BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY EDER, MOLLIE EDER, NANCY KNOCHE,
KAREN LANG, DENNIS HILDERBRAND,
ANNETTE HILDERBRAND, VERN DEWEY,
DALE TOMPKINS, CAROLE HANCOCK,
TOM ALEXANDER and CURTISS BURRELL,
Petitioners,

vs.

CROOK COUNTY,
Respondent,

and

818 POWELL BUTTE, LLC,
Intervenor-Respondent.

LUBA No. 2009-018

FINAL OPINION
AND ORDER

Appeal from Crook County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was Western Environmental Law Center.

Heidi Bauer, Assistant County Counsel, Prineville, filed a response brief and argued on behalf of respondent. With her on the brief was David M. Gordon.

Peter Livingston, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson & Wyatt, P.C.

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

REMANDED 12/17/2009

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 a county decision that grants conditional approval for a development plan for Crossing Trails, a destination resort.

FACTS

In early 2007 an application was submitted to request approval of a destination resort in the Powell Butte area of Crook County, approximately six miles southwest of Prineville and ten miles east of Redmond. That destination resort was to be named Seven Peaks. On February 28, 2008, the applicant (intervenor-respondent 818 Powell Butte LLC) advised the county that the name of the proposed destination resort was being changed to Crossing Trails Resort. Approximately two weeks later, on March 17, 2008, the applicant advised the county that it wished to withdraw its pending application. The applicant also included the following request:

> "We ask that the county please return all documents submitted and refund the application fee. Or, if you prefer, please let us know how and when to pick up the materials." Record 1950.

Eleven days later, on March 28, 2009, a new application was filed for approval of a destination resort named Crossing Trails on the same property.

Crossing Trails would occupy approximately 580 acres of exclusive farm use zoned land, and would include 500 single-family dwellings and 250 overnight units. The "amenities at the resort will include an 18-hole championship golf course, a clubhouse and associated golf facilities * * * a trail system, swimming pool, athletic facilities and other recreational amenities." Record 1586.

The planning commission held a number of public hearings and ultimately approved the application with conditions. The planning commission decision was appealed by petitioners and the Oregon Department of Transportation (ODOT), who were allowed to split the $6,850 appeal fee. After additional hearings before the county court, the county court

approved the application with conditions. Both ODOT and petitioners appealed that decision to LUBA. ODOT later dismissed its appeal, and we now resolve petitioners' appeal.

FIRST ASSIGNMENT OF ERROR

Before turning to the first assignment of error, we first briefly describe the statutory framework for approval of destination resorts. The county is required to adopt maps and regulations to ensure that any destination resorts that the county approves comply with statutory requirements.[1] ORS 197.455 identifies a number of areas that are not eligible for destination resort siting and requires that counties adopt comprehensive plan maps that show areas that are eligible for destination resorts. ORS 197.455 is the focus of the first assignment of error. A different statute, ORS 197.445, sets out detailed approval criteria and requirements for approval of destination resorts. The county adopted its Destination Resort Overlay Zone to implement and comply with ORS 197.445. Crook County Zoning Ordinance (CCZO) 18.116. CCZO 18.116 incorporates the ORS 197.445 destination resort standards and approval criteria that must be satisfied to approve individual applications for destination resort approval. As we explain in more detail below, an application for destination resort approval cannot be granted unless the property where the destination resort would be developed is first included on the county's comprehensive plan map that has been adopted to identify the areas in the county that are eligible for destination resort approval.

Under ORS 197.455, destination resorts cannot be sited closer than three miles from a "high value crop area." As defined by statute, a high value crop area is "an area in which

---

[1] ORS 197.465 provides in part:

> "An acknowledged comprehensive plan that allows for siting of a destination resort shall include implementing measures which:
>
> "(1) Map areas where a destination resort described in ORS 197.445 (1) to (5) is permitted pursuant to ORS 197.455;
>
> "(2) Limit uses and activities to those defined by ORS 197.435 and allowed by ORS 197.445[.]"

there is a concentration of commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year." ORS 197.435(2).[2] In their first assignment of error, petitioners allege the county erred by relying on the Crook County Comprehensive Plan (CCCP) Destination Resort Map to conclude that Crossing Trails does not violate the ORS 197.455(1)(b)(B) requirement that a destination resort may not be sited "within 3 miles of a high value crop area."

As we noted briefly above, ORS 197.455 identifies a number of areas that are not eligible for destination resorts and requires that counties adopt maps as part of their comprehensive plan that show areas that are eligible for destination resorts. The relevant text of ORS 197.455 is set out below:

> "(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.
>
> "(b)(A)On a site with 50 or more contiguous acres of unique or prime farmland * * *.
>
> "(B) On a site within three miles of a high value crop area * * *.

---

[2] The complete ORS 197.435(2) definition is set out below:

> "'High value crop area' means an area in which there is a concentration of commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year. These crops and products include field crops, small fruits, berries, tree fruits, nuts or vegetables, dairying, livestock feedlots or Christmas trees as these terms are used in the 1983 County and State Agricultural Estimates prepared by the Oregon State University Extension Service. The 'high value crop area' designation is used for the purpose of minimizing conflicting uses in resort siting and does not revise the requirements of an agricultural land goal or administrative rules interpreting the goal."

"(c) On predominantly Cubic Foot Site Class 1 or 2 forestlands * * * which are not subject to an approved goal exception.

"(d) In the Columbia River Gorge National Scenic Area * * *.

"(e) In an especially sensitive big game habitat area * * *.

"(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. The map must be based on reasonably available information and may be amended pursuant to ORS 197.610 to 197.625, but not more frequently than once every 30 months. The county shall develop a process for collecting and processing concurrently all map amendments made within a 30-month planning period. *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.*" (Emphasis added.)

In 2002, the county prepared and adopted a Destination Resort Map that shows areas eligible for destination resort siting. As the CCCP explains, in preparing that Destination Resort Map in 2002, the county excluded all the areas that are *ineligible* for destination resort siting under ORS 197.455(1)(a) through (e), and in that process attempted to exclude all areas that are ineligible because they are "within 3 miles of a high value crop area." CCCP 74-80.[3] As provided by ORS 197.455(2), that map cannot be amended "more frequently than once every 30 months" and must "be the sole basis for determining whether tracts of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467."

