BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL FOLAND and CONNIE FOLAND,
Petitioners,
vs.
JACKSON COUNTY,
Respondent,
and
PROVOST DEVELOPMENT COMPANY,
Intervenor-Respondent.

LUBA No. 89-105

FINAL OPINION AND ORDER

CYNTHIA LORD, CHRIS SKREPETOS, OGDEN SHUTES, RODNA SHUTES, and 1000 FRIENDS OF OREGON,
Petitioners,
vs.
JACKSON COUNTY,
Respondent,
and
PROVOST DEVELOPMENT COMPANY,
Intervenor-Respondent.

LUBA No. 89-111

Appeal from Jackson County.

William H. Fowler and Frank R. Alley, Medford, filed a petition for review. With them on the brief was Fowler, Alley and McNair. William H. Fowler argued on behalf of petitioners Foland.

Keith A. Bartholomew and Neil S. Kagan, Portland, filed a petition for review. Keith A. Bartholomew argued on behalf of petitioners Lord, et al.

Arminda J. Brown, Medford, filed a response brief and argued on behalf of respondent.

Gregory S. Hathaway and Virginia L. Gustafson, Portland, filed a response brief on behalf of intervenor-respondent. With them on the brief was Garvey, Schubert and Barer. Gregory S. Hathaway argued on behalf of intervenor-respondent.

SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 02/07/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal an order of the Jackson County Board of Commissioners which (1) adopts a "resolution of intent to rezone" to apply the county's comprehensive plan and zoning map Destination Resort (DR) overlay designation to an approximately 270 acre site, and (2) approves a conceptual site plan for a destination resort on the subject site.

MOTIONS TO INTERVENE

Provost Development Company, the applicant below, moves to intervene on the side of respondent in both LUBA Nos. 89-105 and 89-111. There is no opposition to the motions, and they are allowed.

FACTS

The subject site is a single ownership designated on the county's comprehensive plan and zoning map as Exclusive Farm Use (EFU). The site has been in farm use since the area was first settled in the 1850's. The site, with the exception of the existing farm residence and surrounding farm buildings, is currently leased to a rancher in the area, who uses it for irrigated pasture, grazing and hay production. Two intermittent creeks, Neil Creek and its tributary, Clayton Creek, flow through the site.

The site is located 80-100 feet from the southeast corner of the urban growth boundary of the City of Ashland. The site is adjoined on the north by Rural Residential

(RR-5) and EFU designated and zoned properties. To the east, south and west are EFU designated and zoned properties. Adjoining the site to the southwest is Interstate-5. State Highway 66 passes through the eastern portion of the site.

The proposed Clear Springs Destination Resort would include

> "an 18-hole championship golf course with clubhouse, * * * an executive conference center with banquet and meeting rooms; food and beverage facilities with a minimum seating for 150 persons; and a first class resort hotel with 145-160 rooms, along with 30 cottages for rentable overnight lodging * * * 70-100 non-rental residential units (i.e. single family detached or condominium units not for overnight lodging) * * * health clubs for use by guests of the resort; specialty shops oriented to the health club and golf course; and specialty shops oriented to the main lodge." Record 1, 17-18.

MOTIONS TO STRIKE

Intervenor-respondent and respondent[1] (respondents)

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[1]Intervenor-respondent's (intervenor's) Motion to Strike was filed on November 15, 1989. Respondent's Motion to Strike was filed on November 20, 1989, and consists simply of a statement that respondent joins in intervenor's motion and adopts its arguments. Petitioners Lord et al state that since their petition for review was served on respondent by first class mail on November 3, 1989, "it appears that the county may have filed its motion to strike more than 10 days after it received the petition" and, therefore, the county's motion should be rejected as untimely under OAR 661-10-065(2). Response to Motion to Strike 16, n 8.

Respondent does not state in its motion when it received the petition for review with the appendices in question. However, the earliest possible date respondent could have received the petition for review in the mail was November 6, 1989. Thus, respondent's motion was filed, at most, four days after the time allowed by OAR 661-10-065(2). We regard such a violation of our rules, particularly where respondent's motion merely adopts the

move to strike Appendices C through N to the petition for review filed by petitioners Lord et al because (1) these appendices are not part of the record established below; and (2) to the extent these appendices are submitted as legislative history of certain Statewide Planning Goal (goal) and statutory provisions, it is not appropriate for the Board to rely on legislative history in interpreting the goal and statute provisions at issue in this case. Respondents also argue that Appendices J, M and N should be stricken because they are not legislative history of the subject goal or statutory provisions.[2]

A. Not in the Record

Respondents argue that this Board has previously determined that its review is unconditionally limited to the record established before the local government. Respondents cite Benjfran Development v. Metro Service Dist., ___ Or LUBA ___ (LUBA No. 88-039, Order on Motions, September 30, 1988) (Benjfran). Respondents contend that in Benjfran, the petitioner had appended two documents to its petition for review as legislative history of a statute at issue in that case. Respondents in that case disputed that

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argument contained in an earlier, timely filed motion, as a mere "technical violation." OAR 661-10-005. We decline to reject respondent's Motion to Strike as untimely filed.

[2]Petitioners Lord et al filed a response to respondents' motions to strike and, two days later, filed a Motion to File Memorandum of Additional Authority. There is no opposition to petitioners' motion, and it is granted.

the documents were actually legislative history of the statute, but also argued that petitioner could not expand the record by attaching to its petition for review documents not part of the record of the proceeding below. According to respondents, this Board fully accepted the arguments of the respondents in Benjfran when the motion to strike was granted.

Petitioners Lord et al argue that ORS 197.830(13)(a) limits this Board to the local government record only with regard to evidentiary matters or issues of fact.[3] Petitioners Lord et al assert that the challenged appendices are not submitted to this Board as evidence and do not relate to factual issues, but rather are submitted as extrinsic aids for the interpretation of provisions of goal and statute at issue in this appeal. Petitioners Lord et al argue that it is not necessary for such materials to be in the local government record for this Board to consider them for that purpose.

Petitioners argue that the Oregon appellate courts, although similarly limited to the record with regard to factual and evidentiary matters under ORS 19.065 to 19.108, are not confined to the record when interpreting statutory provisions. See, e.g., Duncan v. Dubin, 276 Or 631, 637,

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[3]ORS 197.830(13)(a) provides:

> "Review of a decision under ORS 197.830 to 197.845 shall be confined to the record."

556 P2d 105 (1976); State v. Leathers, 271 Or 236, 242, 531 P2d 901 (1975); State v. Laemoa, 20 Or App 516, 523, 533 P2d 370 (1975). Petitioners Lord et al also point out that the Court of Appeals has analyzed legislative and administrative history of statutory and administrative rule provisions in an appeal from a decision of this Board. Newcomer v. Clackamas County, 94 Or App 33, 38, 764 P2d 927 (1988).

Petitioners Lord et al also argue that this Board has considered extrinsic aids, such as legislative history and dictionary definitions, in interpreting statutory and local code provisions, without commenting on whether these materials were part of the record. Kola Tepee, Inc. v. Marion County, ___ Or LUBA ___ (LUBA No. 89-021, June 28, 1989), slip op 10, aff'd 99 Or App 481 (1989); Texaco, Inc. v. City of King City, 15 Or LUBA 198, 202-203 (1987); Todd v. Douglas County, 14 Or LUBA 307, 310, n 2 (1986). Petitioners Lord et al further contend that this Board has suggested in previous opinions that it would welcome the appending of relevant legislative history materials to parties' briefs. STOP v. Metro Service Dist., ___ Or LUBA ___ (LUBA No. 89-030, October 25, 1989), slip op 17; Von Lubken v. Hood River County, ___ Or LUBA ___ (LUBA No. 89-023, September 8, 1989), slip op 9.

Finally, petitioners Lord et al argue that the Benjfran order cited by respondents does not establish that legislative history materials outside the record can never

be appended to a party's brief. Petitioners Lord et al maintain that this Board's decision in Benjfran was also based on arguments that legislative history materials were not needed to interpret the statute at issue and that the appended documents were not legislative history materials.

We are directed by ORS 197.805 to conduct our appeal proceedings "consistently with sound principles governing judicial review." We have recognized exceptions to the requirement of ORS 197.830(13)(a) that our review be limited to the record of the proceedings below, where consistency with sound principles of judicial review requires us to consider materials outside of the record below to determine whether petitioners have standing, whether we have jurisdiction or whether an appeal is moot. Century 21 Properties v. City of Tigard, ___ Or LUBA ___ (LUBA No. 89-043, August 16, 1989), slip op 6-7, rev'd other grounds 99 Or App 435 (1989) (mootness); Hemstreet v. Seaside Improvement Comm., ___ Or LUBA ___ (LUBA No. 87-094, April 22, 1988), slip op 4-5 (jurisdiction).

As petitioners point out, the Oregon appellate courts frequently refer to legislative and administrative history in interpreting statutes and administrative rules, and have done so in appeals from decisions of this Board. We believe it is consistent with sound principles of judicial review to consider legislative or administrative history materials, when such materials are necessary to our interpretation of

statutes, administrative rules or ordinances, regardless of whether the materials are in the record of the proceedings below.[4] We, therefore, decline to strike petitioners' Appendices C through N simply because they are not in the record of the county's proceedings.

B. Not Appropriate to Rely On Legislative History

Respondents also argue that Appendices C through N should be stricken on the ground that there is no need to resort to legislative history to interpret ORS 197.465(1) and Goal 8 (Recreational Needs), the statutory and goal provisions at issue in this case, because they are not ambiguous and their meaning is clearly established without resort to extrinsic aids.

Even if respondents were correct that it is not necessary for us to rely on legislative history in interpreting ORS 197.465(1) and Goal 8, that would not be grounds for striking material otherwise properly submitted as legislative history of goal and statutory provisions at issue in this appeal. We will, however, consider respondents' argument that we need not rely on legislative

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[4]Our decision in Benjfran did not establish that legislative history materials not in the record of local proceedings could never be appended to a party's brief. Further, although we did not rely on the legislative history materials appended to a party's brief in Sokol v. City of Lake Oswego, ___ Or LUBA ___ (LUBA No. 88-087, February 3, 1989), we noted that "neither we nor the [appellate] courts have determined whether LUBA may consider as legislative history documents not subject to official notice and not in the record of the appealed local government decision." Id. at 25, n 10.

history in interpreting ORS 197.465(1) and Goal 8, when we consider petitioners' assignments of error concerning the interpretation of these provisions.

C. Not Legislative History

1. Appendix J

Appendix J is entitled "Destination Resort Handbook: A Guide to Statewide Planning Goal 8's Procedures and Requirements for Siting Destination Resorts" (handbook). The handbook was issued by the Department of Land Conservation and Development (DLCD) in July 1989.

Respondents argue that the handbook is not legislative history of the destination resort provisions of statute or goal and cannot be used to interpret those provisions.

Petitioners Lord et al do not claim that the handbook is legislative history of the destination resort statute or goal. Rather, petitioners contend the handbook is an official DLCD publication. Petitioners further argue that we may take official notice of a DLCD publication "as a public official act of an executive department of the State of Oregon," pursuant to ORS 40.090(2). Faye Wright Neighborhood Planning Council v. Salem, 6 Or LUBA 167, 170 (1983).

ORS 40.090 (Oregon Evidence Code Rule 202) provides in relevant part:

"Law judicially noticed is defined as :

"* * * * *

"(2) Public and private official acts of the legislative, executive and judicial departments of this state * * *

"* * * * *"

We agree with respondents that the handbook is not legislative history of the destination resort statute or goal. However, it is within this Board's authority to take official notice of judicially cognizable law, as provided by ORS 40.090. McCaw Communications v. Marion County, ___ Or LUBA ___ (LUBA No. 88-068, December 13, 1988), slip op 4; Faye Wright Neighborhood Planning Council v. Salem, supra. We agree with petitioners Lord et al that the handbook constitutes an official DLCD publication of which we can take official notice.

Accordingly, we take official notice of the handbook and deny respondents' motions to strike with regard to Appendix J.[5]

2. Appendices M and N

Appendix M consists of 1987 Oregon House of Representatives Staff Measure Analyses[6] for the original and

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[5]Both respondents and petitioners also present arguments concerning the appropriate weight given to the handbook in interpreting Goal 8. These arguments are not relevant to determining whether we should take official notice of the handbook. We will address these arguments, infra, if we find it appropriate to rely on the handbook in resolving petitioners' assignments of error.

