BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COPELAND SAND & GRAVEL, INC.,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

GARY L. SWANSON, CAROL SWANSON,
JAMES S. FORD, LINDA S. FORD
and DOLORES LISMAN,
Intervenors-Respondent.

LUBA No. 2003-193

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Daniel O'Connor, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Huycke, O'Connor and Jarvis, LLP.

No appearance by Jackson County.

Christian E. Hearn, Ashland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Davis, Gilstrap, Hearn, Saladoff and Smith, PC.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 04/01/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision denying a conditional use application for an aggregate operation.

MOTION TO INTERVENE

Gary L. Swanson, Carol Swanson, James S. Ford, Linda S. Ford, and Dolores Lisman (intervenors), opponents below, move to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.

FACTS

Petitioner seeks to develop an aggregate operation in the Applegate River near the Jackson and Josephine County border. Petitioner filed a floodplain development permit that was approved and was the subject of a separate LUBA appeal. That floodplain development permit decision was remanded. *Swanson v. Jackson County*, ___ Or LUBA ___ (LUBA No. 2003-198, March 22, 2004). Petitioner also filed a conditional use application for an aggregate operation concerning the same property. The two matters were referred directly to a county hearings officer for a joint public hearing. Although the hearings officer approved the floodplain permit, he denied the accompanying conditional use permit for aggregate mining. This appeal followed.

MOTION TO DISMISS

In an order dated January 16, 2004, we denied intervenors' motion to dismiss. Intervenors argued that petitioner had failed to serve all persons with the notice of intent to appeal as required by our rules. In their response brief, intervenors renew their motion to dismiss and provide additional evidence in support of that motion. Petitioner objects to the renewed motion and evidence.

There certainly is some confusion as to whether petitioner served all persons who received notice of the decision, as is required by our rules.[1] In fact, it now appears likely that petitioner *did not* serve all persons who received written notice of the county's decision. That confusion, however, is not petitioner's fault. As our rule states, the notice of intent to appeal must be served on those persons "shown on the governing body's records." *See* n 1. The hearings officer's decision does not clearly indicate who received notice of the decision. The notice list for the decision appears in the record from pages 13 to 21. Those pages contain what appear to be portions of at least five different lists. The various lists are not in alphabetical order, are duplicative, and include unexplained headings such as "decision mailing list" and "interested parties." Confusion on petitioner's part as to who should be served is understandable.

As we explained in our previous order, petitioner's attorney contacted the county's staff person in charge of mailing the final decision. According to petitioner's attorney, he was told that a certain portion of the notice mailing list was the list of persons mailed notice of the county's decision. Based on that information, petitioner's attorney concluded that he had served all those designated by the county as having received notice of the decision. When (1) the local government's record does not clearly show who was mailed written notice of the decision; (2) a petitioner asks the local government who was actually mailed written notice; and (3) the petitioner serves the notice of intent to appeal on the persons the local government states were mailed written notice of the decision, then that petitioner has complied with our rules and we will not dismiss the appeal.

The motion to dismiss is denied.

ASSIGNMENT OF ERROR

The sole assignment of error in this appeal is whether a conditional use permit should have been issued to petitioner under ORS 215.298(2), which provides:

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[1] OAR 661-010-0015(3)(f)(D) requires a petitioner to serve the notice of intent to appeal on "[a]ny other person to whom written notice of the land use decision * * * was mailed as shown on the governing body's records."

> "A permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan."[2]

The issue in this case is whether petitioner's property is included on an "inventory" for purposes of ORS 215.298(2). We discussed this issue in *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140, 147-48 (2002), *aff'd* 187 Or App 241, 65 P3d 1123 (2003):

