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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

LAST RANCH LLC,
Intervenor-Respondent.

LUBA No. 2025-034

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

No appearance by Deschutes County.

Carrie A. Richter filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

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

REMANDED 09/22/2025

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 redesignating and rezoning a parcel from agricultural to industrial use.

FACTS

The subject property is a 20.36-acre parcel designated agriculture and zoned for exclusive farm use (EFU). The property is long, narrow and roughly leaf-shaped. The property was once part of a larger tract, the Howard Ranch, but was separated from that tract in 1921. At some point thereafter, the property was developed with a residence, and the residents sometimes engaged in various agricultural activities. Currently, the property is developed with a paved parking lot and 12 structures. The parking lot and several structures were used until recently as part of a conditional use approved by the county, called the "Funny Farm," which featured a petting zoo and other animal attractions.

Highway 97 abuts the property's west side for approximately 2,200 feet. The east side of the property abuts an irrigation canal. The southern border abuts a county road and approach ramps to Highway 97. The property has rights to apply irrigation water to approximately 14 acres.

Views of the countryside along that stretch of Highway 97 are designated as a scenic resource under the county's acknowledged program to achieve Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Under that program, property within one-quarter mile of Highway

97 along a nine-mile stretch are subject to a Landscape Management Combining (LM) Zone, a type of overlay zone which generally subjects all development to setback, site plan, and design review standards. Deschutes County Code (DCC) 18.84. The subject property lies entirely within the LM overlay zone.

Intervenor-respondent Last Ranch LLC (intervenor) applied to the county to redesignate the subject property from Agriculture to Rural Industrial and to rezone it from EFU to Rural Industrial (RI). Intervenor did not propose any particular industrial use for the property. To demonstrate that the subject property does not qualify as agricultural land, intervenor submitted a soils study showing that soils on the property consist predominantly of Class VII and VIII non-agricultural soils.

The hearings officer conducted a hearing at which petitioner appeared in opposition. The hearings officer concluded that intervenor had demonstrated that the proposed redesignation and rezoning complied with all applicable approval criteria and all applicable statewide planning goals, with the exception of Goal 5. The hearings officer concluded that the industrial uses allowed under the proposed RI zone constitute "new uses" that could conflict with the scenic resource and, accordingly, that evaluation under Goal 5 was required, including an analysis of economic, social, environmental and energy (ESEE) impacts, and potentially an exception to Goal 5. However, because intervenor had not submitted an ESEE analysis or otherwise attempted to demonstrate consistency

with Goal 5, the hearings officer recommended that the board of commissioners deny the application.

Before the board of commissioners, intervenor submitted an ESEE analysis concluding that the scenic value of the subject property was relatively low, and that most of the industrial uses allowed in the RI zone could be developed on the property, subject to LM overlay zone site plan standards, without conflict with the scenic resource. The ESEE analysis recommended that the county prohibit development of certain industrial uses on the property, such as a pulp and paper manufacturing plant.

The board of commissioners approved the application to redesignate and rezone the property to allow industrial uses, concluding with respect to Goal 5 that the redesignation and rezoning would not introduce "new uses" that could conflict with the scenic resource. Accordingly, the board of commissioners concluded that no ESEE analysis was required. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued OAR 660-023-0050(3) in concluding that redesignating and rezoning the property for industrial uses will not allow "new uses" and thus does not require evaluation for compliance with Goal 5.

Generally, after a county's program to achieve Goal 5 with respect to a resource is acknowledged, the county is not thereafter required to evaluate whether land use decisions made under that program comply with Goal 5. ORS

197.175(2)(d). As explained further below, the county's program to achieve Goal 5 with respect to scenic resources such as the views from Highway 97 was acknowledged in 1992 to comply with the goal. That program consists largely of applying the LM overlay zone to areas within one-quarter mile of the highway and subjecting development with that zone to various standards intended to preserve the scenic resource.

However, where the county adopts a post-acknowledgment plan amendment (PAPA), as in the present case, the county *may be* required to apply Goal 5 to those amendments and evaluate whether the plan and zoning amendments are consistent with the goal. That evaluation generally takes the form of an updated ESEE analysis. Whether a local government must apply Goal 5 to a PAPA is determined by OAR 660-023-0250(3), which is part of the administrative rule implementing Goal 5. The rule provides, in relevant part:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "* * * * *
>
> "(b) The PAPA allows *new uses* that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]" (Emphasis added.)

