

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

3
4 BARRY NATHAN,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 93-107
10 CITY OF TURNER,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 RIVERBEND SAND AND GRAVEL COMPANY,))
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from City of Turner.

22
23 James L. Murch, Salem, filed the petition for review
24 and argued on behalf of petitioner. With him on the brief
25 was Sherman, Bryan, Sherman & Murch.

26
27 No appearance by respondent.

28
29 Wallace W. Lien, Salem, filed the response brief and
30 argued on behalf of intervenor-respondent. With him on the
31 brief was Wallace W. Lien, P.C.

32
33 Celeste J. Doyle, Assistant Attorney General, Salem,
34 submitted a brief on behalf of the Oregon Department of Land
35 Conservation and Development pursuant to ORS 197.830(7).
36 With her on the brief were Theodore R. Kulongoski, Attorney
37 General; Thomas A. Balmer, Deputy Attorney General; and
38 Virginia L. Linder, Solicitor General.

39
40 Paul R. Hribernack, Portland, submitted an amicus brief
41 on behalf of Oregon Concrete & Aggregate Producers
42 Association, Inc. With him on the brief was Black
43 Helterline.

1 HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,
2 Referee, participated in the decision.

3

4 REMANDED 01/10/94

5

6 You are entitled to judicial review of this Order.
7 Judicial review is governed by the provisions of ORS
8 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a city decision granting
4 intervenor's request for an amendment to the City of Turner
5 Comprehensive Plan to designate a 102 acre portion of a 170
6 acre parcel as a significant mineral and aggregate resource
7 site.

8 **MOTION TO INTERVENE**

9 Riverbend Sand and Gravel Company, the applicant below,
10 moves to intervene on the side of respondent. There is no
11 opposition to the motion, and it is allowed.

12 **MOTION TO APPEAR AS AMICUS**

13 Oregon Concrete & Aggregate Producers Association, Inc.
14 moves for permission to participate in this appeal as an
15 amicus. OAR 661-10-052. No party objects, and the motion
16 is allowed.

17 **FACTS**

18 The city's comprehensive plan and land use regulations
19 have been acknowledged by the Land Conservation and
20 Development Commission (LCDC) under ORS 197.251. The
21 subject property is located within the city's urban growth
22 boundary, but only a portion of the property is located
23 within the city's corporate limits. The portion of the
24 subject property located within the city limits is zoned for
25 commercial use; the portion located outside the city limits
26 is zoned for industrial use.

1 Adjoining uses include a residence and some commercial
2 uses to the west, large lot homesites to the north and
3 residences to the east and south. The challenged decision
4 describes the use envisioned for the subject property as
5 follows:

6 "Proposed mining of the * * * extraction site will
7 be done [incrementally] over a projected period of
8 fifteen to twenty years, although mining will be
9 determined by actual market demand for the
10 aggregate produced. The acreage outside the
11 proposed extraction site, but still on the subject
12 property, will be used for setbacks, buffer,
13 wooded slope or the operational area for the
14 applicant. Upon completion of the extraction, the
15 applicant's preliminary reclamation proposal,
16 subject to the land use approvals required for
17 such development at that time, calls for
18 utilization of the subject property and resulting
19 lake for an urban residential subdivision, open
20 space, wildlife habitat and for recreation. The
21 banks of the proposed extraction site will be
22 sloped in keeping with state requirements and will
23 be planted in native vegetation. The wooded ridge
24 areas will remain intact and undisturbed through
25 the extraction period." Record 6.

26 The challenged decision explains that it is limited to
27 a decision to designate the subject property as a
28 significant aggregate resource site under Statewide Planning
29 Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural
30 Resources), based on the location, quality and quantity of
31 aggregate located on the subject property.
32 OAR 660-16-000(5)(c).¹ The challenged decision explicitly

¹OAR Chapter 660, Division 16 is LCDC's administrative rule implementing Goal 5. The rule is discussed under the first assignment of error, infra.

1 states that it is not intended to be a decision identifying
2 conflicting uses and their consequences or establishing a
3 program to resolve any conflicts with the aggregate resource
4 site, as required by OAR 660-16-005 and 660-16-010.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioner contends the city failed to identify certain
7 relevant approval criteria in adopting the decision
8 challenged in this appeal.² The local notice of public
9 hearing included in the record identifies five criteria for
10 approval of the disputed plan amendment.³ Neither the

²ORS 197.763 establishes notice and other procedural requirements for quasi-judicial land use hearings. ORS 197.763(3)(b) requires that the notice of local hearing "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue * * *." ORS 197.763(5)(a) requires a statement at the commencement of a hearing that "[l]ists the applicable substantive criteria * * *."

