BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON COAST ALLIANCE,
Petitioner,

vs.

CURRY COUNTY,
Respondent,

and

CROOK FAMILY LLC, JAMES CROOK,
MELODY CROOK and LEROY BLODGETT,
Intervenors-Respondents.

LUBA No. 2011-005

OREGON SHORES CONSERVATION COALITION,
Petitioner,

vs.

CURRY COUNTY,
Respondent,

and

CROOK FAMILY LLC, JAMES CROOK,
MELODY CROOK and LEROY BLODGETT,
Intervenors-Respondents.

LUBA No. 2011-006

FINAL OPINION
AND ORDER

Appeal from Curry County.

Kenneth D. Helm, Beaverton, filed a petition for review and argued on behalf of petitioner Oregon Coast Alliance.

Courtney Johnson, Portland, filed a petition for review and argued on behalf of petitioner Oregon Shores Conservation Coalition. With her on the brief was the CRAG Law

Center.

M. Gerard Herbage, Curry County Counsel, Gold Beach, filed a response brief and argued on behalf of respondent.

Steven L. Pfeiffer, Portland, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief were Corinne S. Celko and Perkins Coie LLP.

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

REMANDED 05/19/2011

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a destination resort tentative master plan and tentative subdivision plat.

FACTS

The proposed destination resort is located on a 378-acre tract zoned Forestry-Grazing. The tract is bounded on the west by the Pacific Ocean, on the north by the Crook Point unit of the Oregon Islands National Wildlife Refuge (NWR) and Pistol River State Park, and on the south by Boardman State Park. Most of the tract is bordered on the east by Highway 101, although a portion of the tract is located east of the highway. Significant portions of the subject property have slopes greater than 25 percent, and are thus subject to a county Natural Hazard Overlay Zone. The property is developed with farm outbuildings and several single-family dwellings used as vacation rentals, and is located between the cities of Gold Beach and Brookings.

On June 2, 2010, the county adopted a map of lands eligible for destination resort development, including the subject property, and also adopted regulations at Curry County Zoning Ordinance (CCZO) 4.080 to 4.088 governing approval of a destination resort. On June 9, 2010, intervenors-respondents (intervenors) applied to the county for destination resort tentative master plan approval, and tentative subdivision plat approval. The application proposed an 18-hole golf course, a nine-hole golf course, golf shop, golf lodge, spa lodge, and interpretative center, an equestrian center, 175 overnight lodging units, resort owner and employee housing, and a land division into 11 lots (10 residential and one large remainder lot).

The county planning commission conducted hearings on the application and voted to approve it. Petitioners appealed the planning commission approval to the board of commissioners, who conducted additional hearings. On December 28, 2010, the board of

commissioners adopted a written decision denying the appeal and approving the tentative master plan, with conditions. These appeals followed.

FIRST ASSIGNMENT OF ERROR (Oregon Shores); THIRD ASSIGNMENT OF ERROR (Oregon Coast Alliance)

The application proposes significant development on portions of the property with slopes steeper than 25 percent, which are therefore subject to the county's Natural Hazard Overlay Zone. CCZO 4.083 sets out the application requirements for a destination resort tentative master plan application, and requires that the application "shall contain sufficient information to address all the decision criteria" including a "Geologic hazard assessment prepared by an Oregon Certified Engineering Geologist in accordance with CCZO Section 3.250 if the proposed destination resort is within the Natural Hazard Overlay Zone." CCZO 4.083(20). CCZO 3.250 sets out detailed requirements for a geologic hazard assessment.

CCZO 4.085(3)(g) is one of the standards and criteria for approval of a destination resort tentative master plan, and requires that development on any portion of a tract with slopes exceeding 25 percent or subject to other natural hazards shall not be altered or developed except, as relevant here, "[d]evelopment approved under the provisions of CCZO Section 3.250-Natural Hazard Overlay Zone (NH)."

Despite CCZO 4.083(20), the application did not include a geologic hazard assessment in accordance with CCZO 3.250, necessary to demonstrate compliance with CCZO 4.085(3)(g). Instead, intervenors submitted a "Geologic Hazard Overview" from a certified engineering geologist that provides a general evaluation of geologic hazards on the property, but does not include the more detailed, site-specific analyses required under CCZO 3.250. The board of commissioners did not find that the tentative master plan application complied with CCZO 4.085(3)(g) and CCZO 3.250, but deferred the issue of compliance with those criteria to a later proceeding, pursuant to Condition 23. Record 26. Condition 23 states:

> "Prior to any structural development, a site specific geologic hazard assessment by an Oregon Certified Engineering Geologist shall be required. The Applicant shall follow development recommendations by an Oregon Certified Engineering Geologist." Record 43.

Petitioners argue that the county erred in deferring consideration of compliance with CCZO 4.085(3)(g) and CCZO 3.250 to a second review process, without requiring that that second review provide for notice and opportunity for a public hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (a local government may defer a determination of compliance with approval criteria to a later review process that provides notice and opportunity to request a hearing); *see also Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007) (a local government can postpone a determination of compliance with an applicable approval standard to a later review process that is infused with the same participatory rights as those allowed in the initial proceeding).

