BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEZ PERCE TRIBE,
Petitioner,

vs.

WALLOWA COUNTY,
Respondent,

and

K & B FAMILY LTD. PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2004-036

CITY OF JOSEPH,
Petitioner,

vs.

WALLOWA COUNTY,
Respondent,

and

K & B FAMILY LTD. PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2004-042

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION,
Petitioner,

and

MILDRED FRASER, LIAM O'CALLAGHAN
and LYNNE PRICE,
Intervenors-Petitioner,

vs.

WALLOWA COUNTY,
Respondent,

and

K & B FAMILY LTD. PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2004-044

FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Richard K. Eichstaedt, Lapwai, Idaho, filed a petition for review and argued on behalf of the Nez Perce Tribe.

Mark Tipperman, La Grande, filed a petition for review and argued on behalf of the City of Joseph.

Stephan H. Suagee, Nespelem, Washington, filed a petition for review and argued on behalf of the Confederated Tribes of the Colville Reservation.

Mildred Fraser, Joseph, filed a petition for review and argued on her own behalf. Liam O'Callaghan and Lynne Price represented themselves.

No appearance by Wallowa County.

D. Rahn Hostetter, Enterprise, filed the response brief and argued on behalf of intervenor-respondent.

DAVIES, Board Member; HOLSTUN, Board Chair, participated in the decision.

REMANDED 09/03/2004

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

NATURE OF THE DECISION

Petitioners seek review of the county's approval of a subdivision of 62 acres into 11 five-acre lots. The approval also allows one dwelling and one "guest house" per lot. The conditions, covenants, and reservations (CC&Rs) approved as part of the subdivision effectively prohibit further subdivision of the property.

MOTION TO PARTICIPATE AS *AMICUS*

1000 Friends of Oregon (1000 Friends) moves to appear as *amicus*. There is no opposition to the motion, and it is allowed.

MOTION TO TAKE EVIDENCE NOT IN THE RECORD

On June 22, 2004, petitioner Nez Perce Tribe filed a motion requesting that LUBA consider evidence not in the record. OAR 661-010-0045. The documents they seek to have considered include: (1) an audio tape of a February 24, 2004 Planning Commission meeting, (2) the minutes of a March 9, 2004 meeting of the Wallowa County Board of Commissioners, (3) a letter from Anthony D. Johnson, Chairman, Nez Perce Tribe dated March 24, 2004 and (4) a letter dated April 11, 2004, from Mike Hayward, Chairman Wallowa County Board of Commissioners to Rick Eichstaedt, attorney for the Nez Perce Tribe. No objection was filed to the motion, and it is allowed.

This Board also received a letter from the Wallowa County Planning Director dated June 11, 2004 with numerous documents attached. Those documents include materials that petitioner Fraser attempted to submit to the planning commission, excerpts from a guidebook for protecting cultural resources, and three letters: (1) a January 30, 2004 letter from State Archaeologist Dennis Griffin, (2) a February 5, 2004 letter from the Nez Perce Tribe and (3) a February 6, 2004 letter from the Confederated Tribes of the Colville Reservation. The city also refers to documents that were earlier submitted as attachments to record objections. We understand the city to request that

LUBA consider all of these documents in deciding the appeal. No party objects to the city's request, and it is granted.

FACTS

Some of the facts relevant to specific issues raised in this appeal are better presented in the discussion of those assignments of error. In the interest of brevity, we have omitted a statement of those facts here.

The subject property, known as the Marr property or the Marr Ranch, contains approximately 62 acres and is zoned Urban Growth-Residential (Urban Growth zone or UG-R). It is located outside the City of Joseph but within the City of Joseph's Urban Growth Boundary (UGB). The area is governed by an intergovernmental agreement (IGA) between the city and the county intended to set out a process for joint city and county participation in decision making for property situated within this area.

The Wallowa River runs along a portion of the southern boundary of the property, and the Joseph-Wallowa Lake Highway runs along the eastern boundary of the property. Immediately adjacent to the subject property to the north is the City of Joseph. Main Street runs generally north-south and connects with the main access to the proposed subdivision in the northern part of the property. To the west and across the Wallowa River to the south are lands zoned Rural Residential (R-1) and Recreation Residential (R-2). Across the state highway to the east is land zoned exclusive farm use. Also to the east is a county park and abutting the southeast corner of the property is the Chief Joseph Cemetery and Gravesite.

It is undisputed that members of the Chief Joseph Band of Nez Perce and other Nez Perce Indians have occupied the lands in and around the area now known as the Wallowa Valley and Wallowa County. The Chief Joseph Gravesite was, at one time, a part of the subject property, and is currently held in trust for the Nez Perce Tribe by the U.S. Park Service. Several archaeological studies and surveys of the subject property suggest the presence of archaeologically significant sites.

On September 5, 2003, applicant submitted its application for the proposed subdivision. The petitioners in this appeal appeared before the planning commission, objecting to the proposal for various reasons. The Tribes specifically objected to the proposed development based on impacts to the adjacent cemetery, and impacts to cultural resource sites on the subject property itself. They argued, among other things, that the existing surveys were inadequate to completely understand the nature and extent of the site. On December 17, 2003, the planning commission approved the application. An appeal was filed with the Wallowa County Board of Commissioners, and the board of commissioners heard the appeal "on the record." Record 1-A-1. The board of commissioners issued its decision approving the application subject to conditions on February 12, 2004. This appeal followed.

FIRST ASSIGNMENT OF ERROR (FRASER)

On the same day the county approved the challenged subdivision, it adopted individual orders denying the local appeals. The order denying Fraser's appeal states generally that the appeal is without merit or beyond the county's scope of review, without specifically addressing why each of Fraser's assignments of error is denied. Fraser argues that "[b]y not identifying specifically which of the county's reasons apply to which specific assignment of error, [she] cannot respond and [is] thereby removed from the process and [she asserts] a Goal 1 violation." Fraser Petition for Review 8.

Fraser's Goal 1 argument is not sufficiently developed to allow review, and Fraser's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (FRASER)

Fraser's local appeal alleged error by the planning commission in refusing to accept into evidence "some twenty odd letters and reports concerning cultural resources that supported [the] argument of statewide goal 5 violations." Fraser Petition for Review 8. Neither the planning commission decision nor the board of commissioners' decision explains why those letters were rejected.

We have held that a local government may not refuse to accept or consider evidence that is relevant to an approval criterion. *Silani v. Klamath County*, 22 Or LUBA 734, 740 (1992). As discussed below, Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) applies to the challenged decision. The letters and reports rejected by the planning commission concerned cultural resources, a Goal 5 resource. Because the challenged decision does not explain why the letters and reports were rejected, we are unable to perform our review function.

Fraser's second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR (FRASER)

Fraser assigns error to the county's failure to apply Goal 5 to the decision.[1] She contends that because Wallowa County Land Development Ordinance (WCLDO) 44.035A, the county code provision addressing cultural resources, is not yet acknowledged, the county is required to demonstrate compliance with Goal 5.

Where a local ordinance is adopted, but not yet acknowledged, ORS 197.625(3)(a) generally provides that the unacknowledged provision is legally effective and must be applied unless a stay is granted.[2] In that instance, ORS 197.625(3)(b) requires findings of compliance with any applicable statewide planning goal. The challenged decision includes Goal 5 findings, but Fraser

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[1]Fraser's third assignment of error also mentions the county's characterization of the decision as a limited land use decision instead of a land use decision. We consider the issue of whether the challenged decision is a limited land use decision in our discussion of the city's first assignment of error.

