BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF MARION COUNTY,
SALEM AUDUBON, RICHARD BERKEY,
JOHN BRANDT and SUSAN BRANDT,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

ELKHORN GOLF AND RESORT, LLC,
Intervenor-Respondent.

LUBA No. 2008-225

FINAL OPINION
AND ORDER

Appeal from Marion County.

William K. Kabeiseman, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Edward J. Sullivan and Garvey Schubert Barer PC.

Jane Ellen Stonecipher, County Counsel, filed a joint response brief and argued on behalf of respondent. With her on the brief were Steven L. Pfeiffer, Roger A. Alfred, Corrinne S. Celco and Perkins Coie LLP.

Corinne S. Celko, Portland, filed a joint response brief and Steven L. Pfeiffer argued on behalf of intervenor-respondent. With her on the brief were Steven L. Pfeiffer, Roger A. Alfred, Perkins Coie LLP and Jane Ellen Stonecipher.

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

REMANDED 08/06/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal county approval of a preliminary subdivision plan and exceptions to Statewide Planning Goals 11 (Public Facilities and Services) and 14 (Urbanization) to facilitate a 196-unit residential and golf course development.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address an argument in the response brief that the county did not need to adopt exceptions to Goals 11 and 14 to approve the proposed development. There is no opposition to the motion or proposed reply brief, and we agree with petitioners that the argument presents a "new matter" that warrants a reply brief under OAR 661-010-0039. The reply brief is allowed.

FACTS

The subject property is a 464-acre tract located on both sides of the Little North Fork of the Santiam River. In 1980, intervenor-respondent (intervenor) applied to the county for a planned development subdivision for a proposed destination resort called Elkhorn Valley Estates. In 1982, the county approved a conceptual plan for the proposed development that authorized (1) an 18-hole golf course, (2) 150 single family dwellings on 10,000-square foot lots, (3) 46 condominium units, and (4) a small commercial area. The 1982 conceptual plan approval imposed a number of conditions, including a requirement that the development be served by an on-site community sewer system.

At the same time, the county sought to adopt an exception to Statewide Planning Goal 4 (Forest Lands) for the proposed development, as part of legislative amendments subject to periodic review by the Land Conservation and Development Commission (LCDC). In 1984, after two remands of that legislation back to the county, the county adopted and LCDC ultimately approved a Goal 4 exception for the subject property, to allow for the development approved in the 1982 conceptual plan.

As part of the 1984 exception, the county rezoned the property to Acreage Residential, with a Limited Use Overlay (AR-LU). The limited use overlay zone that was applied to the property included additional requirements to assure that the development described in the 1982 conceptual plan approval would be consistent with most of the draft goal and administrative rule requirements for destination resorts, which were then under LCDC's consideration.[1]

Following the 1984 exception intervenor completed construction of the 18-hole golf course, but did not seek subdivision plat or other approvals for the residential or commercial uses authorized in the 1982 conceptual plan. Each year intervenor sought and obtained county approval to extend the conceptual plan approval. In 2007, intervenor filed an application for preliminary subdivision approval to create the 150 residential lots, condominium lot, and two commercial lots described in the 1982 conceptual plan, served by a community sewer system, on a 65.3-acre portion of the subject property.

The county planning commission conducted a hearing on the subdivision application. In response to comments from the Department of Land Conservation and Development (DLCD) and others that intervening changes in law required exceptions to Statewide Planning Goals 11[2] and 14[3] to permit the proposed residential density and community sewer

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[1] The limited use overlay zone requires, among other things, that at least two million dollars in 1984 dollars be spent on improvements for recreational facilities and visitor-oriented accommodations and that visitor oriented accommodations shall include meeting rooms, a restaurant with seating for 100 persons, and 150 separate rentable units for overnight accommodations, which apparently reflect most of the requirements in the June 1984 draft rules then under LCDC's consideration. Record 1407-08. As discussed below, there is no dispute that the proposed development does not meet all of the requirements of a "destination resort" under the current regulatory scheme. As the county found, the subject property is not located within the area of lands eligible for a destination resort on the comprehensive plan map adopted by the county pursuant to ORS 197.455. Record 47.

[2] Goal 11 is:

> "To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development."

Generally, Goal 11 prohibits establishment of a community sewer system outside an urban growth boundary or unincorporated community.

system, intervenor modified the application to include requests for reasons exceptions to those goals. The county provided notice of the proposed post-acknowledgment plan amendments to LCDC, as required by ORS 197.610. After further hearings, the planning commission recommended approval of the goal exceptions. The county board of commissioners conducted a hearing on the recommendation, and ultimately approved the subdivision application and reasons exceptions. This appeal followed.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioners contend that the proposed development is a "destination resort," and therefore the county erred in failing to apply the current statutory and Goal-based requirements for a destination resort. Because the issue of whether the proposed development is a "destination resort" has implications for the remaining assignments of error, we turn first to the third assignment of error.

Petitioners contend that the county explicitly approved the development in 1982 and 1984 as a "destination resort" premised on satisfying the county's needs under Statewide Planning Goal 8 (Recreational Needs),[4] and the proposed development clearly falls within the current Goal 8 and ORS 197.435 definitions of "destination resort."[5] In almost all

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[3] Goal 14 is:

> "To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."

OAR 660-004-0040, adopted in 2000, implements Goal 14 and generally requires an exception to Goal 14 to allow residential subdivisions with lot sizes less than two acres in size.

[4] As currently written, Goal 8 is to:

> "To satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts."

[5] As amended in the mid-1980s, Goal 8 defines a "destination resort" as:

respects, petitioners argue, the proposed development meets the standards that govern destination resorts at ORS 197.435 through 197.467.[6] According to petitioners, the proposed development should be evaluated either as a "large" destination resort under the criteria in ORS 197.445(1) through (5) and similar Goal 8 provisions, or as a "small" destination resort under the criteria in ORS 197.445(6) and (7) and similar Goal 8 provisions.[7]

> "A self-contained development providing visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities, and that qualifies under the definition of either a 'large destination resort' or a 'small destination resort' in this goal."

Similarly, ORS 197.445, adopted in 1987, describes a "destination resort" as "a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities."

[6] Petitioners argue that if the Elkhorn resort is evaluated under the criteria for a large destination resort, it apparently does not satisfy the requirement to provide at least $7 million for improvements. If evaluated under the criteria for a small destination resort, the proposed development provides too many overnight accommodations and proposes residential uses that are prohibited in a small destination resort.

[7] ORS 197.445 provides, in relevant part:

> "A destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. To qualify as a destination resort under ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, a proposed development must meet the following standards:
>
> "(1) The resort must be located on a site of 160 acres or more except within two miles of the ocean shoreline where the site shall be 40 acres or more.
>
> "(2) At least 50 percent of the site must be dedicated to permanent open space, excluding streets and parking areas.
>
> "(3) At least $7 million must be spent on improvements for on-site developed recreational facilities and visitor-oriented accommodations exclusive of costs for land, sewer and water facilities and roads. Not less than one-third of this amount must be spent on developed recreational facilities.
>
> "(4) Visitor-oriented accommodations including meeting rooms, restaurants with seating for 100 persons and 150 separate rentable units for overnight lodging shall be provided. * * *
>
> "* * * * *
>
> "(5) Commercial uses allowed are limited to types and levels of use necessary to meet the needs of visitors to the development. Industrial uses of any kind are not permitted.

