BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BOB CATTOCHE, ANNABELLE STREET, WILL ALKIN, ANNA ALKIN, ANDREA TURNER, STEPHEN TURNER, BILL BARNETT, CHANTAL GABORIAU, KIM HOME, JON LEVY, JANIE THOMAS, JIM CLARKSON, MELODY CLARKSON, NORM PHILLIPS, DEBBIE PHILLIPS, and MAX WILBERT,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

GIMPL HILL PROPERTIES LLC,
Intervenor-Respondent.

LUBA No. 2018-109

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Lane County.

Michael Gelardi, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Hershner Hunter LLP.

RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REMANDED 05/22/2019

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a county board of commissioners' decision changing a 131.55-acre property's comprehensive plan designation from Forestry to Non-resource, and zoning designation from Impacted Forest Land (F-2) to Rural Residential (RR-5).

MOTION TO FILE A REPLY BRIEF

Petitioners submitted a motion to file a reply brief. Intervenor-respondent (intervenor) opposes the motion. Petitioners' appeal was filed in 2018. LUBA amended its rules in 2019. Petitioners' appeal is subject to LUBA's 2017 rules, which provide that reply briefs are limited to new matters raised in the response brief. OAR 661-010-0039 (2017). Intervenor argues that petitioners' reply brief does not address new matters because the reply brief addresses review of local government interpretations under *Siporen v. City of Medford*, 349 Or 247, 266, 243 P3d 776 (2010) and petitioners raised *Siporen* in their petition for review. Response to Motion to File Reply Brief 2.

Petitioners argue in their petition for review that the county's interpretation of state law and local law "is not entitled to the deferential standard of review under *Siporen*" and that LUBA has nothing to defer to "[w]hen there is no reviewable express or implied interpretation." Petition for Review 13. The first part of petitioners' reply brief focuses on whether the county findings include an implicit or explicit local interpretation of (1) OAR 660-025-0040(2), or (2) the

peripheral big game density standard in the county's development code. The second part of the reply brief focuses on whether *Siporen* deference applies if there is a local interpretation.

A reply brief making surrebuttal to argument in the response brief is not allowed. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, *aff'd,* 258 Or App 534, 311 P3d 527 (2013). The reply brief does not respond to a new matter raised in the response brief, but rather to intervenor's response to arguments first raised by petitioners regarding deference and interpretation. The reply brief is not allowed.

FACTS

The 131.55-acre property that is the subject of this appeal (the subject property) was previously part of the Haffner tract, a 171-acre property owned by the Haffners. The 171-acre property was the subject of Measure 37 and Measure 49 claims.[1]

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[1] We have outlined the history of Measures 37 and 49 previously and repeat the summary here:

> "In 2004, the voters approved Ballot Measure 37, which allowed the state and local governments facing a claim for compensation for loss of property value from restrictions on the use of property to waive certain land use regulations, to allow the owner to use property for a use permitted when the owner acquired the property.* * *"
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> "In 2007, the legislature enacted Oregon Laws 2007, chapter 424. That legislation was referred to the voters in the next election as

Following the passage of Measure 37, the Haffners filed a claim for relief pursuant to its provisions. Following the passage of Measure 49, the Haffners pursued a Measure 49 claim and the Oregon Department of Land Conservation (DLCD) approved the creation of nine additional homesites on the Haffner tract. Intervenor developed the nine Measure 49 homesites as a residential subdivision named the Vineyards at Gimpl Hill. Consistent with its vineyard theme, a portion of the remainder property was rented to a local vintner at the rate of $1 per year for the planting and management of a seven-acre vineyard. The nine Measure 49 lots were sold and intervenor filed the application that is the subject of this appeal to facilitate development of the remaining 131.55 acres of land, the subject property. As we discuss in more detail below, the subject property is located within a larger area designated in the county's comprehensive plan provisions that implement Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), as Peripheral Big Game Range and as groundwater limited for both quality and quantity.

> Ballot Measure 49 and the voters approved it. Measure 49 superseded Measure 37. * * *Measure 49 extinguished Measure 37 waivers and allowed a Measure 37 claimant to pursue one of three alternative 'pathways' under Measure 49. * * * Under Measure 49, a Measure 37 claimant could elect to seek a limited number of dwellings on newly created lots or could pursue a 'vested rights' claim for the full relief previously sought under Measure 37." *Friends of Yamhill County v. Yamhill County*, 74 Or LUBA 268, 271 (2016).

The planning commission was the initial review body for intervenor's proposal and was tasked with developing a recommendation for final action by the board of commissioners. The application considered by the planning commission identified the creation of 14 new residential lots as the anticipated future development on the subject property. The planning commission recommended the board of commissioners deny the submitted application.

Before the board of commissioners, intervenor sought the same comprehensive plan and zone changes (to Non-Resource and RR-5), but proposed future development be restricted to residential use on two new 40-acre lots (Lots 11 and 12), open space use on four new lots (Lots 14-17) and vineyard use on one lot (Lot 13). Record 138. The existing residence would be located on a reconfigured 7-acre Lot 10 of the original subdivision. *Id.*

Property to the north and east of the subject property is zoned Impacted Forest (F-2). Property to the south is zoned Exclusive Farm Use (EFU). Concerns raised during the hearing process included the character of the subject property as agricultural or forest land and potential disruption to designated Peripheral Big Game Range and groundwater quantity.

