

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision denying its request for a comprehensive plan
4 map and text amendment and zoning map amendment.

5 **MOTION TO INTERVENE**

6 The Deer Island Preservation Society and the City of Columbia City move to
7 intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 Petitioner requested that the county amend its comprehensive plan to add a 190-acre
10 site to the comprehensive plan list of significant aggregate resource sites. Petitioner also
11 requested that the comprehensive plan map designation for the site be changed from Rural
12 Industrial to Mineral and Aggregate Resource and that the zoning map designation be
13 changed from Rural Industrial-Planned Development to Surface Mining.

14 The subject property is part of a 477-acre site located next to state Highway 30, an
15 arterial highway. The proposed use adjoins a fertilizer plant (Coastal Chemical) and would
16 share a private access directly onto Highway 30 with Coastal Chemical. The Columbia City
17 urban growth boundary is located 3,000 feet south of the subject property.

18 The county planning commission recommended that the board of county
19 commissioners (commissioners) approve petitioner's application. However, the
20 commissioners concluded that the proposal would result in certain conflicts that were not
21 adequately addressed by petitioner. On that basis, the commissioners denied the application.

22 **INTRODUCTION**

23 In 1996, the Land Conservation and Development Commission (LCDC) adopted
24 amendments to its Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources)
25 administrative rule. The amended rule concerning mineral and aggregate resources is
26 codified at OAR 660-023-0180. The scope of the county's authority to consider its

1 comprehensive plan and land use regulations under OAR 660-023-0180(4), when
2 considering a request for approval of a "PAPA [post-acknowledgment plan amendment]
3 involving a significant aggregate site," is the central dispute in this appeal. We briefly
4 describe the key provisions of OAR 660-023-0180 before turning to petitioner's assignments
5 of error.

6 Because the county had not yet amended its comprehensive plan and land use
7 regulations to comply with OAR 660-023-0180 at the time the application at issue in this
8 appeal was filed, OAR 660-023-0180(7) requires that the county directly apply the
9 substantive requirements and procedures of OAR 660-023-0180 to "consideration of a PAPA
10 concerning mining authorization * * *."¹ Except as noted below with regard to OAR 660-
11 023-0180(4)(b)(F), there is no dispute in this appeal that OAR 660-023-0180(7) has the legal
12 effect of preempting county comprehensive plan and land use regulation provisions that
13 would otherwise apply to a post-acknowledgment plan amendment, until the county
14 comprehensive plan and land use regulations have been amended to comply with OAR 660-
15 023-0180.

16 The initial requirement under the rule is to determine whether an aggregate resource
17 site is "significant." OAR 660-023-0180(3) establishes criteria that govern whether an
18 aggregate resource site "shall be considered significant." There is no dispute that the subject
19 property is a "significant" aggregate site.²

20 Once an aggregate resource site has been found to be significant, the rule requires
21 that the county determine whether mining will be allowed. That determination is governed
22 by OAR 660-023-0180(4)(a) through (g). OAR 660-023-0180(4)(a) requires that the county

¹The challenged decision specifically finds that the county had not yet amended its comprehensive plan to comply with OAR 660-023-0180 and that the rule therefore applies directly under OAR 660-023-0180(7). Record 51A, finding 1.

²The challenged decision specifically finds that the site is a significant aggregate resource site. Record 51A, finding 2.

1 "determine an impact area for the purpose of identifying conflicts with proposed mining and
2 processing activities."³ Once the county identifies an impact area, it is required to
3 "determine existing or approved land uses within the impact area that will be adversely
4 affected by proposed mining operations and [to] specify the predicted conflicts." OAR 660-
5 023-0180(4)(b). OAR 660-023-0180(4)(b) specifically limits the conflicts that the county
6 may consider.⁴

7 If conflicts are identified under OAR 660-023-0180(4)(b), local governments are
8 required to determine whether there are "reasonable and practical measures that would

³OAR 660-023-0180(4)(a) also requires that "[t]he impact area shall be large enough to include uses listed in [OAR 660-023-0180(4)(b)] and shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance."

