



1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order denying its  
4 application for a minor partition to divide a 73.85 acre  
5 parcel into three parcels.

6 **MOTIONS TO INTERVENE**

7 Bjorn Everson, Cecil Everson, Gary Gustafson, Meg  
8 Gustafson, Paul D. Bray and Norman D. Jackson move to  
9 intervene in this proceeding on the side of respondent.  
10 There is no opposition to the motions, and they are allowed.

11 **FACTS**

12 The subject parcel is forested and is designated and  
13 zoned Woodland Resource (WR-20). The parcel is identified  
14 as sensitive fish and wildlife habitat and is located within  
15 a designated "area of special concern" (ASC-82-3).<sup>1</sup>  
16 Sterling Creek Road adjoins the west side of the subject  
17 parcel and crosses its northwest corner. Sterling Creek  
18 flows through the parcel, about 200 feet east of Sterling  
19 Creek Road. The property rises sharply to the east, away  
20 from Sterling Creek. Deposits of tailings from prior mining  
21 activities are located throughout the property, but are more  
22 concentrated near the creek.

23 Most of the land to the east of the subject parcel is

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<sup>1</sup>Petitioner's application was filed on February 12, 1991. The county's March 4, 1991 designation of the subject parcel as "Especially Sensitive" wildlife habitat does not alter the standards applicable to petitioner's application. ORS 215.428(3).

1 owned by the U.S. Bureau of Land Management (BLM) and is  
2 designated and zoned Forest Resource (FR-160).<sup>2</sup> Land to the  
3 west is designated and zoned Rural Residential (RR-5) or  
4 Open Space Reserve (OSR). To the north and southwest of the  
5 subject parcel are parcels designated and zoned WR. The WR  
6 zoned parcels along Sterling Creek generally range in size  
7 from 10 to 40 acres, while those away from Sterling Creek  
8 tend to be larger. While only one of the parcels along  
9 Sterling Creek has an existing dwelling, most of the others  
10 have approved homesites or are the subject of pending  
11 homesite applications. Record 51.

12 Petitioner applied for a minor partition to divide the  
13 subject 73.85 acre parcel into parcels of 20, 20 and 33.85  
14 acres. The county planning department administratively  
15 approved petitioner's application. Petitioner Bjorn Everson  
16 and another individual appealed this decision. After a  
17 public hearing, the county hearings officer issued an order  
18 denying petitioner's application. This appeal followed.

19 **ASSIGNMENT OF ERROR**

20 "The hearing officer erred by not following the  
21 county's previous interpretation of its ordinance  
22 and in changing the law applicable to this  
23 proceeding after the application was filed. The  
24 hearing officer incorrectly interpreted the  
25 county's ordinance and written policy."

26 Jackson County Land Development Ordinance (JCLDO)

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<sup>2</sup>One approximately 80 acre parcel adjoining the subject parcel to the northeast is designated and zoned Exclusive Farm Use (EFU).

1 280.110(3)(E)(ii) establishes approval standards for land  
2 use actions in the ASC-82-3 area of special concern. The  
3 county denied the proposed partition for failure to comply  
4 with JCLDO 280.110(3)(E)(ii)(c), which requires:

5 "Maintenance of an overall residential density of  
6 one dwelling per 40 acres, or grouping of  
7 dwellings to achieve the same effect in areas of  
8 sensitive big game habitat \* \* \*."

9 There is no dispute that the subject parcel is within an  
10 area of sensitive big game habitat, as it is within the  
11 designated black-tailed deer and Roosevelt elk winter range.  
12 JCLDO p. 332a.

13 The county's decision states:

14 "The plain wording of 'maintenance of an overall  
15 residential density of one dwelling per 40 acres'  
16 compels the conclusion that the proposed action  
17 fails to meet that requirement. Three parcels on  
18 73.85 acres in no way can be interpreted as  
19 maintaining a density of one dwelling per 40  
20 acres. Likewise, [it cannot be determined that]  
21 'the same effect' can be achieved no matter how  
22 the dwellings are grouped. The location of three,  
23 or even two, dwellings on 73.85 acres simply does  
24 not comply with the requirement of  
25 [JCLDO] 280.111(3)(E)(ii)(c).