The board of commissioners ultimately approved intervenor's request to change the subject property's comprehensive plan designation from Forest to Nonresource and zoning designation from Impacted Forest to Rural Residential (RR-5). Petition for Review 2. As we discuss in more detail below, the board of commissioners also (1) applied a site review (SR) suffix to provide a monitoring

system for future development of the property, and (2) required recording of covenants limiting future development as a condition of approval "as part of any owner's subsequent division application enacting this approval." Record 4. This appeal followed.

OVERVIEW OF GOALS 3, 4 AND 5

Statewide Planning Goal 3 (Agricultural Lands) is "[t]o preserve and maintain agricultural lands." OAR 660-015-0000(3). "Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700." *Id.* Petitioners argue in their third assignment of error that the subject property is properly characterized and preserved as agricultural land.

Statewide Planning Goal 4 (Forest Lands) is

> "[t]o conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water and fish and wildlife resources and to provide for recreational opportunities and agriculture." OAR 660-015-0000(4).

Petitioners argue in their fourth assignment of error that the property should be characterized as forest land and managed to protect resources.

Goal 5 is "[t]o protect natural resources and conserve scenic and historic areas and open spaces." OAR 660-015-0000(5). In order to implement Goal 5,

local governments are required to "adopt programs that will protect natural resources." *Id.* When a new use is introduced into an area, the jurisdiction is required to determine whether the new use will conflict with a protected Goal 5 resource and, if a conflict will occur, is required to perform an economic, social, environmental and energy (ESEE) analysis. OAR 660-023-0040. Petitioners argue in their second assignment of error that the county failed to conduct the necessary ESEE analysis.

Petitioners' first assignment of error, however, is that the findings are overly broad and inconsistent and require remand for adoption of new findings. We begin our review there.

FIRST ASSIGNMENT OF ERROR

Findings supporting a decision must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those fact lead to the decision on compliance with the approval standards." *Heiller v. Josephine* County, 23 Or LUBA 551, 556 (1992). Petitioners argue that the county's findings are impermissibly vague with respect to documents incorporated by reference, and incorporate inconsistent documents. Petition for Review 8.

Petitioners first assert that the county findings are invalid because they are impermissibly vague. The county's decision includes a statement that the findings incorporate "[a]dditional findings and material in support of Board's approval * * * in the record, [including] the Applicant' ESEE analysis, the

Applicant's supplemental narratives and reports from qualified professionals." Record 68. Petitioners argue that the decision should be remanded "because it is impossible to know * * * which documents have been incorporated across the 3700+ page record." Petition for Review 9.

If the local government fails to adequately identify a document as findings, the local government may not rely on that document to support the decision. *Hess v. City of Corvallis*, 70 Or LUBA 283, 290 (2014). Findings lacking specificity as to documents the decision maker wishes to incorporate by reference do not, however, necessarily provide a basis for reversal or remand. Rather, they serve to limit the documents that may be relied upon to defend the decision on appeal. The purported incorporation of documents not clearly identified in the findings fails, and the local government may not rely on the documents to defend a specific adequate findings challenge. *Id.* at 290-291. In reviewing subsequent assignments of error, we will consider whether documents intervenor relies upon as support for the approval are identified with sufficient specificity in the findings. Standing alone, however, a general assignment of error that the findings include some ambiguity as to the incorporated documents is not a basis for reversal or remand.

Petitioners also point out specific inconsistencies in the record, alleging, for example, that there are inconsistent ESEE studies and staff reports and statements that the subject property does and does not have wetlands. Petition for Review 11, 12.

In support of their request for remand, petitioners cite *Larmer Warehouse Co. v. City of Salem*, 43 Or LUBA 53 (2002). In *Larmer,* the city decision was remanded when a city incorporated as findings both a staff report supporting denial and a staff report supporting approval. *Larmer* is not comparable to the present case, because the alleged conflicts before us relate to an ESEE study and staff report for the initial development plan proposal. We will not reverse or remand a decision based on inconsistent findings where the applicable findings are clear. As we held in *Central Bethany Dev. Co. v. Washington County*, 33 Or LUBA 463 (1997), "[n]o purpose would be served by remanding to allow the county to make explicit what is already obvious." The challenged findings in *Central Bethany* clearly related to an earlier proposal and did not nullify the relevant findings. To the extent the conflicting findings here relate to the proposal considered and rejected by the planning commission, they are clearly not applicable to the proposal as approved by the board, and erroneous inclusion in the findings is not a basis for reversal or remand. With respect to items in the ESEE study or staff reports relating to two different proposals, petitioners have not established a basis for remand.

Petitioners next argue that the decision contains inconsistent findings regarding the presence of wetlands. With respect to the presence of wetlands, petitioners have not established that this reflects a meaningful inconsistency. The section of the findings describing the location of the property generally includes a sentence stating that the property does not contain wetlands on the National

Wetlands Inventory. Record 24. Later in the findings, the county engages in a significantly more detailed discussion of wetland resources and criteria compliance, and notes that the National Wetlands Inventory mapping for Lane County shows three distinct wetlands on the subject property. Record 41. "ORS 197.835(11)(b) provides limited authority for LUBA to overlook minor discrepancies in findings."[2] *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169, 180-81 (2016). Accordingly, we will overlook minor errors. Petitioners do not point to a substantive discussion of wetlands that both states there are no wetlands on the property and applies legal standards to the property based on that presumption. Thus, an alleged inconsistency in the record concerning the presence of wetlands on the property is not grounds for reversal or remand. The adopted findings clearly find that wetlands exist on the subject property, and include a wetland protection discussion. Record 47-48.

