

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 OREGON DEPARTMENT OF)

5 TRANSPORTATION,)

6)

7 Petitioner,)

8)

9 vs.)

10)

11 CITY OF NEWPORT,)

12)

13 Respondent,)

14)

15 and)

16)

17 MICHAEL A. GATES, FRANCES GATES,)

18 MICHAEL GATES, and KATHRYN GATES,)

19)

20 Intervenors-Respondent.)

LUBA No. 91-160

FINAL OPINION
AND ORDER

21

22

23 Appeal from City of Newport.

24

25 Lucinda D. Moyano, Assistant Attorney General, Salem,

26 filed the petition for review and argued on half of

27 petitioner. With her on the brief was Charles S. Crookham,

28 Attorney General.

29

30 No appearance by respondent.

31

32 Judith Selich, Newport, filed the response brief and

33 argued on behalf of intervenors-respondent. With her on the

34 brief was Litchfield, Carstens & Hammersley.

35

36 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,

37 Referee, participated in the decision.

38

39 REMANDED 06/29/92

40

41 You are entitled to judicial review of this Order.

42 Judicial review is governed by the provisions of ORS

43 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance approving an extension
4 of the City of Newport urban growth boundary (UGB) and a
5 comprehensive plan map amendment and zone change from Timber
6 Conservation to High Density Multi-Family Residential (R-
7 4).¹

8 **MOTION TO INTERVENE**

9 Michael A. Gates, Frances Gates, Michael Gates and
10 Kathryn Gates move to intervene on the side of respondent.
11 There is no objection to the motion, and it is allowed.

12 **FACTS**

13 The subject property is 18.02 acres in size.
14 Intervenors-respondent propose to construct multi-family
15 residential housing units on the subject parcel after it is
16 included in the UGB and replanned and rezoned for multi-
17 family residential use.

18 The existing UGB adjoins the subject property on its
19 south side. Petitioner owns a rock quarry located outside
20 the UGB on the subject property's southeast border. The
21 quarry haul road runs along the subject property's southern
22 edge. Petitioner's rock quarry consists of approximately 49
23 acres, and is designated as a Statewide Planning Goal 5

¹Under the challenged decision, the Timber Conservation designation in the Lincoln County Comprehensive Plan (county plan) is replaced with the city's R-4 designation. Similarly, the county Timber Conservation zoning district is replaced with the city's R-4 zoning district.

1 (Open Spaces, Scenic and Historic Areas, and Natural
2 Resources) resource site in the county plan. The county
3 plan identifies the rock quarry site as a forest land rock
4 quarry with no conflicting uses.

5 **FIRST ASSIGNMENT OF ERROR**

6 "The city misconstrued the applicable law and
7 failed to comply with Statewide Planning Goals 2
8 and 14 and OAR 660-04-010(1)(c)(B) by not making
9 adequate findings supported by substantial
10 evidence in the record."

11 To amend an acknowledged UGB, Goal 14 requires that
12 Goal 2, Part II requirements for goal exceptions be
13 followed. One criterion of Goal 2, Part II requires a local
14 government to determine whether there are reasons justifying
15 why the state policy in applicable goals should not apply to
16 the subject property. For UGB amendments, local governments
17 may satisfy this criterion by establishing compliance with
18 the seven factors of Goal 14. OAR 660-04-010(1)(c)(B)(i).²
19 The seven factors of Goal 14 require a local government to
20 establish the following:

21 "(1) Demonstrated need to accommodate long-range
22 urban population growth requirements
23 consistent with [the goals];

24 "(2) Need for housing, employment opportunities,
25 and livability;

26 "(3) Orderly and economic provisions for public

²As is explained in greater detail below, OAR 660-04-010 provides regulations for the application of the Goal 2, Part II exception process for certain goals.

1 facilities and services;

2 "(4) Maximum efficiency of land uses within and on
3 the fringe of the existing urban area;

4 "(5) Environmental, energy, economic and social
5 consequences;

6 "(6) Retention of agricultural land as defined,
7 with Class I being the highest priority for
8 retention and Class VI the lowest priority;
9 and

10 "(7) Compatibility of the proposed urban uses with
11 nearby agricultural activities."

