BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MOLALLA RIVER RESERVE, INC.,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

CANBY UTILITY BOARD,
BRINKMAN DAIRY, CHRISTINE BRINKMAN, MICHAEL BRINKMAN,
DEMETRY BURKOFF, MULINO MOLALLA NEIGHBORS UNITED,
WARREN L. JONES, BARBARA JONES, RICHARD J. MILLER, Jr.,
JOAN MILLER, WILLIAM J. TAYLOR, FRAN TAYLOR and
LAURIE FREEMAN SWANSON,
Intervenors-Respondent.

LUBA No. 2001-199

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Paul R. Hribernick and Stark Ackerman, Portland, filed the petition for review. With them on the brief was Black Helterline LLP. Paul R. Hribernick argued on behalf of petitioner.

Michael E. Judd, County Counsel, Oregon City, John H. Hammond, West Linn, Jeffrey L. Kleinman, Portland, and Kristin L. Udvari, Portland, filed a joint response brief on behalf of respondent and intervenors-respondent. John H. Hammond and Jeffrey L. Kleinman argued on behalf of respondent and intervenors-respondent. With them on the brief was Hutchison, Hammond and Walsh, P.C. and Ball Janik, LLP.

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

REMANDED 06/06/2002

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

Petitioner appeals a county decision that designates its property as a significant aggregate resource site but denies a zoning map amendment that would allow mineral and aggregate mining on the site.

MOTIONS TO INTERVENE

Canby Utility Board, Brinkman Dairy, Christine Brinkman, Michael Brinkman, Demetry Burkoff, Mulino Molalla Neighbors United, Warren L. Jones, Barbara Jones, Richard J. Miller, Jr., Joan Miller, William J. Taylor, Fran Taylor, and Laurie Freeman Swanson, opponents below, move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.[1]

FACTS

Petitioner filed a post-acknowledgment plan amendment (PAPA) application for an amendment to the Clackamas County Comprehensive Plan to list its property as a significant aggregate resource site on the county's comprehensive plan inventory under Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and to approve a mineral and aggregate overlay district allowing mineral and aggregate mining on the site. The subject property is zoned exclusive farm use (EFU) and is located on the Molalla River near the City of Molalla. Intervenor-respondent Canby Utility Board provides domestic water service for the City of Canby and takes water from the Molalla River 13.5 miles downstream from the subject property. The Clackamas County Planning Commission recommended denial of the mineral and aggregate overlay due to concerns over mining-related dust and turbidity. The Clackamas County Board of Commissioners approved petitioner's request to list the site as a

[1] Because respondent and intervenors-respondent filed a joint response brief, we will refer to them collectively as respondents.

significant aggregate resource site, but it concurred with the planning commission and denied the mineral and aggregate overlay. This appeal followed.

INTRODUCTION

The county's finding that the site is a significant mineral and aggregate resource site is not challenged in this appeal.[2] Once an aggregate site is determined to be significant, the local government must determine whether to allow mining on the site. That determination is governed by OAR 660-023-0180(4). The relevant text of that rule is set out in the margin, and we briefly describe the process that is required by the rule before turning to petitioner's assignments of error.[3]

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[2] *See generally* OAR 660-023-0180(3) for the criteria for determining whether mineral and aggregate sites are deemed "significant."

[3] OAR 660-023-0180(4) provides in pertinent part:

> "For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a PAPA application involving a significant aggregate site, the process for this decision is set out in subsections (a) through (g) of this section. For a PAPA involving a significant aggregate site, a local government must complete the process within 180 days after receipt of a complete application that is consistent with section (6) of this rule, or by the earliest date after 180 days allowed by local charter. 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 large enough to include uses listed in subsection (b) of this section and 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 purposes of this section, 'approved land uses' are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. 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;

Under OAR 660-023-0180(4)(a), the local government must first identify an impact area for the proposed mining activity. The local government must then identify approved land uses within the impact area that will be affected by the mining and specify any predicted conflicts. OAR 660-023-0180(4)(b). If possible, the local government must minimize any predicted conflicts through reasonable and practicable measures and allow the mining. OAR 660-023-0180(4)(c). If it is not possible to minimize the predicted conflicts, that does not necessarily mean that the request to mine must be denied. In the event that one or more conflicts cannot be minimized, the local government must then determine the economic, social, environmental, and energy (ESEE) consequences of "allowing, limiting, or not

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"* * * * *

"(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[.]

"* * * * *

"(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 governments shall determine the ESEE [economic, social, environmental and energy] consequences of either allowing, limiting, or not allowing mining at the site. Local governments shall reach this decision by weighing the ESEE consequences, with consideration of the following:

"(A) The degree of adverse effect on existing land uses within the impact area;

"(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and

"(C) The probable duration of the mining operation and the proposed post-mining use of the site."

allowing mining at the site." After weighing the ESEE consequences, the local government must determine whether to allow, limit, or not allow mining at the proposed site.

