



**NATURE OF THE DECISION**

Petitioners appeal county approval of a conditional use permit authorizing restoration and enhancement of wetlands and wildlife habitat adjacent to an existing aggregate mining site.

**FACTS**

The subject property is a flat, undeveloped 348-acre parcel zoned A-1 (Exclusive Farm Use). The parcel is situated in a low-lying area of the valley floor, and includes a slough network and several wetlands and ponds. A state highway borders the parcel on the east. Across the highway to the southeast is petitioners' property, developed with a 30-acre aggregate mine known as the Royal Rock pit. Petitioners' property is located on a low hill at the side of the valley floor.

The Union County Comprehensive Plan (UCCP) identifies petitioners' aggregate mine as a significant Statewide Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) resource. Accordingly, petitioners' mine is zoned Surface Mining (SM) under the Union County Zoning Partition and Subdivision Ordinance (UCZPSO). A Surface Mining Impact Area (SMIA) overlay zone extends one-quarter mile from the boundary of the SM zone applicable to petitioners' property. The SMIA overlay zone extends onto the subject property, and applies to approximately 87 acres in the southeast corner of the 348-acre parcel.

In 2003, the owner of the subject property applied to the Division of State Lands (DSL) for a permit to restore and enhance the wetlands on the 348-acre property. The total wetland enhancement project will affect approximately 75 acres of the 348-acre property. For the 87-acre portion within the one-quarter mile SMIA overlay zone, the owner proposes deepening two ponds, creating two swales, filling in part of one ditch and work on three culverts, affecting in total about 2.2 acres of the 87-acre portion. DSL requested a land use compatibility determination from the county. The county planning director concluded that wetland enhancement is a permitted use in the A-1 zone, and rejected petitioners' argument that the proposal required review as a conditional

1 use.<sup>1</sup> Petitioners appealed the planning director’s decision to the planning commission. The  
2 planning commission agreed with petitioners that wetland enhancement could be a “conflicting use”  
3 with respect to petitioners’ mine, and therefore required review as a conditional use, pursuant to  
4 UCZPSO 15.06.<sup>2</sup> The planning commission conducted a hearing on June 28, 2004, and voted to  
5 approve the proposed wetlands project.

6 Petitioners appealed the planning commission decision to the board of commissioners, who  
7 held a hearing on August 18, 2004. On October 6, 2004, the board of commissioners affirmed the  
8 planning commission decision. This appeal followed.

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<sup>1</sup> The planning commission found that wetland enhancement is a permitted use in the A-1 zone. Record 609.  
*See* ORS 215.283(1)(p) (providing for creation, restoration, or enhancement of wetlands in the EFU zone).

<sup>2</sup> UCZPSO 15.06 provides, in relevant part:

- “A. Uses Permitted Outright. Uses permitted outright in the underlying zone, except noise or dust sensitive uses or conflicting uses, may be permitted subject to the standards and criteria of the underlying zone(s).
- “B. Uses Allowed Conditionally
  - “1. Noise or dust sensitive uses or conflicting uses shall be reviewed as conditional uses subject to the standards and criteria of the underlying zone and this section.
  - “2. Conditional uses in the underlying zone(s) which are not noise or dust sensitive uses or conflicting uses shall be reviewed as conditional uses subject to the standards and criteria of the underlying zone.
- “C. Prohibited Uses. Uses identified through the Goal 5 process as incompatible with mining in all instances shall not be permitted within the Impact Area.
- “D. Review Criteria. To approve uses allowed conditionally in the Impact Area, the applicant must demonstrate compliance with the following criteria:
  - “1. The proposed use will not interfere with or cause an adverse impact on lawfully established and lawfully operating mining operation;
  - “\* \* \* \* \*
  - “3. Any setbacks or other requirements imposed through the Goal 5 process have been met, or can be met by a specified date.”

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 As noted above, uses within the SMIA zone applicable to 87 acres of the subject property  
3 are subject to UCZPSO 15.06. In relevant part, UCZPSO 15.06(B)(1) requires that “conflicting  
4 uses” must be reviewed as conditional uses subject to the standards in UCZPSO 15.06(D). *See n*  
5 2. UCZPSO 15.06(D)(1) and (3) require respectively that the applicant demonstrate that the  
6 proposed use will not “interfere with or cause an adverse impact on” a mining operation, and that  
7 any setbacks imposed through the Goal 5 process have been, or can be, met. *Id.* Petitioners argue  
8 that the county misconstrued the applicable law in several respects in interpreting and applying  
9 UCZPSO 15.06(D)(1) and (3) to the proposed wetland enhancement project.

