

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

3
4 DELTA PROPERTY COMPANY LLC,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11 and

12
13
14 JOEL NARVA and TERESA NARVA,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2013-061

18
19 FINAL OPINION
20 AND ORDER

21
22 On remand from the Court of Appeals.

23
24 Bill Kloos, Eugene, represented petitioner.

25
26 Stephen L. Vorhes, Assistant County Counsel, Eugene, represented
27 respondent.

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29 Zack P. Mittge, Eugene, represented intervenors-respondents.

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31 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board
32 Member, participated in the decision.

33
34 AFFIRMED

10/07/2015

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

INTRODUCTION

This appeal concerns a county decision that denies petitioner Delta Property Company LLC’s (Delta’s) request for a special use permit to mine gravel and aggregate resources on Exclusive Farm Use (EFU)-zoned land adjacent to petitioner’s existing mine, which is zoned Sand and Gravel (S-G), a zone that allows mining. To be eligible for the requested special use permit on EFU-zoned land under ORS 215.298(2), Delta was required to show that the proposed mining site is included on a Goal 5 inventory of significant aggregate resource sites.

Lane County and the cities of Springfield and Eugene have all adopted a common comprehensive plan called the Metro Plan, which applies inside the two cities and to a portion of the county located outside the two cities. Both the Metro Plan and the Lane County Rural Comprehensive Plan (RCP) have been acknowledged by the Land Conservation and Development Commission (LCDC) to comply with the statewide planning goals, including Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). The central issues in this appeal are (1) whether the proposed mining site is included on the Metro Plan Goal 5 inventory of significant aggregate resource sites, and (2) whether the proposed mining site must be included on the county’s RCP Goal 5 inventory of significant aggregate resource sites.

1 The county denied petitioner’s request, concluding that the proposed
2 mining site is not included on either the county’s or the Metro Plan’s Goal 5
3 inventory of significant aggregate resource sites. Delta assigned error to the
4 county’s finding that the proposed mining site must be included on the *county’s*
5 Goal 5 inventory of significant aggregate resource sites.¹ Delta argued the
6 proposed mining site is only required to be included on the *Metro Plan*
7 inventory of significant aggregate resource sites. LUBA rejected that
8 argument, with the result that the county’s decision had to be affirmed, without
9 regard to whether the proposed mining site is included on the Metro Plan Goal
10 5 inventory of significant aggregate resource sites. Because rejecting Delta’s
11 challenge to this reason for denial involved “a fairly novel issue of law,”
12 LUBA also considered Delta’s challenge to the second basis of denial, even
13 though LUBA’s rejection of Delta’s challenge to the other basis for denial
14 made it unnecessary to do so. *Delta Property v. Lane County (Delta I)*, 69 Or
15 LUBA 305, 309 (2014).

16 The county’s finding that the proposed mining site is not located on the
17 Metro Plan Goal 5 inventory of significant aggregate resource sites required
18 interpretation of the Metro Plan. In our initial decision in this matter we
19 concluded the county commissioners were not entitled to deferential review

¹ It was undisputed that Delta’s proposed mining site is not included on the Lane County Goal 5 inventory of significant aggregate resource sites. The dispute was whether it needed to be included on the county inventory.

1 under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d
2 776 (2010), because it was only one of the three governing bodies (Lane
3 County Commission, Eugene City Council, and Springfield City Council) that
4 enacted the Metro Plan. We reviewed the Goal 5 planning documents that
5 were submitted for acknowledgment as well as Department of Land
6 Conservation and Development (DLCD) acknowledgement staff reports and
7 ultimately concluded that the proposed mining site is included on the Metro
8 Plan inventory of significant resource sites, and that the county was incorrect in
9 deciding otherwise. We therefore sustained Delta's assignment of error
10 challenging that basis for denial, and affirmed the county's decision based
11 solely on its finding that the proposed mining site must be included on the
12 county's Goal 5 inventory of significant aggregate resource sites before it may
13 be granted a mining permit under ORS 215.298(2).

14 On appeal our decision was affirmed in part and reversed in part. *Delta*
15 *Property Co., LLC v. Lane County*, 271 Or App 612, 352 P3d 86 (2015). The
16 Court of Appeals affirmed the part of our decision that affirmed the county
17 finding that Delta's request must be denied because the proposed mining site is
18 not included on the Lane County Goal 5 inventory of significant aggregate
19 resource sites. But the Court of Appeals reversed the part of our decision that
20 declined to extend deference to the county's interpretations that led it to
21 conclude that the proposed mining site is not included on the Metro Plan Goal
22 5 inventory of significant aggregate resources:

1 “Accordingly, we conclude that LUBA was required to determine
2 whether to give the county’s interpretations of the Metro Plan
3 deference. In this case, LUBA did not determine whether any
4 exception to deference under ORS 197.829(1) was applicable. As
5 the factual summary above reflects, the county determined, based
6 in part on its interpretation of parts of the Metro Plan, that Delta’s
7 proposed expansion site was not on a 1C inventory of aggregate
8 resources.[²] Likewise, based in part on its interpretation of parts
9 of the Metro Plan, without regard to any statutory requirement to
10 give deference to the county’s interpretations, LUBA concluded
11 that the county’s decision was incorrect. LUBA failed to comply
12 with ORS 197.829(1) and failed to consider whether the county’s
13 interpretations of the Metro Plan were plausible.

