

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

3
4 JIM WOOD,
5 *Petitioner,*

6
7 vs.

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9 CROOK COUNTY,
10 *Respondent,*

11 and

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13
14 RANDY GOERING and LINDA GOERING,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2016-016

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Crook County.

23
24 Sean T. Malone, Eugene, filed the petition for review and argued on
25 behalf of petitioner.

26
27 Jeffrey M. Wilson, County Counsel, Prineville, filed a response brief and
28 argued on behalf of respondent.

29
30 Wendie L. Kellington, Lake Oswego, filed a response brief and argued
31 on behalf of intervenors-respondents. With her on the brief was Kellington
32 Law Group PC.

33
34 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
35 Member, participated in the decision.

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37 AFFIRMED

09/06/2016

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

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NATURE OF THE DECISION

Petitioner appeals a county decision that repeals previously adopted amendments to the county’s Rural Aviation Community (RAC) zone.

FACTS

This matter has been before us three times before. *ODFW v. Crook County*, 72 Or LUBA 316 (2015) (*ODFW*); *Wood v. Crook County*, 55 Or LUBA 165 (2007) (*Wood II*); *Wood v. Crook County*, 49 Or LUBA 682 (2005) (*Wood I*). A detailed recitation of the twists and turns this matter has taken would serve no purpose, and we therefore limit our recitation of the facts to the minimum necessary to understand our disposition of this appeal.

The case involves 640 acres that at one time were (1) zoned for exclusive farm use (EFU-1), (2) included on the Crook County Comprehensive Plan (CCCP) General Deer Winter Range Inventory, and (3) protected under Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and CCCP Wildlife Policy 2. Wildlife Policy 2 imposes a density limit of one residence per 80 acres in the General Deer Winter Range. As we explained in *ODFW*:

“* * * 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.” *ODFW*, 72 Or LUBA at 319.

1 **A. LUBA’s Description of Three Options**

2 In the three prior appeals the county has attempted unsuccessfully to
3 permit intervenors to pursue their plans to subdivide and develop the property.
4 In those prior appeals, LUBA identified three options potentially available to
5 the county and intervenors for doing so. We summarized those options in
6 *ODFW* and they are set out below, along with our description of the county’s
7 decision that led to our most recent remand in *ODFW*:

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

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

14 “2. Adopt findings that justify removing the subject property
15 from the county’s inventoried General Winter Range.’

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

17 “3. Adopt findings under OAR 660-023-0040 and 660-023-
18 0050 to amend the county’s acknowledged program to
19 protect General Winter Range to remove the Wildlife Policy
20 2 density limit from the subject property.’^[1]

¹ In *Wood II* we attempted to distinguish between Option 2 and Option 3:

“Under [Option 3], the subject property would remain on the big game inventory as Deer Winter Range, but the county would make a Goal 5 program decision under OAR 660-023-0040 and 660-023-0050 not to limit residential conflicting uses to protect the inventoried Deer Winter Range on the subject property. Such a decision would have to be adequately justified under the

1 “The challenged decision purports to justify the rezoning based on
2 the two options LUBA identified in *Wood I*. The challenged
3 decision purports to amend the RAC zone to make it consistent
4 with the Wildlife Policy 2 maximum density limit, consistent with
5 option 1. The challenged decision purports to adopt option 2 as
6 well, as an alternative basis for the rezoning, and removes the
7 subject property from the inventoried General Winter Range.
8 However, as explained in more detail below, the county’s
9 alternative basis for rezoning is actually a variation on the third
10 alternative that we set out in *Wood II*. The county attempted to
11 justify an amendment to its Goal 5 program to protect deer winter
12 range under OAR 660-023-0040 and 660-023-0050 and made a
13 programmatic decision under OAR 660-023-0050 to fully allow
14 the uses allowed in the RAC zone and not limit those uses to
15 protect the subject property as wildlife habitat. *That action is more*
16 *accurately described as consistent with the third option we*
17 *identified in Wood II.” ODFW, 72 Or LUBA at 329 (emphasis*
18 *added).*

19 Our efforts to explain and distinguish between Options 2 and 3 have
20 been consistently unsuccessful. As we explained in the text quoted above, the
21 county purported to make “a programmatic decision under OAR 660-023-0050
22 to fully allow the uses allowed in the RAC zone and not limit those uses to
23 protect the subject property as wildlife habitat.” In the text quoted above we
24 described that programmatic decision as “a variation on the third alternative
25 that we set out in *Wood II*.” It was a “variation” on Option 3, because while it
26 was not necessary to remove the subject property from the General Deer Winter

applicable rules, and we make no decision here about whether that is possible. But assuming the county can do so, such action under OAR 660-023-0040 and 660-023-0050 is a third option that is potentially open to the county, in addition to the two options we noted in *Wood I*.” *Wood II*, 55 Or LUBA at 175.

