

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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

BCL LLC,
Intervenor-Respondent.

LUBA No. 2026-015

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

No appearance by Deschutes County.

Christopher P. Koback filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Buchanan Schmid Koback.

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

REMANDED 06/26/2026

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

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a board of commissioners ordinance adopting a post-acknowledgement plan amendment (PAPA) redesignating and rezoning a tract of 240 acres.

MOTION TO INTERVENE

BCL LLC (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition and the motion is allowed.

FACTS

The subject tract consists of four tax lots totaling approximately 240 acres, designated Agriculture and zoned Exclusive Farm Use – Tumalo/Redmond/Bend (EFU-TRB). The tract consists of tax lots 100 (100 acres) and 400 (38 acres), both located north of Highway 20, and tax lots 900 (44 acres) and 1000 (57 acres), both located south of Highway 20.¹ That stretch of Highway 20 is designated a scenic route protected under the county's Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) program, via an overlay zone known as Landscape Management Combining (LM) zone. Under the LM zone, development within one-quarter mile of Highway 20 is subject to restrictions designed to protect scenic views.

¹ The application originally included a fifth tax lot, 300, which has higher value soils than most of the rest of the tract. Intervenor later modified the application to remove tax lot 300 from the proposed redesignation and rezoning.

1 Tax lot 100 is developed with a 62-acre solar panel array, approved in 2015
2 as a conditional use in the EFU zone. Tax lots 900 and 1000 are developed with
3 a lot-of-record dwelling and a nonfarm dwelling, respectively.

4 In February 2024, intervenor applied to the county to redesignate the tract
5 to Rural Residential Exception Area (RREA) and to rezone it Multiple-Use
6 Agriculture – 10-acre (MUA-10). In the application, intervenor argued that an
7 exception to Statewide Planning Goal 3 (Agricultural Lands) is unnecessary,
8 because the subject tract does not qualify as “agricultural land” as defined at OAR
9 660-033-0020(1)(a).² According to Natural Resources Conservation Survey
10 (NRCS) maps of the area, soils on the tract consist of three soil types, Deskamp
11 36A, Deskamp 36B, and Gosney-Rock Outcrop-Deskamp Complex (Gosney
12 Complex) 58C. Record 73. The Deskamp 36A and 36B soils are considered

² OAR 660-033-0020(1)(a) defines “agricultural land” as defined in Goal 3 to include:

- “(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;
- “(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and
- “(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.”

1 agricultural soils and high-value if irrigated, while the Gosney Complex 58C soil
2 is considered non-agricultural Class 7 or 8 soils, regardless of irrigation. Record
3 1254-55. The property currently has no irrigation rights. Record 1256. Intervenor
4 hired a soil scientist to interpret the NRCS maps, and based on that interpretation
5 the soil scientist concluded that the subject tract is comprised predominantly of
6 nonagricultural Gosney Complex 58C soils, and hence does not qualify as
7 “agricultural land” under OAR 660-033-0020(1)(a)(A). Record 1254.³ The soil
8 scientist also opined that the subject tract is not “land in other soil classes that is
9 suitable for farm use” for purposes of OAR 660-033-0020(1)(a)(B), or
10 “necessary to permit farm practices” on adjacent or nearby agricultural lands
11 under OAR 660-033-0020(1)(a)(C).

³ OAR 660-033-0030(2) provides, in part, that “[w]hen a jurisdiction determines the predominant soil capability classification of a lot or parcel it need only look to the land within the lot or parcel being inventoried.” Thus, for purposes of determining the predominant soil capability classification, the unit of analysis is the “lot or parcel.” “Lot” and “parcel” are defined at OAR 660-033-0020(10) and (13), with reference to statutory definitions at ORS 92.010 and ORS 215.010, which in turn describe discrete units of land created in certain ways. A “tract,” on the other hand, means “one or more contiguous lots or parcels under the same ownership.” OAR 660-033-0020(14). The subject tract apparently consists of multiple discrete units of land, or “lots of record” in the county’s parlance. Record 71. On appeal, no party questions the methodology of intervenor’s soil report in using the entire 240-acre tract as the unit of analysis to determine the *predominant* soil capability classification for purposes of OAR 660-033-0020(1)(a)(A), and we consider that question no further.

1 The subject tract is located approximately one-quarter mile east of the City
2 of Bend's urban growth boundary (UGB). Surrounding uses include two
3 churches, an electrical power substation, a 95-acre city park, lands developed
4 with solar panel arrays, and a number of smaller parcels developed with
5 residential uses.

6 The county hearings officer conducted a hearing on the application and
7 recommended approval. The board of commissioners conducted *de novo*
8 hearings on the application and, on January 28, 2026, issued an ordinance
9 approving the proposed comprehensive plan and zoning amendments.

10 This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 The MUA-10 zone is a rural residential zone that, as its name suggests,
13 provides for a minimum lot or parcel size of 10 acres. Deschutes County Code
14 (DCC) 18.32.040(A). That minimum lot or parcel size is consistent with
15 Deschutes County Comprehensive Plan (DCCP) 3.3.1, which prescribes that "the
16 minimum parcel size for new rural residential parcels shall be 10 acres."⁴

17 However, DCC 18.116.400(A)(1) and (2) provide that within the MUA-10
18 zone cluster and planned unit developments (PUDs) are allowed as conditional

⁴ As discussed further, below, and extensively explained in *Central Oregon Landwatch v. Deschutes County*, LUBA No 2024-080 (Apr 13, 2026) (*Pohaku Farms*), the county is in the process of amending its comprehensive plan, which includes amending and renumbering DCCP 3.3.1. We continue to refer and cite to this policy as DCCP 3.3.1.

1 uses, subject to DCC 18.128. DCC 18.128.200 provides conditional use standards
2 for cluster development, while DCC 18.128.210 sets out standards for PUDs.
3 Both sets of standards allow for smaller lot or parcel sizes than 10 acres. Under
4 DCC 18.128.200(B)(2), the area not dedicated to open space or common use in a
5 cluster development may be platted for dwelling units with a minimum lot area
6 of two acres and a maximum lot area of three acres. For PUDs, a minimum lot
7 area “shall be 40 acres[,]” although “[a]n equivalent overall density factor may
8 be utilized in lieu of the appropriate minimum lot area[.]” and “the densities shall
9 not exceed that established by the underlying zone.” DCC 18.128.210(D)(2)-(4).
10 Pursuant to DCC 18.116.400(3), the minimum equivalent density in the MUA-
11 10 zone for cluster and planned unit development is one unit per seven and one-
12 half acres, although cluster developments and PUDs within one mile of a UGB
13 are allowed a five-acre minimum lot area or equivalent density.⁵

14 In *Central Oregon Landwatch v. Deschutes County*, we remanded to the
15 county to consider in the first instance whether the sub-10-acre lot sizes in cluster
16 developments and PUDs allowed in the MUA-10 zone conflicted with DCCP

⁵ The DCC does not define the terms “overall density” or “equivalent density,” but we understand them to mean something like average density per dwelling unit, including all land within the tract, including acreage dedicated to open space or common areas. Under this approach, individual residential lots within a cluster development or PUD can be two acres in size, for example, but the development as a whole may have an overall or equivalent density of 10 acres per dwelling unit, when open space and common areas are factored in.

1 3.3.1, citing *Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975),
2 for the proposition that a comprehensive plan provision controls over a
3 conflicting zoning code provision. LUBA No 2025-015 (June 26, 2025) (*Destiny*
4 *Court*) (slip op at 7-8). At the time we issued *Destiny Court*, the county was
5 engaged in a legislative update to the DCCP. In response to our remand in *Destiny*
6 *Court*, the county adopted new DCCP policies that allowed, as an explicit
7 exception to the 10-acre-minimum imposed by DCCP 3.3.1, cluster and PUD lot
8 sizes smaller than 10-acres in county rural residential zones. Subsequently, on
9 appeal of that update to the DCCP, we concluded that the new DCCP policies
10 facially conflicted with state law, at least to the extent they authorized cluster
11 developments and PUDs on non-resource land, that is, land found not to qualify
12 as agricultural land as defined at OAR 660-033-0020(1)(a). *Central Oregon*
13 *Landwatch v. Deschutes County*, LUBA No 2024-080 (Apr 13, 2026) (*Pohaku*
14 *Farms*).

