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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

ANTHONY J. ACETI,
Intervenor-Respondent.

LUBA No. 2021-028

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

No appearance by Deschutes County.

Bill Kloos filed the response brief and argued on behalf of intervenor-respondent.

ZAMUDIO, Board Member; RUDD, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED 06/18/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a decision of the board of county commissioners approving a post-acknowledge plan amendment to change the subject property's comprehensive plan designation from agricultural to rural industrial (RI) and to change its zoning from exclusive farm use to RI.

MOTION TO TAKE OFFICIAL NOTICE

In the statement of facts in the petition for review, petitioner states that the subject property is 2.32 miles from the city of Bend urban growth boundary (UGB), citing and appending Record 804, which is a screenshot of a map and measuring tool depicting a measurement between the Bend UGB and the subject property. Petition for Review 5. In the reply brief, petitioner requests that LUBA take official notice of the location of the subject property relative to the Bend UGB based on Record 804.

The challenged decision finds that "[t]he property is located about 3.25 miles north of Bend and 6.5 miles south of Redmond via US 97." Record 47, 83. Petitioner did not assign error to that finding or to the county's failure to make a more specific finding identifying the location of the subject property relative to the Bend UGB, as opposed to Bend city limits.

Intervenor-respondent (intervenor) opposes the motion to take official notice and moves to strike the portions of the petition for review and reply brief

that rely on the statement that the subject property is 2.32 miles from the Bend UGB.

The location of the subject property relative to the Bend UGB is an adjudicative fact. LUBA does not take notice of adjudicative facts. Petitioner's motion to take official notice is denied. *Citizens for Renewables v. Coos County*, ___ Or LUBA ___, ___ (LUBA No 2020-003, Feb 11, 2021) (slip op at 52). We will disregard the statement that the subject property is 2.32 miles from the Bend UGB and disregard any argument that relies on that factual statement.[1]

BACKGROUND

A. Subject Property Description

The subject property is comprised of 21.54 acres and is located at the intersection of Highway 97 and Tumalo Road. The subject property is generally level, and it is developed with a large warehouse building with parking areas on three sides of the building. That building is used to store hay, seed, and farm machinery. The subject property is also developed with an above-grade approach ramp to the Deschutes Junction Overpass over Highway 97. The remainder of the property is vacant and sometimes used by others for the temporary storage of

---

[1] That argument relies on ORS 197.713, which we address below. Our resolution and rejection of that argument does not depend on a determination that the subject property is more than three miles outside the Bend UGB.

vehicles and equipment.[2] The northwestern corner of the subject property is adjacent to a rural residential subdivision with lot sizes varying from one acre to three and one-half acres. That subdivision predates state and county comprehensive land use planning.

The subject property is near an area generally referred to as Deschutes Junction that was developed with rural industrial and rural commercial uses prior to the adoption of the Deschutes County Comprehensive Plan (DCCP) in 1979 and its acknowledgement by the Land Conservation and Development Commission (LCDC) in 1981. In adopting the plan designation and zoning for Deschutes Junction, the county took a physically developed exception to Statewide Planning Goal 3 (Agricultural Lands).[3] The subject property is near, but not within, the Deschutes Junction exception area.

B. Prior LUBA Appeals and Decisions

This is the fourth time that the plan designation and zoning of the subject property have been disputed before LUBA. *See Central Oregon Landwatch v.*

---

[2] In a separate code enforcement case, the county determined businesses are operating on the property in violation of the current zoning. Record 39.

[3] As discussed at length below, this appeal concerns Statewide Planning Goal 14 (Urbanization). We note that, in 1979 and 1981, exceptions to Goal 14 were not required for rural commercial and industrial uses. *See 1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) (*Curry County*) (holding that Goal 14 prohibits urban use of rural land and observing that exceptions to Goal 14 were neither explicitly permitted nor required until LCDC promulgated OAR chapter 660, division 14, in 1983).

Deschutes County, 74 Or LUBA 156 (2016) (*Aceti I*); *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 441 (*Aceti II*), *aff'd*, 288 Or App 378, 405 P3d 197 (2017); *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (*Aceti III*), *aff'd*, 298 Or App 375, 449 P3d 534 (2019). Those prior appeals provide context for the issues presented in this appeal. We summarize them here and discuss them in more detail in the analysis below.

In 2016, the county approved a plan designation and zone change to RI. That approval included an exception to Statewide Planning Goal 14 (Urbanization). In *Aceti I*, we affirmed the county's conclusion that the subject property is not agricultural land. 74 Or LUBA at 159-68. However, while the subject property is not protected as agricultural land, it is rural land, which may not be used for urban uses without an exception to Goal 14. We remanded for inadequate findings related to that exception. *Id.* at 168-74. We noted that the RI zone does not necessarily authorize urban uses of rural land and suggested that an exception to Goal 14 was not required.

