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DATE: June 29, 2022

TO: Interested Parties

FROM: Land Management Division Planning

RE: Advisory regarding the applicability of RCP Goal 5 Flora & Fauna Policy 11 dwelling density standards to proposals for new dwellings in Goal 5 Big Game Habitat areas

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The Oregon Land Use Board of Appeals (LUBA) and Oregon Court of Appeals have recently held that Lane County Rural Comprehensive Plan (RCP) Goal 5, Flora & Fauna Policy 11 (Policy 11) must be applied directly as an approval criterion for new dwelling proposals on parcels within designated 'Major' and 'Peripheral' Big Game Habitat areas. This advisory provides an overview of the relevant appeal rulings, and clarifies Lane County's understanding of the current requirements for processing new dwelling proposals to which RCP Goal 5 Policy 11 applies.

### **Background**

Counties must adopt comprehensive plans and land use regulations that implement Oregon's Statewide Planning Goals and laws, including Statewide Planning Goal 5 requirements to protect natural resources and conserve scenic and historic areas and open spaces.

The Lane County Rural Comprehensive Plan (RCP) applies to all unincorporated lands within the County that are outside of the Urban Growth Boundaries of incorporated cities and beyond the boundary of the Eugene-Springfield Metropolitan Area Plan. The RCP was acknowledged to comply with Goal 5 by the Land Conservation and Development Commission in 1984. In tandem with the RCP, Lane Code land use regulations were adopted to implement RCP plan policies and Statewide Planning Goals. The County's acknowledged Goal 5 program for natural resource protection within the RCP plan area includes a map and inventory of Big Game Habitat determined to be "significant or important." County GIS data layers that illustrate the mapped inventory can be viewed here:

<https://lcmaps.lanecounty.org/LaneCountyMaps/ZoneAndPlanMapsApp/index.html>

The County's acknowledged Goal 5 program includes Policy 11, which establishes density standards for residential development on properties in 'Major' and 'Peripheral' Big Game Habitat to avoid conflicts with Goal 5 Big Game habitat. Historically, the Land Management Division (LMD) considered Policy 11 dwelling density standards only to apply plan amendments, zone changes, and land division proposals, and not to apply to new dwelling proposals on existing parcels. For the purpose of proposed development on existing parcels, LMD understood the County's Goal 5 program for Big Game Habitat protection to have been incorporated in and implemented by zoning regulations and siting standards that were considered to resolve potential conflicts between residential development and Big Game Habitat. More recently, however, State appeal authorities have held the County has applied Policy 11 too narrowly and have addressed when and how Policy 11 must be applied.

## **RCP Goal 5, Flora & Fauna Policy 11**

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.*

The Oregon Department of Fish & Wildlife (ODFW) recommendations referenced in Policy 11 consist of an overall residential density standard of one (1) dwelling per 80 acres in 'Major' Big Game Habitat and one (1) dwelling per 40 acres in 'Peripheral' Big Game Range. No density standard applies to Big Game Habitat areas identified as 'Impacted,' as these are recognized to be impacted to a degree that does not afford protection under Goal 5. See the 1982 Lane County Flora & Fauna Working Paper, as amended by an Addendum in 1983 for details.

### **Recent Appeal Decisions**

*Nimpkish LLC (LUBA No. 2020-030)*: On January 21, 2021, LUBA issued a Final Order and Opinion concerning County approval of a forest template dwelling on a 10-acre parcel within 'Major' Big Game Habitat. LUBA rejected the County's position that Goal 5 Big Game Habitat protections for existing parcels are implemented entirely through zoning and siting standards and the County's past practice of applying Policy 11 only in the context of land division and plan amendment/zone change proposals. LUBA sustained the opponent's contentions that (1) Policy 11 applies to template dwelling applications; (2) the proposed template dwelling exceeded the applicable density standard of one dwelling unit per 80 acres in conflict with Goal 5; and (3) the proposed template dwelling could be allowed only after resolution in accordance with the Goal 5 process in OAR 660-16-000. LUBA further held that Policy 11 must be interpreted in a "in a manner that is not inconsistent with Goal 5."

