BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS BISHOP, DORBINA BISHOP,
TRUSTEES OF THE BISHOP
FAMILY TRUST,
*Petitioners*,

and

PAUL LIPSCOMB, ARCHIE BLEYER,
KEN GRAHAM, GISELA RYTER,
JANET SLEATH, PAUL SLEATH,
CENTRAL OREGON LANDWATCH,
ROY DWYER, SUSAN STRAUSS,
JEFF COUGHENOUR and SUSAN COUGHENOUR,
*Intervenors-Petitioners*,

vs.

DESCHUTES COUNTY,
*Respondent*,

and

TANAGER DEVELOPMENT, LLC,
and KC DEVELOPMENT GROUP, LLC,
*Intervenors-Respondents*.

LUBA Nos. 2018-111 and 2018-112

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jennifer M. Bragar, Portland, filed a petition for review and argued on

behalf of petitioners. With her on the brief was Tomasi Salyer Martin PC.

Carol E. Macbeth, Bend, filed a petition for review and argued on behalf of intervenor-petitioner Central Oregon Landwatch.

Roy Dwyer, Bend, filed a petition for review on his own behalf. With him on the brief was Dwyer Williams Cherkoss.

Paul Lipscomb, Archie Bleyer, Ken Graham, Gisela Ryter, Janet Sleath, Paul Sleath, Susan Strauss, Jeff Coughenour and Susan Coughenour, Bend, represented themselves.

No appearance by Deschutes County.

Liz Fancher, Bend, filed a response brief and argued on behalf of intervenor-respondent KC Development Group, LLC.

J. Kenneth Katzaroff, Bend, filed a response brief and argued on behalf of intervenor-respondent Tanager Development, LLC.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 05/01/2019

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 two decisions by the board of county commissioners (BOCC) that approve construction of two reservoirs on land within deer winter range.

## REPLY BRIEF

Petitioners (Bishops) and intervenors-petitioners Roy Dwyer (Dwyer) and Central Oregon Landwatch (COLW) move to file a joint reply brief. Intervenors-respondents Tanager Development, LLC (Tanager), and KC Development Group, LLC (KCDG) (jointly, intervenors), oppose the reply brief, arguing that portions of the reply brief are not limited to "new matters" raised in the response brief. OAR 661-010-0039 (2017). We agree with intervenors. The Board shall not consider Sections I and III of the reply brief, but will consider Section II, which responds to allegations of waiver raised in the response briefs.

## FACTS

The property that is the subject of these appeals consists of a tract of 12 parcels zoned Rural Residential 10-acre minimum (RR-10). The tract is also subject to the county Wildlife Area (WA) combining zone, an overlay zone implementing Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) that protects deer winter range. The WA zone was applied to the property in 1992, at a time when the property was zoned Surface Mining (SM) and the site of a large aggregate mining operation. In 2007,

after the mining pits were closed and reclaimed, the property was rezoned RR-10.

In March 2014, KCDG excavated the reclaimed mining pits in order to construct two reservoirs, each lined with impervious surfaces. The southern reservoir has a capacity of 68 acre-feet of water, is shaped as a long oval, and is constructed with islands, ramps, a dock and pilings to support three boathouses. The southern reservoir is designed to be used as a tournament-style water-skiing, wake-boarding and wake-surfing lake. The northern reservoir has a capacity of 57 acre-feet of water, is round in shape, includes three docks, and is designed for passive recreational activities such as fishing and swimming. Based on conversations with county planning staff, KCDG did not believe that excavation and construction of the reservoirs required county land use approvals, and did not seek or obtain any such approvals. However, in August 2014, a county building official issued a stop work order for construction of a marina and boathouses without a building permit. Record 9444.

In May 2014, KCDG filled the reservoirs with water obtained from the Tumulo Irrigation District (TID). To obtain state agency approval to transfer the water, in August 2014, KCDG filed an application with the county for a land use compatibility statement (LUCS), seeking a determination that the proposed transfer, storage and use of the TID water is consistent with the county's land use regulations (2014 LUCS Decision). County staff initially concluded that the water transfer and proposed use of the reservoirs required no county land use

review or approvals. However, after the LUCS decision was appealed to the hearings officer, on October 10, 2014, county staff issued a notice of violation to KCDG for operating a "recreation-oriented facility" without required land use approval. The hearings officer, and ultimately the BOCC, determined that the construction and proposed use of the reservoirs requires county land use approvals. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015) (affirming the BOCC's decision to that effect). Subsequently, KCDG ceased use of the two reservoirs for recreational and irrigation purposes.

In April 2015, KCDG and TID filed conditional use permit applications seeking retroactive land use approval to excavate, construct and use the two reservoirs for two distinct land uses that are listed as conditional uses in the RR-10 zone. The first is a large-acreage recreation-oriented facility (ROF); the second is for a conditional use permit to engage in surface mining to construct a reservoir in conjunction with an irrigation district (SMCUP). In 2016, the county denied the applications for a ROF and SMCUP on several grounds, concluding in part that the uses could not be approved unless and until the site was added to the county's comprehensive plan inventory of non-significant mineral and aggregate sites, which would require a post-acknowledgment plan amendment (PAPA). We refer to this decision as the 2016 Denial. The 2016 Denial also denied the ROF application for failure to comply with some of the standards applicable to a ROF. The Bishops appealed the 2016 Denial to LUBA, but

ultimately sought dismissal of that appeal, which LUBA dismissed. *Bishop v. Deschutes County*, __ Or LUBA __ (LUBA No 2016-023, Apr 12, 2016).

Subsequently, in May 2017, the Bishops filed an action for declaratory and injunctive relief in circuit court, seeking in part to enforce the 2016 Denial and obtain a circuit order requiring that the two reservoirs be removed and the site restored to its former state.

In July 2017, intervenors filed two applications resulting in the two decisions currently before LUBA in these appeals. The first application, filed by Tanager, sought approval of a 10-unit residential planned unit development (PUD), sought to retroactively authorize construction of the reservoirs and associated development and sought a conditional use permit (CUP) to use the two reservoirs as a private large-acreage ROF. Much of the proposed PUD area consists of open space, to be managed under a wildlife management plan. However, the two reservoirs are not located within the boundaries of the proposed PUD, and their use as a private recreational facility would be subject to a separate management agreement.

The second application, filed by KCDG, sought (1) a PAPA to include the site of the two reservoirs on the county's inventory of non-significant mineral and aggregate resources, (2) CUP approval to excavate and construct the two reservoirs as facilities used in conjunction with TID's irrigation system, and (3) approval to fill the reservoirs with TID water. Each application is intended to

stand as an independent basis to approve excavation, construction and use of the two reservoirs.

The county hearings officer conducted a consolidated hearing on the two applications and, on February 7, 2018, issued a decision approving the applications. The applicants, the Bishops and COLW all filed appeals of the hearings officer's decision to the BOCC.

Meanwhile, on October 2, 2017, with the two land use applications still pending before the county, the circuit court dismissed the Bishops' action for declaratory and injunctive relief for lack of subject matter jurisdiction. On October 31, 2017, the Bishops appealed that circuit court decision to the Court of Appeals, where the appeal is currently pending. *Bishop v. KC Development Group, LLC* (A166238). For convenience, we sometimes refer to the circuit court decision and the associated appeal as the 2017 Circuit Court litigation.

On August 23, 2018, the BOCC approved each application, in separate decisions issued the same date. The decision approving Tanager's applications for PUD/ROF approval is referred to here as the ROF Decision. We refer to the decision approving KCDG's applications for a PAPA and surface mining permit allowing excavation and construction of reservoirs for storing irrigation water as the Excavation Decision.

These appeals followed.

## INTRODUCTION

As noted, intervenors presented the county with two legal theories for retroactive approval to excavate and construct the two reservoirs. Excavation of the two reservoirs involved digging tons of rock, an activity that generally constitutes "surface mining" as defined at Deschutes County Code (DCC) 18.04.030. "Surface mining" is a use category that is not allowed in the RR-10 zone, with one exception discussed below. Intervenors' first theory for approval to excavate the two reservoirs is that such approval is subsumed into the approval of the two reservoirs as "recreation-oriented facilities," a conditional use allowed in the RR-10 zone. DCC 18.60.030(G). If so, intervenors argued to the county, the reservoirs qualify for an exception to the definition of "surface mining" included in DCC 18.04.030(A) for mining activities necessary for "on-site construction" of a use allowed in the RR-10 zone.

Approval of the reservoirs as ROFs would not authorize filling the two reservoirs with TID water for irrigation district purposes. Construction and use of reservoirs in conjunction with an irrigation district is a conditional use in the RR-10 zone under DCC 18.60.030(W). In the 2016 Denial, the county determined that a proposal to construct and use the reservoirs in conjunction with an irrigation district under DCC 18.60.030(W) required an additional land use approval, specifically a PAPA to add the site to the county's inventory of non-significant mineral and aggregate sites. Accordingly, intervenors filed a separate application proposing the excavation and use of the two reservoirs under DCC

18.60.030(W), with associated applications for a PAPA and SMCUP. As noted, the county approved both applications in separate decisions.

The Bishops' two assignments of error, and COLW's first assignment of error, present challenges that apply to both decisions. COLW's second assignment of error, and Dwyer's second assignment of error focus on challenges to the ROF decision. Dwyer's first and third assignments of error focus on challenges to the Excavation decision, as does COLW's third assignment of error. Where the findings supporting each decision overlap regarding specific issues, we cite and quote primarily from the ROF decision. In addition, because the various petitions for review and response briefs incorporate and adopt arguments in other petitions for review and response briefs, for convenience we sometimes refer broadly to "petitioners" to include both petitioners and intervenor-petitioners, and "intervenors" to include both intervenors-respondents.

**FIRST ASSIGNMENT OF ERROR (Petitioners)**

Petitioners contend that the county exceeded its jurisdiction in processing and approving the applications resulting in the ROF and Excavation decisions. ORS 197.835(9)(a)(A). According to petitioners, the filing of the 2017 Circuit Court litigation vested the circuit court with exclusive authority to resolve the matters that fell within that pleading, which challenge the legality and continued existence of the two reservoirs, for which the present decisions provide retroactive land use approval. The Bishops argue that the county has no authority to process or approve any land use applications approving the excavation,

construction or use of the two reservoirs until the 2017 Circuit Court litigation and the associated appeal to the Court of Appeals are fully resolved.

