BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD STEVENS,
OREGONIANS IN ACTION
and CHRIS N. SKREPETOS,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

JOHN R. HASSEN,
Intervenor-Respondent.

LUBA Nos. 2004-011, 2004-012,
2004-013, 2004-017 and 2004-026

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Richard Stevens, Medford, filed a petition for review and argued on his own behalf. Ross Day, Portland, filed a petition for review and argued on behalf of Oregonians in Action. Chris N. Skrepetos, Ashland, filed a petition for review and argued on his own behalf.

Corinne C. Sherton, Salem, filed a response brief and argued on behalf of respondent. With her on the brief was Johnson and Sherton, PC.

Alan D.B. Harper, Medford, represented intervenor-respondent.

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

LUBA No. 2004-017	REMANDED	08/20/2004
LUBA Nos. 2004-011, -012, -013, -026	AFFIRMED	

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 decisions that amend the county's comprehensive plan and land development ordinance.

FACTS

The county has been involved in a substantial rewrite of the Jackson County Comprehensive Plan (JCCP) and Jackson County Land Development Ordinance (LDO) for a number of years. The county board of commissioners eventually adopted four ordinances, three of which are challenged in these consolidated appeals, to complete the county's amendments to the JCCP and LDO. Ordinance 2004-1 amends the text of several JCCP elements, including the General Introduction and Map Designations elements. Ordinance 2004-2 adopts numerous amendments to the text of the LDO. Ordinance 2004-3 amends the JCCP plan designation and zoning maps, to implement the text amendments adopted in Ordinances 2004-1 and 2004-2.

These appeals followed.

FIRST ASSIGNMENT OF ERROR (STEVENS)

Petitioner Richard Stevens (Stevens) raises seven subassignments of error alleging that the county committed a number of procedural errors that substantially prejudiced Stevens' due process rights. Stevens appeals only Ordinance 2004-1 (plan text amendments) and Ordinance 2004-3 (plan map amendments).

A. Notice of Public Hearing

Stevens argues that the county failed to list the criteria applicable to the challenged legislative plan amendments at LDO 277.050 and 277.060. Further, Stevens argues that he was prejudiced by that failure because he was unaware of the applicable criteria throughout the proceedings below and unable to direct testimony toward those criteria.

Stevens cites no authority that requires the county to list in the notice of public hearing the criteria applicable to a legislative plan amendment. The only pertinent code provision Stevens cites

is LDO 285.170(2), which requires only that the notice explain the nature of the proposed amendments. Stevens does not argue that the notice failed to explain the nature of the proposed amendments, and we agree with the county that Stevens has not demonstrated that the county committed any procedural error with respect to the notice.

The first and second subassignments of error are denied.

B. Exceeded Authority

Stevens argues that the board of commissioners exceeded its authority in adopting Ordinances 2004-1 and 2004-3, because Order No. 433-99, the board order that initiated the process that led to all three of the challenged ordinances, only authorized drafting the new LDO that was ultimately adopted in Ordinance 2004-2.

The county responds, and we agree, that Order No. 433-99 did not, as Stevens contends, adopt a policy that precludes the board of commissioners from broadening its deliberations to consider the plan amendments adopted in Ordinances 2004-1 and 2004-2. Stevens has not demonstrated that the board exceeded its authority in adopting those ordinances.

The third subassignment of error is denied.

C. County Charter Section 14(6)

Section 14(6) of the county charter states that:

> "An ordinance adopted after being read by title only may have no legal effect if any section incorporating a substantial change in the ordinance as introduced is not read fully and distinctly in open meeting of the Board prior to the adoption of the ordinance."

Stevens contends that a number of changes were made to Ordinances 2004-1 and 2004-3 between the first reading on December 17, 2003, and the date of adoption, January 12, 2004, but that the county failed to read the amended sections at an open meeting as required by Section 14(6). Consequently, Stevens argues, the challenged ordinances are of no legal effect.

Stevens cites to various exhibits in the record but makes no effort to explain exactly what changes were made and why those changes are "substantial." The county disputes that any changes

made between the date of first reading and final adoption were substantial. The county first notes that Stevens identifies no changes to Ordinance 2004-3 (plan and zoning map amendments). With respect to Ordinance 2004-3, the county argues that only two "nonsubstantial" text changes were made to Ordinance 2004-1 after the first reading.

As the county explains, there are few reported Oregon cases involving what constitutes a "substantial" change for purposes of charter provisions such as Section 14(6).[1] Citing several out-of-state cases, the county argues that such provisions should be construed broadly, such that only changes that alter the "basic character" of the ordinance are considered "substantial." We need not resolve that question. As noted, Stevens fails to identify any particular changes or explain why those changes should be considered "substantial." Without some assistance from petitioner, we will not attempt to resolve those questions on our own.

The fourth subassignment of error is denied.

D. Tape Recordings

Stevens argues that the county failed to include in the record a "tape recording" of the proceedings below, as required by OAR 661-010-0025(1)(c).[2] Instead, Stevens argues, the record includes and the county made available to him four compact discs (CDs). According to Stevens, he could not get the CDs to function on his computer, and the county refused to supply him with audio tapes of the proceedings, which prejudiced Stevens' substantial rights to prepare this appeal.

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[1] *See Herman v. Lincoln City*, 36 Or LUBA 521, 537 (1999) (changes that attach an assessor's map and correct a scrivener's error are not "substantial" for purposes of a city charter rendering an ordinance read by title of no legal effect if it differs "substantially" from its terms as filed prior to reading); *Storey v. City of Stayton*, 15 Or LUBA 165, 170 (1986) (ordinance with corrected collating error does not differ substantially from ordinance as originally read).

