



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
Phone: (541) 388-6575 Fax: (541) 385-1764

<http://www.deschutes.org/cd>

RECEIVED
BY: Caroline Harse

SEP 30 2016

LAND USE APPLICATION

INCOMPLETE APPLICATIONS WILL NOT BE ACCEPTED

DELIVERED BY:

Tony Aceti

1. Complete the application form and provide appropriate original signatures. To ensure timely processing of your application, all materials must be submitted on single-sided, 8.5" x 11" paper. Do not use binders, tabs/dividers, staples or tape.
2. This application shall include one full-sized plan set (to scale) and one plan set reduced to no larger than 11" x 17". Include a plot plan that shows all property lines and existing and proposed structures, parking, landscaping, lighting, etc.
3. Include a copy of the current deed showing the property owners.
4. Attach correct fee.
5. All applicable standards and criteria must be addressed in writing prior to acceptance of the application. Detailed descriptions, maps and other relevant information must be attached to the application.

TYPE OF APPLICATION (check one):

FEE: \$3,300.00

Administrative Determination (AD) Partition (MP) Site Plan (SP)
 Conditional Use (CU) Subdivision (TP) Variance (V)
 Declaratory Ruling (DR) Temporary Use (TU) Setback Exception (SE)
 Other

Remand Proceeding (LUBA) 2016-012 (247-14-00456 ZC 247-17-00457 PA)

Applicant's Name (print): Anthony J. Aceti Phone: (541) 419-0858

Mailing Address: 21235 Tumalo Pl City/State/Zip: Bend, OR 97703

Applicant's Email Address: Tony@MingleGame.com

Property Owner/s Name (if different)*: Same Phone: () _____

Mailing Address: ~~Proceed on Remand from LUBA~~ City/State/Zip: _____

1. Request: Proceed on Remand from LUBA 2016-012

2. Property Description: Township 16 Range 12 Section 27D Tax Lot 104 ~~2159 &~~

3. Property Zone(s): FFU/TRB ¹⁶ ¹² ^{26C} Property Size (acres or sq. ft.): 21.59 acres ^{201 Acres}

4. Lot of Record? (State reason): yes

5. Property Address: 21235 Tumalo Pl., Bend, OR 97703

no sites address for 16-12-27D 600104

SCANNED (over) →
OCT - 3 2016

LAW OFFICE OF BILL KLOOS, PC

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September 29, 2016

Deschutes County Board of Commissioners
c/o Peter Gutowsky, Planning Manager
Community Development Department
117 NW Lafayette Avenue
Bend, OR 97703

RECEIVED
BY: Caroline House

SEP 30 2016

DELIVERED BY:
Tony Aceti

Re: Aceti Property Plan and Zone Change Application
(247-14-000456-ZC, 247-14-000457-PA)
Request for Local Proceeding on Remand from LUBA

Dear Chair and Commissioners:

This firm represents Tony Aceti, the applicant for a proposal to change the plan designation and zoning for his property at Deschutes Junction from EFU to Rural Industrial in the above-captioned land use proceeding. You have already approved this proposal. That decision was appealed to the Land Use Board of Appeals and, while LUBA affirmed a core aspect of the decision, it also sustained one of the challenges and remanded the decision.

Mr. Aceti hereby submits this written request for the county to proceed with the application on remand from LUBA. For the reasons provided below, the applicant believes that the Board of County Commissioners can approve the application on remand by repealing the portion of the prior decision that approved an exception to Goal 14, reaffirming its prior decision to change the plan designation and zoning for the property, and adopting appropriate findings and conclusions.

The remainder of this letter consists of an explanation for why and how the County Commissioners can proceed on remand as proposed by the applicant. This letter is supported by several attached documents. These include: a copy of LUBA's decision; draft Ordinances; and a draft set of Findings and Conclusions. The proposed draft Ordinances and Findings reflect the analysis and conclusion presented below.

Introduction

To re-familiarize the County Board about the context of the application before it, the subject property is located at the intersection of Highway 97 and Tumalo Road at Deschutes Junction. The property consists of two tax lots containing 21.59 acres on the west side of Highway 97 that straddle Tumalo Road. A 16x16 foot tunnel underpass connects the north and south portions of the subject property.

The subject property is currently plan designated Agriculture and zoned Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB). All efforts to grow crops or forage on the property have failed even though the property has 16 acres of irrigation rights. Properties to the east, on the other side of Highway 97 are in rural industrial use. Properties to the north and west are generally zoned MUA-10 and are in residential use, with some Rural Commercial (RC) uses in the area. The closest agricultural uses to the property are approximately one-half mile away.

The application proposed changing the plan and zone designations to a Rural Industrial plan designation and Rural Industrial (R-I) zoning. For reasons discussed below, the application included a request for an exception to Goal 14 Urbanization.

The County Board approved the requested plan designation and zone change. Relevant to this remand proceeding were determinations regarding compliance with Goal 3 Agriculture and with Goal 14. Instead of taking an exception to Goal 3 to allow nonresource use on resource land, the applicant demonstrated that the property did not qualify as agricultural land under the applicable statewide planning goal, relying in substantial part on a detailed soils analysis of the property. The County Board approved this approach. The County Board also approved an exception to Goal 14, and ultimately approved the requested plan and zone change.

Central Oregon Land Watch ("Petitioners") appealed the decision to the Land Use Board of Appeals.

LUBA Appeal and Remand

At LUBA, Petitioner presented multiple arguments under two assignments of error. One assignment of error focused on the determination that the subject property is not agricultural land under the Goal 3 implementing regulations and is therefore nonresource land. The second assignment of error challenged the exception to Goal 14.

LUBA denied all of Petitioner's arguments regarding the first assignment of error. See *Central Oregon Landwatch v. Deschutes County*, Attachment 1, Final Opinion and Order, p. 14 line 11.

However, LUBA agreed with Petitioner that the decision failed to justify an exception to Goal 14, namely because the decision does not support a conclusion that all rural use of the property is impracticable as the standard requires. Att. 1, p. 23, and 28 at line 10. Consequently, LUBA remanded the decision. Att. 1, p. 28, line 11.

The implications on remand for each component of LUBA's Final Opinion and Order are addressed below under separate headings.

Nonresource Land

LUBA agreed with the County Board that the subject property does not qualify as agricultural land under OAR 660-033-0020(1). Att. 1, p. 18. For that reason, the County Board's conclusion that the subject property constitutes nonresource land that is no longer subject to the requirements of Goal 3 is a resolved issue in this proceeding.

On remand, the County Board needs only to reaffirm those portions of the prior decision that reach that conclusion. DCC 22.34.040.A provides that remand proceedings shall review those issues required to be addressed by LUBA. The nonresource determination is not an issue the remand requires the County Board to address.

Now that the nonresource determination is a resolved issue, the outstanding issue is what are the appropriate plan designation and zoning for the property? The applicant requested and continues to believe that it is rural industrial.

Goal 14 Exception

The more complicated legal issue on remand concerns the Goal 14 exception. The sections below explain how we got here and discusses why the County Board can repeal the Goal 14 exception component of the earlier decision and still approve the requested plan and zone change.

How we got here.

When the applicant first met with the County concerning the proposed plan and zone change to rural industrial, the applicant's draft application did not include a request for an exception to Goal 14 Urbanization because the applicant was not requesting to place urban uses on the property, only rural industrial uses. County staff informed the applicant that an application to rezone the property would be deemed incomplete if the application did not include a request for a Goal 14 exception. Staff explained that, because a prior Hearings Officer's decision required a Goal 14 exception to be taken for the purposes of limiting the industrial uses to rural levels of use, and the county accepted that decision (ZC-14-2/PA-14-2, Powell/Ramsey Plan and Zone Change) as binding precedent, an exception was needed in this instance. As a result, the applicant prepared and submitted an exception to Goal 14 as part of the completed application.

In reviewing this application, a different Hearings Officer accepted the decision in ZC-14-2/ PA-14-2 as precedent and modeled her decision after the analysis provided in the ZC-14-2/PA-14-2 decision, quoting from it often. That prior decision directed the nature of the Hearings Officer's analysis whether the requested plan and zone change to RI represented an "urban" use of land, and then guided the Hearings Officer on how an exception could be used to limit uses to only rural uses. The Hearings Officer's decision below stated:

"I find that it is appropriate to require an exception to Goal 14 to determine if the proposed "reasons" match the potential uses, and *so that development limitations*

may be established as part of the goal exception to assure the subject site is not developed with "urban" uses. I note that such a goal exception was required by the Hearings Officer in ZC-14-2." Decision p. 51, Record p. 68 (emphasis supplied).

The Board of Commissioners should clearly understand what was happening as a result of the ZC-14-2/PA-14-2 decision. The precedent being followed from that case was that the county required a Goal 14 exception for any plan and zone change to allow rural industrial uses on rural land, and the purpose of the exception was to limit the uses allowed to rural uses. LUBA's decision in this case says this approach is wrong and provides guidance on when a Goal 14 exception is required.

LUBA Guidance

During the LUBA proceedings and at oral argument, LUBA expressed some concern about the decision's stated intention and the approach that was taken to implement that intention. While LUBA ultimately concluded that the findings were not sufficient to comply with the requirements for an exception to Goal 14, the Board provided some explanation concerning the Goal 14 exceptions process as guidance for county consideration on remand.

The key point to consider is LUBA's statement concerning exceptions to Goal 14 that,

"The only reason for providing such an exception that we can think of is to authorize urban uses of rural land." Att. 1, p. 27 (emphasis supplied).

Phrased another way, if the approved uses are rural uses, then an exception to Goal 14 is not necessary to allow those uses on rural land.

As LUBA explained elsewhere in the decision,

"To approve a committed exception to Goal 14 to allow urban uses of the property (because all rural uses are impracticable) and then applying a zoning district that was adopted to limit industrial uses to rural industrial uses would appear on its face to be inconsistent." Att. 1, p. 15-18 (parenthesis in original).

This is because, as LUBA also explained,

"[T]he Rural Industrial Zone was adopted to allow rural industrial uses and ensure the uses allowed in the Rural Industrial Zone are rural uses rather than urban in nature." Att. 1, p. 23

LUBA ultimately held that if the county wanted to grant a Goal 14 exception, it has to satisfy the requirements of that exception and the decision failed to do that. Consequently, LUBA remanded. But in making that decision, LUBA clearly raised the point that, if the purpose was to ensure that only industrial uses that constitute rural uses are permitted on the property, then the

county may need to do no more than impose the Rural Industrial Zone, because the code states that the R-I zone allows only uses that are rural in nature, not urban.

LUBA's explanation is consistent with its prior decision in *Shaffer v. Jackson County*, 17 Or LUBA 922, 944 (1989). There, LUBA explained that, when faced with a concern whether a proposal might allow urban uses on rural land, a local government has three options. It can: (1) demonstrate that the proposed use is rural (i.e. does not convert "rural land" to "urban uses"); (2) include the property in an urban growth boundary; or (3) take an exception to Goal 14 to allow urban uses.

Seen in the framework set forth in *Shaffer*, LUBA's confusion about why the County approved an exception to Goal 14, when the applicant proposed no urban uses, becomes understandable. The decision in ZC-14-2 and the precedent followed in this proceeding concluded that it needed to use approach (3) above to limit the uses to rural uses when the proper approach is to use approach (1) – allow only rural uses on the property through the imposition of R-I zoning.

Are the County's Acknowledged Rural Industrial Uses Urban or Rural?

The applicant believes that the uses allowed in the R-I zone, particularly when developed under the use limitations set forth under DCC 18.100.030 through .090 permit only rural uses on rural property. As quoted above, LUBA reached that same conclusion. The R-I zone designation only allows rural industrial uses on property, it does not allow urban industrial uses on property.

That LUBA conclusion is supported by the Deschutes County Comprehensive Plan. The Comprehensive Plan states that the Rural Industrial plan designation and zoning applies to specific properties to provide compliance with state rules by adopting zoning to ensure that those properties remain rural and that the uses allowed there are less intensive than those allowed in unincorporated communities as defined in OAR 660-022. Comprehensive Plan, Ch. 3, p. 11.

Specific Comprehensive Plan Policies implement this statement. These include:

- Policy 3.4.23 To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor.
- Policy 3.4.27 Land use regulations shall ensure that new uses authorized within the Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area.
- Policy 3.4.28 New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.

- Policy 3.4.31 Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.
- Policy 3.4.32 Residential and industrial uses shall be served by on-site wells or public water systems.
- Policy 3.4.33 Community sewer systems shall not be allowed in Rural Industrial zones.

Furthermore, both the Comprehensive Plan and the DCC have been acknowledged as in compliance with all statewide planning goals, which mean that the acknowledged RI uses are rural uses.

An Exception to Goal 14 is Not Necessary.

This application has always been about permitting only rural industrial uses on rural land. The applicant has always requested that RI uses be allowed on the property. He has never requested that urban uses be allowed and has no intention of asking permission to allow urban uses on the property.

From the evidence in the record, it is apparent that County staff never intended to allow urban uses to be located on the subject property even though it requested that the applicant apply for an exception to Goal 14, which could be used to authorize urban uses on the property.

Certainly, based upon her own statement that the purpose of the Goal 14 exception was to be able to impose development limitations to ensure that the subject site is not developed with "urban" uses, the Hearings Officer did not intend to allow urban uses on the property.

Last, the applicant also believes that the County Board did not intend to authorize urban uses on the subject property in its decision to approve the Goal 14 exception application.

The question here is whether an exception to Goal 14 is even necessary given LUBA's guidance that a Goal 14 exception is needed *only* if the county wants to allow urban uses on the property. That is particularly relevant given LUBA also said that the rural industrial zone was adopted to allow only rural uses, not urban uses.

Following the framework set forth by the *Shaffer* case presented above, the County Board's application of the Rural Industrial plan designation and R-I zoning will operate to ensure that future uses on the property will constitute a rural use, thereby addressing potential rural-urban concerns by using the first of the *Shaffer* options.

