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

1000 FRIENDS OF OREGON,
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

LYNN MERRILL, ACREAGE LAND SOLUTIONS LLC,
RONALD HENTHORNE, and VIRGINIA HENTHORNE,
Intervenors-Respondents.

LUBA Nos. 2025-003/004

FINAL OPINION
AND ORDER

Appeal from Linn County.

John D. Butterfield filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by Linn County.

Wendie L. Kellington filed the intervenor-respondent's brief and argued on behalf of intervenors-respondents.

ZAMUDIO, Board Chair; BASSHAM, Board Member, participated in the decision.

WILSON, Board Member, did not participate in the decision.

AFFIRMED 09/04/2025

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

Opinion by Zamudio.

NATURE OF THE DECISION

In these consolidated appeals, petitioner appeals two board of commissioners decisions rezoning the subject property from Farm/Forest to Non-Resource 5-acre Minimum.

MOTION TO STRIKE

Intervenors-respondents (intervenors), the applicants below, move to strike two images at pages 19 and 26 of the petition for review that are modified images of an area map that is in the record. Intervenors argue that the two modified images are not in the record and we may not consider them. We agree for the reasons explained below.

In the first assignment of error, petitioner argues that the county incorrectly interpreted and applied a dwelling density standard in the county code in a manner that results in an allowed dwelling density that exceeds the standard, permitting overdevelopment on the subject property that will destroy habitat. Petitioner created two images to support that argument. Figure 1 is a map of the subject property with ten identical drawings of houses placed on the property. Petition for Review 19. Petitioner explains that the first image "modifies a simplified version of a figure that appeared in [i]ntervenors' testimony to the [c]ounty. *See* Record 114." Petition for Review 18. Petitioner argues that Figure 1 "illustrates the fragmenting and degradation of peripheral big game habitat that would occur under the [c]ounty's density analysis." *Id.*

Figure 2 is a map of the subject property with four identical drawings of houses placed on the property. Petition for Review 26. Petitioner argues that Figure 2 "illustrates the habitat protection benefits provided by the [Oregon Department of Fish and Wildlife (ODFW)] density analysis, again using a modification of a simplified version of a figure that appeared in [i]ntervenors' testimony. *See* Record 114." *Id.*

Intervenors correctly observe that the two images "are not the same as the map included at Rec[ord] 114[,]" but instead are "modifications of that map" that were not submitted into the local record, nor accepted or considered by the board of commissioners. Motion to Strike 2.

Our review is generally limited to the record that was before the final decision maker. ORS 197.835(2)(a); OAR 661-010-0025(1)(b) (explaining that the record before LUBA includes "[a]ll written testimony and all exhibits, maps, documents or other materials *specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker*." (Emphasis added)). We may consider evidence outside the record in limited circumstances. A party that seeks LUBA review of extra-record evidence must file "[a] motion to take evidence [which] shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the

outcome of the review proceeding." OAR 661-010-0045(1)-(2)(a). Petitioner has not filed a motion to take evidence outside the record.

Petitioner responds that the two disputed images are not "evidence" but, "are, instead, legal argument." Response to Motion to Strike 3. Petitioner observes that we have previously considered material "other than simple text paragraphs * * * as part of a party's legal argument[.]" *Id.* Petitioner cites *Barnes v. City of Hillsboro*, where the petitioner moved to strike tables that the respondents' counsel had created and included in an appendix to the respondent's brief. 61 Or LUBA 375, *aff'd*, 239 Or App 73, 243 P3d 139 (2010). Those tables compared the uses allowed in a proposed zone with the uses allowed in the existing zone. We denied the motion to strike after concluding that the tables could "be understood to constitute legal arguments: the views of respondents' legal counsel regarding the legal effect of rezoning * * *." 61 Or LUBA 381-82.

Intervenors argue, and we agree, that modified map images in the petition for review are not analogous to the text tables in *Barnes*. Petitioner acknowledges that we have recognized a distinction between illustrations and tables. In *Kulongoski v. City of Portland*, we granted the respondents' motion to strike an illustration and related arguments in the petition for review. LUBA No 2021-098 (May 16, 2022) (slip op at 3-4). We reasoned that the illustration was not akin to "tabular representations" and was "not a graphical representation of evidence that is already in the record." *Id.*

Petitioner contends that, unlike *Kulongoski*, their figures do not assert facts that are unfounded in the record. Instead, petitioner asserts that the images are a visual representation of petitioner's argument about density, based on evidence that exists in the record, namely, a map of the subject property and the county's and ODFW's textual interpretations of the county density standards. *See* Record 114 (subject property map); Record 26-27 (county's interpretation, allowing up to ten dwellings); Record 185 (ODFW's interpretation, allowing up to four dwellings).