15 In the present case, petitioner argued to the county, as it did in *Destiny*
16 *Court*, that sub-10-acre development allowed in the MUA-10 zone facially
17 conflicts with DCCP 3.3.1. Neither the board of commissioners' findings nor the
18 incorporated hearings officer's findings address that argument. On appeal,
19 petitioner argues that remand is necessary for the county to address the alleged
20 conflict. Alternatively, petitioner argues that LUBA should simply reverse the
21 decision, as the sub-10-acre minimum lot sizes allowed in the MUA-10 zone
22 clearly conflict with DCCP 3.3.1.

1 Intervenor responds that the application did not propose, and the county
2 did not approve, cluster development or PUD allowed in the MUA-10 zone, or
3 any particular development at any particular density. Intervenor argues that it
4 remains to be seen what kind of development, at what density, future land use
5 applications will seek. Intervenor argues that remanding or reversing the county's
6 decision based on hypothetical development scenarios would essentially result in
7 an advisory opinion on a future land use application not before the county, or
8 LUBA.

9 Moreover, intervenor submits that, given the current state of the law as
10 reflected in LUBA's rulings in *Density Court* and *Pohaku Farms*, the county
11 would likely deny any application for cluster developments or PUDs that
12 proposed sub-10-acre equivalent minimum lot sizes. According to intervenor,
13 until the county takes further steps to resolve the apparent conflict between DCCP
14 3.3.1 and the cluster development and PUD standards allowing sub-10-acre
15 minimums on non-resource lands, a prudent applicant would apply only for a
16 straightforward subdivision under the MUA-10 zone's default 10-acre minimum
17 lot size, and not seek cluster or PUD development at sub-10-acre minimums.

18 Petitioner replies that the challenged decision does not limit development
19 to 10-acre parcels, but on the contrary the findings assumed that the property
20 would be developed with cluster development or PUD at sub-10-acre minimums.
21 Petitioner argues that the time to determine whether development and densities
22 allowed under the MUA-10 zone are consistent with DCCP 3.3.1 is the present

1 PAPA, not a future land use application under the MUA-10 zone. Petitioner
2 contends that without some limitation or condition imposed in this decision,
3 nothing guarantees that in evaluating a future development proposal on the
4 property the county would apply DCCP 3.3.1 or ensure compliance with its
5 mandate for 10-acre-minimum parcel sizes for rural residential development.

6 Petitioner is correct that the county's findings assume that the property,
7 once redesignated and rezoned to MUA-10, could be developed with cluster
8 development or PUD at sub-10-acre minimums, as the highest density use of the
9 property. Record 67 (Statewide Planning Goal 14 (Urbanization) analysis).
10 Although petitioner raised below the issue of whether densities allowed under the
11 MUA-10 zone would be consistent with DCCP 3.3.1, the findings do not address
12 that issue, or explain why it need not be addressed. We agree with petitioner that
13 that issue is most appropriately addressed in the context of the present plan and
14 zoning amendment that creates the potential conflict, not a subsequent land use
15 application for a specific development proposal. As it stands, nothing in the
16 county's decision would prevent a future applicant from seeking cluster
17 development or PUD on the subject tract at sub-10-acre densities, and nothing
18 cited to us in the DCCP or DCC or elsewhere would ensure that the issue of
19 consistency with DCCP 3.3.1 would be addressed and resolved in approving or
20 denying a specific development proposal. Accordingly, we agree with petitioner
21 that remand is appropriate for the county to address and resolve in the first

1 instance the issues raised below regarding whether application of the MUA-10
2 zone in the present case is consistent with DCCP 3.3.1.

3 The first assignment of error is sustained.

4 **SECOND ASSIGNMENT OF ERROR**

5 As noted, OAR 660-033-0020(1)(a)(B) defines “agricultural land” to also
6 include “[l]and in other soil classes that is suitable for farm use as defined in ORS
7 215.203(2)(a), taking into consideration soil fertility; suitability for grazing;
8 climatic conditions; existing and future availability of water for farm irrigation
9 purposes; existing land use patterns; technological and energy inputs required;
10 and accepted farming practices[.]” As shorthand, we refer to this test as the
11 “suitability” test.

12 The suitability test sets out seven factors or considerations that must be
13 applied to determine whether a property with non-agricultural soils is nonetheless
14 “suitable for farm use as defined at ORS 215.203(2)(a).” The statute defines
15 “farm use” broadly to include, in relevant part:

16 “As used in this section, ‘farm use’ means the current employment
17 of land for the primary purpose of obtaining a profit in money by
18 raising, harvesting and selling crops or the feeding, breeding,
19 management and sale of, or the produce of, livestock, poultry, fur-
20 bearing animals or honeybees or for dairying and the sale of dairy
21 products or any other agricultural or horticultural use or animal
22 husbandry or any combination thereof. * * * ‘Farm use’ also
23 includes the current employment of land for the primary purpose of
24 obtaining a profit in money by stabling or training equines including
25 but not limited to providing riding lessons, training clinics and
26 schooling shows.”

1 ORS 215.203(2)(a) distinguishes “farm use” from other kinds of potential
2 agronomic pursuits by imposing the qualification that the listed activities must
3 be conducted “for the primary purpose of obtaining a profit in money[.]” This
4 qualification is sometimes referred to as the “profitability” test.

5 To address the suitability test, intervenor initially submitted the testimony
6 of its soil scientist, opining that given the lack of irrigation for crops the only
7 potential farm use of the property is dry land cattle grazing, but that the poor soils
8 and other limitations of the property rendered it unsuitable even for grazing.
9 Petitioner asserted in response that the subject 240-acre tract is suitable for other
10 kinds of animal husbandry encompassed by ORS 215.203(2)(a), including
11 “[h]oney bees, raising poultry, mink farms, feedlots, and stabling or training
12 equines[.]” Record 1053. The hearings officer generally rejected those assertions,
13 noting the absence of any argument or evidence that such activities could be
14 undertaken with the primary purpose of obtaining a profit in money. Record 187-
15 88.

16 Before the board of commissioners, petitioner presented additional
17 argument, supported by some evidence, regarding animal husbandry and equine
18 facilities, arguing that to approve the application the county must adopt findings
19 that the property cannot be used to raise poultry, goats, sheep, llamas, alpacas
20 and similar animals, and that the property cannot be used for horse breeding,
21 boarding, or training facilities. Record 684. Petitioner submitted evidence
22 regarding an equine facility in the area, and a goat farm in North Carolina. In

1 response, intervenor submitted testimony from a farmer and equine facility owner
2 that addressed the equine facility and some of the animal husbandry uses
3 identified by petitioner. Records 702-06. The board of commissioners adopted
4 findings addressing the farm uses cited by petitioner, and cited the testimony
5 provided by intervenor's experts to conclude that intervenor had demonstrated
6 that the subject property is not suitable for any of the farm uses identified by
7 petitioner. Record 62-63.

8 On appeal, petitioner argues that the county misconstrued ORS
9 215.203(2)(a), OAR 660-033-0020(1)(a)(B), and LUBA's *Destiny Court*
10 decision, in improperly shifting the burden of proof to petitioner to demonstrate
11 that the property is suitable for the farm uses described in ORS 215.203(2)(a),
12 rather than requiring the applicant to demonstrate, and the county to find, that the
13 property is not suitable for those farm uses.

14 In *Destiny Court*, we agreed with the county that the applicant is not
15 required to go through a "rote initial exercise of evaluating every possible type
16 of activity that potentially falls within the broad definition of 'farm use,' and
17 produce evidence regarding whether the subject property is suitable for all
18 conceivable farm uses." LUBA No 2025-015 (slip op at 18). Instead, the
19 applicant has the initial burden of evaluating farm uses that are commonly
20 employed on similar EFU-zoned lands in the area or county. Intervenor's experts
21 testified, and petitioner does not dispute, that the most prevalent farm uses in the
22 area, as well as the county as a whole, are growing hay and raising livestock,

1 specifically cattle. Intervenor's application initially addressed these locally
2 prevalent farm uses, and that is consistent with the approach described in *Destiny*
3 *Court*.

4 The ORS 215.203(2)(a) definition of "farm use" includes raising other
5 kinds of livestock than cattle (*e.g.*, goats, sheep), raising non-livestock kinds of
6 animals (*e.g.*, poultry, fur-bearing animals), and generating products from
7 animals (*e.g.*, eggs, fur, honey, milk). In *Destiny Court*, we stated that responsive
8 analysis and findings may be necessary if other parties "identify specific farm
9 uses that are common in the area or county on EFU-zoned lands, and provide
10 some evidence or argument that the [subject] property is suitable for such uses,
11 considering the listed factors [in OAR 660-033-0020(1)(a)(B)]." LUBA No
12 2025-015 (slip op at 19). We noted that the applicant retains the ultimate burden
13 of proof and persuasion on these points. We remanded the decision in *Destiny*
14 *Court* because the petitioner submitted both argument and evidence that the
15 subject property was suitable for an equine facility, but the applicant did not
16 respond with any countervailing argument or evidence, and the hearings officer
17 adopted no findings on those points.

