BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CAROL N. DOTY,
Petitioner,

and

CHRIS N. SKREPETOS,
Intervenor-Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

DANIEL HARRIS and SUSAN HARRIS,
Intervenors-Respondent.

LUBA Nos. 2002-024 and 2002-025

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Carol N. Doty, Bandon, filed a petition for review and argued on her own behalf.

Chris N. Skrepetos, Ashland, filed a petition for review and argued on his own behalf.

No appearance by Jackson County.

Daniel Harris, Ashland, filed the response brief and argued on his own behalf.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 09/17/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals two county decisions that have been consolidated for our review. One decision amends the comprehensive plan and zoning map, and the second decision amends the text of the zoning ordinance. Both decisions concern the boundary of a deer and elk winter range habitat overlay zone.

MOTION TO INTERVENE

Chris N. Skrepetos moves to intervene on the side of petitioner. There is no opposition to the motion, and it is allowed.[1] Daniel Harris and Susan Harris (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This matter is before us for a second time. We begin by reciting the pertinent facts from our prior opinion.

> "The subject area consists of four contiguous parcels, each approximately 10 acres in size, improved with a nonfarm dwelling, and served by a community well and common road access. Until 1995, the subject parcels were zoned exclusive farm use (EFU) and used to some extent for agricultural purposes. The four nonfarm dwellings were built in 1990, 1992, 1994 and 1996. In December 1995, the county allowed an exception to Goal 3 for the subject parcels, and changed the zoning designation from EFU to Rural Residential five-acre minimum (RR-5). The Department of Land Conservation and Development (DLCD) acknowledged the exception on May 23, 1996. Northeast of the subject parcels is a 10-acre parcel zoned Rural Limited Industrial (RLI) that contains a helicopter logging operation. All other parcels in the immediate area are zoned EFU.

[1] When petitioner and intervenor-petitioner's make the same arguments, we will refer to them as "petitioners." When they make separate arguments, we will refer to them as Doty or Skrepetos as appropriate.

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

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

"In 1990, the county performed a comprehensive Goal 5 analysis, resulting in a document called the 'Jackson County Goal 5 Resources, Background Document' (Background Document). The Oregon Department of Fish and Wildlife (ODFW) assisted the county in that effort by identifying and mapping the winter ranges of deer and elk in the county. The ODFW identified 13 discrete winter range 'units.' Each unit was determined based on characteristics of location, herd type, physiography and habitat quality, and ranked according to relative importance of the winter range provided. The Grizzly Unit is ranked the fourth most important of the 13 units in the county. In the Background Document, the county adopted the ODFW's winter range units and designations, and incorporated the ODFW standards into its land development ordinance (LDO). The county adopted the Background Document as part of its comprehensive plan in 1991.

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

"In pre-application consultations, the county determined that intervenors' application required creation of a new 40-acre winter range unit (comprised of the subject parcels) carved from the Grizzly Unit, and categorization of that new unit as an 'Other' winter range unit. Creation of the new winter range unit required a text amendment to LDO 280.110(3)(E), as well as an amendment to a comprehensive plan map and the zoning map. Under the LDO, text amendments to the LDO are 'legislative' decisions that only the county can initiate, while a minor amendment of the plan and zoning map is a 'quasi-judicial' decision that intervenors could initiate. Accordingly, the county processed intervenors' application as two decisions: a legislative text amendment to LDO 280.110(3)(E) initiated by the county, and a quasi-judicial amendment to the plan map and zoning map initiated by intervenors." *Doty v. Jackson County*, 34 Or LUBA 287, 289-91 (1998) (footnotes omitted).

We sustained three of the assignments of error and remanded the decision to the county. The county held remand hearings and re-adopted the challenged ordinances. This appeal followed.

STANDING

Intervenors challenge petitioners' standing based on the Court of Appeals' decision in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *review allowed* ___ Or ___ (2002). According to intervenors, the challenged decision will not have any "practical effect" on petitioners, and therefore they are not entitled to standing to appeal the decision to LUBA. As intervenors acknowledge, we have rejected such challenges to standing at LUBA several times in the past. *See Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524, 527 (2002) (standing before LUBA determined by statute rather than practical effect). Intervenors urge us to reconsider our prior opinions in this matter. We decline to do so. Petitioners have standing to appeal the challenged decisions to LUBA.

