plan amendments in the goal relating to forestlands;

"(c) For mixed farm and forest use if the land meets both definitions;

"(d) For nonresource use, consistent with ORS 215.794, if the land does not meet either definition; or

"(e) For a use other than farm use or forest use as provided in a goal relating to land use planning process and policy framework and subject to an exception to the appropriate goals under ORS 197.732 (2).

"(5) A county may consider the current land use pattern on adjacent and nearby lands in determining whether land meets the appropriate definition."

DCCP Policy 2.2.2 provides, "[EFU] sub-zones shall remain as described in the 1992 Farm Study * * * unless adequate legal findings for amending the sub-zones are adopted or an individual parcel is rezoned as allowed by Policy 2.2.3." In turn, DCCP Policy 2.2.3 is to "[a]llow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan."

The first subassignment of error under COLW's second assignment of error and 1000 Friends' second assignment of error are that the board of commissioners misconstrued ORS 215.788 and DCCP Policy 2.2.3 in concluding

that it could redesignate and rezone individual properties from agricultural to nonresource in a quasi-judicial process. COLW and 1000 Friends argue that the redesignation and rezoning of land from agricultural to nonresource is authorized only pursuant to the legislative process set out at ORS 215.788, which requires, among other things, a DLCD-approved work plan. COLW observes that DCCP Section 2.2 expressly refers to HB 2229 and that, in a 2015 letter to the county, DLCD interpreted ORS 215.788 as authorizing counties to redesignate and rezone geographic areas, not individual properties.[10] Record 1575-77. Because the county did not follow the process set out in ORS 215.788, and because it redesignated and rezoned only the subject property, COLW and 1000 Friends argue that the county exceeded its authority.

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[10] In addition, COLW observes that, in a 2019 letter to the county, DLCD explained:

> "State rule does not provide an opportunity to designate lands as nonresource if the land meets the agricultural capability class or forest productivity thresholds in the state's 'agricultural lands' and 'forest lands' definitions. A Goal 3 or 4 exception, rather than nonprime resource land designation, appears to be required to designate these lands for low intensity rural development." Record 1547.

As explained above, the county did not err in relying on the site-specific soils assessment to conclude that the subject property is not predominantly Class 1 to 6 soils and, therefore, not "agricultural land" under OAR 660-033-0020(1)(a)(A). The 2019 letter does not assist COLW.

Thomas responds that, while COLW argued below that the county was required to follow the process set out in ORS 215.788, COLW did not argue below that the county was not authorized to redesignate and rezone individual properties. Accordingly, Thomas argues that that issue is waived. COLW observes that it argued below that "[i]t is inconsistent with the legislature's intent in adopting HB 2229 for a county to enact a nonresource plan amendment for a specific area, rather there must be an opportunity for all farm and forest lands to be considered." Record 1008. We conclude that the county and the parties had fair notice and an adequate opportunity to respond to COLW's argument that the county was not authorized to redesignate and rezone individual properties. Accordingly, the issue is not waived.

On the merits, Thomas responds that, while ORS 215.788 *authorizes a county* to conduct a *legislative review* of the lands in the county in order to correct mapping errors made in the acknowledgment process, the statute does not *prevent a property owner* from applying with the county to redesignate and rezone their individual property through a *quasi-judicial process*. Thomas observes that ORS 215.211, which allows counties to use site-specific soils assessments in determining whether land is agricultural land, was enacted after ORS 215.788 and that OAR 660-033-0030(5), which implements ORS 215.211, provides, in part, that it applies to "[a] change to the designation of a *lot or parcel* planned and zoned for exclusive farm use, forest use or mixed farm-forest use to a non-resource plan designation and zone on the basis that such land is not agricultural

land." OAR 660-033-0030(5)(c)(A) (emphasis added). Thomas observes that DCCP Policies 2.2.2 and 2.2.3 expressly refer to the redesignation and rezoning of "individual" properties. Thomas argues that DLCD's 2015 letter is consistent with the argument that, while counties cannot limit the scope of the legislative review authorized by ORS 215.788 to individual properties, they can limit the scope of quasi-judicial proceedings conducted in response to applications from individual property owners. Because the challenged PAPA resulted from a quasi-judicial proceeding conducted in response to 710 Properties' application, Thomas argues that the board of commissioners did not err in failing to follow the process set out in ORS 215.788 or in redesignating and rezoning only the subject property.