[2] ORS 197.625(3) provides:

> "(a) Prior to its acknowledgment, the adoption of a new comprehensive plan provision or land use regulation or an amendment to a comprehensive plan or land use regulation is effective at the time specified by local government charter or ordinance and is applicable to land use decisions, expedited land divisions and limited land use decisions if the amendment was adopted in substantial compliance with ORS 197.610 and 197.615 unless a stay is granted under ORS 197.845.
>
> "(b) Any approval of a land use decision, expedited land division or limited land use decision subject to an unacknowledged amendment to a comprehensive plan or land use regulation shall include findings of compliance with those land use goals applicable to the amendment."

does not specifically challenge those findings. Record 1-A-3. Accordingly, this assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR (CITY)
FIRST ASSIGNMENTS OF ERROR (TRIBES)

The city, the Confederated Tribes of the Colville Reservation (Colville Tribes or Colville) and the Nez Perce Tribe argue the city erred because it (1) sought and considered new evidence and information after the record was closed, (2) failed to fully disclose the information, and (3) failed to provide an opportunity to rebut the information.[3]

Following the close of the record at the board of commissioner's hearing on January 13, 2004, the board of commissioners apparently had questions regarding some issues related to cultural resources, including the meaning of a "Level II" archaeological survey, which is arguably required under the city's comprehensive plan. The board of commissioners, therefore, directed the planning director to "undertake some research." Nez Perce Petition for Review, App D-2. The planning director contacted the state archaeologist and forwarded a copy of proposed draft findings to him for comment. The state archaeologist responded by letter dated January 30, 2004, and provided the planning director with portions of a *Guidebook for Protecting Cultural Resources* (Guidebook). The planning director subsequently forwarded those items to the board of commissioners. The Tribes and the city assert that the Guidebook and January 30, 2004 letter were *ex parte* contacts. ORS 215.422.[4]

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[3] The briefs of the Colville Tribes and the Nez Perce Tribe closely track one another. Where the Colville Tribes' brief incorporates the Nez Perce Tribe's brief, or where their assignments are substantially similar, we refer to them collectively as "the Tribes." Where an argument is presented by only one of them, we refer only to the one by name.

[4] As relevant, ORS 215.422 provides:

> "(3) No decision or action of a planning commission or county governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

At its February 2, 2004 meeting, the board of commissioners discussed both the substance of the Guidebook and the January 30, 2004 letter. The Tribes objected to the consideration of both. At its February 12, 2004 meeting, the county concluded that the Guidebook and January 30, 2004 letter were information received from planning staff and not subject to any prohibition on *ex parte* contacts under ORS 215.422(4).[5] *See* n 4. County counsel stated, "[I]t is acceptable for the staff to present that to you to help in aid of your decision, but is not necessary that [it] be part of the record." Nez Perce Tribe Petition for Review 13. The decision reflects that the county accepted that advice.[6]

A. Introduction

As an initial point, we note that it is one thing to say that ORS 215.422(4) exempts certain contacts with planning staff that would otherwise be *ex parte* contacts from the requirements of ORS 215.422(3). ORS 215.422(4) does so to encourage and facilitate communication between local decision makers and their legal and planning staff in reaching decisions that correctly interpret and apply the law to the facts in local quasi-judicial proceedings. *Flynn v. Polk County*, 17 Or

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> "(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and
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> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.
>
> "(4) A communication between county staff and the planning commission or governing body shall not be considered an *ex parte* contact for the purposes of subsection (3) of this section."

[5] In *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656, 665 (1993), we noted that ORS chapter 227 does not define *ex parte* contacts, but cited the following definition from the Attorney General's Uniform and Model Rules of Procedure: "[A]n oral or written communication to an agency decision maker * * * not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding * * *." OAR 137-003-0055(1).

[6] The decision provides: "[T]hrough inquiry by County staff and reports filed in response to the Board's inquiry, the Board may consider that information at any time, regardless of date of submission, since it was information sought by the Board and obtained through its staff, whose communication with the review authority is not subject to restriction." Record 1-A-16.

LUBA 68, 71 (1988). However, it is quite another thing to say that ORS 215.422(4) authorizes the board of county commissioners to rely on new evidence that is provided by planning staff, *after* the evidentiary record closes, without giving the parties a right to rebut that new evidence. *Id.* Accepting such new evidence and relying on that new evidence without affording the parties a chance to rebut that new evidence could prejudice those parties' substantial right to rebut evidence and require remand. *Id*.

There are potential difficulties in determining whether secret planning staff communications include new evidence for which an opportunity for rebuttal is required, or whether those communications simply assisted the decision maker in analyzing and determining the facts from the evidence that is already in the record. There are related difficulties in determining whether the decision maker actually relied on such new evidence, and whether that reliance results in reversible error. We turn to the parties' arguments.

B. The Guidebook

As far as we can tell, the county only relied on the Guidebook for information it contained relating to the meaning of a Level II archaeological survey. We conclude below, in denying the city's sixth assignment of error, that the city comprehensive plan provision that the city relies upon to argue that a Level II archaeological survey is required in this case does not apply.[7] Accordingly, any error with regard to the Guidebook was harmless error. We do not address the Guidebook further.

C. The January 30, 2004 Letter

The county argues that the January 30, 2004 letter was not accepted into the record, was not relied upon, and so no opportunity for rebuttal was required. While we agree that the county clearly decided not to include the letter in the record, we do not agree that it acted properly in doing so.

[7] As we explain elsewhere in this opinion, other applicable county code provisions do require a "survey and assessment of the site," without specifying any particular level of survey or assessment.

The county code provides that the record shall include all materials "received" or "considered" in reaching the decision under review. WCLDO 7.030.01(B).[8] Although the county now claims that the letter was not relied upon, the challenged decision shows that it was. It is clear that the findings were changed to reflect the comments in the January 30, 2004 letter.[9] Because the county relied upon the letter in reaching its decision, we conclude that the letter should have been made part of the record, and that the parties should have been provided an opportunity to rebut it. The county's failure to disclose the contents of the letter or to provide an opportunity to rebut the letter prejudiced the parties' substantial rights and requires remand.

D. DeBoie/Womack Conversation

The Tribes and city also allege as an impermissible *ex parte* contact a conversation between Commissioner Dan DeBoie (DeBoie) and Bruce Womack (Womack) in which Womack allegedly stated that he knew where to find one of the archaeological sites and could stake out the boundaries of that site on the property. Although it is unclear when the conversation between DeBoie and Womack occurred, DeBoie disclosed the contact and some substance of that contact at the February 9, 2004 hearing. Record 3-2. DeBoie disclosed that Womack indicated he knew where the boundary of site B was and would be willing to place a marker there if needed. *Id.* As

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[8]WCLDO 7.030.01 provides:

> "Unless otherwise provided for by the appeal authority, review of the decision on appeal shall be confined to the record of the proceeding as specified in this section.
>
> "The record shall include:
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> "A. An oral or written factual report prepared by the Planning Director.
>
> "B All exhibits, materials, pleading, memoranda, stipulations, and motions submitted by any party and received or considered in reaching the decision under review.
>
> "C. The minutes of the hearing below and a detailed summary of the evidence."

[9] The proposed findings mailed to the state archaeologist provided: "No site has been found by SHPO to be archaeologically significant." Nez Perce Tribe's Petition for Review, Appendix E-2. In its January 30, 2004 letter, SHPO wrote, "Our office did not declare any site on this property significant or not significant." *Id.* The findings in the challenged decision provide: "The SHPO has not made a determination that any site is archaeologically significant or that it is not." Record 1-A-17.

the record was closed, petitioners had no opportunity to comment on or rebut the substance of that claim.

