BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELIZABETH JOHNSON, CENTRAL OREGON LANDWATCH, FRIENDS OF THE METOLIUS, PETE SCHAY and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,
Petitioners,

and

TOMAS FINNEGAN RYAN,
Intervenor-Petitioner,

vs.

JEFFERSON COUNTY,
Respondent,

and

IRWIN B. HOLZMAN, DUTCH PACIFIC RESOURCES, SHANE LUNDGREN, GORDON C. JONES, JEFFREY JONES, and PONDEROSA LAND & CATTLE CO., LLC,
Intervenor-Respondents.

LUBA Nos. 2007-015, 2007-017, 2007-019, 2007-020, 2007-023, 2007-024, 2007-028 and 2007-029
(New Plan and New Zoning Ordinance Appeals)

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Christopher P. Thomas, Portland, filed a petition for review and argued on behalf of petitioner Elizabeth Johnson.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioners Friends of the Metolius and Pete Schay.

Paul D. Dewey, Bend, filed a petition for review and argued on behalf of petitioner Central Oregon LandWatch.

Ellen H. Grover, Bend, filed a petition for review and argued on behalf of petitioner The Confederated Tribes of the Warm Springs Reservation of Oregon. With her on the brief was Karnopp Petersen, LLP.

Tomas Finnegan Ryan, Portland, filed a petition for review and argued on his own behalf.

David Allen, Madras, filed a response brief and argued on behalf of respondent.

Christopher P. Koback, Portland, filed a response brief and argued on behalf of intervenor-respondents Gordon C. Jones and Jeffrey Jones. With him on the brief was Davis Wright Tremaine, LLP.

Megan Decker Walseth, Portland, filed a response brief and argued on behalf of intervenor-respondent Ponderosa Land & Cattle Co., LLC. With her on the brief was Ball Janik LLP.

Roger A. Alfred, Portland, filed a response brief and argued on behalf of intervenor-respondents Dutch Pacific Resources and Shane Lundgren. With him on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

Corinne C. Sherton, Salem, Donald V Reeder, Madras represented intervenor-respondent Irwin B. Holzman. Corinne C. Sherton filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Johnson & Sherton, PC.

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

REMANDED 02/11/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal decisions repealing the county's comprehensive plan and zoning ordinance and adopting an amended comprehensive plan and zoning ordinance.

FACTS

In 2004, the county began reviewing the Jefferson County Comprehensive Plan (JCCP or plan) and the Jefferson County Zoning Ordinance (JCZO or ordinance) for potential amendments "to correct inconsistencies, to clarify terms and standards, to make the documents more user friendly for County citizens, to comply with state statutes and administrative rules and to add certain uses allowed by state statute." Record 1765. The planning commission forwarded a draft of potential changes to a Citizen Advisory Committee (CAC), and the CAC held meetings and forwarded suggestions to the planning commission. The planning commission held a number of public hearings on the proposed amendments, and in August 2006 the planning commission recommended that the board of county commissioners adopt their proposed amendments to the JCCP and JCZO. The board of county commissioners held numerous public hearings and conducted multiple work sessions. Originally, proposed amendments to the JCCP and JCZO regarding destination resorts were included in the larger package of proposed JCCP and JCZO amendments, but the board of county commissioners decided to separate out the destination resort amendments and adopt those JCCP and JCZO amendments in separate ordinances. Those separate ordinances are the subject of another consolidated LUBA appeal that is decided this date. During a December 21, 2006 work session, the board of county commissioners approved the challenged decisions repealing the existing JCCP and JCZO and adopting an amended JCCP

and JCZO. All the challenged ordinances were signed on December 27, 2006, with an effective date of January 1, 2007. This appeal followed.[1]

MOTION TO FILE REPLY BRIEF

Petitioner Johnson moves to file a reply brief. The motion is granted.

FIRST ASSIGNMENT OF ERROR (JOHNSON), SIXTH ASSIGNMENT OF ERROR (TRIBES), and SEVENTH ASSIGNMENT OF ERROR (COLW)

Petitioners argue that the county failed to provide two separate readings of the ordinances at least 13 days apart, in violation of ORS 203.045(3), which provides:

> "Except as subsections (4) and (5) of this section provide to the contrary, every ordinance of a county governing body shall, before being put upon its final adoption, be read fully and distinctly in open meeting of that body on two days at least 13 days apart."

According to petitioners, the first reading occurred on December 21, 2007 and if there was a second reading it was on December 27, 2007. Therefore, petitioners argue, the county did not comply with the ORS 203.045(3) requirement that ordinances be read "on two days at least 13 days apart."

ORS 203.045(1) provides:

> "[ORS 203.045] does not apply to a county that prescribes by charter the manner of adopting ordinances for the county *or to an ordinance authorized by a statute other than ORS 203.035*." (Emphasis added.)

The challenged ordinances are land use planning ordinances adopted by the county under authority granted by ORS chapter 215, specifically ORS 215.050, 215.060, 215.130, and 215.223. Those statutes do not include the second reading requirement of ORS

[1] There are numerous petitioners and intervenors in this appeal, and five separate petitions for review and response briefs have been filed. We will refer to the petitioners and intervenor-petitioner as follows: Elizabeth Johnson (Johnson); Central Oregon LandWatch (COLW); Confederated Tribes of the Warm Springs Reservation (Tribes); Friends of the Metolius and Pete Schay (FOM); and Tomas Finnegan Ryan (Ryan). We will refer to respondent as the county and to intervenor-respondents as Irwin B. Holzman (Holzman); Dutch Pacific Resources and Shane Lundgren (Dutch Pacific); Gordon C. Jones and Jeffrey Jones (Jones); and Ponderosa Land & Cattle Co., LLC (Ponderosa).

203.045(3). We have already addressed this issue in *Bauer v. Columbia County*, 4 Or LUBA 309, 313 (1981):

> "The authority given counties in ORS 203.045 to exercise legislative power is a general grant of power authorizing them to legislate over 'matters of county concern.' The grant is not exclusive but 'is in addition to other grants of power.' The procedure for action on ordinances in ORS 203.045 is also not exclusive. [ORS 203.045(1)] clearly states that the section does not apply where a local charter controls adoption 'or to an ordinance authorized by statute other than ORS 203.045.' ORS 215.050 and 215.060 are such 'other' statutes. Indeed, ORS 215.050 has been cited as authority for county comprehensive plan adoption. In construing the statute, the court stated that 'ORS 215.050 gives no indication that the legislature intended it [the statute] to compel counties to observe strict ordinance formalities in the adoption of a comprehensive plan.' *Fifth Avenue Corporation v. Washington County*, 282 Or 591, 596, 581 P2d 50 (1978)."

In her reply brief, Johnson argues that LUBA erroneously relied on ORS 215.050 and 215.060 in *Bauer*, because while those statutes may authorize counties to adopt comprehensive plans they do not authorize counties to adopt comprehensive plans *by ordinance*.[2] Therefore, Johnson argues, at least with regard to the JCCP amendments, the county was required to comply with the ORS 203.045(3) separate reading requirement.

We do not agree. It is true, as Johnson argues in her reply brief, that the Oregon Supreme Court in *Fifth Avenue* interpreted ORS 215.050(1) not to *require* that local

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[2] ORS 215.050(1) provides:

> "[T]he county governing body shall adopt and may from time to time revise a comprehensive plan and zoning, subdivision and other ordinances applicable to all of the land in the county. The plan and related ordinances may be adopted and revised part by part or by geographic area."

ORS 215.060 provides:

> "Action by the governing body of a county regarding the plan shall have no legal effect unless the governing body first conducts one or more public hearings on the plan and unless 10 days' advance public notice of each of the hearings is published in a newspaper of general circulation in the county or, in case the plan as it is to be heard concerns only part of the county, is so published in the territory so concerned and unless a majority of the members of the governing body approves the action. The notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television."

governments "follow strict ordinance formalities in the adoption of a comprehensive plan." 282 Or at 598. However, the Oregon Supreme Court also said, in the next sentence of its opinion in *Fifth Avenue*, "[h]owever, this does not give that body carte blanche to adopt a comprehensive plan under any procedure it sees fit." *Id.* Two years before its decision in *Fifth Avenue*, the Oregon Supreme Court had held that land use comprehensive plans are *legislative* in nature. *Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975). In reaching that conclusion, the Oregon Supreme Court noted that some state courts, and legal commentators took the position that the land use comprehensive plan has some of the characteristics of a "constitution." *Id.* at 507. Because comprehensive plans are legislative in nature, most if not all counties now adopt them via ordinances. We conclude that although the Oregon Supreme Court clearly held that ORS 215.050(1) does not *require* that comprehensive plans be adopted following ordinance formalities, the Supreme Court in *Fifth Avenue* did not need to decide and did not decide whether ORS 215.050(1) is properly interpreted to *authorize* a county to adopt a comprehensive plan by ordinance. There can be no question that ORS 215.050(1) expressly authorizes counties to adopt a comprehensive plan along with zoning *ordinances*, subdivision *ordinances* and other *ordinances* that further refine and implement that comprehensive plan. Under the Oregon Supreme Court's decisions and current statutes, there can be no doubt that the comprehensive plan is hierarchically superior to the zoning, subdivision and other ordinances that are adopted to refine and implement the comprehensive plan.[3] While it may be a close question, we conclude that the ORS 215.050(1) authorization to adopt a comprehensive plan that will in turn be implanted by land use ordinances carries with it the *authority* to adopt that comprehensive plan in the way legislative acts are commonly adopted—by adopting an

[3] The term "land use regulation' is defined to include zoning ordinances, subdivision ordinances and other ordinances that are adopted to implement a comprehensive plan. ORS 197.015(11). ORS 197.835(7) requires that LUBA "reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation" in cases where "[t]he regulation is not in compliance with the comprehensive plan."

ordinance. We reach this conclusion even though the statute does not expressly *require or authorize* counties to adopt comprehensive plans by *ordinance*.

