BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

BELVERON REAL ESTATE PARTNERS LLC.,
SUNRIVER RESORT LIMITED PARTNERSHIP
and MATTHEW CYRUS,
Intervenors-Respondents.

LUBA No. 2010-075 and 2010-076

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

Laurie E. Craghead, County Counsel, Bend, filed a joint response brief and argued on behalf of respondent.

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

Steven P. Hultberg, filed a joint response brief on behalf of intervenor-respondent Sunriver Resort Limited Partnership. With him on the brief was Ball Janik LLP.

Tia M. Lewis, Bend, filed a joint response brief on behalf of intervenor-respondent Matthew Cyrus. With her on the brief was Schwabe, Williamson and Wyatt PC.

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

AFFIRMED 03/10/2011

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

provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals two county ordinances. Ordinance 2010-024 amends county comprehensive plan goals and policies concerning destination resorts. Ordinance 2010-025 adopts procedures the county will following in remapping areas that are eligible for destination resort siting. Neither ordinance adopts any amendments to the county's acknowledged map of lands that are eligible for destination resorts. The ordinances alter the county standards and procedures by which that map may be amended in the future.

MOTIONS TO INTERVENE

Sunriver Resort Limited Partnership, Belveron Real Estate Partners, LLC, and Matthew Cyrus separately move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new issues raised in the respondents' brief. The motion is granted.

INTRODUCTION

The county's findings provide the following summary of the historical backdrop for the current state statutes governing destination resorts:

> "Initially, destination resorts were not allowed on rural lands in Oregon without an 'exception' to the statewide planning goals that limit development on farm or forest land. However, several large resort developments preceded the statewide land use planning system, including Black Butte, Sunriver, and Inn of 7th Mountain/Widgi Creek. In 1981, Governor Atiyeh's Task Force on Land Use Planning recommended that destination resorts be allowed as an economic development tool in rural areas, with certain sideboards to limit their effects and ensure that their main focus would be overnight lodging rather than second home development. The provisions authorizing the siting of destination resorts outside UGBs without taking exceptions to the statewide planning goals were adopted by the Land Conservation and Development Commission (LCDC) in 1984 as amendments to Statewide Planning Goal 8. However, in 1987 the entire content of Goal 8 was added to state law (ORS

> 197.435 – 197.465), at the request of destination resort interests." Record 43; footnote omitted.

Petitioner goes on to provide additional background concerning the destination resort statutes:

> "Legislative amendments to the destination resort statutes in 1993 provided that destination resorts are allowed only on land mapped for destination resorts, pursuant to ORS 197.455 * * *. Before 2003 an acknowledged destination resort [map] could be amended only during a state periodic review process. In that year the Legislature added ORS 197.455(2) which provided that counties could remap but not more frequently than once every 30 months. * * *" Petition for Review 4.

Two similarly numbered destination resort statutes are particularly relevant in this appeal. The first statute is ORS 197.455, which sets out a mapping requirement and standards for identifying lands that are eligible for destination resorts. The second statute is ORS 197.445, which sets out standards for approving individual destination resort proposals. We briefly discuss both of those statutes and the Deschutes County Code (DCC) amendments that are before us in this appeal, before turning to petitioner's assignments of error.

A. Destination Resort Eligible Lands Map (ORS 197.455)

Subsection (2) of ORS 197.455 requires that counties adopt a comprehensive plan map to identify lands within the county that are eligible for destination resort siting, and requires that this map "shall be the sole basis for determining whether tracts of land are eligible for destination resort siting." *Eder v. Crook County*, 60 Or LUBA 204, 210-11 (2009). Subsection (1) of ORS 197.455 identifies several types of land that may not be included on the destination resort eligible lands map that is required by subsection (2) of ORS 197.455. The types of land that are not to be included on the map of eligible lands are as follows: (1) lands within 24 miles of large city urban growth boundaries, (2) a site with 50 or more contiguous acres of unique or prime farmland, (3) a site within 3 miles of a high value crop area, (4) land that is predominantly Cubic Foot Site Class I or 2 forestlands, (5)

land in the Columbia River Gorge National Scenic Area, and (6) areas that have been identified as especially sensitive big game habitat. [1]

To summarize, the map that is required by ORS 197.455 can be created through a process of elimination. The county could start with a map of the entire county, and by applying the ORS 197.455 mapping criteria, remove six types or categories of land from the

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[1] The text of ORS 197.455 is set out below with key words that we discuss later emphasized:

> "1. A destination resort must be sited on lands mapped as eligible for destination resort siting by the affected county. The county may not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following *areas*:
>
> "(a) Within 24 air miles of an urban growth boundary with an existing population of 100,000 or more unless residential uses are limited to those necessary for the staff and management of the resort.
>
> "(b)(A) On a *site* with 50 or more contiguous acres of unique or prime farmland identified and mapped by the United States Natural Resources Conservation Service, or its predecessor agency.
>
> (B) On a *site* within three miles of a high value crop area unless the resort complies with the requirements of ORS 197.445 (6) in which case the resort may not be closer to a high value crop area than one-half mile for each 25 units of overnight lodging or fraction thereof.
>
> "(c) On predominantly Cubic Foot Site Class 1 or 2 forestlands as determined by the State Forestry Department, which are not subject to an approved goal exception.
>
> "(d) In the Columbia River Gorge National Scenic Area as defined by the Columbia River Gorge National Scenic Act, P.L. 99-663.
>
> "(e) In an especially sensitive big game habitat *area* as determined by the State Department of Fish and Wildlife in July 1984 or as designated in an acknowledged comprehensive plan.
>
> "(2) In carrying out subsection (1) of this section, a county shall adopt, as part of its comprehensive plan, a map consisting of eligible lands within the county. The map must be based on reasonably available information and may be amended pursuant to ORS 197.610 to 197.625, but not more frequently than once every 30 months. The county shall develop a process for collecting and processing concurrently all map amendments made within a 30-month planning period. A map adopted pursuant to this section shall be the sole basis for determining whether *tracts* of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467." (Emphases added.)