The county rejected that argument, concluding that because the applicant did not request approval under the destination resort statutes and the proposed development is not located on lands mapped as eligible for destination resort in the county's comprehensive plan, the development is not a destination resort subject to the requirements of ORS 197.435 through 197.467 or Goal 8.[8]

"(6) In lieu of the standards in subsections (1), (3) and (4) of this section, the standards set forth in subsection (7) of this section apply to a destination resort:

"(a) On land that is not defined as agricultural or forest land under any statewide planning goal;

"(b) On land where there has been an exception to any statewide planning goal on agricultural lands, forestlands, public facilities and services and urbanization; or

"* * * * *.

"(7) The following standards apply to the provisions of subsection (6) of this section:

"(a) The resort must be located on a site of 20 acres or more.

"(b) At least $2 million must be spent on improvements for on-site developed recreational facilities and visitor-oriented accommodations exclusive of costs for land, sewer and water facilities and roads. Not less than one-third of this amount must be spent on developed recreational facilities.

"(c) At least 25 units, but not more than 75 units, of overnight lodging must be provided.

"(d) Restaurant and meeting room with at least one seat for each unit of overnight lodging must be provided.

"(e) Residential uses must be limited to those necessary for the staff and management of the resort.

"(f) The governing body of the county or its designee has reviewed the resort proposed under this subsection and has determined that the primary purpose of the resort is to provide lodging and other services oriented to a recreational resource which can only reasonably be enjoyed in a rural area. Such recreational resources include, but are not limited to, a hot spring, a ski slope or a fishing stream."

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

"Several opponents argued that the application requested the siting of a 'small destination resort,' and therefore should be denied under the destination resort criteria of ORS 197.455

Under ORS 197.455, a destination resort must be sited on lands mapped as eligible by the county, pursuant to the process set out in that statute.[9] ORS 197.450 provides that a comprehensive plan may provide for the siting of a destination resort on rural lands without taking exceptions to statewide planning goals 3, 4, 11 or 14.[10] Goal 8 has similar provisions.

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and Goal 8. However, the application does not propose a destination resort pursuant to ORS 197.435—467 or Goal 8 and this decision is not based on the criteria of ORS 19.435—467 or Goal 8. The site does not qualify as a destination resort location because it is not within the map of eligible lands adopted by Marion County pursuant to ORS 197.455. The application addresses all applicable subdivision approval criteria and is not subject to the requirements of the destination resort statute or Goal 8. The Board finds that the opponents have not explained by the county should be required to treat an application as a 'destination resort' where the application does not fit within the statutory criteria for such a resort and the applicant has not requested treatment as a destination resort under the county's plan and the applicable statutes. *See Doherty v. Morrow County*, 44 Or LUBA 141 (2003)." Record 47.

[9] ORS 197.455 provides, as relevant:

"(1) A destination resort must be sited on lands mapped as eligible for destination resort siting by the affected county. The county may not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas:

"(a) Within 24 air miles of an urban growth boundary with an existing population of 100,000 or more unless residential uses are limited to those necessary for the staff and management of the resort.

"* * * * *

"(c) On predominantly Cubic Foot Site Class 1 or 2 forestlands as determined by the State Forestry Department, which are not subject to an approved goal exception.

"* * * * *

"(2) In carrying out subsection (1) of this section, a county shall adopt, as part of its comprehensive plan, a map consisting of eligible lands within the county. * * * A map adopted pursuant to this section shall be the sole basis for determining whether tracts of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467."

[10] ORS 197.450 provides:

"In accordance with the provisions of ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, a comprehensive plan may provide for the siting of a destination resort on rural lands without taking an exception to statewide planning goals relating to agricultural lands, forestlands, public facilities and services or urbanization."

Similarly, Goal 8 provides:

Petitioners argue that, while it is possible to approve a destination resort on lands *not* mapped as eligible in the county's comprehensive plan, subject to taking exceptions to Goals 3, 4, 11 and 14, petitioners contend that nothing in ORS 197.435 through 197.467 suggests that the statutory standards for destination resorts would not continue to apply to and govern a destination resort that is approved subject to goal exceptions.

Respondents argue that LUBA has rejected arguments that applications for recreational development that do not seek approval under the statutes and rules that govern approval of a destination resort must comply with those statutes and rules if they have some of the required features of a destination resort. In *Doherty v. Morrow County*, 44 Or LUBA 141 (2003), cited in the county's findings, LUBA held that a proposed motor speedway and associated uses is not a "destination resort" subject to the statute.[11] 44 Or LUBA at 171. Similarly, respondents note that in *VinCEP*, 53 Or LUBA at 553, the Board held that the county did not err in failing to evaluate a proposed luxury "wine country" hotel under the destination resort criteria. In both *Doherty* and *VinCEP*, the proposed development was approved based on Goal exceptions, including exceptions to Goal 14. In the present case, respondents argue, because the proposed development does not meet all of the standards that would apply to a destination resort, it does not qualify as "destination resort" as that term is used in the statute and goal, and therefore need not be evaluated under the statutory and goal criteria for destination resorts.

Petitioners respond that *Doherty* and *VinCEP* are distinguishable, because in neither case did the proposed speedway or hotel fall within the statutory and goal definition of a "destination resort." In contrast, petitioners argue, the Elkhorn resort falls squarely within

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> "Comprehensive plans may provide for the siting of destination resorts on rural lands subject to the provisions of state law, including ORS 197.435 to 197.467, this and other Statewide Planning Goals, and without an exception to Goals 3, 4, 11, or 14."

[11] The proposal in Doherty was a major motorsport speedway and related development and the applicant sought Goal 11 and 14 exceptions to site the development in a rural area.

those definitions, and was originally proposed and approved as a "destination resort," subject to conditions designed to ensure that it complied with destination resort criteria then under consideration.

As defined by the goal and statute, a "destination resort" is a "self-contained development" (*i.e.* development that provides community sewer and water facilities, *see* ORS 197.435(6)) and that provides visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. Neither the speedway proposed in *Doherty* nor the hotel proposed in *VinCEP* included all of those elements, and neither met the definition of "destination resort." For that reason, we agree with petitioners that *Doherty* and *VinCEP* do not assist the county.

In the present case, respondents do not dispute that the proposed Elkhorn resort includes all elements required under the statutory and goal definitions for a destination resort. The Elkhorn resort is self-contained development providing visitor-oriented accommodations and developed recreational facilities, in a setting that appears to offer high natural amenities. Although the statutory and goal definition did not exist at the time of the 1982 and 1984 approvals, the county explicitly approved the resort as a "destination resort" justified by the county's Goal 8 needs, and indeed imposed conditions intended to ensure that the resort complied with the Goal 8 amendments then under consideration. By any reasonable understanding of the term, the Elkhorn resort is a "destination resort."