10 **A. UCZPSO 15.06(D)(1): Adverse Impact**

11 The county’s findings addressing UCZPSO 15.06(D)(1) conclude that the most likely  
12 wildlife use of the enhanced wetland would be migratory birds, which currently use the site, and that  
13 there is no reason to believe that additional migratory birds would interfere with or adversely impact  
14 the Royal pit.<sup>3</sup> Petitioners first argue that the “adverse impact” standard is a rigorous standard that

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<sup>3</sup> The county’s findings with respect to UCZPSO 15.06(D)(1) state, in relevant part:

“[Petitioners and the applicant] have argued wetland enhancement will and will not significantly increase wildlife use on the subject property. The Board of Commissioners finds the Royal aggregate mining operation and Becker property wetlands have existed for many years with no apparent conflict or interference. Because the Impact Overlay Area restricts this review to one-quarter mile from the Royal aggregate site SMZ the conflicts or interference analysis is only applicable to the proposed wetland enhancement improvements in this area.

“County planning Department staff have identified the one-quarter mile boundary on a Ducks Unlimited map dated March 2003. The boundary includes about 25 percent (about 87 acres) of Becker’s 348 acres. The project within the one-quarter mile includes deepening Ponds H & I, creating two meandering swales, filling part of another ditch and work on three culverts. Kevin Hugulet has estimated in a letter dated August 26, 2004 that the impacted area within the buffer is only 2.2 acres (page 4).

“A Ducks Unlimited letter dated May 27, 2004 addresses concerns for wildlife and plant species that could be enhanced or reintroduced as a part of the wetland enhancement project. Ducks Unlimited found no Federal Threatened or Endangered species currently exist on the Becker property and based on their professional expertise believe the project is very unlikely to attract any such species. The Ducks Unlimited letter goes on to state that deer and elk will be less likely attracted to the Becker property because the wetland areas will no longer be grazed by livestock and grass and forbs will become ‘tall and rank.’ This position is supported

1 requires a demonstration that there will be absolutely no adverse impact of any kind. According to  
2 petitioners, the county erred in interpreting the “adverse impact” standard of UCZPSO 15.06(D)(1)  
3 as a “balancing” test that allows adverse impacts that are “generally compatible” with aggregate use.  
4 Petition for Review 9.

5 We do not see that the county in fact interpreted UCZPSO 15.06(D)(1) to include any kind  
6 of balancing test or general compatibility standard. Petitioners cite to a portion of the decision that  
7 discusses UCZPSO 21.06(1), which is part of the code governing conditional uses, and  
8 UCZPSO 40.01, which is the purpose statement for the SMIA overlay zone. Record 4-5.<sup>4</sup> With

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by a July 7, 2004 letter from [ODFW], who states less palatable wetland vegetation combined with proximity to Ore. Hwy 237 will probably not increase elk use.

“The Board of Commissioners finds the most likely wildlife use on the wetland enhanced property within one-quarter mile will be migratory birds. The May 27, 2004 [Ducks Unlimited] letter states in part in item 8:

“‘I have found that a considerable number of migratory birds already nest on the project area with a significant degree of success. If migratory birds are already nesting successfully on the project area in conjunction with the current management of the Royal Pit, there is no reason to believe that migratory birds would not continue to successfully use the project area after completion of the wetland enhancement project.’

“Therefore, the Board of Commissioners concludes migratory birds are the only potential wetland enhancement uses likely to cause an interference or that could have an adverse impact on the Royal aggregate site. Because the existing wetland uses and Royal aggregate site have no history of interference the Board of Commissioners cannot find enhancements to an existing wetland will result in new interference or adverse impact just because there may be more migratory birds.

“The Board of Commissioners also reasons that if new wildlife uses are established on the enhanced wetlands within one-quarter mile, it will occur while the Royal aggregate site is in operation. New wildlife uses would not be established if they were impacted by the Royal aggregate site operation and if they do occur then they must not be impacted by the Royal aggregate operation. If wildlife are not impacted then they ‘will not interfere with or cause an adverse impact on’ the Royal aggregate operation.” Record 8-10.

<sup>4</sup> UCZPSO 21.06(1) provides:

“A conditional use shall ordinarily comply with the standards of the zone concerned for uses permitted outright except as specifically modified by the Planning Commission in granting the conditional use.”

UCZPSO 40.01 states:

1 respect to UCZPSO 21.06(1), the county’s findings observe that the board of commissioners has  
2 “held in a number of previous cases that [UCZPSO 21.06(1)] is interpreted as a ‘general test of  
3 compatibility’ for proposed conditional uses.” Record 4. Turning to UCZPSO 40.01, the findings  
4 quote that provision and then state that the board of commissioners “find[s] the direction provided  
5 by this purpose statement is to balance the protection of surface mining resources in a SMZ while  
6 allowing reasonable use of neighboring properties.” Record 5. Several pages later the decision  
7 addresses the “adverse impact” standard at UCZPSO 15.06(D)(1), quoted above at n 2. Those  
8 findings do not mention or appear to engage in any kind of balancing or compatibility test. The  
9 findings then return to UCZPSO 21.06(1), and conclude that that conditional use criterion is  
10 satisfied because “the existing wetlands and their use did not conflict with the Royal aggregate  
11 operations in 1995, do not conflict now and will not interfere with or cause an adverse impact in the  
12 future[.]” Record 10-11. Finally, the county turns to UCZPSO 40.01, and concludes:

13 “The Board of Commissioners finds the wetland enhancement project will not  
14 create new conflicting uses as stated in [the findings addressing  
15 UCZPSO 15.06(D)(1)] above. Since [the applicant] is only enhancing an existing  
16 wetland the Board of Commissioners finds this is a reasonable use of the  
17 neighboring property that can exist in conjunction with the surface mining activities.”  
18 Record 11.

