BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON SHORES CONSERVATION
COALITION, MARK WILSON
MONICA SCHREIBER and
HOWARD WATKINS,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

ROBIN STEVENOT,
Intervenor-Respondent.

LUBA No. 2004-132

FINAL OPINION
AND ORDER

Appeal from Coos County.

Carra Sahler, Portland, filed the petition for review. With her on the brief was Preston Gates and Ellis LLP. William K. Kabeiseman argued on behalf of petitioners.

No appearance by Coos County

Dan Terrell, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Offices of Bill Kloos, PC.

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

REMANDED 03/02/2005

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 county approval of a marina and a recreational planned unit development (R-PUD) on a 216-acre property located within the Coos Bay Estuary Management Plan (CBEMP) area.

MOTION TO INTERVENE

Robin Stevenot (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address several alleged new matters raised in the response brief, including arguments that petitioners waived several issues. We agree that a reply brief is warranted under OAR 661-010-0039, and the motion is allowed.

FACTS

The subject property is a mostly vacant 216-acre parcel located west of the Cape Arago Highway in the urban unincorporated community of Barview, adjacent to Coos Bay. The entire property is located within the CBEMP, which implements Statewide Planning Goals 16 (Estuarine Resources) and 17 (Coastal Shorelands). Approximately 174.8 acres of the property consist of low shoreland and tidelands below ten feet in elevation above mean sea level. The remaining 41.2 acres consist of uplands ranging from 10 to 25 feet in elevation above mean sea level. The upland areas are vegetated with grasses and low bushes toward the shoreline, and with tree stands along the highway. A creek enters the property from the east and forks north and south down to the bay.

The property is the site of a former pulp mill. Current structures include the mill building and a smokestack on the central upland portion, and the pilings of the Sitka Dock extending out into the bay.

A large area in the approximate middle of the subject property, including the uplands, is zoned CBEMP Unit 56-UW (Urban Water Dependent). Record Vol II-106. A strip of tideland along the southern shore of the property is zoned CBEMP Unit 57-NA (Natural Aquatic). The Sitka Dock and a small area of shoreland adjoining it is zoned CBEMP Unit 56-DA (Development Aquatic). A large area of tidelands north of the dock is zoned either CBEMP Unit 55A-CA (Conservation Aquatic) or CBEMP Unit 55B-NA (Natural Aquatic). A small area in the extreme north is zoned CBEMP Unit 55-UD (Urban Development).

On March 25, 2004, intervenor applied for an R-PUD known as Baywater Estates consisting of (1) a 50-slip marina and deep water dock built on the existing mooring piles for the Sitka Dock, (2) a condominium complex, (3) a commercial building housing a travel agency and rental shop, (4) a 5,000-square foot restaurant, (5) a 2,500-square foot gym and spa within the condominium complex, and (5) boardwalks and nature trails.[1] The existing

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[1] The county's decision describes the proposed uses as follows:

> "The application materials state that the hub of the project is a new marina and deep water dock that will be built using the existing mooring piles of the former Sitka Dock. The marina is designed to moor up to fifty recreational crafts and yachts and will be home to a mini-cruise ship and deep sea vessel. Some of the slips are planned to hold boats for residents of the proposed R-PUD, others to hold boats for vacationers at the proposed R-PUD, and still others will be used by day vacationers or those requiring temporary moorage due to storms and weather changes.
>
> "* * * * *
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> "The plans for the R-PUD explain that the marina and deep water dock will be supported by a variety of land-based structures. These include condominiums, commercial buildings and a restaurant. The Bay Point Estates condominiums will be marketed to people who own recreational craft and want to vacation with their boats and with others who share that same interest. Some of the condominiums will be individually owned as primary homes and others as vacation/second homes. This will create a core community of familiar faces. Blocks of condominiums will be corporate owned as time share and vacation rental units and will cater to visitors who may stay at the facilities only once or for a few days every year. The design of condominium units will reflect the anticipated end-use. The condominium component will be clustered in the upland portion of the site, away from the estuary areas that will surround it. The condominiums will be enclosed as a gated community and will be administered by a homeowner association. Ownership of condominiums will consist of ownership of the buildings only with long-term leases for use of the property they occupy; the entire R-PUD property will remain in single ownership.

mill structure and smokestack would be removed, and the mill timbers reused to construct the restaurant.

The application proposes development in two phases. Phase 1 would include the first half of the marina, 54 condominium units, and some of the boardwalk and nature trails. Phase 2 would complete the marina, extend the dock to the deep water portion of the bay, construct the commercial building and restaurant, and expand the condominium uses. All development other than the dock extension and marina will occur on the upland portion of the property. At full build-out, the developed area of the R-PUD would occupy 41.2 acres. The remainder of the site would be undeveloped open space.

> "The proposal includes several commercial buildings intended to support activities of the marina, the deep water dock and adjacent estuary open space areas. A smaller, 2,500 square foot building is expected to house two small businesses—a travel agency and a rental shop. The travel agency will do bookings for tours leaving the marina (viewing trips, deep-sea fishing trips, nature trips), book and follow the mooring of recreational craft docked in the marina, book mini-cruise luncheon and dinner trips, book golf trips to the nearby golf courses, and schedule general vacation arrangements for local residents and guests. The rental shop will supply recreation gear for visitors as well as sell emergency supplies and accessory items. Rental items will include things such as clamming and crabbing gear, bicycles, kites, equipment for wind sailing, sea kayaking and other boating activities, and beach equipment.
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> "A 5,000 square foot restaurant is also planned for the proposed R-PUD. The restaurant will serve the dual functions of providing meals for the mini-cruises and tours that leave from the marina as well as serving the R-PUD guests and the greater community in the restaurant building. The applicant's proposal indicates that the restaurant will be built with the timber from the existing building on the site, and will be constructed to present an old mill theme, using many of the pictures and other items from the old mill.
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> "Last, a gym and spa is planned to be located in a 2,500 square foot facility within the condominium complex. The gym and spa will cater to the vacationers staying at Bay Point Estates and provide them with alternative recreational and relaxation opportunities.
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> "The developed area of the R-PUD will occupy 41.2 acres at full development. The remaining 174.8 acres will be open space available for recreational uses. Those areas include sandy beaches in the immediate vicinity of the marina area, tidal flats suitable for clamming, wooded areas, and riparian, wetland and estuary areas suitable for bird watching and other nature exploration activities. Included as part of the proposal is a series of boardwalks and walkways around the larger site. Those walkways will provide access to and exposure to the Coos Bay estuary and other wetlands areas of the site. All such paths will conform to all applicable riparian and wetland setback requirements." Record Vol III 8-9.

