BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

JULIUS BENEDICK and JUSTINE BENEDICK,
Intervenors-Respondents.

LUBA No. 2016-115

FINAL OPINION
AND ORDER

Appeal from Lane County.

Marianne C. Ober, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Michael E. Farthing, Eugene, filed the response brief and argued on behalf of intervenors-respondents.

RYAN, Board Member; BASSHAM, Board Member, participated in the decision.

HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED 04/17/2017

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners' decision amending the comprehensive plan designation of a 110.5-acre property from Agricultural to Marginal Land, and rezoning the property from Exclusive Farm Use (E-40) to Marginal Land.

FACTS

The subject property is an L-shaped, 110.5-acre property located just to the east of Fern Ridge Reservoir. The southern end of the property is located to the north of the Amazon Diversion Channel, a channel that runs from the city of Eugene to the Fern Ridge Reservoir. The subject property is developed with three dwellings and agricultural outbuildings, and includes a 10-acre filbert orchard and approximately 60 acres of open hay fields. Intervenors-respondents (intervenors) applied to amend the Lane County Rural Comprehensive Plan map to change the designation of their property from Agricultural to Marginal Land and to change the zoning of the property from Exclusive Farm Use (E-40) to Marginal Land (ML).

Under 1983 Oregon Laws, Chapter 826, Section 2, which was later codified in 1991 at ORS 197.247, Lane County may designate certain lands as marginal lands, if such lands meet a series of tests. We refer to the marginal lands statute in this opinion as ORS 197.247.

The first test, the "gross income" test, requires a finding that the subject property was "not managed during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income or a forest operation capable of producing an average, over the growth cycle, of $10,000 in annual gross income[.]" ORS 197.247(1)(a).

The second test can be met in one of three ways. ORS 197.247(1)(b). In relevant part, ORS 197.247(1)(b)(B) requires a finding that the proposed marginal land is "located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983[.]" As we explain in more detail below in our resolution of the second and third assignments of error, intervenors conducted a study of a total of 680 acres surrounding the subject property and presented evidence that at least 60% of the study area is composed of lots or parcels that were 20 acres or less in size on July 1, 1983.

The planning commission held hearings on the application and recommended that the board of county commissioners approve the application. The board of county commissioners approved the application, and this appeal followed.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner's second and third assignments of error assign error to the county's conclusion that the application meets the two tests described above

and that are set out in ORS 197.247(1)(a) and (1)(b)(B). Because petitioner's two assignments of error contain overlapping challenges under each subsection of the statute, we address the assignments of error together.

A. ORS 197.247(1)(a)

In order to designate land as marginal land, ORS 197.247(1)(a) requires intervenors to demonstrate that "[t]he proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income[.]" ORS 197.247(5) provides that "[a] county may use statistical information compiled by the Oregon State University Extension Service or other objective criteria to calculate income for the purposes of [ORS 197.247(1)(a)]." In order to show compliance with ORS 197.247(1)(a), intervenors submitted sworn affidavits from intervenors and previous owners of portions of the subject property that the farm operations on the properties during the relevant years (1978-83) did not produce $20,000 or more in annual gross income during three of those five years. Record 381-83. Based on that evidence, the county concluded that intervenors' application satisfied ORS 197.247(1)(a). Record 15-16, 30, 41.

In its first subassignment of error under the third assignment of error, petitioner argues that the county erred in relying on sworn affidavits from intervenors and previous owners of the property. That is so, according to petitioner, because ORS 197.247(5) requires "objective criteria," and therefore

prohibits the county from relying on the sworn affidavits that petitioner argues are not "objective criteria." According to petitioner the sworn affidavits are "subjective in nature, especially considering the span of decades between 1978 and the present." Petition for Review 37. Petitioner argues that the statute requires tax records in order to establish compliance with ORS 197.247(1)(a). Petition for Review 38.

Intervenors respond that ORS 197.247(5) authorizes, but does not require, the county to use objective data in order to establish compliance with ORS 197.247(1)(a). We agree with intervenors. Petitioner does not explain why the statute, which uses the permissive word "may," nonetheless requires the county to use "objective criteria," and does not explain why a sworn affidavit is not "objective" simply because the affiant has an interest in the subject of the affidavit. The statute does not require the use of tax records.

