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

FRIENDS OF DOUGLAS COUNTY and
1000 FRIENDS OF OREGON,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.
LUBA No. 2021-045

FINAL OPINION
AND ORDER

Appeal from Douglas County.
Andrew Mulkey filed the petition for review and reply brief and argued on behalf of petitioner.
Paul E. Meyer filed the response brief.
RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED 02/09/2022

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

FACTS

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

FIRST ASSIGNMENT OF ERROR

The county’s amendment of its Timberlands comprehensive plan and TR zoning designations seeks “to recognize the opportunity to apply for a Template 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).
Petitioner’s first assignment of error is that the county’s decision to allow forest template dwellings on land with a comprehensive plan designation of Timberlands and a zoning designation of TR violates Statewide Planning Goals 4 (Forest Lands), 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), and 2 (Land Use Planning), as well as various DCCP policies implementing the goals.2

Goal 4 is

“[t]o 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.” OAR 660-015-0000(4).

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

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

"consist primarily of the following:

"(1) Public and private industry forest lands located contiguously in large blocks;

"(2) Forested lands geographically or topographically separated from those lands predominantly used for agriculture and nonforest uses;

"(3) Critical wildlife and fishery habitat areas;

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

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

"(6) Lands needed for watershed protection or recreation."3 DCCP 2-9.

DCCP Forest Element, Timberlands Policy Implementation 1, explains:

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

3 Nonprime forest land is designated Farm/Forest Transitional. DCCP 2-9.
forests; and, provide for the orderly development of both public and private recreational uses as appropriate and not in conflict with the primary intent of the [TR] zone, which is the sustained production of forest products. Use of land not associated with the management and development of forests shall be discouraged to minimize the potential hazards of damage from fire, pollution and conflict caused by nonforest and nonfarm related residential, commercial and industrial and industrial activities.” DCCP 2-11 (emphasis added).

The Timberlands comprehensive plan and TR zoning designations also play a role in the county’s Goal 5 program.4 Goal 5 is “[t]o protect natural resources and conserve scenic and historic areas and open spaces.” OAR 660-015-0000(5). As explained in DCCP Natural Features Element, Finding 22(d)(1):

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

***

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

We will reverse or remand “an amendment to a comprehensive plan if the amendment is not in compliance with the goals.” ORS 197.835(6). We will 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.
land use regulation if (1) “[t]he regulation is not incompliance with the comprehensive plan” or (2) “[t]he comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.” ORS 197.835(7).

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

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

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

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

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

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

"* * * * *

"With the preceding Forest Element plan policies and [LUDO] provisions and those provided for wildlife, Douglas County will easily satisfy the Oregon Department of Fish and Wildlife’s suggested density guideline for sensitive big game habitat areas of 1 dwelling unit per 80 acres." DCCP 6-8.
DCCP Forest Element, Timberlands Policy 2, quoted above, prohibits the 
construction of dwellings other than owner of record and forest management-
related dwellings on TR land. The amendments to allow additional dwellings on 
TR land are not consistent with the DCCP policies implementing Goal 5 and, 
therefore, not consistent with Goal 5.

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

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

SECOND ASSIGNMENT OF ERROR

In addition to modifying the uses allowed in the TR zone, the county’s 
decision creates a new comprehensive plan designation, RT, and a new zone, RT- 
20. The amendments explain that “[t]he RT plan designation is proposed to 
provide an opportunity for an additional type of nonresource land that is intended 
to provide a transition from denser rural residential development to the
agricultural, timbered and open space areas of the County.” Record 12.

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

A. First Subassignment of Error

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

The county uses the phrase “nonresource land” in an imprecise manner.
“Nonresource Land” is specifically defined in state law as any land that is not
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.
the county uses the phrase “nonresource land” to refer to land that is identified, inventoried, designated, and zoned as agricultural and/or forest land and for which an exception to Goals 3 and 4 are obtained as part of the process for a comprehensive plan designation change to RT and zone change to RT-20. The amendments explain that “[t]he RT-20 zone is a type of nonresource zone and shall only apply to lands proven to be eligible through a Plan Amendment, together with an exception to Statewide Planning Goals 3 and 4, and corresponding Zone Change process.” Record 16 (emphasis added).

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

(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

(c) Complies with ORS 197.732(2), the provisions of this division and if, applicable, the provisions of OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040.” OAR 660-004-0005(1).

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

“The [RT] designation meets the intent of Goal 2 (Exceptions) since compelling reasons and facts will be required to be documented for each site through individual requests for a Plan Amendment, together with an exception to Statewide Planning Goals 3 and 4 and...
corresponding Zone Change process." Record 14.

As we explained in *DLCD v. Douglas County*, our review is limited if (1) the challenged decision demonstrates compliance with the goals, or establishes that certain goals are not implicated by the decision, or (2) the challenged decision affirmatively establishes that the local government will review a future decision that applies the comprehensive plan amendment for goal compliance in a later, required proceeding.” Or LUBA, ___ (LUBA Nos 2018-039/040/041/048/049/051, Aug 2, 2019) (slip op at 13-14).

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

The first subassignment of error is denied.

**B. Second Subassignment of Error**

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

---

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

DCCP Natural Features Element, Finding 22, explains:

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

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

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

The amendments conclude that “the [RT] designation meets the intent of Goal 5” through the “density consideration process.” Record 14. The county does not explain how and when the “density consideration process” occurs. In their findings of Goal 5 compliance, the amendments posit that,
"[w]ith a limit of one (1) single family dwelling and its accessory buildings on a 20 acre parcel, the opportunity to identify a compatible dwelling location, in relationship to existing, inventoried, Goal 5 resources is provided. The application of Douglas County Goal 5 overlays and the process they establish to minimize impacts and assure compatibility avoid significant impacts on Goal 5 resources.” Record 13.

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

The second subassignment of error is sustained.

The second assignment of error is sustained, in part.

The county’s decision is remanded.