12 In this assignment of error, petitioner argues the city
13 failed to establish compliance with the seven Goal 14
14 factors, as well as the requirements of OAR 660-04-
15 010(1)(c)(B).

16 **A. Goal 14 Factors 1 and 2; OAR 660-04-010**
17 **(1)(c)(B)(ii)**

18 Petitioner argues the city failed to establish
19 compliance with Goal 14 factors 1 and 2, as well as
20 OAR 660-04-010(1)(c)(B)(ii), which requires the city to
21 demonstrate that:

22 "Areas which do not require an exception cannot
23 reasonably accommodate the use[.]"

24 Petitioner acknowledges there is a need for additional
25 multi-family housing within the city's UGB. However,
26 petitioner contends the challenged decision fails to
27 establish why that need cannot be satisfied on land already
28 planned and zoned for multi-family residential use within
29 the UGB, and why areas not requiring an exception cannot

1 reasonably accommodate that use.

2 The challenged decision states the following:

3 "There is a need for additional moderately priced
4 multi-family housing within the city." Record
5 316.

6 We agree with petitioner that this determination does
7 not establish that the need for more moderately priced
8 multi-family residential housing cannot be satisfied within
9 the existing UGB or within areas not requiring an exception.
10 This Board has stated:

11 "To justify enlargement of the UGB, the applicant
12 must show no property within the [UGB] can
13 reasonably accommodate the use." Benjfran Dev. v.
14 Metro Service District, 15 Or LUBA 319, 322
15 (1987).

16 The record establishes there are 38 buildable acres
17 within the UGB planned and zoned R-4. The challenged
18 decision contains no explanation of why the city's
19 multi-family housing need cannot be satisfied within the
20 existing UGB or within an area not requiring an exception,
21 and this is error.³

22 This subassignment of error is sustained.

23 **B. Goal 14 Factor 3**

24 Petitioner also argues the record lacks evidentiary
25 support to establish the challenged decision is in
26 compliance with Goal 14 factor 3, quoted above.

³Intervenors contend some of these 38 acres are located in unbuildable wetland areas. However, they cite no evidence in the record to support this claim, and we are aware of none.

1 The decision determines compliance with Goal 14
2 factor 3 as follows:

3 "Adequate sewer facilities, water facilities, and
4 storm drainage are available to serve multi-family
5 development of the subject property.

6 "* * * * *

7 "Because of the existing industrial and public
8 uses, south, east and north of the subject
9 property, the property is more suitable for
10 multi-family development than for single family
11 development." Record 316-17.

12 Intervenors cite no evidence in the record to support
13 these findings.⁴ Petitioner cites evidence strongly
14 suggesting that (1) sewer service is unavailable to the
15 subject property, and (2) the availability of water service
16 and storm drainage systems to serve the subject property is
17 uncertain. Accordingly, we agree with petitioner that these
18 findings of compliance with Goal 14 factor 3 are not
19 supported by substantial evidence in the whole record.

20 This subassignment of error is sustained.

21 **C. Goal 14 Factors 4, 6 and 7**

22 Concerning Goal 14 factors 4, 6 and 7,⁵ the challenged

⁴Intervenors simply cite the above quoted findings as evidentiary support. However, findings are not in themselves evidence.

⁵For convenience, we address petitioner's arguments concerning Goal 14 factor 5 and OAR 660-04-010(1)(c)(B)(iii) and (iv), relating to the adequacy of the economic, social, environmental and energy (ESEE) analysis undertaken by the city, under the third assignment of error. However, we recognize that findings which address ESEE consequences only as required under Goal 14's UGB establishment factor may not constitute an adequate analysis of the conflicts between the existing Goal 5 resources and

1 decision adopted no findings of compliance with these
2 standards. Consequently, we have no basis upon which to
3 review the challenged decision's compliance with those
4 factors.⁶ See Sunnyside Neighborhood v. Clackamas Co.
5 Comm., 280 Or 3, 19-23, 569 P2d 1063 (1977).

6 This subassignment of error is sustained.

7 The first assignment of error is sustained.

8 **SECOND ASSIGNMENT OF ERROR**

9 "The city misconstrued the applicable law and
10 failed to make adequate findings required by
11 ORS 197.835, and made a decision not supported by
12 substantial evidence in the whole record when it
13 approved the plan map amendment for the proposed
14 use."