⁴OAR 660-023-0180(4)(b) provides, in part:

"For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:

- "(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges;
- "(B) *Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards regarding sight distances, road capacity, cross section elements, horizontal and vertical alignment, and similar items in the transportation plan and implementing ordinances. Such standards for trucks associated with the mining operation shall be equivalent to standards for other trucks of equivalent size, weight, and capacity that haul other materials;*
- "(C) Safety conflicts with existing public airports due to bird attractants, i.e., open water impoundments. This paragraph shall not apply after the effective date of commission rules adopted pursuant to Chapter 285, Oregon Laws 1995;
- "(D) Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated;
- "(E) Conflicts with agricultural practices; and
- "(F) *Other conflicts for which consideration is necessary in order to carry out ordinances that supersede Oregon Department of Geology and Mineral Industries (DOGAMI) regulations pursuant to ORS 517.780[.]*" (Emphases added.)

1 minimize the conflicts * * *."⁵ OAR 660-023-0180(4)(c). If such "reasonable and practical
2 measures" exist, mining must be allowed. If identified conflicts cannot be minimized, the
3 local government must proceed to determine the ESEE (economic, social, environmental and
4 energy) consequences of "either allowing, limiting, or not allowing mining at the site."⁶
5 OAR 660-023-0180(4)(d).⁷

6 As explained below, petitioner argues that the county misconstrued OAR 660-023-
7 0180(4)(b)(B) and (F) in the decision challenged in this appeal.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioner argues under its first assignment of error that the county misconstrued its
10 authority to consider additional conflicts under OAR 660-023-0180(4)(b)(F).⁸ The county
11 explained its use of its comprehensive plan and zoning ordinance as decisional criteria,
12 notwithstanding the limitation imposed by OAR 660-023-0180(7), as follows:

13 "7. Pursuant to OAR 660-023-0180(4)(b)(F), Columbia County zoning
14 laws and ordinances are applicable to the Application. In 1972,
15 Columbia County adopted an ordinance regarding the regulation of
16 mining operations within the County. * * * Section 5.3(17) of the
17 Columbia County Surface Mining Ordinance [(SMO)] requires that an
18 applicant for an operating permit show that it has complied with local
19 land use regulations. The Board of Commissioners finds that this

⁵Under the rule, a conflict is minimized if it is reduced "to a level that is no longer significant." OAR 660-023-0180(1)(f).

⁶In performing this ESEE analysis the local government is required to consider the following:

- "(A) The degree of adverse effect on existing land uses within the impact area;
- "(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and
- "(C) The probable duration of the mining operation and the proposed post-mining use of the site." OAR 660-023-0180(4)(d).

⁷OAR 660-023-0180(e) and (f) impose additional requirements, but those requirements are not at issue in this appeal.

⁸The Department of Land Conservation and Development (DLCD) submitted a state agency brief pursuant to ORS 197.830(7) and OAR 661-010-0038, in which it supports petitioner's first assignment of error.

1 section of the [SMO] obligates the County to apply its local land use
2 regulations to this post-acknowledgment plan amendment.
3 Specifically, Columbia County Zoning Ordinance (CCZO) 1502.1B as
4 applied to major map amendments, requires that '[t]he proposed Zone
5 Change * * * [be] consistent with the policies of the Comprehensive
6 Plan.' CCZO Section 1048 requires approval of a zone change to the
7 Surface Mining (SM) District be based upon satisfactory compliance
8 with requirements set forth in CCZO 1047; fulfill a market need; and
9 not cause immediate or long-term land use conflicts that cannot be
10 satisfactorily mitigated." Record 51A-52.

