OREGON'S RESOURCE PROTECTION CONUNDRUM

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I. INTRODUCTION

Because governance in the United States is along the lines of a federal system, the federal government and the states may and do choose to regulate within their respective areas of competence in different ways. This paper examines regulations of the use and protection of natural and other resources under Oregon Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces).[1] Examined here are the strengths and weaknesses of a planning-oriented approach to resource use and protection that is achieved by designating specific resource sites to be protected and by developing and applying policies, implementing measures, and criteria for their use. The object is to foster a more certain outcome—one that can be measured against adopted policies and, perhaps more importantly, does not depend on shifting public attitudes that are not based on consistent planning principles. However, as we shall see, the application of that approach in Oregon comes with appreciable downsides including an inclination to refrain from making significant changes to existing arrangements, which we suggest will lead to a slow but steady loss of resources. The authors' objectives are to describe the interactions between Goal 5 and the resources ostensibly protected thereunder, evaluate that system, and present recommendations for improvement.

1. OR. ADMIN. R. 660-015-0000(5) (2021); OR. DEP'T OF LAND CONSERVATION & DEV., OREGON STATEWIDE PLANNING GOALS AND GUIDELINES 22–24 (2019) [hereinafter CURRENT GOALS], https://www.oregon.gov/lcd/Publications/compilation_of_statewide_planning_goals_July2019.pdf.

II. THE OREGON PLANNING PROGRAM AND GOAL 5

Oregon decided to forgo the use of environmental impact statements and similar measures when it enacted its statewide planning program. The program was initially enacted in 1973 through Oregon Senate Bill 100,[2] and it has been amended over time. The structure of that program will not be recounted at length here, but it involves a state agency, the Land Conservation and Development Commission (LCDC), supported by staff in the Department of Land Conservation and Development (DLCD), which formulates, interprets, and enforces statewide land use planning policies called "goals" that must be incorporated into binding regional and local comprehensive plans and carried out through local land use regulations.[3] LCDC certifies that local comprehensive plans and land use regulations comply with the statewide planning goals through a process called "acknowledgment."[4] By 1981, Oregon completed the basics of its planning program by replacing trial court review of most land use decisions with the Land Use Board of Appeals (LUBA), a state agency with exclusive jurisdiction over land use decisions and whose decisions are appealable by right to the Oregon Court of Appeals.[5]

Oregon's land use policies accommodate change through amendments to state statutes, the statewide planning goals, and their implementing administrative rules. As local comprehensive plans and land use regulations change, continued compliance with the statewide planning goals may be ensured through a comprehensive process called

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2. Oregon Land Conservation and Development Act of 1973, ch. 80, 1973 Or. Laws 127 (codified as amended at OR. REV. STAT. §§ 195.020–.025, 197.005–.010, 197.015, 197.030–.045, 197.050–.060, 197.075–.095, 197.160, 197.175, 197.180, 197.225–.250, 197.405–.410, 197.430, 469.350 (2019)).

3. OR. REV. STAT. §§ 197.030–.070 (2021) (LCDC generally); *id.* §§ 197.075–.095 (DLCD generally); *id.* §§ 197.225–.245 (goal formulation); *id.* § 197.175(2) (goal, plan, and regulation consistency requirement); *id.* §§ 197.319–.335 (goal enforcement). In addition, state agencies must coordinate their programs and permits to ensure compliance with the statewide planning goals and acknowledged comprehensive plans and land use regulations. *Id.* § 197.180. LCDC has adopted administrative rules to ensure such coordination. OR. ADMIN. R. 660-031-0005 to -0040 (2021).

4. OR. REV. STAT. §§ 197.251–.254 (2021).

5. *Id.* §§ 197.805–.860. For a more complete description of the Oregon planning program, see Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 J. MARSHALL L. REV. 357, 367–72 (2012) [hereinafter *Quiet Revolution*]. For a more detailed discussion of LUBA, see Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979–1999*, 36 WILLAMETTE L. REV. 441 (2000).

"periodic review."[6] More often, however, compliance is ensured through the more focused and targeted "post-acknowledgment plan amendment" (PAPA) process, under which individual changes to the text or map of an acknowledged comprehensive plan or zoning ordinance are subject to appeal.[7]

A. The Original Goal and the 1981 Administrative Rules

The statewide planning goals were initially adopted by LCDC between 1974 and 1977, and they include land use policies for programmatic and geographic areas.[8] Goal 5, the focus of this paper, deals with a list of resource categories.[9] The purpose and direction of the original Goal were set out in its opening paragraph: "[t]o conserve open space and protect natural and scenic resources."[10]

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6. OR. REV. STAT. §§ 197.628–.636, .644 (2021); OR. ADMIN. R. 660-025-0010 to -0250 (2021). As the name implies, periodic review is a scheduled review of a jurisdiction's entire comprehensive plan and land use regulations for compliance with the statewide planning goals. As explained below, however, periodic review is no longer a reliable method of ensuring such compliance. *See infra* Section IV.B.

7. OR. REV. STAT. §§ 197.610–.625 (2021); OR. ADMIN. R. 660-018-0005 to -0150 (2021). For more on the periodic review and PAPA processes, see *Quiet Revolution*, *supra* note 5, at 374–77.

8. As one of the authors has noted,

> [t]he goals could be divided into five groups:
> 1. Process Goals (Goals 1 and 2, Citizen Involvement and Comprehensive Plans).
> 2. Natural Resource Goals (Goals 3–5, Agricultural and Forest Lands, Specific Natural Resources).
> 3. Land and Environment Goals (Goals 6–8 and 13, Air, Land and Water, Natural Hazards, Parks and Recreation, and Energy Conservation).
> 4. Urban Goals (Goals 9–12 and 14, Economy of the State, Housing, Public Facilities and Services, Transportation and the Urbanization Process).
> 5. Goals for Specific Areas (Goals 15–19, Willamette River Greenway and Coastal Areas).

Quiet Revolution, *supra* note 5, at 370 n.80.

9. *See infra* notes 96–97 and accompanying text.

10. LAND CONSERVATION & DEV. COMM'N, STATE-WIDE PLANNING GOALS AND GUIDELINES 17 (1974) [hereinafter ORIGINAL GOALS], https://www.oregon.gov/LCD/OP/Documents/original_goals_012575.pdf.

Goal 5 contrasts in many ways with Statewide Planning Goals 3 (Agricultural Lands)[11] and 4 (Forest Lands),[12] which deal with those two resources independently and which are the default goals applicable to most rural lands, *i.e.*, those lands outside "urban growth boundaries" (UGBs).[13] For example, the resources protected by Goal 5 may be found in both urban and rural areas,[14] and they can simultaneously be subject to the requirements of other statewide planning goals. Another difference is that the political constituencies built into Goals 3 and 4 are larger and more focused, given the primacy of the agricultural and forestry industries in the state's economy, whereas the constituency for Goal 5 resources is a collection of smaller, more diverse interests.[15]

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11. OR. ADMIN. R. 660-015-0000(3) (2021); CURRENT GOALS, *supra* note 1, at 16–18. *See generally* Edward Sullivan & Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961–2009*, 18 SAN JOAQUIN AGRIC. L. REV. 1 (2009) (discussing Goal 3).

12. OR. ADMIN. R. 660-015-0000(4) (2021); CURRENT GOALS, *supra* note 1, at 19–21. *See generally* Edward J. Sullivan & Alexia Solomou, *"Preserving Forest Lands for Forest Uses"—Land Use Policies for Oregon Forest Lands*, 26 J. ENV'T L. & LITIG. 179 (2011) (discussing Goal 4).

13. With rare exceptions, land within UGBs is urban or urbanizable and, thus, can expect to be developed within twenty years. CURRENT GOALS, *supra* note 1, at 105 (defining "urban land" and "urbanizable land"); OR. REV. STAT. § 197.296 (2019) (requiring generally that UGBs contain enough land to accommodate housing needs for twenty years); CURRENT GOALS, *supra* note 1, at 54 (same, within the context of Statewide Planning Goal 14 (Urbanization)); OR. ADMIN. R. 660-024-0040 (2021) (same, within the context of Goal 14's implementing administrative rules). Land outside UGBs is given a "rural" appellation and is further defined by the statewide planning goals as follows:

> a) Non-urban agricultural, forest or open space,
> b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or
> c) In an unincorporated community.

CURRENT GOALS, *supra* note 1, at 104.

14. For example, historic resources, open space, and mineral and aggregate resources may be inside or outside UGBs.

15. That is a result of the resource categories that the state considered worthy of special protection when Goal 5 was first adopted in 1974. *See infra* note 96 and accompanying text. Bob Sallinger, who advocates for wildlife on behalf of Portland Audubon, underscores the difficulties of bringing together a diverse constituency of resource advocates:

> Not only are the interests more disparate, but they [are] also more attenuated. It is one thing to get folks to rally around a specific natural resource site that is under threat, but entirely something different to get people to engage in a long term, complicated landscape scale planning process whose on the ground impacts may not be apparent for years to come. Basically, every time there is a Goal 5 planning process, we have

Those smaller constituencies include interest groups seeking to protect natural resources for passive uses such as fish and wildlife habitats, wetlands, and wilderness areas; those seeking to protect natural resources for somewhat more active but otherwise limited uses such as recreation trails and open space; those seeking to protect natural resources for even more active uses such as energy sources and mineral and aggregate resources; and those seeking to protect man-made resources such as cultural areas and historic resources. The overarching policy of the original Goal was to require the development of programs to "(1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character."[16] The Goal then subjected the protected resources to a local refining process set out in the Goal itself and in its implementing administrative rules, which were adopted in 1981[17] and 1996.[18] LUBA has described that process in the context of the 1996 administrative rules as follows:

> Goal 5 requires that [local governments] "conserve open space and protect natural and scenic resources." OAR chapter 660, division 23, the [1996] administrative rule, provides procedures and criteria whereby local governments are required to (1) inventory the location, quality, and quantity of Goal 5 resources within their territory (OAR 660-023-0030); (2) identify conflicting uses for significant Goal 5 resources (OAR 660-023-0040(2)); (3) conduct an analysis of the economic, social, environmental, and energy (ESEE) consequences of negative impacts between conflicting uses and significant Goal 5 resources (OAR 660-023-0040(4)); and (4) develop programs to achieve the goal of significant resource protection (OAR 660-023-0040(5) and 660-023-0050).[19]

> to rebuild a constituency largely from scratch—educating them about the process and how it works, why it matters, [and] the impacts it might have.

E-mail from Bob Sallinger, Dir. of Conservation, Portland Audubon, to Edward J. Sullivan (Mar. 7, 2021) (on file with authors).

16. ORIGINAL GOALS, *supra* note 10, at 17.

17. *See infra* note 22.

18. *See infra* note 52.

19. Pekarek v. Wallowa County, 36 Or. LUBA 494, 498 (1999). While the Goal is geared toward the protection of resources, it does not itself "require" such protection. Rather, as discussed below, it requires that local governments go through certain procedures to determine whether a given resource site is significant and, if so, whether, to what extent, and how it should be protected.

The competing and conflicting interests surrounding the diverse resources protected by Goal 5 would plague LCDC and local governments during the initial acknowledgment process, from 1975 to 1986, due in part to the Goal's imprecise terms.[20] To avoid conflicting interpretations and to provide for more precise application, LCDC adopted administrative rules to implement many of the statewide planning goals,[21] including Goal 5 in 1981.[22] The 1981 administrative rules were adopted to describe the process mandated by and to clarify specific elements of the Goal.

At the outset, the local government must prepare an inventory of significant resource sites.[23] The inventory process begins with the local government collecting data on the "location, quality and quantity" of each resource site within its jurisdiction.[24] Based on that data, the local government must place each resource site into one of three categories.[25] First, the local government may decide not to include the resource site on its inventory because the resource site does not meet the Goal standards or is not important enough for inclusion.[26] Thereafter, the

20. *See Quiet Revolution*, *supra* note 5, at 370–71, 376–77. Only some of the protected resource categories were defined, including cultural, historic, natural, scenic, and wilderness areas and open space, and those definitions were themselves imprecise. ORIGINAL GOALS, *supra* note 10, at 17–18.

21. *See Quiet Revolution*, *supra* note 5, at 377.

22. 21 Or. Bull. 5 (July 15, 1981) (codified as amended at OR. ADMIN. R. 660-016-0000 to -0030 (2021)).

23. OR. ADMIN. R. 660-016-0000 (2021).

24. OR. ADMIN. R. 660-016-0000(1) (2021). With respect to location, the rule notes that some resource categories are more site-specific than others. OR. ADMIN. R. 660-016-0000(2) (2021). For site-specific resource categories, the inventory must include a description or map of each resource site's boundaries and "impact area," if the two are different. *Id.* For non-site-specific resource categories, the inventory must be "as specific as possible." *Id.* A determination of quality must look to the "relative value" of the resource at each resource site compared to other resource sites in the same resource category within the local government's jurisdiction. OR. ADMIN. R. 660-016-0000(3) (2021). A determination of quantity must look to the "relative abundance" of the resource, regardless of quality, at each resource site compared to other resource sites in the same resource category within the local government's jurisdiction. *Id.* Much depends on the availability of evidence. *See id.*; Palmer v. Lane County, 29 Or. LUBA 436, 443–45 (1995).

25. OR. ADMIN. R. 660-016-0000(5) (2021).

26. OR. ADMIN. R. 660-016-0000(5)(a) (2021). In LCDC's order adopting the 1981 administrative rules, that provision was numbered as OR. ADMIN. R. 660-016-0000(1A). *See* Delta Prop. Co. v. Lane County, 352 P.3d 86, 89 (Or. Ct. App. 2015). Although that provision was codified at OR. ADMIN. R. 660-016-0000(5)(a), a decision not to include a resource site on an inventory is still referred to as a "1A" decision. *See* Gonzalez v. Lane County, 24 Or. LUBA 251, 254 n.1 (1992). As Bob Sallinger notes,

local government need take no further action with respect to the resource site.[27] The local government is not required to include any justification in its comprehensive plan for the decision not to include the resource site on its inventory unless that decision is challenged by objectors, DLCD, or LCDC based on contradictory information.[28] Second, if there is evidence that a resource site exists, but that evidence is not adequate to identify the resource site's location, quality, and quantity with particularity, then the local government may place the resource site in a special category and defer a determination of significance, so long as the local government commits to addressing the resource site within a specified time frame.[29] Special implementing measures "are not appropriate or required for Goal 5 compliance purposes" until adequate information is available.[30] Third, the local government may decide that the resource site is "significant;" include the resource site on its inventory along with the quality, quantity, and location data; and proceed through the remainder of the Goal 5 process.[31]

> the battle begins right here: There is always a big scrum as jurisdictions determine the criteria they are going to use to evaluate natural resources. Notably, in most cases, to the degree that . . . this stage [involves stakeholders], it typically is not just natural resource (or other) experts, but also typically includes advocates from industry, developers, business alliances, etc. I am often struck that this stage of the process[,] that really should be based on the best available science[,] is usually so politicized. The room is full of business lobbyists that could [not] tell the difference between a hummingbird and a kangaroo, but[, nonetheless], they are weighing in on riparian buffers, the ecosystem functions provided by trees, etc. Notably, when local jurisdictions look [at] issues such as economic development[,] they focus the process very narrowly on "experts" from industry.

E-mail from Bob Sallinger to Edward J. Sullivan, *supra* note 15.

27. OR. ADMIN. R. 660-016-0000(5)(a) (2021).

28. *Id.* However, if an owner applies to place their own land on the local government's inventory, then a determination that the resource site is not significant must be supported by adequate findings and substantial evidence. *See* Hegele v. Crook County, 44 Or. LUBA 357, 365–68, *aff'd*, 78 P.3d 1254 (Or. Ct. App. 2003); Or. Dep't of Transp. v. Klamath County, 25 Or. LUBA 288, 292 (1993).

29. OR. ADMIN. R. 660-016-0000(5)(b) (2021). That is referred to as a "1B" decision. *See Gonzalez*, 24 Or. LUBA at 254 n.1.

30. OR. ADMIN. R. 660-016-0000(5)(b) (2021).

31. OR. ADMIN. R. 660-016-0000(5)(c) (2021). That is referred to as a "1C" decision. *See Gonzalez*, 24 Or. LUBA at 254 n.1. If the local government determines that a resource site is "significant," then it must complete the Goal 5 process for that resource site. *See* Nathan v. City of Turner, 26 Or. LUBA 382, 391–93 (1994).

With respect to significant resource sites, the local government must identify conflicting uses within the impact area.[32] In that context, "[a] conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site."[33] For example, if the resource site is wildlife habitat in a rural area, then dense housing may be a conflicting use.[34] If there are no conflicting uses, then the local government "must" adopt comprehensive plan policies and land use regulations to ensure preservation of the resource site.[35] However, if conflicting uses are identified, then the local government must conduct an "ESEE analysis."[36] An ESEE analysis is a holistic evaluation of the economic,

32. OR. ADMIN. R. 660-016-0005(1) (2021). As noted, the 1981 administrative rules require a description or map of the "impact area" for each resource site in site-specific resource categories if the impact area is different from the resource site itself. OR. ADMIN. R. 660-016-0000(2) (2021); *see supra* note 24. However, the 1981 administrative rules do not specify the scope and nature of the "impact area." Some case law provides that the impact area under the 1981 administrative rules must be drawn to include all uses that could have an impact on the resource site and on which the resource site could have an impact. *See* Sanders v. Yamhill County, 34 Or. LUBA 69, 101–03 (citing *Nathan*, 26 Or. LUBA at 393), *aff'd*, 963 P.2d 755 (Or. Ct. App. 1998); Portland Audubon Soc'y v. Clackamas County, 14 Or. LUBA 433, 442, *aff'd*, 722 P.2d 745 (Or. Ct. App. 1986). Other case law provides that local governments may determine the scope of the impact area under the 1981 administrative rules in their local codes. *See* Rickreall Cmty. Water Ass'n v. Polk County, 53 Or. LUBA 76, 111–14 (2006), *aff'd*, 158 P.3d 524 (Or. Ct. App. 2007). In any event, determinations regarding the impact area must be made after opposing parties have received an opportunity to respond, and they must be supported by substantial evidence. *See Hegele*, 44 Or. LUBA at 373–77 (requiring a county to reopen the record on remand to allow the applicant to submit evidence and argument that the impact area for a mineral and aggregate resource site should not have been the entire valley in which the resource site was located); Palmer v. Lane County, 29 Or. LUBA 436, 439–41 (1995) (determining that a county's conclusion that the impact area for a mineral and aggregate resource site should not have been expanded to include big game habitat more than one-quarter mile away was not supported by substantial evidence).

33. OR. ADMIN. R. 660-016-0005(1) (2021). Conflicting uses are identified from among the uses that are "allowed in broad zoning districts established by the jurisdiction." *Id.* Presumably, only those zoning districts that are applied to the resource site and the impact area are relevant. The local government may not conclude that there are no conflicting uses simply because the uses that would conflict with the resource site are unlikely to occur—for example, because a state agency with permitting authority over the use has suggested that issuance of a permit is unlikely. *See* Audubon Soc'y of Portland v. Land Conservation & Dev. Comm'n, 760 P.2d 271 (Or. Ct. App. 1988). For a summary of *Audubon Society*, see *infra* notes 276–282 and accompanying text. Other resource sites can constitute conflicting uses. *See* Olsen v. Columbia County, 8 Or. LUBA 152, 164–65 (1983). If the local government concludes that multiple resource sites will not conflict with each other, then it must cite facts to support that conclusion. *See id.* at 166.

34. *See* LandWatch Lane Cnty. v. Lane County, LUBA No. 2019-048, 2019 WL 5130352, at *8–9 (Aug. 9, 2019).

35. OR. ADMIN. R. 660-016-0005(2) (2021). That is referred to as a "2A designation." *See* Friends of Neabeack Hill v. City of Philomath, 911 P.2d 350, 351 (Or. Ct. App. 1996).

36. OR. ADMIN. R. 660-016-0005(3) (2021).

social, environmental, and energy consequences of allowing, limiting, or prohibiting conflicting uses at the resource site and throughout the impact area.[37] There must be a "two-way" assessment of each conflict, *i.e.*, the analysis must consider the positive and negative impacts both of the resource site on each conflicting use and of each conflicting use on the resource site.[38]

The local government must then "develop a program to achieve the Goal"—that is, it must determine whether to (1) protect the resource site by prohibiting conflicting uses at the resource site and perhaps throughout the impact area;[39] (2) allow the conflicting uses completely, regardless of their impacts on the resource site;[40] or (3) allow the

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37. OR. ADMIN. R. 660-016-0005(3), -0010 (2021). LUBA has explained the standard for findings in ESEE analyses as follows:

> The county's determination of ESEE consequences of the mine on conflicting uses and of conflicting uses on the mine is adequate under the rule "if it enables a jurisdiction to provide reasons to explain why decisions are made for specific sites." In performing an ESEE consequences analysis, the local government is not required to quantify every conceivable conflict between the resource use and every conflicting use.

Hegele v. Crook County, 56 Or. LUBA 1, 12–13 (2008) (quoting OR. ADMIN. R. 660-016-0005(3) (2008)) (citing Williams v. Land Conservation & Dev. Comm'n, 961 P.2d 269, 278–79 (Or. Ct. App. 1998); Sanders v. Yamhill County, 34 Or. LUBA 69, 106–07, *aff'd*, 963 P.2d 755 (Or. Ct. App. 1998); Columbia Steel Castings Co. v. City of Portland, 840 P.2d 71, 75–76 (Or. 1992)). Local governments may consider conditions of approval in evaluating ESEE consequences. *See Williams*, 961 P.2d at 280. Other applicable statewide planning goals must also be considered in ESEE analyses. OR. ADMIN. R. 660-016-0005(3) (2021); *see Olsen*, 8 Or. LUBA at 164–65.

38. OR. ADMIN. R. 660-016-0005(3) (2021).

39. OR. ADMIN. R. 660-016-0010(1) (2021). That is referred to as a "3A" decision. *See* Callison v. Land Conservation & Dev. Comm'n, 929 P.2d 1061, 1063 (Or. Ct. App. 1996). The local government must set out reasons to justify that decision and plan and zone the area accordingly. OR. ADMIN. R. 660-016-0010(1) (2021); *see Callison*, 929 P.2d at 1066 (remanding an LCDC periodic review order approving a city's program to achieve the Goal with respect to fish and riparian resources because, while the city declared the resources fully protected in its comprehensive plan, its zoning permitted conflicting uses, even if only in "rare and unusual circumstances").

40. OR. ADMIN. R. 660-016-0010(2) (2021). That is referred to as a "3B" decision. *See Callison*, 929 P.2d at 1063. As with a decision to prohibit conflicting uses fully, the local government must set out reasons to justify that decision and plan and zone the area accordingly. OR. ADMIN. R. 660-016-0010(2) (2021). The rules and case law reflect a desire to avoid making that requirement a "paper exercise" that elevates form over substance. *Compare* Dundas v. Lincoln County, 43 Or. LUBA 407, 419 (2002) (observing that LCDC acknowledged a county's decision to allow conflicting uses fully where "the county balanced the ESEE consequences . . . and determined that the value from mining of [the resource] sites did not offset the harm that would be caused by prohibiting surrounding residential uses"), *with* Or. Dep't of Transp. v.

conflicting uses in a limited way "to protect the resource site to some desired extent."[41] If the local government chooses the third option, then it must designate "with certainty" which uses are allowed outright, prohibited, and allowed conditionally, and the standards or limitations that apply to the conditionally allowed uses, which must be "clear and objective."[42] If one step in the Goal 5 process is flawed, then subsequent steps in the same proceeding will be considered equally flawed.[43]

During periodic review, the local government may assess and change its previous inventory determinations, conflicting use identifications, and program decisions, following the above steps.[44]

Klamath County, 25 Or. LUBA 288, 292 (1993) (concluding that a county's decision to allow conflicting uses fully was not adequately justified where "[t]he findings merely explain[ed] that there [were] homes in close proximity to the aggregate site and suggest[ed] that aggregate extraction would seriously conflict with such uses").

41. OR. ADMIN. R. 660-016-0010(3) (2021). That is referred to as a "3C" decision. *See Callison*, 929 P.2d at 1063. As with decisions to allow or prohibit conflicting uses fully, the local government must set out reasons to justify that decision and plan and zone the area accordingly. OR. ADMIN. R. 660-016-0010(3) (2021).

42. OR. ADMIN. R. 660-016-0010(3) (2021). Local governments may implement decisions to limit conflicting uses by, for example, requiring the preparation of "management plans" for the resource sites or through conditional use review to ensure that conflicts are mitigated. *See* Burton v. Polk County, 48 Or. LUBA 440, 450–53 (2005); Botham v. Union County, 34 Or. LUBA 648 (1998). If the local government's inventory and ESEE analysis are unacknowledged, then the local government must apply Goal 5 directly to a subsequent decision adopting a program to achieve the Goal. *See* Blatt v. City of Portland, 21 Or. LUBA 337, 348–54, *aff'd*, 819 P.2d 309 (Or. Ct. App. 1991).

43. *See* Doty v. Jackson County, 34 Or. LUBA 287, 298–99 (1998) ("Without an adequate Goal 5 inventory, it is not possible for a local government to adequately perform subsequent steps of the Goal 5 analysis, *i.e.* to identify the conflicting uses, or determine the ESEE consequences of the conflicts, as required by OAR 660-016-0005(2), and to adequately develop a program to achieve the goal of resource protection, as required by OAR 660-016-0010. Because the three steps of the Goal 5 analysis are so sequentially dependent, a flaw at step one renders subsequent steps equally flawed." (footnotes omitted) (citing Gonzalez v. Lane County, 24 Or LUBA 251, 265–67 (1992)); Friends of Forest Park v. Land Conservation & Dev. Comm'n, 877 P.2d 130 (Or. Ct. App. 1994) (upholding an LCDC periodic review order requiring a county to repeat the Goal 5 process for a mineral and aggregate resource site because the county did not adequately identify the resource site, conflicting uses, and impact area); Friends of the Columbia Gorge, Inc. v. Land Conservation & Dev. Comm'n, 736 P.2d 575, 577 (Or. Ct. App. 1987) (remanding an LCDC order acknowledging a city's decision to allow a conference and nature interpretive center in bird habitat because the city included only two of the resource site's many bird species on its wildlife habitat inventory). *But see* Urquhart v. Lane Council of Gov'ts, 721 P.2d 870 (Or. Ct. App. 1986) (holding that flawed, but acknowledged, inventory determinations may not be challenged in *subsequent* proceedings). For a summary of *Doty*, see *infra* notes 193–197 and accompanying text. For a summary of *Urquhart*, see *infra* note 102.

44. OR. ADMIN. R. 660-016-0015(1) (2021). LCDC may require local governments to make any of those changes if it determines that they are necessary to ensure compliance with

Additionally, while the 1981 administrative rules did not expressly state so, they have been interpreted to require the application of Goal 5 to any PAPAs that "affect" an inventoried resource site, including by changing the inventory itself or by allowing new conflicting uses.[45] If the local government previously chose to protect the resource site, then it need not follow the above steps if it determines that its existing program to achieve the Goal will continue to protect the resource site notwithstanding the newly allowed uses; however, the local government's reasoning is subject to some degree of scrutiny.[46]

B. The Amended Goal and the 1996 Administrative Rules

Local governments complained that the 1981 administrative rules used uncertain terms, required expensive and lengthy proceedings, and were difficult to administer.[47] Those problems were compounded by two additional controversies that posed existential threats to Goal 5 and, perhaps, to the Oregon planning program itself. First, private timber companies—a significant political, social, and economic force in the state—pushed back on the notion that local governments could designate Goal 5 resource sites on private timberlands and decide which uses could prevail, in whole or in part, over timber operations.[48] As a result of that industry pressure, the Oregon Legislature adopted

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the Goal. *See* Yamhill County v. Land Conservation & Dev. Comm'n, 839 P.2d 238 (Or. Ct. App. 1992).

45. *See* Doty v. Jackson County, 34 Or. LUBA 287, 292–93 (1998); Friends of Cedar Mill v. Washington County, 28 Or. LUBA 477, 487 (1995); Gray v. Clatsop County, 22 Or. LUBA 270, 289–91 (1991); Jensen v. Clatsop County, 14 Or. LUBA 776, 787 (1986). For a summary of *Doty*, see *infra* notes 193–197 and accompanying text. That includes UGB expansions where the expansion area contains a resource site and the expansion allows or requires new conflicting uses. *See* Concerned Citizens of the Upper Rogue v. Jackson County, 33 Or. LUBA 70, 120–23 (1997). Of course, the mere fact that a PAPA protects or regulates natural resources does not mean that the local government must apply Goal 5 in adopting it where none of those natural resources are Goal 5 resource sites. *See* Ramsey v. City of Portland, 30 Or. LUBA 212, 217 (1995) (concluding that a city was not required to apply Goal 5 in adopting a PAPA regulating the cutting of individual trees because none of the trees by itself constituted a resource site).

46. *See, e.g.*, Welch v. City of Portland, 28 Or. LUBA 439, 443–45 (1994) (remanding a city's decision to change the comprehensive plan designation of property containing inventoried resource sites and rejecting the city's conclusion that its existing program to achieve the Goal was sufficient because, although the previous comprehensive plan designation allowed more intense uses than the new designation, the city did not consider the fact that the property was also previously subject to a restrictive overlay zone that would have been removed under the redesignation).

47. *See infra* notes 57, 60, and accompanying text.

48. *See* Sullivan & Solomou, *supra* note 12, at 230–38; Terence L. Thatcher & Nancy E. Duhnkrack, *Goal Five: The Orphan Child of Oregon Land Use Planning*, 14 J. ENV'T L. & LITIG. 713 (1984).

new legislation providing that the Oregon Forest Practices Act prevails over local planning and regulation of certain forest practices on nonfederal forest lands.[49] Second, a battle erupted over whether owner consent should be necessary before a local government may designate land as a historic resource.[50] That battle resulted in legislation requiring such consent, but only if the landowner objects at the time of the historic designation.[51]

Those controversies and the resulting statutes significantly changed the Oregon planning program and, together with the ambiguities in the 1981 administrative rules and the difficulties experienced by local governments, led to the amendment of Goal 5 and the adoption of new implementing administrative rules in 1996.[52] Though rephrased, the Goal's broad, general purpose of protecting natural resources and conserving scenic and historic areas and open spaces remains intact.[53] However, the amended Goal distinguishes between resource categories that must be inventoried and those that are

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49. Act of July 21, 1987, ch. 919, §§ 2, 17, 1987 Or. Laws 2001, 2001, 2009 (codified as amended at OR. REV. STAT. §§ 197.277, 527.722 (2019)); *see* 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, 737 P.2d 607 (Or. 1987); 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, 752 P.2d 271 (Or. 1988). Local governments may still designate forest lands and regulate nonforest activities on those lands. Act of July 21, 1987, § 17, 1987 Or. Laws at 2009 (codified as amended at OR. REV. STAT. § 527.722). In addition, that preemption has been modified over time to allow local governments to regulate or prohibit forest practices within UGBs. Act of Aug. 7, 1991, ch. 919, § 29, 1991 Or. Laws 2037, 2048–49 (codified as amended at OR. REV. STAT. § 527.722). However, the Oregon Forest Practices Act prevails where such local governments have not adopted "land use regulations for forest practices." *Id.*

50. *See infra* notes 312–316 and accompanying text.

51. *See infra* note 317 and accompanying text.

52. 36 Or. Bull. 7 (Oct. 1, 1996) (codified as amended at OR. ADMIN. R. 660-015-0000(5), -023-0000 to -0250). In fact, the decision to adopt new administrative rules came first and the decision to revise the Goal to accommodate the new administrative rules followed, which is a reversal of the usual process. DEP'T OF LAND CONSERVATION & DEV., RECOMMENDATIONS FOR AMENDMENTS TO THE GOAL 5 PROCESS: A REPORT TO THE LAND CONSERVATION AND DEVELOPMENT COMMISSION FROM THE COMMISSION'S GOAL 5 SUBCOMMITTEE AND THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT 53 (1995) [hereinafter SUBCOMMITTEE RECOMMENDATIONS].

53. *Compare* ORIGINAL GOALS, *supra* note 10, at 17, *with* CURRENT GOALS, *supra* note 1, at 22. It was added that "[t]hese resources promote a healthy environment and natural landscape that contributes to Oregon's livability." CURRENT GOALS, *supra* note 1, at 22. LCDC made the changes effective earlier than the statutory default of one year after adoption to avoid frustrating their purpose of "simplifying and making more flexible the Goal 5 planning process" and to keep local governments from "struggl[ing] under the burdensome requirements" of the original Goal and the 1981 administrative rules. LAND CONSERVATION & DEV. COMM'N, STATEMENT OF COMPELLING REASONS: REVISIONS TO GOAL 5 ADOPTED JUNE 14, 1996, at 1 (1996).

"encouraged" to be inventoried.[54] As discussed below, there were slight changes in the appellations given to the protected resource categories, which could be significant as to the nature and scope of their protection.[55]

In amending the Goal and adopting new administrative rules, LCDC relied heavily on the work of its Goal 5 Subcommittee, which was charged with conferring with DLCD staff and various advisory committees and working groups, and making recommendations to LCDC.[56] The Subcommittee identified a number of deficiencies in the existing process and recommended multiple changes.[57] The Subcommittee identified five "categories" or "clusters" of resources for which different processes would apply under the amended Goal and the new administrative rules, and within which some resources would be assigned more unique requirements.[58] Although the Subcommittee

54. *See infra* note 97.

55. The new scheme significantly limits the scope of "natural" and "wilderness" areas, drops the definition of "cultural areas," changes the definitions of "open space" and "historic areas" (renamed "historic resources"), and, more importantly, removes those definitions from the Goal itself and includes them, if at all, in the more easily changeable administrative rules. *Compare* ORIGINAL GOALS, *supra* note 10, at 17–18, *with* CURRENT GOALS, *supra* note 1, at 22–23, *and* OR. ADMIN. R. 660-023-0160 to -0170, -0200 to -0220 (2021).

56. The Subcommittee's deliberations and recommendations are set out in an extensive report. *See* SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52.

57. *Id.* at 5–7. Among those deficiencies were incomplete or inadequate planning work, differences between resource categories that made uniform treatment difficult, inconsistent direction from multiple state and federal resource management agencies, differences in resource protection needs and strategies inside and outside UGBs, a lack of resource prioritization, the complexity of the inventory process combined with a lack of local funding and expertise, conflicting interpretations of the ESEE decision process and "overly burdensome" court interpretations, and the unknown relationship between the Goal's requirements and periodic review. *Id.* at 6–7. The Subcommittee set out a detailed account of the issues that were discussed in amending the Goal and adopting new administrative rules, including, *inter alia*, the state's interest in the Goal 5 process and resource protection, the applicability of the new administrative rules, problems with the inventory and ESEE decision processes, and the relationship between Goal 5 and other statewide planning goals. *Id.* at 13–25.

58. *Id.* at 18. Category 1 includes "fish and wildlife habitat, riparian areas, Metro's open space areas, and certain ecologically and scientifically significant natural areas," which local governments must give the highest priority to avoid the listing of additional species as threatened or endangered and to promote water quality. *Id.* at 26. Category 2 includes historic, open space, and scenic resources, for which local governments are encouraged, but not required, to undertake additional planning work. *Id.* at 31. Category 3 includes extractive resources (*i.e.*, mineral and aggregate resources and energy sources), for which the administrative rules were changed in order to emphasize the unusual circumstance that those resources are protected for their ultimate consumption. *Id.* at 38–39. Category 4 includes wetlands, which are identified and regulated by the fill and removal permit programs of the Oregon Department of State Lands (DSL) and the U.S. Army Corps of Engineers (USACE). *Id.* at 43. Category 5 includes "watersheds, water areas, groundwater resources, wilderness areas, Oregon recreation trails, federal wild and scenic

noted a shortage of studies as to the Goal's effectiveness,[59] LCDC generally adopted the Subcommittee's recommendations, abandoning a uniform treatment of the protected resource categories (*i.e.*, the standard inventory, ESEE decision, and program implementation processes) in favor of an individualized treatment of each resource category that may or may not include elements of the standard Goal 5 process.[60] The amended Goal states, "Following procedures, standards and definitions contained in [LCDC] rules, local governments shall determine significant sites for inventoried resources and develop programs to achieve the goal."[61]

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waterways, and state scenic waterways," which are also regulated by other state and federal programs. *Id.* at 49.

59. The Subcommittee found only one report, limited to the Portland metropolitan area, which focused on protection outcomes instead of the "balancing" option allowed by the original Goal and the 1981 administrative rules. *Id.* at 5–6 (citing PORTLAND AUDUBON SOC'Y & 1000 FRIENDS OF OR., TO SAVE OR PAVE: PLANNING FOR THE PROTECTION OF URBAN NATURAL AREAS (1994)).

60. The preface to the 1996 administrative rules sets out their purpose and intent:

> This division establishes procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources. This division explains how local governments apply Goal 5 when conducting periodic review and when amending acknowledged comprehensive plans and land use regulations.

