

Nov 4 2 18 AM '88

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

RICHARD C. BERGSTROM and)
CAROL A. PATZKOWSKY,)
)
Petitioners,)
)
vs.)
)
KLAMATH COUNTY,)
)
Respondent,)
)
and)
)
EDWARD J. SHIPSEY,)
)
Intervenor-Respondent.)

LUBA No. 88-057

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Richard C. Bergstrom and Carol A. Patzkowsky, Klamath Falls, filed the petition for review. Carol A. Patzkowsky argued on her own behalf.

Michael L. Spencer, Klamath Falls, filed a response brief and argued on behalf of respondent.

Steven A. Zamsky, Klamath Falls, filed a response brief and argued on behalf of intervenor-respondent.

HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 11/04/88

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

1 NATURE OF THE DECISION

2 Petitioners seek review of a Klamath County Board of
3 Commissioners' order approving a preliminary subdivision plat
4 creating 18 lots of slightly more than one acre each out of a
5 20 acre parcel. The subject property is designated Rural in
6 the Klamath County Comprehensive Plan and is zoned R-1, rural
7 residential use with a one acre minimum lot size. Petitioners
8 ask that we reverse the county's decision.

9 FACTS

10 This is the third time approval of this subdivision has
11 been before LUBA. We last remanded the matter in Bergstrom v.
12 Klamath County (Bergstrom I), ___ Or LUBA ___ (LUBA No. 87-099,
13 February 25, 1988).¹

14 The 20 acre parcel is a residual parcel created when the
15 128 lot Cedar Hills Subdivision was platted. The 20 acre
16 parcel is surrounded by the 128 platted lots, fifty-one of
17 which remain unsold.² Although the majority of the unsold
18 lots are five acres in size, some are less than three acres and
19 two lots include 20 acres. All of the one acre lots in Cedar
20 Hills have been sold. Record 112.

21 Cedar Hills is located within the Bear Vally eagle roosting
22 area secondary buffer zone and flyway and within the Pierson
23 Butte deer winter range. As we explained in Bergstrom I:

24 "In 1984, the Land Conservation and Development
25 Commission (LCDC) acknowledged portions of the Klamath
26 County Comprehensive Plan (Plan) and Land Development
Code (Code) affecting the subject property. LCDC
compliance acknowledgment order 84-ACK-135 (August 6,

1 1984). Two of the significant natural resource areas
2 identified in the acknowledged plan are the Bear
3 Valley eagle roosting area and the Pierson Butte deer
4 winter range. Plan Goal 5, Policy 13 states that the
5 county shall protect the roosting area (including the
6 core area, primary, and secondary buffer zone) and the
7 flyway. With regard to the Pierson Butte deer winter
8 range, Plan Goal 5, Policy 16 states that the county
9 shall protect significant big game winter ranges. The
10 county code significant resources overlay (SRO) zone
11 was applied to both natural resource areas. Code
12 Article 83." Bergstrom I, supra, slip op at 2-3.

13 Following our remand of the county's decision in
14 Bergstrom I, the board of commissioners conducted another
15 hearing in this matter. The board adopted additional findings
16 without accepting additional evidence. Petitioners appeal the
17 county's order on remand.

18 FIRST ASSIGNMENT OF ERROR

19 "The county's order was based on pre-existing
20 testimony only and did not allow for new testimony.
21 Yet the basis for remand was that there was not
22 evidence in the record to support the findings made."

23 In petitioners' fourth assignment of error in Bergstrom I,
24 petitioners alleged a number of findings were not supported by
25 substantial evidence. We sustained the assignment of error as
26 follows:

"Neither respondent nor participant-respondent has
cited us to evidence in the record supporting the
findings claimed to lack supportive evidence by
petitioners. We will not search the record for such
evidence. We rely on respondents to provide us with
citations to evidence in the record adequately
supporting challenged findings. City of Salem v.
Families for Responsible Gov't., 64 Or App 238, 249,
668 P2d 395 (1983); Grindstaff v. Curry
County, 15 Or LUBA 100, 109 (1986). Because the
respondents have not cited us to such evidence, we
must sustain this assignment of error." Bergstrom I,
supra, slip op at 11-12.