In the present case, intervenor argued to the hearings officer that the industrial uses allowed under the RI designation and zone do not constitute "new uses" for purposes of OAR 660-023-0250(3)(b), and thus Goal 5 did not apply,

because there were some properties zoned RI within the Highway 97 scenic corridor when it was acknowledged in 1992, and thus industrial uses that are allowed in the RI zone are not "new uses" within the scenic corridor.

The hearings officer disagreed, citing a recent LUBA opinion, *Central Oregon Landwatch v. Deschutes County*, LUBA No 2023-008 (Apr 24, 2023) (*LBNW*), which also involved a PAPA applying the RI zone to property within the Highway 97 scenic corridor. In *LBNW*, we rejected the same argument intervenor made to the hearings officer in this appeal. We concluded that, although there were RI-zoned properties in the Highway 97 scenic corridor in 1992 when the LM overlay zone and the county's scenic corridor program were acknowledged, the county's ESEE analysis supporting that program did not consider the impacts of industrial development of the subject property or other properties within the scenic corridor not already zoned RI. We concluded that rezoning the subject property to industrial use would allow "new uses" that could conflict with the scenic resource, for purposes of OAR 660-023-0250(3)(b), and the county therefore erred in failing to apply Goal 5 to the PAPA. *Id.*, slip op at 37-39. In the present appeal, based on our holding in *LBNW*, the hearings officer recommended that the board of commissioners deny the application, unless interventor demonstrated that the PAPA complied with Goal 5, via an updated ESEE analysis.

The board of commissioners, however, agreed with intervenor that because the scenic corridor included some RI-zoned properties in 1992, when the county's

program was acknowledged, and because the RI zone at that time allowed more intensive industrial uses than the applicable RI allows, industrial development of the subject property would not introduce "new uses" that could conflict with the scenic corridor, for purposes of OAR 660-023-0250(3)(b).[1] Accordingly, the board of commissioners concluded that Goal 5 does not apply and "a site specific ESEE analysis is not required." Record 58.

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[1] The board of commissioners' findings state, in relevant part:

> "In response to the [r]ecommendation of denial, [intervenor] submitted arguments to demonstrate that at the time of the 1992 ESEE analysis associated with the Highway 97 scenic corridor, the zoning and development standards within the scenic corridor allowed a wider variety of uses and a more intensive level of development than would be allowed under today's RI Zone. This corridor included properties zoned RI at the time of the 1992 ESEE. For these reasons, [intervenor] argues that the proposed RI Zone on the subject property will not introduce new uses that would conflict with the Highway 97 scenic corridor. In the alternative, [intervenor] submitted an ESEE analysis to evaluate which uses in the proposed RI Zone should be allowed; which uses should be allowed with restrictions; and which uses should not be allowed.
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> "The [board of commissioners] agrees with the applicant that the proposed RI zone will not introduce new uses that would conflict with the Highway 97 scenic corridor. Consequently, the [board of commissioners] finds the Comprehensive Plan Amendment and Zone Change comply with Goal 5. The [board of commissioners] further finds that because the proposal would not introduce new conflicting uses, a site specific ESEE analysis is not required." Record 57-58 (footnote omitted).

On appeal, petitioner argues that the board of commissioners misconstrued OAR 660-023-0250(3)(b) in concluding that the PAPA would not allow "new uses that could be conflicting uses" with the scenic resource. In addition, petitioner argues that the county's decision is inconsistent with the 1992 ESEE analysis that the county adopted in Ordinance 92-052 to implement its Goal 5 program with respect to scenic resources, and with related comprehensive plan provisions, adopted in Ordinance 92-033 (collectively, the county's 1992 Goal 5 legislation). Based on the alleged inconsistencies with the county's 1992 Goal 5 legislation, petitioner argues that the PAPA cannot be approved as a matter of law, and thus the decision should be reversed rather than remanded.

Initially, intervenor responds that the issues and arguments raised in the first assignment of error were not raised during the proceedings below and are thus waived. ORS 197.797(1); *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991).[2] Under *Boldt*, issues must be raised below with sufficient

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[2] ORS 197.797(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record 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."

specificity to provide "fair notice" to the local government and other parties. 107 Or App at 623.