18 In the present case, petitioner argues that under *Destiny Court* all an
19 opponent has to do to oblige the applicant to prove, and the county to find, that
20 the subject property is *not* suitable for a specific farm use listed in ORS
21 215.203(2)(a) is to present an affirmative argument on that point, that is, assert
22 that the subject property *is* suitable for any and all farm uses described in the

1 statute. Petitioner notes that in *Destiny Court* LUBA referred to “some evidence
2 or argument,” not some evidence *and* argument. Even if bare argument may be
3 insufficient, petitioner contends that they presented evidence or cited evidence
4 already in the record to support their claims with respect to some of the identified
5 farm uses.

6 Intervenor responds, and we agree, that a bare assertion, without more, that
7 a property is suitable for a type of farm use that is uncommon or locally less
8 prevalent is an insufficient basis to obligate responsive evidence from the
9 applicant and findings from the county regarding that farm use. With limited
10 exceptions, petitioner’s assertions regarding less prevalent types of farm uses
11 (raising goats, etc.) were not supported by citation to any basis to conclude that
12 the subject property is suitable for such uses. Petitioner submitted a county-wide
13 census published by the US Department of Agriculture, which describes raising
14 poultry and livestock of various kinds as widespread and valuable farm activities
15 in the county. Record 687-88. Petitioner also submitted evidence regarding an
16 equine facility on a property near Bend, and a goat farm in North Carolina.
17 However, the question under OAR 660-033-0020(1)(a)(B) is the suitability of the
18 subject property for listed farm uses. In our view, to warrant obliging the
19 applicant to provide responsive evidence and the county to provide responsive
20 findings regarding less common or less prevalent farm uses that fall within the
21 statutory definition, a party cannot merely cite evidence that such ORS
22 215.203(2)(a) farm uses are conducted on other lands elsewhere in the county or

1 in the country. At a minimum, the party must also provide some basis to conclude
2 that the subject property shares relevant characteristics with the other property,
3 or some other similar basis to conclude that the subject property is suitable for
4 the identified farm use.

5 Obligating a party opponent to provide some support for assertions
6 regarding less common or prevalent farm uses does not, in our view, shift the
7 burden of proof and persuasion from the applicant. That is because if the initial
8 application addresses locally prevalent farm uses (in this case, hay-production
9 and cattle grazing), such farm uses stand to some extent as proxies for less
10 common or less prevalent farm uses. If lack of irrigation, soils and other factors
11 makes the property unsuitable for growing hay, the most common or prevalent
12 crop grown with the primary purpose of obtaining a profit in money, it is likely
13 that the property is also unsuitable for less common types of crops. Similarly, if
14 the property is unsuitable for raising cattle, the most common or prevalent form
15 of livestock operation in the area, then it is likely that the property is also
16 unsuitable for raising goats or other less common types of livestock. If that initial
17 showing is made, then the applicant has met its initial burden of proof by
18 establishing what is essentially a rebuttable presumption. A party opponent can
19 rebut that presumption by identifying a farm use that was not evaluated and
20 providing some basis to conclude that the subject property is suitable for that
21 farm use, considering the factors listed in OAR 660-033-0020(1)(a)(B). One way
22 to do so is to identify a similarly situated property on which the identified farm

1 use is, has been, or could be conducted. If that showing or a similar showing is
2 made, the applicant can meet its ultimate burden of proof and persuasion only by
3 providing evidence and argument that the property is not suitable for that
4 identified farm use. But we repeat that the mere unsupported assertion that the
5 property is suitable for an identified farm use listed in ORS 215.203(2)(a) is
6 insufficient to overcome the initial presumption.

7 In the present case, the county's findings addressing the evidence and
8 issues raised, including application of the burdens of proof and persuasion,
9 appear to be consistent with the approach described in *Destiny Court*, as
10 elaborated on in this opinion. We address below petitioner's arguments regarding
11 specific farm uses.

12 **A. Conjoined Grazing**

13 OAR 660-033-0030(3) provides, in part, that "Goal 3 attaches no
14 significance to the ownership of a lot or parcel when determining whether it is
15 agricultural land. Nearby or adjacent land, regardless of ownership, shall be
16 examined to the extent that a lot or parcel is * * * 'suitable for farm use[.]'"
17 Under the rule, the county must generally consider whether the subject property
18 could be grazed or farmed in conjunction with other nearby lands. Intervenor
19 presented evidence, cited by the hearings officer, that conjoined use is not
20 feasible with the few nearby lands that are in farm use. Record 197-98. On appeal,
21 petitioner advances general assertions that conjoined grazing is possible, but
22 without identifying or discussing any specific grazing operations on nearby lands

1 that the county failed to consider or consider fully. We agree with intervenor that
2 petitioner's arguments regarding conjoined grazing does not establish that the
3 county's findings are inadequate or not supported by substantial evidence.

4 **B. Irrigation**

5 Determining whether the subject tract is "agricultural land" required the
6 county to consider "existing and future availability of water for farm irrigation
7 purposes[.]" OAR 660-033-0020(1)(a)(B).

8 "Irrigated" means watered by an artificial or controlled means, such
9 as sprinklers, furrows, ditches, or spreader dikes. An area or tract is
10 'irrigated' if it is currently watered, or has established rights to use
11 water for irrigation, including such tracts that receive water for
12 irrigation from a water or irrigation district or other provider. For
13 the purposes of this division, an area or tract within a water or
14 irrigation district that was once irrigated shall continue to be
15 considered 'irrigated' even if the irrigation water was removed or
16 transferred to another tract." OAR 660-033-0020(9).

17 As the proponent for removing the agricultural resource designation,
18 intervenor has the burden of establishing "existing and future availability of water
19 for farm irrigation purposes[.]" including whether the area is within an irrigation
20 district, whether it was once irrigated, and future irrigation availability. OAR
21 660-033-0020(1)(a)(B), (9). The county's decision must "take into
22 consideration" and make findings on those facts. As noted, OAR 660-033-
23 0020(9) provides that "an area or tract within a water or irrigation district that
24 was once irrigated shall continue to be considered 'irrigated' even if the irrigation
25 water was removed or transferred to another tract." Thus the historical

1 availability of irrigation on the subject property is a potentially important
2 consideration under this factor.

3 Initially, we are not cited to any evidence or findings regarding whether
4 the tract or an area within the tract is within an irrigation district. Record 602
5 includes a map showing a Central Oregon Irrigation District (COID) canal across
6 the road from the northeast corner of tax lot 100. Other canals are present in the
7 area, but not adjoining or near the subject tract. Intervenor, as the applicant, bears
8 the burden of demonstrating whether or not the subject property is within an
9 irrigation district. Given the lack of evidence and findings on this point, for
10 purposes of our analysis we will assume the property is within an irrigation
11 district.

12 The next question under this factor is whether any part of the subject
13 property has, or once had, irrigation rights. It is undisputed that the subject
14 property currently lacks irrigation rights. With respect to historical irrigation,
15 intervenor cited evidence from COID that tax lot 100, currently developed with
16 the solar array, has never had irrigation rights. Record 698. However, we are cited
17 to no similar evidence from COID or elsewhere regarding history of irrigation on
18 the remaining tax lots within the tract.

19 Petitioner argues that it introduced aerial photographs from the 1940s to
20 1968 that, petitioner argued below, indicates that a roughly 30-acre portion of the
21 tract south of Highway 20 was once irrigated. Record 10. Petitioner argued below
22 that soils on this portion of the tract are mostly high-value soils if irrigated, and

1 that that history of irrigating high value soils is evidence that the “existing and
2 future availability of water for farm irrigation purposes” factor points toward
3 suitability for farm use, under OAR 660-033-0020(1)(a)(B). Petitioner also
4 argued below that new irrigation rights could be purchased and transferred to the
5 property.

6 The county adopted a finding rejecting both contentions:

7 “As an initial matter, the [b]oard [of commissioners] finds that the
8 subject property is not irrigated and has no ability to be irrigated
9 presently. The images that [petitioner] submitted as evidence of past
10 farming are not clear and do not prove that there was any farm
11 activity engaged in on the property for the purpose of making a
12 profit. Furthermore, the latest photograph was 50 years ago and
13 there is no evidence of any farming activity on the property since
14 that time. The [b]oard [of commissioners] finds persuasive the
15 testimony of Eric Hagerty, a local farmer/rancher who stated that the
16 cost to acquire water rights, if that is even possible, would be
17 prohibitive. Further, his testimony on the ability to conduct dry
18 grazing for any profit is credible.” Record 63.

