LUBA
MAY 31 2024 AM10:16

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 DEPARTMENT OF LAND CONSERVATION
5 AND DEVELOPMENT,
6 *Petitioner*,
7
8 vs.
9
10 CLACKAMAS COUNTY,
11 *Respondent*,
12
13 and
14
15 JESSEY CEREGHINO,
16 *Intervenor-Respondent.*
17
18 LUBA No. 2023-078
19
20 FINAL OPINION
21 AND ORDER
22
23 Appeal from Clackamas County.
24
25 Erin L. Donald filed the petition for review and Sara Urch filed the reply
26 brief. Erin L. Donald argued on behalf of petitioner. Also on the briefs were
27 Steven Shipsey and Ellen F. Rosenblum, Attorney General.
28
29 Caleb J. N. Huegel filed the joint respondent's and intervenor-respondent's
30 brief and argued on behalf of respondent.
31
32 Garrett H. Stephenson filed the joint respondent's and intervenor-
33 respondent's brief and argued on behalf of intervenor-respondent. Also on the
34 brief was Schwabe, Williamson & Wyatt, P.C.
35
36 Andrew H. Stamp filed the amicus brief on behalf of Home Building
37 Association of Greater Portland. Also on the brief were Matthew Martin and VF
38 Law LLP.

1
2 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
3 Member, participated in the decision.
4
5 REMANDED 05/31/2024
6
7 You are entitled to judicial review of this Order. Judicial review is
8 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a hearings officer decision approving a zoning map
4 change from Farm-Forest 10-acre to Rural Area Residential 2-acre.

5 **AMICUS BRIEF**

6 Home Building Association of Greater Portland (Amicus) moves for
7 permission to file an amicus brief. There is no opposition to the motion or the
8 brief, and they are allowed.

9 **MOTION TO TAKE OFFICIAL NOTICE**

10 Intervenor-respondent (intervenor) moves for LUBA to take official notice
11 of periodic review decisions by the Department of Land Conservation and
12 Development (DLCD) and the Land Conservation and Development
13 Commission (LCDC). These decisions include: DLCD Order No. 000631
14 (creating periodic review Work Task 13); DLCD Order No. 0001365 (DLCD
15 Order on Work Task 13); and LCDC Order No. 02-WKTASK-001367 (final
16 periodic review approval). Intervenor asserts that these decisions are relevant to
17 the county's conclusion that the Clackamas County Comprehensive Plan (CCCP)
18 policies at issue in this appeal were acknowledged by DLCD. OAR 661-010-
19 0046 provides that we may take official notice of items subject to judicial notice
20 under ORS 40.090. OAR 660-025-0150(7) provides that

21 "[i]f no appeal [of a director's order on a work task] to the
22 commission is filed within the time provided by section (6) of this
23 rule, the director's order is deemed affirmed by the commission. If

1 the order approved a submittal, the work task or plan amendment is
2 deemed acknowledged."

3 An LCDC acknowledgement order is judicially cognizable law. *Delta Prop. Co.*
4 *v. Lane County*, 69 Or LUBA 305, 308-09 (2014); *D.S. Parklane Development,*
5 *Inc. v. Metro*, 35 Or LUBA 516, 530 (1999), *aff'd as modified*, 165 Or App 1,
6 994 P2d 1205 (2000); *DLCD v. Klamath County*, 24 Or LUBA 643, 646 (1993).
7 The motion is allowed.

8 **BACKGROUND**

9 The subject 111-acre property is located approximately one mile south of
10 the City of Oregon City's urban growth boundary and one mile northwest of the
11 unincorporated community of Beavercreek, and is directly east of and adjacent
12 to Highway 213. A golf course is located across Highway 213. The property is
13 located within the boundaries of the Clackamas River Water District service area.

14 The subject property is located in an area for which an exception to
15 Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) were
16 taken around 1980. The subject property is designated Rural on the CCCP map.
17 The Rural comprehensive plan map designation allows rural residential uses, and
18 is implemented by the Farm/Forest 10-Acre (FF-10), the Rural Residential Farm
19 Forest 5-acre (RRFF-5), and the Rural Area Residential 2-acre (RA-2) zoning
20 map designations. The county's Rural comprehensive plan designation and the
21 county's RRFF-5 and the RA-2 zoning designations were acknowledged by
22 LCDC to comply with Statewide Planning Goal 14 (Urbanization) during initial

1 acknowledgement, and in January 2002 as part of periodic review.[1] DLCD Order
2 on Work Task 13. We discuss the DLCD Order on Work Task 13 later in this
3 opinion.

4 Since 1981, the subject property has been zoned FF-10 on the county's
5 zoning map. The FF-10 zone allows 10-acre minimum parcels. In 2023,
6 intervenor applied for a zoning map designation change to change the zoning map
7 designation for the subject property from FF-10 to RA-2, which allows two-acre
8 minimum parcels, and which would allow subdivision of the subject property into
9 approximately 55 two-acre lots.[2] In this opinion, we refer to that proposed change
10 to the zoning map designation as "Upzoning."

11 Petitioner submitted a three-page letter to the hearings officer that took the
12 position that LCDC's rule at OAR 660-004-0040(7) requires intervenor to obtain
13 an exception to Goal 14 for the requested Upzoning. The hearings officer
14 concluded that the rule does not require a Goal 14 exception for the Upzoning
15 because both the FF-10 and the RA-2 zones have been acknowledged by LCDC
16 to be consistent with Goal 14. Record 26. Therefore, we understand the hearings
17 officer to have reasoned that a change in the zoning map designation from one

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[1] According to the county and intervenor (together, respondents) no detailed explanation of DLCD Order No. 0001365 exists in DLCD's records.

[2] The property adjacent to the subject property is zoned FF-10 and RRFF-5. Property zoned RA-2 is located approximately one-half mile from the subject property.

zoning map designation acknowledged to comply with Goal 14 to a different zoning map designation acknowledged to comply with Goal 14 does not require an exception to Goal 14.[3] This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Introduction

Statewide Planning Goal 14 (Urbanization) is:

> "To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."

In *1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) (*Curry County*), the Supreme Court reversed and remanded LCDC's acknowledgement of Curry County's comprehensive plan and zoning ordinance. The court held that urban uses are not permitted outside of urban growth boundaries, unless an exception to Goal 14 is taken or the use is compliant with Goal 14:

> "We reiterate that the interpretation of 'urban uses' is primarily for LCDC, subject to judicial review only for consistency with the statutes authorizing LCDC to adopt the goals and with the policies of the goals themselves. LCDC, however, must develop some interpretation of 'urban uses,' either by formulating a general definition or by elaborating the meaning ad hoc from case to case. LCDC may even choose to address that issue and other definitional problems noted in this opinion by amending the goals, guidelines,

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[3] The hearings officer's conclusion is difficult to follow because they refer to other prior hearings officer decisions without explaining in the challenged decision the rationale for those prior decisions. Record 26.