1 As the above-quoted portion of our opinion makes clear, we
2 did not determine that the record lacked substantial evidence
3 in support of the disputed findings, as petitioners apparently
4 assume. Rather, in the absence of assistance from respondents
5 in locating supporting evidence in the record, we determined we
6 would not search the record to see if such evidence existed.
7 There is nothing in our prior decision that precludes the
8 county from relying on the evidence in the record in
9 Bergstrom I, if substantial evidence exists in the record to
10 support the decision. We address the adequacy of the evidence
11 in the record identified by the respondents in this appeal
12 under the second assignment of error.

13 The first assignment of error is denied.

14 SECOND ASSIGNMENT OF ERROR

15 "The order issued by the county is not supported by
16 substantial evidence in the record, especially in
17 regard to meeting the seven criteria required by
18 county land development code section 83.004(D) [sic
19 83.004(C)]."

20 As noted supra, the property is located within the secondary
21 buffer zone and flyway for the Bear Valley eagle roosting area
22 and within the Pierson Butte deer winter range. Prior to
23 acknowledgment of the county's comprehensive plan and land use
24 regulations under ORS 197.251, the county adopted Goal 5
25 inventories and analyses as part of its plan and code
26 provisions to protect the eagle roosting area and deer winter
range.³

Under Code Section 83.007(D), residential density in excess

1 of one unit per 20 acres is considered a Goal 5 conflicting use
2 in the secondary buffer area. Under Code Section 83.005(A)(1),
3 residential density in excess of one unit per 80 acres in deer
4 winter range is a conflicting use. Code Section 83.005(A)(4)
5 and 83.004(D) provide a procedure by which the county may allow
6 conflicting uses in the SRO zone. Under those code sections,
7 if the applicant wants to develop at the one unit per acre
8 density potentially allowed by the underlying zone, the
9 applicant must "comply with the review procedure and criteria
10 included in [Code] Section 83.004(C)." In relevant part, Code
11 Section 83.004(C) provides

12 " * * * * *

13 "2. If the responsible agency and the applicant
14 cannot agree on a management plan which would
15 allow for both resource preservation and
16 development, the following findings of fact, if
17 applicable to the disagreement[,] must be made:

18 "a. The resource or site must be disturbed to
19 provide for reasonable use of the site, and
20 if not disturbed, the applicant would be
21 substantially damaged.

22 "b. The use proposed will directly benefit the
23 community and satisfies a substantial public
24 need or provides for a public good which
25 clearly outweighs retention of the resource.

26 "c. The proposed development would not result in
the loss of a rare, ir retrievable, or
irreplaceable natural feature or scientific
opportunity, or the disturbance of a
substantially unaltered natural feature or
area in or adjacent to the proposed site,
unless the benefit to the public from the
proposed use clearly outweighs the public
good from retaining the feature or area.

"d. The public benefit due to the development of
the particular site would be maximized when

1 compared to development of similar
2 properties in the area not possessing a
unique site or resource.

3 "e. The identified site or resource cannot be
4 physically developed for an energy source or
5 has a low potential for an energy
development based upon an evaluation of
environmental, social, and economic factors.

6 "f. The proposed development will disturb or
7 destroy only an area or areas of low
8 preservation value, and will not
significantly alter or disturb other
portions of the resource area on or adjacent
to the site.

9 "g. In big game winter ranges, the cumulative
10 effect of the proposed land use change and
11 other development in the area must be
consistent with the maintenance of long term
big game habitat values."

12 The findings challenged by petitioners are the findings
13 adopted by the county to demonstrate compliance with the
14 above-quoted part of Code Section 83.004(C). Most of the
15 findings adopted by the county in Bergstrom I were readopted by
16 the county following remand. The county also adopted new
17 findings in its decision on remand.⁴

18 Respondent and intervenor-respondent (respondents)
19 attempt to avoid petitioners' challenge to several of the
20 county's findings as follows:

21 "Petitioners' attacks on findings 3, 4, 5, 6, 11, 12,
22 13, 14, 15 & 16 were contained in the order appealed
23 to LUBA in case number 87-099 and were not addressed
24 in that appeal. Petitioners have, therefore, waived
any objections to those findings, and are barred * * *
from raising them in this appeal." Respondent's Brief
2. 25

26 Respondents are correct that petitioners waived their right

1 to challenge some of the cited findings by failing to challenge
2 those findings in Bergstrom I. Hearne v. Baker County, 89 Or
3 App 282, 288, 748 P2d 1016, rev den 305 Or 576 (1988); Mill
4 Creek Glen Protection Assoc. v. Umatilla Co., 88 Or App 522,
5 746 P2d 728 (1987). Findings 11, 13, and 14 were present in
6 Bergstrom I and were not challenged by petitioners. However,
7 findings 3, 4, 5, 6 and 15 are new findings and therefore
8 subject to challenge in this appeal.⁵ In addition, although
9 our opinion in Bergstrom I did not expressly recognize that
10 petitioners challenged findings 12 and 16, those findings were
11 challenged successfully in that appeal and, therefore, the
12 county's readoption of those findings is subject to challenge
13 in this appeal.

