

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

12/18/17 PM 1:07 LUBA

6
7 vs.

8
9 CROOK COUNTY,

10 *Respondent.*

11
12 LUBA No. 2013-005

13
14 OREGON DEPARTMENT

15 OF FISH AND WILDLIFE,

16 *Petitioner,*

17
18 vs.

19
20 CROOK COUNTY,

21 *Respondent.*

22
23 LUBA No. 2013-006

24
25 DEPARTMENT OF LAND CONSERVATION

26 AND DEVELOPMENT,

27 *Petitioner,*

28
29 vs.

30
31 CROOK COUNTY,

32 *Respondent.*

33
34 LUBA No. 2013-007

35
36 FINAL OPINION

37 AND ORDER

38

1 Appeal from Crook County.

2
3 Paul D. Dewey, Bend, filed a petition for review and argued on behalf of
4 petitioner Central Oregon Landwatch.

5
6 Erin L. Donald, Assistant Attorney General, Portland, filed a petition for
7 review and argued on behalf of petitioner Oregon Department of Fish and
8 Wildlife.

9
10 Steven E. Shipsey, Assistant Attorney General, Portland, filed a petition
11 for review and argued on behalf of petitioner Oregon Department of Land
12 Conservation and Development.

13
14 Jeffery M. Wilson, County Counsel, Prineville, filed the response brief
15 and argued on behalf of respondent.

16
17 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM Board
18 Member, participated in the decision.

19
20 REMANDED 12/18/2017

21
22 You are entitled to judicial review of this Order. Judicial review is
23 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal Ordinance 259, which adopts amendments to the county’s acknowledged Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) (Goal 5) program to protect big game habitat.

MOTION TO FILE AMENDED RESPONSE BRIEF

The county moves for permission to file an amended response brief. With the clarification that the amended response brief is actually a supplemental response brief, the motion is granted.

FACTS

A. The County’s Big Game Habitat Goal 5 Protection Program

1. Wildlife Policies 2 and 3 (Maximum Density Standards)

Crook County Comprehensive Plan Wildlife Policies 2 and 3 (Wildlife Policies 2 and 3), which establish maximum residential densities within inventoried big game habitat areas, are set out in the margin.¹ Briefly, for elk,

¹ Wildlife Policies 2 and 3 are as follows:

- “2. Density within Crucial Wintering Areas for deer shall not be greater than one residence for each 160 acres and for the General Winter Range, not more than one residence for 80 acres, except in the EFU-3 zone in which 40 acres may be allowed per residence.
- “3. Elk wintering areas shall not have more than one residence per 320 acres.”

1 Wildlife Policy 3 establishes a maximum residential density of one dwelling
2 unit per 320 acres (1 du/320 ac) throughout elk wintering areas (Elk Range).
3 For deer, Wildlife Policy 2 establishes a maximum residential density of 1
4 du/160 ac, 1 du/80 ac or 1 du/40 ac in mapped Crucial Wintering Areas
5 (Crucial Range), mapped General Winter Range (General Range) and the
6 county's EFU-3 zone, respectively.²

7 **2. Minimum Lot Size Standards**

8 In 2003, the county adopted Crook County Zoning Code (CCC)
9 18.16.070(3), 18.20.070(3) and 18.24.070(3), which are set out in the margin.
10 CCC 18.16.070(3), 18.20.070(3) and 18.24.070(3) establish *minimum lot sizes*
11 in the EFU-1, EFU-2 and EFU-3 zones that correspond to *maximum density*
12 *standards* in Wildlife Policies 2 and 3.³ Briefly, for elk, those CCC sections

² Residential density terminology can be confusing and somewhat counterintuitive. The 1 du/160 ac standard permits *higher/greater* residential density than the 1 du/320 acres standard (twice as dense). Similarly the 1 du/80 acres standard permits *higher* residential density than the 1 du/160 acres (again twice as dense). For perspective and context, if an area was uniformly developed at maximum density under the 1 du/320 acre standard there would be two houses per square mile (640 acres).

³ Those sections are set out below:

“[EFU-1 Zone] Minimum lot size shall be 320 acres within the elk wintering range as designated in the county's comprehensive plan, Goal 5 element. Minimum lot sizes 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.” CCC 18.16.070(3); (COLW Petition for Review App 56).

1 establish a minimum lot size of 320 acres for Elk Range, in all three zones.
2 And for deer, in the EFU-1 and EFU-2 the county established a minimum lot
3 size of 160 acres in Critical Range and a minimum lot size of 80 acres in the
4 General Range. For deer, in the EFU-3 zone, the minimum lot size was 40
5 acres in both Critical Range and General Range.

6 3. Density Computation Study Area Standard

7 In 2010, the county adopted CCC 18.16.081, 18.20.081, 18.24.081,
8 18.112.051 and 18.28.140, which adopted a presumptive “one-mile radius (or
9 2000 acre) study area” for computing density under Wildlife Policy 2 in EFU-
10 1, EFU-2, EFU-3, EFU-JA and F-1 zones.⁴

“[EFU-2 Zone] Minimum lot size shall be 320 acres within the elk wintering range as designated in the county’s comprehensive plan, Goal 5 element. Minimum lot sizes 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.” CCC 18.20.070(3); (COLW Petition for Review App 57).

“[EFU-3 Zone] Minimum lot size shall be 320 acres within the elk wintering range as designated in the county’s comprehensive plan, Goal 5 element. Minimum lot sizes for critical deer winter range shall be 40 acres, as designated by the county’s comprehensive plan, Goal 5 element. Minimum lot size for general winter range shall be 40 acres.” CCC 18.24.070(3); (COLW Petition for Review App 58).

