BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES M. ROOT, VALERIE ROOT
and KURT M. THOMAS,
Petitioners,

vs.

KLAMATH COUNTY,
Respondent,

and

JWTR, LLC,
Intervenor-Respondent.

LUBA No. 2010-077

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent,

and

JWTR, LLC,
Intervenor-Respondent.

LUBA No. 2010-079

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of petitioners Root *et al*. With him on the brief was Davis Wright Tremaine LLP.

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

No appearance by Klamath County.

Michael C. Robinson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Roger A. Alfred and Perkins Coie LLP.

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

HOLSTUN, Board Chair; concurring.

REMANDED 04/19/2011

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners James Root, Valerie Root and Kurt Thomas (collectively Root) and petitioner Central Oregon Landwatch (Landwatch) appeal a decision by the county amending its comprehensive plan map and zoning map to apply a Destination Resort Overlay to approximately 90,000 acres.

REPLY BRIEFS

Landwatch moves for permission to file a reply brief. There is no opposition to the reply brief, and it is allowed.

MOTIONS TO STRIKE

Intervenor, the applicant below, moves to strike Appendices 100 to 109 to Landwatch's petition for review. Appendices 100 to 109 are copies of portions of maps that appear at Record 59 and Record 106. On some of those appendices, Landwatch has added notations and markings. Landwatch responds, and we agree, that the notations and markings on copies of maps that are part of the record are merely a graphic presentation of arguments that Landwatch makes in the petition for review, and that including those notations and marking on maps from the record is not substantially different from Landwatch marking up the same maps during its oral argument presentation, which Landwatch would not be prohibited from doing. Intervenor's motion to strike is denied.

Landwatch moves to strike Appendices 2-12 from intervenor's response brief. Appendices 2-12 are copies of a 1994 ordinance, Ordinance 44.41, and supporting findings. Ordinance 44.41 was initially adopted by the county in 1994 and applied the county's Destination Resort Overlay (DRO) to approximately 900,000 acres of land within the county. Ordinance 44.41 incorporated as exhibits to the ordinance (1) findings in support of the ordinance and (2) maps referenced in those findings. Landwatch first argues that LUBA's authorization to take official notice of Ordinance 44.41 is limited to the ordinance itself and

does not include findings and maps referenced in an ordinance. We disagree. LUBA may take official notice of "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state[.]" Oregon Evidence Code 202(7). Where the noticed ordinance incorporates by reference findings and maps, as Ordinance 44.41 does, LUBA may take official notice of those findings and maps as well, if those findings and maps are provided to LUBA.

Landwatch next argues that our authority to take official notice of Ordinance 44.41 does not extend to notice of evidence, including maps, if notice of that evidence is requested to resolve factual disputes in this appeal, because LUBA's review is limited to the evidentiary record that was submitted by the county. We agree. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007); ORS 197.835(2)(a). Further, we note that although the findings incorporated by Ordinance 44.41 are included in the Appendices to the Response Brief at Appendices 2-12, none of the maps that are incorporated by Ordinance 44.41 are included in the appendices and no copies of any of the maps adopted by Ordinance 44.41 have been provided to LUBA.

Landwatch's motion to strike is denied.

INTRODUCTION

ORS 197.455(2) requires counties to adopt a comprehensive plan map to identify lands that are eligible for destination resort siting. For clarity, in this opinion we refer to that map as a map of eligible lands.[1] ORS 197.455(1) identifies several categories of land on which a destination resort may not be sited:

> "(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:

[1] In Klamath County, lands that have been determined to be eligible for destination resort siting are depicted on the Klamath County Comprehensive Plan (KCCP) map and the county's zoning map with a Destination Resort Overlay.

"(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 identified and mapped by the United States Natural Resources Conservation Service, or its predecessor agency.

"(B) On a site within three miles of a high value crop area unless the resort complies with the requirements of ORS 197.445 (6) in which case the resort may not be closer to a high value crop area than one-half mile for each 25 units of overnight lodging or fraction thereof.

"(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.

" * * * * *

"(e) In an especially sensitive big game habitat area as determined by the State Department of Fish and Wildlife in July 1984 or as designated in an acknowledged comprehensive plan."

The county first adopted a map of lands eligible for destination resort siting in 1994 when it adopted Ordinance 44.41, discussed above in our resolution of Landwatch's motion to strike. Ordinance 44.41 designated approximately 900,000 acres of land as eligible for destination resort siting and applied a Destination Resort Overlay to the zoning map of those lands.

In 2009, intervenor applied for an amendment to the comprehensive plan map and the county zoning map to add approximately 90,000 additional acres of land to the map of eligible lands.[2] In 2010, the board of commissioners (BOC) adopted Ordinance 44.87 approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR (LANDWATCH)

ORS 197.455(2) provides:

[2] Intervenor's application included a list of properties proposed to be included on the map of eligible lands that lists various properties by their location in townships, ranges, and sections, and in some cases, by parcel number. Record 172-74.

> "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 its first assignment of error, Landwatch argues that the county erred in failing to assess the eligibility of the properties proposed to be included on the map of eligible lands on the basis of "tracts," as defined in ORS 197.435(7), and that consequently its findings that ORS 197.455(1) is satisfied are inadequate.[3] Landwatch argues that ORS 197.455(2) requires as a matter of law that the county map "tracts" and requires the county to individually assess the eligibility under ORS 197.455(1) of every "tract" proposed to be added to the map. We understand Landwatch to argue that because the county did not individually identify and assess the properties described at Record 172 – 74 to determine whether the properties are "tracts" and to determine whether any of the "tracts" are lands that must be excluded under ORS 197.455(1), the county's finding are inadequate.[4] Also in its first assignment of error, Landwatch argues that the map that the county adopted is not in a large enough scale to identify the locations and boundaries of the properties that the county approved for inclusion on the map. We address each argument in turn.

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[3] ORS 197.435(7) provides:

> "'Tract' means a lot or parcel or more than one contiguous lot or parcel in a single ownership. A tract may include property that is not included in the proposed site for a destination resort if the property to be excluded is on the boundary of the tract and constitutes less than 30 percent of the total tract."

[4] There is no dispute that the challenged decision is legislative in nature. Although legislative decisions need not in all cases be supported by findings that demonstrate compliance with applicable criteria, "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002); *see also Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12, 16 (2008) (LUBA and the appellate courts must be able to perform their review function).