1 or definitions in accordance with ORS 197.235 to 197.245, or by
2 promulgating new or amended administrative rules, in accordance
3 with ORS chapter 197 and ORS 183.325 to 183.410."[4] *Curry*
4 *County*, 301 Or at 521.

5 The legislature has authorized LCDC to adopt rules to implement the land use
6 planning statutes and goals. ORS 197.040(1)(b). The legislature has also
7 authorized LCDC to adopt rules to implement ORS 197.732, which codifies
8 Statewide Planning Goal 2 (Land Use Planning), Part II (Exceptions), and
9 establishes standards for taking exceptions to statewide land use planning goals.
10 ORS 197.736. In 1999, LCDC and DLCD began the formal process of adopting
11 rules to specify how Goal 14 applies to rural lands in acknowledged exception

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[4] The appeal in *Curry County* challenged the zoning the county had applied to allow residential development on several thousand acres at densities of one to five acres, for which the county had taken exceptions to Goals 3 and 4, that was later acknowledged by LCDC. The county took the position, and LCDC agreed, that the exceptions to Goals 3 and 4 were sufficient to address any issues related to urban development, and that no exception to Goal 14 was necessary. 1000 Friends of Oregon argued that the densities of development allowed by the zoning in rural residential exception areas would exceed densities of several nearby cities, and that such densities, especially near urban growth boundaries or with extensive public facilities and services, would lead to urban types and levels of development.

Following the Supreme Court's decision, Curry County amended its comprehensive plan and zoning ordinance to address Goal 14. The county adopted amended rural exception areas and applied rural residential zoning with two minimum lot sizes—RR-5 (five-acre minimum lot size) and RR-10 (ten-acre minimum lot size). The amended zones were subsequently acknowledged to comply with Goal 14. *See Oregon Shores v Curry County*, 53 Or LUBA 503, 504 (2007) (so explaining).

1 areas that are planned and zoned for residential uses in light of the *Curry County*
2 decision. LCDC adopted the final version of the rule at OAR 660-004-0040 on
3 June 9, 2000, and the rule took effect on October 4, 2000. We refer to that rule as
4 the Rural Residential Rule.[5] We discuss that rulemaking history later in this
5 opinion.

6 **B. First Assignment of Error**

7 The heart of the parties' dispute in this appeal is the scope of one provision
8 of the Rural Residential Rule, at OAR 660-004-0040(7), and in particular, the
9 circumstances under which that provision requires an exception to Goal 14. OAR
10 660-004-0040(7) provides:

11 "After October 4, 2000, a local government's requirements for
12 minimum lot or parcel sizes in rural residential areas shall not be
13 amended to allow a smaller minimum for any individual lot or parcel
14 without taking an exception to Goal 14 pursuant to OAR chapter
15 660, division 14, and applicable requirements of this division."[6]

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[5] OAR 660-004-0040(1) provides that "[t]he purpose of this rule is to specify how Goal 14 'Urbanization' applies to rural lands in acknowledged exception areas planned for residential uses."

[6] OAR 660-004-0040(7) was originally adopted as OAR 660-004-0040(6):

"After the effective date of this rule, a local government's requirements for minimum lot or parcel sizes in rural residential areas shall not be amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14." *Former* OAR 660-004-0040(6) (2000), *renumbered as* OAR 660-004-0040(7) (2018).

1 Petitioner's first assignment of error argues that the hearings officer improperly
2 construed OAR 660-004-0040(7) in concluding that that rule does not require an
3 exception to Goal 14 for the Upzoning that intervenor seeks for the subject
4 property.

5 We understand the hearings officer to have concluded that the rule's
6 reference to amendments to "a local government's requirements for minimum lot
7 or parcel sizes in rural residential areas" refers only to legislative amendments to
8 the text of a comprehensive plan or zoning ordinance. Thus, we understand the
9 hearings officer to have interpreted the rule to find that an exception to Goal 14
10 is required only when a local government legislatively amends the *text* of its
11 comprehensive plan or zoning ordinance.

12 Intervenor and the county (together, respondents) argue that the plain
13 meaning of the phrase "local government's requirements for minimum lot or
14 parcel sizes," and in particular the word "requirements," refers to the county's
15 comprehensive plan and zoning ordinance *criteria* that apply to rural residential
16 areas. Respondents argue that because the proposed zoning map designation
17 change does not amend the county's criteria for minimum lot or parcel sizes in
18 areas designated Rural on the CCCP, no Goal 14 exception is required.

19 Respondents also point out that the CCCP and the county's RA-2 zoning
20 map designation have previously been acknowledged to comply with Goal 14.

Its language has not materially changed since its initial adoption.

1 Respondents argue that petitioner's construction of the Rural Residential Rule is
2 a collateral attack on the acknowledged CCCP provisions at CCCP 4.MM.11,
3 which include policies to guide the county's choice among the three Rural zoning
4 districts. We discuss that argument below.

5 **1. Preservation**

6 Respondents first argue that petitioner failed to preserve the issue raised in
7 the first assignment of error with enough specificity to alert the county to the
8 issue, as required by ORS 197.797(1) and *Boldt v Clackamas County*, 21 Or
9 LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991). We reject that
10 argument. Petitioner submitted a letter to the hearings officer that took the
11 position that OAR 660-004-0040(7) requires intervenor to obtain an exception to
12 Goal 14 for the requested Upzoning of the property from FF-10 to RA-2. Record
13 358-60. That letter squarely raised the issue presented in the first assignment of
14 error, which is that OAR 660-004-0040(7) requires an exception to Goal 14 for
15 the Upzoning that intervenor seeks. Petitioner was not required to include
16 detailed arguments supporting its position that OAR 660-004-0040(7) requires
17 an exception to Goal 14. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690
18 (2001).

