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

OREGON DEPARTMENT OF FISH AND WILDLIFE,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

WEST PRINEVILLE SOLAR FARM LLC,
Intervenor-Respondent.

LUBA No. 2020-114

FINAL OPINION
AND ORDER

Appeal on remand from the Court of Appeals.

Erin L. Donald represented petitioner.

John Eisler represented respondent.

Merissa A. Moeller represented intervenor-respondent.

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

REMANDED 05/09/2022

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

Petitioner appeals a decision by the county court approving a modification of a previously issued conditional use permit for a solar facility to increase the facility site from 320 acres to 654 acres.

FACTS

This matter is on remand from the Court of Appeals. *ODFW v. Crook County*, 315 Or App 625, 640-43, 504 P3d 68 (2021) (*ODFW II*). In *ODFW v. Crook County*, ___ Or LUBA ___ (LUBA No 2020-114, June 9, 2021) (*ODFW I*), petitioner appealed a board of county commissioners' decision approving intervenor-respondent's (intervenor's) application for a modification of a conditional use permit for a solar facility on land zoned exclusive farm use, substantially increasing the solar farm's size. We first summarize, again, the applicable statutes and rules.

ORS 215.446(3)(a)(C) requires intervenor to "[d]evelop a mitigation plan to address significant fish and wildlife habitat impacts consistent with the administrative rules adopted by the State Fish and Wildlife Commission for the purposes of implementing ORS 496.012." The "administrative rules adopted by the State Fish and Wildlife Commission for the purposes of implementing ORS 496.012" are found in OAR chapter 635, division 415, titled "Fish and Wildlife Habitat Mitigation Policy" (Mitigation Policy).

OAR 635-415-0005(18) defines "mitigation plan" to mean

> "a written plan or statement that thoroughly describes the manner in which the impact of a development action will be reduced or eliminated over time, avoided, and/or minimized; and the affected environment, including fish and wildlife habitat, monitored, restored, rehabilitated, repaired and/or replaced or otherwise compensated for in accordance with OAR 635-415-0010 of these rules."[1]

The Mitigation Policy at OAR 635-415-0025 provides the mitigation goals for the six categories of habitat. Habitat Categories 3 and 4 are habitats that are essential or important for wildlife, and have mitigation goals of "no net loss" of habitat quantity or quality. OAR 635-415-0025(3)(a), (4)(a). The parties agree that the "no net loss" mitigation goal that applies to habitat category 4 applies here. Supplemental Petition for Review 4 n 1; Supplemental Response Brief 10. For habitat 4 categories, OAR 635-415-0025(4)(b) directs ODFW to achieve the mitigation goals by "recommending or requiring":

> "(A) Avoidance of impacts through alternatives to the proposed development action; or
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> "(B) Mitigation of impacts, if unavoidable, *through reliable in-kind or out-of-kind, in-proximity or off-proximity habitat*

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[1] OAR 635-415-0010 provides:

> "It is the fish and wildlife habitat mitigation policy of the Oregon Department of Fish and Wildlife to require or recommend, depending upon the habitat protection and mitigation opportunities provided by specific statutes, mitigation for losses of fish and wildlife habitat resulting from development actions. Priority for mitigation measures shall be given to habitat for native fish and wildlife species. Mitigation actions for nonnative fish and wildlife species may not adversely affect habitat for native fish and wildlife."

> *mitigation to achieve no net loss in either pre-development habitat quantity or quality*. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action." (Emphasis added.)

Against that backdrop, we take the facts from *ODFW I*:

> "In April 2019, the county approved a conditional use permit (Original CUP) to site a solar facility on approximately 320 acres of land zoned Exclusive Farm Use-3 (EFU-3). The Original CUP was not appealed and that decision is final.
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> "In April 2020, intervenor-respondent (intervenor) applied to modify the Original CUP to expand the solar facility by an additional 334 acres, for a total facility size of 654 acres (Modified CUP). A majority of soils on the 654-acre subject property are classified by the National Resources Conservation Service as class VI or VII. Because they do not have a history of irrigation, those soils are considered nonarable. OAR 660-033-0130(38)(e). The property contains agricultural fields, sagebrush, and juniper uplands, with steep juniper forested areas in the southwest and northeast of the property. The property is located within an elk migration corridor and is adjacent to pronghorn winter range. The entire 654-acre solar facility is proposed to be fenced at a minimum height of eight feet, with gates to allow wildlife inadvertently trapped in the fenced area to exit.
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> "Approximately 200 acres of the 334-acre expansion area are proposed to be permanently impacted by construction and development of the project. * * * The project life is presumed to be 40 years. Intervenor submitted a wildlife conservation plan and then submitted a revised version of the plan, which the parties refer to in their briefs and we refer to in this opinion as the V2 Plan. The V2 Plan includes three proposed options for mitigating the impacts on deer, elk, antelope, and migratory birds that the project cannot avoid. The V2 Plan explains that it is not the final mitigation plan, that a

> final plan will be prepared that identifies the specific mitigation options chosen by intervenor, that the final plan will be submitted to the county planning department, and that intervenor will seek 'reasonable concurrence' from ODFW for any deviations from the V2 Plan.
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> "Option 1 proposes off-site removal of juniper and enhancement of shrubs and herbaceous vegetation on up to 200 acres—plus a failure buffer of between one and 30 percent, depending on the quality of the mitigation site—either proximate to the property, elsewhere in the county, or somewhere else if intervenor cannot locate a suitable site in proximity to the property or in the county. Option 2 proposes a one-time payment to the Deschutes Land Trust or a similar land trust to pay for mitigation at the 'Aspen Valley Ranch (or some other comparable project) in Crook County,' in lieu of intervenor carrying out the mitigation itself. Option 3 proposes 'alternative mitigation measures agreed to by ODFW.'
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> "On June 2, 2020, the planning commission approved the Modified CUP and conditioned the approval on intervenor providing 'evidence to the County that one of the three options for implementing habitat mitigation, as detailed in [the V2 Plan] and adopted as part of this Condition of Approval, has been initiated.' ODFW appealed the planning commission's decision to the county court. The county court held a public hearing on the appeal on October 6, 2020, and the hearing was continued to October 21, 2020. On November 10, 2020, the county court affirmed the planning commission's decision but removed Option 3 as an available mitigation option." *ODFW I*, ___ Or LUBA at ___ (slip op at 3-5) (internal citations omitted).

Petitioner's petition for review included one assignment of error with five subassignments. We agreed with petitioner's proffered interpretation of the pertinent statute, ORS 215.446(3)(a)(C), in its third and fourth subassignments of error, and given our resolution of the third and fourth subassignments of error, agreed with petitioner's argument in its first subassignment of error that the

county's findings were inadequate. We therefore sustained a portion of petitioner's first, and petitioner's third and fourth subassignments of error, and remanded the county's decision.

We did not reach the second subassignment of error, which argued that the county's conclusion, that the application meets ORS 215.446(3)(a)(C) and OAR 635-415-0025(4)(a) because the development action will result in "no net loss" to habitat quantity or quality, is not supported by substantial evidence in the whole record. We also did not reach the fifth subassignment of error, which alleged that the decision improperly deferred a determination of compliance with those laws to a future process that does not include any public participatory rights. *Id.* at ___ (slip op at 26-27).

Intervenor and the county (respondents) sought judicial review of our decision. The Court of Appeals concluded that our decision represented a "mistaken interpretation of" ORS 215.446(3)(a)(C). *ODFW II*, 315 Or App at 640-43. The court reversed and remanded our decision on that basis. *Id.* at 643.

The court also offered "observations, as relevant to the issues the parties raise on review that LUBA will consider on remand." *Id.* The court "highlight[ed] elements of OAR 635-415-0025 and other provisions of the Mitigation Policy that must be considered when a county makes a determination that a mitigation plan is 'consistent with' the Mitigation Policy." *Id.* Among other things, the court observed that the definition of "mitigation plan" at OAR 635-415-0005(18) indicates that "specificity and definiteness are required for a mitigation plan to

be consistent with the Mitigation Policy." *Id.* at 644. The court also observed that the "no net loss" standard calls for "reliable 'no net loss' mitigation" in either existing habitat quantity or quality, "a schedule of performance measures," and it cannot allow for "mitigation measures that fail to accommodate the impact on habitat for the full life of a renewable energy facility." *Id.* at 645.

