

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

3  
4   BUHLER RANCH PARTNERSHIP,           )  
5    )  
6                    Petitioner,            )  
7    )  
8            vs.                            )  
9    )  
10   WALLOWA COUNTY,                    )  
11    )  
12                    Respondent,            )  
13    )  
14            and                            )  
15    )  
16   JEAN PEKAREK,                        )  
17    )  
18                    Intervenor-Respondent.    )

LUBA No. 96-240

FINAL OPINION  
AND ORDER  
)

19   \_\_\_\_\_ )  
20    )  
21   MILDRED ANNE FRASER,                )  
22    )  
23                    Petitioner,            )  
24    )  
25            vs.                            )  
26    )  
27   WALLOWA COUNTY,                    )  
28    )  
29                    Respondent.            )

LUBA Nos. 96-241 and 96-242

30  
31  
32            Appeal from Wallowa County.

33  
34            D. Rahn Hostetter, Enterprise, filed the petition for  
35 review and argued on behalf of petitioner Buhler Ranch  
36 Partnership.

37  
38            Mildred Anne Fraser, Joseph, represented herself.

39  
40            No appearance by respondent.

41  
42            Jean Pekarek, Enterprise, filed the response brief and  
43 argued on her own behalf.

44  
45            LIVINGSTON, Administrative Law Judge; GUSTAFSON, Chief

1 Administrative Law Judge, participated in the decision.

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3 REMANDED (LUBA No. 96-240) 10/23/97

4 DISMISSED (LUBA Nos. 96-241 and 96-242)

1           You are entitled to judicial review of this Order.  
2   Judicial review is governed by the provisions of ORS  
3   197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 In this consolidated appeal, petitioner Buhler Ranch  
4 Partnership appeals an ordinance (Ordinance 96-06), which  
5 adopts amendments (the amendments) to the county's  
6 comprehensive plan. The amendments include the Wallowa Lake  
7 Moraines as part of the county's Goal 5 resource inventory  
8 and adopt protection standards for certain identified  
9 resource sites.

10 **PRELIMINARY MATTER**

11 On November 4, 1996, the county adopted Ordinance 96-  
12 07, amending its zoning ordinance to include the Wallowa  
13 Lake Moraines and nearby areas in the county's Goal 5  
14 Resource Overlay zone, and creating specific protection  
15 standards for the area. Petitioner Mildred Anne Fraser  
16 appealed both Ordinance 96-06 and Ordinance 96-07, but did  
17 not file a petition for review. Therefore, we dismiss her  
18 appeals (in LUBA Nos. 96-241 and 96-242) and do not consider  
19 Ordinance 96-07. Hereafter, we refer to petitioner Buhler  
20 Ranch Partnership as "petitioner."

21 **MOTION TO INTERVENE**

22 Jean Pekarek (intervenor) moves to intervene on the  
23 side of respondent. There is no opposition to the motion,  
24 and it is allowed.

25 **FACTS**

26 Wallowa Lake occupies a portion of the large glacially

1 carved basin just south of the city of Joseph in Wallowa  
2 County. The lake is approximately four miles long (north to  
3 south) and one mile wide (east to west), and is bordered on  
4 the east and west by the Wallowa Lake Moraines, which are  
5 tall ridges that rise up approximately 800 feet from the  
6 waters of Wallowa Lake. These lateral moraines and the lake  
7 basin below were scraped out of the earth many thousands of  
8 years ago by glaciers.

9 The moraines are privately owned and have historically  
10 been used for the pasture of livestock in the summer and for  
11 selective harvesting of timber. Record 234. Highway 351  
12 runs down the entire eastern border of Wallowa Lake from the  
13 city of Joseph into Wallowa Lake State Park at the southern  
14 end of the lake.