[6]A staff measure analysis is prepared by the staff of the legislative committee that passed out the bill in question and accompanies the bill to the floor of that house of the legislature.

B-Engrossed HB 3097, the bill which was enacted as Oregon Laws 1987, chapter 886, and is codified at ORS 197.435 to 197.465 (destination resort statute). Appendix N consists of three exhibits to the minutes of hearings held on HB 3097 before the House Environment and Energy Committee or Senate Agriculture and Natural Resources Committee.

Respondents argue that Appendices M and N are not legislative history of HB 3097. Respondents contend that the staff measure analyses in Appendix M were not officially adopted or endorsed by the legislature. Respondents also argue that Appendix N is nothing more than letters from various interest groups expressing their preferred interpretations of Goal 8.

Petitioners Lord et al argue that legislative history includes all items which document the life of a legislative provision, including all official records of HB 3097. According to petitioners, in Oregon there is no set list of items that can be considered in reviewing legislative history. In fact, most items relied on for legislative history (e.g., minutes, exhibits and testimony before legislative committees) are not officially adopted by the legislature. Petitioners maintain "the real issue is whether [legislative history] materials are reliable and probative indicators of legislative intent." Response to Motion to Strike 11.

The Oregon appellate courts have recognized that

legislative history includes items such as committee reports, minority reports, committee minutes, and testimony in committee hearings. Southwest Forest Indus. v. Anders, 299 Or 205, 210, n 6, 701 P2d 432 (1985); State ex rel Appling v. Chase, 224 Or 112, 116-117, 355 P2d 631 (1960); State v. Laemoa, supra. Furthermore, "legislative history" is defined by Black's Law Dictionary, 5th Ed. (1979), as "[t]he background and events, including committee reports, hearings, and floor debates, leading up to enactment of a law." These authorities indicate that legislative history materials include all official records documenting the legislative process culminating in the enactment of a statute.

We, therefore, agree with petitioners that the legislative history of HB 3097 includes all items in the official records documenting its enactment, including the staff measure analyses and exhibits to committee hearing minutes submitted as Appendices M and N. Accordingly, respondents' motions to strike Appendices M and N as not constituting legislative history are denied.[7]

Respondents' motions to strike are denied.

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[7]We will address the parties' arguments concerning the appropriate weight to be given to these appendices in interpreting the destination resort statute, infra, if we find it appropriate to rely on these documents in resolving petitioners' assignments of error.

FIRST ASSIGNMENT OF ERROR (LORD)

> "The county erred by approving the siting of the Clear Springs Destination Resort on land that is excluded for such development by the county's comprehensive plan map."

SECOND ASSIGNMENT OF ERROR (FOLAND)

> "The County erred in allowing the application for destination resort zoning without a Goal 2 exception."

In these assignments of error, petitioners argue that the county violated provisions of Goal 8, the destination resort statute and the Jackson County Land Development Ordinance (LDO) by approving application of the DR overlay designation to land which is excluded from destination resort use by the county plan "Map of Areas Excluded from the Goal 8 Resort Siting Process" (Resort Siting Map).

A. Introduction

On October 18, 1984, the Land Conservation and Development Commission (LCDC) amended Goal 8 by adding a section entitled "Destination Resort Siting."[8] The adopted Destination Resort Siting section provided that local government "[c]omprehensive plans may provide for the siting of destination resorts on rural lands * * * without an exception to Goals 3, 4, 11 or 14," pursuant to the provisions of Goal 8.

Subsection (1) of the Destination Resort Siting section

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[8]A section entitled "Definitions," containing definitions for terms used in the Destination Resort Siting section, was also added to the goal.

established standards for destination resort siting, as follows:

> "To assure that resort development does not conflict with the objectives of other Statewide Planning Goals, destination resorts allowed by this Goal shall not be sited in the following areas:
>
> "(a) Within 30 air miles of an urban growth boundary with an existing population of 100,000 or more;
>
> "(b) On a site with 50 or more contiguous acres of unique or prime farm land identified and mapped by the Soil Conservation Service; or within three miles of farm land within a High-Value Crop Area.
>
> "(c) On predominantly Cubic Foot Site Class 1 or 2 forest lands which are not subject to an approved Goal exception;
>
> "(d) In the Columbia River Gorge (as defined by ORS 390.460);
>
> "(e) On areas protected as Goal 5 resource sites in acknowledged comprehensive plans protected in spite of identified conflicting uses ('3A' sites designated pursuant to OAR 660-16-010(1)).
>
> "(f) Especially sensitive big game habitat as generally mapped by the Oregon Department of Fish and Wildlife in July 1984 and as further refined through development of comprehensive plans implementing the requirement." (Emphasis added.)

Subsection (3) listed requirements for implementing measures for destination resort siting pursuant to Goal 8 as follows:

> "Comprehensive plans allowing for destination resorts shall include implementing measures which:
>
> "(a) Map areas where destination resorts are

permitted by requirement (1) above.

"(b) Limit uses and activities to those permitted by this Goal.

"* * * * *" (Emphasis added.)

On December 17, 1986, Jackson County adopted Ordinance No. 86-29, which amended its acknowledged comprehensive plan and LDO to add provisions providing for the siting of destination resorts pursuant to Goal 8.[9] The ordinance included adoption of the Resort Siting Map as an amendment to the plan. This countywide map depicts "Especially Sensitive Big Game Habitat", "Prime Farmland Soil," "Cubic Foot Site Class 1 and 2 Forest Soil," "3 Mile Radius of High Value Crop Area" and "High Value Crop Area," at a scale of 2 centimeters per mile (1 inch = 6700 feet). The ordinance also added to the Map Designations chapter of the plan a "Destination Resort Overlay District (DR)" section, which provides in relevant part:

> "Destination resorts may be allowed within resource and rural plan and zoning designations, when found to be consistent with Statewide Planning Goals and the requirements of the Jackson County Land Development Ordinance, particularly standards and criteria contained in Chapter 246. The Destination Resort Overlay District shall not be applied to lands which lands [sic] are designated on a map entitled "Map of Areas Excluded from the Goal 8 Resort Siting Process" adopted by the Board of Commissioners, which is incorporated herein by this reference, except when

[9]The county's adoption of Ordinance No. 86-29 was not appealed to this Board.

such lands have had an approved Goal 2 exception * * *:

"These lands to which the (DR) Overlay District shall not be applied are the following:

"(i) Sites with 50 or more contiguous acres of prime farmland identified and mapped by the Soil Conservation Service (SCS) or within three miles of farmland in a High Value Crop Area, pursuant to OAR 660-15-000(8). * * *

"(ii) Sites with predominantly cubic foot site class 1 or 2 forest lands which have not been subjected to an approved goal exception;

"(iii) Areas identified as Goal 5 resources which have been identified '3A' in Jackson County's Comprehensive Plan, in spite of identified conflicting uses; and,

"(iv) Sites in especially sensitive big game habitat areas mapped by the Oregon Department of Fish and Wildlife and adopted by [LCDC].

"Soil mapping as illustrated on the "Map of Areas Excluded from the Goal 8 Resort Siting Process" is a generalized representation of soils inventories developed by the Soil Conservation Service (SCS). More precise soils resource mapping by SCS issue [sic] may be used to interpret the location of existing sites with prime farmland or with predominantly cubic foot site class 1 or 2 forest lands illustrated on the adopted map."[10] (Emphasis added.)

Ordinance No. 86-29 also adopted LDO Chapter 246 ("Destination Resort (DR) Overlay"). This chapter

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[10]This final paragraph is referred to by the parties and this Board as the "refinement clause."

establishes procedures and criteria for county plan and zoning map amendments to apply the DR overlay designation and approve destination resort development plans. LDO Chapter 246 contains two provisions directly relevant to these assignments of error. LDO 246.040 ("Application and Review Procedures") provides in relevant part:

> "(1) Application of District: The Destination Resort Overlay District may be applied to any rural property (except those on the adopted "Map of Areas Excluded from the Goal 8 Resort Siting Process," unless an exception has been taken pursuant to Goal 2) when that property complies with the standards contained in this chapter or any other applicable provision of this ordinance and the Comprehensive Plan. * * *
>
> "* * * * *"

LDO 246.050 ("Criteria for Approval of a Destination Resort Overlay Designation") provides in relevant part:

> "A minor Comprehensive Plan and Zoning Map amendment, to provide for a Destination Resort Overlay District, shall be approved upon findings the following criteria are satisfied * * *:
>
> "* * * * *
>
> "(2) The proposed resort development is consistent with applicable resort siting criteria specified by Statewide Planning Goal 8, with the Comprehensive Plan, the adopted "Map of Areas Excluded from the Goal 8 Resort Siting Process," the [LDO], and other relevant state law including ORS Chapters 197 and 215.
>
> "* * * * *"

In 1987, the Oregon Legislature enacted the destination resort statute. ORS 197.455 parallels subsection (1) of the

Goal 8 Destination Resort Siting section, and provides in relevant part:

> "A destination resort shall not be sited in any of the following areas:
>
> "* * * * *
>
> "(2) On a site with 50 or more contiguous acres of unique or prime farmland identified and mapped by the United States Soil Conservation Service * * *
>
> "* * * * *"

ORS 197.465 parallels subsection (3) of the Goal 8 Destination Resort Siting section, and provides in relevant part:

> "An acknowledged comprehensive plan that allows for siting of a destination resort shall include implementing measures which:
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> "(1) Map areas where a destination resort described in ORS 197.445(1) to (5) is permitted pursuant to ORS 197.455;
>
> "(2) Limit uses and activities to those defined by ORS 197.435 and allowed by ORS 197.445; * * *
>
> "* * * * *"[11]

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[11]The major difference between the 1987 destination resort statute and the destination resort siting provisions of Goal 8 adopted in 1984 was the inclusion in the statute of special provisions for siting "small" destination resorts. These provisions are not at issue in this case. On February 17, 1988, LCDC adopted amendments to the Goal 8 Destination Resort Siting and Definitions sections reflecting the destination resort statute. No changes were made to the provisions of subsection (1)(b) concerning prime farm land. The only change made to subsection (3)(a) was to provide that "plans shall include implementing measures which * * * map areas where <u>large</u> destination resorts are permitted by requirement (1) above." (Amendment emphasized.)

B. Goal 8

Petitioners contend we must reverse or remand the county's decision if it fails to comply with Goal 8. Petitioners argue that ORS 197.175(2)(a) requires the county's decision to amend its plan and zoning map to allow the proposed destination resort to comply with the goals. Petitioners point out that ORS 197.835(4) requires this Board to "reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals." Petitioners further argue that LDO 246.050(2), quoted supra, and LDO 277.080(1)[12] require the county's decision to comply with Goal 8.

Petitioners argue that in this case consistency of the county's decision with its acknowledged plan and LDO does not satisfy the requirement that the decision comply with Goal 8. Petitioners argue that the appellate courts have clearly ruled that all comprehensive plan amendments are

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[12]LDO 246.040(1) provides that application of the DR overlay designation to specific properties is accomplished through a minor plan and zoning map amendment. LDO 246.050 states that an amendment to apply the DR designation must meet the requirements of LDO Chapter 277 ("Amendments"). LDO 277.080 ("Standards and Criteria for Minor Map Amendments") provides, in relevant part:

> "The [redesignation] of specific properties shall be based upon the following findings:
>
> "(1) The redesignation conforms to * * * all applicable Statewide Planning Goals for the area in which the proposed [redesignation] could occur and for the County as a whole. * * *
>
> "* * * * *"

reviewable by this Board under ORS 197.835(4) for compliance with the goals. 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 97-98, 718 P2d 753, rev den, 301 Or 445 (1986); see 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 512, 724 P2d 268 (1986).

Petitioners distinguish this case from League of Women Voters v. Metro Service Dist., ___ Or LUBA ___ (LUBA No. 88-102, July 11, 1989), aff'd 99 Or App 333 (1989) (League), in which petitioners contend this Board "held that it had no authority to review a 'locational adjustment' amendment to the Metro UGB for Goal 14 compliance because LCDC had acknowledged a Metro ordinance that purported to contain the sole criteria for such amendments." Lord Petition for Review 13. Petitioners argue that in League the Metro "locational adjustment" ordinance contained a preamble which stated that the ordinance "obviates the need to specifically apply the provisions of Goal 14." Id., slip op at 21. Petitioners further argue that in League, LCDC had issued an order acknowledging the Metro "locational adjustment" ordinance which specifically stated that it complies with Goal 14.

