BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

PINE FOREST DEVELOPMENT,
BELVERON REAL ESTATE PARTNERS, LLC,
and VANDERVERT ROAD, LLC.
Intervenors-Respondents.

LUBA Nos. 2011-115/116

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

No appearance by Deschutes County.

Steven Hultberg, Bend, filed a joint response brief and argued on behalf of intervenor-respondent Pine Forest Development LLC. With him on the brief was Radler, White, Parks & Alexander, LLP.

Liz Fancher, Bend, filed a response brief and argued on behalf of intervenor-respondent Belveron Real Estate Partners, LLC.

Tamara E. MacLeod, Bend, represented intervenor-respondent Vandervert Road LLC.

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

AFFIRMED 09/06/2012

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

Petitioner appeals comprehensive plan amendments to the county's map of lands eligible for siting a destination resort and corresponding zoning map amendments.

MOTIONS TO INTERVENE

Pine Forest Development, LLC, Belveron Real Estate Partners, LLC, and Vandervert Road, LLC (intervenors) move to intervene on the side of respondent. The motions are allowed.

FACTS

In 1992, the county adopted into its comprehensive plan a map of properties eligible for siting a destination resort, pursuant to Statewide Planning Goal 8 (Recreation) and statutory criteria at ORS 197.455. The destination resort map excluded all lands within one mile of an urban growth boundary (UGB), all large agricultural and forest parcels, and lands within three miles of the county border, and deemed the remaining 112,448 acres eligible for destination resort siting. In 2010, the county adopted ordinances that modified the county criteria for eligibility and adopted new destination resort map amendment procedures. LUBA and the Court of Appeals upheld those ordinances on appeal. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (COLW I), *aff'd* 245 Or App 166, 262 P3d 1153 (2011) (COLW II).

In 2011, the county applied the new destination resort map amendment criteria and procedures to adopt a new comprehensive plan map of lands eligible for destination resort siting, and an identical zoning map depicting the destination resort overlay zone. The new maps remove 91,701 acres from eligibility, continue eligibility for 20,747 acres of land, and add three new eligible sites totaling 1,255 acres. The focus of the present appeal is on the three new eligible sites.

The first new eligible site is referred to here as the Pine Forest Development site, consisting of 617 acres located south of the Sunriver Resort. The second site is referred to here as the Vandervert/Belveron site and consists of two adjoining parcels 98 and 179 acres in size, also near the Sunriver Resort. The third site is owned by the Oregon Department of State Lands (DSL), and consists of 400 acres located west of the Eagle Crest Resort outside of the city of Redmond. Each of the three sites is located in areas classified as being Fire Regime Condition Class 3, which means a high risk of wildfire. As discussed below, ORS 197.455(1)(f) prohibits a county from siting a destination resort on lands classified as 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. *See* n 1. The county found ORS 197.455(1)(f) is satisfied, because the three sites are located within areas subject to one of the county's seven adopted community wildfire protection plans.

To demonstrate compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060, the proponents of the Pine Forest and Vandervert/Belveron sites submitted traffic studies for each resort identifying the transportation facilities improvements necessary to ensure compliance with the rule. A similar study was submitted for the DSL site. The county imposed conditions prohibiting resort development until the applicants provide the identified improvements, and concluded that the TPR is satisfied.

The county adopted separate findings for each of the three new sites. Petitioner challenges the findings supporting each site. However, only intervenors Pine Forest Development, Belveron Real Estate Partners, and Vandervert Road LLC filed a response brief, and their response brief defends the challenged decisions only with respect to the Pine Forest and Vandervert/Belveron sites, not the DSL site.

FIRST ASSIGNMENT OF ERROR

ORS 197.455(1) provides that destination resorts may be sited on lands mapped as eligible for destination resort siting, and prohibits counties from siting destination resorts in

six types of areas.[1] Under ORS 197.455(2), the map of eligible lands must be based on reasonably available information, and may be amended no more than once every 30 months.

[1] ORS 197.455 provides, in full:

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

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

"(b) (A) On a site with 50 or more contiguous acres of unique or prime farmland 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.

"(d) In the Columbia River Gorge National Scenic Area as defined by the Columbia River Gorge National Scenic Act, P.L. 99-663.

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

"(A) As determined by the State Department of Fish and Wildlife in July 1984, and in additional especially sensitive big game habitat areas designated by a county in an acknowledged comprehensive plan; or

"(B) If the State Fish and Wildlife Commission amends the 1984 determination with respect to an entire county and the county amends its comprehensive plan to reflect the commission's subsequent determination, as designated in the acknowledged comprehensive plan.

