

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's amendment of its zoning
4 and development ordinance (ZDO), eliminating the requirement
5 that certain applications be reviewed by the county for
6 compliance with its wetland regulations.

7 **MOTION TO INTERVENE**

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

11 **BACKGROUND**

12 In 1993, the county adopted plan and ordinance
13 amendments that legislatively changed the manner in which
14 the county regulates wetlands. Petitioner appealed the
15 county's adoption of the ordinance amendments to LUBA. In
16 our decision on that appeal, Redland/Viola/Fischer's Mill
17 CPO v. Clackamas County, 27 Or LUBA 560, 562-63 (1994)
18 (Redland I), we described the amendments as follows:

19 "The county's comprehensive plan and land use
20 regulations have been acknowledged as being in
21 compliance with the Statewide Planning Goals.
22 ORS 197.251. The challenged decision adopts
23 several legislative amendments to the text of ZDO
24 Section 1000 (Development Standards). The
25 decision adds a new provision requiring the county
26 to notify the Oregon Division of State Lands (DSL)
27 of developments within areas identified as
28 wetlands on the DSL State-wide Wetlands Inventory,
29 as required by ORS 215.418. ZDO 1001.02C.

30 "The challenged decision also amends ZDO 1002.06
31 (Wildlife Habitats and Distinctive Resource

1 Areas). Prior to the amendment, ZDO 1002.06B
2 imposed certain approval standards on development
3 in or within 100 feet of all natural wetlands.
4 The decision adds a new ZDO 1002.06A which states:

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

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

15 "Finally, the ordinance amends ZDO 1011 (Open
16 Space and Parks). Prior to the amendment,
17 ZDO 1011.02A provided that the standards of
18 ZDO 1011 applied to areas indicated as Open Space
19 on the North Urban Area Comprehensive Plan Map
20 (NUA plan map) 'or when one or more of [certain
21 listed] open spaces resources is present.'
22 (Emphasis added.) One of the listed open space
23 resources is '[w]etlands, including recharge
24 areas.' ZDO 1011.02A.5. The challenged decision
25 amends ZDO 1022.02A to provide that the standards
26 of ZDO 1011 apply to areas indicated as Open Space
27 on the NUA plan map and the Mt. Hood Community
28 Plan Map (Mt. Hood plan map) 'when one or more of
29 [certain listed] open spaces resources is
30 present.' The net effect of this change is to
31 make the standards of ZDO 1011 applicable to
32 wetlands only if they are identified as Open Space
33 on the NUA or Mt. Hood plan map. The decision
34 amends ZDO 1011.06B.2 to provide that commercial
35 or industrial developments affecting wetlands may
36 be allowed subject to compliance with ZDO 1011.04
37 'and when permitted by the [ACE] and [DSL].'
38 (Footnotes omitted.)

39 We remanded the county's decision in Redland I because
40 the county had not established that the amendments comply
41 with the Goal 5. In response to the county's argument that

1 the challenged amendments were outside the Goal 5 process,
2 we concluded:

3 "Subject to an exception not relevant here, all
4 amendments to acknowledged land use regulations
5 must themselves comply with the goals and any
6 rules implementing the goals. ORS 197.835(5)(b).
7 We are aware of no basis for concluding an
8 amendment to acknowledged land use regulations
9 that affects Goal 5 resources may be adopted
10 'outside the Goal 5 process.' In this case, the
11 challenged ZDO amendments make portions of the
12 county's acknowledged program for protection of
13 wetlands inapplicable to rural wetlands outside
14 the areas covered by the NUA and Mt. Hood plan
15 maps. The challenged ordinance includes a
16 conclusory statement that the amendments comply
17 with Goal 5. Record 1. To support this
18 conclusion, the county must demonstrate, either in
19 the decision or through argument and citations to
20 the record in its brief, that with regard to rural
21 wetlands, the amendments result in a program that
22 complies with Goal 5 and the Goal 5 rule."
23 Redland I at 566.

24 On remand, the county readopted the plan and ordinance
25 amendments. Although the county adopted new findings to
26 support its decision, the decision does not alter the plan
27 or ordinance amendments adopted in its earlier decision.
28 Again, petitioner and intervenor challenge only the adoption
29 of the ordinance amendments and not the comprehensive plan
30 amendment.

