BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF FISH AND WILDLIFE,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

RANDY GOERING and LINDA GOERING,
Intervenors-Respondents.

LUBA No. 2015-044

FINAL OPINION
AND ORDER

Appeal from Crook County.

Erin L. Donald, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Ellen F. Rosenblum, Attorney General.

Jeffrey M. Wilson, County Counsel, Prineville, filed a response brief and argued on behalf of respondent.

Wendie L. Kellington, Lake Oswego, filed a response brief and argued on behalf of intervenors-respondents. With her on the brief was Kellington Law Group.

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

REMANDED 11/05/2015

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner Oregon Department of Fish and Wildlife (ODFW) appeals a county decision that changes the zoning for a one square mile (640-acre) property from EFU-1, an exclusive farm use zone, to Rural Aviation Community (RAC). The challenged decision also adopts an amendment to the RAC zone text.

FACTS

This matter is before us for the third time.[1] The property is surrounded by EFU-zoned property that is owned by the Bureau of Land Management (BLM). Approximately 213 of the 640 acres are developed with a one-mile long airstrip, hangers, several dwellings and some other airport-related structures. Intervenors wish to subdivide the property to allow construction of additional dwellings that would be marketed to persons who wish to reside close to, and make use of, the existing airstrip.

A. *Wood I*

In a 2005 decision, the county amended its comprehensive plan map designation for the 640 acres from Exclusive Farm Use to Nonresource. That

---

[1] While petitioner ODFW is the petitioner in this appeal, it was not a petitioner or party in the earlier two LUBA appeals of prior county decisions in this matter. We refer to ODFW by name rather than as petitioner to avoid confusion.

2005 decision also applied the county's RAC zone to the property. That decision was appealed to LUBA and remanded. *Wood v. Crook County*, 49 Or LUBA 682 (2005) (*Wood I*). LUBA rejected petitioner Wood's challenge to the comprehensive plan map Nonresource designation. 49 Or LUBA at 687-88. But LUBA sustained petitioner Wood's challenge to the RAC rezoning, based on the county's comprehensive plan Wildlife Policy 2.[2] Wildlife Policy 2 established a maximum residential density of one residence per 80 acres on EFU-1 zoned property located in the Deer General Winter Range.[3] The RAC zone applied to the subject property would have allowed development of up to 32 new residences on lots as small as 20 acres, or without a minimum lot size at all if approved through a planned unit development. LUBA found the development permitted by the RAC zone at issue in *Wood I* would exceed the Wildlife Policy 2 one residence per 80-acre maximum residential density.[4]

---

[2] As we explain later in this opinion, Wildlife Policy 2 was subsequently repealed and replaced with a different Wildlife Policy.

[3] The text of Wildlife Policy 2 is set out below:

> "Density within Crucial Winter Areas for deer shall not be greater than one residence for each 160 acres and for the General Winter Range, not more than one residence per 80 acres, except in the EFU-3 zone in which 40 acres may be allowed per residence."

[4] Although it does not appear to have been an issue in *Wood I*, LUBA assumed the 80 acre, maximum density standard in Wildlife Policy 2 would apply to the 640 acres proposed for rezoning. Applied in that way, Wildlife Policy 2 would permit only 8 residences.

LUBA concluded in *Wood I* that the county had two options if it wants to apply the RAC zone to the property:

> 1. Ensure the RAC zone complies with Wildlife Policy 2's one residence per 80 acre maximum density limit, or
>
> 2. Adopt findings that justify removing the subject property from the Deer General Winter Range.

B. *Wood II*

In 2007, the county again changed the EFU-1 zoning on the subject property to RAC. That decision was appealed to LUBA. In *Wood v. Crook County*, 55 Or LUBA 165 (2007) (Wood *II*). The county took the position in Wood *II* that because Wildlife Policy 2 only applied to properties that were both located on inventoried Crucial or General Winter Range and zoned EFU-1, EFU-2, EFU-3 or F-1, the act of rezoning the property RAC simply rendered Wildlife Policy 2 inapplicable. We rejected that argument, concluding that the act of rezoning did not render Wildlife Policy 2 *inapplicable*, but rather constituted an *amendment* of the county's acknowledge Goal 5 program to protect wildlife habitat, effectively removing the property from the Goal 5 program, and as such the rezoning decision must be justified under Goal 5.

C. Ordinance 259

The county adopted Ordinance 259 on December 19, 2012. That ordinance repealed Wildlife Policy 2 and replaced it with policies that establish a more detailed residential density standard. Ordinance 259 divides the county into to a "West County Area" and a "Greater County Area." For property in the

West County Area for which the comprehensive plan map designation has been changed from a resource designation to a nonresource designation, such as the subject property, Ordinance 259 imposes a 20-acre maximum density limit:

> "9. In the West County Area, where an area of land has changed from a resource comprehensive plan and zone designation to a non-resource comprehensive plan and zone designation and is within a Big Game Habitat area, dwelling density shall not exceed 1 dwelling per 20 acres." Record 415-16.

Ordinance 259 was appealed to LUBA and that appeal has been suspended at the request of the parties to that appeal. The decision that is before us in this appeal does not rely on Ordinance 259 in applying the RAC zone.

With the foregoing overview of the prior appeals and Ordinance 259, we turn to petitioner's assignments of error after resolving intervenors' waiver arguments.

