



1                   Opinion by Sherton.

2   **NATURE OF THE DECISION**

3                   Petitioner appeals a decision amending provisions of  
4   the Clackamas County Zoning and Development Ordinance (ZDO)  
5   regarding wetlands.

6   **MOTION TO INTERVENE**

7                   Dennis J. Tylka moves to intervene in this proceeding  
8   on the side of petitioner. There is no opposition to the  
9   motion, and it is allowed.

10   **FACTS**

11                  The county's comprehensive plan and land use  
12   regulations have been acknowledged as being in compliance  
13   with the Statewide Planning Goals. ORS 197.251. The  
14   challenged decision adopts several legislative amendments to  
15   the text of ZDO Section 1000 (Development Standards). The  
16   decision adds a new provision requiring the county to notify  
17   the Oregon Division of State Lands (DSL) of developments  
18   within areas identified as wetlands on the DSL State-wide  
19   Wetlands Inventory, as required by ORS 215.418.  
20   ZDO 1001.02C.

21                  The challenged decision also amends ZDO 1002.06  
22   (Wildlife Habitats and Distinctive Resource Areas). Prior  
23   to the amendment, ZDO 1002.06B imposed certain approval  
24   standards on development in or within 100 feet of all

1 natural wetlands.<sup>1</sup> The decision adds a new ZDO 1002.06A  
2 which states:

3 "Development in wetland areas not identified as  
4 Open Space on the North Urban Area Comprehensive  
5 Plan Map or Mt. Hood Community Plan Map is subject  
6 to approval by the U.S. Army Corps of Engineers  
7 [(ACE)] and the [DSL]."

8 The decision then amends ZDO 1002.06C (numbered as  
9 ZDO 1002.06B prior to the amendment) to provide it does not  
10 apply to development in the wetlands referred to in  
11 ZDO 1002.06A.

12 Finally, the ordinance amends ZDO 1011 (Open Space and  
13 Parks). Prior to the amendment, ZDO 1011.02A provided that  
14 the standards of ZDO 1011 applied to areas indicated as Open  
15 Space on the North Urban Area Comprehensive Plan Map (NUA  
16 plan map) "or when one or more of [certain listed] open  
17 spaces resources is present." (Emphasis added.) One of the  
18 listed open space resources is "[w]etlands, including  
19 recharge areas." ZDO 1011.02A.5. The challenged decision  
20 amends ZDO 1022.02A to provide that the standards of  
21 ZDO 1011 apply to areas indicated as Open Space on the NUA  
22 plan map and the Mt. Hood Community Plan Map (Mt. Hood plan  
23 map) "when one or more of [certain listed] open spaces

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<sup>1</sup>These standards include requirements that the development be designed to "preserve functions of groundwater recharge, water storage, turbidity reduction, nutrient filtration [and] biologic or botanical production;" "provide compatibility with the continued performance of [certain] wetland functions;" "eliminate the need for filling, dumping and/or excavating in the wetland \* \* \*;" and "maintain the runoff coefficient and erosion equilibrium for lands bordering the wetland \* \* \*."

1 resources is present." The net effect of this change is to  
2 make the standards of ZDO 1011 applicable to wetlands only  
3 if they are identified as Open Space on the NUA or Mt. Hood  
4 plan map. The decision amends ZDO 1011.06B.2 to provide  
5 that commercial or industrial developments affecting  
6 wetlands may be allowed subject to compliance with  
7 ZDO 1011.04 "and when permitted by the [ACE] and [DSL]."<sup>2</sup>

8 **FIRST ASSIGNMENT OF ERROR (PETITIONER)**

9 Petitioner contends the county erred by failing to  
10 adopt findings supporting the challenged decision.  
11 Petitioner contends that without such findings, the county  
12 cannot demonstrate the challenged ZDO amendments comply with  
13 Statewide Planning Goals 2 (Land Use Planning), 5 (Open  
14 Spaces, Scenic and Historic Areas, and Natural Resources), 6  
15 (Air, Water and Land Resources Quality and 9 (Economic  
16 Development), as required by ORS 197.835(5)(b).<sup>3</sup>

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<sup>2</sup>Prior to this change, ZDO 1011.06B.2 allowed commercial and industrial developments affecting wetlands only if the provisions of ZDO 1011.04 (Conflict Resolution/Wetlands and Significant Natural Areas) are satisfied.