After we received the appellate judgment, we requested and received supplemental briefing from petitioner and respondents regarding the court's observations as they relate to our resolution of the remaining subassignments of error. We now address the first, second, and fifth subassignments of error.

FIRST AND SECOND SUBASSIGNMENTS OF ERROR

In its first and second subassignments of error in *ODFW I*, petitioner argues that that there is not substantial evidence in the record to support the county's conclusion that the mitigation proposed in the V2 Plan will achieve the no net loss mitigation goal, and that the county's findings are inadequate to explain its conclusion because they do not explain the justification for approving the V2 Plan as required by ORS 215.416(9), and do not respond to specific issues raised by petitioner. In its supplemental petition for review, petitioner supplements those arguments in light of the court's observations regarding what level of detail must be included in a "mitigation plan" in order to support a conclusion that mitigation proposed is consistent with the Mitigation Policy. Respondents filed a joint supplemental response brief in which they concede that additional findings are necessary but argue that the record contains substantial

evidence upon which the county may find that the applicable criteria are met. We address these assignments of error together because they contain overlapping and dependent arguments.

Substantial evidence is evidence a reasonable person would rely on to support a conclusion. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 690 P2d 475 (1984); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd*, 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992); *Eckis v. Linn County*, 110 Or App 309, 311-12, 821 P2d 1127 (1991). If there is substantial evidence in the whole record to support the county's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993).

In addition, to be sufficient, findings must be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, state the facts relied upon in rendering the decision, and explain the justification for the decision based on the criteria, standards and facts set forth. ORS 215.416(9); *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280

Or 3, 21, 569 P2d 1063 (1977). Also, when a party raises issues regarding compliance with an approval criterion, it is incumbent upon the local government to address those issues in its findings. *Norvell v. Portland Area LGBC*, 43 Or App 849, 604 P2d 896 (1979).

The central issue remaining in this appeal is whether the county's conclusion, that the V2 Plan and the mitigation it describes are consistent with the Mitigation Policy, is supported by substantial evidence in the whole record; that is, whether the V2 Plan is a "mitigation plan" within the meaning of OAR 635-415-0005(18). Determining that requires us to consider whether the V2 Plan contains the requisite qualities of "specificity and definiteness," including a "definiteness of future action" and "completeness and attention to detail." *ODFW II* at 644 ("[W]hen a county assesses whether a mitigation plan is 'consistent with' the Mitigation Policy, it must determine whether the plan has [specificity and definiteness] qualities."). ODFW recommendations for mitigation of Habitat Category 4 are set out in OAR 635-415-0025 and include "reliable 'no net loss' mitigation," that is, accommodations for the impact on habitat for the full life of a renewable energy facility, and "a schedule of performance measures." *Id.* at 644-45. If the V2 Plan fails to include all of those qualities, then it is not a "mitigation plan" within the meaning of ORS 215.446(3)(a)(C), OAR 635-415-0005(18), and OAR 635-415-0025, and the county's reliance on the V2 Plan to conclude that intervenor has satisfied the no net loss standard in the Mitigation Policy is not supported by substantial evidence.

As noted, as relevant here, the V2 Plan identifies two options for mitigation.[2] Option 1 proposes off-site removal of juniper and enhancement of shrubs and herbaceous vegetation on up to 200 acres—plus a failure buffer of between one and 30 percent, depending on the quality of the mitigation site—either proximate to the property, elsewhere in the county, or somewhere else if intervenor cannot locate a suitable site in proximity to the property or in the county. Record 205-09. Option 2 proposes a one-time payment to the Deschutes Land Trust or a similar land trust to pay for mitigation at the "Aspen Valley Ranch (or some other comparable project) in Crook County," in lieu of intervenor carrying out the mitigation itself. Record 209-10.