A. Mapping Requirements

We recently noted some of the ambiguities in the statutes governing destination resort mapping and siting, and we need not restate them here except to note that the same ambiguities make resolving the issues presented in this appeal difficult. *Central Oregon Landwatch v. Deschutes County*. __ Or LUBA __ (LUBA Nos. 2010-075 and 2010-076, March 10, 2011), slip op 7-8, *review pending* CA 148199. As a general matter, we disagree with Landwatch's premise that ORS 197.455(2) necessarily requires that in all cases when mapping eligible lands, a county must examine and map "tracts." For example, a county might have within its boundaries (1) no cities with a population over 100,000, (2) no unique or prime farmland, (3) no high value crop areas, (4) no cubic foot site class I or II forest lands, (5) no especially sensitive big game habitat, and (6) no lands within the Columbia River Gorge National Scenic Area. In that circumstance, a county would not be required to exclude any lands in the county from its map of eligible lands, and for that reason it would not be necessary to identify and map lands at the level of individual "tracts" in adopting a map of eligible lands. As long as such determinations are based on "reasonably available information" as required by ORS 197.455(2), and there is an adequate factual base under Statewide Planning Goal 2 (Land Use Planning) to support such determinations, we see nothing in ORS 197.455(2) that would preclude such a mapping process.[5]

However, as we noted in *Central Oregon Landwatch v. Deschutes County*, as a practical matter, if the county does have within its boundaries some of the lands described in ORS 197.455(1)(a) through (e) the county will be required to ensure that no tracts that include such ineligible lands are included on the map of eligible lands, since ORS 197.455(2) makes the map the "sole basis for determining whether tracts of land are eligible for destination resort siting." As we explained:

[5] Goal 2 requires in relevant part that the county "assure an adequate factual base for [all decisions and actions related to use of land]."

> "The legislature did not use the term 'tract' anywhere in ORS 197.455(1), which sets out the 'areas' and 'sites' that must be excluded Destination Resort Eligible Lands Map. But ORS 197.455(2) provides that the Destination Resort Eligible Lands Map '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.' That reference to 'tracts,' and the practical necessity to identify existing units of land to apply the ORS 197.455(1) mapping criteria to determine which tracts must be excluded from the Destination Resort Eligible Lands Map convinces us that although the legislature used the words 'areas' and 'sites' in ORS 197.455(1), the mapping process dictated by ORS 197.455(1) effectively requires that the county examine 'tracts,' as ORS 197.435(7) defines that term (i.e., lots, parcels, and contiguous lots and parcels in common ownership), and exclude any tract if more than 30 percent of the tract lies within one or more of the 'areas' listed at ORS 197.455(1)(a) through (e)." *Id*. at slip op 8.[6]

In this case it is undisputed that "especially sensitive big game habitat area as determined by the State Department of Fish and Wildlife in July 1984" is present in the county, and it appears that such habitat areas are present in close proximity to the lands proposed to be added to the map of eligible lands. Accordingly, we agree with Landwatch that a more detailed examination of the proposed areas to be included on the map of eligible lands than the county conducted is required to determine whether any "tracts" must be excluded under ORS 197.455(1)(e). We discuss the issue more under our resolution of Landwatch's third assignment of error.

B. Adequacy of Maps and Property Descriptions

In its first assignment of error, Landwatch also argues that "[t]he [c]ounty erred in failing to provide adequate information and maps on the tracts to be mapped for destination

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[6] As defined by ORS 197.435(7), *see* n 3, "[a] tract may include property that is not included in the proposed site for a destination resort if the property to be excluded is on the boundary of the tract and constitutes less than 30 percent of the total tract." There is legislative history that suggests that language was added to permit tracts that include areas where a destination resort may not be sited to be included on the map of lands that are eligible for destination resort siting. Although that result is difficult to square with the language of ORS 197.455 we do not foreclose the possibility that a tract that includes some land that is ineligible for destination resort siting could be included on the map of lands that are eligible for destination resort siting, so long as the map was limited in some way to ensure that the ineligible land is less than 30 percent of the tract and would be excluded from any destination resort that might be proposed after the map of lands eligible for destination resort siting has been adopted.

resorts." Petition for Review 7. According to Landwatch, "[t]here are no legal descriptions of the tracts" and the scale of the map identifying the properties is "too small to be understandable or useable." *Id*. Although its argument is barely developed, we understand Landwatch's argument to be that the list of properties and the map adopted by the county do not provide an adequate factual base for the decision under Goal 2 because the list of properties does not identify the properties as "tracts" as defined in ORS 197.435(7) and because it is not possible to tell by looking at the map where the boundaries of the included properties are located. Intervenor responds that the list of properties at Record 172-74 specifically identifies the locations of all of the properties being added to the DRO map by township, range, and section and when read with the accompanying maps that include the locations of the properties in color and that include township and range numbers, it is not particularly difficult to identify the location of the properties.

We agree with Landwatch that the map is inadequate to show the location of tracts that are included on the eligible lands map. First, we do not understand intervenor or the county to argue that the list of properties at Record 172-74 is part of the map. Second, the properties listed at Record 172-74 are generally either entire sections of land within townships and ranges, or numbered parcels within sections, ranges, and townships. However, the map does not include any section numbers or locations and it is not possible to tell from looking at the map where the properties listed at Record 172-74 are located within the townships and ranges that are labeled on the map.

Landwatch's first assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR (ROOT)

Root's first assignment of error includes four subassignments of error challenging the county's decision to add the proposed lands to the map of eligible lands. In their first, second, and third subassignments of error, Root argues that the county was required to re-evaluate or re-qualify lands that were previously included on the map of eligible lands by

decisions that predate the decision that is the subject of this appeal. In their fourth subassignment of error, Root argues that the county's decision is not supported by an adequate factual base under Goal 2. We address each subassignment of error below.

A. Third Subassignment of Error

In their third subassignment of error, Root argues that in adopting Ordinance 44.87 the BOC "chose to utilize [intervenor's] application as an occasion to reapprove all lands the BOC had previously identified as eligible for DR designation." Root Petition for Review 9. In support of their argument, Root cites Record 45. Record 45 is the map that is attached as Exhibit A to Ordinance 44.87. That map is entitled "Destination Resort Overlay" and shows all of the lands within the county that are designated DRO, including the newly added 90,000 acres and all lands previously included. We understand Root to argue that in attaching that map to Ordinance 44.87, the county reapproved the 1994 map of eligible lands and approved all subsequent amendments to the map of eligible lands, in addition to approving the proposed application to add 90,000 acres to the map of eligible lands.

