

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

JOANNE DELMONICO,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

WESTWOOD HOMES, LLC,
Intervenor-Respondent.

LUBA No. 2022-072

FINAL OPINION
AND ORDER

Appeal from Washington County.

Kenneth P. Dobson filed the petition for review and reply brief and argued on behalf of the petitioner.

Rob Bovett filed the respondent's brief and argued on behalf of respondent.

Garrett H. Stephenson filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief were Joseph O. Gaon, Bailey M. Oswald, and Schwabe, Williamson & Wyatt, P.C.

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

AFFIRMED

11/21/2022

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

1 **NATURE OF THE DECISION**

2 Petitioner appeals a county hearings officer approval of a tentative plan to
3 subdivide a property into 15 single-family residential lots.

4 **MOTION TO INTERVENE**

5 Westwood Homes, LLC (intervenor), the applicant below, moves to
6 intervene on the side of the county. The motion is unopposed and granted.

7 **MOTION TO TAKE OFFICIAL NOTICE**

8 On October 3, 2022, intervenor filed a motion to take official notice of
9 Clean Water Services' (CWS's) Design and Construction Standards.

10 Our review is generally limited to the record. ORS 197.835(2)(a). We may,
11 however, take official notice of documents that (1) constitute officially
12 cognizable law under ORS 40.090 and (2) have some relevance to the issues on
13 appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007). In order
14 to facilitate our review, our rules require that a motion to take official notice
15 “contain a statement explaining with particularity what the material sought to be
16 noticed is intended to establish, how it is relevant to an issue on appeal, and the
17 authority for notice under ORS 40.090.” OAR 661-010-0046(2)(a).

18 Intervenor argues that we may take official notice of the CWS Design and
19 Construction Standards because

20 “ORS 40.090 defines ‘relevant law’ to include both (1) ‘[t]he
21 decisional, constitutional and public statutory law of Oregon, the
22 United States, [...] and any state, territory or other jurisdiction of the
23 United States’ and (7) ‘[a]n ordinance, comprehensive plan or

1 enactment of any county or incorporated city in this state, or a right
2 derived therefrom.[']” Motion to Take Official Notice 1.

3 ORS 40.090 defines “[l]aw judicially noticed.” It does not identify “relevant
4 law.” Intervenor’s motion does not explain what consideration of the CWS
5 Design and Construction Standards is intended to establish or how it is relevant
6 to an issue on appeal, as required by our rules.¹

7 The motion to take official notice is denied.

8 **BACKGROUND**

9 The 8.06-acre subject property is located at 10345 and 10405 NW Leahy
10 Road and designated tax lots 400, 2400, and 2300. It is zoned Residential 5 Units
11 Per Acre (R-5).

12 Washington County Community Development Code (CDC) 422-2
13 provides that the Significant Natural Resources (SNR) designation is applied to
14 “areas identified in the applicable community plan or the Rural/Natural Resource
15 Plan Element as Significant Natural Resources and areas identified as Regionally
16 Significant Fish & Wildlife Habitat on Metro’s current Regionally Significant
17 Fish & Wildlife Habitat Inventory Map.” CDC 422-2 classifies SNRs into the
18 following four categories:

¹ We do not address intervenor’s argument that the CWS Design and Construction Standards are a type of law subject to official notice under ORS 40.090.

1 “422-2.1 **Water Areas and Wetlands.** 100-year flood plain,
2 drainage hazard areas and ponds, except those already
3 developed.

4 “422-2.2 **Water Areas and Wetlands and Fish and Wildlife**
5 **Habitat.** Water areas and wetlands that are also fish and
6 wildlife habitat.

7 “422-2.3 **Wildlife Habitat.** Sensitive habitats identified by the
8 Oregon Department of Fish and Wildlife, the Audubon
9 Society Urban Wildlife Habitat Map, and forested areas
10 coincidental with water areas and wetlands.

11 “422-2.4 **Significant Natural Areas.** Sites of special importance,
12 in their natural condition, for their ecological, scientific,
13 and educational value.” (Boldface in original.)

14 The SNR map for the Cedar Hills-Cedar Mill Community Plan identifies
15 portions of the subject property as SNR areas. Record 760. The SNR map shows
16 Wildlife Habitat on the south and northeast portions of tax lot 2300 and adjacent
17 properties to the northeast, roughly coinciding with existing forested areas. The
18 SNR map also shows Water Areas and Wetlands and Fish and Wildlife Habitat
19 on all three tax lots. The subject property is also mapped with Metro Title 13
20 Class I Riparian Area, county Drainage Hazard Area, and CWS Vegetated
21 Corridor (VC).

22 The subject property is developed with one detached single-family
23 dwelling and three accessory structures. On September 28, 2021, intervenor
24 applied for approval of two property line adjustments, a Drainage Hazard
25 Alteration, and a subdivision of one of the adjusted lots. The subdivision
26 application tentatively subdivides the reconfigured tax lot 2300 into 15 single-

1 family residential lots and three tracts for open space, a stormwater facility, and
2 a private street.²

3 Intervenor's environmental consultant analyzed the subject property. Their
4 analysis began

5 "by defining the location of the stream on the site and several
6 'pocket wetlands' within the forested areas on the site, subject to
7 review and approval by the state. Then County/CWS buffers [were]
8 applied. CWS regulations require a 50-foot wide [VC], or up to the
9 edge of any existing barriers, such as a road." Record 27.