However, that the Elkhorn resort may fit within the definition of a "destination resort" does not necessarily mean that the statutory criteria governing a destination resort apply when the county approves the resort under the exceptions process rather than pursuant to the statute and Goal 8. Petitioners do not dispute that counties have the option of approving a destination resort either (1) under the statute and Goal 8, in which case no exceptions are necessary, or (2) by taking Goal 3, 4, 11 and 14 reasons exceptions, as necessary. Nonetheless, petitioners contend that in the latter case the destination resort must

still comply with all statutory and Goal 8 criteria. We understand petitioners to argue that counties do not have the option of approving a destination resort pursuant to goal exceptions, where the resort does not meet the standards set out in the statute and goal.

Nothing cited to us in the statute or goal explicitly clarifies that a destination resort approved pursuant to goal exceptions need not also comply with the statutory and Goal 8 criteria. However, when the statute is read as a whole we agree with respondents that the legislature did not intend the statute to effectively occupy the field of potential destination resorts, or preclude counties from approving destination resorts, pursuant to applicable goal exceptions, that may differ from the requirements set forth in the statute.

Prior to the adoption of the Goal 8 amendments and the destination resort statutes a destination resort could only be approved via goal exceptions, which can be a lengthy and difficult process, as the present case shows. The 1984 Goal 8 amendments, followed by the 1987 statutes, offered counties what is essentially a safe harbor, a simpler means to approve destination resorts without taking otherwise required goal exceptions, *if* the proposed resort meets certain minimum standards. ORS 197.450 provides that a county "may" provide in its comprehensive plan for the siting of a destination resort without taking goal exceptions, which suggests that counties retain the pre-existing option of approving resorts pursuant to goal exceptions. *See* n 10. That option would be largely illusory if all destination resorts are nonetheless subject to the statutory criteria, as there would be no point in undertaking the arduous pursuit of approval under goal exceptions.

Further, OAR 197.445 provides that "[t]o qualify as a destination resort under" various statutes, including ORS 197.435 to 197.467, "a proposed development must meet the following standards[.]" *See* n 7. We understand that language to indicate that development that does not meet those standards does not "qualify" for approval under the destination resort statutes, and therefore cannot take advantage of the ORS 197.450 option to site a destination resort without the necessity of taking goal exceptions. We do not understand that

language, or any other statutory or goal language cited to us, to suggest that a destination resort can be approved only pursuant to the statutory standards.

In sum, the structure and terms of the statute and Goal 8 do not preclude a county from approving a destination resort that does not comply with all standards set out in ORS 197.445, provided any applicable goal exceptions can be justified. Petitioners have not established that the county erred in failing to apply ORS 197.445 and deny the proposed development for failure to comply with those standards.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the county's reasons exceptions to Goals 11 and 14, arguing that (1) the county erred in relying heavily on the 1984 exception to Goal 4 to justify the exceptions to Goals 11 and 14, and (2) the county failed to identify any unmet goal obligations that would justify the exceptions to Goals 11 and 14.

OAR 660-014-0040(2) provides that a county can justify a reasons exception to Goal 14 to allow establishment of new urban development on undeveloped rural land.[12]

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[12] OAR 660-014-0040 provides, in relevant part:

> "(2) A county can justify an exception to Goal 14 to allow establishment of new urban development on undeveloped rural land. Reasons that can justify why the policies in Goals 3, 4, 11 and 14 should not apply can include but are not limited to findings that an urban population and urban levels of facilities and services are necessary to support an economic activity that is dependent upon an adjacent or nearby natural resource.
>
> "(3) To approve an exception under section (2) of this rule, a county must also show:
>
> > "(a) That Goal 2, Part II (c)(1) and (c)(2) are met by showing that the proposed urban development cannot be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development in existing rural communities;
> >
> > "(b) That Goal 2, Part II (c)(3) is met by showing that the long-term environmental, economic, social and energy consequences resulting from urban development at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically

Appropriate reasons can include, but are not limited to, findings that urban population and facilities are necessary to support economic activity dependent on an adjacent or nearby natural resource. Similarly, OAR 660-011-0060(9) allows a reasons exception to Goal 11 for reasons that include, but are not limited to, the need to avoid an imminent and significant public health hazard.[13]

Although the county's findings under Goals 11 and 14 cite other considerations, the county found that "[t]he primary reasons for allowing the Goal 14 exception stem from the county's prior approval of this planned development subdivision in 1982, together with the related exception to Goal 4 that was specifically approved for purposes of the proposed development that is the subject of this application." Record 21.[14] The county found that

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> result from the same proposal being located on other undeveloped rural lands, considering:
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> "(A) Whether the amount of land included within the boundaries of the proposed urban development is appropriate, and
>
> "(B) Whether urban development is limited by the air, water, energy and land resources at or available to the proposed site, and whether urban development at the proposed site will adversely affect the air, water, energy and land resources of the surrounding area."

[13] OAR 660-011-0060(9) provides, in relevant part:

> "A local government may allow the establishment of new sewer systems or the extension of sewer lines not otherwise provided for in section (4) of this rule * * * provided the standards for an exception to Goal 11 have been met, and provided the local government adopts land use regulations that prohibit the sewer system from serving any uses or areas other than those justified in the exception. Appropriate reasons and facts for an exception to Goal 11 include but are not limited to the following:
>
> "(a) The new system, or extension of an existing system, is necessary to avoid an imminent and significant public health hazard that would otherwise result if the sewer service is not provided; and, there is no practicable alternative to the sewer system in order to avoid the imminent public health hazard, or
>
> "(b) The extension of an existing sewer system will serve land that, by operation of federal law, is not subject to statewide planning Goal 11 and, if necessary, Goal 14."

[14] The county's findings also comment that due to the 1982 and 1984 approvals "additional goal exceptions may not be necessary for this proposed resort." Record 21. In the joint response brief, respondents request, in a brief footnote, that LUBA "consider the alternate argument that exceptions to Goals 11 and 14 are not necessary where, as here, the proposed development has already been approved and such approvals remain

the current proposal is "substantially similar" to that approved under the 1982 and 1984 decisions, and the proposed subdivision merely implements and completes the 1982 and 1984 decisions. The county concluded that the county's prior findings as part of the 1982 and 1984 decisions are "equally relevant today," specifically the need for outdoor recreation and resort opportunities in the county, and adopted those prior findings by incorporation.

Similarly, with respect to Goal 11, the county relied heavily on the reasons that justified the 1984 exception, approved by the county and LCDC, which included a requirement for a community sewer system.[15] The county's Goal 11 findings address the requirements of OAR 660-004-0020(4), but largely rely upon the county's Goal 14 findings. Petitioners' challenges under this assignment of error focus primarily on the county's Goal 14 findings, and our analysis does likewise.

A. Reliance on 1984 Goal 4 Exception

Petitioners contend that the county erred in relying in whole or part on the 1984 Goal 4 exception to justify the Goal 11 and 14 exceptions. Petitioners note that OAR 660-004-0010(3) provides that an exception to one goal "does not exempt a local government from the

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valid," citing ORS 215.427(3)(a), the so-called "goal-post" statute. Response Brief 6-7, n 2. We decline the invitation to consider that alternative argument, for several reasons. First, the county's decision merely speculates that additional goal exceptions may not be needed; it does not so find as an alternative basis for approving the application. Second, the respondents' argument that no goal exceptions were needed is embodied in a one-sentence footnote, based on a theory the county did not consider, and is not developed or briefed at all. Addressing that argument would take LUBA far afield of the briefing and require LUBA to develop both sides of the issue without any assistance from the parties.

