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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

HAROLD K. MARKEN,
Intervenor-Respondent.

LUBA No. 2023-049

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

No appearance by Deschutes County.

J. Kenneth Katzaroff and D. Adam Smith filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 02/15/2024

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners decision approving a post-acknowledgment plan amendment (PAPA) that changes the comprehensive plan designation of a 59-acre property from Agriculture (AG) to Rural Residential Exception Area (RREA) and the zoning from Exclusive Farm Use – Tumalo-Redmond-Bend Subzone (EFU-TRB) to Multiple Use Agricultural 10 Acre Minimum (MUA-10).

FACTS

The subject property is 59 acres and designated AG and zoned EFU-TRB. It is bordered on its western boundary line by other properties zoned EFU that are in farm use. Bear Creek Road is adjacent to its northern boundary and a portion of its northern boundary abuts the City of Bend's urban growth boundary. To the east and south of the property are lands zoned MUA-10. The subject property at one time had 36 acres of irrigation water rights, but now has just over nine acres of irrigation rights.

The hearings officer held a hearing on the application and issued a written decision recommending approval of the applications. The board of county commissioners held a *de novo* hearing on the applications, and at its next hearing, voted to approve the applications. The board of commissioners adopted and incorporated the hearings officer's decision, except where noted in the board of commissioners' findings. Record 28-37. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Goal 3 is "[t]o preserve and maintain agricultural lands."[1] OAR 660-033-0030 sets out the method for identifying and inventorying "agricultural lands." OAR 660-033-0020(1)(a) provides that "agricultural land," as defined in Goal 3, includes, as relevant in this appeal:

> "(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;
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> "(B) Land 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 energy inputs required; and accepted farming practices;[2]

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[1] The county's AG plan designation and EFU-TRB zone implement Goal 3.

[2] ORS 215.203(2)(a) provides:

> "'[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

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

The board of commissioners concluded that the subject property is not "suitable for farm use" based on a consideration of all of the factors under OAR 660-033-0020(1)(a)(B). Record 29, 82-85. The board of commissioners also concluded that the subject property is not "land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands" under OAR 660-033-0020(1)(a)(C). Record 29, 86-89.

Petitioner's first assignment of error is:

"The decision misconstrues and misapplies the applicable law found in Goal 3, ORS 215.203(2)(a), OAR 660-033-0020(l)(a)(B)-(C), and OAR 660-033-0030(1)-(3) by finding that the subject property is not agricultural land suitable for farm use, and by making inadequate findings unsupported by substantial evidence." Petition for Review 4.

Petitioner includes four subassignments of error under its first assignment of error. We understand petitioner's first and fourth subassignments of error to argue that the board of commissioners' conclusion that subject property is not suitable for farm use, as required by OAR 660-033-0020(1)(a)(B), is not supported by substantial evidence, that the findings are inadequate, and that the board of

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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." (Emphasis added.)

commissioners misconstrued some of the seven factors in OAR 660-033-0020(1)(a)(B). We understand petitioner's second subassignment of error to argue that the board of commissioners misconstrued ORS 215.203(2)(a)'s definition of "farm use" to improperly rely on intervenor's testimony that they did not farm the subject property in order to make a profit. Petitioner's third subassignment of error argues that the board of commissioners misconstrued OAR 660-033-0020(1)(a)(C) by giving too much weight to whether the property can be profitably farmed by failing to consider whether the subject property could be profitably farmed when used in conjunction with other land.

A. Waived Issues

Initially, we address intervenor's argument that all but three of the issues raised in petitioner's first and fourth subassignments of error, and the entire third subassignment of error, were not raised during the proceedings below, and therefore are outside of LUBA's scope of review.[3] ORS 197.797(1) and ORS 197.835(3). Three sources of law inform intervenor's waiver argument. First, ORS 197.797(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record

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[3] Intervenor does not separately respond to the fourth subassignment of error. However, the issues raised in the first and fourth subassignments of error overlap and we understand intervenor's general waiver argument under the first assignment of error to apply to the issues raised instead of the specific arguments made in the subassignments of error.

> at or following the final evidentiary hearing on the proposal before the local government. Such issues shall 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."

