

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

CHRIS N. SKREPETOS, CYNTHIA LORD,)
LANE J. BOUMAN, ABBIE J. BOUMAN,)
KLAAS VAN DE POL, and OGDEN SHUTES,)
Petitioners,)

vs.)

JACKSON COUNTY,)
Respondent,) LUBA No. 94-174

and)

SOUTHERN OREGON INVESTORS, INC.,)
Intervenor-Respondent.)

FINAL OPINION
AND ORDER

PAUL E. FOLAND and CONSTANCE J.)
FOLAND,)
Petitioners,)

vs.)

JACKSON COUNTY,)
Respondent,) LUBA No. 94-176

and)

SOUTHERN OREGON INVESTORS, INC.,)
Intervenor-Respondent.)

Appeal from Jackson County.

Chris N. Skrepetos, Ashland, filed a petition for
review and argued on his own behalf.

1 Paul E. Foland and Constance J. Foland, Ashland, filed
2 a petition for review. Constance J. Foland argued on her
3 own behalf.

4
5 No appearance by respondent.

6
7 Gregory S. Hathaway and Timothy R. Volpert, Portland,
8 filed the response brief. With them on the brief was Davis
9 Wright Tremaine. Gregory S. Hathaway argued on behalf of
10 intervenor-respondent.

11
12 SHERTON, Chief Referee, participated in the decision.

13
14 REMANDED 04/25/95

15
16 You are entitled to judicial review of this Order.
17 Judicial review is governed by the provisions of ORS
18 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the board of county
4 commissioners approving a preliminary development plan for
5 the Clear Springs destination resort.

6 **MOTION TO INTERVENE**

7 Southern Oregon Investors, Inc., the applicant below,
8 moves to intervene in this proceeding on the side of
9 respondent. There is no opposition to the motion, and it is
10 granted.

11 **FACTS**

12 The county has adopted a three-step process for
13 approving destination resorts. The first step is adoption
14 of a "resolution of intent to rezone," to apply the county's
15 comprehensive plan and zoning map Destination Resort(DR)
16 overlay designation, and conceptual site plan approval. The
17 second step is preliminary development plan approval. The
18 third step is final development plan approval.

19 The county decision granting first-step, resolution of
20 intent to rezone and conceptual site plan approval to the
21 subject destination resort was appealed to us, and we
22 remanded the county's decision for failure to comply with
23 certain statutory and local ordinance requirements
24 concerning placing destination resorts on prime farmland,
25 the applicants' financial resources, and sewage disposal and
26 water services. Foland v. Jackson County, 18 Or LUBA 731,

1 aff'd 101 Or App 632 (1990), aff'd 311 Or 167 (1991). On
2 remand, after additional proceedings, the county again
3 granted first step approval, with fifteen conditions, and we
4 affirmed that decision. Bouman v. Jackson County, 23
5 Or LUBA 628 (1992).

6 In Foland, 18 Or LUBA at 734-35, and Bouman, 23 Or LUBA
7 at 631, we described the subject property as follows:

8 "The subject site is a single ownership designated
9 on the county's comprehensive plan and zoning map
10 as Exclusive Farm Use (EFU). The site has been in
11 farm use since the area was first settled in the
12 1850's. The site, with the exception of the
13 existing farm residence and surrounding farm
14 buildings, is currently leased to a rancher in the
15 area, who uses it for irrigated pasture, grazing
16 and hay production. Two intermittent creeks, Neil
17 Creek and its tributary, Clayton Creek, flow
18 through the site.

19 "The site is located 80-100 feet from the
20 southeast corner of the urban growth boundary of
21 the City of Ashland. The site is adjoined on the
22 north by Rural Residential (RR-5) and EFU
23 designated and zoned properties. To the east,
24 south and west are EFU designated and zoned
25 properties. Adjoining the site to the southwest
26 is Interstate-5. State Highway 66 passes through
27 the eastern portion of the site."

28 On November 18, 1993, an application for preliminary
29 development plan approval of the proposed destination resort
30 was submitted.¹ The application lists intervenor-respondent
31 Southern Oregon Investors, Inc. (intervenor) as "Applicant"

¹An application for tentative subdivision plat approval was included as well, but is not at issue in this appeal.

1 and Dom and Joyce Provost as "Property Owner." Record 1155,
2 1157. After public hearings, the planning commission
3 adopted a recommendation that the board of commissioners
4 grant preliminary development plan approval. After a public
5 hearing on the record compiled during the planning
6 commission proceeding, the board of commissioners adopted
7 the challenged decision granting preliminary development
8 plan approval. The challenged decision describes the
9 proposed destination resort as follows:

10 "* * * The project will include an 18 hole public
11 golf course and club house, a 96 room
12 hotel/conference center, a health club, 110 golf
13 villas and 50 private home lots compris[ed of] 2
14 single family dwelling lots and 48 condominium
15 lots, when completed. Development is proposed to
16 take place in three phases; Phase I is development
17 of the golf course and club house, Phase II will
18 be development of the resort complex, and
19 Phase III will be development of the single family
20 home lots. * * *" Record 3.