The county planning department approved the application, and opponents appealed it to the board of county commissioners (BOCC), which conducted two hearings. The BOCC denied the appeal, and issued a final decision approving the application on July 21, 2004. Petitioners appealed that decision to LUBA, and the county subsequently withdrew the decision for reconsideration. The BOCC issued its decision on reconsideration on October 27, 2004. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county misinterpreted the applicable law in allowing residential uses within the 56-UW zone on the upland portion of the property.

The management objective for the 56-UW zone is to protect deep-water access for "water dependent uses."[2] All uses allowed in the 56-UW zone are subject to Coos County Comprehensive Plan (CCCP) Policy 16, discussed under the third assignment of error. ZLDO 4.5.311 sets out the uses and activities allowed in the 56-UW zone. Uses allowed subject to CCCP Policy 16 include dryland moorage, industrial and port facilities, log storage/sorting yard, marinas, low intensity and high intensity recreational facilities, and solid waste disposal. Residential use is expressly prohibited. "Activities" allowed subject to CCCP Policy 16 include "land divisions," including partitions, subdivisions, planned unit development, and "Recreation PUD." The county's code defines "recreational planned unit

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[2] Coos County Zoning and Land Development Ordinance (ZLDO) 4.5.310 provides, in relevant part:

> "**Management Objective**: This shoreland district shall be managed so as to insure that the unique qualities of the district closest to deep water access for water-dependent uses are protected and utilized for such development. However, non-water dependent uses may be allowed as per Policy #16a. Water-related and non-water-dependent/non-water-related uses shall be appropriate for portions of the district not 'suitable for water-dependent uses.' * * *
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> "Development of the district shall be consistent with a site development plan that must be submitted and reviewed by the County Planning. The site plan may only be approved if it protects the area's unique qualities for water-dependent uses; water-related and non-water-dependent/non-water-related uses may only be approved if such uses do not inhibit or preclude water-dependent uses of the shoreline, and are compatible with the overall development plan for the district."

development" in relevant part as providing a combination of owner's primary dwelling units, recreational dwelling units and open space.[3]

Petitioners argue that while ZLDO 4.5.311 allows land division, including an R-PUD, that R-PUD cannot include uses that are elsewhere expressly prohibited in the 56-UW zone. Because residential development is prohibited in the zone, petitioners contend, the county erred in authorizing an R-PUD that includes residential uses.[4] According to petitioners, that interpretation effectively reads the prohibition on residential uses out of ZLDO 4.3.311, and is inconsistent with the express language and underlying purpose of the 56-UW zone, to protect shorelands for water-dependent uses. ORS 197.829(1).[5] Further, petitioners argue,

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[3] ZLDO 2.1.200 defines "recreational planned unit development" as follows:

> "A planned unit development providing a combination of: owner's primary dwelling units, recreational dwelling units, and required open space. A recreational planned unit development may also contain retail and service establishments not necessarily limited in scope to meet the needs of the recreational planned unit development users, and accessory structures and uses to the extent necessary and normal to uses permitted within a recreational planned unit development. Recreational planned unit developments shall contain a minimum of 80 contiguous acres in single ownership."

[4] Intervenor responds, in part, that this argument was not raised below and is therefore waived. ORS 197.763(1). Petitioners' reply brief cites to portions of the record where this issue was raised, and we agree with petitioners that the issue was raised. Intervenor also argues that this issue was not sufficiently raised in the notice of appeal to the board of commissioners, from the planning director's decision made without a hearing, and therefore petitioners failed to exhaust administrative remedies, under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 392 (2003), *rev den* 336 Or 615 (2004). We agree with petitioners that the reasoning in *Miles* does not apply where, as here, a local appeal is made from a decision on a "permit" made without a hearing under ORS 215.416 or 227.175. *See McKeown v. City of Eugene*, 46 Or LUBA 494, 504, *aff'd* 193 Or App 512, 93 P3d 845 (2004) (ORS 227.175(10), the statutory cognate to ORS 215.416(11), prohibits cities from limiting issues on appeal from a permit decision made without a hearing). Intervenor does not dispute that the challenged decision is a permit decision governed by ORS 215.416, or that the appeal from the planning director to the board of commissioners is governed by ORS 215.416(11).

[5] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

the county's approach to resolving the conflict between that prohibition and the provision for R-PUDs is inconsistent with ZLDO 1.1.500, which provides that "[w]here the conditions imposed by a provision of this Ordinance are less restrictive than comparable conditions imposed by other provisions of this Ordinance, or another ordinance, the provisions which are more restrictive shall govern."

