



**NATURE OF THE DECISION**

Petitioner appeals the county’s approval of a major partition and variance.<sup>1</sup>

**MOTION TO INTERVENE**

Royce Jones (intervenor) moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

**FACTS**

The subject property is a 64.5-acre parcel zoned farm residential (R-3), and is located within an area designated under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) as a big game habitat area.<sup>2</sup> Intervenor filed an application to partition the property into two 12-acre parcels and a 40.5-acre parcel. Several wildlife biologists testified in opposition to the application, expressing concerns regarding possible conflicts with big game habitat.

The Union County Planning Commission held a hearing and on January 24, 2005, voted to deny the partition. Intervenor appealed the planning commission’s denial to the Union County Board of Commissioners. On April 20, 2005, the board of commissioners overturned the planning commission’s decision, and approved the application. This appeal followed.

**FOURTH ASSIGNMENT OF ERROR**

Petitioner asserts in his fourth assignment of error that he should be permitted to raise “new issues” on appeal. Petitioner’s fourth assignment of error is not cognizable as an assignment of error, but rather is an argument that the first three assignments of error raise issues that are properly before LUBA. Accordingly, we address the arguments only as a preliminary matter as they relate to the waiver challenges made to the first three assignments of error.

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<sup>1</sup> The variance is not relevant to this appeal and will not be discussed further.

<sup>2</sup> The purpose of the R-3 zone is “to provide areas suitable \* \* \* for small agricultural uses and rural living opportunities.” Union County Zoning, Partition and Subdivision Ordinance (UCZPSO) 8.01.

1           Although intervenor argues that petitioner “should not be allowed to raise any new issues as  
2 a result of [his] lack of participation at the local level,” intervenor does not identify any issues raised  
3 in the petition for review that were not raised by at least one participant at the local level. *See*  
4 *Spiering v. Yamhill County*, 25 Or LUBA 695, 714-15 (1993) (petitioner can raise any issue that  
5 was raised by any participant below). In short, petitioner does not raise any “new issues.”  
6 Accordingly, the issues raised in petitioner’s first three assignments of error were not waived.

#### 7 **FIRST ASSIGNMENT OF ERROR**

8           We have summarized the Goal 5 process as follows:

9           “Goal 5 requires that the county ‘conserve open space and protect natural and  
10 scenic resources.’ OAR chapter 660, division 23, the Goal 5 administrative rule,  
11 provides procedures and criteria whereby local governments are required to (1)  
12 inventory the location, quality, and quantity of Goal 5 resources within their territory  
13 (OAR 660-023-0030); (2) identify conflicting uses for significant Goal 5 resources  
14 (OAR 660-023-0040(2)); (3) conduct an analysis of the economic, social,  
15 environmental, and energy (ESEE) consequences of negative impacts between  
16 conflicting uses and significant Goal 5 resources (OAR 660-023-0040(4)); and (4)  
17 develop programs to achieve the goal of significant resource protection (OAR 660-  
18 023-0040(5) and 660-023-0050).” *Pekarek v. Wallowa County*, 36 Or LUBA  
19 494, 498 (1999) (footnote omitted).

20           Once the county conducted an inventory of the resource (in this case, big game habitat),  
21 identified conflicting uses, and analyzed the ESEE consequences resulting from decisions to allow  
22 certain conflicting uses, the county was required to develop one of three types of programs: (1)  
23 require protection of a resource site; (2) allow the uses which conflict with the resource site fully; or  
24 (3) limit the conflicting uses. OAR 660-023-0040(5). The second option, allow the uses which  
25 conflict with the resource site fully, is commonly referred to as a “3B” program or a “3B” site. The  
26 county’s comprehensive plan designates the subject property as a “3B” site.

27           Petitioner argues that the county erred in failing to conduct an analysis of the economic,  
28 social, environmental and energy (ESEE) consequences of the proposed partition on the resource.  
29 The county concluded that it was not required to conduct an ESEE analysis because the subject  
30 property is designated “3B” on the Goal 5 inventory maps and that the county’s code provides that

1 “3B” sites do not require an ESEE analysis. Petitioner does not allege that the property is not  
2 designated as a 3B site.

3 The county code requires review of certain land use actions that could conflict with big  
4 game critical wildlife habitat areas or big game winter range. UCZPSO 20.09(1).<sup>3</sup> UCZPSO

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<sup>3</sup> UCZPSO 20.09 provides, in pertinent part:

“1. Any land use action requiring County zoning or partitioning approval or any activity listed as a conflict in this ordinance, which is within 1320 feet of or could have an impact on:

“\* \* \* \* \*

“D. Big game critical wildlife habitat areas and big game winter range,

“\* \* \* \* \*

“shall be reviewed by the Planning Director for appropriate public notification measures and conflict resolution.

“\* \* \* \* \*

“3. Review Classifications

“A. When a 3A or 3C (limit conflicting uses) decision has been made as indicated in the comprehensive plan, the applicant must, in coordination with the responsible agency, develop a management plan which would allow for both resource preservation and the proposed use. If the responsible agency and the applicant cannot agree on such a management plan, the proposed activity will be reviewed through the conditional use process. 3A sites will be preserved where potential conflicts may develop. Conflicts will be mitigated in favor of the resource on 3C sites.