21 **SECOND ASSIGNMENT OF ERROR (FOLAND)**

22 Under Jackson County Land Development Ordinance
23 (LDO) 246.070(5)(A), a destination resort preliminary
24 development plan must satisfy conditions of approval adopted
25 in the prior county order granting conceptual site plan
26 approval. Conceptual site plan approval condition 15
27 (hereafter conceptual plan condition 15) requires that
28 preliminary development plan approval be "subject to the
29 County's public hearing process set forth in LDO 285.040 to
30 ensure a full opportunity for public involvement at each
31 stage of the development review process." Record 39.

1 Petitioners argue the county proceedings violated conceptual
2 plan condition 15 and LDO 285.040 in three respects.

3 **A. Notice of County Hearings**

4 Petitioners contend the county failed to mail notice of
5 its hearings on preliminary development plan approval to
6 numerous persons who were parties to the previous county
7 conceptual site plan approval proceeding. Petitioners argue
8 this constitutes a violation of LDO 285.040(3)(B), which
9 requires that "all parties shall be afforded an opportunity
10 to present and rebut evidence," and therefore a violation of
11 conceptual plan condition 15 and LDO 246.070(5)(A) as well.
12 Petitioners also argue the county failed to respond to oral
13 and written objections made by petitioners regarding this
14 lack of notice.

15 If the county's failure to mail notice of its hearings
16 on the preliminary development plan to all persons who were
17 parties to the prior conceptual site plan approval
18 proceeding was error, which we do not determine, it was
19 procedural error. We are authorized to reverse or remand a
20 challenged decision because the decision maker failed to
21 follow applicable procedural requirements only if that
22 failure "prejudiced the substantial rights of the
23 petitioner." ORS 197.835(7)(a)(B). There is no dispute
24 that petitioners received notice of the county hearings and
25 participated in them. Petitioners do not demonstrate that
26 any failure by the county to provide notice to other persons

1 prejudiced petitioners' substantial rights. See Forest Park
2 Estate v. Multnomah County, 20 Or LUBA 319, 333 (1990).

3 This subassignment of error is denied.

4 **B. Board of Commissioners Hearing**

5 Petitioners contend the board of commissioners erred in
6 conducting its June 10, 1994 public hearing "on the record"
7 compiled before the planning commission and refusing to
8 allow the submittal of new evidence. According to
9 petitioners, this violated LDO 285.040(3)(C), which provides
10 that "all evidence of a type commonly relied upon by
11 reasonably prudent persons in the conduct of their important
12 affairs shall be admissible." Petitioners argue the
13 published and mailed notices of the board of commissioners'
14 hearing did not indicate the hearing would be on the
15 planning commission record. Record 129, 255, 257.
16 Petitioners further argue petitioner Skrepetos objected to
17 this during the board of commissioners' hearing, and was
18 denied the opportunity to submit new evidence.² Record 72.

19 Where the planning commission approves a preliminary
20 development plan, the approval is a recommendation that
21 automatically goes to the board of commissioners, as

²However, petitioners Skrepetos et al do not assign as error in their petition for review the board of commissioners' refusal to accept new evidence from petitioner Skrepetos at the June 10, 1994 hearing.

1 happened here.³ LDO chapter 246 ("Destination Resort (DR)
2 Overlay") does not indicate what procedures are to be
3 followed by the board of commissioners in reviewing such a
4 planning commission recommendation. LDO 246.040(5)(D)
5 simply states that "[u]pon receipt of a Planning Commission
6 decision to conditionally approve a preliminary development
7 plan, the Board [of Commissioners] may accept, reject, or
8 modify the Planning Commission decision." However, as noted
9 above, conceptual plan condition 15 requires preliminary
10 development plan approval to be subject to the public
11 hearing process set out in LDO 285.040 ("Public Hearings").

12 Nevertheless, even if the board of commissioners erred
13 by conducting its hearing on the record of the planning
14 commission proceeding, without indicating in its notices of
15 hearing that the hearing would be "on the record," which we
16 do not determine, such error would be procedural in nature.
17 Petitioners do not explain how their substantial rights were
18 prejudiced by the alleged error, as required by
19 ORS 197.835(7)(a)(B). Petitioners Foland were allowed to
20 submit evidence to the planning commission and do not
21 identify any additional evidence that they tried to submit
22 which was refused by the board of commissioners.

³LDO 246.040(5)(C) and 246.070(2) provide that if the planning commission denies an application for destination resort preliminary development plan approval, that decision may be appealed to the board of commissioners pursuant to LDO 285.020. LDO 285.020(10) provides that except in certain circumstances, such appeals shall be heard "on the record."

