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

EDWARD J. KING,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA No. 2021-047

E.J.K. INVESTMENTS,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA No. 2021-052

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos filed the petition for review and reply brief and argued on behalf of petitioners.

No appearance by Lane County.

Sean Malone filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 10/15/2021

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

In these consolidated appeals, petitioners appeal two hearings officer decisions denying applications for forest template dwellings.

MOTION TO INTERVENE

Landwatch Lane County (intervenor) moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

Petitioners each applied for approval of a forest template dwelling pursuant to ORS 215.750, OAR 660-006-0027, and the Lane Code (LC) provisions implementing that statute and rule.[1] The properties are contiguous; each is approximately 12 acres in size; both are zoned Impacted Forest Lands (F-2), a zone that implements Statewide Planning Goal 4 (Forest Lands); and both are designated as Major Big Game Range.

The planning director approved the applications, and intervenor appealed each decision to the hearings officer. After the appeals were filed, we issued our

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[1] Briefly, ORS 215.750 and OAR 660-006-0027 allow a county to approve a dwelling on land zoned for forest use if (1) all or part of a prescribed number of lots or parcels that existed on January 1, 1993, are located within a 160-acre square "template" that is centered on the center of the subject parcel and (2) at least three dwellings existed on the other lots or parcels on January 1, 1993. The prescribed number of lots or parcels differs depending on the quality of the soils on the subject parcel and whether the parcel is located in eastern or western Oregon.

decision in *Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2020-030, Jan 21, 2021) (*Nimpkish*). Briefly, in *Nimpkish*, we held that the county's Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) program to protect big game habitat includes a comprehensive plan policy that limits the density of dwellings in big game habitat. We discuss our decision in *Nimpkish* in more detail later in this opinion.

Based on our holdings in *Nimpkish*, planning staff recommended denial of the applications. The hearings officer held hearings on and denied each application. These appeals followed.

INTRODUCTION

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.* The county's program to protect natural resources was acknowledged by the Land Conservation and Development Commission (LCDC) to comply with Goal 5 in 1984. The county's Goal 5 program includes a map and inventory of big game habitat determined to be "significant or important" within the meaning of OAR 660-016-0000(5)(c) (Big Game Habitat Inventory). *Save*

TV Butte v. Lane County, 77 Or LUBA 22, 40 (2018).[2] As noted, the subject properties are included on that inventory as Major Big Game Range.[3]

One component of the county's acknowledged Goal 5 program is Rural Comprehensive Plan (RCP) Goal 5, Flora and Fauna Policy 11 (Policy 11), which provides:

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

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[2] LCDC adopted Goal 5 in 1974. It adopted its first set of Goal 5 rules in 1981, which are codified at OAR chapter 660, division 16. In 1996, LCDC adopted a second set of Goal 5 rules, which are codified at OAR chapter 660, division 23. Because LCDC acknowledged the county's program to protect natural resources in 1984, the 1981 rules applied. *See Delta Property Co., LLC v. Lane County*, 271 Or App 612, 616-19, 617 n 1, 352 P3d 86 (2015).

[3] The Lane County Wildlife Inventory maps were developed based on Oregon Department of Fish and Wildlife big game habitat maps and identify the location, quality, and quantity of big game habitat, identify conflicts with big game habitat, and explain how those conflicts are to be mitigated. *Nimpkish*, ___ Or LUBA at ___ n 2 (slip op at 4 n 2).

The ODFW recommendations referenced in Policy 11 consist of an overall residential density standard of one dwelling per 80 acres in Major Big Game Range and one dwelling per 40 acres in Peripheral Big Game Range.

The application of Policy 11 to proposed development in big game habitat was at the heart of the parties' dispute in *Nimpkish*, and it is one of the issues in these appeals. In *Nimpkish*, we concluded that Policy 11 is part of and implements the county's acknowledged Goal 5 program to protect big game habitat and that the county was required to comply with the second sentence of Policy 11, which provides that proposed densities above ODFW's recommendations conflict with Goal 5 and that conflicts must be resolved through application of the Goal 5 rule. The hearings officer in *Nimpkish* concluded that Policy 11 did not apply to proposed dwellings on existing parcels and that it applied only in the context of land divisions and zone changes. We rejected that interpretation, concluding that nothing in the text, context, or legislative history of Policy 11 suggests that its applicability is so limited. To give some effect to the second sentence of Policy 11, we held, the county must apply Policy 11 to residential development where the proposed density exceeds the ODFW recommendations.[4] Because it was

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[4] We noted in *Nimpkish* that, in the 36 years since acknowledgment, the county has made no attempt to implement a regional approach to applying density limitations, as described in the first sentence of Policy 11. However, we held:

> "[T]he county's failure to take the step of identifying regions and basing zoning by region on either overall residential densities or ODFW minimum parcel size recommendations does not mean that

undisputed in *Nimpkish* that the proposed density exceeded the applicable limitation of one dwelling unit per 80 acres, we further concluded that the proposed density conflicted with Goal 5. As required by the second sentence of Policy 11, the proposed density could be "allowed only after resolution in accordance with OAR 660-16-000." Accordingly, we remanded the decision for further proceedings.