The first assignment of error is denied.

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[2] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards of their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

SECOND ASSIGNMENT OF ERROR

As noted, Goal 5 is "[t]o protect natural resources and conserve scenic and historic areas and open spaces." OAR 660-015-0000(5). The subject property contains identified Goal 5 resources in the form of Peripheral Big Game Range and Groundwater Quantity limited. Petition for Review 18-19. Protection of Goal 5 resources is achieved in part by identifying uses which may conflict with a protected resource. OAR 660-023-0040(2). To identify conflicting uses, a local government must "examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area." *Id.* A determination that there are no conflicting uses must be based on the applicable zoning, rather than ownership of the site. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. *Id.* If the local government determines that a use may conflict with a protected Goal 5 resource, the county is required to "analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use." OAR 660-023-0040(4).

A. Peripheral Big Game Range

The county did not compare other uses allowed outright or conditionally in the RR-5 zone with uses allowed outright or conditionally in the F-2 zone with respect to potential conflicts with big game habitat. The county identified the "primary conflict" as residential use above the Oregon Department of Fish and Wildlife's (ODFW) recommended one dwelling per 40 acres. Record 42.

1. Uses

Petitioners argue that the county failed to evaluate, pursuant to OAR 660-023-0040, the expanded uses and residential densities in the RR-5 zone that could conflict with Peripheral Big Game Range as a result of the rezoning to RR-5. Petition for Review 23-24. Intervenor responds that the county was not required to evaluate uses other than the proposed residential development, stating:

> "LUBA has held repeatedly that it is appropriate for a local government to consider proposed or likely development resulting from a zone change as opposed to the 'worst case' or most intensive development that could theoretically result from the zone change." Response 20-21.

In support, intervenor cites three decisions concerning the adequacy of public facilities. *Id.* For the reasons we explain below, all of those cases are inapposite.

In *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 553, 557 (2007) we observed "that local governments have some latitude in assuming what uses will occur on properties subject to a zone change *for purposes of assessing the capacity of public facilities* to serve those uses." (Emphasis added.) *Bothman v. City of Eugene*, 51 Or LUBA 426, 432-34 (2006) also addressed public facilities. In *Bothman*, we upheld a planning commission determination that the local code did not require traffic study consideration of uses that could not practicably be sited on the property, particularly where additional review would be triggered if more than a given level of trips were generated by development. In *Rickreall Community Water Assoc. v. Polk County,* 53 Or LUBA 76, 109-10 (2008) we similarly held that the transportation planning rule

does not require consideration of "the maximum theoretically possible *intensity* of the most traffic-intensive allowed use," but that the focus is on the allowed uses in the new zone and not necessarily the proposed use. *Id.* (emphasis in original). We have therefore held that a local government may consider likely development when considering the adequacy of public facilities.

This assignment of error, however, challenges the county's findings regarding the impacts of potential new uses on protected Goal 5 resources, and does not involve consideration of the impacts of future development on public facilities under Goals 11 or 12. In *Welch v. City of Portland*, 28 Or LUBA 439, 443 (1994), when initially zoning the property, the city considered the uses allowed in the base zone and then applied an environmental conservation (EC) overlay to protect Goal 5 resources. We held that a later city decision rezoning the property to a different base zone had to identify conflicting uses potentially allowable under the new base zoning and then determine a means of protection. We concluded:

> "The city may ultimately decide the EC overlay is the appropriate resource protection program for the [property]. However, it may not assume the EC overlay as currently applied is adequate to satisfy Goal 5, without following the Goal 5 planning process based on the proposed new plan designation and the consequent allowable uses of the [property]." *Id.* at. 444.

We agree with petitioners that the county erred in failing to evaluate whether the change in zoning from a forest designation to a rural residential designation would introduce the potential for new uses which might conflict with

the Peripheral Big Game Range. For example, it appears that the RR-5 zoning district allows a number of non-residential uses and/or uses that are accessory to residential uses, including without limitation fire stations, schools, churches, home occupations, commercial and non-commercial kennels, private parks, playgrounds, and golf courses. Lane Code (LC) 16.231. On remand, the county must review the evidence and determine whether development with single family dwellings represents the most likely potential conflict under either forest or residential zoning. The county must also evaluate whether other uses allowed either outright or conditionally in the RR-5 zone would conflict with the Peripheral Big Game Range. The county must adopt findings explaining how protections based on avoiding impacts from single family residential development and other uses allowed in the RR-5 zone will also avoid potential conflicts to Peripheral Big Game Range. In any event, the county is required to show its work. Part of the work is analyzing whether the uses allowed in RR-5 zone could, in this case, create a conflict regarding big game habitat and groundwater. OAR 660-023-0040(2).[3]

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[3] OAR 660-023-0040(2) provides, in part:

> "Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments *shall examine land uses allowed outright or conditionally within the zones* applied to the resource site and in its impact area. Local

2. Density

As discussed below, as part of its program to achieve Goal 5, the county has adopted a standard of no more than one dwelling per 40-acres to protect Peripheral Big Game Range (Residential Density Standard). That standard is found in the Flora & Fauna March 1992 Lane County Comprehensive Plan Working Paper Revisions document (Flora and Fauna Working Paper), found beginning at Record 2843.[4] The Flora and Fauna Working Paper indicates that

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governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. The following shall also apply in the identification of conflicting uses:

"(a) If no uses conflict with a significant resource site, acknowledged policies and land use regulations may be considered sufficient to protect the resource site. *The determination that there are no conflicting uses must be based on the applicable zoning rather than ownership of the site.* (Therefore, public ownership of a site does not by itself support a conclusion that there are no conflicting uses.)" (Emphases added.)

[4] The parties agree that the Flora and Fauna Working Paper policies provide applicable criteria in the designated Peripheral Big Game Range. The Flora and Fauna Working Paper discusses potential impacts related to agricultural and forest uses and states that the primary conflict to big game is residential density. *Id.* at 2866. After identifying residential use as the primary conflict to big game habitat, the Flora and Fauna Work Paper explains:

"ODFW has recommended overall residential densities for Peripheral Big Game Range at one dwelling unit per 40 acres * * * to restate the conflict: overall residential density greater than one

the initial intent was to preserve the 40-acre standard through *zoning*. However, the county's inclusion of the subject property in the Peripheral Big Game Range inventory is geographical and is not tied to or dependent on the current F-2 zoning.[5] The challenged decision does not purport to remove the subject property from the Peripheral Big Game Range inventory and associated habitat protections, including the limitation of one dwelling per 40 acres.

The county determined that rezoning the subject property to RR-5 did not conflict with the Residential Density Standard because the approval, as conditioned, limits future residential development to three houses on the entirety of the 131.55-acre subject property and thus satisfies the Residential Density Standard. Record 42.

Petitioners assert that the county's analysis with respect to Peripheral Big Game Range improperly applied this Residential Density Standard. Petitioners argue that the housing developed as part of the Measure 49 Vineyard at Gimpl

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> dwelling unit/40 acres in Peripheral Range * * * conflicts with habitat for big game." *Id.* at 2865.

[5] The county explained the Goal 5 big game inventory as follows:

> "**Big Game Range:** The inventory of this Goal Five resource divides the entire county into three categories of Big Game Range using the ODFW classifications: Major, Peripheral and Impacted. ODFW defines Big Game Range generally as '[a] geographic area occupied by deer, elk, cougar, black bear, mountain sheep, mountain goat, moose, silver gray squirrel or antelope, often on a seasonal basis.' OAR 635-405-0005 (5). The Subject Property appears in the County inventory as Peripheral Big Game Range." Record 2200.

Hill subdivision should be included in the density calculation, and if the existing subdivision housing is included, the 40-acre density standard is violated and an ESEE analysis is required. Petition for Review 28.

Intervenor responds that the county adopted an implied interpretation of the Residential Density Standard as requiring only consideration of the subject property, citing the findings at Record 42, set out above. Response Brief 18. Intervenor argues that because the Residential Density Standard is a "local standard," LUBA's standard of review of the county's interpretation of it is set out in ORS 197.829(1). *Matiaco v. Columbia County*, 42 Or LUBA 277, *aff'd*, 183 Or App 581, 54 P3d 636 (2002) (affirming the county's interpretation of its residential density standard under ORS 197.829(1)). We agree with intervenor that the Residential Density Standard is a local standard and that accordingly, the question here is whether the county governing body's interpretation of the Residential Density Standard is not inconsistent with all of the express language relevant to the interpretation, or the purposes and policies underpinning the regulation.

Petitioners do not identify any provision of the county's land use regulations or comprehensive plan that the county's findings are inconsistent with. The Flora and Fauna Working Paper the county incorporated into its findings explains that the Big Game Range protection:

> "premise is to work overall density figures into minimum lot size recommendations for regions of the County, rather than postponing the issue by referrals to ODFW for every land division application.

> The anticipated result is to base zoning by region on the overall residential densities or ODFW minimum parcel size recommendations, thereby creating no conflict with Goal 5." Record 2865-66.

The Flora and Fauna Working Paper states that the county will be divided into regions[6] and the county will determine the number of existing residences and the:

> "additional number of residences allowable to still fall within the overall density level. Built upon and committed areas are subtracted out, as they are treated as Impacted Range. From the figure of remaining residences and acreage, a residential carrying capacity will be determined. This figure, or the ODFW figure of 40 * * * acres, whichever is lesser, will be recommended in the region for residential density for big game purposes.
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> "* * * * *
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> "If this figure is ever exceeded, it constitutes a conflict with Big Game Range." Record 2867.

The body of the Flora and Fauna Working Paper therefore states that the lesser of this figure or the county's 40-acre figure will be "recommended in the region for residential density for big game purposes." *Id.* If this figure is exceeded, there is a conflict and an ESEE analysis is required. *Id.* Ultimately, however, the Flora and Fauna Working Paper identified as its selected strategy that "ODFW recommendations on overall residential density with Peripheral and

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[6] The Flora and Fauna Working Paper explains that "[t]he County will be divided into regions convenient for planning purposes. These have not yet been determined, but will probably result in 10-20 regions in the County." Record 2866.

