BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TURNER COMMUNITY ASSOCIATION, CITY OF TURNER, CASCADE SCHOOL DISTRICT #5, TURNER FIRE DISTRICT, ALDERSGATE CONFERENCE CENTER, FRIENDS OF CLOVERDALE, RITA E. THOMAS and AARON ZEEB,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

RIVERBEND SAND AND GRAVEL COMPANY,
Intervenor-Respondent.

LUBA No. 99-024

Appeal from Marion County.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson & Sherton, P.C.

Jane Ellen Stonecipher, Salem, and Wallace W. Lien, Salem, filed a joint response brief and argued on behalf of respondent and intervenor-respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

REMANDED 12/16/99

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county ordinance that adds a 389-acre site to the Marion County Comprehensive Plan Mineral and Aggregate Inventory of significant sites and approves a plan to mine and process aggregate material on the site.

MOTION TO INTERVENE

RiverBend Sand & Gravel Company, the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is zoned for exclusive farm use (EFU) and is located approximately one-quarter mile southeast of the City of Turner city limits and urban growth boundary (UGB). The subject property is bordered on the west by Marion Road, on the north by Mill Creek and Mill Creek Road, and on the south by Little Road. A Santiam Water Control District (SWCD) lateral runs along a portion of the eastern border of the subject parcel and then cuts west across the property to Mill Creek.[1]

As approved, the subject mining operation would include a large extraction area in the southern portion of the property and a smaller extraction area in the northern part of the property. A 43-acre processing area with a single access onto Marion Road is proposed for the middle part of the parcel. The processing area is divided from the smaller extraction area by the SWCD lateral. The subject property includes Class I, II or Unique Farmland, as those terms are defined by the U.S. Natural Resources Conservation Service.

[1]The decision refers variously to the SWCD "laterals" and to the SWCD "lateral". Based on clarifications provided at oral argument, we understand the dispute in this appeal to be limited to potential impacts with one lateral that is an open irrigation ditch. Apparently two closed-pipe water mains also cross the extreme northern portion of the property, but these water mains are not at issue in this appeal.

INTRODUCTION

The Land Conservation and Development Commission (LCDC) adopted new administrative rules for Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) in 1996. OAR 660-023-0180 addresses Mineral and Aggregate Resources and establishes detailed procedures for post-acknowledgment plan amendments (referred to in the rule as PAPAs) to identify significant mineral and aggregate resource sites and authorized mining of such sites. Several assignments of error raise questions concerning OAR 660-023-0180(4), which establishes a process the county must follow to determine whether to allow mining of a designated significant resource site.[2] We therefore set out the relevant portions of OAR 660-023-0180(4) in the margin here for reference, and briefly describe the steps required by OAR 660-023-0180(4), before turning to petitioners' assignments of error.[3]

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[2]There is no question raised in this appeal that the subject property qualifies as a significant aggregate resource site.

[3]The portions of OAR 660-023-0180(4) that have some bearing in this appeal are as follows:

> "For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. * * * The process for reaching decisions about aggregate mining is as follows:
>
> "(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area * * * *shall be limited to 1,500 feet from the boundaries of the mining area*, except where factual information indicates significant potential conflicts beyond this distance. For a proposed expansion of an existing aggregate site, the impact area shall be measured from the perimeter of the proposed expansion area rather than the boundaries of the existing aggregate site and shall not include the existing aggregate site.
>
> "(b) The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. * * * For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:
>
> "(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges;
>
> "(B) *Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site* unless a greater distance is necessary in order to include the intersection with the nearest

arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards * * *;

"* * * * *

"(D) *Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources* and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated;

"(E) *Conflicts with agricultural practices*; * * *

"* * * * *

"(c) The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section. *To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the requirements of this section.* If reasonable and practicable measures are identified to minimize all identified conflicts, mining shall be allowed at the site and subsection (d) of this section is not applicable. If identified conflicts cannot be minimized, subsection (d) of this section applies.

"(d) The local government shall determine any significant conflicts identified under the requirements of subsection (c) of this section that cannot be minimized. Based on these conflicts only, local government shall determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site. Local governments shall reach this decision by weighing these ESEE consequences, with consideration of [specified factors].

"(e) Where mining is allowed, the plan and implementing ordinances shall be amended to allow such mining. Any required measures to minimize conflicts, including special conditions and procedures regulating mining, *shall be clear and objective*. Additional land use review (e.g., site plan review), if required by the local government, shall not exceed the minimum review necessary to assure compliance with these requirements and shall not provide opportunities to deny mining for reasons unrelated to these requirements, or to attach additional approval requirements, except with regard to mining or processing activities:

"(A) For which the PAPA application does not provide information sufficient to determine clear and objective measures to resolve identified conflicts;

"* * * * *

"(f) *Where mining is allowed, the local government shall determine the post-mining use and provide for this use in the comprehensive plan and land use regulations.* For significant aggregate sites on Class I, II and Unique farmland, local governments shall adopt plan and land use regulations to limit post-mining use to farm uses under ORS 215.203, uses listed under ORS 215.213(1) or 215.283(1), and fish and wildlife habitat uses, including wetland mitigation banking. * * *" (Emphases added.)

Under OAR 660-023-0180(4)(a) the county is first required to identify an "impact area," which is to be limited to 1,500 feet except where "significant potential conflicts" exist beyond that distance.

B. Specification of Predicted Conflicts

OAR 660-023-0180(4)(b) requires that a local government "specify * * * predicted conflicts" that may be associated with the "proposed mining operations." The rule specifically limits the kinds of conflicts that the local government may consider. Among the potential conflicts that may be considered under the rule are potential conflicts due to "noise, dust or other discharges," and conflicts with local roads, other Goal 5 resources, and agricultural practices. OAR 660-023-0180(4)(b)(A) through (F). If no potential conflicts are identified, the local government must allow mining.

C. Minimization of Conflicts

Where potential conflicts are identified under OAR 660-023-0180(4)(b), the local government is required to identify "reasonable and practical measures" to "minimize the conflicts."[4] If conflicts can be minimized, mining must be allowed.

D. ESEE Consequences[5]

If conflicts cannot be minimized under OAR 660-023-0180(4)(c), the local government must proceed to "determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site." OAR 660-023-0180(4)(d).

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[4]OAR 660-023-0180(1) defines certain terms and concepts. OAR 660-023-0180(1)(f) provides:

> "'Minimize a conflict' means to reduce an identified conflict to a level that is no longer significant. For those types of conflicts addressed by local, state, or federal standards (such as the Department of Environmental Quality standards for noise and dust levels) to 'minimize a conflict' means to ensure conformance to the applicable standard."

[5]As defined by OAR 660-023-0010, "'ESEE consequences' are the positive and negative economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit or prohibit a conflicting use."

E. Clear and Objective Measures and Additional Review

"Any required measures to minimize conflicts, including special conditions * * *, shall be clear and objective."[6] OAR 660-023-0180(4)(e). The rule also provides that the scope of any additional land use reviews that are required is specifically limited under OAR 660-023-0180(4)(e), except in certain specified situations, one of which is where there is inadequate information to develop "clear and objective measures to resolve identified conflicts."

F. Limitation of Post-Mining Uses

OAR 660-023-0180(4)(f) requires that local governments limit post-mining uses on "Class I, II and Unique farmland."

SEVENTH ASSIGNMENT OF ERROR

In performing its obligation to specify potential conflicts under OAR 660-023-0180(4)(b), the county concluded that "[t]he only potential conflict identified [under OAR 660-023-0180(4)(b)] is noise from equipment operating at the mining operation." Record 28. Under this assignment of error, petitioners argue the county failed to follow the procedure dictated by OAR 660-023-0180(4) in considering potential conflicts associated with (1) dewatering the pit to allow dry mining, (2) impacts on the SWCD lateral, and (3) Mill Creek.