An exception to Goal 14 is not needed to limit the uses on the property to rural uses, and using the exceptions process for that purpose is not only logically inconsistent, it is legally flawed.

Decision on Remand.

Although the discussion above is somewhat complex, this remand proceeding should be fairly straightforward and simple. As LUBA's guidance points out, an exception to Goal 14 is necessary only if one wants to allow urban uses on rural land, and that is not what this application has requested. The bad precedent set by ZC-14-2, Powell/Ramsey complicated the land use process for allowing rural industrial uses on rural land. Its use here has been time consuming and very costly for Mr. Aceti. As LUBA clearly explained in its decision, an exception to Goal 14 is not needed to ensure that uses remain rural on the subject property, only the imposition of the Rural Industrial plan designation and R-I zoning. The Goal 14 exception approach used in the Powell/Ramsey case is necessary only if an applicant desires to locate urban uses on rural land. Mr. Aceti does not.

On remand, the applicant urges the Board of Commissioners to: (1) reaffirm its conclusion that the subject property is nonresource land; (2) to repeal those portions of the decision that approved an exception to Goal 14; (3) to approve the plan and zone change to rural industrial, and (4) to adopt a new ordinance supported by findings and conditions that support the decision.

Thank you for your consideration.

Best regards,



Dan Terrell

Attachments

- Attachment 1 *Central Oregon Landwatch v. Deschutes County* Final Opinion and Order, LUBA No. 2016-012
- Attachment 2 Proposed Ordinance 2016-___, Comprehensive Plan Change
- Attachment 3 Proposed Ordinance 2016-___, Zone Change
- Attachment 4 Draft Findings and Conditions
- Attachment 5 DCC Chapter 18.100 Rural Industrial Zone

LAW OFFICE OF BILL KLOOS, PC

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September 29, 2016

Deschutes County Board of Commissioners
c/o Peter Gutowsky, Planning Manager
Community Development Department
117 NW Lafayette Avenue
Bend, OR 97703

Re: Aceti Property Plan and Zone Change Application
(247-14-000456-ZC, 247-14-000457-PA)
Request for Local Proceeding on Remand from LUBA

Dear Mr. Gutowsky:

This firm represents Tony Aceti, the applicant in the above-captioned land use proceeding. Please accept this letter and the accompanying application materials as the applicant's written request for the county to proceed with the application on remand from LUBA pursuant to ORS 215.435.

The applicant believes that the proceedings on remand should be a fairly straight-forward process. LUBA denied all of the Petitioner's arguments that the County Board erred in concluding that the property is not "agricultural land" and is in-fact nonresource land that is not subject to Goal 3 provisions. Consistent with the DCC provisions for proceedings on remand, that issue has been resolved and need not be addressed on remand.

However, LUBA remanded the County's decision to approve an exception to Goal 14. In its decision, LUBA expressed some confusion about the County's intention given: that Rural Industrial uses are by definition inherently rural; the purpose of a Goal 14 exception is to permit urban uses on rural land; and the decision approved a Goal 14 exception but then limited the uses on the property to rural uses. Ultimately LUBA remanded the decision because it concluded the County did not "explain the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than rural level of development." Opinion p. 22, lines 12-15. Because the applicant is not asking for urban uses nor for an urban level of development but merely to allow rural industrial uses on the property, the Goal 14 exception process is irrelevant to the application proposal.

As the attached letter to the County Board explains, the applicant takes the following positions on remand:

- that the subject property is nonresource land is a resolved issue;

- that the acknowledged uses in the County's R-I zone are rural uses;
- that the applicant did not request approval to allow urban uses on the property;
- that the County did not intend to allow urban uses of property in its decision; and,
- therefore, the County Board can conclude on remand that an exception to Goal 14 is not necessary to approve the requested plan designation and zone change, which will allow rural industrial uses on nonresource land.

We believe that LUBA's Final Opinion and Order provides guidance on the above points and we hope that you and planning staff can support the above positions and conclusion.

For the Board's and your convenience, the enclosed materials include proposed ordinances and supporting findings that are based upon the above positions, LUBA's decision and the evidence in the record. They have been drafted in a manner consistent with similar documents contained in the record. Please do not hesitate to contact me if you would like these documents electronically in Word or PDF format.

I appreciate that aspects of LUBA's decision appear to differ significantly from and overrule a prior Deschutes County Hearings Official's decision that planning staff has followed as precedent. However, as difficult as such rulings are to simply accept, LUBA's decisions are controlling and provide guidance about the proper application of state-wide land use regulations. We believe that LUBA has clearly explained that an exception to Goal 14 is not required to allow the County's acknowledged rural industrial zoning on rural land. As LUBA noted, rural industrial uses are rural uses, not urban uses.

As the proceeding on remand moves forward, please feel free to contact me if you have any questions, concerns or requests for additional information. I will make every effort to respond promptly to any communication.

Thank you for your assistance and consideration in processing this material.

Best,



Dan Terrell
danterrell@landuseoregon.com
541-844-6372

encl.

cc: client
Pat Kliewer

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,

10 *Respondent,*

11
12 and

13
14 ANTHONY ACETI,

15 and STEVE MULKEY

16 *Intervenors-Respondents.*

17
18 LUBA No. 2016-012

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Deschutes County.

24
25 Carol Macbeth, Bend, filed the petition for review and argued on behalf
26 of petitioner.

27
28 No Appearance by Deschutes County.

29
30 Dan Terrell, Eugene, filed the response brief and argued on behalf of
31 intervener-respondent Anthony Aceti. With him on the brief was the Law
32 Office of Bill Kloos, PC.

33
34 Steve Mulkey, Bend, represented himself.

35
36 HOLSTUN, Board Chair; BASSHAM, Board Member, participated in
37 the decision.

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6

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

REMANDED

8/10/16

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

NATURE OF THE DECISION

Petitioner appeals amendments to a county comprehensive plan map and zoning map and the adoption of an exception to Statewide Planning Goal 14 (Urbanization) for two tax lots located between the cities of Bend and Redmond, next to Highway 97 at Deschutes Junction.

MOTIONS FOR REPLY BRIEF

Petitioner moves to file a reply brief. The motion is unopposed and the motion is granted.

FACTS

Intervenor-Respondent Anthony Aceti (intervenor) owns the subject 21.59 acres. The decision challenged in this appeal changes the comprehensive plan map designation for the property from Agriculture to Rural Industrial and changes the zoning from Exclusive Farm Use Tumalo/Bend Subzone (EFU) to Rural Industrial Zone. The challenged decision also approves an irrevocably committed exception to Goal 14.

The subject property consists of tax lots 201 and 104. A map of the property is attached as an appendix to this opinion. Tax lot 201 makes up the bulk of the property. Southbound Highway 97 on-off ramps and approach form the northern boundary of the subject property. The subject property is bordered by Highway 97 on the east. Tumalo Road bisects tax lot 201 and passes over Highway 97. The property to the west is improved with a school. The subject

1 property is spotted with sparse stubble left from a failed hay crop fifteen years
2 ago. A recent site-specific soil survey determined that subject property has
3 predominantly poor quality soils. The property is generally level with an
4 existing warehouse and gravel parking lot located on the northern part of Tax
5 Lot near Tax Lot 104 and the intersection of the Highway 97 on-off ramps and
6 Tumalo Road.

7 On October 1, 2015, a hearings officer issued an eighty-one page
8 decision recommending approval of an irrevocably committed exception to
9 Goal 14 and the comprehensive plan and zoning map amendments. The board
10 of county commissioners held a de novo public hearing on the application, and
11 on January 6, 2016 approved the Goal 14 exception and amendments to the
12 plan and zoning map, and incorporated the hearings officer's decision as
13 findings.

14 **FIRST ASSIGNMENT OF ERROR**

15 OAR 660-033-0020(1) defines "Agricultural land," as that term is used
16 in Goal 3 (Agricultural Lands), to include land that is (1) classified by the U.S.
17 Natural Resources Conservation Service (NRCS) as predominantly Class I-VI
18 soils in Eastern Oregon, (2) land in other soil classes that is suitable for farm
19 use, considering several specified factors, (3) land required to allow farm
20 practices to be carried out on adjacent or nearby agricultural lands and (4) land
21 that is adjacent to or intermingled with lands with soil capability classes I-VI

1 within a farm unit.¹ OAR 660-033-0030(2) clarifies that in making the first
2 determination (predominant soil classification) the appropriate focus is on the
3 21-acre property, but in determining if land that falls outside the requisite soil
4 classifications is nevertheless suitable for farm use (OAR 660-033-
5 0020(1)(a)(B)) or “necessary to permit farm practices to be undertaken on
6 adjacent or nearby agricultural lands” the focus is broader than the individual

¹ OAR 660-033-0020(1) provides:

“(a) ‘Agricultural Land’ as defined in Goal 3 includes:

“(A) Lands classified by [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.

“(b) Land in capability classes other than I-IV/I-VI that is adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed;

“(c) ‘Agricultural Land’ does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4.”

1 property under consideration.² The county determined that the subject property
2 does not qualify as agricultural land:

3 “Substantial evidence in the record supports a finding that the
4 property is not Agricultural Land as it consists of predominantly
5 Class VII and VIII soils and is further unsuitable for farm use
6 considering profitability and factors in the Goal 3 administrative
7 rule, including, among other things, difficulties associated with
8 irrigating the property, impacts of nearby heavy traffic and
9 transportation, the bisection of the property with the construction
10 of Tumalo Road, surrounding commercial and industrial uses, and
11 the relatively small size of the parcel.” Record 58.

12 Petitioner argues that the county erred in a number of ways when it determined
13 that the subject property is not agricultural land.

14 LUBA’s standard of review is set out at ORS 197.835(9).³ Before
15 turning to petitioner’s specific arguments, we note that petitioner generally

² OAR 660-033-0030(2) provides:

“When 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. However, whether land is ‘suitable for farm use’ requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the lot or parcel being inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural ‘Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands.’ A determination that a lot or parcel is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in 660-033-0020(1).”

1 appears to argue that there is evidence a reasonable decision maker could have
2 relied on to conclude that the subject property *is made up of Class I through IV*
3 *soils* and therefore qualifies as agricultural land under OAR 660-033-
4 0020(1)(a)(A). *See* n 1. That is not the issue on appeal. In deciding whether
5 the county's decision must be remanded under ORS 197.835(9)(a)(C), because
6 it is "not supported by substantial evidence in the whole record," the question
7 is whether the evidence the county relied on to conclude the property *is not*
8 *made up of Class I through IV soils* is supported by substantial evidence, *i.e.*,
9 evidence a reasonable person would believe. *Dodd v. Hood River County*, 317
10 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346,
11 358-60, 752 P2d 262 (1988). If we conclude that the county's conclusion is

³ ORS 197.835(9) provides in relevant part:

" * * * [LUBA] shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"(C) Made a decision not supported by substantial evidence in the whole record;

"(D) Improperly construed the applicable law; or

"(E) Made an unconstitutional decision[.]"

1 supported by substantial evidence, it does not matter whether the evidentiary
2 record also includes substantial evidence that would support a decision that
3 county did not adopt. *Heceta Water District v. Lane County*, 24 Or LUBA 402,
4 427 (1993). We also note that petitioner either argues or comes very close to
5 arguing that LUBA should reweigh the evidence regarding the quality of the
6 soils on the property. As intervenor correctly notes, in performing substantial
7 evidence review under ORS 197.835(9)(a)(C), LUBA may not reweigh the
8 evidence. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588,
9 842 P2d 441 (1992).

10 **A. The Property's Predominant Soils Classification**

11 As noted above, in Eastern Oregon, “[l]ands classified by [NRCS] as
12 predominantly Class * * * I-VI soils” are considered “Agricultural Land.” OAR
13 661-033-0020(1)(a)(A). *See* n 1. Petitioner’s first subassignment of error
14 begins on page 12 of the petition for review and continues to the top of page 21
15 of the petition for review. In this subassignment of error petitioner challenges
16 the county’s finding that the subject property is predominantly Class VII and
17 VIII soils and therefore is not agricultural land under OAR 661-033-
18 0020(1)(a)(A). Petitioner argues that the decision is not supported by
19 substantial evidence because the NRCS soil survey identifies the subject
20 property as predominantly Class VI soils, which are Class III soils when
21 irrigated. Petitioner advances four arguments under this subassignment of
22 error: (1) the property’s history of irrigated agriculture shows it is agricultural

1 land, (2) there has been no change in the irrigated status of the property, (3)
2 there has been no change in the soils, and (4) the Borine Study which the
3 county relied on does not establish that the property is predominantly Class VII
4 and VIII soils. We consider petitioner's fourth argument first.

5 **1. The Borine Study**

6 Petitioner recognizes that the county relied on the site-specific Borine
7 Study, which concluded the property is predominately Class VII and VIII soils,
8 but argues that that study is simply incorrect, since the NRCS has not identified
9 any acreage of capability Class VII and Class VIII soils in the entire irrigated
10 farmland base of the NRCS Upper Deschutes subbase hydrologic unit.
11 According to the NRCS that unit includes Classes III, IV, and VI soils. Based
12 predominantly on the NRCS determinations and past irrigation and farming
13 practices on the property, petitioner asserts that the county's findings that the
14 soils are Class VII and VIII are defective because they are inconsistent with the
15 NRCS evidence in the record. Specifically, at oral argument, petitioner stressed
16 that the evidence it relies on supports its position that it is highly unlikely that
17 the soils are Class VII or worse because no rational person would irrigate and
18 attempt to grow hay on soils that are so poor they would not appreciably
19 benefit from irrigation. If we understand petitioner correctly, since it is not
20 disputed that the property has been irrigated in the past, and hay crops were
21 raised on the property, petitioner contends that it follows that the property
22 could not be predominantly Class VII and VIII soils.

