BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL
and FRIENDS OF DOUGLAS COUNTY,
*Petitioners,*

vs.

DOUGLAS COUNTY,
*Respondent,*

and

DAVID CONWAY
and CHENYEUK CONWAY,
*Intervenors-Respondent.*

LUBA No. 2003-038

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Douglas County.

David Conway and Chun Yeuk Conway, Oakland, filed the response brief. David Conway argued on his own behalf.

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

REMANDED 06/19/2003

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

Opinion by Bassham.

## NATURE OF THE DECISION

Petitioners appeal a county decision approving a preliminary site plan for a destination resort and related preliminary subdivision plat for a 500-acre portion of a 2,700-acre property zoned for farm and forest uses.

## MOTION TO INTERVENE

David Conway and Chenyeuk Conway (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

## MOTION TO STRIKE

Petitioners move to strike seven items or sets of documents appended to intervenors' response brief. Petitioners argue that the seven items are not part of the local record, not subject to a motion to take evidence under OAR 661-010-0045, and not among the types of documents of which LUBA may take official notice. We agree. ORS 197.835(2)(a) confines our review to the local record, and intervenors do not provide any basis for our consideration of extra-record evidence. We do not consider appendices 2 through 8 as set out at page 7 of the response brief.

## FACTS

The subject property is a 2,700-acre ranch located adjacent to exit 142 of Interstate 5, two miles north of the city of Oakland. It is zoned Farm Forest (FF) and Exclusive Farm Use-Grazing (FG), and is subject to a Peripheral Big Game Habitat Overlay (PBGHO) zone. Most of the ranch was clearcut of its timber approximately 15 years ago, and replanted in Douglas Fir. Two small areas in the northwestern portion of the 2,700-acre ranch, totaling 200 acres, are within a county-identified exclusion area for destination resorts.

Intervenors propose developing approximately 500 acres in the southeast corner of the subject property near Interstate 5 as a destination resort in three phases, with 204 acres used for a resort hotel and associated dwellings, and 296 acres devoted to open space and

recreational facilities. The facilities proposed for the destination resort include a 100-unit hotel, with "lock-out suites" that allow expansion to 200 units, a restaurant and convention center, and recreational facilities, including an equestrian stable, pool and spa. Intervenors also propose a 200-unit residential subdivision of single family homes on half-acre lots. The hotel/restaurant/convention center complex will be visible from Interstate-5.

The county planning commission considered intervenors' proposal at a public hearing on November 21, 2002, that was continued to December 5, 2002. On January 16, 2003, the planning commission approved the proposed destination resort. The planning commission decision was appealed to the county board of commissioners, which declined review. This appeal followed.

**FIRST AND SEVENTH ASSIGNMENTS OF ERROR**

ORS 197.435 through 197.467 authorize counties to approve "destination resorts" under prescribed circumstances.[1] The county has adopted substantially similar local regulations implementing ORS 197.435 through 197.467.

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[1] ORS 197.445 provides, in relevant part:

> "A destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. To qualify as a destination resort under ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, a proposed development shall meet the following standards:
>
> "(1) The resort shall be located on a site of 160 acres or more except within two miles of the ocean shoreline where the site shall be 40 acres or more.
>
> "(2) At least 50 percent of the site shall be dedicated to permanent open space, excluding streets and parking areas.
>
> "(3) At least $7 million shall be spent on improvements for on-site developed recreational facilities and visitor-oriented accommodations exclusive of costs for land, sewer and water facilities and roads. Not less than one-third of this amount shall be spent on developed recreational facilities.
>
> "(4) Visitor-oriented accommodations including meeting rooms, restaurants with seating for 100 persons and 150 separate rentable units for overnight lodging shall be provided. * * *
>
> "* * * * *

In the first assignment of error, petitioners argue that the approved development does not qualify as a "destination resort" because it does not include 150 units of overnight lodgings as required by ORS 197.445(4). In addition, petitioners contend that the record and findings fail to demonstrate that the proposed lodgings are "overnight lodgings" as defined by ORS 197.435(5). Relatedly, under the seventh assignment of error, petitioners argue that the county erred in failing to require that intervenors submit a business plan describing, among other things, the marketing, managing and financial aspects of the proposed resort hotel, as required by Douglas County Land Use and Development Ordinance (LUDO) 3.50.150.2.a.(7).