OR. ADMIN. R. 660-023-0000 (2021). In its "statement of need" for the 1996 administrative rules, LCDC noted that, since 1981, there had been statutory changes, policy issues, and court decisions that affected Goal 5 and its application, and declared that the original Goal and the 1981 administrative rules "require[d] revision to clarify and improve their effectiveness as planning standards." LAND CONSERVATION & DEV. COMM'N, NOTICE OF PROPOSED RULEMAKING 2 (1996). The only specific concern was that the original Goal and the 1981 administrative rules treated a wide variety of resource categories in a single fashion, and experience showed that different resource categories needed to be treated differently. *Id.* Accordingly, the 1996 administrative rules provide:

> The standard Goal 5 process, OAR 660-023-0030 through 660-023-0050, consists of procedures and requirements to guide local planning for all Goal 5 resource categories. The division also provides specific rules for each of the fifteen Goal 5 resource categories (see OAR 660-023-0090 through 660-023-0230). In some cases, this division indicates that both the standard and the specific rules apply to Goal 5 decisions. In other cases, this division indicates that the specific rules supersede parts or all of the standard process rules (*i.e.*, local governments must follow the specific rules rather than the standard Goal 5 process). In case of conflict, the resource-specific rules set forth in OAR 660-023-0090 through 660-023-0230 shall supersede the standard provisions in OAR 660-0223-0030 through 660-023-0050.

OR. ADMIN. R. 660-023-0020(1) (2021).

61. CURRENT GOALS, *supra* note 1, at 23.

The 1996 administrative rules include some changes to the standard Goal 5 process, beginning with definitions.[62] For example, the "inventory" under the 1981 administrative rules (*i.e.*, the local government's official catalogue of significant resource sites) is now the "resource list."[63] New "safe harbor" approaches were created to provide local governments with alternative means of satisfying certain requirements under the 1996 administrative rules.[64] Terms contained in the definitions for the statewide planning goals as a whole, such as "protect," were given more detailed definitions in the context of Goal 5.[65] Finally, terms that were used but undefined in the 1981 administrative rules were given definitions.[66]

Notwithstanding the 1996 administrative rules' more individualized approach to each resource category, there are still some standard provisions that apply when not overridden by resource-specific ones. The inventory process under the 1996 administrative rules involves four steps: the collection of information, a determination of the adequacy of the information, a determination of the significance

62. OR. ADMIN. R. 660-023-0010 (2021).

63. *Compare* OR. ADMIN. R. 660-016-0000(1) (2021), *with* OR. ADMIN. R. 660-023-0010(4) (2021), *and* OR. ADMIN. R. 660-023-0010(9) (2021). The "resource list" must be adopted as part of the local government's comprehensive plan or land use regulations. OR. ADMIN. R. 660-023-0010(9) (2021). The 1996 administrative rules distinguish between a "resource list," which, as mentioned, includes information about significant resource sites for which the local government must complete the Goal 5 process, and an "inventory," which includes information about the values and features associated with one or more resource sites, significant or not. *Compare* OR. ADMIN. R. 660-023-0010(9) (2021), *with* OR. ADMIN. R. 660-023-0010(4) (2021). Those terms are frequently conflated, but the difference between them is especially important when dealing with historic resources under OR. ADMIN. R. 660-023-0200, where a resource site included on an inventory may be prevented from inclusion on a resource list if the landowner does not consent. *See infra* note 317 and accompanying text.

64. OR. ADMIN. R. 660-023-0020(2) (2021). According to Steve Pfeiffer, a former member of both LCDC and the Goal 5 Subcommittee, the purpose of the safe harbor approaches is to provide local governments with "an efficient and science-based implementation tool" in the hope that they will make resource protection decisions rather than avoid Goal 5 decision-making until an increasingly scarce periodic review process, the typical response under the 1981 administrative rules. E-mail from Steve Pfeiffer, former Comm'r, Or. Land Conservation & Dev. Comm'n, to Edward J. Sullivan (Feb. 23, 2021) (on file with authors). It is not clear whether the safe harbor approaches provide greater resource protection.

65. *Compare* CURRENT GOALS, *supra* note 1, at 103, *with* OR. ADMIN. R. 660-023-0010(7) (2021).

66. *See, e.g.*, OR. ADMIN. R. 660-023-0010(1) (2021) ("conflicting use"); OR. ADMIN. R. 660-023-0010(2) (2021) ("ESEE consequences"); OR. ADMIN. R. 660-023-0010(3) (2021) ("impact area"); OR. ADMIN. R. 660-023-0010(6) (2021) ("program to achieve the goal"). Additionally, the phrase "post-acknowledgment plan amendment" and its common abbreviation, "PAPA," were defined. OR. ADMIN. R. 660-023-0010(5) (2021).

of the resource site, and the adoption of a resource list.[67] The information collection step requires the local government to notify state and federal resource management agencies and request current resource information, and to consider any information submitted locally.[68] Information on a particular resource site is "adequate" for Goal 5 purposes if it enables the local government to determine the location, quality, and quantity of the resource site.[69] If the information is inadequate, then the local government is prohibited from regulating land uses so as to protect the resource site.[70] If the information is

67. OR. ADMIN. R. 660-023-0030(1) (2021). Some of those steps may be omitted, depending on the resource category and the task at hand. *Id.*; *see* Shamrock Homes LLC v. City of Springfield, 68 Or. LUBA 1, 6–8 (2013) (citing *Johnson v. Jefferson County*, 56 Or. LUBA 25, 39–40, *aff'd*, 189 P.3d 34 (Or. Ct. App. 2008)) ("Where Goal 5 review is triggered under OAR 660-023-0250(3), the local government is not necessarily obligated to undertake each of the many sequential steps in the Goal 5 process. Which and how many of the substantive steps in the Goal 5 decision process must be revisited, if any, and to what extent, will depend on the nature of the amendments, the existing acknowledged program, the particular Goal 5 resource and the conflicting use at issue."); *Cosner v. Umatilla County*, 65 Or. LUBA 9 (2012); *N.W.D.A. v. City of Portland*, 50 Or. LUBA 310, 338 (2005); *N.W.D.A. v. City of Portland*, 47 Or. LUBA 533, 543 (2004), *remanded on other grounds*, 108 P.3d 589 (Or. Ct. App. 2005); *Home Builders Ass'n of Lane Cnty. v. City of Eugene*, 41 Or. LUBA 370, 443–44 (2002). Local governments have wide discretion in conducting their inventories. OR. ADMIN. R. 660-023-0030(1) (2021) ("The inventory process may be followed for a single site, for sites in a particular geographical area, or for the entire jurisdiction or [UGB], and a single inventory process may be followed for multiple resource categories that are being considered simultaneously.").

68. OR. ADMIN. R. 660-023-0030(2) (2021).

69. OR. ADMIN. R. 660-023-0030(3) (2021). The rule sets out the parameters for "adequate" information:

> (a) Information about location shall include a description or map of the resource area for each site. The information must be sufficient to determine whether a resource exists on a particular site. However, a precise location of the resource for a particular site, such as would be required for building permits, is not necessary at this stage in the process.
> (b) Information on quality shall indicate a resource site's value relative to other known examples of the same resource. While a regional comparison is recommended, a comparison with resource sites within the jurisdiction itself is sufficient unless there are no other local examples of the resource. Local governments shall consider any determinations about resource quality provided in available state or federal inventories.
> (c) Information on quantity shall include an estimate of the relative abundance or scarcity of the resource.

Id.

70. *Id.* Objectors and DLCD may raise issues related to the adequacy of information, but the decision of LCDC in periodic review or LUBA in the PAPA process is final. *Id.* The fact that a resource site cannot be protected under the Goal unless the local government collects the information necessary to support including the resource site on its resource list is a significant

adequate, then the local government must determine whether the resource site is "significant" and, therefore, worthy of consideration for protection.[71] If the local government determines that the resource site is significant, then the resource site must be placed on the resource list in the local government's comprehensive plan or land use regulations.[72] If the local government determines that the resource site is not significant, then it must "make a record of that determination" and it may neither proceed through the remainder of the Goal 5 process nor regulate land uses to protect the resource site.[73] If the local government completes the Goal 5 process for certain resource sites, then LUBA may conclude that those resource sites are significant even if they are not expressly labeled as such in the local government's comprehensive plan or land use regulations.[74]

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feature of the Goal 5 process that offers resistant local governments the opportunity to avoid controversies by postponing difficult decisions on inadequate information grounds.

71. OR. ADMIN. R. 660-023-0030(4) (2021). That determination is made under the following open-ended criteria:

> (a) The quality, quantity, and location information;
> (b) Supplemental or superseding significance criteria set out in OAR 660-023-0090 through 660-023-0230; and
> (c) Any additional criteria adopted by the local government, provided these criteria do not conflict with the requirements of OAR 660-023-0090 through 660-023-0230.

Id. The rules for specific resource categories are thus central to "significance" determinations.

72. OR. ADMIN. R. 660-023-0030(5) (2021). Except for open space and historic resources, local governments must complete the Goal 5 process for all significant resource sites. *Id.*; *see infra* notes 111, 355. Local governments may adopt temporary measures to protect significant resource sites until the Goal 5 process is completed; however, those measures must be temporary, *i.e.*, they may remain effective for up to 120 days. OR. ADMIN. R. 660-023-0030(7) (2021).

73. OR. ADMIN. R. 660-023-0030(6) (2021). There appears to be no case law challenging a local government's express determination under the 1996 administrative rules that a resource site is not significant. However, if the local government maintains an inventory of nonsignificant resource sites and denies a request to include a resource site on that inventory, then it must identify the criteria that it applied in making that decision. *See* Beaver State Sand & Gravel, Inc. v. Douglas County, 43 Or. LUBA 140, 160-65 (2002), *aff'd*, 65 P.3d 1123 (Or. Ct. App. 2003).

74. *See* Save TV Butte v. Lane County, 77 Or. LUBA 22, 35–40 (2018). In *Save TV Butte*, a county concluded that, although it had adopted a major big game habitat inventory, it had never determined that that habitat was significant, and it was therefore not required to apply Goal 5 in allowing mining within that habitat. *Id.* Because a working paper that the county published in 1982 essentially completed the Goal 5 process for that habitat, however, LUBA disagreed:

> The county's Flora & Fauna Working Paper (1) identifies the Lane County Wildlife Inventory Maps that were developed based on ODFW big game range maps, (2) identifies the location, quality and quantity of the big game range, (3) identifies

Like the inventory process, the ESEE decision process under the 1996 administrative rules involves four steps: determining the impact area; identifying conflicting uses within the impact area; analyzing the ESEE consequences of allowing, limiting, or prohibiting those conflicting uses; and developing a program to achieve Goal 5.[75] First, the local government must determine an "impact area" in which to identify conflicting uses and analyze ESEE consequences.[76] Similar to the 1981 administrative rules, the 1996 administrative rules define "conflicting use" as "a land use . . . that could adversely affect a significant Goal 5 resource."[77] If there are no conflicting uses, then the decision is easy: the local government may rely on its acknowledged comprehensive plan and land use regulations to protect the resource site.[78] However, if the local government identifies one or more conflicting uses, then it must proceed with the Goal 5 process. After considering each conflicting use or groups of similar conflicting uses within the impact area, the local government must analyze the ESEE consequences that would result from decisions to allow, limit, or prohibit those conflicting uses.[79]

> conflicts with big game range and (4) explains how those conflicts are to be mitigated by existing zoning. . . . We agree with petitioners that the county erroneously determined that its adopted inventory of big game habitat is not 'an acknowledged list of significant resources . . . for which the requirements of Goal 5 have been completed at the time the PAPA [in this case was] initiated,' within the meaning of OAR 660-023-0180(5)(b)(D).

Id. at 40 (alteration in original) (citation omitted).

75. OR. ADMIN. R. 660-023-0040(1) (2021).

76. OR. ADMIN. R. 660-023-0040(3) (2021). The 1996 administrative rules provide that the impact area must be drawn "to include only the area in which the allowed uses *could* adversely affect" the resource site. *Id.* (emphasis added). That language is consistent with some of the case law interpreting the 1981 administrative rules. *See supra* note 32.

77. OR. ADMIN. R. 660-023-0010(1) (2021); *see supra* note 33 and accompanying text. As under the 1981 administrative rules, conflicting uses are identified from among the uses that are allowed at the resource site and in the impact area, given their *zoning*. OR. ADMIN. R. 660-023-0040(2) (2021); *see supra* note 33. Local governments may not limit their consideration to the uses that are proposed or most likely to be developed. *See* Cattoche v. Lane County, 79 Or. LUBA 466, 474–75 (2019). For a summary of *Cattoche*, see *infra* notes 187–192 and accompanying text. However, local governments may omit consideration of uses that are unlikely to occur due to the permanent nature of existing uses. OR. ADMIN. R. 660-023-0040(2) (2021). As under the 1981 administrative rules, local governments may consider conflicts between multiple resource sites. OR. ADMIN. R. 660-023-0040(2)(b) (2021); *see supra* note 33.

78. OR. ADMIN. R. 660-023-0040(2)(a) (2021).

79. OR. ADMIN. R. 660-023-0040(4) (2021). Local governments have great leeway in conducting their ESEE analyses:

The final step in the ESEE decision process is to develop a program to achieve Goal 5, commencing with a determination of the level of protection to be afforded the resource site. The 1996 administrative rules provide, "Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites."[80] They further require that that decision "be based upon and supported by the ESEE analysis."[81] The local government has three choices at that point: (1) protect the resource site fully by prohibiting conflicting uses in the impact area;[82] (2) allow the conflicting uses fully, notwithstanding their potential adverse impacts on the resource site;[83] or (3) allow both the resource site and the conflicting uses to exist alongside each other to some degree, such as

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> The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource.

Id. While the rule provides that the local government may conduct a single ESEE analysis for multiple resource sites only when the resource sites "are within the same area" or "are similarly situated and subject to the same zoning," LUBA will overlook those requirements when no party explains how the differences between the resource sites prevented a single ESEE analysis from enabling the local government to meaningfully analyze the impacts that the conflicting uses would have on the resource sites. *See* Cent. Or. LandWatch v. Deschutes County, LUBA No. 2020-019, 2021 WL 1535669, at *11–12 (Mar. 22, 2021), *aff'd*, 488 P.3d 781 (Or. Ct. App. 2021), *review denied*, 496 P.3d 627 (Or. 2021). The ESEE analysis need not be "lengthy or complex," but it "should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected." OR. ADMIN. R. 660-023-0040(1) (2021). As under the 1981 administrative rules, there must be a "two-way" assessment of each conflict, *i.e.*, considering only the impacts of the resource site on the conflicting uses or only the impacts of the conflicting uses on the resource site is inconsistent with the Goal. *See* Or. Dep't of Transp. v. Grant County, LUBA Nos. 2018-135/2019-007, 2019 WL 5130322, at *5 (Aug. 8, 2019); *see supra* note 38 and accompanying text. As also under the 1981 administrative rules, the ESEE analysis must consider the requirements of any other applicable statewide planning goals and the local government's own acknowledged comprehensive plan. OR. ADMIN. R. 660-023-0040(4) (2021); *see supra* note 37. In addition, the ESEE analysis itself must be included in the local government's comprehensive plan or land use regulations. OR. ADMIN. R. 660-023-0040(4) (2021).

80. OR. ADMIN. R. 660-023-0040(5) (2021).

81. *Id.*

82. OR. ADMIN. R. 660-023-0040(5)(a) (2021).

83. OR. ADMIN. R. 660-023-0040(5)(c) (2021). For the local government to allow the conflicting uses fully, "[t]he ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided." *Id.*

by permitting the conflicting uses to be "allowed in a limited way that protects the resource site to a desired extent."[84]

After making an ESEE decision for the resource site, the local government must adopt comprehensive plan policies and land use regulations to implement that decision.[85] The comprehensive plan must "describe the degree of protection intended for each significant resource site" and, together with the plan's implementing ordinances, "clearly identify those conflicting uses that are allowed and the specific standards or limitations that apply to the allowed uses."[86] Zoning and other measures applied to limit conflicting uses generally must be "clear and objective."[87] However, with the exception of aggregate resource sites, the local government may adopt an alternative process for approving conflicting uses that does not contain clear and objective standards, so long as the standards adequately protect the resource site and the regulated party retains the option of proceeding under the clear and objective standards.[88]

LCDC's Goal 5 Subcommittee expected the 1996 administrative rules to apply at each local government's next periodic review and, in fact, depended on that process.[89] The 1996 administrative rules

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84. OR. ADMIN. R. 660-023-0040(5)(b) (2021).

85. OR. ADMIN. R. 660-023-0050(1) (2021).

86. *Id.*

87. OR. ADMIN. R. 660-023-0050(2) (2021); *see* Cent. Or. LandWatch v. Crook County, 76 Or. LUBA 396, 416-17 (2017) (concluding that there were so many uncertainties regarding how to identify a study area that the county used to determine residential density in big game habitat that the standard was not "clear and objective" for purposes of OR. ADMIN. R. 660-023-0050(2)). A measure is considered "clear and objective" if it meets any of the following criteria:

> (a) It is a fixed numerical standard, such as a height limitation of 35 feet or a setback of 50 feet;
>
> (b) It is a nondiscretionary requirement, such as a requirement that grading not occur beneath the dripline of a protected tree; or
>
> (c) It is a performance standard that describes the outcome to be achieved by the design, siting, construction, or operation of the conflicting use, and specifies the objective criteria to be used in evaluating outcome or performance. Different performance standards may be needed for different resource sites. If performance standards are adopted, the local government shall at the same time adopt a process for their application (such as a conditional use, or design review ordinance provision).

OR. ADMIN. R. 660-023-0050(2) (2021).

88. OR. ADMIN. R. 660-023-0050(3) (2021).

89. The Subcommittee gave the following response to the question, "[w]hy should we fix these things at this time?":

themselves require local governments to address Goal 5 at periodic review, but only under certain circumstances.[90] As discussed below, the periodic review process itself was subsequently changed in a way that did not further resource planning and protection.[91] The 1996 administrative rules expressly apply to PAPAs adopted between periodic reviews, but only specific kinds of PAPAs that "affect[] a Goal 5 resource."[92] The most frequent example of a PAPA triggering the applicability of the 1996 administrative rules is one that allows new uses that could conflict with a significant resource site on a resource

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> The main focus of the land use program is periodic review. Periodic review is geared toward updating plans, but also allows the state and local governments to improve local plans. If we are to encourage more attention to those natural resources that were not addressed at acknowledgement, we must make sure the Goal 5 process works. If the process is not improved, resource planning will be avoided by local governments in drawing up their periodic review work programs, and Goal 5 planning will tend to bog down the periodic reviews of those local governments who do decide to do Goal 5 work.

SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 7.

90. OR. ADMIN. R. 660-023-0250(5) (2021). Those circumstances are as follows:

> (a) The plan was acknowledged to comply with Goal 5 prior to the applicability of OAR 660, division 16, and has not subsequently been amended in order to comply with that division;
> (b) The jurisdiction includes riparian corridors, wetlands, or wildlife habitat as provided under OAR 660-023-0090 through 660-023-0110, or aggregate resources as provided under OAR 660-023-0180; or
> (c) New information is submitted at the time of periodic review concerning resource sites not addressed by the plan at the time of acknowledgement or in previous periodic reviews, except for historic, open space, or scenic resources.

Id. The 1996 administrative rules apply only to periodic review work programs approved after September 1, 1996. OR. ADMIN. R. 660-023-0250(8) (2021). However, the Director of DLCD may exempt local governments from having to apply the 1996 administrative rules based on certain considerations. OR. ADMIN. R. 660-023-0250(7) (2021). The 1981 administrative rules continue to apply to periodic review work programs approved before that date. OR. ADMIN. R. 660-023-0250(8) (2021).

91. *See infra* Section IV.B.

92. OR. ADMIN. R. 660-023-0250(3) (2021). That language is consistent with the case law interpreting the 1981 administrative rules. *See supra* note 45and accompanying text. The 1996 administrative rules apply only to relevant PAPAs initiated on or after September 1, 1996. OR. ADMIN. R. 660-023-0250(2) (2021). The 1981 administrative rules continue to apply to relevant PAPAs initiated before that date. *Id.* As a procedural matter, before LUBA will consider a challenge to a local government's Goal 5 analysis in adopting a PAPA, the petitioner must identify the specific inventoried resource site(s) that the PAPA allegedly affects. *See* Root v. Klamath County, 68 Or. LUBA 124, 133 (2013), *rev'd and remanded on other grounds*, 320 P.3d 631, 636–37 (Or. Ct. App. 2014).

list.[93] The 1996 administrative rules also require Goal 5 evaluation if the PAPA would either add to or subtract from existing protections for a significant resource site.[94] In both cases, the local government may conclude that existing regulations are sufficient to protect the resource

93. OR. ADMIN. R. 660-023-0250(3)(b) (2021); *see, e.g.*, Renken v. City of Oregon City, 79 Or. LUBA 82, 93–95 (affirming a PAPA annexing and rezoning property because, even though the zone change itself allowed new uses on the subject property compared to the county's prior zoning, those new uses were consistent with the city's acknowledged comprehensive plan designations for the subject property and were therefore not "new uses" for purposes of OR. ADMIN. R. 660-023-0250(3)(b)), *aff'd*, 441 P.3d 733 (Or. Ct. App. 2019); Johnson v. Jefferson County, 56 Or. LUBA 72, 96–104 (concluding that a PAPA allowing destination resorts did not allow new uses that could conflict with an inventoried river because, even though the destination resorts could impact a groundwater resource affecting the river, the groundwater resource was not itself inventoried, but remanding the PAPA because the county did not consider whether increased traffic on roads surrounding the destination resorts could conflict with inventoried big game habitat), *aff'd*, 189 P.3d 30 (Or. Ct. App. 2008). The local government need not apply Goal 5 if it concludes that the new use will in fact not conflict with the resource site. *See* N.W.D.A. v. City of Portland, 50 Or. LUBA 310, 337 (2005) (citing OR. ADMIN. R. 660-023-0040(2)(a) (2005)).

94. OR. ADMIN. R. 660-023-0250(3)(a) (2021); *see, e.g.*, Friends of Bull Mountain v. City of Tigard, 51 Or. LUBA 759, 769–70, 773–74 (2006) (concluding that a city's annexation of land containing inventoried resource sites triggered the applicability of the 1996 administrative rules because it amounted to a *de facto* repeal of the county's program to achieve Goal 5 with respect to those resource sites), *appeal dismissed*, 144 P.3d 965 (Or. Ct. App. 2006). Whether a PAPA amends the local government's program to achieve Goal 5 is not always clear, and the answer may come down to whether the PAPA includes a purpose statement to that effect. *Compare* Rest-Haven Mem'l Park v. City of Eugene, 39 Or. LUBA 282, 296–300 (concluding that a PAPA regulating open waterways amended the city's program to protect inventoried drainageways because, even though the PAPA applied to *all open waterways*, and not just *inventoried drainageways*, the ordinance's purpose statement recognized the "close fit" between those two groups), *aff'd*, 28 P.3d 1229 (Or. Ct. App. 2001), *and* Cosner v. Umatilla County, 65 Or. LUBA 9, 19–23 (2012) (concluding that, because a PAPA regulating wind facilities contained findings regarding such facilities' impacts on inventoried resource sites, and because some of the regulations themselves expressly referred to Goal 5, the county was required to apply Goal 5 in adopting the PAPA), *with* Hatley v. Umatilla County, 66 Or. LUBA 265, 277–80 (2012) (concluding that, because the county did not adopt the findings and regulations that expressly referred to Goal 5 and inventoried resource sites on remand from *Cosner*, the county was no longer required to apply Goal 5 in adopting the PAPA), *rev'd and remanded on other grounds*, 301 P.3d 920, 925–28 (Or. Ct. App. 2013). If a petitioner argues that a particular regulation is part of the local government's program to achieve Goal 5, then it must provide some explanation to support that argument. *See* N.W.D.A. v. City of Portland, 47 Or. LUBA 533, 571 (2004) (rejecting an argument that a city amended its program to achieve Goal 5 with respect to a historic district by making a particular property adjacent to the historic district eligible for a height bonus because the petitioner did "not explain the basis for its view that the . . . zoning of the former site, or its height limitation, was part of the city's program to protect historic resources within the . . . Historic District"), *remanded on other grounds*, 108 P.3d 589 (Or. Ct. App. 2005). The local government need not apply Goal 5 if the PAPA is not substantive; however, it must be clear to LUBA that the PAPA is, in fact, not substantive. Home Builders Ass'n of Lane Cnty. v. City of Eugene, 41 Or. LUBA 370, 429–31, 439–40 (2002).

site and thereby avoid having to repeat the Goal 5 process; however, the local government must justify that conclusion.[95]

III. RESOURCE CATEGORIES PROTECTED BY GOAL 5

The original Goal contained a list of protected resource categories:

a. Land needed or desirable for open space;
b. Mineral and aggregate resources;
c. Energy sources;
d. Fish and wildlife areas and habitats;
e. Ecologically and scientifically significant natural areas, including desert areas;
f. Outstanding scenic views and sites;
g. Water areas, wetlands, watersheds and groundwater resources;
h. Wilderness areas;
i. Historic areas, sites, structures and objects;
j. Cultural areas;
k. Potential and approved Oregon recreation trails; and
l. Potential and approved federal wild and scenic waterways and state scenic waterways.[96]

95. *See* Nicita v. City of Oregon City, 75 Or. LUBA 38, 49–52 (explaining that, if a local government adopts a finding, supported by substantial evidence, that its existing program to achieve Goal 5 will protect resource sites from new uses that "could" conflict with them, then no further inquiry is needed; however, the local government may not simply assume that that is the case), *aff'd*, 399 P.3d 1087 (Or. Ct. App. 2017); *N.W.D.A.*, 47 Or. LUBA at 543 ("In many cases no more is required than an explanation for why the existing program to protect Goal 5 resources, as amended or affected by the challenged [PAPA], continues to be sufficient to protect those resources."); Doty v. Jackson County, 42 Or. LUBA 103, 119–20 (2002) ("[T]he county's findings explain that the existing Goal 5 protections are adequate to protect the identified resources from conflicts .... Absent a focused challenge to those findings, we do not see that Goal 5 requires more." (footnote omitted)); *Home Builders Ass'n*, 41 Or. LUBA at 443–44 ("Where the justification the city adopted to support its original Goal 5 programs also supports the amended Goal 5 programs, the city may simply explain why that is the case. However, where the original justification does not justify the amended Goal 5 program, part or all of the original justification will need to be amended to support the amended Goal 5 program."). A third instance in which a PAPA will require application of the 1996 administrative rules is when the PAPA amends a UGB and factual information demonstrates that a resource site or impact area is included in the amendment area. OR. ADMIN. R. 660-023-0250(3)(c) (2021).

96. ORIGINAL GOALS, *supra* note 10, at 17.

The list contained in the Goal was amended slightly in 1996.[97] Along with some generally applicable provisions,[98] the 1996 administrative rules also identify the protected resource categories, as well as the information, processes, and scope of protection required for each.[99]

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97. The amended Goal provides:

The following resources shall be inventoried:

a. Riparian corridors, including water and riparian areas and fish habitat;
b. Wetlands;
c. Wildlife Habitat;
d. Federal Wild and Scenic Rivers;
e. State Scenic Waterways;
f. Groundwater Resources;
g. Approved Oregon Recreation Trails;
h. Natural Areas;
i. Wilderness Areas;
j. Mineral and Aggregate Resources;
k. Energy sources;
l. Cultural areas.

Local governments and state agencies are encouraged to maintain current inventories of the following resources:

3. Historic Resources;
4. Open Space;
5. Scenic Views and Sites.

CURRENT GOALS, *supra* note 1, at 22–23. Most of the resource categories listed in the amended Goal have analogues in the original Goal. Where applicable, the differences between the two lists are discussed below.

98. OR. ADMIN. R. 660-023-0000 (2021) (Purpose and Intent); OR. ADMIN. R. 660-023-010 (2021) (Definitions); OR. ADMIN. R. 660-023-0020 (2021) (Standard and Specific Rules and Safe Harbors); OR. ADMIN. R. 660-023-0030 (2021) (Inventory Process); OR. ADMIN. R. 660-023-0040 (2021) (ESEE Decision Process); OR. ADMIN. R. 660-023-0050 (2021) (Programs to Achieve Goal 5); OR. ADMIN. R. 660-023-0060 (2021) (Notice and Land Owner Involvement); OR. ADMIN. R. 660-023-0070 (2021) (Buildable Lands Affected by Goal 5 Measures); OR. ADMIN. R. 660-023-0080 (2021) (Metro Regional Resources). Although the rule for Metro regional resources is classified as a generally applicable provision here, it is discussed among the specific resource categories below because it is new with respect to the original Goal and the 1981 administrative rules. *See infra* Section III.M.

99. OR. ADMIN. R. 660-023-0090 (2021) (Riparian Corridors); OR. ADMIN. R. 660-023-0100 (2021) (Wetlands); OR. ADMIN. R. 660-023-0110 (2021) (Wildlife Habitat); OR. ADMIN. R. 660-023-0120 (2021) (Federal Wild and Scenic Rivers); OR. ADMIN. R. 660-023-0130 (2021) (Oregon Scenic Waterways); OR. ADMIN. R. 660-023-0140 (2021) (Groundwater Resources); OR. ADMIN. R. 660-023-0150 (2021) (Approved Oregon Recreation Trails); OR. ADMIN. R. 660-023-0160 (2021) (Natural Areas); OR. ADMIN. R. 660-023-0170 (2021) (Wilderness Areas); OR. ADMIN. R. 660-023-0180 (2021) (Mineral and Aggregate Resources); OR. ADMIN. R. 660-023-0190 (2021) (Energy Sources); OR. ADMIN. R. 660-023-0200 (2021) (Historic Resources); OR.

In addition to the substantive and procedural changes wrought by the amended Goal and the 1996 administrative rules, there are specific caveats to bear in mind when considering Goal 5 protections. First, specific legislation can affect the Goal's application in certain circumstances, including the preemption of forest practices regulation[100] and the "landowner consent" requirement for the designation of historic resources.[101] Second, case law generally restricts or prohibits parties from raising the Goal as an issue where the local government's comprehensive plan is acknowledged.[102] Third,

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ADMIN. R. 660-023-0220 (2021) (Open Space); OR. ADMIN. R. 660-023-0230 (2021) (Scenic Views and Sites). The 1996 administrative rules were later amended to include a resource-specific rule for greater sage-grouse. OR. ADMIN. R. 660-023-0115 (2021). That is the only resource listed in the 1996 administrative rules that is not listed as such in the amended Goal. We mention that resource briefly in our discussion of fish and wildlife areas and habitats. *See infra* note 175. As noted, the 1996 administrative rules call attention to the differences between their generally applicable provisions and their resource-specific provisions. *See supra* note 60.

100. *See supra* note 49 and accompanying text.

101. *See infra* note 317 and accompanying text.

102. Three cases are particularly significant for Goal 5 purposes. First, in *Byrd v. Stringer*,

> [a county] granted [the] respondents a building permit for a dwelling in conjunction with a farm use. [LUBA] reversed. LUBA declined to apply the standards set out in the county ordinance for new development on existing lots in the farm/forest (F/F) zone. Instead, it assessed the county's decision against its interpretation of the standards of Goal 3. The [Oregon] Court of Appeals reversed LUBA, . . . finding that because LCDC, in its acknowledgment order, expressly approved the farm use standard, Goal 3 was inapplicable to the case. [The Oregon Supreme Court] affirm[ed] the Court of Appeals and [went] one step further. [It held] that after acknowledgment, the county plan and implementing zoning regulations control land use decisions. This is so by virtue of ORS 197.605(5), the statute which regulates [the court's] review in post-acknowledgment cases. [The court's] analysis applies to review of any post-acknowledgment land use decision, whether or not LCDC expressly addresses a particular ordinance in its acknowledgment order. The county's decision in this case complied with its acknowledged plan and implementing ordinances.

666 P.2d 1332, 1334 (Or. 1983) (footnotes omitted) (citation omitted); *see also* Dickas v. City of Beaverton, 757 P.2d 451, 452–53 (Or. Ct. App. 1988).

Second, in *Urquhart v. Lane Council of Governments*, a city adopted a PAPA to redesignate property from parks and open space to university/research, and a regional government ratified the PAPA in accordance with a regional planning process. 721 P.2d 870, 871, 871 n.1 (Or. Ct. App. 1986). The petitioner challenged the PAPA, contending that the subject property should have been added to the city's open space inventory. *Id.* LUBA remanded for the city to adopt findings demonstrating why that was not done. *Id.* The Oregon Court of Appeals held that an assertion that a resource site is improperly omitted from a local government's Goal 5 inventory need not be considered where the alleged noncompliance is not a product of the proceeding under consideration. *Id.* at 873. If circumstances have changed since acknowledgement, then "LCDC's periodic review [is] the only method for correcting goal

parties generally must raise issues in proceedings before the local government[103] or LCDC[104] in order to raise them subsequently before LUBA or the courts. Finally, we note the demise of periodic review as a point at which deficiencies regarding currently protected resource

noncompliance." *Id.*; *see also* Yamhill County v. Land Conservation & Dev. Comm'n, 839 P.2d 238 (Or. Ct. App. 1992) (holding that LCDC may require local governments to add specific resource sites to their inventories at periodic review). And, if the acknowledgment was improper because the resource site *should have been* included on the local government's Goal 5 inventory, then "neither LUBA nor [the courts] can do anything about that now." *Urquhart*, 721 P.2d at 873; *see also* Friends of Cedar Mill v. Washington County, 28 Or. LUBA 477, 487–89 (1995). Relatedly, a local government may issue a mining permit for a gravel pit even if the gravel pit is not included in the local government's acknowledged mineral and aggregate resources inventory. Mill Creek Glen Prot. Ass'n v. Umatilla County, 746 P.2d 728, 729–30 (Or. Ct. App. 1987). The 1996 administrative rules effectively codify the court's holding in *Urquhart*. *See* OR. ADMIN. R. 660-023-0250(4) (2021); Johnson v. Jefferson County, 189 P.3d 30, 33–34 (Or. Ct. App. 2008).

Third, in *Friends of Neabeack Hill v. City of Philomath*, a city approved a subdivision and authorized partial removal of an inventoried grove of trees. 911 P.2d 350, 351 (Or. Ct. App. 1996). During a prior Goal 5 process, the city found that no uses conflicted with the grove. *Id.* at 351. Accordingly, under the original Goal and OR. ADMIN. R. 660-016-0005(1), the city was required to manage the grove to "preserve [its] original character" and to "insure preservation of the resource site." *Id.* at 351–52. To comply with that obligation, the city adopted a comprehensive plan policy requiring that the grove "be preserved to the maximum extent possible by limiting clearing to that which is necessary for housing, roads, and utilities." *Id.* at 352. The city's comprehensive plan was subsequently acknowledged. *Id.* at 351. The Oregon Court of Appeals conceded that "the city's Goal 5 process and its promulgation of [the comprehensive plan policy] were at odds with the goal and OAR 660-16-005(1)," but it determined that an improvident acknowledgment of that policy could not be revisited. *Id.* at 352, 355–56; *see also* Dundas v. Lincoln County, 43 Or. LUBA 407, 414–20 (2002).

103. OR. REV. STAT. §§ 197.763(1), .835(3) (2019); *see, e.g.*, Molalla River Rsrv., Inc. v. Clackamas County, 42 Or. LUBA 251, 258–59 (2002). *But see* OR. REV. STAT. § 197.835(4) (2021); Mission Bottom Ass'n, Inc. v. Marion County, 29 Or. LUBA 281, 287–90 (holding that a local government's failure to list all applicable criteria in its hearing notice allows petitioners to raise those criteria for the first time at LUBA), *aff'd*, 901 P.2d 898 (Or. Ct. App. 1995). That is referred to as the "raise it or waive it" requirement. *See, e.g.*, Boldt v. Clackamas County, 813 P.2d 1078, 1079 (Or. Ct. App. 1991). A similar rule provides that issues that were, or could have been, resolved in prior proceedings may not be raised in subsequent ones, such as when a local government makes another decision on the same application on remand from LUBA or the courts. *See, e.g.*, Tylka v. Clackamas County, 45 P.3d 961 (Or. Ct. App. 2002) (citing Beck v. City of Tillamook, 831 P.2d 678, 682 (Or. 1992)). That is referred to as the "law of the case" doctrine. *See, e.g.*, Setniker v. Polk County, 63 Or. LUBA 38, 67, *rev'd and remanded on other grounds*, 260 P.3d 800 (Or. Ct. App. 2011).

104. *See* City of Salem v. Fams. for Resp. Gov't, Inc., 668 P.2d 395, 397 (Or. Ct. App. 1983) (upholding LCDC's "policy that participants in the planning process waive objections by failing to raise them at the first feasible stage of the acknowledgment process"), *rev'd and remanded on other grounds*, 694 P.2d 965 (Or. 1985); Fraser v. Land Conservation & Dev. Comm'n, 138 P.3d 932 (Or. Ct. App. 2006) (citing Thomas Creek Lumber & Log Co. v. Bd. of Forestry, 69 P.3d 1238, 1250 (Or. Ct. App. 2003)) (holding that, under OR. R. APP. P. 5.45(4), parties must preserve issues before LCDC in order to raise them before the courts).

sites, or currently unprotected resource sites that might be worthy of protection, can be identified and resolved.[105]

Let us now proceed through the various resource categories protected by the original Goal or added in 1996, using their original appellations where applicable, to examine their treatment and protection over time.

A. *Land Needed or Desirable for Open Space*

The original Goal defined "open space" as:

> lands used for agricultural or forest uses, and any land area that would, if preserved and continued in its present use:
> (a) Conserve and enhance natural or scenic resources;
> (b) Protect air or streams or water supply;
> (c) Promote conservation of soils, wetlands, beaches or tidal marshes;
> (d) Conserve landscaped areas, such as public or private golf courses, that reduce air pollution and enhance the value of abutting or neighboring property;
> (e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;
> (f) Enhance recreation opportunities;
> (g) Preserve historic sites;
> (h) Promote orderly urban development.[106]

In referring to "lands used for agricultural or forest uses," the original Goal recognized that other statewide planning goals also deal with open space considerations.[107] Notwithstanding the breadth of that definition, there were no cases concerning this resource category until after the adoption of the 1981 administrative rules, and there were only a few such cases before the adoption of the 1996 administrative rules.[108]

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105. *See infra* Section IV.B.