The county and intervenors (together, respondents) argue that Condition 23 effectively requires that a site specific geological hazard assessment complying with CCZO 3.250 will be provided to the planning commission prior to final master plan approval, under CCZO 4.087(2), and the planning commission proceedings on the request for final master plan approval will necessarily be a public hearing, with notice provided to persons entitled to notice. According to respondents, CCZO 2.020, part of the code setting out the county's general procedures for making land use decisions, ensures that the planning commission proceeding on the application for final master plan approval will be a quasi-judicial hearing, and the county would be required to provide prior notice of the hearing to persons entitled to notice.

We agree with petitioners that when a local government defers a finding of compliance with a discretionary approval criterion to a second review proceeding, it must ensure, either in a condition of approval or by necessary operation of its code, that the second review proceeding is infused with the same participatory rights as those allowed in the initial proceeding. In the present case, neither the county's conditions of approval nor its code

provide that assurance. Condition 23, quoted above, says nothing about the review proceeding at which the county will address compliance with CCZO 4.085(3)(g) and CCZO 3.250. It states only that a site specific geologic hazard assessment shall be required "[p]rior to any structural development." As worded, that could mean prior to final building permit approval, which almost certainly would postdate final master plan approval and would not include notice and hearing.

Even if Condition 23 were generously interpreted to require the county to address compliance with CCZO 4.085(3)(g) and CCZO 3.250 at the time of final master plan approval, as respondents suggest, it is not clear under the county's code that the planning commission review of the application for final master plan approval will require prior notice and a hearing. CCZO 2.020 states in relevant part that "[q]uasi-judicial hearings shall be held on all applications for a permit or approval required by these regulations." We understand respondents to argue that the application for final master plan approval would be an application for a "permit or approval." Further, we understand respondents to argue that the reference to "quasi-judicial hearing" is a reference to hearings required for making quasi-judicial land use decisions under ORS 197.763. If so, respondents argue, such a hearing would necessarily require notice of the hearing to persons entitled to notice and the same procedural rights that the county extended in making its initial decision on the tentative master plan, as required by *Rhyne* and *Gould*. While those are certainly reasonable inferences that can be drawn from CCZO 2.020, the problem is that that chain of inference is undercut by CCZO 4.087(2), which sets out the specific standards and review procedure that govern applications for final destination resort master plans.

CCZO 4.087(2) provides that:

> "The final master plan will be reviewed by the Planning Commission for conformance with the approved tentative plan and compliance with all conditions of approval. The final master plan will be approved if it substantially conforms to the tentative master plan approval. Notice of a

> decision to approve a final master plan shall be provided to all parties of record of the tentative master plan application."

Significantly, CCZO 4.087(2) does not mention anything about a hearing and the only notice required is notice of the *decision*. If the planning commission's review of an application for final destination resort master plan approval is intended to include an ORS 197.763 quasi-judicial hearing, with prior notice of the hearing, it is not clear why CCZO 4.087(2) specifies notice of the decision. Because the only standards for approval of a final master plan are conformance with the approved tentative plan and compliance with all conditions of approval, it appears that the planning commission review of the final master plan is far less discretionary than the initial tentative master plan approval. The county might, in processing intervenors' future application for final master plan approval, recognize that the planning commission review should be a ORS 197.763 quasi-judicial public hearing requiring notice of the hearing, but there is nothing in CCZO 4.087(2) that expressly requires such notice and hearing. County staff might easily conclude based on the language of CCZO 4.087(2) that all that is required is a ministerial planning commission decision on the application, followed by notice of that decision. Nothing in the text of Condition 23 advises county staff that the board of commissioners completely deferred its findings of compliance with discretionary tentative master plan approval criteria, and expects the planning commission to address *ab initio* those discretionary tentative master plan approval criteria at the time of final master plan approval, pursuant to a ORS 197.763 hearing that includes prior notice of the hearing.

In sum, we agree with petitioners that the county has erred in deferring a determination of compliance of CCZO 4.085(3)(g) and CCZO 3.250 without adequately ensuring that the deferred determination will occur pursuant to proceedings that offer notice of the hearing and a quasi-judicial hearing, the same participatory rights provided for tentative master plan approval. Remand is necessary for the county to take corrective action, for example, by amending Condition 23 to specify that compliance with CCZO 4.085(3)(g)

and CCZO 3.250 will be addressed at the time of final master plan approval, pursuant to a quasi-judicial hearing with prior notice of hearing to persons entitled to notice.

The first assignment of error (Oregon Shores) and the third assignment of error (Oregon Coast Alliance) are sustained.[1]

SECOND ASSIGNMENT OF ERROR (Oregon Shores)

Petitioners argue that the county failed to properly delineate the coastal shorelands boundary on the property. A proper delineation is important because the area westward of the coastal shorelands boundary is subject to different and more rigorous development standards.

Statewide Planning Goal 17 (Coastal Shorelands) requires that the extent of coastal shorelands shall include, in relevant part, (1) areas subject to ocean flooding and lands within 100 feet of the ocean shore, and (2) adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body. The county's comprehensive plan includes a similar requirement, identifying the extent of coastal shorelands to include (1) lands which are directly affected by the hydraulic actions of a coastal water body, and (2) adjacent areas of geologic instability.