Petitioner replies that it prevailed before the hearings officer on the issue of whether Goal 5 applied and required a Goal 5 evaluation and an updated ESEE analysis and that the board of commissioners addressed the Goal 5 issue in its decision. Reply Brief 1 (citing Record 1687, 1229-31). We agree with petitioner that the issue of whether Goal 5 applied was adequately raised below. *See Kipp v. City of Astoria*, LUBA No 2024-012 (Dec 11, 2024) (slip op at 20-21) (reasoning that the petitioner pointing to specific findings that address the same issue that the petitioner raises on appeal is sufficient to demonstrate that the issue was in fact raised and addressed during the local proceedings).

Petitioner also replies that it raised the issue of inconsistency with the county's Goal 5 program with sufficient specificity, as evidenced by the fact that intervenor responded to those issues in detail, at Record 324-29. We agree with petitioner that the issues raised in the first assignment of error, alleging that the PAPA is inconsistent with cited provisions of the county's Goal 5 program, were raised with sufficient specificity below to afford the parties an opportunity to respond.

On the merits, we agree with petitioner that the board of commissioners erred in concluding that the PAPA does not allow new uses that "could be conflicting uses with a particular significant Goal 5 resource site." OAR 660-023-0250(3)(b). As we noted in *LBNW*, cited by the hearings officer in their

decision, the 1992 ESEE that formed the basis for the county's Goal 5 program with respect to scenic resources evaluated conflicting industrial uses only with respect to the sites then zoned RI. *See* Record 1686-87. Nothing cited to us in *LBNW* indicated that the 1992 ESEE evaluated the possibility that additional parcels along the scenic corridor would be rezoned to allow industrial uses, or evaluated potential conflicts that might arise from such rezoning. As we construed OAR 660-023-0250(3)(b), rezoning property to RI under such circumstances allows uses that "could be conflicting uses" with the scenic resource, and thus triggers application of Goal 5. *LBNW*, LUBA No 2023-008 (slip op at 36-40). That conclusion appears to apply with equal force to the present case, which has virtually identical circumstances. Intervenor does not address our holding in *LBNW* or attempt to distinguish it.

In their findings, the board of commissioners identified two bases for their conclusion that Goal 5 did not apply and need not be addressed. The first is that the 1992 ESEE evaluated conflicts from the parcels then zoned RI, and therefore rezoning additional parcels within the scenic corridor to allow additional industrial uses does not allow any "new uses" for purposes of OAR 660-023-0250(3)(b). We rejected that argument in *LBNW* as inconsistent with OAR 660-023-0250(3)(b) and do so again here.

The second cited basis is that the RI zone in 1992 allowed more intensive industrial uses than are allowed under the current RI zone. However, it is difficult to understand why that reasoning, if accurate, is a sufficient basis to conclude that

Goal 5 does not apply. Less intensive industrial uses still could conflict with the scenic resource. Indeed, as intervenor argues below, the LM zone appears to treat all development within the scenic corridor, no matter how intense, as contributing to conflicts with the scenic resource. *See* Record 256, 256 n 5. The lower intensity of uses allowed in the current RI zone compared to the 1992 RI zone might provide some support for a conclusion, based on an updated ESEE analysis, that the PAPA is consistent with Goal 5. But we do not see that any differences between the 1992 RI zone and the current version obviates the applicability of Goal 5 or the need to evaluate the ESEE consequences of allowing new uses that could conflict with the scenic resource.[3]

Intervenor next argues that the LM overlay zone, the county's primary vehicle for ensuring compliance with Goal 5 with respect to the Highway 97 scenic corridor, imposes restrictions on all development within the overlay zone, regardless of whether that development is a farm structure allowed outright in the EFU zone or an industrial plant allowed in the RI zone. Intervenor argues that the

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[3] It is worth noting in this respect that the ESEE analysis that intervenor submitted to the board of commissioners identifies certain industrial uses allowed in the current RI zone that the ESEE analysis asserted should be *prohibited* on the subject property. Record 181. We address below the puzzling question of whether and for what purpose the board of commissioners may have adopted intervenor's ESEE analysis. For present purposes, the fact that intervenor's ESEE analysis recommends prohibiting certain industrial uses allowed in the RI zone would seem to undercut any argument that the current RI zone does not include any uses that could conflict with the scenic resource.

LM overlay zone does not single out industrial uses as especially conflicting uses, but rather adopts a blanket approach focused on reducing the impacts of all development on the scenic resource. We understand intervenor to argue that, in relying on the LM overlay zone to achieve Goal 5 with respect to scenic resources, the county intended to allow any and all development within the scenic corridor, regardless of future re-zoning and the differential scenic impacts of uses allowed under a different mix of zones than were evaluated in the 1992 ESEE analysis, as long as the development could meet the LM site plan standards.