[2] OAR 661-010-0025(1)(c) defines the content of the local record to include:

> "Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. A verbatim transcript of audiotape or videotape recordings shall not be required, but if a transcript has been prepared by the governing body, it shall be included. * * *"

The county responds that neither OAR 661-010-0025(1)(c) nor the state public meetings law precludes the county from recording its proceedings digitally rather than on analog tapes or videotapes. Further, the county asserts that (1) Stevens has obtained and used CDs from the county before, (2) the CDs initially worked on Stevens' computer but later failed to play on that computer, (3) the county offered to replace the CDs provided Stevens or allow Stevens to use a county computer to play them, (4) the software necessary to play the discs is available free from the internet, and (5) the county includes instructions on how to download that software with the CD copies it provides to the public.

Stevens does not dispute the foregoing assertions. We agree with the county that Stevens has failed to demonstrate procedural error on the county's part, or that any error prejudiced his substantial rights.

The fifth subassignment of error is denied.

E. Ex Parte Contacts

Stevens argues that, during deliberations on January 12, 2004, a member of the planning commission passed a note to the chair of the board of commissioners. Stevens alleges that, after receiving the note, the chair redirected the deliberations. According to Stevens, the chair failed to disclose this *ex parte* contact, as required by ORS 215.422(3),[3] and therefore LUBA must reverse or remand the challenged ordinances, pursuant to ORS 197.835(12).

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[3] ORS 215.422(3) provides:

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

The county does not concede that the note was relevant to the challenged proceedings, or that it had any effect on the board's deliberations. In any case, the county argues, because the challenged ordinances are legislative decisions, the ORS 215.422(3) requirements regarding *ex parte* contacts do not apply. *See Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 285 (1998) (*ex parte* provisions at ORS 227.180(3), applicable to cities, does not apply to legislative decisions); *Union Station Bus. Community Assoc. v. City of Portland*, 14 Or LUBA 556, 559-60 (1986) (same).

Both ORS 215.422(3) and ORS 227.180(3) are part of statutory schemes governing quasi-judicial permit applications, and are identically worded. We agree with the county that, because Ordinances 2004-1 and 2004-3 are legislative decisions, the disclosure requirements of ORS 215.422(3) do not apply.

The sixth subassignment of error is denied.

F. ORS 215.503(3) Notices

ORS 215.503(3) requires that counties provide to certain property owners written notice at least 20 days prior to the date of the first hearing on legislative ordinances that amend the comprehensive plan. Stevens alleges that the county sent the required notice on December 10, 2003, after the county had held four hearings on the challenged ordinances.

The county responds that the December 10, 2003 notice was a *second* notice, and that the county sent the first ORS 215.503(3) notice on June 20, 2003, 27 days prior to the first county hearing. Record 3107-3110. The county is correct.

The seventh subassignment of error is denied.

Stevens' first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (STEVENS)

Stevens argues that the county violated LDO 277.050 regarding major amendments to the official comprehensive plan and zoning map. LDO 277.050(2) provides:

> "Such revisions may only be made if public needs or desires change substantially, and development occurs at rates other than that contemplated by the Plan, which makes a major map amendment necessary; or where such an amendment will correct an error or bring the Official Comprehensive Plan and Zoning Map(s), Comprehensive Plan or Land Development Ordinance text into compliance, or more into compliance, with Statewide Planning Goals and related Oregon Administrative Rules or other relevant law."

Stevens argues that the county violated LDO 277.050(2) because it never identified "public needs or desires" that changed "substantially."

The county responds that Stevens erroneously focuses on only one of the bases for a major plan amendment under LDO 277.050. As the county explains, the changes were made to correct errors and to bring the JCCP and LDO into compliance with statutes and goals. Record 10-11, 651, 652. We agree with the county that its failure also to find a public need or desire for the changes does not constitute a violation of LDO 277.050(2).

Stevens also argues that the decision fails to adopt findings regarding compliance with the goals as required by LDO 277.060(1). While we address actual compliance with the goals later in this opinion, the findings adopted by the county do address the goals. Record 11-12, 652, 800-01, 1552-55, 1667-69, 2900-02, 3011-36, 3789-92. The county's findings are sufficient to satisfy LDO 277.060(1).

Stevens also argues that the decision violates LDO 277.060(2), which requires legislative amendments to be "consistent with the [JCCP] and ordinances." Stevens advances a hypertechnical reading of LDO 277.060(2) to require that no legislative changes can be made to the existing plan because to do so would be by definition inconsistent with the existing plan. Stevens contends the only way to avoid the conundrum created by his interpretation is to either repeal LDO 277.060(2) or to adopt a completely new plan. We do not agree with Stevens' interpretation of LDO 277.060(2). Ordinance provisions of this nature are commonplace and are generally understood to mean that amendments cannot be inconsistent with other parts of the plan and ordinances that are not being amended. In fact, just such an explanation is found in the JCCP

General Introduction Element, Amendment Procedures 5, which provides that plan amendments must "comply with * * * all unamended portions of the plan."

Stevens' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (STEVENS)

Stevens argues that the county violated the General Introduction Element of the JCCP by failing to adopt adequate findings justifying the challenged amendments to the JCCP. Stevens argues that the challenged JCCP text and map amendments are subject to criteria set forth in section (5) of the "Amendment Procedures" portion of the General Introduction Element.[4] According to Stevens, the county's findings fail to identify any errors that justify any text amendments for purposes of Section 5(A), nor any substantial change to "public needs or desires," for purposes of Section 5(C). Stevens further argues that the challenged amendments are not based on the "special studies" required by Section 5(C), and the county's findings fail to demonstrate compliance with the statewide planning goals.