In *Carver v. City of Salem*, we explained that, while we encourage parties to include maps from the record in the petition for review to orient the board to the subject property, we will strike maps in the parties' briefs that are modified to illustrate a disputed point. 42 Or LUBA 305, 309, *aff'd* 184 Or App 503, 57 P3d 602 (2002). In that case, the petitioner included with their petition for review a copy of a map in the record, which the petitioner modified to illustrate one of his arguments about the location and extent of a parks service area. We reasoned that, if accuracy is undisputed, then we would generally consider minor modifications to a map that is in the record. 42 Or LUBA at 309. For example, an addition of color or other information that identifies the subject property. In *Carver*, the city disputed the accuracy of the petitioner's map modifications, and we agreed with the city that the alterations exceeded acceptable modifications. We determined that the disputed illustrations were newly created, extra-record evidence and declined to consider them. *Id.*

Similarly, in *Martin v. City of Dunes City*, the city moved to strike a map that depicted a 50-foot access easement and a drainage easement that was not in the record that the petitioner had created and attached to the petition for review. 45 Or LUBA 458, 463 (2003). We granted the city's motion to strike, reasoning that we would not consider an image that had been created or altered to illustrate a disputed point.

Here, intervenors argue, and we agree that petitioner's figures do not merely emphasize or explain images already in the record. Petitioner removed information in the map legend and removed marks on the original map that represented existing addresses. *Compare* Petition for Review 19 and 26 *with* Record 114. Petitioner added images of houses that intervenors argue "are grossly oversized and suggest that the dwellings and their impacts are significantly greater than they would appear if scaled properly." Reply in Support of Motion to Strike 2. While intervenors do not dispute the number of dwellings that would be permitted under the two different code interpretations, intervenors assert that the scale of the added dwelling images and the implied impacts are inaccurate and, more importantly, that those images were not presented as graphic arguments to the county. In other words, while intervenors do not dispute the numeric accuracy of the added dwelling images, intervenors argue that the images depict an inaccurate relative size and imply impacts that are not reflected in the record.

The same reasoning in *Carver* and *Martin* applies here. Petitioner modified an existing map and created two new, extra-record figures to illustrate their argument. Intervenors dispute that the two figures accurately reflect the different density scenarios that are founded in the record. LUBA will not consider the images at petition for review pages 19 and 26. Intervenors' motion to strike is granted.

BACKGROUND

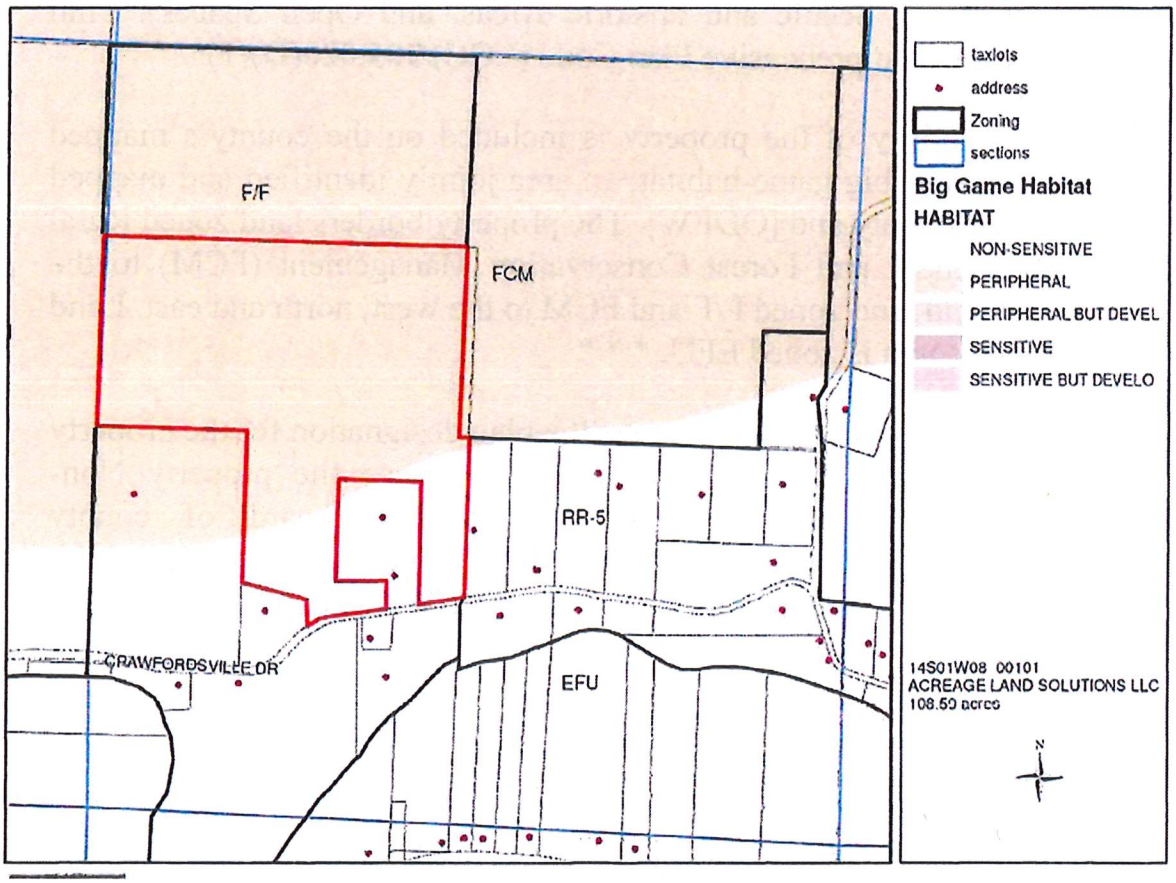
This is the third time that the county has approved the challenged plan amendment and zone change. We reversed the approvals in *1000 Friends of Oregon v. Linn County*, 81 Or LUBA 338 (2020) (*Henthorne I*). The Court of Appeals reversed and remanded our decision. *1000 Friends of Oregon v. Linn County*, 306 Or App 432, 475 P3d 121, *rev den*, 367 Or 290, 477 P3d 407 (2020). We then remanded the approvals. *1000 Friends of Oregon v. Linn County*, LUBA Nos 2019-103/104 (Feb 9, 2021). After remand, the county again approved the plan amendment and zone change and we again remanded. *1000 Friends of Oregon v. Linn County*, LUBA Nos 2022-003/004 (Sept 26, 2022), *aff'd*, 324 Or App 559 (2023) (non-precedential memorandum opinion) (*Henthorne II*).