Petitioners argue that in this case, to the contrary, Ordinance No. 86-29 does not assert that it replaces any goal compliance requirement. Rather, it adopts LDO provisions which specifically require a demonstration of compliance with the goals. LDO 246.050(2); 277.080(1).

Petitioners further point out that Ordinance No. 86-29 was adopted as a postacknowledgment plan amendment. Therefore, according to petitioners, it became acknowledged by operation of law, without any action by LCDC determining that it should supersede the requirements of Goal 8.[13]

Petitioners argue that the Goal 8 destination resort provisions effectively exempt a qualifying destination resort from the constraints of Goals 3 (Agricultural Lands), 4 (Forest Lands), 11 (Public Facilities and Services) and 14 (Urbanization), provided that the resort meets Goal 8 destination resort siting criteria. Petitioners argue that, according to the language of subsection (3) of the Goal 8 Destination Resort Siting section, counties must implement the siting criteria of subsection (1) by mapping the areas in which those criteria permit the siting of destination resorts.

Petitioners concede that the goal "is silent on case-by-case application of the siting criteria." Lord Petition for Review 19. Petitioners argue that there are three ways the language of Goal 8 could be interpreted with regard to the relationship between the mapping requirement

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[13]Presumably petitioners refer to operation of the following provision of ORS 197.625(1):

> "If no notice of intent to appeal is filed within the 21-day period set out in ORS 197.830(8), the amendment to the acknowledged comprehensive plan or land use regulation or new land use regulation shall be considered acknowledged upon the expiration of the 21-day period. * * *" (Emphasis added.)

of subsection (3) and the siting criteria of subsection (1).[14] Under the first alternative, the siting criteria apply in all instances, regardless of how the proposed site is depicted on the adopted map. Under the second, the siting criteria apply only where the proposed site is shown as excluded from destination resort siting on the map; the map itself conclusively determines that sites shown as permitted meet the siting criteria. Under the third, the siting criteria do not apply on a case-by-case basis; rather the map is the sole determinant of whether a proposed site satisfies the siting criteria.

Petitioners argue that under the first interpretation "the map plays no role in the decision making process and does little more than indicate which areas might be more difficult to approve." Id. Therefore, according to petitioners, the first interpretation is not favored because it would nullify any purpose of the Goal's mapping requirement. Petitioners argue that the third interpretation is favored over the second because the goal expressly requires mapping as an implementation technique, but is silent on case-by-case application of the siting criteria. Petitioners also argue that the third interpretation is supported by the administrative history of

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[14]Petitioners also point out that this in itself means that the goal is ambiguous with regard to the relationship between the mapping requirement and application of the siting criteria.

the 1984 Goal 8 amendments.

Petitioners argue that the DLCD staff memo accompanying the April 18, 1984 draft of the proposed Goal 8 amendments, the first draft to contain a mapping provision, stated the requirement that county comprehensive plans include maps of areas where resort development is permitted "will provide clear guidance for proposed resort developments." Lord Petition for Review App. D-5. The staff testified before LCDC on April 26-27, 1984 that a requirement had been added that county plans allowing destination resorts "have to map those areas where resorts are not permitted under that first section" (the siting criteria). Id. at App. E-6. Further, petitioners argue that the LCDC discussion of the proposed amendments indicates LCDC felt the "50 contiguous acres of prime [farm land] identified and mapped" standard was "pretty explicit." Id. at App. E-12.

Petitioners cite other staff testimony and memoranda from the Goal 8 amendment process which they argue indicate that the Goal 8 destination resort siting standards were intended to be "something that creates a clear guideline on where resort development can occur and where it cannot." Id. at App. I-7. Petitioners also cite the following staff testimony concerning proposed Goal 8 amendments, at an August 16-17, 1984 LCDC meeting:

> "* * * the counties will designate in their plans, when they amend them, areas that are exempted from this process. * * * That would be reviewed either

> through the plan amendment process, the Post Acknowledgment Plan Amendment review process, or by the commission at the time of Periodic Review." Id. at App. G-19.

Petitioners argue the above-described administrative history shows the Goal 8 destination resort amendments had the following three purposes:

> "(1) to provide clear and objective siting standards;
>
> "(2) to implement those standards through the mandatory adoption of maps; and
>
> "(3) to avoid costly and lengthy delays in resort siting processes by having counties, developers, and the public use those maps for determining whether or not an area is eligible for resort development." Id. at 24.

Petitioners argue that these three purposes are also reflected in the DLCD Destination Resort Handbook (handbook).[15] According to the handbook, the purpose of

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[15]The introduction to the handbook contains the following "Special Note":

> "This handbook is intended to provide general guidance and background information on siting requirements for destination resorts. The handbook is not intended to interpret Goal 8 requirements or substitute for goal or ordinance language." Id. at App. J-2.

Petitioners argue that this "note" means that DLCD believes the handbook reflects directly, without interpretation, the requirements of Goal 8, but does not suggest that other bodies cannot use the handbook in interpreting Goal 8.

Petitioners also contend that, just as formal interpretations of ambiguous statutes by administering agencies are entitled to weight, less formal opinions by administering agency staff are entitled to the same degree of deference. American States Ins. v. Super Spray Service, 77 Or App 497, 501, n 5, 713 P2d 682 (1986). Petitioners argue that we should

mapping is "to clearly indicate, in advance, what areas are available for resort development." Id. at App. J-22. Furthermore, the handbook contains the following question and answer:

> "Can the plan or ordinance allow for refining the map of eligible areas when an application for a resort is made?
>
> "No. It is inappropriate for a county to allow 'clarification' or 'revision' of the adopted map as part of its implementing procedure.
>
> "Although it is possible to more precisely map soils during the site approval process, it is not permitted by the Goal. Such a process defeats the purpose of prior mapping. The Commission's intent was to have counties map eligible areas in the plan based on available information. The Commission understood that these areas were imperfect or incomplete.
>
> "Allowing more 'precise' mapping simply opens the door the Goal intends to be shut in the plan -- that is, the debate over whether a site is appropriate or inappropriate for resort development. Once again the purpose of the mapping requirement is that eligibility be decided in advance through the adopted map." (Emphasis added.) Id. at App-J-29.

Petitioners conclude the handbook and the administrative history of the Goal 8 amendments together make it clear the proper interpretation of Goal 8 is that

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give some degree of deference to the views of the DLCD, as expressed in its handbook, on matters concerning Goal 8 resort siting requirements. However, petitioners also assert they rely on the handbook "only to show that the guidance and background information being given by DLCD to developers and governments is consistent with the legislative history behind the goal and statute; * * * and do not rely on the handbook as an interpretation of Goal 8." (Emphasis in original.) Response to Motion to Strike 15.

the map adopted pursuant to subsection (3)(a) is required to be the sole determinant of whether a proposed destination resort site satisfies the siting criteria of subsection (1). In this case, petitioners argue that the proposed site is shown on the county's adopted Resort Siting Map as having over 50 contiguous acres of prime farm land and, therefore, the county's application of its DR overlay designation to the site violates Goal 8.

Respondents argue petitioners' contention that Goal 8 requires the adopted Resort Siting Map to be the sole determinant of whether a proposed destination resort site satisfies the goal's siting criteria is really an argument that the process provided for in the county plan's "refinement clause," quoted in the text at n 10, supra, violates Goal 8. Respondents contend this argument cannot succeed because the "refinement clause," which was adopted by Ordinance No. 86-29, became acknowledged by operation of law, when that ordinance was not appealed. ORS 197.625(1); 197.830(7). According to respondents, LUBA cannot do what petitioners ask, i.e., hold that a portion of an acknowledged comprehensive plan violates the goals.

Respondents argue that the same kind of attack on an acknowledged ordinance provision was made in League (challenge to UGB amendment adopted pursuant to acknowledged "locational adjustment" ordinance), supra. According to respondents, in League, the Court of Appeals found that the

decision challenged was a "clone of the [acknowledged] ordinance" and, therefore, could not be invalidated without finding that the ordinance itself was also invalid. League, 99 Or App at 338. Respondents argue that this Board cannot "go behind an amendment under review to redetermine the Goal compliance of acknowledged provisions that are not directly or indirectly affected by the amendment." Id. at 337.

In summary, we understand respondents to argue that we cannot find that the appealed plan and zone map amendment violates Goal 8 in the manner alleged by petitioners under these assignments of error because doing so would necessarily be equivalent to finding that the county's acknowledged "refinement clause" violates Goal 8.[16]

It is clear that this Board has authority to review any amendment to an acknowledged comprehensive plan for compliance with the goals. League, supra; 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 97, 718 P2d 753, rev den 301 Or 445 (1986). However, whether a plan amendment complies with a particular goal in certain instances may be determined by the acknowledgment of a plan or land use

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[16]Respondents offer two additional arguments, should we reach the merits of the issue concerning interpretation of the effect of the mapping requirement of Goal 8: (1) the meaning of that goal provision has unambiguously been established, through LCDC's acknowledgment of the county's refinement clause and, therefore, there is no need to resort to administrative history of the goal in interpreting its mapping requirement; and (2) the statement in the preface of the handbook that it is "not intended to interpret Goal 8 requirements," makes the contents of the handbook worthless as guidance in interpreting Goal 8.

regulation provision controlling such an amendment, if the "amendment cannot be invalidated without holding, in all but name, that the acknowledged [plan or land use regulation provision] is also invalid." League, 99 Or App at 338.

In this case, the acknowledged "refinement clause" provides that the mapping of prime farm land on the county's adopted Resort Siting Map is "a generalized representation of soils inventories" developed by the SCS, and that "[m]ore precise soils resource mapping by SCS issue [sic] may be used to interpret the location of existing sites with prime farmland * * * illustrated on the adopted map." Record 883. Under this subassignment, petitioners basically contend that the appealed decision's reliance on "more precise soils resource mapping" by the SCS, rather than on the adopted Resort Siting Map, as the basis for application of the DR overlay designation, violates Goal 8.[17]

All issues raised by petitioners under this subassignment could have been raised in a challenge to the county's adoption of the "refinement clause." However, the time for challenging the goal compliance of the "refinement clause" has passed. In League, supra, slip op at 22, we stated that "[i]f acknowledgment is to have any function it must mean that application of unamended and acknowledged

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[17]We emphasize that petitioners do not contend that the appealed decision in any way differs from, or is inconsistent with, what is allowed by the acknowledged "refinement clause."

plan or land use regulation criteria continues to 'comply with the goals' * * *."

Thus, we conclude that the aspects of the plan and zone map amendment challenged by petitioners under this subassignment of error as violating Goal 8 "mirror provisions of the acknowledged [plan]" and cannot be found inconsistent with Goal 8 without concluding that the acknowledged plan violates Goal 8. League, supra. This we cannot do.

This subassignment of error is denied.

C. Destination Resort Statute

Petitioners argue that the county must comply with state statutes in making land use decisions, regardless of whether its comprehensive plan and land use regulations are acknowledged. Newcomer v. Clackamas County, 92 Or App 174, 196, n 5, 758 P2d 369, modified 94 Or App 33 (1988); Seagraves v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-020, August 29, 1989), slip op 12-16. Petitioners also point out that LDO 246.050(2), quoted in full in section A of this assignment, requires that a plan and zoning map amendment be consistent with ORS ch 197. According to petitioners, this ordinance provision in itself requires that the county's decision be consistent with the destination resort statute, ORS 197.435 to 197.465. McKay Creek Valley Assoc. v. Washington County, ___ Or LUBA ___ (LUBA Nos. 89-027 and 89-028, September 18, 1989),

slip op 20.

Petitioners contend that ORS 197.455(2) and 197.465(1) are virtually identical to subsections (1)(b) and (3)(a) of Goal 8's Destination Resort Siting section. According to petitioners, interpretation of these statutory provisions, therefore, raises identical issues concerning the relationship between the destination resort mapping requirement and siting criteria. Further, petitioners argue that the legislative history of HB 3097, which became the destination resort statute, indicates that one of the bill's purposes was to codify the existing Goal 8 provisions, as interpreted by LCDC, with regard to "large" destination resorts. Petitioners cite testimony by a chief sponsor of the bill before the Senate Agriculture and Natural Resources Committee that the bill "is not intended to revise Goal 8, to overturn decisions made by LCDC, or to in any way substantially change the current rules on large destination resorts." Lord Petition for Review App L-2.