The county's decision did not endorse this argument, and it is inconsistent with OAR 660-023-0250(3)(b) and the Goal 5 process. The county's 1992 ESEE analysis was based on evaluation of the scenic impacts of uses allowed under the then-existing mix of zoning within the scenic corridor. Nothing cited to us suggests that the 1992 ESEE analysis purported to evaluate the scenic impacts of a different mix of uses that could be allowed if lands within the scenic corridor are rezoned in the future. The LM overlay zone was presumably crafted to reduce to acceptable levels impacts on the scenic resource from the uses allowed under the 1992 zoning. Nothing cited to us in the LM overlay zone or elsewhere suggests that it was designed to address impacts from a different mix of uses allowed under a different mix of zoning. OAR 660-023-0250(3)(b) functions to ensure that, when a local government changes comprehensive plan or zoning regulations in a manner that could affect a particular significant Goal 5 site, the local government considers, usually informed by an updated ESEE analysis,

whether any new uses allowed by the PAPA could conflict with the resource and, if so, whether the existing Goal 5 program is adequate to address conflicts arising from new uses. The local government cannot shortcut that process by simply assuming that the existing program is already adequate to address conflicts arising from new uses allowed by the new zoning.

Indeed, as noted, intervenor's ESEE analysis suggests that the LM overlay may be insufficient to address some of the conflicts arising from rezoning the subject property to allow industrial uses, and that additional measures or limitations may be needed. The status of intervenor's ESEE analysis and its relationship to the challenged decision is not clear to us. The board of commissioners found that "a site specific ESEE analysis is not required[,]" and none of the board of commissioners' findings address the substance of the ESEE analysis. Record 58. On the other hand, we note that the Ordinance that adopts the challenged PAPA states that the board of commissioners incorporate into its findings in support of the decision the "site specific [ESEE] analysis, attached as Exhibit 'H'[.]" Record 29.[4] So it appears that the board of commissioners adopted

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[4] Section 5 of Ordinance 2025-003 states:

> "FINDINGS. The [board of commissioners] adopts as its findings in support of this Ordinance the Decision of the Board of County Commissioners as set forth in Exhibit 'F' and incorporated by reference herein. The [board of commissioners] also incorporates in its findings in support of this decision, the Recommendation of the Hearings Officer, attached as Exhibit 'G' * * * and site specific

intervenor's ESEE analysis only as additional findings, although neither party cites to any finding in the ESEE analysis in support of any arguments on appeal. As far as we can tell, the board of commissioners did not intend to adopt intervenor's ESEE analysis as an updated ESEE analysis for purposes of Goal 5 or OAR 660-023-0250(3)(b). Had it done so, the board of commissioners would presumably have addressed the specific recommendations in the analysis, which, as noted, suggest that the county's existing program to protect scenic resources may not be adequate to address all conflicts that could arise from the challenged PAPA.

Finally, petitioner argues that application of the RI zone to the subject property is inconsistent with the 1992 ESEE analysis and Policies 4 and 10, which were apparently adopted as part of the 1992 ordinances adopting the county's Goal 5 program for scenic resources. As far as we are informed, the county adopted no findings addressing petitioner's arguments regarding the 1992 ESEE analysis or Policies 4 and 10. Intervenor disputes that the county was obligated to apply any language in the 1992 ESEE analysis or Policy 4 or 10 as approval criteria. Intervenor may be correct on that point. However, because the decision must be remanded in any event for the county to reevaluate whether the PAPA is consistent with Goal 5, the county can decide what relevance, if any, the cited 1992 legislation has to approving a PAPA within the scenic corridor.

[ESEE] analysis, attached as Exhibit 'H', each incorporated by reference herein." Record 29.

In sum, we agree with petitioner that the board of commissioners erred in concluding that the challenged PAPA does not allow "new uses" that could be conflicting uses with the scenic resource, for purposes of OAR 660-023-0250(3)(b), based on the two rationales asserted in the findings. Intervenor has not identified any other basis to conclude that Goal 5 does not apply. Accordingly, remand is necessary for the county to adopt findings addressing compliance with Goal 5 and the issues petitioner raised regarding the county's Goal 5 program. In doing so, the county may choose to clarify the status and role of intervenor's ESEE analysis. The county should also address the 1992 legislation adopting the county's Goal 5 program with respect to scenic resources and determine whether and what relevance that legislation has to the challenged PAPA.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county erred in failing to conduct a case-by-case, multi-factor evaluation to determine whether applying the RI zone to the subject property would allow urban uses of rural land, in contravention to Statewide Planning Goal 14 (Urbanization).

