

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by analyzing multiple groups of similar resources and similarly zoned properties within a single resource site. *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by estimating the economic impact to properties that would be affected by protecting the resource site based on assumptions that lead to a conclusion of greater economic impact to those properties than if the ESEE analysis used different assumptions that were applied in estimating the economic impact to other properties, nor does the local government err in failing to consider the cost of environmental remediation that will be incurred to develop specific properties. *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** While local governments have substantial discretion in determining the scope of the impacts that they may consider in conducting an ESEE analysis under OAR 660-023-0040(4), they may not fail to evaluate both the impacts of the resource site on conflicting uses and the impacts of the conflicting uses on the resource site. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by characterizing a proposed limitation on a conflicting use as a negative impact of the resource site on the conflicting use, even where the proposed limitation is already required under the local code, where the local code could be amended in the future to remove that requirement. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In redesignating and rezoning protected habitat from forest land to marginal land under *former* ORS 197.247 (1991), a local government errs by excluding adjacent forest land from the impact area under OAR 661-023-0040(3) without establishing that it is not also protected habitat. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant’s expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where an economic, social, environmental and energy (ESEE) analysis identifies conflicting uses as the commercial and high-density residential development allowed under a

proposed post-acknowledgement plan amendment, and concludes that the greater development intensity and imperviousness may result in greater direct impacts on water quality and water temperature in a nearby creek which is a Goal 5 resource, arguments that the ESEE analysis does not specifically address pollution from stormwater provide no basis for reversal or remand because OAR 660-023-0040(2) does not require a more detailed identification of conflicting uses. *Nicita v. City of Oregon City*, 79 Or LUBA 22 (2019).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** It is not sufficient for petitioners to simply point out that the sound study that was prepared to develop a Statewide Planning Goal 5 program to protect an aggregate resource site does not measure noise in precisely the manner required by the Oregon Department of Environmental Quality (DEQ) rules, without any attempt to show that any deviations from required sound measuring locations could have the effect of allowing noise levels that violate DEQ standards. Where the applicant’s expert took the position that the selected sound measuring locations did not have the effect of inflating the ambient noise level or otherwise rendering those sound measurements inaccurate, at least some effort to challenge the expert’s position is required to show the deviations may have led to inaccurate sound readings for purposes of determining if DEQ noise standards will be met. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Based on an ESEE consequences analysis regarding conflicting uses, under OAR 660-023-0040(4) and (5), a county must develop a program to achieve Goal 5, and determine whether to allow, limit, or prohibit conflicting uses. A local government errs in its ESEE analysis and in its ultimate decision to modify its acknowledged Goal 5 program to eliminate the prohibition on churches in the Wildlife Area Combining Zone, when it relied in part on the cost of defending its existing Goal 5 program against a hypothetical Religious Land Use and Institutionalized Persons Act (RLUIPA) lawsuit to support its decision to achieve Goal 5 by allowing without limits a new conflicting use, without providing an analysis establishing the county’s Goal 5 program would be legally vulnerable to losing a hypothetical RLUIPA lawsuit if one were brought. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** To allow a conflicting use without limit under OAR 660-023-0040(5)(c), a county’s ESEE analysis must (1) demonstrate that the conflicting use is of sufficient importance relative to the resource site, and (2) must indicate why measures to protect the resource “to some extent should not be provided.” OAR 660-023-0040(5)(c) does not prohibit the county from allowing a conflicting use without limit, if there is another option that would both fully protect the resource at issue and satisfy the motivations prompting the county to decide in favor of the conflicting use. Instead, OAR 660-023-0040(5)(c) requires the county to justify its choice to allow a conflicting use without limit, and that justification must include a demonstration that alternatives, such as imposing limits or measures to provide some protection for the resource consistent with OAR 660-023-0040(5)(b) should not be provided. Assuming that demonstration is made, OAR 660-023-0040(5) and Goal 5 do not compel the local government to choose alternatives that fully or partially protect the resource. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In the context of a county’s Goal 5 analysis, LUBA will reject the county’s argument that there are no measures that the county could adopt to protect wildlife habitat from the negative impacts of churches without running afoul of a Religious Land Use and Institutionalized Persons Act (RLUIPA) requirement—that governments not impose a “substantial burden” on religious exercise—where the county’s ESEE analysis includes no evaluation of any measures or any findings on this point, and without actually evaluating any measures that would provide some protection to wildlife resources, it is difficult to understand how the county could reach a conclusion that no measures could be adopted to protect wildlife resources without also imposing a “substantial burden” on religious exercise. In such a circumstance, remand is necessary for the county to adopt an ESEE analysis that either does not rely on the mere threat of RLUIPA litigation, or that actually evaluates whether the county’s existing Goal 5 program is inconsistent with the RLUIPA Equal Terms or Substantial Burden requirements, so that the county can consider whether there are measures it can adopt pursuant to OAR 660-023-0040(5)(b) and (c) to reduce impacts on wildlife resources and include those evaluations in the revised ESEE analysis. As part of that analysis, the county may consider, if necessary, whether identified measures would impose a “substantial burden” on the free exercise of religion. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** The Goal 5 rule, at OAR chapter 660, division 23, includes a “standard” process for inventorying, evaluating and protecting natural resources, at OAR 660-023-0030 to 660-023-0050, that includes rules for evaluating the ESEE consequences for allowing, limiting, or prohibiting uses that conflict with a natural resource site. The Goal 5 rule also includes “special” standards and procedures for specific types of Goal 5 resources, including those that govern aggregate mineral resources, at OAR 660-023-0180. According to OAR 660-023-0020(1), sometimes both the standard process and a special process apply; sometimes the special process supersedes the standard process in whole, or in part, and in case of conflict the specific process controls. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** OAR 660-023-0180(5)(a) requires the local government to identify conflicts with existing and approved uses located within a determined “impact area” limited in size to 1,500 feet from the boundaries of the mining area, unless factual information indicates “significant potential conflicts” beyond 1,500 feet. After deciding to allow mining under OAR 660-023-0180(5), the county must also go on to consider whether to allow, limit, or prevent new or future conflicting uses within the impact area pursuant to OAR 660-023-0180(7). For this limited inquiry, the county must conduct the analysis pursuant to the standard ESEE process in OAR 660-023-0040 and OAR 660-023-0050. OAR 660-023-0040(3) requires local governments to “determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource,” which means that unlike the impact area determined under OAR 660-023-0180(5)(a), the impact area determined under OAR 660-023-0040(3) is not initially limited to 1,500 feet and the geographic extent of the impact area is determined by evaluating whether “allowed uses could adversely affect the identified resource,” rather than evaluating whether there is factual information indicating “significant potential

conflicts” beyond an initial 1,500 feet. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Petitioners have not established that a county’s failure to determine an impact area for purposes of OAR 660-023-0180(7) pursuant to the standard ESEE process at OAR 660-023-0040(3) is more than harmless error, where it is not clear that an impact area determined under OAR 660-023-0040(3) would be larger or different than the one the county established under OAR 660-023-0180(5)(a), petitioners have not identified any new conflicting uses within a more expansive impact area that could adversely impact the mining site and that therefore should have been limited or prevented based on the arguably more sensitive OAR 660-023-0040(3) test, compared to the “significant potential conflict” test that the county employed under OAR 660-023-0180(5)(a), and because the applicant is the only party that could possibly be harmed by employing a potentially smaller impact area as determined under OAR 660-023-0180(5)(a), and the applicant is not challenging that potentially smaller impact area but rather is actively defending it on appeal. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In the context of a post-acknowledgment plan amendment to inventory a significant aggregate site and allow mining of that site under Goal 5, if the local government concludes based on its ESEE analysis that new conflicting uses should be allowed within the impact area under the existing comprehensive plan and land use regulations, the local government’s program to achieve the goal in that regard may consist of simply relying on its acknowledged comprehensive plan and land use regulations to protect the resource site from new conflicting uses pursuant to OAR 660-023-0040(2)(a). *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where a county’s ESEE analysis relies on an inflated estimate of the number of acres of big game habitat added to its Goal 5 inventory and greater existing residential densities in an area to justify allowing significantly increased residential densities on big game habitat in that area, remand is required for a better explanation of the county’s rationale for increasing those residential densities. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where state agencies took the position before the county that two different county EFU zones were equally valuable for big game habitat, and without explanation the county amended its comprehensive plan Goal 5 protection program to allow significantly increased residential densities in one of those zones, remand is required for an explanation of the county’s rationale. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** OAR 660-023-0030 to 660-023-0050 call for a step by step planning process that results in an analysis of the consequences of allowing, limiting, or prohibiting uses that conflict with inventoried Goal 5 resource sites. But after that planning process is complete, the rule does

