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

LANDWATCH LANE COUNTY
Petitioner,

v.

LANE COUNTY,
Respondent,

and

LARRY MARTINEZ,
Intervenor-Respondent.

LUBA No. 2019-048

FINAL OPINION
AND ORDER

Appeal from Lane County.

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

No appearance by Lane County.

Larry Martinez, Eugene, filed the response brief and argued on behalf of intervenor-respondent.

RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REMANDED 08/09/2019

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners' decision amending the comprehensive plan designation of a 54-acre property from Forest Land to Marginal Land and changing the property's zoning from Impacted Forest Lands (F-2) to Marginal Land (ML).

MOTION TO INTERVENE

Larry Martinez, the applicant below (intervenor), moves to intervene on the side of the respondent. No party opposes the motion, and it is granted.

FACTS

Intervenor owns a rectangular, 54-acre site that is zoned F-2 and is designated Peripheral Big Game Habitat and developed with a single-family dwelling, septic system and well (the property or the subject property). Record 17. The southern portion of the property is gently sloped and forested. Record 17. The northern part of the property contains a pond.

A substantial amount of neighboring property is zoned Rural Residential 5 acres (RR-5). Record 16. As the county's decision explains:

> "Immediately to the north of the area proposed to be rezoned is land zoned RR-5 and developed with single family dwellings. * * * A small portion of the eastern boundary lies adjacent to RR-5 zoned properties. Property to the south of the subject property [is] zoned RR-5 and developed with residences. Pine Grove Road abuts the northern portion of the property's western border. Across the road to the west are more RR-5 zoned properties developed with single family residences." Record 18.

Intervenor requested that the county change the comprehensive plan and zoning designation of the property pursuant to ORS 197.247.[1] The county approved the request and this appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error focuses on the county's interpretation of ORS 197.247 and the evidence the county relied upon in concluding that the statute was met. ORS 197.247, which we refer to as the marginal lands statute, allows some counties to designate lands marginal and as a result of that designation, allows for more intense development of those lands than would otherwise be allowed. ORS 215.316; ORS 215.317; ORS 215.327.[2] Lane County is one of those counties. As we explained in *Landwatch Lane County v. Lane County*, 75 Or LUBA 258, 267 (2017), the purpose of the marginal lands statute "was to allow lands that are in proximity to farm lands and to areas already subject to parcelization to be developed as rural residential areas." Designation

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[1] Oregon's marginal lands statute, at ORS 197.247, was first adopted in 1983, and was subsequently repealed in 1993. Or Laws 1983, ch 826, § 2; *repealed by* Or Laws 1993, ch 792, § 55. We refer to the version of ORS 197.247 that existed in 1991 throughout this opinion, unless otherwise noted.

[2] ORS 215.316 provides that counties that designated marginal lands before January 1, 1993, may, in some cases, continue to designate marginal lands as provided in ORS 197.247. ORS 215.317 identifies permitted uses on marginal land. ORS 215.327 governs division of marginal lands.

as marginal lands requires, however, meeting certain tests that we set out and explain below.

Petitioner's first assignment of error argues that the application failed to comply with ORS 197.247(1)(a), (1)(b)(A) and ORS 197.247(2). We address these three subassignments of error out of order.

We begin with the second assignment of error because it addresses the income test in ORS 197.247(1)(a), the first of the marginal lands tests. We proceed to the first subassignment of error because it concerns the second prong of the marginal lands test and the correct interpretation of the lot test in ORS 197.247(1)(b)(A). We then proceed to the third assignment of error under ORS 197.247(2) because it concerns the identification of lots and parcels for purposes of the second prong of the marginal lands test.

A. ORS 197.247(1)(a)

ORS 197.247(1)(a) requires that the county determine that the land was "not managed for three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income or a forest operation capable of producing on average, over the growth cycle, of $10,000 in annual gross income." Petitioner disputes the credibility of the evidence that the county relied upon to conclude that the property was not producing farm income and argues that the county's findings are inadequate to explain why the income test was met. Petition for Review 10-11.

In determining that the income test was met, the county relied upon testimony from a person who occupied the residence located directly across from the property from 1970 until 2004. Record 20-21, 359. The neighbor described observing, from his living room view, minimal orchard, meadows and garden related activity on the property and, other than horses belonging to some of the owners of the property, never seeing any livestock or other farm animals on the property. Record 716-17. The county found the testimony of the neighbor concerning minimal farming activity on the property persuasive.

