

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county ordinance changing the
4 county comprehensive plan map designation for 20.4 acres
5 from Forest to Natural Resource and changing the zoning of
6 the 20.4 acres from Impacted Forest Land (F-2/RCP) to Quarry
7 and Mining Operations (QM/RCP).

8 **MOTION TO INTERVENE**

9 Donald Overholser and Rodney Mathews (intervenors), the
10 applicants below, move to intervene on the side of
11 respondent. There is no opposition to the motion, and it is
12 allowed.

13 **FACTS**

14 This is the second appeal to LUBA of county ordinance
15 PA 951, a comprehensive plan map amendment and zone change
16 on the subject property.

17 In Gonzalez v. Lane County, 24 Or LUBA 251 (1992), we
18 stated the facts as follows:

19 "The subject property is owned by intervenors, and
20 is located on a hillside southeast of the City of
21 Cottage Grove. The property is forested, except
22 for an existing quarry site which occupies
23 approximately two acres. This quarry has been
24 used in the past and has a current Department of
25 Geology and Mineral Industries (DOGAMI) exemption
26 permit. The acknowledged Lane County Rural
27 Comprehensive Plan (RCP) inventories this site as
28 a Statewide Planning Goal 5 '1B' aggregate
29 resource site. Access to the site will be by
30 private easement from Quaglia Road to the east."
31 (Footnote omitted.) 24 Or LUBA at 254.

1 In Gonzalez, we remanded the county's decision because,
2 while a Goal 5 ESEE analysis had been prepared, there was no
3 evidence of an intent to incorporate the analysis into the
4 findings by reference or to identify any particular document
5 in which it was located. Id. at 260. After remand, the
6 county conducted a public hearing, accepted additional
7 evidence, and, on December 7, 1994, made supplemental
8 findings in support of ordinance PA 951. Petitioner appeals
9 the supplemental findings.

10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioner contends the county's inventory of the
12 resource, identification of conflicting uses and ESEE
13 analysis are inadequate.

14 **A. Inventory of Resource**

15 Under this subassignment of error, petitioner contends
16 the county has failed to satisfy OAR 660-16-000(2) in that
17 (1) the resource is not adequately mapped; (2) the impact
18 area to be affected is not adequately identified; (3) the
19 quantity, relative quantity and relative quality of the
20 resource at the site are not adequately determined; and (4)
21 the significance of the site is not established.¹

¹OAR 660-16-000(2) states:

"A 'valid' inventory of a Goal 5 resource under subsection 5(c) of this rule [plan inventory] must include a determination of the location, quality, and quantity of each of the resource sites. Some Goal 5 resources [including aggregate] are more site-specific than others. For site-specific resources, determination of location must include a description or map of

1 **1. Map of Resource**

2 The county's findings 7(e) and (f) rely on maps in the
3 record showing the location of the resource. Record A14-
4 15.² These maps include (1) a USDA Soil Conservation
5 Service Map 145, locating the quarry on the property, as
6 well as with respect to the surrounding area; 2) a schematic
7 plot plan depicting the existing quarry site on the
8 property; and (3) a USGS quadrangle map locating the
9 property with respect to a large area, including the City of
10 Cottage Grove. Record A178, B288, B289. The text of
11 finding 7(j) and a description in the letter of a forest
12 consultant, with attached map, also serve to locate the
13 resource. Record A16, A172-74.

14 This subassignment of error is denied.

15 **2. Impact Area**

16 Petitioner contends the county's delineation of the
17 boundaries of the primary and secondary impact areas is not
18 supported by substantial evidence.

19 The county's findings 7(f) and 30 describe primary and
20 secondary impact areas. Record A14, A44. Finding 30 refers
21 to a map listed at finding 3(i) and found at Record A182

the boundaries of the reserve site and of the impact area to be affected, if different. For non-site-specific resources, determination must be as specific as possible." (Emphasis in original.)

²References to the record generated after LUBA's remand in Gonzales are to "Record A___." References to the record generated prior to the Gonzales appeal are to "Record B___." References to the supplemental record filed February 28, 1995 are to "Record C___."

1 (impact area map). On the impact area map, the primary
2 impact area extends approximately one-quarter mile in all
3 directions from the quarry boundaries, and the secondary
4 impact area extends several hundred feet on either side of
5 Quaglia Road to its intersection with Mosby Creek Road to
6 the north. The primary and secondary impact areas are
7 precisely outlined on the impact area map.