On remand, intervenor did not seek a Goal 14 exception. The county again approved the plan designation and zone change, which petitioner challenged in *Aceti II*. We reversed because DCCP 3.4 (2011) in effect at that time limited the RI plan designation to three specific geographic exception areas. We rejected petitioner's categorical argument that all industrial development is urban and requires a Goal 14 exception in order to be sited on rural land. *Aceti II*, 75 Or LUBA at 449. We observed that DCCP 3.4 (2011) provided that the RI plan

designation and zoning bring the exception areas into compliance with state law by ensuring that they remain rural because the uses allowed in the RI zone are less intensive than those allowed in unincorporated communities. *Id.* at 445. In *Aceti II*, we did not reach the parties' dispute about whether the RI zone regulations in Deschutes County Code (DCC) 18.100.010 to 18.100.090 so limit the industrial uses allowed in the RI zone that they will not constitute urban uses. *Id.* at 445 n 4 ("A significant area of disagreement between petitioner and the county is whether the RI zone actually limits the industrial uses allowed in the RI zone so that they are less intensive than the uses allowed in unincorporated communities under OAR chapter 660, division 22 and will not constitute 'urban uses' that are generally prohibited on rural land by Goal 14. We need not and do not attempt to resolve that disagreement in this opinion.").

In 2018, the county amended the DCCP to allow RI designation and zoning of land outside the three existing exception areas. Petitioner appealed those amendments in *Aceti III*, arguing, among other things, that the county's decision failed to comply with Goal 14 because the amendments would allow urban uses of rural land. Petitioner further argued that the DCC RI zone regulations—which were not amended concurrently in 2018 with the DCCP amendments—allow urban uses of rural land. We rejected those arguments, concluding that the 2018 DCCP amendments are consistent with Goal 14 because (1) any future application for the RI plan designation would have to demonstrate that it is consistent with Goal 14 and (2) petitioner's argument that the RI zone regulations

allow urban uses was an impermissible collateral attack on acknowledged land use regulations. *Aceti III*, 79 Or LUBA at 260-61.

Intervenor subsequently applied to the county to change the plan designation and zoning of the subject property to RI. The application does not seek approval of any specific industrial use. The county approved the changes, finding, among other things, that the changes are consistent with Statewide Planning Goals 6 (Air, Water and Land Resources Quality), 11 (Public Facilities and Services), and 14. This appeal followed.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the DCCP limits the RI plan designation to areas of existing rural industrial development and cannot be applied to the subject property. DCCP 3.4 provides, in part:

> "The county may apply the [RI] plan designation to specific property within existing Rural Industrial exception areas, *or to any other specific property* that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, [the DCCP] and the [DCC], and that is located outside unincorporated communities and [UGBs]." (Emphasis added.)

Petitioner argues that the decision violates DCCP 3.4 and that the subject property cannot satisfy the requirements for a comprehensive plan designation change because it is not in an area of existing industrial development. Petitioner relies on DCCP Table 1.3.3, which lists the RI plan designation and RI zoning as "area specific designations."

It may be that the county mistakenly overlooked amending DCCP Table 1.3.3 in conjunction with the 2018 DCCP amendments extending the RI plan designation. Nevertheless, as intervenor emphasizes, nothing in the DCCP or DCC limits the RI plan designation to areas of existing industrial development. DCCP 3.4 expressly allows application of the RI plan designation to any specific properties that can satisfy the requirements for such designation. Petitioner does not acknowledge the 2018 DCCP amendments, which petitioner challenged in *Aceti III* and which LUBA and the Court of Appeals affirmed. Instead, petitioner proceeds as though those amendments do not exist or are ineffective. Petitioner's argument that the county's decision is not in compliance with the DCCP is incorrect and provides no basis for remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county erred by concluding that the challenged decision complies with Goals 6 and 11. Petitioner argues that the challenged decision cannot be approved without exceptions to Goals 6 and 11. Petitioner's Goal 6 and Goal 11 arguments are intertwined, and we address them together.

Goal 6 is "[t]o maintain and improve the quality of the air, water and land resource of the state." Goal 6 further provides, in part:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to

> the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources.
>
> "***Waste and Process Discharges*** -- refers to solid waste, thermal, noise, atmospheric or water pollutants, contaminants, or products therefrom." (Boldface and italics in original.)

As we explained in *Friends of the Applegate v. Josephine County*,

> "[t]he function served by Goal 6 is not to anticipate and precisely duplicate state and federal environmental permitting requirements. The function of Goal 6 is much more modest. Goal 6 requires that the local government establish that there is a *reasonable expectation* that the use that is seeking land use approval will also be able to comply with the state and federal environmental quality standards that it must satisfy to be built." 44 Or LUBA 786, 802 (2003) (emphasis in original).

The county found that the changes comply with Goal 6 because any use of the subject property under RI zoning must comply with DCC 18.100.030(J), which prohibits county approval of any use of property that requires contaminant discharge permits prior to a review of the proposed use by the state or federal permitting authority.[4] Thus, the county found that

---

[4] DCC 18.100.030(J) provides:

> "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

> "any impact to air, water and land resources from a specific proposed use is not allowed under the [DCC], and may not legally be approved by the County, until state and/or federal agencies review the details of any such proposal and issue permits (typically including conditions) restricting and regulating air emissions, discharges to waterways and ground water and other potential environmental impacts of the use." Record 104.