14 However, for purposes of this appeal respondents' assertion
15 of waiver is of little assistance. In both Bergstrom I and
16 this appeal, petitioners argue the city's decision is not
17 supported by substantial evidence in the record and, therefore,
18 is subject to remand by LUBA under ORS 197.835(8)(a)(C).
19 Petitioners only waived the right to contest the evidentiary
20 support for the county's determination of compliance with
21 specific subparagraphs of Code 84.004(C)(2) if the previously
22 unchallenged findings (11, 13 and 14) are themselves sufficient
23 to establish compliance with those code provisions. We find
24 they are not.

25 Findings 11, 13 and 14 are not actual findings of fact, but
26 rather are merely recitations of evidence.⁶ They do not

1 resolve relevant issues or establish relevant facts. Hill v.
2 Union County Court, 42 Or App 883, 601 P2d 905 (1979);
3 Hershberger v. Clackamas County, 15 Or LUBA 401, 403 (1987).
4 Review of findings 11, 13 and 14 for evidentiary support would,
5 therefore, serve no purpose.⁷

6 We now turn to petitioners' challenge to the evidentiary
7 support for findings 3, 4, 5, 6, 12, 16, 17, 18, 19, 20, 21 and
8 22. We discuss the evidentiary support for the challenged
9 findings under the criteria in Code Section 83.004(C)(2) they
10 appear to have been adopted to address.⁸

11 A. Code Section 83.004(C)(2)(a). Need to Avoid
12 Substantial Damage to Applicant. [Findings 5, 6,
15 and 16].

13 The county found the applicant will realize approximately
14 \$150,000 less if the property is subdivided into five acre lots
15 rather than the approximately one acre lots proposed.⁹ The
16 petitioner argues the property was purchased for approximately
17 \$25,000 in 1982, and the applicant had an offer of \$43,500 that
18 nearly resulted in a sale in 1985. Petition for Review 11.
19 Petitioner argues in these circumstances the potential loss of
20 a speculative profit of \$150,000 is not "substantial injury" as
21 that term is used in Code Section 83.004(C)(2)(a). We agree.

22 We do not believe the applicant's inability to make a
23 \$150,000 profit through development at a higher density
24 constitutes "substantial damage" within the meaning of Code
25 Section 83.004(C)(2)(a). We note that every owner of
26 subdividable R-1 zoned property within the secondary buffer

1 zone or deer winter range potentially could make the same
2 argument. If Code Section 83.004(C)(2)(a) is interpreted in
3 the very open-ended manner argued by respondents, it becomes an
4 illusory standard. We conclude that interpretation is
5 erroneous. McCoy v. Linn County, 90 Or App 271, 275-276, 752
6 P2d 323 (1988).

7 The record suggests the applicant could sell the property
8 for significantly more than he purchased it for in 1982.
9 Record 68-69. The applicant, as far as the record shows, also
10 may subdivide the property into up to four building lots.
11 Record 12. We conclude the record does not contain substantial
12 evidence showing the applicant would be "substantially damaged"
13 in the absence of county approval of the applicant's requested
14 18 lot subdivision. This subassignment of error is sustained.

15 B. Code Section 83.004(C)(2)(b), (c), (d), and (f).
16 The Values of the Site for Residential
17 Development and the Need for Such Development is
18 Such that it Outweighs the Resource Values of the
Property that Would Be Disturbed. [Findings 5,
12, 17, 18, 20, 21 and 22].

19 Petitioners note the Oregon Department of Fish and
20 Wildlife's (ODFW) expression of concern about increases in
21 human disturbance from the development at this particular site
22 and argue the county failed to explain why it does not believe
23 this testimony. According to petitioners, the studies
24 respondent submitted from other areas are not a sufficient
25 basis upon which to conclude the secondary buffer zone is too
26 large and the proposed development will not impact the eagle

1 roosting area.