A. Mill Creek

With regard to petitioners' arguments concerning Mill Creek, we agree with respondent and intervenor (hereafter respondents) that petitioners fail to establish the essential predicate under OAR 660-023-0180(4)(b)(D) that must be established before the

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[6]As we discuss under the seventh assignment of error, this requirement marks a potentially significant difference between cases where no potential conflicts are identified under OAR 660-023-0180(4)(b) and cases where conflicts are identified but it is determined under OAR 660-023-0180(4)(c) that there are measures to minimize those conflicts. The distinction is important because required mitigation measures are subject to the problematic "clear and objective" standards requirement imposed by OAR 660-023-0180(4)(e). *See Rogue Valley Assoc. of Realtors v. City of Ashland*, ___ Or LUBA ___ (LUBA No. 97-260, September 24, 1998), slip op 14-21 (discussing the clear and objective standards requirement of ORS 197.307(6) and OAR 660-016-0010(3)).

county is obligated under the rule to consider potential conflicts with Mill Creek. The county is only required to consider conflicts with Mill Creek under OAR 660-023-0180(4)(b)(D) if it is "shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed * * *." See n 3. Neither the map nor the text from the comprehensive plan attached to the petition for review are sufficient to establish that this portion of Mill Creek is included on an acknowledged list of significant Goal 5 resources.

This subassignment of error is denied.

B. Dewatering

The county's finding that noise represents the sole potential impact effectively means that the county found that there were no potential impacts from other sources, such as the planned dewatering of the extraction area.[7] Under OAR 660-023-0180(4)(b), dewatering impacts would cease to be an issue if that finding is supported by substantial evidence.

However, as petitioners correctly note, the difficulty with the county's finding is that other findings, and the record in this appeal, make it very clear that the county was relying on a variety of measures to ensure that there would be no impacts from dewatering.

> "Dewatering will facilitate extraction of the resource below the water table. A dewatering plan will be developed prior to initiation of mining. This plan will account for various parameters associated with the disposal of the pumped water at that time. Economic conditions and environmental regulations at the time of mining will be key factors in deciding how to dewater. RiverBend currently has an NPDES permit to discharge water into Mill Creek at its current facility. There are a number of options available to treat the pumped water prior to discharge if needed including settling ponds, filtration systems and flocculants. It is also possible to use dewatering methods that produce non-turbid water eliminating the need for treating the water prior to its disposal or reinfiltration.

[7]Petitioners argue that dewatering constitutes a potential conflict under OAR 660-023-0180(4)(b)(A), which requires consideration of "[c]onflicts due to noise, dust, or other discharges * * *." *See* n 3. The water that will be pumped from the pit will be reintroduced into the ground, discharged into Mill Creek or used for irrigation purposes.

> "The potential for groundwater draw down interference appears to be minimal based on the data reviewed by [David Nelson and Associates]. * * * Draw downs in wells greater than 500 feet away from the excavation will be negligible. Potential draw down impacts to wells decreases as distance from the extraction area increases. No interruption of water supply due to dewatering activities is expected for neighboring wells.
>
> "Reasonable and practical mitigation measures are available if drawdown interference is observed as a result of dewatering. Mitigation would be provided, including such measures as locally reintroducing the pumped water to reduce draw down effects, deepening wells and/or providing the pumped water to local irrigators to satisfy their water needs." Record 54.

Petitioners argue the above findings demonstrate that the county is relying on the dewatering plan to mitigate possible conflicts from dewatering. Petitioners contend that the county is required under OAR 660-023-0180(4)(b), (c) and (e) to impose "clear and objective" conditions to ensure the measures required to minimize conflicts are implemented. Petitioners argue alternatively, that if there is insufficient information to develop such clear and objective conditions now, the county must defer that requirement until a later land use review under OAR 660-023-0180(4)(e)(A).

Respondents are correct that the county found that dewatering is "feasible and acceptable." Record 24. However, it is reasonably clear from the county's decision and the record that the county did *not* find that dewatering could not result in potential conflicts. Rather, the county's decision shows that it apparently was relying on the anticipated dewatering plan and perhaps other measures to avoid or mitigate conflicts that might otherwise arise from dewatering. If measures must be taken to avoid potential conflicts, it is incorrect to conclude that there are no conflicts under OAR 660-023-0180(4)(b). That there may be measures to minimize those conflicts does not mean there are no potential conflicts.

The county must either clarify and justify a position that dewatering presents no potential conflicts under OAR 660-023-0180(4)(b) or demonstrate that any potential conflicts can be minimized under OAR 660-023-0180(4)(c). In the latter circumstance, the county must impose any required measures that may be needed to minimize those conflicts under

OAR 660-023-0180(4)(e). As far as we can tell, the county combined the approaches allowed by OAR 660-023-0180(4)(b) and (c), with the result that it satisfied neither approach.

This subassignment of error is sustained.

C. SWCD Drainage Lateral

With regard to potential impacts of the proposed mining operation on the SWCD drainage lateral, the county adopted the following findings:

> "Questions were raised with regard to impact of the proposed project known as the Santiam Water Control District laterals. The existing water district laterals parallel the eastern property line but are offsite. The laterals enter the site on the eastern boundary of the property where they convey water northwest to Mill Creek. Where excavation encroaches to the lateral, a setback or rerouting of the lateral could be used as a mitigation measure to decrease the likelihood of interfering with the lateral." Record 53

> "* * * The availability of irrigation water from the two laterals of the [SWCD] will not be affected by the mining operations because mitigation measures will be employed to protect them." Record 54.

> "* * * The applicant will conduct field testing that establishes the adequacy of 100 foot setback to protect the irrigation water in the laterals. If testing indicates that setback distance should be more than 100 feet, the applicant will selectively line the nearby laterals to limit water loss thus providing mitigation. Field testing to evaluate setback distance and/or the need for lining will be conducted at least 1 year prior to mining below the water table within 500 feet of the laterals." Record 57.

Petitioners contend the challenged decision fails to impose conditions or otherwise require implementation of the field testing and mitigation measures that it is relying on to ensure mitigation of potential conflicts.

As was the case with dewatering, it appears that there are potential conflicts with the SWCD lateral, notwithstanding the county's finding that there are no conflicts. Again, it is apparent that the county is relying on measures to mitigate or avoid such conflicts. Where the county is relying on mitigation measures to "minimize conflicts," its decision must

impose a requirement for those mitigation measures under OAR 660-023-0180(4)(e). Respondents do not claim that the challenged decision does so.

This subassignment of error is sustained.

D. OAR 660-023-0180(4)(d)

A third approach to address potential conflicts is provided by OAR 660-023-0180(4)(d). Under that part of the rule, local governments may "determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site." Based on that ESEE analysis, a local government may allow mining where identified conflicts "cannot be minimized." Respondents argue the county took this third route in the challenged decision as a fallback position.

> "As previously indicated, an ESEE analysis is necessary according to OAR 660-023-0180(4)(d) only when there has been a determination that there are significant conflicts that cannot be minimized. In this case, it is the finding and conclusion of Marion County that there are no such conflicts, and that an ESEE is therefore not necessary. *Nevertheless, recognizing the complexity of this case, this ESEE is set forth to demonstrate that all conflicts have been analyzed and upon consideration of the ESEE factors, the board [of county commissioners] finds that mining should be allowed.*" Record 29a (emphasis added).

Because petitioners do not challenge the finding, respondents argue the seventh assignment of error should be denied. We reject respondents' argument. OAR 660-023-0180(4)(d) authorizes an ESEE analysis to allow mining notwithstanding identified conflicts that cannot be minimized, and limits the ESEE analysis to those "conflicts only." However, as discussed above, the county's findings take inconsistent positions concerning whether there are potential conflicts associated with dewatering and the SWCD lateral. More importantly for purposes of respondents' argument here, the ESEE analysis that follows the above-quoted finding makes no reference to dewatering conflicts or conflicts with the SWCD lateral.

The seventh assignment of error is sustained, in part.

EIGHTH ASSIGNMENT OF ERROR

Petitioners argue:

"OAR 660-023-0180(5) requires the County to 'follow the standard ESEE process in OAR 660-023-0040 and 660-023-0050 to determine whether to allow, limit, or prevent new conflicting uses within the impact area of a significant mineral and aggregate site.' Sections (1) through (4) of OAR 660-023-0040 (ESEE Decision Process) explain how to carry out the ESEE analysis. OAR 660-023-0040(5) states that based upon the ESEE analysis, the local government shall reach one of the following determinations with regard to uses conflicting with a significant resource site:

> "'(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.
>
> "'(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.
>
> "'(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.'

"If a local government chooses to allow conflicting uses in a limited way, under OAR 660-023-0040(5)(b), it must adopt implementing measures applicable to such conflicting uses within the impact area of the resource site that contain 'clear and objective standards.' OAR 660-023-0050(2). * * *" Petition for Review 34-35.