1 Intervenor responds that notwithstanding NRCS's determination, the
2 Borine Study is substantial evidence to support the county's determination that
3 the subject property is not agricultural land. The Borine Study consists of a
4 site-specific soils analysis that included 43 soil data points,⁴ five transects⁵ and
5 276 site observations. The study was prepared by Roger Borine, a certified
6 professional soils classifier. The Borine Study concluded that approximately
7 eighty percent of the subject property is Land Capability Class VII and VIII
8 soils, and twenty percent is Land Capability Class III - VI soils. Accordingly,
9 Borine determined that the subject property is not predominantly Class I
10 through VI soils. Intervenor notes that OAR 660-033-0030 permits the use of
11 more detailed data on soil capability than provided by NRCS soil maps to
12 define agricultural land.⁶ Further, the Department of Land Conservation and

⁴ At these data points, the soils were excavated with a backhoe or shovel. Record 1358.

⁵ The transects are shown at Record 1362.

⁶ OAR 660-033-0030(5) provides in relevant part:

“(a) More detailed data on soil capability than is contained in the [NRCS] soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.

“(b) If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the NRCS * * * would assist a county to make a better

1 Development (DLCD) certified the Borine Study. Record 1373. Intervenor
2 also points out that even if owners of the property were able to grow some hay
3 on the property in the past in conjunction with a larger haying operation on a
4 much larger farm unit, that does not necessarily mean the Borine Study's
5 conclusions are not substantial evidence that the soils on the 21-acre property
6 are predominantly Class VII and VIII.

7 We agree with intervenor. The Borine Study is evidence a reasonable
8 person would rely on and the county was entitled to rely on it. As intervenor
9 notes, the NRCS maps are intended for use at a higher landscape level and
10 include the express statement "Warning: Soil Ratings may not be valid at this
11 scale." Record 316. Conversely, the Borine Study extensively studied the site
12 with multiple on-site observations and the study's conclusions are
13 uncontradicted, other than by petitioner's conclusions based on historical farm
14 use of the property. This study supports the county's conclusion that the site is
15 not predominantly Class VI soils.

16 **2. History of Irrigation/No Change in Irrigation Status**

17 The property apparently has between 15 and 19 acres of water rights, and
18 has held those water rights since at least 1968. As recently as 1996, the

determination of whether land qualifies as agricultural land, the person must request that the [Department of Land Conservation and Development] arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045."

1 property was irrigated to produce hay. In its second and third arguments under
2 this subassignment of error, petitioner argues this history establishes that the
3 subject property qualifies as agricultural land. Petitioner argues the county
4 erroneously found that there has been a change in irrigation status when it
5 determined that “[t]he land has not been irrigated since the overpass was
6 constructed and cut through the established irrigation system.” Record 44.
7 Petitioner argues that there is no reason that the land cannot be irrigated
8 because it was irrigated until at least 1996.

9 Intervenor responds that the decision actually identifies a number of
10 changed circumstances that make irrigation of the subject property problematic
11 and of questionable value:

12 “[W]hile petitioner’s quoted findings implies that there was only
13 one change in circumstance, the findings actually contain two
14 pages of specific findings regarding historic changes to the near-
15 by irrigation system * * *. Those findings include, among other
16 things: the practical destruction of the closest irrigation pond due
17 to ODOT widening Highway 97 in 1991; the creation of the
18 replacement irrigation pond located downhill and half a mile away
19 on Half Mile Lane, the refusal of the seller or new property owners
20 of Tax Lot 1100 to [grant] an easement to convey water to the
21 subject property in 2006 when the Barretts sold the land on which
22 the new pond is located; the lack of an easement across Tax lot
23 1200 abutting the subject property; the Intervenor’s failed 2003
24 attempt to construct a new irrigation pond on the subject property;
25 the reduction of irrigation rights from 21.4 acres in 1995 to 16
26 acres in 2015 and the construction of the approach to the
27 Deschutes Junction Overpass across the subject property making it
28 necessary to use hand lines rather than wheel lines, even if water is
29 available. * * *” Intervenor-Respondent’s Brief 24-25.

1 We agree with intervenor that there is substantial evidence in the record
2 that irrigating the subject property would have to overcome a number of
3 obstacles and would not likely produce enough in the way of increased
4 production to make such irrigation practical. More to the point, intervenor
5 argues the Borine Report shows that the predominant Class VII and VIII soils
6 on the property remain Class VII and VIII soils even if they were irrigated.
7 Record 1329 (Table 2-Order 1 Soils Survey Map Units and Interpretations). In
8 other words, even with irrigation, the subject property would not qualify as
9 agricultural land under OAR 661-033-0020(1)(a)(A). Petitioner's irrigation
10 arguments do not establish that the county erred in finding that the subject
11 property does not qualify as agricultural land under OAR 661-033-
12 0020(1)(a)(A).

13 **3. No Change in Soils**

14 Petitioner's make one additional argument under this subassignment of
15 error:

16 “*In order for the soil quality on the subject property to drop from*
17 *irrigated Class III, suitable for crop cultivation, to Class VII and*
18 *Class VIII, not capable of improvement by irrigation, the soils on*
19 *the property must have undergone a radical change for the worse.*
20 *However, there is no evidence of any such change in the interval*
21 *since the land was last used for irrigated agriculture.”* Petition for
22 Review 17.

23 Petitioner's final argument under this subassignment of error is
24 essentially a contention that because NRCS rates the soils on the property as
25 Class III with irrigation and because the property has been used for irrigated

1 crop production in conjunction with adjoining property in the past, only a
2 change in the physical characteristics of the soils could explain the Borine
3 Study conclusion that the soils are predominantly Class VII and VIII, and that
4 there is no evidence of such a physical change in the soils.

5 As we have already explained, the differences between NRCS and the
6 Borine Study with regard to their conclusions about the classification of the
7 soils on the property is explained by the high level nature of the NRCS data
8 and the more detailed nature of the Borine Study. Petitioner assigns far too
9 much significance to the historical use of the 21-acre property when it was part
10 of a much larger farm unit.

11 Petitioner's first subassignment of error is denied.

12 **B. Land In Other Classifications That are Suitable for Farm Use**
13 **or Adjacent to or Intermingled With Agricultural Land**

14 Petitioner's second subassignment of error, petition for review 21-23, is
15 based on two legal theories. First, under OAR 660-033-0020(1)(a)(B), even if
16 land does not qualify as agricultural land under OAR 660-033-0020(1)(a)(A),
17 because it does not meet the predominantly Class I-VI test, land may qualify as
18 agricultural land "taking into consideration," the factors set out at OAR 660-
19 033-0020(1)(a)(B), which include "accepted farming practices." *See* n 1.
20 Second, under OAR 660-033-0020(1)(b), lands in other classification must be
21 inventoried as agricultural land if they are "adjacent to or intermingled with
22 land in capability classes * * * I-VI within a farm unit * * *." *Id.* We address
23 those legal theories in order.

1 **1. Other Than Class I-VI Lands Taking Into Consideration**
2 **Farming Practices.**

3 In *Wetherell v. Douglas County*, 62 Or LUBA 80, 83 (2010), LUBA explained:

4 “The ‘suitable for farm use’ test in OAR 660-033-0020(1)(a)(B)
5 refers to the definition of ‘farm use’ at ORS 215.203(2)(a), which
6 in relevant part means ‘the current employment of land for the
7 primary purpose of obtaining a profit in money’ by engaging in a
8 number of listed agricultural pursuits, including the ‘feeding,
9 breeding, management and sale of, or the produce of, livestock.’
10 For purposes of determining whether land is agricultural land
11 under OAR 660-033-0020(1)(a)(B), a factor that a local
12 government may consider in addition to the seven factors listed in
13 the rule is whether a reasonable farmer would be motivated to put
14 the land to agricultural use, including grazing, for the primary
15 purpose of obtaining a profit in money. *See Wetherell v. Douglas*
16 *County (Great American Properties)*, 342 Or 666, 160 P3d 614
17 (2007) (invalidating an administrative rule that prohibited
18 consideration of profitability). *See also Wetherell v. Douglas*
19 *County (Garden Valley Estates)*, 60 Or LUBA 131, 137-147
20 (2009), *aff’d* 235 Or App 246, 230 P3d 976 (2010) (describing
21 limitations on the analysis of profitability).”

22 In three pages of analysis, the county determined that based on the listed
23 factors, the subject property is not agricultural land under OAR 660-033-
24 0020(1)(a)(B). Record 58-60.

25 Petitioner argues that the county only provided a cursory analysis of
26 accepted farm practices, and erred in failing to consider what accepted farm
27 practices neighboring farmers may use to cultivate their own soils for irrigated
28 agriculture, where such neighboring farmland includes similar soils identified
29 by NRCS that are also located on the subject property. The county’s findings
30 on accepted farming practices are:

1 “The applicant states the following in the burden of proof
2 statement:

3 “‘It is not an accepted farm practice in Central Oregon to
4 irrigate and cultivate poor quality Class VII and VIII soils—
5 particularly where, as here, those soils are adjacent to rural
6 industrial uses, urban density residential neighborhoods that
7 complain about dust and chemicals and to high traffic
8 counts on the surrounding roads and highways. Irrigating
9 rock is not productive.’

10 “Substantial evidence in the record shows that the subject property
11 does not constitute ‘agricultural land’ under the Goal 3
12 administrative rule factors first because it is comprised of Class VI
13 and VII soils, and second, based on a consideration [of] each of
14 the following factors, addressed by the Borine report: soil fertility,
15 suitability for grazing, climatic conditions, existing and future
16 availability of water for farm irrigation purposes, existing land use
17 patterns, technological and energy inputs required, and accepted
18 farm practices.” Record 60-61 (original italics omitted).

19 Intervenor further points to evidence in the record demonstrating that
20 area farmers have considered and rejected using the subject property as part of
21 a farming operation for growing crops and raising cattle, citing testimony of
22 Wierbach (Record 807), Galazzo (Record 811) and Juhl (Record 804-806).

23 The county’s findings regarding OAR 660-033-0020(1)(a)(B) are
24 adequate and supported by substantial evidence. The county determined that
25 commercial agricultural uses in the vicinity are limited, and found that it is not
26 an accepted farm practice to irrigate and cultivate Class VII and VIII soils.
27 Those finding are supported by the record and are sufficient to explain why the
28 county concluded the subject property need not be inventoried as agricultural
29 land under OAR 660-033-0020(1)(a)(B).

1 **2. Land Adjacent To or Intermingled with Lands in a Farm Unit**

2 Under OAR 660-033-0020(1)(b), lands that do not qualify as Class I-VI
3 agricultural lands must nevertheless be inventoried as agricultural land if they
4 are “adjacent to or intermingled with land in capability classes * * * I-VI
5 within a farm unit * * *.” The county found that “the subject property is
6 predominantly class VII and VIII soils and would not be considered a farm unit
7 itself nor part of a larger farm unit based on the poor soils and the fact that
8 none of the adjacent property is farmed.” Record 62. Petitioner asserts that the
9 subject property was managed as part of a farm unit for almost a century and
10 just because intervenor ceased to manage the parcel as farmland for some time
11 that does not mean the subject property does not qualify as land that is adjacent
12 to or intermingled with agricultural land within a farm unit.

13 Intervenor disputes petitioner’s assertion that the property has been
14 managed as part of a farm unit for almost a century, noting that petitioner only
15 cites its own testimony in support of that position, and that there is conflicting
16 evidence in the record, including evidence that irrigation water was not
17 supplied to the property until 1968. Citing *Riggs v. Douglas County*, 167 Or
18 App 1, 1 P3d 1042 (2000), intervenor argues that although a property may have
19 once been used for farming in conjunction with other parcels as part of a larger
20 farm unit, under the same or different ownership, that does not necessarily
21 mean the property is presently part of a farm unit.

1 Intervenor argues the purpose of the OAR 660-033-0020(1)(b) farm unit
2 requirement is to preserve and protect large blocks of land for agricultural use.
3 *DLCD v. Curry County*, 132 Or App 393, 398, 888 P2d 592 (1995). Intervenor
4 contends that the property is comparatively small for eastern Oregon at 21.59
5 acres, and there is a major highway bisecting the parcel that makes it much
6 more difficult to put to farm use. Intervenor contends that the property never
7 contributed significantly to any of the larger farming operations it was a part of
8 in the past. Finally, and most importantly, intervenor points out the subject
9 property is not adjacent to or intermingled with any property that currently
10 constitutes a farm unit. We agree with intervenor.

11 Petitioner has not shown that the county erred in determining that the
12 property does not qualify as agricultural land under OAR 660-033-0020(1)(b).
13 This sub-assignment of error is denied.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner argues that the county erred by approving an irrevocably
17 committed exception to Goal 14 for the subject property.

18 **A. Waiver**

19 Intervenor initially responds that petitioner waived its right to raise the
20 Goal 14 issues presented in the second assignment of error, because it failed to
21 raise the issues to the county board of commissioners. Intervenor notes that
22 LUBA's scope of review at ORS 197.825(2)(a) provides that LUBA

1 jurisdiction “[i]s limited to those cases in which the petitioner has exhausted all
2 remedies available by right before petitioning the board for review[.]” As
3 clarified in *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003),
4 the ORS 197.825 exhaustion requirement works in conjunction with the “raise
5 it or waive it” provision at ORS 197.763.⁷ Because the county board adopted
6 the hearings officer’s decision, intervenor argues petitioner was required to
7 present to the board the Goal 14 exception issue that it raises in its second
8 assignment of error. Intervenor argues petitioner failed to do so.