[15] The county's Goal 11 findings state, in part:

> "* * * [T]he Board finds that the findings adopted in 1982 for the Goal 4 exception are equally applicable to a Goal 11 exception, and that the same reasons that justified the original exception also justify the construction of a sewer system to serve the development that was previously approved by the county. In fact, an exception to Goal 11 is required by the prior approvals, which include a condition that a community sewer system must be provided for development. Because the residential and commercial components of the subdivision require a location adjacent to the existing Elkhorn Valley golf course, it is not possible to site the development where a system already exists. The proposal provides the county with significant and timely opportunities for economic development and satisfaction of a long-existing need for additional residential and recreational development on land that is already designated for this particular non-resource use as a golf resort." Record 25-26.

requirements of any other goal(s) for which an exception was not taken." In other words, petitioners argue, under OAR 660-004-0010(3) "the existence of an exception to one Goal cannot serve as justification for an exception to another Goal." Petition for Review 7. In support of that argument, petitioners cite *VinCEP v. Yamhill County*, 215 Or App 414, 423, 171 P3d 368 (2007), in which the Court of Appeals held that taking a Goal 14 exception to allow a hotel on agricultural land does not obviate the need to take a Goal 3 exception.

The county responds, and we agree, that OAR 660-004-0010(3) does not prohibit a local government from relying on the reasons that justify an exception to one goal to justify an exception to another goal. The rule simply provides that an exception to one goal does not mean that other goals do not apply or that an exception to other applicable goals may not be necessary. Whether the reasons that justify one goal exception are *sufficient* to justify an exception to another goal as well is a different question, addressed below. However, we disagree with petitioners' categorical argument that it is impermissible in all cases to use the reasons that justified one goal exception as some or all of the reasons that justify another goal exception. Depending on the goals and circumstances at issue, the same set of reasons might well constitute a partial or a complete justification for both goal exceptions.[16]

Petitioners next contend that even if the county can rely on the 1984 Goal 4 exception, the reasons that justified that 1984 exception do not support exceptions to Goals 11 and 14 for the proposed residential development. According to petitioners, the 1984 exception was based on the perceived need for a destination resort-type development under the then-applicable version of Goal 8. The current proposal, petitioners argue, is not for a "destination resort," but instead is largely a residential subdivision served by a community

[16] We note that OAR 660-004-0022 sets out reasons necessary to justify an exception for various goals and uses, and some of those provisions list impermissible considerations in taking a reasons exception. For example, OAR 660-004-0022(2) provides that for rural residential development the reasons cannot be based on market demand for housing, with certain exceptions. It is possible that a reason used to justify an exception for one goal, but applied to justify an exception to a different goal, might conflict with some provision of OAR 660-004-0022, and therefore it would be impermissible to use that reason to justify both exceptions.

sewer system, next to an existing golf course. Even if the proposed development is "substantially similar" to the development approved in the 1982 conceptual plan and 1984 exception, petitioners argue that it is inconsistent for the county to rely on the original exception for a "destination resort" while at the same time find that the proposed development is *not* a "destination resort" subject to ORS 197.435 to 197.467 and Goal 8.

Respondents argue that at the time of the 1982 and 1984 decisions the Goal 8 provisions and statutes governing destination resorts had not yet been adopted, but that the county recognized in both decisions that the proposed development was justified under Goal 8 to satisfy the recreational needs of citizens and visitors, even if the development did not satisfy all of the requirements for a "destination resort" under the draft Goal 8 amendments then under consideration. According to respondents, Goal 8 contemplates different types of recreational facilities other than destination resorts, and the fact that the 1982 and 1984 decisions labeled the proposed development a "destination resort" does not mean that the reasons used to justify the 1984 Goal 4 exception, based on satisfying recreational needs, cannot be used as partial justification for reasons exceptions to Goals 11 and 14 needed to complete the development authorized in the 1982 and 1984 decisions.

We held under the third assignment of error that, notwithstanding that the proposed development fits within the definition of a "destination resort," because the applicant opted to pursue approval under Goal 11 and 14 exceptions the development is not subject to the statutory and Goal 8-based standards that would otherwise govern approval of a destination resort. We perceive no inconsistency in relying on the 1982 and 1984 approvals for a "destination resort" while also recognizing that the statutory and goal-based standards governing destination resorts do not apply to the proposed development. Under these circumstances, the use of the label "destination resort" in the 1982 and 1984 decisions, and the county's choice not to use that label in the present decision, has no particular legal significance. If the currently proposed development is substantially similar to that approved

in 1982 and 1984 decisions, it seems entirely appropriate to consider the reasons that justified the Goal 4 exception in determining whether reasons also exist to justify the proposed Goal 11 and 14 exceptions. Accordingly, petitioners have not demonstrated that there is some inconsistency or other impediment to considering and relying on the same reasons that justified the Goal 4 exception to justify the Goal 11 and 14 exceptions.

Petitioners next challenge the county's finding that the proposed development is "substantially similar" to that approved in the 1982 and 1984 decisions. According to petitioners, there are in fact significant factual differences between the development approved in the 1982 conceptual plan and 1984 exception, and the development currently proposed. Petitioners cite to testimony at Record 515 outlining certain differences, and emphasizes that the county modified one of the original conditions of approval imposed by the 1984 exception decision, requiring that a 150-acre portion of the subject property remain in common ownership with the portion of the property on which the golf course is sited.

Petitioners have not established that there are any legally significant or meaningful differences between the development approved in the 1982 and 1984 decisions and the development proposed in this application. The differences cited at Record 515 are minor in nature, involving the location of a road and some lots. Minor differences between a planned development conceptual plan and a detailed subdivision plan that implements that conceptual plan are not unexpected.[17] With respect to the modified condition of approval, the county explains that Condition No. 8 from the 1982 conceptual plan approval conflicted with Condition No. 1 from the 1984 exception with respect to ownership of the various portions of the property, and in the present decision the county simply reconciles that conflict. We agree with the county that petitioners have not established that the modified condition of approval

[17] We note that the conditions imposed on the 1982 conceptual plan approval required that "[t]he location of the lots shall *generally conform* to the conceptual development plan," and did not require absolute conformance. Record 1418 (emphasis added).

respecting ownership represents a legally or factually significant difference between the earlier approved development and the current proposal. The record supports the county's findings that the proposed development is substantially similar to the development approved in 1982 and 1984.

Finally, petitioners contend that even if the proposed development is substantially similar, the surrounding factual circumstances have changed dramatically since the 1982 and 1984 decisions. According to petitioners, the studies that supported the 1982 and 1984 decisions regarding the need for recreational facilities or housing next to golf courses are at least 25 years old and do not serve as an adequate factual basis for new exceptions to Goals 11 and 14. For example, petitioners contend that other residential/golf course development or other resort-like development has occurred in the county in the intervening years and that the county failed to address how these new developments affect the purported need for recreational facilities in the county.

In addition to incorporating and relying on the 1984 Goal 4 exception findings of need for the proposed facility, the county found that:

> "the conceptual plan approved in 1982 remains uncompleted, and the golf course lacks any related amenities. The proposed resort will generate significant economic benefits to the county by increasing tourist-related income. *A resort of this type will fill a particular niche of overnight accommodation need near the golf course that has never been met by Marion County.* The Board finds that this situation creates one of the 'reasons' that justifies the proposed exception." Record 22 (emphasis added).