Substantial evidence is evidence a reasonable person would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). The neighbor's testimony may reasonably be read to span the length of his occupancy, as opposed to a time period prior to the 1978-1983 time period the statute focuses on. Record 716-17. The county could reasonably conclude that the neighbor's testimony supported the determination that the property did not generate farm income of at least $20,000 per year for three of the five years prior to 1983. The county recognized the neighbor's long tenure on the neighboring property and found that the author of the letter:

> "noted that the only agricultural use he was aware of on the subject property was a very old apple orchard, of which only several trees remain on the property. [The neighbor] testified that the subject property was not actively managed for farm use during the five years preceding January 1, 1983, as required by the statute[]"

and that the author "subsequently submitted another letter re-iterating that no commercial farm use occurred on the property during the statutory time period." Record 20. A reasonable person could rely on the neighbor's testimony to conclude that the property was not managed as a farm operation at any time between 1978-1983.

The county's findings specifically identified much of the evidence submitted by opponents, including recognizing opponents' argument that aerial photos from 1979 and 1982 and a 1979 permit for a new barn supported a determination that active farming occurred between 1978 and 1983. Record 20. The county observed in response to that argument that the neighbor reiterated that there was (1) no farm use such as cattle or crops between 1978 and 1983, and (2) during the 1980s, owners of the property kept their show horses on the property.[3] Record 21. Opponents also submitted evidence of a 1987 farm dwelling approval and the county acknowledged that the approval of a farm dwelling four years after the statutory period could be read to conflict with the neighbor's testimony. Record 20-21. The county again noted, however, that the

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[3] The staff report explained that the neighbor stated in a second letter he submitted to the county that there was no farm use such as cattle or crops on the property between 1978 and 1983. Record 21. The referenced second letter is not part of the record. A local government is not bound by the Oregon Rules of Evidence and does not commit error by considering hearsay evidence in a staff report to reach a conclusion concerning representations made. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 679-80 (2001).

neighbor reiterated that there was no farm use on the property during the critical period. Record 20; 226.

Petitioner directs us to testimony from other area residents such as the resident who

> "submitted testimony contradicting [the neighbor's testimony concerning farm use during the statutory period]:
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> "'Finally, I have to disagree with the testimony claiming that the subject property was not being farmed in the 5 years prior to 1983. The land which was homesteaded in 1894 remained in the same family until 1983 and was continuously farmed during that period. They raised sheep, cows, and horses. The family harvested wheat, hay, and timber. At one time the orchard contained 200 filbert trees as well as apples and pears that still remain.'" Petition for Review 12; Record 364.

The county did not expressly reference testimony from other area residents, but concluded that none of the evidence submitted by opponents served as evidence to establish that any farm activity occurred on the property that produced the necessary $20,000 or more in gross income during the statutory period. The record does not disclose the proximity of the other area residents' properties to the subject property, or whether those area residents had made first-hand observations of the subject property during the relevant statutory period.

We will not reweigh the evidence. *Sanders v. Clackamas County*, 10 Or LUBA 231, 237 (1984) (Local decisionmaker evaluation of witness credibility will not be second guessed by LUBA). The county could reasonably rely on the

testimony provided by the long-term occupant of neighboring property with a view of the property during the relevant time period.

This subassignment of error is denied.

B. ORS 197.247(1)(b)(A)

ORS 197.247(1)(b) requires that, in addition to meeting the income test, the proposed marginal land meet at least one of three additional tests. The applicant proceeded under ORS 197.247(1)(b)(A), which requires that "[a]t least 50 percent of the proposed marginal land plus the lots or parcels at least partially located within one-quarter mile of the perimeter of the proposed marginal land consists of lots or parcels 20 acres or less in size on July 1, 1983." We refer to this as the 50 percent standard. The county interpreted the standard as follows:

> "The total area of all of the lots or parcels falling all or partially within the study area must be considered along with the subject property. The total area of all of the lots and parcels, including the subject property, that are 20 acres or less, must be equal to or greater than one half of the total area of the study area." Record 22.

