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

CAROL N. DOTY,)
)
Petitioner,)
)
vs.)
)
JACKSON COUNTY,)
)
Respondent,)
)
and)
)
DANIEL HARRIS and SUSAN HARRIS,)
)
Intervenors-Respondent.)

LUBA Nos. 97-089 and 97-090

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Carol N. Doty, Talent, filed the petition for review and argued on her own behalf.

No appearance by respondent.

Daniel L. Harris, Ashland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Christian E. Hearn and Davis, Gilstrap, Harris, Hearn & Welty.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 03/27/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals two county decisions, consolidated for
4 our review, one that amends a comprehensive plan map and a
5 zoning map and one that amends the text of the zoning
6 ordinance. Both decisions pertain to the boundaries of an
7 overlay zone protecting deer and elk winter range habitat.

8 **MOTION TO INTERVENE**

9 Daniel and Susan Harris (intervenors), the applicants
10 below, move to intervene on the side of respondent. There is
11 no opposition to the motion, and it is allowed.

12 **FACTS**

13 The subject area consists of four contiguous parcels each
14 approximately ten acres in size, each improved with a nonfarm
15 dwelling, and served by a community well and common road
16 access. Until 1995, the subject parcels were zoned exclusive
17 farm use (EFU) and used to some extent for agricultural
18 purposes. The four nonfarm dwellings were built in 1990,
19 1992, 1994 and 1996. In December 1995, the county allowed an
20 exception to Goal 3 for the subject parcels, and changed the
21 zoning designation from EFU to Rural Residential 5-acre
22 minimum (RR-5). DLCDC acknowledged the exception on May 23,
23 1996. Northeast of the subject parcels is a 10-acre parcel
24 zoned Rural Limited Industrial (RLI) that contains a
25 helicopter logging operation. All other parcels in the
26 immediate area are zoned EFU.

27

1 The subject parcels are characterized by gently sloping
2 open pastures, vegetated with grass and star thistle, with
3 scattered scrub oak trees on the eastern border, adjacent to a
4 county road. Deer occasionally pass through the subject
5 parcels, and a migrational path for deer lies to the west of
6 the subject parcels.

7 The subject parcels are located within the 67,739-acre
8 Grizzly Winter Range Unit (Grizzly Unit), which is subject to
9 an Especially Sensitive Winter Range (ESWR) overlay
10 designation. An ESWR designation is designed to protect
11 critical winter habitat for the survival of black-tailed deer
12 and Roosevelt elk herds. Residential development on property
13 subject to an ESWR overlay is limited to one residence per 160
14 acres.

15 In 1990, the county performed a comprehensive Goal 5
16 analysis, resulting in a document called the "Jackson County
17 Goal 5 Resources, Background Document" (Background Document).
18 The Oregon Department of Fish and Wildlife (ODFW) assisted the
19 county in that effort by identifying and mapping the winter
20 ranges of deer and elk in the county. The ODFW identified 13
21 discrete winter range "units." Each unit was determined based
22 on characteristics of location, herd type, physiography and
23 habitat quality, and ranked according to relative importance
24 of the winter range provided. The Grizzly Unit is ranked the

1 fourth most important of the 13 units in the county.¹ In the
2 Background Document, the county adopted the ODFW's winter
3 range units and designations, and incorporated the ODFW
4 standards into its land development ordinance (LDO).² The
5 county adopted the Background Document as part of its
6 comprehensive plan in 1991.

7 Following the rezoning of the subject parcels to RR-5,
8 intervenors filed an application with the county to change the
9 winter range overlay designation with respect to the subject
10 parcels from ESWR to "Other." An "Other" winter range
11 designation permits residential development pursuant to
12 existing resource zoning minimum lot size and density
13 standards.

14 In pre-application consultations, the county determined
15 that intervenors' application required creation of a new 40-
16 acre winter range unit (comprised of the subject parcels)

¹Seven winter range units in the county are designated ESWR; four are designated "sensitive," while two are designated "other." A "sensitive" winter range designation is subject to a 40-acre minimum residential density requirement. An "other" winter range designation is protected by existing resource zoning minimum lot size and density requirements. Background document 52-53.

²LDO 280.110(3) (E) (v) provides:

- "(a) Epecially Sensitive Winter Range units shall be maintained at a maximum overall density (within the parcel/ownership or proposed land division) of 1:160 * * *.
- "(b) Sensitive Winter Range units shall be maintained at a maximum overall density (within the parcel/ownership or proposed land division) of 1:40 * * *.
- "(c) Other Winter Range units shall be allowed to develop according to the prevailing maximum parcel/lot size for the zoning district." (Emphasis in original).

