

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

JAMES ROOT and VALERIE ROOT,
Petitioners,

VS.

KLAMATH COUNTY,
Respondent,

and

JWTR, LLC,
Intervenor-Respondent.

LUBA No. 2013-008

FINAL OPINION AND ORDER

Appeal on remand from the Court of Appeals.

Gregory S. Hathaway, Portland, represented petitioners.

David P. Groff, County Counsel, Klamath Falls, represented respondent.

Michael C. Robinson and Seth J. King, Portland, represented intervenor-respondent.

RYAN, Board Member; BASSHAM, Board Member, participated in the decision.

HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED 03/26/2014

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

Opinion by Ryan.

This matter is on remand from the Court of Appeals. *Root v. Klamath County*, 260 Or App 665, ___ P3d ___ (2014) (*Root III*).

BACKGROUND

The challenged decision is Ordinance 44.95, a decision by the county amending the Klamath County Comprehensive Plan (KCCP) map and zoning map to add approximately 68,302 acres of land owned by intervenor, subject to a Destination Resort Overlay (DRO). Ordinance 44.95 is the county's second decision amending the KCCP and zoning map.¹ *Root v. Klamath County*, __ Or LUBA __ (LUBA No. 2013-008, August 9, 2013) (*Root II*). The narrow issue that we address in this opinion is petitioners' challenge to the county's application of the Transportation Planning Rule, OAR 660-012-0060.²

13 In *Root I*, we agreed with the petitioners that the county’s application of
14 the TPR was inconsistent with the rule and with *Willamette Oaks, LLC v. City*
15 *of Eugene*, 232 Or App 29, 36, 220 P3d 445 (2009). *Root I* at 249-50.
16 However, recognizing the difficulty in complying with the TPR in the context
17 of a large scale plan or land use regulation amendment, where it is not possible
18 to accurately predict the future effects on transportation facilities of

¹ We remanded the county's first decision in *Root v. Klamath County*, 63 Or LUBA 230 (2011) (*Root I*).

² The TPR provides, in relevant part:

“If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule.”

1 development allowed by such large scale amendments, we posited that the
2 county could comply with the TPR if, in the decision approving the amendment
3 to the KCCP map, the county also applies an overlay district that prohibits
4 development of a destination resort on any of the properties until the overlay
5 district on specific properties is removed through a future post
6 acknowledgement plan amendment, at which time the county would determine
7 whether the amendment to allow one or more specific destination resorts
8 complies with the TPR. *Id.*

9 In the decision challenged in *Root II*, the county imposed a condition of
10 approval that delays the effectiveness of Ordinance 44.95 until the county
11 adopts a separate ordinance that adds the county's Limited Use (LU) overlay
12 district to the same properties that are added to the county's DRO maps in
13 Ordinance 44.95. That condition provides:

14 “This decision is final for purposes of appeal but shall not be
15 effective for purposes of amending the [KCCP] Map and the
16 Klamath County Land Development Code [KCLDC] Map to add
17 approximately 68,302 acres to the Plan and zoning maps until such
18 time as the County imposes the Limited Use ('LU') Overlay
19 zoning district to those same properties in a post-
20 acknowledgement plan amendment proceeding and provides in
21 that post-acknowledgement plan amendment proceeding that the
22 LU Overlay zone shall not allow any new uses allowed by the
23 destination resort overlay designation until such time as the LU is
24 removed in a subsequent post-acknowledgement plan amendment
25 proceeding that demonstrates compliance with the then-applicable
26 provisions of the TPR. The effect of this condition is that no new
27 uses are allowed by this decision and, therefore, as a matter of law
28 pursuant to OAR 660-012-0060(1), this decision does not
29 significantly affect any transportation facility.” Record 32.

30 In the fourth assignment of error in *Root II*, petitioners argued that the county's
31 use of the LU overlay zone set out in KCLDC Article 59.8 is not effective to

1 limit development of a destination resort on the properties because the LU
2 overlay zone only applies to limit uses allowed in the underlying zone, and
3 does not limit uses allowed in another overlay zone, such as the DRO. In *Root*
4 *II*, we did not reach the fourth assignment of error. We held:

5 “We agree with intervenor that it is premature for us to address
6 petitioners’ challenges to availability of the LU overlay zone to
7 limit development allowed by the DRO, since the county has not
8 yet imposed the LU overlay zone on the properties that are the
9 subject of Ordinance 44.95.” *Root II* at slip op 13.

10 In *Root III*, the Court of Appeals agreed with petitioners that we erred in
11 rejecting as premature petitioners’ challenge to the county’s determination that
12 the proposed map amendments satisfy the TPR:

13 “Contrary to LUBA’s conclusion, there was nothing ‘premature’
14 about petitioners’ challenge to the county’s determination that the
15 amendment to the maps would not significantly affect a
16 transportation facility. * * * [W]e reverse and remand to LUBA to
17 address the merits of petitioners’ contention that the county erred
18 when it determined that the amendment to the maps would not
19 significantly affect a transportation facility.” *Root III*, 260 Or App
20 at 674.

