BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANE J. BOUMAN, WILLIAM C. NIELSEN, and KLAAS VAN DE POL, Petitioners, vs. JACKSON COUNTY, Respondent, and DOM PROVOST and JOYCE PROVOST, Intervenors-Respondent.	FINAL OPINION AND ORDER LUBA No. 92-082
PAUL FOLAND and CONNIE FOLAND, Petitioners, vs. JACKSON COUNTY, Respondent, and DOM PROVOST and JOYCE PROVOST, Intervenors-Respondent.	LUBA No. 92-084
CHRIS SKREPETOS, CYNTHIA LORD, and OGDEN SHUTES, Petitioners, vs.	LUBA No. 92-086

JACKSON COUNTY,	)
	)
Respondent,	)
	)

and)
)
DOM PROVOST and JOYCE PROVOST,)
)
Intervenors-Respondent.)

Appeal from Jackson County.

Lane J. Bouman, William C. Nielsen and Klaas Van de Pol, Ashland, filed the petition for review in LUBA No. 92-082. Klaas Van de Pol argued on his own behalf.

Frank R. Alley, III, Medford, filed the petition for review on behalf of petitioners in LUBA No. 92-084. With him on the brief was Fowler, Alley & McNair.

Gary Firestone and Michael J. Uda, Portland, filed the petition for review, and Gary Firestone argued on behalf of petitioners in LUBA No. 92-086. With them on the brief was Heller, Ehrman, White & McAuliffe.

No appearance by respondent.

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

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

AFFIRMED 08/24/92

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 board of county commissioners which (1) adopts a "resolution of intent to rezone" (hereafter resolution) 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.

MOTION TO INTERVENE

Dom and Joyce Provost, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This is the second time a county decision granting these land use approvals for a destination resort on the subject property has been appealed to this Board. In Foland v. Jackson County, 18 Or LUBA 731, 734-35, aff'd 101 Or App 632 (1990), aff'd 311 Or 167 (1991) (Foland), we described the site and the proposed destination resort as follows:

> "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.' * * *"[1]

In Foland, we remanded the county's decision for failure to comply with (1) the criterion of ORS 195.455(2) and Statewide Planning Goal 8(1)(b) prohibiting approval of destination resorts on sites with more than 50 contiguous acres of prime farmland, (2) the requirement of Jackson County Land Development Ordinance (LDO) 246.050(3)(C)

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[1]The local record in Foland is included in the local record of the decision challenged in this appeal. We cite the local record submitted in the prior appeal as "Record (Foland) ____."

regarding availability of financial resources, and (3) the requirement of LDO 246.050(7) regarding provision of adequate sewage disposal and water service. On remand, the board of commissioners held additional public hearings, limited to issues concerning compliance with the the approval criteria that were the basis for our remand in Foland. On March 25, 1992, the board of commissioners adopted the challenged decision.

FIRST ASSIGNMENT OF ERROR (SKREPETOS)

Petitioners contend the county erred by imposing the burden of proof on opponents of the proposed destination resort. Petitioners argue that an applicant for land use approval always has the burden of proof. Green v. Hayward, 275 Or 693, 552 P2d 815 (1976); Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973); LDO 246.040(3).[2] Petitioners argue the county improperly placed the burden of proof on opponents to prove noncompliance with applicable approval criteria, by uncritically accepting whatever evidence the applicants submitted and requiring the opponents to discredit or disprove the applicant's evidence. Petitioners cite the following language in the county's decision as exemplifying the alleged reversal of the burden of proof:

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[2]LDO 246.040(3) provides:

"* * * The burden of proof for approval of a Destination Resort Overlay map designation amendment rests with the applicant."

> "* * * The Board has considered all the evidence submitted by opponents as well as proponents of the application, and it is the finding of the Board based on all the evidence in the record, that the Applicants have satisfied all applicable approval criteria and standards and that the evidence presented by the opponents was not sufficient to discredit the substantial evidence presented by the proponents or to demonstrate that the Applicants had not met the burden of proof in demonstrating compliance with the applicable approval criteria and standards." (Emphasis by petitioners.) Record 31.

The above quoted finding and others cited by petitioners do not indicate the county impermissibly shifted the burden of proof to the opponents, as petitioners contend. The findings indicate the county believed the applicants submitted sufficient evidence to support a conclusion that the relevant approval standards were met, and that petitioners did not present evidence adequate to undermine that conclusion. Such findings reflect a correct understanding of the applicants' burden of proof. Washington Co. Farm Bureau v. Washington Co., 21 Or LUBA 51, 64 (1991); see Stefan v. Yamhill County, 21 Or LUBA 18, 24 (1991).

The first assignment of error (Skrepetos) is denied.

FIRST THROUGH THIRD ASSIGNMENTS OF ERROR (BOUMAN)

FOURTH ASSIGNMENT OF ERROR (FOLAND)

FOURTH ASSIGNMENT OF ERROR (SKREPETOS)

In these assignments of error, petitioners contend the county erred by (1) not accepting this Board's decision in

Foland as a final determination on the issue of whether there are 50 contiguous acres of prime farmland on the subject property, (2) determining the U.S. Soil Conservation Service (SCS) identified less than 50 acres of prime farmland in map unit 46A on subject property,[3] (3) defining "contiguous" acres not to include land separated by a physical barrier, and (4) failing to consider whether adjacent property purchased by the applicants as a source of water rights contains prime farmland.

A. Effect of Foland Decision

ORS 197.455(2) and Goal 8(1)(b) provide that destination resorts may 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 * * *" (hereafter prime farmland criterion).[4] In Foland, we concluded 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, rather than published SCS soil surveys or maps of prime farmlands.

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[3]Each SCS map unit is a particular soil type. Map unit 46A consists of Central Point sandy loam, 0 to 3 percent slope. Record 555. After the county made the decision challenged in Foland, the SCS redesignated map unit 46A as map unit 31A. To avoid confusion, we continue to refer to it as map unit 46A in this opinion.

[4]The county plan contains a virtually identical approval criterion, requiring 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 (Foland) 883.

Foland, 18 Or LUBA at 765-66. However, we also concluded the county erred in determining that the SCS had identified less than 50 acres of prime farmland in map unit 46A of the subject property. Id. at 768-69.