9 Citing *Lowery v. City of Portland*, 68 Or LUBA 339 (2013), petitioner
10 argues that a petitioner adequately raises an issue under ORS 197.763(1) and
11 ORS 197.835(3) by either citing the relevant legal standard, presenting
12 argument that includes the operative terms of the legal standard, or taking
13 actions to raise the issue such that the local government knows or should have
14 known that the issue is one that needs to be addressed in its decision. Petitioner
15 submitted an eighteen-page letter to the board of commissioners that contests

⁷ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 the hearings officer's decision and urges denial of the application for a number
2 of reasons. Record 558-75. At Record 572, the title "Exceptions" appears,
3 followed by two single-spaced pages of analysis. Petitioner stated "No
4 irrevocably committed exception is available because * * * the surrounding
5 land uses remain as they have been for the decades, overwhelmingly
6 agricultural and rural residential." Record 573. Petitioner continued,

7 "Here, the applicant's rationale for approval essentially argues that
8 the statewide planning goals that protect farmland for farm uses
9 *and direct urban development to land inside urban growth*
10 *boundaries* should not apply because, in essence, there is a
11 highway to the east and the land is at an intersection. These
12 conditions were not sufficient to change the zoning on the subject
13 property in the past and are not changed since then. The subject
14 property is surrounded, except to the north, by EFU land, which
15 stretches on both sides of the highway. *This is not a sufficient*
16 *basis for an exception to Goals 3 and 14.*" Record 574 (emphases
17 added).

18 Petitioner argues the above is sufficient to preserve the Goal 14
19 irrevocably committed exception challenge raised in the second assignment of
20 error. We agree with petitioner.

21 **B. ORS 197.732 and OAR 660-014-0030**

22 ORS 197.732(2)(b) provides that a local government may approve an
23 exception to a statewide planning goal if "[t]he land subject to the exception is
24 irrevocably committed as described by Land Conservation and Development
25 Commission [LCDC] rule to uses not allowed by the applicable goal because
26 existing adjacent uses and other relevant factors make uses allowed by the
27 applicable goal impracticable[.]" OAR 660-014-0030 is LCDC rule that

1 governs approval of irrevocably committed exceptions to Goal 14 to allow
2 urban uses of rural land. OAR 660-014-0030(3) and (4) are the most relevant
3 for purposes of the second assignment of error.⁸ OAR 660-014-0030(3) sets
4 out four factors that must be considered in granting an irrevocably committed
5 exception to Goal 14. *See n 8.* OAR 660-014-0030(4) then makes it clear that
6 (1) an irrevocably committed exception to Goal 14 must be based on all the
7 OAR 660-014-0030(3) factors and (2) there must be a statement of reasons

⁸ OAR 660-014-0030(3) and (4) provide:

“(3) A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following:

“(a) Size and extent of commercial and industrial uses;

“(b) Location, number and density of residential dwellings;

“(c) Location of urban levels of facilities and services; including at least public water and sewer facilities; and

“(d) Parcel sizes and ownership patterns.

“(4) A conclusion that rural land is irrevocably committed to urban development shall be based on all of the factors listed in section (3) of this rule. *The conclusion shall be supported by a statement of reasons explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development.*” (Emphasis added.)

1 explaining why the facts found in addressing the OAR 660-014-0030(3) factors
2 support a conclusion that the land is committed to urban rather than rural
3 development.

4 The county adopted findings addressing all of the OAR 660-014-0030(3)
5 factors: Record 94-95. Petitioner argues that a large number of the “facts” the
6 county found are not supported by the record. We need not and do not attempt
7 to resolve all the parties’ factual disputes, which are in many cases are largely
8 semantic.⁹ Even if we assume the facts stated by the county are accurately
9 stated and supported by substantial evidence in the record, there is a
10 fundamental flaw in the county’s Goal 14 exception. The county must do more
11 than address all the factors set out at OAR 660-014-0030(3) and adopt findings
12 of fact. OAR 660-014-0030(4) requires “a statement of reason explaining why
13 the facts found support the conclusion that the land in question is committed to
14 urban uses and urban level development rather than a rural level of
15 development.” That explanation for why the facts the county found support a
16 conclusion that the property is committed to urban use is entirely missing.

⁹ For example the hearings official found “[c]ommercial, industrial, wholesale, and retail businesses now surround the property on its northern and eastern side and a school [is located] on the western side.” Record 45. Although it is undisputed that there is rural industrial development across Highway 97 from the property’s eastern boundary and rural commercial development at the northeast corner of the property, petitioner disputes that the property is “surrounded” by commercial or industrial development. Petition for Review 36.

1 That the required explanation for why the property is irrevocably
2 committed to urban uses is entirely missing is hardly surprising. The subject
3 property is located in the vicinity of a variety of farm and rural non-farm uses
4 and is bordered by Highway 97 and divided by Tumalo Road. In the abstract it
5 is difficult to see how being surrounded by rural uses and roadways could ever
6 irrevocably commit *rural* land to *urban* uses, since that requires a finding that
7 “all rural uses, are impracticable.” *VinCEP v. Yamhill County*, 215 Or App
8 414, 425, 171 P3d 368 (2007), *quoting 1000 Friends of Oregon v. LCDC*
9 (*Curry County*), 301 Or 447, 485, 724 P2d 268 (1986). We see no reason why
10 at least some of the rural uses in the vicinity of the subject property could not
11 also be developed on the subject property. In a similar vein, the challenged
12 decision applies the Rural Industrial Zone to the property. As explained below,
13 the Rural Industrial Zone was adopted to allow rural industrial uses and ensure
14 the uses allowed in the Rural Industrial Zone are rural rather than urban in
15 nature. To approve a committed exception to Goal 14 to allow urban uses of
16 the property (because all rural uses are impracticable) and then apply a zoning
17 district that was adopted to limit industrial uses to rural industrial uses would
18 appear on its face to be inconsistent.

19 Whether approving an irrevocably committed exception to Goal 14 to
20 allow urban uses of rural land and then applying a zone that was adopted to
21 limit industrial uses to rural industrial uses is inconsistent or not, if the county
22 wants to approve an irrevocably committed exception to Goal 14, it must

1 supply the reasoning that supports the conclusion that the rural use of the
2 property is impracticable, with the result that it is committed to urban uses.
3 That reasoning is missing, and remand is therefore required.

4 **C. Intervenor-Respondent's Argument**

5 *Schaffer v. Jackson County*, 17 Or LUBA 922 (1989), concerned a
6 comprehensive plan and zoning map amendment to authorize a proposed
7 asphalt batch plant. In that appeal and a prior *Schaffer* appeal, an issue arose
8 concerning whether the proposed asphalt batch plant was correctly viewed as
9 an urban use rather than a rural use, and thus required an exception to Goal 14
10 to be located outside a UGB. In that circumstance, LUBA explained the county
11 was obligated to “[1] demonstrate that the proposed use is rural, [2] include the
12 subject site within a UGB or [3] take an exception to Goal 14.” *Id.* at 944.
13 Despite the fact that the county actually approved an irrevocably committed
14 exception to Goal 14 in this case, intervenor argues the county took the first of
15 the *Shaffer* options:

16 “Here despite the fact the County framed its actions using the
17 terminology of an ‘exception’ to Goal 14, * * * the County’s
18 stated purpose for going through the Goal 14 ‘exceptions’ process
19 was ‘to assure the subject site is not developed with ‘urban’ uses.’

20 “The decision imposed two conditions of approval * * * that
21 restrict[] use of the property to outright permitted and conditional
22 uses allowed in the Rural Industrial zone, expressly prohibit[] pulp
23 and paper manufacturing uses on the property, and require[] new
24 land use applications and review for any change to the plan
25 amendment or zoning. * * *

1 “As the Hearings Official found, and the County Board adopted,
2 the Rural Industrial plan and zone designations are rural uses. The
3 decision provides:

4 “FINDINGS: The comprehensive plan has the
5 following language for the rural industrial zone:

6 “Rural Industrial

7 “The Rural Industrial plan designation applies to
8 specific exception areas located outside
9 unincorporated communities and urban growth
10 boundaries. The Rural Industrial plan designation
11 brings these areas into compliance with state rules by
12 adopting zoning to ensure they remain rural and that
13 uses allowed are less intensive than those allowed in
14 unincorporated communities as defined in OAR 660-
15 022.

16 “Section 18.100.010 states the purpose of the RI
17 Zone is:

18 “. . . to encourage employment opportunities in rural
19 areas and to promote the appropriate economic
20 development of rural service centers which are
21 rapidly becoming urbanized and soon to be full-
22 service incorporated cities, while protecting the
23 existing rural character of the area as well as
24 preserving or enhancing the air, water and land
25 resources of the area.”¹⁰

26 “The County’s Rural Industrial Zone provisions * * * not only
27 severely limit the range of permitted and conditional uses, they
28 provide additional use and dimensional limitations to include
29 maximum building sizes. * * * These provisions have been
30 acknowledged as consistent with the Statewide Planning Goals, to

¹⁰ The copy of Section 18.100.010 attached to intervenor-respondent’s brief does not include the quoted language.

1 include Goal 14 Urbanization. The County's RI zone does not
2 allow the types of intensive, urban industrial uses that necessitate
3 an exception to Goal 14 such as the RPID zone in *Columbia*
4 *Riverkeeper v. Columbia County*, 70 Or LUBA 171, 212-14
5 (2014) or the RLI zone in *Shaffer*, 17 Or LUBA at 931 because the
6 industrial use is tied to an on-site resource. The county's RI uses
7 are limited to rural uses.

8 "In short, what the County in fact did was follow the first *Shaffer*
9 approach – to limit the proposed use to rural uses – instead of
10 following through on the third *Shaffer* approach, taking an
11 exception to Goal 14 to allow urban uses.

12 "At no point during the local proceedings did Petitioner allege or
13 in any way argue that the uses permitted under the County's Rural
14 Industrial (RI) zone were urban uses or would represent urban
15 uses on rural land. Petitioner alleges for the first time at LUBA
16 that the decision allows urban uses on rural land. Petitioner has
17 waived the right to raise that issue." Intervenor-Respondent's
18 Brief 48-49 (original italics omitted).

19 Before turning to the merits of the above argument, we reject
20 intervenor's contention that petitioner has waived its right to argue that the RI
21 zone allows urban uses. The hearings officer was concerned that the RI zone
22 might allow urban uses, and that apparently was the reason she approved an
23 irrevocably committed exception to Goal 14 to address that concern. The focus
24 of petitioner's challenge in the second assignment of error is that Goal 14
25 exception. If the county on remand decides to adopt a different theory, *i.e.*, that
26 the RI zone only allows rural uses and may be applied to the property without
27 an exception to Goal 14, petitioner has not waived its right to challenge that
28 position and it has not waived its right to advance that challenge in this appeal.

1 Our reasoning in rejecting intervenor’s waiver argument also leads us to
2 reject intervenor’s invitation to affirm the county’s decision based on a legal
3 theory it did not adopt. The hearings officer’s decision does include some
4 language to the effect that the RI zone and the challenged decision, as
5 conditioned, only authorize rural uses. But if that was the hearings officer’s
6 legal theory for approving the map amendments it is not stated with anywhere
7 near adequate clarity. What is clear is that the county approved an irrevocably
8 committed exception to Goal 14: “an exception to Goal 14 is required for the
9 proposed plan amendment and zone change.” Record 49. The only reason for
10 approving such an exception that we can think of is to authorize urban uses of
11 rural land. The approved exception, had it been affirmed on appeal, would
12 make it irrelevant whether the RI zone allows urban uses. The county did not
13 adopt the legal theory that intervenor-respondent asks us to adopt under the
14 second assignment of error.

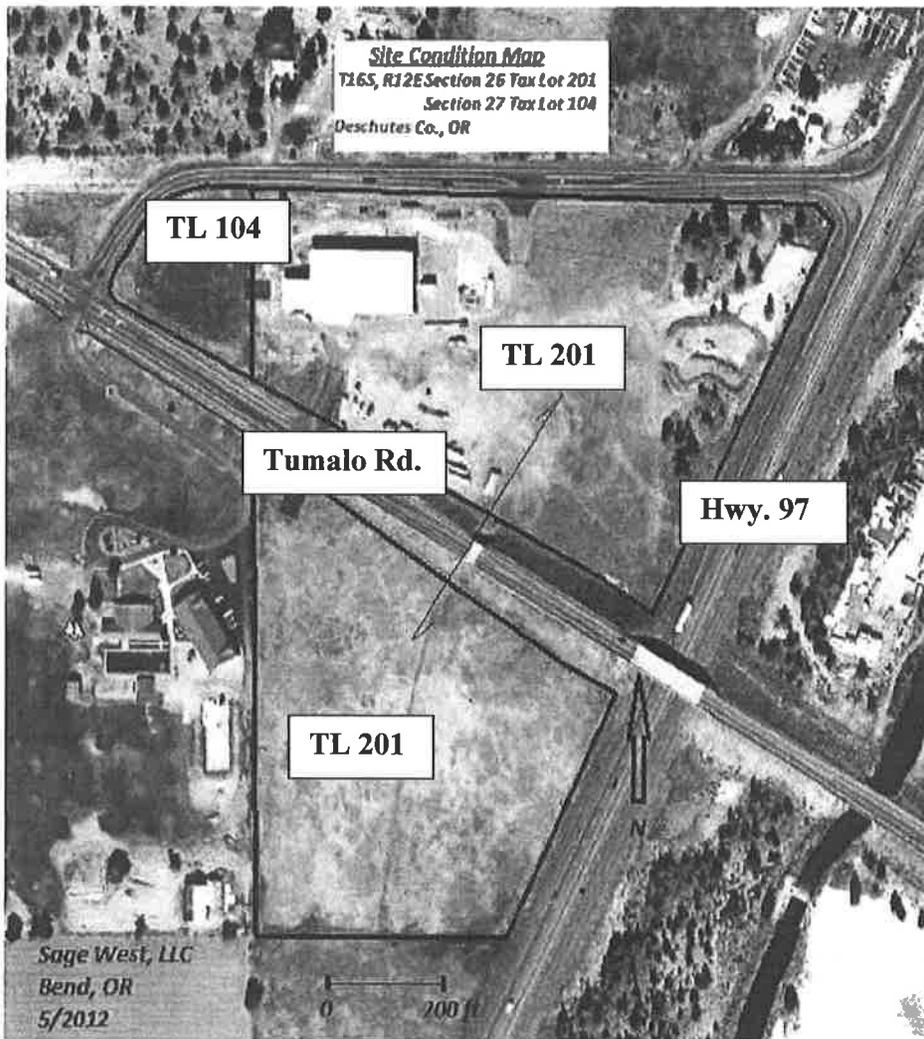
15 Finally, it does appear from the hearings official’s decision that she was
16 concerned that some of the uses allowed in the Rural Industrial Zone might be
17 viewed as “‘urban’ in nature.” Record 49. If that was the hearings official’s
18 concern, the irrevocably committed exception is at the very least a problematic
19 option for addressing that concern. We say “problematic,” because the
20 irrevocably committed exception requires a showing that *all* rural uses are
21 impracticable on the property, rather than other options that would allow a
22 more narrow focus on the potentially urban uses of concern.