The county identified additional dwellings within the impact area as a use that would conflict with the proposed mining. Petitioners recognize that the challenged decision does not specifically state which of the three programmatic options authorized by OAR 660-023-0040(5)(a) through (c) it selected. Petitioners argue that the county selected OAR 660-023-

0040(5)(b) and that the county failed to impose the clear and objective standards that are required for that option under ORS 660-023-0050(2).[8]

The county responds that petitioners incorrectly read the findings. Respondents contend the county was proceeding under OAR 660-023-0040(5)(c) rather than OAR 660-023-0040(5)(b). Respondents contend that the findings explain that the review standards imposed on dwellings under the applicable exclusive farm use zones make further measures to protect the resource site unnecessary. Under OAR 660-023-0040(5)(c) the county is not required to ensure that the existing zoning it was relying on contains clear and objective standards.

The question presented in this assignment of error could easily have been avoided had the county specified which of the programmatic options it selected. Nevertheless, we agree with respondents that the findings can be read consistently with their contention that the county was proceeding under OAR 660-023-0040(5)(c), and we agree that the county did so.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

OAR 660-023-0180(4)(f) requires that when a local government allows mining, it must provide for the post-mining use "in the comprehensive plan and land use regulations." Where, as here, the aggregate site is on Class I, II or Unique farmland, the local government must "adopt plan and land use regulations to limit post-mining use to farm uses under ORS 215.203, uses listed under ORS 215.213(1) or 215.283(1), and fish and wildlife habitat uses, including wetland mitigation banking." *See* n 3.

The challenged decision adopted the following finding:

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[8]OAR 660-023-0050(2) requires "[w]hen a local government has decided to protect a resource site under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards."

> "The proposal complies with OAR 660-023-0180(4)(f). * * * A conceptual reclamation plan has been prepared for this site * * *, which calls for the site to be reclaimed for use as a water impoundment, for use as plant and wildlife habitat. This use is allowed in the EFU zone, and is hereby approved." Record 29.

The decision goes on to impose the following condition:

> "(e) *Future Use*. Except as otherwise approved herein, farming, wetland and wildlife habitat are the designated uses of the subject properties. These shall be the designated uses unless the county approves other uses allowed, permitted subject to standards or conditionally permitted in the underlying zone. * * *" Record 46.

Petitioners argue that the county committed two errors. First, it erred by failing to amend its comprehensive plan and land use regulations to limit the post-mining use of the property. Second, it erred in adopting condition (e), which petitioners interpret as authorizing uses other than those allowed by OAR 660-023-0180(4)(f).

With regard to the first alleged error, respondents answer that the challenged decision is a plan amendment and that the limitation imposed by the above-quoted finding and condition are properly viewed as part of the comprehensive plan. We note that the county has not yet adopted comprehensive plan and land use regulation amendments to comply with OAR 660-023-0180. In that circumstance, OAR 660-023-0180(7) requires that the county apply OAR 660-023-0180 directly. We believe it is sufficient for purposes of OAR 660-023-0180(4)(f) in this case, if the post-acknowledgment plan amendment includes a condition that imposes the limit on post-mining uses required by OAR 660-023-0180(4)(f).

With regard to the second alleged error, respondents contend that petitioners misread condition (e). According to respondents, condition (e) simply recognizes that the decision calls for the post-mining use identified in the reclamation plan, which calls for a "water impoundment, for use as plant and wildlife habitat." Record 29. According to respondents, condition (e) was not intended to authorize uses beyond those allowed by ORS 215.203 and 215.283(1), but rather simply recognizes that ORS 215.283(1) and parallel provisions of the county's zoning ordinance allow some uses besides "farming, wetland [or] wildlife habitat."

If condition (e) said what respondents suggest it was intended to say, it would not violate OAR 660-023-0180(4)(f). Even if it is *possible* to interpret condition (e) in the way respondents suggest, we have no way of knowing whether the board of commissioners embrace that interpretation. On remand, the county must clarify condition (e), to ensure that it does not violate OAR 660-023-0180(4)(f).

The ninth assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR

ORS 215.283(2)(b) allows counties in EFU zones to approve:

> "*Operations* conducted for:
>
> "* * * * *
>
> "(B) *Mining*, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298;
>
> "(C) *Processing*, as defined by ORS 517.750, of aggregate into asphalt or [P]ortland cement; * * *
>
> "* * * * *" (Emphases added.)[9]

In their first assignment of error, petitioners argue that the challenged decision approves a number of uses and activities proposed for the processing area that are not allowed under ORS 215.283(2)(b).

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[9]As relevant, ORS 215.298(3) defines "mining" as set out below:

> "For purposes of ORS 215.213 (2) and 215.283 (2) and this section, 'mining' includes all or any part of the process of mining by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method including open-pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits except those constructed for use as access roads.* * *"

ORS 517.750(11) defines "processing" as follows:

> "'Processing' includes, *but is not limited to*, crushing, washing, milling and screening as well as the batching and blending of mineral aggregate into asphalt and [P]ortland cement concrete located within the operating permit area." (Emphasis added.)

> "An administration/accounting building, operations building, materials lab, dispatch office and truck repair shop are not part of the mining process and are not allowable under ORS 215.283(2)(b) or any other provision of the EFU zone." Petition for Review 8 (footnote omitted).

Respondents contend that petitioners failed to raise this issue below and, for that reason, waived their right to raise the issue at LUBA, under ORS 197.763 and 197.835(3). ORS 197.763(1) requires that issues "be raised and accompanied by statements or evidence sufficient to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."[10] Whether an issue has been sufficiently raised for purposes of ORS 197.763(1) depends on whether the decision maker and the parties are afforded a fair opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). An issue is waived if it is not sufficiently raised to enable a reasonable decision maker to understand the nature of the issue. *Craven v. Jackson County*, 29 Or LUBA 125, 132, *aff'd* 135 Or App 250, 898 P2d 809 (1995).

Petitioners do not identify any place in the record where they raised the issue presented in the first assignment of error. Therefore, the first assignment of error is denied. *DLCD v. Crook County*, 25 Or LUBA 98, 105 (1993).

SECOND ASSIGNMENT OF ERROR

An aggregate mining and processing operation, such as the one disputed in this appeal, is an allowable use in an EFU zone under ORS 215.283(2). ORS 215.283(2) provides that allowable nonfarm uses under ORS 215.283(2) are subject to ORS 215.296.[11] ORS 215.296(1) provides:

> "A use allowed under * * * ORS 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:

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[10]ORS 197.835(3) limits our scope of review to issues that were "raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[11]OAR 660-023-0180(4)(c) provides that in determining whether a proposed measure will minimize conflicts with agricultural practices, the requirements of ORS 215.296 are to be followed.

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

Petitioners advance a number of arguments concerning the county's consideration of ORS 215.296(1). We address those arguments separately below.

A. Misinterpretation of ORS 215.296(1)

Petitioners contend that the county improperly interpreted ORS 215.296(1) as placing a burden on petitioners to present evidence of farm uses on adjoining properties and the nature of accepted farming practices on those properties. Petitioners also argue the county improperly found that the analysis required by ORS 215.296(1) is limited to viable "commercial farms," rather than accepted farming practices associated with *all* farm uses on adjoining properties. Petitioners cite the following findings from pages 25-26 of the record in support of these arguments:

> "'* * * Under ORS 215.296(1) *there must be credible evidence* that two things exist:
>
> "'(1) That a surrounding tract is **devoted to farm use**; and
>
> "'(2) That there are **accepted farming practices** occurring on those surrounding lands.
>
> "'If both conditions exist, then it is appropriate to examine the proposal to determine if it will:
>
> "'(1) Force a **significant change** in the identified farm practices; or
>
> "'(2) **Significantly increase the cost** of the identified farm practices.
>
> "'* * * * *
>
> "'The statutory intent involved here is to compare uses and provide for protection via imposition of conditions of approval that protect normal farming operations of a *viable commercial farm*, and not activities taking place on a rural property.'" Petition for Review 10 (emphases petitioners'; bold emphases in county decision).