Petitioners argue that all issues relating to whether the SCS had identified 50 acres of prime farmland in map unit 46A were fully resolved and finally settled by this Board's decision in Foland. According to petitioners, there was nothing left to do on remand and, therefore, the county erred by conducting a hearing on remand and accepting new evidence on this issue.[5]

As explained above, Foland determined the county's first decision on the subject destination resort proposal failed to demonstrate that three applicable approval criteria were satisfied. Because the county's decision was remanded, not reversed, it was within the county's authority to conduct further proceedings, including holding public hearings and accepting new evidence, to determine whether the subject application complies with those approval

[5]Petitioners also argue, in the alternative, that if the county may consider on remand whether map unit 46A contains 50 contiguous acres of prime farm lands, it should also be required to consider whether other portions of the subject property contain 50 contiguous acres of prime farm lands, as requested by petitioners. However, Foland determined the county's original decision complied with the prime farmland criterion with regard to all portions of the subject property other than map unit 46A. On remand from this Board, a local government is entitled to limit its consideration of a request for land use approval to the issues that were the basis for remand. Hearne v. Baker County, 89 Or App 282, 748 P2d 1016, rev den 305 Or 575 (1988); Von Lubken v. Hood River County, 19 Or LUBA 404, 419 (1990); see Beck v. City of Tillamook, 313 Or 148, ___ P2d ___ (1992).

criteria. Petitioners' arguments amount to a contention that this Board should have reversed, rather than remanded, the county decision challenged in Foland. However, the time to make such an argument was in an appeal of this Board's decision in Foland to the appellate courts. Petitioners may not collaterally attack Foland in this appeal.

This subassignment of error is denied.

B. SCS Identification of Prime Farmland

We understand petitioners to contend the county's determination that the SCS identifies and maps less than 50 acres of map unit 46A as prime farmland is not supported by substantial evidence in the whole record. Petitioners argue the revised map submitted to the county by the SCS is gerrymandered and the result of pressure placed by the applicants on the SCS. Petitioners point out that official SCS soil survey maps indicate map unit 46A extends west of Clayton Creek and southeast of Highway 66. Petitioners further argue that in the absence of an explanation from the SCS as to why these portions of map unit 46A have been deleted from its map of prime farmland, a reasonable person would not rely on the revised SCS map to identify prime farmland.

In Angel v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-192, February 14, 1992) slip op 14-15, aff'd 113 Or App 169 (1992), we stated:

> "Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City

> of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). Where we conclude a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, we defer to the local government's choice between conflicting evidence. Younger v. City of Portland, [305 Or 346, 360, 752 P2d 262 (1988)]; Wissusik v. Yamhill County, [20 Or LUBA 246, 260 (1990)]; Vestibular Disorder Consult. v. City of Portland, 19 Or LUBA 94, 103 (1990); Douglas v. Multnomah County, [18 Or LUBA 607, 617 (1990)]."

We have reviewed the evidence in the record cited by the parties. The published SCS soil survey map shows map unit 46A as including land on the subject property west of Clayton Creek and southeast of Highway 66. Record 488, 745. At the time the county decision challenged in Foland was made, the SCS had identified and mapped 50.9 acres of prime farmland in map unit 46A. Foland, 18 Or LUBA at 769; Record (Foland) 186-87, 731-32.

On March 1, 1990, approximately three weeks after our decision in Foland was issued, representatives of the applicants met with the SCS State Conservationist to request that the SCS resurvey and remap prime farmland in map unit 46A. Record 554, 821. On March 8, 1990, Hoffbuhr & Associates, professional land surveyors, conducted the survey under the supervision of an SCS Area Soil Scientist. Record 822. This survey map shows 46.68 acres of prime

farmland, none of which is located west of Clayton Creek or southeast of Highway 66. Id. On March 9, 1990, the SCS State Conservationist submitted the map to the county, appended to a letter stating:

> "Our initial evaluation of the area in question by [the] District Conservationist, recorded 50.9 acres of prime farmland (map unit 46A, Central Point Sandy Loam, 0-3 percent slopes). We have since been requested to resurvey that area. As [a] result of the resurvey and a land survey by Hoffbuhr and Associates, the area of prime farmland was determined to be 46.68 acres. A copy of the Hoffbuhr and Associates map of prime farmland is attached to this letter." (Emphasis added.) Record 821.

In a September 27, 1991 response to a request by petitioners that the SCS conduct a new survey and mapping of prime farmland on the subject property, the State Conservationist wrote:

> "The [SCS] field investigation involved two phases. First, our soil scientist reviewed the entire property and determined if adjustments to soil boundaries were necessary. No soil boundary adjustments were made. Second, since map unit [46A] was the only unit that was close to 50 acres in size, we staked the boundaries of the soil unit. Then Hoffbuhr and Associates made a land survey of the area mapped [46A].
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> "We do not plan to reevaluate the 'resurvey' that was conducted in March 1990 because the soil survey was determined accurate [based] on our onsite field investigation. * * *" Record 684.

The question we must answer is whether the county could reasonably conclude, based on the above described evidence, that the SCS has identified and mapped less than 50 acres of

prime farmland in map unit 46A. We agree with intervenors that such a conclusion is reasonable. Both the March 9, 1990 and September 27, 1991 letters by the SCS State Conservationist refer to the area in which prime farmland was resurveyed and mapped on March 8, 1990 as "map unit 46A."[6] Record 821, 684. The former letter clearly states the SCS has determined there are 46.68 acres of prime farmland in that area. The latter letter attests to the accuracy of the March 8, 1990 survey.

This subassignment of error is denied.

C. Definition of Contiguous

The board of commissioners apparently adopted a definition of "contiguous" at an October 15, 1991 work session (Record 491, 586), and announced at the beginning of the October 16, 1991 remand hearing on the subject application:

> "[F]or the purposes of [the prime farmland criterion], contiguous mean[s] soil mapping units which [are] continuous and not interrupted by a physical barrier such as a road or other soil mapping unit. * * *" Record 489.

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[6]There is no apparent explanation in the record for why the published soil survey map shows map unit 46A extending west of Clayton Creek and southeast of Highway 66, and the State Conservationist takes the position that no soil boundary adjustments are necessary, yet the revised SCS mapping of prime farmlands in map unit 46A does not include land west of Clayton Creek or southeast of Highway 66. However, as we explained in Foland, 18 Or LUBA at 769 n 35, "the statute, goal and plan prime farmlands criterion require the county to rely on the SCS identification of prime farmland." (Emphasis in original.) "[This Board's] review extends only to whether the county correctly determined what land the SCS identified as prime farmland." Id. at 768 n 34.