The county rejected the foregoing interpretation of ZLDO 4.5.311, reasoning that the code definition of "recreational planned unit development" makes residential uses a "core component" of an R-PUD, and therefore adopting that interpretation would effectively read R-PUDs out of ZLDO 4.5.311.[6] Petitioners do not specifically challenge that reasoning, or

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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[6] The county's findings state, in relevant part:

> "The Board of Commissioners received testimony that takes the erroneous position that the condominium component of the R-PUD should not be allowed because residential use is listed as not allowed by CCZLDO 4.5.311. That interpretation reflects the assumption that only those uses expressly allowed as stand-alone uses in the zone are permitted as part of a comprehensive PUD or R-PUD, which are expressly allowed activities in the zone. In short, the assumption is that if a use is not allowed as an individual use in the respective zone, it cannot be allowed as a component of a PUD or R-PUD.
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> "The Board of Commissioners rejects this reading of the code. The Board of Commissioners interprets CCZLDO 4.5.311 to allow all of the uses contained in the definitions of a listed activity. In other words, merely because a use is listed as not allowed as a stand alone use does not mean that it is not allowed as part of a larger activity, if that use is defined as being allowed under that activity. Consequently, the Board of Commissioners interprets CCZLDO 4.5.311 to provide that, while residential uses alone are not permitted in the 56-UW zone, residences as part of an R-PUD are permitted.
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> "Several reasons support this interpretation. The definition of R-PUD explicitly recognizes residential uses as a core component of recreational planned unit developments. That understanding is reinforced by CCZLDO 6.7.200, which describes the same mix of multiple-family dwellings, two-family dwellings (duplexes), low-and high-intensity recreational facilities, accessory structures, and retail and service establishments not necessarily limited in scope to meet the needs of the R-PUD users as allowed uses in R-PUDs. Following the interpretation suggested by opponents would eviscerate one of the key components of an R-PUD. If such a dissection of uses in this particular zone were intended, the Board of Commissioners believes that that intent would have been expressly stated in the code.

dispute the county's conclusion that residential uses are a "core component" of R-PUDs. The county's interpretation gives some effect to both the prohibition on residential uses and the provision for R-PUDs, while the interpretation preferred by petitioners would effectively preclude R-PUDs. We cannot say that the county's interpretation is inconsistent with the express language of ZLDO 4.5.311. Further, while the purpose of the 56-UW is to preserve the site for deep water access for water-dependent uses, such as marinas, as discussed below it also allows at least some non-water dependent uses. Petitioners have not established that the county's interpretation is inconsistent with the purpose of ZLDO 4.5.311.

As for ZLDO 1.1.500, we agree with intervenor that that provision appears to apply where two or more conflicting standards govern a particular use. In such circumstances, the county must apply the more restrictive standard. We do not see that ZLDO 1.1.500 applies where it is unclear what standards govern a proposed use, and the county must interpret its code to determine which standards apply. ZLDO 1.1.500 does not broadly require the county to adopt the more restrictive interpretation, or the interpretation that results in applying the more restrictive standard, as petitioners suggest. Here, the county determined that the prohibition on residential uses in the 56-UW zone refers to and governs only a particular type of residential use, stand-alone dwellings, and does not refer to or govern dwellings allowed within a PUD or R-PUD. Because the prohibition does not apply to the proposed use, the county found, there is no conflict. We sustained that interpretation above. Under that interpretation, ZLDO 1.1.500 has no bearing on the matter.

> "Additional reasons exist for why residences are allowed as part of an R-PUD while not allowed as a stand-alone use. R-PUDs (as well as PUDs) are subject to a level of review and heightened approval standards that individual uses, standing alone, are not subject to. Because R-PUDs consist of a combination of different uses in one area, they undergo comprehensive planning, design and review intended to identify and resolve many issue that stand-alone use approval criteria do not address. Furthermore, approval of an R-PUD results in an approved site development plan which is consistent with the management objective for the 56-UW zone (*see* CCZLDO 4.5.310, requiring an approved site development plan), whereas development of individual residences on separate lots in the zone would not be similarly controlled." Record Vol III 11-12.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The challenged decision requires at least half of the units to be "recreational dwelling units," but allows up to half of the condominium units to be the "owner's primary dwelling unit," pursuant to ZLDO 6.7.300(3), which governs the density of an R-PUD. ZLDO 6.7.300(3) provides that the density of "owner's primary dwelling units" shall not exceed the density permitted in the underlying zone, and further requires that the number of "recreational dwelling units" not exceed the number of primary dwelling units, nor the carrying capacity of the land.[7]

Petitioners contend that, if a residential R-PUD is allowed at all in the 56-UW zone, the county erred in allowing up to half of the condominium units to be primary dwelling

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[7] ZLDO 6.7.300 provides, in relevant part:

> "In lieu of the property development standards of the primary zone, the following standards shall apply to a R-PUD:
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> "3. Density:
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> "a. Owner's Primary Dwelling Unit. The overall density for 'owners' primary dwelling units' in a R-PUD shall not exceed the density permitted by the underlying zone or 'special consideration' restrictions.
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> "For purposes of a R-PUD, 'owners' primary dwelling unit' shall be defined as providing year-round occupancy for a single-family owner-occupied unit.
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> "b. Recreational Dwelling Unit. The overall numbers of permitted recreational dwelling units in a R-PUD shall not be less than the number of the 'owners' primary dwelling units,' nor shall the number of recreational dwelling units exceed the carrying capacity of the land, considering:
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> "i. individual septic feasibility approvals for each dwelling unit; or approved public or community sanitary system;
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> "ii. proof of an adequate supply of potable water, pursuant to Section 6.5.250(5)(C).
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> "For the purpose of a R-PUD, 'recreational dwelling unit' may be individually owned, and occupied year-round such as through time-sharing or other concepts, but shall be designed and generally used as 'vacation homes' and 'second homes' rather than as the owner's primary dwelling."

units. According to petitioners, because the residential density permitted by the underlying 56-UW zone is zero units per acre, no primary dwelling units are allowed. Therefore, petitioners argue, the county can only approve recreational dwelling units.[8]

The county's findings acknowledge the "inconsistency" between the ZLDO 6.7.300(3) method of determining the density of a R-PUD based in part on the number of primary dwellings allowed in the base zone, and a base zone that does not allow stand alone residences but does allow an R-PUD with residential units.[9] However, the county

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[8] Intervenor responds in part that petitioners failed to raise this issue below, and it is therefore waived. Petitioners cite to the portion of the record where this issue was raised. Record Vol II 68. We agree with petitioners that the issue was sufficiently raised.