ORS 197.445(4) requires that the proposed resort provide at least "150 separate rentable units for overnight lodging." *See* n 1. ORS 197.435(5) defines "overnight lodgings" to include "hotel or motel rooms, cabins and time-share units."[2] Overnight lodgings also include individually-owned units "if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through a central reservation and check-in service." *Id.*

The application describes the proposed lodgings as follows:

> "The resort hotel offers one hundred rooms with full amenities. Additionally the rooms may be designed to have an in-room suite that expands the capacity up to two hundred rooms. * * *" Record 437.

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> "(8) Spending required under subsections (3) and (7) of this section is stated in 1993 dollars. The spending required shall be adjusted to the year in which calculations are made in accordance with the United States Consumer Price Index."

[2] ORS 197.435(5) provides:

> "'Overnight lodgings' means permanent, separately rentable accommodations which are not available for residential use. Overnight lodgings include hotel or motel rooms, cabins and time-share units. Individually owned units may be considered overnight lodgings if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through a central reservation and check-in service. Tent sites, recreational vehicle parks, manufactured dwellings, dormitory rooms and similar accommodations do not qualify as overnight lodgings for the purpose of this definition."

A conceptual drawing at Record 438 depicts a "lock-out suite" that adjoins a "rental unit" with a separate entrance. Intervenors apparently contemplate that the proposed overnight lodging units will be marketed as time-shares. Record 72. The application also states that all of the units in the resort hotel "will be available for 'overnight lodgings' 45 weeks per calendar year." Record 437. The challenged decision concludes that the proposal complies with ORS 197.445(4) and 197.435(5), based on intervenors' representation that each of the proposed 100 suites can be divided into two separate rental units. Record 67.

Petitioners argue that the county's findings are inadequate. According to petitioner, it appears that intervenor proposes to market and sell 100 time-share units, each unit consisting of "lock-out suite" and a "rental unit." However, petitioners argue that there is no finding nor evidence in the record that explains how the 100 units or portions thereof will be rented to the general public for at least 45 weeks per calendar year. Similarly, petitioners argue that the business plan intervenors submitted to comply with LUDO 3.50.150.2.a(7) fails to describe how the proposed destination resort or time shares will be marketed to the public and managed. Absent such an explanation of how the proposed lodging will be marketed and managed, petitioners argue, it appears that the county approved only 100 overnight lodging units, contrary to ORS 197.445(4).

At oral argument, intervenor David Conway explained that the time-share units would be marketed to international investors who would not be expected to personally use the time shares, but who would instead authorize the resort to rent the rooms to overnight hotel guests at least 45 weeks per calendar year. Intervenor argued that in renting rooms under this scheme, the hotel could offer either the lock-out suite and adjoining rental unit together, or separately, and therefore the resort hotel could potentially offer 200 overnight lodging units.

Petitioners are correct that the business plan, found at Record 440, does not describe how the proposed time shares or lodging units will be marketed, managed or rented. Nothing

cited to us explains how the proposed overnight lodging units can be at the same time available to time-share owners *and* available to the general public 45 weeks per calendar year. The definition of "overnight lodging" at ORS 197.435(5) distinguishes between units that are available as "hotel or motel rooms, cabins and time-share units," and units that are "individually-owned." Only the latter must be available to the general public "at least 45 weeks per calendar year through a central reservation and check-in service." Absent some explanation, intervenors' proposal for 100 time share units seems at odds with the proposal to make those units available to the general public 45 weeks per calendar year. More importantly, without some explanation as to how the 100 units will be marketed and made available for overnight lodging, the proposal fails to assure that the resort will offer at least "150 separate rentable units for overnight lodging," as ORS 197.445(4) requires. Intervenor David Conway's explanation at oral argument is not supported by the record. Accordingly, we agree with petitioners that remand is necessary to allow intervenors to submit a business plan that (1) satisfies the requirements of LUDO 3.50.150.2.a.(7) and (2) explains how the proposed 100 time share units will be marketed and rented so as to constitute at least "150 separate rentable units for overnight lodging."