Petitioner argues that the county misinterpreted the statute because the statute requires an applicant to show that (1) at least 50 percent of the land proposed for marginal land designation consists of lots or parcels 20 acres or less in size, and (2) at least 50 percent of the land within ¼ mile of the perimeter of the proposed marginal land consists of lots or parcels 20 acres or less in size. Petition for Review 7. We agree with petitioner "that [ORS 197.274(1)(b)(A)] is concerned with the lots and parcels, not the overall acreage or area," and that the

county improperly construed and applied ORS 197.247(1)(b)(A). Petition for Review 8. We agree with intervenor, however, that ORS 197.274(1)(b)(A) does not require two separate tests and a determination that two distinct areas each meet the 50 percent standard. Response Brief 1.

We review local interpretations of state law to determine whether the county improperly construed state law. ORS 197.835(9)(a)(D). In interpreting state law, we consider text, context and legislative history.[4] *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). Other provisions of the same statute provide relevant context for statutory interpretation. *Stull v. Hoke,* 326 Or 72, 79-80, 948 P2d 722 (1997).

ORS 197.247(1)(b) provides three different means for calculating eligibility for marginal lands designation. ORS 197.247(1)(b)(C) requires a showing that:

> "The proposed marginal land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification System in use by the United States Department of Agriculture Soil Conservation Service on October 15, 1983, and is not capable of producing fifty cubic feet of merchantable timber per acre per year in those counties east of the summit of the Cascade Range and eighty-five cubic feet of merchantable timber per acre per year in those counties west of the summit of the Cascade Range, as that term is defined in ORS 477.001(21)."

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[4] The parties did not submit legislative history for our consideration.

That provision concerns only the land proposed for marginal land designation and the quality of its soil, and does not assist in our interpretation of ORS 197.247(1)(b)(A).

ORS 197.247(1)(b)(B) allows potential designation of land where "[t]he proposed marginal land is located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983[.]" We have developed the chart below to explain the calculation required:

Percentage of land within study area occupied by lots or parcels, as defined by statute, 20 acres or less in size *(must equal or exceed 60%)* =	100 multiplied by	(Acreage within study area occupied by lots or parcels, as defined by statute, 20 acres or less in size) divided by (Total acreage of study area (*must equal at least 240 acres in size*))

The third test is provided in ORS 197.247(1)(b)(A).[5] We have developed the chart below to explain the required calculation under ORS 197.247(1)(b)(A):

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[5] The following example applies the formula: Assume an applicant seeks marginal land designation for a 100-acre tract. The tract includes an 80-acre legal lot and a 20-acre legal lot. In order to evaluate compliance with the marginal land statute under the 50 percent standard, the applicant must draw a line around the perimeter of the tract, at a distance of ¼ mile from the tract's property lines. The applicant must then count the number of legal lots wholly or partially within the line drawn, including the two lots within the tract. This number becomes the denominator in the equation. Assume this number is 12. Next, the applicant counts all the legal lots wholly or partially within the tract's property lines that are 20 acres or smaller in size, including the one within the tract. This number

Percentage of lots and parcels within the land proposed for marginal land designation and lots and parcels at least partially within ¼ mile of that land's perimeter 20 acres or less in size = (*must be 50% or more*)	100 multiplied by	(Number of lots or parcels, as defined by statute, 20 acres or less in size and located either within the land proposed for marginal land or lots and parcels at least partially within ¼ mile of that land's perimeter) divided by (Number of lots and parcels, as defined by statute, at least partially within ¼ mile of land proposed for marginal land designation plus number of lots and parcels within land proposed for marginal land designation)

When we interpret a statute, we may not insert language that is absent from the statute. ORS 174.010. When interpreting a statute, we may conclude that the legislature's use of different language in different provisions is intentional. *Jordan v. SAIF Corp*, 343 Or 208, 217-218, 167 P3d 451 (2007). Unlike ORS 197.274(1)(b)(B), there is no reference to "area of land" in ORS 197.274(1)(b)(A). Unlike ORS 197.274(1)(b)(B), ORS 197.274(1)(b)(A) requires (1) a calculation of the number of lots and parcels at least partially within ¼ mile of the perimeter of the proposed marginal lands, and (2) a determination

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becomes the numerator in the equation. Assume this number is six. The required calculation is six divided by twelve (which equals 0.5) multiplied by 100. In this example, the result is 50 percent and the standard is met.

that 50 percent of those lots and parcels plus the lots and parcels within the proposed marginal lands are 20 acres or less in size.

