

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 DELTA PROPERTY COMPANY,  
5 *Petitioner,*

6  
7 vs.

8  
9 LANE COUNTY and CITY OF EUGENE,  
10 *Respondents,*

11 and

12  
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14 JOEL C. NARVA and TERESE H. NARVA,  
15 *Intervenors-Respondents.*

16  
17 LUBA No. 2008-154

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19 JOEL C. NARVA and TERESE H. NARVA,  
20 *Petitioners,*

21  
22 vs.

23  
24 LANE COUNTY and CITY OF EUGENE,  
25 *Respondents,*

26 and

27  
28  
29 DELTA PROPERTY COMPANY,  
30 *Intervenor-Respondent.*

31  
32 LUBA No. 2008-162

33  
34 FINAL OPINION  
35 AND ORDER

36  
37 Appeal from Lane County and City of Eugene.

38  
39 P. Steven Cornacchia, Eugene, filed a petition for review and a response brief and  
40 argued on behalf of petitioner and intervenor-respondent Delta Property Company. With him  
41 on the brief was Hershner, Hunter, LLP.

42  
43 Zack P. Mittge, Eugene, filed a petition for review and a response brief and argued on  
44 behalf of petitioners and intervenors-respondents Joel C. Narva and Terese H. Narva. With  
45 him on the brief were Douglas M. DuPriest and Hutchinson, Cox, Coons, DuPriest, Orr &

1 Sherlock, P.C.

2  
3 Emily N. Jerome, Eugene, filed a response brief and argued on behalf of respondent  
4 City of Eugene. With her on the brief was Harrang Long Gary Rudnick, P.C.

5  
6 No appearance by respondent Lane County.

7  
8 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,  
9 participated in the decision.

10  
11 AFFIRMED

02/24/2009

12  
13 You are entitled to judicial review of this Order. Judicial review is governed by the  
14 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a Lane County decision that denies Delta Property Company’s (Delta’s) request for comprehensive plan and zoning ordinance amendments that would allow Delta to expand its existing aggregate mining operation onto adjoining property.

**FACTS**

Delta owns approximately 72 acres of vacant land outside the City of Eugene and within the area of Lane County that is subject to the Eugene-Springfield Metropolitan Area General Plan (Metro Plan). The Metro Plan has been jointly adopted by the cities of Eugene and Springfield as their comprehensive plan. Lane County has also adopted the Metro Plan as its comprehensive plan for the unincorporated areas of the county near those cities. Delta currently operates an aggregate mining and processing operation on adjoining land to the east of the proposed 72-acre expansion area. That mining and processing operation is subject to an air contaminant discharge permit that was issued by the Lane County Air Pollution Authority (LRAPA). It is also subject to an operating and reclamation plan that has been approved by the Oregon Department of Geology and Mineral Industries (DOGAMI).

The Metro Plan amendments that Delta sought included a change in the Metro Plan Diagram from Agriculture to Sand and Gravel, as well as an amendment to the Metro Plan Significant Aggregate Resource Site Inventory to include the subject property as a significant aggregate resource site. Delta also requested that Lane County rezone the subject property from Exclusive Farm Use to Sand and Gravel Products.

The Lane County and City of Eugene planning commissions held a joint public hearing on the request. Thereafter, the City of Eugene City Council and Lane County Board of Commissioners held a joint public hearing on the request. Over a year after the public hearing and record closed, the Lane County Board of Commissioners adopted an ordinance granting Delta’s request, and adopted findings to support that decision. Over five months

