BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 24-03-19-04	In the Matter of an On-the-Record Hearing to Review the Hearings Official's Decisions Denying Three (3) Forest Template Dwelling Proposals in the Impacted Forest Lands Zone (F-2): BOARD ORDER NO. 24-03-19-04 (E.J.K. Investments); Assessor's Map 21-25-12, Tax Lot 843, File No. 509-PA23-05321; BOARD ORDER NO. 24-03-19-05 (E.J.K. Investments); Assessor's Map 21-35-07-30, Tax Lot 2900, File No. 509-PA23-05322; BOARD ORDER NO. 24-03-19-06 (Edward J King); Assessor's Map 21-35-07-30, Tax Lot 2800, File No. 509-PA23-05323.

WHEREAS, the Lane County Hearings Official (the Hearings Official) has made the decision to deny three Type II Forest Template Dwelling applications elevated by the Lane County Planning Director (the Director) for Hearings Official review through a Type III procedure under Department File Nos. 509-PA23-05321, 509-PA23-05322, and 509-PA23-05323 (the Decisions); and

WHEREAS, on November 2, 2023, the Hearings Official applied Lane County Rural Comprehensive Plan Goal 5, Flora & Fauna Policy 11 (Policy 11) as an independent approval criterion for template dwelling. The Hearings Official did so in reliance upon LandWatch Lane County v. Lane County (Nimpkish), _ Or LUBA _ (No. 2020-030, Jan. 23, 2021) and King v. Lane County (King), _ Or LUBA _ (LUBA Nos. 2021-047/052, Oct. 15, 2021), aff'd without opinion 317 Or App 136, 501 P3d 1058 (2022). The Hearings Official denied the three applications based solely on Policy 11; and

WHEREAS, pursuant to Lane Code (LC) 14.080(5), the Director requested review of the Hearings Official's Decisions by the Lane County Board of County Commissioners (the Board) in an on-the-record hearing; and

WHEREAS, on January 30, 2024, in a duly noticed public meeting, the Board adopted Order No. 24-01-30-04, electing to review the Hearing Official's decisions in an on-the-record hearing set for March 19, 2024; and

WHEREAS, Board Order No. 24-01-30-04 specified that participation at the hearing on-the-record is limited to the Director, applicants, and applicants' agent, and the opportunity for limited testimony is not allowed; and

WHEREAS, notice of the hearing on the record was mailed in accordance with LC 14.080(5)(b)(i)(c) and LC 14.060(2) at least 10 days in advance of the hearing; and

WHEREAS, on March 19, 2024, the Board passed a motion to postpone the on-the-record hearing to April 16, 2024, 1:30 PM time certain; and

WHEREAS, on April 16, 2024, the Board opened the on-the-record hearing; had staff identify the applicable criteria; provided an opportunity for Commissioners to disclose any ex parte communications, prejudgments, bias, or conflicts of interest; provided an opportunity for anyone to challenge Commissioners' disclosures or qualifications to hear the matter and make an impartial decision; provided Commissioners an opportunity to respond to challenges; heard the staff report and statements by the applicant's agent; and began deliberations. The Board passed a motion via a 5-0 vote to continue to the public hearing to a date and time to be determined and to notice the hearing to allow parties as defined by LC Chapter 14 to present oral argument limited to the Hearings Official record and limited to Policy 11 and its interpretation; and

WHEREAS, notice of the continued on-the-record hearing was mailed in accordance with LC 14.080(5)(b)(i)(c) and LC 14.060(2) at least 10 days in advance of the hearing; and

WHEREAS, on October 8, 2024, the Board opened the continued on-the-record hearing; had staff identify the applicable criteria; provided an opportunity for Commissioners to disclose any ex parte communications, prejudgments, bias, or conflicts of interest; provided an opportunity for anyone to challenge Commissioners' disclosures or qualifications to hear the matter and make an impartial decision; provided Commissioners an opportunity to respond to challenges; heard the staff report and limited additional oral testimony by the applicant's agent and other parties; and proceeded with deliberations. The Board passed motions via a 3-2 vote to continue the hearing to a date and time to be determined and to re-open the record through November 5, 2024, for the limited purpose of admitting limited additional testimony under LC 14.080(5)(c)(ii) in the form of proposed findings related to Policy 11 and its interpretation on the pre-2021 position that Policy 11 does not apply to forest template dwellings, which findings shall be limited to arguments that are already in the record; and

WHEREAS, notice of the continued on-the-record hearing was mailed in accordance with LC 14.080(5)(b)(i)(c) and LC 14.060(2) at least 10 days in advance of the hearing; and

WHEREAS, on December 17, 2024, the Board conducted the continued on-the-record hearing, considered the Hearings Official record and limited additional testimony in the record, had staff identify the applicable criteria; provided an opportunity for Commissioners to disclose any ex parte communications, prejudgments, bias, or conflicts of interest; provided an opportunity for anyone to challenge Commissioners' disclosures or qualifications to hear the matter and make an impartial decision; provided Commissioners an opportunity to respond to challenges; heard the staff report; and proceeded with deliberations, and is now ready to take action.

NOW, THEREFORE, the Board of County Commissioners of Lane County **ORDERS** as follows:

1. The foregoing recitals are adopted herein by reference and in support of this Order.

2. The Findings in Support of the Order attached as Exhibit A are adopted and incorporated into this Order.

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3. The Hearings Official decision to deny Planning Action File No. 509-PA23-05321, dated November 2, 2023, with the Lane County Staff Report dated September 7, 2023, incorporated by reference and attached as Exhibit B, is ratified and affirmed by the Board as the County's final decision. The Board expressly remains silent on the interpretations made by the Hearings Official.

ADOPTED this____day of_____, 2024.

_____
Laurie Trieger, Chair
Lane County Board of Commissioners

ORDER EXHIBIT A

FINDINGS IN SUPPORT OF THE ORDER

1. On May 8, 2023, the Law Office of Bill Kloos filed three applications with the Land Management Division (LMD) on behalf of Edward J. King and E.J. K. Investments, each seeking Director Approval for a dwelling in the Impacted Forest Lands (F-2) Zone pursuant to the 'Template Dwelling' provisions of Lane Code (LC) 16.211(2)-2.4, House Bill 2225, and RCP Goal 5 Flora and Fauna Policy 11 (Policy 11), as applicable.
   a. File No. 509-PA23-05321; Assessor's Map 21-25-12, Tax Lot 843; Owner/Applicant E.J.K. Investments
   b. File No. 509-PA23-05322; Assessor's Map 21-35-07-30, Tax Lot 2900; Owner/Applicant E.J.K. Investments
   c. File No. 509-PA23-05323; Assessor's Map 21-35-07-30, Tax Lot 2800; Owner/Applicant Edward J King

2. Each of the three applications seeks approval for dwellings on a parcel of less than 14 acres that directly abuts the Oakridge Airport and is located within the Airport Safety Combining Zone (/AS) area. Apart from a small corner of Tax Lot 843 of Assessor's Map 21-25-12, the subject parcels are entirely zoned Impacted Forest Lands (F-2) and are located within designated Goal 5 Major Big Game Habitat.

3. On June 7, 2023, LMD staff deemed the applications complete. The Lane County Planning Director elected to elevate the applications for Hearings Official review through a Type III procedure pursuant to LC 14.030(1)(b)(ii)(cc). Accordingly, on August 16, 2023, Lane County staff sent notice of a public hearing before the Lane County Hearings Official to occur on September 7, 2023.

4. The initial public hearings for the applications were held on September 7, 2023. The Hearings Official granted an extended record period for written testimony allowing for parties of record to the Hearings proceeding to submit additional evidence and argument with an opportunity for response and final rebuttal by the applicant by October 12, 2023.

5. During the hearing proceedings, the applicant's agent provided full timeline waivers to the applicable statutory 150-day statutory timeline requirements for final local set forth in ORS 215.427. The waivers were provided for all three applications and were accepted.

6. On November 2, 2023, the Hearings Official issued decisions denying all three applications. Required notice of the Hearings Official's decision was mailed to parties of record on November 6, 2024.

7. On November 9, 2023, the LMD staff mailed notice informing parties of record of the Planning Director's request and recommendation for Board review pursuant to LC 14.080(1)(e) and LC 14.080(5)(a)(iv).

8. On January 30, 2024, the Board considered whether to review the Hearings Official's decisions and to conduct a hearing on the record. Via Order 24-01-30-04, the Board determined Board review was warranted based on the criteria set forth in LC 14.080(5)(a)(i), (iii), and (iv) and elected to conduct a hearing on the record, set for March 19, 2024. The Board Order No. 24-01-30-04 specified that participation at the hearing on-the-record is limited to the Director, applicants, and applicants' agent, and the opportunity for limited testimony is not allowed.

9. At least 10 days prior to the hearing on-the-record, LMD staff mailed notice of the hearing on the record in accordance with LC 14.080(5)(b)(i)(c) and LC 14.060(2).

10. On March 19, 2024, the Board passed a motion to postpone the on-the-record hearing to April 16, 2024, 1:30 PM time certain.

