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

OREGON DEPARTMENT OF FISH AND WILDLIFE, DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, JERALD SIMMONS, VERLINDA SIMMONS, LEEROY HORTON, LARRY TURNBOW, AARON BORROR, REBECCA BORROR, and FOREST GLEN OAKS INC.,
Petitioners,

vs.

LAKE COUNTY,
Respondent,

and

OBSIDIAN SOLAR CENTER LLC,
Intervenor-Respondent.

LUBA Nos. 2019-084/085/093

OREGON DEPARTMENT OF FISH AND WILDLIFE, DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, JERALD SIMMONS, VERLINDA SIMMONS, LEEROY HORTON, LARRY TURNBOW, AARON BORROR, REBECCA BORROR, and FOREST GLEN OAKS INC.,
Petitioners,

vs.

LAKE COUNTY,
Respondent,

and

MOREHOUSE SOLAR LLC,
Intervenor-Respondent.

LUBA Nos. 2019-086/087/088

FINAL OPINION
AND ORDER

Appeal from Lake County.

Erin L. Donald, Portland, filed a petition for review and reply brief on behalf of petitioners Oregon Department of Fish and Wildlife (ODFW) and Department of Land Conservation and Development (DLCD). With her on the briefs were Ellen F. Rosenblum and Steven E. Shipsey. Steven E. Shipsey argued on behalf of petitioners ODFW and DLCD.

Micheal M. Reeder, Eugene, filed a petition for review and a reply brief and argued on behalf of petitioners Simmons *et al*. With him on the briefs was Law office of Mike Reeder.

No appearance by respondent.

Elaine R. Albrich, Portland, filed the response briefs and argued of behalf of intervenors-respondents. With her on the briefs were Caitlin P. Shin, Olivier Jamin and Davis Wright Tremaine, LLP.

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

ZAMUDIO, Board Member, did not participate in the decision.

REMANDED 04/29/2020

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal two county decisions that approve conditional use permit (CUP) applications for two 320-acre solar photovoltaic facilities on agricultural land.

FACTS

On June 20, 2019, intervenor-respondents Obsidian Solar Center LLC (Obsidian) and Morehouse Solar LLC (Morehouse) (we refer to Obsidian and Morehouse together as the Solar Companies) each applied to the county for CUPs to construct commercial utility facilities, specifically, solar photovoltaic energy facilities.[1] Each facility will be located on a separate 320-acre site, to be

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[1] OAR 660-033-0130(38)(f) defines "photovoltaic solar power generation facility" as follows:

> "'Photovoltaic solar power generation facility' includes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity. This includes photovoltaic modules, mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components. Photovoltaic solar power generation facilities also include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances. For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as any existing and proposed facilities

partitioned from a larger 2,374-acre tract owned by Richard and Virginia Morehouse. The proposed sites carry a comprehensive plan map designation of Agriculture (A) and are zoned for Agricultural Use (A-2) pursuant to the Lake County Zoning Ordinance (LCZO). Soils on the proposed sites are rated Class VI or above, have no water rights, and are deemed nonarable land. The proposed sites are within the Oregon Department of Fish and Wildlife's (ODFW's) mapped big game winter range, although they are not inventoried on the county's comprehensive plan inventory of winter range habitat. The sites are also within an area known to provide habitat to two "strategy species" included as state "Species of Greatest Conservation Need" that live underground in burrows: pygmy rabbits and burrowing owls. Record 355.[2] The proposed facilities will involve permanent ground disturbance to construct access roads, ground pads and other infrastructure, and each site will be surrounded by a seven-foot-high fence designed to exclude both big game and small mammals.

> determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or individuals shall be considered to be in common ownership, regardless of the operating business structure. * * *"

[2] The records in these consolidated appeals include two independent sets of records for each proposed site. However, the two decisions and supporting records are very similar and differ in no material ways, as far as we can tell. Accordingly, for convenience we will cite only to the record in LUBA No. 2019-084 *et seq*.

ODFW and the Solar Companies had previously consulted regarding the proposed development at both sites as part of an application the parent company of the Solar Companies filed with the Oregon Energy Facility Siting Council (EFSC), seeking EFSC approval of a larger solar energy project in the area. As part of that EFSC consultation process, ODFW determined that development of the two sites would result in adverse impacts to wildlife, and that the impacts could not be avoided or minimized. Obsidian conducted biological surveys of both sites. At the Obsidian site, the survey found no evidence of pygmy rabbits or burrowing owls. At the Morehouse site, the survey found one active pygmy rabbit burrow complex, approximately 1.5-acre in size. As part of the EFSC process, ODFW and the Solar Companies began coordinating on a mitigation plan to offset impacts to winter range and sensitive species, but at the time of the county's final decision on the two CUP applications on appeal, ODFW and the Solar Companies had not reached an agreement on mitigation.

On July 16, 2019, the county planning commission denied both the Obsidian and Morehouse CUP applications, based on a local suitability standard. Obsidian and Morehouse appealed the planning commission decisions to the county board of commissioners. ODFW and the Department of Land Conservation and Development (DLCD) (the state agencies) also appealed the planning commission decision, arguing that the planning commission erred in concluding that OAR 660-033-0130(38)(j)(G), part of an administrative rule

governing development of solar facilities on nonarable agricultural land, is not an approval criterion for the two CUP applications.[3]

As discussed below, the board of county commissioners agreed with the state agencies that OAR 660-033-0130(38)(j)(G) is an applicable approval standard, and imposed a condition of approval, Condition 13, intended to ensure compliance with OAR 660-033-0130(38)(j)(G). Condition 13 states:

> "Prior to construction, the applicant and ODFW will work cooperatively to develop an agreement for project-specific mitigation to offset the potential adv[e]rse effects of the facility. The mitigation agreement will be based on the results of the applicant's 2018 Habitat Assessment and Biological Resources Report dated August 2019 included in the record. If the applicant and ODFW cannot agree on what mitigation will be carried out, the County is responsible for determining the appropriate mitigation, if any." Record 74.

In its final decision issued August 21, 2019, the board of commissioners reversed the planning commission decisions denying the CUP applications, and approved the Obsidian and Morehouse applications. These appeals followed.