10 Intervenor's consultant determined that

11 "[t]he VC corresponds to the Washington County riparian area
12 associated with the mapped Water Area and Wetlands & Fish and
13 Wildlife Habitat SNR. The County requirements for protective
14 riparian buffers under CDC 106-185(1) must be inclusive of riparian
15 vegetation and be at least 25 feet on either side of the resource. CWS
16 VC require a minimum of 50 feet wide for all perennial streams, so
17 based on [the consultant's] onsite analysis for this property, the 50-
18 foot VC corridor exceeds the width of the Riparian Corridor (Water
19 Areas and Wetlands) established in the CDC." Record 151.

20 As part of its application, intervenor proposed mitigating "for impacts within the
21 VC, in this case the proposed private street crossing. [Intervenor proposed
22 compensating] for the impacts of the road crossing by providing and enhancing
23 additional buffer on the west side of the private road." Record 27.

² Intervenor proposed retaining the existing dwelling and one accessory structure on the adjusted tax lot 2400 and removing the two accessory structures on the adjusted tax lot 2300. Record 17.

1 On March 31, 2022, the planning director issued a decision approving
2 intervenor's application. On April 4, 2022, petitioner filed an appeal of the
3 planning director's decision. The hearings officer denied the appeal, upheld the
4 planning director's decision, and approved the application subject to conditions
5 of approval. This appeal followed.

6 **FOURTH ASSIGNMENT OF ERROR**

7 A brief explanation of the county's acknowledged Statewide Planning
8 Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces)
9 program is necessary to understand this assignment of error. Goal 5 is "[t]o
10 protect natural resources and conserve scenic and historic areas and open spaces."
11 The history of the county's regulation of Goal 5 resources is complex. In *Warren*
12 *v. Washington County*, 78 Or LUBA 107, 110 (2018) (*Big-Vuk*), we explained:

13 "Washington County Comprehensive Framework Plan includes
14 Policy 10, 'to protect and enhance Significant Natural Areas,' and
15 an implementing strategy under that policy states that:

16 "The County will:

17 " * * * * *

18 "c. Through the [CDC], review and regulate proposed
19 activities in identified [SNR] Areas. The review
20 process shall adhere closely to provisions in applicable
21 community plans, which direct the manner and extent
22 to which the area shall be protected."

23 The purpose and intent of CDC chapter 422

24 "is to permit limited and safe development in areas with [SNRs],
25 while providing for the identification, protection, enhancement and

1 perpetuation of natural sites, features, objects and organisms within
2 the county, here identified as important for their uniqueness,
3 psychological or scientific value, fish and wildlife habitat,
4 educational opportunities or ecological role.” CDC 422-1.

5 “CDC Chapter 422 implements Policy 10, and through it, Goal 5.” *Big-Vuk*, 78
6 Or LUBA at 110.

7 In June 2020, the Land Conservation and Development Commission
8 (LCDC) issued an enforcement order prohibiting the county from approving
9 development on land with Goal 5 resources until the county revised of the
10 standards in CDC chapter 422 to make them “clear and objective,” as required
11 by ORS 197.307(4) and *Warren v. Washington County*, 78 Or LUBA 375 (2018),
12 *aff’d*, 296 Or App 595, 439 P3d 581, *rev den*, 365 Or 502 (2019).³ In October
13 2020, the county adopted Ordinance 869, which revised the standards in CDC
14 chapter 422. LCDC terminated its enforcement order in December 2020, on the
15 effective date of Ordinance 869. Ordinance 869 was, however, appealed to and

³ The enforcement order concluded:

“Based on the preceding findings of facts and conclusions of law, [LCDC] issues an enforcement order pursuant to ORS 197 .320(10) directing Washington County to amend its code standards that were invalidated because they were not clear and objective standards for housing in a manner that complies with ORS 197.307(4). While not directly mandated by this order, it would be prudent for the County to review, and if necessary amend, other code standards implementing the County’s Goal 5 program that may also not be clear and objective standards for housing in compliance with ORS 197.307(4).” Record 438.

1 remanded by LUBA. *CPO 4M v. Washington County*, ___Or LUBA ___ (LUBA
2 No 2020-110, Sept 29, 2021). It is undisputed that, prior to the county's adoption
3 of Ordinance 869, the county's Goal 5 program was acknowledged to comply
4 with Goal 5.

5 The challenged decision is a limited land use decision. ORS 197.015(12).
6 ORS 197.175(2)(d) provides that, once a comprehensive plan is acknowledged,
7 a county shall "make * * * limited land use decisions in compliance with the
8 acknowledged plan and land use regulations." In other words, once a
9 comprehensive plan is acknowledged, the statewide planning goals do not apply
10 to limited land use decisions such as the challenged decision. The hearings officer
11 concluded that intervenor's application "is subject to the acknowledged
12 provisions of former CDC 422 that was in effect prior to the adoption of
13 Ordinance 869. Therefore, Goal 5 is not directly applicable to this application."
14 Record 37-38. Petitioner does not challenge that finding or otherwise explain why
15 Goal 5 applies directly to the application. Although petitioner asserts that, "[i]n
16 the absence of a viable and acknowledged Goal 5 program for Wildlife Habitat,
17 the County must apply statewide Goal 5 rules to the application," petitioner does
18 not explain why, even if Ordinance 869 is not effective after our remand, the
19 county lacks an acknowledged Goal 5 program. Petition for Review 30. As
20 explained above, prior to the adoption of Ordinance 869, the county's Goal 5
21 program was acknowledged. We assume, based on petitioner's lack of challenge

1 to the hearings officer's finding that Goal 5 does not apply, that the hearings
2 officer was correct that Goal 5 does not apply.

