

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STEVE LARSON, and WALLOWA LAKE)
5 LODGE, INC., an Oregon corporation,)

6)
7 Petitioners,)
8)
9 vs.)

 FINAL OPINION
 AND ORDER

10
11 WALLOWA COUNTY,)

12)
13 Respondent,)
14)
15 and)
16)
17 DAN GILE AND ASSOCIATES, INC.,)
18 LAKESIDE DEVELOPMENT CO., dba JOSEPH)
19 POINT DEVELOPMENTS, and OREGONIANS)
20 IN ACTION,)
21)
22 Intervenors-Respondent.)
23)
24)
25 BEN BOSWELL, DAVID S. JACKMAN,)
26 ROBERT PERRY, M. KENNETH ROBERTS,)
27 and STEVE A. ZOLLMAN,)
28)
29 Petitioners,)
30)
31 vs.)
32)
33 WALLOWA COUNTY,)
34)
35 Respondent,)
36)
37 and)
38)
39 DAN GILE AND ASSOCIATES, INC.,)
40 LAKESIDE DEVELOPMENT CO., dba JOSEPH)
41 POINT DEVELOPMENTS, and OREGONIANS)
42 IN ACTION,)
43)
44 Intervenors-Respondent.)
45)

LUBA No. 92-008

LUBA No. 92-009

1)
2 1000 FRIENDS OF OREGON, NEZ PERCE)
3 TRIBE, CONFEDERATED TRIBES OF THE)
4 UMATILLA INDIAN RESERVATION, JEAN)
5 PEKAREK, PATTY GOEBEL, ANNETTE)
6 ASCHENBRENNER, EDNA ASCHENBRENNER,)
7 ANNE BELL, DARREN CHITWOOD, FRANK)
8 CONLEY, SUSAN CONLEY, STANLYNN)
9 DAUGHERTY, PATRICE DONOVAN, MILDRED)
10 FRASER, BENNIE J. GOCKLEY, MARLENE)
11 GOCKLEY, MARILYN GOEBEL, SALLY)
12 GOEBEL, KARLA HOLME, MAC HUFF,)
13 ROBERT H. JACKSON, DAVID A. JENSEN,)
14 CARLENE JOHNSON, MARGARET KRICHBAUM,)
15 RANDY KRICHBAUM, DUNCAN LAGOE,)
16 MIRIAM E. LAGOE, INEZ MEYERS,)
17 CELINDA MILLER, LARRY MILLER, SARA)
18 MILLER, JEFF MOORE, MARV RITTER, DAN)
19 STANEK, LESLIE THIES, RON THIES,)
20 RICH WANDSCHNEIDER, JEAN WIGGINS,)
21 DEBBIE WILLIAMSON, GENE WILLIAMSON,)
22 SHARON ZOLLMAN, and DELWYN ZOLLMAN,)
23)
24 Petitioners,) LUBA No. 92-011
25)
26 vs.)
27)
28 WALLOWA COUNTY,)
29)
30 Respondent,)
31)
32 and)
33)
34 DAN GILE AND ASSOCIATES, INC.,)
35 LAKESIDE DEVELOPMENT CO., dba JOSEPH)
36 POINT DEVELOPMENTS, and OREGONIANS)
37 IN ACTION,)
38)
39 Intervenors-Respondent.)
40 _____)
41)
42 DEPARTMENT OF LAND CONSERVATION)
43 AND DEVELOPMENT,)
44)
45 Petitioner,)
46)

1 vs.)
2)
3 WALLOWA COUNTY,) LUBA No. 92-013
4)
5 Respondent,)
6)
7 and)
8)
9 DAN GILE AND ASSOCIATES, INC.,)
10 LAKESIDE DEVELOPMENT CO., dba JOSEPH)

1 POINT DEVELOPMENTS, and OREGONIANS)
2 IN ACTION,)
3)
4 Intervenor-Respondent.)
5
6

7 Appeal from Wallowa County.
8

9 Marc Zwerling, Portland, filed a petition for review
10 and argued on behalf of petitioners Larson, et al. With him
11 on the brief was Winfree, Fearey & Zwerling. Steve Larson
12 argued on his own behalf.
13

14 Steven H. Corey, Pendleton, filed a petition for review
15 and argued on behalf of petitioners Boswell, et al. With
16 him on the brief was Corey, Byler, Rew, Lorenzen & Hojem.
17

18 Blair Batson and Mary Kyle McCurdy, Portland, filed a
19 petition for review and argued on behalf of petitioners
20 1000 Friends of Oregon, et al.
21

22 Jane Ard, Assistant Attorney General, Salem, filed a
23 petition for review and argued on behalf of petitioner
24 Department of Land Conservation and Development. With her
25 on the brief was Charles S. Crookham, Attorney General; Jack
26 Landau, Deputy Attorney General; and Virginia L. Linder,
27 Solicitor General.
28

29 No appearance by respondent.
30

31 D. Rahn Hostetter, Enterprise, filed a response brief
32 and argued on behalf of intervenors-respondent Dan Gile and
33 Associates, Inc., et al. With him on the brief was Mautz
34 Hallman Baum & Hostetter.
35

36 David B. Smith, Tigard, filed a response brief and
37 argued on behalf of intervenor-respondent Oregonians In
38 Action.
39

40 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
41 Referee, participated in the decision.
42

43 REMANDED 07/31/92
44

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

1 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the Wallowa County
4 Court approving a zone change from Exclusive Farm Use (EFU)
5 to Recreation Residential (R-2) and a preliminary plat for a
6 26-lot subdivision.

7 **MOTIONS TO INTERVENE**

8 Dan Gile and Associates, Inc. and Lakeside Development
9 Co., dba Joseph Point Developments, the applicants below,
10 move to intervene on the side of respondent in this
11 consolidated proceeding. Oregonians in Action also moves to
12 intervene on the side of respondent. There are no
13 objections to the motions, and they are allowed.