We reiterate the facts from our decision in *Henthorne I*.

> "The subject property is an approximately 108-acre vacant parcel designated on the county's comprehensive plan map as Farm Forest (F/F) and zoned F/F. Together with the Agricultural Resources Lands (AR) and the Forest Resources Lands (FR) designations, the F/F plan designation implements Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands), and Goal 5 (Natural

> Resources, Scenic and Historic Areas, and Open Spaces). Linn County Comprehensive Plan Code (LCC) 905.020(D)(1).
>
> "A majority of the property is included on the county's mapped peripheral big game habitat, an area jointly identified and mapped by the county and [ODFW]. The property borders land zoned Rural Residential and Forest Conservation Management (FCM) to the east, and land zoned F/F and FCM to the west, north and east. Land to the south is zoned EFU. * * *
>
> "Intervenors applied to change the plan designation for the property from F/F to Non-Resource (NR) and zone the property Non-Resource 5-acre minimum (NR-5). The board of county commissioners held hearings on the application and approved the application." *Henthorne I*, LUBA Nos 2019-103/104 (slip op at 3-4) (internal record citations omitted).

The image below depicts the subject property outlined in red with mapped habitat depicted in beige. Approximately 90 acres of the subject property is mapped peripheral big game habitat. Record 20.



Record 114.

In *Henthorne II*, we remanded for the county to consider its dwelling density code provisions and Condition of Approval 1. Intervenors, the applicants below, initiated remand proceedings. The county found that its tasks on remand were as follows:

> "(1) Interpret how the County's density standards in LCC 903.510(B)(7) and (8) work.
>
> "(2) If Condition of Approval 1 contained in Resolution and Order 2021-396 and Ordinance 2021-397 is reimposed to limit future development to a maximum of 10 dwellings on the peripheral big game habitat portion of the subject property regardless of whether the density standard would allow more, then LUBA wanted the

> County to explain how that 10-dwelling unit density limit is consistent with the LCC 903.510(B)(7) and (8) density standards; and
>
> "(3) If Condition of Approval 1 contained in Resolution and Order 2021-396 and Ordinance 2021-397 is reimposed, then LUBA wants the County to explain how Condition 1 would work – how would it be triggered to bind a subdivision or partition application for the subject property once the property is rezoned NR-5." Record 23.

The county approved the comprehensive plan amendment and zone change for a third time. These appeals followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county interpreted the dwelling density standards in LCC 903.510 in a manner that is implausible and that conflicts with Goal 5 and, thus, the decision is prohibited as a matter of law and should be reversed. ORS 197.835(9)(a)(D); OAR 661-010-0071(1)(c). In the alternative, petitioner argues that the county misconstrued LCC 903.510 and the decision should be remanded. OAR 661-010-0071(2)(d).