ORS 203.045 does not apply to ordinances such as the challenged ordinances, which amend a comprehensive plan and zoning ordinance and were adopted under ORS chapter 215. Therefore, petitioners' arguments do not provide a basis for reversal or remand.

Johnson's first assignment of error, Tribes' sixth, and COLW's seventh assignments of error are denied.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR (JOHNSON)

In these assignments of error petitioner Johnson argues that the county committed various errors in adopting the disputed ordinances.

A. Alleged Four-Day Gap

Johnson argues that by repealing the existing JCCP and JCZO on December 27, 2006, and not making the amended versions effective until January 1, 2007, the county impermissibly created a four-day gap in which the county had no plan or zoning ordinance. The county explains that although the language of the ordinance is less than clear, the intent of the ordinances was that the repeal of the old plan and zoning ordinance would be effective on January 1, 2007, the same date that the new plan and zoning ordinance became effective. We agree with the county's reading of the ordinances.

Johnson's second assignment of error is denied.

B. New Comprehensive Plan or Amended Comprehensive Plan

Johnson first argues that the county failed to provide a redlined version of the amended comprehensive plan amendments to the Department of Land Conservation and Development (DLCD) as part of the notice requirements under ORS 197.610. Johnson then argues that because the county did not submit a redlined version of the proposed comprehensive plan that the county must have submitted a proposed "new" comprehensive plan rather than a proposed "amendment" to its comprehensive plan. According to Johnson,

because the county adopted a "new" comprehensive plan rather than an "amendment" to the comprehensive plan, the county was obligated to undergo the equivalent of the initial acknowledgement process by demonstrating that the new plan, in its entirety, complies with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Johnson argues that because the county's Goal 5 inventory is admittedly outdated, the county was obligated to update its Goal 5 inventory as part of adopting a "new" comprehensive plan. Johnson also argues, alternatively, that if the challenged ordinances "amended" the existing comprehensive plan that the county failed to give proper notice to DLCD under OAR 660-018-0020(2) because it failed to provide a redlined version of the plan to show "the specific language being proposed as an addition to or deletion from the acknowledged plan."

OAR chapter 660, division 23 sets out "Procedures and Requirements for Complying with Goal 5." OAR 660-023-0010(5) defines "post-acknowledgement plan amendment" (PAPA) to include "amendments to an acknowledged comprehensive plan or land use regulation and the adoption of any new plan or land use regulation." The county's adoption of the proposed comprehensive plan is therefore a PAPA, whether it is considered a "new" plan or an "amended" plan. We see no significance in the county's decision not to submit a redlined version of the proposed amendments to DLCD. Although Johnson argues that OAR 660-018-0020 requires that a redlined version be submitted to DLCD, the rule merely requires that the "text" of the PAPA be submitted.[4] The rule does not specifically require a redlined version. As the county explained in its findings:

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[4] OAR 660-018-0020 provides:

> "(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be submitted to the Director at least 45 days before the first evidentiary hearing on adoption. The proposal submitted shall be accompanied by appropriate forms provided by the Department and shall contain three copies of the text and any supplemental information the local government believes is necessary to inform the Director as to

> "Testimony was received asserting that the revised Comprehensive Plan is not an amendment or a revision to the 1981 Plan, but instead is the adoption of a new plan * * *. The County asserts that this is merely a matter of semantics. Several portions of the 1981 Plan, including all Goal 5 inventories, inventories of farm and forest lands, and two appendixes, were retained and carried forward into the revised Plan. Since the format of the revised Plan is different than the 1981 Plan, and much of the language was updated and revised, the County found it to be more feasible and logical to repeal the 1981 Plan rather than trying to show all of the proposed revisions in the standard method of striking out the language to be deleted and underlining new language." Record 57.

There is nothing in OAR 660-018-0020 that requires a redlined version of the PAPA. More importantly, for purposes of this appeal, there is nothing in OAR 660-018-0020 that provides that any failure on the county's part to adequately identify the text to be repealed or adopted by a PAPA has the legal consequence of requiring that the PAPA be viewed as an entirely new comprehensive plan such that unamended portions of the comprehensive plan must be shown to comply with the statewide planning goals.

Johnson's second, third, and fourth assignments of error are denied.

FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR (TRIBES), FIRST AND SECOND ASSIGNMENTS OF ERROR (COLW)

Petitioners argue that the amended ordinances violate Goal 5 for various reasons.

> the effect of the proposal. The submittal shall indicate the date of the final hearing on adoption. In the case of a map change, the proposal must include a map showing the area to be changed as well as the existing and proposed designations. Wherever possible, this map should be on 8-1/2 by 11-inch paper, where a goal exception is being proposed, the submittal must include the proposed language of the exception. The Commission urges the local government to submit information that explains the relationship of the proposal to the acknowledged plan and the goals, where applicable.
>
> "(2) For purposes of this rule, 'text' means the specific language being proposed as an addition to or deletion from the acknowledged plan or land use regulations. For purposes of this rule, 'text' does not mean a general description of the proposal or its purpose. In the case of map changes 'text' does not mean a legal description, tax account number, address or other similar general description."

A. Goal 5 Applies

PAPAs must comply with the statewide planning goals, including Goal 5. OAR 660-023-0250(3) identifies the circumstance in which a PAPA must apply Goal 5:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

To summarize, under the above rule, a PAPA must apply Goal 5 if the PAPA "would affect a Goal 5 resource." As potentially relevant in this appeal, a PAPA affects a Goal 5 resource in two circumstances. First, a PAPA "would affect a Goal 5 resource" if it "amends a * * * portion of an acknowledged plan or land use regulation [that was] adopted in order to protect a significant Goal 5 resource."[5] Second, a PAPA "would affect a Goal 5 resource" if it allows new "conflicting uses."[6]

Once OAR 660-023-0250(3) requires that Goal 5 must be applied, the standard Goal 5 process at OAR 660-023-0030 through 660-023-0050 requires that local governments inventory Goal 5 resources, determine the significance of resource sites, and adopt a list of

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[5] OAR 660-023-0010(6) defines "program" or "program to achieve the goal" as

> "a plan or course of proceedings and action either to prohibit, limit, or allow uses that conflict with significant Goal 5 resources, adopted as part of the comprehensive plan and land use regulations (e.g., zoning standards, easements, cluster developments, preferential assessments, or acquisition of land or development rights)."

[6] OAR 660-023-0010(1) defines "conflicting use" in relevant part as a use "that could adversely affect a significant Goal 5 resource[.]"

significant resource sites. OAR 660-023-0030.[7] The local government must next conduct an economic, social, environmental, and energy (ESEE) analysis that (1) identifies conflicting uses and (2) analyzes the ESEE consequences that could result from decisions to allow, limit, or prohibit conflicting uses. Based on that ESEE analysis, the local government must determine whether to allow, limit, or prohibit identified conflicting uses. OAR 660-023-0040. Finally, for each resource site the local government must adopt a program or programs to achieve Goal 5, consisting of "comprehensive plan provisions and land use regulations" to implement the decisions made during the ESEE process. OAR 660-023-0050(1).

The threshold question therefore is whether Goal 5 applies to the disputed PAPAs because the challenged PAPAs either (1) amend a portion of an acknowledged plan or land use regulation that was adopted in order to protect a significant Goal 5 resource or (2) allow new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list. Petitioners argue that two Goal 5 resources are affected by the challenged PAPAs: Big Game Habitat and Open Space. According to petitioners, the PAPAs amend portions of the JCCP and JCZO that were adopted in order to protect those Goal 5 resources and the PAPAs allow new uses that conflict with those Goal 5 resources.

Petitioners explain that the old JCCP contained nine mandatory policies pertaining to wildlife habitat protection. The new JCCP only contains three policies, and those policies are no longer mandatory. Petitioners also explain that the new JCZO allows many new conflicting uses that were not previously allowed including: forest land partitions; nonforest dwellings in forest zones; lot of record dwellings in agricultural zones; and nonfarm dwellings on rangeland.

[7] The complete text of OAR 660-023-0030, 660-023-0040 and 660-023-0050 is included in an appendix to this opinion. Those rules set out in detail the process that local governments must follow to comply with Goal 5.

Respondents argue that the "mandatory" policies of the old JCCP were not truly mandatory, and that the policies in the new JCCP provide the same protection for the identified Goal 5 resources. Respondents also argue that the new conflicting uses are particular kinds of residential uses, and that residential uses were already allowed under the county's Goal 5 program, and therefore are not "new" conflicting uses that trigger the application of Goal 5.

While respondents' arguments may provide a basis for concluding that the new JCCP and JCZO comply with Goal 5, they do not provide a basis for concluding that Goal 5 does not apply. Even if the amended JCCP and JCZO provide the same or greater protection for Big Game Habitat and Open Space, the challenged decisions nevertheless *amend* the JCCP and JCZO provisions that implement the county's Goal 5 program. That alone is enough to make Goal 5 apply, under OAR 660-023-0250(3)(a) . Furthermore, even if the new uses that are allowed by the PAPAs are simply additional types of a category of conflicting use that is already allowed, they are additional conflicting uses – in other words, the new kinds of residential uses are "new * * * conflicting uses" within the meaning of OAR 660-023-0250(3)(b). Therefore, Goal 5 applies to the challenged PAPAs.

B. Goal 5 Inventory

Petitioners argue that under Goal 5, the county should have updated its Goal 5 inventory regarding Big Game Habitat, in adopting the disputed PAPAs. The county's inventory was conducted in 1981 and has not been updated since. There does not seem to be any dispute that the Big Game Habitat inventory is significantly out of date. According to petitioners, because the inventory is out of date, the county must conduct a new inventory as part of the Goal 5 process under OAR 660-023-0030. *See* Appendix.