19 On appeal, we agree with petitioner that in the above-quoted finding the
20 board of commissioners appeared to place on petitioner the obligation to
21 demonstrate that portions of the property were once irrigated, and further that the
22 farm uses supported by that irrigation were conducted with the purpose of making
23 a profit. The initial and ultimate burden on both those points lies with the
24 applicant. With the exception of tax lot 100, intervenor submitted no evidence
25 whatsoever regarding the presence or historic use of irrigation on portions of the
26 property. The soil report and other evidence submitted by intervenor did not

1 evaluate whether portions of the property were once irrigated and, if so, how such
2 historic irrigation bears on either the “availability of water” factor or the ultimate
3 conclusion that the subject property is not suitable for farm use, considering all
4 relevant factors. The soils report and other evidence submitted by intervenor
5 assumed only non-irrigated soil productivity.

6 Intervenor argues that its soil expert noted the difficulty of operating
7 irrigation equipment on the property, given the predominant Gosney complex
8 soils, and the fact that much of the 95-acres total of higher-quality Deskamp 36A
9 and 36B soils on the tract are found in isolated pockets scattered among areas of
10 rocky, poor quality soils, rather than concentrated together into a large field.
11 Record 1259-60. Such evidence might support an ultimate conclusion that, even
12 considering historic irrigation and the potential for irrigated farm uses on portions
13 of the property, the tract as a whole is not suitable for farm use under OAR 660-
14 033-0020(1)(a)(B). However, the county did not frame the inquiry in that way,
15 or attempt to answer that question, under its erroneous view that petitioner, rather
16 than the applicant, had the obligation to demonstrate whether historic irrigation
17 was present on the property and, if so, whether the activities supported by that
18 irrigation constituted “farm use.” As explained, the initial and ultimate burden on
19 those points lies with intervenor, if anyone. Because intervenor did not meet its
20 initial burden to address the “availability of water” factor as it applies to historic
21 water use, the alleged lack of clarity in the photographs that petitioner submitted

1 is not a basis to simply assume, as the county did, that no historic irrigation
2 occurred or, if it did, the associated farm activities did not qualify as “farm use.”

3 Intervenor also argues that petitioner does not dispute intervenor’s expert’s
4 testimony that buying and transferring new irrigation rights to the property, and
5 establishing a new irrigation system, would be prohibitively expensive. The
6 expert cited an example of 100 acres of irrigation rights for sale for \$2 million,
7 and opined that developing an irrigation system for the subject tract would cost
8 upwards of another \$1 million. Intervenor is correct that petitioner does not
9 dispute the evidence regarding the cost of acquiring and transferring new water
10 rights, and installing new irrigation facilities. However, we note that such
11 testimony is not relevant to consideration of historic irrigation for purposes of
12 OAR 660-033-0020(9). The rule presumes that property once irrigated is still
13 currently irrigated, even if in fact the irrigation water was removed or transferred
14 to another tract and is no longer available.

15 In sum, we agree with petitioner that remand is necessary for the county to
16 accept evidence regarding historic water use, and adopt more adequate findings
17 on the “availability of water” factor. Based on such evidence and findings, the
18 county will be in a better position to render an ultimate conclusion whether the
19 property is suitable for farm use, considering all factors together.

20 **C. Agrivoltaics**

21 In a one-sentence argument, petitioner points out that it argued below that
22 sheep or other small animals could be grazed beneath and beside the 62-acres of

1 solar panel arrays on tax lot 100, a practice known as “solar grazing” or
2 “agrivoltaics.” Petition for Review 20-21 (citing Record 794). We understand
3 petitioner to argue that intervenor’s expert erroneously assumed that no grazing
4 was possible on tax lot 100.

5 We understand agrivoltaics to be a relatively new practice that is possible
6 for some solar installations in some circumstances. Petitioner offered no support
7 below for their assertion that agrivoltaics is possible on tax lot 100, and on appeal
8 does not develop any such argument. Absent a developed argument on this point,
9 petitioner does not provide a basis for reversal or remand. *Deschutes*
10 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) (LUBA declines to
11 review insufficiently developed arguments).

12 **D. Equine Facilities and Other Farm Uses**

13 As noted, one farm use petitioner identified and supported by property-
14 specific information concerns equine facilities. Intervenor submitted responsive
15 evidence, which the county relied upon to conclude that the subject property is
16 not suitable for an equine facility:

17 “As to a horse facility, [intervenor] presented evidence from Mr.
18 Hagerty, who also operates an equestrian facility, who explained
19 that the subject property is not suitable for such use noting the
20 prohibitive cost with constructing the required facilities, the need for
21 irrigation for pasturing and the cost to obtain irrigation rights and
22 then, install the necessary equipment. * * * Further, [intervenor]
23 presented evidence that the equestrian facility used by [petitioner]
24 in its arguments has better soil and ample irrigation, and yet still
25 operates as a non-profit. The [b]oard [of commissioners] finds that
26 farm use is defined as the current employment of land primarily for

1 the purpose of making a profit from activities listed in ORS
2 215.203.” Record 63.

3 Petitioner does not challenge the above-quoted finding or the testimony relied
4 upon with respect to suitability for an equine facility.

5 Intervenor’s expert addressed some of the other farm uses identified by
6 petitioner, including raising poultry, honeybees, aquatic species and game birds.
7 Petitioner does not dispute that the expert’s conclusions on these farm uses
8 constitute substantial evidence supporting the county’s findings. Petitioner does
9 argue, however, that the expert failed to address other farm uses petitioner
10 identified, raising non-cattle livestock such as hogs, pigs, donkeys, mules, goats,
11 sheep, ponies, burros, llamas and alpacas, and producing associated animal
12 products such as goat milk. However, as noted, petitioner offered no property-
13 specific argument or evidence that the subject property is suitable for raising such
14 livestock. In addition, intervenor’s farm expert arguably subsumed all types of
15 livestock into their main conclusion that the property is not suitable for grazing
16 the most locally prevalent form of livestock, cattle. Because the property lacks
17 water, forage and arable soils for growing hay, the expert concluded that raising
18 cattle on the property would require prohibitively expensive supplemental
19 feeding and water transport, and thus would not be undertaken with the primary
20 purpose of obtaining a profit in money. Petitioner does not offer any basis to
21 conclude that non-cattle types of livestock could be raised on the property without
22 similarly prohibitive inputs of feed and water. Petitioner argues only that
23 intervenor’s expert and the county’s findings fail to address whether the property

1 is suitable for raising non-cattle types of livestock and animal products that
2 petitioner identified. However, as explained in *Destiny Court*, and elaborated
3 upon in this decision, in the absence of property-specific examples of less
4 common or prevalent farm uses, intervenor and the county were not obligated to
5 generate responsive evidence and findings on this point, in order to conclude that
6 the subject property is not suitable for farm use under OAR 660-033-
7 0020(1)(a)(B).

8 The second assignment of error is sustained, in part.

9 **THIRD ASSIGNMENT OF ERROR**

10 Statewide Planning Goal 14 (Urbanization) is to

11 “provide for an orderly and efficient transition from rural to urban
12 land use, to accommodate urban population and urban employment
13 inside urban growth boundaries, to ensure efficient use of land, and
14 to provide for livable communities.”

15 The Oregon Supreme Court has interpreted Goal 14 to prohibit urban use of rural
16 land. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 742 P2d 268
17 (1986) (*Curry County*). Under *Curry County*, in redesignating rural land from
18 plan designations implementing the resource goals, counties must evaluate
19 whether development allowed under the new designation and associated zoning
20 would allow for the urban use of rural land.⁶ That evaluation requires

⁶ DLCD has defined “rural land” as follows:

“Land outside urban growth boundaries that is:

1 consideration of a number of factors described in *Curry County* and its progeny.
2 With respect to PAPAs involving residential use of rural land, the relevant factors
3 include the density of development allowed under the new plan designation and
4 zone, the types and levels of services to be provided, and proximity to urban
5 growth boundaries. 301 Or at 504-05. Under *Curry County* and its progeny,
6 residential density at one dwelling unit per 10 or more acres is generally
7 presumed to be rural. 301 Or at 504. A minimum density standard of 10 acres per
8 unit is thus something of a “safe harbor” for purposes of Goal 14. Residential
9 development at higher densities may be either rural or urban, depending on
10 application of relevant factors and applicable administrative rules.⁷ The relevant

“(a) Non-urban agricultural, forest or open space,

“(b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or

“(c) In an unincorporated community.” Oregon Statewide Planning Goals and Guidelines 104 (2019).