We will reverse or remand a land use decision if we find that the local government improperly construed the applicable law. ORS 197.835(9)(a)(D). We must defer to a local governing body's interpretation of its own plan or regulation if that interpretation is not "inconsistent with the express language of the comprehensive plan or land use regulation" or inconsistent with the underlying purposes and policies of the plan or regulation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

"[T]he plausibility determination under ORS 197.829(1) is not

> whether a local government's code interpretation best comports with principles of statutory construction. Rather, the issue is whether the local government's interpretation is plausible because it is not expressly *inconsistent* with the text of the code provision or with related policies that 'provide the basis for' or that are 'implemented' by the code provision, including any ordained statement of the specific purpose of the code provision at issue." *Kaplowitz v. Lane County*, 285 Or App 764, 775, 398 P3d 478 (2017) (emphasis in original).

The "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen* standard." *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012).

A. Dwelling Density Standards

We start by setting out the relevant law and the county's interpretation of the dwelling density standards. Goal 5 is "[t]o protect natural resources and conserve scenic and historic areas and open spaces." OAR 660-015-0000(5). Goal 5 is implemented by OAR chapter 660, division 23. The goal and rule generally require local governments to inventory significant natural resources, and develop a program to protect such resources against conflicting uses, based on the local government's analysis of the economic, social, environmental, and energy consequences of allowing, limiting, or prohibiting conflicting uses.

The county's Goal 5 program includes a map and inventory of big game habitat. As noted above, 90 acres of the subject property is included on the county's mapped peripheral big game habitat. The county's program for protecting peripheral habitat from conflicting residential uses include standards

limiting dwelling density. LCC chapter 903 is the county's natural resources element code. LCC 903.510(B) concerns habitat areas and provides, in relevant part:

> "(4) The major and peripheral habitat map shows dwelling unit density per section (640 acres). Where the combined density of existing and approved, but not constructed dwellings, exceed the ODFW acceptable density standards, the section is considered impacted and is not subject to wildlife habitat management considerations. Various sections which do not exceed ODFW density recommendations, but which have Rural Residential zoning, are also considered impacted.
>
> "(5) The county recognizes that beneficial management of wildlife habitats can be obtained through careful siting of dwellings and structures. Additionally, it is recognized that excessive housing development reduces habitat and sport hunting opportunities, therefore, the county will review proposed development for consistency with ODFW density recommendations.
>
> "(6) The county recognizes that within the major habitat the ODFW recommended dwelling unit density per section one unit per 80 acres (8 units per section). When dwellings are sited using clustering techniques, then ODFW finds that one unit per 40 acres (16 units per section) is acceptable for habitat maintenance.
>
> "(7) The county recognizes that within the peripheral habitat the ODFW recommended density is one unit per 40 acres (16 units per section). When dwellings are sited using clustering techniques, then the ODFW finds one unit per 20 acres (32 units per section) is acceptable.
>
> "(8) The county shall require clustering provisions for new dwellings located in the major and peripheral habitat. Application of clustering techniques will preserve habitat and provide for uniform density standards of 16 units per section in the unimpacted major habitat and 32 units per section in the unimpacted peripheral habitat.

> "(9) The county will review all development requests in the major wildlife habitat areas for conformity with density standards with the exception of those sections which are identified as being impacted. If the density standard cannot be achieved, then a variance may be initiated. ODFW will be notified and their comments taken into consideration before action is taken on a proposal occurring outside of an impacted area which exceeds the recommended density."

In *Henthorne II*, we observed that those density standards are ambiguous.

> "LCC 903.510(B)(4) explains that 'dwelling unit density per section' determines whether 'the *section* is considered impacted and is not subject to wildlife habitat management considerations.' (Emphasis added.) In this case, the mapped habitat crosses and does not completely cover the entire section. The county found that '332.2 acres of the 640-acre section that includes the subject property is subject to the peripheral big game habitat overlay.' * * * It is unclear whether and how the county evaluated the impact of the proposed zone change with respect to dwelling density and protected habitat. If, as intervenors argue, density is calculated by section, then the county should also explain whether dwelling density that could be approved under the zone change within the applicable section but outside the 90 acres of mapped habitat on the subject property will affect mapped habitat in the remainder of the section." *Henthorne II*, LUBA Nos 2022-003/004 (slip op at 37-38).

