BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BILL REED, MADELINE REED, JACK NIEMI, PAT NIEMI, SANDY STROMQUIST, LYNETT SPROUL, DAN GOLUBICKAS, ROBIN GOLUBICKAS, MARY BLAKE, ANN KLINGER, and CAROL JORDAN, Petitioners, and CLYDE V. BRUMMELL and OREGON HOMEOWNERS ASSOCIATION, Intervenors-Petitioner, vs. CLATSOP COUNTY, Respondent, and NORTHWEST CONFERENCE RESORTS, INC., Intervenor-Respondent.	)	LUBA Nos. 91-088 and 91-089
	)	FINAL OPINION AND ORDER

Appeal from Clatsop County.

Clyde V. Brummell, Portland; Leonard Gard, Portland; and Edward J. Sullivan, Portland, filed the petition for review. With them on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis. Edward J. Sullivan argued on behalf of petitioners and intervenors-petitioner.

No appearance by respondent.

Gregory S. Hathaway and Virginia L. Gustafson, Portland, filed the response brief and argued on behalf of

intervenor-respondent. With them on the brief was Garvy, Schubert & Barer.

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

REMANDED 01/21/92

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal two county decisions in this consolidated appeal. The decision challenged in LUBA No. 91-088 approves a conditional use permit for an 18 hole golf course and related facilities. The decision challenged in LUBA No. 91-089 approves a preliminary plat for a 50 lot cluster subdivision located next to the golf course.

MOTIONS TO INTERVENE

Clyde V. Brummell and the Oregon Homeowner's Association move to intervene on the side of petitioners. Northwest Conference Resorts, Inc., the applicant below, moves to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.[1]

FACTS

The subject property is in a rural portion of Clatsop County, west of Highway 101 between the cities of Gearhart and Astoria, in a planning area referred to as the Clatsop Plains. The western boundary of the property borders Sunset Lake, and West Lake forms part of the eastern boundary and lies partially within the boundaries of the subject property. Part of the subject property is zoned Rural-

[1]A single petition for review was filed by all petitioners and intervenors-petitioner. Respondent did not file a brief, but intervenor-respondent filed a brief in support of the county's decisions. In this opinion we refer to petitioners and intervenors-petitioner collectively as "petitioners." We refer to intervenor-respondent as "intervenor."

Agriculture-5 (RA-5). Part of the subject property is zoned Lake and Wetlands (LW). The property is also subject to two overlay zones, the Beaches and Dunes Overlay District and the Shoreland Overlay District.

The proposed golf course conditionally approved by the county would occupy approximately 159 acres, and the proposed subdivision would include 50 lots of approximately one-half acre each. The balance of the property is to be used for common open space, including habitat conservation areas for the Oregon silver spot butterfly, a butterfly designated as threatened under the federal Endangered Species Act.

The Clatsop County Planning Commission held a public hearing on the applications on September 6, 1990. A second hearing was held on October 18, 1990 to allow the applicant an opportunity to present rebuttal argument and testimony, and the planning commission ultimately approved the applications on December 20, 1990. Petitioners appealed the planning commission's decision to the board of commissioners. After conducting an on the record review, the board of commissioners upheld the planning commission decisions on June 12, 1991, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The county violated ORS 197.763 and the Fasano procedural standards when it failed to leave the record open to allow petitioners to respond to evidence submitted by the applicant; accepted new evidence into the record in support of the

application after the record was closed to petitioners; refused to accept and consider the petitioners' legal memorandum analyzing the evidence against the standards; and failed to give the proper notice of the procedure to be followed, thereby violating petitioners' right to participate to their substantial prejudice."

ORS 197.763 provides a relatively detailed procedure for the conduct of quasi-judicial land use hearings by local governments. ORS 197.763(2) identifies the persons entitled to notice of hearings governed by ORS 197.763. ORS 197.763(3), (4) and (6) provide, in relevant part, as follows:

"(3) The notice provided by the jurisdiction shall:

"* * * * *

"(f) Be mailed at least:

"(A) Twenty days before the evidentiary hearing; or

"(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;

"* * * * *

"(h) State that a copy of the application, all documents and evidence relied upon by the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

"* * * * *

"(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.