map. The county could then deem all lands that remain, following that process of elimination, eligible for destination resort development, subject to the additional statutory criteria that govern approval of individual requests for destination resort approval. In this opinion, we refer to this map as the Destination Resort Eligible Lands Map.

B. Destination Resort Approval Criteria

Lands that are shown on a county Destination Resort Eligible Lands Map are simply *eligible* for approval of a destination resort. Including a site on the Destination Resort Eligible Lands Map carries with it no guarantee that a destination resort can be approved on the site. *Johnson v. Jefferson County*, 56 Or LUBA 72, 88, *aff'd* 221 Or App 156, 189 P3d 30 (2008), *rev dismissed* 347 Or 259, 218 P3d 541 (2009). The first step in securing county approval for a destination resort is to have the proposed destination resort site included on the Destination Resort Eligible Lands Map. To complete the process and receive county approval for a destination resort, a proposed destination resort must meet the destination resort approval standards set out at ORS 197.445 and other statutory standards. Under the ORS 197.445 approval standards, a destination resort must: (1) be located on a site of 160 acres or more, (2) leave 50 percent of the site dedicated to open space, (3) commit to spend at least seven million dollars on recreation facilities and visitor accommodations, (4) meet certain requirements for visitor-oriented accommodations, and (5) limit commercial uses.[2]

[2] ORS 197.445 provides, as relevant:

> "A destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. To qualify as a destination resort under ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, a proposed development must meet the following standards:
>
> "(1) The resort must be located on a *site* of 160 acres or more except within two miles of the ocean shoreline where the site shall be 40 acres or more.
>
> "(2) At least 50 percent of the *site* must be dedicated to permanent open space, excluding streets and parking areas.

C. Statutory Ambiguities

Ambiguities in the ORS 197.455 destination resort mapping criteria, the ORS 197.445 destination resort approval criteria and related statutes make the process described above far more complicated that it would appear at first blush. At the heart of the problem is the apparently interchangeable use of key terms in those statues. ORS 197.455 variously describes land to be excluded from the Destination Resort Eligible Lands Map as "areas," "sites" and "tracts." *See* n 1. The terms "areas," and "sites" are not defined in the destination resort statutes. The term "tract" is defined at ORS 197.435(7) to include a single lot or a single parcel or multiple contiguous lots or parcels in common ownership.[3]

"(3) At least $7 million must be spent on improvements for *on-site* developed recreational facilities and visitor-oriented accommodations exclusive of costs for land, sewer and water facilities and roads. Not less than one-third of this amount must be spent on developed recreational facilities.

"(4) Visitor-oriented accommodations including meeting rooms, restaurants with seating for 100 persons and 150 separate rentable units for overnight lodging shall be provided. However, the rentable overnight lodging units may be phased in as follows:

"* * * * *

"(b) On lands in eastern Oregon, as defined in ORS 321.805:

"(A) A total of 150 units of overnight lodging must be provided.

"(B) At least 50 units of overnight lodging must be constructed prior to the closure of sale of individual lots or units.

"* * * * *

"(5) Commercial uses allowed are limited to types and levels of use necessary to meet the needs of visitors to the development. Industrial uses of any kind are not permitted.

"* * * * *."

[3] ORS 197.435(7) provides:

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

Legislative history discloses that the second sentence of the statutory definition of "tract" was added to avoid the possibility of extremely large tracts being excluded from a county's Destination Resort Eligible Lands Map under ORS 197.455, if the disqualifying land is not more than 30 percent of the tract and the disqualifying land is located on the boundary of the tract.

The legislature did not use the term "tract" anywhere in ORS 197.455(1), which sets out the "areas" and "sites" that must be excluded Destination Resort Eligible Lands Map. But ORS 197.455(2) provides that the Destination Resort Eligible Lands Map "shall be the sole basis for determining whether *tracts* of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467." That reference to "tracts," and the practical necessity to identify existing units of land to apply the ORS 197.455(1) mapping criteria to determine which tracts must be excluded from the Destination Resort Eligible Lands Map convinces us that although the legislature used the words "areas" and "sites" in ORS 197.455(1), the mapping process dictated by ORS 197.455(1) effectively requires that the county examine "tracts," as ORS 197.435(7) defines that term (*i.e.*, lots, parcels, and contiguous lots and parcels in common ownership), and exclude any tract if more than 30 percent of the tract lies within one or more of the "areas" listed at ORS 197.455(1)(a) through (e).[4]

Turning to the ORS 197.445 destination resort siting criteria, the legislature did not use the term "tract" at all, and instead uses only the term "site." *See* n 2. An issue that arises under the first assignment of error is whether, despite the legislature's failure to use the term "tract" anywhere in ORS 197.445, the legislature intended to require that a destination resort must be sited on a single tract. Because there is absolutely no textual support for such a statutory limitation, and no practical reason why applying the ORS 197.445 destination resort

[4] As ORS 197.435(7) defines the term "tract," even if less than 30 percent of a tract is disqualified under the ORS 197.455(1) mapping criteria, the entire tract would have to be excluded if the disqualified land does not lie on the "boundary" of the tract.

siting standards necessitates locating a particular destination resort on a single tract, we conclude that the statutes do not impose that requirement.

