

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

3
4 PEGGY SUE JACOBUS, JUDY DAHL,
5 ANN FELBER, and KURT KNABKE,
6 *Petitioners,*

7
8 vs.

9
10 KLAMATH COUNTY,
11 *Respondent,*

12
13 and

14
15 CITY OF CHILOQUIN,
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2021-093/094

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Klamath County.

24
25 Sean T. Malone filed a petition for review and reply brief and argued on
26 behalf of petitioner.

27
28 No appearance by Klamath County.

29
30 Charles D. Sarkiss filed a response brief and argued on behalf of
31 intervenor-respondent. Also on the brief was Hornecker Cowling LLP.

32
33 RUDD, Board Member; ZAMUDIO, Board Chair, participated in the
34 decision.

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

37
38 REMANDED

04/06/2022

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

NATURE OF THE DECISION

These appeals concern an ordinance approving an exception to Statewide Planning Goal 4 (Forest Lands) and establishing a limited use (LU) overlay to allow a wastewater treatment facility, lagoon storage of effluent, and land application of effluent on a 211-acre parcel. In LUBA No. 2021-093, petitioners appeal a board order approving a conditional use permit and directing the planning director to draft an ordinance authorizing the use, and in LUBA No. 2021-094, petitioners appeal the board decision adopting the ordinance authorizing the use.

FACTS

These appeals follow our decision on remand in *Jacobus v. Klamath County*, __ Or LUBA __ (LUBA No 2020-054, Dec 10, 2020) (*Jacobus I*), described below. As we explained in *Jacobus I*, the city plans to transport waste from its existing treatment facility through an approximately 1.8-mile underground pipeline.¹ The pipeline will be located in the Highway 422 right of way and will terminate at the 211-acre subject property, the site of the city’s proposed Lagoon Irrigation area. The Lagoon Irrigation area is to the east of Highway 422 and includes “three (3) lagoons; a primary treatment lagoon (3.7 acres), a secondary treatment lagoon (2.47 acres), and storage lagoon (9.13

¹ The pipeline is not part of the decision challenged in these consolidated appeals.

1 acres)” and an effluent sprinkler system for approximately 40 acres of the subject
2 property. Record 15, 439.

3 The subject property is located approximately 1.75 miles northwest of the
4 city and adjacent to Highway 422. Record 358, 439. The subject property is
5 undeveloped and has topography that climbs towards the northeast and falls to
6 the southeast. Record 361. The subject property is within an area designated by
7 the county as Big Game Winter Habitat Overlay.²

8 The subject property and all abutting properties are zoned Forest.³ The
9 city’s Forest zone implements Goal 4 which is:

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

² The Big Game Winter Habitat Overlay protects a natural resource protected under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces). Goal 5 is “To protect natural resources and conserve scenic and historic areas and open spaces.”

³ The board of commissioners’ findings describe the area as follows

“All properties abutting the subject property are zoned Forestry. There is a single property, approximately ¼-mile from the east boundary of the subject property, on the northwest corner of the intersection of Hwy 422 and Hwy 97 that is zoned Recreational Commercial (CR). Properties to the west (approximately ¾-mile) are zoned EFU-CG.” Record 358.

1 The city's proposed use is not allowed under Goal 4 and therefore requires county
2 approval of an exception to Goal 4. An exception is

3 “(1) * * * an amendment to the county's acknowledged
4 comprehensive plan, that

5 “(a) Is applicable to specific properties or situations and
6 does not establish a planning or zoning policy of
7 general applicability;

8 “(b) Does not comply with some or all goal requirements
9 applicable to the subject properties or situations; and

10 “(c) Complies with ORS 197.732(2), the provisions of
11 [OAR 660-004] and if, applicable, the provisions of
12 OAR 660-011-0060, 660-012-0070, 660-014-0030 or
13 660-014-0040.” OAR 660-004-0005(1).

14 In *Jacobus I*, the petitioners appealed the board of commissioners'
15 approval of a Goal 4 exception, application of a limited use overlay and issuance
16 of a conditional use permit to allow a wastewater treatment facility, lagoon
17 storage of effluent, and application of effluent on the subject property. We
18 remanded the county's decision, agreeing with petitioners that the board failed to
19 adopt findings supporting its decision and failed to consider applicable approval
20 criteria.

21 On May 11, 2021, the board of commissioners held a public hearing on
22 remand at which additional public testimony and evidence was considered. The
23 record remained open until June 15, 2021. On June 22, 2021, the board of

1 commissioners deliberated on the application and voted to approve the
2 application. The Order and Ordinance became final on September 22, 2021.