> "(4) (a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public at the time notice provided in subsection (3) of this section is provided.
>
> "(b) Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence is provided in support of the application, any party shall be entitled to a continuance of the hearing. Such a continuance shall not be subject to the limitations of ORS 215.428 or 227.178."
>
> "* * * * *
>
> "(6) Unless there is a continuance, if a participant so requests before the conclusion of the initial evidentiary hearing, the record shall remain open for at least seven days after the hearing. Such an extension shall not be subject to the limitations of ORS 215.428 or 227.178."

As relevant in this appeal, the above statutes envision essentially two possible scenarios. In the first scenario, all documents and other evidence relied upon by the applicant are submitted to the local government prior to the date it provides the notice of hearing required by ORS 197.763(3).[2] Thereafter, if no additional document or other

[2]It is possible to construe ORS 197.763(4)(b) as providing that the right to request a continuance is only triggered if additional supportive evidence is submitted after the staff report required by ORS 197.763(4)(a) is made available. However, we believe it is reasonably clear that submission of additional supporting evidence after the notice required by ORS 197.763(3) is provided is what triggers the right to request a continuance pursuant to ORS 197.763(4)(b).

evidence supporting the application is submitted, no party would be entitled to a continuance of the hearing under ORS 197.763(4)(b).[3] Nevertheless, under ORS 197.763(6), any participant would be entitled to request, prior to the conclusion of the initial evidentiary hearing, that the record be left open for at least seven days.

Under the second scenario, additional documents or other evidence supporting the application are submitted after the notice of hearing required by ORS 197.763(3) is provided. In that event any party is entitled to a continuance.[4] It is the second scenario that occurred in the county proceedings leading to this appeal.

As this case presently stands, there is no dispute that the applicant submitted additional information in support of the application after the notice of the September 6, 1990 planning commission hearing was mailed.[5] Petitioners first

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[3]However, it would seem unlikely at best that during a land use hearing of any complexity, no additional documents or other evidence supporting an application would be submitted after the notice of the hearing is provided. Even if no supportive documentary evidence were submitted, oral testimony in support of the application could easily introduce additional evidence in support of an application.

[4]Additionally, if parties are entitled to request a continuance, but for some reason do not do so, any participant could request that the record remain open for at least seven days under ORS 197.763(6).

[5]Intervenor concedes that "less than twenty days before the [September 6, 1990 hearing] the applicant [submitted] a revised version of a hydrology report by Luzier Hydrosciences, dated August 20, 1990 * * *; a letter from Scientific Resources, Inc. in response to questions raised by the United States Fish and Wildlife Service [was] submitted August 21, 1991; and a

argue that the right to a continuance in such circumstances is automatic and petitioners need not request such a continuance. However, except as qualified below, we agree with intervenor that the right to a continuance under ORS 197.763(4)(b) is not automatic; the continuance must be requested.

Petitioners also argue that the opponents in this matter did request that the hearing be continued to allow them to present additional evidence. Petition for Review 20. Intervenor contends no such request was made.

Although we agree with intervenor that petitioners never explicitly requested that the hearing be continued under ORS 197.763(4)(b) during the September 6, 1990 hearing, or that the record remain open as provided in ORS 197.763(6), several of the opponents made it clear that they wished to present additional evidence at a later hearing.[6]

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golf course marketing study [was] submitted one week before the hearing." (Record citations omitted.) Intervenor-Respondent's Brief 13.