³The parties agree the written notice that was provided to adjoining and nearby property owners in accordance with ORS 197.763(2)(a) is the same as the published notice appearing at Record 89. That notice provides, in part, as follows:

"* * * * *

"The application criteria upon which the City will decide this application include:

- "1. Turner Comprehensive Plan Mineral and Aggregate Resource section,
- "2. Turner Comprehensive Plan Amendment section, Policies 6 and 8.
- "3. Statewide Goal 5.
- "4. Oregon Administrative Rule[s Chapter 660,] Division 16.
- "5. Marion County and City of Turner Intergovernmental Agreement.

1 notices of public hearing required by ORS 197.763(3)(b) nor
2 the statement given prior to the public hearing required by
3 ORS 197.763(5)(a) included any reference to Section 6 of
4 City of Turner Ordinance 89-101, which provides criteria for
5 amending the city's comprehensive plan.⁴

6 Sections 4 and 5 of Ordinance 89-101 set out notice and
7 hearing procedures for comprehensive plan amendments.
8 Section 6 sets out "Criteria for Decision." Section 6(2)
9 lists eight criteria for comprehensive plan map amendments.
10 Section 6(3) lists two criteria for comprehensive plan text
11 amendments.⁵

12 Intervenor argues it can be determined from the
13 decision and record in this matter that the application was
14 for a text amendment and that the application was in fact
15 processed and approved as a comprehensive plan text

"* * * * *"

⁴Ordinance 89-101 is entitled "An Ordinance providing for Amending the Comprehensive Plan." Petition for Review, Appendix No. 2. Section 1 of Ordinance 89-101 is the Statement of Purpose, and provides as follows:

"The purpose for the Comprehensive Plan Amendment Provisions shall be to provide procedures and criteria for the amendments or revision of the Turner Comprehensive Plan. These provisions are intended to provide the opportunity to amend or revise the plan to meet changing land use needs."

⁵The two criteria listed in section 6(3) are nearly identical to two of the eight criteria in section 6(2) and require that the plan amendment be consistent with (1) the intent of applicable comprehensive plan policies, and (2) the statewide planning goals. However, section 6(2) establishes six additional criteria applicable to comprehensive plan map amendments. Those criteria address natural hazards and potential impacts of the development on the area's land use pattern, wildlife habitat, public facilities, and transportation facilities.

1 amendment, in accordance with section 6(3). Moreover,
2 intervenor contends the city did apply relevant
3 comprehensive plan policies and the relevant statewide
4 planning goal (Goal 5), as required by the two criteria
5 imposed by section 6(3). See n 5, supra. We understand
6 intervenor to argue that, in view of the above, we may
7 overlook the city's failure to identify Ordinance 89-101 or
8 section 6 of that ordinance as applicable criteria.

9 We disagree. Ordinance 89-101 designates the relevant
10 criteria for approval of comprehensive plan text and map
11 amendments. The city's failure to identify that ordinance,
12 and particularly section 6 of the ordinance, as a relevant
13 approval criterion constitutes a failure to follow the
14 procedures required by ORS 197.763. We address petitioner's
15 arguments concerning whether the challenged application is
16 properly viewed as a comprehensive plan text or map
17 amendment under the third assignment of error. However,
18 even if the application is properly viewed as a request for
19 a comprehensive plan text amendment, Ordinance 89-101
20 section 6 establishes different criteria for comprehensive
21 plan text and map amendments and should have been identified
22 as an applicable criterion.

23 Because the challenged decision must be remanded for
24 other reasons, we do not reach the parties' arguments
25 concerning whether the city's procedural error in failing to
26 list Ordinance 89-101 as establishing relevant approval

1 criteria prejudiced petitioner's substantial rights, thereby
2 providing an independent basis for remand of the challenged
3 decision. See Caine v. Tillamook County, 22 Or LUBA 687,
4 691 (1992). However, the city's failure to follow the
5 procedures required by ORS 197.763 means petitioner's
6 arguments under the first and fourth assignments of error
7 are not limited to issues raised during the local
8 proceedings. ORS 197.835(2)(a); Weuster v. Clackamas
9 County, 25 Or LUBA 425, 428-30 (1993).

10 The second assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 Petitioner next argues the city must explain in its
13 decision which of the subsections of section 6 of
14 Ordinance 89-101 apply and why. More precisely, petitioner
15 contends this Board may not assume the city's apparent, but
16 unexplained, decision to apply the criteria governing
17 comprehensive plan text amendments, rather than those
18 governing comprehensive plan map amendments, is correct.
19 See Gage v. City of Portland, 123 Or App 269, ___ P2d ___
20 (1993).