2 The ODFW biologist's testimony, cited by petitioners,
3 appears at Record 188-191. The biologist has worked with the
4 Bear Valley roost since 1976. He testified the roost is
5 important from a basin, national and international standpoint.
6 He also testified about the need for wintering eagles to be
7 isolated from human impacts and other harassment. According to
8 the ODFW biologist, the secondary buffer area is important, and
9 one dwelling unit per 20 acres will result in much less impact
10 than one unit per acre. He emphasized that it is the human
11 activity and free roaming dogs that can be expected with
12 residential development that pose the real threat to the eagle
13 roosting area.¹⁰

14 Respondents cite to intervenor's attorney's verbal summary
15 of information the attorney solicited over the telephone from a
16 number of eagle experts who, according to the attorney,
17 insisted on remaining anonymous. Record 178-179. Respondent
18 also submitted 11 excerpts from studies which suggest a smaller
19 buffer area (approximately one-quarter to one-half mile rather
20 than the one and one-half miles currently provided in the
21 secondary buffer area) would be sufficient to protect the
22 roosting area.

23 We have several problems with intervenor's evidence that
24 the buffer is too large. First, some of the excerpts are
25 simply conclusions presented without the studies on which they
26 are based. Second, all of these studies appear to address

1 nonspecific resource lands far removed from civilization. They
2 appear to be concerned with things like timber harvest,
3 hunters, hikers, roads, etc. In this case, we are concerned
4 with houses at a one acre density, with all the related human
5 activity that will go with them. It is not at all clear the
6 studies submitted by intervenor are concerned with the same
7 type of impacts. Finally, as far as we can tell, respondent
8 did not submit his studies until his rebuttal testimony, so the
9 ODFW biologist never had a chance to rebut the validity or
10 applicability of the studies to this application.

11 In view of the extensive documentation of the value of the
12 roosting area, buffer zones and flyway in the comprehensive
13 plan and the fact none of this documentation was amended in any
14 way by the county's decision, we do not believe the evidence
15 submitted by intervenor is substantial evidence that the
16 proposed development of the subject property will not
17 negatively impact the eagle roosting area.

18 Respondents point out that a 400 foot ridge physically
19 buffers the intervenor's property from the actual roosting
20 area. Perhaps such evidence could provide a basis for
21 establishing a smaller secondary buffer area for eagle roosting
22 areas in general. However, in view of the documentation in the
23 plan of the unique value of this roosting area "for the largest
24 wintering concentrations of bald eagles in the continental
25 United States," we do not believe this evidence is sufficient
26 for the county to conclude the density limitation established

1 in the code need not be observed in this case.

2 Intervenor also submitted testimony from realtors saying
3 the Keno area of Klamath County has a shortage of \$50,000
4 houses. Intervenor said with one acre lots side-by-side he can
5 build such houses. The opponents pointed to available, albeit
6 larger, lots in the Cedar Hills subdivision. Record 112. We
7 note the county zoning map shows large undivided parcels and
8 areas of subdivided R-1 zoned lots nearby. These areas were
9 pointed out to the planning commission. Record 185.

10 There are large areas zoned for the type and density of
11 development proposed. We do not believe the undocumented
12 testimony submitted on behalf of intervenor claiming there is
13 not available property in the area upon which such housing
14 could be built constitutes substantial evidence in support of
15 the proposition that there is a need for more one acre R-1
16 zoned lots in the Keno area.

17 The standards in Code Section 83.004(C)(2) require
18 balancing both the needs of the public for residential
19 development and the owner for reasonable use of the property
20 against the natural resource values of the property. Although
21 the resource value of the property admittedly has been impacted
22 by prior land use approvals, there is evidence that significant
23 resource value remains. Against this evidence we have (1) an
24 owner who will be left with a use similar to that of many
25 others who bought 20 acre lots in the area (i.e., a single
26 homesite or, with ODFW agreement, potentially four buildable

1 lots); and (2) a market demand for \$50,000 houses, which we
2 conclude the applicants have failed to show cannot be met
3 adequately elsewhere.

4 The record does not contain substantial evidence that the
5 proposed development complies with Code Section
6 83.004(C)(2)(b), (c), (d) and (f), and we therefore sustain
7 this subassignment of error.

