

1 intervenors-respondent Elaine Armes, et al.

2

3 David H. Chamberlin, Yachats, filed a response brief on his own behalf.

4

5 BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

6

7 HOLSTUN, Board Chair, concurring.

8

9

REMANDED

06/18/99

10

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

13

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county’s decision vacating a portion of County Road 804.

4 **MOTIONS TO INTERVENE**

5 1000 Friends of Oregon (1000 Friends) moves to intervene on the side of petitioner.
6 The City of Yachats (city) and a number of individuals, listed in footnote 1 below, move to
7 intervene on the side of the county.¹ There is no opposition to their motions, and they are
8 allowed.

9 **FACTS**

10 In 1890, Benton County platted what became Lincoln County Road 804, a 60-foot
11 wide unimproved right-of-way running south along the beach from the City of Waldport to
12 the Yachats River. Just north of the Yachats River, within the present City of Yachats, the
13 platted 804 right-of-way left the beach and traversed a low, rocky bluff running south to the
14 Yachats River. We follow the parties in referring to the relevant portion of the 804 right-of-
15 way within the City of Yachats as South 804. South 804 was never improved or used
16 extensively for transportation, although it continued to be shown on county maps, and was
17 used to some extent as a footpath along the bluff from the 1890s into the 1970s.

18 In 1953, the Ocean Crest Subdivision was platted north of the unincorporated
19 community of Yachats, placing 30 lots between the bluff and a roadway shown on the plat as

¹Elaine Armes, John Arthur, Beverly Author, Robert Barber, Leslie Barber, Gloria Holmes Baehr, Merry Berry, Burd Bicksler, Joan Bicksler, David Bishop, Sharon Bishop, Steven Brous, Susan Brous, Bonita Brown, Rick Brown, Linda Jackson Brown, Anna Lou Case, Evelyn Cahoon, Gladys Clair, Robert Clair, Melvin Clair, Steven Davies, Elizabeth Davies, Robert Diprete, Kathryn Poland, Rebecca Poland, Robert Poland, Mary Elena Dochterman, Patricia Bridges, Donald Durham, George Goble, Joel Evans, Sheila Evans, Craig Gilbert, Linda Gilbert, Ada Griffiths, John Griffiths, Anna Jackson, Phillip King, Mary King, Estate of Fred Dudley, Ruby Jones, Carl Kocher, Marilyn Kocher, Tom Meados, Hope Meados, John McHenry, Margaret McKeowen, Jerry McCall, Meredith McCall, Howard Osborn, Paul Pirruccello, Nola Pirruccello, Arthur Roberts, Fern Roberts, Jose Salazar, Linda Wassom Salazar, Arthur Sleight, Betty Sleight, William Stinnett, Robin Stinnett, Eugene Sullivan, Linda Sullivan, John Toepfer, Nina Toepfer, Richard Stanley Urbanski, William Verstegen, Everett Miles, Elva Miles, Sigrid Bratsch, Malcom Byers, June Byers, Max Wales, Jeanne Wales, and David H. Chamberlin move to intervene on the side of the county.

1 Ocean View Drive. The subdivision plat did not depict the South 804 right-of-way and
2 overplatted the westward portion of the 30 lots within that right-of-way. The City of Yachats
3 was incorporated in 1967, including Ocean Crest Subdivision. By the 1970s, most of the 30
4 lots adjoining the bluff were developed with dwellings, with many structures built wholly or
5 partially within the South 804 right-of-way. Ocean View Drive was developed as a public
6 street parallel to and east of the bluff and the South 804 right-of-way.

7 In 1997, the county resurveyed the South 804 right-of-way, and found that the
8 majority of South 804 is on top of and parallel to the bluff, but that due to erosion of the
9 bluff, portions of the platted right-of-way lie west of and below the current bluff-line. In
10 September 1997, several owners within the Ocean Crest Subdivision filed a petition with the
11 county to vacate South 804 from the northerly boundary of the Ocean Crest Subdivision to
12 the ten-mile marker east of Highway 101. The county board of commissioners conducted
13 proceedings, and determined to vacate the South 804 right-of-way from the northerly
14 boundary of the subdivision to the First Street right-of-way. The county prepared findings to
15 that effect. Pursuant to ORS 368.361(3), the county submitted its findings to the City of
16 Yachats for its concurrence.² On September 10, 1998, the city adopted a resolution
17 concurring with the county's determination to vacate the relevant portion of South 804 and
18 incorporating the county's findings. On September 16, 1998, the county board of
19 commissioners adopted its final decision vacating the South 804 right-of-way.

20 This appeal followed.

²ORS 368.361(3) provides:

"Notwithstanding ORS 368.326, a county governing body may vacate property that is under the jurisdiction of the county and that is entirely within the limits of a city if that city, by resolution or order, concurs in the findings of the county governing body in the vacation proceedings."

1 **MOTION TO DISMISS**

2 Respondents³ move to dismiss this appeal, on the grounds that the county's decision
3 is neither a statutory land use decision pursuant to ORS 197.015(10)(a)⁴ nor a decision
4 subject to LUBA's jurisdiction under the "significant impact test" set forth in Petersen v.
5 Klamath Falls, 279 Or 249, 566 P2d 1193 (1977); City of Pendleton v. Kerns, 294 Or 126,
6 653 P2d 992 (1982); and Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985).

7 With respect to ORS 197.015(10)(a), petitioners and 1000 Friends argue that the
8 challenged decision is a final decision that concerns the application of the Statewide
9 Planning Goals, comprehensive plan provisions, and land use regulations, and is thus, by
10 definition, a land use decision subject to LUBA's jurisdiction. Petitioners identify the
11 following as criteria applicable to the county's decision to vacate South 804: (1)
12 Implementation Requirement 6 (IR 6) of Statewide Planning Goal 17 (Coastal Shorelands);⁵

³The county and all intervenors-respondent with the exception of David H. Chamberlin filed a joint response brief. We refer to the proponents of arguments in the joint response brief collectively as "respondents."

⁴ORS 197.015(10)(a) defines a "land use decision" to include:

- "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
 - "(i) The goals;
 - "(ii) A comprehensive plan provision;
 - "(iii) A land use regulation; or
 - "(iv) A new land use regulation[.]"