In the present cases, the hearings officer relied on our holdings in *Nimpkish* that (1) Policy 11 applies to proposed residential development of existing parcels within big game habitat and (2) an applicant for such development must either demonstrate that the proposed development complies with the applicable density

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> the county is absolved from protecting land included on the Big Game Habitat Inventory as Major Big Game Range through the residential density recommendations referred to in [Policy 11] or that the density recommendations simply do not apply. Rather, the *second sentence* of [Policy 11] remains operative, and it provides that '[a]ny density above [the ODFW-recommended density] limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000.' The second sentence is not tethered to or derivative of the first sentence, which envisions the creation of zoning areas that the county has never completed. The second sentence does not mention or refer to zoning areas. To find that the second sentence simply has no effect absent the creation of zoning areas would be to allow the county to fail to perform an action that it assured LCDC it would perform in order to obtain acknowledgement of its Goal 5 program, and it would have the effect of eliminating the Goal 5 protections for Big Game Range that LCDC understood were in place when it acknowledged the program." *Nimpkish*, ___ Or LUBA at ___ (slip op at 12-13) (emphasis in original; footnote omitted).

standard or seek resolution of the conflict under the Goal 5 rule. As discussed under the second assignment of error, petitioners argued that Policy 11 could be satisfied by demonstrating that the average residential density across all Major Big Game Range in the entire county is less than one dwelling per 80 acres. The hearings officer rejected that effort to demonstrate that the proposed dwellings comply with the applicable density standard, concluded that the proposed dwellings in fact do not comply with the applicable density standard, and, because petitioners had not attempted to resolve the conflicts under the Goal 5 rule, denied both applications.

On appeal, under the first assignment of error, petitioners urge us to revisit our first holding in *Nimpkish* that Policy 11 applies as an approval criterion to proposed dwellings in big game habitat. In the alternative, under the second assignment of error, petitioners argue that, if Policy 11 does apply to the subject applications, then the hearings officer erred in rejecting petitioners' proposed interpretation of Policy 11 and in adopting an interpretation of Policy 11 that is not supported by its text, context, or legislative history. Under the third assignment of error, petitioners challenge the hearings officer's comments on the evidence that petitioners offered to demonstrate compliance with the applicable density standard under their proposed interpretation of Policy 11.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that LUBA erred in concluding, in *Nimpkish*, that Policy 11, specifically the second sentence of Policy 11, applies as an approval criterion

to applications for dwellings in big game habitat. According to petitioners, the county's acknowledged Goal 5 program to protect big game habitat with respect to conflicting residential uses is entirely implemented by LC 16.211(5), which provides siting standards that regulate the location of development on parcels in the F-2 zone.[5]

The LC includes a minimum parcel size of 80 acres for *new parcels* in the F-2 zone. LC 16.211(7)(a). However, it does not include a minimum parcel size

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[5] LC 16.211(5) provides, in relevant part:

> "The following siting criteria apply to all new uses, activities, and structures allowed by LC 16.211. These criteria are designed to make such uses compatible with forest operations, to minimize wildfire hazards and risks and to conserve values found on forest lands. * * *
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> "(a) Residences, dwellings, and structures must be sited as follows:
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> "(i) Near dwellings on other tracts, near existing roads, on the most level part of the tract, on the least suitable portion of the tract for forest use and at least 30 feet from any ravine, ridge or slope greater than 40 percent (40%);
>
> "(ii) With minimal intrusion into forest areas undeveloped by nonforest uses; [and]
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> "(iii) Where possible, * * * at least 500 feet from the adjoining lines of property zoned [Nonimpacted Forest Lands] and 100 feet from the adjoining lines of property zoned F-2 or [Exclusive Farm Use.]"

for *dwellings* in the F-2 zone or any other standards that implement the ODFW density standards referenced in Policy 11. Nonetheless, petitioners argue that, as a matter of text, context, and legislative history, those density standards do not apply to proposed dwellings in the F-2 zone. Instead, petitioners argue, the county's acknowledged Goal 5 program to protect Major Big Game Range from the impacts of dwellings in the F-2 zone is limited to the siting standards at LC 16.211(5).