11 In findings 8-10, the commissioners conclude that the applicant "failed to provide sufficient
12 evidence that there is a market need for the mineral resource on the Property," as required by
13 CCZO 1048. Record 52. The decision also cites an industrial development comprehensive
14 plan goal and policy and finds the goal and policy are violated by the proposal. The decision
15 next cites concerns expressed by Columbia City that the proposal would preclude desired
16 development of the corridor between Columbia City and Deer Island.⁹ The decision also
17 notes that the comprehensive plan includes a statement that the subject property is more
18 valuable for industrial use than for resource use and finds that "maintaining the use of the
19 Property for industrial use would have major positive social impacts for the county because
20 of the potential for more jobs." Record 52. The challenged decision concludes with findings
21 11 and 12.

22 "11. The Applicant has not presented sufficient evidence to assure the
23 above-stated conflicts will be minimized. Further, the economic,
24 social, environmental and energy consequences of allowing mining at
25 the site, given the duration of the mining operation to be 40 or more
26 years, the degree of the adverse effect on the existing land uses within
27 the impact area and the limitation on imposing measures that could
28 reduce the adverse effects, on balance, does not support a decision to
29 grant the PAPA.

30 "12. The applicant has failed to show how the application complies with
31 CCZO 1048. * * *. Record 52-53.

⁹It is not clear to what plan or CCZO provision this finding is directed.

1 Our resolution of the first assignment of error turns on the meaning of OAR 660-023-
2 0180(4)(b)(F), which is set out above at n 4 and allows the county to consider "other
3 conflicts for which consideration is necessary in order to carry out ordinances that supercede
4 [DOGAMI] regulations pursuant to ORS 517.780." Petitioner concedes that the county's
5 SMO is the kind of ordinance referred to in OAR 660-023-0180(4)(b)(F) and ORS
6 517.780.¹⁰ Nevertheless, petitioner and DLCD argue that the county misconstrued the scope
7 of the exception provided by OAR 660-023-0180(4)(b)(F) to include allowing the county to
8 directly apply its comprehensive plan and zoning ordinance.

9 The SMO is a 57-page document with separate articles addressing "Administration,"
10 "Total Exemptions," "Limited Exemptions," "Operating Permits," "Reclamation Plan,"
11 "Financial Security," "Operating Requirements," and "Compliance." Section 5.3 appears in
12 the "Operating Permits" article and, as relevant, provides:

13 "Applications for operating permits for surface mining shall include, or be
14 accompanied by, the following information or items and whatever additional
15 information the Administrator requires or the applicant deems relevant:

16 "* * * * *

17 "(17) Proof that local land use regulations have been complied with."

18 The critical interpretive question, *i.e.* the scope of additional conflicts that may be
19 considered under OAR 660-023-0180(4)(b)(F), is a question of state law and the county's
20 interpretation of OAR 660-023-0180(4)(b)(F) is not entitled to the deferential standard of
21 review required by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710
22 (1992). *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992). For the reasons
23 explained below, we do not agree with the county's interpretation of OAR 660-023-
24 0180(4)(b)(F).

¹⁰Indeed the SMO apparently is the only such ordinance. The SMO is also referred to as the Surface Mining Land Reclamation Ordinance or SMLRO. We use the shorter reference in this opinion.

1 The first problem with the county's interpretation of OAR 660-023-0180(4)(b)(F) as
2 allowing its comprehensive plan and land use regulations to dictate that additional conflicts
3 must be considered is that it relies entirely on SMO 5.3(17) for that proposition.¹¹ The
4 challenged decision identifies nothing in the 57-page SMO itself that requires that particular
5 land use conflicts be considered in the challenged decision. The challenged decision relies
6 entirely on SMO 5.3(17) as requiring that the county apply the comprehensive plan and land
7 use regulations as a source of approval criteria in this matter, such that alleged conflicts with
8 the comprehensive plan and land use regulations must be addressed under OAR 660-023-
9 0180(4)(b)(F).¹²