⁵IR 6 provides that:

"Local government in coordination with the Parks and Recreation Division shall develop and implement a program to provide increased public access. Existing public ownerships, rights of way, and similar public easements in coastal shorelands which provide access to or along coastal waters shall be retained or replaced if sold, exchanged or transferred. Rights of way may be vacated to permit redevelopment of shoreland areas provided public access across the affected site is retained."

1 (2) the City of Yachats Comprehensive Plan (YCP) policy C.6,⁶ which implements IR 6, and
2 corresponding provisions of the Yachats Zoning and Land Use Ordinance (YZO) 3.090 and
3 3.100; and (3) Lincoln County Comprehensive Plan (LCCP) 1.0145(16).⁷

4 For the reasons expressed below, we conclude that at least Goal 17 and IR 6 are
5 applicable to the challenged decision and thus that the decision meets the statutory definition
6 of a land use decision.

7 With respect to IR 6, petitioners note that amended Goal 17, which includes IR 6,
8 became effective in 1984, and the county has not yet implemented IR 6 in its comprehensive
9 plan and land use regulations. Petitioners argue that, in the absence of an acknowledged
10 comprehensive plan that implements Goal 17 and IR 6, the county must directly apply the
11 goal itself to any decisions where, by its terms, IR 6 would apply. ORS 197.646;⁸ Dept. of

⁶YCP C.6 provides:

"The city will review proposals for vacation or sale, exchange or transfer of public
ownerships, easements, or rights-of-way which provide access to or along the Yachats River
or ocean. Existing public ownerships, rights-of-way, and similar public easements in estuary
or ocean shorelands which provide access to or along the estuary or ocean shall be retained or
replaced if sold, exchanged or transferred. Rights-of-way may be vacated to permit
redevelopment of existing developed shoreland areas provided public access across the
affected site is retained."

⁷ LCCP 1.0145(16) provides:

"Lincoln County shall initiate vacation or closure of county or public roads which are no
longer necessary for access or which cannot be maintained as determined by the County
Engineer except where such roads abut the ocean."

⁸ORS 197.646 provides in relevant part:

- "(1) A local government shall amend the comprehensive plan and land use regulations to
implement new or amended statewide planning goals, Land Conservation and
Development Commission administrative rules and land use statutes when such
goals, rules or statutes become applicable to the jurisdiction. Any amendment to
incorporate a goal, rule or statute change shall be submitted to the Department of
Land Conservation and Development as set forth in ORS 197.610 to 197.625.
- "(2) The department shall notify cities and counties of newly adopted commission goals
and commission rules, including the effective date, as they are adopted. * * *

1 Land Conservation v. Lincoln County, 144 Or App 9, 13, 925 P2d 135 (1996), rev den 324
2 Or 560 (1997).

3 Respondents argue that the county's comprehensive plan does not apply to the
4 challenged decision, and hence IR 6 cannot apply by virtue of the unacknowledged status of
5 the county's comprehensive plan, because South 804 lies entirely within the land use
6 jurisdiction of the city. According to respondents, ORS 215.130 limits application of the
7 county's plan to unincorporated areas of the county, except under circumstances not present
8 here.⁹ Because the county has no land use jurisdiction over the challenged road vacation,
9 respondents reason, IR 6 has no applicability to the instant decision.

10 We disagree with respondents that ORS 215.130 has the categorical effect
11 respondents ascribe to it. ORS 215.130(2) describes two circumstances in which a county's
12 comprehensive plan is applicable to portions of a city. Respondents rely on a negative
13 inference drawn from ORS 215.130(2) to argue that the county's plan is not applicable

"(3) When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. * * *"

⁹ORS 215.130 provides in relevant part:

"(2) An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:

"(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise; and

"(b) The area within the county also within the boundaries of a city if the governing body of such city adopts an ordinance declaring the area within its boundaries subject to the county's land use planning and regulatory ordinances, officers and procedures and the county governing body consents to the conferral of jurisdiction.

"(3) An area within the jurisdiction of city land use planning and regulatory provisions that is withdrawn from the city or an area within a city that disincorporates shall remain subject to such plans and regulations which shall be administered by the county until the county provides otherwise."

1 within the boundaries of a city under circumstances other than those specifically listed in
2 ORS 215.130. That inference may be true in most cases, but we do not agree that ORS
3 215.130(2) categorically prohibits application of a county's plan within city boundaries under
4 all but the two circumstances listed there. A city and county may share legitimate planning
5 interests within respect to property that is solely within one local government's territorial
6 boundaries, the most obvious example being land located outside a city's municipal
7 boundaries but inside its urban growth boundary. See DLCD v. Clatsop County, 14 Or
8 LUBA 358, 360-61 (1986) (Goal 2 requires consistency between city and county
9 comprehensive plans, "where the city and the county both have legitimate planning interests
10 in territory * * *"). We perceive nothing in ORS 215.130(2) or elsewhere directed to our
11 attention that prohibits application of that principle to circumstances where the county has
12 legitimate planning interests in territory within city boundaries.

13 In the present case, South 804 is a county road that, by statutory definition, is under
14 the jurisdiction of the county, even though it is entirely within city limits. ORS 368.001(1);
15 368.361(3). Under ORS 368.361(3), the county has jurisdiction and authority to vacate
16 South 804, if it obtains the city's concurrence. The city's role is limited under ORS
17 368.361(3) to a requirement that the city adopts a resolution or order concurring in the
18 county's findings. Further, as we explain below, IR 6, made applicable to the county's
19 decisions pursuant to ORS 197.646, imposes obligations on the county as a zoning authority
20 to retain that access.

21 In short, the present case is one of those unusual circumstances where both the city
22 and the county have "legitimate planning interests" in the same territory. We conclude that,
23 to the extent the county's comprehensive plan contains, or is required to contain, provisions
24 that apply by their terms to a decision vacating South 804, the county must apply those
25 provisions during the vacation proceedings. If any such provisions apply, then the county's
26 vacation of South 804 is, ipso facto, a land use decision as defined by ORS 197.015(10)(a).

