BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY EDER, MOLLIE EDER, NANCY KNOCHE, KAREN LANG, DENNIS HILDERBRAND, ANNETTE HILDERBRAND, VERN DEWEY, DALE TOMPKINS, CAROLE HANCOCK, TOM ALEXANDER, and CURTISS BURRELL, Petitioners, vs. CROOK COUNTY, Respondent, and 818 POWELL BUTTE, LLC, Intervenor-Respondent. .	LUBA No. 2009-018

INTERVENOR-RESPONDENT'S BRIEF

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I. STANDING OF PETITIONER

Intervenor-Respondent 818 Powell Butte, LLC ("intervenor" or "applicant"), the applicant below, acknowledges that petitioners have standing to appeal to LUBA.[1]

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision

The challenged decision, which was made by the Crook County Court on January 2, 2009, approves a development plan for a destination resort on approximately 580 acres of land zoned for Exclusive Farm Use with a Destination Resort Overlay.

B. Summary of Argument

1. Response to First Assignment of Error

The 2003 amendments to ORS 197.455(1) were not intended to impose a new requirement that an applicant for destination resort development has to show that not only is the proposed resort site on lands mapped as eligible, but also that during the application process, none of the exclusions listed in the statute currently apply to the property. Even with the amendments, ORS 197.455(1) is not ambiguous when read in context, because ORS 197.455(2) clearly states that a map "is the sole basis for determining whether tracts of land are eligible for destination resort siting." There is no legislative history to support petitioners' radical interpretation, which is inconsistent with existing case law, the Destination Resort Handbook published by the Oregon Department of Land Conservation and Development (DLCD) and Goal 8.

Even if petitioners' far-fetched interpretation of ORS 197.455(1) were applied, the approval of Crook County (County) is consistent with the statute. Substantial evidence supports the County's conclusion that the subject property is not in a "high value crop area," as that is defined in ORS 197.435(2). The evidence cited by petitioners is anecdotal and does not establish that there is a concentration of commercial farms within three miles of the subject property. Petitioners have also failed to show that such farms are

[1] In the record, Intervenor is often called "Crossing Trails."

capable of consistently producing crops or products with a minimum gross value of $1,000 per acre per year.

2. Response to Second Assignment of Error

Petitioners are incorrect that OAR 660-012-0060 applies to intervenor's application for destination resort approval, because the application is for a conditional use, not an amendment to a functional plan, an acknowledged comprehensive plan or a land use regulation. Nor was OAR 660-012-0060 incorporated by findings in support of Crook County Ordinance 52, which adopted the destination resort chapter in the County's comprehensive plan.

Petitioners fail to demonstrate that Conditions 35 and 36 of the challenged decision do not adequately address concerns raised by the Oregon Department of Transportation (ODOT) related to transportation facility improvements. ODOT has dismissed its appeal of the decision. Condition 35 requires intervenor to provide improvements to three intersections that the proposed development could cause to fail. Condition 36 requires a specified proportionate-share contribution to the intersections that are already failing or will fail within the 20-year planning horizon even if the proposed development is never constructed.

Petitioners have not demonstrated that the resort will "significantly affect a transportation facility." The only standard that could possibly apply is Crook County Code (CCC) 18.116.100(6)(a)(iii), but that requires reducing "the performance standards of the transportation facility below the minimum acceptable level identified in the applicable transportation system plan (TSP)."[2] Some transportation facilities are already below the minimum acceptable level without any further development, which means the proposed development will not reduce the performance standards below the minimum acceptable level.

[2] The CCC criteria related to the Destination Resort Overlay are at CCC 18.116.010-18.116.120, attached as Appendix A.

Under *Dolan v. City of Tigard*, 512 US 687 (1994), any exaction imposed by the County in exchange for development approval must be roughly proportional to the impact of the proposed development. The County cannot use the threat of denial to impose a larger exaction. Even if it were not unconstitutional, it would be unrealistic to expect the developer of a resort to construct several multimillion-dollar transportation facility improvements to failing intersections simply because the resort was expected to contribute a small percentage of additional vehicle trips through the intersections.

3. Response to Third Assignment of Error

Petitioner adopts and incorporates by reference the summary of the response to the third assignment of error contained in the brief of respondent Crook County.

4. Response to Fourth Assignment of Error

Petitioner adopts and incorporates by reference the summary of the response to the fourth assignment of error contained in the brief of respondent Crook County.

C. Summary of Material Facts

1. Introduction

This appeal concerns the approval by the Crook County Court of a destination resort to be called "Crossing Trails," located on a 580-acre site in the vicinity of the rural community of Powell Butte. The site is located within the County Destination Resort Overlay zone. (R 9)

2. New Application: Payment of Application Fees

Before filing the application that resulted in the challenged decision, intervenor filed a similar application in 2007 for a resort to be called "Seven Peaks Resort." In August 2007, the County planning director notified the applicant that the application was not complete. (R 1953) Because of a name conflict, the resort was renamed "Crossing Trails Resort." (R 1951) Then, on March 27, 2008, intervenor withdrew the application, requesting that the County return all documents submitted and the application fee of $25,000. (R 1950) A new application was filed one day later, on March 28, 2008. (R 1556-1949)

As it turned out, the County had some difficulty issuing a check to the applicant for the original $25,000 application fee. Because it was convenient administratively, the $25,000 fee paid for the withdrawn application was not actually refunded to the applicant, but was instead applied to the new, similar application. (R 1519) In addition to the $25,000, the applicant paid $5,900 for traffic impact analysis fees to be paid to OTAK, the County's engineering consultant. Id.