Petitioners contend that under the statute, goal and plan prime farmland criterion, the county must rely on the SCS not only to identify prime farmland, but also to determine what constitutes "50 contiguous acres" of prime farmland. Petitioners also contend the county adopted an erroneous definition of "contiguous" and erred by adopting that definition at a meeting, of which petitioners were given no notice.

The challenged decision concludes the subject application complies with the prime farmland criterion because the SCS determined that map unit 46A does not include 50 or more contiguous acres of prime farmland. Record 39. This conclusion is based solely on SCS identification and mapping of only 46.68 acres of prime farmland in map unit 46A.[7] Record 38. Thus, the county's determination of compliance with the prime farmland criterion does not rely on the definition of "contiguous" which the board of commissioners apparently adopted on October 15, 1991.[8] Therefore, any errors in the substance

[7]Petitioners allege the SCS was "following the county's instructions that land [east] of Highway 66, and [west] of Clayton Creek, should be excluded as falling on the other side of a 'physical barrier'" when it identified and mapped only 46.68 acres of prime farmland in map unit 46A. Petition for Review (Bouman) 25. However, we are cited to nothing in the record supporting this allegation. Further, we note that the SCS survey mapping only 46.68 acres of prime farmland in map unit 46A was performed approximately 19 months before the county adopted the contested definition of "contiguous."

[8]In Foland, 18 Or LUBA at 767, we stated the county must rely on the SCS identification of prime farmland. We did not specifically address the

of that definition, or the procedures by which it was adopted, provide no basis for reversal or remand.

This subassignment of error is denied.

D. Adjacent Property

Petitioners argue that after Foland, the applicants purchased 95 acres[9] adjacent to the subject property (Toney property) in order to transfer its irrigation water rights to the subject property for the proposed golf course. Record 836. Petitioners further argue that if this transfer of water rights is accomplished, the Toney property will no longer be farmed. Therefore, according to petitioners, the Toney property should be considered part of the proposed destination resort site and is required to comply with the prime farmland criterion. Petitioners contend there is no evidence in the record as to the soil types of the Toney property.

The prime farmland criterion requires that a destination resort not be located "[o]n a site with 50 or more contiguous acres of * * * prime farmland * * *." We agree with intervenors that in this case, the "site" is the approximately 270 acres to which the DR overlay designation is proposed to be applied and which are included in the

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issue of whether the county must also rely on the SCS to determine what constitutes 50 contiguous acres of prime farmland. It is also unnecessary to do so in this appeal.

[9]There is some confusion in the record as to whether the adjacent property purchased by intervenors consists of 65 or 95 acres. However, this uncertainty does not affect our review.

conceptual site plan. The "site" does not include the adjacent property purchased by the applicants, as that property will neither be designated for nor used as part of the proposed destination resort. Therefore, the prime farmland criterion does not apply to the Toney property.

This subassignment of error is denied.

The first through third assignments of error (Bouman), fourth assignment of error (Foland) and fourth assignment of error (Skrepetos) are denied.

THIRD ASSIGNMENT OF ERROR (FOLAND)

THIRD ASSIGNMENT OF ERROR (SKREPETOS)

LDO 246.050(3) requires that the following standard be satisfied when the county approves a destination resort 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; * * *
>
> "* * * * *"

In Foland, 18 Or LUBA at 779, one basis for remand was that the county had not found compliance with LDO 246.050(3)(C), but rather had found only that it was

feasible for the proposal to comply with this criterion and had simply restated the criterion as a condition of approval. Because we decided the county did not find compliance with LDO 246.050(3)(C), we did not determine whether there was substantial evidence in the record to support a determination of compliance with LDO 246.050(3)(C).[10]

The county's decision deletes the condition restating the approval criterion and includes the following findings:

> "In order to demonstrate availability of financial resources for the recreation facilities in Phase 1,[11] the Applicants previously submitted 11 letters from individuals interested in investing in the project, in addition to the Applicants' pledge to invest $500,000, for a total investment of $2.4 million. [An] Assistant Vice President for First Interstate Bank * * * testified that the Bank has reviewed the financial condition of each of the 11 individuals and of the Applicants through verification with the banks of these individuals, and has concluded that each individual has the financial resources to make such investments.
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> "[Since the county's original decision] in August 1989, the equivalent value of $2 million in 1984

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[10]However, we did conclude in Foland, 18 Or LUBA at 782, that the county had found compliance with LDO 246.050(3)(D), and also concluded that determination was supported by substantial evidence in the record. LDO 246.050(3)(D) requires:

> "Appropriate assurance from lending institutions or bonding interests that the development has, or can reasonably obtain, adequate financial support for the proposal once approved."

[11]Goal 8 requires that $2 million, in 1984 dollars, be spent on such facilities.

> dollars has increased to an estimated $2.6 million in today's dollars. As a result the Applicants have increased their pledge from $500,000 to $750,000 for a total commitment of $2.65 million to meet the $2 million equivalency requirement. [A] Senior Vice President for Western Bank testified in the remand hearings that he had reviewed the Applicant's financial condition and that it was his professional opinion that the Applicants have the financial resources to make the $750,000 pledge.
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> "[T]he Board [of Commissioners] continues to find that the letters of interest and the pledge by the Applicants, along with the verification by [the banker], constitutes [sic] evidence that a reasonable person would rely upon to conclude that the Applicants have provided a clear demonstration of the availability of financial resources to undertake the development consistent with the minimum investment requirements of Statewide Goal 8 and ORS Ch. 197." Record 56-57.

Petitioners argue that with no new supporting evidence, the county has jumped from finding the applicants may be able comply with LDO 246.050(3)(C) to finding they have complied with LDO 246.050(3)(C). Petitioners contend the county's findings of compliance with LDO 246.050(3)(C) are not supported by substantial evidence because the letters of interest relied on are now three years old, because they do not constitute legally enforceable commitments and because there is insufficient evidence of the letter writers' financial worth.

We disagree with petitioners' contention that LDO 246.050(3)(C) requires legally binding commitments to invest the necessary funds in the proposed project. What is

required is evidence upon which a reasonable mind could conclude that there are sufficient financial resources available to the applicant to carry out the development consistent with the statutory and goal investment requirements. The choice between different reasonable conclusions, based on the evidence in the record, belongs to the county. Stefan v. Yamhill County, 18 Or LUBA 820, 838 (1990).

