

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

3
4 1000 FRIENDS OF OREGON,
5 *Petitioner,*

6
7 vs.

8
9 LINN COUNTY,
10 *Respondent,*

11
12 and

13
14 RONALD HENTHORNE, VIRGINIA HENTHORNE,
15 and LYNN MERRILL,
16 *Intervenors-Respondents.*

17
18 LUBA Nos. 2019-103/104

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Linn County.

24
25 Andrew Mulkey, Portland, filed the petition for review and a reply brief,
26 and argued on behalf of petitioner.

27
28 No appearance by Linn County.

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30 Wendie L. Kellington, Lake Oswego, filed a response brief and argued on
31 behalf of intervenors-respondents. With her on the brief was Kellington Law
32 Group, PC.

33
34 RYAN, Board Member; RUDD, Board Chair, participated in the decision.

35
36 ZAMUDIO, Board Member, did not participate in the decision.

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REVERSED

05/08/2020

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

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NATURE OF THE DECISION

In these appeals, petitioner appeals a board of county commissioners’ Ordinance adopting a plan amendment and zone change from Farm Forest to Non-Resource 5 Acre Minimum, and a board of county commissioners’ resolution and order adopted in support of the ordinance.

FACTS

The subject property is an approximately 108-acre vacant parcel designated on the county’s comprehensive plan map as Farm Forest (F/F) and zoned F/F. Together with the Agricultural Resources Lands (AR) and the Forest Resources Lands (FR) designations, the F/F plan designation implements Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands), and Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Linn County Comprehensive Plan Code (LCC) 905.020(D)(1).

A majority of the property is included on the county’s mapped peripheral big game habitat, an area jointly identified and mapped by the county and the Oregon Department of Fish and Wildlife (ODFW). The property borders land zoned Rural Residential and Forest Conservation Management (FCM) to the east, and land zoned FF and FCM to the west, north and east. Land to the south is zoned EFU. Record 376. The property includes sloped and stepped bench slopes, with volcanic rock, clay, basalt, cobble and gravel, with intermittent drainage ways. Record 341.

1 Intervenors applied to change the plan designation for the property from
2 F/F to Non-Resource (NR) and zone the property Non-Resource 5-acre minimum
3 (NR-5). The board of county commissioners held hearings on the application and
4 approved the application. These appeals followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 As explained above, the subject property is planned and designated F/F.
7 LCC 905.020(D)(1) provides that the F/F zone, along with the AR zone and the
8 FR zone, “address[es]” Goals 3, 4, and 5. Accordingly, we begin with a somewhat
9 detailed explanation of the county’s programmatic implementation of Goal 5
10 with respect to wildlife habitat.

11 **A. The County’s Program to Achieve Goal 5**

12 Goal 5 is “[t]o protect natural resources and conserve scenic and historic
13 areas and open spaces.” Goal 5 requires the county to inventory “[w]ildlife
14 [h]abitat,” and develop a program to achieve the goal (PTAG). The Goal directs
15 that “[f]ish and wildlife areas and habitats should be protected and managed in
16 accordance with the Oregon Wildlife Commission’s fish and wildlife
17 management plans.” Goal 5, Implementation Guideline B(4). As explained in
18 more detail below, the county’s PTAG includes identifying and mapping big
19 game habitat, applying plan and zoning designations that protect big game habitat
20 from most conflicting uses, applying density standards that limit development in
21 big game habitat, and applying siting standards that require clustering.

1 The majority of the subject property is included on the county’s map of big
2 game habitats.¹ Record 379. LCC 900.020(59) defines “sensitive fish and wildlife
3 habitat” as “consistent with Statewide Planning Goal 5, * * * a land or water area
4 where sustaining the natural resource characteristics is important or essential to
5 the production and maintenance of aquatic life or wildlife populations.” The
6 parties appear to agree that the county’s PTAG is codified in LCC 903.500-.550,
7 which contains the comprehensive plan provisions that apply to “sensitive fish
8 and wildlife habitat.”