1 Range Inventory, and we indicated in *Wood II* that it would be more
2 appropriate to leave the subject property on the General Deer Winter Range
3 Inventory under Option 3, in the decision before LUBA in *ODFW* the county
4 nevertheless removed the subject property from the General Deer Winter Range
5 Inventory.

6 **B. LUBA’s Decision in *ODFW***

7 In *ODFW*, petitioner’s first assignment of error alleged procedural errors
8 and petitioner’s second assignment of error alleged the county erroneously
9 found the subject property does not qualify as wildlife habitat. We rejected
10 both of those assignments of error.²

11 Petitioner’s third assignment of error included two subassignments of
12 error. In its first subassignment of error petitioner alleged errors in the county’s
13 attempt to amend the RAC zone to make it consistent with Wildlife Policy 2.
14 In its second subassignment of error, petitioner challenged the county’s
15 alternative justification under Goal 5 and the Goal 5 administrative rule to fully
16 allow conflicting RAC zone uses “and remove the subject property from ‘all
17 Goal 5 big game wildlife winter habitat inventories * * *.’” *ODFW*, 72 Or
18 LUBA at 335-36. In *ODFW*, while we sustained petitioner’s first
19 subassignment of error under the third assignment of error, we rejected

² We concluded that while some of the county’s findings took the position that the subject property is poor wildlife habitat, the county did not take the position that the subject property did not qualify as wildlife habitat.

1 petitioner’s other arguments. We explained our decision to remand in our
2 conclusion in *ODFW*:

3 “Our disposition of petitioner’s first and second assignments of
4 error and second subassignment of error under the third
5 assignment of error would require that we affirm the county’s
6 decision. As we understand the part of the county decision that is
7 challenged in those assignments of error, the county’s decision to
8 fully allow the RAC uses and remove the subject property from
9 the county’s inventories of significant wildlife habitat have the
10 legal effect of removing the subject property from the county’s
11 Goal 5 program for inventoried wildlife habitat. However, because
12 we sustain petitioner’s first subassignment of error under the third
13 assignment of error concerning the amendment of the RAC zone
14 to attempt to make it consistent with Wildlife Policy 2 and Goal 5,
15 remand is required. *The county must either repeal those*
16 *amendments or demonstrate that those amendments are consistent*
17 *with Wildlife Policy 2 and Goal 5.” ODFW, 72 Or LUBA at 340*
18 (italics and underscoring added).

19 To summarize, our remand in *ODFW* was quite limited. On remand the
20 county was directed to either (1) justify its conclusion that the amendments it
21 adopted to the RAC zone are sufficient to make it consistent with Wildlife
22 Policy 2 and Goal 5, or (2) repeal those amendments. On remand, the county
23 repealed the amendments.

24 **FIRST ASSIGNMENT OF ERROR**

25 In his first assignment of error, petitioner contends that the county erred
26 in finding that “LUBA affirmed the County Court’s 2015 decision to remove
27 the subject property from all Goal 5 big game wildlife habitat inventories.”
28 Record 9.

1 Petitioner is technically correct that LUBA did not *affirm* any part of the
2 county decision that was before us in *ODFW*; LUBA remanded the decision.
3 But in the underlined text quoted above, LUBA clearly rejected petitioner’s
4 challenge to the part of the decision that was before LUBA in *ODFW* that made
5 a programmatic decision under OAR 660-023-0040(5)(c) to fully allow the
6 conflicting uses in the RAC zone *and* remove the subject property from the
7 General Deer Winter Range Inventory.³ That Goal 5 rule programmatic
8 decision, in and of itself, is sufficient to render Wildlife Policy 2 (the county’s
9 program to limit conflicts on the General Deer Winter Range) inapplicable,
10 without removing the 640 acres from the General Deer Winter Range
11 Inventory. But there can be no doubt that the county’s decision in *ODFW* in
12 fact removed the subject 640 acres from the county’s Goal 5 big game wildlife
13 habitat inventories. While our remand in *ODFW* probably should have pointed
14 out that it was unnecessary to remove the subject 640 acres from the inventory
15 to render Wildlife Policy 2 inapplicable to the subject property, we did not do
16 so. Because petitioner did not pursue an appeal of our decision in *ODFW*, the

³ Under OAR 660-023-0040(1), for significant resource sites like the county’s General Deer Winter Range, the county is required to analyze the “economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use” of the General Deer Winter Range. The county considered the conflicting uses in the RAC zone and determined those conflicting uses should be allowed fully. That option is specifically allowed under OAR 660-023-0040(5)(c), assuming the option is adequately justified.

1 legal sufficiency of the county's Goal 5 programmatic decision that included
2 removal of the subject from the General Deer Winter Range Inventory is now a
3 resolved issue under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678
4 (1992). Petitioner's attempt to raise an issue regarding the propriety of
5 removing the subject property from the inventory in this appeal is barred by the
6 law of the case principle articulated in *Beck*.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioner next argues the county erroneously found that LUBA affirmed
10 the county's decision to rezone the subject property from EFU-1 to RAC and
11 erroneously found that Goal 5 and Wildlife Policy 2 did not need to be
12 considered in its decision on remand from *ODFW*.

