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

TRADEMARK CONSTRUCTION, INC.,)
)
Petitioner,)
)
vs.)
)
MARION COUNTY,)
)
Respondent,)
)
and)
)
JOHN FREDERIC and SANDRA EDWARDS,)
)
Intervenors-Respondent.)

LUBA No. 97-188
FINAL OPINION
AND ORDER

Appeal from Marion County.

Donald M, Kelley, Silverton, filed the petition for review and argued on behalf of petitioner. With him on the brief was Kelley & Kelley.

Jane Ellen Stonecipher, Assistant County Counsel, Salem and David Doyle, Dallas, filed the response brief and argued on behalf of respondent and intervenors-respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

AFFIRMED 03/24/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's dismissal of its
4 conditional use permit application to expand an existing
5 aggregate operation.

6 **MOTION TO INTERVENE**

7 John Frederic and Sandra Edwards (intervenors) move to
8 intervene on the side of the county. There is no opposition
9 to the motion, and it is allowed.

10 **MOTION TO FILE REPLY BRIEF**

11 Petitioner moves to file a reply brief, pursuant to OAR
12 661-10-039,¹ arguing that the county and intervenors raised a
13 new matter in their joint response brief: that Goal 5 directly
14 applies to the petitioner's proposed use, and that its
15 application supports the county's decision to dismiss
16 petitioner's conditional use permit application.

17 We agree with petitioner that, while the petition for
18 review mentions Goal 5 in several contexts, it does not raise
19 the issue of whether Goal 5 applies directly, or the
20 consequences of its application. We conclude that the
21 response brief raises a new matter within the meaning of OAR
22 661-10-039,

¹OAR 661-10-039 provides that:

"A reply brief may not be filed unless permission is obtained from the Board. * * * A reply brief shall be confined solely to new matters raised in the respondent's brief."

1 and, accordingly, grant petitioner's motion to file a reply
2 brief.

3 **FACTS**

4 **A. The Property**

5 The subject property is a rectangular 20-acre parcel
6 located within the urban growth boundary (UGB) of the city of
7 Stayton (city), approximately 300 feet outside the current
8 city limits. The property is vacant, with a one-acre existing
9 aggregate quarry near the southern boundary, where it borders
10 E. Santiam Street. The property and the immediate area to the
11 south, east and north is zoned urban transitional farm (UTF).
12 The surrounding parcels are in mixed agricultural use, with
13 one farm dwelling across E. Santiam Street from the existing
14 quarry. A residential subdivision lies within the city limits
15 approximately 400 feet from the western boundary of the
16 property.

17 The Oregon Department of Transportation (ODOT) acquired
18 the quarry in 1977, and operated it on a limited basis for
19 approximately 19 years, averaging 1,000 cubic yards of
20 aggregate extracted, produced without blasting or crushing.

21 Petitioner acquired the property from ODOT in November
22 1996, and immediately filed a conditional use permit (CUP)
23 application with the county, seeking to expand the aggregate
24 operation from approximately one acre to 19 acres of the 20-
25 acre site. As part of the expanded operation, petitioner
26 proposes to increase extraction levels up to one hundred times

1 the historical level, and to produce and process some of the
2 aggregate by blasting, crushing and washing rock.

3 A county hearings officer denied petitioner's application
4 April 14, 1997, on the grounds that the applicable version of
5 the Stayton Comprehensive Plan (SCP) permitted only historic
6 levels and methods of extraction. The hearings officer
7 concluded that the proposed expansion could not be approved
8 without an amendment to the SCP and a new Goal 5 analysis, and
9 therefore denied the application. Petitioner appealed to the
10 county board of commissioners (commissioners), who remanded
11 the decision back to the hearings officer for further review,
12 in particular as to which version of the SCP applied.

13 On remand, the hearings officer again concluded that the
14 1980 SCP applied and that petitioner's CUP application did not
15 comply with it, but concluded in addition that the county
16 lacked jurisdiction to process the application because the
17 proposed use could not be approved without an amendment to the
18 SCP and new Goal 5 analysis. Accordingly, on August 22, 1997,
19 the hearings officer dismissed the application. Petitioner
20 again appealed, and, on September 3, 1997, the commissioners
21 affirmed the decision of the hearings officer, adopting the
22 decision's findings of fact and conclusions of law as its own.
23 This appeal followed.