A. Specificity and Definiteness

The board of county commissioners concluded:

> "The Court concludes that the Applicant's final habitat mitigation plan is within the legally acceptable range of mitigation approaches to provide 'appropriate' mitigation, as the County interprets that term. Specifically, the Court recognizes that the County has historically allowed a variety of mitigation approaches for solar projects in Crook County, with input from ODFW, and that 'appropriate mitigation' differs from project to project. The Planning Commission engaged in a robust discussion of possible mitigation options for this project, including considering approaches taken at other solar projects on nearby properties, and determined that the Applicant's final mitigation proposal was consistent with the County's previous decisions.

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[2] As explained above, the board of commissioners held that V2 Plan's Option 3 was not allowed.

> "* * * * *
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> "The Court believes that the modified conditions of approval proposed by the Applicant, which require the Applicant to demonstrate compliance with the final conditional use permit before beginning construction, are sufficient to ensure that, if the project is ultimately developed, the Applicant will actually implement one of the two mitigation alternatives that this Court has determined provide appropriate mitigation. The Applicant is not authorized to construct the project without performing the approved mitigation, and the County has ongoing authority to initiate appropriate enforcement against the Applicant in the event of any noncompliance." Record 5.

Condition 9, which was adopted by the planning commission and the board of county commissioners, provides:

> "The Applicant will conduct avoidance and mitigation measures outlined in the Wildlife Conservation Plan (Exhibit 4) [the V2 Plan]. Prior to site clearing and grading, the Applicant shall provide evidence to the County that one of the three options for implementing habitat mitigation, as detailed in Applicant's final Wildlife Conservation Plan (WCP) dated May 6, 2020 (Exhibit 1) and adopted as part of this Condition of Approval, has been initiated."[3] Record 102.

In its petition for review and supplemental petition for review, petitioner argues that the V2 Plan is not a "mitigation plan" as defined in OAR 635-415-0005(18) because it does not—in the words of the court—include "specificity and definiteness" or, stated differently, "completeness and attention to detail." *ODFW II*, 315 Or App at 644. Petitioner first argues that Option 1 and Option 2

[3] Again, the board of commissioners removed V2 Plan Option 3.

both lack the requisite completeness and attention to detail because both allow intervenor to provide the definite, specific, and complete information on the location within the county or outside of the county of either in-kind juniper treatment or land trust performed mitigation *after* the county has issued the land use approval for the project, with no accompanying public process to evaluate any specific site or sites for their habitat quantity or quality to confirm that the mitigation will achieve the no net loss standard.

1. Habitat Quantity

"Habitat quantity" is defined as "the amount of a given habitat type." OAR 635-415-0005(6). "Habitat type" is defined as "the classification of a site or area based on its dominant plant, soil, and water associations or other salient features (e.g. tidal influence, salinity, substrate, alkalinity, etc.) of value to the support and use by fish and wildlife." OAR 635-415-0005(8).

Regarding the quantity of habitat mitigation, petitioner argues that the plain language of the V2 Plan caps the quantity of mitigation in both Option 1 and Option 2 at 200 acres plus a failure buffer, and that quantity is insufficient to demonstrate that intervenor's proposal will mitigate the effects of the development of the additional 354-acre site.[4] Petition for Review 26; Record 206.

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[4] The V2 Plan provides:

> "Maximum development impact to non-previously permitted incremental acres of existing habitat of up to 200 acres for the Application if fully developed defines the maximum scale of impact

Respondents respond that testimony provided by intervenor's representative during the hearing clarifies that intervenor agreed to a one-to-one replacement ratio, not capped at 200 acres, and that the V2 Plan explains that mitigation will be at a one-acre replacement for every acre disturbed. Record 206-07; Record 419. Respondents explain that the record includes evidence and testimony from intervenor's representatives that although the entire 354-acre site will be fenced, it cannot be fully developed because the site is constrained by a transmission line easement, north facing slopes that preclude solar development, and setbacks, and that the total number of acres that will be developed will not be known until final site design. Intervenor-Respondent's Brief 28 (citing Record 419-20). Petitioner replies that the V2 Plan language itself contains a 200 acre plus buffer maximum, and, accordingly, intervenor's statements during the hearings that the entire site may not be developed is not evidence a reasonable person would rely on to conclude that there is not a cap of 200 acres plus a buffer. Thus, petitioner argues, intervenor's testimony is contradicted by the text of the V2 Plan.[5] Reply Brief 2-3.

