

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

3
4 JILL WARREN and PATRICIA FORSYTH,
5 *Petitioners,*

08/20/18 AM 11:44 LUBA

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11
12 and

13
14 BIG-VUK PROPERTIES, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-045

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Washington County.

23
24 Kenneth P. Dobson, Portland, filed a petition for review and argued on
25 behalf of petitioners.

26
27 Jacquilyn Saito-Moore, Washington County Counsel, Hillsboro, filed a
28 joint response brief and argued on behalf of respondent. With her on the brief
29 were Michael C. Robinson, Garrett H. Stephenson and Schwabe Williamson &
30 Wyatt PC.

31
32 Michael C. Robinson, Portland, filed a joint response brief and argued on
33 behalf of intervenor-respondent. With him on the brief were Jacquilyn Saito-
34 Moore, Garrett H. Stephenson and Schwabe Williamson & Wyatt PC.

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36 RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board
37 Member, participated in the decision.
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1 BASSHAM, Board Member, concurring.

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REMANDED

08/20/2018

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

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NATURE OF THE DECISION

Petitioners appeal a county hearings officer decision approving an eight-lot subdivision.

FACTS

Intervenor-respondent Big-Vuk Properties, LLC (intervenor), applied to subdivide a 1.64-acre parcel zoned R-9 (Residential 9 units per acre) into eight lots, and to develop five single-family attached dwellings. The subject property includes an existing single-family dwelling on the south end of the property that will be demolished. The property is located in the Metzger-Progress area of the county.

The county has adopted the Metzger-Progress Community Plan (Community Plan) as part of the county’s comprehensive plan. The Community Plan includes a “Significant Natural and Cultural Resources” map (SNR Map) that designates almost all of the subject property, except the existing dwelling on the very south end of the site, as Wildlife Habitat.¹ As we discuss in more detail below, intervenor submitted a wildlife habitat study to

¹ Washington County Community Development Code (CDC) 422-2.3 describes “Wildlife Habitat” as “Sensitive habitats identified by the Oregon Department of Fish and Wildlife, the Audubon Society Urban Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands.” Wetlands are also present on the site, but the SNR Map does not identify the property as including what CDC 422-2.1 describes as “Water Areas and Wetlands.”

1 identify the location of the Wildlife Habitat on the property, in order to comply
2 with the requirements of Washington County Community Development Code
3 (CDC) 422-3.1.A and CDC 422-3.6. We discuss those provisions in detail
4 below. The hearings officer found that the applicable criteria in CDC 422 were
5 met and approved the application. This appeal followed.

6 **FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR**

7 The three assignments of error present overlapping and related
8 challenges, and we address them together. A somewhat detailed explanation of
9 the applicable law is necessary before we address the assignments of error.

10 **A. Statewide Planning Goal 5 (Natural Resources, Scenic and**
11 **Historic Areas, and Open Spaces) and the County's Resources**
12 **Document**

13 In order to comply with Goal 5, the county inventoried its natural
14 resources, and in 1982 adopted the Resource Document as a part of the
15 Washington County Comprehensive Framework Plan. The Resource Document
16 includes the county's Goal 5 inventory of significant resources, one of which is
17 "Fish and Wildlife," which the Resource Document describes as:

18 "All Sensitive Habitats identified by the Oregon Department of
19 Fish and Wildlife and those sites on the Audubon Society's Urban
20 Wildlife Habitat map are regarded as significant. In addition,
21 forested areas coincidental with 100-year flood plains, or drainage
22 hazard areas are significant due to the availability of cover, forage,
23 and water." Resource Document Appendix 1-E.3.²

² At oral argument, the Board requested that the county provide the Board and the parties with copies of the county's acknowledged Goal 5 documents.

1 The current adopted version of the Community Plan explains that the SNR Map
2 graphically identifies the location of the significant Goal 5 resources in the
3 Metzger-Progress community planning area. Community Plan 4. All of the
4 subject property except the existing dwelling is identified on the SNR Map as
5 Wildlife Habitat. The map, however, was created from broad scale aerial
6 photographs, and is drawn at a scale of one inch equals 2,000 feet. It is difficult
7 to discern from the map the exact location of the boundary on the subject
8 property.