24 **B. Legislative history of relevant ordinances**

25 Petitioner's assignments of error challenge, in various
26 ways, one alleged flaw in the decision: application of the

1 1980 SCP to petitioner's CUP application. Because the
2 legislative facts are multi-jurisdictional, complex, and
3 underlie four of petitioner's five assignments of error, we
4 explicate them here at some length.

5 The property is under the jurisdiction of the county,
6 subject to the current Stayton-Marion County Urban Growth
7 Boundary Policy and Agreement (UGBPA). The original UGBPA,
8 adopted in 1978, applied the Marion County Comprehensive Plan
9 (MCCP) within the city's UGB area. In June 1979, the county
10 adopted by ordinance the 1979 SCP as its own for lands within
11 the city UGB, thus superseding the 1978 UGBPA.

12 The 1979 SCP contains a general description of the
13 existing quarry practices on the subject property, then known
14 as the Zimmerman Quarry:

15 "The Zimmerman Quarry, located east of the city, is
16 used intermittently as a source for embankment and
17 shoulder material, base aggregate, gabion
18 construction, and emergency repairs due to slides,
19 washouts and flooding. The ridge is basalt
20 intrusive with a platy structure. The material is
21 excellent for free-draining backfill as well as
22 other uses listed. Little effort is needed to
23 extract and stockpile the material. There is
24 approximately 1.5 million cubic yards of material in
25 the site." Record 12.

26 The Department of Land Conservation and Development
27 (DLCD) found that the 1979 SCP did not comply with Statewide
28 Planning Goal 5. In response, the city drafted the 1980 SCP,
29 which more completely described aggregate resources and the
30 property in

1 language that suggests an intent to limit extraction to
2 historic methods and levels.²

3 DLCD acknowledged the 1980 SCP, noting that the county
4 had no recommendation on the proposed changes, but sending
5 notice of acknowledgment to the county. There is no evidence
6 that the city notified or obtained the concurrence of the
7 county concerning the proposed changes, as required by the
8 1979 UGBPA.

9

²The 1980 SCP states:

"The areas adjacent to the Santiam River hold possibilities for potential aggregate resources. The majority of the area is also suitable for residential development. The Stayton area, northern Linn County and eastern Marion County, obtain the necessary aggregate for commercial purposes from private sources outside the Stayton urban area.

"A second source of aggregate is located adjacent to E. Santiam Street and slightly east of the Stayton City limits. The site is commonly known as the Zimmerman Quarry site and is owned by [ODOT].

"The site is intrusive with a platy structure. The material fractures very easily and can be removed and stockpiled or loaded without the necessity of blasting or crushing. An estimate of 1.5 million cubic yards of material is reported to exist at the site.

"[ODOT] currently operates the site on an intermittent basis for emergency repair of slides, washouts, and other maintenance problems.

"The rock removal at this site should be limited due to the proximity to residential areas. The current use activities could be considered to be compatible, at its present level, with the surrounding area for some time to come.

"Within 6 months of the adoption of this amendment, the City of Stayton and [ODOT] shall collectively negotiate for the continued use of the Zimmerman Quarry at a level acceptable to both jurisdictions. The site shall be designated as Public Use in the [SCP] and Zoning Ordinance. An Agreement with specified conditions and limitations shall be ratified by both jurisdictions with provisions for review and modifications."
Record 13.

1 However, in 1981 the city amended its plan map to include
2 a 131-acre golf course within the city's UGB (1981 update).
3 In response, the county held hearings and in May 1982 adopted
4 ordinance 624, which repealed the ordinance adopting the 1979
5 SCP and 1979 UGBPA, and adopted the new UGB and map. In
6 addition, ordinance 624 states that:

7 "The [commissioners] further adopt the Stayton
8 Comprehensive Plan (1981 Update).

9 "The [commissioners] concur in the taking of an
10 exception to [Goal 3] for the reasons and based on
11 the findings in the Stayton Comprehensive Plan (1981
12 Update).

13 "* * * * *

14 "The Urban Growth Boundary and Comprehensive Plan
15 adopted herein shall be implemented as provided in
16 all land use management agreements entered into
17 between Marion County and the City of Stayton.

18 "* * * * *

19 "This Ordinance does hereby supersede and repeal the
20 Comprehensive Plan [1979 SCP] and Urban Growth
21 Boundary Agreement for the City of Stayton [1979
22 UGBPA] * * *." Record 376-77 [Bracketed material
23 added].