[6]For example, near the end of the September 6, 1990 hearing, when the planning commission was considering a proposal to close the hearing and allow the applicant to present rebuttal argument at a subsequent or continued hearing, petitioner Madeleine Reed stated as follows:

> "I'm a little confused. I would like to know whether or not at the same next continued hearing whether or not my husband, who was busy pulling a calf today, could make a statement. * * * He was not willing to take today off and let the cow die to present his opinions. He was willing to be unheard if it was closed this evening. If this hearing is to be left open for Mr. Wudtke's rebuttal, I would ask also that my husband * * * could also speak up. And in light of the new information, that

Even if we agreed with intervenor that the opponents' comments were not sufficient to request a continuance under ORS 197.763(4)(b), or that the record be held open under ORS 197.763(6), we agree with petitioners that the county's failure to include notice of the rights provided under those subsections was a procedural error. See Wissusik v. Yamhill County ___ Or LUBA ___ (LUBA No. 90-050, November 13, 1990), slip op 8 (local government is obliged to include notice of rights under ORS 197.763(6) in its explanation of procedures required by ORS 197.763(3)(j), and failure to include notice of such rights may result in reversal or remand if substantial rights of parties are prejudiced). In view of the opponents' comments, it is clear they would have availed themselves of those rights had they known about them and, therefore, the failure to provide the required notice prejudiced their substantial right under ORS 197.763(4)(b) to a continuance of the hearing when new evidence was submitted in support of the applications. Where a local government commits procedural error, and the substantial rights of a party are thereby prejudiced, remand is required. ORS 197.835(7)(a)(B); Doughton v. Douglas County,

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I also have not had time to thoroughly read or research, I too may have another area." Record 505.

Although the above quoted statement was made in the context of discussions concerning whether there was to be a hearing limited to presentation of nonevidentiary rebuttal by the applicant, we believe the statement viewed in context with statements of other opponents was sufficient to constitute a request that the county continue the hearing as required by ORS 197.763(4)(b).

15 Or LUBA 576, 581 (1987).

At several points in its brief, intervenor contends the opponents were given ample time during the September 6, 1990 hearing to respond to the new evidence that was submitted prior to the hearing. Although intervenor may be correct in this contention, the right granted by ORS 197.763 is not simply a right to present and rebut evidence. ORS 197.763(4) gives the nonapplicant parties in quasi-judicial land use proceedings alternative rights to (1) inspection of all the applicant's supporting evidence at the time the notice required by ORS 197.763(3) is given, or (2) a continuance of the hearing if all such evidence is not made available at that time. Because both rights are substantial, and both were violated in this case, remand is required.

Our conclusion that this case must be remanded to allow the county to provide the continued hearing required by ORS 197.763(4)(b) makes it unnecessary for us to consider a number of problems that may ultimately be presented on remand in carrying out requirements of ORS 197.763 in a way that does not run afoul of other procedural rights enjoyed by parties in quasi-judicial land use proceedings. We briefly note some of these issues below so that they may be considered on remand if necessary.

First, ORS 197.763 does not explicitly state whether the rights extended to parties under ORS 197.763 are

intended to replace some or all of the procedural rights first extended to parties in quasi-judicial land use proceedings in this state under Fasano v Washington Co. Comm., 264 Or 574, 588, 507 P2d 23 (1973), or only to supplement those rights.[7] Assuming without deciding that the latter was intended, accommodating both the parties' rights to present and rebut evidence under Fasano, and the various rights the parties are granted under ORS 197.763, presents a variety of potential problems that are not explicitly addressed by ORS 197.763.

A second problem, related to the first, is that it is not clear what limits, if any, may properly be imposed on the scope of evidence or testimony offered during a continued hearing under ORS 197.763(4)(b).[8] It may be argued that a hearing continued under ORS 197.763(4)(b) should be limited to responding to evidence in support of the application submitted after the required notice of hearing is given. However, there is nothing in the

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[7]Under Fasano, parties in quasi-judicial rezoning proceedings are extended certain procedural rights, including the rights to present and rebut evidence. These procedural rights have been extended to parties in other quasi-judicial land use proceedings. The Oregon Supreme Court has explained the procedural rights extended under Fasano are derived from the comprehensive land use planning statutory scheme in this state, not the due process clause of the Fourteenth Amendment to the U.S. Constitution. 1000 Friends of Oregon v. Wasco County Court, 304 Or 76, 81, 742 P2d 39 (1987). If the procedural rights identified in Fasano are founded on statute, the legislature presumably may modify those procedural rights.

