BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELIZABETH JOHNSON, CENTRAL OREGON LANDWATCH, FRIENDS OF THE METOLIUS, PETE SCHAY and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,
Petitioners,

vs.

JEFFERSON COUNTY,
Respondent,

and

PONDEROSA LAND & CATTLE CO., LLC, IRWIN B. HOLZMAN, DUTCH PACIFIC RESOURCES, and SHANE LUNDGREN,
Intervenor-Respondents.

LUBA Nos. 2007-016, 2007-018, 2007-021, 2007-022, 2007-025, 2007-026, 2007-030 and 2007-031
(Destination Resort Appeals)

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Christopher P. Thomas, Portland, filed a petition for review and argued on behalf of petitioner Elizabeth Johnson.

Ellen H. Grover, Bend, filed a petition for review and argued on behalf of petitioner The Confederated Tribes of the Warm Springs Reservation of Oregon. With her on the brief were Lauren J. Lester and Karnopp Petersen, LLP.

Paul D. Dewey, Bend, filed a petition for review and argued on behalf of petitioner Central Oregon LandWatch, Friends for the Metolius and Pete Schay.

David Allen, Madras, filed a response brief and argued on behalf of respondent.

Megan Decker Walseth, Portland, filed a response brief and argued on behalf of intervenor-respondent Ponderosa Land & Cattle Co., LLC. With her on the brief was Ball Janik LLP.

Roger A. Alfred, Portland, filed a response brief and argued on behalf of intervenor-respondents Dutch Pacific Resources and Shane Lundgren. With him on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

Corinne C. Sherton, Salem, Donald V Reeder, Madras represented intervenor-respondent Irwin B. Holzman.

HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

REMANDED 02/11/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners challenge a county decision amending its comprehensive plan and zoning ordinance regarding destination resorts.

FACTS

In 2004, the county began reviewing the Jefferson County Comprehensive Plan (JCCP or plan) and the Jefferson County Zoning Ordinance (JCZO or ordinance) for potential amendments "to correct inconsistencies, to clarify terms and standards, to make the documents more user friendly for County citizens, to comply with state statutes and administrative rules and to add certain uses allowed by state statute." Record 1765. The planning commission forwarded a draft of potential changes to a Citizen Advisory Committee (CAC), and the CAC held meetings and forwarded suggestions to the planning commission. The planning commission held a number of public hearings on the proposed amendments, and in August 2006 the planning commission recommended that the board of county commissioners adopt their proposed amendments to the JCCP and JCZO.

The board of county commissioners held numerous public hearings and conducted multiple work sessions. Originally, proposed amendments to the JCCP and JCZO regarding destination resorts were included with the larger package of proposed amendments to the JCCP and JCZO, but the board of county commissioners decided to separate out the destination resort provisions and adopt those JCCP and JCZO amendments in separate ordinances. The ordinances adopting the larger package of proposed amendments to the JCCP and JCZO are the subject of a separate consolidated LUBA appeal that is decided this date. During a December 21, 2006 work session the board of county commissioners

approved the challenged decisions. The challenged ordinances were signed on December 27, 2006, with an effective date of January 1, 2007. This appeal followed.[1]

MOTION TO FILE REPLY BRIEF

Petitioner Johnson moves to file a reply brief. The motion is granted.

MOTION TO TAKE EVIDENCE OUTSIDE OF THE RECORD

Petitioner COLW moves the Board to take evidence outside of the record that was filed by the county in these appeals. That extra-record evidence includes correspondence and electronic mail messages between an employee of the United States Geological Service and a state senator's office regarding the groundwater hydrology of the Metolius River basin and maps showing the Metolius basin in relation to intervenors' properties. Respondents argue that the motion should be denied.

OAR 661-010-0045(1) sets out the circumstances in which LUBA may accept evidence outside of the record:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."[2]

COLW argues that the evidence should be accepted on the basis that there are procedural irregularities in the record that would warrant reversal or remand of the decision.

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[1] There are numerous petitioners, respondents, and intervenors in this appeal who filed three separate petitions for review and response briefs. We will refer to the petitioners and intervenor-petitioner as follows: Elizabeth Johnson (Johnson); Central Oregon LandWatch, Friends of the Metolius, and Pete Schay (COLW); Confederated Tribes of the Warm Springs Reservation (Tribes). We will refer to respondent as the county and intervenor-respondents as Dutch Pacific Resources and Shane Lundgren (Dutch Pacific) and Ponderosa Land & Cattle Co., LLC (Ponderosa). Irwin B. Holzman did not file a response brief in the consolidated appeals concerning the destination resort amendments.

[2] OAR 661-010-0045(1) implements ORS 197.835(2)(b) and largely duplicates the statutory language.

According to COLW, in its findings the county "made sweeping and baseless conclusions relevant to impacts of destination resorts on the Headwaters of the Metolius Goal 5 resource to which the public had no opportunity to respond with corrective evidence." COLW's Motion to Take Evidence Not in the Record 1. COLW does not identify any disputed factual allegations regarding procedural irregularities not shown in the record. While there certainly appears to be a factual dispute, that factual dispute has to do with the hydrology of the Metolius River basin; it does not have anything to do with procedural irregularities that are not shown in the record.

COLW asks LUBA to accept evidence dated between March and June 2007, three months after the county adopted the challenged decisions. The evidence submitted by COLW does not demonstrate any procedural irregularities on the part of the county. Rather COLW seeks to provide an evidentiary rebuttal to the factual conclusions adopted by the county in its decision. COLW may not submit evidence to buttress their evidentiary challenges to the decision in this manner. *Palmer v. Lane County*, 32 Or LUBA 484, 487 (1997). COLW also repeats arguments, which we address later in this opinion, that the county failed to conduct the legally required second readings of the appealed ordinances as an example of a procedural irregularity. But there is no dispute that the county did not provide second readings of the appealed ordinances at least 13 days after the first readings. The facts are undisputed; it is the legal consequences of those facts that are in dispute. Furthermore, the evidence regarding the hydrology of the Metolius River basin certainly has no bearing on whether or not there was a required second reading of the ordinances. While COLW's arguments concerning the lack of evidence for the county's findings may provide a basis for an assignment of error, those arguments do not provide a basis for LUBA to accept their new extra-record evidence under ORS 197.835(2)(b) and OAR 661-010-0045(1).

COLW's motion to take evidence outside of the record is denied.

FIRST ASSIGNMENT OF ERROR (JOHNSON) and SIXTH ASSIGNMENT OF ERROR (COLW)

Petitioners argue that the county failed to provide two separate readings of the ordinances at least 13 days apart, in violation of ORS 203.045(3), which provides:

> "Except as subsections (4) and (5) of this section provide to the contrary, every ordinance of a county governing body shall, before being put upon its final adoption, be read fully and distinctly in open meeting of that body on two days at least 13 days apart."

According to petitioners, the first reading occurred on December 21, 2007 and if there was a second reading it was on December 27, 2007. Therefore, petitioners argue, the county did not comply with the ORS 203.045(3) requirement that ordinances be read "on two days at least 13 days apart."

ORS 203.045(1) provides:

> "[ORS 203.045] does not apply to a county that prescribes by charter the manner of adopting ordinances for the county *or to an ordinance authorized by a statute other than ORS 203.035*." (Emphasis added.)

The challenged ordinances are land use planning ordinances adopted by the county under authority granted by ORS chapter 215, specifically ORS 215.050, 215.060, 215.130, and 215.233. Those statutes do not include the second reading requirement of ORS 203.045(3). We have already addressed this issue in *Bauer v. Columbia County*, 4 Or LUBA 309, 313 (1981):

> "The authority given counties in ORS 203.045 to exercise legislative power is a general grant of power authorizing them to legislate over 'matters of county concern.' The grant is not exclusive but 'is in addition to other grants of power.' The procedure for action on ordinances in ORS 203.045 is also not exclusive. [ORS 203.045(1)] clearly states that the section does not apply where a local charter controls adoption 'or to an ordinance authorized by statute other than ORS 203.045." ORS 215.050 and 215.060 are such 'other' statutes. Indeed, ORS 215.050 has been cited as authority for county comprehensive plan adoption. In construing the statute, the court stated that 'ORS 215.050 gives no indication that the legislature intended it [the statute] to compel counties to observe strict ordinance formalities in the adoption of a

comprehensive plan.' *Fifth Avenue Corporation v. Washington County*, 282 Or 591, 596, 581 P2d 50 (1978)."

In her reply brief, Johnson argues that LUBA erroneously relied on ORS 215.050 and 215.060 in *Bauer*, because while those statutes may authorize counties to adopt comprehensive plans, they do not authorize counties to adopt comprehensive plans *by ordinance*.[3] Therefore, Johnson argues, at least with regard to the JCCP amendments, the county was required to comply with the ORS 203.045(3) separate reading requirement.

We do not agree. It is true, as Johnson argues in her reply brief, that the Oregon Supreme Court in *Fifth Avenue* interpreted ORS 215.050(1) not to *require* that local governments "follow strict ordinance formalities in the adoption of a comprehensive plan." 282 Or at 598. However, the Oregon Supreme Court also said, in the next sentence of its opinion in *Fifth Avenue*, "[h]owever, this does not give that body carte blanche to adopt a comprehensive plan under any procedure it sees fit." *Id*. Two years before its decision in *Fifth Avenue*, the Oregon Supreme Court had held that land use comprehensive plans are *legislative* in nature. *Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975). In reaching that conclusion, the Oregon Supreme Court noted that some state courts and legal commentators took the position that the land use comprehensive plan has some of the characteristics of a "constitution." *Id.* at 507. Because comprehensive plans are legislative

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[3] ORS 215.050(1) provides:

> "[T]he county governing body shall adopt and may from time to time revise a comprehensive plan and zoning, subdivision and other ordinances applicable to all of the land in the county. The plan and related ordinances may be adopted and revised part by part or by geographic area."