D. The County's Destination Resort Mapping and Approval Criteria

Although counties may regulate destination resorts more strictly than they are regulated by ORS 197.445 and 197.455 and related statutes, counties may not adopt destination resort regulations that would allow the county to approve destination resort proposals that do not comply with the statutes governing mapping of eligible lands for and approval of destination resorts. *Johnson v. Jefferson County*, 56 Or LUBA at 89; *Gould v. Deschutes County*, 54 Or LUBA 205, 229-30 (2007); *see Riggs v. Douglas County*, 167 Or App 1, 9-10, 1 P3d 1042 (2000) (in cases where a county's EFU zone deviates from the statutory EFU zone in ways that conflict with the statute, the statute controls); *Weuster v. Clackamas County*, 25 Or LUBA 425, 431 (1993) (because ORS 215.448(1) both authorizes counties to approve home occupations and places limits on that authorization, a county may not authorize what the statute prohibits, and the statute controls where the statute conflicts with the county law concerning home occupations).

As we explain in more detail below in our discussion of petitioner's assignments of error, the county regulations concerning mapping of lands eligible for destination resorts and review of individual applications for approval of destination resorts differ from the destination resort statutes. In a number of ways, the county's destination resort regulations impose destination resort mapping restrictions that the ORS 197.445 and 197.455 destination resort statutes do not impose.[5] For example, while the statutory mapping criteria at ORS 197.455 do not require exclusion of platted subdivisions or sites of less than 160 acres when adopting or amending the Destination Resort Eligible Lands Map, the county's destination

[5] We have already noted some statutory ambiguities in ORS 197.445 and 197.455 and the difficulties those ambiguities present. The county's decision to adopt additional county regulations to govern the county's Destination Resort Eligible Lands Map amplifies those difficulties.

resort regulations do. Petitioner's first two assignments of error challenge the county's attempt in one of the appealed ordinances to modify these county-imposed limitations on destination resort mapping.

FIRST ASSIGNMENT OF ERROR

DCC Chapter 23.84 is entitled "Destination Resorts." DCC 23.84.010 describes the county's comprehensive plan requirements for destination resorts. DCC 23.84.020 sets out comprehensive plan "Goals" for mapping lands that are eligible for destination resorts. DCC 23.84.030 set out comprehensive plan "Policies" for mapping lands that are eligible for destination resorts. Ordinance 2010-024 amends the DCC 23.84.030 plan policies for mapping lands that are eligible for destination resorts. DCC 23.84.030(3)(a)(6) provides that "[s]ites less than 160 acres" must be excluded from the county's Destination Resort Eligible Lands Map. Ordinance 2010-024 adopts DCC 23.84.030(3)(d)(6), which provides that destination resorts may be sited in a number of areas, including "[m]inimum site of 160 contiguous acres or greater under one or multiple ownerships."[6]

Petitioner argues that under the destination resort statutes a destination resort must be sited on a single tract and that the modification adopted by Ordinance 2010-024 is inconsistent with the destination resort statutes.

> "The County's allowance of 'multiple ownerships' to constitute a destination resort is contrary to the destination resort statutes which require that destination resort siting is to be located on a tract and that a 'tract' means a single ownership." Petition for Review 9.

[6] DCC 23.84.030 takes the approach of (1) requiring that the areas identified by ORS 197.455 must be *excluded* from Destination Resorts Eligible Lands Map, (2) listing other areas that other statutes and the county requires to be *excluded* from the map, and (3) then listing areas that apparently can be *included* on the Destination Resort Eligible Lands Map. As petitioners note and respondents acknowledge, that structure of setting out areas to be excluded followed by setting out areas to be included is awkward. Petition for Review 10 ("quite confusing"); Respondents' Brief 5 n 2. While the challenged amendment now codified at DCC 23.84.030(3)(d)(6) is not expressly stated as a clarification of the DCC 23.84.030(3)(a)(6) 160-acre site minimum, the legal effect of DCC 23.84.030(3)(d)(6) is to clarify that the county's DCC 23.84.030(3)(a)(6) 160-acre site minimum can be met by a site that is made up of more than one ownership or tract.

Petitioner finds a statutory requirement that a destination resort must be sited on a single tract in ORS 197.455(2), which provides in part:

> "A map adopted pursuant to this section shall be the sole basis for determining whether *tracts* of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467."

When that language from ORS 197.455(2) is read together with the ORS 197.435(7) definition of "tract," petitioner argues that ORS 197.455 precludes making more than one tract available for destination resort development. *See* n 3.

At the outset, we note that it is not easy to characterize precisely what the challenged amendment does. Petitioner's characterization that the amendment allows "'multiple ownerships' to constitute a destination resort" is possible. But it is also possible to characterize the amendment as one that modifies or qualifies the DCC 23.84.030(3)(a)(6) *county* mapping requirement that "[s]ites of less than 160 acres" not be included on the county's Destination Resort Eligible Lands Map. *See* n 6. So characterized, as amended by Ordinance 2010-024, the county's 160-acre "site" minimum may be met by combining more than one ownership or tract.