15 Petitioner argues the city should have identified
16 applicable goals, including Goals 2 (Land Use
17 Planning), 4 (Forest Lands), 9 (Economy of the State), 11
18 (Public Facilities and Services), 12 (Transportation), 13
19 (Energy Conservation), and either determined the proposal
20 complies with those goals or taken an exception to those
21 goals.

22 It is well established that all plan amendments must
23 comply with the goals. 1000 Friends of Oregon v. Jackson
24 County, 79 Or App 93, 98, 718 P2d 753 (1986), rev den

proposed development of the subject parcel. Knapp v. City of Jacksonville,
20 Or LUBA 189, 202 (1990),

⁶We note intervenors do not cite evidence in the record to "clearly support" a determination that these Goal 14 factors are satisfied. ORS 197.835(9)(b).

1 301 Or 445 (1987). Here, there are no findings of
2 compliance with the goals, other than Goals 5 (discussed
3 under the third assignment of error) and 14 (discussed under
4 the first assignment of error).

5 It is not obvious to us why the above goals are not
6 applicable to the proposal. It is the local government's
7 obligation "to explain in its findings why apparently
8 applicable Goal standards need not be addressed and
9 satisfied as part of its decision." 1000 Friends of Oregon
10 v. Washington County, 17 Or LUBA 671, 685 (1989), citing
11 Jackson-Josephine Forest Farm Assn. v Josephine County,
12 12 Or LUBA 40, 43 (1984); Concerned Property Owners of Rocky
13 Point v. Klamath County, 3 Or LUBA 182, 185 (1981).

14 Intervenors argue it is unnecessary to establish
15 compliance with the goals where a proper exception is taken
16 pursuant to OAR 660-04-010. We agree as to the goals
17 covered by an exception adopted pursuant to OAR 660-04-010.
18 However, the challenged decision does not purport to take an
19 exception to any of the goals cited above.⁷

20 The city erred by failing to explain in its decision
21 why the amendment complies with Goals 2, 4, 9, 11, 12 and 13
22 or, in the alternative, why those goals do not apply to the
23 proposed plan amendment or why an exception to those goals

⁷Intervenor also suggests there is evidence outside of the record which establishes compliance with some of these goals. However, our scope of review is limited to the record submitted to this Board. ORS 197.830(13)(a).

1 is justified.

2 The second assignment of error is sustained.

3 **THIRD ASSIGNMENT OF ERROR**

4 "The city misconstrued the applicable law, made a
5 decision not supported by substantial evidence in
6 the whole record and violated Goal 5, OAR 660-16-
7 000 to 660-16-020 in not adequately analyzing
8 conflicts with and developing programs to protect
9 the inventoried aggregate site adjacent to the
10 proposed use."

11 Petitioner's rock quarry is identified in the
12 acknowledged county plan as a forest rock quarry, and as a
13 Goal 5 resource site which has "no conflicting uses."⁸ The
14 proposal is to expand the UGB to include the subject
15 property, which adjoins the border of an acknowledged,
16 Goal 5 inventoried quarry, and to replan and rezone the
17 subject property for multi-family residential use. Under
18 these circumstances, the city must (1) identify conflicts
19 between the proposed development and inventoried Goal 5
20 resources, including the quarry, and (2) determine the ESEE
21 consequences of such conflicts. Knapp v. City of
22 Jacksonville, supra, 20 Or LUBA at 197. In addition, where
23 conflicts are identified, the city must identify how those
24 conflicts will be resolved. Davenport v. City of Tigard,

⁸Under OAR 660-16-005, a local government must determine whether there are uses in the area of an identified Goal 5 resource which conflict with the resource. If conflicting uses are identified, the ESEE consequences of the conflicting uses must be analyzed and a program to achieve the purposes of Goal 5 must be adopted. If no conflicting uses are identified, then measures to protect the resource must be adopted.

1 ___ Or LUBA ____ (LUBA Nos. 91-133 and 91-137, January 2,
2 1992). Finally, resolution of those conflicts must be such
3 that identified Goal 5 resources are adequately protected.
4 Knapp v. City of Jacksonville, supra.