1. Shifting of the Burden of Proof

All parties recognize that it is the applicant's burden to establish compliance with ORS 215.296(1) and the county's obligation to find that ORS 215.296 is satisfied before approving the plan amendments requested in this matter. Application opponents may present evidence in support of their position or to respond to evidence submitted by others, but they have no burden of proof as such. Respondents contend that, notwithstanding the language from the county's findings quoted immediately above, if the findings and record are viewed as a whole, it is clear that the county did not improperly shift the burden of proof to the opponents of the application. Although it is possible to read the findings quoted above as improperly shifting the burden concerning ORS 215.296, we agree it is clear that the county did not do so here.

Subassignment of error A(1) is denied.

2. Limiting Analysis to Commercial Farms

Respondents contend that the reference in the county's findings to "viable commercial farms" is not error, because the concept of viable commercial farms is not substantively different from the concept of "commercial agricultural enterprise." Respondents miss petitioners' point. Petitioners are not arguing that the challenged decision violates the Goal 3 (Agricultural Lands) requirement that minimum parcel sizes in EFU zones be "appropriate to continuation of the existing commercial agricultural enterprise in the area." *Still v. Marion County*, 22 Or LUBA 331, 337-38 (1991). Rather, petitioners argue that in considering whether the proposal will force a significant change in or significantly increase the cost of accepted farm practices, the county may not limit its consideration to accepted farm practices on commercial farms; impacts on accepted farm practices on noncommercial farms must also be considered. *See O'Brien v. Lincoln County*, 31 Or LUBA 262, 265-66 (1996) (concluding that findings that addressed only commercial farm uses violate the substantively identical noninterference standard at OAR 660-033-0130(4)(c)(A)).

The distinction between "commercial" and "noncommercial" farms can be elusive. As we understand petitioners' use of the terms, and as we use the terms here, commercial farms encompass farms that generate sufficient income to constitute continuing business enterprises, whether that business enterprise is family or corporate. Noncommercial farms encompass smaller and less profitable farms that are part-time enterprises or supplemental sources of income for those who own or operate the noncommercial farm, but nevertheless generate sufficient income to qualify as a "farm use" under ORS 215.203(2)(a).[12] As previously noted, the distinction is irrelevant when applying ORS 215.296(1), because it requires consideration of potential impacts on accepted farming practices associated with farm uses, without regard to whether the farm uses are commercial or noncommercial.

We do not believe that the county's reference in its findings to "viable commercial farms" demonstrates that the county improperly ignored accepted farming practices associated with noncommercial farms in the area considered by the county. The cited finding and other findings that refer to commercial farms can be read to suggest that the county improperly limited its consideration of ORS 215.296(1) to commercial farms. However, other findings adopted by the county make it reasonably clear that the reference to "viable commercial farms" is more likely intended as a shorthand reference reflecting the county's understanding that activity that might otherwise qualify as a "farm use," as that term is defined by ORS 215.203(2)(a), is not a "farm use" within the meaning of the statute unless the activity is "primarily for the purpose of obtaining a profit in money."[13] *See* n 12.

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[12]As defined by ORS 215.203(2)(a), "the current employment of land for the primary purpose of obtaining a profit in money" through specified farming activities is required to qualify as a "farm use." The term "profit" in the ORS 215.203(2)(a) definition of farm use "does not mean profit in the ordinary sense, but rather refers to gross income." *1000 Friends v. Benton County*, 32 Or App 413, 429, 575 P2d 651 (1978); *Brown v. Jefferson County*, 33 Or LUBA 418, 433-34 (1997); *Greenwood v. Polk County*, 11 Or LUBA 230, 235 (1984).

[13]On the page following the disputed "viable commercial farm" finding, the county explains:

> "The only specific issue raised during this entire process regarding potential conflict with surrounding [agricultural] uses involved the testimony of an adjoining property owner Ms.

Whatever the county meant, we do not agree with petitioners that the cited reference to "viable commercial farm" demonstrates that the county misconstrued ORS 215.296(1).

Subassignment of error A(2) is denied.

B. Findings and Evidence

Petitioners next argue the county findings addressing ORS 215.296(1) are inadequate and are not supported by substantial evidence. Petitioners argue the county's findings fail to address a number of farm uses in the area.[14] Petitioners also argue that certain of the county's findings are simply conclusions and do not explain why the proposed use will not cause a significant change in or significantly increase the cost of accepted farming practices on surrounding properties.

A straightforward, three-part analysis is required by ORS 215.296(1). First the county must identify the accepted farm and forest practices occurring on surrounding farm and forest lands. The second and third parts of the analysis flow from the first part and require that the county consider whether the proposed use will force a "significant change in"

> McKnight, and that of Ms. Lisa Carkin of the Willamette Valley Pony Club regarding potential interference with her horses.
>
> "* * * * *
>
> "According to the testimony, the extent of the equine activities on the McKnight property involves trail riding and youth club meetings. These activities are not done for the purpose of obtaining a profit in money, but in the words of Ms. Carkin, are to develop 'responsibility, sportsmanship, moral judgment, leadership and self-confidence in young people.'
>
> "The McKnight property is not devoted to 'farm use' as statutorily defined, and therefore the provisions of ORS 215.296 are not applicable to her activities. * * *" Record 27.

[14]Petitioners argue that a report and photographs in the record show the subject property "is currently being used as pasture and to produce corn, beans, strawberries, raspberries, hay, mint and wheat." Petition for Review 12; Record 93-94 and 97. Petitioners go on to argue:

> "A letter in the record indicates the writer has an orchard and vineyard established within one mile of the subject site * * *. Another letter states that the properties to the west, south and east of the subject site are all working farms or ranches. The record also contains photographs of farm operations currently occurring within 1,500 ft. of the subject site, including row crops and cattle ranching. These photos also show large farm machinery and major irrigation equipment being used on these properties." Petition for Review 12-13 (record citations omitted).

the identified accepted farm and forest practices or significantly increase the cost of those practices. *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991).

1. Preliminary Issues

We briefly note two issues. The first issue is raised in the briefs and was discussed briefly by the parties at oral argument. Petitioners argue the record contains no document that constitutes a "study" of the farm uses and their accepted farming practices for purposes of ORS 215.296(1). Respondents cite to several places in the record where the hearings officer and the applicant's attorney refer to a "study." However, we have checked all of respondents' citations, and as far as we can tell there is no such study, at least not one that is labeled as such. Nevertheless, the absence of a "study" designated as such is not critical. We consider the parties' respective arguments and the record citations they provide to determine whether the findings are adequate and whether the citations provided supply evidentiary support.

A second issue is raised by the following invitation on page 13 of respondents' brief: "See also the testimony of Jeff Tross before both the Hearings Officer and Board of Commissioners on the audio tape of the proceedings." The record includes eight audio tapes. Presumably respondents know where the relevant testimony is located, but they have not provided transcripts of that relevant testimony.[15] We will not conduct an unassisted review of eight audio tapes for relevant testimony. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335, 342 n 7 (1997); *see Eckis v. Linn County*, 110 Or App 309, 313, 821 P2d 1127 (1991) ("LUBA is not required to search the record, looking for evidence with which the parties are presumably already familiar").

[15]This Board has a longstanding practice of allowing parties to prepare partial transcripts of the tapes of local proceedings and attach such transcripts to their briefs. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 99 n 2, *aff'd* 89 Or App 40, 747 P2d 379 (1987).

2. Adequacy of the Study Area

A potential dispute under this assignment of error is whether the area studied by the county is sufficient to constitute "surrounding farm and forest lands." In applying ORS 215.296(1), the county considered farm uses located within 1,500 feet of the proposed extraction areas. Respondents contend that petitioners concede the point in their brief; petitioners dispute respondents' contention.

Although we agree with petitioners that they do not formally concede under this assignment of error that the 1,500 foot study area is adequate, we conclude that petitioners do not assign the county's selection of the 1,500 foot study area as error under this second assignment of error.[16] Therefore, under this assignment of error, we do not consider whether the 1,500-foot study area is a sufficiently large study area for purposes of applying ORS 215.296(1).