9 **B. CDC Chapter 422**

10 Washington County Comprehensive Framework Plan includes Policy 10,
11 “to protect and enhance Significant Natural Areas,” and an implementing
12 strategy under that policy states that:

13 “The County will:

14 “* * * * *

15 “c. Through the [CDC], review and regulate proposed activities
16 in identified Significant Natural Resource Areas. The
17 review process shall adhere closely to provisions in
18 applicable community plans, which direct the manner and
19 extent to which the area shall be protected.”

20 CDC Chapter 422 implements Policy 10, and through it, Goal 5. *Plotkin v.*
21 *Washington County*, 165 Or App 246, 252, 997 P2d 226 (2000).

The county then provided the Board and the parties with portions of the county’s acknowledged Goal 5 documents, which are portions of the Resource Document. Petitioners filed a written response to those materials.

1 CDC 422-3 includes the criteria for development of property that
2 includes an identified natural resource. CDC 422-3.1 provides as relevant here:

3 “The required master plan and site analysis for a site which
4 includes an identified natural resource shall:

5 “A. Identify the location of the natural resource(s), except in
6 areas where a Goal 5 analysis has been completed and a
7 program decision adopted pursuant to OAR 660, Division
8 23 (effective September 1, 1996);

9 “B. Describe the treatment or proposed alteration, if any. Any
10 alteration proposed pursuant to Section 422-3.1 B. shall be
11 consistent with the program decision for the subject natural
12 resource; and

13 “C. Apply the design elements of the applicable Community
14 Plan * * * [.]”³

15 In order to satisfy the requirement in CDC 422-3.1.A., intervenor submitted a
16 wildlife habitat study intended to determine the location of the Wildlife Habitat
17 on the property. Record 786-810. The wildlife habitat study determined that the
18 extent of the Wildlife Habitat on the subject property included only “the limits
19 of contiguous native forest with intact native understory.” Record 790. The
20 study excluded as Wildlife Habitat (1) areas with “plant communities that lack
21 understory and/or the establishment of non-natives and invasive cover in the
22 understory,” as well as (2) “landscaped or cleared areas around the existing
23 residential buildings.” Record 790-91, 386. Intervenor’s expert concluded that

³ The parties do not dispute that no Goal 5 analysis has been completed and no program decision has been adopted for the property or the Metzger-Progress area pursuant to OAR 660, Division 23.

1 the area of the Wildlife Habitat on the property was approximately 47,051
2 square feet.⁴ Record 801. Petitioners' wildlife biologist challenged intervenor's
3 wildlife habitat study's methodology that excluded certain areas as Wildlife
4 Habitat, and took the position that the excluded areas were suitable or superior
5 Wildlife Habitat. Record 410-12.

6 The hearings officer accepted intervenor's wildlife study, and for
7 purposes of CDC 422-3.6 and other standards discussed below evaluated only
8 the 47,051 square feet of the property that intervenor's expert identified as
9 constituting protected Wildlife Habitat. As we discuss in more detail below,
10 the hearings officer concluded that the proposed development would interfere
11 with 7,632 square feet of the 47,051 square feet of Wildlife Habitat that was
12 identified by intervenor's wildlife habitat study, and would also require
13 removal of 21 trees.⁵ CDC 422-3.6 provides that:

14 "For any proposed use in a Significant Natural Resource Area,
15 there shall be a finding that the proposed use will not seriously
16 interfere with the preservation of fish and wildlife areas and
17 habitat identified in the Washington County Comprehensive Plan,
18 or how the interference can be mitigated. * * *"

19 In order to mitigate the proposed development's interference with the identified
20 Wildlife Habitat, intervenor proposed planting 42 new trees and 104 new

⁴ 1.64 acres equals 71,438 square feet. It is not clear from the record how many square feet are occupied by the existing dwelling.

⁵ For reasons that are not clear to us, the hearings officer found that the area of Wildlife Habitat on the property totaled 22,679 square feet. Record 38.

1 shrubs, in addition to avoiding impacts to the wetland areas totaling 22,673
2 square feet, and maintaining a 50-foot buffer between the wetlands and
3 development, which includes forested areas that were excluded from the
4 wildlife study's areas containing Wildlife Habitat. With this background, we
5 now turn to petitioners' assignments of error.