1 later, on July 28, 2008, the Eugene City Council adopted an ordinance in which it denied  
2 Delta's application. The city also adopted findings to support its decision. Under the city's  
3 and county's land use regulations, when the county and city adopt conflicting decisions  
4 concerning an application to amend the Metro Plan, such as the application at issue in this  
5 appeal, the matter is referred to a body called the Metropolitan Policy Committee. The  
6 Metropolitan Policy Committee attempted to reach a consensus on how to resolve the  
7 conflict between the county's and city's decisions but was unable to do so. Therefore, the  
8 Metropolitan Policy Committee did not adopt a recommendation to the city and county  
9 governing bodies within 30 days after the matter was referred to the committee. In that  
10 circumstance, Lane Code (LC) 12.235(5)(a) dictates that the requested Metro Plan  
11 amendment must be denied.<sup>1</sup> LC 12.235(5)(b) requires that the county planning director  
12 issue a decision denying the application and provides that the planning director may adopt  
13 the findings of "one or both of the governing bodies" in support of the planning director's  
14 decision.<sup>2</sup> On August 19, 2008, the Lane County Planning Director issued a decision

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<sup>1</sup> LC 12.235(5)(a) is set out below:

"The Metro Plan amendment shall be referred to the Metropolitan Policy Committee within five days after the last governing body action. The Metropolitan Policy Committee shall meet within 30 days of the referral to hear comments on the proposed amendment from the applicant, staff of the affected jurisdictions and interested persons. The committee may develop a recommendation to the governing bodies on the proposed amendment. The Metro Plan amendment shall be denied if the committee fails to act within 30 days of the referral date or if the governing bodies fail to adopt identical plan amendment actions within 45 days of receiving a recommendation from the committee."

<sup>2</sup> LC 12.235(5)(b) is set out below:

"If the plan amendment is denied because of lack of consensus or committee inaction, within 5 days the planning director of the home jurisdiction where the application originated shall issue a denial decision on the amendment containing findings and conclusions on why the proposed amendment does not meet the approval criteria. Those findings and conclusions may incorporate findings and conclusions previously adopted by one or both of the governing bodies. The decision of the director is final."

1 denying Delta’s application. In doing so, the county planning director adopted and relied on  
2 the City of Eugene City Council’s findings. This appeal followed.<sup>3</sup>

### 3 **INTRODUCTION**

4 Mineral and aggregate resources are among the natural resources that Statewide  
5 Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) requires  
6 local governments to inventory and protect. OAR 660-023-0180 is the administrative rule  
7 that the Land Conservation and Development Commission adopted to provide guidance to  
8 local governments regarding how to go about performing their Goal 5 planning obligations  
9 concerning mineral and aggregate resources. That rule calls for a number of sequential  
10 determinations, which we briefly describe below before turning to Delta’s first assignment of  
11 error.

12 Under OAR 660-023-0180(3), a local government must first determine whether a  
13 proposed aggregate resource site is “significant.” A proposed aggregate resource site is  
14 significant if it meets any one of the criteria at subsections (a) through (c) of OAR 660-023-  
15 0180(3).<sup>4</sup> Delta requested that its property be found to be significant under OAR 660-023-  
16 0180(3)(a). However, under OAR 660-023-0180(3), even if an aggregate resource site is  
17 found to be “significant” under OAR 660-023-0180(3)(a) or (b), OAR 660-023-0180(3)(d)

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<sup>3</sup> When we refer to the *county’s* decision in this opinion, we are referring to the county planning director’s decision, which is supported by the City of Eugene City Council’s findings, not the Lane County Board of Commissioners’ decision.

<sup>4</sup> Subsections (a) through (c) of OAR 660-023-0180(3) are set out below:

- “(a) A representative set of samples of aggregate material in the deposit on the site meets applicable Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and soundness, and the estimated amount of material is more than 2,000,000 tons in the Willamette Valley, or more than 500,000 tons outside the Willamette Valley;
- “(b) The material meets local government standards establishing a lower threshold for significance than subsection (a) of this section; or
- “(c) The aggregate site was on an inventory of significant aggregate sites in an acknowledged plan on September 1, 1996.”