8 The delineation of an impact area serves both to
9 protect existing conflicting uses from the impacts of
10 developing a Goal 5 resource and to protect the resource
11 itself from the encroachment of future conflicting uses.
12 See OAR 660-16-005; Nathan v. City of Turner, 26 Or LUBA
13 382, 393 (1994); Eckis v. Linn County, 19 Or LUBA 15, 33 n15
14 (1992). Petitioner contends the boundaries of the impact
15 area have been drawn too small, creating the risk that
16 negative impacts from the quarry will extend farther than
17 shown.³

18 Finding 34(a) states mining at the quarry will create
19 noise, dust and traffic impacts on surrounding forest land.
20 Activities on this surrounding land will create reciprocal
21 noise, dust and traffic impacts on the quarry. The county
22 finds that since mining and forest uses create the same
23 impacts, neither use negatively impacts the other. Record

³One potential consequence of enlarging the impact area is to inhibit uses allowed on adjacent properties. However, petitioner does not object the boundaries are drawn too large, and so we do not consider that possibility.

1 A49.

2 Petitioner challenges finding 34(a) as "conclusory,
3 contrary to evidence in the record, and not supported by
4 substantial evidence." Petitioner's Brief 18. Petitioner
5 cites no conflicting evidence. Petitioner also does not
6 explain what, beyond reasonable supposition, he believes is
7 required to support the county's finding.

8 Finding 39 lists noise, seismic energy, dust or other
9 air pollution, surface water pollution, ground water
10 pollution, and wildlife disturbance as possible adverse
11 environmental impacts of the quarry on nearby rural
12 residential uses. Record A56-58.

13 In addressing impacts from noise, air pollution, and
14 water pollution, the challenged decision relies on
15 "enforceable legal standards," such as Department of
16 Environmental Quality (DEQ) regulations, and future
17 permitting requirements. Record A56-57. The decision
18 states (1) noise must meet DEQ standards; (2) air pollution
19 (including dust) will be controlled by the Lane Regional Air
20 Pollution Authority (LRAPA); and (3) water pollution will be
21 regulated by DOGAMI permit. Id. The county finds that
22 impacts on nearby rural residential uses will be limited by
23 both the isolation of the quarry, which is at least 1,300
24 feet from the nearest residence, and by the dense forest
25 vegetation surrounding the quarry. Record A56. We
26 understand the county to decide that the various regulatory

1 permits to which it refers will reduce the noise, air, and
2 water impacts of mining on neighboring properties such that
3 the mining use will not have substantial impacts on the
4 rural residents over one-quarter mile away.

5 The county also finds that the seismic energy generated
6 by blasting and its potential for water pollution do not
7 create conflicts with neighboring uses. Record A58. This
8 finding is based on an engineer's report that analyzes
9 impacts of blasting on the closest rural residents and
10 concludes the quarry can be compatible with existing rural
11 development. The report states that ground water utilized
12 by the quarry's rural residential neighbors is not part of
13 the ground water system connected to the property. Record
14 A56, B308-10.

15 The county further finds that while the site is located
16 within a Goal 5 resource area, a Major Big Game Range, and
17 mining may displace or negatively affect game activity, the
18 game animals "may freely relocate" to the alternative
19 habitat provided by over two million acres of the Major Big
20 Game Range. Record A58.

21 Determining the perimeters of an impact area is largely
22 subjective. The county's conclusion that noise, air
23 pollution, and surface water pollution will be sufficiently
24 regulated to contain impacts within the designated primary

1 and secondary impact areas is justified.⁴ The findings with
2 respect to seismic energy and ground water pollution clearly
3 are based on substantial evidence.

4 However, although the county identifies big game
5 habitat as a conflicting Goal 5 resource, neither the county
6 in the challenged decision nor the county and intervenors in
7 their brief cite any evidence to support the county's
8 conclusion that the quarry will have insignificant impacts
9 on big game more than one-quarter mile away. As it relates
10 to big game habitat only, petitioner's challenge to the
11 mapping of the impact area is sustained.

12 This subassignment of error is sustained, in part.

13

14 **3. Quantity and Quality of Resource.**

15 **a. Quantity**

16 Petitioner contends the county's finding that the
17 quantity of the aggregate resource is between 500,000 and
18 600,000 cubic yards is not supported by substantial
19 evidence. Record A45, A47. The county bases its finding on
20 a consulting firm's geological evaluation completed before
21 the Gonzales appeal. Record B449-58. In Gonzalez, 24
22 Or LUBA at 264 n11, we expressly raised the failure of this
23 geological evaluation to support the quantity estimate. The

⁴Petitioner contends it is dangerous to transport aggregate on Quaglia Road, which has "many residences and much pedestrian traffic." Petitioner's Brief 17. The county notes these and other, related concerns will be addressed in the site review process. Record A54. See Lane Code 16.257(4).