A. ORS 215.416(8)(a)

ORS 215.416(8)(a) enjoins counties to affirm or deny permit applications based on standards and criteria "set forth in the zoning ordinance or other appropriate ordinance or regulation of the county."[6] In the first subassignment of error, petitioners argue that, because Policy 11 is not listed or explicitly identified in LC 16.211 as one of the approval criteria for forest template dwellings, it cannot be applied as an approval criterion.

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[6] ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

Intervenor responds that no party raised ORS 215.416(8)(a) as an issue below or otherwise argued that, because LC 16.211 does not list Policy 11 as an approval criterion for forest template dwellings, Policy 11 cannot constitute an applicable criterion. Accordingly, intervenor argues, such issues are waived pursuant to ORS 197.763(1) and ORS 197.835(3). In the petition for review, petitioners cite 2021-052 Record 27, 317, and 582 to preserve all of the arguments under the first assignment of error.[7] Petitioners do not otherwise respond to intervenor's waiver argument. We have reviewed the cited record pages, and we agree with intervenor that nothing in them raises the issues raised in the first subassignment of error.

However, even if the issue was preserved, we agree with intervenor that ORS 215.416(8)(a) does not prohibit the hearings officer from applying Policy 11 to forest template dwelling applications. First, ORS 215.416(8)(a) does not limit the county to applying only those standards that are set forth in its zoning ordinance, such as LC 16.211. It also allows for the application of "other appropriate ordinance[s] or regulation[s] of the county," which is broad enough to include the county's comprehensive plan. Further, as we noted in *Nimpkish*, OAR 660-006-0027(6)(a) and OAR 660-006-0025(6), which LCDC adopted to implement ORS 215.750, specifically allow the county to apply standards in its

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[7] The county transmitted separate records for LUBA Nos. 2021-047 and 2021-052. We refer to the record in LUBA No. 2021-047 as "2021-047 Record." We refer to the record in LUBA No. 2021-052 as "2021-052 Record."

comprehensive plan to forest template dwellings. ___ Or LUBA at ___ n 5 (slip op at 8 n 5.[8] As far as petitioners have established, there is no statutory, code-based, or other legal prohibition on the county applying Policy 11, or any other applicable comprehensive plan provision, to approval or denial of forest template dwellings in the F-2 zone.

The first subassignment of error is denied.

B. Remaining Subassignments of Error

Petitioners' remaining subassignments of error argue that, even if there is no legal impediment to applying Policy 11 as an approval criterion, for several reasons, LUBA erred in *Nimpkish* in interpreting Policy 11 to function as an approval criterion under the county's Goal 5 program, given its text, context, and legislative history.

Petitioners first observe—correctly—that Policy 11 is ambiguous and requires interpretation to determine whether and how its density limitations function as approval criteria for dwelling permit applications. In these subassignments of error, petitioners urge us to revisit the question of *whether* the

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[8] OAR 660-006-0027(6)(a) provides that proposed template dwellings are allowed only if they "will comply with the requirements of an acknowledged comprehensive plan, acknowledged land use regulations, and other provisions of law." OAR 660-006-0025(6) provides that "[n]othing in this rule relieves governing bodies from complying with other requirements contained in the comprehensive plan or implementing ordinances such as the requirements addressing other resource values (e.g., Goal 5) that exist on forest lands."

density limitations in Policy 11 apply as approval criteria. In the second assignment of error, discussed below, petitioners assume that the density limitations apply but challenge the hearings officer's interpretation of *how* they apply.

Turning to petitioners' challenges to the hearings officer's reliance on our holdings in *Nimpkish*, petitioners argue that, while it may be plausible to interpret Policy 11 to constitute an applicable approval criterion, the better interpretation, considering all of the text, context, and legislative history, is that Policy 11 does not apply to development proposals in big game habitat and that the only standards that apply to such development under the county's acknowledged Goal 5 program are the siting standards in LC 16.211(5). That argument is based primarily on documents that we did not discuss in *Nimpkish*, some of which were included in the record in *Nimpkish* and all of which are included in the records in the present appeals.