13 Again it is true that LUBA did not affirm any part of the county's
14 decision in *ODFW*. But LUBA sustained only petitioner's challenge to the
15 amendments to the RAC zone that the county adopted in its attempt to make the
16 RAC zone consistent with Wildlife Policy 2's density limitation. Our direction
17 to the county in *ODFW* in the final italicized sentence quoted above was to
18 either repeal those RAC zone amendments or make another attempt to justify
19 the county's conclusion that the disputed amendments rendered the RAC zone
20 consistent with Wildlife Policy 2. As we have already explained, the county
21 elected to repeal those amendments.

1 Petitioner suggests in his arguments under the second assignment of
2 error and under the first assignment of error that the ESEE analysis that LUBA
3 sustained in *ODFW* was based on the amended RAC zone, not the prior RAC
4 zone that has been reinstated by the county's repeal of the RAC zone
5 amendments at issue in *ODFW*. Petitioner suggests that a new ESEE analysis
6 and justification to allow RAC zone conflicting uses is therefore required.

7 We reject the argument. The course of action the county followed on
8 remand, *i.e.*, to abandon its attempt to amend the RAC zone to make it
9 consistent with Wildlife Policy 2 and rely entirely on its Goal 5 rule ESEE
10 analysis and programmatic decision to allow RAC zone uses fully,
11 notwithstanding Wildlife Policy 2, is consistent with our decision in *ODFW*,
12 which expressly concluded that the county could correct the only errors we
13 identified in *ODFW* by repealing the RAC zone amendments. Petitioner's
14 arguments to the contrary are barred by *Beck*.

15 Even if petitioner's arguments were not barred by *Beck*, the disputed
16 RAC zone amendments that led to our remand in *ODFW* concerned how
17 residential density was to be computed to comply with Wildlife Policy 2.
18 Those amendments did not change the uses that were authorized in the prior
19 RAC zone in any way that we can see. Compare Record 10-14 (unamended
20 RAC Zone) with *ODFW* Record 34-35 (now repealed RAC zone amendments).
21 Petitioner makes no attempt to show how authorized uses in the amended RAC
22 zone that was used in the county's ESEE analysis and decision to fully allow

1 RAC zone conflicting uses were changed in any material way by the county's
2 decision to repeal the amendments so as to call into question the county's
3 ESEE analysis. It is the *conflicting uses* authorized by the amended RAC zone
4 that were the focus of the ESEE analysis in *ODFW*. As already noted, the uses
5 in the amended RAC zone appear to be the same uses authorized in the
6 unamended RAC zone. Petitioner fails to explain how an ESEE analysis under
7 the amended RAC zone would be any different from an ESEE analysis under
8 the unamended RAC zone that is now in effect.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 In his final assignment of error, petitioner alleges the county erred by
12 rejecting certain evidence that was offered on remand by Central Oregon Land
13 Watch that petitioner adopted as his own and attempted to submit on his own
14 behalf. While we tend to agree with petitioner that at least some of the
15 rationale the county put forth to justify rejecting the Central Oregon Land
16 Watch evidence that petitioner attempted to adopt as his own and submit on his
17 own behalf is suspect, the county adopted the following alternative findings
18 regarding the disputed evidence:

19 "In the alternative only, and without waiving the county's position
20 that Central Oregon Land Watch lacks standing and that the
21 County's decision is to reject COLW's evidence, the County Court
22 considered the submittal provided by COLW and makes the
23 following findings as a precautionary measure. Because the
24 County Court chose to repeal the RAC zone amendments, instead
25 of attempting to demonstrate that those amendments are consistent

1 with Wildlife Policy 2 and Goal 5, the two options for county
2 action on remand, and because COLW's evidence and testimony is
3 directed to the demonstration of consistency with Wildlife Policy
4 2 * * *, the County Court concludes that COLW's evidence is
5 irrelevant to the County Court's decision. This is consistent with
6 the County Court's consideration of all evidence submitted by any
7 party on the consistency with Wildlife Policy 2 and Goal 5 issue –
8 that evidence is irrelevant to the County Court's decision to repeal
9 the RAC zone amendments.” Record 8.

10 As far as we can tell, and petitioner does not argue otherwise, the
11 evidence that petitioner contends the county wrongfully refused to consider
12 was directed at whether the amendments to the RAC zone were sufficient to
13 make it consistent with Wildlife Policy 2. As the county explained in the
14 above-quoted findings, even if the county were to accept and consider that
15 evidence, it would be irrelevant, because the county did not attempt to
16 demonstrate that the RAC zone amendments were sufficient to make the RAC
17 zone consistent with Wildlife Policy 2. Even if the county erred in rejecting
18 the COLW evidence, the above findings are sufficient to explain why that error
19 was harmless in this case, because the evidence was irrelevant to the decision
20 the county adopted on remand.

21 The third assignment of error is denied.

22 The county's decision is affirmed.