BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BEAVER STATE SAND
AND GRAVEL, INC.,
Petitioner, Cross-Respondent,

vs.

DOUGLAS COUNTY,
Respondent,

and

ROBERT M. WRIGHT, WILLIAM M.
AUSTIN and DOROTHY AUSTIN,
Intervenors-Respondent,
Cross-Petitioners.

LUBA No. 2002-065

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Stephen Mountainspring, Roseburg, filed the petition for review and cross-response brief and argued on behalf of petitioner. With him on the briefs was Dole, Coalwell, Clark, Mountainspring, Mornarich and Aitken, PC.

No appearance by Douglas County.

Corinne C. Sherton, Salem, filed the response brief and cross-petition for review and argued on behalf of intervenors-respondent. With her on the briefs was Johnson and Sherton, PC.

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

REMANDED 10/11/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision that denies its request to place an aggregate site on a list of non-significant aggregate sites in the county's comprehensive plan.

REPLY BRIEF

Intervenors-respondent/cross-petitioners (intervenors) move to file a reply brief to respond to arguments in petitioner/cross-respondent's (petitioner's) brief that the county's actions are unconstitutional and that intervenors waived the issues raised in their cross-petition for review by not raising them below. There is no objection to the motion and it is allowed.

REQUEST TO TAKE OFFICIAL NOTICE

Petitioner requests that LUBA take official notice of Appendix 3 to the petition for review. Appendix 3 is a two-page document entitled "Analysis of Development Pressure on Farmland," which contains county population data drawn from the 2000 United States Census and county cropland acreage data drawn from the 1997 United States Census of Agriculture, and petitioner's analysis of that data. Petitioner argues that the data and analysis are useful in interpreting the intent of the Land Conservation and Development Commission (LCDC) in adopting OAR 660-023-0180(3)(d), set out below. Specifically, petitioner argues that the ratio of county population to the number of acres of cropland in each county is a reliable indicator of "development pressure," and that its analysis shows that development pressure in Oregon is the greatest in the counties described in OAR 660-023-0180(3)(d)(B), and least in the remaining counties in Oregon. According to petitioner, that analysis supports petitioner's argument, discussed below, that LCDC did not intend OAR 660-023-0180(3)(d) to apply to counties not listed in OAR 660-023-0180(3)(d)(B).

The Board has held that it has authority to take official notice of judicially cognizable law, described in Oregon Evidence Code (OEC) 202, but LUBA does not have authority to

take official notice of adjudicative facts. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995).[1] Intervenors argue that nothing in Appendix 3 constitutes the "public and private official acts" of a government body, or any other cognizable law. Instead, it is simply petitioner's analysis of data outside the record. Even if that data is from the Census, intervenors argue, LUBA cannot take official notice of data. *See DLCD v. Crook County*, 34 Or LUBA 243, 245-46 (1998) (soil classification tables produced by the U.S. Department of Agriculture, offered to prove the poor quality of soil on the subject property, are simply compilations of data and not "official acts" subject to official notice).

However, the type of material that may be considered in interpreting a statute or rule is significantly constrained under the framework established for such interpretations. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (prescribing three-step framework for interpreting statutes). Petitioner has not established that anything in Appendix 3 is the type of material we may consider under *PGE*, or that we can take official notice of pursuant to OEC 202. Therefore, we deny the motion to take official notice of Appendix 3.

In the alternative, petitioner argues that OAR 660-023-0180(3)(d) is unconstitutional as the county applied it and moves to take Appendix 3 into the record before LUBA, pursuant to OAR 661-010-0045.[2] However, petitioner makes no effort to explain how the

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[1] In relevant part, OEC 202 defines "law judicially noticed" to include:

> "* * * * *
>
> "(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States."

[2] OAR 661-010-0045 provides, in relevant part:

> "(1) * * * The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision * * *.

facts in Appendix 3 relate to the alleged unconstitutionality of the county's decision. Petitioner's motion to take evidence under OAR 661-010-0045 is denied.

FACTS

The subject parcel includes 80.10 acres and is zoned Exclusive Farm Use-Cropland (FC). The property borders the South Umpqua River and lies within the 100-year floodplain. Forty-eight percent of the property is within the South Umpqua River floodway. The property is composed of more than 62 percent U.S. Natural Resources Conservation Service (NRCS) Class I and II soils, if irrigated.[3] The property has been irrigated and farmed for most of the last 50 years, producing a variety of crops. The property was acquired by petitioner in 1998.

On October 13, 1999, petitioner submitted an application to amend the county comprehensive plan to add the subject property to the county's aggregate inventory. Petitioner identified a 35-acre proposed mining area on the west end of the property, adjacent to the South Umpqua River, and provided evidence that the mining area contains aggregate deposits that exceed Oregon Department of Transportation (ODOT) standards set forth at OAR 660-023-0180(3)(a). *See* n 9, below. The application was initially considered as part of a package of legislative amendments to the comprehensive plan. The application was later bifurcated from the legislative amendments and reviewed by the county as a quasi-judicial plan amendment request. On February 4, 2000, petitioner requested that hearings on the

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> "(2) Motions to Take Evidence:
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> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

[3] The subject property has water rights to irrigate 72 acres. We understand petitioner to take the position that those rights have probably been forfeited as a result of nonuse over the last five years. As discussed below, no issue regarding the nonavailability of water rights for irrigation was raised below, and the county's decision does not address that issue.

application be postponed indefinitely to permit the applicant to provide more evidence in support of the application. On October 18, 2001, petitioner requested that proceedings be resumed.

County staff scheduled a hearing before the county board of commissioners on February 6, 2002. Notice of the hearing stated that applicable criteria consisted of Land Use and Development Ordinance (LUDO) 6.500.2, applicable provisions of OAR chapter 660, division 16 and division 23, and the statewide planning goals.[4]

During the proceedings before the county board of commissioners, intervenors submitted testimony and argued that the property should not be added to the county's aggregate inventory because of the potential impact mining would have on the floodplain and floodway, local transportation systems, residential and agricultural activities in the area, and the necessary loss of valuable agricultural land. Petitioner argued below that such concerns were irrelevant to the applicable criteria, and that the only applicable criteria pertained to whether the subject property satisfied OAR 660-023-0180(3) standards for identifying "significant" aggregate sites, *i.e.*, the quantity, quality and location of the aggregate resource on the site.

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[4] LUDO 6.500.2 sets forth standards for quasi-judicial plan amendments, and provides in relevant part:

> "The application shall address the following requirements which shall be the standard for Amendment:
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> "a. That the Amendment complies with the Statewide Planning Goals and applicable Administrative Rules (which include OAR 660-12, the Transportation Planning Rule) adopted by the Land Conservation and Development Commission pursuant to ORS 197.240 or as revised pursuant to ORS 197.245
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> "* * * * *
>
> "b. That the amendment provides a reasonable opportunity to satisfy a local need for a different land use. A demonstration of need for the change may be based upon special studies or other factual information.
>
> "c. That the particular property in question is suited to the proposed land use, and if an exception is involved, that the property in question is best suited for the use as compared to other available properties."

The board of county commissioners denied the application, in part because of the county's concerns regarding the potential impacts that mining would create. This appeal followed.