10 OAR 660-023-0180(4)(b)(F) must be considered in context. *PGE v. Bureau of Labor*
11 *and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). OAR 660-023-0180(7) effectively
12 limits the conflicts that local governments may consider in reviewing a proposal such as the
13 one challenged in this appeal to those specified in OAR 660-023-0180(4)(b). As previously
14 explained, OAR 660-023-0180(7) effectively preempts application of all local government
15 comprehensive plans and land use regulations to applications such as the one at issue in this
16 appeal, until the local government comprehensive plan and land use regulations have been
17 amended to comply with OAR 660-023-0180. As noted earlier, this means that consideration
18 of additional conflicts under the comprehensive plan or land use regulations is prohibited.¹³
19 However, as interpreted by the county, OAR 660-023-0180(4)(b)(F) provides a bridge to the

¹¹ Although not cited by the county in its decision, SMO 8.1 requires that surface mining be conducted in accordance with federal, state and local law, "including specifically [CCZO] 1040 through 1048 * * *."

¹²As we explain more fully below, the county's second interpretational error lies in its misunderstanding of the concept of "conflicts," as that term is used in OAR 660-023-0180(4)(b). The term "conflicts," as used in the rule, is not synonymous with noncompliance with policies expressed in the comprehensive plan or land use regulations. Even if particular examples of such inconsistencies could be termed conflicts in a general sense, they are not the types of "conflicts" contemplated by the rule.

¹³Presumably local governments will be required to eliminate any requirements for consideration of conflicts that go beyond what is required and allowed under OAR 660-023-0180(4)(b)(A) through (F) in the process of bringing their plans and land use regulations into compliance with OAR 660-023-0180.

1 county's comprehensive plan and land use regulations, as a source of required land use
2 conflicts analysis, notwithstanding the prohibition in OAR 660-023-0180(7).

3 As petitioner and DLCD argue, the Oregon Department of Geology and Mineral
4 Industries (DOGAMI) regulatory process is separate from the land use approval process.¹⁴
5 OAR 660-023-0180(4)(b)(F) simply recognizes that Columbia County retains a role in
6 permitting surface mines that supplements DOGAMI regulations, by virtue of the SMO. Just
7 as DOGAMI does not require conflict analyses based on comprehensive plan and land use
8 regulation provisions, petitioner and DLCD argue that the exception provided for Columbia
9 County to apply its SMO should not be interpreted to include such an obligation or right.
10 Clearly, where the SMO itself requires consideration of conflicts, OAR 660-023-
11 0180(4)(b)(F) preserves the county's right and obligation to consider such conflicts.
12 However, the question is whether, by virtue of SMO 5.3(17), that right and obligation is
13 extended to conflicts under the comprehensive plan and land use regulation. In other words,
14 does SMO 5.3(17) make all conflicts that must be considered under the comprehensive plan
15 or land use regulations "other conflicts for which consideration is necessary in order to carry
16 out ordinances that supercede [DOGAMI] regulations pursuant to ORS 517.780"?

17 We believe it is unlikely that LCDC intended OAR 660-023-0180(4)(b)(F) to allow
18 Columbia County to be the only local government in Oregon that is permitted to apply its
19 comprehensive plan and land use regulations to decisions governed by OAR 660-023-0180
20 without first bringing its comprehensive plan and land use regulations into compliance with
21 OAR 660-023-0180. We believe it is much more likely that LCDC did not intend such a
22 sweeping exception for Columbia County and did not intend to allow a general reference in
23 the SMO concerning comprehensive plan and land use regulation compliance to make

¹⁴OAR 660-023-0180(6)(b) specifically notes that "[f]inal approval of reclamation plans resides with DOGAMI rather than local governments, except as provided in ORS 517.780."

1 conflicts associated with such compliance a consideration under OAR 660-023-
2 0180(4)(b)(F).