INTRODUCTION

In sustaining the first assignment of error in the first appeal, we held that the county failed to comply with Goal 5 (Open Spaces, Scenic and Historic Areas and Natural Resources) by not considering the effects of the proposed change on areas outside of the subject property. Both petitioners assign error to the county's decision on remand regarding compliance with Goal 5. In sustaining the second assignment of error in the first appeal, we held that the county did not comply with its own ordinance requiring minimum impact on winter deer and elk habitat. Doty now challenges the county's decision regarding compliance with that ordinance. In sustaining the third assignment of error in the first appeal, we held that the county did not demonstrate compliance with its ordinance requiring that there be a public need for the proposed change. Doty now challenges the county's finding that the public need requirement does not apply and the county's alternative finding that the public need requirement is satisfied. Skrepetos also raises two assignments of error

regarding the procedures used by the county during the remand proceedings. We begin with the procedural assignments of error.

FIRST ASSIGNMENT OF ERROR (SKREPETOS)

Skrepetos argues that the county's decision must be remanded because the county failed to provide him with an opportunity to respond to new information that was submitted into the record below following remand. ORS 197.763(4)(b) governs local land use hearings and provides in pertinent part:

> "* * * If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. * * *"

The county held a hearing on remand concerning intervenors' application on December 8, 1999. At that hearing, Skrepetos stated that in the event any new information was submitted into the record he would request a continuance for an opportunity to respond to the new evidence. At the hearing, intervenors told Skrepetos that they had no intention of submitting any new evidence into the record. Also at that hearing, a letter was submitted into the record by Bob Ferreira, a neighbor of intervenors, urging the board of commissioners (BCC) to approve the application. Record 372. Skrepetos did not raise any objection to the Ferreira letter or request that the record be left open for an opportunity to respond to the letter. The BCC then closed the public hearing and record. After public deliberation on the matter, the BCC orally approved the proposed ordinances. Two years passed. On December 12, 2001, the BCC held a hearing to adopt the proposed ordinances. At that hearing, Skrepetos objected that new evidence, the Ferreira letter, had been introduced into the record at the December 8, 1999 hearing without a proper opportunity for response.

Assuming that the Ferreira letter constitutes new evidence and that Skrepetos had the right to a continued evidentiary proceeding to respond to that new evidence, his blanket request to leave the record open in the event that new evidence might possibly be submitted sometime in the future is insufficient to invoke that right. For a party to adequately assert a

right to respond to alleged new evidence that has been placed into the record, the alleged new evidence must be identified and a request must be made to leave the record open to respond to that identified evidence. Skrepetos did not do that in the present case. Furthermore, Skrepetos failed to make a timely objection to the county's alleged procedural error. A party may not wait until a local government concludes the evidentiary hearing, closes the record, deliberates and adopts its oral decision, and convenes a final hearing to review the written decision, and then belatedly object to the local government's failure to continue the evidentiary hearing. Skrepetos did not identify the allegedly new evidence at the December 8, 1999 hearing when he had the opportunity, and he may not raise the issue after the fact at the December 12, 2001 hearing.

Skrepetos' first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (SKREPETOS)

Skrepetos argues that the county erred by not accepting evidence submitted by opponents at the December 12, 2001 hearing. As discussed above, the public hearing and record were closed upon conclusion of the December 8, 1999 hearing. At the December 12, 2001 hearing to review the language of the ordinances that were orally approved at the December 8, 1999 hearing, opponents, including Skrepetos, tried to submit additional information in opposition to the proposed ordinances. According to Skrepetos, the evidence offered at the December 12, 2001 hearing was intended, in part, to respond to the Ferreira letter. The county did not indicate at the December 12, 2001 hearing whether it was accepting or rejecting the materials. The BCC eventually continued the hearing until January 9, 2002. At the January 9, 2002 hearing, intervenors requested that the record be opened to allow opponents' materials to be entered into the record and for intervenors to have an opportunity to respond. The BCC responded by stating that it had not accepted the materials submitted by opponents and that the record would not be reopened. Record 89-90. The BCC then directed county staff to review the materials to see if they had any bearing on the

purpose of the continued hearing, which was to review the specific language of the approved ordinances, and the BCC continued its hearing to February 6, 2002. At the February 6, 2002 hearing, the staff reported that the materials submitted by opponents were overwhelmingly new evidence that should not be admitted into the record. Record 86. The BCC then specifically rejected the materials. Record 86.