31 The findings upon which the challenged decision is
32 based address the bases for LUBA's remand, and include the
33 following:

34 * * * * *

35 "2. The Zoning and Development Ordinance (ZDO), as

1 modified by these amendments, complies with Goal 5
2 to the same extent it did prior to these
3 amendments. The directive of Goal 5 is '[t]o
4 conserve open space and protect natural and scenic
5 resources.' Prior to these amendments, the County
6 was required to review all land use applications
7 in the rural area for compliance with our own
8 wetland regulations. After these amendments, all
9 such applications will instead have to be approved
10 by the United States Army Corps of Engineers and
11 the Division of State Lands. There is convincing
12 evidence in the record that a thorough review will
13 be done, particularly by DSL. * * *

14 "3. The Goal 5 administrative rule, OAR Chapter
15 660, Division 16, sets forth the framework for
16 taking inventory of, and developing a program to
17 protect, significant Goal 5 resources. These
18 amendments relate solely to the procedure to be
19 followed for individual applications involving
20 wetlands. They make no change in the county's
21 procedures for inventorying such resources, nor in
22 developing programs to preserve them. The post-
23 amendment ZDO, therefore, complies with OAR
24 Chapter 660, Division 16 to the same extent as the
25 pre-amendment ZDO. To the extent the Goal 5 rule
26 might be viewed a substantive standard, rather
27 than a process outline, this amendment is
28 consistent with it for the same reasons it is
29 consistent with Goal 5 itself. * * *

30 "4. Both Petitioner Redland/Viola/Fischer's Mill
31 CPO and Intervenor Tylka alleged at LUBA that
32 these amendments violate the last sentence of
33 Comprehensive Plan Water Resources Policy 17.3 * *
34 *. These amendments are consistent with Policy
35 17.3, because the County will still review
36 applications to determine if wetlands are present
37 on the property. The change is that, if so[,] the
38 County will require Corps or DSL approval before
39 the application is approved, rather than applying
40 its own corresponding ordinance standards. County
41 review will still 'assure consistency with section
42 1000', but what Section 1000 now requires is
43 approval by the Corps and DSL, rather than
44 compliance with the County's own wetland

1 standards. Applications will also continue to be
2 reviewed for consistency with the goals and
3 policies of Comprehensive Plan Chapter 3, to the
4 extent they apply to any particular application.
5 This Board so interprets Policy 17.3, rather than
6 viewing it as requiring review of rural area
7 applications for compliance with the county's own
8 wetland standards." (Emphasis added.) Record II
9 1-2.

10 The findings reference the county's comprehensive plan,
11 Natural Resources and Energy chapter, which sets forth water
12 resources policies. These provisions pertain to wetland
13 identification and regulation, including Policy 17.2 which
14 states:

15 "The County recognizes the U.S. Department of the
16 Interior, Fish and Wildlife Service Natural
17 Wetlands Inventory as a resource document for
18 wetland identification. Individual site
19 development of inventoried lands will be reviewed
20 for compliance with wetlands policies."

21 Policy 17.3 explains why certain resources are not
22 listed on the county's Goal 5 inventory and describes the
23 county's interim protection process in general terms,
24 stating:

25 "The County has insufficient information as to
26 location, quality, and quantity of wetland
27 resources outside the Mt. Hood urban area and the
28 Urban Growth Boundary to develop a management
29 program at this time. If such information becomes
30 available, the County shall evaluate wetland
31 resources pursuant to Goal 5 and OAR Chapter 660
32 Division 16, prior to the next Periodic Review.
33 In the interim, the County will review all
34 conditional use, subdivision, and zone change
35 applications and commercial and industrial
36 development proposals to assure consistency with
37 Section 1000 of the Zoning and Development

1 Ordinance and goals and policies of Chapter 3 of
2 the Plan." (Emphasis added.)

3 In its brief, the county explains the relationship of
4 its proposed amendments to the interim regulations under
5 Policy 17.3, stating:

6 "In its decision on remand, the Board of County
7 Commissioners found that the ZDO amendments were
8 consistent with Water Resources Policy 17.3, in
9 that the County will still review applications in
10 the rural areas 'to assure consistency with
11 Section 1000'; the fact that one facet of that
12 review has been modified does not make the
13 ordinance inconsistent with that plan policy."
14 Respondent's Brief 9.