The county comprehensive plan includes a small-scale, low-detail map that shows the shoreland boundary in the area of the subject property, known as Segment 16, as a dotted line between Highway 101 and the shoreline. For most of Segment 16, the dotted line is immediately adjacent to Highway 101, but in the northern portion of the subject property Highway 101 veers inland, while the dotted line continues to parallel the shoreline. However, the scale of the map is such that it is impossible to determine the exact location of

[1] Oregon Coast Alliance's third assignment of error also includes arguments directed at delineation of the coastal shorelands boundary, an issue which we address *infra* in conjunction with Oregon Shores' second assignment of error.

the boundary. Hash marks along the shoreline are identified as "Seacliff & Rocky Shore (Pot. Erosion)."

The comprehensive plan text description of Segment 16 states, in part:

> "The shoreland boundary in this segment is defined as the easterly boundary of Pistol River State Park from the mouth of the Pistol River to the south boundary of the state park at the ocean shore to include the Crook Point coastal headland and *the top of the cliff along the seacliff shoreline from the south boundary of Pistol River State Park at the shoreline to Boardman State Park.* The coastal shoreland boundary is defined as US 101 within Boardman State Park due to the exceptional scenic quality of the shoreline west of US 101 in this area." (Emphasis added.)

The comprehensive plan Goal 17 element explains that:

> "The coastal shoreland boundary defined by the Curry County Comprehensive Plan generally parallels the Oregon Coast Highway in the southern two-thirds of the county * * *. Where the coastal shorelands boundary is defined as the top of the seacliff, however, it will be modified on a case by case basis to be a specific line as defined by analysis of the cliff erosion geological hazard as required under the 'Development in Areas of Geologic Hazard'" (Section 3.252) of the [CCZO]." Curry County Comprehensive Plan 15.3.

Thus, because the coastal shorelands boundary in Segment 16 is defined as the "top of the cliff along the seacliff shoreline," the specific location of the boundary is determined on a case-by-case basis, pursuant to an analysis of cliff erosion geological hazard conducted under CCZO 3.252.

The applicant's engineer submitted two potential boundary delineations: (1) a "red line" that closely parallels the shoreline and that includes only cliff areas directly affected by the ocean and undermined by wave erosion; and (2) a "yellow line" that includes a more extensive inland cliff area incorporating large historic landslides with steep slopes and distinct headscarps. Record 1260-61.[2] The applicant argued that the county should adopt the "red line" as the boundary, based on dictionary definitions of "seacliff." Record 1257. A

[2] The engineer concluded that the large landslides "were originally caused by ocean wave undercutting hundreds of years ago but for the last century or more the vast majority of their movement has been caused by saturation or, perhaps, seismic ground shaking." Record 1261.

representative from the Department of Land Conservation and Development (DLCD) submitted objections, arguing that the "red line" is based solely on areas directly affected by ocean waves and does not consider "adjacent areas of geological instability." Further, DLCD argued that neither the red nor yellow line is based on an analysis of cliff erosion geological hazard under CCZO 3.252. DLCD submitted a map showing a third potential boundary line, delineated based on identification of a significant break in slope, with all slopes steeper than 60 percent seaward of the line. Record 717. The boundary advocated by DLCD generally lies eastward of the yellow line delineated by the applicant's engineer, and in a couple of places reaches all the way to Highway 101. The applicant then submitted a letter from a second engineer, opining that the "red line" is consistent with a definition of "seacliff" in a standard geology treatise, as a "nick or scarp resulting from wave erosion." Record 96.

The county adopted the "red line" as the coastal shorelands boundary. Because none of the proposed development is seaward of the red line, the county found, comprehensive plan policies and other regulations implementing Goal 17 do not apply. Record 28-29. The county imposed Condition 25, requiring that prior to final master plan approval the applicant must submit a survey of the red line, described as the "[i]nland extent of lands affected by direct hydraulic action of coastal water," and the surveyed line shall be considered the approved shoreland boundary. Record 43.

Petitioners argue that the county misconstrued the applicable law in determining the shoreland boundary based solely on those lands directly affected by hydraulic actions of coastal waters. According to petitioners, the county erred in failing to determine the boundary based also on "adjacent areas of geological instability," pursuant to a geological hazard analysis under CCZO 3.252. Intervenors respond that the only relevant question is the location of the "top of the cliff along the seacliff shoreline," and based on the expert

testimony in the record the county reasonably determined that the "seacliff" includes only those cliff areas directly affected by wave action.