Petitioner appears to recognize that the single reference to "tracts" in the second subsection of ORS 197.455 that describes how a Destination Resort Eligible Lands Map is to be used, rather than in the first subsection of ORS 197.455 that sets out the criteria for excluding lands from the Destination Resort Eligible Lands Map or in ORS 197.445 that sets out minimum standards for individual destination resorts, is an exceedingly tenuous basis for arguing that ORS 197.445 and 197.455 must be interpreted to require that a destination resort may only be sited on a single tract.[7] To shore up its interpretation of ORS 197.445 and

[7] Petitioner's reliance on the quoted language in ORS 197.455(2) is particularly tenuous since the reference to tracts is plural rather than singular. The quoted definition could have been worded: "A map adopted pursuant to this section shall be the sole basis for determining whether *any tract* of land is eligible for destination resort siting pursuant to ORS 197.435 to 197.467." However, ORS 197.455(2) refers to tracts in the plural and, as worded, could envision either single tract or multi-tract destination resort sites.

197.455, petitioner points to the last sentence of the ORS 197.435(7) definition of "tract," which provides:

> "A tract may include property that is not included in the proposed site for a destination resort if the property to be excluded is on the boundary of the tract and constitutes less than 30 percent of the total tract." *See* n 3.

According to petitioner, legislative history shows that language was added to address two concerns. The first concern was expressed by destination resort developers that large tracts of 1200 acres or more might be disqualified for inclusion on a Destination Resort Eligible Lands Map by ORS 197.455(1)(b), simply because a small portion of the tract is within three miles of a high value crop area or a relatively small percentage of the 1200 acres qualifies as "unique or prime farmland."[8] *See* n 1. The second concern was expressed by farmland protection interests who feared that allowing up to 30 percent of a tract to be excluded would result in "donut holes" of unique or prime farmland surrounded by destination resorts. According to petitioner, the requirement that the up to 30 percent excluded area be located on the "boundary of the tract" was adopted to address that latter concern. Petitioner argues that interpreting ORS 197.455 to allow combinations of tracts to qualify as eligible for destination resort development could allow gerrymandering that would allow excluded areas along multiple tracts to be conglomerated into the "donut holes" of unique or prime farmland surrounded by a destination resort. Petitioner contends the legislature amended the definition of "tract,' in part, to avoid that result. Petitioner also cites other statutory references to "tract" that petitioner contends supports its interpretation.[9]

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[8] The destination resort development interests apparently assumed that EFU zoning would preclude dividing the small portion of a 1200-acre tract from the remainder and selling the small portion to make the remainder tract eligible for inclusion on the Destination Resort Eligible Lands Map. Petition for Review 15.

[9] Petitioner cites ORS 197.462 and 197.467:

> "A portion of a tract that is excluded from the site of a destination resort pursuant to ORS 197.435 (7) shall not be used or operated in conjunction with the resort. Subject to this limitation, the use of the excluded property shall be governed by otherwise applicable law." ORS 197.462.

That the legislature's ORS 197.435(7) definition of "tract" may be inadequate to address the hypothetical multiple-tract destination resort that petitioner argues might result in a donut hole of unique or prime farmland falls considerably short of providing a textual or legislative history basis for reading into ORS 197.445 and 197.455 a requirement that a destination resort may only be approved on a single tract. Similarly, petitioner's contention that the legislature's isolated use of the word "tract" in the statutes it cites must mean that only individual tracts of at least 160 acres may be included on the county's Destination Resort Eligible Lands Map reads far too much into those isolated uses of the word. At most those references show that the legislature may have assumed that in most cases a destination resort would be sited on a single tract. Those references come nowhere near providing a basis for interpreting ORS 197.445 and 197.455 together with DCC 23.84.030(3)(a)(6) to require that only single tracts of 160 acres or more may be included on the county's Destination Resort Eligible Lands Map.

To conclude, ORS 197.455 imposes no tract minimum size standard for excluding land from the county's Destination Resort Eligible Lands Map. It therefore follows that DCC 23.84.030(3)(d)(6), which authorizes including multi-tract "sites" of 160 acres or more on the county's Destination Resort Eligible Lands Map is not inconsistent with ORS 197.455. Petitioner's textual, contextual and legislative history arguments to the contrary are not persuasive, and we reject them.

The first assignment of error is denied.

> "(1) If a tract to be used as a destination resort contains a resource site designated for protection in an acknowledged comprehensive plan pursuant to open spaces, scenic and historic areas and natural resource goals in an acknowledged comprehensive plan, that tract of land shall preserve that site by conservation easement sufficient to protect the resource values of the resource site as set forth in ORS 271.715 to 271.795.
>
> "(2) A conservation easement under this section shall be recorded with the property records of the tract on which the destination resort is sited." ORS 197.467.

SECOND ASSIGNMENT OF ERROR

The issue presented in the second assignment of error is similar to the one presented in the first assignment of error. Under amendments adopted by Ordinance 2010-024, "platted subdivisions" are not to be included on the Destination Resort Eligible Lands Map. DCC 23.84.030(3)(c)(9). However, Ordinance 2010-024 also adopts DCC 23.84.030(3)(d)(5), which effectively creates an exception to DCC 23.84.030(3)(c)(9) to authorize including the following limited category of subdivisions on the Destination Resort Eligible Lands Map:

> "All property within a subdivision for which cluster development approval was obtained prior to 1990, for which the original cluster development approval designated at least 50 percent of the development as open space and which was within the destination resort zone prior to the effective date of Ordinance 2010-024 shall remain on the eligibility map[.]"

