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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

DESTINY COURT PROPERTIES LLC,
Intervenor-Respondent.

LUBA No. 2025-015

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

Stephanie Marshall filed the respondent's brief and argued on behalf of respondent.

Elizabeth A. Dickson filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

REMANDED 06/26/2025

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a board of commissioners decision concluding that a 65-acre parcel is not agricultural land, approving an application to amend the comprehensive plan designation from Agriculture to Rural Residential, and to rezone the property from exclusive farm use to residential use.

FACTS

The subject property is an approximately 65-acre parcel zoned Exclusive Farm Use/Redmond Bend (EFU-TRB). The urban growth boundary for the City of Bend is located approximately 2,000 feet to the southeast. The southern border of the subject property adjoins the Bend Urban Reserve Area. The subject property is undeveloped except for a small pond and fencing. The property has, or had until recently, rights to irrigate approximately 29 acres of land.[1]

Under Statewide Planning Goal 3 (Agricultural Land), "agricultural land" in Eastern Oregon is defined in part based on soil classifications established by the National Resources Conservation Service (NRCS), with soils predominantly in Classes I to VI presumed to constitute agricultural land. Based on NRCS soil maps, the county's initial comprehensive plan and zoning ordinances designated

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[1] The county found that intervenor had recently transferred the irrigation rights for the parcel. However, as discussed below, for purposes of identifying "Agricultural Land," a parcel within a water district that was once irrigated "shall continue to be considered 'irrigated' even if the irrigation water was removed or transferred to another tract." OAR 660-033-0020(9).

and zoned the property for agricultural use. The NRCS soil maps indicated that the subject property has three soil complexes: 38B Deskamp-Gosney complex, 0 to 8 percent slopes, 58C Gosney-Rock-outcrop-Deskamp complex, 0 to 15 percent slopes, and 106E, Redslide Lickskillet complex, 30-50 percent slopes. The 38B soil complex is classified as Class III soils if irrigated, Class VI if not. The 58C soil complex is classified as Class VII soils. The 106E Redslide Lickskillet soil complex is classified as Class VIII soils and found on a few acres on the western portion of the property, where steep rimrock descends to the Deschutes River. Past irrigation on the subject property was concentrated in two cleared areas with mostly 38B Class III/VI soils, which had been used for forage and pasture for cattle and horses.

North of the property are two irrigated 21-acre parcels zoned exclusive farm use (EFU), developed with non-farm dwellings, which had once been part of the subject parcel. West of the property is the Deschutes River, with Tumulo State Park lying to the northwest, and EFU-zoned land to the southwest. East of the property is an area zoned for rural residential use, subject to an exception to Goal 3. Access to the subject property is via Destiny Court Drive from the east through the residential subdivision.

Intervenor-respondent (intervenor), the applicant below, applied to the county to redesignate the parcel from Agriculture to Rural Residential Exception Area (RREA), and to rezone the property from EFU-TRB to Multiple-Use Agricultural, 10 acre minimum (MUA-10). The MUA-10 zone allows residential

development on 10-acre lots, but if the applicant opts for planned or cluster development, then the MUA-10 zone allows residential development at a higher density, especially if the property is located within one mile of an urban growth boundary. The application initially included a proposal to subdivide the parcel into 14 residential lots, but that proposal was later withdrawn.

To demonstrate that the parcel is not "agricultural land" as defined under Goal 3, intervenor hired a soil scientist to conduct an "Order 1" soil survey of the subject property. An Order 1 survey examines soil characteristics at a more refined scale than the NRCS survey. The soil survey confirmed the three soil complexes indicated in the NRCS survey. However, due to inclusions of 58C soils within areas the NRCS mapped as 38B, the soil survey found that the 38B Class III/VI soils on the property represented only about 21.5 acres, or 34 percent of the parcel, with the remainder consisting of Class VII or higher, non-agricultural soils.

The county hearings officer conducted a hearing on the application, at which petitioner appeared in opposition. Based on the soil survey and other applicant submittals, the county hearings officer recommended that the county find that the parcel does not qualify as "agricultural land" under Goal 3. The board of commissioners held a *de novo* hearing on the application and, on January 8, 2025, adopted the county's final decision approving the application, supported by findings as well as the hearings officer's recommendation, which the county adopted as additional findings.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the higher density allowed for planned and cluster development under the MUA-10 zone conflicts with Deschutes County Comprehensive Plan (DCCP) Policy 3.3.1, which mandates: "Except for parcels in the Westside Transect Zone, the minimum parcel size for new rural residential parcels shall be 10 acres." Relatedly, DCCP 3.3 states: "Deschutes County requires a 10-acre minimum lot size for new rural residential lots in order to protect the rural quality of life and its resources."

Deschutes County Code (DCC) 18.32.040(A) provides that in the MUA-10 zone

> "[t]he minimum lot area shall be 10 acres, except planned and cluster developments shall be allowed an equivalent density of one unit per seven and one-half acres and planned and cluster developments within one mile of an acknowledged urban growth boundary shall be allowed a five-acre minimum lot area or equivalent density."