1 carved from the Grizzly Unit, and categorization of that new
2 unit as an "Other" winter range unit. Creation of the new
3 winter range unit required a text amendment to LDO
4 280.110(3)(E), as well as an amendment to a comprehensive plan
5 map and the zoning map. Under the LDO, text amendments to the
6 LDO are "legislative" decisions that only the county can
7 initiate, while a minor amendment of the plan and zoning map
8 is a "quasi-judicial" decision that intervenors could
9 initiate. Accordingly, the county processed intervenors'
10 application as two decisions, a legislative text amendment to
11 LDO 280.110(3)(E) initiated by the county and a quasi-judicial
12 amendment to the plan map and zoning map initiated by
13 intervenors.

14 On April 22, 1997, the county board of commissioners
15 (commissioners) adopted the challenged decisions, which were
16 consolidated for our review. Ordinance 97-10 is a legislative
17 text amendment of LDO 280.110(3)(E) that creates a new 40-acre
18 winter range unit comprised of the subject parcels, and
19 categorizes that new unit as an "Other" winter range unit.
20 Ordinance 97-9 is a quasi-judicial amendment of the plan map
21 and zoning map that makes corresponding changes.³ Both

³With the exception of the third and fourth assignments of error, the parties' arguments are directed indiscriminately at both decisions, and in fact treat both decisions as constituting a single underlying "decision," without acknowledging that our review may differ depending on whether the decision challenged is legislative or quasi-judicial in nature. One such difference is that legislative decisions do not require findings, although in order to satisfy the Goal 2 requirement that land use decisions have an "adequate factual base," the local government is required either to make findings demonstrating compliance with applicable standards or to provide argument in its brief and citations to the record adequate to demonstrate

1 decisions are based on the conclusion that the habitat on the
2 subject parcels is already impacted by residential and
3 industrial development, and thus resembles habitat protected
4 by an "Other" winter range unit designation more than habitat
5 protected by the ESWR designation.

6 Petitioner appeals both decisions.

7 **WAIVER OF ISSUES**

8 Intervenor contends that petitioner does not have
9 standing to raise issues in any of the assignments of error
10 except for the seventh assignment of error, because petitioner
11 did not raise those issues below. Intervenor does not argue
12 that the issues were not raised below, only that petitioner
13 did not raise them.

14 We have explained that even though a petitioner did not
15 raise the issue of compliance with a particular approval
16 criterion below, the issue is not waived if it was raised
17 sufficiently by other parties to the local proceedings.
18 Mitchell v. City of Medford, 29 Or LUBA 158, 160 (1995).

19 Intervenor has not attempted to show that the issues
20 raised by petitioner here were not raised below. Accordingly,
21 these issues are not waived.

22 **FIRST ASSIGNMENT OF ERROR**

23 Petitioner argues the challenged decisions do not comply

that the legislative decision complies with those standards.
Redland/Viola/Fischer's Mill CPO v. Clackamas County, 27 Or LUBA 560, 564
(1994). Unless we discern some necessary reason to distinguish the two
decisions in our analysis, we will follow the parties in treating both
decisions as a single decision.

1 with Statewide Planning Goal 5 and the Goal 5 administrative

1 rule, OAR Chapter 660 Division 16 (Goal 5 rule),⁴ and are not
2 consistent with the county's plan.

3 **A. Compliance with Goal 5**

4 Goal 5 requires that the county "conserve open space and
5 protect natural and scenic resources. The Goal 5 rule sets
6 out a process whereby local governments are required to
7 (1) inventory the location, quality and quantity of listed
8 resources within its territory; (2) identify conflicting uses
9 for the inventoried resources; (3) conduct an analysis of the
10 economic, social, environmental and energy (ESEE) consequences
11 of negative impacts between conflicting uses and Goal 5
12 resources; and (4) develop programs to achieve the goal of
13 resource protection. Gage v. City of Portland, 28 Or LUBA
14 307, 314 (1994).

15 Where a plan or zoning ordinance amendment changes the
16 county's Goal 5 inventory or affects inventoried Goal 5
17 resources, the local government must apply the requirements of
18 the Goal 5 rule and determine that the rule is satisfied.
19 Friends of Cedar Mill v. Washington County, 28 Or LUBA 477,
20 487 (1995). Consequently, to the extent the proposed
21 amendment changes the Goal 5 inventory or affects inventoried
22 Goal 5 resources, the local government must conduct the four-
23 part Goal

⁴OAR Chapter 660 Division 16 has been replaced with Division 23 (effective September 1, 1996). The record does not reflect when intervenors submitted their application. However, the parties do not dispute that Division 16 is applicable here.

1 5 analysis described above. See Palmer v. Lane County, 29 Or
2 LUBA 436, 438-47 (1995).