1 deficiency we noted then has not been remedied. The
2 geological evaluation has not been supplemented or updated.

3 The consulting firm states at the outset of the
4 geological evaluation:

5 "It should be noted that these are only
6 preliminary opinions and should not be taken as
7 official endorsements for aggregate production.
8 An [sic] full investigation of this type would
9 include additional surveys, rock core drilling,
10 laboratory tests on the aggregate, and additional
11 research on available geological literature of the
12 sites." Record B449.

13 The only statement in the geological evaluation as to
14 quantity is the following:

15 "Cross sections A-A' and B-B' show the estimated
16 vertical distribution of site materials and the
17 plan view shows the horizontal distribution.
18 Based on this surface survey, it appears that
19 50,000 cubic yards of Rock Unit 20 is available
20 with 1200 cubic yards of waste material. This
21 would need to be verified and may result in
22 additional or smaller volumes." Id.

23 There are "cloth tape surveys" attached as exhibits to the
24 geological evaluation. Record B456-58. These are not
25 explained, however, and it is impossible to correlate them
26 with the statements in the geological evaluation.

27 This Board does not search the record for evidence
28 supporting a challenged decision, but rather relies on the
29 parties to cite to places in the record where the evidence
30 can be found. Calhoun v. Jefferson County, 23 Or LUBA 436,
31 439 (1992). While the county's decision itself cites only
32 the geological evaluation, the county's and intervenors'

1 brief cites (1) an unsupported statement in the original
2 application that "[a] total of 500,000 to 600,000 yards of
3 rock appears to be available at this site depending upon the
4 nonexposed rock formation"; and (2) a statement by a
5 geologist who had conducted seismic tests in the area of the
6 quarry that, "based on its geologic setting," the aggregate
7 resource could be estimated at "half a million cubic yards
8 or more, an amount that normally we would expect." Record
9 B273; Record C4-5.

10 The statement in the application is not evidence. The
11 statement of the geologist, made without reference to
12 evidence of any kind, is not evidence upon which a
13 reasonable person would rely in reaching a decision. See
14 Bartels v. City of Portland, 20 Or LUBA 303, 316-18 (1990);
15 also see Douglas v. Multnomah County, 18 Or LUBA 607, 617-18
16 (1990). Neither is it evidence of the type and degree
17 acceptable to the aggregate industry itself.

18 Together with the Department of Land Conservation and
19 Development, the Oregon Department of Transportation (ODOT),
20 and DOGAMI, the Oregon Concrete and Aggregate Producers'
21 Association (OCAPA) has prepared a "Handbook for Applying
22 Goal 5 to Aggregate Resources" (handbook).⁵ The Handbook
23 outlines a procedure for establishing quantity:

24 "To demonstrate QUANTITY adequately, a property

⁵The entire Handbook is found at Record A185-214.

1 owner will dig test holes to verify:

2 "a. Depth of overburden at the site;

3 "b. The type of aggregates found; and

4 "c. The depth of the aggregate resource.

5 "Based upon a representative number of test holes
6 of known depths, a property owner will be able to
7 provide a reasonably accurate estimate of the
8 amount of available aggregate. The size of the
9 representative number will depend on the
10 homogeneity and size of the source, and the amount
11 of consistent or conflicting information in the
12 local government's records." Record A194-95.

13 Neither the county nor intervenors cite to any evidence
14 in the record showing that test holes were dug to determine
15 either the depth of overburden at the site or the depth of
16 the aggregate resource. The county's finding as to the
17 quantity of the aggregate resource is not supported by
18 substantial evidence.

19 This subassignment of error is sustained.

1 **b. Relative Quantity**

2 OAR 660-16-000(3) states "[a] determination of quantity
3 requires consideration of the relative abundance of the
4 resource." The record includes the working paper which
5 accompanied the 1982 county comprehensive plan revision, as
6 well as an addendum. Record A220-51. Both contain a
7 general discussion of aggregate resources in the county. In
8 addition, the memorandum of a land planning consultant
9 discusses rock quantity at five inventoried aggregate sites.
10 Record A252-53. This memorandum estimates the quantity of
11 the aggregate resource in the county, acknowledging the
12 limitations on available data. Record A252.