⁴ The text of each of those sections is identical and is set out below. CCC 18.28.140, which applies in the forest F-1 zone, only differs from the others by referencing “dwellings” rather than “nonfarm dwellings”:

1 **4. Non-Resource Zone Exclusion**

2 In 2010, the county also adopted CCC 18.36.70 which provides that the
3 above maximum density and minimum lot size requirements do not apply in
4 non-resource zones.⁵

5 **5. Summary**

6 To summarize, for purposes of this appeal, the county’s prior big game
7 habitat Goal 5 protection program had three components: (1) minimum density
8 standards within mapped Elk Range, Deer Crucial Range and Deer General
9 Range, (2) minimum lot sizes for mapped Elk Range and Deer Crucial Range
10 and Deer General Range, within the EFU-1, EFU-2 and EFU-3 zones, (3) a
11 methodology for calculating density under Wildlife Policy 2, and (4) an

“All new nonfarm dwellings on existing parcels within the deer and elk winter ranges must meet the residential density limitations found in Wildlife Policy 2 of the Crook County comprehensive plan. Compliance with the residential density limitations may be demonstrated by calculating a one-mile radius (or 2,000-acre) study area. An applicant may use a different study area size or shape to demonstrate compliance with Wildlife Policy 2, provided the methodology and size of the study area are explained and are found to be consistent with the purpose of Crook County comprehensive plan Wildlife Policy 2.” COLW Petition for Review App. 21, 22 and 24 .

⁵ The text of CCC 18.36.70 is set out below:

“The residential density limitations and the lot and parcel size limitations found in Wildlife Policy 2 of the Crook County Comprehensive Plan do not apply to any non-resource zones.” Record 348.

1 exclusion of non-resource zoned lands from the maximum density and
2 minimum lot size requirements that otherwise applied in the mapped Elk
3 Range, Deer Crucial Range and Deer General Range.

4 **B. Ordinance 259**

5 Ordinance 259 makes a number of changes that have the collective effect
6 of increasing the permissible residential density on inventoried big game
7 habitat. We identify the primary changes below:

8 1. Ordinance 259 repeals Wildlife Policies 2 (deer), 3 (elk), and 4
9 (upland game birds). Policy 2 and Policy 3 were set out earlier. *See* n 1. Policy
10 4 is set out in the margin.⁶

11 2. Ordinance 259 divides the county into a Greater County Area and
12 a West County Area. The Greater County Area lies generally east of the city of
13 Prineville and takes in approximately 85 percent of the county, where only
14 approximately 10 percent of the county's population lives. The West County
15 Area lies generally west of the city of Prineville and takes in approximately 15
16 percent of the county, where approximately 90 percent of the county's
17 population lives.

⁶ Upland Game Bird Policy 4 provides:

“To preserve valuable upland game bird habitat, urban sprawl and scattered residential use on agricultural lands shall be prohibited.”
Record 45.

1 3. Ordinance 259 amends the prior 1 du/320 ac elk density standard
2 to allow higher density residential development in the county’s EFU and F-1
3 zones. The prior maximum deer density standard ranged from 1du/160 to 1
4 du/80ac to 1 du/40 ac, depending on zoning. Ordinance 259 amends the deer
5 density standard to allow higher density residential development in the
6 county’s EFU zones. Finally, Ordinance 259 establishes antelope density
7 standards for the first time. The new elk, deer and antelope density standards
8 are set out at new Wildlife Habitat Policy 2, which appears at Record 78 and is
9 reproduced below:

10

Wildlife Habitat Policy 2 – Dwelling Density by Range Table (DU = Dwelling Unit – AC = Acres)							
Greater County Area				West County Area			
Dwelling Density by Range and Zone combined				Dwelling Density by Range and Zone combined			
	Antelope Range	Deer Range	Elk Range		Antelope Range	Deer Range	Elk Range
Zone				Zone			
EFU-1	1DU/160AC	1DU/160AC	1DU/160AC	EFU-1	No Requirement.	1DU/80AC	Not Applicable.
EFU-2	1DU/80AC	1DU/80AC	1DU/80AC	EFU-2	No Requirement	1DU/80AC	1DU/80AC
EFU-3	Not Applicable.	Not Applicable.	Not Applicable.	EFU-3	No Requirement.	1DU/40AC	Not Applicable.
F1	1DU/240AC	1DU/240AC	1DU/240AC	F1	Not Applicable.	Not Applicable.	Not Applicable.
EFU-JA	Not Applicable.	Not Applicable.	Not Applicable.	EFU-JA	No Requirement.	No new dwellings allowed.	No new dwellings allowed.

11

1 4. Ordinance 259 adopts a methodology and a diagram to govern
2 calculation of existing residential density as part of applying the big game
3 residential density standards.

4 5. Ordinance 259 adopts an economic, social, environmental and
5 energy (ESEE) analysis to attempt to justify the amendments.

6 **C. Petitioners' Appeal and County Reconsideration**

7 Ordinance 259 was adopted in December 2012. Petitioners separately
8 appealed that ordinance to LUBA in January 2013, and those three appeals
9 were consolidated. In March 2013, LUBA suspended the appeals at the request
10 of the parties to allow settlement negotiations. LUBA reactivated the appeals
11 at the county's request in August 2015. LUBA suspended the appeal for a
12 second time in October 2015, at the parties' request. A little over a year later,
13 in December 2016, LUBA reactivated these consolidated appeals at the request
14 of petitioner Central Oregon Landwatch (COLW). In March 2017, petitioners
15 each filed petitions for review. In April 2017, the county moved for voluntary
16 remand, and all petitioners objected. Despite petitioners' objections, LUBA
17 treated the motion for voluntary remand as a motion to withdraw Ordinance
18 259 for reconsideration under ORS 197.830(13)(b) and OAR 661-010-0021
19 and granted the motion. In July 2017, the board of county commissioners
20 heard argument from the petitioners and readopted Ordinance 259, apparently
21 without any changes. Petitioners filed new petitions for review in September

1 and October 2017.⁷ LUBA received the county’s response briefs in September
2 and October 2017.

3 With that background of the County’s Goal 5 protection program for big
4 game habitat, Ordinance 259 and the over four-year process that has led to this
5 decision, we turn to the petitions for review.

6 **INTRODUCTION**

7 Petitioner COLW’s petition includes twelve assignments of error.
8 Petitioner Oregon Department of Fish and Wildlife’s (ODFW’s) petition
9 includes three assignments of error. Petitioner Oregon Department of Land
10 Conservation and Development’s (DLCD’s) petition includes a single
11 assignment of error, with three subassignments of error.