Intervenors also respond that the board of county commissioners concluded that the sworn statements from intervenors and previous owners were "credible, authentic and entirely believable," and that the statements provided sufficient evidence for the county to conclude that ORS 197.247(1)(a) was met. Record 30. Intervenors note that the record does not contain any evidence to call that evidence into question. We agree with intervenors that a reasonable decision maker could rely on the evidence provided by intervenors and previous owners regarding the income from farm operations. *See Sanders v. Clackamas County*, 10 Or LUBA 231, 237 (1984) (LUBA is not authorized

to second guess the judgments made by local decision-makers with respect to the credibility of evidence presented at land use hearings).

B. ORS 197.247(1)(b)(B)

ORS 197.247(1) allows the county "to designate land as marginal land" if, as relevant here:

> "(b) The proposed marginal land also meets at least one of the following tests:
>
> " * * * * *
>
> "(B) The proposed marginal land is located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983[.]"

1. The Subject Property

In a portion of its second assignment of error, petitioner argues that the county improperly construed ORS 197.247(1)(b). According to petitioner, that statute requires intervenors to demonstrate that the subject property includes "lots" or "parcels" that were lawfully created and, petitioner argues, two of intervenors tax lots were not "lawfully created." In support of its argument, petitioner relies on ORS 197.247(3)(b), which provides that as used in ORS 197.247(1)(b), "'[l]ot' and 'parcel' have the meanings given those terms in ORS 92.010." Petitioner also relies on the Court of Appeals' decision in *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adhered to as modified* 179 Or App 409, 40 P3d 532 (2002), which held that in evaluating the lot and parcel count for forest template dwellings authorized by ORS

215.750(1)(c)(A), "the requirement that the local government determine the legal status of a unit of land in connection with a particular proceeding need not be expressly stated in the relevant enactment, but may be derived from its text and context or by consideration of its purpose or policy." *Maxwell*, 178 Or App at 230.

Intervenors respond that ORS 197.247(1)(b) does not use the terms "lot" or "parcel" when describing the unit of land proposed to be designated as marginal land, but rather uses the phrase "the proposed marginal land[.]" As such, intervenors argue, the definitions of "lot" and "parcel" at ORS 92.010 and the holding in *Maxwell* and other cases applying *Maxwell* have no relevance, and there is no requirement in the marginal lands statute to demonstrate that the land proposed to be designated as marginal land is a lawfully created lot or parcel.

We agree with intervenors. *Maxwell* involved a forest template dwelling under ORS 215.750(1)(c)(A), and the legal question presented was whether the use of the words "lot" and "parcel" in describing the lots or parcels counted in the parcel count for the template must be "lawfully created" lots or parcels, when considering the definitions of "parcel" in ORS 215.010 and "lot" in ORS 92.010. In contrast, ORS 197.247(1)(b) uses the phrase "the proposed marginal land" in referring to the subject property, and therefore there is no requirement to establish that the land proposed to be designated as marginal land is comprised of "lawfully created" "lot[s]" or "parcel[s]." That is particularly so

where, as explained below, the legislature *did* choose to use the phrase "lots" or "parcels" in describing the properties to be considered in the study area under the 60% parcelization test in ORS 197.247(1)(b)(B).

2. The Study Area

a. Lawfulness of Lots and Parcels in the Study Area

In applying the 60% parcelization test in ORS 197.247(1)(b)(B), the county is required to determine whether the "lots or parcels" included in the study area are lawfully created. ORS 197.247(3)(b). In its second subassignment of error under the second assignment of error, petitioner argues that the county's decision that the lots and parcels relied on in applying the 60% parcelization test are "lawfully created" is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). Intervenors respond by citing Record 496-537 as evidence that the lots and parcels were lawfully created. Record 496-537 is an exhibit to the application entitled "Legal Lot Documentation" and includes copies of assessors' records, deeds, and legal lot verifications.

Petitioner argues that "it is conceivable that some of the lots in the study area may actually be unlawfully created, thus impacting the outcome of the parcelization test[.]" Petition for Review 31. Petitioner does not develop its argument or otherwise identify any lots or parcels that petitioner argues were not lawfully created, but rather argues that the deed cards that are included in the record are "difficult to read." Petition for Review 32. Absent any developed

argument regarding its subassignment of error, we agree with intervenors that substantial evidence in the record supports the county's conclusion.

b. Size of the Study Area

In its second subassignment of error under the third assignment of error, petitioner challenges the size and location of the study area that intervenors relied on to demonstrate compliance with ORS 197.247(1)(b)(B). We quote ORS 197.247(1)(b)(B) here again:

> "(B) The proposed marginal land is located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983[.]"