The first and seventh assignments of error are sustained.

**SECOND ASSIGNMENT OF ERROR**

ORS 197.445 defines a "destination resort" as a "self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities." *See* n 1. Petitioners contend that an issue was raised below that the proposed resort is not a "destination resort" because it lacks any "high natural amenities." The county addressed this issue as follows:

> "* * * [The term] 'high natural amenities' is not further specifically defined. Lacking specific legislative definition, the definition of what constitutes 'high natural amenities' is left to the County in its Comprehensive Plan [and LUDO]. The County has not specifically defined 'high natural amenities' in either the [plan] or LUDO.

"* * * * *

> "Lacking specific definitions elsewhere, we find that the natural amenities as described in the application constitute 'high natural amenities,' thus meeting that portion of the definition [of destination resort]." Record 65.

Petitioners contend that the above-quoted finding is inadequate and unsupported by substantial evidence. According to petitioners, the county failed to give any meaning to the term 'high natural amenities," and simply concluded without explanation or discussion of relevant facts that the natural amenities described in the application constitute "high natural amenities." The inadequacy of these findings is compounded, petitioners argue, by the fact that the application includes no discernible description of "high natural amenities" on or near the subject property.

We agree with petitioners that the county's findings on this point are inadequate. A necessary element of a "destination resort" as defined by ORS 197.455 is that the proposed resort be located "in a setting with high natural amenities." While that term is not defined in the statute, or elsewhere, that does not relieve the county of the obligation to set out the facts relied upon and explain why those facts lead to the conclusion that the proposed resort is located "in a setting with high natural amenities." The above-quoted finding sets out no facts and provides no explanation for why the cited facts lead to the conclusion that the proposed resort is located in a setting with high natural amenities. In addition, we agree with petitioners that the finding is not supported by substantial evidence. Like petitioners, we cannot find any description of "high natural amenities" in the application, or elsewhere in the record.

The second assignment of error is sustained.

**THIRD ASSIGNMENT OF ERROR**

Petitioners contend that the county erred in approving what is in reality a rural residential subdivision, located next to a hotel designed to attract transient highway travelers, rather than a destination resort intended to attract resort visitors. According to petitioners,

the defining element of the proposed resort is the subdivision of 200 lots for single-family dwellings, dwellings intended for permanent residents rather than resort visitors. Citing to the legislative history of what was codified as ORS 197.435 through 197.465, petitioners argue that in adopting those statutes the legislature was particularly concerned that destination resorts primarily provide visitor-oriented accommodations and not evolve into full-time residential communities.

ORS 197.445 contemplates that a destination resort may provide for "individually owned lots or units" and units for "residential sale," subject to certain limitations. *See* ORS 197.445(4)(a)(A) and (4)(b). Therefore, the fact that a proposed resort offers residential lots for sale does not render the resort something other than a "destination resort," if the resort otherwise complies with statutory and local requirements applicable to destination resorts. Petitioners are undoubtedly correct that the legislature did not intend ORS 197.435 through 197.467 to authorize establishment of rural residential subdivisions. However, the legislature imposed a number of requirements and restrictions presumably intended to prevent that occurrence. To the extent petitioners argue that those statutory requirements and restrictions are inadequate, petitioners' argument is better directed to the legislature. To the extent petitioners argue that provision of residential lots and location of a hotel next to a highway is inherently inconsistent with a "destination resort," we disagree. As noted, the statute contemplates provision of residential lots as a component of the destination resort, and as relevant here contains no prohibition on location of a resort near a highway.[3] Petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The third assignment of error is denied.

[3] We note, in this respect, that ORS 197.445(6) and (7) allow for smaller resorts on non-resource land under described circumstances, subject to the requirement that "[t]he resort shall be constructed and located so that it is not designed to attract highway traffic." No similar requirement is imposed on larger resorts allowed under ORS 197.445(1) through 197.445(5).