1000 Friends argues, and we agree, that the references in OAR 660-033-0030(5)(c)(A) and DCCP Policies 2.2.2 and 2.2.3 to "a lot or parcel" and "individual" properties do not necessarily support Thomas' position. Even in a legislative review that considers a geographic area rather than individual properties, the end result may be that individual properties are redesignated or rezoned. Under OAR 660-033-0030(5)(c)(A), a property owner could submit a site-specific soils assessment in response to a county-initiated legislative review in which the owner's property is one of many under consideration for redesignation or rezoning. The site-specific soils assessment would then serve the purpose of assisting the county in determining whether and how to

redesignate and rezone the owner's individual property, but it would not be used in a quasi-judicial proceeding.

Nevertheless, we agree with Thomas that the board of commissioners did not err in failing to follow the process set out in ORS 215.788 or in redesignating and rezoning only the subject property. ORS 215.788 authorizes counties to conduct legislative reviews of geographic areas, and it prescribes the process that counties must follow in conducting those reviews. However, that statute does not prohibit counties from considering applications to redesignate and rezone individual properties in quasi-judicial proceedings. COLW's argument inserts into the statute what has been omitted, contrary to ORS 174.010. *See* n 6. The board of commissioners did not misconstrue ORS 215.788 or exceed its authority in redesignating and rezoning only the subject property in a quasi-judicial process.[11] The board of commissioners did not misconstrue DCCP Policy 2.2.3

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[11] Like the reference to HB 2229, in DCCP Section 2.2, COLW maintains that the reference to the year 2010 in DCCP Section 3.3 means that DCCP Policies 2.2.2 and 2.2.3 authorize the redesignation and rezoning of land only pursuant to ORS 215.788. DCCP Section 3.3 provides, in part:

> "As of 2010 any new [RREAs] need to be justified through initiating a non-resource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land, or taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR."

in concluding that it could redesignate and rezone individual properties in a quasi-judicial process.

The first subassignment of error under COLW's second assignment of error and 1000 Friends' second assignment of error are denied.

B. DCC 18.136.020(C)(2) and DCCP Agricultural Lands Goal 1

DCC 18.136.020 governs zone changes and provides, in part:

> "The applicant for a quasi-judicial rezoning must establish that the public interest is best served by rezoning the property. Factors to be demonstrated by the applicant are:
>
> "* * * * *
>
> "C. That changing the zoning will presently serve the public health, safety and welfare considering the following factors:
>
> "* * * * *
>
> "2. The impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan."

DCCP Agricultural Lands Goal 1 is to "[p]reserve and maintain agricultural lands and the agricultural industry."

While 2010 is the year after HB 2229 was enacted, it is also the year before the current version of the DCCP was adopted, and we observe that many DCCP provisions refer to that year. *See, e.g.*, DCCP Section 2.2 ("As of 2010 the district manages approximately 65 miles of canals, ditches and pipes in an area of approximately 18,560 acres."); DCCP Section 2.4 ("The complete acknowledged Goal 5 inventory lists as of 2010 can be found in Chapter 5."); DCCP Section 2.5 ("As of 2010 the DEQ is leading the effort to address nitrates in South County, with the full cooperation of the County.").

Addressing DCC 18.136.020(C)(2), the county found:

"[710 Properties] provided the following response in the submitted burden of proof statement:

> "'The RR-10 zoning is consistent with the specific goals and policies in the comprehensive plan as shown by the discussion of plan policies above. The existing EFU zoning and comprehensive plan already support development of the subject properly with a number of nonfarm dwellings because the property is generally unsuitable for farm or forest uses. *The property is comprised of nine lots of record that could qualify for development with up to approximately 24 dwellings including an existing nonfarm dwelling and two approved nonfarm dwellings. The RR-10 zoning will allow more dwellings to be built on the subject property but the impacts imposed will be the same as the minimal impacts imposed by a nonfarm dwelling.*
>
> "'The only adjoining land in farm use is Volwood Farms. It is located to the west of the subject property. Most of this farm property is located far below the subject property. This geographical separation will make it unlikely that the rezone will impose new or different impacts on Volwood Farms than imposed on it by existing farm and nonfarm dwellings. *There are other farms in the surrounding area but all, like the Volwood Farms property, are functionally separated from the subject property by the steep hillside and rocky ridges of the subject property. Farm uses in the greater area, also, are occurring on properties that have been developed with residences. These properties are, however, separated from the subject property by a sufficient distance that RR-10 development will not adversely impact area farm uses or lands.*'

"In addition to these comments, [710 Properties] provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. * * * [*T*]*he impacts of reclassification*

> *of the subject property to RR10 on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan for the reasons set forth in the Comprehensive Plan section of this Decision and Recommendation.* This criterion is met." Record 84 (emphases added).

Addressing DCCP Agricultural Lands Goal 1, the county found:

> "[S]ubstantial evidence in the record supports a finding that the subject property is not 'agricultural land,' and is not land that could be used in conjunction with adjacent property for agricultural uses. *There is no evidence that the requested plan amendment and rezone will contribute to loss of agricultural land in the surrounding vicinity. * * * [T]he agricultural industry will not be negatively impacted by re-designation and rezoning of the subject property.* Therefore, * * * the applications are consistent with [DCCP Agricultural Lands] Goal 1, 'preserve and maintain agricultural lands and the agricultural industry.'" Record 86 (emphasis added).

In its second assignment of error, Redside argues that the county's findings that the impacts on surrounding land use from rezoning the subject property from EFUTE to RR-10 will be consistent with DCCP Agricultural Lands Goal 1 are inadequate and not supported by substantial evidence. Redside argues that, while 24 dwellings are allowed on the subject property under the existing EFUTE zoning, 71 dwellings will be allowed under the new RR-10 zoning. Redside argues that the county's findings that the increase from 24 to 71 dwellings will have no greater impacts on surrounding agricultural lands and the agricultural industry are inadequate and not supported by substantial evidence. Redside observes that "47 additional dwellings will mean 47 more exempt water wells, 47 more septic systems, 470 more vehicle trips on the rural road system, etc." Redside's Intervenor-Petitioner's Brief 29. Redside also argues that the findings

that the zone change will not adversely impact surrounding agricultural lands because those lands are "separated from the subject property by a sufficient distance" are inadequate and not supported by substantial evidence because those findings do not explain what those distances are and why they are sufficient. Record 84. In addition, Redside argues that the findings fail to address surrounding nonresource lands at all.

Thomas responds that this issue is waived because no party raised it below. While it may be true that no party specifically cited DCC 18.136.020(C)(2) or DCCP Agricultural Lands Goal 1 in their testimony, Redside observes that a number of witnesses, including itself, testified that the new RR-10 zoning might be incompatible with surrounding agricultural lands and the agricultural industry due to the resulting development's water, wastewater, and traffic impacts. *See, e.g.*, Record 1432 ("[W]hat would the cumulative impacts of additional residential water use be to water supply for area irrigated agriculture in the region? * * * What would be the traffic implications?"). We conclude that the county and the parties had fair notice and an adequate opportunity to respond to the argument that the impacts from the zone change would not preserve and maintain surrounding agricultural lands and the agricultural industry. Accordingly, the issue is not waived.

On the merits, Thomas responds that DCCP Agricultural Lands Goal 1 is concerned only with surrounding *agricultural* lands and the *agricultural* industry. Accordingly, Thomas argues that the findings are not inadequate for

failing to address surrounding *nonresource* lands. Thomas also observes that the county found that the impacts from the zone change will not adversely impact surrounding agricultural lands because the subject property is located on a plateau that "functionally" separates it from those lands. Record 84. In addition, Thomas argues that DCC 18.136.020(C)(2) and DCCP Agricultural Lands Goal 1 do not prohibit zone changes from having adverse impacts on surrounding agricultural lands but, rather, require that zone changes preserve and maintain surrounding agricultural lands. In other words, Thomas argues that those provisions allow zone changes to have *adverse impacts* on surrounding agricultural lands as long as they do not result in a *loss* of surrounding agricultural lands.