9 LCC 903.500-550 include several policies to identify, recognize, and in
10 some cases protect sensitive fish and wildlife habitat from “most conflicting
11 uses.”² LCC 903.510(B)(3). The county’s PTAG includes a requirement to
12 identify and map sensitive fish and wildlife habitat. LCC 903.510(B)(1) requires
13 the county to “identify and recognize areas of sensitive fish and wildlife habitat.”
14 LCC 903.510(B)(2) states that “[b]ig game habitats have been jointly identified
15 and mapped by [ODFW] and the county,” and that the maps identify areas that
16 are within “major, peripheral and impacted habitats.”

¹ Nothing in the record cited to us confirms the number of acres of the subject property that is mapped big game habitat. A map at Record 379 depicts more than half of the property as including peripheral big game habitat.

² “Conflicting uses” is not defined in the LCC, but OAR 660-016-0005(1) provides that “[a] conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site.”

1 The PTAG also includes zoning designations intended to implement Goal

2 5. LCC 903.510(B)(3) provides:

3 “The major and peripheral habitats are protected from most
4 conflicting uses through application of the Forest Conservation and
5 Management (FCM), Exclusive Farm Use (EFU), and Farm/Forest
6 (F/F) zones. The FCM, EFU, and F/F zones encourage resource
7 activities and limit potentially conflicting uses. Because of the
8 recreational, economic, aesthetic, and ecological value of fish and
9 wildlife, the potential impact on sensitive habitats will be assessed
10 on planning permit applications for conditional uses, variances, and
11 zone and plan amendments. Siting standards, including the use of
12 setbacks and clustering methods, will be used to lessen impact on
13 habitats.”

14 The PTAG also includes measures to restrict the density of housing development
15 and to require clustering of housing that is allowed to be developed in the zone.

16 LCC 903.510(B)(4) through (10) contain policies requiring development to be
17 reviewed for consistency with ODFW density recommendations, limiting density
18 of dwellings in major and peripheral habitat, and including siting standards for
19 new dwellings.

20 Finally, the PTAG requires plan designations intended to implement Goal

21 5. LCC 903.550, “Policy Implementation of fish and wildlife areas and habitat,”
22 provides, in part:

23 “(A) The policies set forth in LCC 903.510 (B) (2) to [(10)] shall
24 be implemented by the following:

25 “(1) The Agricultural Resource, Forest Resource, and
26 Farm/Forest plan designations shall be used on the
27 Linn County Comprehensive Plan to conserve sensitive
28 fish and wildlife habitats. Land use proposals subject

1 to Linn County review that have undesirable impacts
2 on these resources shall be reviewed during the plan
3 amendment, zone amendment and conditional use
4 permit process.”

5 **B. Standard of Review**

6 LUBA’s standard of review of a decision that amends a comprehensive
7 plan is set out at ORS 197.835(6). LUBA is required to reverse or remand the
8 amendment if “the amendment is not in compliance with the goals.” *Id.* LUBA is
9 also required to reverse or remand a decision that amends a land use regulation
10 if, as relevant here, “[t]he regulation is not in compliance with the comprehensive
11 plan.” ORS 197.835(7)(a). An additional standard of review is set out in ORS
12 197.835(9).³

³ ORS 197.835(9) provides:

“In addition to the review under subsections (1) to (8) of this section,
the board shall reverse or remand the land use decision under review
if the board finds:

“(a) The local government or special district:

“(A) Exceeded its jurisdiction;

“(B) Failed to follow the procedures applicable to the matter
before it in a manner that prejudiced the substantial
rights of the petitioner;

“(C) Made a decision not supported by substantial evidence
in the whole record;

“(D) Improperly construed the applicable law; or

“(E) Made an unconstitutional decision[.]”

1 **C. County Provisions Applicable to Plan Amendments**

2 For plan amendments, as relevant here, Linn County Land Development
3 Code (LDC) 921.874(A)(1) requires the county to adopt findings that “[t]he
4 amendment is consistent with and does not alter the intent of applicable section(s)
5 of the Comprehensive Plan.” LDC 921.874(A)(4) requires the county to adopt
6 findings that “[t]he amendment will not have a significant adverse impact on a
7 sensitive fish or wildlife habitat.”