19 In other words, the county found that the project complied with the “adverse impact” standard of  
20 UCZPSO 15.06(D)(1) and then, *based on that finding*, found compliance with  
21 UCZPSO 21.06(1) and 40.01. The county did not interpret UCZPSO 15.06(D)(1) to include a  
22 balancing or compatibility test. Nor did it reason that compliance with UCZPSO 21.06(1) and  
23 40.01 establishes compliance with UCZPSO 15.06(D)(1). Rather, it reasoned from the other  
24 direction: compliance with UCZPSO 15.06(D)(1) suffices to establish compliance with the

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“The purpose of the SMIA Overlay Zone is to protect designated surface mining resources in Surface Mining Zones from new development which conflicts with the removal and/or processing of a mineral or aggregate resource while allowing property owners near surface mining sites reasonable use of their property.”

1 apparently less rigorous standards of UCZPSO 21.06(1) and 40.01. Petitioners do not explain  
2 why that approach is error, and we do not see that it is. This subassignment of error is denied.

3 **B. Burden of Proof**

4 Petitioners contend that the “adverse impact” standard at UCZPSO 15.06(D)(1) requires  
5 the applicant to demonstrate beyond any doubt that there will be no adverse impact on the  
6 aggregate operation. According to petitioners, the presumption is that the proposed use will  
7 adversely impact the aggregate operation, and the burden on the applicant is to show “that the  
8 proposed use has, *in fact*, not the slightest adverse impact or interference with the existing use—the  
9 aggregate site.” Petition for Review 11 (emphasis original). Petitioners argue that the county failed  
10 to impose that burden on the applicant, and erred in approving the proposed use based on evidence  
11 that the enhanced wetlands were “very unlikely” to attract endangered species, and that elk use of  
12 the property “will probably not increase.” Such qualified evidence, petitioners argue, is insufficient  
13 as a matter of law to show that there will not be adverse impacts.

14 We disagree that the county misapplied the burden of proof. We perceive no presumption  
15 in UCZPSO 15.06(D)(1) that proposed uses within the SMIA overlay zone adversely impact the  
16 aggregate site, nor a concomitant burden on the applicant to overcome that presumption by proving  
17 a negative beyond any doubt. As discussed below, the county relied upon substantial evidence to  
18 conclude that the enhanced wetlands will not adversely impact the Royal pit. The county relied on  
19 evidence that it was very unlikely that the wetlands would attract endangered species or result in  
20 increased elk and deer presence, that most of the additional wildlife attracted to the wetlands would  
21 be migratory birds, and that additional migratory birds would not adversely impact the mining site.  
22 Based on that evidence, the county reached the ultimate conclusion that the enhanced wetlands  
23 would not adversely impact petitioners’ mine. That there was conflicting evidence on these points,  
24 or that the applicant’s experts did not guarantee that the enhanced wetlands would not attract  
25 endangered species or increased numbers of elk, does not establish that the county misconstrued  
26 the burden of proof. This subassignment of error is denied.

1           **C.       Current versus Proposed Conditions**

2           The county’s conclusion that the enhanced wetlands will not adversely impact the mine relies  
3 in part on the county’s finding that the existing wetland supports migratory birds and that such use  
4 has coexisted with the aggregate mine for many years without any conflict. The county reasons that  
5 additional migratory birds attracted to the enhanced wetlands will also not conflict with the mine  
6 operation. Further, the county reasons that

7           “if new wildlife uses are established on the enhanced wetlands within one-quarter  
8 mile, it will occur while the Royal aggregate site is in operation. New wildlife uses  
9 would not be established if they were impacted by the Royal aggregate site  
10 operation and if they do occur then they must not be impacted by the Royal  
11 aggregate operation. If wildlife is not impacted then they ‘will not interfere with or  
12 cause an adverse impact on’ the Royal aggregate operation.” Record 10.

13           Petitioners argue that the county erred in relying on evidence of no conflicts from the existing  
14 wetland, which petitioners argue is in a degraded condition. According to petitioners, the county  
15 must instead focus on whether the proposed use, the enhanced wetland, will conflict with the mine  
16 operation. With respect to the county’s reasoning that only wildlife that is not bothered by the mine  
17 operation will be established in the enhanced wetlands, petitioners argue that that reasoning begs the  
18 question of when is a use “established”? Petitioners contend that sporadic blasting at the mine site  
19 may frighten off endangered bald eagles trying to establish nesting sites on the subject property. If  
20 so, petitioners speculate, wildlife agencies might impose restrictions on the mining site that will  
21 adversely impact its operation.