3 These appeals followed.

4 **STANDARD OF REVIEW**

5 Petitioners submitted a single petition for review in these consolidated
6 appeals. Petitioners' six assignments of error assert that the county's decision is
7 not supported by adequate findings and that the findings are not supported by
8 substantial evidence. We will remand a decision if "[t]he findings are insufficient
9 to support the decision, except as provided in ORS 197.835(11)(b)" and if "[t]he
10 decision is not supported by substantial evidence in the whole record [.]" OAR
11 661-010-0071(2)(a), (b).

12 Adequate findings identify the relevant approval criteria and the evidence
13 relied upon and explain how the evidence leads to the conclusion on whether the
14 approval criteria are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556
15 (1992). Substantial evidence is evidence a reasonable person would rely upon to
16 reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
17 (1993).

18 **FIRST ASSIGNMENT OF ERROR**

19 **A. Background**

20 The county adopted its own findings as well as "Finding(s), Conclusions
21 and evidence noted as Exhibits SUP A, SUP B, SUP C, SUP D, SUP E, SUP and
22 SUP AH, submitted by the applicant in the whole Record as [its] own Finding(s)

1 and Conclusions.” Record 9. Sup D includes the city’s Mitigation Plan, which is
2 a four-page document prepared by Rabe Consulting in February 2020. Record
3 437-441. Because it is central to elements of petitioners’ first and second
4 assignments of error, we begin by describing the city’s Mitigation Plan.⁴

5 As explained in the Mitigation Plan, the

6 “Lagoon-Irrigation Area lies within the Elk Winter Range Overlay
7 (Overlay), which is designated by Klamath County as a Goal 5
8 resource. * * * The Lagoon-Irrigation Area is classified as a
9 category 2 wildlife habitat.

10 “The Lagoon-Irrigation Area exhibits aspen dispersed within a dry
11 draw. The Area has encroachment of Ponderosa and lodgepole
12 pines. The understory exhibits sparse willows, bitterbrush, limited
13 amounts of sagebrush, bunch grasses and forbs. The pine overstory
14 is likely decreasing the density of aspen and shrubs within the
15 Area.”⁵ Record 439.

16 As initially proposed, the city planned to fence the irrigation and pond areas to
17 exclude elk. The Mitigation Plan identified the construction of the ponds and the
18 related fencing as resulting in a permanent habitat impact on 25 acres. The

⁴ Among the conditions of approval imposed by the board of commissioners in its decision is a requirement that, prior to beginning operations, the city complete all recommended Elk Habitat mitigation measures identified in the city’s Mitigation Plan “and as reviewed, inspected and approved by Oregon Department of Fish and Wildlife.” Record 5.

⁵ Webster’s Third International Dictionary defines “aspen” as “any of several poplars * * * the leaves of which flutter in the lightest wind on account of their flattened petioles.” *Webster’s Third New Int’l Dictionary* 129 (unabridged ed 2002).

1 anticipated permanent habitat impact on 25 acres notwithstanding, the Mitigation
2 Plan concluded that the removal of certain trees and addition of irrigation would
3 result in an improvement in habitat on the subject property. Specifically, the
4 Mitigation Plan's author determined that the existing pine overstory is likely
5 decreasing the density of aspen and shrubs within the irrigation area, resulting in
6 a sparse understory, and that the planned removal of some trees and planned
7 addition of irrigation will allow the aspen to increase. Record 439.

8 With that background, we proceed to the first subassignment of error.

9 **B. First Subassignment**

10 The county approved a reasons exception to Goal 4, that is, an exception
11 based on the conclusion that there are reasons consistent with OAR 660-004-
12 0022 to use Forest land for uses not allowed by Goal 4. OAR 660-004-0020(1).
13 OAR 660-004-0020(2) sets out criteria applicable to a reasons exception, with
14 OAR 660-004-0020(2)(c) providing, in part, that the

15 "The long-term environmental, economic, social and energy
16 consequences resulting from the use at the proposed site with
17 measures designed to reduce adverse impacts are not significantly
18 more adverse than would typically result from the same proposal
19 being located in areas requiring a goal exception other than the
20 proposed site."

21 We will refer to the evaluation of the long-term environmental, economic, social,
22 and energy consequences as an analysis of the ESEE consequences or the ESEE
23 findings. Petitioners' first subassignment of error is that the board of

1 commissioners' ESEE findings related to the environmental impact on winter elk
2 habitat are inadequate and are not supported by substantial evidence.

