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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

DESTINY COURT PROPERTIES, LLC,
Intervenor-Respondent.

LUBA No. 2026-032

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

No appearance by Deschutes County.

J. Kenneth Katzaroff filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Schwabe, Williamson & Wyatt, P.C.

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

ZAMUDIO, Board Member, did not participate in the decision.

REMANDED 10/19/2026

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a board of commissioners decision approving, on remand, comprehensive plan and zoning map amendments to allow residential development on a 65-acre parcel formerly designated and zoned for agricultural use.

MOTION TO TAKE OFFICIAL NOTICE

Intervenor-respondent Destiny Court Properties, LLC (intervenor), moves for LUBA to take official notice of three documents pursuant to OAR 661-010-0046(1), which provides that LUBA "may take official notice of relevant law as defined in ORS 40.090." In relevant part, ORS 40.090 defines "law judicially noticed" to include:

> "(1) The decisional, constitutional and public statutory law of Oregon, the United States, any federally recognized American Indian tribal government and any state, territory or other jurisdiction of the United States.
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> "(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.
>
> "* * * * *
>
> "(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom."

Intervenor requests that LUBA take notice, as "decisional law" under ORS 40.090(1), a Court of Appeals' opinion, *Central Oregon LandWatch v. Deschutes County*, 330 Or App 321, 543 P3d 736 (2024) (*710 Properties*). Intervenor also requests that we take notice, as either "decisional law" or an "official act" of the Oregon judicial department, an appellate brief filed in the *710 Properties* appeal. Finally, intervenor requests that we take official notice of the Deschutes County Zoning Ordinance No. PL-15 (1979), as a county ordinance under ORS 40.090(7).

Petitioner takes no position on whether LUBA should take official notice of the Court of Appeals' opinion in *710 Properties*, or the 1979 county ordinance. However, petitioner disputes that the appellate brief in *710 Properties* constitutes either "decisional law" for purposes of ORS 40.090(1) or an "official act" for purposes of ORS 40.090(2).

Intervenor explains that in *710 Properties* the Court of Appeals summarily rejected eight assignments of error or cross-assignments of error across multiple petitions, choosing to address only a single assignment of error. One of the summarily rejected assignments of error was a single assignment of error in cross-petitioner 1000 Friends of Oregon's brief, which challenged LUBA's disposition of an issue raised under Statewide Planning Goal 14 (Urbanization). The court's opinion does not explain why it summarily rejected that assignment of error, or any of the rejected assignments. Intervenor presumes that the Court of Appeals must have rejected 1000 Friends of Oregon's assignment of error

because it disagreed with the merits of that assignment, or because it agreed with the merits of LUBA's disposition of the Goal 14 issue.[1] Accordingly, intervenor argues that LUBA should take official notice of the appellate brief, in order to understand the basis for the court's summary rejection of 1000 Friends of Oregon's assignment of error regarding Goal 14.

We have previously rejected similar arguments that an appellate brief is either "decisional law" or an agency's "official act." *Schaefer v. Marion County*, LUBA Nos 2025-085/086/087 2026-001/002 (July 29, 2026) (declining to take official notice of a state agency petition for review filed before the Supreme Court in an earlier appellate phase of the same case) (slip op at 11-13). In the present case, the argument that 1000 Friends of Oregon's appellate brief in *710 Properties* is judicially cognizable "law" is even weaker. A private party's appellate brief cannot possibly constitute an "official act" of the judicial department, for purposes of ORS 40.090(1) and (2).

In addition, intervenor has not established that the Goal 14 issue presented in *710 Properties* is relevant to any issue presented in this appeal. OAR 661-010-0046(2)(a) (a motion to take official notice must explain how the material is relevant to an issue on appeal). As far as intervenor has established, none of petitioner's five assignments of error in this appeal concern the Goal 14 issue that

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[1] That presumption is questionable. The Court of Appeals might summarily reject an assignment of error for reasons that do not go to the merits of the issues raised on appeal, or the merits of the underlying decision.

was presented in the *710 Properties* appeal. Further, we note that in our initial decision in this appeal, we denied two assignments of error concerning Goal 14, and no Goal 14 issues were remanded to the county. *Central Oregon Landwatch v. Deschutes County*, LUBA No 2025-015 (June 26, 2025) (slip op at 15) (*Destiny Court I*). Because the cited relevance of the appellate brief concerns Goal 14, and Goal 14 was not an issue remanded to the county, intervenor has not established that the appellate brief is relevant to any issue in the present appeal.

Intervenor's request to take official notice of the appellate brief in *710 Properties* is denied. We shall take official notice of the *710 Properties* opinion and the county's 1979 ordinance, and consider the parties' arguments regarding the opinion and ordinance, to the extent relevant to the issues in this appeal. The motion to take official notice is granted, in part.

MOTION TO DISMISS

Intervenor argues that the petition for review fails to comply with the requisite specification and content requirements set out in OAR 661-010-0030(2) and (4) and that the deficiency is so prejudicial that the petition for review should be viewed as untimely filed, or not filed at all, and hence result in dismissal of this appeal. OAR 661-010-0030(1).

OAR 661-010-0030(4)(d) requires that "[e]ach assignment of error must state the applicable standard of review."[2] Each of petitioner's five assignments

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[2] OAR 661-010-0030(4)(d) provides that the petition for review shall:

of error includes a section labeled "Standard of Review." The Standard of Review section for the first assignment of error sets out the standards of review for procedural error, misconstruction of law, adequacy of findings, and substantial evidence. Petition for Review 5-6. The Standard of Review sections for the second through fourth assignments of error simply refer back to the standards of review set out in the first assignment of error. For example, the standard of review section for the second assignment of error says only "[s]ee the Standard of Review for the First Assignment of Error." Petition for Review 11. The fifth assignment of error also refers back to the first assignment's Standard of Review section, but includes additional language regarding substantial evidence. *Id.* at 46-47.

Intervenor argues that petitioner circumvented OAR 661-010-0030(4)(d) by consolidating the requisite standards of review for each assignment under one assignment of error, forcing intervenor to speculate as to what standard applied to each subsequent assignment of error. Moreover, intervenor argues that

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> "Set forth each assignment of error under a separate heading. Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required. Each assignment of error must state the applicable standard of review. Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error shall be combined[.]"

petitioner's consolidation effectively allowed petitioner to expand the word count devoted to the merits of the appeal, beyond the 11,000 words allowed under OAR 661-010-0030(2)(b) (limiting the petition for review to 11,000 words, unless LUBA grants permission for a longer brief). As submitted, the petition for review consists of 10,968 words. Intervenor argues that had petitioner specified the applicable standards of review for each assignment, as required by OAR 661-010-0030(4)(d), petitioner would have had to cut words elsewhere in the petition or asked LUBA for permission to file an over-length brief. Intervenor argues that its substantial rights would be prejudiced if intervenor has to speculate as to the applicable standards of review for each assignment, while addressing a higher density of arguments on the merits.

