

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ROBERT D. LOFGREN, TYRRELL P. HART,
5 JEFFREY J. MOFFET, DAVID EATON,
6 FOREST BOHALL, JAMES J. BETSCHART
7 and RANDY LINKER,
8 *Petitioners,*

9
10 vs.

11
12 JACKSON COUNTY,
13 *Respondent,*

14
15 *and*

16
17 EDWARD L. COX, II,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2007-061

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from Jackson County.

26
27 Debbie Vincent, Medford, filed the petition for review and argued on behalf of
28 petitioners.

29
30 No appearance by Jackson County.

31
32 Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of
33 intervenor-respondent. With him on the brief was Hornecker, Cowling, Hassen & Heysell,
34 LLP.

35
36 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
37 participated in the decision.

38
39 REMANDED

10/04/2007

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

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NATURE OF THE DECISION

Petitioners appeal a county decision that redesignates and rezones a 342.98-acre tract from forest use to rural residential use.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to respond to waiver issues raised in the response brief. The motion and brief are unopposed, and are allowed.¹

FACTS

The subject property consists of five parcels totaling 342.98 acres. The five parcels are designated Forestry/Open Space and zoned for forest uses under comprehensive plan and land use regulations that implement Statewide Planning Goal 4 (Forest Lands). The property is also designated Other Winter Range to protect winter deer habitat, pursuant to Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). In addition, the property is within the eastern portion of an area that is mapped in the Forest Lands Element of the county comprehensive plan as part of the “Rogue-Applegate Upland” region. The exact location of the subject property within that region is one of the issues in this appeal.

The property is located on the eastern shoulder of Johns Peak, which is part of the divide that separates the Applegate River drainage from the Bear Creek and Rogue River drainages. The tract consists of many ridges and canyons at elevations that range from 2,000 feet to 3,000 feet, most of which have an eastern, southeastern or southern aspect.

¹ We note, however, that the reply brief is printed in a font size that is less than 12-point, and that the line spacing appears to be less than double-spaced, in an apparent attempt to squeeze more than five pages of text into the five-page limit permitted for a reply brief under OAR 661-010-0039. The font size, line spacing and page limit requirements in our rules are necessary to allow the Board to absorb the hundreds of pages of briefing the Board must typically read every week. While we choose not to reject the reply brief in this case, we caution that the far better course is to edit the brief to bring it within the required page limits using the required font size and line spacing or, if that is not possible given the complexity or number of issues, request the Board’s permission to file a brief that exceeds the required page limits.

1 Approximately 145 acres of the tract consist of slopes that exceed 20 percent. The property
2 is accessed via the Johns Peak road, which descends into the Bear Creek valley toward the
3 City of Medford. Surrounding properties are generally in forest or other resource use.

4 Intervenor-respondent (intervenor) applied to the county to change the tract's
5 comprehensive plan map designation to Rural Residential and rezone it to Rural Residential,
6 10-acre minimum (RR-10). Intervenor did not seek an exception to Goal 4, but instead
7 presented evidence to the county that the tract is not "forest land" as defined by Goal 4.²
8 Under the requested zoning, the tract could be developed with up to 34 dwellings.

9 The county planning commission conducted a public hearing, and issued a
10 recommendation that the application be denied. The county board of commissioners
11 conducted a hearing on that recommendation, and voted to approve the application. The
12 commissioners concluded in relevant part that the subject property is not forest land
13 protected by Goal 4 or the county's comprehensive plan. Because the property is not forest
14 land, the commissioners concluded, no exception to Goal 4 is required. This appeal
15 followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 The first assignment of error presents four sub-assignments, which we address in
18 turn.

19 **A. Rogue-Applegate Upland Region**

20 Petitioners do not appear to dispute that the subject property is not "suitable for
21 commercial forest uses" and thus is not "forest land" under that element of the Goal 4

² Goal 4 defines "forest land" as follows:

"Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

1 definition of forest lands and the corresponding definition in the Forest Lands Element of the
2 Jackson County Comprehensive Plan (JCCP).³ However, petitioners argue that the county
3 erred in determining that the subject property is not land that must remain designated
4 Forestry/Open Space pursuant to the JCCP Map Designation Element, notwithstanding that it
5 is not “suitable for commercial forestry.”

6 The JCCP Forest Lands Element designates four “principal forest lands
7 environments,” including the Rogue-Applegate Upland, which consists of a mountainous
8 divide that generally runs east-west between the Applegate Valley to the south and Rogue
9 River valley to the north. A map at JCCP 13-3 depicts the “generalized boundary” of the
10 Rogue-Applegate Uplands. Although the map at JCCP 13-3 does not depict property
11 boundaries, there is no dispute in this appeal that the subject property lies within the
12 “generalized boundary” of the Rogue-Applegate Uplands, at its eastern end.

13 The JCCP Forest Lands Element describes the Rogue-Applegate Upland region as
14 follows:

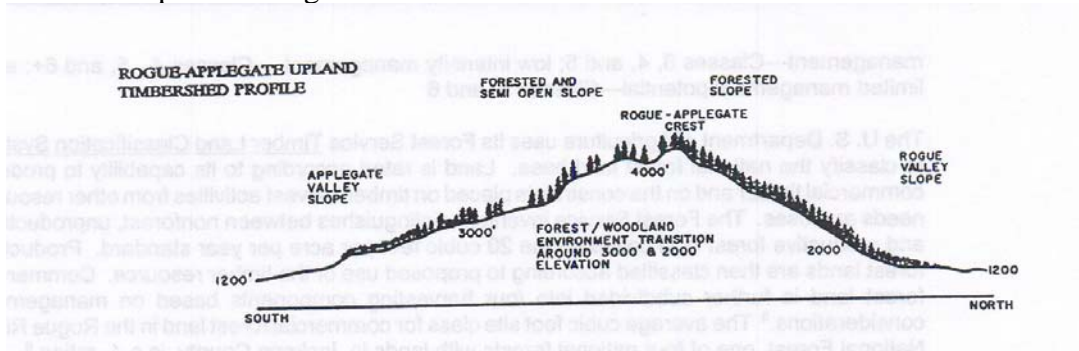
15 “The Rogue-Applegate Upland region lies between the Applegate and Rogue
16 River Valleys, and has a generally rugged terrain with numerous intermittent
17 stream canyons and ridges. The commercial forest/woodland transition zone
18 generally occurs at about the 3,000 foot elevation contour on south-facing
19 slopes, and at about 2,000 feet on the north-facing Rogue Valley slope.
20 Considerable portions of the upland have been extensively logged, with some
21 areas having been restocked with commercial species.”