14 “We therefore reverse LUBA’s decision in favor of Delta on
15 Delta’s first assignment of error before LUBA and remand for
16 LUBA to conduct an analysis that gives due deference to the
17 county’s interpretation of the Metro Plan. * * *” 271 Or App at
18 645-46.

19 **DECISION**

20 ORS 197.829(1) provides:

21 “The Land Use Board of Appeals shall affirm a local
22 government’s interpretation of its comprehensive plan and land
23 use regulations, unless the board determines that the local
24 government’s interpretation:

25 “(a) Is inconsistent with the express language of the
26 comprehensive plan or land use regulation;

27 “(b) Is inconsistent with the purpose for the comprehensive plan
28 or land use regulation;

29 “(c) Is inconsistent with the underlying policy that provides the
30 basis for the comprehensive plan or land use regulation; or

² We explain below the meaning of the 1C nomenclature.

1 “(d) Is contrary to a state statute, land use goal or rule that the
2 comprehensive plan provision or land use regulation
3 implements.”

4 Under the Supreme Court’s decision in *Siporen*, LUBA must affirm a local
5 governing body’s interpretations of its own land use legislation unless the
6 interpretation is not “plausible.” 349 Or at 261. For the reasons set out below,
7 we conclude that none of the four exceptions set out in ORS 197.829(1) apply
8 here, and accordingly we are required to affirm the county’s interpretation.

9 **A. Goal 5 1C Inventories of Significant Aggregate Resources**

10 As we explained at some length in our initial decision, most of the
11 planning that preceded acknowledgment of the Metro Plan and the Lane
12 County RCP under Goal 5 occurred prior to adoption of the Goal 5
13 administrative rule. And DLCD’s acknowledgment under Goal 5 occurred
14 during the early days of the Goal 5 administrative rule. As a result, this appeal
15 has been more like a scavenger hunt for the Metro Plan inventory of significant
16 aggregate resource sites than a normal interpretive enterprise.³ But the case is

³ As we explained in our initial decision:

“This case would be much easier if there actually was a Metro Plan [Goal 5 inventory of significant aggregate resource sites], labeled as such; but there is not. One of the major tasks in this appeal is culling the Metro Plan [Goal 5 inventory of significant aggregate resource sites] from the somewhat disjointed planning and acknowledgment process that led to acknowledgment of the Metro Plan and Lane County [Rural Comprehensive Plan] and Land Use and Development Code. * * *” *Delta I*, 69 Or LUBA at 313 n 2.

1 now remanded to us to review the county’s interpretation that the aggregate
2 sites shown on a document called the Metro Plan Technical Report Map 3 are
3 not part of the Metro Plan inventory of significant aggregate resource sites
4 unless they are also zoned S-G. The proposed mining site is on the Metro Plan
5 Technical Report Map 3, but it is not zoned S-G. For that reason, the county
6 found the proposed mining site is not included on the Metro Plan Goal 5
7 inventory of significant aggregate resource sites.

8 Under LCDC’s initial Goal 5 rule, a local government had three
9 inventory options: (a) do not include the resource on the inventory because it is
10 a nonsignificant resource; (b) delay the Goal 5 process until more information
11 is available; or (c) include the resource on the plan inventory as a significant
12 resource. OAR 660-016-0000(5)(a)-(c). Those options were known
13 respectively as “1A,” “1B,” and “1C” options.

14 An aggregate site must be on a 1C inventory to qualify for a permit to
15 mine under ORS 215.298(2). As just noted, the Goal 5 rule also envisioned
16 situations where there may not be enough information about an aggregate
17 resource site to perform the kinds of analysis and planning that is required to
18 adopt a program to protect the site or to determine that that site is not worthy of
19 protection. Those kinds of sites may be included on what is referred to as a 1B
20 inventory. Sites that are included on a 1B inventory are not eligible for permits
21 to mine in EFU zones under ORS 215.298(2).

1 **B. The Working Papers**

2 Our review in our initial decision focused first on two documents, one
3 called the 1978 Sand and Gravel Resources Working Paper, the other called
4 The Natural Assets and Constraints Working Paper. Simply stated, those
5 documents depict a larger area of mineral and aggregate sites and a smaller area
6 of mineral and aggregate resource sites. The county takes the position that the
7 smaller area, which does not include the proposed mining site, is the 1C
8 inventory. Delta took the position that the larger area, which does include the
9 proposed mining site, is the 1C inventory. Based on our review of the text of
10 the two documents, we concluded both positions found some support in the two
11 documents, with the county’s position finding a little more support than Delta’s
12 position in the 1978 Sand and Gravel Resources Working Paper.