Petitioners argue that although the property where the proposed Crossing Trails destination resort would be developed is shown as eligible for destination resort siting on the county's acknowledged Destination Resort Map, before approving a development plan for Crossing Trails the county must nevertheless find that the Crossing Trails destination resort will not be sited "within 3 miles of a high value crop area." Petitioners contend that there is

---

[3] The discussion regarding how areas "within 3 miles of a high value crop area" were excluded appears at CCCP 76-78. The complete discussion of the mapping process appears at CCCP 74-80. Some of those pages of the CCCP are attached as an appendix to intervenor-respondent's brief, but in copying those pages the odd-numbered pages were omitted. The complete text of the CCCP is available on the county's website.

evidence in the record that there is a high value crop area within three miles of the proposed Crossing Trails.[4] Petitioner's argument relies in large part on amendments to ORS 197.455(1), which were adopted in 2003. The text of that amendment is set out below with the deleted text in bracketed italics and the new text in bold letters:

> "197.455. (1) A destination resort [*shall*] **must** be sited on lands mapped as eligible for destination resort siting by the affected county. [*A map adopted by a*] **The** county [*shall*] **may** not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas:" Or Laws 2003, ch 812, § 3.

We understand petitioners to argue that in changing the text from "[a] map adopted by a county shall not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas" to "[t]he county may not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas" the legislature intended to impose an additional obligation that applies at the time individual destination resorts are proposed for land that is already shown as eligible for destination resorts on the adopted comprehensive plan map. Under petitioners' reading of ORS 197.455(1), even though the county took action to identify lands that are ineligible for destination resort siting under ORS 197.455(1)(a) through (e) when its Destination Resort Map was adopted in 2002, and that map shows the proposed site is within an area that is eligible for a destination resort if it meets the standards and criteria set out in CCZO 18.116, the county must again establish that the proposed site is still eligible under ORS 197.455(1)(a) through (e) when it approves individual requests for destination resort approval.

---

[4] There is conflicting evidence regarding whether there currently are "commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year" within three miles of the proposed destination resort. Because we agree with the county that under the relevant statutes its adopted Destination Resort Map conclusively resolves that question, we do not consider petitioners' evidentiary challenge.

If the first two sentences of ORS 197.455(1) are read in isolation, it might be possible to argue that the map that is required by the first sentence of ORS 197.455(1) is not determinative of a site's eligibility under the factors set out in ORS 197.455(1)(a) through (e), although such a reading renders the effort required to prepare the map of eligible sites of dubious value. But when those two sentences are read in context with the balance of ORS 197.455, petitioners' reading of the statute is not plausible. If the legislature had intended to require that counties apply the ORS 197.455(1)(a) through (e) exclusions and prepare the map required by ORS 197.455 and also revisit the ORS 197.455(1)(a) through (e) exclusions each time a destination resort application is filed and make findings regarding those exclusions, it would not have kept the language in ORS 197.455(2) that states "[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." If such a two-step process is required by ORS 197.455, the map adopted pursuant to ORS 197.455 would not be the "sole basis for determining whether tracts of land are eligible for destination resort siting," that map would be one of two bases for making that determination. Petitioners' interpretation is inconsistent with the text of the last sentence of ORS 197.455(2).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Introduction

Petitioners' second assignment of error is set out below:

> "The county erred in approving a development that would significantly affect existing transportation facilities without requiring adequate mitigation, in violation of Goal 12 and local code requirements."

Our resolution of the second assignment of error would have been easier if petitioners' arguments under this assignment of error were more clearly developed. Similarly, our resolution of the second assignment of error would have been easier if the county's decision had done a clearer job of explaining what the applicable transportation

planning standard is, what that standard requires of the applicant and why the county believes the proposal complies with that transportation planning standard. We have attempted to read petitioners' arguments fairly, without making arguments for petitioners. And we have attempted to read the county's decision fairly, without reading in legal theories that are not fairly stated.

Before turning to the parties' arguments, we briefly describe the heart of the parties' dispute under the second assignment of error. As we explain in more detail below, the traffic that Crossing Trails is expected to generate, unless mitigated, would cause two transportation facilities to fail that would not otherwise have failed during the relevant planning period. The traffic that Crossing Trails is expected to generate will also impact a number of other transportation facilities, but those transportation facilities are either already failing or projected to fail during the planning period, with or without the traffic that Crossing Trails is expected to generate.[5] There was no dispute below that under the 1998 version of OAR 660-012-0060, which the county incorporated into its Destination Resort Overlay Zone in 2002, the applicant is required to mitigate for the traffic impacts on the transportation facilities that Crossing Trails would cause to fail, in accordance with the incorporated rule language. With that required mitigation the additional and improved transportation facilities needed to handle the traffic from Crossing Trails will be in place when needed to avoid failure of those transportation facilities.[6] However, the applicant took the position that it was not required to provide the kind of mitigation that is required by the incorporated version of OAR 660-012-0060 for Crossing Trails' traffic impacts on the transportation facilities that are failing or

---

[5] It is not clear to us whether any of the transportation facilities in the area are *already* failing. But due to the county's approval of other destination resorts in the area that are expected to generate a significant amount of traffic, a number of transportation facilities are projected to fail within the planning period, with or without Crossing Trails.

[6] OAR 660-012-0060 is a section of the Land Conservation and Development Commission's (LCDC's) Transportation Planning Rule. We discuss that section the rule later in this decision.

projected to fail with or without the Crossing Trails traffic. With regard to transportation facilities that are failing or projected to fail with or without Crossing Trails, the applicant took the position that it would agree to contribute funding for improvements, provided that funding contribution was limited to a contribution that is roughly proportional to Crossing Trails' traffic impact on those transportation facilities that Crossing Trails will not cause to fail. However, the applicant expressly took the position that it was not legally required by the incorporated OAR 660-012-0060 rule language to provide any mitigation for transportation facilities that Crossing Trails would not cause to fail.[7] At the June 4, 2008 planning commission hearing in this matter, the applicant presented the following argument:

> "* * * You recall the last time I addressed these questions I was making the case that because of the Coos County decision we were not required to provide compensation or provide funding [for] a transportation facility that's already operating below deployment [*sic* should be "the performance"] standard for that facility. * * *
>
> "* * * * *
>
> "* * * [A]lthough we do not believe we are legally required to contribute to improvements for already failing infrastructure, we are willing to contribute proportional share contributions to take care of the additional traffic. We are contributing to those intersections and Chris can better explain exactly what that means in terms of dollars. But the point it that although there is a strong legal argument that would preclude us from having to pay for any intersection that is already failing and we're making worse, we are not going to rely on that argument. We are willing to make a proportional share contribution." Record 1250-53.[8]

The "Coos County decision" referenced in the quoted text is a Court of Appeals' decision that we discuss later in this opinion

---

[7] The applicant took that position in a June 3, 2008 memorandum from the applicant to the county's attorney. Record 1302-1311. The challenged decision expressly adopts the legal analysis in that June 3, 2008 memorandum, and we discuss the memorandum later in this opinion.