Second, ORS 197.835(3), which addresses LUBA's scope of review, provides that "[i]ssues 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."

Third, in part to implement ORS 197.797, OAR 661-010-0030(4)(d) provides that the petition for review shall set forth each assignment of error and for each assignment of error "demonstrate that the issue raised in the assignment of error was preserved during the proceedings below." As we recently explained in *Rosewood Neighborhood Association v. City of Lake Oswego*, ___ Or LUBA ___, ___ (LUBA No 2023-035, Nov 1, 2023) (slip op at 7), petitioner has an affirmative obligation to establish preservation of error.

The petition for review includes a general section entitled "Preservation of Error" under the first assignment of error that alleges that the issues raised in the first assignment of error were preserved at Record 586, 661, 670, 35, 635-636, and 676. Petition for Review 4-5. However, petitioner's first assignment of error includes four separate subassignments of error. The four subassignments of error do not identify where the issues raised in those subassignments of error were raised below. Therefore, we are left somewhat unaided in our review of the cited

record pages in determining whether the issues raised in the four subassignments of error were raised on any of the cited pages.

As the Court of Appeals has explained, "[ORS 197.797 and ORS 197.835(2)] comprise a so-called 'raise it or waive it' requirement, whereby before an issue may be raised to LUBA it must first have been raised before the local government along with statements and evidence sufficient to allow the government and parties to respond to it." *Pliska v. Umatilla County*, 240 Or App 238, 244, 246 P3d 1146 (2010), *rev den*, 350 Or 408 (2011). The "raise it or waive it" principle does not limit the parties on appeal to the exact same arguments made below, but it does require that the issue be raised below with sufficient specificity so as to prevent "unfair surprise" on appeal. *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991); *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___, ___ (LUBA No 2021-074, Apr 8, 2022), (slip op at 6), *aff'd*, 321 Or App 505 (2022), *rev den*, 370 Or 740 (2023).

A petitioner adequately raises an issue under ORS 197.797(1) and 197.835(3) by citing the relevant legal standard, presenting argument that includes the operative terms of the legal standard, or taking other actions to raise the issue such that the local government knows or should know that the issue is one that needs to be addressed in its decision. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001). An issue is not preserved if it is so generally stated

that a reasonable decision maker cannot meaningfully respond to it. *Dion v. Baker County*, 72 Or LUBA 307, 313 (2015).

With respect to OAR 660-033-0020(1)(a)(B), we have explained that "[a] local government must evaluate each of the factors provided in OAR 660-033-0020(1)(a)(B) to determine whether land is suitable as agricultural land." *Riggs v. Douglas County*, 37 Or LUBA 432, 440 (1999), *aff'd*, 167 Or App 1, 1 P3d 1042 (2000). In the reply brief, petitioner characterizes intervenor's assertion that certain issues are waived as a "squabble[] over petitioner's particular arguments." Reply Brief 1. Petitioner also argues that "the issue of the suitability of the subject property for farm use under Goal 3 and OAR 660-033-0020(1)(a) was the central theme in [petitioner's] 27 pages of written testimony to the county[.]" Reply Brief 1. However, articulating a "central theme" is insufficient to raise an issue under each of the seven factors with the specificity that is required by ORS 197.797(1). To meet the burden of proof to demonstrate that the subject property is not "agricultural land" pursuant to OAR 660-033-0020(1)(a)(B), an applicant is generally required to provide an analysis of each of those factors, and decision makers are required to adopt findings addressing the specific factors. It follows that other interested parties are required to raise and articulate with specificity issues under the seven factors in order to provide "fair notice" to the decision maker and the applicant that they are raising an issue under one or more factors. General statements that the subject property is suitable for farm use do not raise

an issue regarding any single factor with the specificity that is required by ORS 197.797(1).

The petition for review cites *Riggs v. Douglas County*, 37 Or LUBA 432, 441 (1999). *Riggs* is instructive. In *Riggs*, we concluded that the record pages cited by the petitioners had raised the issue of whether the property was "suitable for farm use" under OAR 660-033-0020(1)(a)(B) considering the potential for alternative crops. Here, the record pages cited by petitioner at Petition for Review pages 4 to 5 contain general statements that raise issues specific to only two of the factors, which we discuss below.