Goal 14 is, in part, "[t]o provide for an orderly and efficient transition from rural to urban land use[.]" Goal 14 has been interpreted to prohibit plan amendments that would allow urban use of rural land, without taking an exception to the goal. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447,

477, 724 P2d 268 (1986) (*Curry County*). While Goal 14 itself, and its implementing rules, provide little definitive guidance on what constitutes "urban" use of rural land, in the absence of such guidance caselaw has articulated a case-by-case, multi-factor test that focuses on density, context, location, level of services, proximity to urban growth boundaries, and other relevant considerations. *Shaffer v. Jackson County*, 17 Or LUBA 922, 927-28 (1989).

In the present case, the county did not conduct any site-specific analysis of whether the RI zone as applied to the subject property could allow urban uses, as described in *Curry County* and *Shaffer*. Instead, the county cited a LUBA opinion, *Central Oregon Landwatch v. Deschutes County*, LUBA No 2022-075 (Dec 6, 2022), *aff'd* 324 Or App 655, 525 P3d 895 (2023) (*Aceti V*), for the proposition that given the particular history of the county's RI zone, it can be applied to property without conducting a *Shaffer* analysis of consistency with Goal 14.

The *Aceti V* case was the fifth and final round of appeals involving the county's longstanding attempt to apply the RI zone to rural land without taking an exception to Goal 14. In between rounds of appeals, the county engaged in legislative amendments to the RI zone and its governing comprehensive plan policies intended to ensure that the zone could not allow urban industrial uses on rural land, no matter the local circumstances in which the zone was applied. Those amendments included limitations on density and intensity that were well within safe harbor provisions that the Land Conservation and Development

Commission (LCDC) had adopted for rural industrial uses within rural unincorporated communities. The newly amended RI zone and its supporting comprehensive plan policies were acknowledged to comply with the statewide planning goals, including Goal 14. On appeal in the final *Aceti V* opinion, we rejected the petitioner's Goal 14 challenge, concluding that, given that legislative history, the amended RI and its supporting plan policies were "independently sufficient" to demonstrate consistency with Goal 14, making it unnecessary for the county and LUBA to review a site-specific *Shaffer* analysis. *Aceti V*, LUBA No 2022-075 (slip op at 17-18). We re-affirmed that holding in the *LBNW* case. *See* LUBA No 2023-008 (slip op at 11-12).

Under those cases, the county can demonstrate that application of the RI zone to property is consistent with Goal 14, based solely on its legislative history, supporting plan provisions, and restrictions designed to limit the intensity of industrial uses below the minimal standards adopted by LCDC for industrial uses in rural unincorporated communities, without conducting a site-specific *Shaffer* analysis. In this appeal, petitioner does not address either case, attempt to distinguish them, or argue (at least explicitly) that they should be overruled. Absent a developed argument that *Aceti V* and *LBNW* should be distinguished or overruled, we see no basis to reach a different conclusion in the present case.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

The county concluded that the subject property is not "agricultural land" as defined in OAR 660-033-0020(1)(a)(B), which describes "agricultural land" for purposes of Goal 3 (Agricultural Lands) to include:

> "Land in other soil classes [than Class I-VI] 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[.]"

ORS 215.203(2)(a) defines "farm use" in relevant part as:

> "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."

In findings adopted by the board of commissioners, the hearings officer found:

> "Considering the factors set forth in OAR 660-033-0020(1)(a)(B), I find that it is more likely than not that the [s]ubject [p]roperties are not suitable for farm use as defined in ORS 215.203(2)(a). While it may be possible to conduct some farm activities on the site, that is not the same as employing the land for the primary purpose of obtaining a profit in money from those activities. The low productive soils serve as an initial limit on any profitable farm

> activities. As [intervenor's] soil scientist notes, even irrigating the soils found on site does not improve their quality for farm uses. The [s]ubject [p]roperties are relatively small, irregularly-shaped, and bisected by a rocky outcropping, compounding the difficulties associated with the soil conditions. The portion of the site with the best soils is even smaller and not large enough to support meaningful farming activities. Further, while historical use of the site is not determinative of its current suitability, it is notable that the majority of the farming activities taking place on the site occurred at a time when the [s]ubject [p]roperties were part of a larger tract, or were part of a residential use." Record 66.