1 This subassignment of error is denied.

2 **C. Evidence Accepted After Record Was Closed**

3 The planning commission record was closed on
4 January 10, 1994. Record 2. Petitioners argue the record
5 shows that on May 26, 1994, the county accepted into the
6 record a letter from the Division of State Lands (DSL).
7 Record 188. According to petitioners, the board of
8 commissioners' acceptance of this letter after the planning
9 commission record was closed, while refusing to accept new
10 evidence at the June 10, 1994 hearing, constitutes failure
11 to comply with LDO 285.040(3)(B) and (C), conceptual plan
12 condition 15 and LDO 246.070(5)(A). Petitioners further
13 argue the minutes of the June 10, 1994 hearing show the
14 board of commissioners was made aware of this issue.
15 Record 72.

16 Acceptance of the DSL letter after the record was
17 closed is a procedural error. However, we have repeatedly
18 held that where a party has the opportunity to object to a
19 procedural error before the local government, but fails to
20 do so, that error cannot be assigned as grounds for reversal
21 or remand of the local government decision in an appeal to
22 this Board. Mazeski v. Wasco County, 26 Or LUBA 226, 232
23 (1993); Torgeson v. City of Canby, 19 Or LUBA 511, 519
24 (1990); Dobaj v. Beaverton, 1 Or LUBA 237, 241 (1980).
25 Here, neither petitioners Foland nor any other party
26 objected to the acceptance of the DSL letter as an exhibit

1 at the board of commissioners, June 10, 1994 hearing.⁴
2 Rather, the minutes of the hearing indicate the attorney for
3 petitioners Skrepetos relied on the DSL letter in his
4 testimony. Record 72.

5 This subassignment of error is denied.

6 The second assignment of error (Foland) is denied.

7 **FIRST ASSIGNMENT OF ERROR (FOLAND)**

8 LDO 246.050 sets out the "Criteria for Approval of a
9 Destination Resort Overlay Designation." LDO 246.050(5)
10 requires that the proposed development can be carried out in
11 accordance with a "conceptual site plan."⁵ LDO 246.050(3)
12 requires a demonstration of the economic impact and
13 feasibility of the proposed resort, including:

14 * * * * *

15 "(C) Clear demonstration of the availability of
16 financial resources for the applicant to
17 undertake the development consistent with the
18 minimum investment requirements established
19 by Statewide Planning Goal 8 and ORS
20 [ch] 197[.]

21 * * * * * (Emphasis added.)

22 When we reviewed the county's prior decision approving the
23 resolution of intent to rezone and conceptual site plan, the

⁴We note the DSL letter is in fact adverse to intervenor's preliminary development plan application, in that it states the applicant's evaluation of wetlands on the site is inadequate. Record 188.

⁵The requirements for a conceptual site plan are set out in LDO 246.060 ("Contents of Application for Approval of [DR] Overlay").

1 "applicants" were Dom and Joyce Provost. We decided the
2 county's determination of the availability of financial
3 resources for the Provosts to undertake the proposed
4 development satisfied LDO 246.050(3)(C). Bouman, 23 Or LUBA
5 at 639-41.

6 The challenged decision identifies intervenor as
7 "applicant" and Dom and Joyce Provost as "property owners."
8 Record 1. The decision includes the following finding:

9 "Financial Resources of the Applicant: In the
10 [prior county] order, the Board [of Commissioners]
11 found that the applicant[s] had available
12 financial resources to undertake the development
13 consistent with the minimum investment
14 requirements listed in [LDO] Chapter 246, and that
15 there is appropriate assurance from a lending
16 institution on record showing that the development
17 could obtain adequate financial support. The
18 Board [of Commissioners] finds that, in addition
19 to property owners Dom and Joyce Provost, whose
20 financial resources were the basis for the
21 findings in the [prior] order, financing of the
22 current proposal can also be drawn from the
23 resources of the applicant, Southern Oregon
24 Investors." Record 4.

25 Petitioners contend the above quoted finding is not
26 supported by substantial evidence in the record that Dom and
27 Joyce Provost are "applicants" for preliminary development
28 plan approval. Petitioners also argue there is no evidence
29 in the record regarding the financial resources of
30 intervenor, the actual "applicant" for preliminary
31 development plan approval, other than a statement by
32 intervenor's attorney that Dom Provost is "involved with"
33 intervenor. Record 75. Petitioners argue this is

1 significant because, under LDO 246.050(3), the prior
2 conceptual site plan approval was based on the financial
3 resources of then-applicants Dom and Joyce Provost.
4 Record 2073-74. Petitioners argue that under
5 LDO 246.070(4)(A) and (5)(D), preliminary development plan
6 approval must be consistent with and conform to conceptual
7 site plan approval.

8 Intervenor argues the above quoted finding is
9 surplusage. According to intervenor, nothing in LDO 246.070
10 or elsewhere in the LDO requires that preliminary
11 development plan approval be supported by findings
12 concerning the applicant's financial resources. Intervenor
13 argues that LDO 246.070(4)(A) and (5)(D) simply require that
14 the preliminary development plan and the conceptual site
15 plan be consistent, but nothing in the LDO requires either
16 plan document, itself, to include information or findings on
17 the applicant's financial resources. Intervenor maintains
18 the LDO 246.050(3)(C) requirement for a demonstration of the
19 applicant's financial resources applies only at the
20 conceptual plan approval stage and has no applicability at
21 the preliminary development plan approval stage.