13 **C. LCDC’s Acknowledgment**

14 Our initial decision discusses LCDC’s acknowledgment of the Metro
15 Plan for compliance with Goal 5 at some length. *Delta I*, 69 Or LUBA at 329-
16 33; 335. We will not repeat that analysis here. Based on directives by DLCD
17 regarding mapping of Goal 5 resources, the Metro Plan jurisdictions ultimately
18 submitted Metro Plan Technical Report Map 3 to comply with DLCD’s
19 directives. The inventory of aggregate resource sites on Metro Plan Technical
20 Report Map 3 corresponded with the larger areas shown on the working papers,
21 and included the proposed mining site. Largely on the basis of that
22 acknowledgment history, we concluded that DLCD’s acknowledgment

1 supported a conclusion that the Metro Plan Technical Report Map 3 is the
2 Metro Plan 1C inventory of significant aggregate resource sites.

3 **D. The County's Interpretation**

4 The county hearings officer's reasoning for concluding that the proposed
5 mining site is not on the Metro Plan 1C inventory of significant aggregate
6 resource sites begins at Record 63 and concludes on Record 67. Because the
7 board of commissioners adopted the hearings officer's decision as its own, the
8 hearings officer's interpretations are entitled to deference under ORS
9 197.829(1) and *Siporen. Green v. Douglas County*, 245 Or App 430, 438 n 5,
10 263 P3d 355 (2011). The ultimate interpretation is in four parts at Record 67,
11 and that interpretation is set out in the Court of Appeals decision. 271 Or App
12 at 640-41. While some aspects of that ultimate interpretation are questionable
13 or irrelevant, the primary basis for the county's interpretation that the proposed
14 mining site is not on the Metro Plan 1C inventory was that the county could
15 find no evidence that the conflicting use analysis that is required under the
16 Goal 5 rule for sites on a 1C inventory had been completed for the larger areas
17 shown on the working papers and the Metro Plan Technical Report Map 3 that
18 are not zoned S-G.

19 **E. Decision**

20 Returning to our standard of review, Metro Plan Technical Report Map 3
21 is part of the Metro Plan, which is a comprehensive plan, and county board of

1 commissioners' interpretations of Metro Plan Technical Report Map 3 are
2 entitled to deference under ORS 197.829(1) and *Siporen*.

3 As we have already explained in our initial decision and in this decision,
4 the key planning documents that can be called inventories are all ambiguous
5 about what kind of inventory they are. None of them include any express
6 language that clearly identifies them as 1C or 1B inventories or some
7 combination of the two. Therefore, the county's interpretation is not
8 "inconsistent with the express language of the comprehensive plan," and ORS
9 197.829(1)(a) does not apply here. We also do not see that the interpretation is
10 "inconsistent with the purpose for the comprehensive plan" or "inconsistent
11 with the underlying policy that provides the basis for the comprehensive plan,"
12 or "contrary to a state statute, land use goal or rule that the comprehensive plan
13 provision or land use regulation implements," making ORS 197.829(1)(b), (c)
14 and (d) inapplicable. The county's interpretation that the larger areas shown on
15 the working paper figures and Metro Plan Technical Report Map 3 does not
16 constitute the Metro Plan 1C inventory and that sites shown on that map are not
17 included on the 1C inventory unless they are also zoned S-M was based in
18 large part on the county's finding that the detailed conflict identification and
19 resolution analysis that is part of developing the required program to protect
20 inventoried significant mineral and aggregate resources has not been completed
21 for sites that are not zone S-G. The evidence in the record supports that
22 conclusion. That reasoning is fully consistent with the "purpose" and

1 “underlying policy” of a 1C inventory and fully consistent with the applicable
2 Goal 5 administrative rule requirements.

3 Our initial decision applied the wrong standard of review and therefore
4 asked and answered the wrong question. Based on numerous ambiguities in
5 the planning documents LUBA relied heavily on the acknowledgment history
6 of the Metro Plan to conclude the Metro Plan Technical Report Map 3 is
7 correctly viewed as the Metro Plan 1C inventory. However, the issue is not
8 whether the Metro Plan Technical Report Map 3 is correctly viewed as the
9 Metro Plan 1C inventory. The issue is whether the Lane County Board of
10 Commissioners’ contrary interpretation is reversible under ORS 197.829(1)
11 and *Siporen*. That interpretation is that Metro Plan Technical Report Map 3 is
12 not correctly viewed as the Metro Plan 1C inventory, except as to sites on that
13 inventory that are zoned S-G. For the reasons explained above, we conclude
14 that the county’s interpretation is not reversible under ORS 197.829(1) and
15 *Siporen*.

16 The county’s decision is affirmed.