3 We conclude that OAR 660-023-0180(4)(b)(F) only requires and allows
4 consideration of additional conflicts under the SMO if such conflicts must be considered
5 under the provisions of the 57-page SMO itself. In this case, all the conflicts identified by
6 the county are only required to be considered by virtue of the general requirement in SMO
7 5.3(17) that a permit applicant must also demonstrate compliance with county land use
8 regulations. Until the county's comprehensive plan and land use regulations have been
9 amended to comply with OAR 660-023-0180, petitioner may not be required to address the
10 conflicts, based on the comprehensive plan and land use regulations, that were identified in
11 the challenged decision in denying petitioner's application. The county's decision to deny the
12 application based on those conflicts misconstrued its authority under OAR 660-023-
13 0180(4)(b)(F).

14 The county's second interpretational error lies in its understanding of the word
15 "conflicts." In the words of the rule, the challenged decision does not identify "other
16 *conflicts* for which consideration is necessary in order to carry out ordinances that supercede
17 [DOGAMI] regulations pursuant to ORS 517.780." (Emphasis added.)¹⁵ Again, OAR 660-
18 023-0180(4)(b)(F) must be viewed in its context. That context includes the remaining
19 subsections of OAR 660-023-0180(4)(b). *See* n 4. If OAR 660-023-0180(4)(b) is viewed in
20 its entirety, it is clear that the purpose of OAR 660-023-0180(4)(b) is to define and limit the
21 kinds of "conflicts" between the proposed mining use and "existing or approved" *land uses*

¹⁵Although OAR 660-023-0180 does not define "conflicts," OAR 660-023-0180(1)(b) provides:

"'Conflicting use' is a use or activity that is subject to land use regulations and that would interfere with, or be adversely affected by, mining or processing activities at a significant mineral or aggregate resource site (as specified in sections 4(b) and (5) of this rule)."

1 that the county can and must consider in determining whether to allow mining of a
2 significant aggregate site.¹⁶

3 OAR 660-023-0180(4)(b)(F) admittedly introduces the possibility that the county
4 may be required to consider "conflicts" beyond those that are specified in OAR 660-023-
5 0180(4)(b)(A) through (E). However, the interpretation of OAR 660-023-0180(4)(b)(F)
6 expressed in the decision appears to take the much broader position that the county may
7 apply its entire comprehensive plan and zoning ordinance as decisional criteria, rather than
8 as documents that identify particular land use conflicts that must be considered.

9 The three "conflicts" that the county identifies with comprehensive plan and CCZO
10 provisions requiring a demonstration of market need, need for the subject property for
11 industrial use, and for Columbia City expansion are not conflicts between *land uses* and,
12 thus, are not "conflicts" within the meaning of the rule. A conflict or inconsistency with a
13 comprehensive plan or land use regulation provision is not a "conflict" between *land uses*,
14 within the meaning of OAR 660-023-0180(4)(b).

15 The first assignment of error is sustained.

16 **SIXTH ASSIGNMENT OF ERROR**

17 Under the sixth assignment of error, petitioner argues that the findings challenged in
18 the first assignment of error are not supported by substantial evidence. We have already
19 concluded that those findings improperly interpret OAR 660-023-0180(4)(b)(F). For that
20 reason, the challenged findings do not express a proper basis for denying the disputed
21 application. Therefore, no purpose would be served by reviewing those findings for
22 evidentiary support. *DLCD v. Columbia County*, 16 Or LUBA 467, 471 (1988).

¹⁶The conflicts under the comprehensive plan and land use regulations identified by the county in findings 8-10 include market need, need for the subject property for industrial use, and Columbia City expansion. Transportation system impacts were raised under OAR 660-023-0180(4)(b)(B) and are discussed later in this opinion.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner argues under the second assignment of error that the county erred as a
3 matter of law in finding that conflicts with truck traffic and rail traffic had not been
4 minimized under OAR 660-023-0180(4)(b)(B).

5 OAR 660-023-0180(4)(b)(B) is set out in full at n 4. As relevant to this assignment
6 of error, OAR 660-023-0180(4)(b)(B) limits the conflicts that the county may consider as
7 follows:

8 "Potential conflicts to local roads used for access and egress to the mining site
9 within one mile of the entrance to the mining site unless a greater distance is
10 necessary in order to include the intersection with the nearest arterial
11 identified in the local transportation plan."