19 **2. Standard of Review**

20 OAR 661-010-0030(4)(d) requires the petition for review to state the
21 standard of review. Petitioner cites ORS 197.835(9)(a)(D) for LUBA's standard

1 of review.[7] Petition for Review 5. ORS 197.835(9)(a)(D) provides that LUBA
2 will reverse or remand a local government decision that improperly construes the
3 applicable law. Respondents respond that if petitioner preserved the issue of
4 whether the challenged decision is an amendment of a land use regulation,
5 LUBA's standard of review is found in ORS 197.835(7)(a), which provides that
6 LUBA shall reverse or remand a decision that amends the local government's
7 land use regulations if the decision is not in compliance with the comprehensive
8 plan. However, respondents also acknowledge that petitioner argues that ORS
9 197.835(9)(a)(D) provides the standard of review. Respondents' Brief 14-15.
10 Because we conclude that ORS 197.835(9)(a)(D) provides the applicable
11 standard of review of the county's decision, we need not address respondents'
12 other arguments regarding the standard of review at ORS 197.835(7).

13 **3. OAR 660-004-0040(7)**

14 Resolving the parties' dispute over the circumstances in which OAR 660-
15 004-0040(7) requires an exception to Goal 14 requires us to review the hearings
16 officer's construction of OAR 660-004-0040(7) for legal error to determine
17 whether the interpretation is correct, with no deference to the county's

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[7] Petitioner also cites ORS 197.835(7)(b), which provides that LUBA "shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if: * * * [t]he comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

1 interpretation. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev*
2 *den*, 315 Or 271 (1992).

3 "The meaning of an administrative rule is a question of law, governed by
4 the same principles that apply to the interpretation of statutes. * * * In construing
5 statutes and administrative rules, we are obliged to determine the correct
6 interpretation, regardless of the nature of the parties' arguments or the quality of
7 the information that they supply to the court." *Gunderson, LLC v. City of*
8 *Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (citing *Dept. of Human Services*
9 *v. J.R.F.*, 351 Or 570, 579, 273 P3d 87 (2012) (referring to obligation of courts
10 "to interpret the statutes correctly, which includes an obligation to consider
11 relevant context, regardless of whether it was cited by any party")); *Stull v. Hoke*,
12 326 Or 72, 77, 948 P2d 722 (1997) ("In construing a statute, this court is
13 responsible for identifying the correct interpretation, whether or not asserted by
14 the parties."). We examine text, context, and administrative rule history with the
15 goal of discerning the intent of LCDC, the body that promulgated the Rural
16 Residential Rule. *Landwatch Lane County v. Lane County*, 364 Or 724, 728, 441
17 P3d 221 (2019) (citing *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042
18 (2009)); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143
19 (1993).

20 **a. Text and Context**

21 Petitioner argues that OAR 660-004-0040(7) is a "straightforward
22 prohibition against amendments that reduce the minimum size for any individual

1 lot or parcel without a Goal 14 exception." Petition for Review 14. We disagree
2 with that characterization. The text of OAR 660-004-0040(7) is anything but
3 straightforward. The meaning of the phrase "local government's requirements for
4 minimum lot or parcel sizes" is at the heart of the dispute, and that phrase is
5 ambiguous. That phrase could refer to *criteria* set forth in the text of a local
6 government's comprehensive plan or land use regulations, as respondents read it,
7 or it could refer to both criteria and plan or zoning map designations that establish
8 minimum lot or parcels sizes, as petitioner reads it. The text of the rule is
9 ambiguous, and could support either party's construction of the rule.

10 Petitioner argues that context provided by other provisions of the rule at
11 OAR 660-004-0040(4) and (6) supports its construction of the rule. However,
12 that context does not provide much assistance in understanding the meaning of
13 the disputed phrase "local government's requirements for minimum lot or parcel
14 sizes" because that phrase is not used in either section (4) or (6).

15 Section (4)(b) of the rule contains an express recognition that some
16 counties' "rural residential areas" had already been acknowledged by LCDC to
17 comply with Goal 14 during the time between the court's decision in *Curry*
18 *County* (1986) and the date when the Rural Residential Rule took effect (October
19 4, 2000), and affirms that no amendments to those acknowledged rural residential
20 exception areas are required by the rule. Section (4)(b) provides, in part:

21 "Some rural residential *areas* have been reviewed for compliance
22 with Goal 14 and acknowledged to comply with that goal by
23 [DLCD] or [LCDC] in a periodic review, acknowledgment, or post-

> acknowledgment plan amendment proceeding that occurred after the Oregon Supreme Court's 1986 ruling in [*Curry County*], and before October 4, 2000. Nothing in this rule shall be construed to require a local government to amend its acknowledged comprehensive plan or land use regulations for those rural residential areas already acknowledged to comply with Goal 14 in such a proceeding." (Emphasis added.)

However, Section (4) also puts local governments on notice that future amendments to acknowledged plan provisions or land use regulations that apply to rural residential areas require conformance with the rule:

> "However, if such a local government later amends its plan's provisions *or land use regulations* that apply to any rural residential area, it shall do so in accordance with this rule." OAR 660-004-0040(4)(b) (emphasis added).

That sentence does not expressly provide that amendments to plan provisions or land use regulations are limited to *text* amendments, and we will not insert what has been omitted. ORS 174.010. ORS 197.015(11) defines "land use regulation" to mean "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan." Clackamas County Zoning and Development Ordinance (CCZDO) 103.02(A) provides:

> "Zoning district boundaries are hereby established as shown on the zoning maps of the unincorporated territory of Clackamas County, Oregon, which *maps are hereby made a part of this Ordinance*. Said zoning maps, properly attested, shall be and remain on file in the office of the County Department of Transportation and Development, governing body of the County, or County Clerk." (Emphasis added.)

1 The county's zoning map is expressly made part of the county's zoning
2 ordinance, and accordingly, intervenor's proposed amendment to the zoning map
3 designation for the property proposes an amendment to a land use regulation.
4 However, the question remains as to the meaning of the phrase in OAR 660-004-
5 0040(4)(b) "plan provisions and land use regulations that apply to any rural
6 residential area" whose amendment must be "in accordance with" OAR 660-004-
7 0040.

8 Petitioner also points to current Section (6)(a) of the rule, which was
9 numbered Section (5)(a) when it was originally proposed and then adopted in
10 June, 2000. We will refer to Section 6 to avoid confusion. Section 6 was the
11 subject of much discussion during LCDC's rulemaking proceedings, and we
12 discuss that administrative rule history below. Importantly, Section 6 was
13 proposed in conjunction with a version of current Section 7 of the rule, which
14 was originally numbered Section 6 when the rule was adopted.