The county relies on *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986), for the principle that a local government with an acknowledged Goal 5 inventory is not required to update that inventory when adopting a PAPA that does not itself

alter the acknowledged Goal 5 inventory. According to the county, where an existing acknowledged comprehensive plan Goal 5 inventory has become outdated due to a change in circumstances, the appropriate mechanism for addressing that change in circumstances is periodic review.[8] According to the county, a PAPA that does not directly or indirectly affect the inventory is not the appropriate mechanism for requiring that an outdated Goal 5 inventory be updated.

In LUBA's decision in *Urquhart*, we held that Goal 5 inventories are not "static lists immune from review and update." *Urquhart v. LCOG and City of Eugene*, 14 Or LUBA 335, 345 (1986). We ultimately held that when a local government is presented with evidence in a PAPA proceeding that raises a question concerning whether land that is not included on a Goal 5 inventory in fact may qualify for inclusion on the Goal 5 inventory, it must address and answer that question. *Id.* at 345-46. The Court of Appeals reversed our decision in *Urquhart*. The Court acknowledged that there are potential problems with allowing an existing Goal 5 inventory to insulate PAPAs from new information. The Court, however, balanced this concern with the opposing concern of potentially requiring a local government to undertake an expensive goal rejustification of its acknowledged inventories with every PAPA. 80 Or App at 179-80. The Court held that the appropriate time for requiring that the county update its Goal 5 inventory is during periodic review. *Id*. at 181.

While we agree with COLW that there are some differences between *Urquhart* and the present case, we do not see that those differences support a different result here. We have consistently applied the principle the Court of Appeals announced in *Urquhart. Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477, 487 (1995); *Waugh v. Coos County*, 26 Or LUBA 300, 310 (1993); *Davenport v. City of Tigard*, 22 Or LUBA 577, 586

[8] One of the purposes of periodic review is to insure that once comprehensive plans are acknowledged to be in compliance with the statewide planning goals they "remain in compliance" with those goals. Under ORS 197.628(3)(a) one of the conditions that may "indicate the need for periodic review of comprehensive plans and land use regulations" is "a substantial change in circumstances."

(1992). We see no reason to overturn those decisions. The county did not err in failing to conduct a new Goal 5 inventory for Big Game Habitat as part of the PAPAs challenged in these consolidated appeals.

C. ESEE Analysis

In the standard Goal 5 process, a local government must conduct an ESEE analysis, which generally requires identification of the conflicting uses, determining the impact area, analyzing the ESEE consequences, and developing a program to achieve Goal 5. OAR 660-023-0040(1). *See* Appendix. In *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 443-44 (2002), we held that where application of Goal 5 is required by OAR 660-023-0250(3), a local government may not need to repeat the entire Goal 5 process, including the ESEE process, in all cases. Relying on *Home Builders Assoc.*, we later concluded that "[i]n many cases no more is required than an explanation for why the existing program to protect Goal 5 resources, as amended or affected by the challenged [PAPA], continues to be sufficient to protect those resources." *NWDA v. City of Portland*, 47 Or LUBA 533, 543 (2004), *rev'd on other grounds* 198 Or App 286, 108 P3d 589 (2005).

In *NWDA v. City of Portland*, 50 Or LUBA 310 (2005), we elaborated on what we said in *Home Builders Assoc*. After rejecting the argument that a local government must necessarily conduct an entirely new ESEE analysis where a PAPA authorizes a new conflicting use, we stated:

> "In our view, the above 'standard' ESEE analysis may be considerably simplified where the local government already has an acknowledged program to achieve the goal, and is merely considering a PAPA that allows a new conflicting use that was not considered in adopting the acknowledged program. In that circumstance, the local government has already made key choices about the relative importance of the resource site and a range of conflicting uses, and has adopted a course of action based on those choices. We do not see that the local government must necessarily reconsider or re-justify those basic choices, in adopting a PAPA that allows a new conflicting use. Where, as here, the local government's acknowledged program has chosen to allow conflicting uses subject to various limitations, the local government might conclude, for example, that the new conflicting use has

> similar impacts to conflicting uses that were considered in adopting the acknowledged program, and simply choose to rely on the existing program. Or the local government may decide that the new conflicting use has greater or more negative impacts, and choose to impose new limitations, or to not allow the new conflicting use at all." *Id*. at 338.

As was the case in *NWDA*, the county already has an acknowledged program to protect inventoried Goal 5 resources. The county has already made key choices about the importance of its Big Game Habitat, the range of conflicting uses, and adopted a course of action based on those choices. The county does not have to reconsider or re-justify those basic choices in adopting the disputed PAPAs if it does not wish to do so. The county must merely consider the new plan and code provisions, the new conflicting uses allowed, and explain how its existing Goal 5 program continues to be adequate to protect its inventoried Goal 5 resources. The mere fact that the county did not repeat the entire standard ESEE analysis does not provide a basis for reversal or remand.

D. The County's Program to Protect Goal 5 Resources

The Goal 5 resource at issue is the county's Big Game Habitat. The county's Goal 5 program to protect Big Game Habitat is the Wildlife Area (WA) Overlay zone found in JCZO 321. The county's findings regarding Goal 5 state:

> "Regarding * * * whether the PAPA creates or amends a portion of the previous Plan that was adopted to protect a Goal 5 resource or to address specific requirements of Goal 5, the following analysis explains how the revised Plan either complies with Goal 5, or does not affect a Goal 5 resource because it does not amend a previous Plan provision that was adopted to protect a resource.
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> " * * * * *
>
> "Wildlife Habitat – big game
>
> "The revised Plan contains a map of big game winter range areas, which matches the Wildlife Area Overlay zone. The map was generated from Oregon Department of Fish and Wildlife (ODFW) maps. It was adopted in 1993 as an amendment to a big game habitat map that was in the original 1981 Plan.

"The previous Plan contained a policy (5-H-1) to establish land use categories which preserve the integrity of wildlife habitat. This policy was implemented with the adoption of Zoning Ordinances regulations for the Wildlife Area Overlay zone. Previous Plan policy (5-H-2) requires ODFW to be consulted [when] proposed land use actions may affect wildlife habitat. This policy is carried forward in revised Plan policy 4.2, which states that appropriate state and federal agencies, the Confederated Tribes of the Warm Springs Reservation and other groups with an interest in protection of wildlife habitat should be notified and given the opportunity to comment on proposed land use actions that may affect designated wildlife habitat.

"Previous Plan policy (5-H-3) requires that fencing not be constructed so as to obstruct migration patterns in areas of deer and elk migration routes such as the Metolius Deer Winter Range. Testimony was received that the County is amending its Goal 5 program because this policy was not carried forward into the revised Plan. The County has not specifically identified or mapped big game migration corridors. However, the Zoning Ordinance does contain standards for fencing in the Wildlife Area Overlay Zone. The standards are clear and objective, as required by OAR 660-023-0050(2). Since no migration corridors have been identified or designated as a significant Goal 5 resource, the County has chosen to apply the fencing standards only to the designated big game winter range areas, which are administered through the Wildlife Area Overlay zone. Similarly, previous Plan policy (5-H-4) requires that non-agricultural residential development be limited to specific areas which do not disrupt wildlife migration routes or substantially affect important wildlife values. This policy also is not carried forward to the revised Plan, but is implemented through the Zoning Ordinance regulations for all residential development in the Wildlife Area Overlay zone.

"Previous Plan policy (5-H-5) states that no lot size smaller than 160 acres shall be allowed in any big game winter range area. The minimum lot size is a regulation rather than a policy. It is implemented through the Zoning Ordinance, so policy (5-H-5) has not been carried forward to the revised Plan. The Zoning Ordinance was amended to add the Wildlife Overlay zone in 1993. The zone required minimum lot sizes of 80 acres in deer winter range areas, 160 acres in elk winter range areas, and 320 acres in the antelope (pronghorn) winter range. These standards were acknowledged at the time, and have remained in effect. Any challenge to whether an 80-acre minimum lot size is appropriate in a deer winter range area should have been made in 1993. The revised Plan policy 4.1 states that the Wildlife Area Overlay zone should be used to protect the integrity of big game winter range." Record 60-63.

According to the county, new JCZO Section 321 and the new JCCP largely carry forward the old JCCP requirements by including minimum lot size standards, fencing

standards, building location standards, and additional approval criteria that proposed dwellings have minimal adverse impacts on big game winter range habitat. We understand the county to argue that although there are wording differences between the old JCCP policies set out at pages 22 and 23 of the Tribes petition for review and the new JCCP policies set out pages 23 and 24, those changes are not significant and the county reasonably could conclude that its program to protect big game habitat remained in compliance with Goal 5.

With the exception of the county's explanation for eliminating Old JCCP Policy 5-H-5, we agree with the county. Regarding petitioners' arguments that the new JCZO provisions allowing forest land partitions, nonforest dwellings in forest zones, lot of record dwellings in agricultural zones, and nonfarm dwellings on rangeland, the county found that the WA Overlay zone standards for protection of big game winter range are adequate to ensure protection of that Goal 5 resource from the possibility of additional dwellings under the new JCZO. For instance, regarding the possibility of new nonfarm dwellings in the Range Land zone, the county found:

> "Testimony was received that additional dwellings should not be allowed in the Range Land zone, particularly west of the Deschutes River, because of the potential impact on big game wildlife habitat. Although the 2003 Zoning Ordinance did not include provisions in the Range Land zone for dwellings that are not in conjunction with farm use, nonfarm dwellings were allowed in the zone from 1981 until 2003. Wildlife habitat protection standards found in Section 321 of the Zoning Ordinance were designed to mitigate the impact of development on big game. These provisions were adopted in 1993. Since nonfarm dwellings are authorized by state statute, and previous Zoning Ordinances that allowed nonfarm dwellings in wildlife habitat areas were acknowledged to be in compliance with both Goals 3 and 5, there is no legal requirement that would prohibit the county from again allowing nonfarm dwellings in the Range Land zone." Record 1772.