We agree with Thomas that the findings are not inadequate for failing to address surrounding *nonresource* lands. However, we agree with Redside that the findings that the increase from 24 to 71 dwellings will have no greater water, wastewater, or traffic impacts on surrounding agricultural lands and the agricultural industry, and the findings relying on the distance between the subject property and surrounding agricultural lands, are inadequate. While the fact that the subject property is located on a plateau might mitigate some impacts on surrounding agricultural lands and the agricultural industry, it is not clear how that fact will mitigate any water, wastewater, or traffic impacts.[12] The county

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[12] We observe that the findings do address testimony concerning water, wastewater, and traffic in the context of other criteria. *See, e.g.*, Record 82-83

must consider the evidence of impacts on surrounding agricultural lands vis-à-vis water, wastewater, and traffic.

Redside's second assignment of error is sustained.

GOAL 14 ASSIGNMENTS OF ERROR

Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside [UGBs], to ensure efficient use of land, and to provide for livable communities." 1000 Friends' third and fourth assignments of error and the second subassignment of error under COLW's second assignment of error are that the challenged PAPA violates Goal 14.

Goal 14 generally prohibits urban use of rural land, that is, land outside UGBs. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986). In *Curry Co.*, the Supreme Court explained that, if a decision affecting rural land outside a UGB is challenged as allowing an urban use in violation of Goal 14, a local government may do one of three things. The local government may (1) establish that the decision does not offend Goal 14 by demonstrating that the proposed use is rural and not urban. Differently, if the local government determines that a proposed use is an urban use, then the local government may

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(addressing water and wastewater in the context of DCC 18.136.020(C)(1), which concerns "[t]he availability and efficiency of providing necessary public services and facilities"). However, we will not assume that those findings are responsive to the requirements of DCC 18.136.020(C)(2) and DCCP Agricultural Lands Policy 1.

either (2) comply with the Goal 14 by including the subject site within a UGB or (3) adopt an exception to Goal 14.[13] *Curry Co.*, 301 Or at 477. Proceeding under option (1), the board of commissioners concluded that the amendment does not allow urban uses on rural land. The board of commissioners found:

> "The Plan states that '[e]ach Comprehensive Plan map designation provides the land use framework for establishing zoning districts. Zoning defines in detail what uses are allowed for each area.' DCCP Section 1.3, p. 15. [RREAs], according to the DCCP, 'provide opportunities for rural residential living outside urban growth boundaries and unincorporated communities * * *.' DCCP Section 1.3, p. 15. DCCP Table 1.3.3 provides that Title 18's RR-10 and [Multiple Use Agricultural - 10 Acre Minimum (MUA-10)] are the 'associated Deschutes County Zoning Code[s]' for the RREA plan designation.
>
> "The determination that the RREA plan designations and RR-10 and MUA-10 zoning districts should apply to non-agricultural lands was made when the County amended the DCCP in 2016. Ordinance 2016-005. That ordinance was acknowledged by DLCD as complying with the Statewide Goals. This means that the lot sizes and uses allowed by the RREA plan designation and RR-10 zone are Goal 14 compliant. The proposed Comprehensive Plan Amendment

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[13] Considerations for determining whether a particular use is urban or rural derive from our decision in *Shaffer v. Jackson County*:

> "Under the Supreme Court's decision in [*Curry Co.*], it may well be there is nothing inherently rural or urban about residential, commercial, industrial or other types of uses. Rather there are merely a number of relevant factors to be considered, such as *parcel size, intensity of use, necessity for urban facilities and proximity to a UGB*." 17 Or LUBA 922, 928 (1989) (citation omitted; emphasis added).

simply acts in accordance with the DCCP provisions. It provides no occasion for the County to revisit the issue of whether the RR-10 zone and RREA designation isolate Goal 14 by allowing urban development." Record 31-32.