WAIVER

Intervenors-respondents argue petitioner waived the issues presented in the second and third assignments of error by failing to raise those issues below. The overriding issue during the remand hearing was whether the wildlife habitat values on the subject property warranted continued protection under Goal 5. The remand proceedings were not focused on the nuances of the Goal 5 administrative rule. Parties to the remand hearing adequately raised the issue of whether the habitat values of the subject property are sufficient to warrant protection under the Goal 5 rule. Having done so, the issue of whether the

county's findings are adequate to demonstrate that the proposal is consistent with the Goal 5 rule is preserved for review. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993).

FIRST ASSIGNMENT OF ERROR

A. Remand Procedures

As already noted, the county's decision in this matter followed LUBA's decision in *Wood II*. Crook County Code (CCC) 18.172.130(2) sets out the "Remand Procedures" that apply following a remand from LUBA.[5] As relevant to petitioner's first assignment of error, CCC 18.172.130(2) requires two things. First, it requires that notice of the remand hearing be given in

---

[5] The text of CCC 18.172.130(2) is set out below:

> "(2) Remand Procedures.
>
> > "(a) Notice of a remand hearing shall be as provided by CCC 18.172.110(10)(b).
> >
> > "(b) The remand hearing shall be limited to staff, the applicant and appellants from the prior LUBA appeal. However, the county court may expand those who may participate in the remand hearing upon the county court's own motion.
> >
> > "(c) The remand hearing shall be limited solely to issues remanded in the final decision of the Land Use Board of Appeals unless the county court expands the issues on remand upon the county court's own motion.
> >
> > "(d) The remand hearing shall be limited to new evidence and testimony regarding the issues in subsection (2)(c) of this section."

accordance with CCC 18.172.110(10)(b). CCC 18.172.130(2)(a). Second it requires that participation in that remand hearing be limited to "staff, the applicant and appellants from the prior LUBA appeal" unless the board of commissioners allows other persons to participate, upon its "own motion." CCC 18.172.130(2)(b)

B. The Notice of Remand Hearing Required by CCC 18.172.110(10)(b)

CCC 18.172.110(10)(b) applies to county land use appeals generally, not just notices of remand hearings. As potentially important in this appeal, CCC 18.172.110(10)(b) requires that written notice of the remand hearing be given to "those persons who testified at the subject hearing where a hearing was held * * *."[6] ODFW contends that while it was not a petitioner or a party at LUBA

---

[6] The full text of CCC 18.172.110(10) is set out below:

> "Notice and Hearing of the Appeal.
>
> "(a) Where practicable, the director shall place the appeal on the agenda for the next regularly scheduled appellate body's hearing in order to determine whether or not the appeal has been properly filed.
>
> "* * * *
>
> "(b) At least 10 calendar days prior to the hearing, the hearing authority shall give notice of time, place and the particular nature of the appeal. Notice shall be published in the newspaper and be sent by mail to the appellant(s), to the applicant (if different) and those *persons who testified at the subject hearing where a hearing was held* and affected parties in accordance with this section." (Emphasis added.)

in *Wood I* and *Wood II*, it did participate and testify in the county hearings that led to the decisions that were the subject of those appeals. ODFW contends it therefore was entitled to written 10-day advance notice of hearing on remand by mail under CCC 18.172.110(10)(b), as a person "who testified at the subject hearing * * *."

C. The County's Notice of Hearing

The county's remand hearing in this matter was held on April 7, 2015. On February 27, 2015, the county mailed written notice of that April 7, 2015 hearing to intervenors, petitioner Wood and 1000 Friends of Oregon.[7] It is undisputed that the county did not mail written notice of the April 7, 2015 hearing to ODFW. The written notice that was sent to the parties was also published in the Central Oregonian on March 3, 2015. The written and published notices were identical and included the following relevant text:

> "Notice is hereby given that the Crook County Court will hold a public hearing on **Tuesday April 7, 2015 at 10 a.m.** * * * *The hearing before the County Court shall be limited to County Staff, the applicant, and the appellants from the prior LUBA appeals*. The remand hearing, including any new evidence and testimony shall be limited solely to issues remanded in the final decision of the Land Use Board of Appeals.
>
> "A copy of the appeal and all documents and evidence relied upon by the appellant are available for inspection at no cost, and a copy

[7] It appears that the county mailed written notice to 1000 Friends of Oregon because it believed that 1000 Friends of Oregon was a party at LUBA in *Wood II*. As far as we can tell, 1000 Friends of Oregon was not a party in either *Wood I* or *Wood II*.

> will be provided at a reasonable cost. Persons or parties with standing in this subject matter may appear in person before the Crook County Court at the appointed time or may submit written testimony to the County Court by 5 p.m. on Tuesday, March 31, 2015 * * *." Record 598. (Bold face in original; italics and underscoring added.)

The italicized language in the notice appears to say persons like ODFW, who are not the applicant or an appellant at LUBA, would not be permitted to participate in the April 7, 2015 hearing. The underlined language says persons "with standing in this subject matter" would be allowed to appear, without explaining what is required for "standing." Respondent and intervenors take the position that the underlined language was sufficient to tell persons who were not the applicant or LUBA appellants that they would be allowed to appear and participate at the April 7, 2015 hearing if they otherwise had standing.

D. The April 7, 2015 Hearing

A little over two minutes into the April 7, 2015 remand hearing, one of the County Judges made the following announcement:

> "* * * So the hearing procedure, the remand shall be confined to the record of the proceedings before LUBA including but not limited to any appeal memorandum. Any written or oral [argument] between the applicant and any opponent or their legal representative." Intervenors-Respondents' Brief, App 1.