In so finding, the county rejected petitioner's argument that approval of the application would impermissibly defer a finding of Goal 6 compliance. *Id.*

Petitioner argues that, because the challenged decision does not approve any specific industrial use or uses, the county could not determine whether industrial uses allowed on the subject property pursuant to the RI zoning comply with Goal 6. Petitioner observes that the RI zone allows lumber manufacturing, wood processing, wood pulp and paper manufacturing, and glass and plastic manufacturing, all uses that could result in "waste and process discharges." Petitioner argues that, without specifying which industrial uses may be developed on the property, the county could not find compliance with Goal 6.

The county found that DCC 18.100.030(J) prohibits the county from approving any use in the RI zone that would "threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards" because review of the use for compliance with applicable state or federal environmental quality statutes, rules, and standards must precede county approval. We agree with intervenor that DCC 18.100.030(J) supports a

---

> uses be permitted adjacent to or across a street from a residential use or lot."

reasonable expectation that uses allowed on the subject property under RI zoning will either comply with state and federal environmental quality standards or be denied county approval. Such a determination does not require a specific development proposal. We conclude that the challenged decision does not impermissibly defer a finding of Goal 6 compliance.

Goal 11 is "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." Goal 11 prohibits extension of urban services such as sewer and water to rural lands outside UGBs. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016); *Gisler v. Deschutes County*, 149 Or App 528, 535, 945 P2d 1051 (1997).

The county found that the change to RI will not result in the extension of urban services to the subject property. Record 105, 83. The findings address sewer/septic, water, fire, police, power, telephone, and transportation facilities and services. Record 83-84. Petitioner takes issue with water and wastewater facilities.

With respect to water, petitioner argues that the county erred in not addressing groundwater supply and water rights for the subject property and alleges that industrial use of the subject property will threaten groundwater supplies in the area. Petition for Review 33. Petitioner argues that the challenged decision cannot comply with Goals 6 and 11 because there is no water service to the subject property. Petition for Review 41-43.

Intervenor responds that the county found that the subject property has access to water service and that that finding is supported by substantial evidence in the record. Namely, intervenor explains, a water line currently serves two fire hydrants on the subject property and is connected to an Avion Water Company domestic water pipe at the north property line along the county's right-of-way. Record 84. The county observed that the record includes a will-serve letter from Avion. Record 84, 1041.[5] Petitioner does not acknowledge, let alone challenge, those findings. Accordingly, petitioner's argument regarding water service with respect to Goals 6 and 11 provides no basis for remand.

Petitioner argues that any industrial use of the subject property will require public wastewater treatment and that, without such treatment, "waste and process discharges from RI Zone uses on the subject property will be discharged directly into the environment, where such discharges threaten to violate applicable state or federal environmental quality statutes, rules and standards," in violation of Goal 6. Petition for Review 43. Accordingly, petitioner argues that the county erred in finding that "public facilities and services necessary for development of the subject property in accordance with the RI Zone are available and will be adequate." Record 105.

---

[5] The county found that Avion water is "public water" available to the property. Record 36. Petitioner does not contend that Avion water service to the subject property violates Goal 11.

Intervenor responds, and we agree, that petitioner's argument is based on an unsubstantiated premise that contaminated industrial waste may only be processed in a public wastewater facility. Petitioner does not cite anything in the record or applicable law that compels a conclusion that potential industrial wastewater discharges may only be treated in a public wastewater facility. Accordingly, petitioner's argument regarding wastewater provides no basis for reversal or remand.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the county erred in concluding that the approved changes allow only rural and not urban use of the subject property and, thus, no Goal 14 exception is required.

A. Goal 14, *Curry County*, and the Unincorporated Communities Rule

It is necessary to understand the legal and factual history of the county's RI plan designation and zone in order to resolve the first assignment of error. We take official notice of county ordinances and Department of Land Conservation and Development (DLCD) administrative orders, as described below. ORS 40.090(2) (Oregon Evidence Code 202) (providing that official acts of executive departments of the state are subject to judicial notice); ORS 40.090(7) (providing that county ordinances and enactments are subject to judicial notice).

Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside [UGBs], to ensure efficient use of land, and to provide for livable communities." Goal 14 requires cities and counties to cooperatively establish as part of their comprehensive plans UGBs "to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land." Goal 14 generally prohibits urban uses of rural land. Neither Goal 14 nor any other rule or guideline promulgated by LCDC defines "urban use."[6]

---

[6] LCDC has adopted general definitions that apply to the Statewide Planning Goals, including the following:

> "RURAL LAND. Land outside [UGBs] that is:
>
> "(a) Non-urban agricultural, forest or open space,
>
> "(b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or
>
> "(c) In an unincorporated community.
>
> "* * * * *
>
> "URBAN LAND. Land inside an urban growth boundary.
>
> "URBANIZABLE LAND. Urban land that, due to the present unavailability of urban facilities and services, or for other reasons, either:
>
> "(a) Retains the zone designations assigned prior to inclusion in the boundary, or

The Supreme Court recognized that definitional gap 35 years ago in *1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) (*Curry County*), in which the court held that urban uses are not permitted outside of UGBs unless an exception to Goal 14 is taken. The court explained that, if a decision affecting rural land outside an UGB is challenged as allowing an urban use in violation of Goal 14, a local government may do one of three things. The local government may (1) establish that the decision does not offend Goal 14 by demonstrating that the proposed use is rural and not urban. Differently, if the local government determines that a proposed use is an urban use, then the local government may either (2) comply with the Goal 14 by including the subject site within an UGB or (3) adopt an exception to Goal 14. *Curry County*, 301 Or at 477; *see also Shaffer v. Jackson County*, 16 Or LUBA 871, 872-75 (1988).