The applicant argues, first, that a contact is not considered *ex parte* unless the communication encourages the decision maker to take a particular course of action. Intervenor's Response Brief to the Tribes' Petitions for Review 8 (*citing Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656, 661 (1993)).[10] Because Womack did not urge the county to take a particular course of action, it asserts, the conversation does not qualify as an *ex parte* contact. The county reads too much into *Horizon*. The case merely explains why a newspaper editorial could be considered an *ex parte* contact with the decision maker; it does not create a requirement that all communications must urge or encourage a particular course of action in order to qualify as an *ex parte* contact. The January 30, 2004 letter and the conversation between DeBoie and Womack were direct communications with the decision maker on the subject of the pending application, and whether they urged a particular course of action or not, they were *ex parte* contacts.

The applicant also argues that the conversation with Womack, *i.e.*, the location of the site, did not pertain to an issue in the proceeding. As discussed below, the location of the site relates to the adequacy of the existing surveys of the site, and is central to the issues being considered.

Finally, the applicant argues that even if the conversation was an *ex parte* contact, the board did not rely on it. The record does not support the applicant's argument. The adequacy of the delineation of the archaeological sites' boundaries was one of the more contentious issues the board of commissioners considered. One of the conditions adopted by the county incorporated Womack's offer to stake the boundaries of site B, and petitioners were afforded no opportunity to

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[10]The language that applicant relies upon provides: "there is no inherent reason why a local government decision maker's reading of a newspaper editorial, outside the local hearing process, would not be an *ex parte* contact, if that editorial was directed at the decision making body, *in the sense of urging it to take a particular course of action*, and discussed a fact or facts at issue in the local proceedings." *Horizon*, 25 Or LUBA at 661, 665 (emphasis added).

respond to that offer. That failure on the county's part was error. *Angel v. City of Portland*, 21 Or LUBA 1, 8-9 (1991)(failure to provide an opportunity to rebut *ex parte* information is sufficient to demonstrate prejudice to a substantial right).

This assignment of error is sustained as to the DeBoie/Womack conversation and the January 30, 2004 letter and denied as to the Guidebook.

SECOND ASSIGNMENT OF ERROR (NEZ PERCE)
THIRD ASSIGNMENT OF ERROR (COLVILLE TRIBES)

Shortly after the challenged decision became final, the Tribes learned that a member of the planning commission made remarks during the February 24, 2004, planning commission meeting that might suggest that her decision in favor of the proposed subdivision was motivated by racial animus toward the Tribes.

The Tribes argue that their substantial right to an unbiased and impartial tribunal was prejudiced by the planning commissioner's involvement. *See Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973)(establishing requirement for an impartial tribunal in quasi-judicial land use proceedings). The Tribes recognize that the bias of a planning commissioner will not always result in an impartial tribunal where a *de novo* appeal is available to a higher decision-making body. *See O'Rourke v. Union County*, 29 Or LUBA 303, 308 (1995) (procedural errors before a lower level decision maker may be cured by *de novo* review by a higher level local decision maker); *see also Slatter v. Wallowa County*, 16 Or LUBA 611, 617 (1988)(regardless of possible bias by planning commissioner, *de novo* review by city council gave petitioners the impartial tribunal to which they were entitled). However, the Tribes contend that the review in this case was not *de novo.* The board of commissioners reviewed the planning commission's decision "on the record;" *i.e.*, the board of commissioners accepted the record as developed by the planning commission, which included a biased commissioner. While the Tribes are correct that the board of commissioners accepted the planning commission's evidentiary record, the board adopted its own order, findings, conclusion and reasons for its decision. It was a *de novo* review of the record.

The allegedly biased public official in this case was not one of the ultimate decision makers. The question is not, therefore, whether the planning commissioner prejudged the case or was unable to render a decision based on the criteria. Rather, the potential harm in this case is that the evidentiary record that the board of commissioners relied upon may have been improperly influenced by the participation of a biased planning commissioner. Because the planning commissioner is not the decision maker in this instance, it is not enough for the Tribes to show that the planning commissioner is biased. The Tribes must also make a showing that the record has been tainted by the biased commissioner, apart from the mere fact of the bias. *Utah Int'l v. Wallowa County*, 7 Or LUBA 77, 83 (1982)(petitioner must show "fatal link" between the alleged lack of fairness at the planning commission level and the county court decision).

The Tribes argue that the fact that the board had to go outside the record to develop evidence necessary to resolve the cultural and archaeological resources issue discussed below showed that the record created by the planning commission was inadequate to resolve the issues raised by the Tribes. That may be true. However, the fact that the record may have been incomplete or inadequate does nothing to show that the record was, in fact, tainted by the planning commissioner's involvement or her alleged bias. Neither have they alleged or shown that the planning commission's rejection of certain documents regarding cultural resources was initiated or influenced by the planning commissioner.

These assignments of error are denied.

SECOND ASSIGNMENT OF ERROR (COLVILLE TRIBES)

The Colville Tribes claim that their substantial rights have been prejudiced by the county's failure to prepare critical documents required by WCLDO 7.030.01. *See* n 8. That provision sets out the information that is to be considered part of the record in a local appeal. Under that provision, the Colville Tribes assert, the county was required to prepare a report from the planning director and a detailed summary of the evidence, but failed to do so. Given the confusion and

disagreement explained in the previous assignment of error regarding what is and is not a part of the record, the Colville Tribes assert the omission of these two items prejudiced their substantial rights.

Neither the county nor the applicant responds to this assignment or error. Absent an argument to the contrary, we agree with the Colville Tribes, and sustain this assignment of error.

FIRST ASSIGNMENT OF ERROR (CITY)

The city argues that the challenged decision is not a limited land use decision.[11] It apparently makes this assertion in an attempt to call into play the city's and county's comprehensive plan policies. ORS 197.195(1).[12]

The city asserts that the decision is not a limited land use decision because it effectively changes the minimum lot size applicable to the Marr property and alters the permitted density, in essence rezoning the property. The decision also, according to the city, effectively grants a conditional use permit for guest homes, approves a *de facto* variance of the maximum length of a cul-de-sac, and a waiver of a county code requirement limiting private roads to 600 feet.

The subject property is zoned UG-R, a zone that requires a minimum lot size of five acres. WCLDO 26.025.01.[13] WCLDO 26.025.01 provides an exception to the 5-acre minimum lot size:

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[11] A "limited land use decision" is "a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:

> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
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> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review." ORS 197.015(12).

[12] ORS 197.195(1) provides, in relevant part:

> "A 'limited land use decision' shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. * * * Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. *If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision*." (Emphasis added.)

where a community water or sewer system is available, the minimum lot size *may be* less than 5 acres and is to be determined by the use. However, the exception clarifies that the minimum lot size can never be *smaller* than required by a residential zone of the nearest incorporated city. Under the language of WCLDO 26.025.01, where community water and sewer are available, the exception allows lots as small as 5850 square feet (the City of Joseph's minimum lot size), depending upon the use proposed. The challenged decision merely approves a subdivision that creates lots that meet the minimum lot size currently allowed in the zone. The code does not impose a maximum lot size. The challenged decision does not constitute a *de facto* zone change.