Alternatively, petitioners argue that if LUBA concludes that the county did not exceed its jurisdiction in processing and approving the applications, LUBA should nonetheless recognize that LUBA's scope of review over the present appeals is limited by the fact that the Bishops' appeal of the circuit court decision is currently pending before the Court of Appeals.[1] Petitioners suggest that under these circumstances LUBA's scope of review over the two challenged decisions is so limited "as to render any useful opinion on these Decisions a near impossibility." Petition for Review 25.

KCDG responds, initially, that petitioners raised below only the issue that the 2017 Circuit Court litigation deprived the county of authority to process the applications. KCDG argues that petitioners did not argue that the appeal of the 2017 circuit court decision that is currently pending before the Court of Appeals

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[1] Petitioners previously filed a motion to suspend these appeals pending the final outcome of the Court of Appeals' proceeding on the 2017 Circuit Court litigation and any subsequent circuit court proceedings if the Court of Appeals remands to the circuit court. LUBA denied the initial motion and petitioners' motion for reconsideration. *Bishop v. Deschutes County*, __ Or LUBA __ (LUBA Nos 2018-111/112, Order, Oct 12, 2018); *Bishop v. Deschutes County*, __ Or LUBA __ (LUBA Nos 2018-111/112, Order, Nov 16, 2018). On April 12, 2019, petitioners and intervenors-petitioners jointly filed renewed motions to suspend these appeals. The renewed motions offer no basis for suspending these appeals that we have not already considered and rejected. Accordingly, the renewed motions are denied.

also affects the county's authority to process the applications, or LUBA's scope of review. ORS 197.763(1). Petitioners reply, and we agree, that because the circuit court and the Court of Appeals' proceedings are part of the same proceeding, and because the legal arguments concerning the impact on the county's authority and our scope of review are essentially identical, and because the county adopted findings in both decisions noting the issue at Record 48, petitioners adequately raised below the issue presented in their first assignment of error.

On the merits, KCDG argues that petitioners have not established that either the 2017 Circuit Court litigation or the Court of Appeals' proceeding has the effect of depriving the county of authority to process the two land use applications or issue the two land use decisions before LUBA. We agree with KCDG. While there are statutes that operate to deprive a local government of authority to issue a land use decision on a land use application once a certain type of mandamus action is filed in circuit court, those statutes do not apply in the present case, and no statute cited to us would so operate in the present circumstances. ORS 197.825(1) grants LUBA exclusive authority to review local government land use decisions. ORS 197.825(3)(a) provides that, notwithstanding LUBA's exclusive jurisdiction under ORS 197.825(1), circuit courts retain jurisdiction to "grant declaratory, injunctive or mandatory relief in * * * proceedings brought to enforce the provisions of an adopted comprehensive

plan or land use regulations[.]"[2] Whether the 2017 Circuit Court litigation falls within the scope of the circuit court's jurisdiction under ORS 197.825(3)(a) is presumably the precise issue now pending before the Court of Appeals. Regardless of how that issue is ultimately resolved, petitioners in the present appeals cite nothing in ORS 197.825 or elsewhere suggesting that even if the circuit court properly exercises jurisdiction over an action for declaratory and injunctive relief regarding alleged illegal use of property, that the local government thereby is deprived of jurisdiction to process and take action on land use applications that seek required land use approvals for that same property, even if those applications seek land use approvals for the same conduct or development that is at issue in the circuit court proceeding.

The crux of petitioners' argument is that the issues and relief sought in the circuit court action regarding the legality and existence of the reservoirs are

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[2] ORS 197.825(3) provides:

> "Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:
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> "(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015 (10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and
>
> "(b) To enforce orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order."

"inextricably bound" to the issues and development approvals sought in the two land use applications to retroactively approve the two reservoirs. Petition for Review 12. Petitioners argue that if they ultimately succeed in obtaining the full relief requested of the circuit court—the removal of the two reservoirs—that that relief would render the county's land use decisions (and LUBA's review) moot. However, that argument fundamentally misstates the nature of the circuit court's enforcement authority under ORS 197.825(3)(a) and the local government's authority (and obligation) to process land use applications before it, including determining whether proposed uses and development are allowed by local land use regulations.

The circuit court's ruling in an enforcement action of this kind is based on a snapshot of the subject property and the legal terrain as of a given point in time. Further, under existing precedent, petitioners' position in their declaratory ruling action, that no reservoirs could possibly *ever* be approved in the future on the subject property under the county's current land use legislation, is a declaration that the circuit court would almost certainly lack jurisdiction to issue. *See Grabhorn v. Washington County*, 255 Or App 369, 297 P3d 524 (2013) (circuit court properly dismissed action for declaratory ruling and injunctive relief that asked the court to issue a land use decision, in that case to declare that a 1991 county LUCS provided the requisite local land use authority to obtain a new state agency permit to operate a landfill); *see also Sauvie Island Agr. League v. GGS (Hawaii), Inc.,* 107 Or App 1, 6, 810 P2d 856 (1991) (circuit court lacked

jurisdiction over declaratory judgment action seeking declaration that county's approval of conditional use for development of golf course had expired pursuant to county zoning ordinance).[3] Even if the circuit court granted the full injunctive relief requested, and ordered the removal of the two existing reservoirs, that would not preclude the county from thereafter approving a land use application seeking construction or reconstruction of the reservoirs under the applicable land use regulations.

The cases that petitioners cite in support of their jurisdictional argument are largely inapposite or, indeed, support the opposite proposition. The closest case in its posture and legal circumstances is *Rogue Advocates v. Board of Com'rs of Jackson County*, 277 Or App 651, 372 P3d 587 (2016), *rev dismissed,* 362 Or 269 (2017), in which the Court of Appeals affirmed a circuit court decision dismissing an enforcement action for lack of jurisdiction under ORS 197.825(3)(a). Like petitioners' action, the plaintiffs in *Rogue Advocates* sought declaratory and injunctive relief to enforce against a use of land that, at that point in time, lacked required land use approvals (in that case, the landowner had unsuccessfully sought verification of the use as a lawful nonconforming use and floodplain development permits). The Court of Appeals adopted a narrow

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[3] We discuss and reject below COLW's argument that the 2016 Denial binds the county, under the doctrines of claim or issue preclusion, to preclude approval of any future applications seeking to authorize the two reservoirs.

reading of ORS 197.825(3)(a), finding that that the circuit court did not have jurisdiction over claims that are subject to pending land use decisional processes.

The Oregon Supreme Court accepted review, but ultimately dismissed the appeal as moot because the landowner had subsequently abandoned the nonconforming use. *Rogue Advocates*, 362 Or 269. Petitioners rely upon a concurrence by Justice Walters for the proposition that circuit court jurisdiction under ORS 197.825(3)(a) can be concurrent with local government jurisdiction over land use applications, and that circuit court jurisdiction to enforce local government land use regulations is not defeated by the fact that the property owner could, in the future, file applications for land use approval. *Id.* at 276.

First, while Justice Walters' concurrence may provide persuasive precedent, it is not controlling law on circuit court jurisdiction to enforce land use ordinances ORS 197.825(3)(a). Moreover, Justice Walters' concurrence does not stand for the proposition that petitioners advance in this appeal: that circuit court exercise of concurrent jurisdiction over a declaratory judgment and enforcement action means the county is thereby divested of jurisdiction to process new land use applications approving the land use against which enforcement is sought or that, by extension, LUBA should decline to exercise its review function over that land use decision. Indeed, Justice Walters explicitly stated the opposite:

> "As I read ORS 197.825, a circuit court would have jurisdiction to declare that a landowner's use of property is in violation of a land use regulation or a LUBA order and to enjoin that use, even if the

> landowner could, in the future, obtain a land use decision from a local government or LUBA that would permit that use. *The commencement of an action in circuit court would not preclude the landowner from seeking such permission.* Nothing in ORS 197.825 limits LUBA review jurisdiction to instances in which there is no pending or potential enforcement proceeding before a circuit court. And the obverse is also true: nothing in ORS 197.825 limits the circuit court's enforcement jurisdiction to situations in which there is no pending or potential land use proceeding before a local governmental body or LUBA. Nor does the wording of the statute in any way suggest that parties must exhaust their rights or take advantage of opportunities to obtain local governmental land use decisions or review of such decisions by LUBA before bringing circuit court enforcement actions." *Id.* at 277 (emphasis added).[4]

In sum, we disagree with petitioners that petitioners' filing their action in circuit court resulted in divesting the county of authority to issue the land use decisions challenged in this appeal.

We turn to petitioners' alternative argument, that LUBA's scope of review over these appeals has been reduced to the point of futility by exercise of the Court of Appeals' appellate jurisdiction over the circuit court decision dismissing petitioners' enforcement action. We addressed similar arguments in denying petitioners' motions to suspend the current appeals, pending resolution of the Court of Appeals' proceeding and any subsequent circuit court proceedings on

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[4] Justice Walters goes on to discuss how, in the event that concurrent jurisdiction exists, the circuit court's exercise of its jurisdiction over an enforcement action could be circumscribed to avoid conflict with local land use proceedings. For example, the circuit court could limit relief to enjoining the disputed land use pending the outcome of the local land use proceedings. *Id.* at 281.

remand. *See* n 1. As before, petitioners have not persuaded us that our review of the merits of petitioners' challenges could conflict in some way with any dispositions that could arise from either the Court of Appeals, or any subsequent circuit court proceeding on petitioners' action for declaratory and injunctive relief. As explained above, even if petitioners ultimately obtain the requested injunctive relief from the circuit court, a circuit court order granting that relief would have no impact on the county's authority to process land use applications seeking approval to construct or reconstruct the disputed reservoirs. And as also explained above, petitioners' action for a declaratory ruling that no reservoirs could possibly be approved is a declaration that the circuit court would almost certainly decline to issue for lack of subject matter jurisdiction.

