

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 FRIENDS OF DOUGLAS COUNTY and
5 1000 FRIENDS OF OREGON,
6 *Petitioners,*
7

8 vs.
9

10 DOUGLAS COUNTY,
11 *Respondent.*
12 LUBA No. 2021-045
13

14 FINAL OPINION
15 AND ORDER
16

17 Appeal from Douglas County.
18

19 Andrew Mulkey filed the petition for review and reply brief and argued on
20 behalf of petitioner.
21

22 Paul E. Meyer filed the response brief.
23

24 RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board
25 Member, participated in the decision.
26

27 REMANDED 02/09/2022
28

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

Opinion by Rudd.

2 NATURE OF THE DECISION

Petitioner appeals a board of county commissioners decision adopting a post acknowledgment plan amendment that (1) amends the Timberlands comprehensive plan and Timberland Resource (TR) zoning designations and (2) creates new Rural Transitional (RT) comprehensive plan and Rural Transitional – 20 Acre (RT-20) zoning designations.

8 FACTS

9 On March 31, 2021, the board of county commissioners adopted
10 Ordinance 2021-03, amending the Douglas County Comprehensive Plan (DCCP)
11 and Land Use and Development Ordinance (LUDO) “to provide opportunities
12 for a second type of resource dwelling in the TR zone and a new plan designation
13 and zoning for nonresource lands, respectively, in Douglas County.” Record 9.
14 This appeal followed.

15 FIRST ASSIGNMENT OF ERROR

16 The county's amendment of its Timberlands comprehensive plan and TR
17 zoning designations seeks "to recognize the opportunity to apply for a Template
18 Dwelling in the [TR] zone as provided in OAR 660-006-0027."¹ Record 15.

¹ OAR 660-006-0027 does not purport to create an absolute ability to allow forest template dwellings in forest zones. The criteria applicable to forest template dwellings include a requirement that such dwellings comply with the requirements of an acknowledged comprehensive plan. OAR 660-006-0027(6)(a); ORS 215.750(5)(a).

1 Petitioner's first assignment of error is that the county's decision to allow forest
2 template dwellings on land with a comprehensive plan designation of
3 Timberlands and a zoning designation of TR violates Statewide Planning Goals
4 (Forest Lands), 5 (Natural Resources, Scenic and Historic Areas, and Open
5 Spaces), and 2 (Land Use Planning), as well as various DCCP policies
6 implementing the goals.²

7 Goal 4 is

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

15 Pursuant to Goal 4, local governments must “inventory, designate and zone forest
16 lands” and “adopt zones which contain provisions to address the uses allowed by
17 the goal and administrative rule and apply those zones to designated forest lands.”

18 *Id.*

² Petitioner's first subassignment of error is that “[t]he county’s comprehensive plan amendment in this case violates both Goal 4 and the county’s acknowledged comprehensive plan provisions that implement Goal 4.” Petition for Review 4. The second subassignment of error is that, for the reasons discussed in the first subassignment of error, the county’s decision violates Goal 2. Petition for Review 31. The third subassignment of error is that “[t]he county’s decision to allow forest template dwellings within the TR zone fails to comply with Goal 5 or the county’s comprehensive plan provisions” and “lacks an adequate factual base.” Petition for Review 33.

1 The DCCP Forest Element is intended to “satisfy all the requirements of
2 Statewide Planning Goal 4.” DCCP 2-1. Pursuant to DCCP Forest Element, Land
3 Use Policy Implementation 1, the county applies the Timberlands comprehensive
4 plan designation to prime forest lands, which

5 “consist primarily of the following:

6 “(1) Public and private industry forest lands located contiguously
7 in large blocks;

8 “(2) Forested lands geographically or topographically separated
9 from those lands predominantly used for agriculture and
10 nonforest uses;

11 “(3) Critical wildlife and fishery habitat areas;

12 “(4) Forest lands which are predominantly cubic foot site class 1
13 through 4 in southern Douglas County and 1 through 3 in
14 central and northern Douglas County;

15 “(5) Isolated pockets of land within forest areas which do not meet
16 timberland criteria (1) through (4), but for practical reasons
17 are precluded from any other land use; or

18 “(6) Lands needed for watershed protection or recreation.”³ DCCP
19 2-9.

20 DCCP Forest Element, Timberlands Policy Implementation 1, explains:

21 “The [TR] zoning classification is a forest zone authorized under
22 OAR 660, Division 6 and is intended to implement the Timberlands
23 plan designation and to preserve and protect lands for continued
24 timber production, harvesting and related uses; conserve and protect
25 watersheds, wildlife habitats and other such uses associated with

³ Nonprime forest land is designated Farm/Forest Transitional. DCCP 2-9.