“B. When a 3B (allow conflicting uses) decision has been made as indicated on Goal 5 inventory sheets, *the request shall not be subject to the standards of this Section.*

“\* \* \* \* \*

“5. The following criteria shall be considered, as applicable, during the appropriate decision making process:

“A. ECONOMIC: The use proposed is a benefit to the community and would meet a substantial public need or provide for a public good which clearly outweighs retention of the resources listed in Section [20.09 (1)].

“B. SOCIAL: The proposed development would not result in the loss of or cause significant adverse impact to, a rare, one of a kind or irreplaceable resource as listed in Section [20.09(1)].

1 20.09(3)(B) provides that “when a 3B \* \* \* decision has been made \* \* \*, the request shall not be  
2 subject to the standards of this Section.” The challenged decision concludes that, pursuant to  
3 UCZPSO 20.09(3)(B), the standards in UCZPSO 20.09 do not apply in this case because the  
4 subject property is designated a 3B site.<sup>4</sup> Petitioner argues that the “standards” from which the 3B  
5 sites are exempted are not the ESEE “criteria” listed in UCZPSO 20.09(5). Rather, he argues,  
6 UCZPSO 20.09(3)(B) merely exempts 3B sites from the requirement to develop a management  
7 plan, pursuant to 20.09(3)(A), or from the “physical standards” imposed by UCZPSO  
8 20.09(6)(C).<sup>5</sup> He argues that the county’s interpretation that an ESEE analysis is not required is

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“C. ENERGY: The development, as proposed, would support energy efficient land use activities for such things as transportation costs, efficient utilization of urban services, and retention of natural features which create micro climates conducive to energy efficiency.

“D. ENVIRONMENTAL: If alternative sites in Union County for proposed development are available which would create less of an environmental impact [on] any of the resources listed in Section [20.09(1)], major consideration should be given to these options.” (Emphasis added.)

<sup>4</sup> The challenged decision provides, on this point, as follows:

“The Board of Commissioners find the applicant has satisfied the UCZPSO Section 20.09 Significant Goal 5 Resource Areas requirements for the following reasons:

“1. UCZPSO Section 20.09 3.B. does not require an application for a 3B Goal 5 inventory site to meet the ‘standards’ of Section 20.09. The Land Use Plan Supplement (pg. 16) identifies the Catherine Creek Farm Residential Area including the subject property as a 3B Goal 5 inventory site. Webster’s Third New International Dictionary includes as part of its definitions ‘standard—3a: something that is established by authority, custom, or general consent as a model or example to be followed: CRITERION, TEST’ and ‘criterion—2: a standard on which a decision or judgement may be based’. Therefore, the Board of Commissioners finds UCZPSO Section 20.09 is not applicable to the applicant’s property and his Major Partition application because ‘standard’ and ‘criterion’ are interchangeable terms, therefore all of the requirements in Section 20.09 are within the definition of ‘standards’.” Record 10-11.

<sup>5</sup> UCZPSO 20.09(6)(C) provides:

“6. The reviewing body may impose the following conditions, as applicable upon a finding of fact that warrants such restrictions:

“\* \* \* \* \*

1 inconsistent with UCZPSO 20.09(1), which he contends requires review of all partitioning  
2 approvals within a certain distance or that could have an impact on big game critical wildlife habitat  
3 and big game winter range.

4 We agree with petitioner that the county's code is less than clear on this issue. However,  
5 we disagree with petitioner that the county's interpretation of the scope of the 3B exemption is  
6 inconsistent with UCZPSO 20.09(1) or that the county's interpretation renders subsection (1)  
7 meaningless. The exemption provided for in UCZPSO 20.09(3)(B) is merely an exception to the  
8 general rule in UCZPSO 20.09(1). The county's interpretation of its own code is entitled to  
9 deference, ORS 197.829(1), *Church v. Grant County*, 187 Or App 518, 523-25, 69 P3d 759  
10 (2003), and its interpretation that 3B sites are exempt from the ESEE analysis is consistent with the  
11 express language, purpose and policy of the code and with the Goal 5 rule. *See* OAR 661-023-  
12 0040(5)(c) (a local jurisdiction, based on an ESEE analysis, may determine that a conflicting use  
13 should be allowed fully, notwithstanding the possible impacts on the resource site).

14 Petitioner's first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner argues that the county erred in failing to apply an applicable comprehensive plan  
17 provision that requires "long, narrow parcels" in the area of the subject property. Union County  
18 Comprehensive Land Use Plan Supplement, 1984, Article III.<sup>6</sup> The county concluded that this

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"C. BIG GAME WINTER RANGE AND BIG GAME CRITICAL HABITAT: A proposed new structure requiring a conditional use may be required to:

- "1. Be located as close as possible to an adjacent compatible structure (a compatible structure shall be any structure which does not adversely affect the intended use of another structure);
- "2. Share a common access road or where it is impossible to share a common access road, locate as closely as possible to the nearest existing public road in order to minimize the length of access from the nearest road."