Petitioners contend the enactment of statutory language virtually identical to that of Goal 8, together with the cited indication of legislative intent, demonstrate that the legislature intended, by enacting the destination resort statute, to adopt the meaning of Goal 8, as interpreted by LCDC. Petitioners, therefore, incorporate under this subassignment of error their arguments under the previous subassignment regarding the interpretation and

administrative history of Goal 8. According to petitioners, these arguments support the conclusion that a county map adopted pursuant to ORS 197.465(1) is required by the statute to be the sole determinant of whether a site is eligible for a destination resort under the siting criteria of ORS 197.455.[18]

Respondents agree with petitioners that the relevant statutory requirements are identical to those of Goal 8. However, respondents contend that if the "refinement clause" in the county plan is acknowledged to comply with Goal 8, and Goal 8 and the statute are identical, then the "refinement clause" must comply with the statute as well.[19]

Respondents further argue that ORS 197.465(1) requires only that the county comprehensive plan include a map of areas where destination resorts are permitted pursuant to the criteria of ORS 197.455. Respondents contend the county

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[18]Petitioners also argue that this interpretation of the effect of the statutory mapping requirement is supported by letters by prospective destination resort developers submitted at legislative committee hearings on HB 3097, which object to the mapping provision "precisely because they felt that the resulting maps would provide the only basis for applying the siting criteria." Lord Petition for Review 29, n 11, citing testimony at App. N-2,3,7,8,13,15 and 17. Petitioners argue the cited testimony indicates the authors, developers highly interested in the bill, believed the county siting maps required by the bill would serve as the sole basis for siting decisions. Petitioners contend these letters are reliable and probative indicators of the legislators' purpose in adopting HB 3097.

[19]Respondents also distinguish Newcomer v. Clackamas County, supra, arguing that in that case the acknowledged county ordinance and state statute at issue contained different provisions, and the court simply concluded that "additional and different restrictions in local legislation [do not] obviate the need for compliance with * * * a standard which the state statute makes essential."

complied with this requirement by adopting its Resort Siting Map. Respondents argue the statute does not include any provision either making use of the map the exclusive method by which a county can site a destination resort, or prohibiting use of an implementation measure refining the application of the adopted map on a case-by-case basis. According to respondents, if the legislature had intended the map to be the sole siting criterion it could easily have said so in the statute.[20]

Statutory requirements do not become inapplicable to counties after acknowledgment of their plans and land use regulations. Newcomer v. Clackamas County, 92 Or App at 186, n 5; see Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983). In this case, the county's decision must comply with the destination resort statute (as well as with Goal 8 and its own plan and LDO). We have authority to reverse or remand a land use decision if the county improperly construed an applicable statutory provision. ORS 197.835(7)(a)(D). Thus, we have authority to review the challenged plan and zone map amendment to determine whether it complies with the destination resort statute.

In the preceding section, we found that our determination of whether the county's decision complies with

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[20]Respondents also argue that the letters from prospective developers relied upon by petitioners as indicative of legislative intent behind HB 3097, see n 18, are nothing more than testimony by a particular interest group and are in no way statements of legislative purpose.

Goal 8 is controlled by acknowledgment of the plan provision which the county's decision reflects. Acknowledgment, however, only determines compliance with the statewide planning goals, not with statutes or other legal standards. McKay Creek Valley Assoc. v. Washington County, supra, slip op at 5. The interpretation of applicable provisions of the destination resort statute is a question of law not controlled by LCDC's apparent interpretation of parallel Goal 8 provisions in acknowledging county Ordinance No. 86-29.[21]

We agree with petitioners that the destination resort statute is silent and, therefore, ambiguous with regard to the relationship between application of the mapping implementation measure requirement of ORS 197.465(1) and the siting criteria of ORS 197.455. The only legislative history of the statute cited by petitioners concerning this point is testimony before the Senate Agricultural and Natural Resources Committee on HB 3097 by prospective destination resort developers. Some of those developers apparently understood the bill provisions eventually codified as ORS 197.465(1) to mean that if the adopted map did not identify a site as being permitted for destination

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[21]Of course, to the extent the destination resort statute was enacted to codify the provisions of Goal 8 and LCDC's interpretations thereof, in interpreting the destination resort statute, we will give "some degree of respect" to LCDC's interpretation of parallel provisions of Goal 8. See Hay v. Dept. of Transportation, 301 Or 129, 139, 719 P2d 860 (1986).

resorts, the site could not be approved for destination resort use through a demonstration of compliance with the siting criteria of ORS 197.455.[22]

The beliefs of these prospective developers are not reliable indicators of the legislative intent in enacting the destination resort statute. The legislature's failure to alter the proposed mapping requirement in response to the developers' testimony could mean that it agreed with and intended to adopt the interpretation feared by the developers. However, it could also mean that the legislature did not agree with the developers' interpretation of the proposed mapping requirement and, therefore, did not think it necessary to amend HB 3097.

We also agree with petitioners that the statute's use of language identical to the Goal 8 provisions at issue in this case, and the testimony by the chief sponsor of HB 3097 that the bill was not intended to change the existing Goal 8 requirements for siting large destination resorts, indicate that the destination resort statute was intended to codify the parallel provisions of Goal 8, as they were interpreted at the time the statute was enacted. Because of this, the administrative history of the 1984 Goal 8 amendments is

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[22]Actually, not all the testimony cited by petitioners expresses a belief that under HB 3097, destination resort sites could not be approved unless shown as permitted on the adopted map. Some simply expresses opposition to HB 3097 or the mapping requirement in general. Lord Petition for Review App L-7,8,17.

relevant to interpretation of parallel provisions in the destination resort statute as well. However, we disagree with petitioners that this administrative history shows that the mapping required to be adopted as part of county plans is also required to be the sole determinant of whether a destination resort can be approved on a particular site.

In the administrative history materials cited by petitioners, the required mapping is referred to as providing "guidance" or creating "guidelines" for destination resort siting. Lord Petition for Review App. D-5, L-7. This terminology does not support petitioners' interpretation that inclusion on such maps is a mandatory siting criterion. See ORS 197.015(9); Downtown Community Assoc. v. City of Portland, 80 Or App 336, 340, 722 P2d 1258, rev den 302 Or 86 (1986). The administrative history also indicates that LCDC intended to adopt objective and explicit siting standards for approval of destination resorts. However, the references concerning explicit standards apparently occurred in discussions concerning the nature of proposed siting standards themselves, not in reference to the proposed mapping requirement. In conclusion, we do not find the administrative history of the 1984 Goal 8 amendments instructive as to the intended relationship of the Goal 8 destination resort siting

criteria and implementation measure mapping requirement.[23]

Petitioners are correct that some weight should be given, in interpreting the destination resort statute, to LCDC's and DLCD's interpretations of the identical Goal 8 provisions, as LCDC and DLCD are charged with adopting and administering the statewide planning goals. Hay v. Dept. of Transportation, supra. However, the only indication of how LCDC and DLCD interpreted the relevant Goal 8 provisions at the time the statute was enacted is that they had allowed county Ordinance No. 86-29, including the "refinement clause," to become acknowledged.[24] This supports, although indirectly perhaps, an interpretation of Goal 8 as allowing approval of a destination resort site not shown as permitted on the adopted county map, through compliance with the Goal 8 siting criteria.

The DLCD handbook, on the other hand, clearly expresses

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[23]We note petitioners also cite statements in the administrative history of the 1984 Goal 8 amendments which indicate that DLCD staff believed that county adoption of the required siting maps as part of county plans could be reviewed by LCDC either through the postacknowledgment plan amendment or periodic review processes. However, this would seem to be true of any amendment to an acknowledged comprehensive plan. It does not necessarily mean that adoption of a map reviewable in this way should preclude case-by-case demonstrations of compliance with the destination resort siting criteria.

[24]No assertion has been made in this case that proper postacknowledgment plan amendment procedures, including the required notice to DLCD, were not followed by the county in adopting Ordinance No. 86-29.

an opposite interpretation.[25] However, that publication did not exist at the time the statute was enacted. Furthermore, it has not been adopted by LCDC, and contains the disclaimer quoted above, stating it is not "intended to interpret Goal 8 requirements." Lord Petition for Review App. J-2. We conclude the handbook is not entitled to significant weight in interpreting the destination resort statute.

The destination resort statute establishes criteria for determining where a destination resort cannot be sited. ORS 197.455. It also requires acknowledged comprehensive plans to "include implementing measures which * * * map areas where a destination resort * * * is permitted pursuant to ORS 197.455." ORS 197.465(1). The county has adopted as part of its plan a map which purports to serve that purpose.[26] The county has also adopted plan provisions (the "refinement clause") and ordinance provisions (LDO Chapter 246) which allow it to refine its mapping of areas where destination resorts are permitted, with regard to prime farm land (and cubic foot site class 1 or 2 forest lands), through determination of compliance with the

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[25]We note, to the extent the position expressed by DLCD in the handbook represents a policy concerning destination resort siting which it considers necessary to carry out the destination resort statute and Goal 8, rather than an interpretation of the statute and Goal 8, that policy is required to be adopted as an administrative rule or goal. ORS 197.040(1)(c).

[26]We express no opinion on whether the adopted Resort Siting Map by itself is adequate to comply with ORS 197.465(1).

statutory and goal siting criteria on a case-by-case basis. Such a process is not precluded by the destination resort statute.

We agree with respondents that if the legislature intended to require that a destination resort not be approved unless an adopted county plan map showed that area as permitted for destination resort siting, it would have said so.[27] We conclude that designation of a proposed site as permitted for destination resorts on the county's adopted Resort Siting Map is not required for approval under the destination resort statute.

This subassignment of error is denied.

D. LDO 246.040(1) and 246.050(2)

LDO 246.040(1) and 246.050(2) are quoted in section A of this assignment. LDO 246.040(1) provides that the DR overlay designation may be applied to any rural property, except that on the adopted Resort Siting Map (unless a Goal 2 exception is taken). LDO 246.050(2) provides that a proposed destination resort must be "consistent with" the adopted Resort Siting Map.

Petitioners argue that these LDO provisions are inconsistent with the "refinement clause." Petitioners

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[27]We note the legislative findings set out at ORS 197.440 indicate a need to provide destination resorts in the state, and to establish a less difficult and costly process for their approval than the previously used goal exception process, but give no indication that ability to conclusively rely on adopted county siting maps was a legislative concern.

further argue that under these LDO provisions, the county cannot approve application of the DR overlay designation to a site excluded by the adopted Resort Siting Map, as petitioners claim the county did in this case, without adoption of a Goal 2 exception, which the county did not do. Therefore, according to petitioners, the county's decision is inconsistent with these LDO provisions.

The "refinement clause," LDO 246.040(1) and LDO 246.050(2) were all adopted at the same time, by Ordinance No. 86-29. LDO 246.050(2) is in the ordinance section establishing criteria for approval of the DR plan and zone designation. LDO 246.040(1) is in the ordinance section establishing application and review procedures. Interpreting these three provisions together, we believe it is clear that county approval of a DR designation for a site shown as excluded on the large scale Resort Siting Map because of the presence of prime farm land (or cubic foot site class 1 or 2 forest soils) would, nonetheless, be "consistent" with that map, _if_ it is demonstrated through the "refinement" process that the site satisfies the relevant siting criterion. This is what occurred in this case and under such a circumstance, we do not believe that the LDO requires a goal exception to be adopted.

This subassignment of error is denied.

The Lord first assignment of error and Foland second assignment of error are denied.

SECOND ASSIGNMENT OF ERROR (LORD)

> "The county erred by determining that the propose [sic] site for the Clear Springs Destination Resort does not contain 50 or more contiguous acres of unique or prime farmland identified and mapped by the United States Soil Conservation Service."

FIRST ASSIGNMENT OF ERROR (FOLAND)

> "The County erred in ordering a Destination Resort designation for land containing more than 50 contiguous acres of prime farm land."

In these assignments of error, petitioners challenge the county's determination that the proposed destination resort complies with the criterion of ORS 197.455(2) and Goal 8(1)(b) that destination resorts not be approved "[o]n a site with 50 or more contiguous acres of * * * prime farmland identified and mapped by the United States Soil Conservation Service * * *."[28]

A. Introduction

The United States Soil Conservation Service (SCS) is required by 16 USC § 590 and 7 USC § 4242 (Farmland Protection Policy Act) to carry out an "Important Farmlands Inventory." As part of this inventory, the SCS is required to define, identify and map unique and prime farmlands. Rules for conducting this inventory are found in 7 CFR

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[28]The county plan contains the virtually identical approval criterion that the DR designation "shall not be applied [to] sites with 50 or more contiguous acres of prime farmland identified and mapped by the Soil Conservation Service * * *." Record 883.