1 The challenged decision only changes the plan and zoning map
2 designations for the property; it does not approve any specific uses on the
3 property. Once any potentially urban uses of concern that might be allowed in
4 the RI zone have been identified, conditions of approval could be imposed to
5 either preclude such urban uses or require approval of a Goal 14 exception in
6 the future before such uses could be authorized in the future. Or if the
7 applicant plans to seek approval for such uses, a more limited “reasons”
8 exception to authorize just those potentially urban uses would seem to offer a
9 far better chance for success than an irrevocably committed exception.

10 The second assignment of error is sustained.

11 The county’s decision is remanded.

12



1

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Code, *
Title 23, and the Amending Deschutes County * ORDINANCE NO. 2016-
Comprehensive Plan to Change the Plan Designation *
for Certain Property from Agricultural to Rural *
Industrial *

WHEREAS, Anthony Aceti applied to change the comprehensive plan designation for certain property from Agriculture to Rural Industrial that included an application for an “irrevocably committed” exception to Goal 14 and a Plan Amendment to certain sections of the Deschutes County Code (“DCC”); and

WHEREAS, Anthony Aceti applied for a Zone Change to the Deschutes County Code (“DCC”) Title 18, Zoning Map, to rezone certain property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (“EFU-TRB”) to Rural Industrial (“R-I”); and

WHEREAS, after notice was given in accordance with applicable law, public hearings were held on June 16, 2015 and July 14, 2015 before the Deschutes County Hearings Officer, and on October 1, 2015 the Hearings Officer recommended approval of the exception to Goal 14, a Plan Amendment, and a Zone Change; and

WHEREAS, after notice was given in accordance with applicable law a de novo public hearing was held on November 23, 2015 before the Board of County Commissioners (“Board”); and

WHEREAS, on January 6, 2016, the Board adopted Ordinance 2016-001, adopting a goal exception to Statewide Planning Goal 14 and amending DCC Title 23, the County Comprehensive Plan, changing the plan designation of the property from Agriculture to Rural Industrial, and amending the Comprehensive Plan Map accordingly; and

WHEREAS, on January 6, 2016, the Board adopted Ordinance 2016-002, to amend the zone designation for the property from Exclusive Farm Use (“EFU”) to Rural Industrial (“R-I”) and amending the Zoning Map accordingly; and

WHEREAS, Ordinances 2016-001 and 2016-002, were appealed to the Land Use Board of Appeals (“LUBA”); and

WHEREAS, LUBA denied all Petitioner’s challenges to the Board’s decision that concluded the property does not qualify as agricultural land under OAR 660-033-020(1)(b); and

WHEREAS, LUBA sustained Petitioner’s challenge to the exception to Goal 14 and remanded Ordinances 2016-001 and 2016-002; and

WHEREAS, in its Final Opinion and Order LUBA provided guidance to the Board by explaining, “The only reason for approving such an exception that we can think of is to authorize urban uses of rural land.”; and

WHEREAS, Anthony Aceti requested the Board of County Commissioners to consider the applications on remand; and

WHEREAS, after notice was given in accordance with applicable law, a hearing on remand was held on [redacted] before the Board; and

WHEREAS, Anthony Aceti did not request approval for urban uses on rural land through the submitted land use applications; and

WHEREAS, the Board did not intend to grant approval for urban uses on rural land through the prior approvals of the land use applications; and

WHEREAS, the adopted findings by the Hearings Official stated that the purpose of requiring an exception to Goal 14 was to ensure only rural uses were permitted on the subject property; and

WHEREAS, the Deschutes County Comprehensive Plan provides that the Rural Plan designation complies with state regulations for lands outside of urban growth boundaries by adopting zoning to ensure rural industrial uses remain rural and that allowed uses are appropriate for rural areas; and

WHEREAS, the Deschutes County Comprehensive Plan and Deschutes County Code are acknowledged as consistent with all of the Statewide Planning Goals; and

WHEREAS, the Board concludes that an exception to Statewide Planning Goal 14 Urbanization is not required to allow uses permitted under the County's RI zone on rural land; and

WHEREAS, the Board, after review on remand conducted in accordance with applicable law, decided to repeal those portions of Ordinance 2016-001 that approved the exception to Goal 14, and to reaffirm those portions of Ordinance 2016-001 that concluded the subject property is not agricultural land as defined by OAR 660-033-020(1)(b), that approved the comprehensive plan designation for the property from Agriculture to Rural Industrial and the amendment of the Comprehensive Plan Map to reflect that change, and to reaffirm Ordinance 2016-002 to rezone the subject property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone ("EFU-TRB") to Rural Industrial ("R-I"); now therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. The Deschutes County Comprehensive Plan Map is amended to change the plan designation for certain property described in Exhibit "[redacted]" and depicted on the map set forth as Exhibit "[redacted]" with both exhibits attached and incorporated by reference herein, from Agriculture to Rural Industrial.

Section 2. AMENDMENT. The description of the Deschutes Junction rural industrial site in Chapter 3.4 of the Deschutes County Comprehensive Plan is amended to read as described in Exhibit "[redacted]," attached and incorporated by reference herein.

Section 3. AMENDMENT. Chapter 3.4 of the Deschutes County Comprehensive Plan is amended to include a new Rural Economic Policy to read as described in Exhibit "[redacted]," attached and incorporated by reference herein.

Section 4. FINDINGS. The Board adopts as its findings in support of this Ordinance the Findings of Fact and Conclusions of Law on Remand attached as Exhibit "█," and incorporated by reference herein, and those portions of the Decision of the County Hearings Official attached as Exhibit "█," and incorporated by reference herein, that are consistent with the Findings of Fact and Conclusions of Law on Remand.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance to Change the Zone Designation for *
Certain Property from Exclusive Farm Use * ORDINANCE NO. 2016-
(EFU-TRB) to Rural Industrial (R-I) *

WHEREAS, Anthony Aceti applied to change the comprehensive plan designation for certain property from Agriculture to Rural Industrial that included an application for an “irrevocably committed” exception to Goal 14 and a Plan Amendment to certain sections of the Deschutes County Code (“DCC”); and

WHEREAS, Anthony Aceti applied for a Zone Change to the Deschutes County Code (“DCC”) Title 18, Zoning Map, to rezone certain property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (“EFU-TRB”) to Rural Industrial (“R-I”); and

WHEREAS, after notice was given in accordance with applicable law, public hearings were held on June 16, 2015 and July 14, 2015 before the Deschutes County Hearings Officer, and on October 1, 2015 the Hearings Officer recommended approval of the exception to Goal 14, a Plan Amendment, and a Zone Change; and

WHEREAS, after notice was given in accordance with applicable law a de novo public hearing was held on November 23, 2015 before the Board of County Commissioners (“Board”); and

WHEREAS, on January 6, 2016, the Board adopted Ordinance 2016-001, adopting a goal exception to Statewide Planning Goal 14 and amending DCC Title 23, the County Comprehensive Plan, changing the plan designation of the property from Agriculture to Rural Industrial, and amending the Comprehensive Plan Map accordingly; and

WHEREAS, on January 6, 2016, the Board adopted Ordinance 2016-002, to amend the zone designation for the property from Exclusive Farm Use (“EFU”) to Rural Industrial (“R-I”) and amending the Zoning Map accordingly; and

WHEREAS, Ordinances 2016-001 and 2016-002, were appealed to the Land Use Board of Appeals (“LUBA”); and

WHEREAS, LUBA denied all Petitioner’s challenges to the Board’s decision that concluded the property does not qualify as agricultural land under OAR 660-033-020(1)(b); and

WHEREAS, LUBA sustained Petitioner’s challenge to the exception to Goal 14 and remanded Ordinances 2016-001 and 2016-002; and

WHEREAS, in its Final Opinion and Order LUBA provided guidance to the Board by explaining, “The only reason for approving such an exception that we can think of is to authorize urban uses of rural land.”; and

WHEREAS, Anthony Aceti requested the Board of County Commissioners to consider the applications on remand; and

WHEREAS, after notice was given in accordance with applicable law, a hearing on remand was held on [redacted] before the Board; and

WHEREAS, Anthony Aceti did not request approval for urban uses on rural land through the submitted land use applications; and

WHEREAS, the Board did not intend to grant approval for urban uses on rural land through the prior approvals of the land use applications; and

WHEREAS, the adopted findings by the Hearings Official stated that the purpose of requiring an exception to Goal 14 was to ensure only rural uses were permitted on the subject property; and

WHEREAS, the Deschutes County Comprehensive Plan provides that the Rural Plan designation complies with state regulations for lands outside of urban growth boundaries by adopting zoning to ensure rural industrial uses remain rural and that allowed uses are appropriate for rural areas; and

WHEREAS, the Deschutes County Comprehensive Plan and Deschutes County Code are acknowledged as consistent with all of the Statewide Planning Goals; and

WHEREAS, the Board concludes that an exception to Statewide Planning Goal 14 Urbanization is not required to allow uses permitted under the County's RI zone on rural land; and

WHEREAS, the Board, after review on remand conducted in accordance with applicable law, decided to repeal those portions of Ordinance 2016-001 that approved the exception to Goal 14, and to reaffirm those portions of Ordinance 2016-001 that concluded the subject property is not agricultural land as defined by OAR 660-033-020(1)(b), that approved the comprehensive plan designation for the property from Agriculture to Rural Industrial and the amendment of the Comprehensive Plan Map to reflect that change, and to reaffirm Ordinance 2016-002 to rezone the subject property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone ("EFU-TRB") to Rural Industrial ("R-I"); now therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. DCC Title 18, Zoning Map, is amended to change the zone designation from Exclusive Farm Use ("EFU") to Rural Industrial ("RI") for certain property depicted on the map set forth as Exhibit "[redacted]," attached and incorporated by reference herein, and described in Exhibit "[redacted]," incorporated by reference herein.

Section 2. FINDINGS. The Board adopts as its findings in support of this Ordinance the Findings of Fact and Conclusions of Law on Remand attached as Exhibit "[redacted]," and incorporated by reference herein, and those portions of the Decision of the County Hearings Official attached as Exhibit "[redacted]," and incorporated by reference herein, that are consistent with the Findings of Fact and Conclusions of Law on Remand.

**BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON
FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND**

FILE NUMBERS: 247-14-000456-ZC; 247-14-000457-PA

APPLICANT/OWNER: Anthony J. Aceti
21235 Tumalo Place
Bend, OR 97703

**APPLICANT'S
REPRESENTATIVE:** Pat Kliewer
60465 Sunridge Drive
Bend, OR 97702

REQUEST: The applicant requests approval of a plan amendment and zone change from Exclusive Farm use to Rural Industrial for a 21.59-acre site located at Deschutes Junction north of Bend.

I. FINDINGS OF FACT:

- A. Incorporated Findings of Fact:** The Findings of Fact lettered A through K, from the Hearings Officer's decision dated September 30, 2015, are hereby incorporated to the extent they are consistent with these findings and conclusions.
- B. Procedural History:** Central Oregon Land Watch appealed Ordinances 2016-001 and 2016-002 to the Land Use Board of Appeals. LUBA remanded the decisions on August 10, 2016. The applicant requested in writing on [REDACTED], 2016 that the County Board proceed with the application on remand pursuant to ORS 215.435. The remand proceeding was limited to the issue remanded by LUBA and a public hearing on remand was held on [REDACTED], 2016. The County Board issued its written decision on remand on [REDACTED], 2016.
- C. LUBA Decision and Guidance:** The Land Use Board of Appeal's Final Opinion and Order, *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2016-012, denied many of Petitioner Central Oregon LandWatch's issues raised under the two assignments of error presented. However, because LUBA affirmed Petitioner's argument that the County Board erred in approving an exception to Goal 14 Urbanization, LUBA remanded the decision for further review.

LUBA denied all of the arguments presented under Petitioner's first assignment of error, which challenged the County Board's conclusion that the subject property does not constitute "agricultural land" under OAR 660-033-020(1). LUBA Slip Op. p. 18.

LUBA affirmed Petitioner's second assignment of error, concluding that the adopted findings did not supply the reasoning necessary to conclude that all rural use of the property is impracticable and is therefore irrevocably committed to urban uses. LUBA Slip Op. p. 24 and p. 28. Consequently, LUBA remanded the decision.

LUBA's Final Opinion and Order provides the County Board and staff guidance regarding the purpose of the Goal 14 exception and whether a Goal 14 exception is required to authorize rural uses on rural land. The decision states:

"In a similar vein, the challenged decision applies the Rural Industrial Zone to the property. As explained below, the Rural Industrial Zone was adopted to allow rural industrial uses and ensure the uses allowed in the Rural Industrial Zone are rural rather than urban in nature. *To approve a committed exception to Goal 14 to allow urban uses of the property (because all rural uses are impracticable) and then apply*

a zoning district that was adopted to limit industrial uses to rural industrial uses would appear on its face to be inconsistent.

