BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES ROOT and VALERIE ROOT,
Petitioners,

vs.

KLAMATH COUNTY,
Respondent,

and

JWTR, LLC,
Intervenor-Respondent.

LUBA No. 2013-008

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hathaway Koback Connors LLP.

No appearance by Klamath County.

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

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

BASSHAM, Board Member, did not participate in the decision.

AFFIRMED 08/09/2013

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the county amending its comprehensive plan map and zoning map to apply a Destination Resort Overlay to approximately 68,302 acres.

MOTION TO INTERVENE

JWTR, LLC, the applicant below, moves to intervene on the side of the respondent in the appeal. The motion is granted.

FACTS

The challenged decision is the county's decision on remand from *Root v. Klamath County*, 63 Or LUBA 230 (2011) (*Root I*). The decision challenged in *Root I* amended the Klamath County Comprehensive Plan (KCCP) map and zoning map to apply a Destination Resort Overlay (DRO) to approximately 90,000 acres of land owned by intervenor.[1] After our decision in *Root I*, the county held a hearing and adopted Ordinance 44.95, an amendment to the KCCP and county zoning map to apply the DRO to approximately 68,302 acres. This appeal followed.

MOTION TO DISMISS

On February 27, 2013 the Board received a supplemental record in the appeal. On March 8, 2013, the Board issued an order settling the record in this appeal and establishing the briefing schedule. That order was issued prior to the expiration of the deadline for objecting to the supplemental record. On March 7, 2013, petitioners filed an objection to the supplemental record. That objection was filed within the time set forth in OAR 661-010-0026(2) for objecting to the record. However, on April 10, 2013 intervenor moved to dismiss the appeal on the grounds that the Board's March 8, 2013 order established the briefing

[1] As we explained in *Root I*, in Klamath County, lands that have been determined to be eligible for destination resort siting are depicted on the Klamath County Comprehensive Plan (KCCP) map and the Klamath County Land Development Code (KCLDC) zoning map with a Destination Resort Overlay (DRO).

1 schedule and petitioners failed to file the petition for review within the time set forth in that
2 March 8, 2013 order.

3 Intervenor's motion is denied. OAR 661-010-0026(6) provides that an objection to
4 the record automatically suspends the time limits for all further procedures under our rules,
5 including the time limits for filing the petition for review and response briefs that were set
6 out in our March 8, 2013 order.

7 **FIRST ASSIGNMENT OF ERROR**

8 As we explained in *Root I*, ORS 197.455(2) requires the county to ensure that no
9 "tracts" as defined in ORS 197.435(7) that include ineligible lands described in ORS
10 197.455(1) are included on the map of eligible lands, since ORS 197.455(2) makes the map
11 the "sole basis for determining whether tracts of land are eligible for destination resort
12 siting."[2] ORS 197.435(7) provides that "tract" means "a lot or parcel or more than one
13 contiguous lot or parcel in a single ownership." ORS 197.435(7) further provides that "[a]
14 tract may include property that is not included in the proposed site for a destination resort if

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[2] As relevant here, ORS 197.455(1) identifies several categories of land on which a destination resort may not be sited:

> "(1) A destination resort must be sited on lands mapped as eligible for destination resort siting by the affected county. The county may not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas:
>
> "* * * * *
>
> "(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.
>
> "* * * * *
>
> "(e) In an especially sensitive big game habitat area as determined by the State Department of Fish and Wildlife in July 1984 or as designated in an acknowledged comprehensive plan."

the property to be excluded is on the boundary of the tract and constitutes less than 30 percent of the total tract." Like the parties, we refer to this last sentence of the ORS 197.435(7) definition of "tract" as the 30 percent rule.

In *Root I*, we concluded that the county's failure to assess the eligibility of the properties proposed to be included on the map of lands with a DRO on the basis of "tracts," as defined in ORS 197.435(7), required remand. *Root I* at 238. On remand, intervenor's consultant, Rabe Consulting, evaluated the properties proposed to be included on the county's map of lands eligible for destination resort development, and concluded that the original list of properties included seven tracts that should not be included on the map, because more than 30 percent of the tract was made up of ineligible lands. These tracts were removed from the list of properties to be eligible for destination resort development and were removed from the amended map that the county eventually adopted in Ordinance 44.95. Record 117-123; compare Record 408-412. In a December 4, 2012 report, Rabe Consulting explained its methodology for evaluating the proposal's compliance with ORS 197.455(2) and ORS 197.435(7):