1 forests; and, provide for the orderly development of both public and
2 private recreational uses as appropriate and not in conflict with the
3 primary intent of the [TR] zone, which is the sustained production
4 of forest products. *Use of land not associated with the management*
5 *and development of forests shall be discouraged to minimize the*
6 *potential hazards of damage from fire, pollution and conflict caused*
7 *by nonforest and nonfarm related residential, commercial and*
8 *industrial and industrial activities.*" DCCP 2-11 (emphasis added).

9 The Timberlands comprehensive plan and TR zoning designations also
10 play a role in the county's Goal 5 program.⁴ Goal 5 is "[t]o protect natural
11 resources and conserve scenic and historic areas and open spaces." OAR 660-
12 015-0000(5). As explained in DCCP Natural Features Element, Finding 22(d)(1):
13 "All lands deemed sensitive big game habitat have been designated
14 as timberlands in the [DCCP]. * * *

15 * * * * *

16 * * * Douglas County holds the position that the TR zone in
17 conjunction with the policies of the [DCCP] does conserve the
18 County's forest resources and therefore all 'sensitive big game
19 habitat areas.' DCCP 6-8.

20 We will reverse or remand "an amendment to a comprehensive plan if the
21 amendment is not in compliance with the goals." ORS 197.835(6). We will
22 reverse or remand an amendment to a land use regulation or an adoption of a new

⁴ The DCCP Natural Features Element addresses "a portion of Statewide Planning Goal 5." DCCP 6-1. DCCP Natural Features Element, Finding 22(b), explains that, "[f]or a majority of those lands in Douglas County delineated as big game habitat by the Oregon Department of Fish and Wildlife, Douglas County employs 3 resource zones: [TR], FF (Farm Forest) and EFU-G (Exclusive Farm Use - Grazing)." DCCP 6-7.

1 land use regulation if (1) “[t]he regulation is not in compliance with the
2 comprehensive plan” or (2) “[t]he comprehensive plan does not contain specific
3 policies or other provisions which provide the basis for the regulation, and the
4 regulation is not in compliance with the statewide planning goals.” ORS
5 197.835(7).

6 The county concedes in its response to the first assignment of error “that
7 its forest template dwelling comprehensive plan and land use regulation
8 amendments are inconsistent with its comprehensive plan and that remand is
9 appropriate.” Response Brief 3. We agree. As we explained above, the DCCP
10 Forest Element implements Goal 4. DCCP Forest Element, Resource
11 Management Policy 5, provides, “Douglas County shall regard residential
12 subdivisions and parcelizations in designated timberlands as incompatible with
13 the protection and efficient management of the County’s timber resources.”
14 DCCP 2-8. DCCP Forest Element, Timberlands Policy 2, is to, “[w]ith the
15 exception of ‘Owner of Record’ dwellings authorized by state statute, prohibit
16 incompatible development such as the construction of dwellings not related to
17 forest management within designated timberlands.” DCCP 2-10. DCCP Forest
18 Element, Timberlands Policy Implementation 1, provides, “Use of land not
19 associated with the management and development of forests shall be discouraged
20 to minimize the potential hazards of damage from fire, pollution and conflict
21 caused by nonforest and nonfarm related residential, commercial and industrial
22 activities.” DCCP 2-11. The amendments to allow forest template dwellings on

1 TR land are not consistent with the DCCP policies implementing Goal 4 and,
2 therefore, not consistent with Goal 4.

3 DCCP Forest Element, Resource Management Policy 6, provides,
4 "Douglas County encourages the conservation and protection of watersheds, fish
5 and wildlife habitats, and areas of historical, cultural or scenic resources." DCCP
6 2-8. With respect to Goal 5, DCCP Natural Features Element, Finding 22(b),
7 explains:

8 "The major issue regarding big game habitat is the loss of habitat
9 due to increased residential densities beyond the preferred density
10 of 1 dwelling per 40 acres in peripheral areas and 1 dwelling per 80
11 acres in sensitive big game habitats.

12 "Many nonresource uses, if approved, could permanently alter big
13 game habitat areas. Some generally common characteristics among
14 these uses include: 1) the introduction of people to habitat areas on
15 a year-round basis; 2) the permanent introduction of groups of
16 people on a seasonal or weekly basis; or 3) the use of land in a
17 manner which necessitates the removal of large amounts of
18 vegetative cover." DCCP 6-7.

19 DCCP Natural Features Element, Finding 22(d)(1), concludes:

20 "All lands deemed sensitive big game habitat have been designated
21 as timberlands in the [DCCP]. * * *

22 ***

23 "With the preceding Forest Element plan policies and [LUDO]
24 provisions and those provided for wildlife, Douglas County will
25 easily satisfy the Oregon Department of Fish and Wildlife's
26 suggested density guideline for sensitive big game habitat areas of
27 1 dwelling unit per 80 acres." DCCP 6-8.