15 On August 5, 1996, the county adopted Ordinance 96-06,  
16 which amends the county's comprehensive plan to include  
17 Wallowa Lake and the Wallowa Lake Moraines as part of the  
18 county's inventory of Goal 5 resources. Petitioner owns  
19 approximately 935 acres of land on the west side of the  
20 western moraine; approximately 200 acres of that land is  
21 within the Goal 5 overlay zone adopted by the county through  
22 Ordinance 96-06. The amendments identify four Goal 5  
23 resources: scenic (view) areas, natural (resource) areas,  
24 wildlife habitat areas, and areas of historical  
25 significance. Record 196. As required by Statewide  
26 Planning Goal 5 (Goal 5) and OAR 660 chapter 16, which

1 implements the goal, the amendments identify the location,  
2 quality, and quantity of each of the resource sites,  
3 identify conflicting uses that could negatively impact the  
4 resource sites, assess the economic, social, environmental  
5 and energy (ESEE) consequences of allowing or prohibiting  
6 the conflicting uses, and develop a program to protect each  
7 inventoried Goal 5 resource. Record 196-227. The  
8 amendments also include individual analyses of the effects  
9 of resource protection on specific properties in the area.  
10 Record 228-37.

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioner contends that the county "failed to make  
13 site-specific analyses of the ESEE consequences of applying  
14 the restrictions set out in the Goal 5 overlay zones to the  
15 resource site on petitioner's property." Petition for  
16 Review 2. Specifically, petitioner asserts that the  
17 amendments do not describe the resource site with sufficient  
18 particularity, and fail to describe the interaction of the  
19 conflicting uses with the resource site.

20 **A. Resource Site-Specific Analyses**

21 Petitioner contends that the county's ESEE analyses for  
22 the scenic view area, natural resource area, and wildlife  
23 habitat area are not resource site-specific, as required by  
24 OAR 660-16-005 and the Oregon Supreme Court's decision in  
25 Columbia Steel Castings Co. v. City of Portland, 314 Or 424,  
26 840 P2d 71 (1992). In Columbia Steel, the city adopted

1 amendments to its comprehensive plan and zoning map applying  
2 an "environmental overlay zone" to a 14,000-acre area known  
3 as the Columbia Corridor. For purposes of the ESEE analysis  
4 required by OAR 660-16-005, the city divided the Columbia  
5 Corridor into five sub-areas, and identified and inventoried  
6 36 individual resource sites within those areas. However,  
7 the city's conflicting use and ESEE findings were made for  
8 each of the five areas, rather than for each of the 36  
9 resource sites. The court held that the city's analysis was  
10 not sufficiently site-specific because "OAR 660-16-005  
11 requires that a conflicting use and an ESEE analysis be done  
12 for each resource site."<sup>1</sup> Id. at 431.

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<sup>1</sup>OAR 660-16-005 provides:

"It is the responsibility of local government to identify conflicts with inventoried Goal 5 resource sites. This is done primarily by examining the uses allowed in broad zoning districts established by the jurisdiction (e.g., forest and agricultural zones). A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource. Where conflicting uses have been identified, Goal 5 resource sites may impact those uses. These impacts must be considered in analyzing the economic, social, environmental and energy (ESEE) resources:

"(1) Preserve the Resource Site: If there are no conflicting uses for an identified resource site, the jurisdiction must adopt policies and ordinance provisions, as appropriate, which insure preservation of the resource site."

"(2) Determine the Economic, Social, Environmental, and Energy Consequences: If conflicting uses are identified, the [ESEE] consequences of the conflicting uses must be determined. Both the impacts on the resource site and on the conflicting use must be considered in analyzing the ESEE consequences. The applicability and requirements of

1 Attached to the amendments adopted by the county are  
2 maps that define the location and boundaries of each of the  
3 three resources that petitioner identifies, and a map  
4 identifying the privately owned parcels that are affected by  
5 the adopted Goal 5 protection standards. Record 238-245.  
6 The amendments also contain specific descriptions of the  
7 location of each resource. Record 196-97, 208-09, 215-16,  
8 221.