14 **MOTION TO SUPPLEMENT THE RECORD/MOTION TO STRIKE**

15 Intervenors-respondent Dan Gile and Associates, Inc.,
16 et al (hereafter intervenors Gile), move to supplement the
17 local record in this proceeding with (1) an assessor's map
18 of Township 3S, Range 45E, Wallowa County; and (2) City of
19 Joseph Comprehensive Plan, pages 55-65, entitled
20 "XIV. Urbanization." Intervenors Gile's motion is supported
21 by an affidavit by intervenors Gile's attorney.

22 Petitioners do not object to intervenors Gile's motion
23 to supplement the local record with the two documents
24 described above. However, petitioners 1000 Friends of
25 Oregon, et al (petitioners 1000 Friends), object to the
26 inclusion of intervenors Gile's attorney's affidavit in the

1 local record. Petitioners 1000 Friends move to strike
2 certain portions of that affidavit from the record, on the
3 basis that these portions of the affidavit constitute
4 testimony to this Board that was not placed before the local
5 government decision maker below.

6 As we understand it, intervenors Gile's attorney's
7 affidavit is submitted to us solely as argument in support
8 of the motion to supplement the record. It is not submitted
9 for inclusion in the local record or as evidentiary
10 testimony to this Board. Our decision in this proceeding is
11 based on the evidence in the local record, the applicable
12 law and the arguments in the parties' briefs. Petitioners
13 1000 Friends' motion provides no basis for striking the
14 affidavit from the record of this Board's proceeding.

15 The motion to supplement the record is granted. The
16 motion to strike is denied.

17 **FACTS**

18 The property that is the subject of the proposed zone
19 change from EFU to R-2 consists of 24 acres located near the
20 north end of Wallowa Lake. Wallowa Lake occupies a trough
21 formed by an ice age glacier. It is adjoined by glacial
22 moraines to the west, east and north. The subject property
23 is located predominantly on the south side of the northern
24 moraine, facing the lake, but extends over the crest of the
25 moraine. Whether this northern moraine should be considered
26 an extension of the eastern lateral moraine, or a separate

1 terminal moraine, is a matter of dispute.

2 The subject property is undeveloped. It is within the
3 boundaries of the Wallowa Lake County Service District
4 (WLCSD), which provides sewer service. Whether the subject
5 property consists of predominantly U.S. Soil Conservation
6 Service Class VI or VII soils is in dispute. Whether the
7 subject property is designated Exclusive Farm Use or
8 Recreational Residential by the Wallowa County comprehensive
9 plan (plan) is also a matter of dispute.

10 Property to the north and northeast of the subject
11 property is zoned EFU. Property to the southeast, south and
12 southwest is zoned R-2. Property to the northwest is within
13 the urban growth boundary (UGB) of the City of Joseph and is
14 zoned Urban Growth (UG). The property adjoining the subject
15 property to the north is used for grazing. To the south of
16 the subject property is a recreational residential
17 subdivision, with houses on lots of approximately 1/2 to 1
18 acre. The property within the Joseph UGB to the northwest
19 is the site of a proposed destination resort.

20 On September 6, 1991, intervenors Gile applied to the
21 county for approval of the proposed zone change and of the
22 preliminary plat for a 32-lot subdivision on 28 acres,
23 including the 24 acres subject to the proposed zone change
24 and an adjacent four acre parcel to the southeast already
25 zoned R-2. The preliminary plat submitted with the
26 application, Record Map A-2 (dated August 1991), shows 32

1 residential lots, ranging in size from 0.5 to 1.2 acres, and
2 a 1.5 acre lot labeled "Public Use Monument Site."¹ A
3 revised preliminary plat, Record Map A-3 (dated October 29,
4 1991), shows the area north of the crest of the moraine
5 along the northern boundary of the subject property as one
6 large lot, 31 residential lots ranging in size from
7 approximately 0.3 acres to 1.2 acres, and the 1.5 acre
8 monument site lot.

9 On October 29, 1991, after a public hearing, the county
10 planning commission adopted a recommendation to deny the
11 proposed zone change. Because it recommended denial of the
12 zone change, the planning commission took no action on the
13 subdivision application. Record 14, 180.

14 On December 26, 1991, after additional public hearings,
15 the county court adopted the challenged decision approving
16 both the zone change and a preliminary plat for the proposed
17 subdivision. However, the identity of the preliminary plat
18 approved by the county court is unclear. The county court's
19 decision states it approves the preliminary plat for a
20 26-lot subdivision.² Record 3, 16. We are not aware of any

¹The lot labeled "Public Use Monument Site" is at the western end of the property, located across the adjoining highway from the Chief Joseph Monument.

²The decision also states the "zone change is conditioned upon recording of [the] final plat or plats within the time allowed by the zoning ordinance [WCZO] with no change in the number of lots." (Emphasis added.) Record 16. In addition, a condition of preliminary plat approval provides that "[t]he portion of the property lying north of the ridge of the moraine [shall] be designated common area - open space." Record 16. Another

1 preliminary plat in the record that fits this description.³

2 **FIRST ASSIGNMENT OF ERROR (1000 FRIENDS)**

3 "The county violated its comprehensive plan by
4 rezoning a portion of the property for a use not
5 authorized by [its] plan designation."

6 Petitioners contend the subject property is designated
7 Exclusive Farm Use by the county comprehensive plan.
8 Petitioners argue that in Confederated Tribes v. Wallowa
9 County, 14 Or LUBA 92, 94-96 (1985) (Confederated Tribes),
10 this Board recognized the county's Land Use Classifications
11 Map (plan, p. 4A) has too large a scale to be usable in
12 determining the plan classifications applied to specific
13 properties. Petitioners argue that in Confederated Tribes,
14 this Board relied on smaller scale maps of land use
15 designations around UGB areas found in the urbanization
16 section of the plan. Petitioners contend plan Plate XIVD
17 "Joseph Growth Boundary" shows that only a narrow strip of
18 land north of Wallowa Lake, which does not include the
19 subject property, is designated Recreational Residential.