15 Section (6)(a) deemed all rural residential *zones* in effect that required any
16 new lot or parcel to have an area of at least two acres to comply with Goal 14:

17 "(6)(a) A rural residential zone in effect on October 4, 2000 shall be
18 deemed to comply with Goal 14 if that zone requires any new lot or
19 parcel to have an area of at least two acres, except as required by
20 section (8) of this rule."[8]

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[8] OAR 660-004-0040(8) provides in relevant part that:

1 However, Section (6)(a) also provides limited context for interpreting the phrase
2 "local government's requirements for minimum lot or parcel sizes" used in OAR
3 660-004-0040(7) because it does not use that phrase.

4 **b. Administrative Rule History**

5 None of the parties provided any administrative rule history to us to aid us
6 in interpreting the phrase "local government's requirements for minimum lot or
7 parcel sizes in rural residential areas[.]" OAR 660-004-0040(7). However, as
8 noted above, "in construing statutes and administrative rules, we are obliged to
9 determine the correct interpretation, regardless of the nature of the parties'

> "(a) The creation of any new lot or parcel smaller than two acres in a rural residential area shall be considered an urban use. Such a lot or parcel may be created only if an exception to Goal 14 is taken. This subsection shall not be construed to imply that creation of new lots or parcels two acres or larger always complies with Goal 14. The question of whether the creation of such lots or parcels complies with Goal 14 depends upon compliance with all provisions of this rule.
>
> "(b) Each local government must specify a minimum lot size for each rural residential area.
>
> "(c) If, on October 4, 2000, a local government's land use regulations specify a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect.
>
> "(d) If, on October 4, 2000, a local government's land use regulations specify a minimum lot size smaller than two acres, the area of any new lot or parcel created shall equal or exceed two acres[.]"

1 arguments or the quality of the information that they supply to the court." 2 *Gunderson*, 352 Or at 662. Parties should provide LUBA with any relevant and 3 available legislative history. LUBA may, although not compelled to do so, go 4 beyond the legislative history offered by the parties because of "its own resolve 5 to correctly discern legislative intent."[9] *Gaines*, 346 Or at 166. We have reviewed 6 the available administrative rule history of LCDC's adoption of the Rural 7 Residential Rule, and we conclude that the history makes clear that, in adopting 8 Section 7, LCDC intended to prohibit the type of Upzoning that intervenor seeks 9 without an exception to Goal 14.

10 As noted, in 1999, LCDC began rulemaking proceedings to specify how 11 Goal 14 applies to rural residential areas. In one of the first rulemaking meetings 12 in January 2000, DLCD explained that it estimated that approximately 750,000 13 acres of land in the state was already zoned for rural residential use, with 14 approximately 75,500 acres in Clackamas County. Staff Report, Land 15 Conservation and Development Commission, Rural Residential Rule, Jan 24, 16 2000, 2-3, 8 (staff report of DLCD Policy Development Specialist Mitch Rohse).

17 As part of its rulemaking exercise, LCDC created a Rural Residential 18 Advisory Committee (RRAC). At its March 28, 2000, meeting, several members

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[9] Parties should assume that LUBA will attempt to correctly construe a statute or rule. When parties fail to provide relevant legislative or rulemaking history, those parties deprive themselves of the opportunity to argue to LUBA about the meaning and import of the history that LUBA discovers by its own efforts.

1 of the RRAC expressed that LCDC needed to recognize (*i.e.*, "grandfather")
2 some counties' existing rural residential zones that were acknowledged to comply
3 with Goal 14 after the *Curry County* decision, and to allow land division and
4 development in those zones. At the same time, the RRAC also expressed concern
5 with the potential for rezoning existing rural residential zoned areas to higher
6 densities (Upzoning). The RRAC requested that DLCD draft proposed language
7 to recognize that land with existing rural residential zoning with minimum lot
8 sizes of two or more acres would comply with Goal 14 and to allow that land to
9 be developed at those already applied zoning densities, while at the same time
10 making Upzoning of existing rural residential zoned lands "difficult to
11 achieve."[10] DLCD reported on that RRAC meeting in its April 20, 2000, report

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[10] DLCD's staff report to LCDC at LCDC's April 27 and 28, 2000, meeting explained:

> "Issue Summary: At the March 28 meeting of the RRAC, some members supported a new two-part concept: existing Rural Residential (RR) zones with minimum lot size requirements of two or more acres would be 'grandfathered in.' That is, they would be found to comply with Goal 14 and the *Curry County* case, and '[U]pzonings' (reductions in current lot-size minimums) would be made more difficult to achieve. Counties would be permitted to upzone RR lands by decreasing a minimum lot size currently in effect (from five acres to two acres, for example) only if they meet detailed standards to ensure compliance with Goal 14. See related issue summary: Rezoning Rural Residential Land To Higher Densities." Attachment to Item 12, Land Conservation and Development Commission, Rural Residential Rule, Apr 27-28, 2000, 1 (DLCD's Summary of Five Main Issues).

1 to LCDC prior to LCDC's April 28-29, 2000, work session.[11] At the April 28-29,

2 2000, work session, LCDC directed DLCD to prepare a revised draft of the rule.

"REZONING RR LAND TO HIGHER DENSITIES

"* * * * *

"Issue Summary: As an outgrowth of discussing other aspects of development in rural residential exception areas in the state, the RRAC raised the issue of current and potential policies surrounding rezoning of RR lands to higher densities. Currently, counties rezone such lands to higher densities either through quasi-judicial land use actions or through legislative comprehensive plan and zone amendments. Precise data on the frequency, amount, and location of rezoning to higher densities is not available, but there are a number of areas where significant rezoning to higher densities ('[U]pzoning') could occur.

"Several members of the RRAC suggested that staff explore approaches to assure that rezoning to higher densities could only be accomplished after a rigorous analysis of information to justify increasing densities. In the staff recommendation for a 'NEW SECTION' below, we have describe[d] a process to supplement the requirement to make findings on an exception to Goal 14, as it would apply to such rezones." DLCD's Summary of Five Main Issues, 7.

[11] An initial draft of the proposed rule language was:

"A local government's land use regulations on the effective date of this rule specifying a minimum lot size for rural residential exception lands shall not be revised to provide for higher densities of residential dwelling units unless the subject lots or parcels are included within an Urban Growth Boundary or meet the following criteria:

"1. Decisions to rezone to higher densities are considered through legislative reviews to assure that cumulative impacts are

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assessed. Changes to minimum lot size requirements through case-by-case quasi-judicial decisions shall not be permitted.

"2. The area to be addressed in a rezoning proposal shall demonstrate through an analysis of site conditions as certified by a geologist or engineering geologist (water), or a sanitarian or soils scientist (wastewater) that

"(a) On-site wastewater systems on individual sites are feasible.