[8] Although intervenor-respondent does not call our attention to the quoted testimony by applicant, petitioners do. Petition for Review 12.

Although it is less than clear from the parties' arguments, the applicant apparently also took the position that the needed improvements for those transportation facilities that are failing or projected to fail with or without the Crossing Trails need not be in place before Crossing Trails is developed.[9]

B. Destination Resort Map and Destination Resort Overlay Zone

When the county adopted its Destination Resort Map and Destination Resort Overlay Zone in 2002, it adopted the following findings to address its obligation under OAR 660-012-0060 to ensure that those amendments would not significantly affect transportation facilities or, if they would, to provide the mitigation specified in the rule:

> "* * * [T]he amendments are consistent with OAR 660-012-0060, * * * because the implementing regulations also require analysis of transportation impacts of specific resort proposals at the time of future development review. The County Court finds that the amendments have the potential to significantly affect a number of transportation facilities under OAR 660-012-0060(2) because the amendments permit the siting of destination resorts in Crook County, and the future resorts are likely to add traffic to existing facilities. However, the Court finds that OAR 660-012-0060(1) allows the Court to adopt the subject amendments so long as it 'limits allowed land uses to be consistent with the planned function, capacity, and performance standards of affected transportation facilities.' Since compliance with particular performance standards cannot be determined until a specific resort proposal is submitted, the Court finds that the amendments properly limit uses to be consistent with any applicable performance standards by requiring resort applicants to provide a traffic study * * * at the time of development review to show that the proposed development will not reduce the level of service of any impacted transportation facility based on the performance standards set forth in the applicable transportation system plan * * *." Petition for Review, Appendix C, finding 18.

As the above findings suggest, to ensure that its 2002 plan and land use regulation amendment decisions were consistent with the OAR 660-012-0060 transportation planning requirements in effect at that time, the county did two things. First, the Destination Resort

---

[9] Apparently the timing of those facility improvements and the timing of the applicant's financial contributions to construct those facility improvements was to be worked out between the applicant and ODOT in a memorandum of understanding.

Overlay Zone that was adopted in 2002 requires that individual applications for approval of destination resorts include a traffic impact study. CCC 18.116.080(3)(g).[10] Second, the county adopted as part of the Destination Resort Overlay Zone the version of OAR 660-012-0060 that was in effect in 2002.[11] That OAR 660-012-0060 language is codified at CCZO 18.116.100(6) and is set out below:

> "(a) The traffic study required by CCC 18.116.080(3)(g) illustrates that the proposed development will not significantly affect a transportation facility. A resort development will *significantly affect a transportation facility* for purposes of this approval criterion if it would, at any point within a 20-year planning period:
>
> "* * * * *
>
> "(iii) *Reduce the performance standards of the transportation facility below the minimum acceptable level identified in the applicable transportation system plan (TSP).*
>
> "(b) If the traffic study required by CCC 18.116.080(3)(g) illustrates that the proposed development will significantly affect a transportation facility, the applicant for the destination resort shall assure that the development will be consistent with the identified function, capacity, and level of service of the facility through one or more of the following methods:
>
> "(i) Limiting the development to be consistent with the planned function, capacity and level of service of the transportation facility;

---

[10] CCZO 18.116.080(3)(g) sets out the required elements of a destination resort development plan. CCZO 18.116.080(3)(g) requires that a destination resort development plan include the following:

> "A traffic study which addresses: (1) impacts on affected county, city, and state road systems, and (2) transportation improvements necessary to mitigate any such impacts. The study shall be prepared by a licensed traffic engineer in coordination with the affected road authority (either the county department of public works or the Oregon Department of Transportation, or both[.]"

[11] We note that under the Court of Appeals' recent decision in *Willamette Oaks LLC. v. City of Eugene*, 232 Or App 29, ___ P3d ___ (2009), it may be that the approach the county took in 2002 would be viewed as an improper deferral of OAR 660-012-0060. However, the county's 2002 decision is not before us in this appeal.

"(ii) Providing transportation facilities adequate to support the proposed development consistent with Chapter 660 OAR, Division 12; or

"(iii) Altering land use densities, design requirements or using other methods to reduce demand for automobile travel and to meet travel needs through other modes.

"(c) Where the option of providing transportation facilities is chosen in accordance with subsection (6)(b)(ii) of this section, the applicant shall be required to provide the transportation facilities to the full standards of the affected authority as a condition of approval. Timing of such improvements shall be based upon the timing of the impacts created by the development, as determined by the traffic study or the recommendations of the affected road authority." (Emphases added.)

Under the 1998 version of OAR 660-012-0060, which was incorporated into CCC 18.116, the obligation to mitigate for destination resort traffic impacts in one or more of the three ways set out in CCC 18.116.100(6)(b) is only triggered if the destination resort traffic would "significantly affect a transportation facility." As relevant in this appeal, destination resort traffic will "significantly affect a transportation facility" if that traffic will "[r]educe the performance standards of the transportation facility below the minimum acceptable level identified in the applicable transportation system plan (TSP)." CCC 18.116.100(6)(a)(iii).

C. The Meaning of "Significantly Affect a Transportation Facility"

Because the mitigation obligations set out in CCC 18.116.100(6)(b) only apply for transportation facilities that Crossing Trails will significantly affect, the meaning of "significantly affect a transportation facility" is a key consideration. Although petitioners suggest otherwise, the relevant definition of those words is the definition that is provided in the 1998 version of OAR 660-012-0060, which was incorporated into CCC 18.116.100(6), not the definition of those words in the current version of OAR 660-012-0060.[12]

[12] Under the current version of OAR 660-012-0060, a comprehensive plan or land use regulation will "significantly affect" a transportation facility if it would "[w]orsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard * * *."