3 The hearings officer also adopted alternative findings that, "to the extent
4 Goal 5 does apply, the application complies, based on the [intervenor's] ESEE
5 analysis." Record 38. Petitioner's fourth assignment of error is that the hearing
6 officer's finding that Goal 5 is met is not supported by substantial evidence.
7 Petition for Review 31-34. As explained above, because petitioner does not
8 challenge the hearings officer's finding that Goal 5 does not apply, we assume
9 that Goal 5 does not apply, and petitioner's substantial evidence challenge to the
10 alternative findings does not provide a basis for reversal or remand.

11 Petitioner argues, in a footnote, that, if we determine that CDC 422-3.6
12 applies to intervenor's application, then we should apply its arguments that there
13 is not substantial evidence to support the hearings officer's conclusion that Goal
14 5 is met to the hearings officer's conclusion that CDC 422-3.6 is met. We do not
15 address assignments of error that are raised in footnotes.

16 The fourth assignment of error is denied.

17 **FIRST ASSIGNMENT OF ERROR**

18 CDC 106-185 provides:

19 **"Riparian Corridor (Water Areas and Wetlands).** This term shall
20 have one of the following two meanings:

21 "(1) For areas that have not been the subject of a Goal 5 analysis
22 completed and a program decision adopted pursuant to OAR
23 660-023 (effective September 1, 1996), *riparian corridor*

1 *shall mean the area, adjacent to a water area, which is*
2 *characterized by moisture-dependent vegetation, compared*
3 *with vegetation on the surrounding upland, as determined by*
4 a qualified botanist or plant ecologist, or in no case less than
5 a ground distance of 25 feet on either side of the channel.
6 Where, in its existing condition, a wetland or watercourse has
7 no discernible channel which conveys surface water runoff,
8 the riparian zone shall be measured from the center of the
9 topographic trough, depression or canyon in which it is
10 located.

11 “(2) For areas that have been the subject of a Goal 5 analysis
12 completed and a program decision adopted pursuant to OAR
13 660-023 (effective September 1, 1996), riparian corridor shall
14 mean a Goal 5 resource that includes the water areas, fish
15 habitat, adjacent riparian areas, and wetlands within the
16 riparian area boundary, or the definition of the term used in
17 OAR 660, Division 23. The boundary of a riparian corridor
18 having this meaning shall be defined pursuant to OAR 660-
19 023-0090.”⁴ (Emphasis added.)

20 CDC 422-3.3(A) provides that, subject to exceptions listed in CDC 422-3.3(A)(1)
21 to (12), “[n]o new or expanded alteration of the vegetation or terrain of the
22 Riparian Corridor (as defined in Section 106) or a significant water area or
23 wetland (as identified in the applicable Community Plan or the Rural/Natural
24 Resource Plan) shall be allowed.” Petitioner’s first assignment of error is that the
25 hearings officer’s decision does not comply with CDC 422-3.3(A)’s limitation

⁴ CDC 106-218 provides, “**Wetlands.** Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

1 on the alteration of terrain and vegetation in areas protected by the section.
2 Petition for Review 13.

3 ORS 197.828(2)(b) provides that we will reverse or remand a limited land
4 use decision if “[t]he decision does not comply with applicable provisions of the
5 land use regulations.” As explained above, we will also reverse or remand a
6 limited land use decision if the decision is not supported by substantial evidence.
7 In the case of a limited land use decision such as this, “[t]he existence of evidence
8 in the record supporting a different decision shall not be grounds for reversal or
9 remand if there is evidence in the record to support the final decision.” ORS
10 197.828(2)(a).

11 **A. Interpretation of CDC 422-3.3(A)**

12 **1. Location of Protected Areas**

13 Petitioner argues that the hearings officer erred in identifying the part of
14 tax lot 2300 subject to CDC 422-3.3(A). The SNR map includes a dark blue line
15 on the subject property. Record 760. The map legend identifies the dark blue line
16 as Water Areas and Wetlands and Fish and Wildlife Habitat.

17 According to intervenor’s consultant’s report,

18 “[t]he Washington County *Cedar Hills Community Plan* maps
19 Wildlife Habitat on most of the eastern parcel corresponding to
20 onsite canopy cover and does not map any wildlife habitat on the
21 western two parcels. The plan maps Water Area and Wetlands and
22 Fish and Wildlife Habitat in a corridor passing east-west through the
23 center of the three parcels, however, this mapping is assumed to
24 correspond to the stream running through the site, which flows
25 through the southern end of these parcels.” Record 181 (italics in

1 original; citation omitted).

2 Said differently, intervenor's consultant concluded that the dark blue line shown
3 on the SNR map as passing through the middle of tax lot 2300 corresponds to a
4 stream that the consultant's on-site investigation found flowing through the
5 southern portion of the parcel. The hearings officer agreed that the consultant
6 correctly identified the location of the protected Water Area and Wetlands and
7 Fish and Wildlife Habitat on the property, that is, the part of the property subject
8 to CDC 422-3.3(A).