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for which the project must mitigate its permanent impacts through one or more of the following measures." Record 206.

[5] We note that the 354-acre site is within the larger 654-acre site that is proposed to be fully fenced with an eight-foot fence. Record 541. Presumably, the fencing will exclude some wildlife. We do not understand petitioner to argue that intervenor is required to mitigate the entire 354 acres. Instead, we understand petitioner to argue that intervenor's development might ultimately impact more than 200 acres and the approval caps required mitigation at 200 acres.

We agree with intervenor that the V2 Plan does not include a maximum mitigation acreage of 200 but instead agrees to a one-to-one ratio of mitigation. Although the V2 Plan language contains some ambiguity, we understand the language of the V2 Plan to agree to ODFW's recommendation of a one-to-one ratio of replacement acreage, plus a buffer, and to use a "maximum of 200 acres" as an example of the ratio plus a buffer to demonstrate the replacement acreage ratio.[6] Accordingly, intervenor is obligated to replace each acre developed with an acre of mitigation plus a buffer depending on the quality of mitigation. The V2 Plan is complete and detailed enough for the county to conclude that there will be no net loss of habitat quantity.

2. Habitat Quality

OAR 635-415-0005(7) defines "habitat quality" as "the relative importance of a habitat with regard to its ability to influence species presence and support the life-cycle requirements of the fish and wildlife species that use it." Regarding the quality of replacement habitat, petitioner argues that without identification of the location of potential mitigation site or sites, the V2 Plan does

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[6] The V2 Plan includes the following:

> "For the sake of clarity, ODFW agrees if 200 acres of habitat were developed, 200 acres of juniper mitigation project (plus applicable buffer and subject to other criteria herein) meets or exceeds the required mitigation *scale*. (If lesser development occurred, this mitigation amount would scale down proportionally.)" Record 206-07 (emphasis in original).

not qualify as a "mitigation plan," and that there is not substantial evidence in the record to support the county's conclusion that mitigation will result in no net loss of habitat quality for either Option 1 or Option 2.

For Option 1, petitioner argues that the V2 Plan is not specific and definite enough to qualify as substantial evidence that the eventual mitigation site will add habitat quality that is equal to or greater than the habitat lost by the development action:

> "To demonstrate that a development action will not result in loss of habitat function, a developer must assess the habitat quality of the development site (*e.g.* through a baseline survey) and match the lost quality (from development) with the gained quality (from mitigation). Demonstrating no loss of habitat quality without an identified mitigation site would be a challenge, and the V2 Plan does not accomplish this." Petition for Review 27.

Petitioner explains:

> "While removing encroaching juniper would likely improve habitat quality, the vague requirement that juniper treatment occur where there is encroaching juniper is not sufficient evidence to conclude that the implementation of the mitigation plan will result in no net loss of habitat quality. Juniper encroachment can occur at varying levels, and just because some juniper is removed, resulting in some improvement to habitat quality, does not necessarily mean the end result will be no net loss of habitat quality." Petition for Review 27-28 (internal footnote omitted).

For Option 2, petitioner argues that the V2 Plan's statement that the payment would be made "for wildlife enhancement on the Aspen Valley Ranch (or some other comparable project) in Crook County" is too vague and provides

no evidence that the project will result in no net loss of habitat quality.[7] Petition for Review 31 (referencing Record 209). According to petitioner, simply committing to a cash payment does not demonstrate that no net loss standard will be met, especially given the lack of a definite identification of the recipient of the cash payment or the project the payment will be used for, and the vague statement in the record from a land trust regarding implementation of the mitigation project. See n 9. Relatedly, petitioner argues that the county was required to make, but failed to adopt, findings addressing these issues when petitioner raised them below. *Norvell*, 43 Or App 849.