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[3] OAR 660-033-0130(38)(j)(G) is quoted in full below. As relevant here, OAR 660-033-0130(38)(j)(G) provides:

> "* * * If the applicant's site-specific assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the facility. Where the applicant and the resource management agency cannot agree on what mitigation will be carried out, the county is responsible for determining appropriate mitigation, if any, required for the facility."

MOTIONS REGARDING EXTRA-RECORD DOCUMENTS

A. Motion to Take Official Notice/Motion to Strike

Intervenors request that LUBA take official notice of five sets of documents, which fall into three categories. The first category includes legislative history of OAR 660-033-0130(38) and ORS 215.446. No party objects to LUBA's consideration of these documents, and intervenors' request is granted.

The second category consists of an ODFW publication entitled "2013 ODFW Oregon Big Game Winter Range Habitat." Intervenors argue that ORS 40.090(1) authorizes LUBA to consider this document, which is offered to support intervenors' argument, advanced in a footnote, that ODFW improperly uses the guidance document to impose new legal requirements on the county and applicants, requirements not found in applicable administrative rules and statutes.[4] In their motion to strike, the state agencies object, arguing that the

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[4] ORS 40.090 defines "law judicially noticed" to include, in relevant part:

> "(1) The decisional, constitutional and public statutory law of Oregon, the United States, any federally recognized American Indian tribal government and any state, territory or other jurisdiction of the United States.
>
> "(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.
>
> "* * * * *

ODFW guidance document is not a source of cognizable "law" as defined at ORS 40.090(1). In response, intervenors concede that point, but argue that the guidance document is an official publication of a state agency, and thus subject to judicial notice under ORS 40.090(2). We agree with intervenors that LUBA may take notice, for what it is worth, of an official state agency publication that offers guidance on how the agency believes state law should be applied. *See Foland v. Jackson County*, 18 Or LUBA 731, 740 (1990) (taking notice of a DLCD publication entitled "Destination Resort Handbook: A Guide to Statewide Planning Goal 8's Procedures and Requirements for Siting Destination Resorts").

The third category includes documents collected in Appendix A to each response brief, which relate to November and December 2019 county board of commissioners' meetings at which, intervenors argue, the commissioners approved a mitigation plan. The documents in Appendix A include mitigation plans for each site and the minutes of two board of commissioners' meetings. Intervenors argue that LUBA may consider all of the documents in Appendix A for the limited purpose of determining whether an appeal has become moot. *See Blatt v. City of Portland*, 21 Or LUBA 337, 342, *aff'd*, 109 Or App 259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992) (pursuant to ORS 197.805, LUBA will

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> "(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015."

consider facts outside the record where they are essential to determining whether the Board has jurisdiction or whether an appeal is moot). As discussed below, intervenors contend that in the November 25, 2019, and December 4, 2019 meetings, the commissioners approved mitigation that, intervenors argue, renders moot the state agencies' appeal, which is focused on challenges to Condition 13.

The state agencies object to consideration of the entirety of the documents in Appendix A, with the exception of the November 25, 2019, and December 4, 2019 meeting minutes, which they agree may be considered for the limited purpose of resolving the mootness issues raised on appeal. The state agencies move to strike all other documents in Appendix A.

Intervenors respond that consideration of all documents in Appendix A would aid LUBA's review of the mootness dispute. We agree with intervenors. As discussed below, the parties disagree on what, exactly, the board of commissioners achieved in the November 25, 2019, and December 4, 2019 meetings. The minutes of the November 25, 2019, and December 4, 2019 meeting are perhaps the most direct evidence available to resolve that dispute, but consideration of the other documents in Appendix A, including the proposed mitigation plans, would likely inform LUBA's understanding of what the board of commissioners intended and the practical effect of the post-decision meetings regarding Condition 13. Accordingly, LUBA will consider all of the documents in Appendix A for the limited purpose of resolving the parties' mootness dispute.

B. Motion to Strike Portions of Response Briefs/Motion to Take Evidence

The state agencies also move to strike arguments in the joint response briefs that, they argue, misrepresent the actions the board of commissioner took as reflected in the November 25, 2019 and December 4, 2019 minutes. According to the state agencies, the minutes show that the commissioners approved only a first mitigation step, involving only approximately 15 acres of the two proposed sites, and did not approve further steps for full mitigation, which are still under negotiation with ODFW. Accordingly, the state agencies request that LUBA disregard suggestions in the response briefs to the effect that the county approved a full mitigation plan for the proposed facilities.

In response, intervenors state that they did not intend to mischaracterize the effect of the board of commissioners' November 25, 2019, and December 4, 2019 meetings. Intervenors attach to their response Exhibits A and B, which include additional documents and a transcription of the audio recording of the meetings, and request that LUBA consider these additional documents and transcription, pursuant to a motion to take evidence outside the record under OAR 661-010-0045, if necessary.[5] Intervenors argue that reviewing the additional

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[5] ORS 197.835(2)(a) limits LUBA's evidentiary review to the local record. However, ORS 197.835(2)(b) and OAR 661-010-0045 allow the Board to consider extra-record evidence in specified circumstances. The specified circumstances listed in the statute and rule do not include extra-record evidence that may be necessary to resolve disputes over the Board's jurisdiction, including mootness. However, the Board has long held that it has inherent authority to

documents and transcription would help LUBA understand more fully what the commissioners intended those proceedings to accomplish, and thus aid LUBA in resolving the dispute over mootness.

We agree with intervenors. LUBA will consider the additional documents and transcription attached to intervenors' response, for the limited purpose of resolving the parties' dispute regarding mootness. LUBA will disregard any characterizations in the response briefs that are not supported by the local record, or the extra-record material that we have accepted into LUBA's record. *See* n 4.

FIRST ASSIGNMENT OF ERROR (SIMMONS)

OAR 660-033-0130(38)(j) limits the size of a solar power facility on nonarable lands to 320 acres.[6] However, as noted above, the OAR 660-033-0130(38)(f) definition of "[p]hotovoltaic solar power generation facility" clarifies that the size restriction in OAR 660-033-0130(38)(j) applies to limit the size of solar power facilities located either (1) within the same "tract," or (2) within 1,320 feet, if located on separate tracts. We follow the parties in referring to these restrictions as the "single tract" test and the "1,320 foot separation" test.