9 Petitioner does not dispute that the mapped Water Area and Wetlands and
10 Fish and Wildlife Habitat corresponds to the stream running through the site or
11 that the stream flows through the southern portion of the parcel. However,
12 petitioner maintains that the protected area is determined not by intervenor's field
13 verification but by transposing the dark blue line on the SNR map to a location
14 on the ground, even if the location on the ground is not near the actual location
15 of the stream.

16 Relatedly, petitioner observes that intervenor's consultant's report
17 identifies two wetlands within an area that petitioner contends corresponds to the
18 dark blue line on the SNR map. Petitioner argues that,

19 "[b]ecause there is no question that the proposed construction of
20 homes and stormwater facilities will encroach into field verified
21 wetlands within the mapped Goal 5 resource as shown on the
22 applicable community plan, the application is subject to the various
23 requirements of CDC 422-3.3, including the general prohibition
24 against alterations of vegetation and terrain." Petition for Review
25 17.

1 We agree with the county and intervenor that the hearings officer did not err in
2 locating the protected Water Area and Wetlands and Fish and Wildlife Habitat
3 on the property based on the on-site delineation.

4 Resolving this element of the first assignment of error requires that we first
5 interpret CDC chapter 422. In construing the law, we will consider the text and
6 context of the law at issue in order to determine the intent of the enacting
7 legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d
8 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

9 As we set out in *Big-Vuk*,

10 “CDC 422-3 includes the criteria for development of property that
11 includes an identified natural resource. CDC 422-3.1 provides as
12 relevant here:

13 ““The required master plan and site analysis for a site which
14 includes an identified natural resource shall:

15 ““A. Identify the location of the natural resource(s), except
16 in areas where a Goal 5 analysis has been completed
17 and a program decision adopted pursuant to OAR 660,
18 Division 23 (effective September 1, 1996);

19 ““B. Describe the treatment of proposed alteration, if any.
20 Any alteration proposed pursuant to section 422-3.1B.
21 shall be consistent with the program decision for the
22 subject natural resource; and

23 ““C. Apply the design elements of the applicable
24 Community Plan * * * [.]” 78 Or LUBA at 110.

25 As intervenor explains, no party has argued that the subject property is an area
26 where a Goal 5 analysis has been completed. Intervenor-Respondent’s Brief 20.

1 “In order to satisfy the requirement in CDC 422-3.1.A, [the applicant in
2 *Big-Vuk*] submitted a wildlife habitat study intended to determine the location of
3 the Wildlife Habitat on the property.” 78 Or LUBA at 111. We proceeded to
4 explain that

5 “CDC Chapter 422 anticipates that further refinement of the location
6 of the protected resource will occur when the county receives an
7 application for development of property that is included on the SNR
8 Map. CDC 422-3.1.A requires an applicant for development of
9 property that is included on the SNR Map to provide the county with
10 additional information identifying ‘the location of the natural
11 resource(s)[.]’ However, the requirement to precisely identify the
12 location of the protected resource does not amount to an amendment
13 of the SNR Map, because before and after the precise location of the
14 identified resource is known, the extent of the property included on
15 the SNR Map is the same. Stated differently, if intervenor abandons
16 its development plans, a future developer of the property would be
17 required to begin the process all over again and identify the precise
18 location of the protected resource, because the subject property is
19 included on the SNR Map and the provisions of CDC 422 apply. If
20 petitioners were correct and the SNR Map has already determined
21 the location of the natural sources on a property, then the CDC 422-
22 3.1.A requirement to identify the location of the natural resources
23 would be a meaningless requirement.” *Id.* at 112.

24 This interpretation is consistent with the CDC 106-185 definition of “riparian
25 area,” linking it to the adjacent water area.

26 Petitioner argues that the prohibition on alterations at CDC 422-3.3(A)
27 includes “a *significant* water area or *wetland* (as identified in the applicable
28 Community Plan or the Rural/Natural Resource Plan)” and that intervenor’s
29 expert identified two wetlands within the area that corresponds to the dark blue

1 line on the SNR map. (Emphases added.) The SNR map does not, however,
2 identify a significant wetland on tax lot 2300 but, rather, depicts Water Areas and
3 Wetlands and Fish and Wildlife Habitat. As the court explained in *Plotkin v.*
4 *Washington County*, the presence of wetlands on the site does not necessarily
5 mean that those wetlands are subject to CDC 422-3.3(A).

6 “Because the context provides perspective on the text of CDC 422-
7 3.3A, we begin with that subsection’s context before turning to its
8 text. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611,
9 859 P2d 1143 (1993) (both text and context may be examined at the
10 first stage of analysis). As the county explains, CDC 422-2
11 specifically provides that the [SNRs] that are subject to the
12 regulations and the protections of the ‘section’ are those that are
13 ‘identified’ in the relevant component or components of the
14 comprehensive plan. It does not appear to be disputed—and our
15 review of the structure of the CDC at our disposal confirms—that
16 the term ‘section’ refers to CDC 422 in its entirety. Hence, lands that
17 are not identified in the plan, and that are therefore outside the
18 regulatory ambit that CDC 422-2 defines, are not subject to
19 regulation under CDC 422-3.3A or any other subsection of CDC
20 422.” 165 Or App 246, 250-51, 997 P2d 226 (2000) (footnote
21 omitted).