8 C. Code Section 83.004(C)(2)(e). The Property
9 Cannot Be Developed For and Has Low Potential For
Energy Development. [Finding 19].

10 Petitioners argue the record "does not address the energy
11 issue." Petition for Review 12. However there was testimony
12 that the site has no energy development potential. Record
13 180. Petitioners point to no testimony that would contradict
14 or question the accuracy of that testimony. Accordingly, we
15 reject this subassignment of error.

16 D. Code Section 83.004(C)(2)(g). Development is
17 Consistent With Maintenance of Long-Term Big Game
Habitat Values. [Findings 11, 21, and 22].

18 The ODFW biologist testified that this is an important deer
19 winter range and the number of deer in the area has declined in
20 recent years primarily because of subdivision development in
21 the area. Record 65. This testimony is countered by testimony
22 from several local residents that deer populations are healthy.

23 Although it may be possible to question how valuable a 20
24 acre parcel located in the middle of a partially developed
25 subdivision is, in and of itself, to overall efforts to protect
26 deer winter range, we do not believe the evidence submitted by

1 intervenor is sufficient to overcome the testimony of the ODFW
2 biologist. In addition, the plan acknowledges the threat to
3 wintering deer posed by free roaming dogs and cites an ODFW
4 study establishing that dogs may roam two to four miles from
5 the nearest dwelling. ESEE for Shipsey - Thomas Property 23.
6 In view of the plan's express recognition of potential impacts
7 on the deer winter range from additional subdivision and the
8 ODFW biologist's testimony, we believe the intervenor was
9 obligated to submit testimony in addition to that of the three
10 local residents who simply testified to their general
11 perception of deer herd strength. This subassignment of error
12 is sustained.

13 E. Conclusion

14 Aside from the county's finding of compliance with Code
15 Section 83.004(C)(2)(e) (finding 19), none of the challenged
16 findings are supported by substantial evidence. Therefore, the
17 county's determination that the standards of Code Section
18 83.0004(C)(2) are met by the proposal is not supported by
19 substantial evidence.

20 The second assignment of error is sustained.

21 The county's decision is remanded.

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1 FOOTNOTES

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4 We first remanded the county's approval of this subdivision
5 in Patzkowsky v. Klamath County, 8 Or LUBA 64 (1983). In
6 Bergstrom I, we concluded the county's findings failed to
7 address an approval criterion adequately and that the county's
8 decision was not supported by substantial evidence.

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11 It is not clear from the record how many of the 77 lots
12 that have been sold are actually developed.

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15 We take official notice of the "Bear Valley ESEE Paper."
16 This ESEE (economic, social, environmental and energy) analysis
17 was prepared and submitted by the county to the Land
18 Conservation and Development Commission as part of its request
19 for acknowledgment of compliance of its comprehensive plan and
20 land use regulations with the statewide planning goals.
21 ORS 197.251. The Bear Valley ESEE Paper specifically was
22 prepared to demonstrate compliance with Goal 5 and OAR
23 661-16-000 through 660-16-025. The ESEE Paper describes the
24 Bear Valley roosting area as follows:

25 "The United States Fish and Wildlife Service proposes to
26 establish an eagle management area on 5,200 acres in and
near the Bear Valley, Klamath County, Oregon. Up to 300
bald eagles use part of the Bear Valley for nighttime
roosting from late October or early November until late
March or early April. This night roost is the largest
known roosting concentration of bald eagles in North
America. According to a landowner whose family pioneered
in the Bear Valley, there is a tradition of eagles roosting
in the Valley for at least eighty years.

"Bear Valley provides excellent habitat for roosting bald
eagles. The area is secluded, relatively undeveloped, has
limited access, is protected from the weather, close to
feeding grounds, and has the type of old growth timber
essential for roosting. The average age of roost trees in
Bear Valley is approximately 200 years.

"The eagles roosting in Bear Valley are part of a larger
population that winters in the Klamath Basin. In February,
1977 (a minimum of) 477 bald eagles were counted in the
Basin. The Bear Valley roost thus harbored 57% of all the
bald eagles in the area at that time. Counts in 1978

1 showed similar results. These results are significant in
 2 that the number of eagles in Bear Valley at high count was
 3 the largest known winter roost in North America." Bear
 4 Valley ESEE Paper, p. 19.