Notwithstanding the above announcement, the applicant was permitted to submit additional evidence to the County Court. At the conclusion of the

applicants' evidentiary presentation, about 43 minutes into the remand hearing, county counsel asked if any opponent wished to present testimony:

> "* * * The question now is, is there any opponent testimony or anyone who wants to testify regarding the Goal 5 issue? But anyone who would testify at this hearing would need to have standing, meaning that they submitted evidence into the record at some point in this case. This is not a new hearing it is a continuation of a previous hearing, so I don't know if there is anyone here who has standing. So certainly Jim Wood, appeared in the case, 1000 Friends appeared in the case. Those are the two individuals or entities who I believe have standing.
>
> Rubbert: I came to testify several times in opposition to this before, I didn't pay to join the case. Does that give me standing to testify since I testified before, or not?
>
> Wilson: Did you testify before the county?
>
> Rubbert: I did.
>
> "* * * * *." Intervenors-Respondents' Brief, App 1-2.

Thereafter, petitioner Wood and Mr. Rubbert were allowed 30 minutes for testimony, and both petitioner Wood and Mr. Rubbert presented testimony in opposition to the proposal. An ODFW wildlife biologist was present at the April 7, 2015 remand hearing. Supplemental Record 15. ODFW did not advise the county that ODFW presented testimony in prior local hearings in this matter and did not request an opportunity to testify at the April 7, 2015 hearing. Neither did ODFW object to the county's failure to give ODFW 10 days prior written notice of the April 7, 2015 remand hearing.

At the conclusion of the April 7, 2015 remand hearing, petitioner Wood asked that the record be left open for seven days. After county staff expressed

some concern about whether sufficient time remained to grant that request and allow the applicant to present final legal argument within the ORS 215.435 90-day deadline for rendering the county's decision following the *Wood II* LUBA remand, petitioner Wood stated that three days would be sufficient. Both petitioner Wood and Mr. Rubbert submitted additional written evidence during the three day open record period; ODFW did not. Record 195-361.

The applicant submitted its final argument on April 17, 2015. The County Court completed its deliberations on April 24, 2015 and adopted the challenged decision on May 20, 2015.

E. ODFW's Argument Regarding Alleged Notice Errors

ODFW argues the county committed two procedural errors that warrant remand. ORS 197.835(9)(a)(B).[8] First, ODFW contends it was error for the county not to give ODFW 10-day prior written notice by mail of the April 7, 2015 remand hearing. Second, ODFW contends that the notice the county gave was misleading, in that it stated the remand hearing would be on the record and limited to the applicant and LUBA appellants, whereas the county in fact allowed additional evidence at the remand hearing, and allowed persons other than the applicant and the LUBA appellants to testify. We understand ODFW to contend these procedural errors prejudiced ODFW's substantial rights to an

[8] ORS 197.835(9)(a)(B) provides that LUBA "shall reverse or remand" a land use decision if LUBA finds that a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

adequate opportunity to prepare and submit its case in opposition to the proposal.

CCC 18.172.130(2)(b) authorizes the County Court to "expand those who may participate in the remand hearing upon the county court's own motion." Although no one points to any formal motion under CCC 18.172.130(2)(b) to expand participation, as noted earlier, the county's mailed and published notices of hearing stated "[p]ersons or parties with standing in this subject matter may appear in person before the Crook County Court at the" April 7, 2015 remand hearing." Record 598. County counsel clarified at the April 7, 2015 remand hearing that "anyone who would testify at this hearing would need to have standing, meaning that they submitted evidence into the record at some point in this case * * *." Intervenors-Respondents' Brief, App 1. The challenged decision interprets the words "and anyone with standing" in CCC 18.172.130(2)(b) "to refer to persons who either participated in the LUBA appeal (but are not the applicants or appellants, both of whom have explicit standing under the county code) or persons who participated in the local proceedings leading to the LUBA appeal and remand." Record 13. ODFW presented testimony in the earlier hearings. Under the County Court's interpretation of CCC 18.172.130(2)(b), there is little doubt that the County Court would have allowed ODFW to testify and provide evidence in the remand proceeding, had ODFW sought to do so.

Respondent and intervenors argue that failure to provide ODFW notice of the April 7, 2015 hearing as required under CCC 18.172.110(10) was not procedural error, given the discretion the County Court could have exercised under CCC 18.172.130(2)(b) to allow ODFW to testify or not. However, that argument conflates the CCC 18.172.110(10)(b) requirement for notice to prior county hearing participants and the CCC 18.172.130(2)(b) limit on participation at the April 7, 2015 remand hearing. The right of a person who participated in the earlier proceedings to receive notice protects that person's ability to seek to participate in the hearing on remand. That right to notice is not qualified by the fact that CCC 18.172.130(2)(b) purports to grant the County Court the discretion to approve or deny a request to participate in the remand hearing from a person who is not the applicant or a LUBA appellant.

To summarize, as the County Court interpreted CCC 18.172.130(2)(b) in the challenged decision, ODFW had a right to participate in the April 7, 2015 remand hearing. The county failed to give ODFW the mailed written notice of the April 7, 2015 remand hearing that it was entitled to under CCC 18.172.110(10)(b). Had the county given the required prior written notice, ODFW would have had at least ten days before the April 7, 2015 hearing to prepare its evidence and legal arguments.[9] Although we do not know precisely

[9] Since the mailed written notice in this case was sent on February 27, 2015, ODFW would have had over a month before April 7, 2015 to prepare its presentation if that notice had been given to ODFW.

when ODFW received actual notice of the hearing, ODFW suggests it was shortly before the April 7, 2015 hearing, and we have no reason to assume otherwise. We agree that the county's notice failures constitute a procedural error that prejudiced ODFW's substantial rights. The only remaining question is whether ODFW had an opportunity to object to the notice errors identified in the first assignment of error, and failed to do so, with the consequence that ODFW may not assign error at LUBA based on those procedural errors.