Petitioner responds, and we agree, that the petition for review substantially complies with OAR 661-010-0030(4)(d), and that any violation is non-prejudicial and hence not a basis for corrective action, much less dismissal of the appeal.[3] OAR 661-010-0030(4)(d) does not prohibit cross-references to standards

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[3] OAR 661-010-0005 sets out the purpose of LUBA's administrative rules:

> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a

of review set out elsewhere in the brief, at least if it is clear which standards of review are cross-referenced. Here, it is true that petitioner's simple cross-references do not identify what specific standards of review are invoked by each assignment of error. However, read in context with the assignment of error itself, it is clear what standard of review is invoked for each assignment. For example, the second assignment of error is: "Respondent misconstrued the applicable law and LUBA's remand by failing to consider the subject farm as irrigated." Petition for Review 11. That clearly invokes misconstruction of law as the relevant standard of review, and only that standard of review. Intervenor has not established that ascertaining which standards of review are invoked by each assignment of error is particularly problematic or prejudicial. We conclude that petitioner's violation of OAR 661-010-0030(4)(d) is technical in nature, and does not prejudice intervenor's substantial rights to reasonable time to prepare and submit their case, and a full and fair hearing.

Similarly, that petitioner's cross-references might have effectively allowed petitioner to devote more of the petition for review to argument on the merits, compared to an otherwise identical petition for review that employs no cross-

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> land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1), a motion to intervene under OAR 661-010-0050(2), or a petition for review under OAR 661-010-0030(1), or to respond to an order to show cause under OAR 661-010-0011, is not a technical violation."

references with respect to stating the applicable standards of review, does not violate OAR 661-010-0030(2)(b). Petitioner's brief is less than 11,000 words in length, and thus complies with OAR 661-010-0030(2)(b).

Intervenor's motion to dismiss is denied.

BACKGROUND

Intervenor applied to the county to redesignate the parcel from Agriculture to Rural Residential Exception Area (RREA), and to rezone the property from Exclusive Farm Use/Redmond Bend (EFU-TRB) to Multiple-Use Agricultural, 10 acre minimum (MUA-10). In our opinion in *Destiny Court I*, we described the subject property as follows:

> "The subject property is an approximately 65-acre parcel zoned [EFU-TRB]. The urban growth boundary for the City of Bend is located approximately 2,000 feet to the southeast. The southern border of the subject property adjoins the Bend Urban Reserve Area. The subject property is undeveloped except for a small pond and fencing. The property has, or had until recently, rights to irrigate approximately 29 acres of land.
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> Under Statewide Planning Goal 3 (Agricultural Land), 'agricultural land' in Eastern Oregon is defined in part based on soil classifications established by the National Resources Conservation Service (NRCS), with soils predominantly in Classes I to VI presumed to constitute agricultural land. Based on NRCS soil maps, the county's initial comprehensive plan and zoning ordinances designated and zoned the property for agricultural use. The NRCS soil maps indicated that the subject property has three soil complexes: 38B Deskamp-Gosney complex, 0 to 8 percent slopes, 58C Gosney-Rock-outcrop-Deskamp complex, 0 to 15 percent slopes, and 106E, Redslide Lickskillet complex, 30 [to] 50 percent slopes. The 38B soil complex is classified as Class III soils if

> irrigated, Class VI if not. The 58C soil complex is classified as Class VII soils. The 106E Redslide Lickskillet soil complex is classified as Class VIII soils and found on a few acres on the western portion of the property, where steep rimrock descends to the Deschutes River. Past irrigation on the subject property was concentrated in two cleared areas with mostly 38B Class III/VI soils, which had been used for forage and pasture for cattle and horses.
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> "* * * * *
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> "To demonstrate that the parcel is not 'agricultural land' as defined under Goal 3, intervenor hired a soil scientist to conduct an 'Order 1' soil survey of the subject property. An Order 1 survey examines soil characteristics at a more refined scale than the NRCS survey. The soil survey confirmed the three soil complexes indicated in the NRCS survey. However, due to inclusions of 58C soils within areas the NRCS mapped as 38B, the soil survey found that the 38B Class III/VI soils on the property represented only about 21.5 acres, or 34 percent of the parcel, with the remainder consisting of Class VII or higher, non-agricultural soils." *Destiny Court I*, LUBA No 2025-015 (slip op at 3-5) (footnote omitted).

Based on the soil survey and other evidence, the county concluded that the subject property does not qualify as "agricultural land" as defined at OAR 660-033-0020(1), and approved the applications to redesignate the subject property RREA and rezone it MUA-10.

On appeal in *Destiny Court I*, the petitioner asserted six assignments of error. We sustained the first and third assignments of error, rejected the remainder, and remanded the decision to the county for additional findings on two issues. *Destiny Court I*, LUBA No 2025-015 (slip op 10, at 23-24). The two remand issues were limited to adopting findings addressing (1) the potential conflict between a comprehensive plan policy and the MUA-10 zone, and (2)

whether the subject property is suitable for the farm uses the petitioner identified in the record below, including various types of animal husbandry and equine facilities listed in ORS 215.203(2)(a). We also held that, in evaluating whether the subject property is suitable for farm use, the county must consider that the property retains access to irrigation. OAR 661-033-020(9).

On remand, the board of commissioners conducted hearings that allowed all parties to submit additional evidence on the two remand issues, with the evidentiary record closing February 11, 2026. Intervenor, as applicant, submitted its final written argument on February 18, 2026. On March 4, 2026, the board of commissioners deliberated and voted to again approve the application. On April 15, 2026, the county issued its final decision on remand, based on additional findings addressing the remand issues.

This appeal followed.

FOURTH ASSIGNMENT OF ERROR

As part of intervenor's final written argument, submitted to the county on February 18, 2026, were Exhibits UU, VV, XX and WW. Record 410-51. Petitioner argues that these exhibits constitute "new evidence" in violation of Deschutes County Code (DCC) 22.24.130(D), which provides that the applicant's final written argument "shall not include any new evidence." *See also* ORS 197.797(6)(e).[4] Consequently, petitioner argues, the county committed

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[4] ORS 197.797(6)(e) provides, as relevant:

procedural error by accepting and relying on that new evidence without providing other parties the opportunity to respond.