[9] The county's findings state, in pertinent part:

> "The Board of Commissioners finds that there is an unanticipated, internal inconsistency in the CCZLDO between the R-PUD development standards, CCZLDO 6.7.300.3, and the Uses, Activities, and Special Conditions provisions of many zoning units in the CBEMP area. That inconsistency arises when attempting to determine density limitations for R-PUD dwellings (based, in part, upon a determination of the maximum number of owner's primary dwellings allowed in the base zone) when a CBEMP area zoning unit may not allow residences as a stand-alone unit but does allow for R-PUDs with residential units.
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> "The Board of Commissioners sees two reasonable approaches to interpreting these conflicting code provisions. One approach is to conclude that R-PUDs in such CBEMP units must consist entirely of recreational dwelling units and can contain no owner's primary dwelling units because there is no 'density permitted by the underlying zone' to establish the maximum number of owner's primary dwelling units allowed in such CBEMP units. However, the Board of Commissioners does not believe that this approach provides the 'flexibility needed to encourage the appropriate development of tracts of land that are large enough to allow the use of individualized site planning to fulfill an identified need for intense recreational opportunities' that is the purpose of [R-PUDs]. CCZLDO 6.7.100.
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> "The other approach is to conclude that the 'density permitted by the underlying zone' provision is nonmeaningful in such instances and is therefore not applicable. In such case, the other provisions contained in 6.7.300.3 (carrying capacity limitations, and the relationship of the number of recreational dwelling units to owner's primary dwelling units) provide the density limitations for an R-PUD to be located on that CBEMP zoning unit. Such an approach would allow some owner's primary dwelling units, but would limit those numbers by requiring an equal or greater number of recreational dwelling units be included in the R-PUD and would limit the total numbers of dwelling units in the development. The Board of Commissioners finds that this interpretation provides a greater flexibility for promoting a harmonious variety of residential and recreationally-related structures and uses in a manner envisioned by the purpose statement for the [R-PUD] provisions of the CCZLDO. This interpretation is also consistent with the language of the section as a whole, which anticipates 'owner's primary dwelling' as an element of R-PUDs." Record Vol III 18-19.

concludes that allowing some primary dwelling units in an R-PUD is more consistent with the text, context and purpose of the applicable code provisions than allowing only recreational dwelling units, under petitioners' interpretation.

Petitioners contend that the county's interpretation fails to give effect to the "zero" units per acre density limitation in ZLDO 6.7.300(3), and is inconsistent with ZLDO 1.1.500, which, as noted above, requires the county to impose the more restrictive condition where two or more code provisions apply.

Intervenor responds in part that the choice between two admittedly less than compelling interpretations is within the county's discretion under ORS 197.829(1). *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680, 698-99, *aff'd* 194 Or App 211, 95 P3d 269 (2004). We agree with intervenor that there is no clear or obviously correct way to apply the density standard at ZLDO 6.7.300(3) to zones such as 56-UW that do not allow residential uses, and therefore have no residential density limits, but that do allow R-PUDs. As the findings note, petitioners' interpretation results in 100 percent recreational dwelling units, the maximum number of which depends only on the carrying capacity of the land.[10] That is somewhat inconsistent with the R-PUD definition and R-PUD code provisions, which clearly contemplate that an R-PUD consists of a combination of primary and recreational dwellings. The interpretation the county adopted allows up to half of the units to be primary dwelling units, again with the maximum number of total units determined by the carrying capacity. That interpretation is consistent with the R-PUD definition and the ZLDO 6.7.300(3), but it effectively treats the 56-UW zone as imposing no dwelling density limitation. However, that is literally true. The 56-UW zone imposes no explicit density limitations at all, on dwellings or other uses. We affirmed above the county's interpretation

[10] The examples attached to ZLDO 6.7.300(3) at ZLDO VI-52 make it clear that the number of recreational dwelling units allowed is in *addition* to the number of primary dwelling units allowed in the base zone, with the total number of units limited only by the carrying capacity of the land.

that the 56-UW zone allows residential uses, albeit only within a PUD or R-PUD. Therefore, it is inaccurate to argue, as petitioners do, that the 56-UW zone imposes a "zero" dwelling density limitation. It is more accurate to say that the 56-UW zone imposes no dwelling density limitation at all. Under that view, the number of dwellings allowed in an R-PUD within the 56-UW zone is limited only by ZLDO 6.7.300(3) and other applicable provisions, such as CBEMP Policy 16, discussed below. We cannot say that the county's interpretation to that effect is inconsistent with the text, context, purpose or policy underlying the applicable code provisions. ORS 197.829(1).

With respect to ZLDO 1.1.500, because the 56-UW zone does not impose a dwelling density limitation, there is no conflict between applicable provisions that must be resolved under ZLDO 1.1.500.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the county's decision misconstrues and is inconsistent with CBEMP Policies 2 and 16, and the statewide planning goals and rules those policies implement.

A. CBEMP Policy 2 and Statewide Planning Goal 16

Petitioners first argue that "establishment of a residential development" is inconsistent with CBEMP Policy 2, which implements Goal 16 and OAR chapter 660, division 17. The goal, rule and policy set out three types of management units governing estuarine resources: natural, conservation, and development. Consistent with the goal and rule, Policy 2 lists various uses allowed in development management units, including water-dependent commercial and industrial uses and marinas. The goal, rule and policy also allow "water-related and nondependent, non-water-related uses not requiring dredge or fill." Policy 2 further states that "[l]ocal governments shall restrict estuarine development or alteration so as to be equal to, or less intensive than uses and activities" that are allowed under Goal 16.