As we explained in *NWDA*, when a local government has already balanced the importance of conflicting uses with a Goal 5 resource, it may not need to reconsider or re-justify those choices in adopting a PAPA that does not result in significantly different effects

on that Goal 5 resource. As we explained, it may be that the new conflicting uses are sufficiently similar to the conflicting uses that were previously considered in adopting the acknowledged program, so that the local government may simply rely on the existing program to resolve conflicts between Goal 5 resources and the new conflicting uses. We believe that is what the county did in the present case with regard to the additional residential use types that are allowed under the challenged ordinances. Although the county could have perhaps been clearer in its explanation of how it was complying with Goal 5, as we stated in *NWDA*, that determination need not precisely follow the formulaic steps of the standard Goal 5 rule:

> "[Petitioner] is correct that the city did not explicitly conduct a formal ESEE analysis, or explicitly determine whether to allow, limit, or prohibit the identified conflicting use, at least in those terms. However, we believe that the city implicitly made the required determination, and that its findings, although not intended to address OAR 660-023-0040(5), are nonetheless sufficient to satisfy the rule and demonstrate compliance with Goal 5." 50 Or LUBA at 339-40.

In the present case, petitioners argue that the county violated Goal 5 by allowing additional residential dwellings in big game habitat areas. Although not explicitly explained this way, the county essentially determined that the potential for additional residential dwellings in big game habitat areas presented the same kind of conflicting uses contemplated and allowed under the old JCCP and JCZO and found that the existing program that is carried forward in the new JCCP and JCZO is still sufficient to protect the Goal 5 big game habitat resource. The county's findings in this case regarding the potential for additional residences under the new JCCP and JCZO more explicitly address the continued adequacy of the county's Goal 5 program than was the case with the city's findings in *NWDA*. The county's determination that the new JCCP and JCZO are sufficient to protect the big game habitat resource notwithstanding the additional residences that may be allowed under the amended JCCP and JCZO is adequate.

However, the county adopted a different theory for why its repeal of Old JCCP Policy 5-H-5 has no Goal 5 implications. Old JCCP Policy 5-H-5 provided that "[n]o lot size smaller than 160 acres shall be allowed in any big game winter range or sensitive wildlife habitat." Notwithstanding Old JCCP Policy 5-H-5, the Wildlife Overlay zone that was adopted in 1993 allowed lots as small as 80 acres in the Metolius and Grizzly Deer Winter Range. Old JCZO 321(D)(1). The new JCZO carries that 80-acre minimum lot size forward. New JCZO 321.3(A). The challenged ordinances eliminate Old JCCP Policy 5-H-5. The county's explanation for why it may now eliminate Old JCCP Policy 5-H-5 is that the Wildlife Overlay zone with the 80-acre minimum lot size was adopted in 1993 and is now acknowledged. The county found that "[a]ny challenge to whether an 80-acre minimum lot size is appropriate in a deer winter range area should have been made in 1993." Record 62-63.

The county is simply wrong about the effect of its adoption of the Wildlife Overlay zone in 1993. What the county had after its 1993 decision to adopt the Wildlife Overlay zone was a conflict between Old JCCP Policy 5-H-5 (which was acknowledged to comply with Goal 5) and the Wildlife Overlay zone 80-acre minimum lot size in the deer winter range area (which was also acknowledged to comply with Goal 5). In cases where there is a direct conflict between a comprehensive plan and a land use regulation that was adopted to carryout the comprehensive plan, the comprehensive plan controls. *Baker v. City of Milwaukie*, 271 Or at 514. Therefore, contrary to the county's finding quoted above, when it adopted the decisions that are before us in this appeal, lot sizes smaller than 160 acres were prohibited in the deer winter range, notwithstanding Old JCZO 321(D)(1). If the county now wishes to eliminate that inconsistency in favor of the Wildlife Overlay zone 80-acre minimum lot size, it must explain how it can do so and still leave its Goal 5 program to protect big game winter range in compliance with Goal 5.

The Tribes fifth assignment of error is denied. The Tribes' and COLW's first and second assignments of error are sustained, in part.

FOURTH ASSIGNMENT OF ERROR (TRIBES)

In addition to the amendments to the county's Goal 5 program discussed earlier, the county also revised its Goal 5 program relating to riparian corridors. The county utilized the "safe harbor" provision contained in OAR 660-023-0090(8) to revise its Goal 5 program. By adopting the OAR 660-023-0090(8) safe harbor, the county is not required to follow the procedure set out in the standard Goal 5 process at OAR 660-023-0030 through OAR 660-023-0050.

OAR 660-023-0090(8) provides:

> "As a safe harbor in lieu of following the ESEE process requirements of OAR 660-023-0040 and 660-023-0050, a local government may adopt an ordinance to protect a significant riparian corridor as follows:
>
> "(a) The ordinance shall prevent permanent alteration of the riparian area by grading or by the placement of structures or impervious surfaces, except for the following uses, provided they are designed and constructed to minimize intrusion into the riparian area:
>
> "(A) Streets, roads, and paths;
>
> "(B) Drainage facilities, utilities, and irrigation pumps;
>
> "(C) *Water-related and water-dependent uses*; and
>
> "(D) Replacement of existing structures with structures in the same location that do not disturb additional riparian surface area.
>
> "(b) The ordinance shall contain provisions to control the removal of riparian vegetation, except that the ordinance shall allow:
>
> "(A) Removal of non-native vegetation and replacement with native plant species; and
>
> "(B) Removal of vegetation necessary for the development of water-related or water-dependent uses;

"(c) Notwithstanding subsection (b) of this section, the ordinance need not regulate the removal of vegetation in areas zoned for farm or forest uses pursuant to statewide Goals 3 or 4;

"(d) The ordinance shall include a procedure to consider hardship variances, claims of map error, and reduction or removal of the restrictions under subsections (a) and (b) of this section for any existing lot or parcel demonstrated to have been rendered not buildable by application of the ordinance; and

"(e) The ordinance may authorize the permanent alteration of the riparian area by placement of structures or impervious surfaces within the riparian corridor boundary established under subsection (5)(a) of this rule upon a demonstration that equal or better protection for identified resources will be ensured through restoration of riparian areas, enhanced buffer treatment, or similar measures. In no case shall such alterations occupy more than 50 percent of the width of the riparian area measured from the upland edge of the corridor." (Emphasis added.)

JCZO Section 419 was adopted to take advantage of the riparian corridor safe harbor authorized by OAR 660-023-0090(8). JCZO 419.2 provides:

"Permitted Uses

"The following uses are permitted outright in the riparian protection area provided they are designed and constructed to minimize the intrusion into the riparian area and minimize the removal of riparian vegetation, and provided lands disturbed during development are reclaimed. The use must also comply with other applicable standards and criteria of this Ordinance, including, but not limited to, Section 316 – Flood Plain Overlay Zone and Section 425 – Dock Design and Review Requirements.

"A. *Water-related and water-dependent uses* such as boat landings, docks, marinas, bridges, dams and hydroelectric facilities.

"B. Drainage facilities, utilities, fire and irrigation pumps.

"C. Replacement or remodeling of existing structures with structures in the same location, provided that no additional riparian area is permanently disturbed.

"D. Roads, driveways, and pedestrian/bicycle paths. However, roads and driveways shall whenever possible be located to avoid the riparian protection area except at stream crossings." (Emphasis added.)

The Tribes argue that JCZO 419.2 *may* be less restrictive than the safe harbor provisions of OAR 660-023-0090(8), and therefore the county was required to complete the ESEE analysis and program development requirements set out in the standard Goal 5 process at OAR 660-023-0040 and 660-023-0050. According to the Tribes, because the JCZO definitions of "water-dependent" and "water-related" are different from the definitions for those terms found in the statewide planning goals, JCZO Section 419 does not qualify as an OAR 660-023-0090(8) safe harbor.[9]

Intervenor-respondent Holzman argues there is no reason to believe the terms "water dependent" and "water related" as used in OAR 660-023-0090(8) have the same meaning as the definition of those terms in the statewide planning goals. The 2003 JCZO was acknowledged in 2003 as complying with the current version of Goal 5 and OAR 660 division 023, and includes definitions of "water-dependent use" and "water-related use" that are almost identical to those in the new JCZO. The only differences are that the term "intrinsic" is changed to "inherent" in the definition of "water-dependent use," the term "intrinsically" is changed to "fundamentally" in the definition of "water-related use," and "motels and hotels" are removed from the list of examples of a "water-related use."[10]

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[9] The definitions section of the Statewide Planning Goals provides the following definitions for those terms:

> "**WATER-DEPENDENT**. 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."
>
> "**WATER-RELATED**. Uses which are not directly dependent upon access to a water body, but which provide goods or services that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered. Except as necessary for water-dependent or water-related uses or facilities, residences, parking lots, spoil and dump sites, roads and highways, restaurants, businesses, factories, and trailer parks are not generally considered dependent on or related to water location needs."

[10] Those definitions are set out below. The additions and deletions that are adopted by the disputed PAPA are shown in underlining (additions) and brackets and strikethrough (deletions).

Respondents argue there is no significant difference between "intrinsic" and "inherent" or between "intrinsically" and "fundamentally," and removing hotels and motels from water-related uses makes the definition more restrictive not less restrictive.[11]

We agree with respondents that, if the county is entitled to rely on its acknowledged definitions of the terms "water dependent use" and "water related use," petitioners have failed to show that the minor word differences adopted in the challenged PAPA are legally significant. However, there is no reason to believe that LCDC did not intend that the terms "water dependent" and "water related" in OAR 660-023-0090(8) should carry their statewide planning goal definitions. We reject respondent's arguments to the contrary. In adopting the safe harbor in the disputed PAPA, the safe harbor must be interpreted and applied consistently with the statewide planning goal definitions of "water dependent" and "water related."