Petitioner argues that allowing cluster subdivisions to be included on the Destination Resort Eligible Lands Map violates state and county law, and advances five separate arguments in support of that contention. We address each of those arguments below.

A. ORS 197.445(4)(b)(B) Requires Construction of 50 Units of Overnight Lodging Before Lots Can Be Sold

ORS 197.445(4)(b)(B) is one of the ORS 197.445 destination resort approval criteria. ORS 197.445(4)(b)(B) requires that at least 50 units of overnight lodging be built before lots or residential units can be sold. *See* n 2. Petitioners contends that "[b]y definition" the cluster subdivisions identified in DCC 23.84.030(3)(d)(5) "already include[] individual lots or units which have already been sold." Petition for Review 18. Although it seems likely that lots would have been sold by now in subdivisions that have been approved for over 20 years, we are not sure we see why that necessarily will always be the case. In any event, petitioner once again confuses a standard that is applied at the time that approval of a particular destination resort is requested for a mapping criterion that applies when adopting or amending a Destination Resort Eligible Lands Map. Petitioner may well be correct that a

proposed destination resort that includes a cluster subdivision where lots or residential units have already been sold would not comply with ORS 197.445(4)(b)(B), and for that reason could not be approved. We need not decide that question here because the county has not approved a destination resort on a site that includes a pre-1990 cluster subdivision and may never do so. ORS 197.445(4)(b)(B) is written as a criterion that applies directly to proposed and approved destination resort proposals; it does not apply at the time the county is mapping lands that are eligible for destination resort proposals, and the county's decision to adopt DCC 23.84.030(3)(d)(5) is not inconsistent with ORS 197.445(4)(b)(B).

B. Multiple Ownerships

Petitioner contends that DCC 23.84.030(3)(d)(5) authorizes mapping of destination resort sites that include multiple ownerships, which is not permitted under ORS 197.455. We have already rejected that argument under the first assignment of error.

C. State and Local Compatibility Standards

Petitioner next argues that allowing cluster subdivisions to be included on the Destination Resort Eligible Lands Map violates statutory and county requirements that destination resorts be developed in a manner that is compatible with the destination resort site and adjacent lands.[10] Petitioners also argue that DCC 23.84.030(3)(d)(5) violates several

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[10] Petitioner cites ORS 197.460, 197.476 and DCC 23.84.030(4). ORS 197.467 is set out at n 9. ORS 197.460 and DCC 23.84.030(4) are set out in part below.

ORS 197.460 provides, in part:

> "A county shall insure that a destination resort is compatible with the site and adjacent land uses through the following measures:
>
> "(1) Important natural features * * * shall be retained. * * *.
>
> "(2) Improvements and activities shall be located and designed to avoid or minimize adverse effects of the resort on uses on surrounding lands, * * *[.]"

DCC 23.84.030(4) provides:

additional DCC sections that set out destination resort application and approval requirements. We understand petitioner to argue those DCC sections envision planning first before approving destination resorts and that DCC 23.84.030(3)(d)(5), by allowing previously approved subdivisions to be included on the Destination Resort Eligible Lands Map, improperly puts the destination resort (cart) before the planning (horse).[11]

DCC 23.84.030(3)(d)(5) does not conflict with the cited statutes or DCC sections and does not improperly put the destination resort approval cart before the planning horse. DCC 23.84.030(3)(d)(5) simply authorizes cluster subdivisions to be included on the Destination Resort Eligible Lands Map. There is nothing in the ORS 197.455 destination resort mapping criteria that requires that cluster subdivisions be excluded from the Destination Resort Eligible Lands Map. If individual applications for approval of destination resorts on sites

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> "a. The County shall ensure that destination resorts are compatible with the site and adjacent land uses through enactment of land use regulations that, at a minimum, provide for the following:
>
> "1. Maintenance of important natural features, * * *; and
>
> "2. Location and design of improvements and activities in a manner that will avoid or minimize adverse effects of the resort on uses on surrounding lands, * * *.
>
> "3. Such regulations may allow for alterations to important natural features* * *, provided that the overall values of the feature are maintained.
>
> "b. Minimum measures to assure that design and placement of improvements and activities will avoid or minimize the adverse effects noted in Policy 4(a) shall include:
>
> "1. The establishment and maintenance of buffers * * *.
>
> "2. Setbacks of structures and other improvements from adjacent land uses.
>
> "c. The County may adopt additional land use restrictions to ensure that proposed destination resorts are compatible with the environmental capabilities of the site and surrounding land uses."

[11] DCC 18.113.050(B)(1) sets out a destination resort application requirement. DCC 18.113.070(D) and (N) both set out destination resort approval criteria.

included on the Destination Resort Eligible Lands Map cannot meet the statutory and DCC compatibility requirements or the DCC 18.113 application requirements or the ORS 197.445 approval standards because they include cluster subdivisions, the county will have to deny such destination resort applications. But as we have already explained, the Destination Resort Eligible Lands Map is a map of lands that are *eligible* to *seek* approval of a destination resort. The county is not obligated to ensure that a destination resort can be approved on all lands it includes on the Destination Resort Eligible Lands Map. The ORS 197.455 and county destination resort mapping criteria simply do not serve that function.