> "Rabe Consulting compared the DRO and the land ownership layer for Klamath County. The land ownership layer was accessed via the 'Klamath County On-line Maps' located on the Klamath County Public Works website. The comparison indicated a number of ownership tracts which were more than 30% excluded from the DRO. The DRO tracts which were less than a 30% portion of the ownership tracts were excluded from the DRO. These tracts were tract numbers 16, 17, 28, 29, 30, 32, and 35 on the Tracts List.
>
> "Tract number 43 was revised to depict current land ownership information. The tract was revised into smaller tracts with portions of a different ownership excluded.
>
> "The revised Tract Lists and accompanying large map reflect [the] aforementioned changes. I have included tracts in the proposed Amended Destination Resort Overlay that in my professional opinion, satisfy the requirement in ORS 197.435(7) that any property excluded from a tract be located on the boundary of the tract and constitutes less than 30% of the total tract." Record 117.

Based on Rabe's submissions, the county found:

1 “[T]he Applicant has presented substantial evidence that the Applicant is the
2 sole owner of each tract. [Petitioners] do not present substantial evidence that
3 undermines this conclusion with, for example, deed or assessor’s records
4 indicating that another party owns any part of any tract. * * *

5 “* * * As explained in [Rabe Consulting’s December 4, 2012 report] and
6 summarized above, Applicant has compared the locations of lands owned by
7 Applicant with the locations of the proposed destination resort sites and
8 determined that there were seven (7) tracts where more than 30% of the tract
9 had been excluded. Applicant has revised the proposed map and list of
10 eligible sites to delete these tracts * * *. [Petitioners] do not offer any other
11 specific tracts that do not satisfy the definition of ‘tract.’ For these reasons,
12 the Board denies [petitioners’] contention and find that, as revised, the tract
13 list and map only include ‘tracts’ as defined in ORS 197.435(7).” Record 22-
14 23.[3]

15 In their first assignment of error, petitioners argue that the county’s decision is not
16 supported by an adequate factual base because “there is no clear map which permits a
17 conclusion that * * * [the 30% rule is] satisfied.” Petition for Review 7. According to
18 petitioners:

19 “the County may only demonstrate compliance with the tract statute and the
20 LUBA remand by describing and mapping tracts in their entirety so the map is
21 legible and a reader of the map can determine what portions of the map are
22 excluded (and where these areas are located) to determine compliance with
23 ORS 197.435(7).” *Id.*

24 As a variation on that theme, petitioners argue that there is not an adequate factual base in the
25 record to support the county’s decision because “there is no evidence in the record qualifying
26 Ms. Rabe as a map expert to support her ‘professional opinion’ or that she conducted the
27 review.” Petition for Review 8.

28 We understand petitioners’ arguments in the first assignment of error to allege that
29 there is not an adequate factual base in the record to support the county’s decision because
30 the record does not include a map that shows in totality the locations of intervenor’s land

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[3] Although the county’s phrasing is awkward, we understand the county to have found that the seven tracts that were eventually eliminated from the list of properties proposed to be included on the map were eliminated from the list because each of the properties contained more than 30% of land that was ineligible for inclusion on the map.

ownership within the county in order to demonstrate that the properties included on the map are made up of tracts that include no lands that are ineligible under ORS 197.455 or comply with the 30 percent rule. We disagree. First, nothing in the definition of "tract" in ORS 197.435(7) or any other authority that we are aware of requires the map that petitioners contend is absent from the record. Second, the evidence in the record demonstrates that intervenor's consultant compared the entirety of intervenor's ownership of land within the county, based on the county's ownership database, to the properties proposed for inclusion on the map of eligible lands, and disqualified several properties from inclusion on the map because they included ineligible lands and did not comply with the 30 percent rule. A reasonable person would rely on that evidence to conclude that the properties included on the map are made up of tracts that include no ineligible lands or comply with the 30 percent rule, even where the record does not include any supporting documentation. *Younger v. City of Portland*, 305 Or 346, 752 P2d 262 (1988). Absent a developed argument from petitioners that points to evidence in the record that a specific property or properties were wrongly included on the map because they include tracts that include ineligible land and do not comply with the 30 percent rule, the county's conclusion that the proposed map includes only "tracts" that qualify for inclusion under ORS 197.435(7) is supported by an adequate factual base.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 197.455(1)(e) prohibits destination resorts from being sited in "an especially sensitive big game habitat area as determined by the State Department of Fish and Wildlife in July 1984 or as designated in an acknowledged comprehensive plan." In *Root I*, we concluded that the county's findings were not supported by an adequate factual base where the record of that proceeding included evidence that several of the properties proposed to be included on the map of eligible lands were potentially located in especially sensitive big

game habitat. In the challenged decision, the county concluded that "based on the evidence in [intervenor's submissions to the record] * * * none of the areas proposed to be designated and mapped DRO contain Especially Sensitive Big Game Habitat." Record 30.