22           The fact that the county extrapolated from current conditions to determine whether the  
23 enhanced wetland would adversely impact the mining operation does not mean that the county failed  
24 to evaluate the enhanced wetland. It is undisputed that migratory birds use the current wetland  
25 notwithstanding its degraded function and the existing mine operations. As the county explains, the  
26 only anticipated change from enhancing the wetlands is the presence of additional migratory birds.  
27 The county relied on evidence that enhanced wetlands will likely not attract threatened or  
28 endangered bird species such as bald eagles or peregrine falcons, because there are no nearby



1 nesting sites for such species. It seems eminently logical to conclude that if existing migratory birds  
2 are not bothered by the mine operation, additional migratory birds will also not be bothered by the  
3 mine operation. It also seems logical to conclude that only migratory birds not bothered by the mine  
4 will establish themselves on the enhanced wetland. Petitioners offer no reason to believe that  
5 migratory birds that visit but do not establish themselves at the wetlands will lead wildlife agencies to  
6 impose restrictions on the mining operation. This subassignment of error is denied.

7 **D. Impacts from Uses Outside the SMIA Overlay Zone**

8 Petitioners contend that the county erred in restricting its analysis of impacts to the wetland  
9 enhancements proposed within the one-quarter mile SMIA overlay zone, and failing to evaluate  
10 wetland enhancements on the remainder of the 348-acre parcel outside the SMIA overlay zone.  
11 However, petitioners do not cite to any code or comprehensive plan provision that requires  
12 evaluation of conflicting uses outside the SMIA overlay zone. UCZPSO 15.06 governs uses within  
13 the SMIA overlay zone, but does not purport to regulate uses outside that zone. This  
14 subassignment of error is denied.

15 **E. UCZPSO 15.06(D)(3)**

16 UCZPSO 15.06(D)(3) requires a finding that “[a]ny setbacks or other requirements  
17 imposed through the Goal 5 process have been met, or can be met by a specified date.” The  
18 county found that the Goal 5 process for the Royal pit did not identify any setbacks or other  
19 requirements for wetland enhancement projects.<sup>5</sup>

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<sup>5</sup> The county’s findings with respect to UCZPSO 15.06(D)(3) state, in relevant part:

“The Goal 5 process for the Royal Rock Pit states in part:

“‘Other Goal 5 resources which could be impacted by or have an impact on the  
aggregate site include other significant Goal 5 resources such as fish and wildlife  
habitat.’ \* \* \*

“‘ESEE consequences to other Goal 5 resources (wildlife habitat) do not exist and are  
not anticipated for the reasons stated above’ \* \* \*

1           Petitioners argue that the one-quarter mile SMIA overlay zone itself functions as a setback,  
2 designed to protect the Royal site from conflicting uses, including other Goal 5 resources such as  
3 wildlife, and therefore the county erred in concluding that the Goal 5 process provides no “setback”  
4 against wildlife uses for purposes of UCZPSO 15.06(D)(3).

5           It is reasonably clear that the county understood UCZPSO 15.06(D)(3) to refer not to the  
6 one-quarter mile SMIA zone itself, but rather to particular setbacks within that zone prescribed by  
7 the county’s Goal 5 inventory. Petitioners do not explain why that view is erroneous, and we do not  
8 see that it is. The county found that the Goal 5 inventory for the Royal pit prescribes no “setback”  
9 with respect to wildlife uses. From the portions of the Goal 5 inventory petitioners cites to us, that  
10 finding appears to be correct. This subassignment of error is denied.

11           The first and second assignments of error are denied.

### 12   **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

13           Petitioners contend that the county’s findings of compliance with UCZPSO 15.06(D)(1) are  
14 inadequate and not supported by substantial evidence.

#### 15    **A.    Non-Existent Findings**

16           Petitioners argue that the county failed to adopt any findings at all directly addressing the  
17 “adverse impact” standard at UCZPSO 15.06(D)(1). Further, petitioners argue that the county  
18 failed to address issues raised below regarding (1) whether the enhanced wetlands would attract big  
19 game such as elk and deer, leading wildlife agencies to restrict the mining operation, and (2) whether  
20 the enhanced wetlands will attract members of the public, resulting in increased traffic and conflicts  
21 with petitioners’ mine operation.

22           We do not understand petitioners’ argument that the county failed to address the “adverse  
23 impact” standard at UCZPSO 15.06(D)(1). The findings quoted at n 3 clearly address that

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“The Board of Commissioners finds the Goal 5 process for the Royal Rock Pit did not identify any setbacks or other requirements for wetland enhancement projects where no conflict is found to exist.” Record 10.

1 standard and conclude that enhancement to the existing wetland will not result in new interference or  
2 adverse impacts on petitioners' mining operation.

