

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Where a county inventoried big game habitat, identified conflicting uses, analyzed the ESEE consequences, and identified the subject property as a 3B site (allow the uses which conflict with the resource site fully), the county governing body’s interpretation that its code exempts 3B sites from further ESEE analysis is entitled to deference. *Kemp v. Union County*, 50 Or LUBA 61 (2005).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** OAR 660-023-0007 exempts the determination of a “program to protect historic resources” from the requirement to conduct an ESEE (economic, social, environmental and energy) analysis. The scope of that exemption is ambiguous, and could plausibly exempt (1) a local government’s entire historic resources “program,” as that rule broadly defines that term, or (2) only those parts of the program that “protect” historic resources, which a rule definition narrowly limits to local government review of applications for demolition or alteration of historic resources. Given the intertwined nature of most historic resources programs, the better reading of OAR 660-023-0007 is that it comprehensively exempts from the ESEE analysis adoption or modification of the “program,” not merely those parts of the program that require local government review of applications for demolition or alteration of historic resources. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Where a local government determines that there are no conflicting uses allowed under the applicable zoning districts, the local government need not undertake an ESEE analysis, but must simply adopt appropriate policies and ordinance provisions, such as zoning, to ensure preservation of the resource site. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Where the “resource protection program” is zoning that protects open space, when a local government amends the zone to allow a new use that could conflict with preservation of open spaces, it must either apply Goal 5 or take an exception to Goal 5. If it applies Goal 5, it must either demonstrate that the new use is not a conflicting use or, if it is, conduct an ESEE analysis sufficient to determine whether to protect the resource fully, allow conflicting uses, or limit conflicting uses. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Findings that a text amendment adding a new use to a park zone are inadequate to address protection of historic sites under Goal 5, where the findings address only one of several parks with historic sites, and fail to explain why allowing a new potentially conflicting use on or near historic sites is consistent with Goal 5. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Comprehensive plan language stating that the county will contact

the state fish and wildlife agency “for any matter which could affect existing or potential wildlife habitat” within general deer winter range areas does not authorize the county to waive a plan policy imposing an 80-acre density limitation to such areas after consulting with the agency. *Wood v. Crook County*, 49 Or LUBA 682 (2005).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** That the county’s Goal 5 program initially applied regulations protecting big game habitat to areas zoned for resource use does not mean that such regulations are automatically lifted from a parcel of land that the county rezones from a resource zone to a newly created nonresource zone. *Wood v. Crook County*, 49 Or LUBA 682 (2005).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Adoption of an ordinance that authorizes demolition of a structure that the city’s Goal 5 historic inventory classifies as “noncontributing” and that is not protected under the city’s historic resource protection program does not alter the Goal 5 inventory or “amend” the city’s “resource list” within the meaning of OAR 660-023-0250(3)(a). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Because OAR 660-023-0200(7) provides that local governments are not required to apply the ESEE process in order to determine a program to protect historic resources, it follows that a local government is also not required to apply the ESEE process when the city allows a new use that could conflict with a particular historic resource. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Where a post-acknowledgment plan amendment allows new uses that could conflict with significant Goal 5 resource sites, and thus triggers application of the Goal 5 rule under OAR 660-023-0250(3), the city need not in all cases repeat the entire Goal 5 process, including the ESEE analysis. In many cases no more is required than an explanation for why the existing program to protect Goal 5 resources continues to be sufficient to protect those resources. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** ORS 197.467 requires imposition of a conservation easement to protect Goal 5-designated resources on the site of a proposed destination resort, and that requirement is not obviated by the fact that the Oregon Department of Fish and Wildlife has indicated that it will not require a conservation easement. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A county errs in interpreting a one dwelling per 40 acres density standard intended to protect Goal 5 wildlife habitat to be satisfied if the average dwelling density over a 1.2 million-acre area of the county does not exceed the standard, where the county’s

interpretation gives the standard no regulatory effect until over 28,000 dwellings are built in the area, and is inconsistent with the purpose of the standard to protect wildlife habitat. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A local standard imposing a one dwelling per 40 acre density limitation on Goal 5-protected wildlife habitat must be construed in a way that is consistent with its purpose and context to allow no more than one dwelling per 40 acres on the subject property. As applied to a destination resort, such a standard may effectively prohibit a resort that proposes 200 single-family residential lots in a 500-acre area. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A plan provision that simply repeats the Goal 5 rule requirement that resource sites be preserved, where no conflicting uses are identified, does not apply directly to protect a resource site where no conflicts are identified, where the plan makes clear that it is the “results and conclusions” of applying that plan provision and others that constitutes the county’s program to protect Goal 5 resource sites. *Dundas v. Lincoln County*, 43 Or LUBA 407 (2002).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Where the county’s comprehensive plan makes it clear that it relied on a particular zoning district as its program to protect an existing mining operation from conflicting uses, and that zone allows mining and dwellings as conditional uses, the county does not err in requiring that a conditional use application to reopen that mine after it had been closed for over ten years to demonstrate that the mine would be compatible with nearby dwellings. Any error that the county may have committed in subjecting an existing mine with no conflicts to conditional use review in the future if the mine closed was rendered irrelevant by LCDC’s acknowledgment of the comprehensive plan. *Dundas v. Lincoln County*, 43 Or LUBA 407 (2002).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Where a county considers the impacts that a proposed rezoning would have on inventoried Goal 5 resources, and concludes that the existing Goal 5 protection program continues to be adequate to protect those resources, the county’s conclusion satisfies Goal 5. *Doty v. Coos County*, 42 Or LUBA 103.