⁷ In 2000, the Land Conservation and Development Commission (LCDC) adopted OAR 660-004-0040, which specifies how Goal 14 applies to rural lands in acknowledged exception areas planned for rural residential uses. OAR 660-004-0040 generally prohibits creation of residential parcels within exception areas that are less than two acres in size, effectively deeming development at such densities a clear “urban” use. OAR 660-004-0040(7). Subject to the rule’s requirements, the rule generally allows residential development within exception areas at a density of at least two acres per dwelling unit without taking an exception to Goal 14. However, OAR 660-004-0040 expressly applies only to residential development of exception areas, and thus does not apply or govern

1 factors must be considered together, not in isolation. *Oregon Shores*
2 *Conservation Coalition v. Coos County*, 55 Or LUBA 545, 556, *aff'd*, 219 Or
3 App 429, 182 P3d 325 (2008). No one factor is determinative.

4 In *Destiny Court*, we rejected arguments that the acknowledged status of
5 the RREA plan designation and the MUA-10 zone means that, as a matter of law,
6 the designation and zone allow only rural uses, and therefore no evaluation of
7 consistency with Goal 14 is necessary. We held that

8 “all comprehensive plan amendments are potentially subject to
9 review for compliance with applicable statewide planning goals,
10 even if the amendment only applies an acknowledged plan
11 designation and zoning district to a specific property. The
12 acknowledged status of the plan provisions and zoning code applied
13 may simplify any required goal analysis, and in limited cases render
14 it redundant. However, the county had not established any basis in
15 the present case to completely eliminate the contextual analysis
16 required by *Curry County*[.]” *Destiny Court*, LUBA No 2025-015
17 (slip op at 13).

18 In the present case, the county initially found that application of the RREA
19 plan designation and the MUA-10 zone to the subject property requires no
20 evaluation of consistency with Goal 14, because when the plan designation and
21 zone were legislatively adopted the adopting ordinances were acknowledged to
22 comply with Goal 14. In the alternative, the county adopted findings addressing

zoning or development of non-resource lands, for which no exception to a
resource goal is taken. *See Pohaku Farms*, LUBA No 2024-080 (explaining the
history of OAR 660-004-0040 and its application) (slip op at 23-32). The rule is
thus of limited utility in the present case, which does not involve an exception
area.

1 consistency with Goal 14 and applying the *Curry County* factors concerning
2 residential uses.

3 On appeal, petitioner challenges both sets of alternative findings.
4 Intervenor does not attempt to defend the first alternative, that the acknowledged
5 status of the RREA designation and MUA-10 zone means that as a matter of law
6 no Goal 14 analysis is required. For the reasons stated in *Destiny Court*, we agree
7 with petitioner that that legal conclusion is erroneous, and that the county must
8 demonstrate that the proposed redesignation and rezoning is consistent with Goal
9 14, applying the relevant *Curry County* factors. We turn then to the parties'
10 arguments regarding the county's application of the three residential *Curry*
11 *County* factors: density, extension of urban services, and proximity to a UGB.

12 **A. Density**

13 With respect to density, the county concluded that even under the
14 maximum five-acre "equivalent density" permitted within cluster development
15 and PUD under the MUA-10 zone, pursuant to DCC 18.116.400, the resulting
16 density would not be "urban" in nature.⁸

⁸ The county's findings regarding the density factor state:

"Allowing MUA-10 uses on the subject property will not lead to urban density. The minimum parcel size in the MUA-10 zone is 10 acres. The current zoning code allows smaller parcels for cluster developments and planned developments. In *Central Oregon LandWatch v. Deschutes County (Destiny Court)*, LUBA No. 2025-015, LUBA remanded a plan amendment and rezone approval for

1 On appeal, petitioner notes that pursuant to DCC 18.128.210(D)(3) a PUD
2 could be developed on the subject property with no minimum residential lot or
3 parcel size, limited only by an “equivalent density” of five acres per dwelling
4 unit, which takes into account acreage used for open space and common areas.
5 DCC 18.128.210(D)(3) provides that the “minimum lot area” otherwise applying

the [b]oard [of commissioners] to address a perceived inconsistency between the DCCP that limits parcels size in the MUA-10 zone to 10 acres and the zoning code that allows smaller parcels under the cluster and planned development provisions. The [b]oard [of commissioners] is currently in the process of updating the DCCP to address the remand; however, in the event that cluster and planned development remain in the code and allow parcels less than 10 acres with corresponding open space, such development does not result in urban density.

“The smallest parcel in the MUA-10 zone, even using a cluster development application and for property within a mile of a UGB, is five acres or the equivalent density. The Board notes that in *Curry County*, 1000 Friends asserted that densities greater than one dwelling per three acres are urban. That argument did not account for provisions requiring large undeveloped open space either. The [b]oard [of commissioners] finds that five-acre parcels along with 65 [percent] undeveloped open space are not urban density. By way of contrast, the lowest density allowed in the City of Bend is 1.1 units per acre in the [Low Density Residential (RL)] zone. There is a significant difference between one dwelling per acre and one dwelling per five acres. Moreover, the allowance of 65 [percent] of otherwise unrestricted and unconstrained property to be left open and undeveloped is inconsistent with development at urban densities. Even under the cluster development and planned development provisions, while smaller parcels may be approved, the overall density remains consistent with the rural character of the area.” Record 67.

1 to individual structures in the zone in which a PUD is proposed “do not apply
2 within a planned development.” Instead, “[a]n equivalent overall density factor
3 may be utilized in lieu of the appropriate minimum lot area.”

4 Petitioner argues that application of a county zone with no minimum
5 residential lot size is inconsistent with Goal 14. *Wood v. Crook County*, 49 Or
6 LUBA 682, 693 (2005) (remanding the application of zone that allows planned
7 unit development without a minimum lot size and requiring the local government
8 to either condition the zone to ensure consistency with Goal 14 or take an
9 exception to the goal); *1000 Friends of Oregon v. Josephine County*, LUBA No
10 2021-116 (June 2, 2022) (similar conclusion and disposition) (slip op at 25). We
11 understand petitioner to argue that, for purposes of evaluating density for
12 purposes of Goal 14, under zoning that allows cluster development or PUD, it is
13 the *actual* lot size per dwelling that matters, not the “equivalent overall density”
14 once open space and common areas are averaged in.

15 DCC 18.128.210(B)(7) requires that in a PUD at least 65 percent of the lot
16 area be maintained as open space. Petitioner appears to be correct that under DCC
17 18.128.210 the remainder of the PUD could be developed with residential lots of
18 any size, potentially less than two acres for each dwelling unit.

19 Intervenor responds that petitioner’s speculations about potential actual lot
20 size in a potential PUD are very interesting, but academic, because as discussed
21 under the first assignment of error, intervenor did not propose cluster
22 development or PUD and the county did not approve such development.

1 Intervenor repeats its arguments that it is premature to consider what kind of
2 development, at what density, intervenor or a future applicant will propose.
3 Further, intervenor repeats its argument that under *Destiny Court* and *Pohaku*
4 *Farms* an applicant is unlikely to gain approval for cluster development or PUD
5 at sub-10-acre minimums, but instead would likely be limited to approval of a
6 straightforward subdivision within the MUA-10 zone, where each lot is a
7 minimum 10 acres in size.

8 However, as previously noted, the county expressly assumed that the
9 subject property would be developed with cluster development and PUD at the
10 maximum potential density allowed under the applicable code provisions. For
11 purposes of evaluating whether the PAPA is consistent with Goal 14 under *Curry*
12 *County*, that assumption is appropriate. The applicant did not propose, or the
13 county impose, any conditions or restrictions that would limit the density or
14 intensity of development. Accordingly, we disagree with intervenor that it is
15 premature or advisory to reach the merits of petitioner's arguments regarding
16 actual lot size allowed under potential cluster development or PUD of the
17 property.