3 With respect to big game, the same findings address whether the enhanced wetlands will  
4 attract deer and elk and conclude that they will not. With respect to petitioners' argument that the  
5 wetland will attract the public and cause traffic and other conflicts, the county adopted a finding  
6 rejecting that argument.<sup>6</sup> Petitioners do not challenge that finding or explain why it is inadequate.  
7 This subassignment of error is denied.

8 **B. Inadequate Findings**

9 Petitioners repeat their arguments under the first and second assignments of error that the  
10 county misconstrued UCZPSO 15.06(D)(1) by (1) applying an incorrect burden of proof, (2)  
11 applying a balancing approach, (3) evaluating the current degraded rather than the enhanced  
12 wetlands, and (4) evaluating only the one-quarter mile SMIA overlay zone rather than the entire  
13 subject property. According to petitioners, the county's findings are inadequate because they fail to  
14 address the requirements of UCZPSO 15.06(D)(1), correctly construed.

15 Petitioners' findings challenge is derivative, based on the premise that the county  
16 misconstrued and misapplied UCZPSO 15.06(D)(1). Because we rejected petitioners' arguments  
17 under the first and second assignments of error that the county misconstrued and misapplied  
18 UCZPSO 15.06(D)(1), petitioners' findings challenge does not provide a basis for reversal or  
19 remand. This subassignment of error is denied.

20 **C. Substantial Evidence**

21 Petitioners contend that the evidence relied upon by the county demonstrates, at best, that  
22 the enhanced wetland is "highly unlikely" to attract species that may lead to restrictions on

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<sup>6</sup> The county adopted the following finding:

"[Petitioners have] argued the wetland enhancement will attract the public who could object to aggregate operations. The Board of Commissioners finds the wetland enhancement project is on private land and no public access is identified for the [proposed] improvements. Therefore, public access is not available." Record 11.

1 petitioners’ mine, and thus fails to establish that there will be no adverse impacts or interference, as  
2 required by UCZPSO 15.06(D)(1). Because the applicant’s evidence fails to “absolutely rule out  
3 the possibility” that the enhanced wetlands will attract species that may ultimately result in limitations  
4 being imposed on the mine operation, petitioners argue, the record does not support the county’s  
5 finding of compliance with UCZPSO 15.06(D)(1). Petition for Review 24.

6 As petitioners point out, scientific evidence is typically couched in probabilities, and no  
7 expert can “absolutely rule out the possibility” that the enhanced wetland will attract species that  
8 might lead to restrictions on petitioners’ mine. If UCZPSO 15.06(D)(1) is read to require a finding  
9 and supporting evidence that there is absolutely no possibility of an adverse impact, then  
10 UCZPSO 15.06(D)(1) becomes a standard that cannot be met whenever there is the potential,  
11 however infinitesimal, of an adverse impact. However, the county clearly did not understand  
12 UCZPSO 15.06(D)(1) in that manner, and neither do we. UCZPSO 15.06(D)(1) requires a  
13 finding that “[t]he proposed use *will not* interfere with or cause an adverse impact on lawfully  
14 established and lawfully operating mining operation.” (Emphasis added). That standard does not  
15 require a finding that adverse impacts are impossible; rather, it requires the county to predict future  
16 conditions, *i.e.*, to evaluate probabilities.<sup>7</sup> Expert evidence that it is “highly unlikely” that the  
17 enhanced wetlands will attract species that might lead to restrictions on the mine operation is  
18 evidence that a reasonable person would rely upon to find compliance with UCZPSO 15.06(D)(1).

19 Petitioners go on to criticize the applicant’s evidence or the county’s failure to address or  
20 give weight to petitioners’ evidence. Petitioners note that their experts raised questions about the

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<sup>7</sup> There are actually several probabilities or contingencies at issue. One is the probability that the enhanced wetlands will attract species that do not currently use the wetlands that are protected in some manner by state or federal agencies. If the evidence relied upon by the county is believed, that probability is very low. The second contingency is whether state or federal agencies would take protective action of some kind if the enhanced wetlands in fact attracted such species. The third contingency is whether those agency actions would restrict petitioners’ mine operations. Only if all three contingencies occur could there be an adverse impact or interference. The latter two contingencies are entirely speculative. The combination of (1) low probability of attracting protected species, and (2) speculation as to how federal or state agencies would respond and whether that response would restrict the mine operation, would seem to make the overall probability of an adverse impact even lower.

1 possibility that a federally protected plant might become established on the enhanced wetlands. The  
2 applicant's expert responded that the plant is not currently found on the site, and even if later  
3 established on the site would not conflict with the mine operation.<sup>8</sup> Petitioners fault this testimony  
4 for failure to demonstrate that there is no possibility that the protected plant, if established, would  
5 not cause adverse impacts. However, as explained, UCZPSO 15.06(D)(1) does not require  
6 evidence that conflicts are impossible. In any case, the applicant's expert stated that he "cannot  
7 imagine any scenario under which operation of the Royal Pit would conflict" with a plant growing on  
8 the subject property. That statement is about as absolute as could be, and petitioners offer no  
9 reason to dispute it.