<sup>6</sup> Article III, section B. provides, in pertinent part:

1 provision does not apply to the subject application because the provision is phrased in the past  
2 tense, and therefore does not limit future partitioning.<sup>7</sup> Petitioner argues that the county’s  
3 interpretation is wrong, and entitled to no deference, because there is no proof that such a provision  
4 ever existed, and that the only plausible interpretation is that it was intended to limit future  
5 development by requiring long, narrow lots.

6 While we agree with petitioner that the plan provision is perplexing, we do not agree that the  
7 county’s reliance on the use of the past tense term “was” to support its conclusion that the provision  
8 does not limit future partitioning is misplaced. The county’s code provides the reviewing body the  
9 authority to require new structures to be located as close as possible to adjacent compatible  
10 structures and as close as possible to the “nearest existing public road in order to minimize the length  
11 of access from the nearest road.” UCZPSO 20.09(6)(C); *see* n 5. These requirements would  
12 seem to do more to ensure minimizing impacts on habitat than the vaguely worded comprehensive  
13 plan provision that petitioner asserts is a mandatory approval criterion. It is quite likely that the

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“The Catherine Creek/High Valley critical wildlife area contains two areas identified for Farm Residential use and is near one area identified for Rural Residential use. The first is the Catherine Creek Farm Residential area east of Oregon Highway 203. The second area is referred to as the High Valley Farm Residential area and is limited to a strip of land 330 feet back from High Valley Road. In both instances the roads were recognized as barriers to wildlife movement. *Therefore, development of small lots was limited to the creation of long, narrow parcels adjacent to the roads to reduce potential impacts on the critical wildlife habitat areas.*” (Emphasis added). Union County Comprehensive Land Use Plan Supplement, 1984, Article III, p. 16.

<sup>7</sup> The findings state, in relevant part:

“The Land Use Plan Supplement – June 1984 page 16 refers specifically to the Catherine Creek Farm Residential area and concludes –

“Therefore, development of small lots was limited to the creation of long, narrow parcels adjacent to the roads to reduce potential impacts on the critical wildlife habitat areas (underline added).

“The Board of Commissioners finds the use of ‘was’ refers to the past tense and is not interchangeable with ‘is’ referring to future tense, therefore this statement is not a requirement limiting future partitioning for the Catherine Creek Farm Residential area.”

1 county chose to implement the comprehensive plan provision at issue here by adopting UCZPSO  
2 20.09(6)(C).

3 While the context of the plan provision could suggest that the county intended the  
4 requirement for long, narrow lots to apply to future subdivisions, as petitioner proposes, such an  
5 interpretation would require the county to replace the word “was” with the words “shall be.” The  
6 county’s interpretation gives meaning to the drafter’s choice to use the past tense, rather than the  
7 future tense, of the verb. The county’s interpretation of the plan policy is entitled to deference, it is  
8 at least as plausible as the interpretation offered by petitioner, and therefore we must affirm it.

9 Petitioner’s second assignment of error is denied.

### 10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner alleges that the county erred in concluding that the proposed partition will reduce  
12 impacts on critical wildlife habitat.<sup>8</sup> He asserts that the county’s finding “is not tied to any evidence,  
13 is not preceded by any explanation and is patently illogical.” Petition for Review 22-23.

14 We agree with petitioner that a finding that partitioning the subject property as proposed will  
15 *reduce* impacts on wildlife habitat is unsupported by the evidence or by the comprehensive plan  
16 language the county employs to justify the finding. However, our disagreement with the county’s  
17 statement would provide a basis to reverse or remand the challenged decision only if the finding is  
18 necessary to demonstrate compliance with a relevant approval criterion. Petitioner does not identify  
19 any such criterion, nor does he otherwise explain how the finding is necessary to the decision. *See*  
20 *Paddock v. Yamhill County*, 45 Or LUBA 39, 50 (2003) (local government’s failure to adopt

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<sup>8</sup> The findings state, in relevant part:

“The Farm Residential Land Use Plan and Zoning Map boundaries were drawn to include all (74.5 acres) of the original parent property (Tax Lots 500 & 600). The Land Use Plan Supplement – June 1984 page 16 statement cited \* \* \* above recognizes development of small lots adjacent to the road will ‘reduce potential impacts on the critical wildlife habitat area’. Therefore, partitioning the applicant’s property within the Farm Residential Zone was recognized by the County’s Land Use Plan to ‘reduce potential impacts on the critical wildlife habitat areas’.” Record 11.



1 particular findings provides a basis for reversal or remand only if there is some legal requirement that  
2 the local government adopt such findings); *see also Moorefield v. City of Corvallis*, 18 Or LUBA  
3 95, 101 (1989) (it is unnecessary to evaluate the substantiality of findings that are not essential to the  
4 decision). And we do not see that it is.

5           Petitioner's third assignment of error is denied.

6           The county's decision is affirmed.