20 Petitioners also argue the plan provides that lands
21 shown on the plan Soil Capabilities map (plan, p. 16A) as
22 Class I through VI soils are designated for agricultural

condition provides that the "north lot lines of the northernmost tier of
lots [shall] be ten feet south of the crest of the moraine." Id.

³Although the October 29, 1991 revised preliminary plat might satisfy
the conditions described in n 2, were the large lot located north of the
crest of the moraine designated as common open space, it cannot be the
preliminary plat approved by the county court, because it includes 31
residential lots.

1 use, unless an exception to Statewide Planning Goal 3
2 (Agricultural Lands) was adopted, allowing designation for
3 rural residential use. Petitioners contend that because the
4 Soil Capabilities map identifies the subject property as
5 Class VI, and no exception to Goal 3 was taken,⁴ the
6 property must be designated Exclusive Farm Use.

7 Petitioners argue that the R-2 zoning district cannot
8 be applied to land designated Exclusive Farm Use on the plan
9 map, because it allows uses more intensive than are
10 permitted under that plan map designation. According to
11 petitioners, because the county did not amend the Exclusive
12 Farm Use plan map designation for the subject property, the
13 challenged zone change must be reversed.

14 Intervenors Gile and Oregonians in Action (intervenors)
15 concede that property designated Exclusive Farm Use by the
16 county plan cannot be zoned R-2. However, intervenors
17 contend the county properly determined that both the plan
18 Land Use Classifications map and Generalized Land Use map
19 (plan, p. 80E) designate the subject property Recreational
20 Residential. Intervenors contend this case is
21 distinguishable from Confederated Tribes because, with
22 regard to the area at issue here, the boundary between the

⁴Petitioners point out that the county plan includes an irrevocably committed exception to Goal 3 for the recreational residential subdivision adjoining the subject property to the south. Plan, p. 129. Petitioners contend there is no corresponding exception in the plan for the subject property.

1 Exclusive Farm Use and Recreational Residential designations
2 on the plan Land Use Classifications map happens to coincide
3 with a line dividing Townships 2S and 3S. Intervenors argue
4 the preliminary plats and assessor's maps in the record
5 establish that the entire subject property is located south
6 of this township line and, therefore, that the subject
7 property is designated Recreational Residential on the plan
8 Land Use Classifications map.

9 The county comprehensive plan consists of the
10 following:

11 "1. Plan map and description of land use
12 classifications.

13 "2. The plan background information and related
14 policies.

15 "3. Recommended measures of implementation
16 resulting from background information
17 analysis, statements of policy or plan map
18 revisions." Plan, p. 2.

19 The Land Use Classifications map and descriptions of "the
20 purposes and the types of uses encompassed" by each of the
21 classifications shown on the map are contained in the
22 section of the plan immediately following the text quoted
23 above. Plan, pp. 3-5. Therefore, we conclude the Land Use
24 Classifications map is the "plan map" referred to above.

25 The Land Use Classifications map depicts the entire
26 county, which appears to be at least 60 miles X 50 miles in

1 size, on an 8 1/2 X 11 inch page.⁵ Although this map bears
2 no scale, it appears from the grid of township and range
3 lines displayed on the map that 1 inch equals approximately
4 9 miles. As near as we can tell, the lines in black ink
5 which separate the different color designations on the
6 printed map themselves cover 400 to 500 feet, which is over
7 half the north-south width of the subject property at its
8 widest point. It is clear that a plan map at this scale is
9 not property-specific, regardless of the happenstance that
10 the black line separating the Exclusive Farm Use and
11 Recreational Residential classifications in the subject area
12 touches the line separating Townships 2S and 3S.

13 Because the classification boundaries on the county's
14 plan map are not property-specific, we conclude they are
15 ambiguous in nature and, therefore, as with ambiguous
16 textual provisions in local legislation, the county must
17 interpret and apply them in the first instance.⁶ Fifth

⁵The parties agree that the 8 1/2 X 11 inch Land Use Classifications map found in the county plan document is the county's official map, and not merely a reproduction of a larger map on file in the county's offices.

⁶Construction of local legislation is subject to the same rules that apply to statutory construction. Lane County v. Heintz Construction Co., 288 Or 152, 364 P2d 627 (1961); City of Hillsboro v. Housing Devel. Corp., 61 Or App 484, 489, 657 P2d 726 (1983); Sevcik v. Jackson County, 16 Or LUBA 710 (1988). For example, different provisions of the plan should be construed together in a manner which gives meaning to all parts. Kenton Neighborhood Assoc. v. City of Portland, 17 Or LUBA 784, 797 (1989); Highlands Neighborhood Assoc. v. Portland, 11 Or LUBA 189, 193 (1984). In construing ambiguous provisions, such as the plan map at issue here, the county may rely on extrinsic aids, such as legislative history, to determine legislative intent. 1000 Friends of Oregon v. LCDC (Tillamook

1 Avenue Corp. v. Washington Co., 282 Or 591, 599, 581 P2d 50
2 (1984); J.C. Reeves Corp. v. Clackamas County, ___ Or LUBA
3 ___ (LUBA No. 91-072, November 20, 1991), slip op 11, aff'd
4 111 Or App 452 (1992); Mental Health Division v. Lake
5 County, 17 Or LUBA 1165, 1176 (1989). The county did not do
6 so in the challenged decision. The decision includes merely
7 a conclusory statement that the proposed zone change is in
8 conformance with the plan map.⁷ Record 12.