1 dictates that such aggregate resource sites are not “significant,” within the meaning of OAR  
2 660-023-0180(3), in two circumstances.<sup>5</sup> One of those circumstances is where more than 35  
3 percent of the proposed mining area is made up of soil “classified as Class II, or of a  
4 combination of Class II and Class I.” In that circumstance, in Lane County, the aggregate  
5 resource is not “significant” within the meaning of OAR 660-023-0180(3) unless “the  
6 average thickness of the aggregate layer within the mining area exceeds 60 feet.” OAR 660-  
7 023-0180(3)(d)(B)(i). *See* n 5.

8 If a mineral and aggregate site is found to be significant under OAR 660-023-  
9 0180(3), then local governments must determine whether mining will be allowed. That in  
10 turn requires a number of additional determinations regarding: (1) an impact area, (2)  
11 conflicts, and (3) whether conflicts can be minimized. OAR 660-023-0180(5)(a) through (c).  
12 If all identified conflicts can be minimized, mining must be allowed. OAR 660-023-  
13 0180(5)(c). If all identified conflicts cannot be minimized, the local government must then  
14 determine the economic, social, environmental, and energy (ESEE) consequences of  
15 allowing mining notwithstanding that the conflicts cannot be minimized. OAR 660-023-

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<sup>5</sup> As relevant here, OAR 660-023-0180(3)(d) provides:

“Notwithstanding subsections (a) and (b) of [OAR 660-023-0180(3)], \* \* \* an aggregate site is not significant if the criteria in either paragraphs (A) or (B) of this subsection apply:

“(A) More than 35 percent of the proposed mining area consists of soil classified as Class I on Natural Resource and Conservation Service (NRCS) maps on June 11, 2004; or

“(B) More than 35 percent of the proposed mining area consists of soil classified as Class II, or of a combination of Class II and Class I or Unique soil, on NRCS maps available on June 11, 2004, unless the average thickness of the aggregate layer within the mining area exceeds:

“(i) 60 feet in Washington, Multnomah, Marion, Columbia, and Lane counties;

“(ii) 25 feet in Polk, Yamhill, and Clackamas counties; or

“(iii) 17 feet in Linn and Benton counties.”

1 0180(5)(d). OAR 660-023-0180 imposes other planning obligations, but the above summary  
2 of OAR 660-023-0180’s planning requirements is sufficient for our decision in this appeal.

3 **DELTA’S FIRST ASSIGNMENT OF ERROR**

4 The challenged decision is supported by lengthy findings that conclude the applicant  
5 failed to carry its burden under OAR 660-023-0180(3) to establish the proposed aggregate  
6 resource site is “significant.” The county concludes Delta did not carry that burden for two  
7 reasons. First, the county found that Delta failed to provide a “representative set of samples  
8 of aggregate material in the deposit on the site [which show that the site] meets applicable  
9 Oregon Department of Transportation (ODOT) specifications for base rock for air  
10 degradation, abrasion, and soundness, and the estimated amount of material is more than  
11 2,000,000 tons.” OAR 660-023-0180(3)(a). *See* n 4. Second, the county found that in  
12 addition to Delta’s failure to establish that the proposed site qualifies as “significant” within  
13 the meaning of OAR 660-023-0180(3)(a), Delta also failed to establish that the site is not  
14 disqualified from a significance finding under OAR 660-023-0180(3)(d)(B).

15 **A. The Threshold Significance Finding Under OAR 660-023-0180(3)(a)**

16 A prerequisite for a finding that a proposed aggregate site is significant under OAR  
17 660-023-0180(3)(a) is a “representative set of samples of aggregate material in the deposit on  
18 the site.” The county found that Delta’s expert, EGR, failed to provide such a representative  
19 set of samples. The county cited two bases for that finding. Although most of the county’s  
20 findings discuss improper mixing of samples, the county’s findings also cite Delta’s failure  
21 to collect samples from “the full vertical extent of material in each of the separate layers” of  
22 aggregate. Record 51. We set out below some of the city council’s findings, which as we  
23 have noted were adopted by the county planning director:

24 “The Council \* \* \* finds that EGR’s Exhibit 1, Original Delta application,  
25 including Exhibit E \* \* \* establish that there are two contiguous, but distinct  
26 layers of sand and gravel, in the expansion area. These layers consist of an  
27 upper layer (‘younger alluvium’) and a lower layer (‘older alluvium’). \* \* \*”

1 “For the reasons stated herein, the Council finds that the applicant has failed  
2 to provide a ‘representative set of samples of aggregate material in the  
3 deposit’ sufficient to demonstrate the quality of the aggregate for either layer.  
4 Instead, the applicant’s information as to aggregate quality is based on the use  
5 of mixed samples that combine materials from the two distinct geologic layers  
6 before testing the quality of the aggregate. This mixing of aggregate from  
7 distinct layers before testing makes it impossible for the Council to determine  
8 that there is a layer of aggregate of the required quality, and of sufficient  
9 thickness, sufficient to satisfy the rule.”

10 “The conclusion that the aggregate samples described by EGR \* \* \* do not  
11 constitute the ‘representative set of samples of aggregate material on the site’,  
12 as required by subsection (3)(a) of the rule, is based, in part, on the definitions  
13 and principles of representative sampling of sand and gravel and other  
14 aggregate deposits as laid out in the sampling standards of the ASTM  
15 (American Society for Testing and Materials) Designation D75-97) \* \* \*,  
16 AASHTO (American Association of State Highway and Transportation  
17 Officials) Standard No. T2 \* \* \*, and ACE (Army Corp of Engineers)  
18 Handbook for Concrete and Cement Chapter CDR-C 100-75 \* \* \* sampling  
19 standards as cited in the written and oral testimony of University of Oregon  
20 professor of resource geology Mark Reed \* \* \*. This conclusion is further  
21 based on the arguments in these exhibits concerning the application of the  
22 ASTM, AASHTO and ACE standards, including Delta’s departure from these  
23 standards by testing: (1) samples composed by mixing material from the two  
24 separate layers of sand and gravel (the upper and lower layers), and (2)  
25 *samples that do not include the full vertical extent of material in each of the*  
26 *separate layers.*

27 “\* \* \* \* \*

28 “Since the Council finds that the set of samples obtained and tested by the  
29 applicant was not representative of the aggregate material in the deposit, and  
30 the applicant failed to provide adequate information to otherwise characterize  
31 that aggregate material, it is immaterial, for purposes of this decision, whether  
32 the samples collected comply with ODOT’s base rock specifications.” Record  
33 50-51 (underscoring in original; italics added).

34 All of Delta’s arguments under its first assignment of error challenge the county’s  
35 finding that Delta’s mixing of aggregate samples from the two distinct aggregate layers led to  
36 something other than the “representative set of samples of aggregate material in the deposit  
37 on the site” that is required by OAR 660-023-0180(3)(a). According to Delta, following  
38 professor Reed’s testimony, ODOT tested samples that were not mixed. Delta argues that  
39 because the county’s findings do not acknowledge this subsequent evidence, the county’s

1 decision to rely on professor Reed’s criticism of the “mixed sample” evidence is  
2 unreasonable and the county’s finding that the applicant failed to supply a representative set  
3 of samples is not supported by substantial evidence.

4 In challenging the county’s finding that Delta failed to carry its burden under OAR  
5 660-023-0180(3)(a) Delta faces a difficult task. As the first step in carrying that burden,  
6 Delta must assign error to all the county’s bases for that finding. *Doman v. City of*  
7 *Woodburn*, 45 Or LUBA 158, 160 (2003); *Lee v. City of Oregon City*, 34 Or LUBA 691,  
8 693-94 (1998); *Garre v. Clackamas County*, 18 Or LUBA 877, 881, *aff’d* 102 Or App 123,  
9 792 P2d 117 (1990). If Delta does not assign error to any independent basis for denial, the  
10 county’s decision must be affirmed. *Id.*