3. Failure to Identify or Discuss Farm Uses in the Area

If, as petitioners allege, the record shows that there are particular farm uses and accepted farming practices associated with those farm uses within the relevant study area that are not addressed in the county's findings, those findings would likely be inadequate to demonstrate compliance with ORS 215.296(1). However, our conclusion that this assignment of error does not challenge the selection of a 1,500-foot study area resolves several of petitioners' contentions that the findings fail to discuss certain farm uses or the accepted farming practices associated with those farm uses. The vineyard and orchard that

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[16]The closest petitioners come to doing so is in the following sentence:

> "Even assuming, for the sake of argument, that the County properly limited its consideration under ORS 215.296(1) to the 1,500 ft. radius 'impact area,' it established for the purpose of OAR 660-023-0180(4) (*but see* Fourth Assignment of Error), the [county's findings] regarding the farm practices on surrounding lands devoted to farm use [are inadequate] and are "not supported by substantial evidence * * *." Petition for Review 12. This sentence is not sufficient to allege the county erred in selecting its study area, much less to explain why that study area is inadequate.

petitioners argue should have been considered is outside the 1,500-foot area. The reference to farms and ranches to the west, south and east does not demonstrate that there are farms and ranches within the study area that the findings fail to identify.[17] The cited photographs of farming activities are actually poor quality copies of photographs and are several years old. They show some sort of farming activity on property in the area, but we cannot determine where that farming activity is located or what kinds of crops are shown. We agree with respondents that these photographs do not demonstrate that the county's findings identifying farm uses and accepted farming practices are inadequate or lack evidentiary support.

4. Adequacy of the County's Findings

The dispute over possible impacts on accepted farming practices during the hearings included discussion about possible impacts on the Willamette Valley Pony Club. The county's findings conclude that the Willamette Valley Pony Club is not a farm use because it is not operated for "profit," within the meaning of ORS 215.203. Petitioners do not dispute the adequacy of these findings or their evidentiary support.

Petitioners fault other county findings as being unexplained conclusions. The county's findings include the following:

> "The surrounding lands in the impact area are zoned and used for farm use. There are no forest uses on the surrounding lands. Farm uses in the area are pasture and cropland planted mostly to small grasses or grains. The additional traffic generated by the subject site will not impede the use of the public way for the movement of farm machinery. Traffic improvements, such as street and bridge widening will assist in the movement of farm machinery over rural roads.
>
> "* * * * *
>
> "The farm practices employed in the impact area for these activities are minimal (light farm vehicle activity-irrigation to a minor degree, but there is

[17] As noted below, the county's findings do identify pasture and farm crops as farm uses in the study area that was considered.

> no aerial spraying) will not be affected by operation of the proposed aggregate site.
>
> "The aggregate operation will not cause surrounding farm land to be removed from production. The availability of irrigation water will not be affected, with the recommended mitigation measures * * *. The aggregate operation will not be affected by the operation of farm machinery or by the application of agricultural chemicals, and the farming practices associated with field cultivation will not be impaired, interfered with, or affected by activities on the aggregate site.
>
> "* * * * *
>
> "Farm practices, including the types of crops that are raised, cultivation methods, access to the fields, and irrigation water sources, will not be affected. The farm zoning on the subject property and the surrounding lands will not change. Without any verified affect on accepted farm practices, their cost will not be affected. For these reasons, the proposal will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm use." Record 26-27.

These findings state that the farm uses in the area are pasture and crop production. The findings identify a number of farming practices associated with these farm uses: (1) movement of farm machinery, (2) light farm vehicle activity, (3) some irrigation, (4) the particular types of crops being raised, (5) application of agricultural chemicals, and (6) unspecified cultivation methods.

We conclude that these findings are adequate to identify the accepted farm practices on the surrounding lands. However, petitioners are correct that the county's findings do not explain why the county believes the cited farm practices will not be significantly affected by the proposal; they simply conclude that they will not be significantly affected. Such conclusory findings are inadequate. *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 373 (1986). Findings adopted by the county elsewhere in the decision identify the potential off-site impacts of the proposal as including: (1) noise, (2) dust, (3) possible impacts on wells, (4) possible impacts on the SWCD lateral, and (5) truck traffic. The above findings do not explain why those potential impacts will not significantly affect accepted farm practices in the area. We therefore sustain petitioners' subassignment of error challenging the adequacy

of the county's findings to explain why the proposal will not force a significant change in or significantly increase the cost of accepted farm practices.

Under ORS 197.835(11)(b) we may overlook the conclusory nature of the county's findings if "the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision." However, the "clearly supports" standard is considerably more demanding than the substantial evidence standard. *Waugh v. Coos County*, 26 Or LUBA 300, 306-08 (1993).

The written evidence produced by the applicant in response to issues raised during the local proceedings concerning noise, impacts on wells and impacts on the SWCD lateral is detailed and concludes that the impacts will be minimal and can be mitigated if necessary. Record 66-67, 126-29, 564-69, 770-72. This evidence is sufficient to clearly support a conclusion that these three potential off-site impacts will not force a significant change in or significantly increase the cost of the identified farm practices. However, while respondents cite many *findings* concerning traffic impacts, there is no evidence cited that specifically addresses potential traffic conflicts with farm vehicles and machinery or possible conflicts with identified farm practices related to dust. This is not to say there are not satisfactory answers to these concerns. However, the cited evidence is not sufficient to clearly support a conclusion that such possible impacts will not force a significant change in or significantly increase the cost of identified accepted farm practices.

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

Under the third assignment of error, petitioners argue the county improperly construed applicable law in concluding that the county's conditional use permit criteria are preempted by OAR 660-023-0180.[18] Petitioners argue that, "[r]egardless of whether OAR

[18]OAR 660-023-0180(7) provides:

660-023-0180 itself expresses an intent to supersede all local regulations governing approval of aggregate operations, it is axiomatic that an administrative agency may not adopt rules inconsistent with an applicable statute." Petition for Review 15. Petitioners go on to argue that ORS 215.283(2) specifically provides that the nonfarm uses authorized by that statute "may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use * * *."[19] Petitioners argue that LCDC may not, by administrative rule, take away the regulatory authority that is granted to counties by ORS 215.283(2).

We need not determine whether petitioners' reading of the statutes is correct or whether they are correct that OAR 660-023-0180, as interpreted by the county, is inconsistent with the cited statutes. Respondents argue petitioners waived their right to raise this issue by not raising the issue during the proceedings below. *Craven v. Jackson County*, 29 Or LUBA at 132. We agree with respondents.

> "Local governments shall amend the comprehensive plan and land use regulations to include procedures and requirements consistent with this rule for the consideration of PAPAs concerning aggregate resources. Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a PAPA concerning mining authorization, unless the local plan contains specific criteria regarding the consideration of a PAPA proposing to add a site to the list of significant aggregate sites, provided:
>
> "(a) Such regulations were acknowledged subsequent to 1989; and
>
> "(b) Such regulations shall be amended to conform to the requirements of this rule at the next scheduled periodic review, except as provided under OAR 660-023-0250(7)."

The board of commissioners agreed with the hearings officer's finding that OAR 660-023-0180 preempts the county's conditional use criteria in this case. Record 41, 534.

[19]We previously discussed the additional "noninterference" standard that is imposed by ORS 215.296(1) on the nonfarm uses that are allowable under ORS 215.283(2). Petitioners also point out that ORS 215.296(10) specifically provides that nothing in ORS 215.296 "shall prevent a local governing body approving a use allowed under * * * ORS 215.283(2) from establishing standards in addition to those set forth in [ORS 215.296(1)] or from imposing conditions to insure conformance with such additional standards."

At oral argument petitioners cited several pages in the record where they claim the issue that is presented in the third assignment of error was raised.[20] However, the only issue raised in the cited pages of the record is whether OAR 660-023-0180, by its terms, precludes the county from applying its conditional use criteria. Petitioners do not argue under the third assignment of error that OAR 660-023-0180 does not, by its terms, preempt the county's conditional use criteria.[21] Rather, petitioners' argument under this assignment of error is limited to their contention that LCDC's administrative rule is inconsistent with ORS 215.283(2) and, for that reason, may not preempt the county's conditional use criteria in this case. That issue is not raised on any of the pages of the record cited by petitioners at oral argument. Because the issue raised in this assignment of error was not raised below, the county did not have a fair opportunity to respond to the issue, and it is waived. ORS 197.763(1); 197.835(3); *Boldt*, 107 Or App at 623; *Craven*, 29 Or LUBA at 132.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue the county failed to coordinate its decision with the City of Turner and the Cascade School District #5. Petitioners explain:

> "Goal 2 (Land Use Planning) is applicable to the challenged decision because the decision amends the [Marion County Comprehensive Plan]. ORS 197.175(2)(a). Goal 2 provides that 'each plan and related implementation measure shall be coordinated with the plans of affected governmental units.' Goal 2 defines 'affected governmental units' as 'those local governments, state and federal agencies and special districts which have programs, land ownerships, or responsibilities within the area included in the plan.' Goal 2 and ORS 197.015(5) provide that a plan is 'coordinated' when the needs of all

[20]Petitioners cite record pages 534, 781, 862-63, 865.