The county's choice to adopt definitions of "water dependent" and "water related" that vary slightly from the statewide planning goal definitions for those terms creates ambiguity and the possibility for confusion and error. However, as Holzman points out, when the county interprets those terms, it must interpret them in accordance with the statewide planning goal definitions under ORS 197.829(1)(d), which requires that such interpretations not be "contrary to a [statewide planning] goal or rule that the [provision] implements." *See Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500, 519

> "Water-Dependent Use: A use or portion of a use that cannot exist in any other location and requires a location on the shoreline and is dependent on the water by reasons of the [~~intrinsic~~] inherent nature of its operation.
>
> "Water-Related Use: A use or portion of a use which is not [~~intrinsically~~] fundamentally dependent on a waterfront location, but whose operation cannot occur economically without a shoreline location. These activities demonstrate a logical, functional, connection to a waterfront location. Examples of water-related uses may include warehousing of goods transported by water, [~~motels and hotels,~~] and log storage."

[11] Respondent and intervenor-respondents all adopt intervenor-respondent Holzman's response to this assignment of error.

(2006) (where code provisions implement a statewide planning goal and rule, no deference is owed to the county's interpretation); *Burton v. Polk County*, 48 Or LUBA 440, 446, *aff'd* 199 Or App 270, 111 P3d 248 (2005) (ambiguous land use regulations may not be interpreted inconsistently with an administrative rule they were adopted to implement). The county has stated its intent to use JCZO 419.2 as a safe harbor under OAR 660-023-0090(8). Therefore, if the Tribes are correct that the goal definitions are applicable, and we have concluded that they are, then the county may not resolve any ambiguity caused by the differently worded JCZO definitions in a way that is contrary to the statewide planning goal definitions. ORS 197.829(1)(d); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 45-46, 911 P2d 350 (1996).[12] So long as any such ambiguities are resolved in that manner, and they must be, we do not understand the Tribes to argue that JCZO 419.2 exceeds the scope of the safe harbor authorized by OAR 660-023-0090(8).

The Tribes fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR (COLW)

Goal 4 (Forest Lands) requires that forest lands be conserved. Goal 4 defines forest lands to include:

> "* * * lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

We understand COLW to argue that under the above definition the forest lands that must be conserved under Goal 4 include three categories of forest land: (1) lands that are suitable for commercial forest uses, (2) lands that are not themselves suitable for commercial forest use but are adjacent to or nearby the lands that fall into category 1, if those adjacent or nearby lands are necessary to permit forest operations and practices on the category 1 forest

[12] ORS 197.829(1)(d) provides that LUBA is not to affirm a local government interpretation of its land use regulations if the interpretation "[i]s contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

land, and (3) forested lands that maintain soil, soil, air, water and fish and wildlife. COLW contends the third category of forest land need not be adjacent to or nearby the first category of forest land.

The county's Forest Management Zone was adopted to implement Goal 4. COLW argues that the appealed PAPA adopts a comprehensive plan policy limiting the application of that zone in a way that is inconsistent with the Goal 4 definition of "forest lands," with the result that some lands that must be conserved under Goal 4 will no longer be conserved under the county's Forest Management Zone and may therefore be rezoned for other purposes.

The revised comprehensive plan includes policy 1.2, which provides:

> "The Forest Management Zone should include lands capable of producing 20 cubic feet or more per acre per year of industrial wood, and other interspersed or adjacent areas which are necessary to permit forest operations or practices, or to maintain soil, air, water and fish and wildlife resources."

We understand COLW to argue that under policy 1.2, the county would only be obligated to include two categories of land in the Forest Management Zone: (1) lands capable of producing at least 20 cubic feet of industrial wood, and (2) other lands that are interspersed with or adjacent to the first category of land, if those interspersed or adjacent lands are either "necessary to permit forest operations or practices," or necessary "to maintain soil air, water and fish and wildlife resources. We do not understand COLW to challenge the county's decision in policy 1.2 to equate "lands suitable for commercial forest uses" with "lands capable of producing 20 cubic feet or more per acre of industrial wood." However, COLW does argue that the third category of forestlands that must be conserved under Goal 4 (forested lands that maintain soil, air, water and fish and wildlife resources) is effectively narrowed by policy 1.2 to exclude such forested lands unless they are "interspersed or adjacent to" lands that are "capable of producing 20 cubic feet or more per acre per year of industrial wood." We agree with COLW.

We cannot tell if the decision not to include forested lands that maintain soil, air, water and fish and wildlife resources in the Forest Management zone unless such forested lands are "interspersed or adjacent to" commercial forest land was mistaken or intentional. We also cannot tell if the exclusion affects a significant or insignificant amount of land. But whatever the case, we agree with COLW that policy 1.2 excludes forest lands that Goal 4 requires the county to conserve. Policy 1.2 conflicts with Goal 4 in that regard. Remand is required so that the county can amend policy 1.2 to be consistent with the Goal 4 definition of forest lands.

COLW's fifth assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR (COLW)

COLW argues that the amended plan and zoning ordinance fail to comply with Goal 7 (Areas Subject to Natural Hazards). Goal 7 requires local governments to evaluate risks to people "upon receiving notice" of new hazard information from DLCD, and based on evaluation of that risk to prohibit development in areas "where the risk to public safety cannot be mitigated." According to COLW, there is not an adequate factual base, as required by Goal 2, to demonstrate that the county complied with Goal 7 regarding development in areas prone to wildfires.

The decision explains how wildfire risks associated with dwellings in forest zones will be mitigated by the fire safety requirements for all new dwellings and structures. Development in forest zones must comply with JCZO 303.7 which requires that dwellings and structures be sited "so that * * * [t]he risks associated with wildfire are minimized." All development must also comply with JCZO 426, which sets forth extensive standards relating to roof coverings, chimneys, slopes, emergency access, fuel breaks, and additional recommended standards. The rural fire protection district testified in support of JCZO 426 and stated that it would mitigate the danger of wildfires in forest zones.

Based on the foregoing, the county could reasonably conclude that such protections would mitigate the danger of wildfires in forest zones. That is all the county was required to do under Goal 7. It is true, as COLW argues, that the focus of many of the fire protection standards at JCZO 303.7 and 426 is on protecting structures from forest fires rather than protecting forests from fire hazards associated with structures that are located in the forest. However, the focus of those JCZO provisions is not exclusively on protecting dwellings from forest fires.[13] We agree with respondents that the county was not required to find or ensure that there would be no danger whatsoever of wildfires or to prohibit development in forest zones because development related fires are a possibility.

COLW's fourth assignment of error is denied.

ASSIGNMENT OF ERROR (FOM)

A brief history of the Camp Sherman area is necessary to provide context for FOM's arguments under its first assignment of error. The earlier version of JCZO 342, which established a Vacation Rental zone in Camp Sherman (CSVR zone), did not list "vacation rental units" as a permitted use, and the term "vacation rental units" was not a term that existed in the JCZO. Instead, JCZO 342 allowed "tourist rental cabins" as a use. Prior to the challenged ordinances, Jones received approval for additional tourist rental cabins at the Lake Creek Lodge, under the prior CSVR zone. The approval allowed for owner occupancy of the cabins for up to 180 days initially, then for 120 days. FOM and Ryan challenged those prior approvals and argued that allowing owner use of the vacation cabins had the legal consequence of converting the cabins into single family dwellings, which could only be authorized in the CSVR zone if they satisfied much more restrictive density standards. In an appeal of the county's prior approval of those tourist rental cabins, we held that only *de minimis* owner use is consistent with the JCZO definition of tourist rental cabins. Because

[13] For example, JCZO 426.2(B) requires spark arresters for chimneys and stove pipes, JCZO 426.2(E) will improve access by fire fighting equipment and JCZO 426.3(G) restricts open fires and use of burn barrels.

the county's decision allowed more than *de minimis* owner use of the approved tourist rental cabins, we remanded the decisions. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005); *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004). The Court of Appeals affirmed our decisions. *Friends of the Metolius v. Jefferson County*, 200 Or App 416, 426, 116 P3d 220 (2005).

In the ordinances challenged in these appeals, the county formally designated Camp Sherman as a Resort Unincorporated Community. The county also removed the term "tourist rental cabin" from JCZO 342 and added as an allowed use in CSVR zone "vacation rental units." FOM argues that the county erred in designating Camp Sherman as an unincorporated community and violated OAR chapter 660, division 22.

A. Map of Unincorporated Communities

FOM argues that the county failed to adopt a map that shows the boundaries of the Camp Sherman unincorporated community, in accordance with OAR 660-022-0020(2). OAR 660-022-0020(2) provides:

> "Counties shall establish boundaries of unincorporated communities in order to distinguish lands within the community from exception areas, resource lands and other rural lands. The boundaries of unincorporated communities shall be shown on the county comprehensive plan map at a scale sufficient to determine accurately which properties are included."

It is not clear from FOM's subassignment of error whether it is arguing that there is no map that shows the boundaries of the Camp Sherman unincorporated community or whether there is such a map but the map is inadequate.[14] The record includes the county's comprehensive plan map as one of the oversize exhibits. Each unincorporated community is

[14] FOM's entire argument in support of this assignment of error is set out below:

> "As best Petitioners can determine, the plan fails to contain a delineation of the boundaries of the community that meets the requirements of the rule. A baseline requirement for adopting the subject regulations appears to be missing." FOM Petition for Review 2-3.

shown on the comprehensive plan map in purple. The Camp Sherman unincorporated community is shown on that map.