Intervenor initially submitted an application for tentative approval for a 14-lot planned unit development, each lot approximately 1.7 acres in size, with the remainder of the subject property used for open space or roadways. Intervenor later withdrew that application from consideration, but the site plan remains in the record of this appeal. Record 43, 1033, 1134. We understand petitioner to argue that the site plan illustrates the potential density that is possible under the MUA-10, with lot sizes as small as 1.7 acres in size.

Petitioner contends that the MUA-10 facially conflicts with DCCP Policy 3.3.1, which unambiguously mandates a 10-acre minimum parcel size for rural residential development (except for parcels in the Westside Transect Zone, which no party argues this property is within). Petitioner argues that where there is a conflict between a zoning code provision and a comprehensive plan provision, the plan is hierarchically superior and controls over the conflicting zoning code provision. *Baker v. City of Milwaukie*, 271 Or 500, 533 P2d 772 (1975).

In *Baker*, the Oregon Supreme Court held that zoning code provisions that allow a more intensive use than permitted under the city's comprehensive plan may be invalid:

> "In summary, we conclude that a comprehensive plan is the controlling land use planning instrument for a city. Upon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. We further hold that the zoning decisions of a city must be in accord with that plan and a zoning ordinance which allows a more intensive use than that prescribed in the plan must fail." 271 Or at 514 (footnote omitted).

Petitioner raised the alleged plan/zone conflict during the proceedings below. Record 291-92. However, the county's decision does not address the alleged conflict between those plan policies and the MUA-10 zone, or address DCCP 3.3 or Policy 3.3.1 at all. In the response briefing, the county and intervenor (together, respondents) likewise do not address petitioner's argument under *Baker*, that the code provision allowing for rural residential development on parcels less than 10 acres in size conflicts with the 10-acre minimum mandated

by the plan policies. Instead, respondents re-cast the first assignment of error as an argument that the MUA-10 zone allows *urban*-uses of rural land and is therefore inconsistent with Statewide Planning Goal 14 (Urbanization). As discussed below under the second and sixth assignments of error, petitioner presents arguments that the residential development allowed under the planned and cluster provisions of the MUA-10 zone do conflict with the county's obligation under Goal 14 to prohibit urban development on rural land. However, under the first assignment of error, petitioner presents a somewhat different argument: that the MUA-10 zone provisions for planned and cluster development facially conflict with DCCP Policy 3.3.1, which mandates a 10-acre minimum parcel size for rural residential development. Neither the decision nor the response briefing respond to that argument.

Respondents appear to presume that if the MUA-10 zone is consistent with Goal 14, or is deemed to be consistent as a matter of law, consistency between the MUA-10 zone and Goal 14 necessarily means that the reduced parcel sizes allowed in the MUA-10 zone does not conflict with DCCP 3.3. and Policy 3.3.1. However, that does not follow. The 10-acre minimum parcel size dictated by DCCP Policy 3.3.1 possibly reflects a legislative concern to ensure compliance with Goal 14. As discussed under the second and sixth assignments of error, below, under the controlling case law a 10-acre minimum parcel size represents something like a judicially recognized safe harbor for avoiding any conflicts between residential development of rural lands and a county's obligations under

Goal 14. But DCCP Policy 3.3.1 may also, or instead, embody other legislative concerns or values independent of Goal 14. DCCP 3.3 appears to state the legislative purpose of the 10-acre minimum specified in DCCP Policy 3.3.1 – to protect the rural quality of life and its resources. That legislative purpose may be partially or wholly independent of Goal 14. In other words, it is possible to conclude that the reduced parcel sizes allowed in the MUA-10 zone are consistent with Goal 14, yet conflict with the terms of DCCP Policy 3.3.1 and the purpose identified in DCCP 3.3.

The county's brief includes one argument directed at petitioner's claim that the code and plan policies conflict. The county points out, accurately, that the MUA-10 zone does in fact provide for a default 10-acre minimum parcel size, in circumstances where the applicant does *not* opt for planned or cluster development using a more intense equivalent density. However, that response does not explain why the equivalent densities of one dwelling per 7.5 acres or 5 acres allowed in the MUA-10 zone, which apparently would allow creation of parcels as small as 1.7 acres in size, are consistent with the 10-acre minimum parcel size specified in DCCP Policy 3.3.1.

As noted, the county's decision does not address this issue at all, or provide any express or implicit interpretations of the relevant DCCP and DCC text and context. Where the local government fails to interpret its comprehensive plan or land use regulations, or any interpretation is inadequate for review, ORS 197.829(2) authorizes LUBA to make its own determination whether the local

government decision is correct. However, that authorization is permissive, and if the decision must be remanded in any event, the better course may be to also remand so that the governing body may provide an interpretation in the first instance, as the local government is presumably in a better position than LUBA to understand the intent of its legislation.[2] *Green v. Douglas County*, 245 Or App 430, 441, 263 P3d 355 (2011). As discussed below under the third assignment of error, remand is necessary for additional findings under OAR 660-033-0020(1)(a)(B). Accordingly, we deem it appropriate under this first assignment of error to remand so that the county may address the alleged conflict between DCCP Policy 3.3.1 and DCC 18.32.040(A) in the first instance.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR
SIXTH ASSIGNMENT OF ERROR

Under the second assignment of error, petitioner argues that the county misconstrued the applicable law in concluding that the acknowledged status of the MUA-10 zone means that the decision to apply that zone to the subject property does not require any analysis under Goal 14. Relatedly, under the sixth assignment of error, petitioner argues that residential development of the subject

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[2] The parties do not cite to or provide any legislative history of the MUA-10 zone that might illuminate the intent of the provisions allowing equivalent densities below 10-acres in size, or the relationship between those provisions and any applicable DCCP policies. On remand, the county may wish to consider any relevant legislative history.

property under the higher equivalent densities allowed in MUA-10 zone would not be consistent with Goal 14, and therefore the rezone can be accomplished only by taking an exception to Goal 14.

Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities." Generally, converting rural land to urban uses is not consistent with Goal 14, and requires taking an exception to the Goal. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 477, 724 P2d 268 (1986). In *Curry County*, the Oregon Supreme Court noted that there is no controlling definition of what constitutes "urban uses." The court agreed with the parties that residential development at a density of one dwelling per 10 acres is generally not an urban use, while half-acre residential lots served by community water and sewer clearly are urban uses. However, the court found it unnecessary to locate a bright line between these two extremes. *Id.*at 504-05. The court concluded that, absence guidance from the Land Conservation and Development Commission (LCDC) on this point, any determination whether uses allowed under land use legislation are "urban" or "rural" will depend greatly on the context, including the locale and the factual situation at a specific site. *Id.* at 504 n 33.

In *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989), LUBA held that, in the absence of LCDC guidance, determining whether use of rural land is

impermissibly "urban" will depend on a multi-factor analysis of the specific circumstances, including parcel size, intensity of use, necessity of urban facilities, and proximity to an urban growth boundary. 17 Or LUBA at 928.

In the present case, the hearings officer adopted two sets of findings addressing whether residential development allowed under the MUA-10 zone on the subject property is consistent with Goal 14. In the first set of findings, at Record 54-57, the hearings officer took official notice of the fact that, when the county adopted the RREA plan designation and the MUA-10 zone, the ordinances adopting the designation and zone were acknowledged by the Oregon Department of Land Conservation and Development (DLCD) to comply with all statewide planning goals, including Goal 14. We understand the hearings officer to have interpreted that acknowledgment to mean that, as a matter of law, the MUA-10 zone does not facially conflict with Goal 14. Record 56. The second set of findings consists of a site-specific analysis of the factors identified in *Shaffer*, prepared by intervenor's attorney, that the hearings officer adopted by reference. Record 57.

In the second assignment of error, petitioner challenges the first set of findings, specifically the hearings officer's finding that the acknowledged status of the MUA-10 zone means that development of the subject property under the MUA-10 is necessarily consistent with Goal 14. Petitioner understands that finding to constitute an argument that Goal 14 is inapplicable to the challenged comprehensive plan amendment and zone change. Petitioner cites several cases

for the proposition that all comprehensive plan amendments are reviewable for compliance with the statewide planning goals. Petition for Review 13-14 (citing *Ludwick v. Yamhill County*, 72 Or App 224, 696 P2d 536, *rev den*, 299 Or 443 (1985); *1000 Friends of Oregon v. Jackson County*, 79 Or App 93, 718 P2d 753, *rev den*, 301 Or 445 (1986); *DLCD v. Clackamas County*, 335 Or App 205, 222, 558 P3d 64 (2024), *rev den*, 373 Or 305 (2025)); *see also* ORS 197.835(6) (LUBA shall reverse or remand a comprehensive plan amendment that is not in compliance the statewide planning goals). Based on those cases, petitioner argues that the county cannot simply rely on the acknowledged status of the RREA designation and the MUA-10 zone to avoid the site-specific contextual analysis indicated in *Curry County* and *Shaffer*. Petitioner faults the county for failing to adopt such a site-specific contextual analysis.

We agree with petitioner that all comprehensive plan amendments are potentially subject to review for compliance with applicable statewide planning goals, even if the amendment only applies an acknowledged plan designation and zoning district to a specific property. The acknowledged status of the plan provisions and zoning code applied may simplify any required goal analysis, and in limited cases render it redundant. However, the county had not established any basis in the present case to completely eliminate the contextual analysis required by *Curry County* and *Shaffer*.

The county cites to *Central Oregon Landwatch v. Deschutes County*, LUBA No 2022-075 (Dec 6, 2022) (*Aceti V*), for the proposition that a *Curry*

County/Shaffer analysis is not necessary in all cases to demonstrate that application of an acknowledged rural zone is consistent with Goal 14. *Aceti V* involved application of a rural industrial designation and zone, where the county previously engaged in a lengthy and deliberate legislative effort to adopt plan policies and land use regulations limiting the size and intensity of industrial uses allowed in the zone. Under those limits, the allowed industrial uses were significantly less intensive than industrial uses allowed under an LCDC rule governing rural unincorporated communities. We agreed with the county that, given that specific legislative history, prompted by the application at issue in the *Aceti* line of cases, the county could independently rely on the acknowledged plan and land use regulations to conclude that industrial uses allowed on the subject property after redesignation and rezoning would be consistent with Goal 14. *Aceti V*, LUBA No 2022-075 (slip op at 24). Accordingly, we did not need to address challenges to the county's alternative *Curry County/Shaffer* findings, which the county had adopted as a precaution.