A. Acknowledgment of the 2016 Amendments

In its fourth assignment of error, 1000 Friends argues that the board of commissioners erred in relying on DLCD's acknowledgement of the 2016 amendments to conclude (1) that the RREA plan designation and RR-10 zone facially do not allow urban uses of rural land and (2) that it was therefore not necessary to apply the *Shaffer* factors to determine whether the RREA plan designation and RR-10 zone allow urban uses of rural land as applied to the subject property.

Prior to 2016, DCCP Section 3.3 provided, in part, "As of 2010 any new [RREAs] need to be justified through taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR." That provision allowed RREA designation and RR-10 zoning only of lands for which Goal 3, 4, 11, and 14 exceptions had been taken. In 2016, the county amended that provision by adding the following italicized language:

> "As of 2010 any new [RREAs] need to be justified through *initiating a non-resource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land, or* taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR." Ordinance 2016-005 Ex C, at 1.

In addition to lands for which Goal 3, 4, 11, and 14 exceptions have been taken, the 2016 amendments allow RREA designation and RR-10 zoning of all

nonresource lands, including lands that are not "agricultural land" for purposes of Goal 3. The 2016 amendments were not appealed to LUBA and, accordingly, they are "deemed to be acknowledged" by DLCD. ORS 197.625(1)(a).

The board of commissioners concluded that the subject property is not "agricultural land" for purposes of Goal 3.[14] Because the 2016 amendments were acknowledged by DLCD as complying with the statewide planning goals, including Goal 14, the board of commissioners concluded that the RREA plan designation and RR-10 zone facially do not allow urban uses of rural land. In turn, the board of commissioners concluded that the challenged PAPA also does not allow urban uses of rural land and, therefore, complies with Goal 14. 1000 Friends argues that, in acknowledging the 2016 amendments, DLCD did not acknowledge RREA designation of nonresource lands as facially complying with Goal 14. 1000 Friends observes that, before the 2016 amendments, the RREA plan designation could be applied only to lands for which Goal 3, 4, 11, and 14 exceptions had been taken pursuant to Statewide Planning Goal 2 (Land Use Planning). 1000 Friends argues that, just as applying the RREA plan designation to lands for which Goal 3, 4, 11, and 14 exceptions have been taken requires a site-specific analysis for compliance with Goal 2, applying the RREA plan

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[14] That conclusion is challenged in the parties' Goal 3 assignments of error, which we address above.

designation to nonresource lands requires a site-specific analysis for compliance with Goal 14.

1000 Friends also argues that, in acknowledging the 2016 amendments, DLCD did not acknowledge RR-10 zoning of nonresource lands as facially complying with Goal 14. 1000 Friends argues that the 2016 amendments concerned only RREA designation of nonresource lands, observes that the 2016 amendments did not make any changes to or include any mention of the RR-10 zone, and observes that DCC chapter 18.60, which governs the RR-10 zone, does not include any mention of nonresource lands.

DCCP Policy 2.2.3 is to "[a]llow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan." 1000 Friends argues that rural residential development may be allowed only pursuant to one of two administrative rules: OAR 660-004-0040, which specifies how Goal 14 applies to resource lands for which a Goal 3 or 4 exception has already been taken, or OAR 660-014-0040, which governs Goal 14 exceptions to allow new urban development on undeveloped rural land. 1000 Friends observes that both of those rules require site-specific analyses. 1000 Friends further argues that DLCD would have also relied on DCCP Section 3.2, and the RREA plan designation's historical exception context to ensure that RREA designation of nonresource lands would require a site-specific analysis for compliance with Goal 14.

Turner responds that this issue is waived because no party raised it below. In its petition for review, 1000 Friends identifies its fourth assignment of error as having been preserved in an August 17, 2022, letter that it submitted into the record and an August 31, 2022, letter that COLW submitted into the record. Record 994-97, 1630. We have reviewed the cited pages, and both 1000 Friends and COLW argued below that the county was required to apply the *Shaffer* factors to determine whether the RREA plan designation and RR-10 zone allow urban uses of rural land as applied to the subject property. We conclude that the county and the parties had fair notice and an adequate opportunity to respond to that argument. Accordingly, the issue is not waived.