18 On the merits, the question of whether evaluation of the density factor
19 under *Curry County* focuses on actual residential lot size per dwelling, or can be
20 based on "equivalent overall density" of the development as a whole – taking into
21 account and averaging acreage devoted to open space and common
22 areas – appears to be a novel issue. We are not aware of any caselaw, statutes, or

1 administrative rules that address that issue, with the possible exception of OAR
2 660-004-0040, which specifies how Goal 14 applies to rural lands in
3 acknowledged resource-goal exception areas planned for rural residential uses.
4 In relevant part, that rule addresses minimal parcel sizes and circumstances under
5 which cluster development and PUD can be approved within exception areas
6 without taking an exception to Goal 14.⁹ While OAR 660-004-0040 expressly

⁹ OAR 660-004-0040(8)(e) provides, in relevant part:

“A local government may authorize a planned unit development (PUD), specify the size of lots or parcels by averaging density across a parent parcel, or allow clustering of new single-family dwellings in a rural residential area only if all conditions set forth in paragraphs (A) through (H) are met:

“(A) The number of new single-family dwellings to be clustered or developed as a PUD does not exceed 10;

“(B) The number of new lots or parcels to be created for new single-family dwellings does not exceed 10;

“(C) None of the new lots or parcels will be smaller than two acres;

“(D) The development is not to be served by a new community sewer system;

“(E) The development is not to be served by any new extension of a sewer system from within an urban growth boundary or from within an unincorporated community;

“(F) The overall density of the development will not exceed one single-family dwelling for each unit of acreage specified in

1 applies only to exception areas, and does not apply to non-resource lands, in our
2 view how LCDC chose to treat density within cluster development and PUD for
3 purposes of ensuring consistency with Goal 14 is instructive in the present
4 circumstances. We note that while averaging or overall density plays a role under
5 the rule, OAR 660-004-0040(8)(e)(C) specifies that “[n]one of the new lots or
6 parcels will be smaller than two acres.” That is clearly a reference to the actual
7 or individual lot size, not averaging or overall density that takes into account open
8 space or common areas. Under the rule, even where use of average or overall
9 density is permitted for some purposes, the rule is careful to specify limits on
10 actual or individual residential lot sizes, regardless of how much open space is
11 provided and actual residential lot size density is thereby diluted. LCDC
12 apparently deemed such limits necessary to ensure consistency with Goal 14. An
13 otherwise indisputably urban use cannot be recharacterized to a rural use simply
14 by surrounding it with open space to dilute the “average” density. Accordingly,
15 we agree with petitioner that the appropriate unit of analysis for purposes of
16 applying the density factor under *Curry County*, to evaluate zoning of non-
17 resource land that would allow cluster development or PUD, is not the overall or
18 average density taking open or common space into account, but the highest
19 density lot area allowed for residential lots under the county’s cluster
20 development or PUD regulations.

the local government’s land use regulations on October 4,
2000 as the minimum lot size for the area[.]”

1 With respect to cluster development, DCC 18.128.200(B)(2) imposes a
2 two-acre minimum lot area. As noted, the PUD provisions at DCC 18.128.210(D)
3 exempt planned development from any minimum lot area requirements for
4 individual dwellings, but require a minimum lot area of 40 acres for the planned
5 development and the equivalent overall density cannot exceed that allowed in the
6 base zone.

7 The county's findings addressing the density factor under *Curry County*
8 evaluated only the overall or equivalent density of five acres per dwelling unit
9 within potential cluster development or PUD located within one mile of a UGB,
10 and concluded that such overall density is rural and not urban. That evaluation is
11 not based on the actual or individual lot sizes allowed within cluster development
12 or PUD. We agree with petitioner that the findings on this point are inadequate,
13 and that remand is necessary for the county to adopt more adequate findings that
14 evaluate the actual or individual lot sizes allowed under the DCC.

15 **B. Types and Levels of Services**

16 A factor under *Curry County* is what types and levels of services the
17 allowed uses will require, including public facilities or services. The county
18 concluded that residential development of the subject property would not require
19 the extension of any public facilities or services to the property.¹⁰ On appeal,

¹⁰ The county's findings state:

1 petitioner does not dispute that conclusion, but argues that the county failed to
2 address issues raised below regarding whether, given the close proximity to the
3 City of Bend UGB, the future residents of any development on the subject
4 property would be reliant on public facilities and services within the UGB, for
5 schools, libraries, healthcare, etc., and hence the development would function as
6 a de facto urban neighborhood rather than a rural residential development.
7 Petitioner contends that Goal 14 is concerned not only with the extension of urban
8 services and facilities to rural lands, but also with whether development on rural
9 land is functionally reliant on services and facilities within nearby urban areas.
10 According to petitioner, relatively dense cluster or planned unit development
11 located within one-quarter mile of the Bend UGB will be inextricably connected
12 to the public facilities and services available within the UGB.

13 Intervenor responds, and we agree, that *Curry County* does not require the
14 county to consider the extent to which future residents of the property will travel

“The [b]oard [of commissioners] rejects the notion that rezoning the subject parcel to MUA-10 will lead to the extension of urban facilities to the area. The City of Bend has no obligation to extend public services and in some cases is prohibited from providing extraterritorial service to rural lands. Development will be served primarily by private water and onsite septic systems. Electricity already extends onto the property as evidenced by the approved plat from 1990. For fire and public safety, the area is served by the Bend Rural Fire District and Deschutes County Sheriff’s office, both of which serve rural areas. Further, that coverage will remain unchanged under any county zoning.” Record 68.

1 to urban areas to take advantage of public services and facilities such as schools,
2 libraries and medical facilities. By definition, rural lands do not have much, if
3 any, public services and facilities.¹¹ This *Curry County* factor is not concerned
4 with the practical reality that residents of most rural areas must travel (sometimes
5 a considerable distance) to the nearest urban area to obtain public services such
6 as schools, libraries and hospitals, because such public services are not usually
7 available in rural areas.

8 Petitioner's arguments regarding the functional relationship between the
9 UGB and a proximate cluster or planned unit development have more traction
10 under the next factor considered below, but in our view those arguments do not
11 demonstrate any error or insufficiency with respect to the county's consideration
12 with respect to the "services and facilities" factor.

13 **C. Effectiveness of the Bend UGB**

14 In *Curry County*, the Court noted that Goal 14 has long been understood
15 to be concerned with intensification of rural lands near UGBs that could
16 adversely impact or undermine the effectiveness of the UGB. 301 Or 474 n 19
17 (citing *1000 Friends of Oregon v. Clackamas Cty.*, 3 Or LUBA 316, 327 (1981);
18 *Medford v Jackson Cty.*, 2 Or LUBA 387, 391 (1981), *aff'd in part and rem'd in*

¹¹ As the court noted in *Curry County*, the term "rural land" is defined for purposes of the statewide planning goals to include lands "with no or hardly any public services." 301 Or at 456; *see also* Oregon Statewide Planning Goals and Guidelines 104 (2019).

1 part, 57 Or App 155, 643 P2d 1353 (1982); *Metropolitan Serv. Dist. v.*
2 *Clackamas Cty.*, 2 Or LUBA 300, 307-08 (1981); *Sandy v. Clackamas Cty.*, 3
3 LCDC 139, 148-50 (1979)).

4 In *DLCD v. Klamath County*, 42 Or LUBA 368 (2002), the county rezoned
5 a 680-acre tract, located 2.5 miles from the City of Klamath Falls' UGB, to allow
6 subdivision into five-acre residential lots. After two remands to consider
7 compliance with Goal 14, we ultimately affirmed the county's conclusion that,
8 given the 2.5-mile distance between the subject property and the UGB, evidence
9 that persons likely to reside in the proposed development would not otherwise
10 reside in the UGB, and the size difference between the proposed five-acre lots
11 and the .16-acre lots allowed within the UGB, among other factors, the proposed
12 rezoning would not undermine the effectiveness of the UGB. *Id.* at 375-76.

13 In the present case, petitioner argued below that rezoning the subject parcel
14 to MUA-10 would undermine the effectiveness of the Bend's UGB, given the
15 one-quarter-mile proximity, because it would attract residents who seek
16 proximity to the urban area and who would otherwise reside in the UGB. The
17 county rejected that argument:

18 "The [b]oard [of commissioners] does not agree that rezoning the
19 subject property to MUA-10 will be a magnet pulling rural residents
20 into the urban area and urban residents to the rural area. That
21 position does not reflect reality. Currently, there are few, if any,
22 resources available to rural residents that are located in rural areas.
23 The schools that rural residents around Bend attend are in the City.
24 The medical services and major grocery stores are in urban areas.
25 Rural residents living close to Bend already come in large numbers

1 to urban areas for goods and services.” Record 68.

2 On appeal, petitioner argues that the county’s findings reinforce its
3 argument, that residents seeking proximity to urban amenities will be drawn to
4 the subject property precisely *because* of its close proximity to the urban area and
5 its employment opportunities, services, and amenities.