The county responds that the challenged JCCP amendments are not subject or pursuant to section (5) of the "Amendment Procedures" portion of the General Introduction Element, quoted in

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[4] Section 5 of the Amendment Procedures portion of the JCCP General Introduction Element states, in relevant part:

> "Criteria for Amendments: Amendments may be necessary to meet changes which have occurred in public attitudes or development patterns. Any amendment to the [JCCP] must comply with all applicable Statewide Planning Goals and with all unamended portions of the plan. The following shall also apply:
>
> "A) Major Amendments to Text: The body initiating the amendment may do so to correct an error, or to bring the plan into compliance with the Statewide Planning Goals.
>
> "* * * * *
>
> "C) Legislative Map Amendments (Major): Such map revisions may only be made if public needs or desires changes substantially, and development occurs at rates other than that contemplated by the plan which makes a major map amendment necessary; or where such an amendment will correct an error or bring the Official Plan and Zoning Map into compliance or more into compliance with Statewide Planning Goals. * * * Such amendments are intended to be the result of special studies or other information which can serve as the factual basis to support the change. Legislative map amendments must conform to the requirements of Chapter 277 of the [LDO]."

n 4. According to the county, the challenged JCCP amendments instead are pursuant to the "Plan Evaluation and Update" portion of the General Introduction Element. The General Introduction Element provides in pertinent part:

> "Plan Evaluation and Update:
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> "The Comprehensive Plan is not intended to be a static document. Changing conditions in the form of changing attitudes, economics, law, or other conditions which were projected within the plan, but never attained, all lend support to periodical review of the plan. As conditions change, so should the plan in many instances.
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> "It is therefore recognized that the Comprehensive Plan will be evaluated and updated in the following manner:
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> "(1) Minor changes will be made on an annual basis as deemed desirable by the Planning Commission or the Board of Commissioners.
>
> "(2) Major changes may be made upon completion of significant special studies by the Planning Commission and Board of Commissioners.
>
> "(3) *The entire plan will be reevaluated and updated as deemed necessary every five years after adoption*." (Emphasis added).

The county argues that the challenged JCCP amendments were initiated as a plan reevaluation pursuant to (3), quoted above, and not as a major map or text amendment pursuant to Section 5, quoted at n 4. Therefore, the county contends, the challenged decision is not subject to the criteria set forth in Section 5. In the alternative, the county argues that the challenged decisions comply with those criteria.

The county appears to be correct that the JCCP General Introduction Element distinguishes between major text and map amendments, on one hand, and periodic and comprehensive "plan evaluations," on the other.[5] The latter are not subject to the criteria for major text and map

[5] Section 2 of the "Amendment Procedures" portion of the JCCP General Introduction Element defines a "Major or Legislative Revision of the Official Plan and Zoning Map" in relevant part as amendments that "may have widespread and significant impact beyond the immediate area or parcel where a land use action is proposed" or "a spatial change affecting a large area or many ownerships." That definition supports the county's view that the "plan evaluation" required by the "Plan Evaluation" portion of the JCCP General

amendments set out in Section 5(A) and (C). As the preface to the "Amendment Procedures" portion of the General Introduction Element indicates, that portion (including Section 5) "shall apply to text and official plan and zoning map amendments *other than those described previously*." (Emphasis added.) The "Plan Evaluation" portion that the county asserts the challenged decisions fall under precedes the "Amendment Procedures" section, and therefore is "described previously." The challenged decisions are the culmination of ongoing periodic review that began in 1989. Although the county apparently has not apparently conducted a "plan evaluation" on a strict five-year basis, it is clear from the county's procedural recitals that the challenged decisions fall under that category. Record 6-9, 647-50. Because the challenged decisions are not subject to the Section 5 criteria for major text and map amendments, Stevens' arguments under this assignment of error do not provide a basis for reversal or remand.[6]

Stevens' third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (STEVENS)

As noted above, LDO 277.050(2) requires that the county bring the JCCP and LDO into compliance with the statewide planning goals, related administrative rules, or other relevant law. Stevens argues under this assignment of error that the challenged decisions are inconsistent with various statewide planning goals and other relevant laws.

A. Plan Map Designations Element

Stevens first challenges Policy 1 of the JCCP "Map Designations Element," which provides in pertinent part:

> "* * * Amending the map designation of only a portion of a resource-designated parcel or tract will not be considered unless the purpose is to limit uses to those

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Introduction Element is not the same thing as a major text or map amendment subject to Section 5 of the Amendment Procedures portion.

[6] Even if the Section 5 amendment procedures did apply, they almost perfectly mirror the procedural requirements of LDO 277 addressed in the second assignment of error. For the same reasons expressed in the second assignment of error, were it necessary to reach Stevens' arguments regarding the amendment procedures, we would reach the same conclusion.

> justified through the Goal 2 Exceptions procedure, to implement protection of a Goal 5 resource, to establish industrial lands consistent with the provisions of this Plan, or to implement an unincorporated community plan or urban growth management agreement."

Stevens argues that this policy means that entire parcels must be redesignated, even if that is not practical or feasible, and that it makes redesignation of resource-designated property impossible. However, Stevens does not explain what statewide planning goal or other authority requires the county to allow redesignation of less than an entire parcel. Furthermore, the policy provides five circumstances under which such a partial redesignation may occur. Stevens does not explain why, even assuming partial redesignation of parcels is required by some goal or rule, allowing partial redesignation only under the five listed circumstances is inconsistent with such requirements.

This subassignment of error is denied.

B. Forestry/Open Space Map Designation

Ordinance 2004-1 amends the JCCP Map Designations Element to include map designation criteria for the new Forestry/Open Space plan designation. Stevens argues that the new Forestry/Open Space plan designation is so broadly defined that it encompasses land that is not protected under Goal 4. Further, Stevens argues that the challenged amendments make it too difficult to remove forest land designations from land inaccurately zoned as forest land.

Although it is not entirely clear, Stevens appears to argue that the challenged decisions actually redesignate as forest land large amounts of land that were not formerly designated as forest land. However, that does not seem to be the case. As the county explains, the existing plan included three separate plan map designations that were considered Goal 4 resource lands: Forest Resource, Woodland Resource, and Open Space Reserve. All three of the plan designations were implemented by the same zoning district: Forest Resource. The new plan combines the three previous plan designations into one: Forestry/Open Space. That plan designation now has three zoning districts that implement it: Forest Resource, Woodland Resource, and Open Space Reserve.