11 Delta’s evidentiary challenge under the first assignment of error is directed solely at  
12 the county’s findings regarding improper mixing of samples.<sup>6</sup> Delta does not assign error to  
13 the county’s second basis for finding that Delta failed to carry its burden under OAR 660-  
14 023-0180(3)(a)—that the “samples that do not include the full vertical extent of material in  
15 each of the separate layers.” Record 51. We are not sure we understand what that finding  
16 means. But it is clear that it was adopted as a separate basis for concluding that Delta failed  
17 to carry its burden regarding OAR 660-023-0180(3)(a). Delta’s failure to assign error to that  
18 finding means the county’s decision that petitioner failed to carry its burden regarding OAR  
19 660-023-0180(3)(a) would have to be affirmed, even if we agreed with Delta that the  
20 county’s “mixed samples” findings are not supported by substantial evidence in the record.

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<sup>6</sup> Delta’s arguments include the following:

“\* \* \* The city found that the expansion area contained two contiguous layers of aggregate material and that [Delta’s] evidence of the aggregate quality is based on ‘the use of mixed samples that combine materials from the two distinct geologic layers before testing the quality of the aggregate.’ \* \* \*” Petition for Review 9.

“\* \* \* No reasonable person will conclude in the face of the ODOT and DOGAMI testimony that [Delta’s] demonstration of significance must fail purely on the basis of mixed sampling. \* \* \*” *Id.* at 12.

1           **B.       The OAR 660-023-0180(3)(d) Requirement that the Average Thickness of**  
2           **the Aggregate Layer Exceed 60 Feet.**

3           As we explained earlier, even if Delta had established that the disputed site qualifies  
4 as a significant aggregate site under OAR 660-023-0180(3)(a), that site could be disqualified  
5 under OAR 660-023-0180(3)(d) if the average thickness of the aggregate layer does not  
6 exceed 60 feet. The county found that such is the case here:

7           “The report of [Delta’s] geologic consultant EGR \* \* \* states that more than  
8 35% of the proposed mining area consists of Class II soils. The Council  
9 agrees with the specific part of EGR’s report that characterizes the type of  
10 agricultural soils present on the proposed site. The Council hereby finds that  
11 more than 35% of the proposed mining area consists of Class II soils. Thus,  
12 the requirement of OAR 660-023-0180(3)(d)(B)(i) applies to this application  
13 and requires that the average thickness of the aggregate layer exceeds 60  
14 feet.” Record 50.

15           “\* \* \* \* \*

16           “The EGR report estimates that the average thickness of the aggregate layer in  
17 that area is 70.5 feet; however, DOGAMI evaluation observed only 51.5 feet  
18 depth. (see Exhibit 144). The Council also finds that EGR’s Exhibit A (e.g. p.  
19 5-8 and 11-13, Figures 7, 8 and 9, Appendix E well logs and table) and related  
20 materials, establish that there are two contiguous, but distinct layers of sand  
21 and gravel in the expansion area. \* \* \* The EGR report also acknowledges  
22 that layers of mudflow/clay from 4 to 12 fee[t] thick have been experienced  
23 on the existing excavation site and are encountered along the put wall (see  
24 also in Exhibit I, EGR’s Exhibit A \* \* \* and Exhibit 216). Based on that  
25 information, we also find that neither of these individual layers of aggregate is  
26 60 feet thick. Therefore, OAR 660-023-180(3)(d)(B) applies.

27           “In summary, even if the proposed expansion site satisfied the significance  
28 criteria of OAR 660-023-0180(3)(a), because section (3)(d)(B) applies to the  
29 site, the site would not be significant.” Record 53.