Stated differently, the two decisions before us do not simply provide *retroactive* approval of the existing reservoirs, as existing structures; they authorize the excavation and construction of those reservoirs under the applicable land use regulations, even if those reservoirs did not already exist. In other words, even if the circuit court ordered intervenors to drain the reservoirs and restore the land to the *status quo ante*, that would not preclude the county from issuing land use approvals that authorize intervenors to excavate and construct those reservoirs. For the same reason, the possibility that in a future proceeding the circuit court might grant the fullest extent of petitioners' requested relief does not, as far as petitioners have established, either require or counsel that LUBA limit our scope of review over these appeals.

The first assignment of error (Petitioners) is denied.

**SECOND ASSIGNMENT OF ERROR (Petitioners)**

DCC 22.20.015 generally prohibits the county from approving any application for land use development if the property involved is "in violation of applicable land use regulations," unless the approval "results in the property coming into full compliance with all applicable provisions of the federal, state, or local laws, and Deschutes County Code[.]"[5]

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[5] DCC 22.20.015 provides, in relevant part:

> "A. Except as described in (D) below, if any property is in violation of applicable land use regulations, * * * the County shall not:
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> "1. Approve any application for land use development,
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> "2. Make any other land use decision, including land divisions and/or property line adjustments;
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> "3. Issue a building permit.
>
> "* * * * *
>
> "C. A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement (VCA).
>
> "D. A permit or other approval, * * * may be authorized if:
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> "1. It results in the property coming into full compliance with all applicable provisions of the federal, state, or local laws, and Deschutes County Code, including

Petitioners argue that the subject property has been determined in several county decisions, most notably the 2014 LUCS and the 2016 Denial, to "not be in compliance" with county land use regulations due to the lack of required county land use approvals, and therefore the county can approve the two applications at issue in this appeal only if the approvals result in the property coming into full compliance with all applicable federal, state, and local laws and regulations. Petition for Review 45-46. Petitioners contend that the county erred in concluding that no county decisions have determined that the subject property is not in compliance with county land use regulations, and argue that there are no findings or evidence that the approvals result in full compliance with all applicable federal, state and local laws and regulations.

As we understand petitioners' arguments, the primary "violation" at issue here is the failure to obtain required county land use approvals to construct and use the reservoirs.[6] The 2014 LUCS decision determined that excavation, construction and use of the reservoirs for the proposed recreational or irrigation purposes requires county land use approvals. However, the county's findings

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> sequencing of permits or other approvals as part of a voluntary compliance agreement[.]"

[6] The county adopted findings addressing allegations of other types of code violations, *e.g.*, stockpiling of crushed rock in alleged violation of a crushing permit, and concluded that there are no existing code violations on the subject property. Record 46-47. We do not understand petitioners to challenge those findings with respect to any alleged violations other than the failure to obtain required land use approvals.

take the position that the 2014 LUCS and other county determinations that land use approvals are required do not constitute a determination of a "violation," for purposes of DCC 22.20.015. For example, the findings state that, while the 2014 LUCS found that "conditional use land use approvals would be needed in order for the reservoirs to be used for water skiing or irrigation district reservoir use," the 2014 LUCS "did not find that the excavation of the reservoirs was unlawful."[7] Record 46. Similarly, with respect to the 2016 Denial, the BOCC concluded that that decision "simply determined that the property did not qualify for approval of the requested uses based on the submitted proposal and then applicable law," and made no determinations regarding violations on the subject property.[8] Record 48.

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

> "County code enforcement staff has confirmed that no building permit or code violations currently exist on the subject property. Prior code complaint matters have been closed.
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> "The Bishops argued that prior County decisions have determined that the subject property is in violation of County land use regulations. The 2014 LUCs decisions found that conditional use land use approvals would be needed in order for the reservoirs to be used for water skiing or irrigation district reservoir use but they did not find that the excavation of the reservoirs was unlawful." Record 46.

[8] The findings continue:

> "No prior decision of the County has determined that the subject property is in violation of the County code and no [Voluntary Compliance Agreement] VCA has been signed by KCDG, the property owner and alleged violator. No member of County staff, its

The county's findings explain that DCC 22.20.015 is intended to be remedial in nature, to incentivize landowners to bring their property into compliance with all applicable code requirements, not to punish code violators.[9] We understand the

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hearings officer or the BOCC has made a determination of noncompliance through the review process of the current application.

"The Bishops argue that the prior denial of conditional use permits for surface mining in conjunction with TID and for operation of a recreation oriented facility for water skiing on the south reservoir determined that KCDG was in violation of the County code. This is incorrect. No such determination was made in the decision of denial. The County simply determined that the property did not qualify for approval of the requested uses based on the submitted proposal and then applicable law." Record 47-48.

[9] The BOCC findings state:

"A number of comments were received arguing that the County must deny or refuse to process the current applications due to the provisions of DCC 22.20.015. This is not, however, a correct reading of the code. The purpose of this provision is to achieve compliance with the code, not to deny applications as a punishment for code violators. If a violation exists, as defined by the code, the County may approve the application if approval will address or remedy the violation.

"The Bishops and several other parties have argued that the subject property has existing code violations. The BOCC disagrees. A violation must exist before the other provisions of DCC 22.20.015 are operative. A violation, as the term is defined by DCC 22.20.015 (C), exists only if a prior decision or the review process of the current application determines that a violation exists or if the applicant has acknowledged a violation in a signed voluntary compliance agreement. In this case, no prior decision has

BOCC to interpret DCC 22.20.015 to the effect that a decision that (1) determines only that existing development requires land use approvals, or (2) denies an application to approve that existing development, does not constitute a determination that the development "violates" the land use code for purposes of DCC 22.20.015.

The BOCC's code interpretations are entitled to a deferential standard of review under ORS 197.829(1)(a)-(c), and must be affirmed unless we conclude that the interpretation is inconsistent with the express language, purpose or policy underlying the code provision.[10] *See also Siporen v. City of Medford*, 349 Or

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determined that a violation exists and no finding of violation has been made in the review of the pending land use applications. Although DCC 22.20.015(C) authorizes the BOCC to make a finding of violation as a part of this review, it does not require the BOCC to do so." Record 250.

[10] ORS 197.829(1) provides:

"[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

247, 252, 243 P3d 776 (2010) (LUBA must affirm a governing body's code interpretation under ORS 197.829(1)(a)-(c) unless the interpretation is implausible). We understand the county to interpret DCC 22.20.015 to the effect that such decisions would constitute determinations of a "violation" only if they concluded that the existing development was "unlawful," *i.e.*, prohibited by the current land use code or a use that cannot be approved on the subject property under any possible set of land use applications.

We cannot say that the BOCC interpretation of DCC 22.20.015 is inconsistent with the express language, purpose or policy underlying that code provision, particularly given the undisputed finding that DCC 22.20.015 is intended to be remedial in nature and not punitive. The BOCC interpretation is at least as consistent with the express language of DCC 22.20.015 as petitioners' more draconian interpretation, and is far more consistent with the code provision's remedial purpose. Under its interpretation, the BOCC reasonably concluded that because the 2014 LUCS and the 2016 Denial did not determine that the existing reservoirs were unlawful or could not be approved, neither decision constitutes a determination of a "violation" for purposes of DCC 22.20.015.

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"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

In any case, even if either the 2014 LUCS and the 2016 Denial constituted a determination of a violation for purposes of DCC 22.20.015, petitioners have not demonstrated that the county erred in concluding that approval of the two applications "results in the property coming into full compliance" with all applicable federal, state, and local laws. DCC 22.20.015(D)(1). Petitioners do not dispute that granting approval of the two applications cures any noncompliance with the DCC resulting from the lack of required land use approvals. Instead, petitioners argue that approving the two application does not result in the property coming into full compliance with two state agency permit requirements, namely the need to obtain permits from (1) the Oregon Water Resources Department (OWRD) to store TID irrigation water in the reservoirs, and (2) the Oregon Department of Geology and Mineral Industries (DOGAMI) to excavate the two reservoirs.

Intervenors dispute that a DOGAMI permit is required, at least for the ROF approval, and argue that the only impediment to obtaining an OWRD permit was the lack of required local land use approvals, a lack that the challenged decisions have now cured. Intervenors argue that OWRD and DOGAMI's administrative rules both require local land use approvals, if needed, before either agency can issue a state agency permit. Intervenors contend that petitioners' apparent view of DCC 22.20.015—that the applicant must obtain all required state agency permits prior to obtaining county land use approval—would place intervenors in an endless loop of rejection, unable to obtain either state agency permits or local

land use approvals. In addition, intervenors argue, DCC 22.20.015(D) does not require the county to go beyond its land use authority granted under ORS chapter 215 and make determinations regarding whether or not the property owner can comply with state agency permit requirements.

We agree with intervenors. As far as petitioners have established, the only impediment to obtaining any required OWRD or DOGAMI permit is the lack of county land use approvals, which these decisions cure. The county has done all that it can do within its land use authority to ensure that excavation, construction and use of the two reservoirs comes into full compliance with state agency requirements. Petitioners have not demonstrated that DCC 22.20.015(D) requires more.

The second assignment of error (Petitioners) is denied.

**FIRST ASSIGNMENT OF ERROR (COLW)**

Intervenor-petitioner COLW contends that because the 2016 Denial denied land use applications for the creation and use of the two reservoirs, the doctrines of claim and issue preclusion now bar the county from approving any new land use applications for the two reservoirs.

Claim and issue preclusion are similar common law doctrines that can operate to limit or bar subsequent judicial or adjudicative proceedings, based on claims that were or could have been litigated to finality in prior proceedings, or issues that were fully litigated in prior proceedings. *See Drews v. EBI Companies*, 310 Or 134, 142, 795 P2d 531 (1990) (discussing the differences between claim

and issue preclusion). In rejecting opponents' arguments regarding claim and issue preclusion, the BOCC cited and relied on DCC 22.28.040(A), which provides:

> "If a specific application is denied on its merits, reapplication for substantially the same proposal may be made at any time after the date of the final decision denying the initial application."