Exhibits UU and VV are copies of two county land use ordinances. In its findings, the board of commissioners stated that it will take official notice of the two ordinances, and referenced those ordinances in resolving the first issue on remand: the potential conflict between the county's comprehensive plan and the MUA-10 zone. Petitioner argues that ordinances in Exhibits UU and VV constitute "evidence," as that term is defined at DCC 22.04.020, that is "facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed to be relevant to the decision." *See* ORS 197.797(9)(b) (same). Petitioner contends that the two county ordinances are "documents" and hence constitute "evidence" as defined at DCC 22.04.020.

Intervenor responds, and we agree, that Exhibits UU and VV, while "documents," do not constitute evidence as defined at DCC 22.04.020, because they were not submitted to demonstrate compliance or noncompliance with applicable approval standards. The two county ordinances were submitted in support of intervenor's legal arguments regarding how to interpret the county's comprehensive plan and land use regulations.

> "Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence."

Exhibit WW is a document entitled "Conditions of Approval Agreement and Restrictive Covenant" that includes a single condition of approval limiting future subdivision development on the subject property to an "equivalent density of 1 lot per 10 acres, which can be accomplished through use of a cluster or planned unit development for a minimum lot size of 2-acres with associated 8-acre reservation of open space." Record 442-43. The agreement states that "[t]his condition shall be required so long as the property remains outside of an urban growth boundary." Record 443.

Petitioner argues that Exhibit WW constitutes new evidence that the county cited in part to support its conclusion that the comprehensive plan does not conflict with the MUA-10 zone. As discussed below under the first assignment of error, the MUA-10 zone allows residential subdivisions at an "equivalent density" of 10 acres, via cluster development or planned development.

Intervenor responds, and we agree, that the condition of approval proposed in Exhibit WW, restricting development of the subject property, does not, in itself, constitute "evidence" as defined at DCC 22.04.020. In *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 597-98 (2000), we noted that conditions of approval are routinely applied as part of the decision-making process following the close of the evidentiary record. There, the applicant proposed, after the close of the evidentiary record, a condition of approval restricting the number of dwelling units allowed to 20 units. We concluded that the proposed condition of

approval was not "evidence" within the meaning of *former* ORS 197.763(9)(b) (2000), *renumbered as* ORS 197.797(9)(b) (2021), and rejected the petitioners' argument that the city was required to re-open the record to allow a response. We similarly conclude here that the proposed condition of approval limiting future development of the subject property to the 10-acre equivalent density allowed in the MUA-10 zone does not itself constitute "evidence" for purposes of ORS 197.797(9)(b) or its local cognate, DCC 22.04.020. Petitioner does not identify anything else in Exhibit WW that arguably constitutes "new evidence."[5]

Finally, Exhibit XX is a three-column table listing in the first column a number of crops grown and livestock produced in the county, with the second and third columns providing a Yes/No answer to the questions of whether petitioner had raised issues about each specific crop or livestock either (1) in the county's initial proceeding or (2) before LUBA. Record 447-51. For example, one type of livestock listed is "Llamas." The second and third columns indicate with Yes and No answers, respectively, that petitioner raised issues regarding whether the subject property is suitable for raising llamas during the prior proceeding, but did not raise that issue in its appeal to LUBA in *Destiny Court I*. Record 447.

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[5] We noted in *Marine Street LLC* that the petitioners were free to challenge, before LUBA, the terms and efficacy of conditions imposed by the decision. 37 Or LUBA at 597-98. In the present case, petitioner challenges under the first assignment of error the substance of the condition set out in Exhibit WW, discussed below.

Petitioner argues that Exhibit XX constitutes "new evidence" for purposes of DCC 22.24.130(D) and ORS 197.797(6)(e), and therefore its submission to and acceptance by the county as part of final written argument violated the code and statute.

Intervenor responds that Exhibit XX is simply a tabular data set based upon information already in the record, that summarizes for the county's convenience which specific arguments and issues petitioner had preserved, or not, with respect to the second basis for remand, suitability for farm use. Intervenor argues that Exhibit XX is not evidence at all, but argument regarding what issues are within the scope of remand. To the extent Exhibit XX includes evidence, intervenor argues, it is not "new" evidence, because it is based entirely on petitioner's submissions during the initial county proceedings and the LUBA appeal of the county's initial decision.

We agree with intervenor. Exhibit XX was not submitted to demonstrate as evidence regarding compliance with applicable approval criteria, but as argument regarding which specific issues were preserved or not under the limited scope of remand. That is largely if not entirely a legal argument, and petitioner was free to provide, and did provide, its own argument regarding the scope of remand and which specific farm uses must be considered in responding to LUBA's limited remand. *See* Record 453-63 (petitioner's February 11, 2026 letter to the county, listing a number of different crops and livestock that petitioner asserted were within the scope of remand). Indeed, Exhibit XX can be

understood as a response to petitioner's legal assertions that all the crops and livestock listed in its letter to the county were properly within the scope of remand.

In sum, we agree with intervenor that petitioner has not demonstrated that submission and acceptance of Exhibits UU, VV, WW, and XX as part of intervenor's final written argument violated DCC 22.24.130(D) and ORS 197.797(6)(e), or otherwise constituted procedural error.[6]

The fourth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Deschutes County Comprehensive Plan (DCCP) 3.3.1 sets out the following policy: "Except for parcels in the Westside Transect Zone,[7] the

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[6] Petitioner's fourth assignment of error also includes arguments that LUBA erred in rejecting petitioner's record objections to Exhibits UU, VV, WW, and XX. In our order settling the record, we concluded that the exhibits had clearly been "placed before, and not rejected by" the board of commissioners, and therefore were part of the local record. *Central Oregon Landwatch v. Deschutes County*, LUBA No 2026-032 (July 13, 2026) (slip order at 3-5). We concluded that petitioner's record objection arguing that the exhibits were improperly accepted into the record was, in effect, a procedural assignment of error in the guise of a record objection. In its brief, petitioner offers no basis to revise our disposition of its record objection regarding the exhibits. Any errors therein (or in this opinion) can be challenged only via ORS 197.850.

[7] The Westside Transect Zone (WTZ) is a special zone that applies to certain geographic areas subject to the Bend Urban Growth Boundary Zoning Ordinance, DCC chapter 19.22. As the findings explain, the WTZ was adopted pursuant to an exception to Statewide Planning Goal 14 (Urbanization). Record 52. The WTZ provides for a minimum parcel size of 2.5 acres for residential lots. There is no

minimum parcel size for new rural residential parcels shall be 10 acres." DCCP 3.3 explains that "Deschutes County requires a 10-acre minimum lot size for new rural residential lots in order to protect the rural quality of life and its resources."