10 Petitioners next argue that the applicant's evidence discussed only forage on the subject  
11 property, and failed to discuss the extent to which the enhanced wetlands will provide cover and  
12 water for elk, thus attracting more elk compared to the existing conditions.<sup>9</sup> Petitioners cite to

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<sup>8</sup> Petitioners cite to the following portion of the May 27, 2004 letter from the applicant's expert:

"\* \* \* That leaves the one plant species mentioned, Howell's Spectacular Thelypody. This species is not currently found on the site. As owners of an easement on the site, the U.S. Natural Resources Conservation Service may choose to work with Mr. Becker to reintroduce this species on the property. I am not aware of any plants to do so at this time. However, if such a decision was made, I cannot imagine any scenario under which operation of the Royal Pit would conflict with a plant growing on the Becker property." Record 64-65.

<sup>9</sup> Petitioners cite to the following portion of the May 27, 2004 letter:

"[Petitioners' experts] state, 'Due to the gravel mining operations, deer and elk in the area may be discouraged from entering the valley floor within this area. However, with the proposed wetland enhancement and creation and presumably the set aside of 75 acres for wildlife habitat, this would likely encourage wintering elk and deer to use the area and bring wildlife closer to the gravel mining operation.' After checking with local landowners and ODFW, it is my understanding that elk and deer do in fact currently use habitats on the valley floor, especially in the winter, contrary to the statement from [petitioners' experts]. In fact, elk move down the hill, past the Royal Pit, through the proposed project area, to feed in the short green browse provide by agricultural fields further to the west in the valley. The proposed project does include approximately 75 acres of enhanced wetlands that are being enrolled into the Wetland Reserve Program. However, I believe these particular acres will be LESS attractive to wintering deer and elk because of the conditions of the available browse within the 75 acres of enhanced wetlands. When wetlands are enrolled into WRP, there is usually a significant decrease in grazing and haying activities on the site. This is accomplished, in part, to allow the grass and forb community to grow as tall as possible, in order to provide additional nesting cover, escape cover for water birds, and production of aquatic plants that produce food for

1 testimony from their experts opining that the enhanced wetlands will provide increased cover and  
2 water sources that are likely to attract greater numbers of elk to the subject property. In addition,  
3 petitioners contend that the applicant’s expert is inconsistent with respect to food sources from  
4 cultivated fields on the subject property, at one point suggesting that only “tall, rank vegetation” will  
5 exist on the property and at another point stating that the balance of the subject property will  
6 continue to be actively used for agricultural production.

7 While the passage quoted at n 9 focuses on forage, it also discusses whether the 75 acres of  
8 enhanced wetlands on the 348-acre subject parcel would provide suitable “habitat” for elk during  
9 the winter or summer, and concluded that it would not. The passage also points out that what  
10 habitat will exist will consist of long, skinny wetland channels, with the remainder of the 348-acre  
11 parcel remaining in active agricultural use. The applicant’s expert found it “highly unlikely” that elk  
12 would find that type of habitat suitable.<sup>10</sup> We disagree with petitioners that that evidence is not

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water birds and other wetland wildlife. The resulting habitat tends to be tall, rank vegetation. Wintering elk prefer the tender, young, short green browse provided in alfalfa fields, winter wheat fields, grass seed fields and similar agricultural fields. The decadent, rank, and dead forage that will be present within the project area may provide excellent early spring nesting cover for waterfowl, but is certainly not a preferred grazing habitat for wintering elk. After completion of the proposed wetland enhancement project, I believe wintering elk will continue to move through this area, like they do now, to graze on more desirable forage further into the valley floor.

“[Petitioners’ experts] state ‘with this information it can be assumed that elk and deer in the area of the gravel mining site and the proposed wetlands site would behave in the same manner and frequent the area in the winter as well as the summer months, which is the primary operating season for the gravel mining operation.’ [Petitioners’ experts] made this statement after consulting with [the] manager of the Ladd Marsh wildlife area. They imply that elk use on this 75 acre wetland enhancement project could be similar to elk use on the Ladd Marsh Wildlife Area. What [petitioners’ experts] failed to mention was that the elk that spend the summer on Ladd Marsh Wildlife Area have hundreds of acres of habitat to use, including expansive amounts of cattails to escape from human activity. The proposed project on Mr. Becker’s land will enhance 75 acres. The shape of this habitat will be almost entirely long, skinny pieces of wetland channel. The balance of the site will continue to be actively used for agricultural production. It is highly unlikely that elk would find this type of habitat suitable during the summer months. If fact, it is highly unlikely that elk would find this habitat suitable during any time of year, except for occasional grazing use during the winter months as they pass through the property to more suitable grazing sites, as they currently do. \* \* \*” Record 65-66.