9 Petitioners 1000 Friends' first assignment of error is
10 sustained. This requires that we remand the challenged
11 decision for the county to interpret and apply its plan map
12 to the subject property. Furthermore, because the
13 determination of whether the county's acknowledged
14 comprehensive plan designates the subject property Exclusive
15 Farm Use or Recreational Residential has a direct bearing on
16 how several of the Statewide Planning Goal and county plan
17 provisions cited by the parties apply to the subject
18 property, we address the remaining assignments of error only
19 to the extent the issues raised are not affected by the

County), 303 Or 430, 441, 737 P2d 607 (1987); Davis v. Wasco IED, 286 Or
261, 266, 593 P2d 1152 (1979); Hay v. City of Cannon Beach, 17 Or LUBA 322,
326 (1988).

⁷The decision does include a finding that the subject property is designated as "rural land" on the Generalized Land Use map found at plan, p. 80E. Record 8. However, as explained in the text, supra, it is the Land Use Classifications map that is the official "plan map," and the county's decision does not explain the role of the Generalized Land Use map in the plan, or what bearing a designation of "rural land" on such map has on the question of how the Land Use Classifications map designates the subject property.

1 subject property's plan map designation.

2 **FIRST AND SECOND ASSIGNMENTS OF ERROR (LARSON)**

3 **THIRD AND FOURTH ASSIGNMENTS OF ERROR (1000 FRIENDS)**

4 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR (BOSWELL)**

5 "Respondent violated Goal 5 and OAR 660-16-000 and
6 provisions of its comprehensive plan for
7 protection of natural areas."

8 Statewide Planning Goal 5 (Open Spaces, Historic and
9 Scenic Areas, and Natural Resources) and OAR 660-16-000 et
10 seq (Goal 5 rule) require local governments to (1) inventory
11 the location, quality and quantity of certain types of
12 natural resources, including "scientifically significant
13 natural areas;" (2) identify conflicting uses for such
14 areas; (3) determine the economic, social, environmental and
15 energy (ESEE) consequences of such conflicts; and
16 (4) develop a program to achieve the goal of protecting the
17 resource.⁸ Knapp v. City of Jacksonville, 20 Or LUBA 189,
18 197 (1990). After a local government completes the first
19 step of gathering information on the location, quality and
20 quantity of resources, it may choose not to include a site
21 on its Goal 5 inventory, to delay the Goal 5 process because
22 of inadequate information, or to include a site on its

⁸The statewide planning goals and their implementing rules apply to the proposed zone change regardless of whether a plan map amendment for the subject property is required. WCZO 8.025.1.A requires major amendments to the WCZO to comply with the statewide planning goals. WCZO 8.010 provides that amendments to the zoning map affecting areas of more than 10 acres are major amendments.

1 Goal 5 inventory. OAR 660-16-000(5). These three choices
2 are often referred to as "1A," "1B" and "1C" decisions,
3 respectively.⁹ With regard to the 1B alternative,
4 OAR 660-16-000(5)(b) provides:

5 "Delay Goal 5 Process: When some information is
6 available, indicating the possible existence of a
7 resource site, but that information is not
8 adequate to identify with particularity the
9 location, quality and quantity of the resource
10 site, the local government should only include the
11 site on the comprehensive plan inventory as a
12 special category. The local government must
13 express its intent relative to the resource site
14 through a plan policy to address that resource
15 site and proceed through the Goal 5 process in the
16 future. The plan should include a time-frame for
17 this review. Special implementing measures are
18 not appropriate or required for Goal 5 compliance
19 purposes until adequate information is available
20 [to complete the Goal 5 process]. The statement
21 in the plan commits the local government to
22 address the resource site through the Goal 5
23 process in the post-acknowledgment period. Such
24 future actions could require a plan amendment."

25 The county plan inventory of "scenic and scientific
26 natural areas" includes the following entry:

27	<u>Location</u>	<u>Goal 5</u>	<u>Area/Site</u>	<u>Ownership</u>
28		<u>Desig.</u>		
29	"3S, 45E	1B	East Moraine	Private
30	"4,9,16,21		Wallowa Lake	
31	<u>Remark:</u>	USGS identified as Natl Geological		
32	Landmark."	Record 136.		

33 The plan describes the 1B Goal 5 designation as follows:

⁹These designations are taken from the "Flow Chart" accompanying the Goal 5 rule.

1 "Some information is available[,] but inadequate
2 to identify the resource site; adopt plan
3 statement to address resource site and Goal 5
4 process in the future." Plan, p. 29.

5 Plan Natural Resource policy 10 states:

6 "The county will complete the Goal Five rule
7 process when information becomes available for
8 eighteen sites and resources [given a 1B
9 designation by the plan]."

10 Additionally, plan Natural Resources policy 4 provides:

11 "[T]he Wallowa Lake Basin Moraines [shall] be
12 preserved as scientific natural areas, significant
13 to the County, State and nation."

14 Under these assignments of error, petitioners contend
15 the county failed to comply with the requirements of Goal 5,
16 OAR 660-16-000 and plan Natural Resources policies 4 and 10
17 with regard to the Wallowa Lake moraines. Petitioners
18 specifically argue the county failed to (1) consider whether
19 the moraine on the subject property is simply an extension
20 of the east moraine and should be included in the scientific
21 natural area identified in the plan Goal 5 inventory,
22 (2) complete the Goal 5 planning process for the moraines,
23 and (3) consider whether the proposed zone change and
24 subdivision would adversely affect the scientific natural
25 area qualities of the moraines.

26 **A. Inclusion in Plan Goal 5 Inventory**

27 The challenged decision states:

28 "[The subject property] is not within the area
29 intended to be protected by the Plan and Goal 5.
30 The Goal 5 inventory portion of the Plan set out
31 in Appendix VA at Page 136 establishes the legal

1 description of the area on the Wallowa Lake
2 moraine which is given a '1B' classification. The
3 [subject property] is not within that area. * * *
4 Objectors have urged us to reassess the Goal 5
5 inventory for possible expansion before this
6 application is ruled upon or granted. We cannot
7 do so. Urquhart v. Lane Council of Governments,
8 80 Or App 176, 721 P2d 870 (1986). Nor would we
9 choose to do so." Record 12-13.