"(b) Wells on individual sites are feasible and will not compromise water resources available to other existing residential or agricultural uses in the area.

"(c) In addition, in an area with significant groundwater resources defined pursuant to OAR 660-023-0140(3), the county has adopted a program to protect the resource.

"3. The area addressed in the rezone proposal Is approved to be served at the densities proposed by a fire protection district.

"4. Additional lots created would not adversely affect nearby farm or forest practices.

"5. Additional lots created would not adversely affect wildlife habitat protected in the comprehensive plan.

"6. Additional lots created would not require additional capacity improvements to state or county roads based on projected full build-out of an area served by such facilities.

"7. More than 50 [percent] of the land area to be rezoned must be comprised of existing legal lots and parcels smaller than 10 acres.

"8. The area considered for rezoning has at least fifty acres of land." DLCD's Summary of Five Main Issues, 7-8.

1 Minutes, Land Conservation and Development Commission, Rural Residential
2 Rule, Apr 27-28, 2000, 26-27.

3 A May 9, 2000, draft rule (May 9 Draft) was reviewed at the May 16, 2000,
4 RRAC meeting. Staff Report, Land Conservation and Development Commission,
5 Rural Residential Rule, May 22, 2000, 8-9 (staff report of DLCD Director
6 Richard P. Benner). The May 9 Draft included, for the first time, Proposed
7 Section 5 recognizing existing acknowledged rural residential zones "in effect"
8 on the rule effective date as compliant with Goal 14.[12]

9 Importantly for our review, the May 9 Draft also included new Proposed
10 Section 6, addressing "Upzoning of RR Land." Proposed Section 6 provided in
11 relevant part:

> 12 "(6)(a) After the effective date of this rule, *a local government's*
> 13 *requirements for minimum lot or parcel sizes in rural residential*
> 14 *areas shall not be amended through a quasi-judicial land-use*
> 15 *decision to set a smaller minimum for any individual lot or parcel.*
> 16 Any amendment of a minimum lot or parcel size requirement for a
> 17 rural residential area shall be made through a legislative post-
> 18 acknowledgment plan amendment and shall be subject to all
> 19 applicable statewide planning goals, including but not limited to
> 20 Goal 14. The amendment shall be supported by data on the
> 21 additional amounts and densities of development likely to occur if
> 22 such an amendment were approved and by an analysis of such data
> 23 to determine cumulative effects of such development on land,

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[12] Proposed Section 5 was adopted without significant revision. For purposes of this decision, we understand the phrase "[a] rural residential zone in effect on October 4, 2000" to refer to a zone that had already applied to specific land as of the effective date of the rule. OAR 660-004-0040(6)(a).

1 resources, and public facilities and services in the area.

2 "(b) *A local government's requirements* for minimum lot or parcel
3 sizes in a rural residential area shall not be amended to provide for
4 smaller minimums or higher densities of development in that area
5 unless the local jurisdiction demonstrates that the requirements set
6 forth in paragraphs (6)(b)(A)-(M) of this rule have been met. As
7 used in this subsection, 'the area' refers to the land subject to a
8 proposed comprehensive plan amendment to allow a smaller
9 minimum lot or parcel size." Attachment to Memorandum, Land
10 Conservation and Development Commission, Rural Residential
11 Rule, May 9, 2000, 3-4 (May 9, 2000, Draft Proposed Rule)
12 (emphases added; subsections (A) through (M) omitted).

13 The May 9 Draft used, for the first time, the phrase "a local government's
14 requirements for minimum lot or parcel sizes," and prohibited their amendment
15 through a "quasi-judicial land use decision." That prohibition signals that the
16 phrase "local government requirements for minimum lot or parcel sizes" was
17 envisioned to broadly encompass both applicant-driven and local government-
18 driven plan and zoning *map* designation amendments and plan and zoning
19 ordinance *text* amendments, because amending a local government's plan or
20 zoning ordinance text cannot be accomplished "through a quasi-judicial land use
21 decision" but only legislatively, by the local government. Thus, if the phrase
22 "local government requirements for minimum lot or parcel sizes" referred only
23 to the text of a comprehensive plan or zoning ordinance, that prohibition would
24 have been unnecessary. Accordingly, we understand the May 9 Draft's use of the
25 phrase "a local government's requirements for minimum lot or parcel sizes" to
26 have referred generally to then-existing provisions in the acknowledged plan or

1 zoning ordinance, including plan or map designations, that established minimum
2 lot or parcel sizes in rural residential exception areas.[13] DLCD's May 9 Draft
3 proposed Upzoning to be accomplished through a post-acknowledgement plan
4 amendment, legislatively, in accordance with all of the statewide planning goals
5 – meaning that the county must establish that the legislative Upzoning complied
6 with Goal 14 – and in accordance with proposed requirements (A) through (M).[14]
7 The RRAC discussed the May 9 Draft at the last RRAC meeting on May
8 16, 2000. As explained in more detail in the DLCD Director's staff report to
9 LCDC for its June 8 and 9, 2000, meeting, the RRAC disliked DLCD's proposal
10 and viewed proposed (A) through (M) as too complex. The RRAC voted 12 to 9
11 in favor of a motion to recommend to LCDC that Upzoning be prohibited. A
12 different motion to allow Upzoning only with a Goal 14 exception narrowly
13 failed by a vote of 11 to 12.
14 In their staff report to LCDC for LCDC's June 8 and 9, 2000, meeting,
15 DLCD Director Benner explained:
16 "As the table shows, most RR land already is subject to zoning that
17 requires new lots and parcels to have at least five or ten acres. Many

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[13] We have not included Proposed Section 6(b)(A) through (M) here because they were not ultimately adopted. Standard (M) was apparently dropped at some point after the rule draft was proposed.

[14] Of course, that legislative Upzoning could be accomplished by amending the plan or zoning ordinance text or by amending the plan or zoning map designation, or both.

people, including members of the commission, have raised concerns that by declaring current two-acre zoning to be consistent with Goal 14, the rule would encourage '[U]pzoning' of those other RR lands. The rule deals with that problem in Section 6. It specifies some strict requirements and high standards for any such upzoning. Its net effect would be to keep most RR land in its current five- and ten-acre zoning.

