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

TIM KOHLER,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

STAMPER, LLC,
Intervenor-Respondent.

LUBA No. 2021-022

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Charles Sarkiss filed the petition for review and argued on behalf of petitioner. Also on the brief were Mark S. Bartholomew and Hornecker Cowling LLP.

No appearance by Jackson County.

Garrett K. West filed the response brief and cross petition for review and argued on behalf of intervenor-respondent. Also on the brief was O'Connor Law, LLC.

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

AFFIRMED 05/28/2021

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a hearing officer approval of a forest template dwelling.

MOTION TO INTERVENE

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

BACKGROUND

The subject property is a vacant, 80-acre parcel that is accessed via an easement extending across several other parcels from Coleman Creek Road. The subject property is zoned Woodland Resource, a zone which implements Statewide Planning Goal 4 (Forest Lands).[1] Jackson County Land Development Ordinance (LDO) 5.2.2. The subject property is also in the Area of Special Concern 90-1 (ASC 90-1) overlay zone. ASC overlays are intended in part to protect site-specific environmental features through the application of additional development regulations and requirements. The ASC 90-1 overlay is applied to

> "all lands on which development can affect survival of Black-tailed

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[1] Goal 4 is:

> "To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture."

> deer or Roosevelt elk herds as described in the Natural and Historic Resources Element (Chapter 16) of the Comprehensive Plan. Such lands are identified as winter range habitat on base maps prepared by the Oregon Department of Fish and Wildlife (ODFW) and adopted by the Board of Commissioners as ASC 90-1." LDO 7.1.1(C).

Intervenor submitted an application to develop a forest template dwelling on the subject property. On October 13, 2020, staff issued a tentative decision denying the application. On October 21, 2020, intervenor appealed staff's tentative decision. On December 7, 2020, the hearings officer held a public hearing on intervenor's application. On January 20, 2021, the hearings officer granted the appeal and approved the forest template dwelling application.

This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The ASC 90-1 overlay approval criteria are set out in LDO 7.1.1(C). Petitioner's first assignment of error is that the hearings officer misconstrued LDO 7.1.1(C)(6), that the decision does not comply with LDO 7.1.1(C)(6), and that the decision is not supported by substantial evidence. Petitioner's second assignment of error argues that the hearings officer's conclusion that it is feasible for intervenor to meet LDO 7.1.1(C)(6) is not supported by substantial evidence. Because resolving these assignments of error requires an understanding of the role that LDO 7.1.1(C)(6) plays in the county's habitat protection program and of the relationship between LDO 7.1.1(C)(4), (5), and (6), we begin with a discussion of those provisions.

LDO 7.1.1(C)(4) provides that the first dwelling on a lawfully created lot or parcel must be located within 300 feet of a public or private road, a driveway, or an "other developed access way," such as an easement.[2] LDO 7.1.1(C)(5)(c) provides that dwellings and other development reviewed through a Type 2 process must be located within 300 feet of a public or private road or a driveway,

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[2] LDO 7.1.1(C)(4) provides:

> "The standards of this subsection are deemed to comply with the deer and elk habitat protection measures recommended by ODFW and therefore do not require ODFW comment on Type 1 permits issued in conformance with this subsection. *A first dwelling on a lawfully created lot or parcel will be located within 300 feet of an existing*:
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> "a) Public or private road;
>
> "b Driveway that provides access to an existing dwelling on another parcel (provided the new dwelling unit will not take access on it unless the driveway is improved to the private road standards of Section 9.5.3); or
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> "c) Other developed access way that existed as shown on the County 2001 aerials or other competent evidence (e.g., a road or driveway for a legal easement recorded prior to the aerial date).
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> "To be considered under the locational criteria of this subsection, any access must, at a minimum, conform with the emergency vehicle access standards of Section 9.5.4. *When an initial dwelling is proposed to be sited in an alternative location that does not conform to the standards of this subsection, the alternative location may be allowed through a Type 2 review process in accordance with subsection (6), below*." (Emphases added.)

but it does not include the "other developed access way" option found in LDO 7.1.1(C)(4).[3] Both LDO 7.1.1(C)(4) and (5) include language providing that an

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[3] LDO 7.1.1(C)(5) provides:

"*General Development Standards*

"The following standards apply to all discretionary land use permits subject to review under this Section, unless a condition of approval when the parcel was created required compliance with prior habitat protection standards. The land use decision will include findings that the proposed use will have minimal adverse impact on winter deer and elk habitat based on:

"a) Consistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction;

"b) Consideration of the cumulative effects of the proposed action and other development in the area on habitat carrying capacity; and

"c) *Location of dwellings and other development within 300 feet of an existing public or private road, or driveway that provides access to an existing dwelling as shown on the County 2001 aerials or other competent evidence. When it can be demonstrated that habitat values and carrying capacity are afforded equal or greater protection through a different development pattern an alternative location may be allowed through the discretionary review process described in subsection (6), below*;

"d) Dwellings other than the initial dwelling on a lot or parcel will comply with one (1) of the following, as applicable:

"i) A maximum overall density (within the tract) of one (1) dwelling unit per 160 acres in Especially Sensitive

applicant unable to comply with those standards may seek approval under LDO 7.1.1(C)(6).