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consider extra-record evidence that is essential to resolve disputes over mootness or the Board's jurisdiction. *Blatt*, 21 Or LUBA at 342. Accordingly, intervenors' motion to take evidence under OAR 661-010-0045 is denied, as unnecessary.

[6] OAR 660-033-0130(38)(j) provides, in relevant part:

> "For nonarable lands, a photovoltaic solar power generation facility shall not use, occupy, or cover more than 320 acres. * * *"

OAR 660-033-0020(14) defines "[t]ract" for purposes of the administrative rule as "one or more contiguous lots or parcels under the same ownership." Petitioners Simmons *et al.* (Simmons) contend that the county erred in approving a total of 640 acres of solar power facilities on a single tract. According to Simmons, the record reflects that both of the proposed sites are located within a single tract, owned by the Morehouses, and as such, OAR 660-033-0130(38(f) prohibits either project from being approved. Simmons Petition for Review 12.

Alternatively, Simmons argue that even if the two proposed sites are not within the same tract, *i.e.*, contiguous and commonly owned, the two sites are located within 1,320 feet of each other, and thus the aggregate 640 acres of proposed solar power facilities violates OAR 660-033-0130(38)(f) and (j) for that reason.

As set out in footnote 1, OAR 660-033-0130(38)(f) provides:

> "For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as any existing and proposed facilities determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or individuals shall be considered to be in common ownership, regardless of the operating business structure. * * *"

Simmons argue that the county's findings under both the Obsidian and Morehouse applications myopically address only whether each facility

individually exceeds the 320-acre limit imposed under OAR 660-033-0130(38)(f), and fail to address (1) whether the two facilities are located on the same "tract," or (2) whether either facility would be located on a tract that is less than 1,320 feet from an existing or proposed facility that is "commonly owned" under the broad meaning of that term as used in OAR 660-033-0130(38)(f). Simmons note that while intervenors filed applications to partition each of the proposed sites from the parent tract owned by the Morehouses, there is no evidence in the record that (1) those partitions have become final or that (2) even if the partitions have become final, deeds that would be necessary to remove the proposed sites from the Morehouse tract have been executed. Simmons also note that the county imposed no conditions to ensure compliance with OAR 660-033-0130(38)(f) or (j), such as requiring partitions and transfer of ownership, or ensuring that the two facilities are not in "common ownership."

Intervenors respond, initially, that Simmons failed to exhaust the issue raised under OAR 660-033-0130(38)(f) and (j) during the proceedings below, by failing to file a local appeal of the planning commission decision that specifies that issue on appeal to the board of commissioners. *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003). In *Miles*, the Court of Appeals interpreted ORS 197.825(2)(a) in context to require that, where a local ordinance requires that an appellant specify the grounds for local appeal, "a party may not

raise an issue before LUBA when that party could have specified it as a ground for appeal before the local body, but did not do so." *Id.*[7]

Intervenors concede that the state agencies raised compliance with OAR 660-033-0130(38)(f) and (j) in a July 11, 2019 letter to the planning commission, and that July 11, 2019 letter was attached to the agencies' August 2, 2019 local appeal to the board of commissioners. However, intervenors argue that the state agencies' local appeal was limited to the issue of whether OAR 660-033-0130(38) is an approval criterion, and the agencies' choice not to pursue other issues listed in the July 11, 2019 letter means that Simmons cannot rely on the state agencies' local appeal to avoid the *Miles* exhaustion requirement.

Simmons reply, and we agree, that the *Miles* exhaustion doctrine does not assist intervenors. Simmons prevailed before the planning commission. The planning commission denied the CUP applications. Nothing in the county code, *Miles*, or elsewhere requires a prevailing party to file what would amount to a precautionary local appeal challenging a planning commission decision, in order to exhaust administrative remedies for purposes of ORS 197.025(2)(a). *See Olstedt v. Clackamas County*, 62 Or LUBA 131 (2010) (where the petitioner was the prevailing party in the planning commission decision denying the application, the petitioner was not obligated under *Miles* to specify issues as part of the

[7] ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]"

applicant's local appeal, in order to preserve those issues for LUBA's review). For strategic reasons, it may be prudent in some circumstances for a prevailing party to file a precautionary local appeal, as indeed the state agencies did in this case, but we do not understand either *Miles* or ORS 197.825(2)(a) to *compel* prevailing parties to file contingent or precautionary local appeals, in order to preserve issues for LUBA's review in the event the final decision-maker reverses the initial denial.

In addition, even if the reasoning in *Miles* were extended to effectively require locally-prevailing parties to file contingent or precautionary local appeals, we disagree with intervenors that the local appeal filed by the state agencies was limited to the single issue of whether the planning commission erred in concluding that OAR 660-033-0130(38) is not an approval criterion. The state agencies' local appeal was on a form provided by the county, which requires that the appellant list the "reason" for the appeal, inviting the appellant to submit additional information as exhibits to the form. The state agencies left the "reason" section blank, and instead attached a letter to the board of commissioners dated August 2, 2019 and, as an appendix to that letter, their July 11, 2019 letter to the planning commission. The August 2, 2019 letter states that the planning commission erred "because it failed to list OAR 660-033-0130(38) as an applicable criterion per ORS 197.646(3) *and make associated findings*." Record 352 (emphasis added). The July 11, 2019 letter attached to the August 2, 2019 letter raises a number of issues under OAR 660-033-0130(38), and argues

that the county must adopt findings addressing the various provisions of the administrative rule, including OAR 660-0033-0130(38)(f) and (j). Read in context, it is clear that the state agencies' local appeal specified as an issue the planning commission's failure to adopt findings and conditions addressing applicable approval criteria, including OAR 660-033-0130(38)(f) and (j), specifically including the "single tract" issue. That is essentially the same issue at the core of Simmons' first assignment of error. For the foregoing reasons, the issue raised in Simmons' first assignment of error is properly before us.