In the present case, the county established an impact area and identified conflicting uses. The county also determined that dust conflicts with existing and approved uses and turbidity conflicts with a Goal 5 resource, the Molalla River, could not be minimized. Instead of determining the ESEE consequences of allowing, limiting, or not allowing the proposed mining, the county prohibited mining on the basis that petitioner had not provided an ESEE analysis. The county then denied petitioner's application to allow mining on the property. Petitioner's first assignment of error challenges the county's findings regarding dust conflicts; the second assignment of error challenges the findings regarding turbidity conflicts; and the third assignment of error challenges the county's failure to conduct the ESEE determination required by OAR 660-023-0180(4)(d).

We reject below petitioner's challenge to the county's findings that turbidity impacts cannot be mitigated. However, those turbidity findings obligate the county to perform the ESEE determination that is required by OAR 660-023-0180(4)(d) and we agree with petitioner that the county's failure to conduct the ESEE determination that is required by OAR 660-023-0180(4)(d) requires remand. With regard to dust conflict mitigation, we also agree with petitioner that the county's findings are inadequate to explain why the county believes petitioner does not qualify for a statutory exemption that provides access to water for dust suppression. We also conclude that the county's findings are inadequate to explain the county's conclusion that petitioner failed to demonstrate that dust conflicts can be minimized.

FIRST ASSIGNMENT OF ERROR

The county determined that dust conflicts with existing and approved uses within the impact area could not be minimized. Petitioner's argument under the first assignment of error is twofold. First, petitioner argues that it is undisputed that any dust conflicts that

might be associated with the proposed mining operation can be mitigated if petitioner has access to at least 3,300 gallons of water per day (gpd). Second, petitioner argues that the record establishes that it has access to at least 5,000 gpd. We first turn to petitioner's second argument.

A. Petitioner's Right to 5,000 gpd

Ultimately, it appears that access to water is a critical component in addressing dust conflict minimization. In the proceedings below, petitioner identified a number of sources for water that it believed would be sufficient to minimize impacts from dust. The county's decision finds that none of those sources are available to petitioner. On appeal, petitioner devotes most of its first assignment of error to the argument that it can drill a 5,000 gpd well within a quarter-mile of the river due to a statutory exemption to the requirement of obtaining a permit from the Oregon Water Resources Division (WRD). ORS 537.545.[4] The county apparently found that petitioner could not drill a well within a quarter-mile of the river because of a "hydraulic presumption" that groundwater within a quarter-mile of a river is hydrologically connected and would interfere with the river. OAR 690-009-0040(4)(a).[5]

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[4] ORS 537.545(1) provides:

> "Except as provided in subsection (4) of this section, no registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate under ORS 537.505 to 537.795 and 537.992 is required for the use of ground water for:
>
> "* * * * *
>
> "(f) Any single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day[.]"

[5] OAR 690-009-0040(4) provides:

> "All wells that produce water from an aquifer that is determined to be hydraulically connected to a surface water source shall be assumed to have the potential to cause substantial interference with the surface water source if the existing or proposed ground water appropriation is within one of the following categories:
>
> "(a) The point of appropriation is a horizontal distance less than one-fourth mile from the surface water source[.]"

Petitioner argues that the "hydraulic presumption" does not apply to wells that are exempt under ORS 537.545. OAR 690-009-0030.[6]

Respondents argue that petitioner failed to raise any issue concerning the applicability of the "hydraulic presumption" below and cannot raise that issue for the first time on appeal. ORS 197.763(1); 197.835(3). Petitioner responds that the issue of obtaining a well pursuant to the statutory exemption was raised many times below.

In considering waiver arguments under ORS 197.763(1) and 197.835(3), we must determine whether "fair notice" was given to the parties and decision maker, such that a reasonable person would know that an issue must be addressed. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). In the present case, although the statutory exemption was discussed, petitioner never argued before the county, as it does now, that the "hydraulic presumption" does not affect its right to drill a well within a quarter-mile of the river under the statutory exemption. In fact, petitioner specifically indicated that it believed the "hydraulic presumption" did prevent drilling a well within a quarter-mile of the river under the statutory exemption:

> "* * * The third source [of water], Water Resources Division rules allow for industrial purposes. One industrial site can take 5,000 gallons a day without a permit. There are a couple of restrictions on that. You gotta be outside the presumptive influence [hydraulic presumption] corridor of the river so you have to be more than a quarter mile away." Testimony of Petitioner's Counsel, Record 1202-03.

Although the statutory exemption was discussed below, we do not believe the county was put on fair notice that petitioner believed it was entitled to drill a well within a quarter-mile of

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[6] OAR 690-009-0030 provides:

> "The following rules establish criteria to guide the Department in making determinations whether wells have the potential to cause substantial interference with surface water supplies and in controlling such interference. The rules apply to all wells, as defined in ORS 537.515(7), and to all existing and proposed appropriations of ground water *except the exempt uses under ORS 537.545*. * * *" (Emphasis added.)

the river pursuant to the statutory exemption. Because petitioner did not raise the issue, we do not consider it for the first time on appeal. ORS 197.763(1); 197.835(3).