The new application included 33 exhibits addressing the criteria in the CCC Destination Overlay Zone. (R 1583)

3. Process

The Crook County Planning Commission held six public hearings on the application, on April 30, June 4, June 18, July 2, August 13 and August 27, 2008, and deliberated at public meetings on September 3 and September 9, 2008. Minutes and transcripts of these hearings are at R 1377-1434 (April 30, 2008), R 1193-1270 (June 4, 2008), R 1023-98 (June 28, 2008), R 886-946, Supp R 118-174 (July 2, 2008), R 593-648 (August 13, 2008), R 415-79 (August 27, 2008), R 329-85 (September 3, 2008) and R 288-94, Supp R 80-117 (September 9, 2008). There are also minutes of October 22, 2008 (Supp R 74-75), when the application was on the consent agenda and a final decision of approval was made. (R 196-240)

ODOT and a group of neighbors filed separate appeals of the planning commission decision to the Crook County Court (R 151-82), splitting the appeal fee. (R 148) The appeals were on the record, with limited exceptions. (R 10-11) The County Court held a public meeting on November 12, 2008 to consider administrative issues, including whether to permit evidence outside the record. (Supp R 67-68) There were hearings on December 3, 2008 (R 114-30 (minutes)) and December 17, 2008 (R 70-91 (minutes)). A hearing set for December 31, 2008 was ultimately postponed to January 2, 2009. (R 65) The County Court made a final decision on January 5, 2009. (R 8-63)

4. Issues on Appeal to County Court

ODOT objected to the planning commission decision for three stated reasons. (R 153-54) Underlying all three was ODOT's disagreement with intervenor's analysis of the relationship between CCC 18.116.080(3)(g) and the Oregon Highway Plan (OHP). ODOT specifically objected to the planning commission's Conditions 27, 28 and 29.[3] (R 154) These conditions were the subject of much discussion by the County Court and were extensively modified in the final decision as Conditions 35-38. (R 61-62)

The neighbors, some of whom are now petitioners to LUBA, raised a host of issues, including those that are now part of the present appeal. (R 162-65)

III. JURISDICTION

This appeal is subject to LUBA's jurisdiction under ORS 197.015(11) and ORS 197.825 because the challenged decision applies the County's land use regulations.

IV. ARGUMENT

A. Response to First Assignment of Error

1. Introduction

Under the first assignment of error, petitioners contend: (1) the County confused the concepts of "high value farmland" and "high value crop area"; (2) the County misinterpreted the relevant statute, ORS 197.455, to conclude that land mapped as eligible for destination resort development is in fact eligible for destination resort development; and (3) the County's conclusion that the subject property is not in a "high value crop area" under the statutory definition is not supported by relevant evidence. Petition for Review (PR), pp. 6-7.

ORS 197.435 defines "high value crop area" to mean:

> "[A]n area in which there is a concentration of commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year. These crops and products include field crops, small fruits, berries, tree fruits, nuts or vegetables, dairying, livestock feedlots or Christmas trees as these terms are used in the 1983 County and State Agricultural Estimates prepared by the Oregon State University Extension Service. The 'high value

[3] These are at R 240.

> crop area' designation is used for the purpose of minimizing conflicting uses in resort siting and does not revise the requirements of an agricultural land goal or administrative rules interpreting the goal."

ORS 197.455(1), which addresses the siting of destination resorts, states:

> "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."

The statute then lists a number of exclusions – areas where resorts *cannot* be sited. These include sites "within three miles of a high value crop area." ORS 197.455 (1)(b)(B).

ORS 197.455(2) states:

> "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*." (Emphasis added.)

CCC 18.116.010 contains a purpose statement, which opens with the following sentence: "The purpose of the destination resort overlay zone is to provide a process for the siting of destination resorts *on rural lands that have been mapped by the county as eligible for this purpose*." (Emphasis added.) The County found that the site is located within the County's destination resort overlay zone and is eligible for destination resort siting and development. (R 9, 12)

2. Distinction between "High Value Farmland" and "High Value Crop Area"

Petitioners' argument that the property is not eligible for a destination resort rests on ORS 197.455 rather than the CCC. However, since findings are not typically made in response to statutory requirements, absent some argument that the zoning ordinance is inconsistent with a statute, the challenged decision contains findings addressing ORS 197.455 under the closest code criterion related to farmland, CCC 18.116.040(2), which states, "Development shall not be located on high value farmland." (R 12-16).

After discussing the high value farmland issue (R 12), the findings squarely (and separately) address petitioners' arguments concerning the high value crop area issue. (R 13-16). These findings make clear the County understood the distinction between high value farmland and high value crop areas. They warrant the Board's close scrutiny. They summarize petitioners' arguments, which are made again to LUBA, and the applicant's responses, which are as valid now as they were when they were made to the County.

