

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON DEPARTMENT OF)
5 TRANSPORTATION,)

6)
7 Petitioner,)

8)
9 and)

10)
11 DEPARTMENT OF LAND CONSERVATION)
12 AND DEVELOPMENT,)

LUBA No. 92-099

13)
14 Intervenor-Petitioner,) FINAL

15 OPINION

16) AND ORDER

17 vs.)

18)
19 KLAMATH COUNTY,)

20)
21 Respondent.)

22
23
24 Appeal from Klamath County.

25
26 Lucinda Moyano, Assistant Attorney General, Salem,
27 filed the petition for review on behalf of petitioner and
28 intervenor-petitioner. With her on the brief were Charles
29 S. Crookham, Attorney General; Jack Landau, Deputy Attorney
30 General; Virginia L. Linder, Solicitor General; and Jane
31 Ard, Assistant Attorney General.

32
33 Reginald R. Davis, County Counsel, Klamath Falls, filed
34 the response brief on behalf of respondent.

35
36 HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,
37 Referee, participated in the decision.

38
39 REMANDED 05/10/93

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 The Oregon Department of Transportation (ODOT) appeals
4 a county decision denying its request that certain property
5 be included on the county's inventory of Statewide Planning
6 Goal 5 (Open Space, Scenic and Historic Areas, and Natural
7 Resources) resource sites.

8 **MOTION TO INTERVENE**

9 The Department of Land Conservation and Development
10 (DLCD) moves to intervene on the side of petitioner in this
11 appeal. There is no opposition to the motion, and it is
12 allowed.

13 **FACTS**

14 The relevant facts were set out in our prior order on
15 respondent's motion to dismiss as follows:

16 "[ODOT] owns a 10.5 acre site which is not
17 presently identified in the county comprehensive
18 plan as a Statewide Planning Goal 5 * * * site.
19 [ODOT] wants the county to designate the site as a
20 significant aggregate resource site. Following a
21 joint public hearing before the Klamath County
22 Planning Commission and the Klamath County Board
23 of Commissioners, the planning commission applied
24 Goal 5 and the Goal 5 administrative rule (OAR
25 Chapter 660, Division 16) and recommended approval
26 of Draft Ordinance 44.23.¹ Thereafter, the board
27 of county commissioners adopted the challenged
28 order rejecting Draft Ordinance 44.23.² This
29 appeal followed.

30 _____

31 ¹Draft Ordinance 44.23 proposed the
32 following actions:

- 1 "1. Amend the Klamath County Comprehensive Plan
2 map of Mineral and Aggregate Resources to
3 show the subject property.
- 4 "2. Amend the plan Goal 5 inventory material to
5 include information concerning the subject
6 property.
- 7 "3. Amend the plan map of Significant Goal 5
8 Resources to show the subject property.
- 9 "4. Apply the Significant Resources Overlay zone
10 to the subject property.
- 11 "5. Require that aggregate removal at the site be
12 conducted in accordance with Article 81 of
13 the Klamath County Land Development Code.

14 "2The effect of the board of county
15 commissioners' order is to leave in place the
16 existing acknowledged comprehensive plan and land
17 use regulation provisions." ODOT v. Klamath
18 County, ___ Or LUBA ___ (LUBA No. 92-099, Order on
19 Motion to Dismiss, March 3, 1993), slip op 1-2.

20 **FIRST ASSIGNMENT OF ERROR**

21 Under their first assignment of error, petitioner ODOT
22 and intervenor-petitioner DLCD (petitioners) argue the
23 county improperly characterized the challenged decision as
24 legislative. Petitioners contend the challenged decision is
25 quasi-judicial.

26 The county earlier moved to dismiss this appeal,
27 arguing the challenged decision is a decision not to adopt a
28 legislative amendment to an acknowledged comprehensive plan.
29 Decisions not to adopt legislative amendments to an
30 acknowledged comprehensive plan are not appealable to this
31 Board. ORS 197.620(1). For the reasons explained in our
32 Order on Motion to Dismiss, we agree with petitioners that

1 the challenged decision is quasi-judicial.

2 The first assignment of error is sustained.¹

3 **SECOND ASSIGNMENT OF ERROR**

4 Under their second assignment of error, petitioners
5 contend the county failed to follow comprehensive plan and
6 administrative rule provisions governing identification,
7 analysis and protection of aggregate resource sites under
8 Goal 5.

9 **A. The Goal 5 Process**

10 Among the Klamath County Comprehensive Plan Goal 5
11 policies is policy 2, which provides as follows:

12 "Inventories of significant resources shall be
13 reviewed using the OAR 660-16-000 process for
14 identifying the quantity, quality, and location of
15 each site. When conflicting uses are identified,
16 the economic, social, environmental, and energy
17 consequences of the conflicting [uses] shall be
18 determined and the conflicting [uses] shall be
19 allowed, limited or prohibited.

20 "* * * * *

21 "Implementation

22 "• The County Planning Department shall review
23 existing and newly submitted sites and
24 develop implementing programs to resolve
25 conflicts in accordance with OAR 660-16-000.