Although the materials were given exhibit numbers and were included with the local record that was submitted to LUBA, that does not necessarily mean they were also part of the evidentiary record below that was the basis for the county's decision. More commonly, when materials are rejected by a local government, they are omitted from the local record submitted to LUBA. However, it is also acceptable for the local government to include the rejected materials in the record provided to LUBA while indicating that the materials were specifically rejected below.

There is no question that the materials are not part of the record before the county. OAR 660-010-0025(1)(b) provides that the record includes:

> "Materials specifically incorporated into the record or placed before, *and not rejected by*, the final decision maker, during the course of the proceedings before the final decision maker." (Emphasis added.)

In this case, the BCC specifically rejected the exhibits. The evidentiary hearing had been concluded two years previously, and the record had been closed. As we discussed under Skrepetos' first assignment of error, petitioners did not adequately request or preserve the opportunity to respond to the alleged new evidence. Therefore, the BCC properly rejected the offered materials as untimely filed.

Skrepetos' second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (DOTY) AND THIRD ASSIGNMENT OF ERROR (SKREPETOS)

Although petitioners' arguments are often difficult to follow, they essentially challenge the county's compliance on remand with the requirements of Goal 5. In particular,

petitioners challenge the county's inventory and analysis of the Goal 5 resources. In our prior opinion, we directed the county to collect additional information relating to the location, quality, and quantity of the habitat resource, to identify an impact area, and to consider the impact that conflicting uses would have on the area beyond the property boundaries of the subject four parcels themselves. On remand, intervenors hired a certified wildlife biologist to prepare a report addressing those questions. Intervenors retained the wildlife biologist, Gary Hostick, who prepared the original wildlife resources study that became the basis of the county's winter range maps. This report (Hostick report) constitutes the basis of the county's decision approving the proposed ordinances.

A. Validity of Inventory

A valid inventory must include a determination of location, quality, and quantity of the resource.[2] Initially, petitioners fault the county for not relying on "as many sources as

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[2] OAR 660-016-0000 describes the requirements for a valid inventory of Goal 5 resources:

> "(1) The inventory process for Statewide Planning Goal 5 begins with the collection of available data from as many sources as possible including experts in the field, local citizens, and landowners. The local government then analyzes and refines the data and determines whether there is sufficient information on the location, quality and quantity of each resource site to properly complete the Goal 5 process. * * * Based on the evidence and local government's analysis of those data, the local government then determines which resource sites are of significance and includes those sites on the final plan inventory.
>
> "(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 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'.
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> "* * * * * (Emphasis in original.)"

possible." Petitioners, however, merely criticize the sources the county relied upon. Petitioners do not assert that there were other sources of information that the county refused to consider or that there is some unidentified threshold of sources of information necessary for compliance with the rule. Petitioners may disagree with the conclusions the county drew from the sources of information it considered, but that does not mean the county violated the rule by relying on the Hostick report.

Petitioners next challenge the county's reliance on the Hostick report to establish the impact area, identify the impacts, and the ultimate conclusion to remove the subject property from an ESWR designation. Petitioners begin by attacking the methodology of the Hostick report. According to petitioners, the Hostick report is "conclusory, contains no methodology, presents no factual data on the quality and quantity of the habitat or the relative values of these compared to other portions of the Grizzly unit or with the impact area." Doty Petition for Review 13. The county's findings regarding the Goal 5 inventory are set out in part below:

> "Based upon the expert opinion and analysis submitted into the record, the Board finds that deer and elk habitat consists essentially of shelter, food and water. The Board finds that, based on the aerial map submitted by the planning staff, the testimony of witnesses living on the parcels in this subject area and the expert advice submitted as part of this application, very little deer or elk shelter in the form of trees and large shrubbery, exists on the subject parcels. Further, based upon the testimony of residents living on the subject parcels, no elk have been observed on the subject parcels since observations began being made by the residents in 1984. Further, residents of the subject area testified that deer will occasionally pass across the property, but their numbers are few. Further, based upon the expert opinion and analysis submitted with this application, there is very little, if any, deer or elk food in the form of vegetation on the subject properties. With regard to food, the evidence indicates that deer are known to obtain most of their nourishment from trees and brushy plants like ceanothus. Although the Goal 5 background document describes portions of the Grizzly Unit as containing an excellent variety of browse materials, the evidence shows that the subject area has no brushy plants or bushes, with only a few scattered scrub oak located along the eastern edge of Tax Lot 509. The only reliable source of water in the general area is Walker Creek, which is situated some distance south and east from the subject properties on the other side of Dead Indian Memorial Road. As stated

> at the hearing by the property owners, a small seasonal wash does pass over a portion of the subject properties during a two to three month period in those years when greater than average rainfall is recorded during the late winter and early spring. The evidence supports the conclusion that this limited and sporadic seasonal source of water adds very little to the habitat potential of the subject parcels." Record 15-16.

Petitioners make various arguments about the evidence the BCC relied upon in making its decision, the Hostick report in particular. Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Where the Board concludes that a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). That a petitioner may disagree with the local government's conclusions provides no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993). Petitioner essentially asks that LUBA reweigh the evidence and reach a different conclusion than that reached by the county.

While petitioners criticize particular parts of the Hostick report and methodologies used in the report, petitioners' criticisms are not sufficient to discredit the report, to such an extent that it is no longer evidence a reasonable person could rely upon. For instance, petitioners go to great length explaining why they believe the identified impact area, the area outside of and adjacent to the subject parcels, is too small. The Hostick report cites two studies to justify the identified impact area. The first study is a Colorado study that concludes that humans, horses and dogs venture approximately one-half mile into the adjoining deer winter range. The second study is a Wyoming study that shows "elk prefer to be at least [one-half] mile away from campers, anglers and hikers." Doty Petition for Review 19. The Hostick report and the BCC concluded that these studies support use of a half-mile impact area. We understand petitioners to argue that the focus of the first study is on the

distance that human or human related presence is projected out into adjoining habitat areas. We understand petitioners to argue that the focus of the second study is the reaction of elk to that projected human presence. Petitioners reason that the true impact area therefore should be the sum of those two distances, making the impact area one mile rather than the half-mile that the Hostick report and BCC assume. Although there is some logic to petitioners' argument, we cannot say that a reasonable person could only view the two reports in the way petitioners do. Stated differently, we do not agree that it was unreasonable for the Hostick report to conclude that the impact area is one-half mile or that it was unreasonable for the BCC to reach the same conclusion based on the Hostick report.

The county properly established an impact area that included the portion of the Grizzly Unit outside of the subject parcels that would be affected by the proposed changes, and inventoried the quantity, quality, and location of the Goal 5 resources within that impact area. The county's decision is supported by evidence that a reasonable person could rely upon. Doty's first assignment of error and Skrepetos' third assignment of error are denied.

SECOND ASSIGNMENT OF ERROR (DOTY)

Doty argues that the county erred in its economic, social, environmental, and energy (ESEE) analysis required by Goal 5.[3]

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[3] OAR 660-016-0005 provides:

> "It is the responsibility of the local government to identify conflicts with inventoried Goal 5 resource sites. This is done primarily by examining the uses allowed in broad zoning districts established by the jurisdiction (*e.g.*, forest and agricultural zones). A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site. 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:
>
> "(1) Preserve the Resource Site: If there are no conflicting uses for an identified resource site, the jurisdiction must adopt policies and ordinance provisions, as appropriate, which insure preservation of the resource site.
>
> "(2) Determine the Economic, Social, Environmental, and Energy Consequences: If conflicting uses are identified, the economic, social, environmental and energy consequences of the conflicting uses must be determined. Both the impacts on the

A. Adequacy of ESEE Analysis

Doty argues that the county failed to complete an adequate ESEE analysis. The county's decision assumes that further development will conflict with winter range habitat values in the area and conducts an analysis of the ESEE consequences of any negative impacts between conflicting uses and potential Goal 5 resources. The county analyzed the economic consequences of the proposal and decided that the development would have little to no impact on winter range habitat and would have a long-term positive economic impact on the area. Record 16. The county found there would be a positive social impact associated with the infill of the existing residential parcels compared to allowing more scattered development. Record 17. The county found there would be little to no adverse environmental impact associated with the development, and that the development would likely increase the amount of habitat through the planting of trees and shrubs. *Id.*. Finally, the county found that the energy consequences of development would be beneficial because of clustering development around existing facilities like a community water system. *Id.*