13 OAR 660-16-000(3) states that the level of detail to be
14 provided on resource quantity and quality "will depend on
15 how much information is available or 'obtainable.'" The
16 rule recognizes practical limitations on information
17 gathering. The evidence of quantity at other quarries in
18 the county is sufficient to satisfy the rule's requirements.

19 However, since the quantity of the resource on the
20 subject property has not been established, the relative
21 quantity also has not been established.

22 This subassignment of error is sustained.

23 **c. Relative Quality**

24 Petitioner challenges the county's finding that the
25 aggregate resource available at the site is "comparable to
26 the highest quality of aggregate material at other

1 designated sites included in the county's inventory * * *."
2 Record A45. Petitioner does not dispute the evidence of
3 resource quality at the subject site, but contends a
4 comparison with the quality of the resource at other sites
5 is required by OAR 660-16-000(3). Petitioner argues that
6 rock should be obtained from other sites, tested, and
7 compared to rock from the subject site.

8 The record includes a letter from a geologist
9 describing the test results of rock removed from the quarry
10 site. The letter compares the quality of the rock tested to
11 the minimum requirements for highway project aggregate as
12 listed by OCAPA in its handbook, and finds the tested
13 material easily satisfies the requirements. Record A175.

14 In addition, the memorandum of the land planning
15 consultant compares the quality of the rock at the site to
16 the same five inventoried aggregate sites used for the
17 quantity comparison. Record A252-53. The consultant
18 concludes:

19 "[T]he * * * site contains aggregate which exceeds
20 standards required for all typical construction
21 applications. The site therefore contains equal
22 or better quality material than [is found at]
23 other sites within the County's inventory."

24 We reject petitioner's suggestion that intervenor has
25 an obligation to test the rock being sold by competitors in
26 the area in order to establish the relative quality of the
27 rock on the subject property. The evidence in the record
28 supports the county's findings on the relative quality of

1 the resource.

2 This subassignment of error is denied.

1 **4. Significance**

2 OAR 660-16-000(5)(c) provides, in relevant part:

3 "* * * When information is available on location,
4 quality and quantity, and the local government has
5 determined a site to be significant or important
6 as a result of the data collection and analysis
7 process, the local government must include the
8 site on its plan inventory and indicate the
9 location, quality and quantity of the resource
10 site * * *."

11 The county has relied on its findings with respect to
12 resource location, quality and quantity to determine the
13 site is significant. However, since the evidence supporting
14 the finding of quantity is inadequate, the evidence
15 supporting the county's finding of significance is also
16 inadequate.

17 This subassignment of error is sustained.

18 **B. Conflicting Uses**

19 Petitioner contends the county has not identified uses
20 that conflict with the development of the quarry, as
21 required by OAR 660-16-005, which states, in relevant part:

22 "It is the responsibility of local government to
23 identify conflicts with inventoried Goal 5
24 resource sites. This is done primarily by
25 examining the uses allowed in broad zoning
26 districts established by the jurisdiction (e.g.
27 forest and agricultural zones). A conflicting use
28 is one which, if allowed, could negatively impact
29 a Goal 5 resource site. Where conflicting uses
30 have been identified, Goal 5 resource sites may
31 impact those uses. These impacts must be
32 considered in analyzing the economic, social,
33 environmental and energy (ESEE) consequences.* *
34 *"

1 Petitioner specifically mentions rural residences, wildlife,
2 and forestry as conflicting uses. Petitioner's Brief 15-21.

3 Conflicting uses and impacts are two sides of the same
4 coin: the uses have impacts which cause conflicts. With
5 the exception of big game habitat, we conclude the county's
6 determination and mapping of impacts withstand petitioner's
7 challenge.

8 This subassignment of error is sustained, in part.

9 **C. ESEE Analysis**

10 Since the county has identified conflicting uses,
11 OAR 660-16-005(2) requires it perform an ESEE analysis:

12 "* * * If conflicting uses are identified, the
13 economic, social, environmental and energy
14 consequences of the conflicting uses must be
15 determined. Both the impacts on the resource site
16 and on the conflicting use must be considered in
17 analyzing the ESEE consequences. The
18 applicability and requirements of other Statewide
19 Planning Goals must also be considered, where
20 appropriate, at this stage of the process. A
21 determination of the ESEE consequences of
22 identified conflicting uses is adequate if it
23 enables a jurisdiction to provide reasons to
24 explain why decisions are made for specific
25 sites." (Emphasis added.)