5 In determining whether there would be conflicts between
6 the proposal and petitioner's quarry, the city determined
7 the following:

8 "Although [petitioner's and intervenors'
9 properties] share a common property line, the
10 portion of the quarry in current use is over 1,100
11 feet from [intervenors'] property line.
12 [Petitioner] is concerned that noise from trucks
13 on the access road as well as blasting, would
14 create objections from urban residents to
15 operating hours, blasting, dust, quarry noise,
16 processing equipment operations and emissions, and
17 truck traffic. [Petitioner] is also concerned
18 about trespass problems. The applicants have
19 appeared willing to agree to reasonable protection
20 measures. This action will not adversely impact
21 the quarrying activities of [petitioner].
22 [Petitioner] has not adduced any evidence tending
23 to show that the proposed action itself is not
24 appropriate, or that such action would directly
25 have any adverse impact upon [petitioner's] nearby
26 quarrying activity. Rather [petitioner] has
27 acknowledged that its primary reason for
28 opposition is that the quarrying activity itself
29 may be carried out in such a manner as to
30 constitute a nuisance impacting the property
31 subject to these proceedings, and [petitioner]
32 fears the assertion of the lawful rights of
33 potential owners/occupants of such property."
34 Record 256.

35 Essentially, in these findings the city determines the
36 proposal will not allow a use which conflicts with
37 petitioner's quarry because (1) the quarry is located 1,100
38 feet from the subject property's border, and (2) petitioner

1 has not established that the proposal would create
2 conflicts. Record 256. However, in other findings the city
3 concludes the proposal conflicts with the inventoried Goal 5
4 resource site.⁹ Record 257.

5 The challenged decision imposes the following
6 conditions:

7 "With respect to surface mining and quarry
8 activities, the City will cooperate and coordinate
9 with the County and the State Department of
10 Geologic and Mineral Industries to assure the
11 lawful operation of the [quarry]

12 * * * * *

13 * * * Notwithstanding [petitioner's] admission
14 that the quarrying operations will create a
15 potential nuisance for the applicant's development
16 with the accompanying potential remonstrance
17 rights, [intervenors have] voluntarily agreed to
18 the following development limitations in order to
19 provide protection for the aggregate resource:

20 "1. New construction on [intervenors'] property
21 involving conflicting 'noise sensitive' and
22 'dust sensitive' uses, such as multi-family
23 dwellings, may be sited closer than 100 feet
24 from the easterly or southerly lines of the
25 applicant's property only if [intervenors]
26 and/or occupant has signed a waiver of
27 remonstrance precluding protest of any quarry
28 or surface mining activity; and

⁹The challenged decision can be read to make an OAR 660-16-010(2) "allow conflicting uses fully" choice. However, we determine below the city has not properly completed the earlier required steps of the Goal 5 planning process. Therefore, the city has not established the necessary bases for developing a program to achieve the goal pursuant to OAR 660-16-010. Eckis v. Linn County, ___ Or LUBA ___ (LUBA No. 90-132, September 11, 1991), slip op at 38, aff'd 110 Or App 309 (1991); League of Women Voters v. Klamath County, 16 Or LUBA 909, 928 (1988).

1 "2. In all cases of new conflicting 'noise
2 sensitive' and 'dust sensitive' uses, such
3 uses are prevented from locating any closer
4 than 50 feet to the easterly line and/or
5 50 feet to the southerly line of applicant's
6 property.

7 "* * * * *." Record 258.

8 In the first place, petitioner does not have a burden
9 to establish that the proposal will conflict with the
10 identified Goal 5 resource. Rather, the applicant for land
11 use approval has the burden of proof that applicable
12 approval standards are met. 1000 Friends of Oregon v. Benton
13 County, 20 Or LUBA 7, 14-15 (1990). There is no
14 determination in this case that there is adequate evidence
15 to establish no conflicts would result from the proposal.¹⁰
16 Rather, the findings simply state intervenors "have appeared
17 willing to agree to reasonable protection measures" and that
18 petitioner did not establish the proposal would conflict
19 with the quarry. Record 256. Therefore, we conclude the
20 city impermissibly shifted the burden of proof to petitioner
21 during the proceedings below.