The evidence relied on by the county to support its determination of compliance with LDO 246.050(3)(C) is the applicants' pledges, the 11 letters of commitment, and the banker's expert testimony as to the adequacy of the financial resources for the proposed development. Record (Foland) 253-56; Record 343, 351, 666-67, 670-76. While reasonable minds might reach different conclusions concerning the weight to be given to letters of interest that were three years old at the time of the challenged county decision, we agree with intervenors that a reasonable decision maker could conclude that there are sufficient financial resources available to the applicant, as required by LDO 246.050(3)(C).

The third assignment of error (Foland) and third assignment of error (Skrepetos) are denied.

FOURTH ASSIGNMENT OF ERROR (BOUMAN)

FIRST AND SECOND ASSIGNMENTS OF ERROR (FOLAND)

SECOND ASSIGNMENT OF ERROR (SKREPETOS)

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 * * *[.]"

In Foland, 18 Or LUBA at 775-76, one basis for remand was that the county had failed to comply with this criterion by identifying "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." However, we also noted:

> "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)." Id. at 776 n 41.

Finally, we concluded there was not substantial evidence in the record to support a determination that there is adequate irrigation water available to serve the proposed development. Id. at 777.

In these assignments of error, petitioners make several challenges to the county's determination that adequate water for irrigation and domestic use can be provided to the proposed destination resort, as required by LDO 246.050(7).

A. Introduction

The proposed destination resort requires the use of water (1) during the irrigation season (April through October),[12] for irrigating the resort golf course and general landscaping; and (2) year-round, for "domestic use" in the resort's residences, hotel, conference center, restaurants and golf clubhouse.[13] Intervenors propose to

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[12]There is some confusion in the record as to whether the "irrigation season" extends from April 1 through October 31 or from April 15 through October 15. This uncertainty does not affect our review. For convenience, in this opinion we refer to the "irrigation season" as April through October and the "non-irrigation season" as November through March.

[13]The LDO does not define "domestic use" of water. The challenged decision and the parties' briefs refer to the use of water in the proposed resort's residences, hotel, conference center, restaurants and golf clubhouse as "domestic use" and, to avoid confusion, we do the same. However, we note that Oregon Water Resources Department (WRD) administrative rules on water applications and permits, of which we take official notice, define "domestic use" as "the use of water for human consumption, household purposes, [and] domestic animal consumption that is ancillary to residential use of the property or related accessory uses." OAR 690-11-010(12). "Commercial use" is defined by the WRD rules as the "use of water at a place or location where retail or wholesale sales of goods, services and commodities or services are conducted, such as a gas station, restaurant, motel, etc." OAR 690-11-010(4).

obtain the necessary water from Neil Creek.[14] Water from Neil Creek currently reaches the subject property after flowing for two miles in Dunn Ditch, an open unlined ditch.

Intervenors propose to use the subject property's existing water right for use of 2 cubic feet per second (cfs) from Dunn Ditch,[15] on a rotation of 7 out of 21 days, for irrigation of the resort golf course and landscaping during the irrigation season. Intervenors have purchased the adjacent Toney property, which has a similar water right. Intervenors propose to transfer the Toney water right to the subject property, resulting in the ability to use 2 cfs from Dunn Ditch, 14 out of 21 days, for irrigation of the golf course and landscaping during the irrigation season.[16] Intervenors propose to obtain additional water from Dunn Ditch during the non-irrigation season (November through March), to be stored in impoundments on the subject property, for supplemental irrigation of the golf course

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[14]During the county proceedings on remand, the possibility of obtaining additional water from groundwater sources or the Talent Irrigation District was considered. However, intervenors subsequently abandoned such proposals, and the challenged decision's determination of adequacy of water supply depends on use of surface water from Neil Creek. Record 63-66, 70-71.

[15]The challenged decision refers to existing and proposed water rights as being from Dunn Ditch. As explained in the text, supra, the source of all water in Dunn Ditch is Neil Creek.

[16]Petitioners contend that the Toney water right is shared with another property and, therefore, its transfer to the subject property would yield less than an additional 7 out of 21 days of 2 cfs of water from Dunn Ditch. This contention is addressed in section D.3 below.

during the peak irrigation consumption months of June, July and August.[17]

Intervenors also propose to obtain water from Dunn Ditch for the proposed resort's year-round domestic use, as a quasi-municipal entity.[18] The proposed domestic water system would include a self-contained water treatment plant, a storage facility for treated water (sufficient to provide for maximum daily domestic use, emergency use and fire flow), and a network of distribution pipelines. Finally, after the resort is fully developed (buildout), intervenors propose to impound Class IV reclaimed domestic wastewater to use for supplemental irrigation of the golf course during the peak irrigation period, thereby decreasing the amount of water required to be obtained from Dunn Ditch for that purpose during the non-irrigation season.[19]

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[17]Such impoundments will consist of ponds used as golf course water hazards or separate ponds used solely for water storage. Record 778.

[18]The WRD application and permit rules define "quasi-municipal use" as "the delivery and use of water through the water service system of a corporation created for the purpose of operating a water supply system, for those uses usual and ordinary to a municipal water supply system." OAR 690-11-010(30). "Municipal use" may include domestic, commercial and other uses of water. OAR 690-11-010(20).

[19]There is some confusion in the record as to whether, after buildout, intervenors propose to rely entirely on storage of treated domestic wastewater for supplemental irrigation of the golf course. Intervenors' "Conceptual Report for Water, Wastewater and Irrigation" contains statements and a table indicating that after buildout, no water would have to be taken from Dunn Ditch during the non-irrigation season for storage for supplemental irrigation of the golf course. Record 771, 774. However, the report also contains statements that golf course irrigation will be provided by a combination of existing water rights, storage of water from

The challenged decision describes intervenors' proposal with regard to water service, addresses specific issues raised by petitioners and others below and reaches the following conclusion:

> "[T]he Applicants have demonstrated that adequate water can be provided on-site to meet the domestic and irrigation water demands of the Clear Springs Resort subject to the condition that the appropriate [WRD] approvals be granted [(1)] to allow for the storage of water during November to March for the irrigation of the golf course during the peak irrigation season of June, July, and August; [(2)] to allow the storage of Class IV reclaimed wastewater to irrigate the golf course during the peak irrigation season; [(3)] to allow transfer of the Toney water right to the Resort property to irrigate the golf course on an allocation rotation of 14 days of water out of every 21 days between April and October; and [(4)] to allow the use of surface water from the Dunn Ditch for domestic purposes as a quasi-municipal entity." Record 70-71.

