BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM WOOD,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

LINDA GOERING and RANDY GOERING,
Intervenors-Respondent.

LUBA No. 2005-041

FINAL OPINION
AND ORDER

Appeal from Crook County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioner.

Jeff M. Wilson, Crook County Counsel, Prineville, filed a response brief and argued on behalf of respondent.

Tia M. Lewis, Bend, filed a response brief and argued on behalf of intervenors-respondent. With her on the brief was Schwabe Williamson and Wyatt PC.

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

REMANDED 07/29/2005

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision amending the comprehensive plan designation for a 640-acre
4 parcel from Exclusive Farm Use (EFU) to Nonresource, and amending the zoning from EFU-1 to
5 Rural Aviation Community (RAC), to facilitate an aviation housing planned unit development.

6 **FACTS**

7 The subject property consists of an entire section, 640 acres, including five tax lots. The
8 property is surrounded by Bureau of Land Management (BLM) land that is also zoned EFU-1.
9 Vehicular access to the property is by easement across the BLM lands. The BLM lands are used
10 for grazing and off-road vehicle use.

11 Intervenors-respondent (intervenors) acquired the subject property in 1983, and received
12 county approvals for a private use airport and several homes. At present approximately one-third
13 of the property, 213 acres, is developed with a one-mile long airstrip, hangers, several dwellings,
14 and a limited aircraft maintenance, service, and production facility. Soils on the subject property are
15 predominantly Class VII. Approximately 150 acres of Class VI soils are currently occupied by the
16 airstrip and related facilities. No irrigation is available for the property, and the closest irrigated land
17 is 2.6 miles distant. The county's comprehensive plan includes the property within a designated
18 General Deer Winter Range and Antelope Winter Range area.

19 Intervenors seek to develop the property as an aviation housing planned unit development,
20 with up to 32 new residential lots and dwellings, in addition to the existing dwellings. Accordingly,
21 intervenors requested that the county redesignate the property as nonresource land, and apply a
22 newly created zone that allows a maximum of 32 new single-family dwellings within a planned unit
23 development.[1] The county planning commission recommended approval and, on February 2, 2005,

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[1] The RAC zone, codified at Crook County Zoning Ordinance (CCZO)18.3.085, provides in relevant part:

> "1. **Uses Permitted Outright**. In the **RAC Zone**, the following uses and their accessory uses are permitted outright:

1 the county court adopted Ordinance 158, which designates the property as nonresource and applies
2 the new RAC zone. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner contends that the county erred in concluding that the subject property is not
5 "agricultural land" as defined by Statewide Planning Goal 3 (Agricultural Lands) and OAR 660-
6 033-0020(1).[2] In particular, petitioner disputes the county's conclusion that the subject property is
7 not suitable for grazing, under OAR 660-033-0020(1)(a)(B).

> > "A. Planned Unit Development for a minimum of 5 dwelling units and a maximum of 32 single-family dwellings, associated aviation hangers, airstrip, accessory uses appurtenant to permitted uses, excluding permanent mobile homes on an individual lot in compliance with Section 4.130 of this Ordinance.
> >
> > "B. Development of single-family dwellings on the existing 5 tax lots.
> >
> > "C. Subdivision or land partitioning in conjunction with planned unit development for rural aviation residential purposes, excluding a mobile home subdivision.
> >
> > "D. New residential single-family homes when part of an approved planned unit development.
> >
> > "E. New aircraft hangers when part of an approved planned unit development.
> >
> > "F. Existing aviation service, repair, and limited aircraft manufacture. Note: These activities exist onsite today. The site has accommodated up to 20 aircraft at one time—services, repairs, and sales activities included.
> >
> > "G. Utility facility necessary to serve the planned unit development including energy facilities, fire protection methods, ponds, reservoirs and related devices, airstrip repair, paving and enhancements, water supply and treatment, sewage disposal and treatment and solid waste disposal.
> >
> > "* * * * *
>
> "* * * * *
>
> "7. **Lot Size**. In the **RAC Zone**, the minimum lot size for a new parcel shall be a function of the density for the zone where the new minimum lot size is no less than 20 acres in size or as approved through a planned unit development where the maximum density shall not exceed 32 residential units per 640 acres of land."

[2] OAR 660-033-0020(1)(a) defines "agricultural land" in relevant part as

1 The county adopted 17 pages of findings addressing OAR 660-033-0020(1), including
2 findings concluding that the property was not suitable for grazing.[3] Petitioner argues that that
3 conclusion is not supported by substantial evidence. According to petitioner, the soils and forage
4 conditions on the subject property are similar to that of the surrounding BLM land, which is
5 currently used for grazing. Petitioner also cites to testimony by the president and members of a

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"(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;

"(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices[.]"