Major Big Game Range shall be a determinant in minimum parcel size for regions of the County." Record 2875.

In the challenged decision, the county did not identify the level of residential density allowed in the F-2 zone or compare that density to the level of residential density allowed in the RR-5 zone. On appeal, no party identifies the level of residential density allowed in the F-2 zone. However, petitioners argue that "[i]t is undisputed that the RR-5 zone allows a greater density than one dwelling unit per 40 acres" and that "the allowance for dwellings and residential homes at the density allowed in the RR-5 zone is vastly different than a template dwelling in the F-2 zone." Petition for Review 25, 24.

We observe that the F-2 zone does not provide a general residential density standard. The use table for impacted forest zones lists six types of dwellings allowed in the F-2 zone. LC Table 16.211-1, 2.1–2.6. Those dwellings include: (1) caretaker residence for public parks and public fish hatcheries, (2) large tract forest dwelling, (3) lot of record dwelling, (4) template dwelling, (5) replacement dwelling, (6) temporary hardship dwelling. *Id.* A large tract forest dwelling may be allowed in the F-2 zone on a tract that is "at least 160 contiguous acres or 200 acres in one ownership that are not contiguous but are in Lane County or adjacent counties and zoned for forest use." LC 16.211(3)(a)(ii). The remaining five types of dwellings do not require a particular minimum lot or parcel size. LC 16.211(3). The minimum lot or parcel size for new or adjusted lots or parcels in the F-2 zone is 80 acres. LC 6.211(7); *see also* ORS 215.780 (providing generally applicable

80-acre minimum requirement); OAR 660-006-0026 (same). However, the F-2 zoning indicates that predominant land ownerships are 80 acres or less. Accordingly, as we understand it, the county did not quantify a residential density allowed in the F-2 zone to compare to the residential density allowed in the RR-5 zone, and instead used the ODFW 40-acre standard for areas inventoried as Peripheral Big Game Range.

State law affords local governments fairly broad discretion in identifying and managing Goal 5 resources. However, after a local government has identified (*i.e.*, inventoried or listed) a Goal 5 resource, state law requires local governments to follow prescribed procedures to ensure measured consideration of consequences to inventoried Goal 5 resources from planning and development. This case involves a post-acknowledgement plan amendment (PAPA) changing the subject property comprehensive plan designation from forest land to nonresource land and rezoning the property from impacted forest (F-2) to rural residential, five acre (RR-5). Local governments are required to apply Goal 5 in consideration of a PAPA if the PAPA affects a Goal 5 resource. A PAPA affects a Goal 5 resource if it "allows new uses that could be conflicting uses with a Goal 5 resource site * * *." OAR 660-023-0250; *see also Nicita v. City of Oregon City*, ___Or LUBA ___ (LUBA No 2018-102, Jan 3, 2019) (slip op at 7), *aff'd,* 297 Or App 192, __P3d__ (2019) (observing that the initial evaluation under OAR 660-023-0250 presents a fairly low threshold for what "could be" conflicting uses with respect to a particular Goal 5 resource site); *Id.* ("On its face, a zone change

that significantly increases the volume or intensity of development impacts on a natural resource compared to development under the existing zoning almost certainly would, without more, exceed that low threshold, by allowing uses that 'could be' conflicting uses.").

The local government applies Goal 5 to a PAPA through the ESEE analysis prescribed in OAR 660-023-0040. Again, the local government has some latitude in applying the ESEE analysis. OAR 660-023-0040(1) ("The ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected."). The first step in the ESEE process is to identify conflicting uses. OAR 660-023-0040(1)(a). Whether a specific use conflicts is determined by the applicable zoning, not the ownership of the site, limitations in specific proposed development, or limitations imposed in the PAPA approval. *See* OAR 660-023-0040(2) ("To identify [conflicting] uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area."); OAR 660-023-0040(2)(a) ("The determination that there are no conflicting uses must be based on the applicable zoning rather than ownership of the site.").

After the local government has identified the conflicting use and determined the impact area, the local government must "analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use." OAR 660-023-0040(4). "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." OAR 660-023-0040(5). However, the ESEE process compels the local government to complete an analysis and make a determination. For example, "[a] local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent." OAR 660-023-0040(5)(b).

In this case, with respect to big game habitat, an inventoried Goal 5 resource, the county avoided the ESEE analysis process entirely by determining that residential uses otherwise allowed outright in the RR-5 zone did not constitute a conflicting use with big game habitat because "the Applicant's revised development plan limits residential development to [two] additional Residential Lots (Lots 11 and 12) that are each forty (40) acres in size which establishes the overall density of the Subject Property at full development to be less than ODFWs 40-acre minimum (three Residential Lots on 131 acres)." Record 42. That approach is inconsistent with the ESEE rule, which requires that conflicting uses be examined with respect to the "land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area." OAR 660-023-0040(2).