22 Thus, the JCCP Forest Lands Element distinguishes between “commercial” forest lands and
23 “woodland” forest lands in the Rogue-Applegate Upland, with the boundary based in part on
24 elevation contours. Lands above the transition boundary are part of the “principal forest

³ The JCCP Forest Lands Element defines “forest land” in relevant part to include:

“For land use planning purposes, forest lands are defined as: 1) lands composed of existing and potential forest lands which are suitable for commercial forest uses; 2) other forested lands needed for watershed protection, wildlife and fisheries habitat, and recreation; [and] 3) lands where extreme conditions of climate, soil, and topography require the maintenance of vegetative cover, irrespective of use[.]”

1 lands environment,” while lands below that boundary may be “woodland” forest lands or
2 other rural lands. A “Timbershed Profile” of the Rogue-Applegate Upland is found at JCCP
3 13-7 and depicted in Fig. 1 below.



4
5 Fig. 1

6 The JCCP Map Designation Element provides criteria for designating lands within
7 various plan map designations, including Forestry/Open Space lands and Rural Residential
8 lands.⁴ Criterion 2(A) provides that principal forest land environments “must be designated

⁴ Subsection 2 of the JCCP Forest Lands Element provides the following “map designation criteria:”

“A. The four principal forest land environments described in the Forest Lands Element of this Plan are inventoried as commercial forest lands and must be designated for Forestry and Open Space unless the land is otherwise qualified as agricultural or aggregate resource land, or an exception to Goal 4 is taken. The generalized boundary of the principal forest land environments is depicted on the Forest Land Environments map in the Forest Land Element. The specific boundary in relation to individual parcels is determined based on the text description in the Forest/Woodland transition elevations described in the Geographic Location and Conditions section of the Forest Lands Element. The valley floors, terraces, and slopes depicted on the Forest Lands Element profile illustrations are lands below the noted transition elevations, and are not part of the commercial forest base. Tracts of land located predominantly below the noted transition contour will similarly be inventoried as being outside the principal forest land environment and may be considered for Woodland or a rural designation found to be compatible with adjacent forest use.”

“* * * * *

“D. Map amendment requests may demonstrate that property is not located in forest land environments described herein by providing substantive site specific evidence which clearly indicates that the subject property is not forest land or woodland as outlined in the Forest Lands Element of the [JCCP].”

1 for Forestry and Open Space” unless an exception to Goal 4 is taken. Criterion 2(A) further
2 provides that the specific boundary for individual parcels within the “generalized boundary”
3 is determined by the text descriptions of each forest environment, and that lands below the
4 “transition elevations” are outside the principal forest land environments. To similar effect,
5 criterion 2(E) specifies that unless justified through a goals exception process, Goal 4 is
6 deemed to apply and the Forest/Open Space designation will not be removed from “lands
7 within principal forest land environments.” Thus, criterion 2(A) and 2(E) appear to suggest
8 that if the subject property is within a “principal forest land environment,” the Forestry/Open
9 Space map designations require the property to remain designated Forestry/Open Space,
10 unless an exception to Goal 4 is approved.

11 The staff report, which the commissioners’ decision adopted, concludes that the
12 subject property is not within a principal forest land environment, finding:

13 “The applicant states the subject properties are below the transition contours
14 outlined in the Forest Lands Element for the Rogue-Applegate Upland unit.
15 They are predominantly south or southeast facing, below 3000 feet in
16 elevation, and should be inventoried as being outside the principal forest land
17 environment. The subject properties may be considered for a rural
18 designation compatible with the adjacent forest area.

19 “Based upon the subject properties’ elevations, the soils study, and the
20 forester’s report, staff finds that the above characteristics for Forestry/Open

“E. Except where another resource land designation is requested, or where justified through the Goal Exceptions process, Goal 4 is deemed to apply and the Forest/Open Space designation will not be removed from:

“i) Lands within the principal forest land environments described in subsection 2A above;

“* * * *”

“F. Where it can be demonstrated with substantive findings the lands currently designated as Forestry/Open Space pursuant to sections 2A through 2C above do not merit Goal 4 protection pursuant to section 2D above, a rural lands designation may be established that is otherwise consistent with the Statewide Planning Goals and the [JCCP]. An appropriate rural zoning district may then be applied to the land consistent with the Comprehensive Plan map designation requirements and the Jackson County Land Development Ordinance.” (Footnote omitted).

1 Space Lands do not warrant designation of the subject properties as
2 Forestry/Open Space Lands.” Record 24.

3 Similarly, the staff report quoted the plan description of the Rogue-Applegate Upland
4 Region, and concluded, in relevant part:

5 “Most of the slopes here are generally south-facing slopes and this area is
6 predominantly below the 3,000-foot contour with many ridges and canyons
7 scattered throughout, which would identify this area as a ‘woodland transition
8 zone.’ * * *” Record 16.

9 Petitioners argue that the county erred in concluding that the property is not part of
10 the principal forest land environment as described under the JCCP Rogue-Applegate Upland
11 region provisions. According to petitioners, the Rogue-Applegate Upland region plan
12 description at JCCP 13-3 and the timbershed profile at JCCP 13-7 make it clear that the
13 boundary between forest lands that must be protected by the Forestry/Open Space
14 designation and other lands that need not be so protected is determined by two variables: (1)
15 the property’s elevation, and (2) whether the property is located in the Applegate Valley
16 watershed or the Rogue River watershed. Petitioners contend that the 3,000 foot elevation is
17 the “transition elevation” on the southerly Applegate Valley side of the upland, while the
18 2,000 foot elevation is the transition elevation on the northerly Rogue Valley side of the
19 upland. Because the subject property is on the Rogue Valley side of the Rogue-Applegate
20 divide, and not the Applegate Valley side, and because it is above 2,000 feet in elevation,
21 petitioners contend that under Criterion 2(A) and (E) the Forestry/Open Land plan
22 designation can be removed only pursuant to a Goal 4 exception. Remand is therefore
23 necessary, petitioners argue, for the county to adopt the required Goal 4 exception.