> "Goal 5 requires that local governments plan and protect mineral and aggregate sites. The first Goal 5 administrative rule was adopted in 1981 and codified at OAR chapter 660, division 16. That rule set out a required structure for evaluating Goal 5 resources. Local governments were obligated to (1) identify Goal 5 resources; (2) determine whether those identified resources were located within the locality's jurisdiction; (3) evaluate whether those resources were significant; (4) identify existing and potential uses that could conflict with significant Goal 5 resources; and (5) determine whether conflicting uses would be prohibited, conditionally permitted, or allowed without restriction.
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> "At the first two steps of the process, the local government was required to collect available data regarding the location, quality and quantity of each Goal 5 resource, and determine whether there was enough information to properly complete the process. OAR 660-016-0000(1). Based on analysis of the collected data, the local government had three options: (a) do not include the resource on the inventory; (b) delay the Goal 5 process until more adequate information was available; or (c) include the resource on the plan inventory.[3] Under the Goal 5 rule as first

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[2] ORS 215.283(2)(b)(B) provides that "[m]ining, crushing or stockpiling of aggregate * * * resources" may be established in EFU zones subject to approval of the governing body and also "subject to ORS 215.298."

[3] OAR 660-016-0000(5) provides, in relevant part:

> "Based on data collected, analyzed and refined by the local government, as outlined above, a jurisdiction has three basic options:
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> "(a) Do Not Include on Inventory: Based on information that is available on location, quality and quantity, the local government might determine that a particular resource site is not important enough to warrant inclusion on the plan inventory, or is not required to be included in the inventory based on the specific Goal standards. No further action need be taken with regard to these sites * * *;
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> "(b) Delay Goal 5 Process: When some information is available, indicating the possible existence of a resource site, but that information is not adequate to identify with particularity the location, quality and quantity of the resource site, the local government should only include the site on the comprehensive plan inventory as a special category * * *;

> promulgated, these options with regard to including resources on the inventory were known as '1A,' '1B' and '1C' options, respectively. Many local government comprehensive plans, including Douglas County's [and Jackson County's], still contain references to '1A,' '1B' and '1C' resources." (Footnotes omitted and added.)

In *Beaver State*, we held that aggregate sites that were "1A" sites, even if such sites are included on something called a list or "inventory" in a county's comprehensive plan, are not "included on an inventory" for purposes of ORS 215.298(2). *Id*. at 175.

Petitioner applied for a conditional use permit based on its contention that its property is listed on the county's "1B" inventory of potentially significant aggregate sites. In *Beaver State*, we noted that although it was not at issue in that case, our prior opinions had held that a "1B" site was considered to be on an inventory for purposes of ORS 215.298(2) and that we had no occasion to reconsider that proposition.

> "In *O'Rourke v. Union County*, 31 Or LUBA 174, 179-80 (1996), we noted that OAR 660-016-0000(5)(b) requires that a local government include '1B' sites in its comprehensive plan inventory as a special category. We held that a decision adding a '1B' site to the inventory must address applicable statewide planning goals. In explaining that holding, we stated that, pursuant to ORS 215.298(2), such inventoried sites are available to be mined under a conditional use permit process, a process that does not generally permit consideration of the goals, and therefore the goals must be considered when the '1B' site is added to the inventory. As relevant here, *O'Rourke* stands for the proposition that the 'inventory' referenced in ORS 215.298(2) includes the 'special category' of '1B' sites in the county's Inventory. We have no occasion here to question that proposition, and assume it is correct for purposes of this opinion." *Id*. at 170 n 21.

The hearings officer considered the question we raised in footnote 21 in our *Beaver State* decision, whether "1B" sites are included on an inventory for purposes of ORS 215.298(2), and concluded that such sites were not "included on an inventory," within the meaning of ORS

> "(c) Include on Plan Inventory: When information is available on location, quality and quantity, and the local government has determined a site to be significant or important as a result of the data collection and analysis process, the local government must include the site on its plan inventory and indicate the location, quality and quantity of the resource site (see above). Items included on this inventory must proceed through the remainder of the Goal 5 process."

215.298(2) and are therefore not allowed as a conditional use in the EFU zone. Record 7. Petitioner challenges that conclusion.