Residential density allowed outright in the RR-5 zone at one dwelling per five acres is a land use that conflicts with the big game habitat inventory, protection of which is ensured by residential density limited to one dwelling per

40 acres. The county may have decided that, because the PAPA does not affect the big game habitat inventory, existing regulations will prohibit the more intensive development otherwise allowed in the RR-5 zone. *See Nicita*, ___ Or LUBA at ___ (LUBA No 2018-102, Jan 3, 2019) (slip op at 7) ("a local government can avoid further analysis under OAR 660-023 only if it concludes, supported by substantial evidence, that existing regulations that protect the resource are sufficient to 'eliminate the possibility of conflicts' from more intensive development allowed under the proposed zoning.") The county may also decide to limit the impact of conflicting uses by imposing conditions of approval that would potentially limit development on the subject property, despite the RR-5 zoning. Indeed, it appears that the county intended that result in the challenged decision. However, the county could not avoid the ESEE analysis by relying on limitations in the application or subsequently imposed conditions of approval. Instead, the county was required to follow the ESEE analysis required by OAR 660-023-0250 and prescribed in OAR 660-023-0040. This subassignment of error is sustained.

B. Groundwater Limited

The Water Resources Working Paper conflict resolution section provides:

> "For a quantity limited aquifer otherwise acceptable development should be allowed if an adequate showing is made that water will be available for a foreseeable period in the future, and that the additional withdrawal will not negatively impact surrounding users."Record 3179.

Petitioners argue that the findings fail to adequately address the potential impact of new development on existing water users. Petition for Review 29. The Water Resources Working Paper referenced in the findings is part of the record. Record 43, 3168. The parties agree that the Water Resources Working Paper provides the relevant approval standard.

As petitioners observe, the findings consider only the first part of the provision, stating, "[w]ith respect to quantity, the plan resolves that residential development and other uses requiring groundwater should be allowed if a showing is made that the water will be available for the foreseeable future." Record 43. The findings do not consider whether "the additional withdrawal will not negatively impact surrounding water users." Record 1264; 43-45.

The findings discuss LC 13.050(13)(c)(i) which provides that aquifer tests are not required for proposed lots greater than twenty acres in size. Record 44. The county concluded that although the intervenor consultant's aquifer report was not required pursuant to LC 13.050, the aquifer study provided by intervenor was substantial evidence of sufficient groundwater for the subject property. Record 45. However, the findings that address OAR 660-023-0040 do not address groundwater quantity impacts on surrounding lands or explain how the LC will protect existing users.

Intervenor argues that other findings for other applicable criteria conclude that existing water users will not be adversely impacted. Response 23. The findings discuss Rural Comprehensive Plan Policy 19, which provides in part that

rural residential designations for non-resource lands shall be one residence per five or ten acres. Record 124. "Domestic water supply availability" is one of the Policy 19 approval criteria. *Id.* The Policy 19 findings conclude that intervenor's Aquifer Analysis provides a thorough analysis of water availability for the new lots as well as the existing subdivision lots, noting that the original 10 lots will be served by the community water system and the new residential lots, 11 and 12, will have individual wells. *Id.* at 56-57. Based on the analysis, the county found that the domestic water supply for the subject property was suitable under Policy 19.

Intervenor also points to evidence in the record that existing water users will not be impacted by the proposed development. ORS 197.835(11)(b) provides that

> "[w]henever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government with direction indicating appropriate remedial action."

The "clearly supports" standard provided by ORS 197.835(11)(b) is high and is not met where there is conflicting evidence in the record. *Doob v. City of Grants Pass*, 34 Or LUBA 480, 484 (1998). Petitioners submitted a report from groundwater consultant Mark Yinger. Record 294-98. The material cited by intervenor supports a finding of adequate water to serve existing domestic users

within the subdivision, but it fails to cure the county's findings problem. The county findings do not address the criticisms in the Yinger report or the testimony from neighbors concerning their water supply. This subassignment of error is sustained.

On remand, the county must address whether the change in zoning potentially introduces the potential for new conflicting uses for Peripheral Big Game Range on the subject property and if so, conduct the requisite ESEE analysis. If the county adopts conditions of approval to avoid conflicts with Peripheral Big Game Range, the county must explain how those conditions effectively avoid the conflict. The county must also address the adequacy of water for existing users and address the competing evidence concerning the groundwater quantity issue.

This assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

OAR 660-033-0020 sets forth measures by which land may be classified as agricultural in character. Petitioners argue that the subject property is properly classified as agricultural because it is classified that way under a general Lane County report. Petitioners also argue that the county improperly relied upon a site-specific study of soil classifications on the subject property. Petitioners next argue that the county should not consider encumbered lands when evaluating the percentage of the subject property properly classified as agricultural. Lastly, petitioners argue that the property is properly considered agricultural because

there is evidence the property is amenable to farm use alone or in conjunction with other properties.

A. Site Specific Study

OAR 660-033-0020(1) defines agricultural land as including "[l]ands classified by the U.S. National Resources Conservation Service (NRCS) as predominately Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon." Petitioners rely on the Lane County Soil Rating for Agriculture, Lane County Land Management Division, August 1997 for the conclusion the property has predominately I-IV soils. Petition for Review 36-37. OAR 660-033-0030(5) provides that agricultural land may, however, be identified using a more detailed soil study. Intervenor submitted a site-specific study of soils to DLCD for its review consistent with OAR 660-033-0045. DLCD had the report reviewed by an outside consultant and the DLCD consultant reported some concerns with the initial report. Petition for Review 37. Following various communications concerning the DLCD consultant's concerns regarding the initial report, DLCD reported that its consultant was satisfied with the final site-specific report. Record 1575.