Condition 4.B of the challenged decision states that surface water and reclaimed wastewater will be the source of irrigation water for the proposed development, and surface water will be the source of domestic water. The condition also requires intervenors to obtain the four WRD permits listed in the above quote. Record 85. Finally, the condition provides that groundwater may be used to

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Dunn Ditch during the non-irrigation season and storage of treated domestic wastewater. Record 779. Further, as described more fully infra, at subsequent hearings before the board of commissioners, the author of the report submitted testimony and revised tables which indicate a continuing need after buildout to store water from Dunn Ditch, albeit a decreased amount, during the non-irrigation season for supplemental irrigation of the golf course. Record 334, 387-88.

supplement the domestic water system of the proposed resort, and sets out requirements and standards for approval of any such use of groundwater that must be satisfied at the time of preliminary site plan approval. Record 85-86.

B. Reliance on Subsequent Issuance of State Agency Permits

Petitioners argue that because the challenged decision conditions county approval of the resolution/conceptual site plan on intervenors obtaining necessary permits from the WRD, the county's findings do not demonstrate compliance with LDO 246.050(7). According to petitioners, the challenged decision does not find that adequate water service for the proposed development is available, but rather only that adequate water service might be available if intervenors can obtain the necessary WRD permits. Petitioners argue that to support a determination of compliance with LDO 246.050(7), either intervenors must obtain the necessary WRD permits prior to obtaining county approval, or the county must find intervenors can meet applicable standards for approval of such WRD permits and the evidence in the record must support such findings.

Intervenors point out that in Foland, 18 Or LUBA at 779, we stated:

> "[W]e have frequently recognized that a local government does demonstrate compliance with an approval criterion by (1) determining that the proposal can comply with the criterion, if certain conditions are imposed; and (2) relying on the imposition of those conditions to ensure

> compliance. Kenton Neighborhood Assoc. v. City of Portland, 17 Or LUBA 784, 804 (1989); McCoy v. Linn County, 16 Or LUBA 295, 301 (1987), aff'd 90 Or App 271 (1988); Sigurdson v. Marion County, 9 Or LUBA 163, 176 (1983). * * *" (Emphasis in original.)

Intervenors contend this is precisely what the county has done with regard to compliance with LDO 246.050(7). Intervenors maintain that the county may condition its approval on intervenors obtaining the necessary WRD permits, and is not required to determine that intervenors' proposal satisfies applicable WRD criteria for approval of the permits in question. Intervenors argue local governments have insufficient expertise to determine compliance with state agency permit approval criteria, and would exceed their authority by doing so.

We agree with intervenors that they are not required to obtain all necessary state agency permits before obtaining county approval of a resolution/conceptual site plan for the proposed destination resort. We further agree with intervenors that the county's decision properly finds compliance with LDO 246.050(7) as described in the above quote, by determining the proposal can comply with LDO 246.050(7) if the necessary WRD permits are obtained, and imposing a requirement that the WRD permits be obtained as a condition of approval.

We also agree with intervenors that the county's determination of compliance with LDO 246.050(7) need not be

supported by findings demonstrating that the proposal can satisfy all applicable WRD approval standards for issuance of the four permits described in the challenged decision. Local government land use proceedings should not displace established processes for obtaining state agency permits.

In Kenton Neighborhood Assoc. v. City of Portland, supra, 17 Or LUBA at 805, we stated that where a local government finds that approval criteria will be met if certain conditions (of a performance standard nature) are imposed, a decision approving the subject application must be supported by substantial evidence in the record that it is feasible for the proposed use to satisfy those conditions. In such an instance, it is the local government itself that ultimately will determine if the standard established by the condition is satisfied.

However, where a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, we think a decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as a matter of law. There does not have to be substantial evidence in the record that it is feasible to comply with all discretionary state agency permit approval standards because the state agency, which has expertise and established standards and

procedures, will ultimately determine whether those standards are met.

Petitioners do not contend that intervenors are precluded as a matter of law from obtaining a permit to use Class IV reclaimed wastewater to irrigate the golf course or a transfer of the Toney water right to the subject property, just that the state agency standards for obtaining such approvals will be difficult to satisfy. For the reasons stated above, the county is not required to demonstrate in the challenged decision that such state agency standards can be satisfied and, therefore, we do not consider petitioners' arguments regarding these permits further. Petitioners make similar arguments with regard to WRD permits to store water from Dunn Ditch during the non-irrigation season and to use water from Dunn Ditch year-round for quasi-municipal use, but also contend that it is not legally possible to obtain such permits. We address this latter contention below.

The Water Resources Commission (WRC) is authorized to adopt "basin programs" for the use and control of water resources. ORS 536.300. Such basin programs may include provisions restricting the types of use for which water may be appropriated from particular water sources. ORS 536.340. The WRC has adopted a basin program for the Rogue Basin, of which we take official notice. OAR Chapter 690, Division 515. With regard to the Bear Creek portion of the Rogue Basin, which includes Neil Creek, the basin program

provides, as relevant:

> "[The WRC] hereby adopts the following program in accordance with ORS 536.300(2) pertaining to the water resources of the Bear Creek Basin:
>
> "A. No applications for appropriation of water shall be accepted or issued by any state agency except appropriations for beneficial uses involving water legally stored in excess of the amount necessary for existing rights.
>
> "* * * * *
>
> "F. All applications for appropriations of water for storage in structures impounding more than 3,000,000 gallons of water shall be reviewed by the [WRC] prior to approval. During the review the [WRC] may establish additional minimum flows on the natural flow of the stream to support aquatic life or minimize pollution. Storage projects consistent with the purposes of minimum perennial streamflows shall be encouraged." Rogue Basin Program, pp. 14-15.

Petitioners argue that paragraph A of the basin program, quoted above, "means that only water which is currently diverted and stored in a reservoir or other storage device pursuant to an existing water right may be appropriated and used for beneficial consumptive uses." Petition for Review (Skrepetos) 15. Petitioners argue that because intervenors do not have a right to store water and do not currently store water in excess of their existing water right, they cannot appropriate additional water from Neil Creek pursuant to paragraph A. Therefore, according to petitioners, the basin program precludes intervenors from obtaining water rights to use additional water from Neil

Creek for irrigation or quasi-municipal use. Petitioners further argue that the county planning staff report supports their position, in that it states the Bear Creek Basin is a "closed" basin. Record (Foland) 168-69.