26 "* * * * *"

¹As we explained in our Order on Motion to Dismiss, we have jurisdiction in this matter because the county's decision is correctly viewed as a quasi-judicial rather than a legislative decision. However, the county's incorrect characterization of its decision as legislative, of itself, provides no basis for reversal or remand of the county's decision.

1 In Ramsey v. City of Portland, 23 Or LUBA 291, 295,
2 aff'd 115 Or App 20 (1992), we explained the way the Goal 5
3 rule (OAR 660-16-000 et seq) works:

4 "* * * The Goal 5 rule sets out a detailed process
5 for complying with Goal 5 which includes (1)
6 inventorying the location, quality and quantity of
7 Goal 5 resources; (2) identifying conflicting uses
8 for such resources; (3) analyzing the economic,
9 social, environmental and energy (ESEE)
10 consequences of such conflicts; and (4) adopting a
11 program to achieve the goal of resource
12 protection. * * *"

13 The county reviewed the proposal to include ODOT's site
14 on its Goal 5 inventory of aggregate resource sites as part
15 of its obligation under periodic review. See ORS 197.628;
16 197.633; OAR Chapter 660, Division 19. The county planning
17 staff prepared a draft ordinance and supporting
18 documentation to add the site to the county's inventory of
19 significant aggregate resource sites. The staff's
20 supporting documentation included an identification of
21 conflicting uses, an ESEE analysis and a recommended program
22 to allow development of the aggregate resource.²

23 The board of county commissioners rejected the draft
24 ordinance and adopted the following findings in support of
25 its decision:

²The program options under OAR 660-16-010 include "Protect the Resource Site" (OAR 660-16-010(1)), "Allow Conflicting Uses Fully" (OAR 660-16-010(2)), and "Limit Conflicting Uses" (OAR 660-16-010(3)). The staff recommended that conflicting uses be limited to facilitate aggregate extraction, as allowed under the OAR 660-16-010(3) program option.

1 "1. The site is owned by the Oregon State Highway
2 Department.

3 "2. The property is located * * * at the junction
4 of Balsam Drive and Long Lake Road. The site
5 is approximately 10.5 acres in size and is
6 zoned RS (Suburban Residential), a zone for
7 residential uses such as single family
8 dwellings and manufactured homes.

9 "3. The Klamath County Land Development Code
10 requires that the impact area be a minimum of
11 1000 feet and the existing permitted uses are
12 as close as 300 feet from the boundaries of
13 the site.

14 "4. The quarry site would be visible from several
15 homes. Blasting could effect [sic] their
16 water wells, and cause structural damage.
17 Also, * * * there would be an increase in
18 truck and other equipment traffic causing
19 dust and noise problems.

20 "5. Property values would be affected because of
21 the [site's] proximity to the homes. Any
22 removal of the Junipers in the area would
23 create an eyesore.

24 "6. The use of the site for a quarry would
25 seriously conflict with the existing
26 residential uses.

27 "CONCLUSION AND ORDER

28 "Draft Ordinance 44.23 is hereby rejected as use
29 of a site as a quarry would have a serious
30 negative impact on the residences in this suburban
31 residential area." Record 0-0A.

32 Petitioners argue it is not clear from the above
33 findings whether the county determined the subject site is
34 not a significant resource site or whether it determined the
35 subject site is significant, but that conflicting uses (the
36 adjoining residential uses) are such that the conflicting

1 uses should be allowed fully. Petitioners contend whatever
2 course the county selected, the decision must be remanded

3 "[b]ecause the county's findings do not explain
4 its decision, [and] are inadequate to support the
5 county's decision. DLCD v. Klamath County, 16 Or
6 LUBA 817, 824 (1988); Mill Creek Glen Protect.
7 Ass'n. v. Umatilla County, 15 Or LUBA 563, 574,
8 aff'd 88 Or App 522 (1987)." Petition for Review
9 9.

10 We agree with petitioners. To the extent the county
11 concluded the subject site is not a significant resource,
12 there is no explanation offered for that conclusion and, as
13 petitioners point out, there is a significant amount of
14 evidence in the record to the contrary.

15 To the extent the county determined that conflicting
16 uses should be allowed fully under OAR 660-16-010(2),
17 selection of that program option clearly is not justified by
18 the above findings. The findings merely explain that there
19 are homes in close proximity to the aggregate site and
20 suggest that aggregate extraction would seriously conflict
21 with such uses. There is no attempt to perform the type of
22 ESEE analysis required under OAR 660-16-005(2) or to use
23 that analysis to justify allowing the conflicting uses to
24 preclude aggregate extraction at the subject site.

25 In its brief, respondent attacks the adequacy of the
26 staff proposal rather than defends the findings adopted by
27 the county in support of its decision. This approach
28 reflects a misunderstanding of the county's obligation in
29 this matter. The county is performing an affirmative

1 obligation under its Goal 5 plan policy and periodic review
2 to apply the Goal 5 process to the subject site so that it
3 can justify a program to protect the site fully, allow the
4 conflicting uses fully, or protect the site to some desired
5 extent. See n 2, supra. Perceived weaknesses in the course
6 of action proposed by county staff do not relieve the county
7 of its obligation to justify the course of action it
8 ultimately selects, in the manner required by the Goal 5
9 rule.

10 The second assignment of error is sustained.

11 The county's decision is remanded.