

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

3
4 LANDWATCH LANE COUNTY,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 WEYERHAEUSER COMPANY,
15 *Intervenor-Respondent.*

06/07/18 AM 8:44 LUBA

16
17 LUBA No. 2017-115

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 Andrew Mulkey, Eugene, filed the petition for review and argued on
25 behalf of petitioner.

26
27 No appearance by Lane County.

28
29 Bill Kloos, Eugene, filed a response brief and argued on behalf of
30 intervenor-respondent. With him on the brief was the Law Office of Bill Kloos,
31 P.C.

32
33 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN Board
34 Member, participated in the decision.

35
36 AFFIRMED 06/07/2018

37
38 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners approving an application to amend the county's comprehensive plan to redesignate property from Forest to Natural Resource: Mineral, and rezone it from Nonimpacted Forest Land to Quarry and Mine Operations.

FACTS

In the beginning there was a single tract of land, numbered Tax Lot 200 by the county's assessment and taxation department. That single tract of land included an existing quarry, known as the Swiss Home Quarry. In 1979, that single tract of land was partitioned into two parcels: a small parcel and a much larger parcel to the west of the smaller parcel. Sometime after the 1979 partition, the county's assessment and taxation department numbered the larger parcel Tax Lot 201, and numbered the smaller parcel Tax Lot 200, depicted here from a copy of the approved partition map at Supplemental Record 385:

approval	
BY: _____ Acting Chairman, Land Development Review Committee	_____ Date
PARTITION CONDITIONAL APPROVAL	
MAY 03 1979	
LANE COUNTY PLANNING DIVISION	vicinity map
FILE NO: <u>MA 224-77</u>	MAP PREPARED BY: <u>N.K.</u>

PLANNING DIVISION / ENVIRONMENTAL MANAGEMENT DEPARTMENT / 135 EAST 8TH AVE. / EUGENE, OR 97401 / PHONE (503) 687-4186

385

1
 2 The larger parcel (Tax Lot 201) now includes approximately 123 acres and the
 3 smaller parcel (Tax Lot 200) now includes approximately nine acres. The Swiss
 4 Home Quarry continues to exist on the larger parcel today. No mining has ever
 5 occurred on the smaller parcel.

6 Shortly after the 1979 partition, in 1980, the county began
 7 comprehensive planning, a process which included developing and issuing a
 8 draft Mineral and Aggregate Resources Working Paper in 1982 (draft Working
 9 Paper). That draft Working Paper listed the Swiss Home Quarry as an active

1 mining site in Appendix D, and the working paper identified the quarry as
2 being located on "Tax Lot 200." Supplemental Record 48.

3 In 1983, prior to the county's adoption of its comprehensive plan and
4 zoning maps, the county proposed to designate the property that included the
5 larger parcel and the smaller parcel as Forest (F) and zone them Nonimpacted
6 Forest (F-1). The property owner filed an application, called a CPR project
7 change request, to zone the property that included the existing Swiss Home
8 Quarry to Quarry and Mine Operations (QM). Supplemental Record 206-13.
9 The CPR project change request identified the Swiss Home quarry property as
10 "Tax Lot 200," and also attached a map and a legal description for the property
11 that was the subject of the CPR project change request. The county approved
12 the request to change the zoning of the property on which the Swiss Home
13 Quarry was located to QM, noting on the application and approval "site on
14 county's list." Supplemental Record 206.

15 In February 1984, the county adopted Ordinance 884, which assigned
16 plan and zoning designations on the final adopted comprehensive plan and
17 zoning maps. On those maps, the smaller parcel, on which no quarry was
18 present, and which was numbered by assessment and taxation as Tax Lot 200,
19 was zoned QM, while the larger parcel containing the existing quarry and that
20 was numbered by assessment and taxation as Tax Lot 201, was zoned F-1. In
21 other words, the comprehensive plan and zoning map designated the nine-acre

1 parcel on which no quarry existed as QM, and the remaining 123-acre parcel
2 that included the Swiss Home Quarry as F-1.

3 In September 1984, the county adopted Ordinance 892. Ordinance 892
4 identified the Swiss Home quarry, referred to as “TRS 17-09-30-200,” as a
5 “1C” site pursuant to the county’s Statewide Planning Goal 5 (Open Space,
6 Scenic and Historic Area and Natural Resources) process to inventory
7 significant mineral and aggregate sites, and listed it as “Site 4.” Supplemental
8 Record 225.