D. Cluster Subdivision Standards

DCC Chapter 23.24 is entitled "Rural Development." DCC 23.24.030(4) is a Rural Development Policy. DCC 23.24.030(4) requires that cluster subdivisions maintain 65 percent of their area in open space and requires that a cluster subdivision be included within an urban growth boundary before any of the open space can be developed.[12] Petitioner argues:

> "[DCC 23.84.030(3)(d)(5)] would allow the open area to be developed as part of a destination resort and presumably down to 50%. This is directly contrary to the Plan provision not allowing 'any development' of the open space 'until the whole development is brought inside an urban growth boundary." Petition for Review 24 (footnote and emphasis omitted).

DCC 23.24.030(4) is a Rural Development Policy, whereas DCC 23.84.030(3)(d)(5) is a destination resort mapping criterion. Respondents argue:

> "* * * The present ordinances do not authorize any development. They simply allow certain cluster subdivisions that meet all State-mandated

[12] DCC 23.24.030(4) provides in part:

> "Cluster and planned developments shall maintain a minimum of 65 per cent of the land in open space, forest or agricultural uses compatible with the surrounding area and the development area. The open space of the development may be platted as a separate parcel or in common ownership of some or all of the clustered units; however, the open area shall not be subject to development unless the whole development is brought inside an urban growth boundary. * * *"

> requirements to be mapped as eligible for destination resort development, nothing more. Whether such property can ultimately be developed with a destination resort is not before [LUBA]." Respondents' Brief 12.

We agree with respondents.

E. Internal Inconsistency

A comprehensive plan may not be amended in a manner that creates an internal inconsistency. *See 1000 Friends of Oregon v. Jackson County*, 79 Or App 93, 98, 718 P2d 753 (1986) (plan amendment may have secondary effects on unamended parts of the plan that violate the statewide planning goals); *Von Lubken v. Hood River County*, 22 Or LUBA 307, 313 (1991) (plan amendment may not conflict with unamended plan or land use regulations); *DLCD v. Polk County*, 21 Or LUBA 463, 465 n 2 (1991) (comprehensive plan amendment must be consistent with relevant comprehensive plan policies). To understand petitioner's final argument under this assignment of error, we must set out the parts of DCC 23.84.030 that prohibit including platted subdivisions on the county's Destination Resort Eligible Lands Map, but also permit including cluster subdivisions on that same map:

> "Policies.
>
> "* * * * *
>
> "3. Mapping for destination resort siting
>
> "a. To assure that resort development does not conflict with the objectives of other Statewide Planning Goals, destination resorts shall pursuant to Goal 8 not be sited in Deschutes County in the following areas:
>
> "[the ORS 197.455 exclusions as well as additional county exclusions are set out here]
>
> "c. To assure that resort development does not conflict with the objectives of Deschutes County, destination resorts shall also not be located in the following areas:
>
> "* * * * *
>
> "9. Platted subdivisions.

> "d. *For those lands not located in any of the areas designated in (3)(a) though (c),* destination resorts may, pursuant to Goal 8, Oregon Revised Statute and Deschutes County zoning code, be sited in the following areas:
>
> "* * * * *
>
> "5. All property within a subdivision for which cluster development approval was obtained prior to 1990, for which the original cluster development approval designated at least 50 percent of the development as open space and which was within the destination resort zone prior to the effective date of Ordinance 2010-024 shall remain on the eligibility map[.]" DCC 23.84.030 (emphasis added).

We understand petitioner to argue that DCC 23.84.030(3)(c)(9) prohibits including platted subdivisions on the Destination Resort Eligible Lands Map and that cluster subdivisions are by definition subdivisions. Therefore, under the language of DCC 23.84.030(3)(d) emphasized above, because platted cluster subdivisions are located in one of the areas designated in DCC 23.84.030(3)(c), the exception in DCC 23.84.030(3)(d)(5) either creates an internal inconsistency, if it is interpreted to allow including platted cluster subdivisions, or must be interpreted to only allow approved but *unplatted* cluster subdivisions to avoid that internal inconsistency.

While this is another example of the awkward structure and wording that makes DCC 23.84.030 a challenge to interpret and apply, we agree with respondents that it is sufficiently clear that the board of county commissioners intended for DCC 23.84.030(3)(d)(5) to be an exception to the DCC 23.84.030(3)(c)(9) prohibition against including platted subdivisions on the Destination Resort Eligible Lands Map. As an initial point, it is simply implausible that the board of county commissioners adopted DCC 23.84.030(3)(c)(9) to allow cluster subdivisions to be included on the Destination Resort Eligible Lands Map, but only if the cluster subdivision remains unplatted 21 years after it was approved. We turn to petitioner's reading of the initial clause of DCC 23.84.030(3)(d)(5), which is italicized above. If that

clause is given the effect that petitioner would give it, the exception provided by DCC 23.84.030(3)(d)(5) would have no effect. DCC 23.84.030(3)(d)(5) and 23.84.030(3)(c)(9) were both enacted by Ordinance 2010-024, and they should be interpreted in a way that gives effect to both if possible. ORS 174.010. We agree with respondents that when DCC 23.84.030(3)(d)(5) and 23.84.030(3)(c)(9) are read together it is sufficiently clear that the county intended the specific authorization to include pre-1990 cluster subdivisions to qualify the general prohibition against including platted subdivisions. The more specific controls the more general and resolves any apparent conflict. *Pete's Mountain Homeowners Assn. v. Clackamas County*, 227 Or App 140, 150, 204 P3d 802 (2009); ORS 174.020.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As we have already explained, Ordinance 2010-024 adopts new destination resort mapping criteria that will apply in the future. The county did not attempt to adopt a new Destination Resort Eligible Lands Map at the same time it was adopting new destination resort mapping criteria. Instead the county adopted Ordinance 2010-025 which adopts a new procedure and deadlines for amending the Destination Resort Eligible Lands Map in the future. DCC 22.23.010; Record 51. Although petitioner does not identify any particular properties that petitioner believes are currently on the Destination Resort Eligible Lands Map and would not be eligible under the new destination resort mapping criteria, petitioner contends the challenged decisions create an internal comprehensive plan conflict because sites remain on the Destination Resort Eligible Lands Map that would be ineligible under the new mapping criteria.