"* * * * *

"Grandfathering Existing RR Zoning While Limiting Upzonings

"At the March meeting of the RRAC, a majority of members supported a new two-part concept. First, existing RR zones with minimum lot size requirements for at least two acres would be 'grandfathered in.' They would simply be deemed to comply with Goal 14 and the Curry County case. Second, the rule would be written to make 'upzonings' (reductions in current lot size minimums) difficult to achieve. Counties would be permitted to upzone RR lands by decreasing a minimum lot size currently in effect (from five acres to two acres, for example) only if they met detailed standards to ensure compliance with Goal 14. The restrictions on upzoning would be adopted to prevent massive upzoning of RR lands to two-acre densities, and to reinforce earlier findings made by counties that their larger minimums comply with Goal 14.

"The main benefit from such a combination would be continuity and simplicity. Counties could retain most current RR zoning provisions and comply with the Curry County ruling with minimal cost and effort: more than half of them would face no additional work as a result of this rule. Upzoning of RR land would be restricted, thereby maintaining continuity of land-use regulations in RR areas.

"The main cost from such a combination is that if standards for upzoning are not rigorous enough, most RR land eventually might come to have two-acre zoning. This would lead to far more residential development than would have resulted from earlier

1 versions of the rule. To allow two-acre development on less than
2 200,000 acres of RR land (as this draft would do) is one thing; to
3 allow two-acre development on all 750,000 acres is quite another.
4 Such development might be very costly to taxpayers, could harm
5 important rural resources, and surely would violate Goal 14's
6 prohibition against urban use of rural land.

7 "The department designed the May 9 draft to reflect the two-part
8 concept described above. Section 5 grandfathers all current RR
9 zoning that has a minimum lot size of at least two acres. Section 6
10 sets forth 12 criteria and requirements for upzoning RR land.

11 "Note that Section 6(a) on pages 3-4 requires all [U]pzonings of RR
12 land to be carried out through a post-acknowledgment plan
13 amendment. Any upzoning proposal thus would have to be reviewed
14 against all applicable statewide planning goals and meet all
15 requirements in paragraphs (A) through (M). For example, an
16 [U]pzoning proposal would have to comply with Goal 7's
17 requirement for 'appropriate safeguards' against natural hazards
18 even though hazards are not mentioned in paragraphs (A) through
19 (M).

20 "At its final meeting [on May 16, 2000], several members of the
21 RRAC raised concerns about the complexity of the requirements in
22 Section 6. They proposed a simpler alternative: replace Section 6
23 with a single sentence to prohibit any [U]pzoning of RR land after
24 the effective date of the rule. The idea was put to a vote, and it
25 passed, 12 to 9. Three people abstained.

26 "Another member of the committee then proposed a different
27 alternative to Section 6: allow [U]pzonings only if an exception to
28 Goal 14 is taken, Again, the idea was put to a vote, but it failed to
29 pass. The count was 11 in favor, 12 against, with one abstention."
30 Staff Report of DLCD Director Richard P. Benner 6-8.

31 Director Benner then explained:

32 "The variety of proposals stems from a difference of opinion about
33 what is meant by 'making it difficult to [U]pzone' and how that is

1 best accomplished. The staff believes a set of strong requirements
2 such as those in the current draft is the best way to proceed for two
3 reasons: it would result in the smallest amount of RR land being
4 upzoned, and it would establish useful standards for any increase in
5 density of RR development. No such standards exist in the current
6 rules for exceptions.

7 "*We believe that a 'ban' on [U]pzonings amounts to the same thing*
8 *as allowing [U]pzonings through an exception to Goal 14.* That's
9 because ORS 197.732, Goal 2, and OAR Chapter 660's Division
10 004 all allow local governments to take exceptions to a variety of
11 goals, including Goal 14. That option would remain available to
12 local governments even if this rule were to specify a 'ban' on RR
13 [U]pzonings. And an exception to Goal 14 probably might not be
14 difficult to obtain after this rule is passed. The applicant could argue
15 that by grandfathering current RR zoning with a two-acre minimum,
16 the rule implies that all development at two-acre densities is
17 consistent with Goal 14 and the Curry County ruling. If the applicant
18 could get development officials or a court to accept that argument,
19 little basis would remain for denying the exception.

20 "We hasten to add that the department does not accept the premise
21 that, by grandfathering all current two-acre RR zoning, the rule
22 somehow establishes that all future residential development at that
23 density is a rural use, consistent with Goal 14. We continue to
24 believe that urban and rural residential uses cannot be defined solely
25 in terms of density. Two-acre development in some situations may
26 be clearly rural and fully consistent with Goal 14. Two-acre
27 development in other settings may be decidedly urban. * * *

28 "This proposed rule therefore does not define all two-acre RR
29 development to be 'rural' or to be consistent with Goal 14. Rather,
30 it has the commission declare that all **current** RR zoning with
31 minimum lot sizes of two or more acres is consistent with Goal 14.
32 It also would specify a minimum of at least two acres for any RR
33 land currently subject to a sub-two-acre minimum. The likely effect
34 of these two provisions will be two-acre zoning on less than 200,000
35 acres of RR land state-wide. The balance – about three-quarters of
36 the RR land – will be in five- or ten-acre zoning. That is quite a

1 different result from a rule that would permit two-acre zoning on all
2 750,000 acres of RR land. We believe the cumulative effect of such
3 extensive two-acre zoning would indeed be 'urban' and would
4 violate Goal 14." *Id.* at 9 (boldface in original; emphasis added).

5 Proposed Section 5 and Proposed Section 6 were discussed at length during
6 the June 8 and 9, 2000, LCDC meeting, at the conclusion of which LCDC
7 adopted the Rural Residential Rule. A representative from the Association of
8 Oregon Counties (AOC) testified that it supported recognizing existing rural
9 residentially zoned parcels and that "going beyond that" would require a Goal 14
10 exception. Audio Recording, Land Conservation and Development Commission,
11 June 8, 2000, Part 2 at 0:26:00, https://pdxscholar.library.pdx.edu/lcdc/40/
12 (accessed May 28, 2024).[15] The Chair of LCDC expressed a preference for a
13 combination of AOC's proposal and DLCD's proposal, but explained his view
14 that "if we don't do Section 6 or can't come up with an amalgam, I would default
15 to the exceptions process."[16] Audio Recording, Land Conservation and

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[15] Clackamas County's planning director testified at that meeting. He explained that the county had submitted a package to DLCD under periodic review "under *Curry County*" to have its existing rural zoning acknowledged to comply with Goal 14, and that the materials included an assessment of the number of vacant parcels potentially capable of redivision. Audio Recording, Land Conservation and Development Commission, June 8, 2000, Part 2 at 0:13:30 (comments of Clackamas County planning director Douglas McClain), https://pdxscholar.library.pdx.edu/lcdc/40/ (accessed May 28, 2024).