The applicant relied in large part below on *Dept. of Transportation v. Coos County*, 158 Or App 568, 976 P2d 68 (1999). That decision concerned an earlier version of OAR 660-012-0060(2)(d) with language that was similar to the language in the 1998 version of OAR 660-012-0060(2)(d).[13] The applicable TSP in that case was the Oregon Highway Plan (OHP), and at the time the OHP provided that the transportation facilities that would be affected by the amendments at issue in that case should operate at level of service (LOS) C. The applicant's traffic study in *Dept. of Transportation v. Coos County* showed that all of the impacted transportation facilities were operating at LOS E and thus were already failing, with or without the amendment. The amendment would have generated additional traffic for those transportation facilities and thus would have worsened the existing failure, but it would not have caused a change in the existing LOS E. The Court of Appeals held that such worsening of an already failing transportation facility does not result in a "significant affect," within the meaning of the applicable version of OAR 660-012-0060(2)(d):

> "It is unnecessary for us to resolve the full scope of the interpretive question that the parties pose in order to decide this case. The parties appear to agree that 'level of service,' although not defined in the rule, is a 'term of art,' and that it refers to six discrete incremental stages that are identified in descending order of sufficiency by letters of the alphabet. In order for there to be a 'significant effect' under OAR 660-012-0060(2)(d), whatever else an amendment may or may not have to do, it must 'reduce the level of service.' The amendment here does not do that. The level of service was at E before the enactment of the amendment, and it will remain within the E range after the amendment." 158 Or app at 572.

DLCD v. City of Warrenton, 37 Or LUBA 933 (2000) is another decision that was discussed below. That case concerned a land use regulation amendment and the 1998 version

---

[13] As we have already explained, the 1998 version of OAR 660-012-0060(2)(d) provided that a decision would "significantly affect a transportation facility" if the traffic that decision will generate would "[r]educe the performance standards of the transportation facility below the minimum acceptable level identified in the applicable transportation system plan (TSP). "

The version of OAR 660-012-0060(2)(d) at issue in *Dept. of Transportation* provided that a decision would "significantly affect a transportation facility" if the traffic that decision will generate would "[r]educe the level of service of the facility below the minimum acceptable level identified in the (TSP)."

of OAR 660-012-0060(2)(d). *See* n 13. The words "level of service" in OAR 660-012-0060(2)(d) had been changed to "performance standards" but the rule language was otherwise the same. DLCD also concerned the OHP, but the OHP had also been amended after the Court of Appeals' *Dept. of Transportation v. Coos County* decision in two important ways. As amended, the OHP no longer used LOS to establish the desired performance level of transportation facilities and instead used volume to capacity ratio (V/C ratio).[14] In addition to amending the OHP to replace LOS with V/C, the OHP was amended to include the following action item "Action 1F.6," which provides

> "For purposes of evaluating amendments to transportation system plans, acknowledged comprehensive plans and land use regulations subject to OAR 660-012-0060, in situations where the [V/C ratio] for a highway segment, intersection or interchange is above the standards [established in the OHP] and transportation improvements are not planned within the planning horizon to bring performance to standard, the performance standard is to avoid further degradation. If an amendment to [an] acknowledged comprehensive plan or land use regulation increases the [V/C ratio] further, it will significantly affect the facility." OHP 82.

Based on the changed language in OAR 660-012-0060(2)(d) and the amendments to the OHP, we concluded that the no "further degradation" standard applies and that an amendment that would result in increase in the V/C ratio for a transportation facility that is already failing "significantly affects" that facility, within the meaning of OAR 660-012-0060(2)(d). 37 Or LUBA at 945-46. In doing so, we rejected arguments that ODOT's amendments to the OHP were an improper attempt by ODOT to amend the TPR and overrule the result in *Dept. of Transportation v. Coos County*. We also rejected the argument that the

---

[14] As we explained in DLCD:

> "V/C ratios replace the LOS performance standard contained in the 1991 OHP. According to the 1999 OHP, LOS was defined by letter grades A-F, with each grade representing a range of V/C ratios. The OHP explains that V/C ratios are similar in concept, but represents LOS by specific V/C ratios to improve clarity and ease of implementation. OHP 72." 37 Or LUBA at 944 n 8.

Action 1F.6 non-degradation requirement should not be viewed as part of the "performance standards," as those words are used in OAR 660-012-0060(2)(d). *Id.* at 946.

Finally, in a 2001 decision that petitioners do not discuss at all and that intervenor-respondent relies on to question the soundness of our decision in *DLCD v. City of Warrenton*, the Court of Appeals agreed with LUBA that under the 1998 version of OAR 660-012-0060 a comprehensive plan or land use regulation amendment would "significantly affect" a transportation facility that was not already failing but was projected to fail during the planning period, if that amendment would cause the performance standard to be "violated sooner than it otherwise would be during the planning period." *Department of Transp. v. City of Klamath Falls,* 177 Or App 1, 9, 34 P3d 667 (2001).

To summarize, under the Court of Appeals' 1999 decision in *Dept. of Transportation v. Coos County* a comprehensive plan or land use regulation amendment that only worsened the performance of a transportation facility that had already failed would not "[r]educe the level of service of the facility below the minimum acceptable level" and therefore would not significantly affect a transportation facility under the TPR. Under LUBA's 2000 decision in *DLCD v. Warrenton*, a comprehensive plan or land use regulation amendment that reduces the V/C ratio of a transportation facility that is already failing would "[r]educe the performance standards of the transportation facility below the minimum acceptable level," within the meaning of OAR 660-012-0060. *See* n 13. Finally, under *Department of Transp. v. City of Klamath Falls,* a comprehensive plan or land use regulation amendment that hastens the failure of a transportation facility that is already projected to fail during the planning period "significantly affects" that facility, within the meaning of the 1998 version of OAR 660-012-0060.

D. The Debate Below Regarding Transportation Impacts

The applicant's initial July 2, 2007 Transportation Impact Study (TIS) was prepared for Seven Peaks Resort by Ferguson & Associates (Ferguson). Supplemental Record 193-

337.[15] The Ferguson TIS identified ten intersections in the vicinity of Crossing Trails that were already failing or forecast to exceed state or county performance standards in the 2028 planning period. The Ferguson TIS concluded that the proposed destination resort would be the cause of intersection failure in only one of those ten instances—Highway 26/Wiley Road. The Ferguson TIS included proposed mitigation for seven of the ten intersections that would be impacted by the proposal. Supplemental Record 239.