3 With respect to the environmental element of the ESEE findings, the board
4 of commissioners found:

5 "Environmental – This site was selected, in part, for its location
6 along an existing street/highway right-of-way. The subject
7 property's location along Hwy 422 allows construction of the
8 pipeline between the existing [wastewater treatment facility] and the
9 new facility to occur within the existing right-of-way. This is less
10 impactful on the environment as there is no need to disturb lands
11 that may contain resource uses such as forest lands, farm lands,
12 wetlands, riparian is corridors, etc. This site was also chosen for its
13 topography. The site is gently sloping on the west side of the
14 property which allows for the construction of the new facility
15 without large amounts of cut and fill to level the site (see contour
16 map – Exhibit F). The applicant contends that not only will the
17 selection of this site not be significantly more environmentally
18 impactful than the same proposal on other sites, this site will have a
19 lesser impact on the environment compared with the use of other
20 sites in the vicinity." Record 391.

21 More broadly, the county found:

22 "[T]hat the subject property is within an area designated as Goal 5
23 Big Game Winter Habitat Overlay as recognized by the Oregon
24 Department of Fish & Wildlife (ODFW). ODFW comments
25 demonstrate that the applicant has evaluated and prepared a habitat
26 mitigation plan for the impacts of development and that the
27 mitigation plan when developed will be a net benefit to elk and
28 wildlife habitat. The enhancement [of the property] with greater
29 quality of grasses, shrubs and aspens and other vegetation, will not
30 result in the loss of habitat for threatened or endangered animal
31 species that may be found on the subject property." Record 8.

1 Petitioners argue that the board of commissioner' findings fail to adequately
2 address potential impacts on elk and their habitat and are not supported by
3 substantial evidence.

4 The only fencing described in the Mitigation Plan is around the irrigation
5 area, which includes, but is larger than, the lagoons. Petitioners point to the city's
6 final rebuttal as evidence that the city changed its plans related to fencing on the
7 subject property over the course of the county review, quoting the city as stating
8 its

9 “* * * ESEE analysis was prepared with information and plans prior
10 to the recent wildfire. Regarding the Environmental analysis, the
11 opponents claim that the irrigated area will be fenced from the elk.
12 The fence, prior to the fire, was wood post and barbed wire along
13 the property lines and generally surrounding the irrigated area. The
14 proposed fencing was to keep persons/trespassers outside of the
15 irrigated area, due to the overhead sprinklers system coming on with
16 no notice. *The applicant is no longer proposing a fence surrounding*
17 *the irrigated area and only a perimeter fence that will allow elk and*
18 *other wildlife movement along the subject property's boundary*
19 *lines. The lagoons and facilities will have an exclusion fence to keep*
20 *elk and other wildlife out, so that the integrity of the lagoons and*
21 *proper functioning of the facilities are not compromised. See Exhibit*
22 *W and Exhibit AL.” Record 21 (Emphasis added).*

23 Generally consistent with this testimony from the city, the board of
24 commissioners found:

25 “The proposed development includes a chain-link fence to be
26 constructed around the lagoons and control/pump building. Access
27 to the entire site will be controlled with an existing barbed wire
28 fence around the perimeter of the property. The maximum permitted
29 fence height is 7 feet per Article 64.030 and all fencing will be no

1 taller than 7 feet in height.” Record 406.

2 The board of commissioners’ decision reflects different fencing than the fencing
3 described in the Mitigation Plan that the county also adopted as findings and
4 relied upon as support for its conclusions as to impact on elk habitat.

5 The Mitigation Plan does not identify perimeter fencing or fencing limited
6 to the lagoons and control pump building yet concludes:

7 “The City of Chiloquin will improve wildlife habitat within the
8 Lagoon-Irrigation Area in accordance with OAR 635-415-
9 0025(2)(a)(b)(B) in conjunction with the construction of the
10 Chiloquin Wastewater Project. The goal of the wildlife habitat
11 improvements is to achieve no net loss of either predevelopment
12 habitat quantity or quality, while providing a net benefit of habitat
13 quantity and quality.” Record 439.

14 Petitioners argue that the findings fail to explain how interior fencing to exclude
15 elk from the lagoons can be reconciled with the conclusion in the Mitigation Plan
16 that there is no loss of habitat. Petitioners argued below that if there are 35 acres
17 of irrigation area fenced off and 15 acres of sewage lagoons, 50 acres are fenced
18 and

19 “* * * there is clearly a net loss of habitat, despite the allegation that
20 the goal is to achieve a no net loss of either predevelopment habitat
21 quantity or quality. If the 50 acres is fenced off, including sewage
22 lagoon ponds, there is no possibility of no net loss of habitat for elk,
23 whether quantitatively or qualitatively.” Record 94-95.