"(f) On a site 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.

ORS 197.455(2) further provides that the map of eligible lands "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."

ORS 197.445 sets out the approval criteria used to approve or deny a specific destination resort on lands that are included on the eligibility map. Thus, the siting of a destination resort is typically a two-step process. The first step is inclusion of the site on the county's map of eligible lands, pursuant to the eligibility criteria at ORS 197.455. The second step is the approval of a proposed destination resort on an eligible site, pursuant to the approval criteria at ORS 197.445. However, that seemingly clear division between the eligibility decision and the siting decision is not in fact so clear. Three of the eligibility criteria that prohibit siting resorts on particular categories of lands include express exceptions, signaled by an "unless" clause, under which a resort may be sited on land that would otherwise not be eligible *if* resort development is limited or conditioned in specified ways. ORS 197.455(1)(a),(b)(B) and (f); *see* n 1. Under ORS 197.455(1)(a), a destination resort cannot be sited on land within 24 air miles of a UGB 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." Under ORS 197.455(1)(b), a destination resort cannot be sited on land 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."

> "(2) In carrying out subsection (1) of this section, a county shall adopt, as part of its comprehensive plan, a map consisting of eligible lands within the county. The map must be based on reasonably available information and may be amended pursuant to ORS 197.610 to 197.625, but not more frequently than once every 30 months. The county shall develop a process for collecting and processing concurrently all map amendments made within a 30-month planning period. A map adopted pursuant to this section shall be the sole basis for determining whether tracts of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467."

Finally, under ORS 197.455(1)(f), a destination resort may not be sited on lands 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."

Each of the three new sites is located in areas classified as Fire Regime Condition Class 3. The county found the amendments comply with ORS 197.455(1)(f) based primarily on the fact that the three new sites are within one of the sub-areas governed by two of the county's seven community wildfire protection plans.[2] The Pine Forest and Vandervert/Belveron sites are located within what we will call for convenience the Deschutes Wildfire Plan, while the DSL site is located within what we will call the Redmond Wildfire Plan. To address petitioner's argument that ORS 197.455(1)(f) requires the county to actually approve a specific wildfire protection plan for the resort area at the time the

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[2] The county's findings state with respect to the Vandervert/Belveron and Pine Forest sites:

> "Each of these properties [Vandervert/Belveron and Pine Forest] is predominantly classified as being Fire Regime Condition Class 3 pursuant to the Upper Deschutes River Natural Resource Coalition Revised Community Wildfire Protection Plan (the 'Wildfire Plan'). In particular, each of these properties is within the Three Rivers area of the Wildfire Plan. Deschutes County has seven community wildfire protection plans (CWPPs) that address the entire county. The Wildfire Plan is in the plan applicable to the Vandervert/Belveron and Pine Forest properties. Thus, each of these properties are currently subject to a County-approved wildfire protection plan. In addition, the County will require, as a condition to this ordinance, that each of the properties added to the Destination Resort Overlay Zone map not only comply with the Wildfire Plan, but that each be developed consistent with 'FireWise' standards, and each become a recognized FireWise Community.
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> "* * * To the extent that new information becomes available or evidence is presented that the FireWise standards and the Wildfire Plan are insufficient to address wildfire risk, the County may impose additional standards at the time of resort approval as required by the condition of approval adopted by the County. To the extent that ORS 197.455(1)(f) requires the County to adopt individual wildfire protection plans for each property at the time of mapping, the County hereby adopts the Wildfire Plan as the wildfire protection plan required under ORS 197.455(1)(f) for the Belveron, Vandervert and Pine Forest properties. For purposes of the present amendments, the County finds that the existing approved Wildfire Plan, and the requirement to develop any resort as a FireWise community, constitute the wildfire protection plans described in ORS 197.455(1)(f) and that these demonstrate that each of the three properties [may] be developed without being at a high overall risk of fire." Record 183-84.

destination resort map of eligible lands is amended to include those areas, the county adopted the Deschutes and Redmond Wildfire Plans, as applicable, as the wildfire protection plans required by ORS 197.455(1)(f). In addition, the county required each resort to be developed to "FireWise" standards similar to other resorts developed in recent years. Finally, the county imposed a condition of approval requiring that, if at the time of resort development information is presented that the relevant Wildfire Plan and FireWise standards are insufficient to prevent a high overall risk of fire, the county must adopt an alternate wildfire protection plan that demonstrates that each of the three properties can be developed without being at a high overall risk of fire.[3]