24 In 1989, the city and county entered into the current
25 UGBPA (1989 UGBPA), which provided, like earlier versions,
26 that the city must notify and seek the concurrence of the
27 county for any plan amendments affecting the city's UGB, and
28 that the county shall apply the SCP to any land use
29 applications in the city's UGB. In 1991, the city adopted the
30 current SCP (1991 SCP) that considerably restricts any future
31 aggregate operations on the property. However, the city
32 failed to notify and gain the

1 concurrence of the county concerning the 1991 SCP, as required
2 by the 1989 UGBPA.

3 The challenged decision in this case determines that (1)
4 petitioner's application is subject to the 1989 UGBPA, which
5 requires that the county apply the SCP to land use decisions
6 within the city's UGB; (2) the 1991 SCP is not applicable,
7 because the city did not gain the concurrence of the county in
8 adopting it; and (3) the 1980 SCP is applicable, because the
9 county adopted it in 1982, effectively repealing its prior
10 adoption of the 1979 SCP.

11 The threshold issues in this case are whether the 1980 or
12 1979 SCP applies, and what approval standards, if any, either
13 of them require.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioner assigns error to the county's finding that the
16 1980 SCP applied to its CUP application. Petitioner disputes
17 first that any version of the SCP is applicable.³ The
18 applicability of any and all versions of the SCP hinge on a
19 requirement in the 1989 UGBPA that

20 "All land use actions within the urban growth area
21 and the city limits shall be consistent with the
22 City's comprehensive plan and the County's land use
23 regulations." Record 936b (emphasis added).

24 Petitioner disputes that this language, or any part of
25 the 1989 UGBPA, constitutes a mandatory approval standard.

³Neither party disputes the decision's finding that 1991 SCP does not apply because the city did not obtain the concurrence of the county in adopting it.

1 Instead, petitioner characterizes the 1989 UGBPA as a
2 voluntary agreement that the county was not bound to follow,
3 or, if it was, as a document containing only nonbinding,
4 advisory language that provides no approval standards. We
5 disagree with both contentions. Petitioner cites no authority
6 for the proposition that a local government subject to an
7 intergovernmental agreement controlling how land use actions
8 are processed within joint planning areas is not bound by that
9 agreement. Further, the decision implicitly interprets the
10 1989 UGBPA, part of the county's land use regulations, as
11 requiring that land use applications within the city's UGB
12 comply with the SCP. That interpretation is supported by the
13 plain text of the passage quoted, and we defer to it as not
14 inconsistent with either the text, policy or purposes of any
15 applicable land use regulations or comprehensive plan made
16 known to us. ORS 197.829(1).

17 Petitioner next argues that the 1980 SCP is not
18 applicable because it was not adopted by the county pursuant
19 to the UGBPA. All versions of the UGBPA require notice,
20 opportunity for review and a hearing between city and county
21 before the city's comprehensive plan amendments are applicable
22 via the UGBPA. Petitioner argues that no such notice,
23 opportunity for review or hearing occurred with respect to the
24 1980 SCP, and hence if any version of the SCP is applicable,
25 it is the 1979 SCP.

26 The decision relies on the county's ordinance 624 as the

1 basis for county adoption of the 1980 SCP. Petitioner argues
2 that the county intended in ordinance 624 to adopt, for
3 purposes of the UGBPA, only a minor change in the city's
4 comprehensive plan map (the 1981 update), and thus the county
5 had no intent to adopt the 1980 SCP text, or awareness that it
6 might inadvertently do so.

7 We disagree. Ordinance 624 repeals the ordinance that
8 adopted the 1979 SCP, and adopts the 1981 update in terms
9 suggesting the adoption of the then-current SCP. We
10 understand petitioner to argue that the county engaged in the
11 meaningless exercise of repealing the 1979 SCP and then
12 readopting it in the same document. It is more plausible that
13 the county intended ordinance 624 to adopt the current version
14 of the SCP, i.e. the 1980 SCP. In any case, the decision
15 interprets ordinance 624 to adopt the 1980 SCP in its
16 entirety, map and text, and that interpretation is not
17 inconsistent with any applicable text, purpose or policy of
18 which we are made aware. Accordingly, we defer to that
19 interpretation.