3. Destination Resort Eligibility Map as Determinative

The County rejected petitioners' contention that a new eligibility determination must be made under ORS 197.455 each time an application for a destination resort is considered. (R 15) That contention is based on the 2003 amendment to ORS 197.455(1) as follows (with removed language in *italics* and new language in **bold**):

> "A destination resort [*shall*] **must** be sited on lands mapped as eligible for destination resort siting by the affected county. [*A map adopted by a*] **The** county [*shall*] **may** not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas."

The change from "shall" to "must" or "may" was made in many places in the statutes in 2003 and has no independent significance. Contrary to petitioners' unsupported claim, PR, p. 7, there is no legislative history that explains why the first few words of the second sentence were modified. As intervenor argued below, and as the County agreed:

> "Opponents misread ORS 197.455(1), which begins by a reference to 'lands mapped as eligible.' The statute addresses the mapping process and identifies certain areas that cannot be mapped as eligible for resorts. To focus on one sentence, to the exclusion of the balance of the statute, is to improperly disregard context. ORS 197.455(2) provides, '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 no 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 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.' In other words, a county cannot change the designation of land as eligible for destination resort siting without amending its destination resort map. It cannot make individual eligibility determinations at the time of application for a resort.

> "The 2003 amendment to ORS 197.455(1) does not change its meaning. In the context of the entire statute, it would be incorrect to rely on a change in one sentence, which was made without mention anywhere in the legislative history of the statute, and which would invalidate a clear history involving case law (*Foland v. Jackson County*, 311 Or 167, 807 P2d 801 (1991)) and subsequent statutory amendments intended to address the *Foland* holding. As stated by the Destination Resort Handbook, published by the Department of Land Conservation and Development in 1995, 'The purpose of mapping is to clearly show areas available for resort development. * * * It is important that counties precisely map eligible areas. The mapping must be property-specific to avoid uncertainty in applying the plan. *The law says that this map is the sole determinant of tracts eligible for destination resorts*.' Goal 8, which addresses destination resort siting, states in the 'Implementing Measures,' 'A map adopted pursuant to this section shall be the *sole basis* for determining whether tracts of land are eligible for siting of large destination resorts under the provisions of this goal and ORS 197.435 to 197.467." (Emphasis added.) (R 13-14)

Petitioners' reading of ORS 197.455(1) would create a contradiction between the first and second sentences. The second sentence must be read to elaborate on the mapping process discussed in the first sentence, not to establish a new requirement that would render the mapping process obsolete. If petitioners were correct that it is necessary to re-qualify a property as eligible for destination resort siting at the time of application for destination resort development plan approval, as well as at the time the map is developed, there would be no purpose to the mapping process at all. The exclusions in ORS 197.455 would have to be addressed when the map was adopted and again at the time of an application. Petitioners' strained interpretation is contrary to the language in ORS 197.455(2), which petitioners do not discuss. It is also contrary to Statewide Planning Goal 8, which, like ORS 197.455(2), uses the "sole basis" language.

4. Decision Supported by Substantial Evidence

There is no reason to examine the County's evaluation of the evidence unless this Board concludes that ORS 197.455(1) means that the County should have reviewed, during the application process, the eligibility of the subject property for a destination resort. If the Board does reach the evidence question, it should conclude that the County's findings are supported by substantial evidence in the whole record.

The County's original decision to map the subject property as eligible for destination resort development was based in part on the work of Stanley D. Miles, a

consultant and Agricultural Economist Emeritus at Oregon State University. (R 14) This work is discussed in the Crook County Comprehensive Plan (CCCP), pp. 76-78.[4] As the CCCP explains, the standard for a high value crop area "does not include land that routinely fails to produce High Value Crops, but has an exceptionally productive year." The County considered the language in the CCCP in rejecting petitioners' argument that evidence of one year of high productivity should qualify land producing hay as a high value crop area. (R 14-15)

The County also relied on an August 27, 2008 letter, with attached exhibits, from Bruce Andrews, intervenor's consultant, who previously was a director of the Oregon Department of Agriculture (for 10 years). (R 515-49, 1422) Mr. Andrews acknowledged that due to inflation, energy shock, international market pressure, the declining value of the dollar and shifting crop patterns brought about by cash market opportunities, hay prices were experiencing historic price peaks.[5] (R 515) However, Mr. Andrews advised:

> "The 'high value crop area' definition – 'capable of producing crops or products with a minimum gross value of $1,000 per acre per year' – does not refer to a one-time event or to a glass ceiling that, once broken, forever renders hay a 'high value crop.' By its very nature, a 'high value crop' should consistently be able to produce a value in excess of $1,000 per acre. If 2008 proves to be a big year for hay, so much the better. However, a much longer trend line must be observed before reaching a lasting conclusion that hay is a high value crop." (R 517)

Mr. Andrews also noted that per-acre values of hay and alfalfa production in Crook County have been below $500 per acre for the last five production years. Id. His statement is supported by an attached table based on numbers from the 2007 Oregon County and State Agricultural Estimates (R 518), as well as additional supporting data. (R 519-49)

[4] The chapter of the CCCP addressing destination resorts is attached as Appendix B.