12 The county’s Amended Response Brief addresses COLW’s first and
13 seventh assignments of error. Rather than specifically address each of the
14 remaining assignments of error, the county contends in its Response Brief that
15 “many of the assignments of error present essentially the same legal questions,”
16 and so the county instead summarizes the three legal questions the county
17 believes those remaining assignments of error present as follows:

- 18 “● That the challenged decision does not comply with Goal 2,
19 Goal 5, and OAR Chapter 660, Division 023 * * *;

⁷ Petitioner COLW added two assignments of error, but the new petitions for review were otherwise the same as the initial petitions for review that were filed March 2017.

- 1 “● That the challenged decision fails to include a legally
2 sufficient ESEE Analysis * * *;
- 3 “● That the challenged decision fails to adopt a program to
4 achieve Goal 5 by implementing legally sufficient
5 comprehensive plan and code amendments * * *.”
6 Response Brief 2.

7 There is no inherent problem with the county proceeding in this manner,
8 provided the summaries accurately describe the assignments of error and the
9 response brief includes adequate responses to the actual assignments of error
10 presented in petitions for review. However, as we explain below, for a number
11 of assignments of error presented by petitioners, the response brief includes no
12 response.

13 The county is correct that there is a fair amount of overlap in petitioners’
14 assignments of error. They present essentially eight separate legal issues which
15 we address separately below, along with COLW’s first and seventh
16 assignments of error.

17 **ASSIGNMENTS OF ERROR**

18 **A. The County’s Reconsideration Procedures (COLW’s First**
19 **Assignment of Error)**

20 As noted earlier, LUBA treated the county’s April 2017 motion for
21 voluntary remand as a motion to withdraw Ordinance 259 for reconsideration
22 under ORS 197.830(13)(b) and OAR 661-010-0021.⁸ The county has adopted

⁸ Ordinance 259 is a post acknowledgment plan amendment and ORS 197.830(13)(b) and OAR 661-010-0021 give the county a unilateral right to

1 procedures for how it goes about addressing *remands* from LUBA. Crook
2 County Code (CCC) 18.172.130.⁹ But the county has not adopted procedures
3 for how it must conduct *reconsiderations* under ORS 197.830(13)(b) and OAR
4 661-010-0021. Citing CCC 18.172.130(2)(c) as its authority for doing so, the
5 board of commissioners apparently attempted to limit its reconsideration to the
6 issues raised by petitioners in their petitions for review, and attempted to limit
7 the evidentiary record to the evidentiary record that was settled by LUBA on

withdraw Ordinance 259 for reconsideration, provided the withdrawal is requested prior to the “filing of the respondent’s brief,” which it was.

⁹ CCC 18.172.130 provides in relevant part:

“Remand by the Land Use Board of Appeals:

“When a final decision of the county court or other land use decision is remanded by the Land Use Board of Appeals:

“* * * * *

“(2) Remand Procedures.

“* * * * *

“(c) The remand hearing shall be limited solely to issues remanded in the final decision of the Land Use Board of Appeals unless the county court expands the issues on remand upon the county court’s own motion.

“(d) The remand hearing shall be limited to new evidence and testimony regarding the issues in subsection (2)(c) of this section.”

1 February 24, 2017.¹⁰ Citing CCC 18.172.130(2)(d), COLW contends it was
2 error for the board of county commissioners to refuse to accept new evidence
3 COLW attempted to offer and to limit the issues it considered in its
4 reconsideration hearing. COLW argues further that the county represented in
5 its motion for voluntary remand that it would address all issues, and it should
6 be required to live up to that representation.

7 Although the county's request for another opportunity to adopt a
8 defensible decision was made via a motion for voluntary remand, LUBA
9 elected to treat the motion as a request to withdraw Ordinance 259 for
10 reconsideration under ORS 197.830(13)(b) and OAR 661-010-0021. Neither
11 ORS 197.830(13)(b) nor OAR 661-010-0021 dictate the scope of issues that
12 must be addressed in a reconsideration hearing, or how a local government
13 must treat offers of additional evidence at a reconsideration hearing.

14 CCC 18.172.130 applies to county proceedings following a LUBA
15 *remand*, and for that reason both the county's and COLW's reliance on CCC
16 18.172.130 is misplaced. The county was not bound to follow any particular
17 procedures in its reconsideration hearing. *Barnard Perkins Corp. v. City of*
18 *Rivergrove*, 34 Or LUBA 660 (1998). The county did not err by limiting the
19 issues it addressed in the reconsideration hearing. In addition, the county was
20 entitled to limit its consideration to the LUBA record in this matter, and COLW

¹⁰ In fact the board of commissioners apparently allowed what it described as "testimony," and some of that testimony was evidentiary in nature.

1 fails to identify any prejudice that may have resulted from any irregularities in
2 the county's evidentiary rulings that apparently allowed some new evidence to
3 be submitted at the reconsideration hearing. COLW's first assignment of error
4 provides no basis for remand.

5 COLW's first assignment of error is denied.

6 **B. Increased Maximum Dwelling Densities (COLW Second**
7 **Assignment of Error; ODFW's First and Third Assignments of**
8 **Error)**

9 OAR 660-023-0040(4) requires that programs to protect Goal 5
10 resources such as big game habitat must be supported by an economic, social,
11 environmental and energy (ESEE) analysis of the consequences that would
12 result from allowing, limiting or prohibiting conflicting uses (such as rural
13 dwellings), with regard to inventoried Goal 5 resources (such as big game
14 habitat). OAR 660-023-0040(5) gives the county options to "allow, limit, or
15 prohibit identified conflicting uses for significant resource sites," so long as the
16 selected option is "supported by the ESEE analysis." Under its second
17 assignment of error, petitioner COLW argues the county failed to adopt an
18 adequate ESEE analysis to support its decision to significantly increase the
19 residential densities that are allowed within inventoried big game habitat.
20 Petitioner ODFW makes the same argument under its first and third
21 assignments of error.