On the merits, intervenors argue that throughout the CUP proceedings the county and all participants were aware that intervenors were contemporaneously seeking partition approval to create two 320-acre parcels for the Obsidian and Morehouse solar facilities. Intervenors argue that county partition approval eliminates any concern regarding compliance with the single tract test in OAR 660-033-0130(38)(f) and (j).

However, as Simmons argue, there is apparently no evidence in the record or findings that any partitions the county has approved to create two 320-acre parcels for each proposed facility have become final. Further, there are no findings addressing the "single tract" limitation in OAR 660-033-0130(38)(f), and the only finding addressing the OAR 660-033-0130(38)(j) 1,320 foot separation test is the simple statement that "the project will not occupy more than 320 acres of nonarable land," which is not responsive to the single tract issue. Record 70. Further, even if the record and decision included evidence, findings

and/or conditions that ensured that each facility would be located within a discrete 320-acre parcel, that would not suffice to establish compliance with the "single tract" test. As Simmons argue, the definition of "tract" at OAR 660-033-0020 includes all contiguous lots or parcels *that are commonly owned.* That the Morehouses have partitioned their parent parcel into three parcels, including two 320-acre parcels, does not mean that the entire contiguous ownership would not constitute a single "tract." To disaggregate the two 320-acre parcels from the Morehouse tract, one or more parcels must be conveyed by deed to third parties. Intervenors do not cite to evidence, or even argue, that such conveyances have happened or are certain to happen, and the county's decision includes no conditions that would require such conveyances. We agree with Simmons that remand is necessary for the county to adopt findings, supported by substantial evidence that the two proposed sites are not on one single "tract."

Even if the record included evidence and findings sufficient to establish that the two proposed sites are not on one single "tract," we agree with Simmons that the county erred by failing to adopt findings addressing the 1,320-foot separation test. Under that test, all existing or proposed solar facility projects that are "commonly owned" must be evaluated together for purposes of the size restriction, regardless of whether they are located on the same tract. Intervenors do not appear to dispute that the Obsidian and Morehouse facilities share a common corporate owner, and thus are "commonly owned" under the broad terms of OAR 660-033-0130(38)(f). However, intervenors argue that the record

includes evidence that a reasonable decision-maker could rely upon to conclude that the two parcels on which the facilities will be located are at least three-quarters of a mile from each other, or over 3,000 linear feet, citing Record 307.

Record 307 is a plat that shows the two parcels proposed for the two proposed facilities, separated by a square-shaped portion of the Morehouse parent parcel that appears to be approximately 160 acres in size. In reply, Simmons cite to statements in the staff report that Simmons argue can be read to suggest that the two proposed sites are less than 750 feet apart. The plat at Record 307 might be evidence that the county could rely upon to support a finding that neither facility will be located fewer than 1,320 feet "from the tract on which the new facility is proposed to be sited," assuming of course that the parcelization pattern depicted on the plat has become finalized and the parcels' ownership decoupled by the appropriate conveyances. OAR 660-033-0130(38)(f). However, there are no findings on that point or the 1,320-foot separation test.

Because the decision must be remanded in any event for the county to adopt findings and/or conditions with respect to the single tract test, remand is appropriate for the county to determine the distance between the sites and adopt findings or conditions, as necessary, to establish or ensure compliance with the 1,320-foot separation test.

Simmons' first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (SIMMONS)

LCZO 24.19 provides conditional use approval standards for non-farm uses in the A-1 zone, based on findings that the proposed nonfarm use:

> "A. Is compatible with farm uses described in ORS 215.203(2) and is consistent with the intent and purposes set forth in ORS 215.243;
>
> "B. Does not interfere seriously with accepted farming practices as defined in ORS 215.203(2)(c), on adjacent lands devoted to farm use;
>
> "C. Does not materially alter the stability of the overall land use pattern of the area[.]"

Simmons collectively refer to these three standards as the "compatibility/farm impacts" test, and discuss them together as a single standard, alleging that the county failed to adopt adequate findings of compliance with the "compatibility/farm impact" test, by ignoring testimony regarding certain impacts on farm practices.[8] However, as intervenors argue and we agree, the three standards use different terms and include distinct requirements. Simmons' findings challenge appears to be most closely directed at LCZO 24.19(B), a standard that requires finding the proposed non-farm use "[d]oes not interfere

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[8] Adequate findings are required to support a decision. *South of Sunnyside Neighborhood League v. Board of Com'rs of Clackamas County*, 280 Or 3, 20-21, 569 P2d 1063 (1977). To be adequate, findings must at a minimum (1) identify the relevant approval standards; (2) set out the facts that are believed and relied upon; and (3) explain how those facts lead to the conclusion that the proposal either does or does not comply with the relevant standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

seriously with accepted farming practices[.]" Simmons do not direct any specific argument, or connect any specific findings challenges, to the compatibility test at LCZO 24.19(A) or the stability test at LCZO 24.19(C). Accordingly, our analysis focuses on LCZO 24.19(B) and the findings addressing that criterion.

As noted, Simmons contend the findings fail to address the testimony of adjacent farmers raising concerns about impacts on their farming practices, specifically that the proposed development's impacts include dust, erosion, and rodent population displacement. Relatedly, Simmons argue that the county erred in shifting the burden of proof to opponents, by relying on the absence of testimony regarding specific impacts on specific farm practices, rather than requiring the applicant to provide substantial evidence that the standard is met. To support this proposition, Simmons cite *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1, 26-27 (2016), *aff'd*, 284 Or App 470, 391 P3d 932 (2017), *aff'd in part, rev'd in part*, 364 Or 432, 435 P3d 698 (2019), which involved application of ORS 215.296(1), a standard requiring a finding that a proposed non-farm use will not force a significant change, or significantly increase the cost of, accepted farm practices on surrounding farms.

Intervenors respond, initially, that Simmons failed to exhaust administrative remedies as required under *Miles*, 190 Or App 500, 510, because Simmons failed to file a local appeal of the planning commission decision. However, as discussed above, *Miles* does not compel parties who prevailed before a lower decision-maker to file a contingent or precautionary local appeal

to the higher decision-maker, in order to satisfy the ORS 197.825(2)(a) exhaustion requirement.