11. On April 16, 2024, the Board opened the on-the-record hearing; had staff identify the applicable criteria; provided an opportunity for Commissioners to disclose any ex parte communications, prejudgments, bias, or conflicts of interest; provided an opportunity for anyone to challenge Commissioners' disclosures or qualifications to hear the matter and make an impartial decision; provided Commissioners an opportunity to respond to challenges; heard the staff report and statements by the applicant's agent; and began deliberations. The Board passed a motion via a 5-0 vote to continue to the public hearing to a date and time to be determined and to notice the hearing to allow parties as defined by LC Chapter 14 to present oral argument limited to the Hearings Official record and limited to Policy 11 and its interpretation.

12. Notice of the continued on-the-record hearing was mailed in accordance with LC 14.080(5)(b)(i)(c) and LC 14.060(2) at least 10 days in advance of the hearing; and

13. On October 8, 2024, the Board opened the continued on-the-record hearing; had staff identify the applicable criteria; provided an opportunity for Commissioners to disclose any ex parte communications, prejudgments, bias, or conflicts of interest; provided an opportunity for anyone to challenge Commissioners' disclosures or qualifications to hear the matter and make an impartial decision; provided Commissioners an opportunity to respond to challenges; heard the staff report and limited additional oral testimony by the applicant's agent and other parties; and proceeded with deliberations. The Board passed motions via a 3-2 vote to continue the hearing to a date and time to be determined and to re-open the record through November 5, 2024, for the limited purpose of admitting limited additional testimony under LC 14.080(5)(c)(ii) in the form of proposed findings related to Policy 11 and its interpretation on the pre-2021 position that Policy 11 does not apply to forest template dwellings, which findings shall be limited to arguments that are already in the record.

14. Notice of the continued on-the-record hearing was mailed in accordance with LC 14.080(5)(b)(i)(c) and LC 14.060(2) at least 10 days in advance of the hearing; and

15. On December 17, 2024, the Board conducted the continued on-the-record hearing, reviewed the Hearings Official's decisions based on the materials contained in the record and limited additional testimony presented. The Board considered whether or not to adopt a local interpretation of Policy 11 or to expressly adopt the Hearings Official's interpretation of Policy 11 in conjunction with the review of the Hearings Official's decisions. The Board passed a vote ratifying and affirming the Hearings Official's decisions dated November 2, 2023, as the County's final decisions, and electing to expressly remain silent on any interpretations made by the Hearings Official.

NOV 0 6 2023

BEFORE THE LANE COUNTY HEARINGS OFFICIAL

REVIEW OF AN APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING WITHIN AN F–2 DISTRICT

Application Summary

On May 8 2023, the applicant, Edward J. King/E.J.K. Investments, filed an application seeking to establish a dwelling in the Impacted Forest Lands (F-2) zone on tax lot 843, assessors map 21-25-12. PA 23-05321. The application was deemed complete on June 7, 2023. County staff elected to hear this application through a Type III initial Hearings Official review, pursuant to Lane Code 14.030(1)(b)(ii)(cc). Accordingly, on August 16, 2023, Lane County staff sent notice of a public hearing to occur on September 7, 2023 before the Lane County Hearings Official. The initial public hearing was held on September 7, 2023.

Parties of Record

Edward J. King/E.J.K. Investments (Bill Kloos)
Michael Farthing — Jim McLaughlin
Nicholas Milosevich — Amy Pincus
LandWatch Lane County (LandWatch) (Lauri Segel; Sean Malone)
1000 Friends of Oregon (Andrew Mulkey)
Richard and Amy Shearer — Sharon Carroll — Jim Babson
Ellen and Herbert Jaeger — Carlette Larson — Tony Drago
Land Planning Consultants; Mike Evans — Deborah Noble
McKenzie Land and Timber, LLC; Casey Jones (Kim O'Dea)
Chris and Meagan Leturno — Lynda McCord (Kim O'Dea)
Jeremy and Celeste Keepers (Kim O'Dea) — Kay King
Greg Demers; ATR Services (Kim O'Dea)
Fern Hollow Farms (Kim O'Dea) — PM Land and Timber (Kim O'Dea)
Melvin McDougal; McDougal Bros. Inv., McDougal Bros. Inc., Leelynn Inc. (Kim O'Dea)
Mike Miller (Kim O'Dea) — Weston Hallstead (Kim O'Dea)
Robert Gill (Kim O'Dea)
Oregon Department of Fish and Wildlife (ODFW) (Joe Stack)

Application History

Hearing Date: September 7, 2023
(Record Held Open Until October 12, 2023)

Decision Date: November 2, 2023

Appeal Deadline

A party may request reconsideration of this decision by the Hearings Official, pursuant to Lane Code 14.080(1)(a)(iii) and (1)(b), by filing a notice of appeal within 12 days after the date the notice of decision was mailed. If a party seeking further review chooses not to seek reconsideration, they must file an appeal directly with LUBA within the timelines set forth in state law. See LUBA's website for more information on appeal deadlines.

Statement of Criteria

Lane Code (LC) 16.211(2)-2.4; LC 16.211(3)(c), (3)(p), (3)(q), (5), and (6)
House Bill 2225
Rural Comprehensive Plan (RCP) Goal 5 Flora and Fauna Policy 11

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 843, assessor's map 21–25–12, which is immediately west of the Oakridge Airport and situated between the Westfir and Oakridge Urban Growth Boundaries. The property is approximately 13.34 acres and is vacant.

   The subject property is zoned Impacted Forest Land (F–2) except for a small portion of the property's eastern corner, which is zoned Rural Residential (RR-5). The property also falls within the Airport Safety Combining Zone (/AS). The F-2 portion of the property is located entirely within designated Major Big Game Habitat recognized as a significant Goal 5 resource under the RCP.

2. The subject application is one of three template dwelling applications submitted on the same date. The other two applications are PA 23-05322 and PA 23-05323. The other two applications are requests for forest template dwelling approvals that were previously denied by the Hearings Official (PA 20-05064 and PA 20-05066) and subsequently appealed to LUBA.

Decision

THE EDWARD J. KING/E.J.K. INVESTMENTS APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING (PA- 05321) ON TAX LOT 843, ASSESSOR'S MAP 21–25–12 IS DENIED.

Motion to Strike

At the hearing in this matter, the Hearings Official announced the following open record period:

September 21, 2023: First open record period
October 5, 2023: Responses to materials submitted during first open record period

October 12, 2023: Final rebuttal by applicant

During the time period for submitting responses (*i.e.*, from September 21 through October 5), Carlette Larson submitted written materials. The submittal included tax lot maps with writing on them; a list of tax lots and tax payers and owners; Assessment and Taxation records; and individual property account information. Ms. Larson does not explain how the documents are in response to issues raised in the open record period.

LandWatch moves to strike the submittal of Ms. Larson because the documents are not relevant to the issues before the Hearings Official, and LandWatch does not believe the documents are responsive to issues raised in the initial open record period. The Hearings Official agrees that the materials do not appear to be responsive to materials that were submitted during the first open record period. Accordingly, the motion to strike is granted.

Justification for the Decision

I. Goal 5, Policy 11

The main dispute in this case involves an interpretation of RCP Goal 5 Flora and Fauna Policy 11 (referred to herein as Policy 11). Policy 11 is a policy that is intended to implement the requirements of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) aimed at preserving habitat for Big Game.[1] Policy 11 provides:

> "*Oregon Department of Fish and Wildlife [ODFW] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program.*" Lane County Rural Comprehensive Plan (RCP) Goal 5, Flora and Fauna Policy 11.

The history of the adoption of RCP Goal 5 Flora and Fauna Policy 11 goes all the way back to the 1980s, when the RCP was acknowledged by the Land Conservation and Development Commission (LCDC). This history is important to the Hearings Official's and the Board's mission in this case, which is to discern what the County Board at that time intended regarding the meaning and applicability of Policy 11.

The County's recent decision making on the issue began in November, 2019 with the Hearings Official's decision in *Green.* PA 18-05913 (November 25, 2019). A different Lane County Hearings Official issued a decision in *Nimpkish* a few months later, in February, 2020. PA 19-

[1] The County mapped areas of big game as Major Big Game (the most highly protected), Peripheral Big Game (the next highest level of protection), and Impacted Big Game (least protected).

05298 (February 4, 2020). Prior to *Green* and *Nimpkish*, the County did not require an application for a forest template dwelling to assess the impacts of such dwelling on Big Game Habitat. Both *Green* and *Nimpkish* involved applications for forest template dwellings on property located in the F-2 zone and within the County's areas designated for Major Big Game Habitat. In both cases, LandWatch argued that it was not sufficient for an applicant seeking approval of a forest template dwelling on property located within mapped Big Game Habitat areas, to demonstrate compliance with the applicable approval criteria found in the Lane Code. LandWatch argued that Policy 11 provided an approval criterion that applied directly to an application for a forest template dwelling where the property fell within a protected Major Big Game area.

The parties in *Green* and *Nimpkish* provided research regarding the initial RCP acknowledgment process in an attempt to shed light on the County's intent in adopting Policy 11. Ultimately, the Hearings Officials in both *Green* and *Nimpkish* held that Policy 11 did not apply directly to applications for forest template dwellings in this circumstance. The Hearings Official's decision in *Nimpkish* was appealed to LUBA.