22 Petitioner ODFW contends the county's ESEE analysis clearly
23 recognizes the importance of big game winter range:

1 “In its ESEE analysis, the County acknowledges the important
2 function winter range provides to big game and therefore to the
3 County which values big game. For example, it provides that
4 ‘[t]he primary purpose of conserving winter range is to ensure that
5 Crook County’s big game species have areas where they can
6 escape low temperatures, wind, and snow accumulations to
7 continue providing the ecological functions and economic values
8 described above.’ Rec. 92. It also states that ‘[h]unting and
9 viewing big game is an important part of the local culture[,]’ and
10 that ‘hunters contributed an estimated \$3.3 million to the Crook
11 County economy.’ Rec. 88, 90.

12 “The ESEE analysis acknowledges the impacts that loss of habitat
13 from development and fragmentation have on big game: ‘Loss of
14 habitat will significantly reduce the number of big game and have
15 a direct impact on the economic benefits derived from big game
16 hunting.’ Rec. 76. It also discusses evidence that roads are
17 particularly damaging:

18 “Gucinski et al. (2001) considered roads to be the
19 most damaging feature to the environment in public
20 wildlands management. Roads can provide access to
21 poachers (Stussy 1994, and Cole 1997), disturb
22 wildlife during the critical winter season, reduce
23 habitat effectiveness by causing big game to avoid
24 well-travelled areas, and cause mortality directly
25 through collisions with vehicles (Gaines et al 2003).
26 Gowan [et] al. (1989) estimated that every mile of
27 forest road eliminated approximately 4 acres of
28 habitat, and an average road density of 3 linear miles
29 per square mile reduced habitat effectiveness by
30 58%.’ Rec. 92.” ODFW Petition for Review 9-10.

31 Petitioners ODFW and COLW contend that given the county’s recognition of
32 the importance of big game winter range, some justification for significantly
33 increasing the permissible residential density is required.

1 Other than generally summarizing aspects of the ESEE analysis and
2 describing the ESEE analysis as “thoughtful and thorough,” the county
3 identified several specific justifications for allowing increased densities. The
4 county previously included slightly fewer than 1.5 million acres on its
5 inventory of significant big game habitat.¹¹ Ordinance 259 adopted updated
6 big game habitat maps that include a little more than 1.5 million acres.¹² The
7 county contends the added 58,473 acres to the big game habitat inventory
8 offsets the impacts of the increased permissible residential density.
9 Respondent’s Brief 16. With regard to the increased density that will be
10 permitted in the Elk Range, the ESEE analysis points out that “approximately
11 300,000 acres is being added to the protected Elk Range,” and for the first time
12 the county has inventoried approximately 300,000 acres of antelope habitat.
13 Record 76. With regard to the increased allowable densities in the West County
14 Area, the county contends the ESEE analysis justifies that increased density by
15 pointing to the greater level of development that already exists in that area such
16 that “habitat quality has been diminished thereby justifying a higher density
17 threshold for conflicting uses.” Response Brief 16.

18 We agree with petitioners that the ESEE analysis citation to the
19 approximately 300,000 acres of newly inventoried Elk Range and

¹¹ The exact number is 1,456,376 acres. Record 70.

¹² The exact number is 1,514,849 acres. Record 70.

1 approximately 300,000 acres of newly inventoried Antelope Range is
2 misleading because the majority of that “newly” inventoried Elk and Antelope
3 Range was already inventoried Deer Range (in the case of the new Elk Range)
4 or was already inventoried as Deer or Elk Range (in the case of the new
5 Antelope Range). As noted earlier, the total increase in inventoried big game
6 range is only 58,473 acres, or an approximately four percent increase in the
7 previously inventoried 1,456,376 acres.¹³ It is certainly not obvious to us why
8 that relatively small increase in the number of inventoried acres of big game
9 habitat offsets the significant increase in allowable densities in a much larger
10 area, particularly within the Elk Range and in the West County Area. And the
11 county’s rationale that there is already greater residential density in the West
12 County Area (with resulting habitat degradation) thus justifying increased
13 residential densities in the West County Area (presumably with additional
14 habitat degradation) will need further elaboration. The soundness of that logic,
15 and its consistency with Goal 5, is not obvious to us. To the extent the county
16 believes increased residential densities in the West County Area are justified by
17 a shift in emphasis to, and additional protection for, big game habitat in the
18 Greater County Area, that belief appears to be based on an inflated
19 understanding of the positive impact of adding 58,473 acres to the total acres of

¹³ The ESEE analysis takes the position that the increase is smaller, only 3.4 percent. Record 75.

1 inventoried big game habitat while at the same time development densities on
2 the entire 1,514,849 acres are being permitted to increase significantly.

3 On remand the county needs to adopt findings that respond more directly
4 to petitioners' contentions that the increased residential densities that are
5 allowed by Ordinance 259 in the West County Area and Greater County Area
6 will result in significant damage to big game habitat that is not offset by any of
7 the other changes adopted by Ordinance 259 or justified in the county's ESEE
8 analysis. We agree with petitioners that this is a circumstance when such
9 findings are required even though the challenged decision is legislative rather
10 than quasi-judicial. *Citizens Against Irresponsible Growth v. Metro*, 179 Or
11 App 12, 16 n 6, 38 P3d 956 (2002).

12 Finally, according to ODFW, both DLCD and ODFW took the position
13 below that lands zoned EFU-1 and EFU-2 are equally important as winter
14 range and that Ordinance 259 allows significantly increased residential density
15 on EFU-2 zoned land without any explanation for why that increased density is
16 justified or consistent with Goal 5. We see no response to that position in the
17 ESEE analysis or the respondent's brief. On remand the county will need to
18 respond to that issue. *Citizens Against Irresponsible Growth*.