§ 657. 7 CFR § 657.4(a) provides, in relevant part:

"Each SCS State Conservationist is to:

"(1) Provide leadership for inventories of important farmlands for the State, county, or other subdivision of the State. * * *

"(2) Identify the soil mapping units within the State that qualify as prime. * * *

"(3) Prepare a statewide list of:

"(i) Soil mapping units that meet the criteria for prime farmland;

"* * * * *"

7 CFR §657.5(a)(1) sets out the following general definition of "prime farmlands":

"Prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber and oilseed crops, <u>and is also available for these uses (the land could be cropland, pastureland, rangeland, forestland, or other land, but not urban built-up land or water)</u>. It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops <u>when treated and managed, including water management, according to acceptable farming methods</u>. * * *" (Emphasis added.)

In addition, 7 CFR § 657.5(a)(2)(i) - (viii) set out detailed technical criteria for determining whether soils qualify as prime farmlands.

The county determination challenged under these assignments of error does not rely on a published SCS Soil Survey or Important Farmlands Inventory for Jackson County. Rather, it relies on two letters from individual SCS staff

members addressing the subject property. The first, dated October 26, 1987 and addressed to intervenor's representative, is from the district conservationist in Medford. It enclosed "an updated soils map for the Provost property and a summary showing the approximate acreage in each mapping unit." Record 731. The district conservationist also "indicated on the summary whether or not the mapping unit is considered 'prime farmland' by SCS." Id.

The map and summary indicate that the proposed destination resort site contains 50.9 contiguous acres of prime farmland in map unit 46A and 28.0 acres of prime farmland in map unit 38A. They also indicate that these prime farmland areas are separated from one another by 79.7 contiguous acres in map unit 24A. The summary identifies map unit 24A as "Prime Farmland If Drained." Record 732. With regard to the status of the 24A map unit, the letter states:

> "* * * this soil is considered 'prime' only if it has been drained. In the case of the [24A] soil situated on the Provost property, it is presently in an undrained condition and would not be considered 'prime farmland.'" Record 731.

With regard to the 50.9 acre 46A map unit, the letter states:

> "[It] consists of two farming units of approximately 16.3 acres and 33.3 acres separated by Clayton Creek. The balance of this mapping unit, 1.3 acres[,] is adjacent to and along Clayton Creek, and is not considered a farming

> unit within itself. Included in the 33.3 acre unit is a farmstead area of approximately 3.8 acres. This area is presently not available for farming and would not be considered as farmland by SCS." Id.

On March 31, 1989, the county sent a letter to the SCS state conservationist in Portland, calling his attention to the statutory, goal and plan prime farmlands siting criterion for destination resorts and asked for his "assistance in interpreting whether or not [intervenor's] application complies with the [destination] resort siting criteria regarding soils." Record 188.

The second letter relied on by the county is the reply of the state conservationist to the county's request, dated April 10, 1989. This letter verifies that the soil map and list of prime farmland soils in the district conservationist's letter are up to date and correct. Record 186. With regard to the status of the 24A soil type, the letter states:

> "I would assume Mr. Weber had previous knowledge of the property or did an on-site inspection to determine the soil 24A * * * had not been drained adequately enough to qualify for prime farmland.
>
> "The criteria [of 7 CFR § 657.5(a)(2)(iv)] states 'The soils either have no water table or have a water table that is maintained at sufficient depth during the cropping season to allow cultivated crops common to the area to be grown.' This requirement was apparently not met in Mr. Weber's judgment." Record 187.

The state conservationist's letter also comments on the status of the farmstead in the 46A map unit as follows:

> "The issue dealing with the homestead [sic] being deducted from prime farmland is a decision for your Planning Commission. The definition of prime farmland was published in the Federal Register in Volume 43, No. 21, January 31, 1978. The general criteria in the published definition states:
>
>> "'Prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber and oilseed crops, and is also available for these uses (the land could be cropland, pastureland, rangeland, forestland, or other land, but not urban built-up land or water).'
>
> "This statement is what Mr. Weber probably used to recommend subtracting the acreage of the farmstead from the prime farmland unit.
>
> "The intent of excluding urban built-up areas was to avoid adding acreage of cities and urban areas already dedicated and zoned to these urban uses. The interpretation whether the farmstead is considered urban build-up [sic] land is one the County Planning Commission should make. That decision is outside the Soil Conservation Service's expertise and knowledge of the County ordinance and its intent." Record 186-187.

The state conservationist's letter is silent on the status of the 1.3 acres of the 46A map unit along Clayton Creek.

The county made independent conclusions that the proposed destination resort site complies with the statutory, goal and plan prime farmlands criterion based on (1) the SCS data and reasoning contained in the district conservationist's letter (Record 25-26), and (2) its own application of the 7 CFR § 657.5(a)(1) general definition of "prime farmlands" to the evidence in the record (Record

24-25).

In analyzing the arguments made by the parties under these assignments of error, it is helpful to clarify on which specific points the parties disagree. The parties agree that the identification of prime farmlands on the subject property must be based on SCS soils mapping and employ SCS criteria for identifying prime farmlands. However, the parties disagree on whether the final identification of prime farmlands must be made by the SCS, based on preexisting, published SCS soils maps and lists identifying prime farmland soil types, or can be made by the county, relying on SCS prime farmlands criteria and SCS soils maps prepared specifically for the proposed destination resort site.

There is no disagreement between the parties concerning the soil unit map or the table of acreage in each map unit found in the district conservationist's letter. There is no disagreement concerning the classification of map units as prime or nonprime farmlands, except with regard to unit 24A. However, there is disagreement concerning the subtraction of the area along Clayton Creek and the farmstead area from the 50.9 contiguous acres of prime farmland in map unit 46A.

B. Identification of Prime Farmland

Petitioners argue that the plain language of ORS 197.455(2) and Goal 8(1)(b), and the legislative or administrative history behind each provision, indicate that

the legislature and LCDC intended counties to rely on "existing soil maps and standards developed by the SCS, rather than making their own interpretations about what constitutes 'prime farmland.'" Lord Petition for Review 33. Petitioners quote the following testimony by DLCD staff concerning the proposed prime farmlands criterion at the April 26, 1984 LCDC meeting on the proposed Goal 8 amendments:

> "* * * It's clear that we want to exempt from this expedited process the most valuable of the agricultural lands in the state. What has been difficult is trying to come up with the definition of what those most valuable lands are. The Soil Conservation Service has developed an inventory of what are considered to be prime farm lands which they considered to be the best and it is, I believe, 2.3 million acres of Oregon's agricultural land." (Emphasis added by petitioners.) Lord Petition for Review App. E-2-3.

DLCD staff further discussed the problem of identifying valuable farm lands at an October 10-12, 1984 LCDC meeting:

> "* * * The problem is we don't have a clear absolute test that identifies what those farm lands are.
>
> "The two that we have discussed are: prime and unique lands, which are mapped by the Soil Conservation Service or can be readily mapped using their data, and a new term which we have invented for this test 'high value crop areas. * * *" (Emphasis added by petitioners.) *Id*.at App. I-3.

In response to a LCDC commissioner's question of whether SCS had actually done the mapping of prime and unique soils,

DLCD staff testified:

> "Well in a number of cases SCS has not completed the mapping of prime and unique soils, but what they have on a statewide basis is a list of which soils are prime and unique. So a county planner, by taking his soil survey and that list of soils, can pretty readily identify where the prime and unique soils are." Id. at App. I-5.

Petitioners argue that the statements quoted above indicate that LCDC intended for counties to rely on preexisting SCS prime farmland maps for the county or preexisting SCS soil survey maps for the county in conjunction with preexisting SCS lists of prime farmland soil types.

Petitioners contend that a comparison of the Goal 8 prime farmland criterion with the goal's sensitive big game habitat criterion lends further support to this interpretation. Goal 8(1)(f) provides that destination resorts shall not be sited in

> "[e]specially sensitive big game habitat as generally mapped by the Oregon Department of Fish and Wildlife in July 1984 and as further refined through development of comprehensive plans implementing this requirement."

According to petitioners, the inclusion of a county refinement provision in this goal siting criterion, the absence of such a criterion in the prime farmland standard, suggests that the goal intends for counties to rely on the maps and standards developed by SCS, rather than make their own identifications of prime farmlands.

Intervenor argues that the issue under this

subassignment is not whether Goal 8 requires the county to rely on "preexisting" SCS maps, as petitioners argue, but rather whether the county complied with its acknowledged destination resort siting process. If the county did comply with its acknowledged siting process, then its decision must comply with Goal 8. Intervenor also argues that the "refinement clause" does not limit the county to relying on "preexisting" SCS prime farmland or soil survey maps for the county. Intervenor contends that the "refinement clause" specifically authorizes county reliance on "more precise" SCS soils mapping for a particular site.

Our determination of whether the county's decision to amend its plan and zone map to apply the DR overlay designation to the subject property complies with the prime farmland siting criteria of Goal 8(1)(b) and ORS 197.455(2) is not controlled by LCDC's acknowledgment of the destination resort siting process set out in the county plan and LDO. The statute, goal and plan contain virtually the same prime farmland siting criterion. The issue under this subassignment of error is the correct interpretation of that criterion.[29]

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[29]The interpretation and application of the "refinement clause" is not directly relevant to the issues raised by petitioners under this subassignment. The "refinement clause" merely allows the county to rely on "more precise soils resource mapping by SCS issue," rather than the Resort Siting Map, in determining compliance with the prime farmlands criterion. The "refinement clause" does not require that the SCS "more precise soils resource mapping" be issued in any particular format, or authorize the

The statute, goal and plan all say that prime farm land must be "identified and mapped" by the SCS.[30] We believe this means the SCS must make the determination identifying prime farmlands, a determination on which the county must rely in making its determination of compliance of a particular site with the prime farmlands criterion. We, therefore, conclude the county exceeded the authority granted it under the statute, goal and plan when it made its own determination identifying prime farmlands on the subject property, even though it purported to apply SCS standards.[31]

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county to make its own identification of prime farmlands on the subject property.

[30]We note the requirement for identification by the SCS is different from that in the Goal 3 definition of "agricultural lands," which requires soil classes to be identified in the SCS Soil Capability Classification System. Thus, Goal 3 requires the SCS classification system to be used in identifying soil classes, but does not require that the identification be made by the SCS.

[31]However, this conclusion is not a sufficient basis for reversal or remand in this case, as the county alternatively based its determination of compliance on the prime farmlands criterion on SCS identification of less than 50 contiguous acres of prime farmlands on the subject property:

> "* * * The evidence indicates that the SCS has provided a more precise soils resource mapping for the subject property and has concluded that there are less than 50 contiguous acres of prime farmland on the resort site. The Board [of Commissioners] also acknowledges the SCS's reasoning for excluding the water and builtup areas from the 50.9 acre total and the undrained area from Mapping Unit 24A * * *. Based on the above findings and the Board's consideration of all the evidence in the record on this siting criterion, the Board concludes it is reasonable to rely upon the conclusion of Mr. Weber of SCS that there are not 50 or more contiguous acres of prime farmland on the site." Record 25-26.

However, the statute, goal and plan prime farmland criterion says nothing about the timing or format of the identification and mapping of prime farmlands by the SCS. The statements by DLCD staff in the hearings on the 1984 Goal 8 amendments indicate they thought that the way the prime farmlands criterion would generally be applied would be that counties would rely on (1) published SCS county prime farmlands maps, or (2) published SCS county soil surveys plus a published state or countywide list of prime farmlands soil types. However, nothing in the prime farmland criterion or its legislative and administrative history indicates that the required SCS identification and mapping of prime farmlands must take place in a particular manner. If the legislature or LCDC had intended that only a particular form of SCS identification be relied upon, they would have so provided.

Accordingly, we conclude the county did not err in relying on site-specific SCS identification and mapping of prime farmlands issued in letters by the district and state conservationists.[32]

Petitioners' challenges to this basis for the county's decision of compliance with the prime farmlands criterion are addressed in sections C and D, infra.