9 The text of the amendments and the attached maps  
10 indicate that the scenic view, natural/geologic, and  
11 wildlife habitat resources are located throughout the  
12 Wallowa Lake Basin. As intervenor points out, the sites  
13 identified in the amendments for these three resources  
14 comprise the entire basin, including the moraines and  
15 specified adjacent lands. As required by OAR 660-16-005 and  
16 Columbia Steel, the amendments include a conflicting use  
17 analysis and an ESEE analysis for each of the three resource  
18 sites within identified boundaries. Record 202, 212-13,  
19 218-19.

20 Petitioner's arguments under the first assignment of  
21 error are not developed. We understand petitioner to  
22 contend that because its property is "unique," the county

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other Statewide Planning Goals must also be considered, where appropriate, at this stage of the process. A determination of the ESEE consequences of identified conflicting uses is adequate if it enables a jurisdiction to provide reasons to explain why decisions are made for specific sites."

1 was required to undertake a separate ESEE analysis  
2 addressing the resources that are present on petitioner's  
3 property.

4 In Columbia Steel, the court stated that

5 "the references in OAR 660-16-005 and throughout  
6 the Goal 5 implementing rules to 'resource sites',  
7 'sites,' 'particular sites,' and 'specific sites'  
8 all refer to resource sites, not to smaller  
9 parcels (such as tax lots) within a resource  
10 site." Id. at 428 (emphasis in original).

11 Petitioner does not explain (and it is not obvious) why the  
12 characteristics of its property justify or require an ESEE  
13 analysis separate from the ESEE analyses of the larger  
14 resource sites.

15 This subassignment of error is denied.

16 **B. Adequacy of ESEE Analyses**

17 Petitioner contends that the county's ESEE analyses for  
18 the three identified resources fail to describe the  
19 interaction of the conflicting uses with the resource sites,  
20 as required by OAR 660-16-005 and Columbia Steel.  
21 Petitioner provides no argument or analysis to support its  
22 contention.

23 In Columbia Steel, the court held that the ESEE  
24 analysis required by OAR 660-16-005 must adequately describe  
25 both the resource site and the conflicting uses, and must  
26 describe their interaction by setting forth the impact that  
27 each has on the other. Id. at 431. The court went on to  
28 state:

1 "In conclusion, we hold that the Goal 5  
2 implementing rules require that an ESEE analysis  
3 contain enough information on impacts that  
4 resource sites and conflicting uses will have on  
5 each other to permit the responsible jurisdiction  
6 to have 'reasons to explain why decisions are made  
7 for specific resource sites.'" Id. at 432.

8 The amendments explain why specific decisions were made  
9 for the resource sites at issue. Although not all of the  
10 analysis for each identified resource is located under the  
11 "ESEE Analysis" subheadings, the discussion of the relevant  
12 impacts of the conflicting uses and resource sites on each  
13 other pervades the amendments. For example, the impacts of  
14 the identified conflicting uses on resource sites are  
15 discussed in relation to each of the resources at issue.  
16 Record 198-202, 210-13, 216-19. These discussions include  
17 treatment of the relevant ESEE consequences. They include  
18 an analysis of the ESEE consequences of the resource site  
19 impacts on the conflicting uses. Record 202-04, 212-13,  
20 218-19. They also specifically discuss the impacts of the  
21 Goal 5 protection standards adopted by the county on  
22 petitioner's property. Record 234. The amendments contain  
23 sufficient ESEE information to "explain why decisions are  
24 made for specific resource sites." Columbia Steel at 432.

25 This subassignment of error is denied.

26 The first assignment of error is denied.

27 **SECOND ASSIGNMENT OF ERROR**

28 The amendments prohibit the construction of structures  
29 within 100 yards of the crests of the east and west

1 moraines. Petitioner contends that, in adopting a 100-yard  
2 setback requirement, the county failed to adopt "clear and  
3 objective conditions and standards," as required by OAR 660-  
4 16-010(3), and imposed a plan designation that is  
5 inconsistent with its ESEE analysis for the inventoried  
6 scenic view resource.