Although the petition for review could certainly be clearer, we understand FOM to argue that the comprehensive plan map that shows the unincorporated communities is not at a "scale sufficient" to identify the included properties. We agree with FOM. The comprehensive plan map is at a scale of 1:100,000. At that scale, one inch on the map represents over a mile and a half on the ground. Unless the comprehensive plan map delineation of the unincorporated communities operates in concert with other larger scale official maps that more precisely delineate Camp Sherman, it would be impossible to "determine accurately which properties are included" in the boundaries of the Camp Sherman unincorporated community. No party argues that there are larger scale maps that operate with the comprehensive plan map to allow the properties that are included in the county's unincorporated communities to be "accurately" determined, as required by OAR 660-022-0020(2).

This subassignment of error is sustained.

A. Hotels and Motels Must Be Connected To a Community Sewer System

OAR 660-022-0030(5) provides development standards for unincorporated communities:

> "County plans and land use regulations may authorize hotels and motels in unincorporated communities only if served by a community sewer system * * *"

FOM argues that the uses allowed in the CSVR zone, "lodges and vacation rental units," are either a "hotel" or "motel," as OAR 660-022-0030(5) uses those words. According to FOM, because the allowed uses are either hotels or motels, the JCZO must require a community sewer system for lodges and vacation rental units. Because JCZO 342.B.5 only requires that sewage disposal be "adequate" rather than requiring a community sewer system, FOM argues that the amended JCZO violates OAR 660-022-0030(5).

Intervenors Jones argue that the lodges and vacation rentals authorized by JCZO 342 may have features that resemble hotels or motels, but they also are different from hotels and motels in that the units will not be available all the time for rent as hotel and motel rooms usually are.

We need not and do not decide whether FOM's or intervenors Jones' view of OAR 660-022-0030(5) is correct. The CSVR zone allows lodges and does not expressly require that all lodges be connected to a community sewer system. However neither does the CSVR zone expressly authorize lodges that are not connected to a community sewer system, if the lodge qualifies as a "hotel or motel" within the meaning of OAR 660-022-0030(5). It is at best ambiguous whether JCZO Section 342 authorizes lodges that are not served by a community sewer system, if a particular lodge qualifies as a "hotel" or "motel," as those words are used in OAR 660-022-0030(5) Therefore, JCZO Section 342 must be interpreted consistently with the administrative rule it was adopted to implement. ORS 197.829(1)(d); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 45-46, 911 P2d 350 (1996). If a lodge is properly viewed as a "hotel" or "motel," as those words are used in OAR 660-022-0030(5), it could only be approved in the CSVR zone if it will be served by a community sewer system.

This subassignment of error is denied.

B. Health Hazards and Carrying Capacity

FOM argues that the amended JCZO violates OAR 660-022-0030(8), which provides:

> "Zoning applied to lands within unincorporated communities shall ensure that the cumulative development:
>
> "(A) Will not result in public health hazards or adverse environmental impacts that violate state or federal water quality regulations; and
>
> "(B) Will not exceed the carrying capacity of the soil or of existing water supply resources and sewer services."

FOM's entire argument is that the amended JCZO violates OAR 660-022-0030(8) because the specific provisions of OAR 660-022-0030(8) are not "grafted into" the JCZO. We understand FOM to argue that the only way to ensure that development in the CSVR satisfies the OAR 660-022-0030(8) public health hazard, environmental impact and carrying capacity standards is to set those standards out verbatim in the CSVR. We do not agree.

As intervenors Jones point out, JCZO 342(A) limits the number of vacation rental units and the permissible floor area of lodges and vacation rental units. JCZO 342(B) sets out a number of development standards to regulate and minimize the impacts of development in the CSVR zone. Lodges and vacation rental units are also subject to site plan review under JCZO 414 where a variety of impacts are considered. FOM simply claims that the standards in OAR 660-022-0030(8) are not "reflected in" JCZO 342 and 414. FOM Petition for Review 4. It is not unusual for local governments to adopt a variety of specific land use regulations to comply with more general statutory, statewide planning goal and administrative rule requirements. Without commenting on whether the standards that the county must apply to approve lodges and vacation rental units and grant site plan review necessarily are sufficient to ensure that development of lodges and vacation rental units will comply with OAR 660-022-0030(8), FOM must do more than simply claim that the only way to comply with OAR 660-022-0030(8) is to copy the OAR 660-022-0030(8) standards into the JCZO.

This subassignment of error is denied.

C. Low Impact Commercial Uses

FOM argues that the CSVR zone allows a commercial use that violates the restrictions on commercial uses provided by OAR 660-022-0030(10). Under OAR 660-022-0030(10)

> "* * *a small-scale, low impact commercial use is one which takes place in an urban unincorporated community in a building or buildings not exceeding 8,000 square feet of floor area, *or in any other type of unincorporated*

> *community in a building or buildings not exceeding 4, 000 square feet of floor space*." (Emphasis added.)

The 4,000 square foot limitation applies because Camp Sherman is not an urban unincorporated community. However, JCZO Section 342 does not expressly limit lodges to no more than 4,000 square feet of floor area. FOM argues that a "lodge" allowed by the CSVR zone is a commercial use because the definition of "lodge" states "[a] lodge complex may include a central kitchen and dining facilities designed for the preparation and serving of meals to unit occupants and the public." JCZO 105.B. According to FOM, because the JCZO allows a restaurant that is not a low impact commercial uses, the JCZO violates OAR 660-022-0030(10).

Intervenors Jones argue, that the CSVR zone does not allow restaurants or any other commercial uses. Intervenors Jones argue that lodges are residential uses, and that any dining facilities associated with the residential uses would be permitted accessory uses to that residential use – not commercial uses.

FOM is almost certainly correct that if the analysis that is required to apply OAR 660-022-0030(10) requires a separate analysis of different components of a lodge, "a central kitchen and dining facilities designed for the preparation and serving of meals to unit occupants and the public" is accurately characterized as a commercial use. However, neither FOM nor intervenors Jones address the OAR chapter 660, division 23 definition of "commercial use." OAR 660-022-0010(1) provides the following definition of the term "[c]ommercial [u]se:"

> "'Commercial Use' means the use of land primarily for the retail sale of products or services, including offices. It does not include factories, warehouses, freight terminals, or wholesale distribution centers."

It may be, as petitioners appear to argue, that individual components of a lodge may qualify as a commercial use and therefore are subject to the OAR 660-022-0030(10) requirement that they be "small-scale, low impact commercial use." Or it may be as intervenor Jones appears

to argue that a lodge is analyzed as a whole and so long as the lodge as a whole is not "primarily for the retail sale of products or services," it is not a "commercial use," within the meaning of OAR 660-022-0010(1) and not subject to the building square foot limitation in OAR 660-022-0030(10).

As was the case with FOM's argument that the lodges authorized by JCZO Section 342 are or could be "hotels or motels" that must be connected to a community sewer system under OAR 660-022-0030(5), we need not and do not decide whether FOM's or intervenors Jones' view of OAR 660-022-0030(10) is correct. The CSVR zone allows lodges and does not expressly require that the buildings that make up a lodge complex include no more than 4,000 square feet. However, neither does the CSVR zone expressly authorize lodges that exceed 4,000 square feet of building floor space, if the lodge qualifies as a "commercial use" within the meaning of OAR 660-022-0010(1) or includes components that are properly viewed as commercial uses. It is at best ambiguous whether JCZO Section 342 authorizes lodges with more than 4,000 square feet if they are properly viewed as commercial uses or include components that are commercial use. Therefore, JCZO Section 342 must be interpreted consistently with the administrative rule it was adopted to implement. ORS 197.829(1)(d); *Friends of Neabeack Hill v. City of Philomath,* 139 Or App at 45-46.

Because we do not agree with FOM that JCZO 342 unambiguously allows lodges that violate the restrictions on commercial uses imposed by OAR 660-022-0030(10) and because the county will be required to consider that question directly when approving lodges in the CSVR zone in the future, this subassignment of error provides no basis for remand.

This subassignment of error is denied.

FIRST ASSIGNMENT OF ERROR (RYAN)

The crux of Ryan's argument under his first assignment of error appears to be that the county cannot allow more than *de minimis* use of the vacation rental units by the owners of those units. This argument appears to be based on our earlier rulings in the *Friends of the*

Metolius cases discussed under FOM's assignment of error. As we explained in those cases, we remanded the county's earlier decisions that allowed more than *de minimis* use of "tourist rental cabins" The question of whether the county's earlier decisions allowed more than *de minimis* use of the approved "tourist rental cabins" was legally significant because the prior CSVR zone regulated "tourist rental cabins" and single family dwellings differently. The most important difference was that under the former CSVR zone the minimum lot size was 5 acres, and only one single family dwelling was allowed per lot, whereas many tourist rental cabins could be allowed on a single lot, resulting in a significantly higher development density. Under our *Friends of the Metolius* decisions, limiting an owner's use of a tourist rental cabin to *de minimis* use was necessary to avoid having what purported to be multiple "tourist rental cabins" on a single lot become *de facto* multiple single family dwellings on a single lot, at a density that could not be approved in the former CSVR zone if they were approved as single family dwellings. Preserving a real distinction between "tourist rental cabins" and conventional single family dwellings was important under the old CSVR, because Goal 14 (Urbanization) prohibits urban residential development on rural land. The old CSVR zone only allowed single family dwellings at low densities to comply with Goal 14's prohibition against urban residential densities on rural land. Because tourist rental cabins were functionally different than single family dwellings, their higher density presumably did not violate Goal 14.