LUBA disagreed with the Hearings Official's determination in *Nimpkish* and determined, based on a rather extensive review of the acknowledgment materials from the early 1980s, that Policy 11 applied directly as an approval criterion to applications for forest template dwellings on lands shown as protected big game habitat on the County's Goal 5 maps for big game habitat. *LandWatch Lane County v. Lane County (Nimpkish)*, ___ Or LUBA ___ (LUBA No. 2020-030, January 23, 2021).

In two subsequent appeals, the Lane County Hearings Official denied requests for forest template dwellings, based on LUBA's ruling in *Nimpkish*. PA 20-05064 and PA 20-05066 (*King*). These decisions were also appealed to LUBA, which affirmed the Hearings Official decisions denying the applications based on the applicant's failure to demonstrate compliance with Policy 11. *King v. Lane County (King* or *King 2021)*, ___ Or LUBA ___ (LUBA Nos. 2021-047/052, October 15, 2021).[2] On appeal to the Oregon Court of Appeals, the Court affirmed without opinion. *King v. Lane County*, 317 Or App 136, 501 P3d 1058 (2022).

LUBA's determinations in both *Nimpkish* and *King* involved a review of final local decisions rendered by the Lane County Hearings Official. When LUBA reviews a decision of a local hearings official, it is not required to "defer" to that decision. When LUBA reviews a decision of a local governing body (in this case, the Board of Commissioners), however, LUBA is required to defer to that body's interpretation of its own local legislation. The applicant in this case asserts that the Lane County Board of Commissioners can provide its own interpretation of Policy 11, and it argues that LUBA will be required to defer to that interpretation. That added deference, according to the applicant, could result in a different decision by LUBA.

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[2] LUBA's decisions in the *King 2021* appeals went further than LUBA's decision in *Nimpkish* and examined how the "overall dwelling density" was to be determined—i.e., what unit of land was to be used for the denominator in the density calculation. That issue is not relevant to this appeal and will not be discussed further.

For the most part, the Hearings Official agrees with the applicant regarding this assertion. The Hearings Official does not agree with LandWatch that the County Board is bound by LUBA's previous rulings, because the scope of deference is different in this case.[3] The Hearings Official does note, however, that any interpretation that the Board adopts must also be consistent with state law, as Policy 11 is intended to implement the requirements of Statewide Planning Goal 5 as it relates to protection for Big Game Habitat. LUBA's discussions in both *Nimpkish* and *King* were based largely on the extent to which an interpretation of Policy 11 complied with state law, *i.e.*, the dictates of Statewide Planning Goal 5.[4] It seems likely that, on review of this decision, if appealed, LUBA will be concerned about an interpretation of Policy 11 that it feels lacks the necessary protections to fully implement the dictates of Goal 5.

The Hearings Official understands that the Board will likely review this Hearings Official decision so that it can provide a Board interpretation of Policy 11 that LUBA, on appeal, will be required to defer to. With that goal in mind, the Hearings Official provides the following interpretation as a guide to the Board's decision.

RCP Acknowledgment

At the time of acknowledgment of RCP Policy 11, it was well accepted that residential development was the main potential conflict with protection of Big Game Habitat. Accordingly, DLCD and ODFW staff's primary concern regarding Big Game Habitat was the allowed density of dwellings in areas mapped for Big Game Habitat protections. In that vein, DLCD aimed to help counties draft comprehensive plan policies and code language that would minimize the density of residences where such density could impact Big Game Habitat.

There is relevant analysis in both LUBA decisions in *Nimpkish* and *King* and in staff's memorandum to the Hearings Official in this case. However, this decision will attempt to narrow the discussion to the key issue in this case. That issue is to what extent the County and DLCD viewed the Lane Code provisions as adequate to protect the resource; *i.e.*, Big Game Habitat. That is, did the Code fully implement Policy 11, such that only the Code provisions applied? Or did Policy 11 contain protections that remained applicable to discrete land use applications such as requests for forest template dwellings on land protected for Big Game Habitat?

The first sentence of Policy 11 provides: *Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County.*

In the prior cases, it was assumed that the ODFW "recommendations for overall residential density for protection of big game" was no more than one dwelling per 80 acres in the Major Big Game Habitat areas and no more than one dwelling per 40 acres in the Peripheral Big Game

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[3] The applicant is correct that LUBA would be required to affirm an interpretation so long as it is "plausible."
[4] LUBA stated: "Moreover, the county must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential development through density standards, in a manner that is not inconsistent with Goal 5. ORS 197.829(1)(d)." *Nimpkish*, slip op. 14.

Habitat. This assumption or assertion was not correct or complete. The record in this case makes clear that the ODFW overall residential density recommendations included an alternative for circumstances where clustering was required. In the Major Big Game Habitat, one dwelling per 40 acres (rather than one dwelling per 80 acres) is acceptable with cluster development. In Peripheral Big Game Habitat, one dwelling per 20 acres (rather than one dwelling per 40 acres) is acceptable with cluster development. *See* attachment to March 30, 1983 letter from Neal Coenen, ODFW Program Leader, to Aldie Howard, Benton County Planning Director.[5] The recommendation articulates clearly that it relates to "overall residential density" and not "minimum lot sizes." A minimum lot size only regulates how big or small a property must be when the property is being created. It does not address how big a property must be in order to site a dwelling on it. That said, the County relied, at least in part, on minimum lot sizes in the F-1 and F-2 zones to assist with compliance with Goal 5 Big Game Habitat protections.

Lane County's first attempt at acknowledgment of its Goal 5 program related to protection of Big Game Habitat was rejected by DLCD. It had proposed a minimum lot size in the F-2 zone of 20 acres and a minimum lot size in the F-1 zone of 40 acres. ODFW and 1000 Friends objected to that proposal, in part because it was not consistent with the ODFW density recommendations. As a result of the negative comments, Lane County ended up adopting much larger minimum lots sizes of 80 acres for the F-1 zone and 40 acres for the F-2 zone. It also adopted provisions that required clustering.

However, as DLCD and ODFW made clear, the recommended residential density related to overall residential density, not minimum lot size. That is, the County's choice to adopt a minimum lot size for the forest zone (and presumably for areas designated for protected Big Game Habitat), did not fully address ODFW's recommended residential densities. There was nothing in the adopted Code that addressed actual overall residential densities when a dwelling was proposed to be added. Specifically, the Code did not include a required minimum lot size for approval of a dwelling in the F-2 zone. Accordingly, the Code provisions did not fully address the overall residential density recommendations. For example, if there was a cluster of small, nonconforming (*i.e.*, smaller than the minimum lot size for the zone) properties zoned F-2, as long as the owners could satisfy the approval criteria in the Code, they could potentially build out the properties far in excess of ODFW's recommended residential density.

That all being said, the Hearings Official is aware that the question here is not whether Policy 11 and the Lane Code fully protect Big Game resources. Rather, the question is what the County and DLCD intended at the time the RCP was acknowledged in 1984. As discussed below, the Hearings Official believes that the intent of Policy 11 was to fill the hole with regard to Goal 5 protections that was left because the County Code did not have a minimum lot size requirement for placement of a dwelling.

The applicant's proposed interpretation of Policy 11 is found in the Home Builders Association of Lane County's letter of interpretation that was provided to the Board by Pete Barrell on May

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[5] The ODFW policy recommendation for overall residential densities found attached to the March 30, 1983 letter was in relation to Benton County's acknowledgment. But the one-page attachment is entitled "Big Game Ranges—Northwest Oregon" and appears to contain the recommendations for Lane County as well.

8, 2022. That letter asserts that Lane Code 16.211, the chapter of the Code applicable to the F-2 zone, is intended as an exhaustive list of applicable approval criteria and standards. It relies on the Purpose statement in LC 16.211(1) and the introduction to the Table of Permitted Uses (Table 16.211-1) found at LC 16.211(2). The Table includes "Template Dwellings" as an allowed use in the F-2 zone and makes no mention of Policy 11 as an applicable approval standard. In general, the applicant is correct that comprehensive plan policies do not usually apply directly to discrete land use applications where there are land use regulations that fully implement that particular policy. However, as explained below, Policy 11 was not fully implemented by the Lane Code in this case. The legislative history of Policy 11 (*i.e.,* the acknowledgment materials) make clear that in certain circumstances, a full Goal 5 analysis would be required when a forest template dwelling was sought on lands protected as Big Game Habitat.

The applicant also argues, through the Home Builders' proposed interpretation, that the Flora and Fauna Working Paper "moved away from setting minimum lot sizes for dwelling applications on F-2 land and toward applying siting and clustering standards." The Hearings Official does not believe this argument, even if true, provides a basis for concluding that Policy 11 does not apply directly to certain applications for forest template dwellings.

The applicant relies, at least in part, on Directive 2.d of DLCD staff's July 19, 1984 staff report, which provides: "Amend the F-2 and EFU zones to carry out the intent of the Flora and Fauna Policy 11. Specifically, the zones must either require larger minimum lot sizes in the Big Game Habitat portions of those zones or contain clustering requirements in those areas." Taken out of context, this statement could be read as an either/or directive: increase minimum lot sizes OR adopt clustering requirements. Read in context, however, it is clear that the County chose to address this directive by increasing the minimum lot size proposed in the F-2 zone (from 20 acres to 40 acres), AND by adopting clustering requirements for dwellings in an attempt to comply with the ODFW recommended density standards, which were one dwelling per 40 acres in the Major Big Game Habitat where clustering is required.