As noted, intervenor applied to the county to redesignate the subject property to the RREA plan designation, and to rezone it MUA-10. The MUA-10 zone specifies a minimum parcel size of 10 acres. DCC 18.32.040(A) (2026). However, *former* DCC 18.32.040(A) (2025) provided that cluster development and planned development are allowed within the MUA-10 zone (among other zones) as a conditional use, subject to conditional use standards at DCC 18.128, and further subject to certain "density bonuses" that allow a higher "equivalent density."[8] Intervenor's original application included an application for tentative approval for planned development of the subject property, proposing that the 65-

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dispute that the subject property is not within the Bend Urban Growth Boundary and not subject to the Westside Transect Zone.

[8] Apparently as part of 2025 DCC amendments, *former* DCC 18.32.040(A) was deleted from the MUA-10 subchapter, and the authorization to construct cluster and planned development within the MUA-10 zone is currently codified at DCC 18.116.400, subject to conditional use standards at DCC 18.128. DCC 18.116.400(A)(3) also currently codifies what the decision refers to as "density bonuses," providing in relevant part that within certain zones including the MUA-10 zone, cluster and planned developments are allowed "an equivalent density of one unit per seven and one-half acres," except for property located within one mile of an acknowledged urban growth boundary, in which case cluster and planned development are "allowed a five-acre minimum lot area or equivalent density." Because the findings and decision refer to both *former* DCC 18.32.040(A) and the current re-codification of those provisions elsewhere in the DCC, we shall also refer to both sets of provisions in this opinion.

acre property be divided into 14 residential lots, with each lot approximately 1.7 acres in size, and the remainder of the property used for open space, roads, etc. Intervenor subsequently withdrew the application for planned development, and proceeded only upon its request to redesignate and rezone the subject property. Nonetheless, the application for planned development remains in the original record, and no party disputes that the application accurately represents the potential minimum lot size and density allowed on the subject property under *former* DCC 18.32.040(A) and its current codification at DCC 18.116.400.

During the county's initial proceedings, petitioner argued that the DCC provisions allowing sub-10-acre minimum lot sizes in cluster and planned development on rural lands facially conflicts with the 10-acre minimum parcel size mandated by DCCP 3.3.1. Petitioner contended that, under *Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975), zoning provisions must be in accordance with the hierarchically superior comprehensive plan, and cannot allow a more intensive use than prescribed in the comprehensive plan. The county's initial decision did not address the issue raised regarding a potential *Baker* conflict between DCCP 3.3.1 and code provisions allowing sub-10-acre minimum lot size. On appeal, petitioner assigned error based on the alleged *Baker* conflict, but the respondent's brief did not respond to that argument. We sustained the assignment of error, remanding the decision in part for the county to address the alleged *Baker* conflict in the first instance. We noted that no party cited any legislative history of the DCCP or DCC that might illuminate the intent

of DCCP 3.3.1 or the DCC provisions allowing "equivalent densities" below 10 acres in size, and suggested that the county may wish to consider any relevant legislative history. *Destiny Court I*, LUBA No 2026-015 (slip op at 10 n 2).

On remand, the county adopted findings addressing the issue. Record 51-53. The county ultimately concluded:

> "The [b]oard interprets DCCP Policy 3.3.1 to require minimum lot sizes of 10 acres, except when P[lanned Unit Development]s or cluster developments are used, in which case equivalent densities of 1:10 are permitted with the preservation of open space." Record 53.

On appeal, petitioner challenges this interpretation, arguing that the term or concept of "equivalent density" is found nowhere in the text of DCCP 3.3.1. According to petitioner, the text of DCCP 3.3.1 imposes a fixed minimum parcel size of 10 acres on each residential unit of land, and does not mention density at all, much less an "equivalent density." Petitioner argues that "minimum parcel size" and "equivalent density" are very different development density concepts, and that nothing in the text or context of DCCP 3.3.1 supports the county's conflation of those two concepts. Petitioner argues that the county's interpretation impermissibly inserts into DCCP 3.3.1 terms that were omitted, contrary to the general rule of interpretation set out in ORS 174.010.[9]

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[9] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been

As we understand how the term "equivalent density" is used in the DCC, it is a measure of density derived by dividing the total number of acres by the total number of residential lots or dwellings. Applied to a hypothetical 100-acre parcel, a straightforward application of DCCP 3.3.1 would allow a maximum of 10 lots, each 10 acres in area, with a maximum of 10 dwellings. Expressed as a density ratio, that is one dwelling per 10 acres or 1:10. If the same parcel were developed as a cluster or planned development, an "equivalent density" of 1:10 would allow the same 10 dwellings, but the lots for those 10 dwellings could be much smaller in area, two acres for example, with the remainder of the parcel devoted to roads and open space. With the density bonuses allowed under *former* DCC 18.32.040(A), and as currently codified under DCC 18.116.400(A)(3), an "equivalent density" of 1:10 could be reduced to one dwelling per 7.5 acres or even one dwelling per five acres, if the property is within one mile of an urban growth boundary. In our hypothetical, an "equivalent density" of 1:5 could potentially double the number of residential lots and dwellings allowed, for a maximum of 20 lots and 20 dwellings on the 100-acre property, compared to a maximum of 10 lots and 10 dwellings allowed under a straightforward application of DCCP 3.3.1.

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inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

Intervenor responds that the county's interpretation of DCCP 3.3.1 is entitled to a deferential standard of review under ORS 197.829(1)(a) to (c)[10] and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). Under *Siporen*, the test is not whether a governing body's interpretation of its comprehensive plan is correct, or the best or superior interpretation, but whether the interpretation is "plausible," given its text and context. 349 Or at 259. Intervenor argues that the county's interpretation of DCCP 3.3.1 plausibly reconciles the text of the policy with those DCC provisions that have long allowed, within cluster and planned development, "equivalent densities" and density bonuses that effectively allow creation of residential lots with minimum areas much smaller than 10 acres.

Intervenor emphasizes that the equivalent density concept and density bonuses currently codified at DCC 18.116.400(A)(3) have existed in the DCC in substantially the same form since 1979, when the county adopted Ordinance No.

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[10] ORS 197.829(1) provides in relevant part:

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

PL-15, which we have taken official notice of. We understand intervenor to argue that when the county adopted Ordinance No. PL-15 in 1979, it presumably intended the provisions for equivalent density and density bonuses to work in tandem with DCCP 3.3.1, which has existed since the county adopted its first comprehensive plan. Intervenor also emphasizes, as do the county's findings, that in 2019, the county amended both DCCP 3.3.1 and certain DCC provisions governing the Westside Transect Zone (WTZ), to allow development within the WTZ at densities as low as 2.5 acres, as an explicit exception to the 10-acre minimum parcel size specified in DCCP 3.3.1.[11] We understand intervenor to argue that the 2019 amendments indicate that the board of commissioners was aware of how DCCP 3.3.1 interacted with DCC provisions that allow for equivalent density, and that the board of commissioners intended, then and in 1979, for DCCP 3.3.1 to operate consistently with those DCC provisions, including the equivalent density and density bonuses in *former* DCC 18.32.040(A).