INTRODUCTION

This appeal involves the relationship between ORS 215.283(2)(b), ORS 215.298(2), Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources), and the two administrative rules implementing Goal 5: OAR chapter 660, divisions 16 and 23. ORS 215.283(2)(b) establishes that mining may be permitted on EFU-zoned lands "subject to ORS 215.298." In turn, ORS 215.298, which was adopted in 1989, provides in relevant part that a "permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan."[5]

Goal 5 requires that local governments plan and protect mineral and aggregate sites. The first Goal 5 administrative rule was adopted in 1981 and codified at OAR chapter 660, division 16. That rule set out a required structure for evaluating Goal 5 resources. Local

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[5] ORS 215.298 provides:

> "(1) For purposes of ORS 215.213 (2) and 215.283 (2), a land use permit is required for mining more than 1,000 cubic yards of material or excavation preparatory to mining of a surface area of more than one acre. A county may set standards for a lower volume or smaller surface area than that set forth in this subsection.
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> "(2) A permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan.
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> "(3) 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. 'Mining' does not include excavations of sand, gravel, clay, rock or other similar materials conducted by a landowner or tenant on the landowner or tenant's property for the primary purpose of reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction or other on-site construction or nonsurface impacts of underground mines."

governments were obligated to (1) identify Goal 5 resources; (2) determine whether those identified resources were located within the locality's jurisdiction; (3) evaluate whether those resources were significant; (4) identify existing and potential uses that could conflict with significant Goal 5 resources; and (5) determine whether conflicting uses would be prohibited, conditionally permitted, or allowed without restriction.

At the first two steps of the process, the local government was required to collect available data regarding the location, quality and quantity of each Goal 5 resource, and determine whether there was enough information to properly complete the process. OAR 660-016-0000(1). Based on analysis of the collected data, the local government had three options: (a) do not include the resource on the inventory; (b) delay the Goal 5 process until more adequate information was available; or (c) include the resource on the plan inventory.[6] Under the Goal 5 rule as first promulgated, these options with regard to including resources on the inventory were known as "1A," "1B" and "1C" options, respectively. Many local

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[6] OAR 660-016-0000(5) provides, in relevant part:

> "Based on data collected, analyzed and refined by the local government, as outlined above, a jurisdiction has three basic options:
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> "(a) Do Not Include on Inventory: Based on information that is available on location, quality and quantity, the local government might determine that a particular resource site is not important enough to warrant inclusion on the plan inventory, or is not required to be included in the inventory based on the specific Goal standards. No further action need be taken with regard to these sites * * *;
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> "(b) Delay Goal 5 Process: When some information is available, indicating the possible existence of a resource site, but that information is not adequate to identify with particularity the location, quality and quantity of the resource site, the local government should only include the site on the comprehensive plan inventory as a special category * * *;
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> "(c) Include on Plan Inventory: When information is available on location, quality and quantity, and the local government has determined a site to be significant or important as a result of the data collection and analysis process, the local government must include the site on its plan inventory and indicate the location, quality and quantity of the resource site (see above). Items included on this inventory must proceed through the remainder of the Goal 5 process."

government comprehensive plans, including Douglas County's, still contain references to "1A," "1B" and "1C" resources.

OAR chapter 660, division 16 states that "[n]o further action need be taken with regard" to sites that do not warrant inclusion on the plan inventory, but does not otherwise indicate what actions can or should be taken regarding such sites. The Douglas County Mineral Resources Inventory (Inventory), which is an appendix to the county's comprehensive plan, was developed in 1988 under OAR chapter 660, division 16. The Inventory identifies 330 mineral resource sites, and finds 97 of them to be insignificant because of their size, mineral type or quantity of mineral remaining. These 97 sites were labeled "1A." The Inventory classified 131 sites as "1B," because of lack of specific information. The remaining sites were classified as significant resources, with appropriate subclassifications depending upon the level of protection afforded those resources against conflicting uses. The Inventory contains a table that separately lists "1A" sites, "1B" sites and the various subclassifications of "1C" sites found to be significant. The Inventory further contains a brief description of all 330 sites.

In 1996, LCDC adopted a new Goal 5 rule at OAR chapter 660, division 23. The new Goal 5 rule is applicable, in relevant part, to any post-acknowledgment plan amendments initiated on or after September 1, 1996. Like the old Goal 5 rule, the new rule generally requires that Goal 5 resources be studied to determine whether they are significant resource sites. OAR 660-023-0030. However, the two rules differ in pertinent ways. The old Goal 5 rule generally uses the term "inventory" to describe both the Goal 5 analysis *process* and its *result*: a list or "final plan inventory" of significant Goal resource sites. OAR 660-016-0000(1). The new Goal 5 rule draws finer distinctions, and specifies that the term "inventory" as a noun means "information about the resource values and features" of

resource sites. OAR 660-023-0010(4).[7] As a verb, "inventory" means "collect, prepare, compile, or refine information about one or more resource sites." *Id.* The new Goal 5 rule uses the term "Resource list" to refer to information about significant Goal 5 resource sites that is adopted by a local government as part of its comprehensive plan or land use regulations. The rule specifies that a "plan inventory" that was previously adopted under OAR 660-016-0000(5)(c), *i.e.*, for significant sites labeled "1C," shall be considered a "resource list." OAR 660-023-0010(9).

Unlike the old Goal 5 rule, the new rule contains specific provisions governing mineral and aggregate resources, at OAR 660-023-0180. The requirements of OAR 660-023-0180 modify, supplement, or supersede the requirements of the standard Goal 5 process at OAR 660-023-0030 through 660-023-0050. OAR 660-023-0180(2).[8] The process for

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[7] OAR 660-023-0010 provides the following definitions, in relevant part, as used in OAR chapter 660, division 23:

> "(4) 'Inventory' is a survey, map, or description of one or more resource sites that is prepared by a local government, state or federal agency, private citizen, or other organization and that includes information about the resource values and features associated with such sites. As a verb, 'inventory' means to collect, prepare, compile, or refine information about one or more resource sites. (See resource list.)
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> "* * * * *
>
> "(9) 'Resource list' includes the description, maps, and other information about significant Goal 5 resource sites within a jurisdiction, adopted by a local government as a part of the comprehensive plan or as a land use regulation. A 'plan inventory' adopted under OAR 660-016-0000(5)(c) shall be considered to be a resource list.
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> "(10) 'Resource site' or 'site' is a particular area where resources are located. A site may consist of a parcel or lot or portion thereof or may include an area consisting of two or more contiguous lots or parcels."

[8] OAR 660-023-0180(2) provides, in relevant part:

> "Local governments are not required to amend acknowledged inventories or plans with regard to mineral and aggregate resources except in response to an application for a PAPA, or at periodic review as specified in OAR 660-023-0180(7). The requirements of this rule either modify, supplement, or supersede the requirements of the standard Goal 5 process in OAR 660-023-0030 through 660-023-0050, as follows:

determining whether an aggregate resource is "significant" is set out at OAR 660-023-0180(3)(a) through (c).[9] However, OAR 660-023-0180(3)(d) provides an exception that

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"(a) A local government may inventory mineral and aggregate resources throughout its jurisdiction, or in a portion of its jurisdiction. When a local government conducts an inventory of mineral and aggregate sites in all or a portion of its jurisdiction, it shall follow the requirements of OAR 660-023-0030 as modified by subsection (b) of this section. When a local government is following the inventory process for a mineral or aggregate resource site filed under a PAPA, it shall follow only the applicable requirements of OAR 660-023-0030, except as provided in sections (3) and (6) of this rule;

"(b) Local governments shall apply the criteria in section (3) of this rule rather than OAR 660-023-0030(4) in determining whether an aggregate resource site is significant[.]"