DKS Associates (DKS) conducted a review of the Ferguson TIS, on behalf of OTAK, the county's engineering firm. That review is dated October 26, 2007 and includes the following discussion:

> "The only substandard operating condition triggered by the proposed development is at the Highway 126/Wiley Road intersection under the 2018 scenario. Several mitigation options are discussed but no improvements are identified as an impact of the proposed development. County and ODOT staff should consider an appropriate condition of approval for this location.
>
> "The potential funding of the mitigation measures * * * should be identified. This review should include all off-site improvements that are not the sole responsibility of the development applicant. It should be clarified if the County or ODOT expects to construct the improvement within the planning horizon, or if this is an unfunded improvement that would likely only be built with proportionate share funds collected from development applicants. It is important to establish that the identified off-site mitigations can reasonably be expected to be constructed within the timeframe at which they will be needed to serve traffic from the proposed development." Record 1697.

The DKS report is not expressed in TPR terminology, but it appears to assume that if the proposed destination resort will accelerate the failure of a transportation facility that would fail with or without the proposed destination resort, it would "significantly affect" that facility within the meaning of 18.116.100(6)(a) and therefore require one or more of the mitigation measures set out in 18.116.100(6)(b) be assured so that it would be in place when needed to

---

[15] The Supplemental Record submitted by the county did not include the entire Ferguson TIS. The omitted portion of the Ferguson TIS was submitted in a document entitled Second Supplemental Record but that document continues the pagination in the Supplemental Record, pages 280-337.

handle the traffic to be generated by the proposal. That approach is consistent with the Court of Appeals' decision in *Department of Transp. v. City of Klamath Falls*.

In its application for Crossing Trails, which was received by the county on March 28, 2008, the applicant took the following position in its burden of proof:

> "Because Applicant does not propose an amendment to a functional plan, an acknowledged comprehensive plan or a land use regulation, OAR 660-012-0060 ('Plan and Land use Regulation Amendments') does not apply to the application. As the ODOT Development Review Guidelines, which are attached as Appendix D to the Ferguson study, explain at p. 3-3-2, 'The authority to require a Traffic Impact Study as part of a local land use review comes from the [CCC].'
>
> "CCC 18.116.[100](6)(a) is modeled on an earlier version of the rule. Under the reasoning in *Dept. of Transportation v. Coos County* * * * which analyzes the version of OAR 660-012-0060 from which the County standard is taken, before there can be a finding of 'significant affect,' the *resort itself* must 'reduce the performance standards of the transportation facility below the minimum acceptable level' in the TSP. If the transportation facility is already failing or would fail without the development of the resort, it cannot be said that the resort development has reduced or will reduce the performance standards below the minimum acceptable level." Record 1615 (emphasis in original).

Another report was prepared by Group Mackenzie on March 28, 2008 to address traffic issues raised by Crossing Trails. Record 1702-08. That report includes the following discussion:

> "Analysis presented in the TIA identifies a number of transportation facilities in the study area that are currently operating, or are projected to operate, below the minimum acceptable performance standards as identified in the applicable TSP regardless of the proposed development. In other words, the proposed development does not cause these facilities to exceed performance standards – the CCC criterion necessitating mitigation.
>
> "The Applicant acknowledges the proposed development impacts other study area transportation facilities, especially those under ODOT jurisdiction. However, it is important to note those transportation facilities (intersections), with the exception of the OR 126/Wiley Road intersection, are projected to exceed minimum acceptable performance standards by the end of the planning

> period, regardless of development impact.[16] Although the Applicant is not actually required by CCC Section 18.116.100(6)(a)(iii) to mitigate development impacts at these intersections, the Applicant will work with ODOT to reach an agreement concerning these intersections and proposes to enter into a memorandum of understanding (MOU) with ODOT to document the agreement." Record 1706.

The burden of proof and the Group Mackenzie report rely on the result in *Dept. of Transportation v. Coos County* and that reliance would appear to be inconsistent with the Court of Appeals' decision in *Department of Transp. v. City of Klamath Falls* and LUBA's decision in *DLCD v. City of Warrenton.*[17]

In an April 30, 2008 letter from ODOT to the county, ODOT appears to take the position that Crossing Trails will significantly affect seven intersections that are failing or would fail during the planning period, with or without Crossing Trails, and that the applicant should be required to mitigate those impacts in accordance with CCC 18.116.100(b). Record 1434-35. The letter lists the costs of that mitigation and suggests that if the required funding cannot be guaranteed from other sources to ensure the required mitigation will be in place when needed to serve Crossing Trails, the applicant should be required to provide that funding or the application should be denied. [18] Although ODOT's letter never mentions LUBA's decision in *DLCD v. Warrenton*, or the Court of Appeals' decision in *Department of Transp. v. City of Klamath Falls* it seems likely those decisions were the basis for ODOT's position that the applicant could be required to provide mitigation for intersections that were failing or would fail even if Crossing Trails is not built.

---

[16] Earlier in the report, Group Mackenzie concluded that the proposal would be the cause of failure for a second intersection, OR 126/Parrish Lane. Record 1703.

[17] As we note later in this opinion, the applicant argued that the nondegradation standard that LUBA found in OAR 660-012-0060(2)(d) and the OHP in *DLCD v. City of Warrenton* does not apply in this case for several reasons.

[18] The combined cost of that mitigation would be almost 14 million dollars.

The applicant responded in a June 3, 2009 letter that *DLCD v. Warrenton* was not controlling here and that because the seven intersections identified in ODOT's letter would fail, with or without Crossing Trails, Crossing Trails does not significantly affect those intersections within the meaning of CCC 18.116.100(a)(iii).[19] The applicant took the position that if Crossing Trails does not "significantly affect" those intersections, within the meaning of CCC 18.116.100(a)(iii), the applicant is not legally required to provide any mitigation at those intersections under CCC 18.116.100(b).

> "* * * If the performance standards of the transportation facility are already below the minimum acceptable level, expressed as a V/C ratio, then the proposed development will not reduce the standards below that level. In that case, the analysis in *Dept. of Transportation v. Coos County* * * * discussed in Crossing Trails' burden of proof statement, applies. Under that analysis, as stated in the burden of proof statement, the proposed resort can be said to 'significantly affect' only two intersections: (1) Highway 126 and SW Wiley Road; and (2) Highway 126 and SW Parrish Lane." Record 1306.