1 As explained above, petitioners contend that Goal 17 became effective in 1984 and,
2 because the county has not implemented Goal 17 in its comprehensive plan, IR 6 is directly
3 applicable to the county's land use decisions pursuant to ORS 197.646(3). Respondents
4 counter that, even if the county's comprehensive plan is applicable, ORS 197.646(3) does not
5 operate to make IR 6 directly applicable, because LCDC has not yet made Goal 17
6 "effective" with respect to Lincoln County. Respondents explain that the county is currently
7 undergoing periodic review, and that one of the work tasks for the current periodic review
8 requires the county to adopt comprehensive plan and land use regulations implementing Goal
9 17. The county has received two extensions of time to complete this work task, with the
10 latest extension expiring on June 30, 1998. Respondents state that "[u]ntil periodic review is
11 completed or until LCDC otherwise specifies an effective date for the application of
12 amended Goal 17 to Lincoln County decisions, the amended goal is not applicable to Lincoln
13 County decisions." Brief Opposing Petition for Review 12.

14 Respondents' argument is based on ORS 197.245, which requires in pertinent part
15 that when LCDC adopts a new or amended goal LCDC:

16 "shall specify with particularity those goal provisions that are applicable to
17 land use decisions, expedited land divisions and limited land use decisions
18 before plan revision. [LCDC] shall establish the effective date for application
19 of a new or amended goal. Absent a compelling reason, [LCDC] shall not
20 require a comprehensive plan, new or amended land use regulation, land use
21 decision, expedited land division or limited land use decision to be consistent
22 with a new or amended goal until one year after the date of adoption."

23 In addition, ORS 197.250 provides that

24 "Except as otherwise provided in ORS 197.245, all comprehensive plans and
25 land use regulations adopted by a local government to carry out those
26 comprehensive plans * * * shall be in compliance with the goals within one
27 year after the date those goals are approved by [LCDC]."

28 We understand respondents to argue that in order to make amended Goal 17 effective
29 as to Lincoln County, LCDC was required to take some positive action to that effect other
30 than "establish the effective date for application" of Goal 17 pursuant to ORS 197.245.

1 Absent such other action, respondents argue, the earliest date that Goal 17 could apply to
2 Lincoln County is when the current periodic review is completed.

3 It is not clear to us why respondents believe ORS 197.646 compels LCDC to do
4 something other than establish the effective date of amended Goal 17 in order to make it
5 effective as to the county. Be that as it may, we need not resolve whether LCDC made
6 amended Goal 17 effective as to the county in 1984, because we agree with 1000 Friends
7 that, at the latest, amended Goal 17 became applicable to the county as of July 1, 1998.

8 1000 Friends explains that in the course of the current periodic review LCDC
9 specifically required the county to adopt plan amendments implementing Goal 17 no later
10 than June 30, 1998. As 1000 Friends points out, the county failed to meet that deadline, and
11 had not adopted plan amendments implementing Goal 17 as of the date of the challenged
12 decision. We agree with 1000 Friends that, even if Goal 17 did not become applicable to the
13 county in 1984, LCDC unambiguously made it applicable to the county as of July 1, 1998, by
14 requiring that the county adopt amendments implementing that goal prior to that date.
15 Accordingly, we conclude that Goal 17 became applicable to the county not later than July 1,
16 1998, and, in the absence of the county's implementation of that Goal, it became directly
17 applicable to the challenged decision pursuant to ORS 197.646(3).

18 As the first in a series of alternative arguments, respondents contend that, even if
19 Goal 17 is effective as to the county, by its terms IR 6 is not a mandatory approval criterion
20 applicable to the challenged vacation of South 804. Respondents argue that the text of IR 6
21 merely encourages the county to retain existing rights-of-way and grants the county wide
22 discretion in deciding to vacate county roads in shoreland areas, and thus does not provide
23 any standards governing the county's decision. We disagree. The plain text of IR 6 provides
24 mandatory requirements that counties "shall" retain or replace existing rights-of-way that
25 provide access to or along coastal waters. Vacation of such rights-of-way is permitted

1 "provided" that public access across the affected site is retained. Such terms unambiguously
2 provide mandatory approval requirements.

3 Second, respondents contend that, by its terms, "IR 6 does not apply to the majority
4 of the area" the county vacated. Brief Opposing Petition for Review 13. Respondents argue
5 that IR 6 applies only to rights-of-way "in coastal shorelands," which respondents equate
6 with the area below the vegetation line coextensive with the definition of "ocean shore" at
7 ORS 390.605.¹⁰ Respondents note that the majority of South 804 is above the vegetation
8 line, *i.e.*, on the bluff. However, we are not persuaded that "coastal shorelands" and "ocean
9 shore" have the same geographic scope. LCDC defines the term "coastal shorelands" to
10 mean "[t]hose areas immediately adjacent to the ocean, all estuaries and associated wetlands,
11 and all coastal lakes." Oregon Statewide Planning Goals and Guidelines 39 (1995). More to
12 the point, Goal 17 itself requires that local governments identify coastal shorelands, which
13 "shall include at least * * * lands within 100 feet of the ocean shore[.]" That definition refers
14 to areas that are not limited to the ocean shore below the vegetation line. We conclude that,
15 whatever the geographic scope of "coastal shorelands," it is not limited to those areas below
16 the vegetation line.

17 Third, as a variant of the above, respondents contend that even if South 804 is within
18 "coastal shorelands," IR 6 does not apply because South 804 provides access, at best, to lands
19 that overlook coastal waters, and does not "provide access to or along coastal waters" within
20 the meaning of IR 6. If we understand respondents correctly, they argue that "access to or
21 along coastal waters" can only occur on the ocean shore, that is, on lands below the
22 vegetation line that are subject to inundation by coastal waters. Because most of South 804
23 is inland of the ocean shore, respondents argue, it cannot provide "access to and along coastal
24 waters," apparently because the public would have to cross intervening lands to reach coastal

¹⁰ORS 390.605 defines "ocean shore" to mean "the land lying between extreme low tide of the Pacific Ocean and the line of vegetation as established and described by ORS 390.770."

1 waters. However, we disagree that IR 6 limits protection to rights-of-way on the ocean
2 shore. If the operative terms of IR 6 had the narrow meaning respondents ascribe to it, the
3 reference to rights-of-way "in coastal shorelands" would have no meaning. Further,
4 respondents concede that parts of South 804 either abut or are within the ocean shore.
5 Respondents fail to explain why, even under their limited view of IR 6, the parts of South
6 804 abutting or within the ocean shore fail to provide access to or along coastal waters.