8 The county adopted findings addressing LDC 921.874(A)(1). Those
9 findings generally address LCC Chapter 905, which contains provisions specific
10 to the NR plan designation. Record 10-25. However, the county did not adopt
11 any findings specifically addressing how the proposed plan amendment is
12 “consistent with and does not alter the intent of” LCC 903.510 or LCC 903.550.
13 Rather, the county incorporated its findings addressing LDC 921.874(A)(4),
14 which requires the county to find that “[t]he amendment will not have a
15 significant adverse impact on a sensitive fish or wildlife habitat,” as findings for
16 why the plan amendment is consistent with and does not alter the intent of the
17 LCC. Record 25-28.

18 In its findings addressing LDC 921.874(A)(4), the county concluded that
19 the change in the plan designation to NR and in the zoning to NR-5 would not
20 have a significant effect on mapped habitat on the subject property:

21 “The amended Plan map and zoning map designations themselves
22 are not a land use that will have a direct impact on sensitive fish or
23 wildlife habitat. The adopted NR zoning will permit certain land

1 uses which must first be reviewed under specific development
2 criteria before they can be approved or developed.

3 “* * * * *

4 “As discussed further below, county protection of sensitive fish and
5 wildlife habitat is implemented during the development phase of a
6 land use application. The re-designation of the property from
7 Farm/Forest to Non-Resource land does not alter or diminish the
8 ability to protect sensitive fish or wildlife habitat.” Record 25-26.

9 The county concluded that the effects of development of the property under the
10 NR Comprehensive Plan and NR-5 zone designation on big game habitat would
11 be evaluated and if necessary, mitigated, during subsequent review of
12 development proposals, including subdivision proposals, through application of
13 the density standards and clustering requirements.⁴ Record 25-28.

14 **D. First Assignment of Error**

15 Petitioner’s first assignment of error contains several arguments.

16 **1. OAR 660-023-0250**

17 Petitioner first asserts that the county improperly failed to address conflicts
18 from the proposed plan and zone change with peripheral big game habitat, as
19 required by OAR 660-023-0250(3).⁵ Intervenors respond, and we agree, that

⁴ The county also adopted findings addressing Goal 5, which reference and incorporate the county’s findings addressing LDC 921.874(A)(4). Record 31.

⁵ OAR 660-023-0250(3) provides:

“(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5

1 petitioner is precluded from raising an issue regarding the county's compliance
2 with OAR 660-023-0250(3) because the issue was not raised prior to the close of
3 the evidentiary hearing as required by ORS 197.763(1); ORS 197.835(3).
4 Petitioner does not point to any place in the record where any issue regarding
5 compliance with the rule was raised.

6 **2. LCC 903.510(B) and LCC 903.550(A)(1)**

7 Petitioner also argues that to the extent the county determined that the
8 proposed plan amendment and zone change is "consistent with and does not alter
9 the intent of applicable section(s) of the Comprehensive Plan," as required by
10 LDC 921.874(A)(1), the county improperly construed LCC 903.510(B)(3) and
11 LCC 903.550(A)(1). Petition for Review 22-23. According to petitioner,
12 applying the NR-5 zone designation to property that is mapped peripheral big

resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

- “(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
- “(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or
- “(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.”

1 game habitat is inconsistent with the policy in LCC 903.510(B)(3) to apply the
2 FCM, EFU and F/F zones to property that is mapped as big game habitat to
3 protect major and peripheral habitat from “most conflicting uses” and “limit
4 potentially conflicting uses.” Petitioner also argues that applying the NR plan
5 designation to the subject property is inconsistent with the express requirement
6 in LCC 903.550(A)(1) to implement the policies in LCC 903.510(B)(2) through
7 (10) by using the Agricultural Resource, Forest Resource, and Farm/Forest plan
8 designations to “conserve sensitive fish and wildlife habitats.” LCC
9 903.550(A)(1) (“The Agricultural Resource, Forest Resource and Farm/Forest
10 plan designations *shall be* used on the [LCC] to conserve sensitive fish and
11 wildlife habitats”) (emphasis added).

12 Intervenor respond that the county’s findings that address LDC
13 921.874(A)(4) also addressed LDC 921.874(A)(1), and correctly interpreted the
14 provisions of LCC 903.510 to conclude that “county protection of sensitive fish
15 and wildlife habitat is implemented during the development phase of a land use
16 application.” Record 26. However, that interpretation does not address the part
17 of the county’s PTAG embodied in LCC 903.510(B)(3) or LCC 903.550(A)(1)
18 at all.