[8]This same ambiguity exists with regard to the scope of the documentary evidence and argument that may be submitted under ORS 197.763(6).

statutory language explicitly limiting the arguments or evidence a party requesting a continued hearing may present at that hearing.

Finally, we recognize intervenor's arguments that it is possible under a broad and literal reading of ORS 197.763(4)(b) to require that an applicant remain silent at the initial hearing and any continued hearings or risk introducing new evidence and causing a never ending succession of continuances. However, to the extent an applicant limits its presentation to presenting or discussing the evidence previously supplied pursuant to ORS 197.763(4)(a), and rebutting evidence presented by opponents, we question whether a right to a continuance would arise under ORS 197.763(4)(b).

The first assignment of error is sustained.[9]

SECOND ASSIGNMENT OF ERROR

> "The county misinterpreted and misapplied the provisions of its comprehensive plan and subdivision standards relating to rural housing and failed to adopt adequate findings under ORS 215.416(9) responsive to applicable standards and supported by substantial evidence in the whole record."

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[9]Petitioners also allege a variety of other procedural errors occurred at the October 18, 1990 planning commission meeting where certain additional information was accepted into the record and the applicant was permitted to present rebuttal evidence. Petitioners further allege the board of county commissioners later erred in not correcting the errors they allege the planning commission committed. In view of our decision that this matter must be remanded for the county to conduct the continued hearing required under ORS 197.763(4)(b), we do not consider petitioners' additional allegations under this assignment of error.

Under this assignment of error, petitioners argue the 50 lot cluster subdivision with lots of less than one acre violates applicable provisions of the Clatsop Plains Community Plan.[10]

A. Need for Rural Housing

Clatsop County Land and Water Development and Use Ordinance (LWDUO) Section 5.220(2) requires that subdivisions in the Clatsop Plains Rural Lands area must also satisfy Clatsop Plains Rural Lands Policy 6, which provides as follows:

> "Clatsop County intends to encourage a majority of the County's housing needs to occur within the various cities' urban growth boundaries. Approval of subdivisions and planned developments shall relate to the needs for rural housing. Through the County's Housing Study, the County has determined the Clatsop Plains rural housing needs to be approximately 900 dwelling units for both seasonal and permanent [housing] by the year 2000. * * *"

As discussed in the next subassignment of error, the approved subdivision is a 50 lot cluster subdivision with approximately one-half acre lots. Petitioners contend such a subdivision is urban rather than rural in nature, pointing out that these will be expensive year round homes on one-half acre lots with a central water system. Petitioners speculate that the subdivision ultimately will require a

[10]The Clatsop Plains Community Plan is part of the county's acknowledged comprehensive plan.

sewerage system and that the county should have at least considered Goals 14 (Urbanization) and 11 (Public Facilities) before approving the challenged subdivision. See 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 502-07, 724 P2d 268 (1986); Hammack & Assoc., Inc. v. Washington County, 89 Or App 40, 42-46, 747 P2d 373 (1987); DLCD v. Douglas County, 17 Or LUBA 466, 473 (1989). Petitioners further argue that because the challenged subdivision is urban in nature, it will serve urban needs in contravention of the above quoted Clatsop Plains Community Plan Policy.

Intervenor argues that because the challenged decisions do not amend the county's acknowledged comprehensive plan or land use regulations, the statewide planning goals do not apply directly to the challenged decisions. We agree. ORS 197.175(2)(d); Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983).

With regard to the above quoted Clatsop Plains Community Plan Policy, the county found that, although the policy states a need for 900 units by the year 2000, only 14 new lots have been approved since the policy was adopted. Record 10-11. The evidentiary support for that finding is not challenged. Intervenor contends that finding is sufficient to demonstrate that the proposed 50 lots properly satisfy the need for 900 units of rural housing by the year 2000 identified in the policy.