Intervenor disagrees that the map attached as Exhibit A is anything more than the pre-existing DRO map as amended by Ordinance 44.87 to show all properties that are, after approval of Ordinance 44.87, part of the county's map of eligible lands. We agree with intervenor. We do not see anything in the text of Ordinance 44.87 that purports to readopt or reapprove the previous map of eligible lands. Ordinance 44.87 recites that the BOC "voted to approve the planning commission recommendation to amend the comprehensive plan atlas and the zoning map destination resort overlay, based on the findings of fact approved within the final order for CLUP/ZC 3-09." Record 43. CLUP/ZC 3-09 is the planning file number that was assigned to intervenor's application to add 90,000 acres to the map of eligible lands. We understand Ordinance 44.87 to approve an amendment to the map of eligible lands to add that 90,000 acres to the map of eligible lands. Despite some language that can be read to the contrary, Ordinance 44.87 was not adopted to provide independent authority for adding

property to the map of eligible lands that were already included on the map of eligible lands by virtue of prior land use decisions.

The third subassignment of error is denied.

B. First and Second Subassignments of Error

In their first and second subassignments of error, Root argues that ORS 197.455(2) and Klamath County Land Development Code (KCLDC) 31.120A require the county to reevaluate whether both previously designated and proposed lands remain eligible for inclusion on the map of eligible lands. According to Root, ORS 197.455(2)'s requirement that the map of eligible lands must be "based on reasonably available information" and its restriction of map amendments to not more than once every thirty months, and KCLDC 31.120A's requirement that all final orders adopted by the county include "[s]tatements of facts relevant to the situation and used by the Review Body in making its decision * * *," including descriptions of proposed uses and the nature of the site and surrounding areas, obligate the county to re-evaluate and re-qualify lands previously designated on the map of eligible lands.

The statutory and KCLDC provisions cited by Root are an exceedingly tenuous basis on which to argue that the county is obligated to re-evaluate or re-qualify lands that have previously been included on the map of eligible lands by virtue of a final, unappealed land use decision, and to remove any of those previously included lands from the map of eligible lands if they are required to be excluded under ORS 197.455(1)(a) – (e). We disagree that there is anything in ORS 197.455(2) or KCLDC 31.120A that obligates the county to take such an action. Absent a more focused argument from Root, the first and second subassignments of error provide no basis for reversal or remand of the decision.

The first and second subassignments of error are denied.

C. Fourth Subassignment of Error

The challenged decision, Ordinance 44.87, adopted findings in support of the ordinance, and those findings incorporated various documents as findings, including the application narrative included with the application. Record 32, 197. The application narrative includes findings that rely almost exclusively on the findings and the maps incorporated by Ordinance 44.41 in 1994 to conclude that none of the properties included on the map or eligible lands are (1) prime or unique farmland (ORS 197.455(1)(b)(A)), (2) within three miles of a high value crop area (ORS 197.455(1)(b)(B)), or (3) located within especially sensitive big game habitat (ORS 197.455(1)(e)).[7] In addition to the Ordinance 44.41 findings and maps, the county appears to have also relied on a 1999 soil survey of

[7] The application narrative includes the following in response to whether ORS 197.455(1)(a) – (e) are satisfied:

> "[ORS 197.455(1)(b)(A):]
>
> "The areas proposed as eligible for destination resort siting are not identified as unique or prime farmland areas on the reference maps accompanying the findings to Ordinance 44.41. In addition, the areas adjacent to the Lake County border are not anticipated to contain unique or prime farmland. The Soil Survey of Lake County, Oregon, Southern Part, dated 1999, indicates that prime farmland, if any, exists in a very limited part of the County only if an adequate and dependable supply of irrigation water were available. It is not anticipated that such supply is readily available in those areas.
>
> "[ORS 197.455(1)(b)(B):]
>
> "The areas proposed as eligible for destination resort siting are not identified as within three miles of a high value crop area on the reference maps accompanying the findings to Ordinance 44.41.
>
> "[ORS 197.455(1)(c):]
>
> "There are no Cubic Foot Site Class 1 or 2 forestlands within Klamath County. *See* Exhibit A1 to Ordinance 44.41 initially establishing the map of lands eligible for destination resort siting.
>
> "[ORS 197.455(1)(e):]
>
> "The areas proposed as eligible for destination resort siting are not identified as an especially sensitive big game habitat area on the reference maps accompanying the findings to Ordinance 44.41." Record 196-97.

Lake County to conclude that the lands located close to the county's border with Lake County do not include any unique or prime farmland.

In their fourth subassignment of error, Root argues that the county's decision that no properties are required to be excluded from the map of eligible lands under ORS 197.455(1)(a) through (e) is not supported by an adequate factual base under Goal 2. According to Root, Ordinance 44.41 is not a part of the record in this appeal and may not be relied on as evidence to support the county's decision. Root also argues that the findings and maps incorporated by Ordinance 44.41 are over 16 years old, and the 1999 soil survey of Lake County is ten years old, and those 1994 and 1999 maps are too dated to provide reliable evidence to establish that the lands on the map of eligible lands are not ineligible under ORS 197.455(1)(a) – (e).

As explained above, neither Ordinance 44.41 nor the findings and maps it incorporated are a part of the record of this appeal and thus may not be relied on as a factual base of support for the decision. Intervenor does not cite to anything else in the record to provide an adequate factual base to support the county's decision. Therefore, we agree with Root that there is not an adequate factual base to support the county's decision that none of the lands that have been included on the map of eligible lands should be excluded under ORS 197.455(1)(b) or (e). In addition, although we need not resolve the issue, even if the findings and maps incorporated by Ordinance 44.41 were part of the record of this appeal, we tend to agree with Root's argument that evidence that was generated 16 years prior to the decision (or 11 years earlier in the case of the 1999 soil survey of Lake County) may not provide an adequate factual base to support the decision.

The fourth subassignment of error is sustained.

Root's first assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR (LANDWATCH)

In its third assignment of error, Landwatch challenges the county's finding under ORS 197.455(1)(e) that none of the properties are located in an area of especially sensitive big game habitat. The county adopted findings that concluded in relevant part that "ORS 197.455(1)(a)-(e) are satisfied." Record 34. The county did not analyze on an individual or area wide basis any of the properties listed at Record 172-74. According to Landwatch, the county was required to exclude "tracts" that are located in sensitive big game habitat areas under ORS 197.455(1)(e).[8] As we explain in our resolution of Landwatch's first assignment of error, in the circumstances presented here where there is especially sensitive big game habitat in close proximity to the proposed lands, we agree with Landwatch that the county must examine and exclude from the map of eligible lands any "tracts" that are required to be excluded under ORS 197.455(1)(e).