[16] It is not possible to tell from the audio recordings what language AOC proposed, and that language is not included in the official file for the June 8 and 9, 2000 LCDC meeting. However, a May 3, 2000, letter from AOC to DLCD in the official file proposed the following language:

1 Development Commission, June 8, 2000, Part 6 at 0:55:30,
2 https://pdxscholar.library.pdx.edu/lcdc/44/ (accessed May 28, 2024). DLCD's
3 position was that if the standards in Proposed Section 6(b)(A) through (M) were
4 abandoned, then an exception to Goal 14 should be required. Audio Recording,
5 Land Conservation and Development Commission, June 9, 2000, Part 8 at
6 1:13:12 (statement of Director Benner regarding the state policy regarding
7 Upzoning), https://pdxscholar.library.pdx.edu/lcdc/46/ (accessed May 28, 2024).

8 The meeting minutes for the June 8 and 9, 2000, meeting indicate that a
9 majority of the LCDC commissioners favored strict requirements for Upzoning.
10 Revisions to the draft rule were made and discussed during the June 8 and 9,
11 2000, meeting, but those revised versions are not part of LCDC's official
12 rulemaking file. Additionally, approximately 45 minutes of the audio recordings
13 of the June 8 and 9, 2000, meeting, consisting of the LCDC commissioners'

> "Rural Residential Areas acknowledged by the COMMISSION with comprehensive plan designations and implementing zoning of 2 acres or more is defined as rural development (use). Amendments to acknowledged county comprehensive plans and/or zoning designations after the effective date of this rule shall be considered only through the 'POST ACKNOWLEDGMENT PLAN AMENDMENT PROCESS'." Testimony, Land Conservation and Development Commission, Rural Residential Rule, May 3, 2000, (comments of Association of Oregon Counties President Harold Haugen).

deliberations regarding Section 6, are also unavailable.[17] However, the meeting minutes, meeting materials, and the meeting recordings that are available demonstrate that the LCDC commissioners supported making Upzoning difficult to achieve.

When the language in the May 9 Draft is compared to the language that LCDC ultimately adopted, and what is at issue in this appeal, it is clear that all Upzoning requires an exception to Goal 14 and that petitioner's construction of the rule is the correct one because it comports with LCDC's intent, as illuminated by the rulemaking history set out above. The final, adopted version of Section 6 revised parts of Sections 6(a), added the language "without taking an exception to Goal 14," and eliminated the (6)(b)(A) through (M) standards, as shown below:

> "(6)~~(a)~~ After the effective date of this rule, a local government's requirements for minimum lot or parcel sizes in rural residential areas shall not be amended ~~through a quasi-judicial land-use decision to set~~ **to allow** a smaller minimum for any individual lot or parcel~~. Any amendment of a minimum lot or parcel size requirement for a rural residential area shall be made through a legislative post-acknowledgment plan amendment and shall be subject to all~~

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[17] Portland State University maintains a digital archive of audio recordings from LCDC's June 8 and 9, 2000, meeting, which contains the following disclaimer:

> "Parts 7-10 contain sides 13-20, covering the commission's meeting on June 9, 2000. *Please note that cassette side 14 was blank, indicating an omission of 45 minutes between the end of Part 7 and the start of Part 8*." https://pdxscholar.library.pdx.edu/lcdc/46/ (accessed May 28, 2024) (emphasis added.)

> ~~applicable statewide planning goals, including but not limited to~~ **without taking an exception to Goal 14 pursuant to OAR chapter 660, division 14, and applicable requirements of this division**. ~~The amendment shall be supported by data on the additional amounts and densities of development likely to occur if such an amendment were approved and by an analysis of such data to determine cumulative effects of such development on land, resources, and public facilities and services in the area.~~
>
> ~~"(b) A local government's requirements for minimum lot or parcel sizes in a rural residential area shall not be amended to provide for smaller minimums or higher densities of development in that area unless the local jurisdiction demonstrates that the requirements set forth in paragraphs (6)(b)(A)-(M) of this rule have been met. As used in this subsection, 'the area' refers to the land subject to a proposed comprehensive plan amendment to allow a smaller minimum lot or parcel size~~."

Even in the absence of the recording of LCDC's deliberations regarding what is now OAR 660-004-0040(7), or copies of the revised versions that were considered during the June 8 and 9, 2000, meeting, it is clear that LCDC intended the phrase "a local government's requirements for minimum lot or parcel sizes in rural residential areas" to mean existing plan or zone text or map designations that established minimum lot or parcel sizes. It also seems clear that in adopting the final version of Section 6, which addressed Upzoning, LCDC intended that Upzoning be accomplished only in conjunction with a Goal 14 exception.

4. DLCD Order on Work Task 13

We turn to the hearings officer and respondents' reliance on acknowledgement in 2002 after the county and DLCD engaged in periodic review between 1996 and 2002. As explained in the materials included with

1 intervenor's Motion to Take Official Notice, as part of periodic review, DLCD
2 created Work Task 13 in 1996. Work Task 13 was to "[r]esolve the Goal 14 issues
3 raised in the *Curry County* Supreme Court decision *for the areas zoned RRFF-5,*
4 *RA-2, RC and RI* located outside the unincorporated communities and outside the
5 Mt. Hood Corridor." Motion to Take Official Notice Ex 1, at 5 (emphasis added).
6 The DLCD Order on Work Task 13 is in the form of a January 25, 2002, letter
7 from DLCD's Rural Lands coordinator to the county commission chair that
8 explains:

9 "I am pleased to inform you that the Department of Land
10 Conservation and Development has approved the county's Periodic
11 Review Work Task 13 submittal. The Task 13 submittal consisted
12 of *amendments to the county's Rural Commercial (RC), Rural*
13 *Industrial (RI), Historic Landmark (HL), Historic District (HD) and*
14 *Historic Corridor (HC) districts* to comply with Statewide Planning
15 Goal 14 (Urbanization) and the Supreme Court decision in [*Curry*
16 *County*, 301 Or 477]. This letter constitutes the department's order
17 approving this work task."[18] Motion to Take Official Notice Ex 1, at
18 9 (emphasis added).

19 Respondents argue that petitioner's first assignment of error is a collateral attack
20 on the DLCD Order on Work Task 13 and on the CCCP policies that guide the

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[18] OAR 660-025-0150(4) provides:

"If the director does not issue an order or refer the work task within the time limits set by section (3) of this rule, and the department did not receive any valid objections to the work task, the work task shall be deemed approved. In such cases, the department will provide a letter to the local government certifying that the work task is approved."