In order to demonstrate compliance with ORS 197.247(1)(b)(B), intervenors conducted a study of 680 acres of property, in the location shown at Appendix A. Record 208, 276. The 680-acre study area extends mainly north and east of the subject property, and only slightly to the west and south of the subject property, where Fern Ridge Reservoir and the Amazon Ditch, respectively, are located.

Intervenors then extracted from the 680-acre study area (1) the subject property, comprising approximately 121 acres, and (2) 288 acres directly to the northeast of the subject property that are subject to an exception to the statewide planning goals, as may be required by ORS 197.247(4), which

disallows exception areas from being included in the calculation.[1] After that extraction, the study area included 272 acres, and "100 percent of the study area * * * is composed of lots and parcels that are 20 acres or less in size[.]" Record 277. Intervenors also calculated the percentage of lots and parcels in the entire 680-acre study area, including the 288-acre exception area and the 120-acre subject property, and concluded that 84 percent of the study area consisted of lots and parcels that were 20 acres or less in size. In a third variation of the calculation, intervenors subtracted the 288-acre exception area and included the 120-acre subject property, for a 392-acre study area, and concluded that 69 percent of the lots and parcels were 20 acres or less in size. Record 277.

In its second subassignment of error under the third assignment of error, petitioner argues:

> "[T]here is no valid justification for a 680-acre study area in the present case – other than to help the Applicants establish that at least 60% of the parcels within the study area were less than 20 acres in 1983. Essentially, the Applicants are gerrymandering to obtain desired results, and the County permits them to do so. A more suitable study area would be including the acreage closest to or contiguous to the subject property, to the north (excluding the

[1] ORS 197.247(4) provided that "lots and parcels located within an area for which an exception has been adopted shall not be included in the calculation." The exception for the 288-acre area was adopted and acknowledged after July 1, 1983. Record 275.

> subdivision, an exception area), east, and south. *See* Study Area and 1984 maps, R 208, 211, 212." Petition for Review 40.

We understand petitioner to argue that intervenors' reliance on a study area that is 680 acres in size and that excludes larger parcels in reasonable proximity to the subject property is inconsistent with ORS 197.247(1)(b)(B). Or, as petitioner puts it, intervenors "gerrymandered" the study area in a way that is inconsistent with ORS 197.247(1)(b)(B).[2] Petition for Review 42.

Intervenors respond that the board of county commissioners correctly understood the statute as requiring only that the study area may not be "less than 240 acres," and therefore a 680-acre study area satisfies that requirement. Intervenors also note that even with the alternative extractions of various categories of property from the study area, such as the subject property and the exception area, the study area always exceeds 240 acres and the included parcels meet the 60% parcelization test.

Intervenors also respond that nothing in the statute either requires or prohibits placing the boundaries of the study area in any particular location. In support, intervenors point to a September, 1983 draft memorandum from the director of the Department of Land Conservation and Development (DLCD) to county commissioners and planners, which the board of county commissioners

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[2] *Webster's Third New Int'l Dictionary* 952 (unabridged ed 2002) defines "gerrymander" in relevant part as "2 : to divide (an area) into in political units in an unnatural and unfair way with the purpose of giving special advantages to one group."

relied on as context for interpreting ORS 197.247(1)(b)(B). Record 31. The draft DLCD memorandum describes how the newly-enacted marginal lands statute would work. Record 214-216. The memorandum explains the two tests that were eventually codified in 1991 at ORS 197.247(1)(b)(A) and (B). In describing what the memorandum calls the second "small ownerships test" at ORS 197.247(1)(b)(B), the memorandum explains:

> "The second 'small ownerships' test works differently. A test area must include at least 240 acres. At least 60 percent of the area, not 50 percent as in the first test, must be in ownerships 20 acres or smaller. However, the area can take any shape the County wishes. The County can 'gerrymander' the boundaries of the test area to take in small ownerships and exclude large ownerships (Section 2(1)(b)(B)).
>
> "For example, in some valleys there are narrow strips of five-acre and ten-acre lots along a road. Behind the small lots are large tracts of pasture or woodlots. An area like this would not qualify under the first test because the quarter-mile perimeter would take in the larger tracts. Under the second test, instead of drawing a quarter-mile line around a central lot, the line could be drawn as far down the road as necessary to make up the minimum 240-acre area.
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> "It should be noted that, under this second 'small ownerships' test, adopted exception areas may not be counted toward the 60 percent total of ownerships 20 acres or smaller. (Section 2(4)) (see Figure 3). However, just as for the first test, adjacent lots or parcels owned by the same person or a spouse, parent, child or sibling are treated as one lot." Record 217.