Landwatch also argues that the county's conclusion that ORS 197.455(1)(e) is satisfied is not supported by an adequate factual base. Intervenor responds by pointing to Ordinance 44.41 and its findings, which, as discussed above, is the county's 1994 ordinance that adopted the county's existing map of eligible lands. According to intervenor, those findings describe and incorporate Map A7, and Map A7 identifies the location of especially sensitive big game habitat.[9] We understand intervenor to take the position that Map A7 demonstrates that none of the properties proposed to be added to the map of eligible lands are located in especially sensitive big game habitat areas. However, as explained above in our resolution of Root's first assignment of error, Ordinance 44.41 is not in the record and therefore cannot provide an adequate factual base to support the county's conclusion that

[8] Landwatch does not assign error to the county's examination of the properties for purposes of ORS 197.455(1)(a) – (d).

[9] In the Response Brief, intervenor states "[m]ap number A7 referenced above is a large-format map and is therefore an oversized exhibit that will be provided to LUBA at the time of oral argument." Response Brief 17. No oversized maps were provided to LUBA at or prior to oral argument.

none of the properties proposed to be added to the map of eligible lands are located in especially sensitive big game habitat.

Landwatch points to evidence in the record at Record 59 and 106 that demonstrates that several of the properties are located in especially sensitive big game habitat. That evidence includes the 1984 ODFW maps referenced in ORS 197.455(1)(e), at Record 106, and the map of the proposed areas to be added to the map of eligible lands, at Record 59. A visual comparison of those maps indicates that some of the lands proposed to be added could be located in sensitive big game habitat. Intervenor does not point to any other evidence in the record to support the county's conclusion.

Landwatch's third assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (LANDWATCH)/SECOND ASSIGNMENT OF ERROR (ROOT)

KCLDC 49.030(B) provides in relevant part:

> "(B) An amendment to the Comprehensive Plan or Land Development Code shall be reviewed against the following criteria:
>
> > "1. The proposed amendment is supported by specific studies or other factual information, which documents the public need for the change."

In Landwatch's second assignment of error and Root's second assignment of error, petitioners argue that the county's findings regarding KCLDC 49.030(B) are inadequate and are not supported by an adequate factual base. As noted above, the county incorporated a number of documents as findings, and intervenor cites two findings in documents that were incorporated into the county's findings that intervenor maintains support the county's conclusion that KCLDC 49.030(B) is met:

> "Destination resorts have been recognized by the state as important to providing diverse outdoor recreation facilities and to responding to the need for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. This application complies with the destination resort requirements of Statewide Planning Goal 8 and with ORS

> 197.435-467. Therefore, the Commission can find that these Plan Policies will be met.
>
> " * * * * *
>
> "The proposed change is supported by reference maps and reports prepared in developing the County's initial Destination Resort Overlay map and referred to in the findings for Ordinance 44.41, dated November 4, 1994. In addition, the proposed change is supported by the Soil Survey of Lake County, Oregon Southern Part, dated 1999, which relates to the buffer areas in Klamath County adjacent to Lake County." Record 186, 193.

We agree with petitioners that neither of the findings cited by intervenor is adequate to explain how the proposed amendment meets KCLDC 49.030(B). Neither finding refers to or relies on any "specific studies or other factual information" or otherwise explains how the record supports a determination that the proposed amendment is supported by information that documents the public need for the addition of 90,000 acres to the map of eligible lands. We also agree with petitioners that such findings are not supported by an adequate factual base. As discussed above, Ordinance 44.41 is not in the record and cannot provide an adequate factual base to support a determination of public need. However, even if the findings and maps incorporated by Ordinance 44.41 were part of the record, those findings rely on information and studies that were prepared in or prior to 1994 and that presumably do not address any of the 90,000 acres proposed to be added in 2009. We do not see how that information could satisfy the requirement that the "*the proposed amendment*" be supported by "specific studies or other factual information."

Intervenor also responds that the county's official policies set forth in the Klamath County Comprehensive Plan (KCCP) policies that implement Goal 8, Policy 11, are adequate to demonstrate how the proposed amendment meets KCLDC 49.030(B). Those policies encourage the development of destination resorts "to increase tourism," "to diversify recreational opportunities for local citizens and visitors to the County" and "to provide additional jobs and investment in the County." Those policies also require the county to map "all areas within the county that are eligible for destination resort siting." According to

intervenor, those KCCP policies support a continuing and ongoing public need for destination resorts that was originally identified in 1994 when the county first determined to map all eligible lands in the county and no additional factual information or specific studies are required.

For similar reasons, we do not think that a general policy to include all eligible lands on the county's map of eligible lands is sufficient to meet the requirement of KCLDC 49.030(B) that the county explain how the public need for the proposed amendment is supported "by specific studies or other factual information."

Landwatch's and Root's second assignments of error are sustained.

FOURTH ASSIGNMENT OF ERROR (LANDWATCH)

As a general rule, post-acknowledgment plan amendments (PAPAs) such as the proposed amendment to the KCCP map must comply with the statewide planning goals, including Goal 5. ORS 197.175(2); 197.835(6) and (7). The Land Conservation and Development Commission (LCDC) has adopted an administrative rule that specifies the circumstances in which a local government is obligated to apply Goal 5 when adopting a PAPA.[10] OAR 660-023-0250(3) provides in relevant part:

> "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:
>
> " * * * * *
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

[10] The requirement to apply Goal 5 includes the requirement set out in OAR 660-023-0040 to "develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use * * *."

To summarize, under the above rule, a local government must apply Goal 5 if the PAPA "would affect a Goal 5 resource." Under OAR 660-023-0250(3), the threshold question is whether the county was required to apply Goal 5 in adopting the proposed amendments because the challenged decision allows new uses that could conflict with an inventoried Goal 5 resource.

In its fourth assignment of error, Landwatch argues that the county's findings regarding Goal 5 are inadequate and are not supported by an adequate factual base. The county's adopted findings include the following statements from a June 3, 2010 letter from intervenor to the county:

> "[W]here there are Goal 5 resources near the proposed properties, such properties are already adjacent to the existing DRO; therefore, any conflicts with Goal 5 resources have already been identified and analyzed, and the county has determined to allow destination resorts. Because there are no Goal 5 resources on any proposed properties that would conflict with the siting of destination resorts and because proposed properties with nearby Goal 5 resources are adjacent to the existing DRO, a further ESEE analysis is not required.
>
> " * * * * *
>
> "[The county] can find that this [PAPA] does not authorize a new use. * * * [T]his amendment to the County's zoning map only adds Destination Resort Overlay mapping; no Destination Resort permit is approved. * * * Therefore, the County can find that OAR 660-023-0250(3) does not require the consideration of Goal 5." Record 80-81.