In 1994, in response to the *Curry County* decision, LCDC adopted the Unincorporated Communities Rule at OAR chapter 660, division 22, which interprets Goals 11 and 14 concerning urban and rural development outside UGBs. As the court explained in *Gisler*, Goals 11 and 14 work together

> "to regulate development as well as services and facilities, to coordinate development levels with service and facility levels[,] and * * * to channel intensive uses and development to existing urban

---

> "(b) Is subject to interim zone designations intended to maintain the land's potential for planned urban development until appropriate public facilities and services are available or planned." (Boldface omitted.)

> and urbanizable land first before allowing the conversion of or intense non-resource uses on the rural land that comprises the areas outside UGBs." 149 Or App at 535 (citing *Curry County*).

The purpose of the Unincorporated Communities Rule is to establish a statewide policy for the planning and zoning of unincorporated communities and to expedite the planning process for counties by reducing the need to take exceptions to statewide planning goals when planning and zoning unincorporated communities. OAR 660-022-0000(1). The Unincorporated Communities Rule requires counties to identify and plan for development in unincorporated communities.

In 1994, as part of periodic review, DLCD tasked the county with inventorying its rural unincorporated communities.[7] In 1995, based on that inventory, DLCD imposed Work Task 14, which required the county to comply with the Unincorporated Communities Rule, Goal 14, and *Curry County* for all areas zoned rural commercial (RC) and RI. Pursuant to the Unincorporated Communities Rule, the county was required to do one of the following: (1) plan those areas zoned RC and RI as unincorporated communities in compliance with the Unincorporated Communities Rule; (2) demonstrate that all uses authorized by the DCCP and DCC for the RC and RI zones are rural, in compliance with

---

[7] Periodic review involves the development of a work program, DLCD approval of the work program, local government completion of work tasks outlined in the work program, and DLCD review of completed work tasks for compliance with the statewide planning goals. OAR 660-025-0040(1); ORS 197.628 to 197.650 (statutory provisions that govern periodic review).

Goals 11 and 14; (3) amend the DCCP and DCC to limit uses authorized by the RC and RI zones to those which are rural, in compliance with Goals 11 and 14; or (4) adopt exceptions to Goal 14, and Goal 11 if necessary, to allow urban uses of rural land. OAR 660-022-0070.

Work Task 14 was extended and modified multiple times between 1995 and 2002. In 2002, the board of county commissioners adopted Ordinances 2002-018 and 2002-019, which amended the DCCP and DCC provisions regarding areas zoned RC, including a portion of Deschutes Junction. On September 11, 2002, DLCD issued Order No. 001429, approving those ordinances. DLCD observed that, in 1998, the county had taken an exception to Goals 3 and 14 for a portion of one property at Deschutes Junction. However, that Goal 14 exception did not include the Deschutes Junction RI-zoned area or other areas in the county zoned RI. DLCD postponed its review of Work Task 14 for areas zoned RI to permit the county additional time to address Goal 14.

To bring RI zoning into compliance with Goals 11 and 14, instead of taking exceptions to those goals, the county elected to amend the DCCP and DCC to limit the uses authorized in the RI zone to rural uses. On December 11, 2002, the board of county commissioners adopted Ordinances 2002-126 and 2002-127 (the 2002 Ordinances) and adopted a staff report as findings in support of those ordinances. That staff report explains that the original RI zoning did not ensure that the areas remain rural; rather, it encouraged continued development of the RI sites toward urban levels of development. To comply with Work Task 14 and

Goal 14, the county amended the DCCP and DCC to restrict the types and intensity of uses permitted in the RI zone.

The county relied on the building size limitation in the Unincorporated Communities Rule as the primary means of ensuring that industrial uses in the RI zone would remain rural, consistent with Goal 14. "Small-scale, low impact industrial uses," defined as industrial uses "which take[] place in an urban unincorporated community in a building or buildings not exceeding 60,000 square feet of floor space, or in any other type of unincorporated community in a building or buildings not exceeding 40,000 square feet of floor space," are allowed in unincorporated communities. OAR 660-022-0030(11). The 2002 Ordinances restrict new rural industrial uses, except primary processing of raw materials produced in rural areas, to a maximum of 7,500 square feet of floor space within a building. That floor area limitation is codified in DCC 18.100.040(H)(1).[8]

Ordinance 2002-126 adopted what is now DCCP Policy 3.4.23, which applies to lands designated and zoned RI and provides: "To assure that urban uses

---

[8] DCC 18.100.040(H)(1) provides, in part:

> "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."

are not permitted on rural industrial lands, land use regulations in the [RI] zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor." Ordinance 2002-127 amended DCC chapter 18.100, the RI zone regulations. On January 23, 2003, DLCD issued Order No. 001456, acknowledging the 2002 Ordinances as consistent with Goal 14.