However, the present case does not feature the same history of legislative efforts to restrict allowed uses, designed to bring them within the threshold of a Goal 14 safe harbor, as was the case in *Aceti V*. Indeed, as discussed under the first assignment of error, the MUA-10 zone arguably conflicts with comprehensive plan policies mandating a 10-acre minimum parcel size for rural residential development. That mandate possibly reflects another Goal 14 safe harbor, the 10-acre minimum parcel size discussed in *Curry County*.

Accordingly, *Aceti V* does not assist the county's argument that the acknowledged status of the RREA designation and MUA-10 zone is sufficient, without more, to demonstrate consistency with Goal 14. Some site-specific analysis as indicated in *Curry County* and *Shaffer* is still necessary.

All that said, petitioner does not acknowledge that the county did, in fact, adopt by incorporation alternative findings that include a *Curry County/Shaffer* analysis. Record 57. The hearings officer incorporated intervenor's Goal 14 analysis in its May 27, 2022, Burden of Proof, its March 19, 2024, open-record submission, and its April 2, 2024, final argument. Record 57. Petitioner does not address or challenge those incorporated analyses. Absent some challenge to those alternative findings, petitioner's arguments under the second and sixth assignments of error do not provide a basis for reversal or remand.

Petitioner's second and sixth assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Goal 3 is "[t]o preserve and maintain agricultural lands." As noted, OAR 660-033-0020(1)(a)(A) defines "Agricultural Land" in part to include land in Eastern Oregon with predominate Class I-VI soils. OAR 660-033-0020(1)(a)(B) provides a broader definition, to include:

> "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[.]"

OAR 660-033-0020(1)(a)(B) is commonly referred to as the "Suitable for Farm Use" test. "Farm use" for purposes of OAR 660-033-0020(1) means the same as the definition of "farm use" at ORS 215.203(2)(a). OAR 660-033-0020(7)(a). ORS 215.203(2)(a) defines "farm use" to include a broad range of activities:

> "[T]he 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."

Petitioner argued below that the subject property is "suitable for farm use" for purposes of OAR 660-033-0020(1)(a)(B), specifically that the property could be employed for the primary purpose of obtaining a profit in money by engaging in many of the farm uses listed in ORS 215.203(2)(a). Petitioner argued that the property has cleared, fenced, irrigated pastures that would be suitable for many types of animal husbandry that is commonly practiced in Deschutes County, such as raising lambs, goats, pigs, horses, ponies, mules, burros, donkeys, honeybees, poultry, and egg production. Petitioner also submitted information on three

equine boarding, training, and riding facilities located in the area, and argued that the property is also suitable for developing the subject property with an equine facility. Record 274-79.

However, in findings adopted by the county, the hearings officer declined to evaluate any of the farm uses cited by petitioner. The hearings officer explained:

> "This Hearings Officer does not believe every listed 'farm use' in ORS 215.203(2)(a) needs to be individually/independently analyzed as part of every Goal 3 'agricultural land' determination process. The Hearings Officer finds it is unnecessary for [intervenor] to demonstrate (provide documentation and analysis) that the Subject Property is not 'agricultural land' because it is not feasible to use the property, for example, to use that property as a dairy or for the propagation and harvest of aquatic species. The Hearings Officer finds that requiring every listed [ORS] 215.203(2)(a) potential farm use to be analyzed in every case does not represent the spirit and intention of ORS 215.203 or associated OARs. The Hearings Officer finds that the goal of ORS 215.2[0]3 and associated OARs is to thoughtfully consider what a reasonable farmer would consider when assessing a particular property's ability to be profitably farmed.
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> "The Hearings Officer finds that there are common agricultural uses in every geographical area of Oregon and that the viability of a specific farm use of any property is dependent upon the factors set forth in OAR 660-033-0020. The Hearings Officer believes that a reasonable farmer is going to consider such factors as soils, topography, orientation to the sun, transportation access and water access when assessing potential farm uses of a particular property. The Hearings Officer does not, however, believe a reasonable farmer would take the list of potential farm uses set forth in ORS 215.203(2)(a) and pragmatically consider the pros and cons of every

> one of those activities on a particular Deschutes County property. * * *
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> "* * * * *
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> "The Hearings Officer finds that [intervenor] in this case was not required to consider all uses listed in ORS 215.203(2)(a) or by [petitioner]. Rather, the Hearings Officer finds that [intervenor] is required to consider only uses that a 'reasonable farmer' for the Subject Property would consider in light of the OAR 660-033-0020(1)(a)(B) factors. The Hearings Officer does not believe that [intervenor] in this case is obligated to independently/individually analyze and assess each and every one of the ORS 215.203(2)(a) or [petitioner-]listed possible uses." Record 89-90.

We generally agree with the hearings officer that an applicant is not required to go through a rote initial exercise of evaluating every possible type of activity that potentially falls within the broad definition of "farm use," and produce evidence regarding whether the subject property is suitable for all conceivable farm uses.