20 Petitioner argues next that the county's reasoning in
21 refusing to apply the 1991 SCP precludes it from applying the
22 1980 SCP. The decision finds that the 1991 SCP did not apply
23 because the city never notified the county before the city
24 adopted the 1991 SCP, or obtained the concurrence of the
25 county thereafter. Petitioner argues that this reasoning
26 compels the same conclusion with respect to the 1980 SCP,

1 where the city also failed to follow the prescribed procedures
2 when it adopted the 1980 SCP. The obvious difference is that,
3 notwithstanding the city's initial failure in both instances
4 to provide notice, the county later reviewed and adopted the
5 1980 SCP, while it has not reviewed and adopted the 1991 SCP.
6 To the extent petitioner argues that the county's later
7 adoption of the 1980 SCP cannot cure the city's initial
8 failure to comply with the procedures required by the UGBPA,
9 we disagree. Petitioner has not established any cognizable
10 harm the county suffered thereby, or that it cannot waive the
11 pre-adoption notice requirement.

12 In sum, the county did not err in determining that the
13 application must comply with the 1980 SCP.

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 Petitioner argues that, even if the 1980 SCP applies, the
17 county erred in determining that the 1980 SCP contains
18 mandatory approval criteria, and in applying those criteria.⁴

⁴For ease of reference, we repeat the pertinent text of the 1980 SCP:

"The areas adjacent to the Santiam River hold possibilities for potential aggregate resources. The majority of the area is also suitable for residential development. The Stayton area, northern Linn County and eastern Marion County, obtain the necessary aggregate for commercial purposes from private sources outside the Stayton urban area.

"A second source of aggregate is located adjacent to E. Santiam Street and slightly east of the Stayton City limits. The site is commonly known as the Zimmerman Quarry site and is owned by [ODOT].

"The site is intrusive with a platy structure. The material fractures very easily and can be removed and stockpiled or

1 As an initial matter, petitioner contends that because
2 the county interprets another jurisdiction's comprehensive
3 plan, no deference is owed to the county's determination that
4 the 1980 SCP contains mandatory approval standards, or what
5 those standards require. Gage v. City of Portland, 319 Or
6 308, 877 P2d 1187 (1994). Gage held that we do not owe
7 deference to a hearings officer's interpretation of local
8 legislation, but only to the interpretations of the local
9 governing body. Gage, 319 Or at 316-17.

10 We agree with petitioner that Gage's reasoning extends to
11 the present circumstance, and that no deference is owed when a
12 governing body interprets land use plans or regulations
13 produced by another local government. Essentially, the county
14 is in the position of a city hearings officer to the extent it
15 interprets the city's plan. Thus, the appropriate standard of
16 review is whether the county's interpretation of the 1980 SCP

loaded without the necessity of blasting or crushing. An estimate of 1.5 million cubic yards of material is reported to exist at the site.

"[ODOT] currently operates the site on an intermittent basis for emergency repair of slides, washouts, and other maintenance problems.

"The rock removal at this site should be limited due to the proximity to residential areas. The current use activities could be considered to be compatible, at its present level, with the surrounding area for some time to come.

"Within 6 months of the adoption of this amendment, the City of Stayton and [ODOT] shall collectively negotiate for the continued use of the Zimmerman Quarry at a level acceptable to both jurisdictions. The site shall be designated as Public Use in the [SCP] and Zoning Ordinance. An Agreement with specified conditions and limitations shall be ratified by both jurisdictions with provisions for review and modifications." Record 13 (Emphasis added.)

1 is reasonable and correct. McCoy v. Linn County, 90 Or App
2 271, 752 P2d 779 (1989). To the extent that interpretation is

1 inadequate for review, we may determine whether the decision
2 is correct. ORS 197.829(2).⁵

3 In the present case, the county interpreted and applied
4 the 1980 SCP as follows:

5 " * * * The 1980 SCP shows that rock extraction on
6 the site was intended to be kept at a much lower
7 level than proposed by applicant, and that blasting,
8 crushing and washing were not to be allowed."
9 Record 18.

10 The decision goes on to conclude that, because petitioner
11 proposes a scale and type of extraction far beyond that
12 contemplated by the 1980 SCP, petitioner's application
13 requires an amendment to the SCP, something beyond the
14 jurisdiction of the county to grant. Record 18.