10 With regard to petitioners' contention that the subject
11 property should be included in the East Moraine site
12 identified in the plan Goal 5 inventory, the above quoted
13 portion of the challenged decision clearly indicates the
14 county interpreted its plan Goal 5 inventory entry for "East
15 Moraine Wallowa Lake" to include only those sections listed
16 as the location of that site.¹⁰ We see no reason to
17 disagree with the county's interpretation of its Goal 5
18 inventory on this point. If the subject property is not
19 included in the Goal 5 inventory of the acknowledged plan,
20 and the proposed zone change does not itself affect that
21 inventory, the county is not required to consider whether
22 the subject property should be included on that inventory.
23 See Urquhart v. Lane Council of Governments, supra.

24 This subassignment of error is denied.

25 **B. Completion of Goal 5 Process**

26 OAR 660-16-000(5)(b) requires a local government to
27 adopt a plan policy "to address [the 1B] resource site and

¹⁰There is no dispute that the subject property is located in Township 3S, Range 45E, section 5, which is not one of the sections identified in the plan inventory entry quoted above.

1 proceed through the Goal 5 process in the future." Natural
2 Resources policy 10 requires that the county complete the
3 Goal 5 process for 1B sites "when information becomes
4 available." Petitioners contend these provisions require
5 the county to complete the Goal 5 process in the course of a
6 quasi-judicial zone change and permit proceeding where
7 sufficient additional information concerning the 1B resource
8 is submitted. Petitioners contend information submitted
9 during the proceeding below concerning the Wallowa Lake
10 moraines is sufficient to allow the county to complete its
11 Goal 5 planning process for this resource. Petitioners
12 argue that even if the subject property is not included in
13 the resource site, it may be within the "impact area"
14 affecting the inventoried resource, required to be
15 identified under OAR 660-16-000(2).

16 The issue to be decided under this subassignment is
17 whether OAR 660-16-000(5)(b) and plan Natural Resources
18 policy 10 require the county to complete its Goal 5 planning
19 process for the "1B" East Moraine site identified in its
20 inventory, as part of its decision on the subject zone
21 change and subdivision application. Neither the rule nor
22 the plan policy explicitly provides whether the county is
23 required to complete the Goal 5 process as part of a
24 quasi-judicial zone change or permit proceeding, should
25 sufficient information be submitted during that proceeding,
26 or whether the county is simply required to complete the

1 Goal 5 process as part of some future legislative plan
2 update proceeding.

3 OAR 660-16-000(5)(b) requires local governments to
4 adopt plan provisions requiring them to complete the Goal 5
5 planning process for "1B" resource sites in the future,
6 sometime during the postacknowledgment period.
7 OAR 660-16-000(5)(b) also suggests these plan provisions
8 "should include a time frame for this review." This implies
9 the rule contemplates the adoption of plan provisions
10 establishing a proposed schedule for completing the Goal 5
11 process as part of its legislative plan update process,
12 rather than in conjunction with a specific development
13 application. Plan Natural Resources policy 10 implements
14 this rule requirement by providing the county will complete
15 the Goal 5 process "when information becomes available." We
16 believe this policy, like the rule, contemplates completion
17 of the Goal 5 process in a plan update proceeding, not as
18 part of a quasi-judicial proceeding on a development
19 application.

20 This subassignment of error is denied.

21 **C. Preservation of the Moraines**

22 Petitioners contend plan Natural Resource policy 4,
23 which refers simply to "the Wallowa Lake Basin Moraines,"
24 requires the county to preserve all Wallowa Lake moraines as
25 scientific natural areas, not just the East Moraine
26 identified in the plan Goal 5 inventory. According to

1 petitioners, because the subject property is part of the
2 northern, or terminal, Wallowa Lake moraine, the county
3 cannot approve the subject zone change and subdivision
4 without determining that the scientific natural area
5 qualities of this northern moraine will be preserved.
6 Petitioners also argue that even assuming Goal 5, the Goal 5
7 rule and plan Natural Resources policy 4 apply only to the
8 east moraine, the county failed to determine whether the
9 proposed zone change and subdivision, which are located
10 within 1/4 mile of the east moraine, would adversely affect
11 its scientific natural area qualities.

12 With regard to the first issue, intervenors point out
13 that Natural Resources policy 4 was adopted in 1977, long
14 before the adoption of the scientific natural area "1B"
15 Goal 5 inventory listing for "East Moraine Wallowa Lake" and
16 Natural Resources policy 10. Intervenors argue these plan
17 provisions should be interpreted together as requiring the
18 county to preserve scientific natural area qualities of the
19 east moraine identified as a possible scientific natural
20 area on the plan inventory, pending completion of the Goal 5
21 process, pursuant to Natural Resources policy 10. We agree
22 with intervenors.

23 With regard to the second issue, we also agree with
24 intervenors that neither Goal 5 nor OAR 661-16-000 requires
25 a local government to protect a resource area which is the
26 subject of a 1B designation in the plan Goal 5 inventory.

1 However, as explained above, plan Natural Resources policy 4
2 does require the county to preserve the east moraine as a
3 scientific natural area. The decision fails to address
4 whether the proposed zone change and subdivision is
5 consistent with this requirement.

6 This subassignment of error is sustained, in part.

7 Petitioners Larson's first and second assignments of
8 error, petitioners 1000 Friends' third and fourth
9 assignments of error and petitioners Boswell's fourth and
10 fifth assignments of error are sustained, in part.