On remand, intervenors argued that dwelling density should be calculated based on the number of dwellings located within the mapped habitat area within a section. Petitioner argued that dwelling density should be calculated based on the size of each lot or parcel on which a dwelling may be developed in a designated habitat area. The county rejected both of those interpretations and instead concluded that dwelling density is calculated based on the number of dwellings within an entire section that includes mapped habitat, including the land area of the section that is not mapped habitat. The county found that

"the language in LCC 903.510(B)(7-8) is to count the number of existing or approved dwellings located within an entire section. This is how this policy has been historically administered by the County Planning & Building Department for land use decisions on properties proposing to site a dwelling within the habitat area. In interpreting LCC 903.510(B)(7) and (8), LCC 903.510(B)(4) is instructive. LCC 903.510(B)(4) indicates the County's interpretation of dwelling density within a mapped habitat area. That policy states, *'The major and peripheral habitat map shows dwelling unit density per section (640 acres).'*

"As described in the *Comprehensive Plan* background reports addressing Statewide Planning Goal 5, a dwelling density of 1 dwelling per 40 acres, or 1 dwelling per 20 acres with cluster development was recommended for dwellings within the peripheral big game range. This dwelling density standard is based on the 640 acres contained within a section.

"The recommendations detailed in the *Plan* background reports are implemented in LCC 903.510(B)(7). Language contained in LCC 903.510(B)(7) includes the ODFW recommended dwelling density described in the *Plan* background reports with clarification that the dwelling unit density equals a certain number of dwellings per section." Record 25 (emphasis in original).

Consistent with the "per section" interpretation, the county found:

"Based on the number of existing and approved dwellings in Section 8, development of the property may, at a maximum, permit for 11 additional dwellings, and be consistent with the density standards contained in the *Plan.* The application, on its face, complies with the dwelling density standards contained in the *Plan.* However, in order to allow for future development on other vacant properties within the section and still allow for development on the subject property in compliance with the dwelling density standard in the *Plan,* the Board is modifying condition #1 to limit the total number of dwellings allowed as a result of an approved subdivision to 10, rather than 10 within the habitat area. This condition is consistent with the Board's interpretation of the policies contained in LCC

> 903.510(B)(7-8). The condition limits the total number of dwellings as a result of a subdivision or partition(s) application to 10. The Board notes the condition does not require that the applicant subdivide the property to allow for 10 homesites. The applicant can choose to create less than 10 lots for homesites." Record 28 (emphases in original).

Petitioner argues that the county's interpretation of the dwelling density standards is implausible because the "calculation conflicts with both Goal 5 and the policy and purpose of LCC 903.510, as it would allow overdevelopment on the subject property leading to habitat destruction." Petition for Review 19.

B. Goal 5

Petitioner argues that the county's interpretation of LCC 903.510 is inconsistent with Goal 5, the state land use goal that the dwelling density standards implements. This is so, petitioner argues, because LCC 903.510 is intended to implement Goal 5's policy of protecting natural resources by preventing the degradation of big game habitat, and the county's interpretation of the density standard will accelerate habitat destruction.

1. Goal 5 Waiver

Intervenors initially respond that petitioner has waived any Goal 5 issue because petitioner "failed to raise the issue of compliance with the requirements of Goal 5 and the Goal 5 rule during the initial application proceedings and LUBA has already concluded that [p]etitioner waved their right to raise such issues during the initial LUBA appeal." Intervenor-Respondent's Brief 7 (citing *Henthorne I*, 81 Or LUBA at 344; *Henthorne II*, LUBA Nos 2022-003/004 (slip

op at 22)). Intervenors cite a number of cases concerning "law of the case doctrine," sometimes also referred to as *Beck* waiver, in support of their waiver argument. *Id.* (citing *Windlinx Ranch Trust v. Deschutes County*, LUBA No 2023-079 (Feb 29, 2024) (slip op at 7-12), *aff'd*, 335 Or App 272, 555 P3d 1287 (2024); *VanSpeybroeck v. Tillamook County*, 221 Or App 677, 691 n5, 191 P3d 712 (2008); *Beck v. Tillamook County*, 313 Or 148, 153, 831 P2d 678 (1992); *Wetherell v. Douglas County*, 60 Or LUBA 131, 137-38 (2009)).

In *Henthorne I*, we found that petitioner had not raised during the local proceeding, and thus waived the issue "that the county improperly failed to address conflicts between the proposed plan amendment and zone change and peripheral big game habitat, as required by OAR 660-023-0250(3)." 81 Or LUBA at 344. In *Henthorne II*, petitioner "argue[d] that the county's interpretation of LCC 903.510(B)(3) and LCC 903.550(A)(1) conflict[ed] with state law[]" and "that the county is required to apply Goal 5 regulations in consideration of the proposed post-acknowledgment plan amendment." LUBA Nos 2022-003/004 (slip op at 21-22). We found that that issue "is essentially the same" as the issue that was waived in *Henthorne I* and that issue was similarly waived in *Henthorne II*. *Id.*