In construing the meaning of a statute, our task is to determine the legislature's intent in adopting the statute, looking at the text, context, and legislative history of the statute, and resorting if necessary to maxims of

statutory construction. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). Petitioner challenges the county's reliance on the DLCD memorandum, points out that the memorandum is stamped "preliminary draft subject to revision," and argues that it is not particularly competent legislative history. Record 214. We agree with petitioner that the DLCD memorandum is not competent legislative history that we can rely on in determining the intent of the legislature in enacting ORS 197.247(1)(b)(B). *DeFazio v. WPPSS*, 296 Or 550, 561, 679 P2d 1316 (1984); *Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26-28, 61 P3d 970 (2003) (subsequent statements by legislators are not probative of intent of statutes already in effect).

The text of ORS 197.247(1)(b)(B) requires that the study area be "not less than 240 acres[.]" Perhaps it was not particularly good drafting for the legislature to not include a *maximum* number of acres or a size range for the study area, such as the one-quarter mile size included in ORS 197.247(1)(b)(A), but the statute does not include a maximum size or a size range. It would be inconsistent with the express text to conclude that a study area that is not less than 240 acres in size is disqualified.

We also do not think that, under the present circumstances, a 680-acre study area is inconsistent with the purpose of the marginal lands statute, which was to allow lands that are in proximity to farm lands and to areas already subject to parcelization to be developed as rural residential areas. Even excluding the large 288-acre exception to the north and east of the subject

property, which is comprised of one acre to five acre lots, the area near the subject property is by any measure significantly parcelized into parcels less than 20 acres in size.

We also think that the legislature's intent was to allow an applicant wide latitude in meeting the 60% parcelization test. The 60% parcelization test includes only two restrictions: that the calculation not include exception areas, and that the study area be not less than 240 acres.[3] In contrast, the test at ORS 197.247(1)(b)(A) includes a one-quarter mile template, which is some indication that the legislature knows how to require a template test or a size range when it wants to.

For the reasons explained above, the second and third assignments of error are denied.

FIRST ASSIGNMENT OF ERROR

Lane County Rural Comprehensive Plan (RCP) Goal 3, Policy 14 provides:

> "Land may be designated as marginal land if it complies with the following criteria:

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[3] At oral argument, petitioner argued that the statute's use of the singular word "area" means that the study area must be a single contiguous area and that, as drawn in the present appeal, intervenors' study area really contains two or more separate areas. That argument is not presented in the petition for review, and petitioner does not assign error to the county's choice to accept a study area with arguably two or more separate areas. Accordingly, we do not consider that argument here.

"a. The requirements of ORS 197.247 (1991 Edition), and

"b. Lane County General Plan Policies, Goal 5, Flora and Fauna, policies numbered 11 and 12."

Petitioner's first assignment of error includes two subassignments of error that we address below.

A. Second Subassignment of Error

Goal 5, Flora and Fauna Policy 11, provides:

> "Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program."

The county concluded that the application satisfies RCP Goal 5, Policy 11. The county reached this conclusion by relying in part on background information regarding three categories of Big Game Winter Range - Major Big Game Range, Peripheral Big Game Range, and Impacted Big Game Range - identified in a "Flora and Fauna Working Paper" that the county prepared and considered contemporaneously with the adoption of its comprehensive plan between 1981 and 1984.[4] There is no recommended density limit for Impacted Big Game

[4] The board of commissioners found:

Range included in the Flora and Fauna Working Paper or RCP Goal 5 Policy 11.

In its second subassignment of error under the first assignment of error, petitioner argues that the county's conclusion that the property is included on the county's inventory of Impacted Big Game Winter Range is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). Petition for Review 18-22. Intervenors submitted a map labeled "Exhibit O Big Game Range Inventory" with its application materials. Record 494. Exhibit O is a map with cross hatched lines covering a large area of the property included on the map, which includes the subject property. Exhibit O does not include any legend that explains the meaning of the cross hatched lines. Petitioner argues that nothing on Exhibit O except the label added by intervenor identifies it as a

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> "The RCP has inventoried the subject property as Impacted Big Game Range and found there is no conflict with rural residential uses because Impacted Big Game Range has been 'written off' for big game management. The Flora and Fauna Working Paper adopted as a part of the Rural Comprehensive Plan states:
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> > "'Impacted Range is the lowest quality habitat of the three categories. It is already developed to an extent that precludes viable management of the species, although populations may still exist there.' (Pg. 23)
>
> "With regards to conflict identification for Big Game Habitat, the Working Paper goes on to state:
>
> > "'Impacted Range has essentially been 'written off' for big game management.' (Pg. 24)" Record 18.

map or inventory of properties on the county's inventory of Impacted Big Game Winter Range, and therefore the county's decision that the property is included on the Impacted Big Game Winter Range inventory is not supported by substantial evidence in the record.