Petitioners argue that not all concerns initially raised by the DLCD consultant were reflected in changes to the final report so the county should not have relied upon the final report. Petition for Review 38. Petitioners conclude that "[b]ecause the findings fail to respond to the issues raised by Gallagher regarding the 43E complex, the findings are inadequate. Similarly, because, there

is no explanation for delineating 43E complex without further investigation, the findings of predominance are not supported by substantial evidence." Petition for Review 41. As intervenor observes, the county findings state:

> "The soils assessment concluded that the soils within the Subject Property did meet the criteria for Non-resource designation* * *. * * *
>
> "We adopt as findings in support of this conclusion entire report of Mr. Rabe and [the consulting company employing Mr. Rabe.] Additionally, that report has been reviewed and approved by [DLCD]. DLCD independently retained a third-party consulting soil scientist to review the CES report. The consulting soil scientist concurred with CES methodology, analysis and findings.* * *
>
> "The [consulting firm's study] conclusions* * * demonstrate that the Subject Property is not Agricultural Land as defined by Goal 3 because less than fifty percent (50%) of the Subject Property is Class I-IV soil classifications."[7] Record 30.

The findings must be supported by substantial evidence, that is evidence upon which a reasonable person would rely. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). The ultimate conclusion of the expert retained by DLCD is evidence a reasonable person would rely on to make a decision that the concerns raised as part of the initial review by a DLCD consultant were adequately resolved and is therefore substantial evidence. Petitioners reference numerous

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[7] The county expressly adopted the Rabe, and his consulting firm's report as findings. Record at 30.

concerns the DLCD consultant raised concerning the initial report but do not address the fact that DLCD's consultant ultimately found "the revised soils assessment to be soundly and scientifically based." Record 1575. This subassignment of error is denied.

Petitioners also argue that "[f]indings fail to demonstrate the 131.55-acre property consisting of 42% class I-IV soils is not land that consists predominately of class I-IV soils" because the property already has use restrictions on parts of the property as a result of the presence of features such as a Bonneville Power Administration easement and wetlands. Petition for Review 41. Petitioners provide no legal support for their argument that some lands should be excluded from the analysis and therefore provide no basis for reversal or remand. *Deschutes Development Company v. Deschutes* County, 5 Or LUBA 218 (1982).

This subassignment of error is denied.

B. Suitability for Farm Use

In addition to classifying land as agricultural based on soil quality, agricultural land is defined to include land suitable for farm use taking into consideration soil fertility, suitability for grazing and other crops, climatic conditions, irrigation water, existing land use patterns, technology and energy inputs required, and accepted farm practices. OAR 660-033-0020(1)(a)(B). The county ultimately concludes that "[o]verall, the Subject Property is not land that is suitable for farm use considering the above-discussed factors. Such use would be impractical, inefficient and economically not possible." Record 33.

Stephen Caruna, an agronomist retained by intervenor addressed the seven factors in OAR 660-033-0020(1)(a)(B) in detail in his report. This report is clearly part of the findings as the county states "[t]hese seven factors were addressed in detail by Stephen Caruana, a qualified agronomist retained by the Applicant, *in two separate reports that we hereby adopt as findings* in support of the general conclusion that the Subject Property is not suitable for farm use considering all of the factors set forth in the rule and addressed by Mr. Caruana with regard to the Subject Property." Record 31 (emphasis added). These findings specifically address suitability of the site for activities such as grazing, yet petitioners do not address these findings in their petition for review or show why they are inadequate with respect to "the raising, harvesting and selling of crops, the feeding, breeding, management and sale of livestock, poultry and honeybees; animal husbandry; and the stabling and training of equines." Petition for Review 44. Petitioners' failure to address the county's findings results in a failure to provide a basis for reversal or remand. *Deumling v. City of Salem*, 76 Or LUBA 99, 109 (2017). We have also held that a county is not required "to consider whether the property is suitable for farm use based on the cultivation of marijuana (or any other crop) in ways that are entirely removed from the agricultural qualities of the land." *Landwatch Lane County v. Lane County,* 77 Or LUBA 368, 373, *aff'd*, 294 Or App 415, 421 P3d 432 (2018). Petitioners do not explain how the cultivation of honeybees is not removed from the agricultural qualities of the land.

Petitioners also argue that the property is properly considered agricultural land "because it is adjacent to or intermingled with lands in capability classes I-IV within a farm unit." Petition for Review 44; OAR 660-033-0020(1)(b). Petitioners base this argument on the fact that the portion of Phase 1 of the Gimpl Hill Vineyard subdivision planted with grapes as part of a vineyard theme was operated by the owner of an adjacent vineyard. Petition for Review 45. Petitioners argue that the property should be considered farmland because intervenor did not demonstrate [by substantial evidence] that the subject property is not suitable for any farm use independently or in combination with other property, and that the findings improperly disregard evidence and statements that the property is currently and has previously been used for farm use.