Intervenor's consultant evaluated the properties proposed to be included on the map of eligible lands, concluded that approximately 8,200 acres were located in especially sensitive big game habitat area, and removed those properties from the proposed map of eligible lands and from the accompanying list of tracts that are to be eligible of destination resort siting, received by the county on November 15, 2012. Record 346-47. In a letter dated November 27, 2012, petitioners' consultant, Stone, took the position that the proposed map of eligible lands includes properties that "appear" to be located in especially sensitive big game habitat:

> "[L]ands proposed to be made eligible are located in areas that intersect with BGWR habitat despite proposed findings to the contrary. See the attached map[2] which compares selected proposed DRO areas in relation to the 1984 map and shows where said proposed areas appear to be located within ineligible lands." Record 235.

Footnote 2 referenced in the passage quoted above refers the reader to "Root Exhibit 1," and describes Root Exhibit 1 as "a copy of record Exhibit 3 depicting the 1984 map of big game habitat areas excluded from destination resort siting * * * with markups of where proposed DRO areas appear to overlap ineligible areas." Record 235. "Root Exhibit 1" is located at Record 242-43 and is an 8 ½ by 11 copy of a portion of the ODFW 1984 map of especially sensitive big game habitat for the affected area of the county, marked with labels presumably inserted by Stone that read "Proposed DRO" and direct the reader to "See Exhibit 4." There is no "Exhibit 4" in the submissions from Stone.[4]

[4] Stone's submission includes "Exhibit 4A" at Record 256 that is titled "Mapping Error Example * ** Example of Non-Compliance with ORS 197.445(7) Tract Exclusion More than 30%," and "Exhibit 4B" at Record 257 that is titled "Example of Non-Compliance with ORS 197.445(7) Tract Issue." Presumably the reference to "ORS 197.445(7) Tract Issue" is a reference to ORS 197.435(7) definition of "tract," since ORS 197.445(7) does not use the word "tract" at all.

In the second assignment of error, we understand petitioners to argue that the November 27, 2012 Stone letter provides evidence that the proposed map of eligible lands includes lands that are prohibited from inclusion under ORS 197.455(1)(e), and for that reason the county's conclusion to the contrary is not supported by an adequate factual base, because intervenor failed to rebut Stone's evidence. Petitioners also argue that the county's findings are inadequate to explain why the county chose to rely on intervenor's evidence rather than on the evidence introduced in the Stone letter.

Intervenor responds that the Stone letter does not provide evidence that any of the properties that were included on the map of eligible lands are located in especially sensitive big game habitat because the letter draws only "broad generalizations from a dated, black and white map." Response Brief 11. Intervenor also responds that petitioners have not identified any of the specific properties that are included on the final map that petitioners contend are located in especially sensitive big game habitat.

We agree with intervenor that it was reasonable for the county to rely on intervenor's evidence in determining that none of the properties proposed to be included on the map of eligible lands are located in especially sensitive big game habitat. The Stone letter does not provide any conclusive evidence that the proposed map of eligible lands includes properties that are located in especially sensitive big game habitat. Rather, the Stone letter takes the position that there are properties that "appear" to be located in especially sensitive big game habitat, without specifically identifying any of the properties.

Additionally, prior to the time the Stone letter was introduced into the record, intervenor's consultant prepared and submitted a map into the record that delineates the location of especially sensitive big game habitat based on the ODFW map, and that map is at a sufficiently large scale that it shows the location of big game habitat based on individual township and range numbers. Exhibit 18 to Remand Findings of Fact and Conclusions of Law, Oversized Map of Eligible Lands (Retained Exhibit dated October, 2012). Sometime