It is not clear to us how there could be an internal plan conflict, even if we assume there are sites on the Destination Resort Eligible Lands Map that would not qualify under the new destination resort mapping criteria. Such sites presumably complied with the prior destination resort mapping criteria that applied at the time such sites were added to the

Destination Resort Eligible Lands Map. There might be an internal plan conflict (at least temporarily) if the county intended the new mapping criteria to operate both prospectively and retroactively. However, as our discussion of the fifth assignment of error below makes clear, the county does not intend its mapping criteria to operate retroactively unless the owners of sites that are already on the Destination Resort Eligible Lands Map no longer wish their property to remain on the map.

Finally, even in cases where a comprehensive plan map is amended to create an actual conflict with a zoning map, there is no general requirement that the comprehensive plan/zoning map conflict be eliminated at the same time the comprehensive plan map amendment that creates the conflict it adopted. *Neighbors for Livability v. City of Beaverton*, 27 Or LUBA 408, 417 (1999), *rev'd in part on other grounds* 168 Or App 501, 4 P3d 765 (2000). Therefore, even if the county had intended the new destination resort mapping criteria to apply retroactively, it would be entirely permissible for the county to delay updating its Destination Resort Eligible Lands Map under the newly adopted destination resort mapping criteria until a date in the future.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

As we have already noted, the challenged ordinances do not amend the Destination Resort Eligible Lands Map, but rather change the standards and procedures that the county must follow in amending the Destination Resort Eligible Lands Map in the future. The county's findings in support of Ordinance 2010-024 expressly recognize that when the comprehensive plan is amended in the future to add sites to the Destination Resort Eligible Lands Map, the county will have to address the Transportation Planning Rule. Record 41. Under OAR 660-012-0060, the county will be required to demonstrate that such future amendments to the Destination Resort Eligible Lands Map either will not significantly affect transportation facilities or, if they would, the county must adopt one or more of the remedial

measures set out in OAR 660-012-0060. The county went further in Ordinance 2010-024 and acknowledged that a recent decision by the Court of Appeals specifically finds that this obligation must be satisfied at the time the comprehensive plan is amended. *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 33, 220 P3d 445 (2009).

As far as we can tell, petitioner continues to fail to appreciate what the challenged amendments actually do. Petitioner argues:

> "Several changes in the mapping criteria expand the development potential of areas already mapped and thus the transportation impacts. The new plan amendment criteria which expand development potential on already-mapped lands include allowing multiple ownerships to constitute a destination resort. While previously any lots or parcels less than 160 acres in size could not be developed as a destination resort, the County's new eligibility criteria allow the combination of multiple ownerships to satisfy the 160-acre requirement. This would create a significant effect and requires application of OAR 660-012-0060." Petition for Review 27 (footnote omitted).

Although petitioner claims Ordinance 2010-024 adopts several changes that may have significant affects on transportation facilities, petitioner identifies only one. But that change only affects the eligibility of sites that may be mapped in the future and, as noted above, the county expressly recognized that any Destination Resort Eligible Lands Map amendments in the future that seek to utilize that change will be required under *Willamette Oaks, LLC* to address OAR 660-012-0060 at that time. As far as we can tell, the challenged ordinances make no changes in the way destination resorts may be developed on lands that are now included on the county's Destination Resort Eligible Lands Map or may be included on the Destination Resort Eligible Lands Map in the future.

While the ordinances that are at issue in this appeal are comprehensive plan amendments, and therefore potentially could result in significant affects on transportation facilities that could implicate OAR 660-012-0060, petitioner has not identified any such potential significant effects. We agree with respondents that amendments that merely alter the standards for adding sites to the Destination Resort Eligible Lands Map in the future have no discernable impact on transportation facilities. It is the future Destination Resort Eligible

Lands Map amendments themselves that might implicate OAR 660-012-0060, and the county correctly recognized that it will be obliged to consider OAR 660-012-0060 at the time those comprehensive plan amendments are adopted in the future.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner's fifth assignment of error overlaps somewhat with its second and third assignments of error. In its fifth assignment of error, petitioner challenges what it describes as two grandfather clauses. One of the disputed grandfather clauses is DCC 23.84.030(3)(d)(5), which we have already discussed under section E of the second assignment of error. The other disputed grandfather clause is DCC 22.23.010(C), which provides:

> "Lands shown on the existing eligibility map but unable to comply with DCC 23.84.030(3)(a), 23.84.030(3)(b), 23.84.030(3)(c) and 23.84.030(3)(d) will remain on the eligibility map if property owners file a formal request with the Deschutes County Community Development Department on an authorized county form by the first Friday in January at 5:00 p.m. to remain eligible."