Intervenors also suggest that all issues under LCZO 24.19(A)-(C) are waived because Simmons failed to adequately raise issues under those standards in testimony before the board of commissioners. According to intervenors, most of the testimony from adjacent farmers on farm impacts was provided during the planning commission proceedings, and adjacent farmers offered only limited testimony regarding farm impacts directly to the board of commissioners. Record 35. Intervenors argue that the limited testimony regarding farm impacts before the commissioners was not specific enough to afford the commissioners and other parties an adequate opportunity to respond, citing *Bruce Packing Co. v. City of Silverton*, 45 Or LUBA 334, 352-53 (2003).

Although intervenors do not cite the statute, intervenors' argument and case citation invoke the "raise it or waive it" principle embodied in ORS 197.763(1).[9] The *Miles* exhaustion principle and the "raise it or waive it"

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[9] ORS 197.763(1) provides:

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

principle in ORS 197.763(1) are congruent, but distinct principles. If ORS 197.763(1) is the basis for intervenors' argument, we reject it. ORS 197.763(1) requires only that issues be raised prior to the close of the record at or following the final evidentiary hearing, which in this case was the final evidentiary hearing before the board of commissioners. Issues raised during the planning commission proceeding, the record of which was before the board of commissioners, were timely raised, as far as ORS 197.763(1) is concerned. Intervenors do not dispute that the issues presented in Simmons' second assignment of error were raised during the planning commission proceedings with the specificity required by ORS 197.763(1). Because the outcome of the board of commissioners' *de novo* proceeding was to reverse the planning commission decisions denying the applications and instead to approve those applications, the board of commissioners was obligated to adopt or incorporate adequate findings, supported by substantial evidence, addressing all applicable approval criteria, including findings addressing legitimate issues raised prior to the final evidentiary hearing regarding compliance with LCZO 24.19(A)-(C). *Norvell v. Portland Metropolitan Area Local Government Boundary Com.*, 43 Or App 849, 604 P2d 896 (1979).

Turning to the merits, intervenors argue that the county's findings addressing all three standards at LCZO 24.19(A)-(C) are adequate and supported by substantial evidence. With specific reference to the "serious interference" standard at LCZO 24.19(B), intervenors quote the extensive findings at Record

67-69, and argue that those findings adequately address testimony regarding dust and erosion. We agree with intervenors. The findings discuss at length a number of measures proposed by intervenors' experts to avoid dust and erosion impacts on adjoining farm practices during construction and operation of the solar facilities. Simmons make no attempt to explain why those findings or the measures they describe are inadequate to address the testimony submitted regarding dust and erosion impacts of the proposed facilities.

With respect to the possibility that construction and operation would displace rodent populations onto adjacent farms, petitioners quote one adjoining farmer stating that "clearing of sage brush * ** will drive the rodents out of that area, and in the future that whole entire area will be turned into solar panels so they will be running through their fields, getting into all of their grain bags and everything else." Record 337-38. The findings do not address this testimony, or rodents in general, other than to impose Condition 15, which requires construction of a perimeter fence around the proposed sites that excludes small mammals but allows rodent ingress. Record 74. Intervenors cite no findings or countervailing testimony regarding rodents, other than to suggest that displacement of rodent population due to construction will be temporary, and that refugee rodents will eventually return to their former homes on the proposed sites, rather than seek permanent asylum on adjoining farms.

Intervenors argue, correctly, that to be adequate findings need not address every comment made in testimony; nonetheless, findings must address all

testimony that raises pertinent issues regarding compliance with approval criteria. *Norvell*, 43 Or App 849. Here, an adjacent farmer testified that the proposed use would displace rodent populations onto her farm, impacting her farm practices. That testimony is directly relevant to compliance with LCZO 24.19(B). Even if there were evidence in the record that such impacts would be temporary, findings are necessary to address those impacts. We agree with Simmons that remand is necessary to adopt more adequate findings addressing that testimony.

Finally, we reject Simmons' unfocused argument that the county shifted the burden of proof to opponents to disprove compliance with LCZO 24.19(A)-(C). *Stop the Dump Coalition*, 74 Or LUBA 1, 26-27, cited by Simmons, involved a differently worded statute that shares a similar policy goal to LCZO 24.19(A). However, Simmons have not demonstrated that the burden-shifting LUBA found in *Stop the Dump Coalition* is present here. In *Stop the Dump Coalition*, the county rejected farmer/opponent testimony regarding various farm impacts of a proposed landfill, faulting the farmers for failing to provide a sophisticated causative analysis, and also for failure to explain how individual impacts were cumulatively significant. *Id.* at 26-27, 58. We held that that approach erroneously shifted the burden of proof and persuasion from the applicant to the farmer/opponents. In the present case, Simmons cite no similar findings that purport to shift the burden of proof or analysis from the applicant to the farmer/opponents.

Simmons' second assignment of error is sustained, in part.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (STATE AGENCIES)/THIRD ASSIGNMENT OF ERROR (SIMMONS)

These assignments of error all challenge, in various ways, Condition 13 and the county's finding of compliance with OAR 660-033-0130(38)(j)(G).[10]

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[10] OAR 660-033-0130(38)(j)(G) provides, in full:

> "If a proposed photovoltaic solar power generation facility is located on lands where, after site specific consultation with an [ODFW] biologist, it is determined that the potential exists for adverse effects to state or federal special status species (threatened, endangered, candidate, or sensitive) or habitat or to big game winter range or migration corridors, golden eagle or prairie falcon nest sites or pigeon springs, the applicant shall conduct a site-specific assessment of the subject property in consultation with all appropriate state, federal, and tribal wildlife management agencies. A professional biologist shall conduct the site-specific assessment by using methodologies accepted by the appropriate wildlife management agency and shall determine whether adverse effects to special status species or wildlife habitats are anticipated. Based on the results of the biologist's report, the site shall be designed to avoid adverse effects to state or federal special status species or to wildlife habitats as described above. If the applicant's site-specific assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the facility. Where the applicant and the resource management agency cannot agree on what mitigation will be carried out, the county is responsible for determining appropriate mitigation, if any, required for the facility."