*King/EJK Investments (LUBA No. 2021-047)*: On October 15, 2021, LUBA issued a Final Order and Opinion affirming County denials (based on *Nimpkish*) of two applications for template dwellings on contiguous 12-acre parcels in designated Big Game Habitat. LUBA's ruling was appealed to the Oregon Court of Appeals and affirmed without opinion on December 28, 2021. On appeal, LUBA revisited and affirmed its previous holding in *Nimpkish* with consideration of the new information and arguments before them. LUBA also addressed the manner in which Policy 11 density standards apply. LUBA rejected the argument that compliance with Policy 11 density standards may be determined by averaging the density of the entire County Big Game Habitat area or a specific region. Further, LUBA affirmed that calculating density based on parcel size is an appropriate methodology that is consistent with past Board interpretation, at least in one Plan Amendment and Zone Change application (*Cattoche*). In other words, to be approvable, dwellings must be located on subject properties large enough to meet the applicable density standard (1 dwelling / 40 acres or 80 acres).

*Hendrickson (LUBA No. 2021-117)*: On April 11, 2022, LUBA reversed a Hearings Official decision that had denied a temporary medical hardship dwelling in the Exclusive Farm Use (EFU) Zone due to lack of compliance with Goal 5 Policy 11. The subject property consisted of five acres located within a designated Major Big Game Range. The Hearings Official held that Policy 11 density standards apply to dwelling proposals in Big Range areas regardless of zoning, and reversed the Planning Director approval. In summary, LUBA found that Policy 11 cannot be applied to dwelling types specifically allowed outright in the EFU zone under ORS 215.213(1), including EFU temporary hardship dwellings, based on *Brentmar v. Jackson County*, 321 Or. 481, 900 P.2d 1030

(1995). In *Brentmar*, the Supreme Court held that a county may not enact or apply more stringent criteria of its own that supplement the ORS 215.213(1) ('sub (1)') uses allowed under ORS 215.213.

### **Current Practice & Options for RCP Area Dwelling Proposals**

As clarified in recent appeal decisions, Policy 11 density standards must be met for all land use applications proposing new or additional dwellings on parcels within 'Major' and 'Peripheral' Big Game Habitat, with the exception of certain dwellings in the EFU zone. These EFU exceptions include temporary hardship dwellings, farm dwellings, and other dwelling types specifically allowed in the EFU zone pursuant to ORS 215.213(1). All new or additional dwellings in forest zones, including temporary hardship dwellings, require land use application approval subject to compliance with Goal 5 Policy 11 residential density standards. As provided in the Flora and Fauna Working Paper Addendum, Rural Residential zoned areas and other acknowledged Developed & Committed exception areas are recognized as Impacted Big Game Habitat regardless of habitat mapping, and are not subject to Policy 11 density standards. Where applicable, density standards are calculated based on the number of dwellings within the subject property. Certain exceptions may apply. Please check with the planner on duty (541-682-3577) to confirm the applicability of this density standard to your property.

### **Possible Options for prospective Property Owners or Applicants for New or Additional Dwellings in Major and Peripheral Big Game Habitat Areas**

1. Seek advice from a private local land use consultant or land use attorney concerning the implications of appeal decisions and the potential for dwelling approval.
2. For dwelling proposals that meet the density standard or that are not subject to the density standard, proceed with preparation and submittal of the required land use application that addresses and demonstrates compliance with all applicable criteria and standards.
3. For dwelling proposals that do not meet the density standard and, therefore, conflict with Goal 5 Big Game resources, a land use application for the addition of the dwelling could only be approved after resolution of the conflict in accordance with OAR 660-016-0005 and 0010 via an Economic, Social, Environmental, and Energy (ESEE) Analysis. If the property owner wishes to proceed with an ESEE to resolve the conflict in lieu of meeting the density standard for a specific property, LMD understands per recent appeal decisions that the RCP Goal 5 program would need to be amended. The owner could pursue this option via the Type IV land use application process prior to submittal of a Type II new dwelling application. Type IV permits are accompanied by a processing fee and take approximately 1-2 years to process. Note, an ESEE analysis would likely need to be accompanied by reports from a qualified professional (such as biologist, agronomist, etc.) and, potentially, a letter from ODFW to support the applicant's findings on Big Game resources. A Type IV land use application process entails public hearings with the Lane County Planning Commission and Lane County Board of Commissioners.

**If you have questions about this memo, please feel free to meet with the planner-on-duty at 3050 N. Delta Highway from 9 am to 3 pm, Monday through Friday.**