ORS 215.060 provides:

> "Action by the governing body of a county regarding the plan shall have no legal effect unless the governing body first conducts one or more public hearings on the plan and unless 10 days' advance public notice of each of the hearings is published in a newspaper of general circulation in the county or, in case the plan as it is to be heard concerns only part of the county, is so published in the territory so concerned and unless a majority of the members of the governing body approves the action. The notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television."

in nature, most if not all counties now adopt them via ordinances. We conclude that although the Oregon Supreme Court clearly held that ORS 215.050(1) does not *require* that comprehensive plans be adopted following ordinance formalities, the Supreme Court in *Fifth Avenue* did not need to decide and did not decide whether ORS 215.050(1) is properly interpreted to *authorize* a county to adopt a comprehensive plan by ordinance. There can be no question that ORS 215.050(1) expressly authorizes counties to adopt a comprehensive plan along with zoning *ordinances*, subdivision *ordinances* and other *ordinances* that further refine and implement that comprehensive plan. Under the Oregon Supreme Court's decisions and current statutes, there can be no doubt that the comprehensive plan is hierarchically superior to the zoning, subdivision and other ordinances that are adopted to refine and implement the comprehensive plan.[4] While it may be a close question, we conclude that the ORS 215.050(1) authorization to adopt a comprehensive plan that will in turn be implemented by land use ordinances carries with it the *authority* to adopt that comprehensive plan in the way legislative acts are commonly adopted—by adopting an ordinance. We reach this conclusion even though the statute does not expressly *require or authorize* counties to adopt comprehensive plans by *ordinance*.

ORS 203.045 does not apply to ordinances such as the challenged ordinances, which amend a comprehensive plan and zoning ordinance and were adopted pursuant to authority granted by ORS chapter 215.[5]

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[4] The term "land use regulation' is defined to include zoning ordinances, subdivision ordinances and other ordinances that are adopted to implement a comprehensive plan. ORS 197.015(11). ORS 197.835(7) requires that LUBA "reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation" in cases where "[t]he regulation is not in compliance with the comprehensive plan."

[5] Respondents argue that any failure on the county's part to comply with the ORS 203.045 separate reading requirement would be a procedural error and that petitioner's substantial rights were not prejudiced in this case. Because we are not sure a violation of ORS 203.045 is properly viewed as a mere procedural error and because we conclude that the statute does not apply in this case, we need not and do not address that question.

Finally, under this assignment of error petitioner Johnson argues that the Ordinances that are the subject of this consolidated appeal are of "no legal effect," because the county failed to publish "10 days advance public notice of the hearings" that ORS 215.060 requires. *See* n 3. Johnson acknowledges that on December 6, 2006 the county provided published notice of the hearing that was held on December 20, 2006, but Johnson argues that the December 6, 2006 notice predated the county's decision to prepare separate ordinances to adopt the destination resort amendments from the ordinances that adopt the balance of the JCCP and JCZO amendments.[6] Johnson argues the county cannot rely on the December 6, 2006 notice for the destination resort amendments that are the subject of this appeal.

As Dutch Pacific argues, the substance of the amendments that are the subject of this appeal was included in the amendments that were included in the two ordinances that were referenced in the published notice. The subsequent bifurcation of the subject matter of the amendments and their adoption by four ordinances rather than two is not legally significant. The December 6, 2006 notice suffices to comply with ORS 215.060 for the ordinances that are the subject of this appeal.

For the reasons explained above, Johnson's first assignment of error, and COLW's sixth assignment of error are denied.

SECOND ASSIGNMENT OF ERROR (JOHNSON)

Johnson argues that the county erred by processing the destination resorts amendments to the comprehensive plan as a legislative land use decision rather than following quasi-judicial land use decision making procedures. Johnson accurately describes the legal analysis that the Oregon appellate courts apply to determine whether a decision is quasi-judicial or legislative:

> "There are three factors that distinguish quasi-judicial decision from legislative decisions. The three factors are summarized as follows: (1) Is the

[6] The destination resort ordinances apparently first became available on December 13, 2006.

> process bound to result in a decision? (2) Is the decision bound to apply pre-existing criteria to concrete facts? (3) Is the action directed at a closely circumscribed factual situation or a relatively small number of persons? The more definitely the questions are answered in the positive, the more likely the decision under consideration is a quasi-judicial land use decision. Each of the factors must be weighed, and no single factor is determinative. *Strawberry Hill 4 Wheelers v. Benton Co. Board of Comm.*, 287 Or 591, 602-03 (1979); *Sullivan v. Polk County*, 49 Or LUBA 543, 548 (2005); *Patterson v. City of Independence*, 48 Or LUBA 155 (2004); *Thomas v. Veneta*, 44 Or LUBA 5 (2003)." Johnson's Petition for Review 18-19

Johnson argues that the decision was quasi-judicial because the county applied the pre-existing destination resort criteria of ORS 197.455 to decide that the two properties of intervenors would be the only properties placed on the county's map of possible destination resorts.[7] According to Johnson, the decision was directed at the closely circumscribed factual situation of intervenors' two properties.

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[7] ORS 197.455 provides:

> "(1) A destination resort must be sited on lands mapped as eligible for destination resort siting by the affected county. The county may not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas:
>
> > "(a) Within 24 air miles of an urban growth boundary with an existing population of 100,000 or more unless residential uses are limited to those necessary for the staff and management of the resort.
> >
> > "(b)(A) On a site with 50 or more contiguous acres of unique or prime farmland identified and mapped by the United States Natural Resources Conservation Service, or its predecessor agency.
> >
> > "(B) On a site within three miles of a high value crop area unless the resort complies with the requirements of ORS 197.445 (6) in which case the resort may not be closer to a high value crop area than one-half mile for each 25 units of overnight lodging or fraction thereof.
> >
> > "(c) On predominantly Cubic Foot Site Class 1 or 2 forestlands as determined by the State Forestry Department, which are not subject to an approved goal exception.
> >
> > "(d) In the Columbia River Gorge National Scenic Area as defined by the Columbia River Gorge National Scenic Act, P.L. 99-663.

Under the first *Strawberry Hill* factor, the challenged decision was not bound to result in a decision. While interested parties, including intervenors, commented on the decision, no party filed an application for destination resort mapping.

Under the second *Strawberry Hill* factor, the county applied ORS 197.455(1) in determining potential areas for destination resorts. However, as noted above, no single factor is determinative. The county originally proposed to identify a much larger area of the county as eligible for destination resorts, but reconsidered that proposal late in what was admittedly a legislative process. The county was concerned that once its map showed a property as eligible for destination resorts any subsequent action to amend the map to make previously designated areas ineligible could have adverse consequences under Ballot Measure 37. Record 29, 1114-15. The county thus limited the eligibility map to the properties most likely to proceed within the next 30 months. Therefore, while the county may have been applying pre-existing criteria to concrete facts, the county also engaged in a policy-making exercise regarding the proper location and boundaries for potential destination resorts. Although we have noted that this factor is present to some extent in nearly all land use decisions, whether quasi-judicial or legislative, we have stated that lesser weight should be attributed to this factor when the challenged decision establishes new policy objectives, as the present decision does. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 271 (1998).

> "(e) In an especially sensitive big game habitat area as determined by the State Department of Fish and Wildlife in July 1984 or as designated in an acknowledged comprehensive plan.
>
> "(2) In carrying out subsection (1) of this section, a county shall adopt, as part of its comprehensive plan, a map consisting of eligible lands within the county. The map must be based on reasonably available information and may be amended pursuant to ORS 197.610 to 197.625, but not more frequently than once every 30 months. The county shall develop a process for collecting and processing concurrently all map amendments made within a 30-month planning period. A map adopted pursuant to this section shall be the sole basis for determining whether tracts of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467."

Under the third *Strawberry Hill* factor, although the initial round of mapping only affects two landowners, thousands of acres are designated. In addition to designating the areas eligible for destination resorts, the county adopted an entirely new JCCP map to identify where destination resorts may be allowed. After 30 months, other property owners may request to be added to that destination resort eligibility map.

Under the three *Strawberry Hill* factors, all three are resolved entirely or mostly in favor of the challenged decision constituting a legislative land use decision, just as the county processed the decision. We agree with intervenors that the challenged decision was properly considered a legislative land use decision. The county did not err by processing the challenged decision as a legislative decision.

Johnson's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (JOHNSON)

Johnson argues that the county failed to provide the 45-day notices to the Department of Land Conservation and Development (DLCD) that are required by ORS 197.610(1) for the two destination resort ordinances.[8] Although Johnson concedes that the county provided the required 45-day notice to DLCD on April 17, 2006, Johnson argues that the notice was inadequate because it did not specifically include notice of the county's later bifurcation of the destination resort amendments from the balance of the amendments to the JCCP and JCZO.

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[8] ORS 197.610(1) provides:

> "A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of the Department of Land Conservation and Development at least 45 days before the first evidentiary hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending."

We do not see that it makes any difference whether the county adopted the amendments by adopting two ordinances or by adopting four ordinances, for purposes of complying with the ORS 197.610(1) notice requirement. The notice provided to DLCD explained that the county was considering significant revisions to its comprehensive plan and zoning ordinance, including amendments to the provisions regarding destination resorts. The county's ultimate action in adopting the two plan and zoning ordinance amendment ordinances and the two destination resort ordinances was consistent with that notice. DLCD and the persons who were provided notice by DLCD were provided with notice of the substantive amendments contemplated by the county. There was no need for a separate notice to DLCD simply because the county decided to separate the destination resort amendments from the other amendments and adopt those amendments by adopting separate ordinances.