24 Intervenor responds that the issues raised in this subassignment of error were not
25 raised during the proceedings below, and are thus waived. ORS 197.763(1).⁵ On the merits,

⁵ ORS 197.763(1) provides:

1 intervenor argues that the county correctly understood the Rogue-Applegate Upland plan
2 provisions to locate the transition boundary based on whether the site is predominantly
3 composed of south or north-facing slopes. Because most of the slopes on the subject
4 property have south or southeast facing aspects, intervenor contends, the county correctly
5 concluded that the property is within the Applegate Valley side of the upland, not the Rogue
6 Valley side. Accordingly, intervenor argues, the relevant “transition elevation” is 3,000 feet,
7 not 2,000 feet. Because the property lies entirely below 3,000 feet and is therefore not part
8 of the principal forest land environment, intervenor argues, the map designation criteria do
9 not require a goal exception to remove the Forestry/Open Space designation.

10 In the reply brief, petitioners provide a number of record citations to documents that,
11 they allege, raise the issue of whether the subject property is within a principal forest land
12 environment due to its elevation and location within the Rogue-Applegate Upland region was
13 raised during the proceedings below. We have reviewed the cited documents and they do not
14 come close to raising that issue. One set of documents simply consists of letters from
15 opponents arguing that the subject property can grow trees and should continue to be planned
16 and zoned for forest uses. Petitioners also cite to the portions of the staff report quoted
17 above. However, the staff report simply adopts the applicant’s position with respect to how
18 the transition elevations are applied. The staff report did not raise any cognizable “issue” on
19 that point. Petitioners also cite to the planning commission decision at Record 551-595.
20 However, we are not cited to any specific language in the planning commission decision that
21 raised or addressed this issue, and we see none.

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 Finally, petitioners argue that a related interpretative issue was raised below by staff
2 early in the proceedings, specifically whether the JCCP Rural Residential map designation
3 provisions require an exception to Goal 4 even where the county finds that the subject
4 property is not “forest land” as defined by Goal 4. Staff asked county counsel for an opinion.
5 The county counsel responded in a written memorandum, first addressing state law and
6 determining that state law does not require an exception in that circumstance. Record 516-
7 17. The county counsel then addressed some of the JCCP Forestry/Open Space map
8 designation criteria set out at n 4 above, and concluded that, while those criteria are
9 ambiguous and the answer not entirely clear, fairly read the Forestry/Open Space map
10 designation criteria do not require a goal exception for lands that the county determines are
11 not “forest lands” as defined by the goal. Record 517-18. Counsel then went on to conclude
12 that the Rural Residential map designation criteria also do not require an exception to Goal 4,
13 an issue we address below under the second assignment of error.

14 However, the county counsel’s memorandum did not consider the legal theory raised
15 in this subassignment of error, which is that the JCCP Forestry/Open Space map designation
16 criteria require an exception to Goal 4 because the property is located on the Rogue Valley
17 side of the Rogue-Applegate Upland region above 3000 feet in elevation, and thus within a
18 principal forest land environment. While county counsel interpreted various Forestry/Open
19 Space map designation criteria, he did not address the Rogue-Applegate Upland provisions at
20 all, or whether the transition boundary is based on slope aspect or location under those
21 provisions, or how the county determines whether land is within a principal forest land
22 environment. As far as we are informed, no party or participant below raised any issue on
23 those points. Accordingly, the issue raised in this subassignment of error is waived. The
24 first subassignment of error is denied.

1 **B. Lands Necessary to Permit Forest Operations**

2 The second sub-assignment of error appears to be an alternative argument that, if the
3 property is not suitable for commercial forest uses under the Goal 4 definition, it nonetheless
4 must remain designated and planned for forest uses in order to protect forest uses on
5 surrounding lands. *See* n 2. Petitioners cite to a letter from a timber company that owns
6 adjacent land requesting that deeds for any residential lots on the subject property carry a
7 restrictive covenant under which lot purchasers waive any right to object to customary forest
8 practices on surrounding resource lands. Petitioners argue that this letter is evidence that the
9 subject property is “necessary to permit forest operations or practices” for purposes of the
10 Goal 4 definition of forest land.

11 Intervenor responds that the timber company letter actually is supportive of the
12 application, and the request for a deed restriction is not evidence that the subject property
13 must remain in a forest designation to permit forest operations on nearby lands. We agree
14 with both contentions. Petitioners have not established that the county erred in concluding
15 that the subject property is not “forest land” under the remaining prongs of the Goal 4
16 definition.

17 The second sub-assignment of error also includes arguments that the property must
18 remain in the Forestry/Open Space designation under JCCP map designation criterion
19 2(E)(iii) and (vi). Criterion 2(E)(iii) states in relevant part that “Goal 4 is deemed to apply”
20 to land “subject to risk from identified natural hazards,” and absent two circumstances not
21 present here the land must remain in the Forestry/Open Space plan designation.⁶ Criterion

⁶ JCCP Map Designation Criteria 2(E) was partially quoted above in n 4, and the portions relevant to this subassignment of error are set out below.

“E. Except where another resource land designation is requested, or where justified through the Goal Exceptions process, Goal 4 is deemed to apply and the Forest/Open Space designation will not be removed from:

“* * * * *

1 2(E)(vi) provides to the same effect for land that is “adjacent to, intermingled with, or needed
2 for access to public or private commercial forest lands.”

3 With respect to criterion 2(E)(vi), petitioners argue that easements over the subject
4 property provide needed access to public and private timberlands higher on Johns Peak, and
5 therefore the subject property must remain in forest zoning to provide access to those
6 commercial forest lands. With respect to criterion 2(E)(iii), petitioners cite to a finding in the
7 staff report addressing Statewide Planning Goal 7 (Natural Hazards), stating that “[s]taff has
8 identified natural hazards specific [to] this area [such] as steep slopes, erosion, wildfire,
9 stream/drainage, flooding and mass movement,” and that such natural hazards can be
10 mitigated through development conditions required by the county’s code. Record 19.
11 Petitioners argue that the existence of these “natural hazards” require that the property
12 remain designated and zoned for forest use under map designation criterion 2(E)(iii).

13 Intervenor does not specifically respond to petitioners’ contentions regarding plan
14 designation criteria 2(E)(iii) and (vi). However, we note that the adjoining timber owner’s
15 letter that intervenor cites to states in relevant part that they “look forward to seeing the road
16 paved and widened. This will reduce our haul times, increase the safety of hauling and
17 increase firefighting response times.” Record 15. That letter hardly suggests that the author
18 believes the subject property must remain in forest zoning to provide access to adjoining
19 forest lands, and petitioners cite to no evidence at all supporting her argument on that point.