This is not our first review of the interaction of LDO 7.1.1(C)(4) and (5). *See Kohler v. Jackson County*, ___ Or LUBA ___ (LUBA No 2020-091, Jan 14, 2021) (*Kohler I*) (holding that, because forest template dwellings are subject to a Type 2 approval process under LDO Table 4.3-1, LDO 7.1.1(C)(5)(c), rather than LDO 7.1.1(C)(4), applies). Consistent with our holding in *Kohler I*, the hearings officer concluded that intervenor's Type 2 forest template dwelling application was subject to LDO 7.1.1(C)(5)(c). Intervenor's proposed forest template dwelling will be located within 300 feet of an "other developed access way" and would therefore be allowed under LDO 7.1.1(C)(4).[4] However, because intervenor's proposed forest template dwelling is subject to LDO 7.1.1(C)(5)(c), both the dwelling and other development are required to be within 300 feet of a public or private road or a driveway. Because the application does not meet this

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> Winter Range units, or one (1) dwelling unit per 40 acres in Sensitive Winter Range units; or
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> "ii) Clustering of new structures within a 200-foot radius of the existing dwelling to achieve the same development effect as would be achieved under i), above." (First emphasis in original; second emphasis added.)

[4] The hearings officer found that the "drawings/site plans in the record show that the building envelope will be within 300 feet of [the easement from Coleman Creek Road]." Record 17.

standard, the hearings officer concluded that the application must comply with LDO 7.1.1(C)(6).

LDO 7.1.1(C)(6) provides:

> "*ODFW Approved Alternate Siting Plan*
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> "Initial dwellings and other development may be sited in locations that do not conform with subsections (4) and (5) above when the applicant demonstrates at least one (1) of the following:
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> "a) The wildlife habitat protection measures required by Section 7.1.1(C)(4) will render the parcel unbuildable; or
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> "b) A written authorization approving an alternate siting plan is received from ODFW. Any such authorization must include a statement from ODFW that confirms habitat values and carrying capacity will be afforded equal or greater protection if the dwelling or other development is sited in the alternate location. The written authorization must be made on ODFW letterhead or forms and be signed by an ODFW official with authority to make habitat protection decisions. Authorization of an alternative dwelling location will not release an applicant from compliance with any other applicable standard of this Ordinance." (Emphasis in original.)

The hearings officer found that

> "subsection 6(b) can be met with a condition of approval requiring submission of ODFW approval of an alternative siting plan prior to the issuance of a building permit. That is a clear and objective standard for which only documentation is necessary. Thus, such a condition does not require the county to provide additional public review. Given that the language between subsections (4) and (5) are similar and were approved by ODFW, the Hearings Officer finds that it is feasible for the applicant to obtain such an ODFW approval." Record 21.

Petitioner argues that the hearings officer misconstrued and the decision does not comply with LDO 7.1.1(C)(6) because, according to petitioner, that provision requires that the ODFW approval precede county review. Petitioner contends that, because LDO 7.1.1(C)(6) does not release an applicant from compliance with other applicable LDO provisions, the ODFW-approved site plan must be available during county review so that it may actually be evaluated for compliance with the other applicable LDO provisions. Absent an ODFW-approved site plan, petitioner maintains that the decision is not supported by substantial evidence.

We will reverse or remand a decision if we conclude that it is not in compliance with applicable land use regulations. ORS 197.835(8). We will also reverse or remand a decision that "[i]mproperly construe[s] the applicable law" or is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C), (D). While we agree with petitioner that the county must measure the site plan that it ultimately approves against the applicable LDO standards, we agree with intervenor that petitioner misreads the decision.

Condition of Approval 1 provides that "[t]he proposed residential development, including the dwelling, accessory structures and propane tank shall be located within the 200' x 300' building envelope shown on the approved site plan." Record 26. Condition of Approval 2 requires intervenor to submit a revised site plan complying with Condition 1 prior to the issuance of permits. *Id.* Condition of Approval 17 is that, "[p]rior to issuance of a building permit,

[intervenor] shall submit documentation of ODFW approval of an alternative site plan for the proposed location of the building envelope." Record 30 (boldface omitted). Under these conditions of approval, construction of the proposed forest template dwelling requires that the ODFW-approved "alternative site plan" referenced in Condition 17 be the same as the county-approved site plan referenced in Conditions 1 and 2. The ODFW-approved site plan is an "alternative site plan" only in that, by approving it, ODFW would be authorizing a site plan that is an alternative to development sites within 300 feet of public and private roads and driveways, on which dwellings and other development are allowed by right under LDO 7.1.1(C)(5)(c). If ODFW does not approve development in the location approved by the county, intervenor would be unable to comply with Conditions 1 and 2 and would have to seek county approval of that new location prior to development. We agree with intervenor that nothing in the plain language of the applicable LDO provisions requires that the ODFW site plan be approved before county review of the application and that the hearings officer did not misconstrue LDO 7.1.1(C)(6).