3 Petitioner challenges the county's findings with respect
4 to all four steps in the Goal 5 analysis.⁵

5 **1. Inventory**

6 Petitioner challenges the validity of the county's Goal 5
7 inventory of the subject parcels.⁶ A valid inventory under

⁵Both parties make arguments regarding compliance with Goal 5 and the Goal 5 Rule without acknowledging that the county has a different obligation to make findings with respect to the legislative decision than it does with respect to the quasi-judicial decision. Ordinance 97-10, the legislative decision, does not contain any findings of compliance with Goal 5 or the Goal 5 Rule. Ordinance 97-9, the quasi-judicial decision, does contain findings directed at Goal 5 and the Goal 5 Rule. The situation is complicated in this case because the legislative decision amends a land use regulation, while the quasi-judicial decision amends, in part, a comprehensive plan map. Amendments to land use regulations are not usually reviewed for compliance with the Statewide Planning Goals, unless the comprehensive plan does not contain specific policies providing a basis for the amendment. ORS 197.835(7). However, LDO 277.060(1) requires that legislative amendments shall comply with all applicable Statewide Planning Goals. Thus, both decisions are reviewable for compliance with Goal 5 and the Goal 5 Rule. However, the burden and mechanics of demonstrating compliance with Goal 5 and the Goal 5 Rule remains different for legislative and quasi-judicial decisions.

In this rather unusual situation, we will continue to analyze both decisions together, focusing our analysis on the county's findings in the quasi-judicial decision. Doing so is appropriate in this case because those findings, supplemented with intervenors' argument and citations in the record in their brief, make the best case in the record for compliance of the legislative decision with Goal 5 and the Goal 5 Rule. See Redland/Viola/Fischer's Mill CPO, 27 Or LUBA at 564. In other words, under the present circumstances, whether the record demonstrates that the legislative decision complies with Goal 5 and the Goal 5 Rule depends, essentially, on whether the quasi-judicial decision complies. We caution that this approach is forced on us by the unusual posture of this case and the parties' failure to recognize the differences between legislative and quasi-judicial decisions. Our approach is not intended to diminish those differences.

⁶OAR 660-016-000(2) and (3) describe the requirements for a valid inventory of Goal 5 resources:

- "(2) A "valid" inventory of a Goal 5 resource under subsection (5)(c) of this rule must include a determination of the location, quality, and quantity of each of the resource sites. Some Goal 5 resources (e.g., natural areas, historic sites, mineral and aggregate sites, scenic

1 the Goal 5 rule must include a determination of location,
2 quality and quantity. For site-specific resources like winter
3 range habitat, a determination of location must include a
4 description or map of the resource site's boundaries and of
5 the impact area, if different. OAR 660-16-000(2).
6 Determination of quality requires a comparison of the site
7 with other examples of the same resource in the county. OAR
8 660-16-000(3).

9 The county's Goal 5 inventory analysis in these decisions
10 essentially downgrades the classification of the quality of
11 part of the resource (winter range habitat) with respect to
12 the subject parcels. This reclassification is based on the
13 county's understanding that the difference between ESWR and
14 "Other" winter range habitat is that the former provides good
15 forage, water and cover and minimal human contact, while the
16 latter provides poor forage, water and cover and significant
17 human contact. The county found essentially that the subject
18 parcels exhibit characteristics of "Other" winter range

waterways) are more site-specific than others (e.g.,
groundwater, energy sources). For site-specific
resources, determination of location must include a
description or map of the boundaries of the resource site
and of the impact area to be affected, if different. For
non-site-specific resources, determination must be as
specific as possible.

"(3) The determination of quality requires some consideration
of the resource site's relative value, as compared to
other examples of the same resource in at least the
jurisdiction itself. A determination of quantity requires
consideration of the relative abundance of the resource
(of any given quality). The level of detail that is
provided will depend on how much information is available
or 'obtainable'."

1 habitat rather than ESWR habitat, and thus do not provide as
2 valuable a habitat resource as other unspecified areas of the
3 Grizzly Unit.

4 Petitioner makes a number of general arguments, but the
5 one specific argument sufficiently developed for our review is
6 her contention that the county misapplied the Goal 5 inventory
7 analysis in considering the "resource" subject to the analysis
8 to be solely the winter range habitat on the subject parcels.⁷
9 We agree with petitioner that the appropriate "resource" for
10 purposes of the Goal 5 inventory analysis in this case is the
11 Grizzly Unit, or that part of the Grizzly unit potentially
12 impacted by the residential uses permitted by the RR-5 zoning,
13 not just the microcosm of winter range habitat on the 40 acres
14 of the subject parcels.

15 The purpose of the boundary delineation and mapping
16 required by the Goal 5 rule is to make both feasible and
17 meaningful the next step of the Goal 5 analysis: identifying
18 the mutual impacts of Goal 5 resource sites and conflicting
19 uses. See Nathan v. City of Turner, 26 Or LUBA 382, 393
20 (1994). OAR 660-16-000(2) contemplates that certain Goal 5
21 resource sites may be subject to impacts from nearby
22 conflicting uses beyond the boundaries of the resource itself.