“iii) Lands within mountainous [areas] where the majority of the acreage is
comprised of slopes where the average grade exceeds 40% or where the
majority of acreage is otherwise subject to risk from identified natural
hazards (e.g. rapidly moving landslides);

“* * * * *

“vi) Lands adjacent to, intermingled with, or needed for access to public or
private commercial forest lands[.]”

1 With respect to criterion 2(E)(iii), which applies when the majority of the subject
2 property is “subject to risk from identified natural hazards,” petitioners do not explain why
3 the staff finding under Goal 7 that lists several natural hazards in “this area” leads to the
4 conclusion that the majority of the subject property is “subject to risk from identified natural
5 hazards” and therefore must remain designated for forest use. Petitioners do not challenge
6 the county’s findings that directly address criterion 2(E)(iii), and cite to no evidence that a
7 “majority of the subject property” is subject to risk from identified natural hazards. Absent a
8 challenge to the county’s criterion 2(E)(iii) findings, petitioners’ arguments under criterion
9 2(E)(iii) provide no basis for reversal or remand.

10 For the foregoing reasons, the second sub-assignment of error is denied.

11 **C. Goal 5, Wildlife Habitat**

12 A significant portion of the subject property is designated “Other Winter Range”
13 under the county’s Goal 5 program to protect winter range for deer and elk, under Land
14 Development Ordinance (LDO) 7.1. In relevant part, LDO 7.1 provides for three types of
15 winter range units: Especially Sensitive, Sensitive, and Other. Under LDO 7.1.1(C)(2), the
16 minimum parcel size for Especially Sensitive Winter Range is 160 acres, and for Sensitive
17 Winter Range either 40 acres or “the minimum parcel size required by the underlying zoning
18 district, whichever is larger.” For Other Winter Range, LDO 7.1.1(C)(2)(c) states that
19 “Other Winter Range units may be divided according to the prevailing minimum parcel/lot
20 size for the zoning district.” LDO 7.1.1(C)(3)-(5) set out development standards that apply
21 to all three types of winter range, including the requirement for a finding that the proposed
22 use “will have minimal adverse impact on winter deer and elk habitat,” based on a list of
23 considerations.

24 The Oregon Department of Fish and Wildlife (ODFW) recommended denial of the
25 proposed plan and amendment, because in its view the resulting housing development would
26 have more than a minimal adverse impact on winter deer and elk habitat. According to

1 ODFW, the county’s Goal 5 program to protect Other Winter Range relies on the underlying
2 resource plan map designation and zoning, and that the proposed zoning amendment
3 allowing houses on 10-acre lots would “undermine the originally intended protection of the
4 Deer and Elk Winter Range Ordinance.” Record 297.

5 The county found that the proposed development would have only a minimal impact
6 on deer winter range habitat on the property, based on a report by intervenor’s wildlife
7 consultant (Thiebes) dated April 2003 that had been submitted in support of an earlier
8 application to re-designate and rezone a portion of the subject property (totaling 283 acres) to
9 Rural Use to allow up to 26 dwellings.⁷

10 Petitioners argue first that ODFW is correct that the county’s Goal 5 program to
11 protect Other Winter Range relies upon the density standards in the underlying resource
12 zoning, and therefore any change to underlying zoning to allow higher residential density
13 requires an amendment to the county’s Goal 5 program, which the county did not undertake
14 or evaluate. Alternatively, petitioners argue that the April 2003 Thiebes letter is outdated,
15 and involved a different proposal that included only two of the tax lots that make up the
16 subject property. Further, petitioners note that the Thiebes letter concluded there would be
17 minimal impacts on habitat based on a proposal to provide a 50-acre conservation easement
18 on one tax lot along with habitat improvement measures. Record 331-32. However,
19 petitioners argue, there were no proposed conservation easement or habitat improvement

⁷ The commissioners rejected the planning commission recommendation that the proposed amendments be denied under Goal 5 and the county’s Winter Range regulations, finding:

“The Board of Commissioners finds the proposed development impacts to deer winter range habitat will be minimal. A report from John Thiebes * * * states that this area of winter range is of poor quality based upon soil conditions and is in the lowest valued winter range classification (Other Winter Range). Mr. Thiebes also states *‘The overall cumulative impact of the proposed development will maintain or improve long-term habitat value of browse and forage, cover and sight obstruction and provide for an overall improvement of carrying capacity.’* The Board agrees with Mr. Thiebes and the [LDO] development standards * * * are sufficient to assure protection of this deer habitat.” Record 4 (Emphasis in original).

1 measures in the present application, and the county imposed no such conditions requiring an
2 easement or improvement measures. Accordingly, petitioners argue that the county's
3 "minimal impact" determination is not supported by substantial evidence.

4 Intervenor responds that the issue of whether the underlying zoning is part of the
5 county's Goal 5 program was not raised below and is therefore waived. Petitioners reply that
6 the ODFW letter sufficiently raises that issue. Record 297. We agree with petitioners.

7 On the merits, intervenor disputes that the original underlying zoning is part of the
8 county's Goal 5 program to protect Other Winter Range. Because the underlying zoning in
9 this case requires a minimum parcel size of 80 to 160 acres, intervenor argues, the result
10 would be that the Other Winter Range overlay would be as restrictive as if the property were
11 designated Sensitive Winter Range, which has a minimum lot size of either 40 acres or that
12 imposed by the underlying zoning, whichever is greater. Intervenor argues that the
13 hierarchical structure of the county's Goal 5 winter range program suggests that the least
14 sensitive "Other" Winter Range unit must have a less restrictive minimum lot size than more
15 sensitive winter range units.

16 With respect to the Thiebes letter, intervenor argues that the letter is substantial
17 evidence supporting the county's finding of minimal impact on habitat. According to
18 intervenor, the county's decision adopts, by incorporation, the 50-acre conservation easement
19 and other conditions recommended in the Thiebes' letter.

20 The county's findings do not directly address this issue. Although not entirely clear,
21 it seems likely that the county's Goal 5 program to protect Other winter range relies upon the
22 underlying resource zoning, as the ODFW letter indicates, and therefore that an amendment
23 to the underlying resource zoning to a residential zone to allow higher residential density is
24 effectively an amendment to the Goal 5 program, which the county would have to justify
25 under Goal 5 and its implementing administrative rule. While the hierarchical structure of
26 the county's winter range program certainly suggests that the county could, consistently with

1 Goal 5, amend the underlying zoning to allow a higher residential density in Other Winter
2 Range than in Sensitive Winter Range, under intervenor’s view the Goal 5 program imposes
3 no limit at all on residential density in Other Winter Range areas. That view seems unlikely,
4 because the main thrust of the program appears to be to protect winter deer range by limiting
5 residential density. Further, while LDO 7.1.1(C)(2)(c) provides that land designated Other
6 Winter Range “may be divided according to the prevailing minimum parcel/lot size for the
7 zoning district,” it does not suggest that the county may, without addressing Goal 5, amend
8 the underlying zoning district to a nonresource, residential zone that significantly increases
9 residential density.