As part of an EFSC process seeking state approval for a larger collection of solar facilities, of which the two facilities at issue in this appeal are apparently components, ODFW determined that OAR 660-033-0130(38)(j)(G) applies to the proposed sites, because the area that includes the subject properties is within ODFW's mapped big game winter range and also within an area known to provide habitat for two Strategy Species. Further, ODFW concluded that the proposed solar facilities could adversely affect winter range and sensitive species, triggering obligations under the rule to (1) avoid potential adverse effects using site design and (2), if adverse effects cannot be avoided through site design, work with ODFW to develop mitigation. As noted, in the present CUP proceedings the planning commission failed to apply OAR 660-033-0130(38)(j)(G) as an approval criterion, and denied the applications for other reasons. On local appeal, the board of commissioners agreed with the state agencies that the rule applied, and adopted Condition 13 as the primary means to ensure compliance with the rule.

Condition 13 provides:

> "Prior to construction, the applicant and ODFW will work cooperatively to develop an agreement for project-specific mitigation to offset the potential adv[e]rse effects of the facility. The mitigation agreement will be based on the results of the applicant's 2018 Habitat Assessment and Biological Resources Report dated August 2019 included in the record. If the applicant and ODFW cannot agree on what mitigation will be carried out, the County is responsible for determining the appropriate mitigation, if any." Record 74.

The board of commissioners adopted the following as its primary finding regarding OAR 660-033-0130(38)(j)(G) and Condition 13:

> "Findings: Applicant conducted, using a qualified biologist, desktop and field surveys for wildlife and wildlife habitat on land that included the CUP Site. This work was done in consultation with ODFW and Applicant is continuing to coordinate with ODFW on mitigation measures for the project. Applicant will work with ODFW using the habitat report for the CUP Site * * * to evaluate whether site-specific mitigation is needed. See response under LCZO 24.18(A)(3) which is incorporate[d] by reference as findings to support compliance with subpart (38)([j])(G).[11] Condition 13 will ensure compliance and proper coordination with ODFW and the County. For these reasons, the project complies with the requirements in subpart (38)([j])(G)." Record 72.

On appeal, the state agencies' first assignment of error argues that the county's reliance on Condition 13 to ensure compliance with OAR 660-033-0130(38)(j)(G) is not supported by substantial evidence, in part because the habitat report that Condition 13 states must be used as the basis for mitigation did

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[11] LCZO 24.18(A)(3) is a local renewable energy facility conditional use standard providing in relevant part that "[f]acilities shall be designed, operated and monitored, so as to protect surrounding fish and wildlife resources as much as practical." The county's finding regarding big game winter range habitat states, as relevant:

> "The CUP Site is not within a Goal 5 resource area as inventoried by the County in the Comp Plan. It is within the big game winter range area as mapped by ODFW staff. Applicant and ODFW have consulted regarding avoidance and mitigation strategies pertaining to big game habitat. See findings under OAR 660-033-0130(38) for further discussion." Record 57.

not address deer and elk winter range habitat. In the second assignment of error, the state agencies argue that the county misconstrued OAR 660-033-0130(38)(j)(G) to potentially allow the county to approve no mitigation at all. Finally, the state agencies argue under the first and third assignments of error that Condition 13 represents an impermissible deferral of a determination of compliance with OAR 660-033-0130(38)(j)(G) to a decision process that does not provide for individual notice and other participatory safeguards inherent in land use proceedings. Simmons' third assignment of error similarly argues that Condition 13 impermissibly defers a determination of compliance with the rule to a non-land use process.

A. Mootness

Initially, intervenors respond that LUBA review of each of the foregoing assignments of error has been rendered moot by post-decision proceedings the county conducted in November and December 2019, to approve a partial mitigation plan for the proposed facilities.[12] According to intervenors, the November and December 2019 meetings effectively made LUBA's review of these assignments of error advisory and without any practical effect. For the

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[12] Intervenors actually argue that these consolidated *appeals* have been mooted, and therefore the appeals should be *dismissed*. However, not all of the assignments of error presented in these appeals concern Condition 13 or OAR 660-033-0130(38)(j)(G). At best, intervenors can argue that LUBA's review of *some* assignments of error have been rendered advisory by post-decision events, not that the appeals themselves are moot.

following reasons, we disagree with intervenors that our review of these assignments of error would be of no practical effect.

First, as intervenors acknowledge, the November and December 2019 proceedings concerned only approval of a *partial* mitigation plan, Step 1 of a proposed two-step process to approve a full mitigation plan. The Step 1 mitigation plan affects only 15 acres of the two 320-acre sites. The county apparently postponed consideration and approval of a full mitigation plan for the entire development to some future process or proceeding. Thus, the November/December proceedings have at best obviated only some of the challenges directed at Condition 13 and the county's attempt to demonstrate compliance with OAR 660-033-0130(38)(j)(G) in the decisions before us.

Second, as discussed below, we agree with the state agencies and Simmons that OAR 660-033-0130(38)(j)(G) requires a determination of current compliance, based on habitat studies, site design avoidance measures and mitigation plans that are presented as part of the public land use approval process and approved as part of the final land use decision. As explained below, in many circumstances a local government can defer a determination of full compliance with an approval standard such as OAR 660-033-0130(38)(j)(G) to a subsequent public land use process that provides notice and opportunity for public participation. However, the November and December 2019 proceedings were simply special meetings of the board of commissioners, and did not provide all of the notice, evidentiary and procedural safeguards, and other essential

attributes, of a land use hearing. Those post-decision proceedings did little or nothing to moot the challenges presented in these assignments of error.

In our view, the only assignment of error that the November and December 2019 proceedings might have rendered advisory is the state agencies' second assignment of error, which argues that Condition 13 embodies a county interpretation of OAR 660-033-0130(38)(j)(G) to the effect that the county need not approve any mitigation at all. Because the commissioners approved partial Step 1 mitigation, and all parties seem to accept the need for full mitigation, it does not appear that the commissioners understand Condition 13 to embody the interpretation of OAR 660-033-130(38)(j)(G) that the agencies attribute to the commissioners - that the county may elect not to require mitigation. In any case, as discussed below, we disagree with the state agencies' countervailing interpretation of OAR 660-033-0130(38)(j)(G).