The challenged decision addresses this issue as follows:

> "* * * Bear Creek basin is an open basin. [The] Manager of the Southwest Region, [WRD], testified that the Bear Creek basin is an open basin and that the Applicants could apply to the State for approval to store water during the non-irrigation season. * * *" (Emphasis in original.) Record 69-70.

Intervenors concede the testimony by the WRD manager referred to in the above quoted finding is not in the record. However, intervenors point out that their engineer testified that the Bear Creek basin is "open." Record 244, 246. Intervenors also argue that paragraphs A and F of the basin program, read together, make it clear that new applications for storage of water (in excess of existing rights) in impoundments, and for use of that stored water for beneficial uses, may be accepted and approved by the WRD. According to intervenors, this is precisely what they propose to do by diverting currently unappropriated water from Neil Creek during the non-irrigation season and storing it for use for supplemental irrigation of the golf course during peak irrigation months.

We agree with intervenors' interpretation of paragraphs A and F of the basin program. This means the record

substantiates that it is legally possible for intervenors to obtain the necessary permit(s) to impound water from Neil Creek during the non-irrigation season for use for supplemental irrigation of the golf course during the peak irrigation months.

However, the status of intervenors' proposed permit to use water from Neil Creek (via the Dunn Ditch) year-round for quasi-municipal use is less clear. Under paragraph A of the basin program, such a permit could only be accepted and approved if it "involv[ed] water legally stored in excess of the amount necessary for existing rights." It appears possible from intervenors' proposal that its proposed year-round use of water for quasi-municipal use could satisfy this requirement, as intervenors propose to obtain all water needed in addition to what they are entitled to under their existing rights through impoundment of water during the non-irrigation season. We therefore conclude that the proposed WRD permit for quasi-municipal use of water is not prohibited by the above quoted basin program provisions.[20]

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[20]We also note that ORS 536.295 states:

> "Notwithstanding any provision of ORS 536.000 or 536.040, the [WRC] may accept an application to appropriate water for a use in addition to the uses for which waters are classified in the applicable basin program if:
>
> "* * * * *

This subassignment of error is denied.

C. Availability of Sufficient Ground Water

Petitioners make a variety of arguments to the effect that the challenged decision does not include, and the record does not support, a determination that sufficient ground water is available as a source of water for the proposed destination resort.

The county's conditions of approval allow ground water to be used as a supplementary source of water for domestic use by the proposed destination resort under certain circumstances. However, the county's determination that adequate water service can be provided to the proposed resort, as required by LDO 246.050(7), is based entirely on the use of surface water. Therefore, whether or not there are sufficient findings and evidence to demonstrate the sufficiency of ground water to serve the proposed resort, does not affect the county's determination of compliance with LDO 246.050(7).

This subassignment of error is denied.

> "(3) The use is of an unusual nature not likely to recur in the basin, and unlikely to have been within the uses considered by the commission in classifying the uses presently allowed in the applicable basin program * * *."

Thus, even if intervenors' proposed year-round quasi-municipal use of water for a destination resort could not be allowed under paragraph A of the basin program, it might nevertheless be allowable under the above quoted statutory provision.

D. Availability of Sufficient Surface Water

Under this subassignment of error, petitioners make a variety of challenges to the evidentiary support for the county's conclusion that adequate water service can be provided to the proposed destination resort. Petitioners' evidentiary challenges concern projected water demands of the proposed resort, availability of surface water to meet those demands and operation of the proposed resort water system. In many instances, petitioners express their arguments as challenges to the evidentiary support for individual county findings regarding particular aspects of the proposed water system.

However, we are authorized to reverse or remand the challenged decision on evidentiary grounds only if the county made a decision not supported by substantial evidence in the whole record. ORS 197.835(7)(a)(C); Sellwood Harbor Condo Assoc. v. City of Portland, 16 Or LUBA 505, 513-14 (1988). The county decision challenged under these assignments of error is that adequate water service will be provided to serve the proposed destination resort, as required by LDO 246.050(7). Therefore, we will consider the evidence cited by the parties concerning the various water service issues raised by petitioners, and then determine whether, in light of all the evidence cited, the county's conclusion that adequate water service can be provided is reasonable. Younger v. City of Portland, supra.

1. Introduction

On October 9, 1991, intervenors submitted to the county a document entitled "Conceptual Plan for Water, Wastewater, and Irrigation" (conceptual plan), dated July 11, 1991, prepared by Century West Engineering. Record 767-91. The purpose of this conceptual plan is to define the water and sewerage service demands of the proposed resort and describe a feasible means of providing the necessary water and sewerage services. Record 768. Four tables in the conceptual plan are relevant to petitioners' arguments here.

Table 1 (Domestic Water Consumption) displays the projected water demand, in gallons per day (GPD), at buildout for each use proposed to be included in the destination resort. Record 769. Table 3 (Total Water Requirements) displays, for each month of the year, the amounts of water required by the proposed resort, in acre-feet (AF), for irrigation and for domestic use. The total amount of water needed yearly for irrigation and domestic use are projected to be 432.6 AF and 95.6 AF, respectively. Record 772.

Table 4 (Irrigation Storage Pond Annual Water Balance) displays, on a month-to-month basis, the amount of water from Dunn Ditch entering the resort's irrigation storage pond(s) prior to buildout, the amount lost to evaporation and seepage, the amount discharged for irrigation, and the cumulative amount remaining in the irrigation storage

pond(s). Table 4 indicates that irrigation storage pond(s) impounding a total of 61.8 AF, with an average surface area of 6.5 acres would be sufficient. Record 773. Table 5 (Effluent Storage Pond Annual Water Balance) displays, on a month-to-month basis, the amount of reclaimed domestic wastewater entering the resort's effluent storage pond at buildout, the amount lost to evaporation and seepage, the amount discharged for supplemental irrigation, and the cumulative amount remaining in the effluent storage pond. Table 5 indicates that an effluent storage pond impounding a total of 67.5 AF, with an average surface area of 6.75 acres, would be sufficient.[21] Record 774.