B. First and Fourth Subassignments of Error

Petitioner's first and a portion of its fourth subassignment of error argue that there is not substantial evidence in the record to support the board of commissioners' conclusion that the subject property is not "suitable for farm use" applying each of the seven factors in OAR 660-033-0020(1)(a)(B), because (i) there is evidence in the record that the property has been in farm use for many years, and (ii) the only evidence in the record that the farming generated losses every year is intervenor's testimony to that effect. Petition for Review 8-10, 28. Petitioner also argues that the county's findings are inadequate to explain the board of commissioners' conclusion that the subject property is not "suitable for farm use." Petition for Review 28-29.

We have reviewed the cited record pages, and we agree with intervenor that most of the issues raised in the first and fourth subassignments of error were

not raised with enough detail to give the board of commissioners the opportunity to meaningfully respond to them. Only three issues in the first and fourth subassignments of error were raised with the specificity required by ORS 197.797(1). They are: (1) that the evidence in the record is that the property has been actively farmed in the past (Record 585-86, 670); (2) that, considering "availability of water," the evidence in the record shows that intervenor had 36 acres of irrigation water rights and sold 26.51 acres of those water rights (Record 670); and (3) that, considering "technological and energy inputs required," evidence in the record is that other area farmers have been able to profitably farm their land "[w]ith soil science research, land tending, perseverance, and intense crop and business planning." Record 635. All other issues raised in the first subassignment of error and the fourth subassignment of error were not raised below and, thus, are waived.[4]

1. Past Farming

The board of commissioners concluded that prior and past use of a property for farm use is a relevant consideration in determining whether property is agricultural land, but that the seven factors in OAR 660-033-0020(1)(a)(B) supported a determination that the property is not suitable for farm use. Record

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[4] Specifically, petitioner failed to preserve issues related to soil fertility, suitability for grazing, climatic conditions, existing land use patterns, and accepted farming practices. OAR 660-033-0020(1)(a)(B).

29. The board of commissioners adopted the hearings officer's findings regarding the seven factors. *Id.* (citing Record 82-85).

Petitioner argues that the evidence in the record is that the property was used for growing hay and other crops from which intervenor received income, that aerial photographs in the record showing the property between 2005 and 2023 demonstrate that the property is and has been used for irrigated agriculture, and that long history of growing hay and crops conclusively demonstrates that the property is suitable for farm use. Record 661-670. We understand petitioner to argue that the aerial photographs and intervenor's testimony that the property has been used in the past for growing irrigated crops and hay so undercuts the evidence in the record the board of commissioners relied on that the decision is not supported by substantial evidence.

Intervenor responds that 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."[5] Intervenor responds that the board of commissioners placed more weight on other evidence in the record that intervenor's hay and crops failed to

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[5] The board of commissioners briefly addressed the aerial photographs:

> "[Petitioner] filed aerial photographs of the Marken property showing green fields and a lawn. They claim this shows the Marken property is 'demonstrably suitable for farm use regardless of its soil class.' This is not correct." Record 34.

generate a profit between 2007 and 2021 and that intervenor lost money in every year of operation during those years. Record 31.

We will reverse or remand a land use decision if we determine that the local government made a decision not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely upon to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision-maker. Rather, LUBA must consider all the evidence to which it is directed and determine whether, based on that evidence, a reasonable local decision-maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). We agree with intervenor that petitioner has not established that photographic evidence of crops growing on a property is conclusive evidence that property is "suitable for farm use," given that the definition of farm use includes farm activities undertaken "for the primary purpose of obtaining a profit," where other evidence demonstrates that growing crops did not generate a profit. OAR 660-033-0020(1)(a)(B); ORS 215.203(2)(a).