10 Petitioners attach to the reply brief portions of Ordinance 91-1, which adopts a
11 document entitled “Goal 5 Background Document 1990” and related plan and code
12 amendments.⁸ That ordinance apparently adopted the original version of the relevant code
13 language at issue here, now codified at LDO 7.1.1(C)(2)(c). It seems clear that when
14 mapping the winter range units for the county, ODFW generally excluded lands with existing
15 partition patterns of 20 acres or less, or that were zoned Rural Residential, as lands too
16 impacted to support winter range. *See* page 331a of Exhibit A to Ordinance, attached to the
17 Reply Brief; *see also* Goal 5 Background Document at 32 (describing impacted lands
18 excluded from any winter range units as areas in a nonresource plan and zoning designation
19 or lands with parcel groups less than 20 acres in size). That context lends support to
20 petitioners’ and ODFW’s view that the Other Winter Range relies on the underlying resource
21 zoning to protect habitat, and therefore an amendment to a nonresource, Rural Residential
22 zoning is an amendment to the Goal 5 program that must be evaluated for compliance with
23 Goal 5.

⁸ Petitioners request that we take official notice of the ordinance and attachments. That request is granted. In addition, LUBA has in its library a complete copy of the Goal 5 Background Document 1990. LUBA will also take official notice of that document.

1 We also agree with petitioners that the county’s finding of minimal impact on habitat
2 is not supported by substantial evidence. Contrary to intervenor’s argument, we see nothing
3 in the commissioners’ decision or the staff report that the decision incorporates that purports
4 to impose the conditions recommended by the Thiebes’ letter.⁹ As petitioners point out, the
5 Thiebes’ conclusion of minimal impact relied on the applicant’s proposal to place 50 acres of
6 the then-proposed 283-acre tract (almost one-fifth of the tract) into a conservation easement
7 where no development would be allowed, and to conduct habitat improvement measures
8 within that easement. No such easements or measures were proposed or imposed in the
9 present decision, which appears to authorize residential development in the area that Thiebes
10 recommended be placed in a conservation easement. It is less clear whether the 2003 date of
11 the Thiebes’ letter, or the fact that it addressed a different, less intensive development
12 proposal, is a fatal evidentiary defect. It may be that an addendum from Thiebes explaining
13 why the conclusions in the 2003 letter remain valid for the larger and more intensive
14 development now proposed would suffice. However, absent such an addendum or similar
15 evidence, or findings demonstrating that the conclusions in the 2003 letter remain valid and
16 can be applied to the present proposal, we agree with petitioners’ that the Thiebes’ letter is
17 not substantial evidence supporting the county’s finding of minimal impact on habitat.

18 This subassignment of error is sustained.

19 **D. Goal 5, Aggregate Resource**

20 A parcel zoned Aggregate Resource (AR) adjoins the subject property, on which is
21 located an active mining operation. The owner of the adjoining parcel submitted a letter
22 objecting to the proposed rezoning, arguing that placing 10-acre residential development on

⁹ As far as we can tell, the commissioners’ decision and the staff report do not appear to impose any conditions at all. The staff report simply notes in its discussion of various approval standards conditions of approval that the planning commission could consider, if it wished. However, the planning commission recommended denial and made no recommendations regarding conditions of approval. The board of commissioners’ decision does not discuss or explicitly impose any conditions of approval.

1 the subject property would “direct[ly] conflict” with the aggregate operation and would
2 jeopardize the ability of that operation to continue. Record 424.

3 Petitioners argue that, given that letter, the county was obligated to determine
4 whether the aggregate resource on the adjoining parcel is significant and, if so, conduct a
5 Goal 5 analysis of economic, social, energy and environmental consequences (ESEE) to
6 determine whether the aggregate resource should be protected against conflicting uses, or
7 whether to allow the conflicting uses.

8 Intervenor responds that the issue of whether the county should conduct a Goal 5
9 inventory and ESEE analysis of the aggregate resource on the adjoining parcel was not raised
10 below and is waived. We agree. Nothing in the letter at Record 424 requests that the county
11 evaluate the significance of the resource on the adjoining parcel or conduct a Goal 5 ESEE
12 analysis. Nothing in the letter mentions Goal 5. While that letter may be sufficient to raise
13 general issues regarding potential conflicts between the aggregate operation and the proposed
14 residential uses, the issue that petitioners raise under this subassignment of error is that the
15 county was obligated to conduct a Goal 5 significance and ESEE analysis of the resource on
16 the adjoining parcel, and that issue was not raised below.

17 The fourth subassignment of error is denied.

18 The first assignment of error is sustained, in part.

19 **SECOND ASSIGNMENT OF ERROR**

20 Petitioners present five subassignments of error challenging the county’s
21 determination that the subject property is properly designated as Rural Residential lands,
22 under the JCCP map designation element. We address each in turn.

23 **A. Rural Residential Lands**

24 The JCCP map designation element sets out criteria to be used to determine whether
25 land qualifies for the Rural Residential plan designation. The purpose statement of the Rural
26 Residential designation states in relevant part that “[e]xceptions to statewide planning Goals

1 3, 4 and 14 (as applicable) are required to establish Rural Residential lands outside adopted
2 Urban Growth Boundaries.” Similarly, map designation criterion 2(A) provides that:

3 “Currently designated Agricultural or Forest/Open Space Lands may not be
4 designated as Rural Residential unless an exception to the applicable Goal 3
5 or 4 is justified in accordance with the Goal 2 Exceptions Process,
6 ORS 197.732, and OAR 660, Division 4.”