Finally, even if the decision to bifurcate and adopt the original proposal by four ordinances rather than by adopting two ordinances could be called a substantial modification, no new notice to DLCD was required under ORS 197.610. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291, 306-07 (2000) ("once notice of the proposed amendment is provided under ORS 197.610, no further notice is required under that statute even if the local government eventually adopts a substantially modified version of the proposed amendment"). And further, even if the initial notice was defective in some way, as far as we can tell any such defect would constitute a procedural error. Under ORS 197.835(9)(a)(B), LUBA only remands based on procedural errors where petitioners demonstrate that the procedural errors prejudiced petitioners' "substantial rights." Johnson neither argues nor makes any attempt to show that the defect prejudiced her substantial rights in any way. *Bollam v. Clackamas County*, 52 Or LUBA 738, 751-52 (2006); *OCAPA v. City of Mosier*, 44 Or LUBA 452, 470-71 (2003); *Stallkamp v. City of King City*, 43 Or LUBA 333, 351-52 (2002), *aff'd* 186 Or App 742, 66 P3d 1029 (2003).

Johnson's third assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR (JOHNSON)

Johnson argues that in adopting maps that show the areas that are eligible for destination resorts, the county the county did not find that the eligible areas are "in a setting with high natural amenities." Johnson also argues that the county's decision improperly substitutes an approval criterion that requires a finding that any proposed destination resort will be "in a setting with high natural amenities." Johnson argues that the substituted approval criterion is improper because it will apply directly to applications for destination resort tentative plan approval, *after* the county has adopted the map of eligible areas for destination resorts that is required by ORS 197.455. We understand Johnson to argue the obligation to ensure that destination resorts are located "in a setting with high natural amenities" applies at the time the map is adopted.

ORS 197.445, sets out standards under which individual applications for destination resorts are reviewed for approval. ORS 197.445 provides:

> "A destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities *in a setting with high natural amenities*. To qualify as a destination resort under ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, *a proposed development must meet the following standards*:
>
> "[The statute sets out 9 detailed standards that impose numerous limitations and requirements that must be meet in an application for approval of a destination resort]." (Emphases added.)

A separate statute, ORS 197.455, requires that counties first adopt a map to identify lands in the county that are eligible for destination resort siting and identifies lands that must not be included on the map as eligible for destination resorts. The text of ORS 197.455 was set out earlier at footnote 7. The final sentence of ORS 197.455(2) provides:

> "A map adopted pursuant to this section shall be the sole basis for determining whether tracts of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467."

Johnson argues in her fourth assignment of error that the county erred by not finding that the two properties included on the newly adopted JCCP destination resort eligibility map are "in a setting with high natural amenities." Citing legislative history regarding amendments to ORS 197.455 following *Foland v. Jackson County*, 18 Or LUBA 731 (1990), *aff'd* 101 Or App 632, 792 P2d 1228 (1990), *aff'd* 311 Or 167, 807 P2d 801 (1991), Johnson argues that properties must be shown to be in settings "with high natural amenities" under ORS 197.455, before the properties are included on the JCCP destination resort eligibility map.

Johnson then argues in her fifth assignment of error that the county inappropriately included a requirement that individual destination resorts must be found to be "in a setting with high natural amenities" as an approval standard that the county will apply to individual destination resorts that may be proposed in the future. JCZO 430.6(K).[9]

Johnson confuses the destination resort eligibility mapping standards at ORS 197.455 with the ORS 197.445 approval standards that must be applied to individual applications for destination resort approval on lands that have been included on the destination resort eligibility map. The concern in *Foland* was with a lack of precision in the destination resort eligibility maps with a resulting uncertainty regarding whether individual properties at the edge of the mapped area would be found to be eligible or ineligible for destination resort siting. The county in *Foland* had adopted a procedure whereby it engaged in a case-by-case inquiry to make the edge of the mapped areas eligible for destination resort citing more precise, once applications for individual destination resorts were filed. Subsequent legislation, codified at ORS 197.455(2) and quoted above, prohibits such a procedure. Under ORS 197.455(2), the areas eligible for destination resort siting must be determined solely from the map that is adopted pursuant to ORS 197.455. That amended statute has the legal

[9] Johnson also objects in her fifth assignment of error that other approval standards in JCZO Section 602 may be more stringent than the ORS 197.460 compatibility standards that apply to destination resorts.

effect of forcing counties to adopt more precise destination resort eligibility maps or, if they do not, prohibiting counties from adopting procedures that go beyond the map to resolve any ambiguities that result from imprecise mapping of lands that are eligible for destination resorts.

The destination resort approval criteria that are set out at ORS 197.455 serve a very different function from the destination resort mapping standards set out at ORS 197.455. Just because land is eligible for destination resort siting does not mean that any particular proposal for a destination resort within an eligible destination resort mapped area must be approved. Indeed individual applications for destination resort approval may not be approved unless they comply with the criteria set out at ORS 197.445. To the extent there is a legal requirement that destination resorts be limited to lands that are located "in a setting with high natural amenities," that requirement is stated in the ORS 197.445 criteria that apply to individual destination resort applications, not in the ORS 197.455 standards that govern destination resort eligibility mapping. We reject Johnson's argument to the contrary.

Finally, we also reject Johnson's suggestion in her arguments under her fifth assignment of error that the compatibility standards in ORS 197.460 are *maximum* standards that the county may not exceed. Certainly there is nothing in the language of ORS 197.460 to suggest that counties are powerless to impose regulations on destination resorts that go beyond the compatibility requirements of ORS 197.460.[10]

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[10] ORS 197.460 provides as follows:

> "A county shall insure that a destination resort is compatible with the site and adjacent land uses through the following measures:
>
> "(1) Important natural features, including habitat of threatened or endangered species, streams, rivers and significant wetlands shall be retained. Riparian vegetation within 100 feet of streams, rivers and significant wetlands shall be retained. Alteration of important natural features, including placement of structures which maintain the overall values of the feature may be allowed.

To summarize, the standards that the county must apply in adopting a map to identify the lands that are eligible for destination resort siting are set out at ORS 197.455. The only potential legal requirement that destination resorts must be limited to "a setting with high natural amenities" that Johnson cites appears at ORS 197.445. ORS 197.445 does not set out mandatory standards for mapping areas that are eligible for destination resort siting. It follows that the county did not err by failing to find that all lands that are included on the county's map of lands that are eligible for destination resort siting are lands that provide "a setting with high natural amenities." The county's decision to require that individual applications for approval of destination resorts be shown to be proposed for lands that provide "a setting with high natural amenities" is not error. Even if such a finding is not required by ORS 197.445, no statute or other law cited to us prohibits the county from adopting a destination resort approval standard that requires such a finding. Neither is it error for the county to impose compatibility criteria that vary in some ways to arguably make them more restrictive than the compatibility criteria set out at ORS 197.460.

Johnson's fourth and fifth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR (JOHNSON)

Under her sixth assignment of error, Johnson argues that the new destination resort provisions in the JCZO improperly allow uses beyond those authorized by the destination resort statutes. We address each of Johnson's challenges in turn.

> "(2) Improvements and activities shall be located and designed to avoid or minimize adverse effects of the resort on uses on surrounding lands, particularly effects on intensive farming operations in the area. At a minimum, measures to accomplish this shall include:
>
> > "(a) Establishment and maintenance of buffers between the resort and adjacent land uses, including natural vegetation and where appropriate, fences, berms, landscaped areas and other similar types of buffers.
> >
> > "(b) Setbacks of structures and other improvements from adjacent land uses."

A. Overnight Lodging

Johnson argues that the JCZO definition of "overnight lodging" improperly expands the more limited type of lodging that is allowed by the statute. ORS 197.445(4)(b)(A) requires that a destination resort include at least 150 units of "overnight lodging."[11] ORS 197.435(5)(b) defines "overnight lodging" as:

> "permanent, separately rentable accommodations that are not available for residential use, *including* hotel or motel rooms, cabins and time-share units * * *. Tent sites, recreational vehicle parks, manufactured dwellings, dormitory rooms and similar accommodations do not qualify as overnight lodgings for the purpose of this definition." (Italics and underling added.)

JCZO 430.2(D) defines "overnight lodging" as:

> "Permanent, separately rentable accommodations that are not available for residential use, *including, but not limited to,* hotel, motel or *lodge rooms*, cabins, timeshare units *and similar transient lodging facilities*." (Emphases added.)

Johnson argues that JCZO 430.2(D), by expanding the ORS 197.435(5)(b) definition of overnight lodging to include "lodge rooms" and "similar transient lodging facilities," impermissibly expands the type of overnight lodgings allowed by the statute.

The statutory definition sets forth a general category of use, "permanent, separately rental accommodations," followed by a list of more specific examples of that general category of use. The list of more specific examples of overnight lodging in ORS 197.435(5)(b) does not purport to be an exclusive list, and we do not see that it is. If the list of more specific examples of overnight lodging were meant to be exclusive there would be no need to list specific uses that "do not qualify as overnight lodgings" as the above-underlined language in ORS 197.435(5)(b) does.

[11] ORS 197.445(4)(a) and (b) set out slightly different requirements for destination resorts located in eastern Oregon and destination resorts that are located outside eastern Oregon. The ORS 197.445(4)(b) eastern Oregon requirements apply to Jefferson County.

JCZO 430.2(D) merely expands upon the list of examples of the general category of "permanent, separately rental accommodations." The additions to that list of examples in JCZO 430.2(D) do not appear to us to fall outside the general category of use established by ORS 197.435(5)(b).

This subassignment of error is denied.

B. Separately Rentable Units

ORS 197.445(4) requires that a destination resort must include 150 "separate rentable units for overnight lodging." JCZO 430.6(E) implements the statute by requiring 150 "overnight lodging units." Johnson argues that because JCZO 430.6(E) does not expressly require that the 150 units be "separately rentable," JCZO 430.6(E) is impermissibly less restrictive than the statute.