7 Finally, respondents argue that IR 6 does not apply because it only protects existing,
8 publicly-used rights-of-way. According to respondents, South 804 does not currently
9 "provide access to or along coastal waters" within the meaning of IR 6 because in fact use of
10 South 804 as a county road or trail ceased long ago as a result of development and
11 concomitant resistance by landowners. However, respondents do not cite to any basis in IR 6
12 or elsewhere to require current use of South 804 in order for it to qualify as a right-of-way
13 subject to IR 6.

14 For the foregoing reasons, we conclude that IR 6 is applicable to the challenged
15 vacation of South 804. Because the challenged decision is a final decision involving the
16 application of a Statewide Planning Goal, it is a land use decision subject to our jurisdiction.
17 ORS 197.015(10)(a)(A)(i).

18 Our conclusion regarding Goal 17 makes it unnecessary to consider petitioners'
19 argument that LCCP 1.00145(16), YCP Policy C.6, and YZO 3.100 also apply to the county's
20 decision, and hence also supply a basis for our jurisdiction. However, in the course of
21 addressing several assignments of error, below, we determine that YCP Policy C.6 and YZP
22 3.100 are also applicable to the county's decision. It follows that those provisions also
23 provide a basis for our jurisdiction. Further, our conclusion regarding Goal 17 makes it
24 unnecessary to resolve whether the county's decision constitutes a land use decision under
25 the "significant impact" test.

26 Respondents' motion to dismiss is denied.

1 **FIRST ASSIGNMENT OF ERROR (OREGON SHORES)**

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

3 Petitioners and 1000 Friends argue that the challenged decision violates IR 6 by
4 failing to retain public access "to and along coastal waters" and "across the affected site"
5 within the meaning of that provision.¹¹

6 In the challenged decision, the county applied IR 6 and found compliance with that
7 provision, stating in relevant part:

8 "* * * there already is extensive existing beach access in the vicinity of South
9 804. The testimony [in the record] indicates that there would continue to be
10 an abundance of shoreland access if South 804 is vacated. Ocean View Drive,
11 for example, will continue to provide direct access to almost 3000 feet of
12 ocean, river and tidelands. It is wide enough to accommodate the trail
13 identified in the Village Circulation Plan. In addition, there are three deeded
14 access locations along Ocean View Drive to the beach. (Lots 1 and 26 of
15 Ocean Crest Subdivision and a tax lot at the end of Sixth Street). Finally,
16 there are several existing access points to the beach through Yachats State
17 Park as well as access to the confluence of the Yachats River and the Pacific
18 Ocean at Yachats Bay.

19 "Consequently, Goal 17 and [IR 6] would be met by this vacation decision.
20 Additionally, the existing access will be improved, pursuant to this vacation
21 order, by improving the signage for the access points and improving, where
22 feasible, the physical nature of the access points themselves. Finally, pursuant
23 to this order, the County will work with the City of Yachats to identify
24 possible further access points outlined in the Yachats Village Circulation Plan
25 in an effort to join the entire Yachats shoreline with a continuous footpath.
26 The purpose of [IR 6] is being met; the vacation of South 804 is not contrary
27 to the Goal requirement." Record 38.

28 Petitioners, echoed by 1000 Friends, argue that the county misconstrues IR 6 because
29 the "affected site" in this case is either the lots burdened by the South 804 right-of-way, or

¹¹For ease of reference, we repeat the text of IR 6:

"Local government in coordination with the Parks and Recreation Division shall develop and implement a program to provide increased public access. Existing public ownerships, rights of way, and similar public easements in coastal shorelands which provide access to or along coastal waters shall be retained or replaced if sold, exchanged or transferred. Rights of way may be vacated to permit redevelopment of shoreland areas provided public access across the affected site is retained."

1 the right-of-way itself. Thus, petitioners contend, in order to retain "access across the
2 affected site" within the meaning of IR 6 the county must ensure that public access is
3 retained within those affected lots or within the right-of-way both to and along the ocean
4 shore, in a manner that functionally replaces the access South 804 could provide. According
5 to petitioners, the access that the county identifies in the general vicinity of the South 804
6 right-of-way does not retain access to and along coastal waters and "across the affected site"
7 within the meaning of IR 6.

8 In the same vein, petitioners argue that South 804 is within coastal shorelands that, by
9 definition, are "immediately adjacent" to coastal waters, and thus the county must retain
10 access along coastal waters that is also immediately adjacent to those waters, and not merely
11 access that is in the vicinity of the vacated right-of-way. Accordingly, petitioners submit that
12 access along Ocean View Drive, which is set back some distance from the ocean, and
13 separated from the shore in most places by developed residential lots, cannot satisfy IR 6
14 because Ocean View Drive is not "immediately adjacent" to coastal waters.

15 Further, petitioners contend that deeded access across two tax lots in the Ocean Crest
16 Subdivision is inadequate to satisfy the requirement that the county retain access "to" coastal
17 waters. For example, petitioners argue that the deeded access to Lot 26 is not for public
18 access, but only for residents of the subdivision. Record 1680. Although the county retained
19 the South 804 right-of-way in these lots, petitioners contend that that retention fails to
20 provide public access to coastal waters, because, absent further easements, the public cannot
21 reach the 804 right-of-way or use Lot 26 to access coastal waters without trespassing.
22 Several other possible access points, petitioners note, are similarly dependent upon
23 speculative acquisition of future easements. For these reasons, petitioners argue, retaining
24 the two access points within the South 804 right-of-way, and the other access points in the
25 vicinity, are inadequate to satisfy IR 6, or replace the South 804 access.

1 In response to petitioners' first assignment of error and 1000 Friends' assignment of
2 error, respondents incorporate by reference the arguments in their motion to dismiss why IR
3 6 does not apply to the county's decision.¹² Respondents also incorporate the county's
4 findings regarding IR 6 at Record 33-39 and, finally, make one direct argument in response
5 to these assignments of error, to the effect that the county's decision is consistent with IR 6,
6 read in its proper context. We addressed above respondents' arguments that IR 6 does not
7 apply or does not provide mandatory approval criteria and will not repeat that discussion
8 here. We confine our analysis to respondents' arguments that the county's decision is
9 consistent with IR 6.