Substantial evidence is evidence a reasonable person would rely on to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). Petitioner also argues in the first and second assignments of error that the decision is not supported by substantial evidence because the record does not contain (1) an ODFW-approved site plan or (2) evidence supporting the hearings officer's

finding that ODFW approval is feasible. Petitioner maintains that the hearings officer erred in finding that ODFW approval is feasible because the county did not condition its own approval on intervenor complying with any conditions that ODFW might impose and because the record does not contain the ODFW criteria that intervenor must satisfy in order to obtain ODFW approval. For the reasons set out below, we deny this element of the first and second assignments of error.

To the extent that petitioner argues that the hearings officer was required to consider the criteria that ODFW will apply in considering the alternative site plan and whether meeting those criteria is feasible, petitioner is incorrect. In *Bouman v. Jackson County*, a local ordinance "require[d] that the following criterion for approval of a destination resort resolution/conceptual site plan be satisfied: 'Adequate sewer, water and public safety services will be provided on site to serve the proposed development * * *[.]'" 23 Or LUBA 628, 642 (1992). We concluded:

> "[W]here a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, we think a decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as a matter of law. There does not have to be substantial evidence in the record that it is feasible to comply with all discretionary state agency permit approval standards because the state agency, which has expertise and established standards and procedures, will ultimately determine whether those standards are met."
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> "Petitioners do not contend that intervenors are precluded as a

> matter of law from obtaining a permit to use Class IV reclaimed wastewater to irrigate the golf course or a transfer of [a] water right to the subject property, just that the state agency standards for obtaining such approvals will be difficult to satisfy. * * * [T]he county is not required to demonstrate in the challenged decision that such state agency standards can be satisfied and, therefore, we do not consider petitioners' arguments regarding these permits further." *Bouman*, 23 Or LUBA at 646-47.

Similarly, the hearings officer was not required to consider ODFW approval criteria in considering whether LDO 7.1.1(C)(6) could be met. To the extent that petitioner argues that the county erred because intervenor may not comply with any conditions that ODFW places on its approval of an alternative site plan, the county is not required to consider what conditions ODFW might place on its approval. The decision explains that "[i]t is the property owner's responsibility to ensure that the development complies with the requirements of any other regulatory agency or provisions of law prior to initiating development." Record 30. Petitioner cites no legal authority supporting its contention that the county must consider ODFW criteria or ODFW-imposed conditions.

The hearings officer concluded that, because ODFW approved LDO 7.1.1(C)(4) and (5), which allow development within 300 feet of other developed access ways in some situations, it is feasible that ODFW would approve development within 300 feet of another developed access way in this case. Record 21. Petitioner does not challenge the hearing officer's finding that LDO 7.1.1(C)(4) and (5) support the conclusion that it is feasible for intervenor to obtain ODFW approval of development within 300 feet of another developed

access way on the subject property or explain why that finding is incorrect. A party provides no basis for reversal or remand where the party makes no attempt to explain why the local government's findings are inadequate or not supported by substantial evidence in the record. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 610 (2000).

We understand that the ASC overlays are part of the county's program to achieve Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and that ODFW was consulted in the development of that program.[5] Although the hearings officer did not reference it, Jackson County Comprehensive Plan (JCCP) Natural and Historic Resources Policy 3 provides, "In conjunction with [ODFW] and other affected agencies, the county shall provide for the protection of a productive and healthy fish and wildfire community and habitat, and shall protect threatened or endangered species." JCCP Natural and Historic Resources Policy 3, Implementation Strategy A, provides that the county shall "[u]tilize [an] overlay zoning technique to designate specific habitat areas for special development review." The ASC overlays serve to protect big game habitat areas and other Goal 5 resources. The hearings officer relied upon the fact that ODFW has approved LDO 7.1.1(C)(4)

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[5] Goal 5 is "to protect natural resources and conserve scenic and historic areas and open spaces." Goal 5, Guideline B(4), provides that wildlife areas should be "protected and managed in accordance with the Oregon Wildlife Commission's fish and wildlife management plans."

and (5) to conclude that it is feasible for intervenor to obtain ODFW approval of a county-reviewed site plan which would be allowed under LDO 7.1.1(C)(4) but for the requisite Type 2 process. Absent evidence that intervenor is precluded as a matter of law from obtaining ODFW approval, the hearings officer's findings are adequate and supported by substantial evidence.