The statutory definitions of "limited land use decision" and "land use decision" control here. A "limited land use decision" is a local government's final decision or determination pertaining to a site within the UGB that concerns the approval of a subdivision. *See* n 11. The definition of "land use decision" specifically excludes decisions that satisfy the definition of "limited land use decision." ORS 197.015(10). The city cites to two cases in support of its position that an approval for a subdivision becomes a land use decision if it goes beyond the scope of land use standards applicable to a subdivision. *Lloyd Dist. Community Assoc. v. City of Portland,* 30 Or LUBA 390, 394, *aff'd* 141 Or App 29, 916 P2d 884, *rev den* 334 Or 322 (1996), and *Crowley v. City of Bandon,* 43 Or LUBA 79 (2002). Neither case has any apparent bearing on this case. However, *Bartels v. City of Portland*, 20 Or LUBA 303 (1990), a case that is not cited by the city, arguably could lend indirect support to the city's argument. The challenged decision in *Bartels* approved a subdivision, granted planned unit development approval and granted variances. Although *Bartels* predated the ORS 197.015(12) provisions concerning limited land use decisions, *see* n 11, the city moved to dismiss that appeal based on an earlier statute, ORS 197.015(10)(b)(B)

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[13] WCLDO 26.025.01 provides:

> "PARCEL SIZE IN THE URBAN GROWTH ZONE: The minimum lot size shall be five acres. Exception: if a community water or sewer system is available for use then the minimum lot area shall be determined by the use provided that in no instance shall the lot be less than that required in a residential zone of the nearest incorporated city."

(1989), which removed urban subdivisions from LUBA's jurisdiction altogether. LUBA denied the motion to dismiss:

> "[W]e have explained that the exception to [LUBA's] review jurisdiction created by ORS 197.015(10)(b)(B) is a relatively limited one. It is limited to urban partition and subdivision decisions [that] simply *apply* the *existing* standards governing such land divisions. The exception does not apply in cases where a subdivision or partition decision includes or requires plan or zone changes. Neither does ORS 197.015(10)(b)(B) apply where a subdivision or partition requires modifications to or variances from the approval standards governing subdivisions and partitions." 20 Or LUBA at 307. (Footnote and citations omitted; emphasis in original).

There is no reason that we can see why the underlying principle in the above-quoted language from *Bartels* would not apply equally to the question of whether a decision that grants subdivision approval for land inside a UGB, along with other approvals that viewed by themselves would be land use decisions, would qualify as a limited land use decision under ORS 197.015(12)(a). If the county's decision in this case purported to rezone the property, grant conditional use approval or approve a variance, *Bartels* would support the city's contention that the disputed decision would therefore not qualify as a limited land use decision under ORS 197.015(12). However, the county's decision does not purport to rezone the property, grant conditional use approval or grant a variance. The county's failure to rezone the property, grant conditional use approval or grant variances might have been error, and thus provide a basis for reversing or remanding the decision. However, those failures do not convert the subdivision approval, which is the only approval the county granted, into something other than a subdivision decision for land located within an UGB. Under ORS 197.015(12), such decisions are limited land use decisions.

This assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (CITY)

The city asserts that the county erroneously disregarded an intergovernmental agreement (IGA) and comprehensive plan provisions.[14]

First, the city notes that the IGA requires the county to incorporate into its comprehensive plan provisions and land use ordinances the city's comprehensive plan provisions and ordinances that address lands within the Urban Growth Area. IGA Article IV, sections 1, 3. The city concedes that the county has never incorporated those city plan provisions into the county's plan. The city asserts, however, that the county plan should be read to include those city plan provisions that should have been incorporated.

We cannot read provisions into the county's plan that the county never adopted, even if they should have done so. The IGA does not include a provision requiring or allowing direct application of those provisions absent the necessary county actions to incorporate the provisions into the county's plan. Because the city provisions have not been incorporated into the county code or plan, they do not apply.

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[14]The Intergovernmental Agreement between the city and the county provides, in pertinent part:

> "1. The County shall incorporate into the Wallowa County Comprehensive Land Use Plan, by reference, those portions of the City of Joseph Land Use Plan that address lands within the Urban Growth Area.
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> "* * * * *
>
> "3. The County shall incorporate into [its] land use ordinances, those City ordinances that specifically address lands within the Urban Growth Area.
>
> "4. All County land use designations and zoning of lands within the Urban Growth Area shall be consistent with the City of Joseph Land Use Plan. The County shall not approve a land use designation or zoning change to lands within the Urban Growth Area without prior written approval from the City." Intergovernmental Agreement, Article IV. Record 19-A-4.

Article III of the IGA provides, in part: "City's Urban Growth Area is considered to be available, over time, for City expansion." *Id.*

Second, the city cites to Article IV, section 4 of the IGA, which requires city consent where the county seeks to approve a land use designation or zone change for lands within the Urban Growth Area. *See* n 14. The city asserts that the challenged decision violates the IGA because the county approved a land use designation or zone change without the city's consent. The city's argument is based upon the city's position that the challenged decision changed the land use designation of Marr Ranch or rezoned it, and that the city's consent was therefore required. Based on our determination above that the decision is not a *de facto* zone change, this argument fails.

Finally, the city makes general assertions that the decision to approve a subdivision with five-acre lots effectively removes from the city's inventory the largest potential site of affordable housing, in violation of the city's comprehensive plan policies. However, as already noted, this argument fails because the policies do not apply directly to a limited land use decision and the county's code specifies a five-acre minimum lot size without imposing a maximum lot size. Because the county adopted as part of its code the minimum lot size of 5 acres, and that code provision was acknowledged, that argument is precluded here. This assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (CITY)[15]

The applicant was required to provide to the county "a list of any proposed restrictive covenants." WCLDO 31.025.02B. The county conditioned its approval upon the recording of the CC&Rs "in the form presented to and approved by the Board on the date of these findings or a subsequent Review Authority approved revision thereof." Record 1-A-39. The CC&Rs approved by the county effectively prohibit further subdivision of the property.[16]

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[15] 1000 Friends' *amicus* brief supports the city's third assignment of error.

[16] We do not decide here whether the county was required to condition its approval on the applicant's recording the CC&Rs. In this case, the county clearly approved the CC&Rs ("The non-revocable Conditions, Protective Covenants, and Reservations (CC&Rs) approved in this decision deed restrict the subdivision to eleven (11) lots of at least five (5) acres each, so density will never approach the number of lots or homes that are now allowed by the UG-R zone." Record 1-A-7.) and conditioned the approval of the subdivision on their being recorded.

The city and 1000 Friends assert that the county violated provisions of the city and county comprehensive plans, the IGA, ORS 197.752 and Goal 14 in approving a 5-acre lot subdivision within the UGB that precludes the possibility of eventual urbanization.[17] They argue that under these authorities, lands within the UGB must be available for urban development, and that the creation of 5-acre lots with a prohibition on further subdivision is inconsistent with the requirement that the subject lands be "available for urban development."

The UG-R zone has been acknowledged and is therefore deemed consistent with Goal 14 as a matter of law. While Goal 14 does not apply directly to the appealed decision, ORS 197.752(1) arguably does. *See Kenagy v. Benton County,* 115 Or App 131, 878 P2d 1076 , *rev den* 315 Or 271 (1992) (relevant statutes remain applicable to local land use decisions after acknowledgment). The city and 1000 Friends both cite to the statute, which requires lands within

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[17] ORS 197.752 provides:

> "(1) Lands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards."
>
> "(2) Notwithstanding subsection (1) of this section, lands not needed for urban uses during the planning period may be designated for agricultural, forest or other nonurban uses."