Petitioners argue that establishment of a residential development in the 56-UW zone is inconsistent with the policy, goal and rule, because it allows a use more intensive than uses and activities allowed by Goal 16. Intervenor responds that the policy, goal and rule allow non-water-dependent uses within a Goal 16 estuarine development unit as long as they do not involve dredge or fill.

It is not clear to us that the proposed residential development in the 56-UW zone implicates Policy 2 at all. Goal 16 governs estuarine resources, and the goals define "estuary" to include only estuarine water, tidelands, tidal marshes, and submerged lands. As far as we can tell, the 56-UW zone includes only shorelands that are governed by Goal 17, rather than estuarine resources governed by Goal 16. It may well be that the other zones on the property, 57-NA (natural aquatic), 56-DA (development aquatic), 55A-CA (conservation aquatic), and 55(B)-NA (natural aquatic), are zones that implement Goal 16, and are subject to Policy 2. However, intervenor proposes no residential or non-water-dependent development in these zones. Without some explanation from petitioners as to why development within the 56-UW zone is subject to Policy 2, petitioners' arguments under the policy do not provide a basis for reversal or remand.

B. Policy 16

All permitted uses and activities within the 56-UW zone are subject to CBEMP Policy 16, which in relevant part allows "non-water-dependent uses" within the zone only if they are "in conjunction with and incidental and subordinate to a water-dependent use."[11]

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[11] CBEMP Policy 16(III) provides, in relevant part:

> "Permissible Non-Water-Dependent Uses. Unless otherwise allowed through an Exception, new non-water dependent uses which may be permitted in 'Urban Water-Dependent (UW)' management units are a temporary use which involves minimal capital investment and no permanent structures, or a use in conjunction with and incidental and subordinate to a water-dependent use. Such new non-water-dependent uses may be allowed only if the following findings are made, prior to permitting such uses:
>
> "* * * * *

The principal vehicle to ensure that non-water-dependent uses are "incidental and subordinate" under Policy 16 is to require (1) construction of non-water-dependent uses at the same time or after water-dependent uses are established, and (2) a ratio of one to three between the "ground-level indoor floor space plus outdoor acreage distributed between the non-water-dependent uses and the water-dependent uses." Policy 16 implements Statewide Planning Goal 17 (Coastal Shorelands) and OAR chapter 660, division 037 (Goal 17 Water-Dependent Shorelands).[12] The 1-to-3 ratio imposed by Policy 16 specifically implements OAR 660-037-0080(3).[13]

"[2]. Use in conjunction with and incidental and subordinate to a water-dependent use:

"a. Such non-water dependent uses shall be constructed at the same time as or after the water-dependent use of the site is established, and must be carried out together with the water-dependent use.

"b. The ratio of the square footage of ground-level indoor floor space plus outdoor acreage distributed between the non-water-dependent uses and the water-dependent uses at the site shall not exceed one to three (non-water-dependent to water-dependent).

"c. Such non-water-dependent uses shall not interfere with the conduct of the water-dependent use."

[12] Goal 17 provides the following useful examples of "incidental uses":

"EXAMPLES OF INCIDENTAL USES

"Examples of uses that are in conjunction with and incidental to a water-dependent use include a restaurant on the second floor of an existing seafood processing plant and a retail sales room as part of a seafood processing plant. Generally, to be in conjunction with and incidental to a water dependent use, a non-water-dependent use must be constructed at the same time or after the water-dependent use of the site is established and be carried out together with the water-dependent use. Incidental means that the size of non-water-dependent use is small in relation to the water-dependent operation and that it does not interfere with conduct of the water-dependent use."

[13] OAR 660-037-0080(3) is substantially the same as CBEMP Policy 16(III), quoted in n 11, and provides:

"To protect a designated water-dependent shoreland site, local land use regulations may do any of the following:

"(a) Allow only water-dependent uses.

1. Constructed at the Same Time

Petitioners first argue that the county erred in failing to require that water-dependent uses be established before the non-water-dependent uses can be constructed, pursuant to Policy 16(III)(2)(a). According to petitioners, as a practical matter the dock and marina, the water-dependent uses, cannot be "established" prior to or even at the same time as the non-water dependent residential uses are constructed, because until the residences are occupied there will be no boats in the marina or other uses of the dock. Petitioners argue that Policy 16(III)(2)(a) requires the county to prohibit construction of the residential units until the dock and marina are fully constructed and operating, with the marina full of boats and the mini-cruise line using the dock.

We do not read Policy 16(III)(2)(a) as petitioners do to require that the water-dependent uses be constructed and fully operating prior to construction of the non-water-dependent uses. A marina that is constructed, empty, but ready to berth boats is as much "established" as is a marina that is full of boats. The county found that construction of the condominiums, dock and marina will occur at the same time and be carried out together throughout all phases of the development. That is sufficient to satisfy Policy 16(III)(2)(a).

"(b) Allow nonwater-dependent uses that are in conjunction with and incidental and subordinate to water-dependent uses on the site.

"(A) Such nonwater-dependent uses shall be constructed at the same time as or after the water-dependent use of the site is established, and must be carried out together with the water-dependent use.

"(B) The ratio of the square footage of ground-level indoor floor space plus outdoor acreage distributed between the nonwater-dependent uses and the water-dependent uses at the site shall not exceed one to three (nonwater-dependent to water-dependent).

"(C) Such nonwater-dependent uses shall not interfere with the conduct of the water-dependent use."

2. Incidental and Subordinate

Petitioners argue that the county misconstrued the applicable law, in concluding that the proposed non-water-dependent uses are "incidental and subordinate" to the water-dependent uses, within the meaning of Policy 16(III)(2)(b), Goal 17, and OAR 660-037-0080(3)(b).