1. Addendum to Flora and Fauna Working Paper

The county's Goal 5 program was developed, in part, by relying on a March 1982 Flora and Fauna Working Paper (the Working Paper), as amended by a November 1983 Addendum to the Flora and Fauna Working Paper (the Addendum). The county and the Department of Land Conservation and Development (DLCD) relied on the Working Paper and the Addendum as

background documents to the RCP.[9] In *Nimpkish*, the record included, and we relied, in part, on the Working Paper to interpret the first sentence of Policy 11 that refers to "regions of the County." *Nimpkish*, ___ Or LUBA at ___ (slip op at 12). That Working Paper language explained that the county had intended to divide the county into 10 to 20 regions and determine for each region the number of acres, existing dwellings, and additional dwellings allowable to comply with the applicable density limitation. *Id.* at ___ n 7 (slip op at 10 n 7).

Petitioners argue that the language that we relied upon to interpret the reference to "regions of the County" in the first sentence of Policy 11 was deleted by the Addendum and replaced with different language that appears to downplay, as a mere "numbers game," the regional approach.[10] The new language instead

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[9] The RCP characterizes the Working Paper as "background information * * * to be used to help interpret and understand [the RCP]." RCP Part 1(C). The Working Paper explains in more detail that the ODFW residential density recommendations for Major Big Game Range were one dwelling unit per 80 acres:

> "The primary conflict to big game, as mentioned earlier is residential use at certain densities. ODFW has recommended overall densities for Peripheral Big Game Range at one dwelling unit per 40 [acres]; for Major Big Game Range at one dwelling unit per 80 acres. Therefore, to restate the conflict: overall residential density greater than one dwelling unit/40 acres in Peripheral Range and one dwelling unit/80 acres in Major Range conflicts with habitat for big game." 2021-047 Record 525; 2021-052 Record 522.

[10] The inserted text states:

focuses on two other measures: minimum parcel sizes for new parcels in forest zones and siting standards that require clustering of dwellings.

> "Although [the regional approach] is a useful index, officials of the ODFW stress the fact that a mere 'numbers game' is not the optimum manner to deal with conflicts to the Big Game Range resource. While overall densities are important indicators of conflict, the manner in which these densities occur can either create worse conflict or reduce that which already exists.
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> "A prime example is that of 'clustering' dwelling units in Peripheral or Major Range areas—siting dwellings on large tracts of timber or agricultural land near lot lines, near roads, and near one another. This leaves the balance of the land unimpacted.
>
> "The means to prevent conflict is appropriate zoning and siting regulations. As a general rule, the County's 80-acre forest land zone will satisfy the requirements of Major Range, and the 40-acre zone will satisfy the requirements of Peripheral Range. Since commercial timber zoning is very restrictive of dwelling unit placement, it is unlikely that conflicts will occur.
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> "* * * * *
>
> "The County should continue to work with the ODFW to resolve the issue of Big Game Range designation and protection in a mutually acceptable manner—including the involvement of that agency in land use regulation development. If the zoning procedure described above does not succeed in pre-empting conflicts with the resource, it will be necessary for the County to go through the [Goal 5] process and determine new ways of dealing with conflicts. The process should follow the Goal 5 Rule format, and center on weighing the relative benefits of dwelling unit construction against those of Big Game Range maintenance." 2021-047 Record 556; 2021-052 Record 553.

Petitioners argue that the deletion of the language discussing a regional approach, and the inclusion of new language referring to clustering and siting standards, supports their view that the county proposed, and LCDC acknowledged, abandoning any reliance on density limitations as part of the county's Goal 5 program to protect big game habitat. Instead, petitioners argue, the county chose to rely solely on the siting standards at LC 16.211(5) to protect big game habitat.

2. DLCD Staff Reports

The second set of documents that petitioners rely upon are two DLCD staff reports that, in petitioners' view, demonstrate that DLCD accepted that the county intended to protect big game habitat *exclusively* via the LC 16.211(5) siting standards and would not implement *any* density limitations on dwellings in big game habitat.

In addressing ODFW's objections to the adequacy of the county's initial efforts to protect big game habitat, including Policy 11, the July 19, 1984 DLCD staff report commented:

> "ODFW is correct that the County's [Nonimpacted Forest Lands (F-1)] and F-2 zones do not incorporate ODFW's development density recommendations, nor do they set forth siting or clustering requirements. Without siting and clustering requirements, the minimum lot sizes in the F-l, F-2 and [Exclusive Farm Use (EFU)] zones are half that recommended by ODFW (i.e., the minimum lot sizes would have to be doubled to be acceptable)." 2021-047 Record 149; 2021-052 Record 150.

The July 19, 1984 DLCD staff report concluded that, in order to comply with Goal 5, the county had to, among other things,

> "[a]mend the F-2 and EFU zones to carry out the intent of [Policy 11]. Specifically, the zones must either require larger minimum lot sizes in the Big Game Habitat portions of those zones, or contain clustering requirements in those areas." 2021-047 Record 186; 2021-052 Record 187.