106. ORIGINAL GOALS, *supra* note 10, at 18.

107. For example, Goals 3 and 4 also protect open spaces. *See* sources cited *supra* notes 11–12.

108. Despite their scarcity, several of those cases are significant with respect to the application of the Goal. First, in *Collins v. Land Conservation & Development Commission*, the Oregon Court of Appeals remanded LCDC's acknowledgment of a city's comprehensive plan because, rather than identifying uses that conflicted with open space in and around a historic district, the plan concluded that the city's historical and architectural review commission would

The amended Goal and the 1996 administrative rules severely constrain the protection of open space. Open space protections are made optional,[109] and the definition of "open space" is less inclusive than before.[110] However, if a local government chooses to adopt or amend an open space inventory under the 1996 administrative rules, then the standard Goal 5 process applies.[111] Since 1996, the cases are straightforward. If open space resource sites are already included on the local government's resource list, then PAPAs that affect those resource sites must demonstrate compliance with the Goal.[112] On the

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resolve any conflicts in an *ad hoc*, application-driven process, thereby impermissibly deferring the Goal 5 process. 707 P.2d 599, 600–03 (Or. Ct. App. 1985). Second, as noted, in *Urquhart v. Lane Council of Governments*, the Oregon Court of Appeals found that there was no obligation for a city to revisit its open space inventory until the next periodic review. 721 P.2d 870 (Or. Ct. App. 1986); *see supra* note 102. Third, as also noted, in *Friends of Neabeack Hill v. City of Philomath*, where a grove of trees was included on a city's open space inventory and required to be preserved, but where the city's acknowledged comprehensive plan and land use regulations contrarily allowed for the removal of 75% of the trees to allow for a 100-lot subdivision, the Oregon Court of Appeals concluded that it could not later be argued that the grove should have been more fully protected. 911 P.2d 350 (Or. Ct. App. 1996); *see supra* note 102.

109. OR. ADMIN. R. 660-023-0220(2) (2021) ("Local governments are not required to amend acknowledged comprehensive plans in order to identify new open space resources."). DLCD specifically recommended that change. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 36. The Subcommittee felt that Goal 5 lacked clear planning criteria with respect to open space; noted that local governments already deal with the matter through acquisition programs under Statewide Planning Goal 8 (Recreational Needs), where the finely ground processes of Goal 5 are inappropriate; and speculated that the only lands that could qualify as open space that did not already qualify as another Goal 5 resource category (*e.g.*, wetlands) were privately owned, urban lands zoned for development that would need to be acquired by the government for public use. *Id.* at 34–36. In addition, DLCD cited budget-related concerns. *Id.* at 36. Under the 1996 administrative rules, if a local government concluded before acknowledgment that it lacked sufficient information to determine whether certain open space resource sites were "significant," unlike with most resource categories, the local government need not consider whether it has subsequently acquired sufficient information at the time of periodic review. OR. ADMIN. R. 660-023-0250(5)(c) (2021).

110. OR. ADMIN. R. 660-023-0220(1) (2021) ("'[O]pen space' includes parks, forests, wildlife preserves, nature reservations or sanctuaries, and public or private golf courses."). The Subcommittee found the previous definition exceedingly broad. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 34.

111. OR. ADMIN. R. 660-023-0220(2) (2021). Local governments are authorized to adopt lists of significant open space resource sites as part of their acquisition programs, but they are not obligated to complete the Goal 5 process for those resource sites unless they adopt measures to protect the resource sites until acquisition. OR. ADMIN. R. 660-023-0220(3) (2021).

112. In *Cox v. Polk County*, LUBA remanded a PAPA that allowed dog control facilities in a public park zone containing numerous open space resource sites with respect to which it was previously determined that the public park zone allowed no conflicting uses. 49 Or. LUBA 78, 91–94 (2005). Because the PAPA "allow[ed] new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list" for purposes of OR. ADMIN. R. 660-023-0250(3)(b), the county was required but failed to determine whether the newly allowed dog parks would themselves conflict with the open space resource sites and, if

other hand, as noted, the 1996 administrative rules limit challenges under Goal 5 so that, before the next periodic review, the Goal may *only* be raised in response to PAPAs and, even then, only in certain circumstances.[113]

Open space is no longer a priority for the state in the context of Goal 5; however, resource sites that were inventoried before 1996 continue to be recognized and local governments retain the option to inventory new resource sites.

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so, to complete the Goal 5 process. *Id.* Similarly, in *Home Builders Ass'n of Lane County v. City of Eugene*, LUBA remanded a PAPA that altered a public lands zone containing numerous open space resource sites. 41 Or. LUBA 370, 437–38 (2002). Even though the public lands zone did not directly implement Goal 5 protections for those resource sites, it implemented a parks and open space comprehensive plan designation that did implement Goal 5 protections for those resource sites. *Id.* The PAPA therefore "amend[ed] . . . a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource" for purposes of OR. ADMIN. R. 660-023-0250(3)(a), and the city was required but failed to demonstrate that the amendments complied with Goal 5. *Id.* In addition, the PAPA adopted a new parks, recreation, and open space zone. *Id.* at 438. Even though the PAPA did not actually apply that zone to any property, because it was designed to implement Goal 5 protections, the city was required but failed to demonstrate Goal 5 compliance. *Id.* at 438–39.

113. *See supra* note 113 and accompanying text. If none of those circumstances are present, then the Goal 5 challenge must fail. *See* Cutsforth v. City of Albany, 49 Or. LUBA 559, 566–67 (2005) (concluding that a city was not required to apply Goal 5 in annexing property with an open space comprehensive plan designation because the decision neither redesignated nor rezoned the annexation area); No Tram to OHSU, Inc. v. City of Portland, 44 Or. LUBA 647, 669–72 (2003) (affirming a PAPA that expressly listed trams as an example of "basic utilities," which were conditionally allowed in an open space zone, and that allowing trams outright in the open space zone, because trams were already implicitly considered "basic utilities" and because the change in the level of review (*i.e.*, allowed conditionally to allowed outright) did not allow any "new uses" for purposes of OR. ADMIN. R. 660-023-0250(3)(b)). Of course, if a particular open space resource site is not included on a local government's inventory, then an argument that the local government did not apply the Goal in allowing new conflicting uses provides no basis for reversal or remand. *See* Crowley v. City of Hood River, 77 Or. LUBA 117, 126–28 (affirming a city's decision to rezone a city park from an open space/public facilities zone to a residential zone in part because the park was not actually included on the city's open space inventory), *rev'd and remanded on other grounds*, 430 P.3d 1113 (Or. Ct. App. 2018); Smith v. City of Salem, 61 Or. LUBA 87, 91 (2010) (concluding that a city was not required to apply Goal 5 in adopting a PAPA changing the subject property's comprehensive plan designation from parks and open space to commercial and residential because the subject property was not included on the city's open space inventory). Given the optional nature of open space protections under the 1996 administrative rules, it becomes even more important to determine whether open space policies and designations in local comprehensive plans are mandatory or aspirational in nature. *See* Friends of the Hood River Waterfront v. City of Hood River, 68 Or. LUBA 459 (2013).

B. Mineral and Aggregate Resources

Both the original and amended Goal include this resource category.[114] However, unlike other resource categories in the original Goal, LCDC adopted rules specifically related to mineral and aggregate resources before 1996, reflecting the political exceptionalism of this resource category and the power exercised by its advocates.[115] Those rules, adopted in 1992, require local governments to address state statutes and administrative rules relating to mined land reclamation when planning for and regulating the development of aggregate resources;[116] to coordinate with the Oregon Department of Geology and Mineral Industries (DOGAMI), the state agency tasked with regulating most mining activities, to ensure that those requirements are incorporated into their programs to achieve Goal 5;[117] and to amend their land use procedures to ensure that authorizations of mineral and aggregate development are coordinated with DOGAMI.[118]

Along with energy sources, mineral and aggregate resources are different from most Goal 5 resource categories:

> These are natural resources that are vital to the state, but only if they are extracted and used. Therefore, the Goal 5 requirements to "conserve" or "protect" these resources have been interpreted to mean that sites for their removal and processing must be identified and appropriately zoned. This interpretation has been in effect for over a decade, but it is not generally understood. It is definitely confusing that the statewide Goal definitions of "protect" and "develop" both seem to apply here.[119]

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114. ORIGINAL GOALS, *supra* note 10, at 17; CURRENT GOALS, *supra* note 1, at 22.

115. 32 Or. Bull. 11 (July 1, 1992) (codified at OR. ADMIN. R. 660-016-0030). It is somewhat odd that mineral and aggregate resources fall under the same regulatory scheme as wetlands, riparian corridors, and historic resources. LCDC's Goal 5 Subcommittee recognized that. *See infra* note 119 and accompanying text. The outsized representation of this resource category in the body of Goal 5 litigation attests both to the need for these materials for construction and to the land use controversies that often attend applications to extract them.

116. OR. ADMIN. R. 660-016-0030(1) (2021).

117. OR. ADMIN. R. 660-016-0030(2) (2021).

118. OR. ADMIN. R. 660-016-0030(3) (2021). Local governments were required to adopt those amendments by January 1, 1993. *Id.*

119. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 38; *see also* Hegele v. Crook County, 44 Or. LUBA 357, 367 ("In the context of an aggregate resource site, to 'protect' the resource against conflicting uses means to allow the aggregate to be extracted."), *aff'd*, 78 P.3d 1254 (Or. Ct. App. 2003).

The 1996 administrative rules extensively detail both the procedures for and the limitations on local governments in approving mining at mineral and aggregate resource sites under the Goal.[120] Local governments are not obligated to amend their mineral and aggregate resources inventories except in response to individual development applications.[121] Moreover, the requirements of the resource-specific rule for mineral and aggregate resources "modify, supplement, or supersede" the standard Goal 5 process in several respects.[122] For one, the determination of whether an aggregate resource site is "significant" is governed by the resource-specific rule rather than the standard Goal 5 process.[123]

120. OR. ADMIN. R. 660-023-0180 (2021). That detail begins with definitions that are applicable only to mineral and aggregate resources, including definitions for "aggregate resources," "conflicting use," "mineral resources," "minimize a conflict," and "protect." OR. ADMIN. R. 660-023-0180(1) (2021). The rule has been amended twice. 43 Or. Bull. 269 (Aug. 1, 2004); ARCHIVES DIV., OFF. OF THE SEC'Y OF STATE, STATUTORY MINOR CORRECTION: LCDD 7-2018 (2018), records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/6845654.

121. OR. ADMIN. R. 660-023-0180(2) (2021). That is consistent with the recommendation of LCDC's Goal 5 Subcommittee. The Subcommittee noted that many mineral and aggregate resource sites had only gone through the Goal 5 process because local governments received applications to develop them. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 38. The Subcommittee suggested maintaining that practice going forward by making the inventory process for mineral and aggregate resources a quasi-judicial siting process instead of an advance planning process. *Id.* at 38–39. The Subcommittee also noted testimony from the aggregate extraction community that the ESEE process was well suited to resolve conflicts. *Id.* at 39.

122. OR. ADMIN. R. 660-023-0180(2) (2021).

123. OR. ADMIN. R. 660-023-0180(2)(b) (2021). By contrast, the determination of whether mineral—as opposed to aggregate—resource sites are "significant" is governed by the standard inventory process. OR. ADMIN. R. 660-023-0180(2)(a) (2021). As noted, the resource-specific rule contains separate definitions for "aggregate resources" and "mineral resources." *See supra* note 120. The resource-specific rule requires less detailed information than the standard inventory process for a local government to determine that an aggregate resource site is significant. *Compare* OR. ADMIN. R. 660-023-0180(8) (2021), *with* OR. ADMIN. R. 660-023-0030(3) (2021). Under the resource-specific rule, an aggregate resource site may be determined significant if one of three criteria is met: (1) the aggregate at the resource site is of a certain quantity and meets certain Oregon Department of Transportation quality standards, (2) the aggregate at the resource site meets certain local government quality standards, or (3) the resource site was included on a Goal 5 inventory on September 1, 1996. OR. ADMIN. R. 660-023-0180(3)(a)–(c) (2021). Determinations regarding the quality and quantity of the aggregate at a resource site must be supported by adequate findings and substantial evidence. *See* Westside Rock – Hayden Quarry, LLC v. Clackamas County, 56 Or. LUBA 601 (2008) (remanding a county's determination that an aggregate resource site was not significant under OR. ADMIN. R. 660-023-0180(3) because the county misinterpreted data from off-site wells and on-site test pits and because the county failed to explain why boulders on the resource site did not qualify as aggregate). If only a portion of the aggregate at a resource site is of sufficient quality, then only that portion of the resource site may be included on the local government's resource list. *See* Save TV Butte v. Lane County, 77 Or. LUBA 22, 27–29 (2018). Some aggregate resource sites that would otherwise qualify may not be determined significant if they contain certain amounts

If a mineral or aggregate resource site is determined to be significant, then the local government must determine whether mining is allowed at the resource site.[124] For significant aggregate resource sites, the local government must proceed through a modified Goal 5 process within 180 days.[125] Like the standard Goal 5 process, the resource-specific rule requires a determination of an "impact area for the purpose of identifying conflicts with proposed mining and processing activities" at the aggregate resource site.[126] Unlike the standard Goal 5 process, however, the impact area is limited to 1,500 feet from the boundaries of the proposed mining area at the aggregate resource site unless "factual information indicates significant potential conflicts beyond this distance."[127] The local government must then set

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of high-quality soil and if the aggregate layer does not exceed a certain thickness. OR. ADMIN. R. 660-023-0180(3)(d) (2021). However, the case law is divided on whether that provision disqualifies only those aggregate resource sites that would otherwise qualify under the *first or second* criteria for significance, or whether it disqualifies aggregate resource sites that would otherwise qualify under *any* of the three criteria for significance. *Compare* Protect Grand Island Farms v. Yamhill County, 64 Or. LUBA 179, 182 (2011) ("OAR 660-023-0180(3)(d) . . . in some circumstances disqualifies sites that would otherwise qualify as significant under OAR 660-023-0180(3)(a) or (b) ...."), *aff'd*, 275 P.3d 201 (Or. Ct. App. 2012), *and* Delta Prop. Co. v. Lane County, 58 Or. LUBA 409, 413 (2009) ("[E]ven if an aggregate resource site is found to be 'significant' under OAR 660-023-0180(3)(a) or (b), OAR 660-023-0180(3)(d) dictates that such aggregate resource sites are not 'significant,' within the meaning of OAR 660-023-0180(3) ...."), *with* Delta Prop. Co. v. Lane County, 69 Or. LUBA 305, 313 (2014) ("[E]ven if a site is shown to be significant under OAR 660-023-0180(3)(a), (b) or (c), under OAR 660-023-0180(3)(d), sites that would otherwise qualify as significant are disqualified in some circumstances ...."), *rev'd and remanded on other grounds*, 352 P.3d 86 (Or. Ct. App. 2015), *and* Beaver State Sand & Gravel, Inc. v. Douglas County, 43 Or. LUBA 140, 151–52 (2002) ("OAR 660-023-0180(3)(d) provides an exception that disqualifies certain aggregate resource sites that would otherwise qualify as 'significant' under OAR 660-023-0180(3)(a)–(c)."), *aff'd*, 65 P.3d 1123 (Or. Ct. App. 2003).

124. OR. ADMIN. R. 660-023-0180(5) (2021).

125. *Id.* By contrast, the determination of whether mining is allowed at significant mineral—as opposed to aggregate—resource sites is governed by the standard ESEE decision and program implementation processes. OR. ADMIN. R. 660-023-0180(2)(c) (2021). Again, as noted, the resource-specific rule contains separate definitions for "aggregate resources" and "mineral resources." *See supra* note 120.

126. OR. ADMIN. R. 660-023-0180(5)(a) (2021).

127. *Id.* That impact area does not include the aggregate resource site itself; rather, it includes only the 1,500-foot ring around the aggregate resource site. *See* Stockwell v. Benton County, 38 Or. LUBA 621, 625–27 (2000). That is, at the conflict identification step under OR. ADMIN. R. 660-023-0180(5)(b), the local government need not consider conflicts between the proposed mining and existing uses on the land proposed to be mined, with which the proposed mining will inevitably interfere. *See id.* LUBA has generally upheld local denials of requests to expand the impact area for aggregate resource sites. *See* Poto v. Linn County, 67 Or. LUBA 162, 170–72 (2013); Rogue Aggregates, Inc. v. Jackson County, 57 Or. LUBA 8, 22–25 (2008). However, such determinations must be supported by adequate findings, as evidenced by a series of cases involving a request to place a basalt mining and processing operation on a county's

forth all "existing or approved land uses within the impact area that will be adversely affected by proposed mining operations" at the aggregate resource site.[128]

In identifying conflicting uses with respect to the aggregate resource site, the resource-specific rule enumerates specific types of conflicts that the local government is allowed to consider.[129] Noise, dust, and other discharges related to mining must be considered against uses and "associated activities," such as houses and schools, that are "sensitive" to such discharges.[130] Transportation impacts must also be considered, but they are generally limited to local roads providing access to and egress from the resource site that are within a mile of the resource site's entrance, and such impacts must be determined under clear and objective transportation standards.[131] Conflicts with public

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mineral and aggregate resources inventory, where the resource site was adjacent to agricultural operations and sage-grouse habitat. *See* Walker v. Deschutes County, 55 Or. LUBA 93, 98–104 (2007); Walker v. Deschutes County, 59 Or. LUBA 488, 491–98 (2009); Nash v. Deschutes County, 63 Or. LUBA 27 (2011); Cent. Or. LandWatch v. Deschutes County, 72 Or. LUBA 45 (2015).

128. OR. ADMIN. R. 660-023-0180(5)(b) (2021). Under that provision, "approved land uses" are limited to dwellings that are allowed in residential zones on existing platted lots and other uses for which local governments have already granted conditional or final approvals. *Id.* Thus, uses that are only potentially approvable or that are planned for future approval need not be considered. *See* Port of St. Helens v. Land Conservation & Dev. Comm'n, 996 P.2d 1014, 1015–16 (Or. Ct. App. 2000) (upholding an LCDC periodic review order requiring a county to repeal a local code provision that prohibited mining near planned, but not existing or approved, industrial uses). In that way, the resource-specific rule contrasts with the standard Goal 5 process, under which existing uses as well as outright and conditionally permitted uses must be considered in identifying conflicting uses. OR. ADMIN. R. 660-023-0040(2) (2021); *see supra* note 77. Additionally, while conflicting uses under the standard Goal 5 process are uses that *could* adversely affect *the resource site*, OR. ADMIN. R. 660-023-0010(1) (2021); *see supra* note 77 and accompanying text, the uses that must be identified under the resource-specific rule are those that *will themselves* be adversely affected by the proposed mining. OR. ADMIN. R. 660-023-0180(5)(b) (2021). Native American religious practices are an "existing" land use that must be addressed under the resource-specific rule. *See Walker*, 59 Or. LUBA at 498–500.

129. OR. ADMIN. R. 660-023-0180(5)(b) (2021). That limitation was intended to remove local politics from the siting process by "(1) eliminating local discretion based on other than science/facts/law/evidence and (2) allowing politicians to blame others." E-mail from Steve Pfeiffer to Edward J. Sullivan, *supra* note 64.

130. OR. ADMIN. R. 660-023-0180(5)(b)(A) (2021). Local governments may rely on conditions of approval to conclude that such conflicts will be minimized, but it must be apparent that those conditions will be effective. *See* Save TV Butte v. Lane County, 77 Or. LUBA 22, 45–46 (2018) (remanding a county's decision to allow mining in part because the findings only "suggest[ed]" that conditions of approval would be sufficient to minimize silica dust conflicts and because they provided no way for LUBA to confirm that that would be case).

131. OR. ADMIN. R. 660-023-0180(5)(b)(B) (2021). The "local roads" and "access and egress" requirements are strictly construed. *See* Morse Bros. v. Columbia County, 37 Or. LUBA 85, 99 (1999) ("[The rule] does not permit the county to consider the types of conflicts with

airports due to birds being attracted to mining operations are also listed.[132] Local governments must also consider conflicts with other resource sites[133] and agricultural practices.[134] Finally, the resource-specific rule lists "[o]ther conflicts for which consideration is necessary in order to carry out ordinances that supersede [DOGAMI] regulations" pursuant to state statute.[135] That involves a fairly rare circumstance in which (1) a county adopted a surface mining ordinance before

highways, local roads [that do not provide access to or egress from the resource site,] and railroads that are identified in the disputed finding."), *aff'd*, 996 P.2d 1023 (Or. Ct. App. 2000); Friends of the Applegate Watershed v. Josephine County, 44 Or. LUBA 786, 795–97 (2003) (holding that the local government did not err in failing to consider transportation impacts where the applicant changed the application to take access from a state highway and avoid local roads). The rule allows consideration of roads more than a mile away if "necessary in order to include the intersection with the nearest arterial identified in the local transportation plan." OR. ADMIN. R. 660-023-0180(5)(b)(B) (2021). As always, the local government's findings must be adequate. *See* Turner Cmty. Ass'n v. Marion County, 37 Or. LUBA 324, 365–67 (1999) (remanding a county's decision to approve mining at an aggregate resource site in part because, while the county found that local road intersections within a one-mile area would operate at level of service (LOS) C and that there would therefore be no conflicts, the findings did not address evidence in the record that a particular intersection would operate at LOS E).

132. OR. ADMIN. R. 660-023-0180(5)(b)(C) (2021). No cases have dealt with that provision; however, that may be due to Oregon's planning rules for airports, which are aimed at reducing such conflicts. *See* OR. ADMIN. R. 660-013-0010 to -0160 (2021).

133. OR. ADMIN. R. 660-023-0180(5)(b)(D) (2021); *see Save TV Butte*, 77 Or. LUBA at 36–40 (remanding a county's decision to approve mining at an aggregate resource site in part because the county did not consider conflicts with adjacent inventoried big game habitat); Eugene Sand & Gravel, Inc. v. Lane County, 44 Or. LUBA 50, 91–92 (concluding that a county's findings that water drawdown from a proposed mining operation would conflict with inventoried riparian areas were inadequate because the applicant proposed to divert water back into those riparian areas and because the county inconsistently found that the water drawdown would not conflict with inventoried wetlands that were located between and hydrologically connected to the riparian areas), *rev'd and remanded on other grounds*, 74 P.3d 1085 (Or. Ct. App. 2003). *But see Walker*, 59 Or. LUBA at 497–98 (determining that, although sage-grouse habitat is a resource identified in the 1996 administrative rules, because only a *sage-grouse lek* was included on the county's resource list, conflicts with *other sage-grouse habitat* were not relevant for purposes of OR. ADMIN. R. 660-023-0180(5)(b)(D)).

134. OR. ADMIN. R. 660-023-0180(5)(b)(E) (2021); *see* Cent. Or. LandWatch v. Deschutes County, 72 Or. LUBA 45, 58–60 (2015) (affirming a county's conclusion that sage-grouse fleeing from proposed mining and nesting elsewhere in the impact area would not conflict with cattle ranching on those lands). A use may constitute an "agricultural practice" for purposes of this provision even if it does not constitute a "farm use" for purposes of exclusive farm use (EFU) zoning. *See Eugene Sand & Gravel*, 74 P.3d 1085 (Or. Ct. App.) (concerning whether a county correctly considered conflicts between a proposed mining operation and nearby farm stands), *rev'g* 44 Or. LUBA 50 (2003).

135. OR. ADMIN. R. 660-023-0180(5)(b)(F) (2021).

DOGAMI adopted surface mining regulations and (2) that ordinance identifies conflicts not listed in the resource-specific rule.[136]

Upon considering the limited types of conflicts identified by the resource-specific rule, the local government must determine whether "reasonable and practicable measures" can be taken to "minimize" any instances of those conflicts with respect to the aggregate resource site.[137] If the identified conflicts can be minimized, then mining must be allowed at the aggregate resource site and the local government need not consider any ESEE consequences.[138] If conflicts "cannot be

136. OR. REV. STAT. § 517.780(1)(a) (2019). Such conflicts must be identified by the ordinance itself; the local government may not consider additional conflicts simply because the ordinance requires general compliance with other local land use regulations and comprehensive plan provisions. *See Morse Bros.*, 37 Or. LUBA at 91–97.

137. OR. ADMIN. R. 660-023-0180(5)(c) (2021). The terms "reasonable and practicable" and "minimize" provide much discretion. In general, the resource-specific rule defines "minimize a conflict" to mean reducing an identified conflict to a level that is no longer significant. OR. ADMIN. R. 660-023-0180(1)(g) (2021). To minimize a conflict with agricultural practices for purposes of OR. ADMIN. R. 660-023-0180(5)(b)(E), however, the proposed mining must comply with section 215.296 of the Oregon Revised Statutes. OR. ADMIN. R. 660-023-0180(5)(c) (2021); *see infra* note 153 and accompanying text; Walker v. Deschutes County, 55 Or. LUBA 93, 115–17 (2007) (explaining that OR. ADMIN. R. 660-023-0180(5)(b)(E) is not concerned with the relative significance of the agricultural practices at issue and remanding a county's decision to allow mining at an aggregate resource site in part because the county's findings did not address whether conflicts with nearby grazing could be minimized under section 215.296 of the Oregon Revised Statutes); *Eugene Sand & Gravel*, 44 Or. LUBA at 60–90 (affirming a county's conclusion that dust, groundwater, and flooding impacts from proposed mining at an aggregate resource site would violate section 215.296 of the Oregon Revised Statutes and that those conflicts could therefore not be minimized for purposes of OR. ADMIN. R. 660-023-0180(5)(c)); Friends of the Applegate Watershed v. Josephine County, 44 Or. LUBA 786, 797–800 (2003) (applying section 215.296 of the Oregon Revised Statutes and affirming a county's conclusion that impacts related to farm machinery movement, noise, dust, crop production, grazing, livestock maintenance, flooding, and erosion from proposed mining at an aggregate resource site would be minimized).

138. OR. ADMIN. R. 660-023-0180(5)(c) (2021); *see* Lindsey v. Josephine County, 51 Or. LUBA 383, 393 ("[A]n ESEE analysis is only required if identified conflicts cannot be minimized."), *aff'd*, 138 P.3d 62 (Or. Ct. App. 2006). The local government may consider conditions of approval in determining whether the identified conflicts can be minimized. *See* Protect Grand Island Farms v. Yamhill County, 66 Or. LUBA 291, 298–301 (2012). However, any conditions of approval or procedural requirements necessary to minimize conflicts must be clear and objective. OR. ADMIN. R. 660-023-0180(5)(e) (2021); *see infra* note 143 and accompanying text. Determinations that conflicts can be minimized must be supported by adequate findings and substantial evidence. *Compare Walker*, 55 Or. LUBA at 122–24 (affirming a county's conclusion that noise impacts on a nearby residence would be minimized based on the presence of an intervening highway, the below-grade nature of the proposed mining, and expert evidence that any noise would not rise above ambient levels, but remanding the county's decision to allow the proposed mining due to inadequate findings regarding dust impacts on the residence), *with Walker*, 59 Or. LUBA at 500–04 (affirming the county's conclusion on remand that dust impacts on the residence would be minimized based on a condition of approval requiring that blasting occur only when the wind is blowing away from

minimized," however, then the local government must "determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site" and weigh those consequences in deciding whether to allow mining at the aggregate resource site, considering the following factors:

> (A) The degree of adverse effect on existing land uses within the impact area;
> (B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and
> (C) The probable duration of the mining operation and the proposed post-mining use of the site.[139]

If an ESEE analysis is necessary because the identified conflicts cannot be minimized, then that analysis cannot be avoided or deferred.[140] Although the local government is only required to "determine the ESEE consequences," meaning that it is not required to prepare an ESEE analysis itself, the local government may not cite the lack of an applicant-prepared ESEE analysis to excuse its obligation under the resource-specific rule.[141] It is critical that the ESEE analysis clearly define the nature of the resource site.[142]

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the residence). A conclusion that any conflicts can be minimized is not the same thing as a conclusion that there would be no conflicts; those are separate issues, and local governments would do well not to conflate the two. *See* Turner Cmty. Ass'n v. Marion County, 37 Or. LUBA 324, 332–34 (1999).

139. OR. ADMIN. R. 660-023-0180(5)(d) (2021).

140. *See* Rogue Advocs. v. Josephine County, 72 Or. LUBA 275, 291 (2015).

141. *See* Molalla River Rsrv., Inc. v. Clackamas County, 42 Or. LUBA 251, 275 (2002). By the same token,

> the permit applicant . . . has the burden of presenting substantial evidence to support findings of compliance with all relevant approval standards and approval of [the] application. Any permit opponents are entitled to present rebutting and opposing evidence, and county planning staff's presentations may also include relevant evidence. The county's obligation under steps four and five is a *findings* obligation; it is not an *evidentiary* obligation. The county is entitled to base its decision on the evidence that is placed before it by the parties to th[e] permit proceeding.

Hellberg v. Morrow County, 49 Or. LUBA 423, 432–33 (2005) (emphases in original).

142. *See* Mark Latham Excavation, Inc. v. Deschutes County, 281 P.3d 644 (Or. Ct. App.) (upholding a county's decision to prohibit further mining of a headwall at a mineral and aggregate resource site because, while the county's ESEE analysis for the resource site considered open pit mining, it did not consider headwall mining), *rev'g* 65 Or. LUBA 32 (2012); Hoffman v. Deschutes County, 61 Or. LUBA 173, 184–92 (remanding a county's decision to allow an applicant to mine 700,000 cubic yards of pumice and 3.4 million cubic yards of tuff at

If the local government makes a final decision to allow mining at the aggregate resource site, meaning that either the conflicts can be minimized or the ESEE consequences have been weighed and mining is allowed, then that decision may not later be frustrated:

> Where such mining is allowed, the plan and implementing ordinances shall be amended to allow such mining. Any required measures to minimize conflicts, including special conditions and procedures regulating mining, shall be clear and objective. Additional land use review (e.g., site plan review), if required by the local government, shall not exceed the minimum review necessary to assure compliance with these requirements and shall not provide opportunities to deny mining for reasons unrelated to these requirements, or to attach additional approval requirements, except with regard to mining or processing activities:
> (A) For which the PAPA application does not provide information sufficient to determine clear and objective measures to resolve identified conflicts;
> (B) Not requested in the PAPA application; or
> (C) For which a significant change to the type, location, or duration of the activity shown on the PAPA application is proposed by the operator.[143]

The local government must also approve a post-mining use of the aggregate resource site and provide for that use in its comprehensive plan and land use regulations.[144] However, for certain superior agricultural soils, the post-mining uses are limited to farm uses and fish and wildlife habitat.[145]

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a mineral and aggregate resource site in part because the county's ESEE analysis considered mining 750,000 cubic yards of pumice and no tuff), *aff'd*, 240 P.3d 79 (Or. Ct. App. 2010).

143. OR. ADMIN. R. 660-023-0180(5)(e) (2021).

144. OR. ADMIN. R. 660-023-0180(5)(f) (2021).

145. *Id.* Although it did not concern the application of Goal 5, in *Central Oregon LandWatch v. Deschutes County*, the Oregon Court of Appeals concluded that a former mining operation with soils that might have been agricultural soils was not subsequently required to be zoned EFU since the property had always been zoned surface mining and had never been included on the local government's Goal 3 inventory of agricultural lands. 457 P.3d 369 (Or. Ct. App. 2020), *aff'g* LUBA No. 2019-011, 2019 WL 5130331 (Aug. 21, 2019). The court explained that the local government was not required to revisit its prior determination that the property was not agricultural land until the next periodic review. *Id.* at 374–75 (citing Urquhart v. Lane Council of Gov'ts, 721 P.2d 870 (Or. Ct. App. 1986)). For a summary of *Urquhart*, see *supra* note 102.

Most mining occurs in rural, unincorporated areas where farm and forest activities predominate. Mining that is auxiliary to forest practices must be allowed in forest zones,[146] and local governments may allow the mining and processing of mineral and aggregate resources on forest lands subject to the requirements of Goal 4 and its implementing administrative rules.[147]

Mineral and aggregate resource uses are allowed as conditional uses on farmland.[148] However, most mining on farmland requires a permit that may be issued only for resource sites that are "included on an inventory in an acknowledged comprehensive plan."[149] Although the 1996 administrative rules allow for the inclusion of nonsignificant resource sites on an "inventory," as opposed to a "resource list," which,

146. OR. ADMIN. R. 660-006-0025(2)(c) (2021).

147. OR. ADMIN. R. 660-006-0025(4)(g) (2021). Those requirements include that the mining will not "force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands" or "significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel." OR. ADMIN. R. 660-006-0025(5)(a)–(b) (2021). It is generally not inconsistent with Goal 4 for a local government to allow the mining and processing of mineral and aggregate resources on forest lands. *See* Zippel v. Josephine County, 27 Or. LUBA 11, 16–19 (1994); Gonzalez v. Lane County, 24 Or. LUBA 251, 254–56 (1992). However, even if allowing mining at an aggregate resource site would arguably be inconsistent with the state statutes and administrative rules that implement Goal 4, that does not necessarily mean that it is precluded. *See* Save TV Butte v. Lane County, 77 Or. LUBA 22, 30–35 (2018).

148. OR. REV. STAT. §§ 215.213(2)(d), .283(2)(b) (2019).

149. *Id.* § 215.298(2)(b). That permit requirement applies if the applicant proposes to mine more than 1,000 cubic yards of material or to excavate more than one acre of surface area in preparation for mining, but counties may establish lesser thresholds. *Id.* § 215.298(2)(a). Mining on farmland in certain Eastern Oregon counties is exempt from most of the requirements of the statewide planning goals and their implementing administrative rules (except for certain rules relating to sage-grouse) as well as from the requirements of section 215.296 of the Oregon Revised Statutes. *Id.* § 215.298(3)–(4); *see infra* note 153 and accompanying text. Those Eastern Oregon counties may only deny permits for mining on farmland if the following criteria are met:

> (a) The county determines, based on clear and objective standards, that the proposed use will create:
>
> (A) A significant conflict with local road capacity, sight distances, horizontal or vertical alignment and cross section elements;
>
> (B) A significant safety conflict with existing public airports due to bird attractants; or
>
> (C) A significant health or safety conflict with existing residential uses within the boundaries of the impact area of the proposed use; and
>
> (b) The county determines that the conflict identified in paragraph (a) of this subsection cannot be minimized through the imposition of reasonable and practicable mitigation measures as conditions of approval.

Id. § 215.298(5).

as noted, includes only significant resource sites,[150] LUBA and the Oregon Court of Appeals eventually determined that mining permits could only be issued for *significant* resource sites.[151] As a result, many existing mineral and aggregate resource sites on farmland could not be expanded and new resource sites could not be permitted.

In response, LCDC amended the resource-specific rule in 2004 to enable local governments to designate smaller aggregate resource sites on farmland as "significant," and to allow mining at such resource sites, if certain requirements are met.[152] One of those requirements is that the proposed mining comply with a particular statute that limits many nonfarm uses on farmland by requiring that the nonfarm use neither "[f]orce a significant change in" nor "[s]ignificantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."[153]

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150. *See supra* note 63 and accompanying text.

151. Beaver State Sand & Gravel, Inc. v. Douglas County, 43 Or. LUBA 140, 170–75 (2002), *aff'd*, 65 P.3d 1123 (Or. Ct. App. 2003). In *Beaver State*, LUBA observed that the reference to an "inventory" in section 215.298 of the Oregon Revised Statutes was enacted in 1989, before the 1996 administrative rules were adopted. *Id.* By contrast, the 1981 administrative rules, which were in effect when that statute was enacted, refer to an "inventory" as including only significant resource sites. *Id.*

152. 43 Or. Bull. 269 (Aug. 1, 2004); Memorandum from Bob Rindy, Or. Dep't of Land Conservation & Dev., to the Or. Land Conservation & Dev. Comm'n (May 28, 2004) (on file with author). The 2004 amendments define "farmland" as "land planned and zoned [EFU] pursuant to Goal 3 and OAR chapter 660, division 033." OR. ADMIN. R. 660-023-0180(1)(e) (20210. If an aggregate resource site is on farmland, then it may be determined significant if either (1) a certain quantity of aggregate is proposed to be mined from the resource site, again, barring certain amounts of high-quality soil and a thin aggregate layer, or (2) a local land use permit for mining was issued before April 3, 2003, and is currently effective. OR. ADMIN. R. 660-023-0180(4) (2021). Local governments may allow mining at such resource sites if four requirements are met. OR. ADMIN. R. 660-023-0180(6) (2021). First, the proposed mining must meet the discretionary county land use requirements for nonfarm uses in EFU zones, including section 215.296 of the Oregon Revised Statutes. OR. ADMIN. R. 660-023-0180(6)(a) (2021); *see infra* note 153 and accompanying text. Second, as when the aggregate resource site is not on farmland, the local government must determine and provide for a post-mining use of the resource site under OR. ADMIN. R. 660-023-0180(5)(f). OR. ADMIN. R. 660-023-0180(6)(b) (2021); *see supra* note 144–145 and accompanying text. Third, the resource site must be included on the local government's resource list, *i.e.*, be determined significant. OR. ADMIN. R. 660-023-0180(6)(c) (2021). Fourth, the local government may not allow more than a certain quantity of aggregate to be mined. OR. ADMIN. R. 660-023-0180(6)(d) (2021). To encourage local governments to transition from the 1981 administrative rules to the 1996 administrative rules, the 1981 administrative rules were not similarly amended. Memorandum from Bob Rindy to the Or. Land Conservation & Dev. Comm'n, *supra*.

