

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

3  
4                               JAMES ROOT and VALERIE ROOT,  
5                                       *Petitioners,*

6  
7   vs.

8  
9                               KLAMATH COUNTY,  
10                                       *Respondent,*

11  
12   and

13  
14                               JWTR, LLC,  
15                                       *Intervenor-Respondent.*

16  
17   LUBA No. 2013-008

18  
19   FINAL OPINION  
20   AND ORDER

21  
22                               Appeal on remand from the Court of Appeals.

23  
24                               Gregory S. Hathaway, Portland, represented petitioners.

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26                               David P. Groff, County Counsel, Klamath Falls, represented respondent.

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28                               Michael C. Robinson and Seth J. King, Portland, represented intervenor-  
29 respondent.

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31                               RYAN, Board Member; BASSHAM, Board Member, participated in the  
32 decision.

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34                               HOLSTUN, Board Chair, did not participate in the decision.

35  
36   AFFIRMED   03/26/2014

37  
38                               You are entitled to judicial review of this Order. Judicial review is  
39 governed by the provisions of ORS 197.850.



1 development allowed by such large scale amendments, we posited that the  
2 county could comply with the TPR if, in the decision approving the amendment  
3 to the KCCP map, the county also applies an overlay district that prohibits  
4 development of a destination resort on any of the properties until the overlay  
5 district on specific properties is removed through a future post  
6 acknowledgement plan amendment, at which time the county would determine  
7 whether the amendment to allow one or more specific destination resorts  
8 complies with the TPR. *Id.*

9 In the decision challenged in *Root II*, the county imposed a condition of  
10 approval that delays the effectiveness of Ordinance 44.95 until the county  
11 adopts a separate ordinance that adds the county’s Limited Use (LU) overlay  
12 district to the same properties that are added to the county’s DRO maps in  
13 Ordinance 44.95. That condition provides:

14 “This decision is final for purposes of appeal but shall not be  
15 effective for purposes of amending the [KCCP] Map and the  
16 Klamath County Land Development Code [KCLDC] Map to add  
17 approximately 68,302 acres to the Plan and zoning maps until such  
18 time as the County imposes the Limited Use (‘LU’) Overlay  
19 zoning district to those same properties in a post-  
20 acknowledgement plan amendment proceeding and provides in  
21 that post-acknowledgement plan amendment proceeding that the  
22 LU Overlay zone shall not allow any new uses allowed by the  
23 destination resort overlay designation until such time as the LU is  
24 removed in a subsequent post-acknowledgement plan amendment  
25 proceeding that demonstrates compliance with the then-applicable  
26 provisions of the TPR. The effect of this condition is that no new  
27 uses are allowed by this decision and, therefore, as a matter of law  
28 pursuant to OAR 660-012-0060(1), this decision does not  
29 significantly affect any transportation facility.” Record 32.

30 In the fourth assignment of error in *Root II*, petitioners argued that the county’s  
31 use of the LU overlay zone set out in KCLDC Article 59.8 is not effective to

1 limit development of a destination resort on the properties because the LU  
2 overlay zone only applies to limit uses allowed in the underlying zone, and  
3 does not limit uses allowed in another overlay zone, such as the DRO. In *Root*  
4 *II*, we did not reach the fourth assignment of error. We held:

5 “We agree with intervenor that it is premature for us to address  
6 petitioners’ challenges to availability of the LU overlay zone to  
7 limit development allowed by the DRO, since the county has not  
8 yet imposed the LU overlay zone on the properties that are the  
9 subject of Ordinance 44.95.” *Root II* at slip op 13.

10 In *Root III*, the Court of Appeals agreed with petitioners that we erred in  
11 rejecting as premature petitioners’ challenge to the county’s determination that  
12 the proposed map amendments satisfy the TPR:

13 “Contrary to LUBA’s conclusion, there was nothing ‘premature’  
14 about petitioners’ challenge to the county’s determination that the  
15 amendment to the maps would not significantly affect a  
16 transportation facility. \* \* \* [W]e reverse and remand to LUBA to  
17 address the merits of petitioners’ contention that the county erred  
18 when it determined that the amendment to the maps would not  
19 significantly affect a transportation facility.” *Root III*, 260 Or App  
20 at 674.