The Hearings Official believes that language found in the August 17, 1984 DLCD acknowledgment staff report to LCDC is determinative as to the intended meaning of Policy 11. In response to objections made to the version of Policy 11 that was ultimately adopted, DLCD found:

> "[Response 2]. [The proposed, and ultimately adopted, language of Policy 11 is cited here].
>
> Objectors are not correct that this policy [Policy 11] violates Goal 5. Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.* This would require a plan amendment and could only take place if justified based on the Goal 5 analysis. However, as noted previously, the County still needs to adopt measures in its F-2, [Marginal Lands] and EFU zones which ensure ODFW's density standards will be achieved.

> The second part of the policy requires the County to work with ODFW in preventing conflicts from occurring through land use regulations in resource areas and such things as siting requirement[s]. *ODFW is correct that its recommended density standards (if adopted in the ordinance) would constitute an approach to resolve and/or prevent conflicts between dwellings and big game habitat. However as discussed below, the county has not adopted such standards in its zoning ordinance."* August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).
>
> [Response 3]. ODFW is correct that the County's F-1 and F-2 zones do not incorporate ODFW's development density recommendations, nor do they set forth siting or clustering requirements. Without siting and clustering requirements, the minimum lot sizes in the F-1, F-2 and E zones are half that recommended by ODFW (i.e., the minimum lot sizes would have to be doubled to be acceptable). This is a problem in the F-2 and EFU zones in particular, but not in the F-1 zone, since in general, dwellings are not permitted in that zone." August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).

The County ultimately adopted a minimum lot size in the F-2 zone of 40 acres, with clustering standards. However, as was made clear in the comment quoted above, this action only demonstrated compliance with the ODFW overall residential density standards where a property on which a dwelling would be sited satisfied the 40-acre minimum lot size requirement and where the siting of the dwelling satisfied the clustering siting standards. Consistent with the language in Policy 11, as explained in the July, 1984 staff report, "Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.*" The County could have adopted minimum lot sizes for siting of dwellings that satisfied the ODFW recommended density standards. However, it chose not to do so. It chose, rather, to leave the Goal 5 analysis of the conflict created between a proposed dwelling and big game habitat to the time at which "such proposals are made"—that is, at the time the County processes an application for a forest template dwelling that, if approved, would create an overall residential density greater than the ODFW recommended residential density standards.

The Hearings Official believes that LUBA has already succinctly answered the applicant's arguments as follows:

> "the County's failure to take the step of identifying regions and basing zoning by region on either overall residential densities or ODFW minimum parcel size recommendations does not mean that the county is absolved from protecting land included on the Big Game Habitat Inventory as Major Big Game Range through the residential density recommendations referred to in RCP Goal 5, Flora and Fauna Policy 11, or that the density recommendations simply do not apply. * * * the County must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential

development through density standards, in a manner that is not inconsistent with Goal 5." *Nimpkish*, slip op. at 14.

The Hearings Official hereby incorporates the analysis in staff's August 31, 2023 Staff Report,[6] addressing the appeal issues, as well as staff's analysis addressing the remainder of the approval criteria. *See* Attachment 1 to Staff Report (Lane County Hearings Official Staff Analysis).

II. Needed Housing

The applicant raises another theory upon which he bases the assertion that Policy 11 does not apply directly to an application for a forest template dwelling. The applicant contends that Policy 11 is not clear and objective and therefore cannot be applied to needed housing, pursuant to ORS 197.307(4), the needed housing statute. The Hearings Official understands the applicant to have withdrawn this argument, based on the recent LUBA decision in *LandWatch Lane County v. Lane County (Helsel)*, ___ Or LUBA ___ (LUBA No. 2023-037, August 28, 2023). *Helsel* held that the clear and objective requirement found in ORS 197.307(4) does not apply to housing on EFU land outside the urban growth boundary. To the extent the applicant did not technically withdraw the "needed housing" argument, the Hearings Official determines that, based on the analysis in *Helsel*, the clear and objective requirement does not apply to applications for forest template dwellings on rural resource lands zoned F-2.

III. Access and Other Findings

During the open record period, the applicant submitted four revised site plans relevant to access to the subject property: one showing the proposed access for all three dwellings sought on tax lot 2800 (PA 23-05323), tax lot 2900 (PA 23-05422), and tax lot 843 (subject application); one showing access for tax lot 2800 only; one showing access for tax lot 2900 only; and one showing access for tax lot 843 only. *See* applicant's Open Record submittal letter dated September 21, 2023, with attached revised site plans (all dated September 20, 2023). The revised site plans are attached hereto as Exhibit A.

The Hearings Official understands the Planning Director to propose adopting the Planning Director analysis and proposed conditions of approval regarding the driveway (based on the revised site plans), as well as the rest of the findings addressing the remainder of the approval criteria.[7] That is, if the Board opts to adopt an interpretation of Policy 11 that would allow approval of the proposed dwelling, the remainder of the applicable approval criteria are satisfied, as set forth in the Lane County Hearings Official Staff Analysis (Staff Analysis), attached as Attachment 1 to the Lane County Hearings Official Staff Report, dated August 31, 2023, with the proposed conditions of approval, attached as Exhibit C to Staff Analysis.

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[6] Caveat: The Hearings Official agrees with the opponents that the language in reference to Cerro Gordo is not particularly applicable to determining compliance with the Big Game aspects of Goal 5 as a whole.

[7] The Hearings Official's reliance on the revised site plans dated September 20, 2023 is based on the understanding that the accessway shown on the revised site plans accurately depicts the location of the existing roadway. That is, the evidentiary foundation for the determination that the approval criteria are satisfied assumes that a new roadway will not be created.

Conclusion

The Hearings Official agrees with the applicant that, in a review by LUBA of the Board's decision in this case, LUBA will be required to defer to the Board's interpretation of its own policy (Policy 11). However, that statement is tempered by the fact that any interpretation must also be consistent with the requirements imposed by Statewide Planning Goal 5 as it relates to protection of Big Game Habitat. Given the language of LUBA's opinions, quoted above, in *Nimpkish* and *King*, the Hearings Official believes that the Board has an uphill battle if it wishes to adopt an interpretation that does not fully implement ODFW's recommended residential densities, which is required by Policy 11.

With regard to any hope on the part of the County to "remove barriers" for approvals for dwellings in the F-2 zone due to the current emergency for needed housing, the Hearings Official does not believe that the answer to the housing crisis should include ignoring the protections of Goal 5 for Big Game Habitat to facilitate housing in a rural resource zone. There are better places for such needed housing where the necessary facilities are available and where precious resources will not be impacted.

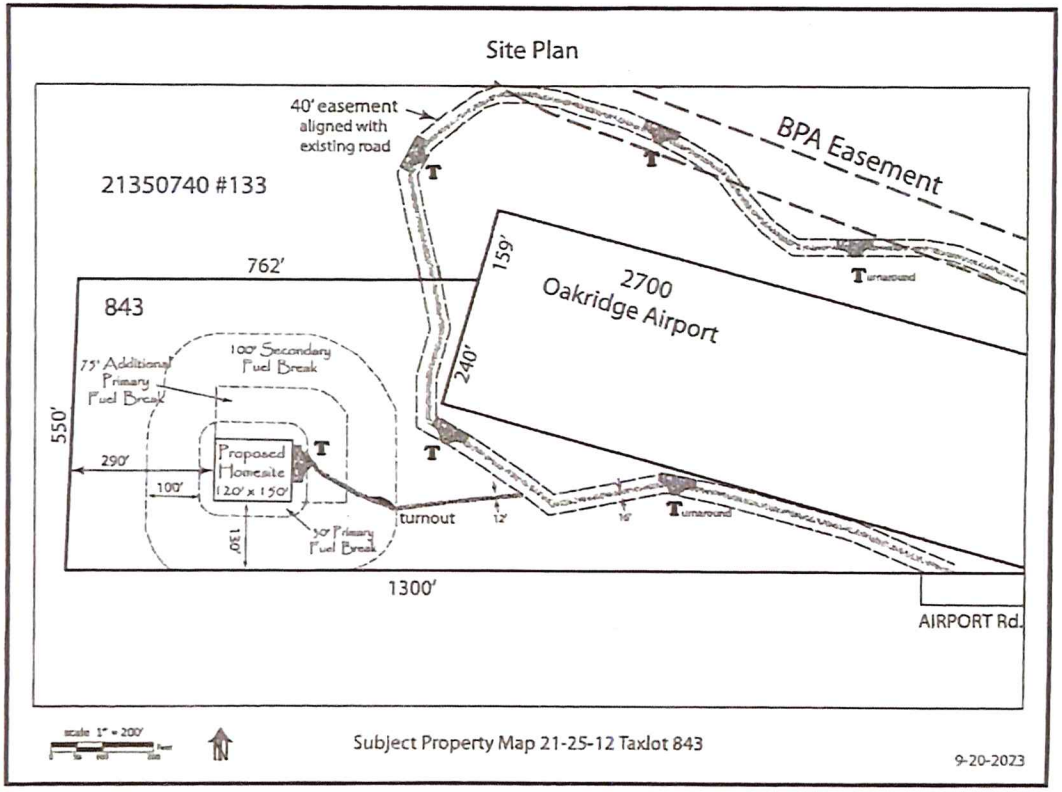
Respectfully Submitted,

Anne C. Davies
Lane County Hearings Official

ORDER EXHIBIT B
(509-PA23-05321)