2. Availability of Water

In another portion of the first subassignment of error, petitioner argues that the evidence in the record demonstrates that the property was irrigated with 36 acres of water rights for many years before intervenor relinquished all but 9.49 acres of water rights. Petitioner does not develop any argument regarding that

evidence, but merely cites our decision in *Peterson v. Crook County*, 49 Or LUBA 223, 232-233 (2005) (*Peterson I*). In *Peterson I*, we held that for purposes of evaluating a division of land to create up to two new parcels for siting nonfarm dwellings under ORS 215.263(5), the county was required to consider the feasibility of transferring the irrigation rights back to the nonfarm parcels. However, in *Peterson v. Crook County*, 52 Or LUBA 160 (2006) (*Peterson II*), we concluded that the county's findings that returning the irrigation to the subject property would not render the nonfarm parcels generally suitable for producing farm crops or livestock were supported by substantial evidence, where the evidence was that prior irrigation of the nonfarm parcels did not result in enough productive land for grazing to overcome the evidence that the majority of the parcel would be unsuitable for grazing. Here, as intervenor points out, the evidence in the record is that past farming activity even with 36 acres of irrigated land failed to result in a profit. We conclude that is evidence a reasonable person would rely on.

3. Technology and Energy Inputs

Petitioner argues that the county erred in finding that the property is not suitable for farm use taking into consideration "technological and energy inputs required" because an area farmer testified that "[w]ith soil science research, land tending, perseverance and intense crop and business planning, we have been able to be profitable on our land since our first year farming." Record 635. Intervenor responds by pointing to evidence in the record from intervenor's expert, Rabe,

that excess fertilization and additional energy for pumping irrigation water could still not support a farm use on the subject property. Record 85, 1399. We conclude that a reasonable person could rely on Rabe's testimony, even in light of countervailing evidence in the record.

The first subassignment of error and the fourth subassignment of error are denied.

C. Second Subassignment of Error

Petitioner's second subassignment of error is:

> "The decision errs by finding the subject property is not agricultural land suitable for farm use based on the subjective motivation of a particular landowner and not the objective suitability of the land." Petition for Review 20.

We understand petitioner's second subassignment of error to argue that the board of commissioners improperly construed ORS 215.203(2)(a)'s definition of "farm use" by relying on testimony from intervenor that their motivation for farming was to "break even," rather than applying an objective test of what agricultural activities a reasonable farmer would be able to undertake on the land "for the primary purpose of obtaining a profit in money."[6] Record 31, 63, 67.

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

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[6] Intervenor does not allege that the issues raised in the second subassignment of error are waived.

focuses on the agricultural activities for which the land could be used. 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). *See also Central Oregon LandWatch v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA Nos 2023-006/009, Jul 28, 2023) (slip op at 30), *aff'd*, 330 Or App 321, ___ P3d ___ (2024).

Intervenor disputes that the board of commissioners focused solely on the subjective motivation of intervenor, and argues that the board of commissioners decision was based on the evidence in the record of intervenor's past losses from farming and intervenor's expert's testimony that fertilization costs are high given the soils limitations, including soil type and soil depth. Response Brief 17-18 (citing Record 34).

The board of commissioners' findings discuss the evidence in the record that intervenor "attempted to break even by producing crops and livestock on their property." Record 31. However, the findings also discuss and rely on the evidence that intervenor's farming of the property has resulted in losses every year of operation, as well as evidence from intervenor's expert that the soils are

too shallow to retain enough water to support crops and that the cost of irrigation water has increased. Record 31. The board of commissioners concluded that "[b]oth increasing cost and the limited supply of irrigation water support the Board's finding that no reasonable farmer would intend to make a profit in money by conducting agricultural activities on [intervenor's] property." Record 31. Those findings are sufficient to demonstrate that the board of commissioners applied the correct objective test to determine whether the subject property is capable of farm use.

The second subassignment of error is denied.

D. Third Subassignment of Error

OAR 660-033-0020(1)(a)(C) provides that "agricultural land," as defined in Goal 3, includes:

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

Petitioner's third subassignment of error is:

> "The decision misconstrues and misapplies the applicable law found in Goal 3, OAR 660-033-0020(l)(a)(C), and OAR 660-033-0030(1)-(3) by giving undue weight to the profitability of the subject property operating independently and without considering that the subject property could be used in conjunction with other land." Petition for Review 23.

Intervenor argues that the issues raised in the third subassignment of error were not raised below. We have reviewed the record pages cited by petitioner at Petition for Review 4 to 5, and we agree with intervenor that nothing in those

record pages raises the issues raised in the third assignment of error. The issue of undue emphasis on profitability was raised at Record 670, as quoted at Petition for Review 4 to 5. However, the issue raised in the third subassignment of error is that the county failed to consider whether the subject property can be profitably used in conjunction with other land.