15 Policy 17.3, which we determined in Redland I has been
16 acknowledged by LCDC as in compliance with Goal 5,
17 replicates some of the language of the inventory deferral
18 process set forth in OAR 660-16-000(5)(b).¹ OAR 660-16-
19 000(5)(b) states, in relevant part:

20 "Delay Goal 5 Process: When some information is
21 available, indicating the possible existence of a
22 resource site, but that information is not
23 adequate to identify with particularity the
24 location, quality and quantity of the resource
25 site, the local government should only include the
26 site on the comprehensive plan inventory as a
27 special category. The local government must
28 express its intent relative to the resource site
29 through a plan policy to address that resource
30 site and proceed through the Goal 5 process in the
31 future. The plan should include a time-frame for

¹After the county enacted the challenged decision, the Land Conservation and Development Commission (LCDC) replaced the Goal 5 rule, OAR Chapter 660 Division 16, with new rules at Division 23, with certain exceptions not relevant to wetlands regulation. The parties do not argue that the rule amendments are applicable to the challenged decision.

1 this review. Special implementing measures are not
2 appropriate or required for Goal 5 compliance
3 purposes until adequate information is available
4 to enable further review and adoption of such
5 measures. The statement in the plan commits the
6 local government to address the resource site
7 through the Goal 5 process in the post-
8 acknowledgment period. * * *²

9 Resources included in the OAR 660-16-000(5)(b) special
10 category are customarily described as 1B resources. The
11 resources regulated by the challenged decision are 1B
12 resources.

13 **ORDINANCE AMENDMENTS**

14 The challenged decision amends ZDO Section 1000,

²Goal 5 and the implementing rule, OAR Chapter 660, Division 16 require a local government to seek information on the location, quality and quantity of resources and then prepare an inventory of the sites it deems significant.

"After a local government completes the first step of gathering information on the location, quality and quantity of resources, it may choose not to include a site on its Goal 5 inventory, to delay the Goal 5 process because of inadequate information, or to include a site on its Goal 5 inventory. OAR 660-16-000(5). These three choices are often referred to as "1A," "1B" and "1C" decisions, respectively." Larson v. Wallowa County, 23 Or LUBA 527, 537 (1992), rev'd on other grounds 116 Or App 96 (1992).

After the inventory of significant sites is completed the local government identifies conflicts between the inventoried Goal 5 resource and the allowed uses, determines the economic, social, environmental and energy consequences of the conflicting uses, and if sufficient information is available, develops a program to achieve the goal and resolve any conflicts. See Gage v. City of Portland, 28 Or LUBA 307 (1994) aff'd 133 Or App 346 (1995).

1 Development Standards in four subsections, as follows:³

2 ZDO 1001.02, Application of Standards, was amended to
3 add:

4 "**C.** **The county shall notify the Division of State**
5 **Lands of developments wholly or partially**
6 **within areas identified as wetlands on the**
7 **State-Wide Wetlands Inventory pursuant to the**
8 **provisions of ORS 215,418.**"

9 ZDO 1002.06, Wildlife Habitats and Distinctive
10 Resources Areas, now states:

11 "**A.** **Development in wetlands areas not identified**
12 **as Open Space on the North Urban**
13 **Comprehensive Plan Map is subject to approval**
14 **by the U.S. Army Corps of Engineers and the**
15 **Oregon Division of State Lands.**

16 "**B.** All developments, **except as provided in**
17 **Subsection 1002.06A above,** shall be planned,
18 designed, constructed, and maintained so as
19 to:

20 "1. Protect native plant species, aquatic
21 habitats, and endangered or otherwise
22 important wildlife species.

23 "2. Minimize adverse wildlife impacts in
24 sensitive habitat areas and wetlands.