[32]However, 7 CFR § 657.4(a) gives the state conservationist the responsibility for identifying the soil mapping units which qualify as prime farmland and for developing and publishing an inventory of important farmlands, including prime and unique farmlands. Where, as here, the state conservationist reviewed an identification of prime farmlands on the subject property by a district conservationist and issued a subsequent

This subassignment of error is sustained, in part.

C. Map Unit 24A

Petitioners point out the SCS identified this 79.7 acre map unit as "prime farmland if drained." Record 732. Petitioners contend the district conservationist concluded this portion of the subject property is not prime farmland because "it is presently in an undrained condition." Record 731. Petitioners argue this conclusion reflects application of the wrong standard, because 7 CFR § 657.5(a)(1) defines prime farmland as having the ability "to economically produce sustained high yields of crops when treated and managed, including water management, according to acceptable farming methods." (Emphasis added.) Under this definition, according to petitioners, the present condition of the soil unit is immaterial, it can only be determined to be nonprime farmland if drainage would be beyond "acceptable farming methods."[33]

Intervenor argues that the county is entitled to rely on the conclusion of the SCS that map unit 24A is not prime farmland. Intervenor also points out that this unit is not identified as prime farmland on the "preexisting" SCS maps

letter regarding that identification, we believe the opinion of the state conservationist must control if there is any conflict between the two. In these circumstances, the opinion of the state conservationist becomes the "official" SCS identification of prime farmlands.

[33]Petitioners also cite evidence in the record indicating that this portion of the property is flood irrigated. Record 201, 619. Petitioners speculate that the property might not be considered to be in an undrained condition if another method of irrigation were employed.

or the county's Resort Siting Map.

As we stated above, the statute, goal and plan require the SCS to identify prime farmland. We agree with intervenor that the county is entitled, in fact required, to rely on the SCS's determination of whether a map unit is prime farmland. Furthermore, we do not believe we have the authority to review the SCS's identification of prime farm land for compliance with applicable SCS standards. Our review is of the county's decision. In this instance, the county's decision is limited to determining whether the SCS has identified the map unit as prime farmland.

Thus, the only question to be resolved under this subassignment is whether the county was correct in concluding that the SCS identified map unit 24A as not being prime farmland. The district conservationist so stated in his letter. Record 731. His conclusion was endorsed by the state conservationist. Record 187. The county correctly determined that the SCS did not identify unit 24A as prime farmland.

This subassignment of error is denied.

D. Map Unit 46A

The district conservationist mapped this 50.9 acre soil unit and listed it as prime farmland. Record 732. The state conservationist states that the soil map used is the most current available for the subject property and that the district conservationist's list of prime farmlands soil

types is correct. Record 186. The only issue we need address under this subassignment is whether the county correctly determined that the SCS identified the 1.3 acres along Clayton Creek and the 3.8 acre farmstead as being excluded from its identification of this map unit as prime farmland.[34]

1. Land Along Clayton Creek

There is no mention of the 1.3 acres along Clayton Creek in the state conservationist's letter. The district conservationist's letter states:

> "The mapping unit 46A * * * consists of two farming units of approximately 16.3 acres and 33.3 acres separated by Clayton Creek. The balance of this mapping unit, 1.3 acres is adjacent to and along Clayton Creek, and is not considered a farming unit within itself. * * *" (Emphasis added.) Record 731.

The district and state conservationists identify the 50.9 acre soil type 46A mapping unit as prime farmland. The 1.3 acres along Clayton Creek is part of that 50.9 acres of type 46A soil. Whether it can be considered part of, or in itself, a farming unit has no apparent bearing on its classification as prime farmland. We, therefore, conclude that the SCS did not exclude the 1.3 acres along Clayton

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[34]Petitioners additionally argue that excluding the area along Clayton Creek and the farmstead from the identified prime farmland area does not comply with the provisions of 7 CFR § 657.5(a)(1) and 658.2(a) which exclude "urban built-up land or water" from the definition of prime farmland. However, as we explained under the preceding subassignment, our review extends only to whether the county correctly determined what land the SCS identified as prime farmland.

Creek from its identification of map unit 46A as prime farmland. The county erred by relying on SCS exclusion of these 1.3 acres in its determination of compliance with the statute, goal and plan prime farmlands standard.

2. Farmstead

The district conservationist's letter states that "a farmstead area of approximately 3.8 acres * * * is presently not available for farming and would not be considered as farmland by SCS." Record 731. This could be interpreted as identifying the 3.8 acres to not be prime farmland. However, the state conservationist does not endorse this exclusion. His letter states:

> "The issue with the homestead being deducted from prime farmland is a decision for [the county] Planning Commission. * * *
>
> "[Quotes 7 CFR §657.5(a)(1) definition of prime farmlands.] This statement is what Mr. Weber probably used to recommend subtracting the acreage of the farmstead from the prime farmland unit.
>
> "The intent of excluding urban built-up areas was to avoid adding acreage of cities and urban areas already dedicated and zoned to these urban uses. The interpretation whether the farmstead is considered urban build-up [sic] land is one the County Planning Commission should make. That decision is outside the Soil Conservation Service's expertise and knowledge of the County ordinance and its intent." Record 186-187.

The state conservationist's letter states that the SCS does not determine that the farmstead is excluded from the identified 46A prime farmland mapping unit. It states that

the SCS cannot make such a determination.[35]

We conclude that the net result of the district and state conservationists' letters is that the SCS identifies and maps the 50.9 acre 46A map unit as prime farmland, and does not identify any exclusions from that prime farmland map unit. Therefore, the county erred in concluding that the SCS identified and mapped the subject property as containing less than 50 contiguous acres of prime farmland. The county's determination of compliance with the statute, goal and plan prime farmlands siting criterion is dependent on this erroneous conclusion.

This subassignment of error is sustained.

The Lord second assignment of error and Foland first assignment of error are sustained, in part.

FOURTH ASSIGNMENT OF ERROR (LORD)

> "The county erred by concluding the applicant demonstrated compliance with approval criteria requiring that adequate water and sewer services be provided."

Under this assignment of error, petitioners argue the county failed to comply with subsection (7) of LDO 246.050

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[35]The state conservationist suggests that the county should make the determination on whether the farmstead is "urban built-up land." The county did so. Record 24-25. However, as we explained previously, the statute, goal and plan prime farmlands criterion require the county to rely on the SCS identification of prime farmland. Although the SCS certainly could consult with the county, the SCS must determine whether the exclusion for "urban built-up areas" applies in these circumstances. Unless the SCS does so, the exclusion does not apply, and the area remains identified as prime farmland.

("Criteria for Approval of a Destination Resort Overlay Designation"). LDO 246.050 provides that "a minor Comprehensive Plan and Zoning Map amendment, to provide for a Destination Resort Overlay District, shall be approved upon findings the following [listed] criteria are satisfied * * *." There is a basic disagreement between the parties with regard to the applicability of the standards of LDO 246.050 to a county decision approving a resolution of intent to rezone and conceptual site plan for a proposed destination resort. We address this issue first, before turning to petitioners' specific challenges under this assignment of error.

A. Applicability of LDO 246.050

Petitioners argue that the standards of LDO 246.050 are mandatory approval criteria for county approval of a resolution of intent to rezone (resolution) and conceptual site plan for a destination resort. Petitioners contend the county must find compliance with the standards of LDO 246.050 in approving a resolution/conceptual site plan. According to petitioners, the county may not defer its demonstration of compliance with the criteria of LDO 246.050 to the preliminary or final development plan stages, through the adoption of conditions of approval which simply restate the resolution/conceptual site plan approval standards. MACC/ECOS v. Clackamas County, 8 Or LUBA 78 (1983). Petitioners argue that if the county wishes to make the

standards of LDO 246.050 approval criteria for preliminary or final development plan approval, rather than resolution/conceptual site plan approval, it should amend its ordinance. See West Hills & Island Neighbors v. Multnomah County, 69 Or App 782, 683 P2d 1032, rev den 298 Or 150 (1984).

Intervenor argues that the standards of LDO 246.050 are not mandatory criteria for approval of a resolution/conceptual site plan for a destination resort. According to intervenor, "LDO 246.050 clearly states this requirement must be satisfied prior to the redesignation of the property for a destination resort, not prior to the conceptual site plan approval." Intervenor's Brief 38, n 10. We understand intervenor to argue that the standards of LDO 246.050 are not required to be satisfied until the county adopts an ordinance amending its plan and zoning map to apply the DR designation, which will occur some time after approval of the destination resort final development plan.[36] Intervenor also argues that, even if the standards

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[36]Conceptual site plan approval may only occur through approval of a resolution of intent to rezone pursuant to LDO 277.040. LDO 246.040(5)(B). Fulfillment by the applicant of the conditions contained in such a resolution makes the resolution "a binding commitment on the Board of Commissioners." LDO 277.040. Upon the applicant's compliance with the conditions, the county must adopt a plan and zoning map amendment in accordance with the resolution. Additionally, subsection (5)((G) of LDO 246.040 (Destination Resort "Application and Review Procedures") allows the county board of commissioners to adopt an ordinance amending the plan and zoning map to apply the DR overlay designation only after final development plan approval has been granted.

of LDO 246.050 were mandatory resolution/conceptual site plan approval criteria, the county could defer its determination of compliance with such mandatory approval criteria to the preliminary or final development plan approval stage, so long as "its regulations or decision require the full opportunity for public involvement" provided in the resolution/conceptual site plan proceeding. Holland v. Lane County, ___ Or LUBA ___ (LUBA No. 87-106, April 13, 1988) (Holland), slip op 19.

The county's decision identifies LDO 246.050 and 277.080 as containing the standards applicable to its approval of the resolution/conceptual site plan. The county presents its view of the manner in which LDO 246.050 applies to its approval of the resolution/conceptual site plan as follows:

> "Because this is the first step in a multi-step process, the Board [of Commissioners] has acknowledged that with regard to some mandatory approval criteria and standards, it is neither feasible or [sic] required that the applicant establish full compliance at this stage. For some criteria, until the county has determined the feasibility of the destination resort, it is not appropriate to require the applicant to incur the costs associated with demonstrating the means by which such approval criteria and standards can be satisfied. Satisfaction of other approval criteria and standards is more appropriate at a later stage of the approval process after more details of the resort development have been established.

> "Therefore, the Board finds that at this conceptual site plan stage, there are some criteria and standards with which the applicant need not establish full compliance at this time. Rather, so long as the applicant has met a threshold determination of the feasibility of compliance with applicable criteria and standards, conditions of approval are an appropriate means to insure the criteria and standards will be fully satisfied. Additionally, in situations where compliance is more appropriately determined at a later stage in these proceedings, [LUBA] has determined that the county may defer a determination of compliance to a later stage in the development review process, where it will be subject to the same opportunity for review and involvement as in this initial stage. Full compliance with all approval criteria and standards is established or made a condition of approval of this order." (Citations omitted.) Record 13-14.

LDO Chapter 246 establishes a three stage review process for destination resort approval. First, the county approves a conceptual site plan, through adoption of a resolution of intent to rezone. LDO 246.040(5)(B). Second, the county approves a preliminary development plan. LDO 246.040(5)(C)-(D). Third a final development plan is approved. LDO 246.040(5)(E)-(F). If (1) the final development plan is approved, and (2) the applicant complies with the conditions of resolution/conceptual site plan approval, the county is obligated to adopt an ordinance amending the plan and zone map in accordance with the resolution. LDO 246.040(5)(G); 277.040.

The critical question is whether LDO 246.050 establishes criteria for approval of the

resolution/conceptual site plan (the first stage of the review process), or criteria which simply must be satisfied by the time the ordinance carrying out the final amendment of the plan and zoning map is adopted. LDO 246.060 ("Contents of Application for Approval of Destination Resort (DR) Overlay") establishes only the information required to be included in a conceptual site plan.[37] LDO 246.040(5)(C) states that approval of an intent to rezone "shall be based on a conceptual site plan for the resort." LDO 246.040(5)(B) states that a conceptual site plan may be approved "by a resolution of intent to rezone pursuant to [LDO] 277.040," if the conceptual site plan meets criteria set forth in the plan, LDO Chapter 246 and elsewhere in the LDO.