[5] The economic climate of early to mid-2008 cannot be ignored, although the record closed on October 22, 2008, before the collapse of the economy in late 2008 was evident. Since then the economies of Crook County, the State of Oregon and the nation have experienced radical changes, and many commodities have experienced dramatic devaluations. These highlight the instability of prices generally and the difficulty present in relying on prices during a "bubble" phase of the economy.

Petitioners contend that all of this evidence is "irrelevant." In opposition, they rely upon anecdotal and/or speculative testimony of neighbors of the proposed resort that their land (and, presumably, by inference or extrapolation the subject property) is "capable" of producing hay worth $1,000 per acre (R 873, 877-78, 1006, 1346, 1360-62).[6] They also rely upon evidence that in 2008, certain farms near the subject property, which may well not have the same soil and slope characteristics, actually produced crops valued at more than $1,000 per year. (R 952-85) Petitioners do not admit the possibility that the economic bubble could have been driving up prices unnaturally. They also do not demonstrate that there is a "concentration of commercial farms" within three miles of the subject property that are capable of producing crops or products, including hay and other crops, with a minimum gross value of $1,000 per acre per year.[7]

Petitioners argue that the definition of "high value crop area" – particularly the words "capable of" – means that it is a mistake to consider whether values of hay in one year are an anomaly. This argument erroneously separates the economic environment from the capability question. If the economy is slow, fewer people can afford farm animals and the demand for hay is reduced, it doesn't matter that in a different economy hay production would qualify the area as a high value crop area. Given the volatility of commodity prices, which is established by Mr. Andrews's evidence (R 518 (table), R 519-49 (backup data)), it should be clearer than ever that it is important to consider at least several years' worth of data in determining whether a site is eligible for a destination resort. Another way to understand this is to imagine someone asking in January 2000, at the height of the dot-com bubble, "Is Pets.Com stock capable of being worth $300 million?" The answer then was yes, but no one

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[6] Petitioners also cite to arguments by their own attorney (R 1071) and other testimony that says little that is pertinent. *See, e.g.,* R 1517: "In fifty years this farm has changed hands only three times – two of the owners stayed until retirement age. During this time I have seen hay, grain, even potatoes plus cattle raised on this property. This can be a productive farm!"

[7] Almost all of the discussion at the County focused on hay as a crop. However, there is a small amount of unsupported testimony in the record from opponents of the resort that other "high-value" crops can be produced in the area.

would make the same claim today, and anyone who relied on the January 2000 stock price of Pets.Com in making investment decisions would today be viewed as imprudent.

When confronted by conflicting evidence in the local record, LUBA has a limited role. In *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988), the Oregon Supreme Court stated, "We emphasize that the question LUBA is to decide on remand is simply whether, in light of all the evidence in the record, the city's decision was reasonable." In deciding whether a challenged decision is supported by substantial evidence in the whole record, LUBA is required to consider whether supporting evidence is refuted or undermined by other evidence in the record, but it cannot reweigh the evidence. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994). As the Oregon Court of Appeals observed, "[t]he line between reweighing evidence and determining substantiality in the light of supporting and countervailing evidence is either razor thin or invisible to tribunals that must locate it." *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). However, the outcome in that case, where the court reversed LUBA, emphasizes the respect that is due to the local government.

Petitioners argue that their evidence is more persuasive than intervenor's evidence. However, this Board has held on many occasions that arguments that merely cite to opposing testimony and contend that that testimony should be believed over the evidence the local government chose to rely upon are insufficient to demonstrate that the decision is not supported by substantial evidence. *See, e.g., Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

The first assignment of error should be denied.

B. Response to Second Assignment of Error

1. OAR 660-012-0060 Does Not Apply

Petitioners acknowledge that because intervenor's application was for a conditional use, not for an amendment to a functional plan, an acknowledged comprehensive plan or a land use regulation, OAR 660-012-0060 does not apply to the application. PR, p. 9.

Nevertheless, they argue that "the Goal 12 TPR was incorporated into the destination resort development approval analysis by * * * the adoption of the destination resort 'eligibility map.'" Id. They rely upon findings in support of the adoption of Ordinance No. 52, which added a chapter concerning destination resorts to the CCCP in May 2002.[8]

Findings in support of an ordinance are not acknowledged land use regulations. The CCCP chapter on destination resorts does not mention transportation at all. It does not contain the language of paragraph 18 of the findings, which is quoted by petitioners. PR, p. 10. In any event, paragraph 18 does not support petitioners' argument and is not particularly helpful in applying the relevant provisions of the CCC:

> "Since compliance with particular performance standards cannot be determined until a specific resort proposal is submitted, the Court finds that the amendments [to the comprehensive plan] properly limit uses to be consistent with any applicable standards by requiring resort applicants to provide a traffic study at the time of development review to show that the proposed development will not reduce the *level of service* of any impacted transportation facility based on the performance standards set forth in the applicable transportation system plan." (Citations omitted, emphasis added.)

The 1999 OHP, which is the transportation system plan (TSP) for state transportation facilities, does not use "level of service" (LOS) any more, but instead uses "volume/capacity ratios."[9] It appears that when paragraph 18 was written in 2002, the County was being guided by the 1991 version of OAR 660-012-0060(2), which stated, "A plan or land use regulation amendment significantly affects a transportation facility if it * * * (d) Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP." *See: Oregon Dept. of Transportation v. Coos County*, 158 Or App

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[8] *See* Appendix B.