25 "**C.** **All** developments, **except as provided in**
26 **subsection 1002.06A above,** proposed in or
27 near (within one hundred (100) feet of)
28 natural wetlands shall be designed to:

29 "1. Preserve functions of groundwater
30 recharge, water storage, turbidity
31 reduction, nutrient filtration, biologic

³Bold type and underscoring indicate language added by the proposed amendments. Brackets and italics indicate language deleted by the proposed amendments.

1 or botanical production, and protective
2 habitat cover.

3 "2. Provide compatibility with continue
4 performance of wetland functions, such
5 as:

6 " * * * * *

7 "3. Eliminate the need for filling, dumping
8 or excavating in the wetland proper * *
9 *

10 "4. Maintain the runoff coefficient and
11 erosion equilibrium for lands bordering
12 the wetland substantially the same as if
13 such lands were undeveloped. * * *"

14 ZDO 1002.06 allowed development in wetland areas before
15 the proposed amendments and continues to allow development
16 in wetland areas after the proposed amendments, albeit,
17 under different circumstances. The protections formerly set
18 forth in ZDO 1002.06(B) and (C) are replaced by DSL and ACE
19 standards.

20 ZDO 1011.02(A) Open Space areas, Area of Application,
21 was amended to state:

22 "A. The standards and requirements of this
23 section shall apply to areas generally
24 indicated as Open Space on the North[west]
25 Urban Area Comprehensive Plan Map [or] and
26 Mount Hood Community Plan Map when one or
27 more of the following open space resources is
28 present:

29 " * * * * *

30 "5. Wetlands, including recharge areas

31 " * * * * *"

32 While ZDO 1011.02 formerly imposed requirements on many

1 areas identified as open space, the areas now regulated by
2 the county are more limited.⁴ The amendments make the
3 standards of ZDO 1011.02 applicable to wetlands only if they
4 are identified on two specified maps.

5 ZDO 1011.03(B), Development Standards and Limitations,
6 was amended to state:

7 "'High priority' open space [which includes
8 wetlands in its definition] shall be preserved
9 outright, except:

10 "* * * * *

11 "2. Commercial or industrial developments
12 affecting wetlands * * * may be allowed,
13 subject to the provisions of subsection
14 1011.4 and when permitted by the Corps of
15 Engineers and the Oregon Division of State
16 Lands." Record I 4-14.⁵

17 The net result of the challenged decision is that
18 outright protection of wetlands is further modified, and
19 previously specified restrictions under ZDO 1011.02(A) do
20 not apply at all in specified rural areas. The changes
21 under the proposed amendments do not affect wetlands listed
22 on the county's inventory.

23 In contrast to our statement in Redland I that the
24 proposal would make portions of the county's acknowledged

⁴The challenged decision affects regulation of open space areas generally. However, petitioner confines its appeal to changes in regulation of wetlands.

⁵The local record submitted for the decision in Redland I is denominated Record I. The local record submitted in the matter before us is denominated Record II.

1 program inapplicable to certain rural wetlands, we
2 understand the county to find that the proposal to change
3 regulation of certain rural wetlands does not change its
4 Goal 5 program. The proposed amendments merely alter the
5 existing interim process that protects certain resources
6 that are not listed on the county's inventory.

7

8 **FIRST THROUGH THIRD AND FIFTH ASSIGNMENTS OF ERROR**
9 **(PETITIONER)**

10 **FIRST THROUGH SIXTH ASSIGNMENTS OF ERROR (INTERVENOR)**

11 Petitioner's first through third and fifth assignments
12 of error and intervenor's first through sixth assignments of
13 error fall within one of two arguments: (1) The proposed
14 ordinance amendments do not comply with one or more aspects
15 of Goal 5 and the Goal 5 implementing rule because they do
16 not protect ecologically and scientifically important
17 natural resources and because they do not follow the
18 procedures set forth in the Goal 5 rule; or (2) The proposed
19 ordinance amendments do not comply with the county's
20 comprehensive plan, specifically Chapter 3, Policy 17.3
21 (Policy 17.3) which implements the county's Goal 5 1B
22 process.⁶

⁶Statewide Planning Goal 2 requires that planning decisions and actions have an adequate factual base, regardless of whether the decision is legislative or quasi-judicial in nature. Because the Goal 2 requirement for an adequate factual base is equivalent to the requirement for substantial evidence in the whole record, we understand petitioner to contend that the county lacked an adequate factual base for the amendment. 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372 (1994).