26 "[There is] no authority for the view that an  
27 overall density of one dwelling per 40 acres can  
28 somehow be maintained in a case such as this where  
29 the proposal is for one dwelling per 24.6 acres.  
30 [T]he phrase 'or grouping of dwellings to achieve  
31 the same effect' does not provide a method for  
32 getting around the requirement of 'maintenance of  
33 an overall residential density of one dwelling per  
34 40 acres." Record 9.

35 Petitioner contends the county improperly construed and  
36 applied JCLDO 280.111(3)(E)(ii)(c) (hereafter

1 "standard (c)") in denying the subject application because  
2 (1) the county failed to follow a written planning  
3 department policy, and its past practice, interpreting  
4 standard (c); and (2) the term "overall residential density"  
5 in standard (c) should be interpreted to refer to the deer  
6 winter range area in general, not just to the subject  
7 parcel.

8 **A. JCLDO Policy 9 / Past Practice**

9 JCLDO Policy 9 is a written policy adopted by the  
10 county planning director, effective April 8, 1983, which  
11 purports to explain how the county applies  
12 JCLDO 280.111(3)(E)(ii) to divisions of WR-20 zoned land  
13 within the area designated as sensitive deer and elk  
14 habitat. Record 19. Petitioner argues that both JCLDO  
15 Policy 9 and past county practice in approving land  
16 divisions in sensitive big game habitat areas establish the  
17 applicable law at the time the subject application was  
18 filed. Petitioner argues that under JCLDO Policy 9 and past  
19 practice, the county allowed divisions creating parcels at  
20 least 20 acres in size, the "base density" of the WR-20  
21 zone,<sup>3</sup> if the Oregon Department of Fish and Wildlife (ODFW)  
22 determined that the proposed division "would not have  
23 significant adverse consequences to wildlife." Petition for

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<sup>3</sup>JCLDO 212.040 provides that the "minimum parcel size" in the WR-20 zone is 20 acres. We assume this is what petitioner refers to as the "base density."

1 Review 8.

2       Petitioner argues that in this case, ODFW submitted two  
3 letters recommending that the county approve the proposed  
4 division, with certain conditions.     Record 54-55, 93.  
5 Petitioner also argues that the hearings officer gave no  
6 notice that he would depart from the prior interpretation of  
7 standard (c) and, therefore, petitioner did not have an  
8 adequate opportunity in the proceeding below to present  
9 evidence and argument regarding the county's prior  
10 interpretation of standard (c).

11       The county's comprehensive plan and land use  
12 regulations have been acknowledged as complying with the  
13 Statewide Planning Goals by the Land Conservation and  
14 Development Commission (LCDC).   ORS 197.251.   The county's  
15 decision on the subject application is required to be  
16 consistent with its acknowledged comprehensive plan and land  
17 use regulations.   ORS 197.175(2)(d); 197.835(6); 215.416(4).  
18 "Land use regulation" is defined by ORS 197.015(11) as:

19       "\* \* \* any local government zoning ordinance, land  
20       division ordinance \* \* \* or similar general  
21       ordinance establishing standards for implementing  
22       a comprehensive plan."   (Emphasis added.)

23       The JCLDO, including standard (c), is an acknowledged  
24 land use regulation.   JCLDO Policy 9 was adopted by the  
25 county planning director.   There is no contention that JCLDO  
26 Policy 9 was adopted by procedures similar to those for  
27 adopting ordinances or was acknowledged by LCDC pursuant to

1 ORS 197.251. Neither is there any contention that JCLDO  
2 Policy 9 was adopted under the postacknowledgment amendment  
3 procedures of ORS 197.610 to 197.625. Thus, JCLDO Policy 9  
4 is not an acknowledged land use regulation. To allow the  
5 provisions of this planning director policy to replace those  
6 of the acknowledged JCLDO as the applicable standard for  
7 certain land use decisions would negate the procedures  
8 required by statute and goal to obtain acknowledgment. See  
9 McKay Creek Valley Assoc. v. Washington County, 18 Or LUBA  
10 71, 84 (1989). We therefore conclude the county is required  
11 to comply with standard (c) itself, and that standard is not  
12 replaced or superseded by JCLDO Policy 9.