21 It is relatively clear that the city treated the
22 application as one for a comprehensive plan text amendment
23 and applied the criteria called for under Ordinance 89-101,
24 section 6(3) for such text amendments.⁶ However, the issue

⁶The record includes an October 22, 1992 letter submitted with the application. The letter states that the application is "for Comprehensive

1 of whether the city was correct in doing do presents a
2 question of interpretation, which this Board cannot decide
3 in the first instance. Gage v. City of Portland, supra;
4 Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844 P2d
5 914 (1992); Larson v. Wallowa County, 116 Or App 96, 840 P2d
6 1350 (1992). While we express no view concerning whether
7 the city committed error in approving the challenged
8 application as a comprehensive plan text amendment, rather
9 than a comprehensive plan map amendment, the city must
10 explain its apparent choice to treat the application as one
11 for a comprehensive plan text amendment. See Eskandarian v.
12 City of Portland, ___ Or LUBA ___ (LUBA No. 93-012, October
13 15, 1993), slip op 15; Miller v. Washington County, 25 Or
14 LUBA 169, 179 (1993).

15 In reaching this conclusion, we note the choice between
16 whether to characterize the request as a text or map
17 amendment is not obvious. The comprehensive plan map is a
18 general map applying one of five different designations to
19 all properties within the city.⁷ That map does not include
20 any aggregate resource site designations, or any Goal 5
21 resource designations of any type for that matter. As far
22 as we can tell, prior to adoption of the challenged

Plan text amendment to identify [the subject] property as a significant aggregate resource, and to adopt it on the Comp Plan inventory of significant sites, as required by the provisions of Statewide Planning Goal 5." Record 93.

⁷Those designations are as follows: "Lower Density Residential," Higher Density Residential," "Commercial," "Industrial," and "Public/Semi-Public."

1 decision, the city's comprehensive plan included neither
2 textual nor map provisions constituting an aggregate
3 resource site inventory. None of the parties identify any
4 such map or text provisions.

5 The third assignment of error is sustained.

6 **FIRST ASSIGNMENT OF ERROR**

7 The Goal 5 planning process, as explained in LCDC's
8 Goal 5 administrative rule, involves essentially three
9 steps.⁸ Those steps and the options available to a local
10 government under each step can be stated in outline form as
11 follows:

12 Step 1. Adopt inventory of Goal 5 resource
13 sites. OAR 660-16-000.

14 a. Collect information on potential Goal 5
15 sites. OAR 660-16-000(1)-(3).

16 b. Make inventory decision.

17 1. Do not include on inventory.
18 OAR 660-16-000(5)(a).

19 2. Delay Goal 5 process.
20 OAR 660-16-000(5)(b).

21 3. Include site on plan inventory
22 OAR 660-16-000(5)(c).

23 Step 2. Identify conflicts with Goal 5 resource
24 sites. OAR 660-16-005.

25 a. If no conflicts exist, preserve the
26 site. OAR 660-16-005(1).

⁸We explained the manner in which the Goal 5 process works regarding historic resources in some detail in DLCD v. Yamhill County, 17 Or LUBA 1273, 1279-80, aff'd 99 Or App 441 (1989).

1 b. Determine the economic, social,
2 environmental and energy (ESEE)
3 consequences of any identified
4 conflicts. OAR 660-16-005(2).

5 Step 3. Develop a program to achieve the goal.
6 OAR 660-16-010.

7 a. Preserve the site fully.
8 OAR 660-16-010(1).

9 b. Allow the conflicting use fully.
10 OAR 660-16-010(2).

11 c. Protect the site to some desired degree
12 by limiting the conflicting uses.
13 OAR 660-16-010(3).

14 No party contends the city's acknowledged comprehensive
15 plan includes a decision made under step one not to include
16 the subject property on its Goal 5 inventory of aggregate
17 resource sites, as provided in OAR 660-16-000(5)(a). DLCD
18 suggests the city's acknowledged comprehensive plan delayed
19 the Goal 5 process for the subject property.
20 OAR 660-16-000(5)(b).⁹ We have no reason to question that
21 assertion, and will assume it is accurate. The challenged
22 decision purports to be a decision under
23 OAR 660-16-000(5)(c) to amend the acknowledged comprehensive
24 plan to include the site on the comprehensive plan Goal 5

⁹A decision to delay the Goal 5 process under OAR 660-16-000(5)(b) requires that the local government include the site on the plan inventory as a special category, and adopt a plan policy to address the resource site in a stated time frame during the postacknowledgment period. Under OAR 660-16-000(5)(b), the adoption of plan or land use regulations to protect such a site is "not appropriate or required for Goal 5 compliance purposes until adequate information is available to enable further review and adoption of such measures."