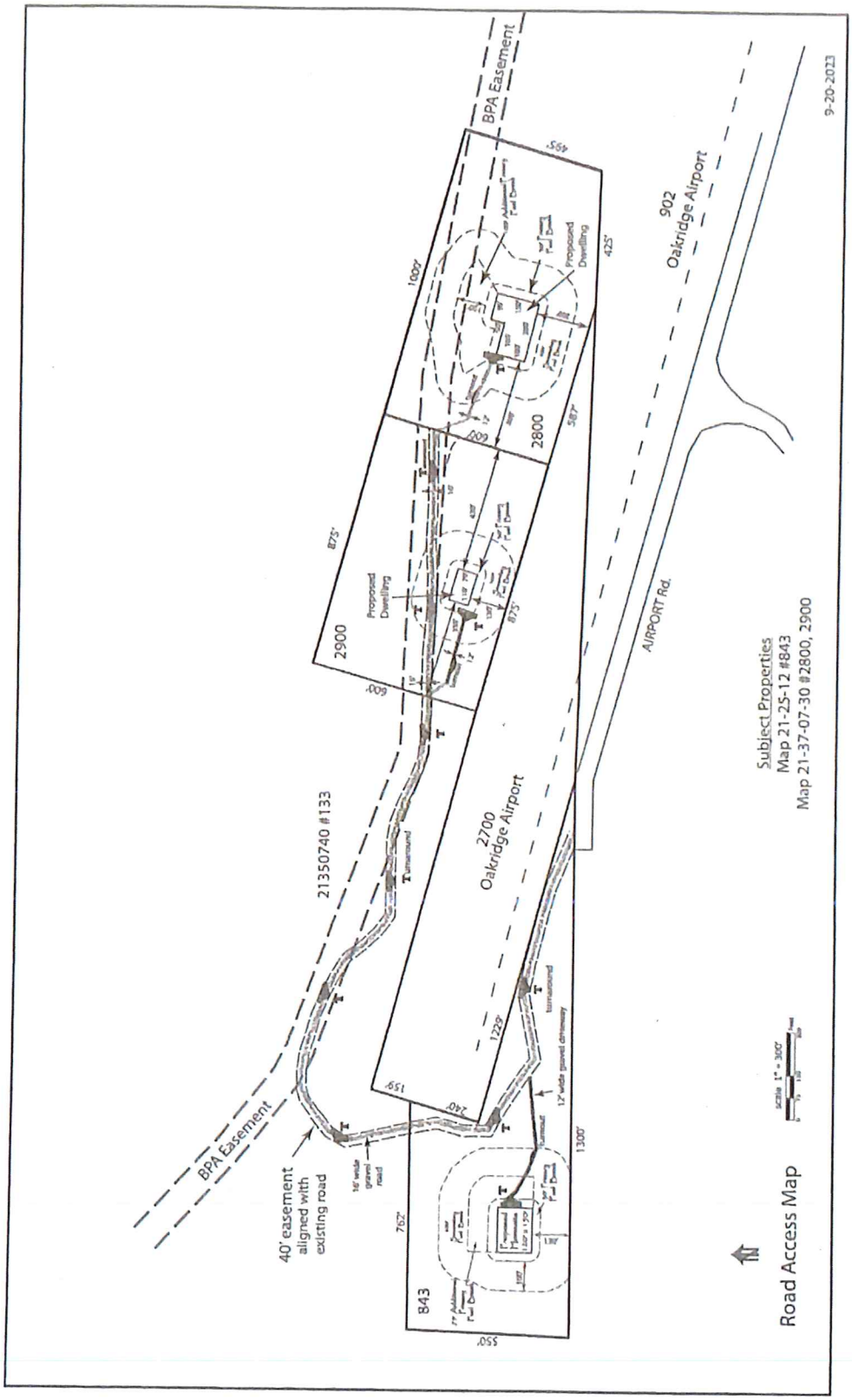
SITE PLAN SUBMITTAL FORM

OWNER NAME: E.J.K Investments **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405	**Map and Taxlot #:** 21-25-12 Tax Lot 843 **Scale:** 1 inch = 200 feet	**APPLICANT NAME:** Edward J. King **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405



ORDER EXHIBIT B
(509-PA23-05321)

EXHIBIT A



Lane County
LAND MANAGEMENT DIVISION
3050 NORTH DELTA HIGHWAY
EUGENE, OREGON 97408
PHONE: 541-682-4065
WEB: www.lanecounty.org/lmd

LANE COUNTY HEARINGS OFFICIAL STAFF REPORT

Department Files:	509-PA23-05321
Hearing Date:	September 7, 2023
Report Date:	August 31, 2023
Owner/Applicant:	E.J.K. Investments & Edward J. King
Agent:	Bill Kloos
Assessor's Map & Tax Lot:	21-25-12-00-00843
Acreage:	Approximately 13.34 acres (total)
Base Zone:	Impacted Forest Land Zone (F-2) Rural Residential, RR-5
Combining Zones:	Airport Safety Combining Zone (/AS)
Comprehensive Plan:	Lane County Rural Comprehensive Plan (/RCP)
Staff:	Julia Dobberstein, Planner Shawna Adams, Senior Planner

I. PROPOSAL DESCRIPTION

A request for a Type II Planning Director Approval of a forest template dwelling in the Impacted Forest Lands (F-2) Zone pursuant to Lane Code 16.211(2)-2.4, House Bill 2225, and RCP Goal 5 Flora and Fauna Policy 11. The Lane County Planning Director has elected to process the application through a Type III Hearings Official procedure in accordance with Lane Code 14.030(1)(b)(ii)(cc).

The proposals were submitted in conjunction with two other template dwelling requests, 509-PA23-05322 and 509-PA23-05323, which have been scheduled for the same hearing date and are addressed in a companion Hearings Official staff report.

II. PROPOSAL BACKGROUND

The subject property is located immediately west of the Oakridge Airport. The property is zoned F-2 Impacted Forest Land except for a small portion of the parcel's eastern corner, which is zoned Rural Residential (RR-5). The property takes access via Airport Road and a shared private access road that extends from Airport Road through the subject property, adjacent property to the north and the properties on which the other two template dwellings have been proposed. All three template dwelling requests are subject to the same criteria and standards, are comparable in size, with their F-2 portion entirely located within designated major big game habitat recognized as significant under Lane County Rural Comprehensive Plan (RCP). For the other two template dwelling proposals, the applicants have requested that the Director reissue the Director approvals for the 2020 *King* template dwelling applications that denied on appeal under 509-PA20-05066 for Tax Lot 2800 and 509-PA20-05064 for Tax Lot 2900 (*King v. Lane County*, Or LUBA (LUBA Nos. 2021-047/052, Oct. 15, 2021), *aff'd without opinion* 317 Or App 136, 501 P3d 1058 (2022).

In accordance with LUBA's ruling in *Nimpkish*, this Hearings Official denied the 2020 applications on the sole basis that they failed to comply with RCP Goal 5 Flora & Fauna Policy 11 (Policy 11) density standards (see

LandWatch Lane County v. Lane County (Nimpkish LLC), Or LUBA (No. 2020-030, Jan. 23, 2021). On appeal, LUBA recognized the text of Policy 11 to be ambiguous with respect to whether and how the Policy 11 density limitations apply to dwelling proposals in big game habitat (Slip op 13 and 22). LUBA concluded that that the Policy 11 text, context, and legislative history, together, make reasonably clear that the density limitations must be applied to forest template dwelling proposals and that it is reasonable to use parcel size as the denominator for calculating density.

The applicant argues that the 2017 'needed housing' statutes in effect when the subject application was submitted on May 8, 2023, preclude the County from applying Policy 11 density limitations, in keeping with the Hearings Official's decision for the *Helsel* relative farm help dwelling under 509-PA23-05928 (**Attachment 2**). The applicants rely on the Court of Appeals decision in *Warren v. Washington County*, Or LUBA (No. 2018-089, Nov 14, 2018), *aff'd* 296 Or App 595, 439 P3d 581 (March 20, 2019) and LUBA's decision in Community *Participation Organization 4M v Washington County*, OR LUBA (No. 2020-110, September 29, 2021). The applicant contends that Policy 11, like the criteria at issue in *Helsel*, is prohibited under ORS 197.307(4) because it cannot be applied in a "clear and objective" and objective manner. In support of this conclusion, the applicant notes that Policy 11 can be interpreted in multiple ways and cite LUBA's holding in *King* that the policy is ambiguous.

III. RECOMMENDATION

Inasmuch as the Hearings Official finds their needed housing determination in *Helsel* to remain valid and to apply to the circumstances of the subject proposal, the Director recommends approval based on the analysis provided in **Attachment 1.** Staff has provided an analysis and conditions of approval based on the current code format rather than the former Chapter 16 format addressed in the applicant's narrative.

The Director makes this recommendation with the understanding that the circumstance for the subject application differs from those considered by the Hearings Official in *Helsel* and may warrant a different conclusion. Chief among these circumstances would be LUBA's ruling for *Helsel*, regarding whether the needed housing statutes in question apply outside of UGBs or to dwellings on resource land, specifically forest template dwellings authorized under allowed under ORS 215.705(1)(f). Of note, LUBA's decision for Helsel was issued after this staff report was drafted and has not yet been fully reviewed by staff.