Under the third assignment of error, petitioner argues that the above-quoted finding is not supported by substantial evidence, and misconstrues the applicable law, OAR 660-033-0020(1)(a)(B) and the definition of "farm use" at ORS 215.203(2)(a).

Intervenor submitted extensive evidence regarding past use of the subject property, including periods prior to 1921 when it was part of a larger 160-acre ranch. During this period a barn on the property was used to stable horses as part of a stagecoach line.

After the property was separated from the Howard tract in 1921, residents of the property engaged in various agricultural activities, primarily raising livestock, including sheep, goats, cows, pigs, burros, mules, and turkeys. At one point a resident sold bouquets of lilacs raised in a backyard garden, as part of the "Funny Farm" conditional use. Petitioner initially argues that this undisputed history of agricultural activity is conclusive proof that the property is suitable for "farm use" as defined in ORS 215.203(2)(a), considering the factors set forth in OAR 660-033-0020(1)(a)(B).

Intervenor responds that petitioner failed to raise below the issue of whether the historic agricultural activities on the property conclusively establish that it is suitable for farm use. Petitioner replies that this issue was raised in a letter beginning at Record 1066, which petitioner cited in the petition for review. Reply Brief 4; Petition for Review 30. Petitioner contends that the letter raised the issue with sufficient specificity for intervenor to respond at length and for the county to adopt responsive findings. Record 247-53; Record 65. We agree with petitioner.

On the merits, intervenor responds that the county's findings correctly apply OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a), and that those findings are supported by substantial evidence. 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 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).

The hearings officer dismissed the documented agricultural activities on the property that occurred more than a century ago, such the stabling of horses for the stagecoach line, at a time when the property was part of a much larger unit of land. We agree with the hearings officer that agricultural activities that

occurred more than a century ago, when the property was part of a much larger unit of land, and when the existing land use patterns, technology and energy inputs, and accepted farming practices were almost certainly somewhat different than today, are not particularly probative of the property's current suitability for farm use.

With respect to agricultural activities on the property after 1921, the hearings officer found that those activities were all incidental to residential use of the property, represented hobby farming, or were part of the commercial tourist attraction on the property, approved as a conditional use, for a petting zoo and other animal attractions. A reasonable person viewing the evidence on this point could reach the conclusion the hearings officer did. Accordingly, the findings on this point are supported by substantial evidence.

To the extent petitioner argues that the past agricultural activities on the property conclusively demonstrate as a matter of law that the property is suitable for farm use, we disagree. Historic use of a property is relevant, but not conclusive on the question of whether the property is suitable for farm use under OAR 660-033-0020(1)(a)(B). Just as past failed attempts at farming a property are not conclusive in demonstrating that the property is unsuitable for farm use as defined at ORS 215.203(2), the fact that agricultural activities have occurred on the property in the past is not, contrary to petitioner's argument, conclusive evidence that the property is suitable for farm use. Suitability is determined based on consideration of all the factors listed in OAR 660-033-0020(1)(a)(B), and the

actual historic use of the property, while relevant, is not conclusive in establishing that the property is or is not suitable for farm use.

Under the fourth assignment of error, petitioner advances related arguments under each of the OAR 660-033-0020(1)(a)(B) factors.[5] Those arguments mostly ask LUBA to reweigh the evidence in the record, rather than apply the appropriate standard of review: whether a reasonable person could reach the conclusion the hearings officer did, viewing the evidence in the whole record. We address below petitioner's specific arguments regarding each factor.

A. Soil Fertility

With respect to soil fertility, the hearings officer found, based on the soil scientist's report, that irrigating the soils on the property does not improve their quality for farm uses. Record 65-66. The hearings officer cited that point, among others, in concluding that the subject property is not suitable for farm use, considering soil fertility. Petitioner argues that the finding regarding the efficacy of irrigation is belied by photographs in the record showing brownish-greenish pasture on part of the property. However, a reasonable person could conclude, based on the soil report, that the soils on the property, which are predominantly

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[5] Intervenor concedes that petitioner quoted the OAR 660-033-0020(1)(a)(B) factors, at Record 1071. Intervenor argues that petitioner failed to raise any specific issue under each factor, as it does in the petition for review. However, petitioner does so in the pages following the quote. *See* Record 1071-73. We agree with petitioner that the issues raised in the fourth assignment of error are not waived.