10 Respondents argue that IR 6, read in context, merely requires that the county ensure
11 there is adequate alternate access to coastal waters, and does not require that that access be
12 within the vacated right-of-way or otherwise functionally retain access provided by the
13 vacated road. Respondents argue that the purpose of IR 6 is provided in the first sentence of
14 IR 6, which requires local governments to coordinate with state parks authorities to "increase
15 public access." That purpose is fulfilled, respondents argue, by the existing alternate access
16 points described in the county's finding, combined with the improvements in signage and
17 future access required by that finding.

18 Respondents are correct that the first sentence of IR 6 is context that may illuminate
19 the meaning of the second sentence of that provision. However, the first sentence does not
20 suggest, as respondents argue, that as long as the county improves access elsewhere in the
21 vicinity it may ignore the requirements in the second sentence of IR 6 that access to or along
22 coast waters and access across the affected site shall be retained. For the reasons stated

¹²The response brief of intervenor-respondent David H. Chamberlin consists in large part of intervenor-respondent's personal observations on the history of South 804, including testimony that we cannot verify is in the record, because intervenor-respondent provides no record citations. To the extent intervenor-respondent's brief contains legal argument relevant to the issues raised in this appeal, that argument adds nothing beyond that stated in the combined response brief. Accordingly, we do not address intervenor-respondent's arguments separately.

1 below, we agree with petitioners that the county's findings regarding IR 6 fail to demonstrate
2 compliance with that provision.

3 We agree with petitioners that South 804 provides access both to and along coastal
4 waters within the meaning of IR 6; see also YCP II-21 (South 804 provides "pedestrian
5 access to and along the ocean shore"). We also agree that retaining rights-of-way in coastal
6 shorelands that provide access to or along coastal waters, and access across the affected site,
7 as required by IR 6, mandates that the county provide alternative rights-of-way that,
8 individually or cumulatively, functionally replace the access lost through vacation.
9 However, we disagree with petitioners that retaining access "across the affected site"
10 necessarily requires that access be retained within the burdened lots or within the vacated
11 right-of-way. Accordingly, we conclude that the "affected site" for purposes of IR 6 is not
12 limited to the burdened lots or the right-of-way itself. It does not follow, however, that
13 improving existing access in the general vicinity of the vacated right-of-way is sufficient to
14 "retain access across the affected site."

15 One of the difficulties of reviewing the county's application of IR 6 in this case is that
16 it is not clear that either the county or the city has identified the extent of the "coastal
17 shorelands" in the subject area, as required by Goal 17.¹³ As noted earlier, Goal 17 requires
18 that comprehensive plans identify coastal shorelands, the extent of which must include lands
19 at least 100 feet from the ocean shore, and perhaps further, depending on the existence of
20 special circumstances described in Goal 17.¹⁴ In our view, identification of the extent of

¹³The YCP contains a discussion of coastal shorelands that repeats the seven Coastal Shoreland identification factors described in Goal 17, and implies that the city has made the requisite identification. YCP I-9; II-19. However, that identification is not made in the YCP itself, but is apparently made on the city's natural resources map, which the city has not supplied to LUBA. Accordingly, we cannot verify the exact extent of coastal shorelands in the South 804 area, but in our discussion we will assume, based on Goal 17, that it is at least 100 feet back from the ocean shore, i.e. the top of the bluff.

¹⁴Goal 17 provides in relevant part that:

1 coastal shorelands in the area is essential to any determination under IR 6 regarding whether
2 a proposed vacation retains "public access across the affected site" at least where the vacated
3 access is "along the ocean shore." We agree with petitioners that any access in coastal
4 shorelands that is "retained across the affected site" must also be within coastal shorelands.
5 Accordingly, identifying the extent of coastal shorelands is necessary to identify the inland
6 boundaries of the affected site.

7 In the present case, the county did not identify the "affected site" for purposes of IR
8 6, nor the extent of coastal shorelands, but it found compliance with IR 6 based on three
9 types of existing or potential alternate access points: (1) lots 1 and 26 of the Ocean View
10 Subdivision, which putatively provide access to the ocean shore; (2) Ocean View Drive,
11 which parallels part of South 804 and putatively provides access "along" the ocean shore;
12 and (3) other existing access points in the vicinity.

"Lands contiguous with the ocean, estuaries, and coastal lakes shall be identified as coastal shorelands. The extent of coastal shorelands shall include at least:

- "1. Areas subject to ocean flooding and lands within 100 feet of the ocean shore or within 50 feet of an estuary or a coastal lake;
- "2. Adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body;
- "3. Natural or man-made riparian resources, especially vegetation necessary to stabilize the shoreline and to maintain water quality and temperature necessary for the maintenance of fish habitat and spawning areas;
- "4. Areas of significant shoreland and wetland biological habitats whose habitat quality is primarily derived from or related to the association with coastal water areas;
- "5. Areas necessary for water-dependent and water-related uses, including areas of recreational importance which utilize coastal water or riparian resources, areas appropriate for navigation and port facilities, dredge material disposal and mitigation sites, and areas having characteristics suitable for aquaculture;
- "6. Areas of exceptional aesthetic or scenic quality, where the quality is primarily derived from or related to the association with coastal water areas; and
- "7. Coastal headlands."

1 We agree with petitioners that existing alternate access points in the vicinity of the
2 vacated right-of-way that are not part of the "affected site" cannot satisfy IR 6. With respect
3 to lots 1 and 26, the access contributed by those lots might suffice to retain access to the
4 ocean shore, if the public indeed has access through those lots. However, we agree with
5 petitioners that the county cannot rely upon the speculative prospect of obtaining easements
6 to allow public access to the ocean shore. With respect to Ocean View Drive, it is not clear
7 if relevant parts of that street are within "coastal shorelands," because the county has not
8 determined the extent of coastal shorelands in the subject area. Moreover, it is not clear that
9 Ocean View Drive provides the functional equivalent of access "along" the ocean shore
10 provided by South 804. If we understand the county's findings correctly, it contemplates that
11 the pedestrians using Ocean View Drive will at the northern extremity of that street turn east
12 on Marine Drive, then cross over two lots to Aqua Vista Drive, and thence, by virtue of
13 easements in the Aqua Vista subdivision easements, regain access to and along the ocean
14 shore. However, it is not clear that the necessary easements or public right-of-way currently
15 exists across the two lots needed to connect Marine Drive and Aqua Vista Drive, or, if they
16 do, that such easements are within coastal shorelands or the affected site.