However, an applicant has the burden of demonstrating that the subject property is not suitable for "farm use," which as defined includes a wide range of activities. In our view, an applicant has the initial burden of identifying, from that wide range of activities, potentially feasible farm uses that are commonly employed on EFU-zoned lands in the area or county, and providing some evidence or explanation, based on the factors listed in OAR 660-033-0020(1)(a)(B), as to whether the land is suitable for such initially identified uses. Such an initial analysis could address potential farm uses together in broad categories as appropriate.

More detailed analysis may be needed if, as happened here, other parties identify specific farm uses that are common in the area or county on EFU-zoned lands, and provide some evidence or argument that the property is suitable for such uses, considering the listed factors. If so, an applicant, such as intervenor in this appeal, is obliged to evaluate those uses as well, and demonstrate that the subject property is not suitable for such uses. Based on such evidence, the hearings officer will then be in a position to determine whether an applicant has demonstrated that the subject property is not suitable for farm use, under the listed factors.

In the present case, intervenor initially submitted evidence that the subject property was not suitable for growing crops or a cattle grazing operation, but did not evaluate or present evidence regarding any other specific farm uses or general categories of farm uses within the broad definition at ORS 215.203(2)(a). Petitioner presented evidence and argument that a subset of farm uses, various types of animal husbandry and equine facilities, are commonly practiced in the area or county, and that at least the cleared and irrigated portion of the subject property was suitable for those uses. Intervenor chose not to produce any countervailing evidence or evaluation of those identified farm uses.

As we understand the findings, the hearings officer found that intervenor did not need to submit any evidence or evaluation regarding the identified farm use, based on a conclusion that a "reasonable farmer" would not consider the subject property for any of the identified farm uses. We discuss petitioner's other

challenges to the findings that articulate a "reasonable farmer" framework, under the fifth assignment of error, below. Under the third assignment of error, we address only petitioner's arguments with respect to the farm uses petitioner identified during the proceedings below, and that the hearings officer declined to consider.

LUBA has used the phrase "reasonable farmer" or similar phrases as a shorthand for the "suitable for farm use" test, and as a useful reminder that the "suitable for farm use" test is an objective test, not one based on the personal motivations of property owners or any individual farmer. *See, e.g.*, *Central Oregon Landwatch v. Deschutes County*, LUBA Nos 2023-006/009 (July 28, 2023), *aff'd*, 330 Or App 321, 543 P3d 736 (2024) (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." (quoting *Landwatch Lane County v. Lane County*, 77 Or LUBA 368, 371 (2018) (emphasis from *Central Oregon Landwatch* omitted))).

It is not entirely clear to us what the hearings officer meant by the phrase "reasonable farmer," or why he concluded that that semi-legendary figure would evaluate only a few, if any, of the farm uses described in ORS 215.203(2)(a), in determining whether the subject property is suitable for farm use. The only farm use the hearings officer actually evaluated was livestock grazing, which is the only use historically attempted on the subject property in recent years, and which corresponds to one of the listed factors in OAR 660-033-0020(1)(b)(A)

(suitability for grazing). If the hearings officer is saying that the only uses that must be evaluated are those historically attempted on the property, or uses that correspond to factors listed in the rule, we disagree. In our view, if there is evidence in the record that the subject property may be suitable for any of the farm uses listed in ORS 215.203(2)(a), the county must evaluate that evidence, based on the whole record, which may include any rebuttal information or evaluation supplied by an applicant.

In the present case, as a relatively clear example of the foregoing, petitioner submitted information on three equine boarding, training or riding facilities in the area, and argued that the subject property, with its cleared, irrigated, fenced pastures consisting mostly of agricultural soils, would also be suitable for development of an equine facility. In a recent case, *Redside Restoration Project One, LLC v. Deschutes County*, LUBA Nos 2024-082/083/085 (May 16, 2025), *appeal pending* (A187727/A187728/A187729/A187760), we discussed some of the considerations that might go into an evaluation of an equine facility under OAR 660-033-0020(1)(a)(B), including access to water, fencing, pasture, and locational considerations. LUBA Nos 2024-082/083/085 (slip op at 61-64). The record in that case included detailed evidence and argument regarding the feasibility and economic prospects of establishing an equine facility on the parcel at issue. To evaluate that evidence the county adopted extensive findings. LUBA ultimately affirmed the county's findings that the property was not suitable for

an equine facility, given the lack of water, fencing, pasture, access, and the property's remote location.

In the present case, intervenor submitted no evidence or argument with respect to equine facilities, other than a submittal from its attorney arguing that developing an equine facility would be "cost-prohibitive." Record 264. Neither the commissioners nor the hearings officer evaluated the suitability of the subject property for that potential farm use, or adopted findings (at least any findings we understand) explaining why that use need not be evaluated.