Petitioner also argues that it can drill a well more than a quarter-mile from the river and that under the statutory exemption it can withdraw up to 5,000 gpd. It is undisputed that part of the subject property is outside the quarter-mile limit. As the above-quoted language indicates, petitioner raised the issue of using water from a well located outside the quarter-mile area that is affected by the "hydraulic presumption."[7] Respondents' response brief does not address this argument, and the county's findings state only:

> "* * * The proposal to drill wells [outside] a quarter-mile of the river is insufficient because this water has yet to be appropriated and its legal availability is uncertain. * * *" Record 9.

The county must address and respond to specific issues raised in the proceedings below that are relevant to compliance with applicable approval standards. *Hillcrest Vineyard v. Bd. of Comm. Douglas Co.*, 45 Or App 285, 293, 608 P2d 201 (1980); *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Water obtained pursuant to the statutory exemption is not subject to appropriation, and the county's findings to the contrary do not address, and appear to be inconsistent with, ORS 537.545(1)(f). The challenged decision provides no legally sufficient basis for the above-quoted conclusion that the legal availability of water from an exempt well is uncertain.

B. Amount of Water Needed to Mitigate Dust Conflicts

Petitioner submitted evidence that 3,300 gpd would be more than enough water to mitigate any dust conflicts that might otherwise be generated by the proposed mining operation. Petitioner's hydrogeologist submitted evidence that minimizing dust impacts is a matter of having adequate water and that the amount of water necessary for dust control at

[7] At oral argument, petitioner asserted that it may be entitled to three wells, each of which could withdraw 5,000 gpd, because the subject property consists of three lots. That argument was not raised in petitioner's brief, and we do not consider it. OAR 661-010-0040(1).

aggregate sites will vary from site to site. According to petitioner's expert, a hard rock mining site in Yamhill County calculated its worst-case water need scenario to be 5,500 gpd for dust suppression. The expert explained that this worst-case scenario was much worse than could be anticipated for the proposed mine because the Yamhill County site is not wet mining and has a large quarry floor requiring dust suppression. The proposed mine has no quarry floor and significant portions will be open ponds. Record 1049. The expert estimated that the proposed site would require no more than 3,300 gpd for dust suppression.

The only evidence that respondents identify that can be read to dispute petitioner's evidence is the following statement by the opponents' environmental engineer and water rights examiner that:

> "* * * The exempt use water right for industrial use is also stated as a source. The exempt use industrial water right is only for 5000 gallons per day which is less than 3.5 gallons per minute. A garden hose runs 5 gallons per minute and is not enough to supply a rock crushing and washing operation and dust control water needs. * * *" Record 1481.

The county's findings do not explicitly address either petitioner's evidence or the above-quoted opponents' evidence with regard to whether mitigating dust conflicts is purely a question of having enough water and, if so, whether 3,300 gpd is enough water. However, the challenged decision includes the following findings:

> "However, for both agricultural and residential uses, based on substantial evidence in the record, the applicant has not demonstrated that the predicted significant conflicts related to dust can be minimized. In making this determination, the Board makes the following findings:
>
> "**The applicant failed to provide sufficient information concerning its materials handling, processing, and loading operations to show how dust will or will not be generated and/or minimized.**
>
> "The application shows generally where the processing area will be located. It states that typical conveyors will be used to transport excavated rock for processing. However, the applicant has not shown how dust will be mitigated on the conveyors, especially at junction points; what the crusher operation will consist of, including the type of crushing equipment to be employed; or how crushed and/or stockpiled rock will be loaded onto trucks for transport

> from the site. Thus, the Board finds that the applicant has failed to meet its burden to identify the specific components of an inherently dusty aggregate operation, and then to show how (or if) specific mitigation measures would minimize the conflicts of dust with the impacted residential and agricultural uses. Even though the site plan did show the general location of the crushing operation, the applicant did not show, by evidence or testimony by the operator, the specific types of crushing and conveyor equipment to be used, the nature and extent of the rock and truck loading operation or the stockpile. Because these operational elements will produce a significant amount of dust and their precise impact and location is unclear, the applicant did not meet its burden of showing how the dust produced by the operation would be minimized. Without a site-specific layout of the proposed mining operation explaining where and how much dust will be created, where and how it will travel, and how it will be minimized, it is impossible to determine whether the dust impacts will conflict with the surrounding residential and agricultural uses." Record 7.