Petitioner responds, and we agree, that the Goal 5 issue in this appeal is distinct from the Goal 5 issues that we concluded were waived in the prior appeals. The Goal 5 issue that petitioner raises in this appeal is whether the county's interpretation of LCC 903.510, which the county made for the first time

in the challenged decisions, is inconsistent with Goal 5. LCC 903.510 is part of the county's Goal 5 program. Petitioner does not assert in this appeal that the county erred by failing to directly apply Goal 5 or the administrative rules that govern the county's process for adopting or amending the county's Goal 5 program. Instead, petitioner argues that we should not defer to the county's interpretation of the disputed dwelling density standards because the county's interpretation is inconsistent with the Goal 5 policy of protecting natural resources. Petitioner has not waived the Goal 5 issue in this appeal.

2. Goal 5 Merits

On the Goal 5 merits, intervenors respond that

> "Goal 5 is a process-oriented goal and does not provide 'approval standards' for review of local land use applications. Rather, the Goal 5 rule requires local governments gather information, make policy choices and adopt a program for reviewing and approving land use applications. There are no separate Goal 5 wildlife 'standards' that must be reflected in a locally adopted Goal 5 program; there is only the [c]ounty's own wildlife habitat regulations that have been acknowledged as being consistent with Goal 5." Intervenor-Respondent's Brief 7 n 2.

We agree with intervenors that, while the Goal 5 policy is, broadly, to protect natural resources, Goal 5 is a process goal that requires the county to consider the benefit of protecting wildlife habitat against conflicting uses and adopt a program consistent with the county's decision whether and how stringently to protect inventoried habitat. There is no generally applicable policy that each county decision made under the county's natural resources code must

"protect natural resources." So long as the county's decision is consistent with the county's adopted and acknowledged Goal 5 program, the decision is consistent with the underlying Goal 5 policies. In other words, Goal 5 does not provide an independent basis for analyzing the county's interpretation of its dwelling density standards in this appeal.

C. The "per section" calculation is a plausible interpretation.

Intervenors respond that the county's interpretation of the density standard as being calculated by dwelling units per section is plausible and not inconsistent with text, context, or underlying policy that is the basis for the standards. We agree.

1. Text

LCC 903.510(B)(7) provides that "*within the peripheral habitat* the ODFW recommended density is one unit per 40 acres (16 units *per section*). When dwellings are sited using clustering techniques, then the ODFW finds one unit per 20 acres (32 units *per section*) is acceptable." (Emphases added.) LCC 903.510(B)(8) provides:

> "The county shall require clustering provisions for new dwellings located *in the major and peripheral habitat*. Application of clustering techniques will preserve habitat and provide for uniform density standards of 16 units *per section* in the unimpacted major habitat and 32 units *per section* in the unimpacted peripheral habitat." (Emphases added.)

The dwelling density standards are ambiguous. LCC 903.510(B)(7) refers to dwelling density "*within* the peripheral habitat." LCC 903.510(B)(8) refers to

"dwellings located *in* the major and peripheral habitat." We agree with petitioner that text indicates that density should be calculated based on dwelling density within the mapped habitat. However, those provisions also refer to units "per section." Petitioner argues that the "parenthetical [in LCC 903.510(B)(7)] is most reasonably read as indicating how the 'one per 20' ratio was derived[,]" and that "one unit per 20 acres ratio to the habitat area within the [subject] property" is how the provision should be interpreted. Petition for Review 22. Petitioner does not address the sole use of the term "section" in LCC 903.510(B)(8), which intervenors point to as further support for the county's interpretation. Intervenor-Respondent's Brief 28-29.

The "in" and "within" text could be interpreted to support a dwelling density calculation based on dwelling density only "within" the mapped habitat. The "per section" language can also be interpreted as the county did, as permitting a dwelling density calculation based on an entire section that includes mapped habitat, even if the entire section is not mapped habitat. Given the ambiguity in the text, petitioner has not established that the county's interpretation is implausible. *See Mark Latham Excavation, Inc.*, 250 Or App at 555 ("The existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen* standard."). We conclude that the county's interpretation plausibly interprets the express, ambiguous text of the dwelling density standards.

2. Context, Purpose, and Policy

Petitioner argues that the county's "per section" approach "risks transforming an unimpacted section into an impacted one." Petition for Review 29. According to petitioner, if the 10 dwellings permitted by the approvals are developed on the subject property, and two additional dwellings are developed on vacant lots that are zoned rural residential in the same section, then the *entire section* would exceed the habitat dwelling density standards and be "considered impacted" and, thus, no longer qualify as peripheral habitat with applicable habitat protection standards. LCC 903.510(B)(4).