F. The Obligation to Object to Procedural Errors

Although not a requirement that is expressly set out in ORS 197.835(9)(a)(B), *see* n 8, LUBA has always required that a party who wishes to assign procedural error at LUBA must have entered an objection to the procedural error locally, if there was an opportunity to object, so that the local government has an opportunity to correct the procedural error. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 391-92 (2002); *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd* 73 Or App 334, 698 P2d 529 (1985); *Meyer v. Portland*, 7 Or LUBA 184, 190 (1983), *aff'd* 67 Or App 274, 678 P2d 741 (1984); *Dobaj v. Beaverton*, 1 Or LUBA, 237, 241 (1980).

As we have already noted, an ODFW wildlife biologist learned of the April 7, 2015 remand hearing and attended. Supplemental Record 15. The notices of the remand hearing at the very least left it exceedingly unclear whether persons other than the applicant and petitioner Wood would be

allowed to testify at the April 7, 2015 hearing. So if ODFW saw the published notice or a copy of the written notice before the April 7, 2015 hearing, ODFW could reasonably have understood that only the applicant and petitioner Wood would be permitted to present testimony. It was approximately 43 minutes into the April 7, 2015 hearing that persons who presented evidence during the county hearings that led to the remanded decision first learned they would be allowed to testify. Mr. Rubbert took advantage of that opportunity to present testimony, ODFW did not. ODFW cannot now complain that it was given *no* right to present testimony at the April 7, 2015, because as a party who participated in the county hearings that led to the decision in *Wood II*, it appears that ODFW would have been allowed to present testimony at the April 7, 2015 hearing if it had asked to be allowed to do so.

ODFW suggests in its petition for review that a right of participation granted so late in the hearing is an ephemeral right of participation at best. Given the new expert testimony that the applicant submitted prior to and at the April 7, 2015 remand hearing, we generally agree with ODFW's suggestion. Had ODFW been given the advance written notice it was entitled to, it would have had at least 10 days to prepare that testimony in advance. Giving ODFW an opportunity 43 minutes into the hearing to share 30 minutes with petitioner Wood and Mr. Rubbert is not sufficient to render the notice failure harmless. But ODFW could have entered an objection to that effect at the April 7, 2015 hearing and requested that the hearing be continued to allow ODFW to prepare

evidence and legal arguments. ODFW also could have attempted to enter such an objection during the three days the record was held open to April 10, 2015, but did not do so.

There were some forces in play that might well have led the county to deny a request for more time, even if ODFW had made such a request. As previously noted the 90 day deadline imposed by ORS 215.435 was approaching, and there is no guarantee the applicant would have agreed to extend the deadline if that had been necessary. And since the three day open record period was nominally for the receipt of additional evidence, the county might not have entertained a procedural objection or a request for additional time if it had been filed during the three-day open record period. But we cannot know how the county would have responded, because ODFW did not enter the objection or request additional time.

The ODFW representative at the April 7 remand hearing is a wildlife biologist, not a lawyer. But LUBA does not distinguish between lawyers and non-lawyers in deciding whether to award attorney fees under ORS 197.830(15)(b). *Sommer v. City of Cave Junction*, 56 Or LUBA 818, 819 (2008); *Squires v. City of Portland*, 33 Or LUBA 783, 785 (1997), *aff'd* 149 Or App 436, 942 P2d 303 (1997). Similarly, LUBA has never distinguished between lawyers and non-lawyers in determining whether a party in a land use proceeding has taken the required steps to preserve its rights at LUBA. Persons frequently appear in local land use proceedings without legal counsel.

We also appreciate the irony that had ODFW simply not learned of the April 7, 2015 hearing and not attended, it would not have had an opportunity to object, and ODFW's first assignment of error almost certainly would be sustained and the county's decision remanded to give ODFW the notice of hearing and participatory rights it was entitled to under CCC 18.172.110(10)(b) and CCC 18.172.130(2)(b). But ODFW did learn of the April 7, 2015 hearing and did attend. Because it attended the April 7, 2015 remand hearing, ODFW had at least some opportunity to present argument and evidence. ODFW also had an opportunity to object that the county failed to give ODFW the required prior written notice and had the opportunity to request a delay to give ODFW sufficient time to prepare and submit evidence and argument in opposition to the proposal. Because ODFW failed to take advantage of that opportunity to object, we must reject ODFW's procedural challenges in the first assignment of error.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

A. Introduction

Our attempts in *Wood I* and *Wood II* to identify and simplify the options potentially available for the county to rezone the subject property RAC have not been very successful. Again, we identified two potential options in *Wood I*:

1. Ensure the RAC zone complies with Wildlife Policy 2's one residence per 80 acre maximum density limit, or

2. Adopt findings that justify removing the subject property from the county's inventoried General Winter Range.

In *Wood II*, we identified a third option:

3. Adopt findings under OAR 660-023-0040 and 660-023-0050 to amend the county's acknowledged program to protect General Winter Range to remove the Wildlife Policy 2 density limit from the subject property.