Class VII-VIII non-agricultural soils, are not improved by irrigation. The soil report noted the existence of small inclusions of better-quality soils on the property, and it is certainly possible that small portions of the property have soils that could benefit from irrigation. However, even if so, that would not undermine the hearings officer's conclusion that considerations of soil fertility, on balance, support a finding that the property is not suitable for farm use.

Relatedly, petitioner challenges the finding that:

> "While it may be possible to conduct some farm activities on the site, that is not the same as employing the land for the primary purpose of obtaining a profit in money from those activities. The low productive soils serve as an initial limit on any profitable farm activities." Petition for Review 42 (quoting Record 66).

Petitioner contends that this finding misconstrues OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a), which do not require that farm activities be "profitable." Petitioner notes that the rule itself does not mention profitability, and the referenced statute, the definition of "farm use" at ORS 215.203(2)(a), refers only to the "current employment of land for the primary purpose of obtaining a profit in money" by engaging in specified activities. Petitioner argues that the statute refers to purpose or motivation, and it is indifferent to whether or not the farm activity actually results in a profit, as well as to the size of that profit.

However, we do not read the foregoing finding to characterize as "farm use" only those farm activities that are actually "profitable." Like ORS 215.203(2)(a) itself, the hearings officer was attempting to draw a distinction

(admittedly, not an easy task) between agricultural activities that constitute "farm use" and other agricultural activities, usually characterized as "hobby" farming, that do not constitute farm use. Attempting to draw that distinction in evaluating evidence of historic use is consistent with the statute and, because the rule references the statute, consistent with the rule.

Intervenor submitted evidence that all of the agricultural activities conducted on the property since it was separated from the parent ranch were conducted with some other primary purpose than obtaining a profit in money, for example, raising weaner pigs as a 4-H project, or otherwise as an activity incidental to residential use, and hence those activities do not qualify as "farm use." No party submitted any countervailing evidence. The hearings officer's findings on these points are supported by substantial evidence. The hearings officer did not err in finding that consideration of the soil fertility factor supports a conclusion that the subject property is not suitable for farm use under OAR 660-033-0020(1)(a)(B).

B. Suitability for Grazing

As noted, until 1921 the subject property was part of a larger tract known as the Howard Ranch. Petitioner cites evidence that the Howard tract has similar soils to the subject property, and that cattle grazing occurred or is occurring on irrigated portions of the former Howard Ranch. We understand petitioner to argue that if cattle are grazed on irrigated soils nearby that are similar to the soils on the subject property, then the subject property is also necessarily suitable for

grazing. Accordingly, petitioner argues, the hearings officer erred in concluding that the "suitability for grazing" factor is not met. OAR 660-033-0020(1)(a)(B).

Intervenor responds that the subject property has a number of differences between the parts of the former Howard Ranch that were historically or are currently being grazed, including parcel size, steep topography, a rock spine that transects the subject property, isolation from all adjoining properties due to roads and the canal, and other distinguishing features. Intervenor Respondent's Brief 32-33 (citing Record 1015-22, 1157). We agree with intervenor that the fact that the subject property shares soil types with nearby properties that have historically or are currently being grazed is not sufficient to establish that the subject property is suitable for grazing, given that the record and findings identify a number of salient obstacles to grazing the property that are not present on other portions of the former Howard Ranch. Petitioner has not established that the hearings officer erred in concluding that the suitability for grazing factor does not support a finding that the property is suitable for farm use.

C. Climatic Conditions

The hearings officer agreed with intervenor that general climatic conditions in the county such as the limited growing season, drought conditions, temperature extremes, indicate that the "climatic conditions" factor supports a conclusion that the subject property is not suitable for farm use. OAR 660-033-0020(1)(a)(B). Petitioner argues to the contrary that precisely because the subject property shares the same general climatic conditions as other farms and ranches

in the county that are, nonetheless, used for grazing livestock, it follows that this factor supports the conclusion that the property *is* suitable for farm use.

Intervenor responds that, even if it is true that the property is subject to the same general climatic conditions as other grazing lands in the county, the property has many physical features distinguishing it from other grazing lands (small size, poor soils, rock ridge transecting the property, isolation from other farms and ranches, etc.). According to intervenor, it is these site-specific limitations that underpin the hearings officer's ultimate conclusion, after considering all factors, that the property is not suitable for farm use. We understand intervenor to argue that consideration of the climatic conditions factor in this case is, at best, neutral with respect to the property's suitability for farm use, and that suitability must be determined based on the other OAR 660-033-0020(1)(a)(B) factors.