[9] OAR 660-023-0180(3) provides, in relevant part:

"An aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets any one of the criteria in subsections (a) through (c) of this section, except as provided in subsection (d) of this section:

"(a) A representative set of samples of aggregate material in the deposit on the site meets Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and sodium sulfate soundness, and the estimated amount of material is more than 2,000,000 tons in the Willamette Valley, or 100,000 tons outside the Willamette Valley;

"(b) The material meets local government standards establishing a lower threshold for significance than subsection (a) of this section; or

"(c) The aggregate site is on an inventory of significant aggregate sites in an acknowledged plan on the applicable date of this rule.

"(d) Notwithstanding subsections (a) through (c) of this section, except for an expansion area of an existing site if the operator of the existing site on March 1, 1996 had an enforceable property interest in the expansion area on that date, an aggregate site is not significant if the criteria in either paragraphs (A) or (B) of this subsection apply:

"(A) More than 35 percent of the proposed mining area consists of soil classified as Class I on Natural Resource and Conservation Service (NRCS) maps on the date of this rule; or

"(B) More than 35 percent of the proposed mining area consists of soil classified as Class II, or of a combination of Class II and Class I or Unique soil on NRCS maps available on the date of this rule, unless the average width of the aggregate layer within the mining area exceeds:

"(i) 60 feet in Washington, Multnomah, Marion, Columbia, and Lane counties;

disqualifies certain aggregate resource sites that would otherwise qualify as "significant" under OAR 660-023-0180(3)(a)–(c). OAR 660-023-0180(3)(d) provides in relevant part that, notwithstanding that a resource site satisfies the standards at (a) through (c), the site is "not significant" where more than 35 percent of the mining area consists of Class I or II soils. OAR 660-023-0180(3)(d)(A) and (B) (hereafter, the "35 percent rule"). In turn, OAR 660-023-0180(3)(d)(B)(i) through (iii) provide an exception to that exception: the 35 percent rule does *not* apply where the aggregate layer in specified counties exceeds a certain depth.

For resource sites found to be "significant," the local government must decide whether mining is permitted, pursuant to OAR 660-023-0180(4) through (6). Where mining is allowed, the local government must determine the post-mining use and provide for this use in its comprehensive plan and land use regulations. OAR 660-023-0180(4)(f). For significant aggregate sites on Class I, Class II or unique soils, local governments shall adopt plan and land use regulations to limit post-mining use to farm uses, non-farm uses listed in ORS 215.213(1) or 215.283(1), or fish and wildlife habitat uses.

Except as modified or superseded by OAR 660-023-0180, the standard Goal 5 process at OAR 660-023-0030 through 0050 applies. OAR 660-023-0180(2). OAR 660-023-0180 does not specify what, if anything, local governments should do with aggregate sites that are not found to be significant under OAR 660-023-0180(3). The standard Goal 5 inventory process at OAR 660-023-0030 is to (1) collect information about Goal 5 resource sites; (2) determine the adequacy of the information; (3) determine the significance of the resource sites; and (4) adopt a list of significant resource sites. OAR 660-023-0030(1). OAR 660-023-0030(5) provides that the local government must adopt the list of significant

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"(ii) 25 feet in Polk, Yamhill, and Clackamas counties; or

"(iii) 17 feet in Linn and Benton counties."

Goal 5 resources as part of its comprehensive plan or land use regulations.[10] With respect to non-significant sites, OAR 660-023-0030(6) requires only that the local government "maintain a record of that determination."

As discussed below, petitioner's application was premised on an assumption that the list of non-significant "1A" sites in the county's Inventory is an "inventory" for purposes of ORS 215.298(2). Petitioner's theory, apparently, is that once the subject property is found to be "not significant" by virtue of OAR 660-023-0180(3)(d) and added to the county's "1A" list, petitioner may then seek a conditional use permit to mine the site pursuant to ORS 215.283(2)(b)(B). The county also proceeded on that assumption. In the cross-petition for review, intervenors question petitioner's assumption, arguing that the term "inventory" as used in ORS 215.298(2) is a reference to the term "inventory" as used in OAR chapter 660, division 16, *i.e.*, the list of "1C" significant resource sites that the rule directs be included on "the final plan inventory." OAR 660-016-0000(1); (5)(c). Intervenors argue that OAR 660-016-0000(5)(a) directs local governments to "Not Include On Inventory" resource sites found to be non-significant. According to intervenors, local governments can maintain a list of non-significant sites, and some of them (Douglas County included) may even maintain that list as part of their comprehensive plan Goal 5 provisions. However, intervenors argue, such a list is clearly not an "inventory" or "resource list" for purposes of Goal 5, and resource sites on such a list are not on an "inventory" within the meaning of ORS 215.298(2).

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[10] OAR 660-023-0180(5) and (6) provide:

> "(5) Adopt a list of significant resource sites: When a local government determines that a particular resource site is significant, the local government shall include the site on a list of significant Goal 5 resources adopted as a part of the comprehensive plan or as a land use regulation. Local governments shall complete the Goal 5 process for all sites included on the resource list except as provided in OAR 660-023-0200(7) for historic resources, and OAR 660-023-0220(3) for open space acquisition areas.
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> "(6) Local governments may determine that a particular resource site is not significant, provided they maintain a record of that determination. Local governments shall not proceed with the Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5."

With that introduction, we turn to the parties' contentions.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends that the county erred in interpreting the 35 percent rule at OAR 660-023-0180(3)(d)(B) to apply to Douglas County. As a result of the county's error, petitioner argues, the county found that the resource site was "not significant." According to petitioner, there is no dispute that the quantity and quality of the resource in the proposed 35-acre mining area exceeds ODOT specifications and is thus a "significant" resource pursuant to OAR 660-023-0180(3)(a). If the 35 percent rule does not apply to Douglas County, petitioner contends, then the county erred in failing to determine that the subject property is a significant resource site, and continue with the Goal 5 process. If the county had continued with the Goal 5 process, we understand petitioner to argue, it would necessarily place the subject property on its list of "1C" sites in the county's Goal 5 inventory, and ultimately make a determination whether or not to allow mining of the site, pursuant to OAR 660-023-0180(4).

According to petitioner, OAR 660-023-0180(3)(d)(B) is ambiguous, and can be read in either of the following ways: (1) the 35 percent rule protects Class II soils only in the 10 specified counties; or (2) the 35 percent rule protects Class II soils in all counties. Petitioner argues that the first parsing is more logical and more consistent with the text and apparent legislative intent of the rule than is the second parsing. According to petitioner, the 10 counties listed in OAR 660-023-0180(3)(d)(B) represent Willamette Valley or nearby counties where the greatest development pressure and the best cropland in the state coincide. Petitioner contends that development pressure per acre of cropland outside of these 10 counties is less. The apparent intent of these provisions, petitioner argues, is to protect high-quality agricultural soils where development pressure is the greatest, and provide less protection where development pressure is less. Assuming that apparent policy intent, petitioner argues, the second parsing must be rejected because it entails the absurd result that

where a site outside of the 10 specified counties—where development pressure is presumably less—has more than 35 percent Class II soils, aggregate deposits can never be "significant," no matter the quantity or quality, or how deep the aggregate layer. In support of its view, petitioner attaches portions of the legislative history of OAR 660-023-0180(3)(d), which suggests that, as originally proposed, the intent of the 35 percent rule was to protect Class II soils only in the 10 specified counties.[11] Although the pertinent language of the rule was changed, petitioner argues that none of the changes were intended to alter that original intent. Petitioner contends that the correct reading of OAR 660-023-0180(3)(d)(B) limits the rule to the 10 specified counties, and the county therefore erred in interpreting the rule to apply to Douglas County.