13 With regard to petitioner's allegations concerning  
14 prior county interpretation of standard (c), we have  
15 explained on several occasions that this Board reviews  
16 challenged land use decisions for compliance with applicable  
17 approval standards, not for consistency with prior local  
18 government decisions. Reeder v. Clackamas County, \_\_\_  
19 Or LUBA \_\_\_ (LUBA No. 90-107, November 9, 1990), slip op 9.  
20 In Okeson v. Union County, 10 Or LUBA 1, 5 (1983), we  
21 explained:

22 "The issue here is whether [the challenged  
23 decision] meets all the applicable criteria based  
24 upon the facts in the record. There is no  
25 requirement local government actions must be  
26 consistent with past decisions, but only that a  
27 decision must be correct when made. Indeed, to  
28 require consistency for that sake alone would run  
29 the risk of perpetuating error. \* \* \*"

1 See also BenjFran Development v. Metro Service Dist., 17  
2 Or LUBA 30, 46-47 (1988); S & J Builders v. City of Tigard,  
3 14 Or LUBA 708, 711-12 (1986). Thus, we do not determine  
4 whether the challenged decision is consistent with past  
5 county interpretations of standard (c).<sup>4</sup>

6 **B. Overall Residential Density**

7 Petitioner argues that the term "overall residential  
8 density" in standard (c) should be interpreted to refer to  
9 the "area of sensitive big game habitat" mentioned in  
10 standard (c), not the particular property which is the  
11 subject of a development application. Petitioner argues  
12 that considering "the large size of the BLM holdings with no  
13 residential development at all, the 'overall residential  
14 density' in the area of deer winter range along Sterling  
15 Creek Road is less than one dwelling per 40 acres."  
16 Petition for Review 14.

17 The interpretation of local ordinances is a question of  
18 law which must be decided by this Board. While a local  
19 government's interpretation of its own ordinance must be  
20 considered, it is ultimately this Board's responsibility to  
21 determine the correct interpretation of disputed ordinance  
22 provisions. McCoy v. Linn County, 90 Or App 271, 275-76,  
23 752 P2d 323 (1988).

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<sup>4</sup>We note that local governments are not required to explain in their decisions departures from prior precedent, as state agencies are required to by ORS 183.482(8)(b)(B).



1 Standard (c) provides, in its entirety:

2 "Maintenance of an overall residential density of  
3 one dwelling per 40 acres, or grouping of  
4 dwellings to achieve the same effect in areas of  
5 sensitive big game habitat, and maintain densities  
6 which are appropriate to the protection of other  
7 sensitive fish and wildlife habitat areas."  
8 (Emphasis added.)

9 According to petitioner, because standard (c) does not  
10 specifically state "overall residential density" is to be  
11 measured in relation to the subject property, it should be  
12 measured in relation to the "area of sensitive big game  
13 habitat," which term is used in standard (c).<sup>5</sup> However, it  
14 is clear that the term "areas of sensitive big game habitat"  
15 is included in standard (c) to distinguish between those  
16 habitat areas where an "overall residential density" of one  
17 dwelling per 40 acres must be maintained, and the "other  
18 sensitive fish and wildlife habitat areas" where  
19 "appropriate" residential densities must be maintained.  
20 Thus, we conclude standard (c) does not explicitly state how  
21 "overall residential density" is to be determined for  
22 development proposed in sensitive big game habitat areas.<sup>6</sup>

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<sup>5</sup>Petitioner argues that the amended standard (c) which applies to applications filed on or after March 4, 1991 within the newly designated "Especially Sensitive" habitat area, specifically states that "maximum overall density" is to be determined within the property proposed to be divided. However, we do not find that a subsequent amendment to standard (c) is indicative of the county's original intent in adopting standard (c).

<sup>6</sup>We also note that the terms "overall residential density" or "overall density" apparently are not used or defined elsewhere in the JCLDO.

1           In the challenged decision, the county interprets the  
2 requirement of standard (c) that "overall residential  
3 density" be maintained at one dwelling per 40 acres to refer  
4 to the residential density on the subject property.  
5 Petitioner argues that under standard (c) "overall  
6 residential density" should be measured for the "area of  
7 deer winter range along Sterling Creek Road." Petition for  
8 Review 14. However, standard (c) provides no basis for  
9 defining the limits of any such area. We therefore agree  
10 with the county that standard (c) is reasonably interpreted  
11 to require that the "overall residential density" on the  
12 subject property be maintained at one dwelling per 40 acres.  
13 The proposed partition clearly does not satisfy  
14 standard (c).

15           The assignment of error is denied.

16           The county's decision is affirmed.