The only provision in LDO Chapter 246 which conceivably establishes criteria for resolution/conceptual site plan approval is LDO 246.050 ("Criteria for Approval of a Destination Resort Overlay Designation").[38] One of these criteria is that the proposed development can be accomplished "in accordance with the conceptual site plan." LDO 246.050(5). Other criteria reflect the information

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[37]By contrast, LDO 246.070 ("Preliminary Development Plan Approval") and 246.080 ("Final Development [Plan] Approval") each contain provisions establishing information required to be in, and approval criteria for, preliminary and final development plans, respectively.

[38]If LDO 246.050 does not establish approval criteria for the first stage of the destination resort review process, then there are no criteria in LDO Chapter 246 for the first stage of the process.

required to be in the conceptual site plan. Compare LDO 246.050(1), (4), (6), (7) with 246.060(2), (5)-(7). Some of the criteria set out in LDO 246.050 are paralleled by more detailed preliminary development plan approval criteria in LDO 246.070(4) concerning the same subject.

Interpreting the relevant portions of LDO Chapters 246 and 277, as a whole, we agree with petitioners that the standards of LDO 246.050 are approval criteria for resolution of intent to rezone/conceptual site plan approval.[39] We also agree with petitioners that the requirement to comply with criteria applicable to the resolution/conceptual site plan stage of the process cannot be avoided by deferring those determinations to the preliminary development plan stage of the review process, through restatement of the first stage approval criteria as conditions of approval for the second stage.[40] See

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[39]We note that interpretation of what these criteria for resolution/conceptual site plan approval actually require will be affected by factors such as what information LDO 246.060 requires to be in the conceptual site plan, and whether there are more detailed approval criteria on the same subject which are applicable to preliminary development plan approval. However, we do not agree with the county that it can decide on an ad hoc basis that satisfaction of particular resolution/conceptual site plan approval criteria is "more appropriate at a later stage of the approval process." Record 13. If the county wishes to make some of the standards in LDO 246.050 applicable only to preliminary or final development plan approval, it must amend its ordinance. West Hills & Island Neighbors v. Multnomah County, supra.

[40]This case is distinguishable from Holland, supra, which concerned approval of a zone change. The county code provision at issue in Holland provided that "prior to the * * * rezoning of land * * * all requirements to affirmatively demonstrate adequacy of long-term water supply must be met * * *." Holland, slip op at 17. The challenged ordinance did not find

MACC/ECOS v. Clackamas County, 8 Or LUBA at 86.

B. Sewer and Domestic Water

LDO 246.060(5) requires that a destination resort conceptual site plan include:

> "* * * preliminary studies describing feasibility of and method for providing a water supply system [and] sewage management system * * *."

LDO 246.050(7) requires that the following criterion for approval of a destination resort resolution/conceptual site plan be satisfied:

> "Adequate sewer, water and public safety services will be provided on site to serve the proposed development * * *"

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that the requirement to demonstrate adequacy of long-term water supply had been satisfied. Rather, it adopted a condition requiring that such a demonstration be made within 90 days of ordinance adoption. However, the ordinance also provided that the change of zone would not occur until the condition was satisfied.

We concluded in Holland that the deferral of the demonstration of compliance allowed by the condition did not violate the code provision, because the rezoning would not occur until the required demonstration was made. We also concluded the county could not defer, i.e. postpone, its determination of compliance with an applicable zone change criterion "unless its regulations or decision require the full opportunity for public involvement provided in this initial [portion of the] zone change proceeding." Holland, slip op at 19. Finally, we also noted that the parties in Holland did not question whether a "final" rezoning decision had in fact been made in these circumstances.

In this case, the standards established by LDO 246.050 are criteria for resolution/conceptual site plan approval. Unlike Holland, the challenged order does not provide that approval of the resolution/conceptual site plan will not take effect until all standards applicable to resolution/conceptual site plan approval are satisfied. Rather, it provides that compliance with some of the resolution/conceptual site plan approval standards will be demonstrated through preliminary development plan approval, a process which has its own distinct approval criteria, including consistency with the conceptual site plan approved at the earlier stage. LDO 246.070(4)(A).

With regard to sewer and domestic water services, the county found:

> "* * * The applicant has proposed to install an on-site sewage lagoon system. The applicant has the right to pursue other methods of sewer service as authorized by State statute and Goal 8.
>
> "For whichever system the applicant proposes to be implemented, in accordance with Condition 4(A), the applicant is required to establish how adequate sewer service will be provided prior to approval of the preliminary development plan, and show compliance with all state, local and federal requirements, including all DEQ requirements for site evaluation and water pollution control facilities permits, prior to final development approval. * * *
>
> "* * * * *
>
> For provision of domestic water supply, the applicant has proposed an on-site groundwater well. As an alternative, as with provision of sewer services, the applicant has the right to pursue other methods of water service as authorized by the State statute and Goal 8. For whichever system the applicant proposes to implement, in accordance with Condition 3(C) [sic 4(C)], the applicant is required to establish how adequate water service will be provided prior to approval of the preliminary development plan, and show compliance with all state and local requirements prior to final development approval." Record 57-58.

Conditions 4(A) and 4(C) referred to above basically require the applicant to submit proposals for provision of sewage treatment and domestic water supply as part of the preliminary development plan application. They also provide that the applicant must establish how sewage disposal and domestic water service will be provided prior to approval of

the preliminary development plan. Record 72-74.

Petitioners argue the county's decision fails to demonstrate compliance with LDO 246.050(7), and improperly relies on the applicant's compliance with condition 4(A) and (C) to resolve "the very basic issues of identifying the method to be used for providing water and sewer services and demonstrating whether those methods will be adequate to meet the applicant's needs." Petition for Review 47. Petitioners contend the county has impermissibly deferred until a later stage of the review process demonstration of compliance with criteria that the LDO requires to be met before approval of the resolution/conceptual site plan.

Intervenor responds that the county properly determined that at this stage of the multi-step destination resort review process, it was neither feasible nor required that the applicant incur the costs associated with demonstrating satisfaction of LDO 246.050(7). According to intervenor, because compliance with this criterion is "more appropriate after the initial feasibility of the resort has been established," the county properly deferred compliance until preliminary development plan review.

As we explained in section A of this assignment, the county must demonstrate compliance with LDO 246.050(7) when it approves a resolution/conceptual site plan. We agree with petitioners that this requires identification of an available method for providing adequate sewage disposal and

domestic water service to the proposed development which is reasonably certain to comply with applicable standards and produce the desired result.[41] The county failed to do this.

This subassignment of error is sustained.

C. Irrigation Water

The county's decision concludes that "the proposed resort has adequate irrigation capacity." Record 58.

Petitioners argue this determination is not supported by substantial evidence. Petitioners argue that the conceptual site plan states only that the property has water rights with an 1856 priority date. Petitioners contend there is not substantial evidence in the record to establish the needs of the proposed development for irrigation water or whether the existing rights can meet those needs. According to petitioners, the only evidence in the record demonstrates that the existing water rights will not be adequate to serve the proposed development.

With regard to irrigation water for the proposed development, the conceptual site plan states:

> "* * * the property has priority water rights on Neil Creek and Dunn Ditch (1856) for irrigation purposes, so irrigation of the golf course and the

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[41]In determining the detail which LDO 246.050(5) requires in identifying such a method for providing sewage disposal and domestic water services, it is appropriate to recognize that a much greater level of detail with regard to these services is required at the next stage of review, as the preliminary development plan must identify "[l]ocation, size and design of all sewer [and] water * * * utility facilities * * * at an appropriate scale." LDO 246.070(3)(C).

> balance of the property requiring irrigation is not viewed as a serious problem." Record 802.

The additional evidence cited by petitioners is detailed testimony by petitioner Skrepetos regarding the nature and amount of water available through the existing water right, the probable irrigation water needs of the proposed development and possible means of storing the available water to meet the needs. Record 116-118. The Skrepetos testimony concludes that the existing water rights would be able to provide less than half of the irrigation water needed by the proposed development.

The evidence in the record to which we are cited does not allow a reasonable person to conclude there is adequate irrigation water available to serve the proposed development.

This subassignment of error is sustained.

The Lord fourth assignment of error is sustained.

<u>THIRD ASSIGNMENT OF ERROR (LORD)</u>

> "The county erred by concluding the applicant demonstrated compliance with approval criteria requiring a clear demonstration of the availability of financial resources to meet the minimum standards and requiring an appropriate assurance that the applicant has adequate financial support for the project."

<u>THIRD ASSIGNMENT OF ERROR (FOLAND)</u>

> "The county erred in finding that the applicant had satisfied Land Development Ordinance requirements regarding the ability to provide adequate financing for the destination resort project."

These assignments of error challenge the county's compliance with two provisions of LDO 246.050(3) concerning economic feasibility of the proposed destination resort.

A. Demonstration of Availability of Financial Resources

LDO 246.050(3) requires that the following standard be satisfied when the county approves a resolution/conceptual site plan:

> "The economic impact and feasibility of the proposed resort, as demonstrated in a plan by a qualified professional economist(s) and financial analyst(s), shall be provided by the applicant and include:
>
> "* * * * *
>
> "(C) Clear demonstration of the availability of financial resources for the applicant to undertake the development consistent with the minimum investment requirements established by Statewide Planning Goal 8 and ORS [ch] 197;* * *
>
> "* * * * *"

Petitioners are not certain how the county's decision should be characterized with regard to compliance with LDO 246.050(3)(C). If it is characterized as a deferral of the determination of compliance to a later stage in the review process, petitioners again argue that such deferral is improper. If it is characterized as a determination that the proposed development can comply with the criterion, relying on the imposition of conditions to ensure such compliance, petitioners argue that the record lacks

substantial evidence to support (1) a determination that it is feasible for the applicant to satisfy the criterion, and (2) a determination that compliance with the conditions imposed is feasible.

Intervenor argues, as it did under the preceding assignment of error, that the provisions of LDO 246.050 are not approval standards for the resolution/conceptual site plan stage of review. Intervenor also argues that the county properly determined "the applicant has sufficiently demonstrated the initial feasibility of the likelihood of compliance with these criteria to conditionally proceed to the preliminary plan stage." Intervenor's Brief 35. According to intervenor, the county required "a showing of initial feasibility of compliance with [LDO 246.050(3),] followed by complete compliance at the time of the preliminary plan review." Id. at 36. Intervenor also argues that the evidence submitted by the applicant is substantial evidence in support of the county's determination of feasibility of compliance with the criterion.

The county's findings on LDO 246.050(3)(C) state:

> "* * * * *
>
> "The Board [of Commissioners] accepts these letters [from individuals interested in investing in the project] and the verification by the First Interstate Bank in finding that such evidence shows the applicant can provide a clear demonstration of the availability of financial resources to undertake the development consistent

> with the requirement of Goal 8 and ORS Ch. 197. Condition 13 will ensure that this approval criterion is further satisfied prior to the approval of the preliminary development plan. Condition 13 requires that, within twelve months of the adoption of this order, the applicant must furnish to the county a legally binding document that sufficient funds are available to complete the project, including the minimum money requirements for phase 1 of the development. The Board, therefore, finds that the applicant has established <u>the feasibility of compliance with</u> this requirement and that this requirement will be fully satisfied through compliance with Condition 13." (Emphasis added.) Record 49-50.

Condition 13 requires the applicant to submit to the county

> "* * * legally binding documentation of sufficient funds being available to complete the project[,] consisting of commitments for loans, bonds or commitment letters in a form acceptable to the county and in an amount sufficient to pay for the cost of the project together with documentation showing what the cost will be. * * *" Record 82.

We held under the previous assignment of error that the county cannot <u>defer</u> determinations of compliance with the standards of LDO 246.050 to the preliminary development plan approval stage. On the other hand, we have frequently recognized that a local government <u>does</u> demonstrate compliance with an approval criterion by (1) determining that the proposal <u>can</u> comply with the criterion, if certain conditions are imposed; and (2) relying on the imposition of those conditions to ensure compliance. <u>Kenton Neighborhood Assoc. v. City of Portland</u>, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989), slip op 24; <u>McCoy v. Linn County</u>, 16 Or LUBA 295, 301 (1987); <u>aff'd</u> 90 Or App 271 (1988);

Sigurdson v. Marion County, 9 Or LUBA 163, 176 (1983). However, we do not think this is what the county has done with regard to compliance with LDO 246.050(3)(C). Rather, the county has simply (1) found that it is feasible for the proposal to comply with the criterion; and (2) restated the criterion as a condition of approval. A local government may not defer a determination of compliance with a mandatory approval criterion based on the expectation that more detailed information may be developed in the future to demonstrate compliance with the standard. This is not sufficient to demonstrate compliance with the criterion.[42]

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[42]We recognize that the distinction between findings that properly find compliance with criteria based on the imposition of conditions, and findings that improperly defer a determination of compliance to a later date when more detailed information will be available, can be a fine one. However, the distinction must be drawn.