<sup>3</sup>ORS 197.835(5) provides, in relevant part:

"[LUBA] shall reverse or remand an amendment to a land use regulation if the \* \* \* if:

\* \* \* \* \*

"(b) The 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." (Emphasis added.)

1       There is no dispute that the challenged ZDO amendments  
2 are legislative, rather than quasi-judicial, in nature.  
3 That a legislative land use decision is not supported by  
4 findings is not, in itself, a basis for reversal or remand,  
5 because no applicable legal standard requires that all  
6 legislative land use decisions to be supported by findings.  
7 Riverbend Landfill Company v. Yamhill County, 24 Or LUBA  
8 466, 472 (1993); Von Lubken v. Hood River County, 22 Or LUBA  
9 307, 313 (1991). We have previously stated that for this  
10 Board to perform its review function, it is generally  
11 necessary either (1) that a challenged legislative land use  
12 decision be supported by findings demonstrating compliance  
13 with applicable legal standards, or (2) that respondents  
14 provide in their briefs argument and citations to facts in  
15 the record adequate to demonstrate that the challenged  
16 legislative decision complies with applicable legal  
17 standards. Id. at 314; see Gruber v. Lincoln County, 2  
18 Or LUBA 180, 187 (1981).

19       Goal 2 does require that legislative land use decisions  
20 have "an adequate factual base." 1000 Friends of Oregon v.  
21 City of North Plains, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 92-154,  
22 93-169 and 93-160, June 23, 1994), slip op 5. However, with  
23 regard to providing an explanation of the basis for a

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The county does not contend its comprehensive plan contains specific policies that provide the basis for the challenged ZDO amendments and agrees that the amendments are required to comply with the statewide planning goals.

1 challenged legislative decision, either of the two courses  
2 described above will satisfy the "adequate factual base"  
3 requirement of Goal 2.

4 In this case petitioner simply asserts the challenged  
5 decision fails to explain why it is in compliance with  
6 Goals 2, 5, 6 and 9. Petitioner's arguments regarding  
7 noncompliance with these goals are not sufficiently  
8 developed to warrant a response.<sup>4</sup> Deschutes Development v.  
9 Deschutes County, 5 Or LUBA 218, 220 (1982).

10 Petitioner's first assignment of error is denied.

11 **SECOND THROUGH FOURTH ASSIGNMENTS OF ERROR (PETITIONER)**

12 **SECOND ASSIGNMENT OF ERROR (INTERVENOR)**

13 Petitioner and intervenor-petitioner (petitioners)  
14 contend the challenged ZDO amendments fail to comply with  
15 Goal 5 and OAR 660-16-000 et seq. (Goal 5 rule).  
16 Petitioners argue the amendments delete the county's entire  
17 program for protecting a listed Goal 5 natural resource --  
18 wetlands -- outside the 14,000 urban and quasi-urban acres  
19 covered by the NUA and Mt. Hood plan maps.<sup>5</sup> Petitioners  
20 concede that under the challenged amendments, development in  
21 the county's rural wetlands will still require approval from

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<sup>4</sup>We address the arguments concerning compliance with Goal 5 presented by petitioner in its second through fourth assignments of error in the following section.

<sup>5</sup>Petitioner points out the rural areas which the amendments remove from the county's wetland protection program constitute approximately 98% of the county's total 601,600 acres. Record 530.

1 the ACE and DSL. However, petitioners argue that reliance  
2 on the permitting programs of these agencies is not  
3 sufficient to satisfy Goal 5 and the Goal 5 rule.  
4 Petitioners further argue the challenged ZDO amendments are  
5 not supported by the following items required by the Goal 5  
6 rule -- (1) an inventory of the quality, quantity and  
7 location of the rural wetlands (OAR 660-10-000);<sup>6</sup> (2) an  
8 identification of conflicting uses for such wetlands  
9 (OAR 660-10-005); (3) a determination of the economic,  
10 social, environmental and energy (ESEE) consequences of such  
11 conflicts (OAR 660-10-005); and (4) establishment of a  
12 program to protect the resource (OAR 660-10-010).