Initially, we understand the county to have generally concluded that OAR 660-023-0250(3)(b) does not apply because the proposed lands are near existing lands that are on the map of eligible lands, and thus any conflicts with Goal 5 resources were previously resolved in the county's ESEE determination in favor of allowing the conflicting uses (the destination resorts). Landwatch challenges this finding, arguing that the fact that the proposed lands might be near other lands already included in the map of eligible lands does not support a conclusion that conflicts with existing Goal 5 resources from allowing mapping those properties as eligible for siting a destination resort were previously addressed when the

county adopted its initial map of eligible lands in 1994. We agree with Landwatch. First, intervenor does not point to anything in the record that supports its contention that in a previous ESEE analysis, the county determined to allow destination resorts where that use conflicts with inventoried Goal 5 resources. Second, it is not clear from the record how any ESEE analysis that was completed when the initial map of eligible lands was adopted in 1994 could have considered the new 90,000 acres that are proposed to be added or could have considered whether inventoried resources were present on or near any of those lands and if so, what would be the impacts on those resources from new uses.

In those findings, we also understand the county to have adopted several conclusions regarding OAR 660-023-0250(3)(b), some of which appear to be alternative conclusions. First, with respect to whether the challenged decision allows new uses that could conflict with inventoried Goal 5 resources located *on the proposed lands*, we understand the county to have concluded that (1) the proposed amendments do not authorize a "new use" under OAR 660-023-0250(3) because no destination resort permit has been approved, so that the rule is inapplicable; (2) the rule is inapplicable because there are no inventoried Goal 5 resources on the proposed lands, a conclusion that is based on intervenor's wildlife expert's conclusion,[11] and (3) even if there are inventoried resources on the proposed lands, the requirement in ORS 197.467(1) to preserve designated Goal 5 resources through

[11] Intervenor's wildlife expert concluded:

> "Having reviewed the County's Goal 5 inventory and maps, it is my finding that adoption of the proposed [DRO] will not impact Big Game Habitat protected by Goal 5. The areas mapped by the overlay zone do not include any Goal 5 habitat. Also the adoption of the overlay zone merely identifies areas that are eligible for future resort development, and does not itself cause development that could result in impacts to habitat. Any potential off-site impacts to mapped Big Game Habitat from future development of a destination resort would be more appropriately considered at the specific project development level, when potential impacts could be quantified and mitigated. Attempting to analyze such impacts now, at the overlay mapping stage, would be largely based on speculation rather than actual data." Record 96.

conservation easements means that "the PAPA [does not] affect a Goal 5 resource" under OAR 660-023-0250.[12]

Landwatch challenges those findings. First, Landwatch argues that the county's conclusion that the proposed amendments do not authorize new uses because there is no accompanying permit that has approved development of a destination resort is an argument that was rejected in *Johnson v. Jefferson County*, 56 Or LUBA 72, 102 (2008), *aff'd* 221Or App 156, 189 P3d 30 (2008) (the future destination resort development that is made possible by the [PAPA] will generate a significant amount of traffic that could be a new use under the Goal 5 rule). We agree with Landwatch.

Landwatch next argues that there is not an adequate factual base to support the county's conclusion that there are no inventoried Goal 5 resources on the proposed lands. Specifically, we understand Landwatch to argue that there is an inventoried Goal 5 resource, especially sensitive big game habitat, located on or near some of the proposed lands, and that the applicant's wildlife expert's conclusion that there is no especially sensitive big game habitat on any of the proposed lands is contradicted by the maps in the record discussed in our resolution of the third assignment of error. We agree with Landwatch that at best the expert's conclusion is called into question by some of the maps and a more detailed examination and explanation for her conclusions is required to provide an adequate factual

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[12] The application narrative states:

> "The amendments are consistent with Goal 5 because Goal 8 and ORS 197.467 require the preservation of designated Goal 5 resources located on any tract used for a destination resort through conservation easements." Record 195.

ORS 197.467(1) provides:

> "If a tract to be used as a destination resort contains a resource site designated for protection in an acknowledged comprehensive plan pursuant to open spaces, scenic and historic areas and natural resource goals in an acknowledged comprehensive plan, that tract of land shall preserve that site by conservation easement sufficient to protect the resource values of the resource site as set forth in ORS 271.715 to 271.795."

base for the conclusion that "[t]he areas mapped by the overlay zone do not include any Goal 5 habitat." Record 96.

Third, Landwatch argues that the county's finding that the requirement of ORS 197.467 to preserve inventoried resources on a destination resort site through conservation easements fails to address *off-site* impacts to inventoried Goal 5 resources from the new roads needed to access a new destination resort. According to Landwatch, the new roads that will be required to access a destination resort that is developed on the newly added lands are a new use that could impact inventoried Goal 5 resources, and an ESEE analysis is required.

We understand the county to have adopted alternative findings that even if future destination resort traffic would impact inventoried Goal 5 resources not located on the proposed lands, the impacts could be mitigated through specific management practices that will avoid conflicts with the resources so that a full ESEE analysis is not required. The county adopted as findings the following:

> "Alternatively, if the County believes that OAR 660-023-0250(3)(b) is implicated * * * then it can find that the County can limit conflicts with big game habitat, * * * as described below.
>
> "Exhibit 4 is a May 25, 2010 letter from [intervenor's wildlife expert]. [The letter] contains nine (9) recommendations for addressing conflicts with sensitive big game habitat areas. [Record 96-97]. No Destination Resort Overlay mapping is proposed to be located on big game habitat but a conflict with the resource might arise * * * due to roads serving a destination resort, for example." Record 81.

Landwatch argues that "Goal 5 is not satisfied by an *ad hoc* listing of possible mitigation actions in a biologist's report * * *." Landwatch Petition for Review 21. We agree with Landwatch that the mitigation measures identified in intervenor's wildlife expert's letter do not conclusively establish that there will be no conflicts with inventoried Goal 5 resources off-site from the proposed lands, and that a more detailed analysis under OAR 660-023-0040 is required. *See* n 10.

Landwatch's fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR (LANDWATCH)

Statewide Planning Goal 12 (Transportation) and OAR 660-012-0060(1) (the Transportation Planning Rule or TPR) require in relevant part that if the county's amendment to its comprehensive plan and zoning maps to add properties to the map of eligible lands would "significantly affect" a transportation facility, "the [county] shall put in place measures as provided in [OAR 660-012-0060(2)] to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility."[13] The county must determine, prior to

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[13] OAR 660-012-0060(1) provides:

> "Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:
>
> "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
>
> "(b) Change standards implementing a functional classification system; or
>
> "(c) As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
>
> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."