1 around December 4, 2012, intervenor's consultant also prepared and submitted into the
2 record a revised large scale map that shows the location of big game habitat based on
3 individual township, range, and section numbers. Exhibit 18 – Replacement Page, December
4 2012 (Retained Exhibit dated December 2012). Stone's submission could have, but did not,
5 point to specific properties that are located in especially sensitive big game habitat, based on
6 intervenor's large scale map submissions. Instead, Stone's submission relied on a marked up
7 version of an extremely small scale ODFW map that does not clearly show that any of the
8 properties proposed for inclusion are located in especially sensitive big game habitat. It is
9 simply not possible to tell from looking at "Root Exhibit 1" whether any of the properties
10 proposed to be included on the map are in fact located in especially sensitive big game
11 habitat. Absent any more detailed evidence from Stone, we do not think that a reasonable
12 decision maker would understand Stone's November 27, 2012 letter or maps to contain
13 evidence that any of the properties proposed to be included were located in especially
14 sensitive big game habitat. Accordingly, we agree with intervenor that the county's decision
15 is supported by an adequate factual base, that it was reasonable for the county to rely on
16 intervenor's maps, and that the county did not err in failing to address Stone's November 27,
17 2012 submission specifically.

18 The second assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR**

20 In *Root I*, we explained:

21 "As a general rule, post-acknowledgment plan amendments (PAPAs) such as
22 the proposed amendment to the KCCP map must comply with the statewide
23 planning goals, including Goal 5. ORS 197.175(2); 197.835(6) and (7). The
24 Land Conservation and Development Commission (LCDC) has adopted an
25 administrative rule that specifies the circumstances in which a local
26 government is obligated to apply Goal 5 when adopting a PAPA. OAR 660-
27 023-0250(3) provides in relevant part:

> "'Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "' * * * * *
>
> "'(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"
>
> "To summarize, under the above rule, a local government must apply Goal 5 if the PAPA 'would affect a Goal 5 resource.' Under OAR 660-023-0250(3), the threshold question is whether the county was required to apply Goal 5 in adopting the proposed amendments because the challenged decision allows new uses that could conflict with an inventoried Goal 5 resource." 63 Or LUBA at 245 (footnote omitted).

In *Root I*, we sustained the petitioner's assignment of error that the county's finding that Goal 5 did not apply to the proposed PAPA was not supported by an adequate factual base where a map in the record called into question the evidence that the county relied on to reach its conclusion that none of the properties proposed to be included on the map were located in especially sensitive big game habitat, an inventoried Goal 5 resource in the county.[5] As described above, on remand, intervenor removed properties located in especially sensitive big game habitat from the list and map of properties proposed to be eligible for destination resort development.

In its third assignment of error, petitioners argue that the county's decision that Goal 5 does not apply to the proposal is not supported by an adequate factual base because the county failed to compare the location of "other inventoried Goal 5 resources" to the properties proposed to be included on the map to determine whether there is a conflict. Petition for Review 12. Petitioners argue that "[t]he only way the County can [determine whether a new destination resort conflicts with an inventoried Goal 5 resource] is to develop

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[5] As we understand it, the county-inventoried Goal 5 resource is called "Big Game Winter Range" (BGWR) and the location of BGWR is concurrent with the location of "especially sensitive big game habitat" shown on the ODFW 1984 map.

1 a composite map to determine whether any County inventoried Goal 5 resource conflicts with
2 a proposed DRO area." *Id*. Petitioners argue that "LUBA should remand the County's
3 decision for the County to provide a Goal 5 examination of all inventoried Goal 5 resources."
4 Petition for Review 13.

5 The problem with petitioners' argument is that petitioners do not identify any
6 inventoried Goal 5 resource that the proposed post-acknowledgement plan amendment
7 "would affect." OAR 660-023-0250(3). Absent a developed argument from petitioners that
8 identifies an inventoried Goal 5 resource that the proposed amendment would affect,
9 petitioners' argument in the third assignment of error provides no basis for reversal or
10 remand of the decision. *Dougherty v. Tillamook County*, 12 Or LUBA 20, 33 (1984) ("[o]ne
11 who challenges a land use decision is obligated to do more than simply assert the
12 decisionmakers reached the wrong conclusion. Specific grounds of error must be set forth
13 and explained") (*citing Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220
14 (1982)).