The challenged decision purports to justify the rezoning based on the two options LUBA identified in *Wood I*. The challenged decision purports to amend the RAC zone to make it consistent with the Wildlife Policy 2 maximum density limit, consistent with option 1. The challenged decision purports to adopt option 2 as well, as an alternative basis for the rezoning, and removes the subject property from the inventoried General Winter Range. However, as explained in more detail below, the county's alternative basis for rezoning is actually a variation on the third alternative that we set out in *Wood II*. The county attempted to justify an amendment to its Goal 5 program to protect deer winter range under OAR 660-023-0040 and 660-023-0050 and made a programmatic decision under OAR 660-023-0050 to fully allow the uses allowed in the RAC zone and not limit those uses to protect the subject property as wildlife habitat. That action is more accurately described as consistent with the third option we identified in Wood *II*.

B. Second Assignment of Error

OAR 660-023-0110(1)(b) defines Wildlife habitat" as follows:

"'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.

In its second assignment of error, petitioner argues "[t]he County's decision that the property is not 'wildlife habitat' is not supported by substantial evidence in the record." Petition for Review 20.

Petitioner contends that the county found that the subject property is not wildlife habitat on pages 8 and 14 of the Record. Petition for Review 21-22. We have been unable to locate any finding on those pages to the effect that the subject property is not wildlife habitat.[10] The county relies on a Wildlife Habitat Assessment, referred to as the Schott Report, to conclude that the poor habitat values on the subject property do not justify limiting the uses that are allowed in the RAC. There are statements in the Schott Report to the effect that the subject property does not qualify as wildlife habitat, as that term is defined by OAR 660-023-0110.[11] However, we generally agree with intervenor that the challenged decision is more accurately read to take the position that the subject property has very limited value as wildlife habitat, not that the subject

---

[10] The reference to Record 8 is likely a mistake. Record 14 is page 8 of the decision on appeal.

[11] For example, the introduction to the Schott Report states "[t]he purpose [of the report] was to determine if the property falls within the definition of 'wildlife habitat' in OAR 660-023-0110 * * *." Record 557. Later the report states "[t]he site does not appear to be * * * suitable as an area upon which wildlife depends in order to meet their requirements for food, water, shelter, and reproduction." Record 561.

property does not qualify as wildlife habitat at all.[12] We address the County Court's response to petitioner's arguments that the wildlife habitat warrants some level of protection from RAC zone uses in our discussion of the second part of the third assignment of error.

The second assignment of error is denied.

C. Third Assignment of Error

Under its third assignment of error, petitioner assigns error to the county's amendment of the RAC zone, to make it consistent with Wildlife Policy 2. Petitioner also assigns error to the county's alternative findings under OAR 660-023-0040 and OAR 660-023-0050 to adopt an economic, social, environmental, and energy (ESEE) analysis and a program that allows RAC uses fully, despite the potential for conflicts with wildlife habitat. We address those subassignments of error in turn.

1. Amend the RAC Zone to Make it Consistent with Wildlife Policy 2

The text of Wildlife Policy 2 was set out earlier at footnote 3 and is set out again below:

---

[12] For example, in explaining its ultimate decision that the subject property could be removed from the county's Goal 5 wildlife habitat protection program without reducing protection below the desired extent, the county court stated "we reach this conclusion, in part, because the subject property is poor winter habitat for the identified wildlife (deer and antelope), * * * and because higher and high quality habitat will remain in other locations in the county." Record 25.

> "Density within Crucial Winter Areas for deer shall not be greater than one residence for each 160 acres and for the General Winter Range, not more than one residence per 80 acres, except in the EFU-3 zone in which 40 acres may be allowed per residence."

The prior RAC Zone allowed lots as small as 10 acres and allowed up to 32 single-family dwellings. CCC 18.80.020; 18.80.080. The amendments in the decision that is before us in this appeal carry forward the 10 acre minimum lot size and limit to 32 single-family dwellings. Record 34. As already explained, the former RAC zone included no residential density limit like the one in Wildlife Policy 2. One of the options we identified in *Wood I* and *Wood II* for the county to make the RAC zone comply with the county's Goal 5 program was to "amend the RAC zone to make it consistent with * * * Wildlife Policy 2." 55 Or LUBA at 174. In an attempt to pursue that option the county amended the RAC zone to include a maximum density limitation of 80 acres. But unlike Wildlife Policy 2, the amendment to the RAC zone sets out a required methodology for applying its density limitation that in one regard is similar to the methodology employed by OAR 660-033-0130(4)(D)(i).[13] The

---

[13] OAR 660-033-0130(4) sets out standards for approval of nonfarm dwellings. OAR 660-033-0130(4) requires that nonfarm dwelling must "not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use." To apply that standard a county is required to "[i]dentify a study area for the cumulative impacts analysis." OAR 660-033-0130(4)(a)(D)(i). OAR 660-033-0130(4)(a)(D)(i) further requires that:

> "The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct

county's amendment to the RAC zone to make it consistent with Wildlife Policy 2 are set out below:

"**18.80.080 Lot Size and Dwelling Density**

"(1) In the RAC zone, any new residential lot or parcel shall have an area of at least 10 acres. If the RAC zoned property is within the 'West County Area' identified in the Crook County Comprehensive Plan and is designated as a Big Game Habitat area, then dwelling density shall not exceed 1 dwelling per 20 acres. Provided however, that until the Crook County Comprehensive Plan is acknowledged with the above density standard, if property is within the 'West County Area' identified in the Crook County Comprehensive Plan and is designated as a Big Game Habitat area, then dwelling density shall not exceed 1 dwelling per 80 acres. Both wildlife density determinations shall be measured as follows: draw a one (1) mile circle around the perimeter of the RAC zoned property, count all public and private acres within that one mile circle, subtract out all land:

"(a) designated 'Destination Resort';

"(b) within incorporated city limits; within an urban growth boundary,

"(c) within any Goal 14 exception areas,

"(d) that has a 'Nonresource' designation or that is zoned Rural Residential, and

---

agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas."