not require separately considering the cumulative impacts of all identified conflicting uses. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In order for the Goal 5 requirement at OAR 660-010-005 and OAR 660-023-0050(2) of an evaluation of the economic, social, environmental, and energy (ESEE) consequences of a plan amendment for a property which includes wetlands to apply, the wetlands must be on an acknowledged inventory of “Goal 5 resources.” Absent any evidence in the record that the wetlands are included on a county inventory of Goal 5 resources, Goal 5 does not apply to require an ESEE analysis of wetlands on subject property. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where the issue of whether a county erred by removing property from its Goal 5 inventory of Deer General Winter Range was clearly resolved against petitioner in a prior appeal, petitioner’s attempt to revive that issue in a subsequent appeal is barred under the holding in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), and constitutes a position presented “without probable cause to believe the position was well-founded in law \* \* \*” under ORS 197.830(15)(b). *Wood v. Crook County*, 75 Or LUBA 494 (2017).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where a county’s Goal 5 ESEE analysis and program make a decision to fully allow uses that conflict with inventoried wildlife habitat, and the county zones the property to fully allow those conflicting uses, the county is not required to remove the property from its wildlife habitat inventory. But where the county does remove the property from its wildlife habitat inventory and LUBA rejects all challenges to the Goal 5 ESEE analysis and program and remands on a different issue, in a subsequent appeal of the county’s decision on remand a petitioner may not assign error to the county’s removal of the property from its wildlife habitat inventory because that is a resolved issue under *Beck v. Tillamook County*, 313 Or 148, 153, 831 P2d 678 (1992). *Wood v. Crook County*, 74 Or LUBA 278 (2016).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where a Goal 5 ESEE analysis is based on the uses authorized by a particular zoning district, but the program ultimately adopted by the county includes an amended version of the zoning district, adopting the amended version of the zoning district is not error, where petitioner neither alleges nor demonstrates that the amended zoning district allows any uses that are not allowed by the pre-amendment zoning district. *Wood v. Crook County*, 74 Or LUBA 278 (2016).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Under OAR 660-004-0020(2)(c), a county does not err when determining that permitting adaptive reuse of existing historic structures in the proposed exception area results in fewer adverse consequences, compared to locating the proposal on other resource lands that require an exception, which would require significant new construction of infrastructure and accordingly more adverse consequences. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** OAR 660-023-0180(7) requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 resource. Where a petitioner raised general issues of compliance with OAR 660-023-0180(7) during the proceedings below, but in its findings the county declined to conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses, on appeal to LUBA the petitioner may challenge the county’s finding that it need not conduct an ESEE analysis. The petitioner is not required to anticipate that the county will adopt findings concluding that no ESEE analysis is required. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Nothing in OAR 660-023-0180(7), which requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 mining resource, allows a county to postpone the ESEE analysis to a future land use proceeding after it has approved the comprehensive plan and zoning changes to allow the mining use that triggers application of OAR 660-023-0180(7). *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where in an initial appeal LUBA concluded that the ESEE Consequences Determination portion of Goal 5 planning for a site was not part of the regulatory Resource Protection Program, any attempt in the decision on remand from LUBA to give regulatory effect to parts of that ESEE Consequences Determination portion of Goal 5 planning for a site will be rejected on appeal to LUBA. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Before it is appropriate to consider the non-regulatory ESEE Consequences Determination portion of Goal 5 planning for a site as context for interpreting the regulatory Resource Protection Program there must first be an ambiguity in the Resource Protection Program. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where in its initial decision the county applies the old Goal 5 rule at OAR chapter 660, division 16, instead of the new Goal 5 rule, and no issue was raised about that position in the first appeal to LUBA, the county is arguably constrained on appeal of its decision on remand from arguing that the old Goal 5 rule does not apply and instead the new Goal 5 rule applies. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** A local government errs in concluding that it is not required to apply Statewide Planning Goal 5 to a post acknowledgement plan amendment (PAPA) that adds lands to the county’s map of lands eligible for a destination resort by relying on an ESEE analysis that was completed and adopted 16 years prior to the proposed PAPA and that does not include any analysis of the new lands proposed for inclusion on the destination resort map. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** The fact that the entire Goal 5 planning document that a local government adopted for a site was adopted as part of the comprehensive plan does not necessarily mean that the identification of conflicts and ESEE analysis portions of that document that were not included in the Program to Achieve the Goal must be given regulatory effect. Whether those portions of the ESEE analysis have regulatory effect depends on the text of those portions of the ESEE analysis and their context. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** A county's failure to first determine the degree of adverse effects of blasting-generated dust on a nearby residence before conducting its ESEE analysis, as required by OAR 660-023-0180(5)(d)(A), is not reversible error, where the county's ESEE analysis finds that a condition of approval restricting blasting times to periods when the wind blows away from the residence will minimize or eliminate adverse impacts on the residence. That finding, if supported by the record, means that the county did not need to conduct an ESEE analysis at all with respect to impacts of dust on the residence. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** If a mineral and aggregate site is found to be significant under OAR 660-023-0180(3), then local governments must determine whether mining will be allowed. That in turn requires a number of additional determinations regarding: (1) an impact area, (2) conflicts, and (3) whether conflicts can be minimized. OAR 660-023-0180(5)(a) - (c). If all identified conflicts can be minimized, mining must be allowed. OAR 660-023-0180(5)(c). If all identified conflicts cannot be minimized, the local government must then determine the economic, social, environmental, and energy consequences of allowing mining notwithstanding that the conflicts cannot be minimized. OAR 660-023-0180(5)(d). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** At a minimum, the analysis of the ESEE consequences of allowing or prohibiting the mining operation should address the four ESEE factors (economic, social, environmental and energy), and should address the evidence petitioner submitted on those points. *Hegele v. Crook County*, 56 Or LUBA 1 (2008).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** The mere fact that a local government did not repeat the entire Goal 5 ESEE analysis process in adopting post-acknowledgement plan and land use regulation amendments does not provide a basis for remand. A local government must consider the new plan and land use regulation provisions and any new conflicting uses allowed and explain how its existing Goal 5 program continues to be adequate to protect its inventoried Goal 5 resources. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Remand is necessary where the county's ESEE findings evaluate impacts of dust from daily mining activities on nearby residences, but fail to evaluate dust generated by blasting

or determine whether such impacts may be minimized or reduced. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Under OAR 660-016-0005(1), if the only identified negative impact is from the resource to an allowed use, then the allowed use is not a “conflicting use” for purposes of the rule. Such negative impacts on an allowed use are considered only when conducting the analysis of economic, social, environmental and energy consequences under OAR 660-016-0005(3). *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** OAR 660-010-0010(3) requires local governments to include in the comprehensive plan a statement of “reasons” that support the decision to protect a resource site, allow conflicting uses fully, or limit conflicting uses. That “reasons” statement may consist of a summary, and the local government need not incorporate the entire ESEE analysis into the comprehensive plan as its “reasons.” *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** OAR 660-023-0007 exempts the determination of a “program to protect historic resources” from the requirement to conduct an ESEE (economic, social, environmental and energy) analysis. The scope of that exemption is ambiguous, and could plausibly exempt (1) a local government’s entire historic resources “program,” as that rule broadly defines that term, or (2) only those parts of the program that “protect” historic resources, which a rule definition narrowly limits to local government review of applications for demolition or alteration of historic resources. Given the intertwined nature of most historic resources programs, the better reading of OAR 660-023-0007 is that it comprehensively exempts from the ESEE analysis adoption or modification of the “program,” not merely those parts of the program that require local government review of applications for demolition or alteration of historic resources. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where a local government determines that there are no conflicting uses allowed under the applicable zoning districts, the local government need not undertake an ESEE analysis, but must simply adopt appropriate policies and ordinance provisions, such as zoning, to ensure preservation of the resource site. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** The final steps in the analysis required under OAR 660-023-0180 to review requests for mining are limited and structured: (1) the county must determine whether there are any conflicts with the proposed mining, (2) if there are conflicts the county must consider whether there are measures that would minimize those conflicts, (3) if conflicts cannot be minimized, the county must determine the economic, social, environmental and energy consequences of allowing, limiting or not allowing mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).