Planning standards frequently must be applied early in the development process when the detail and amount of information may be somewhat limited. In view of this practical reality, as long as a decision maker finds, based on the information provided, that the services, financial resources, etc. required by an approval criterion will be provided if certain fairly objective conditions are met, this Board and the appellate courts have concluded that compliance with the approval criteria is demonstrated. Meyer v. City of Portland, 67 Or App 274, 280, n 5, 678 P2d 741 (1984); Kenton Neighborhood Assoc. v. City of Portland, supra; McCoy v. Linn County, supra.

However, participants (both proponents and opponents) in the land use planning process are entitled to know whether approval standards really are approval standards and, if so, when in the approval process determinations concerning satisfaction of those standards are to be made. Particularly in multi-stage land use approval processes such as this one, the process becomes unmanageable where standards that appear to be mandatory approval standards, applicable to a particular land use decision, are deferred on an ad hoc basis to a subsequent stage in the development approval process. If a local government finds that the approval standards it has adopted for early stages of multi-stage approval processes cannot reasonably be applied

This subassignment of error is sustained.

B. Assurance of Adequate Financial Support

LDO 246.050(3) also requires that the following standard be satisfied when the county approves a resolution/conceptual site plan:

> "The economic impact and feasibility of the proposed resort, as demonstrated in a plan by a qualified professional economist(s) and financial analyst(s), shall be provided by the applicant and include:
>
> "* * * * *
>
> "(D) Appropriate assurance from lending institutions or bonding interests that the development has, or can reasonably obtain, adequate financial support for the proposal once approved."

Once again there is disagreement concerning how the county's decision should be characterized with regard to compliance with LDO 246.050(3)(D). Petitioners argue that the county's decision does find compliance with LDO 246.050(3)(D), and contend this aspect of the decision is not supported by substantial evidence in the record. Petitioners argue that both the county, and the banker whose testimony the county relies on, unreasonably depend on letters which do no more than indicate initial interest in the proposed development. Petitioners argue there is no way

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because it is impossible or impractical at that stage to provide the information necessary to do so, the solution is for the local government to amend its approval standards to apply at a later stage, when it is possible and practical to provide the needed information.

of knowing whether the authors of the letters will still be interested in investing in the proposed project when the terms of such investments are finally established. Petitioners contend the banker testified that "a commercial lender would be enticed 'to proceed with a financial package' <u>if</u> the local funds represented in the eleven letters were in fact invested. Record at 353." Lord Petition for Review 43. Petitioners also point out that when asked to define "reasonable assurance," the banker stated that "for the bank to issue a commitment letter, it would require investors to be legally obligated to the development." Record 356.

As under the previous subassignment of error, intervenor argues that the county did <u>not</u> find compliance with LDO 246.050(3)(D), but rather found that compliance with this criterion is feasible, and that Condition 13 will ensure complete compliance at the time of preliminary development plan approval. Intervenor also argues that the banker's testimony that the investment letters are adequate to entice a commercial lender to proceed with a financial package to carry the proposed development through phase III, and that his bank could provide assurance that the proposed development could obtain adequate financial support, constitutes substantial evidence in support of the county's decision. Record 353, 355.

The county's findings on LDO 246.050(3)(D) state:

> "At this conceptual plan stage, this criterion requires reasonable and adequate assurance of financial support rather than a commitment of funds. * * * [An assistant vice president of the Medford Branch of First Interstate Bank testified that the eleven investment letters submitted by the applicant] would constitute adequate equity to entice a commercial lender to proceed with a financial package which would carry the project through to phase III; and that the First Interstate Bank could provide assurance that the development could reasonably obtain adequate financial support for the proposal once approved. * * * This expert testimony <u>provides sufficient and appropriate assurance</u> that the development has and can obtain adequate support for the proposal once approved.
>
> "The Board [of Commissioners] therefore finds that the applicant <u>satisfies the requirement</u> that the applicant provide appropriate financial assurances and that there is financial support for the project. Additionally, Condition 13 requires that, prior to submission of the preliminary development plan and within 12 months of this order, the assurance of adequate funding be certified by a lending institution or bonding interest. This condition will <u>further confirm compliance</u> with this criterion." (Emphasis added.) Record 50-51.

We believe the above-quoted findings <u>do</u> find compliance with LDO 246.050(3)(D). We, therefore, consider petitioners' substantial evidence challenge. The county's decision relies primarily on the banker's expert testimony.[43] The banker testified that a site inspection was performed and reviews were conducted of plans and other

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[43]Petitioners do not challenge the qualifications or expertise of the banker to offer expert testimony in this matter.

evidence regarding the nature of the proposed development and of the letters of investment. Record 353. Based on the inspection and reviews, the banker stated that "substantial funding of phase one exists; and, based on those funds there would be adequate equity to entice a commercial lender to proceed with a financial package which would carry the proposed development through Phase 3." Id.

The banker also testified that he "was giving an expert opinion that the initial funds were available by local investors to encourage a financial institution to lend the needed funds or by using the commitments of the local investors and through a stand-by letter of credit provide adequate bonding for the development." Record 355. He further stated he was "confident that the financial resources would be available for the development; and, that there were various ways of funding the development." Id. Finally, when asked by a planning commissioner whether the bank could give the county reasonable assurance that funds could be obtained for the proposal, once approved, the banker replied that "First Interstate Bank could provide appropriate assurance that the project had adequate support for approval." Record 356.

We agree with petitioners the banker testified that the bank could not issue a "commitment letter" unless the authors of the investment letters or other investors were legally obligated to invest in the proposed development.

However, LDO 246.050(3)(D) does not expressly require that a lending institution provide a "commitment letter." On the other hand, the banker also testified that the bank could provide the county with "appropriate assurance" that, in its opinion, the proposed development will be able to obtain adequate financial support once approved. We believe, considering all of the banker's testimony, a reasonable mind could conclude that the First Interstate Bank provided "appropriate assurance" that adequate financial support can be obtained for the proposed development.

This subassignment of error is denied.

The Lord and Foland third assignments of error are sustained, in part.

FOURTH ASSIGNMENT OF ERROR (FOLAND)

> "The County erred by failing to provide that its order would be void if its conditions are not complied with."

Petitioners point out that LDO 246.040(5)(B) requires conceptual plan approval to be by resolution of intent to rezone pursuant to LDO 277.040. Petitioners also point out that LDO 277.040 states that "[f]ailure of the applicant to meet any or all of the stipulations contained in the resolution shall render the resolution void." Petitioners argue the county erred by failing to include a similar statement in its order. Petitioners contend the county's order takes a different approach by stating in its order that the order is a binding contract between the applicant

and the county. Petitioners argue the order should expressly state that it is void if the applicant fails to satisfy the conditions it imposes.

LDO 277.040 provides, in relevant part:

> "* * * Fulfillment by the applicant of the stipulations contained in the resolution [of intent to rezone] shall make such resolution a binding commitment on the Board of Commissioners. Upon compliance by the applicant, the Board of Commissioners shall effect the map amendment change in accordance with this resolution. Failure of the applicant to meet any or all of the stipulations contained in the resolution shall render the resolution void."

The county's order states:

> "Approval of this Resolution of Intent to Rezone by the Board [of Commissioners] is in effect a binding contract between the applicant and the county. The applicant, for its part, agrees to perform according to the conditions and terms of this order. The county, upon receipt of satisfactory evidence of compliance with the terms of this order, agrees to redesignate the property for Destination Resort uses as authorized by Chapter 246." Record 68-69.

The county's order is not inconsistent with the provisions of LDO 277.040, it simply fails to include a provision stating what will occur if the applicant fails to comply with the conditions imposed by the resolution. We do not think this omission is basis for reversal or remand of the county's decision. LDO 277.040 itself prevents county adoption of an ordinance changing the plan and zoning map designation to apply the DR overlay to the subject property, unless the conditions imposed by the resolution are

satisfied.[44]

The Foland fourth assignment of error is denied.

<u>FIFTH ASSIGNMENT OF ERROR (FOLAND)</u>

> "The County erred in finding that a 'public need' exists for the proposed rezoning of the subject property."

A. <u>Alternative Sites</u>

LDO 246.040(5)(B), 246.050, 277.040 and 277.080 require that a resolution of intent to adopt a minor plan and zoning map amendment to apply the DR overlay designation comply with the following criterion:

> "A public need exists for the proposed rezoning. 'Public need' shall mean that a valid public purpose, for which the Comprehensive Plan and this ordinance have been adopted, is served by a proposed map amendment. Findings that address public need shall, at a minimum, document:
>
> "(A) Whether or not additional land for a particular use is required in consideration of that amount already provided by the current zoning district within the area to be served.
>
> "* * * * *" LDO 277.080(2).

Petitioners argue that the above-quoted criterion requires the county to demonstrate that <u>the subject property</u>

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[44]In addition, there are other LDO provisions which have the same net effect. For instance, LDO 246.040(5)(G) and 246.080(4) provide that the county may adopt an ordinance redesignating the subject property only after approval of the final development plan. The final development plan cannot be approved unless a preliminary development plan has been approved. LDO 246.040(5)(E) and 246.080(1). The preliminary development plan cannot be approved unless the conditions of approval set out in the resolution of intent to rezone are satisfied. LDO 246.040(5)(D) and 246.070(5)(A).

is required to fill any need for a destination resort which may exist. Petitioners argue the county incorrectly found that its adopted Resort Siting Map demonstrates a scarcity of potential destination resort sites. Petitioners contend the map shows there are substantial areas of land in the county which qualify for destination resort siting.

Intervenor replies that petitioners misinterpret the "public need" criterion. According to intervenor, LDO 277.080(2) requires the county to consider whether there is a need for additional DR designated land in light of the amount already designated DR. It does not require an alternative sites analysis of all land in the county which could satisfy the destination resort siting criteria to determine which should be used to meet an identified public need.

LDO 277.080(2) explains that there is a "public need" for a proposed plan and zoning map amendment when "a valid public purpose, for which the Comprehensive Plan and this ordinance have been adopted is served by a proposed map amendment." We agree with intervenor that paragraph (A) of this subsection only requires the county to consider, in determining whether there is "public need" for the proposed map amendment, other land already designated DR. It does not require consideration of other areas of the county which are eligible for destination resort siting. Therefore, even if the county's finding that the Resort Siting Map shows

"limited potential" for destination resort siting were incorrect, that would not provide a basis for reversing or remanding the county's decision.

This subassignment of error is denied.

B. Evidentiary Support

Petitioners contend the county findings addressing LDO 277.080(2)(A) are not supported by substantial evidence. Petitioners argue that besides the existence of state and county policies encouraging the tourist industry, the only evidence in the record arguably addressing public need is a 1971 report and a study by consultants "submitted by [the] applicant with the argument that [they] demonstrated that a market demand exists for this sort of facility." Foland Petition for Review 35. Petitioners argue the existence of a market demand does not establish "public need" for planning purposes. Leonard v. Union County, 5 Or LUBA 135, 146 (1986).

Intervenor argues that the county's determination of public need is based on policies to provide for destination resorts expressed in state statute, the recreational element of the county's plan and the LDO. According to intervenor, the latter documents "recognize tourism as a principal economic mainstay of the County's economy and acknowledge the desirability of destination resorts to provide for the County's economic health." Intervenor's Brief 47. Intervenor also argues that the studies on which the county

relied demonstrate the desirability of locating a destination resort in the region to diversify the region's economic base and expand tourist-oriented attractions. Record 425-571; 814-865.

We must decide whether, in light of all the evidence in the record to which we are cited by the parties, the county's decision that the standard of LDO 277.080(2)(A) is satisfied is reasonable. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988); Kenton Neighborhood Assoc. v. City of Portland, supra, slip op at 24-25. Based on the statutory, plan and LDO provisions concerning destination resorts, and the two studies cited in the record, we find a reasonable person could conclude that the proposed plan and zoning map amendment is needed to provide additional land to serve a valid public purpose, as required by LDO 277.080(2)(A).

This subassignment of error is denied.

The Foland fifth assignment of error is denied.

The county's decision is remanded.