OAR 660-012-0060(2) provides:

> "(2) Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:

approving the proposed amendment, whether the proposed comprehensive plan amendment would have a significant effect on transportation facilities. *Willamette Oaks v. City of Eugene*, 232 Or App 29, 36, 220 P3d 445 (2009). If the amendment would have a significant effect, the county must put into place measures described in OAR 660-012-0060(2) or (3), as applicable.

A. Significant Effects

The county adopted the following findings:

> "The Board herein adopts the findings contained in [intervenor's] June 3, 2010 letter addressing [the TPR]. The Board also specifically relies on the evidence found in the May 25, 2010 letter from Kittelson and Associates * * * addressing the [TPR] * * *. For the reasons contained in the June 3, 2010 [intervenor's] letter and as supported in [the May 25, 2010 letter from Kittelson], the Board finds that the relevant provisions of [the TPR] have been satisfied." Record 33.

> "(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.
>
> "(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.
>
> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.
>
> "(d) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.
>
> "(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided."

The June 3, 2010 letter from intervenor that the above-quoted findings adopt includes a proposed finding that there will be no significant effects from the amendments because no development is permitted by the amendments, and an alternative proposed finding that the map amendments would significantly affect the county's entire transportation system, based on the May 25, 2010 letter from intervenor's traffic consultant Kittelson. The May 25, 2010 Kittelson letter concludes:

> "With the trip generation potential of destination resorts and the overall land area that would be allowed to contain destination resorts, *an amendment to rezone 80,000 acres of rural lands to allow destination resorts outright would create a significant impact on the transportation system under [the TPR] because it would allow land uses and types of travel that are inconsistent with the functional classification of existing transportation facilities.* Because a significant effect is created, [the TPR] identifies potential strategies to mitigate a significant effect." Record 98 (emphasis added.)[14]

However, the Kittelson letter did not attempt to analyze or evaluate how destination resorts allowed under the plan amendment would significantly affect any transportation facilities in any of the ways set out in OAR 660-012-0060(1); it simply assumed that there would be a significant effect on unspecified transportation facilities if some unspecified portion of the 90,000 acres were developed with an unspecified number of destination resorts of an unspecified size at unspecified locations.

Landwatch first points out that the June 3, 2010 letter from intervenor proposed alternative findings and that it is not clear which of those alternative findings the county adopted. However, the county's findings that refer to the "evidence" in the May 25, 2010 Kittleson letter, which includes a conclusion that the amendments would significantly affect a transportation facility, can be fairly read to conclude that the amendments would significantly affect a transportation facility, presumably under OAR 660-012-0060(1)(c)(A).

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[14] It is not clear why intervenor's consultant used a figure of "80,000" acres, which is more than 10 percent less than the number that all parties agree are proposed to be added to the map of eligible lands, or what effect an undercounting of the proposed number of acres might have had on the analysis of significant effects.

See n 13. We understand the county's primary conclusion to be that the amendment would significantly affect unspecified transportation facilities, based on the above quoted Kittleson letter.

Landwatch challenges the county's determination of significant effect. According to Landwatch, if the county attempts to determine whether the amendments would significantly affect a transportation facility for purposes of OAR 660-012-0060(1), the determination must be based on some actual analysis of the impacts of uses allowed under the amendment on specific transportation facilities. Without some kind of supporting traffic impact analysis, Landwatch argues, a bare conclusion that the amendments would significantly affect the county's transportation system, combined with a requirement to (re)evaluate the TPR when actual development occurs, is no different in substance from the approach the Court rejected in *Willamette Oaks*. Such a bare conclusion is for all practical purposes the equivalent of deferring a determination of whether the proposed amendments would significantly affect a transportation facility to the destination resort development stage, which is impermissible under the TPR and the Court's holding in *Willamette Oaks*.

Intervenor maintains that the county satisfied OAR 660-012-0060(1) by concluding that the plan amendment would significantly affect the county's transportation system and adopting a condition of approval that prohibits development of a destination resort until the TPR is satisfied, when a destination resort is proposed. According to intervenor, the county's determination that the amendments would significantly affect the county's transportation system complies with the requirement of the TPR and *Willamette Oaks* that the county make such a determination when amending an acknowledged comprehensive plan or land use regulation. Intervenor argues that the May 25, 2010 Kittleson letter that found that the proposed amendments would significantly affect the county's entire transportation system supports the county's determination.

We generally agree with Landwatch that the county's approach in adopting a purely *pro forma* finding of significant affect on unspecified facilities, unsupported by any analysis at all, and then requiring that the TPR be addressed at the time of specific destination resort development, is substantially the same approach that the Court of Appeals rejected in *Willamette Oaks.* That approach is substantially equivalent to deferring the OAR 660-012-0060(1) determination to a later development stage, and is inadequate to satisfy the TPR. Among other things, the OAR 660-012-0060(1) analysis of significant affect helps determine how much and what kind of mitigation or measures must be adopted under OAR 660-012-0060(2) or (3) in order to assure that allowed uses are consistent with the capacity, etc. of particular transportation facilities. It is meaningless to determine one without the other, or at different points in time. And, as the Court instructed in *Willamette Oaks*, the time to evaluate compliance with the TPR is prior to adopting the plan amendment that allows the uses that may be inconsistent with the capacity, etc. of transportation facilities. We agree with Landwatch that the county's nominal finding that the plan amendment would significantly affect the county's transportation system is insufficient to avoid the problem the Court identified in *Willamette Oaks.*

B. Mitigation Measures

The May 25, 2010 Kittelson letter and the June 3, 2010 letter from intervenor proposed that in order to mitigate the significant effects of the map amendments, the county could, possibly under OAR 660-012-0060(2)(e), impose a condition of approval that would effectively prohibit development of a destination resort under the new zoning designation until a specific proposal to develop a destination resort is submitted, at which time the TPR would be addressed under the KCLDC criteria for destination resort development. According to intervenor, in adopting intervenor's proposed findings that suggested such a mitigation measure, the county in fact adopted such a condition of approval. However, the decision does not contain any conditions of approval. The letter adopted by the county as

incorporated findings merely *suggests* a possible condition of approval, as one of several suggested alternative courses of action. It is not clear in this circumstance that the county intended in adopting the letter to also impose that suggested condition of approval. Proposing a condition of approval in a letter that is adopted by the decision maker does not mean that the condition becomes part of the decision where the decision does not impose any specific conditions of approval. *Walker v. Josephine County*, 60 Or LUBA 186, 202-03 (2009) (a condition of approval that is merely suggested in a letter to the county does not become part of the decision.)