26 Petitioner contends the county's ESEE analysis is
27 incomplete or inadequate because it does not consider and
28 address every concern raised during the proceedings below.
29 Petitioner's Brief 21-23. We disagree. The emphasized
30 language quoted above makes clear the ESEE analysis is
31 adequate if it provides an explanation based on identified
32 conflicting uses for the county's ultimate decision with

1 respect to a specific site. Most of petitioner's objections
2 relate to supposed conflicts with neighboring rural
3 residences. To the extent the county has determined these
4 conflicts don't exist, it need not consider them further in
5 the ESEE analysis.

6 The challenged decision finds that "[t]he subject site
7 is not uniquely suited to wildlife in comparison with the
8 overall big game habitat range." Record A37. However,
9 there is not substantial evidence to support the finding.
10 As part of its ESEE analysis, the county must assess the
11 nature and extent of both the aggregate and wildlife
12 resource and the property's relative value for each. Panner
13 v. Deschutes County, 14 Or LUBA 1, 9-10 (1985). The
14 challenged findings do not explain what the existence of two
15 million acres of Major Big Game Habitat has to do with this
16 property's quality as big game habitat. See Sills v.
17 Josephine County, 9 Or LUBA 122, 132 (1983).

18 Finally, and more importantly, the county cannot
19 complete the ESEE analysis before the significance of the
20 resource is established.

21 This subassignment of error is sustained.

22 The first assignment of error is sustained, in part.

23 **SECOND ASSIGNMENT OF ERROR**

24 Petitioner contends the challenged decision fails to
25 comply with RCP Goal 5, Policy 7, which states, in relevant
26 part:

1 "Mineral and aggregate resource sites, which, on
2 the basis of substantial evidence, are considered
3 for inclusion in Appendix 'D' of the 'Mineral and
4 Aggregate Resources Working Paper' pursuant to the
5 application of the Goal 5 rule
6 (OAR 660-16-000/025), shall also show evidence of
7 substantial resource utility over time. Any site
8 evaluation shall also address possible impacts on
9 agricultural lands, forest lands, and residential
10 development (existing or planned).* * *"
11 (Emphasis added.)

12 While this appears to restate the Goal 5 rule, it could be
13 interpreted to impose an additional requirement for evidence
14 of "substantial resource utility over time."

15 The parties do not direct us to a point in the decision
16 where the county applied RCP Goal 5, Policy 7, and we do not
17 see that it did. When reviewing a decision by a local
18 governing body, this Board cannot interpret local enactments
19 in the first instance. Gage v. City of Portland, 123 Or App
20 269, 860 P2d 282, on reconsideration, 125 Or App 119, 866
21 P2d 466 (1993), rev'd on other grounds, 319 Or 308, 877 P2d
22 1187 (1994); Weeks v. City of Tillamook, 117 Or App 449,
23 453, 844 P2d 914 (1992). We therefore must remand for the
24 county to interpret RCP Goal 5, Policy 7.

25 The second assignment of error is sustained.

26 **THIRD ASSIGNMENT OF ERROR**

27 Petitioner contends the findings with respect to the
28 impacts listed by the county are insufficient to meet the
29 requirements of Goal 6. Unresolved issues, which may be
30 considered in a local government proceeding on remand from
31 LUBA and raised in a subsequent appeal from a local decision

1 on remand, include (1) issues presented in the first appeal
2 that LUBA either sustains or does not consider, and (2)
3 issues that could not have been raised in the first LUBA
4 appeal. Beck v. Tillamook County, 313 Or 148, 154, 831 P2d
5 678 (1992); Louisiana Pacific v. Umatilla County, 28 Or LUBA
6 32, 35 (1994). The county was not required to address
7 Goal 6 because Goal 6 was not raised in the first LUBA
8 appeal, and we remanded only on Goal 5 issues. Gonzalez, 24
9 Or LUBA at 256-270.

10 The third assignment of error is denied.

11 **FOURTH ASSIGNMENT OF ERROR**

12 Petitioner contends the county has failed to comply
13 with Lane Code 16.252(2), which states procedures for
14 zoning, rezoning, and amendments to zoning requirements.
15 Petitioner asserts first, that the rezoning has not been
16 shown to be in the public interest; and second, that the
17 county has not complied with Goal 5 and RCP Goal 5, Policy
18 7.

19 Compliance with the Goal 5 planning process (and with
20 RCP Goal 5, Policy 7, to the extent it is different from
21 Goal 5) would be sufficient to establish that the proposed
22 zone change is not contrary to the public interest. See
23 Gonzales, 24 Or LUBA at 270. However, as we concluded in
24 our disposition of the first assignment of error, the county
25 did not complete the Goal 5 planning process.

26 The fourth assignment of error is sustained.

1 The county's decision is remanded.