Goal 14 states: "Land within the boundaries separating urbanizable land from rural land shall be considered available over time for urban uses. Conversion of urbanizable land to urban uses shall be based on consideration of:

> "(1) Orderly, economic provision for public facilities and services;
>
> "(2) Availability of sufficient land for the various uses to insure choices in the market place:
>
> "(3) LCDC goals or the acknowledged comprehensive plan; and,
>
> "(4) Encouragement of development within urban areas before conversion of urbanizable areas."

The city's only reliance on Article III of the IGA ("[c]ity's Urban Growth Area is considered to be available, over time, for City expansion") is that it and the other sources cited obligate the city and county to consider potential impacts of the challenged decision on future urbanization of lands within the UGB. City's Petition for Review 24. It offers no other argument regarding Article III, and we do not address it further.

the UGB to be "available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards." *See* n 17. We understand their arguments to present two separate questions. First, does approval of this 5-acre lot subdivision violate the statute? Second, does the perpetual prohibition on future subdivision, required by the CC&Rs, violate the statute.

ORS 197.752(1) tracks the language of Goal 14, which provides for separating urban and urbanizable lands from rural lands and encourages urban development within the UGBs. The statute differs slightly from the goal in that it more expressly links the requirement that lands inside UGBs be available for urban development to the availability of water and sewer services. The statute requires land within UGBs needed for urban uses be available for urban development "concurrent with the provision of key urban facilities and services." Those urban facilities and services are not yet available to the Marr property. The WCLDO expressly requires that the lots include a minimum of five acres in that circumstance. Accordingly, the county's approval of 5-acre lots is not inconsistent with the requirement that the subject land "be available for urban development[.]"

We turn to the second question. 1000 Friends and the city argue that the subdivision as approved (*i.e.*, with a prohibition on further subdivision) is improper because the services that are not yet available to the subject property will, at some time in the future, become available. Under the statute, they argue, the property must be available for urban development at such time as those services become available. They assert that 5-acre residential lots that cannot be further subdivided, even if provided with urban services, are not "available for urban development" within the meaning of ORS 197.752(1).

We agree with 1000 Friends and the city that the county erred in requiring as a condition of final plat approval that the applicant record CC&Rs that effectively prohibit further subdivision of five-acre residential lots within the city's UGB. The county presumably made a determination that the property is needed for urban uses when it placed the property within the city's UGB and zoned it UG-R. Having done so, the county is obligated by ORS 197.752(1) to ensure that the subject

property is "available for urban development" in the future, even though 5-acre lots may be appropriate at the present time given the current lack of urban services. A county decision that approves five-acre residential lots and effectively prohibits further division of those large lots and the higher residential density that may be necessary to satisfy the identified need for urban uses is inconsistent with that obligation. While it is true that the county's decision does not directly impose the prohibition, it indirectly does so by approving the draft CC&Rs and requiring that those CC&Rs be recorded as a condition of final plat approval. Absent a demonstration from the county that the prohibition on further subdivision is consistent with the county's obligation to make land within the UGB needed for urban uses "available for urban development," the county cannot impose that prohibition.

This assignment of error is denied in part and sustained in part.

SIXTH ASSIGNMENT OF ERROR (CITY)
THIRD AND FOURTH ASSIGNMENTS OF ERROR (NEZ PERCE)
FOURTH AND FIFTH ASSIGNMENTS OF ERROR (COLVILLE TRIBES)

In 1986, the first archaeological study of the subject property relevant to this appeal was conducted by Womack and Manfred Jaehnig. That study was done in three phases: first, an initial surface survey of the entire property; second, the excavation of 142 shovel test holes in places deemed likely to yield archaeological information; and third, the excavation of 1x1 meter test units in surface features like possible rock cairns and surface depressions. Record 15-F-12. The study found two prehistoric sites. The study recommended "that further testing (not complete excavation) be done on the sites to find (1) their actual depth and areal extent, (2) the nature of the specific natural deposits that contain the artifacts, and (3) the nature of the cultural deposits to determine site type * * *. With that information in hand, property owners could develop plans of protecting the site * * *." Record 15-F-34-35.

In late 1989 and early 1990, another survey was conducted by Womack in anticipation of the city's construction of a water filtration system on the property. The project area for this study was more limited, encompassing only the 1.3 acres around the area proposed for the filtration

system. The report concluded that the proposed project would have "'no effect' on any listed or potentially eligible cultural resources." Record 15-G-10. It did find some flakes, but concluded that they were not near the proposed project.

A follow-up study was subsequently conducted in July 1990, focusing on the areas west and north of Knight's Pond, which is located just north of the Wallowa River on the southern portion of the property. This study included a diagram showing two possible archaeological sites, Area A and Area B.

The City of Joseph Land Use Plan refers to these studies and the sites:

> "* * * Two 'chip sites' have been located on the property during two separate archaeological investigations done by Jaehnig and Womack. The investigations identified two areas containing flake scatters (indicating they may have been chipping stations). The two sites are located on the western edge of a narrow, high terrace above the Wallowa River. The specific location, quality and quantity are in the investigation reports which are adopted by reference. The existence of 'flake scatters' may indicate the existence of a more significant cultural site where extensive, long term occupation occurred. * * *
>
> "* * * Before [residential] uses are permitted, the City will require that a Level II survey be completed, Native American Cultural Archaeologist's input recommended, to determine whether or not there is a cultural site worthy of protection." City of Joseph Ordinance No. 93-2 (City Comprehensive Plan) at 52-3.

The city and the Tribes argue that the county erred in not requiring a "Level II" archaeological survey of the Marr Ranch. Although there is nothing near consensus on what constitutes a Level II survey, all parties appear to agree that the city's comprehensive plan is the only source for the Level II requirement. Based on our conclusion above, that the city comprehensive plan provisions that were not specifically incorporated into the county's plan do not apply, any county failure to require a Level II survey could not constitute a violation of the county's comprehensive plan.[18]

[18] The city's only argument with regard to the cultural resources issues is that a Level II survey was not completed. The remainder of the discussion under this assignment addresses the Tribes' arguments.

The city's sixth, the Nez Perce's fourth and the Colville Tribes' fifth assignments of error are denied.

The Tribes next argue that the county violated its own comprehensive plan by conditionally approving the challenged decision before establishing that the subdivision complies with all mandatory approval standards. That argument appears to be aimed at compliance with WCLDO 44.035A, rather than the Wallowa County Comprehensive Plan.[19]

The county imposed Condition #2, which provides:

> "Approval is conditioned upon the conformance of the final plat to any requirement imposed by the WCLDO, WCCLUP, or the State Historic and Preservation Office [SHPO] or Federal Law concerning any archaeological site on the property either by assurance in the final plat that no change is proposed to the continuous use of any area within the boundaries of an archaeological site or by issuance by SHPO of a development permit within the boundaries of any archaeological site and by concurrence of the SHPO in the adequacy of: (1) the delineation of boundaries of sites, including establishment of surveyed boundaries permanently monumented on the ground and represented on the Final Plat; (2) the management plan for protection of those delineated sites within the subject property; and (3) the

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[19] WCLDO 44.035A provides:

> "Development proposals for sites involving known or highly probable potential cultural resources including historic or prehistoric sites, buildings, objects, and properties related to American and Native American history, architecture, archaeology and culture, such as settler or Native American artifacts, must include a survey and assessment of the site and resources by authorities judged competent by the review authority, and a management plan, if indicated, responsive to the findings of the assessment, for historic/cultural resource protection.
>
> "The Review Authority shall communicate with representatives of the tribes listed at the end of this section with regard to the choice of the assessment authorities.
>
> "The review authority may consult with any competent authority to assist in evaluation of an assessment or a management plan for historic/cultural resource protection and to assure that the plan is in compliance with applicable Federal laws and regulations including the American Antiquities Act of 1906 (16 U.S.C. 431-433), National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.) and the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470 aa et seq.) and applicable laws and administrative rules of the State of Oregon including ORS 97.740-760, 358.905-955, and 390.235. The County recognizes that historical and cultural sites are present in the Goal V area, but are not listed in this document to protect the sites. Site lists of Native American sites may be obtained from the tribes, at tribal discretion, listed at the end of this section.
>
> "* * * * *."