⁷Many of the arguments throughout the petition for review are so confusing or so insufficiently developed that we cannot meaningfully address them. It is petitioner's responsibility to state the basis upon which we might grant relief, and accordingly, we confine our analysis to those arguments sufficiently developed for review. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982).

1 In that case, the

1 county must identify an "impact area" larger in size than the
2 resource site. See Palmer v. Lane County, 29 Or LUBA at 441.

3 It is a corollary of the foregoing that the county must,
4 in determining the location and quality of a Goal 5 resource,
5 consider the extent to which proposed conflicting uses such as
6 residences have impacts beyond their property boundaries. In
7 other words, where a conflicting use is proposed on property
8 within the boundaries of a Goal 5 resource site, it is not
9 sufficient for the county to consider only the location and
10 quality of the resource on the subject property. It must also
11 consider the location and quality of the resource in the area
12 that is potentially subject to impacts from conflicting
13 residential uses on the subject property. See Palmer, 29 Or
14 LUBA at 441.

15 The record in this case indicates that a "main migratory
16 path" for deer exists in the vicinity of the subject parcels
17 at an unspecified distance, and that deer migrate down to
18 Walker Creek, across the county road from the subject parcels.
19 Record 41, 66. The county's Goal 5 analysis makes no effort
20 to identify the location and quality of winter range habitat
21 in the vicinity of the subject parcels. It is possible that
22 habitat or migrational paths in the area are of such nature
23 and quality that they could be impacted even at a distance
24 from the proposed dwellings.⁸ We conclude that the county's

⁸The description of ESWR units in the Background Document suggests this to be the case:

1 failure to identify the location and quality of habitat in the
2 area makes it impossible to meaningfully evaluate the impact
3 of conflicting residential uses on the winter range habitat in
4 the Grizzly Unit.

5 Intervenor's respond that the county made a finding, based
6 on evidence in the record, that the proposed development will
7 not have significant impacts beyond the subject parcels. We
8 understand intervenors to argue, with respect to the Ordinance
9 97-9, the quasi-judicial decision, that this finding and
10 evidence renders the county's failure to identify the location
11 and quality of habitat in the vicinity of the subject parcels
12 not a basis for reversal or remand. ORS 197.835(11)(b).⁹
13 With respect to Ordinance 97-10, the legislative decision, we
14 understand intervenors to argue that the record supports a

"ODFW has determined that a residential density/land division standard of 1:160 is necessary to protect the carrying capacity of the herds. Even with this standard ODFW indicates that the carrying capacity is reduced by 20 to 60 percent for elk and up to 20 percent for deer." Background Document 52.

⁹ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

We held in Waugh v. Coos County, 26 Or LUBA 300 (1993), that ORS 197.835(11)(b) imposes a difficult standard of proof:

"Where the relevant evidence in the record is conflicting, or provides a reasonable basis for different conclusions, such evidence does not 'clearly support' the challenged decision." Id. at 307.

1 finding that the proposed development has no significant
2 impact beyond the subject parcels, which is adequate to
3 satisfy the first step of the Goal 5 analysis.

4 Ordinance 97-9, the quasi-judicial decision, states in
5 this respect:

6 "The Board finds that in a letter from [ODFW] dated
7 August 22, 1996 * * * [the] District Wildlife
8 Biologist, stated, in part, that '* * * it is my
9 conclusion [that the subject parcels] if developed
10 as planned, will not have a significant additional
11 adverse impact to wintering wildlife. Existing
12 houses, businesses and the county road located in
13 the area already have a significant and negative
14 effect on wintering wildlife.'^[10]

15 * * * * *

16 "The Board finds that redesignating [the subject
17 parcels] from 'Especially Sensitive' to 'Other'
18 winter range habitats does not have a significant
19 impact beyond the immediate area of the proposed
20 change since these properties are already developed,
21 have received an exception to Goal 3, Agricultural
22 land, and have been rezoned [RR-5], in keeping with
23 the character of the neighborhood. The Board finds
24 that the addition of four five-acre parcels, with
25 four additional dwellings, represents the total
26 build out for the zoning applied to this area and
27 that four additional dwellings will not have a
28 significant impact since the area has already been

¹⁰The ODFW letter was apparently a response to DLCD's acknowledgment of part of the county's 1995 Goal 3 exception for the area of the subject parcels. It states in full:

"I have reviewed the DLCD's conclusion for an exception to Statewide Planning Goal 3 for all of Subarea 1-T and the portion of Subarea 1-U north of Dead Indian Memorial Road. It is my conclusion the area shown on the map provided to you by [intervenors], if developed as planned, will not have a significant additional adverse impact to wintering wildlife. Existing houses, businesses and the county road located in the area already have a significant and negative effect on wintering wildlife.

"If you have any questions regarding this letter please feel free to contact me." Record 95.

1 described as significantly impacted by the [ODFW
2 letter] dated August 22, 1996." Record 23-24.