22 With regard to compliance with LDO 246.050(3)(C), the
23 prior county decision granting "first step" destination
24 resort approval was based on the financial resources of the
25 then-applicants, the Provosts. The challenged decision is,
26 at best, unclear as to whether the county considers the

1 Provosts to be "applicants" for preliminary development plan
2 approval. Further, we are cited to no evidence in the
3 record that the Provosts are "applicants" for preliminary
4 development plan approval and to no evidence regarding the
5 financial resources of intervenor, which is named as the
6 "applicant" on the application itself. Record 1155, 1157.

7 As we understand it, intervenor does not contend the
8 Provosts are applicants for preliminary development plan
9 approval, but rather argues that even if the Provosts are
10 not applicants, this is of no consequence. According to
11 intervenor, granting preliminary development plan approval
12 does not require findings on the financial resources of the
13 applicant, and the conceptual site plan itself, as opposed
14 to the county's prior order granting conceptual site plan
15 approval, does not include findings on the applicant's
16 financial resources.

17 Whether the Provosts not being "applicants" would
18 affect the county's ability to grant preliminary development
19 plan approval depends on interpretations of LDO 246.050(3),
20 246.070(4)(A) and (5)(D) and possibly other LDO provisions.⁶
21 The challenged decision does not include interpretations of
22 these LDO provisions with regard to this issue. When

⁶It is at least arguably inconsistent with the purpose of LDO 246.050(3) to hold this provision has no applicability after conceptual site plan approval is granted, and that in later steps of the destination resort approval process, new applicants may freely be substituted for those whose financial resources have been shown to comply with LDO 246.050(3), without further consideration of compliance with LDO 246.050(3).

1 reviewing a decision by a local governing body, this Board
2 cannot interpret local enactments in the first instance.
3 Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on
4 reconsideration 125 Or App 119 (1993), rev'd on other
5 grounds 319 Or 308 (1994); Weeks v. City of Tillamook, 117
6 Or App 449, 453, 844 P2d 914 (1992). Consequently, the
7 challenged decision must be remanded for the board of
8 commissioners to consider whether the Provosts are
9 "applicants" for preliminary development plan approval and,
10 if they are not, to address whether the LDO contains
11 applicable standards regarding the financial resources of
12 intervenor, the sole applicant.

13 The first assignment of error (Foland) is sustained.

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

15 LDO 246.070(1) provides, in relevant part:

16 " * * * A destination resort may be developed in
17 phases according to the conceptual site plan,
18 provided detailed discussion of phasing and the
19 necessity for such phasing is described fully
20 within the preliminary development plan approval.
21 * * *"

22 The challenged decision describes the three proposed phases
23 of destination resort development and states:

24 "Development of the resort in phases is necessary
25 in part because the recreation facilities for a
26 destination resort must be substantially completed
27 before accommodations can be developed, and
28 residential development is only allowed subsequent
29 to resort development. * * *" Record 9.

30 Petitioners contend the county's findings are

1 inadequate to satisfy LDO 246.070(1) and are not supported
2 by substantial evidence in the record.

3 The county's findings describe the proposed phasing and
4 why the county believes phasing is necessary. The findings
5 are adequate to satisfy LDO 246.070(1). We have reviewed
6 the evidence in the record cited by the parties.
7 Substantial evidence is evidence a reasonable person would
8 rely on in reaching a decision. City of Portland v. Bureau
9 of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay
10 v. State Board of Education, 233 Or 601, 605, 378 P2d 558
11 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd
12 108 Or App 339 (1991). Based on the evidence cited, a
13 reasonable person could reach the decision made by the
14 county with regard to the nature of and necessity for
15 phasing of the proposed destination resort.

16 The third assignment of error (Foland) is denied.

17 **FOURTH ASSIGNMENT OF ERROR (FOLAND)**

18 LDO 246.070(3)(B) and (D) require that a destination
19 resort preliminary development plan include the location,
20 size, design and certified cost of all proposed developed
21 recreation facilities, visitor accommodations, other
22 structures, roads, streets, parking, pedestrian ways,
23 equestrian trails and bike paths. LDO 246.070(3)(C)
24 requires a preliminary development plan to include the
25 location, size and design of all sewer, water, storm
26 drainage, power and other utility facilities.