**FOURTH ASSIGNMENT OF ERROR**

ORS 197.467 provides:

> "(1) If a tract to be used as a destination resort contains a resource site designated for protection in an acknowledged comprehensive plan pursuant to open spaces, scenic and historic areas and natural resource goals in an acknowledged comprehensive plan, that tract of land shall preserve that site by conservation easement sufficient to protect the resource values of the resource site as set forth in ORS 271.715 to 271.795.
>
> "(2) A conservation easement under this section shall be recorded with the property records of the tract on which the destination resort is sited."

Petitioners argue that the subject property is a Peripheral Big Game Habitat resource site designated for protection under statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), and subject to the PBGHO zone. According to petitioners, the county erred in failing to require a conservation easement to protect this resource site, as required by ORS 197.467. Further, petitioners argue that the county erred in failing to establish that the proposed resort complies with the LUDO dwelling density standard applicable to Peripheral Big Game Habitat resource sites.

**A. Conservation Easement**

The county's decision dismisses the need for a conservation easement by observing that a conservation easement "is usually not appropriate unless required by ODFW [Oregon Department of Fish and Wildlife]." Record 41. Because ODFW did not require a conservation easement, the decision concludes, no easement is required.

Petitioners argue, and we agree, that ORS 197.467 requires imposition of a conservation easement in the present circumstances, and that nothing in the county's decision or the record explains why that requirement is waived simply because ODFW has not also required an easement. That said, the form such an easement would take in the present case is not clear to us. The statute appears to contemplate preservation of a particular resource *site* located on the subject property, and does not appear to contemplate the possibility that the

entire subject property is a protected site. Nonetheless, short of amending the boundaries of the PBGHO, we do not see that the county can avoid the statutory obligation to impose a conservation easement on the subject property.

**B. Dwelling Density**

LUDO 3.32.300 imposes a one dwelling unit per 40 acres density standard in the PBGHO zone.[4] The county's decision finds that the proposed resort is consistent with that density standard, reasoning as follows:

> "The [PBGHO] applies to the subject property. LUDO 3.32.300, [PBGHO], is designed to preserve identified peripheral habitat areas by providing supplementary development standards which promote an area wide dwelling density consistent with such habitat management. A density of 1 dwelling unit per 40 acres shall be maintained in areas so designated on the Peripheral Big Game Habitat Map of the Comprehensive Plan.
>
> "The subject property is located within the Calapooya and Elk Creek geographic Planning Advisory Committee (PAC) areas. The area wide acreage for this region is approximately 1,121,378 acres. Within this region,

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[4] LUDO 3.32.300 provides:

> "**1. Purpose**
>
> "The Peripheral Big Game Habitat Overlay is designed to preserve identified peripheral habitat areas by providing supplementary development standards which promote an areawide dwelling density consistent with such habitat management. A density of 1 dwelling unit per 40 acres shall be maintained in areas so designated on the Peripheral Big Game Habitat Map of the Comprehensive Plan.
>
> "**2. Permitted Uses**
>
> "All uses allowed in the underlying zone may be permitted or conditionally permitted. However, dwellings shall be subject to the density considerations contained in Subsection 3 of this section.
>
> "**3. Density Provision**
>
> "All quasi-judicial requests for dwellings or land divisions that will result in eventual placement of a dwelling, or administrative review of nonresource dwellings (ORS 215.213(3)) which could result in an average density of greater than 1 dwelling per 40 acres, shall be referred to the Oregon Department of Fish and Wildlife (ODFW) for review and recommendation. If the ODFW cannot recommend approval or suggest acceptable mitigation measures, a Variance, pursuant to Article 40, shall be required."

> there are currently approximately 12,232 dwellings; the Destination Resort subdivision proposes to add 200 dwellings to this figure for a total of 12,432, or 1 dwelling to approximately 90 acres." Record 41.

Petitioners argue that the county erred in considering the entire 1,121,378-acre Calapooya and Elk Creek geographic PAC area as the denominator for applying the one dwelling per 40 acre density standard. According to petitioners, the evident purpose of the density standard is to minimize human impacts on wildlife habitat in the area of the tract in question, by limiting the density of residential development to one dwelling per 40 acres. That purpose is not served, petitioners argue, by examining the average dwelling density over a huge swath of the county, because it effectively permits large areas protected as wildlife habitat to be developed at densities that destroy its value as wildlife habitat. Petitioners contend that, under the county's reasoning, the county could theoretically approve thousands of dwellings on the subject property without violating the one dwelling per 40 acres standard.