The third subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Background

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." 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 indicated that certain factors could be considered in determining whether a use is urban or rural: (a) the size of the area in relationship to the developed use (density); (b) its proximity to an acknowledged UGB and whether the proposed use is likely to become a magnet attracting people from outside the rural area; and (c) the types and levels of services which must be provided to it. *Id.* at 505, 507. 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 establish that the decision complies with Goal 14 by demonstrating that the proposed use is rural and not urban.

An applicant bears the burden to establish that a post-acknowledgment plan amendment complies with applicable Statewide Planning Goals. *Hess v. City of Portland*, 23 Or LUBA 343, 345 (1992). At the same time, a petitioner who alleges that a decision violates Goal 14 by allowing conversion of rural land to urban uses must explain what urban use the decision allows. *Wood v. Crook County*, 55 Or LUBA 165, 176-77 (2007).

As noted, the board of commissioners adopted the hearings officer's findings, and also adopted its own findings, and the board of commissioners' findings include:

> "The Deschutes County Comprehensive Plan and Title 18 of the Deschutes County Code have been acknowledged by [the Land Conservation and Development Commission (LCDC)] as being in compliance with every statewide planning goal, including Goal 14. The County specifically amended its comprehensive plan in 2016 to provide that the Rural Residential Exception Area Plan and its related MUA-10 and RR-10 zones should be applied to non-resource lands. Ordinance 2016-005. This amendment is acknowledged, which means that the RREA plan designation and its related zoning districts, when applied to non-resource lands such as the subject property, do not result in a violation of Goal 14." Record 30.

The hearings officer concluded that the proposed plan and zoning designations do not allow urban uses according to the *Curry Co.* factors. Record 98-101.

B. Second Assignment of Error

Petitioner's second assignment of error is:

> "The decision misconstrues and misapplies the applicable law by finding that Goal 14 does not apply and alternatively finding that the decision complies with Goal 14 when the subject property is adjacent to a UGB and the PAPA decision allows a new 12-unit residential neighborhood with no minimum lot sizes, resulting in an urban use under the *Curry County* factors." Petition for Review 29.

The second assignment of error includes two subassignments of error that contain overlapping and repetitive arguments. However, both subassignments of error challenge the board of commissioners' conclusion that the application complies with the *Curry Co.* factors. The first subassignment of error argues that the board of commissioners' decision improperly construes the *Curry Co.* factors. The second subassignment of error argues that the board of commissioners' conclusion that the *Curry Co.* factors are met is not supported by substantial evidence in the record and that the findings are inadequate.

1. Waiver

Intervenor argues that the only issue that petitioner raised with the specificity required by ORS 197.797(1) is that the potential density of residential development fails to comply with Goal 14. In the petition for review, petitioner identifies Record 1175 and 661 as raising the issue raised in the second assignment of error. Record 1175 is a September 6, 2022 letter from petitioner to the hearings officer that takes the position that:

> "The application has not shown that it complies with Goal 14. The requested zoning would allow 1 dwelling per 10 acres on this 60-

> acre property, or perhaps more under cluster or planned development conditional uses. As the property currently has only one dwelling, a sixfold increase in the residential density on this property would urbanize rural lands in violation of Goal 14, and thus requires an exception to Goal 14." Record 1175.

Petitioner's letter at Record 661 incorporated that letter into its January 18, 2023 letter to the board of commissioners, and did not raise any other issue regarding Goal 14.

In the reply brief, petitioner provides new record citations to Record 799-800, which are two pages from intervenor's final written argument to the hearings officer that respond to petitioner's September 6, 2022 letter at Record 1175. Petitioner argues that *intervenor* thus raised the issue of compliance with Goal 14.

There are two problems with that reply. First, in *Rosewood*, we explained that OAR 661-010-0030(4)(d) requires that "[e]ach assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below," or explain why preservation is not required. ___Or LUBA at ___ (slip op at 5). OAR 661-010-0030(4)(d) requires the petitioner to demonstrate preservation in the petition for review. Our rules do not allow a petitioner to demonstrate preservation for the first time in a reply brief. That is so because such an approach is, in effect, an unauthorized amendment of the petition for review. More importantly, we explained, such an approach also prejudices the responding party's substantial rights where preservation is disputed, because at the point in the adversarial proceeding that a reply brief is filed, the responding

party has already filed their responsive brief and has no opportunity to dispute a demonstration of preservation contained in a reply brief. *Rosewood Neighborhood Association*, ___ Or LUBA at ___ (slip op at 9-10).