Intervenor argues that this legislative background supports the county's interpretation of DCCP 3.3.1, that the policy requires a minimum parcel size of

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[11] The 2019 amendments to the DCCP added the "[e]xcept for parcels in the Westside Transect Zone" exclusion to the text of DCCP 3.3.1. Record 410-12. As the findings in the present case explain, the 2019 amendments established that the 10-acre minimum parcel size for new rural residential parcels otherwise mandated by the policy did not apply to rural residential development within the WTZ. Record 52.

10 acres for rural residential development, *except* in those circumstances when cluster or planned development is proposed under the applicable DCC provisions, in which case "equivalent densities" of 1:10, or even non-equivalent densities under the density bonuses, are permitted.

We agree with petitioner that the county's interpretation of DCCP 3.3.1 is inconsistent with the express language of that comprehensive plan provision, and that the interpretation implausibly inserts into DCCP 3.3.1 a significant exception to its textual mandate. As petitioner argues, the text of DCCP 3.3.1 unambiguously imposes a minimum parcel size of 10 acres for rural residential development. DCC 18.04.030 defines "parcel" by reference to the definition at ORS 92.010, which in turn defines parcel as a "single unit of land created by a partition of land." ORS 92.010(6). In specifying a 10-acre minimum parcel size for rural residential development, DCCP 3.3.1 is clearly referring to a unit of land that is 10 acres in size, and cannot plausibly be read to refer to an average density calculated over a number of parcels and tracts of open space. Nothing in the text suggests that that mandatory minimum parcel size can be reduced below 10 acres, pursuant to code processes that allow rural residential development based on "equivalent densities."

The only explicit exception in the text of DCCP 3.3.1 to the otherwise unqualified reach of its mandate is in the WTZ, where the 10-acre minimum lot area requirement does not apply. In place of that 10-acre minimum, the WTZ

provisions impose a minimum lot area of 2.5 acres. DCC 19.22.050(A).[12] In our view, that explicit exception indicates that the county knows how to carve exceptions from the broad mandate set out in DCCP 3.3.1. We agree with petitioner that the county's interpretation is simply inconsistent with the express language of DCCP 3.3.1 and cannot be affirmed. ORS 197.829(1)(a).

The context of DCCP 3.3.1 includes DCCP 3.3, which as noted explains that "Deschutes County requires a 10-acre minimum lot size for new rural residential lots in order to protect the rural quality of life and its resources." DCCP 3.3 also seems to function as a purpose statement for DCCP 3.3.1. Neither the county's decision nor intervenor address the context provided by DCCP 3.3, or attempt to explain why, if a 10-acre area for rural residential development is the minimum parcel size deemed necessary to protect the rural quality of life and its resources, those qualities and resources are also protected by clustering rural residences together into lots as small as two acres or less. Absent some findings

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[12] In its findings on remand, the county described the effect of the 2019 amendments as reducing the "equivalent density" of residential lots in the WTZ from 10 acres to 2.5 acres. Record 52. However, we do not understand that finding. The 2019 amendments do not, as far as we can tell, refer to or concern "equivalent density" at all. The 2019 amendments provide for a straightforward minimum lot area of 2.5 acres for each residential lot, not an "equivalent density" as that term is used in *former* DCC 18.32.040(A) and DCC 18.116.400(A)(3), governing cluster and planned development. *Former* DCC 18.32.040(A) and DCC 18.116.400(A)(3) do not allow cluster or planned development in the WTZ zone, and the WTZ zone, at DCC 19.22, does not appear to authorize cluster or planned development, at any density, much less equivalent density.

or argument on that point, we conclude that the county's interpretation is inconsistent with the purpose of DCCP 3.3.1. ORS 197.829(1)(b).

The findings and intervenor's arguments appear to treat the conflicting provisions of *former* DCC 18.32.040(A), and the current codification under DCC 18.116.400(A)(3), as context for purposes of interpreting DCCP 3.3.1. While associated code provisions can certainly function as context for interpreting ambiguous language in comprehensive plan policies, in the present case DCCP 3.3.1 is unambiguous in mandating a minimum parcel size of 10 acres for rural residential development. Stated differently, *former* DCC 18.32.040(A) and DCC 18.116.400(A)(3) do not disambiguate any unclear terms in DCCP 3.3.1. Those code provisions *conflict* with the express language of DCCP 3.3.1, and the county's interpretation resolves that conflict by effectively importing the conflicting code terms into DCCP 3.3.1, in the form of an implicit *exception* to the mandatory 10-acre minimum parcel size. That is not an exercise of interpreting text in context; that is amending the text of DCCP 3.3.1 in the guise of interpretation. Finally, it bears repeating that DCCP 3.3.1 is hierarchically superior to *former* DCC 18.32.040(A) and DCC 18.116.400(A)(3). As explained in *Baker*, and as discussed below, conflict between the comprehensive plan and the zoning code must be resolved in the plan's favor. Under the county's interpretation, the conflict between the plan and zoning code is impermissibly resolved in favor of the zoning code. *Baker*, 271 Or at 514.

The findings and intervenor also emphasize that *former* DCC 18.32.040(A) and DCC 18.116.400(A)(3) were adopted by ordinances that were not appealed, and which became by operation of law acknowledged to comply with the statewide planning goals. ORS 197.625. Acknowledgment means, among other things, that when the acknowledged code provisions are applied in a land use decision, the terms of those provisions cannot be challenged for inconsistency with the statewide planning goals. *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350, *rev den*, 323 Or 136 (1996). However, neither the findings nor intervenor cite any authority for the proposition that acknowledgement shields a code provision from a challenge that the code provision conflicts with a hierarchically superior comprehensive plan provision. We are aware of no such authority. In the present case, petitioner does not argue that any DCC provision is inconsistent with the statewide planning goals. Petitioner argues that *former* DCC 18.32.040(A) and DCC 18.116.400(A)(3) authorize more intensive residential uses than are allowed by DCCP 3.3.1, and hence conflict with that comprehensive plan provision, under the reasoning in *Baker*. The acknowledged status of the applicable comprehensive plan and code provisions has no obvious bearing on resolving that argument.