11 **FIFTH ASSIGNMENT OF ERROR (1000 FRIENDS)**

12 **SIXTH ASSIGNMENT OF ERROR (BOSWELL)**

13 **FOURTEENTH ASSIGNMENT OF ERROR (LARSON)**

14 Plan Natural Resources policy 11 provides that the
15 county "will address Goal [5] rule requirements when
16 significant archaeological sites are discovered on private
17 lands." Under these assignments of error, petitioners
18 contend the county's determination that there are no
19 significant archaeological sites on the subject property is
20 not supported by substantial evidence in the record.¹¹

¹¹The county's finding states:

"Historic, ethnographic and ethnohistoric and archaeological data indicate that historic and prehistoric Native American populations have occupied lands immediately adjacent to the parcel. However, not a single piece of chipping waste, glass fragment, ceramic fragment, nail or any other historic or prehistoric artifact has been found on the parcel. There is no convincing evidence that the parcel was occupied or utilized by Native Americans." Record 9.

1 Therefore, according to petitioners, under plan Natural
2 Resources policy 11, the county erred by not applying the
3 Goal 5 rule process to the archaeological sites on the
4 subject property.

5 Intervenor do not dispute that plan Natural Resources
6 policy 11 would require the county to address the
7 requirements of the Goal 5 rule in its decision on the
8 subject application, if there were significant
9 archaeological sites on the subject property. Rather,
10 intervenors argue the county's determination that there are
11 no significant archaeological sites on the subject property
12 is supported by substantial evidence in the whole record.

13 In Angel v. City of Portland, ___ Or LUBA ___ (LUBA
14 No. 91-192, February 14, 1992), slip op 14-15, aff'd 113
15 Or App 169 (1992), we stated:

16 "Substantial evidence is evidence a reasonable
17 person would rely on in reaching a decision. City
18 of Portland v. Bureau of Labor and Ind., 298 Or
19 104, 119, 690 P2d 475 (1984); Bay v. State Board
20 of Education, 233 Or 601, 605, 378 P2d 558 (1963);
21 Van Gordon v. Oregon State Board of Dental
22 Examiners, 63 Or App 561, 567, 666 P2d 276 (1983);
23 Braidwood v. City of Portland, 24 Or App 477, 480,
24 546 P2d 777 (1976). Where we conclude a
25 reasonable person could reach the decision made by
26 the local government, in view of all the evidence
27 in the record, we defer to the local government's
28 choice between conflicting evidence. Younger v.

Although the above quoted finding does not specifically refer to
"significant archaeological sites," the parties contend this finding
constitutes a determination that there are no such sites subject to plan
Natural Resources policy 11 on the subject property, and we agree.

1 City of Portland, supra, 305 Or at 360; Wissusik
2 v. Yamhill County, supra; Vestibular Disorder
3 Consult. v. City of Portland, 19 Or LUBA 94, 103
4 (1990); Douglas v. Multnomah County, [18 Or LUBA
5 607, 617 (1990)]."

6 In addition, the choice between different reasonable
7 conclusions based on the evidence in the record belongs to
8 the local government. Stefan v. Yamhill County, 18 Or LUBA
9 820, 838 (1990).

10 We have reviewed the evidence in the record cited by
11 the parties. The evidence indicates that the north end of
12 Wallowa Lake was used extensively by the Nez Perce tribe as
13 fishing and camping grounds. Record 158. According to the
14 Confederated Tribes of the Umatilla Indian Reservation,
15 "campsites and burial sites are located throughout the
16 Wallowa Lake area." Record 273. An archaeological survey
17 was performed by two archaeologists. Their report states
18 that their intensive subsurface investigation "failed to
19 reveal any significant evidence of prehistoric occupation."
20 Record 638. However, they did find two rock cairns which
21 "closely resemble those known to be associated with Native
22 American burials in other areas." Record 633, 485. The
23 report recommends either subjecting the cairns to further
24 archaeological evaluation or protecting them from any future
25 development. Record 639-40. A letter from the Oregon Parks
26 and Recreation Department states that the State Historic
27 Preservation Office (SHPO) has not had a chance to review
28 the archaeological survey. It further states that if the

1 two cairns are burial or "vision quest" cairns, they may be
2 eligible for listing in the National Register of Historic
3 Places. Record 265.

4 It is undisputed that there is no evidence in the
5 record of prehistoric occupation of the subject property.
6 However, there is evidence in the record that Native
7 Americans have used the general area for fishing and
8 camping, and there is no dispute that two rock cairns
9 similar to Native American burial cairns in other areas have
10 been discovered on the subject property. In view of the
11 evidence in the record that the function of these cairns
12 cannot be determined without further archaeological
13 evaluation and that if these cairns are burial cairns, they
14 may be eligible for listing on the National Register of
15 Historic Places, we find there is not substantial evidence
16 in the record to support the county's determination that
17 there are no significant archaeological sites on the
18 property.

19 Petitioners 1000 Friend's fifth assignment of error,
20 petitioners Boswell's sixth assignment of error and
21 petitioners Larson's fourteenth assignment of error are
22 sustained.

23 **THIRD ASSIGNMENT OF ERROR (1000 FRIENDS)**

24 **FOURTH ASSIGNMENT OF ERROR (BOSWELL)**

25 "The county's decision fails to comply with * * *
26 certain requirements of the county's land use plan
27 and is not supported by substantial evidence."

1 In addition to plan Natural Resources policy 4,
2 addressed supra, these assignments of error contend the
3 challenged decision fails to comply with plan Planning
4 Process policies 5 and 8 and Housing policy 1.¹²

5 **A. Planning Process Policies 5 and 8**

6 Planning Process policies 5 and 8 provide:

7 "[I]n considering plan revision, alternative sites
8 for the proposed use(s) [shall] be considered, and
9 it [shall] be determined that the area proposed to
10 be changed compares favorably with other areas
11 which might be available for the use(s) proposed."
12 (Emphasis added.)