On appeal, intervenor emphasizes that any farm use as defined at ORS 215.203(2)(a) must be one that is conducted with "the primary purpose of obtaining a profit in money[.]" As a shorthand for that statutory phrase, we follow the parties in using the term "profitability." According to intervenor, profitability is a threshold issue, and only if there is evidence that the subject property can be employed for an identified farm use with the primary purpose of obtaining a profit in money need the county actually evaluate that use under the factors listed in OAR 660-033-0020(1)(a)(B). Because petitioner submitted no economic analysis demonstrating that animal husbandry or an equine facility on the subject property might be profitable, we understand intervenor to argue that they were not required to submit any evidentiary response to petitioner's evidence and argument regarding those uses, and the county did not err in failing to evaluate those uses.

We disagree with intervenor that "profitability" is a threshold evidentiary issue that opponents must surmount before intervenor and the county are obligated to evaluate potential farm uses identified in the record. We have stated previously that, while the potential or possibility of obtaining a profit of money is a consideration under the ORS 215.203(2)(a) definition of "farm use," it is a relatively minor consideration and one with a significant potential to distract the decision-maker from the factors listed in OAR 660-033-0020(1)(a)(B). *Wetherall v. Douglas County*, 58 Or LUBA 638, 657 (2009). Elevating "profitability" to a threshold or initially controlling consideration is not consistent with its role in the OAR 660-033-0020(1)(a)(B) analysis. Moreover, intervenor's apparent view inverts the burden of proof. As explained, it is the applicant that bears the initial and ultimate burden of proof and persuasion that the subject property is not suitable for farm uses described in ORS 215.203(2)(a), considering the listed factors.

In sum, we agree with petitioner that remand is necessary for the county to evaluate whether the subject property is suitable for the farm uses petitioner identified in the record, including various types of animal husbandry and equine facilities listed in ORS 215.203(2)(a). We note that, because the subject property is within an irrigation district, and once had irrigation rights, the county's evaluation must assume that the property retains the irrigation rights that intervenor transferred. OAR 660-033-0020(9). Under ORS 215.203(2)(a), considerations of "profitability," or more precisely whether the subject property

can be employed for identified farm uses with the primary motivation of obtaining a profit in money, may well play a role, depending on what evidence is submitted on remand. We address, below, petitioner's additional arguments regarding the role of "profitability," and that discussion may assist the parties on remand.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

DCC 18.136.020(D) is a standard for a quasi-judicial rezoning, requiring that the applicant must establish that "the public interest is best served by rezoning the property[,]" and that the applicant must demonstrate, among other things, that "there has been a change in circumstances since the property was last zoned, or a mistake was made in the zoning of the property at question."

The hearings officer adopted the following statement from intervenor as findings demonstrating that the proposed rezoning complies with DCC 18.136.020(D):

> "Circumstances have changed since the zoning of the property. When the property was first given an EFU zoning assignment, it was in the early days of Oregon zoning, approximately half a century ago. Much of our undeveloped and unirrigated lands were zoned EFU, for lack of a better zone or label, even though these parcels were dry and not farmable. If they weren't forest or already developed in a denser pattern, they were zoned farm by default. This property was zoned without detailed or site specific consideration given to its soil, geologic, and topographic characteristics. Now that a certified soils scientist has conducted a detailed Soils Investigation, it is documented that the parcels do not qualify as

> farmland. The change in circumstance is the soil study. It also evidences a mistake of sorts in classifying poor soil as farmland.
>
> "In summary, the [c]ounty's zoning of agricultural lands has been a process of refinement since the 1970s. The Subject Property has never been suitable for agriculture and has never been actively farmed successfully due to its poor soil. Although it was assigned EFU zoning, this property likely should not have been originally zoned EFU due to its location, soils, and geology. Therefore, the parcels should be rezoned to MUA-10, consistent with the zoning of adjacent rural-residential uses. The MUA-10 zoning assignment supports logical, compatible, and efficient use of the land." Record 64 (parenthetical omitted).

Thus, the county found, based on the Order 1 soil study obtained by intervenor, both that circumstances have changed since zoning was applied, and that a mistake was made in applying the original zoning.

Petitioner argues the foregoing findings misconstrue the applicable law, are inadequate, and not supported by substantial evidence. Petitioner disputes that the Order 1 soil study is evidence of a "change in circumstances" or a "mistake" in zoning the property EFU.

As noted, the county applied the EFU zone to the subject property and surrounding properties based on a NRCS survey, which was conducted at a larger scale than the Order 1 soil study conducted by intervenor's soil scientist. The Order 1 soil study confirmed the presence of the three soil types found in the NRCS survey, and differed only by identifying small inclusions of Class VII 58C soils within the Class III/VI 38B soils mapped by the NRCS, which altered the former understanding of which soils "predominated" on the subject parcel.

However, petitioner argues that there is no evidence in the record that the NRCS data is inaccurate, given its scale, or that the soil conditions have changed since the county first applied the EFU zone. Further, petitioner argues that the "predominate" soil type is relevant only to the definition of Agricultural Land at OAR 660-033-0020(1)(A), and says nothing about whether the land is defined as Agricultural Land under OAR 660-033-0020(1)(B) or (C). Similarly, petitioner disputes the finding that, when initially zoning the property and much of the county EFU, "undeveloped and unirrigated lands were zoned EFU, for lack of a better zone or label, even though these parcels were dry and not farmable." Record 64. Petitioner argues that dry rangeland in the county is correctly zoned EFU because it is suitable for grazing livestock, and that it is not the case that unirrigated lands are incorrectly zoned EFU simply because they are not irrigated or capable of growing crops, as the above-quoted finding suggests.