Petitioners argue that the findings disregard evidence and statements by intervenor and neighbors that the property is in farm use in the form of vineyards. Petition for Review 43. The county findings state that the prior owner, Dr. Haffner, had a "hobby farm" on the property and the developer leased land to a vineyard operator with facilities on nearby property for $1 per year as a landscaping feature supportive of the subdivision's vineyard theme. Record 30-31. OAR 660-033-0020(1)(a)(C) treats as agricultural land, "[l]and that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." As the county explained:

> "The presence of the vineyards is the result of the Applicant's desire to establish a theme for the subdivision. The vineyards on the Subject Property will remain, not as a 'farm unit', but rather as a

> unique circumstance in which a small portion of a generally unproductive parcel can be maintained as a vineyards/landscaping feature solely because the land costs for the vineyards are subsidized by the Applicant." Record 34.

In determining whether a land use is a "farm practice," a local government may consider whether a reasonable farmer would be motivated to put the land to agricultural use "for the primary purpose of obtaining a profit in money." 77 Or LUBA 368, 371. Neither of the hobby farm or vineyard uses reflected a use of the property for farming for the primary purpose of obtaining a profit in money. Record 30-31. The county properly determined that the vineyard is not agricultural land. Accordingly, the subject property is not necessary to permit any farm practices in the vineyard and the subject property is not "agricultural land."

This subassignment of error is denied.

This assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

OAR 660-015-0000(4) provides that in the context of a plan amendment involving forest lands, "forest land shall include lands which are suitable for commercial forest uses including adjacent and nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources." Petitioners argue that the county misconstrued applicable law and made findings not supported by substantial evidence because the county failed to demonstrate that the subject property is not "other forested land that maintains soil, air, water and fish and wildlife resources." Petition for Review 46. Petitioners argue that the county misconstrues

"the phrase 'other forested lands' to require a redundant determination of whether soils are predominately forested lands." Petition for Review 47.

The county's findings begin by concluding that a baseline for considering this factor is whether the subject property is predominately forested. Record 38. Predominately forested is not, however, part of the test for whether property constitutes other forested lands necessary to protect identified resources.

The Forest Productivity Analysis provided substantial evidence "that the Property has only isolated areas that contain evergreen trees and that tree growth is constrained and limited by the condition of the Property." Response Brief 35. There are small stands of timber on the property. Record 1515. The county held that the trees are at best isolated on the subject property and constrained "by shallow soils, steep slopes and wet conditions." Record 38. Large portions of the site are grassland with thin soil and exposed rock. *Id.* Brush present on the property includes "blackberry, scotch broom, poison oak, rose, hazel and vine maple." Record 1515. The county reasonably concluded that the subject property is not predominately forest land. This is not, however, the end of the inquiry.

LUBA has held that "[t]he mere presence of trees on the property is not itself sufficient" to establish that the property constitutes other forested lands that maintain soil, air, water and fish and wildlife resources. *Doob v. Josephine County,* 48 Or LUBA 227, 243 (2004). In *Doob*, the county found that the property at issue was not other forested land because it was not within a wildlife

habitat, or fisheries habitat area, was not needed to protect the watershed or to preserve wetland, urban buffers or open space. We held:

> "Absent some reason to believe that the subject property must remain in forest zoning in order to maintain soil, air, water and fish and wildlife resources, something petitioner has not established, the county's findings that the property is not 'other forested lands' are adequate and supported by substantial evidence." *Id.* at 243-44.

The county's findings with respect to this criterion do not address whether the property must remain in forest zoning in order to maintain soil, air, water and fish and wildlife resources. As we noted above, the county first concludes that the property must be predominately forested. We agree with petitioners that this is not the correct standard for this prong of the test. The county goes on to state:

> "Beyond this basic test, the identified resource of this criterion (soil, air, water and fish and wildlife resources) are either not present or are not relevant or unique to the Subject Property under this section of the rule. No permanent water feature or fish habitat exists on the property. * * * There is no evidence of any kind of wildlife population most likely because of the extensive rural residential developments that border the property. That same development further demonstrates that air resources will not be affected if this amendment is approved." Record 38.

The findings do not explain why a water feature must be permanent in order to be considered. In addition, the record is clear that the subject property contains wetlands. Intervenor argues in its response that the findings recognize that federal and state environmental laws will require a permit to develop wetlands. Response 35. This finding in another part of the county decision does not, however, address maintaining the water feature. Intervenor argues that the

county found that the proposed development will not impact wetlands because "the Applicant is committed to development of the property without any disturbance to wetlands" but does not clarify how the decision ensures no disturbance to wetlands. Record 41.

The findings do not respond to the testimony from area residents concerning the presence of wildlife, instead concluding that there is no evidence of wildlife, likely because of the neighboring development. Record 38. Neighbors testified that they in fact observed wildlife in the area and an ODFW staff member noted that he had not seen wildlife on the subject property but would expect such wildlife to exist. Petition for Review 41. Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Metropolitan Area Local Government Boundary Com.,* 43 Or App 849, 853, 604 P2d 896 (1979). Rather than doing so, the county adopted broad findings that wildlife is not observed in the area, likely due to the neighboring development, and that there are no permanent water features. On remand, the county must address the other forested areas prong of the test and evaluate whether the property must remain in forest zoning in order to protect the listed features.

This assignment of error is sustained.

The county's decision is remanded.