Intervenors respond that petitioner failed to raise the issue raised in its second subassignment of error prior to the close of the initial evidentiary hearing, and is therefore precluded for raising the issue for the first time at LUBA. ORS 197.763(1); ORS 197.835(3); Response Brief 18-19. Intervenors also respond that substantial evidence in the record, including in statements in intervenors' application, Exhibit O, and the county's decision itself support the county's factual conclusion that the property is included on the county's inventory of Impacted Big Game Range, and that there is no evidence in the record to contradict that evidence.

We agree with intervenors that petitioner failed to raise the issue before the close of the initial evidentiary hearing and is precluded from raising the issue for the first time at LUBA. ORS 197.763(1); ORS 197.835(3). The application and the staff report took the position that the property is included on the Impacted Big Game Inventory. Record 195, 282, 494. Petitioner does not point to any place in the record where the issue of whether the property is in fact included on the county's inventory of Impacted Big Game Winter Range was raised.

Even if the issue was not waived, however, we would agree with intervenors that substantial evidence in the record supports the county's conclusion that the property is Impacted Big Game Winter Range. Exhibit O at Record 494, the application materials at Record 282, and the staff report at Record 195 all take the position that the property is included on the county's inventory of Impacted Big Game Winter Range. Petitioner points to no evidence in the record that contradicts that position.

The second subassignment of error is denied.

B. First Subassignment of Error

Petitioner's first subassignment of error is difficult to follow, but we understand petitioner to argue that the county improperly construed OAR 660-016-0005, OAR 660-023-0050, and RCP Goal 5, Policy 12, when it concluded that no evaluation of the economic, social, environmental, and energy (ESEE) consequences of the proposed plan amendment for the wetlands on the property is required.[5] Petition for Review 13-17. Petitioner first argues that OAR 660-

[5] RCP Goal 5, Flora and Fauna Policy 12 requires an evaluation of the economic, social, environmental and energy (ESEE) consequences of allowing new uses that would conflict with an identified Goal 5 resource, and provides:

> "If uses are identified (which were not previously identified in the Plan) which would conflict with a Goal 5 resource, an evaluation of the economic, social, environmental and energy consequences shall be used to determine the level of protection necessary for the resource. The procedure outlined in OAR 660-16-000 will be followed."

016-0005 requires the county to identify conflicts with the wetlands.[6] Petition for Review 13-14. Petitioner next argues that OAR 660-023-0050(2) requires the county to protect the wetlands located on the property with implementation measures that are "clear and objective," and argues that the implementation measures the county identified are not "clear and objective."[7] Petition for Review 17. Finally, petitioner argues "[RCP Goal 5] Policy 12 has not been satisfied by the Applicant." Petition for Review 17. *See* n 5.

The county concluded that the county was not required to conduct an ESEE analysis of the impact on the wetlands of the proposed comprehensive plan map amendment:

> "Isolated wetlands on the subject property are protected by State and Federal Laws. With a minimum parcel size of 10 acres in the Marginal Lands zone, it is feasible to configure any future lots or parcels in a manner that could accommodate allowable development while leaving the wetlands areas undisturbed.
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> "As a result there is no requirement to conduct an ESEE (economic, social, environmental, and energy) analysis to identify conflicting uses, determine the impact area, analyze the ESEE consequences or develop a program to achieve compliance with Goal 5." Record 18.

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[6] OAR 660 Division 16 has been superceded by OAR Division 23.

[7] OAR 660-023-0050(2) provides in relevant part that "[w]hen a local government has decided to protect a resource site under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards."

Intervenors first respond that the issues raised under the first subassignment of error were not raised prior to the close of the initial evidentiary proceeding and petitioner may not raise them for the first time at LUBA. ORS 197.763(1); ORS 197.835(3). ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals 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."