7 Under OAR 660-16-010(3), where a local government  
8 determines in its ESEE analysis that both the resource site  
9 and an identified conflicting use are important relative to  
10 each other, it may impose limitations on conflicting uses to  
11 protect the resource site. If the local government decides  
12 to implement limitations on conflicting uses, it must  
13 specify what uses and activities are allowed and what  
14 specific standards or limitations must be placed on  
15 permitted and conditional uses for each resource site:

16 "Whatever mechanisms are used, they must be  
17 specific enough so that affected property owners  
18 are able to determine what uses and activities are  
19 allowed, not allowed, or allowed conditionally and  
20 under what clear and objective conditions or  
21 standards." OAR 660-16-010(3).

22 Petitioner argues that the county's adoption of a 100-  
23 yard setback from the crests of the east and west moraines  
24 does not create a clear and objective standard because the  
25 exact crests of the moraines are difficult to identify.  
26 Petitioner points to the following statement in the  
27 amendments:

28 "In addition to the above 3C restrictions, a 100-  
29 yard set back from the 3A protection area and the

1 crests of the East and West Moraines will be  
2 required for all structures. This standard will  
3 act to buffer potentially conflicting uses from  
4 this area of extreme visual sensitivity. While it  
5 is not possible to absolutely identify the exact  
6 crest of each moraine, county staff will utilize  
7 all available resources in order to specifically  
8 identify this protective line when a request for a  
9 structure or other potentially conflicting use is  
10 received in its general vicinity." Record 204-05  
11 (emphasis added).

12 Intervenor responds, and we agree, that the 100-yard  
13 setback is a clear and objective standard. The crest of a  
14 moraine may be specifically located using accepted survey  
15 techniques as necessary to determine compliance with the  
16 standard in conjunction with individual applications.

17 Petitioner also contends that because there are sites  
18 on petitioner's property within 100 yards of the crest of  
19 the west moraine that are not visible from any of the  
20 designated primary viewshed areas, "nothing in the record  
21 provides any basis to prohibit construction of structures in  
22 those areas." Petition for Review 4-5. In support of this  
23 argument, petitioner points to statements by its own  
24 attorney to the effect that there are locations on the  
25 petitioner's property where "you are within 100 yards of the  
26 crest and yet due to the topographical features excludes  
27 anyone [sic] from seeing the building in any direction."  
28 Record 170.

29 Essentially, petitioner challenges the factual base  
30 supporting the county's legislative decision to prohibit  
31 construction of structures within 100 yards to the west of

1 the crest of the western moraine. See 1000 Friends of  
2 Oregon v. City of North Plains, 27 Or LUBA 372, 376-78,  
3 aff'd, 130 Or App 406 (1994) (the Goal 2 requirement for an  
4 adequate factual base to support land use decisions,  
5 including legislative land use decisions, is comparable to  
6 the substantial evidence requirement in ORS 197.835(7),  
7 which applies only to quasi-judicial land use decisions).

8 In response, intervenor relies upon statements in an  
9 October 23, 1996 staff report that

10 "[i]t is not practical to imagine that a structure  
11 and the infrastructure required could meet all the  
12 provisions contained in [petitioner's] draft  
13 [regulations]. For example, it is highly unlikely  
14 that a structure and its road will not be visible  
15 from any **primary view area** when placed within 100'  
16 of the crest of the moraine. Utilities are  
17 required to be placed underground. Pacific Power  
18 & Light has a maximum 'pull' of 500 yards."  
19 Record 28.

20 A planning staff report may constitute substantial  
21 evidence in support of a local government's quasi-judicial  
22 land use decision. Scott v. City of Portland, 17 Or LUBA  
23 197, 202 (1988). Thus, it may also provide an "adequate  
24 factual base" to support a legislative land use decision.  
25 However, as indicated above, the staff report refers to a  
26 100-foot setback, and not to the 100-yard setback standard  
27 that was actually adopted in the amendments.<sup>2</sup> Record 28-29.

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<sup>2</sup>The staff report includes several references to the "100'" setback.  
Record 27-28.

1 In an August 15, 1996 letter to the county, petitioner's  
2 attorney specifically observed that a "100-foot setback  
3 would be much more acceptable than a 100-yard setback."  
4 Record 187.