22 Second, the city's findings are inadequate to establish
23 the proposal will not result in conflicts with the quarry.

¹⁰While findings stating that an applicant for development approval submitted adequate evidence to support a conclusion that relevant standards were met, and that the petitioner did not produce evidence adequate to undermine that conclusion do not indicate the local government impermissibly shifted the burden of proof to petitioner, this is not what the challenged decision here determines. Washington Co. Farm Bureau v. Washington Co., ___ Or LUBA ___ (LUBA No. 90-154, March 29, 1991).

1 The findings themselves demonstrate petitioner established
2 that its manner of operation includes blasts, produces
3 noise, dust, odors, heavy truck traffic, and the like. The
4 findings strongly suggest that these impacts can be ignored
5 because operating the quarry in this way may constitute
6 nuisance actionable by the potential apartment dwellers and
7 owners of the subject property. These findings do not
8 establish that there will be no conflicts between the
9 proposal and the resource site. Cf. Williams v. Wasco
10 County, 18 Or LUBA 61, 67-68 (1989) (chemical drift from
11 field spraying and the drift from smoke from field burning
12 are the consequences of accepted farming practices and must
13 be evaluated in determining whether a proposed children's
14 camp will seriously interfere with such farm use of an
15 adjacent parcel). In addition, these findings fail to
16 analyze the impacts of the future expansion of the quarry,
17 as anticipated under the county plan. Clearly, the purpose
18 of protecting an aggregate resource site pursuant to Goal 5
19 is for eventual use of the resource through mining. Eckis v.
20 Linn County, supra. Consequently, it is improper to ignore
21 the impacts of present and future mining activities in
22 evaluating whether a proposal will result in conflicts with
23 the mined resource.

24 Further, the conditions of the challenged decision are
25 inadequate to establish that all conflicts will be
26 prevented. The conditions fail to establish (1) whether the

1 noise and dust conflicts (which apparently the conditions
2 are designed to control), are limited to occurring within
3 100 ft. from intervenors' and petitioner's shared property
4 line, (2) how the proposed setbacks will resolve conflicts
5 between the proposal and the aspects of petitioner's
6 operations other than those involving noise and dust (e.g.
7 blasting, truck traffic), and (3) how a "remonstrance
8 precluding protest" resolves conflicts.¹¹

9 The city's Goal 5 analysis is fundamentally flawed in
10 another respect. Much of the ESEE analysis in the
11 challenged decision is predicated upon the city's
12 determination that it requires additional multi-family
13 housing. However, we conclude under the first assignment of
14 error that the city failed to demonstrate the alleged need
15 for additional multi-family residential housing cannot be
16 satisfied within the existing UGB. This defect is equally
17 relevant to the Goal 5 analysis. In the absence of a
18 determination that the alleged housing need cannot be
19 satisfied within the existing UGB, the alleged need for more
20 housing within the city does not serve as a basis for
21 approving a UGB expansion and allowing a conflicting
22 residential use to be located next to an acknowledged,

¹¹We note that even if these conditions were intended to, or could require, apartment dwellers and property owners to waive litigation rights concerning petitioner's operation of the quarry, this would not establish that the conflicts between such residential dwellers and the site are resolved. See Champion International Inc., v. Douglas County, 16 Or LUBA 132 (1987).

1 inventoried Goal 5 resource site.

2 The third assignment of error is sustained.

3 **FOURTH ASSIGNMENT OF ERROR**

4 "The city misconstrued the applicable law, made a
5 decision not supported by substantial evidence in
6 the whole record and violated the Urbanization
7 Policies in its comprehensive plan by not making
8 adequate findings to show that its decision is
9 consistent with its comprehensive plan."

10 The plan requirements at issue under this assignment of
11 error are nearly identical to the requirements of Goal 14
12 and OAR 660-04-010(1)(c)(B), which we determine under the
13 first assignment of error the county failed to satisfy.
14 Consequently, the challenged decision also fails to
15 establish compliance with the plan.

16 The fourth assignment of error is sustained.

17 The city's decision is remanded.

18