1 inventory of significant mineral and aggregate resource
2 sites.

3 Citing Collins v. LCDC, 75 Or App 517, 707 P2d 599
4 (1985), and Ramsey v. City of Portland, 23 Or LUBA 291,
5 aff'd 115 Or App 20 (1992), petitioner argues the city may
6 not apply Goal 5 to particular aggregate resource sites on a
7 case-by-case basis. Petitioner's argument under this
8 assignment is difficult to follow. We limit our discussion
9 to two questions. First, may a local government proceed on
10 a case-by-case basis to amend its acknowledged comprehensive
11 plan to add a single aggregate resource site to its
12 inventory of significant mineral and aggregate resource
13 sites, and to adopt appropriate plan and land use
14 regulations concerning that site? Second, does the
15 challenged decision improperly defer the analyses and
16 planning tasks required under steps two and three of the
17 Goal 5 rule, as described above?

18 **A. Addition of Sites to the Plan Goal 5 Inventory on**
19 **a Case-By-Case Basis**

20 Neither Collins nor Ramsey stand for the proposition
21 that a local government with an acknowledged comprehensive
22 plan and land use regulations may not take action with
23 regard to a particular Goal 5 resource site to add that site
24 to its Goal 5 inventory of significant resource sites.
25 Indeed, as DLCD points out, OAR 660-16-020 specifically
26 envisions adoption of postacknowledgment amendments to

1 update comprehensive plan and land use regulation provisions
2 with regard to individual Goal 5 resource sites.

3 Collins concerned LCDC's acknowledgment of the City of
4 Jacksonville's comprehensive plan and land use regulation
5 under ORS 197.251. As relevant to this appeal, Collins
6 simply holds that LCDC may not acknowledge a comprehensive
7 plan which identifies significant Goal 5 resource sites
8 (option b(3) under step one above), but fails to include the
9 conflicting use analysis or the appropriate resource
10 protection programs required by OAR 660-16-005 and
11 660-16-010 (steps 2 and 3 above). Collins says nothing
12 about whether a local government may amend its acknowledged
13 comprehensive plan to add a single site to its inventory of
14 significant resource sites.¹⁰

15 Similarly, Ramsey simply holds a local government may
16 not amend its acknowledged comprehensive plan and land use
17 regulations concerning an inventoried Goal 5 resource site
18 to replace them with plan and land use regulation provisions
19 that defer steps two and three to case-by-case
20 determinations made in response to individual permit
21 applications. Neither the court of appeals' decision nor
22 our decision in Ramsey holds that a local government may not

¹⁰However, as discussed below, Collins does indirectly support petitioner's contention that a local government may not amend its acknowledged comprehensive plan to add a significant resource site to its inventory but, at the same time, defer completion of steps 2 and 3 indefinitely.

1 follow postacknowledgment amendment procedures to amend its
2 plan and land use regulations to adopt new comprehensive
3 plan and land use regulations concerning a particular Goal 5
4 resource site.

5 In summary, the rule established in Collins (in an
6 acknowledgment context) and applied in Ramsey (in a
7 postacknowledgment context) is that the step two and three
8 requirements under Goal 5 described above may not be
9 deferred for case-by-case determination once a site is
10 identified and inventoried as a significant Goal 5 resource
11 site. Those cases do not preclude postacknowledgment
12 comprehensive plan or land use regulation amendments to add
13 individual sites to a local government's Goal 5 inventory.

14 **B. Deferral of Steps Two and Three**

15 Petitioner contends the decision to include the subject
16 property on the city's Goal 5 inventory of significant
17 aggregate resource sites obligates the city to complete the
18 second and third steps of the Goal 5 planning process. The
19 city did not do so, and petitioner argues that failure is
20 error. We agree with petitioner.

21 Where there is sufficient information to determine a
22 Goal 5 resource site is significant, OAR 660-16-000(5)(c)
23 provides the site must be included on the inventory. OAR
24 660-16-000(5)(c) is also very specific about what must occur
25 after a site is included on a Goal 5 inventory of
26 significant resource sites:

1 "* * * When information is available on location,
2 quality, and quantity, and the local government
3 has determined a site to be significant or
4 important as a result of the data collection and
5 analysis process, the local government must
6 include the site on its plan inventory and
7 indicate the location, quality and quantity of the
8 resource site * * *. Items included on this
9 inventory must proceed through the remainder of
10 the Goal 5 process."