B. Condition 13 and OAR 660-033-0130(38)(j)(G).

Although OAR 660-033-0130(38)(j)(G) includes no explicit timing or procedural requirements, it is reasonably clear that it is intended to be applied during the local land use proceeding that considers whether to approve a proposed solar facility. The first sentence of OAR 660-033-0130(38)(j)(G) refers to the "*proposed* photovoltaic solar power generation facility[,]" suggesting that when the rule applies, the facility has not yet been approved. *See* n 11 (emphasis added). The last sentence of the rule requires that the county make the ultimate decision regarding mitigation, at least where the applicant and the appropriate

wildlife management agency have not been able to agree on a mitigation plan. Nothing in the administrative rule suggests that that county approval can occur outside the context of land use proceedings to approve the proposed solar facility.

Intervenors note that other provisions of OAR 660-033-00130(38), governing development of solar facilities on higher-quality agricultural land, include requirements that certain plans, for example plans to prevent erosion of high-value farm soils, be approved and attached to the land use decision as a condition of approval. *See, e.g.*, OAR 660-033-0130(38)(h)(B),(C) and (D). Intervenors argue that the lack of similar language in OAR 660-033-0130(38)(j)(G) suggests that the Land Conservation and Development Commission (LCDC), the author of the rule, is less concerned with the impact of solar facilities on wildlife habitat on nonarable soils, and has made a deliberate choice not to explicitly require that habitat mitigation plans be considered and approved as part of the land use decision that approves the facility.

It may be, as intervenors argue, that in adopting provisions such as OAR 660-033-0130(38)(h)(B),(C) and (D), LCDC has elected to protect high-value farm soils by somewhat restricting the procedural flexibility that counties can exercise when it comes to conducting land use proceedings and conditioning land use decisions. We discuss some of those flexible processes below. However, it is a different matter altogether to infer from the absence of similar restrictions in OAR 660-033-0130(38)(j)(G), governing solar facilities on nonarable soils, that LCDC intended to abrogate one of the fundamental tenets of land use decision-

making: that compliance with applicable land use regulations be determined in a land use proceeding that offers minimum procedural and participatory rights, and that the required determination of compliance be based upon substantial evidence submitted during the land use proceeding.

In our view, OAR 660-033-0130(38)(j)(G), like virtually all land use regulations, contemplates that a determination of compliance with the rule be made as part of the county land use approval of the proposed solar facility, based on substantial evidence in the record. However, that is not what occurred in the present case. There is no dispute in the present case that compliance with OAR 660-033-0130(38)(j)(G) requires mitigation to offset unavoidable impacts to habitat. While the county adopted a finding of compliance with OAR 660-033-0130(38)(j)(G), as discussed below that finding is wholly conclusory, and not supported by a proposed mitigation plan or evidence. The county's finding of compliance rests entirely on a condition of approval requiring the applicant to continue working privately with ODFW to agree on a mitigation plan, outside a public participatory process, and return to the county for approval of the mitigation plan only if the applicant is unable to reach agreement with the wildlife agency.

For whatever reason, intervenors and ODFW were unable to reach agreement on a mitigation plan prior to the close of the evidentiary record. The solution to that impasse is stated in the rule: the county is ultimately responsible for making the determination regarding what mitigation is required, if any. As is

the case with a determination of compliance for any discretionary land use approval criterion, that determination should be made as part of a public land use proceeding, be supported by substantial evidence, and be justified in a final land use decision, appealable to LUBA. That determination need not in all cases be made in the *same* land use proceeding that applies all other applicable land use approval standards to approve the proposed use. In some circumstances, it is permissible for the county to postpone to a subsequent land use proceeding a finding of compliance with an approval standard such as OAR 660-033-0130(38)(j)(G), as long as certain steps are observed and procedural safeguards are put in place. *Gould v. Deschutes County*, 216 Or App 150, 161-63, 171 P3d 1017 (2007).

Gould involved a local destination resort approval standard that, like OAR 660-033-0130(38)(j)(G), required avoidance or complete mitigation of impacts on wildlife habitat, based on a mitigation plan. The county found compliance with the local standard, despite the absence of any mitigation plan, based on a habitat study and findings that development of a mitigation plan was "feasible" and likely to gain acceptance in negotiations with the appropriate wildlife management agencies. LUBA affirmed that approach. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007). However, the Court of Appeals reversed, holding that the county's approach impermissibly denied the public input into the mitigation plan, and meant that final adoption of the plan would be based on evidence outside the land use record. 216 Or App at 159-60. The Court noted

that, in the absence of a proposed mitigation plan to review, the only permissible option other than denial was for the county to postpone a determination of compliance with the approval standard to a second stage proceeding that was infused with the same participatory rights as the initial proceeding. 216 Or App at 162.

Intervenors attempt to distinguish *Gould*, despite the factual and postural similarities, arguing that the local habitat mitigation standard at issue in *Gould* was a different and more stringently-worded standard than OAR 660-033-0130(38)(j)(G). While there are differences, both standards require, in essence, that proposed development avoid adverse impacts on wildlife habitat and, if harm cannot be avoided, mitigation be put in place to offset adverse impacts, to be accomplished via a mitigation plan approved in a final land use decision. We see no meaningful difference between the two standards that would render *Gould* inapposite to the present case.

In the present case, the county attempted something similar, adopting a current finding of compliance with OAR 660-033-0130(38)(j)(G), despite the complete absence of a proposed mitigation plan, and conditioning the approval based on future development of a mitigation plan via private negotiations with ODFW. That was error, for the reasons stated in *Gould*.

Condition 13 leaves open the possibility that the applicant may return to the county to gain approval of the applicant's preferred mitigation plan, in the event the applicant and ODFW cannot agree, so in that sense Condition 13

resembles a potential postponement of determining full compliance with OAR 660-033-0130(38)(j)(G). However, even viewed in that light Condition 13 does not specify that the subsequent county proceeding be infused with the same participatory rights as the initial CUP proceeding. And, as subsequent events have proved, the county did not intend to provide the same kind of individual notice, evidentiary hearing, and other procedural safeguards afforded by the CUP proceeding. To the extent Condition 13 was intended to allow the county to make a final determination of compliance with OAR 660-033-0130(38)(j)(G) in a subsequent proceeding, we agree with petitioners that Condition 13 is deficient in failing to provide for a proceeding that was infused with the same participatory rights as the initial CUP proceeding.