[9] The 1999 Oregon Highway Plan explains at p. 60:

> "In the 1991 Highway Plan, levels of service were defined by a letter grade from A-F, with each grade representing a range of volume to capacity ratios. A level of service A represented virtually free flow traffic with few or no interruptions while level of service F indicated bumper-to-bumper, stop-and-go traffic. However, each letter grade actually represented a range of traffic conditions, which made the policy difficult to implement. This Highway Plan maintains a similar concept for measuring highway performance, but represents levels of service by specific volume to capacity ratios to improve clarity and ease of implementation."

568, 976 P2d 68 (1999) (When zoning code amendments cause transportation facilities that are already below the minimum acceptable level identified in the TSP to get worse, they do not have a "significant effect" under 1991 version of OAR 660-012-0060.) Since it uses a different standard of measurement, paragraph 18 cannot be applied to ODOT facilities. The CCC itself is the only applicable standard.

2. Anticipated Impact of Destination Resort to Calculate Proportionate Share Contribution

Four engineering firms participated in determining the anticipated impact of the proposed resort.[10] Ferguson & Associates, Inc. (Ferguson) prepared a lengthy study which contains a table, Table E-1, in the Executive Summary (Supp R 238). This table assumes all approved, pending development will occur and then looks to see how the resort would affect ten intersections that are forecast to exceed County operation standards or ODOT mobility standards in at least one of the analysis years (through 2028). The study concludes that in only one case, the junction of Highway 126 and Wiley Road, can failure be attributed to the proposed resort.

Table E-2 of the study (Supp R 239) includes mitigation recommendations for the seven intersections (of the ten studied) that were likely to be impacted by trips from the proposed resort. It notes that the three already failing intersections requiring an interchange as mitigation are in the Crook County Transportation System Plan (TSP).

The Ferguson study was reviewed by DKS Associates, reporting to OTAK (the County's engineering firm). (R 1695-98) DKS observed, "The proportionate share of impact from the proposed development could be utilized to determine the proposed development's share of the future improvement costs." (R 1698) In its response, Ferguson stated, "To date several discussions have taken place with ODOT and the County. * * * A proportionate share proposal is being prepared and will be presented to Crook County and ODOT for consideration as soon as possible." (R 1701)

[10] In addition, opponents submitted a letter from Main Street Engineering dated June 10, 2008, which relied on the data from the applicant's transportation studies. (R 47, 753-762)

Building on the Ferguson study, a second engineering firm, Group Mackenzie, prepared a letter (R 1702-17) dated March 28, 2008, concluding that under CCC 18.116.100(6)(a), the proposed development would "significantly affect" two transportation facilities – the Highway 126/Wiley Road and Highway 126/Parrish Lane intersections – by reducing the performance standards below the minimum acceptable level identified in the applicable TSP. (R 1703) In a letter dated June 4, 2008, Group Mackenzie stated that the applicant was working with ODOT staff to identify the necessary infrastructure at these intersections.[11] Group Mackenzie added:

> "The TIA analysis also identifies a number of transportation facilities in the study area that are currently operating, or are projected to operate, below the minimum acceptable performance standards regardless of the proposed development. The Applicant acknowledges a proportional share responsibility with respect to future intersection improvements. To address this responsibility, the Applicant proposes the County impose a condition of approval requiring the Applicant to enter into a memorandum of understanding (MOU) with the County requiring a proportional share contribution to identified future intersection improvements." (R 1189)

Group Mackenzie attached a "Summary of Estimated Share Contributions to Roadway Improvements." (R 1192) Finally, Group Mackenzie submitted a letter on June 18, 2008, which furnishes more information about the Highway 126/Wiley Road and Highway 126/Parrish Lane intersections. (R 1099-1101)

In Table 3 of a letter dated July 1, 2008 (R 994-1000), OTAK listed the seven intersections identified by ODOT in its April 30, 2008 letter to the County. (R 1000) OTAK then listed the mitigation measures stated by ODOT to be appropriate and ODOT's estimate of the cost of mitigation, which were somewhat higher than the Group Mackenzie estimates. Finally, OTAK multiplied the estimated cost by the percentage of the overall traffic attributed to the project by Group Mackenzie to calculate a suggested proportional share of the mitigation cost. The applicant and the County accepted OTAK's higher numbers in negotiating the conditions of approval. (R 47)

[11] The Wiley Road intersection was not identified by Ferguson as requiring mitigation.