Before turning to the merits of petitioner's argument, however, we first consider intervenors' challenge to a key premise underlying petitioner's argument and the county's decision. Intervenors argue that even if *Beaver State* can be read to support the conclusion that a "1B" site is on an "inventory" for purposes of ORS 215.298(2) (which intervenors dispute), the subject property is not on a "1B" inventory because the county does not have a "1B" inventory. According to intervenors, because the county does not have a "1B" inventory and the subject property is not on any other inventory included in the county's comprehensive plan, as a matter of law, petitioner cannot be granted a conditional use permit under ORS 215.298(2).

The hearings officer appears to have operated on the assumption that the subject property is included on a county "1B" inventory.[4] Intervenors did not file their own appeal or file a cross petition for review challenging the hearings officer's conclusion that the subject property is on a "1B" inventory. Intervenors instead included this argument in their response brief as an alternative basis upon which LUBA may rely to affirm the hearings officer's decision. Petitioner moves to strike this argument and argues that we may not consider the issue of whether the subject property is actually on a "1B" inventory. After oral argument, we issued an order requesting additional briefing, and we allowed petitioner 14 days to file a reply brief responding to the merits of intervenors' argument that the subject property is not on a "1B" inventory. We did so to ensure that petitioner had an opportunity to respond to intervenors' argument, in case we denied the motion to strike.

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[4] The decision states:

> "Thus it would appear that under *Beaver State's* reading of ORS 215.298(2) it is not enough that a site be 'included on an inventory' if that site falls into a ['1B' category], as the site does here." Record 7.

Turning to the motion to strike, petitioner argues that the scope of the issues on appeal is limited to the issues raised in the assignment of error in its petition for review and thus to the issue of whether the "inventory" referenced in ORS 215.298(2) includes an inventory of "1B" sites. Petitioner cites *Femling v. Coos County*, 34 Or LUBA 328, 333 (1998) and *Cummings v. Tillamook County*, 29 Or LUBA 550, 553 (1995) for this proposition. These cases do not support petitioner's position. In *Femling*, the petitioners sought to challenge the adoption of an earlier ordinance to argue that it could not be applied to the challenged decision. We held the petitioners could not collaterally attack the adoption of that earlier ordinance. 34 Or LUBA at 332-33 ("We have no authority to review the validity of an ordinance, adopted in a separate proceeding, in the course of reviewing a decision that applies the ordinance."). In *Cummings*, in resolving record objections, we also stated the scope of our review was limited to the challenged board of county commissioners' decision not to accept the petitioner's local appeal of a planning commission decision, rather than the underlying merits of the planning commission decision itself. 29 Or LUBA at 553. Both of those decisions merely state the well-established proposition that only the decision appealed to LUBA is subject to our review. They certainly do not stand for the proposition that review of the challenged decision itself is limited to issues presented in the petition for review.

Beaver State itself clearly illustrates that the issues on appeal to LUBA are not limited solely to the issues raised in the petition for review. In *Beaver State*, the county interpreted the word "inventory," as that term is used in ORS 215.298(2), to include an inventory of "1A" sites under Goal 5. Because the applicant-petitioner agreed with that interpretation, it did not assign error to the interpretation. Instead, the applicant-petitioner assigned error to the county's decision to deny its application to add its site to the county's "1A" inventory. The intervenors in that case agreed with the county's decision to deny the applicant-petitioner's request to add its site to the "1A" inventory, but intervenors disagreed with the county's interpretation regarding the scope of the "inventory" that is referred to in ORS 215.298(2). Therefore, intervenors filed a cross petition, as

authorized by OAR 661-010-0030(7), in which they assigned error to the hearing officer's interpretation of ORS 215.298(2).[5]

Intervenors argued that, in the event LUBA sustained any of the applicant-petitioner's assignments of error, LUBA should consider intervenors' assignments of error. Because we did sustain one of the applicant-petitioner's assignments of error, we then turned to the intervenors' assignments of error. 43 Or LUBA at 168. We ultimately sustained the intervenors' assignment of error and concluded that the inventories referred to in ORS 215.298(2) do not include inventories of "1A" sites. *Beaver State* makes it clear that our scope of review includes issues presented in assignments of error that are set out in a cross petition.