1 DCCP Forest Element, Timberlands Policy 2, quoted above, prohibits the
2 construction of dwellings other than owner of record and forest management-
3 related dwellings on TR land. The amendments to allow additional dwellings on
4 TR land are not consistent with the DCCP policies implementing Goal 5 and,
5 therefore, not consistent with Goal 5.

6 Goal 2 is “[t]o establish a land use planning process and policy framework
7 as a basis for all decision and actions related to use of land and to assure an
8 adequate factual base for such decisions and actions,” and it requires that “[a]ll
9 land use plans include * * * inventories and other factual information for each
10 applicable statewide planning goal” and that the plans “be the basis for specific
11 implementation measures.” OAR 660-015-0000(2). Goal 2 requires that the
12 county’s decision and conclusion that the goals are met be supported by an
13 adequate factual base, yet the county’s decision is not consistent with the DCCP
14 policies intended to ensure compliance with Goals 4 and 5. Goal 2 is not met.

15 The first, second, and third subassignments of error are sustained.

16 The first assignment of error is sustained.

17 **SECOND ASSIGNMENT OF ERROR**

18 In addition to modifying the uses allowed in the TR zone, the county’s
19 decision creates a new comprehensive plan designation, RT, and a new zone, RT-
20 20. The amendments explain that “[t]he RT plan designation is proposed to
21 provide an opportunity for an additional type of nonresource land that is intended
22 to provide a transition from denser rural residential development to the

1 agricultural, timbered and open space areas of the County.” Record 12.
2 According to the amendments, “[t]hese lands may be suitable for small farms and
3 homesites but are not suitable, necessary or intended for urban levels of use.”⁵
4 Record 12. Petitioner’s second assignment of error concerns the new RT
5 comprehensive plan and RT-20 zoning designations.

6 **A. First Subassignment of Error**

7 Statewide Planning Goal 3 (Agricultural Lands) is “[t]o preserve and
8 maintain agricultural lands.” OAR 660-015-0000(3). Petitioner’s first
9 subassignment of error is that “[t]he county cannot create a zone for the purpose
10 of establishing a farm use on land that it also argues will also qualify for an
11 exception to Goal 3. As a matter of law, the two categories do not and cannot
12 overlap.” Petition for Review 38-39. The county responds that the RT-20 zone
13 does not violate Goal 3 because it may be applied only to nonresource land and
14 goal compliance will be verified at the time the designations are applied to
15 specific parcels of land through the county’s process for quasi-judicial plan
16 amendments. Response Brief 3-4.

17 The county uses the phrase “nonresource land” in an imprecise manner.
18 “Nonresource Land” is specifically defined in state law as any land that is *not*
19 subject to Goals 3, 4, 16, 17, or 18. OAR 660-004-0005(3). As we understand it,

⁵ The county concluded that “[t]he [RT] designation * * * meets the intent of [Statewide Planning] Goal 10 (Housing) by providing areas to house a portion of the County’s future population.” Record 14.

1 the county uses the phrase “nonresource land” to refer to land that is identified,
2 inventoried, designated, and zoned as agricultural and/or forest land and for
3 which an exception to Goals 3 and 4 are obtained as part of the process for a
4 comprehensive plan designation change to RT and zone change to RT-20. The
5 amendments explain that “[t]he RT-20 zone is *a type of nonresource zone* and
6 shall only apply to lands proven to be eligible through a Plan Amendment,
7 together with an exception to Statewide Planning Goals 3 and 4, and
8 corresponding Zone Change process.” Record 16 (emphasis added).

9 “An ‘Exception’ is a comprehensive plan provision, including an
10 amendment to an acknowledged comprehensive plan, that:

- 11 “(a) Is applicable to specific properties or situations and does not
12 establish a planning or zoning policy of general applicability;
- 13 “(b) Does not comply with some or all goal requirements
14 applicable to the subject properties or situations; and
- 15 “(c) Complies with ORS 197.732(2), the provisions of this
16 division and if, applicable, the provisions of OAR 660-011-
17 0060, 660-012-0070, 660-014-0030 or 660-014-0040.” OAR
18 660-004-0005(1).

19 Like state law, the LUDO requires that comprehensive plan amendments be
20 consistent with the statewide planning goals and applicable administrative rules.
21 ORS 197.175; LUDO 6.500(2)(a). In addressing goal conformance, the
22 amendments state:

23 “The [RT] designation meets the intent of Goal 2 (Exceptions) since
24 compelling reasons and facts will be required to be documented for
25 each site through individual requests for a Plan Amendment,
26 together with an exception to Statewide Planning Goals 3 and 4 and

1 corresponding Zone Change process.”⁶ Record 14.