Intervenors respond that petitioner has affirmatively waived the issue of whether the 35 percent rule at OAR 660-023-0180(3)(d)(B) applies to Douglas County. According to intervenors, between March and September 1999, petitioner, county staff and the Department of Land Conservation and Development (DLCD) exchanged views regarding whether the 35 percent rule applied to Douglas County. Planning staff and DLCD took the position that the rule does apply, and so informed petitioner. Thereafter, intervenors argue, petitioner consistently represented that its application was one for inclusion of the subject property on

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[11] Petitioner cites to a proposal from the Oregon Farm Bureau, after agreement with the aggregate community, the governor's office and the Department of Agriculture, that was the apparent source for OAR 660-023-0180(3)(d). The Oregon Farm Bureau proposed the following:

> "* * * An aggregate site is not significant if the mining area is more than 35 % Class I.
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> "* * * An aggregate site with a mining area that is more than 35% Class I & II soil is only determined to be 'significant' if in addition to the quantity and quality requirements, it also meets the rock layer thickness requirements of:
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> "a. At least 60 feet thick in Washington, Multnomah, Marion, and Lane counties;
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> "b. At least 25 feet thick in Polk, Yamhill, and Clackamas counties; and
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> "c. At least 17 feet thick in Linn and Benton counties." Testimony of Don Schellenberg, Oregon Farm Bureau, April 19, 1996, attached to the Petition for Review at App 2-12.

the county's list of non-significant "1A" sites, and the county proceeded solely on that theory.[12] Intervenors contend that petitioner's representations led the county and other parties to believe that the questions of whether the 35 percent rule applied and whether the subject site should be placed on the county's inventory of significant aggregate sites were not issues.

On the merits, intervenors argue that OAR 660-023-0180(3)(d)(B) is unambiguous, and the county correctly applied it to Douglas County. According to intervenors, the plain language of the rule sets out a generally applicable statement that an aggregate site is not significant if more than 35 percent of the proposed mining area consists of Class II soils, or a combination of Class I, Class II and Unique soils. The rule then creates three exceptions to that general statement, exceptions that apply to only 10 counties. There is no exception for Douglas County, intervenors argue, and thus the 35 percent rule clearly applies. As to petitioner's policy arguments and citations to legislative history, intervenors argue that the evident purpose of OAR 660-023-0180(3)(d)(B) is to minimize the loss of the state's best

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[12] Intervenors cite to several statements by petitioner, including the following statement made during petitioner's presentation to the board of commissioners on February 6, 2002:

> "* * * As [Commissioner Robertson has] already indicated, this is a two-step process. We are right now at the determination of putting this on the Non-Significant Aggregate Sites [list]. We're going to look at all these important issues at the second step, if we get there, which is the conditional use permit, where we have to address farmland preservation, which we recognize is important, flooding, traffic, dust, noise, and all these other issues that are important to us * * *.
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> "It began when we nominated the [subject property] for the County's Mineral Resource Inventory. Goal 5 requires the County to inventory and evaluate and determine the protection level for mineral resources and, ordinarily, first you would decide whether we've shown here there's location, quantity and quality, then you would show—you would go on to decide whether there's a significant resource. That's where DLCD has cut you off. * * * Well, because DLCD rules have stopped the process at step one, which is because more than 35 percent of the site by surface area is Class I and II soils, this must be a non-significant Goal 5 resource, and is not entitled to Goal 5 protection. That's what we're asking for here today. * * * If we have shown location, quantity and quality, we are entitled to have the site listed on the County Mineral Resource Inventory as a non-significant site." Tape 2, Douglas County Board of Commissioners Hearing, February 6, 2002 (transcribed at Intervenor's Response Brief, 11-12).

farmland. Intervenors argue that it is entirely possible that LCDC believed that Class I and II soils outside the Willamette Valley are so rare and important, and demand for aggregate so much less, that they should not be subject to an exception like those created at OAR 660-023-0180(3)(d)(B)(i) through (iii).

We agree with intervenors that petitioner affirmatively waived the issue of whether OAR 660-023-0180(3)(d)(B) applies to Douglas County, and correspondingly the issue of whether the subject site should be added to the county's "1C" inventory. The record is clear that, after the county and DLCD made their position known regarding OAR 660-023-0180(3)(d)(B), petitioner elected to proceed on the application exclusively under the theory that the site was "not significant" by virtue of OAR 660-023-0180(3)(d)(B) and thus should be added to the county's list of non-significant aggregate sites. Petitioner's choice led the county and other parties to focus on that issue, and to believe that any other theory had been put to rest. Therefore, that issue has been affirmatively waived. *Newcomer v. Clackamas County*, 92 Or App 174, 186, 758 P2d 369, *modified* 44 Or App 33, 764 P2d 927 (1988); *DLCD v. Curry County*, 28 Or LUBA 205, 211 (1994), *aff'd* 132 Or App 393, 888 P2d 592 (1995).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In the fifth assignment of error, petitioner argues that if the 35 percent rule applies to Douglas County, the county erred in failing to determine whether the 35 percent rule applies to the subject property. According to petitioner, the county found that the 80-acre subject property is composed of more than 35 percent Class I and II soils, but it made no findings whether the *proposed mining area*, the westernmost 35 acres of the subject property, is comprised of more than 35 percent Class I and II soils, as OAR 660-023-0180(3)(d)(B) requires. A portion of the subject property contains Evans Loams soils. Those soils are Class II if irrigated, and Class III if not irrigated. Petitioner argues that the outcome of the 35

percent test as applied to the mining area depends on whether and the extent to which the Evans Loam soil in the mining area is irrigated. Petitioner argues that the county erred in failing to address whether and to what extent this soil type is irrigated on the proposed mining area.

Intervenors respond that petitioner failed to raise any issue before the county regarding the percentage of Class II soils within the proposed mining area or whether those soils are irrigated.[13] According to intervenors, county staff concluded that the subject property has 72 acres of irrigation rights, that the Evans Loam soil on the subject property is thus a Class II soil, and accordingly that 62 to 65 percent of the subject property consists of Class I or II soils. Record 513. At no point during the proceedings below, intervenors argue, did anyone raise a question about the percentage of soils within the proposed mining area, whether the Evans Loam is irrigated or not, much less argue on those bases that the rule does not apply to the proposed mining area. Therefore, intervenors argue, such issues are waived. ORS 197.763(1).[14]

At oral argument, petitioner argued that these issues were raised below, citing to Record 36 and 517-18. Record 36 is petitioner's April 23, 2002 letter to the board of commissioners, which states in relevant part that the subject property is "not significant solely because the proposed mining area appears to consist of more than 35% of soils classified as Class I or II." A footnote to that statement indicates that "[t]he applicant does

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[13] Intervenors advise us that they do not concede that the proposed mining area is the westernmost 35 acres of the subject property, as petitioner asserts. Intervenors argue that the size of the "mining area" as defined by OAR 660-023-0180(1)(g) depends in part upon the size of required buffer areas, and argues that it is unclear how extensive the buffer areas must be. Intervenors also cite to evidence that petitioner ultimately plans to mine approximately 57 acres of the subject property.

[14] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

not concede this determination, but assumes it for the argument." Record 517-18 is an unidentified document that lists the soils on the subject property, and categorizes them as either "high value" or "lower value" farm soils. In relevant part, it indicates that there are 21 acres of "Evans Loam (nonirrigated)" on the property, describes that soil as Class III, and lists it among the 65 acres on the property characterized as consisting of "lower value" soils.