Johnson acknowledges that the JCZO 430.2(D) definition of "overnight lodging," which is quoted above, expressly requires that overnight lodging be "separately rentable accommodation[s]." However, Johnson argues that an "accommodation" is substantially different from a "unit" and therefore the JCZO violates the statute. Johnson argues:

> "Although [JCZO] 430.2(D) * * * defines 'overnight lodgings' as 'separately rentable accommodations,' separately rentable 'accommodations' are not the same as separately rentable 'units.' For example, nothing in the County's regulations will prevent a destination resort operator from bundling some of the 150 units into pairs and requiring that those pairs be rented together, in which case some of the 150 units would not be 'separate rentable units.' Such a practice, allowed by [JCZO] 430.6(E), would violate the requirement of ORS 197.445(4)." Johnson's Petition for Review 34.

Arguments like the one Johnson makes here are almost always possible when comprehensive plans or land use regulations deviate from any mandatory or restrictive statutory language that the local laws were adopted to implement. However, even if Johnson is correct that the language difference in JCZO 430.2(D) and ORS 197.445(4) creates an ambiguity that might allow the county to interpret JCZO 430.2(D) in the manner Johnson fears, that interpretation would be foreclosed. JCZO Section 430 was expressly adopted to

comply "with ORS 197.435 to .467, to provide for properly designed and sited destination resort facilities * * *." JCZO 430.1. ORS 197.435 through 197.467 impose a number of restrictive requirements that counties are not free to ignore or deviate from. JCZO 430.2(D) was adopted to implement ORS 197.445(4). To the extent it is possible to interpret JCZO 430.2(D) in the manner Johnson suggests and that interpretation is inconsistent with ORS 197.445(4), the ORS 197.445(4) requirement for "150 separate rentable units of for overnight lodging" would trump any less restrictive interpretation of JCZO 430.2(D). *See Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076 (1992)(even after acknowledgment, where an acknowledged comprehensive plan or land use regulation is inconsistent with a statutory obligation, the statutory obligation must be observed).

This subassignment of error is denied.

C. Commercial Uses

Johnson argues that the county impermissibly extended the scope of allowed commercial uses beyond that allowed by the statute. ORS 197.445(5) provides:

> "Commercial uses allowed are limited to types and levels of use necessary to meet the needs of visitors to the development. * * *"

JCZO 430.6(F) provides:

> "Commercial *and entertainment uses* shall be limited to types, numbers, location and levels of use necessary to meet the needs of visitors to the resort. * * *"

Johnson argues that by including the word "entertainment" in the JCZO the county impermissibly expanded the type of commercial uses allowed in destination resorts. We understand Johnson to argue that by adding the word "entertainment" to JCZO 430.6(F) JCZO 430.6(F) might allow "entertainment uses" that are not "commercial uses," as ORS 197.445(5) uses that term.

Like intervenors we have a hard time envisioning entertainment uses that would not also be "commercial uses." Johnson gives the example of an "Indy car racetrack."

Johnson's Petition for Review 35. However, it seems likely to us that an Indy car racetrack that charges for admission would be a commercial use. The more likely difficulty an applicant would face in securing approval of an "Indy car racetrack" as part of a destination resort under JCZO 430.6(F) would likely be caused by the requirement in JCZO 430.6(F) that commercial and entertainment uses must be limited to "levels of use necessary to meet the needs of visitors to the resort."

In any event, as we explained above in rejecting Johnson's challenge based on the ORS 197.445(4) requirement that a destination resort must include 150 "separate rentable units for overnight lodging," JCZO Section 430 was adopted to implement ORS 197.435 through 197.467. To the extent inserting the word "entertainment" creates a ambiguity that might allow the county to approve an "entertainment use" under JCZOO 430.6(F) that could not be approved as a "commercial use," as that term is used in ORS 197.445(5), the county would be obliged to interpret that term consistently with the statute and deny such an entertainment use. *Kenagy v. Benton County*, 115 Or App at 134-36.

Johnson also argues that ORS 197.445(5) only allows commercial uses that are "necessary to serve the needs of visitors to the development," and Johnson argues that JCZO 430.6(F)(1) defines that phrase in a way that allows commercial uses that ORS 197.445(5) would not allow. JCZO 430.6(F)(1) defines "necessary to serve the needs of visitors" as:

> "Its primary purpose is to provide goods or services that are typically provided to overnight or other short-term visitors to the resort[.]."

According to Johnson, by using the terms "primary" to modify purpose and "other short-term" to modify visitors, JCZO 430.6(F)(1) weakens the restriction imposed by the statutory language. We fail to see how the cited language is inconsistent with ORS 197.445(5). The statute does not require that non-visitors be refused service at destination resort commercial uses. It seems to us that the cited language in JCZO 430.6(F)(1) is an attempt by the county to address an ambiguity that is present in the statute. Based on Johnson's arguments, we do not agree that the cited language impermissibly expands on the statutory language. And as

we have already explained, to the extent it does, the county remains bound by ORS 197.445(5).

This subassignment of error is denied.

D. Overnight Lodging Ratio

Johnson argues that the new JCZO allows more individually-owned residential units than are allowed under the applicable statutes. JCZO 430.6(G) provides that individually-owned residential units "shall not exceed 2½ units for each unit of permanent overnight lodging." Under JCZO 430.6(G), so long as the specified ratio of individually-owned to the *total* number of permanent overnight lodging units is maintained, there is no other limit on the number of individually-owned units in a destination resort under JCZO 430.6(G).

According to Johnson, the version of ORS 197.445(4)(b)(E) that was in effect when the challenged ordinances were adopted limits the total number of individually-owned units that are possible in a destination resort in a way that is not reflected in JCZO 430.6(G). ORS 197.445(4)(b) (2005) provided, in pertinent part:

> "On lands in eastern Oregon * * *
>
> "* * * * *
>
> "(B) At least 50 units of overnight lodging must be constructed prior to the closure of sale of individual lots or units.
>
> "* * * * *
>
> "(E) The number of units approved for residential sale may not be more than 2½ units for each unit of permanent overnight lodging provided under *subparagraph (B)* of this paragraph." (Emphasis added.)

ORS 197.445(4)(b)(B) (2005) required that at least 50 units of overnight lodging be constructed before any individual lots our units may be sold. According to Johnson, ORS 197.445(4)(b)(E) (2005) then limited the total number of individually-owned units that may be offered for residential sale to 2½ units for every unit of overnight lodging that is constructed prior to the closure of sale of individual lots or units under ORS

197.445(4)(b)(B) (2005). According to Johnson, JCZO 430.6(G) impermissibly allows the 2½ ratio to be applied to the *total* number of permanent overnight units rather than limiting application of the 2½ ratio to the number of overnight lodging units provided under subparagraph (B) of ORS 197.445(4)(b) (2005). Johnson argues that JCZO 430.6(G) impermissibly allows the ratio to be applied to permanent overnight units that are constructed *after* the permanent overnight units that are constructed to comply with ORS 197.445(4)(b)(B) (2005).

Intervenors dispute Johnson's interpretation of ORS 197.445(4)(b) (2005) and advance various arguments for why ORS 197.445(4)(b) (2005) can be interpreted to be consistent with JCZO 430.6(G). Intervenors also point out that the legislature amended ORS 197.445(4)(b)(E) in 2007. As amended in 2007, ORS 197.445(4)(b)(E) does not include the reference to "subparagraph (B)" that Johnson relies on under this subassignment of error.

As ORS 197.445(4)(b)(B) is presently worded, the 2½ unit ratio is applied to the total number of overnight lodging units, not the number of overnight lodging units that are provided under ORS 197.445(4)(b)(B). The amendment to ORS 197.445(4)(b)(B) became effective January 1, 2008, and thus applies to JCZO 430.6(G).[12] JCZO 430.6(G) is not contrary to ORS 197.445(4)(b)(B).

This subassignment of error is denied.

Johnson's sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR (JOHNSON)

ORS 197.445(1) requires that a destination resort be located on a site of at least 160 acres. Johnson argues that the new JCZO definition of "lot size" allows minimum lot sizes that could be smaller than required by ORS 197.445(1).

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[12] The "fixed goal post" rule set out at ORS 215.427(3), which requires that permit decisions be judged by the legal standards in effect on the date the application was filed or was deemed complete, does not apply here because the challenged ordinances are not "permit" decisions.

JCZO 105.B defines "lot size" as:

> "The total horizontal net area within the lot lines of a lot or parcel. When a road or railroad right-of-way lies entirely within the boundaries of a lot, it is included for the purpose of determining the total lot size. When a road borders a lot, the area to the centerline of the right-of-way shall be included for the purposes of determining lot size * * *"

According to Johnson, including rights-of-way in the lot or parcel or the combination of lots and parcels that make up a destination resort site could result in the county approving a destination resort site that is smaller than the ORS 197.445(1) minimum of 160 acres. Johnson, however, does not explain why the county's definition of lot size is necessarily inconsistent with the way minimum lot sizes must be computed under state law. Presumably, Johnson believes that internal or adjoining rights of way may not be included in determining whether a proposed lot satisfies the cited statutory minimum lot sizes. However, the only authority Johnson cites for that presumption is the ORS 92.010(4) definition of "lot" and the ORS 92.010(6) definition of "parcel," neither of which say anything about whether rights of way may be included in considering whether lots or parcels satisfy minimum lot and parcel area requirements.