"Whether approving an irrevocably committed exception to Goal 14 to allow urban uses of rural land and then applying a zone that was adopted to limit industrial uses to rural industrial uses is inconsistent or not, if the county wants to approve an irrevocably committed exception to Goal 14, it must supply the reasoning that supports the conclusion that the rural use of the property is impracticable, with the result that it is committed to urban uses." Slip Op. at p. 23-24 (emphasis supplied).

And,

"What is clear is that the county approved an irrevocably committed exception to Goal 14: 'an exception to Goal 14 is required for the proposed plan amendment and zone change.' Record. 49. *The only reason for approving such an exception that we can think of is to authorize urban uses of rural land.*" Slip Op. at p. 27 (emphasis supplied).

- D. Parties' Intentions:** At no point during the prior proceedings did the applicant request that the County approve urban uses on the subject property. The applicant always asserted that he sought to allow rural industrial uses on the property. When informed that the County believed he needed to apply for an exception to Goal 14 because of prior precedent, the applicant asserted he did not believe that an exception was necessary to allow rural uses, but would prepare an exception application to cooperate with the County.

The County Board and county staff did not intend to authorize urban uses on the subject property through the Goal 14 exception approved by Ordinance 2016-001. This is reflected in the RI plan and zone designations imposed on the property as well as the conditions of approval.

- E. Basis for Hearings Official's Decision:** The Hearings Officer did not intend to authorize urban uses on the subject property. The Hearings Officer's decision expressly states:

"I find that it is appropriate to require an exception to Goal 14 to determine if the proposed "reasons" match the potential uses, and so that development limitations may be established as part of the goal exception to assure the subject site is not developed with "urban" uses. I note that such a goal exception was required by the Hearings Officer in ZC-14-2." Record p. 68 (emphasis supplied).

- F. Deschutes County Land Use Regulations:** The Deschutes County Comprehensive Plan and Title 18 of the Deschutes County Code have been acknowledged by LCDC as consistent with all of the statewide planning goals.

The Comprehensive Plan states that the Rural Industrial plan designation and zoning applies to specific properties to provide compliance with state rules by adopting zoning to ensure that those properties remain rural and that the uses allowed there are less intensive than those allowed in unincorporated communities as defined in OAR 660-022. Comprehensive Plan, Ch. 3, p. 11.

Specific Comprehensive Plan Policies implement this statement. These include:

Policy 3.4.23 To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor.

Policy 3.4.27 Land use regulations shall ensure that new uses authorized within the Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area.

Policy 3.4.28 New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.

Policy 3.4.31 Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.

Policy 3.4.32 Residential and industrial uses shall be served by on-site wells or public water systems.

Policy 3.4.33 Community sewer systems shall not be allowed in Rural Industrial zones.

The Comprehensive Plan also includes a policy specifically for the Deschutes Junction area intended to ensure rural uses in that rural area.

Policy 3.10.5 Maximize protection of the rural character of neighborhoods in the Deschutes Junction area while recognizing the intended development of properties designated for commercial, industrial and agricultural uses.

The Deschutes County Code Chapter 18.100 RURAL INDUSTRIAL ZONE – R-I, implements the above Comprehensive Plan policies. It limits the types of industrial uses, whether permitted outright or through conditional approval, to inherently rural industrial uses. DCC 18.100.010 and .020. The DCC further restricts those industrial uses through use limitations, dimensional standards, off-street parking and loading standards, site design, additional requirements, solar setbacks, and restrictions through the Limited Use Combining Zone – Deschutes Junction. DCC 18.100.030 through .090.

- G. Issue on Remand:** The issue on remand is whether the rural industrial uses the applicant has requested approval to allow on the subject property (the uses allowed by the R-I zoning code) require an exception to Goal 14 or whether the application for a change in the plan and zone designation for the property to Rural Industrial can be approved without a Goal 14 exception.

II. CONCLUSIONS OF LAW:

For the reasons provided below and based upon the evidence in the record and the findings provided above, the Board of County Commissioners of Deschutes County concludes that the subject property does not qualify as "agricultural land" under OAR 660-033-020(1) for Goal 3 purposes, that an exception to Goal 14 Urbanization is not required for the County to approve the rural industrial comprehensive plan designation or zoning on the subject property and hereby approves the application to change the plan designation for the property from Agriculture to Rural Industrial and the zoning for the property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial (R-I).

LUBA's remand denied all of the Petitioner's challenges to our conclusion that the subject property does not qualify as "agricultural land" under OAR 660-033-020(1) and affirmed that portion of our previous decisions. The consequence of that determination is that non-resource (i.e, other than EFU) rural uses may be permitted on the subject property consistent with the rural plan designation and zoning of the property. That issue has been resolved and is not subject to challenge in this remand proceeding. The County Board reaffirms that portion of our decision without further discussion or analysis.

Given the above findings that the applicant did not intend to request and the County Board did not intend to authorize urban uses on the subject property, LUBA's remand requires us to examine why an exception to Goal 14 was filed in this proceeding at all.

It is plainly evident from the evidence in the record and the above findings that staff's request that the applicant submit an application requesting an exception to Goal 14, the Hearings Officer's consideration and approval of that exception, and the County Board's consideration of the exception application flowed directly from the precedent set by the Hearings Official's decision in ZC-14-2. The County had concluded that the decision is binding precedent and has consistently applied the approach used in that decision to assign R-I zoning to a property to subsequent applications. That decision, as interpreted and applied by the County, concluded that an exception to Goal 14 Urbanization was required whenever a property owner sought rural industrial zoning on rural property, and that the Goal 14 exception process was to ensure that the subject site was not developed with "urban" uses. The Hearings Officer's decision in ZC-14-2 was not appealed and, therefore, its reasoning was never reviewed by LUBA.

As the excerpts from LUBA's opinion in this matter quoted above make clear, the Hearings Officer's analysis and conclusions regarding the use of the Goal 14 exceptions process to limit Rural Industrial uses to those that are not "urban" is both rationally inconsistent and legally incorrect. As LUBA's decision plainly explains, the purpose of a Goal 14 exception is to allow urban uses on rural land. The decision also explains that to get a committed exception to Goal 14, one must demonstrate that it is impossible to locate any rural use on the subject property. It is thus illogical to approve a Goal 14 exception only to then limit it to Rural Industrial uses, which are "rural" by definition and acknowledgment. To do so is also inconsistent with the state's land use legal framework.

The County Board hereby concludes that the County should no longer follow the precedent set forth in ZC-14-2, which requires approving an exception to Goal 14 before approving the change in plan designation and zoning of a rural property to the Rural Industrial plan designation and R-I zoning. As LUBA explained in its decision, the requirement for an applicant to apply for an exception to Goal 14 is to be limited to proposals that request urban uses on rural land, or as otherwise required by the DCC, state statute or state land use regulations.

Based upon the above conclusion, because the applicant did not request urban uses to be allowed on the subject property and because the County Board did not intend to allow urban uses on rural land, the County Board concludes that the applicant should not have been required to submit an application for an exception to Goal 14 for the purposes set forth by the decision in ZC-14-2 as followed by the Hearings Official in this proceeding.

One issue remains from the LUBA decision. LUBA seemed to think that the Hearings Officer believed that the application for R-I zoning would allow urban uses on rural land, and referenced page 49 of the record twice in its decision. The relevant passage from that page is:

"I find that the subject property is 'nonresource land' based on the fact that it is not Agricultural Land subject to Goal 3, but the proposed plan amendment is subject to Goal 14. This is because it could result in the 'urbanization' of the subject site by allowing development with RI Zone uses that are more 'urban' in nature including both retail and service uses. For this reason, an exception to Goal 14 is required for the proposed plan amendment and zone change." Record p, 49.

For the following reasons, the County Board rejects the Hearings Official's analysis provided above and similar comments contained elsewhere in the Hearings Officer's decision.

First, uses allowed in the rural industrial zone are not more, or less, "urban" than other rural uses. Uses are either urban or they are rural. Rural industrial uses are no more urban or rural than rural residential uses, EFU uses or rural commercial uses. While R-I uses may be more or

less intensive than rural residential uses or rural commercial uses, they remain "rural uses," particularly when developed consistent with the development standards for uses authorized within the county's RI zoning code. In fact, LUBA and the courts have noted that farm practices permitted in the EFU zone often resemble industrial uses. The Hearings Officer erred when she concluded or otherwise suggested that the proposal for R-I zoning could lead to the urbanization of the subject site.

Second, the County's Rural Industrial plan designation and the R-I zone provisions have been acknowledged by LCDC as rural uses. As LUBA recognized, acknowledged rural industrial uses are not urban uses, they are rural uses. Given the development limitations set forth under DCC 18.100.030 to .090, the authorized rural industrial uses on the subject property, if the application is approved, will be less intensive than those allowed in unincorporated communities. The Hearings Officer erred when she concluded or suggested that Rural Industrial development of the property would constitute an urban use of rural land.

Third, there is nothing about the application or the subject property that suggests rural industrial uses within the range of uses permitted in the R-I zone would be "urban." The proposal simply seeks a rural industrial plan designation and zoning. All development proposals will be reviewed for consistency within the limitations established by the DCC, which will ensure that the approved uses are rural uses. With respect to the site, all industrial uses will be served by a DEQ approved on-site sewage disposal system consistent with Comprehensive Plan Policy 3.4.31. The property is not served by, nor can be approved for service by a community sewer system, which is consistent with Policy 3.4.33. Furthermore, the subject property is served by a public water system, which is consistent with Policy 3.4.32 and the Comprehensive Plan's limitations on property to ensure that rural industrial uses are in-fact rural. Any analysis, conclusions or suggestions contained in the Hearings Official's decision that suggests any of the above site factors may lead to urban uses on rural land are in error.

Based upon the above analysis, the County Board concludes that there is nothing about the applicant's request for a Rural Industrial plan designation and Rural Industrial (R-I) zoning that would allow urban uses on rural land or that would in any way require the applicant to obtain an exception to Goal 14 Urbanization.

The County Board hereby incorporates those portions of the Hearings Official's findings and conclusions that are consistent with these findings and conclusions.

The County Board hereby expressly rejects the Hearings Official's Goal 14 finding at page 32 of the Hearings Official's decision and finds instead: **Goal 14, Urbanization.** Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use." We find that the subject property is "nonresource land" based on the fact that it is not Agricultural land subject to Goal 3. Because our analysis leads us to conclude that the proposal does not represent an "urban" use of land, and the proposal seeks to apply rural industrial plan and zone designations to the property and the uses permitted under R-I zoning, as restricted by the development standards provided in the Deschutes County Code, constitute rural uses on rural land, the proposal is consistent with Goal 14.

The County Board Ultimately Concludes:

- To reaffirm our previous decision that the subject property is "nonresource land" because the property is not "agricultural land" under OAR 660-033-020(1) and is therefore not subject to Goal 3.
- To repeal those portions of Ordinance 2016-001 and the related findings that approved an exception to Goal 14, on the basis that a Goal 14 exception is not necessary to approve the requested plan designation and zone change, or to allow rural industrial uses on the subject property.

- To approve the Comprehensive Plan Amendment to re-designate the subject property from Agriculture to Rural Industrial and the corresponding Zone Map Amendment (Zone Change) to reassign the zoning from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (R-I).

III. DECISION:

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board of County Commissioners hereby **APPROVES** the Applicant's applications for a Comprehensive Plan Map amendment to re-designate the subject property from Agriculture to Rural Industrial and a corresponding Zone Map Amendment (Zone Change) to reassign the zoning from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (R-I) subject to the following conditions of approval:

1. This approval is based on the applicant's burdens of proof, supplemental materials, and written and oral testimony. Any substantial change to the approved plan amendment or zone change will require new land use application(s) and approval(s).
2. This approval allows on the subject property all uses allowed outright and conditionally in the Rural Industrial zone, except that any pulp and paper manufacturing use shall not be allowed within the subject property.
3. The Deschutes County Year 2011 Comprehensive Plan shall be amended to include an updated description of the Deschutes Junction rural industrial site in Chapter 3.4, as follows:

The Deschutes Junction site consists of the following tax lots: 161226C000107 (9.05 acres), 16126C000106 (4.33 acres), 161226C000102 (1.41 acres), 161226C000114 (2.50 acres), portions 161226C000300 (12.9 acres), 161226C000301 (8.93 acres), 161226A000203 (1.5 acres), those portions of 161226C000111 located west of the Burlington Northern-Santa Fe railroad tracks (16.45 acres), 161226C000201 (20.27 acres) and 161227D0000104 (1.32 acres). Generally, the Deschutes Junction site extends to property to the west of Highway 97, bordered by Tumalo Road and Tumalo Place and is bordered on the east by the Burlington Northern Railroad, on the north by Tumalo Place (except for a portion of 1612226A000111), and on the south by EFU-zoned property owned by the City of Bend.

4. The Deschutes County Year 2011 Comprehensive Plan shall be amended to include a new Rural Economy Policy in Chapter 3.4, setting forth the following language for the Deschutes Junction Limited Use Combining Zone:

To ensure that the uses in the Rural Industrial Zone on Tax Lot 201 on Deschutes County Assessor's Map 16-12-26C, and Tax Lot 104 on Assessor's Map 16-12-27D as described in Exhibit "___" and depicted on Exhibit "___" to Ordinance ___, and incorporated by reference herein, are limited in nature and scope, the Rural Industrial zoning on the subject parcel shall be subject to a Limited Use Combining Zone, which will prohibit the use on that site for any pulp and paper manufacturing use.