[3] The county's findings include the following:

"The County finds that the Steve Wert soils report contains a body of evidence that is undisputed. The reports contains NRCS [National Resource Conservation Service] data showing the majority of the soils on the property are primarily Class VII soils or worse, and that these soils are not conducive to agriculture and crop production. The report is supplemented by photographic evidence supplied by the applicant showing 10 different color photos of soils from a variety of positions on the subject property. Additional photos indicate the effects of livestock grazing on property over 2 miles away. All photos show the soils are very shallow, rocky and not able to support forage necessary for typical grazing purposes. Several photos taken on nearby land that is similar to the subject property show that very little forage is available and what had been available has been completely eliminated leaving vast amounts of unirrigated, dusty, bare ground. The County finds that denuding the landscape of all vegetation via overgrazing of severely limited forage lands is not in the best interests of the community nor is it consistent with the intent of the Crook County Comprehensive Plan.

"The County further finds that the subject property has never been used for grazing. The record shows that in addition to lack of grazing onsite by current and past property owners of the subject property, no ranch—not even the closest ranch (2.6 miles away)—has ever sought out grazing rights from the subject property owners who have lived on the property for over 24 years.

"Other findings adopted by the County show that the soils do not have the capability to provide adequate forage for cattle. Those findings, in addition to the findings and evidence regarding the soil classifications of the property, are adequate to show that insofar as soil condition affects the suitability of the property for cattle grazing, the property is generally unsuitable for cattle forage. The lack of any irrigation water, poor soils, sparse and non-nutritive vegetation and rocky terrain provide little opportunity for adequate forage for grazing purposes on the subject property. In addition, the County Planning Commissioners personally toured the site and found that the minimal amount of types of vegetation that do exist on the property is not adequate for typical cattle grazing. Thus, the scarcity and species of on site vegetation available are additional limiting factors showing that the land is unsuitable for cattle grazing." Record 99-100.

1 county stockgrower's association that cattle are grazed on land with similar soils and conditions. In
2 addition, petitioner cites to the testimony of a BLM rangeland specialist indicating that the forage
3 capacity of the subject property could be improved with various techniques, such as removing
4 juniper and seeding the soil with grass. Because the subject property is indistinguishable from
5 nearby BLM lands on which cattle are grazed, petitioner argues, the evidence in the record
6 establishes that the subject property is suitable for grazing.

7 Intervenors respond that the comparison between the 640-acre subject property (one-third
8 of which is developed with non-agricultural uses) and the vast BLM allotments is not persuasive.
9 Intervenors note that the surrounding BLM allotments are 5,000 acres or more in size and further
10 cite to evidence that the quality of forage on these BLM lands is very poor. Given the critical
11 differences in size between the BLM lands and the subject property, intervenors argue, the fact that
12 some level of grazing occurs on the BLM lands is not indicative of the grazing potential on the
13 subject property, and certainly that fact does not outweigh the substantial evidence the county relied
14 upon to conclude that the subject property is not suitable for grazing.

15 Where there is substantial but conflicting evidence from which a reasonable person could
16 reach contrary conclusions, the choice of which evidence to believe is up to the decision maker.
17 *Younger v. City of Portland*, 305 Or 346, 369, 752 P2d 262 (1988). We agree with intervenors
18 that the county's conclusion that the subject property is not agricultural land is supported by
19 substantial evidence. That cattle grazing occurs at some level on large tracts of lands is perhaps
20 some evidence, albeit indirect, that a much smaller property with the same soils and vegetative
21 characteristics could also support some, presumably lesser, level of grazing. However, the
22 evidentiary value of that comparison is limited, and hardly compels the conclusion that the subject
23 property is suitable for grazing, for purposes of OAR 660-033-0020(1). A reasonable decision
24 maker could conclude, based on all the evidence in the record, that the subject property is not
25 suitable for grazing under OAR 660-033-0020(1).

26 The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The RAC zone allows up to 32 new residential lots 20 acres in size or smaller, within a planned unit development, plus a dwelling on each of the five existing lots. *See* n 1. Petitioner contends that the RAC zone is inconsistent with Crook County Comprehensive Plan (CCCP) Wildlife Policy 2, which implements Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). CCCP Wildlife Policy 2 provides:

> "Density within Crucial Winter Areas for deer shall not be greater than one residence for each 160 acres and for the General Winter Range, not more than one residence per 80 acres, except in the EFU-3 zone in which 40 acres may be allowed per residence."