Petitioners' challenge is directed at the alleged urban nature of the proposed lots, rather than at the county's finding that the proposed 50 lots will help satisfy the identified need for 900 units in view of the limited subdivision activity experienced since the policy was adopted. Essentially, petitioners argue the above quoted policy imposes a requirement that approval of individual subdivisions in the Clatsop Plains Rural Lands area include a finding that a proposed subdivision is rural rather than urban in nature.

We see no such requirement in the policy. Rather, the policy establishes the projected need for rural housing in the Clatsop Plains Rural Lands area at 900 units. While we see no reason why the county could not have gone the additional step petitioners argue is required by the above policy, we do not agree the policy requires a case-by-case evaluation of whether a particular subdivision proposal is rural or urban in nature. That limitation is imposed indirectly by establishing a numerical rural housing goal and establishing density limits and minimum lot sizes (discussed infra).

This subassignment of error is denied.

B. Minimum Lot Size

The proposed subdivision is located in the RA-5 zone, which allows residential development with a five acre minimum lot size. Therefore, assuming at least 250 acres of

the 276 acre site are zoned RA-5, the subject parcel includes sufficient area to create the 50 residential lots proposed. However, the Clatsop Plains Community Plan also imposes a requirement that subdivisions in the rural designated portion of the planning area cluster land uses.[11]

> "All planned developments and subdivisions in the Clatsop Plains planning area designated RURAL LANDS shall cluster land uses and designate areas as permanent open space. * * * The minimum percentage of common open space shall be 30%, excluding roads and property under water. The clustering of dwellings in small numbers and the provision of common open space assures good utilization of land, increased environmental amenities, maintenance of a low density semi-rural character, maintenance of natural systems (dunes, wetlands), and may be used as an open space buffer between the residential use and adjacent agricultural or forest uses. This policy shall apply to all RURAL LANDS areas in the Clatsop Plains * * *." (Emphasis in original.) Clatsop Plains Community Plan Open Space Policy 4.

Under the above quoted policy, subdivisions in the Clatsop Plains Rural Lands area must cluster proposed residences and provide not less than 30% common open space. Under such a clustering approach, the five acre minimum lot size otherwise required by the RA-5 zone is reduced so that the required minimum 30% common open space can be provided.

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[11]"Cluster development" is defined in the LWDUO, in pertinent part, as follows:

> "A development technique wherein house sites or structures are grouped together around access ways or cul-de-sacs, with the remainder of the tract left in open space or common open space. * * *" LWDUO 1.030.

In the case of the subdivision at issue in this appeal, the lots have been clustered more than required to provide the minimum 30% common open space to provide additional open space which is to be developed as the proposed golf course.[12] We address the common open space requirement under the third assignment of error.[13]

Petitioners contend, however, that the proposed 50 lots, which include approximately one-half acre each, violate Clatsop Plains Community Plan Rural Lands Policy 1, which provides as follows:

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[12]The terms "open space" and "common open space" are defined in the LWDUO, in pertinent part, as follows:

> "Open Space -- Land used for farm or forest uses, and any land area that would, if preserved and continued in its present use:
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> "* * * * *
>
> "d. Conserve landscaped areas, such as public or private golf courses * * *
>
> "* * * * *."
>
> "Open Space, Common -- A parcel of land together with any improvements that are to be used, maintained and enjoyed by the owners and occupants of the individual building units (Homeowners Association) in subdivisions with common open space, planned development or cluster development." LWDUO 1.030.

[13]We note that the Clatsop County Development Standards Document includes standards applicable to cluster development in the Clatsop Plains Planning Area. S3.160. S3.160 imposes requirements very similar to those imposed by Clatsop Plains Community Plan Open Space Policy 4, but does not require that "property under water" be excluded from the 30% common open space and allows "water bodies" to be included in common open space. There is no dispute Clatsop Plains Community Plan Open Space Policy 4 governs the proposed subdivision and for purposes of this decision we will assume that is the case.

> "The minimum parcel size for building sites in RURAL LANDS areas shall be one acre."