13 "[A]rea, County or other public need [shall] be
14 established prior to making plan changes to
15 accommodate uses which are more desirable and can
16 be developed in other locations." (Emphasis
17 added.)

18 The provisions emphasized in the above quotes indicate
19 that Planning Process policies 5 and 8 apply only to plan
20 amendments, and are not applicable to the challenged
21 decision approving a zone change and subdivision.¹³

22 This subassignment of error is denied.

¹²These assignments of error also contend the decision fails to comply with plan Agriculture policies 2(A)-(E). However, the application of these policies is affected by whether the plan map designates the subject property Exclusive Farm Use or Recreational Residential. Therefore, for the reasons stated supra, we do not address this issue.

¹³Of course, if the county determines on remand that the subject property is designated Exclusive Farm Use by the plan, a plan amendment would be required to approve the proposed zone change and subdivision, and Planning Process policies 5 and 8 would apply to such a plan amendment.

1 **B. Housing Policy 1**

2 Housing policy 1 provides:

3 "[M]aximum utilization of vacant land within city
4 limits [shall] be encouraged."

5 We agree with intervenors that because the above policy
6 simply requires the county to "encourage" maximum
7 utilization of vacant city land, it is not a mandatory
8 approval standard for the subject zone change and
9 subdivision application. Bennett v. City of Dallas, 96
10 Or App 645, 648-49, 773 P2d 1340 (1989); Benjamin v. City of
11 Ashland, 20 Or LUBA 265, 267 (1990).

12 This subassignment of error is denied.

13 **SEVENTH ASSIGNMENT OF ERROR (BOSWELL)**

14 **THIRD ASSIGNMENT OF ERROR (LARSON)**

15 Petitioners contend the challenged decision fails to
16 comply with plan Natural Resources policy 3 and Resource
17 Quality policy 9. Petitioners also argue the county
18 findings that the subject property is not located in a big
19 game habitat area and that the proposed zone change will not
20 adversely impact big game habitat are not supported by
21 substantial evidence in the record.

22 Natural Resources policy 3 provides:

23 "[F]ish and wildlife habitat [shall] be protected
24 by the Forest Practices Act and similar
25 provisions."

26 Resource Quality policy 9 provides:

27 "The county will work with the Oregon Department
28 of Fish and Wildlife to provide a more complete

1 Fish and Wildlife habitat inventory."

2 Neither of the above quoted policies is an approval
3 standard for the challenged decision. Petitioners identify
4 no approval standard requiring the challenged findings.
5 That findings are not supported by substantial evidence
6 provides a basis for reversal or remand only if the findings
7 are essential to the challenged decision. Murray v.
8 Clackamas County, ___ Or LUBA ___ (LUBA No. 91-081,
9 October 29, 1991), slip op 14; Moorefield v. City of
10 Corvallis, 18 Or LUBA 95, 101 (1989); Cann v. City of
11 Portland, 14 Or LUBA 254, 257, aff'd 80 Or App 246 (1986).

12 Petitioners Boswell's seventh assignment of error and
13 petitioners Larson's third assignment of error are denied.

14 **FIRST ASSIGNMENT OF ERROR (BOSWELL)**

15 **THIRD ASSIGNMENT OF ERROR (DLCD)**

16 "The County violated its acknowledged land use
17 regulations by approving the proposed subdivision
18 plat without any action by its planning
19 commission."

20 Under WCZO 31.015, an application for subdivision
21 preliminary plat approval is "subject to the public hearing
22 process." Under WCZO 5.015, the county planning commission
23 "is the review authority for all applications requiring
24 public hearing review, unless delegated to a hearings
25 officer." Decisions of the planning commission may be
26 appealed to the county court. WCZO 7.015.3. WCZO 1.020.3
27 provides that a "use or development shall be approved only

1 by the director, [planning] commission, county court or
2 other designated review authority only in accordance with
3 the provisions of this ordinance." (Emphasis added.)

4 The challenged decision states:

5 "The County Court finds, concerning approval of
6 the subdivision preliminary plat, which was
7 considered but not voted upon by the Planning
8 Commission, that the County Court has now fully
9 reviewed the facts of both the zone change and the
10 preliminary plat applications and there is
11 therefore no need for additional review by the
12 Planning Commission. The county Court hereby
13 exercises its discretion to make the final
14 decision on the preliminary plat without
15 recommendation from the Planning Commission."
16 Record 14.

17 Petitioners contend that, as indicated by the above
18 quoted finding, the planning commission took no action on
19 the subject preliminary plat approval application.
20 Petitioners argue that under the above described WCZO
21 provisions, it is the planning commission which must act on
22 the preliminary plat application, subject only to an appeal
23 of its decision to the county court. According to
24 petitioners, the WCZO leaves the county court no discretion
25 to substitute different procedures or to act upon the
26 preliminary plat application other than upon an appeal from
27 a planning commission decision.

28 Citing Sunnyside Neighborhood v. Clackamas Co. Comm.,
29 27 Or App 647, 557 P2d 1375 (1976), rev'd other grounds 280
30 Or 3 (1977), intervenors Gile argue the county court has
31 discretion to bypass the planning commission in making a

1 decision on a subdivision preliminary plat.

2 In Sunnyside Neighborhood v. Clackamas Co. Comm., 280
3 Or 3, 7-9, 569 P2d 1063 (1977), the Oregon Supreme Court
4 determined that a county governing body did not violate
5 either its own procedures or procedures required by statute
6 by taking action on a proposed comprehensive plan amendment
7 without a prior planning commission recommendation on the
8 proposed amendment. However, there are significant
9 differences between that case and this one. First,
10 Sunnyside concerned a proposed comprehensive plan amendment,
11 which at that time could only be adopted by the county
12 governing body,¹⁴ and the lack of a prior planning
13 commission recommendation on such amendment. ORS 215.050,
14 215.060. Second, the Supreme Court found nothing in the
15 county regulations concerning plan amendments that "makes
16 planning commission action a necessary prerequisite to
17 consideration by the [governing body]." Sunnyside, 280 Or
18 at 8.