5 Had the staff report referred to 100 yards, rather than  
6 100 feet, it would have been adequate to justify a setback  
7 of 100 yards. However, we assume that the staff report  
8 means what it says. Intervenor identifies no additional  
9 evidence supporting the need for a 100-yard setback, as  
10 opposed to a 100-foot setback.

11 The second assignment of error is sustained, in part.

12 **THIRD ASSIGNMENT OF ERROR**

13 Petitioner contends that the county imposed a plan  
14 designation that is inconsistent with its ESEE analysis when  
15 it prohibited the siting of dwellings or other structures in  
16 areas that exceed a 10 percent grade. Petitioner argues  
17 that

18 "[t]here is nothing in the [ESEE analysis] or  
19 anywhere else in the record that provides a basis  
20 for concluding that construction of structures in  
21 areas exceeding a 10% grade will, even where  
22 hidden from view, negatively impact the Goal 5  
23 resources sought to be protected." Petition for  
24 Review 5 (emphasis added).

25 The emphasized language suggests that petitioner is  
26 confusing the applicability of the resource protection  
27 standards adopted by the county. The stated purpose of the  
28 10 percent grade restriction is not to protect the scenic  
29 view resource, but to protect the natural geologic resource.

1 In the county's analysis of the natural geologic resource,  
2 it identifies the creation of new dwellings as a potential  
3 conflicting use with the resource site, and expressly finds  
4 that

5 "[t]he greater the incline of the site, the  
6 greater the negative impact of a dwelling and its  
7 associated accessory structures will have on the  
8 geologic moraines. Dwellings sited in areas which  
9 have a grade of 10% or more will be considered in  
10 conflict with this resource." Record 210.

11 Petitioner does not identify any part of the plan amendments  
12 that is inconsistent with the 10 percent grade restriction,  
13 and does not explain why the 10 percent grade restriction  
14 adopted by the county is inconsistent with the ESEE  
15 analysis.

16 Petitioner also asserts that the 10 percent grade  
17 restriction is not a clear and objective standard as  
18 required by OAR 660-10-010, because "the record shows the  
19 county was not certain what was meant by a 10% grade or  
20 slope." Petition for Review 5-6. We disagree. Petitioner  
21 relies solely on a statement by one of the decision makers,  
22 reflected in the minutes of the county's October 23, 1996  
23 hearing, regarding the difference between degree and percent  
24 of slope. The decision maker suggests that the adopted  
25 ordinance "needs to clarify degree or percent of slope."  
26 Record 23. However, the amendments consistently refer to  
27 the slope requirements in degrees, not in percentages.

28 The third assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2       Petitioner contends that the county failed to adopt a  
3 "clear and objective" standard when it prohibited the  
4 construction of dwellings on parcels of less than 160 acres  
5 except "where an acceptable visual buffer is present."  
6 Record 204.       Petitioner argues that because the plan  
7 amendments do not explain what constitutes such a buffer,  
8 the standard is not sufficiently specific to allow  
9 petitioner "to determine what uses are allowed, not allowed,  
10 or allowed conditionally and under what clear and objective  
11 conditions or standards," as required by OAR 660-16-010(3).<sup>3</sup>

12       Intervenor responds that the amendments state a  
13 sufficiently clear and objective standard because the term  
14 "suitable visual buffer" is further described to mean  
15 "timber or other natural features."<sup>4</sup> Record 9. We disagree  
16 with intervenor.       The term "suitable visual buffer" is  
17 inherently subjective.       If the county wishes to require the  
18 visual "buffering" or screening of new dwellings, it must  
19 clearly specify the outcome to be achieved by the screening  
20 and the vantage point from which the proposed dwelling must  
21 be screened.

22       The fourth assignment of error is sustained.

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<sup>3</sup>The amendments also require a "suitable visual buffer" for nonresidential structures, subject to design review standards. Petitioner does not object to this requirement.

<sup>4</sup>"Acceptable visual buffer" and "suitable visual buffer" are used interchangeably in the amendments.

1           The county's decision appealed in LUBA No. 96-240 is  
2 remanded.