The findings also stress that provisions for equivalent density and density bonuses have existed in the code since 1979, stating for example that "the County has always considered an *equivalent density* as the standard, and not just minimum lot size." Record 53 (emphasis original). We understand the county to

suggest that the sheer longevity of the conflict between these code provisions and DCCP 3.3.1 somehow requires resolving the conflict in favor of the code. If so, we reject the suggestion.

The findings also state that "[a] contrary interpretation would effectively strike those provisions from Code, which is not the intent of DCCP Policy 3.3.1 * * *." Record 53. The findings and parties do not identify when the county first adopted DCCP Policy 3.3.1, but intervenor states the county's comprehensive plan has always included DCCP 3.3.1. Intervenor-Respondent's Brief 7. If adoption of DCCP 3.3.1 preceded the adoption of PL-15 in 1979, as we understand to be the case, then it seems unlikely that the board of commissioners that adopted DCCP 3.3.1 formed any intent with respect to future zoning code provisions that might conflict with DCCP 3.3.1. The county cites no legislative history or other evidence that the intent of the board of commissioners who originally adopted DCCP 3.3.1 was that its mandated 10-acre minimum parcel size should give way to conflicting, later adopted code provisions. In adopting those subsequent code provisions, and in adopting 2019 revisions to DCCP 3.3.1 to provide an exception for development within the WTZ, the adopting board of commissioners presumably did not perceive any conflict between DCCP 3.3.1's mandate for 10-acre minimum parcel sizes and the code provisions authorizing sub-10-acre minimum parcel sizes. But their apparent lack of perception on this point is not evidence of intent to subordinate DCCP 3.3.1 to conflicting code provisions. Even if evidence of such intent existed or could be

inferred, the intent of the later board of commissioners who (knowingly or unknowingly) adopted the conflicting code provisions cannot control, or otherwise the principle articulated in *Baker* would never apply.[13] As explained in *Baker*, where the code allows more intensive uses than permitted under the hierarchically superior plan, the code must give way.

Two final issues require comment. Petitioner appears to argue that the conflict between DCCP 3.3.1 and certain code provisions that are operable under the MUA-10 zoning means that the MUA-10 zone is invalid and cannot be lawfully applied to the subject property at all. Petition for Review 9-10. Intervenor responds that this argument represents a new issue that was not raised in the prior appeal, and is therefore waived under *Beck v. City of Tillamook*, 313

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[13] Although the parties do not discuss more recent legislative developments, we note that in 2025, in response to our June 26, 2025 remand in this case, the county re-opened a then-pending legislative proceeding intended to comprehensively update the DCCP. The re-opened proceeding included amendments that adopted express exceptions to the 10-acre minimum lot area specified in a renumbered version of DCCP 3.3.1, to adopt as comprehensive plan policy the sub-10-acre densities and density bonuses that heretofore had existed only in the DCC. That 2025 legislative decision was appealed to LUBA, and remanded on several grounds. *Central Oregon Landwatch v. Deschutes County*, LUBA No 2024-080 (April 13, 2026) *(Pohaku Farms)*. One basis for remand was to resolve potential conflicts between the new DCCP policies and existing DCC code provisions that allow cluster and planned unit development at reduced densities. *Pohaku Farms*, LUBA No 2024-080 (slip op at 37). We note that, on September 10, 2026, the county adopted a decision on remand in *Pohaku Farms*, and that decision has been appealed to LUBA and assigned LUBA No. 2026-079.

Or 148, 831 P2d 678 (1992). We agree with intervenor. We also agree with intervenor's response on the merits, that petitioner fails to establish that the conflict identified above renders the MUA-10 zone invalid. It may be that to ensure that development allowed under the RREA plan designation and MUA-10 zone is consistent with DCCP 3.3.1, the county may have to impose conditions of approval or other measures to limit development on the subject property. But petitioner cites no authority for the proposition that the identified inconsistency renders the MUA-10 zone invalid or incapable of being lawfully applied to the subject property.

As intervenor argues, the county in fact imposed a condition of approval that requires in relevant part that

> "[a]ny future subdivision shall be limited to equivalent density of 1 lot per 10-acres, which can be accomplished through use of a cluster or planned unit development for a minimum lot size of 2-acres with associated 8-acre reservation of open space. This condition shall be required so long as the property remains outside of an urban growth boundary." Record 62.

As we understand it, this condition effectively prohibits application of the density bonuses allowed under *former* DCC 18.32.040(A) and DCC 18.116.400(A)(3), but it still allows cluster or planned residential development at an "equivalent density" of one dwelling per 10 acres, on residential lots no smaller than two acres.

Intervenor argues that if LUBA rejects the county's interpretation of DCCP 3.3.1, the consequence is that the 10-acre minimum parcel size imposed

by that plan provision will control any subsequent development application under the DCC, that is, each residential lot must be a minimum of 10 acres in size. Intervenor-Respondent's Brief 11-12. We understand intervenor to argue that, notwithstanding the county's misconstruction of law and the fact that the condition of approval imposed does not completely eliminate the identified conflict with DCCP 3.3.1, LUBA should nonetheless deny this assignment of error. Intervenor argues that in any future application to develop the subject property under DCCP 3.3.1 and its 10-acre minimum parcel size, then as a matter of law only 10-acre lots can be approved on the subject property, in which case no purpose would be served by sustaining this assignment of error and remanding the decision to the county.

In a recent decision, we concluded that the appropriate juncture to address potential conflicts between DCCP 3.3.1 and DCC provisions that allow sub-10-acre lot sizes is at the time of rezone, not at the subdivision or planned development stage. *Central Oregon Landwatch v. Deschutes County*, LUBA No 2026-015 (June 26, 2026) (slip op at 10-11). Similarly, in the present case, we conclude that petitioner's successful challenge to the county's interpretation of DCCP 3.3.1 requires sustaining this assignment of error and remanding the rezoning decision to the county for further proceedings consistent with this opinion. Among other things, remand would allow intervenor to propose and the county to consider whether new or revised conditions of approval are necessary to ensure consistency with DCCP 3.3.1.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error is that "Respondent misconstrued the applicable law and LUBA's remand order by failing to consider the subject farm as irrigated. OAR 660-033-0020(9)." Petition for Review 11.

As we noted in *Destiny Court I*, OAR 660-033-0020(9) requires that in determining whether land is agricultural land as defined at OAR 660-033-0020, "an area or tract within a water or irrigation district that was once irrigated shall continue to be considered 'irrigated' even if the irrigation water was removed or transferred to another tract." The subject property once had water rights to irrigate 28.94 acres of land in the approximate center of the property, on soils that include soils classified as Class III if irrigated, but those water rights were sold. Intervenor's consultants initially evaluated the agricultural potential for the property based in part on the current lack of irrigation, and the county's initial decision failed to apply the presumption required by OAR 660-033-0020(9), under which the county must assume that the property still retains water rights. Accordingly, we remanded the county's initial decision to re-evaluate the property's suitability for farm use consistently with OAR 660-033-0020(9). *Destiny Court I*, LUBA No 2025-015 (slip op at 23-24).