We agree with petitioners that the county erred in determining the shoreland boundary based solely on consideration of lands directly affected by hydraulic actions of coastal waters. The logical starting point for identifying the coastal shorelands, it seems to us, is the county's comprehensive plan coastal shorelands map, which the county did not consider. While that map is small scale, it does generally depict the shoreland boundary along most of the subject property as immediately adjacent and parallel to Highway 101, with discernible land areas westward of the dotted line in many places. As noted, the subject property is within Segment 16, which more specifically identifies the shoreland boundary as the "top of the cliff along the seacliff shoreline." In that circumstance, the comprehensive plan Goal 17 element specifically provides that the shoreland boundary depicted on the map will be "modified on a case by case basis to be a specific line as defined by analysis of the cliff erosion geological hazard as required" under CCZO 3.252. That is consistent with the relevant Goal 17 and comprehensive plan definitions, which identify coastal shorelands to include not only lands directly affected by hydraulic actions of coastal water but also "adjacent areas of geological instability." As the county has implemented Goal 17, the "top of the cliff along the seacliff shoreline" includes not only those lower portions of a cliff subject to direct wave action, but also those adjacent portions that are geologically unstable, based on a hazard analysis conducted pursuant to CCZO 3.252. However, the applicant conducted no geological hazard analysis under CCZO 3.252, and the county erred in adopting a shorelands boundary delineation that is not based on a geological hazard analysis, as the comprehensive plan requires.

The second assignment of error (Oregon Shores) is sustained.

THIRD ASSIGNMENT OF ERROR (Oregon Shores); FIFTH ASSIGNMENT OF ERROR (Oregon Coast Alliance)

Petitioners argue that the county's finding of compliance with CCZO 4.085(3)(b) is inadequate and the county failed to correctly avoid or minimize adverse impacts on the adjacent state parks and national wildlife refuge. CCZO 4.085(3)(b) requires in relevant part that:

> "Improvements and activities shall be located and designed to avoid or minimize adverse effects of the resort on uses on surrounding lands, particularly effects on farming or forestry operations in the area and on state parks and national wildlife refuges. * * * The applicant shall propose buffers and setbacks as part of the tentative resort plan and the Planning Commission shall determine whether the proposed measures are adequate to avoid or minimize impacts to surrounding lands. *Adverse effects on surrounding lands are to be avoided first and minimized if avoidance is not possible*. The Planning Commission may set forth additional conditions to avoid or minimize impacts on surrounding lands." (Emphasis added).

Citing to the above-emphasized language, petitioners argue that CCZO 4.085(3)(b) requires the county to first evaluate whether it is possible to avoid adverse impacts on surrounding lands, and evaluate proposed minimization of impacts only "if avoidance is not possible." According to petitioners, the county did not follow that approach, and did not consider whether adverse effects on the surrounding state parks and wildlife refuge can be "avoided first"; instead the county evaluated and approved only the applicant's proposals to "minimize" adverse effects, relying in large part on a written agreement between the applicant and the adjacent wildlife refuge. In addition, petitioner Oregon Coast Alliance argues that the county failed to address the issue raised below regarding avoiding or minimizing raccoon predation on seabird colonies.

Respondents argue that while CCZO 4.085(3)(b) may express a preference for avoidance over minimization, the first sentence of CCZO 4.085(3)(b) is stated in the disjunctive: development must be located and designed to "avoid *or* minimize" adverse effects, and therefore the applicant and county can choose to either avoid or minimize.

(Emphasis added.) Respondents dispute that the county is first obligated to determine whether it is possible to avoid adverse effects before addressing proposals to minimize adverse effects. Further, respondents argue that the agreement with the wildlife refuge cited in the county's findings includes specific measures to avoid or minimize adverse impacts, such as trash management measures intended to avoid or minimize attracting raccoons to the area.

We agree with petitioners that the above-emphasized language in CCZO 4.085(3)(b) clearly gives priority to avoiding adverse effects over minimizing adverse effects, and allows minimization only if "avoidance is not possible." That is more than a mere preference for avoidance. It is difficult to give effect to that language under the approach advocated in the response brief, which would apparently allow the applicant to propose and the county to consider only measures to minimize adverse effects on surrounding lands, without any consideration of whether it is possible to avoid adverse effects.

The county's finding of compliance with CCZO 4.085(3)(b) gives no indication that the county considered at all whether it is possible to avoid adverse effects on surrounding lands.[3] The finding mentions only efforts to "minimize adverse effects." The finding relies heavily on the written agreement with the wildlife refuge, conditions of approval negotiated with an advocacy group, and an e-mail message from a state park representative. Petitioners

---

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

> "The Board finds that the applicant's property is located adjacent to state parks to the north and south, and Crook Point Unit of Oregon Islands National Wildlife Refuge. The Board also finds that the applicant has entered into an agreement with the Oregon Islands National Wildlife Refuge * * * which [agreement] was designed to further protect the refuge area and covered topics as buffer zones, conducting a geologic analysis of Hole #3, provisions for natural forested area throughout the project, wildlife, trespassing, dark sky, invasive plant species, trash management, landscaping, and fences. In addition, the Board finds that the applicant worked together with the Kalmiopsis Audubon Society to proposed conditions of approval that would help minimize adverse effects of the resort on surrounding lands. In addition, the Board finds that the email from Cliff Houck at the Oregon Department of Parks and Recreation, dated August 26, 2010, demonstrates that the applicant has adequately addressed impacts to adjacent state parks. In order to ensure compliance with this criterion, the Board imposes Conditions Nos. 10 through 18, 31 and 32." Record 24.

argue that the written agreement, conditions and other evidence relied upon all focus, like the finding, only on minimizing adverse effects, and do not consider whether avoiding adverse effects is possible. In any case, petitioners argue, the agreement and the conditions of approval cannot substitute for findings that consider whether avoidance of adverse effects is possible.