In other words, the county found, the need identified in 1984 for this particular type of recreational facility is still unmet in the county. Petitioners do not cite to any evidence that a similar destination resort-type development has been developed in the county in the intervening years. For example, the newly developed golf course/residential or resort-like

developments that petitioners cite to all appear to be located within urban areas, with the exception of Black Butte Ranch, which is located outside the county in central Oregon.[18]

In sum, petitioners have not demonstrated that the county erred in relying in part on the 1982 and 1984 findings to conclude that reasons justify why the policies in Goals 11 and 14 should not apply, for purposes of OAR 660-014-0040(2). The county found and the record supports that the reasons that justified the Goal 4 exception in 1984 for the proposed development are still valid. The county also found, and the record supports, that the challenged decision implements and completes the 1982 and 1984 county and LCDC approvals. Under these circumstances, it seems entirely appropriate to rely on the reasons that justified the 1984 Goal 4 exceptions, in order to justify exceptions to Goals 11 and 14 needed to complete that approved development.

B. OAR 660-004-0022(1)(a): Unmet Goal Obligations

As noted, OAR 660-004-0022 sets outs a list of reasons that can justify exceptions to various goals, and further provides, in OAR 660-004-0022(1), a "catch-all" set of nonexclusive reasons, "[f]or uses not specifically provided for in subsequent sections of this rule or in OAR 660-012-0070 or chapter 660, division 14[.]"[19] OAR 660-004-0022(1)(a)

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[18] As far as the record reflects, the county has approved no destination resort anywhere in the county under ORS 197.435 to 197.467. In fact, it is not even clear whether the county has adopted a map of eligible lands pursuant to ORS 197.455. The findings suggest such a map has been adopted, but we can find no map or reference to such a map in the copy of the county comprehensive plan the county submitted to LUBA or in the version on the county's website.

[19] OAR 660-004-0022 provides, in relevant part:

> "An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:
>
> "(1) For uses not specifically provided for in subsequent sections of this rule or in OAR 660-012-0070 or chapter 660, division 14, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:
>
> "(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either

requires a finding that "[t]here is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19," among other findings. Under this subassignment of error, petitioners argue that the county failed to identify a demonstrated need for the proposed development based on any unmet goal requirements, and thus erred in adopting the exceptions to Goals 11 and 14.

The county responds, initially, that no findings under OAR 660-004-0022 are necessary with regard to the Goal 14 exception, and accordingly the county did not address OAR 660-004-0022 in its Goal 14 findings. The county is correct that with respect to Goal 14, OAR 660-014-0040(2) supplies the criteria for a reasons exception, not OAR 660-004-0022. *VinCEP*, 215 Or App at 422-23. The county properly applied OAR 660-004-0022(1) to the Goal 11 exception and found that reasons justify why the state policy embodied in Goal 11 should not apply. We therefore understand petitioners' arguments under this subassignment of error to be directed only at the Goal 11 exception.

The county's findings under OAR 660-004-0022 first incorporate and rely on earlier Goal 11 and 14 findings that in turn incorporate and rely on the findings adopted to support the 1982 and 1984 approvals. The county concludes that:

> "* * * The need for the use was demonstrated in the 1982 approval in findings adopted by Marion County and acknowledged by LCDC, and is even more relevant today since the golf course component of the proposed resort has been fully developed at this location pursuant to those earlier acknowledged decisions. * * *" Record 28.

Apparently as an alternative, the findings continue:

> "(b) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this subsection must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or
>
> "(c) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."

> "Additionally, OAR 660-004-0022(1) provides that one example of a reason that can be relied upon to establish the justification for an exception is that the exception will enable a local government to meet one or more of its planning obligations. Such obligations can be found in both the Statewide Planning Goals and in the county's acknowledged comprehensive plan. The requested exceptions are necessary to allow a use that has been identified as an essential means by which the county can meet is requirements under Goal 8 and Goal 9, and implementing policies of the Marion County Comprehensive Plan, in order to provide needed outdoor recreational opportunities and to achieve the county's goals of diversification and stabilization of the local economy. * * *" *Id.*

Petitioners contend that to show a "demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19" under OAR 660-004-0022(1)(a) the county must find that the county is "unable to satisfy its obligations under one or more of Goals 3-19 absent the proposed exception[.]" *Morgan v. Douglas County*, 42 Or LUBA 46, 20 (2002), *quoting Middleton v. Josephine County*, 31 Or LUBA 423, 430 (1996). According to petitioners, the county failed to demonstrate that, absent the proposed use, the county is unable to satisfy its obligations under any statewide planning goal, including Goal 8 or Goal 9.

Respondents counter that the OAR 660-004-0022(1)(a) requirement to identify an unmet need "based on the requirements of Goals 3-19" is part of *non-exclusive* set of reasons that can justify an exception, and that the county's initial finding, quoted above, relies on the reasons stated under its earlier Goal 14 findings, rather than under OAR 660-004-0022(1)(a). According to respondents, OAR 660-014-0040(2) contemplates that the same set of reasons can justify exceptions to Goals 3, 4, 11 *and* 14, and the county is not obligated to proceed under OAR 660-004-0022(1)(a) through (c). Respondents argue that, in *Doherty v. Morrow County*, 44 Or LUBA 141, 177 (2003), LUBA held that:

> "* * * If reasons are identified under OAR 660-014-0040(2) that justify exceptions to Goal 14, and Goals 3 and 11 as well, then there is no need to provide additional reasons to justify reasons exceptions to Goals 3 and 11 under OAR 660-004-0022(1) or (2)."

In other words, respondents argue, the reasons that justify an exception to Goal 14 under OAR 660-014-0040(2) may also suffice to justify an exception to Goal 11 under OAR 660-004-0022, without the need to articulate a different reason. In that circumstance, respondents argue, there is no obligation to make findings under OAR 660-004-0022(1)(a) regarding unmet goal requirements.

We agree with respondents that the county appeared to proceed, initially, to satisfy OAR 660-004-0022 with respect to Goal 11 by relying on the same reasons it used to justify the Goal 14 exception, and only as an alternative did the county attempt to justify the Goal 11 exception based in part on OAR 660-004-0022(1)(a) and a finding of unmet goal obligations. Therefore, petitioners' arguments under the *Middleton/Morgan* cases do not provide a basis for reversal or remand, unless petitioners first demonstrate that the county erred in justifying the Goal 11 exception based on the same reasons it used to justify the Goal 14 exception, which in turn rely heavily on the reasons supporting the 1982 and 1984 approvals.