Doty criticizes the adequacy and evidentiary foundation for the above findings. However, those criticisms are insufficient to demonstrate that the county erred. OAR 660-016-0005(2) provides that an ESEE analysis "is adequate if it enables a jurisdiction to provide reasons why decisions are made for specific sites." The county's findings adequately address the ESEE consequences of redesignating the subject property as "Other Winter Range," and explain why that designation is appropriate. Doty has not established that further analysis or explanation is necessary.

> resource site and on the conflicting use must be considered in analyzing the ESEE consequences. The applicability and requirements of other Statewide Planning Goals must also be considered, where appropriate, at this stage of the process. A determination of the ESEE consequences of identified conflicting uses is adequate if it enables a jurisdiction to provide reasons why decisions are made for specific sites."

Doty also criticizes the county's findings for failing to cite the facts relied upon, and argues that the county's ESEE analysis is not supported by substantial evidence. For example, the county's findings regarding energy consequences state that:

> "The Board further finds that allowing the clustering of dwellings in the subject area, which is already impacted by development, would be preferable to scattering development over a wide area. With a community water system already in place, less energy would be required to infill the subject area to a 5-acre density than to place dwellings on four other parcels and utilize individual wells. Further, less energy and fewer resources would be required to construct houses, access, utilities etc., in the subject area than would be the case on other, less developed parcels." Record 17.

Doty argues that the decision fails to cite any evidence supporting, for example, the assertion that less energy is required to develop property with an existing community water system compared to digging new individual wells. However, the disputed assertion is taken verbatim from the staff report, as is much of the county's ESEE analysis. Record 506. A staff report can itself constitute substantial evidence, and Doty does not explain why the staff report is not reliable evidence. Doty has not established that the county's ESEE findings are not supported by substantial evidence.

B. Statewide Planning Goals

OAR 660-016-0005(2) requires the county to consider whether other statewide planning goals apply and what requirements any such goals might impose on the decision. In addition to repeating other arguments made in other parts of her brief, which we address elsewhere, Doty asserts that the county was required to comply with Goal 3 (Agricultural Lands) and the "stability test" that is discussed in *Sweeten v. Clackamas County*, 17 Or LUBA 1234 (1989). Doty is mistaken. When the subject properties were zoned rural residential it was as part of an exception area that took an exception to both Goal 3 and Goal 4 (Forest Lands). Because the property is no longer subject to those goals, there is no need to take an exception to Goals 3 or 4, or to apply criteria that those goals make relevant.

C. Program to Achieve Goal 5

Once a local government conducts a Goal 5 ESEE analysis, it must make a determination under OAR 660-016-0010 to either protect the Goal 5 resource fully, to allow conflicting uses fully, or to limit the conflicting uses while still providing protection for the Goal 5 resource. Doty argues that the county allowed the conflicting uses fully while not protecting the Goal 5 resource at all. Although the county's findings are not a model of clarity, it is reasonably clear that the county was proceeding under the third option, limiting the conflicting uses.

> "* * * The Board finds that the conflicting use—in this case, residential and industrial development—should be protected and the subject area removed from the designation 'especially sensitive' winter range and redesignated as 'other' winter range. The Board finds that this program enables the subject area to retain its designation as wildlife habitat, while recognizing the subject area's conflicting uses of residential and industrial development as well as the current zoning designation of Rural Residential-5. The Board finds that there are sufficient standards in [LDO] 280.110(3)(E)(vii) to assure the maintenance of whatever habitat value is still present in the area." Record 18.