As the Court of Appeals has explained, issues presented during the proceedings below must give the county "fair notice" that it needs to address an issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). In *Boldt*, the Court of Appeals made it clear that a petitioner need not have cited to the precise sections of the zoning ordinance where approval criteria appear, so long as an issue is raised with regard to the "subject matter of the criteria." *Id*. at 624.

At oral argument, to satisfy its burden to demonstrate that the issues raised in the first subassignment of error were raised below, petitioner responded with citations to Record 87, 88 and 133. We have carefully reviewed the cited record pages, and we agree with intervenors that two issues that petitioner raises in the first subassignment of error were not raised on those

record pages. We agree with petitioner that one issue was raised, as we explain more fully below.

1. OAR 660-016-0005 and OAR 660-023-0050(2)

In its first subassignment of error, petitioner argues that OAR 660-016-0005 and OAR 660-023-0050 require an ESEE analysis of the impacts of the proposed plan amendment on wetlands located on the property and require clear and objective implementation measures. *See* ns 6 and 7. Petitioner argues that the county has not demonstrated that its implementation measures to protect the wetlands are "clear and objective" as required by OAR 660-023-0050(2).

Record 88 points out that the property contains wetlands.[8] Record 88 then takes the position that (1) LCDC's 1984 Acknowledgement Order, and (2)

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[8] The entire argument at Record 87-88 is set out below:

> "The applicant's findings assert that because the subject property is 'inventoried as Impacted Big Game' and because 'isolated wetlands on the subject property are protected by State and Federal Laws (laws not indicated or otherwise identified) there is 'no requirement to conduct an ESEE analysis to identify conflicting uses, determine the impact area, analyze the ESEE consequences or develop a program to achieve compliance with Goal 5.'
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> "This is contrary to the Supplemental Findings adopted by Ordinance PA892 (item 2 (G), adopted 'in order to fully comply with the requirements of Oregon statewide planning Goals as promulgated by the Oregon Land Conservation and Development Commission [LCDC]. Lane County must revise certain elements of it's rural General Plan.'

RCP Goal 3, Policy 14 requires the county to evaluate the ESEE consequences of the plan amendment. Record 133 takes the position that RCP Goal 3, Policy 14, (presumably through application of RCP Goal 5, Policy 12) requires the county to conduct an ESEE analysis of the plan amendment.[9]

> "The supplemental findings adopted by Ordinance PA 892 includes the following: 'Revise Goal 3, policy 14 to set forth criteria to be followed in designating land as marginal land. In its 8/19/84 staff report, DLCD pointed out that Goal 5 should be applied to lands which are requesting a change to the marginal land plan designation to identify the resources present, identify conflicting uses and ESEE consequences, etc. This revision makes clear the policy that, if land is to be designated as marginal land, a Goal 5 analysis **must** (emphasis added) be applied to the change.'
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> "Additionally, LCDC Acknowledgement of Compliance documentation, with Date of Commission Action August 17, 1984 establishes among other actions that ' * * * as noted previously, the County still needs to adopt measures in its F2, ML, and EFU zones which ensure that ODFW's density standards will be achieved.' However, LC 16.214 (ML) has no language or provisions addressing ODF&W density standards, and there is no evidence in the record to support the finding that no ESEE analysis is required.
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> "Regarding Big Game Range, the 1984 Acknowledgement also notes 'Developed and committed exception areas are considered impacted, and the County has decided that conflicting uses should be permitted in those areas.' The subject property is not a 'developed and committed exception area' and the findings asserting no ESEE analysis is necessary is in error." Record 88 (emphasis in original).

[9] The argument at Record 133 is set out below:

In the petition for review, petitioner appears to present a different legal theory for why an ESEE analysis is required than the legal theory presented at Record 87-88 and 133. That legal theory is that OAR 660-010-0005 and OAR 660-023-0050(2) require the county to conduct an ESEE analysis and to ensure that implementation measures to protect an identified Goal 5 resource are clear and objective. In a footnote in the petition for review, petitioner cites the 1984 LCDC Acknowledgement Order that is apparently referenced at Record 88. Petition for Review 13-14, n 4. However, no argument is developed in that footnote, and LUBA generally does not consider arguments included solely in footnotes that set out a different legal theory than presented in the body of the petition for review. *Frewing v. City of Tigard*, 59 Or LUBA 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19 (2008). We decline to do so here.