Petitioners repeat their arguments, rejected above, that the county erred in relying on the reasons set out in the 1982 and 1984 approvals to justify the Goal 14 exception. For the reasons explained above, we again reject those arguments. The 1982 and 1984 decisions required, as a condition of approval, that the development be served by a community sewer system. LCDC presumably acknowledged the 1984 Goal 4 exception with that understanding. There is no dispute that the development must be served by some kind of community sewer system in order to support the urban residential densities approved in the 1982 and 1984 decisions, and under the county's Goal 14 exception. While Goal 11 and Goal 14 are subject to somewhat different, if congruent, policy objectives, in the present case the relevant policy embodied in Goal 11—to limit the establishment or extension of community sewer facilities on rural lands—follows hand in glove with the Goal 14 exception. As contemplated in the 1982 and 1984 decisions, and pursuant to the Goal 14

exception, the subject property is authorized for urban development, with residential density and commercial uses that require a community sewer facility of some kind, otherwise prohibited by Goal 11. Under these circumstances, there is no need to articulate a different reason to justify the exception to Goal 11 than is used to justify the Goal 14 exception or, stated differently, the reasons sufficient to justify the Goal 14 exception are also sufficient to justify the Goal 11 exception for purposes of OAR 660-004-0022. Because petitioners have failed to demonstrate that the county erred in justifying a reasons exception to Goal 14, they also fail to demonstrate that the county erred in justifying a reasons exception to Goal 11. Consequently, petitioners' challenges to the county's alternative findings under OAR 660-004-0022(1)(a) do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

OAR 660-014-0040(3)(a) requires the county, in adopting a reasons exception to Goal 14, to demonstrate that:

> "[T]he proposed urban development cannot be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development in existing rural communities."

The county found that because the proposed development completes a previously approved golf course resort, the golf course component of which had been fully constructed, the proposed development cannot be reasonably accommodated in or through expansion of existing urban areas or rural communities, and the only reasonable location for the residential and commercial components of the project is in proximity to the existing golf course.[20]

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

> "As explained above, the Board finds that the previous conceptual approval and related goal exception require the commercial and residential components of the subdivision to be built in conjunction with the existing 18-hole golf course. The approval includes findings regarding the proposed development in an area already committed to recreational development. It concludes that there are no alternative sites in Marion County that meet the minimum locational requirements that would not require taking a goal exception. The reasoning of the

A. Goal 14 Alternatives Analysis

Petitioners argue first that the county erred in taking the development approved in the 1982 and 1984 approvals as a given, and thus failed to evaluate whether the residential and commercial components of the resort can be reasonably accommodated at other locations that do not require a Goal 14 exception. According to petitioners, under OAR 660-014-0040(3)(a) the county must identify the "essential characteristics" of the proposed urban use, and cannot simply use nonessential details of the applicant's preferred design, such as a desire for a "rural setting," to disqualify otherwise reasonable urban alternative locations that do not require a Goal 14 exception. *VinCEP*, 53 Or LUBA 514, 539, *rem'd on other grounds*, 215 Or App 414, 171 P3d 368 (2007). Petitioners argue that the county failed to identify any essential characteristics of the proposed residential and commercial uses that would preclude their location in one or more of the cities or rural communities in the area.

Respondents argue that in circumstances where the county is taking a Goal 14 exception to implement prior development approvals such as the 1982 and 1984 approvals, the required features of that development can be regarded as the "essential characteristics" of the development for purposes of OAR 660-014-0040(3)(a), and considered in determining

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previous approval is even more persuasive today because the golf course and related facilities are fully developed at this location. The residential uses that were approved as part of the 1982 conceptual approval require location in the immediate proximity of the golf course and, therefore, can only reasonably be accommodated at this location. Additionally, there is no evidence in the record establishing that suitable alternative sites that are already committed to golf course development have become available inside an existing UGB or in existing rural communities between 1982 and the present.

"Further, the proposed golf resort development has specific locational requirements that inherently cannot be accommodated in an urban area or an existing rural community. * * *

"For the reasons described above, * * * the Board agrees that the proposed development could not be reasonably accommodated in or through expansion of existing UGBs, or in existing rural communities. The applicant proposes to complete the development that was approved by the county in 1982, which obviously requires it to occur in the location for the golf resort previously approved and already developed with the existing golf course facility." Record 23.

whether the development can be reasonably accommodated in areas that do not require a Goal 14 exception.

We generally agree with respondents. As noted, the county imposed a limited use overlay zone to implement the 1982 and 1984 approvals, intended to ensure that the proposed development will conform to most of the draft requirements for a destination resort under the Goal 8 amendments then under consideration, including a requirement that the development provide on the subject property "visitor-oriented accommodations," specifically "meeting rooms, restaurant with seating for 100 persons, and 150 separate rentable units for overnight lodging." Record 1407-08. As approved under the 1982 and 1984 decisions, and as implemented by the AR-LU zone, it is clear that the proposed subdivision implementing those approvals is something other than generic residential or commercial development that may or may not be associated with a golf course. To satisfy the conditions imposed in the 1982 and 1984 approvals, it would appear that most if not all of the 196 dwellings and condominium units authorized in the 1982 and 1984 decisions and in the present decision must be available for overnight lodging, a condition typical of destination resorts but not at all typical of a residential subdivision on urban lands.

In this circumstance, we see no error in treating the required features of the development approved under the 1982 and 1984 decisions as part of the "essential features" of the development, for purposes of the alternative site analysis under OAR 660-014-0040(3)(a). Among those "essential features" are on-site visitor-oriented accommodations, such as the proposed residential and commercial uses. Accordingly, petitioners have not demonstrated that the county erred in concluding that the proposed development "cannot be reasonably accommodated in or through expansion of existing urban growth or by intensification of development in existing rural communities."

B. Goal 11 Alternatives Analysis

In addition to OAR 660-014-0040(3)(a), the county addressed OAR 660-004-0020(2)(b), which requires a finding that "[a]reas which do not require a new exception cannot reasonably accommodate the use." Petitioners challenge the county's findings with respect to the county's Goal 11 exception, repeating their arguments above that the county erred in relying on the 1982 and 1984 approvals to limit the alternatives analysis and disqualify all potential urban sites for the proposed development.

We reject those arguments, for the same reasons set out above. The 1982 and 1984 approvals required that the development be served by an on-site community sewer system, and there is no dispute that the destination resort approved under the 1984 Goal 4 exception requires some kind of community sewer system in order to exist. Such a system is therefore an "essential feature" of the proposed development, for purposes of the alternatives analysis under OAR 660-004-0020(2)(b). It follows that the county did not err in concluding that alternative locations in distant urban areas cannot reasonably accommodate the proposed development, for purposes of the exception to Goal 11.

Petitioners' only other argument regarding the Goal 11 exception and OAR 660-004-0020(2)(b) is that the county failed to consider as a reasonable alternative to a community sewer system a "septic tank effluent pumping" system, which would apparently involve pumping sewage off-site for treatment rather than employing on-site treatment. If petitioners are seriously suggesting that constructing pipelines over rural land to pump sewage from the subject property to the nearest urban treatment facility is a reasonable alternative to an on-site treatment facility for purposes of OAR 660-004-0020(2)(b), petitioners do not explain why. For one thing, such an alternative would presumably involve the extension of an urban public facility onto rural land, and would therefore also require an exception to Goal 11.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend that the county erred in failing to apply the requirements of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces).

OAR 660-023-0250(3), part of the administrative rule implementing Goal 5, provides that local governments apply Goal 5 in considering a post-acknowledgment plan amendment (PAPA) if the PAPA "affects a Goal 5 resource."[21] The rule lists three ways in which a PAPA can affect a Goal 5 resource, specifically that the PAPA "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

The county found that no inventoried Goal 5 resources are located on the subject property. Record 18. Further, the county concluded that:

> "* * * The proposed development was conceptually approved in 1982 and the County previously acknowledged a Goal 5 inventory, at which time this proposed use was identified and permitted. Since this application merely implements the previous conceptual approval, no new conflicting uses are allowed by this application and Goal 5 is therefore met. * * *" Record 48.