Respondents respond that the V2 Plan includes enough detail that the county could reasonably rely on it to conclude that the project will result in no net loss to habitat quantity or quality, because the V2 Plan broadly incorporates petitioner's recommendations for the "type, amount, scale, and location of mitigation." Intervenor-Respondent's Brief 3. Intervenor argues that under Option 1, it has committed to conserving habitat with at least the same habitat quality as the development site, and under Option 2, intervenor has committed to a payment formula that makes up for the net loss of habitat in its payment calculation. Accordingly, intervenor responds, the V2 Plan contains enough

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[7] More to the point, as we discuss in our resolution of the fifth subassignment of error, petitioner argues that assessing the habitat quality of the mitigation site is not an assessment that intervenor and the county can evaluate in private, without public participation.

detail for the county to rely on it, especially given Condition 9's requirement for intervenor to implement the V2 Plan and report back to the county on its choice of option prior to construction.

We agree with petitioner that the V2 Plan lacks the specificity and definiteness regarding habitat quality necessary to qualify it as a "mitigation plan" required to be developed under ORS 215.446(3)(a)(C), and that the county erred in relying on it to conclude that the project will achieve the no net loss standard. First, while Option 1 is specific regarding the type of replacement habitat, Option 1 lacks sufficient detail regarding the location of replacement habitat.[8] Option 1 proposes that a variety of information, including the final location of mitigation sites, be prepared "prior to construction:"

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[8] Option 1 provides:

> "Any mitigation project(s) related to impacts from the Application will be implemented within Crook County, selecting a specific final habitat mitigation area (HMA) therefrom to benefit big game associated with the area of impact (unless otherwise reasonably approved by ODFW) and will satisfy ODFW's request the mitigation satisfy 'proximity' criteria applicable to its recommendation standards.
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> "*Habitat type:* For juniper removal mitigation, the final HMA site selected will be habitat which is (or was previously) sagebrush and/or bitterbrush dominant (or would be expected to restored to such state after mitigation efforts) but suffering from juniper encroachment, such that juniper removal would improve habitat by facilitating the re-growth of vegetation that would provide forage for big game. For the sake of clarity, acceptable sites for juniper

> "Prior to construction of the proposed facilities (or other applicable habitat disturbance) a final mitigation plan will be prepared, defining the specific mitigation project(s) being implemented for the applicable habitat disturbance, including documenting how such final mitigation plan addresses the criteria herein and applicable permit conditions, such as the specific land/site where the mitigation project will occur (including a map), quantitative and qualitative success criteria, project timeline (including evaluation of applicable goals and standards, along with monitoring and evaluation methods and frequency), durability measures being implemented, and reporting schedule (including a reasonable timeline after the execution of the mitigation agreements, such as with the landowner) by which time the mitigation measures will initially be completed." Record 208.

Condition 9, quoted previously, requires intervenor to "provide evidence to the County that one of the [two] options for implementing habitat mitigation, as detailed in [the V2 Plan] * * * has been initiated." Record 102. The problem with that approach is that, for both Option 1 and Option 2, defining the location and

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> removal mitigation projects would not include different habitat types, such as removal of juniper from lodge pole pine stands, as this would not meet the 'in kind' criteria applicable to ODFW's recommendation standards.
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> "*Alternative locations:* The Applicant will undertake commercially reasonable efforts to secure a mitigation location with the above-specified habitat characteristics in Crook County. If despite such efforts a suitable mitigation project cannot be realized in the County, a mitigation project in another location reasonably approved by ODFW shall be implemented; however Applicant understands that more scrutiny of such alternate locations would occur by ODFW relative to mitigating impacts in the project vicinity and be subject to ODFW's reasonable consent and approval absent with the alternative location would not be acceptable for a mitigation project." Record 207.

habitat quality of the final mitigation site is left to intervenor, possibly with some input from ODFW. It is unclear what future actions intervenor is required to take if it chooses Option 2. That approach comes exceedingly close to the approach the court rejected in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), which we discuss in detail in our resolution of the fifth subassignment of error below, because it allows the important details of the mitigation to be hashed out in private between intervenor and the county, and possibly ODFW. Option 2 similarly lacks location and type of replacement detail, beyond the amount of the cash payment, and is unsupported by any statement in the record that demonstrates that the cash payment will ever end up enhancing any habitat at all.[9] Moreover, the record fails to demonstrate how, when, or where the mitigation will occur, and the quality and quantity of mitigation that will result from the payment. In short, the V2 Plan is a promise by intervenor to achieve the no net loss standard in some unspecified location by pursuing one of two options.