> mitigation plan to address post approval inadvertent finds of archaeological artifacts or human remains. The applicant shall delineate site boundaries, develop a management plan, and prepare a mitigation plan for submission to the SHPO for review and approval and subsequently to Wallowa County for its review and approval in consultation with and with the voluntary assistance of the Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Colville Reservation, and the Nez Perce Tribe, following the procedures outlined in Article 44 and Article 28." Record 1-A-39.

The Tribes contend that the county must require completed archaeological surveys and assessments, a management plan and ensure that the proposed subdivision complies with local, state and federal laws relating to preservation of archaeological resources *prior* to preliminary plat approval. They argue that the condition impermissibly defers the county's determination of compliance with WCLDO 44.035A to a later stage that does not provide an opportunity for public participation. The applicant responds that the only condition imposed is a requirement that the final plat conform to state and federal law by assuring either (1) that the continuous use of any "significant" site not be changed or (2) that a development permit be issued by SHPO.

We disagree with applicant's characterization of the condition for several reasons. First, the condition requires conformance not only with state and federal law, but also with "any requirement imposed by the WCLDO or WCCLUP." WCLDO 44.035A is the provision in the county's code that addresses archaeological resources. Issuance of a permit by SHPO is not necessarily sufficient to show compliance with WCLDO 44.035A. WCLDO 44.035A contains its own requirements, independent of the federal and state requirements. *See* n 19.

Second, Condition #2 requires the applicant to delineate the boundaries of the archaeological sites, develop a management plan and prepare a mitigation plan prior to final plat approval. The condition ignores the requirement, imposed by the language of WCLDO 44.035A, that the survey, assessment and management plan be completed as part of the development proposal. Under WCLDO 44.035A, a development proposal for sites with or likely to contain

cultural resources *must include* a survey, assessment and, where indicated, a management plan.[20] The language makes it reasonably clear that any management plan that is necessary to respond to the findings of a survey or assessment must accompany the development proposal.

The circumstances under which a local government can defer consideration of compliance with applicable approval criteria to a second proceeding are limited. In *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), we held that if a local government can adopt findings that demonstrate it is feasible to comply with an approval criterion, it is appropriate to impose conditions of approval to assure compliance with that criterion. Where there is not sufficient evidence to establish that it is feasible to comply with an approval criterion, a local government may defer consideration of that criterion to a later stage. If it does so, however, it must assure that the later stage proceeding provides the same notice and participatory rights that are required for the initial stage. *Id*. at 447-48. In the present case, the county essentially deferred all consideration of the WCLDO cultural resources provisions to the final plat approval stage.

The applicant, at oral argument, asserted that final plat approval would provide the necessary public participation this case. However, the county's code does not currently require such public involvement at the final plat stage. WCLDO 31.050. Neither does the county's decision require public participation. Condition #2 provides that the county's future "review and approval" of the site boundary delineation, management plan and mitigation plan will follow "the procedures outlined in Article 44 and Article 28." Those code provisions do not provide for public participation in final plat approval decisions. Accordingly, we agree with the Tribes that the county erred in deferring the preparation of a management plan to the final plat.[21]

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[20] The applicant does not argue that the proposed tentative subdivision application is not the "development proposal" to which the requirements of WCLDO 44.035A apply. In fact, the county and all parties treated it as if it was, and so do we. Neither does the applicant dispute that the property involves known or "highly probable potential cultural resources."

[21] Our agreement with the Tribes that the county improperly deferred preparation of a management plan should not be understood to reject the applicant's proposed method to protect the identified sites on the property by continuing past use of those parts of the property where archaeological sites are located and

While we agree with the Tribes regarding deferral of the management plan, we do not necessarily agree with the Tribes that the county failed to require an archaeological survey and assessment. Although WCLDO 44.035A does not offer much guidance about what a survey and assessment must include, it does not expressly require a Level II survey.[22] And while there is disagreement about the adequacy of the completed surveys and assessments and the exact location of at least one archaeological site, a "survey and assessment of the site and resources" has been completed. On remand, the county should explain why it believes that the existing surveys and assessments are sufficient to provide the factual basis needed for the required management plan. Alternatively, if the county finds that the existing surveys and assessments are inadequate to prepare the required management plan prior to preliminary subdivision plat approval, it may require that additional surveys and assessments be prepared.

The Tribes also raise the timing of compliance with applicable state and federal laws. WCLDO 44.035A states that the review authority may consult with a competent authority to assure the management plan complies with applicable state and federal laws. *See* n 19. Technically, the code only requires that the management plan comply with applicable state and federal laws, not that any or all necessary state or federal permits be obtained prior to tentative plan approval. On remand, the county will be required, under WCLDO 44.035A, to consult with SHPO, or another competent authority, and to explain how the management plan complies with state and federal regulations.

The Nez Perce's third and the Colville Tribes' fourth assignments of error are sustained in part and denied in part.

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prohibiting any additional development of those sites. Although we need not and do not address that question here, such an approach seems reasonable. However, such an approach makes current knowledge of the precise location of those sites and the nature of those sites critical, so that the management-by-avoidance plan can be developed with sufficient precision to evaluate its adequacy.

[22] Although it is not entirely clear, we understand the WCLDO 44.035A reference to "survey" to refer to collection of data regarding cultural resources on a site and the reference to "assessment" to be an assessment of the meaning and significance of that data at a level of detail that is sufficient to establish the kind of management plan, if any, that is warranted.

FIFTH ASSIGNMENT OF ERROR (NEZ PERCE)
SIXTH ASSIGNMENT OF ERROR (COLVILLE TRIBES)

The Tribes assert the decision is not supported by substantial evidence in a number of respects regarding cultural resources issues.

A. Level II Survey

The Tribes contend that the county's finding that the existing surveys constitute Level II archeological surveys is not supported by substantial evidence in the record.

We have already concluded that no legal standard that applies in this proceeding requires a Level II archeological survey. The finding is therefore not critical to the decision and any lack of substantial evidence for the finding would provide no basis for remand.

B. Simplicity of Site Mapping

The Tribes challenge the county's finding that "it will be a relatively simple task to establish and map the boundaries" of the identified sites on the property.

We have already agreed with the Tribes that more precise mapping is needed to prepare the management plan that WCLDO 44.035A requires. Based on the record before us, the ease or difficulty of preparing that more precise mapping of the location and nature of the sites on the property is somewhat difficult to assess. Whatever the correct characterization of the level of difficulty of that effort, we agree that it must be completed before preliminary plat approval is granted. With that understanding, the county's characterization of the effort that will be required to complete that mapping, itself, provides no basis for reversal or remand.

C. Findings Concerning Condition 2

The Tribes argue that the county failed to explain how Condition #2 satisfies the objectives and requirements of the county's code.