We disagree that the foregoing is sufficient to raise the issue presented in this assignment of error: petitioner's argument that the 35 percent rule does not apply to the proposed mining area, because of the specific percentage of soils or the existence and extent of irrigation that can be applied within the area. The cited record pages do not reflect that that issue was raised or accompanied by statements or evidence sufficient to afford the county and other parties an adequate opportunity to respond to that issue. Accordingly, that issue is waived.

The fifth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in denying petitioner's application, because it met all applicable approval criteria, and failure to approve the application violated Goal 5 and its implementing rules.

According to petitioner, its application to place the subject property on the county's list of non-significant aggregate sites should have been approved, because the site meets the OAR 660-023-0180(3)(a) standards for quantity, quality and location. Because petitioner presented adequate information below regarding quantity, quality and location of resource on the site, petitioner argues, the county is required to add the site to the list of non-significant resource sites, and petitioner is entitled to approval as a matter of law.

The county's notice of hearing included as applicable criteria the two Goal 5 rules and applicable statewide planning goals. As discussed further below, intervenors argued to the county, and now to us, that the county could not approve the application to place the site

on the list of non-significant aggregate sites without addressing compliance with Statewide Planning Goals 6 (Air, Water and Land Resources Quality), 7 (Areas Subject to Natural Disasters and Hazards), and 12 (Transportation), among others. We do not understand petitioner to dispute that at least some statewide planning goals are potentially applicable to the post-acknowledgment plan amendment it proposed. Therefore, petitioner is incorrect that the only applicable criteria are those at OAR 660-023-0180(3)(a), or that it is entitled to approval as a matter of law based solely on compliance with that rule.

The first assignment of error is denied.

SECOND, THIRD AND SIXTH ASSIGNMENTS OF ERROR

The challenged decision finds that the subject site meets the OAR 660-023-0180(3)(a) standards for quantity and quality of aggregate resource. However, the county then concludes that the 35 percent rule at OAR 660-023-0180(3)(d) prohibits a finding that the site is a "significant" resource site, and therefore the site cannot be added to the county's "resource list." Record 4. The county then turned to the question of what it can, or must, do with petitioner's request to add the site to the list of non-significant sites. The county described the parties' positions, as follows:

> "According to [petitioner], if a party presents the county with competent evidence * * * of the location, quantity and quality of an aggregate site that contains more than 35 percent of Class I or II soil, then the county has no option to but add the site to a non-significant site list. In other words, [petitioner] argues that the listing of such a site on such a list by the county is mandatory. According to [opponents], however, the listing of such a site on such a list by the county is discretionary and the county may or may not choose to list such a site on such a list based on other factors in addition to location, quantity and quality of the aggregate, such as the impacts on the adjacent surrounding land from such things as the risk of floods resulting from changing the channel of the river, such as truck traffic from hauling the aggregate to processing plants, and such as dust and noise from the mining operation itself." Record 3-4.

The county found an answer in OAR 660-023-0030(6).[15] The county interpreted the rule to allow it the discretion to decide what to do with a request to add a site to its list of non-significant aggregate sites, based on other considerations besides location, quantity and quality. Based on that interpretation, the county then denied petitioner's application based on concerns about floods, traffic, dust and noise impacts.[16]

Petitioner contends that the county erred in denying its application based on concerns regarding flooding, traffic, dust and noise impacts from mining the subject property. According to petitioner, county staff and the board of commissioners announced that the only issue before the county was whether to add the site to the county's list of non-significant aggregate sites, and that issues regarding impacts or incompatibility of actually mining the site would be addressed later if petitioner seeks conditional use permit approval to mine the site.[17] Based on such announcements, petitioner argues, it reasonably expected that the

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[15] We quote again the text of OAR 660-023-0030(6), which provides:

> "Local governments may determine that a particular resource site is not significant, provided they maintain a record of that determination. Local governments shall not proceed with the Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5."

[16] The county's findings state, in relevant part:

> "We interpret the word 'may' [in OAR 660-023-0030(6)] to mean that the determination decision is a discretionary act. We agree with the [opponents] that, even if we are presented with adequate information about the quantity, quality, and the location of the minerals—as we have been—that we may nonetheless decline to add the site to the list of non-significant sites when we have concerns about other factors. In this case we are concerned about potential impacts on the adjacent surrounding land from such things as the risk of floods resulting from changing the channel of the river, such as truck traffic from hauling the aggregate to processing plants, and such as dust and noise from the mining operation itself. The record contains no evidence about the extent of such impacts. Thus, we decline the invitation to add the site to the list of non-significant sites." Record 4-5.

[17] Petitioner cites to a January 31, 2002 staff memorandum to the applicant and parties, stating in relevant part:

> "At the hearing on February 6, the Board of Commissioners will not be deciding on the compatibility or incompatibility of mining the Beaver State site. Issues of compatibility will be addressed at the time of the CUP [conditional use permit] review. The hearing before the

county's decision would not be based on consideration of adverse impacts or compatibility issues. Petitioner states that it was prepared to present evidence regarding impacts and compatibility, but chose not to do so, based on the county's assurances that such evidence was irrelevant to petitioner's request. Petitioner contends that the county's error prejudiced its substantial rights and that, if such evidence is relevant to its request, it is entitled to a new evidentiary hearing on remand to present that evidence.

Under the third assignment of error, petitioner argues that the county's concerns regarding flooding, traffic, dust and noise appear to be an analysis of the economic, social, environmental and energy (ESEE) consequences of allowing the proposed mining, pursuant to OAR 660-023-0040. However, petitioner argues, OAR 660-023-0030(6) makes it clear that the county shall not proceed with the Goal 5 process, including the ESEE analysis, for non-significant sites. Therefore the county erred, petitioner argues, in denying the request based on criteria from the ESEE analysis at OAR 660-023-0040, rather than on the applicable criteria.

Under the sixth assignment of error, petitioner argues that the county's findings are defective for failure to identify the applicable approval standards. If the county's decision is subject to other standards than those set forth in Goal 5, petitioner argues, the county failed

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Board of Commissioners is only for the purpose of adding the site to the Inventory. * * *" Record 120.

Petitioner also cites to the opening remarks of the county chair:

"This is not a hearing to voice opposition to the mining site. This is not a hearing to take testimony about your concern about flooding or what might happen to other properties. If this property is put on the mineral list, then the next step if the company so desires is to file a conditional use permit so they can mine this site. If they do that, that is the time we will take testimony * * * about your concerns about this site being developed as an aggregate mining site. The only issue before us today, before this board, the only issue we can take testimony on today, is whether or not it belongs on the mineral inventory list. * * * Testimony, evidence and arguments in this hearing must be directed toward the approval criteria listed in the planning staff's written report. Those criteria will be recited by the planning staff again as part of its presentation. Testimony may also address other criteria in the comprehensive plan or [LUDO] which [a] party believes applies. * * *" Tape 1, Douglas County Board of Commissioners Hearing, February 6, 2002 (partial transcript at Petition For Review 15 and Response Brief 7).

to identify the source and content of those standards. Until the county does, petitioner contends, LUBA cannot determine whether the decision is supported by substantial evidence.

In response to the second assignment of error, intervenors argue that the county correctly considered arguments and evidence presented at the February 6, 2002 and April 3, 2002 hearings that adding the subject property to the county's list of non-significant aggregate sites would violate applicable criteria, or criteria believed to be applicable. According to intervenors, the opponents to the application argued that issues of flooding, traffic, dust and noise from mining of the proposed site implicate Statewide Planning Goals 6, 7, and 12. Intervenors argue that petitioner declined to respond to the opponents' argument and evidence, despite opportunities to do so. For example, intervenors argue that petitioner had an opportunity to respond to these issues at the April 3, 2002 hearing, before the close of the record on April 15, 2002, and until April 23, 2002 as part of the applicant's written rebuttal. Instead, intervenors argue, petitioner unreasonably chose to rely on the initial position expressed by the county staff and decision makers that issues of impacts and compatibility to be addressed under the conditional use permit process are not relevant to whether the county should add the site to its list of non-significant aggregate sites.