The state agencies also argue that the county's finding of compliance with OAR 660-033-0130(38)(j)(G) is inadequate and not supported by substantial evidence. We generally agree with the agencies. In *Gould*, the court discussed *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984), a case that intervenors rely upon. *Meyer* stands for the proposition that where a development plan is sufficiently specific and certain enough to support findings that the proposal satisfies the applicable criteria, the local government may find compliance and approve the development, even though further technical studies or other minor refinements may be necessary and will be addressed, per condition, in a subsequent administrative proceeding. However, the court in *Gould* rejected the applicant's reliance on *Meyer*, explaining that in the absence

of at least a draft mitigation plan or similar evidence to review, compliance with the approval standard was simply too uncertain to find compliance. 216 Or App at 161-62. The county's only options in that circumstance, the court explained, were to deny the application or postpone a determination of compliance to a subsequent land use hearing that provides the same notice and participatory rights as the original proceeding.

Similarly, in the present case, no mitigation plan, even a draft one, was provided to the county and participants to review during the land use proceedings, and the county had little or no evidence on which to base its findings of compliance with OAR 660-033-0130(38)(j)(G). Not surprisingly, the findings are conclusory and inadequate to constitute findings of compliance with the rule's requirements. The *Meyer* option was not available to the county or intervenors.

Relatedly, the state agencies argue that Condition 13 is defective in requiring that the to-be-determined mitigation plan be based on the 2018 habitat studies conducted by intervenors' biologist. The state agencies note that the 2018 habitat studies do not address impacts on deer and elk winter range, or conduct any surveys regarding deer or elk. The state agencies argue that no finding of compliance with OAR 660-033-0130(38)(j)(G) based solely on the 2018 habitat studies, without additional studies directed at winter range habitat, could be supported by substantial evidence.

Intervenors respond that the state agencies raised no issues below regarding the 2018 habitat studies and offered no objections that the studies failed

to address winter range habitat. On the contrary, intervenors note, the state agencies requested that the studies be included in the record. Accordingly, intervenors argue that the state agencies have waived any issues regarding the evidentiary sufficiency of the 2018 studies. ORS 197.763(1). The state agencies reply that the agencies could not have predicted that the county would impose, via Condition 13, an obligation to base the future mitigation plan on the 2018 studies.

We agree with the agencies. Generally, to preserve issues under ORS 197.763(1), a party must raise issues regarding compliance with the applicable approval criterion, but is not required to anticipate the actual findings or conditions a local government adopts to demonstrate compliance with that criterion, or to question the adequacy of the evidence accepted into the record to support findings of compliance. *Lucier v. City of Medford*, 26 Or LUBA 213 (1993). The state agencies raised issues of compliance with OAR 660-033-0130(38)(j)(G), including the need for mitigation for impacts on deer and elk winter range. The agencies were not obligated to anticipate that the county would attempt to establish compliance with the rule primarily via imposition of Condition 13, based on the 2018 studies and a yet-to-be-determined mitigation plan.

On the merits, we agree with the state agencies that adequate findings of compliance with OAR 660-033-0130(38)(j)(G) must address impacts and/or mitigation required with respect to winter range habitat, and such findings must

be supported by substantial evidence. Intervenors do not dispute that the 2018 studies do not address impacts on winter range habitat, and intervenors cite no other evidence that does. Further, Condition 13 can be read to limit the mitigation plan to impacts evaluated under the 2018 studies, which would apparently exclude impacts on winter range habitat. We agree with the state agencies that the findings and conditions regarding compliance with OAR 660-033-0130(38)(j)(G) are defective regarding impacts on winter range.

C. Interpretation of OAR 660-033-0130(38)(j)(G).

Under the second assignment of error, the state agencies argue that Condition 13 embodies an erroneous county interpretation of OAR 660-033-0130(38)(j)(G), to the effect that the county could ultimately decide not to require any mitigation at all in the present case.

As noted, OAR 660-033-0130(38)(j)(G) requires the applicant and the appropriate wildlife management agency to consult toward an agreed mitigation plan to offset unavoidable impacts on wildlife habitat. If the applicant and the agency are unable to agree on mitigation, the county is responsible for "determining appropriate mitigation, *if any*, required for the facility." (Emphasis added.) Condition 13 paraphrases these provisions of the rule. On appeal, the state agencies argue that as Condition 13 is written, the county could choose to require no mitigation at all in the present case, despite clear evidence of unavoidable impacts to winter range habitat caused by fencing off 640 acres of habitat.

The short answer to the state agencies' argument is that Condition 13 accurately paraphrases the requirements of the rule on this point. OAR 660-033-0130(38)(j)(G) is written in a manner that would potentially allow a county to conclude that no mitigation is required at all. That possibility is inherent in the phrase "determining appropriate mitigation, *if any*, required for the facility." (Emphasis added.) Of course, a conclusion that no mitigation at all is required must be supported by adequate findings and substantial evidence, and as discussed above, the findings and evidence must be generated in a public land use proceeding that provides all required evidentiary, procedural and appellate protections. Assuming such protections are provided, if a county ultimately determines no mitigation is required, opponents can appeal that land use decision to LUBA and assign error to the decision. We generally agree with the agencies that it seems highly unlikely, given the circumstances of this case, that the county could ultimately adopt a sustainable conclusion that no mitigation at all is required. However, we disagree with the agencies that Condition 13 embodies an erroneous interpretation of OAR 660-033-0130(38)(j)(G) on this point.

The state agencies' first and third assignments of error, and Simmons' third assignment of error, are sustained.

The state agencies' second assignment of error is denied.

DISPOSITION

For the foregoing reasons, remand is necessary for the county to conduct additional proceedings consistent with this opinion, and to adopt new or additional findings and conditions, supported by substantial evidence.

The county's decision is remanded.