<sup>10</sup> It is worth pointing out that both sets of experts appear to be disputing the habitat values of the 75 acres of enhanced wetland on the 348-acre subject property, rather than the 2.2 acres of enhanced wetlands within the one-quarter mile SMIA overlay zone, which, as we determined above, is the proper focus of inquiry under

1 substantial evidence supporting the county’s findings with respect to elk. We also disagree with  
2 petitioners that the applicant’s expert is inconsistent with respect to continued agricultural production  
3 on the property. It is reasonably clear that the reference to “tall, rank vegetation” is to vegetation on  
4 the 75 acres of enhanced wetlands, not the remainder of the property, which will continue to be  
5 cultivated.

6 Petitioners next fault the county for failing to explain the apparent contradiction between  
7 language in the UCCP Goal 5 inventory indicating that ODFW wants to discourage wildlife use near  
8 the Royal pit, with the fact that ODFW now supports the wetland enhancement project. However,  
9 the county adopted findings explaining ODFW’s support for the proposed wetland enhancement.<sup>11</sup>  
10 Petitioners do not challenge that finding or explain why it is inadequate.

11 Finally, petitioners fault the county for failure to address the testimony of its experts and  
12 explain why it chose to believe the applicant’s expert evidence rather than petitioners’. However,  
13 where LUBA is able to determine that a reasonable decision maker could rely on the evidence the  
14 decision maker chose to rely on, findings specifically addressing conflicting evidence are  
15 unnecessary. *Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004). We have examined  
16 the evidence petitioners cite us to with respect to elk. In our view, the county could reasonably  
17 have relied upon either set of experts with respect to elk. Therefore, the choice of which evidence  
18 to believe is up to the county. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA  
19 124, 138, *aff’d* 149 Or App 417, 943 P2d 1106, *adhered to on recons* 151 Or App 16, 949

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UCZPSO 15.06(D)(1). If, as the applicant’s expert opined, 75 acres of enhanced wetlands consisting of “long, skinny wetland channels” is unsuitable habitat for elk, it seems even less likely that the 2.2 acre wetland portion within the SMIA overlay zone is suitable.

<sup>11</sup> The decision states, in relevant part:

“[Petitioners] states [that] ODFW historically objects to mining operations next to wildlife habitat. James S. Cadwell, Assistant District Wildlife Biologist, ODFW, in a letter dated July 7, 2004, did not object to this specific application and found the wetland enhancement ‘will likely decrease the quality and quantity of big game forage on that site for both deer and elk.’”  
Record 11.

1 P2d 1225 (1997). Because a reasonable person could rely on the evidence the county chose to  
2 rely upon, the county was under no obligation to adopt findings addressing contrary evidence.

3 The third and fourth assignments of error are denied.

4 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

5 UCZPSO 21.06(1) requires that a conditional use “comply with standards of the zone \* \* \*  
6 for uses permitted outright.” See n 4. The county identified UCZPSO 21.06(1) as one of the  
7 applicable criteria, and found that the application complied with it. Petitioners argue that a permitted  
8 use in the Z-1 zone must be consistent with the purpose of the A-1 zone, described at  
9 UCZPSO 2.01, which states in relevant part that the A-1 zone “is intended to conserve and  
10 maintain agricultural land for continued agricultural use[.]” Petitioners contended below that the  
11 proposed wetlands were inconsistent with the UCZPSO 2.01 purpose statement, because the  
12 increased number of elk, deer and waterfowl attracted to the wetlands will eat agricultural crops on  
13 surrounding lands. Although restoring or enhancing wetlands is a permitted use in the A-1 zone,  
14 petitioners argued below, the county must still evaluate whether the proposed wetlands are  
15 consistent with agricultural use of surrounding lands. Petitioners also raised an issue regarding  
16 whether the enhanced wetlands would create a shortage of water to surrounding lands, because the  
17 applicant does not have any water rights. In addition, petitioners argue that it raised a question  
18 below regarding whether the application involves a “hunting and fishing preserve,” which is a  
19 conditional use under the county’s code. According to petitioners, the county failed to address any  
20 of these issues.

21 **A. Conserve and Maintain Agricultural Land**

22 The county’s decision does not address the A-1 zone purpose statement at UCZPSO 2.01,  
23 although it addresses the conditional use criteria at UCZPSO 2.04(1) and (2), which require  
24 respectively a finding that uses will not force a significant change in accepted farm or forest practices  
25 on surrounding lands and will not significantly increase the cost of accepted farm or forest practices



1 on lands devoted to farm or forest use.<sup>12</sup> Petitioners do not explain why the purpose statement at  
2 UCZPSO 2.01 is one of the “standards” the county must apply as an approval criterion under  
3 UCZPSO 21.06(1), and we do not see that it is. The county’s failure to address issues raised  
4 under UCZPSO 2.01 is, at most, harmless error. This subassignment of error is denied.