We need not and do not decide whether internal and adjoining rights of way may be included in determining whether a proposed destination resort site complies with the 160-acre minimum site size that is required by ORS 197.445(1). The JCZO 105.B definition of "lot size" applies generally throughout the JCZO, and where state law does not impose a minimum lot size, the county presumably is free to compute lot sizes as it sees fit. The county's failure to anticipate in the JCZO 105.B definition of "lot size" that state law might require that lot size be computed differently in certain circumstances is not an error that requires remand. *See Rogue Valley Assoc. of Realtors v. City of Ashland*, 158 Or App 1, 4, 970 P2d 685 (1999) (facial challenge to legislation fails where the legislation can be applied consistently with controlling law); *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126, 135 (2004) (same). If state law does not allow lot size to be computed in the

manner set out in the JCZO 105.B definition of "lot size," where state law specifies a minimum lot or site size, the state law standard would control over the JCZO 105.B definition of "lot size."

Johnson's seventh assignment of error is denied.

FIRST AND SECOND ASSIGNMENTS OF ERROR (COLW and TRIBES)

Petitioners argue that the amended ordinances violate Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces).

A. Goal 5

As a general rule, post-acknowledgment plan amendments (PAPAs) must comply with the statewide planning goals, including Goal 5. ORS 197.175(2); 197.835(6) and (7). The Land Conservation and Development Commission has adopted an administrative rule that specifies the circumstances in which a local government is obligated to apply Goal 5 when adopting a PAPA. OAR 660-023-0250(3) provides:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

To summarize, under the above rule, a local government must apply Goal 5 if the PAPA "would affect a Goal 5 resource." As potentially relevant in this appeal, a PAPA affects a Goal 5 resource in two circumstances. First, a PAPA "would affect a Goal 5 resource" if it "amends a * * * portion of an acknowledged plan or land use regulation [that

was] adopted in order to protect a significant Goal 5 resource.[13] Second, a PAPA "would affect a Goal 5 resource" if it allows new "conflicting uses."[14]

Once OAR 660-023-0250(3) requires that Goal 5 must be applied in adopting a PAPA, the standard Goal 5 process at OAR 660-023-0030 through 660-023-0050 requires that local governments inventory Goal 5 resources, determine the significance of resource sites, and adopt a list of significant resource sites. OAR 660-023-0030.[15] The local government must next conduct an economic, social, environmental, and energy (ESEE) analysis that (1) identifies conflicting uses and (2) analyzes the ESEE consequences that could result from decisions to allow, limit, or prohibit conflicting uses. Based on that ESEE analysis, the local government must determine whether to allow, limit, or prohibit identified conflicting uses. OAR 660-023-0040. *See* Appendix. Finally, for each resource site the local government must adopt a program or programs to achieve Goal 5, consisting of "comprehensive plan provisions and land use regulations" to implement the decisions made during the ESEE process. OAR 660-023-0050(1). *See* Appendix.

Under OAR 660-023-0250(3), the threshold question is whether the county was required to apply Goal 5 in adopting the disputed PAPAs because the challenged decisions either (1) amend a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements

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[13] OAR 660-023-0010(6) defines "program" or "program to achieve the goal" as

> "a plan or course of proceedings and action either to prohibit, limit, or allow uses that conflict with significant Goal 5 resources, adopted as part of the comprehensive plan and land use regulations (e.g., zoning standards, easements, cluster developments, preferential assessments, or acquisition of land or development rights)."

[14] OAR 660-023-0010(1) defines "conflicting use" in relevant part as a use "that could adversely affect a significant Goal 5 resource[.]"

[15] The complete text of OAR 660-023-0030, 660-023-0040 and 660-023-0050 is included in an appendix to this opinion. Those rules set out in detail the process that local governments must follow to comply with Goal 5.

of Goal 5 or (2) allow new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list. Petitioners argue that two Goal 5 resources are affected by the challenged decisions: the Metolius River and Big Game Habitat.[16] Petitioners do not argue that the challenged decisions amend a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5. However, petitioners do argue that the destination resorts that are made possible under the challenged ordinances are new uses that will conflict with the Metolius River and Big Game Habitat. We first consider the Metolius River.[17]

B. The Metolius River

The board of county commissioners rejected arguments that the destination resorts that might be approved in the future pursuant to the mapping and approval criteria established by the challenged ordinance constitute new uses that will conflict with Metolius River related Goal 5 resource sites.

> "Testimony was received asserting that destination resorts are a 'new conflicting use' under OAR 660-023-0250(3), such that the County is required to apply Goal 5 and conduct an ESEE analysis. The Board [of County Commissioners] disagrees." Record 41.

Petitioners assign error to the county's finding.

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[16] Petitioners also state that "[o]ther recognized and potential Goal 5 critical resources include Whychus Creek * * *, Fly Creek * * *, the Metolius River Corridor, etc." COLW's Petition for Review 6. These other potential Goal 5 resources are not further discussed in the petition for review. To the extent COLW raises these resources as pertinent to the challenged decision, they are not raised with sufficient specificity for the Board to properly review them, and we do not consider them further. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

[17] According to JCCP Goal 5 Inventory, Appendix IV, Part L, the Metolius River is a "[h]igh volume stream of exceptionally clean cold water fed by Metolius Spring, a unique point-source * * *. The river flows from the base of Black Butte approximately 24 river-miles north through Camp Sherman to Lake Billy Chinook.

Intervenor Ponderosa sets out a concise description of the county's inventoried significant Goal 5 resource sites that are associated with the Metolius River, and we set out that description below:

> "The County's acknowledged inventory identifies Goal 5 resources in various elements of the Metolius River:
>
> "(1) 'Head of the Metolius River' was identified as a Scenic Resource * * *. Residential zoning that allowed subdivision of 'private land which includes and surrounds the spring' was identified as a conflicting use to be limited by rezoning the area to prohibit subdivisions.
>
> "(2) 'Head of the Metolius River' was identified as a Natural Area * * *. It was designated '2-A' with no conflicting uses because the 'site [is] owned and managed by the USFS for scenic value.'
>
> "(3) 'Metolius River' was identified as a Water Resource. It was described as [24] river miles. Conflicting uses were identified as 'rafting, fishing, residential development, Indian rights, forest practices on public and private land, boating, power production, [and] wildlife habitat.' The decision was to limit conflicting uses by limiting construction and forest practices 'to minimize environmental disruption in riparian areas.'
>
> "(4) 'Metolius River' was identified as a 'Potential State & Federal Wild and Scenic River.' It was defined as approximately 24 river miles from Head of the Metolius to the slackwater of Lake Billy Chinook. The determination to limit conflicting uses stated: 'Until designation is finalized, Jefferson County will place resource zoning on the subject area sufficient to substantially protect the national values present.' The Metolius River now has been designated a State Scenic Waterway and a 'scenic' and 'recreational' river under the Federal Wild and Scenic River Act. Those laws regulate uses of the river itself and development within one-quarter mile of the riverbank.
>
> "(5) 'Metolius Natural Area' was identified as a federal 'Dedicated Natural Area' on approximately 1500 acres * * *. The site was designated '2-A' with no conflicting uses, because 'Federal Research Natural Area designation and management is sufficient to protect natural area values.'" Ponderosa's Response Brief 7-8 (footnotes and citations omitted).

Ponderosa goes on to point out that the county has adopted riparian protections and regulates activity within 100 feet of the top of the bank of the Metolius River. As Ponderosa

correctly points out, petitioners' suggestions that the entire Metolius surface water drainage basin is an inventoried significant Goal 5 resource is mistaken. Rather, the inventoried Goal 5 resource is the Metolius River itself, its headwaters and the federally protected Metolius Natural Area. Ponderosa goes on to argue:

> "* * * The intended scope of the identified resource is geographically narrow: the only conflicting uses considered in the acknowledged inventory were those immediately surrounding the river. Those uses were, and continue to be, regulated through County's riparian corridor regulations. With the destination resort eligible areas located more than two miles from the river, the County was not required to recognize destination resort eligibility as a potentially conflicting use." Ponderosa's Response Brief 9.

We agree with Ponderosa. The county's acknowledged Goal 5 program is concerned with conflicting uses that are proximate to the Metolius River and its headwaters. The mapped areas that will be eligible for destination resorts are over two miles from the Metolius River and its headwaters. With regard to the Metolius Headwater site itself, which appears to be the focus of petitioners' concern, petitioners argue that the county erred by assuming the destination resorts will have no impact on the groundwater resource that provides the entire flow of the river at its source. The short answer to petitioners' concern about potential groundwater impacts from destination resorts is that the groundwater resource upon which the Metolius River depends is not an inventoried significant Goal 5 resource. To the contrary, the county's acknowledged JCCP concludes that the county does not have sufficient information about groundwater to perform an ESEE analysis or develop a county program to protect groundwater. COLW's Petition for Review App 64. That determination regarding the unavailability of sufficient information is authorized by OAR 660-023-0030(3). *See* Appendix. In that circumstance, OAR 660-023-0030(3) directs:

> "When local governments determine that information about a site is inadequate, they shall not proceed with the Goal 5 process for such sites unless adequate information is obtained, *and they shall not regulate land uses in order to protect such sites*." (Emphasis added.)

The county did not err by rejecting petitioners' concerns about potential ground water impacts as a basis for requiring that Goal 5 be applied to the disputed PAPAs.

This subassignment of error is denied.

C. Big Game Habitat

The county protects Big Game Habitat through its designation of elk, deer and pronghorn winter range. Inventoried winter range is subject to the county Wildlife Resource Overlay. ORS 197.455(1)(e) only makes "especially sensitive" big game habitat ineligible for destination resort siting. The county apparently does not distinguish between "especially sensitive" and other types of big game habitat, and the area that the county designated as eligible for destination resorts falls entirely outside the county's designated big game habitat.[18] Therefore, a destination resort may not be sited on designated big game habitat in Jefferson County.