19 ODFW's first and third assignments of error and COLW's first
20 assignment of error are sustained.

1 **C. Repeal of Minimum Lot Sizes (COLW's Third Assignment of**
2 **Error)**

3 We are not sure we understand this assignment of error. Petitioner
4 COLW appears to argue that, in addition to the increased permissible
5 residential densities that resulted from Ordinance 259's replacement of
6 Wildlife Policies 2 and 3 with new Wildlife Habitat Policy 2, the repeal of
7 Wildlife Policies 2 and 3 results in repeal of the minimum lot sizes that those
8 policies impose. It is hard to see how Policies 2 and 3 can be read to impose
9 minimum lot sizes when they clearly are written as density standards.¹⁴ See n
10 1. Petitioner COLW apparently relies on a negative inference it draws from
11 Crook County Code amendments the county adopted in 2010 (Ordinance 236)
12 to conclude that Wildlife Policies 2 and 3 impose both a density limit and
13 minimum lot sizes and, moreover, that the minimum lot size standard applies to
14 both land divisions that create new parcels in inventoried big game habitat and
15 for residential development on existing parcels. The negative inference is
16 based on the following language, which Ordinance 236 adopted and applied to
17 non-resource zoned big game habitat:

¹⁴ That is not to suggest that minimum lot sizes might not be one indirect way to achieve minimum density standards, and as we noted earlier, CCC 18.16.070(3), 18.20.070(3) and 18.24.070(3) impose minimum parcel sizes in the EFU-1, EFU-2 and EFU-3 zones. See n 3. But the county apparently does not require that dwellings sited in those zones on existing EFU-1, EFU-2 and EFU-3 zoned parcels must satisfy those minimum parcel sizes. Petitioner COLW believes Wildlife Policies 2 and 3 impose such minimum parcel size requirements. We express no opinion on the merits of that position.

1 “The residential density limitations and *the lot and parcel size*
2 *limitations found in Wildlife Policy 2* of the Crook County
3 Comprehensive Plan do not apply to any non-resource zones.”
4 (Emphasis added.) Record 348-49 (emphasis added).

5 We understand petitioner COLW to contend that if the county wishes to repeal
6 Wildlife Policies 2 and 3 it must justify eliminating the minimum lot sizes the
7 above Ordinance 236 language suggests are required by those policies.

8 The only response to petitioner COLW’s third assignment of error that
9 we have been able to locate in the county’s brief is the following:

10 “* * * Nor was it error for Crook County not to impose minimum
11 parcel size when it adopted ordinance 259. As noted above, Crook
12 County repealed former Wildlife Policy 2 in favor of Ordinance
13 259, including its wildlife density calculation requirement.”
14 Response Brief 13.

15 As was the case with COLW’s third assignment of error, we are not sure
16 we understand the county’s response. On remand, the county must answer the
17 following questions.

18 First, do Wildlife Policies 2 and 3 impose only a density standard or do
19 they also impose a minimum parcel size requirement? Second, if the answer to
20 the first question is that the policies also impose a minimum parcel size
21 requirement, can the county amend its acknowledged Goal 5 program to
22 eliminate those minimum parcel size requirements and remain in compliance
23 with the Goal 5 requirement to protect big game habitat?

24 We do not decide COLW’s third assignment of error, but respondent
25 must address it on remand.

1 **D. Use of Nonfarm Dwelling Study Area (COLW’s Fourth, Fifth**
2 **and Sixth Assignments of Error; ODFW’s Second Assignment**
3 **of Error)**

4 OAR 660-023-0050(1) sets out the following requirements for
5 inventoried Goal 5 resource sites:

6 “For each resource site, local governments shall adopt
7 comprehensive plan provisions and land use regulations to
8 implement the decisions made pursuant to OAR 660-023-0040(5).
9 The plan shall describe the degree of protection intended for each
10 significant resource site. The plan and implementing ordinances
11 shall clearly identify those conflicting uses that are allowed and
12 *the specific standards or limitations that apply to the allowed*
13 *uses.* A program to achieve Goal 5 may include zoning measures
14 that partially or fully allow conflicting uses (see OAR 660-023-
15 0040(5)(b) and (c)).” (Emphasis added.)

16 Ordinance 259 adopts the following CCC amendment to clarify how the
17 new Wildlife Habitat Policy 2 dwelling densities are to be determined:

18 “Density calculations for non-farm dwelling approvals shall use a
19 study area which is consistent with criteria found in OAR 660-
20 033-0130(4)[(a)](D)(i), Diagram A and the list of exclusion
21 areas.” Record 53.

22 We set out below the text of OAR 660-033-0130(4)(a)(D)(i), the
23 referenced Diagram A and the list of exclusion areas below before turning to
24 petitioners’ arguments.

25 **1. OAR 660-033-0130(4)(a)(D)(i).**

26 OAR 660-033-0130(4) authorizes nonfarm dwellings on EFU-zoned
27 lands and provides, in part:

1 “A single-family residential dwelling not provided in conjunction
2 with farm use requires approval of the governing body or its
3 designate in any farmland area zoned for exclusive farm use:

4 “(a) In the Willamette Valley, the use may be approved if:

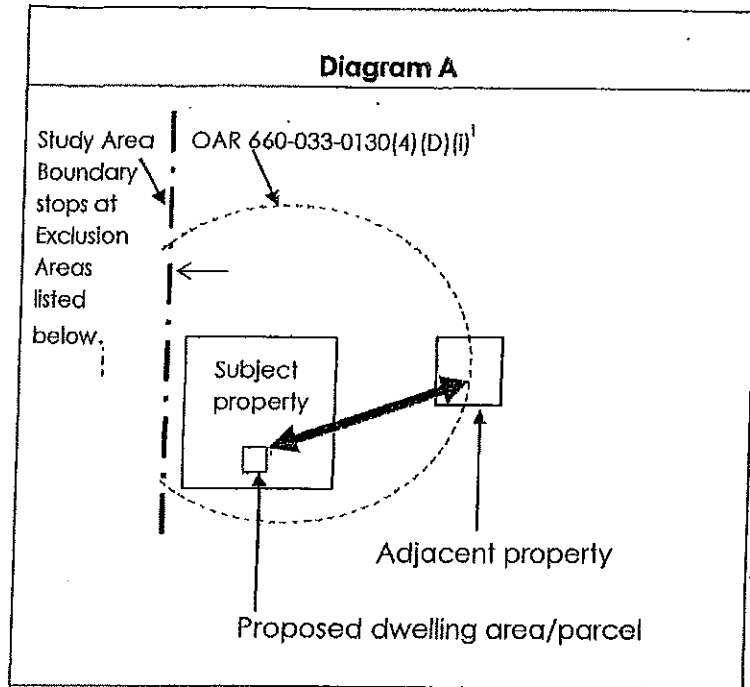
5 “* * * * *

6 “(D) The dwelling will not materially alter the stability of
7 the overall land use pattern of the area. In determining
8 whether a proposed nonfarm dwelling will alter the
9 stability of the land use pattern in the area, a county
10 shall consider the cumulative impact of possible new
11 nonfarm dwellings and parcels on other lots or
12 parcels in the area similarly situated. To address this
13 standard, the county shall:

14 “(i) Identify a study area for the cumulative impacts
15 analysis. The study area shall include at least
16 2000 acres or a smaller area not less than 1000
17 acres, if the smaller area is a distinct
18 agricultural area based on topography, soil
19 types, land use pattern, or the type of farm or
20 ranch operations or practices that distinguish it
21 from other, adjacent agricultural areas.
22 Findings shall describe the study area, its
23 boundaries, the location of the subject parcel
24 within this area, why the selected area is
25 representative of the land use pattern
26 surrounding the subject parcel and is adequate
27 to conduct the analysis required by this
28 standard. Lands zoned for rural residential or
29 other urban or nonresource uses shall not be
30 included in the study area[.]”

31 2. Diagram A

32 Diagram A is set out below:



1

2

3. Exclusion Areas

3

Ordinance 259 identifies a number of areas that are to be excluded when

4

calculating residential density:

5

“The Big Game Habitat study area shall exclude the following areas:

6

7

“1) Destination Resorts;

8

“2) City Limits;

9

“3) Urban Growth Boundary areas;

10

“4) Goal 14 exception areas;

11

“5) Areas with a non-resource Comprehensive Plan designation and/or a Rural Residential Zoning Designation;

12

13

“6) When a property is in both the West County and Greater County Areas, the property shall be regulated by the

14

1 requirements of the area which it is predominantly within
2 (51% or more).

3 “7) Committed Lands Site.

4 “8) Public Lands.” Record 54.

5 **4. Petitioners’ Arguments**

6 Petitioners advance a number of argument in challenging (1) the
7 county’s decision to select the OAR 660-033-0130(4)(a)(D)(i) study area, (2)
8 Diagram A and (3) the exclusions.

9 **a. The OAR 660-033-0130(4)(a)(D)(i) Study Area**

10 Petitioners contend the OAR 660-033-0130(4)(a)(D)(i) study area was
11 established by the Land Conservation and Development Commission (LCDC)
12 to assess the impacts nonfarm dwellings may have on the stability of the land
13 use pattern in EFU-zoned lands in the Willamette Valley. Petitioners argue the
14 county does not explain why that study area, developed for a different purpose
15 and for a different part of the state, is appropriate for determining the
16 residential density on inventoried big game habitat in Crook County.

17 The challenged decision and the county in its brief take the position that
18 LUBA in *Young v. Crook County*, 56 Or LUBA 704, *aff’d* 224 Or App 1, 205
19 P3d 48 (2008), upheld that study area “as valid and appropriate.” Third
20 Supplemental Record 28; Response Brief 13. However, as petitioner COLW
21 explains in his brief (COLW Petition for Review 35), LUBA in *ODFW v.*
22 *Crook County* 72 Or LUBA 316, 334 (2015) has already explained that the
23 broad reading of *Young* that the county relies on is inappropriate:

1 “It is one thing to say, as we did in *Young*, that no method of
2 computing density under Wildlife Policy 2 is expressly required by
3 that policy, and for that reason affirm the county’s use of a one-
4 mile study area where there is no focused challenge to that
5 methodology from the petitioner in that quasi-judicial proceeding
6 concerning a single 25-acre parcel. It is quite another thing to
7 amend the RAC zone to require use of a one mile study area in this
8 case and presumably in future applications of the RAC zone to
9 other properties located in inventoried significant wildlife habitat
10 areas. The county erred to the extent it relied on *Young* to establish
11 that mandating such a methodology in all applications of the RAC
12 zone in the future is consistent with Wildlife Policy 2 or Goal 5.”

13 A 2,000-acre study area may well be entirely appropriate for calculating
14 residential density when applying the Ordinance 259 density limitations. But
15 since petitioners have questioned its adequacy, the county needs to adopt
16 findings that justify adopting the study area as part of its Goal 5 program to
17 protect big game habitat under OAR 660-023-0040(5) and 660-023-0050,
18 rather than attempt to rely on an overbroad reading of a LUBA decision in an
19 appeal of a quasi-judicial decision that presented very different circumstances.
20 *Citizens Against Irresponsible Growth v. Metro*, 179 Or App at 16 n 6.

21 Finally, as we have already noted, the county previously adopted “a one-
22 mile radius (or 2,000 acre) study area” for its EFU zones and F-1 zone. CCC
23 18.16.081, 18.20.081, 18.24.081, 18.112.051 and 18.28.140. See n 4. What
24 relationship those existing code sections might have to the similar new
25 Ordinance 259 study area is something the county might want to consider on
26 remand.

27 This subassignment of error is sustained.

1 **b. Types of Dwellings to Count**

2 Petitioner ODFW next argues that for purposes of computing residential
3 densities under Ordinance 259 it is not clear whether both farm and nonfarm
4 dwellings are to be counted. The challenged decision does not address that
5 issue and neither does the county’s brief. However, as petitioner ODFW
6 recognizes, LUBA has already considered the question and concluded that even
7 with the deference required by ORS 197.829(1), *Siporen v. City of Medford*,
8 349 Or 247, 261, 243 P3d 776 (2010), and *Clark v. Jackson County*, 313 Or
9 508, 515, 836 P2d 710 (1992), an interpretation of Ordinance 259 to the effect
10 that only nonfarm dwellings are considered in applying Ordinance 259 density
11 limits is inconsistent with the relevant text of Ordinance 259 and is not
12 sustainable under ORS 197.829(1). *Central Oregon LandWatch v. Crook*
13 *County*, __ Or LUBA __ (LUBA No. 2016-107, March 7, 2017) (slip op at 15-
14 16).