Intervenor originally submitted evidence that the first phase of development would result in 195,000 square feet of non-water-dependent uses and 17,000 square feet of water-dependent uses, for a ratio of 11-1. Record Vol I 102. The county's original decision did not address the ratio question at all. After the decision was withdrawn for reconsideration, the county adopted findings identifying the non-water-dependent uses as the condominiums, commercial uses, and the gym/spa, and finding that those uses plus associated outdoor acreage would total 41.2 acres.[14] The county identified the water-dependent uses as the dock, the marina, and "water-dependent recreational open-space areas." Record Vol III 15. Apparently, the area occupied by these water-dependent uses is the entire subject property

[14] The county's findings state, in relevant part:

> "* * * The Board of Commissioners interprets [Policy 16(III)(2)(b)] as a measure protecting the area available for water-dependent uses in the CBEMP area. This criterion is satisfied if more water-dependent use area is protected than is indicated by the ratio and is not satisfied if less water-dependent use area is protected than is indicated by the ratio. The area (ground-level indoor floor space plus outdoor acreage) of the proposed R-PUD to be committed to nonwater-dependent uses (the commercial, condominium, gym/spa components) will occupy 41.2 acres. The area (ground-level indoor floor space plus outdoor acreage) of the proposed R-PUD to be committed to water-dependent uses (dock, marina, water-dependent recreational open space areas) will occupy 174.8 acres. The ratio of non-water-dependent uses to water dependent uses is 41.2:174.8, or 1:4.2. A 1:3 ratio for 41.2 acres of non-water dependent uses acreage would protect 123.6 acres for water-dependent use. The Board of Commissioners recognizes that the applicant submitted information that showed that the ratio was 11:1 at one point. However, the applicant misconstrued the language of this standard and the resultant ratio was incorrect. The Board of Commissioners, as explained above, finds that the ratio of non-water-dependent uses to water dependent uses for the proposed R-PUD is 1:4.2. This criterion is satisfied by the proposal because it protects a greater acreage for water-dependent uses than is required by the minimum ratio." Record Vol III 15.

less the upland portion, totaling 174.8 acres.[15] Therefore, the county found, the ratio of non-water-dependent uses to water-dependent uses is 1 to 4.2 (41.2:174.8), consistent with Policy 16.

Petitioners contend that, while the county accurately identified some non-water dependent uses, the county erred in including the tidelands as "water-dependent uses," for purposes of calculating the 1-to-3 ratio. According to petitioners, the only "water-dependent uses" on the property are the dock, the marina and related support facilities, such as the parking lot serving those uses. The county must recalculate the ratio using only those facilities, petitioners argue, and the resulting ratio must meet the 1-to-3 standard.

We agree with petitioners that the county misconstrued the applicable law, in calculating the 1-to-3 ratio. The goals and the county's code define a "water-dependent" use in relevant part as "[a] use or activity which can be carried out only on, in, or adjacent to water areas because the use requires access to the water body for water-borne transportation, recreation, energy production, or source of water." OAR 660-037-0040(6) elaborates on that definition and, in relevant part, defines "recreation" to mean "water access for fishing, swimming, boating, etc."[16] "Access" in turn is defined to mean "physical contact with or use

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[15] As petitioners point out, there is no evidence and there are no findings explaining how the county calculated that there are 41.2 acres of non-water-dependent uses and 174.8 acres of water-dependent uses. We infer from the county's finding that there are 41.2 acres of upland (ten feet or more above mean sea level) and 174.8 acres of shoreland and tidelands (ten feet or less above mean sea level) that the county simply attributed all uses on the upland portion to non-water-dependent uses and all uses on shorelands or tidelands to water-dependent uses.

[16] OAR 660-037-0040(6) provides, in relevant part:

> "'Water-Dependent Use'.
>
> "(a) The definition of 'water-dependent' contained in the Statewide Planning Goals (OAR Chapter 660, Division 015) applies. In addition, the following definitions apply:
>
> "(A) 'Access' means physical contact with or use of the water.
>
> "(B) 'Requires' means the use either by its intrinsic nature (e.g., fishing, navigation, boat moorage) or at the current level of technology cannot exist without water access.

of the water." Further, OAR 660-037-0040(6)(b) sets out several pertinent examples of what do and do not constitute "water-dependent uses." As defined by the goal and rule, recreational uses are "water-dependent" only if they involve *facilities* that provide water access, *i.e.*, physical contact with or use of the water, for activities such as fishing, swimming, and boating. Typical examples include recreational marinas and boat ramps.

Here, the county's decision does not explain how it determined that 174.8 acres of the property will be occupied by "water-dependent uses," but it apparently placed the entire 216-acre property into one of two categories: 41.2 acres of non-water-dependent uses, and 174.8 acres of water-dependent uses. The former category apparently includes large upland areas of the property, including forested areas along the highway and open grassy areas left in their natural state and occupied, if at all, only by hiking trails. The category of "water-dependent uses" appears to include large areas of periodically submerged tidelands zoned 57-NA, 55A-

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"* * * * *

"(D) 'Recreation' means water access for fishing, swimming, boating, etc. Recreational uses are water dependent only if use of the water is an integral part of the activity.

"* * * * *

"(b) Typical examples of water dependent uses include the following:

"(A) Industrial - e.g., manufacturing to include boat building and repair; water-borne transportation, terminals, and support; energy production which needs quantities of water to produce energy directly; water intake structures for facilities needing quantities of water for cooling, processing, or other integral functions.

"(B) Commercial - e.g., commercial fishing marinas and support; fish processing and sales; boat sales, rentals, and supplies.

"(C) Recreational - e.g., recreational marinas, boat ramps, and support.