We understand petitioners to argue while Clatsop Plains Community Plan Open Space Policy 4 requires that subdivisions in the Clatsop Plains Rural Lands area be clustered so not less than 30% of the subdivided property is preserved as common open space, Clatsop Plains Community Plan Rural Lands Policy 1 establishes an absolute minimum lot size of one acre.

Intervenor argues the above interpretation renders "the County's clustering and open space requirements virtually impossible." Intervenor-Respondent's Brief 40.

We see no inconsistency between the one acre minimum building site requirement and the clustering and 30% common open space requirements. The Clatsop Plains Community Plan simply imposes two minimums, one on lot size and one on the required amount of common open space. For example, with a 100 acre RA-5 zoned parcel requiring no deductions for roads or property under water, the possible lot size/open space extremes would range from a subdivision with 20 one acre lots, 30 acres of common open space and 50 acres of other open space to a subdivision with 20 three and one-half acre lots and 30 acres of common open space. Such a range of possible subdivision configurations hardly renders the cluster subdivision development and open space requirements requirement a nullity. The Clatsop Plains Community Plan cluster development, common open space and minimum buildable

site requirements are entirely consistent, and the one acre minimum building site requirement imposed by Clatsop Plains Community Plan Rural Lands Policy 1 may be the means by which the county assures cluster subdivisions in rural areas are rural rather urban in nature.[14]

The second subassignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

> "The county misinterpreted and misapplied the provisions of its comprehensive plan and subdivision standards relating to the requirements for common open space and failed to adopt adequate findings under ORS 215.416(9) supported by substantial evidence in the whole record demonstrating compliance with common open space requirements."

LWDUO Section 5.226(20) requires that the preliminary plat include the acreage, location and dimensions of areas proposed for "common open space." The record submitted by the county does not include a preliminary plat including the required designations of "common open space." Although this makes it difficult to follow the parties' arguments under

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[14]As noted above, Clatsop Plains Community Plan Open Space Policy 4 provides, in part, as follows:

> "* * * The clustering of dwellings in small numbers and the provision of common open space assures * * * maintenance of a low density semi-rural character * * *."

Despite the above language in Clatsop Plains Community Plan Open Space Policy 4, if there were no minimum lot size for cluster subdivisions, such rural cluster subdivisions potentially would be distinguishable from subdivisions in urban areas only by the amount of common open space. We believe Clatsop Plains Community Plan Rural Lands Policy 1 was intended to preclude rural cluster subdivisions from approaching urban intensity by setting a one acre minimum lot size.

this assignment of error, we attempt to do so to the extent it will provide guidance on remand.

As noted in our discussion of the second assignment of error, Clatsop Plains Community Plan Open Space Policy 4 requires that subdivisions in the Clatsop Plains Rural Lands area cluster development and designate common open space as follows:

> "* * * The minimum percentage of common open space shall be 30%, excluding roads and property under water. * * *." (Emphasis in original.)

Before turning to the challenged decision and the parties' arguments, we note that it is possible to interpret the above requirement, and the directive that roads and property under water be excluded, in more than one way. First, the exclusion could refer to both the lands subject to the 30% open space requirement and the lands ultimately designated to satisfy that requirement. Second, the exclusion could apply only to the lands subject to the 30% open space requirement. Finally, the exclusion could apply only to the lands ultimately designated to satisfy the 30% open space requirement.[15]

[15]Using a 100 acre parcel with 10 acres of roads and 10 acres underwater, the first interpretation would result in a common open space requirement of 24 acres which could not be satisfied with any of the 20 acres under water and in roads. The second interpretation would also result in a requirement for 24 acres of common open space, but that requirement could be met, in part, by the 20 acres in roads and under water. The final interpretation would result in a common open space requirement of 30 acres, but the 20 acres under water and in roads could not be used to meet part of the common open space requirement.

It is not clear from the challenged decision which of the above interpretations the county applied in this case.[16] However, from the record it is reasonably clear the county believes that "lands under water" must be excluded both when computing the number of acres required for common open space and when designating the areas to satisfy the common open space requirement.