3 We disagree that the ODFW letter supports the decision or
4 that the county's findings based on it are adequate to satisfy
5 the location, quality and boundary delineation requirements of
6 the Goal 5 rule. The ODFW letter merely opines that the
7 proposed development will not have a significant additional
8 adverse impact on wintering wildlife, above that already
9 caused by existing development, which already has a
10 significant negative effect on wildlife. Record 95. That
11 statement says nothing about the location or quality of
12 wildlife habitat in the vicinity, or even on the subject
13 parcels. The ODFW letter has limited relevance to the first
14 step of the Goal 5 analysis, identifying the location and
15 quality of the Goal 5 resource.¹¹

16 We conclude that the county erred in confining its Goal 5
17 inventory analysis to the subject parcels.

¹¹Indeed, the county's reliance on the ODFW letter tends to conflate the three steps of the Goal 5 analysis. Rather than first identify the location, quality and quantity of the Goal 5 resource, then identify conflicting uses and study the mutual impacts, the county uses the impact of conflicting uses as the primary means to undertake the Goal 5 inventory, i.e. to identify the location, quality and quantity of the resource. The Goal 5 analysis is undermined if the adverse impacts of a conflicting use may be used to determine the location and quality of a Goal 5 resource.

We note, in this respect, that the four dwellings on the subject parcels were built after the county performed the Goal 5 analysis in the Background Document, which identified the Grizzly Unit as an ESWR unit, and that three were built after the city adopted the Background Document in 1991, in apparent contravention of the one dwelling per 160 acres restriction. See Record 65, 73.

1 **2. Identify Conflicting Uses/ESEE Analysis**

2 **3. Program to Achieve the Goal**

3 Without an adequate Goal 5 inventory, it is not possible
4 for a local government to adequately perform subsequent steps
5 of the Goal 5 analysis, i.e. to identify the conflicting uses,
6 or determine the ESEE consequences of the conflicts, as
7 required by OAR 660-16-005(2),¹² and to adequately develop a
8 program to achieve the goal of resource protection, as
9 required by OAR 660-16-010.¹³ Gonzalez v. Lane County, 24 Or
10 LUBA 251, 265-67 (1992). Because the three steps of the Goal

¹²OAR 660-16-005(2) provides in relevant part:

"* * * It is the responsibility of local government to identify conflicts with inventoried Goal 5 resource sites. * * * Where conflicting uses have been identified, Goal 5 resource sites may impact those uses. These impacts must be considered in analyzing the economic, social, environmental and energy (ESEE) consequences:

"* * * * *

"(2) * * * If conflicting uses are identified, the economic, social, environmental and energy consequences of the conflicting uses must be determined. Both the impacts on the resource site and on the conflicting use must be considered in analyzing the ESEE consequences. * * *"

¹³OAR 660-16-010 provides in relevant part:

"Based on the determination of the economic, social, environmental and energy consequences, a jurisdiction must 'develop a program to achieve the Goal'. Assuming there is adequate information on the location, quality, and quantity of the resource site as well as on the nature of the conflicting use and ESEE consequences, a jurisdiction is expected to 'resolve' conflicts with specific sites in any of the following three ways listed below. * * *:

"(1) Protect the Resource Site: * * *.

"(2) Allow Conflicting Uses Fully: * * *.

"(3) Limit Conflicting Uses: * * *."

1 5 analysis are so sequentially dependent, a flaw at step one
2 renders subsequent steps equally flawed. We therefore do not
3 address petitioner's arguments regarding the county's
4 compliance with steps two through four of the Goal 5 analysis.

5 This subassignment of error is sustained.

6 **B. Compliance with the Plan**

7 We understand petitioner's second subassignment of error
8 to allege that the county's legislative text amendment of its
9 land development ordinance is not in compliance with the
10 county's plan. ORS 197.835(7)(a).¹⁴

11 Petitioner contends that the county's amendment of LDO
12 280.110(E) is inconsistent with plan policies that require
13 that the county "shall provide for the protection of a
14 productive and healthy wildlife community and habitat."
15 Jackson County Comprehensive Plan (plan) 16-19. Where a
16 decision fails to explain why an amendment to a land use
17 regulation is consistent with relevant plan provisions, the
18 decision is inadequate for our review. Rea v. City of
19 Seaside, 26 Or LUBA 444, 447 (1994). Here, the challenged
20 decision amending the LDO does not identify

¹⁴ORS 197.835(7)(a) provides:

"The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

"(a) The regulation is not in compliance with the comprehensive plan[.]"

1 relevant plan provisions and explain why the decision is
2 consistent with them.