"* * * *

"(c) For purposes of this division, examples of uses that are not 'water dependent uses' include restaurants, hotels, motels, bed and breakfasts, residences, parking lots not associated with water-dependent uses, and boardwalks."

CA and 55B-NA that will remain in their natural state and be used, if at all, only for clam-digging and similar activities.

We agree with petitioners that the county's approach is inconsistent with Policy 16 and the goal and rule it implements, for the following reasons. The clear aim of Policy 16 and the goal and rule it implements is to ensure that scarce shoreland sites that provide water access not be irretrievably committed to non-water dependent uses.[17] Accordingly, Policy 16 and the rule require that non-water dependent uses be in conjunction with and "incidental and subordinate" to water-dependent uses. To ensure that non-water-dependent uses are incidental to water-dependent uses, the policy and rule require that (1) the non-water dependent use be constructed at the same time as the water-dependent use is established, and "carried out together," (2) the geographic extent of non-water-dependent uses and water-

[17] OAR 660-037-0020 provides:

> "(1) The Land Conservation and Development Commission (LCDC) recognizes that since the early 1980's, when comprehensive estuary management plans were acknowledged by LCDC, significant economic changes experienced in coastal communities have affected the demands for shorelands. During this period, most of the shorelands designated for water-dependent development in local estuary plans have remained vacant. As a result of these economic changes, there have been increased pressures to develop the vacant or underdeveloped water-dependent lands for nonwater-dependent uses.
>
> "(2) The reasons to protect certain shorelands for water-dependent uses are both economic and environmental. Economically, shoreland sites for water-dependent development are a finite economic resource that usually need protection from prevailing real estate market forces. By its very nature, water-dependent development can occur only in shoreland areas and only in certain shorelands with suitable characteristics relating to water access, land transportation and infrastructure, and surrounding land use compatibility. Once these suitable sites are lost to nonwater-dependent uses, they are very difficult and expensive to recover, if at all. Environmentally, providing 'suitable' areas for water-dependent development means less economic and political pressure to accommodate future development in environmentally sensitive areas such as wetlands, marshes, and biologically productive shallow subtidal areas.
>
> "(3) As a matter of state policy, it is not desirable to allow these scarce and non-renewable resources of the marine economy to be irretrievably committed to, or otherwise significantly impaired by, nonindustrial or nonwater-dependent types of development which enjoy a far greater range of locational options."

dependent uses not exceed a 1 to 3 ratio, and (3) that non-water-dependent uses not interfere with the conduct of the water-dependent uses.

The 1-to-3 ratio in Policy 16 and the rule is calculated based on (1) the square footage of ground-level indoor floor space, plus (2) "outdoor acreage" distributed between the non-water-dependent uses and the water-dependent uses at the site. The scope of "outdoor acreage" is unclear. It could be read expansively to include all non-indoor areas within the property boundaries, even undeveloped open spaces or tidally submerged lands. That is essentially the approach the county took. However, it could also refer less expansively to outdoor areas that are actually developed and used as or in conjunction with the proposed non-water-dependent and water-dependent uses, for example docks, ramps, parking lots, roads, trails, picnic areas, boardwalks, etc., and thus not include any undeveloped lands for purposes of calculating the 1-to-3 ratio. Because the term "outdoor acreage" has no explicit limitations, the broadest meaning adopted by the county is the most obvious textual reading. However, read in context we believe that the county's approach is incorrect, and that the narrower reading is most consistent with the text, context and purpose of Policy 16 and the rule.

In our view, the requirement that non-water-dependent uses be "incidental and subordinate" to water-dependent uses under the 1-to-3 ratio requires a comparison of indoor and outdoor space that is committed by *development* to either water-dependent or non-water-dependent uses, not a comparison that includes undeveloped, vacant lands that are left in their natural state and used, if at all, only for passive recreational purposes. It is significant that all of the pertinent uses described in OAR 660-037-0040(6)(a), (b) and (c) involve physical structures or facilities of some kind. *See* n 16. Nothing in the rule suggests that undeveloped open spaces used, at most, for passive recreation are either water-dependent or non-water dependent uses. That view is also supported by the requirement in Policy 16(III)(2)(a) that the non-water-dependent uses be constructed at the same time or after the water-dependent

uses are established, and that the uses be "carried out together." It is meaningless to say that vacant lands left in their natural state can be either "constructed" or "established."

In addition, considering vacant undeveloped land under the county's approach leaves compliance with Policy 16(III)(2) and the rule subject to the vagaries of property boundaries, rather than on how land is proposed for and committed to development. Under the county's approach, the canonical example of an "incidental use" in Goal 17—a small seafood restaurant incidental to a large seafood processing plant—would not satisfy Policy 16(III)(2)(b) if the parcel on which those uses were located happened to include a significant amount of undeveloped uplands rather than, as here, a significant amount of undeveloped tidelands. We do not see why compliance with Policy 16(III)(2)(b) for such a proposal should turn on the character of vacant, undeveloped lands within the property boundaries.

The narrower view of "outdoor acreage" is also supported by what we understand to be the purpose of the 1-to-3 ratio in Policy 16 and the rule: to preserve water access for water-dependent uses, by limiting the size or acreage committed to non-water-dependent uses, compared to the size or acreage used for water-dependent uses. As a practical matter, such commitment to non-water-dependent uses can occur only when land is *developed*. That suggests that determining the ratio between the area of water-dependent and non-water dependent uses is based on a comparison of the areas *developed* for such uses, not including undeveloped natural areas. In the present case, the applicant proposes to develop in the first phase approximately 195,000 square feet of non-water-dependent residential uses and only 17,000 square feet of water-dependent uses, for a ratio of 11-1. Under the approach the county takes, the applicant could propose *no* water-dependent development at all, no marina, no dock, no boat ramp, etc., and still fill up to one-third of the property with non-water-dependent residential development, as long as the property happens to include sufficient acres of undeveloped tidelands to meet the 1-to-3 ratio. Indeed, the county's approach would potentially allow a residential subdivision within a PUD or R-PUD to line the shore and

completely preclude all *developed* access to the water, such as a marina, dock or boat ramp, which seems entirely inconsistent with the text and purpose of Policy 16, the rule and the goal. By no stretch of the imagination could such residential development be considered "incidental and subordinate" to a "water-dependent" use, as the policy, rule and goal use those terms.