In response to the third assignment of error, intervenors argue that it is clear that the county did not deny petitioner's request based on an ESEE analysis under OAR chapter 660, division 23. Intervenors repeat their argument that the concerns cited by the county as the basis for denial are made relevant and applicable by virtue of the statewide planning goals, specifically dust and noise (Goal 6), flooding (Goal 7), and traffic (Goal 12).

In response to the sixth assignment of error, intervenors note that, pursuant to ORS 197.175(2)(a) and LUDO 6.500.2, all comprehensive plan amendments must comply with the goals, and therefore even if the county's own legislation provides no standards for amending the comprehensive plan list of non-significant sites, that does not mean there were

no approval standards. Intervenors repeat their arguments that, in addition to Goal 5, at least Goals 6, 7, and 12 apply to the challenged decision.

The county's findings do not identify the source of the criteria that require or allow the county to consider issues such as flooding, traffic, and dust and noise impacts, in rejecting petitioner's request to add the site to the county's list of non-significant aggregate sites. As previously noted, intervenors argue that the statewide planning goals require that the county consider those concerns. However, if that is the county's view, it is not expressed or even suggested in the challenged decision. Instead, the decision indicates that, based the county's interpretation of OAR 660-023-0030(6), the county believes it has the discretion to consider other issues than are provided for in the Goal 5 rule, in approving or denying a request to add a site to the county's list of non-significant aggregate sites.

Although petitioner does not directly challenge that interpretation, the main thrust of its argument under these assignments of error (and to some extent the first assignment of error) is that the county erred in denying petitioner's request based on inapplicable criteria. That allegation is difficult to resolve, because the criteria the county relied upon to deny petitioner's request are not identified in the decision. To the extent these assignments of error can be read to challenge the county's interpretation of OAR 660-023-0030(6), that challenge is well-founded. Other than to require that the county "maintain a record" of a determination of non-significance, OAR 660-023-0030(6) says nothing regarding what the county should do with a request to add a site to the county's comprehensive plan list of non-significant sites, and certainly does not authorize the county to approve or deny that request based on unspecified "other factors." Because the county's decision fails to identify any other source of authority for considering flooding, traffic, and dust and noise impacts as a basis to deny petitioner's request, the decision must be remanded to identify that authority.

Given that disposition, we need not resolve petitioner's specific arguments of procedural error. If, on remand, the county identifies a source of authority for considering

flooding, traffic, and dust and noise impacts as a basis to deny petitioner's request, the county must ensure that petitioner has had, or will have, an adequate opportunity to present evidence regarding those concerns.

The sixth assignment of error is sustained. We do not resolve the second and third assignments of error.

SEVENTH ASSIGNMENT OF ERROR

According to petitioner, the individual members of the board of commissioners declared, at the start of the initial hearing, that no member had a personal conflict of interest. However, petitioner argues, during deliberations one board member who ultimately voted to deny the request explained his concern that the board of commissioners would not be able to hear an appeal of any conditional use permit application, once the subject property was added to the comprehensive plan list of non-significant sites.[18] The commissioner expressed

[18] The minutes of the May 8, 2002 deliberations state, in relevant part:

> "[Commissioner Robertson]: [T]he applicants have provided information documenting there is sufficient quantity, quality in a specific location they have identified to qualify for inclusion in the list. There seems to be no discretion of this board relative to this decision. It is unlikely the board [of commissioners] will hear this on an appeal [of a conditional use permit decision], because we have a conflict of interest as we will likely be purchasers of this material from this company. As a result, such an application would be turned over to a hearings officer. The problem is that the board [of commissioners] will be out of the loop, and has no discretion on the conditional use when material is removed and under what conditions. * * *
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> "* * * [I]n this case, the only evidence important in this issue is if there is sufficient quantity, quality of material in this location, and there is. * * * The impact on the neighborhood is not something we can talk about here, because that isn't what this hearing is about. [My] concern is not being able to talk about it and not being able to revisit the issue on appeal, because the [board of commissioners'] last involvement with this issue will be here. [To me] that is not very sufficient.
>
> "* * * * *
>
> "[In my] opinion there is no basis for appeal if [we] make the decision to add it to the list. If the board [of commissioners] denies this request, [I] believe there is [a] basis for appeal, and we get to the question of 'does the board [of commissioners] have the authority to deny adding this to the list or not' and 'can [we] discuss these issues in this hearing or not.' * * * [W]e need an opinion from a higher court that says the board [of commissioners] can or

the view that, because the county would probably buy aggregate from petitioner, the board would have a "conflict of interest" and would therefore not be able to hear any appeal of the conditional use permit, to address the impacts of mining. The commissioner explained that he would vote to deny the application in order to obtain a ruling from a higher review body as to whether the board of commissioners can consider the impacts of mining in the context of an application to add the site to the county's list of non-significant aggregate sites.

Petitioner argues that the county erred in failing to disclose this "conflict of interest" prior to the close of the proceedings. Further, petitioner contends that the commissioner's statement demonstrates that the commissioner was biased and unable to reach a decision based on the criteria he believed to be applicable, in that he based his decision to deny the application on concerns that do not relate to the applicable criteria.

Intervenors respond that petitioner does not allege that the county's decision would be to the private pecuniary benefit or detriment of the commissioner and thus constitute a "conflict of interest" or "potential conflict of interest" as those terms are defined at ORS 244.020(1) and (7). Intervenors also argue that there is no evidence of a conflict of interest. We agree.

With respect to bias, intervenors argue that the commissioner's concern regarding inability to consider mining impacts reflects staff advice (erroneous advice, in intervenors' view) that the only criteria applicable during the hearing were the quality, quantity and location of the resource. According to intervenors, the commissioner's explanation for his vote—that he is seeking to place the issue before a higher review body in order to resolve the question of what issues may be considered—does not demonstrate prejudgment or inability to make a decision based on applicable standards. Again, we agree.

The seventh assignment of error is denied.

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cannot discuss these issues as they are relevant to your community, neighborhood and roads." Record 20.

CROSS-PETITION FOR REVIEW

Intervenors ask LUBA to affirm the challenged decision. However, if LUBA decides to remand the county's decision based on any assignment of error in the petition for review, intervenors request that the Board also remand the decision based on the assignments of error in the cross-petition for review. *See Smith v. Clackamas County*, 19 Or LUBA 171, 181 (1990) (where LUBA affirms a decision denying an application, the Board will not consider cross-assignments of error that set forth an alternate basis for remand). Because we remand the county's decision based on the sixth assignment of error in the petition for review, we accordingly turn to the cross-petition.

FIRST CROSS-ASSIGNMENT OF ERROR

Intervenors contend that the county failed to consider intervenors' argument that the proposed comprehensive plan amendment adding the subject property to the list of non-significant aggregate sites would be inconsistent with the text of the county's Mineral Resources Inventory and, therefore, inconsistent with the county's comprehensive plan.