Second, petitioner's reply in the reply brief that *intervenor* raised the issue of compliance with Goal 14 mischaracterizes the record. In intervenor's final argument to the hearings officer, intervenor addressed what it understood to be *petitioner's* argument regarding the *Curry Co.* factors that petitioner presented in its September 6, 2022 letter to the hearings officer. Record 799-800. Intervenor did not raise an issue that challenged the application's compliance with Goal 14. We agree with intervenor that the sole issue that was raised with the specificity required by ORS 197.797(1) is whether the potential density of residential development of the 59-acre property under MUA-10 zoning complies with Goal 14 or, in other words, whether it is an urban use of rural land. Under ORS 197.835(3), that is the only issue presented in the second assignment of error that is within our scope of review.

2. Density

Petitioner raised the issue at Record 1175 that the density of residential development under the MUA-10 zoning does not comply with Goal 14. In the second assignment of error, petitioner argues that a density of one dwelling unit per five acres, or potentially one dwelling unit per two acres is allowed under the MUA-10 zoning, and that a planned unit development would allow up to 12 dwelling units. Petition for Review 34-35.

In response, intervenor points to findings adopted by the hearings officer and incorporated by the board of commissioners:

"i. Density

"The MUA-10 zone imposes a maximum density of 1 dwelling per 10 acres. This is not an urban density. Such a density would never be allowed in any urban residential zoning district other than a reserve or holding zone. By way of comparison, the Porter Kelly Burns property will be developed at a density of 11 homes per acre (excluding a small park). In *Curry County*, the Supreme Court accepted the concession of 1000 Friends a density of one house per ten acres is generally 'not an urban intensity.' COLW argues that the comprehensive plan requires a 10-acre minimum parcel size. If they are correct, this minimum will apply during a review of any subdivision on the subject property and assure that development is 'not an urban intensity.' Furthermore, in *Curry County*, 1000 Friends of Oregon argued that densities greater than one dwelling per three acres (e.g. one dwelling per one or two acres) are urban. The density allowed by the RR-10 zone in a planned development is 2.5 times less dense. For a standard subdivision, the density allowed (1 house per 10 acres) is over 3 times less dense.

"The density of the RR-10 zone is not, as claimed by COLW, six times greater than the density of development allowed in the EFU-zone. Deschutes County's EFU zone allows for non-irrigated land divisions for parcels as small as 40 acres to create two nonfarm parcels (1:20 acres density). It also allows for 2-lot irrigated land divisions that, in Deschutes County can occur on parcels zoned EFU-TRB subzone that are less than 30 acres in size. This division requires 23 acres of irrigated land and imposes no minimum lot size on the nonfarm parcel or parcels. This is a density greater than one house per 15 acres. A density of one house per 10 acres is not an urban density of development.

"ii. Lot Size

"The MUA-10 zoning district requires a minimum lot size of one

> house per ten acres. Smaller lots are allowed only if 65% to 80% of the land being divided is dedicated as open space.
>
> "The EFU zone that applies to the subject property imposes no minimum lot size for new nonfarm parcels. DCC 18.16.055. The only exception is that 5-acre minimum is required for non-irrigated land divisions of properties over 80 acres in size. DCC 18. 16. 055(C)(2)(a)(4). The EFU zone requires that other nonfarm uses be on parcels that are 'no greater than the minimum size necessary for the use.' Although not relevant to this Application because the property is non resource land rather than land in an exceptions area, OAR 660-004-0040 contemplates lot sizes as small as two acres in rural residential exceptions areas." Record 100-101.

Petitioner does not address or otherwise challenge these findings or explain why the county's conclusion that the density of the proposed zoning of the subject property is not an urban level of density. Accordingly, we reject petitioner's argument in the second assignment of error that the application fails to comply with Goal 14.

The second assignment of error is denied.

The county's decision is affirmed.