

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JIM WOOD,
5 *Petitioner,*

6
7 vs.

8
9 CROOK COUNTY,
10 *Respondent,*

11 and

12
13 LINDA GOERING and RANDY GOERING,
14 *Intervenor-Respondents.*

15
16 LUBA No. 2007-087

17
18 FINAL OPINION
19 AND ORDER

20
21 Appeal from Crook County.

22
23 Charles Swindells, Portland, filed the petition for review and argued on behalf of
24 petitioner.

25
26 David M. Gordon, Prineville, filed a response brief and argued on behalf of
27 respondent.

28
29 Jeffrey M. Wilson, Prineville, filed a response brief and argued on behalf of
30 intervenor-respondents. With him on the brief was Miller Nash LLP.

31
32 HOLSTUN, Board Chair; RYAN, Board Member, participated in the decision.

33
34 BASSHAM, Board Member, did not participate in the decision.

35
36 REMANDED

37 10/09/2007

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision that amends the county’s comprehensive plan and zoning map designations for a 640-acre property. The comprehensive plan map designation is changed from Exclusive Farm Use (EFU) to Non-Resource and the zoning map designation is changed from EFU-1 to Rural Aviation Community (RAC). The amendments were adopted to allow development of a residential planned unit development in conjunction with an existing air strip on the property.

FACTS

The subject 640-acre property is located about 16 miles east of Bend and 10 miles south of Prineville in Crook County. The subject property is currently surrounded by Bureau of Land Management (BLM) lands that are also planned for Exclusive Farm Use and zoned EFU-1. The county adopted an earlier decision that also changed the comprehensive plan and zoning map designations for the subject property to Non-Resource and RAC. Petitioner appealed that earlier decision to LUBA. Under his second assignment of error petitioner alleged the county’s prior decision violated Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and comprehensive plan and zoning ordinance provisions that were adopted to implement Goal 5 with regard to deer winter range. Under his third and fourth assignments of error, petitioner alleged the county’s decision violated Goals 11 (Public Facilities) and 14 (Urbanization). LUBA sustained the second, third and fourth assignments of error, and remanded the decision to the county. *Wood v. Crook County*, 49 Or LUBA 682 (2005) (“*Wood I*”).

In response to *Wood I*, the county took steps to address Statewide Planning Goals 5, 11 and 14. To address Goals 11 and 14, Crook County modified the RAC zone so that community sewerage treatment facilities are not allowed in the RAC zone, and the minimum residential lot or parcel size is ten acres. To address Goal 5, the county interpreted the

1 county ordinance that incorporated its Goal 5 program for deer winter range into its resource
2 zones to have the legal effect of limiting application of that Goal 5 program to property that
3 is subject to one of the county’s resource zones.¹ According to the county’s interpretation,
4 because the challenged decision rezones the subject property to RAC, which is not a resource
5 zone, the county’s Goal 5 program to protect elk and deer winter range no longer applies, by
6 virtue of that rezoning, and it was not necessary for the county to address Goal 5 further.

7 **FIRST ASSIGNMENT OF ERROR**

8 Under his first assignment of error, petitioner alleges the county’s Goal 5 program to
9 protect deer winter range imposes a residential density limitation of no more than one
10 residence per 80 acres. Petitioner contends the challenged decision is inconsistent with that
11 Goal 5 program, because the challenged decision will allow residential development on lots
12 that are as small as 10 acres. Petitioner contends that the county must adopt findings that
13 justify its decision under Goal 5 to now remove the residential density limit that it applied to
14 the subject property in 1992 to protect deer winter range.

15 **A. Post Acknowledgment Plan Amendments**

16 The decision that is before LUBA in this appeal is a post-acknowledgment plan
17 amendment (PAPA). The decision amends the acknowledged Crook County Zoning
18 Ordinance (CCZO) and Crook County Comprehensive Plan (CCCP). OAR 660-023-
19 0250(3)(a) identifies the circumstances in which a PAPA must address Goal 5.² Under that

¹ In this context, the county’s “resource zones” are zoning districts that were adopted to implement Goal 3 (Agricultural Lands) or Goal 4 (Forest Lands). Those zones include the EFU-1, EFU-2, EFU-3 and F-1 zones. As previously noted, the subject property was zoned EFU-1 before the disputed decision applied RAC zoning in place of that EFU-1 zoning.