B. Industrial development is not a *per se* urban use.

In the first assignment of error, third subassignment, petitioner argues that Goal 14 itself indicates that all industrial uses are urban uses, citing the following passage from Goal 14 concerning rural industrial development:

> "Notwithstanding other provisions of this goal restricting urban uses on rural land, a county may authorize industrial development, and accessory uses subordinate to the industrial development, in buildings of any size and type, on certain lands outside [UGBs] specified in ORS 197.713 and 197.714, consistent with the requirements of those statutes and any applicable administrative rules adopted by [LCDC]."

Petitioner contends that the term "notwithstanding" "conveys an equivalence" between urban uses on rural land and industrial development on land outside UGBs. Petition for Review 21. Petitioner argues that all industrial uses are urban uses and that, without an exception to Goal 14, all new industrial development is limited to (1) land within UGBs, (2) unincorporated communities, and (3) the circumstances set out in ORS 197.713, ORS 197.714, and those statutes' implementing rule at OAR 660-014-0040(4), for lands that were planned and

zoned for industrial use on January 1, 2004. The county rejected petitioner's argument. Record 76.

Intervenor responds, and we agree, that we have previously rejected petitioner's argument that all industrial uses are *per se* urban uses in *Aceti II* and *Shaffer*, 17 Or LUBA 922, 931 (1989) (*Shaffer*). Petitioner does not acknowledge, let alone attempt to explain why our conclusions in those cases are wrong or otherwise not controlling in this case.

We agree with intervenor that the above-quoted language in Goal 14, ORS 197.713, ORS 197.714, and OAR 660-014-0040(4) limit the establishment of new *urban* industrial use of rural land, not new *rural* industrial use of rural land. Goal 14 provides that a county may authorize industrial development "in buildings of any size and type, on certain lands outside [UGBs] specified in ORS 197.713 and 197.714." In turn, ORS 197.713 provides that, notwithstanding Goals 14 and 11, a county may authorize industrial development "in buildings of any size and type," in areas that were planned and zoned for industrial use on January 1, 2004, subject to permit requirements, building codes, territorial limits. We understand that reference to "buildings of any size and type" to distinguish industrial uses allowed under those provisions from industrial uses in unincorporated communities, which are limited by floor area. OAR 660-022-0030(11). If a county had planned and zoned rural land for industrial use prior to January 1, 2004, industrial development on that land is not subject to the floor area limitation. Differently, industrial development that occurs outside a UGB in

buildings with a floor area smaller than that allowed in unincorporated communities may be presumed to be rural industrial use, subject to case-by-case review of other indicia that the industrial use is urban. Similarly, ORS 197.714 requires a county to provide notice to and cooperate with cities when it considers approving industrial development of land within 10 miles of the city UGB. Those requirements indicate that the legislature was concerned with urban industrial development outside UGBs.

OAR 660-014-0040(4) provides:

> "Counties are not required to justify an exception to Goal 14 in order to authorize industrial development, and accessory uses subordinate to the industrial development, in buildings of any size and type, in exception areas that were planned and zoned for industrial use on January 1, 2004, subject to the territorial limits and other requirements of ORS 197.713 and 197.714."

As explained above, a Goal 14 exception is required for urban use of rural land. Because only *urban* industrial uses require a Goal 14 exception, OAR 660-014-0040(4) applies only to *urban* industrial development and implicitly provides that *urban* industrial development that complies with ORS 197.713 and 197.714 does not require a Goal 14 exception.

We do not read Goal 14, ORS 197.713, ORS 197.714, or OAR 660-014-0040(4) as prohibiting or limiting *rural* industrial use of rural land. Those statutes and rules do not limit rural industrial use of rural land or provide any analytical assistance in distinguishing between urban and rural industrial uses.

The first assignment of error, third subassignment, is denied.

C. The county's decision does not misconstrue *Curry County*.

In the first assignment of error, second subassignment, petitioner argues that the county misconstrued Goal 14 as interpreted by the Supreme Court in *Curry County*. As set out above, in *Curry County*, the court explained that, if a decision affecting rural land outside an UGB is challenged as allowing an urban use in violation of Goal 14, a local government may do one of three things. The local government may (1) establish that the decision does not offend Goal 14 by demonstrating that the proposed use is rural and not urban. Differently, if the local government determines that a proposed use is an urban use, then the local government may either (2) comply with the Goal 14 by including the subject site within an UGB or (3) adopt an exception to Goal 14. *Curry County*, 301 Or at 477.

The county proceeded under *Curry County* option 1 in this case and determined that the decision does not approve any urban use of rural land. Petitioner argues that, because LCDC has not defined "urban use" or promulgated rules for determining whether an industrial use is "urban," there are no legal standards to apply under option 1 and, thus, that option was unavailable to the county.

We agree with petitioner that LCDC is responsible for developing consistent policies for evaluating whether a particular industrial use is an urban use. However, petitioner's argument ignores cases in which we determined

whether a proposed use is urban on a case-by-case basis. We have previously explained that

> "[t]he larger question of what the general concept of urban uses encompasses generally is one that the Supreme Court has left to LCDC because it necessarily involves the exercise of significant discretion and policy choice. Thus, while there are some uses generally agreed to be urban (e.g., residential subdivisions with half-acre lots and community water and sewer) and some uses generally agreed to be rural (e.g., residential development on ten acre parcels), there remain a significant number of uses that will require a case-by-case analysis." *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 80, *aff'd*, 89 Or App 40, 747 P2d 373 (1987) (citing *Curry County*, 301 Or at 521, 505-11).