> "OK I have one minute left, the property is filled with wetlands, there's wetlands on the property, there's impacted big game. Staff did not, staff pointed out in the approval criteria which plan polices apply, but the applicant didn't address the plan policy for Marginal Lands in Goal 3. They only address Goal 3, Policy 11. Goal 3, Policy 14 requires them to do an ESEE analysis. Not in the record is the letter from ODF&W that talks about the 20 acre minimum parcel sizes that they recommend. There is no doubt that an ESEE analysis is required. You can just, you know, let the applicant refute that, I have the evidence, I'm not going to be able to bring it up now, I'm not going to be able to talk to it now. I'll put it in the record eventually. [we're at time] OK." Record 133.

We agree with intervenors that the issue of whether OAR 660-016-0005 and OAR 660-023-0050(2) require an ESEE analysis and "clear and objective" implementation measures was not presented to the county during the proceedings below in a manner that provided "fair notice" to the county that the county needed to address those LCDC rules. Petitioner is precluded from raising those issues for the first time at LUBA.

2. RCP Goal 5, Policy 12

The issue that *was* presented to the county during the proceedings below and that is presented in the first assignment of error is whether RCP Goal 5, Policy 12 (through RCP Goal 3, Policy 14) requires an ESEE analysis of the plan amendment. According to petitioner, RCP Goal 5, Policy 12 requires the county to conduct an ESEE analysis. We set out RCP Goal 5, Policy 12 again here:

> "If uses are identified (which were not previously identified in the Plan) which would conflict with a Goal 5 resource, an evaluation of the economic, social, environmental and energy consequences shall be used to determine the level of protection necessary for the resource. The procedure outlined in OAR 660-16-000 will be followed."

Intervenors respond that the wetlands present on the property are not included on any county inventory of significant wetlands and are therefore not "a Goal 5 resource" within the meaning of RCP Goal 5, Policy 12. Response Brief 15-16. According to intervenors, in order for Goal 5, Policy 12 to apply and require an ESEE analysis of the wetlands, the wetlands must be on an

acknowledged inventory of Goal 5 resources. Intervenors cite to evidence in the record that the wetlands are not on a county inventory of Goal 5 resources. Record 284.

It is petitioner's burden to establish that RCP Goal 5, Policy 12 applies to the plan amendment, and that includes establishing that the wetlands qualify as "a Goal 5 resource" within the meaning of that provision. As intervenors argue, the reference to "Goal 5 resource" in RCP Goal 5, Policy 12 appears to be a reference to resources that are inventoried under the Goal 5 process. Petitioner does not argue otherwise, or cite any evidence that the wetlands on the property are inventoried Goal 5 resources. Absent any evidence in the record that the wetlands are included on a county inventory of Goal 5 resources, we agree with intervenors that RCP Goal 5, Policy 12 does not apply to require an ESEE analysis of the wetlands on the property.

The first assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Lane Code (LC) 15.697(1)(c) requires a Traffic Impact Analysis (TIA) for a comprehensive plan amendment "unless waived by the County Engineer[.]"[10] The county engineer waived the requirement of a traffic impact

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[10] LC 15.697(2) allows the County Engineer to waive requiring a traffic impact analysis when, as relevant here:

> "The County Engineer or designee may waive traffic impact analysis requirements specified in LC 15.697(1) above, when:

analysis because increased traffic from development that could be approved under the new ML plan designation did not exceed 50 additional trips during peak hours, the county's standard for triggering the need for a TIA. Record 33. The county based that decision in part on intervenors' estimate provided in its application materials that the new plan designation would result in an increase

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> "(a) Previous analysis has determined that the development proposal will not result in congestion, safety, or pavement structure impacts that exceed the standards of the agency that operates the affected transportation facilities; or
>
> "(b) In the case of a plan amendment or zone change, the scale and size of the proposal is insignificant, eliminating the need for detailed traffic analysis of the performance of roadway facilities for the 20-year planning horizon. Whether the scale and size of a proposal may be considered insignificant may depend on the existing level of service on affected roadways. Generally, a waiver to Traffic Impact Analysis will be approved when:
>
> "(i) the plan designation or zoning that results will be entirely a resource designation; or
>
> "(ii) the plan designation or zoning that results will be entirely residential and the allowed density is not likely to result in creation of more than 50 lots; and
>
> "(iii) there is adequate information for the County Engineer or designee to determine that a transportation facility is not significantly affected as defined in Lane County Transportation System Plan Policy 20-d."

of 64 daily trips, the majority of which would not, according to intervenors, occur during peak hours.