3 Intervenor's respond that, notwithstanding the county's
4 failure to make findings, the record clearly supports a
5 finding that the decision is consistent with relevant plan
6 policies calling for protection of wildlife habitat. ORS
7 197.835(11)(b). Intervenor's argue that the overwhelming
8 weight of evidence is that the subject parcels do not provide
9 quality wildlife habitat and therefore the decision is
10 consistent with protection of wildlife habitat. However,
11 intervenor's argument fails for the same reason expressed
12 above regarding the Goal 5 inventory analysis. The decision
13 does not assess the quality of habitat in the immediate area,
14 nor does it assess the impact of existing and proposed
15 conflicting uses on that habitat.

16 The second subassignment of error is sustained.

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioner argues that the county failed to make findings
20 that the legislative text and quasi-judicial map amendments
21 comply with LDO 280.110(3)(E)(vii) as required by LDO
22 277.060(3)

1 and 277.080(4).¹⁵ LDO 280.110(3)(E)(vii) provides, in
2 relevant part:

3 "Any land use action subject to review under this
4 section shall include findings that the proposed
5 action will have minimum impact on winter deer and
6 elk habitat based on:

7 "(a) Consistency with maintenance of long-term
8 habitat values of browse and forage, cover,
9 sight obstruction.

10 "(b) Consideration of the cumulative effects of the
11 proposed action and other development in the
12 area on habitat carrying capacity.

13 "(c) Location of dwellings and all other development
14 within three hundred feet of existing roads or
15 driveways where practicable unless it can be
16 found that habitat values and carrying capacity
17 is afforded equal or greater protection through
18 a different development pattern.

19 "(d) New private roads shall be gated between
20 November and April (where permitted by law) to
21 protect wintering deer and elk."

22 "* * * * *"

¹⁵LDO 277.060(3) provides:

"Legislative amendments shall:

"(1) Comply with all applicable Statewide Planning Goals.

"(2) Be consistent with the Jackson County Comprehensive Plan and ordinances.

"(3) In designated Areas of Special Concern, shall also comply with the provisions of Sections 280.110 and 277.080(4)."

LDO 277.080(4) provides the following criteria for quasi-judicial minor map amendments:

"Minor map amendments in areas which involve an Area of Special Concern created under the provisions of Section 280.110 are also governed by any conditions specified by that section or the ordinance adopted by the Board of Commissioners which created the Area of Special Concern, or both, as well as the provisions of this Chapter."

1 Neither of the challenged decisions address compliance
2 with the criteria at LDO 280.110(3)(E)(vii).¹⁶ The only
3 reference to LDO 280.110(3)(E)(vii) is a statement in
4 ordinance 97-9 that:

5 "The Board finds that there are sufficient standards
6 in Section 280.110(3)(E)(vii) to assure the
7 maintenance of whatever habitat value is still
8 present in the area." Record 24.

9 The reference to standards at LDO 280.110(3)(E)(vii) is
10 apparently a reference to LDO 280.110(3)(E)(vii)(c) and (d),
11 which require that dwellings be located near existing roads
12 and that new private roads be gated during winter. We agree
13 with petitioner that this statement does not constitute
14 findings with respect to LDO 280.110(3)(E)(vii)(a) and (b).

15 Intervenors respond that the record contains evidence
16 that clearly supports a finding of compliance with
17 LDO 280.110(3)(E)(vii)(a) and (b). We disagree. As noted
18 above, intervenors have not pointed to evidence in the record
19 of the habitat values in the vicinity of the subject parcels.
20 Moreover, LDO 280.110(3)(E)(vii)(b) requires consideration of
21 the "cumulative impact" of proposed and existing development
22 in the area. The only evidence in the record pertinent to

¹⁶As we noted above, a legislative decision such as ordinance 97-10 is not necessarily required to make findings of compliance with approval criteria. However, in this case, LDO 277.060(3) requires that legislative amendments involving areas of special concern comply with LDO 280.110, and LDO 280.110(3)(E)(vii) expressly requires that all land use actions subject to that section make findings of compliance. Because the local ordinance requires legislative amendments to make findings in the present circumstance, there is no substantive difference in the scope of our review, and we analyze both decisions together.

1 this criterion directed to our attention is the ODFW letter.
2 However, the ODFW letter merely opines that the proposed
3 development will not have a significant adverse impact over
4 and above existing development, which already has a
5 significant, negative impact. The challenged decisions do not
6 consider that existing significant and negative impact, and
7 therefore do not consider the total cumulative impact of
8 development in the area. Nothing in the record directed to
9 our attention describes the cumulative impact of development
10 on habitat carrying capacity in the area.

11 The second assignment of error is sustained.

12 **THIRD ASSIGNMENT OF ERROR**

13 Petitioner argues that the county failed to make findings
14 that the quasi-judicial map amendments in Ordinance 97-9
15 complies with the "public need" requirements of LDO 277.070(3)
16 and 277.080(2).¹⁷

¹⁷LDO 277.070(3) provides that with respect to quasi-judicial map amendments:

"Public need and justification for a particular change shall be established according to the provisions of Section 277.080."