In sum, the policy, goal and rule use the pertinent terms "water-dependent," "non-water-dependent," "recreation," "indoor floor space," "outdoor acreage" etc., in narrow, specialized ways that focus the "incidental and subordinate" tests on *development* or *facilities* that are proposed or that exist on the property. Vacant, undeveloped lands that are used if at all only for low-intensity recreational activities are not considered for purposes of determining whether the non-water-dependent use is "incidental and subordinate" to the water-dependent use under the 1-to-3 ratio test.

Accordingly, the decision must be remanded to the county to determine (1) the square footage of ground-level indoor floor space devoted to water-dependent and non-water dependent uses, and (2) the "outdoor acreage" developed in conjunction with water-dependent and non-water-dependent uses. After allocating such developed outdoor acreage to water-dependent and non-water-dependent uses, the county will be in a position to determine whether the proposed development complies with the 1-to-3 ratio in Policy 16(III)(2)(b).

This assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

ZLDO 6.7.100 is the purpose statement for the provisions governing R-PUD development. It states in relevant part that "[a]ll R-PUD proposals shall comply with ORS 94."[18] The current ORS Chapter 94 governs "Real Property Development," and contains

[18] ZLDO 6.7.100 provides:

numerous provisions governing development agreements, transferable development credits, planned communities, timeshare estates, and membership campgrounds.

The county found that the above-quoted sentence requiring that R-PUD proposals "shall comply" with ORS chapter 94 is not an approval criterion or, to the extent it is, the R-PUD proposal is consistent with it.[19] The county also explains that the reference to

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> "**Purpose**. The purpose of the Article is to set forth the objectives, principals, standards and procedures to be used in developing a Recreation Planned Unit Development (R-PUD). The R-PUD Article is designed to permit flexibility needed to encourage the appropriate development of tracts of land that are large enough to allow the use of individualized site planning to fulfill an identified need for intense recreational opportunities. It is intended to provide flexibility in the application of certain regulations in a manner consistent with the general intent and provisions of the Comprehensive Plan for Coos County, and this Ordinance, thereby promoting a harmonious variety of residential and recreationally-related structures and uses. These may include tourist-oriented uses such as motels, restaurants, etc. All R-PUD proposal shall comply with ORS 94."

[19] The county's findings state, in relevant part:

> "Testimony was submitted that the R-PUD proposal does not comply with ORS Chapter 94 as required by CCZLDO 6.7.100. The Board of Commissioners sees several approaches to addressing the arguments raised * * * regarding this issue. The first approach examines whether the cited sentence is even a mandatory approval criterion. The second is to look to the express language of ORS Chapter 94. The third [is] to look to the fact that the chapter was amended in 1989. In all instances, the arguments made relating to this issue are without merit.
>
> "First, the cited sentence. The key point here is that CCZLDO 6.7.100 is a purpose statement and the cited sentence is not a mandatory approval criteria. The testimony argues as if it is. The Board of Commissioners concludes that, because the requirement that R-PUDs comply with ORS 94 appears in the purpose statement, it is not a mandatory approval criterion.
>
> "Second, ORS Chapter 94 is a consumer protection provision, not a land use provision, and pertains to development agreements. ORS 94.501(1) expressly provides, 'A city or county may enter into a development agreement as provided in ORS 94.504 to 94.528 with any person having a legal or equitable interest in real property for the development of that property.' (Emphasis added.) Entering into a development agreement is optional. The Board of Commissioners concludes that it is not necessary to enter into a development agreement with the applicant of this proposal because many of the things accomplished in a development agreement will be accomplished through the documents required for condominium development by ORS Chapter 100. Consequently, the proposal is consistent with ORS Chapter 94 because the Board of Commissioners concludes that a development agreement is not necessary in this instance.
>
> "Third, extensive portions of ORS Chapter 94 were amended in 1987 and renumbered as sections of ORS Chapter 100, which applies to condominiums. To the extent that components of the R-PUD constitute a condominium form of ownership, the provisions of ORS Chapter 100 apply. ORS 100.020(1). However, again, this chapter is a consumer protection provision and does not provide approval criteria for this land use decision. Thus, the ORS Chapter 94

ORS chapter 94 is to the statutory condominium provisions, which were moved to ORS chapter 100 in 1987. Intervenor points out that the county imposed a condition of approval requiring that the proposed development comply with ORS chapter 100.

Petitioners do not argue that ZLDO 6.7.100 is an approval criterion requiring findings of compliance with particular provisions of ORS chapter 94. Nor do petitioners allege that the proposed development is inconsistent with any provision of ORS chapter 94. However, petitioners fault the county for failing to "impose, as a condition of approval, compliance with ORS chapter 94." Petition for Review 11.

The county's findings address the statutory provisions governing development agreements in ORS chapter 94, and conclude that they do not apply to the proposed development. Petitioners do not dispute those findings, or argue that any other provisions in ORS chapter 94 apply to the proposed development. Absent a focused argument that the proposed development is governed by something in ORS chapter 94, the county's failure to impose a condition of approval requiring compliance with that chapter is not a basis for reversal or remand.

The fourth assignment of error is denied.

The county's decision is remanded.

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reference in CCZLDO 6.7.100 is a nullity and has no effect. In such an instance, the proposal satisfies this (non-)requirement.

"This issue does not provide a basis for denying the application." Record Vol III 29-30.