12 The county adopted the following finding:

13 "5. The Application presents potential conflicts to roads used for access
14 and egress to the mining site by creating traffic safety and congestion
15 problems as a result of the projected numerous rail car crossings and
16 truck traffic originating from the site. Such safety and congestion
17 problems will impede local road access to the state highway and
18 potentially delay emergency service vehicles. The Applicant did not
19 present evidence or information to assure such conflicts would be
20 minimized to a level that is no longer significant (OAR 660-023-
21 0180(4)(b)(B)." Record 51A.

22 Petitioner argues that the county improperly construed OAR 660-023-0180(4)(b)(B)
23 to allow consideration of conflicts with all roads generally. Petitioner first argues that OAR
24 660-023-0180(4)(b)(B) only allows consideration of conflicts to "local roads"; it does not
25 allow consideration of conflicts to arterial roads such as Highway 30. Petitioner next argues
26 that conflicts to local roads may only be considered under the rule if the local road is "used
27 for access and egress to the mining site." Because access to the proposed mining site is
28 directly from highway 30, an arterial highway, petitioner argues there is no local road "used
29 for access and egress to the mining site."

30 We agree with petitioner. The conflicts upon which finding 5 are based are beyond
31 the scope of conflicts to local roads that may be considered under OAR 660-023-

1 0180(4)(b)(B). If access to the mining site were via a "local road," the county could consider
2 potential conflicts with that local road "within one mile of the entrance to the mining site
3 unless a greater distance is necessary in order to include the intersection with the nearest
4 arterial identified in the local transportation plan."¹⁷ However, access to the mining site in
5 this case is via a direct connection with an arterial highway; there are no "local roads used for
6 access and egress to the mining site." OAR 660-023-0180(4)(b)(B) does not permit the
7 county to consider the types of conflicts with highways, local roads and railroads that are
8 identified in the disputed finding.

9 Finally, respondent suggests that the disputed finding concerning transportation
10 system impacts relies on OAR 660-023-0180(4)(b)(F) and CCZO 1502.1(B)(3), rather than
11 OAR 660-023-0180(4)(b)(B). Respondent's Brief 7-10. CCZO 1502.1(B)(3) applies where
12 the county is considering a major zoning map amendment and requires evidence that the
13 property is served by an "adequate transportation network." There are two difficulties with
14 respondent's suggestion. First, the challenged finding does not purport to rely on CCZO
15 1502.1(B)(3); to the contrary, it expressly refers to OAR 660-023-0180(4)(b)(B). Second,
16 even if the finding were relying on OAR 660-023-0180(4)(b)(F) and CCZO 1502.1(B)(3)
17 with regard to traffic impacts, we have determined under the first assignment of error that
18 such reliance would be outside the range of discretion permitted by OAR 660-023-
19 0180(4)(b)(F).

20 The second assignment of error is sustained.

¹⁷We understand the arterial intersection referenced in the rule to refer to the place where a local road access to a mining site first connects with an arterial highway. If that intersection is more than one mile away from the site, consideration of impacts on such a local road for more than one mile is authorized by the rule. Petitioner attaches legislative history of OAR 660-023-0180(4)(b)(B), which supports this reading of the rule. Petition for Review, Appendix H.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner argues that the county misconstrued OAR 660-023-0180(4)(a), which
3 provides:

4 "The local government shall determine an impact area for the purpose of
5 identifying conflicts with proposed mining and processing activities. The
6 impact area shall be large enough to include uses listed in subsection (b) of
7 this section and shall be limited to 1,500 feet from the boundaries of the
8 mining area, except where factual information indicates significant potential
9 conflicts beyond this distance. For a proposed expansion of an existing
10 aggregate site, the impact area shall be measured from the perimeter of the
11 proposed expansion area rather than the boundaries of the existing aggregate
12 site and shall not include the existing aggregate site."