We agree with petitioners that remand is necessary for the county to adopt more adequate findings regarding CCZO 4.085(3)(b) that either consider whether adverse effects on surrounding lands have been avoided to the extent possible, or adopt a sustainable interpretation explaining why it is not necessary to consider whether it is possible to avoid any expected adverse effects.

The third assignment of error (Oregon Shores) and the fifth assignment of error (Oregon Coast Alliance) are sustained.

FIRST ASSIGNMENT OF ERROR (Oregon Coast Alliance)

CCZO 4.083(5), part of the destination resort tentative master plan application requirements, requires that the application include:

> "A statement of the proposed method of providing water, sanitation, and utilities. A water supply study prepared by a professional hydrologist, an Oregon Registered Engineering Geologist or similar professional shall be submitted describing the following:
>
> "a. An estimate of water demands for the resort at maximum build out, including a breakdown of estimated demand for commercial uses, residential uses, visitor oriented accommodations, recreational uses, and any irrigated common areas;
>
> "b. The availability of water to meet the estimated demand, including the proposed water source, evidence of the quantity and quality of water from that source, identification of the area that may be impacted if water to serve the resort is taken from that source, and information on whether water rights are needed or have been obtained[.]"

To comply with this requirement, the applicant submitted a peer-reviewed water supply study, with a later supplement. Based on the water study, the applicant proposed to

create a private domestic community water system, supplied by three existing wells on the subject property. To meet irrigation and fire suppression demands, the applicant proposed diverting water from two creeks that flow through the property to a reservoir. The county approved the proposed water systems, and imposed several conditions to ensure that the water supply is adequate for the estimated need.

Petitioner argues that the water study is insufficient in several particulars, and does not provide substantial evidence to determine either the water demand for purposes of CCZO 4.083(5)(a) or the availability of the water supply for purposes of CCZO 4.083(5)(b).

A. CCZO 4.083(5)(a): Water Demand

Petitioners contend first that there is not substantial evidence supporting the water consultant's estimates of water supply needed for irrigation and fire suppression. The water consultant estimated irrigation and fire suppression demand based on information obtained from three coastal golf resorts. Record 329, 1666. Petitioners cite no countervailing evidence. Intervenors respond, and we agree, that petitioners have not demonstrated that a reasonable decision maker could not rely on the information at Record 329 and 1666.

Next, petitioners argue that the estimate of domestic water demand is based solely on a table from the Department of Environmental Quality (DEQ), at OAR 340-071-0220, that estimates on-site sewage flows. Petitioners contend that it is not reasonable to presume that all domestic water used at the proposed resort will wind up in the septic system; some water will be lost through respiration, perspiration, indoor cleaning, watering indoor plants, etc., and therefore the DEQ table is not a sufficient basis to estimate total demand for domestic water. Intervenors respond that the water consultant also relied upon water data compiled from a similar golf resort in the area, which independently supports the estimated domestic water demand of approximately 51,000 gallons per day (gpd). Record 330. We agree with intervenors that even if the DEQ table is not a sufficient basis to estimate domestic water supply, the record supports the estimated need of 51,000 gpd.

B. CCZO 4.083(5)(b): Water Supply

1. Irrigation and Fire Suppression

To meet the estimated average demand of 335,196 gpd for irrigation and fire suppression, the applicant proposed to divert water from two creeks on the property into a reservoir. The applicant submitted evidence originating from the Oregon Water Resources Department (WRD) that the creeks have more than sufficient water during the irrigation season to meet the estimated demand. Record 338. Petitioners submitted testimony that recounted local observations that the creeks run dry in the summer. Record 122. The applicant's consultant responded that most of the water flows through the gravel creek beds even if it does not pool on the surface, and that the WRD analysis is reliable. Record 57. The county chose to rely on the WRD analysis, and noted that the applicant has applied for water rights in the two creeks. Record 30.

Petitioners argue that the WRD analysis is merely a flow model without on-the-ground evidence to support it, and further that the analysis is undermined by local observations indicating that the creeks dry up in the summer. Intervenors respond, and we agree, a reasonable person could rely on the WRD analysis and the consultant's testimony to conclude that there is sufficient water in the creeks during the irrigation season.

Next, petitioners argue that although the applicant has applied to WRD for the right to divert from the creek, the reservoir itself will require a separate state permit under ORS 537.409 that has not been applied for and for which there may be legal obstacles. According to petitioners, ORS 537.409 does not allow a reservoir to rely on multiple "sources" such as the two creeks, but only a single source. Intervenors respond that obtaining the required state permit for the proposed reservoir is not required by any tentative master plan approval criterion, and the applicant is not required to demonstrate that it has or can obtain a reservoir permit. Intervenors note that Condition 28 requires the applicant to apply for all required water permits, and that CCZO 4.087(f), a final master plan approval criterion, requires a

demonstration that "any necessary water rights or service contracts have been obtained" both of which are intended to ensure that all necessary permits, including a reservoir permit, will be obtained prior to development.