The county implemented CCCP Wildlife Policy 2, at least in part, by imposing a minimum lot size of the appropriate acreage in the county's resource zones. For example, CCZO 18.16.070(3), which governs the EFU-1 zone, provides that "[m]inimum lot size for general winter range shall be 80 acres."[4] We understand petitioner to argue that in order to be consistent with CCCP Wildlife Policy 2 and Goal 5, the county must either amend the RAC zone to allow only residential densities consistent with the policy and goal, or remove the General Winter Range designation from the property.

The county found that the subject property is within the General Deer Winter Range and Antelope Winter Range. As far as we can tell, the county's findings do not address CCCP Policy 2, or explain why residential densities less than one dwelling per 80 acres are consistent with the policy or Goal 5. The county's Goal 5 findings state, simply, that "[t]he proposal includes measures intended to protect and manage wildlife areas and habitats." Record 86-87.

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[4] CCZO 18.16.070(3) provides:

> "Minimum lot size shall be 320 acres within the elk wintering range as designated in the county's comprehensive plan, Goal 5 element. Minimum lot size for critical deer winter range shall be 160 acres, as designated by the county's comprehensive plan, Goal 5 element. Minimum lot size for general winter range shall be 80 acres."

The county's EFU-2, EFU-3 and F-1 zones include similar provisions.

1 The county's response brief argues that, in contrast with Crucial Winter Range areas,
2 General Winter Range areas are not specifically inventoried or mapped.[5] According to the county,
3 the county's practice with respect to General Winter Range areas is to consult with Oregon
4 Department of Fish and Wildlife (ODFW) on a case-by-case basis for individual sites and to not
5 apply the 80-acre minimum lot size to lands outside resource zones. We understand the county to
6 argue that, because the property is nonresource land and is no longer zoned EFU-1 or any resource
7 zone, the CCCP Wildlife Policy 2 80-acre density standard no longer applies.
8 There appears to be no dispute that the subject property is designated General Winter
9 Range. The fact that the county did not specifically map General Winter Range areas, which
10 apparently includes most of the county, does little to explain why the 80-acre density standard in
11 CCCP Wildlife Policy 2 does not apply to the subject property, which is indisputably within the
12 General Winter Range area. With respect to the county's view that the 80-acre General Winter
13 Range density limitation can be applied or not on a case-by-case basis, after consulting with
14 ODFW, nothing cited to us in the CCCP or elsewhere supports that view. That view is apparently
15 based on the CCCP statement that the "general nature of the winter range" requires that the agency

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[5] The county cites to the following passages from the Wildlife section of the CCCP:

> "Major big game species are mule deer, pronghorn antelope, and Rocky Mountain elk. Optimum habitat requirements for these species include adequate water, forage and a variety of vegetation cover for thermal protection, hiding and fawning purposes. Detailed habitat requirements for elk, antelope and deer are included in Appendix VI. *The general winter range locations for these wildlife species, as well as for waterfowl nesting habitat, are plotted on the Wildlife Resource Map. Because deer winter range covers most of the county, only crucial winter range was mapped.* * * *
>
> "* * * * *
>
> "It is the purpose of the resource maps to identify wildlife resources on a general scale and to delineate species habitat requirements for preservation. The areas outlined are considered potential, as well as existing habitat, even though there may be few, or no species within them at the present time, i.e. elk in the Maury Mountains. All mapped habitat areas could fulfill wildlife needs if animal species were utilizing them. *The general nature of the winter range, waterfowl nesting areas, and lack of specific locations on nesting sites, however, requires that the Fish and Game Commission be contacted for any matter which could affect existing or potential wildlife habitat*." CCCP 173-74 (emphasis added).

1 should "be contacted for any matter which could affect existing or potential wildlife habitat." *See* n
2 5. That language does not suggest that the county is authorized to waive the 80-acre density
3 limitation after consulting with ODFW.
4 With respect to the county's suggestion that the 80-acre density limitation no longer applies
5 because the property is no longer zoned as resource land, we understand the county to argue that it
6 implemented CCCP Wildlife Policy 2 by imposing the appropriate density standard on the
7 appropriate lands in resource zones, and chose not to impose any density standard in any non-
8 resource zones, such as those governing rural exception areas.[6] However, we do not see that
9 rezoning the subject property from a resource zone to a newly created non-resource zone has any
10 effect on whether the property is designated General Winter Range, for purposes of CCCP Wildlife
11 Policy 2, and thus whether the 80-acre density limitation in that policy applies. The question here is
12 whether the RAC zone is consistent with CCCP Wildlife Policy 2 and, more remotely, Goal 5. We
13 agree with petitioner that the county must either ensure that the RAC zone complies with CCCP
14 Wildlife Policy 2 or, after adopting appropriate findings addressing Goal 5, remove the property
15 from the General Winter Range.
16 The second assignment of error is sustained.
17 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**
18 As noted, the RAC zone allows dwellings on lots within a planned unit development without
19 a minimum lot size, as long as the overall density does not exceed 32 dwellings per 640 acres. *See*
20 n 1. The zone also allows "utility facility[ies] necessary to serve the planned unit development,"
21 including "water supply and treatment [and] sewage disposal and treatment[.]"