13 The county argues that prior to the challenged ZDO  
14 amendments, under its acknowledged plan and land use  
15 regulations, "the county was considering protection of  
16 wetlands on a case-by-case basis, as individual applications  
17 were processed." Respondent's Brief 3. The county further  
18 argues that in Ramsey v. City of Portland, 115 Or App 20,  
19 836 P2d 772 (1992), the court of appeals decided such an  
20 ad hoc approach is impermissible. Therefore, according to  
21 the county, Ramsey requires that the county amend the ZDO to  
22 eliminate the case-by-case review of applications concerning  
23 wetlands. The county contends Goal 5 and the Goal 5 rule

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<sup>6</sup>Intervenor cites evidence in the record which he contends establishes the existence of at least one significant rural wetland (Bear Creek Wetland) that should be protected under Goal 5.

1 are not applicable to the challenged ZDO amendments, because  
2 the amendments are an interim measure taken outside the  
3 Goal 5 process. The county recognizes, however, that in the  
4 future it will have to carry out the Goal 5 process  
5 (inventory, identification of conflicting uses,  
6 determination of ESEE consequences and adoption of  
7 protection program) with regard to rural wetlands.

8 There is no dispute that under ORS 197.251, the Land  
9 Conservation and Development Commission (LCDC) has issued a  
10 compliance acknowledgment order for the Clackamas County  
11 comprehensive plan and land use regulations. In this case,  
12 the county essentially is asking us to determine that its  
13 acknowledged plan and land use regulations do not comply  
14 with Goal 5 and, therefore, to conclude that no harm is done  
15 if an amendment to its acknowledged land use regulations  
16 also does not comply with Goal 5.<sup>7</sup>

17 ORS 197.015(1) defines "acknowledgment" as:

18 "[An LCDC] order that certifies that a  
19 comprehensive plan and land use regulations \* \* \*  
20 complies with the [statewide planning] goals  
21 \* \* \*."

22 This Board does not have jurisdiction to review LCDC

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<sup>7</sup>In Ramsey, the City of Portland amended its acknowledged land use regulations to adopt a case-by-case permit review process for protecting Goal 5 resources in certain areas of the city. The court of appeals affirmed our determination that a postacknowledgment land use regulation amendment adopting such a case-by-case review process does not comply with Goal 5. Ramsey does not authorize local governments or this Board to determine that acknowledged plan and land use regulation provisions do not comply with Goal 5.

1 acknowledgment orders. ORS 197.825(2)(c). Subject to  
2 review by the appellate courts, once an LCDC acknowledgment  
3 order is issued, it forecloses an appeal to LUBA on any  
4 issue that was raised or could have been raised in the LCDC  
5 acknowledgment proceedings concerning goal compliance. 1000  
6 Friends of Oregon v. Jackson County, 79 Or App 93, 98, 718  
7 P2d 753, rev den 301 Or 445 (1986); Reeves v. Washington  
8 County, 24 Or LUBA 483, 487 (1993). Consequently, we cannot  
9 determine the acknowledged county land use regulations  
10 regarding rural wetlands do not comply with Goal 5. To the  
11 contrary, because those land use regulations were  
12 acknowledged, we must assume, for the purposes of this  
13 opinion, that they do comply with Goal 5.

14 Subject to an exception not relevant here, all  
15 amendments to acknowledged land use regulations must  
16 themselves comply with the goals and any rules implementing  
17 the goals. ORS 197.835(5)(b). We are aware of no basis for  
18 concluding an amendment to acknowledged land use regulations  
19 that affects Goal 5 resources may be adopted "outside the  
20 Goal 5 process." In this case, the challenged ZDO  
21 amendments make portions of the county's acknowledged  
22 program for protection of wetlands inapplicable to rural  
23 wetlands outside the areas covered by the NUA and Mt. Hood  
24 plan maps. The challenged ordinance includes a conclusory  
25 statement that the amendments comply with Goal 5. Record 1.  
26 To support this conclusion, the county must demonstrate,

1 either in the decision or through argument and citations to  
2 the record in its brief, that with regard to rural wetlands,  
3 the amendments result in a program that complies with Goal 5  
4 and the Goal 5 rule. The county has failed to do this.