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Under OAR 660-023-0250(3), a local government cannot adopt a post-acknowledgment plan amendment that amends the program to protect significant Goal 5 resources without establishing that the amendment complies with Goal 5 and the Goal 5 rule, even if the amendment merely increases the level of protection afforded inventoried Goal 5 resources. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Code provisions that were previously acknowledged to comply

with Goal 5 and are carried forward into a new code without substantive change do not constitute an “amendment” of a Goal 5 regulation and thus do not trigger an obligation to establish that those amendments comply with the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A zoning classification that implements a Goal 5 plan designation and is applied to an inventoried Goal 5 resource site is among the regulations that “protect a significant Goal 5 resource” for purposes of OAR 660-023-0250(3). Therefore, a substantive amendment to such a zoning classification must be evaluated under the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A “safe harbor” provision at OAR 660-023-0090(8) allowing local governments to adopt ordinances implementing Goal 5 that allow an “existing structure” in a riparian area to be repaired or replaced is not properly interpreted to require a threshold inquiry into whether the “existing structure” was lawfully approved or developed. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** The terms and not the title of a code provision setting forth certain exceptions to prohibited activities in riparian areas control the scope of the exceptions in that provision. LUBA will affirm a hearings officer’s interpretation to that effect where the text and context of the provision indicate that the provision applies more broadly than its title suggests. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Code provisions protecting historic structures that are described in the county’s inventory as significant, important or contributing to the significance of the overall resource are not properly interpreted to protect an accessory structure on the subject property that is not mentioned in the county’s inventory. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A code provision allowing a historic resource to be relocated if it is on land that is “needed to accommodate” a planned transportation project is not properly interpreted in context to require the county to determine if an alternative alignment would not require relocation, where a related code provision prohibits the county from considering alternative alignments. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Remand is appropriate where the local government approves an aggregate mine that appears to impact an inventoried Goal 5 groundwater resource without addressing issues raised below regarding whether the proposed mine complies with local provisions that were adopted to protect Goal 5 resources. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Under OAR 660-023-0180(4)(b) and OAR 660-023-0180(4)(c) a local government may either determine that there are no potential conflicts associated with a proposed aggregate mining proposal or that, although there are potential conflicts associated with the proposed aggregate mining, the conflicts can be minimized. The options available under these two rules are separate and distinct, and a decision that does not make it clear which option is being selected must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Under OAR 660-023-0180(4)(f) where a proposed aggregate mining operation will be located on Class I, II or Unique Farm land, the comprehensive plan must be amended to limit post-mining uses to uses listed under ORS 215.213(1) or 215.283(1) and fish and wildlife habitat uses. A decision authorizing mining that does not so limit post-mining uses must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A committed-exception zone-change decision that acknowledges the existence of Goal 5 resources on the subject property, but concludes that the county's existing Goal 5 plan provisions will address any conflicts, is not adequate to demonstrate compliance with Goal 5, where the findings do not state which of the county's existing Goal 5 plan provisions ensure continued compliance once the exception is taken, and the findings do not consider whether the zone change may introduce the possibility of new conflicting uses. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A land development ordinance amendment adopting a half-acre minimum lot size for a flood hazard zone is not reviewable for compliance with Goal 5 where the acknowledged comprehensive plan calls for a half-acre minimum in the flood hazard zone. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A Goal 5 program requiring a 100-yard setback from the crests of certain moraines satisfies the OAR 660-16-010(3) requirement for "clear and objective standards" where the crest of a moraine can be located using accepted survey techniques. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A Goal 5 program requirement for a "suitable visual buffer" does not satisfy the OAR 660-16-010(3) requirement for "clear and objective standards." Such a requirement must clearly specify the outcome to be achieved by the screening and the vantage point from which the proposed dwelling must be screened. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Where a county has an acknowledged Goal 5 program, which

includes an acknowledged inventory, and rural wetlands are included in a special category that is not part of that inventory, amendments to the county's ordinance that modify protections to rural wetlands do not change the county's procedures for inventorying Goal 5 resources and do not conflict with Goal 5 because they continue to provide interim protection of resources in a special category. *Redland / Viola / Fischer's Mill CPO v. Clackamas County*, 33 Or LUBA 152 (1997).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** LUBA will defer to the local governing body's interpretation that under its code provisions governing permits for the demolition of historic properties, the planning director's determination regarding compliance with pre-application requirements is not reviewable by the historic review board or appealable to the governing body. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Whereas ORS 358.653(1) imposes a duty on state agencies and local governments that have a proprietary interest in historically significant properties to consult with the state Historic Preservation Office prior to seeking demolition of such properties, it does not establish requirements for state agencies and local governments to follow in carrying out their authority to regulate property under the ownership and control of other entities. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** The provisions of ORS 358.920 to 358.950 and 97.740 to 97.760 concerning excavation of archaeological sites are not approval standards a local government must address in approving a planned development, so long as the local government does not approve the planned development in a way that obviates the applicant's responsibility to comply with those statutes, without demonstrating (1) the statutes do not apply to the excavation or construction that may be carried out under the challenged decision, or (2) the statutory requirements have been met. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Code provisions that provide interim resource protection to property not on a local government's acknowledged Goal 5 resource inventories, until the Goal 5 planning process can be carried out, do not implement Goal 5. Therefore, local interpretations of such code provisions are not subject to reversal by LUBA under ORS 197.829(4). *Gage v. City of Portland*, 28 Or LUBA 307 (1994).