Petitioners first dispute the finding that no inventoried Goal 5 resources exist on the property, arguing that the subject property is located on both sides of the Little North Fork of the

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[21] OAR 660-023-0250(3) provides:

> "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; or
>
> "(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area."

Santiam River, which is identified in the comprehensive plan Background and Inventory Report as a fish-bearing stream.[22] Petitioners cite testimony from Oregon Department of Fish and Wildlife (ODFW) that the river provides critical habitat for two federally listed fish species. Record 968. In addition, petitioners argue that the subject property is surrounded by Big Game Winter Range habitat, and as ODFW noted is frequented by nearby elk herds. Petitioners contend that the proposed development will conflict with adjoining big game habitat, even if the property itself is not inventoried as part of the winter range.

Respondents do not dispute that the Little North Fork of the Santiam River is identified as a Goal 5 resource in the comprehensive plan Background and Inventory Report. Nor do respondents dispute petitioners' contention that the subject property adjoins Big Game Winter Range habitat. Instead, respondents argue that the county correctly found that the application merely implements the previous conceptual approval, and therefore no "new conflicting uses" are allowed by this application. In addition, respondents contend that the 1982 conceptual approval included an analysis of the impacts of the proposed resort on environmental resources, as part of the county's evaluation of environmental, economic, social and energy impacts, which included an extensive discussion of impacts to elk winter range. Record 1487-88. Respondents argue that when the Goal 4 exception was acknowledged, the proposed resort was deemed to comply with Goal 5 as a matter of law, and the site was accordingly excluded from the mapping of Goal 5 resources, at least with respect to winter range habitat.[23] The county contends that petitioners' arguments under this

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[22] The Background and Inventory Report is apparently a supporting document that is part of the county's comprehensive plan. The Board does not possess a copy of the Report, and petitioners do not attach copies of the pertinent pages to their petition for review. However, the Report is available on the county's website. Table 1 on page 32 of the Report appears to confirm petitioners' allegation that the Little North Fork of the Santiam River is identified as a fish-bearing stream, specifically for Chinook Salmon, that is presumably protected under the county's Goal 5 program. Respondents do not contend otherwise, and therefore we will assume for purposes of our analysis that the river is a protected Goal 5 resource.

[23] Apparently the county generally applies the Big Game Winter Range habitat designation to timber resource-zoned property. When the property was rezoned to AR-LU, the effect was to exclude it from that

assignment of error are essentially a collateral attack on the acknowledged Goal 4 exception and comprehensive plan.

The focus of OAR 660-023-0250(3)(b) is on a PAPA that "allows new uses." The challenged decision is a PAPA because it adopts Goal 11 and 14 exceptions. Whether Goal 5 must be addressed pursuant to OAR 660-023-0250(3)(b) depends on whether those goal exceptions permit "new uses" of the subject property that were not already permitted under the previously acknowledged comprehensive plan and land use regulations. While the Goal 11 and 14 exceptions may have been necessary to approve the subdivision and complete the proposed resort, we disagree with petitioners that those exceptions authorized "new uses" of the property, within the meaning of OAR 660-023-0250(3)(b), that were not already authorized under the applicable plan and zoning designation Under the acknowledged county comprehensive plan and land use regulations, including the AR-LU zone, development of the subject property as a destination resort was not a "new use." Nothing about the Goal 11 or 14 exceptions authorized anything more or different from what had already been previously approved and acknowledged, at least with respect to impacts on Goal 5 resources. Therefore, petitioners have not demonstrated that the county erred in concluding that the decision "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Under the fifth assignment of error, petitioners argue that the county either failed to address, or address adequately, whether the proposed subdivision is consistent with a number of policies in the Marion County Comprehensive Plan (MCCP). In addition, petitioners argue that the county improperly deferred consideration of compliance with certain

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designation. Because the surrounding parcels are largely timber lands, the result is that the property is surrounded by winter range habitat.

comprehensive plan policies to subsequent proceedings that do not provide for public notice or input.

A. MCCP Policies and Regulations Implementing Goals 11 or 14.

Most of the comprehensive plan policies and regulations petitioners cite to clearly implement either Goal 11 or 14. For example, MCCP Urban Growth Management Policy 4 states in relevant part that the county will "discourage the development of new communities of housing and employment outside of urban growth boundaries and designated unincorporated communities."[24] Respondents argue, and we agree, that the county did not err in failing to address whether the subdivision is consistent with Policy 4 and similar policies implementing Goals 11 or 14, because the county adopted exceptions to those goals. When a goal exception is taken to facilitate proposed development, any comprehensive plan policies that implement the goal for which the exception is taken no longer govern that development. *See 1000 Friends of Oregon v. LCDC*, 73 Or App 350, 352, 698 P2d 1027 (1985) (when a county adopts a goal exception amending an acknowledged comprehensive

[24] Among the policies and regulations petitioners argue the county failed to address are (1) an unnumbered MCCP Rural Development policy requiring a two-acre minimum rural residential density, (2) Rural Development Plan Policy 7, which requires that rural commercial uses be located in designated unincorporated communities, and (3) Marion County Rural Zoning Ordinance (RZO)Section 128.070, which provides that the minimum lot size is two acres in the AR zone. These policies and regulations appear to directly implement Goal 14 or the administrative rules implementing Goal 14.

Similarly, petitioners challenge the adequacy of the county's findings addressing (1) Rural Residential Policy 8, which requires a minimum two-acre lot size in rural residential zones, (2) Rural Services Policy 2, which requires the county maintain the rural character of rural lands by not allowing uses that increase the potential for urban services, (3) Rural Services Policies 3 and 4, which require public and private facilities and services be consistent with and sized to maintain rural character, (4) Private Facility Policy 3, which permits private sewage and water systems on rural lands only if maximum development densities are not exceeded. These MCCP policies appear to directly implement Goals 11 or 14.

Finally, petitioners cite to RZO 113.020, which provides in relevant part that no lot or parcel shall be "reduced in size below the minimum lot width or lot areas required by this ordinance[.]" Petitioners contend that subdividing the subject property to create lots smaller than two acres is inconsistent with RZO 113.020. However, RZO 113.020 appears to be directed at property line adjustments rather than subdivision applications. To the extent it is also intended to ensure compliance with the two-acre minimum lot size required under Goal 14 and its implementing rules, we agree with the county that the exception the county adopted to Goal 14 renders RZO 113.020 inapplicable.

plan, the goals provide the standard against which the exception is measured, not comprehensive plan criteria). Therefore the county did not err in failing to apply comprehensive plan policies and land use regulations implementing Goals 11 or 14.