17 In sum, we agree with petitioners that the county misconstrued IR 6 and its findings
18 fail to demonstrate compliance with that provision.

19 The first assignment of error (Oregon Shores) and 1000 Friends' assignment of error
20 are sustained.

21 **SECOND ASSIGNMENT OF ERROR (OREGON SHORES)**

22 Petitioners contend that the city misconstrued and misapplied various provisions of
23 its comprehensive plan and land use ordinance in concurring with the county's vacation
24 decision.

1 **A. Threshold Issue**

2 As a threshold issue, respondents note that this assignment of error does not allege
3 that the county misconstrued or misapplied the city's comprehensive plan and land use
4 ordinance, and argues that any assignments of error directed at the city's concurrence must be
5 denied because petitioners failed to appeal the city's concurrence. At oral argument,
6 petitioners responded that the city's concurrence under ORS 368.361(3) was not a final,
7 appealable land use decision, because the city's concurrence has no effect other than to allow
8 the county to proceed with the proposed vacation. Petitioners argue that the city's
9 concurrence under ORS 368.361(3) is not a final, appealable land use decision, because it is
10 so integrated into the county's decision as to form an indivisible part of it. Therefore, the
11 appropriate means to challenge the city's concurrence is by appealing the county's decision.

12 We agree with petitioners that the city's concurrence under ORS 368.361(3) is not a
13 final, appealable land use decision. ORS 368.361(3) requires that the city concur (or not) in
14 the county's findings in the county's vacation proceedings, and does not require the city to
15 make its own findings or conduct its own vacation proceedings. It follows that a city's
16 concurrence under ORS 368.361(3) is not a final, separately appealable land use decision.
17 See Citizens for Better Transit v. City of Portland, 15 Or LUBA 278, 281-82 (1987) (city
18 resolution endorsing transportation proposal by another agency is an advisory determination
19 and not a final land use decision).

20 In our view, the county is the local government responsible for applying any
21 applicable city comprehensive plan provisions or land use regulations in the context of a
22 vacation under ORS 368.361(3), because that provision imposes on the county the obligation
23 to make the findings necessary to support the vacation. Imposing that obligation on the
24 county under such circumstances is also consistent with Statewide Planning Goal 2, which
25 requires that county actions "related to land use" be consistent with the comprehensive plans
26 of cities and counties.

1 That being the case, the next issue is whether this assignment of error, which alleges
2 that the city misconstrued and misapplied its comprehensive plan and land use regulations,
3 can be construed as an argument that the county misconstrued and misapplied the city's
4 comprehensive plan and land use regulations. We perceive no prejudice to any party in
5 doing so in the present case. The issue of compliance with the city's comprehensive plan and
6 land use regulations was raised below, and the county made findings directed at any
7 potentially applicable city provisions. Respondents' brief addresses the county's findings,
8 and argues that those findings demonstrate that vacating South 804 is consistent with any
9 applicable provisions of the city's comprehensive plan and land use regulations.
10 Accordingly, we conclude that petitioners' misplaced focus on the city rather than the county
11 is, at most, harmless error, that does not prevent us from addressing the merits of this
12 assignment of error to the extent those merits contend that the county's vacation of South 804
13 is inconsistent with the city's comprehensive plan and land use regulations.

14 **B. YCP Policy C.6**

15 Petitioners argue that YCP Policy C.6, read in context, requires that South 804 be
16 dedicated for use as a hiking trail and cannot be vacated. YCP Policy C.6, which implements
17 and is nearly identical to IR 6, provides:

18 "The city will review proposals for vacation or sale, exchange or transfer of
19 public ownerships, easements, or rights-of-way which provide access to or
20 along the Yachats River or ocean. Existing public ownerships, rights-of-way,
21 and similar public easements in estuary and ocean shorelands which provide
22 access to or along the estuary or ocean shall be retained or replaced if sold,
23 exchanged, or transferred. Rights-of-way may be vacated to permit
24 redevelopment of existing developed shoreland areas provided public access
25 across the affected site is retained."

26 Record 1340. Petitioners point to language in the city's comprehensive plan inventory that
27 requires the city to "adopt a plan policy and implementing measure to protect the County
28 Road #804 right-of-way and prescriptive easements from alterations which would prevent the
29 establishment and maintenance of a segment of the Oregon Coast Hiking Trail." Record 892.

1 Petitioners argue that these two provisions, read together, require to city to preserve South
2 804 for use as a hiking trail. Accordingly, petitioners contend, the county's vacation of South
3 804 is inconsistent with these county's comprehensive plan provisions.

4 Respondents argue, and we agree, that the inventory language petitioners rely on
5 refers to North 804 and not to South 804. Further, even if that language could be construed
6 to refer to South 804, YCP Policy C.6 expressly allows for vacation of rights-of-way, as long
7 as public access across the affected site is retained. Petitioners have not established that
8 YCP Policy C.6 categorically prohibits the vacation of South 804.

9 This subassignment of error is denied.

10 **C. YZO 3.090 and 3.100**

11 Petitioners contend that the challenged vacation is inconsistent with YZO 3.090 and
12 3.100.

13 YZO 3.090 tracks the language in the YCP inventory quoted above and requires in
14 relevant part that "[n]o structure, alteration, or other developments shall be permitted within
15 the County Road #804 right-of-way and prescriptive easements except for a public recreation
16 trail and improvements which are necessary or accessory to the construction or maintenance
17 of a public recreation trail." Petitioners argue that YZO 3.090, like the YCP inventory
18 language, also categorically prohibits the vacation of South 804. We reject that argument for
19 the same reasons discussed above.

20 YZO 3.100 parallels the language of YCP Policy C.6:

21 "The City shall review under ORS 271.080 [to] 271.230 proposals for the
22 vacation of public easements or rights-of-way which provide access to or
23 along the estuary or ocean. * * * Existing public ownerships, rights-of-way
24 and similar public easements which provides access to or along the estuary or
25 ocean shall be retained or replaced if they are sold, exchanged, or transferred.
26 Right-of-way may be vacated to permit redevelopment of existing developed
27 shore land areas provided public access across the affected site is retained."