Rather than applying the ORS 197.274(1)(b)(A) standard, the county used a process closer to that set out in ORS 197.274(1)(b)(B). The county accepted intervenor's analysis, which established a study area defined by the area proposed for marginal land designation combined with the area identified by parcels or lots at least partially within ¼ mile of the perimeter, subtracting road area.[6] Record 467. The analysis then considered the area of lots or parcels wholly or partially within that study area and determined that the area occupied by lots or parcels 20 acres or less in size was equivalent in size to more than 50 percent of the study area acreage. *Id.* Based on this analysis, the county concluded that this prong of the marginal lands test was met. Record 22. As we explain above, this was error. ORS 197.274(1)(b)(A) requires an analysis of the relative number of lots, not relative area.

Petitioner argues that intervenor cannot meet this standard because the proposed marginal land is a single 54-acre lot and therefore intervenor cannot show that 50 percent of the proposed marginal land consists of lots 20 acres or less in size. Petition for Review 8. Contrary to the position taken by petitioner, however, we conclude that ORS 197.247(1)(b)(A) requires only one calculation.

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[6] ORS 197.247 does not mention subtracting road area. The county concluded that the statute did not prohibit the subtraction. Record 23-24.

Intervenor was not required to show that at least 50 percent of the proposed marginal land was made up of lots or parcels 20 acres or less in size *and* that 50 percent of the lands within ¼ mile of the perimeter was made of lots or parcels 20 acres or less in size. The statute provides that the test area "consists of lots or parcels 20 acres or less in size on July 1, 1983." ORS 197.247(1)(b)(A). Words are properly given their ordinary meaning. *State v. Ausmus*, 336 Or 493, 504, 85 P3d 864 (2004). Definitions of "consist" include "**5 :** to become composed or made up[.]" *Webster's Third New Int'l Dictionary* 484 (unabridged ed 2002). The use of the singular tense of the verb–"consists"–suggests that the legislature intended for there to be one test, because the verb "consists" is used when a singular noun precedes it. Applying this to the statutory language:

> "At least 50 percent of the proposed marginal land plus the lots or parcels at least partially located within one-quarter mile of the perimeter of the proposed marginal land **consists of** lots or parcels 20 acres or less in size on July 1, 1983,"

the boldfaced language is properly read to reflect a singular item, or a singular test. ORS 197.274(1)(b)(A) (emphasis added).

This interpretation is consistent with ORS 197.274(6), which provides that any lot within the ORS 197.274(1)(b)(A) "test area" that meets the income test may be designated marginal land. The singular "test area" supports the conclusion that there is one test area consisting of all the lots (or parcels) found in the proposed marginal lands and within ¼ mile of their perimeter. As noted

above, although the county is correct that it is one test, the county erred in its application of ORS 197.274(1)(b)(A).

This subassignment of error is sustained.

C. ORS 197.247(2)

Petitioner argues that the county improperly construed ORS 197.247(2), that the county's findings are inadequate and that the county's decision that ORS 197.247(2) is met is not based on substantial evidence. Petition for Review 14. For the reasons explained below, we agree with petitioner.

ORS 197.247(2) and (4) identify the lots and parcels eligible for consideration in determining whether the percentage test in ORS 197.247(1)(b) is met. Section (4) provides that lots and parcels located in exception areas may not be included in the calculation. Section (2)(a) provides that lots and parcels within an urban growth boundary are not included in the calculation. Section (2)(b) looks at common ownership of lots and parcels. ORS 197.247(2)(b) provides:

> "For purposes of subparagraphs (A) and (B) of paragraph (b) of subsection (1) of this section:
>
> "* * * * *
>
> "(b) Only one lot or parcel exists if:
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> "(A) A lot or parcel included in the area defined in subparagraph (A) of paragraph (b) of subsection (1) of this section is adjacent to one or more such lots or parcels;

> "(B) On July 1, 1983, greater than possessory interests are held in those adjacent lots or parcels by the same person, parents, children, sisters, brothers, or spouses, separately or in tenancy in common; and
>
> "(C) The interests are held by relatives described in subparagraph (B) of this paragraph, one relative held the interest in the adjacent lots or parcels before transfer to another relative."[7]

Intervenor submitted a list of properties that intervenor maintained were within the study area and less than 20 acres in size. Record 468-69. Petitioner argues that intervenor's list improperly counted lots. Petitioner argues the county failed to respond to the annotated list of intervenor's list of lots that petitioner provided, other than to criticize opponents. Petition for Review 15-17. Petitioner argues that in so doing, the county improperly shifted the burden to petitioner to prove that ORS 197.247(2) was not met.