**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** A county’s obligation under OAR 660-023-0180(4)(c) to consider reasonable measures to minimize conflicts associated with mining and its obligation under OAR 660-023-0180(4)(d) to consider economic, social, environmental and energy consequences of allowing, limiting or not allowing mining are “findings” obligations, and they do not place an obligation on the county to produce evidence regarding an application for mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Because OAR 660-023-0200(7) provides that local governments are not required to apply the ESEE process in order to determine a program to protect historic resources, it follows that a local government is also not required to apply the ESEE process when the city allows a new use that could conflict with a particular historic resource. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** The OAR 660-016-0000 requirement to identify the “location” of the resource within an identified “impact area” is intended to assist the local government to determine the “significance” of the resource and whether it should be included on the Goal 5 inventory. If found to be “significant,” the resource must be included on the Goal 5 inventory. The OAR 660-016-0000 requirements are not intended to be a shortcut to the conflict identification and ESEE analysis required under OAR 660-016-0005 and 0010. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** OAR 660-016-0005 does not limit the size of the impact area or the types of conflicting uses that may be considered. Under the rule, a local government may consider visual impacts of proposed mining on residential use in the area as a “conflicting use,” even if such conflicts do not rise to the level of nuisance or trespass claims. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where a staff report and evidentiary hearings focus on an area within 500 feet of the subject property as the relevant “impact area” for purposes of conducting the conflicts identification and ESEE analysis required by OAR 660-016-0005 and OAR 660-016-0010, the county may not deny an application under Goal 5 based on conflicts in a 15-square-mile area that is identified for the first time in its final decision, without offering the applicant an opportunity to submit evidence and argument responsive to the larger impact area. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Under OAR 660-023-0180(4)(d), a local government, as part of its decision-making obligations, must conduct the environmental, social, energy, and environmental (ESEE) determination and, based on that determination, decide whether to allow, limit, or not allow mining. The burden of conducting the ESEE determination cannot be shifted to the applicant. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** The level of precision required in the conflicting use analysis required by the Goal 5 rule is difficult to determine. The process is fluid and subject to refinement based on new information. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** In performing an ESEE consequences analysis, the local government is not required to quantify every conceivable conflict between the resource use and every conflicting use. The requirement is more general and is guided by *Columbia Steel Castings Co. v. City of Portland*, 314 Or 424, 840 P2d 71 (1992), which requires that the local government must be aware of the general nature and scope of the identified conflicts and their interplay. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Even though noise levels may be legally increased on a parcel under DEQ regulations, an ESEE analysis must consider the economic impact of actual increased noise throughout the impact area. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where a county comprehensive plan’s Goal 5 ESEE analyses adequately describe the resource site and the conflicting uses, and their interaction, analysis of smaller parcels within the site is not required. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** Where the county identifies Big Game Habitat Range as a Goal 5 resource that conflicts with a proposed aggregate operation, it must identify the evidence upon which it relies to support its finding that the proposed quarry will have insignificant impacts on big game more than one-quarter mile away. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** A county’s Goal 5 ESEE analysis is sufficient if it addresses the uses identified by the county as conflicting. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** The county’s finding, made as part of its Goal 5 ESEE analysis, that an aggregate site located within a Big Game Habitat Range is not uniquely suited to wildlife must be supported by substantial evidence, not just a statement that the wildlife can “freely relocate” to other parts of the Big Game Habitat Range. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

**9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination.** A local government may not simply assume a new residential plan designation will have less impacts on identified Goal 5 resources on the subject property than are allowable under the existing industrial plan designation, without considering limitations on industrial activity on the subject property that are imposed by an overlay district. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).