While the plan designations and zoning districts were changed, the actual land encompassed by those designations and districts were not. As the county points out, Goal 4 defines "forest lands" to include lands acknowledged as forest land as of 1994.

Stevens' argument may be that, if the new Forestry/Open Space plan designation is applied in future decisions to land not formerly designated as forest land, it may include lands that do not qualify as forest lands under Goal 4. However, even assuming that to be the case, Stevens does not explain why such decisions would be inconsistent with Goal 4 or any other applicable goal or rule. Stevens cites to no pertinent law requiring that a plan designation that implements Goal 4 be applied *only* to forest land protected under Goal 4. In any case, as far as we can tell the purpose statement and map designation criteria that Stevens objects to are based on, and consistent with, the unamended JCCP Forest Lands Element, which is acknowledged to comply with Goal 4.

This subassignment of error is denied.

C. Redesignation of Forest Lands

Section 2(D) of the amended Map Designations Element allows land designated as Forestry/Open Space to be redesignated if the applicant demonstrates that the subject property is not forest land as described in the JCCP Forest Lands Element.[7] Section 2(E) provides that

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[7] Section 2 of the Forestry/Open Space Land portion of the JCCP Map Designations Element provides, in relevant part:

> "D) Map amendment requests may demonstrate that property is not located in forest land environments described herein by providing substantive site specific evidence which clearly indicates that the subject property is not forest land or woodland as outlined in the Forest Lands Element of the [JCCP]
>
> "E) Except where another resource land designation is requested, or where justified through the Goal Exceptions process, Goal 4 is deemed to apply and the Forest/Open Space designation will not be removed from:
>
> "i) Lands within the principal forest environments described in subsection 2A above or woodlands described in 2B above; or
>
> "* * * * *
>
> "iv) Lands with no legal public road access or where the only public road access is by Bureau of Land Management or Forest Service Roads; or

Forestry/Open Space designation may be removed if another resource designation is requested or if an exception to Goal 4 is justified. However, Section 2(E) sets forth a number of circumstances under which the county will not remove the Forestry/Open Space designation. Stevens argues that the circumstance described in Section 2(E)(i) is so circular and restrictive that in fact it is impossible to remove the Forestry/Open Space designation. In addition, Stevens argues that four of the listed circumstances (Section 2(E)(iv), (viii), (ix) and (xi)) have nothing to do with Goal 4 or the protection of forest lands.

Read together, Sections 2(D) and 2(E) clearly allow removal of the Forestry/Open Space designation under at least some circumstances. Stevens' argument to the contrary is not well taken. With respect to the four circumstances that Stevens alleges are not related to Goal 4 or the protection of forest lands, the county's brief adequately explains why each of the four is in fact related to Goal 4 or other pertinent statewide planning goals.

This subassignment of error is denied.

D. Aggregate Resources

Ordinance 2004-1 amends the Aggregate Resource Land portion of the JCCP Map Designation Element, but does not amend the JCCP Aggregate and Mineral Resources Element. Stevens argues that the JCCP is inconsistent with Goal 5 because the JCCP does not adequately protect aggregate resources as required by the Goal. Stevens explains that, as this Board recognized in *Copeland Sand & Gravel v. Jackson County*, 46 Or LUBA 653 (2004), the

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"* * * * *

"viii) Lands identified as being needed for watershed or aquifer recharge maintenance protection; or

"ix) Lands having outstanding or unusual ecological, botanical, geological, scenic, or other natural resource characteristics; or

"* * * * *

"xi) Lands where the feasibility of providing on-site septic disposal systems and domestic water supply has not been established[.]"

county repealed its inventories of significant and potentially significant aggregate sites in a 1995 decision. According to Stevens, without a JCCP inventory of significant aggregate sites, the county cannot adequately protect significant aggregate resource sites.

The county responds that Ordinance 2004-1 made only minor amendments to the Aggregate Resource Land portion of the JCCP Map Designation Element and that the amended JCCP continues to apply the same level of protection to aggregate resources as the existing acknowledged JCCP. According to the county, under both the existing and amended JCCP, the owner of an aggregate site can apply to the county to redesignate land to Aggregate Resource and to rezone the land to Aggregate Removal (AR), which has the effect of designating the site as a "significant" aggregate resource site for purposes of Goal 5. To the extent that scheme is inconsistent with Goal 5 because it lacks an explicit "inventory" of significant and potentially significant Goal 5 sites, we understand the county to argue, that scheme is a product of the county's 1995 decision and cannot be challenged in the current appeal of Ordinance 2004-1. We agree with the county that Stevens has not demonstrated that the ordinances challenged in this appeal are inconsistent with Goal 5.

This subassignment of error is denied.

Stevens' fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR (STEVENS)

LDO 277.060 requires that legislative amendments "comply" with the statewide planning goals. In a previous order regarding the establishment of a committee to revise the LDO the board of commissioners stated the purpose of the LDO was to be "consistent" with the goals. Stevens contends that directives that the LDO "comply" and be "consistent" with the goals precludes the LDO from ever being more restrictive than state law requires.[8]

[8] Stevens' petition for review sets forth numerous examples of LDO provisions that Stevens believes are more restrictive than state law requires.

While the county does not concede that any amended LDO provisions are more restrictive than state law, it also argues that the commonly understood meaning that a requirement "comply" with the goals means that the decision be "at least as restrictive" as required by state law. We agree with the county that the requirement of compliance with the goals generally if not universally provides a floor rather than a ceiling. Even assuming that the challenged amendments are more restrictive or protective than the goals require, Stevens has not demonstrated that adoption of more restrictive or protective standards violates any applicable goals or statutes.