Petitioner argues the county erred in relying on the Deschutes Wildfire Plan as the "wildfire protection plan that demonstrates the site can be developed without being at a high overall risk of fire," required by ORS 197.455(1)(f).[4] First, petitioner argues that the Deschutes Wildfire Plan, adopted in 2007, was not intended to satisfy ORS 197.455(1)(f), which did not take effect until 2010. Second, petitioner argues that the Deschutes Wildfire

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[3] The condition states:

> "The County has adopted, as the relevant wildfire protection plans described in ORS 197.455(1)(f), the Upper Deschutes River Natural Resources Coalition Revised Community Wildfire Protection Plan [for the Vandervert/Belveron and Pine Forest sites] and the Greater Redmond Community Wildfire Protection Plan [for the DSL property]. Any resort developed on the three properties added to the resort map shall be required to comply with the terms and conditions of the applicable wildfire protection plan, as such plan may be amended from time to time. In addition, any resort developed on any of the three properties added to the resort map shall be required to be developed consistent with FireWise standards and shall, as a condition of approval to any resort development, be required to be recognized as a FireWise community. If the County determines that, at the time of resort development, that the adopted wildfire plans and FireWise community standards are insufficient to assure that a site can be developed without being at a high overall risk of fire, then the County shall require, as a condition of approval, the adoption of an alternate wildfire protection plan that demonstrates the site can be developed without being at a high overall risk of fire." Record 214.

[4] Petitioner asserts that the Vandervert/Belveron site is not actually in the Three Rivers sub-area of the Deschutes Wildfire Plan, as the county's findings state, but rather in the Little Deschutes Corridor sub-area of the Deschutes Wildfire Plan. However, as far as we can tell or petitioner has established, the same wildfire protection measures would apply to both sub-areas.

Plan does not include any specific recommendations for destination resorts, but only generalized recommendations to protect structures. Third, petitioner notes that the Deschutes Wildfire Plan does not specifically address the three new "sites" mapped for destination resort eligibility, but rather larger geographic areas within the county which include the three sites. Fourth, petitioner argues that the Deschutes Wildfire Plan includes only recommendations, and does not include actual "standards" that can be complied with.

In addition, petitioner challenges the county's secondary efforts to ensure compliance with ORS 197.455(1)(f). According to petitioner, the condition requiring that any resort be developed under "FireWise" standards is insufficient to satisfy ORS 197.455(1)(f). Further, petitioner argues that ORS 197.445(1)(f) must be satisfied when the county adopts the eligibility map to include lands classified in Fire Regime Condition Class 3, and approval of a wildfire protection plan cannot be deferred to the destination resort siting decision.

Intervenors do not attempt to defend the county's initial choice to rely on the 2007 Deschutes Wildfire Plan to satisfy the requirement that the county adopt a wildfire protection plan for purposes of ORS 197.455(1)(f).[5] Instead, intervenors argue that the county is not obligated to adopt a wildfire protection plan at the time of adopting or amending its map of eligible lands, but may satisfy ORS 197.455(1)(f) by imposing conditions that require county approval of a wildfire protection plan at or before the time of resort development. According

[5] That initial choice may be defensible. The legislature added ORS 197.455(1)(f) during the 2010 special legislative session, as part of a package of amendments to ORS 197.455(1) that was the consensus product of a select work group. Senate Bill 1031, 2010 Or Laws, chapter 32. We have examined the legislative history of SB 1031, including the audio recordings of the hearings. Interestingly, one member of the work group was the Deschutes County planning director, who testified in favor of the bill. The planning director held up the county's seven community wildfire protection plans, presumably including the same Wildfire Plan that the county relied upon in the present case, as an example of the kind of wildfire protection plan that the work group had in mind when drafting ORS 197.455(1)(f). Senate Environmental and Natural Resources Committee, February 9, 2010, audio recording at 29:30. In other words, petitioner's premise that the legislature intended ORS 197.455(1)(f) to require a wildfire protection plan that is directed at a specific destination resort site, and which includes specific recommendations for development of a destination resort at that site, may be incorrect. Arguably, the legislature did not mean to exclude more general wildfire protection plans, such as the county's seven wildfire protection plans. However, because intervenors do not challenge that premise, we do not address the matter further.