9 In 2016, intervenor-respondent applied to the county to change the map
10 designation for Tax Lot 201 to Natural Resources: Mineral (NR:M) and the
11 zoning designation to QM. The Lane County Rural Comprehensive Plan (RCP)
12 includes a Goal and Policy — Goal 2, Policy 27 — that allows property owners
13 to seek a “Conformity Determination Amendment” to amend an existing
14 comprehensive plan and zoning designation under certain circumstances,
15 discussed in more detail below. The planning commission recommended
16 approval, and the board of county commissioners adopted an ordinance
17 amending the comprehensive plan designation for the property on which the
18 Swiss Home quarry operates from F to NR:M and the zoning from F-1 to QM.

19 This appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 RCP Goal 2, Policy 27 (Policy 27) sets out a process for corrections to
22 identified plan or zoning designations. As relevant here, Policy 27 provides:

1 “Conformity Determinations. Lane County will annually initiate
2 and process applications to correct identified plan or zoning
3 designations in the RCP Official Plan and Zoning Plots resulting
4 from the Official Plan or Zoning Plots not recognizing lawfully
5 existing (in terms of the zoning) uses or from inconsistencies
6 between the Official Plan and Zoning Plots. Changes to correct
7 nonconformities shall comply with the procedures and
8 requirements of Lane Code Chapter 12 (Comprehensive Plan),
9 Chapter 14 (Application Review and Appeal Procedures), and
10 Chapter 16 (Land Use Development Code), except as provided for
11 in 27 c. and d., below.

12 “a. Circumstances qualifying for consideration by the Board of
13 Commissioners under the Conformity Determinations
14 Policy may include one or more of the following:

15 “ * * * * *

16 “[iv.] Correction of a scrivener error on an adopted Official
17 Plan or Zoning Plot.

18 “ * * * * *

19 “[vii.] Correction of an inconsistency between the text of an
20 order or ordinance adopted by the Board of
21 Commissioners and an Official Plan or Zoning
22 diagram.

23 “[viii.] A circumstance other than as listed in Policy 27. a.
24 [i.-viii.] above, which the Planning Commission
25 elects to forward a favorable recommendation for
26 consideration by the Board of Commissioners.”¹

¹ The online version of RCP Goal 2, Policy 27(a), available at <http://lanecounty.org/common/pages/DisplayFile.aspx?itemId=6477350> (accessed June 6, 2018), includes two subsections that are numbered as “i.” For convenience, we refer to the subsections in the same way that the county’s final decision refers to them, which apparently auto-corrected the second “i” to “ii,” and so on, so that subsection (a) of Policy 27 includes eight subsections.

1 The board of county commissioners concluded that intervenor’s application
2 met the circumstances set out in Policy 27(a)(iv), (vii) and (viii). Supplemental
3 Record 37-41. In four subassignments of error under the first assignment of
4 error, petitioner argues that the county’s conclusion that Policy 27 allows the
5 comprehensive plan and zone map change is not supported by substantial
6 evidence in the record, and that the board of commissioners improperly
7 construed Policy 27. ORS 197.835(9)(a)(C) and (D).

8 **A. First Subassignment of Error**

9 In its first subassignment of error, petitioner argues that the board of
10 county commissioners improperly construed Policy 27 to correct the
11 comprehensive plan and zoning map designations because, according to
12 petitioner, the corrections are not the result of either “the Official Plan or
13 Zoning Plots not recognizing lawfully existing (in terms of zoning) uses or
14 from inconsistencies between the Official Plan and Zoning Plots.” According
15 to petitioner, the existing (official) plan and zoning designations recognize the
16 existing quarry, because the existing F-1 zone allows mining and commercial
17 gravel extraction, as long as it is “auxiliary to forest practices.” Lane County
18 Code (LC) 16.210(2)(c). Petitioner also argues that there is no inconsistency
19 between the existing plan map designation of Forest and the zoning map
20 designation of F-1, which is one of the zones that implement the F
21 comprehensive plan designation.

1 Intervenor responds that the issue raised in the first subassignment of
2 error was not raised prior to the close of the record, and therefore petitioner is
3 precluded from raising the issue for the first time on appeal to LUBA. ORS
4 197.763(1); ORS 197.835(3). Petitioner’s petition for review takes the position
5 that the issues raised in the first assignment of error were raised at
6 Supplemental Record 8-21, 276-78, and 279-83. We have reviewed each of
7 these record pages, and we agree with petitioner that it raised the issue of
8 whether an inconsistency between the official plan and zoning map
9 designations exist, at Supplemental Record 279-80. Although the issue is
10 barely developed, we also agree with petitioner that it raised the issue of
11 whether the official plan and zoning designations recognize the lawfully
12 existing quarry use, at Supplemental Record 279-80.