The terms lots and parcels have the meanings provided in ORS 92.010 and we have previously held that lots and parcels considered for purposes of the marginal lands statute must be lawful. ORS 197.274(3); *Landwatch Lane County*, 75 Or LUBA at 263. The county assumed that the lots or parcels included on intervenor's list had been lawfully created. Record 23-24. The county also determined that petitioner had not developed an argument or identified a sufficient number of lots it alleged were unlawful. *Id.*

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[7] "Lots or parcels are not 'adjacent' if they are separated by a public road[.]" ORS 197.247(3)(a).

An annotated lot list submitted by petitioner appears to specifically challenge the legality of a few of the listed properties. Record 343-44. We agree with petitioner, however, that the burden of establishing that the lots or parcels were lawful rests in the first instance on intervenor, and intervenor failed to provide the required foundational evidence. It is applicant's burden of proof to establish in the first instance that the applicable criteria are met. *Strawn v. City of Albany*, 20 Or LUBA 344, 350 (1990).

The county also took the position that it was petitioner's burden to show that an impermissible number of the lots were in common ownership. The county concluded:

> "Finally, opponents allege that applicant must study each and every lot and parcel and determine whether adjacent properties were held in the same ownership in 1983. See ORS 197.247((2)(b)).Many of the lots are parts of subdivisions, and the property description cards included with applicant's evidence demonstrates that most of the properties were created by land division and then likely sold to different owners for single family dwellings. The map applicant included shows where single family dwellings exist on those properties. The Board concludes that the applicant, in this circumstance, is not required to locate the ownership of each and every parcel to demonstrate that it is accurately counted as one lot or parcel. The applicant has provided evidence that demonstrates compliance with the marginal lands criteria. The opponents must do more than argue that some of those lots or parcels were under the same ownership. They must present evidence that some of the lots or parcels that applicant has counted are overcounted because they are part of another lot or parcel, and they must demonstrate that the undercounting results in noncompliance with the marginal lands criteria. This they have not done." Record 24.

We agree with petitioner that the county erred. Petition for Review 16-17. The county improperly shifted the burden to petitioner. Intervenor is required to submit evidence establishing the number of lots and parcels properly counted as one under the statute and the percentage of those lots 20 acres or less in size.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

A. Background

Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) is "[t]o protect natural resources and conserve scenic and historic areas and open spaces." The property is designated Peripheral Big Game Habitat, a Goal 5 resource. As explained in the findings:

> "[T]he County has not yet completed the Goal 5 process for Big Game Habitat. At this point, the County has recognized that the resource is significant, it has recognized that there are several degrees of significance (by mapping the entire county into three alternative zones–Major, Peripheral, and Impacted), and it has deferred the balance of the Goal 5 analysis to a later date." Record 29.

The county is required to evaluate consistency with Goal 5 at the time of a post acknowledgement plan amendment (PAPA) impacting a Goal 5 resource. Goal 5 is implemented in part by OAR 660-023-0040 and pursuant to OAR 660-023-0040(3) and (4), the local government must analyze the consequences of its decision to allow, limit or prohibit a use which conflicts with an inventoried Goal 5 resource.

The 54-acre property's existing F-2 zoning imposes an 80-acre minimum lot size. Record 88. The county recognized a conflict exists between Peripheral Big Game Habitat and residential densities higher than one dwelling per 40 acres. Record 29. The county also recognized that approval of this application may lead to creation of 20-acre parcels and 10-acre parcels. Record 88. Accordingly, the county required intervenor to submit an Environmental, Social, Economic and Energy (ESEE) analysis. Petitioner argues that the ESEE analysis is inadequate to meet the requirements of OAR 660-023-0040(3). For the reasons discussed below, we agree.