Contrary to petitioner's first argument under the first assignment of error, the above findings seem to take the position that until more detail is known about the mining operation that is proposed for the site, so that more is known about the quantity of dust and the location and nature of any dust generation, the county cannot know whether dust conflicts will be minimized. The findings *appear* to take the position that in determining whether dust conflicts will be minimized, it is first necessary to determine the precise nature and location of dust generation before the potential conflicts can be identified and the amount of water needed to minimize those conflicts can be estimated. We say the findings appear to take that position, because they do not clearly do so.[8] That may explain why petitioner neither assigns error to the above-quoted findings nor specifically directs any of its arguments under the first assignment of error at those findings. If those findings are viewed as an independent basis

[8] Subsequent findings in support of the county's determination that petitioner failed to demonstrate it has access to the water that will be needed to minimize dust conflicts can be read to couch the question of dust conflict minimization as solely a question of access to an adequate supply of water, rather than a question of whether more detail is needed regarding the proposal to determine how much water is needed:

> "The Board finds that water is the essential ingredient in minimizing the dust conflict. This issue is ultimately reduced to whether the applicant possesses or has legal access to water rights sufficient to minimize the dust conflict. * * *" Record 7.

for the county's decision that petitioner failed to adequately demonstrate that dust conflicts can be minimized, petitioner's failure to assign error to those findings would require that the first assignment of error be denied for that reason alone.

Although it is a close question, we do not reject petitioner's first assignment of error for failure to assign error to the quoted findings. The county's apparently mistaken belief that petitioner has no access to water for dust suppression permeates the county's conclusion that dust conflicts cannot be minimized. The quoted findings completely ignore petitioner's "worst case" approach to addressing the questions of whether water will solve the dust conflict minimization problems that might be associated with the proposed mine and, assuming that is the case, whether 3,300 gpd is an adequate amount of water. As described above, that approach appears to be a reasonable solution for resolving dust conflicts where there may be material variations in the quantity of water needed from site to site.

The county's findings quoted above seem to take the position that more detail about the particulars of the proposed mining operation is essential, before it is possible to determine whether dust conflicts can be minimized by applying water and, if so, how much water will be needed. Although the findings offer no explanation for why the county rejected the approach that petitioner took to addressing dust conflict minimization and offer no explanation for why the county believes a very different approach to dust conflict minimization is necessary, we are not in a position to say the approach the county is requiring is unreasonable.

Given the very different approaches petitioner and county took in addressing the dust conflict minimization requirement, we believe the county's findings are inadequate because they fail to provide petitioner with an explanation for why the county believes the approach that petitioner took to address that requirement is inadequate and why the county believes a more detailed site and operating plan is essential. In addition, the county's findings must explain, in at least a general way, how that more detailed site and operating plan must be

used by petitioner in addressing the ultimate question, *i.e.*, can the dust conflicts that can be expected from mining the subject property be minimized. *See Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994) (in denying subdivision application, local government must provide reasonably definite guides about what will be required for approval or inform applicant that approval is unlikely).

In summary, we reject petitioner's argument that it is undisputed that any dust conflicts that may be associated with mining on the subject property can be minimized so long as petitioner has access to at least 3,300 gpd of water. The above-quoted findings apparently dispute that contention. However, as we explained above, we also conclude that the county's findings are inadequate to explain why the county believes petitioner has not demonstrated that dust conflicts can be minimized. Although the detail that is required in findings of noncompliance with an applicable approval criterion may be less than is required for findings of compliance with an approval criterion, petitioner is entitled to a better explanation of why its approach was rejected and a different approach is required. Petitioner is also entitled to a better idea of how to go about complying with the approach the county appears to require. *Id.*

C. Conclusion

Petitioner requests that we reverse the county's decision based on the first assignment of error. We must reverse a local government decision if we find:

> "Based on the evidence in the record, that the local government decision is outside the range of discretion allowed a local government under its comprehensive plan and implementing ordinances[.]" ORS 197.835(10)(a)(A).

The Court of Appeals has interpreted this language to mean that LUBA must reverse a denial of permit approval if the record establishes, as a matter of law, that the application must be approved. *Smith v. Douglas County*, 93 Or App 503, 508, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989).

We do not agree that petitioner has established as a matter of law that the dust that will be generated in mining the site can be minimized with 3,300 gpd of water. Thus, we do not reverse the county's decision based on the first assignment of error. However, because we conclude that the county's findings are inadequate to explain the approach the county is requiring to address dust conflict and are inadequate to explain why petitioner's approach was rejected, remand of the challenged decision for additional findings under the first argument under the first assignment of error is appropriate. In addition, it appears that petitioner has a right to drill at least one 5,000 gpd well on the part of the property that is outside the quarter-mile "hydraulic presumption" area. If, as appears to be the case, petitioner has access to at least 5,000 gpd of water to suppress dust, it may be that the county will conclude on remand that the additional detail that it cited in its initial decision is unnecessary to determine whether dust conflicts can be mitigated.