4 4

5 The following table sets out the relationship between the
 6 findings challenged in Bergstrom I and those challenged in this
 7 appeal.

8	9	10	11	12	13	14	15	16
7	Findings challenged		Findings challenged		Subparagrah of Code			
	in this appeal		in Bergstrom I		83.004(C)(2) addressed			
	3 (new)							--
	4 (new)							--
	5 (new)							a, c
	6 (new)							a, c
	11							c, f, g
	12		12					c, f
	13							b, c, d
	14							b, c, d
	15 (new)							a
	16		16					a
	17		17					b
	18		18					c
	19		19					e
	20		20					d
	21		21					f, g
	22		22					f, g

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18 Findings 3 and 4 are simply conclusions that the
 19 subsequent findings show compliance with code section
 20 83.004(C)(2).

20 6

21 Findings 11, 13 and 14 provide as follows:

22 "11. No opponents or agencies presented evidence
 23 insofar as the deer winter range is concerned,
 24 other than Mr. Opp in his letter. During
 25 Mr. Opp's testimony, it was apparent that his
 26 concern revolved not around deer, but around
 eagles. Proponents submittted significant
 testimony through the applicant, Ted Paddock, and
 Barney Oldfield that in their experience and
 personal obervation of the area, over many years,

1 that if anything the deer herd in the area are on
2 the increase, even in view of the significant
3 development that has occurred in the Keno area
4 generally during that time. Significant
5 development surrounds this property.

6 * * * * *

7 "13. Applicant produced evidence that there is a need
8 for affordable housing in the Keno area
9 generally, and that he intends to build that type
10 of house which would sell for approximately
11 \$50,000. There is no evidence to the contrary.

12 "14. Applicant presented testimony from Barney
13 Oldfield, Ted Paddock, and himself that in order
14 to build that type of housing, it is necessary
15 that the building operation be done efficiently,
16 and that can only be accomplished when the lots
17 are next to each other and relatively
18 inexpensive. He also testified that he was not
19 aware (which testimony was supported by both
20 Mr. Paddock, Mr. Oldfield, and by letter from
21 Mr. Hank Holman) of other property in the Keno
22 area with the R-1 zone, with lots next to each
23 other, and with appropriate prices, which was
24 available for development. Opponents produced
25 evidence of the amount of property zone R-1, but
26 no specific evidence of buildable land, which was
27 appropriately zoned, nor any evidence of whether
28 or not such land was available."

29 Finding 11 merely recites the existence of conflicting
30 evidence about impacts on deer winter range and finds
31 there is significant development surrounding the
32 property. The latter point regarding significant
33 development is not in dispute. Findings 13 and 14 merely
34 recite the existence of evidence concerning housing in the
35 \$50,000 price range and the existence of conflicting
36 evidence concerning the availability of other properties
37 for construction of such housing.

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40 The evidence relevant to findings 11, 13 and 14 is
41 also relevant to some of the other findings challenged by
42 petitioners. We discuss the evidence in examining the
43 evidentiary support for those findings infra.

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Although petitioner challenges the evidentiary support for the county's conclusory findings 3 and 4 that the criteria in Code Section 83.004(C)(2) are met, petitioners do not explicitly connect the challenged findings to the subparagraphs of Code Section 83.004(C)(2) they were adopted to address. In addition, neither the county's order nor the respondent's brief make that connection. However, no party identified other findings or evidentiary support for the county's ultimate conclusion that the proposal satisfies Code Section 83.004(C)(2). We therefore assume, as do the parties, the challenged findings and the evidentiary support for those findings are the only evidence and findings supporting the county's determination of compliance with Code Section 83.004(C)(2).

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The record shows the ODFW would not object to subdivision of the 20 acre parcel into four five acre lots. Record 12. With such agreement by ODFW, the criteria in Code Section 83.004(C)(2)(a) through (g) need not be addressed.

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The plan ESEE Papers support the ODFW biologist's testimony. We take notice of the ESEE Paper contained in the plan for the Shipsey-Thomas property, which is also adjacent to the Bear Valley eagle roosting area and adjacent to Cedar Hills subdivision. That paper acknowledges the threat posed to the roosting area by adjoining subdivision development and notes the only violations of road closures into Bear Valley were by residents of nearby subdivisions. ESEE for Shipsey-Thomas property 22-25. The paper also notes the potential for negative impact on the eagle flyway. Id. at 22.

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