5. Prior to any development of the property, the developer shall work with Swalley Irrigation District to transfer some or all of the existing 16 acres of irrigation water rights associated with the subject property to ensure that there will not be any development on top of irrigated land; only those irrigation water rights that can be dedicated to beneficial uses, such as irrigated landscaping, may be retained.
6. As part of any development of the property, the developer shall

Chapter 18.100. RURAL INDUSTRIAL ZONE - R-I

- 18.100.010. Uses Permitted Outright.**
- 18.100.020. Conditional Uses.**
- 18.100.030. Use Limitations.**
- 18.100.040. Dimensional Standards.**
- 18.100.050. Off-street Parking and Loading.**
- 18.100.060. Site Design.**
- 18.100.070. Additional Requirements.**
- 18.100.080. Solar Setback.**
- 18.100.090. Limited Use Combining Zone – Deschutes Junction**

18.100.010. Uses Permitted Outright.

In an R-I Zone, the following uses and their accessory uses are permitted outright except as limited by DCC 18.100.040, and unless located within 600 feet from a residential dwelling, a lot within a platted subdivision or a residential zone.

- A. Farming or forest use.
- B. Primary processing, packaging, treatment, bulk storage and distribution of the following products:
 - 1. Agricultural products, including foodstuffs, animal and fish products, and animal feeds.
 - 2. Ornamental horticultural products and nurseries.
 - 3. Softwood and hardwood products excluding pulp and paper manufacturing.
 - 4. Sand, gravel, clay and other mineral products.
- C. Residence for caretaker or night watchman on property.
- D. Freight Depot, including the loading, unloading, storage and distribution of goods and materials by railcar or truck.
- E. Contractor's or building materials business and other construction-related business including plumbing, electrical, roof, siding, etc., provided such use is wholly enclosed within a building or no outside storage is permitted unless enclosed by sight-obscuring fencing.
- F. Ice or cold storage plant.
- G. Wholesale distribution outlet including warehousing, but excluding open outside storage.
- H. Welding, sheet metal or machine shop provided such is wholly enclosed within a building or all outside storage is enclosed by sight-obscuring fencing.
- I. Kennel or a Veterinary clinic.
- J. Lumber manufacturing and wood processing except pulp and paper manufacturing.
- K. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards and criteria established by DCC 18.116.230.
- L. Class III road or street project.
- M. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.
- N. Medical marijuana dispensary subject to DCC 18.116.320, Medical Marijuana Dispensary. (Ord. 2015-004 §8, 2015; Ord. 2002-126, §1, 2002; Ord. 2001-039 §12, 2001; Ord. 2001-016 §2, 2001; Ord. 93-043 §16, 1993; Ord. 91-038 §1, 1991)

18.100.020. Conditional Uses.

The following uses may be allowed subject to DCC 18.128:

- A. Any use permitted by DCC 18.100.010, which is located within 600 feet of a residential dwelling, a lot within a platted subdivision or a residential zone.

- B. Any use permitted by DCC 18.100.010, which involves open storage.
- C. Concrete or ready-mix plant.
- D. Petroleum products storage and distribution.
- E. Storage, crushing and processing of minerals, including the processing of aggregate into asphaltic concrete or Portland Cement Concrete.
- F. Commercial feedlot, stockyard, sales yard, slaughterhouse and rendering plant.
- G. Railroad trackage and related facilities.
- H. Pulp and paper manufacturing.
- I. Any use permitted by DCC 18.100.020010, which is expected to exceed the following standards:
 - 1. Lot coverage in excess of 70 percent.
 - 2. Generation of any odor, dust, fumes, glare, flashing lights or noise that is perceptible without instruments 500 feet from the property line of the subject use.
- J. Manufacture, repair or storage of articles manufactured from bone, cellophane, cloth, cork, feathers, felt, fiber, glass, stone, paper, plastic, precious or semiprecious stones or metal, wax, wire, wood, rubber, yarn or similar materials, provided such uses do not create a disturbance because of odor, noise, dust, smoke, gas, traffic or other factors.
- K. Processing, packaging and storage of food and beverages including those requiring distillation and fermentation.
- L. Public Landfill Transfer Station, including recycling and other related activities.
- M. Mini-storage facility.
- N. Automotive wrecking yard totally enclosed by a sight-obscuring fence.
- O. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A) or (B).
- P. Utility facility.
- Q. Manufacturing, storage, sales, rental, repair and servicing of equipment and materials associated with farm and forest uses, logging, road maintenance, mineral extraction, construction or similar rural activities.
- R. Electrical substations.
(Ord. 2004-013, §10, 2004; Ord. 2002-126, §1, 2002; Ord. 2001-039 §12, 2001; Ord. 2001-016 §2, 2001; Ord. 97-063 §3, 1997; Ord. 91-038 §1, 1991; Ord. 91-020 §1, 1991; Ord. 90-014 §38, 1990; Ord. 86-018 §15, 1986)

18.100.030. Use Limitations.

In an R-I Zone, the following limitations and standards shall apply to all permitted and conditional uses:

- A. Properties subject to a limited use combining zone shall be limited to those uses and conditions specified in the limited use combining zone.
- B. No use expected to generate more than 30 truck-trailer or other heavy equipment trips per day to and from the subject property shall be permitted to locate on a lot adjacent to or across a street from a residential dwelling, a lot in a platted subdivision or a residential zone.
- C. No use shall be permitted that generates more than 20 auto or truck trips during the busiest hour of the day to and from the premises unless served directly by an arterial or collector or other improved street or road designed to serve the industrial use which does not pass through or adjacent to residential lots in a platted subdivision or a residential zone.
- D. Any use on a lot adjacent to or across the street from a residential dwelling, a lot in a platted subdivision or a residential zone shall not emit odor, dust, fumes, glare, flashing lights, noise, or similar disturbances perceptible without instruments more than 200 feet in the direction of the affected residential use or lot.
- E. All parking demand created by any use permitted by DCC 18.100.020 010 or 030 020 shall be accommodated on the applicant's premises entirely off-street.

- F. No use permitted by DCC 18.100.020 010 or 030 020 shall require the backing of traffic onto a public or private street or road right of way.
- G. There shall be only one ingress and one egress from properties accommodating uses permitted by DCC 18.100.020 010 or 030 020 per each 300 feet or fraction thereof of street frontage. If necessary to meet this requirement, permitted uses shall provide for shared ingress and egress.
- H. All uses permitted by DCC 18.100.020 or 030 shall be screened from adjoining residential uses by a sight-obscuring fence.
- I. No use shall be permitted to operate for business between the hours of 11:00 p.m. and 7:00 a.m. if located adjacent to or across the street from a residential dwelling, a lot in a platted subdivision or a residential zone except as is consistent with DCC 8.08.
- J. No use shall be permitted which has been declared a nuisance by state statute, County ordinance or a court of competent jurisdiction. No use requiring contaminant discharge permits shall be approved by the Planning Director or Hearings Body prior to review by the applicable state or federal permit-reviewing authority, nor shall such uses be permitted adjacent to or across a street from a residential use or lot.
- K. Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.
- L. Residential and industrial uses shall be served by on-site wells or public water systems.
(Ord. 2009-008 §2; Ord. 2004-013, §10, 2004; Ord. 2002-126, §1, 2002; Ord. 91-020 §1, 1991)

18.100.040. Dimensional Standards.

In an R-I Zone, the following dimensional standards shall apply:

- A. The minimum lot size shall be determined subject to the provisions of DCC 18.100.050.
- B. No conditional use permitted by DCC 18.100.030 that is located within 600 feet of a residential use, lot in a platted subdivision or a residential zone shall exceed 70 percent lot coverage by all buildings, storage areas or facilities and required off-street parking and loading area.
- C. The minimum setback between a structure and a street or road shall be 50 feet.
- D. The minimum setback between a structure and a property line adjoining a residential lot or use shall be 50 feet.
- E. The minimum rear or side yard setback shall be 25 feet unless a greater setback is required by DCC 18.100.050 C or D.
- F. The maximum building height for any structure shall be 30 feet on any lot adjacent to or across a street from a residential use or lot and 45 feet on any other lot.
- G. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.
- H. Maximum industrial use floor area.
 - 1. The maximum size of a building is 7,500 square feet of floor space. The maximum square footage in a building or buildings for a single allowable use, as defined in DCC 18.100.020 and 18.100.030, on an individual lot or parcel shall not exceed 7,500 square feet. There is no building size limit for uses that are for the primary processing of raw materials produced in rural areas.
 - 2. A lawfully established use that existed on or before 02/25/03 may be expanded to occupy a maximum of 10,000 square feet of floor area or an additional 25 percent of the floor area currently occupied by the existing use which ever is greater.

(Ord. 2002-126, §1, 2002; Ord. 95-075 §1, 1995; Ord. 94-008 §26, 1994; Ord. 91-020 §1, 1991)

18.100.050. Off-street Parking and Loading.

Off-street parking and loading shall be provided subject to the provisions of DCC 18.100.070 and DCC 18.116.

(Ord. 91-020 §1, 1991)

18.100.060. Site Design.

All uses except farm, forest and residential uses are subject to the provisions of DCC 18.124, Site Plan Review.

(Ord. 2002-126, §1, 2002; Ord. 91-020 §1, 1991)

18.100.70. Additional Requirements.

As a condition of approval of any use proposed within an R-I Zone, the Planning Director or Hearings Body may require:

- A. An increase in required setbacks.
- B. Additional off-street parking and loading facilities.
- C. Limitations on signs or lighting, hours of operation, and points of ingress and egress.
- D. Additional landscaping, screening and other improvements.

(Ord. 91-020 §1, 1991)

18.100.080. Solar Setback.

The setback from the north lot line shall meet the solar setback requirements in DCC 18.116.180.

(Ord. 91-020 §1, 1991; Ord. 83-037 §20, 1983)

18.100.090 Limited Use Combining Zone – Deschutes Junction

- A. For the property at Deschutes Junction that is described in Exhibit “C” and identified on Exhibit “D”, attached to Ordinance 2009-007 and incorporated by reference herein, the storage, crushing, processing, sale and distribution of minerals and their accessory uses are permitted outright and do not require site plan review.
- B. For the property at Deschutes Junction that is described in Exhibit “D” identified on Exhibit “E”, attached to Ordinance 2010-030 and incorporated by reference herein, the storage, crushing, processing, sale and distribution of minerals are subject to conditional use and site plan approval.

(Ord. 2010-031 §1, 2010; Ord. 2009-008 §2, 2009)

Peter Gutowsky

From: Daniel Terrell <danterrell@me.com>
Sent: Monday, October 10, 2016 2:58 PM
To: Peter Gutowsky
Subject: Aceti Remand - Amended Proposed Findings
Attachments: Attachment 4 - Amended Proposed Findings.pdf; ATT00001.htm

Peter:

As we discussed on the telephone earlier today, attached please find an Amended Attachment 4 - Proposed Findings. The only changes I made were to remove Condition of Approval #4, which imposed the Limited Use Combining Zone, and re-numbered the remaining conditions of approval. The existing Condition of Approval 2 already included express language prohibiting pulp and paper manufacturing use so it did not need to be changed.

Please replace the Attachment 4 that was submitted with the remand request application with the one attached here.

Thanks for flagging that issue for me and giving the opportunity to clean things up before the hearing. Don't hesitate to contact me if you have any further questions.

Best,

Dan

**BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON
FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND**

FILE NUMBERS: 247-14-000456-ZC; 247-14-000457-PA

APPLICANT/OWNER: Anthony J. Aceti
21235 Tumalo Place
Bend, OR 97703

**APPLICANT'S
REPRESENTATIVE:** Pat Kliewer
60465 Sunridge Drive
Bend, OR 97702

REQUEST: The applicant requests approval of a plan amendment and zone change from Exclusive Farm use to Rural Industrial for a 21.59-acre site located at Deschutes Junction north of Bend.

I. FINDINGS OF FACT:

A. Incorporated Findings of Fact: The Findings of Fact lettered A through K, from the Hearings Officer's decision dated September 30, 2015, are hereby incorporated to the extent they are consistent with these findings and conclusions.

B. Procedural History: Central Oregon Land Watch appealed Ordinances 2016-001 and 2016-002 to the Land Use Board of Appeals. LUBA remanded the decisions on August 10, 2016. The applicant requested in writing on [REDACTED], 2016 that the County Board proceed with the application on remand pursuant to ORS 215.435. The remand proceeding was limited to the issue remanded by LUBA and a public hearing on remand was held on [REDACTED], 2016. The County Board issued its written decision on remand on [REDACTED], 2016.

C. LUBA Decision and Guidance: The Land Use Board of Appeal's Final Opinion and Order, *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2016-012, denied many of Petitioner Central Oregon LandWatch's issues raised under the two assignments of error presented. However, because LUBA affirmed Petitioner's argument that the County Board erred in approving an exception to Goal 14 Urbanization, LUBA remanded the decision for further review.

LUBA denied all of the arguments presented under Petitioner's first assignment of error, which challenged the County Board's conclusion that the subject property does not constitute "agricultural land" under OAR 660-033-020(1). LUBA Slip Op. p. 18.

LUBA affirmed Petitioner's second assignment of error, concluding that the adopted findings did not supply the reasoning necessary to conclude that all rural use of the property is impracticable and is therefore irrevocably committed to urban uses. LUBA Slip Op. p. 24 and p. 28. Consequently, LUBA remanded the decision.

LUBA's Final Opinion and Order provides the County Board and staff guidance regarding the purpose of the Goal 14 exception and whether a Goal 14 exception is required to authorize rural uses on rural land. The decision states:

"In a similar vein, the challenged decision applies the Rural Industrial Zone to the property. As explained below, the Rural Industrial Zone was adopted to allow rural industrial uses and ensure the uses allowed in the Rural Industrial Zone are rural rather than urban in nature. *To approve a committed exception to Goal 14 to allow urban uses of the property (because all rural uses are impracticable) and then apply*

a zoning district that was adopted to limit industrial uses to rural industrial uses would appear on its face to be inconsistent.

"Whether approving an irrevocably committed exception to Goal 14 to allow urban uses of rural land and then applying a zone that was adopted to limit industrial uses to rural industrial uses is inconsistent or not, if the county wants to approve an irrevocably committed exception to Goal 14, it must supply the reasoning that supports the conclusion that the rural use of the property is impracticable, with the result that it is committed to urban uses." Slip Op. at p. 23-24 (emphasis supplied).