1 The challenged decision finds the required information
2 is shown in a number of exhibits which are part of the
3 preliminary development plan application and are identified
4 in the findings. Record 10-11. Petitioners contend the
5 cited exhibits do not contain certain required information.
6 Petitioners' contentions regarding which information is
7 missing are based on a table at Petition for Review
8 (Foland) 37.⁷

9 Intervenor argues that unlike LDO 246.070(3)(B) and
10 (D), LDO 246.070(3)(C) explicitly does not require that the
11 cost of sewer, water, storm drainage, power and other
12 utility facilities be included in the preliminary
13 development plan. We agree. Intervenor provides citations
14 to exhibits that are part of the preliminary development
15 plan application, in which intervenor contends the
16 information petitioners allege is missing can be found. The
17 adequacy of this information to satisfy LDO 246.070(3)(B)-
18 (D) is reviewed below.

19 **A. Golf Course**

20 LDO 246.070(3)(B) requires information on the cost of
21 "all developed recreation facilities * * * and any other
22 proposed structures * * *." LDO 246.070(3)(B) also states
23 that "[c]ost estimates shall be certified for all structures
24 by a licensed contractor, or registered professional

⁷The table displays which information petitioners concede is present in the numbered exhibits.

1 engineer or architect." (Emphasis added.) Petitioners
2 Foland contend the certified cost estimate for construction
3 of the proposed golf course required by LDO 246.070(3)(B) is
4 lacking.

5 Intervenor cites a cost estimate signed by intervenor's
6 agent as "developer." Record 1423. As far as we can tell,
7 this estimate is not certified by a licensed contractor,
8 registered professional engineer or registered architect.
9 Therefore, it satisfies the requirement of LDO 246.070(3)(B)
10 only if the proposed golf course is not a "structure" under
11 relevant provisions of the LDO. However, as explained
12 supra, this Board cannot interpret the LDO in the first
13 instance. On remand, the local governing body must address
14 this interpretive issue, unless a cost estimate certified by
15 a licensed contractor, registered professional engineer or
16 registered architect is made part of the preliminary
17 development plan application.

18 This subassignment of error is sustained.

19 **B. Hotel and Golf Villas**

20 Petitioners contend information on the design of these
21 proposed structures is lacking. Intervenor cites plans for
22 the hotel and golf villas at Record 1272-75 and 1278-83.

23 This subassignment of error is denied.

24 **C. Parking Areas and Pedestrian Ways**

25 Petitioners contend information on the size and design
26 of parking areas and on the location, design and cost of

1 pedestrian ways is missing. Intervenors cite the
2 preliminary site development plan at Record 1190 for
3 information on location, size and design of these
4 facilities. However, this site plan does not explicitly
5 identify any "parking areas." There are areas next to
6 buildings labeled "Hotel" and "Clubhouse & Banquet
7 Facility," and within a "V" formed by the proposed "Golf
8 Villas," that may be intended as parking areas, but they are
9 not identified as such and no information is given on how
10 many parking spaces they might accommodate. There is no
11 indication on the site plan of the location or design of
12 proposed pedestrian ways. Also, the construction cost
13 budget cited by intervenors at Record 1425 does not list the
14 cost of any pedestrian ways.

15 This subassignment of error is sustained.

16 **D. Bicycle Paths**

17 Petitioners contend information on the size and cost of
18 bicycle paths is lacking. Intervenor cites a conceptual
19 entry road plan which indicates an 8-foot wide
20 bicycle/pedestrian path. Record 1287. A reasonable person
21 could find this adequate to satisfy the requirement for
22 information on size. With regard to cost, intervenor again
23 cites the construction cost budget at Record 1425. However,
24 that budget does not list a cost for bicycle paths.

25 This subassignment of error is sustained, in part.

1 **E. Sewerage/Septic Systems**

2 Petitioners contend information on the location, size
3 and design of the proposed sewerage and septic systems is
4 lacking. Intervenor cites a preliminary plan for wastewater
5 facilities at Record 1228-34. A reasonable person could
6 find this plan contains adequate information on the
7 location, size and design of the proposed sewerage and
8 septic systems.

9 This subassignment of error is denied.

10 **F. Water System/Impoundments**

11 Petitioners contend information on the location, size
12 and design of the proposed water system and impoundments is
13 lacking. Petitioners point to testimony by intervenor's
14 representative that all five major water storage ponds
15 proposed to be built will be "lined," and object to a lack
16 of information on such liners. Record 221. Petitioners
17 also note that a particular portion of the site is depicted
18 as either an 8-acre storage pond or a "driving range" on
19 different maps in the record. Record 1226, 1263.

20 Intervenor cites a document entitled "Preliminary Plan
21 for Domestic Water and Irrigation Water" (preliminary water
22 plan) at Record 1193-1226. Intervenor also argues that
23 LDO 246.070(3) does not require information on location,
24 size and design of impoundment liners. Finally, with regard
25 to the 8-acre area mapped variously as a storage pond or a
26 driving range, intervenor argues "the subject area is both a

1 driving range and, during severe weather conditions, a water
2 impoundment area."⁸ (Emphasis in original.) Intervenor's
3 Brief 28 n 10.