5 **B. Water Rights**

6 The county appears to have addressed petitioners’ arguments regarding water rights by  
7 finding that no water right is necessary.<sup>13</sup> Petitioners do not challenge that finding. While that finding  
8 does not address petitioners’ concerns regarding impacts on surrounding farm lands under  
9 UCZPSO 2.01, as explained above petitioners have not established that that provision is an  
10 applicable approval criterion. This subassignment of error is denied.

11 **C. Hunting and Fishing Preserve**

12 Finally, petitioners speculate that the enhanced wetlands may be part of a scheme to  
13 develop the subject property as a “hunting preserve” that is regulated as a conditional use, and

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<sup>12</sup> The county’s decision states, in relevant part:

“The Board of Commissioners find UCZPSO 2.02(13) identifies wetland enhancement as a Use Permitted Outright in an A-1 EFU Zone. Some Conditional uses in the A-1 EFU Zone are subject to the UCZPSO 2.04(1) & (2) criteria. The review criteria in 2.04(1) & (2) are identified in OAR 660-033-0130(5) and are intended to make sure some conditional uses are compatible with farm uses. Wetland enhancement is listed as an outright use in an EFU zone or a compatible use with farm use. Therefore, the Board of Commissioners find Section 2.05 as the applicable conditional use requirements. Other Conditional Uses listed in UCZPSO 2.05 are only required to meet the Section 21.06(1) ‘general test of compatibility’ requirement.

“Even if the UCZPSO 2.04(1) and (2) criteria are applicable, [the applicant’s expert] stated in his May 27, 2004 letter (unnumbered page 3) that only existing wetlands are being enhanced and fenced and adjacent lands will continue to be actively used for agricultural production. No testimony has shown how wetland enhancement of 1.69 acres to an existing wetland will impact crop practices or the cost of agricultural production.” Record 7.

<sup>13</sup> The county’s findings state, in relevant part:

“The Board of Commissioners finds the August 6, 2004 letter from Shad Hattan, Watermaster, states no water right permit is necessary where an applicant does not intend to store or divert water, and he found the project plan did not intend to store or divert water. Kevin Hugulet, representative for [the applicant], in an August 6, 2004 letter reviews the project proposal within the one quarter mile buffer area and states no new water storage is planned or intended.” Record 6-7.

1 subject to the licensing and other requirements of ORS 497.248. However, petitioners do not  
2 explain why the application to enhance existing wetlands should be viewed as an application for a  
3 “hunting preserve” subject to conditional use criteria and ORS 497.248. As far as we can tell, a  
4 “hunting preserve” allowed as a conditional use in the A-1 zone and regulated under ORS 497.248  
5 involves an enterprise in which privately owned or propagated wildlife species are released for  
6 hunting. Petitioners point to nothing in the record suggesting that any such use for the subject  
7 property is proposed. The county’s failure to address this issue is, again, harmless error. This  
8 subassignment of error is denied.

9 The fifth and sixth assignments of error are denied.

10 **SEVENTH ASSIGNMENT OF ERROR**

11 Petitioners contend that the county erred in failing to require the applicant to file a  
12 conditional use application, once it determined that the proposal required review as a conditional  
13 use pursuant to UCZPSO 15.06(B)(1). According to petitioners, their substantive rights were  
14 prejudiced by the county’s failure, as otherwise the applicant would have been required to comply  
15 with the conditional use application requirements, such as filing on a form prescribed for that  
16 purpose, paying a filing fee, and providing drawings or other material essential to an understanding  
17 of the proposed use. Because no “application” was filed, petitioners argue, they had to guess why  
18 the applicant believed he met the applicable criteria.

19 The county addressed this issue as follows:

20 “[Petitioners] argue Mr. Becker did not follow the County’s Conditional Use  
21 application process—no written application was submitted. The Board of  
22 Commissioners finds UCZPSO 15.06(B)(1) states in part: ‘conflicting uses shall be  
23 reviewed as conditional uses subject to the standards and criteria of the underlying  
24 zone and this section.’ Here wetland enhancements shall be ‘reviewed’ as  
25 conditional uses is found to refer to the review process, not the application process.  
26 The original application was submitted to DSL and referred to the County for land  
27 use evaluation. [Petitioners’] appeal of a Planning Director decision resulted in the  
28 Planning Commission requiring a Conditional Use review to determine if the wetland  
29 enhancement was a conflicting use. No new application was required since the

1 conditional use review process was required from an appeal decision by the  
2 Planning Commission.” Record 11-12.

3 Petitioners express disagreement with the foregoing finding, but do not explain why the  
4 county is obligated to require an applicant for an outright permitted use to submit a conditional use  
5 application under the present circumstances. While UCZPSO 15.06(B)(1) requires that “conflicting  
6 uses shall be reviewed as conditional uses subject to the standards and criteria of the underlying  
7 zone,” it does not require the applicant for a permitted use that is, or may be, a conflicting use to file  
8 a conditional use application. This subassignment of error is denied.

9 The seventh assignment of error is denied.

10 The county’s decision is affirmed.