6 Intervenor responds that the county correctly observed that all rural
7 residents rely to some extent on urban services and amenities, such as schools,
8 libraries, medical facilities, large grocery stores, etc., because such services and
9 amenities are usually not available in rural areas. While that general observation
10 is true, we agree with petitioner that it does not necessarily answer the question
11 of whether rezoning a particular property to allow relatively high-density cluster
12 development or PUD could undermine the effectiveness of a UGB located only
13 one-quarter mile away. In our view, if, due to proximity, density, and other
14 relevant factors, residential development of rural land could have a similar
15 functional relationship to an urban area as would a residential development
16 within the UGB, that is, function essentially as a suburban neighborhood,
17 attracting residents drawn to proximity to the urban area, then rezoning rural land
18 to allow such development would undermine the effectiveness of the UGB, and
19 require a Goal 14 exception.

20 A comparison with the circumstances in *DLCD v. Klamath County* is
21 instructive. There, the applicable zoning allowed five-acre parcels, while the
22 nearby UGB allowed lots as large as .16-acre in size. Thus, the proposed zoning

1 imposed a minimum lot size roughly 30 times larger than the largest lots allowed
2 in the UGB. Here, the MUA-10 zone potentially allows two-acre parcels within
3 a cluster development, and imposes no minimum lot size on lots within a PUD,
4 whereas as the county's findings note the largest lot allowed in the City of Bend
5 UGB is 1.1-acres per dwelling unit. At least theoretically, the county could
6 approve a PUD on the subject property with residential lots that are comparable
7 in size to those allowed on urban or urbanizable lands within the UGB.

8 Further, in the present case the subject property is only one-quarter mile
9 from the UGB, and is even closer to a city park. In *DLCD v. Klamath County* the
10 subject property was located in a rural area 2.5 miles from the UGB, ten times
11 the distance in the present case.

12 Finally, in *DLCD v. Klamath County*, the record included evidence that
13 persons likely to purchase lots in the proposed development differed from those
14 who would purchase lots within the UGB, and would not otherwise reside in the
15 UGB. There is no similar evidence in the present case. The county's findings do
16 not attempt to explain how persons attracted to relatively high-density cluster
17 development or PUD on the subject property would materially differ from those
18 attracted to comparably sized lots allowed within some areas of the UGB.

19 **D. Conclusion**

20 In sum, we agree with petitioner that the evidence and findings addressing
21 the density factor and the proximity to the UGB factor do not support the county's
22 conclusion that the proposed redesignation and zoning is consistent with, and

1 require no exception to, Goal 14. Remand is necessary for the county to adopt
2 more adequate findings addressing these two factors, supported by substantial
3 evidence, and then reach a new conclusion regarding consistency with Goal 14,
4 based on consideration of all relevant factors.

5 The third assignment of error is sustained, in part.

6 **FOURTH ASSIGNMENT OF ERROR**

7 As noted, portions of the subject property located within one-quarter mile
8 of Highway 20 are subject to the LM overlay zone, which implements the
9 county's program to achieve Goal 5 with respect to scenic views from the
10 highway. The county's program to achieve Goal 5 with respect to scenic views
11 was developed in 1992, based on an analysis of the economic, social,
12 environmental and energy (ESEE) consequences of allowing, limiting, or
13 prohibiting conflicting uses. The existing program, implemented in the LM
14 overlay zone, represents the county's original choice to limit and regulate the
15 identified conflicting uses to some extent.

16 Under OAR 660-023-0250(3), a local government adopting a PAPA is not
17 required to address Goal 5 unless the PAPA "affects" a Goal 5 resource. One way
18 a PAPA could affect a Goal 5 resource is if the PAPA "allows new uses that could
19 be conflicting uses with a particular significant Goal 5 resource[.]" OAR 660-
20 0023-0250(3)(b). To demonstrate consistency with Goal 5, intervenor submitted
21 an analysis of the ESEE consequences of rezoning the property from EFU to
22 MUA-10, with respect to the new or different uses allowed in the MUA-10 zone.

1 Intervenor's ESEE analysis concluded that some of the new uses allowed in the
2 MUA-10 zone could conflict with the scenic resource, but ultimately
3 recommended that all conflicting uses be "allowed in a limited manner after
4 application of all applicable development standards in Chapter DCC 18.032 and
5 the LM Overlay." Record 1074. Essentially, the ESEE analysis concluded that
6 no modification was needed to the existing program to achieve the goal.

7 The hearings officer found that the ESEE analysis sufficiently addressed
8 Goal 5 requirements. Record 120. Petitioner challenged the sufficiency of the
9 ESEE analysis before the board of commissioners, arguing that it omitted some
10 uses, but the board of commissioners rejected those challenges and found that
11 "the applicant's ESEE analysis satisfied the applicable administrative rules and
12 County code." Record 64.

13 **A. Omitted Uses**

14 On appeal, petitioner repeats its argument that the ESEE analysis did not
15 address all of the uses conditionally allowed in the MUA-10 zone, but omitted a
16 few uses. However, with one exception, petitioner does not cite or discuss any
17 specific uses allowed in the MUA-10 that were omitted from the analysis. Absent
18 a more developed argument, petitioner's general assertion that the ESEE analysis
19 is incomplete does not provide a basis for reversal or remand.

20 The only specific use cited is personal use landing strips for airplanes and
21 helicopter pads, a land use category that is allowed in both the MUA-10 and EFU
22 zones, and thus would not seem to constitute a "new" conflicting use. However,

1 petitioner notes that the two zones have different setback and usage requirements.
2 We understand petitioner to argue that the different setback and usage
3 requirements mean that a landing strip in a MUA-10 zone and in the EFU zone
4 are different uses, for purposes of conflicting use analysis under OAR 660-023-
5 0040(4). However, petitioner cites no basis under the rule or elsewhere to require
6 the ESEE analysis to treat the same use category as a different use, simply
7 because as instantiated in different zones the use is subject to different setback
8 and usage requirements.

9 **B. Adoption of the ESEE Analysis**

10 OAR 660-023-0040(4) requires that “[t]he analyses of the ESEE
11 consequences shall be adopted either as part of the plan or as a land use
12 regulation.” Citing the rule, petitioner argues that it is unclear whether the board
13 of commissioners formally adopted the ESEE analysis as part of the
14 comprehensive plan. Intervenor responds that no issue was raised during the
15 proceedings below regarding OAR 660-023-0040(4) or its adoption requirement,
16 and thus this issue is waived, pursuant to ORS 197.797(1).¹² Petitioner replies

¹² 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

1 that it could not have anticipated that the county would fail to follow the rule and
2 adopt the ESEE analysis as part of the comprehensive plan or as a land use
3 regulation.

4 Petitioner cites *Hildenbrand v. City of Adair Village*, 217 Or App 623, 629-
5 30 (2008), for the proposition that a party is not required to “anticipate and
6 identify” to a decision-maker “all the ways that its future decision could be
7 wrong.” *Hildenbrand* concerns preservation for judicial review under the Oregon
8 Rules of Appellate Procedure (ORAP), and it is not clear why petitioner believes
9 preservation doctrines under the ORAP should control or even be persuasive
10 reasoning in construing the scope of waiver under ORS 197.797(1). Nonetheless,
11 we understand petitioner to argue that a similar “could not anticipate” doctrine
12 should apply under ORS 197.797(1).

13 *Hildenbrand* involved an appeal of a LUBA decision where the petitioner
14 assigned error to the local government’s calculation of “need” for an expansion
15 of its UGB, arguing that the calculation was not supported by substantial
16 evidence. LUBA rejected that assignment of error, citing a comprehensive plan
17 policy that supported the local government’s need calculation. On appeal, the
18 court held for purposes of the ORAP that petitioner’s arguments to LUBA
19 preserved the right to challenge LUBA’s rejection of its assignment of error,
20 stating:

commission, hearings body or hearings officer, and the parties an
adequate opportunity to respond to each issue.”

1 “If a party sufficiently raises an issue before the agency – here, the
2 assertion that the local governments’ decision regarding the amount
3 of land to be added is not supported by substantial evidence in the
4 record – the party can challenge the agency decision rejecting that
5 assertion on whatever basis is articulated by the agency order.” *Id.*
6 at 630.

7 Thus, under *Hildenbrand* the petitioner must first raise an issue regarding an
8 approval criterion before the decision maker, sufficient to require a response. On
9 appeal, the petitioner may then challenge the basis on which the decision maker
10 resolves the issue, even if that basis was unanticipated or not specifically
11 challenged below. We assume for purposes of this opinion that that framework
12 can be generalized to ORS 197.797(1) and applied in the present case.