² As potentially relevant here, OAR 660-023-0250(3)(a) provides:

“Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

1 rule, the county must adopt findings to demonstrate that its decision to amend the CCCP and
2 CCZO to remove EFU-1 zoning, and thereby remove the one residence per 80 acres density
3 limitation, is consistent with Goal 5 if that decision either (1) “amends * * * a portion of an
4 acknowledged plan or land use regulation [that was] adopted in order to protect a significant
5 Goal 5 resource,” or (2) “allows new uses that could be conflicting uses with a particular
6 significant Goal 5 resource site on an acknowledged resource list[.]” We understand
7 petitioner to argue that the challenged decision does both of these things, and that the county
8 therefore erred in deciding that it need not address Goal 5 in adopting the appealed decision.

9 **B. The County’s Goal 5 Program for Deer Winter Range**

10 When the county’s Goal 5 program was adopted in 1992, the applicable Goal 5
11 administrative rule appeared at OAR chapter 660, division 16.³ Under that rule, the county
12 was first required to inventory its Goal 5 resources. OAR 660-016-0000(1). To comply with
13 this requirement regarding deer winter range, the county adopted a map. That map identifies
14 Deer Winter Range and Deer Critical Winter Range. Record 89-90.⁴ Much of the county,
15 including the subject property, is located in the area that is shown as Winter Range. A
16 smaller area is designated Deer Critical Winter Range.⁵

“(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or
land use regulation adopted in order to protect a significant Goal 5 resource or to
address specific requirements of Goal 5;

“(b) The PAPA allows new uses that could be conflicting uses with a particular
significant Goal 5 resource site on an acknowledged resource list[.]”

³ OAR chapter 660, division 16 has been replaced by OAR chapter 660, division 23. The new rule, like the old rule, requires an inventory of Goal 5 resources, identification of conflicting uses, an assessment of the economic, social, environmental and energy consequences of the conflicting uses, followed by a program to (1) protect inventoried significant Goal 5 resources, (2) protect them to some desired extent, or (3) allow conflicting uses fully.

⁴ The record in this appeal includes the record and supplemental records that were submitted in *Wood I*. All citations to the record in this opinion are to the Record and Supplemental record that were developed by the county following our remand in *Wood I*.

⁵ The Deer Winter Range is sometimes referred to as General Winter Range, to more clearly distinguish it from Deer *Critical* Winter Range.

1 After the county inventoried its deer winter range as a significant Goal 5 resource, it
2 then identified conflicting uses and analyzed the economic, social, environmental and energy
3 (ESEE) consequences of those conflicting uses. OAR 660-016-0005.⁶ The county identified
4 “an increase in density of residential dwellings in the habitat area” as a conflicting use.
5 Supplemental Record 38.

6 The final step is development of a Goal 5 program. Under the old Goal 5 rule, there
7 were three kinds of programs: (1) protect the resource site and prohibit the conflicting uses;
8 (2) allow the conflicting uses fully notwithstanding its impact on the Goal 5 resource site;
9 and (3) limit the conflicting uses in some way to protect the Goal 5 resource site to some
10 desired extent. OAR 660-016-0010(1)-(3). The program the county adopted for big game
11 habitat appears to fall into the third category. That big game habitat protection program does
12 not prohibit additional residential density, but it does incorporate policies that limit
13 residential density.⁷ For deer winter range, CCCP Wildlife Policy 2 is the relevant CCCP
14 policy. CCCP Wildlife Policy 2 establishes a maximum density of one residence per 160
15 acres for Deer Critical Winter Range and a maximum density of one residence per 80 acres

⁶ OAR 660-016-0005(3) provides:

“* * * If conflicting uses are identified, the economic, social, environmental and energy consequences of the conflicting uses must be determined. Both the impacts on the resource site and on the conflicting use must be considered in analyzing the ESEE consequences. The applicability and requirements of other Statewide Planning Goals must also be considered, where appropriate, at this stage of the process. A determination of the ESEE consequences of identified conflicting uses is adequate if it enables a jurisdiction to provide reasons to explain why decisions are made for specific sites.”

⁷ The CCCP Program to achieve Goal 5 with regard to big game habitat is set out below:

“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 zones, the acknowledged exception areas are exempted from these requirements.” Supplemental Record 39.