Petitioner further argues that different hypothetical facts illustrate that the county's interpretation is not consistent with the policy of preserving habitat. The findings state that, once the allowed section density is met, the county cannot approve a development application for an additional dwelling or a residential subdivision/partition within the section. Record 32. The county's interpretation is that any property in any section that contains any mapped habitat is subject to the respective dwelling density standard. Petitioner posits that, if there were no pre-existing dwellings in the section outside of the mapped habitat, then the county's interpretation would allow 32 dwellings within the 90 acres of peripheral habitat on the subject property, which is approximately one dwelling per three acres. Differently, if 31 dwellings already existed in a section that included mapped habitat, then the county could only permit a single additional dwelling, even on a property within the section that was entirely outside of the

mapped habitat, which does nothing to benefit mapped habitat. We agree with petitioner that those hypotheticals illustrate practical and logical weaknesses in the county's interpretation that will likely present regulatory anomalies and challenges for the county. However, they do not persuade us that the county's interpretation is inconsistent with the purpose and policy of the disputed dwelling density standards.[1]

Intervenors observe that the LCC does not include an explicit purpose or policy statement. Intervenors argue that the county's application of the code demonstrates that the purpose and policy of LCC 903.510 is not broadly to preserve habitat, but, instead, to manage habitat benefits along with conflicting residential uses through the application of the dwelling density and cluster development standards in LCC 903.510(B)(5), (6), (7), (8), and (10). This view is supported by LCC 903.510(B)(5), which provides:

> "The county recognizes that *beneficial management of wildlife habitats* can be obtained through careful siting of dwellings and structures. Additionally, it is recognized that *excessive housing development* reduces habitat and sport hunting opportunities, therefore, the county will review proposed development for

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[1] Intervenors point out that a previously adopted condition limited the maximum number of dwelling units *in the mapped big game habitat area* of the subject property to 10, which would have allowed a maximum of 15 dwellings on the property. The amended condition limits the maximum number of dwelling units on the entire subject property (mapped and unmapped) to 10, in part "to allow for future development on other vacant properties within the section[.]" Record 29.

consistency with ODFW density recommendations." (Emphases added.)

Intervenors argue, and we agree, that "beneficial management of wildlife habitat" does not establish a policy that prohibits negative impacts to big game habitat. The county's policies limit, but do not prohibit, potential conflicting uses through the section density standards and siting and clustering requirements. The county's interpretation is not inconsistent with the policy and purpose of LCC 903.510.

Based on the foregoing, we conclude that the county's interpretation is plausible.

Petitioner's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county failed to support its conclusions with findings. Petitioner contends that, "in order to approve the application, the [c]ounty must find 'that habitats are not adversely affected by any proposed change.'" Petition for Review 32 (citing *1000 Friends of Oregon*, 306 Or App at 438, the court's decision on appeal of *Henthorne I*). Petitioner further argues that the county was required, but failed to find that the decision will result in "no net loss" to existing habitat, based on ODFW's wildlife habitat mitigation policy at OAR 635-415-0025(4)(a).

Generally, findings must (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

Intervenors respond, and we agree, that neither standard that petitioner relies on is an applicable criterion and so the county was not required to find that the decision will result in no net loss and no adverse effects to habitat.

First, ODFW's "no net loss" policy is not an applicable criterion.

Second, the court's statement is not an interpretation of the dwelling density criteria at issue in this appeal. The statement that petitioner relies on comes from the court's analysis and rejection of our conclusion in *Henthorne I* that LCC 903.550(A)(1) and LCC 903.510(B)(3) require that land mapped as wildlife habitat remain designated and zoned for resource use and that those standards prohibited the county from redesignating and rezoning the subject property to NR-5, which is a nonresource zone.[2] The court reversed our decision and reasoned:

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[2] LCC 903.550(A)(1) provides:

> "The Agricultural Resource, Forest Resource, and Farm/Forest plan designations shall be used on the Linn County Comprehensive Plan to conserve sensitive fish and wildlife habitats. Land use proposals subject to Linn County review that have undesirable impacts on these resources shall be reviewed during the plan amendment, zone amendment and conditional use permit process."

LCC 903.510(B)(3) provides:

> "The major and peripheral habitats are protected from most conflicting uses through application of the Forest Conservation and Management (FCM), Exclusive Farm Use (EFU), and Farm/Forest (F/F) zones. The FCM, EFU, and F/F zones encourage resource activities and limit potentially conflicting uses. Because of the

> "The provisions then require the assessment of the impacts on wildlife habitat of any proposed changes to those default designations through plan amendments or zone changes. It is this latter aspect of each provision—that is, the requirement to assess impacts on wildlife habitats in the context of plan amendments and zone amendments—that makes it plausible to read both provisions as allowing for plan amendments and zone changes away from the specified designations *provided the impacts on wildlife are analyzed and addressed in the process so that habitats are not adversely affected by any proposed change*." *1000 Friends of Oregon*, 306 Or App at 437-38 (emphasis added).