Grandfather clauses are a commonly used tool in land use regulation. *See Scappoose Sand and Gravel, Inc. v. Columbia County*, 161 Or App 325, 327, 984 P2d 876 (1999) (grandfather clause exempting certain zoning regulations from preemption by a surface mining statute); *St. John v. Yachats Planning Commission*, 138 Or App 43, 906 P2d 304 (1995) (grandfather clause allowing lots that were legal when created to be developed even though they do not meet current minimum lot size requirements); *Campbell v. Bd. of County Commissioners*, 107 Or App 611, 613, 813 P2d 1074 (1991) (same). DCC 22.23.010(C) is a conditional grandfather clause, since a property owner must file a formal request to retain a property's designation on the Destination Resort Eligible Lands Map. But we do not see that that variation on the grandfather clause is legally significant. Like the typical grandfather clauses that routinely appear in land use regulations, DCC 22.23.010(C) was adopted to permit property owners whose property was included on the Destination Resort Eligible

Lands Map in the past under the laws that were in existence at that time to simply remain on the Destination Resort Eligible Lands Map even though they might not qualify under the newly amended destination resort mapping criteria.

Petitioner's arguments under this assignment of error are not well developed. Petitioner first argues that DCC 22.23.010(C) may permit lands that were added to the Destination Resort Eligible Lands Map in the past to remain on the Destination Resort Eligible Lands Map even though they are not eligible under the new county destination resort mapping criteria. But that is the essence of what a grandfather clause does. A grandfather clause shields land use rights that were gained under old land use laws from the application of new land use laws. That is a roundabout way of saying the new land use laws are only applied prospectively. If petitioner has discovered a source of legal authority that provides that all changes in land use law must be applied retroactively to upset land use rights that were obtained under prior land use laws, petitioner does not identify that legal authority.

Petitioner next argues the grandfather clause could allow properties to remain on the Destination Resort Eligible Lands Map even though they do not comply with state standards governing destination resorts. Although petitioner makes no attempt to distinguish between state standards governing destination resort mapping and state standards governing approval of individual destination resorts, petitioner appears to be concerned about both types of state standards.

Turning first to state standards governing approval of individual destination resorts, as far as we can tell DCC 22.23.010(C) would have absolutely no effect on those state standards. For example ORS 197.416(6) provides "[a] county may not approve siting a destination resort in the Metolius Area of Critical State Concern." The Metolius Area of Critical State Concern was designated by the Oregon Legislature in 2009. Even if there are sites within the Metolius Area of Critical State Concern that are on the county's Destination Resort Eligible Lands Map, and those sites would be allowed to remain on that map under

DCC 22.23.010(C), something petitioner suggests may be true but makes no attempt to establish, ORS 197.416(6) would nevertheless preclude county approval of a destination resort on that site. ORS 197.416 directs LCDC to prepare a management plan for the Metolius Area of Critical State Concern and prohibits counties from approving destination resorts within that area, but the statute says nothing about what the county must do about sites that were added to its Destination Resort Eligible Lands Map prior to 2009. Petitioner appears to assume that ORS 197.416 obliges the county to identify and remove any such properties from county maps, but makes no argument in support of that assumption. We will not develop that argument for petitioner. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

We turn next to petitioner's contention that DCC 22.23.010(C) might allow the county to retain sites on its Destination Resort Eligible Lands Map even though those sites violate ORS 197.455 destination resort mapping standards. Again, the target of petitioner's concern and petitioner's legal theory are unclear. If petitioner is contending that the county cannot assume that sites that were added to the Destination Resort Eligible Lands Map *pursuant* to former or current state standards were properly added, petitioner cites no authority for why the county must reexamine those prior decisions.

State standards for mapping and siting destination resorts have been amended over the years and sites that were included under prior versions of the destination resort mapping criteria might no longer be eligible if they were being considered today under amended ORS 197.455 mapping criteria. If petitioner is concerned that DCC 22.23.010(C) might allow such sites to remain on the county's Destination Resort Eligible Lands Map indefinitely, that concern might have merit if ORS 197.455 imposes an obligation on the county to take action to remove properties that were included on the Destination Resort Eligible Lands Map before ORS 197.455 was amended, if those properties would not qualify for the Destination Resort Eligible Lands Map under the amended ORS 197.455 destination resort siting standards. But

again, petitioner merely assumes that ORS 197.455 imposes that legal obligation, without making any attempt to show that it does. We decline to develop that legal argument for petitioner. *Deschutes Development v. Deschutes Cty*. It may be that ORS 197.455 does impose that obligation, and that DCC 22.23.010(C) runs afoul of that statutory obligation. It may also be that without regard to whether ORS 197.455 imposes such an obligation, ORS 197.646 would require that the amended ORS 197.455 mapping criterion apply directly and therefore preclude county approval of a destination resort on such a site.[13] Because petitioner does not adequately develop its position concerning sites that were properly added to the county's Destination Resort Eligible Lands Map but may no longer qualify under amended statutory destination resort mapping standards, we do not consider it further.

The fifth assignment of error is denied.

The county's decision is affirmed.

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[13] As relevant, ORS 197.646 provides:

> (1) A local government shall amend its acknowledged comprehensive plan, regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with:
>
> "(a) A new statutory requirement[.]
>
> "* * * * *
>
> "(4) When a local government does not adopt amendments to a comprehensive plan, a regional framework plan and land use regulations implementing either plan as required by subsection (1) of this section, the new statutory, land use planning goal or rule requirements apply directly to the local government's land use decisions. The failure to adopt amendments to a comprehensive plan, a regional framework plan and land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335."