3. ODOT's Position

ODOT never said in any of its letters, as petitioners argue, PR, p.11, that all of the mitigation projects listed in its April 30, 2008 letter should be funded or completed as a result of a decision of approval. ODOT said only this:

> "To sufficiently evaluate the applicant's proposal, ODOT would recommend a more thorough technical review of the transportation impacts to establish feasibility, interim solution options, design details, timing triggers and cost sharing, as appropriate." (R 1435)

In its June 3, 2008 letter (R 1297-98), ODOT commented that "Discussions related to the project impacts and transportation system deficiencies, mitigations and the funding for any agreed upon mitigations are on-going [sic] and incomplete." ODOT took the legal position that Crook County's TSP requires the County to defer to ODOT's mobility standards. In particular, as relevant here, ODOT pointed to policies within the 1999 OHP with which local jurisdictions are required to be consistent: "Policies * * * 1F, Highway Mobility Standards; * * * Access Management; 4A; Efficiency of Freight Movement;[12] 4D, * * * in their local and regional plans when planning for state highway facilities within their jurisdiction."[13] (R 1298) However, ODOT did not explain what these policies had to do with the issue raised by petitioners below and in this appeal, which is whether the application could be approved as long as intervenor's proportionate share contribution was required through conditions at the appropriate time.

In a third letter dated July 16, 2008, ODOT contended:

> "[T]he proffered proportional share contribution does not comply with [CCC 18.116.100(6)(c)] since it does not include the timing of the improvements. Some of the improvements are needed at day of opening and others are needed through the study horizon year. The assurance of the necessary improvements being in place at time of need is required to protect the safety of the traveling public." (R 740)

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[12] This reference is incorrect. Policy 4A, Efficiency of Freight Movement, is listed below Goal 4, Travel Alternatives.

[13] This reference is incorrect and confusing. Policy 4D, which is also listed below Goal 4, Travel Alternatives, applies to Transportation Demand Management.

ODOT agreed with the applicant that the mobility improvements the applicant proposed to construct at Highway 126/Wiley Road and Highway 126/Parrish Lane were appropriate and requested a condition requiring applicant to construct the improvements. Id.

ODOT continued:

> "The July 2, 2007 Transportation analysis [Ferguson] produced for Seven Peaks (Crossing Trails) identified several ODOT transportation facilities that are currently operating or are projected to operate below minimum performance standards in the near future. The applicant has acknowledged a proportional share responsibility for future intersection improvements at the identified locations. To ensure that required transportation facility improvements are in place at time of need and the traveling public safety and mobility are protected, ODOT requests that if the application is approved, the applicant, County and ODOT be required as a condition of approval, to enter into a memorandum of understanding (MOU) to identify the Crossing Trails Resort obligation to identified future intersection improvements." (R 741)

To address ODOT's concerns, the County included Conditions 35, 36 and 37 in its decision of approval, which do what ODOT requested. Although ODOT initially appealed the County's decision to LUBA, it subsequently dismissed its appeal. It is unclear to intervenor what petitioners' concerns are, since they apparently assume the worst – failure of one or more transportation facilities at some unidentified time – without explaining why the conditions are insufficient to solve the problem. The fact that ODOT dismissed its appeal suggests that it does not share petitioners' concerns.

The second assignment of error should be denied for the simple reason that petitioners' assumption that the proposed mitigation measures are inadequate is incorrect. Petitioners offer no argument or evidence in support of that assumption. ODOT's letters do not support it. (There are, of course, no letters in the record from ODOT after the decision, with its modified conditions, was adopted.) Therefore, there is no reason for LUBA to reach petitioners' constitutional argument, discussed below, based on *Dolan v. City of Tigard*, 512 US 687 (1994).

4. Analysis of Applicability of CCC 18.116.100(6)(a)-(c) and the OHP Standards

CCC 18.116.100(6), which is similar to OAR 660-012-0060 (1998 version), provides:

"(a) The traffic study required by CCC 18.116.080(3)(g) illustrates that the proposed development will not significantly affect a transportation facility. A resort development will significantly affect a transportation facility for purposes of this approval criterion if it would, at any point within a 20-year planning period:

"(i) Change the functional classification of the transportation facility;

"(ii) Result in levels of travel or access which are inconsistent with the functional classification of the transportation facility; or

"(iii) Reduce the performance standards of the transportation facility below the minimum acceptable level identified in the applicable transportation system plan (TSP).

"(b) If the traffic study required by CCC 18.116.080(3)(g) illustrates that the proposed development will significantly affect a transportation facility, the applicant for the destination resort shall assure that the development will be consistent with the identified function, capacity, and level of service of the facility through one or more of the following methods:

"(i) Limiting the development to be consistent with the planned function, capacity and level of service of the transportation facility;

"(ii) Providing transportation facilities adequate to support the proposed development consistent with Chapter 660 OAR, Division 12; or

"(iii) Altering land use densities, design requirements or using other methods to reduce demand for automobile travel and to meet travel needs through other modes.

"(c) Where the option of providing transportation facilities is chosen in accordance with subsection (6)(b)(ii) of this section, the applicant shall be required to provide the transportation facilities to the full standards of the affected authority as a condition of approval. Timing of such improvements shall be based upon the timing of the impacts created by the development, as determined by the traffic study or the recommendations of the affected road authority."

The challenged decision expressly adopts and incorporates by reference (R 47) the legal analysis in intervenor's June 3, 2008 memorandum (R 1302-11) and November 26, 2008 memorandum. (Supp R 13-25)[14] The June 3, 2008 memorandum was written in response to ODOT's April 30, 2008 letter to the County, and the analysis contained therein is essentially repeated here.