On remand, intervenor submitted additional expert testimony assuming that the former water rights were available, but still concluding that the subject property as a whole is not suitable for farm use. The county relied on that

evidence to conclude that the subject property is not suitable for farm use, even assuming the former water rights were available.

On appeal, petitioner argues that the county on remand misconstrued OAR 660-033-0020(9), and accordingly failed to correctly apply the presumption that the property is, as a matter of law, irrigated. Petitioner contends that throughout the findings the county pervasively failed to apply the presumption that a portion of the subject property is irrigated. For example, in addressing whether the property could be used for a horse boarding operation, petitioner argues that the county found that such operations require irrigated pasture, but that irrigated pasture lands "are not available on the subject property." Petition for Review 14 (quoting Record 56).

However, as intervenor argues, the county did not in fact adopt such a finding, at Record 56 or anywhere else in the decision, as far as we can determine. Petitioner may be misquoting a different passage at Record 56, where the county found that "horse facilities commonly have additional facilities and infrastructure such as barns, arenas, and irrigated and separated irrigated pasture lands for each boarded horse. The Property has no such improvements. In fact, absent some limited fencing and a lean-to structure, there are no other improvements on the Property." Record 56. The county found that the property lacked improvements typical of horse facilities, such as barns, arenas and separate irrigated pasture lands for each horse, but did not find or assume that irrigation was not "available" to the subject property, as petitioner argues. We agree with intervenor that

petitioner has not identified any findings indicating that the county failed to apply the presumption required by OAR 660-033-0020(9), or findings that otherwise presume that irrigation is not available.

The county's direct findings regarding water availability state, in relevant part:

> "LUBA's remand required the County to consider the Property as if it already had irrigation. Testimony from both Greg Mohnen and Rand Campbell discussed the difficulty of installing an irrigation system due to the extreme rockiness of the soils. Mr. Campbell estimated that such a system would cost over $100,000 and specifically commented that the physical characteristics of the Property make it unlikely to be successful. Therefore, no reasonable farmer would expend the resources to establish a system on the Property. As was shown in the aerials, any previous attempts to irrigate were short lived. The [b]oard finds this is persuasive evidence to support findings that the Property is not suited for irrigated agriculture-especially when coupled with the soil fertility challenges on the Property.
>
> "* * * [W]e find persuasive the testimony of Mr. Campbell and Mr. Mohnen that operators would not seek to establish an irrigation system on the Property. Mr. Rabe's testimony is also persuasive – the areas of better soils are irregular in shape and occur in 15 separate delineations as small as 0.12 acres in size. The rocky outcroppings and irregular shape of the limited good soils make the Property unsuitable for irrigation." Record 58-59.

Petitioner does not directly challenge these findings, which assume, consistent with OAR 660-033-0020(9), that irrigation is available to a portion of the property. The findings cite and rely upon evidence that, notwithstanding the availability of water to a portion of the property with limited good soils, the

subject property as a whole is unsuitable for farm use. Absent some challenge to these findings, petitioner has not demonstrated that the county misconstrued OAR 660-033-0020(9).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is that "Respondent misconstrued and misapplied ORS 215.203(2)(a) and OAR 660-033-0020(1)(a)(B) and made a decision not supported by substantial evidence in finding the subject irrigated farm is not agricultural land." Petition for Review 18. In relevant part, OAR 660-033-0020(1)(a) defines "agricultural land" to include

> "(A) Lands classified by the [NRCS] as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon; [or]
>
> "(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[.]"

The referenced statute, ORS 215.203(2)(a) defines "farm use" to mean the "current employment of land for the primary purpose of obtaining a profit in money" by raising crops or engaging in various kinds of animal husbandry.[14] Farm use also includes stabling or training equines.

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[14] ORS 215.203(2)(a) provides, in relevant part:

In *Destiny Court I*, we held that the county erred in failing to address evidence and argument regarding whether the subject property is suitable for farm uses that petitioner had identified below, "including various types of animal husbandry and equine facilities listed in ORS 215.203(2)(a)." *Destiny Court I*, LUBA No 2025-015 (slip op at 23).

On remand, the county conducted hearings at which both petitioner and intervenor submitted additional evidence on this question. As explained above in addressing the fourth assignment of error, intervenor argued, and the county agreed, that many of the farm uses identified by petitioner on remand had not been raised in the first proceeding.

On appeal, petitioner advances three subassignments of error. The first argues that the subject property is suitable for farm use, for purposes of ORS 215.203(2)(a) and OAR 660-033-0020(1)(a)(B), because it is located in the same

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> "As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows."

ecoregion, plant hardiness zone, and general climate as farms and ranches in the county, and shares the same general geology, physiography, native vegetation, soils and hydrology with those farms and ranches.

Intervenor argues, and we agree, that our remand for additional findings and evidence under ORS 215.203(2)(a) and OAR 660-033-0020(1)(a)(B) was limited to the particular farm uses petitioner raised during the initial proceedings: specified types of animal husbandry and equine facilities. That limited scope of remand did not include issues regarding whether the subject property is suitable for farm uses based on the fact that the property is located in the same general ecological and climactic zones shared by every farm and ranch in the county. The issue raised under the first subassignment of error was not raised during the initial proceedings or before LUBA, was not part of our remand to the county, and is therefore not preserved on appeal of the county's decision on remand.

The second subassignment of error argues that the subject property is "suitable for growing crops commonly grown on Central Oregon farms." Petition for Review 31. Petitioner lists dozens of crops that are grown in the county and argues that intervenor has failed to demonstrate that those crops cannot also be grown on the irrigated portion of the subject property.

Intervenor responds, and we agree, that our limited remand on this issue did not require the county to evaluate whether the subject property could grow the dozens of crops identified by petitioner on remand. Our remand on this issue was limited to the farm uses identified in the first appeal, and did not include any

crops at all, much less the crops identified during the remand proceedings. The issue presented under this subassignment of error was not raised during the initial proceedings, was not part of our remand to the county, and is not preserved on appeal.

Under the third subassignment of error, petitioner discusses the seven factors set out in OAR 660-033-0020(1)(a)(B) for determining whether land is suitable for farm use, cites the evidence petitioner submitted during the proceedings below, and argues that the record on remand compels the conclusion that the subject property is agricultural land under the factors set out in the rule.