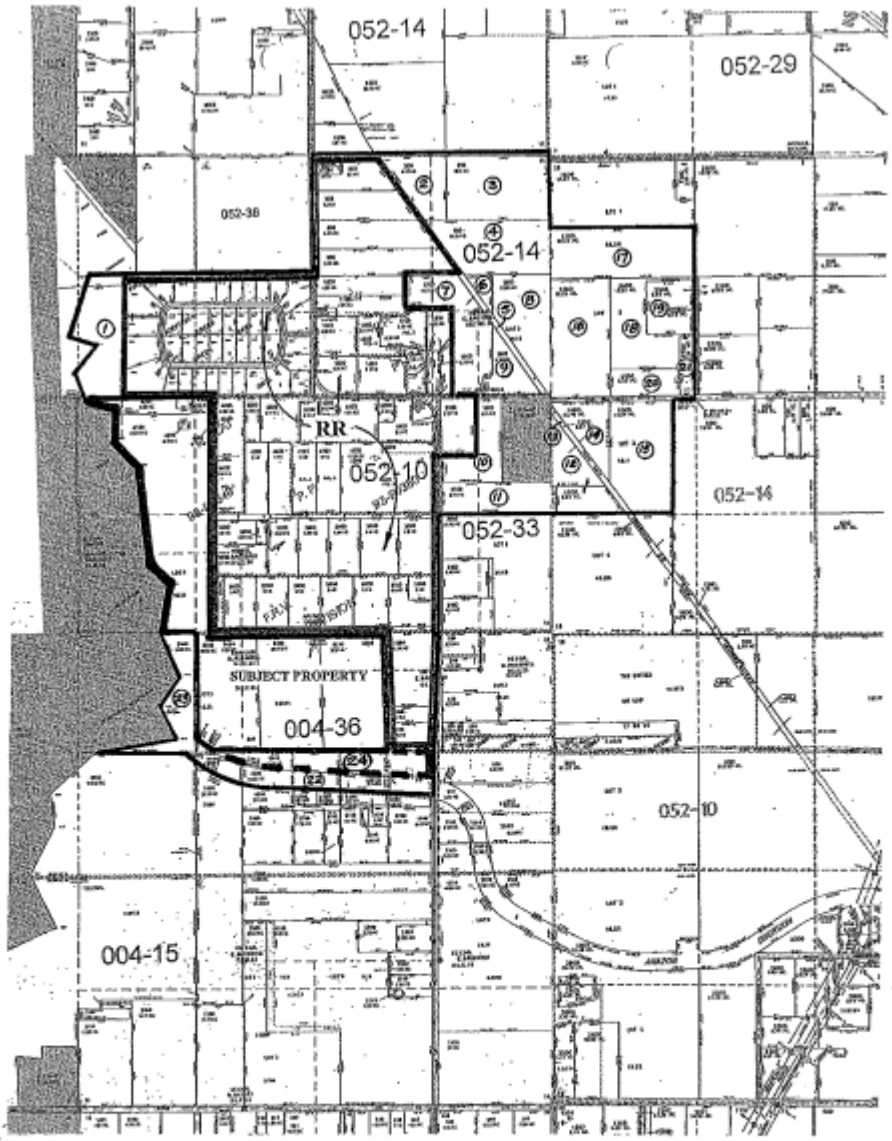
In its fourth assignment of error, petitioner argues that the county's decision to waive the requirement to provide a traffic impact analysis is not supported by substantial evidence in the record because the record does not include data, calculations or analysis to support intervenors' estimate of 64 additional trips. Intervenors respond that the estimates provided in the application materials were reviewed and accepted by the county's transportation planning staff, and that a reasonable person would rely on the estimates.[11] Record 183. We agree. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (substantial evidence is evidence a reasonable person would rely on in making a decision). Petitioner does not point to anything in the record that calls into question or contradicts the evidence that the county relied on to justify waiving the TIA requirement.

The fourth assignment of error is denied.

The county's decision is affirmed.

[11] Petitioner moves to strike Appendix 9, Exhibit 1, from the Response Brief. Appendix 9, Exhibit 1 is an email from the county's transportation planning staff that is not included in the record of the proceedings. LUBA's review is limited to the record filed by the local government. ORS 197.835(2). Intervenors do not dispute that the email is not a part of the record. Petitioner's motion to strike Appendix 9, Exhibit 1 is granted.

Appendix A



240 ACRE TEST STUDY AREA

17-04-18 / 17-05-13 / 17-05-24

○ = 1983 OWNERSHIP

FIGURE 5
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