Even if the density standard can be read in isolation in the manner that the county has, petitioners argue, it is clear under ORS 197.467 that the county must take steps to preserve the resource values present on the site. Petitioners contend that allowing resource values to be completely destroyed on a 500-acre portion of the subject property is inconsistent with ORS 197.467.

Intervenors provide no focused response to petitioners' arguments under ORS 197.467 and LUDO 3.32.200. LUDO 3.32.200 provides no express denominator for the density standard, so the county's view that the pertinent denominator is a 1,121,378-acre area of the county is not necessarily inconsistent with the text of LUDO 3.32.200.[5] However, we agree with petitioners that that view is inconsistent with the purpose of the

[5] Because the county's decision is a planning commission decision, and the county board of commissioners declined to review the planning commission decision, our standard of review of the planning commission's interpretation of local land use regulations is whether the interpretation is reasonable and correct. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988).

density standard, to "preserve identified peripheral habitat areas." *See* n 4. Neither intervenors nor the county's decision provides any basis to question petitioners' view that the purpose of the density standard is to preserve big game wildlife habitat by minimizing human impacts on that habitat, specifically by limiting the density of residential uses. Under the county's view, large areas of Goal 5-protected wildlife habitat may be developed at residential densities that significantly exceed one dwelling per 40 acres, as long as the average density over a much larger area of the county does not exceed that standard. As the county interpreted LUDO 3.32.300, it will have no regulatory effect at all until over 28,000 dwellings are built in the 1,121,378-acre PBGHO. At that point, its regulatory effect would change from nonexistent to exceedingly harsh, because it would effectively impose a residential building moratorium throughout the PBGHO. The variance procedure referenced in LUDO 3.32.300(3) would offer the only possibility for an exception or variance at that point. *See* n 4. It seems exceedingly unlikely to us that anyone who thought about how LUDO 3.32.300 would be implemented could possibly have intended that it work in that way.

The county's interpretation is also inconsistent with the LUDO 3.32.300(3) description of how the density standard works. LUDO 3.32.300(3) anticipates that individual quasi-judicial requests for approval for dwellings or land divisions may exceed the one dwelling per 40 acre standard and LUDO 3.32.300(3) allows that dwelling standard to be exceeded on a case-by-case basis where exceeding the standard can be justified. As the county interpreted LUDO 3.32.300, LUDO 3.32.300(3) is unnecessary until over 28,000 residences are constructed in the PBGHO, at which point it becomes the only way a residence could be constructed in the PBGHO.

A construction of LUDO 3.32.300 that is far more consistent with its apparent purpose and the language of LUDO 3.32.300 is that the denominator for the one dwelling per 40-acre density limit is the subject property, in this case the 500 acres that make up the

proposed destination resort. Where, as here, the proposal exceeds that density, LUDO 3.32.300 may provide a way to approve a higher density development. If not, the proposed destination resort is barred by the LUDO 3.32.300 density limit.

We recognize that a density standard that permitted selection of some larger local area, *i.e.*, a local area larger than the 500-acre subject property but smaller than the 1,121,378-acre applied here, might provide the county with desirable flexibility to permit clustered residential development in areas with lesser habitat value if some way could be found to further limit or bar residential development altogether in areas with high habitat value. However desirable that flexibility might be, as written, LUDO 3.32.300 does not permit application of the one dwelling unit per 40 acres standard over an area that is larger than the property that is the subject of the application. If the county wishes the density limit to apply in some other manner, it must amend LUDO 3.32.300 to achieve that result.

In sum, the county's view that the denominator required by the LUDO 3.32.300 density standard is a 1,121,378-acre portion of the county is not reasonable and correct. The county also erred in failing to comply with the requirements of ORS 197.467.

The fourth assignment of error is sustained.