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[9] The record includes an email from Deschutes Land Trust to intervenor's representatives that states in its entirety:

> "Thanks for taking some time to talk through possible mitigation opportunities at Aspen Valley Ranch the other day. I definitely appreciate your willingness to support the remaining pieces of the first phase of conserving Aspen Valley Ranch, and we're looking forward to further discussions. Our staff is still thinking through how we might best accept and use some kind of up-front mitigation payment toward our remaining project needs, and we can circle back with you once we have more clarity there." Record 211.

However, neither option is specific enough to allow any interested party to evaluate the quality of the replacement acreage ultimately chosen. Rather, that evaluation is left to county planning staff and intervenor, in a non-public manner.

B. Reliable and Durable Mitigation

Petitioner also argues that the V2 Plan does not propose reliable mitigation, for the same reasons that it lacks specificity and definiteness. The V2 Plan acknowledges that the Mitigation Policy requires an applicant to protect the mitigation site for the life of the facility, here 40 years, and to establish maintenance procedures to achieve that protection for the 40-year life of the project. Option 1 proposes:

> "*Site Protection:* Prior to construction (or other disturbances to habitat or big game wildlife's access thereto) at the site by Applicant, Applicant or third party will provide mechanisms of durability assurance such that the survival and beneficial impacts of the mitigation measures are reasonably expectable to be substantially commensurate with the expected operating life of the facilities or disturbance.
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> "This durability requirement may be accomplished by means of an outright purchase of the mitigation area, a conservation easement, a working lands agreement, or other materially similar restriction, reasonably expected to prevent development or other substantial adverse impacts to the site habitat by the landowner. Actions may include other durability measures reasonably approved by ODFW to implement the intent of this durability requirement. Facility life for the project shall be presumed to be 40 years unless reasonably demonstrated otherwise by Applicant. Thus, the term for any durability restriction or agreement described above will be for a minimum of 40 years unless reasonably demonstrated otherwise by Applicant." Record 207.

For maintenance, Option 1 proposes (1) "retreatment actions," that is "[a]ctions which examine the success and failures of the treatment and take reasonable remedial actions at such time, at one or more intervals during the target durability term;" (2) extra buffering; or (3) other measures "reasonably likely to have comparable effects as reasonably approved by ODFW." Record 208. As noted, for Option 2 no specifics are provided as to maintenance or treatment.

Petitioner argues that the mechanisms of reliable site protection are too vague for the county to rely on to conclude that the no net loss standard is met. Petitioner argues that while fee acquisition of the mitigation area is likely sufficiently reliable, a conservation easement, working lands agreement, or other restrictive instrument may not be sufficiently robust or run with the land such that it adequately prevents conflicting uses and allows access for monitoring and enforcement, and accordingly, is too vague for the county to reasonably rely on the V2 Plan to find that the no net loss standard is met. Petitioner similarly argues that the described habitat maintenance, particularly the catch-all measure, is too vague for the county to rely on. And related to the requirement for performance measures, petitioner argues that without specific performance measures to examine the success and failures of the treatment, the treatment measures are insufficiently reliable to serve as evidence that the mitigation will last for the life of the project. Petition for Review 30.

Respondents respond that the "mechanisms of durability assurance" explained in the above-quoted language in the V2 Plan are evidence that the

county could reasonably rely on to conclude that intervenor will secure a binding instrument that prevents development on the mitigation site for the life of the project, and that the details of the instrument used are not necessary for the county to have relied on the V2 Plan to conclude that the no net loss standard is met. Intervenor-Respondent's Brief 32-33. However, absent any sample or example instrument that evidences reliability (such as an instrument that runs with the land and is binding on future owners), we agree with petitioner that the V2 Plan is not evidence of a mitigation plan that is "reliable." We also agree with petitioner that the treatment options are too vague to be relied on to conclude that the mitigation will last for the duration of the project, especially in the absence of defined performance measures.