13 The county adopted the following finding to explain its expansion of the impact area
14 3,000 feet to the south of the subject property:

15 "3. The Board of County Commissioners determines the impact area of
16 the proposed mining operation, in addition to the 1,500 feet from the
17 boundaries of the mining area, as provided by OAR 660-023-
18 0180(4)(a) should be expanded a further 1,500 feet from the southern
19 boundaries of the mining area (or [a] total of 3,000 feet) as a result of
20 that area being adversely affected by the proposed mining operation.
21 The impact on traffic and to the economic development of the area, as
22 further described below, have not been fully addressed by the
23 applicant." Record 51A.

24 Petitioner presents several arguments challenging finding 3, but the dispositive argument is
25 that it purports to expand the impact area based on conflict considerations that are not
26 permissible under the rule. The finding's reference to impact on traffic presumably refers to
27 the traffic impacts discussed in finding 5, which we determined in our discussion of the
28 second assignment of error to be based on an erroneous view of the scope of conflicts to local
29 roads that may be considered under OAR 660-023-0180(4)(b)(B). The finding's reference to
30 "economic development of the area" presumably refers to conflicts identified in findings 9
31 and 10 (concerning comprehensive plan industrial lands preservation provisions and
32 development of Columbia City), which we determined in our discussion of the first

1 assignment of error to be based on an erroneous view of the scope of conflicts that may be
2 considered under OAR 660-023-0180(4)(b)(F).

3 Because the conflicts the county relied upon to expand the impact area to 3,000 feet
4 are all outside the scope of conflicts that may be considered under OAR 660-023-0180(4)(b),
5 the county's expansion of that impact area was error.

6 The third assignment of error is sustained.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Petitioner challenges finding 11:

9 "The Applicant has not presented sufficient evidence to assure the above-
10 stated conflicts will be minimized. Further, the economic, social,
11 environmental and energy consequences of allowing mining at the site, given
12 the duration of the mining operation to be 40 or more years, the degree of the
13 adverse effect on the existing land uses within the impact area and the
14 limitation on imposing measures that could reduce the adverse effects, on
15 balance, does not support a decision to grant the PAPA." Record 52-53.

16 OAR 660-023-0180(4)(c) requires that the county determine whether there are
17 "reasonable and practical measures that would minimize the conflicts identified under [OAR
18 660-023-0180(4)(b)]." If conflicts cannot be minimized, OAR 660-023-0180(4)(d) requires
19 in part that the county then proceed to "determine the ESEE consequences of either allowing,
20 limiting, or not allowing mining at the site."¹⁸

21 The first sentence of finding 11 apparently is intended as a finding that conflicts will
22 not be minimized, as provided by OAR 660-023-0180(4)(c). However, that finding is based
23 on conflicts identified by the county that we have already determined under the first and
24 second assignments of error are beyond the conflicts that may be considered under OAR
25 660-023-0180(4)(b). Therefore, under the rule, the county was not required to consider the

¹⁸OAR 660-023-0180(4)(d) specifies certain considerations that must be followed in performing an ESEE analysis under the rule.

1 "ESEE consequences of either allowing, limiting, or not allowing mining at the site"; and the
2 second sentence in finding 11 cannot provide a basis for denial under the rule.

3 The fourth assignment of error is sustained.

4 **FIFTH ASSIGNMENT OF ERROR**

5 In the fifth assignment of error petitioner repeats arguments made elsewhere in its
6 brief that, by citing railroad conflicts, the county improperly intrudes into an area of
7 regulation that has been preempted by federal law. We essentially agree with the county's
8 response to that argument. Respondent's Brief 8-10.¹⁹ However, it is not necessary to reach
9 the question because we agree with petitioner's additional argument that even if the county
10 could otherwise consider conflicts related to rail crossings in the area, for the reasons
11 explained under our discussion of the second assignment of error, consideration of such
12 conflicts is precluded in this case by OAR 660-023-0180(4)(b)(B). This is because the rule
13 limits consideration of conflicts to "local roads used for access" and there are no such roads
14 in this case. Under this assignment of error, petitioner also repeats other arguments made
15 under petitioner's remaining assignments of error. No purpose would be served by
16 addressing those argument again here.