to intervenors, the exception at ORS 197.455(1)(f) is similar to the two other exceptions at ORS 197.455(1)(a) and (b)(B), and the text of those provisions suggest that the exceptions can be addressed at the time a particular destination resort is sited on land mapped as eligible, and need not be satisfied at the time the county adds lands to the map. Intervenors contend that it is entirely consistent with ORS 197.455(1) and (2) to add otherwise prohibited lands to the map, with a condition prohibiting the siting of a destination resort on those lands until the limitation required by ORS 197.455(1)(a),(b)(B) or (f) is met. In the case of ORS 197.455(1)(f), intervenors argue that the county can add to the eligibility map lands that are classified as Fire Regime Condition Class 3, but impose conditions sufficient to ensure that no destination resort will be sited on such lands unless and until the county approves the required wildfire protection plan.

As noted, ORS 197.455(2) provides that the eligibility map is the sole basis for determining whether land is eligible for resort siting. That language suggests that once a map of eligible lands is adopted, no further action is needed to make such lands "eligible" for destination resort siting. *See Eder v. Crook County*, 60 Or LUBA 204, 211 (2009) (a county is not required to determine at the time of destination resort approval whether the site is within three miles of a high value crop area under ORS 197.455(1)(b)(B), if the adopted comprehensive eligibility map shows that the proposed site is eligible without restriction for destination resort siting).[6] There is an arguable tension between the last sentence of ORS

[6] In *Eder*, the county originally adopted a map of eligible lands that excluded all lands within three miles of a high value crop area. The findings supporting that decision found no high value crop areas near the site at issue in that appeal. Years later, at the time of destination resort siting, the opponents to the resort cited to evidence that in the intervening years a new high value crop area might have been established within three miles of the site, and argued to LUBA that the county is obligated to revisit ORS 197.455(1)(b)(B) at the time of destination resort siting and if necessary deny the proposed resort as being inconsistent with the prohibition at ORS 197.455(1)(b)(B). We rejected the argument, concluding that once the county applied ORS 197.455(1)(b)(B) to determine that land is eligible without limitation in adopting its map of eligible lands, it would be inconsistent with ORS 197.455(2) to require the county to revisit that determination at the time of destination resort siting, based on allegedly changed circumstances.

197.455(2) and the language of the three exceptions at ORS 197.455(1)(a), (b)(B) and (f). If those exceptions can apply at the second step, at the time of destination resort siting, then arguably the map of eligible lands would not be the "sole basis" for determining land is "eligible" for destination resort siting. However, intervenors are correct that the three exceptions in ORS 197.455(1)(a), (b)(B) and (f) appear to contemplate a specific destination resort proposal, and that in at least some cases it would be difficult to satisfy those exceptions at the time the county adopts or amends a county-wide eligibility map to include otherwise prohibited lands, at a time when there would likely be no specific destination resort proposal before the county, unless an applicant filed concurrent applications for both an eligibility map amendment and a destination resort approval.

The parties present starkly different views of ORS 197.455. We understand petitioner's position to be that the county can *only* satisfy the exception in ORS 197.455(1)(f) when adopting or amending the map of eligible lands, by adopting a specific wildfire protection plan for a destination resort on that site, even if there is no specific destination resort proposal before it. We understand intervenors' position to be that the county has the option of including a fire-prone site on the map of lands eligible for destination resort siting if the county attaches express conditions to the mapping decision that effectively require that the requirement for an adopted wildfire protection plan must be fulfilled prior to resort development approval.

Although the relevant statutory text and context do not conclusively resolve which of these views, if either, the legislature intended, we generally agree with intervenors' reading of the statutes.[7] For whatever reason, the legislature has placed three exceptions in the eligibility criteria at ORS 197.455(1), at least two of which would be difficult to address or

[7] As far as we can discern, the available legislative history of the 2010 amendments does not clarify the legislative intent on this point.