On the merits, Turner responds that the board of commissioners did not err in relying on DLCD's acknowledgement of the 2016 amendments and in concluding that it was not necessary to conduct a site-specific analysis for compliance with Goal 14. Turner observes that we recently held, and the Court of Appeals affirmed, that the county could rely on the acknowledgment of its Rural Industrial (RI) plan designation and zone to conclude that the plan designation and zone facially do not allow urban uses of rural land. *Central Oregon Landwatch v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No 2022-075, Dec 6, 2022) (slip op at 24) (*Aceti V*), *aff'd*, 324 Or App 644, 525 P3d 895 (2023). Turner observes that, consistent with that holding, the state agency letter provides: "The application proposes to include the subject property in an RR-10, Rural Residential Zoning district. It is unclear to us whether such an

arrangement is set forth in the County Comprehensive Plan. *If so, the issue is settled in this case and our Goal 14 comments would be addressed.*" Record 1435 (emphasis added). Turner quotes the board of commissioners' findings that "such an arrangement" is set forth in the DCCP because DCCP Table 1.3.3 provides that the county's RREA plan designation is implemented by the RR-10 and MUA-10 zones.

We agree with Turner that the board of commissioners did not err in relying on DLCD's acknowledgement of the 2016 amendments and in concluding that it was not necessary to conduct a site-specific analysis for compliance with Goal 14. That the RREA plan designation could previously only be applied to lands for which Goal 3, 4, 11, and 14 exceptions were taken does not compel a conclusion that RREA designation of nonresource lands requires a site-specific analysis for compliance with Goal 14.

The DCCP provides that the RREA comprehensive plan designation is implemented by the RR-10 and Multiple Use Agriculture (MUA) zones. We have no reason to believe that DLCD's acknowledgment of the 2016 amendments as consistent with Goal 14 was premised on anything other than the conclusion that the RREA plan designation facially does not allow urban uses of rural land. DCCP Section 3.2 is titled "Rural Development," and it includes a general discussion of growth potential in the county and a list of possibilities for new

rural development.[15] Although DCCP Section 3.2 states that most of the listed possibilities are site-specific, and although the list of possibilities does not

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[15] DCCP Section 3.2 provides, in part:

> "[C]hanges to State regulations [have] opened up additional opportunities for new rural development. The following list identifies general categories for creating new residential lots, all of which are subject to specific State regulations.
>
> "■ New lots can be created in destination resorts
>
> "■ Some farm lands can be subdivided to permit one or two 'non-farm' parcels
>
> "■ New lots can be created based on the property rights legislation known as Measure 37 and Measure 49
>
> "■ New lots can be created through the addition of sewer systems
>
> "■ New lots can be created in Unincorporated Communities (see Chapter 4)
>
> "■ 2009 legislation permits a new analysis of agricultural designated lands
>
> "■ Existing large forest or rural residential lots can be subdivided
>
> "■ Exceptions can be granted from the Statewide Planning Goals
>
> "■ Some farm lands with poor soils that are adjacent to rural residential uses can be rezoned as rural residential
>
> "■ Some farm lands with poor soils can be rezoned into a new agricultural category with a smaller acreage requirement
>
> "* * * Most of these possibilities are extremely site-specific requiring an analysis of each property."

include redesignating and rezoning individual properties from agricultural to nonresource in quasi-judicial proceedings after concluding that the properties are not "agricultural land" for purposes of Goal 3, the list does not purport to be exclusive. *See* n 15. DCCP Policy 2.2.2. provides, "[EFU] sub-zones shall remain as described in the 1992 Farm Study * * * unless adequate legal findings for amending the sub-zones are adopted or *an individual parcel is rezoned as allowed by Policy 2.2.3*." (Emphasis added.) Again, Policy 2.2.3 is to "[a]llow comprehensive plan and zoning map amendments, *including for those that qualify as non-resource land, for individual EFU parcels* as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan." (Emphasis added.) OAR 660-004-0040 applies to resource lands for which a Goal 3 or 4 exception has already been taken, and OAR 660-014-0040 governs new exceptions to Goal 14. Those provisions do not apply where, as here, the county concludes (1) that no Goal 3 or 4 exception is required because the subject property is nonresource land and (2) that no Goal 14 exception is required because the plan designation and zone applied by the challenged PAPA do not allow urban uses of rural land. We conclude that the board of commissioners did not err in relying on DLCD's acknowledgment of the 2016 amendments to conclude that the RREA plan designation facially complies with Goal 14.