As the above makes reasonably clear, there was generally agreement below that Crossing Trails will significantly affect the intersection of Highway 126 and SW Wiley Road and the intersection of Highway 126 and SW Parish Road, within the meaning of CCC 18.116.100(a)(iii), and therefore the applicant is obligated to mitigate its impact on those intersections under CCC 18.116.100(b). But there was confusion and disagreement below regarding whether Crossing Trails would "significantly affect" the other impacted

---

[19] The basis for that position seems to be threefold. First, *DLCD v. Warrenton* concerned a decision that is subject to OAR 660-012-0060 (a land use regulation amendment), whereas the challenged decision is a conditional use permit that is not directly subject to OAR 660-012-0060. Second, the applicant cited two Court of Appeals decisions which it contended suggest that *DLCD v. Warrenton* may have been wrongly decided. Third, the applicant noted that following *DLCD v. Warrenton*, DLCD took action to amend the OAR 660-012-0060(2) definition of "significant effect" to make an amendment that worsened the performance of a already-failing facility an amendment that significantly affects that facility. The applicant took the position that that amendment would not have been necessary if *DLCD v. Warrenton* was correctly decided. Record 1302-1307.

One of the Court of Appeals decisions that the applicant contended undermined LUBA's decision in *DLCD v. Warrenton* is *Department of Transp. v. City of Klamath Falls.* However, the applicant does not discuss the part of that decision where the Court of Appeals holds that an amendment that will hasten the failure of a transportation facility that is not failing but is projected to fail during the planning period "significantly affects" that facility, within the meaning of the 1998 version of OAR 660-012-0060.

intersections that have already failed or will fail during the planning period with or without Crossing Trails and whether the applicant was legally obligated to mitigate those impacts in the ways specified in CCC 18.116.100(b).[20] To add to the confusion, the applicant appears to have been willing from the beginning to make a financial contribution to improve transportation facilities that would be affected by Crossing Trails, while maintaining the position that it was not legally obligated to make that proportional contribution or any contribution to improve those transportation facilities that Crossing Trails would not cause to fail.

E. The County's Decision

The county's decision acknowledges the disagreement between ODOT and the applicant concerning the scope of the applicant's mitigation obligation under CCC 18.116.100(b) and how much the applicant's financial contribution should be. The decision then provides the following explanation:

> "ODOT acknowledges that Applicant has agreed to construct needed mobility improvements at Highway 126/SW Wiley Road and Highway 126/SW Parish Lane, as well as make a proportional share contribution to additional intersections. ODOT requests that if the application is approved, Applicant, ODOT and the County enter into a memorandum of understanding ('MOU') that requires the agreed improvements be constructed and the agreed contributions are made.
>
> "* * * * *
>
> "In a situation where an applicant and opponents rely on experts, the County occasionally commissions an independent expert to provide reliable advice. The county's own traffic consultant, OTAK, prepared a study * * * which supports the data and conclusions of Ferguson and Group Mackenzie. OTAK calculated a similar amount ($754,950). Using OTAK's higher number, plus amounts for road improvements and a proposed bridge replacement, Applicant's total contribution will be approximately $1,455,000.

---

[20] The applicant's focus on LUBA's decision in *DLCD v. City of Warrenton* seems misplaced since at least some and perhaps most of the affected intersections are projected to fail during the planning period but are not currently failing. Crossing Trails would "significantly affect" those intersections under *Department of Transp. v. City of Klamath Falls* if it would hasten the failure of those intersections.

> "The TIA, Table E-1, shows intersections that do not meet operation standards today, in 10 years or in 20 years. Although many of the intersections are presently failing or will fail during the next 20 years, only the intersection of Highway 126 and SW Wiley Road is shown to fail as a result of the proposed resort. A subsequent study showed that eliminating left-hand turns on SW Wiley Road would redirect north- and south-bound traffic onto SW Parrish Lane, causing the intersection of Highway 126 and SW Parrish Lane to fail. Therefore, the proposed resort can be said to 'significantly affect' only two intersections: (1) Highway 126 and SW Wiley Road; and (2) Highway 126 and SW Parrish Lane.
>
> "OTAK rebuts arguments made by ODOT in its submissions and effectively agrees with the legal reasoning contained in a Memorandum dated June 3, 2008 submitted by Applicant.[21] * * * *The Court specifically incorporates by reference the legal analysis in Applicant's June 3, 2008 memorandum and December 3, 2008 memorandum and concludes that not only does the proposed development not have a 'significant affect' on transportation facilities, as the term is used (in a technical sense) in CCC 18.116.100(6)(a), but the Court cannot constitutionally require the Applicant to contribute to make major improvements to already failing transportation facilities, given the small amount of traffic Applicant will be contributing to those facilities.* * *" (Emphasis added.)[22]

The challenged decision goes on at some length discussing the constitutional implications under *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 129 L Ed 2d 304 (1994), if the county were to require that the applicant fully fund solutions for the transportation facilities that would fail even if Crossing Trails is not built. But those constitutional issues simply do not arise unless the Crossing Trails traffic will "significantly affect" transportation facilities, within the meaning of CCC 18.116.100(6)(a), so that the applicant is legally obligated by CCC 18.116.100(6)(a) to mitigate the traffic impact of Crossing Trails in one of the three ways set out in CCC 18.116.100(6)(b).

The challenged decision imposes conditions of approval to ensure that needed improvements are made to the Highway 126/Wiley Road and Highway 126/Parrish Road

---

[21] This is the memorandum submitted by the applicant and discussed above. *See* n 19 and related text.

[22] There is no December 3, 2008 memorandum. The county likely intended to refer to a November 26, 2008 memorandum that appears at Supplemental Record 13-25.

intersections. The applicant appears to have agreed to pay the full cost of these improvements, and we do not understand petitioners to challenge the adequacy of these improvements to fully mitigate for the impact of Crossing Trails on these intersections. Petitioners' arguments under the second assignment of error are directed entirely at the adequacy of intervenor's proportionate financial contribution to mitigate for Crossing Trails' traffic impact on those intersections that are currently failing or would fail even if Crossing Trails is not constructed.