[21]To the extent the issue is suggested or left open in the quoted argument presented on page 15 of the petition for review quoted above in the text, petitioners do not develop an argument in support of the issue under this assignment of error and for that reason we do not consider it. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

> levels of governments * * * have been considered and accommodated as much as possible.'" Petition for Review 18.

Petitioners also contend the county violated its Urban Growth Boundary Coordination Agreement (UGB Agreement) with the City of Turner.

A. UGB Agreement

As respondents correctly note, the UGB agreement is limited to "land use actions on lands located within [designated Areas of Special Mutual Concern]." Respondents' Brief App B-1. It is undisputed that the subject property is not located in a designated Area of Special Mutual Concern. That the *impact area* encompasses a designated Area of Special Mutual Concern is irrelevant. The UGB agreement does not apply in the circumstances presented in this appeal, and the county did not err in failing to adopt findings addressing its obligations under the UGB Agreement.

This subassignment of error is denied.

B. Coordination Under Goal 2 and ORS 197.015(5)

Respondents argue that there was no obligation to coordinate with the City of Turner, because the disputed property is not located in the City of Turner, or with the Cascade School District #5 or the Turner Fire District, because those two governmental entities do not adopt comprehensive plans. However, the coordination obligation is not so circumscribed. Indeed it is impossible to square respondents' position with the language of ORS 197.015(5) which requires coordination with "all levels of governments."

Petitioners' arguments quoted at the beginning of our discussion of this assignment of error accurately describe the coordination obligation imposed by Goal 2 and ORS 197.015(5). We have explained on many occasions that the coordination obligation does not mean that local governments must "accede to every request" made by an affected governmental agency. *Brown v. Coos County*, 31 Or LUBA 142, 146 (1996); *Waugh v. Coos County*, 26 Or LUBA 300, 314 (1993). However, the obligation imposed by Goal 2 and ORS

197.015(5) goes beyond the county's obligation to address and demonstrate compliance with other applicable approval criteria. The coordination obligation requires an exchange of information and an attempt to accommodate the legitimate interests of all affected governmental agencies. *Rajneesh v. Wasco County*, 13 Or LUBA 202, 210 (1985). Goal 2 and ORS 197.015(5) do not mandate success in accommodating the needs or legitimate interests of all affected governmental agencies, but they do mandate a reasonable effort to accommodate those needs and legitimate interests "as much as possible."[22] For LUBA to be able to determine that this coordination obligation has been satisfied, a local government must respond in its findings to "legitimate concerns" that are expressed by affected governmental agencies. *Waugh*, 26 Or LUBA at 314-15 (1993).

Our cases do not articulate a precise standard that an affected local government must meet to raise a "legitimate concern." We do not believe a local government is required to respond in its findings to every written and oral statement that an affected local government may present during the local proceedings. We explained in *ONRC v. City of Seaside*, 29 Or LUBA 39, 56-59 (1995) that "the concern must be sufficiently developed to require a specific response by the [local government]." In other words, the concern must be explained in sufficient detail to (1) communicate the expectation of some sort of response from the local government and (2) provide the decision maker sufficiently detailed understanding of the concern that an appropriate response can be included in the decision. With these principles in mind, we turn to the concerns that petitioners allege the City of Turner and other governmental entities raised below that were not specifically addressed by the county.

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[22]The coordination obligation could be satisfied in a number of different ways, depending on the circumstances. For example a concern might be rejected as being based on an erroneous understanding of the facts. On the other hand, the local government might determine that the concern is legitimate and encourage or require that the proposal be modified or conditioned to eliminate or mitigate the concern, in whole or in part. Or the local government might take the position that while a concern is valid, practical alternatives to address the concern are not available and that the proposal is of a nature that overrides the legitimate concern. Other responses may be appropriate, depending on the nature of the legitimate concern and the circumstances.

1. Truck Traffic Assumed to Use Witzel Road

Truck traffic leaving the proposed facility will travel north on Marion Road to the intersection with Mill Creek Road. Most of the trucks will turn west on Mill Creek Road and proceed toward and through the City of Turner. At the point where Mill Creek Road crosses the City of Turner UGB, the applicant's Transportation Impact Analysis (TIA) assumes that 15 percent of the truck traffic would turn right on Witzel Road rather than proceeding through the City of Turner.[23] TIA 14 (Figure 4). In a July 14, 1998 letter signed by the Mayor (hereafter Mayor's letter), the city contended that trucks taking Witzel Road to Aumsville Highway would be required to navigate "a winding road with steep grades," and two difficult "T-intersections." Record 387. The city took the position that large trucks avoid Witzel Road if there is an alternative. The city ultimately took the position that the assumed use of Witzel Road by 70 trucks per day "is unsubstantiated and speculative," and that the trucks in fact would proceed through the City of Turner. *Id.*

The city's concern regarding truck traffic impacts on the City of Turner was a central concern below, and we conclude it is a legitimate concern. The questions raised about the assumptions concerning Witzel Road were sufficiently developed to warrant a response from the county in its findings.

In its brief, respondents cite to Record 61, which is a summary of the TIA that was adopted as part of the challenged decision's findings and simply states the 15 percent assumption. Record 61 does not respond to the city's legitimate concern. The TIA itself is not cited by respondents. It explains that "[t]he distribution of site-generated trips onto the roadway system within the study impact area was estimated by a thorough examination of existing traffic volumes in the site vicinity and assumptions regarding anticipated truck

[23]The pages of the copy of the TIA that is included at Supplemental Record 27-135 are out of order. A complete copy of the TIA was provided to LUBA, and we cite to the pages of the TIA rather than the pages in the Supplemental Record.

traffic origins and destinations during the weekday a.m. and p.m. peak hours." TIA 13. This statement and the evidence and assumptions upon which it rests may provide a basis for a response to the city's concern regarding the 15 percent assumption for Witzel Road. However, if the county believes the concern expressed by the city is without merit, it must explain in its findings why that is the case. The language in the TIA does not respond to the concern.

This subassignment of error is sustained.

2. Peak Traffic Hour Determinations

Willard Bradshaw, a professional traffic engineer, represented in a July 14, 1996 letter to the board of county commissioners (hereafter Bradshaw letter), that he had been asked by the mayor to review and comment on the applicant's TIA. He offered the following comment:

> "[T]he weekday a.m. and p.m. peak hours were determined after analyzing count data taken on a Wednesday in May 1996 between the hours of 7 and 9 a.m. (morning) and 4 and 6 p.m. (evening). The location of the count was at the intersection of Mill Creek Road and Witzel Road. Cascade's Middle School and High School let out at 3:10 p.m. A time period which includes this 3:10 p.m. exit may be the highest hour. * * *" Record 382.

Although it is a close question, we conclude that the above is not sufficient to raise any issue with sufficient specificity to warrant a response in the county's findings. The author of the letter makes no attempt to challenge the hours used to measure traffic to determine peak hours, except to note that those hours "may" not coincide with peak traffic related to the school. While that may be true, it says nothing about the logic of selecting the hours used in the TIA, which we assume were selected to coincide with morning and evening rush hour traffic.

This subassignment of error is denied.

3. Summer and Fall Truck Traffic

The Mayor's letter states the following:

> "* * * We question seriously whether the analysis adequately reviewed traffic usage at all relevant hours of the day over the summer and early fall seasons when expected traffic from the proposed project will be highest. * * *" Record 387.

This concern is not developed with sufficient specificity to warrant a response by the county in its findings under its Goal 2 coordination obligation.[24]

This subassignment of error is denied.

4. Inaccurate Measurement of the One-Mile Distance From the Entrance of Proposed Use

A July 14, 1998 letter signed by the Mayor of the City of Turner and others entitled "Objections to River Bend Sand and Gravel Application" (hereafter Objection letter) states that the TIA is "based on wrong suppositions and is therefore invalid." Record 390, 394. The letter goes on to state what it alleges are "wrong suppositions," including "[i]naccurately stating the one-mile road rule." Record 395.