13 On the merits, intervenor responds that the county properly construed
14 Policy 27 as allowing the county to correct an error that occurred in planning
15 and zoning the property as F and F-1, which plan and zone failed to
16 “recogniz[e] lawfully existing (in terms of the zoning) uses” on the property at
17 the time the F-1 zoning was applied. Intervenor points out that the quarry was
18 an active quarry at the time the county adopted its Goal 5 inventory of
19 significant mineral and aggregate sites, and that the quarry is included on the
20 acknowledged inventory. The county’s acknowledged program to achieve Goal
21 5 is to “apply the appropriate district (SG, SG/CP, QM)” to sites that are
22 included on the county’s inventory of significant resource sites. RCP Mineral

1 and Aggregate Resources Policy 9. Notably, the F-1 zoning designation is not
2 part of the county's program to achieve Goal 5. Therefore, applying Forest
3 designation and F-1 zoning to a site that is included on the county's inventory
4 of significant mineral and aggregate sites is inconsistent with the RCP's
5 Mineral and Aggregate Resources Policy 9.

6 We agree with intervenor that the county properly construed Policy 27 to
7 amend the existing plan and map designations to reflect the lawfully existing
8 mine on the property and the county's acknowledged program to achieve Goal
9 5, and to correct "inconsistencies between the Official Plan and Zoning Plots."
10 Applying plan and zone designations that planned and zoned the existing
11 quarry for forest uses is inconsistent with Ordinance 892's recognition of the
12 existing quarry as a "1C" site, and with the county's acknowledged program to
13 achieve the goal to designate those sites as, in relevant part, QM.

14 The first subassignment of error is denied.

15 **B. Second, Third, and Fourth Subassignments of Error**

16 In its second, third, and fourth subassignments of error, petitioner
17 challenges the county's conclusion that the circumstances that qualify for a
18 Conformity Determination set out in subsections (a)(iv), (vii), and (viii) of
19 Policy 27 are present. *See* n 1. Because Policy 27 allows the county to approve
20 a map amendment if any one of the eight listed circumstances in subsection (a)
21 are present, the county need only have concluded that one of the eight listed
22 circumstances were present in order to rely on Policy 27. Relatedly, LUBA

1 need only conclude that one of the several subsections the county found
2 applied to the circumstances presented was properly applied in order to affirm
3 the county's decision.

4 In its third subassignment of error, petitioner argues that the county's
5 conclusion that "an inconsistency between the text of an order or ordinance
6 adopted by the Board of Commissioners and an Official Plan or Zoning
7 diagram" exists pursuant to Policy 27(a)(vii) is not supported by substantial
8 evidence in the record. The board of county commissioners concluded that "the
9 Board [of county commissioners] approved the rezone to QM for the quarry
10 tract, and that approval conflicts with the Plan and Zoning diagram" so that
11 Policy 27(a)(vii) supported the map amendment. Supplemental Record 39. We
12 understand petitioner to argue that the 1983 CPR project change request that
13 references approval of the request by the board of county commissioners of the
14 change to QM zoning, and the evidence in the record that identifies the quarry
15 on the county's inventory of significant aggregate sites, is not substantial
16 evidence to support the decision.

17 Intervenor responds that the evidence in the record supports the
18 conclusion that the official plan and zoning map designations of Forest are
19 inconsistent with both the CPR project change request, which indicates that the
20 zone change to QM was approved by the board of county commissioners, and
21 with Ordinance 892, which identified the property on which the existing Swiss
22 Home quarry was located as a significant aggregate and mineral resource site.

1 We agree. As explained above, according to the county’s program to achieve
2 Goal 5, sites included on the county’s inventory were to be designated “SG,
3 SG/CP, [or] QM[.]” It is plain from Ordinance 892 that the Swiss Home quarry
4 is included on the county’s inventory of significant mineral and aggregate
5 resource sites. Supplemental Record 109, 225. The existing plan and zoning
6 designations of Forest are inconsistent with Ordinance 892, which adopted the
7 county’s inventory, placed the Swiss Home Quarry on the inventory, but
8 mistakenly identified the Swiss Home Quarry as being located on “Tax Lot
9 200,” and dictated that sites on the inventory should be zoned SG, SG/CP or
10 QM. Supplemental Record 225, 319.

11 The third subassignment of error is denied.

12 For the reasons explained above, we do not reach the second and fourth
13 subassignments of error.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 In its second assignment of error, petitioner argues that the challenged
17 decision is an “impermissible collateral attack” on Ordinance 884, the February
18 1984 ordinance that designated and zoned the larger parcel and the smaller
19 parcel as Forest and F-1. Petitioner argues, as it argued in the first
20 subassignment of error under the first assignment of error, that Policy 27(a) is
21 not available to intervenor or the county to amend the map designations for the
22 property.