The BOCC explained:

> "DCC 22.28.040 contemplates that an applicant may refile denied land use applications. DCC 22.28.040 is an acknowledged land use regulation upon which the applicants in this matter were entitled to rely. The intent of the provision is to encourage applicants to accept decisions of denial at the early stages of the land use review process rather than appeal decisions of denial. This encourages applicants to revise and improve land use applications to address issues that resulted in denial rather than to challenge issues related to the denial by filing appeals with the BOCC, LUBA and appellate courts." Record 50.

COLW argues that the BOCC erred in relying on DCC 22.28.040, because that code provision applies only for reapplications "for substantially the same *proposal*[.]" (Emphasis added.) COLW contends that the current set of applications (as well as the 2016 applications) are not for *proposed* development, but instead to retroactively approve *existing* development that was constructed without the required land use approvals.

The BOCC findings do not explicitly address this interpretational issue, although it seems clear that the BOCC does not share COLW's limited view of the meaning of "proposal." After quoting the text of DCC 22.28.040, the BOCC noted the differences between the 2016 and 2018 applications, specifically the

addition of applications for a PUD and a PAPA.[11] We understand the BOCC to conclude that DCC 22.28.040 applies to authorize renewed applications that involve existing development, at least where new, additional applications or development are proposed. In any case, even if the county's findings do not include an explicit or implicit interpretation of DCC 22.28.040 that is adequate for review, COLW has not established that the term "proposal" must be interpreted to include only applications for new development, and to exclude

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[11] The BOCC findings state:

> "The Bishops argued that they prevailed in challenging similar applications filed in 2015 (the '2015 Land Use Applications'), and that KCDG and Tanager, therefore, should not 'get another bite at the apple.' The Deschutes County Code, DCC 22.28.040, however, grants KCDG the right to refile the denied applications and to obtain new decisions on the merits of the applications. It says '[i]f a specific application is denied on its merits, reapplication for substantially the same proposal may be made at any time after the date of the final decision denying the initial application.'
>
> "Further, the 2015 Land Use Applications were not identical to the current applications. The 2015 Land Use Applications sought approval of a conditional use for surface mining for reservoirs, a conditional use for a recreation facility and a site plan for a recreation facility. The applicants at that time did not seek approval of a planned unit development or of a plan amendment to add the subject property to the non-significant mineral and aggregate inventory; two of the current applications filed by Tanager and KCDG." Record 48-49.

applications to retroactively approve existing development.[12] Nothing in the text or context of DCC 22.28.040 cited to us suggests that it is intended to exclude applications to approve existing development that was constructed without required land use approvals. Further, COLW's interpretation would undermine the intent and purpose of DCC 22.28.040, which the BOCC findings describe as encouraging "applicants to accept decisions of denial at the early stages of the land use review process rather than appeal decisions of denial." Record 50. COLW's interpretation would instead force denied applicants onto the appeal track, rather than encouraging them to submit revised applications that attempt to address problems identified in the denial decision. For the foregoing reasons, we reject COLW's proffered interpretation of DCC 22.28.040. ORS 197.829(2).

COLW next argues that, notwithstanding DCC 22.28.040, the common law judicial doctrines of claim and issue preclusion operate to limit or eliminate the county's authority to review and approve renewed applications for the reservoirs. We disagree with COLW. No case cited to us suggests that the common law doctrines of claim and issue preclusion proscribe local land use proceedings on different land use applications, notwithstanding local legislation

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[12] ORS 197.829(2) authorizes LUBA to make its own determination whether a local government decision is correct, where the "local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review[.]"

to the contrary.[13] *Central Oregon Land Watch v. Deschutes County*, __ Or LUBA ___ (LUBA No 2018-095, Dec 18, 2018) (slip op at 18-19), *aff'd*, 296 Or App 903 (2019). Even in the absence of local legislation such as DCC 22.28.040, LUBA has held that Oregon's system of land use adjudication "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990).[14]

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[13] Petitioners discuss a number of cases from the Oregon Court of Appeals and Oregon Supreme Court regarding the common law doctrines of claim and issue preclusion. Most of the cited cases do not involve the specialized arena of land use disputes. We note initially that care must be taken in translating general judicial concepts into the land use context. *See PETA v. Inst. Animal Care & Use Comm.*, 312 Or 95, 105, 817 P2d 1299 (1991) (land use decisions are *sui generis*, and it is inappropriate to generalize rules of standing from other judicial contexts). Accordingly, we focus our analysis on the few cases cited that arise from land use disputes.

[14] Nelson remains good law, and neither we nor the Court of Appeals has overruled it. In *Nelson*, we stated:

> "[W]e believe the system of local government land use adjudications established by state statute and local regulations places primary importance on expeditious adjudications, contemporaneous application of the same approval criteria, as set out in comprehensive plans and land use regulations, to all similarly situated applicants and the ability of a local government tribunal to make an independent determination on the application of those approval criteria to the facts before it. This system is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." 19 Or LUBA at 148.

As COLW notes, in at least one land use case the Court of Appeals "assumed for the sake of argument" that issue preclusion could apply to limit re-litigation of certain issues that were resolved in prior land use proceedings. *Lawrence v. Clackamas County*, 180 Or App 495, 503, 43 P3d 1192 (2002). The applicant in *Lawrence* filed an initial application for a nonconforming use verification, which was denied based on failure to establish continuity throughout the entire period of nonconformity. After the law was changed shortening the time period needed to demonstrate continuity, the applicant filed a second application, which the county denied, applying the doctrine of issue preclusion to conclude that the applicant could not relitigate the issue of continuity. The county code in *Lawrence* allowed successive applications after two years, or earlier if the applicable law had changed, and the Court of Appeals affirmed LUBA's holding that, under that code provision, the "general doctrine of claim preclusion does not deny an applicant the right to file a successive application that an ordinance specifically permits to be filed." *Id.*

The court then considered whether the doctrine of issue preclusion might apply to bar relitigation of the issue of continuity. The court noted our broad holding in *Nelson* that land use proceedings are not the type of proceedings to which preclusive effect should be given, but assumed for the sake of argument that issue preclusion could apply to land use proceedings. The court ultimately concluded that the first of five elements of common law issue preclusion were

not met in that case, because due to intervening changes in the law the issue of continuity in the two proceedings was not the same issue.[15]

As the court did in *Lawrence*, we will assume that issue preclusion potentially could apply in the present circumstances. However, even under that assumption, COLW fails to establish that the elements of issue preclusion are met. COLW is vague regarding the precise "issue" that was resolved in the 2016 Denial, but we understand it to be the "issue" of whether the two reservoirs can obtain conditional use permit approvals as a ROF and SMCUP for a facility in conjunction with an irrigation district, under DCC 18.60.030(G) and (W). However, as we understand it, the county denied the 2015 CUP applications based not on final resolution of a specific legal or factual issue, but rather because the applications were missing associated applications or information that the county deemed essential to approval, *e.g.,* an application for a PAPA, and a wildlife habitat management plan. The 2018 applications resulting in the

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[15] The Court of Appeals noted that issue preclusion is subject to five requirements:

> "(1) The issue in the two proceedings must be identical. (2) The issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding. (3) The party sought to be precluded had a full and fair opportunity to be heard. (4) The party sought to be precluded was a party or was in privity with a party in the prior proceeding. (5) The prior proceeding was the type of proceeding to which a court will give preclusive effect." 180 Or App 495, 503.

decisions before us included that missing information. At most, the "issue" resolved in the 2016 Denial was whether applications missing those components could be approved.[16] The 2016 Denial obviously did not resolve whether applications that included those components could be approved. In short, the relevant "issue" resolved by the 2016 Denial is not the same "issue" resolved in the two decisions before us. For that reason alone, we conclude that the first requirement for application of issue preclusion is not met.

The first assignment of error (COLW) is denied.

**SECOND ASSIGNMENT OF ERROR (COLW)**

The RR-10 zone allows as a conditional use a "[r]ecreation-oriented facility requiring large acreage such as off-road vehicle track or race track, but not including a rodeo ground." DCC 18.60.030(G). The RR-10 zone also allows, as a separate conditional use category, "[p]ublic park, playground, recreation facility or community center owned and operated by a government agency or nonprofit community organization." DCC 18.60.030(A). The subject property

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[16] Assuming we have correctly characterized COLW's argument, that argument is more closely related to claim preclusion than issue preclusion. COLW argues, essentially, that the 2016 Denial should be given preclusive effect regarding whether the two reservoirs can qualify for conditional use permit approvals, because the applicants *could have* presented the missing information in the 2016 proceedings, but failed to do so. One of the distinguishing characteristics between claim and issue preclusion is that claim preclusion includes claims that could have been brought in a legal proceeding, but were not, while issue preclusion applies only to issues that were actually litigated and resolved. *Drews*, 310 Or 134, 142.

is also zoned WA, to protect winter wildlife habitat. The WA zone, at DCC 18.88, generally allows any conditional uses permitted in the underlying zone, with a number of exclusions, including for "[p]layground, recreation facility or community center owned and operated by a government agency or nonprofit community organization." DCC 18.88.040(B)(6).[17]

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[17] DCC 18.88.040(A) and (B) provide:

> "A. Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the conditional uses permitted shall be those permitted conditionally by the underlying zone subject to the provisions of the Comprehensive Plan, DCC 18.128 and other applicable sections of this title.
>
> "B. The following uses are not permitted in that portion of the WA Zone designated as deer winter ranges, significant elk habitat or antelope range:
>
> "1. Golf course, not included in a destination resort;
>
> "2. Commercial dog kennel;
>
> "3. Public or private school;
>
> "4. Bed and breakfast inn;
>
> "5. Dude ranch;
>
> "6. Playground, recreation facility or community center owned and operated by a government agency or a nonprofit community organization;
>
> "7. Timeshare unit;
>
> "8. Veterinary clinic;

Opponents argued below that the proposed use of the reservoirs as "recreation-oriented facilities" is prohibited in the WA zone, because that zone prohibits "recreation facilities." The BOCC rejected that argument, interpreting the relevant text and context to prohibit only recreation facilities owned and operated by a government agency or nonprofit organization, not private recreation facilities that otherwise qualify as a "recreation-oriented facility requiring large acreage" allowed as a conditional use in the underlying zone.[18]

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"9. Fishing lodge."