On remand the county must first address and resolve petitioner's contention that at least one 5,000 gpd well can be drilled on the subject property outside the quarter-mile "hydraulic presumption" area. If that issue is resolved in petitioner's favor, the county will then be in a position to determine whether the availability of that water changes the county's view about the need for additional mining operational detail in assessing dust conflicts. If the county remains of the view that additional mining operational detail is needed, the county must provide at least general guidance about how to go about providing that detail and using it to address dust conflict mitigation.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

The county determined that conflicts with other acknowledged Goal 5 resource sites and uses within the impact area caused by turbidity cannot be minimized. The county found that turbidity discharges from the proposed mining would adversely impact the river.[9]

OAR 660-023-0180(4)(b)(D) requires the county to consider the impacts of the proposed mining on other Goal 5 resources. *See* n 3. The Molalla River is listed as an acknowledged Goal 5 resource on the county's Goal 5 inventory. Turbidity released by the proposed mine could conflict with the river. For all conflicts, if there are reasonable and practical measures that would minimize the conflict, then the local government must approve the application. OAR 660-023-0180(4)(c). To "minimize conflicts" means to reduce a conflict to a level that is no longer significant. When conflicts that can be numerically quantified are involved, such as turbidity, OAR 660-023-0180(1)(f) provides:

> "* * * For those types of conflicts addressed by local, state or federal standards (such as Department of Environmental Quality [(DEQ)] standards for noise and dust levels) to 'minimize a conflict' means to ensure conformance with the applicable standard."

The numerical turbidity standard is that no more than a 10-percent increase may occur due to the activity creating the turbidity.[10]

Petitioner argues that it produced four experts who all testified that the numeric turbidity level that would be generated by the proposed mining is zero, while all the expert testimony produced by opponents addressed turbidity generally and had nothing to do with the applicable numeric standard. According to petitioner, because the only relevant evidence

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[9] "Turbidity" means "a measure of the cloudiness of water caused by suspended particles. The units of measure for turbidity are nephelometric turbidity units (NTU)." OAR 333-061-0020(142).

[10] OAR 340-041-0445(2)(c) provides:

> "Turbidity (Nephelometric Turbidity Units, NTU): No more than a ten percent cumulative increase in natural stream turbidities shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. * * *"

regarding turbidity was that the applicable discharge would be zero, as a matter of law, the county erred in concluding that the proposed mining may conflict with an acknowledged Goal 5 resource.

Respondents assert that petitioner failed to raise this issue below and cannot raise it for the first time on appeal. ORS 197.763(1); 197.835(3). Petitioner counters that the issue of compliance with the numerical turbidity standard was raised numerous times below. We agree with petitioner. The issue of compliance with the DEQ standard was addressed many times. Record 748, 812, 959, 995, 1114. In fact, the opponents' experts explicitly raised the issue:

> "The proposal for the Molalla River Reserve project indicates that it will comply with DEQ water quality requirements for the Willamette Basin (OAR 340-041) which requires that turbidities in the Molalla River due to the project will not exceed 10% over natural river turbidities. If the project meets this requirement continuously, then, in our opinion, the existing [Canby Utility Board] water supply system will not be adversely impacted in a significant or measurable way by increased turbidity levels." Record 1495.

This issue was more than sufficiently raised to put the county on "fair notice" that it should be addressed.

Petitioner directs us to statements from the four experts who assert that there will be zero turbidity discharge into the Molalla River and that there will be no adverse impacts on the river. Petitioner's experts state that water from the mine will not directly enter the surface water of the Molalla River, except during some flood events. Outside of such flood events, petitioner's experts explained that any exchange of water between the mine and the Molalla River will be through groundwater migration, and the distance between the mine and the location where such groundwater would eventually enter the river downstream is more than sufficient to filter out any turbidity. During flood events that overtop the mine, petitioner's experts explained that the turbidity levels in the Molalla River during such events will be higher than those in the mine, with the result that the 10-percent increase standard will not be violated. Record 115, 136, 642, 1114. According to petitioner, the evidence it

submitted is the *only* evidence in the record directed towards compliance or noncompliance with the DEQ numerical turbidity standard of OAR 340-041-0445(2)(c).

While it is true that none of the experts who testified against the mining proposal provided testimony that was specifically directed at the 10-percent standard, we do not believe that is fatal to the county's findings. The turbidity standard requires a comparison of the natural turbidity level above the proposed mining site with the turbidity level below the site. The problem with making a numerical comparison is that the natural turbidity level of the river is not static. The natural turbidity level of the Molalla River as it passes the subject property apparently fluctuates greatly. What might be an impermissible discharge of turbid water from the mine during certain water conditions might not violate the DEQ standard during other levels even though the turbidity of the discharge itself would be the same.

The county's findings state:

> "We find the applicant has not demonstrated that the proposal will not significantly and adversely affect the quality of the Molalla River. The Board finds that the evidence adduced by and on behalf of the [opponents] is more persuasive than the evidence adduced by and on behalf of the applicant, or which the applicant otherwise asserts supports its position herein. We find that substantial turbidity is likely to be discharged into the Molalla River by the proposed mining operation, with significant adverse impacts upon water quality and fish habitat in at least that portion of the river lying within the 1,500-foot impact area. We further find that these significant impacts cannot be minimized." Record 11.