The county adopted the following findings explaining how it determined that the common open space requirement is satisfied by the proposed subdivision and golf course:

> "The preliminary plat shows the entire project, both the subdivision and the golf course. Of the total approximate 276 acres, 20.2 acres is delineated as wetlands (approximately 15.08 acres of jurisdictional wetlands; approximately 5.12 acres of [LW] zoned wetlands), leaving approximately 256 acres and allowing 50 residential homesites under the RA-5 zoning.
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> "Approximately seventy-six (76) acres of the above mentioned 256 acres are delineated as common open space, which includes approximately 25 acres allocated to the Oregon Silverspot Butterfly Habitat, approximately 15.08 acres of jurisdictional wetlands and approximately 36.3 acres of other common open space areas. The land area designated by the Habitat Conservation Plan ('HCP') as habitat area is considered common open space for the visual and aesthetic enjoyment by the public and is used in calculating the amount of common open space on the final plat. Condition of Approval No. 24 provides that the habitat area as defined by the HCP shall have no physical

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[16]In addition, it appears the county treated "roads" and "property under water" differently in computing the required amount of open space. See n 18, infra.

public access, except for maintenance purposes." Record 18.

Petitioners' arguments under this assignment of error go beyond the above quoted assignment of error and raise two issues. In addition to arguing the county erroneously applied the above common open space requirement by requiring too little common open space and allowing the proposed butterfly habitat to be included in the common open space, petitioners include arguments that the county improperly computed the number of clustered lots that may be permitted on the subject property under current zoning. For the reasons set forth below, we agree with petitioners concerning the county's computation of the required amount of common open space and sustain this assignment of error, in part, on that basis. We discuss the issue raised concerning the permissible number of lots only to provide guidance on remand.

A. Common Open Space

Intervenor first argues the above findings establish "that there are 20.2 acres in wetlands on the property [of which] 5.2 acres are under water." Intervenor-Respondent's Brief 42. Assuming intervenor is correct in this argument, and that Clatsop Plains Community Plan Open Space Policy 4 is properly interpreted to require that property under water be excluded when computing the required amount of common open space, the amount of common open space required is 30% of 270.8 acres (276 acres minus 5.2 acres), or 81.24 acres.

The proposed subdivision only designates 76 acres and, therefore, designates an insufficient amount of land for common open space. Again, this assumes intervenor is correct about the amount of land on the subject property that is under water.[17]

In the above findings, the county appears to have taken a different approach, equating the 20.2 acres delineated as wetlands (including both the 15.08 acres of jurisdictional wetlands and 5.2 acres of LW zoned wetlands) with "property under water," as those words are used in Clatsop Plains Community Plan Open Space Policy 4. The county then computed the number of acres required for common open space as 30% of 255.8 acres (276 acres minus 20.2 acres) or approximately 76 acres. However, notwithstanding its inclusion of the 15.08 acres of "jurisdictional wetlands" as "property under water," thus reducing the amount of land subject to the 30% common open space requirement, the county thereafter allowed those 15.08 acres, but not the 5.02 acres of LW zone wetlands, to be designated as common open space.

We can think of no way to square the above computation and designation of common open space with the requirement of

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[17]Intervenor correctly points out that if there are only 5.2 acres of land under water, leaving 270.8 acres of RA-5 zoned land, it is entitled to 54 lots rather than the proposed 50. If those assumptions concerning the number of acres under water and number of acres zoned RA-5 are correct, we agree. However, that would not change the requirement for 81.24 acres of common open space.

Clatsop Plains Community Plan Open Space Policy 4.[18]

This subassignment of error is sustained.

B. Butterfly Habitat

Petitioners also argue the county may not designate the 25 acres proposed for the Oregon silverspot butterfly habitat as common open space, because the definition of common open space requires that such open space be "used, maintained and enjoyed by the owners and occupants of the individual building units." LWDUO Section 1.030. Petitioners contend that since neither homeowners nor the public will be allowed to physically enter the butterfly habitat area, it cannot be "used" and therefore cannot be considered common open space.