[18] The BOCC finding state:

> "Opponents argue that the ROF is not permitted in the WA Zone. They argue that all recreational facilities are prohibited in the WA Zone by subsection (8)(6). The County consistently applies this code provision to prohibit recreation facilities *owned and operated by a government agency or a nonprofit community organization*, not to privately-owned recreation facility requiring large acreage like the facility proposed by Tanager. The County's comprehensive plan recognizes that private recreational facilities are not prohibited by the WA Zone. Section 2.6 of the plan explains that ODFW and other public agencies recommended that the County prohibit private recreational facilities such as OHV courses, paintball courses, shooting ranges, model airplane parks and BMX courses when the County updated its comprehensive plan in 2011. This recommendation would not have been made if private recreation facilities were already prohibited by the WA Zone. The BOCC chose, however, not to amend the WA Zone to prohibit private recreational facilities and did not prohibit such a use in the plan. As a result, the BOCC interprets DCC 18.88.040(B)(6) to not prohibit the proposed ROF in the WA Zone." Record 63 (emphasis in original).

On appeal, COLW argues that the BOCC misconstrued DCC 18.88.040(B)(6). According to COLW, the qualifying phrase "owned and operated by a government agency or nonprofit community organization" modifies only the immediately preceding noun, "community center," and does not modify the earlier nouns in that list, including "recreation facility[ies]." COLW invokes a canon of statutory construction known as the doctrine of the last antecedent, which states that in the absence of contrary legislative intent a qualifying phrase located at the end of a list of items, without a separating comma, is usually understood to attach only to the last item in that list. COLW argues that application of the doctrine of last antecedent to DCC 18.88.040(B)(6) suggests that the qualifying phrase "owned and operated by a governmental agency or a nonprofit organization" attaches only to "community center[s]," and thus earlier items in that list, including "recreational facilit[ies]," are prohibited whether they are publicly or privately owned and operated.

COLW argues that its interpretation is supported by the context in DCC 18.16, the county's exclusive farm use (EFU) zone, which allows as a conditional use category "[c]ommunity centers owned by a governmental agency or nonprofit organization." DCC 18.16.030(I). That EFU use category implements ORS 215.213(2)(e) and 215.283(2)(e), which only allow in the EFU zone community centers that are owned and operated by a governmental agency or nonprofit organization. COLW contends that most of the use categories prohibited in the WA zone in DCC 18.88.040(B) are borrowed directly from the county EFU zone,

and that in adopting the list of prohibited uses in DCC 18.88.040(B) the county borrowed the use category of "[c]ommunity centers owned by a government agency or nonprofit organization" wholesale from DCC 18.16.030(I). If so, COLW argues, it is clear that despite including that borrowed phrase in a list with other use categories, the qualification "owned by a governmental agency or nonprofit organization" was intended to modify only "community centers," not earlier antecedents in that list, such as a "recreation facility." In short, COLW argues, the text and context of DCC 18.88.040(B)(6) indicates that the county intended to prohibit private as well as public recreation facilities.

COLW also argues that the BOCC interpretation is inconsistent with the purpose of the prohibitions in DCC 18.88.040(B), which are clearly intended to preclude noisy activities that can disrupt winter wildlife habitat. According to COLW, the noise impacts of a recreation facility such as a water-skiing lake do not vary based on private versus public ownership and operation.

Finally, COLW argues that even if DCC 18.88.040(B)(6) is ambiguous on this point, because the prohibitions in DCC 18.88.040(B)(6) are intended to implement the Statewide Planning Goal 5 obligation to protect wildlife resources, the applicable standard to review the BOCC interpretation is not ORS 197.829(1)(a)-(c) but rather the non-deferential standard of review at ORS 197.829(1)(d), which authorizes LUBA to reject an interpretation of a local land use regulation that is "contrary to a state statute, land use goal or rule that the * * * land use regulation implements." COLW contends that in interpreting

ambiguous code provisions that implement statewide planning requirements, a county cannot choose an interpretation that is contrary to the applicable goals and rules, if there is an interpretation that is consistent with those applicable goals and rules. *White v. Lane County*, 68 Or LUBA 423 (2013).

Intervenors respond, and we agree, that COLW fails to establish that the BOCC misconstrued DCC 18.88.040(B). The text of DCC 18.88.040(B)(6) was adopted in 1992 and has remained unchanged since. That text, considered in isolation, is ambiguous regarding whether the last qualifying phrase modifies only "community center" or all the uses listed in that provision, including "recreation facility." The parties agree that much of the language of DCC 18.88.040(B), including that qualifying phrase, was probably borrowed from the county EFU zone, which in turn implemented the then-current statutory EFU scheme at ORS chapter 215. As intervenors note, in 1991 (as well as today) ORS 215.283(2) distinguished between certain private and public facilities, including private and public parks.[19] Read in this context, it is reasonably clear that ORS 215.283(2)(d) (1991) was concerned with public facilities. The county EFU zone

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[19] The 1991 edition of ORS 215.283(2) authorized counties to approve in the EFU zone:

> "(c) Private parks, playgrounds, hunting and fishing preserves and campgrounds.
>
> "(d) Parks, playgrounds or community centers owned and operated by a governmental agency or a nonprofit community organization."

in 1992 also distinguished between public and private facilities. KCDG Response Brief, App 1, 4. If, as COLW argues, the county borrowed the language of the 1992 county EFU zone to populate much of the list of prohibited uses in DCC 18.88.040(B), it seems to us that the strongest inference is that the county understood that all of the use categories listed in DCC 18.88.040(B)(6) were, like community centers, public facilities.

That inference has other contextual and historical support. As intervenors note, how the RR-10 zone categorizes conditional uses is a relevant consideration in determining the meaning of DCC 18.88.040(B)(6). In 1992 (as today), the RR-10 zone set out separate use categories for "recreation-oriented facility" and "public park, playground, recreation facility or community center owned and operated by a government agency or nonprofit community organization." KCDG Response Brief, App 1, 1. Because the language of DCC 18.88.040(B)(6) closely tracks the latter use category, the strongest inference is that the county did not intend DCC 18.88.040(B)(6) to encompass the distinct use category of "recreation-oriented facility."

The BOCC findings also note that the county has historically viewed DCC 18.88.040(B)(6) to encompass only public facilities, and that in 2011, when the county adopted comprehensive plan amendments to its provisions implementing Goal 5, the county rejected arguments that the plan should be amended to prohibit *private* recreational facilities in wildlife habitat protected by the WA zone. While such post-adoption history may not be competent legislative history of DCC

18.88.040(B)(6), it provides some support to the county's current interpretation that a "recreation facility" as that term is used in DCC 18.88.040(B)(6) does not include private recreational facilities allowed as a conditional use in the RR-10 zone.

In sum, the textual ambiguity of DCC 18.88.040(B)(6) is adequately resolved by the context and legislative history of that provision, and indicates that in 1992 the county made a deliberate choice to limit the prohibition on recreational facilities in the WA zone to public recreational facilities. Thus, even if COLW is correct that that deliberate choice conflicted with the county's obligations under Goal 5, the county's choice on that point, for better or worse, is acknowledged to comply with Goal 5. *See Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 45, 911 P2d 350 (1996) (a goal compliance challenge under ORS 197.829(1)(d) is not permitted when the argument relies on the thesis that the acknowledged local land use legislation does not comply with the goal).[20]

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[20] The Court of Appeals explained:

> "We conclude that a goal or rule compliance challenge cannot be advanced under ORS 197.829(1)(d) when, however phrased, the argument necessarily depends on the thesis that the acknowledged local land use legislation itself does not comply with a goal or rule, and when a direct contention that the acknowledged legislation is contrary to the goal or rule could not be entertained under ORS 197.835. Situations undoubtedly will arise where that rule will prove difficult to apply. The line between an interpretation and the provision it interprets will not always be sharp." 139 Or App at 49.

COLW's argument under ORS 197.829(1)(d) necessarily depends on its argument that the acknowledged provision does not comply with Goal 5 if the prohibition is limited to public recreation facilities only. ORS 197.829(1)(d) does not operate to allow COLW to advance goal compliance challenges in the guise of a challenge to the BOCC's interpretation of DCC 18.88.040(B)(6). *Id.* at 45.

The second assignment of error (COLW) is denied.

**THIRD ASSIGNMENT OF ERROR (COLW)**

In addition to being zoned RR-10, the subject property and all surrounding areas are also zoned WA, in order to protect deer winter range, a resource that the county comprehensive plan identifies as a significant natural resource for purposes of Statewide Planning Goal 5. In 1992, when it designated that resource and adopted a program to achieve Goal 5 (PTAG) with respect to deer winter range, pursuant to an analysis of the economic, social, environmental and energy (ESEE) consequences, the county determined which land uses do not conflict with deer winter range or, despite conflicts, can be allowed within deer winter range. As noted, the WA zone is the county's PTAG. DCC 18.88.040(A) generally allows the conditional uses specified in the underlying base zone, including, as relevant here, large-area recreational facilities allowed under DCC 18.60.030(G), and surface mining in conjunction with an irrigation district, under DCC 18.60.030(W). Because authorization of those uses in the WA zone is acknowledged to comply with Goal 5, conditional use approval of those uses on the subject property typically would not require further evaluation under Goal 5

or the Goal 5 administrative rule, at OAR 660-023-0250(3). Under OAR 660-023-0250(3), a local government with an acknowledged comprehensive plan need consider the application of Goal 5 only if the local government adopts a PAPA that affects a Goal 5 resource.[21]

However, in the 2016 Decision the county determined that a PAPA was necessary in order to place the site on a comprehensive plan inventory of non-significant (*i.e.*, non-Goal 5) mineral and aggregate sites.[22] In the present

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[21] OAR 660-023-0250(3) provides in relevant part:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

[22] The Excavation Decision explains the nature of the inventory of non-significant mineral and aggregate resources, and why a PAPA is necessary in order to approve surface mining in conjunction with an irrigation district:

> "As a preliminary matter, it must be noted that the Hearings Officer and the BOCC previously found in [the 2016 Denial] that the excavation to construct the reservoirs was surface mining in conjunction with an irrigation district. DCC 18.128.280 provides specific approval criteria for surface mining of a non-Goal 5

Excavation Decision, the county concluded that the PAPA to add the site to the inventory of non-significant sites did not allow "new uses that could be conflicting uses" with deer winter range, and thus does not require further analysis under Goal 5 or the Goal 5 rule.[23] The county reasoned that surface

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> resources. Subsection (D)(2) further says that a permit for mining aggregate shall be issued only for a site included on the County's non-significant mineral and aggregate resource list.
>
> " * * * * *
>
> "The County's non-significant mineral and aggregate resources inventory was developed to allow the County to authorize surfacing mining, including the use and sale of excavated material off-site, by irrigation districts on properties that do not meet the standards of significance set by the Goal 5 rules (OAR 660-023).* * *
>
> "After Deschutes County adopted its non-significant resources inventory, the Oregon Court of Appeals determined that mining of a site listed on a non-significant resources inventory was not allowed in the EFU zone due to the provisions of ORS 215.298(2) that authorize the mining of significant mineral and aggregate sites in EFU zoning districts under conditions that protect other EFU land for agricultural use. *Beaver State Sand and Gravel, Inc. v. Douglas County*, 187 Or App 241 (2003). The *Beaver State* case does not, however, apply to any zone other than the EFU zones because it is based on ORS Chapter 215.298(2) that applies only to EFU land. Lands in other zoning districts, including the RR-10 zone, need not be listed on a Goal 5 significant resource inventory to be mined if the use is otherwise allowed by the applicable zoning district." Record 259-60.