F. Petitioners' Argument

Petitioners' substantive argument is set out below:

> "Three traffic studies and testimony from ODOT and others underlie the county's findings that, in fact, a number of roads and intersections near the proposed site are already at or exceeding capacity, in part due to other destination resort proposals previously approved, which would, like this one, contribute thousands of daily vehicle trips to local and state roadways. The proposed resort would push two other intersections over the 'failure' point. Thus, under either the existing Goal 12 TPR or the 'old' TPR language incorporated into the county code, the proposed development would 'significantly affect' transportation facilities in the area.
>
> "Therefore, the county is required to deny the proposal unless it can be shown that the proposed mitigation measures 'assure that the development will be consistent with the identified function, capacity, and level of service of the facility.' Relying on the second of the three allowed mitigation methods, the county conditioned approval of the proposal upon the applicant fully paying for some of the necessary improvements and partially paying for others.
>
> "Significantly, however, the county did not find that that required mitigation would be adequate to fully fund the upgrades necessary, and, in fact, ODOT testified that that amount needed to actually construct the improvements would be *more than fourteen times* the amount the conditions of approval required the applicant to pay, and that neither state nor local funding had been identified to make up the difference. As both ODOT and the petitioners pointed out during the local appeal, the mitigation measures would not 'assure that the development would be consistent with the identified function, capacity, and level of service of the facilities,' as required by the TPR and thus, the county was required to deny the proposal. Rec. 735-36, 740-41." Petition for Review 11-12 (italics and underscoring in original).

Intervenor-respondent first argues that petitioners' arguments under the second assignment of error should be summarily rejected as insufficiently developed for review.[23] Although petitioners' argument could be stated more clearly, we believe it is adequate to express petitioners' position that the condition requiring the applicant to enter a MOU with ODOT and the county to provide its proportional share financial contribution for failing intersections is not sufficient to comply with CCC 18.116.100(6)(b)(ii), which requires that the applicant provide "transportation facilities adequate to support the proposed development consistent with Chapter 660 OAR, Division 12[.]"[24]

The argument quoted above can be understood to take the position that the only way the applicant can comply with CCC 18.116.100(6)(b)(ii) is to fully fund all of the improvements that will be necessary to correct the failing intersections, and any lesser financial contribution necessarily falls short of what is required under CCC 18.116.100(6)(b)(ii). That argument would be an erroneous construction of CCC 18.116.100(6)(b)(ii), since CCC 18.116.100(6)(b)(ii) and CCC 18.116.100(6)(c) are only concerned with the timing and availability of facility improvements when they are needed. Those rules are not concerned with who pays for those facilities. But the above argument relies in part on arguments advanced by ODOT at 740-41, where ODOT explained its concern with the applicant's proposal:

---

[23] Intervenor-respondent's argument is set out below:

> "The second assignment of error should be denied for the simple reason that petitioners' assumption that the proposed mitigation measures are inadequate is incorrect. Petitioners offer no argument or evidence in support of that assumption. ODOT's letters do not support it. * * *" Intervenor-Respondent's Brief 16.

[24] CCC 18.116.100(6)(c) elaborates:

> "Where the option of providing transportation facilities is chosen in accordance with subsection (6)(b)(ii) of this section, the applicant shall be required to provide the transportation facilities to the full standards of the affected authority as a condition of approval. *Timing of such improvements shall be based upon the timing of the impacts created by the development, as determined by the traffic study or the recommendations of the affected road authority.*" (Emphasis added.)

> "The proffered proportional share contribution does not comply with [CCC 18.116.100(6)(c)] since it does not include the timing of the improvements. Some of the improvements are needed at day of opening and other are needed through the study horizon year. The assurance of the necessary improvements being in place at the time of need is required to protect the safety of the traveling public." Record 740.

We understand ODOT to have argued below that the applicant's offer to pay a proportional share of the cost of improvements needed to correct failing intersections, by itself, is not sufficient to assure that "transportation facilities adequate to support the proposed development" will be provided at the time they are needed, as required under CCC 18.116.100(6)(b)(ii) and CCC 18.116.100(6)(c). Petitioners cite to ODOT's testimony in the petition for review, in support of their argument. Again, while that argument could have been stated more clearly in the petition for review, it is stated clearly enough so that summary rejection is not appropriate. Assuming Crossing Trails will "significantly affect" the failing intersections so that the applicant was obligated to mitigate that significant affect under CCC 18.116.100(6)(b), petitioners' argument is sufficient to challenge the adequacy of the county's decision, as conditioned, to ensure that the applicant's proposed mitigation is sufficient to comply with CCC 18.116.100(6)(b)(ii) and CCC 18.116.100(6)(c).

Our discussion under the second assignment of error to this point was necessary to set the backdrop for what has been the threshold question under the second assignment of error from the very beginning. That question is: Will the traffic that will be generated by Crossing Trails "significantly affect" the intersections that are either already failing or will fail during the planning period with or without the construction of Crossing Trails? Unless that is the case, the applicant has no obligation to mitigate under CCC 18.116.100(6)(b). In that case, it does not matter whether the proportional financial contribution that the applicant has agreed to provide is sufficient to comply with CCC 18.116.100(6)(b)(ii) and 18.116.100(6)(c).

As we have explained, the challenged decision finds that Crossing Trails traffic will not "significantly affect" those intersections, within the meaning of CCC

18.116.100(6)(a)(iii). In adopting that finding, the county expressly relied on the legal analysis that was supplied by the applicant. *See* n 19. In their petition for review, petitioners neither acknowledge that finding nor offer any challenge to the legal reasoning the county adopted in support of those findings. We seriously question that legal reasoning.[25] However, based on petitioners' failure to challenge either the county's finding that Crossing Trails will not significantly affect those failing intersections and petitioners' failure to offer any response to the legal reasoning the county adopted in support of that finding, we deny the second assignment of error. To do otherwise would require that we (1) supplement petitioner's second assignment of error to read in a challenge to the county's finding that Crossing Trails will not significantly affect those failing intersections and (2) address the merits of the legal reasoning the county adopted in support of that finding with no legal argument from petitioners challenging that legal reasoning. We decline to do so.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Applicants for development plan approval for a destination resort must pay an application fee. CCC 18.116.080(2).[26] Pursuant to CCC 18.172.050(2), "[f]iling of an application is not considered complete until all applicable fee(s) are paid to the director." In this case the applicant paid the required $25,000 application fee when the application for

---

[25] That reasoning is based almost entirely on criticism of LUBA's decision in *DLCD v. Warrenton,* a case that was concerned with a transportation facility that was already failing. In this case it appears that few if any of the affected transportation facilities are already failing, although a number of those facilities are projected to fail during the planning period, with or without Crossing Trails. It would appear that *Department of Transp. v. City of Klamath Falls* is likely the controlling precedent and that under that decision Crossing Trails significantly affects those transportation facilities and is required to mitigate that effect under CCC 18.116.100(6)(b)(ii) and 18.116.100(6)(c).