A circle with a radius of one mile includes approximately 2010 acres.

> "(e) land that is subject to a committed land Statewide Planning Goal exception.
>
> "(2) Provided however, the total number of acres in the density study area after all of the above exclusions are subtracted shall be at least 2000 acres and not less than 1000 acres. * * *."[14]

The applicant argued to the County Court that the above methodology "was upheld as valid and appropriate by LUBA in *Young v. Crook County*, 56 Or LUBA 704 (2008) * * *." Record 382. The county apparently relied on that argument to conclude that the 80-acre maximum residential density standard in revised CCC 18.80.0180(2) is consistent with Wildlife Policy 2 and Goal 5.[15]

If the county is relying on something other than *Young* and some similarities in the language in amended CCC 18.80.0180(2) and the language in

---

[14] If the study area required by amended CCC 18.80.080(2) is "at least 2000 acres" it will always be "not less than 1000 acres," so the "not less than 1000 acres limitation in amended CCC 18.80.080(2) is meaningless. The CCC 18.80.080(2) language presumably was borrowed from OAR 660-033-0130. *See* n 13. The county's omission of the language that appears after "not less than 1000 acres" limitation in OAR 660-033-0130(4)(a)(D)(i) is what makes the "not less than 1000 acres" limitation in amended CCC 18.080.80(2) meaningless.

[15] The County Court found that the methodology in revised CCC 18.80.080(2) is similar to the methodology included the Ordinance 259 amendments that are currently on appeal to LUBA. We understand the county to have concluded that revised CCC 18.80.080(2) and similar policies adopted by Ordinance 259 are "the functional equivalent of [Wildlife] Policy 2." The county further found "the county's 1 dwelling per each 80 acres measured over a 1 mile radius, has long been acknowledged as being in compliance with Goal 5." Record 10.

Wildlife Policy 2 to conclude that amended CCC 18.80.0180(2) is consistent with Wildlife Policy 2 and Goal 5, the county does not adequately identify what that might be.

The county's reliance on *Young* is misplaced. *Young* concerned a quasi-judicial decision that approved a nonfarm dwelling on an existing 25-acre parcel. The property was subject to the 160-acre maximum density limit in Wildlife Policy 2. Petitioner in *Young* argued a 160-acre maximum residential density limit applied to the 25-acre parcel, with the result that the nonfarm dwelling could not be approved on the 25-acre parcel. The county argued that the 160-acre maximum density standard should be applied to a study area of one, two, three or four miles, and under any of those scenarios the dwelling could be approved because the dwelling would not cause the residential density in any of those study areas to exceed one dwelling per 160 acres.

In *Young* we discussed and distinguished our decision in *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003), where we concluded, based on an internal variance mechanism to achieve higher densities, that "one dwelling per 40 acres" residential density limit in that case could not be applied the county's entire 1.2 million acre "peripheral big game habitat overlay zone" and instead had to be applied to the 500 acres proposed for development. After limiting *Wetherell* to its facts and the particular code language involved, we ultimately agreed with the county in *Young* that the county did not err by applying the

Wildlife Policy 2 one dwelling per 160 acre density standard to a one-mile radius study area around the 25 acres:

> "* * * However, we cannot say that it is categorically inconsistent with the purpose of such a density limitation to use an area larger than the subject property as the denominator, *if a larger area can be justified based on applicable code or comprehensive plan provisions, or otherwise shown to be consistent with the text, context and purpose of the limitation*.
>
> "In the present case, petitioner cites to no text or context suggesting that the denominator for CCCP Wildlife Policy 2 is limited to the subject property or that prohibits the county from applying a denominator larger than the subject property. *As far as petitioner has shown, the CCCP is simply silent as to how the one dwelling for each 160 acres density limitation is applied or calculated*. As noted, intervenor presented evidence of residential density within a one-mile as well as a four-mile radius of the subject property. The one-mile radius was presumably chosen because it corresponds to the 2000-acre study area required by OAR 660-033-0130(4)(a)(D). Because the stability standard also functions as a kind of density limitation, it seems congruent, at least, to use a similar one-mile radius, 2000-acre study area for purposes of applying the CCCP Wildlife Policy 2 density limitation. *Absent a more focused challenge from petitioner, we cannot say that the county's approach in averaging residential density across a 2000-acre area centered on the subject property is inconsistent with the purpose of CCCP Wildlife Policy 2*." 56 Or LUBA 704, 713-14 (emphases added).

It is one thing to say, as we did in *Young*, that no method of computing density under Wildlife Policy 2 is expressly required by that policy, and for that reason affirm the county's use of a one-mile study area where there is no focused challenge to that methodology from the petitioner in that quasi-judicial proceeding concerning a single 25-acre parcel. It is quite another thing to

amend the RAC zone to require use of a one mile study area in this case and presumably in future applications of the RAC zone to other properties located in inventoried significant wildlife habitat areas. The county erred to the extent it relied on *Young* to establish that mandating such a methodology in all applications of the RAC zone in the future is consistent with Wildlife Policy 2 or Goal 5.