30           The county’s reasoning for concluding that the disputed site does not satisfy the OAR  
31 660-023-0180(3)(d)(B)(i) requirement that the average thickness of the aggregate layer on  
32 the site must exceed 60 feet is not entirely clear to us. The adjoining older and younger  
33 alluvial layers viewed together clearly appear to be more than 60 feet thick, based on the  
34 evidence cited in the findings. While there may be a separating clay layer on the existing  
35 excavation site, the cited evidence does not seem to support a conclusion that the older and

1 younger alluvia on the expansion site are separated by a clay layer of any significance. If the  
2 county found that 660-023-0180(3)(d)(B)(i) applies here simply because there are two  
3 distinct layers of aggregate and neither of those layers viewed alone is more than 60 feet  
4 thick, that interpretation of the rule seems suspect to us. However, whatever the county's  
5 reasoning for concluding that OAR 660-023-0180(3)(d)(B) applies here, there can be no  
6 doubt that the county found that OAR 660-023-0180(3)(d)(B) does apply. Where OAR 660-  
7 023-0180(3)(d)(B) applies, and the requisite average thickness of the aggregate layer is  
8 lacking, an aggregate resource site is not "significant," within the meaning of OAR 660-023-  
9 0180(3). Delta does not assign error to the county's OAR 660-023-0180(3)(d)(B) finding.  
10 That unchallenged finding provides a second reason why the county's finding that the subject  
11 site is not a significant aggregate resource site must be affirmed.

12 Delta' first assignment of error is denied.

13 **DELTA'S REMAINING ASSIGNMENTS OF ERROR**

14 Because a significance determination is critical to the balance of Delta's application  
15 and because we reject the only assignment of error that challenges that significance  
16 determination, the county's decision would have to be affirmed even if we agreed with  
17 Delta's remaining assignments of error. We therefore do not address those assignments of  
18 error.<sup>7</sup>

19 We do not consider Delta's remaining assignments of error.

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<sup>7</sup> We do not mean to suggest that we believe those remaining assignments of error are meritorious. In particular, we are skeptical of Delta's suggestion that it can be assumed that because Delta's existing air contaminant discharge permit imposes daily and yearly limits on the amount of rock that can be crushed on site, it necessarily follows that allowing mining on the expansion site would not create additional conflicts on local roads used for access and egress that could not be minimized. As intervenors point out, there is no evidence that the crusher is currently operating at the limit imposed by the permit, so there could be additional truck traffic to and from the crusher as a result of the expansion. Intervenors also argue the air contaminant discharge permit would not limit additional trucks that might haul aggregate off-site for use without crushing.

1 **THE NARVAS' ASSIGNMENTS OF ERROR**

2 The Narvas filed a 36-page petition for review, with ten assignments of error, even  
3 though they seek a final opinion and order from LUBA that affirms the county's ultimate  
4 decision to deny Delta's application.

5 The Narvas' third through tenth assignments of error challenge aspects of the Lane  
6 County BOC's interlocutory decision to approve the disputed application. That decision is  
7 not the decision that is before us for review in this appeal, and none of the arguments the  
8 Narvas' advance in those assignments of error convinces us to conclude otherwise. Those  
9 assignments of error are denied.

10 In their first and second assignments of error, the Narvas argue the city council and  
11 county commissioners erred by allowing additional evidence that was submitted after the  
12 evidentiary record closed at the conclusion of the county and city planning commission  
13 deliberations in this matter. According to the Narvas, under the LC, the governing bodies  
14 were limited to the evidentiary record compiled by the planning commissions.

15 The Narvas contend that if we were to sustain those assignments of error that would  
16 provide additional bases for affirming the county's ultimate decision that was issued by the  
17 planning director and supported by the city council's findings. The Narvas are wrong. If we  
18 sustained the first two assignments of error, we would be required to remand the challenged  
19 decision to the county and city so that they could make a decision without considering the  
20 evidence that was accepted after the record before the planning commissions closed. Since  
21 that is not the remedy that the Narvas seek, we do not consider those assignments of error  
22 further.

23 The Narvas' assignments of error are denied.

24 The county planning director's decision is affirmed.