15 ODFW and DLCDC also took the position below that potential dwellings
16 should also be counted when applying the density limits. That position seems
17 highly suspect to us since the Ordinance 259 density standards seem to be
18 actual density standards not *theoretical* or *potential* density standards. But
19 because the county failed to address that question, and Ordinance 259 must be
20 remanded in any event, the county can have the first opportunity to address that
21 question on remand.

22 This subassignment of error is sustained in part.

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c. Committed Lands

One of the areas to be excluded from the study area when computing the residential density under Ordinance 259 are “Committed Lands Site[s].” Petitioner COLW argues:

“It is not clear what that term means or what lands it refers to. Nonresource lands are also excluded, so ‘Committed Lands Site’ must refer to something else.” COLW Petition for Review 37.

Although the county does not respond directly to this issue in its brief, ORS 197.732(2)(b) authorizes statewide planning goal exceptions for lands that are “irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]” LCDC’s rule governing irrevocably committed exceptions appears at OAR 660-004-0028. It seems highly likely that “Committed Land Site[s]” is referring to sites for which an irrevocably committed exception has been approved under ORS 197.732(2)(b) and OAR 660-004-0028. However, Ordinance 259 must be remanded for other reasons. Therefore we sustain this subassignment of error and the county can address the question in the first instance on remand.

This subassignment of error is sustained.

d. Lack of Clarity in Identifying Study Area

OAR 660-023-0050(1) was quoted in full earlier and imposes the following requirement on the program the county selects to protect big game

1 habitat: “The plan and implementing ordinances shall clearly identify those
2 conflicting uses that are allowed and *the specific standards or limitations that*
3 *apply to the allowed uses.*” (Emphasis added.) OAR 660-023-0050(2) requires
4 that implementing measures to protect Goal 5 resource sites must “contain clear
5 and objective standards.” Petitioner COLW contends there are so many
6 uncertainties and unanswered questions about how to identify the study area
7 under Ordinance 259, that Ordinance 259 should be remanded to the county to
8 answer those questions. We summarize below the questions identified by
9 petitioner COLW:

- 10 1. Does the study area shape and size change when lands are
11 excluded? If so how?
- 12 2. Where is the center of the circle in Diagram A to be
13 located—the center of the property to be developed—the
14 proposed dwelling site—the property’s boundary—
15 wherever the applicant wishes? Petitioner COLW contends
16 that if the decision about where to locate the center of the
17 circle is ambiguous or left up to the applicant very different
18 results may be obtained and in certain circumstances the
19 purpose of the density limit can be frustrated.
- 20 3. How does the Ordinance 259 study area work in
21 conjunction with the study areas required by CCC
22 18.16.081, 18.20.081, 18.24.081, 18.112.051 and
23 18.28.140? See n 4.

24 These are all legitimate questions and we agree with COLW that until
25 they are answered the Ordinance 259 study area does not comply with the OAR
26 660-023-0050(1) requirement for “specific standards” or the OAR 660-023-
27 0050(2) requirement for “clear and objective” standards.

1 This subassignment of error is sustained.

2 COLW's fourth, fifth and sixth assignments of error are sustained.

3 ODFW's third assignment of error is sustained.

4 **E. Cumulative Effects (COLW's Seventh Assignment of Error)**

5 LCDC's Goal 5 rule sets out detailed requirements for inventorying Goal
6 5 resource sites. OAR 660-023-0030. OAR 660-023-040 then sets out a multi-
7 step ESEE analysis process for making a decision about whether and how to go
8 about protecting inventoried Goal 5 sites. Those steps include identifying
9 conflicting uses (OAR 660-023-0040(2)), identifying an impact area around the
10 Goal 5 resource site (OAR 660-023-0040(3)), analyzing the ESEE
11 consequences of allowing, limiting, or prohibiting conflicting uses (OAR 660-
12 023-0040(4)) and then developing a program to achieve Goal 5 (OAR 660-023-
13 0040(5); 660-023-0050)). It is, or can be, a very complicated and time
14 consuming process. Petitioner COLW would make it even more complicated
15 by requiring that the ESEE analysis under OAR 660-023-0040(4) not only
16 consider the impacts on inventoried Goal 5 resource sites from all identified
17 conflicting uses, but also separately consider the cumulative impacts of all
18 identified conflicting uses. Even if we assume there might be some benefit in
19 some cases from requiring such a separate cumulative effects analysis, there is

1 simply nothing in the text of OAR 660-023-0040(4) that suggests such a
2 separate cumulative effects analysis is required.¹⁵

3 We note that petitioner COLW makes a number of other arguments
4 under the seventh assignment that are only tangentially related to the
5 assignment of error itself. We do not consider those arguments.

6 **F. Dividing County into Greater County and West County Areas**
7 **(COLW’s Eighth Assignment of Error)**

8 In this assignment of error petitioner COLW contends the county’s
9 ESEE analysis does not support the much less protective program it adopted for
10 the West County Area. We do not agree with COLW that the county
11 necessarily erred by distinguishing between the West County Area (15 percent

¹⁵ The text of OAR 660-023-0040(4) is set out below:

“Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.”

1 of county land mass; 90 percent of county population) and the Greater County
2 Area (85 percent of county land mass; 10 percent of the county population).
3 Those differences in population density could potentially provide a basis for
4 adopting programs with differing levels or types of protection for big game
5 habitat. However, as explained elsewhere in this opinion, we agree with
6 petitioners that the county has not adequately justified the significant increases
7 in rural residential development densities that Ordinance 259 would allow in
8 both the Greater County Area and the West County Area.