Intervenor responds that petitioner fails to acknowledge, much less challenge, the six pages of findings the county adopted addressing the seven OAR 660-033-0020(1)(a)(B) factors. Record 50-56. We agree with intervenor that petitioner has not established that the county misconstrued ORS 215.203(2)(a) and OAR 660-033-0020(1)(a)(B), or that its findings on the seven factors are not supported by substantial evidence. To mount such challenges, petitioner would need to identify the findings that include the alleged misconstructions of law, and that are not supported by substantial evidence. The latter would also require petitioner to demonstrate that the county's findings are not supported by the evidence in the whole record, including the evidence the county relied upon with respect to each factor, not just the countervailing evidence that petitioner submitted. *See Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988) (a finding of fact is supported by substantial evidence if the record, viewed as a

whole, would permit a reasonable person to make that finding). Petitioner's failure to identify, much less challenge, the findings addressing the OAR 660-033-0020(1)(a)(B) factors that include the alleged misconstructions of law or that lack the support of substantial evidence offers no basis for reversal or remand.

The first, second, and third subassignments of error are denied.

The third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued the applicable law, and adopted a decision lacking substantial evidence, with respect to classifying the soils on the subject property under the NRCS classification system. According to petitioner, intervenor's expert testified that approximately 21 acres of the 65-acre subject property consist of Deskamp soils, which are classified under the NRCS system as Class III soils if irrigated, Class VI if not irrigated. However, the expert noted that the cleared and formerly irrigated portion of the property includes a number of rocks and rocky outcrops that would impede future attempts to irrigate and cultivate that portion. Petitioner argues that the findings repeatedly describe the soils on that portion as stony or rocky, and apparently cite that fact as a reason for concluding that the subject property is not suitable for farm use. For example, the findings state that

> "even the 'cleared' area on the Property remains extremely rocky. Mr. Mohnen estimated that it would take at least $100,000 to attempt to remove rock such that you *may* be able to use standard farm equipment. The Board finds [intervenor's] evidence and expert

testimony to be persuasive and more reliable than evidence provided by [petitioner]." Record 56 (emphasis in original).

Petitioner contends, however, that under the NRCS classification scheme, properly understood, the presence of rocks on the portion of the property with Deskamp soils does not alter the Class III classification or convert it to an inferior sub-class of "Class III but rocky." That is because, petitioner argues, the NRCS scheme assigns a classification based on the presumption that removable rocks will be removed, and where rocks cannot be removed, the classification already takes that circumstance into account. According to petitioner, that means that the portion of the subject property with Deskamp soils is Class III, period. Petitioner argues that the county, in adopting findings that cite the rockiness of the soil as one basis to conclude that the subject property is not suitable for farm use, misconstrued OAR 660-033-0020(1)(a)(B). Further, petitioner argues, those findings are not supported by substantial evidence.

The NRCS source that petitioner cites is a 1961 NRCS handbook entitled "Land-Capability Classification." Record 505. The handbook describes a number of assumptions that underpin the NRCS classification system, including:

> "6. Presence of water on the surface or excess water in the soil; lack of water for adequate crop production; *presence of stones*[.] * * *
>
> 7. *Soils considered feasible for improvement* by draining, by irrigating, *by removing stones*, by removing salts or exchangeable sodium, or by protecting from overflow *are classified according to their continuing limitations in use, or the risks of soil damage, or both, after the improvements have been installed. * * * Where it is considered not feasible to*

> *improve soils by* drainage, irrigation, *stone removal*, removal of excess salts or exchangeable sodium, or both, or to protect them from overflow, *they are classified according to present limitations in use*." Record 513 (emphases added).

In responding to this argument when raised by petitioner's attorney below, intervenor's expert stated:

> "In Section 2 of [petitioner's] submittal, it is alleged that not removing rock from the Destiny Court property is a form of neglect as it relates to Land Capability Classification of soils in the areas previously assigned water by the Swalley Irrigation District. The soils in this area, like the soils across most of the property, are a complex mosaic of moderately deep Deskamp soils and shallow, rocky Gosney soils. Rockiness, especially at or near the surface, interfere with the safe operation of tillage and harvest equipment, and is not commonly associated with Deskamp soils. However, rockiness is commonly associated with Gosney soils, along with the shallow depth to bedrock. [Petitioner] cites Agricultural Handbook No. 210, the 1961 document published by the Soil Conservation Service (now known as the [NRCS]) outlining the national process for placing soils in land capability classes. However, they misinterpret the footnote pertaining to the removal of rocks. That is only of value if the soil conditions after removal result in a better classification. The Oregon Guide for Placing Soils in Land Capability Classes (issued 1977) state that soils with an available water holding capacity of less than 2 inches are Class VII. Gosney soils are Class VII whether the rocks are present or not. Removing rocks from Gosney soils serves no practical purpose.
>
> "In addition, COLW refers to '[t]he 21.53 or more acres of irrigated, predominantly Class III farmland on the subject farm[.]' This is a very inaccurate representation. The acreage figure refers to the total amount of Deskamp soil across the entire site, most of which has never been assigned water or irrigated. These soils occur in 15 separate delineations ranging from 0.12 to 7.3 acres in size. The largest delineation is an extremely irregularly shaped area in the southwest part of the site that is fully vegetated with native

> vegetation (mature sagebrush, juniper, grasses and forbes) and has never been irrigated. In contrast to [petitioner's] statement, the area that was previously cleared and irrigated in a failed attempt to farm with the intent of making a profit in money, is more than 52 [percent] Class VII Gosney soils with less than 48 [percent] Deskamp soils – and therefore, is not predominantly Class III." Record 488.

As we understand the parties' arguments regarding the NRCS classification scheme, petitioner has not demonstrated that the county's findings regarding the rockiness of the cleared and formerly irrigated portion of the subject property include any misconstructions of law or are not supported by substantial evidence. Intervenor's expert explained, and petitioner does not dispute, that because the rocky Gosney soils are interspersed with the Class III Deskamp soils, which themselves are scattered throughout the subject property, the cleared and formerly irrigated portion of the property consists predominantly of rocky Gosney soils. The county chose to rely on this testimony as the explanation for why the cleared and formerly irrigated portion of the parcel has a lot of rocks, despite the presence of less-rocky Deskamp soils. The county did not misconstrue OAR 660-033-0020(1)(a)(B) or the NRCS classification scheme by creating a new classification of "Class III but rocky," as petitioner argues. Further, a reasonable person could rely on the explanation of intervenor's expert for why the cleared and formerly irrigated portion of the property has a lot of rocks, despite the interspersed presence of Class III Deskamp soils. Accordingly, the county's findings on this point are supported by substantial evidence.

The fifth assignment of error is denied.

The county's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2026-032 on October 19, 2026, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 19th day of October, 2026.

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