Intervenors in this appeal could have filed a cross petition that included an assignment of error that the hearings officer erred in determining that the subject property is on a "1B" inventory. Intervenors, however, did not file a cross petition. Instead, they made their argument that the county does not have a "1B" inventory in their response brief. Although there is no question that this issue *could be raised* in this appeal, the question remains whether it was *properly raised* in the response brief. Although petitioner's motion to strike does not make this argument, we consider on our own motion whether intervenors are *required* to raise their argument in a cross petition.

Generally, cross petitions may advance at least two different kinds of issues or arguments. In the first situation, a cross petitioner seeks reversal or remand of the challenged decision, in addition to or without regard to the assignments of error that may be included in the petition for review. We will refer to this situation as a "cross-appeal." In the second situation, a cross

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[5] Our only rule specifically addressing cross petitions is OAR 661-010-0030(7), under the general rule for petitions for review. That rule provides:

> "Cross Petition: Any respondent or intervenor-respondent who desires to file a petition for review may do so by filing a cross petition for review. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

petitioner seeks to preserve the ultimate disposition of the challenged decision, but challenges an intermediate ruling, as providing an alternate basis for the ultimate disposition, that the local decision maker failed to adopt or rejected. We will refer to this situation as a "cross-assignment of error." Our rule regarding cross petitions does not distinguish between those different situations.

Most of our cases have failed to draw a distinction between these two situations, and we have generally treated both in the same manner. That is, we have generally required that both cross-appeals and cross-assignments of error be raised in a cross petition pursuant to OAR 661-010-0030(7).[6] *See Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166, 172 (1995) ("Intervenor cannot, in a response brief, raise new issues regarding the applicability of an identified approval criterion."); *Louks v. Jackson County,* 28 Or LUBA 501, 507 (1995) ("intervenor's argument that the county erred in applying [the ordinance], and should have found that provision to be preempted by [statute], is properly presented in a petition for review or a cross petition for review [and] cannot be made in a response brief."); *Spathas v. City of Portland*, 28 Or LUBA 351, 357 (1994), *rev'd on other grounds* 133 Or App 275 (1995) ("Although intervenor describes his argument as a separate basis for affirming the challenged decision * * * LUBA will not consider assignments of error included in a respondent's brief."); *Brentmar v. Jackson County,* 27 Or LUBA 453, 456 (1994), *rev'd on other grounds* 321 Or 481, 900 P2d 1030 (1995) ("Intervenor-respondent [may not] assert cross-assignments of error in his intervenor-respondent's brief."); *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238, 243 (1993), *rev'd on other grounds* 122 Or App 59, 857 P2d 167 (1993) (LUBA will not consider alternate arguments not raised in a petition for review or cross petition); *Miller v.*

[6] In 1994, we amended our rules, moving the provision regarding cross petitions from our miscellaneous provisions at 661-010-0075(3) to the rules regarding petitions for review at 661-010-0030. We did this to clarify that any "respondent or intervenor-respondent," as opposed to just any "respondent," may file a cross petition. Prior to the rule change, the rule merely stated that "any respondent" could file a cross petition, although we held that the prior rule did allow intervenor-respondents to file cross petitions as well. *See Reusser v. Washington County*, 24 Or LUBA 652, 653-54 (1993) (allowing intervenor-respondents to file cross petitions).

Washington County, 25 Or LUBA 169, 173 (1993) (LUBA will not consider argument that local appeal should have been dismissed if not raised in a petition for review or cross petition).

The above-cited cases, however, do not include any analysis of the issue or make any distinction between cross-appeals and cross-assignments of error. Furthermore, none of those cases cites any authority for the proposition that cross-assignments of error cannot be raised in a response brief, other than to cite to other cases that take that position without explaining why.[7] The only LUBA case we are aware of that specifically addresses the issue with more than cursory analysis is *BenjFran Development v. Metro Services Dist.*, 17 OR LUBA 1009, 1011-12 (1988). In *BenjFran*, the petitioner moved to strike arguments made in the intervenors-respondent's brief that correspond to what we refer to today as cross-assignments of error. There the Board held:

> "Petitioner says that arguments made in response to petitioner's first assignment of error constitute a cross petition. 1000 Friends of Oregon and individual intervenors-respondent assert a proposition alleging error in Metro's view of what constitutes an adequate showing of need under Goal 14 Factor 2. Petitioner argues this alleged error should have been argued in a cross petition under OAR 661-10-075(3) [now OAR 661-010-0030(7)].
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> "Petitioner's motion to strike is denied. We view the arguments of 1000 Friends of Oregon and individual intervenors-respondent simply as additional reasons why this Board may affirm Metro's conclusion. * * * Intervenors-respondent argue with Metro's interpretation of Goal 14, but we do not view the argument as a demand that we declare Metro's decision invalid. Without a claim that Metro's decision must be reversed or remanded for the alleged erroneous interpretation of Goal 14

[7] The earliest in this line of cases is *Miller*. *Miller*, however, did not involve what we now describe as a cross-assignment of error. In that case, the intervenor-respondent did not seek to have the county's decision affirmed for a separate reason, but instead sought to have the local government's decision to accept a local appeal reversed and to dismiss the appeal. 25 Or LUBA at 172-73. We believe *Miller* is correct. If an intervenor-respondent argues that the local government should have *dismissed* a local appeal, rather than arguing that the local decision should be *affirmed* for another reason, then that must be raised in a petition for review or a cross petition.

Factors 1 and 2, a cross petition was not required and no basis exists to sustain petitioner's motion to strike." *Id*. at 1011-12.[8]

Although *BenjFran* has not been overruled, none of the subsequent cases cite to it, although they appear to reach a contrary conclusion. We therefore endeavor to reconcile those cases.

Unlike our rules, the Oregon Rules of Appellate Procedure (ORAP) expressly distinguish between "cross-appeals" and "cross-assignments of error." Cross-appeals under the ORAPs appear to be appropriate where a party to an appeal challenges the ultimate disposition of the appealed decision.[9] In contrast, cross-assignments of error under the ORAPs do not seek to reverse or modify the judgment on appeal, but rather seek reversal or modification of an intermediate ruling, if the relief sought by the appellant were to be granted. ORAP 5.57.[10] In the present case, intervenors' challenge to the hearing officer's conclusion regarding the county's "1B" inventory resembles a "cross-assignment of error," as ORAP 5.57 uses that term, more than it does a cross-appeal. Intervenors do not ask that LUBA reverse or remand the hearings officer's

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[8] In our final opinion and order we did not agree with the intervenors-respondent's argument, but we did however consider that argument without the necessity of a cross petition. *BenjFran Development v. Metro Services Dist*., 17 Or LUBA 30, 41 (1988), *aff'd* 95 Or App 22, 767 P2d 467 (1989).

[9] ORAP 1.15(3)(j) defines "cross-appellant" as:

> "* * * a party, already a party to an appeal, who files an appeal against another party to the case."

ORAP 1.15 does not define "cross petitioner," but ORAP 4.15(2), which governs petitions for review of administrative agency proceedings provides that:

> " * * * The parties shall be shown on judicial review with appropriate party designations as 'petitioner' for the party seeking judicial review and 'respondent' for the party against whom relief is sought. A subsequent party seeking judicial review of the same agency order shall be designated as 'cross-petitioner.'" (Footnote omitted.)

[10] ORAP 5.57(2) provides:

> "A cross-assignment of error is appropriate:
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> "(a) If, by challenging the trial court ruling, the respondent does not seek to reverse or modify the judgment on appeal; and
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> "(b) If the relief sought by the appellant were to be granted, respondent would desire reversal or modification of an intermediate ruling of the trial court."

decision; they challenge an intermediate ruling (that the county has a "1B" inventory and the subject property is on that inventory) and ask that LUBA affirm the disposition of the hearings officer, albeit based on a different rationale.

As the ORAPs make clear, when respondents assert cross-assignments of error they are not required to file their own appeal or cross-appeal — what would correspond to filing their own appeal or cross petition before LUBA.