We similarly conclude that the board of commissioners did not err in relying on DLCD's acknowledgment of the 2016 amendments to conclude that the RR-10 zone facially complies with Goal 14. We observe, as the board of

commissioners did, that DCCP Table 1.3.3 expressly provides that the county's RREA plan designation is implemented by the RR-10 zone. In addition, DCC 18.60.010 explains:

> "The purposes of the [RR-10] Zone are to provide rural residential living environments; *to provide standards for rural land use and development consistent with desired rural character and capability of the land and natural resources*; to manage the extension of public services; to provide for public review of nonresidential uses; and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards." (Emphasis added.)

Although the 2016 amendments themselves may not have included any mention of the RR-10 zone, as 1000 Friends points out, "DLCD acknowledgment looks at the comprehensive plan *as a whole* to determine compliance with the goals." 1000 Friends' Intervenor-Petitioner's Brief 53 (emphasis in original). In acknowledging the 2016 amendments, DLCD would have been aware of DCCP Table 1.3.3 and would have understood that the RR-10 zone would implement the RREA plan designation on nonresource lands in order to provide standards for rural land use and development.

We conclude that the board of commissioners did not err in relying on DLCD's acknowledgement of the 2016 amendments to conclude (1) that the RREA plan designation and RR-10 zone facially do not allow urban uses of rural land and (2) that it was therefore not necessary to apply the *Shaffer* factors to determine whether the RREA plan designation and RR-10 zone allow urban uses of rural land as applied to the subject property.

1000 Friends' fourth assignment of error is denied.

B. Site-Specific Analysis

Because the board of commissioners concluded that the RREA plan designation and RR-10 zone *facially* do not allow urban uses of rural land, the board of commissioners concluded that it was not necessary to apply the *Shaffer* factors to determine whether the RREA plan designation and RR-10 zone allow urban uses of rural land *as applied to the subject property*. Nevertheless, taking a belt-and-suspenders approach, the board of commissioners adopted alternative findings applying the *Shaffer* factors and concluding that the RREA plan designation and RR-10 zone do not allow urban uses of rural land as applied to the subject property. Record 33-35.

In the first subassignment of error under its third assignment of error, 1000 Friends argues that the challenged PAPA violates Goal 14 because it does not "provide for an orderly and efficient transition from rural to urban land use." The second subassignment of error under 1000 Friends' third assignment of error and the second subassignment of error under COLW's second assignment of error are that the challenged PAPA violates Goal 14 because it allows an urban use of rural land, or "'urbanization,' if not a conversion to 'urban use,'" under the *Shaffer* factors. COLW's Petition for Review 30. Because those challenges are dependent on our conclusion that the county (1) could not rely on DLCD's acknowledgment of the 2016 amendments to conclude that the RREA plan designation and RR-10 zone facially do not allow urban uses of rural land and (2) was required to apply

the *Shaffer* factors to determine whether the RREA plan designation and RR-10 zone allow urban uses of rural land as applied to the subject property, we do not address them further.

1000 Friends' third assignment of error and the second subassignment of error under COLW's second assignment of error are denied.

COLW's second assignment of error is denied.

CONCLUSION

On remand, the board of commissioners must consider the ability to use the subject property for farm use in conjunction with other property, including the Keystone property, and may not limit its review to the profitability of farm use of the subject property as an isolated unit. The board of commissioners must consider the ability to import feed for animals and may not limit its consideration to the raising of animals where adequate food may be grown on the subject property. The board of commissioners must also consider whether the subject property is suitable for farm use as a site for construction and maintenance of farm equipment. Furthermore, the board of commissioners must consider the evidence and adopt findings addressing the impacts of redesignation of the property related to water, wastewater, and traffic and whether retaining the property's agricultural designation is necessary to permit farm practices on adjacent or nearby lands.

The county's decision is remanded.