11 OAR 660-16-000(5)(c) does not explicitly specify when
12 the remainder of the Goal 5 process (steps two and three
13 described above) must be completed, when a Goal 5 resource
14 site is determined to be significant and is added to the
15 comprehensive plan inventory of significant resource sites.
16 However, it clear from the rule and the decisions in Collins
17 and Ramsey that steps two and three may not be deferred
18 indefinitely or left to the initiative of the property
19 owner. Because the challenged decision to add the subject
20 property to the city's aggregate resource inventory was
21 adopted without completing steps two and three and, as far
22 as we know, contemporaneous decisions completing steps two
23 and three have not been adopted by the city, the challenged
24 decision violates OAR 660-16-000(5)(c).

25 As noted supra, even in the circumstance where
26 insufficient information is available to include a site on
27 the inventory, OAR 660-16-000(5)(b) requires that the local
28 government specify a time frame for completing the Goal 5
29 process for such sites. See n 9, supra. It would not be
30 consistent with that requirement to allow a site about which

1 more information is known to be included on the inventory,
2 but nevertheless to allow completion of steps two and three
3 to be deferred indefinitely.

4 If the city could include sites on its inventory of
5 significant resource sites and at the same time indefinitely
6 defer completion of steps two and three, the result would be
7 inconsistent with the principle established in Collins. In
8 this case, had the city's decision to include the subject
9 property on its inventory of significant aggregate resource
10 sites not been appealed, that decision would have been
11 deemed acknowledged under ORS 197.625(1), with steps two and
12 three of the Goal 5 process deferred for determination in
13 the future and with no guarantee that steps two and three
14 would ever be completed. Such deferral of steps two and
15 three for an inventoried significant Goal 5 resource site
16 violates Goal 5 and the Goal 5 rule.

17 The first assignment of error is sustained, in part.

18 **FOURTH ASSIGNMENT OF ERROR**

19 OAR 660-16-000(2) provides as follows:

20 "A 'valid' inventory of a Goal 5 resource under
21 [OAR 660-16-000(5)(c)] must include a
22 determination of the location, quality, and
23 quantity of each of the resource sites. Some
24 Goal 5 resources (e.g., * * * mineral and
25 aggregate sites * * *) are more site-specific than
26 others (e.g., groundwater, energy sources). For
27 site-specific resources, determination of location
28 must include a description of or map of the
29 boundaries of the resource site and of the impact
30 area to be affected, if different. * * *"
31 (Emphasis added.)

1 Petitioner contends the city improperly refused to
2 allow or consider testimony concerning the impact area
3 associated with the subject property and improperly
4 determined the impact area is coterminous with the
5 boundaries of the 170 acre parcel.

6 The challenged decision identifies the 170 acre parcel
7 as the impact area. The identification of an "impact area,"
8 as required by OAR 660-16-000(2), is interrelated with
9 identification of the impacts of Goal 5 resource sites and
10 conflicting uses on one another, as required by OAR 660-16-
11 005 (step two described above). The challenged decision
12 makes it clear the question of the proper impact area will
13 be revisited during steps two and three of the Goal 5
14 process. The city's decision appears to adopt a tentative
15 decision concerning the impact area, subject to change when
16 steps two and three are performed. If the city refused to
17 consider testimony or other evidence supporting
18 identification of a larger impact area, it erred. Such
19 testimony is relevant to the requirement to identify an
20 impact area under OAR 660-16-000(2).

21 It is not clear to us that the city refused to consider
22 including more than the 170 acre subject parcel as the
23 impact area. However, in view of our disposition of the
24 first assignment of error, the city will be required to
25 complete steps two and three for the subject site, in
26 conjunction with its decision to add the site to its Goal 5

1 inventory of significant aggregate resource sites. The
2 challenged decision explicitly provides that the impact area
3 is to be reexamined in conjunction with performing those
4 steps. Therefore, we sustain this assignment of error. On
5 remand, the city must allow relevant testimony and other
6 evidence concerning the impact area and, based on that
7 evidence, designate the impact area as required by
8 OAR 660-16-000(2).

9 **FIFTH ASSIGNMENT OF ERROR**

10 Petitioner contends a number of findings adopted by the
11 city are not supported by substantial evidence in the
12 record. In view of our disposition of the first and fourth
13 assignments of error, the city will be required to hold
14 additional hearings, accept new evidence and adopt
15 additional findings, at least with regard to steps two and
16 three of the Goal 5 process. Therefore, we do not consider
17 petitioner's fifth assignment of error.

18 The city's decision is remanded.