22 The court affirmed the county’s interpretation that

23 “CDC 422-3.3A protects riparian zones ‘as defined in Section 106’
24 of the Code. Section 106 in turn defines a ‘riparian zone’ as ‘[t]he
25 area, adjacent to a water area, which is characterized by moisture
26 dependent vegetation.’ CDC 106.185. In light of that definition,
27 CDC 422-3.3A can be read as applying only to wetlands identified
28 in a community plan and adjacent riparian zones; that is, the
29 reference to riparian zones in CDC 422-3.3A does not extend
30 protection to all riparian zones regardless of whether they are listed
31 in a community plan. Rather, the reference makes clear that if a
32 wetland or water area is listed in a community plan, then the adjacent

1 moisture dependent vegetation, as defined in section 106, will also
2 be protected from development.” *Id.* at 251 (footnote omitted).

3 The hearings officer did not err in interpreting the CDC to require that the
4 location of the protected area be determined through on-site investigation or in
5 concluding that wetlands outside that area and not identified as significant are not
6 protected by CDC 422-3.3(A).

7 **2. Location of Stormwater Outfall**

8 As explained above, one of the tracts resulting from the subdivision
9 application would be for a stormwater facility. The outfall for those facilities
10 would be in the area protected by CDC 422-3.3(A). One of the exceptions to CDC
11 422-3.3(A)’s limitation on the alteration of terrain and vegetation in areas
12 protected by the section is the “[i]nstallation or construction of the following
13 utilities: sewer and water lines, electric, communication and signal lines; and gas
14 distribution and transmission lines.” CDC 422-303(A)(3). The hearing officer
15 found that the stormwater outfall was allowed as a sewer. Record 27. Petitioner
16 challenges that finding. However, petitioner’s challenge is presented in a limited
17 statement in a footnote that “no ‘sewage’ or wastewater should be discharged
18 from the outfall and the Hearings Officer’s characterization of the stormwater
19 outfall as a ‘sewer’ was in error.” Petition for Review 16 n 2. We do not address
20 assignments of error or arguments in footnotes. *McCaffree v. Coos County*, 70
21 Or LUBA 15, 20 (2014) (“LUBA has refused to consider arguments in footnotes
22 that set out a different legal theory than presented in the assignment of error.”);

1 *see also David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19, *aff'd*, 223 Or
2 App 761, 197 P3d 1152 (2008), *rev den*, 346 Or 10 (2009).

3 **B. Substantial Evidence**

4 **1. Location of Protected Area and Home Sites**

5 Petitioner argues that substantial evidence does not support the location
6 that the hearings officer determined is the protected Water Area and Wetlands
7 and Fish and Wildlife Habitat on the property because it differs from the SNR
8 map. Petitioner also argues that the protected area identified on the SNR map will
9 contain homesites under intervenor's subdivision plan. For the reasons set out
10 above, the protected Water Area and Wetlands and Fish and Wildlife Habitat on
11 the property is not defined by transposing its location on the SNR map to a
12 location on the ground. Following their on-site investigation, intervenor's
13 consultant provided evidence that the protected Water Area and Wetlands and
14 Fish and Wildlife Habitat is to the south of the dark blue line depicted on the SNR
15 map. The hearings officer concluded that

16 "Figure 1 the Cedar Hills-Cedar Mill SNR map shows the Water
17 Areas and Wetlands and Fish and Wildlife Habitat area passing from
18 east to west [in] the middle of the northern portion of the site.
19 However, based on [intervenor's] on-site delineation, the Water
20 Areas and Wetlands and Fish and Wildlife Habitat area is actually
21 further south. This is consistent with the 'Submittal Requirements'
22 set out in the director's 1998 Interpretation, which includes
23 'Delineation of the boundary of the resource must be established by
24 a professional or team of professionals qualified to address different
25 characteristics of the natural resource.['] The community plan maps
26 are developed at a broad scale and it is necessary to refine the

1 mapping to delineate the actual boundaries of the resource on a
2 proposed development site. [Intervenor's] professional biologist
3 performed such a delineation in this case. *Based on that delineation,*
4 *no lots or stormwater detention facilities are proposed within the*
5 *Wetlands and Fish and Wildlife Habitat area on the site."* Record
6 40 (citations omitted; emphasis added).