24 Petitioners also argue that the findings fail to address the potential for elk to
25 become tangled in too low fences after an unsuccessful attempt to jump the fence
26 or, after successfully jumping over a fence, becoming trapped within an enclosed

1 area. We agree with petitioners that the county's findings must include this
2 analysis. The Mitigation Plan does not explain why improving the quality of
3 habitat on parts of the property resolves the total loss of habitat on others.

4 Petitioners stated in their testimony below that at times, the city appeared
5 to propose fencing off the entire property. Record 98. Petitioners argue that the
6 perimeter fencing proposed in the city's final rebuttal and approved by the
7 county, may both create a hazard for elk and may prevent elk from accessing the
8 habitat on site at all. The city responds that because the property was fenced at
9 the time the Mitigation Plan was submitted, we should assume that perimeter
10 fencing is not relevant to the county's decision. We disagree.

11 The Mitigation Plan makes no reference to perimeter fencing and there is
12 no basis for us to conclude that the author of the Mitigation Plan was aware of
13 and considered perimeter fencing in their analysis. An ODFW biologist reviewed
14 and concurred in the Mitigation Plan in letter dated February 8, 2021. Record
15 436. Specifically, ODFW concluded that "[t]he application of the treated
16 wastewater will enhance growth of grasses, shrubs, and aspen, which will
17 improve the quality and quantity of forage for elk and other wildlife." *Id.*
18 However, there is no evidence that the ODFW biologist was aware of perimeter
19 fencing. Petitioners assert that even if the record supports a conclusion that the
20 application of treated wastewater will improve habitat, elk will be excluded from
21 the irrigated area by the perimeter fence. We cannot tell from the findings or the
22 evidence whether the approved perimeter fence will exclude elk from the

1 irrigated area. The county’s findings must include this analysis. We agree with
2 petitioners that whether the previous perimeter fence excluded elk from the
3 irrigation area is not particularly relevant to the analysis required by OAR 660-
4 004-0020(2)(c), which focuses on the “consequences resulting from the use”
5 proposed to be developed under a reasons exception.

6 We agree with petitioners that the findings are inadequate to respond to
7 specific issues raised by petitioners concerning compliance with applicable
8 standards.⁶ Findings must address and respond to specific issues relevant to
9 compliance with applicable approval standards that were raised in the
10 proceedings below. *Norvell v. Portland Metropolitan Area, ETC.*, 43 Or App
11 849, 853, 604 P2d 896 (1979). We also agree with petitioners that the findings
12 concerning the long-term environmental consequences of the proposed use as it
13 relates to elk and their habitat is not supported by substantial evidence because
14 the record does not address these issues.

15 The first subassignment of error is sustained.

16 **C. Second and Third subassignments of error**

17 The ESEE findings also requires an analysis of the social impact of the
18 proposed use. Petitioners argue in their second and third assignments of error that
19 the board of commissioners’ findings concerning social impact are inadequate
20 and not supported by substantial evidence.

⁶ See for example Record 94, 98.

1 With respect to social impacts, the board of commissioners observed that
2 “[t]here are a few homes near the proposed site but the site’s topography and the
3 planned layout for the facility will help to reduce any negative impacts on
4 adjoining properties.” Record 392. The board of commissioners found:

5 “The site was selected, in part, due to its location along Hwy 422,
6 the size and its topography, all of which helps to buffer between the
7 site and neighboring properties. The site climbs to the northeast and
8 falls to the southeast. These changes in elevation help to provide a
9 visual buffer between the proposed use and properties to the east.
10 The existing trees onsite will also be retained where possible to
11 further buffer the site. The project’s location near the west side of
12 the property takes advantage of the highway right-of-way to provide
13 separation between the proposed use and properties to the west. The
14 design of the proposed facility includes additional space onsite to
15 provide buffering to the west. The proposed facility could have
16 some periodic negative impacts related to odor. The subject site is
17 located away from concentrations of residential and/or commercial
18 development while still being located in close proximity to the City
19 of Chiloquin to be practical and feasible. * * * The applicant
20 contends that social impacts of the proposed location have been
21 considered and that the selection of this site will not be significantly
22 more socially impactful than the same proposal on other sites in the
23 vicinity.” Record 392.