The county found that development of any destination resorts in the future would not conflict with any Goal 5 resource sites located within the destination resort site itself, because under JCZO 430.6(N) and ORS 197.467 any Goal 5 resource sites on the destination resort site must be protected.[19]

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[18] The ordinance that amends the JCCP explains:

> "The county has not determined which big game habitat areas are 'especially sensitive'. Consequently, all land subject to the Wildlife Overlay Combining Zone, which protects deer, elk and pronghorn winter range habitat areas were mapped as being excluded from destination resort siting. * * *" Record 21

[19] JCZO 430.6(N) provides:

> "Any designated Goal 5 resource on the tract where [a destination resort] will be sited will be preserved through conservation easements as set forth in ORS 271.715 to 271.795. A conservation easement under this section shall be sufficient to protect the resource values of the Goal 5 site and shall be recorded with the property records of the tract on which the destination resort is sited.

ORS 197.467 contains nearly identical language.

Petitioners fault the county for assuming that just because any on-site Goal 5 resources must be protected and no designated big game habitat is eligible for destination resort siting that destination resorts will not conflict with designated big game habitat. Petitioners contend that deer populations have been declining and destination resorts will "increase traffic on roads needed to access the destination resort areas and which are located on land zoned for protection of wildlife habitat." COLW's Petition for Review 7.[20] We understand petitioners to argue that such increased traffic and roadway improvements could conflict with inventoried significant big game habitat.

Dutch Pacific responds that the county was justified in not considering speculative off-site traffic impacts as a new conflicting use that conflicts with big game habitat:

> "* * * Petitioners * * * state that the county should have considered the possibility of impacts resulting from unidentified roads that petitioners assert are (or perhaps could be) located on unidentified land zoned for 'protection of wildlife habitat.' Petitioners do not specifically identify the location of any such roads with respect to wildlife habitat, do not identify the location of the habitat, and notably do not specifically assert that the 'wildlife habitat' is actually big game winter range mapped on a county Goal 5 inventory. Indeed, big game herds and habitat outside of the winter range area are *not* inventoried Goal 5 resources. Petitioners have not provided sufficiently detailed information to allow the Board [of Commissioners] to find that there are potential conflicts with big game winter range habitat that were not adequately addressed by the county." Dutch Pacific's Petition for Review 18 (emphasis in original).

Ponderosa similarly argues:

> "* * * OAR 660-023-0250(3)(b) [is not] triggered by the mere possibility of resort-associated road development and traffic within the Winter Range. Roads and traffic through the Winter Range are not a 'new use.' The possibility of road improvements and traffic generated by resort and residential development both within and outside of the Winter Range existed at the time of the Goal 5 inventory. Tourism uses existed in the Camp

[20] The Big Game Winter Range map that appears at page 26 of the JCCP is at a scale that makes it difficult to precisely compare that map with the more detailed Jefferson County Destination Resort Map of Eligible Lands. However, when those maps are compared it appears that the larger Ponderosa site is bordered by and nearly surrounded by inventoried deer winter range. That does not appear to be the case for the Dutch Pacific site. But the Dutch Pacific site appears to be less than a mile west of inventoried deer winter range.

> Sherman 'resort community,' the Blue Lake tourism area, and in campgrounds attracting thousands of seasonal users. The zoning for the Camp Sherman area (inside the Winter Range) and the Blue Lake area (outside the Winter Range) allowed for new residential, resort and tourist oriented development. At the time the inventory was adopted (1981) and the Goal 5 program implemented (1993), existing and potential development generated roads and traffic within the Winter Range. Road development and traffic within the Winter Range do not become a 'new' conflicting uses because they are associated with destination resorts permitted under Goal 8. Thus, the County was not required to recognize road and traffic impacts as a new conflicting use." Ponderosa's Petition for Review 11-12 (citations omitted).

We do not agree with Ponderosa's suggestion that just because additional traffic and roads might have been possible at the time the county's existing Goal 5 program to protect big game habitat was developed (without regard to any destination resort development) that it *necessarily* follows that the additional traffic and roads that might be associated with destination resorts could not be a new conflicting use. As petitioners correctly note, destination resorts can easily resemble and have the characteristics of small cities. And the two sites mapped for potential destination resorts (one 640 acres and the other 10,000 acres) could easily accommodate significant development that would generate a significant amount of traffic that could conflict with big game habitat. The additional traffic that could be generated by and the new roads that might be required for destination resorts in the future could be sufficiently significant that they could constitute a new conflicting use.

The question we must answer is whether the county committed error by failing to consider, or inadequately considering whether off-site destination resort related traffic and road impacts constitute "new uses that could be conflicting uses with" nearby inventoried significant big game habitat, thereby obligating the county to apply Goal 5 under OAR 660-023-0250(3)(b). That is a two-part inquiry: (1) is destination resort related traffic and road impacts a "new" use and, (2) if so, is it a new use that *could* conflict with big game habitat. *N.W.D.A. v. City of Portland*, 198 Or App 286, 299, 108 P3d 589 (2005).

With regard to the first part of the question, we reject Ponderosa's argument that any future traffic, new roads or widened or improved roads that may be associated with

destination resorts on over 10,000 acres of land made eligible for destination resort siting is not properly viewed as a new use. As we have already noted, those future destination resorts could easily resemble small cities. Based on the current record, there is simply no evidentiary basis for assuming there will not be a dramatic increase in traffic or a need to construct or improve roads within the inventoried deer winter range to serve those destination resorts.

Turning to the second part of the question, the county never really considered whether destination resort related traffic and roadway improvements "could be conflicting uses" with the county's inventoried deer winter range. The county directly confronted and resolved potential conflicts with deer winter range from development on the destination resort site itself by excluding inventoried deer winter range from the mapped eligible area, and noting the statutory and Goal 8 requirement to protect any other Goal 5 sites that may lie within the mapped destination resort area. But the closest the county came to considering whether off-site road and traffic impacts that may result from future development of destination resorts could conflict with big game habitat is the following finding:

> "In addition, the Board [of County Commissioners] finds that there is no reasonably available evidence to suggest that destination resorts, subject to compliance with development criteria, will conflict with specific Goal 5 resources within or around the eligible tracts." Record 31.

At this point, the amount of traffic any particular destination resort will generate is somewhat speculative, because no destination resorts have yet been proposed. Nonetheless, there can be no doubt that the future destination resort development that is made possible by the challenged ordinances will generate a significant amount of traffic. The inability to know precisely how much traffic will be generated and precisely where that traffic will be generated can be taken into account in an ESEE analysis. And, if there were a more adequate evidentiary basis for doing so, it *might* be a reason for concluding such traffic could not be a conflicting use with nearby big game habitat. However, we agree with petitioners that the

county's bare conclusion that such traffic could not constitute a conflicting use with big game habitat is not supported by an adequate factual base, as is required under Goals 2 and 5. *OCAPA v. City of Mosier*, 44 Or LUBA 452, 462 (2003).

Similarly, any requirement for new or improved roads to serve those destination resorts is speculative. But if such roads will be required or likely will be required, and if they must traverse inventoried deer winter range, they easily *could* conflict with that Goal 5 resource, making Goal 5 applicable under OAR 660-023-0250(3)(b) and an ESEE analysis necessary under OAR 660-023-0040. On remand, the county must consider that possibility and, if necessary, supplement the evidentiary record to allow it to make a decision that is supported by an adequate factual base.

To summarize, the relevant threshold question is whether the traffic and roadway improvements that may be required to serve the destination resorts that are made possible by the challenged decisions "could be conflicting uses with" nearby inventoried significant big game habitat. While we do not mean to foreclose the possibility that the county might answer that question in the negative with a more adequate factual base, its conclusion that they could not be conflicting uses is not supported by an adequate factual base in the record that is before us in this appeal. If traffic and roadway improvements could conflict with inventoried deer winter range, an ESEE analysis is required under OAR 660-023-0250(3)(b) and 660-023-0040.

This subassignment of error is sustained.

D. The County's Goal 5 Program is Outdated

The county's Goal 5 inventory was done in 1981 and has not been updated since. Petitioners contend that because the county is updating its comprehensive plan in other ways it should be obligated to update its Goal 5 inventory. We understand petitioners to argue that if the county did so, it likely would be forced to conclude that the destination resorts

authorized by the challenged ordinances are uses that will conflict with the county's big game habitat.

The county relies on *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986), for the principle that a local government with an acknowledged Goal 5 inventory is not required to update that inventory when adopting a PAPA that does not itself alter the acknowledged Goal 5 inventory. According to the county, where an existing acknowledged comprehensive plan Goal 5 inventory has become outdated due to a change in circumstances, the appropriate mechanism for addressing that change in circumstances is periodic review.[21] According to the county, a PAPA that does not directly or indirectly affect the inventory is not the appropriate mechanism for requiring that an outdated Goal 5 inventory be updated.

In LUBA's decision in *Urquhart*, we held that Goal 5 inventories are not "static lists immune from review and update." *Urquhart v. LCOG and City of Eugene*, 14 Or LUBA 335, 345 (1986). We ultimately held that when a local government is presented with evidence in a PAPA proceeding that raises a question concerning whether land that is not included on a Goal 5 inventory in fact may qualify for inclusion on the Goal 5 inventory, it must address and answer that question. *Id.* at 345-46. The Court of Appeals reversed our decision in *Urquhart*. The Court acknowledged that there are potential problems with allowing an existing Goal 5 inventory to insulate PAPAs from new information. The Court, however, balanced this concern with the opposing concern of potentially requiring a local government to undertake an expensive goal rejustification of its acknowledged inventories with every PAPA. 80 Or App at 179-80. The Court held that the appropriate time for requiring that the county update its Goal 5 inventory is during periodic review. *Id*. at 181.

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[21] One of the purposes of periodic review is to insure that once comprehensive plans are acknowledged to be in compliance with the statewide planning goals they "remain in compliance" with those goals. Under ORS 197.628(3)(a) one of the conditions that may "indicate the need for periodic review of comprehensive plans and land use regulations" is "a substantial change in circumstances."