Regardless of whether the Hearings Official approves the application based on the applicant's 2017 needed housing statute argument, the Director respectfully requests that the Hearings Official make findings and conclusions for compliance with Policy 11. Specifically, the Director asks the Hearings Official consider text, context, and legislative history which indicates that, at the time of plan adoption and acknowledgment, DLCD, the county, and ODFW recognized the applicable density standard under Policy 11 to be much less restrictive than the one dwelling/80-acre standard that has been presumed to apply. In the Director's view, the legislative history and context makes clear that Policy 11 allows double the density that was presumed in *Nimpkish* and *King*, meaning that the subject properties would only need to be 40 acres in size, rather than 80 acres, to meet the applicable Policy 11 density standard for dwelling approval.

The subject proposal would fall short of meeting the Policy 11 density standard regardless of whether the 40-acre or 80-acre standard were determined to be the correct standard. Although the distinction would not be determinative for this proposal, certainty concerning the specific density standard that is applicable for F-2 dwellings in big game range habitat is a timely concern of Countywide significance - and one that merits a comprehensive analysis of the available information and matters of law by for the purposes of informing future land use decisions or legislative action by the Board of County Commissioners (Board).

The remainder of this staff report focuses on the circumstances that have given rise to the Director's request and the evidence that leads the Director to conclude that the density limitations of Policy 11 are significantly less restrictive than have been recognized for forest template dwelling proposals subject to F-2 siting standards.

IV. BACKGROUND AND BASIS FOR POLICY 11 REQUEST

Historically, Lane County has not applied Policy 11 as an approval criterion for forest template dwelling proposals. Beginning as early as 2018, the issue of noncompliance with Policy 11 density standards started being raised in testimony for template dwelling proposals in designated Goal 5 major and peripheral big game habitat range. Initially, the Director, Hearings Officials, and applicants were in agreement that Policy 11 did not apply directly to template dwelling proposals and was fully implemented in Lane Code Chapter 16. This position was comprehensively addressed by this Hearings Officials decision in Green (509-PA18-05913), which was relied on in support of the *Nimpkish* (509-PA19-05298) Hearings Official decision.

The Director approved the 2020 *King* template dwelling proposals in keeping with these Hearings Officials decisions. Thereafter, it was learned that LUBA had issued their decision for *Nimpkish* and held that Policy 11 density standards must be applied to forest template dwellings proposals. This Hearings Official applied Policy 11 density standards accordingly and concluded that the proposals failed to meet the density standards using parcel sizes of the subject property as the denominator.

In their appeal to LUBA for the 2020 *King* Hearings Official denials, the applicants asked LUBA to revisit their ruling in *Nimpkish* in consideration of additional policy text, context, and legislative history. They argued that the additional evidence clarifies that the F-2 siting standard were meant to fully implement Goal 5 big game habitat protections for dwelling proposals, in lieu of Policy 11 density standards applying directly to template dwelling proposals. In the alternative, the applicants asked that LUBA find the Hearings Official misconstrued Policy 11 by using lot size as the denominator to calculate density, rather than using the total County big game habitat acreage as the denominator.

LUBA denied both assignments of error and affirmed the County's denial of the 2020 King proposals on October 15, 2021. On May 3, 2022, Land Management Division staff provided the Board of County Commissioners an overview of the *Nimpkish* and *King* opinions. On May 10 of the following week, the Board requested that staff report back to the Board concerning a May 8, 2022 request from the Lane County Homebuilders Association (HBA) regarding Policy 11. The letter requests that the Board make a local interpretation of Policy 11. The specific interpretation proposed generally presents the same arguments rejected by LUBA in *King* concerning regarding whether Policy 11 applies directly to F-2 dwelling proposals, with the expectation that LUBA would be obligated to affirm the interpretation under the deferential standard afforded decisions by the Board. **See Attachment 7**.

On June 7, 2022, staff reported back to the Board with considerations and options for how the Board could proceed in responding to the letter. The Board directed staff to take the HBA request before the Lane County Planning Commission (LCPC) for a recommendation. The LCPC recommended that the Board take no action regarding the HBA proposal and further recommended that the Board direct staff to scope a post acknowledgement plan amendment to make amendments to Rural Comprehensive Plan Goal 5, Policy 11. Staff reported back to the Board on June 13, 2023. The Board directed staff to scope options for a Goal 5 Big Game update and to return to the Board with a formal project proposal. Most significant for this hearing matter, the Board directed staff to elevate the next relevant Hearings Official's decision involving Goal 5, Policy 11 to the Board for their consideration of whether to adopt a local interpretation of the policy, either by affirming the Hearing's Official interpretation or through an on-the-record review.

The Hearings Official decisions for the subject proposal and 509-PA23-05322 and 509-PA23-05323 would be the first relevant Hearings Official decisions involving Policy 11. Although the applicants argue that needed

housing statutes preclude the County from applying Policy 11, staff understands that such a conclusion could only be reached via a determination by the Hearings Official that Policy 11 cannot be imposed in a clear and objective manner. Staff also understands that such a determination would necessitate consideration of whether legislative history and context resolves any ambiguity in how the standard applies, with demonstration that no other plausible interpretations of the policy exist. See *Roberts v. City of Cannon Beach*, 316 Or. App. 305, 504 P.3d 1249 (Or. Ct. App. 2021).

With consideration of the *King* holding and related work assignments that have been assigned by Board, staff has undertaken a comprehensive examination of the text and context of the plan and code, and the events and documents in the 1980s plan acknowledgment process. These include the materials in the *King* LUBA record, and the additional material attached to this staff report. The most relevant context included in the *King* LUBA record have also been attached for ease of review.

V. LEGISLATIVE HISTORY AND CONTEXT SUPPORTING THE LESS RESTRICTIVE DENSITY STANDARD

As LUBA concluded in King, "the legislative history is reasonably clear that the LC 16.211(5) clustering standards were intended to supplement, rather than to replace, the other components of the county's Goal 5 program, including Policy 11". Equally clear to the Director, is that the F-2 siting standards were adopted to allow for the doubling of densities in big game habitat in keeping with Policy 11 density limitations.

Not considered by LUBA or any party in *Nimpkish* and *King* were any arguments as to <u>how</u> the F-2 siting standards *supplement* Policy 11. More particularly, not considered was whether the evidence the applicants relied on to support their argument that the F-2 siting standards codified or replaced the density standards, <u>instead</u>, served to clarify that the F-2 siting standards were adopted for the purpose of qualifying F-2 parcels for a less restrictive density standard under Policy 11. In the Director's view, the text, legislative history, and context makes reasonably clear that this was done for the purposes of aligning F-2 parcel size standards with the County's commitment to Policy 11 density limitations to the extent required for plan acknowledgment. Furthermore, this conclusion appears to be generally consistent with LUBA's reasoning in *King*, notwithstanding that LUBA upheld the denial based on an 80-acre standard rather than a 40-acre standard with clustering. As well, the legislative history demonstrates the F-2 siting standards that were adopted in keeping with the lesser 40-acre standard remain in place and are applicable to forest template dwelling proposals.

Policy text. RCP Goal 5 Flora & Fauna Policy 11 states:

> *"Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of Big Game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program."*

In *Nimpkish* and *King*, LUBA concluded that Policy 11 is part of and implements the County's acknowledged Goal 5 program and to give some effect to the second sentence of Policy 11, the County must apply Policy 11 to residential development where the proposal density exceeds ODFW recommendations. The recommendations on overall residential density referenced by Policy 11 are clarified in legislative history and context, most comprehensively in the DLCD staff reports at the time RCP adoption on September 12, 1984 and the DLCD staff reports referenced therein.

The Flora and Fauna Working Paper (March 1982) and its Addendum (November 1983): The Flora & Fauna Working Paper, as modified by the 1983 Addendum, identifies residential use above the overall residential densities recommended by ODFW as the primary conflict with big game. The documents further indicate that ODFW has recommended overall residential densities for Peripheral Big Game range at one dwelling/40 acres and for major big game at one dwelling/ 80 acres. The documents identify density above that limit as a conflict that would only be allowable if justified through the Goal 5 process.

The original Working Paper identified a process involving coordination with ODFW for implementing and codifying the density standards based on a regional approach. The Addendum entirely replaces the text related to that regional approach (beginning with the last paragraph of page 24 and all text on page 25) with new text that focuses on a combination of clustering and siting standards to avoid or resolve conflicts with big game. In *King*, the applicants argued that the revisions support the conclusion that the F-2 siting standards obviated the applicability of Policy 11 density limitations. LUBA disagreed, concluding that, "nothing in the Addendum supports the conclusion that the County proposed, and LCDC acknowledged, abandoning any reliance on density limitations as part of the Goal 5 program to protect big game habitat to rely solely on the siting standards fully implement Policy 11 and big game protections. As LUBA emphasizes, the Addendum left in place the original language that an overall residential density greater than one dwelling per 80 acres in major big game range conflicts with Goal 5. It also included language describing a process to ensure compliance with Goal 5 "in the event that other identified measures (the regional approach, minimum parcels sizes, and clustering) are insufficient- by applying the Goal 5 rule." (*King*, Slip op 19)

The Director understands the Addendum revisions to allow for the possibility of an alternative density standard for preventing -or resolving - big game conflicts via some combination of siting standards and less restrictive density standards that is acceptable to ODFW, as had been indicated in the ODFW correspondence attached to this staff report (**Attachment 4).** Accordingly, the Addendum identified the need for adding to Policy 11 the following statement: "The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program."