9 COLW's eighth assignment of error is sustained.

10 **G. Removal of Habitat Protection Upon Conversion of Property**
11 **to Non-Resource Zoning (COLW's Ninth Assignment of**
12 **Error)**

13 Ordinance 259 recognizes that EFU and Forest-zoned properties subject
14 to density limitations under the county's Goal 5 program to protect big game
15 habitat could be rezoned in the future and lose the protection those density
16 limits impose. Ordinance 259 proposes to make a case by case determination in
17 the future about whether and how to continue big game habitat for such
18 properties in the future:

19 "Future conversions from EFU or Forest zoning to allow for
20 greater residential densities are proposed from time to time in
21 Crook County. In these instances the requested residential
22 densities are usually 10-20 acres per single-family dwelling. The
23 county recognizes that there may be lands that are not necessary to
24 protect under statewide planning Goals 3 or 4 but which may offer
25 important winter range to big game. Even low productivity soils
26 may hold vegetation, such as sage brush and antelope bitterbrush,
27 which is important winter forage for Mule Deer, Rocky Mountain

1 Elk and Pronghorn Antelope. In the case of such proposed
2 conversions, the County's determination will be made on a site-
3 specific basis." Record 87.

4 As petitioner COLW correctly argues, LCDC's Goal 5 rules require the
5 county to perform the ESEE analysis and develop a program to protect Goal 5
6 resource sites. OAR 660-023-0040(5).¹⁶ The county's decision in Ordinance
7 259 to defer that program development to a future date when rezoning is
8 proposed is inconsistent with Goal 5 and OAR 660-023-0040(5). *See Collins v.*
9 *LCDC*, 75 Or App 517, 522-23, 707 P2d 599 (1985) (Goal 5 does not permit
10 acknowledgment of a comprehensive plan that defers conflict resolution and
11 Goal 5 program development into the future).

12 COLW's ninth assignment of error is sustained.

13 **H. Identification of Nonresidential Conflicting Uses and Deferral**
14 **of Protection Program to Future (COLW's Tenth Assignment**
15 **of Error; DLCD's Three Subassignments of Error)**

16 The county's ESEE analysis identifies the following nonresidential uses
17 as potential conflicting uses:

¹⁶ OAR 660-023-0040(5) provides, in part:

"Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. * * *"

1 “Nonresidential Uses – Nonresidential uses include those listed at
2 ORS 215.283(1), (2) and (4), as well as OAR 660-006-0025 and
3 other similar uses that do not establish a single-family dwelling,
4 but which still require a land use permit. Examples of prominent
5 nonresidential uses currently present include aggregate quarries,
6 roads, public and private airstrips, and power transmission lines.”
7 Record 87-88.

8 Ordinance 259 then takes the following position regarding nonresidential
9 conflicting uses:

10 “It is the County’s position that, due to the wide range of parcel
11 sizes throughout the County, no simple classification method can
12 be used to evaluate, in the abstract, applications for nonresidential
13 uses. In particular, tests tied to acreage size and car trips per day
14 were considered but rejected. On a case-by-case basis, a
15 determination will be made as to whether the proposed use has the
16 potential to be in conflict with a resource and, if so, whether it
17 should be fully allowed, partially allowed, or prohibited in the
18 wildlife habitat areas. This is the same approach as currently used
19 by the County.” Record 88.

20 Later in its ESEE analysis the county takes a similar position:

21 “* * * Energy projects, for example, may contribute to the
22 economy directly, but if they degrade habitat and decrease the
23 ability of the land to protect game species, they may indirectly
24 harm the economy by reducing the County’s ability to attract
25 hunters and wildlife viewers. ESEE analyses are complicated by
26 many such interactions, most of which are unknown or
27 unpredictable before-the-fact. For this reason, it is the County’s
28 position that the only sensible way in which to assess individual
29 situations is on a case-by-case basis.” Record 95.

30 Petitioners argue the county’s general identification of conflicting
31 nonresidential conflicting uses is insufficiently specific to conduct the required
32 ESEE analysis and adopt a program to protect inventoried big game habitat

1 from conflicting nonresidential uses. In addition to that problem, petitioners
2 contend Ordinance 259's deferral of the ESEE analysis and program
3 development phases to an unspecified future date is not permitted under Goal 5
4 and OAR 660-023-0040(5). We agree with petitioners. *Collins*, 75 Or App at
5 522-23.

6 COLW's tenth assignment of error, and DLCD's assignment of error, are
7 sustained.

8 **I. ESEE Analysis of Conflicts Other Than Nonfarm Dwellings**
9 **(COLW's Eleventh Assignment of Error)**

10 Under this assignment of error, COLW makes the following argument:

11 "At one point, the County listed a number of types of dwellings
12 other than nonfarm dwellings to consider, including farm
13 dwellings, accessory farm dwellings, relative dwellings, forest
14 dwellings, template dwellings, wildlife habitat dwellings, lot of
15 record dwellings and temporary dwellings. (Rec. 965) The
16 County's ESEE analysis is deficient in failing to address these
17 other dwellings." COLW Petition for Review 51.

18 For purposes of considering the ESEE consequences of the impacts of
19 residential development on big game habitat, it is not immediately apparent to
20 us why it matters what *type* of residence is being proposed. And as petitioner
21 COLW recognizes, one of Ordinance 259's policies expressly provides that the
22 density limits that are the backbone of the county's big game habitat protection

1 program apply to non-farm dwellings.¹⁷ Nevertheless, because the county does
2 not respond to this argument, it will need to do so on remand.

3 COLW's eleventh assignment of error is sustained.

4 **G. Repeal of Upland Bird Policy (COLW's Twelfth Assignment of**
5 **Error)**

6 The text of Wildlife Policy 4, which calls for preserving upland game
7 bird habitat, was set out earlier. *See* n 6. Petitioner COLW contends Ordinance
8 259 simply repeals Wildlife Policy 4 without providing any explanation or
9 justification for doing so. Petitioner COLW contends that failure requires
10 remand. We agree.¹⁸

11 Petitioner COLW's twelfth assignment of error is sustained.

12 Ordinance 259 is remanded.

¹⁷ That code requirement was set out earlier and is reproduced again below:

“Density calculations for non-farm dwelling approvals shall use a study area which is consistent with criteria found in OAR 660-033-0130(4)[(a)](D)(i), Diagram A and the list of exclusion areas.” Record 53.

¹⁸ Petitioner COLW also contends the county's notice to DLCD did not identify repeal of Wildlife Policy 4 as part of the proposal. However, petitioner COLW does not identify how that notice defect prejudiced its substantial rights and the notice defect therefore provides no additional basis for remand.