17 The fifth assignment of error is denied.

18 **CONCLUSION**

19 As noted in our introductory discussion of OAR 660-023-0180, once a mineral and
20 aggregate site is found to be significant, the next inquiry is whether there are conflicts and, if
21 so, whether any conflicts can be minimized. If there are no conflicts or those conflicts can be
22 minimized, the county is required to allow the site to be mined. OAR 660-023-0180(4)(c).

¹⁹The gist of the county's response is that the decision does not attempt to regulate railroad crossings as petitioner suggests. Rather, according to respondent, the decision simply finds that expected rail traffic to the proposed mining operation would cause conflicts at rail crossings that the county believed it could consider under OAR 660-023-0180(4)(b)(B) and (F).

1 The challenged decision concludes that some identified conflicts can be minimized.
2 Record 16, finding 2; Record 51A, finding 4. The only conflicts identified by the county that
3 it ultimately concluded could not be minimized are conflicts that we determine in this
4 opinion were beyond the permissible scope of inquiry under OAR 660-023-0180(4)(b)(B)
5 and (F). Therefore, under OAR 660-023-0180(4)(c), the county was required to allow
6 mining and it erred by failing to do so.

7 The county erred as a matter of law because the reasons given for denying the
8 application are prohibited as a matter of law. Therefore, the county's decision must be
9 reversed. OAR 661-010-0071(1)(c). Although we reverse the county's decision, we do not
10 do so under ORS 197.835(10)(a)(A), as petitioner requests in its statement of relief sought.
11 Petition for Review 1. ORS 197.835(10)(a)(A) mandates that we reverse a land use decision
12 where a "local government decision is outside the range of discretion allowed the local
13 government under its comprehensive plan and implementing ordinances[.]" If a decision is
14 reversed under ORS 197.835(10)(a)(A), ORS 197.835(10)(b) requires that we award attorney
15 fees to the applicant. In this case, the county made a decision outside the range of discretion
16 allowed under OAR 660-023-0180(4)(b)(B) and (F), which are LCDC administrative rule
17 provisions. ORS 197.835(10)(a)(A), therefore, does not apply.

18 The county's decision is reversed. As a consequence of our reversal of the county's
19 decision, the county must take any additional measures required to perform its obligations
20 under OAR 660-023-0180(4)(e) and (f), consistent with this opinion.²⁰

²⁰Those requirements of OAR 660-023-0180(4) are as follows:

- "(e) Where mining is allowed, the plan and implementing ordinances shall be amended to allow such mining. Any required measures to minimize conflicts, including special conditions and procedures regulating mining, shall be clear and objective. Additional land use review (e.g., site plan review), if required by the local government, shall not exceed the minimum review necessary to assure compliance with these requirements and shall not provide opportunities to deny mining for reasons unrelated to these requirements, or to attach additional approval requirements, except with regard to mining or processing activities:

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- "(A) For which the PAPA application does not provide information sufficient to determine clear and objective measures to resolve identified conflicts;
 - "(B) Not requested in the PAPA application; or
 - "(C) For which a significant change to the type, location, or duration of the activity shown on the PAPA application is proposed by the operator.
- "(f) Where mining is allowed, the local government shall determine the post-mining use and provide for this use in the comprehensive plan and land use regulations. For significant aggregate sites on Class I, II and Unique farmland, local governments shall adopt plan and land use regulations to limit post-mining use to farm uses under ORS 215.203, uses listed under ORS 215.213(1) or 215.283(1), and fish and wildlife habitat uses, including wetland mitigation banking. Local governments shall coordinate with DOGAMI regarding the regulation and reclamation of mineral and aggregate sites, except where exempt under ORS 517.780."