6 **C. Assignments of Error**

7 At the crux of all three of petitioners' assignments of error is petitioners'
8 disagreement with the hearings officer's decision to exclude certain areas of the
9 property as Wildlife Habitat.

10 **1. First Assignment of Error**

11 In the first assignment of error, petitioners argue that intervenor's code-
12 mandated site analysis—which identified the location of Wildlife Habitat more
13 specifically than the SNR Map, and identified the amount of Wildlife Habitat
14 as less than the amount of the subject property petitioners assert is included in
15 the SNR Map boundary—amounts to an impermissible *de facto* amendment of
16 the SNR Map boundary.

17 Intervenor and the city (together, respondents) respond that the code
18 requirement to identify the location of the Wildlife Habitat does not amount to
19 an amendment of the SNR Map. For the reasons set forth below, we agree with
20 respondents on that point.

21 As explained above, the county's acknowledged Goal 5 program to
22 protect the identified and inventoried resource, Wildlife Habitat, is CDC

1 Chapter 422. *Plotkin*, 165 Or App at 252. CDC Chapter 422 anticipates that
2 further refinement of the location of the protected resource will occur when the
3 county receives an application for development of property that is included on
4 the SNR Map. CDC 422-3.1.A requires an applicant for development of
5 property that is included on the SNR Map to provide the county with additional
6 information identifying “the location of the natural resource(s)[.]” However,
7 the requirement to precisely identify the location of the protected resource does
8 not amount to an amendment of the SNR Map, because both before and after
9 the precise location of the identified resource is known, the extent of the
10 property included on the SNR Map is the same. Stated differently, if intervenor
11 abandons its development plans, a future developer of the property would be
12 required to begin the process all over again and identify the precise location of
13 the protected resource, because the subject property is included on the SNR
14 Map and the provisions of CDC 422 apply. If petitioners were correct that the
15 SNR Map has already determined the location of the natural resources on a
16 property, then the CDC 422-3.1.A. requirement to identify the location of the
17 natural resources would be a meaningless requirement.

18 The first assignment of error is denied.

19 **2. Second and Third Assignments of Error**

20 In the second assignment of error, petitioners argue that intervenor’s
21 expert’s determination of the precise location of Wildlife Habitat on the
22 property is not supported by substantial evidence in the record, and is “wholly

1 arbitrary,” because the wildlife habitat study was not prepared based on any
2 standards adopted into the CDC. Petition for Review 25. Petitioners also argue
3 the hearings officer’s findings are inadequate to explain why he chose to
4 exclude certain areas as containing Wildlife Habitat. In the third assignment of
5 error, which includes similar arguments as the first assignment of error,
6 petitioners argue that the proposed mitigation plan for disturbance of Wildlife
7 Habitat is not supported by substantial evidence in the record, because the plan
8 proposes mitigation for only the Wildlife Habitat areas identified in the wildlife
9 study and not for the entire property that is included on the SNR Map.
10 Petitioners also argue that the proposed mitigation plan is not supported by
11 substantial evidence because, according to petitioners, planting new trees is
12 insufficient to offset the loss of mature trees, and because mitigation from
13 leaving the wetland areas undisturbed is not really mitigation, since those areas
14 are already protected from development by Clean Water Services regulations.

15 The hearings officer found:

16 “The applicant’s materials include a report that assesses the
17 resource area on the site, performed by Environmental Science &
18 Assessment (ESA) and contained in Exhibit 20 of the applicant’s
19 materials. The report includes observation of existing vegetation,
20 existing areas of disturbance, evaluation of habitat quality and
21 observed and presumed birds and wildlife. *The report identifies*
22 *that the SNR-Wildlife Habitat boundary on the site is*
23 *approximately 22,679 square feet in size. This area was*
24 *determined based on evaluation of the limits of the contiguous*
25 *habitat area and vegetative cover on the site. The proposed*
26 *development would encroach into approximately 7,623 square feet*
27 *of this SNR area.*