15 The third assignment of error is denied.

16 **FOURTH ASSIGNMENT OF ERROR**

17 In *Root I*, we sustained the petitioner's assignment of error that the county's
18 application of OAR 660-012-0060 was inconsistent with the rule and with *Willamette Oaks,*
19 *LLC v. City of Eugene*, 232 Or App 29, 36, 220 P3d 445 (2009).[6] We recognized the

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[6] We explained:

> "Statewide Planning Goal 12 (Transportation) and OAR 660-012-0060(1) (the Transportation Planning Rule or TPR) require in relevant part that if the county's amendment to its comprehensive plan and zoning maps to add properties to the map of eligible lands would 'significantly affect' a transportation facility, 'the [county] shall put in place measures as provided in [OAR 660-012-0060(2)] to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility.' The county must determine, prior to approving the proposed amendment, whether the proposed comprehensive plan amendment would have a significant effect on transportation facilities. *Willamette Oaks v. City of Eugene*, 232 Or App 29, 36, 220 P3d 445 (2009). If the amendment would have a significant effect, the county

1 difficulty in complying with OAR 660-012-0060 in the context of a large scale plan or land
2 use regulation amendment, where it is not possible to accurately predict the future effects of
3 development on transportation facilities. *Root I* at 257-58 (Holstun, Board Member
4 concurring). We posited that the county could comply with OAR 660-012-0060 if, in the
5 decision approving the amendment to the KCCP map, the county also adds an overlay district
6 that prohibits development of a destination resort on any of the properties until the overlay
7 district is removed through a future PAPA.[7]
8 On remand, the county imposed a condition of approval that delays the effectiveness
9 of Ordinance 44.95 until the county adopts a separate ordinance that adds an overlay district
10 to the same properties that are added to the county's DRO maps in Ordinance 44.95.[8] In the

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must put into place measures described in OAR 660-012-0060(2) or (3), as applicable." *Root I* at 249-50 (footnote omitted)

[7] We posited:

> "A potential solution to the practical problem of addressing the TPR in the context of a large scale plan or land use regulation amendment, where it is not possible to accurately predict development effects on transportation facilities, could be that the local government impose an overlay on the amended plan and zoning map designations that prohibits development of the properties. To remove the overlays would require a post-acknowledgement plan and/or land use regulation amendment (PAPA) that would trigger application of the TPR. Under this approach, the county could find, accurately, that the initial plan amendment is not a plan amendment that *allows* uses potentially inconsistent with the capacity, etc. of transportation facilities, because it effectively authorizes no new land uses, and thus the initial plan amendment does not, as a matter of law, significantly affect any transportation facility. The plan amendment that significantly affects facilities is the one that authorizes uses potentially inconsistent with the capacity, etc. of transportation facilities, which would be the subsequent plan amendment removing or modifying the overlay zone that prohibits development." *Root I* at 254 n 15.

[8] Ordinance 44.95 includes the following condition of approval:

> "This decision is final for purposes of appeal but shall not be effective for purposes of amending the [KCCP] Map and the Klamath County Land Development Code Map to add approximately 68,302 acres to the Plan and zoning maps until such time as the County imposes the Limited Use ('LU') Overlay zoning district to those same properties in a post-acknowledgement plan amendment proceeding and provides in that post-acknowledgement plan amendment proceeding that the LU Overlay zone shall not allow any new uses allowed by the destination resort overlay designation until such time as the LU is removed in a subsequent post-acknowledgement plan amendment proceeding that demonstrates compliance with the then-applicable provisions of the TPR. The effect of this condition is that no new uses are allowed by this decision and, therefore, as a matter of law pursuant to OAR 660-012-0060(1), this decision does not significantly affect any transportation facility." Record 32.

fourth assignment of error, petitioners argue that the county's use of the Limited Use (LU) overlay zone in KCLDC Article 59.8 is not effective to limit development of a destination resort on the properties added to the DRO maps by Ordinance 44.95, because the LU overlay zone only applies to limit uses allowed in the *underlying* zone, and does not limit uses allowed in another *overlay* zone, such as the DRO.

Intervenor responds that petitioners' challenge to the effectiveness of the county's LU overlay zone in limiting development of the properties is not ripe for review, because Ordinance 44.95 does not impose the LU overlay zone on the properties. As intervenor explains:

> "[T]he county may never impose the LU Overlay zone on the Eligible Lands. Alternatively, the County may impose the LU Overlay zone in the future, but it may wait to do so after making legislative amendments to the KCLDC to address petitioner's concern." Response Brief 24.

We agree with intervenor that it is premature for us to address petitioners' challenges to availability of the LU overlay zone to limit development allowed by the DRO, since the county has not yet imposed the LU overlay zone on the properties that are the subject of Ordinance 44.95.

We do not reach the fourth assignment of error.

The county's decision is affirmed.