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[6] The county cites to the following CCCP language:

> "In order to protect the big game habitat, the Comprehensive Plan policies must be carried over and enacted directly into the County Zoning Ordinance for the EFU-1, EFU-2, EFU-3, and F-1 zones.
>
> "By placing the density requirement standards in the specific resource zone, the acknowledged exception areas are exempted from these requirements." CCCP 176.

1 Petitioner contends that the county erred in concluding that Statewide Planning Goal 14
2 (Urbanization) is inapplicable, and that the county failed to adopt adequate findings demonstrating
3 that the RAC zone is consistent with the goal.[7] In addition, petitioner argues that the county erred in
4 adopting a zone that potentially allows rural community sewage treatment and disposal, contrary to
5 Statewide Planning Goal 11 (Public Facilities and Services).[8]

6 **A. Goal 14**

7 With respect to Goal 14, the county concluded, based on OAR 660-004-0040(2)(c)(F),
8 that Goal 14 does not apply to nonresource lands.[9] Respondents concede that the cited rule
9 provision states only that the *rule* does not apply to nonresource lands, and that the county

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[7] Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use." As interpreted by the Supreme Court, Goal 14 implicitly prohibits local governments from allowing urban land uses outside urban growth boundaries. *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 498-511, 724 P2d 268 (1986).

[8] Goal 11 provides, in relevant part:

> "Local governments shall not allow the establishment or extension of sewer systems outside urban growth boundaries or unincorporated community boundaries * * *
>
> "Local governments shall not rely upon the presence, establishment, or extension of a water or sewer system to allow residential development of land outside urban growth boundaries or unincorporated community boundaries at a density higher than authorized without service from such a system."

See also OAR 660-011-0060(2) and 660-011-0065(2)(same). OAR 660-011-0060(1)(f) defines "sewer system" as a "system that serves more than one lot or parcel, or more than one condominium unit or more than one unit within a planned unit development * * *."

[9] OAR 660-004-0040(2) provides, in relevant part:

> "(a) This rule applies to lands that are not within an urban growth boundary, that are planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3, (*Agricultural Lands*), Goal 4 (*Forest Lands*), or both has been taken. Such lands are referred to in this rule as *rural residential areas.*
>
> "* * * * *
>
> (c) This rule does not apply to types of land listed in (A) through (H) of this subsection:
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> "* * * * *
>
> (F) nonresource land, as defined in OAR 660-004-0005(3)[.]"

1 erroneously concluded that Goal 14 itself does not apply to nonresource lands. *See* OAR 660-
2 004-0005(3) (defining "nonresource land" as land not subject to most statewide planning goals,
3 with the exception of Goals 11 and 14). However, respondents argue, the county found elsewhere
4 that the uses allowed in the RAC zone are not "urban." Record 280. According to respondents,
5 notwithstanding the absence of findings addressing Goal 14, LUBA may affirm the county's
6 decision, because the record "clearly supports" a finding that the uses allowed under the RAC zone
7 are consistent with Goal 14. ORS 197.835(11)(b). We understand respondents to argue that
8 intervenors do not intend to allow residential densities within the planned unit development that
9 would implicate Goal 14.

10 We disagree that the record "clearly supports" a finding that the uses allowed under the
11 RAC zone are necessarily consistent with Goal 14. As we understand the RAC zone, it allows
12 clustering of up to 32 new dwellings within a planned unit development, without any minimum lot
13 size. As a general matter, Goal 14 is applicable to plan and zoning amendments that allow
14 residential density less than one dwelling per ten acres. *See 1000 Friends of Oregon v. Yamhill
15 County*, 27 Or LUBA 508, 521 (1994) (exceptions to Goal 3 that allow residential development
16 on lots smaller than 10 acres must address Goals 11 and 14); *see also* OAR 660-004-0040(5)(b)
17 (providing that a rural residential zone in acknowledged exception areas does not comply with Goal
18 14 if it allows new lots or parcels smaller than two acres).[10] Because the RAC zone effectively has
19 no minimum parcel size, it potentially would allow residential development at densities that clearly
20 could be inconsistent with Goal 14. It may be that intervenors do not intend to create lots or
21 parcels in sizes that would be contrary to Goal 14. However, nothing in the RAC zone would
22 preclude that. We agree with petitioner that remand is necessary for the county to either amend the

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[10] Although OAR 660-004-0040 applies only to lands subject to exceptions to Statewide Planning Goals 3 (Agricultural Land) and 4 (Forest Lands), we have held that the rule is pertinent guidance when determining when proposed residential development is urban or rural under Goal 14. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97, 102-03 (2002).