153. OR. REV. STAT. § 215.296(1) (2021); OR. ADMIN. R. 660-023-0180(6)(a) (2021). That statute, known as the "farm impacts test," can pose a serious obstacle for applicants and local governments wishing to allow mining on farmland. *See* Mission Bottom Ass'n, Inc. v. Marion County, 29 Or. LUBA 281, 294–96, *aff'd*, 901 P.2d 898 (Or. Ct. App. 1995); Sanders v.

One of the authors has elsewhere already noted the controversy that often erupts in evaluating mining on farmland.[154] The conflict between mineral and aggregate resources and the state's agricultural economy is also apparent from the legislative policy on their relationship:

> (1) The Legislative Assembly finds that:
> (a) The extraction of aggregate, other minerals and other subsurface resources is an essential contribution to Oregon's economic well-being.
> (b) Oregon has an economic and social interest in locating and providing affordable aggregate, other minerals and other subsurface resources in close proximity to the end user of the materials.
> (c) Oregon has an interest in balancing competing land use demands for lands identified as farmlands or forestlands in a manner that protects the economic viability of mining and other resource uses.
> (d) To balance competing resource uses, Oregon has an interest in providing significant volumes of high-quality aggregate, other minerals and other subsurface resources that are critical to building Oregon's communities and infrastructure while preserving farmland for agricultural production.
> (2) The Legislative Assembly declares that:
> (a) High-value farmland composed predominantly of Class I and Class II soils in the Willamette Valley should not be available for mining unless there is a significant volume of high-quality aggregate and other minerals and other subsurface resources available for extraction.

Yamhill County, 34 Or. LUBA 69, 119–21, *aff'd*, 963 P.2d 755 (Or. Ct. App. 1998). In a sea-change from prior cases, the Oregon Supreme Court recently interpreted that statute to require a determination not only of whether a proposed nonfarm use will significantly impact each farm practice on surrounding farms but also of whether any less-than-significant impacts on multiple farm practices cumulatively amount to a significant impact on the farm as a whole. *See* Stop the Dump Coal. v. Yamhill County, 435 P.3d 698 (Or. 2019). In applying that statute, adequate findings and substantial evidence are critical. *See* Turner Cmty. Ass'n v. Marion County, 37 Or. LUBA 324, 341–50 (1999); Mission Bottom Ass'n, Inc. v. Marion County, 32 Or. LUBA 56, *aff'd*, 930 P.2d 897 (Or. Ct. App. 1996). It is notable that the statute applies only when the local government is determining whether to allow mining at the aggregate resource site; it does not apply when the local government is merely determining whether to include the resource site on its resource list. *See* Stern v. Josephine County, 58 Or. LUBA 511, 513–15 (2009).

154. *See* Sullivan & Eber, *supra* note 11, at 26 n.174.

> (b) State agencies and local governments should balance competing resource uses and not restrict the removal of the full depth of aggregate unless public health and safety concerns necessitate the restriction of mining activity.[155]

If a local government allows mining at a mineral or aggregate resource site other than an aggregate resource site on farmland, then it must apply the standard Goal 5 process—that is, it must potentially conduct a *second* ESEE analysis—to "determine whether to allow, limit, or prevent new conflicting uses within the impact area."[156]

Finally, the resource-specific rule requires local governments to amend their comprehensive plans and land use regulations to conform therewith.[157] Until that happens, local governments must apply the resource-specific rule directly to PAPAs that would authorize mining unless (1) the local government's comprehensive plan contains criteria for the consideration of PAPAs that would add aggregate resource sites to the local government's resource list and (2) those criteria were acknowledged after 1989 and will be amended to conform with the resource-specific rule at the local government's next periodic review.[158]

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155. OR. REV. STAT. § 215.299 (2021). That legislative balancing essentially codifies DLCD's understanding in adopting the 2004 amendments to the resource-specific rule. *See supra* note 152. Other statutes also reflect that legislative balancing. *Compare* OR. REV. STAT. § 215.130(7)(b) (2021) (shielding nonconforming surface mining operations in counties from being deemed interrupted or abandoned in certain circumstances), *with id.* § 215.301 (prohibiting the batching and blending of mineral and aggregate into asphalt cement within two miles of planted vineyards except for operations approved as of October 3, 1989, and subsequent renewals).

156. OR. ADMIN. R. 660-023-0180(2)(d), (7) (2021); *see* Or. Dep't of Transp. v. Grant County, LUBA Nos. 2018-135/2019-007, 2019 WL 5130322, at *4–6 (Aug. 8, 2019); Rogue Advocs. v. Josephine County, 72 Or. LUBA 275, 289–91 (2015). For purposes of that provision, the "impact area" is the broader impact area under the standard Goal 5 process, not the narrower, 1,500-foot impact area for aggregate resource sites under the resource-specific rule. Rogue Advocs. v. Josephine County, 77 Or. LUBA 452, 455–60 (2018); *see supra* notes 76, 127 and accompanying text.

157. OR. ADMIN. R. 660-023-0180(9) (2021). For an interesting case concerning county code provisions implementing the resource-specific rule—specifically those portions of the rule pertaining to significance determinations, the 1,500-foot impact area, and conflict minimization, as well as a code provision requiring the county to seek approval from other local governments before applying an impact area to land within their jurisdictions—see *Weiss v. Linn County*, LUBA No. 2021-033, 2021 WL 2916838 (June 10, 2021).

158. OR. ADMIN. R. 660-023-0180(9) (2021); *see* Morse Bros. v. Columbia County, 37 Or. LUBA 85, 89 (1999) ("OAR 660-023-0180[(9)] has the legal effect of preempting county comprehensive plan and land use regulation provisions that would otherwise apply to a [PAPA], until the county comprehensive plan and land use regulations have been amended to comply

Mineral and aggregate resources are among the most controversial elements of the Goal 5 protective system, and they are frequently the subject of legislative attention because they are needed for construction. More limitations on local governments in the determination of significant resource sites, the identification of conflicting uses, and the analysis of ESEE consequences exist for this resource category than for any other. More litigation centers on this resource category than on any other. That litigation frequently involves conflicts with resources that are strongly valued under other statewide planning goals, such as agricultural lands, and conflicts with other Goal 5 resource categories, demonstrating the need to balance multiple resources over time.

C. *Energy Sources*

While Oregon does not have significant oil, coal, or natural gas resources, energy sources are nonetheless one of the resource categories listed in Goal 5.[159] However, it is fair to say that the nature

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with OAR 660-023-0180."), *aff'd*, 996 P.2d 1023 (2000); Hegele v. Crook County, 44 Or. LUBA 357, 369–72 (citing *Morse Bros.*, 37 Or. LUBA at 89) (concluding that a county could not impose a "public need" requirement on an application to include the subject property on the county's mineral and aggregate resources inventory because the county had not adopted regulations implementing the resource-specific rule and because the comprehensive plan provisions from which the "public need" requirement allegedly stemmed either (1) did not apply to the relevant PAPAs or (2) could not actually be read to impose such a requirement), *aff'd*, 78 P.3d 1254 (Or. Ct. App. 2003). As noted, local governments must apply Goal 5 and the 1996 administrative rules at periodic review as required by the resource-specific rule for mineral and aggregate resources. *See supra* note 90 and accompanying text.

159. CURRENT GOALS, *supra* note 1, at 22. Statewide Planning Goal 13 (Energy Conservation) also concerns energy. OR. ADMIN. R. 660-015-0000(13) (2021); CURRENT GOALS, *supra* note 1, at 52–53. *See generally* Edward J. Sullivan, *The Slow Evolution of Energy Planning—One State's Experience*, 40 ZONING & PLAN. L. REP., Mar. 2017, at 1 (discussing Goal 13). However, as one of the authors has elsewhere already noted, Goal 13 is probably Oregon's weakest expression of state land use policy. *See* Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 826 (1998). In *1000 Friends of Oregon v. Jackson County*, the Oregon Court of Appeals concluded that a county erred in approving a solar facility on more than twelve acres of high-value farmland. 423 P.3d 793 (Or. Ct. App. 2018), *aff'g on other grounds* 76 Or. LUBA 270 (2017). The twelve-acre limit comes from LCDC's administrative rules implementing Goal 3. OR. ADMIN. R. 660-033-0130(38)(g) (2021). The county relied on Goal 13 to justify the larger facility size, but the court concluded that Goal 13 contains no land use mandates:

> Goal 13 falls within [a] category of policies affecting the manner by which property is developed. The goal expressly states that it regulates the way land uses are "managed and controlled." The planning and implementation guidelines for the goal pertain to "land use planning" and "techniques and implementation devices" in a comprehensive plan and map and its implementing development code and zoning

of Goal 5, in giving local governments wide latitude to determine when and how to conduct their inventories and address specific resource sites, has enabled local governments to avoid some of the conflicts surrounding energy sources.

The stage was set in an early case, *La Pine Pumice Co. v. Deschutes County Board of Commissioners*, in which the Oregon Court of Appeals upheld county comprehensive plan and zoning ordinance amendments restricting geothermal exploration and production in order to protect wildlife habitat.[160] The court held that the Goal 5 process may preclude exploration for a *speculative* resource site (*e.g.*, an energy source) in order to protect the existence of a *known* resource site (*e.g.*, wildlife habitat).[161]

According to LCDC's Goal 5 Subcommittee, the 1996 administrative rules codified the "current policy" for energy sources:

> Goal 5 . . . works as a "permit" process for energy sources. These sources include natural gas, oil, coal, surface water (i.e., dam sites), geothermal, uranium, solar and wind power. The subcommittee's proposal is to deal with these as "Category 4" resources, i.e., to not require broad inventories at periodic review. Instead, Goal 5 would require site-by-site consideration when and if a specific energy development proposal that requires a plan amendment is submitted to the local government.[162]

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map. Neither the text of the goal nor its guidelines "require" the county to develop or facilitate the development of any particular land use, much less large solar power generation facilities. Instead, Goal 13 requires that *all* development on land be "managed and controlled" to conserve energy. The text of the goal and its guidelines do not directly or indirectly require the development of energy facilities.

1000 Friends, 423 P.3d at 804–05 (footnote omitted). However, the court did note the existence of several state statutes that provide protections for solar facilities. *Id.* at 801 (citing OR. REV. STAT. §§ 215.110(5), 227.190, .290(2) (2021)).

160. La Pine Pumice Co. v. Deschutes Cnty. Bd. of Comm'rs, 707 P.2d 1263 (Or. Ct. App.), *aff'g* 13 Or. LUBA 242 (1985). The court noted that the subject property was located above a volcanic chamber and fault zone and that it had been identified by the county as a very likely energy source. *Id.* at 1264. However, the county chose to allow the wildlife habitat use fully. *Id.*

161. *Id.* at 1267. The court added, somewhat derisively, that, whether or not Goal 5 requires an "eternal quest" for resource sites, it does not require local governments to allow measures to locate them that could destroy already-identified resource sites. *Id.*

162. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 42. For more on the Subcommittee's categorization of the Goal 5 resource categories, see *supra* note 58.

As discussed above, the 1981 administrative rules gave local governments the ability to defer determinations of significance for specific resource sites due to inadequate information.[163] That concession arguably enabled local governments to interfere with potential energy sources during the deferral period. For example, in *Cosner v. Umatilla County*, a county did not include wind energy areas on its initial Goal 5 inventory due to inadequate information.[164] Although LCDC acknowledged that inventory, it required the county to inventory energy sources "when adequate information becomes available."[165] The county later adopted a PAPA limiting the siting of wind facilities in order to protect inventoried cultural areas and wildlife habitat.[166] The petitioners argued that, because adequate information had by that time become available, the county was required to inventory wind energy areas and apply Goal 5 to the PAPA.[167] The county disputed that adequate information had become available, but LUBA concluded that, even if it had, because LCDC's acknowledgment order did not require the county to conduct a countywide energy sources inventory in that event, and because the 1996 administrative rules specifically allow local governments to address energy sources on a case-by-case basis in response to development applications, the county was not required to apply Goal 5 to the PAPA with respect to energy sources.[168] However, because the

163. *See supra* note 29 and accompanying text.

164. Cosner v. Umatilla County, 65 Or. LUBA 9, 24 (2012).

165. *Id.* LUBA did not discuss the fact that, under the 1981 administrative rules, a decision to defer a determination of significance due to inadequate information "should include a time-frame for this review." OR. ADMIN. R. 660-016-0000(5)(b) (2021). Apparently, that time frame need not include any temporal limitation.

166. *Cosner*, 65 Or. LUBA at 19–20.

167. *Id.* at 24–26.

168. *Id.* at 26. The 1996 administrative rules subject energy sources to Goal 5's standard applicability at periodic review. OR. ADMIN. R. 660-023-0190(2) (2021); *see supra* note 90 and accompanying text. However, like for mineral and aggregate resources, the resource-specific rule for energy sources alternatively allows local governments to address energy sources in an application-driven process. OR. ADMIN. R. 660-023-0190(2) (2021); *see supra* note 119 and accompanying text. LUBA added that, under OR. ADMIN. R. 660-023-0250(4), "in adopting amendments to the [county's] program to protect one set of inventoried Goal 5 resources[,] the county [did not] thereby incur[] the obligation to complete the county's Goal 5 process for different[,] *non-inventoried* Goal 5 resources." *Cosner*, 65 Or. LUBA at 27 (emphasis in original). Similarly, in *Home Builders Ass'n of Lane County v. City of Eugene*, LUBA explained that, under OR. ADMIN. R. 660-023-0250(3)(a), for Goal 5 to apply to a PAPA that amends a local government's solar standards, energy sources must be included on the local government's resource list and the solar standards must be part of the local government's program to achieve Goal 5 with respect to those resource sites:

PAPA amended the county's program to protect cultural areas and wildlife habitat that *were* inventoried, LUBA concluded that the county erred by not applying Goal 5 with respect to those resource sites.[169] On remand, the county amended the PAPA to eliminate references to the protection of cultural areas and wildlife habitat, and LUBA affirmed the county's decision adopting the amended PAPA.[170]

Thus, with energy sources, as with most Goal 5 resource categories, local governments are afforded a great deal of discretion in determining whether to include specific resource sites on their resource lists. Under the 1996 administrative rules, a local government need not apply Goal 5 to a particular energy source except upon receiving an application to develop that resource site.[171] The same may be true if a local government chose to defer a determination of significance due to inadequate information under the 1981 administrative rules.[172] Moreover, even if a local government chooses not to proceed on a case-by-case basis, there is so little periodic review in Oregon—particularly for rural areas—that the resource-specific rule provides an essentially infinite avoidance device, illustrating one of Goal 5's weaknesses.[173] However, while energy sources do not currently play much of a role under Goal 5, they are likely to receive more attention in the future.

> With respect to energy sources, petitioners claim that although the city addressed energy sources such as solar energy under different goals than Goal 5, such resources are in fact Goal 5 resources, and therefore part of the city's Goal 5 inventory. Accordingly, petitioners argue, several [land use code] amendments affecting the city's solar standards must comply with the Goal 5 rule. The city does not respond specifically to this claim, although as discussed below it argues generally that petitioners have in many cases failed to demonstrate that challenged [land use code] provisions are part of the city's Goal 5 program. We agree that petitioners have not demonstrated that "energy sources" are an inventoried Goal 5 resource, and that the city's solar standards are part of the city's Goal 5 program.

41 Or. LUBA 370, 429 (2002).

169. *Cosner*, 65 Or. LUBA at 19–23.

170. Hatley v. Umatilla County, 66 Or. LUBA 265, 277–80 (2012). Though it reversed and remanded LUBA's decision on other grounds, the Oregon Court of Appeals agreed with LUBA that Goal 5 no longer applied. Hatley v. Umatilla County, 301 P.3d 920, 925–28 (Or. Ct. App. 2013).

171. OR. ADMIN. R. 660-023-0190(2) (2021).

172. *See Cosner*, 65 Or. LUBA at 23–27.

173. *See infra* Section IV.B.

D. Fish and Wildlife Areas and Habitats

The original Goal listed fish and wildlife areas and habitats together, and neither the original Goal nor the 1981 administrative rules spoke to that resource category further.[174] The amended Goal and the 1996 administrative rules take a very different approach, listing wildlife habitat and riparian corridors (which include fish habitat) separately[175] and providing clarity as to the nature of both resource categories.[176]

1. Wildlife Habitat

The 1996 administrative rules provide two alternative approaches for determining whether wildlife habitat is "significant": the standard

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174. ORIGINAL GOALS, *supra* note 10, at 17–20; OR. ADMIN. R. 660-016-0000 to -0030 (2021). It is clear, however, that the Goal and its implementing administrative rules purport to protect fish and wildlife *habitat*, not species. Gould v. Deschutes County, 227 P.3d 758, 762–64 (Or. Ct. App. 2010).

175. CURRENT GOALS, *supra* note 1, at 22; OR. ADMIN. R. 660-023-0090, -0110 (2021). Under the 1996 administrative rules, there is a tendency to consider fish and wildlife habitat in terms of forest lands, as Goal 4 defines forest lands to include "other forested lands that maintain soil, air, water, and fish and wildlife resources." CURRENT GOALS, *supra* note 1, at 19. Because both goals must be met, even if fish or wildlife habitat is not included on a local government's Goal 5 resource list, the local government must still consider the resource site under Goal 4. *See* Hecker v. Lane County, 52 Or. LUBA 91, 105–09 (2006); Dep't of Land Conservation & Dev. v. Curry County, 33 Or. LUBA 728, 742–43, *modified*, 947 P.2d 1123 (Or. Ct. App. 1997). Similarly, even where state statute allows certain dwellings on forest lands, a local government's program to achieve Goal 5 with respect to fish and wildlife habitat may prevent their approval. *See* Jackson Cnty. Citizens League v. Jackson County, 32 Or. LUBA 212, 218–19 (1996). Wildlife habitat is also protected under the administrative rules implementing Goal 3. *See* Or. Dep't of Fish & Wildlife v. Lake County, LUBA Nos. 2019-084/085/086/087/088/093, 2020 WL 2306258 (Apr. 29, 2020) (applying OR. ADMIN. R. 660-033-0130(38)(j)(G), which requires that the installation of solar facilities on certain agricultural lands avoid or mitigate impacts on wildlife habitat). A resource-specific rule for greater sage-grouse was added to the 1996 administrative rules in 2015 to avoid a listing of that species under the Federal Endangered Species Act. 54 Or. Bull. 126 (Sept. 1, 2015) (codified as amended at OR. ADMIN. R. 660-023-0115); *Endangered and ESA Candidate Species in Oregon*, DEP'T OF LAND CONSERVATION & DEV., https://www.oregon.gov/lcd/NRRE/Pages/Endangered-Species.aspx (last visited May 24, 2021); *Greater Sage-Grouse*, OR. DEP'T OF FISH & WILDLIFE, https://www.dfw.state.or.us/wildlife/sagegrouse (last visited May 24, 2021). The resource-specific rule for greater sage-grouse has been amended twice. 55 Or. Bull. 99 (Mar. 1, 2016); 56 Or. Bull. 162 (July 1, 2017).

176. OR. ADMIN. R. 660-023-0110(1)(b) (2021) ("'Wildlife habitat' is an area upon which wildlife depend in order to meet their requirements for food, water, shelter, and reproduction. Examples include wildlife migration corridors, big game winter range, and nesting and roosting sites."); OR. ADMIN. R. 660-023-0090(1)(a) (2021) ("'Fish habitat' means those areas upon which fish depend in order to meet their requirements for spawning, rearing, food supply, and migration.").

inventory process or a "safe harbor" approach.[177] If the standard inventory process is used, then the local government must use current habitat information from the Oregon Department of Fish and Wildlife (ODFW) and other state and federal agencies.[178] If the safe harbor approach is used, then the local government may determine that wildlife habitat is significant only under certain circumstances.[179] Whichever approach is chosen, the local government must follow the standard ESEE decision and program implementation processes, and it must coordinate with state and federal agencies in doing so.[180]

Unlike for mineral and aggregate resources and energy sources,[181] the resource-specific rule for wildlife habitat does not allow local governments to rely on an application-driven process to address specific resource sites. Instead, the 1996 administrative rules subject

177. OR. ADMIN. R. 660-023-0110(2), (4) (2021).

178. OR. ADMIN. R. 660-023-0110(3) (2021). Wildlife habitat inventories must include information on threatened, endangered, and sensitive wildlife species habitat; sensitive bird site inventories; and "[w]ildlife species of concern and/or habitats of concern identified and mapped by ODFW." *Id.* Location information for certain threatened or endangered species is generally exempt from public records requests, and local governments may adopt procedures to allow limited availability of that information to landowners and other specified parties. OR. REV. STAT. § 195.345(13) (2019); OR. ADMIN. R. 660-023-0110(5) (2021).

179. OR. ADMIN. R. 660-023-0110(4) (2021). Those circumstances include:

> (a) The habitat has been documented to perform a life support function for a wildlife species listed by the federal government as a threatened or endangered species or by the state of Oregon as a threatened, endangered, or sensitive species;
> (b) The habitat has documented occurrences of more than incidental use by a species described in subsection (a) of this section;
> (c) The habitat has been documented as a sensitive bird nesting, roosting, or watering resource site for osprey or great blue herons pursuant to ORS 527.710 (Oregon Forest Practices Act) and OAR 629-024-0700 (Forest Practices Rules);
> (d) The habitat has been documented to be essential to achieving policies or population objectives specified in a wildlife species management plan adopted by the Oregon Fish and Wildlife Commission pursuant to ORS Chapter 496; or
> (e) The area is identified and mapped by ODFW as habitat for a wildlife species of concern and/or as a habitat of concern (e.g., big game winter range and migration corridors, golden eagle and prairie falcon nest sites, or pigeon springs).

Id. "'Documented' means that an area is shown on a map published or issued by a state or federal agency or by a professional with demonstrated expertise in habitat identification." OR. ADMIN. R. 660-023-0110(1)(a) (2021).

180. OR. ADMIN. R. 660-023-0110(6) (2021).

181. *See supra* notes 121, 168 and accompanying text.

wildlife habitat to Goal 5's standard applicability at periodic review.[182] Because there is little periodic review activity today,[183] the case law focuses on PAPAs. For example, as with most resource categories, changes to acknowledged programs to achieve Goal 5 with respect to wildlife habitat require an evaluation under the Goal.[184] Similarly, local governments must apply Goal 5 whenever they allow new uses that could conflict with inventoried wildlife habitat.[185]

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182. OR. ADMIN. R. 660-023-0110(2), (6) (2021). As noted, local governments must apply Goal 5 and the 1996 administrative rules at periodic review as required by the resource-specific rule for wildlife habitat. *See supra* note 90 and accompanying text.

183. *See infra* Section IV.B.

184. OR. ADMIN. R. 660-023-0250(3)(a) (2021). In *Central Oregon LandWatch v. Crook County*, a county adopted a PAPA amending its program to achieve Goal 5 by increasing the residential densities allowed in inventoried big game habitat. 76 Or. LUBA 396, 402 (2017). As justification for those increased densities, the county's ESEE analysis explained that the PAPA simultaneously increased the total amount of inventoried big game habitat from slightly under 1.5 million acres to slightly over 1.5 million acres and increased the amount of inventoried elk and antelope habitat by approximately 300,000 acres each. *Id.* at 408. LUBA pointed out that, although the PAPA increased the amount of inventoried elk and antelope habitat, most of that increased area was already inventoried for other species, and LUBA stated that it was "not obvious . . . why th[e] relatively small increase in the number of inventoried acres of big game habitat offset[] the significant increase in allowable densities in a much larger area." *Id.* at 408–09. LUBA remanded the PAPA for the county to

> adopt findings that respond more directly to petitioners' contentions that the increased residential densities that are allowed by [the PAPA] will result in significant damage to big game habitat that is not offset by any of the other changes adopted by [the PAPA] or justified in the county's ESEE analysis.

Id. at 409. The PAPA also acknowledged that properties in inventoried big game habitat could be rezoned in the future, thereby removing the residential density limits, but it concluded that the county would address how to protect big game habitat on those properties on a case-by-case basis, thereby impermissibly deferring the Goal 5 process. *Id.* at 419 (citing Collins v. Land Conservation & Dev. Comm'n, 707 P.2d 599 (Or. Ct. App. 1985)). *See also* Wood v. Crook County, 55 Or. LUBA 165, 167–75 (2007) (remanding a county's decision to rezone inventoried big game habitat from EFU to rural aviation community because the county erroneously concluded that EFU zoning was not part of its program to achieve Goal 5 with respect to big game habitat). For a summary of *Collins*, see *supra* note 108.

185. OR. ADMIN. R. 660-023-0250(3)(b) (2021); *see* Root v. Klamath County, 63 Or. LUBA 230, 245–48 (2011) (citing Johnson v. Jefferson County, 56 Or LUBA 72, 102, *aff'd*, 189 P.3d 30 (Or. Ct. App. 2008)) (concluding that a county erred in failing to apply Goal 5 to a PAPA that applied a destination resort overlay zone to land because the PAPA allowed new uses that could conflict with nearby, inventoried big game habitat, even though the PAPA did not approve a permit for the development of a destination resort). However, local governments need not apply Goal 5 in approving subsequent stages of multi-stage developments. *See* Friends of Marion Cnty. v. Marion County, 59 Or. LUBA 323, 347–49 (2009) (concluding that a county did not allow new uses that could conflict with inventoried wildlife habitat by approving a preliminary subdivision plan where the county had already approved a conceptual plan for the

The adequacy of findings demonstrating compliance with the amended Goal and the 1996 administrative rules, particularly with respect to wildlife habitat in rural areas, is frequently contested.[186] A leading case in that regard is *Cattoche v. Lane County*, in which a county rezoned 131.55 acres of inventoried big game habitat from a forest zone to a rural residential zone in order to allow the development of eight lots with three dwellings, open space, and a vineyard use.[187] As part of its program to achieve Goal 5, the county adopted a minimum lot size of forty acres in big game habitat.[188] By contrast, the rural residential zone had a minimum lot size of five acres.[189] The rural residential zone also would have allowed a number of nonresidential uses and uses that are accessory to residential uses, including fire stations, schools, churches, home occupations, commercial and noncommercial kennels, private parks, playgrounds, and golf courses.[190] Because the application proposed only residential, open space, and agricultural uses, and because the application proposed only three dwellings on the 131.55-acre subject property, at a density of more than forty acres per lot, the county determined that the PAPA allowed no new conflicting uses and the county therefore did not conduct an ESEE analysis.[191] LUBA concluded that, because the 1996 administrative rules require the identification of conflicting uses from among the uses that are *allowed* in the relevant zoning districts, and not from among the uses that are *proposed* in a particular application, the

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destination resort of which the subdivision was going to be a part), *aff'd*, 227 P.3d 198 (Or. Ct. App. 2010).

186. For an interesting series of cases concerning a county's attempts to rezone inventoried big game habitat from EFU to rural aviation community, see *Wood v. Crook County*, 49 Or. LUBA 682, 688–91 (2005) (remanding the county's decision because the county erroneously concluded that the density standards in its program to achieve Goal 5 with respect to big game habitat no longer applied because the subject property was no longer zoned for resource use); *Wood v. Crook County*, 55 Or. LUBA 165, 167–75 (2007) (remanding the county's decision because the county erroneously concluded that EFU zoning was not part of its program to achieve Goal 5 with respect to big game habitat); *Oregon Department of Fish & Wildlife v. Crook County*, 72 Or. LUBA 316, 329–40 (2015) (remanding the county's decision because, while the county's ESEE analysis was adequate to justify the decision with respect to the subject property, the county alternatively adopted density standards for similar zone changes throughout the county without demonstrating that those standards were consistent with the county's program to achieve Goal 5 with respect to big game habitat); and *Wood v. Crook County*, 74 Or. LUBA 278 (2016) (affirming the county's decision).

187. Cattoche v. Lane County, 79 Or. LUBA 466, 468–70 (2019).

188. *Id.* at 476.

189. *Id.* at 480–81.

190. *Id.* at 475.

191. *Id.* at 480.

county erred by not considering the nonresidential and accessory uses and the five-acre minimum lot size allowed in the rural residential zone in identifying conflicting uses.[192]

In *Doty v. Jackson County*, a county carved forty acres from a 67,739-acre unit of inventoried winter range, created a new unit of winter range for the forty acres, added the new unit to its wildlife habitat inventory, and changed the overlay zone applicable to the new unit from "especially sensitive" winter range, which included a 160-acre minimum lot size, to "other" winter range, which allowed minimum lot sizes consistent with the base zoning—in that case, a 5-acre minimum lot size.[193] The county found that that increased density would not significantly impact wildlife habitat beyond the subject property because the area, including the subject property, was already developed with houses, businesses, and a county road.[194] LUBA concluded that the county, in conducting the inventory step of the Goal 5 process, did not adequately identify the location and quality of the surrounding wildlife habitat that remained zoned as "especially sensitive" and that could have been impacted even at a distance by the increased density.[195] Specifically, LUBA noted that there was a "main

192. *Id.* at 475, 480–81 (citing OR. ADMIN. R. 660-023-0040(2) (2019)). LUBA noted that a provision in the county's comprehensive plan provided that, "[i]f [the forty-acre minimum lot size] is ever exceeded, it constitutes a conflict with Big Game Range." *Id.* at 478. However, LUBA also pointed out that, on remand, the county could determine that existing regulations or the imposition of clear and objective conditions of approval would be sufficient to protect the big game habitat. *Id.* at 475, 480–81 (citing Nicita v. City of Oregon City, 79 Or. LUBA 22, 27, *aff'd*, 440 P.3d 683 (Or. Ct. App. 2019)). The point was that "the county [was] required to show its work." *Id.* at 475.

Depending on the language of a local government's comprehensive plan, Goal 5 may apply to more than just PAPAs. *See* LandWatch Lane Cnty. v. Lane County, LUBA No. 2020-030, 2021 WL 467269 (Jan. 21, 2021) (concluding that, given the language of the county's comprehensive plan, the county was required to apply Goal 5 in approving a forest dwelling in a forest zone, which would have exceeded the same density standards at issue in *Cattoche*); King v. Lane County, LUBA No. 2021-047/052, 2021 WL 5131648 (Oct. 15, 2021) (reaffirming *LandWatch* after considering additional local legislative history and concluding that, absent identification by the county of a different denominator, the correct denominator for purposes of applying the density standards was the acreage of the subject property), *aff'd*, 317 Or. App. 136 (2022). Determinations that newly allowed uses will not conflict with inventoried wildlife habitat must be supported by an adequate factual base. *See* Johnson v. Jefferson County, 56 Or. LUBA 72, 100–04 (remanding a PAPA allowing destination resorts because the county did not consider whether increased traffic on roads surrounding the destination resorts would conflict with inventoried big game habitat), *aff'd*, 189 P.3d 30 (Or. Ct. App. 2008).

193. Doty v. Jackson County, 34 Or. LUBA 287, 289–91 (1998).

194. *Id.* at 296–97.

195. *Id.* at 293–98.

migratory path" for deer in the vicinity of the subject property.[196] Thus, the county needed to identify a larger impact area.[197]

Much of the case law concerns conflicts between wildlife habitat and mineral and aggregate resources.[198] One anomalous situation involves Washington County, a suburban area near Portland, and the dilemma of protecting wildlife habitat and riparian corridors or

196. *Id.* at 295–96.

197. *Id.* at 298. LUBA explained:

> The purpose of the boundary delineation and mapping required by the Goal 5 rule is to make both feasible and meaningful the next step of the Goal 5 analysis: identifying the mutual impacts of Goal 5 resource sites and conflicting uses. OAR 660-16-000(2) contemplates that certain Goal 5 resource sites may be subject to impacts from nearby conflicting uses beyond the boundaries of the resource itself. In that case, the county must identify an "impact area" larger in size than the resource site.

Id. at 295 (citing Nathan v. City of Turner, 26 Or. LUBA 382, 393 (1994); Palmer v. Lane County, 29 Or. LUBA 436, 441 (1995)); *see also* LandWatch Lane Cnty. v. Lane County, LUBA No. 2019-048, 2019 WL 5130352, at *9 (Aug. 9, 2019) (remanding a county's decision to allow more intense development of property in big game habitat in part because the record did not establish whether adjacent property was also in big game habitat and therefore should have been included in the impact area); *Palmer*, 29 Or. LUBA at 439 ("The delineation of an impact area serves both to protect existing conflicting uses from the impacts of developing a Goal 5 resource and to protect the resource itself from the encroachment of future conflicting uses."). In *Lofgren v. Jackson County*, LUBA concluded that, because the "other" winter range overlay zone at issue in *Doty* relied on the density standards in property's base zoning to protect wildlife habitat, the county was required to apply Goal 5 in changing the base zoning of property subject to that overlay zone. 55 Or. LUBA 126, 138–42 (2007).

198. *See* Save TV Butte v. Lane County, 77 Or. LUBA 22, 36–40 (2018); Rogue Advocs. v. Josephine County, 72 Or. LUBA 275, 292–94 (2015); Walker v. Deschutes County, 59 Or. LUBA 488, 496–98 (2009); Walker v. Deschutes County, 55 Or. LUBA 93, 101–02 (2007); Cadwell v. Union County, 48 Or. LUBA 500 (2005); *Palmer*, 29 Or. LUBA at 441, 446–47; Gonzalez v. Lane County, 24 Or. LUBA 251, 267 (1992).

increasing the supply of available housing.[199] Another issue is actual or potential conflicts with federal constitutional and statutory law.[200]

Protections for wildlife habitat under Goal 5 were overhauled in the 1996 administrative rules, including the provision of a "safe harbor" approach to cut the time and expense of the standard inventory process.[201] Frequent conflicts arise when mining, rural residential, and destination resort uses are proposed. The myriad of potential errors counsels for a robust analysis in advance.

2. *Riparian Corridors*

This resource category includes water areas, fish habitat, riparian areas, and certain wetlands.[202] Neither version of the Goal provides additional detail for this resource category, nor did the 1981 administrative rules. However, the 1996 administrative rules provide

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199. *See* Warren v. Washington County, 76 Or. LUBA 295 (2017); Warren v. Washington County, 78 Or. LUBA 107 (2018); Warren v. Washington County, 78 Or. LUBA 375 (2018), *aff'd*, 439 P.3d 581 (Or. Ct. App. 2019). The *Warren* litigation involved the interaction of section 197.307(4) of the Oregon Revised Statutes, which requires that local governments impose only "clear and objective" conditions of approval on the development of housing, and the county's program to achieve Goal 5 with respect to wildlife habitat and riparian corridors, which included regulations that were not clear and objective, such as one regulation prohibiting development in riparian corridors unless the applicant proposed an enhancement that would "measurably improve[]" the quality of the riparian corridor. *Warren*, 439 P.3d at 585. The county, LUBA, and the Oregon Court of Appeals all concluded that that statute prevented the county from applying its program to achieve Goal 5. *Id.* As a result, the county found itself under an LCDC enforcement order. Washington County, No. 20-ENF-001916 (Or. Land Conservation & Dev. Comm'n June 1, 2020) (enf't order), https://www.oregon.gov/lcd/NN/Documents/20200601_WashCo_Enf_FinalOrder_20-ENF0001916.pdf. The county amended its program to achieve Goal 5 to remedy that situation; however, those amendments were appealed to and remanded by LUBA because they were not "clear and objective," as required by OR. ADMIN. R. 660-023-0050(2), and because they allowed new, potentially conflicting uses without the county having applied the 1996 administrative rules, as required by OR. ADMIN. R. 660-023-0250(3)(b). Cmty. Participation Org. 4M v. Washington County, LUBA No. 2020-110, 2021 WL 4710453 (Sept. 29, 2021), *aff'd*, 316 Or. App. 577 (2021); *see supra* notes 87, 9387 and accompanying text.

200. For an interesting series of cases concerning churches in a wildlife area overlay zone, which constituted part of the county's program to achieve Goal 5 with respect to wildlife habitat, and the Federal Religious Land Use and Institutionalized Persons Act, see *Central Oregon LandWatch v. Deschutes County*, 75 Or. LUBA 284, 298–99, *aff'd*, 400 P.3d 325 (Or. Ct. App. 2017); *Central Oregon LandWatch v. Deschutes County*, 77 Or. LUBA 395, *aff'd*, 431 P.3d 457 (Or. Ct. App. 2018); *Central Oregon LandWatch v. Deschutes County*, 78 Or. LUBA 516 (2018), *aff'd*, 439 P.3d 1060 (Or. Ct. App. 2019); and *Central Oregon LandWatch v. Deschutes County*, LUBA No. 2020-019, 2021 WL 1535669 (Mar. 22, 2021), *aff'd*, 488 P.3d 781 (Or. Ct. App. 2021).

201. *See supra* notes 177–179 and accompanying text.

202. *See infra* note 206.

some clarity as to the nature of this resource category and the steps needed to protect it.[203]

First, the 1996 administrative rules provide important definitions for terms including "fish habitat,"[204] "riparian area,"[205] "riparian corridor,"[206] "riparian corridor boundary,"[207] and "water area."[208] The resource-specific rule for riparian corridors requires that local governments amend their comprehensive plans to inventory riparian corridors and provide programs to achieve Goal 5 by the end of their first periodic review following the rule's effective date.[209] The resource-specific rule then provides two alternate approaches to inventorying riparian corridors: the standard inventory process or a "safe harbor" approach.[210] If the standard inventory process is used, then the local government must consult specific federal and state sources in gathering information regarding riparian corridors.[211] If the

203. LCDC's Goal 5 Subcommittee proposed separating wildlife habitat from fish habitat and identifying riparian areas (with special protection for fish-bearing water areas) as a new resource category. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 29. In doing so, the Subcommittee wrote off most rural lands—concluding that farm and forest uses "cannot be regulated"—and suggested that efforts be concentrated on lands within UGBs and rural communities at the next periodic review. *Id.* at 29–30. The Subcommittee also suggested the use of "safe harbor" approaches. *Id.*

204. OR. ADMIN. R. 660-023-0090(1)(a) (2021) ("'Fish habitat' means those areas upon which fish depend in order to meet their requirements for spawning, rearing, food supply and migration.").