In *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992), which petitioners cite, we held that where a local government finds compliance with a local approval criterion based on the applicant obtaining a state agency permit required by the agency, and imposes a condition to that effect, the applicant need not demonstrate that it is feasible to obtain the state agency permit or comply with the state agency criteria; the record must show only that the applicant is not precluded from obtaining the permit as a matter of law. Here, we understand petitioners to argue that obtaining a reservoir permit from WRD is precluded as a matter of law, based on petitioners' reading of ORS 537.409(2)(a), which requires the applicant for a WRD reservoir permit to submit information on, among other things, the "source of the water used to fill the reservoir." However, it is far from clear to us that ORS 537.409(2)(a) impliedly limits a reservoir to a single "source," or that an application proposing to fill a reservoir from multiple sources is precluded as a matter of law. Even if petitioners' interpretation of ORS 537.409(2)(a) is correct, that would simply limit the reservoir to one source; it would not preclude obtaining a permit. The water consultant testified that multiple reservoirs are possible and that other solutions exist to storing water for irrigation and fire suppression. Record 57. Petitioners have not demonstrated that obtaining necessary state permits is precluded as a matter of law.

2. Domestic Water Availability

a. Water Quantity

The county found that the three existing wells on the property produce approximately 64,800 gpd, sufficient to supply the estimated demand for domestic water of approximately 51,000 gpd. Petitioners note that that finding is based on the original well reports, some of which are nearly 30 years old. Petitioners argued below, and argue on appeal, that only a

current pump test can verify whether the wells are still capable of producing at least 51,000 gpd. Petitioners cite an e-mail message from a WRD watermaster stating that, if the resort applies for water rights based on the wells, WRD will require pump tests to verify how much each well produces. Record 297. The county chose to rely upon the original well reports, but imposed Condition 34, requiring that prior to final master plan approval the applicant provide pump test results and, if necessary, new wells that are adequate to meet the estimated demand. However, petitioners argue, CCZO 4.083(5)(b) requires that the applicant for tentative master plan approval provide sufficient information to determine whether there is an adequate quantity of water to meet the estimated demand, and the original well reports the county relied upon are insufficient to make that determination, absent a current pump test.

The original well reports are some evidence that the wells are capable of providing enough water to meet the estimated demand. Petitioners cite no countervailing evidence in the record. The fact that WRD will require a pump test in reviewing the application for water rights does not mean that the well reports are unreliable or that a new pump test is the only reliable evidence of productivity. In our view, the original well reports are substantial evidence that a reasonable decision maker could rely to conclude that there is an adequate quantity of water to meet the estimated need, particularly where there is no evidence in the record to the contrary. To address the possibility that the well reports are no longer accurate, the county appropriately imposed Condition 34, to ensure prior to final master plan approval that there will be an adequate quantity of water.

b. 15,000 gpd limit on exempt uses

Petitioners next argue, based on an e-mail message from the WRD watermaster, that if the wells are located on a single tax lot, which petitioners allege to be the case, then under WRD rules only 15,000 gpd can be drawn from the wells as exempt uses, without obtaining a water right. Record 1052. Petitioners acknowledge that the applicant has applied for a WRD water right for a quasi-municipal water system based on the wells, but argues that because

WRD has not yet approved the water right application the county is in no position to find that there is an adequate quantity of water to meet the estimated demand of 51,000 gpd.

Intervenors respond, and we agree, that CCZO 4.083(5)(b) requires the application for tentative master plan approval to include information on "whether water rights are needed or have been obtained," but does not require evidence that necessary water rights have already been obtained. As intervenors note, evidence that necessary water rights are in hand are expressly required at the time of *final* master plan approval, pursuant to CCZO 4.087(1)(f), which requires that the application for final master plan approval include evidence "that adequate water to serve the resort is lawfully available and any necessary water rights or service contracts have been obtained." For purposes of CCZO 4.083(5)(b) and tentative master plan approval, nothing in the code requires that the applicant have actually obtained the water rights necessary to use the wells beyond the exempt limitation of 15,000 gpd.

c. Hydrologic Connection Between Wells and Creek

Petitioners argue that at least two of the three wells are located within one-quarter mile of Burnt Hill Creek, and thus presumed under WRD rules to be hydrologically connected to the creek, with the potential to interfere with that surface water source. Petitioners note also that the proposed diversion point for the irrigation reservoir is in the vicinity of the three wells. Petitioners argue that WRD may not approve both (1) withdrawing up to 51,000 gpd from an aquifer presumed to be hydrologically linked to Burnt Hill Creek, while at the same time (2) diverting an average of 335,196 gpd from the creek for irrigation during the summer. Petitioners contend that without some evidence, such as a WRD water availability analysis considering the hydrologic connection, that the creek and supporting aquifer can supply both domestic and irrigation water at the same time, there is not sufficient information in the record of an adequate supply of water for purposes of CCZO 4.083(5)(b).