13 Intervenor acknowledges that petitioner and others argued below that an
14 updated ESEE analysis was required under OAR 660-023-0040. Prompted by
15 those arguments, intervenor prepared an ESEE analysis and submitted it to the
16 hearings officer, who found that it complied with all requirements of OAR 660-
17 023-0040. The hearings officer cited OAR 660-023-0040(4) and noted that it
18 “directs that the County adopt the ESEE analysis.” Record 119. On appeal to the
19 board of commissioners, petitioner challenged the adequacy of the ESEE analysis
20 in certain ways, but did not specifically raise any issues regarding OAR 660-023-
21 0040(4)’s adoption requirement. Intervenor argues that petitioner’s failure to
22 raise issues below regarding OAR 660-023-0040(4)’s adoption requirement
23 means that all issues regarding the adoption requirement are waived on appeal to
24 LUBA. Intervenor argues that petitioner’s challenges to the adequacy of the

1 ESEE analysis is a “qualitatively different” issue than the issue of adopting the
2 ESEE analysis into the comprehensive plan or land use regulations. *Willamette*
3 *Oaks, LLC v. City of Eugene*, 295 Or App 757, 766, 437 P3d 314, *rev den*, 365
4 Or 192 (2019).

5 In our view, waiver under ORS 197.797(1) applies differently when the
6 regulation at issue, like the OAR 660-023-0040(4) adoption requirement,
7 concerns not an approval criterion but rather a mandatory action that the local
8 government must undertake in making or issuing the land use decision. In this
9 sense, the OAR 660-023-0040(4) adoption requirement is similar to the
10 requirement that the county adopt the reasons for a reasons exception into the
11 comprehensive plan. OAR 660-004-0015(1) (“A local government approving a
12 proposed exception shall adopt, as part of its comprehensive plan, findings of fact
13 and a statement of reasons that demonstrate that the standards for an exception
14 have been met.”); *see also* OAR 660-004-0020(1) (“If a jurisdiction determines
15 there are reasons consistent with OAR 660-0040-0022 to use resource lands for
16 uses not allowed by the applicable Goal or to allow public facilities or services
17 not allowed by the applicable Goal, the justification shall be set forth in the
18 comprehensive plan as an exception.”). Those rules require that the local
19 government embody its policy reasoning in the comprehensive plan, to provide a
20 roadmap for future applicants and local government decision makers. The OAR
21 660-023-0040(4) adoption requirement serves a similar purpose. Both processes
22 are mandatory actions unrelated to an approval criteria, that ripen as a potential

1 “issue” for purposes of appeal to LUBA only at the time the decision is made or
2 issued.

3 The OAR 660-023-0040(4) adoption requirement is also somewhat similar
4 to the requirement in ORS 197.615(1) that the local government provide notice
5 of a PAPA decision to DLCD.¹³ Generally, a party to a PAPA proceeding can,
6 on appeal to LUBA, assign error to a local government’s failure to comply with
7 the notice requirements at ORS 197.615(1). *See, e.g., Oregon City Leasing, Inc.*
8 *v. Columbia County*, 121 Or App 173, 854 P2d 495 (1993) (violation of the ORS
9 197.615(1) notice requirement is a substantive error, rather than a procedural
10 error that requires a showing of prejudice to the petitioner). Noncompliance with
11 the notice requirement of ORS 197.615 is not infrequently assigned as error in
12 LUBA appeals, yet we are not aware of any case where waiver has been asserted
13 against such assignments. That presumably reflects the nature of the ORS
14 197.615(1) notice requirement, which functions not as an approval criterion, but
15 rather a post-decision mandatory action. The OAR 660-023-0040(4) adoption
16 requirement differs somewhat in that the required action is not necessarily post-
17 decision, but typically would occur as part of the decision, as discussed below.

¹³ ORS 197.615(1) provides:

“When a local government adopts a proposed change to an acknowledged comprehensive plan or a land use regulation, the local government shall submit the decision to the Director of the [DLCD] within 20 days after making the decision.”

1 Nonetheless, both requirements are mandatory actions regarding the processing
2 of PAPA decisions that the parties reasonably expect the local government will
3 follow.

4 Accordingly, we agree with petitioner that ORS 197.797(1) does not
5 require parties to anticipate that the local government will fail to comply with
6 such mandatory actions, and proactively “raise issues” regarding those future
7 actions before the close of the final evidentiary hearing.

8 Even if ORS 197.797(1) requires raising issues below regarding
9 compliance with mandatory actions such as the OAR 660-023-0040(4) adoption
10 requirement, we conclude that the issue was in fact sufficiently raised below.
11 Petitioner argued below, successfully, that an updated ESEE analysis under OAR
12 660-023-0040 was required, implicitly arguing that all requirements of the rule
13 must be met. The hearings officer apparently recognized that implicit argument,
14 and expressly recommended that the commissioners adopt the ESEE analysis, as
15 required by OAR 660-023-0040(4). Given that recommendation, no party should
16 have been surprised that, if the board of commissioners chose to rely upon the
17 ESEE analysis to establish consistency with Goal 5, the OAR 660-023-0040(4)
18 adoption requirement must be complied with. *See Boldt v. Clackamas County*, 21
19 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078 (1991) (the “raise it or
20 waive it” principle does not limit the parties on appeal to the exact same
21 arguments made below, only that the issue be raised below with sufficient

1 specificity so as to prevent “unfair surprise” on appeal). Accordingly, we reject
2 intervenor’s waiver argument.

3 Turning to the merits, OAR 660-023-0040(4) requires, again, that “[t]he
4 analyses of the ESEE consequences shall be adopted either as part of the plan or
5 as a land use regulation.” Petitioner argues that OAR 660-023-0040(4) plainly
6 requires the county to “adopt” the analysis in some form into the comprehensive
7 plan or as a land use regulation. Petitioner suggests that the required “adoption”
8 must be accomplished by amending the text of the county’s Goal 5 program with
9 respect to scenic views to include, or at least reference, the ESEE analysis.

10 Intervenor responds that OAR 660-023-0040(4) does not require that
11 “adoption” take any specific form, and that the board of commissioners
12 sufficiently complied with the rule by expressly adopting the hearings officer’s
13 findings and recommendations, which included the recommendation to “adopt”
14 the ESEE analysis. Record 38. We understand intervenor to argue that the
15 requirement to “adopt” the analysis into the comprehensive plan or land use
16 regulation can be accomplished without amending the text of the relevant plan or
17 regulatory provisions, as long as the board of commissioners “adopt” the analysis
18 in the sense of adopting findings concluding that the analysis establishes that the
19 PAPA is consistent with Goal 5.

20 OAR 660-023-0040(4), like the rest of the rule, sets out the process for
21 developing a program to achieve Goal 5 with respect to certain resources, based
22 on an initial ESEE analysis. The county initially adopted its Goal 5 program with

1 respect to scenic resources, supported by a comprehensive ESEE analysis, in
2 1992. Some or all of that 1992 ESEE analysis was adopted into the DCCP as an
3 appendix or supplement, and the program to achieve the goal is represented by
4 the LM overlay zone. Where a PAPA allows new uses that could conflict with an
5 identified Goal 5 resource, OAR 660-023-0250(3) requires that the county
6 demonstrate that the PAPA is consistent with Goal 5, and that demonstration
7 typically, if not invariably, will be carried out by adopting an ESEE analysis
8 focused on the new conflicting uses allowed by the PAPA, pursuant to the process
9 set out in OAR 660-023-0040.

10 We generally agree with intervenor that such a narrow-focus ESEE
11 analysis need not be “adopted” in the exact same manner and form as the county’s
12 initial comprehensive ESEE analysis. But we also agree with petitioner that OAR
13 660-023-0040(4) plainly requires that the ESEE analysis be adopted as needed
14 into the comprehensive plan or as a land use regulation. The exact form and
15 manner of that adoption may vary, depending on the ESEE analysis and other
16 relevant variables. An ESEE analysis concluding that some new conflicting uses
17 must be fully allowed, or must be prohibited, or that requires changes to the
18 existing Goal 5 program, might be embodied in the county’s plan and regulations
19 very differently than an ESEE analysis concluding that new potentially
20 conflicting uses do not, in fact, conflict with the resource, or that the existing
21 program to achieve the goal is sufficient, without changes, to address conflicts
22 from new uses. Regardless, we agree with petitioner that remand is necessary

1 under this assignment of error for the county to grapple with these questions in
2 the first instance, and decide what form and manner of “adoption” is required by
3 OAR 660-023-0040(4) in the present case.

4 The fourth assignment of error is sustained, in part.

5 The county’s decision is remanded.