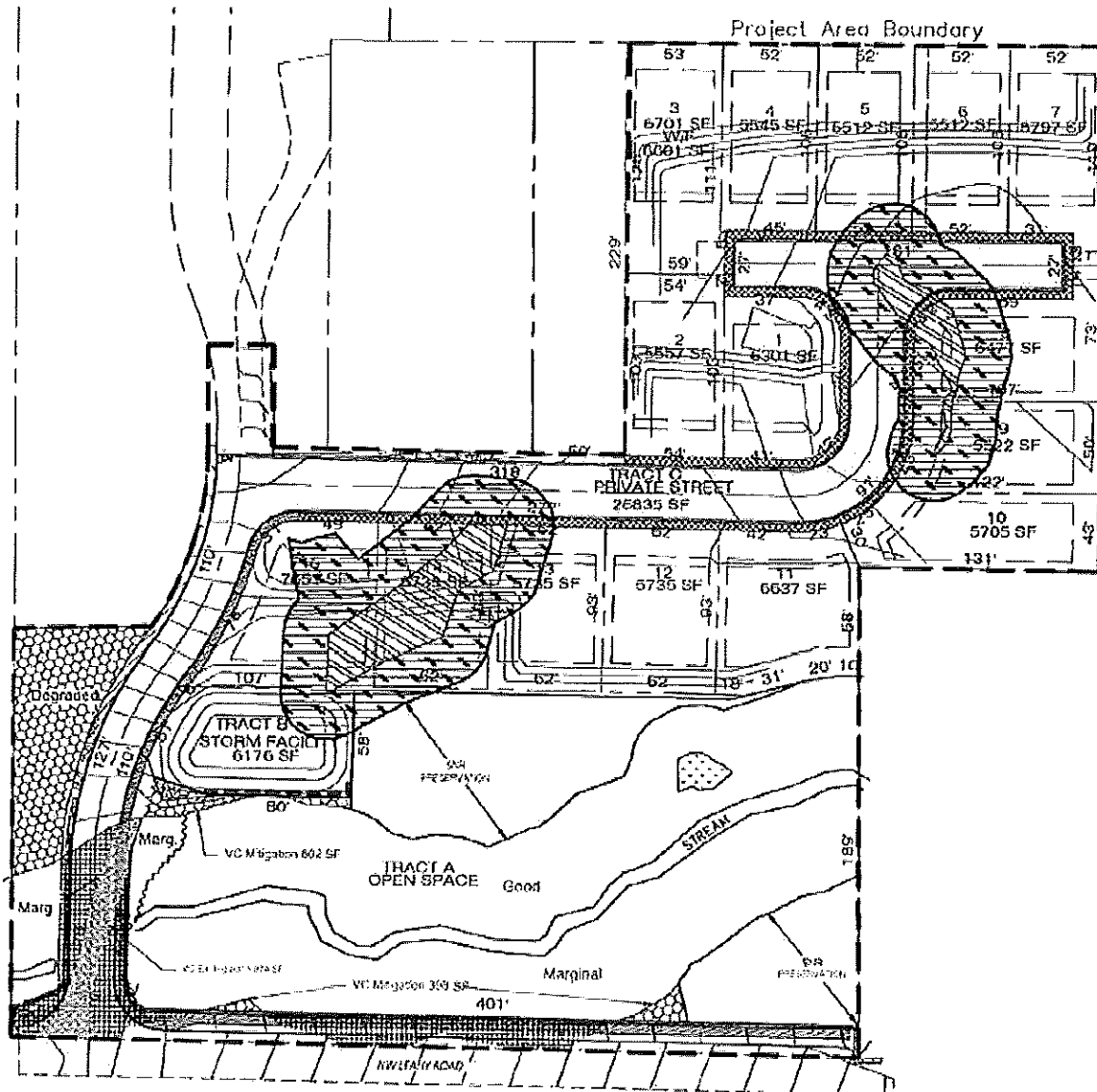
7 Substantial evidence is evidence a reasonable person would rely upon to reach a
8 decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). The
9 consultant's delineation is substantial evidence supporting the hearings officer's
10 conclusion that the protected area is that identified by intervenor's consultant and
11 that there are no proposed homesites within the protected area.

12 **2. Location of Stormwater Facility**

13 Petitioner argues that the stormwater facility is improperly located in an
14 area protected by CDC 422-3.3(A). Petition for Review 20. The hearings officer
15 concluded:

16 "In this case, development proposed within [the Riparian Corridor
17 and Water Areas and Wetlands and Fish and Wildlife Habitat areas
18 on the site] is limited to the private road crossing, which is allowed
19 by CDC 422-3.3.A(1) and (2), and the installation of utilities
20 allowed by CDC 422 3.3.A(3). *Contrary to the statement in Exhibit*
21 *PH-4, no lots or stormwater detention facilities are proposed within*
22 *the Riparian Corridor and Water Areas and Wetlands and Fish and*
23 *Wildlife Habitat areas on the site."* Record 39-40 (emphasis added).

24 Tract A is shown on intervenor's map as open space, and Tract B is shown
25 as containing the stormwater facility.



1

2 Record 161. The hearings officer found that Tract A “will retain and protect a
 3 170-foot wide corridor of stream, VC, and upland SNR.” Record 42. The hearings
 4 officer found that intervenor will collect stormwater from all new impervious
 5 surfaces on the subdivision site and convey it to a stormwater facility in proposed
 6 Tract B for treatment and detention. Record 17. Tract B is outside the protected
 7 area adjacent to the stream, as identified by the on-site delineation. That is

1 evidence upon which a reasonable person would rely to make a decision.
2 Substantial evidence supports the hearings officer's conclusion that the area to
3 the north of the protected area is not subject to CDC 422-3.3(A) and that the
4 stormwater facility is outside the protected area.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioner's second assignment of error is that the hearings officer
8 approved alteration of the VC and riparian SNR in violation of CDC 422-3.3(A).

9 First, we point out that petitioner appears to use the terms VC, which
10 relates to the CWS designation, and SNR, which relates to the county
11 designation, interchangeably. For example, petitioner argues that intervenor
12 proposed enhancement of the VC, citing the statement by intervenor's consultant
13 that "[t]he remaining 5,619 square feet of VC impact will be mitigated onsite the
14 largest area being enhancement of degraded habitat west of site. Enhancing 6,705
15 square feet of on-site VC provides a 1:1.2 ratio of enhancement mitigation to
16 impact for Tier 2 impacts." Petition for Review 22 (quoting Record 975).
17 Petitioner then states, "This and other proposed enhancements of the riparian
18 SNR are not allowed under CDC 422-3.3, which sets forth a general prohibition
19 against 'new or expanded alteration of the vegetation or terrain' in designated
20 riparian SNRs." *Id.* The CDC regulations concern the SNR. CWS regulations
21 concern the VC and are not at issue in this appeal. With that clarification, we
22 proceed to the assignment of error.