1 Intervenor responds, and we agree, that the challenged decision is not a
2 collateral attack on Ordinance 884 at all, but a proper application of another
3 RCP provision - Policy 27 - that allows the county annually to do exactly what
4 it has done here.

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioner's third assignment of error includes three subassignments of
8 error that we address below.

9 **A. First Subassignment of Error**

10 In its first subassignment of error under its third assignment of error, we
11 understand petitioner to argue, as it argued under the first assignment of error,
12 that the county improperly relied on Policy 27 to approve the map amendments.
13 For the reasons explained in our resolution of the first assignment of error, we
14 reject that argument and conclude that the county properly relied on Policy 27
15 to amend the map designations.

16 The first subassignment of error is denied.

17 **B. Second Subassignment of Error**

18 LC 16.400(8)(c)(ii) and (iii) require an applicant for a "[m]inor
19 amendment" to submit adequate documentation to allow the county to adopt
20 the findings that are required by LC 16.400(6)(h)(ii), and to conduct "[a]n
21 assessment of the probable impacts of implementing the proposed

1 amendment[.]”² In its second subassignment of error, petitioner argues that the
2 county’s findings regarding LC 16.400(8)(c)(ii) and (iii) are inadequate.
3 Petition for Review 23.

² LC 16.400(8)(c) provides in relevant part:

“(c) Minor amendment proposals initiated by an applicant shall provide adequate documentation to allow complete evaluation of the proposal to determine if the findings required by LC 16.400(6)(h)(iii) above can be affirmatively made. Unless waived in writing by the Planning Director, the applicant shall supply documentation concerning the following:

“(i) A complete description of the proposal and its relationship to the [Plan].

“(ii) An analysis responding to each of the required findings of LC 16.400(6)(h)(ii) above.

“(iii) An assessment of the probable impacts of implementing the proposed amendment, including the following:

“(aa) Evaluation of land use and ownership patterns of the area of the amendment;

“(bb) Availability of public and/or private facilities and services to the area of the amendment, including transportation, water supply and sewage disposal;

“(cc) Impact of the amendment on proximate natural resources, resource lands or resource sites, including a Statewide Planning Goal 5 ‘ESEE’ conflict analysis where applicable;

“(dd) Natural hazards affecting or affected by the proposal;

“(ee) For a proposed amendment to a nonresidential, nonagricultural or nonforest designation, an assessment of employment gain or loss, tax revenue impacts and public service/facility costs, as compared to equivalent factors for the existing uses to be replaced by the proposal[.]”

LC 16.400(6)(h) provides that for all comprehensive plan amendments:

“(h) Method of Adoption and Amendment.

“ * * * * *

“(ii) The adoption or amendment shall be concurrent with an amendment to LC 16.400(4) above. In the case of a RCP adoption, the Code amendment shall place such Plan in the appropriate category. In the case of a RCP amendment, the Code amendment shall insert the number of the amending Ordinance.

“(iii) The Board may amend or supplement the RCP upon making the following findings:

“(aa) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.

“(bb) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is:

“(i-i) necessary to correct an identified error in the application of the Plan; or

1 The county adopted several pages of findings addressing LC
2 16.400(8)(c)(ii) and (iii). Supplemental Record 42-44. Petitioner does not
3 address those findings at all, or attempt to explain why they are inadequate.
4 Absent any developed argument challenging the findings the county did adopt,
5 petitioner’s argument provides no basis for reversal or remand.

“(ii-ii)necessary to fulfill an identified public or
community need for the intended result
of the component or amendment; or

“(iii-iii)necessary to comply with the mandate
of local, state or federal policy or law; or

“(iv-iv)necessary to provide for the
implementation of adopted Plan policy
or elements; or

“(v-v)otherwise deemed by the Board, for
reasons briefly set forth in its decision, to
be desirable, appropriate or proper.

“(cc) For Minor Amendments as defined in LC
16.400(8)(a) below, the Plan amendment or
component does not conflict with adopted
Policies of the Rural Comprehensive Plan, and
if possible, achieves policy support.

“(dd) For Minor Amendments as defined in LC
16.400(8)(a) below, the Plan amendment or
component is compatible with the existing
structure of the Rural Comprehensive Plan, and
is consistent with the unamended portions or
elements of the Plan.”