Finally, Stevens argues that the new Rural Use Map Designation Criterion (2)(B) and the new Rural Residential Map Designation Criterion (2)(C), which require the subject area to be within a fire protection district or to have fire protection service available from a fire protection district by contract, are inconsistent with the new Plan Natural Hazards Element Wildfires Policy 1, Implementation Strategy (B)(i), which requires the county to "discourage intensive residential development outside of rural fire protection districts through zoning until fire service can be provided, or such development can be made 'fire safe.'" We understand Stevens to argue that Policy 1 correctly recognizes that residential development need not be within or serviced by a fire protection district in order to be "fire safe," and that the county erred in imposing conflicting requirements with respect to residential development in the rural use and rural residential designation.

The county points out that Policy 1 applies county-wide, while the rural use and rural residential designation criteria apply only to areas so designated. According to the county, it is within the county's discretion, and not inconsistent with Policy 1, to decide that development within a rural use or rural residential designation will be "fire-safe" only if served by a fire protection district. We agree that Stevens has not demonstrated any inconsistency between Policy 1 and the rural use and rural residential designation criteria.

Stevens' fifth assignment of error is denied.

ASSIGNMENT OF ERROR (OREGONIANS IN ACTION)

Ordinance 2004-1 amended the purpose statement for the Rural Residential Land portion of the JCCP Map Designations Element to state as follows:

> "The official Plan map designates rural residential areas to provide for moderate to large acreage homesites in an open setting, consistent with the physical capacity of the land to accommodate such development. Exceptions to statewide planning Goals 3, 4 and 14 (as applicable) are required to establish Rural Residential lands outside adopted Urban Growth Boundaries."

Petitioner Oregonians In Action (OIA) argues that Ordinance 2004-1 makes it "impossible for a property owner to correctly zone non-resource land." Petition for Review (OIA) 4. According to OIA, the amended Rural Residential Land language effectively prevents an owner of land that is incorrectly designated and zoned as resource land from successfully seeking to redesignate and rezone the land for rural residential uses. By forcing a property owner in such circumstances to seek an exception to a resource goal, OIA argues, the county is effectively forcing the property owner to admit, falsely, that the property is resource land. OIA argues that, given the difficult standards for obtaining an exception to a resource goal, the county has effectively crafted a process that will inevitably result in denial. According to OIA, the county must provide a process whereby property owners of land that is incorrectly designated and zoned as resource land can seek to redesignate and rezone that land to nonresource uses, without the necessity of taking an exception to the resource goals.

The county does not concede that the county *must* provide some means to redesignate non-resource land to non-resource uses without taking an exception to the resource goals. However, the county argues, even if some such requirement existed, the amended JCCP does just that. According to the county, the new Rural Use designation allows property owners to demonstrate their land is not resource land. Once such a demonstration is made, the JCCP designation can be changed to Rural Use without having to take an exception.

OIA's petition for review does not acknowledge or discuss the Rural Use designation. The county appears to be correct that, unlike the Rural Residential plan designation, the Rural Use plan

designation does not require an exception. The Rural Use plan designation allows rural residential development, albeit not at the intensity of the Rural Residential plan designation. OIA does not explain the basis for its apparent view that the county must allow nonresource lands to be designated Rural Residential, as opposed to other nonresource plan designations. OIA's assignment of error is that the JCCP must allow some means for non-resource lands to be planned and zoned for non-resource uses without taking an exception to resource goals. Assuming, without deciding, the validity of that argument, the JCCP does so. Therefore, OIA's assignment of error does not provide a basis for reversal or remand.

OIA's assignment of error is denied.

FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR (SKREPETOS)

As relevant here, Ordinance 2004-02 amends LDO 10.2.1(A) and (C), which respectively govern creation of lawful lots or parcels, and legalization of lots or parcels created without required zoning review. In these four assignments of error, petitioner Skrepetos (Skrepetos) argues that LDO 10.2.1(A) and (C) are inconsistent with state law.

A. LDO 10.2.1(A)

LDO 10.2.1(A) provides in relevant part that lots or parcels established prior to adoption of a 1989 ordinance by any of five listed methods "are considered separate, whether or not they received County land division approval at the time they were created[.]"[9]

[9] LDO 10.2.1(A) provides in pertinent part:

> "Creation of Lawful Lots or Parcels
>
> "Lots or parcels created by filing a final plat for a subdivision or partition approved through the land division procedures established by Ordinance No. 88-18 effective February 13, 1989 are considered lawfully separate lots or parcels. In addition, lots or parcels that were established prior to adoption of that Ordinance by any of the methods listed below are considered separate, whether or not they received County land division approval at the time they were created, provided the parcels conformed to the dimensional standards including minimum lot size then in effect (see subsection (C) below). Development of separate lots or parcels is subject to all regulations and standards in effect at the time any land development approval is applied for."

Skrepetos argues that LDO 10.2.1(A) violates numerous statutes by recognizing as separate, lawful lots or parcels certain units of land that were established without required county approval. For example, Skrepetos argues, LDO 10.2.1(A)(1) recognizes parcels formed by deeds or land sales contracts prior to 1989, notwithstanding that state and county law from approximately 1973 to 1989 required county approval to create a parcel. Skrepetos argues that LDO 10.2.1(A)(1) is thus inconsistent with ORS 92.010 and ORS 215.010(1), which authorize creation of a parcel by deed or land sales contract only if there were no applicable planning, zoning or partitioning ordinances or regulations in existence at the time.

While not necessarily conceding that the provision would violate all the statues alleged by Skrepetos, the county concedes that "it would be improper for the County to recognize a lot or parcel as lawfully created if, at the time of that alleged creation, County land division approval was required but not obtained." Respondent's Brief 6.