According to intervenors, the text of the county's Inventory indicates that the list of "1A" sites in the Inventory is limited to sites that "are insignificant because of their size, mineral type, or quantity of mineral remaining." Cross-Petition for Review, App 32. There is no dispute, intervenors argue, that the subject site is not "insignificant" as a result of its size, mineral type or quantity of mineral remaining. Therefore, intervenors contend, adding the site to the "1A" list would conflict with the stated purpose of the "1A" list and cause the county's comprehensive plan to be internally inconsistent.

Petitioner responds that, to the extent intervenors seek to require the county to perform its mandated responsibilities, it agrees with intervenors that on remand the county should address the issue presented in the first cross-assignment of error. Petitioner then goes

on to dispute the merits of intervenors' view that adding the subject property to the "1A" list would be inconsistent with the text of the Inventory.[19]

We agree with the parties that, on remand, the county should address intervenors' arguments that adding the subject site to the "1A" list would be inconsistent with the text of the Inventory.[20] In doing so, we imply no agreement with the merits of that argument.

The first cross-assignment of error is sustained.

SECOND CROSS-ASSIGNMENT OF ERROR

Intervenors argue that the county's decision fails to address and consider intervenors' alternative arguments that either (1) the proposed comprehensive plan amendment adding the subject property to the "1A" list of non-significant aggregate sites will not allow mining under ORS 215.298(2); or (2) if the proposed plan amendment would allow mining, it must be based on a demonstration of compliance with applicable statewide planning goals.

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[19] Petitioner includes in its response to the cross-petition an argument that OAR 660-023-0180(3)(d), if applied to render the subject property a "non-significant" site, is unconstitutional as applied, under the Fourteenth Amendment to the United States Constitution. In a reply brief, intervenors respond that petitioner cannot assert what is essentially a new assignment of error in the context of responding to a cross-assignment of error. We agree. Petitioner also argues that to the extent the text of the county's Inventory bars a determination that the subject property is a "non-significant" site, as intervenors argue, then the county inventory text is unconstitutional under the Fourteenth Amendment. In the reply brief, intervenors respond that the issue of the constitutionality of the county's Inventory is (1) not ripe, because the county has not addressed intervenors' arguments regarding the text of the Inventory; and (2) waived, because petitioner failed to raise any issue below regarding the constitutionality of the Inventory, in response to intervenors' arguments presented below. Intervenors' responses are in tension with each other. If the issue is not ripe, it is hard to see how it can also be waived. In any case, we agree with intervenors that the issue is not ripe, because the county has not yet addressed intervenors' argument that the Inventory precludes adding the subject site to the "1A" list.

[20] In its response, petitioner argues that the county's Mineral Resources Inventory is no longer, in fact, a paper document and disputes that the document attached to the cross-petition for review is properly viewed as the county's Mineral Resources Inventory. According to petitioner, the present inventory is a computerized database. Petitioner argues that the county no longer updates the paper inventory in response to applications such as the present one, but instead simply updates its computer database. Although we need not resolve this point, we seriously question whether a computer database can constitute part of an acknowledged comprehensive plan, absent an express declaration to that effect in the plan itself. However, the county may wish to resolve, on remand, any questions about the contents or identity of the Inventory.

A. ORS 215.298

As explained in the introduction, petitioner's application is premised on the belief that, once the subject property is added to the county's "1A" list of non-significant aggregate sites, it will necessarily be "included on an inventory in an acknowledged comprehensive plan" within the meaning of ORS 215.298(2). The county also proceeded under that view of the statute. Intervenors argued below, and now to us, that that view of the statute is incorrect, and that the term "inventory" in ORS 215.298(2), when it was adopted in 1989, referred to the inventory required by Goal 5 and OAR chapter 660, division 16, *i.e.*, "1B" and "1C" sites.[21]

Specifically, intervenors argue:

> "* * * The statute [ORS 215.298(2)] was enacted in 1989, at a time when the 'old' Goal 5 and Goal 5 rule were in effect. * * * Thus, at the time when the language of ORS 215.298(2) was enacted, the only Goal specifically applying to aggregate sites, under which there could be any 'acknowledged' comprehensive plan inventory, was Goal 5, and under the Goal 5 rule then in effect, the only sites which could be included on an inventory of aggregate sites in a comprehensive plan were '1C' (significant) and '1B' (insufficient information) sites. The 'old' Goal 5 rule explicitly provided that the option for resource sites determined *not* to be significant was 'Do Not Include on Inventory.' OAR 660-016-0000(5)(a). This context clarifies that the legislature's use of 'inventory in an acknowledged comprehensive plan' should be interpreted to mean an inventory of aggregate sites adopted and acknowledged consistently with Goal 5 and the Goal 5 rule, not just any list of sites in the county comprehensive plan to which the county chooses to apply the title 'Inventory.' If the latter interpretation were adopted, ORS 215.298(2) would become a nullity, as a County would be able to place absolutely any site on a non-Goal 5 list in its plan and call it an 'Inventory.'" Cross-Petition for Review 14 (emphasis in original).

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[21] In *O'Rourke v. Union County*, 31 Or LUBA 174, 179-80 (1996), we noted that OAR 660-016-0000(5)(b) requires that a local government include "1B" sites in its comprehensive plan inventory as a special category. We held that a decision adding a "1B" site to the inventory must address applicable statewide planning goals. In explaining that holding, we stated that, pursuant to ORS 215.298(2), such inventoried sites are available to be mined under a conditional use permit process, a process that does not generally permit consideration of the goals, and therefore the goals must be considered when the "1B" site is added to the inventory. As relevant here, *O'Rourke* stands for the proposition that the "inventory" referenced in ORS 215.298(2) includes the "special category" of "1B" sites in the county's Inventory. We have no occasion here to question that proposition, and assume it is correct for purposes of this opinion.

Intervenors point out that the new Goal 5 rule, OAR chapter 660, division 23, eliminates the "1B" category and replaces the term "inventory" with the term "resource list." Under the new Goal 5 rule, intervenors argue, a "resource list" is limited to significant sites, and cannot include non-significant sites. Therefore, intervenors argue, a list of non-significant sites is neither a "resource list" of significant Goal 5 resources under OAR chapter 660, division 23, nor a plan "inventory" under OAR chapter 660, division 16. Consequently, intervenors point out, adding the subject property to the county's list of nonsignificant sites will not result in making the property available for mining under the statute.

Petitioner responds that intervenors' argument regarding the meaning of ORS 215.298(2) is premature, because even if correct it would not affect the plan amendment requested here. According to petitioner, the issue will become ripe only if and when the county approves a conditional use permit allowing mining of the subject property, pursuant to ORS 215.298(2).

On the merits, petitioner contends that when ORS 215.298(2) was enacted in 1989, the concept of "inventory" included any list of "1A" sites in an acknowledged comprehensive plan, even if OAR chapter 660, division 16 did not require counties to include such lists in their Goal 5 inventory. Had the legislature intended the more limited meaning intervenors advocate, petitioner argues, it could have written ORS 215.298(2) to refer to "inventory of significant aggregate sites."

In support of that view of the statute, petitioner cites to a report issued by DLCD's mineral/aggregate specialist on July 21, 1999. The report reviews the history of Goal 5 aggregate inventories, and provides guidance on questions related to adding or removing sites to existing inventories. In relevant part, the report states:

> "Sites placed on the '1A' list were those that were determined not to be 'significant' under the Goal 5 rule. Because 1A sites were not eligible for Goal 5 protection, these sites were often not included in comprehensive plans.

> In those cities and counties that chose to keep a list of these sites in their plan as a permanent record, it is often referred to as a list of 'unimportant,' 'non-significant,' or 'other' sites. This category of sites became very useful after [ORS] 215.298 was enacted in 1989 to allow mining as a conditional use on EFU-zoned land provided that the site was '*on an inventory in an acknowledged plan.*'" Record 556 (emphasis in original).