15 Petitioner makes several arguments why the county erred
16 in deciding the 1980 SCP provides mandatory approval criteria,
17 but each are reducible to one of two themes: (1) that the 1980
18 SCP itself states or implies that its provisions are merely
19 advisory,⁶ and (2) the text at issue, considered alone or in

⁵ORS 197.829(2) provides:

"If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

⁶The introduction to the 1980 SCP (and all SCP versions) states that

"The purpose of this document is to establish a guide for the growth and development of the Stayton community. The plans and policies contained in this document are, in effect, an adopted statement of public policy which will serve, not only as a guide in the decision-making process, but also to communicate an understanding of the community's growth policies to the general public, other agencies, and the private landowner."

1 context, does not contain specific, mandatory criteria against
2 which the proposed use can be measured for compliance.

3 Where a comprehensive plan or land use regulation
4 explicitly states that particular portions of the plan or
5 regulations do not operate as mandatory approval criteria,
6 then such portions are not approval criteria. Downtown Comm.
7 Assoc. v. City of Portland, 80 Or App 336, 339, 722 P2d 1258
8 (1986) (a statement in zoning code that comprehensive plan
9 provisions were to be used "as a guideline only" rendered the
10 plan provisions advisory). In the absence of such explicit
11 statements, whether plan provisions or land use regulations
12 provisions constitute approval criteria depends on a case-by-
13 case analysis of the wording and context of the particular
14 provisions. Eskandarian v. City of Portland, 26 Or LUBA 98,
15 104 (1993).

16 In our view, nothing in the introductory language renders
17 the 1980 SCP merely advisory. The introduction does not
18 explicitly state that the SCP is to be used "as a guideline
19 only" or words to that effect.

20 With respect to the text and context of the provisions at
21 issue, petitioner argues that the provisions are generally

"* * * It is important to understand that because this plan is intended to serve as a guide to future development, more specific actions and programs must be undertaken to implement the goals and plans. A distinction between the comprehensive plan and implementing measures such as zoning, subdivision codes, public land acquisitions, taxing policies, and public improvements must be understood. Implementing measures are specific and separate actions. The plan is not a zoning ordinance, but a guide to future development." Record 77.

1 descriptive in nature, and that the only language arguably
2 specific enough to constitute a standard is the statement that
3 "[t]he rock removal operation at this site should be limited
4 due to the proximity to residential areas." Record 13
5 (emphasis added). Petitioner argues that use of the word
6 "should" rather than "shall" demonstrates a non-mandatory
7 standard.

8 However, in our view these arguments miss the point. The
9 context of the 1980 SCP includes the UGBPA, which, as we saw
10 above, requires the county to determine that "[a]ll land use
11 actions within the urban growth area and outside the city
12 limits shall be consistent with the City's comprehensive plan
13 * * * [.]" Record 937b (emphasis added). We affirmed above
14 the county's determination that this statement in the UGBPA is
15 itself a mandatory approval criterion. Where a land use
16 regulation requires that a proposed use demonstrate
17 consistency with a comprehensive plan, the plan itself need
18 not contain specific, mandatory approval criteria. See
19 Shelter Resources, Inc. v. City of Cannon Beach, 27 Or LUBA
20 229, 238, aff'd 129 Or App 433, 879 P2d 1313 (1994) (affirming
21 the city's interpretation of a local requirement that proposed
22 use be in conformance with the city's plan, to permit the city
23 to apply nonspecific, nonmandatory plan policies as approval
24 standards).

25 In the present case the county interprets the UGBPA to
26 require it to determine that the proposed use was consistent

1 with the SCP. We conclude that the county was permitted,
2 under these circumstances, to measure the consistency of the
3 proposed use with policies and other relevant standards in the
4 SCP, even ones that, in themselves, may not independently
5 constitute mandatory approval criteria.

6 Finally, petitioner contends that the county misconstrued
7 the pertinent language from the SCP, particularly in finding a
8 proscription against "blasting, crushing, and washing" rocks,
9 and finding an intent to limit rock extraction to 1980 levels.
10 With respect to the first finding, the decision evidently
11 relies on the statement that "the material fractures easily
12 and can be removed and stockpiled or loaded without the
13 necessity of blasting or crushing." Record 13. With respect
14 to the second finding, the decision evidently relies on the
15 statement that extraction "should be limited due to the
16 proximity of residential areas," and that "current use
17 activities" are compatible at its present level with the
18 surrounding area for some time to come. Id. Petitioner
19 argues that neither of these cited provisions support the
20 interpretation the county places on them.