The Tribes' third challenge is not a substantial evidence challenge. We have already addressed the Tribes' arguments regarding the legal sufficiency of Condition #2, and we do not discuss this contention further.

D. SHPO Determination

The Tribes argue that the county's finding that "SHPO has not made a determination that any site is archaeologically significant or that it is not," is not supported by substantial evidence.

The language of that finding is taken directly from language in the January 30, 2004 letter from the state archaeologist. *See* n 9. The Tribes do not explain why the finding is critical to the county's decision. Therefore, even if the finding is not supported by substantial evidence, that unsupported finding does not provide an independent basis for remand.

E. Finding Concerning County Inventory of Cultural Resources

The Tribes argue that the finding that "the subject property is not on the County's inventory of cultural resources * * * and therefore claims that the entire property cannot be developed because it is a 'Cultural Property' cannot be sustained," ignores testimony presented by the Tribes that not all sites deserving of protection are on the inventory.

The applicant responds only by citing to the record in support of the statement that the subject property is not on the county's Goal 5 inventory for cultural resources. The Tribes agree that the subject property is not on the county's inventory. Their argument appears to be that the county's finding suggests that, because the property is not on the inventory, it cannot be considered a "Cultural Property," and thus can be developed notwithstanding WCLDO 44.035A. The Tribes read too much into the county's findings. While we have already agreed that the county inadequately addressed the WCLDO 44.035A requirement concerning protection of cultural resources, it is clear that the county does not take the position that WCLDO 44.035A does not apply in this case. The Tribes have not identified any specific criterion that relies upon the finding regarding the inventory or whether the property is a "Cultural Property" and therefore have provided no basis for remand.

F. Finding Concerning Purchase of the Property

The Tribes contest the county's finding that if protection of the area is desired, the solution is to pursue purchasing the property.

Again, the finding is not necessary to show compliance with any applicable approval criterion. The Tribes' disagreement with the county's opinion that purchase of the property is the best solution for protecting the cultural resources on the property provides no basis for remand.

These assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR (NEZ PERCE)
SEVENTH ASSIGNMENT OF ERROR (COLVILLE TRIBES)

The Tribes and the city argue that the county's decision is inconsistent with the public interest.[23] WCLDO 31.030.01(G).[24] The challenged decision interprets the "public interest" to be commensurate with satisfaction of the applicable land use criteria. In other words, if the applicable WCLDO criteria are satisfied, then the proposal is consistent with the public interest. The Tribes and the city neither directly challenge that interpretation nor offer a different one.

The Tribes allege the decision violates the public interest by failing to ensure that cultural resources are adequately understood and protected. In support of that contention, they merely reiterate the importance of the cultural resources and reassert that the criteria relevant to the cultural resources are not satisfied. The city alleges that the proposed subdivision violates the public interest by adopting a perpetual prohibition on the future urbanization of Marr Ranch.

The county interprets the "public interest" criterion in WCLDO 31.030.01(G) to depend upon whether a proposal satisfies other applicable WCLDO criteria. The county's finding that the proposal complies with WCLDO 31.030.01(G) necessarily depends on whether the proposal complies with those other criteria. We conclude elsewhere in this opinion that the county has not established that the proposal complies with all of those criteria. Therefore, these assignments of error are sustained.

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[23] The city's argument regarding violation of this criterion is not a separate assignment of error; it is presented in support of its third assignment of error. We will address it with the Tribes' assignment of error challenging the findings in support of the public interest criterion.

[24] WCLDO 31.030.01(G) requires that a "subdivision is in the public interest and is not contrary to the public health, safety, and welfare."

FOURTH ASSIGNMENT OF ERROR (CITY)

The city contends that the challenged decision violates WCLDO 32.045.09, which provides:

> "To provide for proper site design and prevent the creation of irregularly shaped parcels, parcels shall be located and laid out to properly relate to adjoining or nearby lots or parcel lines, utilities, streets or other existing planned facilities, unless there are existing topographical, environmental or man made constraints."

The challenged decision concludes:

> "[T]he lots * * * are located and laid out to properly relate to adjoining or nearby lots or parcel lines, utilities, and streets. The lots are properly designed and shaped considering the constraints of existing topographical and man-made features such as irrigation ditches and existing water and sewer mains." Record 1-A-37.

The city argues that the findings are conclusory, and are not supported by substantial evidence. We agree with the city that the findings are conclusory. Because the applicant has not pointed to any evidence in the record that would support the finding, this assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR (CITY)

The city contends that the county erred in approving the subdivision with only internal private roadways, and with no provision for public access to or from future development or nearby properties, as required by WCLDO 26.025.02.

The main roadway within the subdivision, Elkhorn Lane, will provide a direct connection from the Wallowa Lake Highway (State Route 82) on the north side of the property to Main Street, which is located to the southwest of the property. Elkhorn Lane will also provide access not only to the eleven lots within the subdivision, but also to the adjacent gravesite of Old Chief Joseph, located just beyond the northeast corner of the property.

Specifically, the city argues that Elkhorn Lane must be dedicated as a public road. Applicant, in its brief, argues that the county has long interpreted the term "public access" in WCLDO 26.025.02 as a reference to the development standards applicable to public roads and

does not require that the access be dedicated to the public. In other words, roads within subdivisions can be private roads, but improved to "public access" road standards.

The challenged decision does not include the interpretation offered by the applicant. [25] Where the local government does not adopt an interpretation, this Board may make its own interpretation in the first instance. ORS 197.829(2); *Thompson v. City of St. Helens,* 30 Or LUBA 339, 345 (1996).

We look first to the text and context of the provision to be interpreted. *PGE v. Bureau of Labor and Industries,* 317 Or 606, 611, 859 P2d 1143 (1993). The starting point of our analysis is Article 31, the county's general subdivision procedures. WCLDO 31.030.01D provides:

> "In reviewing preliminary plats all of the following criteria shall be met prior to approval.
>
> "* * * * *
>
> "D. The road design meets the required road standards as found in the Wallowa County Transportation System Plan and Article 32, Road Design * * *."

We turn next to the provisions of Article 32. WCLDO 32.040.09 provides:

> "PRIVATE ROADS: Any road that is to be constructed for access serving a partition or subdivision shall at a minimum, meet the applicable road standards of this article and may be required by the review authority to provide public access.
>
> "The review authority may allow non-dedicated private roads, built to the applicable road standards, where it has been determined:
>
> "A. The private road would not violate the provisions of the land use plan and land development ordinances.
>
> "B. There are no needs for public right-of-way acquisition in the area, either now or in the future."

[25] The applicant asserts that the county's findings regarding the road standards explains the interpretation. Upon a close reading of those findings, however, the interpretation just is not there.

Reading these two generally applicable provisions alone, it does not appear that internal roads within a subdivision must be dedicated to the public. In fact, WCLDO 32.040.09 specifically allows non-dedicated private roads within subdivisions in certain circumstances.

For subdivisions proposed within the Urban Growth zone, however, a different rule applies. Article 26 sets forth the requirements applicable to the Urban Growth zone. WCLDO 26.025.02 provides:

> "ACCESS: Residential lots shall be served by improved public access – exception: private access will be allowed where no more than two residential lots are to be served by the access and where there is no potential for further division to be served by the private access."

This language is specifically applicable only to access in the Urban Growth zone. When viewed in this light, it is apparent that, to the extent this provision conflicts with the provisions applicable generally to partitions and subdivisions, the more specific regulations, *i.e.*, the ones applicable in the Urban Growth zone, apply.[26] Nothing in the language cited above supports the applicant's suggested interpretation that "improved public access" refers only to development standards, and not to a requirement that the access be dedicated to the public. The code provision requires that "residential lots shall be served by improved public access."[27] The language is mandatory; the access must be improved and it must be public.