The above does not explain why the authors believe the TIA inaccurately states the one-mile rule and is not sufficient to state a concern that warrants a response in the county's findings under its Goal 2 coordination obligation

5. Five-Axle Trucks

The Mayor's letter states that the TIA recognizes that only 5 percent of existing truck traffic in the City of Turner is made up of heavy trucks with five or more axles. The Mayor's letter explains that the proposal will result in a significant increase in heavy truck traffic with five or more axles in the City of Turner.[25] The Mayor goes on to fault the TIA for failing to

[24]We note that respondent cites findings that suggest that the study extended over an 18-month period which at least suggests that the traffic usage study was not so limited as the Mayor's letter suggests.

[25]The letter notes that the record is not clear whether the existing number of trucks with at least five axles (nine) would increase by one hundred and fifty or only 35 percent of that number. The letter takes the position that in either event, the increase will be significant.

analyze this significant change in the *nature* of the truck traffic that will pass through the City of Turner.

This concern is developed with sufficient specificity to warrant a response by the city in its findings under its Goal 2 coordination obligation.

This subassignment of error is sustained.

6. Left Turn from Marion Road onto Mill Creek Road

The Bradshaw letter states the following with regard to the Marion Road/Mill Creek Road Intersection:

> "The proposed site will increase the volume northbound on Marion Road and with the destination being predominantly to the northwest, are there any safety concerns at the intersection of Mill Creek Road and Marion Road with this additional left-turn movement through this stop controlled approach? What has been the accident history at this intersection?" Record 383.

The above are general questions. They are not developed with sufficient specificity to warrant a response by the city in its findings under its Goal 2 coordination obligation.

7. Impact on Emergency Services

The Mayor's letter states:

> "The Turner Rural Fire Protection District is located on the main road in the City of Turner. The District provides fire and other services within the City and to surrounding areas. The District frequently travels north out of Turner on Turner Road, west on Delaney Road, east on Mill Creek Road and south on Marion Road in providing emergency services.
>
> "All of these roads in and out of the City are narrow with no shoulders and very few turnouts. The frequency of large trucks proposed by the applicant to travel through these areas will substantially delay the provisions for emergency services on all routes leading in and out of Turner because of the inability for traffic to pull off the road to allow emergency vehicles to pass." Record 388.

We have no way of telling whether the frequency of emergency vehicle trips and the cited shortcomings of the roads make this a legitimate concern. However, reviewing the pages of the record cited by the parties, we cannot say the concern is without merit. The

pages in the record cited by respondents are not an adequate response under the county's Goal 2 coordination obligation.

This subassignment of error is sustained.

8. Safety Concerns

The Objection letter provides statistics on morning and evening school bus trips associated with several schools in the area and takes the position that the roads within one mile of the subject property cannot accommodate the expected truck traffic the proposal will generate, along with the expected growth in traffic generally, without posing safety problems for school buses. Record 391. The Objection letter also expresses concern about safety problems that may be associated with teenage drivers going to and from schools in the area "competing with hundreds of gravel trucks on Marion and Mill Creek Roads." Record 391. The Objection letter goes on to express concern about the safety of children who currently travel by foot along Marion Road from a summer camp to a swimming pool in the City of Turner. Record 392.

The expressed concern about teenage drivers is undeveloped. Similarly, the concern regarding the current practice of allowing summer camp students to travel to the City of Turner by foot along Marion Road, and whether or not there are satisfactory alternatives, is not developed. Neither concern is sufficiently developed to warrant a response by the city in its findings under its Goal 2 coordination obligation.

The school bus concerns are more developed and include data concerning bus trips by the Cascade School District. The school bus/truck traffic concerns are developed with sufficient specificity to warrant a response by the city in its findings under its Goal 2 coordination obligation. However, respondents identify a summary of the applicant's June 10, 1998 Update of the TIA, which was adopted as part of the challenged decision. Record 63-65. That document and the documents that it summarizes make it clear that the issue of conflicts with school buses was considered. Most of the discussion focuses on Turner

Elementary School, but the concern expressed states a generalized concern and there is no reason to believe the potential conflicts at Turner Elementary differ significantly from potential conflicts elsewhere. The county's response to the concerns expressed about school bus/truck traffic potential conflicts is adequate to comply with its Goal 2 coordination obligation.

This subassignment of error is denied.

9. Noise Impacts on Schools

Petitioners argue:

> "The City and School District raised the issue of whether the noise of hundreds of large trucks passing close to schools where children play and study will impact the children's hearing and make it difficult to maintain a learning environment."[26] Petition for Review 22.

This concern is not sufficiently developed to warrant a response by the city in its findings under its Goal 2 coordination obligation. This is not to say that schools do not have legitimate concerns about the impact noise may have on the educational process that occurs within school buildings and on the grounds surrounding those buildings. However, no apparent attempt was made to explain how or whether schools are currently being affected by traffic on adjoining streets, or why the school district believes adding the expected number of trucks will necessarily "make it difficult to maintain a learning environment."[27]

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[26]This argument apparently refers to the following language in the Objection letter:

> "5. The chronic noise created by hundreds of gravel trucks passing close to schools and children playing will impact the hearing of children and make it difficult to maintain a learning environment." Record 391.

[27]Because we conclude the noise issue raised under this subassignment of error was not sufficient raised to warrant a response in the county's findings under its Goal 2 coordination obligation, we need not specifically address respondents' response to it. That response essentially takes the position that because there are no schools within the 1,500-foot impact area the applicant analyzed to comply with OAR 660-023-0180, the school district's noise concerns are irrelevant. As we have already explained, the county's obligation to comply with Goal 5 and to coordinate under Goal 2 are separate and distinct obligations. Again, while Goal 2 does not require that the county accede to every legitimate concern expressed, neither may the county ignore them. Where an affected local government satisfied its obligation to clearly state a legitimate concern with a proposed

This subassignment of error is denied.

10. Health Impacts of Particulate and Other Emissions

Petitioners argue:

> "The City and School District raised the issue of whether particulate and other emissions from the proposed use will have an adverse impact on medically fragile children attending schools in the vicinity. The City and School District also submitted technical documentation regarding these concerns. The challenged decision does not respond to this concern * * *." Petition for Review 22 (record citations omitted).

The stated concerns about particulate and other emissions are accompanied by a number of general studies to support the concerns. As respondents correctly note the studies are general and do not address this proposal specifically. Respondents also take the position that the state and federal permits the applicant will secure to comply with OAR 660-023-0180 will insure that the concern stated under this subassignment of error is unfounded. While that may well be an appropriate response, the county must make it in its findings to comply with its Goal 2 coordination obligation.

This subassignment of error is sustained.

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioners argue the challenged decision violates Goal 12 (Transportation) for the same reasons advanced in the fourth assignment of error.

Goal 12 requires that the county "provide and encourage safe, convenient and economic transportation systems." *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 588, *aff'd* 134 Or App 414 (1995). Petitioners argue that for the same reasons they advanced under the fourth assignment of error, the county's failure to address their "specific concerns regarding whether the County's road system would be safe for vehicles and pedestrians"

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comprehensive plan amendment, the county is obligated to at least address that concern in its findings and, in the words of ORS 197.015(5), accommodate that concern "as much as possible."

violates Goal 12. Petition for Review 23. As petitioners correctly note, the county is required to respond to specific issues that are raised concerning a relevant approval criterion. *City of Wood Village v. Portland Metro. Area LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *Hillcrest Vineyard v. Bd. of Comm. Douglas Co.*, 45 Or App 285, 293, 608 P2d 201 (1980); *McConnell v. City of West Linn*, 17 Or LUBA 502, 519 (1989).

A. OAR 660-023-0180(4)(b)(B)

We first address a potentially dispositive response that is raised by respondents. Respondents correctly note that OAR 660-023-0180 establishes detailed provisions for review of post-acknowledgment plan amendments to designate significant aggregate resource sites and to decide whether to allow mining. OAR 660-023-0180(4) establishes the process that must be followed in determining whether to allow mining on a designated significant resource site. Among other things, OAR 660-023-0180(4)(a) requires identification of an impact area for purposes "of identifying conflicts with proposed mining and processing activities." That impact is generally to be limited to 1,500 feet and, as previously noted, the county established a 1,500-foot impact area in this case. As relevant, OAR 660-023-0180(4)(b) provides

> "* * * For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:
>
> "* * * * *
>
> "(B) Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. * * *"
>
> "* * * * *"

Respondents contend that this assignment of error must be denied because all of the issues raised in the fourth assignment of error "involve concerns that are both outside the one mile radius, and are unrelated to the substantive limitation of OAR 660-023-0180(4)(b)(B)."