21 We disagree. Read together and in context, the pertinent
22 SCP language exhibits an intent to limit rock extraction to
23 historical methods and levels. The county's interpretation is
24 reasonable and correct, and accordingly, we affirm it.

25 The fourth assignment of error is denied.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner assigns error to the county's conclusion that
3 it lacked jurisdiction over the application. The decision
4 explains that conclusion as follows:

5 "The proposed expansion of the mining area from one
6 acre to approximately 19 acres constitutes a post-
7 acknowledgment plan amendment (PAPA). In addition,
8 applicant is not the original operator of the
9 subject quarry, and applicant asks for an operation
10 of up to 100,000 cubic yards per year with crushing
11 and occasional blasting. The 1980 SCP shows that
12 rock extraction on the site was intended to be kept
13 at a much lower level than proposed by applicant,
14 and that blasting, crushing and washing were not to
15 be allowed. The application, as proposed, cannot be
16 approved without a new goal 5 analysis and
17 comprehensive plan amendment.

18 "According to applicant, a goal 5 analysis can be
19 undertaken as a part of this process. * * *
20 [However,] this application cannot proceed under the
21 conditional use process. * * * Since an expansion
22 of this site will require a comprehensive plan
23 amendment by the responsible local government, it is
24 up to the applicant to petition the City of Stayton
25 (in coordination with Marion County) for an
26 amendment to its comprehensive plan. Even if Marion
27 County is considered the applicable jurisdiction, no
28 comprehensive plan amendment application was filed,
29 and a conditional use application cannot be
30 converted [to a PAPA] even by virtue of ORS 197.646.
31 No comprehensive plan amendment or goal 5 analysis
32 is made here." Record 18.

33 We understand the decision to conclude that the 1980 SCP
34 limited extraction methods and levels, and thus petitioner's
35 application increasing extraction levels in part through
36 different methods could not be approved without amending the
37 SCP. The decision further concludes that OAR 660-23-180 (the
38 Goal 5 rule) applies and, in this circumstance, also requires
39 a post-acknowledgment plan amendment (PAPA) and Goal 5

1 analysis. Petitioner argued below (and continues to argue
2 on appeal) that the county had sufficient information to
3 perform the Goal 5 analysis, and thus should have performed
4 the Goal 5 analysis in the context of its CUP application.
5 The decision rejects this suggestion, reasoning that the
6 application requires an amendment to the SCP and hence a PAPA,
7 which petitioner must file with the city. Even if the county
8 could have jurisdiction over a PAPA to amend the SCP, the
9 decision declines to convert petitioner's CUP application into
10 a PAPA. Accordingly, the decision concludes that the county
11 lacks jurisdiction to decide the application.

12 We determined above that the county did not err in
13 applying the SCP as an approval standard and finding that the
14 proposed use did not comply with the SCP. It follows the
15 decision correctly determines that petitioner's CUP
16 application could not be approved without an amendment to the
17 SCP.

18 We also agree that the county could not approve the
19 proposed mining expansion in the absence of a PAPA.
20 Petitioner argues that in this circumstance the decision to
21 file a CUP or a PAPA is completely within petitioner's
22 discretion. We disagree. The Goal 5 rule requires that,
23 where a local government decides to allow mining on a
24 particular site, "the plan and implementing ordinances shall
25 be amended to allow such mining." OAR 660-23-180(4)(e). By
26 implication, a comprehensive plan amendment is unnecessary

1 only in those circumstances where the plan already allows the
2 proposed mining. See City of Barlow v. Clackamas County, 26
3 Or LUBA 375, 378 (1994) (where applicant sought a CUP to
4 resume an aggregate operation at levels previously permitted
5 by the acknowledged comprehensive plan, the county was not
6 required to perform a new Goal 5 analysis). We conclude that
7 where a proposed expansion of a mining site is inconsistent
8 with an acknowledged comprehensive plan, a CUP is insufficient
9 to permit the expansion. In that circumstance, OAR 660-23-
10 180(4) requires a PAPA.