> "Defendants cross-assign as error the failure of the trial court to grant its motion on alternative grounds. Plaintiffs contend that defendants' cross-assignments of error are actually cross-appeals that were not timely filed and 'that may not be raised at this time.' We disagree." *Gladhart v. Oregon Vineyard Supply Co.*, 164 Or App 438, 444-45 n 4, 994 P2d 134 (1999), *rev'd on other grounds* 332 Or 226, 26 P3d 817 (2001).

S*ee also Anslie v. Spolyar*, 144 Or App 134, 147-48, 926 P2d 822 (1996), *rev dismissed* 328 Or 331 (1999) (cross-assignments of error are proper when the purpose of the assigned error is to attack a trial court ruling that, if reversed, would support the judgment on a different ground from that relied on by the trial court."). Rather, under ORAP 5.57, cross-assignments of errors are raised in the respondent's brief itself.[11]

The fact that LUBA rules, unlike the ORAPs, do not expressly distinguish between cross-appeals and cross-assignments of error, or provide separate pleading instruments for cross-appeals and cross-assignments, might suggest that (1) cross-assignments of error are not permitted under

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[11] We also note that under ORAP 5.65 a cross-appellant's brief is included as part of respondent's opening brief. ORAP 5.65 provides in pertinent part:

> "(1) When a respondent has cross-appealed, the brief on cross-appeal shall be presented in a separate portion of the respondent's answering brief immediately following the body of the answering brief. * * *" (Footnote omitted.)

Additionally, upon judicial review of our final orders, cross-petitions may be filed with the respondent's brief. ORAP 4.68 provides in pertinent part:

> "(2) A cross-petitioner's brief and excerpt of record shall be served and filed within 14 days after the filing of petitioner's opening brief and may, if appropriate, be combined with the respondent's brief."

our rules or (2) if they are, cross-assignments of error must be raised in a cross petition for review. The case law predating the current ORAPs, however, recognized cross-appeals and cross-assignments of error as distinct options, and did not require that a respondent file a cross-appeal in order to assert a cross-assignment of error. In *Artman v. Ray*, 263 Or 529, 532-33 (1972), the Court stated:

> "The problem facing a respondent * * * is as follows: He has a favorable judgment which the appellant seeks to overturn. The respondent seeks to uphold the judgment. If the appellant succeeds in reversing the judgment, however, the respondent contends he is entitled to a new trial because of errors the trial court made, but which were harmless to the respondent as long as his judgment remained unreversed.
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> "* * * * *
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> "We are now of the opinion that a cross-appeal is unnecessary and illogical unless the respondent is contending that the judgment is in error, which is not the situation with which we are concerned. When the respondent is seeking to sustain the judgment he should not be required to cross-appeal from the judgment in order to preserve for appellate court's consideration alleged errors by the trial court."

Thus, even when appellate rules did not specifically provide for cross-assignments of error, the Court did not require a cross-appeal when the respondent did not seek to reverse the decision on appeal.

Returning to our rules, a cross petition for review under OAR 661-010-0030(7) is a suitable pleading vehicle to assert what constitutes a cross-assignment of error in the ORAP nomenclature. OAR 661-010-0030(7) requires that a cross petition for review comply in all respects with the requirements for a petition for review. OAR 661-010-0030(4)(b)(A) requires the petition for review to state "the relief sought by petitioner[.]" We see no reason why the "relief" sought in a cross petition for review could not include the relief warranted under a successful cross-assignment of error. For example, an applicant intervenor-respondent could assert a contingent cross-assignment of error arguing that, if the decision is remanded for any reason under the petition for review, LUBA should also order the decision maker to address or correct an erroneous

intermediate order or determination. Such contingent requests for relief seem entirely appropriate in a cross petition for review. *See Beaver State*, 43 Or LUBA at 168.