fully satisfy at the mapping stage, and which can most practicably be fulfilled at the resort siting stage. Nothing in the text or context of ORS 197.455(1) or (2) prohibits adding lands described in ORS 197.455(1)(a),(b)(B) and (f) to the map of eligible lands, subject to a condition or restriction of some kind adopted as part of the mapping decision to ensure that a site will not be developed with a resort unless the relevant exception is satisfied. Indeed, it is difficult to imagine how the exceptions in ORS 197.455(1)(a) and (b)(B) could be satisfied in any other way. Even under petitioner's view of the statutes, the most straightforward way a county could satisfy the exceptions at ORS 197.455(1)(a) and (b)(B) at the mapping stage, when no resort application is before the county, is to impose a condition that ensures that resort development is limited consistent with the relevant exception. For example, to satisfy the exception in ORS 197.455(1)(a) at the mapping stage, the county could impose a condition on the mapping decision that limits residential uses of any resort on a site that is closer than 25 miles to an UGB with a population of 100,000 or greater, to those necessary for the staff and management of any resort on the site. Similarly, to satisfy the exception in ORS 197.455(1)(b)(B) at the mapping stage, the county could impose a condition that ensures that at the time of resort development appropriate limits will be placed on the number of units of overnight lodging, based on the proximity to the high value crop area. If including otherwise prohibited lands on the map pursuant to such conditions is a permissible approach for purposes of the exceptions at ORS 197.455(1)(a) and (b)(B), it is difficult to see why a similar approach is impermissible for purposes of the exception at ORS 197.455(1)(f).

In sum, nothing in the destination resorts statute cited to our attention prohibits a county from placing a site that is classified Fire Regime Condition Class 3 on the map of eligible lands, as long as conditions or similar restrictions are imposed as part of the mapping decision that effectively ensure that prior to resort development the county has adopted a wildfire protection plan consistent with ORS 197.455(1)(f).

Petitioner has not established that the conditions the county imposed here are insufficient to ensure that the exception in ORS 197.455(1)(f) is satisfied. Even if the Deschutes Wildfire Plan that the county adopted as the wildfire protection plan for the Pine Forest and Vandervert/Belveron sites is insufficient to constitute the kind of wildfire protection plan contemplated by ORS 197.455(1)(f), the county has effectively required that such a plan be adopted prior to resort development. If that condition is not fulfilled, no resort development can be sited on those lands. We do not believe that ORS 197.455(1)(f) requires more.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The county found, based on traffic studies submitted for the Pine Forest, Vandervert/Belverson and DSL sites, that developing those sites with destination resorts would "significantly affect" one or more nearby transportation facilities within the meaning of OAR 660-012-0060(1), by causing identified facilities to fail the applicable performance measure within the planning period. To avoid causing the identified facilities to fail, the traffic studies recommended construction of several transportation improvements. To demonstrate compliance with the TPR, the county relied upon measures adopted under OAR 660-012-0060(2)(a), to "demonstrate allowed land uses are consistent with the planned function, capacity and performance standards of the transportation facility."[8] Specifically,

[8] OAR 660-012-0060(2) was amended, effective January 1, 2012, but the amendments are not material to this appeal. The most significant differences for purposes of this appeal is that OAR 660-012-0060(2)(e) was renumbered to (2)(d). Because the amended rule would apply to any proceedings on remand of this legislative decision, and there are no material differences, we quote the relevant portions of amended rule:

> "If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below * **.

the county imposed a condition that, among other measures, prohibited approval of a destination resort at any of the three sites until the identified transportation improvements are in place. *See* n 10, below. As a backstop, the county also required the applicants for a destination resort on these sites to submit a new traffic study that again evaluates whether the proposal will comply with the TPR, and if that study identifies the need for more improvements in addition to those already identified, the applicants must construct those additional improvements as well. The county found:

> "The above condition is imposed pursuant to OAR 660-012-0060(2)(a). By imposing this condition, the County has assured compliance with OAR 660-012-0060(1) by adopting a measure that demonstrates that allowed uses are consistent with the planned function, capacity, and performance standards of the transportation facility. No trips may be added to the transportation system under these amendments until such time as any necessary transportation improvements are in place. A complete prohibition on resort development until such time as specific identified improvements are made or until such time as the improvements identified in a subsequent traffic analysis are made, ensures that the uses allowed on the subject properties are consistent with the identified function, capacity, and performance standards of the identified facilities." Record 207.

Petitioner advances three challenges to the county's findings and condition.

> "(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) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.
>
> "(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures 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."

A. Deferral of TPR Compliance

Petitioner first argues that the county erred in deferring a determination of TPR compliance to the time of destination resort development, contrary to the holdings in *Willamette Oaks v. City of Eugene*, 232 Or App 29, 36, 200 P3d 445 (2009), and *Root v. Klamath County*, 63 Or LUBA 230 (2011).