5 Petitioner's second through fourth assignments of error  
6 are sustained. Intervenor's second assignment of error is  
7 sustained.

8 **FIFTH ASSIGNMENT OF ERROR (PETITIONER)**

9 **FIRST ASSIGNMENT OF ERROR (INTERVENOR)**

10 Petitioners argue the challenged ZDO amendments must  
11 comply with the county comprehensive plan. Petitioners  
12 contend the amendments fail to comply with the following  
13 plan goals and policies concerning wetlands:

14 Water Resources Goal (5)

15 "Protect and enhance wetlands as a valuable source  
16 of groundwater recharge, wildlife habitat, and  
17 stormwater drainage control." Plan 13.

18 Water Resources Policy 17.3

19 "The County has insufficient information as to  
20 location, quality, and quantity of wetland  
21 resources outside of the Mt. Hood urban area and  
22 the Urban Growth Boundary to develop a management  
23 program at this time. If such information becomes  
24 available, the County shall evaluate wetland  
25 resources pursuant to Goal 5 and OAR Chapter 660,  
26 Division 16, prior to the next Periodic Review.  
27 In the interim, the County will review all  
28 conditional use, subdivision, and zone change  
29 applications and commercial and industrial  
30 development proposals to assure consistency with  
31 [ZDO] Section 1000 \* \* \* and goals and policies of  
32 Chapter 3 of the [Comprehensive] Plan." Plan 23.

1           Wildlife Habitats and Distinctive Resource Areas  
2           Goal (2)

3           "Retain and enhance wetlands and riparian habitat  
4           to provide areas for fisheries and wildlife and to  
5           promote species diversity, bank stabilization, and  
6           stormwater runoff control." Plan 36.

7           Wildlife Habitats and Distinctive Resource Areas  
8           Policy 5.0

9           "Minimize adverse wildlife impacts in sensitive  
10          habitat areas, including \* \* \* wetlands."  
11          Plan 37.

12         The county argues the challenged amendments are  
13          consistent with the final sentence of Water Resources  
14          Policy 17.3, quoted above. According to the county, under  
15          the amendments it will still review applications for rural  
16          development to determine whether there are wetlands on the  
17          property, and will still require consistency with the  
18          development standards of ZDO Section 1000 and the policies  
19          and goals of plan Chapter 3. The only thing changed by the  
20          amendments is what ZDO Section 1000 now requires -- ACE and  
21          DSL approval, rather than application of the county's own  
22          standards. With regard to the rest of the plan provisions  
23          quoted above, the county argues they do not apply to the  
24          challenged ZDO amendments, either because they are  
25          inapplicable prior to periodic review or because they are  
26          "clearly aspirational." Respondent's Brief 7.

27         Postacknowledgment land use regulation amendments are  
28          required to be consistent with the local government's  
29          acknowledged comprehensive plan. ORS 197.835(5)(a); McKay

1      Creek Valley Assoc. v. Washington County, 19 Or LUBA 421,  
2      435, aff'd 104 Or App 690 (1990). This Board is required to  
3      defer to a local government's interpretation of its own  
4      comprehensive plan, unless that interpretation is contrary  
5      to the express words, purpose or policy of the plan or to a  
6      state statute, statewide planning goal or administrative  
7      rule which the plan implements. ORS 197.829; Clark v.  
8      Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).

9            Further, under Gage v. City of Portland, 123 Or App  
10     269, 860 P2d 282, on reconsideration 125 Or App 119 (1993),  
11     rev allowed 318 Or 478 (1994), and Weeks v. City of  
12     Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992), this  
13     Board is required to review a local government's  
14     interpretation of its plan and may not interpret the local  
15     government's plan in the first instance. To be reviewable  
16     by LUBA, a local government's interpretation of its plan  
17     must be provided in the challenged decision or supporting  
18     findings, not in the local government's brief. Eskandarian  
19     v. City of Portland, 26 Or LUBA 98, 109 (1993); Miller v.  
20     Washington County, 25 Or LUBA 169, 179 (1993).