Moreover, even assuming that the county imposed such a condition of approval, we seriously doubt whether doing so would be consistent with *Willamette Oaks* and the requirement of the TPR to assess the effects of development on the transportation system *prior to* approving a plan amendment. As we understand the county's approval procedure for developing destination resorts, after a property is included on the map of eligible lands, no further "amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation" within the meaning of OAR 660-012-0060(1) would be required to develop a destination resort. As the Court of Appeals explained in *Willamette Oaks*:

> "The key language in the [TPR] for purposes of the issue * * * is the phrase 'the local government shall put in place measures' and the word 'would.' The words used in the text of the rule demonstrate that an evaluation of significant effect is intended to be performed *prior to* a contemplated amendment. The word 'shall' in the phrase is mandatory as to the obligation of the local government. * * * In other words, * * * the local government has no discretion to refuse to put appropriate measures in place where 'an amendment to * * * a land use regulation *would* significantly affect' a transportation facility." 232 Or App at 35-36 (emphasis in original.)

The word "shall" that is used in the TPR and discussed in the passage from *Willamette Oaks* quoted above describes actions the local government *must* take when it determines that a plan or land use regulation amendment would significantly affect a transportation facility. The determination of significant effects must occur prior to a decision on a plan amendment, and we see no reason to read the TPR as allowing the determination of how to address those

significant effects to be made subsequent to plan amendment approval. We do not think that a condition of approval that prohibits development of uses allowed by a newly approved plan and zoning map designations until an analysis under the TPR is undertaken prior to the development stage complies with the TPR's requirement that the local government "shall" put appropriate mitigation measures in place to address those significant effects. Such an approach is strikingly similar to the approach taken by some local governments prior to the Court's decision in *Willamette Oaks* and by the city in *Willamette Oaks*, which approach the Court rejected. *See e.g.*, *Citizens for Protection of Neighborhoods v. City of Salem*, 47 Or LUBA 111, 119-20 (2004) (city approved plan and zoning map amendments finding no significant effect on transportation facilities under the TPR, based on a condition that prohibited development of the property under the new plan and zoning classifications until the TPR was met during the planned development approval process).[15]

Landwatch's fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR (LANDWATCH)

KCCP Goal 8, Policy 11 includes a requirement that the county exclude from the map of eligible lands "sites in which the lands are predominantly classified as being in Fire Regime Condition Class 3, unless the county approves a wildfire protection plan that demonstrates the site can be developed without being at a high overall risk of fire." Record 95. Landwatch argues that the county erred in failing to consider at all whether any of the

[15] A potential solution to the practical problem of addressing the TPR in the context of a large scale plan or land use regulation amendment, where it is not possible to accurately predict development effects on transportation facilities, could be that the local government impose an overlay on the amended plan and zoning map designations that prohibits development of the properties. To remove the overlays would require a post-acknowledgement plan and/or land use regulation amendment (PAPA) that would trigger application of the TPR. Under this approach, the county could find, accurately, that the initial plan amendment is not a plan amendment that *allows* uses potentially inconsistent with the capacity, etc. of transportation facilities, because it effectively authorizes no new land uses, and thus the initial plan amendment does not, as a matter of law, significantly affect any transportation facility. The plan amendment that significantly affects facilities is the one that authorizes uses potentially inconsistent with the capacity, etc. of transportation facilities, which would be the subsequent plan amendment removing or modifying the overlay zone that prohibits development.

proposed 90,000 acres should be excluded from the map of eligible lands, and that there is nothing in the record regarding the issue except a letter from the US Forest Service expressing concerns about wildfire risk.

Intervenor does not provide any meaningful response to this assignment of error. We agree with Landwatch that the county erred in failing to determine whether any of the proposed lands must be excluded from the map of eligible lands under KCCP Plan Goal 8, Policy 11.

Landwatch's sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR (LANDWATCH)

As explained above, the county adopted findings in support of Ordinance 44.87, and those findings incorporated as findings several hundred pages of documents, including staff reports and letters and submittals from intervenor. Record 34. In its seventh assignment of error, Landwatch argues that the findings are inadequate where the incorporated documents in some cases contain what Landwatch characterizes as contradictory findings. Specifically, Landwatch points to (1) incorporated material addressing the Transportation Planning Rule, where the incorporated material includes a proposed finding that there will be no significant effect from the proposed map amendments, and other proposed alternative findings conclude that a significant effect will occur and propose mitigation strategies, and (2) findings regarding Statewide Planning Goal 5 (Natural Resources) where some of the incorporated documents conclude that the properties proposed to be included in the DRO do not include any Goal 5 habitat, while other documents conclude that new roads required to develop a destination resort could have off-site impacts on Goal 5 resources, and propose mitigation strategies.

Intervenor responds that the proposed findings regarding Goal 5 and Goal 12 set forth in the documents incorporated into the county's findings were presented to the county as alternative findings, either of which the county could adopt, and that the county is not

prohibited from adopting alternative findings. We agree with intervenor. While there is considerable risk in adopting hundreds of pages of diverse documents from the record as "findings" that the county will inadvertently adopt materially inconsistent findings, the only allegedly inconsistent findings cited to us appear to be accurately framed as alternative dispositions. As alternatives to each other, those dispositions are not inconsistent.

Landwatch's seventh assignment of error is denied.

The county's decision is remanded.

Holstun, Board Chair, concurring.

I generally agree with the result the majority reaches regarding the TPR, but write separately in hopes of highlighting a practical problem that is present in the TPR, as it has been interpreted by the Court of Appeals in *Willamette Oaks*. The TPR terminology and structure are complicated, but essentially under the TPR if a comprehensive plan or zoning map amendment will allow new or more intense uses to be developed in the future without additional comprehensive plan or zoning map amendments and those uses would generate traffic that would significantly affect transportation facilities (*i.e.*, cause them to fail), a local government must identify the measures it will put in place to prevent such failures. Under *Willamette Oaks*, both the significant affects determination and the identification of the measures that will be employed to avoid the significant affects must be adopted at the time the plan and zoning map are amended to make those new uses possible. Stated differently, neither the significant effects determination nor the identification of measures that will be employed to avoid significant effects can be deferred to future decision making that will post-date the plan or zoning map amendment that makes those uses possible. In the decision that was at issue in *Willamette Oaks*, the city deferred both the significant affects determination and the identification of measures that would avoid those significant affects to a future decision that would post-date the zoning map amendment that made the higher density uses possible. In the present appeal, the county appears to have adopted a *pro forma*

significant affects determination, but it clearly has not identified the measures that will be required to avoid significant affects, when and if destination resorts are developed on the lands the county's plan and zoning map amendments make eligible for destination resort development.[16]

Although there is some language in the Court of Appeals' decision in *Willamette Oaks* that intervenor and the county appear to rely on to conclude that the Court of Appeals was *only* concerned that the significant affects determination be made at the time the plan and zoning map amendment that makes the more intense development possible, and was not concerned that the measures that would be necessary to avoid those significant affects under OAR 660-012-0060(2) and (3) also be identified as part of the plan and zoning map amendment, I believe that is an incorrect reading of the Court of Appeals' *Willamette Oaks* decision. I believe it was the city's failure to identify the measures that would be needed to avoid significant effect under OAR 660-012-0060(2) or (3), if the property is developed as authorized under the new zoning, that the Court of Appeals was primarily concerned with. The significant affects determination is simply the step that activates the OAR 660-012-0060(2) and (3) planning obligation under the TPR.