July 19, 1984 DLCD Staff Report to LCDC (See Attachment 3.a): The July 1984 DLCD staff report addresses the County's request for plan acknowledgment of compliance with Goals 2, 5, and 15. In *King*, LUBA concluded that the July 19 staff report "clearly illustrates DLCD's expectation that, while additional measures were necessary to ensure full compliance with Goal 5, the ODFW density standards embodied in Policy 11 would continue to play a role in evaluation of development proposals. Nothing in the acknowledgment process eliminated or vitiated the applicability of those density standards to proposed residential development in big game." The applicants had argued that the following DLCD response to objectors and associated "in order to comply" (IOTC) requirement supports the conclusion that Policy 11 Goal 5 protections were fully implemented and codified by the F-2 siting standards.

> *"[Response 3]. ODFW is correct that the County's F-1 and F-2 zones do not incorporate ODFW's development density recommendations, nor do they set forth siting or clustering requirements. Without siting and clustering requirements, the minimum lot sizes in the F-1, F-2 and E zones are half that recommended by ODFW (i.e., the minimum lot sizes would have to be doubled to be acceptable). This is a problem in the F-2 and EFU zones in particular, but not in the F-1 zone, since in general, dwellings are not permitted in that zone." (p. 39, emphasis added)*
>
> *"[IOTC 2.d.} Amend the F-2 and EFU zones to carry out the intent of [Policy 11}. Specifically, the zones must either require larger minimum lot sizes in the Big Game Habitat portions of those zones, or contain clustering requirements in those areas." (p. 75, emphasis added)*

LUBA rejects the applicant's arguments and highlights DLCD's previous response to objectors concerning Policy 11 density standards and Goal 5 compliance:

> *"[Response 2]. Objectors are not correct that [Policy 11] violates Goal 5. Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. The county has, through [Policy 11], however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made. This would require a plan amendment and could only take place if justified based on the Goal 5 analysis. However, as noted previously, the County still needs to adopt measures in its F-2, [Marginal Lands] and EFU zones which ensure ODFW's density standards will be achieved.*
>
> *The second part of the policy requires the County to work with ODFW in preventing conflicts from occurring through land use regulations in resource areas and such things as siting requirement. ODFW is correct that its recommended density standards (if adopted in the ordinance) would constitute an approach to resolve and or prevent conflicts between dwellings and big game habitat. However as discussed below, the county has not adopted such standards in its zoning ordinance." (p. 39, emphasis added).*

Additional context is provided in DLCD's summary of the objections raised by ODFW and 1000 Friends of Oregon on pages 24-36. These are followed by a summary of the County's Goal 5 analysis and implementation measures on pages 27-33. The most relevant statements include:

> *"Big Game Range: The primary conflict with big game range is identified as residential use at densities over one dwelling unit per 40 acres in Peripheral Range, and one unit per 80 acres in Major Range ….The County indicates that its 80-acre commercial timber zoning is very restrictive in terms of dwelling unit placement, and therefore, "it is unlikely that conflicts will occur" in Major Range areas (Addendum, p. 14). Similarly, the County believes its 40-acre zone will satisfy ODFW's recommended density in the Peripheral Range (p. 14)." (p. 27, emphasis added)*
>
> *"The [F-2 Zone] requires a minimum of 20 acres for creation of a woodlot or farm parcel…However, there is no requirement that, in the Big Game Range portions of that zone, densities will not exceed those recommended by ODFW (i.e. one unit per 40 acres in the Peripheral Range, or one unit per 20 acres with clustering and siting standards; one unit per 80 acres win the Major Range, or one unit per 40 acres with clustering and siting standards)." (p. 33, emphasis added)*
>
> *"In the [EFU Zone], a dwelling…may be approved if it meets certain criteria; similarly, a division of land may be allowed for a dwelling….if it meets those criteria…However, none of the criteria address ODFW's dwelling density recommendations…As noted in the Flora and Fauna Working Paper (p.24)…ODFW's recommended density in Peripheral Big Game Range (which , according to the County, is mostly zoned [EFU] is one unit per 40 acres or greater in the Peripheral Big Game Range. There are no standards in the zone which require lot sizes to be 40 acres or greater in the Peripheral Big Game Range portions of the zone, or alternatively, that require clustering of dwellings (to allow densities as greater as one unit per 20 acres." (p. 33, emphasis added)*
>
> *"[Objection 2]. ODFW and 1000 Friends have objected to [Policy 11] since it regards densities above ODFW's recommendations in big game areas to constitute a conflict. ODFW regards its recommended densities as the approach to resolve conflicts between dwellings and game range. 1000 Friends state that Policy 11 allows residential densities to exceed ODFW recommendations 'if conflicts can be resolved in accordance with OAR 660-16-000.' Objectors believe this allows the County to justify density*

levels which exceed those recommended by ODFW through an analysis of ESEE consequences. Objectors do not believe this exclusion is consistent with the Goal 5 Rule. (p. 35, emphasis added)

"[Objection 3]. ODFW objects because, contrary to Policy 11 which adopts ODFW's density recommendation in big game habitat areas, the County's F-1 and F-2 zones do not provide the siting or clustering requirements that need to accompany the density levels allowed in those zones. Similar objections have been filed by 1000 Friends of Oregon. Objectors point out the F-1 zone establishes a minimum lot size of 40 acres, but smaller divisions can be made without regard to big game impacts. The F-2 zone establishes minimum lot sizes of 20 and 40 acres for forest and farm uses, which also fail to meet ODFW's recommended densities for the Peripheral Range, according to objectors. 1000 Friends points out that the Flora and Fauna Working Paper Addendum and Policy 11 prescribe clustering and siting standards, but these are not carried out in the F-2 zone. The Addendum also references forest land minimum lot sizes which are no longer current." (pgs. 35-36, emphasis added)

"[Objection 4.] ODFW and 1000 Friends object because Goal 5 has apparently not been applied in the process of designating marginal land nonresource lands. Objectors are particularly concerned how this affects big game range areas. ODFW contends that the County's plan provisions for lots of record, resource and nonresource-related dwellings, marginal lands, and nonresource lands could allow considerable development in game range. The County's F-1 and F-2 zones do not adequately assure that recommended densities will be maintained. This is further complicated by the fact that it is unclear where marginal and nonresource lands are located, and therefore the extent to which they are in game range areas…1000 Friends points out the Goal 5 must be applied wherever Goal 5 resources occur, even in areas designated marginal or nonresource land." (p. 36, emphasis added)

The above passages recognize that the County's expectation was that the density limitations adopted under Policy 11 were not likely to be exceeded based on other restrictions in place for forest dwellings. They also support LUBA's conclusions in *King* that F-2 siting standard were intended to supplement those density limitations. Specifically, the passages clarify that that ODFW and DLCD understood the County to adopt and adhere to ODFW's density recommendation in big game habitat areas, and that apart from any need to codify the density standards, the general F-2 lot area requirements and dwelling clustering standards were inconsistent with the County's density commitment under Policy 11. Moreover, they clarify that the specific siting standards that were ultimately adopted to satisfy IOTC 2.d. were intended to carry out the purpose of Policy 11 by bringing F-2 lot size requirements into alignment with the County's Policy 11, and that this occurred by justifying the doubling of densities in big game habit in accordance with ODFW overall residential density recommendations in keeping with ODFW's "clustered" density standard. The passages also acknowledge certain differences between other objector's and ODFW's understanding of how ODFW 's density recommendations with clustering square with the Goal 5 rule and Policy 11, with regard to preventing or mitigating conflicts.

August 17, 1984 DLCD Report to LCDC (See Attachment 3.b): DLCD's August 17, 1984 report makes revisions to their July 19 report. The revised response for Objection 4 makes clear that the ODFW density recommendations referenced in Policy 11 include the 'clustered' density standard.

"[Response 4.] Objectors are not correct that the Goal 5 process was not addressed in the process of designating nonresource lands. However, the Goal 5 conflicting uses/ESEE consequences analysis for one of the nonresource areas- Cerro Gordo—does not justify the residential densities proposed.…The applicant has proposed a wildlife management plan which calls for clustering buildings and maintaining wildlife corridors. Although the proposed clustering and wildlife corridor measures will help resolve some of the conflicts identified, the overall density of the development 'with clustering' is one unit per five acres. ODFW recommendations are one per 80 acres (or one per 40 acres with clustering) in major big

game habitat, and one per 40 acres (or one per 20 acres with clustering in peripheral habitat. According to the County's own plan (Policy 11), such densities cannot be exceeded without being justified through an ESEE consequences analysis…" (p. 8, mark-up removed, emphasis added).

Relatedly, the August 17 report revises the conclusions and options for Cerro Gordo, and further clarifies how Goal 5 compliance is achieved under Policy 11, in consideration of the clarifications made in ODFW's objections.

"However, one unresolved Goal 5 issue remains. The Oregon department of Fish and Wildlife (ODFW) indicates (within their objection regarding big game habitat—see Goal 5 section p.35) that provisions authorizing a doubling of densities in big game habitat area is a measure satisfying OAR 660-16-010(3) when clustering of dwellings occurs.