The report goes on to discuss adding new sites to existing inventories, stating in relevant part:

> "* * * Under OAR 660, Division 23, local governments are not required to find new sites to include on [1A, 1B, and 1C] inventories (although they do have that option). They need only evaluate new sites upon request from an applicant. Therefore, generally they need to be concerned only with adding sites to the 1C or 'significant' sites inventory for those sites seeking Goal 5 protection and adding sites to a 1A or 'unimportant' sites inventory for those sites on EFU-zoned land where a conditional use permit to mine is sought. There is no longer the need to add sites to the 1B inventory. However, when a local government has no inventory of 'unimportant' sites, placing sites on the 1B inventory may be a temporary solution for addressing the requirements of ORS 215.298. * * * Record 557-58.

We disagree with petitioner's initial argument, that the issue of whether the county can approve a conditional use permit to allow mining of the subject property, once it is added to the county's list of non-significant sites, is premature. As noted, the premise of petitioner's application, and the county's proceedings on that application, was that the legal effect of adding the subject property to the county's list of non-significant aggregate sites is that petitioner may then seek approval to mine the site, pursuant to the statute. The county's decision denies the application, based on the perceived impacts of mining the subject property under the statute. Under these circumstances, it is inaccurate to characterize petitioner's application as simply one to add the subject site to the county's "1A" list.

The meaning of ORS 215.298(2) is a matter of statutory interpretation, which requires discerning the intent of the legislature by (1) examining the text and context of the statute; (2) if necessary, considering any legislative history; and (3), if necessary, applying maxims of statutory construction. *PGE*, 317 Or at 610-12. The text and context of ORS 215.298(2) suggest that the requirement that the site be "included on an inventory in an

acknowledged comprehensive plan" is intended to function as a limitation or restriction on mining in EFU zones. ORS 215.213(2) and 215.283(2) allow such mining, "subject to ORS 215.298." In turn, the only substantive requirement in ORS 215.298 is the requirement that the site be "included on an inventory in an acknowledged comprehensive plan." In the context of mining resources, it is clear that the statutory reference to "inventory" is to a Goal 5 mineral resources inventory. As intervenors point out, in 1989 when the statute was adopted, a Goal 5 inventory of aggregate sites did not include a list of non-significant aggregate sites. The old Goal 5 rule instructs that such sites should not be included on the "inventory." OAR 660-016-0000(5)(a). The "final plan inventory" was intended for significant sites. OAR 660-016-0000(1), 660-016-0000(5)(c). Given this context, the most straightforward reading of the statute is that it allows mining in EFU zones only if the site is included on a county's Goal 5 mineral resources inventory.

That view of the statute gives full effect to the apparent legislative intent that ORS 215.298 function as a limitation on mining in EFU zones. Presumably, the legislature was aware that mining in EFU zones presents a conflict between preservation of agricultural soils and extraction of important mineral resources. Arguably, ORS 215.298 represents the legislature's balancing of that conflict: mining is allowed, but only for resources found to be significant. In contrast, petitioner's view of the statute gives little effect to that apparent legislative intent. Under petitioner's view, aggregate resources that are insignificant in quality or quantity can be mined, even if that means the removal of important agricultural soils. Indeed, under petitioner's broad view of the statute, ORS 215.298(2) would permit the mining of any site that is on any list in a comprehensive plan denominated an "inventory," even if that "inventory" was not related to Goal 5 at all.

Context for ORS 215.298(2) includes ORS 215.283(2) and other statutory provisions related to the EFU zone. The uses allowed in the EFU zone under ORS 215.283(2) are considered exceptions to what normally would be allowed in EFU zones. ORS 215.203(1);

Warburton v. Harney County, 174 Or App 322, 328, 25 P3d 978 (2001). State and local provisions permitting nonfarm uses in EFU zones should be construed, to the extent possible, as being consistent with the overriding policy of preventing agricultural land from being diverted to nonagricultural use. *Warburton*, 174 Or App at 328, citing *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 555, 773 P2d 779 (1989); *see also Craven v. Jackson County*, 308 Or 281, 287-88, 779 P2d 1011 (1989) (interpreting the scope of "commercial activities that are in conjunction with farm use" under ORS 215.283(2)(a) to exclude commercial activities that would subvert the goal of preserving land in productive agriculture). As noted, petitioner's broad view of the statute would divert productive agricultural land from agricultural use, to allow mining of mineral resources that are insignificant in quality and quantity. Intervenors' narrower interpretation allows such diversion only where the applicant has demonstrated and the county has found that the mineral resource is significant in quality and quantity.

It is worth noting in this respect that the 35 percent rule at OAR 660-023-0180(3)(d) is obviously intended to draw a balance between protecting agricultural soils, specifically high-quality or unique soils, and extracting aggregate. That intent is largely undermined by petitioner's view of the statute. For example, under petitioner's view an aggregate site that is found to be "not significant" because more than 35 percent of the site consists of Class I soils under OAR 660-023-0180(3)(d)(A), and therefore a site that cannot be approved for mining under Goal 5, can nonetheless be approved for mining pursuant to ORS 215.298(2), subject only to ORS 215.296 and whatever conditional use criteria are contained in the county's code. By contrast, intervenors' view of the statute is consistent with and gives full effect to LCDC's apparent intent in enacting the 35 percent rule.

With regard to the DLCD report petitioner cites, that report certainly expresses the view of at least one DLCD staff member (and perhaps DLCD as an agency) that a list of "1A" aggregate sites in a comprehensive plan is part of an "inventory" for purposes of

ORS 215.298(2). However, the report does not analyze the statute or its context, cite legislative history, or provide any explanation for that view. It simply assumes that view. While we treat the views of DLCD staff with due respect, the report gives us no reason to enlarge the meaning of the statute in a manner contrary to its text and context.

In sum, based on the text and context of the statute, we conclude that the term "inventory" in ORS 215.298(2) refers only to the county's Goal 5 inventory of aggregate sites, and does not include a list of non-significant aggregate sites, even where the county has chosen to place that list in its comprehensive plan.

B. Compliance with Statewide Planning Goals

Intervenors' argument regarding compliance with statewide planning goals is framed in the alternative. Because we agree with intervenors that the premise for the county's decision—that petitioner can proceed to mine a site under ORS 215.298(2) once the site is placed on the county's "1A" list—is incorrect, we need not address intervenors' alternative argument.

The second cross-assignment of error is sustained, in part.

CONCLUSION

We sustained petitioner's sixth assignment of error, requiring remand for the county to adopt more adequate findings regarding the bases for denial. Specifically, the county must identify what code provisions, statutes, rules or goals authorize the county to consider the impacts of mining the subject property. We also sustained the first cross-assignment of error. Both of these errors require remand. In addition, we sustained intervenors' argument in the second cross-assignment of error that the statutory premise for the county's decision is erroneous. That holding does not, in itself, require remand, because it does not affect whether the county should or should not add the subject property to the county's "1A" list. However, that holding will likely affect the county's proceedings on remand. If we are correct that adding the subject property to the county's "1A" list does not have the legal

effect of allowing petitioner to seek a permit for mining, pursuant to ORS 215.298(2), it may be that adding the subject property to the county's "1A" list has no real legal effect. If so, it may be that a decision to add the site could not violate a statewide planning goal. Of course that would also mean that there is no practical reason or benefit to petitioner in adding the site to the county's "1A" list.

The county's decision is remanded.