Respondents' Brief 31. Respondents do not further develop their argument that OAR 660-023-0180 precludes consideration of issues that are otherwise relevant under Goal 12. Petitioners do not address the issue at all.

Comprehensive plan amendments must comply with the statewide planning goals. ORS 197.175(2)(a); *Welch v. City of Portland*, 28 Or LUBA 439, 443 (1994*); ODOT v. City of Newport*, 23 Or LUBA 408 (1992). OAR 660-023-0180 does not say that the analysis required under that rule either obviates or is sufficient by itself to establish compliance with all other statewide planning goal requirements. Moreover, OAR 660-023-0000, which states the purpose and intent of OAR chapter 660 division 23, provides:

> "This division establishes procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources. *This division explains how local governments apply Goal 5* when conducting periodic review and when amending acknowledged comprehensive plans and land use regulations." (Emphasis added).

OAR 660-023-0000 does not support respondents' understanding of OAR 660-023-0180. Neither do OAR 660-023-0240(1) and (2), which specify "Relationship of Goal 5 to Other Goals."

> "(1) The requirements of Goal 5 do not apply to the adoption of measures required by Goals 6 and 7. *However, to the extent that such measures exceed the requirements of Goals 6 or 7 and affect a Goal 5 resource site, the local government shall follow all applicable steps of the Goal 5 process.*
>
> "(2) The requirements of Goals 15, 16, 17, and 19 shall supersede requirements of this division for natural resources that are also subject to and regulated under one or more of those goals. *However, local governments may rely on a Goal 5 inventory produced under OAR 660-023-0030 and other applicable inventory requirements of this division to satisfy the inventory requirements under Goal 17 for resource sites subject to Goal 17*." (Emphases added.)

OAR 660-023-0240(1) and (2) are inconsistent with respondents' understanding of the rule for at least two reasons. First, the existence of the rule makes it clear that LCDC was aware of the statutory requirement that Goal 5 is not the only Statewide Planning Goal that applies

to comprehensive plan amendments. Second, the emphasized language makes it clear that LCDC knew how to require that OAR chapter 660 division 23 preempt or satisfy other Goal requirements where it wished that result. LCDC did not specify that possible Goal 12 requirements concerning the adequacy of roads are addressed through compliance with OAR 660-023-0180.

Respondents also suggest that it makes little sense to require a substantively and geographically constrained conflicts analysis under OAR 660-023-0180 if a broader analysis may be required to comply with other goals. Whether or not we agree with respondents' suggestion, we are required to base our decision on the text and context of the rule. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). The text and context are clearly contrary to respondents' understanding of the rule.

B. Goal 12 Arguments

Returning to our resolution of subassignments of error B(1) through B(10) under the fourth assignment of error, we conclude that four of the issues raised there also raised issues that the county is required to address under Goal 12.[28] The remaining subassignments of error do not raise issues that must be considered on remand under this assignment of error because they (1) were adequately addressed by the county in its decision, (2) were not raised with sufficient specificity, or (3) do not raise Goal 12 issues.[29]

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[28]These issues include the issue concerning applicant's assumptions regarding usage of Witzel Road (subassignment of error B(1)), the issue regarding the projected increase in the percentage of large trucks with five or more axles (subassignment of error B(5)), the issue concerning impacts on emergency services (subassignment of error B(7)) and the issue concerning emissions impacts (subassignment of error B(10)).

[29]We concluded under the fourth assignment of error that school bus impacts under subassignment of error B(8) were adequately addressed for purposes of Goal 2, and we conclude the county's response is adequate for purposes of Goal 12 as well. The remaining issues under subassignment of error B(8) concerning teenage drivers and Marion Road pedestrians and the issues raised under subassignments of error B(2) through B(4) (peak traffic, summer/fall traffic and one-mile study area), B(6) (Marion Road/Mill Creek Road left turn) and B(9) (noise) were not sufficiently raised to warrant a response under Goal 2, and we conclude for the same reason they were not adequately raised to require a specific response in the county's findings under Goal 12. Subassignments of error B(4) (one-mile study area) and B(9) (noise) do not raise issues under Goal 12, and need not be addressed under this assignment of error for that reason as well.

The fifth assignment of error is sustained, in part.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that the county's decision that the proposal will result in no conflicts with the Marion Road/Mill Creek Road intersection is not supported by substantial evidence.

Under OAR 660-023-0180(4)(b) the county is required to determine whether there are any "[p]otential conflicts to local roads used for local access and egress to the mining site within one mile of the entrance * * *." The county found that the proposal will not result in a potential conflict with the Marion Road/Mill Creek Road intersection. Two of the findings adopted by the county in support of that conclusion are as follows:

> "The [TIA] examined roadway and intersection capacity in a one mile area and also within the City of Turner. The conclusion of the TIA was that capacity was adequate, and that no intersection would operate at lower [than] a level of service (LOS) C, a satisfactory LOS for unsignalized intersections." Record 24-25.

> "* * * All intersections were found to operate at less than 60% of their available capacity, with very good levels of service. No capacity or level of service deficiencies were identified anywhere. * * *" Record 63.

Petitioners argue that the above findings conflict with the following evidence that was produced by the applicant in a February 9, 1998 memorandum:

> "The EMME/2 model is showing a 3-4 percent annual growth rate along Mill Creek Road and Marion Road between 1995 and 2017. Assuming this growth rate, year 2010 average daily traffic volumes are expected to grow from 2,500 to 3,950 along Mill Creek Road and increase from 2,250 to 3,500 along Marion Road. A level-of-service analysis was performed at the Marion Road/Mill Creek [Road] intersection under forecasted 2010 volumes (assumes a 3.5% growth per year) during the critical a.m. peak hour. Results of the analysis indicate that under 2010 conditions the critical northbound left-turn movement would operate at-level-of-service 'E' with a volume-to-capacity ratio of 0.76." Record 143.

Petitioners characterize the county's finding that all intersections would operate at LOS C as "essential" and argue that it is inconsistent with the February 9, 1998 memorandum and therefore not supported by substantial evidence in the record.

Respondents answer that the February 9, 1998 memorandum conclusion that the disputed intersection would operate at LOS E is a "'worst case scenario' used to demonstrate that even given projected population increases proposed by the opponents * * * that the Mill Creek/Marion Road intersection would still operate at an acceptable LOS." Respondents' Brief 36. Respondents go on to contend that the county "actually found that the 'worst case' would not occur." *Id*.

The record citations provided by respondents do not show that the assumptions represented a "worst case scenario" and, more importantly, do not show that the county found the worst case scenario would not occur. The most that can be said from the pages in the record cited by respondents is that the county continued to find that the disputed intersection would continue to operate at LOS C. We cannot tell from the decision whether the county rejected the applicant's analysis that led to a prediction of LOS E or whether the county's findings are simply inconsistent with the February 9, 1998 memorandum.

Respondents also suggest that because the county "found that even a LOS 'E' is an acceptable LOS," any inconsistency between the disputed finding and the February 9, 1998 memorandum is harmless error. We reject this argument, because respondents cite to no place in the record where the county makes such a finding.[30]

Either of the reasons respondents suggest might provide an acceptable basis for the county to adopt findings explaining the disputed finding. However, if the county embraces either of those reasons, it must incorporate them into its findings. We agree with petitioners that the disputed finding appears to be an essential part of the decision and that, in view of the February 9, 1998 memorandum, it is not supported by substantial evidence in the record.

The sixth assignment of error is sustained.

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[30]Respondents may be relying on the TIA, which explains that "LOS E is generally considered to represent the minimum acceptable design standard." TIA B-2. If respondents are relying on this language in the TIA, we do not agree that it is sufficient, by itself, to explain the apparent discrepancy between the finding that all intersections will operate at LOS C and the evidence that the intersection will operate at LOS E.

The county's decision is remanded.