21           All of the plan provisions quoted above are arguably  
22     relevant to amending county land use regulations applicable  
23     to the protection and development of rural wetlands. As  
24     explained above, we cannot interpret those plan provisions  
25     in the first instance, nor can we defer to an interpretation  
26     expressed in the county's brief. We must therefore remand

1 the challenged decision for the county to adopt the  
2 necessary plan interpretations as part of its decision.<sup>8</sup>

3 Petitioner's fifth assignment of error is sustained.

4 Intervenor's first assignment of error is sustained.

5 **INTERVENOR'S THIRD ASSIGNMENT OF ERROR**

6 ORS 215.418(1) requires the county to give DSL notice  
7 if the county accepts any of the following types of  
8 applications for property within areas identified as  
9 wetlands on DSL's State-wide Wetlands Inventory:

10 "(a) Subdivisions;

11 "(b) Building permits for new structures;

12 "(c) Other development permits and approvals that  
13 allow physical alteration of the land  
14 involving excavation and grading, including  
15 permits for removal or fill, or both, or  
16 development in floodplains or floodways;

17 "(d) Conditional use permits and variances that  
18 involve physical alterations to the land or  
19 construction of new structures; and

20 "(e) Planned unit development[s]."

21 The challenged decision adds the following provision to  
22 ZDO 1001.02 (Application of These Standards):

23 "The County shall notify [DSL] of developments  
24 wholly or partially within areas identified as  
25 wetlands on the State-wide Wetlands Inventory

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<sup>8</sup>The plan goals and policies quoted above are worded in mandatory terms. Saying such provisions are "aspirational" might support interpreting these goals and policies as being inapplicable to individual permit decisions, but more is required to explain why they are inapplicable to the adoption or amendment of land use regulations apparently designed to implement these plan provisions.

1           pursuant to the provisions of ORS 215.418."  
2           (Emphases added.) ZDO 1001.02C.

3           Intervenor argues the above provision is inconsistent  
4       with ORS 215.418 because whereas "developments" is not  
5       defined in ZDO 1001.02C, ZDO 1001.02A states that the  
6       standards of ZDO Section 1000 shall apply only to "major and  
7       minor partitions; subdivisions; commercial and industrial  
8       projects; [and] multi-family and common-wall structures of  
9       three (3) or more dwellings." Therefore, petitioner  
10      contends, ZDO 1001.02C does not require notification of DSL  
11      in all instances where such notification is required under  
12      ORS 215.418(1).

13           The county responds there is no inconsistency with  
14      ORS 215.418 because ZDO 1001.02C refers to notification  
15      "pursuant to ORS 215.418," and it follows the county is  
16      required to give notice in all instances required by  
17      ORS 215.418. The county also argues ZDO 1001.02A simply  
18      sets out the types of applications to which the development  
19      standards adopted elsewhere in ZDO Section 1000 apply, and  
20      does not affect the application of ZDO 1001.02C.

21           There is no general definition of "development" in ZDO  
22      Section 202 or 1000. Although ZDO 1001.02A lists types of  
23      applications to which the standards of ZDO Section 1000  
24      apply, it does not describe these as "developments." On the  
25      other hand, ZDO 1001.02C states that notification of certain  
26      "developments" will be provided to DSL "pursuant to \* \* \*  
27      ORS 215.418." This is sufficient to establish ZDO 1001.02C

1 implements ORS 215.418. Consequently, under ORS 197.829(4),  
2 the county must interpret the term "development" in  
3 ZDO 1001.02C consistently with the types of development  
4 applications and approvals listed in ORS 215.418(1)(a)-(e).  
5 We therefore conclude there is no inconsistency between  
6 ZDO 1001.02C and ORS 215.418(1).

7 Intervenor's third assignment of error is denied.

8 The county's decision is remanded.