7 As explained above, county staff requested an opinion from the county counsel as to
8 whether the JCCP Rural Residential map designation criteria required an exception to the
9 resource goals notwithstanding that the county finds that the subject property is not resource
10 land subject to those goals. Citing *Bates v. Josephine County*, 28 Or LUBA 21 (1994), the
11 county counsel opined that state law does not require an exception in that circumstance.¹⁰
12 The county counsel reached a similar conclusion under the JCCP Rural Residential map
13 designation criteria.¹¹ Apparently based on that opinion and our decision in *Bates*, the staff
14 report to the planning commission stated that “the Planning Commission must determine
15 [that] the subject properties are not farm or forest land subject to Goals 3 and 4 in order to
16 remove the [Rural Residential] Map Designations Element requirement for an exception to
17 Goals 3 or 4.”¹² Record 28. The board of commissioners’ decision does not specifically

¹⁰ In *Bates*, we held that that state law does not require an exception to Goals 3 and 4 where the local government concludes, based on substantial evidence, that the subject property is not resource land subject to those goals.

¹¹ The county counsel’s opinion states, in relevant part:

“Moving next to the Rural Residential Land section of the Comp Plan, the Map Designation Criteria section appears dispositive. Section 2(A) states that Forest/Open Space Lands may not be designated Rural Residential unless an ‘applicable’ exception to Goal 4 is ‘justified.’ Once again, an applicable exception is not justified if the evidence clearly proves the land located within a Forestry designation on the Comp Plan Map is not forest land by definition as set out in Oregon law and local ordinance that define the physical characteristics of forest land. Thus, I believe the County can comfortably interpret its Comp Plan consistent with state law as applied under *Bates*.” Record 518.

¹² We understand staff to have taken the position that the Rural Residential map designation element could be interpreted to allow the subject property to be designated Rural Residential, without approving an exception to Goals 3 and 4, so long as the subject property is found not to be agricultural or forest land that is protected by Goals 3 and 4.

1 address the issue with respect to the Rural Residential map designation criteria, but does
2 adopt a finding with respect to the Forestry/Open Space map designation criteria that an
3 exception to Goals 3 and 4 is not required because the property is nonresource land. Record
4 3.

5 Petitioners argue that the county counsel and staff misconstrued the Rural Residential
6 map designation criteria, in concluding that the Rural Residential plan may be applied to
7 lands for which an exception to Goals 3 or 4 has not been approved, if those lands are
8 “nonresource” lands that are not subject to the goals. Petitioners note that the county has an
9 entirely different plan and zoning designation, Rural Use, that is specifically designed to
10 apply to “nonresource” lands that are not subject to the resource goals and for which no
11 exception is required. In contrast, petitioners argue, the Rural Residential plan designation is
12 clearly designed to apply only to lands that are subject to the resource goals, and for which
13 an exception is required. Petitioners contend that that distinction between “rural residential”
14 and “non-resource” lands is consistent with and reflects a similar distinction in OAR 660-
15 004-0040, governing the application of Goal 14 (Urbanization) to Rural Residential Areas.
16 OAR 660-004-0040(2)(a) makes it clear, petitioners argue, that the rural residential rule
17 applies only to lands for which an exception to Goals 3 or 4 or both has been taken.
18 Conversely, petitioners argue, OAR 660-004-0040(2)(c)(F) clarifies that the rural residential
19 rule does not apply to “nonresource land,” as that term is defined at OAR 660-004-0005(3).
20 That provision, in turn, defines “nonresource land” as land not subject to a range of statewide
21 planning goals, including Goals 3 and 4.

22 Petitioners argue that the county structured its map designation scheme consistently
23 with OAR 660-004-0040 to distinguish between the Rural Residential designation, which
24 may only be placed on lands for which an exception to the resource goals have been taken,
25 and the Rural Use designation, which may only be placed on non-resource lands.

1 Viewed in that context, petitioners argue that the county counsel erroneously
2 concluded that the references to the “applicable” goals in the Rural Residential Lands
3 purpose statement and in criterion 2(A) are intended to indicate that no exception is required
4 if the land is not resource land subject to the resource goals, and therefore the Rural
5 Residential designation may be applied to nonresource lands to which the resource goals do
6 not apply. On the contrary, petitioners argue, the “as applicable” language in the purpose
7 statement and the similar language in criterion 2(A) simply acknowledge that there will be
8 circumstances where Goal 3 but not Goals 4 or 14 apply, or where Goal 4 but not Goals 3 or
9 14 apply, and other circumstances where all three apply.

10 Intervenor responds that this issue was not raised below and is waived. Petitioners
11 reply that the staff e-mails that prompted the county counsel opinion, and the opinion itself,
12 squarely raise the issue of whether the Rural Residential designation may be applied to
13 nonresource lands for which no exception is taken. We agree with petitioners that where
14 planning staff recognize an ambiguity in an approval standard, and request and receive a
15 written interpretation from the local government’s legal counsel in an attempt to resolve that
16 ambiguity, an issue has been raised regarding the meaning of that approval standard, and that
17 issue is not waived for purposes of ORS 197.763(1).

18 On the merits, intervenor argues that the county counsel correctly interpreted the
19 Rural Residential map designation criteria to the effect that Goal 4 is “applicable” only if the
20 subject property is forest land protected by Goal 4. According to intervenor, the map
21 designation criteria do not mandate that nonresource land be designated “Rural Use” rather
22 than “Rural Residential,” and in fact the map designation criteria contemplate that non-forest
23 lands may be designated for any rural use, including rural residential use.

24 The relevant portion of the county counsel’s letter quoted at n 10 considered only the
25 language of Rural Residential map designation criterion 2(A), which provides that
26 “[c]urrently designated Agricultural or Forest/Open Space Lands may not be designated as

1 Rural Residential unless an exception to the applicable Goal 3 or 4 is justified in accordance
2 with the Goal 2 Exceptions Process, ORS 197.732, and OAR 660, Division 4.” That
3 language, in isolation, is somewhat ambiguous, and can be read as county counsel apparently
4 understood it to mean that an exception to Goals 3 or 4 is necessary only if one or more of
5 those goals happen to be “applicable,” and need not be understood to mean that whether Goal
6 3 or 4 is “applicable” depends on whether the land is “currently designated” as agricultural
7 land or forest land. However, as petitioners note, the purpose language to the Rural
8 Residential map designation element includes similar language and, in our view, that
9 language tends to support the latter interpretation more than the former.