11 To the extent petitioner's argues that it provided all
12 the information needed for a Goal 5 analysis and thus
13 essentially filed a PAPA with the county, we agree with the
14 decision that the county lacked jurisdiction to process a
15 PAPA. Under the 1989 UGBPA, the county is required to apply
16 the city's comprehensive plan and the county's land use
17 regulations to any land use applications within the city's
18 UGB. By implication, the county cannot apply its own
19 comprehensive plan within the UGB, and thus even if
20 petitioner's application is construed as a PAPA, amending the
21 county's plan would not change the outcome.⁷

⁷Petitioner does not suggest that the county has authority to amend the SCP. Nor does petitioner address the possibility that the county has authority under ORS 195.025(1) to unilaterally amend its own comprehensive plan to allow within the city's UGB what the SCP does not. See City of Portland v. Washington County, 27 Or LUBA 176, 191-92, aff'd 131 Or App 630 (1994) (suggesting that a county has authority under ORS 195.025(1) to unilaterally override conflicting city plan provisions in areas of overlapping planning).

1 In sum, the decision correctly concludes that the county
2 lacked jurisdiction to process an application that could not
3 be approved without amending the SCP.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioner argues that the decision is inconsistent with
7 the county's own comprehensive plan (MCCP) and Urban Zoning
8 Ordinance (MCUZO). In both respects, petitioner reasons that
9 MCCP and MCUZO require protection of aggregate sites pursuant
10 to Goal 5, the challenged decision fails to protect the
11 aggregate site, and thus the decision is not in compliance
12 with the MCCP, the MCUZO, and, ultimately, Goal 5.

13 With respect to the MCCP, petitioner cites several
14 passages that require that any proposed dwellings near an
15 aggregate source be subject to special review in order to
16 protect the source from residential encroachment.⁸ With
17 respect to the MCUZO, petitioner argues that an aggregate
18 quarry is recognized as a conditional use by the county under
19 MCUZO 14.02(d), and petitioner reasons therefore that MCUZO
20 14.02(d) must also embody the MCCP policies against
21 residential encroachment of aggregate sites. With respect to
22 Goal 5, petitioner argues that Goal 5 and the Goal 5 rule
23 require protection of resource use over conflicting uses, that

⁸We will assume for purposes of our discussion of this assignment of error that the county's decision must be consistent with the MCCP, notwithstanding the provisions of the 1989 UGBPA requiring the county to apply the SCP, not the MCCP, to land uses within the city's UGB.

1 the MCCP and MCUZO are acknowledged as complying with Goal 5,
2 and thus that the MCCP and MCUZO embody that Goal 5
3 requirement to protect resource use over conflicting uses.

4 The common theme to these arguments is that the county's
5 decision fails to protect the aggregate resource from
6 residential encroachment. Petitioner argues that limiting
7 extraction to 1980 levels means that much of the resource will
8 not be extracted before it is surrounded by residences, with
9 the consequence that much of the resource will never be
10 extracted. According to petitioner, the only way to protect
11 the aggregate resource is to extract it as rapidly as
12 possible.

13 The common flaw to petitioner's arguments is that nothing
14 cited to us in the county's provisions and in the Goal 5 rule
15 provide for or require a particular pace or level of resource
16 extraction in order to protect the resource. See Consolidated
17 Rock Products v. Clackamas County, 17 Or LUBA 609, 617 (1989)
18 (Goal 5 does not require that aggregate sites must be mined
19 until the resource is exhausted). The cited provisions of the
20 MCCP and MCUZO appear to require consideration of resource
21 protection only in the context of a proposed residential or
22 other conflicting use. No residential or other conflicting
23 use is proposed here. Contrary to petitioner's assertions,
24 the Goal 5 rule does not mandate protection of resource use
25 over conflicting uses. Rather, the Goal 5 rule permits the
26 local government to deny an application to mine a significant

1 aggregate site, which implies that, in some circumstances,
2 conflicting uses may prevail over resource use. OAR 660-23-
3 180(4). We conclude that the challenged decision is not
4 inconsistent with the M CCP or MCUZO for any reason cited to
5 us.

6 The second assignment of error is denied.

7 We need not reach petitioner's fifth assignment of error,
8 which challenges a finding that it is unclear whether MCUZO
9 40.02(c) can be met, as not supported by substantial evidence.
10 Petitioner is required to demonstrate compliance with each
11 applicable standard, and, we have concluded, the county
12 correctly determined that the application does not comply with
13 the SCP. On appeal of a denial of a conditional use
14 application, the county need only establish the existence of
15 one adequate basis for denial. Baughman v. Marion County, 17
16 Or LUBA 632, 636 (1989).

17 The county's decision is affirmed.