The county also erred to the extent it relied on some similar language in amended CCC 18.80.0180(2) and Wildlife Policy 2 to conclude amended CCC 18.80.0180(2) is consistent with Wildlife Policy 2 and Goal 5. There are material differences. Mandating the one-mile study area in current and future RAC zone applications, where Wildlife Policy 2 is ambiguous and may be susceptible to more than one interpretation regarding permissible methodologies, is a material difference that the county must justify under Goal 5 if it is going to amend the RAC zone to require that methodology in this case and in all RAC rezone actions on inventoried wildlife habitat in the future.

The amended RAC zone is different in another material respect. Under amended CCC 18.80.0180(2), a number of areas are automatically excluded from the one-mile study area. Those exclusions likely would allow development in areas where development would otherwise be precluded if those automatically excluded areas were considered as part of the study area. There may be valid reasons for those exclusions, but the challenged decision does not identify any.

This subassignment of error is sustained.

2. Amendment of the Goal 5 Program for the Site to Fully Allow RAC Zone Uses

Simply stated, before the county adopted the decision that is before us in this appeal, the county's Goal 5 program to protect the wildlife habitat values on the subject property consisted of EFU-1 zoning and the residential density limitation set out in Wildlife Policy 2. In the language of the Goal 5 administrative rule, in adopting that Goal 5 program the county found that residential development constituted a "conflicting use" with the subject property's wildlife habitat values. OAR 660-023-0040(2). OAR 660-023-0040(4) requires the county to "analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use." The county presumably adopted an ESEE analysis before adopting the prior Goal 5 program for the subject property. One of the options the county had under the Goal 5 rule when it adopted its Goal 5 program to protect wildlife habitat was to determine that "the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent." OAR 660-023-0040(5)(b). The county's prior EFU-1 zoning/Wildlife Policy 2 Goal 5 program for the subject property was an OAR 660-023-0040(5)(b) protect "to some desired extent" program. OAR 660-023-0040(5)(c) sets out another option:

> "A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The 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, as per [OAR 660-023-0040(5)(b)]."

In the challenged decision, the county adopted a new ESEE analysis for the subject property to support its selection of option OAR 660-023-0040(5)(c), to fully allow RAC zone uses on the property, and remove the subject property from "all Goal 5 big game wildlife winter habitat inventories * * *." Record 32.

a. The ESEE Analysis Does not Enable Reviewers to Gain a Clear Understanding of the Conflicts and Consequences of Fully Allowing the RAC Uses

OAR 660-023-0040(1) provides in part that an "ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected." Petitioner contends the ESEE analysis is inadequate to provide the "clear understanding" required by OAR 660-023-0040(1).

Petitioner argues the ESEE analysis lacks any meaningful analysis because it is based on an assumption that the subject property is not wildlife habitat and therefore "does not engage in any meaningful analysis of the consequences of degrading it." Petition for Review 38. Petitioner also argues the ESEE analysis is "misleading because it says that the dwelling density standard allowed by the RAC zone is consistent with the 1 dwelling per 80 acres requirement that currently applies under the EFU-1 zone." Petition for Review 39.

Intervenor responds that petitioner's "clear understanding" argument is based on a challenge to the county court's findings that *summarize* the ESEE analysis that the applicant prepared rather than the ESEE analysis itself, which the county court adopted. Intervenor contends the ESEE analysis identifies a number of consequences and frequently identifies mitigating measures that will limit the consequences.[16] We agree with intervenor that without some challenge to the adequacy of the ESEE analysis itself, petitioner fails to demonstrate the ESEE analysis is insufficient to comply with the OAR 660-023-0040(1) "clear understanding" requirement.

This subassignment of error is denied.

b. Importance of RAC Uses; Why Measures to Protect to Some Extent Should not be Provided

As noted earlier, OAR 660-023-0040(5)(b) requires that a local government, when adopting a Goal 5 program to allow conflicting uses fully, must "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, as per [OAR 660-023-0040(5)(b)]." Petitioner contends the challenged decision does not

---

[16] For example, the ESEE analysis identifies a number of environmental consequences of fully allowing RAC zone uses, including the following: prohibitions on hunting, off-highway vehicle use, livestock grazing, additional fencing, light pollution, aircraft noise impacts, "excavation, grading, paving and construction related activity," "increased road construction, and water quality and ecosystem health degradation. Record 391-92.

demonstrate that the RAC uses are sufficiently important to allow them fully and does not adequately demonstrate that measures to protect the wildlife habitat to some extent should not be provided.

The challenged decision and its supporting ESEE analysis are many pages long. It is not always easy to locate the findings that address particular Goal 5 rule requirements. But the complexity of the ESEE analysis and the findings is in part a function of the complexity of the planning process called for by the Goal 5 rule. In any event, petitioner is simply wrong in arguing that the county failed to adopt findings to establish that the RAC uses are of "sufficient importance relative to the resource site" to allow them fully or to "indicate why measures to protect the resource to some extent should not be provided." Some of those findings are set out below:

> "Of great significance is the evidence that the subject property is in poor ecological condition, is not an area upon which wildlife depends in order to meet their requirements for food, water, shelter and reproduction, and is not significant wildlife habitat as defined by the Goal 5 rule. That conclusion is based on an expert's on-site evaluation of the property (Dr. Schott) and is consistent with a URS habitat assessment conducted for the subject property in 2003, as well as the property owner's own observations. There is no evidence in the record that the subject property is prime or even good wintering habitat for any big game species or that big game wildlife remain on the property for extended periods of time in the winter, the time when forage is most needed. There is no evidence in the record that the property forms part of a big game migration corridor; in fact the evidence is to the contrary. The evidence is that there is only incidental deer, antelope or even, to respond to opponent evidence, elk use of the property. Evidence that there is incidental insignificant big game wildlife use of the property does not establish the property as significant habitat. This point weighs

greatly in our evaluation because it factors into how much might be lost (very little) in comparison to the benefits to be gained from the proposed use under each of the ESEE consideration. The entire ESEE calculus changes if the quality of the habitat that could be adversely impacted is of high value. However, that is not the case here – the evidence in the record establishes that the subject property can barely be described as habitat because it is entirely lacking two of the three key components – water and forage – that make up habitat. The poor ecological condition of the property goes directly to the value of the resource site and its relative weight compared to the conflicting use under each of the ESEE factors. The value of the subject property as a resource site simply is not that weighty given the demonstrated poor habitat that exists.