1 “The in-field analysis to identify the location of the natural
2 resource is required by Section 422-3.1. For SNR areas that
3 involve a water body, it is not assumed that the mapped
4 boundaries shown at a scale of 1:24,000 in the Community Plan
5 are the delineated edges of a water body or wetland. Rather, these
6 boundaries and associated impacts and required mitigation must be
7 established in the field. Establishing the actual boundary of these
8 features through field observation does not effectuate a legislative
9 map amendment. While the boundary of a Wildlife Habitat area
10 may be less exact than the boundary of a water body, the same
11 principle of field verification of the limits of the mapped SNR is
12 still applicable. The Hearings Officer finds that site analysis
13 performed by the applicant to determine the location of the
14 Wildlife Habitat is supported by substantial evidence in the
15 record.” Record 36-37 (emphasis added).

16 We agree with petitioners that the hearings officer’s findings are
17 inadequate to explain why he concluded that the location of Wildlife Habitat on
18 the property includes only contiguous habitat area with intact native vegetative
19 cover. Although CDC 422-3.1.A requires the applicant to identify the
20 “location” of the natural resource on the subject property, in this case Wildlife
21 Habitat, that provision does not expressly allow or require a qualitative analysis
22 of the value of the protected natural resources on the site.⁶ More
23 problematically, the hearings officer determined that “[the] site analysis
24 performed by the applicant to determine the location of the Wildlife Habitat is

⁶ We cannot tell from the portions of the Resource Document that the county provided whether that qualitative analysis was conducted when (1) the Resource Document—that identified Wildlife Habitat as a protected resource—was adopted, and/or (2) the SNR Map—that includes the subject property—was adopted.

1 supported by substantial evidence in the record.” Record 37. However, the
2 hearings officer’s task is not to determine whether intervenor’s submittals in
3 support of its application are “supported by substantial evidence in the record.”
4 *Id.* The hearings officer’s task is to consider all of the evidence in the record
5 and determine whether the applicable approval criteria in CDC 422 are
6 satisfied. A hearings officer must weigh the evidence themselves against the
7 applicable standards and criteria, and make that determination in the first
8 instance.⁷

9 Finally, petitioners argue that the hearings officer’s findings contain no
10 explanation or rationale for excluding portions of the property as Wildlife
11 Habitat, and do not reference any criteria, standards, or guidance from any
12 other sources regarding how to identify the location of Wildlife Habitat areas
13 when complying with CDC 422-3.1.A. Petitioners contend that any such
14 criteria, standards or guidance for identifying the location of the wildlife
15 habitat must necessarily be found in the CDC. Absent any developed argument
16 from petitioners explaining why the standards, criteria or guidance must be
17 contained in the CDC, we do not agree with petitioners.

⁷ We previously addressed the requirements of CDC 422-3.1.A and 422-3.6 in *Kyle v. Washington County*, 52 Or LUBA 399 (2006). In that case, we explained that the record included a four-page Community Development Code Interpretation signed by the county planning manager in 1998 that set out the kind of information that the county required applicants to submit regarding Significant Natural Resource Areas, and how the county applies CDC 422-3.6. *Id.* at 407 n 9.

1 The second and third assignments of error are sustained, in part.

2 The county's decision is remanded.

3 Bassham, Board Member, concurring.

4 I agree with the majority that remand is necessary under the second and
5 third assignments of error. I write separately to note my agreement with one of
6 petitioners' arguments that the majority opinion does not directly address.
7 Specifically, in the first sub-assignment of error to the third assignment of error
8 petitioners argue notwithstanding that CDC 422-3.1 may allow the applicant to
9 identify the location of wildlife habitat on the property, CDC 422-3.6 expressly
10 requires the county to apply the "seriously interfere" standard to the wildlife
11 habitat that is "identified in the Washington County Comprehensive Plan," in
12 other words, to the area of the subject property that is mapped as SNR on the
13 county's SNR Map. I agree with that argument, and it has important
14 ramifications.