1 zoning map designation of rural residential exception areas. We understand
2 respondents' argument to be, essentially, that the CCCP provisions that guide the
3 zoning map designation of rural residential exception areas, coupled with
4 acknowledgement of Work Task 13 in January 2002, shield intervenor's
5 application from the rule's prohibition against Upzoning without an exception to
6 Goal 14. Stated differently, respondents' argument is that the CCCP provisions
7 and DLCD Order on Work Task 13 in 2002, after the Rural Residential Rule was
8 adopted, provided the county with an exemption from the prohibition on
9 Upzoning without a Goal 14 exception.

10 The county is correct that the county's RRFF-5, and RA-2 zones in effect
11 on October 4, 2000, are acknowledged to comply with Goal 14, pursuant to OAR
12 660-004-0040(4)(b) and (6)(a). However, to the extent respondents argue that the
13 CCCP policies that guide the zoning of rural residential exception areas may be
14 applied in a manner that is inconsistent with an LCDC rule adopted after those
15 policies were enacted, we reject that argument.[19] ORS 197.646(1) and (3)

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[19] We note that the DLCD Order on Work Task 13 refers only to amendments to the county's Rural Commercial, Rural Industrial, and Historic zoning districts to comply with Goal 14 and the *Curry County* decision. The DLCD Order on Work Task 13 lacks any reference to the rural residential zoning districts, which the original 1996 Work Task identified as requiring amendments. Although we cannot be certain, it is likely that is because in the intervening time period between 1996, when Work Task 13 was created, and 2002, when the DLCD Order on Work Task 13 was issued, LCDC adopted the Rural Residential Rule.

1 (requiring a local government to amend its comprehensive plan and land use
2 regulations to comply with a new requirement in a rule that implements a goal,
3 and providing that when a local government does not adopt amendments to an
4 acknowledged comprehensive plan or land use regulations to implement the new
5 rule, the new requirements in the rule apply directly to the local government's
6 land use decisions). And while Goal 14 does not apply directly to the decision,
7 ORS 197.732 arguably does. *See Kenagy*, 115 Or App 131 (relevant statutes
8 remain applicable to local land use decisions after acknowledgment).

9 Section (4)(b) and Section (6)(a) of the Rural Residential Rule and the
10 administrative rule history discussed above make clear that LCDC intended to
11 recognize counties that had achieved during the time between the court's decision
12 in *Curry County* and the effective date of the rule acknowledgement of existing
13 rural residential zones as compliant with Goal 14. Section 7 of the rule makes
14 clear that LCDC intended to prevent Upzoning of properties to an existing higher

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The purpose of Work Task 13 was to "[r]esolve the Goal 14 issues raised in the Curry County Supreme Court decision in the areas zoned RRFF-5, RA-2, RC and RI located outside the unincorporated communities and outside the Mt. Hood Corridor." The Rural Residential Rule has a similar purpose, albeit more targeted to residential exception areas, to "specify how Goal 14 'Urbanization' applies to rural lands in acknowledged exception areas planned for residential uses." Given that LCDC had adopted the Rural Residential Rule approximately 18 months before the DLCD Order on Work Task 13, a reasonable inference is that DLCD and the county were aware of the prohibition in OAR 660-004-0040(7) on Upzoning without a Goal 14 exception, *see* n 15, and it is reasonable to assume that if DLCD had intended to exempt the county from that prohibition, it would have said so explicitly.

1 density rural residential zoning designation without a Goal 14 exception.
2 Petitioner is correct that Upzoning the property to a higher density zoning map
3 designation requires an exception to Goal 14, pursuant to OAR 660-004-0040(7).

4 **5. Oregon Shores**

5 Finally, we turn to our decision in *Oregon Shores v. Curry County*, 53 Or
6 LUBA 503 (2007), which the hearings officer and respondents rely on as support
7 for their construction of OAR 660-004-0040(7). *Oregon Shores* was a challenge
8 to the county's 2006 amendment of its zoning ordinance text to create, but not
9 apply, a new minimum parcel size of two acres in rural residential areas (Two-
10 Acre Zone). The county specified in the text of the ordinance that when the new
11 Two-Acre Zone was applied, application of that zone to any property would
12 require a Goal 14 exception.

13 The existing, unamended portion of the *Oregon Shores* ordinance allowed
14 Upzoning property from a 10-acre minimum to a five-acre minimum parcel size
15 without a Goal 14 exception. The petitioners argued that the county was required
16 to also amend the existing portion of its zoning ordinance that allowed Upzoning
17 property from a 10-acre minimum parcel size to a five-acre minimum parcel size
18 without a Goal 14 exception to require a Goal 14 exception for that Upzoning.
19 We held that OAR 660-004-0040(7) did not require the county to also amend the
20 *unamended* portions of its zoning ordinance that allowed Upzoning.

21 Here, intervenor seeks a quasi-judicial zoning map designation
22 amendment for the property from a 10-acre minimum to a two-acre minimum

1 zoning map designation. The issue that is presented in this appeal was not at issue
2 in *Oregon Shores* because in that case, there was no dispute that OAR 660-004-
3 0040(7) required a Goal 14 exception to allow existing 10- and five-acre parcels
4 to be upzoned to the new Two-Acre Zone. Accordingly, *Oregon Shores* is of little
5 value in determining whether OAR 660-004-0040(7) requires a Goal 14
6 exception for the Upzoning that intervenor seeks.

7 The first assignment of error is sustained.

8 **SECOND ASSIGNMENT OF ERROR**

9 In its second assignment of error, petitioner argues that even if OAR 660-
10 004-0040(7) does not require an exception to Goal 14, the application fails to
11 comply with Goal 14 because it proposes an urban use of rural land in violation
12 of the *Curry County* factors. Because we sustain petitioner's first assignment of
13 error and agree that a Goal 14 exception is required in order to change the zoning
14 map designation to RA-2, we need not address the second assignment of error,
15 which is precautionary.

16 We do not address the second assignment of error.

17 **DISPOSITION**

18 Petitioner seeks reversal or remand of the decision. OAR 661-010-
19 0071(2)(d) provides that LUBA will remand a land use decision when "[t]he
20 decision improperly construes the applicable law, but is not prohibited as a matter
21 of law." We conclude above that the hearings officer improperly construed OAR
22 660-004-0040(7) as not requiring an exception to Goal 14 for the proposed

1 Upzoning. Although petitioner argues that the application is prohibited without a
2 Goal 14 exception, petitioner does not argue that a Goal 14 exception is
3 prohibited as a matter of law. Accordingly, remand is required.
4 The county's decision is remanded.