205. OR. ADMIN. R. 660-023-0090(1)(b) (2021) ("'Riparian area' is the area adjacent to a river, lake, or stream, consisting of the area of transition from an aquatic ecosystem to a terrestrial ecosystem.").

206. OR. ADMIN. R. 660-023-0090(1)(c) (2021) ("'Riparian corridor' is a Goal 5 resource that includes the water areas, fish habitat, adjacent riparian areas, and wetlands within the riparian area boundary.").

207. OR. ADMIN. R. 660-023-0090(1)(d) (2021) ("'Riparian corridor boundary' is an imaginary line that is a certain distance upland from the top bank, for example, as specified in section (5) of this rule.").

208. OR. ADMIN. R. 660-023-0090(1)(h) (2021) ("'Water area' is the area between the banks of a lake, pond, river, perennial or fish-bearing intermittent stream, excluding man-made farm ponds.").

209. OR. ADMIN. R. 660-023-0090(2) (2021). As noted, local governments must apply Goal 5 and the 1996 administrative rules at periodic review as required by the resource-specific rule for riparian corridors. *See supra* note 90 and accompanying text.

210. OR. ADMIN. R. 660-023-0090(3) (2021). Local governments may divide riparian corridors into sections, or reaches, and treat each section as an individual resource site. *Id.*

211. OR. ADMIN. R. 660-023-0090(4) (2021). In a significant departure from the 1981 administrative rules, local governments are *encouraged*, but not *required*, to conduct field investigations to verify the location, quality, and quantity of riparian corridors and may postpone the delineation of riparian corridors on farm and forest lands until they receive permit applications for uses that would conflict with those resource sites. *Id.*

safe harbor approach is used, then the boundaries of significant riparian corridors are determined using a standard setback distance from the banks of all fish-bearing lakes and streams.[212] The resource-specific rule also sets out two alternate approaches to developing programs to achieve Goal 5 with respect to riparian corridors: the standard ESEE decision and program implementation processes, and another "safe harbor" approach.[213] If the standard ESEE decision and program implementation processes are used, then the local government must complete those processes only if it identifies as conflicting uses the placement of structures or impervious surfaces in the riparian corridor or the removal of vegetation from the riparian area—with certain exceptions.[214] If the safe harbor approach is used, then the local government must adopt regulations to prevent or control the same conflicting uses—again, with certain exceptions.[215]

There have been few cases on the safe harbor approaches. LUBA has described their place within the regulatory scheme as follows:

> The Willamette River riparian area is a significant natural resource on the city's acknowledged resource inventory, an inventory required by Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Space). Goal 5 is implemented by OAR Chapter 660, division 023. The goal and rule generally require local governments to inventory significant natural resources, and develop a program to protect such resources against conflicting uses, based on an analysis of the economic, social, environmental, and energy (ESEE) consequences of allowing, limiting, or prohibiting conflicting uses. The rule also includes special provisions and "safe harbors" with respect to specific types

212. OR. ADMIN. R. 660-023-0090(5) (2021). The setback distance for fish-bearing streams depends on the flow rate in cubic feet per second. OR. ADMIN. R. 660-023-0090(5)(a)–(b) (2021). If the riparian corridor includes a wetland which is itself determined to be significant under the 1996 administrative rules, then the setback is applied from the upland edge of the wetland. OR. ADMIN. R. 660-023-0090(5)(c) (2021). For more on the treatment of wetlands under Goal 5, see *infra* Section III.G.1. Finally, if the bank of the stream or lake is not clearly defined or if the area is characterized by steep cliffs, then the local government must complete the standard inventory process. OR. ADMIN. R. 660-023-0090(5)(d) (2021).

213. OR. ADMIN. R. 660-023-0090(6) (2021).

214. OR. ADMIN. R. 660-023-0090(7) (2021).

215. OR. ADMIN. R. 660-023-0090(8)(a)–(b) (2021). Those regulations need not control the removal of vegetation on farm and forest lands. OR. ADMIN. R. 660-023-0900(8)(c) (2021).

> of resources, such as riparian areas and wetlands. Such a safe harbor applies in lieu of the ESEE analysis process.[216]

The straightforward nature of the safe harbor approaches enables local governments to adopt findings that require much less analysis and, thus, are much less likely to fail on appeal.[217] However, local governments may not stray far from the provisions' precise terms.[218]

As with most resource categories, changes to acknowledged programs to achieve Goal 5 with respect to riparian corridors, whether increasing or decreasing protections,[219] and decisions to allow new uses that could conflict with riparian corridors,[220] must comply with the

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216. Shamrock Homes LLC v. City of Springfield, 68 Or. LUBA 1, 6–7 (2013) (citing OR. ADMIN. R. 660-023-0900, -0100, -0090(8), -0100(4)(b)) (2013).

217. *See* Stop the Dump Coal. v. Yamhill County, 72 Or. LUBA 341, 356–58 (2015) (affirming a county's application of the safe harbor approach at OR. ADMIN. R. 660-023-0090(8)); Johnson v. Jefferson County, 56 Or. LUBA 25, 44–48 (same), *aff'd*, 189 P.3d 34 (Or. Ct. App. 2008); Tylka v. Clackamas County, 41 Or. LUBA 53, 59–64 (2001) (same), *aff'd*, 45 P.3d 961 (Or. Ct. App. 2002).

218. *See* Or. Dep't of Fish & Wildlife v. Josephine County, 59 Or. LUBA 174, 177–80 (2009) (remanding a county's decision to approve residential improvements within a riparian corridor in part because the county allowed alterations to occupy more than fifty percent of the riparian corridor's area, whereas the safe harbor approach at OR. ADMIN. R. 660-023-0090(8)(e) allows alterations to occupy fifty percent of the riparian corridor's "width"). *But see Johnson*, 56 Or. LUBA at 47–48 (concluding that "minor word differences" between the safe harbor approach at OR. ADMIN. R. 660-023-0090(8) and the local provisions implementing it were not legally significant).

219. OR. ADMIN. R. 660-023-0250(3)(a) (2021); *see* Home Builders Ass'n of Lane Cnty. v. City of Eugene, 41 Or. LUBA 370, 429–31, 440–41 (2002) (remanding a PAPA in part because, although it *increased* protections for riparian corridors, the city was nonetheless required but failed to apply Goal 5 in adopting it).

220. OR. ADMIN. R. 660-023-0250(3)(b) (2021). Of course, the corollary is that the Goal does not apply if the decision does not allow new conflicting uses. *See* Terra Hydr Inc. v. City of Tualatin, 68 Or. LUBA 279, 299 (2013) (concluding that, because a city's program to achieve Goal 5 with respect to riparian corridors already authorized certain uses within riparian corridors, a subsequent decision approving the development of such uses within riparian corridors did not allow new conflicting uses); Cent. Or. LandWatch v. City of Bend, 66 Or. LUBA 392, 413 (2012) (concluding that a city's decision to allow more water to be taken out of a creek did not allow new uses that could conflict with an inventoried riparian area along the creek because the petitioner did not explain how the increased amount of water taken out of the creek constituted a new conflicting "use"); Friends of Marion Cnty. v. Marion County, 59 Or. LUBA 323, 347–49 (2009) (concluding that a county did not allow new uses that could conflict with an inventoried fish-bearing stream by approving a preliminary subdivision plan where the county had already approved a conceptual plan for the destination resort of which the subdivision was to be a part), *aff'd*, 227 P.3d 198 (Or. Ct .App. 2010); 1000 Friends of Or. v. Yamhill County, 49 Or. LUBA 640, 661–63 (same as *Terra Hydr*), *rev'd and remanded on other grounds*, 126 P.3d 684 (Or. Ct. App. 2005); Johnson v. Lane County, 31 Or. LUBA 454, 467 (1996) (concluding that a county's decision to rezone property for rural residential use created

Goal. Such compliance must be demonstrated when those changes and decisions are made.[221] Once the local government determines that the Goal applies, the issue becomes the adequacy of and the evidentiary support for the local government's findings of compliance therewith.[222] Another issue is the correction of errors at periodic review.[223]

What has been said for wildlife habitat is equally applicable to riparian corridors: conflicts are likely to involve mining, rural residential, and destination resort uses.[224] The 1996 administrative rules provide "safe harbor" approaches, but the viability of riparian corridors depends on the alertness and resources of the public and private agencies that concentrate on them.

E. Ecologically and Scientifically Significant Natural Areas, Including Desert Areas

The original Goal defined "natural area" as "land and water that has substantially retained its natural character and land and water that, although altered in character, is important as habitats for plant, animal or marine life, for the study of its natural historical, scientific or paleontological features, or for the appreciation of its natural features."[225] Almost no cases under the original Goal and the 1981 administrative rules refer to this resource category by its full name.[226]

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no conflicts with adjacent, inventoried fish habitat because the fish habitat continued to be protected by setback requirements in the county's comprehensive plan).

221. *See* Gordon v. Polk County, 50 Or. LUBA 647, 664–65 (2005) (remanding a PAPA rezoning property containing an inventoried fish-bearing stream for rural residential use in part because, while the PAPA did not approve any actual development, and while a management plan would have been required for any eventual development near the stream, local governments must generally address Goal 5 at the time of the relevant PAPA, which the county did not do).

222. *See* Eugene Sand & Gravel, Inc. v. Lane County, 44 Or. LUBA 50, 91–92 (concluding that a county's findings that water drawdown from a proposed mining operation would conflict with inventoried riparian areas were inadequate because the applicant proposed to divert water back into those riparian areas and because the county inconsistently found that the water drawdown would not conflict with inventoried wetlands that were located between and hydrologically connected to the riparian areas), *rev'd and remanded on other grounds*, 74 P.3d 1085 (Or. Ct. App. 2003).

223. *See* Callison v. Land Conservation & Dev. Comm'n, 929 P.2d 1061, 1065–66 (Or. Ct. App. 1996) (remanding an LCDC periodic review order approving a city's program to achieve Goal 5 because, although the city purported to protect fish and riparian resources fully, it allowed utilities in the same zone, even if only in "rare and unusual circumstances").

224. That includes the peculiar situation of Washington County. *See supra* note 199 and accompanying text.

225. ORIGINAL GOALS, *supra* note 10, at 17.

226. In fact, only one case does, and it does so only in passing. 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, 737 P.2d 607, 608 n.1 (Or. 1987).

However, some cases refer to "scientific natural areas," which is almost certainly a shorthand term for this resource category.[227] The Wallowa Lake moraines are at least partially protected as scientific natural areas.[228] In addition, the City of Portland has adopted plans to protect natural areas in at least two different parts of its jurisdiction.[229] The local provisions that comprise Jackson County's program to achieve Goal 5 still refer to "ecologically or scientifically significant natural areas," and they recently might have required the protection of spotted owl habitat, had certain parties not waived that issue before the county.[230]

The amended Goal and the 1996 administrative rules significantly narrow the definition of "natural areas" to include only those areas listed in the Oregon State Register of Natural Heritage Resources,[231] which contains areas owned by the public and by nongovernmental

227. Pekarek v. Wallowa County, 36 Or. LUBA 494, 500–04 (1999); Larson v. Wallowa County, 25 Or. LUBA 537, 544–45 (1993); Larson v. Wallowa County, 23 Or. LUBA 527, 537–41, *rev'd and remanded on other grounds*, 840 P.2d 1350 (Or. Ct. App. 1992).

228. *See Pekarek*, 36 Or. LUBA at 501 ("The lake-facing side of the eastern moraine is considered the most sensitive and is protected by a 3A program. No conflicting uses are allowed in that area. The lake-facing side of the western moraine is protected by a 3C program that allows development only under the strictest conditions. Other areas, including the portion of the western moraine facing away from the lake, are protected by a 3C program with less rigid guidelines for development."). The Wallowa Lake moraines are "one of Oregon's unique natural treasures .... The moraines are, as described by [Wallowa County in an appendix] to its comprehensive plan, 'an example of a nearly perfect glacial moraine development—one which would surely rival any such found in the entire world.'" Fraser v. Land Conservation & Dev. Comm'n, 138 P.3d 932, 933 (Or. Ct. App. 2006); *see also* Buhler Ranch P'ship v. Wallowa County, 33 Or. LUBA 594 (1997).

229. Callison v. Land Conservation & Dev. Comm'n, 929 P.2d 1061, 1066 (Or. Ct. App. 1996) (referring to measures that the city adopted to protect a resource site in its Northwest Hills Natural Areas Protection Plan); Nw. Trail All. v. City of Portland, 71 Or. LUBA 339, 340, 342 (2015) (concerning a decision that the city made to protect a resource site in its Southwest Hills Resource Protection Plan, which is part of the natural areas inventory that the city conducted in 1991).

230. Martucci v. Jackson County, 77 Or. LUBA 252, 267–68, *aff'd*, 425 P.3d 799 (Or. Ct. App. 2018). That is an example of the "raise it or waive it" requirement in practice. *See supra* note 103 and accompanying text.

231. OR. ADMIN. R. 660-023-0160(1) (2021). DLCD recommended that change to prevent local governments from struggling to determine for themselves, given the broad definition under the original Goal, which resource sites are truly worthy of consideration. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 30–31. At periodic review, local governments must "consider information about natural areas not addressed at acknowledgment or in previous periodic reviews" and follow the standard Goal 5 process for those resource sites. OR. ADMIN. R. 660-023-0160(2) (2021).

organizations such as The Nature Conservancy.[232] Case law under the amended Goal and the 1996 administrative rules is about as sparse as it was under the original Goal and the 1981 administrative rules. In *Johnson v. Jefferson County*, a county had included the head of a river and 1,500 nearby acres on its natural areas inventory.[233] When the county subsequently amended its zoning ordinance and comprehensive plan to allow destination resorts, LUBA concluded that those amendments did not allow new uses that could conflict with the natural areas because the areas eligible for the resorts were more than two miles from the river.[234] In *Carver v. Washington County*, LUBA affirmed a county's conclusion that its program to achieve Goal 5 with respect to natural areas did not apply to its approval of a subdivision on property containing an inventoried creek because the creek was inventoried under the water areas, wetlands, and fish and wildlife habitat resource categories.[235]

The natural areas resource category is now a "closed set." It is clear which resource sites must be protected under the Goal. Additional resource sites may be protected by amending the Oregon State Register of Natural Heritage Resources.

F. Outstanding Scenic Views and Sites

The original Goal defined "scenic areas" as "lands that are valued for their aesthetic appearance."[236] There was no further elaboration in the 1981 administrative rules, and there were no major cases before LCDC adopted the amended Goal and the 1996 administrative rules.

The 1996 administrative rules define this resource category in the same way as the original Goal.[237] In addition, while the resource-specific rule for scenic views and sites generally does not require local governments to amend their comprehensive plans to address such

232. *Register of Natural Heritage Resources*, OR. ST. UNIV., https://inr.oregonstate.edu/orbic/natural-areas-program/register-natural-heritage-resources (last visited June 3, 2021).

233. Johnson v. Jefferson County, 56 Or. LUBA 72, 98–99, *aff'd*, 189 P.3d 30 (Or. Ct. App. 2008).

234. *Id.* at 99.

235. Carver v. Washington County, 70 Or. LUBA 23, 29–31 (2014).

236. ORIGINAL GOALS, *supra* note 10, at 18.

237. OR. ADMIN. R. 660-023-0230(1) (2021) ("'[S]cenic views and sites' are lands that are valued for their aesthetic appearance.").

resource sites, local governments that choose to do so must follow the standard Goal 5 process.[238]

The primary case under the 1996 administrative rules is *Restore Oregon v. City of Portland*, in which the City of Portland amended its comprehensive plan to, *inter alia*, adopt an inventory of viewpoints within the central city area, including a view of Mt. Hood from a certain bridge.[239] LUBA observed that the city had adhered to the resource-specific rule by following the standard Goal 5 process.[240] As part of its program to achieve Goal 5 with respect to the view of Mt. Hood, the city applied a scenic overlay zone to the view corridor for that viewpoint, which limited building height.[241] An owner of land within the view corridor challenged the height limits on three grounds.[242] The first challenge involved the fact that the "resource site" identified by the city for purposes of its Goal 5 analysis was the entire central city area, divided into ten sub-areas, each of which contained multiple viewpoints.[243] LUBA concluded that that approach was consistent with the 1996 administrative rules and the Oregon Supreme Court's decision in *Columbia Steel Castings Co. v. City of Portland*.[244] The second

238. OR. ADMIN. R. 660-023-0230(2) (2021) ("Local governments are not required to amend acknowledged comprehensive plans in order to identify scenic views and sites. If local governments decide to amend acknowledged plans in order to provide or amend inventories of scenic resources, the requirements of OAR 660-023-0030 through 660-023-0050 shall apply."). LCDC's Goal 5 Subcommittee specifically recommended that change. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 38. The Subcommittee explained that planning with respect to this resource category on a voluntary basis had "very much" been the status quo up to that time, that most jurisdictions had not inventoried or protected such resource sites, and that the establishment of impact areas for viewpoints and view corridors was problematic. *Id.* at 37–38.

239. Restore Or. v. City of Portland, LUBA Nos. 2018-072/073/086/087, 2019 WL 5130306, at *8 (Aug. 6, 2019), *aff'd*, 458 P.3d 703 (Or. Ct. App. 2020).

240. *Id.* at *8–9.

241. *Id.* at *9.

242. *Id.* at *9–13.

243. *Id.* at *8–10.

244. *Id.* at *10. In *Columbia Steel Castings Co. v. City of Portland*, the court rejected a city's Goal 5 analysis that identified thirty-six individual resource sites but analyzed the ESEE consequences by grouping those resource sites into five sub-areas that were in some cases much larger than the resource sites they contained. 840 P.2d 71 (1992). By contrast, in *Restore Oregon*, the city's Goal 5 analysis identified only one resource site, and that resource site contained multiple resources. 2019 WL 5130306, at *8. LUBA therefore found *Columbia Steel Castings* inapposite. *Id.* at *10. LUBA further observed that the 1996 administrative rules expressly allow local governments to "conduct a single analysis for a site containing more than one significant Goal 5 resource." *Id.* (quoting OR. ADMIN. R. 660-023-0040(4) (2019)). The Oregon Court of Appeals agreed with LUBA's conclusion on that point. Restore Or. v. City of Portland, 458 P.3d 703, 718–19 (Or. Ct. App. 2020).

challenge involved the assumptions that the city used in determining economic impacts as part of its ESEE analysis, which allegedly undervalued the owner's land and failed to consider the environmental remediation costs that the owner would be required to incur in order to develop their land at all.[245] LUBA responded:

> We agree with the city that the ESEE analysis accurately estimated the economic impact to properties in the [view corridor], including [the owner's land]. [The landowner] has not explained why the ESEE's assumptions regarding maximum building height, [floor area ratio], lot coverage, and dollars and jobs lost are incorrect or inaccurate for the [view corridor], or for [the owner's land]. In fact, we agree with the city that the ESEE estimated the economic impact to properties in the [view corridor] that would be affected by protecting [the bridge view of Mt. Hood] based on assumptions that led to a conclusion of greater economic impact to those properties than if the ESEE used different assumptions that were applied in other areas of the [city].[246]

The final challenge to the height limits was that the view corridor that the city identified was too wide, given the location of existing towers

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245. *Restore Or.*, 2019 WL 5130306, at *10–12.

246. *Id.* at *12. Because LUBA correctly applied its own standard of review, the court deferred to its determination of whether there was substantial evidence in the whole record to support the city's assumptions:

> [The landowner's] arguments to us about LUBA's decision are directed only at the substantiality of the evidence in the record to support the city's findings and decision. That, as explained, is not our role. With regard to whether LUBA misunderstood or misapplied its application of its own substantial evidence standard of review, which is the question we must answer on review, [the landowner] has not argued or demonstrated that LUBA erred, and we conclude that LUBA did not err in applying its own standard of review.

Restore Or., 458 P.3d at 717. As to the remediation costs, LUBA explained:

> Nothing in OAR 660-023-0040(4) . . . requires the local government to consider the cost of environmental remediation for properties with conflicting uses, or requires the level of specificity [the landowner] argues is required. In fact, the rule allows the city to analyze the ESEE consequences based on the entire resource site. Accordingly, [the landowner's] arguments provide no basis for reversal or remand.

Restore Or., 2019 WL 5130306, at *12. The court agreed with that interpretation. *Restore Or.*, 458 P.3d at 720.

and silos that would partially obscure the view of Mt. Hood.[247] However, because the view corridor was intended to protect the view of Mt. Hood only to 1,000 feet below the timberline, LUBA agreed with the city that it was accurately mapped.[248]

It is unlikely that there will be increased planning for the protection of scenic views and sites any time soon. While it is legally possible, the effort requires time and resources that most local governments do not possess. Local governments are far more likely to expend planning resources on resource categories for which the Goal requires the process to be completed.

G. Water Areas, Wetlands, Watersheds and Groundwater Resources

The original Goal listed water areas, wetlands, watersheds, and groundwater resources together, but it did not define them,[249] and the 1981 administrative rules offered no clarification. By contrast, the amended Goal and the 1996 administrative rules list wetlands and groundwater resources separately,[250] include water areas in the riparian corridors category,[251] and do not address watersheds at all.[252]

247. *Restore Or.*, 2019 WL 5130306, at *12.

248. *Id.* at *13. The landowner did not pursue that claim on appeal. As with all resource categories, arguments that an acknowledged land use regulation is insufficient to implement comprehensive plan policies requiring the protection of scenic views and sites as part of a program to achieve Goal 5 provide no basis for reversal or remand of a local government's decision. Crowley v. City of Bandon, 41 Or. LUBA 87, 91–94 (2001) (citing Friends of Neabeack Hill v. City of Philomath, 911 P.2d 350 (Or. Ct. App. 1996)). For a summary of *Friends of Neabeack Hill*, see *supra* note 102.

249. ORIGINAL GOALS, *supra* note 10, at 17–18.

250. CURRENT GOALS, *supra* note 1, at 22; OR. ADMIN. R. 660-023-0100, -0140 (2021).

251. *See supra* notes 206, 208. Certain wetlands are also included in the riparian corridors resource category. *See supra* notes 206, 212.

252. LCDC's Goal 5 Subcommittee suggested that every place in the state is in a watershed and noted that many watersheds are protected under administrative rules adopted by the Oregon Department of Environmental Quality (DEQ) or the Oregon Water Resources Department (OWRD). SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 50. While suggesting that previous decisions involving watersheds not be overturned, the Subcommittee recommended that watersheds be eliminated from the Goal. *Id.*

1. Wetlands

Wetlands are a unique Goal 5 resource category, as they are subject to extensive state[253] and federal[254] regulation apart from the Goal. The first and foremost of those regulations is the state removal-fill permit program.[255] Under that program, a person may not remove more than fifty cubic yards of material from any "waters of this state," or fill any such waters with fifty cubic yards of material or more, without a permit from the Department of State Lands (DSL).[256]

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253. *See infra* notes 255–272 and accompanying text. Interestingly, under Oregon's stringent farmland protection laws, the creation, restoration, and enhancement of wetlands is permitted in EFU zones. OR. REV. STAT. §§ 215.213(1)(o), .283(1)(m) (2019). Thus, the Oregon Legislature has determined that wetlands are consistent with agricultural activity. *See* Sullivan & Eber, *supra* note 11, at 25–29. However, that attitude may be shifting. In 2016, in response to pressure from dairy farmers, the Oregon Legislature enacted a pilot program enabling Tillamook County to treat the creation, restoration, and enhancement of wetlands as conditional uses in EFU zones under section 215.283(2) of the Oregon Revised Statutes, rather than as outright permitted uses under section 215.283(1). Act of Mar. 29, 2016, ch. 84, 2016 Or. Laws 2755; *see also* TILLAMOOK CNTY., TILLAMOOK COUNTY FARM AND WETLAND (SB 1517) PILOT PROGRAM PLANNING PROCESS (2019), https://www.co.tillamook.or.us/sites/default/files/fileattachments/community_development/page/8365/tillamookcountysb1517finalreportandappendices.pdf; *Tillamook County SB1517 Pilot Program – October 19th Open House*, TILLAMOOK CNTY. PIONEER (Apr. 3, 2020), https://www.tillamookcountypioneer.net/tillamook-county-sb1517-pilot-program-october-19th-open-house/.

254. Todd H. Votteler & Thomas A. Muir, *Wetland Protection Legislation*, *in* NATIONAL WATER SUMMARY ON WETLAND RESOURCES 57 (U.S. Geological Surv., Water-Supply Paper 2425, 1996), https://pubs.usgs.gov/wsp/2425/report.pdf.

255. OR. REV. STAT. §§ 196.795–.990 (2021); OR. ADMIN. R. 141-085-0500 to -0785 (2021).

256. OR. REV. STAT. §§ 196.800(3), .800(13), .810(1)(a) (2021). However, state and local governments are prohibited from regulating the alteration or fill of wetlands up to one acre in size that were artificially created for the purpose of controlling, storing, or maintaining storm water, unless they were created as a condition of development, in which case they may not be altered or filled unless the "approving authority" accepts a plan to mitigate the loss of their "functional capabilities." *Id.* § 196.687(1)–(2). USACE regulates the discharge of dredged or fill material into "waters of the United States" pursuant to section 404 of the Clean Water Act. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 404, 86 Stat. 816, 884 (codified as amended at 33 U.S.C. § 1344 (2018)); *Permit Program Under CWA Section 404*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 (last visited June 28, 2021). Actually, section 404 regulates the discharge of material into "navigable waters;" however, that term is defined elsewhere to mean "waters of the United States." 33 U.S.C. § 1362(7). Although states can completely assume federal permit authority under section 404, Oregon has only partially done so, meaning that developers must apply for removal-fill permits with both DSL and USACE. *DSL Partial Assumption of Federal 404 Permit Authority*, DEP'T OF ST. LANDS, https://www.oregon.gov/dsl/WW/Pages/404PermitAuthority.aspx (last visited June 28, 2021).

"Waters of this state" include "wetlands."[257] DSL may issue a removal-fill permit only if it concludes that the proposed development "[i]s consistent with the protection, conservation and best use of the water resources of this state" and "[w]ould not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation."[258] In determining whether to issue a permit, DSL may consider a number of factors, including the "public need for" and likely benefits of the proposed removal or fill, the availability of alternatives, whether the proposed removal or fill "conforms to sound policies of conservation and would not interfere with public health and safety," whether the proposed removal or fill is consistent with local comprehensive plan provisions and land use regulations, and whether the applicant has provided "all practicable mitigation."[259] The state removal-fill permit program is heavily oriented towards the protection of salmonid habitat.[260]

Oregon has also enacted a statewide wetland conservation planning program.[261] That program calls for a single definition of "wetlands" for purposes of both the statewide planning goals and the state removal-fill permit program.[262] That program also calls for a statewide wetlands inventory, based on uniform identification standards, that is available to local governments for planning and

257. OR. REV. STAT. § 196.800(15) (2021). USACE has defined "waters of the United States" under section 404 of the Clean Water Act to include "[a]djacent wetlands." 33 C.F.R. § 328.3(a)(4) (2020). The U.S. Supreme Court has upheld that definition. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

258. OR. REV. STAT. § 196.825(1) (2021).

259. *Id.* § 196.825(3). For a recent case clarifying the analysis that these statutes require, see *Citizens for Responsible Development in the Dalles v. Wal-Mart Stores, Inc.*, 461 P.3d 956 (Or. 2020).

260. *See* OR. REV. STAT. § 196.810(1)(b) (2021) (requiring a permit for removal and fill in "essential indigenous anadromous salmonid habitat" regardless of the amount of material that is involved).

261. *Id.* §§ 196.668–.692.

262. *Id.* § 196.672(2). Consistent with that policy, "wetlands" are defined under both DSL's and DLCD's enabling legislation and administrative rules as areas that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* § 196.800(17) (defining "wetlands" for purposes of the removal-fill permit program); OR. ADMIN. R. 141-085-0510(110) (2021) (same); OR. ADMIN. R. 141-086-0005 (2021) (same for purposes of wetland conservation plans); OR. ADMIN. R. 141-086-0200(17) (2021) (same for purposes of the statewide wetlands inventory and wetland identification); OR. ADMIN. R. 141-086-0330(8) (2021) (same for purposes of determining whether wetlands are "significant" under Goal 5); OR. ADMIN. R. 660-023-0100(1) (2021) (same for purposes of Goal 5 in general); OR. REV. STAT. § 197.015(22) (2021) (same for purposes of the Oregon planning program in general).

regulatory purposes.[263] In addition, that program calls for the coordination of efforts under local comprehensive plans, the statewide planning goals, and state and federal regulatory programs.[264]

The statewide wetland conservation planning program also authorizes local governments to adopt and DSL to review wetland conservation plans.[265] Wetland conservation plans must, among other things, contain detailed inventories of the wetlands subject thereto; designate wetlands for protection, conservation, or development, including removal or fill; and include a mitigation plan to replace planned wetland losses.[266] If a local government adopts and DSL

263. OR. REV. STAT. § 196.672(3) (2021); *see also id.* § 196.674 (setting forth the parameters for compiling, publicizing, and updating the statewide wetlands inventory). DSL is required to adopt by rule wetland identification standards, which it has done. *Id.* §§ 196.674(2), 197.279(3)(a); OR. ADMIN. R. 141-086-0180 to -0240 (2021). Those standards guide local governments in developing local wetlands inventories, which must be approved by DSL. OR. ADMIN. R. 141-086-0180, -0228 (2021). The statewide wetlands inventory consists of the Oregon portion of the national wetlands inventory prepared by the U.S. Fish and Wildlife Service; however, if a local government develops a local wetlands inventory, then the DSL-approved local inventory supplants the national inventory for that jurisdiction. OR. REV. STAT. § 196.674(2) (2021); OR. ADMIN. R. 141-086-0185(1) (2021). LCDC's Goal 5 Subcommittee recognized that the national inventory generally does not provide sufficiently specific information regarding the "quality" and "location" of wetlands. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 44. By contrast, DSL's wetland identification standards are detailed. OR. ADMIN. R. 141-086-0210 (2021).

264. OR. REV. STAT. § 196.672(1) (2021). Consistent with that policy, if a removal-fill permit has not already been issued for certain proposed development areas that are identified as wetlands on the statewide wetlands inventory, then the local government must notify DSL within five days of accepting a complete application. *Id.* §§ 215.418(1), 227.350(1). DSL must respond within thirty days. *Id.* § 196.676. However, there is no "deemed approval" if DSL fails to respond, and the local government is in any event required to notify the applicant and the landowner of the possible presence of wetlands and the potential need for state and federal approval. *Id.* §§ 215.418(4)–(5), 227.350(4)–(5). Local government approval of the development must include one of the following notice statements:

> (a) Issuance of a permit by the department required for the project before any physical alteration takes place within the wetlands;
> (b) Notice from the department that no permit is required; or
> (c) Notice from the department that no permit is required until specific proposals to remove, fill or alter the wetlands are submitted.

Id. §§ 215.418(3), 227.350(3). The local government must notify DSL within five days of its approval. *Id.* §§ 215.418(6), 227.350(6). However, the local government's approval is not invalid if it fails to submit any required notices. *Id.* §§ 215.418(7), 227.350(7).

265. *Id.* §§ 196.678–.684; OR. ADMIN. R. 141-086-0005 to -0100 (2021). Local governments must adopt wetland conservation plans through the PAPA process. OR. REV. STAT. §§ 196.684(2), 197.279(2) (2021).

266. OR. REV. STAT. § 196.678(2) (2021). Wetlands may be designated for development, including removal or fill, only if the following criteria are met:

approves a wetland conservation plan, then DSL must approve removal-fill permits for wetlands designated for such development in the plan, though DSL must impose conditions to ensure that certain additional criteria are met.[267] DSL must also review subsequent amendments to the wetland conservation plan.[268] If the local government makes no amendments, then DSL is still required to review the wetland conservation plan every five years.[269] While wetland conservation plans are not mandatory for purposes of Goal 5,[270] they are, if approved by DSL, automatically deemed to comply with the Goal.[271] However, a local government's decision to adopt a wetland conservation plan, and DSL's decision on review, may be appealed to LUBA.[272]

(a) There is a public need for the proposed uses set forth in the acknowledged comprehensive plan for the area;
(b) Any planned wetland losses shall be fully offset by creation, restoration or enhancement of wetland functions and values . . .; and
(c) Practicable, less damaging alternatives, including alternative locations for the proposed us are not available.

Id. § 196.681(4).

267. *Id.* § 196.682(1). In other words, DSL may not consider the factors that it would be required to consider if there was no wetland conservation plan. *Id.* However, those factors, the criteria that DSL must impose conditions in order to satisfy, and the standards that DSL must consider in approving a wetland conservation plan in the first place are all markedly similar. *See supra* note 259 and accompanying text (permit approval factors with no wetland conservation plan); OR. REV. STAT. § 196.682(1) (2021) (permit approval criteria with a wetland conservation plan); *id.* § 196.681(3)–(4) (wetland conservation plan approval standards). Further, in approving a wetland conservation plan, DSL may simultaneously approve removal-fill permits for wetlands designated for such development in the plan—subject to standards which are, again, very similar. OR. REV. STAT. § 196.681(7) (2021).

268. OR. REV. STAT. § 196.684(1)–(5) (2021).

269. *Id.* § 196.684(6)–(7).

270. *See* Clarke v. City of Hillsboro, 25 Or. LUBA 195, 197–98 (1993).

271. OR. REV. STAT. §§ 196.684(8), 197.279(1) (2021). That is not true for wetland conservation plans relating to estuarine wetlands, which are subject to separate statutory requirements, and which are treated separately under Statewide Planning Goal 16 (Estuarine Resources). *Id.* §§ 197.279(1), 196.684(8), .686; CURRENT GOALS, *supra* note 1, at 67–76. While local governments need not apply Goal 5 with respect to *wetlands* in adopting and amending DSL-approved wetland conservation plans, they must still apply Goal 5 with respect to any affected *nonwetland* resource sites. *See* Friends of Eugene v. City of Eugene, 44 Or. LUBA 239, 280–83, *aff'd*, 75 P.3d 922 (Or. Ct. App. 2003).

272. OR. REV. STAT. § 196.684(9) (2021); OR. ADMIN. R. 141-086-0030 (2021).

The 1996 administrative rules subject wetlands to Goal 5's standard applicability at periodic review.[273] However, the resource-specific rule for wetlands differentiates between urban and rural lands and provides a "safe harbor" approach.[274] In addition, consistent with state statute, as an alternative to the process set out in the resource-specific rule, local governments may comply with Goal 5 by adopting DSL-approved wetland conservation plans.[275]

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273. OR. ADMIN. R. 660-023-0100(2) (2021). As noted, local governments must apply Goal 5 and the 1996 administrative rules at periodic review as required by the resource-specific rule for wetlands. *See supra* note 90 and accompanying text.

274. As noted, DSL has adopted by rule wetland identification standards, which guide local governments in developing local wetlands inventories. *See supra* note 263. State law also requires DSL to adopt by rule criteria for local governments to use in determining whether a particular wetland is "significant" for Goal 5 purposes, which DSL has done. OR. REV. STAT. § 197.279(3)(b) (2021); OR. ADMIN. R. 141-086-0300 to -0390 (2021). For wetlands located within UGBs and urban unincorporated communities, local governments are not required to complete the standard inventory process; instead, they must conduct a local wetlands inventory, determine each wetland's significance in accordance with DSL's rules, and adopt the inventory and resource list into the local government's comprehensive plan or land use regulations. OR. ADMIN. R. 660-023-0100(3) (2021). For those wetlands determined to be significant, the local government has two options. OR. ADMIN. R. 660-023-0100(4) (2021). First, it may complete the standard ESEE decision and program implementation processes for those wetlands. OR. ADMIN. R. 660-023-0100(4)(a) (2021). Second, it may utilize a safe harbor approach by adopting (1) restrictions on grading, excavation, fill placement, and most vegetation removal, and (2) a variance process to address, *inter alia*, lands rendered unbuildable by those restrictions. OR. ADMIN. R. 660-023-0100(4)(b) (2021). In *Willamette Oaks LLC v. Lane County*, the county's program to achieve Goal 5 with respect to wetlands consisted of a prohibition on filling, grading, excavating, and removing native vegetation within the wetlands themselves and within setbacks that varied depending on the quality of the wetland at issue. 64 Or. LUBA 328, 342–43 (2011), *aff'd*, 281 P.3d 685 (Or. Ct. App. 2012). For purposes of determining those setbacks, the county was entitled to rely on either the owner of the subject property to prepare and secure DSL approval of jurisdictional wetland boundaries or, if the owner did not secure such approval, the boundaries depicted on the county's existing Goal 5 inventory. *Id.* at 343–44.