We agree with intervenor that the butterfly habitat area need not be subject to physical access to qualify as usable common open space.

This subassignment of error is denied.

C. Allowable Number of Lots

Many of petitioners' arguments regarding common open space are based on their contention that the county never

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[18]We note one additional point of confusion. Clatsop Plains Community Plan Open Space Policy 4 requires that "roads" be treated in the same way as "property under water" in determining the common open space requirement. However, the county does not appear to have treated "roads" and "property under water" in the same way. As explained in the text, the county apparently required the applicant to exclude all "property under water" when it calculated the 30% common open space requirement but did not exclude "roads" in making that calculation.

clearly or consistently identifies how many acres of the subject property are zoned RA-5 and how many acres are zoned LW. We agree with intervenor that with regard to the computation of common open space, zoning is essentially irrelevant. The computation and designation of the required common open space simply requires identification of the number of acres within the subject property, and the appropriate deletions for property occupied by roads and under water, depending on how Clatsop Plains Community Plan Open Space Policy 4 is interpreted. See n 15, supra. However, with regard to computing the allowable number of lots, zoning does appear to be relevant.

Petitioners dispute the county's position that only 5.12 acres of the subject property are zoned LW. Petitioners contend that more of the 276 acres are included in in the LW zoning designation. From the record submitted in this appeal, we cannot tell who is correct, and the challenged decision takes different positions concerning how many acres of the subject property are zoned RA-5. Petitioners also argue that additional acreage within the subject property is subject to the Beaches and Dunes Overlay, which does not allow residential development, and the Shoreland Overlay, which may or may not allow residential development.[19] If we understand petitioners

[19]Residential development is not allowed in the Shoreland Overlay District on Category 1 shorelands but is allowed on Category 2 shorelands.

correctly, they contend, at a minimum, that lands within the LW zoning district and any RA-5 zoned lands subject to the Beaches and Dunes Overlay, may not be considered in computing the permissible number of cluster lots.[20]

Although we do not decide the issue, and the LWDUO ordinance does not appear to answer the question clearly, it seems reasonable that where a proposed cluster subdivision includes (1) lands zoned to allow residential development, and (2) lands zoned in a manner that does not allow residential development, only the acreage zoned to allow residential development may be included when computing the permissible number of cluster lots.[21]

Intervenor states in several places in its brief that county zoning maps delineating the zoning for the property are available. If so, it should be a relatively simple matter to precisely identify the number of acres included in the RA-5 zone, LW zone, and the acres subject to the Beaches

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[20]It does not appear the property includes any Category 1 shorelands, see n 19, supra. However, if any of the subject property is subject to the Shoreland Overlay and includes Category 1 shorelands, we understand petitioners to argue those lands would have to be excluded when computing the number of permitted cluster lots.

[21]Intervenor suggests at page 42 of its brief that the number of permissible cluster lots is based on the "number of buildable acres on the property." Intervenor suggests that the number of buildable acres in this case is easily calculated by subtracting the number of wetland acres (20.2 acres) from the total 276 acres. However, intervenor's argument appears to be based on an assumption that only 20.2 acres are zoned LW or are subject to an overlay zone that would prohibit development. While intervenor may be correct in that assumption, the record in this case does not establish the validity of that assumption.

and Dunes Overlay and Shoreland Overlay Districts, and then to explain how the county computes the permissible number of cluster lots in view of the existing zoning.

The third assignment of error is sustained, in part.

REMAINING ASSIGNMENTS OF ERROR

In view of our resolution of the first, second and third assignments of error, additional evidentiary proceedings will be required and the proposed subdivision must be revised to comply with Clatsop Plains Community Plan Rural Lands Policy 1. Additionally, the required common open space and the permissible number of lots may be revised, necessitating changes in the proposed golf course. We therefore do not consider petitioners' ten remaining assignments of error.

The county's decisions are remanded.