4 The preliminary water plan cited by intervenor provides
5 adequate information on the location, size and design of the
6 proposed water system, with two possible exceptions. The
7 preliminary water plan clearly indicates the proposed water
8 system includes five major storage ponds. Record 1200,
9 1203, 1205. The preliminary water plan does not, however,
10 say anything about lining those ponds. If intervenor's
11 proposal includes lining the proposed storage ponds, as
12 indicated by intervenor's representative at Record 221,
13 LDO 246.070(3)(C) requires that information on the size and
14 design of such liners be in the record.⁹ Also, if
15 intervenor's proposal includes using an 8-acre site as both
16 a storage pond and driving range, LDO 246.070(3)(B) and (C)
17 require that there be information in the record on the
18 design of such a dual purpose facility.

19 This subassignment of error is sustained, in part.

20 The fourth assignment of error (Foland) is sustained,
21 in part.

⁸Intervenor does not, however, cite any evidence in the record on this issue.

⁹We presume the "location" of such liners will be the same as that of the proposed storage ponds themselves.

1 **FIRST ASSIGNMENT OF ERROR (SKREPETOS)**

2 LDO 246.070(4)(A) provides:

3 "The preliminary development plan shall be
4 consistent with the conceptual site plan approved
5 by the Board of Commissioners for the property,
6 pursuant to the adopted Resolution of Intent to
7 Rezone."

8 LDO 246.070(5)(D) requires the county to find:

9 "The preliminary development plan is in
10 substantial conformance with the conceptual site
11 plan approved by the Board of Commissioners, and
12 alterations, if any, from the conceptual site plan
13 are found to be minor in nature."

14 We also note that LDO 246.070(3) requires an application for
15 approval of a destination resort preliminary development
16 plan to "include detailed text and graphics to demonstrate
17 consistency of the preliminary development plan with the
18 conceptual site plan approved for the property."

19 The county findings on LDO 246.070(4)(A) and (5)(D),
20 respectively, state:

21 "The * * * preliminary development plan is
22 consistent with the conceptual plan approved in
23 the [prior county] order because it proposes the
24 same concept at the same scale, and, because some
25 components have been scaled down or moved to more
26 central locations, adverse impacts on resources
27 and neighboring properties are actually reduced.
28 The overall concept as well as the major details
29 have remained the same. * * *" Record 13.

30 "[LDO 246.070(5)(D)] is met if the conditions of
31 approval in the [prior county] order are met
32 * * *. The * * * preliminary development plan is
33 in substantial conformance with the [prior county]
34 order, and the alterations to the plan are minor
35 changes that generally reduce the impact of the
36 proposed development on resources and surrounding

1 land uses." Record 19.

2 Petitioners argue the above findings are inadequate
3 because they simply restate the standards. Petitioners
4 argue the findings fail to identify the "concept" and
5 "scale" referred to, what "components" have been "scaled
6 down or moved" and what the nature and impacts of any
7 changes are, or to explain the reasons why the county
8 believes the standards are satisfied. Petitioners also
9 contend the findings fail to respond to relevant issues
10 specifically raised during the county proceedings regarding
11 the magnitude of differences alleged between the preliminary
12 development and conceptual site plans, including (1) a 25%
13 increase in the amount of land devoted to irrigated golf
14 greens, (2) the addition of perimeter landscaping, (3) a
15 change from a 145-room hotel to a 96-room hotel, (4) a
16 change from 30 cottages/30 condominiums/75 single family
17 dwelling lots to 110 golf villas/48 condominiums/2 single
18 family dwelling lots, (5) replacement of an executive
19 conference center with greater recreation facilities,
20 (6) change from a recirculating sand filter sewage disposal
21 system to a combination of conventional septic tanks and an
22 "activated sludge" sewage treatment process.¹⁰ Finally,
23 petitioners contend the county's determinations of

¹⁰Petitioners also contend approval of the increased irrigation requirements and newly proposed system of sewage treatment are not supported by the findings on adequacy of public facilities required by LDO 246.070(5)(C).

1 compliance with LDO 246.070(4)(A) and (5)(D) are not
2 supported by substantial evidence in the record.

3 The above quoted provisions of LDO 246.070(3), (4)(A)
4 and (5)(D) indicate that identifying differences between an
5 approved destination resort conceptual site plan and a
6 proposed preliminary development plan is central to the
7 county's preliminary development plan approval process. It
8 is clear simply from a comparison of the description of the
9 proposed destination resort in Foland, supra, and Bouman,
10 supra, and in the challenged decision that there are
11 differences between the two plans, and the county's findings
12 acknowledge this. However, the county's findings are
13 impermissibly conclusory. They do not identify the facts
14 relied on or explain how the county reached its conclusion.
15 We cannot discern from the county's findings in what ways
16 the preliminary development plan is different from the
17 conceptual site plan, the magnitude of those differences or
18 why the county believes they are minor.