As we explain above, the county could condition its approval on intervenor obtaining ODFW approval of the site plan approved by the county, and there is no requirement that the ODFW approval or ODFW approval criteria be in the record. Petitioner does not argue that intervenor is precluded from obtaining ODFW approval as a matter of law. The substantial evidence challenges fail.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is that the county misconstrued LDO 7.1.1(C)(6), that the decision is not in compliance with LDO 7.1.1.(C)(6), and that the decision is not supported by substantial evidence, because the county did not impose conditions necessary to ensure that intervenor will implement all provisions of the ODFW-approved site plan. As we explain in our resolution of the first and second assignments of error, in order to comply with the county-imposed conditions of approval, the ODFW-approved site plan must authorize development in the same location approved by the county. Petitioner has cited no legal authority that requires the county to enforce ODFW-imposed conditions. The county included in the decision a statement that intervenor remains

responsible for complying with all requirements of other regulating entities. We reject this argument for the same reasons set forth in our resolution of the first and second assignments of error.[6]

The third assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

ORS 215.750 provides that counties may approve forest template dwellings when certain criteria are met, including that the development "will comply with the requirements of an acknowledged comprehensive plan, acknowledged land use regulations and other provisions of law." ORS 215.750(5)(a). Petitioner argues in their fourth assignment of error that the county's decision exceeded the county's jurisdiction because the decision does not ensure that the applicable criteria in the LDO are met. Petitioner argues in their fifth assignment of error that they were denied their right to participate in the review of the site plan that will ultimately be implemented. We will reverse or remand a decision where the local government exceeds its jurisdiction. ORS 197.835(9)(a)(A). However, petitioner's fourth and fifth assignments of error are premised on the belief that the decision authorizes intervenor to implement an ODFW-approved site plan that does not conform to the county-approved site plan, resulting in the county failing to ever apply the LDO to the site plan that

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[6] As we discuss earlier in this opinion, the hearings officer imposed a condition of approval requiring intervenor, prior to the issuance of a building permit, to submit documentation of the ODFW approval.

will ultimately be implemented and depriving petitioner of the opportunity to participate in the public process for reviewing that application. As we explain above, the ODFW approval required by Condition 17 must allow development in the same location as the site plan approved by the county and reflected in Conditions 1 and 2. The LDO has been applied to the relevant site plan.

Petitioner views the county's approval of intervenor's application as a two-stage approval process requiring an opportunity for the public to comment on the site plan to be approved by ODFW. We described the procedural requirements applicable to multi-stage approvals in *Rhyne v. Multnomah County*:

> "When conducting a multi-stage approval process for discretionary permits, such as that provided by the county for [planned development] approval, the county is required to assure that discretionary determinations concerning compliance with approval criteria occur during a stage where the statutory notice and public hearing requirements noted above are observed. *Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. In such circumstances, neither notice to adjoining property owners nor additional public hearings are statutorily required during the second stage.* These principles are relatively simple and straightforward in the abstract, but, as this case demonstrates, may prove more complex in the context of specific permit approval requests.
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> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has

> three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may der a determination concerning compliance with the standard to a second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage of approval as it does under the first option described above. Therefore the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local cod may not require such notice and hearing for second stage decisions in other circumstances." 23 Or LUBA 442, 447-48 (1992) (footnotes omitted; emphasis added) (citing *Meyer v. City of Portland*, 67 Or App 724, 280 n 3, 678 P2d 741, *rev den*, 297 Or 82 (1984); *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991); *Bartles v. City of Portland*, 20 Or LUBA 303, 310 (1990); *Margulis v. City of Portland*, 4 Or LUBA 89, 98 (1981)).

Here, the county found that it was feasible for intervenor to comply with all approval criteria during a first stage approval proceeding, where statutory notice and public hearing requirements were observed, and it imposed conditions of approval to assure that those criteria are met. The hearings officer deferred responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage approval proceeding (*i.e.*, review of

the ODFW-approved site plan for conformance with the county-approved site plan). No additional public process is required.

The fourth and fifth assignments of error are denied.

INTERVENOR'S CROSS-ASSIGNMENT OF ERROR

According to intervenor, the proper application of LCC 7.1.1(C)(6)(a), quoted above, provides an alternate basis for approval of its forest template dwelling application. Intervenor's cross-assignment of error is that the county was required but failed to make findings explaining why the application does not comply with LDO 7.1.1(C)(6)(a). Because we deny petitioner's assignments of error, we do not reach intervenor's cross-assignment of error.

The county's decision is affirmed.