The more critical question for present purposes is whether the cross petition for review is the *exclusive* pleading vehicle for advancing a cross-assignment of error, *i.e.*, whether it is permissible under our rules to advance a cross-assignment of error in the response brief. Nothing in our rules expressly or implicitly confines cross-assignments of error to the cross petition for review or prohibits including a cross-assignment of error in a response brief. We note, however, that OAR 661-010-0035, which governs the respondents' brief, provides that the response brief "may state additional relevant facts or other matters." OAR 661-010-0035(3)(a). Arguably, a matter that constitutes a cross-assignment of error is an "other matter" that is properly included in a response brief. Because nothing in our rules prohibits including a cross-assignment of error in the response brief, the rules governing response briefs contemplate inclusion of "other matters" in the response brief, and many cross-assignments of error cannot practicably be advanced except in the response brief, we conclude that it is consistent with our rules to include a cross-assignment of error in a response brief. To the extent our decisions subsequent to *BenjFran* cited above suggest otherwise, we now overrule those decisions.[12]

Turning to the present case, the argument included in the response brief—that the hearings officer erred in determining that the county has a "1B" inventory in the first place—is properly viewed in substance as a cross-assignment of error. Intervenors do not seek to reverse or modify the ultimate disposition (petitioner is not entitled to a conditional use permit), but instead challenge an intermediate ruling or assumption (the county has a "1B" inventory that includes the subject property). Intervenors argue, essentially, that the hearings officer reached the right result based on

[12] In view of the many legal and factual variables that are possible in a LUBA appeal, we do not attempt to anticipate all of those variables and comprehensively address the differences between cross petitions and cross-assignments of error in this opinion. We have generally described in this opinion our view of when cross petitions and cross-assignments of error are appropriate. Given the number of our prior decisions that have been overruled today and the minimal treatment the subject receives in our rules, rulemaking to further elaborate on cross petitions and cross-assignments of error will be needed.

an erroneous assumption. If intervenors are correct on that point, then even if petitioner is correct that the hearings officer erred in determining that the inventories referred to in ORS 215.298(2) include "1B" inventories, that error does not provide a basis for reversal or remand. We see no error under our rules, or prejudice to petitioner's rights in the present circumstances, in addressing the merits of intervenors' cross-assignment of error.

The motion to strike is denied.

Turning to the merits of intervenors' argument that the county does not have a "1B" inventory, the relevant facts are undisputed. The county planning staff report gives an excellent summary of what we understand to be the general history of the county's "1B" inventory:

> "In 1980, the County adopted a Key Aggregate Resource Lands Map, which shows a linear area on the subject properties encompassing the Applegate River as a sand and gravel site. Since this was prior to adoption of OAR 660-016, the map and the associated written data on each site did not contain language specifying whether the sites were significant, potentially significant, or not significant. At one time the Aggregate and Mineral Resources Element of the Comprehensive Plan contained an aggregate lands inventory, which was a listing of significant and potential mineral and aggregate sites pursuant to OAR 660-016. The subject properties appeared on this list as being potentially significant (1B). This inventory list was added to the Comprehensive Plan in 1994 as part of a periodic review work task. The county's actions regarding the work task were appealed to [the Land Conservation and Development Commission], and the matter was remanded. As a result, the County amended the Aggregate and Mineral Resources Element in 1995 and removed the inventory list from the Comprehensive Plan, apparently because of objections to the significance rating of some of the sites. The periodic review task and the Aggregate and Mineral Resources Element of the Comprehensive Plan were acknowledged later in 1995, without the aggregate inventory. Consequently, the Comprehensive Plan does not contain a list of significant aggregate sites. However, some sites have been reviewed under OAR 660-016 both during periodic review and post-acknowledgement . Sites found to be significant have generally been zoned Aggregate Resource (AR). The subject site has not been reviewed for significance under the Goal 5 process.
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> "No official determination has been made as to whether the 1980 Key Aggregate Resource Lands Map can be considered an inventory of significant sites. Consequently, it is unclear whether the application complies with ORS 215.298(2)." Record 315-16.