24 Petitioners’ second subassignment of error concerns social impacts related
25 to mosquitos, odors, and project screening. Petitioners argue that the effluent
26 lagoons will breed mosquitos and odor, which will result in negative social
27 consequences for nearby residential uses. Petitioners argue that the county
28 improperly relied on wind movement to prevent stagnation. Petitioners do not
29 dispute that wind would disperse mosquitos and odor but rather maintain that it

1 is not possible to both retain trees for a visual screen and remove trees to facilitate
2 wind movement over the lagoons. Thus, petitioners argue that the findings are
3 inadequate and not supported by substantial evidence. The approval is
4 conditioned upon, prior to operations, the city planting a “* * * sufficient amount
5 of conifer trees, as recommended by a professional forester for the carrying
6 capacity of the soils present adjacent to and within 100-feet of Highway 422 for
7 screening purposes.” Record 5. Petitioners point to an Australian Department of
8 Health publication in the record stating that in order for a

9 “lagoon to be able to break down the sewage or effluent properly
10 and to be a healthy place it must meet the following requirements:

11 * * * * *

12 There must be no grass, trees or other vegetation on the banks or
13 surrounding area which would stop the sun and wind action needed
14 by the lagoon[.]” Record 732.

15 That statement does not establish that any and all trees in the surrounding area
16 will stop wind action from preventing stagnation in the lagoons at issue in these
17 appeals. Petition for Review 18. We agree with the city that the findings are not
18 inconsistent and are supported by substantial evidence because trees interior to
19 the site and on the banks of the ponds may be removed to allow wind wave action
20 to prevent stagnation while still allowing planting screening trees at the edge of
21 the site, along the highway, as required by the condition of approval.

22 The second subassignment of error is denied.

1 Petitioners' third subassignment of error is that the ESEE findings
2 addressing social impacts are inadequate and not supported by substantial
3 evidence because they do not address the potential freezing of the ponds and odor
4 during the subsequent thawing of the ponds. Again, findings must address and
5 respond to specific issues relevant to compliance with the applicable approval
6 standards that were raised in the proceedings below. The city identifies no board
7 of commissioners' findings addressing offensive odor following a thaw. Instead,
8 the city directs us to its statement in its final rebuttal that:

9 “Facultative lagoons for wastewater treatment are extremely
10 common practice across Eastern Oregon. In-fact, it is the most
11 common type of wastewater treatment. In Klamath County, the
12 following systems use the same technology: City of Bonanza, Town
13 of Bly, City of Malin, City of Merrill and Crescent Sanitary District.
14 Each of these systems go through the same winter cycle and do not
15 have issues with winter treatment. See Exhibit I, Items F for further
16 explanation of odors caused by spring thaw/turnover.” Rec 39-40.

17 There are several problems with that response. First, evidence is generally not a
18 sufficient substitute for adequate findings. Adequate findings are necessary for
19 decisions that result from quasi-judicial land use proceedings. *Fasano v.*
20 *Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973). To be adequate
21 “[f]indings must (1) identify the relevant approval standards, (2) set out the facts
22 which are believed and relied upon, and (3) explain how those facts lead to the
23 decision on compliance with the approval standards.” *Heiller v. Josephine*
24 *County*, Or LUBA 551, 556 (1992). As mentioned above, this was not done here.
25 Second, ORS 197.835(11)(b) provides that LUBA may affirm a decision or a part

1 of a decision when “the parties identify relevant evidence in the record which
2 clearly supports the decision or a part of the decision”. The “clearly supports”
3 standard, however, is high. *Doob v. City of Grants Pass*, 34 Or LUBA 480, 484
4 (1998). The evidence cited by the city is not sufficient to clearly support a
5 conclusion that the freeze-thaw cycle will not create offensive odor and negative
6 social consequences. The city does not direct us to the referenced “Exhibit I, Item
7 F,” or to evidence comparing the treatment facilities in the listed cities to the
8 facility proposed by the city or explain how it was determined that the conditions
9 at the sites are similar and that those facilities have not had issues with spring
10 thaw odors.

11 The third subassignment of error is sustained.

12 The first subassignment and third subassignments of error are sustained.

13 The second subassignment of error is denied.

14 The first assignment of error is sustained in part.

15 **SECOND ASSIGNMENT OF ERROR**

16 Klamath County Land Development Code (CDC) 55.035(D)(1) provides
17 that a conditional use in the Forest zone must be “* * * suitable for the proposed
18 use considering its size, shape, location, topography, existence of improvements
19 and natural features.” Petitioners’ second assignment of error is that the board of
20 commissioners’ findings that the subject property is suitable for the use given the
21 characteristics of the site are inadequate and are not supported by substantial

1 evidence. This assignment of error incorporates arguments from the first
2 assignment of error regarding potential project impacts.