We also explained that,

> "[u]nder [*Curry County*], it may well be there is nothing inherently rural or urban about residential, commercial or even industrial uses. Rather, under current LCDC interpretive rules there are merely a number of relevant factors such as parcel size, intensity, necessity for urban facilities and proximity to the UGB." *Id.* at 81 n 6 (citing *Curry County*, 301 Or at 507).

See also Shaffer, 17 Or LUBA at 930-31; *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171, 211, *aff'd*, 267 Or App 637, 342 P3d 181 (2014). Petitioner does not argue that those cases were wrongly decided. We reject petitioner's argument that the county erred as a matter of law by proceeding under *Curry County* option 1 and determining that the decision does not convert rural land to urban uses.

The first assignment of error, second subassignment, is denied.

D. The county did not defer its determination of Goal 14 compliance.

In the first assignment of error, first subassignment, petitioner argues that the county erred by adopting a decision that allows unspecified industrial uses on rural land. Petitioner argues that the county impermissibly deferred its determination of Goal 14 compliance until a future application for specific industrial use of the subject property. Petitioner correctly asserts that the county must assess compliance with Goal 14 at the time of the plan amendment. *Columbia Riverkeeper*, 70 Or LUBA at 205 (identifying the general principle that Goal 14 compliance issues raised by a post-acknowledgment plan amendment must be addressed and resolved at the time the plan amendment is adopted (citing *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160, 169 (2004))).

Intervenor responds, and we agree, that the county did not defer its determination that the plan designation and zone change complies with Goal 14. Instead, the county determined that even the most intensive industrial use that could be approved on the subject property under the RI regulations and use limitations would not constitute an urban use. Record 76-78. The county found that the DCCP RI policies and implementing RI zone regulations in DCC 18.100.010 to 18.100.090 limit the scope and intensity of industrial development in the RI zone so that no urban industrial use can be allowed on the subject property. Record 77-78. For example, as explained above, new industrial uses are limited to a maximum floor areas of 7,500 square feet within a building and

industrial uses must be served by on-site sewage disposal. DCCP Policy 3.4.28; DCCP Policy 3.4.31; DCC 18.100.040(H)(1); DCC 18.100.030(K).

Petitioner is incorrect that the challenged decision defers determination of Goal 14 compliance to a future application for specific industrial use of the subject property. Accordingly, petitioner's argument provides no basis for remand.

E. The county is not prohibited as a matter of law from analyzing Goal 14 compliance in the context of the RI zone regulations rather than specific proposed industrial uses.

Petitioner also argues that, in the absence of an application for approval of a specific industrial use of the subject property, the county erred in analyzing whether the change in plan designation and zoning could result in urban industrial use of the subject property.

Petitioner argues that, if the RI zone does not permit any urban uses, then the county should adopt a reasons exception to Goal 14 for any property that it wishes to zone RI. Petitioner misapprehends the application of the goals and goal exceptions and the county's conclusion with respect to the RI zone. If the county correctly determined that even the most intensive industrial uses permissible in the RI zone are not urban uses, then the county's decision does not implicate or violate Goal 14 because RI zoning would never result in urban use of rural land. *Curry County*, 301 Or at 471 (explaining that "a local government must take an exception only 'where an applicable goal would otherwise prohibit [a local government's] proposed action'" (quoting *1000 Friends of Oregon v. Wasco*

County Court, 299 Or 344, 352, 703 P2d 207 (1985) (brackets in *Curry County*))).

In *Columbia Riverkeeper*, we reasoned that nothing requires the county to identify a specific proposed use in applying a zoning designation or precludes the county from identifying a relatively wide range of industrial uses as the proposed "use" for purposes of applying the reasons exception criteria or determining compliance with Goal 14. 70 Or LUBA at 181, 213. In that case, we remanded for the county to address whether any of the uses allowed in the Rural Industrial Planned Development zone that the county had applied to rural land constitute urban uses "under the *Shaffer* factors or other applicable considerations." *Id.* at 213. We observed that task would be complicated and difficult, but not prohibited. Similarly, here, petitioner has not identified anything that precludes the county from identifying a relatively wide range of industrial uses for purposes of analyzing whether the challenged decision will impermissibly allow urban use of rural land.

While it may be more difficult for intervenor to demonstrate that all of the uses that RI zoning authorizes on the subject property are not urban uses, petitioner has cited no authority that requires intervenor to propose specific industrial uses before the county can determine whether the plan designation or zone change would violate Goal 14. To be sure, the county's and LUBA's analyses in *Aceti III* appear to have assumed that an applicant would apply for a zone change concurrently with an application for approval of a specific industrial

use. However, our reasoning in *Aceti III* does not require that procedure and petitioner has not identified any applicable law that precludes intervenor and the county from assessing Goal 14 compliance in this case absent a specific development proposal.

F. Collateral Attack

The county found that the RI zone "effectively prevent[s] urban use of rural land" by subjecting all development in the RI zone to the requirements of DCC chapter 18.100, which allow development that is less intense than that allowed under the Unincorporated Communities Rule. Record 77-78. Petitioner does not challenge that finding or otherwise explain why it is inadequate to explain why the county concluded that the uses allowed in the RI zone are not urban uses. We will not develop petitioner's argument. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982) ("It is not our function to supply petitioner with legal theories or to make petitioner's case for petitioner.").