19 We have previously stated that where local land use
20 regulations delegate the authority to act initially on an
21 application to a planning commission or hearings officer,
22 and reserve to the governing body only the power to review
23 the planning commission's or hearings officer's decision,

¹⁴ORS 215.431, which allows a county governing body to authorize a planning commission or hearings officer to make final decisions on the adoption of certain comprehensive plan amendments, was enacted in 1987.

1 the governing body exceeds its authority if it approves such
2 an application without it having first been acted on by the
3 planning commission or hearings officer. Scott v. Josephine
4 County, ___ Or LUBA ___ (LUBA No. 91-069, September 20,
5 1991), slip op 6-7; Downtown Community Ass'n v. Portland, 3
6 Or LUBA 244, 252-53 (1981).

7 In this case, pursuant to ORS 92.044(2) and 215.402 to
8 215.428, the county court has delegated decision making
9 authority on subdivision applications to the planning
10 commission and has reserved for itself only the authority to
11 hear and decide appeals of such planning commission
12 decisions.¹⁵ Therefore, the county court exceeded its
13 authority by approving the subdivision preliminary plat
14 application without it first having been acted upon by the
15 planning commission and the planning commission decision
16 having been appealed to the county court.

17 Petitioners Boswell's first assignment of error and
18 petitioner DLCD's third assignment of error are sustained.

19 **TWELFTH ASSIGNMENT OF ERROR (LARSON)**

20 "The Respondent's conclusion that the subdivision
21 proposal complies with all provisions of the
22 [WCZO] is not supported by substantial evidence
23 because the lots are less than one acre."

24 Petitioners contend the majority of the residential

¹⁵Intervenors cite no provision in the WCZO, and we are aware of none, which reserve to the county court the ability to make the initial decision on a subdivision preliminary plat application.

1 lots shown on the revised preliminary plat are too small to
2 be allowed in the R-2 zone. Petitioners argue the
3 challenged decision provides no explanation of why the
4 proposed subdivision lot sizes are permissible under the
5 WCZO.

6 WCZO 31.025.1.B establishes the following standard for
7 approval of a subdivision preliminary plat:

8 "All of the proposed lots conform to the minimum
9 standards for lot designs [sic] as set out in the
10 respective zones."

11 The "Property Development Standards" section of the R-2 zone
12 includes a subsection on "density," which provides as
13 relevant:

14 "Density: Where * * * slope of a lot is greater
15 than 10%, application review for * * * creation of
16 new lots shall be based on recommendations by a
17 registered licensed engineer or geologist."
18 WCZO 18.030.1.

19 The challenged decision includes the following finding:

20 "The slope of the land on the parcel is such that
21 lots of less than one acre in size would not be
22 permissible under the criteria of the R-2 zone."
23 Record 11.

24 The challenged decision also imposes a condition requiring
25 that there be "no changes in the size of the lots within the
26 subdivision nor the density of the development either before
27 or after final plat approval." Record 16.

28 Read together, WCZO 31.025.1.B and 18.030.1 require
29 that where property in the R-2 zone proposed for subdivision

1 has a slope greater than 10%,¹⁶ the county must make a
2 case-by-case determination on the density of development
3 allowable on such property, based on recommendations by a
4 registered licensed engineer or geologist. The above quoted
5 county finding appears to carry out this requirement by
6 stating that "lots under one acre in size would not be
7 permissible." Record 11. We therefore agree with
8 petitioners that if the preliminary subdivision plat
9 approved allows lots less than one acre in size, it fails to
10 comply with WCZO 31.025.1.B and 18.030.1.

11 We have a basic problem in determining what size lots
12 are allowed under the challenged preliminary plat approval
13 because, as explained supra, the record does not include an
14 approved preliminary plat that is consistent with the county
15 court's approval of a 26-lot subdivision. However, the
16 revised preliminary plat in the record, which includes 31
17 residential lots, clearly includes at least 28 lots which
18 are smaller than one acre. Further, it appears impossible
19 to reconfigure those 31 lots into 26 lots, in accordance
20 with the challenged decision, without a number of lots being
21 smaller than one acre.

22 Petitioners Larson's twelfth assignment of error is
23 sustained.

¹⁶In this case, there is no dispute that the subject property has a slope greater than 10%.

1 **FOURTH ASSIGNMENT OF ERROR (LARSON)**

2 "Respondent improperly construed the Wallowa Lake
3 County Service District ('WLCSD') Ordinance No.
4 88-06-01 when it found that all properties within
5 the boundary of the WLCSD are prohibited from
6 installing private sewage systems."

7 The challenged decision includes a finding that all
8 properties located within the boundaries of the WLCSD, as is
9 the subject property, "are prohibited from installing
10 private sewage systems." Record 5. Petitioners argue this
11 finding is based on a misinterpretation of WLCSD Ordinance
12 No. 88-06-01.

13 Intervenors Gile contend this issue was not raised in
14 the proceedings below and, under ORS 197.763(1) and
15 197.835(2), petitioners are therefore precluded from raising
16 this issue in this appeal.

17 Petitioners cite nothing in the local record
18 establishing they raised this issue in the proceedings below
19 and, therefore, may not raise the issue for the first time
20 at LUBA. ORS 197.763(1), 197.830(10), 197.835(2); Broetje-
21 McLaughlin v. Clackamas County, ___ Or LUBA ___ (LUBA No.
22 91-056, October 21, 1991), slip op 10; Wethers v. City of
23 Portland, ___ Or LUBA ___ (LUBA No. 90-121, April 5, 1991),
24 slip op 19.

25 Petitioners Larson's fourth assignment of error is
26 denied.

27 The county's decision is remanded.