For these reasons, petitioner contends that the record and findings do not demonstrate either that "conditions have changed" since EFU zoning was applied, or that a "mistake" was made in zoning the property EFU.

Respondents argue that conducting a site-specific Order 1 soil survey is a common and permissible means of refining the NRCS data on which most county zoning is based. Respondents note that site-specific surveys are authorized by ORS 215.211(1) and OAR 660-033-0030, and their methodology must be reviewed and approved by DLCD, which intervenor obtained in this case. According to respondents, the county reasonably relied on the DLCD-approved

Order 1 survey to conclude that the NRCS data did not accurately reflect the actual soil conditions and agricultural capability of the subject property.

We tend to agree with petitioner that the findings and record do not demonstrate that the original application of EFU zoning was a "mistake," given the data available and methodology employed when the NRCS surveyed the area, and the fact that identifying agricultural land, then and now, is not a simple matter of soil capability classes. As petitioner notes, much of Deschutes County as well as Eastern Oregon consists of dry, uncultivatable rangeland that is nonetheless productive agricultural land. This property, in some respects, seems better quality than dry rangeland, because it has some Class III/VI agricultural soils, and even (as a matter of law) irrigation available to water those Class III/VI soils. Further, when the county zoned the property EFU, it was part of a larger irrigated tract, which presumably had more agricultural potential than the present parcel. The record cited to us does not support a finding that the county made a "mistake" when it first applied EFU zoning, either to the subject property or, as the incorporated findings suggest, to large swathes of the county.

However, we agree with respondents that the Order 1 soil study can be viewed as a "change in circumstances" for purposes of DCC 18.136.020(D). Petitioner argues that only a physical change to the soils or conditions on the subject property, such as a flood or earthquake, could possibly constitute a "change in circumstance." But petitioner cites nothing in the text or context of

DCC 18.136.020(D) suggesting that "change of circumstances" is limited to such physical changes.

The board of commissioners adopted the hearings officer's findings concluding that the new and more detailed information provided by the soils study is sufficient to constitute a "change in circumstance" for purposes of DCC 18.136.020(D). We understand those incorporated findings to embody an implicit interpretation of the phrase "change in circumstances." The board of commissioners clearly understood the phrase "change in circumstances" to encompass more than physical changes to the soil or site conditions, and to broadly include development of new information that fundamentally challenges the agricultural status of the property. That implicit understanding is adequate for our review and therefore subject to the deferential standard of review we apply to a governing body's interpretations of its land use regulations, under ORS 197.829(1).[3] We cannot say that the county's understanding of DCC

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[3] ORS 197.829(1) provides, as relevant:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

18.136.020(D) is inconsistent with the text, context, purpose or underlying policy of that provision. Accordingly, petitioner has not demonstrated that the county misconstrued the applicable law, or that the findings and record are insufficient to demonstrate compliance with DCC 18.136.020(D).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Under the fifth assignment of error, petitioner argues in part that the county misconstrued ORS 215.203(2)(a) with respect to the role of "profitability" in applying the definition of farm use, for purposes of identifying agricultural land under OAR 660-033-0020(1)(a)(B). We have already addressed, under the third assignment of error, some of petitioner's arguments regarding the role of "profitability," with respect to the county's obligation to evaluate the farm uses petitioner identified. Under the fifth assignment of error, petitioner advances other arguments regarding the meaning and proper role of "profitability," as well as challenges to the county's findings regarding the factors listed in OAR 660-033-0020(1)(a)(B). We now address those arguments.

A. Profitability

Petitioner notes, accurately, that the definition of "farm use" at ORS 215.203(2)(a) originated as part of a definition that was used to guide tax

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"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

assessors in determining whether property qualified for special property tax assessments applicable to land in farm use. The tax code cognate to ORS 215.203(2)(a) is now codified at ORS 308A.056. *See Doherty v. Wheeler County*, 56 Or LUBA 465, 470 (2008) (discussing relationship between ORS 215.203(2)(a) and ORS 308A.056). Both statutes use the phrase "current employment of land for the primary purpose of obtaining a profit in money" by engaging in a very similar list of activities. Petitioner argues that the historic role of ORS 215.203(2)(a) as part of the statutory scheme for identifying land qualified for farm use special assessments informs the meaning of the phrase "current employment of land for the primary purpose of obtaining a profit in money" or, in our shorthand, "profitability."

Petitioner argues that under both statutes the question is not whether the farm use of the land would actually yield a profit in money, but whether the "primary purpose" or motivation in farming the land is to seek a profit in money. Petitioner cites to an Oregon Tax Court case, *Everhart v. Dept. of Rev.*, 15 Or Tax 76, 80 (1999), for the proposition that farm use is not required to actually result in money profit in order to qualify for the farm use special assessment, as the legislature recognized the risks of farming, and drafted the statutes accordingly to focus on purpose, the goal or motivation, not the results. We understand petitioner to argue that in the present case the county applied too narrow an understanding of "profitability," as part of its musings about a

"reasonable farmer," to focus on whether farm use of the property would actually yield a profit in money.