1 CDC 501-8.1(A) requires that “[a]n applicant for development * * *
2 provide documentation from the appropriate non-county service provider that
3 adequate water, sewer and fire protection can be provided to the proposed
4 development prior to occupancy.” The CDC defines “development” as

5 “[a]ny man-made change to improved or unimproved real estate or
6 its use, including but not limited to construction, installation or
7 change of land or a building or other structure, change in use of land
8 or a building or structure, land division, establishment, or
9 termination of right of access, storage on the land, tree cutting,
10 drilling, and site alteration such as that due to land surface mining,
11 dredging, grading, construction of earthen berms, paving,
12 improvements for use as parking, excavation or clearing. Also refer
13 to Section 421-2.2 for definition of development for flood and
14 drainage hazard area management purposes.” CDC 106-57.

15 We understand that, “[a]s part of the Washington County land use application
16 process (Section 501-8), [intervenor] obtained service provider letters from CWS
17 for sensitive areas, surface water management, and sanitary sewer, confirming
18 that adequate levels of service can be provided to the proposed development prior
19 to occupancy.” Record 134-35. The CWS service provider letter states:

20 “The existing SNR riparian area, corresponding [to] the CWS VC,
21 has mature canopy cover except for the outer edges. This area will
22 be planted with native trees and the understory throughout will be
23 enhanced with native shrubs after invasives have been removed. A
24 total of 43,207 square feet of existing VC (Good and Marginal
25 Condition) will be enhanced along the stream corridor to CWS
26 district standards.” Record 152.

27 Intervenor’s consultant’s report explained that

28 “[t]he CWS standards provide methodology for assessing the

1 presence and extent of Sensitive Areas within a development site
2 and within 200 feet of the site, and the required [VC] setbacks. The
3 VC corresponds to the Washington County riparian area associated
4 with the mapped Water Area and Wetlands & Fish and Wildlife
5 Habitat SNR. *The County requirements for protective riparian*
6 *buffers under CDC 106-185(1) must be inclusive of riparian*
7 *vegetation and be at least 25 feet on either side of the resource. CWS*
8 *VC require a minimum of 50 feet wide for all perennial streams, so*
9 *based on our onsite analysis for this property, the 50-foot VC*
10 *corridor exceeds the width of the Riparian Corridor (Water Areas*
11 *and Wetlands) established in the CDC.”* Record 114-15 (emphasis
12 added).

13 The hearings officer noted that “*CWS regulations* require a 50-foot wide [VC],
14 or up to the edge of any existing barriers, such as a road.” Record 27 (emphasis
15 added). The approval is conditioned upon compliance with the CWS
16 requirements.

17 One of the exceptions to CDC 422-3.3(A)’s limitation on the alteration of
18 terrain and vegetation in areas protected by the section is:

19 “Where it can be demonstrated, with concurrence of the Clackamas
20 District biologist or other applicable district biologist of the Oregon
21 Department of Fish and Wildlife, that a riparian corridor, Water
22 Areas and Wetlands, or Water Areas and Wetlands and Fish and
23 Wildlife Habitat has been degraded, an enhancement of these areas
24 which conforms to the definition and criteria in Section 422-3.4 may
25 be permitted through a Type II procedure. Enhancement or
26 alteration of a non-degraded portion of these areas is permitted when
27 it is in conjunction with and it is needed to support the enhancement
28 of the degraded area. Where development is proposed that would
29 have negative impacts on these areas it is the county’s policy to
30 follow state and federal regulatory guidelines for mitigation
31 proposals.” CDC 422-3.3(A)(7).

32 The hearings officer concluded that CDC 422-3.3(A)(7) does not apply because

1 “[*intervenor*] *did not propose any enhancement within the Riparian*
2 *Corridor and Water Areas and Wetlands and Fish and Wildlife*
3 *Habitat areas*. The hearings officer finds that mitigation required by
4 CWS as a condition of approval of this application is not subject to
5 [CDC 422-3.3(A)]. *CWS nearly always requires mitigation*
6 *plantings within Riparian Corridor, Water Areas and Wetlands, and*
7 *Water Areas and Wetlands and Fish and Wildlife Habitat areas*
8 *whenever development is proposed on properties containing such*
9 *SNRs*, yet the County has never required compliance with [CDC
10 422-3.3(A)] nor has it required concurrence from ODFW biologists
11 that these areas have been degraded. If the Board had intended [CDC
12 422-3.3(A)] to apply to CWS required mitigation planting it would
13 have said so explicitly and included an exception for that activity.”
14 Record 40 (emphases added).

15 We conclude that the hearings officer correctly found that the mitigation work
16 was allowed as part of the application, which proposed installation or
17 construction of utility lines, in accordance with CWS regulations requiring
18 plantings.