The new CSVR zone differs from the old CSVR zone in two important ways. First, as we note in our discussion of Ryan's second assignment of error below, concerns that the development densities allowed in the new CSVR zone may violate Goal 14 have been directly addressed by designating Camp Sherman as an unincorporated community. The county is no longer relying on limiting single family dwellings to low density in the CSVR zone to comply with Goal 14. Second, because limiting single family dwellings to low densities is no longer required to ensure the new CSVR zone complies with Goal 14, the

differential regulation of single family dwellings and tourist rental cabins was not carried forward in the new CSVR zone. In fact, the CSVR zone no longer allows single family dwellings. The new CSVR zone expressly allows owners to occupy a vacation rental unit for up to 30 days per quarter. That is certainly more than *de minimis* use. However, the county is relying on Camp Sherman's status as an unincorporated community to address any Goal 14 questions that may be raised by that greater than *de minimis* use of vacation rental units by their owners. Because the legal reason for limiting tourist rental cabins to *de minimis* use is no longer present in the new CSVR, the failure of the county to limit vacation rental units to *de minimis* use by the owner provides no basis for reversal or remand.

Ryan's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (RYAN)

Ryan argues that the county erred by allowing urban uses in the CSVR zone without demonstrating that such urban uses can be allowed on rural land consistently with Goal 14 (Urbanization), or taking an exception to Goal 14. The CSVR allows vacation rental units, and potentially allows for 42 units at Lake Creek Lodge. According to Ryan, those 42 units must be on 21 acres, but can be located anywhere on those 21 acres, and therefore at a density much greater than would typically be allowed in rural zones.

Ryan fails to recognize that the county designated Camp Sherman as an unincorporated community. OAR 660-022-0020(2) states that one of the purposes of the unincorporated communities rule is to interpret "Goals 11 and 14 concerning urban and rural development outside urban growth areas." OAR 660-022-0030(2) provides:

> "County plans and land use regulations may authorize any residential use and density in unincorporated communities, subject to the requirements of this division."

So long as the CSVR zone is consistent with the requirements of OAR chapter 660, division 22, the county was not obligated to consider Goal 14 directly. Ryan does not argue that the

CSVR zone is inconsistent with any of the requirements of OAR chapter 660, division 22. Therefore, Ryan's assignment of error provides no basis for reversal or remand.

Ryan's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (TRIBES), THIRD and SIXTH ASSIGNMENT OF ERROR (COLW)

Petitioners argue that various provisions of the amended JCZO are inconsistent with the old and amended JCCP.

A. Consistency With the Old JCCP

Petitioners first argue that provisions of the new JCZO are inconsistent with the old JCCP. Petitioners cite numerous examples of what they contend are inconsistencies between the new JCZO and the old JCCP. We need not consider whether the new JCZO is inconsistent with the old JCCP because we agree with respondents that the new JCZO is not required to be consistent with the old JCCP.

Petitioners argue that under ORS 197.835(7), all land use regulation amendments must be in compliance with the local government's comprehensive plan.[15] While that is true, it begs the question of whether an amended zoning ordinance must comply with a contemporaneously amended comprehensive plan or an old comprehensive plan that the amended JCCP replaces. ORS 197.625 applies in the specific circumstances presented in the present appeal. ORS 197.625(3) provides:

> "(a) Prior to its acknowledgment, the adoption of a new comprehensive plan provision or land use regulation or an amendment to a comprehensive plan or land use regulation is effective at the time specified by local government charter or ordinance and is applicable to

[15] ORS 197.835(7) provides:

> "The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
>
> "(a) The regulation is not in compliance with the comprehensive plan * * *."

> land use decisions, expedited land divisions and limited land use decisions if the amendment was adopted in substantial compliance with ORS 197.610 and 197.615 unless a stay is granted under ORS 197.845.
>
> "(b) Any approval of a land use decision, expedited land division or limited land use decision subject to an unacknowledged amendment to a comprehensive plan or land use regulation shall include findings of compliance with those land use goals applicable to the amendment.
>
> "(c) The issuance of a permit under an effective but unacknowledged comprehensive plan or land use regulation shall not be relied upon to justify retention of improvements so permitted if the comprehensive plan provision or land use regulation does not gain acknowledgment. * * *"

Under ORS 197.625(3)(a), the new JCCP and JCZO became effective on January 1, 2007. The earlier versions of the JCCP and JCZO were also repealed on January 1, 2007. Under ORS 197.625(3), because the challenged amendments have been appealed, they are not acknowledged. Thus, the only applicable JCCP is the unacknowledged, amended JCCP. Under ORS 197.625(3)(b), because the amended JCCP has not been acknowledged, the challenged amendments must comply with statewide planning goals. The challenged amendments to the JCZO do not have to comply with the old JCCP.

These subassignments of error are denied.

B. Consistency With the New JCCP

Petitioners argue that the new JCZO is also inconsistent with the new JCCP. Petitioners state that the new JCZO allows for additional dwellings in the county EFU, FM, and RL zones and then list provisions of the new JCCP that allegedly are inconsistent with authorizing such dwellings. Petitioners, however, merely quote the language of the new JCCP. Petitioners may believe it is obvious why the new JCZO is inconsistent with the new JCCP, but it is not obvious to us. Petitioners provide no argument explaining why they believe the amended JCZO is inconsistent with the amended JCCP. Many of the provisions cited by petitioners appear to be similar to their arguments under Goal 5 discussed above. To

the extent petitioners make arguments in addition to those addressed elsewhere, they are not sufficiently developed for our review. *Deschutes Development v. Deschutes County*, 5 Or LUBA at 220.

These subassignments or error are denied.

C. Camp Sherman Local Advisory Committee

An appendix to the old JCCP sets out administrative provisions that create and assign certain duties to the Camp Sherman Local Advisory Committee (LAC). Petitioner COLW sets out some of those provisions in its petition for review and we set them out below:

> "The [LAC] is established to gather citizen input, and to act as a coordinator for planning matters in the Camp Sherman Area. The Committee will function as an official advisory group to the County Planning Commission.
>
> "* * * * *
>
> "The LAC will provide the County Planning Commission with their opinions and recommendations in regards to planning and zoning matters of local concern.
>
> "* * * * *
>
> "The LAC shall determine whether any proposed use and/or development in the Camp Sherman Area is in conformity with standards set by the Camp Sherman Plan. * * *
>
> "* * * * *
>
> "Proposals for modification of this document and the Jefferson County Comprehensive Plan may be initiated by an individual or by the Local Advisory Committee. * * *" COLW Petition for Review Appendix 43-46.

The county found that the required LAC involvement suggested in the above-quoted language from JCCP Appendix was not required here because the challenged JCCP and JCZO amendments are *legislative* amendments and the procedures described above must be followed when considering *applications* that lead to *quasi-judicial* land use decisions. Petitioner COLW assigns error to those findings.

The county's response to arguments that it was error not to involve the Camp Sherman LAC in preparing the draft JCZO and JCCP proposed amendments is set out below.

> "B. Testimony was received that the process followed in amending the [JCCP] was flawed because the Camp Sherman [LAC] was not involved in the preparation of the draft Plan. As stated in the [JCCP Appendix] the role of the LAC is to gather citizen input, act as a coordinator for planning matters in the Camp Sherman area, and function as an official advisory group to the County Planning Commission by reviewing all proposed development in the Camp Sherman area and providing a written report and recommendation to the Planning Commission on development applications. The County interprets the role of the LAC as providing input on quasi-judicial land use applications.
>
> "C. In a section titled 'Long Range Plan Rivision [sic],' the Camp Sherman Appendix states that proposals for modification of the appendix and the [JCCP] may be initiated by an individual or by the [LAC]. (In this respect the document is in error by not recognizing that the Jefferson County Board of Commissioners also has the authority to amend, modify or repeal the Appendix.) No further procedures for legislative amendments are included in the Appendix. Consequently there is no legal requirement for the LAC to be involved in legislative amendments to the text of the [JCCP]." Record 56.[16]

Although we concluded earlier in this opinion that the county was not obligated to ensure that the JCZO amendments complied with the old JCCP, any procedural obligations the county may have had under the old JCCP would have applied at the time the draft JCCP and JCZO were prepared. The county's findings are adequate to explain that the county interprets the procedural obligation it had under the former JCCP Appendix to involve the

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[16] In other findings the county identified specific Appendix language that led it to its conclusion that the LAC need not have been involved in preparing the initial draft of the proposed JCCP and JCZO amendments:

> "(1) The Board's interpretation of [the JCCP Appendix] is based on the underlined portions of the following text: 'Upon receipt of an application for approval of any proposed use or development, the secretary of the LAC shall forward the application and all available information to the County Planning Department[.] . . . If the planning department is contacted by the applicant prior to contact with the LAC, the director will notify the secretary of the LAC and forward all available information.' The Board interprets this section's reference to 'the applicant' to refer only to quasi-judicial, applicant-initiated land use actions." Record 1770 (emphasis in original).

Camp Sherman LAC in its planning actions as being limited to quasi-judicial land use decisions regarding specific development proposals. The county's findings are also adequate to explain that any attempt to interpret the last of the above-quoted provisions from the JCCP Appendix to provide that only the LAC or individuals could initiate JCCP amendments would be incorrect. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we may only overturn a local government's interpretation of its own ordinances if it is inconsistent with the express language, purpose, or policy of the ordinance.[17] The county's interpretation is not inconsistent with the express language, purpose, or policy of Appendix I.

Finally, we agree with respondents that any error the county may have committed in failing to involve the LAC in preparing the initial drafts of the proposed JCCP and JCZO amendments would be a procedural error. LUBA may remand based on a procedural error, only where the procedural error prejudiced petitioners' rights. ORS 197.835(9)(a)(B). As respondents' correctly note, while petitioners allege that lack of early involvement of the LAC may have prejudiced the substantial rights of the LAC or its members, petitioners do not allege or demonstrate that any such failure to involve the LAC in preparing the initial drafts prejudiced *petitioners'* substantial rights. Holzman's Response Brief 6-7.

This subassignment of error is denied.