B. Other MCCP Policies Not Addressed

Some of the comprehensive plan policies that petitioners cite to appear to implement other statewide planning goals, or non-goal based policy considerations. For example, Transportation System Management Policy 7 requires mitigation for any land use changes that could result in increased development levels and higher traffic levels.[25] Petitioners argue that they raised the issue of compliance with Policy 7 during the proceedings below, but that the county did not address the issue in its findings, and the record does not reflect that the county complied with Policy 7 by requiring mitigation for traffic impacts of the proposed development. Petitioners make similar arguments with respect to Transportation Development and Access Policies 7 and 8.[26]

Respondents do not address these transportation policies, other than to assert that all of the comprehensive plan policies and regulations petitioners cite implement Goals 11 or 14

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[25] MCCP Transportation System Management Policy 7 provides:

> "Land use changes that could result in increased development levels and thus higher traffic levels will be assessed for their impact to current and future traffic volume and flow, and these impacts must be appropriately mitigated (as determined by the Public Works Director in accordance with applicable standards and practices) in order for the development to be allowed."

[26] MCCP Transportation and Development and Access Policies 7 and 8 state, in relevant part:

> "7. To prevent exceeding the function and capacity of any component of the transportation system, the County will consider roadway functional classification, capacity and current conditions as primary criteria for proposed changes in land use designations and proposed land use developments. In addition, present and anticipated safety issues shall also be significant criteria.
>
> "8. The County shall review land use actions, development proposals and large transportation projects in the region for impacts to the transportation system and facilities. If the impacts are deemed significant by the County and cannot be mitigated to the County's satisfaction, the action shall be denied or modified until the impacts are acceptable. * * *"

and thus are inapplicable, given that the county adopted exceptions to those goals. However, it is not at all clear that the cited transportation policies implement either Goal 11 or Goal 14. If anything, the policies appear to implement Statewide Planning Goal 12 (Transportation), to which the county did not take an exception, or do not implement any statewide planning goal. The county did not address these particular transportation policies in its findings, although it did address Goal 12 and generally rejected arguments regarding impacts on transportation facilities, based on traffic studies and mitigation proposed by the applicant. Record 18, 46. It may be that those findings are also sufficient to address the cited MCCP transportation policies, but without some assistance from respondents, we decline to take up that question in the first instance. Therefore, remand is necessary for the county to address the transportation policies and either explain why they are inapplicable or why the proposed development is consistent with them.

C. Deferral of Compliance with MCCP Fish and Wildlife Policies

MCCP Fish and Wildlife Plan Policies 4 and 5 provide that conflicts with wildlife shall be considered in land development, and imposes limits on development density in significant wildlife habitat.[27] :

The county found with respect to MCCP Fish and Wildlife Plan Policies 4 and 5:

> "Opponents assert that the project will result in adverse environmental consequences to elk herds, salmon and steelhead, and that the application violates MCCP Fish and Wildlife Habitat Policies 4 and 5. * * *

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[27] MCCP Fish and Wildlife Habitat Policies 4 and 5 provide:

> "4. Conflicts with wildlife (especially big game) shall be considered in land development. Development adjacent to streams, sensitive waterfowl areas and critical wildlife areas shall incorporate adequate setbacks and buffer zones.
>
> "5. Development density shall be controlled so that significant wildlife habitat will not be adversely affected in the County's resource zones. The standards for dwelling density in big game habitat, as identified on the habitat maps, shall be: 1 dwelling unit/80 acres in major habitat; 1 dwelling unit/40 acres in peripheral habitat. If dwellings are clustered within 200 feet of each other these densities may be doubled."

> "The Board * * * finds the Habitat Management Plan, to be approved by ODFW, appropriately and sufficiently addresses wildlife issues raised by the opponents. The Board therefore imposes as conditions of approval the requirement that the applicant continue to work with state and federal agencies to create and implement such environmental management plans. These conditions are attached." Record 47.

Condition 31 requires:

> "The habitat management plan submitted by the applicant shall be approved by ODFW and implemented by applying specific actions in order to uplift the value of the property and address the long term management and protection of mitigation sites." Record 56.

Petitioners contend that the county failed to determine whether the application complies with MCCP Fish and Wildlife Plan Policies 4 and 5, but simply required that ODFW approve the habitat management plan submitted by the applicant, and in so doing impermissibly deferred issues raised regarding the adequacy of the habitat management plan to a process that does not provide for public notice or input. Petitioners note that ODFW submitted three letters into the record citing concerns regarding impacts to wildlife and identifying deficiencies in the submitted habitat management plan. The county did not address these concerns or the opponents' concerns, petitioners argue, but impermissibly found that the habitat management plan "to be approved by ODFW" will address all issues raised regarding Policies 4 and 5, and conditioned approval on obtaining ODFW approval. Petitioners cite *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), for the proposition that the county cannot defer consideration of the adequacy of a wildlife habitat mitigation plan by simply requiring that the applicant obtain a state agency's approval of the plan.

Respondents argue that the county did not defer findings of compliance with MCCP Fish and Wildlife Plan Policies 4 and 5, but instead found that the habitat management plan complied with those policies, or that it is feasible for the plan to comply with those policies, and simply imposed a condition to obtain ODFW approval to ensure compliance. According to respondents, that approach is consistent with the approach described in *Rhyne v.*

Multnomah County, 23 Or LUBA 442, 447-48 (1992).[28] Respondents distinguish *Gould* because in that case the county code required a mitigation plan but the applicant submitted no plan, and the county simply conditioned approval on obtaining agency approval. In the present case, respondents argue, Policies 4 and 5 do not *require* a habitat management plan, but the applicant submitted one in part to demonstrate compliance with Policies 4 and 5, and the county found that that "the Habitat Management Plan, to be approved by ODFW, appropriately and sufficiently addresses wildlife issues raised by the opponents." Record 47.

However, the county did not find that the habitat management plan, as submitted, demonstrates compliance with Policies 4 and 5.[29] The county instead found that the habitat management plan "to be approved by ODFW" addresses wildlife issues raised by opponents. Petitioners are correct that ODFW and others raised numerous concerns regarding the proposed habitat management plan and compliance with Policies 4 and 5. Condition 31 requires the applicant to obtain ODFW approval of that plan, which will likely be modified

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[28] In *Rhyne*, we held:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances. *Holland v. Lane County*, 16 Or LUBA 583, 596-97 (1988)." 23 Or LUBA at 447-48 (footnotes omitted).

[29] To the extent the county can be understood to make that finding, it is inadequate and conclusory. The findings do not explain what issues were raised below regarding compliance with Policies 4 and 5 and the adequacy of the habitat management plan, or explain why the plan demonstrates compliance with the policies or addresses the issues raised by opponents.

to address ODFW's concerns, presumably under a process that may or may not be focused on Policies 4 and 5, and that may or may not include consideration of the issues raised by opponents. While it is certainly appropriate under *Rhyne* and *Gould* to find that the evidence demonstrates compliance with local approval criteria, and impose a condition of approval requiring that submitted plans *also* obtain state agency approval, as an additional means to *ensure* compliance with local approval criteria, that is not what the county did here. The county made no findings of compliance with Policies 4 and 5, or addressed the issues raised below regarding compliance with Policies 4 and 5 or the adequacy of the habitat management plan, but essentially found that the issues raised by opponents will be addressed *if* the applicant obtained ODFW approval of the habitat management plan. That is not consistent with any of the options we discussed in *Rhyne*, and is not so much a deferral of a determination of compliance with Policies 4 and 5 to a subsequent proceeding, as a complete failure to ensure that the county considers those policies at all.

The fifth assignment of error is sustained, in part.

The county's decision is remanded.