Petitioners argue that DLCD gave the county a choice to demonstrate full compliance with Goal 5: *either* require larger minimum lot sizes in big game habitat *or* adopt clustering requirements in such areas.[11] Petitioners contend that the county chose the latter option. The September 12, 1984 DLCD staff report explained that the county had subsequently adopted an earlier version of the siting standards at LC 16.211(5), and it recommended that LCDC acknowledge the county's legislation as complying with Goal 5. 2021-047 Record 286-87; 2021-052 Record 287-88.

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[11] As mentioned, the LC currently limits the size of *new parcels* in the F-2 zone to 80 acres. LC 16.211(7)(a). At the time of the 1983 to 1984 acknowledgment proceedings, the minimum parcel size in the F-2 zone was "20 acres for creation of a woodlot or farm parcel for growing grapes, berries, or horticultural specialties, and 40 acres for creation of a farm parcel." 2021-047 Record 143; 2021-052 Record 144. At some point not shown in the records, the county apparently amended the F-2 zone to specify a minimum parcel size of 80 acres for new parcels. However, the purpose statement of the F-2 zone explains that "[t]he minimum parcel size and other standards established by this zone are intended to promote commercial forest operations." LC 16.211(1). Thus, it is not clear what role, if any, the current 80-acre minimum parcel size in the F-2 zone plays as part of the county's Goal 5 program to protect big game habitat.

According to petitioners, the foregoing legislative history indicates that LCDC acknowledged that compliance with the siting standards at LC 16.211(5) is sufficient, without more, to ensure that residential development in big game habitat is consistent with Goal 5. Under this view, petitioners argue, Policy 11 plays no role in approving proposed dwellings in big game habitat.

3. Analysis

The principle of *stare decisis* applies to our final opinions. ORS 197.805 (instructing that LUBA decisions "be made consistently with sound principles governing judicial review"). We will reconsider a prior decision if a party demonstrates that we erred in making it because we were not presented with an important argument. *Nicita v. City of Oregon City*, ___ Or LUBA ___, ___ (LUBA Nos 2020-037/039, Sept 21, 2021) (slip op at 20) (citing *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011)). In *Nimpkish*, no party made any arguments based on either the Addendum or the DLCD staff reports, and our opinion did not address all of those documents in analyzing Policy 11's text, context, and legislative history. We do so now, and we uphold our decision in *Nimpkish*.

Turning first to the Addendum, intervenor initially responds that it is unclear whether the new language in the Addendum replaced all or only a portion

of the original language in the Working Paper describing the regional approach.[12] In any case, intervenor argues, the new Addendum language may represent a step back from primary reliance on the regional approach, but nothing in the Addendum purports to completely abandon the ODFW density recommendations or suggests that siting or clustering standards, in themselves, are sufficient to establish compliance with Goal 5.

We agree with intervenor that nothing in the Addendum purports to eliminate or reduce the role of the ODFW density recommendations in the county's program to protect big game habitat. The Addendum left in place the original Working Paper language stating that an overall residential density greater than one dwelling per 80 acres in Major Big Game Range conflicts with Goal 5. *See* n 9. Notably, both the Working Paper and the Addendum include language describing a process to ensure compliance with Goal 5 in the event that other identified measures (the regional approach, minimum parcel sizes, and clustering) are insufficient—by applying the Goal 5 rule. In the county's Goal 5

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[12] Under the heading "Working Paper Revisions," the Addendum instructs, "DELETE text beginning with the last paragraph on page 24 of the Working Paper through the remainder of text on page 25, and ADD the following in its place[.]" 2021-047 Record 543, 556; 2021-052 Record 540, 553. Intervenor argues that it is unclear whether the Addendum intended to delete only the last paragraph on page 24 and the remainder of *that paragraph* at the top of page 25 or whether it intended to delete all of the paragraphs on page 25. For purposes of our analysis, we assume, as petitioners do, that the Addendum was intended to replace all of the paragraphs on page 25 of the Working Paper.

program to protect big game habitat, the process to ensure compliance with Goal 5 is operationally embodied in the second sentence of Policy 11. The county added other measures, as requested by ODFW, but it chose to leave that process in place. LCDC acknowledged Policy 11, and the other components of the county's Goal 5 program, with that process in place. If petitioners are correct that the county's Goal 5 program consists entirely of the siting standards at LC 16.211(5), then the second sentence of Policy 11 is a nullity.