For wetlands located outside UGBs and urban unincorporated communities, local governments are also not required to complete the standard inventory process; instead, they may simply adopt the statewide wetlands inventory as part of their comprehensive plans or land use regulations. OR. ADMIN. R. 660-023-0100(5) (2021). As explained above, if a local government has not adopted a local wetlands inventory, then the statewide wetlands inventory consists of the national wetlands inventory prepared by the U.S. Fish and Wildlife Service. *See supra* note 263. Local governments need not determine whether rural wetlands are significant or complete the ESEE decision or program implementation processes for significant rural wetlands but, if they choose to do so, then they must follow the same process that applies to urban wetlands. OR. ADMIN. R. 660-023-0100(6) (2021). Local governments must adopt regulations requiring them to notify DSL of applications for development permits or other land use decisions affecting inventoried wetlands, regardless of whether they are urban or rural. OR. ADMIN. R. 660-023-0100(7) (2021); *see supra* note 264.

275. OR. ADMIN. R. 660-023-0100(8) (2021); *see supra* note 271 and accompanying text. Wetland conservation plans have been authorized since 1989. Act of July 26, 1989, ch. 837, §§ 10–13, 1989 Or. Laws 1513, 1516–19 (codified as amended at OR. REV. STAT. §§ 196.678–

Perhaps because of the Oregon Legislature's extensive involvement in the protection of wetlands apart from Goal 5, there has been comparatively little litigation involving the Goal. In *Audubon Society of Portland v. Land Conservation & Development Commission*, LCDC acknowledged a county's conclusion that no uses would conflict with an inventoried wetland because, even though the wetland was in an exclusive farm use (EFU) zone and chemicals from agricultural operations could harm the wetland, it was unlikely that DSL would approve a fill permit to allow agricultural operations to take place.[276] The county concluded that it was unlikely that DSL would approve a fill permit because DSL had recently been engaged in enforcement proceedings against an owner of land within the wetland who began draining the wetland without a permit.[277] In defending its reliance on DSL's enforcement proceedings, the county pointed to a prior case in which the Oregon Supreme Court accepted a county's reliance on the Oregon Board of Forestry's administration of the Oregon Forest Practices Act to conclude that it could not prevent certain forest practices that would conflict with inventoried resource sites.[278]

The court rejected the county's rationale for two reasons. First, although DSL's enforcement proceedings suggested that "there would

.684) (2021). LCDC's Goal 5 Subcommittee suggested that wetland conservation plans were not sufficient to ensure compliance with Goal 5 because they were so rarely used. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 45. The Subcommittee also noted that, while DSL had funded several local wetlands inventories, most jurisdictions had deferred the Goal 5 process for wetlands due to inadequate information. *Id.* at 43. The Subcommittee further explained that many local governments were hesitant to conduct adequate inventories because of the expense involved and because, if an adequate inventory exists, then the local government is required to complete the cumbersome Goal 5 process at periodic review. *Id.* at 43–44. That process is particularly problematic for wetlands due to difficulties defining impact areas, takings issues, and concerns regarding the overlap of Goal 5 and the state removal-fill permit program (*i.e.*, even if a local government allows development of a particular wetland under Goal 5, DSL might deny a removal-fill permit for the project). *Id.* at 44–45. After considering several options, the Subcommittee recommended that LCDC require local governments to conduct adequate inventories at periodic review (cities would be required to develop local wetlands inventories in accordance with DSL's rules while counties would need only adopt the national wetlands inventory) but not require them to complete the Goal 5 process, instead relying on DSL to protect wetlands through the state removal-fill permit program. *Id.* at 47–49. That is essentially what LCDC did; however, for urban wetlands, the resource-specific rule does require local governments to either complete the standard ESEE decision and program implementation processes or use the safe harbor approach. *See supra* note 274.

276. Audubon Soc'y of Portland v. Land Conservation & Dev. Comm'n, 760 P.2d 271, 272–73 (Or. Ct. App. 1988).

277. *Id.* at 273.

278. *Id.* at 273–74 (quoting 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, 737 P.2d 607, 612 (Or. 1987)).

be many impediments" to the approval of a fill permit, they did not support a "definitive conclusion" that such a permit could not be issued.[279] Second, unlike the Oregon Forest Practices Act, which *preempts* local regulation of certain forest practices,[280] the state removal-fill permit program is in part *dependent on* local comprehensive plans and land use regulations.[281] The court concluded that the county's approach did not comply with Goal 5.[282]

If a particular wetland is not included on a local government's inventory, then an argument that the local government did not apply the Goal in allowing new conflicting uses provides no basis for reversal or remand.[283] However, if a particular wetland is included on a local government's inventory and protected by a program to achieve Goal 5, then the local government must apply the Goal in adopting substantive amendments to that program.[284] Conflicts between wetlands and mineral and aggregate resources, while less common than conflicts between wildlife habitat and mineral and aggregate resources,[285] are not unheard of.[286]

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279. *Id.* at 274.

280. *See supra* note 49 and accompanying text.

281. *Audubon Soc'y*, 760 P.2d at 274 (citing OR. REV. STAT. § 541.625(3)(g) (1987) (providing in part that one of the factors that DSL must consider in approving a removal-fill permit is "[w]hether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place"), *renumbered as* OR. REV. STAT. § 196.825(3)(g) (1989)).

282. *Id.* at 275 ("The county has not followed the process that Goal 5 and OAR 660-16-000 *et seq* require. It has not treated identifiable and apparent conflicting uses as being such or undertaken the necessary analysis, conflict resolution and program development that would follow from their identification. The county has essentially avoided the process by assuming that a chain of future events, beyond its control, will occur and might serve to prevent or limit conflicting uses without regulatory intervention by the county. We agree with petitioners that the process the county has followed does not satisfy the goal and the rule.").

283. *See* LandWatch Lane Cnty. v. Lane County, 75 Or. LUBA 258, 273–74 (2017); Gordon v. Polk County, 54 Or. LUBA 351, 362–63 (2007); Doob v. City of Grants Pass, 48 Or. LUBA 245, 250–53 (2004).

284. OR. ADMIN. R. 660-023-0250(3)(a) (2021); *see* Home Builders Ass'n of Lane Cnty. v. City of Eugene, 41 Or. LUBA 370, 429–31, 439–40 (2002). The local government need not apply the Goal if the amendments are not substantive; however, it must be clear to LUBA that the amendments are, in fact, nonsubstantive. *Id.*

285. *See supra* note 198 and accompanying text.

286. *See* Cadwell v. Union County, 48 Or. LUBA 500 (2005); Eugene Sand & Gravel, Inc. v. Lane County, 44 Or. LUBA 50, 91–92 (concluding that a county's findings that water drawdown from a proposed mining operation would conflict with inventoried riparian areas were inadequate because the applicant proposed to divert water back into those riparian areas and because the county inconsistently found that the water drawdown would not conflict with inventoried wetlands that were located between and hydrologically connected to the riparian areas), *rev'd and remanded on other grounds*, 74 P.3d 1085 (Or. Ct. App. 2003).

Wetlands are likely to be managed through extensive state regulation as well as state and local coordination, especially where wetland conservation plans exist. Where no such plans exist, the state removal-fill permit program acts to protect some wetlands; however, the lack of funds to undertake further local planning[287] and the practical absence of periodic review[288] result in fewer protections for this resource category than would otherwise be possible.

2. *Groundwater Resources*

Water for domestic and industrial use is often at a premium, especially groundwater, the supply of which may be less dependable in different parts of the state.[289] However, as is the case throughout the Western United States,[290] water regulation in Oregon is frequently controversial.[291]

Like the original Goal,[292] the amended Goal and the 1996 administrative rules allow local governments to designate groundwater resources for protection.[293] However, the 1996 administrative rules

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287. *See infra* Section IV.A.

288. *See infra* Section IV.B.

289. *See* OR. WATER RES. DEP'T, WATER RIGHTS IN OREGON: AN INTRODUCTION TO OREGON'S WATER LAWS (2018), https://www.oregon.gov/owrd/WRDPublications1/aquabook.pdf (explaining that Oregon has declared seven "critical groundwater areas" and twelve "groundwater classified areas" or "limited areas").

290. *See, e.g.*, Matthew McKinney & John E. Thorson, *Resolving Water Conflicts in the American West*, 17 WATER POL'Y 679 (2015).

291. *See* OR. WATER RES. DEP'T, REPORT ON CONTESTED CASES AND LITIGATION (2019), https://olis.oregonlegislature.gov/liz/2020R1/Downloads/CommitteeMeetingDocument/210636. The potential for conflict is enhanced by the overallocation of water rights in the state. *See* Nicole Montesano, *Water Rights a Forbidding Tangle in the West*, NEWSREGISTER.COM (Aug. 18, 2015), https://newsregister.com/water-rights-forbidding-tangle-in-west.

292. ORIGINAL GOALS, *supra* note 10, at 17.

293. CURRENT GOALS, *supra* note 1, at 22; OR. ADMIN. R. 660-023-0140 (2021). The Oregon Legislature has required LCDC to "assure that city and county comprehensive plans and land use regulations and state agency coordination programs are consistent with the goal set forth in ORS 468B.155." OR. REV. STAT. § 197.283(1) (2019). That goal is "to prevent contamination of Oregon's ground water resource while striving to conserve and restore this resource and to maintain the high quality of Oregon's ground water resource for present and future uses." *Id.* § 468B.155. In addition, the Oregon Legislature has required DLCD to "assure that any information contained in a city or county comprehensive plan that pertains to the ground water resource of Oregon shall be forwarded to the centralized repository established under ORS 468B.167." *Id.* § 197.283(2). That repository, which is maintained by DEQ, includes:

(A) Hydrogeologic characterizations;

limit significant groundwater resources to certain wellhead protection areas and areas designated by the Oregon Water Resources Department (OWRD) as critical groundwater areas and groundwater limited areas.[294] Cases regarding those protections are relatively infrequent given that the adjudication of water rights often occurs in other settings,[295] but some exist. A program to achieve Goal 5 with respect to a groundwater resource might require a zone change applicant to affirmatively demonstrate the adequacy of the long-term water supply,[296] both for the proposed development itself and to ensure that surrounding users will not be negatively impacted.[297] While a local government may defer a determination of compliance with its program to achieve Goal 5 to a later point in the development process, that second-stage proceeding must provide adequate opportunities for public participation.[298] Of course, if a particular groundwater resource is not included on a local government's inventory, then an argument

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(B) Results of local and statewide monitoring or testing of ground water;
(C) Data obtained from ground water quality protection research or development projects; and
(D) Alternative residential, industrial and agricultural practices that are considered best practicable management practices for ground water quality protection.

Id. § 468B.167(1)(e). Despite that legislation, for LCDC's Goal 5 Subcommittee, the choice of whether to include groundwater resources as a Goal 5 resource category was difficult:

> The inventory and decision processes in Goal 5 do not work where the quantity, quality, and location of resources cannot be determined. This is the case for most groundwater areas in the state. [OWRD] and [DEQ] operate programs to identify and regulate groundwater areas of special concern. However, even in these areas, little or no planning for groundwater has occurred using the Goal 5 process.

SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 50.

294. OR. ADMIN. R. 660-023-0140(2)–(5) (2021). "'Wellhead protection area' is the surface and subsurface area surrounding a water well, spring, or wellfield, supplying a public water system, through which contaminants are reasonably likely to move toward and reach that water well, spring, or wellfield." OR. ADMIN. R. 660-023-0140(1)(e) (2021).

295. *See* OR. REV. STAT. §§ 537.585–.610, .670–.695 (2021) (registration of pre-existing groundwater rights); *Adjudications and Registrations*, OR. WATER RES. DEP'T, https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/Pages/default.aspx (last visited June 15, 2021) (same); OR. REV STAT. §§ 537.615–.629 (permits for new groundwater rights); OR. WATER RES. DEP'T, *supra* note 291, at 29–34 (same).

296. *See* Holland v. Lane County, 16 Or. LUBA 583, 598–600 (1988).

297. *See* Cattoche v. Lane County, 79 Or. LUBA 466, 481–83 (2019). For a summary of *Cattoche*, see *supra* notes 187–192 and accompanying text.

298. *See Holland*, 16 Or. LUBA at 596–97, 599 (citing Spalding v. Josephine County, 14 Or. LUBA 143, 147 (1985); Storey v. City of Stayton, 15 Or. LUBA 165, 184 (1986); Meyer v. City of Portland, 678 P.2d 741, 744 (Or. Ct. App. 1984)).

that the local government did not apply the Goal in allowing new conflicting uses provides no basis for reversal or remand.[299] It is important for applicants to remember that, even if there is evidence in the record that a proposed use, such as mining, would not conflict with a groundwater resource, LUBA will defer to a local government's conclusion that there *would* be conflicts as long as a reasonable person could rely on the evidence in the record that the local government found more credible—that is, LUBA will not reweigh the evidence.[300]

Groundwater resources are likely to receive more land use attention in the future due to climate change and the consequent water shortages and conflicts between urban and rural uses.[301]

H. Wilderness Areas

The original Goal defined "wilderness areas" as

> areas where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. It is an area of undeveloped land retaining its primeval character and influence, without permanent improvement or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) may also contain ecological, geological, or other features of scientific, educational, scenic, or historic value.[302]

Despite that broad definition, there was little controversy over this resource category under the original Goal and the 1981 administrative rules, possibly because the phrase "wilderness area" is associated with a federal designation[303] and possibly due to an attempt by local

299. *See* Johnson v. Jefferson County, 56 Or. LUBA 72, 98–100, *aff'd*, 189 P.3d 30 (Or. Ct. App. 2008); Churchill v. Tillamook County, 29 Or. LUBA 68, 74 (1995).

300. *See* Eugene Sand & Gravel, Inc. v. Lane County, 44 Or. LUBA 50, 73–83, *rev'd and remanded on other grounds*, 74 P.3d 1085 (Or. Ct. App. 2003).

301. *See, e.g.*, Edward Sullivan & A. Dan Tarlock, *The Western Urban Landscape and Climate Change*, 49 ENV'T L. 931 (2019); Edward J. Sullivan & A. Dan Tarlock, *The Paradox of Change in the American West: Global Climate Destruction and the Reallocation of Urban Space and Priorities*, 37 J. ENV'T L. & LITIG. (forthcoming Aug. 2022).

302. ORIGINAL GOALS, *supra* note 10, at 18.

303. Congress designates wilderness areas pursuant to the Wilderness Act of 1964. Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§

governments to avoid takings claims if private property was ever inventoried as a wilderness area. Under the amended Goal and the 1996 administrative rules, this resource category is now officially limited to federally designated wilderness areas, of which there are forty-seven in Oregon.[304] There have been no cases involving wilderness areas under the 1996 administrative rules. The wilderness areas resource category is another "closed set" that will change only if the federal government designates more wilderness areas in the state.

I. Historic Areas, Sites, Structures and Objects

In 1966, Congress passed the National Historic Preservation Act (NHPA), creating a national program to coordinate and support efforts to identify, evaluate, and protect historic and archeological resources throughout the country.[305] The NHPA authorizes the National Park

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1131–1136 (2018)); Jamie Hale, *Oregon's 47 Wilderness Areas, Where You Can Really Get Away*, OREGONLIVE.COM (Aug. 29, 2019), https://www.oregonlive.com/life_and_culture/erry-2018/06/856b431f3a8176/oregons_47_wilderness_areas_wh.html (explaining that "[w]ilderness are federally-protected natural areas—thanks to the Wilderness Act of 1964," providing a map showing the location of Oregon's wilderness areas, and providing links to U.S. Forest Service websites containing more detailed maps and additional information regarding each of those wilderness areas).

304. OR. ADMIN. R. 660-023-0170(1) (2021) ("'[W]ilderness areas' are those areas designated as wilderness by the federal government."); Hale, *supra* note 303("Oregon has 47 official wilderness areas. . . ."). Accordingly, under the 1996 administrative rules, local governments must update their resource lists at periodic review to include all federally designated wilderness areas. OR. ADMIN. R. 660-023-0170(2)–(3) (2021). Local governments need not complete the standard ESEE decision and program implementation processes unless they choose to provide additional protections for those resource sites, for example, by limiting conflicting uses in an impact area. OR. ADMIN. R. 660-023-0170(4) (2021). LCDC's Goal 5 Subcommittee found that the Goal played "little or no role" in planning for wilderness areas and recommended that the resource category be limited to federally designated wilderness areas. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 52. In addition, DLCD proposed

> that [LCDC] not use the ESEE process for any new wilderness areas. The only requirement should be one of showing the new area on the plan and coordination with federal agencies managing such a new wilderness area. This would mean that Goal 5 would not be used to identify and protect buffer areas around newly declared wilderness areas. If buffers are needed for newly declared wilderness resources, it would be up to the federal government to include them in the wilderness boundary, or to arrange for them through easements.

Id. While not going so far as to recommend that the wilderness areas resource category be removed from Goal 5, the Subcommittee did note that that would provide the same result as the rules that were adopted. *Id.*

305. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 54 U.S.C. §§ 300101–307108).

Service (NPS) to maintain a National Register of Historic Places, which is "the official list of the Nation's historic places worthy of preservation."[306] The NHPA calls for the appointment of State Historic Preservation Officers (SHPOs) to assist with designating historic resources for inclusion on the register.[307] The NHPA and implementing regulations adopted by the NPS provide for a local government certification program, under which local governments that, *inter alia*, inventory historic resources within their jurisdictions become participants in the historic designation process and may qualify for federal grants.[308]

The original Goal defined "historic areas" as "lands with sites, structures and objects that have local, regional, statewide or national historical significance."[309] The 1981 administrative rules did not provide further direction. Thus, local governments had fairly wide discretion in designating historic resources. Local governments that were "certified" under the NHPA responded by importing the inventories that they conducted to become certified into the Goal 5 rubric.[310] Most of that was accomplished without providing notice to affected landowners.[311]

In 1989, Yamhill County adopted an ordinance requiring owner consent before land could be designated as a historic landmark and

306. *National Register of Historic Places*, NAT'L PARK SERV., https://www.nps.gov/subjects/national register/index.htm (last visited June 28, 2021); 54 U.S.C. §§ 302101–302108. The NHPA authorizes the "Secretary" to maintain the register, meaning the U.S. Secretary of the Interior. 54 U.S.C. § 100102(3). However, under the NHPA, the Secretary acts through the Director of the NPS. *Id.* §§ 300316, 100102(1).

307. 54 U.S.C. §§ 302104(a), (c), 302301–302304.

308. *Id.* §§ 302103(2)(A), 302504, 302505, 302902(c)(4)–(5); 36 C.F.R. § 61.6 (2020); *Preservation Through Partnership*, NAT'L PARK SERV., https://www.nps.gov/clg/index.htm (last visited Feb. 4, 2022).

309. ORIGINAL GOALS, *supra* note 10, at 17.

310. E-mail from Carrie Richter, *Pro Tem* Instructor, HIST. PRES. PROGRAM, UNIV. OF OR., to Edward J. Sullivan (July 28, 2021) (on file with authors).

311. Notice to landowners of relevant land use decisions was generally not required until the passage of Oregon Ballot Measure 56 in 1998. Ballot Measure 56 requires notice to landowners of actions by counties, cities, the state, and Metro that directly or indirectly (1) change the underlying zoning of land or (2) limit or prohibit uses that were previously allowed on land. Act of December 3, 1998, ch. 1, 1999 Or. Laws 1 (codified as amended at OR. REV. STAT. §§ 215.503, 227.186, 197.047, 268.393). Such notice must indicate that the relevant action may affect the value of the land. *Id.* The 1996 administrative rules require notice to landowners consistent with those statutes. OR. ADMIN. R. 660-023-0060 (2021). For more on Metro, see *infra* note 422 and accompanying text.

thereby placed on the county's historic resources inventory.[312] In appealing that decision to LUBA, DLCD argued that the original Goal and the 1981 administrative rules required that inventory determinations be based solely on the location, quality, and quantity of the resource site, without any consideration of landowner consent.[313] LUBA agreed with DLCD and remanded the decision.[314] On appeal, the county argued that the landowner consent requirement was not part of the county's inventory process but, rather, was part of its ESEE decision process—that is, in adopting the ordinance, the county concluded that, if an owner objected to the designation of their land as a historic landmark and, therefore, its inclusion on the county's historic resources inventory, then the ESEE consequences of protecting the historic resource *ipso facto* outweighed the consequences of allowing conflicting uses fully.[315]

The Oregon Court of Appeals concluded that, while landowner consent could be considered in conducting ESEE analyses, because the original Goal and the 1981 administrative rules required that ESEE analyses be conducted on a *site-specific*, *case-by-case* basis, whereas the county's landowner consent requirement *categorically* determined the ESEE decision for *all* historic resources, the ordinance was invalid.[316] In 1995, the Oregon Legislature reversed those decisions by requiring local governments to remove land from consideration for any form of local historic designation if the owner refuses to consent to such designation at any time during the designation process.[317]

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312. Dep't of Land Conservation & Dev. v. Yamhill County, 17 Or. LUBA 1273, 1275, 1281, *aff'd*, 783 P.2d 16 (Or. Ct. App. 1989).

313. *Id.* at 1277 (citing OR. ADMIN. R. 660-016-0000) (1989).

314. *Id.* at 1282 ("We conclude that making landowner consent a determinative criterion for whether a site will be included on the county's inventory of historic resources is not allowed by Goal 5 and OAR 660-16-000.").

315. Dep't of Land Conservation & Dev. v. Yamhill County, 783 P.2d 16, 18 (Or. Ct. App. 1989).

316. *Id.* The court also acknowledged, consistent with LUBA's decision, that local governments "[m]ay not give property owners the ability to decide unilaterally whether resource sites will be included on Goal 5 inventories." *Id.* at 18 (citing Collins v. Land Conservation & Dev. Comm'n, 707 P.2d 599 (Or. Ct. App. 1985)).

317. Act of July 19, 1995, ch. 693, § 21, 1995 Or. Laws 2096, 2102–03 (codified as amended at OR. REV. STAT. § 197.772). That statute is the only state statute of its kind in the United States. Local governments, acting in their proprietary capacities, may refuse such consent with respect to government-owned property; however, they would do well to designate with clarity which decision-makers or employees have authority to refuse such consent. *See* McLoughlin Neighborhood Ass'n v. City of Oregon City, 77 Or. LUBA 377, *aff'd*, 425 P.3d 799 (Or. Ct. App. 2018). A similar provision was added to the NHPA in 1980. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 201, 94 Stat. 2987, 2989–90

LCDC's Goal 5 Subcommittee did not review the proposed resource-specific rule for historic resources.[318] However, due to budget constraints and the landowner consent statute, DLCD recommended that local governments not be required to complete the Goal 5 process for new historic resources, except for those included on the National Register of Historic Places.[319] LCDC apparently agreed with that reasoning in adopting the 1996 administrative rules.[320] Nevertheless, for those local governments that *chose* to complete the Goal 5 process for new historic resources, rather than prescribing the standard ESEE decision and program implementation processes, the 1996 administrative rules merely "encouraged" the adoption of historic preservation ordinances that were consistent with federal historic preservation guidelines.[321] Once adopted, however, landowners that

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(codified as amended at 54 U.S.C. § 302105(b) (2018) ("If the owner of any privately owned property, or a majority of the owners of privately owned properties within the district in the case of a historic district, object to inclusion or designation, the property shall not be included on the National Register or designated as a National Historic Landmark until the objection is withdrawn.")).

318. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 32.

319. *Id.* DLCD reasoned:

> The choice to maintain the status quo (no new inventories are currently required) is with recognition that the state does not have sufficient funds to distribute in support of this type of new inventory mandate.
>
> The decision to excuse jurisdictions from making a decision about completed inventories derives from the legislation: owners of resources on such inventories are entitled to opt out of the decision at any point in the process. Under that circumstance, the department recommends that completion of the decision process for such new resources be at the discretion of the local government (except National Register sites).

Id. at 33–44.

320. *See* OR. ADMIN. R. 660-023-0200(2) (1997) ("Local governments are not required to amend acknowledged plans or land use regulations in order to provide new or amended inventories, resource lists or programs regarding historic resources, except as specified in this rule.").

321. OR. ADMIN. R. 660-023-0200(7) (1997) ("Local governments are not required to apply the ESEE process in order to determine a program to protect historic resources. Rather, local governments are encouraged to adopt historic preservation regulations regarding the demolition, removal or major exterior alteration of all designated historic resources. Historic protection ordinances should be consistent with standards and guidelines recommended in the Standards and Guidelines for Archeology and Historic Preservation published by the U.S. Secretary of the Interior."). That is consistent with DLCD's recommendation:

> The proposal should remove the ESEE process for those jurisdictions that do choose to proceed with designation of historic resources inventoried since acknowledgment. Historic experts prefer that decisions about important resources be based on a process recommended by the Secretary of the Interior. Therefore, that

violated such ordinances were subject to significant sanctions.[322] While completing the Goal 5 process was voluntary for most *new* historic resources, local governments were required to do what they could to "conserve" historic resources for which the process had already been completed[323] and to "protect" historic resources that were included on

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process would be substituted. Note that almost all acknowledged historic ordinances do not provide for final decisions "up front", as we advocate for other Goal 5 resources. Typically, ordinances provide a review process so that decisions are made on a case-by-case basis—when and if a conflicting use (demolition or alteration) is proposed. In other words, the standard Goal 5 process does not fit this category.

SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 34.

322. *See* State *ex rel.* Crown Inv. Grp., LLC v. City of Bend, 136 P.3d 1149, 1153 (Or. Ct. App. 2006) (upholding a $100,000 remedial contempt sanction for the demolition of a historic resource protected under Goal 5 without first securing a permit from the city); Kelly Cannon-Miller, *Big Red: The Crane Shed, Community Identity, and Historic Preservation in Bend*, 117 OR. HIST. Q. 402 (2016) (discussing the demolition at issue in *Crown*).

323. *See* King v. Clackamas County, 72 Or. LUBA 143 (2015). In *King*, a county had previously designated a former electrical generating facility, a former school, and a former day-use area as historic landmarks and subjected those resource sites to a historic district overlay zone. *Id.* at 146. Because the resource sites cost $10,000 per month to maintain, and because there was no viable economic use of the resource sites under their existing forest zoning, the county approved an application to change the base zoning of the resource sites to allow their "adaptive reuse" for various educational, cultural, and commercial purposes. *Id.* at 146–47, 150. The petitioners argued that, because Goal 5 requires local governments only to *adopt programs* to protect historic resources, which the county had already done by applying the historic district overlay zone, and because nothing in the resource-specific rule requires local governments to *actually preserve* historic resources, the requirements of Goal 5 did not support the zone change. *Id.* at 150–52. LUBA agreed with the applicants that the text of Goal 5 itself "imposes obligations on local governments with respect to the preservation of historic resources." *Id.* at 152. Specifically, LUBA noted that the text of the Goal is to "conserve" historic resources and that the statewide planning goals define "conserve" as "[t]o manage in a manner that avoids wasteful or destructive uses and provides for future availability." *Id.*; CURRENT GOALS, *supra* note 1, at 22, 98. *But see* No Tram to OHSU, Inc. v. City of Portland, 44 Or. LUBA 647, 671 (2003) ("Goal 5 [does not] impose decisional criteria that are independent of the criteria set out in OAR chapter 660, division 23."). LUBA explained:

> It is true that a local government's obligations and authority with respect to historic resources under Goal 5 and its administrative rule are heavily qualified. For example, by statute and rule a property owner may remove a historic designation that the local government imposed on the property when certain conditions are present .... Such qualifications exist because many historic resources are in private ownership, and conservation of historic resources often represents a significant financial burden. As a practical and financial reality, the preservation of historic resources depends heavily on the voluntary efforts and financial resources of private property owners. Local governments are frequently in a position where they can only "foster and encourage the preservation, management and enhancement" of historic resources. Nonetheless, it is clear that Goal 5 requires a local government to do what it can, within the limits of the goal and rule, to help willing property owners achieve the

the National Register of Historic Places regardless of whether the process had been completed for them.[324] As with most resource categories, the 1996 administrative rules generally limit the Goal's applicability with respect to historic resources to those situations in which a local government changes an acknowledged program to achieve Goal 5 or allows new uses that could conflict with a historic resource.[325]

The 1996 administrative rules were "not an exemplar of clarity" with respect to historic resources.[326] In *N.W.D.A. v. City of Portland*, a city amended its zoning ordinance to authorize the construction of six commercial parking structures on specific sites in a historic district.[327]

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actual (and not merely nominal) conservation of historic resources for present and future generations.

King, 72 Or. LUBA at 152 (citing OR. REV. STAT. § 197.772 (2015); OR. ADMIN. R. 660-023-0200(6), (7) (2015)) (emphasis in original). Thus, the Goal required the county to allow the adaptive reuse of the resource sites to ensure the availability of funds for their maintenance and to prevent their demolition by neglect over time.

324. OR. ADMIN. R. 660-023-0200(8)(a) (1997) ("Local governments shall protect all historic resources [that are included on the National Register of Historic Places] through local historic protection regulations, regardless of whether these resources are 'designated' in the local plan."); OR. ADMIN. R. 660-023-0200(1)(c) (1997) ("'Protect' means to require local government review of applications for demolition, removal, or major exterior alteration of a historic resource."). Thus, notwithstanding *Urquhart*, local governments were required to review applications for the demolition, removal, or major exterior alteration of historic resources that were included on the National Register of Historic Places, even if the local government erroneously excluded those resource sites from its resource list and even if that resource list was erroneously acknowledged. For a summary of *Urquhart*, see *supra* note 102. In that way, the 1996 administrative rules reversed the result in *Miller v. City of Dayton*, in which the petitioner's argument that a city erroneously excluded a resource site that was included on the National Register of Historic Places from its acknowledged inventory provided no basis for reversal or remand. 833 P.2d 299 (Or. Ct. App. 1992).

325. OR. ADMIN. R. 660-023-0250(3)(a)–(b) (2021); *see* Cox v. Polk County, 49 Or. LUBA 78, 94–95 (2005) (remanding a county's decision to allow dog control facilities in a public park zone that contained three historic resources because it appeared that the public park zone constituted the county's program to achieve Goal 5 and because, even if the historic preservation provisions of the county's zoning ordinance constituted its program to achieve Goal 5, the county failed to adopt findings explaining why allowing dog control facilities potentially on or near the resource sites was consistent with the Goal); *No Tram to OHSU*, 44 Or. LUBA at 667–72 (concluding that a city was not required to apply Goal 5 in amending its comprehensive plan and land use regulations to promote the development of a tram over the center of a historic district because the amendments did not affect the historic resource protection overlay zone that the city had adopted as its program to achieve Goal 5 with respect to the historic district and because the city had previously interpreted its code to allow trams in the underlying zone, meaning that the amendments did not allow any new conflicting uses).

326. N.W.D.A. v. City of Portland, 50 Or. LUBA 310, 321 (2005).

327. N.W.D.A. v. City of Portland, 47 Or. LUBA 533, 538 (2004), *aff'd in part, remanded in part*, 108 P.3d 589 (Or. Ct. App. 2005).

A community association appealed the city's decision to LUBA, arguing that, because the parking structures could have conflicted with the historic district, the city was required but failed to apply Goal 5—specifically by conducting an ESEE analysis.[328] LUBA first observed that the resource-specific rule expressly exempted local governments from having to conduct ESEE analyses when developing "program[s] to protect historic resources" and concluded that the same was true when local governments allowed new conflicting uses.[329] In addition, LUBA reiterated that a local government need not repeat the Goal 5 process if it determines that its existing program to achieve Goal 5 is sufficient to protect the resource site from any new conflicting uses.[330] Because the city had adopted findings explaining why its existing program to achieve Goal 5—requiring design review for all new development in the historic district—would protect the historic district from the parking structures, LUBA denied that assignment of error.[331] The community association appealed LUBA's decision to the Oregon Court of Appeals, which disagreed with LUBA's determination that, because the resource-specific rule explicitly exempted local governments from having to conduct ESEE analyses when developing programs to protect historic resources, it implicitly exempted them from having to conduct such analyses when allowing new conflicting uses.[332] The court therefore remanded for LUBA to determine whether the city's decision was part of its "program to protect historic resources."[333]

Back at LUBA, the community association first argued that the city's decision was not part of its "program to protect historic resources," and was therefore not subject to the ESEE exemption, because the decision allowed uses that could have conflicted with the historic district and therefore harmed, rather than protected, the

328. *Id.* at 541.

329. *Id.* at 542 (citing OR. ADMIN. R. 660-023-0200(7) (2004)); *see supra* note 321. Actually, the resource-specific rule exempts local governments from having to conduct ESEE analyses when they "determine" a program to protect historic resources; however, LUBA later concluded that LCDC intended to use the phrase "develop" a program. *N.W.D.A.*, 50 Or. LUBA at 332 n.10.

330. *N.W.D.A.*, 47 Or. LUBA at 543 (quoting Home Builders Ass'n of Lane Cnty. v. City of Eugene, 41 Or. LUBA 370, 443–44 (2002)); *see supra* note 95.

331. *N.W.D.A.*, 47 Or. LUBA at 543–44. Based on similar reasoning, LUBA denied another assignment of error that challenged the city's decision to make a particular property adjacent to the historic district eligible for a height bonus. *Id.* at 571–73.

332. N.W.D.A. v. City of Portland, 108 P.3d 589, 597–98 (Or. Ct. App. 2005).

333. *Id.* at 598.

district.[334] The community association also pointed out that the resource-specific rule defines "protect" as "to require local government review of applications for demolition, removal, or major exterior alteration of a historic resource" and argued that the city's decision was not part of its "program to protect historic resources" because the decision did not amend the city's code provisions governing historic design review.[335] Because the generally applicable definitions in the 1996 administrative rules define "protect," when applied to a resource category, as "to develop a program consistent with this division," and because those generally applicable definitions prevail over resource-specific definitions "unless the context otherwise requires," LUBA concluded that the ESEE exemption applied to more than just decisions that adopt or amend local code provisions governing historic design review and similar regulations.[336]

Further, because the 1996 administrative rules define "program" as plans or actions "either to prohibit, limit, or allow uses that conflict with significant Goal 5 resources," and because many programs to achieve Goal 5 consist of a unitary set of regulations that simultaneously allow, limit, and prohibit different conflicting uses, LUBA concluded that the community association's interpretation, that only decisions that prohibited or limited conflicting uses were eligible for the ESEE exemption, would have effectively made that exemption useless.[337] Thus, LUBA concluded that the city's decision was part of its "program to protect historic resources" and was therefore subject to the ESEE exemption.[338] However, in the alternative, LUBA concluded that, while the city did not conduct a formal ESEE analysis, it did analyze the economic, social, environmental, and energy consequences of allowing the parking structures in the course of addressing other statewide planning goals and comprehensive plan policies.[339] LUBA therefore denied that assignment of error a second time.[340]

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334. N.W.D.A. v. City of Portland, 50 Or. LUBA 310, 325 (2005) (quoting OR. ADMIN. R. 660-023-0200(7) (2005)).

335. *Id.* at 326 (quoting OR. ADMIN. R. 660-023-0200(1)(e) (2005)).

336. *Id.* at 330–32 (quoting OR. ADMIN. R. 660-023-0010, -0010(7) (2005)).

337. *Id.* at 332–33 (quoting OR. ADMIN. R. 660-023-0010(6) (2005)).

338. *Id.* at 333.

339. *Id.* at 340–42.

340. *N.W.D.A.*, 47 Or. LUBA at 342. LUBA later affirmed the city's decision to approve historic design review for one of the parking structures. N.W.D.A. v. City of Portland, 58 Or. LUBA 533 (2008), *aff'd*, 213 P.3d 590 (Or. Ct. App. 2009).

As explained above, Oregon law requires local governments to remove land from consideration for local historic designation if the owner refuses to consent to such designation at any time during the designation process.[341] That statute also requires local governments to remove any already-imposed designation from land at the owner's request.[342] The limits of that latter provision were tested in *Lake Oswego Preservation Society v. City of Lake Oswego*, in which a city granted a request by an owner to remove their land from the city's list of historic landmarks.[343] The petitioners argued, and LUBA agreed, that the statute does not authorize subsequent owners to remove already-imposed designations.[344] The Oregon Court of Appeals reversed LUBA's decision, concluding that the statute authorizes all owners to remove such designations, regardless of when they purchased the property in relation to when the designation was imposed.[345] The Oregon Supreme Court reviewed the statute's legislative history and concluded that the only "owner" who is eligible to remove an already-imposed designation is the owner who objected during the designation process—subsequent owners may not do so.[346]

The *N.W.D.A.* and *Lake Oswego Preservation Society* cases, along with other high-profile historic designation controversies, led the Governor's Office in 2016 to instruct LCDC to amend the resource-specific rule,[347] which LCDC did in 2017.[348] The 2017 amendments define "owner" for purposes of the landowner consent statute.[349] The

341. OR. REV. STAT. § 197.772(1) (2019); *see supra* note 317 and accompanying text.

342. OR. REV. STAT. § 197.772(3) (2021).

343. Lake Oswego Pres. Soc'y v. City of Lake Oswego, 379 P.3d 462, 465 (Or. 2016).

344. *Id.* (citing Lake Oswego Pres. Soc'y v. City of Lake Oswego, 70 Or. LUBA 103, 121 (2014)).

345. *Id.* (citing Lake Oswego Pres. Soc'y v. City of Lake Oswego, 344 P.3d 26, 32 (Or. Ct. App. 2015)).

346. *Id.* at 478–84. Additionally, a landowner must have *actually objected* during the designation process; that is, a designation is not "imposed" on land for purposes of the statute, and the owner therefore may not subsequently request that the designation be removed, if the owner voluntarily allowed their land to receive the designation. *See* Demlow v. City of Hillsboro, 39 Or. LUBA 307 (2001) (remanding a city's decision to remove a historic resource from its cultural resources inventory at the request of the landowner because the city did not determine whether the landowner objected when the resource site was added to the inventory).

347. Memorandum from Jim Rue, Dir., Or. Dep't of Land Conservation & Dev., & Rob Hallyburton, Cmty. Servs. Div. Manager, Or. Dep't of Land Conservation & Dev., to Or. Land Conservation & Dev. Comm'n 2 (Jan. 13, 2017).