[23] The BOCC findings state:

mining and privately-owned large area recreation facilities are allowed in the RR-10 zone, and are also not prohibited in the WA zone under DCC 18.88.040(B)(6).

On appeal, COLW disputes that conclusion, arguing that the PAPA is necessary to authorize surface mining to create a reservoir, and that surface mining eliminates reclaimed mining pits that function as deer habitat and thus "could" easily conflict with deer winter range, triggering the requirement for

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> "FINDING: The comprehensive plan recognizes deer winter range as a Goal 5 resource. The subject property is located on land mapped as deer winter range.
>
> "Surface mining/excavation is not identified as a conflicting use in the County's ESEE for deer winter range (Ordinance No. 92-41). Surface mining/excavation and privately operated large scale recreational facilities are not prohibited in the RR-10 zoning district by the WA Zone, the zone that is the County's program to meet Goal 5 for deer winter range. As a result, there is no 'new use' that conflicts with a significant Goal 5 resource site on an acknowledged resource list. *See Shamrock Homes, LLC v. City of Springfield*, 68 Or LUBA 1 (2013).
>
> "Surface mining/excavation is an historic use of the subject property. Additionally, surface mining/excavation is allowed in the RR-10 Zone in conjunction with uses permitted outright and conditional uses. It, therefore, is not a new use. In particular, the RR-10 Zone allows large acreage recreational facilities like the KCDG water ski lake/fish pond. Agricultural ponds, including those for aquaculture or ponds for effluent generated by dairy cows, may also be constructed in the RR-10 zone without County review and approval because they are uses allowed outright that may be built under the on-site construction exception of the County's definition of surface mining." Record 263.

Goal 5 analysis and potentially a new or revised ESEE analysis. COLW argues that the county erred in relying on the fact that the 1992 ESEE analysis did not identify surface mining as a conflicting use in deer winter range and that the acknowledged DCC provisions expressly allow surface mining in conjunction with an irrigation district in the WA zone. COLW contends that the 1992 ESEE analysis is outdated, and fails to take into account the loss of deer winter range and reduction in deer herds over the last several decades, caused by a fragmentation of habitat and other impacts of development, including surface mining.

As framed, COLW's argument that the county's acknowledged 1992 PTAG with respect to deer winter range is outdated or inadequate is a collateral attack on the acknowledged status of the county's land use regulations, rather than an argument that the PAPA "allows new uses that could be conflicting uses" with winter deer range within the meaning of OAR 660-023-0250(3)(b). *Friends of Neabeack Hill*, 139 Or App at 45.

Intervenors respond, and we agree, that the county did not err in concluding that no further Goal 5 analysis is required under OAR 660-023-0250(3)(b). The question that the rule asks is whether a PAPA authorizes "new uses that could be conflicting uses" with an identified Goal 5 resource. While DCC 18.128.28(D)(2) requires that the site proposed for surface mining or reservoir construction in conjunction with an irrigation district must be added to the county inventory of non-significant mineral sites, that plan amendment is

technical in nature, and does not represent a policy choice to allow "new uses" that could conflict with a significant resource, within the meaning of OAR 660-023-0250(3)(b). The actual land use at issue, surface mining or reservoir construction and operation in conjunction with an irrigation district, is already allowed on the subject property under the county's acknowledged land use regulations as a conditional use in the RR-10 zone, consistent with the WA zone, which represents the county's PTAG with respect to deer winter range. The PAPA does not change the types or kinds or intensities of land uses that can lawfully be established on the property under the acknowledged RR-10 or WA zones. As intervenors argue, reservoirs can be constructed in the RR-10 and WA zones for several permitted or conditionally permitted uses, including a ROF, and the only practical consequence of seeking a conditional use permit to construct a reservoir in conjunction with an irrigation district is to allow the reservoirs to be filled with TID water (instead of using groundwater). In our view, a PAPA that has as its only practical or legal consequence permission to use one source of water rather a different source, for a land use otherwise allowed by the acknowledged county code and program to achieve the goal, is not a PAPA that allows "new uses that could be conflicting uses with a particular significant Goal 5 resource site."

The third assignment of error (COLW) is denied.

**FIRST ASSIGNMENT OF ERROR (Dwyer)**

Intervenor-petitioner Dwyer argues that the county erred in approving excavation of the two reservoirs for recreational purposes under the ROF decision, without also requiring a surface mining permit for that excavation.

As defined in DCC 18.04.030, excavation of the scale needed to create the two reservoirs constitutes "surface mining," which requires a surface mining permit.[24] As noted, the county required a surface mining permit (SMCUP) for

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[24] DCC 18.04.030 defines "surface mining" as follows:

> "A. Includes:
>
> > "1. All or any part of the process of mining by removal of the overburden and extraction of natural mineral deposits thereby exposed by any method including, open pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for access roads; and
> >
> > "2. Mining which involves removal of more than 1,000 cubic yards of material or excavation prior to mining of a surface area more than one acre.
>
> "B. Does not include:
>
> > "1. The construction of adjacent or off-site borrow pits which are used for access roads to the surface mine;
> >
> > "2. Excavation and crushing of sand, gravel, clay, rock, or other similar materials conducted by a landowner, contractor or tenant on the landowner's property for the

the excavation for the limited purpose of creating reservoirs in conjunction with the irrigation district for irrigation purposes. However, the county did not require a surface mining permit for the purpose of creating the reservoirs as recreation-oriented facilities, a conditional use allowed in the RR-10 zone. For that purpose, the county relied on the DCC 18.04.030(B) exclusion to the definition of "surface mining," for "on-site construction." The findings explain:

> "The 'on-site construction' exemption serves an important function in the County's zoning code. It allows property owners to establish the uses the County lists as allowed in each and every zoning district in unincorporated Deschutes County. Without this exemption, the uses the County intends to allow would be prohibited if they require moving more than 1,000 cubic yards of earth. This is clearly not the intent of the County code and no provision of State law prohibits this type of surface mining.
>
> "The work performed by KCDG involved the removal of more than 1,000 cubic yards of material. The mining conducted by KCDG is not surface mining, however, because it was for the primary purpose of other on-site construction, on-site road construction and the maintenance of access roads." Record 36 (footnote omitted).

On appeal, Dwyer argues that the county erred in relying on the "on-site construction" exclusion from the definition of "surface mining," to avoid the need to issue an additional SMCUP to excavate the two reservoirs. According to

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> primary purpose of construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction and *other on-site construction*, or nonsurface impacts of underground mines[.]" (Emphasis added.)

Dwyer, the DCC definition of "surface mining," including the exclusion for "on-site construction," is based on ORS 215.298(b)(A) and (B), and that statute is limited in its operation to the EFU zone.[25] Because both the statute and the direct county implementation apply only in the EFU zone and do not apply in the RR-10 zone, Dwyer argues that the county cannot rely upon the DCC 18.04.030(B) exclusion for "on-site construction" to avoid the need for a SMCUP for the ROF.

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[25] ORS 215.298 provides standards for mining operations authorized in EFU zones under ORS 215.213(2) and ORS 215.283(2), and provides in relevant part:

> "(1) As used in this section and ORS 215.213 (2) and 215.283 (2):
>
> "* * * * *
>
> "(b)(A) 'Mining' includes all or any part of the process of mining by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method including open-pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits except those constructed for use as access roads.
>
> "(B) 'Mining' does not include excavations of sand, gravel, clay, rock or similar materials conducted by a landowner or tenant on the landowner or tenant's property for the primary purpose of reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction or other on-site construction or nonsurface impacts of underground mines."

Intervenors respond that the county intended the DCC 18.04.030 definition of "surface mining" and its exclusions to operate in any county zone, as indicated by the complete absence in that definition of any reference to the EFU zone or uses allowed in the EFU zone.[26] Intervenors note that mining activities are allowed or regulated in many county zones, including the county Surface Mining (SM) zone. Intervenors argue that under Dwyer's logic the DCC 18.04.030 definition of "surface mining" would not apply in the SM zone. We agree with intervenors. The BOCC clearly understands the DCC 18.04.030 definition of "surface mining" and its exclusions to operate in all county zones, including the RR-10 zone. Nothing in ORS 215.298 or elsewhere cited to our attention prohibits the county from applying the definitions in ORS 215.298, as they are implemented in the DCC, to zones other than county EFU zones.