1 for Deer Winter Range.⁸ As the county and intervenor-respondents correctly point out, the
2 Goal 5 program to protect deer winter range that the county adopted in 1992 was
3 geographically limited. The county determined that it would only apply the residential
4 density limits specified in Wildlife Policy 2 if the property was both inventoried Deer Winter
5 Range and zoned for resource use. Ordinance 72, which the county adopted on July 28,
6 1992, amended the EFU-1, EFU-2, EFU-3 and F-1 zones specifically to incorporate the
7 residential density limits imposed by the CCCP Wildlife Policies. The EFU-1 zone was
8 amended specifically to limit residential density in the EFU-1 zone to one residence per 80
9 acres if such EFU-1-zoned property falls within Deer Winter Range.⁹

10 To summarize, in 1992, when the county adopted its Goal 5 program to protect big
11 game habitat, that Goal 5 program included a plan policy to limit residential development in
12 inventoried Deer Winter Range properties that were zoned EFU-1, EFU-2, EFU-3 or F-1 to
13 no more than one residence per 80 acres. In 1992, the subject property was (1) zoned EFU-1
14 and (2) included in the inventoried Deer Winter Range. Therefore, in 1992, the subject
15 property was subject to the one residence per 80 acres residential density limit. As far as we
16 can tell, the parties essentially agree with the forgoing description of the county's Goal 5
17 program to protect Deer Winter Range.

⁸ CCCP Wildlife Policy 2 provides:

“Density within crucial wintering areas for deer shall not be greater than one residence per each 160 acres, and for the general winter range not more than one residence per 80 acres.”
Supplemental Record 36.

⁹ At the time the county adopted Ordinance 72, the EFU-1 zone was codified at Crook County Zoning Ordinance (CCZO) 3.010. CCZO 3.010(7)(C) was amended by Ordinance 72 to read:

“* * * 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.”

This same language appears in the current EFU-1 zone at CCZO 18.16.070(3).

1 **C. The Challenged Decision’s Interpretation**

2 The county’s findings regarding the question presented in the first assignment of error
3 are set out below:

4 “Wildlife Policy 2 was implemented by the Crook County Court on July 28,
5 1992, when it adopted Emergency Ordinance No. 72 amending Ordinance No.
6 18. The Crook County Court interprets Ordinance No. 72 as the
7 implementing rule by which Crook County Comprehensive Plan Wildlife
8 Policy 2 is achieved by making the density limitations in that policy
9 applicable only to lands in resource zones, (EFU-1; EFU-2; EFU-3; and F-1
10 zones).

11 “The Crook County Court finds that by implementing Ordinance No. 72, the
12 density limitations contained in Wildlife Policy 2 are only applicable to
13 resource zones and therefore the newly created non-resource zone (RAC
14 zone) complies with the Comprehensive Plan Wildlife policies.

15 “The Crook County Court finds that there are numerous examples in Crook
16 County where the application of CCCP Wildlife Policy 2 is limited to
17 resource lands, and consequently where CCCP Wildlife Policy 2 is excluded
18 from non-resource lands. For example, the record indicates that significant
19 portions of Juniper Canyon including Dry Creek Air Park are within the
20 General Deer Winter Range but are not subject to the wildlife density
21 requirements because those same areas have been zoned RRM-5 (a non-
22 resource zone establishing 5 acre minimum lot size).

23 “The Crook County Court also finds that the Crook County Comprehensive
24 Plan (pages 175 and 176) includes a generic ESEE analysis that resulted in a
25 program to achieve the goal ‘by placing the density requirement standards in
26 the specific resource zone’ and exempting the density requirement from the
27 ‘acknowledged exception areas’ (non-resource zones). This generic ESEE
28 and the corresponding program to achieve the goal are further evidence of the
29 County’s intent when it adopted Ordinance No. 72 to not impose any density
30 standard in non-resource zones such as those governing rural exception
31 areas.” Record 40.

32 We understand the above findings to take the position that the county’s Goal 5
33 program for big game habitat was a residential density limitation that applied only to lands
34 that were included on the county’s adopted Goal 5 inventory of big game habitat and only if
35 the big game habitat was zoned EFU-1, EFU-2, EFU-3 or F-1. Although we have been
36 unable to locate the county’s 1992 reasoning or justification for limiting application of the

1 residential density limitation to resource zones, the relevant CCCP language seems clearly to
2 limit the geographic application of the county's Goal 5 program for deer winter range to
3 property that is both included on the inventory of big game habitat and zoned for resource
4 use.