1 RAC zone to ensure that residential development under that zone is consistent with Goal 14, or take
2 an exception to the goal.

3 **B. Goal 11.**

4 With respect to Goal 11, the county found that the proposed planned unit development
5 would require "some new public facilities," including "domestic water and sewage disposal."
6 Record 87.[11] However, the county found that the proposed development would not require a
7 public facilities plan given its "rural nature and low density," and apparently for that reason
8 concluded that the proposal was consistent with Goal 11. *Id.*

9 Petitioner argues that the RAC zone potentially allows community sewage treatment and
10 disposal systems, and therefore is inconsistent with Goal 11. Intervenors respond that neither they
11 nor the county contemplated anything other than individual septic systems for each dwelling. In any
12 case, intervenors argue, even if the RAC zone would potentially permit a sewage system within the
13 meaning of Goal 11 and the Goal 11 rule, a CCCP policy prohibits establishment of new sewer
14 systems outside urban growth boundaries and unincorporated communities, and thus no such system
15 could ever be approved on the property.

16 It is not clear to us what the RAC zone allows, or what intervenors contemplated, although
17 the county seemed to believe the RAC zone allows "*public* facilities," including "domestic water and
18 sewage disposal." Record 87 (emphasis added). By its terms, the RAC zone allows establishment
19 of "water supply and treatment [and] sewage disposal and treatment" facilities to serve the
20 proposed planned unit development. *See* n 1. That language is broad enough to include a "sewage
21 system" or a "water system" that Goal 11 generally prohibits in most circumstances outside urban

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[11] The county's Goal 11 findings state, in full:

> "Goal 11—Public Facilities and Services is applicable, as the proposal will require some new public facilities and services, but the rural nature and low density of the proposed development should not necessitate a public facilities plan. The development of a Planned Unit Development (PUD) in connection with the proposal will require the provision of domestic water, sewage disposal, and roads." Record 87.

1 growth boundaries and unincorporated communities, and the county's findings provide no assurance
2 that such facilities are not authorized by the RAC zone. The fact that a CCCP policy implementing
3 Goal 11 prohibits the kind of sewage facilities that the RAC zone could be read to authorize hardly
4 establishes that the zone is consistent with Goal 11. Given these considerations, we agree with
5 petitioner that remand is necessary for the county to amend the RAC zone to ensure that it is
6 consistent with Goal 11, or take an exception to the goal.[12]

7 The third and fourth assignments of error are sustained.

8 **FIFTH ASSIGNMENT OF ERROR**

9 The CCCP Agricultural Policies element states in relevant part that:

10 "It shall further be the policy of the county that nonagricultural development in the
11 rural areas shall be based, whenever possible, upon a demonstrated public need. *
12 * *" CCCP 45.

13 Petitioner argues that there is no basis in the record to conclude that there is a "public need" or
14 market demand for aviation housing.

15 The county found that this agricultural policy language has "limited applicability" to the
16 proposal, because the county determined that the subject property was not agricultural land.
17 Record 126. In any case, the county found that there is a "demonstrated need for additional
18 aviation housing" in the county and therefore the policy objective is met. *Id.* The county argues,
19 and we agree, that petitioners have not demonstrated reversible error with respect to the policy or
20 the county's findings. Petitioner does not challenge the county's determination that the policy is of
21 "limited applicability." The county cites to evidence of the relative scarcity of and demand for
22 aviation housing in the county, evidence that a reasonable person could rely upon to conclude that
23 there is a "public need" for the proposed nonagricultural development.

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[12] Actually, petitioner seeks reversal rather than remand under the fourth assignment of error, arguing that the RAC zone violates Goal 11 and is prohibited as a matter of law. OAR 661-010-0071(1)(c). However, it is doubtful that the proposed development *requires* communal facilities in violation of Goal 11, and it seems likely that the RAC zone can be easily amended to avoid conflict with the goal. Therefore, remand is appropriate. OAR 661-010-0071(2)(d).

1 The fifth assignment of error is denied.

2 The county's decision is remanded.