In our view, the legislative history is reasonably clear that the LC 16.211(5) clustering standards were intended to supplement, rather than replace, the other components of the county's Goal 5 program, including Policy 11. The July 19, 1984 DLCD staff report concluded that Policy 11 is insufficient to ensure compliance with Goal 5, and it ultimately required additional measures, but there is no suggestion in any legislative history that the county or DLCD believed that siting standards or any other measures could eliminate the need for Policy 11's density limitations. The July 19, 1984 DLCD staff report addressed criticism that Policy 11 is inadequate:

> "Objectors are not correct that [Policy 11] violates Goal 5. Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. The County has, through [Policy 11], however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made. This would require a plan amendment and could only take place if justified based on the Goal 5 analysis. However, as noted previously, the County still needs to adopt measures in its F-2, [Marginal Lands] and EFU Zones which ensure that ODFW's

density standards will be achieved." 2021-047 Record 149; 2021-052 Record 150.

The foregoing clearly illustrates DLCD's expectation that, while additional measures were necessary to ensure full compliance with Goal 5, the ODFW density standards embodied in Policy 11 would continue to play a role in evaluating development proposals. Nothing in the acknowledgment process eliminated or vitiated the applicability of those density standards to proposed residential development in big game habitat.

We consider petitioners' arguments below regarding exactly what role Policy 11 plays in the county's Goal 5 program to protect big game habitat. For purposes of the first assignment of error, however, we reject petitioners' arguments that LUBA erred in concluding in *Nimpkish* that Policy 11 is applicable as an approval criterion to development proposals that may exceed the ODFW density recommendations.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners challenge the hearings officer's interpretations regarding how the Policy 11 density limitations are properly applied.

We repeat the text of Policy 11, numbering each of the three sentences:

> "[1] [ODFW] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. [2] Any density above that limit shall be considered to conflict with Goal 5

> and will be allowed only after resolution in accordance with OAR 660-16-000. [3] The County shall work with [ODFW] officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program."

As noted, the text of Policy 11 is ambiguous and requires interpretation to determine how to apply the ODFW density limitations for purposes of the second sentence. The hearings officer observed:

> "Anybody who has studied residential densities, either in urban or rural settings, understand[s] that the determination of residential density depends on the denominator that is used. That is, the relevant residential density as stated by ODFW is a ratio (dwellings/acre). If the denominator of that ratio (area studied) is a discrete property, the density calculation will be very different than if the denominator is the entire county." 2021-047 Record 5; 2021-052 Record 5.

Before the hearings officer, petitioners attempted to demonstrate compliance with Policy 11 based on their interpretation of that policy. Specifically, petitioners argued that, to determine whether the "overall residential density" exceeds one dwelling per 80 acres, the applicant need only (1) determine the number of acres in the county designated as Major Big Game Range, including all federal, state, and private lands (roughly 2.5 million acres, stretching from the Cascade Range to the Pacific Ocean), and (2) divide that number by the number of existing dwellings in areas designated as Major Big Game Range (roughly 3,137 dwellings). The resulting number, in petitioners' view, is the "overall residential density" (in this case, an average of approximately one dwelling per 819 acres). Alternatively, petitioners performed the same

calculations using large regions of the county, for example, by dividing the county into eastern and western halves at Interstate 5 and separately calculating the "overall residential density" in each half (also resulting in densities of less than one dwelling per 80 acres).

The hearings officer rejected that approach. The hearings officer first noted that, in *Nimpkish*, LUBA remanded, in part, because there was no dispute that development of the 10-acre subject property would violate the one-dwelling-per-80-acres density limitation. That conclusion can be read to suggest that Policy 11 imposes, essentially, a minimum parcel size of 80 acres for dwellings in big game habitat. The hearings officer characterized that suggestion as *dicta* because the primary issue in *Nimpkish* was whether Policy 11 applies, not how it should be applied or what denominator should be used in determining residential density.

Given the lack of dispute in *Nimpkish* that the proposed dwelling violated Policy 11, we agree with the hearings officer that it was not necessary for LUBA to suggest any particular approach to applying Policy 11. To the extent that we suggested in *Nimpkish* that Policy 11 effectively imposes a minimum parcel size of 80 acres for dwellings, that suggestion was *dicta* and, moreover, not supported by any analysis.

The hearings officer conducted an analysis of the text and context of Policy 11, along with relevant case law, in order to evaluate the parties' arguments regarding permissible approaches to demonstrating compliance with Policy 11. As noted, the hearings officer ultimately rejected petitioners' interpretation that

the appropriate denominator for determining residential density is the roughly 2.5 million acres of the county that are designated as Major Big Game Range. Instead, the hearings officer held that, until the county divides the county into regions as described in the first sentence of Policy 11, the only appropriate denominator for purposes of applying the second sentence of Policy 11 is the acreage of the subject parcel. As a practical matter, the hearings officer noted, this means that a proposed dwelling on a parcel less than 80 acres in size can be approved in big game habitat only pursuant to the Goal 5 rule, as described in the second sentence of Policy 11.