C. Schedule of Performance Measures

The court observed that a "mitigation plan" defined in OAR 635-415-0005(18) includes a schedule of performance measures. *ODFW II*, 315 Or App at 645. OAR 635-415-0025(4)(b)(B) provides that "[p]rogress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures." Petitioner argues that the V2 Plan fails to include any performance measures, and instead provides that performance measures will be included in the "final mitigation plan" to be prepared (but not necessarily submitted to the county) "prior to construction." Respondents do not dispute that the V2 Plan included in the record does not include performance measures. We agree with petitioner. The statement in the V2 Plan that intervenor

will provide performance measures prior to construction in "the final mitigation plan" is not evidence a reasonable person would rely on to conclude that the no net loss standard is met.

D. Conclusion

In conclusion, the V2 Plan is not substantial evidence in the record as to the quality of mitigation, the reliability or durability of mitigation, and lacks a schedule of performance measures required to be included in a mitigation plan. Accordingly, the V2 Plan is not evidence a reasonable person would rely on to conclude that the development action meets the no net loss standard.

Given that conclusion, we need not address petitioner's related subassignment of error that argues that the county's findings are inadequate to satisfy ORS 215.416(9). On remand, the county will need to adopt findings that state the facts relied upon in rendering the decision and explain the justification for the decision based on the criteria, standards and facts set forth, presumably based on additional evidence provided by intervenor. ORS 215.416(9). The county should also address issues regarding compliance with an approval criterion raised by participants in the proceeding. *Norvell*, 43 Or App 849.

The second subassignment of error is sustained.

FIFTH SUBASSIGNMENT OF ERROR

In the fifth subassignment of error, petitioner argues that the V2 Plan's allowance for implementation in unidentified alternative locations without any public process unlawfully defers a determination of compliance to a future

proceeding that lacks the required public process in violation of the principle articulated in *Gould v. Deschutes County*, 216 Or App 150, 159, 171 P3d 1017 (2007) (holding that a decision that lacks a sufficient description of the wildlife impact mitigation plan and justification of that plan based on the applicable mitigation standards is inconsistent with ORS 215.416(9)). *Gould* involved a local destination resort approval standard that required avoidance or complete mitigation of impacts on wildlife habitat, based on a mitigation plan. The county found compliance with the local standard, despite the absence of any mitigation plan, based on a habitat study and findings that development of a mitigation plan was "feasible" and likely to gain acceptance in negotiations with the appropriate wildlife management agencies. LUBA affirmed that approach. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007). However, the Court of Appeals reversed, holding that the county's approach impermissibly denied the public input into the mitigation plan, and meant that final adoption of the plan would be based on evidence outside the land use record. *Gould*, 216 Or App at 159-60. The Court noted that, in the absence of a proposed mitigation plan to review, the only permissible option other than denial was for the county to postpone a determination of compliance with the approval standard to a second stage proceeding that was infused with the same participatory rights as the initial proceeding. *Id.* at 162.

Intervenor disagrees that the county deferred a finding of compliance with the Mitigation Policy, and we agree with intervenor. Intervenor-Respondent's

Brief 35-36. Reasonably read, we conclude that the county found that the application complies with the Mitigation Policy, relying on the V2 Plan to support that conclusion. As we understand Condition 9 (and the portion of the V2 Plan that provides for development of a "final mitigation plan" "prior to construction"), it is not a deferred finding of compliance with the Mitigation Policy to a future proceeding. It is a requirement for intervenor to notify the county whether it has chosen Option 1 or Option 2. Accordingly, Condition 9 does not implicate *Gould*.[10] For the reasons we explained above, the V2 Plan is not evidence a reasonable person would rely on to conclude that the no net loss standard is met, because the V2 Plan lacks the requisite information required to qualify it as a mitigation plan as defined in OAR 635-415-0005(18).

The fifth subassignment of error is denied.

The county's decision is remanded.

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[10] However, if the county intended to defer a finding of compliance with the Mitigation Policy to a future proceeding, we would agree with petitioner that such a deferral violates the principle articulated in *Gould* because the future proceeding lacks any opportunity for public participation.