[14] The reference in the County decision (R 47) to a December 3, 2008 memorandum appears to be an error. There is no December 3, 2008 memorandum. However, Intervenor submitted a memorandum on November 26, 2008, which discusses transportation issues in response to ODOT. (Supp R 21-25)

In the County proceedings, ODOT relied upon CCC 18.116.100(6)(a)(iii) as a surrogate for OAR 660-012-0060(2)(d) (1998 version). ODOT also relied upon *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000), which interprets OAR 660-012-0060(2)(d) (1998 version), to argue that intervenor was responsible for mitigating "significant impacts" on already failing state highways. However, *Warrenton* concerned a proposed rezone, which brought it squarely within the governance of OAR 660-012-0060. In *Warrenton*, the relevant question was the relationship between OAR 660-012-0060(2)(d) (1998 version) and the OHP. The question presented was whether the proposed zone changes would "significantly affect" a transportation facility as the term "significantly affect" was employed in OAR 660-012-0060(2) (1998 version). OAR 660-012-0060(2) (1998 version) stated: "A plan or land use regulation amendment significantly affects a transportation facility if it * * * (d) [w]ould reduce the performance standards of the facility below the minimum acceptable level identified in the TSP." The TSP for Oregon state highways is the OHP.

The OHP, Policy 1F, Action 1F.6, states:

> "*For purposes of evaluating amendments to transportation system plans, acknowledged comprehensive plans and land use regulations subject to OAR 660-12-060*, in situations where the volume to capacity ratio for a highway segment, intersection or interchange is above the standards in Table 6 or Table 7, or those otherwise approved by the Commission, and transportation improvements are not planned within the planning horizon to bring performance to standard, the performance standard is to avoid further degradation.[15] If an amendment to a transportation system plan, acknowledged comprehensive plan or land use regulation increases the volume to capacity ratio further, it will significantly affect the facility." (Emphasis added.)[16]

Based on this language, ODOT argued in *Warrenton* that the quoted OHP language in its entirety was a "relevant performance standard for Highway 101." That is, it argued the language that "the performance standard is to avoid further degradation" meant that even when the intersection was already failing, the fact that there would be further

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[15] Note that "above the standards" and "increase the V/C ratio further" means reducing highway performance, because as the V/C ratio number increases from 0 to 1, the performance deteriorates.

[16] *See* Appendix C.

degradation, thereby increasing the V/C ratio, was reason enough to apply OAR 660-012-0060(2)(d) (1998 version) to find the change would "significantly affect" the intersection.

The language in CCC 18.116.100(6)(a)(iii) has been modified from the state rule because it deals with the approval of development (a destination resort) rather than with "amendments to functional plans, acknowledged comprehensive plans and land use regulations." However, the provision "Reduce the performance standards of the transportation facility below the minimum acceptable level identified in the applicable transportation system plan" is in both CCC 18.116.100(6)(a)(iii) and OAR 660-012-0060(2)(d) (1998 version).

OAR 660-012-0060 does not apply directly to a destination resort application, since a destination resort application is not "an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation." *See* OAR 660-012-0060(1) (1998 version). OHP Policy 1F, Action 1F.6 also does not apply to a destination resort application, because, by its own terms, it is "For purposes of evaluating amendments to transportation system plans, acknowledged comprehensive plans and land use regulations subject to OAR 660-[0]12-060."

That leaves open the question whether CCC 18.116.100(6)(a)(iii) was intended to import the analysis in *Warrenton* in different circumstances. The language of the "relevant performance standard," which is OHP Policy 1F, Action 1F.6 for purposes of OAR 660-012-0060(2)(d), clearly limits that performance standard to circumstances that do not include destination resort development. Destination resort development on the Crossing Trails property is already contemplated by existing functional plans, acknowledged comprehensive plans and land use regulations. Therefore, neither OAR 660-012-0060 nor OHP Action 1F.6 applies to a destination resort application.

Furthermore, it is now reasonable to doubt that *Warrenton* would have been affirmed by the Court of Appeals, had it been appealed. In *ODOT v. City of Klamath Falls* 177 OR App 1, 34 P3d 667 (2001), the court specifically declined to consider the issue. (*See*

Klamath Falls, footnotes 2 and 3.) LUBA had to stretch to reach the conclusion that the "further degrade" language in OHP Policy 1F, Action 1F.6 is a "performance standard" under OAR 660-012-060(2)(d) (1998 version). LUBA admitted, "[T]he question is a close one." 37 Or LUBA at 946. And in *Jacqua v. City of Springfield*, 193 Or App 573, 591 n 10, 91 P3d 817 (2004), which followed *Warrenton*, the court noted that the OHP "is not an administrative rule and is not codified in statute, although it is referred to as establishing certain highway standards."

It appears that DLCD, perhaps as a result of the note in *Jacqua*, had its own doubts about LUBA's interpretation of the 1998 version of OAR 660-012-060(2)(d) and the applicability of OHP Action 1F.6. In 2005, after *Warrenton* was decided, DLCD added OAR 660-012-0060(1)(c)(C) to the rule: "Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan." The 2005 amendment/addition to the rule would have been unnecessary if the 1998 version, in combination with the OHP, meant what LUBA had concluded it meant. CCC 18.116.100(6)(a) does not include the "worsen the performance" clause that is now in OAR 660-012-0060(1)(c)(C).