5 As we noted above, under OAR 660-023-0250(3)(a), the county must apply Goal 5
6 and justify its decision under Goal 5 if it "amends * * * a portion of an acknowledged plan or
7 land use regulation [that was] adopted in order to protect a significant Goal 5 resource." The
8 county's apparent position is that although EFU-1, EFU-2, EFU-3 and F-1 zoning limit
9 application of the county's Goal 5 program for big game habitat, the EFU-1, EFU-2, EFU-3
10 and F-1 zoning that geographically limits application of the county's Goal 5 program to
11 protect big game habitat is not part of an "acknowledged plan or land use regulation [that
12 was] adopted in order to protect a significant Goal 5 resource." However, that position is
13 simply untenable. EFU-1, EFU-2, EFU-3 and F-1 zoning clearly was part of the county land
14 use regulations that were "adopted in order to protect a significant Goal 5 resource." EFU-1,
15 EFU-2, EFU-3 and F-1 zoning, in concert with the county's inventory of significant big
16 game habitat, determined where the residential density limit in Wildlife Policy 2 applied and
17 where it did not apply. Just as a PAPA decision 15 years later to amend the CCCP Deer
18 Winter Range inventory to delete the subject 640-acre property from the previously
19 inventoried property would constitute an amendment of the county's 1992 Goal 5 program to
20 protect Deer Winter Range, a PAPA decision to remove EFU-1 zoning and apply a
21 nonresource zoning designation also amends the county's 1992 Goal 5 program to protect
22 Deer Winter Range. Both decisions have the same legal effect of removing the subject 640-
23 acre property from the Goal 5 program. The county's decision to remove resource zoning,
24 which has the legal effect of removing the residential density limit that applied before the
25 rezoning, must be justified under Goal 5.

1 **D. *Wood I***

2 Before turning to the second assignment of error, we note that in sustaining the
3 second assignment of error in *Wood I*, we rejected an argument that was very similar to the
4 argument that the county adopts in the decision that is before us in this appeal.

5 “With respect to the county’s suggestion that the 80-acre density limitation no
6 longer applies because the property is no longer zoned as resource land, we
7 understand the county to argue that it implemented CCCP Wildlife Policy 2
8 by imposing the appropriate density standard on the appropriate lands in
9 resource zones, and chose not to impose any density standard in any non-
10 resource zones, such as those governing rural exception areas. However, we
11 do not see that rezoning the subject property from a resource zone to a newly
12 created non-resource zone has any effect on whether the property is
13 designated General Winter Range, for purposes of CCCP Wildlife Policy 2,
14 and thus whether the 80-acre density limitation in that policy applies. The
15 question here is whether the RAC zone is consistent with CCCP Wildlife
16 Policy 2 and, more remotely, Goal 5. We agree with petitioner that the county
17 must either ensure that the RAC zone complies with CCCP Wildlife Policy 2
18 or, after adopting appropriate findings addressing Goal 5, remove the property
19 from the General Winter Range.” *Wood I*, 49 Or LUBA at 690-91.

20 Because the decision that is before us in this appeal relies in large part on Ordinance
21 72, which was not the focus in *Wood I*, we have considered intervenor-respondents’ and
22 respondent’s arguments on the merits in this appeal. However, there is nothing about the
23 wording of Ordinance 72, viewed alone or in context with the supporting CCCP language,
24 that convinces us that the subject property’s EFU-1 zoning is not properly viewed as part of
25 the county’s Goal 5 program to protect inventoried Deer Winter Range. Because the EFU-1
26 zoning is part of the county’s adopted Goal 5 program to protect inventoried Deer Winter
27 Range, the county must justify its decision to remove the subject property from that program
28 under OAR 660-023-0040 and 660-023-0050.¹⁰

¹⁰ Under those rules, the county would be required to consider the ESEE consequences of allowing the additional conflicting uses on the subject property (*i.e.*, the additional residential units) that would be allowed under RAC zoning. The county would then have to justify the “degree of protection” that RAC zoning with any mitigating conditions would provide, without the one dwelling per 80 acres density limitation.

1 One aspect of our decision in *Wood I* requires clarification. The above-quoted
2 language can be read to say the county only has two options if this matter is to be pursued
3 further: (1) amend the RAC zone to make it consistent with CCCP Wildlife Policy 2 or (2)
4 justify amending the big game winter range inventory to remove the subject property from
5 the inventory of Deer Winter Range. However, as we have just explained, the county has at
6 least one additional option under OAR 660-023-0040 and 660-023-0050 that is similar to the
7 second option we noted in *Wood I*. Under that third option, the county could apply OAR
8 660-023-0040 and 660-023-0050 and attempt to justify amending the program to protect
9 Deer Winter Range that it adopted in 1992, to remove the residential density limitation that it
10 imposed in 1992 on the subject property. Under that scenario, the subject property would
11 remain on the big game inventory as Deer Winter Range, but the county would make a Goal
12 5 program decision under OAR 660-023-0040 and 660-023-0050 not to limit residential
13 conflicting uses to protect the inventoried Deer Winter Range on the subject property. Such
14 a decision would have to be adequately justified under the applicable rules, and we make no
15 decision here about whether that is possible. But assuming the county can do so, such action
16 under OAR 660-023-0040 and 660-023-0050 is a third option that is potentially open to the
17 county, in addition to the two options we noted in *Wood I*.