28 Petitioners repeat the gist of their arguments, addressed in the first assignment of
29 error with respect to IR 6, that vacation of South 804 is inappropriate because the county

1 failed to retain "access across the affected site." With one exception, petitioners do not argue
2 that YZO 3.100 imposes any different or more stringent requirements than IR 6. However,
3 petitioners note that YZO 3.100 requires the city to review proposals for vacating rights-of-
4 way providing access to or along the ocean under the provisions of ORS 271.080 to 271.230.
5 Petitioners argue that ORS 271.080 requires the consent of all abutting property owners in
6 order to vacate a right-of-way within an incorporated city under that statutory provision, and
7 that the evidence in the present case is that not all of the 30 or so owners of lots abutting
8 South 804 have consented to its vacation.

9 Respondents argue, and we agree, that ORS 271.080 is not applicable to the present
10 vacation of South 804, either on its own terms or as reflected in YZO 3.100. Petitioners do
11 not explain why a county vacating a county road under ORS 368.361(3) must apply
12 procedures applicable by their terms only to city vacation proceedings. ORS 368.361(4)
13 specifies that public bodies vacating property under ORS 368.361 must "each use procedures
14 for vacation that each uses for other vacation proceedings." Thus, county proceedings to
15 vacate a county road under ORS 368.361(3) are subject to vacation procedures at ORS
16 368.326 applicable to counties and are not subject to vacation procedures at ORS 271.080
17 applicable to cities.

18 Because petitioners' arguments under this subassignment of error do not provide a
19 basis for reversal or remand beyond that stated and addressed in the first assignment of error,
20 this subassignment of error is denied.

21 The second assignment of error is denied.

22 **THIRD ASSIGNMENT OF ERROR**

23 Petitioners argue that, in concurring with the county's findings under ORS
24 368.361(3), the city erred in failing to follow procedures applicable to city vacation
25 proceedings and land use decisions.

1 We determined in addressing the first assignment of error that the city's concurrence
2 under ORS 368.361(3) is not a final land use decision and thus that its actions under that
3 provision cannot be challenged by appealing the county's decision. Further, we agree with
4 respondents that in concurring with a county's findings under ORS 368.361(3), a city is not
5 required by ORS 368.361(4) to conduct its own vacation proceedings. Accordingly, the
6 city's alleged failure to apply procedures applicable to land use decisions and city vacations
7 cannot provide a basis in the present case to reverse or remand the county's decision.

8 The third assignment of error is denied.

9 **FOURTH ASSIGNMENT OF ERROR (OREGON SHORES)**

10 Petitioners argue that the challenged decision violates LCCP 1.0145(16), which,
11 according to petitioners, prohibits the county from initiating the vacation of roads that abut
12 the ocean.¹⁵

13 The county made findings rejecting petitioners' view of LCCP 1.0145(16). The
14 county finds that LCCP 1.0145(16):

15 " * * * does not create standards that govern the County's decision here. The
16 provision only creates an affirmative duty for the County to initiate vacation
17 proceedings with respect to certain roads. It does not prohibit vacation of
18 other roads including those that abut the ocean; it merely removes those roads
19 from the class of roads for which the county is required to initiate vacation
20 proceedings. [LCCP] Policy 1.0145(16) has no relevance to, nor does it
21 govern, this road vacation decision." Record 35-36 (emphasis in original).

22 Further, the county finds that:

23 "The policy does not prohibit the county from initiating vacation of a road
24 abutting the ocean. Nor does it prohibit adjudicating such a proposal initiated
25 by a private petition. Also, as discussed above, the provision only requires the
26 County to initiate vacation proceedings under certain conditions. In this case,

¹⁵We repeat the text of LCCP 1.0145(16):

"Lincoln County shall initiate vacation or closure of county roads or public roads which are no longer necessary for access or which cannot be maintained as determined by the County Engineer except where such roads abut the ocean."

1 landowners initiated the vacation proceeding." Record 40 (emphasis in
2 original).

3 In short, the county interpreted LCCP 1.0145(16) as allowing it, but not requiring it,
4 to vacate roads that abut the ocean. Further the county interpreted that provision as not
5 applying where, as here, landowners, and not the county, "initiated" the vacation proceeding.
6 The county expressly rejected petitioners' argument that LCCP 1.0145(16) absolutely
7 prohibited vacation of roads that abut the ocean. Respondents contend that the petitioners
8 have failed to establish that the county's interpretation is inconsistent with the language,
9 purpose or policy underlying LCCP 1.0145(16) or that the county's interpretation is
10 otherwise "clearly wrong." ORS 197.829(1); Goose Hollow Foothills League v. City of
11 Portland, 117 Or App 211, 217, 843 P2d 992 (1992).

12 The Court of Appeals has clarified that a local government's interpretation of local
13 provisions is "clearly wrong" where the reviewing body can say that no person could
14 reasonably interpret the provision in the manner that the local body did. Huntzicker v.
15 Washington County, 141 Or App 257, 261, 917 P2d 1051 (1996). Petitioners argue that the
16 county's primary interpretation of LCCP 1.0145(16) -- that it allows, but does not require,
17 vacations of roads that abut the ocean -- is contrary to the text and plain meaning of that
18 provision. However, we cannot say that no person could reasonably interpret LCCP
19 1.0145(16) in the way the county has. Accordingly, we affirm the county's interpretation of
20 that provision. ORS 197.829(1).¹⁶

21 The fourth assignment of error is denied.

¹⁶Our conclusion regarding the county's primary interpretation of LCCP 1.0145(16) makes it unnecessary to consider petitioners' challenge to its secondary interpretation regarding whether that provision prohibits the county, but not adjoining landowners, from initiating a vacation proceeding. Similarly, we need not address the county's alternative finding that LCCP 1.0145(16) does not apply because South 804 does not "abut" the ocean.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners contend that the county failed to obtain the consent of all owners of
3 recorded right of access abutting South 804, and thus that the challenged decision violates
4 ORS 368.331. ORS 368.331 provides:

5 "A county governing body shall not vacate public lands under ORS 368.326
6 to 368.366 if the vacation would deprive an owner of a recorded property
7 right of access necessary for the exercise of that property right unless the
8 county governing body has the consent of the owner."