10 As noted above, the purpose language states that “[e]xceptions to statewide planning
11 Goals 3, 4 and 14 (as applicable) are required to establish Rural Residential lands * * *.”
12 This use of the term “applicable” in the purpose statement seems to suggest that some but not
13 necessarily all of the listed goals will apply in taking the required exception, which in turn
14 suggests that the county intended a similar meaning to the use of the word “applicable” in
15 criterion 2(A). While neither the purpose statement nor criterion 2(A) explicitly exclude the
16 possibility that no goals at all may apply, at the same time there is no particular language
17 contemplating that possibility, either, and certainly no express language indicating that the
18 county need not take an exception if “currently designated” resource lands are in fact found
19 not be protected by the resource goals. To the contrary, the rural residential map designation
20 provisions uniformly speak of exceptions as “required” or in similar mandatory terms

21 The ambiguity on this point is clarified somewhat by the Rural Use map designation
22 criteria, which is relevant context. The Rural Use plan map designation is clearly intended to
23 be applied in circumstances, such as the present one, where the landowner demonstrates that
24 the resource goals do not apply, and in fact can only be applied in that circumstance.¹³ Read

¹³ The “Rural Use” map designation provisions state, in relevant part:

1 in that context, the Rural Residential map designation provisions mandating an “exception”
2 and the absence of any language suggesting the contrary convey the strong impression that
3 the county intended the Rural Residential designation to apply exclusively to exceptions
4 lands, while the Rural Use designation applies exclusively to non-resource lands for which
5 no exception is required. Petitioners assert, and neither the county nor intervenor disputes,
6 that the plan map distinction between rural residential lands and rural non-resource lands is
7 intended to reflect similar distinctions made in the administrative rules governing designation
8 of rural residential lands.

9 However, we do not hold that the Rural Residential map designation criteria must
10 *necessarily* be interpreted in the foregoing manner, and do not intend to foreclose a contrary
11 interpretation. The county counsel did not consider the context provided by the Rural Use
12 map designation criteria, and there may be other relevant context or legislative history that
13 points in a different direction. Further, while it can be surmised that staff and the county
14 commissioners agreed with the county counsel’s interpretation or at least the ultimate
15 conclusion, there are no findings addressing the issue or adopting the county counsel’s

“1) Purpose: The Rural Use designation is provided for lands outside urban growth boundaries or unincorporated community boundaries that are not deemed to be Forestry/Open Space or Agricultural lands as set forth in the Map Designations Element of the Jackson County Comprehensive Plan to implement Statewide Planning Goals 3 and/or 4. This designation is only applied where very low intensity rural development is found to be appropriate over the foreseeable future due to topographic, environmental, natural hazard, public access, or needed public service constraints. This designation is not intended for exception areas taken pursuant Statewide Planning Goal 2 where Goals 3 or 4 would otherwise be applicable.

“2) Map Designation Criteria: In the existing Agricultural Land and Forestry/Open Space Comprehensive Plan map designations, Statewide Planning Goals 3 and/or 4 apply to the areas so designated unless the applicant can demonstrate otherwise. The burden is on the applicant to demonstrate to the County that Goals 3 and 4 are inapplicable based on all of the following criteria:

“A) The proposed Rural Use area does not meet the definitions of “Agricultural Land” and “Forest Lands” contained in the Statewide Planning Goals, and as set forth in the Definitions Element, Map Designations Element, Agricultural Lands Element, and the Forest Lands Element of the Jackson County Comprehensive Plan.”

1 interpretation as the county's. Because remand is necessary in any event to address
2 arguments sustained under the first assignment of error, we believe that it is appropriate to
3 remand the decision under this subassignment of error to allow the board of commissioners
4 to address this interpretative issue in the first instance.

5 The first subassignment of error is sustained.

6 **B. Map Designation Criterion 2(B): Slopes**

7 Rural Residential map designation criterion 2(B) states that:

8 "Rural Residential lands are to be located on lowland foothill, valley terrace,
9 and valley floor areas with a moderate to gently sloping or level terrain.
10 Other lands may also be included which do not logically fit within any other
11 Plan category, where shown to be suitable for residential use. * * *"

12 Petitioners argue that the subject property is mountainous and rugged, with steep
13 slopes and canyons, and thus unsuitable for the rural residential designation under criterion
14 2(B). According to petitioners, the property clearly does not consist of "moderate to gently
15 sloping or level terrain."

16 Intervenor responds that 200 acres of the 343 acres on the property have slopes less
17 than 20 percent, and that the county considers slopes less than 20 percent to be moderate or
18 gentle slopes. According to intervenor, the property consists of "lowland foothill" with
19 slopes that predominantly (58 percent) fall below the 20 percent threshold for steep slopes.
20 Alternatively, intervenor notes that the Rural Residential map designation includes lands that
21 do not logically fit within other plan categories, and argues that the subject property does not
22 fit logically into any category other than Rural Residential.

23 The planning commission recommended denial under criterion 2(B) based on the
24 "steep slopes throughout" the property. The board of county commissioners rejected that
25 recommendation, finding that

26 "while there are steep slopes, slopes greater than 20%, in this area, there [are]
27 approximately 200 acres on which slopes are less than 20% and are suitable
28 for residential use. Evidence in the record and testimony by [intervenor] show

1 there is adequate land available for potential residential development in areas
2 that are not considered steep slopes by Jackson County.” Record 3.

3 The county evidently interprets criterion 2(B) to be satisfied as long as the
4 predominate slopes on the tract do not exceed 20 percent, which is apparently the line the
5 county has adopted between “steep” slopes and more moderate slopes. Petitioners do not
6 attempt to explain why that interpretation of criterion 2(B) is erroneous. Accordingly, we
7 must affirm it. ORS 197.829(1).

8 The second sub-assignment of error is denied.

9 **C. Map Designation Criterion 2(B)(ii): Transportation**

10 Rural Residential map designation criterion 2(B)(ii) requires in relevant part a finding
11 that the property is served by

12 “a road developed to County road standards C, D or E, or the equivalent state
13 standards, exists or is proposed for (re)construction within a five-year period
14 as delineated in the Jackson County Capital Improvements Program or as
15 otherwise assured in accordance with OAR 660, Division 12, the
16 Transportation Planning Rule. * * * [F]easibility of private road access
17 development to a qualifying public road may be considered for Plan
18 amendment purposes.”