"(1) Execution of a recorded or unrecorded properly signed and dated conveyance, security document or contract to convey (not including an earnest money agreement) which clearly describes the tract or parcel(s) to be conveyed and that resulted in creation of a parcel or parcels that conformed to any zoning requirements then in effect. If the document was not recorded, its date of execution must be evidenced by notary acknowledgement or other reliable contemporary documentation signed by a disinterested third party. Documents used to convey ownership of land will not be honored if said conveyance has, in some fashion, been materially altered following its execution.

"(2) Execution of a lease for a period of more than 50 years.

"(3) Creation of a tax lot on the records of the County Assessor prior to November 10, 1982 (e.g., segregation requests via journal vouchers) when such tax lot was established at a property owner's request for purposes of land division.

"(4) Filing a survey map with the Jackson County Surveyor that clearly indicates the prior existence of the parcel by map or legal description prior to November 10, 1982. In order to be considered separate, substantial evidence must be provided that verifies the property owner's intent in surveying the parcel was to convey ownership of land.

"(5) Parcels recognized pursuant to Chapter 11 (Nonconformities).

"* * * * *

However, the county argues that, properly interpreted, LDO 10.2.1(A) does *not* recognize such lots or parcels as lawfully created lots or parcels. The county admits that the wording of LDO 10.2.1(A) is unclear, and states that it is willing to amend LDO 10.2.1(A) to more clearly express its intent. That intent, according to the county, is to recognize as lawful, separate lots or parcels under LDO 10.2.1(A) *only* those lots or parcels that were established by one of the five listed methods *prior* to adoption of state and county laws that require county approval. The county continues that if a lot or parcel was formed through one of those five methods at a time when county land division approval was required, but not received, it can only be recognized as a lawful lot or parcel through the review process provided in LDO 10.2.1(C), discussed below. *See* n 10. The county argues that the purpose of the reference in 10.2.1(A) to "subsection (C)" is to indicate that such a lot or parcel can be recognized as a lawful lot or parcel only if it satisfies the dimensional and other requirements of LDO 10.2.1(C).

The foregoing may represent the county's intent in adopting LDO 10.2.1(A), but we cannot agree that that is what the provision says. LDO 10.2.1(A) functions as a legislative declaration of which lots or parcels the county considers to be lawfully created lots or parcels. LDO 10.2.1(A) declares that lots or parcels created pursuant to the 1989 ordinance "are considered lawfully separate lots or parcels." It next declares that lots or parcels established prior to 1989 by any of the five listed methods "are considered separate, whether or not they received County land division approval at the time they were created[.]" That sentence does not, as the county suggests, distinguish between lots or parcels established prior to dates when county approval was required, and lots or parcels established after those dates. Rather, it treats those lots or parcels as a single category. The intent of the oblique reference to LDO 10.2.1(C) is certainly unclear. In short, the most plausible reading of LDO 10.2.1(A) is that it purports to recognize the legality of lots or parcels established prior to February 12, 1989, including lots or parcels that did not receive required county approvals. As the county concedes, it is inconsistent with state law for the county to legislatively declare that such lots or parcels were lawfully created.

A related problem is that LDO 10.2.1(A) appears to recognize that such lots or parcels were "created" as of the dates they were illegally formed. As Skrepetos points out, a number of statutes allow certain types of development only if the subject parcel was "lawfully created" prior to a certain date. *See, e.g.*, ORS 215.705 (lot of record dwellings on lots or parcels lawfully created prior to 1985); ORS 215.284(2) (non-farm dwellings on lots or parcels created prior to 1993); ORS 215.263(4) (partition of a lot or parcel lawfully created prior to 2001). To the extent LDO 10.2.1(A) purports to recognize the creation of illegally formed lots or parcels as of the date they were illegally formed, LDO 10.2.1(A) is inconsistent with statutes and rules that are concerned with the date that a lot or parcel is lawfully created. *See DLCD v. Douglas County*, 28 Or LUBA 242, 249 (1994) (after-the-fact legalization of illegally formed lots or parcels does not mean that such lots or parcels were "lawfully created" for purposes of ORS 215.705).

B. LDO 10.2.1(C)

LDO 10.2.1(C) sets forth a process and provides criteria under which lots or parcels "created" after 1973 but prior to 1982 without required land use approval may be approved for development.[10] LDO 10.2.1(C) refers to, and is an apparent attempt to implement, ORS 92.177,

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[10] LDO 10.2.1(C) provides, in relevant part:

> "Lots and Parcels Without Zoning Review
>
> "Lots and parcels created after September 1, 1973 but prior to November 10, 1982 without required land use review and approval, will not by that fact alone be denied development permits, provided development of the lot or parcel can otherwise conform to the development standards of this Ordinance. ORS 92.177 provides that the County may approve an application for creation of lots or parcels which were improperly formed, including those created as a result of court actions, notwithstanding that less than all of the owners of the previous conforming lot or parcel have applied for the approval. The criteria applicable to this Type 2 review are as follows:
>
> "(1) The lots and parcels conform to current dimensional and density standards, or conform to the dimensional and density standards in effect when the lots or parcels were improperly formed;
>
> "2) No subsequent land division has occurred;

which authorizes local governments to approve the creation of lots or parcels that were improperly formed without required approvals, notwithstanding that less than all of the owners of the existing legal lot or parcel have applied to create the lots or parcels.[11]

Skrepetos argues that LDO 10.2.1(C) authorizes the county to grant retroactive legal lot or parcel recognition to an illegally formed lot or parcel as of the date it was illegally formed. As with LDO 10.2.1(A), Skrepetos argues that the county cannot, consistent with state law, recognize illegally formed parcels as being lawfully created parcels as of the date they were illegally formed.

The county concedes that ORS 92.177 does not authorize the county to legalize lots or parcels, and in so doing establish the date those lots or parcels were illegally formed as the date they were legally created. However, the county argues that, properly interpreted, LDO 10.2.1(C) does not purport to do so. The county argues that if an improperly formed lot or parcel is legalized through a Type 2 review pursuant to the standards in LDO 10.2.1(C), the date of creation of that lot or parcel will be the date of the County's final decision approving its creation.