While we agree with COLW that there are some differences between *Urquhart* and the present case, we do not see that those differences support a different result here. We have consistently applied the principle the Court of Appeals announced in *Urquhart. Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477, 487 (1995); *Waugh v. Coos County*, 26 Or LUBA 300, 310 (1993); *Davenport v. City of Tigard*, 22 Or LUBA 577, 586 (1992). We see no reason to overturn those decisions. The county did not err in failing to conduct a new Goal 5 inventory for Big Game Habitat as part of the PAPAs challenged in these consolidated appeals.

This subassignment of error is denied.

COLW's and the Tribes' first and second assignments of error are affirmed in part and denied in part.

THIRD ASSIGNMENT OF ERROR (COLW and TRIBES)

Petitioners argue that the destination resort provisions are not consistent with either the old JCCP or the new JCCP.

A. Consistency With the Old JCCP

Petitioners first argue that provisions of the new JCZO are inconsistent with the old JCCP. Petitioners cite numerous examples of what they contend are inconsistencies between the new JCZO and the old JCCP. We need not consider whether the new JCZO is inconsistent with the old JCCP because we agree with respondents that the new JCZO is not required to be consistent with the old JCCP.

Petitioners argue that under ORS 197.835(7), all land use regulation amendments must be in compliance with the local government's comprehensive plan.[22] While that is true,

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[22] ORS 197.835(7) provides:

> "The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
>
> "(a) The regulation is not in compliance with the comprehensive plan * * *."

it begs the question of whether an amended zoning ordinance must comply with a contemporaneously amended comprehensive plan or an old comprehensive plan that the amended JCCP replaces. ORS 197.625 applies in the specific circumstances presented in the present appeal. 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.
>
> "(c) The issuance of a permit under an effective but unacknowledged comprehensive plan or land use regulation shall not be relied upon to justify retention of improvements so permitted if the comprehensive plan provision or land use regulation does not gain acknowledgment. * * *"

Under ORS 197.625(3)(a), the new JCCP and JCZO became effective on January 1, 2007. The earlier versions of the JCCP and JCZO were also repealed on January 1, 2007. Under ORS 197.625(3), because the challenged amendments have been appealed, they are not acknowledged. Thus, the only applicable JCCP is the unacknowledged, amended JCCP. Under ORS 197.625(3)(b), because the amended JCCP has not been acknowledged, the challenged amendments must comply with statewide planning goals. The challenged amendments to the JCZO do not have to comply with the old JCCP.

This subassignment of error is denied.

B. Consistency With the New JCCP

Petitioners argue that the new destination resort provisions are inconsistent with the new JCCP. First, petitioners argue the new JCZO violates Goal 4, Policy 1.3, which provides:

> "Zoning regulations applied to land in the Forest Management zone should limit uses which could have significant adverse effects on forest land, operations or practices. Siting standards should be designed to make allowed uses compatible with forest operations and practices and agriculture, to conserve other values found on forest lands, and to minimize wildlife hazard."

According to petitioners, the new JCZO is not consistent with this policy because it "fails to address the broader impacts of residential development in heavily-forested areas, including effects on firefighting and forest management on surrounding forest lands." COLW's Petition for Review 14. Goal 4, Policy 1.3 is worded as a "should" policy indicating that the policy is aspirational and does not mandate that the county's zoning regulations ensure that no uses could ever have significant adverse effects on forest land. *Barman v. City of Cornelius*, 42 Or LUBA 548, 557 (2002). Even if Goal 4, Policy 1.3 does impose some sort of mandatory obligation on the county, JCZO 430.6(M) requires "destination resort improvements and activities * * * to avoid or minimize adverse effects of the resort on surrounding lands, particularly effects on * * * forestry operations in the area."[23] We believe JCZO 430.6(M) adequately implements the policy.

Petitioners also argue that the new JCZO violates Camp Sherman Area Policy 3.2, which provides:

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[23] JCZO 430.6(M) provides:

> "Improvements and activities shall be located and designed to avoid or minimize adverse effects of the resort on uses on surrounding lands, particularly effects on farming or forestry operations in the area. At a minimum, measures to accomplish this shall include the establishment and maintenance of buffers between the resort and adjacent uses, including natural vegetation and, where appropriate, fences, berms, landscaped areas and other similar types of buffers, and setbacks of structures and other improvements from adjacent land uses. * * *"

> "Recreational and resort development on private lands within the National Forest boundary should continue to be allowed when the development will be in harmony with the natural environment and will not have an adverse impact on forest lands, rivers and streams or wildlife habitat."

Again, the "should" wording in Camp Sherman Area Policy 3.2 makes it questionable whether it imposes a mandatory obligation of any kind. Even if it does, we just noted above that JCZO 430.6(M) requires that "destination resort improvements and activities" "avoid or minimize adverse effects of the resort on" "surrounding lands." There is no reason to believe that if "adverse *effects*" of a destination resort on surrounding lands are avoided or minimized, those adverse *effects* would no longer constitute an "adverse *impact*," within the meaning of Camp Sherman Area Policy 3.2. In addition, JCZO 430.6(L) requires destination resorts to retain "important natural features" including riparian setbacks. These ordinance provisions are adequate to implement Camp Sherman Area Policy 3.2.

This subassignment of error is denied.

C. Consistency With Goals 2 and 5

Petitioners incorporate their arguments concerning Goals 2 and 5 from their first two assignments of error. We reject those arguments here for the same reason we rejected them above.

COLW and the Tribes' third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR (COLW)

COLW argues that the new JCCP and JCZO violate Goal 7 (Areas Subject to Natural Hazards) regarding wildfire risks from destination resorts. Goal 7 requires local governments to evaluate risks from natural hazards and to avoid or prohibit development in areas "where the risk to public safety cannot be mitigated." The county's findings regarding fire safety state:

> "Testimony was received that allowing additional development in the Forest Management zone will fragment the timber base and asserting that there has been an inadequate assessment of the increased fire risks and increased difficulties in combating fires if additional development is allowed in the

> zone. All of the uses proposed in the zone are allowed by OAR 660-006. Section 303 includes siting and fire safety standards in accordance with OAR 660-006-0035 and OAR 660-006-0040. The fire safety standards of Section 426 will also apply to all new development in the zone. Prior to being approved, all new dwellings and structures will have to provide evidence that these standards can be met. Subsection 303.6(B) [sic 303.6] requires that all other uses that require administrative review or conditional use approval show that the approved use will not significantly increase fire hazard, significantly increase fire suppression costs, or significantly increase risks to fire suppression personnel, in accordance with OAR 660-006-0025(5)(b)." Record 1772-73.

The county determined that the fire siting standards were adequate to mitigate the wildfire risk from destination resorts. In addition, JCZO 303.7(A)(4), 426, and 430.6(P) all provide fire safety and prevention standards applicable to destination resorts. The county also received supportive testimony from the rural fire protection district's assistant chief and a representative of the Oregon Department of Forestry. Record 2456-57. The county could reasonably conclude that such protections would mitigate the danger of wildfires in forest zones. That is all the county was required to do under Goal 7. The county was not required to find or ensure that there would be no danger whatsoever of wildfires or to prohibit destination resorts because fires are a possibility.

COLW's fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR (COLW)

An appendix to the old JCCP sets out administrative provisions that create and assign certain duties to the Camp Sherman Local Advisory Committee (LAC). Petitioner COLW sets out some of those provisions in its petition for review and we set them out below:

> "The [LAC] is established to gather citizen input, and to act as a coordinator for planning matters in the Camp Sherman Area. The Committee will function as an official advisory group to the County Planning Commission.
>
> "* * * * *
>
> "The LAC will provide the County Planning Commission with their opinions and recommendations in regards to planning and zoning matters of local concern.

"* * * * *

"The LAC shall determine whether any proposed use and/or development in the Camp Sherman Area is in conformity with standards set by the Camp Sherman Plan. * * *

"* * * * *

"Proposals for modification of this document and the Jefferson County Comprehensive Plan may be initiated by an individual or by the Local Advisory Committee. * * *" COLW Petition for Review Appendix 43-46.

The county found that the required LAC involvement suggested in the above-quoted language from JCCP Appendix was not required here because the challenged JCCP and JCZO amendments are *legislative* amendments and the procedures described above must be followed when considering *applications* that lead to *quasi-judicial* land use decisions. Petitioner COLW assigns error to those findings.

The county's response to arguments that it was error not to involve the Camp Sherman LAC in preparing the draft JCZO and JCCP proposed amendments is set out below.

"B. Testimony was received that the process followed in amending the [JCCP] was flawed because the Camp Sherman [LAC] was not involved in the preparation of the draft Plan. As stated in the [JCCP Appendix] the role of the LAC is to gather citizen input, act as a coordinator for planning matters in the Camp Sherman area, and function as an official advisory group to the County Planning Commission by reviewing all proposed development in the Camp Sherman area and providing a written report and recommendation to the Planning Commission on development applications. The County interprets the role of the LAC as providing input on quasi-judicial land use applications.

"C. In a section titled 'Long Range Plan Rivision [sic],' the Camp Sherman Appendix states that proposals for modification of the appendix and the [JCCP] may be initiated by an individual or by the [LAC]. (In this respect the document is in error by not recognizing that the Jefferson County Board of Commissioners also has the authority to amend, modify or repeal the Appendix.) No further procedures for legislative amendments are included in the Appendix.