19 We also agree with petitioners that relevant issues
20 concerning compliance with these standards were specifically
21 raised below and are required to be addressed in the
22 county's findings. Norvell v. Portland Area LGBC, 43 Or App
23 849, 853, 604 P2d 896 (1979); Heiller v. Josephine County,
24 23 Or LUBA 551, 556 (1992). Intervenor argues that some of
25 the "changes" alleged by petitioners Skrepetos are not
26 really changes or that they are minor in nature. However,

1 it is the county governing body that must interpret
2 LDO 246.070(4)(A) and (5)(D) and apply them to the facts in
3 the first instance. Gage, supra; Weeks, supra.

4 The first assignment of error (Skrepetos) is
5 sustained.¹¹

6 **FOURTH ASSIGNMENT OF ERROR (SKREPETOS)**

7 LDO 246.070(4)(F) requires the preliminary development
8 plan to satisfy the following standard:

9 "Important natural features including, but not
10 limited to fish and wildlife habitat, big game
11 migration routes, or threatened or endangered
12 species, streams, rivers, and significant wetlands
13 shall be maintained, and specific measures for
14 their retention and protection shall be described.
15 Riparian vegetation within 100 feet of streams,
16 rivers, and significant wetlands shall be
17 maintained. Alterations to important natural
18 features, including placement of structures
19 maintaining the overall value of the features, may
20 be allowed."¹² (Emphases added.)

21 Petitioners contend that with regard to wetlands and

¹¹We do not consider petitioners Skrepetos et al's second and third assignments of error, because the challenged decision and the parties' arguments regarding these assignments rely at least in part on the extent to which certain issues were settled by county approval of the conceptual site plan for the proposed destination resort. In order to evaluate such arguments, we must first be able to determine to what extent the proposed preliminary development plan differs from the approved conceptual site plan.

¹²We note that LDO 246.070(3)(D) also imposes the following requirement on preliminary development plans:

"* * * The type and location of all natural features in the development site shall be identified and a detailed description of measures proposed for maintaining the overall value of these important site attributes shall be provided. Methods employed to mitigate adverse impacts shall be fully described."

1 fish and wildlife habitat, the county's determinations of
2 compliance with LDO 246.070(4)(F) are not supported by
3 adequate findings or by substantial evidence in the whole
4 record.

5 **A. Wetlands**

6 The county findings addressing LDO 246.070(4)(F) state,
7 in relevant part:

8 "Exhibit 27: 'Wetlands, Fish and Wildlife,
9 Riparian Vegetation' inventories the natural areas
10 and habitat values of the development site. * * *
11 Wetlands will be protected consistent with the
12 requirements of the Oregon [DSL], and are to be
13 designated 'off limits' to golfers as a management
14 policy." Record 15.

15 Additionally, the challenged decision imposes the following
16 condition (condition 9):

17 "This site includes wetlands within its
18 boundaries. Delineation of the wetlands on the
19 site is subject to review by the [DSL]. Fill or
20 removal activities in wetlands * * * typically
21 require a permit from the [DSL] and/or the Army
22 Corps of Engineers. Within 35 days of submitting
23 a completed local application, the [DSL] will
24 notify you whether you need to apply for a state
25 Removal-Fill permit. Jackson County is not liable
26 for any delays in the processing of a state or
27 federal permit." Record 41.

28 Petitioners contend the challenged decision neither
29 delineates the extent of the wetlands located on the subject
30 property, explains how significant wetlands will be
31 maintained, nor describes specific methods to be used for
32 the retention and protection of significant wetlands, all of

1 which are required by LDO 246.070(3)(F).¹³ Petitioners
2 argue there is evidence from DSL in the record that the
3 wetland inventory submitted by intervenor, and referred to
4 in the above finding, does not meet DSL's standards for
5 identifying wetlands. Record 188. Petitioners also argue
6 the county's reliance on condition 9 to achieve compliance
7 with LDO 246.070(4)(F) is improper because the decision does
8 not include findings establishing it is feasible for the
9 proposed development to satisfy condition 9.

10 Whether the county believes the preliminary development
11 plan identifies the wetlands on the subject property is
12 unclear. The findings state intervenor's "Exhibit 27 * * *
13 inventories the natural areas * * * of the development
14 site." Record 15. However, condition 9 states this
15 delineation of wetlands will be subject to further review by
16 DSL. The decision also states that wetlands "will be
17 protected consistent with" DSL requirements. Id. The
18 decision does not identify how the proposed development will
19 impact the wetlands on the subject property, or what
20 specific measures will be used for wetland protection, other
21 than declaring wetlands "off limits" to golfers.

¹³With regard to the finding about designating wetlands areas "off limits" to golfers, petitioners note certain maps in the preliminary development plan application, including the tentative subdivision plat map, preliminary water plan map and golf course routing map, show golf holes located in such a way that golfers will be shooting in or over areas shown as wetlands on the Exhibit 27 referred to in the county findings. Record 1191A, 1226, 1263, 1306.