1 Finally, the petition for review includes footnote 2, which is set out in
2 the margin in the petition for review’s “Statement of Material Facts” section.
3 Petition for Review 6-7. In footnote 2, petitioner argues that the county’s
4 decision fails to include the findings that are required by LC
5 16.400(6)(h)(iii)(aa) and (bb). *See* n 2. LUBA generally does not consider
6 arguments in footnotes that set out a different legal theory than that presented
7 in the assignment of error itself. *Frewing v. City of Tigard*, 59 Or LUBA 23, 45
8 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19 (2008).
9 Accordingly, we do not consider any argument that is included in footnote 2 of
10 the petition for review. If petitioner wishes to allege that the county’s findings
11 regarding LC 16.400(6)(h)(iii)(aa) and (bb) are inadequate, petitioner needs to
12 do so in an assignment of error, not in a footnote to the petition for review’s
13 “Statement of Material Facts” section. *See Regency Centers, L.P. v.*
14 *Washington County*, 265 Or App 49, 61, 335 P3d 856 (2014) (LUBA was not
15 required to scour the petition for review for material that potentially could have
16 supported an argument that the county’s decision involved a “proposed
17 development of land” when petitioners did not make that argument for
18 themselves).

19 The second subassignment of error is denied.

20 **C. Third Subassignment of Error**

21 In its third assignment of error, petitioner argues that as part of the plan
22 and zone map amendment approved pursuant to Policy 27, the county was

1 required to conduct an analysis of the environmental, economic, social and
2 environmental (ESEE) consequences of the amendments, pursuant to the Goal
3 5 rules at OAR 660-023-0040 and 660-023-0180. Petition for Review 23.

4 Intervenor responds that the evidence in the record is that the Swiss
5 Home quarry has already been subjected to the inventory and ESEE process in
6 the 1982 draft Working Paper, which was amended, supplemented, and
7 eventually adopted and incorporated into Ordinance 892. Notwithstanding
8 Ordinance 892's misidentification of the Swiss Home quarry as "TRS 17-09-
9 30-200," intervenor points to Appendix J to Ordinance 892, which is the ESEE
10 analysis for the inventory sites, including the Swiss Home quarry, identified on
11 Appendix D to the ordinance as "Site 4." Supplemental Record 225. As such,
12 intervenor argues, the ESEE analysis for the site has already been conducted,
13 and the county determined to designate the quarry as a "1C" site. Supplemental
14 Record 225, 227; OAR 660-016-0000 *et seq.* (1981); *see Beaver State Sand*
15 *and Gravel v. Douglas County*, 187 Or App 241, 248-49, 65 P3d 1123 (2003)
16 (explaining the local government's three basic options for creating its inventory
17 of significant mineral and aggregate resource sites).

18 OAR 660-023-0040 and 660-023-0180, the rules that petitioner cites, are
19 complex rules governing when ESEE analyses are required for various Goal 5
20 resources. Beyond its bare assertion that an ESEE analysis is required for the
21 plan and zone map amendments, petitioner does not develop its argument or
22 otherwise explain why the ESEE analysis that was adopted and acknowledged

1 as part of the adoption of Ordinance 892 is insufficient to satisfy any county
2 obligation under Goal 5 or the Goal 5 rules. Accordingly, petitioner's argument
3 provides no basis for reversal or remand of the decision.

4 Finally, petitioner argues that the county's findings are inadequate
5 because the challenged decision does not modify the adopted Goal 5 inventory
6 to remove all references to Tax Lot 200 from the county's inventory and place
7 Tax Lot 201 on the inventory. Intervenor responds that the county's decision is
8 a decision on the application that was before it, which was to amend the plan
9 and zone map designations for the Swiss Home quarry, the larger parcel. As
10 such, the county is not obligated to amend its Goal 5 inventory as part of the
11 decision on the map amendment application.

12 We agree with intervenor that petitioner has not identified any basis to
13 require the county to amend the inventory in the challenged decision to remove
14 all references to Tax Lot 200, or otherwise remove Tax Lot 200 from the
15 inventory. Arguably, for the reasons we explain above that conclude that the
16 existing Swiss Home quarry is included on the inventory notwithstanding the
17 typographical error in identifying it as Tax Lot 200, the inventory does not
18 include the smaller parcel that is numbered Tax Lot 200, where no quarry has
19 ever existed. However, the county's Conformity Determination process occurs
20 "annually," and at the next annual review, the county may adopt conforming
21 amendments to delete the references to Tax Lot 200 in the inventory or
22 otherwise correct it to reflect the correct tax lot number for the Swiss Home

1 quarry. Accordingly, petitioner's argument provides no basis for reversal or
2 remand.

3 The third subassignment of error is denied.

4 The county's decision is affirmed.