"* * * * *

"Another aspect of great weight in our consideration is the potential for aircraft – animal conflicts. There is an existing airport on the subject property and the Oregon Airport Protection Act (APA) encourages local governments to support the expansion and appropriate development of existing private airports. The county understands that the APA does not support homesite development. Rather, it supports airport and aircraft related uses. However, the important point to recognize is that the expansion and appropriate development of the airport under the existing CUP as well as the Airport Protection Act is fundamentally inconsistent with maintaining the subject property to attract or maintain big game wildlife or as a 'refuge' for them.

"The applicants have submitted evidence into the record that the private airport on the subject property falls within the protections afforded by the APA. The county finds that the airport was a base for three or more aircraft as shown by the records of the Federal Department of Transportation on December 31, 1994. The county finds that the entire subject property is committed to existing and potential future airport uses described in ORS 836.608(3) and ORS 836.616(2) including areas to serve as a protective buffer as identified by the owner's aviation safety expert (EAGLE UAV – Aaron Rose). The county finds that during 1996, the subject property was used for customary and usual aviation-related

activities including but not limited to takeoffs, landings, aircraft hangars, tie downs, construction and maintenance of airport facilities, fixed base operator facilities and other activities incidental to the normal operation of an airport. There were also flight instruction, aircraft service, maintenance and training, agricultural related flights originating and terminating out of the subject property; aircraft rental, aircraft sales and sale of aviation equipment and supplies, and aviation recreational and sporting activities.

"Applicants have submitted a letter from an air-safety expert that discusses the serious and potentially catastrophic consequences that can result from a collision between aircraft and big game. That letter recommends removing any big game wildlife attractants from the 640 acre property and maintaining the fencing immediately around the airport. The expert does not recommend any additional fencing. In other words, to protect existing airport uses, discouraging wildlife from entering the entire 640 acre subject property is important. On the other hand, the purpose of the relevant Goal 5 inventory is to designate areas to be used to attract and support the wintering of big game. Attracting big game to the Goering 640 acres is exactly what the Eagle UAV Services letter recommends against. The outcome of a successful Goal 5 implementing program to make the Goering property or any part of it big game habitat would be to increase the likelihood of a catastrophic aircraft-wildlife collision. As the Applicants' ESEE recognizes, an aircraft – big game collision would not benefit the protection of big game or promote airport use. Similar to the poor habitat quality issue, the fact that there is an existing private airport and the potential harm to human and animal life that may result from an aircraft-wildlife collision, weighs the ESEE calculus in favor of allowing the RAC uses without restriction. While this conclusion follows with or without the Airport Protection Act, the APA lends strong weight to the balance of allowing the conflicting uses fully since they are consistent with the APA and the big game overlays are not. In this instance, the potential for a catastrophic accident to occur as a result of the conflicting use and the resource site is a strong reason why

> measures to protect the resource to some extent should not be provided and, instead, supports fully allowing the conflicting use.
>
> "While the ESEE documents the full range of factors the County Court considered, the above three factors (poor quality habitat on the subject [property] and extreme wildlife disruptions on the surrounding property, the existing airport and related uses and its needs for safety, and the Airport Protection Act which expresses strong state policy favoring protection of existing airports for current and future aviation uses) carry the greatest weight and significance for our conclusion to remove the subject property from the big game winter habitat inventory and provide the additional analysis required by OAR 660-023-0040(5)(c) to support a decision to fully allow conflicting uses." Record 23-25.

There is conflicting evidence on many of the County Court's findings quoted above. But we agree with respondents that there is evidence a reasonable decision maker could believe to support the above findings. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 *Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). We conclude the County Court's findings are adequate to "demonstrate that the conflicting use is of sufficient importance relative to the resource site, and [to] indicate why measures to protect the resource to some extent should not be provided, as per [OAR 660-023-0040(5)(b)]," as required by OAR 660-023-0040(5)(c).

Petitioner's second subassignment of error is denied.

The third assignment of error is sustained, in part.

CONCLUSION

Our disposition of petitioner's first and second assignments of error and second subassignment of error under the third assignment of error would require that we affirm the county's decision. As we understand the part of the county decision that is challenged in those assignments of error, the county's decision to fully allow the RAC uses and remove the subject property from the county's inventories of significant wildlife habitat have the legal effect of removing the subject property from the county's Goal 5 program for inventoried wildlife habitat.[17] However, because we sustain petitioner's first subassignment of error under the third assignment of error concerning the amendment of the RAC zone to attempt to make it consistent with Wildlife Policy 2 and Goal 5, remand is required. The county must either repeal those amendments or demonstrate that those amendments are consistent with Wildlife Policy 2 and Goal 5.

The county's decision is remanded.

[17] We do not know what effect Ordinance 259 may have on the subject property and express no view on the possible impact of Ordinance 259 on the subject property.