And,

"What is clear is that the county approved an irrevocably committed exception to Goal 14: 'an exception to Goal 14 is required for the proposed plan amendment and zone change.' Record. 49. *The only reason for approving such an exception that we can think of is to authorize urban uses of rural land.*" Slip Op. at p. 27 (emphasis supplied).

- D. Parties' Intentions:** At no point during the prior proceedings did the applicant request that the County approve urban uses on the subject property. The applicant always asserted that he sought to allow rural industrial uses on the property. When informed that the County believed he needed to apply for an exception to Goal 14 because of prior precedent, the applicant asserted he did not believe that an exception was necessary to allow rural uses, but would prepare an exception application to cooperate with the County.

The County Board and county staff did not intend to authorize urban uses on the subject property through the Goal 14 exception approved by Ordinance 2016-001. This is reflected in the RI plan and zone designations imposed on the property as well as the conditions of approval.

- E. Basis for Hearings Officer's Decision:** The Hearings Officer did not intend to authorize urban uses on the subject property. The Hearings Officer's decision expressly states:

"I find that it is appropriate to require an exception to Goal 14 to determine if the proposed "reasons" match the potential uses, and *so that development limitations may be established as part of the goal exception to assure the subject site is not developed with "urban" uses. I note that such a goal exception was required by the Hearings Officer in ZC-14-2.*" Record p. 68 (emphasis supplied).

- F. Deschutes County Land Use Regulations:** The Deschutes County Comprehensive Plan and Title 18 of the Deschutes County Code have been acknowledged by LCDRC as consistent with all of the statewide planning goals.

The Comprehensive Plan states that the Rural Industrial plan designation and zoning applies to specific properties to provide compliance with state rules by adopting zoning to ensure that those properties remain rural and that the uses allowed there are less intensive than those allowed in unincorporated communities as defined in OAR 660-022. Comprehensive Plan, Ch. 3, p. 11.

Specific Comprehensive Plan Policies implement this statement. These include:

Policy 3.4.23 To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor.

Policy 3.4.27 Land use regulations shall ensure that new uses authorized within the Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area.

Policy 3.4.28 New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.

Policy 3.4.31 Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.

Policy 3.4.32 Residential and industrial uses shall be served by on-site wells or public water systems.

Policy 3.4.33 Community sewer systems shall not be allowed in Rural Industrial zones.

The Comprehensive Plan also includes a policy specifically for the Deschutes Junction area intended to ensure rural uses in that rural area.

Policy 3.10.5 Maximize protection of the rural character of neighborhoods in the Deschutes Junction area while recognizing the intended development of properties designated for commercial, industrial and agricultural uses.

The Deschutes County Code Chapter 18.100 RURAL INDUSTRIAL ZONE – R-I, implements the above Comprehensive Plan policies. It limits the types of industrial uses, whether permitted outright or through conditional approval, to inherently rural industrial uses. DCC 18.100.010 and .020. The DCC further restricts those industrial uses through use limitations, dimensional standards, off-street parking and loading standards, site design, additional requirements, solar setbacks, and restrictions through the Limited Use Combining Zone – Deschutes Junction. DCC 18.100.030 through .090.

- G. Issue on Remand:** The issue on remand is whether the rural industrial uses the applicant has requested approval to allow on the subject property (the uses allowed by the R-I zoning code) require an exception to Goal 14 or whether the application for a change in the plan and zone designation for the property to Rural Industrial can be approved without a Goal 14 exception.

II. CONCLUSIONS OF LAW:

For the reasons provided below and based upon the evidence in the record and the findings provided above, the Board of County Commissioners of Deschutes County concludes that the subject property does not qualify as "agricultural land" under OAR 660-033-020(1) for Goal 3 purposes, that an exception to Goal 14 Urbanization is not required for the County to approve the rural industrial comprehensive plan designation or zoning on the subject property and hereby approves the application to change the plan designation for the property from Agriculture to Rural Industrial and the zoning for the property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial (R-I).

LUBA's remand denied all of the Petitioner's challenges to our conclusion that the subject property does not qualify as "agricultural land" under OAR 660-033-020(1) and affirmed that portion of our previous decisions. The consequence of that determination is that non-resource (i.e, other than EFU) rural uses may be permitted on the subject property consistent with the rural plan designation and zoning of the property. That issue has been resolved and is not subject to challenge in this remand proceeding. The County Board reaffirms that portion of our decision without further discussion or analysis.

Given the above findings that the applicant did not intend to request and the County Board did not intend to authorize urban uses on the subject property, LUBA's remand requires us to examine why an exception to Goal 14 was filed in this proceeding at all.

It is plainly evident from the evidence in the record and the above findings that staff's request that the applicant submit an application requesting an exception to Goal 14, the Hearings Officer's consideration and approval of that exception, and the County Board's consideration of the exception application flowed directly from the precedent set by the Hearings Official's decision in ZC-14-2. The County had concluded that the decision is binding precedent and has consistently applied the approach used in that decision to assign R-I zoning to a property to subsequent applications. That decision, as interpreted and applied by the County, concluded that an exception to Goal 14 Urbanization was required whenever a property owner sought rural industrial zoning on rural property, and that the Goal 14 exception process was to ensure that the subject site was not developed with "urban" uses. The Hearings Officer's decision in ZC-14-2 was not appealed and, therefore, its reasoning was never reviewed by LUBA.

As the excerpts from LUBA's opinion in this matter quoted above make clear, the Hearings Officer's analysis and conclusions regarding the use of the Goal 14 exceptions process to limit Rural Industrial uses to those that are not "urban" is both rationally inconsistent and legally incorrect. As LUBA's decision plainly explains, the purpose of a Goal 14 exception is to allow urban uses on rural land. The decision also explains that to get a committed exception to Goal 14, one must demonstrate that it is impossible to locate any rural use on the subject property. It is thus illogical to approve a Goal 14 exception only to then limit it to Rural Industrial uses, which are "rural" by definition and acknowledgment. To do so is also inconsistent with the state's land use legal framework.

The County Board hereby concludes that the County should no longer follow the precedent set forth in ZC-14-2, which requires approving an exception to Goal 14 before approving the change in plan designation and zoning of a rural property to the Rural Industrial plan designation and R-I zoning. As LUBA explained in its decision, the requirement for an applicant to apply for an exception to Goal 14 is to be limited to proposals that request urban uses on rural land, or as otherwise required by the DCC, state statute or state land use regulations.

Based upon the above conclusion, because the applicant did not request urban uses to be allowed on the subject property and because the County Board did not intend to allow urban uses on rural land, the County Board concludes that the applicant should not have been required to submit an application for an exception to Goal 14 for the purposes set forth by the decision in ZC-14-2 as followed by the Hearings Official in this proceeding.

One issue remains from the LUBA decision. LUBA seemed to think that the Hearings Officer believed that the application for R-I zoning would allow urban uses on rural land, and referenced page 49 of the record twice in its decision. The relevant passage from that page is:

"I find that the subject property is 'nonresource land' based on the fact that it is not Agricultural Land subject to Goal 3, but the proposed plan amendment is subject to Goal 14. This is because it could result in the 'urbanization' of the subject site by allowing development with RI Zone uses that are more 'urban' in nature including both retail and service uses. For this reason, an exception to Goal 14 is required for the proposed plan amendment and zone change." Record p, 49.

For the following reasons, the County Board rejects the Hearings Official's analysis provided above and similar comments contained elsewhere in the Hearings Officer's decision.

First, uses allowed in the rural industrial zone are not more, or less, "urban" than other rural uses. Uses are either urban or they are rural. Rural industrial uses are no more urban or rural than rural residential uses, EFU uses or rural commercial uses. While R-I uses may be more or

less intensive than rural residential uses or rural commercial uses, they remain "rural uses," particularly when developed consistent with the development standards for uses authorized within the county's RI zoning code. In fact, LUBA and the courts have noted that farm practices permitted in the EFU zone often resemble industrial uses. The Hearings Officer erred when she concluded or otherwise suggested that the proposal for R-I zoning could lead to the urbanization of the subject site.

Second, the County's Rural Industrial plan designation and the R-I zone provisions have been acknowledged by LCDC as rural uses. As LUBA recognized, acknowledged rural industrial uses are not urban uses, they are rural uses. Given the development limitations set forth under DCC 18.100.030 to .090, the authorized rural industrial uses on the subject property, if the application is approved, will be less intensive than those allowed in unincorporated communities. The Hearings Officer erred when she concluded or suggested that Rural Industrial development of the property would constitute an urban use of rural land.

Third, there is nothing about the application or the subject property that suggests rural industrial uses within the range of uses permitted in the R-I zone would be "urban." The proposal simply seeks a rural industrial plan designation and zoning. All development proposals will be reviewed for consistency within the limitations established by the DCC, which will ensure that the approved uses are rural uses. With respect to the site, all industrial uses will be served by a DEQ approved on-site sewage disposal system consistent with Comprehensive Plan Policy 3.4.31. The property is not served by, nor can be approved for service by a community sewer system, which is consistent with Policy 3.4.33. Furthermore, the subject property is served by a public water system, which is consistent with Policy 3.4.32 and the Comprehensive Plan's limitations on property to ensure that rural industrial uses are in-fact rural. Any analysis, conclusions or suggestions contained in the Hearings Official's decision that suggests any of the above site factors may lead to urban uses on rural land are in error.

Based upon the above analysis, the County Board concludes that there is nothing about the applicant's request for a Rural Industrial plan designation and Rural Industrial (R-I) zoning that would allow urban uses on rural land or that would in any way require the applicant to obtain an exception to Goal 14 Urbanization.

The County Board hereby incorporates those portions of the Hearings Official's findings and conclusions that are consistent with these findings and conclusions.

The County Board hereby expressly rejects the Hearings Official's Goal 14 finding at page 32 of the Hearings Official's decision and finds instead: **Goal 14, Urbanization.** Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use." We find that the subject property is "nonresource land" based on the fact that it is not Agricultural land subject to Goal 3. Because our analysis leads us to conclude that the proposal does not represent an "urban" use of land, and the proposal seeks to apply rural industrial plan and zone designations to the property and the uses permitted under R-I zoning, as restricted by the development standards provided in the Deschutes County Code, constitute rural uses on rural land, the proposal is consistent with Goal 14.

The County Board Ultimately Concludes:

- To reaffirm our previous decision that the subject property is "nonresource land" because the property is not "agricultural land" under OAR 660-033-020(1) and is therefore not subject to Goal 3.
- To repeal those portions of Ordinance 2016-001 and the related findings that approved an exception to Goal 14, on the basis that a Goal 14 exception is not necessary to approve the requested plan designation and zone change, or to allow rural industrial uses on the subject property.

- To approve the Comprehensive Plan Amendment to re-designate the subject property from Agriculture to Rural Industrial and the corresponding Zone Map Amendment (Zone Change) to reassign the zoning from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (R-I).

III. DECISION:

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board of County Commissioners hereby **APPROVES** the Applicant's applications for a Comprehensive Plan Map amendment to re-designate the subject property from Agriculture to Rural Industrial and a corresponding Zone Map Amendment (Zone Change) to reassign the zoning from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (R-I) subject to the following conditions of approval:

1. This approval is based on the applicant's burdens of proof, supplemental materials, and written and oral testimony. Any substantial change to the approved plan amendment or zone change will require new land use application(s) and approval(s).
2. This approval allows on the subject property all uses allowed outright and conditionally in the Rural Industrial zone, except that any pulp and paper manufacturing use shall not be allowed within the subject property.
3. The Deschutes County Year 2011 Comprehensive Plan shall be amended to include an updated description of the Deschutes Junction rural industrial site in Chapter 3.4, as follows:

The Deschutes Junction site consists of the following tax lots: 161226C000107 (9.05 acres), 16126C000106 (4.33 acres), 161226C000102 (1.41 acres), 161226C000114 (2.50 acres), portions 161226C000300 (12.9 acres), 161226C000301 (8.93 acres), 161226A000203 (1.5 acres), those portions of 161226C000111 located west of the Burlington Northern-Santa Fe railroad tracks (16.45 acres), 161226C000201 (20.27 acres) and 161227D0000104 (1.32 acres). Generally, the Deschutes Junction site extends to property to the west of Highway 97, bordered by Tumalo Road and Tumalo Place and is bordered on the east by the Burlington Northern Railroad, on the north by Tumalo Place (except for a portion of 1612226A000111), and on the south by EFU-zoned property owned by the City of Bend.

4. Prior to any development of the property, the developer shall work with Swalley Irrigation District to transfer some or all of the existing 16 acres of irrigation water rights associated with the subject property to ensure that there will not be any development on top of irrigated land; only those irrigation water rights that can be dedicated to beneficial uses, such as irrigated landscaping, may be retained.
5. As part of any development of the property, the developer shall
 - a. Create a system of access easements that connect the three driveways with any lots created by partitioning or subdividing of the land.
 - b. Work with Commute Options to assist in preparing a two year start-up Transportation Demand Management program (TDM). The program will include:
 - 1) Conducting workshops and training on TDM alternatives;
 - 2) Provide posters and brochures promoting smart commuting choices;
 - 3) A plan to have employees from on-site businesses have staggered start and end work hours.
 - c. Prepare an internal Traffic Control Plan (in accordance with the MUTCD), that includes:
 - 1) Directional signing to Redmond, Bend, Tumalo at each intersection;
 - 2) Time-restrictive (4 PM – 6 PM) "NO LEFT TURN" sign at the driveway onto Tumalo Place;
 - 3) Bridge undercrossing shall be signed "ONE LANE ROAD";

- 4) Prepare a site map, with the aid of DCPWD, showing the location of traffic control devices.
- d. Have the Deschutes County Transportation Planner approve the Traffic Management Plan.

Dated this ____ day of _____, 2016

Mailed this ____ day of _____, 2016