19 In addition, the county’s interpretation—that county protection of sensitive
20 fish and wildlife habitat is implemented when development of a property is
21 proposed—is inconsistent with the express language of the county’s adopted and
22 acknowledged PTAG, which relies on resource plan and zone designations to

1 protect mapped wildlife habitat. Accordingly, we are not required to affirm that
2 interpretation. ORS 197.829(1).⁶ While it is true that some of the provisions of
3 LCC 903.510(B) include density restrictions and require clustering (LCC
4 903.510(B)(5)-(10)), the county’s interpretation fails to give any effect to LCC
5 903.510(B)(3) or LCC 903.550(A)(1).

6 Intervenor next respond that the express language LCC 903.510(B)(3) is
7 not an exclusive list of the county zoning designations that can be applied to
8 property mapped as major or peripheral big game habitat. Intervenor cite a
9 portion of LCC 903.510(B)(5), which provides in part that “beneficial
10 management of wildlife habitats can be obtained through careful siting of
11 dwellings and structures.” However, that LCC section also recognizes that

⁶ ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal, or rule that the comprehensive plan or land use regulation implements.”

1 “excessive housing development reduces habitat and sport hunting opportunities”
2 and requires the county to review development for consistency with ODFW
3 density recommendations. *Id.* But intervenors’ response does not really address
4 the part of the PTAG that expressly relies on EFU, F/F and FCM zoning, and the
5 corresponding plan designations, to protect mapped big game habitat from “most
6 conflicting uses” and to “limit potentially conflicting uses.” In particular, the
7 language in LCC 903.550(A)(1) is mandatory and requires that the AR, FR and
8 F/F plan designations “shall be used on the [LCC] to conserve sensitive fish and
9 wildlife habitats.”

10 LCC 903.510(B)(3) also makes clear that the PTAG requires the potential
11 impact on sensitive habitats to be assessed “on planning permit applications for
12 * * * *zone and plan amendments.*” (Emphasis added.) Similarly, LCC
13 903.550(A)(1) provides that “[l]and use proposals * * * that have undesirable
14 impacts on [sensitive fish and wildlife habitats] shall be reviewed *during the plan*
15 *amendment, zone amendment* and conditional use permit process.” (Emphasis
16 added). Accordingly, to the extent the county’s findings conclude that the
17 potential impact on sensitive habitats is not required to be addressed at the plan
18 amendment stage, or that the potential impact can be addressed during subsequent
19 development proposals, that interpretation is inconsistent with the plain language
20 of LCC 903.510(B)(3).

21 In sum, we agree with petitioner that the county’s interpretation of its
22 PTAG provisions is inconsistent with the express language in LCC

1 903.510(B)(3) and LCC 903.550(A)(1), which require resource plan and zone
2 designations for property that is mapped as peripheral big game habitat.

3 The first assignment of error is sustained.

4 **SECOND ASSIGNMENT OF ERROR**

5 In its second assignment of error, petitioner challenges the county's
6 findings that the plan amendment satisfies LCC 905.960(J), which requires a plan
7 amendment that designates resource land as NR to demonstrate that the subject
8 property is not suitable for commercial forest use or farm use, as inconsistent
9 with OAR 660-006-0010(2). Intervenors respond, initially, that the issue raised
10 in the second assignment of error was not raised during the proceedings below,
11 and therefore is waived. ORS 197.763(1); ORS 197.835(3).

12 Petitioner has not responded to intervenors' waiver argument.
13 Accordingly, we agree with intervenors that petitioner is precluded from raising
14 the issue raised in the second assignment of error for the first time at LUBA.

15 The second assignment of error is denied.

16 **DISPOSITION**

17 We will reverse a land use decision when the decision "violates a provision
18 of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c).
19 Intervenors seek a plan amendment and zone change to apply the NR plan and
20 zoning designation to property that is, at least partially, mapped as peripheral big
21 game habitat. In our resolution of the first assignment of error, we concluded the
22 LCC 903.510(B)(3) and LCC 903.550(A)(1) require resource plan and zone

1 designations for property that is mapped big game habitat. Accordingly, changing
2 the plan and zoning designations of property that mapped as peripheral big game
3 habitat to a NR designation is “prohibited as a matter of law.”

4 The county’s decision is reversed.