3 The county found:

4 “By demonstrating that the proposed development is generally
5 compatible with the farm and forest uses permitted in the F zone and
6 that the development will adhere to all applicable development
7 standards for the zone, the applicant has demonstrated that the parcel
8 is suitable for the proposed development/use. In addition, the parcel
9 was selected due to its location along an existing right-of-way and
10 its topography. The subject property’s location along Hwy 422
11 allows construction of the transport pipeline of pretreated effluent
12 between the existing [wastewater facility] and the new facility to
13 occur with the existing right-of-way. The site is gently sloping on
14 the west side of the property which allows for the construction of
15 the new facility without large amounts of cut and fill to level the site
16 (see contour map-Exhibit D). The information provided in support
17 of this application demonstrate that the parcel is suitable for the
18 proposed use considering its size, shape location, topography,
19 existence of improvements and natural features.” Record 407.

20 The city cites the county’s findings that because the proposed development is
21 generally compatible with farm and forest uses in the F zone and will adhere to
22 all development standards in the F zone, the site is suitable for the use. First, a
23 statement that the use is generally compatible is conclusory and does not address
24 the project impacts identified by the opponents. Second, adherence to all
25 development standards does not guarantee that the site is suitable because
26 consideration of “size, shape, location, topography, existence of improvements
27 and natural features” is a CUP criterion specific to the property.

1 The city accepts petitioners’ contention that elk habitat is a “natural
2 feature” for purposes of CDC 55.035(D)(1) and incorporates by reference
3 arguments from its response to the first assignment of error. Intervenor-Response
4 Brief 10. As we indicated above, evidence is generally not a substitute for
5 adequate findings. Further, as additional evidence that the criterion is met, the
6 city points to a county finding that the Mitigation Plan and ODFW concurrence
7 ensure that elk habitat has no net loss and in fact is benefitted by the project. As
8 we explained in our resolution of the first assignment of error, the Mitigation Plan
9 and ODFW fail to adequately address site conditions. With respect to visual
10 impacts, the city points to the topography and presence of trees as providing
11 screening. As we explained in our resolution of the first assignment of error, the
12 county may rely on topography and trees as mitigating visual impacts, but the
13 county did not find that the site is appropriate for the use based on these features.

14 Similarly, the county’s findings do not address the concerns raised around
15 mosquitos and odor, which we understand petitioners to argue, and the city to
16 concede, concern the suitability of the “location” for purposes of CDC
17 55.035(D)(1). The city identifies the county’s findings that mosquitos and odor
18 will be addressed by providing for wave action over the lagoons. The city also
19 identifies evidence in the record that the city will treat the waste in a manner that
20 will mitigate odor. As we explained in our resolution of the first assignment of
21 error, the county may rely on wave action to mitigate mosquitos and odor. As we
22 also explained in our resolution of the first assignment of error, the county has

1 not explained how thaw may impact odor. We agree with petitioners concerning
2 the inadequacy of the findings relating to potential impacts related to odor and
3 elk habitat for the reasons identified in our resolution of the first assignment of
4 error. For the reasons explained in our resolution of the first assignment of error,
5 we disagree with petitioners concerning the adequacy of the findings and
6 evidence related to screening. For the reasons set out above, we agree with
7 petitioners that the county's findings fail to adequately address the suitability of
8 the subject property given its size, shape, location, topography, the existence of
9 improvements and natural features.

10 Petitioners' second assignment of error is sustained, in part.
11

12 **THIRD ASSIGNMENT OF ERROR**

13 Petitioners' third assignment of error is that the board of commissioners'
14 findings that CDC 57.060(B) is met are inadequate and are not supported by
15 substantial evidence.

16 Significant Resource Overlay General Review Criteria are set out in CDC
17 57.060. CDC 57.060(B) requires that "[t]he proposed development * * * not
18 result in the loss of habitat for threatened or endangered species of animals or
19 plants as identified by the U.S. Fish and Wildlife Service, Oregon Department of
20 Fish and Wildlife or other appropriate state or federal agency[.]" Petitioners argue
21 that the findings do not adequately address and are not supported by substantial
22 evidence concerning threatened and endangered species.