As further support for their conclusion that the appropriate denominator is the subject parcel's acreage, the hearings officer cited *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003), which involved a destination resort proposal and a code provision that limited residential density to one dwelling per 40 acres in peripheral big game habitat. The code did not specify the appropriate denominator for purposes of applying that density standard, so the county applied as the denominator a large planning area consisting of 1,121,378 acres. Under the county's interpretation, the subject 500 acres could have been developed at a much greater density than one dwelling per 40 acres, as long as the *average* density across the 1,121,387-acre planning area remained below that ratio. However, we rejected that interpretation as inconsistent with the purpose of the density standard, which was to protect big game habitat from residential density. Absent specification in the code of a different denominator, we held that the

denominator most consistent with the purpose of the density standard was the acreage of the subject property.

The hearings officer applied our reasoning in *Wetherell* to the present cases, rejecting petitioners' proposal to use over 2.5 million acres of the county as the denominator because that interpretation is inconsistent with the purpose of the residential density standard to protect big game habitat. Further, the hearings officer concluded that, absent definition by the county of a different denominator, based on regional averages or some other approach, the only denominator that is consistent with the purpose of the density standard is the acreage of the subject property. Consequently, the hearings officer concluded, the proposed densities conflict with Goal 5 and can be approved only via application of the Goal 5 rule, pursuant to the second sentence of Policy 11.

Petitioners challenge the hearings officer's interpretations. First, petitioners distinguish *Wetherell* because, unlike the code provision at issue in that case, Policy 11 references an "overall" residential density. Petitioners argue that the qualifier "overall" clearly denotes some kind of *averaging* of multiple parcel sizes and that no averaging is possible when only the acreage of the subject property is considered.

The hearings officer noted that, while the adjective "overall" appears in the first sentence of Policy 11, it does not appear in the second sentence. Instead, the second sentence refers simply to "that limit." The hearings officer concluded

that the second sentence of Policy 11 has no express denominator.[13] We understand the hearings officer to have concluded that, for purposes of the second sentence, no averaging or "overall" density need be calculated.

We agree with petitioners that the phrase "that limit" in the second sentence of Policy 11 refers to the ODFW density standards, which are described in terms of an "overall residential density." We further agree with petitioners that the term "overall" suggests averaging more than one unit or number, for example, averaging parcel sizes for two or more parcels. However, we see no mathematical or logical reason why the appropriate denominator cannot be based on the number of acres in a single unit of land. That, in fact, is the approach that the county board

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[13] The findings state:

> "The applicant argues that the term 'overall' in Policy 11 means that the density denominator must be the entire County, or in the alternative, the portions of the County on the east or west side of Interstate 5. [Intervenor] points out that the use of the term 'overall' in Policy 11 relates only to the ODFW recommendation. Apparently, the ODFW density recommendations are stated in terms of 'overall residential density.' The first sentence of Policy 11 makes clear that the County was going to use those numbers (one dwelling per 80 acres in the Major Big Game habitat) to 'determine the allowable number of residential dwelling units within regions of the county.' The next sentence does not use the 'overall' modifier: 'Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000.' The second sentence of Policy 11 provides no express denominator for the density standard. So the text itself does not clearly answer the question presented in this appeal." 2021-047 Record 5-6; 2021-052 Record 5-6.

of commissioners adopted, and LUBA affirmed, in *Cattoche v. Lane County*, 79 Or LUBA 466 (2019).

Cattoche involved a proposal to rezone a 131.55-acre parcel in order to subdivide it and develop it with two additional dwellings, for a total of three dwellings. The parcel was designated as Peripheral Big Game Range and, pursuant to Policy 11, the county applied a density standard of one dwelling per 40 acres. The county found that the Policy 11 density standard was satisfied because the resulting density of the three dwellings would have been less than one dwelling per 40 acres, using the 131.55 acres of the subject parcel as the denominator. On appeal to LUBA, the petitioners argued that the commissioners misapplied the one-dwelling-per-40-acres density standard by failing to include in their density calculation the dwellings on and acreage of an adjoining property that was previously part of the same tract. Although we remanded the decision on other grounds, we rejected the petitioners' argument and affirmed the commissioners' implicit interpretation of the density standard as limiting the denominator to the acreage of the subject property.