9 Petitioners argue that a number of owners in lots 1-30 of the subdivision possess, as
10 do all citizens of Oregon, a customary easement right "recorded" in state statutes to use the
11 area between ordinary high tide and the 16-foot elevation. According to petitioners, the
12 nature of the rocky shore and the limitations and danger posed in access across that shore
13 makes it necessary to retain South 804 in order for those citizens to exercise their rights.

14 We agree with respondents that petitioners have not established that the customary
15 easement right provided in state statutes is a "recorded" property right within the meaning of
16 ORS 368.331. Petitioners cite no authority for the proposition that a right of access can be
17 "recorded" within the meaning of ORS 368.331 other than by recordation with the county
18 clerk, and we are aware of none.

19 The fifth assignment of error is denied.

20 **SIXTH ASSIGNMENT OF ERROR**

21 Petitioners argue that the county erred in failing to apply or find consistency with
22 Statewide Planning Goal 7 and Policies E.3 and E.5 of the city's comprehensive plan.
23 According to petitioners, both provisions restrict development in hazard areas, which
24 petitioners argue includes areas immediately adjacent to coastal waters, because such areas
25 are subject to hazards such as a tsunami, subsidence, and flooding.

26 Goal 7 and YCP Policy E.3 both provide that "[d]evelopments subject to damage or
27 that could result in loss of life shall not be planned nor located in known areas of natural

1 disasters and hazards without appropriate safeguards." YCP Policy E.5 provides that "[l]ow
2 density and open space uses that are least subject to loss of life or property damage such as
3 open storage, forestry, agriculture, and recreation shall be preferred uses in flood prone and
4 steep-sloped areas."

5 Petitioners do not explain why Goal 7, YCP Policy E.3 or E.5 are applicable to the
6 county's decision, and it is not otherwise apparent. Even assuming that petitioners' assertion
7 is correct, that the South 804 area is subject to natural hazards within the meaning of Goal 7
8 and the cited YCP provisions, the apparent effect of Goal 7 and those YCP provisions is to
9 restrict or discourage new development in hazard areas. Nothing in the county's decision to
10 vacate South 804 results in new development in any of the lots overplanning South 804.

11 The sixth assignment of error is denied.

12 The county's decision is remanded.

13 Holstun, Board Chair, concurring.

14 I concur with the majority that the challenged decision must be remanded. I agree
15 with most of the majority's analysis and conclusions concerning the substantive requirements
16 of Goal 17 and IR 6. In particular, I agree with the majority that under ORS 197.646(3), IR 6
17 applies directly to the county's land use decisions until the county's comprehensive plan and
18 land use regulations have been acknowledged for compliance with Goal 17. However, I do
19 not agree that there is anything in substance of Goal 17 or IR 6 that requires that the county
20 adopt and apply comprehensive plan and land use regulation provisions governing road
21 vacations in coastal shorelands that are located outside the county's municipal jurisdiction
22 and inside the City of Yachats. For that reason, I do not think the county is required in this
23 case to apply Goal 17 or IR 6 to its decision to vacate a right-of-way that is located entirely
24 within the City of Yachats.

25 ORS 368.361(3) gives the county "jurisdiction" to vacate county roads that are
26 located in the City of Yachats. However, I believe that statute simply places the county into

1 the shoes of the city as the decision maker—giving the county jurisdiction or authority to
2 vacate such roads that it would otherwise lack due to ORS 368.326.¹⁷ I see nothing in ORS
3 368.361(3) that has any bearing on whether the county must adopt comprehensive plan or
4 land use regulation provisions to implement Goal 17 and IR 6 with regard to rights-of-way
5 located inside cities.

6 Because I see nothing in Goal 17, IR 6 or ORS 368.361(3) that addresses who is
7 obligated under ORS 197.175 to adopt comprehensive plan and land use regulations to
8 implement Goal 17 and IR 6 with regard to the disputed right-of-way, I conclude it is the city
9 that has that obligation because that is where the right-of-way is located.¹⁸ The city has
10 satisfied that obligation by adopting YCP Policy C.6 and YZO 3.100, which incorporate the
11 substance of the requirements imposed by Goal 17, IR 6. I believe it is the city's
12 acknowledged plan and land use regulation provisions implementing Goal 17 and IR 6 that
13 apply in this case.

14 My conclusion that YCP Policy C.6 and YZO 3.100 apply to the challenged decision
15 means I agree with the majority that the challenged decision is a land use decision, although I
16 would base our jurisdiction on the applicability of YCP Policy C.6 and YZO 3.100 rather
17 than Goal 17 and IR 6. I also agree with the majority that in the somewhat unusual

¹⁷ORS 368.361(3) provides:

"Notwithstanding 368.326 [which prohibits counties from vacating public property or public interests in property within a city], a county governing body may vacate property that is under the jurisdiction of the county and that is entirely within the limits of a city if that city, by resolution or order, concurs in the findings of the county governing body in the vacation proceedings."

Although the above statutory language referring to "property that is under the jurisdiction of the county," provides the opportunity for some confusion, I read the statute to allow counties to make decisions vacating its property interests in public properties that are located inside city limits, provided the affected city concurs in the county's findings.

¹⁸This does not necessarily mean that the county could not adopt plan or land use regulation provisions addressing county-owned rights-of-way that are located wholly within cities. Rather, the relevant question is whether any statute or Statewide Planning Goal requires that the county do so. I believe that question is correctly answered in the negative.

1 circumstances presented in this case, it is appropriate to construe petitioner Oregon Shores'
2 second assignment of error (which purports to be directed at the city's findings) as sufficient
3 to challenge the county's findings concerning YCP Policy C.6 and YZO 3.100.¹⁹ Finally, I
4 believe those findings are insufficient to demonstrate compliance with YCP Policy C.6 and
5 YZO 3.100, for the same reasons the majority concludes the challenged decision fails to
6 demonstrate compliance with the identical substantive requirements imposed by Goal 17, IR
7 6.

8 With the exception of the above, I concur in the balance of the majority opinion.

¹⁹The city simply adopted the county's findings. Record 69.