Dwyer goes on to suggest that the DCC 18.60.030(W) authorization to conduct surface mining in the RR-10 zone in conjunction with an irrigation district, including the "excavation" of "reservoirs," does not authorize the

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[26] Initially, intervenors argue that Dwyer's arguments on appeal for why the DCC 18.04.030(B) exclusion does not apply in the RR-10 zone differ from the arguments made below, and thus the issue raised under Dwyer's first assignment of error is waived. ORS 197.763(1). Dwyer responds that waiver under ORS 197.763(1) applies to issues, not specific arguments, and that the issue of whether the exclusion applies in the RR-10 zone was adequately raised below, at Record 2924-25. Because we reject Dwyer's arguments on appeal, we need not attempt to determine whether those arguments represent a different "issue" than the issue presented below.

excavation of new reservoirs in conjunction with an irrigation district. We understand Dwyer to argue that DCC 18.60.030(W), read in context with other DCC provisions governing mining, authorizes only the "operation and maintenance of irrigation systems," not the excavation of new reservoirs. If that is Dwyer's argument, we do not agree. DCC 18.60.030(W) plainly authorizes surface mining needed to excavate reservoirs, in conjunction with the operation and maintenance of an irrigation district.

The first assignment of error (Dwyer) is denied.

**SECOND ASSIGNMENT OF ERROR (Dwyer)**

Dwyer advances a miscellany of challenges to retroactive approval of the two reservoirs, based on a single premise: that KCDG originally constructed the two reservoirs as Phase 1 of a contemplated residential cluster development, rather than as either recreation-oriented facilities allowed under DCC 18.60.030(G), or as reservoirs in conjunction with an irrigation district under DCC 18.60.030(W). Cluster development is a type of residential development allowed in the RR-10 zone at DCC 18.60.030(E), subject to specific standards. Planned unit development (PUD) is another type of residential development allowed in the RR-10 zone, under DCC 18.60.030(F), subject to different standards. Dwyer notes that the record reflects that at one point KCDG contemplated filing a future application for cluster development; however, intervenors now seek approval for a PUD with no phases, and for separate

standalone approvals of the reservoirs as a ROF and facility in conjunction with an irrigation district.

We understand Dwyer to argue that the applicant and county cannot recharacterize the original intended purpose of the reservoirs, but those reservoirs can now be approved only under the standards that would have applied had KCDG, in 2014, sought approval to construct the reservoirs as phase 1 of cluster development. Relatedly, Dwyer argues that the applicant and county cannot now recharacterize the two reservoirs as facilities in conjunction with an irrigation district under DCC 18.60.030(W), because TID was not involved at all in 2014 when KCDG constructed the reservoirs. Dywer contends that the phrase "in conjunction with" must at a minimum mean that at the time the reservoirs were constructed the irrigation district was involved in some way in their design or construction. Dwyer argues that the southern ski lake, in particular, was clearly designed and constructed as a recreational facility, not as an irrigation reservoir.

The BOCC generally rejected those arguments.[27] Intervenors respond, and we agree, that Dwyer has not identified anything in the DCC or elsewhere that

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[27] The BOCC findings state, in relevant part:

> "Opponents argue that the applicant cannot receive approval for a PUD because the site was developed first with the reservoirs, which, they allege is phased development only permitted as a cluster development. The BOCC rejects that argument. This argument is based on the fact that DCC 18.128.200(E) says that conditions for phased development of cluster developments shall be specified and

prohibits an applicant for retroactive approval from seeking that approval under any legal theory or characterization currently allowed under the DCC, or that

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performance bonds required to assure completion of the project if not completed prior to platting. This code provision merely imposes a specific requirement for cluster developments that are phased. It does not require phased development for cluster developments nor does it limit phased developments to cluster developments only.

"First, it is clear that the applicant is not proposing a phased development. The BOCC does not agree that establishment of the reservoirs in advance of the PUD application constitutes a phased development of a subdivision. The entire PUD will be built in one phase. The ROF is to be developed on three parcels that are located outside of the three lots of record being subdivided to create the PUD. Second, even if the PUD were a phased subdivision, the code does not restrict phased development to cluster developments. Title 17 allows phasing of any subdivision under the provisions of DCC 17.16.050 - 17.16.070, or DCC 17.16.080." Record 99-100.

" * * * * *

"DCC 18.60.030(W) does not require that a new reservoir built in conjunction with an irrigation district be constructed, planned by or designed by that irrigation district. All that is required is that the reservoir and related construction be 'in conjunction with the operation and maintenance of irrigation systems operated by an irrigation district.' In this case, the property owner wishes to obtain approval to allow TID to store water in its reservoirs and pump it back to the irrigation canal that runs along the west side of the KCDG property - as a secondary use of its reservoir. This shared use offers potential benefits to patrons of the district as it will allow the district to even out its delivery of water over time. If and when TID proceeds with this use, the reservoir will be operated as a part of TID's irrigation system pursuant to the TID-KCDG contract or other future agreement." Record 259.

restricts the applicant to the legal theory or characterization that the applicant may have contemplated when the development was first constructed without required land use approvals. Similarly, that KCDG may have designed, excavated, and constructed the reservoirs as recreational facilities, without initial involvement with TID, does not necessarily preclude KCDG from later seeking retroactive approval to excavate the reservoirs as facilities in conjunction with an irrigation district.

Under this assignment of error, we also understand Dwyer to challenge retroactive approval of on-site road construction or improvements to existing on-site roads needed to access the reservoirs, arguing that road construction cannot be approved as part of the ROF or SMCUP approvals, and cannot be approved as an independent use under the applicable WA standards. However, Dwyer has not explained why. On-site roads or driveways necessary to access an approved development are clearly accessory to that development, and do not require separate approvals under any criteria that Dwyer has cited to us.

We have considered Dwyer's other arguments under this assignment of error and, to the extent we understand them, none provide a basis for reversal or remand.

The second assignment of error (Dwyer) is denied.

**THIRD ASSIGNMENT OF ERROR (Dwyer)**

Dwyer argues that the county's surface mining regulations conflict with and are preempted by state statutes that require a DOGAMI permit for surface mining and the reclamation of mines.

ORS 517.702 to 517.989 is based on legislation first adopted in 1971, prior to adoption of the statewide planning statutes and goals in 1973, and which generally requires that all "surface mining" as defined at ORS 517.750(16) obtain DOGAMI operation and reclamation permits.[28] ORS 517.750(16)(b) sets out a number of exceptions to that definition of "surface mining," but unlike the somewhat similar definition of "surface mining" in ORS 215.298, specific to the EFU zone, the exceptions listed in ORS 517.750(16)(b) do not include a specific exception for "on-site construction." We understand Dwyer to argue that because

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[28] ORS 517.750(16)(a) defines "surface mining" for purposes of ORS 517.702 to 517.989 as follows:

> "'Surface mining' includes:
>
> "(A) All or any part of the process of mining minerals by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method by which more than 5,000 cubic yards of minerals are extracted or by which at least one acre of land is affected within a period of 12 consecutive calendar months, including open-pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits (except those constructed for use as access roads)."

the county's definition of surface mining exempts excavation for "on-site construction" from the necessity to obtain a county conditional use permit, the county code conflicts with ORS 517.750(16).

Intervenors respond, and we agree, that Dywer has not established conflict between the county code and anything in ORS chapter 517. ORS 517.702 to 517.989 require in relevant part that persons engaged in "surface mining" obtain DOGAMI operation and reclamation permits. The county's code says nothing about DOGAMI permits and certainly does not operate in any way that could exempt persons from the obligation to obtain DOGAMI permits.

Dwyer also advances the more extraordinary claim that ORS 517.702 to 517.989 preempts all of the county's legislation regulating surface mining. That claim is based on ORS 517.780(1)(a), which provides:

> "The provisions of ORS 517.702 to 517.989 and the rules and regulations adopted thereunder do not supersede any county zoning laws or ordinances in effect on July 1, 1972. However, if the county zoning laws or ordinances are repealed on or after July 1, 1972, the provisions of ORS 517.702 to 517.989 and the rules and regulations adopted thereunder are controlling. The governing board of [DOGAMI] may adopt rules and regulations with respect to matters covered by county zoning laws and ordinances in effect on July 1, 1972."

Dwyer argues that ORS 517.702, in expressly not superseding county zoning laws ordinances in effect on July 1, 1972, impliedly supersedes any county zoning regulating surface mining that might be adopted after that date, which would presumably include the current Deschutes County surface mining

legislation. Dwyer cites legislative history indicating the legislature intended that if local governments adopted reclamation ordinances approved by DOGAMI that local governments could issue reclamation permits themselves, rather than rely on DOGAMI, but notes that Deschutes County does not have a DOGAMI-approved reclamation ordinance.

Intervenors respond, and we agree, that Dwyer falls far short of demonstrating that county legislation regulating surface mining, for example, the DCC obligation to obtain a surface mining conditional use permit to conduct surface mining, was proactively preempted by adoption of ORS 517.702 to 517.989 in 1971. Nothing cited to us in ORS 517.702 to 517.989 or elsewhere suggests a legislative intent to preempt counties from adopting ordinances regulating surface mining that are otherwise consistent with applicable statutes. As discussed above, Dwyer has not established that anything in the DCC or in the challenged decisions conflicts with any statute or DOGAMI regulation governing surface mining, and nothing in the challenged decisions prevents DOGAMI from requiring intervenors to obtain whatever state operating or reclamation permits are required under DOGAMI's administrative rules.[29]

The third assignment of error (Dwyer) is denied.

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[29] Finally, we note the irony that, if Dwyer's preemption argument was valid, the county's failure to apply its surface mining regulations to the proposal for a ROF under the exclusion for "on-site construction" could not possibly constitute error, because under Dwyer's preemption theory the county would have no authority to apply those regulations.

**FOURTH ASSIGNMENT OF ERROR (Dwyer)**

Under the fourth assignment of error, Dwyer assumes that there are no legal impediments for approving the PUD, ROF, PAPA and SMCUP applications, but argues that for various reasons the findings regarding the approval criteria are inadequate and not supported by substantial evidence.