**FIFTH ASSIGNMENT OF ERROR**

ORS 197.445(3) requires that at least $7 million in 1993 dollars, adjusted for inflation, be spent on improvements for on-site developed recreational facilities and visitor-oriented accommodations, of which not less than one-third must be spent on developed recreational facilities. *See* n 1. At the time of the public hearing before the planning commission, the minimum inflation-adjusted investment amount for developed recreational facilities was $2,922,667. Petitioners argue that the record does not support a finding that intervenors proposed to spend at least $2,922,667 on developed recreational facilities.

ORS 197.435(1) defines "developed recreational facilities" as

> "* * * improvements constructed for the purpose of recreation and may include but are not limited to golf courses, tennis courts, swimming pools, marinas, ski runs and bicycle paths."

*See also* LUDO 3.50.020.5 (defining "recreational facilities" to include tennis, racquetball, volleyball and handball courts; hiking, horseback riding, running, skiing, snowmobiling and bicycle trails; boating and swimming facilities; and golf courses).

Petitioners explain that intervenors originally proposed $2,392,500 worth of "recreational facilities" in Phase 1, consisting of a "Club House/Recreation Area," an "Outdoor Seating Recreation Area," a pool and spa, an equestrian stable, "Open Space/Trail Riparian Enhancements," and unspecified "Recreational Facilities." Record 441-42. For Phases 2 and 3, intervenors proposed to spend $520,000 on "Recreational Facilities Adjacent to Dam," further "Open Space/Trail Riparian Enhancement," and unspecified "Landscaping/Site Features." *Id.* After petitioners and others raised concerns that some of the proposed "recreational facilities" were not properly considered recreational facilities and in any case did not meet the required minimum expenditure, intervenors submitted a proposal to spend $750,000 on additional "recreational facilities" described as "Lobby/Public Space," and "Hotel Services." Record 126. Finally, intervenors submitted a more detailed description of proposed recreational facilities, proposing additional facilities that totaled over $5.6 million in Phase 1 alone. Record 113-14. The planning commission approved the destination resort and subdivision with conditions that require intervenors to construct at least $2,922,667 worth of recreational facilities in phase 1, prior to receiving final subdivision plat approval. Record 74.

Petitioners argue that, even as supplemented, many of the facilities described at Record 113-14 do not qualify as "recreational facilities" under the statute and code. For example, the described "recreational facilities" include an "internet café," a "music festival stage," and the lounge and dance area at the proposed restaurant. Further, petitioners point out, the proposed equestrian stable appears to include improvements that are apparently

intended to benefit permanent residents rather than resort visitors. Finally, petitioners argue that the cost of some facilities described at Record 113-14 are greatly inflated over the initial estimated costs, without any explanation for the difference. For example, petitioners argue, there is little explanation for why the stable originally proposed to cost $250,000 will now cost $1.6 million.

We agree with petitioners that some of the facilities described at Record 113-14 do not qualify as "recreational facilities" under the statute and code, and that improvements intended for the exclusive benefit of permanent residents may not be considered "recreational facilities." While a number of other proposed facilities would appear to qualify, it is not clear that expenditure on the qualifying facilities will necessarily exceed the minimum $2,922,667, and the conditions imposed in the county's decision do not ensure that only qualified facilities will be counted toward the minimum expenditure. However, we do not agree with petitioners that further explanation regarding the differences between the initial and final estimates is necessary. The final estimate at Record 113-14 includes sufficient detail regarding the components of each facility, for example the proposed stable, to indicate that intervenors significantly expanded the scope and features of proposed facilities over those initially proposed.

In sum, on remand the county must determine whether qualifying "recreational facilities" proposed for construction in phase 1 meet or exceed the minimum expenditure, and impose any necessary conditions of approval to ensure that the minimum expenditure requirement is satisfied.

The fifth assignment of error is sustained, in part.