Petitioners merely speculate that there would be hydrologic interference between the wells and the creek, and if so that WRD may limit withdrawals or diversions with the result that there may not be sufficient water to meet the estimated demand for both domestic and irrigation water. Because the applicant is required to apply, and has applied, to WRD for water rights both to divert water from the creek and to pump and store non-exempt amounts of water from the wells, there is no dispute that WRD will conduct a water availability analysis required under its rules, in which WRD will consider to the extent it deems necessary the hydrologic connection between the wells and creek and the impacts of the proposed withdrawals on the creek and aquifer. Petitioners argue essentially that that WRD water availability analysis must be performed and all WRD water rights/permits must be issued prior to tentative master plan approval, in order to provide sufficient information to determine whether there is an adequate quantity of water for purposes of CCZO 4.083(5)(b).

Again, under CCZO 4.087(1)(f) whether the applicant has the legal right to obtain adequate supplies of water is an issue that is finally resolved at the time of final master plan approval. For purposes of CCZO 4.083(5)(b) and tentative master plan approval, we disagree with petitioners that a WRD water availability analysis required to obtain water rights must be performed and WRD water rights/permits must be in hand to provide the evidentiary basis necessary to determine whether there is an adequate quantity of water. The county has imposed conditions sufficient to ensure that development as proposed will not proceed if the hypothetical petitioners posit in fact occurs, and WRD ultimately limits withdrawals or diversions to a level that is insufficient to meet estimated demand. CCZO 4.083(5)(b) does not require more.

d. Comprehensive Plan Policy 15

Curry County Comprehensive Plan (CCCP) Policy 15, part of the plan element addressing Statewide Planning Goals 17 (Coastal Shorelands) and 18 (Beaches and Dunes), provides as relevant that "Curry County will take measures to protect groundwater from

drawdown which would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of salt water into water supplies."[4] The county's decision addresses a number of comprehensive plan policies from the same plan element implementing Goals 17 and 18, in the course of addressing CCZO 4.085(3)(h), which in relevant part requires that portions of the proposed destination resort located in areas subject to the coastal goals be consistent with applicable provisions of the CCCP. Petitioners argued below that Policy 15 is also applicable, and argue on appeal that the county's decision did not address Policy 15 or explain why it need not be addressed.

Intervenors respond that Policy 15 is implemented by CCZO 4.085(3)(h) and that the county implicitly found compliance with Policy 15 through its findings of compliance with CCZO 4.085(3)(h). We do not understand the argument. CCZO 4.085(3)(h) requires the county to consider whether the resort is consistent with applicable comprehensive plan policies in the plan's coastal element, and the county identified and addressed eight such policies. Record 27-28. The county apparently ignored petitioners' argument that Policy 15 must also be addressed, and did not adopt any finding or explanation why it need not be addressed like the other Goal 17 policies. Intervenors offer no basis for us to conclude that Policy 15 does not apply. We note that, while WRD will presumably address impacts on groundwater, it may not address impacts of any drawdown on stabilizing vegetation or other considerations required under Policy 15. Remand is necessary for the county to address Policy 15 pursuant to CCZO 4.085(3)(h) or explain why it need not be addressed.

---

[4] CCCP Policy 15 provides, in full:

> "Curry County will take measures to protect groundwater from drawdown which would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of salt water into water supplies. Building permits for single family dwellings are exempt from this requirement if the dwelling is located in a subdivision for which findings were made at the time the subdivision was approved which demonstrated that there will be no groundwater drawdown or no negative effects of groundwater drawdown."

e. Condition 28

Condition 28 requires an applicant to provide proof that an application for any permit necessary to divert a sufficient quantity of water has been submitted to WRD and determined to be complete, prior to issuance of any building permit. Petitioners argue that Condition 28 is meaningless, because it merely requires that an application be submitted and deemed complete, not that the permit actually be granted.

Intervenors respond that Condition 28 functions only to assure that information is provided regarding whether a water right is needed for purposes of CCZO 4.083(5)(b), and that the function of ensuring that needed water rights are actually obtained is performed by CCZO 4.087(1)(f), which as noted above requires that prior to final master plan approval the applicant provide evidence that "any necessary water rights * * * have been obtained."

It is not clear to us what function Condition 28 is intended to serve, but we tend to agree with petitioners that the condition falls short if it is intended to ensure that the applicant actually obtain the WRD permits or water rights necessary to provide a sufficient water supply. However, we agree with intervenors that the function of ensuring that needed WRD permits or water rights are actually obtained prior to final master plan approval is independently fulfilled by CCZO 4.087(1)(f). That being the case, petitioners' challenge to the adequacy of Condition 28 does not provide a basis for remand.

The first assignment of error (Oregon Coast Alliance) is sustained, in part.

SECOND ASSIGNMENT OF ERROR (Oregon Coast Alliance)

CCZO 4.083(18), which implements 2010 amendments to ORS 197.460, provides that:

> "If the site is within 10 miles of an urban growth boundary the county shall require the applicant to submit an economic impact analysis of the proposed development that includes an analysis of the projected impacts within the county and within cities whose urban growth boundaries are within the distance specified in this subsection."