The TPR requirement that planning for the potential traffic impacts occur as part of the plan and zoning map amendments that make the development that will generate those

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[16] The condition imposed by the county calls for a trip cap, which prohibits development that would produce additional vehicle trips. However, the condition goes on to say:

> "'* * * The Board [of Commissioners] may remove the trip cap after the approval of a Traffic Impact Analysis ('TIA') that analyzes the impacts of a specific destination resort proposal on affected transportation facilities. If that TIA shows a 'significant affect' as that term is used in OAR 660-12-0060(1), then the applicant for a destination resort permit shall be required to demonstrate mitigation measures pursuant to OAR 660-012-0060(2) or (3). The evaluation of the TIA, and removal of the vehicle trip cap shall be subject to a public hearing before the Planning Commission with the right of an appeal to the Board.'" Record 82-3.

The language quoted above effectively defers the second step of the TPR process—the identification of measures that will be required to avoid significant effects—from the plan and zoning map decision to future decision making that will not be adopted as a plan or zoning map amendment.

traffic impacts possible, rather than deferring that planning until the time of actual development, is manageable when the zoning map amendment only allows 23 acres to be developed at a slightly higher residential density than under prior zoning, as was the case in *Willamette Oaks*. But this planning requirement imposes a much more daunting planning obligation when 90,000 acres of land (approximately 140 square miles) are being added to the map that shows the lands that are eligible to seek approval for a destination resort in the future, and the county may know little about which of those many thousands of acres might actually be developed, how they will be developed, or when. How is the county to go about identifying significant affects and identifying measures that will avoid those significant affects in that context? Does the county assume that all 140 square miles will be developed with destination resorts? That is a highly improbable development scenario, and one that would almost certainly cause many county transportation facilities to fail. What possible purpose would be served by requiring transportation planning for a development scenario that no one actually believes is going to happen?

Does the county instead assume that only some of the land being made available for destination resort development by the map amendments will be developed and make assumptions about the nature and timing of that development? If the county takes that approach, the significant affects determination and the usefulness of the measures identified to avoid significant affects will only be as good as the county's ability to predict which of the many thousands of acres that are eligible for destination resorts will actually be developed and how and when they will be developed in the future. Unless there are actually destination resort proposals in the works, that would seem to call for a planning exercise that would be so speculative that it also would be of questionable value.

A possible third option is the one the county chose. Under that option the county would recognize the obvious. Development of all 140 square miles of land that the plan and zoning map makes eligible for destination resorts would overwhelm the county's

transportation system and almost certainly have significant affects. But development of all 140 square miles is improbable and would take many years even if such an improbable development scenario came to pass. Under the third option the county would prohibit development that could create additional traffic until the time destination resorts are actually proposed, and at the time a destination resort is proposed the county would require that (1) the transportation facilities that the proposed destination resort would significantly affect be identified and (2) the measures that would be necessary to avoid those transportation facility failures be identified. However, as has already been explained, under the TPR as interpreted by the Court of Appeals in *Willamette Oaks*, the third option is an improper deferral of TPR planning, and this option simply is not available to the county.[17]

The majority suggests a possible way to solve the problem the county faces that arguably would be consistent with *Willamette Oaks*. *See* n 15. Under that approach, the county might amend its comprehensive plan and zoning ordinance to make the plan and zoning map amendment to add the 90,000 acres the penultimate plan and zoning map amendment that is required to develop individual destination resorts. If that could be done, for example by requiring that the map of eligible lands be amended a second (and final) time when individual destination resorts are proposed, the plan and zoning map amendment that adds the 90,000 acres to the map would not be the zoning map and plan amendment that made the use possible, and therefore arguably would not be the plan and zoning map amendment that significantly affects transportation facilities. I believe such an approach

[17] A similar approach was taken by the city in its decision in response to the Court of Appeals' decision in *Willamette Oaks*. That city remand decision was also appealed to LUBA, and LUBA's decision is now on appeal to the Court of Appeals. *Willamette Oaks v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2010-060/061/062, March 8, 2011), *review pending* CA 148149. While there were differences in the condition and trip cap imposed by the city on remand in *Willamette Oaks* and the condition and trip cap imposed by the county in the present appeal, in both cases the condition permitted the trip cap to be removed via a transportation impact analysis and decision making process that post-dated the comprehensive plan and zoning map amendments that made the more intense development possible. *See* n 16, *supra*; *Willamette Oaks* (LUBA No. 2010-060/061/062) slip op 8-9 n 4. We did not confront this issue in *Willamette Oaks*, because petitioner failed to adequately present the issue. Slip op at 22-24 .

would probably pass muster under *Willamette Oaks*. However, I note that ORS 197.455(2) may present a practical problem with using a two-amendment approach for destination resort planning, since under that statute county maps showing lands that are eligible for destination resort siting may not be amended more frequently that once every 30 months.

Another potential solution would be for LCDC to amend the TPR to identify circumstances where LCDC believes it is permissible to allow local governments to defer the planning required by OAR 660-012-0060 to permitting decisions that post-date the comprehensive plan or zoning map amendments that make new or more intense development a possibility. The statutory requirement that county's first map all the lands in the county that are eligible for destination resorts, and amend those maps no more often than once every 30 months, would seem to be a prime candidate for special treatment under the TPR. However, unless and until LCDC does so, the planning required by OAR 660-012-0060 must be done at the time the local government adopts the map of eligible lands that makes development of individual destination resorts possible, and that planning may not be deferred to the future when development permits are sought for individual destination resorts. And local governments will simply have to develop ways to work around the practical difficulties that may be presented under the TPR when a plan or land use regulation is amended to make a significant amount of new traffic generating development theoretically possible.