The text and context of WCLDO 26.025.02 support a conclusion that within the Urban Growth zone, improved, dedicated public access is required where more than two residential lots are to be served by the access. The proposed subdivision is within the Urban Growth zone, and the

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[26] This interpretation is also consistent with the code's own dictate regarding ordinance interpretation: "Where conditions imposed by any provision of this ordinance are less restrictive than comparable provisions of this ordinance or any other ordinance, regulation, or law; the more restrictive provision will prevail." WCLDO 1.030.

[27] WCLDO 1.060.01 provides in part: "When used in this ordinance, the words: shall, will, [and] must * * * are always mandatory and not discretionary. The words: should and may are permissive."

proposed roads will provide access for more than two residential lots. The code requires improved public access. This assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR (CITY)

The city assigns error to the county's failure to include certain information on the preliminary plat. Specifically, the county code requires an applicant to include the following information on the preliminary plat: planned transportation features, internal circulation plans including walkways and bikeways, approximate grade of all proposed roads, and a plan for bicycle and pedestrian facilities. WCLDO 31.025.01.[28]

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[28] WCLDO 31.025.01 provides:

> "It shall be the applicant's responsibility to provide the following information on the preliminary plat.
>
> "* * * * *
>
> "L. All proposed road improvements should conform to this Article and Article 32, Road Standards. The Preliminary Plat shall also show:
>
> "* * * * *
>
> "d. All planned transportation features.
>
> "e. Parking and internal circulation plans including walkways and bikeways.
>
> "* * * * *
>
> "P. Location, width, name, approximate grade, and radius of curves of all proposed roads and the relationship of such roads to any projected or existing roads adjoining the proposed subdivision * * *."
>
> "* * * * *
>
> "S. A plan for bicycle and pedestrian facilities and improvements within the subdivision, including access ways as necessary to provide connectivity throughout subdivision. The tentative plan shall demonstrate how the subdivision's internal pedestrian and bikeway system provides safe and convenient connections to the surrounding transportation system."

The challenged decision includes a condition (Condition #3) requiring that some of these items to be shown on the final plat.[29] The city argues that these items are required to be included on the preliminary plat, and cannot be deferred to the final plat stage.

With respect to the bicycle and pedestrian paths, applicant responds that the omission of those elements is intentional as none are planned. Intervenor's Response Brief to City's Petition for Review 31. This response is interesting given the language of Condition #3 that requires that such paths comply with Article 32. *See* n 29. The applicant does not directly address the absence of the road grades on the preliminary plat except to say that the road design and configuration does minimize grading and filling by avoiding side cuts. Intervenor's Response Brief to City's Petition for Review 30.[30]

This Board generally treats approval standards and submittal requirements differently. We have held that omission of required information from an application is harmless procedural error if the required information is located elsewhere in the record. *McConnell v. City of West Linn,* 17 Or LUBA 502, 525 (1989). If the information is not available elsewhere and is necessary for compliance with applicable approval criteria, however, remand is appropriate. *Hopper v. Clackamas County,* 15 Or LUBA 413, 418, *aff'd* 87 Or App 167, 741 P2d 921 (1987), *rev den* 304 Or 680 (1988) . We are not aware of a case that applies this rule on submittal requirements for *applications* to a similar requirement for information required on the *preliminary*

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[29] Condition #3 provides:

> "Approval is conditioned upon sidewalks or paths meeting the dimensional requirements of Article 32 for pedestrian, bicycle, or horses being set out in the final plat to provide continuous connections to entrances to the subdivision and common areas from all residential properties." Record 1-A-39.

[30] The city points out in its brief that the applicant's engineers indicate the roadway grades could be as steep as 12.00 percent, a grade so steep that it is prohibited by local law. City's Petition for Review at 49; record 36-D-1. However, we are not directed to anything in the record that indicates "approximate grades of all proposed roads."

plat. We need not decide that issue here, however, because the required missing information is not found elsewhere and is necessary to show compliance with applicable approval criteria.

According to the city, road grade information is necessary to establish compliance with several mandatory approval criteria.[31] The missing plan for bicycle and pedestrian facilities and improvements is necessary to show that "the internal pedestrian and bikeway system provides safe and convenient connections to the surrounding transportation system." WCLDO 31.025.01S. We agree with the city that the county cannot defer submittal and consideration of the required information to the final plat approval unless it adopts findings that compliance is feasible or defers the determination to a second proceeding that offers public participation, pursuant to *Rhyne*, as discussed earlier in this opinion. The county has not done either of those things here.[32] We therefore sustain this assignment of error.

NINTH ASSIGNMENT OF ERROR (CITY)

The city argues that the county erred in concluding that WCLDO 31.030(D)(2)[33] is satisfied, and that there is not substantial evidence to show that it is. The challenged decision merely restates the approval criterion: "that all proposed roads follow the natural topography and preserve natural features of the site where possible and practical, that alignments have been planned to

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[31] WCLDO 32.040.01 provides: "The location, width, and grade of roads shall be considered in their relation to existing and planned roads, topographical conditions, public convenience, maintenance costs and safety, and the proposed use of the land to be served by the road."

WCLDO 32.040.05 provides: "The maximum grade for a cul-de-sac turn around shall be 4%.

WCLDO 36.020.01A provides: "Roads shall be maintained and designed to avoid quick runoff and improve infiltration."

[32] The challenged decision includes a general finding that seemingly purports to make a feasibility finding. It provides, "[t]he Board also finds that these conditions [referring to all of the conditions imposed] do not constitute a deferred land use decision since the Board has ascertained in the record and in these findings that each condition has a 'reasonable certainty' of being met by the applicant as a 'condition subsequent' to approval." Record 1-A-5. We do not believe that a local government can satisfy the *Rhyne* requirement by adopting such a conclusory general finding that all conditions imposed have a "reasonable certainty" of being met.

[33] WCLDO 31.030.01(D)(2) provides: "All proposed roads shall follow the natural topography and preserve natural features of the site where possible and practical. Alignments shall be planned to minimize grading/fills."

minimize grading/fills." Record 1-A-23. The city argues that the proposed roads "track some of the steepest grades on the site," presumably increasing the required grading and filling required. The applicant counters that the roads were designed in "high places" specifically to minimize disturbance of the land through grading and filling.

We agree with the applicant that steep roads or roads at high elevations do not necessarily mean that alignments do not minimize grading and filling. A road that follows the natural topography may have a very steep grade because the topography is steep and creating a road with a lower grade would require more excavation and filling. However, the county's finding is merely conclusory on this point, and the applicant's citations to the record do not provide the evidentiary support necessary to show that the approval criterion is satisfied.

This assignment of error is sustained.

CONCLUSION

The city's and Tribes' assignments of error regarding the DeBoie/Womack conversation and the January 30, 2004 letter are sustained. Fraser's second assignment of error is sustained. The Colville Tribes' second assignment of error regarding the county's requirement to prepare critical documents is sustained. The Nez Perce's third and the Colville Tribes' fourth assignments of error regarding cultural resources are sustained in part and denied in part. The Nez Perce's sixth and the Colville Tribes' seventh assignment of error regarding the public interest criterion are sustained. The city's third assignment of error is sustained in part and denied in part. The city's fourth, seventh, eighth and ninth assignments of error are sustained. The remaining assignments of error are denied.

The county's decision is remanded.