348. 56 Or. Bull. 185 (Mar. 1, 2017) (codified as amended at OR. ADMIN. R. 660-023-0030, -0200).

349. OR. ADMIN. R. 660-023-0200(1)(h) (2021). Specifically, the 2017 amendments define "owner" as "the owner of fee title to the property" and exclude from that definition those

amendments also codify the holding in *Lake Oswego Preservation Society*.[350] Completing the Goal 5 process for new historic resources,

holding "easements or less than fee interests." OR. ADMIN. R. 660-023-0200(1)(h)(A), (D) (2021). That definition was intended to achieve consistency with the NHPA. Memorandum from Jim Rue & Rob Hallyburton to Or. Land Conservation & Dev. Comm'n, *supra* note 347, at 10–11. Similar to the landowner consent statute, the NHPA requires owner consent before land may be included on the National Register of Historic Places. *See supra* note 317. However, regulations adopted by the NPS to implement the NHPA define "owner" as those with "fee simple title to property" and exclude from that definition those with "easements or less than fee interests." 36 C.F.R. § 60.3(k) (2020).

The definition of "owner" in the 2017 amendments was also likely adopted in response to the Pilot Butte Canal controversy, which concerned attempts by residents of the Bend area to designate a portion of an irrigation canal as a historic resource to prevent the Central Oregon Irrigation District (COID) from piping and undergrounding it to prevent water loss. Jeanette Shupp, *Historic Pilot Butte Canal Threatened by Hydroelectric Project*, RESTORE OR. (Aug. 14, 2014), https://www.restoreoregon.org/2014/08/14/pilot-butte-canal/. Because COID objected, both the city and the county refused to designate the portion of the canal as a historic resource pursuant to the landowner consent statute. *Id.* However, because COID held only an easement for the canal, the Oregon SHPO refused to recognize COID as an owner. Ted Shorack, *Historic Listing for Pilot Butte Canal is Revisited*, BEND BULL. (Aug. 21, 2015), https://www.bendbulletin.com/localstate/historic-listing-for-pilot-butte-canal-is-revisited/article_76ef9bd3-9be2-59a2-9042-15ae66611e12.html. The portion of the canal was eventually included on the National Register of Historic Places. Ted Shorack, *Pilot Butte Canal Section Listed as Nationally Historic*, BEND BULL. (Feb. 9, 2016), https://www.bendbulletin.com/localstate/pilot-butte-canal-section-listed-as-nationally-historic/article_806a0827-1794-536f-af77-f41f2fba5867.html.

The 2017 amendments also define "owner" to mean, for historic resources with multiple owners, such as historic districts, "a simple majority of owners." OR. ADMIN. R. 660-023-0200(1)(h)(E) (2021). That definition was also intended to achieve consistency with the NHPA, since most local governments had construed the landowner consent statute to require consent from every owner in a proposed historic district. Memorandum from Jim Rue & Rob Hallyburton to Or. Land Conservation & Dev. Comm'n, *supra* note 347, at 10–11. The NHPA provides that property may not be included on the National Register of Historic Places if "a majority of the owners of privately owned properties within the district in the case of a historic district" object to such inclusion. *See supra* note 317. DLCD was aware that some neighborhoods had applied for inclusion on the National Register of Historic Places to avoid state and local laws that otherwise would have required increased residential density. Memorandum from Jim Rue & Rob Hallyburton to Or. Land Conservation & Dev. Comm'n, *supra* note 347, at 11; *see* Lyndsey Hewitt, *Historic Districts in Conflict with Moves to Boost Density*, PORTLAND TRIB. (Mar. 28, 2017), https://pamplinmedia.com/pt/9-news/351740-231108-historic-districts-in-conflict-with-moves-to-boost-density. DLCD's response was, essentially, that proposed historic districts would only be designated as such if they were in fact historic and, even then, the regulations that apply are dictated by local codes, not the designation itself. Memorandum from Jim Rue & Rob Hallyburton to Or. Land Conservation & Dev. Comm'n, *supra* note 347, at 11.

350. *See* OR. ADMIN. R. 660-023-0200(9)(a)(A) (2021) (providing that a local government need not remove a historic designation from land unless, in relevant part, the owner "[h]as retained ownership since the time of the designation"); *see supra* notes 343–346 and accompanying text. The 2017 amendments also codify the holding in *Demlow v. City of Hillsboro*. *See* OR. ADMIN. R. 660-023-0200(9)(a)(B) (2021) (providing that a local government need not remove a historic designation from land unless, in relevant part, the owner "[c]an

except for those included on the National Register of Historic Places, remains voluntary.[351] However, for those local governments that choose to do so, the amendments clarify the requirements for collecting information,[352] determining significance,[353] adopting resource lists,[354]

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demonstrate that [they] objected to the designation on the public record"); *see supra* note 346. A local government must also remove a historic designation from land if the requesting owner was not given an opportunity to object at the time of the designation. OR. ADMIN. R. 660-023-0200(9)(a)(C)–(D) (2021).

351. OR. ADMIN. R. 660-023-0200(2)(a) (2021).

352. OR. ADMIN. R. 660-023-0200(4) (2021).

353. OR. ADMIN. R. 660-023-0200(5) (2021). The criteria for determining whether a historic resource is significant may include, but are not limited to, the following:

> (A) Significant association with events that have made a significant contribution to the broad patterns of local, regional, state, or national history;
> (B) Significant association with the lives of persons significant to local, regional, state, or national history;
> (C) Distinctive characteristics of a type, period, or method of construction, or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components may lack individual distinction;
> (D) A high likelihood that, if preserved, would yield information important in prehistory or history; or
> (E) Relevance within the local historic context and priorities described in the historic preservation plan.

OR. ADMIN. R. 660-023-0200(5)(a) (2021). Local governments are encouraged to develop "historic context statements" and "historic preservation plans" to guide themselves in determining whether historic resources are significant and whether to apply additional protections to historic resources that are included on the National Register of Historic Places. OR. ADMIN. R. 660-023-0200(3), (5)(a), (8)(b) (2021). The resource-specific rule defines "historic context statement" as "an element of a comprehensive plan that describes the important broad patterns of historical development in a community and its region during a specified time period. It also identifies historic resources that are representative of the important broad patterns of historical development." OR. ADMIN. R. 660-023-0200(1)(c) (2021). The rule defines "historic preservation plan" as "an element of a comprehensive plan that contains the local government's goals and policies for historic resource preservation and the processes for creating and amending the program to achieve the goal." OR. ADMIN. R. 660-023-0030(1)(d) (2021). The governing body may delegate determinations of significance to another agency. OR. ADMIN. R. 660-023-0200(5)(b) (2021); *see* McLoughlin Neighborhood Ass'n v. City of Oregon City, 77 Or. LUBA 377, 382 (concerning an argument that a city council erroneously made a decision where the local code required the city's historic review board to make "[l]andmark designations" pursuant to OR. ADMIN. R. 660-023-0200(5)(b)), *aff'd*, 425 P.3d 799 (Or. Ct. App. 2018).

354. OR. ADMIN. R. 660-023-0200(6) (2021). The adoption or amendment of a resource list is a "land use decision" subject to LUBA's exclusive jurisdiction. OR. ADMIN. R. 660-023-0200(6)(a) (2021); OR. REV. STAT. § 197.825(1) (2019); *see* McLoughlin Neighborhood Ass'n v. City of Oregon City, 76 Or. LUBA 180, 182–83 (2017) (concerning two letters from a city to an applicant, explaining that the city was refusing to consent to the historic designation of land that it owned, which the city conceded were land use decisions under OR. ADMIN. R. 660-023-

and adopting local historic resource protection ordinances.[355] The 2017 amendments also establish a base level of protection for historic resources that are included on the National Register of Historic Places.[356]

0200(6)) (2021). *See generally* OR. REV. STAT. § 197.015(10) (2021) (defining "land use decision"). Consistent with the landowner consent statute, local governments must allow owners to refuse to consent to the "designation" of their land as a historic resource—that is, to the placement of their land on a resource list. OR. ADMIN. R. 660-023-0200(6)(b) (2021). However, local governments may place land on a historic resources inventory notwithstanding the owner's refusal to consent to the "designation" of their land as a historic resource. *Id.*

Like the placement of a resource site on a resource list, the removal of a resource site from a resource list is a land use decision. OR. ADMIN. R. 660-023-0200(9) (2021). Except for certain cases involving landowner consent, discussed *supra* note 350, such removal may occur only in one of the following circumstances:

> (A) The resource has lost the qualities for which it was originally recognized;
> (B) Additional information shows that the resource no longer satisfies the criteria for recognition as a historic resource or did not satisfy the criteria for recognition as a historic resource at time of listing;
> (C) The local building official declares that the resource poses a clear and immediate hazard to public safety and must be demolished to abate the unsafe condition.

OR. ADMIN. R. 660-023-0200(9)(b) (2021).

355. OR. ADMIN. R. 660-023-0030(7) (2021). Like before the 2017 amendments, the adoption of such ordinances replaces the standard ESEE decision and program implementation processes for historic resources. *Id.* (explaining the replacement of the program implementation process); OR. ADMIN. R. 660-023-0200(2)(c) (2021) (explaining the replacement of the ESEE decision process); *see supra* note 321 and accompanying text. However, unlike before the 2017 amendments, the adoption of such ordinances is *required*, not just "encouraged." OR. ADMIN. R. 660-023-0200(7) (2021) ("Local governments must adopt land use regulations to protect locally significant historic resources designated under section (6)."); *see supra* note 321 and accompanying text.

356. OR. ADMIN. R. 660-023-0030(8) (2021). Historic resources that are included on the National Register of Historic Places are *ipso facto* significant. *Id.* Whereas the 1996 administrative rules required local governments merely to review applications for the demolition, removal, or major exterior alteration of such resource sites, *see supra* note 324, the 2017 amendments require a public hearing process and provide a list of factors that local governments must consider in reviewing such applications. OR. ADMIN. R. 660-023-0200(8)(a) (2021). Unlike the 1996 administrative rules, the protections required by the 2017 amendments apply instantly upon a historic resource's inclusion on the National Register of Historic Places. OR. ADMIN. R. 660-023-0200(8)(c) (2021) ("Until such regulations are adopted, subsections (a) and (b) shall apply directly to National Register Resources."); *see* Niederer v. City of Albany, 79 Or. LUBA 305, 312–15 (2019) (concluding that a city's development code did not fully implement OR. ADMIN. R. 660-023-0200(8)(a) because the review criteria in the code did not include all of the factors in the 2017 amendments and that, as a result, the 2017 amendments applied directly to the city's decision to approve the demolition of three structures in a historic district that was included on the National Register of Historic Places). Local governments may apply additional protections to historic resources that are included on the National Register of Historic Places, beyond the base level required by the 2017 amendments. OR. ADMIN. R. 660-023-0200(8)(b) (2021). In determining whether to apply additional protections, local

With the 2017 amendments, the pendulum has swung back towards the actual protection of historic resources. While completing the Goal 5 process for new historic resources is still voluntary and subject to landowner consent, local governments now have clearer definitions, processes, and requirements. Of course, even where a local government's comprehensive plan and land use regulations comply with the resource-specific rule, decisions concerning historic resources must be supported by adequate findings.[357]

J. Cultural Areas

The original Goal defined "cultural area" as "an area characterized by evidence of an ethnic, religious or social group with distinctive traits, beliefs and social forms."[358] The 1981 administrative rules added no clarity. The 1996 administrative rules explain that they replace the 1981 administrative rules "*except with regard to cultural resources*."[359] As a practical matter, this resource category is distinguished from

governments must consider, among other things, any adopted "historic context statement" or "historic preservation plan." *Id.*; *see supra* note 353.

357. *See, e.g.*, Restore Or. v. City of Portland, LUBA Nos. 2018-072/073/086/087, 2019 WL 5130306, at *5–6 (Aug. 6, 2019) (remanding a city's decision to amend the height limits that applied to new buildings in a historic district in part because the findings did not explain how the height limits would "preserv[e] and complement[] historic resources," as required by a comprehensive plan policy), *aff'd*, 458 P.3d 703, 708–12 (Or. Ct. App. 2020).

358. ORIGINAL GOALS, *supra* note 10, at 17.

359. OR. ADMIN. R. 660-023-0250(1) (2021) (emphasis added). That is consistent with the recommendation of LCDC's Goal 5 Subcommittee:

> This resource category pertains to cultural and other resources that are of concern to Native American Tribes. Local governments have expressed the concern that the Goal 5 process is not the most appropriate way to consider these resources in the land use planning process. However, [LCDC] should not consider changes to the current rules without providing a process to involve interested tribes.
>
> The Governor's Office is developing a "government-to-government" agreement concerning how state agencies will consider rules affecting the interests of Native American Tribes. Therefore, the subcommittee postponed work on cultural resources. The subcommittee has recommended that cultural resources not be addressed until the conclusion of the governor's effort .... Until amendments are considered for this resource, the [1981 administrative rules] would remain in effect.

SUBCOMMITTEE REPORT, *supra* note 52, at 23. One reason the 1996 administrative rules have not been amended to apply to cultural areas is that tribal governments are concerned about the public disclosure of information concerning those resource sites, and they have looked to more effective legal means, such as the NHPA, to protect them. *See* e-mail from Steve Pfeiffer, former Comm'r, Or. Land Conservation & Dev. Comm'n, to Edward J. Sullivan (Feb. 8, 2021) (on file with authors).

historic resources by its association with archeological objects and sites.[360]

Most of the LUBA cases dealing with this resource category involve Native American cultural areas and illustrate the need for public participation as well as adequate inventories and programs to achieve Goal 5. In *Nez Perce Tribe v. Wallowa County*, LUBA remanded a county's decision to approve a preliminary plat for a subdivision because the county planning commission rejected, without explanation, relevant evidence including "some twenty odd letters and reports concerning cultural resources that supported [the] argument of statewide goal 5 violations."[361] The county's program to achieve Goal 5 with respect to cultural areas applied to "sites involving known or highly probable potential cultural resources including historic or prehistoric sites, buildings, objects, and properties related to American and Native American history, architecture, archaeology and culture, such as settler or Native American artifacts."[362] That program required that development proposals for such sites include a survey and assessment of the site "by authorities judged competent by the review authority" as well as a management plan to protect cultural resources identified by the assessment.[363] The county was required to "communicate" with tribal representatives regarding the authority chosen to conduct the assessment, and the management plan was required to comply with various federal and state laws relating to the protection of historic, archaeological, and Native American sites.[364] Although the subject property was not included on the county's cultural areas inventory, the county did not argue that its program to achieve Goal 5 was inapplicable to the subject property.[365] Accordingly, an additional basis for LUBA's remand was the county's decision to defer consideration of compliance with that program to final plat approval, a

360. Such resources are also protected by state statute. *See* OR. REV. STAT. §§ 358.905–.961 (2019) (generally setting out requirements for the protection of and prohibiting certain conduct related to archeological objects and sites, whether on public or private land, including their unpermitted excavation, destruction, and removal).

361. Nez Perce Tribe v. Wallowa County, 47 Or. LUBA 419, 424–25, *aff'd*, 106 P.3d 699 (Or. Ct. App. 2004).

362. *Id.* at 443 n.19.

363. *Id.*

364. *Id.*

365. *Id.* at 449.

proceeding that did not provide the same public participatory rights as preliminary plat approval.[366]

Perhaps unsurprisingly, many of the cases concern conflicts between cultural areas and uses involving large amounts of excavation, particularly mineral and aggregate resource uses. In *Rogue Advocates v. Josephine County*, a county approved an application to allow the development of an aggregate mine.[367] The petitioners acknowledged that the subject property was not included on the county's cultural areas inventory, but, concerned "that the mining operation could uncover cultural and archaeological artifacts from Indian tribes that formerly occupied the area," they nonetheless argued that the county should have conditioned its approval on the applicant complying with several state and federal laws requiring consultation with tribal and state officials and other protective steps if any cultural resources were discovered in the course of mining.[368] Because there was "no land use regulation or other applicable law that require[d] the county to adopt findings addressing compliance with state and federal laws concerning preservation of cultural and archeological resources, or to adopt conditions of approval requiring compliance with such laws," LUBA denied that assignment of error.[369]

In *Walker v. Deschutes County*, a county approved an application to allow surface mining.[370] Two of the petitioners' arguments concerned Native American cultural areas. The applicant had an archaeological survey conducted for the portion of the subject property that would have been mined and, although the survey found a prehistoric tool manufacturing site, among others, the expert who conducted the survey concluded that those cultural areas were not significant and that the mine would not impact any cultural areas that were significant.[371] The petitioners argued that the county erred by not requiring the applicant to survey the entire subject property.[372] Because the remainder of the subject property was within a 600-foot buffer area between the mine and a highway, because the buffer area would not

366. *Id.* at 443–47. Because the county's program to achieve Goal 5 was not yet acknowledged, the county was also required to adopt findings addressing compliance with the Goal itself, which it had done. *Id.* at 425–26.

367. Rogue Advocs. v. Josephine County, 72 Or. LUBA 275, 278 (2015).

368. *Id.* at 291–92.

369. *Id.* at 292.

370. Walker v. Deschutes County, 55 Or. LUBA 93, 95 (2007).

371. *Id.* at 109–10.

372. *Id.* at 110.

have been mined, and because no law required the applicant to survey an area that would not have been mined for undiscovered cultural areas, LUBA denied that assignment of error.[373]

In addition to the nonsignificant cultural areas on the subject property, a nearby property contained Native American pictograms.[374] Although the pictogram site was not included on the county's cultural areas inventory, the petitioners argued that the pictograms constituted "existing" uses with which the county was required to evaluate conflicts due to "discharges" from the mine.[375] The petitioners argued that (1) the county failed to consider impacts on the pictograms from "discharges" such as potential wildfires and diesel exhaust; (2) while the county did consider impacts from vibrations and dust on the pictograms, the vibration study on which the county relied was inadequate; and (3) the county failed to consider impacts from the mine on Native American religious and cultural visits to the pictogram site.[376] Because the petitioners cited no evidence that the mine would have increased the risk of either wildfire or diesel exhaust impacts on the pictograms, because the mine and the pictogram site were located in the already-dry Oregon high desert and were separated by a highway, and because the petitioners failed to demonstrate that the vibration study on which the county relied was not substantial evidence, LUBA denied most of those assignments of error.[377] However, LUBA agreed with the petitioners regarding impacts on the religious and cultural visits to the pictogram site:

> The issue of native American religious and cultural use of the area around the pictograms is a more difficult one. Intervenor does not respond to that argument, and nothing cited to us in the decision addresses it. Petitioners cite to testimony that the area around the pictograms includes numerous burial sites, and that tribal members visit the area to conduct religious and cultural ceremonies honoring their ancestors. A tribal cultural resource protection specialist stated

373. *Id.* at 110–11.

374. *Id.* at 111.

375. *Id.* at 112–13. The resource-specific rule for mineral and aggregate resources enumerates specific types of conflicts that local governments are allowed to consider in identifying conflicting uses, including "[c]onflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges." OR. ADMIN. R. 660-023-0180(5)(b)(A) (2021); *see supra* notes 129–130 and accompanying text.

376. *Walker*, 55 Or. LUBA at 111–13.

377. *Id.*

> that the proposed mining operation would destroy an area that demands quiet for tribal members that visit for religious and cultural purposes. Absent some response from intervenor or the county on this issue, we agree with petitioners that remand is necessary for the county to evaluate whether such visits are "existing" uses for purposes of [the resource-specific rule for mineral and aggregate resources] and, if so, to evaluate alleged conflicts with those uses.[378]

On remand, the county concluded that, because religious and cultural visits to the pictogram site did not occur on a regular basis, they were not "existing uses" for purposes of the resource-specific rule for mineral and aggregate resources.[379] Alternatively, the county concluded that blasting noise would not interfere with such visits because a condition of approval restricted blasting activities for up to three days following notice of such visits.[380] Although LUBA disagreed with the county that a use is not an "existing use" for purposes of the resource-specific rule for mineral and aggregate resources unless it occurs on a regular basis, LUBA concluded that the condition of approval was a valid basis for the county to determine that any conflicts between the mine and the religious and cultural visits to the pictogram site would be minimized.[381]

A more successful strategy for the protection of Native American cultural areas under Goal 5 is involving tribes in land use matters where tribal interests are at stake. In *Southern Oregon Pipeline Information Project, Inc. v. Coos County*, a county granted conditional use approval for a liquefied natural gas import terminal.[382] A comprehensive plan policy required applicants for development proposals involving cultural areas to submit site plans showing the areas proposed for excavation, which the county was, within three working days of receipt, required to share with certain tribes.[383] Those tribes then had thirty days to comment on whether the project would protect any cultural resources at the site or, if not, whether it could be modified by "appropriate

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378. *Id.* at 113.

379. Walker v. Deschutes County, 59 Or. LUBA 488, 498–99 (2009).

380. *Id.* at 499. Once a conflict is identified, the resource-specific rule for mineral and aggregate resources requires local governments to "determine reasonable and practical measures that would minimize [such] conflicts." OR. ADMIN. R. 660-023-0180(5)(c) (2021); *see supra* note 137 and accompanying text.

381. *Walker*, 59 Or. LUBA at 499–500.

382. S. Or. Pipeline Info. Project, Inc. v. Coos County, 57 Or. LUBA 44, 46, *aff'd*, 196 P.3d 123 (Or. Ct. App. 2008).

383. *Id.* at 60 n.7.

measures" to do so.[384] If the project would have no adverse impacts on the cultural resources, then the county was required to approve the application.[385] If the tribes and the applicant agreed to appropriate measures to protect the cultural resources, then the local government was required to approve the application subject to those measures and any additional measures that the county deemed necessary.[386] Lastly, if the tribes and the applicant could not agree on appropriate measures to protect the cultural resources, then the county was required to hold a quasi-judicial hearing to determine whether the project could be modified to do so, in which case it could proceed subject to those modifications.[387]

Although some amount of coordination and communication had taken place between the tribes and the applicant, several tribal representatives expressed concerns regarding the county's ability to ensure that the applicant would adequately identify and protect cultural resources.[388] Despite that indication that the tribes and the applicant had not agreed to appropriate mitigation measures, the county concluded that the applicant had complied with the comprehensive plan policy and imposed a condition of approval requiring the applicant to adopt a "resource identification and protection plan," coordinate with the tribes and the Oregon SHPO, provide a copy of the plan to the county, and provide the tribes with notice seventy-two hours before conducting ground-disturbing activity.[389] The petitioner argued, and LUBA agreed, that the county erred by failing to conduct the required quasi-judicial hearing to resolve the disagreement between the tribes and the applicant and to adopt measures necessary to protect the cultural resources, and by instead allowing the applicant to adopt those

384. *Id.* The policy provided examples of "appropriate measures," including "[r]etaining the prehistoric and/or historic structure in situ or moving it intact to another site," "[p]aving over the site without disturbance of human remains or cultural objects upon the written consent of the Tribe(s)," and "[c]lustering development so as to avoid disturbing the site," among others. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* Throughout the entire process, the policy provided that the county would "refrain from widespread dissemination of site-specific information about identified archaeological sites." *Id.* Other local governments' programs to achieve Goal 5 with respect to cultural areas contain similar provisions. *See* Dorgan v. City of Albany, 27 Or. LUBA 64, 76–77 (1994) (involving a comprehensive plan policy requiring a city to, "[i]n cooperation with state agencies, determine the location of any known archaeological sites as information becomes available and protect available information to minimize vandalism of the site").

388. *S. Or. Pipeline Info. Project, Inc.*, 57 Or. LUBA at 62.

389. *Id.* at 63 n.8.

measures itself after further coordination with the tribes.[390] Although it was possible for the county to defer the required quasi-judicial hearing to a point in time after conditional use approval, the county's decision did not ensure that it would occur before building permit approval.[391]

A later case, *Oregon Shores Conservation Coalition v. Coos County*, involved the same applicant and the same comprehensive plan policy.[392] That time, however, the applicant sought conditional use approval for a liquefied natural gas *export* terminal.[393] The county expressly deferred consideration of the comprehensive plan policy to a subsequent proceeding and adopted a condition of approval to that effect.[394] On appeal, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians intervened on behalf of the petitioner. Because the condition of approval did not specify how or when the subsequent proceeding would be initiated, and, therefore, did not ensure that it would be completed prior to development; because the county did not find that eventual compliance with the comprehensive plan policy was "feasible;" and because it was unclear to LUBA whether the comprehensive plan policy was the kind of approval standard that could be deferred in the first place, given the special role that it ascribed to the tribes, LUBA agreed with the tribes that the county erred in deferring consideration of the comprehensive plan policy and remanded the decision.[395] In both *Southern Oregon Pipeline* and

390. *Id.* at 65–66.

391. *Id.* at 67–68.

392. Or. Shores Conservation Coal. v. Coos County, 76 Or. LUBA 346 (2017), *aff'd*, 416 P.3d 1110 (Or. Ct. App. 2018).

393. *Id.* at 350.

394. *Id.* at 376–77.

395. *Id.* at 379–80. Rather than adopting the requisite findings regarding feasibility, the county simply found that the applicant's request to defer consideration of the comprehensive plan policy "seemed reasonable." *Id.* at 379. LUBA explained:

> [The comprehensive plan policy] clearly contemplates that resolution of issues raised by the Tribes, which may change the scope, scale and footprint of the development proposal considerably, or even cause it to be denied outright, will be completed before the development is approved.
>
> Moreover, it is important to note that [the comprehensive plan policy] requires coordination with and the resolution of disputes raised by a *sovereign* government. Under [the comprehensive plan policy], the Tribes are not merely another participant in the proceedings. The Tribes are entitled under [the comprehensive plan policy] to special notification and consideration of issues raised, as well as the power to compel the applicant into negotiations to resolve those issues, and to compel county resolution of unsuccessfully negotiated issues. That power is considerably vitiated if the applicant can first obtain county approval of the proposed development, and only then

Oregon Shores, some measure of protection for cultural areas was vindicated by LUBA's decision.

Cultural areas are distinguishable from historic resources in that the former are more concerned with the history and cultural heritage of Native Americans. While the 1996 administrative rules continued the regime of the 1981 administrative rules with respect to cultural areas, DLCD's 2021-2023 Policy Agenda includes a "Goal 5 Rule Update for Cultural Resources," indicating that that may not be the case for much longer.[396] Most recently, the case law seems to be centered on conflicts between cultural areas and coastal pipeline projects. Litigation of that sort is likely to increase as tribes become more successful in terms of the inclusion of their interests in local comprehensive plans and the enforcement of those interests through land use regulations.

> sit down with the Tribes to negotiate changes to the approved development. Given the inertia of an existing conditional use permit approval, the county is less likely in a deferred . . . proceeding to force the applicant to accept changes to a development proposal that the county has already considered and approved. It is even less likely in such a deferred proceeding that the county would take seriously arguments that the application cannot comply with [the comprehensive plan policy] and must be (retroactively) denied.

Id. at 380.

396. OR. DEP'T OF LAND CONSERVATION & DEV., 2021-2023 POLICY AGENDA 9(2021), https://www.oregon.gov/lcd/Commission/Documents/2021-11_Item-8-DLCD-2021-2023-Policy-Agenda_Attachment-A_DLCD-Full-Policy-Agenda.pdf. The agenda states:

> For various reasons, local protection measures have not manifested as originally envisioned in the goal. Local protections are weak or non-existent in many communities. . . .
>
> A new administrative rule for Goal 5 Cultural Areas would correct the lack of implementation of the Goal. It would emphasize that appropriate confidentiality measures must be maintained for data on archeological sites and improve protection of areas and items that are sacred to one or more tribes in Oregon.
>
> The objectives of this rule writing are to ensure:
>
> - Existing data on known and suspected archeological sites is used to avoid disturbance from locally permitted development activities while maintaining appropriate confidentiality measures;
> - Landowners and developers are informed, through the local permitting process, of existing state and federal law pertaining to unintended disturbance of archeological sites;
> - Native American artifacts, human remains and associated funerary objects are treated lawfully and with respect.

Id.

K. Potential and Approved Oregon Recreation Trails

Neither the original Goal nor the 1981 administrative rules defined this resource category, and no cases arose that concerned it. There was no further description in the amended Goal; however, both the amended Goal and the 1996 administrative rules limit the resource category from "potential and approved" Oregon recreation trails to only "approved" Oregon recreation trails,[397] *i.e.*, those recreation trails designated by the Oregon Parks and Recreation Department (OPRD).[398] Local governments are not required to complete the standard inventory process for Oregon recreation trails; instead, they must designate all OPRD-designated recreation trails as significant resource sites.[399] Local governments are also not required to complete the standard ESEE decision or program implementation processes for Oregon recreation trails unless they choose to supplement OPRD protections—for example, by imposing setbacks and other buffers.[400] There is only one case involving Oregon recreation trails, *Oregon Shores Conservation Coalition v. Lincoln County*, which concerned (1) a county's decision to vacate a portion of a county road right-of-way and (2) comprehensive plan and zoning ordinance provisions protecting another portion of the right-of-way for a planned border-to-border coastal trail.[401]

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397. *Compare* ORIGINAL GOALS, *supra* note 10, at 17, *with* CURRENT GOALS, *supra* note 1, at 22, *and* OR. ADMIN. R. 660-023-0150 (2021).

398. OR. ADMIN. R. 660-023-0150(1) (2021). OPRD designates recreation trails by rule pursuant to the Oregon Recreation Trails System Act of 1971. Oregon Recreation Trails System Act, ch. 614, 1971 Or. Laws 1137 (codified as amended at OR. REV. STAT. §§ 390.950–.989 (2019)); OR. ADMIN. R. 736-009-0005 to -0030 (2021). For a list of OPRD-designated trails, see *Scenic and Regional Trails*, OR. PARKS & RECREATION DEP'T, https://stateparks.oregon.gov/index.cfm?do=v.page&id=61 (last visited July 14, 2021).

399. OR. ADMIN. R. 660-023-0150(2) (2021). At periodic review, local governments must amend their comprehensive plans to include any recreation trails designated by OPRD that are not already included. *Id.*

400. OR. ADMIN. R. 660-023-0150(3) (2021). The resource-specific rule for Oregon recreation trails comports with the recommendation of LCDC's Goal 5 Subcommittee, which observed that such a rule would require no changes to acknowledged comprehensive plans and no ESEE decision processes for future Oregon recreation trails, which are already protected through easements or other means before OPRD designation. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 52.

401. Or. Shores Conservation Coal. v. Lincoln County, 38 Or. LUBA 699, 706–12 (2000). For more information on the trail at issue in that case, see *Oregon Coast Trail*, OR. PARKS & RECREATION DEP'T, https://stateparks.oregon.gov/index.cfm?do=v.page&id=95 (last visited October 28, 2021).

Changes to the list of resource sites in this resource category depend on decisions by OPRD to designate additional Oregon recreation trails. At the moment, such activity is moribund.

L. *Potential and Approved Federal Wild and Scenic Waterways and State Scenic Waterways*

The original Goal listed federal wild and scenic waterways and state scenic waterways together.[402] The 1981 administrative rules barely discussed that resource category,[403] and there were no cases concerning it. The amended Goal lists federal wild and scenic rivers and state scenic waterways separately.[404] The 1996 administrative rules followed suit, though they refer to the latter resource category as Oregon scenic waterways.[405] In addition, the amended Goal and the 1996 administrative rules eliminate any reference to "potential" rivers and waterways, indicating that, as with Oregon recreation trails, these resource categories include only currently designated rivers and waterways as well as those designated in the future under federal or state law.[406]

The resource-specific rules for federal wild and scenic rivers and Oregon scenic waterways are very similar. As with Oregon recreation trails, local governments are not required to complete the standard inventory process for these resource categories; instead, they must designate all federally designated rivers and OPRD-designated waterways as significant resource sites.[407] Local governments may complete the standard ESEE decision and program implementation processes for state scenic waterways, and they must complete those

402. ORIGINAL GOALS, *supra* note 10, at 17.

403. OR. ADMIN. R. 660-016-0000(2) (2021) ("Some Goal 5 resources (e.g., natural areas, historic sites, mineral and aggregate sites, scenic waterways) are more site-specific than others (e.g., groundwater, energy sources).").

404. CURRENT GOALS, *supra* note 1, at 22.

405. OR. ADMIN. R. 660-023-0120, -0130 (2021).

406. *Id.* Congress designates federal wild and scenic rivers pursuant to the Wild and Scenic Rivers Act of 1968. Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271–1287 (2018)). The NPS has adopted implementing regulations. 36 C.F.R. §§ 297.1–.6 (2020). OPRD designates state scenic waterways pursuant to the Oregon Scenic Waterways Act of 1970. Oregon Scenic Waterways Act, ch. 1, 1971 Or. Laws 9 (1970) (codified as amended at OR. REV. STAT. §§ 390.805–.925 (2019)). OPRD has adopted implementing administrative rules. OR. ADMIN. R. 736-040-0005 to -0120 (2021).

407. OR. ADMIN. R. 660-023-0120(2), -0130(2) (2021). At periodic review, local governments must amend their comprehensive plans to include any rivers and waterways designated by Congress and OPRD that are not already included. OR. ADMIN. R. 660-023-0120(1), -0130(1) (2021).

processes for federal wild and scenic rivers; however, they may delay that completion until the federal government and OPRD adopt management plans for those resource sites.[408] Programs to achieve Goal 5 must be consistent with any such management plans.[409] Indeed, the resource-specific rule for state scenic waterways provides a "safe harbor" approach, under which the local government need not complete the standard ESEE decision and program implementation processes if it simply amends its comprehensive plan and zoning ordinance to implement the OPRD management plan.[410] If a federal wild and scenic river is also a state scenic waterway, then the local government need only apply the resource-specific rule for state scenic waterways.[411]

The only case that has involved these resource categories is *Johnson v. Jefferson County*, which concerned county zoning ordinance and comprehensive plan amendments allowing destination resorts.[412] The county's inventory of federal wild and scenic rivers and

408. OR. ADMIN. R. 660-023-0120(3), -0130(3) (2021). As discussed below, the standard ESEE decision and program implementation processes are optional for state scenic waterways. *See infra* note 410 and accompanying text. LCDC's Goal 5 Subcommittee recommended requiring the standard ESEE decision and program implementation processes for federal wild and scenic rivers to address uses on adjacent private lands that are not regulated by the federal government. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 53. In completing the ESEE decision process for federal wild and scenic rivers, the impact area is the river corridor, as established by the federal government. OR. ADMIN. R. 660-023-0120(4) (2021). For state scenic waterways, the impact area includes the waterway as well as "adjacent lands," meaning lands within one-quarter mile of the riverbank. OR. ADMIN. R. 660-023-0130(4) (2021); OR. REV. STAT. § 390.805(1) (2021). If local governments choose to delay the standard ESEE decision and program implementation processes until management plans are adopted, then they must notify the federal government and OPRD of proposed development and land use changes within river and waterway corridors. OR. ADMIN. R. 660-023-0120(3), -0130(3)(a) (2021). For state scenic waterways, local governments must also notify any landowners proposing development within waterway corridors of the landowners' notice obligations under section 390.845 of the Oregon Revised Statutes. OR. ADMIN. R. 660-023-0130(3)(b) (2021). Under that statute, owners must notify OPRD one year in advance of putting land within waterway corridors to certain uses. OR. REV. STAT. § 390.845(3) (2021). If OPRD determines that the proposal would not "impair substantially the natural beauty of the scenic waterway," then the owner may proceed with the proposal immediately. *Id.* § 390.845(4). However, if OPRD determines that the proposal would result in such impairment, then OPRD may either negotiate with the landowner for modifications or alterations of the proposal or OPRD may acquire the land. *Id.* § 390.845(4)–(7).

409. OR. ADMIN. R. 660-023-0120(4), -0130(4) (2021).

410. OR. ADMIN. R. 660-023-0130(5) (2021). That is consistent with the Subcommittee's recommendation, which was to make the ESEE process optional for state scenic waterways due to the existing statutory program to protect them. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 53; *see* Oregon Revised Statutes cited *supra* note 406.

411. OR. ADMIN. R. 660-023-0120(5) (2021).

412. Johnson v. Jefferson County, 56 Or. LUBA 72, 76, *aff'd*, 189 P.3d 30 (Or. Ct. App. 2008).

state scenic waterways included the headwaters of the Metolius River, and the county's program to achieve Goal 5 with respect to the river consisted of resource zoning and reliance on federal and OPRD protections:

> "Metolius River" was identified as a "Potential State & Federal Wild and Scenic River." It was defined as approximately 24 river miles from Head of the Metolius to the slackwater of Lake Billy Chinook. The determination to limit conflicting uses stated: "Until designation is finalized, Jefferson County will place resource zoning on the subject area sufficient to substantially protect the national values present." The Metolius River now has been designated a State Scenic Waterway and a "scenic" and "recreational" river under the Federal Wild and Scenic River Act. Those laws regulate uses of the river itself and development within one-quarter mile of the riverbank.[413]

The petitioners argued that the county was required but failed to apply Goal 5 in adopting the amendments.[414] LUBA concluded that the county's program to achieve Goal 5 was concerned with conflicting uses that were "proximate" to the river and noted that the areas eligible for the destination resorts were more than two miles away.[415] In addition, while the resorts could have impacted a groundwater resource affecting the river, LUBA observed that the groundwater resource was not itself inventoried due to inadequate information and concluded that, in that circumstance, the 1996 administrative rules prohibited the county from protecting it.[416] Accordingly, LUBA concluded that the amendments did not allow new uses that could conflict with the river.[417] Although LUBA remanded the decision on other grounds,[418] the petitioners appealed and the Oregon Court of Appeals agreed with LUBA.[419] The Oregon Supreme Court initially allowed review of the

413. *Id.* at 98–99.