19 The subject property is accessed via Johns Peak Road, a county road for most of its
20 length. Petitioners argue that only the first 1,132 feet of Johns Peak Road is developed to
21 County Road standard D, a standard designed to serve only 45 lots.¹⁴ The next 2,680 feet of
22 the road leading up to and into the subject property is a local access road maintained by the
23 adjacent property owners that is not developed to any county road standard. The next section
24 is apparently a private road. Intervenor agreed to upgrade Johns Peak Road leading up to
25 and through the subject property to road standard C. However, petitioners contend that
26 improving Johns Peak Road to standard C would require an amendment to the county’s

¹⁴ Apparently, road standard E is designed to serve 12 lots, D is designed to serve 45 lots, and C is designed to serve a much larger number of lots. There is no dispute in this case that Johns Peak Road must be improved to county road standard C in order to service the residential development authorized by the proposed plan and zoning amendments.

1 transportation system plan and that the findings fail to demonstrate that the road meeting the
2 applicable standards “exists or is proposed for (re)construction within a five-year period as
3 delineated in the Jackson County Capital Improvements Program or as otherwise assured in
4 accordance with OAR 660, Division 12, the Transportation Planning Rule.”

5 Intervenor responds, initially, that while issues were raised below regarding the
6 current condition of Johns Peak Road, no one argued below that improving the road would
7 require an amendment to the county’s transportation system plan, and that aspect of
8 petitioners’ argument is waived. Petitioners reply that ORS 197.763(1) does not require that
9 arguments in the petition for review be identical to those made below, as long as the
10 arguments made below sufficiently raise the issue sought to be raised in the petition for
11 review, citing *Boldt v. Clackamas County*, 21 Or LUBA 40, 46 (1991).

12 We have reviewed the arguments made at the record citations petitioners provide us,
13 and those arguments generally involve allegations that the current condition of Johns Peak
14 Road is inadequate. Nothing cited to us makes any argument under criterion 2(B)(ii), and in
15 particular no party apparently argued below that Johns Peak Road is not “proposed for
16 (re)construction within a five-year period as delineated in the Jackson County Capital
17 Improvements Program or as otherwise assured in accordance with OAR 660, Division 12,
18 the Transportation Planning Rule.” Accordingly, we agree with intervenor that the issue
19 raised in this subassignment of error is waived.

20 The third sub-assignment of error is denied.

21 **D. Map Designation Criterion 2(D): Conflicting Goal 5 Uses**

22 Rural Residential map designation criterion 2(D) requires that:

23 “[w]here the proposed area includes or adjoins identified Goal 5 resources, or
24 is otherwise mapped within a Goal 5 impact area, a conflicting use analysis
25 must be provided in accordance with the Goal 5 process to support the
26 proposed Plan designation.”

1 Petitioners repeat their arguments under the first assignment of error that the county
2 failed to address the requirements of Goal 5 with respect to winter deer range and the
3 adjoining aggregate operation. According to petitioners, the county failed to conduct a
4 conflicting use analysis in accordance with the Goal 5 process for both Goal 5 resources.
5 Intervenor merely refers to his earlier responses under the first assignment of error.

6 For the reasons expressed above, the issue of whether a Goal 5 analysis is required
7 for the adjoining aggregate operation was not raised below and is waived. We concluded
8 above, however, that the ODFW letter at Record 297 had adequately raised the issue of
9 whether the proposed plan and zoning change is an amendment to the county's Goal 5
10 program to protect winter deer range. It is less clear that the ODFW letter also raises the
11 related issue raised in this subassignment of error. However, intervenor does not specifically
12 assert that the issue raised under this subassignment of error was waived. Absent a more
13 focused waiver challenge, we decline to dismiss this subassignment of error as waived.

14 On the merits, intervenor does not dispute that the county failed to conduct a
15 "conflicting use" analysis under the Goal 5 process with respect to winter deer range, or
16 make any specific argument under criterion 2(D). It may be that the county's existing and
17 incorporated findings under Goal 5 and criterion 2(D) suffice to constitute the "conflicting
18 use analysis" that "must be provided in accordance with the Goal 5 process." However,
19 presumably the "Goal 5 process" referenced in criterion 2(D) is the process set out in
20 OAR chapter 660, division 023, the administrative rule that implements Goal 5. Nothing
21 cited to us in the decision addresses the administrative rule. Accordingly, we agree with
22 petitioners that remand is necessary for the county to adopt more adequate findings
23 addressing criterion 2(D), in light of our remand under the first assignment of error, and any
24 necessary findings addressing OAR chapter 660, division 023.

25 The fourth sub-assignment of error is sustained, in part.

1 **E. Map Designation Criterion 2(C): Acceptable Wildfire Risk**

2 Rural Residential Map designation criterion 2(C) provides in relevant part that “[t]he
3 implementing zoning district will be determined, in part, based upon findings of acceptable
4 wildfire hazard risk to the proposed development, the surrounding community, and to nearby
5 commercial timber stands and wildlife areas.”

6 The commissioners found an “acceptable wildfire hazard risk” based upon a 2004
7 letter from the fire district opining that, if developed according to conditions and restrictions
8 to be applied at the time of development, and if the road were improved, the plan and zoning
9 amendments proposed in 2003 for 283 acres of the subject property, which would have
10 allowed up to 26 dwellings, would “dramatically reduce” the risk of wildfire.¹⁵

11 Petitioners contend that the commissioners’ finding is not supported by substantial
12 evidence. According to petitioners, the fire district 2004 letter was submitted in regards to
13 the earlier, less intensive proposed development and is therefore stale and inadequate with
14 respect to the challenged plan and zoning amendments, which would allow more dwellings.

15 Intervenor responds that the fire district letter and the timber manager’s letter is
16 substantial evidence of compliance with criterion 2(C). We agree. Petitioners do not explain
17 why a fire district opinion concerning amendments to allow 26 potential homes on 283 acres
18 of the subject tract is necessarily stale or invalid with respect to the current proposal for
19 amendments that would allow up to 34 homes on 342 acres. As far as we are informed, the
20 density proposed in both applications is similar, and nothing in the fire district letter suggests

¹⁵ The commissioners’ decision finds, in relevant part:

“The Board of Commissioners finds there is an acceptable risk for fire hazard based upon evidence in the record. A letter submitted by the applicant from Jackson County Fire District No. 3 * * * concludes there is an acceptable risk of fire hazard with conditions applied at the time of development and that the proposed development will reduce the fire hazard in this area. A letter from and testimony by [an adjoining timber company manager] state that the improved access due to development would help to provide better fire protection and reduce fire danger for this area.” Record 3-4.

1 that its conclusions are based on the total number of dwellings allowed by the plan and
2 zoning district proposed in the 2003 application.

3 The fifth sub-assignment of error is denied.

4 The second assignment of error is sustained, in part.

5 The county's decision is remanded.