> Consequently there is no legal requirement for the LAC to be involved in legislative amendments to the text of the [JCCP]." Record 56.[24]

Although we concluded earlier in this opinion that the county was not obligated to ensure that the JCZO amendments complied with the old JCCP, any procedural obligations the county may have had under the old JCCP would have applied at the time the draft JCCP and JCZO were prepared. The county's findings are adequate to explain that the county interprets the procedural obligation it had under the former JCCP Appendix to involve the Camp Sherman LAC in its planning actions as being limited to quasi-judicial land use decisions regarding specific development proposals. The county's findings are also adequate to explain that any attempt to interpret the last of the above-quoted provisions from the JCCP Appendix to provide that only the LAC or individuals could initiate JCCP amendments would be incorrect. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we may only overturn a local government's interpretation of its own ordinances if it is inconsistent with the express language, purpose, or policy of the ordinance.[25] The county's interpretation is not inconsistent with the express language, purpose, or policy of Appendix I.

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[24] In other findings the county identified specific Appendix language that led it to its conclusion that the LAC need not have been involved in preparing the initial draft of the proposed JCCP and JCZO amendments:

> "(1) The Board's interpretation of [the JCCP Appendix] is based on the underlined portions of the following text: 'Upon receipt of an application for approval of any proposed use or development, the secretary of the LAC shall forward the application and all available information to the County Planning Department[.] . . . If the planning department is contacted by the applicant prior to contact with the LAC, the director will notify the secretary of the LAC and forward all available information.' The Board interprets this section's reference to 'the applicant' to refer only to quasi-judicial, applicant-initiated land use actions." Record 1770 (emphasis in original).

[25] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

COLW argues that even if the county is correct that the LAC need only be involved under the Old JCCP Appendix when reviewing quasi-judicial land use applications, COLW contends that because the map that the county ultimately adopted to designate lands eligible for destination resorts only includes two properties, the challenged ordinances are quasi-judicial decisions.

We rejected Johnson's third assignment of error that the challenged ordinances are quasi-judicial. We reject COLW's argument for the same reasons.

Finally, we agree with Ponderosa that any error the county may have committed in failing to involve the LAC in preparing the initial drafts of the proposed JCCP and JCZO amendments would be a procedural error. LUBA may remand based on a procedural error, only where the procedural error prejudiced petitioners' rights. ORS 197.835(9)(a)(B). While petitioners allege that lack of early involvement by the LAC may have prejudiced the substantial rights of the LAC or its members, petitioners do not allege or demonstrate that any such failure to involve the LAC in preparing the initial drafts prejudiced *petitioners'* substantial rights.

COLW's fifth assignment of error is denied.

CONCLUSION

We partially sustain COLW's and the Tribes first and second assignments of error. Therefore, Ordinance O-03-07, which amends the JCCP, must be remanded. The JCZO amendments adopted by Ordinance O-04-07 depend on the JCCP amendments adopted by Ordinance O-03-07. In responding to our remand of Ordinance O-03-07, changes in O-04-07 may be required. Therefore, we remand Ordinance O-04-07 as well.

Ordinances O-03-07 and O-04-07 are remanded.

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

OAR chapter 660, division 23, sections 30, 40 and 50

"**660-023-0030**

"**Inventory Process**

"1) Inventories provide the information necessary to locate and evaluate resources and develop programs to protect such resources. The purpose of the inventory process is to compile or update a list of significant Goal 5 resources in a jurisdiction. This rule divides the inventory process into four steps. However, all four steps are not necessarily applicable, depending on the type of Goal 5 resource and the scope of a particular PAPA or periodic review work task. For example, when proceeding under a quasi-judicial PAPA for a particular site, the initial inventory step in section (2) of this rule is not applicable in that a local government may rely on information submitted by applicants and other participants in the local process. The inventory process may be followed for a single site, for sites in a particular geographical area, or for the entire jurisdiction or urban growth boundary (UGB), and a single inventory process may be followed for multiple resource categories that are being considered simultaneously. The standard Goal 5 inventory process consists of the following steps, which are set out in detail in sections (2) through (5) of this rule and further explained in sections (6) and (7) of this rule:

"(a) Collect information about Goal 5 resource sites;

"(b) Determine the adequacy of the information;

"(c) Determine the significance of resource sites; and

"(d) Adopt a list of significant resource sites.

"(2) Collect information about Goal 5 resource sites: The inventory process begins with the collection of existing and available information, including inventories, surveys, and other applicable data about potential Goal 5 resource sites. If a PAPA or periodic review work task pertains to certain specified sites, the local government is not required to collect information regarding other resource sites in the jurisdiction. When collecting information about potential Goal 5 sites, local governments shall, at a minimum:

"(a) Notify state and federal resource management agencies and request current resource information; and

"(b) Consider other information submitted in the local process.

"(3) Determine the adequacy of the information: In order to conduct the Goal 5 process, information about each potential site must be adequate. A local government may determine that the information about a site is inadequate to complete the Goal 5 process based on the criteria in this section. This determination shall be clearly indicated in the record of proceedings. The issue of adequacy may be raised by the department or objectors, but final determination is made by the commission or the Land Use Board of Appeals, as provided by law. When local governments determine that information about a site is inadequate, they shall not proceed with the Goal 5 process for such sites unless adequate information is obtained, and they shall not regulate land uses in order to protect such sites. The information about a particular Goal 5 resource site shall be deemed adequate if it provides the location, quality and quantity of the resource, as follows:

"(a) Information about location shall include a description or map of the resource area for each site. The information must be sufficient to determine whether a resource exists on a particular site. However, a precise location of the resource for a particular site, such as would be required for building permits, is not necessary at this stage in the process.

"(b) Information on quality shall indicate a resource site's value relative to other known examples of the same resource. While a regional comparison is recommended, a comparison with resource sites within the jurisdiction itself is sufficient unless there are no other local examples of the resource. Local governments shall consider any determinations about resource quality provided in available state or federal inventories.

"(c) Information on quantity shall include an estimate of the relative abundance or scarcity of the resource.

"(4) Determine the significance of resource sites: For sites where information is adequate, local governments shall determine whether the site is significant. This determination shall be adequate if based on the criteria in subsections (a) through (c) of this section, unless challenged by the department, objectors, or the commission based upon contradictory information. The determination of significance shall be based on:

"(a) The quality, quantity, and location information;

"(b) Supplemental or superseding significance criteria set out in OAR 660-023-0090 through 660-023-0230; and

"(c) Any additional criteria adopted by the local government, provided these criteria do not conflict with the requirements of OAR 660-023-0090 through 660-023-0230.

"(5) Adopt a list of significant resource sites: When a local government determines that a particular resource site is significant, the local government shall include the site on a list of significant Goal 5 resources adopted as a part of the comprehensive plan or as a land use regulation. Local governments shall complete the Goal 5 process for all sites included on the resource list except as provided in OAR 660-023-0200(7) for historic resources, and OAR 660-023-0220(3) for open space acquisition areas.

"(6) Local governments may determine that a particular resource site is not significant, provided they maintain a record of that determination. Local governments shall not proceed with the Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5.

"(7) Local governments may adopt limited interim protection measures for those sites that are determined to be significant, provided:

"(a) The measures are determined to be necessary because existing development regulations are inadequate to prevent irrevocable harm to the resources on the site during the time necessary to complete the ESEE process and adopt a permanent program to achieve Goal 5; and

"(b) The measures shall remain effective only for 120 days from the date they are adopted, or until adoption of a program to achieve Goal 5, whichever occurs first."

"**660-023-0040**

"**ESEE Decision Process**

"(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule. Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE analysis need not be lengthy or complex, but should enable

reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:

"(a) Identify conflicting uses;

"(b) Determine the impact area;

"(c) Analyze the ESEE consequences; and

"(d) Develop a program to achieve Goal 5.

"(2) Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. The following shall also apply in the identification of conflicting uses:

"(a) If no uses conflict with a significant resource site, acknowledged policies and land use regulations may be considered sufficient to protect the resource site. The determination that there are no conflicting uses must be based on the applicable zoning rather than ownership of the site. (Therefore, public ownership of a site does not by itself support a conclusion that there are no conflicting uses.)

"(b) A local government may determine that one or more significant Goal 5 resource sites are conflicting uses with another significant resource site. The local government shall determine the level of protection for each significant site using the ESEE process and/or the requirements in OAR 660-023-0090 through 660-023-0230 (see OAR 660-023-0020(1)).

"(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.

"(4) Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of

the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.

"(5) Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:

"(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.

"(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.

"(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section."

"**660-023-0050**

"**Program to Achieve Goal 5**

"(1) For each resource site, local governments shall adopt comprehensive plan provisions and land use regulations to implement the decisions made pursuant to OAR 660-023-0040(5). The plan shall describe the degree of protection intended for each significant resource site. The plan and implementing ordinances shall clearly identify those conflicting uses that are allowed and the specific standards or limitations that apply to the allowed uses. A program to achieve Goal 5 may include zoning measures that partially or fully allow conflicting uses (see OAR 660-023-0040(5)(b) and (c)).

"(2) When a local government has decided to protect a resource site under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards. For purposes of this division, a standard shall be considered clear and objective if it meets any one of the following criteria:

"(a) It is a fixed numerical standard, such as a height limitation of 35 feet or a setback of 50 feet;

"(b) It is a nondiscretionary requirement, such as a requirement that grading not occur beneath the dripline of a protected tree; or

"(c) It is a performance standard that describes the outcome to be achieved by the design, siting, construction, or operation of the conflicting use, and specifies the objective criteria to be used in evaluating outcome or performance. Different performance standards may be needed for different resource sites. If performance standards are adopted, the local government shall at the same time adopt a process for their application (such as a conditional use, or design review ordinance provision).

"(3) In addition to the clear and objective regulations required by section (2) of this rule, except for aggregate resources, local governments may adopt an alternative approval process that includes land use regulations that are not clear and objective (such as a planned unit development ordinance with discretionary performance standards), provided such regulations:

"(a) Specify that landowners have the choice of proceeding under either the clear and objective approval process or the alternative regulations; and

"(b) Require a level of protection for the resource that meets or exceeds the intended level deter-mined under OAR 660-023-0040(5) and 660-023-0050(1)."