1 The board of commissioners found that the implementation of the
2 Mitigation Plan will provide increased habitat and forage for any threatened and
3 endangered species on the property and the city responds that the county's
4 analysis is adequate. Record 377. Essentially, the city argues that the county
5 properly concluded that the project will result in a net gain for elk habitat, and
6 implicit in that finding is a finding that the project will "not result in the loss of
7 habitat for threatened or endangered species of animals or plants." However,
8 nothing in the findings or the record reflects whether the subject property
9 provides habitat for any threatened or endangered species—including both plants
10 and animals. We agree with petitioners that the board of commissioners' findings
11 are inadequate with respect to CDC 57.060(B) because the findings do not
12 explain or identify evidence supporting the conclusion that there is not loss in
13 habitat for identified threatened or endangered species of animals or plants. The
14 Mitigation Plan is limited to a review of elk habitat. The city emphasizes that the
15 ODFW biologist's letter states that the mitigation plan "will improve quality and
16 quantity of forage for elk and other wildlife." Record 436. The city argues that
17 "other wildlife" necessarily includes threatened or endangered species. That
18 sentence refers only to forage and does not identify what other wildlife the
19 biologist considered. We agree with petitioners that the mitigation plan and the
20 ODFW letter are not evidence a reasonable person would rely upon to conclude
21 that the proposed development will "not result in the loss of habitat for threatened
22 or endangered species of animals or plants."

1 Petitioners' third assignment of error is sustained.

2 **FOURTH ASSIGNMENT OF ERROR**

3 CDC 48.030(B)(2) provides that a proposed change in comprehensive plan
4 designation must be consistent with the comprehensive plan. Petitioners' fourth
5 assignment of error is that the board of commissioners' findings that the
6 application is consistent with the county's comprehensive plan Goal 5, Policy 12
7 are inadequate and not supported by substantial evidence. The County's Goal 5,
8 Policy 12 requires that "[t]he county shall protect significant big game winter
9 ranges and other significant wildlife habitat." Petitioners incorporate arguments
10 from their first assignment of error concerning the impact on winter range elk
11 habitat.

12 The board of commissioners relies upon the Mitigation Plan for its finding
13 of compliance with this provision. Record 371. For the reasons set out in our
14 resolution of the first and third assignments of error, we agree that the findings
15 are inadequate and not supported by substantial evidence.

16 Petitioners' fourth assignment of error is sustained.

17 **FIFTH ASSIGNMENT OF ERROR**

18 The city's application includes adding a limited use (LU) overlay to the
19 property. Petitioners' fifth assignment of error is that the county's findings that
20 CDC 47.030(B)(4) provision that "[t]he proposed change of zone designation
21 will have no significant adverse effect on the appropriate use and development

1 of adjacent properties” is met, are not adequate and are not supported by
2 substantial evidence.

3 The board of commissioners found:

4 “The site was selected, in part, due to its rural location along Hwy
5 422, the size of the property and its topography, all of which helps
6 to buffer between the site and neighboring properties. The
7 topography of the subject property climbs towards the northeast and
8 falls to the southeast. These changes in elevation help to provide a
9 visual buffer between the proposed use and properties to the east.
10 The existing trees that have survived on site will also be retained
11 where possible to further buffer the site. Additional planting of
12 conifer trees may be warranted, where screening of the [wastewater
13 facility] is needed along Highway 422. The project’s location near
14 the west side of the property takes advantage of the highway right-
15 of-way to provide separation between the proposed use and
16 properties to the west. The design of the proposed facility includes
17 additional space on-site to provide buffering to the west.

18 “The proposed facility could have some periodic negative impacts
19 related to odor and mosquitos. The project engineers, Adkins
20 Engineering, has incorporated a ferric chloride injection at the new
21 or modified pump station within the existing Chiloquin [wastewater
22 facility] property, which will mitigate odors and reduce hydrogen
23 sulfide buildup in the transport pipeline. These concerns will be
24 monitored by the City of Chiloquin who will provide additional
25 treatment for odor control and pest control when warranted. Other
26 impacts raised by adjacent neighbors are ground water quality on
27 existing wells and treatment of biosolids. These matters are
28 monitored and controlled by Oregon DEQ and possibly the
29 Watermaster's Office/Oregon Water Resources Department; thus,
30 based on the monitoring required, the applicants will be required to
31 maintain compliance.

32 “The subject site is located in a rural area with generally large
33 parcels and separated from concentrations of residential and/or
34 commercial development while still being located in close proximity

1 to the City of Chiloquin to be practical and feasible. There are a few
2 homes near the proposed site; however, the topography of the
3 subject parcel, spatial separation from existing development and the
4 planned layout for the facility will help to mitigate any negative
5 impacts on adjoining properties and uses. The applicant contends
6 that any adverse impacts identified will not be significant on the
7 allowed forest zone uses for surrounding properties. In addition,
8 adverse impacts of the proposed location have been considered and
9 the selection of this site will not be significantly more impactful than
10 the same proposal on other sites in the vicinity.” Record 361.