At the county's October 16 and 17, 1991 hearings, petitioners raised numerous issues concerning the adequacy of the conceptual plan and the accuracy of the projections and methodology used in preparing the four tables described above. The author of the conceptual plan submitted revised Tables 3 and 4, prepared in response to the issues raised by petitioners, and testified at the county's December 5, 1991 hearing.[22] Compared to the original tables, the revised

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[21]As explained in n 19, Table 5 would support a conclusion that at buildout, supplemental irrigation for the golf course could be provided entirely from domestic waste water, thereby eliminating the need to impound water from Dunn Ditch for that purpose during the non-irrigation season.

[22]Intervenors' engineer actually submitted three sets of revised Tables 3 and 4 at the December 5, 1991 hearing. One set relies on the availability of Talent Irrigation District water and, therefore, is not relevant here. See n 14. The other two sets differ solely because of a different assumption regarding the availability of water from Dunn Ditch

tables reflect higher projections for amount of water required for resort domestic and irrigation use and lower assumptions regarding amount of water available from Dunn Ditch during the irrigation season. The revised tables also rely on impounding more water from Dunn Ditch during the non-irrigation season, for both irrigation and domestic use. Revised Table 4 (Total Annual Water Balance) concludes that storage of 237 AF, with an average surface area of 23.7 acres, would be sufficient. Record 387. Intervenors' engineer testified that this amount of storage is feasible on the subject property. Record 334.

2. Demand Projections

With regard to domestic use, petitioners contend they pointed out below several deficiencies in the projections of domestic water demand shown in Table 1 of the conceptual plan. According to petitioners, the water requirement for hotel rooms should be 120 GPD, rather than 80 GPD, and the number of hotel rooms used should be 160, the maximum allowed by the county's decision, rather than 145. Petitioners also argue Table 1 fails to include water demands for the proposed swimming pool and golf clubhouse. Petitioners contend compensating for these deficiencies would increase the projected average daily demand for

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from August through October. We discuss in detail in the text the set of revised tables which relies on a lesser amount of water being available from Dunn Ditch, since that set provides stronger support for the challenged decision.

domestic water by at least 10%. Petitioners also argue intervenors' projections of domestic water demand, as shown in Tables 1 and 3 of the conceptual plan, fail to take into account seasonal variation in domestic water use. According to petitioners, domestic use will be greater during the summer months.

The average daily domestic water demand originally projected by Table 1 of the conceptual plan is 85,350 GPD. Record 769. The amount of water needed for domestic use initially shown on Table 3 of the conceptual plan does not reflect seasonal fluctuations and totals 95.6 AF per year. Record 772. Intervenors did not submit a revised version of Table 1. However, revised Table 3 shows an average daily domestic water demand varying between a low of 89,216 GPD in January and a high of 165,805 GPD in August. Record 388. Revised Table 3 also shows the total amount of water needed yearly for domestic use to be 137.1 AF (43.4% greater than shown on the original Table 3). Id. Additionally, intervenors' engineer testified that he used petitioners' suggested water consumption figures in preparing the revised tables. Record 334.

With regard to irrigation, petitioners contend intervenors' conceptual plan is deficient because the projected demand for irrigation water for the golf course is based on 120 acres. Record 772. Petitioners argue that because the county found the proposed golf course will

occupy "over 50 percent of the proposed resort site" (Record 33), intervenors should have provided for at least 135 acres of golf course irrigation in their conceptual plan.

Revised Table 3 bases its projection of the amount of water needed for irrigation on the assumption that 135 acres of the golf course will be irrigated. Record 388. Revised Table 3 also shows the total amount of water needed yearly for irrigation to be 486.7 AF (12.5% greater than shown on the original Table 3). Id.

Petitioners do not claim that the water demand figures found in revised Table 3 are inaccurate or fail to rectify any deficiencies they identified in intervenors' earlier projections. We find a reasonable person could rely on revised Table 3 and the engineer's accompanying testimony with regard to demand for domestic and irrigation water by the proposed resort.[23]

[23]The county adopted a finding that the projected average daily domestic water demand of 85,350 GPD found in Table 1 of the conceptual plan is accurate and appropriate. Record 67. However, elsewhere in its decision the county specifically relies on revised Tables 3 and 4 submitted by intervenors, which are based on significantly higher domestic water demand projections. Record 68-69. As explained in the text infra, we conclude that the water demand/supply analysis provided in revised Tables 3 and 4 provides substantial evidence to support the county's ultimate determination of compliance with LDO 246.050(7). Therefore, we regard the county's finding that the average daily domestic water demand will be only 85,350 GPD as unnecessary to the challenged decision.

3. Availability of Surface Water During the Irrigation Season

Petitioners contend county reliance on the availability of 2 cfs from Dunn Ditch, for 14 days out of 21 during the irrigation season, is unreasonable for several reasons. First, petitioners contend there is overwhelming evidence in the record that 2 cfs is not available in Neil Creek, for diversion into Dunn Ditch, during substantial portions of the irrigation season, particularly in drought years. Record 124-28, 292, 409, 480, 577-78. Second, petitioners argue that even if 2 cfs were diverted into Dunn Ditch, considerably less (perhaps 50% to 80%) would actually reach the subject property, due to evaporation and seepage loss during the two mile transit in the open, unlined Dunn Ditch. Third, petitioners contend the county cannot rely on intervenors being able to use their water rights 14 days out of 21 because, even if the Toney right is transferred to the subject property, it will not provide a full additional 7 out of 21 days. According to petitioners, the Toney water right is shared with another property that is entitled to approximately 20% of that right. Fourth, petitioners argue that abandonment proceedings initiated against the water right for irrigation of approximately 60 acres of the subject property are likely to result in decreasing the subject property's present right to 2 cfs from the Dunn Ditch.

Intervenors argue that testimony by the man who was

county watermaster for 30 years indicates that 2 cfs has historically been available from Neil Creek for diversion into Dunn Ditch for 95% of the irrigation season. Record 338. Intervenors argue the record includes expert testimony that if a significant amount of water were lost due to evaporation or seepage from Dunn Ditch, a closed pipe could be installed to convey water from Neil Creek. Record 122. Intervenors further argue petitioners' contention that 60 acres of the Dunn Ditch water right for the subject property may be declared abandoned is mere speculation and, in any case, there is expert testimony in the record that even if that occurred, the subject property's allocation of 2 cfs for 7 days out of 21 would not be reduced. Record 122, 337.