18 For the reasons explained above, the first assignment of error is sustained.

19 **SECOND ASSIGNMENT OF ERROR**

20 The petitioner asserts that the new RAC zoning designation will permit additional
21 dwellings and utility facilities to be built that are “urban in scale or intensity” that requires
22 that the county either comply with, or justify an exception to, Goal 14. We decided in *Wood*
23 *I* that Goal 14 operates to limit the type and intensity of development possible on the subject
24 property, notwithstanding the county’s decision to apply a non-resource designation.¹¹ To

¹¹ We pointed out in *Wood I*:

1 address Goal 14, Crook County modified the approval to clarify densities allowed within the
2 RAC Zone so that minimum residential parcel size shall not be less than one residence per
3 ten acres. In addition, the RAC zone was amended to eliminate the possibility that a
4 community sewerage system could be provided. The ten-acre minimum lot size and
5 community sewerage changes are adequate to address the potential urban residential density
6 problem that we identified in *Wood I*.

7 The newly adopted RAC zone (Crook County Code Chapter 18.80) describes the uses
8 that are permitted outright and the uses that are conditionally permitted. The petitioner
9 speculates that the other uses allowed in the RAC zone could be approved in a way that
10 would produce uses that are urban in nature or intensity.

11 “The challenged decision on remand acknowledges that Goal 14 applies to the
12 subject property and imposes a 10-acre minimum lot size for new residences
13 in response to LUBA’s order, but does not otherwise address why the
14 substantial residential, commercial and industrial uses allowed under the zone
15 are rural and not urban in scale and intensity. The decision does not describe
16 the scope anticipated ‘aviation service, repair, and manufacture,’ and it is
17 unclear what additional ‘new buildings,’ ‘modifications’ and ‘other
18 conditional uses’ are allowed under the RAC zone. Potential uses also
19 include ‘new energy facilities, fire protection methods, reservoirs and related
20 devices, airstrip repair, paving and enhancements, and water supply and
21 treatment facilities.’ The only limitation to their approval occurs ‘if, in the
22 opinion of the planning commission, the proposed use is not related to or
23 sufficiently dependent upon the aviation or residential resource of the area.’”
24 Petition for Review 9.

25 Although it does not do so expressly, Goal 14 operates on rural lands to limit the
26 nature and intensity of uses that are located outside urban growth boundaries. *1000 Friends
27 of Oregon v. LCDC (Curry County)*, 301 Or 447, 477, 724 P2d 268 (1986). Goal 14 operates
28 in this manner, in part, to ensure that the detailed planning that is necessary to establish

“Because the RAC zone effectively has no minimum parcel size, it potentially would allow residential development at densities that clearly could be inconsistent with Goal 14. It may be that intervenors do not intend to create lots or parcels in sizes that would be contrary to Goal 14. However, nothing in the RAC zone would preclude that.” *Wood I*, 49 Or LUBA at 693.

1 urban growth boundaries and plan for urban uses inside those urban growth boundaries is not
2 undercut by allowing urban uses to be developed on rural land outside urban growth
3 boundaries. But determining whether a land use regulation allows *rural* land to be converted
4 to *urban* uses calls for an inherently subjective case-by-case inquiry. *Hammack &*
5 *Associates, Inc. v. Washington County*, 16 Or LUBA 75, 80-83, *aff'd* 89 Or App 40, 747 P2d
6 373 (1987). A petitioner who alleges in a LUBA appeal that a land use regulation is
7 defective because it allows conversion of rural land to urban uses without an adequate Goal
8 14 justification or exception is obligated to develop his or her argument to that effect.
9 Petitioner's speculation that the uses allowed in the RAC zone are so uncertain or could be
10 approved in a manner in the future that would result in such improper conversion of rural
11 land to urban uses is insufficiently developed for review. *Deschutes Development v.*
12 *Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

13 The second assignment of error is denied.

14 The county's decision is remanded.