As with LDO 10.2.1(A), the county's intent in adopting LDO 10.2.1(C) is less than clear. The first sentence of LDO 10.2.1(C) can be read to suggest that the county regards lots or parcels formed without required county approval between 1973 and 1982 to be already "created" for all relevant purposes, and that the only remaining question is whether the county will allow development

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> "3) The owner must demonstrate that the lots or parcels can physically accommodate a development site along with the necessary facilities and utilities, in compliance with all siting standards of this Ordinance; and
>
> "4) Practical physical access to the building site currently exists from a public road, or access can be provided through a irrevocable easement or equivalent means. Practical physical access must at a minimum allow emergency vehicle access to the property."

[11] ORS 92.177 provides:

> "Where application is made to the governing body of a city or county for approval of the creation of lots or parcels which were improperly formed without the approval of the governing body, the governing body of a city or county or its designate shall consider and may approve an application for the creation of lots or parcels notwithstanding that less than all of the owners of the existing legal lot or parcel have applied for the approval."

of those lots or parcels under the standards at LDO 10.2.1(C)(1) through (4). LDO 10.2.1(C) does not explicitly state, one way or the other, how application of that provision affects the lot or parcel's date of creation. Given the lack of clarity on that point, and because remand is necessary in any event to address similar ambiguities in LDO 10.2.1(A), the better course is to also sustain this part of the first and second assignment of error so that LDO 10.2.1(C) can be revised to more clearly express the county's intent.

Skrepetos' first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR (SKREPETOS)

Skrepetos argues that one of the five listed methods for establishing a lawful lot or parcel under LDO 10.2.1(A) is inconsistent with ORS 215.010(1).

LDO 10.2.1(A)(3) recognizes as a separate lot or parcel:

> "Creation of a tax lot on the records of the County Assessor prior to November 10, 1982 (e.g., segregation requests via journal vouchers) when such tax lot was established at a property owner's request for purposes of land division."

According to Skrepetos, this provision violates ORS 215.010(1)(b), which states that as used in ORS chapter 215, "parcel" "[d]oes not include a unit of land created solely to establish a separate tax account." Skrepetos argues that determining whether the purpose of creating a tax lot was for a land division or to establish a separate tax lot account is an inquiry that is "subjective and open to multiple interpretations" Petition for Review (Skrepetos) 20.

The county responds that LDO 10.2.1(A)(3) is not inconsistent with ORS 215.010(1)(b), because the statute excludes from the definition of "parcel" only units of land "created solely" to establish a separate tax account. LDO 10.2.1(A)(3) requires a unit of land to have been created *for the purposes of land division*. The county argues that LDO 10.2.1(A)(3) requires some evidence demonstrating that the property owner requested the separate tax lot for the purpose of carrying out a land division. While evidence regarding purpose may indeed be subjective in particular cases, the county argues, LDO 10.2.1(A)(3) does not purport to recognize as parcels units of land "created solely" to establish a separate tax account.

We agree with the county that LDO 10.2.1(A)(3) is not inconsistent with ORS 215.010(1)(b).

Skrepetos' third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (SKREPETOS)

Skrepetos argues that LDO 10.2.1(A) and (C) purport to allow the county to reverse the outcomes of prior, final land use decisions. For example, Skrepetos argues that in *DeBoer v. Jackson County*, 46 Or LUBA 24 (2003), Skrepetos successfully defended before LUBA a county decision that denied a requested non-farm dwelling permit for a parcel formed in 1974 without required county approvals, on the grounds that the parcel was not a lawfully created parcel. Skrepetos contends that under LDO 10.20.1(A) and (C), the county could attempt to reverse that adjudicated outcome, and determine that the same parcel at issue in *DeBoer* was lawfully created prior to 1993, and thus eligible for a non-farm dwelling under ORS 215.284(2). If so, Skrepetos argues, LDO 10.2.1(A) and (C) constitute impermissible "retroactive" ordinances prohibited by ORS 92.285 and ORS 215.110(6).

The county does not specifically respond to this assignment of error. However, we have already concluded that remand of LDO 10.2.1(A) and (C) is necessary for the county to clarify that those code provisions do not authorize what Skrepetos argues the county cannot do under this assignment of error. Without expressing agreement with Skrepetos that LDO 10.2.1(A) and (C) constitute "retroactive" ordinances prohibited by ORS 92.285 and ORS 215.110(6), we do not see that resolving this assignment of error would add anything to our disposition of Skrepetos' first and second assignments of error. Accordingly, we do not reach this assignment of error.

FIFTH ASSIGNMENT OF ERROR (SKREPETOS)

The following background is useful in understanding the parties' arguments. In 1984, Goal 8 was amended to allow for the siting of destination resorts. In 1987, the legislature codified these amendments in ORS 197.435 to 197.465. In 1986, the county amended its LDO to provide for the siting of destination resorts pursuant to the Goal 8 amendments. In 1993, the legislature

adopted numerous changes to the destination resort statutes. Generally, goal, rule, and statutory amendments are immediately and directly applicable to local governments. ORS 197.646. The 1993 amendments to the destination resort statutes, however, provided a timing mechanism that allowed counties to come into compliance at a later date. Oregon Laws 1993, chapter 590, section 6 (Section 6) provides:

> "Counties that have adopted plans and land use regulations that implement ORS 197.435 to 197.465 prior to the effective date of this 1993 Act may continue to apply the provisions of such plans and land use regulations until they adopt plan and land use regulation amendments implementing this 1993 Act, but not later than the completion of the next periodic review after the effective date of this 1993 Act."