Cattoche illustrates that the county has, in at least some cases, chosen to calculate "overall residential density" for purposes of Policy 11 based solely on the acreage of the subject property. We therefore reject petitioners' categorical argument that, in all cases, the denominator used to determine "overall residential density" must be based on averaging the acreage of multiple parcels. It is true that, in *Cattoche*, the subject parcel was relatively large and could be developed

with multiple dwellings consistent with the ODFW density limitations. However, petitioners identify no principled reason why the size of the subject parcels makes a difference. *Cattoche* also involved a zone change application, while the present cases do not. However, we perceive no principled basis to calculate the denominator differently based on whether the proposed development involves a zone change.

Based on the legislative history of Policy 11, it is reasonably clear that the phrase "overall residential density" was originally formulated with the expectation that the county would engage in a post-acknowledgment process that, among other things, would identify some 10 to 20 regions of the county and determine, based on the number of acres and existing dwelling units within each region, how many new dwelling units can be constructed within each region consistent with the ODFW density standards. However, as noted, ODFW apparently had concerns about the adequacy of that regional approach to ensuring compliance with Goal 5, and it ultimately recommended that the county adopt additional measures while leaving the original density limitations in place. As also noted, the county has made no effort in the intervening post-acknowledgment period to adopt a regional approach or, indeed, any regulations fleshing out how "overall residential density" should be calculated. In the absence of such regulations, *Cattoche* suggests that the county has chosen to apply the density limitations in Policy 11 using the acreage of the subject parcel as the

relevant denominator. Petitioners have not demonstrated that that approach is legal error.

In any case, petitioners have certainly not demonstrated that the only permissible denominator is the total acreage of vast portions of the county designated as Major Big Game Range. While *Wetherell* involved a different code provision and different facts, it is instructive in noting that ambiguous regulations implementing a statewide planning goal must be interpreted in a manner that is consistent with the goal that they implement. ORS 197.829(1)(d). The obvious purpose of the ODFW density limitations is to protect big game habitat from conflicts by limiting residential density. Because big game habitat is not fungible, determining residential density in that context is necessarily an inquiry into reasonably *local* circumstances. It seems highly inconsistent with Goal 5 and the purpose of the density limitations to justify high-density residential development in one area of big game habitat based on the fact that, hundreds of miles away, on the other side of the county, there are public forests and large private commercial timber holdings with little or no residential development. In that sense, petitioners' preferred approach to calculating overall residential density, using vast portions of the county as the denominator, is much more of a mere "numbers game" than the regional approach about which ODFW expressed reservations during the acknowledgment process.

In sum, petitioners have not demonstrated that the hearings officer erred in calculating residential density based on the acreage of the subject property.

Accordingly, the hearings officer did not err in concluding that the proposed densities conflict with Goal 5 and that those conflicts must be resolved based on application of the Goal 5 rule.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In support of their theory of how to determine residential density, petitioners relied on data taken from various non-county sources regarding how many acres in the county are designated as Major Big Game Range and how many dwellings exist thereon. In one portion of their decisions, the hearings officer expressed skepticism that data and evidence that is not included in the county's comprehensive plan can be used to support quasi-judicial decisions, citing Statewide Planning Goal 2 (Land Use Planning) and case law interpreting that goal. 2021-047 Record 8-9; 2021-052 Record 8-9.

Goal 2 requires that land use decisions be supported by an "adequate factual base." The hearings officer understood the cited cases to stand for the proposition that, where an applicant relies on a buildable lands inventory or similar inventory to support a land use decision, the inventory must be adopted into the applicable comprehensive plan. In a footnote, the hearings officer noted that their musings regarding Goal 2 are not necessary to support the primary conclusion that the appropriate denominator is the acreage of the subject property. 2021-047 Record 9 n 8; 2021-052 Record 9 n 8.

On appeal, petitioners argue that the hearings officer misconstrued Goal 2, the applicable case law, and the applicable county legislation to the extent that they concluded that petitioners' evidence can be relied upon to support the decisions only if it is adopted into the county's comprehensive plan.

We need not resolve this assignment of error because petitioners challenge a legal conclusion that is, at best, a contingent and alternative basis for denying the applications. We would have to address challenges to that contingent conclusion only if we had rejected the hearings officer's primary conclusion and affirmed petitioners' preferred approach to determining overall residential density for purposes of Policy 11. However, we have instead affirmed the hearings officer's primary conclusion and rejected petitioners' preferred approach. Accordingly, petitioners' arguments under the third assignment of error provide no basis for reversal or remand.

The third assignment of error is denied.

The county's decisions are affirmed.