During oral argument, counsel for petitioner explained that the proposed mining site plan and design had changed numerous times during the proceedings below in response to concerns raised by different parties. The parties' briefs, however, make no mention of the different mining proposals, nor do they explain which evidence may or may not be relevant due to the changes in the proposal. We will not search a 3,500-page record in an attempt to determine whether evidence presented regarding an earlier proposal applies to subsequent modifications. Respondents direct us to numerous parts of the record that support their assertion that turbidity impacts cannot be minimized. Petitioner does not dispute that the

evidence applies to its proposal, only the value of such evidence. Therefore, we will consider all the evidence cited by respondents.

As we discussed, it is not necessary that the opponents' experts supply a specific turbidity percentage increase, but rather they must supply evidence from which the county could reasonably determine that the 10-percent standard would be exceeded. We believe that the county is entitled to draw reasonable inferences from testimony regarding increased turbidity to determine that the numerical standard would be exceeded. Although the county's findings are perhaps not as artfully written as they could be, it is reasonably clear that the county believed that turbidity would be increased to an extent that it could not be minimized to meet the DEQ standard.

The findings make clear that the county considered the issue to be a battle of the experts and chose to believe the opponents' experts. A local government may rely on the opinion of an expert if, considering all the relevant evidence in the record, a reasonable person could have chosen to rely on the expert's conclusions. *Bates v. Josephine County*, 28 Or LUBA 21, 29 (1994). That a petitioner may disagree with that conclusion provides no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993). Therefore, we must determine whether it was reasonable for the county to rely on the opponents' experts.

While there are many places in the record where the opponents' experts testified that increased turbidity would result from the proposed mine, the following provides an illustrative example:

> "* * * There has been zero data submitted by the applicant to quantify the turbidity of the river or the pit during floods. The pit will always be turbid from the wet mining dragline operations. The level of turbidity of flood events is quite variable depending upon the weather conditions that cause the flood and if the soil is frozen at the time of the flood. The Molalla River watershed is a high elevation snow pack and rain fed area that has some winter storms occurring from relatively warm rain falling on snow that is on frozen ground. These storms result in rapid snow melt and flashy runoff but contain very little frozen soil. The water turbidity during a flood that results

> from these storms is very low. These storms are usually less than the 30 year flood events that would cover the full pit but can be greater than the 10 year flood event that will overtop the pit and flush out the turbid water that it contains. During such events the contribution of turbidity from the pit will be significant and cannot be minimized." Record 126.[11]

We believe the county could reasonably conclude from the above testimony that during certain periods, particularly during certain types of winter storms, the natural turbidity in the river would not be extremely high and that very turbid water from the mine could enter the river, which would increase the turbidity level by more than 10 percent. In other words, there is conflicting evidence in the record, and the choice between conflicting evidence belongs to the county.

Petitioner also briefly suggests that even if the county found turbidity would have significant impacts, it failed to "determine reasonable and practical measures that would minimize the conflicts." OAR 660-023-0180(4)(c). The county found that all the proposals from petitioner would not result in the conflict being minimized. Petitioner, however, does not identify specific measures in the record that it proposed but the county did not consider. To the extent this constitutes another argument, that argument is not sufficiently developed for our review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under OAR 660-023-0180(4)(d), when a local government determines that all cognizable conflicts cannot be minimized, it must determine the ESEE consequences of allowing, limiting, or not allowing mining and issue its decision accordingly. The county found that all conflicts could not be minimized, *i.e.* dust and turbidity, but did not determine the ESEE consequences and decide whether to allow, limit, or not allow mining based on those consequences. The county's findings state that performing an ESEE analysis was

[11] This testimony appears to be directed at the final mining proposal.

petitioner's responsibility and because petitioner did not provide such an analysis the county denied the mining permit. Petitioner argues that the county misconstrued the applicable law by improperly shifting the burden to petitioner.

Respondents assert that petitioner failed to raise this issue below and cannot raise it for the first time on appeal. ORS 197.763(1); 197.835(3). Petitioner's position below, and on appeal, is that an ESEE analysis under OAR 660-023-0180(4)(d) is not required because all conflicts can be minimized.[12] We believe the county was given "fair notice" that petitioner did not believe it was required to provide an additional ESEE analysis pursuant to OAR 660-023-0180(4). Furthermore, respondents direct us only to comments made by county commissioners during deliberations after the record had been closed that allegedly indicate that petitioner should have known the burden of conducting an ESEE analysis would be shifted. Record 16. At that point it was too late for petitioner to submit a position for the record, let alone conduct an ESEE analysis.[13] Petitioner did not waive the issue.