11 Petitioners argue that the county’s findings are inadequate and not
12 supported by substantial evidence. Petitioners argue that the highway provides
13 only a physical divider that will not serve as a visual or odor buffer. We deny this
14 element of the assignment of error.

15 Petitioners argue that the findings are inadequate because it may take time
16 for trees to grow to sufficient height to provide “adequate” screening. Petitioners
17 also argue that the findings are insufficient to establish the amount of trees to be
18 planted. The board of commissioners found that trees for screening *may* be
19 warranted and approval is conditioned upon planting of trees consistent with the
20 carrying capacity of the property as determined by a professional forester. The
21 findings do not rely on the provision of the trees along the highway. We deny this
22 element of the assignment of error.⁷

⁷ We also recognize that the board is afforded substantial discretion in its interpretation of the term “adequate” in its own regulation. *See Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

1 Lastly, petitioners argue that the findings are inadequate as they relate to
2 odor. The above findings describe treatment of the waste to mitigate odors and
3 monitoring by the city with additional treatment if necessary. Petitioners maintain
4 that there is not a specific condition of approval related to monitoring and
5 treatment if the standard operating procedures are inadequate to address odor.
6 The city identifies the following monitoring condition in the Mitigation Plan:

7 “The City of Chiloquin will conduct routine monthly monitoring of
8 the irrigation equipment, pump station and lagoons to make sure
9 they are in proper functioning order. In addition the City of
10 Chiloquin will monitor irrigation at least once weekly to ensure that
11 water is not standing on the surface of the ground and is infiltrating
12 the soil profile. Additional seasonal monitoring will be conducted
13 for noxious weeds. The irrigation area will have removal of conifers
14 at least every 10 years to maintain the shrubs/grass and aspen
15 components of the habitat.” Record 440.

16 As we found above, however, the county has not addressed the issue of odor due
17 to thawing. For the reasons set forth in our resolution of petitioners’ first, second,
18 and third assignments of error, we agree with petitioners that the county’s
19 findings are inadequate as relates to odor and not supported by substantial
20 evidence. We sustain this aspect of this assignment of error for the same reasons.

21 Petitioners’ fifth assignment of error is sustained, in part.

22 **SIXTH ASSIGNMENT OF ERROR**

23 CDC 47.030(B)(5) provides that a proposed zone change must be “* * *
24 supported by specific studies or other factual information, which documents the
25 need for the change.” The board of commissioners adopted findings concluding:

1 “The City selected [this project] as their preferred alternative
2 because it is the only of the three alternatives that eliminates treated
3 water discharge into the Williamson River to ensure surface water
4 quality compliance, and also it presents a greatly reduced cost for
5 ongoing operations and maintenance compared to the other two
6 alternatives. Although the other two alternatives may produce
7 treated effluent which meets regulatory requirements, thus
8 correcting existing noncompliance issues, this effluent would
9 continue to be discharged into the Williamson River. This surface
10 water discharge, along with the more expensive and labor-intensive
11 ongoing maintenance and operations, make it more likely that
12 alternatives 1 and 2 could result in future noncompliance issues.
13 [This project] was viewed as the best and most feasible long-term
14 solution demonstrating the public need for the change of zone to
15 apply the LU overlay. In addition, alternative sites to locate the
16 proposed [wastewater treatment facility] were conducted to identify
17 a suitable location with adequate size and useable area, topography
18 and proximity to the City of Chiloquin. The results of these studies
19 identified the subject property as a suitable area for the use and the
20 needed public facility.” Record 362.

21 Petitioners argue that cost was a consideration in the city’s selection of this
22 project design for treatment of the city’s waste, and in the board of
23 commissioners’ findings related to need, but the project cost estimated for the
24 project failed to consider the cost to dredge the lagoons. The city responds that
25 although cost was a consideration, this project was selected because it better
26 meets other project goals. The city also points to evidence related to cost that it
27 submitted in response to petitioners’ arguments. The city does not indicate that
28 the county adopted findings in reliance on its rebuttal evidence.

1 On remand, the board of commissioners is required to address the cost of
2 lagoon dredging if cost is relied upon as evidence that specific studies or other
3 factual information document the need for the zone change.

4 The sixth assignment of error is sustained.

5 The decision is remanded.