21 We now address the merits of petitioners’ fourth assignment of error.

22 **FOURTH ASSIGNMENT OF ERROR**

23 In their fourth assignment of error in *Root II*, petitioners argue:

24 “While [p]etitioners understand the suggestion by LUBA in *Root*
25 *[I]*, in this particular case, the County is not authorized to apply its
26 LU Overlay Zone to another overlay zone such as the DRO.
27 KCLDC 59.810 (Purpose) specifically provides that the purpose of
28 the Limited Use Overlay is to limit permitted uses allowed in the
29 *underlying zone*. KCLDC 59.820 (Application) specifically
30 provides that *uses permitted in the underlying zone shall be*
31 *limited* and the LU Overlay shall not be used to authorize uses not
32 expressly provided for in the *underlying zone*.

1 “The express language in these sections are unambiguous – the
2 Limited Use Overlay Zone can only be applied to *limit* uses in the
3 *underlying zone* – not to another overlay zone. The underlying
4 zones for the proposed DRO areas are either rural or resource
5 zones. The DRO, by its own terms, is an overlay zone. As such,
6 the County is not authorized under KCLDC 2.040(A) to impose a
7 condition applying the LU Overlay to DRO properties in violation
8 of KCLDC Article 59.8.

9 “Since this condition is unlawful, Intervenor and the County were
10 required to demonstrate compliance with the TPR consistent with
11 LUBA’s decision in *Root [I]*. The County cannot take advantage
12 of LUBA’s suggestion due to the express limitations in the LU
13 Overlay zone. Because there is not evidence in the current record
14 demonstrating compliance with the TPR, the County’s conclusion
15 there is compliance with the TPR is not supported by an adequate
16 factual base.” Petition for Review 14 (emphases in original).

17 Intervenor responds that the plain language of KCLDC 59.810 allows the
18 county to apply the LU overlay zone to prohibit destination resort uses until a
19 subsequent PAPA removes the overlay zone. We agree.

20 KCLDC 59.810 – Purpose provides:

21 “The purpose of the Limited Use Overlay is to limit permitted uses
22 allowed in the underlying zone to only those uses which are
23 justified in a required ‘exception statement’ or, in the case where a
24 statement is not required, testimony and evidence gathered in the
25 review process, *or to prohibit certain uses until allowed by a*
26 *subsequent post-acknowledgment amendment to remove the*
27 *Limited Use Overlay.*” (Emphasis added.)

28 Petitioners rely on the first purpose of the LU overlay zone set out in KCLDC
29 59.810 to support their contention that “the County is not authorized to apply
30 its LU Overlay Zone to another overlay zone such as the DRO.” Petition for
31 Review 14. But petitioners’ argument fails to recognize the second purpose of
32 the LU overlay zone: “to prohibit certain uses until allowed by a subsequent
33 post-acknowledgment amendment to remove the Limited Use Overlay.” The

1 second part of KCLDC does not include the phrase “allowed in the underlying
2 zone” after the phrase “certain uses.” It allows the LU overlay zone to entirely
3 “prohibit certain uses” until the LU overlay zone is removed. When KCLDC
4 59.810 is read in its entirety, it is clear that the county intends the LU overlay
5 zone to be used (1) to limit uses allowed in the underlying zone, in the context
6 of an approval of an exception to a statewide planning goal, to uses “justified in
7 [the] exception statement” or in testimony and evidence gathered in the
8 county’s review of the exception application; or (2) to prohibit “certain uses”
9 until the LU overlay zone is removed in a subsequent PAPA process.

10 Petitioners also cite and rely on KCLDC 59.820(C) to support their
11 argument. KCLDC 59.820(C) provides:

12 “Uses permitted in the underlying zone shall be limited to those
13 uses specifically referenced in the comprehensive plan
14 amendment/zone change and the accompanying exception
15 statement, *or certain uses shall be prohibited until allowed by a*
16 *subsequent post-acknowledgment to remove the Limited Use*
17 *Overlay.*” (Emphasis added.)

18 As with KCLDC 59.810, KCLDC 59.820(C) allows the county to limit uses
19 permitted in the underlying zone to uses approved in an exception process, and
20 also permits the county to use the LU overlay zone to prohibit “certain uses,”
21 i.e. destination resort uses, until the LU overlay zone is removed in a
22 subsequent PAPA proceeding. The LU Overlay zone is available to the county
23 to prohibit “certain uses,” i.e. “destination resort uses” of the properties until
24 the LU overlay is removed, and the county’s condition is not unlawful.

25 The fourth assignment of error is denied.

26 The county’s decision is affirmed.