Once a local government determines that one or more cognizable conflicts cannot be minimized, OAR 660-023-0180(4)(d) provides:

> "The local government shall determine any significant conflicts identified under the requirements of section (c) of this section that cannot be minimized. Based on these conflicts only, local government shall determine the ESEE

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[12] Petitioner provided an ESEE analysis pursuant to OAR 660-023-0180(5). Record 2585-93. However, that ESEE analysis is required only if the local government finds conflicts can be minimized under OAR 660-023-0180(4)(c) and allows mining. The ESEE analysis that is required under OAR 660-023-0180(5) *is directed at possible future conflicting uses*. OAR 660-023-0180(5) provides:

> "Local governments shall 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. (This requirement does not apply if, under section (4) of this rule, the local government decides that mining will not be authorized at the site.)" (Emphasis added.)

[13] Respondents cite *Lett v. Yamhill County*, 32 Or LUBA 98 (1996), for the proposition that petitioner was required to raise the issue below. In *Lett*, however, the petitioner failed to object to the size of the county's impact area, the first step in the analysis, throughout the proceedings. In the present case, conducting an ESEE analysis is the last step in the process and comes into play only in the event all conflicts cannot be minimized. *Lett* is of no benefit to respondents.

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 the following:

"(A) The degree of adverse effect on existing land uses within the impact area;

"(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and

"(C) The probable duration of the mining operation and the proposed post-mining use of the site."

The county's findings state:

"Throughout the hearing process, and as evidenced in their original application, the applicant took the position that all of the conflicts with current uses could be minimized. * * * As provided by [OAR 660-023-0180(4)(d)], if all conflicts can be minimized, an ESEE analysis and assessment of ESEE consequences is unnecessary. However, the Board has determined that, based on substantial evidence in the record, conflicts with dust and turbidity to the Molalla River cannot be minimized. Once it concluded that certain conflicts with current uses cannot be minimized, the Board must look to the applicant's ESEE analysis in order to determine the ESEE consequences of allowing, limiting or prohibiting mining at the site. As the applicant has failed to provide the Board with any ESEE analysis, it is impossible for the Board to draw any ESEE conclusions therefrom. As a result, this criterion is not met." Record 12-13.

Petitioner argues that the rule clearly requires the local government to determine the ESEE consequences and clearly requires the local government to reach the ultimate decision by weighing the ESEE consequences. According to petitioner, the county cannot delegate this decision-making obligation.

Respondents argue that despite the clear language of the rule requiring the local government to determine the ESEE consequences, LUBA precedent establishes that the burden falls on the applicant. In *Knapp v. City of Jacksonville*, 20 Or LUBA 189, 199-200 (1990), the city denied a subdivision application that affected Goal 5 resources because, among other things, the application did not address ESEE consequences. We stated:

"* * * We do not believe that references in [Goal 5] to *local governments* being required to identify conflicts, determine ESEE consequences and

develop programs to achieve the goal do anything to alter the principle that when a quasi-judicial land use action must comply with Goal 5, the applicants bear the burden of proving such compliance." *Id*. at 200 n 7 (emphasis in original).

In *Knapp*, however, we were construing OAR 660-016-0005, which generally involves local governments developing plans to comply with the requirements of Goal 5 and does not contemplate PAPAs that concern applications for approval of uses that are themselves protected by Goal 5. *Knapp* essentially stands for the principle that applicants bear the burden of demonstrating compliance with Goal 5. The amendments that created OAR chapter 660, division 23, however, now establish specific procedures for how that compliance is to be demonstrated. We agree with petitioner that *Knapp* has little relevance in deciding the issue before us in this appeal. We turn to the requirements of OAR 660-023-0180(6), which provides:

> "In order to determine whether information in a PAPA submittal concerning an aggregate site is adequate, local government shall follow the requirements of this section rather than OAR 660-023-0030(3). An application for a PAPA concerning a significant aggregate site shall be adequate if it includes:
>
> "(a) Information regarding quantity, quality, and location sufficient to determine whether the standards and conditions in section (3) of this rule are satisfied;
>
> "(b) A conceptual site reclamation plan;
>
> "* * * * *
>
> "(c) A traffic impact assessment within one mile of the entrance to the mining area pursuant to section (4)(b)(B) of this rule;
>
> "(d) Proposals to minimize any conflicts with existing uses preliminarily identified by the applicant within a 1,500 foot impact area; and
>
> "(e) A site plan indicating the location, hours of operation, and other pertinent information for all proposed mining and associated uses."

This rule sets out the specific requirements for an aggregate site PAPA application. The county found that petitioner's application was complete. Record 18. The rule does not require an applicant to provide an ESEE analysis for use, if necessary, under OAR 660-023-

0180(4)(d). Petitioner concedes that the burden of providing evidence to satisfy Goal 5 belongs on the applicant. However, the rule requirement that the county determine ESEE consequences and decide whether to allow, limit, or not allow mining is part and parcel of the quasi-judicial function that the county must perform under the rule, rather than an application requirement or burden of proof that is imposed on the applicant.