Intervenor argues, in part, that petitioner's arguments that the zone change allows urban uses in violation of Goal 14 are impermissible collateral attacks on the acknowledged DCC RI zone regulations.

> "DCC 18.100.030 and .040 impose restrictions for rural industrial uses on the subject property that reduce the size and intensity of permitted uses, such as limits on the number of vehicle trips allowed (DCC 18.100.030(A) and (B)) as well as size limitations for industrial floor area (DCC 18.100.040.H). As LUBA recognized in * * * *Aceti III*, those provisions have been acknowledged by DLCD as consistent with Goal 14, and any claims that those provisions are inconsistent with Goal 14 represents a collateral attack on an

acknowledged land use regulation." Response Brief 21-22 (footnote omitted).

As explained above, the county amended the DCC RI zone regulations in 2002 and DLCD acknowledged those regulations are consistent with Goal 14. In 2002, the RI plan designation was limited to certain geographic areas and specific properties. However, the 2002 Ordinances did not limit uses allowed in the RI zone to preexisting industrial uses. Instead, the 2002 Ordinances provided that the purpose of the RI plan designation "is to recognize existing industrial uses in rural areas of the county and to allow the appropriate development of additional industrial uses that are consistent with the rural character, facilities and services." Ordinance No. 2002-126.

As also explained above, in 2018, the county amended the DCCP to make the RI plan designation available for properties other than those already zoned RI. We have no reason to believe that DLCD's acknowledgment of the 2002 Ordinances as consistent with Goal 14 was premised on the fact that the RI plan designation was at that time limited to specific geographic areas. However, we note that certain factors that indicate the urban nature of a use—such as proximity to a UGB or extension of public facilities—might be different on a new parcel as compared to those properties originally zoned RI prior to the 2018 DCCP amendments.

In *Aceti II*, we did not reach the parties' dispute about whether the RI zone regulations so limit the industrial uses allowed in the RI zone that they will not constitute urban uses. *Id.* at 445 n 4. It is not clear from our decision in *Aceti II*

whether intervenor argued in that appeal that petitioner's arguments were an impermissible collateral attack on the acknowledged DCC.

In adopting the 2018 DCCP amendments, the county took a belt-and-suspenders approach by requiring an applicant for a new RI plan designation to demonstrate compliance with Goal 14, even though the county had already concluded (and DLCD acknowledged) that the RI zone itself complies with Goal 14 by limiting uses to those that are rural in character. In *Aceti III*, we affirmed that belt-and-suspenders approach in response to petitioner's Goal 14 challenge.

In this case, the county agreed with intervenor that "the policies of the DCCP, implemented by DCC Chapter 18.100, which is an acknowledged land use regulation, do not allow urban uses on RI designated and zoned land." Record 75. Petitioner does not assign error to that finding on appeal. That might have been the end of the Goal 14 inquiry. Nevertheless, perhaps because the county took a belt-and-suspenders approach to support the 2018 DCCP amendments by requiring an applicant to demonstrate compliance with Goal 14, the county further concluded that "[s]pecific findings with 'reasonable clarity' must be made to support a determination that the [DCC] and [DCCP] limit industrial uses to those that are rural in nature." *Id.* In what appears to us to be yet another belt-and-suspenders approach, the county applied the *Shaffer* test to explain why applying RI zoning to the subject property will not result in urban uses.

Intervenor appears to have accepted and invited that second-step inquiry and neither assigns error to it on appeal nor argues that the county's *Shaffer*

analysis is dicta or unnecessary, alternative findings in light of the county's collateral attack conclusion regarding the acknowledged DCC chapter 18.100. Accordingly, we assume for purposes of this decision, as the county did and the parties do, that the fact that the RI zone regulations have been acknowledged by DLCD to comply with Goal 14 is not independently sufficient to demonstrate the challenged post-acknowledgment plan amendment applying the RI plan designation and zone to the subject property also complies with Goal 14.

G. *Shaffer* Test[9]

In *Shaffer*, we explained that "whether a residential, commercial, industrial or other type of use is 'urban' or 'rural' requires a case by case determination, based on relevant factors identified in various opinions by [LUBA] and the courts." *Shaffer*, 17 Or LUBA at 931. We derived the following factors from case law:

> "(1) relevant characteristics of the proposed use (such as number of employees, noise, odor, dust and other pollutants emitted, associated traffic); (2) the ultimate use of the products of the proposed use (e.g., whether for urban or rural uses, and in what proportions); (3) the characteristics of urban development in nearby UGBs; (4) where other similar uses in the county are located; and (5) whether there is a practical necessity to locate the proposed use in the rural area, close to a site specific resource." *Shaffer*, 17 Or LUBA at 946.

---

[9] We note that we issued *Shaffer* in 1989, three years after the Supreme Court issued *Curry County*, and five years before LCDC adopted the Unincorporated Communities Rule. No party argues that the *Shaffer* analysis has been superseded by the Unincorporated Communities Rule.