We do not understand petitioner to argue that the county failed to analyze the impacts to wildlife habitat in the challenged approvals. Instead, we understand petitioner to argue that the court's statement requires the county to apply the dwelling density standards in a manner that results in no adverse impact to habitat. The weight of that premise is not supported by the court's decision or the dwelling density criteria at issue in these appeals.

Petitioner's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county's findings are not supported by substantial evidence. A finding of fact is supported by substantial evidence if the record, viewed as a whole, would permit a reasonable person to make that finding.

> recreational, economic, aesthetic, and ecological value of fish and wildlife, the potential impact on sensitive habitats will be assessed on planning permit applications for conditional uses, variances, and zone and plan amendments. Siting standards, including the use of setbacks and clustering methods, will be used to lessen impact on habitats."

Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988); *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

A. "Most protective of habitat" is not a criterion.

Petitioner argues that there is not substantial evidence in the record to support the county's finding that its interpretation of the dwelling density standards is "the most protective of the habitat." Record 25 ("The Board also reasons its interpretation of the policy is the most protective of the big game habitat area in that it reduces impacts to habitat from existing and proposed dwellings by limiting the total number of dwellings within the section and allows for more open space for habitat and wildlife usage."). Petitioner argues that evidence submitted by ODFW contradicts the county's statement that its interpretation is "the most protective of the habitat."

Intervenors respond that "the most protective of the habitat" statement by the county is not related to any approval criterion within LCC 903.510(B) and that the disputed finding is not necessary to demonstrate satisfaction of an approval criterion. We agree with intervenors that findings unrelated to an approval criterion cannot provide a basis for reversal or remand, even if the challenged finding is not supported by substantial evidence. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488, 510 (2016), *aff'd*, 284 Or App 314, 391 P3d 1007 (2017). Accordingly, this argument provides no basis for remand and we need not resolve it.

B. Number of Dwellings in the Section

The county found that, "[b]ased on Linn County GIS maps and Linn County Assessor data[,]" there are 21 pre-existing dwellings in Section 8, the section the subject property is in. Record 26. The county then found that, based on the number of pre-existing dwellings and that those dwellings are clustered, there is the potential for the approval of 11 additional dwellings in the section. Record 27-28. Petitioner argues that there is not substantial evidence in the record to support the county's findings that there are 21 pre-existing dwellings because "the maps included in the [s]taff [r]eport do not include [the] GIS maps or the [c]ounty's assessor data." Petition for Review 38.

Intervenors respond that the staff report in the record describes the data sources relied on, the Linn County GIS maps and Linn County Assessor data, for the county to reach the conclusion that there are 21 pre-existing dwellings in the sections and that a staff report can constitute substantial evidence. *Pete's Mountain Homeowners Association v. Clackamas County*, 55 Or LUBA 287, 312-13 (2007); *see also Willhoft v. City of Gold Beach*, 41 Or LUBA 130, 145 (2001) (finding that a statement in a staff report that ODFW had reviewed and "determined to be adequate" an applicant submittal constitutes substantial evidence).

The staff report states:

> "Based on Linn County GIS maps and Linn County Assessor data, Tl4S, RO1W, Section 8 contains 21 dwellings, which have been determined to be clustered in accordance with the requirements of

> LCC 903.510(B)(8) and (10). The clustering determination is made by looking at previously approved and final land use decisions for dwellings on other properties within the section, looking at the location of existing dwellings and other structures in proximity to roads within the section and considering usage of the remaining acreage of a property, and using aerial photography, elevation maps, and address information. Because dwellings in Section 8 are clustered, the applicable standard in LCC 903.510(B)(7) is one dwelling unit per 20 acres (32 units per section)." Record 194.

We agree that a staff report is substantial evidence that the county can rely on. Additionally, intervenors also point to a map contained in the LUBA Nos 2022-003/004 Record that illustrates the pre-existing dwellings in the section. *See* LUBA Nos 2022-003/004 Record 191. This map is also included in the LUBA Nos 2022-003/004 Record at page 117 and is attached to an August 30, 2021 report submitted into the record by intervenors' expert. The county, in their 2022 decision, specifically highlighted this report as one of the "two authoritative documents" considered in making that decision. LUBA Nos 2022-003/004 Record 22. We find that there is substantial evidence in the whole record to support the county's conclusion that there are 21 pre-existing dwellings in the section.

Petitioner's third assignment of error is denied.

The county's decision is affirmed.