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[17] ORS 197.829(1) provides, in relevant part:

> "[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;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

The Tribes' third assignment of error, and COLW's third and sixth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR (JOHNSON)

Johnson argues that the new JCZO definition of "lot size" allows minimum lot sizes that are smaller than the minimum lot sizes that required by state statutes and administrative rules for certain farm and forest lands. JCZO 105.B defines "lot size" as:

> "The total horizontal net area within the lot lines of a lot or parcel. When a road or railroad right-of-way lies entirely within the boundaries of a lot, it is included for the purpose of determining the total lot size. When a road borders a lot, the area to the centerline of the right-of-way shall be included for the purposes of determining lot size * * *"

According to Johnson, including rights-of-way when computing lot size will result in the county approving lot sizes that are smaller than the statutory minimum in EFU and forest zones. Johnson, however, does not explain why the county's definition of lot size is necessarily inconsistent with statutory minimum lot sizes. Presumably, Johnson believes that internal or adjoining rights of way may not be included in determining whether a proposed lot satisfies the cited statutory minimum lot sizes. However, the only authority Johnson cites for that presumption is the ORS 92.010(4) definition of "lot" and the ORS 92.010(6) definition of "parcel," neither of which say anything about whether rights of way may be included in considering whether lots satisfy minimum lot size requirements.

We need not and do not decide whether internal and adjoining rights of way may be considered in determining whether minimum lot sizes that are required by state law are satisfied. The JCZO 105.B definition of "lot size" applies generally throughout the JCZO, and where state law does not impose a minimum lot size, the county presumably is free to compute lot sizes as it sees fit. The county's failure to anticipate in the JCZO 105.B definition of "lot size" that state law might require that lot size be computed differently in certain circumstances is not an error that requires remand. *See Rogue Valley Assoc. of Realtors v. City of Ashland*, 158 Or App 1, 4, 970 P2d 685 (1999) (facial challenge to

legislation fails where the legislation can be applied consistently with controlling law); *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126, 135 (2004) (same). If state law does not allow lot size to be computed in the manner set out in the JCZO 105.B definition of "lot size," where state law specifies a minimum lot size, the state law standard would control over the JCZO 105.B definition of "lot size."

Johnson's fifth assignment of error is denied.

CONCLUSION

We partially sustain the Tribes and COLW's first and second assignments of error regarding the county's decision to eliminate Old JCCP Policy 5-H-5 in the new JCCP. We sustain COLW's fifth assignment of error, which challenges new JCCP Policy 1.2. We sustain the part of FOM's assignment of error that challenges the adequacy of the comprehensive plan mapping of unincorporated communities. All of these defects concern the new JCCP which was adopted by Ordinance O-01-07. However, the new JCZO depends on those JCCP amendments, in part. Therefore Ordinance O-02-07 must also be remanded.

Ordinances O-01-07, and O-02-07 are remanded.

OAR chapter 660, division 23, sections 30, 40 and 50

"**660-023-0030**

"**Inventory Process**

"1) Inventories provide the information necessary to locate and evaluate resources and develop programs to protect such resources. The purpose of the inventory process is to compile or update a list of significant Goal 5 resources in a jurisdiction. This rule divides the inventory process into four steps. However, all four steps are not necessarily applicable, depending on the type of Goal 5 resource and the scope of a particular PAPA or periodic review work task. For example, when proceeding under a quasi-judicial PAPA for a particular site, the initial inventory step in section (2) of this rule is not applicable in that a local government may rely on information submitted by applicants and other participants in the local process. The inventory process may be followed for a single site, for sites in a particular geographical area, or for the entire jurisdiction or urban growth boundary (UGB), and a single inventory process may be followed for multiple resource categories that are being considered simultaneously. The standard Goal 5 inventory process consists of the following steps, which are set out in detail in sections (2) through (5) of this rule and further explained in sections (6) and (7) of this rule:

"(a) Collect information about Goal 5 resource sites;

"(b) Determine the adequacy of the information;

"(c) Determine the significance of resource sites; and

"(d) Adopt a list of significant resource sites.

"(2) Collect information about Goal 5 resource sites: The inventory process begins with the collection of existing and available information, including inventories, surveys, and other applicable data about potential Goal 5 resource sites. If a PAPA or periodic review work task pertains to certain specified sites, the local government is not required to collect information regarding other resource sites in the jurisdiction. When collecting information about potential Goal 5 sites, local governments shall, at a minimum:

"(a) Notify state and federal resource management agencies and request current resource information; and

"(b) Consider other information submitted in the local process.

"(3) Determine the adequacy of the information: In order to conduct the Goal 5 process, information about each potential site must be adequate. A local government may determine that the information about a site is inadequate to complete the Goal 5 process based on the criteria in this section. This determination shall be clearly indicated in the record of proceedings. The issue of adequacy may be raised by the department or objectors, but final determination is made by the commission or the Land Use Board of Appeals, as provided by law. When local governments determine that information about a site is inadequate, they shall not proceed with the Goal 5 process for such sites unless adequate information is obtained, and they shall not regulate land uses in order to protect such sites. The information about a particular Goal 5 resource site shall be deemed adequate if it provides the location, quality and quantity of the resource, as follows:

"(a) Information about location shall include a description or map of the resource area for each site. The information must be sufficient to determine whether a resource exists on a particular site. However, a precise location of the resource for a particular site, such as would be required for building permits, is not necessary at this stage in the process.

"(b) Information on quality shall indicate a resource site's value relative to other known examples of the same resource. While a regional comparison is recommended, a comparison with resource sites within the jurisdiction itself is sufficient unless there are no other local examples of the resource. Local governments shall consider any determinations about resource quality provided in available state or federal inventories.

"(c) Information on quantity shall include an estimate of the relative abundance or scarcity of the resource.

"(4) Determine the significance of resource sites: For sites where information is adequate, local governments shall determine whether the site is significant. This determination shall be adequate if based on the criteria in subsections (a) through (c) of this section, unless challenged by the department, objectors, or the commission based upon contradictory information. The determination of significance shall be based on:

"(a) The quality, quantity, and location information;

"(b) Supplemental or superseding significance criteria set out in OAR 660-023-0090 through 660-023-0230; and

"(c) Any additional criteria adopted by the local government, provided these criteria do not conflict with the requirements of OAR 660-023-0090 through 660-023-0230.

"(5) Adopt a list of significant resource sites: When a local government determines that a particular resource site is significant, the local government shall include the site on a list of significant Goal 5 resources adopted as a part of the comprehensive plan or as a land use regulation. Local governments shall complete the Goal 5 process for all sites included on the resource list except as provided in OAR 660-023-0200(7) for historic resources, and OAR 660-023-0220(3) for open space acquisition areas.

"(6) Local governments may determine that a particular resource site is not significant, provided they maintain a record of that determination. Local governments shall not proceed with the Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5.

"(7) Local governments may adopt limited interim protection measures for those sites that are determined to be significant, provided:

"(a) The measures are determined to be necessary because existing development regulations are inadequate to prevent irrevocable harm to the resources on the site during the time necessary to complete the ESEE process and adopt a permanent program to achieve Goal 5; and

"(b) The measures shall remain effective only for 120 days from the date they are adopted, or until adoption of a program to achieve Goal 5, whichever occurs first."

"**660-023-0040**

"**ESEE Decision Process**

"(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule. Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE analysis need not be lengthy or complex, but should enable

reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:

"(a) Identify conflicting uses;

"(b) Determine the impact area;

"(c) Analyze the ESEE consequences; and

"(d) Develop a program to achieve Goal 5.

"(2) Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. The following shall also apply in the identification of conflicting uses:

"(a) If no uses conflict with a significant resource site, acknowledged policies and land use regulations may be considered sufficient to protect the resource site. The determination that there are no conflicting uses must be based on the applicable zoning rather than ownership of the site. (Therefore, public ownership of a site does not by itself support a conclusion that there are no conflicting uses.)

"(b) A local government may determine that one or more significant Goal 5 resource sites are conflicting uses with another significant resource site. The local government shall determine the level of protection for each significant site using the ESEE process and/or the requirements in OAR 660-023-0090 through 660-023-0230 (see OAR 660-023-0020(1)).

"(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.

"(4) Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of

the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.

"(5) Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:

"(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.

"(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.

"(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section."

"**660-023-0050**

"**Program to Achieve Goal 5**

"(1) For each resource site, local governments shall adopt comprehensive plan provisions and land use regulations to implement the decisions made pursuant to OAR 660-023-0040(5). The plan shall describe the degree of protection intended for each significant resource site. The plan and implementing ordinances shall clearly identify those conflicting uses that are allowed and the specific standards or limitations that apply to the allowed uses. A program to achieve Goal 5 may include zoning measures that partially or fully allow conflicting uses (see OAR 660-023-0040(5)(b) and (c)).

"(2) When a local government has decided to protect a resource site under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards. For purposes of this division, a standard shall be considered clear and objective if it meets any one of the following criteria:

"(a) It is a fixed numerical standard, such as a height limitation of 35 feet or a setback of 50 feet;

"(b) It is a nondiscretionary requirement, such as a requirement that grading not occur beneath the dripline of a protected tree; or

"(c) It is a performance standard that describes the outcome to be achieved by the design, siting, construction, or operation of the conflicting use, and specifies the objective criteria to be used in evaluating outcome or performance. Different performance standards may be needed for different resource sites. If performance standards are adopted, the local government shall at the same time adopt a process for their application (such as a conditional use, or design review ordinance provision).

"(3) In addition to the clear and objective regulations required by section (2) of this rule, except for aggregate resources, local governments may adopt an alternative approval process that includes land use regulations that are not clear and objective (such as a planned unit development ordinance with discretionary performance standards), provided such regulations:

"(a) Specify that landowners have the choice of proceeding under either the clear and objective approval process or the alternative regulations; and

"(b) Require a level of protection for the resource that meets or exceeds the intended level deter-mined under OAR 660-023-0040(5) and 660-023-0050(1)."