2 As we explained in *DLCD v. Douglas County*, our

3 “review is limited if (1) the challenged decision demonstrates
4 compliance with the goals, or establishes that certain goals are not
5 implicated by the decision, or (2) the challenged decision
6 affirmatively establishes that the local government will review a
7 future decision that applies the comprehensive plan amendment for
8 goal compliance in a later, required proceeding.” ____ Or LUBA ___,
9 ____ (LUBA Nos 2018-039/040/041/048/049/051, Aug 2, 2019)
10 (slip op at 13-14).

11 The county’s quasi-judicial comprehensive plan amendment process requires a
12 review for goal compliance. LUDO 6.500(2)(a). In the case of the RT-20 zoning
13 designation, the amendments require approval of an exception to Goals 3 and 4.
14 Record 16. As a result, compliance with those goals and the availability of an
15 exception will be considered at that time.

16 The first subassignment of error is denied.

17 **B. Second Subassignment of Error**

18 Petitioner’s second subassignment of error is that (1) the county’s decision
19 violates Goal 5 and the DCCP provisions that implement Goal 5 and (2) the
20 county’s statement of compliance with Goal 5 lacks evidentiary support in the

⁶ The administrative rules recognize that some land that is identified as forest land protected by Goal 4 may also qualify as agricultural land protected by Goal 3. When land satisfies the definition requirements of both agricultural land and forest land, “an exception is not required to show why one resource designation is chosen over another. The plan need only document the factors that were used to select an agricultural, forest, agricultural/forest, or other appropriate designation.” OAR 660-033-0030(4); OAR 660-006-0015(2).

1 record. The county maintains that an applicant “will be required to show
2 compliance with Goal 5 or that an exception is justified” when application of the
3 RT and RT-20 designations to specific property is requested. Response Brief 5.

4 DCCP Natural Features Element, Finding 22, explains:

5 “Lands identified by the big game habitat map describe those habitat
6 areas deemed ‘sensitive’ or that area which support the majority of
7 big game; ‘peripheral’ or those which support large quantities of big
8 game but have existing land uses do not allow management options
9 favorable to big game; and ‘impacted’ or developed areas no longer
10 considered to be viable big game habitat.” DCCP 6-6 (underscoring
11 in original).

12 DCCP Natural Features Element, Finding 22(b), quoted above, explains that the
13 major issue regarding big game habitat is the loss of habitat due to increased
14 residential densities beyond the preferred density of 1 dwelling per 40 acres in
15 peripheral areas and 1 dwelling per 80 acres in sensitive areas. DCCP 6-7. LUDO
16 3.32.300(1) provides:

17 “The Peripheral Big Game Habitat Overlay is designed to conserve
18 identified peripheral habitat areas by providing supplementary
19 development standards which promote an areawide dwelling density
20 consistent with such habitat management. A density of 1 dwelling
21 unit per 40 acres shall be maintained in areas so designated on the
22 Peripheral Big Game Habitat Map of the [DCCP].”

23 The amendments conclude that “the [RT] designation meets the intent of
24 Goal 5” through the “density consideration process.” Record 14. The county does
25 not explain how and when the “density consideration process” occurs. In their
26 findings of Goal 5 compliance, the amendments posit that,

1 “[w]ith a limit of one (1) single family dwelling and its accessory
2 buildings on a 20 acre parcel, the opportunity to identify a
3 compatible dwelling location, in relationship to existing,
4 inventoried, Goal 5 resources is provided. The application of
5 Douglas County Goal 5 overlays and the process they establish to
6 minimize impacts and assure compatibility avoid significant
7 impacts on Goal 5 resources.” Record 13.

8 The statement that one dwelling on a 20-acre parcel provides an
9 opportunity to identify a compatible dwelling location suggests that the county
10 determined that Goal 5 is necessarily satisfied by RT-20 zoning. The next
11 sentence references Goal 5 overlays, but the county does not explain how Goal 5
12 overlays apply. DCCP Natural Features Element, Big and Upland Game Policy
13 4, which provides that “[a]reas which are identified as committed or exception
14 areas within the [DCCP] shall not have the peripheral density requirements
15 applied as such areas already exceed specified densities,” suggests that no Goal
16 5 overlay will be applied to an exception area created as part of RT-20 zoning.
17 DCCP 6-104. Because the application of the RT comprehensive plan designation
18 could affect existing big game habitat, and because, according to DCCP Natural
19 Features Element, Big and Upland Game Policy 4, the exceptions process will
20 remove the subject property from protection under the county’s Goal 5 program,
21 the county’s decision lacks support in the record and violates Goal 5 and the
22 DCCP policies that implement Goal 5.

23 The second subassignment of error is sustained.

24 The second assignment of error is sustained, in part.

25 The county’s decision is remanded.