Here, the county found that intervenor provided the "worst case" development scenario, assuming the most intensive level of development that could be allowed under RI zoning on the subject property. In assessing whether the decision would allow urban use of rural land, the county assumed "that any of the suite of outright and conditional use[s] in the RI zone could be developed on the property, subject to the requirements of that zone, site plan review (DCC Chapter 18.124), and conditional use criteria (DCC Chapter 18.128) where applicable." Record 76.

With respect to the *Shaffer* factors, the county found that the potential uses would employ a small number of workers and do not require public facilities or services. The county determined that the DCCP RI policies and implementing DCC RI use and dimensional limitations will limit the scope and intensity of industrial development to rural use. In particular, the county references limitations on maximum floor area and requirements for on-site sewage disposal and on-site wells or public water systems. Record 77. The county determined that there was insufficient evidence in the record to determine whether the potential uses are the types of uses typically located in rural areas or whether they are significantly dependent on a site-specific resource.

1. The *Shaffer* factors are not exclusive.

Petitioner argues that the county erred by relying on the maximum floor area limitation and on-site sewage treatment requirement because those two factors are not specifically identified and analyzed in *Shaffer* and other cases that

apply the *Shaffer* test. Petition for Review 15. *Shaffer* provides an inquiry framework for determining whether a use is urban or rural. Because the urban or rural nature of a proposed use is determined on a case-by-case basis, the *Shaffer* factors provide examples. No single factor will determine whether a particular use is urban, and nothing prohibits the county from identifying additional relevant factors. The relevant inquiry examines the density and intensity of a use, the range of facilities and services needed to support it, and proximity to urban areas. *Hood River Valley Residents Committee v. Hood River County*, 75 Or LUBA 452, 456 n 3 (2017) (citing *Curry County*, 301 Or at 505, 507). That inquiry is flexible. A local government need not necessarily make findings addressing all of the *Shaffer* factors, and other factors may be relevant. *Shaffer*, 17 Or LUBA at 946 (observing that it is not essential that counties adopt findings addressing all of the identified factors); *Columbia Riverkeeper*, 70 Or LUBA at 213 (remanding "for the county to address whether any of the proposed uses allowed in the exception area under the *Shaffe*r factors *or other applicable considerations* constitute the urban use of rural land" (emphasis added)). Petitioner does not argue that floor area and on-site sewage treatment are not relevant to determining whether a particular use is urban. They are. Petitioner has not established that the county erred in considering additional relevant factors beyond those described in *Shaffer*.

2. The county made inadequate findings regarding the number of workers that could be employed in industrial use of the subject property.

Petitioner challenges the county's finding that all potential uses would employ a small number of workers, which is the first *Shaffer* factor. The county found that the potential industrial uses of the subject property would employ a small number of workers. Record 77. However, the challenged decision does not explain the basis for that finding at all or tie that finding to any specific RI zone regulation or to any evidence in the record regarding the potential number of workers. Petitioner observes that the RI zone regulations impose no specific limit on the number of workers permitted to be employed at any rural industrial use.

Intervenor does not contend that the number of workers is not applicable to the assessment of whether the uses are urban in this case. Instead, intervenor responds that the finding that the uses will employ a small number of workers is supported by RI zone regulations that limit the number of vehicle trips per day and the industrial use floor area. DCC 18.100.030(B), (C); DCC 18.100.040(H)(1), n 8.[10]

---

[10] DCC 18.100.030(B) provides:

> "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.

DCC 18.100.030(C) provides:

Intervenor argues that the limitations imposed by those RI zone regulations are reflected in intervenor's traffic impact analysis (TIA), which assumes a "reasonable 'worst-case' scenario" for development of multiple industrial uses on the property and estimates a daily trip generation of 438. Record 1269. Intervenor argues that estimate is a "relatively low number of vehicle trips" and that it "is indicative of the low number of employees typical for the identified uses, particularly once one also considers that the vehicle trip numbers include trips to the site by delivery vehicles and visitors to the business." Response Brief 23. Intervenor also observes that a county transportation planner and the county's road department agreed with the TIA analysis of the traffic that could potentially be generated by employees and visitors to the property, should it be rezoned to RI. Record 61-62.

Intervenor does not point to any county findings that adopt or express intervenor's reasoning that the TIA is a proxy for the number of employees or supports the county's conclusion that the uses allowed on the property under RI zoning will necessarily employ a small number of workers based on RI zone

---

> "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."

regulations. Instead, without citing it, intervenor's response invokes ORS 197.835(11)(b), which provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

We have explained that ORS 197.835(11)(b) allows us to overlook minor defects in local government findings when substantiating evidence makes the local government's decision obvious or inevitable. *Harcourt v. Marion County*, 33 Or LUBA 400, 404 (1997). The challenged decision does not establish that the county concluded that compliance with the use and dimensional standards for the RI zone will obviously or inevitably limit the number of employees employed by the most intensive potential industrial use of the property, or that the county relied on the TIA as evidence to support that conclusion. We decline to reach that conclusion under ORS 197.835(11)(b). It is not obvious to us that the RI zone regulations will necessarily result in a small number of workers. Accordingly, we agree with petitioner that remand is required for the county to explain why it concluded that the potential uses would employ a small number of workers.

The first assignment of error is sustained, in part.

The county's decision is remanded.