LDO 277.080 provides in relevant part:

"The rezoning of specific properties shall be based upon the following findings:

"* * * * *

"(2) A public need exists for the proposed rezoning. 'Public need' shall mean that a valid public purpose, for which the Comprehensive Plan and this ordinance have been adopted, is served by the proposed map amendment. Findings that address public need shall, at a minimum, document:

1 Intervenors respond that the "public need" requirements
2 of LDO 277.070(3) and 277.080(2) apply only to "rezonings,"
3 and therefore are not approval criteria for the particular map
4 amendments at issue here, which do not involve a rezoning.
5 Intervenors argue that the first sentence of LDO 277.080
6 expressly limits the criteria at LDO 277.080, including the
7 "public need" standard, to "rezoning of specific properties."

8 LDO 277.080 appears to be limited, by its terms and
9 structure, to map amendments involving rezoning of property.
10 However, the requirement of compliance with the "public need"
11 standard is here imposed by LDO 277.070, which is a section
12 describing quasi-judicial map amendments in general terms, not
13 limited to rezonings. The operative language of LDO
14 277.070(3) requires that the "[p]ublic need and justification
15 for a particular change shall be established according to the
16 provisions of [LDO] 277.080" (emphasis added). Absent an
17 interpretation by the county commissioners to the contrary, we
18 conclude that LDO 277.070(3) imposes the public need standard
19 on all quasi-judicial map amendments of any type.

20 We agree with petitioner that the challenged decision
21 fails to make required findings of compliance with the "public
22 need" standard.

"A) Whether or not additional land for a particular use
is required in consideration of that amount already
provided by the current zoning district within the
area to be served.

"(B) Whether or not the timing is appropriate to provide
additional land for a particular use."

1 The third assignment of error is sustained.

2 **FOURTH ASSIGNMENT OF ERROR**

3 Petitioner argues that the county made a finding not
4 supported by the record when it determined that the plan and
5 zoning map amendments in Ordinance 97-9 have little or no
6 impact upon the availability of winter range beyond the
7 immediate area of the proposed change, and thus incorrectly
8 processed the map amendments as "minor" map amendments rather
9 than as "major" map amendments.

10 A "major" map amendment is required where the amendment
11 "may have widespread and significant impact beyond the
12 immediate area or parcel where the land use action is
13 proposed." LDO 277.050(1). In contrast, a "minor" map
14 amendment does not "have significant impact beyond the
15 immediate area of the proposed change." LDO 277.070(1).

16 Ordinance 97-9 found that the proposed reclassification
17 from ESWR to 'Other' winter range habitats "does not have a
18 significant impact beyond the immediate area of the proposed
19 change since these properties are already developed * * *"
20 Record 24. Petitioner argues that this finding fails to
21 address the impacts of the development on habitat in the
22 vicinity of the subject parcels. However, unlike the criteria
23 addressed in the first and second assignments of error, LDO
24 277.050(1) and 277.070(1) are directed at the discrete impact
25 from the proposed land use action, rather than at the
26 cumulative impact of development or conflicting uses in the

1 area on winter range habitat. In this context, the ODFW
2 letter directed at the discrete impacts of the proposed
3 development supports the county's finding that the proposed
4 development does not have significant impact beyond the
5 subject parcels. We conclude that there is substantial
6 evidence in the record supporting the county's finding. The
7 county did not err in processing the map amendment as a
8 "minor" rather than "major" map amendment.

9 The fourth assignment of error is denied.

10 **FIFTH ASSIGNMENT OF ERROR**

11 Petitioner alleges that the county erred in failing to
12 take an exception to Goal 5. We understand petitioner to
13 argue (1) that the county erred in the challenged decisions by
14 relying on the prior Goal 3 exception in 1995 when it rezoned
15 the subject parcels RR-5 without taking a Goal 5 exception;
16 and (2) that it was required to take an exception to Goal 5 in
17 this decision.

18 To the extent petitioner attacks the county's failure to
19 take a Goal 5 exception in 1995, the time to appeal that
20 decision is long past, and any errors therein cannot be
21 bootstrapped into the present decision by reference to the
22 prior decision. We also disagree that the county was required
23 to take a Goal 5 exception in the present case. Where a local
24 government's amendment of its plan potentially affects the
25 plan's compliance with a Statewide Planning Goal, the local
26 government is required to find and explain why (1) the

1 proposed action does not implicate the goal, (2) the proposed
2 action complies with the goal, or (3) the land subject to the
3 proposed action meets the standards for goal exception. See
4 ODOT v. City of Newport, 23 Or LUBA 408, 414-15 (1992). In
5 this case, the county elected to establish how the proposed
6 land use action complies with Goal 5 by performing the Goal 5
7 analysis at OAR 660-16. While we have determined above that
8 the county has not established such compliance, we disagree
9 with petitioner that the county was compelled to take an
10 exception to Goal 5 in this circumstance.