We agree with intervenor that consideration of the climatic conditions factor in this case is seemingly neutral with respect to the overarching question of suitability for farm use, given the apparent uniformity of the cited climatic conditions over the entire county. Given that uniformity, adverse climatic conditions do not provide much support for a conclusion either that the property is unsuitable for farm use, or that the property is suitable. We address below petitioner's challenge to the hearings officer's ultimate conclusion that, on balance, the OAR 660-033-0020(1)(a)(B) factors do not indicate that the property is suitable for farm use. Subtracting consideration of neutral climatic conditions

from that weighing does not change that conclusion. Accordingly, petitioner's arguments on this factor do not provide a basis for reversal or remand.

D. Existing and Future Availability of Water for Farm Irrigation Purposes

The hearings officer noted that the property has rights to irrigate 14 acres of land, but agreed with intervenor that, given the predominate poor soils, irrigation does not provide much benefit to efforts to farm or ranch the subject property. Record 66. On appeal, petitioner argues the availability of irrigation compels the conclusion that the property is suitable for farm use considering this factor.

We agree with intervenor that this factor is not a simple binary choice, with the presence of irrigation necessarily pointing toward suitability for farm use, and the absence of irrigation necessarily pointing toward the opposite conclusion. Other considerations, such as the degree to which soil productivity on the property is improved if irrigation were applied, also play a role. Here, the hearings officer found, based on the soil study, that the predominate Class VII/VIII soils do not benefit from irrigation, and that finding is supported by substantial evidence. Hence, the availability of irrigation does not compel a conclusion that the property is suitable for farm use.

E. Existing Land Use Patterns

The hearings officer found that the existing land use patterns in the area are not conducive to agricultural use of the property, because the property is

surrounded by non-farm uses and disrupted by the adjoining or nearby transportation systems. Petitioner disputes that characterization of the existing land use pattern, arguing that agricultural zoning is widespread around the subject property, and that construction of the highway in 1937 and other subsequent road improvements in the area did not disrupt farm use of the property, as evidenced by the fact that grazing livestock of various kinds continued on the property thereafter. Petitioner notes that the nearby railroad track was once used to transport sheep raised on the Howard Ranch, and so disputes that the railroad track is a disruptive or limiting factor.

Intervenor responds that petitioner mischaracterizes the existing land use pattern, and that the evidence in the record shows that most of the immediately surrounding area is in fact zoned for, or developed with, non-farm uses. Record 189-90. We agree with intervenor that the record supports the hearings officer's characterization of the existing land use pattern in the area as largely non-farm. The record also supports a finding that the transportation system in the area is disruptive, at least in the sense that it isolates the subject property from any surrounding properties that remain in farm use. The hearings officer did not err in concluding that consideration of the existing land use pattern, on balance, supports a conclusion that the subject property is not suitable for farm use.

F. Technological and Energy Inputs Required; Accepted Farming Practices

The hearings officer agreed with intervenor that the technological and energy inputs needed to conduct farm use of the property are substantial, which is perhaps a reason why the subject property has not been farmed, historically, to any degree. Petitioner disputes that conclusion, arguing that the property has been used for farm use in the past, and that no additional technological or energy inputs are needed in order to resume that historic level of farm use. Relatedly, petitioner argues that the historic farm practices on the property, mainly irrigating pasture to raise various types of livestock, are still feasible, low-technology, low-energy endeavors that the subject property can support.

However, as discussed, we have affirmed the hearings officer's findings regarding agricultural activities on the property since division of the Howard Ranch, that such activities were incidental to residential use of the property, or related to the commercial conditional use, and thus did not constitute "farm use" as defined at ORS 215.203(2)(a). Accordingly, petitioner's disagreement with the hearings officer on this point does not provide a basis for reversal or remand.

G. Ultimate Conclusion on Suitability for Farm Use

After weighing all seven of the OAR 660-033-0020(1)(a)(B) factors, the hearings officer concluded that, on balance, it is more likely than not that the subject property is not suitable for farm use as defined in ORS 215.203(2)(a). Petitioner has not demonstrated that those findings are inadequate or not supported by substantial evidence. The record supports a conclusion that most of

the seven factors point to non-suitability for farm use. Accordingly, we affirm the county's conclusion that the property is not suitable for farm use, and hence not agricultural land as defined at OAR 660-033-0020(1)(a)(B).

The third and fourth assignments of error are denied.

The county's decision is remanded.