Ordinance 2004-2 recodifies the LDO provisions regarding destination resorts into a new section, LDO 4.2.7, with some textual amendments and deletions. The county's findings explain its intent in adopting LDO 4.2.7:

> "A county's pre-existing destination resort siting standards may be employed until the county's next periodic review. Since Jackson County was in periodic review at the time the State enacted destination resort legislation, Jackson County is not required to comply with the 1993 statute at this time.
>
> "While Jackson County has yet to adopt a destination resort map in strict compliance with ORS 197.455(2), the existing map complies with the intent of ORS 197.455 by illustrating both the areas where destination resorts are not permitted and (by inference) where they are allowed. Jackson County has also opted to include statutory destination resort standards by reference in its revised LDO. These actions bring the County *more into compliance* with ORS 197.435-.467 and specifically ORS 197.465(1)." Record 196 (emphasis added).

Skrepetos argues that the county cannot *partially* implement the 1993 statutes or bring the LDO "more into compliance" with the 1993 statues without triggering the obligation to bring the LDO into full compliance.

In addition, Skrepetos argues that the new LDO 4.2.7 deletes 12 pages of code provisions that implemented the 1987 statute. According to Skrepetos, even if the county did not intend to implement the 1993 statute, Section 6 does not permit the county to *delete* existing LDO standards that implement the 1987 statute. Skrepetos contends that Section 6 grants the county temporary

reprieve from the obligation to implement the 1993 statute *only* if the county has implemented and continues to apply code standards based on the 1987 statute.

The county responds that the above-quoted finding stating that LDO 4.2.7 is intended to bring the LDO "more into compliance" with the statute is an inadvertent holdover from an earlier version of the proposed new LDO that was intended to implement some requirements of the 1993 statute. However, the county argues, the board of commissioners was ultimately persuaded (by Skrepetos and others) that if it implemented some provisions of the 1993 statute, it must implement all of them. Accordingly, the county argues, the commissioners ultimately opted to retain the substance of the old LDO destination resort provisions that directly implement the 1985 statute.

With respect to the deleted LDO provisions, the county argues LDO 246.030 to 246.080 imposed a number of procedural and substantive requirements that were not required by the 1987 statute.[12] Because those code requirements were not essential to compliance with the 1987 statute, the county contends, it may delete them without triggering any obligation to comply with the 1993 statute.

We agree with the county that, notwithstanding the finding suggesting that the county intended to partially implement the 1993 statute, in fact the county abandoned that intent and adopted LDO amendments that do not implement any provision of the 1993 statute. However, we disagree with the county that it may delete substantive portions of the old LDO that implement the pre-1993 statute and continue to rely on Section 6 to avoid the obligation to implement the 1993 statute.

Section 6, quoted earlier, grants the county a limited reprieve from the obligation otherwise imposed by ORS 197.646 to implement the 1993 statute. That reprieve is available only if the

[12] We briefly describe the deleted code provisions. LDO 246.030 listed a number of uses permitted as part of a destination resort. LDO 246.040 set forth application and review procedures for the Destination Resort Overlay District required in order to site a destination resort. LDO 246.050 imposed a number of criteria for approval of the overlay district. LDO 246.060 prescribed the contents of the application for the overlay district. LDO 246.070 set forth the application and review criteria for the preliminary development plan approval required of destination resorts. LDO 246.80 provided the final development plan approval criteria.

county has "adopted plans and land use regulations that implement ORS 197.435 to 197.465 prior to the effective date" of the 1993 statute. If so, the county "may continue to apply the provisions of such plans and land use regulations" instead of implementing the 1993 statute, at least until completion of the next periodic review. There is no question that the deleted LDO provisions implemented the 1987 statute, even assuming the county is correct that those provisions may not be "essential" to implementing the 1987 statute. In our view, the reprieve granted by Section 6 applies only if the county "continue[s] to apply" the "adopted plans and land use regulations that implement" the pre-1993 statute. That reprieve is lost if the county substantively amends the "adopted plans and land use regulations that implement" the pre-1993 statute. Under that circumstance, the county will no longer "continue to apply" those adopted plans and regulations, but will instead apply a substantively different set of plans and regulations. It may be that the amended plans and regulations can be said to meet the minimal requirements of the pre-1993 statute. However, as noted, the reprieve granted by Section 6 is a narrow one, limited to counties that "continue to apply" the plans and land use regulations that were adopted prior to 1993 to implement the pre-1993 statute. Section 6 does not apply to plans and land use regulations adopted or substantively amended after 1993.

We do not mean to suggest that the shelter provided by Section 6 would be lost where the county simply recodifies the old LDO destination resort provisions, or adopts minor amendments that do not significantly affect the substantive standards applicable to destination resorts. However, as far as we can tell, wholesale deletion of LDO 246.030 to 246.080 goes far beyond recodification or nonsubstantive amendments. Taken together, LDO 246.030 to 246.080 impose an elaborate procedural and substantive scheme for approving and regulating destination resorts. The county cannot delete that scheme and continue to rely on Section 6. Accordingly, remand is necessary for the county to either fully implement the 1993 statute or, at a minimum, restore the deleted LDO provisions to conform to the "adopted plans and land use regulations" that implemented ORS 197.435 to 197.465 prior to the effective date of the 1993 statute.

Skrepetos' fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR (SKREPETOS)

In his final assignment of error, Skrepetos argues that even if the county was not required to bring the new LDO into compliance with the 1993 amendments to the destination resort statutes, *see* fifth assignment of error, the challenged decision nonetheless violates the 1987 statutes. Because we sustained Skrepetos' fifth assignment of error, holding that the county could not make substantial changes to the destination resort ordinances and continue to rely on Section 6, we need not address whether those amended provisions would comply with the 1987 statutes.

We do not reach Skrepetos' sixth assignment of error.

For the reasons stated under petitioner Skrepetos' first, second, and fifth assignments of error, Ordinance 2004-02 is remanded. Ordinances 2004-01 and 2004-03 are affirmed.