11 The fifth assignment of error is denied.

12 **SIXTH ASSIGNMENT OF ERROR**

13 In the sixth assignment of error, petitioner raises a
14 number of diverse arguments attacking directly or indirectly
15 the county's decision in 1995 to rezone the subject parcels to
16 RR-5. As noted in the fifth assignment of error, the time to
17 appeal that decision is past.

18 The sixth assignment of error is denied.

19 **SEVENTH ASSIGNMENT OF ERROR**

20 Petitioner alleges that the county improperly delegated
21 its planning role to ODFW when it relied on ODFW's comments as
22 the factual basis to justify approval of the amendments. We
23 understand petitioner to assert that the county improperly
24 left the determination of compliance with an approval standard
25 up to ODFW, rather than make its own findings of compliance.
26 See Kaye/DLCD v. Marion County, 23 Or LUBA 452, 474-75 (1992).

1 We disagree. LDO 280.110(3)(E)(vii)(e) requires the
2 county to solicit comments from ODFW on any land use actions
3 affecting winter range units.¹⁸ While the county relied
4 heavily on the ODFW letter to find compliance with the
5 approval standards it addressed, it did not leave the
6 determination of compliance up to ODFW.¹⁹

7 The seventh assignment of error is denied.

8 **NINTH ASSIGNMENT OF ERROR**

9 Petitioner argues that the county misconstrued the
10 county's Background Document and plan to allow the county to
11 carve off isolated portions of the Grizzly Unit not containing
12 prime winter range habitat.

13 According to petitioner, the Background Document
14 indicates that the county and ODFW evaluated each winter range
15 unit as whole, and specifically noted the relatively poorer
16 forage and cover in the southern end of the Grizzly Unit,
17 where the subject parcels are located. Background Document
18 35. Nonetheless, petitioner argues, the ODFW and the county

¹⁸LDO 280.110(3)(E)(vii)(e) provides:

"Comments shall be solicited in writing from [ODFW] for all land use actions on winter range other than dwellings which comply with density standards set forth in subsection (v) above. The ODFW shall be given a maximum of ten days to make such comments. Final decision by the County to decline to accept ODFW's position shall be on substantive findings provided by the applicant."

¹⁹Petitioner also appears to argue that the ODFW letter does not support findings with respect to approval standards at LDO 280.110(3)(E)(vii) and elsewhere that, we determined above, the county failed to address. Because the county made no findings with respect to LDO 280.110(3)(E)(vii), petitioner's substantial evidence challenge is premature.

1 found that area as well as the Grizzly Unit as a whole to
2 merit the ESWR designation. Petitioner asserts that the
3 Background Document does not contemplate that every 40-acre
4 portion of a winter range unit contain all of the
5 characteristics (browse, forage, cover, sight obstruction) of
6 winter range habitat, and in fact specifically contemplates
7 variations in the quality of habitat within the Grizzly Unit.
8 In the same vein, petitioner argues that the Background
9 Document considers each winter range unit as a whole because
10 each unit is intended to protect not only habitat values, but
11 migration of deer and elk from one area to another, which may
12 depend on passage through or around areas of lesser habitat
13 value.

14 In short, petitioner contends that the county's decisions
15 are inconsistent with the Background Document, which,
16 according to petitioner, does not permit discrete parts of a
17 winter range unit to be carved off or reduced in levels of
18 protection.

19 Intervenors respond that the Background Document is a
20 general document based on limited information, and that
21 nothing in the Background Document or elsewhere prevents the
22 county from refining the information therein to account for
23 more accurate information about specific sub-areas of the
24 Grizzly Unit.

25 We agree with intervenors that nothing drawn to our
26 attention in the Background Document necessarily prohibits the

1 county from redrawing the boundaries of a winter range unit,
2 or downgrading its winter range designation, subject to
3 compliance with the Goal 5 rule and applicable local
4 provisions.

5 The ninth assignment of error is denied.

6 **EIGHTH ASSIGNMENT OF ERROR**

7 Petitioner argues that the county failed to respond to
8 ten specific issues petitioner raised below that were relevant
9 to compliance with applicable approval standards, as required
10 in ORS 197.763(1). Petitioner notes, correctly, that while
11 the county is not required to address all conflicting
12 evidence, it must address and respond to specific issues
13 raised below that are relevant to compliance with approval
14 standards. Thomas v. Wasco County, 30 Or LUBA 302, 310
15 (1996); Skrepetos v. Jackson County, 29 Or LUBA 193, 208
16 (1995).

17 However, as far as we can tell, petitioner has repeated
18 each of the ten issues raised below more or less directly in
19 her previous eight assignments of error, which we have
20 addressed and resolved. We see no point in deciding whether
21 the county failed to address an issue raised below when that
22 issue is reached, and resolved, on review.

23 The eighth assignment of error is denied.

24 The county's decision is remanded.