The nature of the process itself further illustrates that the local government must determine the ESEE consequences and make the final decision regarding mining. An ESEE determination under OAR 660-023-0180(4)(d) only occurs when the local government decides that one or more conflicts cannot be minimized. Neither the applicant nor opponents will know for sure whether that ESEE determination will be necessary until after the record is closed and the local government has made its decision. It is hard to see how an applicant could be expected to speculate regarding the ESEE consequences of impacts it believes will be minimized in the event the local government later disagrees based on evidence that is submitted during the proceedings by the applicant or by others. Analysis of ESEE consequences will necessarily be dependent upon whether, and the extent to which, the local government concludes that certain impacts are not minimized. If an applicant does not anticipate the possibility that a local government will find that one or more impacts cannot be minimized, and fails to provide evidence regarding such conflicts that would allow the county to rule in its favor under the ESEE determination that is required by OAR 660-023-0180(4)(d), then the applicant runs the risk of an unfavorable ESEE determination under OAR 660-023-0180(4)(d) in the event such an ESEE determination becomes necessary. However, the local government, as part of its decision-making obligations, must still conduct that ESEE determination and, based on that determination, decide whether to allow, limit, or not allow mining.

Finally, respondents point out that OAR 660-023-0180(4)(d) only requires that the county consider ESEE *consequences*. That rule is silent about who has responsibility for

preparing any ESEE *analysis* that may be necessary to support the required county determination under OAR 660-023-0180(4)(d) concerning ESEE consequences of "allowing, limiting, or not allowing mining at the site." Respondents contrast this lack of reference in OAR 660-023-0180(4) with OAR 660-023-0040, which explicitly requires the county to prepare an ESEE analysis to support county ESEE determinations when it acts under the generally applicable Goal 5 provisions.

The above argument, like the county's decision, appears to assume that there must be something that is formally designated an ESEE *analysis*, before it is possible for the county to perform its obligation under OAR 660-023-0180(4)(d) to determine whether to "allow, limit, or not allow mining at the site." Petitioner conceded at oral argument that the applicant ultimately retains the burden of proof throughout the county's proceedings in this matter. Assuming that petitioner's concession represents a correct reading of the rule, the county is entitled to limit its consideration to the evidence that is submitted to the county by the applicant and by other parties. However, petitioner does not concede that OAR 660-023-0180(4)(d) requires it to prepare a formal ESEE analysis document, and we agree with petitioner on this point. Had the legislature intended that the applicant must prepare such a document, it would have said so in OAR 660-023-0180(6) (PAPA application requirements) or in OAR 660-023-0180(4)(d) itself. OAR 660-023-0180(4)(d) simply dictates that the county "determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site" and make its decision accordingly. The county may not cite the lack of an applicant-prepared ESEE analysis document to excuse performing its obligation to "determine the ESEE consequences of either allowing, limiting, or not allowing mining" and rendering an ultimate decision on the request that is consistent with that determination.

We recognize that the county's reference to the lack of an applicant-prepared ESEE analysis may have been intended as a shorthand conclusion that the county does not believe that there is adequate information in the record to support approval of the request to

authorize mining on the subject property. Even if that is the case, such a cursory disposition of its obligation under OAR 660-023-0180 is inadequate. The county must review the evidence that is in the record before it that may have some bearing on the ESEE consequences of allowing the requested mining, limiting the requested mining to some extent, or denying the requested mining altogether, and make its decision concerning the request based on that evidence.[14]

The third assignment of error is sustained.

CONCLUSION

Petitioner apparently has the right to drill at least one 5,000 gpd well on the portion of its property that is more than a quarter-mile from the Molalla River, and we have concluded above that the county's findings to the contrary are inadequate. On remand, the county must first address and resolve petitioner's contention that an exempt 5,000 gpd well is available under the exemption provided by ORS 537.545(1). If the county resolves that contention in petitioner's favor, the county must then reconsider whether petitioner has adequately demonstrated that dust conflicts can be mitigated, given that potential source of water for dust suppression. In addressing this question, if the county believes the question cannot be answered until petitioner submits additional detail concerning the proposed mining operation, it must offer some additional explanation for why petitioner's approach to this question was rejected, why the county believes that additional detail is required and generally how that information is to be used in addressing the dust conflict mitigation question. If the county again concludes on remand that dust conflicts cannot be minimized, the county must then consider the ESEE consequences of those conflicts, along with the

[14] Although we do not see that the county is obligated to do so under the rule, we see no reason why the county could not provide petitioner and other parties an opportunity to submit additional evidence and legal argument that might bear on the obligation that is imposed on the county under OAR 660-023-0180(4)(d), after it reaches a decision that one or more impacts cannot be minimized under OAR 660-023-0180(4)(c). Of course, there might not be time for any such additional proceedings under the 180-day deadline that is imposed by OAR 660-023-0180(4).

ESEE consequences of the identified turbidity conflicts, to determine whether to allow, limit or not allow mining on the site.

The county's decision is remanded.