The amounts of water available from Dunn Ditch during the irrigation season relied on in Tables 3 to 5 of the conceptual plan are based on obtaining 2 cfs, for 14 days out of 21, during the irrigation season. Record 772-74. However, the revised tables rely on greatly reduced assumptions with regard to availability of water from Dunn Ditch during the irrigation season. Specifically, the total annual water balance analysis shown in revised Table 4 is based on the following amounts of Dunn Ditch water being available on a 14 out of 21 day rotation -- 0.45 cfs in April; 1.22 cfs in May; 1.33 cfs in June and July; 0.87 cfs in August, September and October. Record 387. This has the

effect of reducing the amount of water projected to be obtained from Dunn Ditch during the irrigation season by 50%.

Petitioners do not explain why intervenors' 50% reduction in water projected to be obtained from Dunn Ditch during the irrigation season does not satisfy their concerns. Additionally, we agree with intervenors that there is substantial evidence in the record that 2 cfs is potentially available in Neil Creek for 95% of the irrigation season, that water from Neil Creek could be transmitted to the subject property via a closed pipe and that any future reduction of intervenors' existing water right due to the initiated abandonment proceedings is highly speculative. We therefore conclude a reasonable person could rely on the amounts of water available from Dunn Ditch during the irrigation season shown in revised Table 4 in determining the adequacy of water service for the proposed resort.

4. Availability of Surface Water During the Non-irrigation Season

Column 1 of revised Table 4 indicates intervenors' proposal depends on obtaining during the non-irrigation season an average of 50.5 AF of water per month from Neil Creek for storage.[24] Record 387. At oral argument, petitioners contended the record lacks evidence demonstrating that the necessary amount of water is available in Neil Creek during the non-irrigation season. Petitioners also contend the record shows they raised this issue during the county proceedings.

Intervenors contend petitioners failed to raise this issue sufficiently either in their petitions for review or in the proceedings below. Intervenors argue that under ORS 197.763(1) and 197.835(2), petitioners are precluded from raising this issue in this appeal.

Petitioners are required to set out their assignments of error and supporting argument in their petitions for review. OAR 661-10-030(3)(b). The arguments in the petitions for review relating to intervenors' ability to obtain water from Neil Creek during the non-irrigation season relate solely to whether intervenors will be able to obtain a WRD permit for such use, considering provisions of the applicable basin program and concerns regarding

[24]Obtaining this amount of water would require a diversion of slightly less than 1 cfs.

maintaining winter instream flows for anadromous fish. Petition for Review (Bouman) 35, 37-38; Petition for Review (Skrepetos) 14-16, 22-24. The petitions for review contain no argument regarding the quantities of water physically present in Neil Creek during the non-irrigation season. Accordingly, we do not address this issue.[25]

5. Operation of Proposed Water System

Petitioners argue the county's decision is not supported by substantial evidence because intervenors' conceptual plan fails to provide for loss of water from the proposed storage pond(s) due to seepage. Petitioners also argue that intervenors' conceptual plan does not constitute substantial evidence because Table 5's demonstration that

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[25]In addition, even if petitioners had raised this issue in their petitions for review, under ORS 197.835(2) we could not review it. The record shows petitioners' concerns below, as in this appeal, were focused on intervenors' legal ability to obtain a WRD permit for appropriation from Neil Creek during the non-irrigation season. The only statement in the record arguably relevant to the issue of whether sufficient water is physically present in Neil Creek is the following statement by petitioner Skrepetos in his December 19, 1991 rebuttal testimony:

> "Will [the WRD] grant a new water right in a closed basin for more than 383.36 AF? This amount of water is not even available during certain months, such as November, December and sometimes into January." (Emphasis in original.) Record 311.

The above-quoted question focuses, as did much of petitioners' testimony below, on whether the WRD will approve a new appropriation permit in the Bear Creek Basin. The comment following the question does not explain whether it is referring to water legally "available" for appropriation or water physically "available" in the stream. We agree with intervenors that petitioners did not raise this issue before the county "with sufficient specificity so as to afford the [board of commissioners] and the parties an adequate opportunity to respond to [the] issue." ORS 197.763(1); Boldt v. Clackamas County, 107 Or App 619, 623, 813 P2d 1078 (1991).

reclaimed domestic wastewater will be sufficient to provide supplemental irrigation water for the golf course is based on an unreasonable assumption that 100% of domestic water used will be reclaimed. Compare Record 772, Column 4 and Record 774, Column 1.

Both original and revised Table 4 include a column titled "Seepage," but all entries in the column are "0.00." A note provides that seepage "should not exceed 1/16 inch per day." Record 387, 773. Intervenors cite testimony in the record by their engineer that "it is reasonable to provide a liner [as] a means to keep water from seeping out of the lagoons." Record 244. Intervenors also argue that revised Table 4 demonstrates it is possible to provide adequate water service to the proposed resort without relying on use of any reclaimed wastewater. Intervenors' engineer testified that to be conservative, revised Table 4 does not include use of reclaimed wastewater, but that 75 to 100 AF of reclaimed wastewater could be used to reduce the need to store water from Neil Creek during the non-irrigation season.[26] Record 334.

Neither intervenors' revised annual water balance nor the county's decision relies on reclamation of 100% of the domestic water used at the proposed resort to determine that adequate water service will be provided. Additionally, the

[26]We note that 75 to 100 AF represents 55 to 73% of the 137.1 AF projected annual domestic water use shown in revised Table 3. Record 388.

record contains substantial evidence that it is reasonable to line the proposed irrigation storage ponds; and that if this is done, seepage water loss will be negligible.

6. Conclusion

Intervenors' revised Tables 3 and 4 are based on a worst case scenario of high domestic water demand, peak monthly irrigation demand, minimum precipitation, maximum evaporation, and limited availability of water from Dunn Ditch during the irrigation season. Record 387-88. This analysis demonstrates that under these conditions adequate water can be provided to the proposed resort, even if no domestic wastewater is reclaimed, if in addition to intervenors' existing water right and the Toney water right, approximately 252 AF of water is obtained from Neil Creek during the non-irrigation season and 237 AF of water is stored in impoundments on the subject property. Id. In addition, intervenors' engineer testified that impounding such a quantity of water on the subject property in golf course water hazards or storage ponds is feasible. Record 334. We believe, based on all the evidence cited in the record, a reasonable decision maker could conclude that adequate water service can be provided to the proposed destination resort.

This subassignment of error is denied.

The fourth assignment of error (Bouman), first and second assignments of error (Foland) and second assignment

of error (Skrepetos) are denied.

The county's decision is affirmed.