Although the confusion over whether the county has a "1B" inventory was highlighted by the staff report, the hearings officer's decision does not address the issue. The decision appears to take for granted that the subject property is on a "1B" inventory. Record 7. The parties are apparently in agreement that the subject property was originally included on the 1980 Key Aggregate Resource Lands Map and that in 1983 the subject property was included on the county's acknowledged aggregate inventory as a potential ("1B") site. The parties are also apparently in agreement that: (1) in 1993, as part of periodic review, the county adopted Ordinance No. 93-19, which amended the Aggregate Resources Mapping Criteria, the Aggregate Lands Inventory, and the Aggregate and Mineral Resources Element; (2) in 1994, the county adopted Ordinance No. 94-129, which amended the Aggregate and Mineral Resources Element and deferred amendment of the Aggregate Lands Inventory until a review of all economic, social, environmental, and energy (ESEE) consequences had been completed; and (3) in 1995, the county adopted Ordinance No. 95-1, which repealed Ordinance Nos. 93-19 and 94-129. The parties dispute the legal consequences of Ordinance No. 95-1.

Petitioner argues that by repealing Ordinance Nos. 93-19 and 94-129 in Ordinance No. 95-1, the county effectively reinstated the prior status quo regarding aggregate inventories as acknowledged in 1983 and including the subject property as a "1B" site. Intervenors, on the other hand, argue that Ordinance No. 95-1 repealed the existing inventory and had the effect of abolishing existing aggregate inventories until periodic review had been completed and that all recognized significant aggregate sites had been designated AR. After oral argument, we directed the parties to have the county provide us with the applicable version of its comprehensive plan so that we could determine whether the comprehensive plan contained a "1B" inventory. Apparently only intervenor-respondent Lisman contacted the county planning department. A staff member from the planning department then contacted LUBA to confirm Lisman's request. The planner subsequently forwarded to LUBA copies of pertinent ordinances as well as his opinion regarding whether the

county has a "1B" inventory.[13] Based upon our independent review of the county ordinances, we agree with intervenors that the effect of Ordinance No. 95-1 was to eliminate the aggregate inventory altogether rather than to restore it to its pre-periodic review status quo.[14] The county was aware that its aggregate inventory needed to be revised to bring it into conformity with Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and OAR 660-016-0000 et seq. Ordinance No. 95-1, Section 1.1. We believe the county intended to forego an aggregate inventory until it had completed the Goal 5 process.

> "The Board [of County Commissioners] finds that the ESEE analysis for new sites cannot be completed until 1995, and that the Department of Land Conservation and Development has agreed that submission of the Aggregate Lands Inventory [of] the aggregate resource package can be deferred until such time as the ESEE's are completed." Ordinance 95-1, Section 1.3.

Furthermore, Section 4.1 states:

> "The Board of County Commissioners hereby amends Ordinance No. 82-26 as it pertains to the Aggregate and Mineral Resources Element (Exhibit A) of the Comprehensive Plan, and repeals Ordinances 93-19 and 94-129. *The element is amended in its entirety to read as follows* in the exhibit, which is incorporated by reference." (Emphasis added.)

The attached exhibit, which apparently is the Aggregate Mineral and Resources Element in its entirety, does not include any inventory. Ordinance 95-1, Exhibit A.

Therefore, based on our review of the pertinent ordinances, we agree with intervenors that the county does not presently have a "1B" inventory and therefore petitioner is not entitled to a conditional use permit for aggregate operations on EFU land. For the foregoing reasons, we need

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[13] The county planner expressed his opinion that Ordinance 95-1 had the effect of repealing the county's aggregate inventory and that until the county readopts an aggregate inventory after concluding periodic review that, consistent with intervenors' position, it does not have a "1B" inventory. Petitioner, however, objects to our consideration of the planner's opinion. Intervenors have not submitted a motion to take evidence not in the record pursuant to OAR 661-010-0045. Therefore, we do not consider the opinion of the county planner in our disposition.

[14] Under OEC 202, LUBA may take official notice of local government enactments. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995).

not decide whether the term "inventory," as it is used in "ORS 215.298(2), includes a "1B" inventory.[15]

The county's decision is affirmed.

[15] Generally we would reach intervenors' argument only if we sustained petitioner's assignment of error. However, we see no point in rendering what would be an advisory opinion on petitioner's assignment of error, particularly given that it involves an issue with potential statewide implications. We deem it more consistent with "sound principles of judicial review" to address only intervenors' dispositive argument. ORS 197.805.