1 LDO 246.070(3)(D) and (4)(F) appear to require that the
2 preliminary development plan identify wetlands on the
3 subject property and that the county explain how significant
4 wetlands will be maintained and describe specific measures
5 for their retention and protection. We agree with
6 petitioners that the county's findings are inadequate to
7 demonstrate either (1) compliance with these requirements,
8 or (2) that it is feasible to comply with these requirements
9 and that compliance will be ensured through reliance on the
10 DSL fill and removal permitting process.¹⁴ See Rhyne v.
11 Multnomah County, 23 Or LUBA 442, 447 (1992).

12 This subassignment of error is sustained.

13 **B. Fish and Wildlife Habitat**

14 With regard to fish and wildlife habitat, petitioners
15 contend the decision does not comply with LDO 246.070(4)(F)
16 or condition 6 of the prior conceptual site plan approval
17 decision (conceptual plan condition 6), which provides:

18 "The Applicants shall provide a professionally
19 prepared study of the effect of the resort
20 development on riparian habitat within Neil and
21 Clayton Creeks. The developer shall minimize

¹⁴We agree with intervenor that if the county properly determines that it is feasible for the proposed development to comply with the wetlands protection requirement of LDO 246.070(4)(F), and demonstrates that conditioning approval on compliance with the DSL fill and removal permitting process will ensure such compliance, it need not demonstrate that the project will comply with DSL's discretionary permit approval standards. Bouman, 23 Or LUBA at 646-47. The problem here is that the county's findings do not explain how the proposed development will affect the wetlands and why DSL's permitting process will ensure compliance with the wetlands protection requirement of LDO 246.070(4)(F).

1 vegetation removal in the crossing of creeks by
2 fairways, bridges, and roadways within the
3 development through its preliminary development
4 plan * * *. The report and proposed measures for
5 mitigation of riparian habitat segregation shall
6 be approved by the Oregon department of Fish and
7 Wildlife (ODFW) and the [DSL]." Record 33.

8 With regard to fish and wildlife habitat, the county
9 findings addressing LDO 246.070(4)(F) state:

10 "Exhibit 27: 'Wetlands, Fish and Wildlife,
11 Riparian Vegetation' inventories the natural areas
12 and habitat values of the development site. The
13 subject property is not included in any designated
14 wildlife habitat area. Stream crossings have been
15 minimized in the golf course routing design
16 (Exhibit 9). Blackberries will be retained in
17 most cases to discourage golfers from entering
18 riparian areas. * * *." Record 15.

19 The challenged decision imposes a new condition
20 (condition 10) imposing development setbacks from Neil Creek
21 and Clayton Creek and other riparian vegetation retention
22 requirements. Record 41-42. The challenged decision also
23 imposes the a new condition 6, which must be satisfied at
24 the time of application for final development plan approval:

25 "Evidence of approval of the riparian area
26 mitigation plan, including consideration of
27 bridges and stream crossings, by [ODFW] and [DSL]
28 is required to be submitted with the final
29 development plan application for Phase I."
30 Record 44.

31 Petitioners do not specifically challenge the county's
32 finding that the subject property does not include
33 designated wildlife habitat areas. Neither do petitioners
34 challenge the adequacy of the county findings and newly

1 imposed conditions 6 and 10 to satisfy LDO 246.070(4)(F) and
2 conceptual plan condition 6 with regard to riparian
3 vegetation protection. Petitioners do contend the county's
4 findings are inadequate to satisfy LDO 246.070(4)(F) with
5 regard to explaining how fish habitat in Neil Creek and
6 Clayton Creek will be maintained and protected.¹⁵ According
7 to petitioners, issues were specifically raised during the
8 county proceedings concerning the impacts of the proposed
9 destination resort on water flows in Neil and Clayton
10 Creeks, including impacts of removal of water from Neil
11 Creek during the winter on the spawning of salmon and
12 steelhead and the decrease of return flows to Neil Creek and
13 Clayton Creek that formerly occurred during the summer due
14 to flood irrigation of the subject property. Petitioners
15 argue the challenged decision does not describe specific
16 measures to protect the fish habitat in Neil and Clayton
17 Creeks from these impacts of the proposed development.

18 The challenged decision adopts Exhibit 27 as the
19 county's inventory of fish and wildlife habitat. Exhibit 27
20 recognizes Neil Creek and Clayton Creek provide fish
21 habitat. Record 1307. We agree with petitioners that the
22 issues described above concerning impacts of the proposed

¹⁵Petitioners also argue this constitutes a failure to comply with conceptual plan condition 6, quoted in the text supra. However, conceptual plan condition 6 refers only to riparian habitat and riparian vegetation, which is the habitat and vegetation on and near the banks of the creeks, not the fish habitat in the creeks themselves.

1 development on the flow of Neil and Clayton Creeks were
2 raised below, are relevant to compliance with
3 LDO 246.070(4)(F) and should be addressed in the county's
4 findings. Norvell, supra; Heiller, supra.

5 This subassignment of error is sustained.

6 The fourth assignment of error (Skrepetos) is
7 sustained.

8 The county's decision is remanded.