As noted, the hearings officer addressed evidence about the historic use of the property for livestock grazing, focusing on evidence that in 2012 tenants leased the subject property as part of a cattle grazing operation. The tenants found after one month that the irrigated pastures on the property did not produce sufficient forage to sustain their herd without supplemental feed, and withdrew from the lease. The hearings officer cited this example as "persuasive evidence that a reasonable farmer would not consider 'livestock grazing' to be a 'farm use' that would be entered into for the primary purpose of obtaining a profit in money." Record 90. We understand petitioner to argue, however, that the hearings officer improperly focused on whether the tenants actually profited from grazing the subject property, instead of on their motivation, which was clearly to engage in farm use with the primary purpose of obtaining a profit in money.

As explained, the "suitable for farm use" test is objective in nature, not dependent on the personal motivations or subjective expectations of individual farmers. Thus, that the tenants in 2012 were presumably motivated by profit to attempt a cattle grazing operation on the subject property is not conclusive evidence that the property is suitable for farm use, as we understand petitioner to suggest. By the same token, that the one attempted cattle grazing operation was not profitable or not sufficiently profitable in the experience of one farmer does not, as the hearings officer seemed to find, conclusively demonstrate that the

subject property is unsuitable for the broad category of "livestock grazing," much less other potential farm uses described in ORS 215.203(2)(a). That historic experience is relevant to the question of whether the property is suitable for farm use, and whether an objective farmer would be motivated to attempt to engage in some farm use of the property for the purpose of obtaining a profit in money (as opposed to a non-pecuniary purpose, such as a hobby). But the experience of one farmer or one attempt at farming is not compelling or conclusive on that question.

With those general observations, we turn to petitioner's specific challenges to the county's findings under OAR 660-033-0020(1)(a)(B).

B. Conjoined Use

Petitioner argues that the county erred in failing to consider whether the subject property is suitable for farm use in conjunction with grazing operations on other lands elsewhere. Petitioner cites to evidence suggesting that the 2012 grazing operation was conducted by ranchers who grazed cattle in a different county, and argues that it is common practice for grazing operations to be conducted on multiple, discontiguous tracts, with cattle trucked between grazing sites.

Under OAR 660-033-0030(3), the county must consider conjoined use with nearby or adjacent land, regardless of ownership, in determining whether land is agricultural land as defined in OAR 660-033-0020(1). However, petitioner cites no authority requiring the county to consider conjoined use with lands that are not nearby or adjacent. Intervenors notes that the record includes

an analysis of EFU-zoned lands within one mile of the subject property, that identified no lands capable of a conjoined farm use with the subject property. Petitioner does not challenge that analysis or the associated findings.

C. OAR 660-033-0020(1)(a)(B) Suitability Factors

As noted, under OAR 660-033-0020(1)(a)(B), the county must determine whether the subject property is "suitable for farm use," considering a list of factors, including soil fertility, suitability for grazing, climatic conditions, availability of water for irrigation, existing land use patterns, technological and energy inputs required, and accepted farming practices. The county adopted findings addressing each of these factors, at Record 87-89. The findings conclude that each factor is either nondeterminative or points toward the conclusion that the subject property is not suitable for farm use, usually citing as evidence the Order 1 soil survey, intervenor's March 19, 2023, submittals, or the testimony of the tenants who grazed cattle on the land in 2012.

Under the remainder of the fifth assignment of error, petitioner challenges the findings and supporting evidence for each OAR 660-033-0020(1)(a)(B) factor. Under each factor, petitioner generally argues that the factor, properly understood in light of the relevant evidence, points toward the conclusion that the property is suitable for crop production and livestock grazing, which are the only farm uses the hearings officer actually evaluated. Petitioner contends that, taken together, consideration of the OAR 660-033-0020(1)(a)(B) factors overwhelmingly supports the conclusion that the property is suitable for farm use.

Intervenor does not respond in detail to petitioner's arguments regarding each factor, but responds generally that the findings are supported by substantial evidence, namely the soil survey and other evidence cited by the hearings officer.

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). In reviewing the evidence, LUBA may not substitute its judgement 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, 725 P2d 262 (1988).

Under this portion of the fifth assignment of error, petitioner appears to be asking LUBA to reweigh the evidence regarding each suitability factor, and draw our own conclusions regarding whether the property is suitable for farm use. That of course is not LUBA's role. Petitioner has not demonstrated that the evidence the county relied upon, the soil survey and other evidence cited by the hearings officer, is evidence that a reasonable person would not rely upon, based on review of evidence in the whole record, at least with respect to the farm uses the county actually evaluated.

As explained under the third assignment of error, remand is necessary for the county to evaluate whether the property is suitable for the farm uses identified by petitioner. That remand may require additional findings regarding the OAR 660-033-0020(1)(a)(B) factors. However, as far as the limited set of farm uses

that the county evaluated in this decision, petitioner has not demonstrated that the OAR 660-033-0020(1)(a)(B) findings are inadequate or not supported by substantial evidence.

The fifth assignment of error is denied.

The county's decision is remanded.