[26] CCC 18.116.080(2) provides:

> "Following a preapplication conference, the applicant shall submit a development plan for review by the planning commission. Fifteen copies of the development plan shall be submitted to the planning department along with a filing fee set by the Crook County court to defray costs incidental to the review process."

Seven Peaks was submitted in early 2007. When that application was withdrawn and the application for Crossing Trails was submitted, the applicant did not submit another $25,000 application fee. Petitioners assign error to the county's failure to require the applicant to pay a second application fee.

The record includes an e-mail message from the county planning director that provides the following explanation for why the county did not require the applicant to pay a second $25,000 application fee:

> "There is no cancelled check per se for Crossing Trails. They came in and withdrew their application fee and took their booklets as Seven Peaks. No refund was given on the $25,000 application fee because of the difficulties in refunding a check. They were required to submit an additional $5,900+ for traffic impact analysis fees which were paid to OTAK, the county's consultant. No renaming check fee was required as they submitted a 'new application' with their previously paid fee kept for that application." Record 1519.

The above seems to be a complete and adequate explanation for why the county did not require the applicant to pay a second $25,000 application fee. Although petitioners contend that some work had been done by the county in processing the Seven Peaks application and that the county should be required to account for that work, they cite no CCC requirement that the county do so. If the county wishes simply to apply the initial Seven Peaks application fee to the Crossing Trails application that replaced it, we do not see why the county cannot do so.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In their fourth assignment of error, petitioners contend the $6,850 appeal fee the county charged to process their appeal was excessive. ORS 215.422(1)(c) limits the appeal fee a county may charge for land use permit appeals. The relevant text of OAR 215.422(1)(c) is set out below:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. * * *"

In a decision issued this date we remand the fee schedule that the county adopted in 2009. *1000 Friends of Oregon v. Crook County*, ___ Or LUBA ___, (LUBA No. 2009-077, December 17, 2009). However, because that decision concerns the 2009 appeal fee schedule, and petitioners' appeal fee was set by the 2008 appeal fee schedule, our decision in *1000 Friends of Oregon v. Crook County* does not directly dispose of this assignment of error.

In Crook County the appeal fee that the county charges for land use appeals is based on a formula. In this case that appeal fee is $1,850 plus 20 percent of the $25,000 application fee. The formula that was used to set petitioners' appeal fee was adopted in 2008. Although it is not entirely clear from the parties' arguments, the appeal fee schedule that was adopted in 2008 and the appeal fee schedule that was adopted in 2009 were both based on the same June 13, 2008 staff report and are the same appeal fee schedule.

Because petitioners are making an "as applied" challenge of the appeal fee, petitioners have the "burden to establish a *prima facie* case that the appeal fee violated [ORS 215.422(1)(c)]." *Young v. Crook County*, 224 Or App 1, 3, 197 P3d 48 (2008). To carry that burden, petitioners sent an e-mail message to the county requesting that the county provide written documentation of the actual or average cost of their appeal. Record 183-84. The county responded to that e-mail message with its own e-mail message, advising that petitioners must make a public records request on a form, which was attached to the e-mail message. *Id.* The county contends that petitioners never completed and submitted the form. We therefore do not consider that requested evidence further.

Under the CCC, appeals of planning commission decisions are on the record. However, under CCC 18.172.110(12)(a)(vi) the county court may allow the record to be

supplemented with additional evidence.[27] Therefore, at the time petitioners filed their appeal of the planning commission decision, they also filed a request that the county court supplement the record with the June 13, 2008 staff report. Record 150. The county denied that request, and gave the following explanation for its denial:

> "The evidence [petitioners] sought to introduce related to Crook County appeals fees. The Court elected not to take evidence outside the record because the Court determined that the [petitioners] had not established that 'the supplement is necessary to take into consideration the inconvenience of locating the evidence at the time of the initial hearing, with such inconvenience not being the result of negligence or dilatory act by the moving party' pursuant to [CCC 18.172.110(12)(a)(vi)].[28] The Court noted that the staff memorandum had been available since June 13, 2008 * * *." Record 11.

Although it is an exceedingly close question, in large part because petitioners neither acknowledge nor direct any arguments at the above-quoted findings, we conclude the county erred by not granting petitioners' request to supplement the record with the June 13, 2009 staff report. While petitioners apparently intended to challenge the appeal fee the county charges for appeals of planning commission destination resort decisions, if an appeal was necessary, petitioners could not know for sure that they would challenge the appeal fee until the planning commission rendered a decision in the applicant's favor. Under the county courts' interpretation and application of CCC 18.172.110(12)(a)(vi), all parties who believe the county's appeal fees exceed actual or average costs would have to make an evidentiary

---

[27] CCC 18.172.110(12)(a)(vi) provides as follows:

> "The appellate body may, at its option, admit additional testimony and other evidence from an interested party or party of record to supplement the record of prior proceedings. The record may be supplemented by order of the appellate body or upon written motion by a party. The written motion shall set forth with particularity the basis for such request and the nature of the evidence sought to be introduced. Prior to supplementing the record, the appellate body shall provide an opportunity for all parties to be heard on the matter. The appellate body may grant the motion upon a finding that the supplement is necessary to take into consideration the inconvenience of locating the evidence at the time of initial hearing, with such inconvenience not being the result of negligence or dilatory act by the moving party."

[28] *See* n 27.

showing that would be sufficient to establish the *prima facie* case that is required under *Young v. Crook County before* the county renders an appealable decision and *before* those parties know whether the decision will be an unfavorable decision that they wish to appeal. The county court is entitled to deference in interpreting and applying the CCC 18.172.110(12)(a)(vi) "inconvenience" standard for supplementing the record. However, we conclude that requiring such anticipatory and potentially unnecessary *prima facie* evidentiary showings at all planning commission hearings would be "inconvenient" for both the parties and the county under any reasonable understanding of the word.

We understand petitioners to have sought to supplement the record with the June 13, 2008 staff report so that they could argue that the staff report is not substantial evidence that the appeal fee established in the 2008 fee schedule for appeals of destination resorts does not exceed the average cost of such appeals. Given our decision in *1000 Friends of Oregon v. Crook County*, petitioners are likely correct in that contention unless the county can identify other evidence that supports a conclusion that its $6,850 appeal fee for appeals of destination resort decisions does not exceed the average cost of such appeals.

The fourth assignment of error is sustained.

The county's decision is remanded.