414. *Id.* at 98.

415. *Id.* at 99.

416. *Id.* at 99–100 (citing OR. ADMIN. R. 660-023-0030(3) (2008)); *see supra* note 70 and accompanying text.

417. *Johnson*, 56 Or. LUBA at 100.

418. *Id.* at 100–04, 112 (concerning the evidentiary support for the county's determination that traffic and roadway improvements associated with the destination resorts would not conflict with inventoried wildlife habitat).

419. Johnson v. Jefferson County, 189 P.3d 30 (Or. Ct. App. 2008).

case;[420] however, it dismissed that review as moot when the Oregon Legislature designated the Metolius Area of Critical State Concern.[421]

As with Oregon recreation trails, planning with respect to these resource categories depends on the work of independent state and federal agencies.

M. Metro Regional Resources

Metro is the regional government for the Portland metropolitan area.[422] There were no Metro-specific provisions in the original Goal or the 1981 administrative rules, and there is no such provision in the amended Goal. Instead, this authority is contained solely in the 1996 administrative rules.[423] The rule for Metro regional resources allows Metro to "adopt one or more regional functional plans to address all applicable requirements of Goal 5 for one or more resource categories and provide time limits for local governments to implement the plan."[424] In 2005, Metro adopted its Nature in Neighborhoods program to implement the rule for Metro regional resources.[425] That program

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420. Johnson v. Jefferson County, 200 P.3d 147 (Or. 2008).

421. Johnson v. Jefferson County, 218 P.3d 541 (Or. 2009); Act of July 15, 2009, ch. 712, 2009 Or. Laws 2321 (codified as amended at OR. REV. STAT. § 197.416 (2019)); *see also* e-mail from Paul Dewey, Strategic Advisor, Cent. Or. LandWatch, to Edward J. Sullivan (Feb. 23, 2021) (on file with authors).

422. OR. ADMIN. R. 660-023-0080(1)(a) (2021) ("'Metro' is the Metropolitan Service District organized under ORS Chapter 268, and operating under the 1992 Metro Charter, for 24 cities and certain urban portions of Multnomah, Clackamas, and Washington counties."). *See generally* Carl Abbott, *Metro Regional Government*, OR. ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/metro/#.YJbxf2ZKi8o (last visited May 8, 2021) (explaining Metro's history and function).

423. OR. ADMIN. R. 660-023-0080 (2021).

424. OR. ADMIN. R. 660-023-0080(3) (2021). Such functional plans must be submitted to LCDC for acknowledgment, after which local governments within Metro's jurisdiction must apply the requirements of the functional plan, as opposed to the 1996 administrative rules, to the resource categories addressed thereby. *Id.* LCDC's Goal 5 Subcommittee reported that Metro had identified open space and riparian corridors throughout its jurisdiction that it believed local governments should consider (presumably for protection) as soon as possible. SUBCOMMITTEE RECOMMENDATIONS, *supra* note 52, at 31. The Subcommittee recommended that local governments be required to address those resource sites at the first periodic review following the adoption of the 1996 administrative rules. *Id.* However, Metro requested a means of protecting them in the interim. *Id.*

425. Metro, Or., Ordinance 05-1077C (Sept. 29, 2005) (codified as amended at METRO, OR., CODE §§ 3.07.1310–.1370 (2018)). Even before the adoption of the Nature in Neighborhoods program, however, Metro was able to use the requirements of other statewide planning goals to protect Goal 5 resources. *See* METRO, OR., CODE §§ 3.07.310–.370 (governing "water quality and flood management," implementing Statewide Planning Goals 6 (Air, Water and Land Resources Quality) and 7 (Areas Subject to Natural Hazards), and protecting wetland

generally consists of a Regionally Significant Fish and Wildlife Habitat Inventory Map identifying regionally significant resource sites; a Habitat Conservation Areas Map identifying those regionally significant resource sites that Metro has, through an ESEE decision process, determined warrant conservation; a set of performance standards and best management practices applicable to those resource sites warranting conservation; and several alternative implementation methods for local governments.[426] Thus, the rule for Metro regional resources has proven successful, at least for riparian corridors.[427]

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and riparian corridors without using the terminology or processes of Goal 5 to do so); e-mail from Mike Houck, former Urb. Naturalist, Portland Audubon, to Edward J. Sullivan (Dec. 30, 2020) (on file with authors).

426. METRO, OR., CODE §§ 3.07.1320–.1340. Among those implementation methods is (1) adopting a model ordinance prepared by Metro and (2) demonstrating that existing or amended comprehensive plan and zoning ordinance provisions will substantially comply with the Nature in Neighborhoods program's performance standards and best management practices. *Id.* § 3.07.1330(b)(1)–(2). Another implementation method incorporates the Tualatin Basin program. *Id.* § 3.07.1330(b)(5). In 2002, Metro, Washington County, eight cities, and two special districts began developing a coordinated program to achieve Goal 5 with respect to fish and wildlife habitat within the Tualatin Basin by encouraging landowners and developers to implement habitat friendly development practices. TUALATIN BASIN STEERING COMM., TUALATIN BASIN GOAL 5 PROGRAM IMPLEMENTATION REPORT: ENCOURAGING HABITAT FRIENDLY DEVELOPMENT PRACTICES (2007), https://www.co.washington.or.us/LUT/Divisions/LongRangePlanning/Publications/loader.cfm?csModule=security/getfile&pageid=592831. The Tualatin Basin program, along with the use of surface water management fees, has improved water quality and the environmental health of the region. E-mail from Michelle Miller, Senior Planner, Washington Cnty., to Edward J. Sullivan (Mar. 2, 2021) (on file with authors).

427. Due to fears over takings claims under Oregon Ballot Measure 37, most of the wildlife habitat (but not riparian corridors) within the Metro UGB was not designated for conservation. METRO, OR., CODE § 3.07.1320(b)(1) (designating for conservation only the wildlife habitat within the Metro UGB that is "within publicly-owned parks and open spaces, except for parks and open spaces where the acquiring agency clearly identified that it was acquiring the property to develop it for active recreational uses"); e-mail from Mike Houck, former Urb. Naturalist, Portland Audubon, to Edward J. Sullivan (July 23, 2021) (on file with authors); *see* discussion of Measure 37 *infra* note 454 and accompanying text. However, while most of the wildlife habitat within the Metro UGB was not designated for conservation, the Nature in Neighborhoods program contains a "no rollback" provision that prohibits local governments that have already adopted programs to achieve Goal 5 with respect to wildlife habitat from repealing or amending those programs "in a manner that would allow any more than a de minimis increase in the amount of development that could occur in [those] areas." METRO, OR., CODE § 3.07.1330(a)(2); *see* Metro v. City of Lake Oswego, 68 Or. LUBA 136 (2013) (interpreting and applying the "no rollback" provision). For example, the City of Portland has adopted an environmental overlay zone that it applies to wildlife habitat not designated for conservation by Metro. *See* CITY OF PORTLAND, 4 ENVIRONMENTAL OVERLAY ZONE MAP CORRECTION PROJECT 18 (proposed draft 2020), https://www.portland.gov/sites/default/files/2020-07/proposeddraft_v4_compliancereportcombined.pdf. For more on the City of Portland's extensive Nature in Neighborhoods compliance program, see CITY OF PORTLAND, TITLE 13 –

As the Nature in Neighborhoods program demonstrates, Metro has taken an active role in regional resource conservation planning, at least with respect to wildlife habitat and riparian corridors. That is likely a reflection of the urban voters of the region, who support the preservation of fish and wildlife habitat and open space to such a degree that they have allowed the use of property taxes for the acquisition and maintenance of lands for those purposes.[428] Given its voters' willingness to pay for resource protections, Metro will likely explore additional open space and natural resource land acquisition and regulation in the future.

IV. EVALUATION OF THE GOAL 5 PROTECTIVE SYSTEM

As it approaches its half-century mark, the resource protection system provided by Goal 5 remains in place. The Goal has provided an important tool for resource protection that has, for the most part, withstood legal and political challenges over time. Certain cultural areas and historic resources are preserved for future generations. Recreation trails, wild and scenic rivers, and scenic waterways are

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NATURE IN NEIGHBORHOODS, REQUEST FOR METRO DETERMINATION OF SUBSTANTIAL COMPLIANCE (2012), https://www.portlandoregon.gov/bps/article/421365.

428. *See Parks and Nature Investments*, METRO, https://www.oregonmetro.gov/public-projects/parks-and-nature-investments/funding (last visited July 20, 2021) ("Two decades of voter investments have allowed Metro—on behalf of the public—to protect clean water, restore fish and wildlife habitat and provide opportunities to experience nature close to home .... By approving bond measures in 1995, 2006 and 2019, voters asked Metro to acquire land, award community nature grants for capital improvements and provide money to local parks providers. As a result, Metro has protected more than 13,000 acres. Hundreds of community nature projects have also received a boost through grants and allocations to local cities, counties and park providers. In November 2019, 67% of voters across greater Portland approved a renewal of the 2006 bond. The bond, which will raise $475 million, supports six program areas: land purchase and restoration, improvements at Metro parks, Nature in Neighborhoods capital grants, 'local share' money to support local park providers, walking and biking trails, and complex community projects. The 1995 bond measure raised $136 million. The 2006 bond measure raised $227 million."). Bob Sallinger characterizes those efforts as only partially successful:

> First, although Metro has delivered on its promise to pass acquisition bond measures, there is no way that we can adequately protect significant upland natural resources with acquisition alone. It takes a combination of both regulation and acquisition. Second, Nature in Neighborhoods was supposed to include a variety of other strategies as well such as programs to work with developers to promote nature friendly development practices. These types of auxiliary programs lasted for a few years but eventually were discontinued. Third[,] Metro has done an inadequate job of tracking loss of upland resources over time.

E-mail from Bob Sallinger to Edward J. Sullivan, *supra* note 15.

protected from incompatible uses. Mineral and aggregate resource operations and their neighbors know the limits of each other's activities.

However, those benefits are dependent on the vigilance and continued participation of a diverse and perhaps counterintuitive coalition of interest groups, consumers, conservationists, public professionals, and citizen watchdogs.[429] In addition, the system will stall if new resource sites are not considered during the PAPA process, if their significance is misevaluated, or if local governments conduct inadequate ESEE analyses.

One report on fish and wildlife habitat protection under the Oregon planning program and Goal 5 conceded:

> There can be little doubt that Oregon's land use planning laws have benefited fish and wildlife. The program's focus on preventing development on productive resource lands has resulted in long-term protection of large, unbroken tracts of forest and agricultural land. While most of this land is managed for economic uses, in many cases it also serves to provide nesting, feeding and cover areas, migration corridors and other essential components of habitat for fish and wildlife. Rural subdivisions, widely regarded as threats to habitat conservation in most of the West, are of less concern in Oregon. Second, flawed though it may be, Goal 5 has resulted in the recognition and at least partial protection by local governments of habitat resources that might otherwise have been lost entirely. As local governments apply the "new" Goal 5 in the future, it may accomplish more.[430]

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429. *See supra* note 15 and accompanying text; Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Bob Sallinger observes:

> [M]any of these groups either do not understand or have the resources to engage in this type of planning process. It is one thing to work to develop a specific trail or protect and restore a specific natural area. It is entirely something else to traverse the arcane landscape of land use planning. Audubon remains one of the few groups in the metro region that is interested in these processes and we have very deliberately cultivated a different approach to activism to allow us to have a constituency that is willing to engage in these types of processes. It is a constant battle even internally because there is always pressure to make conservation as simple and accessible as possible—goal 5 does not lend itself to those kinds of approaches.

E-mail from Bob Sallinger to Edward J. Sullivan, *supra* note 15.

430. PAM WILEY, DEFS. OF WILDLIFE, NO PLACE FOR NATURE: THE LIMITS OF OREGON'S LAND USE PLANNING PROGRAM IN PROTECTING FISH AND WILDLIFE HABITAT IN

Still, as that report and others have argued, there are deficiencies within the Oregon planning program that must be addressed.[431]

THE WILLAMETTE VALLEY 35–36 (2001), https://defenders.org/sites/default/files/publications/no_place_for_nature.pdf.

431. *Id.* at 36–43. That report lists several improvements that, in the author's view, would enhance the Oregon planning program with respect to fish and wildlife habitat protection, including more clearly articulating the state's interest in those resources, providing better information and education for local governments as to available tools, recognizing the interconnectedness of many resource categories and the need for cross-jurisdictional coordination, reviewing the standards for when the information regarding a particular resource site is adequate to complete the Goal 5 process as well as the effectiveness of the "safe harbor" approaches, and strengthening other statewide planning goals to better protect fish and wildlife habitat. *Id.* Ted Lorensen, a longtime manager for the Oregon Department of Forestry, suggests that the Goal should be amended to incorporate an ecosystem management approach:

> In evaluating Goal 5, in defining how successful the program is, the original goal and methods need to be considered. In this context[,] it is important to look at the evolution of resource protection over the past 50 years. In the late-1960's we were focused on "protecting" distinct sites and/or resources. "Protection" generally meant preventing change. Even when the sites/resources were large scale, such as a national park, protection was viewed in the context of that site, not within the greater ecosystem that it existed within. Over the intervening years, the concept of "ecosystem management" has developed, not negating the need for protecting individual sites or resources, but also recognizing the need for maintaining the context that allows those sites to function and sustain themselves over time, and especially recognizing that we need to sustain the dynamic processes like fire and floods that modify and sustain ecosystems and watersheds over time. Thus, the core policy of Goal 5 probably needs to be revisited by LCDC to reflect the concepts of ecosystem management. A tremendous advantage of this approach is that it would allow for improved integration of this goal with other goals, such as the natural hazard goal. This is a broad policy issue that needs to be addressed by many of the state's natural resource laws.

E-mail from Ted Lorensen, former Assistant State Forester, Or. Dep't of Forestry, to Edward J. Sullivan (Jan. 30, 2021) (on file with authors). Bob Sallinger advocates a similar approach:

> [With respect to Goal 5,] we are only talking about existing resource sites—not what we actually need for a healthy functioning ecosystem. As sites degrade[,] they disappear from the process. For example, the City of Portland made a big shift several years back from protecting a continuous riparian corridor along the Willamette. Historically they argued that the entire corridor was essential for ecosystem function. However, because of the way Goal 5 is written, they faced criticism that they were ranking sites that were severely degraded. Eventually they caved to this pressure so that riverside sites that [contain] no vegetation or [are] just lawn, no longer receive any protection at all. This has allowed for further degradation and reduced/eliminated opportunities for restoration. There is a logic to why the city went this route, but from an ecosystem function standpoint, it makes no sense at all.

A. Funding

The battle to protect additional resource sites under Goal 5 is not over. Many advances have been made in our understanding of the natural and human worlds, enabling local governments to assess the significance of new resource sites through a scientific lens. In addition, those resource sites that have already been deemed significant and worthy of protection would benefit from the application of more recent scientific advancements. Unfortunately, those efforts require funding that the state has not seen fit to provide.[432]

That lack of funding is likely due in large part to Oregon Ballot Measures 5, 47, and 50, passed in the 1990s, which collectively limited both property tax rates and assessed value growth.[433] Local

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E-mail from Bob Sallinger to Edward J. Sullivan, *supra* note 15. Roberta Jortner, a former planner for the City of Portland, suggests that the ESEE decision process be revised to provide better guidance to local governments, for example, by encouraging or requiring consideration of the ecosystem services provided by some Goal 5 resources (*e.g.*, stormwater management, carbon sequestration, and thermoregulation, or reducing urban heat island effects). E-mail from Roberta Jortner, former Senior Env't Planner, City of Portland, to Edward J. Sullivan (Jan. 3, 2021) (on file with authors). A glimpse into the possibilities of the ecosystem management approach can be found in the state's efforts to protect salmon and sage-grouse. OR. LEGIS. COMM. SERVS., BACKGROUND BRIEF ON OREGON PLAN FOR SALMON AND WATERSHEDS (2010), https://digital.osl.state.or.us/islandora/object/osl%3A97046/datastream/OBJ/view; SAGE-GROUSE CONSERVATION P'SHIP, THE OREGON SAGE-GROUSE ACTION PLAN (2015), https://oe.oregonexplorer.info/ExternalContent/SageCon/SageCon_Action_Plan_Main_Body_FINAL.pdf. Lorensen notes that part of the reason for the adoption of the salmon plan was that local governments had not done enough under Goal 5 to protect riparian corridors:

> A key issue for decline of salmon was riparian condition (a key Goal 5 resource) and the [Oregon Plan for Salmon and Watershed] attempted to create a set of measures to improve riparian habitat. It is fair to say that DLCD was a reluctant partner in pushing for "regulatory" measures under the [plan] from local government. Nonetheless, where other factors were involved such as clean water violation issues, or the local government saw additional interest in adopting riparian ordinances some efforts at the local level began to be developed.

E-mail from Ted Lorensen to Edward J. Sullivan, *supra* note 431.

432. Patty Snow, a longtime planner who worked for ODFW and who now manages Oregon's implementation of the Coastal Zone Management Program, recalls her experience at ODFW, where funding for adequate fish and wildlife habitat inventories was lacking. E-mail from Patty Snow, Or. Coastal Mgmt. Program Manager, Or. Dep't of Land Conservation & Dev., to Edward J. Sullivan (Dec. 30, 2020) (on file with authors). Snow also points out that, even when adequate estuary inventories, landslide data, and tsunami data are available through the federally supported Coastal Zone Management Program, getting local governments to update their comprehensive plans to include that information is challenging without additional funding, such as through external grants. *Id.*

433. OR. CONST. art. XI, §§ 11, 11b. *See generally* OR. DEP'T OF REVENUE, A BRIEF HISTORY OF OREGON PROPERTY TAXATION, https://www.oregon.gov/DOR/programs/gov-

governments, which could no longer rely on local or state funds, turned to other means of providing infrastructure, such as requiring development to provide or fund additional facilities subject to various statutory and constitutional limitations.[434] Fiscal constraints made it so that local governments were not disposed to inventory new resource sites or change existing programs to achieve Goal 5 with respect to already-inventoried resource sites.

Until adequate funding is secured, there should be no expectation that the existing state of resource protection—that is, the protection of already-inventoried resource sites under decades-old programs to achieve Goal 5—will change. As a result, there is little assurance that those programs will be updated to accord with current science and policy or that new resource sites will be inventoried. Given the dynamic nature of many natural resources, particularly with the increasing impacts of climate change, if local governments are not invested with the funding necessary to make those changes, then the resources that Goal 5 aims to protect will surely be left behind.

B. The Failure of Periodic Review

The 1981 administrative rules showed an awareness that adequate information regarding some resource sites could not be gleaned quickly; they allowed local governments to defer determinations of significance for resource sites for which there was inadequate information, so long as the local government committed to addressing the resource site in the future—for example, at the next periodic review.[435] Periodic review is also an important opportunity for local governments to update their Goal 5 inventories and ESEE analyses to incorporate current data and information from scientific (*i.e.*, climate change and public health) and economic literature.[436] However, the obligation for most local governments to undergo periodic review was effectively terminated around the turn of the century.[437] Absent a legal requirement or significant political intervention, there is little incentive

research/Documents/303-405-1.pdf (last visited July 19, 2021) (discussing Measures 5, 47, and 50).

434. *See* OR. REV. STAT. §§ 223.297–.314 (2019) (governing "system development charges"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (providing the "essential nexus" requirement for development conditions); Dolan v. City of Tigard, 512 U.S. 374 (1994) (providing the "rough proportionality" requirement for development conditions).

435. *See supra* note 29 and accompanying text.

436. E-mail from Roberta Jortner to Edward J. Sullivan, *supra* note 431.

437. *See Quiet Revolution*, *supra* note 5, at 392–93.

for local governments to consider new resource sites, take up consideration of resource sites for which there was previously inadequate information, or adjust their programs to achieve Goal 5 with respect to already-inventoried resource sites.

As a result, some of the resources ostensibly protected by the Goal remain in a legal and political stasis. This situation could be remedied by a revived periodic review process. It could also be remedied by a requirement that local governments consider new resource sites brought to their attention by the public through an application-driven process à la mineral and aggregate resources and energy sources.[438] Alternatively, it could be remedied by a requirement that local governments periodically revisit their determinations of significance or their ESEE analyses with respect to known resource sites during the PAPA process or on a fixed schedule not tied to periodic review.[439]

C. The Urban-Rural Divide

The voting patterns of Oregon are more liberal and "blue" than conservative and "red;"[440] however, on a county-by-county basis, much of the state's land area is "red."[441] Blue areas tend to be the Portland metropolitan area and a swath of the Willamette Valley from Portland to Eugene, while much of the rest of the state's land area is rural, unincorporated, and run by county governments. As mentioned above, most local governments are strapped for cash. That is particularly true for rural counties, most of which do not have "home rule" charters and, therefore, lack a means of imposing income or sales taxes to supplement property tax revenues.[442] That funding shortage frustrates efforts to consider new resource sites or take up consideration of

438. *See supra* notes 121, 168 and accompanying text.

439. An appropriate analogy might be the requirement that local governments periodically demonstrate that their UGBs contain enough land to accommodate housing needs for twenty years. OR. REV. STAT. § 197.296 (2021).

440. Since 1988, Oregon has cast all of its Electoral College votes for the Democratic candidate for President; since 1999, both of its U.S. Senators have been Democrats; and, since 1987, all of its Governors have been Democrats. *Oregon Presidential Election Voting History*, 270TOWIN, https://www.270towin.com/states/Oregon (last visited July 20, 2021).

441. *Oregon Election Results*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-oregon.html (last visited July 20, 2021).

442. *See* 33 Or. Op. Att'y Gen. 238 (1967), 1967 WL 98117, at *7 ("[C]ities and charter counties, but not other counties, have the authority to adopt sales and income tax measures if so provided in their respective charters."); *County Government in Oregon*, OR. SEC'Y OF ST., https://sos.oregon.gov/blue-book/Pages/local/counties/about.aspx (last visited Aug. 22, 2021) ("Nine [of Oregon's thirty-six] counties have adopted 'home rule' charters.").

resource sites for which there was previously inadequate information. Consequently, rural counties are less prone to restricting the use of land to protect those resource sites. The difficulty of protecting rural resource sites is further underscored by the inability of the state to regulate federal lands,[443] which take up fifty-two percent of the state's total land area,[444] and the preemption of county regulation of forest practices.[445]

Another issue is that, over the years, Goal 5 has been administered in a way that has allowed for—and perhaps contributed to—a perception that urban areas are largely devoid of significant natural resources. Some state agencies (*e.g.*, ODFW) have contributed to that perception by focusing their studies and analyses on rural rather than urban areas, making it more challenging for urban local governments to adopt accurate inventories.[446] Mike Houck, who worked as a naturalist for Portland Audubon for many years, recalls:

> In 1982, when I began my work as Audubon Society of Portland's urban naturalist, local planners believed that Oregon's land use program did not contemplate the protection of natural resources inside our [UGB]. The UGB, they believed, was to halt urban sprawl and to protect farmland and forestland outside the city. In fact, the argument has been made that protecting fish and wildlife habitat and too much open space inside the UGB was antithetical to good urban planning. Accordingly, the Portland metropolitan region has more than three hundred miles of streams that have been placed in underground conduits, and more than two hundred miles of streams and rivers are "water quality limited" or polluted, according to [DEQ]. The steelhead trout and chinook salmon are listed as threatened under the [F]ederal Endangered Species Act, and the cutthroat trout is likely to be listed soon.[447]

Contrary to the perception that significant natural resources are a rural phenomenon, most of Oregon's urban areas are located along major river systems and in areas that are (or were) near forest lands, where

443. 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 12.07 (2d ed. 1976).

444. CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8 (2020), https://fas.org/sgp/crs/misc/R42346.pdf.

445. *See supra* note 49 and accompanying text.

446. E-mail from Roberta Jortner to Edward J. Sullivan, *supra* note 431.

447. Michael C. Houck, *Respecting Nature's Design in Metropolitan Portland, Oregon*, *in* THE HUMANE METROPOLIS: PEOPLE AND NATURE IN THE 21ST-CENTURY CITY 75, 75–76 (Rutherford H. Platt. ed., 2006).

timber could be readily extracted. Many fish and wildlife species reside in, or migrate through, Oregon's urban areas.[448] Many of Oregon's urban areas provide important feeding, breeding, and wintering habitat for migratory bird species.[449] The habitats within those urban areas, though more fragmented and smaller in scale than rural habitats, are critical for the species that use them.[450]

Urban residents may be more likely to pass bond measures or otherwise fund land acquisition and maintenance for public parks and natural areas.[451] However, there is competition from residential, commercial, and industrial uses of land within UGBs.[452]

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448. For example, every salmonid species that uses the Willamette River system must pass through downtown Portland.

449. BUREAU OF ENV'T SERVS. & PORTLAND PARKS & RECREATION, CITY OF PORTLAND, PORTLAND, OREGON'S BIRD AGENDA 6 (2011), https://www.portlandoregon.gov/bes/article/354681.

450. *See id.* at 29.

451. *See supra* note 428 and accompanying text.

452. According to Mike Houck, there is continuing competition in Portland between protecting natural resources under Goal 5 and providing an adequate supply of industrial and employment lands under Statewide Planning Goal 9 (Economic Development); as a result, urban planners are urged to view Goal 5 resources as "rural" and not entitled to priority consideration inside the UGB. E-mail from Mike Houck, former Urb. Naturalist, Portland Audubon, to Edward J. Sullivan (Feb. 18, 2021) (on file with authors). Bob Sallinger echoes those concerns:

> The biggest Goal 5 conflicts in Portland over the past couple of decades have involved conflicts between Goal [5] and Goal 9. This is where Goal 5's focus on process rather than outcomes is writ particularly large. Since Goal 9 mandates that jurisdictions must maintain a 20[-]year[] supply of industrial land but Goal 5 only mandates that jurisdictions must inventory and conduct an ESEE analysis for fish and wildlife habitat, those concerned about natural resource protection are at a distinct disadvantage. In a land[-]constrained city such as Portland where there is no ability to expand, new industrial land must come from the existing land base. Given the cost of commercial and residential land, the City invariably looks toward open[ ]space to find this new land supply. The challenge is exacerbated by a variety of factors including the tendency to equate acres of industrial land with jobs (an assumption that does not necessarily hold up), successful efforts by industrial landowners to upzone existing industrial lands for higher value uses thus exacerbating the alleged deficit, and a non-transparent, industry driven approach to [economic opportunity analyses] that relies primarily on the input of industrial interests that directly benefit from the analysis. We have seen industrial interests successfully manipulate [economic opportunity analyses] not only to demonstrate a deficit of industrial lands but also to advance an environmental regulation agenda and to promote the conversion of existing natural resource lands for industrial use. The same industrial interests that are allowed to convert existing industrial land to higher value uses in order to cash out have also been allowed to turn around and use Goal 9 to demand conversion of open[ ]space and oppose regulations in order to compensate for the industrial land deficits that they themselves created. In recent decades this had manifested itself in Portland in successful efforts to prevent new environmental regulations from going

D. *Policy Paralysis*

The passage of Oregon Ballot Measure 30 in 2000 made additional planning under Goal 5 even less likely by limiting the Oregon Legislature's ability to impose "unfunded mandates" on local governments.[453] That conservatism is also reflected in the passage of Measure 37 in 2004, which created a statutory right of compensation for land use regulations that allegedly lowered property values.[454] Although Measure 37 was generally repealed through the passage of Measure 49 in 2007, certain regulatory activities can still provide a basis for compensation.[455] That possibility;[456] skepticism surrounding the use of eminent domain, which arose out of the *Kelo* decision;[457] and more activist interpretations of the Takings Clause as applied to government regulation[458] have added to the timidity and passivity of

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> into effect ([*e.g.*, the] North Reach [phase of Portland's] River Plan, [Portland's] Tree Code), conversion of open[ ]spaces ([*e.g.*, the] Broadmoor and Colwood Golf Courses)[,] and long[-]term land[ ]use battles ([*e.g.*,] West Hayden Island). Audubon has had some success in shifting this paradigm in recent years and we are positioned to see a major shift in the next couple of years. There is significant talk in Portland of a need to modify or seek an exemption from Goal 9 in order to bring Goals 5 and 9 into better balance.

E-mail from Bob Sallinger to Edward J. Sullivan, *supra* note 15.

453. OR. CONST. art. XI, § 15. *See generally* KEN ROCCO, OR. LEGIS. COMM. SERVS., BACKGROUND BRIEF ON LOCAL MANDATES (2008), https://www.oregonlegislature.gov/citizen_engagement/Reports/2008LocalMandates.pdf (discussing Measure 30).

454. *See generally* Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENV'T L. 131 (2006) (discussing Measure 37).

455. OR. REV. STAT. §§ 195.300–.336 (2019). *See generally* Edward J. Sullivan & Jennifer M. Bragar, *The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure in Oregon*, 46 WILLAMETTE L. REV. 577 (2010) (discussing Measure 49).

456. E-mail from Patty Snow, Or. Coastal Mgmt. Program Manager, Or. Dep't of Land Conservation & Dev., to Edward J. Sullivan (Dec. 29, 2020) (on file with authors) ("[T]he passage of Measures 37 and 49 have had a chilling effect on local governments looking at adding any resource protection to new sites even if they want to.").

457. Kelo v. City of New London, 545 U.S. 469 (2005). The *Kelo* Court upheld the taking of property by a local government for transfer to a private entity in the name of economic development, leading to significant political backlash that tended to limit the use of eminent domain for such purposes. *See, e.g.*, Harvey M. Jacobs & Ellen M. Bassett, *After "Kelo": Political Rhetoric and Policy Responses*, LAND LINES, Apr. 2010, at 14.

458. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (removing procedural barriers to the litigation of takings claims in federal court). Although the three most recent additions to the U.S. Supreme Court are more conservative than their predecessors, predictions that the Court will begin to more strictly scrutinize regulations through a takings lens

local governments.[459] In response to public resistance toward additional government regulations, some advocate for the use of nonregulatory approaches.[460]

E. Process Over Substance

Although the text of Goal 5 is "[t]o conserve open space and protect natural and scenic resources," the Goal simply requires local governments to follow a process that may or may not result in such conservation and protection. Bob Sallinger, who advocates for wildlife on behalf of Portland Audubon, notes:

> Goal 5 is a process goal. This is the Achilles['] heel of Goal 5. It is an uphill battle from start to finish. It largely sets up a dynamic in which decision-makers often seek to do the least amount possible and advocates are put in the position of trying to convince decision-makers to do more. It lacks an overriding objective such as "achieving landscape health." With Goal 5[,] you start with what you have left and try to prevent as much additional loss as possible . . . as opposed to trying to achieve something that really looks like a healthy ecosystem.[461]

The process-oriented nature of Goal 5 stands in stark contrast to other statewide planning goals, such as Goals 3 and 4, which are aided by implementing statutes and administrative rules that affirmatively prohibit certain uses that conflict with agricultural and forest

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may not come to pass. *See* Mark Tushnet, *Will a 6-3 Conservative Supreme Court Roll Back Regulations on Business? Not So Fast*, FORTUNE (Oct. 26, 2020), https://fortune.com/2020/10/26/amy-coney-barrett-confirmation-supreme-court-vote-conservative-business-deregulation-scotus/.

459. Bob Sallinger notes that, in the "hyper-political" Goal 5 process, "the onus is on natural resource advocates to make the case for why [a resource site] should be protected[,] as opposed to development/other interests to demonstrate why it is necessary to develop [the resource] site," resulting in a one-way process under which fewer and fewer resource sites are protected. E-mail from Bob Sallinger to Edward J. Sullivan, *supra* note 15.

460. JULIE BAXTER, OR. CHAPTER OF THE AM. PLAN. ASS'N, PLANNING FOR NATURAL RESOURCES: THE POLICIES AND CHALLENGES OF OREGON'S LAND USE PROGRAM IN PROTECTING NATURAL RESOURCES 14 (2004), http://centralpt.com/upload/342/2408_wp_challengesofprotectingnature.pdf ("Landowner education and incentive programs can increase participation in stewardship and resource management on private property. Forming partnerships with watershed councils or land trusts and using a diversity of implementation strategies, such as conservation easements, transfer of development rights, cluster zoning, and public acquisition, provides local governments with more flexibility in achieving resource goals.").

461. E-mail from Bob Sallinger to Edward J. Sullivan, *supra* note 15.

practices.[462] Perhaps it is time that Goal 5 was amended to move beyond process—if not to *require* that local governments "conserve" and "protect" significant resource sites, as the Goal itself is phrased, then to impose a *presumption* that such conservation and protection is warranted, which must be overcome by some heightened burden of proof.

V. CONCLUSION

We suggest intuitively that, notwithstanding its faults, the deliberate, methodical, and perhaps unexciting Goal 5 process is an appropriate means of protecting Oregon's resources. The Oregon planning program, honed over the last fifty years, has done much to provide relative certainty,[463] limit discretion,[464] and promote timely decisions on land use matters.[465] While Goal 5 and its implementing administrative rules have not brought absolute certainty with respect to the protection of significant resource sites, they have brought more certainty than existed before and a planning process that is not dictated by momentary exigencies. Although that process can certainly be improved, it provides a structure within which the problems and

462. *See* Sullivan & Eber *supra* note 11; Sullivan & Solomou, *supra* note 12.

463. *See, e.g.*, OR. REV. STAT. § 197.296 (2019) (requiring generally that UGBs contain enough land to accommodate housing needs for twenty years); *id.* § 197.290 (requiring some cities to adopt and DLCD to review housing production strategies to address housing needs); *id.* §§ 195.137–.145 (providing for the designation of urban and rural reserves to be added to the Metro UGB within or protected from such urbanization for the next fifty years); *id.* § 197.455 (limiting the siting of destination resorts to lands mapped as eligible for such siting in the relevant county comprehensive plan).

464. *See, e.g.*, *id.* § 197.307(4) (requiring "clear and objective standards, conditions and procedures regulating the development of housing"); *id.* § 197.796 (providing a remedy for government overreach in imposing conditions of approval on land use decisions); *id.* § 197.180 (requiring generally that state agencies carry out their planning responsibilities in a manner that is consistent with local government comprehensive plans and land use regulations); *id.* §§ 197.505–.540 (prescribing standards for the imposition by local governments and the review by LUBA of development moratoria); *id.* §§ 215.213, .283 (listing the nonfarm uses that are permitted in EFU zones).

465. *See, e.g.*, *id.* §§ 215.427(1), 227.178(1) (requiring generally that local governments take final action on land use applications within 120 days); *id.* § 197.830(14) (requiring generally that LUBA issue a final order on a land use appeal within seventy-seven days of when the local government transmits the record); *id.* § 197.850(7) (requiring generally that the Oregon Court of Appeals hear oral argument in an appeal of a LUBA decision within forty-nine days of when LUBA transmits the record); *id.* § 197.855(1) (requiring generally that the Oregon Court of Appeals issue a final order on an appeal of a LUBA decision within ninety-one days of when the court holds oral argument).

potential solutions discussed above can be addressed, resulting in a greater return on the state's investment to date.

Ted Lorensen, a longtime manager for the Oregon Department of Forestry, observes that Oregon's combination of land use and resource protection programs, involving not only the state's land use agency but also its environmental, farm, and forest agencies, is more efficient and effective than the resource protection programs in some other states, although it may be made even more so:

> A number of studies have looked at the costs and results among the states an[d] Oregon is doing relatively better overall. Despite my concern about not having an ecosystem management approach, Oregon's system was designed to limit urban/rural-residential development and protect working agricultural and forest landscapes. These working landscapes have provided an inherent ecosystem protection mechanism just thr[ough] the fact that water quality, habitat and other values are better sustained and connected on the working landscapes than on either non-natural or highly fragmented ecosystems of urban and rural residential areas. This in particular is where Oregon has been successful compared to the other states. Many studies in Oregon, Washington and California have documented that water quality and aquatic habitats are better on farm and forest lands, notwithstanding their problems, than more develop[ed] uses.
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> . . . [M]y view is that what is in place under the land use program has probably resulted in a decrease in the rate of loss of Goal 5 resources on private lands (especially compared to Washington and California), but that development and land use activities are still degrading these resources and for some of them I think the cumulative effects of continuing small losses has become significant. Nonetheless, Oregon has had relatively good outcomes because we have done a good job of sustaining working private forest and farm landscapes that inherently provide protections for a range of Goal 5 resources.[466]

However, as discussed above, the consideration of resource sites should not be limited to rural areas and should extend into urban areas for the Goal 5 protective system to be successful. The trick, of course, is to provide enforceable standards under which resource sites must be

466. E-mail from Ted Lorensen to Edward J. Sullivan, *supra* note 431.

considered for inclusion in inventories, an adequate process for analyzing ESEE consequences, a means of ensuring the effectiveness of programs to achieve Goal 5, and an ongoing procedure for revisiting and reevaluating those decisions in light of new information, on both as-needed and periodic bases.

Oregon has the legal framework necessary to empower local governments to protect resources from the challenges of tomorrow. It is time to use those tools fully. Adequate funding, the revitalization of periodic review, and a greater emphasis on outcomes rather than processes would go a long way toward institutionalizing protections for Goal 5 resources that might, in some areas of the state, earn widespread public support. Otherwise, the present Goal 5 protective system will likely result in the slow but inevitable destruction of resources over time. Because it is a slow process, awareness of that destruction will seep in only when the resources are gone, or almost gone. Sadly, we acknowledge the wisdom of Hegel that the owl of Minerva only spreads its wings at dusk.[467]

467. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 23 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).