**A. Wildlife Habitat Management Plan**

In the 2016 Denial, the hearings officer recommended that any future applications for a ROF or SMCUP include a Wildlife Habitat Management Plan (WHMP), to address impacts of development on wildlife habitat protected by the WA zone, under the applicable conditional use criteria. In the 2018 applications, intervenors submitted a WHMP authored by a wildlife expert, Wente, which proposed various measures to protect and improve wildlife habitat. The BOCC relied on the WHMP in part to demonstrate compliance with conditional use permit criteria for the PUD and ROF such as DCC 18.128.015(A)(3), which requires a finding that the site is suitable for the proposed use considering, among other things, the natural resource values on the site.[30]

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[30] DCC 18.128.015(A) is a conditional use permit standard, which requires a finding that:

> "The site under consideration shall be determined to be suitable for the proposed use based on the following factors:
>
> "* * * * *

On appeal, Dwyer argues that the both the BOCC and WHMP erroneously assume for purposes of DCC 18.128.015(A)(3) that two reservoirs already exist, and thus fail to evaluate the natural resource values present before the two reservoirs were constructed, and the impact the loss of habitat caused by their construction.

Intervenors respond that DCC 18.128.015(A)(3) does not require a comparison of pre- and post-development natural resource values and, in any case, argue that the BOCC findings consider the pre-reservoir condition of the site and note the habitat loss that occurred when the reservoirs were constructed.[31]

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"3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values."

[31] The BOCC findings state:

"The general topography on the subject property prior to excavation for the reservoirs consisted of steep canyon walls and slopes associated with Tumalo Creek, rolling terrain and the reclaimed Klippel mining pits. The mining pits comprised two large depressed areas with contoured slopes. The topography of the mining pits was altered to create the reservoirs. Creation of the reservoirs left the existing tree cover intact. It removed sparse vegetation in and around the reclaimed pits resulting in large areas of gravel, rock and dirt that will be developed with homes and landscaped. The reclaimed surface mines were suited by their physical features for redevelopment as a ROF including water features, as a large amount of material had been removed prior to 2014. Outside of the steep slopes associated with the south end of the south reservoir, the BOCC finds the site is suitable to the reservoirs considering the topography of the site prior to reservoir creation. With respect to the

Intervenors argue that the findings adequately explain, based on the measures recommended by the WHMP, why the site is suitable for the proposed development considering natural resource values that pre-existed the reservoirs and that will be preserved and enhanced pursuant to conditions of approval.

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> steep slopes, the BOCC finds these slopes can be made suitable to the site subject to compliance with the proposed Landscaping Plan to soften the appearance of these slopes.
>
> "The only natural hazard that existed on the subject property prior to creation of the reservoirs (and which exists at present) is the risk of wildfire. That risk is no greater on the subject property than elsewhere on the west side of Bend. The record also shows that water in the ROF has been made available and used for wildfire suppression. It is clear that this can be a benefit to the surrounding area, and the public in general.
>
> "In [the 2016 Denial], the Hearings Officer found the natural resource values of the site, pre-reservoirs, consisted of the reclaimed mine, including the native vegetation and wildlife habitat that was removed in and around the current location of the reservoirs. In her decision, the Hearings Officer recommended the applicant develop a wildlife habitat management plan to address impacts to wildlife and habitat. The applicant proposes compliance with the Wildlife Habitat Management Plan ('WHMP') to ensure suitability of the site considering natural resource values. The BOCC finds the WHMP will mitigate impacts to wildlife and habitat, and ensure continued protection of these resources. Compliance with the WHMP is included as a condition of approval.
>
> "With the imposition of a condition of approval requiring compliance with the proposed Landscape Plan and the WHMP, the BOCC finds the site is suitable to the reservoirs considering the natural and physical features of the site." Record 93-94.

We generally agree with Dwyer that, in the context of evaluating whether existing development should be retroactively approved under applicable standards that require some evaluation of site conditions, the analysis should proceed as if the development does not already exist, and thus should evaluate pre-development site conditions. However, the BOCC findings appear to do just that, evaluating evidence of pre-development site conditions and explaining why the site is suitable for the proposed use considering both pre-development and post-development natural resource values. Dwyer has not demonstrated that DCC 18.128.015(A)(3) requires more, or that the WHMP or the BOCC findings erroneously assumed that the existing reservoirs form the baseline for evaluating compliance with DCC 18.128.015(A)(3).

Finally, Dwyer includes what we consider a "blunderbuss attack" at various findings and conditions that cite and rely on the WHMP, arguing that the county cannot meaningfully evaluate the impacts of the reservoirs on wildlife habitat unless it first orders their removal and the restoration of pre-development conditions. *Tillamook County v. DLCD*, 56 Or App 459, 642 P2d 691 (1982).[32] Dwyer Petition for Review 42-49. We reject these arguments. The record includes substantial evidence of pre-development conditions, and nothing cited to us in the DCC or elsewhere compels the destruction of existing development

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[32] Not to be confused with a "720-degree whiff of grapeshot," *Neuberger v. City of Portland*, 37 Or App 13, 586 P2d 351 (1978), much less the "holy hand grenade of Antioch." *Monty Python and the Holy Grail* (1975).

and restoration to pre-development conditions in order to evaluate whether to approve that development under the applicable approval standards.

**B. Compatibility**

DCC 18.128.015(B) requires a finding that the proposed development is compatible with existing and projected uses on surrounding lands. In applying DCC 18.128.015(B) to the proposed ROF, the BOCC stated:

> "The ROF use is a generally desirable use that typically benefits area properties, most particularly because the addition of water features in the area is a positive addition to the area as it provides a source of water for wildlife and for fighting any future wildfires. On balance, it is much preferred to use reclaimed surface mining pits for the ROF than to leave them as large, vacant excavated areas with sparse vegetation which are unattractive and provide little or no value to the area." Record 96.

Dwyer argues that this finding is not supported by substantial evidence, and that the record instead overwhelmingly reflects that the reservoirs are not compatible with the surrounding area. Dywer argues having water available for wildlife and fighting fires is irrelevant to a determination of compatibility. Dwyer also objects to the finding that the pre-development reclaimed mining pits were "unattractive and provide little or no value to the area," contending that the neighbors preferred the wildlife habitat provided by the reclaimed mining pits to the reservoirs. Dwyer Petition for Review 46.

However, Dwyer does not cite to any conflicting evidence, or develop an argument that the BOCC findings regarding compatibility are not supported by substantial evidence. As intervenors argue, the BOCC findings note and Dwyer

does not dispute that reservoirs and ponds are common features in the surrounding area, and act as buffers between adjoining mining uses on one side and nearby residential uses. Like intervenors, we do not see that the availability of water for wildlife and fire suppression are irrelevant considerations in determining compatibility with the surrounding area, which is zoned WA and which is prone to wildfire. And the neighbors' preference for the pre-development mining pits over the reservoirs does not demonstrate any error or inadequacy in the BOCC findings.

Intervenors conducted a noise study of ski lake activities and submitted that study to help demonstrate compliance with the DCC 18.128.015(B) compatibility requirement. The BOCC relied on the noise study in part to conclude that the proposed ROF would be compatible with the surrounding area, with respect to noise. Dwyer complains that a process that allows intervenors to construct the ski lake and then use it to provide actual empirical data regarding noise impacts is unfair to the opponents because it allows unpermitted development to justify continuation of its own use, and denies the opponents the opportunity to make their case prior to that unpermitted construction. We understand Dwyer to argue that the correct procedure is to require intervenors to remove the reservoirs so that both the applicant and opponents are limited to theoretical or speculative evidence regarding noise impacts of the ski lake.

However, Dwyer cites no applicable procedure or authority that prohibits an applicant for retroactive approval of development from using empirical data

in order to demonstrate compliance with approval criteria regarding compatibility, or that would prohibit the county from considering such evidence. Dwyer's procedural argument does not provide a basis for reversal or remand.

### C. Calculation of Open Space

DCC 18.128.210(B)(7) is a planned unit development standard that requires at least 65 percent of the land be preserved as open space. DCC 18.88.050(D) increases the open space requirement for land in the WA zone to 80 percent. Intervenors proposed, and the BOCC approved, preserving as open space 80 percent (83.04 acres) of the 104.68-acre area subject to the PUD. The land subject to the PUD does not include the 32.11 acres occupied by the two reservoirs. The opponents argued below that the open space calculation must include both the PUD area and the ROF area, which would increase the acreage that must be preserved as open space. The BOCC rejected that argument, noting that DCC 18.128.210(B)(7) is a PUD requirement that applies only to the "land" subject to the PUD.[33]

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[33] The BOCC findings state:

> "The applicant proposes to maintain 80 percent of the property in open space. Bishops argue that the PUD cannot meet the standards in the code related to open space because, the ponds' surface area should be included in the overall calculation of compliance with open space requirements for the PUD. DCC 18.128.210(B)(7) requires 65% 'of the land' to be maintained as open space. The land referred to by the code is the land included in the planned development by the applicant; typically the land being subdivided.

On appeal, Dwyer argues that the two reservoirs function as an integral part of the PUD, and therefore their acreage should be added to the "land" subject to the PUD for purposes of the open space calculation. However, Dwyer does not challenge the BOCC interpretation of DCC 18.128.210(B)(7) quoted in the margin, or attempt to demonstrate that that interpretation is reversible under ORS 197.829(1). Under that unchallenged interpretation, the BOCC correctly limited the open space calculation to the land subject to PUD approval.

**D. Miscellaneous Findings Challenges**

Dwyer challenges as inadequate 11 findings that address a variety of issues. Dwyer Petition for Review 49-57. We have considered Dwyer's challenges to those 11 findings, and intervenors' responses, and summarily agree

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> The applicant in this case has included three legal lots of record in the subdivision/planned development, but none include the ROF. DCC 18.88.050(D) increases the amount of open space required to 80% for land divisions in the WA Zone but does not impose an open space requirement on lands outside of the boundaries of land being divided. Given these facts, the BOCC does not interpret the code to require lands that are outside of the PUD to be included in open space calculations. The requirement of the relevant code provisions, as applied to this case, is that the proposed planned development that consists of 104.68 acres provide at least 80% open space, or 83.74 acres. The applicant has exceeded this requirement by preserving 83.75 acres of the subject property of the PUD as open space. The lands associated with the ROF are not considered or included as they are not part of the planned development. The BOCC finds this criterion is met." Record 105.

with intervenors that Dwyer has not established that the challenged findings are inadequate, or that any inadequacy warrants reversal or remand. *See* n 32.

The fourth assignment of error (Dwyer) is denied.

The county's decision is affirmed.