Doty assumes that the above means the county decided to completely allow the conflicting uses while not protecting the Goal 5 resource at all. She is mistaken. The decision merely redesignates the wildlife habitat overlay from "especially sensitive" to "other." "Other" winter range habitat still provides protection for the Goal 5 resource, just not as much protection as the prior designation. Under "other" winter range habitat protection the protections of LDO 280.110(3)(E)(vii) still apply.[4] Doty's arguments are all

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[4] LDO 280.110(3)(E)(vii) provides:

> "General Land Division/Development Standards for all Winter Range Units:
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> "Any land use action subject to review under this Section shall include findings that the proposed action will have minimum impact on winter deer and elk habitat based on:
>
> "(a) Consistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction.

based on the mistaken premise that the decision allows conflicting uses fully, and fails to demonstrate error in the county's program to achieve Goal 5 standards.

Doty's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (DOTY)

A. Public Need Requirement

Doty argues that the county findings do not demonstrate that there is a "public need" for the proposed map change as allegedly required by LDO 277.070(3) and 277.080(2).[5] In

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

"(c) Location of dwellings and all other development within 300 feet of existing roads or driveways where practicable unless it can be found that habitat values and carrying capacity is afforded equal or greater protection through a different development pattern.

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

"(e) 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 or accept ODFW's position shall be based on substantive findings provided by the applicant."

[5] LDO 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:

"(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; and

the prior appeal, we stated that it appeared that the public need requirement applied to all quasi-judicial map amendments of any type.

> "* * * Absent an interpretation by the county commissioners to the contrary, we conclude that LDO 277.070(3) imposes the 'public need' standard on all quasi-judicial map amendments of any type." 34 Or LUBA at 304.

On remand, the county provided just such an interpretation:

> "With respect to [this assignment of error], the Board concludes that the 'public need' issue has been resolved by interpreting LDO 277.070(3) to not require a public need assessment on all map amendments, but only on zone changes. Furthermore, the Board interprets the public needs requirements of LDO 277.070(3) to be adequately addressed through the Goal 5 process. Finally, the Board concludes that the public need assessment has been satisfied in this action." Record 20.

The BCC has significant discretion in how it interprets its own ordinance. ORS 197.829; *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992). We must affirm the county's decision unless we conclude that the interpretation is clearly wrong. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). Although Doty acknowledges the deferential standard of review that must be applied, she merely asserts that the BCC interpretation is inconsistent with the express language, purpose, and underlying policy of the ordinance.

LDO 277.070 governs minor map amendments, and subsection (3) incorporates the public need requirements of LDO 277.080, which lists the findings required to be made for the "rezoning of specific properties." Property may be subject to both a base zone, which typically establishes the uses that are conditionally allowed or allowed outright, and an overlay zone, which typically imposes additional restrictions on those allowed and conditionally allowed uses. The county apparently distinguishes between map amendments that simply change a habitat overlay zone and map amendments that change the base zone.

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

Under the county's interpretation the public need standard in LDO 277.080 applies to the latter and not to the former. Doty does not explain why this interpretation is inconsistent with the local ordinance and we do not see that it is. The county's interpretation of its own ordinance is not clearly wrong and is entitled to deference.[6]

B. Compliance With Land Division/Development Standards

In our prior decision, we directed the county to address subsections (a) and (b) of LDO 280.110(3)(E)(vii). *See* n 4. In response, the county considered the cumulative effect of proposed and existing development in the area. Record 19. The county concluded that habitat values were thoroughly assessed and that the map and text amendments will have a minimal impact on habitat carrying capacity due to the significant cumulative effects of the existing uses of the land for residential and industrial purposes on the subject parcels and in the impact area and the winter range protection and siting standards of LDO 280.110(3)(E)(vii), which are designed to minimize the impact any development will have on potential wildlife habitat. The county addressed the issues that they were directed to address on remand, and the county's findings in this regard are supported by substantial evidence.

Doty's third assignment of error is denied.

DOTY'S FOURTH ASSIGNMENT OF ERROR

Doty challenges the county's legislative text amendment describing the change in wildlife habitat overlay for the subject property. The challenge is based on the same arguments already made in the other assignments of error challenging the quasi-judicial decision. In our prior opinion, we indicated that the legislative decision would survive review or not based upon the quasi-judicial decision. As discussed earlier, petitioners' arguments against the proposed ordinances are not convincing. Therefore, the arguments against the legislative decision fail as well.

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[6] Because we affirm the county's first interpretation, we need not address Doty's challenge to the alternative interpretation, or the finding that the public need assessment has been satisfied.

Doty's fourth assignment of error is denied.

The county's decision is affirmed.