15 CDC 422-3.1 requires the applicant to identify the location of the natural
16 resource, here wildlife habitat, on the subject property. But CDC 422-3.1 does
17 not expressly allow or require the hearings officer or the applicant's expert to
18 limit the *geographic application* of the county's acknowledged program to
19 achieve Goal 5 with respect to wildlife habitat to only those habitat areas on the
20 property that the hearings officer or the applicant's expert believes meets some
21 qualitative threshold of value or significance. The hearings officer applied
22 CDC 422-3.6 and other standards that are part of the county's program to

1 protect wildlife habitat on the property only to the 47,051 square feet of
2 property that the applicant's expert concluded met a self-defined threshold for
3 protected "wildlife habitat," specifically forested areas sufficiently dominated
4 by certain types of trees and by native undergrowth. Other forested and
5 vegetated areas on the property designated as significant wildlife habitat were
6 excluded from the protection of CDC 422-3.1, not because they did not
7 constitute "wildlife habitat," but because those areas were apparently deemed
8 to have insufficient value or significance as wildlife habitat to qualify as a
9 protected Goal 5 resource.

10 The hearings officer's understanding of CDC 422-3.1 effectively reduces
11 the geographic applicability of CDC 422-3.6, the chief element of the county's
12 program to achieve Goal 5 with respect to significant wildlife habitat. As
13 petitioners argue, that understanding is inconsistent with the text of CDC 422-
14 3.6, which provides that for any proposed use in a significant natural area, the
15 county must find that the proposed use "will not seriously interfere" with
16 "wildlife areas and habitat identified in the Washington County Comprehensive
17 Plan." By its plain text, the "seriously interfere" standard and related
18 mitigation requirements of CDC 422-3.6 must be applied to the entire area
19 identified as wildlife habitat in the county comprehensive plan. Limiting
20 application of the seriously interfere standard to a subarea of the total area
21 designated as significant wildlife habitat, because habitat outside that subarea

1 does not meet an undefined threshold of value or quality, is inconsistent with
2 the text of CDC 422-3.6.

3 A better reading of CDC 422-3.1.A—and one that is consistent with
4 CDC 422-3.6 (as well as, as explained below, more consistent with Goal 5)—is
5 that CDC 422-3.1.A requires the applicant to provide the information the
6 hearings officer will need regarding the location and condition of habitat on
7 designated portions of the property, in order to meaningfully apply the
8 “seriously interfere” standard at CDC 422-3.6, and to impose any necessary
9 mitigation. For example, if some of the wildlife habitat on a designated portion
10 of the property is found to be degraded, the hearings officer could take the
11 location and the condition of such habitat into account in determining whether
12 proposed development would “seriously interfere” with the preservation of
13 wildlife habitat on the property. But what the hearings officer cannot do,
14 consistent with CDC 422-3.6, is to not apply the “seriously interfere” standard
15 *at all* to portions of the property that are designated as a significant natural
16 resource area.

17 Taken to an extreme, the approach taken by the hearings officer could
18 mean that the county’s program to achieve Goal 5 with respect to wildlife
19 resources is not applied to *any* portion of the subject property, if the applicant’s
20 expert opines and the hearings officer agrees that none of the existing wildlife
21 habitat on the property meets some undefined threshold of value, quality or
22 significance. Such an approach would not only be inconsistent with the plain

1 text of CDC 422-3.6, but in my view would be inconsistent with Goal 5. While
2 Goal 5 is not directly applicable here, a county cannot interpret ambiguities in
3 its acknowledged program to achieve Goal 5 in a manner that renders the
4 program inconsistent with the goal, if the ambiguity can be interpreted
5 consistently with the goal. ORS 197.829(1)(d); *White v. Lane County*, 68 Or
6 LUBA 423, 434 (2013).⁸ CDC 422-3.1 is ambiguous regarding the purpose and
7 consequence of requiring the applicant to identify the location of the resource
8 on the subject property. To the extent the hearings officer has interpreted CDC
9 422-3.1 in a manner that would effectively limit or potentially eliminate the
10 geographic application of CDC 422-3.6 (*i.e.*, the county’s program to achieve
11 the goal with respect to wildlife areas), the hearings officer erred. Such an
12 interpretation is not only inconsistent with the text of CDC 422-3.6, and not
13 compelled by any text within CDC 422, but it is erroneous because it arguably
14 represents a *de facto* amendment of the county’s program to achieve the goal.

⁸ ORS 197.829(1)(d) provides:

“(1) [LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“* * * * *

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

- 1 For these additional reasons, I would sustain the first sub-assignment to the
- 2 third assignment of error.