In *Willamette Oaks*, the Court of Appeals held that a local government must demonstrate compliance with OAR 660-012-0060 in adopting a plan amendment or zone change, and cannot defer that demonstration to a later permit proceeding that is not a post-acknowledgment plan amendment or zone change to which the TPR would otherwise apply. *Root* involved a legislative decision adding 90,000 acres to the county's map of lands eligible for a destination resort. The county attempted to establish compliance with OAR 660-012-0060 by imposing a condition that prohibited any specific destination resort development until a TPR analysis is performed at the time of development and the TPR is satisfied. We held that the county's approach was an improper deferral of compliance with OAR 660-012-0060.[9]

We disagree with petitioner that the county's approach in the present case is a deferral of compliance with OAR 660-012-0060 contrary to *Willamette Oaks* and *Root.* The county conducted the analysis required under OAR 660-012-0060(1) and (2) for each of the three new destination resort sites, determined that each development would significantly affect one

[9] In a footnote, we observed that a relatively simple way to address the TPR in the context of a large scale plan or land use regulation amendment, such as adopting a county-wide map of lands eligible for destination resort siting, is to impose an overlay zone on the included sites prohibiting resort development until the overlay zone is removed or modified. Under that approach, the county could accurately find that adoption of the eligibility map does not significantly affect any transportation facility within the meaning of OAR 660-012-0060. Because the TPR would necessarily apply to any post-acknowledgment plan amendment to remove the overlay zone, and it is *that* zone change decision that would actually allow the uses that could significantly affect transportation facilities, the county could legitimately postpone further TPR analysis to that zone change decision. 63 Or LUBA at 254, n 15. However, if the destination resort siting decision is not a post-acknowledgment plan or land use regulation amendment such as a zoning map amendment, then the TPR would not apply.

or more transportation facilities within the planning period, identified the transportation improvements needed to ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the affected facilities, and required the applicant to provide those improvements prior to resort development.[10] That the county prohibited resort development until those improvements are in place, and prudently required the applicant to submit a *second* TPR analysis at the time of resort development, and provide any *additional* improvements that may be required under that second (and unnecessary) TPR analysis, is not a deferral of compliance with the TPR. The county's belt and suspenders approach is not contrary to *Willamette Oaks* or *Root*.

Nonetheless, petitioner argues that the county erred in failing to actually "adopt" the measures required by OAR 660-012-0060(2)(a). According to petitioner, identifying needed transportation facility improvements and requiring that the applicant provide those

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[10] The conditions imposed by the county state, in relevant part:

> "The County may not approve a destination resort on any of the three properties added to the resort map pursuant to these amendments until:
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> "a. The applicant for resort development has complied with the version of ORS 197.460(4) then in effect regarding a resort-specific traffic impact analysis.
>
> "b. The destination resort application has addressed and incorporated as a part of the development plan, the transportation improvements identified in the Vandervert Analysis or the DSL analysis (including the interchange Requirement decision described in the 2005 Group Mackenzie study), as applicable, necessary to mitigate the finding of significant effect.
>
> "c. The applicant has prepared a traffic impact analysis that in all respects conforms to the requirements of the Transportation Planning Rule and ORS 197.460(4), and demonstrates that resort development on the property may occur in a manner which will not significantly affect a transportation facility or, if a subsequent significant effect is found, resort development may not proceed until measures are in place as described in OAR 660-012-0060(2) to assure that resort development is consistent with the identified function, capacity, and performance standards of affected transportation facilities. If the transportation improvements identified in this subsequent traffic study differ from those identified in the Vandervert Study or the DSL study, the applicant shall make the improvements identified in this subsequent study." Record 214-15.

improvements at the time of resort development is insufficient to "adopt" measures that demonstrate allowed land uses "are consistent with the planned function, capacity, and performance standards of the transportation facility," for purposes of OAR 660-012-0060(2)(a). Petitioner notes that OAR 660-012-0060(2)(a) is phrased in the present tense, and argues that the rule requires *current* consistency, not future consistency. According to petitioner, OAR 660-012-0060(2)(a) requires the county to adopt the necessary measures at the time it approves the plan amendment, not at the time of development. Petitioner argues that only OAR 660-012-0060(2)(d) expressly authorizes the county to delay the timing of "other measures as a condition of approval," but petitioner notes that the county did not purport to proceed under OAR 660-012-0060(2)(d). *See* n 8.