**SIXTH ASSIGNMENT OF ERROR**

ORS 197.445(1) requires in relevant part that a destination resort be a self-contained development. ORS 197.435(6) defines "self-contained development" as providing, among other things, on-site community sewer and water facilities. The application proposed that

water supplies for phase 1 development would come from groundwater wells. To support phase 2 and 3 development, the application proposed construction of a 700-acre/foot reservoir on Calapooya Creek, which flows through the ranch. The county imposed conditions requiring intervenors to obtain (1) all necessary water rights and permits for groundwater wells and the proposed reservoir; and (2) an engineer's certification that an adequate water supply is available to serve the resort and to provide irrigation and fire flow supplies, prior to final site approval for each of the three phases. Record 44-45. In response to concerns that intervenors had failed to establish that sufficient water was available for each phase, the county adopted the following finding:

> "* * * Applicant states that sufficient water is available either from wells currently on the property, or a proposed reservoir and water reuse to meet the requirements for domestic, irrigation and fire protection. The application, in the subdivision portion, attests that existing wells on the property indicate a flow of approximately 100 gallons per minute. This translates into 144,000 gallons per day. We understand that the Seven-Feathers Resort, a resort with Casino, 200-room hotel and RV park in Canyonville, uses less than 80,000 gallons per day. Phase 1 development could be supported on the wells alone without impacting existing reservoirs used for the cattle operation. Construction of the 700-acre/foot reservoir is in phase 2. The application shows that water from this reservoir will meet the water requirements for all three phases while still maintaining recreational, wildlife and agricultural benefits.
>
> "* * * * *
>
> "Applicant has demonstrated a reasonable assumption that sufficient water will be available for each phase developed. Conditions requiring appropriate permits, engineered plans and proof of adequate water supplies for domestic water and fire flow will be required prior to final approval of Phase 1 of the development." Record 65-66.

Petitioners contend that the county's decision fails to determine that compliance with the statutory water supply criterion is feasible and impose conditions sufficient to ensure compliance. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (in approving a land use permit, a local government must either (1) find compliance or feasibility of compliance with approval criteria, and impose conditions sufficient to ensure

compliance; or (2) defer a finding of compliance to a stage of review that provides statutorily required notice and hearing). According to petitioners, to the extent the county has proceeded under option 1, there is no substantial evidence to support the county's finding that intervenors have demonstrated that sufficient water is available, nor are there findings or evidence that the necessary water rights and permits may be obtained, even if a sufficient supply of water exists. To the extent the county has proceeded under option 2, petitioners argue, the county has impermissibly deferred the question of compliance with the water supply criterion to a later process that does not provide for public participation.

We understand the county to have proceeded under option 1, *i.e.*, to have found based on the application that groundwater supplies alone are sufficient to provide an adequate water supply for phase 1, and that the proposed reservoir is sufficient to provide an adequate water supply for all three phases. Therefore, we understand the county to conclude, the record establishes compliance or feasibility of compliance with statutory and local water supply criteria. To ensure compliance with those criteria, the county then imposed conditions of approval requiring intervenors to obtain necessary permits and water rights, and have an engineer certify that an adequate water supply is available. When the local government's decision takes that approach, the pertinent question is whether the findings of compliance or feasibility of compliance are adequate and supported by substantial evidence, not whether the local government has deferred a finding of compliance or feasibility of compliance to a later stage. *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999).

Most of petitioners' argument under this assignment of error alleges that the county impermissibly deferred a finding of compliance or feasibility of compliance. Petitioners do not provide a focused challenge to the above-quoted finding that groundwater resources and the proposed reservoir are sufficient to supply the proposed resort. As to the feasibility of obtaining any required permits or water rights, we held in *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992) that:

> "[W]here 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 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 identify any evidence in the record indicating that intervenors are precluded from obtaining groundwater or surface water rights and permits. Petitioners do not advance other challenges to the adequacy or evidentiary support to the county's finding. Accordingly, petitioners have not demonstrated that the county's finding is inadequate or unsupported by substantial evidence.

The sixth assignment of error is denied.

**EIGHTH ASSIGNMENT OF ERROR**

Petitioners contend that the proposed 200-lot subdivision is dependent on obtaining approval for the proposed destination resort. For the reasons expressed in the first through seventh assignments of error, petitioners argue that the county's approval of the proposed destination resort must be remanded. Therefore, petitioners argue, the county's approval of the preliminary subdivision plat approval must also be remanded.

We have sustained several assignments of error requiring remand of the county's decision approving the destination resort. We agree with petitioners that the lawfulness of the approved subdivision is dependent on the destination resort, and the county's preliminary subdivision plat approval must also be remanded.

The eighth assignment of error is sustained.

The county's decision is remanded.