21 We now address the merits of petitioners’ fourth assignment of error.

22 **FOURTH ASSIGNMENT OF ERROR**

23 In their fourth assignment of error in *Root II*, petitioners argue:

24 “While [p]etitioners understand the suggestion by LUBA in *Root*  
25 [*I*], in this particular case, the County is not authorized to apply its  
26 LU Overlay Zone to another overlay zone such as the DRO.  
27 KCLDC 59.810 (Purpose) specifically provides that the purpose of  
28 the Limited Use Overlay is to limit permitted uses allowed in the  
29 *underlying zone*. KCLDC 59.820 (Application) specifically  
30 provides that *uses permitted in the underlying zone shall be*  
31 *limited* and the LU Overlay shall not be used to authorize uses not  
32 expressly provided for in the *underlying zone*.

1 “The express language in these sections are unambiguous – the  
2 Limited Use Overlay Zone can only be applied to *limit* uses in the  
3 *underlying zone* – not to another overlay zone. The underlying  
4 zones for the proposed DRO areas are either rural or resource  
5 zones. The DRO, by its own terms, is an overlay zone. As such,  
6 the County is not authorized under KCLDC 2.040(A) to impose a  
7 condition applying the LU Overlay to DRO properties in violation  
8 of KCLDC Article 59.8.

9 “Since this condition is unlawful, Intervenor and the County were  
10 required to demonstrate compliance with the TPR consistent with  
11 LUBA’s decision in *Root [I]*. The County cannot take advantage  
12 of LUBA’s suggestion due to the express limitations in the LU  
13 Overlay zone. Because there is not evidence in the current record  
14 demonstrating compliance with the TPR, the County’s conclusion  
15 there is compliance with the TPR is not supported by an adequate  
16 factual base.” Petition for Review 14 (emphases in original).

17 Intervenor responds that the plain language of KCLDC 59.810 allows the  
18 county to apply the LU overlay zone to prohibit destination resort uses until a  
19 subsequent PAPA removes the overlay zone. We agree.

20 KCLDC 59.810 – Purpose provides:

21 “The purpose of the Limited Use Overlay is to limit permitted uses  
22 allowed in the underlying zone to only those uses which are  
23 justified in a required ‘exception statement’ or, in the case where a  
24 statement is not required, testimony and evidence gathered in the  
25 review process, *or to prohibit certain uses until allowed by a*  
26 *subsequent post-acknowledgment amendment to remove the*  
27 *Limited Use Overlay.*” (Emphasis added.)

28 Petitioners rely on the first purpose of the LU overlay zone set out in KCLDC  
29 59.810 to support their contention that “the County is not authorized to apply  
30 its LU Overlay Zone to another overlay zone such as the DRO.” Petition for  
31 Review 14. But petitioners’ argument fails to recognize the second purpose of  
32 the LU overlay zone: “to prohibit certain uses until allowed by a subsequent  
33 post-acknowledgment amendment to remove the Limited Use Overlay.” The

1 second part of KCLDC does not include the phrase “allowed in the underlying  
2 zone” after the phrase “certain uses.” It allows the LU overlay zone to entirely  
3 “prohibit certain uses” until the LU overlay zone is removed. When KCLDC  
4 59.810 is read in its entirety, it is clear that the county intends the LU overlay  
5 zone to be used (1) to limit uses allowed in the underlying zone, in the context  
6 of an approval of an exception to a statewide planning goal, to uses “justified in  
7 [the] exception statement” or in testimony and evidence gathered in the  
8 county’s review of the exception application; or (2) to prohibit “certain uses”  
9 until the LU overlay zone is removed in a subsequent PAPA process.

10 Petitioners also cite and rely on KCLDC 59.820(C) to support their  
11 argument. KCLDC 59.820(C) provides:

12 “Uses permitted in the underlying zone shall be limited to those  
13 uses specifically referenced in the comprehensive plan  
14 amendment/zone change and the accompanying exception  
15 statement, *or certain uses shall be prohibited until allowed by a*  
16 *subsequent post-acknowledgment to remove the Limited Use*  
17 *Overlay.*” (Emphasis added.)

18 As with KCLDC 59.810, KCLDC 59.820(C) allows the county to limit uses  
19 permitted in the underlying zone to uses approved in an exception process, and  
20 also permits the county to use the LU overlay zone to prohibit “certain uses,”  
21 i.e. destination resort uses, until the LU overlay zone is removed in a  
22 subsequent PAPA proceeding. The LU Overlay zone is available to the county  
23 to prohibit “certain uses,” *i.e.* “destination resort uses” of the properties until  
24 the LU overlay is removed, and the county’s condition is not unlawful.

25 The fourth assignment of error is denied.

26 The county’s decision is affirmed.