1 Although petitioner's and intervenor's arguments are
2 premised on all county wetlands being subject to all Goal 5
3 protections, they do not assert that the resources subject
4 to the challenged decision are part of the county's valid
5 Goal 5 inventory. OAR 660-16-000(2) distinguishes between a
6 valid Goal 5 inventory and other inventoried resources,
7 explaining

8 "A 'valid' inventory of a Goal 5 resource under
9 subsection (5)(c) of this rule must include a
10 determination of the location, quality, and
11 quantity of each of the resource sites. Some Goal
12 5 resources (e.g., natural areas, historic sites,
13 mineral and aggregate sites, scenic waterways) are
14 more site-specific than others (e.g., groundwater,
15 energy sources). For site-specific resources,
16 determination of location must include a
17 description or map of the boundaries of the
18 resource site and of the impact area to be
19 affected, if different. For non-site-specific
20 resources, determination must be as specific as
21 possible."

22 OAR 660-16-000(5)(b) provides that "when some
23 information is available, * * * but that information is not
24 adequate * * *, the local government should only include the
25 site on the comprehensive plan inventory as a special
26 category." OAR 660-16-000(5)(b) does not require that the
27 county adopt special measures for resources that are not

Petitioner argues also that there is not substantial evidence in the record to demonstrate that ZDO 102 is in compliance with ORS 197.230. Petitioner does not explain how the ORS 197.230 requirement that the Land Conservation and Development Commission prepare, adopt and amend land use planning goals is a relevant criterion for the challenged decision, and we will not develop petitioner's argument. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218 (1982).

1 listed on the county's valid inventory but are included in
2 the special category. Moreover, nothing in the rule or
3 Policy 17.3 prevents the county from amending the special
4 measures it previously adopted for resources included in the
5 special category.⁷

6 The county has an acknowledged Goal 5 program, which
7 includes an acknowledged inventory. Because the county has
8 determined that it does not yet have sufficient information
9 to list rural wetlands, those resources are included in a
10 special category and are not a part of the county's valid
11 inventory. Since the wetlands regulated by the proposed
12 amendments are not listed on the county's valid inventory,
13 we agree with the county's explanation on remand that
14 "[t]hese amendments * * * make no change in the county's
15 procedures for inventorying [Goal 5] resources, nor in
16 developing programs to preserve them."⁸ Record 2. The
17 proposed amendments continue to comply with Goal 5 and
18 Policy 17.3 because they continue to provide interim
19 protection of resources included in a special category. The
20 types of protection provided under the proposed amendments
21 may differ from what was formerly provided. Goal 5 and
22 Policy 17.3 do not preclude this result.

⁷We are unable to determine if Policy 17.3 and Section 1000 implement Goal 5 as a Goal 5 program.

⁸The time for challenging the adequacy of the county's inventory is at periodic review. See Urquhart v. Lane Council of Governments, 80 Or App 176, 181, 721 P2d 870 (1986).

1 Petitioner and intervenor have not established that the
2 challenged decision violates Goal 5, OAR Chapter 660
3 Division 16 or Policy 17.3. The county has established that
4 the proposed amendments to its interim program are in
5 compliance with Goal 5 and OAR Chapter 660 Division 16 in
6 that the proposed amendments do not violate the goal or
7 rules. Additionally, nothing in Policy 17.3 precludes the
8 proposed amendments to the county's interim protection
9 program.

10 These assignments of error are denied.

11 **FOURTH ASSIGNMENT OF ERROR - PETITIONER**

12 Petitioner argues that the county erred when it enacted
13 ZDO 102 because it results in inconsistent treatment of
14 wetlands within the urban growth boundary from those outside
15 the urban growth boundary in violation of Goal 5. The
16 foundation of petitioner's argument is that the challenged
17 decision does not provide the Goal 5 wetlands protection
18 that petitioner considers good public policy.

19 Petitioner has not identified any component of Goal 5
20 that requires consistent treatment of all wetlands within a
21 county.

22 The fourth assignment of error is denied.

23 The county's decision is affirmed.