If the performance standards of a transportation facility are already below the minimum acceptable level, expressed as a V/C ratio, then the proposed development will not reduce the standards below that level. In that case, the analysis in *Dept. of Transportation v. Coos County*, 158 Or App 568, 976 P2d 68 (1999), applies. The proposed resort can be said to "significantly affect" only two intersections: (1) Highway 126 and SW Wiley Road; and (2) Highway 126 and SW Parrish Lane. Condition 35 requires full mitigation for those.

In summary, the language of OHP Policy 1F, Action 1F.6 makes clear that it does not apply to destination resort approvals. Intervenor would also argue that it does not apply, through OAR 660-012-060 (1998 version), to even "an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation," although LUBA has

decided otherwise, and so that is the rule at least until it is appealed to the Court of Appeals. Since OHP Policy 1F, Action 1F.6, does not apply to the application of CCC 18.116.100(6)(a)(iii), the applicant was not required by the CCC to mitigate already failing transportation facilities. This is a second reason to deny the second assignment of error without reaching petitioners' *Dolan* argument.

5. *Dolan* Analysis

In *Dolan*, the U.S. Supreme Court held that exactions, where a local government makes an adjudicative decision to condition an application for development on an individual parcel and requires the applicant to deed portions of property to the city, are subject to heightened scrutiny. Not only is an "essential nexus" required between the condition and impact of the development, *Nollan v. California Coastal Comm'n*, 483 US 825 (1987), but there must be "rough proportionality" between the exaction and the impact of the proposed development. With the exception of the Highway 126 intersections with Wiley Road, Parrish Lane and Reif Road and the affected roads, where Conditions 35, 37 and 38 require full mitigation from intervenor, the actual percentage contribution of the proposed resort to the failure of the transportation facilities listed in the Ferguson/Group Mackenzie/OTAK analyses will be negligible. The Powell Butte Highway/Highway 126 intersection, the Millican Road/Highway 126 intersection, the Tom McCall Road/Highway 126 intersection, the Veterans Way/Highway 126 intersection and both the northbound and southbound Highway 126/Highway 26 intersections are already failing. (Supp R 238, R 998) The percentage share contribution of intervenor's project to the traffic at these intersections will range from 1.9 to 4.7 percent of existing traffic. (R 998)

In response to petitioners' arguments that the County should simply deny the application: *Dolan* makes clear that the government cannot force an applicant to choose between outright denial and an unacceptable condition. The petitioner in *Dolan* contended that the city had forced her to choose between the building permit and her right under the Fifth Amendment for compensation for the public easements. The court found the choice

forced by the city to be unconstitutional. The local government had the burden of proof to show that exaction was "roughly proportional" to the impact of the proposed development. It could not deny the application if the applicant refused to pay more. Yet petitioners now ask LUBA to require the County to impose the same choice upon the applicant in this case: Either accept denial of the application or make a contribution to highway improvements that vastly exceeds the actual impact of the proposed development on the affected intersections.[17]

Taken to its logical conclusion, petitioners' argument would require a local government to demand that an applicant for any zone change or map amendment, no matter how minor, be required to construct state highway interchanges or other transportation facilities costing many millions of dollars if traffic projections showed (1) the intersections were already failing or would fail at any time during the next twenty years, and (2) the zone change or map amendment could result in an increase of one car at any of the intersections. As an example of why this is a very bad idea, leaving destination resorts aside for the moment: Urban growth boundary expansions are often necessary to add industrial land to attract new business to an area. Petitioners' interpretation of the CCC would be a powerful disincentive to any new business. Ultimately, the task of funding and building major highway improvements belongs to the County and ODOT, not private developers.

The second assignment of error should be denied.

C. Response to Third Assignment of Error

Intervenor adopts and incorporates by reference the response of respondent Crook County to this assignment of error.

D. Response to Fourth Assignment of Error

Intervenor adopts and incorporates by reference the response of respondent Crook County to this assignment of error.

[17] Petitioners appear to agree that (1) if the application is approved, any exactions must be roughly proportional, and (2) the exactions imposed by the County in Condition 36 are roughly proportional.

V. CONCLUSION

Petitioners' assignments of error should be denied. Intervenor respectfully asks that LUBA affirm the County's decision of approval.

DATED this 27th day of October, 2009.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____
Peter Livingston, OSB #823244
Of Attorneys for Intervenor-Respondent
818 Powell Butte, LLC

CERTIFICATE OF FILING

I hereby certify that I filed the original of the INTERVENOR-RESPONDENT'S BRIEF, together with four (4) copies thereof, with the Land Use Board of Appeals, Public Utility Commission Building, 550 Capitol Street NE, Salem, OR 97310-2552, on October 27, 2009, by first class mail, postage prepaid, to the Board at the above address.

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818 Powell Butte, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2009, I served a true and correct copy of this INTERVENOR-RESPONDENT'S BRIEF on the persons listed below by first class mail, postage prepaid:

David M. Gordon Crook County Courthouse 300 NE 3rd Street Prineville, OR 97754 Attorney for Respondent Crook County	Jannett Wilson Western Environmental Law Center 1216 Lincoln St. Eugene, OR 97401 Attorney for Petitioners Gary and Mollie Eder, et al

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