B. OAR 660-023-0040(3)

OAR 660-023-0040(3) requires that when evaluating the introduction of a conflicting use into an identified Goal 5 resource area, the local government must

> "determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site."

The county determined that the property itself was the appropriate impact area, finding that:

> "adjacent and nearby development degrades the value of the habitat on the subject property to such an extent that it can be concluded that the allowed uses would not further adversely affect big game habitat off of the property. Further, opponents have not identified a specific big game corridor that exists in the vicinity or otherwise indicated why a larger impact area would be necessary or would require a different result." Record 30 (emphasis added).

Petitioner argues that the county's finding "begs the question of what other properties' big game habitat would be degraded by the development on this property." Petition for Review 26.

The impact area is required to identify the area in which Peripheral Big Game Habitat resources may be impacted. The property is adjacent to F-2 zoned land to the east and to a smaller extent to the southwest. The parties have not directed us to information establishing whether the adjacent F-2 land is also designated Peripheral Big Game Habitat. Excluding other adjacent F-2 land from the impact area analysis without establishing that it is not protected habitat is not consistent with OAR 660-023-0040(3).

This subassignment of error is sustained.

C. OAR 660-23-0040(4)

OAR 660-023-0040(4) provides that:

> "Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation."

Petitioner argues that the ESEE analysis is not supported by substantial evidence because it was not prepared by someone with environmental expertise. The ESEE analysis was prepared by intervenor's land use consultant, who is also an attorney. We agree with intervenor that nothing in Goal 5 or the Goal 5 rules requires an ESEE study to be prepared by persons with environmental expertise. Response Brief 6-7. We conclude, however, that petitioner has established a basis for remand in this particular case.

Petitioner has not identified a statute or rule requiring that the ESEE analysis be prepared by someone with environmental expertise, but rather points to our decision in *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015). In *Oregon Coast Alliance,* we held that:

> "Whether or not pollution from stormwater runoff from the subject property could adversely impact endangered salmon species, and if so what measures may be necessary to avoid or minimize such impacts, are the kind of questions that likely require some level of scientific or professional expertise to answer. The mere statements of the applicant's attorney do not provide the required evidentiary foundation necessary to support conclusions regarding such technical questions, even if the city's findings had attempted to address them." *Id.* at 232-33.

Here, the record contains more than "mere statements." An attorney land use consultant prepared the ESEE analysis but included in his ESEE analysis, numerous plans, reports and other documents in support of his conclusions. Record 369-465. It is possible, however, that the proper utilization of material relied upon in an ESEE analysis will require environmental expertise. In *Oregon*

Coast Alliance, we noted that where adverse expert testimony is submitted, some level of expertise may be required to establish the sufficiency of a response to the adverse expert testimony. The expert testimony identified by petitioner in this case as rebutting the ESEE analysis was a letter authored by an Oregon Department of Fish and Wildlife (ODFW) biologist for another matter but that generally discusses the cumulative impact of development on habitat and general ODFW guidance related to levels of residential density in areas of peripheral big game habitat. Record 31, 341-42. The county described the ODFW biologist's letter in its findings:

> "[The ODFW biologist] points out the need to acknowledge the cumulative impacts that development has on big game habitat. He points out the error in the applicant's attempt to minimize the importance of the reduction in the quantity of habitat on the impacts to big game populations. Finally, he takes issue with the applicant's density analysis in that it includes properties inside the Eugene Urban Growth Boundary and some even within the city limits." Record 31.

The county also discussed ODFW's general guidance "that dwellings be limited in the Peripheral Big Game designation to one per 40 acres," concluding that the density provision was "merely a recommendation" and that ODFW officials "stress the fact that a mere 'numbers game' is not the optimum manner to deal with conflicts to the Big Game Range resource." Record 32. We agree with petitioner that the general ODFW guidance related to residential density and the ODFW letter provided by petitioner addressing cumulative impacts constitute expert testimony and that expertise is required in order to establish the sufficiency

of responsive evidence. Intervenor does not direct us to material in the record establishing the expertise of the author of the ESEE analysis.

This subassignment of error is sustained.

The second assignment of error is sustained.

The county's decision is remanded.