Because the density authorized by Lane County for Cerro Gordo exceeds ODFW's accepted densities mitigation strategy under the "3C" approach (OAR 660-16-010(3)), one of three options remains open to the County to resolve this issue. These options are as follows:

1) *Provide additional ESEE consequences analysis justifying the decision to 'allow the conflicting uses fully' (OAR 660-16-010(2)) at a density exceeding a threshold acceptable to ODFW; or*
2) *Limit the density in the Cerro Gordo development to ODFW's recommended density with clustering consistent with (OAR 660-16-010(3); or*
3) *Cooperate with ODFW to design a mitigation strategy which combines (a) the current wildlife management plan for Cerro Gordo; (b) additional ESEE consequence analysis supporting the decision to allow a density which exceeds ODFW's recommended density with clustering; and (c) other mitigation measures deemed necessary by ODFW…" (pgs. 12 and 13, emphasis added).*

The revised options provided for Cerro Gordo reinforce the view that ODFW's clustered density standard was understood to be a mitigation measure that did not require additional ESEE justification and ODFW acceptance under Policy 11.

September 12, 1984, DLCD Staff Report to LCDC (See Attachment 3.c): The September 12 DLCD staff report recommends acknowledgment of the County's RCP and implementation measures related to big game habitat protection. The report summarizes the steps taken by the County to resolve the deficiencies necessary for acknowledgment. Specific to the July 19, 1984 IOTC 2.d. requirement that the County adopt larger lot sizes or clustering standards to align the F-2 and EFU lot size requirements with ODFW residential density recommendations, the report concludes that Lane County opted to meet the requirement via clustering:

"Requirement [IOTC 2.d.} Amend the F-2 and EFU zones to carry out the intent of [Policy 11}. Specifically, the zones must either require larger minimum lot sizes in the Big Game Habitat portions of those zones, or contain clustering requirements in those areas.

Response. Lane County has added the following new language to both the F-2 and EFU Zones:

(a) The Approval Authority shall balance the setback standards of LC 16.211(a)(a) with the siting requirements and application of approval criteria specified elsewhere in LC 16.211 in order to minimize adverse impacts upon forest uses and to assure optimal siting of proposed residences consistent with the purposes of the F-2 [EFU] zone.
   (i) Residences to be sited upon tracts located within a big game range as designated by the Department of Fish and Wildlife shall be sited as follows:
      (aa) Near residences on other tracts.
      (bb) With minimal intrusion into forest areas undeveloped by nonforest uses.

> *(cc) Where possible, when considering LC 16.211(8)(a)(i)(aa) and (bb) above and the dimensions and topography of the tract, at least 500 feet from the adjoining lines of property zoned F-1 and 100 feet from the adjoining lines of property zoned F-2 or EFU."*

Specific to Cerro Gordo, the report concludes that compliance was achieved as follows:

> *"The County's policy is to abide by ODFW's density recommendation unless the entire Goal 5 process is applied and a decision to exceed these recommendations is justified. Lane County has adopted supplementary findings (Order No. 84-9-11-23) and has revised its ESEE consequences analysis and wildlife habitat management plan for Cerro Gordo to justify development in a recognized big game habitat area, in excess of ODFW's recommended density standards. A meeting was held on August 14, 1984 with ODFW, Cerro Gordo, and DLCD representatives to discuss this issue. It was determined that, in this case, ODFW density recommendations do not have as much bearing on the acceptability of the development as do other factors. These factors include the overall number and location of dwellings and roads, as well as mitigating measures incorporated into the development. The following factors in the revised Cerro Gordo proposal are particularly relevant (Order No. 84-9-11-23)…*
>
> *Because of these and other factors addressed in the County's amended findings, the impacts on big game range are thought to be acceptable by ODFW. Allowing such conflicts to occur, but with restrictions outlined above, is a (3C) decision under the Goal 5 Administrative Rule. The County has justified this decision. (p. 11-12, original emphasis preserved)*

Noteworthy is that DLCD's response includes no caveats with respect to the County's policy to abide by ODFW's density limitations. Also noteworthy is that the response suggests that the County's choice to justify exceeding ODFW overall density recommendations via the Goal 5 process, and ODFW acceptance of mitigation measures on a different basis than density, were emphasized to be isolated to Cerro Gordo proposal. DLCD's response underscores that as of the date of RCP adoption, Policy 11 was understood by the County, DLCD, and ODFW to require additional ESEE justification and ODFW's blessing to justify approval of dwellings that exceed the ODFW clustered density standard and such path had not been taken for implementation of Goal 5 protections in F-2 big game habitat areas.

Ordinance No 11-84, enacted September 12, 1984 (See Attachment 5): Under this ordinance, the Board adopted multiple changes to Lane Code Chapter 16 satisfy LCDC's IOTC requirements and gain RCP acknowledgment. These included changes to the F-2 and EFU siting standards for clustering in big game habitat areas to resolve IOTC 2.d. The adopted siting standards for the F-2 and EFU zones each included a two-track approach, depending on whether a property was located within or outside of big game habitat. Per the Board findings, "small groupings of residences will have less of an adverse impact on wildlife and resource uses in the big game range than would more scattered residences. However, if not within the big game range, mitigation of possible adverse effects on the resource uses of neighboring properties is a more important consideration."

Ordinance No. 11-91A, enacted July 31, 1991 (See Attachment 6): LCDC's acknowledgment of the RCP and Chapter 16 under Ordinance No. 11-84 was appealed and remanded by the Supreme Court in 1988. The County's Goal 5 big game habitat protection program was not an appeal issue. In response to Goal 4 and other related Goal 5 compliance issues remanded back to LCDC by the Supreme Court, LCDC required certain changes to the F-2 zone, included changes to the F-2 siting standards. In response, Lane County was directed to make several changes to bring the F-1 and F-2 zone siting standards into compliance with Goal 4. These included a requirement to bring the RCP into compliance with Goal 4 via the elimination of the siting standards track that had applied to tracts outside of big game habitat areas "with the result that [the big game habitat] standards have now become applicable to all areas."

Denominator for Calculating Density - ODFW Correspondence. In *King*, LUBA recognized that the Policy 11 text is ambiguous with respect *how* density standards apply, particularly with respect to the denominator to be used for applying the standard. LUBA agreed that the reference to "overall" in the first sentence suggests averaging more than one unit or number, such as averaging parcel sizes for two or more parcels, but saw no mathematical or logical reason why the appropriate denominator cannot be based on the number of acres in a single unit of land. As noted by LUBA, this was the approach that had been adopted by the Board and affirmed by LUBA for *Cattoche* v. *Lane County*, 79 Or LUBA 466 (2019).

On the whole, the legislative history and context generally indicates the expectation that the decision on how to apply ODFW density limitations would necessarily require further coordination with ODFW how to apply and codify ODFW's density recommendation and that alternative mitigation measures would require additional ESEE justification. This is made clear in the available ODFW correspondence regarding the department's density recommendations referenced in the Flora & Fauna Working Paper and Addendum and Policy 11. It should be noted that the correspondence predates ODFW's objection letters to DLCD and DLCD's responses provided in the 1984 DLCD staff reports and was not in the *King* LUBA record.

That RCP acknowledgement was predicated on the actions taken by the County to make F-2 lot size and clustering standards consistent with Policy 11 density limitations, lends support for the conclusion that ODFW's overall density recommendations were acknowledged to be reasonably applied based on parcel size in the absence of further coordination with ODFW.

In sum, the context makes clear that ODFW density recommendations referenced under Policy 11 consisted of a preferred density standard and an acceptable density standard with clustering. The context also indicates that the County adopted siting standards to qualify for the lesser density standard with clustering. Further, the context appears to indicate that the County and DLCD contemplated that these would be applied on a parcel size denominator absent further coordination with ODFW. Accordingly, the subject properties would each need to be 40 acres in size to satisfy Policy 11 standards rather than 80 acres, as had been understood for the 2020 *King* proposals.

VI. REFERRAL COMMENTS

As of the date of this report, no referral comments or written testimony has been submitted in response to the hearing notice.

VII. CONCLUSION

For the reasons explained above, the Director concludes that the proposal does not satisfy Policy 11, based on its failure to meet ODFW's recommended 40-acre 'clustered' density standard for major big game habitat with parcel size as the denominator.

Apart from Policy 11 density standards, the Director concludes that the applicable criteria and standards would be satisfied based on the staff evaluation and conditions of approval provided in **Attachment 1**.

VIII. ATTACHMENTS

Attachment 1: Staff Evaluation

Attachment 2: Application materials (partial)
a. Site Plan
b. Submittal Letter
c. Application Form
d. Supplemental Narrative

Attachment 3: DLCD Staff reports
a. July 19, 1984
b. August 17, 1984
c. September 12, 1984

Attachment 4: ODFW Correspondence
a. November 1, 1983
b. October 7, 1983
c. August 11, 1983
d. May 6, 1983
e. December 9, 1980
f. June 16, 1980

Attachment 5: Ordinance 11-884

Attachment 6: Ordinance 11-91A

Attachment 7: May 8, 20232 Lane County Homebuilder's Association Policy 11 Interpretation request

*Additional information to be included in the digital file record: *King* LUBA Record