Measures adopted under OAR 660-012-0060(2)(a) must "demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility," but we disagree with petitioner that there is also an implicit requirement that such "measures" must be in place on the date that the post-acknowledgment plan amendment decision is issued in order to be "adopted." At least where the affected transportation facilities are not projected to fail or be significantly affected until the development allowed by the amendment is constructed, as in the present case, we do not see why it is necessarily inconsistent with OAR 660-012-0060(2)(a) to identify the measures that are needed to ensure consistency with the performance standards of the facilities—in this instance, transportation facility improvements funded by private parties—and require that those measures be in place by the time the development allowed by the amendment is constructed. Adoption of such requirements as part of the plan amendment are sufficient to "adopt" measures for purposes of OAR 660-012-0060(2)(a).

Petitioner next argues that the county erred in relying upon the traffic impact analysis and mitigation measures required by ORS 197.460(4) to partially satisfy OAR 660-012-

0060.[11] Petitioner contends that ORS 197.460(4) imposes different obligations than OAR 660-012-0060 and reliance on the statute is insufficient to ensure compliance with the TPR. We generally agree with petitioner that ORS 197.460(4) imposes or at least could impose somewhat different obligations than the TPR, but disagree that the county's condition requiring destination resort applicants to comply with the statute forms an essential part of the county's basis for concluding that the TPR is satisfied. The county imposed a condition requiring that any applicant for a destination resort on the three new sites must comply with ORS 197.460(4). *See* n 11. Technically, that condition was unnecessary, since the statute will apply under its own terms at the time of resort siting. While the county cited the traffic study required by ORS 197.460(4) as one of several bases for its conclusion that adding the new sites to the map of eligible lands is consistent with the TPR, as discussed above the measures taken and the conditions imposed are intended to fully and independently satisfy the TPR, regardless of compliance with ORS 197.460(4). The county might well have erred if it relied entirely on ORS 197.460(4) to satisfy the TPR, but as we understand the county's findings and conditions, reliance on the statute is just one of several suspenders backing up the TPR belt.

Finally, petitioner argues that the wording of the condition quoted at n 10 is vague and indefinite. Petitioner notes that condition (a) refers to future versions of ORS 197.460(4), and that conditions (b) and (c) include qualifiers such as "as applicable" and "may" instead

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[11] ORS 197.460(4) was added to the statute in the same legislation that added ORS 197.455(1)(f), and provides:

> "If the site is west of the summit of the Coast Range and within 10 miles of an urban growth boundary, or if the site is east of the summit of the Coast Range and within 25 miles of an urban growth boundary, the county shall require the applicant to submit a traffic impact analysis of the proposed development that includes measures to avoid or mitigate a proportionate share of adverse effects of transportation on state highways and other transportation facilities affected by the proposed development, including transportation facilities in the county and in cities whose urban growth boundaries are within the distance specified in this subsection."

of "shall." We disagree that any problematic wording in conditions (a), (b) or (c) warrants remand. As noted, the version of ORS 197.460(4) in effect at the time of resort siting will apply by its own terms, regardless of the county's condition. The qualifier "as applicable" in condition (b) simply acknowledges that there are two different TPR studies for Pine Forest and Vandervert/Belverson sites, on the one hand, and to the DSL site, on the other. The use of the word "may" in condition (c) to state that the destination resort "may not proceed" until requirements are satisfied is clearly intended to be mandatory.

B. Measures Adopted for the Pine Forest and Vandervert/Belveron Sites.

For the Pine Forest and Vandervert/Belveron sites, the county required that improvements identified in a 2011 Kittleson Report be in place prior to resort development. As relevant here, the Kittleson Report recommended an eastbound left-turn lane at Highway 97/Vandervert Road and a roundabout at Spring River Road/South Century Drive. Petitioner argues first that the county failed to "adopt" those measures within the meaning of OAR 660-012-0060(2)(a). We understand petitioner to argue that when a "measure" is a transportation improvement, particularly to a state facility, 'adoption" requires more than requiring the improvement be in place: there must be evidence that the road authority for that facility, e.g. the state, has accepted the proposed improvement and a finding of feasibility of funding for that project.