19 In interpreting the CDC, we apply the rules of statutory interpretation and
20 look to the text and context. The hearings officer agreed with intervenor’s
21 explanation that intervenor’s application for work in the protected area was an
22 application for activity allowed under CDC 422-3.3(A):

23 “[*Intervenor*] does not *propose* enhancement or revegetation of the
24 riparian corridor, it proposes an upgraded stream crossing to provide
25 access to the project and associated utility lines within that crossing.
26 The only vegetation enhancement that will be conducted within the
27 riparian corridor is required by [CWS] as a *condition* of approval of
28 the Project’s Site Development Permit. It is also required by
29 proposed condition of approval B.11. Thus, the Hearings Officer can
30 and should conclude that CWS-required vegetation enhancement
31 within the Riparian Corridor is not subject to subsection (7), and
32 therefore, no concurrence of a district biologist is required.” Record

1 115 (emphases in original; citation omitted).

2 Petitioner argues that the hearings officer inserted an exception into the CDC
3 which does not exist. The list of exceptions to the restriction on alteration of
4 vegetation and terrain is instructive context for interpreting the CDC. The
5 exceptions include:

6 “(1) Crossings for streets, roads or other public transportation
7 facilities.

8 “(2) Construction or reconstruction of streets, roads or other public
9 transportation facilities.

10 “(3) Installation or construction of the following utilities: sewer
11 and water lines, electric, communication and signal lines; and
12 gas distribution and transmission lines.

13 “(4) Wildlife viewing areas and recreation or nature trails.

14 “(5) Bank maintenance, restoration or stabilization, including
15 riprapping for erosion control, of a river or other watercourse
16 or body of water provided there is compliance with the
17 requirements of Section 421-4.6. This use is not subject to
18 Section 422-3.5 or Section 422-3.6.

19 “(6) Detached dwellings and accessory structures on a lot of
20 record, provided there is insufficient suitable, existing
21 buildable land area to permit construction outside the riparian
22 corridor, as defined in Section 106, or a significant water area
23 or wetland (as identified in the applicable Community Plan or
24 the Rural/Natural Resource Plan) and all required local, state
25 or federal permits are obtained.

26 “* * * * *

27 “(8) All activities and uses associated with an expansion or
28 alteration of Barney Reservoir and Henry Hagg
29 Lake/Scoggins Dam; including but not limited to

1 impoundment structures, water diversion and transmission
2 facilities, road construction and related land alterations. Such
3 activities and uses may be permitted through a Type III
4 procedure.

5 “(9) In addition in the Rural/Natural Resource Area:

6 “(a) Propagation or harvesting of timber for personal
7 consumption, provided that the use of a caterpillar
8 tractor, yarder, backhoe, grader or similar heavy
9 mechanized equipment is prohibited;

10 “(b) Commercial forestry activities when in compliance
11 with the Oregon Forest Practices Act and
12 Administrative Rules; and

13 “(c) Farming or raising of livestock not utilizing a structure.

14 “(d) Operations for the exploration for and production of
15 geothermal resources, oil and gas.

16 “(10) All public use airport related uses and activities allowed
17 pursuant to Section 387-4.

18 “(11) Wetland mitigation, creation, enhancement and restoration
19 within public use airport approach surface areas and airport
20 direct impact boundaries shall be allowed upon demonstration
21 of compliance with the requirements of Section 388-9.

22 “(12) One middle housing duplex (Section 430-84) and accessory
23 structures on a lot of record, provided there is insufficient
24 suitable, existing buildable land area to permit construction
25 outside the riparian corridor, as defined in Section 106, or a
26 significant water area or wetland (as identified in the
27 applicable Community Plan or the Rural/Natural Resource
28 Plan) and all required local, state or federal permits are
29 obtained.” CDC 422-3.3(A).

30 All of the exceptions reflect types of development under the CDC. Each of the
31 exceptions would result in alteration of vegetation and terrain, and we understand

1 the hearings officer to have found that CWS generally requires plantings as part
2 of any of the above types of development in its county-required review. We
3 understand the hearings officer to have found that the plantings within the
4 protected area are part of the allowed access and utility line installation. In other
5 words, the hearings officer concluded that CWS requires plantings as part of any
6 development it reviews and that the development in intervenor's application falls
7 under the exceptions in CDC 422-3.3(A)(1) and (3) for street crossings and
8 installation of utilities, rather than the exception in CDC 422-3.3(A)(7) for
9 enhancement. We agree with the hearings officer's interpretation of the CDC as
10 allowing alteration of vegetation that CWS requires as part of an application for
11 development that is allowed under CDC 422-3.3(A).

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENTS OF ERROR**

14 Petitioner's third assignment of error is that the proposed plantings in the
15 protected area do not comply with various provisions of CDC 422-3.3(A)(7) and
16 CDC 422-3.4. For the reasons set out in our resolution of the second assignment
17 of error, we agree with the hearings officer that the planting work is part of the
18 access and utility work that it is allowed within the protected area pursuant to
19 CDC 422-3.3(A)(1) and (3). CDC 422-3.4 applies to "[e]nhancement of a
20 degraded riparian corridor, Water Areas and Wetlands, or Water Areas and
21 Wetlands and Fish and Wildlife Habitat permitted by Section 422-3.3 A. (7)."
22 The access and utility work is not subject to CDC 422-3.3(A)(7) for the reasons

1 set out in our resolution of the second assignment of error, and CDC 422-3.4 does
2 not apply.

3 The third assignment of error is denied.

4 The county's decision is affirmed.