The applicant submitted an "economic benefit analysis" that according to petitioners describes only the positive economic impacts of the proposed resort within the county and within the cities of Brookings and Gold Beach, the urban growth boundaries of which may be within 10 miles of the site.[5] Petitioners argued below that the economic impact analysis required by CCZO 4.083(18) and ORS 197.460 as amended must evaluate not only the positive economic impacts, but also any negative economic impacts, such as the cost of public infrastructure, the impact of low-paying services jobs on the county workforce, and the costs of increased pressure on state parks and the wildlife refuge. Petitioners submitted into the record an example of such an analysis of both positive and negative economic impacts that was performed for a different destination resort in central Oregon.

The county found that the applicant's economic benefit analysis and two supplements discussed below appropriately addressed economic impacts, and specifically rejected the argument that CCZO 4.083(18) requires a cost assessment of county-provided infrastructure. Record 17. On appeal, petitioners argue that economic "impacts" is not limited to economic "benefits," and the county erred to the extent it concluded otherwise.

We generally agree with petitioners that where CCZO 4.083(18) and ORS 197.460 as amended require an economic impacts analysis, that analysis must evaluate both positive and negative economic impacts, if any, and an analysis focused exclusively on positive or negative economic impacts would likely be an incomplete analysis. That said, we note that CCZO 4.083(18) and ORS 197.460 do not tell the county what to do with the impact analysis provided. While the legislature apparently thought it important for the county to consider

[5] There is apparently some uncertainty about the distance to the nearest urban growth boundaries. The county found at one point in its decision that the cities of Brookings and Gold Beach are more than 10 miles from site. Record 17. However, the county also imposed Condition 35, which requires the county Department of Public Services to confirm the distance between the site and the nearest urban growth boundaries, and if the distance is within 10 miles, final master plan approval shall include a determination of compliance with CCZO 4.083(14) and (18). CCZO 4.083(14) requires a traffic impact analysis if the site is within 10 miles of an urban growth boundary.

such information, it did not supply a standard to apply in approving or denying the proposed resort based on the economic impacts analysis.

In any case, as intervenors note, the author of the "economic benefits analysis" submitted two supplemental memoranda responding to petitioners' arguments, which addressed to some extent the adverse economic impacts cited by petitioners, and generally concluded that the positive economic impacts would greatly outweigh any negative economic impacts. Record 592-93, 1225-29. The county referenced the supplemental memoranda in its findings, and petitioners do not challenge the evidentiary support provided by the memoranda. Absent a more developed argument, petitioners' arguments do not provide a basis for remand.

The second assignment of error (Oregon Coast Alliance) is denied.

FOURTH ASSIGNMENT OF ERROR (Oregon Coast Alliance)

CCZO 4.085(3)(a) requires that "[i]mportant natural features including habitat of threatened or endangered species, streams, rivers and significant wetlands shall be retained * * *." CCZO 4.085(3)(a) implements ORS 197.640(1). To demonstrate compliance, the applicant submitted several studies, including a wildlife habitat assessment. Petitioners argued to the county below that the habitat assessment evaluated only whether threatened or endangered species were actually present on the property, and failed to evaluate whether the property includes *habitat* for threatened or endangered species, as CCZO 4.085(3)(a) requires. *See Gould v. Deschutes County*, 59 Or LUBA 435, 451 (2009) (county did not err in focusing on wildlife habitat rather than the presence of wildlife, for purposes of mitigating the effects of a destination resort under a local "no net loss" to wildlife resources standard). Petitioners argued to the county that the wildlife habitat assessment failed to evaluate whether there is habitat on the subject property for a number of threatened or endangered species that have designated critical habitat in the area, such as the neighboring wildlife refuge, but generally took the approach of evaluating whether threatened or endangered

species are actually found on the property, based on literature reviews, interviews and a site visit. The county relied on the wildlife habitat assessment to conclude that CCZO 4.085(3)(a) is complied with. Petitioners argue on appeal that in accepting the wildlife habitat assessment's methodology, the county misinterpreted CCZO 4.085(3)(a) to read the term " habitat" out of the regulation.

Intervenors respond that the wildlife habitat assessment and the county's findings properly focused on habitat rather than or in addition to the actual presence of threatened or endangered species. We agree with intervenors that petitioners have not established that the wildlife habitat assessment failed to evaluate habitat. Petitioners quote passages from the assessment that suggest a species-presence approach; intervenors quote passages that discuss the presence or absence of habitat. The starting point for the wildlife habitat assessment was a list of threatened or endangered species, or species of concern, that had historically been observed within one mile of the subject property. Based on further information such as interviews with local wildlife experts, the assessment attempted to determine whether either the listed species or habitat for such species was found on the property. For example, with respect to the northern spotted owl, the assessment noted that its habitat is mature conifer forests with old growth characteristics, but that type of habitat does not occur on the property. Record 1848. With respect to the Aleutian Canada Goose, a migratory species of concern, the assessment concluded that the subject property has very little, if any, agricultural fields suitable for wintering that species. Record 1850. Petitioners cite no passages in the assessment where the author focused solely on whether threatened or endangered wildlife was physically present on the property at any give time, instead of the existence of habitat for such wildlife. Absent a more developed challenge, petitioners' arguments do not provide a basis for remand.

The fourth assignment of error (Oregon Coast Alliance) is denied.

The county's decision is remanded.