However, petitioner has not established that OAR 660-012-0060(2)(a) requires more in the present case to "adopt" a measure that is a privately funded and provided transportation improvement, other than to require that the improvement be in place prior to resort development. Some TPR provisions, notably OAR 660-012-0060(2)(b), do require findings that a future transportation improvement that is needed to avoid or mitigate a significant effect is funded, but OAR 660-012-0060(2)(b) appears to concern publicly-funded improvements added to the local government's transportation system plan or comprehensive plan. *See* n 8. One key concern embodied in OAR 660-012-0060(2)(b) and other TPR

provisions is that applicants for plan amendments that will significantly affect transportation facilities do not escape responsibility for mitigation or other measures needed to offset the impacts of the amendment, based on unfunded and perhaps idealized future public transportation projects that may never be constructed within the planning period. *See generally* OAR 660-012-0060(4). That concern is not implicated when the applicant is made responsible for funding and providing a needed transportation improvement, and development allowed under the amendment cannot occur absent the improvement. For the same reason, we do not believe that the record must include evidence that the relevant road authority has approved or accepted a privately-funded improvement. If the road authority does not accept the improvement for whatever reason, then as conditioned development allowed under the amendment cannot occur and there is no possible "significant effect."

Petitioner next argues that a map attached to the Kittleson Report omits the Belveron property, and suggests that the Kittleson Report failed to conduct a traffic analysis of resort development of that 179.5-acre property. Record 1237. Intervenors respond that while the map at Record 1237 incorrectly omits the Belveron property, it is clear from other portions of the Report that it included all three properties, totaling approximately 904 acres, in the analysis. Intervenors appear to be correct. Record 1236.

C. Measures Adopted for the DSL Site.

The county relied upon a different 2011 Kittleson Report, called the "DSL Analysis," which identifies several improvements to transportation facilities that would fail if the DSL site is developed. With respect to the Highway 20/Cook Avenue intersection, the DSL Analysis recommended signalization, based apparently on an earlier 2004 Group Mackenzie study. Petitioner argued below that the 2004 study had been revised in 2005 to recommend a $2 million interchange improvement for that intersection, rather than signalization. The county's findings responded to that argument by requiring the applicant to construct the interchange improvements described in the 2005 Group Mackenzie study:

> "Central Oregon LandWatch also has argued the DSL study should not have relied on a December 2004 Group Mackenzie traffic study because that report was significantly revised in 2005. In particular, LandWatch argues that the improvements necessary to mitigate a significant effect at the US 20 and Cook Avenue intersection involve a full interchange rather than signalization. * * * To address LandWatch's concern in addition to the measures identified in Table 3 of the DSL Study, the County adopts, as a measure under OAR 660-012-0060(2), the requirement to construct an interchange as addressed in the 2005 Group Mackenzie study provided by LandWatch (the 'Interchange Requirement'). With respect to LandWatch's concerns regarding the ultimate cost of the interchange, that question is irrelevant to either the significant effect determination under OAR 660-012-0060(1) or the implementation measure under OAR 660-012-0060(2)." Record 209.

On appeal, petitioner cites to an Oregon Department of Transportation (ODOT) draft list of candidate projects at Record 336 that lists a $23 million project described as the "US 20 Tumulo Interchange." Petitioner argues that that expensive project is ODOT's view of what is needed for the Highway 20/Cook Avenue intersection, rather than the $2 million interchange project described in the 2005 Group Mackenzie study. We understand petitioner to argue that the ODOT document undermines the evidentiary support for the county's finding that the improvements identified in the 2011 DSL Analysis and the 2005 Group Mackenzie study are sufficient to mitigate the impacts of a resort on the DSL site and ensure compliance with the TPR.

We do not understand the argument. It is not clear to us that the project described in the ODOT list as the "US 20 Tumulo Interchange" is the same intersection as the Highway 20/Cook Avenue intersection described in the 2005 Group Mackenzie study. Even if we assume it is the same intersection, the ODOT document does not purport to evaluate the impacts of the DSL resort. The ODOT document is apparently a draft list of possible projects that ODOT believes would "reduce traffic congestion, improve freight mobility and enhance safety" if additional revenue were made available. Record 336. The document says nothing about the current or projected performance of the Highway 20/Cook Avenue intersection within the planning period, or any intersection, much less indicate that a $23

million project is necessary to mitigate a performance failure caused by development of a resort on the DSL property. The ODOT document petitioner cites to does not undermine the evidence the county relied upon to conclude that, as conditioned to construct the improvements identified in the DSL Analysis and the 2005 Group Mackenzie study, a resort development at the DSL site as allowed under the eligibility mapping decision is consistent with the TPR.

The second assignment of error is denied.

The county's decision is affirmed.